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FILED
ALAMEDA COUNTY

JUN 26 2007

CLERK OF THE SUPERIOR COURT
By [Signature] Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

WILLIAM D. HOFFMAN, et al,

Plaintiffs,

v.

AMERICAN EXPRESS TRAVEL RELATED
SERVICES CO., a New York Corporation; and
Does 1 through 50,

Defendants.

No. 2001-022881

ORDER (1) DENYING MOTION OF AMEX
FOR SUMMARY JUDGMENT AND (2)
GRANTING MOTION OF AMEX FOR
SUMMARY ADJUDICATION OF UNJUST
ENRICHMENT CLAIM.

Date: June 22, 2007

Time: 11:00 am

Dept.: 22

The motion of Defendant American Express Travel Related Services ("AmEx") for summary judgment or, in the alternative, summary adjudication and the motion of Plaintiff to compel discovery came on for hearing on June 22, 2007, in Department 22 of this Court, the Honorable Bonnie Sabraw presiding. Counsel appeared on behalf of Plaintiff Greg Carr and AmEx. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: (1) the motion of AmEx for summary judgment is DENIED, (2) the motion of AmEx for summary adjudication is GRANTED with regard to the unjust enrichment claim only.

OPPORTUNITY FOR FURTHER BRIEFING.

The Court has considered matters not expressly raised in the briefing. In the tentative decision, the Court identified new issues and stated that it would entertain a request for further

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1 briefing and a second hearing. *Bacon v. Southern Cal. Edison Co.* (1997) 53 Cal.App.4th 854,
2 860. The parties did not request additional briefing.

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4 PROCEDURAL STATUS.

5 There are three plaintiffs in this case. (1) Aviation Data is a New York corporation and
6 its individual claims are stayed pending the Court of Appeal's resolution of AmEx's motion to
7 compel it to arbitrate its individual claims. (2) Christina Modenius will be dismissed with
8 prejudice. (P Oppo at 2:27.) (3) Gregg Carr is the representative of a California class and a 49
9 state class. (Order of 1/11/06.) The claims of the 49 state class are stayed pending the Court of
10 Appeal's resolution of AmEx's motion to compel the 49 state class to arbitrate its individual
11 claims. The claims of Carr and the California class are proceeding. (Order of 5/26/06.)

12 This case is in the time period after the Court's order granting class certification and
13 before the completion of the notice and opt out period. This raises two issues. First, by filing the
14 motion, AmEx waives the protection against one-way intervention afforded defendants by
15 *Fireside Bank v. Superior Court* (2007) 40 Cal. 4th 1069. The absent class members will know
16 the results of the motion if/when they decide to stay in the case or to opt out. Second, given that
17 the case is post-certification order, it is unclear whether the Court can or should be resolving the
18 claims of individual class members. The class mechanism would lose a great deal of the benefits
19 of resolving common issues in a single action if even after class certification a defendant could
20 seek summary judgment against individual class members. The Court resolves this issue by
21 observing that the class certification process is not complete until the expiration of the notice and
22 opt out procedure and the acquisition of jurisdiction over the absent class members. *Phillips*
23 *Petroleum Co. v. Shutts* (1985) 472 U.S. 797, 811-812; *Fireside Bank v. Superior Court* (2007)
24 40 Cal. 4th 1069, 1083; *Kass v. Young* (1977) 67 Cal. App. 3d 100, 105-106. As a matter of
25 class action jurisprudence the only parties before the Court are the named plaintiffs. Therefore,

1 the Court will permit a motion directed at the named plaintiffs alone. If this motion were brought
2 after the completion of the opt out process then the result would likely be different. ¹

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4 CLAIMS BY MODENIUS.

5 Christina Modenius will be dismissed with prejudice. (P Oppo at 2:27.)

6
7 CLAIMS BY CARR.

8 The Fourth Amended Complaint filed on July 18, 2005, asserts six causes of action: (1)
9 breach of contract (NY law), (2) unjust enrichment (NY law), (3) N.Y. G.B.L. 349 (NY law), (4)
10 conversion (NY law), (5) Cal. Bus. & Prof. 17500, and (6) Cal. Bus. & Prof. 17200. These causes
11 of action break down into two categories: (1) contract related claims governed by New York Law
12 and (2) statutory claims under California law.

13 General observations. AmEx's motion rests on the premise that Carr cannot prevail on
14 his claims because AmEx provided him with a simple and easy way to seek repayment of any
15 overcharges and Carr knowingly decided not to pursue that remedy. The Court has three
16 overarching concerns with this argument.

17 First, as a legal matter, AmEx's central argument is in the nature of an affirmative
18 defense. AmEx is asserting that even if it overcharged its consumers, the consumers have no
19 damages. This is an application of the avoidable consequences doctrine and/or the duty to
20 mitigate avoidable damages. *State Dep't of Health Servs. v. Superior Court* (2003) 31 Cal. 4th

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22 ¹ The Court is also aware that if the motion for summary judgment were granted, then the issue just over the horizon
23 is whether a judgment against a named plaintiff based on facts that are specific to that individual (1) terminates the
24 entire class action, (2) terminates the claims of the named plaintiff but permits motions to substitute in new named
25 plaintiffs, or (3) terminates the claims of the named plaintiff but the ability of the named plaintiff to represent the
26 class relates back to the filing of the class certification motion. *First American Title Ins. Co. v. Superior Court*
(2007) 146 Cal. App. 4th 1564, 1574-1575 (amendments to add new plaintiffs); *Weiss v. Regal Collections* (3rd Cir.
2004) 385 F.3d 337, 344-348 (relation back); *McDowall v. Cogan* (E.D.N.Y., 2003) 216 F.R.D. 46, 51 (relation
back). The result might vary depending on whether the claims of the named plaintiff are dismissed based on facts
specific to the individual or common to the class. The result also might vary depending on whether the claims of the
named plaintiff are dismissed based on facts that existed at the time the case was filed or developments subsequent to
the filing of the complaint. This is a developing area of California law.

1 1026, 1043 (“Under the avoidable consequences doctrine as recognized in California, a person
2 injured by another's wrongful conduct will not be compensated for damages that the injured
3 person could have avoided by reasonable effort or expenditure.”). Therefore, the issue is not
4 whether Carr has standing and has shown a triable issue of fact regarding his claim, but whether
5 AmEx has presented undisputed material facts that it will prevail on its affirmative defense. This
6 shifts the motion from C.C.P 437c(o)(1) to C.C.P 437c(o)(2) and requires AmEx to prove a
7 complete defense.

8 Second, AmEx’s argument appears in some way contrary to the analysis in *Discover*
9 *Bank v. Superior Court* (2005) 36 Cal. 4th 148. The logical conclusion of AmEx’s argument is
10 that because individual consumers have individual contractual remedies that by contract they
11 must exercise, AmEx is excused from all the erroneous overcharges it might ever make.
12 *Discover Bank* concerned the different issue of arbitration agreements, but expressed a concern
13 that the individual contractual remedies should not be a complete defense because consumers
14 often do not take the time to pursue individual remedies and the result is that an exclusive
15 individual contract remedy can function as an aggregate exculpatory clause. Although not
16 directly on point, the *Discover Bank* analysis appears relevant.

17 Third, the Court is troubled by the premise of the argument that it is the customer’s
18 responsibility to find and remedy overcharges that a business allegedly knows it is making and
19 allegedly has the ability to correct. If a grocery store knew that its scanner occasionally
20 overcharged for certain products but took no action to reprogram the scanner, it would probably
21 not be an absolute defense for the store to state that consumers get receipts at checkout and that if
22 consumers identify overcharges then the store promptly refunds all overcharges. The refund
23 policy would be a step in the right direction, but it might not excuse the store’s knowing failure
24 to fix its broken scanner. Although AmEx’s alleged situation is more complex and significantly
25 larger, it appears to present the same fundamental issues.

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1 Contract claims. The motion of AmEx for summary adjudication of Carr's contract claim
2 is DENIED.

3 Carr's contract with AmEx states that the consumer will submit requests for refunds. The
4 undisputed facts demonstrate that Carr knew of the opportunity to submit refund requests and did
5 not do so.

6 Under New York law, the elements of a common law cause of action for breach of
7 contracts include "performance by plaintiff." *Sayeedi v. Walser* (2007) 2007 N.Y. Misc LEXIS
8 497, * 6. Carr argues that his failure to make a claim is a trivial breach and not a failure of
9 performance. *Mega Group Inc. v. Halton* (2002) 290 A.D.2d 673, 674-675 ("Whether promises
10 in a contract are mutually dependent upon each other such that a failure to act by one party
11 excuses non-performance by the other ordinarily is a question of fact ... the claim is defeated
12 only if the facts show a failure of performance that is substantial, material and strikes at the very
13 essence of the contract"). There are triable issues of material fact whether Carr's failure to make
14 a claim is a sufficiently material breach that it precludes him from asserting his contract claim.

15 Although not briefed by the parties, the *Discover Bank* analysis of unconscionable
16 contract terms appears to apply to AmEx's defense that Carr is precluded from bringing a
17 contract claim in a class action because he was obligated to recover through the individual
18 contractual process.

19 Unjust enrichment and conversion claims. The motion of AmEx for summary
20 adjudication of Carr's Unjust enrichment claim is GRANTED. The motion of AmEx for
21 summary adjudication of Carr's conversion claim is DENIED.

22 Under New York law, the equitable claims of unjust enrichment and conversion claims
23 can exist only when there is no express agreement between the parties on the same subject.
24 *Frydman & Co. v. Credit Suisse First Boston Corp.* (2000) 272 A.D.2d 236, 238 ("such quasi-
25 contractual claim [for unjust enrichment,] is therefore barred by the existence of a valid and
26 enforceable written contract"); *Wolf v. National Council of Young Isr.* (1999) 264 A.D.2d

1 416 (“claim to recover damages for conversion cannot be predicated on a mere breach of
2 contract”); *MBL Life Assur. Corp. v. 555 Realty Co.* (1997) 240 A.D.2d 375, 376-377
3 (conversion must be predicated on “a wrong independent from the contract claim”).

4 Plaintiff argues that he can state a claim for conversion because AmEx committed a tort
5 independent of the contract breach. Plaintiff’s assertion is that AmEx used the funds for
6 something other than their intended purpose, which can be an intentional tort. *Hoffman v.*
7 *Unterberg* (2004) 9 A.D.3d 386, 388 (“When funds are provided for a particular purpose, the use
8 of those funds for an unauthorized purpose constitutes conversion”); *Meese v. Miller* (1981) 79
9 A.D.2d 237, 244 (“Plaintiff states that M & T and Moxley asserted an unauthorized control over
10 plaintiff’s property subsequent to and independent of the contract.”). Given the New York
11 insurance law that premiums are to be received and retained only for risks incurred, AmEx’s
12 alleged actions would seem to support the intentional tort of conversion under New York law.
13 *Holmes v. Nationwide Mut. Ins. Co.* (1963) 40 Misc. 2d 894, 898.

14 Plaintiff argues that he can pursue his unjust enrichment claim in the alternative to the
15 contract claim. *Joseph Sternberg, Inc. v. Walber 36th Street Assoc.* (1993) 187 A.D.2d 225, 228,
16 says that “where there is a bona fide dispute as to the existence of a contract or where the
17 contract does not cover the dispute in issue, plaintiff may proceed upon a theory of quantum
18 meruit and will not be required to elect his or her remedies.” In this case the undisputed facts
19 demonstrate both the existence of a contract and that the contract covers the dispute in issue.

20 UCL - standing. The motion of AmEx for summary adjudication of Carr’s UCL claim
21 based on standing is DENIED.

22 Under the UCL a person must allege he or she (1) “suffered injury in fact” and (2) “lost
23 money or property as a result of [the alleged] unfair competition.” A plaintiff suffers an injury in
24 fact for purposes of standing under the UCL when as a result of the defendant’s acts of unfair
25 competition he or she has: (1) expended money, (2) lost money or property, or (3) been denied
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1 money to which he or she has a cognizable claim. *Meyer v. Sprint Spectrum L.P.* (2007) 150 Cal.
2 App. 4th 1136, 1142.

3 AmEx argues that the UCL incorporates the standing requirement under the United States
4 Constitution because the “Findings and Declaration of Purpose” in section 1(e) of Proposition 64,
5 states, “It is the intent of the California voters in enacting this act to prohibit private attorneys
6 from filing lawsuits for unfair competition where they have no client who has been injured in fact
7 under the standing requirements of the United States Constitution.” The recent case of *Daro v.*
8 *Superior Court* (2007) 2007 WL 1620511, references this as part of UCL’s standing requirement
9 concerning causation. *Meyer v. Sprint Spectrum L.P.* (2007) 150 Cal. App. 4th 1136, 1140-1145,
10 does not mention standing under the United States Constitution when discussing the UCL’s
11 standing requirement concerning the fact of injury.

12 Carr has presented evidence that raises a triable issue of fact whether he suffered injury in
13 fact and lost money or property as a result of the alleged unfair competition. Carr was charged
14 and paid money as a result of Amex’s alleged acts of unfair competition. Carr was told he would
15 pay only when he flew (or did other things) but AmEx billed him for flight insurance when he
16 didn’t fly and Carr paid the bill. This raises a triable issue of fact whether there is a causal
17 connection between AmEx’s actions and Carr’s loss of money or property and thus whether Carr
18 has standing under Business and Professions Code 17204.

19 Carr’s standing to assert his claim is based on whether he suffered injury in fact and lost
20 money or property as a result of AmEx’s billing him for flight insurance when he didn’t fly.
21 AmEx might have a valid affirmative defense against Carr and the class based on its procedure
22 that permits cardholders to obtain credits or refunds, but that is an affirmative defense to the
23 merits. The Court is careful not to merge section 17204’s standing requirement with an analysis
24 of whether the Carr and the class will prevail on the merits. A plaintiff certainly can have
25 standing to prosecute a claim even if he or she ultimately either cannot prove the claim or cannot
26 recover monetary relief.

1 UCL –merits – reliance. The motion of AmEx for summary adjudication of Carr’s UCL
2 claim based on the merits is DENIED.

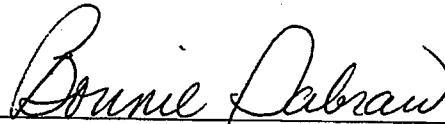
3 The procedural posture of the case influences how the Court addresses the issue of
4 reliance. If the case is pre-certification, then Carr is the only relevant plaintiff and the issue of
5 reliance is fact specific as to Carr and can be resolved primarily based on Carr’s deposition
6 testimony. In contrast, if the case is post-certification, then the Court refocuses on the claims of
7 the class as a whole and whether AmEx’s statements are materially misleading and would induce
8 a reasonable consumer to act to his or her detriment. “Causation as to each class member is
9 commonly proved more likely than not by materiality. That showing will undoubtedly be
10 conclusive as to most of the class. The fact a defendant may be able to defeat the showing of
11 causation as to a few individual class members does not transform the common question into a
12 multitude of individual ones; plaintiffs satisfy their burden of showing causation as to each by
13 showing materiality as to all.” *Mass. Mut. Life Ins. Co. v. Superior Court* (2002) 97 Cal. App.
14 4th 1282, 1292-1293. See also *McAdams v. Monier, Inc.* (2007) 2007 Cal. App. LEXIS 870, at
15 *22-34.

16 The evidence as to Carr individually suggests that the “pay only when you fly” feature
17 was not the sole reason he signed up for the program, but it does not conclusively demonstrate
18 that Carr did not consider or rely on the “pay only when you fly” feature when signing up for the
19 program. In addition, the evidence before the Court demonstrates a triable issue of fact whether
20 AmEx’s statements were materially misleading in light of AmEx’s alleged subsequent actions,
21 which in turn creates a triable issue of fact of whether there can be a classwide inference of
22 reliance and causation. Assuming a classwide inference of reliance and causation, the evidence
23 as to Carr individually cannot conclusively overcome the classwide inference of reliance and
24 causation.

1 EVIDENCE.

2 Plaintiff and Defendant both specifically requested the Court to make evidentiary rulings
3 on their objections to evidence. See *City of Long Beach v. Farmers & Merchants Bank of Long*
4 *Beach* (2000) 81 Cal.App.4th 780. The evidentiary objections by the parties are OVERRULED.
5 The Court's consideration of the evidence is limited to this motion only and is not to be
6 construed as an indication of admissibility in future motions or at trial.
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9 Dated: June 25 2007



10 Judge Bonnie Sabraw
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**Case Title/No.: HOFFMAN VS. AMERICAN EXPRESS TRAVEL
RELATED SERVICES CO. 2001022881**

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the Alameda County Superior Court and not a party to this cause. I served this ORDER (1) DENYING MOTION FO AMEX FOR SUMMARY JUDGMENT AND (2) GRANTING MOTION OF AMEX FOR SUMMARY ADJUDICATION OF UNJUST ENRICHMENT CLAIM by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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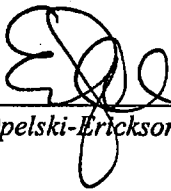
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Dated: June 26, 2007

Executive Officer/Clerk of the Superior Court

By


Elizabeth Opelski-Erickson, Deputy Clerk

CLERK'S CERTIFICATE OF MAILING
HOFFMAN VS. AMERICAN EXPRESS TRAVEL RELATED SERVICES CO. 2001022881