

H**Motions, Pleadings and Filings**

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United States District Court,
 S.D. New York.
 Bernd BILDSTEIN, on Behalf of Himself and Others
 Similarly Situated, Plaintiff,
 v.
 MASTERCARD INTERNATIONAL,
 INCORPORATED, Defendant.
No. 03 Civ.98261(WHP).

June 6, 2005.

Irving Bizar, Ballon Stoll Bader & Nadler P.C., New York, NY, for Plaintiff.

Jay N. Fastow, Theodore Allegaert, Weil, Gotshal & Manges LLP, New York, NY, for Defendant.

MEMORANDUM AND ORDER

PAULEY, J.

*1 This putative class action concerns certain foreign currency conversion practices by MasterCard International Incorporated ("MasterCard" or "Defendant"). In his Second Amended Complaint (the "Complaint"), Bernd Bildstein ("Bildstein" or "Plaintiff") alleges that MasterCard unlawfully charges cardholders an undisclosed Foreign Currency Transaction Fee ("FCTF"). [FN1] Plaintiff asserts claims for deceptive business practices under New York General Business Law ("GBL") Section 349 and unjust enrichment under New York law.

FN1. Familiarity with this Court's prior Memorandum and Order is presumed. See Bildstein v. MasterCard Int'l Inc., 329 F.Supp.2d 410 (S.D.N.Y.2004).

Presently before this Court is MasterCard's motion to dismiss the Complaint pursuant to Rule 12(b)(6) for failure to state a claim. For the reasons set forth below, MasterCard's motion to dismiss is denied.

BACKGROUND

MasterCard is a global credit card network that

promotes "its Master[C]ard brand credit card for use in the United States and all over the world." (Second Amended Complaint ("SAC") ¶ 6.) Plaintiff alleges that MasterCard indirectly charges its cardholders a service fee of approximately one percent, the FCTF, for transactions in foreign currencies. (SAC ¶ 7.) The FCTF is part of the currency conversion rate charged to cardholders and is not disclosed by MasterCard in promotional material or monthly billing statements. (SAC ¶ 9.) As a result, cardholders who use their MasterCard brand credit card for foreign transactions are charged "more than the currency conversion rate applicable to that particular country and currency involved in the transaction" and therefore, "unknowingly paid millions of dollars for the FCTF." (SAC ¶¶ 9, 16.)

Bildstein has been a MasterCard debit cardholder since September 1997. (SAC ¶ 1.) Beginning in 2000 and continuing through the filing of the Complaint, Bildstein used his MasterCard debit card in Mexico for certain transactions in Mexican Pesos. (SAC ¶ 12.) Bildstein contends that MasterCard assessed the FCTF in addition to the exchange rate on these charges and concealed the fee as part of the conversion rate. (SAC ¶ 12.) Had MasterCard disclosed the embedded fee, Bildstein argues that he would have sought other methods to exchange his currency for no fee or, a fee lower than the FCTF. (SAC ¶ 13.)

Bildstein filed his Second Amended Complaint on August 25, 2004 following this Court's earlier decision dismissing Plaintiff's Amended Complaint and granting leave to replead. The Complaint asserts two claims against MasterCard: (1) deceptive business practices under GBL Section 349; and (2) unjust enrichment. Defendant moves to dismiss the entire Complaint.

DISCUSSION**I. Motion to Dismiss Standard**

In determining whether dismissal is appropriate under Rule 12(b)(6), the court must "accept as true the material facts alleged in the complaint and draw all reasonable inferences in [plaintiff's] favor." Freedom Holdings Inc. v. Spitzer, 357 F.3d 205, 216 (2d Cir.2004); accord Velez v. Levy, 401 F.3d 75, 80 (2d Cir.2005). Further, "[a] complaint cannot be dismissed for failure to state a claim 'unless it appears

beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Freedom Holdings Inc., 357 F.3d at 216 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); accord Dabit v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 395 F.3d 25, 31 (2d Cir.2005). As such, "the office of a motion to dismiss is merely to assess the legal feasibility of the complaint, not to assay the weight of the evidence which might be offered in support thereof." Eternity Global Master Fund Ltd. v. Morgan Guar. Trust Co. of New York, 375 F.3d 168, 176 (2d Cir.2004) (quoting Geisler v. Petrocelli, 616 F.2d 636, 639 (2d Cir.1980)); accord Velez, 401 F.3d at 80. On a motion to dismiss, the inquiry "is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Eternity Global Master Fund Ltd., 375 F.3d at 177 (quoting York v. Ass'n of the Bar, 286 F.3d 122, 125 (2d Cir.2002).

II. N.Y. General Business Law § 349

*2 As fully set forth in this Court's prior decision, GBL Section 349 provides a private right of action for consumer fraud. See Bildstein, 329 F.Supp.2d at 413; Twentieth Century Fox Film Corp. v. Marvel Enters., Inc., 155 F.Supp.2d 1, 25 (S.D.N.Y.2001) (citation omitted). Under Section 349, Bildstein must establish that: "(1) the defendant's deceptive acts were directed at consumers, (2) the acts are misleading in a material way, and (3) the plaintiff has been injured as a result." Maurizio v. Goldsmith, 230 F.3d 518, 521-22 (2d Cir.2000); accord Lava Trading Inc. v. Hartford Fire Ins. Co., No. 03 Civ. 7037(PKC), 2004 WL 555723, at *3 (S.D.N.Y. Mar. 19, 2004); Blue Cross & Blue Shield of N.J. v. Philip Morris USA Inc., 3 N.Y.3d 200, 205-06 (2004); Solomon v. Bell Atl. Corp., 9 A.D.3d 49, 51, 777 N.Y.S.2d 50, 54 (1st Dep't 2004). With respect to the injury requirement, a plaintiff must demonstrate "actual" injury to recover under the statute, though not necessarily pecuniary harm." Stutman v. Chem. Bank, 95 N.Y.2d 24, 29, (2000) (citation omitted).

MasterCard argues that Bildstein's Section 349 claim should be dismissed for Plaintiff's failure to plead facts establishing consumer-oriented conduct, actionable deception or actual injury. Accepting the facts pled in the Complaint as true and drawing all inferences in favor of Bildstein, this Court concludes that Plaintiff now states a Section 349 claim.

A. Consumer-Oriented Conduct

Section 349 broadly protects consumers from

deceptive business practices conducted in New York. See N.Y. Gen. Bus. Law § 349 (McKinney 2004); Pelman ex rel. Pelman v. McDonald's Corp., 396 F.3d 508, 511 (2d Cir.2005) ("§ 349 extends well beyond common-law fraud to cover a broad range of deceptive practices"); Blue Cross & Blue Shield, 3 N.Y.3d at 205 ("the scope of the statute is intentionally broad, applying to virtually all economic activity") (internal quotation marks and citations omitted). Under this statute, consumer-oriented conduct requires the allegation of "facts sufficient to show that the challenged conduct has 'a broader impact on consumers at large,' i.e., it 'potentially affects similarly situated consumers' in New York." The Jordan (Bermuda) Inv. Co. v. Hunter Green Invs. Ltd., No. 00 Civ. 9214(RWS), 2003 WL 1751780, at 15 (S.D.N.Y. Apr. 1, 2003) (quoting S.F. K.F.C., Inc. v. Bell Atl. Tricon Leasing Corp., 84 F.3d 629, 636 (2d Cir.1996)); accord New York v. Feldman, 210 F.Supp.2d 294, 301 (S.D.N.Y.2002) (consumer-oriented "has been construed liberally").

Bildstein has satisfied that pleading requirement. The Complaint contains allegations that "Master[C]ard has spent millions of dollars promoting its Master[C]ard brand credit card for use in the United States and all over the world. Master[C]ard's promotion efforts include substantial efforts directed to the New York consumer." (SAC ¶ 6.) Plaintiff also alleges that "Master[C]ard began applying the FCTF to all transactions in which the transaction currency differs from the billing currency" and that MasterCard did not separately disclose "the FCTF in the promotional material directed to the New York consumer or in the billing statement sent to its credit card holders." (SAC ¶¶ 8, 9.) Finally, Bildstein asserts that he "brings this action on behalf of himself and all other persons who ... were subjected to hidden transaction charges which were buried in the 'conversion rate' and not disclosed to them" and consequently, "unknowingly paid millions of dollars for the FCTF." (SAC ¶¶ 14, 16.) Such allegations that MasterCard orchestrated a deceptive practice directed at Bildstein and others similarly situated amply demonstrate "a broader impact on consumers at large." S.F.K.F.C., Inc., 84 F.3d at 636.

*3 Defendant's reliance on Kraus v. Visa International Service Association, No. 602168/2001, slip op. at 11 (N.Y.Sup.Ct. Apr. 9, 2002) is misplaced. (Defendant's Memorandum in Support of Motion to Dismiss ("Def.Mem.") at 11-12; Declaration of Theodore Allegaert Ex. A.) In Kraus,

plaintiff alleged that Visa International Service Association ("Visa") charged a foreign exchange rate fee in excess of the amount set forth in his cardholder agreement with the issuing bank. *Kraus*, No. 602168/2001, slip op. at 1. The New York State Supreme Court dismissed plaintiff's Section 349 claim based on documentary evidence pursuant to New York C.P.L.R. 3211. Given the absence of consumer-directed conduct, the state court concluded that the issuing bank determined the disputed fee, not Visa. *Kraus*, No. 602168/2001, slip op. at 6.

In contrast, MasterCard's motion is not based on documentary evidence. Rather, it is a Rule 12(b)(6) motion to dismiss where the facts alleged in the complaint must be accepted as true and all reasonable inferences drawn in favor of Bildstein. *Grandon*, 147 F.3d at 188. Bildstein alleges that MasterCard determined the FCTF "should be at least one percent, and that it would be assessed as part of the currency conversion rate to all cardholders." (SAC ¶ 7.) Further, unlike *Kraus*, Bildstein alleges that MasterCard encouraged him to use the card for foreign currency transactions. These allegations, together with the allegations discussed above, sufficiently plead consumer-directed conduct.

Defendant's assertion that Bildstein must show direct contact with MasterCard to establish consumer-oriented conduct is unavailing. (Def. Mem. at 10.) Privity is not required to state a Section 349 claim. See *In re Tertiary Butyl Ether Prods. Liab. Litig.*, 175 F.Supp.2d 593, 630-31 (S.D.N.Y.2001) ("Indeed, there is no requirement of privity, and the victims of indirect injuries are permitted to sue under [Section 349].") (internal quotation marks and citation omitted). Accordingly, the Complaint amply pleads consumer-oriented conduct.

B. Actionable Deception

MasterCard also moves to dismiss the Section 349 claim based on Plaintiff's allegations of deception. (Def. Mem. at 7.) Under Section 349, "[d]eceptive acts" are defined objectively, as acts "likely to mislead a reasonable consumer acting reasonably under the circumstances." *Boule v. Hutton*, 328 F.3d 84, 94 (2d Cir.2003) (quoting *Maurizio*, 230 F.3d at 521). Moreover, it is well established that omissions may provide the basis for such claims. See *Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A.*, 85 N.Y.2d 20, 26 (1995) ("objective definition of deceptive acts and practices" includes "misrepresentations or omissions"); see also *Stutman*, 95 N.Y.2d at 29; *Solomon*, 9 A.D.3d at 52.

Deceptive practices, however, "need not reach the level of common-law fraud to be actionable under [S]ection 349." *Boule*, 328 F.3d at 94 (quoting *Stutman*, 95 N.Y.2d at 29).

*4 Bildstein has sufficiently pled deception by omission. Omission-based claims under Section 349 are appropriate "where the business alone possesses material information that is relevant to the consumer and fails to provide this information." *Oswego*, 85 N.Y.2d at 26. The Complaint alleges that MasterCard went "to great efforts to conceal the FCTF" by embedding it in the currency conversion rate and failing to disclose its existence. (SAC ¶ 9.) Bildstein further alleges that "no other fee is similarly [e]mbedded" and that "Master [C]ard was fully aware that disclosing the FCTF as a separate fee would cause the consumer not to use the Master[C]ard credit card." (SAC ¶ 11.) The Complaint therefore, alleges that MasterCard withheld material information from cardholders and effectively pleads omission-based deception. [FN2]

FN2. Defendant also argues that Section 349 should be interpreted in accord with the disclosure requirements of Regulation Z, 12 C.F.R. § 226.5 and the Truth in Lending Act, 15 U.S.C. § 1601 *et seq.* Because these statutes impose no disclosure obligations on MasterCard, Defendant contends that Bildstein cannot state an omission-based claim under Section 349. (Def. Mem. at 10.) Defendant's position is untenable. Bildstein has asserted a Section 349 claim against MasterCard irrespective of these federal statutes. See *Fischer v. MasterCard Int'l, Inc.*, No. 03 Civ. 2111(WHP), 2003 WL 22110169, at *3 (S.D.N.Y. Sept. 11, 2003) (remanding case with § 349 claim where plaintiff alleged no federal claims and disavowed reliance on federal law to interpret § 349).

C. Actual Injury

This Court addressed the actual injury requirement of a Section 349 claim at length in its prior decision. See *Bildstein*, 329 F.Supp.2d at 415-16. To survive a motion to dismiss, plaintiff must plead injury separate and distinct from the alleged deception. See *Small v. Lorillard Tobacco Co.*, 94 N.Y.2d 43, 56 (1999) (plaintiff may not assert "deception as both act and injury"); *Donahue v. Ferolito, Vultaggio & Sons*, 13 A.D.3d 77, 78 (1st Dep't 2004); *Sokoloff v. Town Sports Int'l, Inc.*, 6 A.D.3d 185, 186, 778 N.Y.S.2d 9,

10 (1st Dep't 2004). Previously, this Court dismissed Plaintiff's Amended Complaint as "bereft of any allegation that MasterCard failed to deliver the service Bildstein paid for ... or that MasterCard charged an inflated FCTF" and further provided that "[s]uch allegations would have been sufficient to state a claim under Section 349." *Bildstein*, 329 F.Supp.2d at 16. Despite Defendant's argument to the contrary, the Complaint does not suffer such fatal pleading deficiencies.

Bildstein alleges that his actual injury is the amount the FCTF exceeded the prevailing exchange rate at the time of his transactions in Pesos. (SAC ¶ 13.) He specifically asserts that MasterCard's failure to disclose the FCTF deprived him the opportunity to "pay for the purchases in American currency and pay only the foreign exchange rate;" convert "American currency into [P]esos before arriving in Mexico, and pay only the exchange rate;" and research "other credit cards to ascertain if they had an embedded FCTF in their exchange rate and a lower rate than Master[C]ard, or, possibly have found a credit card that did not charge a FCTF at all." (SAC ¶ 13.) These allegations adequately plead harm beyond the claimed deception. Based on the above, Plaintiff has sufficiently stated a claim under Section 349.

III. Unjust Enrichment

Defendant also moves to dismiss Plaintiff's unjust enrichment claim. In New York, unjust enrichment requires "proof that (1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir.2004); accord *Golden Pac. Bancorp v. FDIC*, 375 F.3d 196, 203 n. 8 (2d Cir.2004). The Complaint alleges that MasterCard collected the FCTF, which exceeded the prevailing exchange rate, from unknowing cardholders pursuant to a manipulative practice of nondisclosure. (SAC at ¶¶ 7, 9, 11, 13.) Construing all reasonable inferences in favor of Plaintiff, the Complaint states a claim for unjust enrichment.

*5 Nevertheless, Defendant argues that Plaintiff cannot state a claim for unjust enrichment where a contract governs the subject matter at issue. (Def. Mem. at 13-14.) MasterCard contends that Plaintiff entered an agreement with his card issuing bank thereby barring his unjust enrichment claim. Although MasterCard correctly observes that an enforceable contract generally precludes recovery in

quasi contract, that rule does not apply here. See *Bazak Int'l v. Tarrant Apparel Group*, 347 F.Supp.2d 1, 4 (S.D.N.Y.2004) (contract precludes unjust enrichment claim based on same subject matter); *Shady Records, Inc. v. Source Enters., Inc.*, 351 F.Supp.2d 74, 78 (S.D.N.Y.2004).

Bildstein's agreement with his card issuing bank cannot preclude Plaintiff's unjust enrichment claim against MasterCard, a non-party to that agreement. See *EUA Cogenex Corp. v. N. Rockland Centr. School Dist.*, 124 F.Supp.2d 861, 873 (S.D.N.Y.2000) (unjust enrichment "applies in the absence of an express agreement"); *Hochman v. LaRea*, 14 A.D.3d 653, 789 N.Y.S.2d 300, 302 (2d Dep't 2005) ("where ... there is a bona fide dispute as to the existence of a contract, or where the contract does not cover the dispute in issue, a plaintiff may proceed upon a theory of quasi-contract"); *Zuccarini v. Ziff-Davis Media, Inc.*, 306 A.D.2d 404, 405, 762 N.Y.S.2d 621 (2d Dep't 2003). Accordingly, Bildstein states a claim for unjust enrichment.

MasterCard further argues that the unjust enrichment claim should be dismissed for Plaintiff's failure to plead a relationship between the parties. Whether New York law imposes a nexus requirement to state a claim for unjust enrichment is unsettled. *Compare Reading Int'l, Inc. v. Oaktree Capital Mgmt.*, 317 F.Supp.2d 301, 333-34 (S.D.N.Y.2003) (claims for unjust enrichment "clearly contemplate that a defendant and plaintiff must have had some type of direct dealings or an actual, substantive relationship") (quoting *In re Motel 6 Sec. Litig.*, Nos. 93 Civ. 2183, 2866(JFK), 1997 WL 154011, at *7 (S.D.N.Y. Apr. 2, 1997)), with *Dreick Finanz AG v. Sun*, No. 89 Civ. 4347(MBM), 1989 WL 96626, at *4 (S.D.N.Y. Aug. 14, 1989) (stating that unjust enrichment does not require "plaintiff and defendants to have had direct dealings with one another"); see also *Cox v. Microsoft Corp.*, 8. A.D.3d 39, 40- 41, 778 N.Y.S.2d 147 (1st Dep't 2004) (direct dealing not required to state a claim for unjust enrichment). This Court need not decide whether a nexus must be shown as the Complaint sufficiently pleads a relationship between Bildstein and MasterCard to state a claim. Bildstein alleges that he held a MasterCard debit card since 1997 and during that time, MasterCard collected the FCTF from him. (SAC ¶¶ 1, 12, 13.) These allegations, to the extent required, along with the allegations discussed above adequately state a claim for unjust enrichment under New York law.

CONCLUSION

For the reasons set forth above, MasterCard's motion

to dismiss the Second Amended Complaint is denied.

2005 WL 1324972 (S.D.N.Y.)

Motions, Pleadings and Filings (Back to top)

- 1:03cv09826 (Docket)
(Dec. 11, 2003)

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