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CAUSE NO. C-1056-03-C

GIL HERNANDEZ, on behalf of himself and
representatives of all others similarly
situated,

Plaintiff,

v.

MASTERCARD INTERNATIONAL, INC.,
a Delaware corporation,

Defendant.

IN THE DISTRICT COURT

139TH JUDICIAL COURT

OF HIDALGO COUNTY, TEXAS

FILED

AT _____ O'CLOCK _____ M

APR 01 2004

OMAR GUERRERO, CLERK
District Courts, Hidalgo County
By _____ Deputy

FIRST AMENDED CLASS ACTION PETITION

TO THE HONORABLE JUDGE OF SAID COURT:

Plaintiff Gil Hernandez, through his attorneys, based on his individual experience and the investigation of counsel, and on information and belief, alleges on behalf of himself and the proposed plaintiff's class as defined herein, as follows:

LEVEL OF DISCOVERY

Discovery is intended to be conducted under Level 3.

JURISDICTION AND VENUE

This is a class action brought under Rules 42 of the Texas Rules of Civil Procedure seeking equitable and declaratory relief for the individual plaintiff and the class he represents.

1 Venue is proper in this County because MasterCard International, Inc. ("MasterCard") is a
2 foreign corporation authorized to do, and doing, business in the State of Texas and regularly
3 transacts business in Hidalgo County, Texas.
4

5 Federal jurisdiction does not exist in this case because there is no federal question
6 implicated and claim for relief by plaintiff and absent class members will be less than the federal
7 jurisdictional minimum of \$75,000.
8

9 Venue is proper in this County under Section 15.002 of the Civil Practice and Remedies
10 Code because a substantial part of the acts and practices giving rise to plaintiff's claims occurred
11 in this County. Tex. Civ. Prac. & Rem. Code §15.002(a)(1). Defendant has received substantial
12 compensation from their services in this County and in the State of Texas as a result of their
13 business activities in this County, including the collection of the currency conversion fee. Plaintiff
14 Gil Hernandez is and was a resident of Hidalgo County, Texas and was billed, and paid the
15 currency conversion fee in Hidalgo County, Texas. MasterCard's scheme directly affected
16 citizens of Hidalgo County, Texas. MasterCard has, within the relevant time period, transacted
17 substantial business in Hidalgo County and throughout Texas. In the alternative, venue is proper
18 in Hidalgo County pursuant to Tex. Civ. Prac. & Rem. Code § 15.002(a)(4).
19
20

21 **PARTIES**
22

23 Plaintiff Gil Hernandez, a Hidalgo County resident, was charged a currency conversion fee
24 by MasterCard for purchases in Mexico.

25 Defendant MasterCard is a Delaware corporation registered to do business in the State of
26 Texas, and doing business in the State of Texas and may be served with process at its registered
27
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1 agent CT Corporation, 1601 Elm Street, Dallas, TX 75201. MasterCard issues payment cards
2 carrying the MasterCard brand to consumers in the United States, including tens of thousands of
3 consumers in Texas.
4

5 At all times mentioned herein, each and every defendant was an agent and/or employee of
6 each and every other defendant. In committing the acts alleged herein, each and every defendant
7 was acting within the course and scope of this agency or employment and was acting with the
8 consent, permission and authorization of each remaining defendant. All actions of each defendant
9 as alleged herein were ratified and approved by every other defendant or its officers or managing
10 agents.
11

12 **FACTS REGARDING DEFENDANT'S UNLAWFUL CONDUCT**
13

14 MasterCard is a non-stock membership corporation created, owned, governed and
15 operated by approximately 1500 principal member financial institutions. MasterCard licenses its
16 principal members and its affiliate members to issue to consumers payment cards carrying the
17 MasterCard brand ("the Card").
18

19 MasterCard advertises extensively to promote use of the Card in both the United States
20 and in foreign countries. MasterCard does not, however, itself extend credit to the cardholders
21 and plaintiff alleges no claim under the federal Truth In Lending Act.
22

23 American consumers using the Card in the United States pay only the actual price of the
24 services or goods charged to the Card. MasterCard charges the consumer no transaction fee for
25 these Card charges.
26
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1 Since 1989, however, MasterCard has deceptively levied a fee on consumers and
2 businesses using the Card to purchase goods and services in currencies other than US dollars.
3 Specifically, MasterCard adds and collects a 1% currency conversion fee (the so-called "MCCR")
4 to the amount of every Card charge by a Texas resident who uses the Card for transactions in
5 which the transaction currency differs from the billing currency (except in Canada or where the
6 ratio between the two currencies is pegged at 1:1). MasterCard has in the past four years
7 collected approximately \$200 million in currency conversion fees, reaping profits of 1,000% or
8 more.
9
10

11 There is no meaningful disclosure of the currency conversion fee to Cardholders. To the
12 contrary, the fee is deceptively embedded in the transaction amount set forth in the billing
13 statement sent to Cardholders, in a manner that is deliberately calculated by MasterCard to
14 conceal its assessment.
15

16 On some monthly statements, the consumer charging goods or services abroad only sees
17 the amount in the foreign currency and the corresponding dollar value they owe. On other
18 statements the exchange rate for each transaction is stated, but without any explanation that the
19 rate includes the 1% fee paid to MasterCard. Either way, MasterCard conceals the fee by
20 embedding it in the transaction amount. MasterCard's omission of the fee misleads consumers
21 into believing that their foreign Card charges have been converted into dollars without any mark-
22 up. There is no way to discern from the statement that MasterCard has added a 1% fee to the
23 exchange rate. By embedding the fee in monthly statements MasterCard deceptively conceals the
24 currency conversion fee from consumers.
25
26

27 No other fee charged by MasterCard is similarly embedded in the transaction amount.
28

1 The currency conversion fee is not an attempt to recoup MasterCard's trivial costs relating
2 to the conversion of foreign currency. There is no rational relationship between the additional
3 cost to MasterCard of purchases made in a foreign country and the currency conversion fee
4 MasterCard levies. Indeed, because MasterCard nets Cardholders' purchases in various
5 currencies before settling such transactions and engages in an advance hedging process, the vast
6 majority of overseas purchases are not converted at all and MasterCard in fact pays no cost to do
7 so.
8

9
10 Although relentlessly advertising the Card as the easiest, the most convenient, and
11 particularly the safest method of purchasing goods and services abroad, MasterCard does not
12 disclose the currency conversion fee in any of its advertising or promotional materials.
13

14 MasterCard further conceals the fee by not embedding it in transactions involving
15 currencies pegged 1:1 to the U.S. dollar, because the assessment of the fee would in such
16 circumstances be so obvious as to alert its Cardholders to the fee.
17

18 In the context of credit cards, Cardholders expect that if fees are to be charged for the use
19 of the card, those fees will be disclosed. With expectations conditioned by domestic purchases,
20 Cardholders in general do not expect to be charged the undisclosed fee for use of the credit card.
21

22 MasterCard's by-laws and regulations demonstrate that it has control over the disclosures
23 made to Cardholders.
24

25 MasterCard in the 1990's determined that, to the extent any reference was made to the
26 fee, it be characterized as an "adjustment" to the exchange rate, thereby fraudulently concealing
27
28

1 its assessment of the fee against Cardholders. Correspondence and draft bulletins prepared by
2 MasterCard specifically instructed members that the fee should not be described as a "fee."

3
4 MasterCard executives recognized the competitive dangers if the fee were not embedded
5 and consumers could see the effect of MasterCard's currency conversion fee. In a memo written
6 on December 22, 2000 to several MasterCard executives, including Doug Raymond, Vice
7 President-Financial Analysis, MasterCard's Alan Timblick wrote:

8
9 Another point about MCCR is that MasterCard will not be the card of choice for foreign
10 travel as long as cardholders can see on their statements two currency amounts for the
11 same purchase - one for the original and another including MCCR. I noticed this on my
12 own KEB card personal statement and was shocked - It's a real turn-off!

13
14 MasterCard thus conceived, developed and implemented a deliberate plan to embed the
15 currency conversion fee into the transaction amount, so that the fee would be paid undetected by
16 Cardholders.
17

18 *THE SCHWARTZ ACTION*

19
20 In *Schwartz v. VISA International Corp., et al.*, Cause No. 822404-4, a lawsuit was filed
21 in California State Court, challenging MasterCard's deceptive assessment of the currency
22 conversion fee (the "*Schwartz Action*").
23

24 On April 7, 2003, the California Court in the *Schwartz Action* ruled that MasterCard's
25 assessment of the embedded currency conversion fee is deceptive, and ordered that MasterCard
26 fully and effectively disclose the currency conversion process to cardholders. The Court also
27 ordered millions of dollars in restitution to MasterCard cardholders residing in California.
28

1 CLASS ALLEGATIONS

2
3 MasterCard has similarly assessed undisclosed "currency conversion fees" against
4 thousands of other Texas residents who used their MasterCard to make purchases in currencies
5 other than dollars. MasterCard's actions have caused direct injury to each such cardholder in the
6 form of money paid under false pretenses.

7
8 Plaintiff brings this suit as a class action pursuant to Rules 42 of the Texas Rules of Civil
9 Procedure, on behalf of a class of all Texas residents who have been issued MasterCards and who
10 have used their Cards to make purchases in currencies other than dollars other than in Canada's
11 dollars or currencies pegged at a 1:1 currency ratio to U.S. dollars (hereinafter "Members of the
12 Class").

13
14 Members of the Class are so numerous and geographically dispersed that joinder of them
15 all is impracticable.

16
17 Plaintiff will fairly and adequately protect the interests of the Members of the Class and
18 has retained counsel competent and experienced in class litigation.

19
20 Plaintiff's claims are also typical of those existing with Members of the Class, as
21 MasterCard's deceptive assessment of the currency conversion fee has caused direct monetary
22 damage to plaintiff and Members of the Class alike.

23
24 A class action is superior to other available methods for the fair and efficient adjudication
25 of this controversy because at issue is the propriety of a standardized and undisclosed corporate
26 practice, and because joinder of all Members of the Class is impracticable. Furthermore, the
27

1 expense and burden of individual litigation makes it unfeasible for many Members of the Class to
2 obtain individual redress for the wrongs done to them.

3
4 There are questions of law and fact common to the class, which predominate over any
5 questions solely affecting individual Members of the Class. Among the questions of law and fact
6 common to this class are:

- 7
- 8 • whether MasterCard's assessment of the currency conversion fee is deceptive;
 - 9 • whether MasterCard attempted to conceal the assessment
10 of the currency conversion fee;
 - 11 • whether MasterCard knew that its cardholders were unaware of the fee;
 - 12 • whether MasterCard's conduct constitutes a violation of the Texas consumer fraud
13 statute;
 - 14 • whether MasterCard acted with a malicious manner and callous disregard for the
15 rights of its cardholders, whereby it should be subjected to the assessment of
16 punitive damages;
 - 17 • whether the Members of the Class have sustained damages; and
 - 18 • whether damages can be established on a class-wide basis and, if so, what is the
19 proper measure of damages.

20 Plaintiff knows of no difficulty that will be encountered in the management of this
21 litigation that would preclude its maintenance as a class action.

22 **FIRST CAUSE OF ACTION**

23 **(Declaratory Relief)**

24 Plaintiff realleges and incorporate herein by reference the above paragraphs of the
25 Complaint. This cause of action is brought on behalf of plaintiff and the class against MasterCard.
26

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1 Section 17.45(6) provides:
2

3 (6) "Trade" and "commerce" mean the advertising, offering for sale, sale, lease, or
4 distribution of any good or service, of any property, tangible or intangible, real, personal,
5 or mixed, and any other article, commodity, or thing of value, wherever situated, and shall
6 include any trade or commerce directly or indirectly affecting the people of this state.
7

8 Plaintiff and Members of the Class are "consumers" within the meaning of the Texas
9 Deceptive Trade Practices - Consumer Protection Act.
10

11 MasterCard is involved in conducting "trade or commerce" of "goods" and/or "services"
12 within the meaning of the Texas Deceptive Trade Practices - Consumer Protection Act.
13

14 MasterCard's policies, acts and practices alleged herein were intended to or did result in
15 the sale of its products and services to consumers in violation of the Texas Deceptive Trade
16 Practices - Consumer Protection Act.
17

18 By committing the acts and practices alleged herein, MasterCard violated the Texas
19 Deceptive Trade Practices - Consumer Protection Act by falsely advertising that its product had
20 certain characteristics or benefits that it did not possess, and by omitting material facts
21 contradicting these representations. Such conduct also violated the Texas Deceptive Trade
22 Practices - Consumer Protection Act in that MasterCard either knew, recklessly disregarded or
23 reasonably should have known that consumers who purchased and used these products and
24 services would not receive the quality, characteristics and benefits advertised.
25

26 Such violations of law are ongoing. Plaintiff reserves the right to identify additional
27 violations of the law as circumstances warrant.
28

1 MasterCard's misrepresentations of the challenged conversion fee is likely to deceive the
2 class regarding the actual benefits and characteristics of MasterCard's product and/or services.

3
4 The acts, omissions, misrepresentations, practices and non-disclosures of MasterCard as
5 alleged herein thus constitute "fraudulent" business acts or practices within the meaning of Texas
6 Deceptive Trade Practices - Consumer Protection Act.

7
8 MasterCard have thus engaged in unlawful, unfair and/or fraudulent business acts and
9 practices, entitling plaintiff to judgment and relief against MasterCard, as set forth in the Prayer
10 for Relief. Plaintiff and each Member of the Class has suffered individual damages less than
11 \$70,000 but in excess of this Court's minimum jurisdictional amount.
12

13 **THIRD CAUSE OF ACTION**

14 **(Unjust Enrichment)**

15
16 MasterCard has been unjustly enriched by the imposition of embedded currency
17 conversion fees against plaintiff and the class.
18

19 Plaintiff and the class have been unjustly impoverished by MasterCard's actions, in an
20 individual amount less than \$70,000 but greater than this Court's minimum jurisdictional amount,
21 to be proven at trial.
22

23 Because MasterCard denies any direct contractual privity between itself and the
24 Cardholders, plaintiff and the class may lack an adequate remedy at law.
25

26 MasterCard must provide restitution and other equitable relief to plaintiff and the class to
27 remedy MasterCard's unjust enrichment.
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PRAYER FOR RELIEF

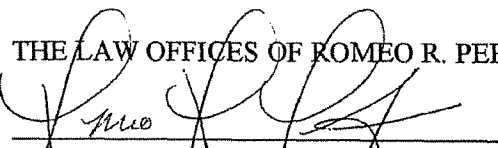
WHEREFORE, plaintiff respectfully requests that judgment be entered in their favor and against MasterCard, awarding the following:

- declaratory relief as described above;
- compensatory damages and/or restitutionary relief in an amount to be established at trial;
- punitive damages in an amount sufficient to punish and make an example of MasterCard;
- costs and attorneys' fees to the extent permitted by law;
- pre- and post-judgment interest; and
- such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable.

DATED: April 1, 2004

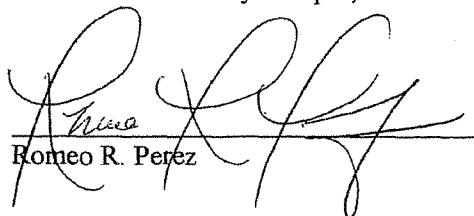
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing First Amended Class Action Petition was served on the following counsel of record via U.S. Mail on this 1st day of April, 2004.



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