

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

| | | |
|---------------------------------------|---|---------------------------|
| INTERNATIONAL CARDS COMPANY, LTD., |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| v. |) | C.A. No. 13-CV-2576 (LGS) |
| |) | |
| MASTERCARD INTERNATIONAL INC., |) | |
| |) | |
| Defendant. |) | |

**DEFENDANT MASTERCARD INTERNATIONAL INCORPORATED'S
MEMORANDUM OF LAW IN SUPPORT OF ITS
MOTION FOR JUDGMENT AS A MATTER OF LAW
ON PLAINTIFF'S CONVERSION CLAIM**

DRAFT
PRIVILEGED & CONFIDENTIAL
ATTORNEY WORK PRODUCT

5/10/2017 4:34 PM

TABLE OF CONTENTS

| | Page |
|--|-------------|
| I. INTRODUCTION | 1 |
| II. BACKGROUND | 2 |
| III. APPLICABLE LAW | 2 |
| IV. ARGUMENT | 5 |
| A. A Reasonable Jury Could Not Find That ICC Has Carried Its Burden To Prove That No Amount Was Due And Payable To MasterCard Merchants At The Time Of The Drawdown..... | 5 |
| B. A Reasonable Jury Could Not Find That ICC Has Carried Its Burden To Prove that MasterCard Knew At The Time Of The Drawdown That No Amount Was Due And Payable To MasterCard Merchants | 7 |
| V. CONCLUSION..... | 9 |

DRAFT
PRIVILEGED & CONFIDENTIAL
ATTORNEY WORK PRODUCT

5/10/2017 4:34 PM

TABLE OF AUTHORITIES

| | Page(s) |
|---|----------------|
| FEDERAL CASES | |
| <i>Eastland Bank v. Massbank for Sav.</i> , 767 F. Supp. 29 (D.R.I. 1991), <i>aff'd</i> , 953 F.2d 633 (1st Cir. 1991) | 9 |
| <i>Frink Am., Inc. v. Champion Rd. Mach. Ltd.</i> , No. 7:96-CV-486, 2001 WL 34124761 (N.D.N.Y. Aug. 9, 2001), <i>aff'd</i> , 43 Fed. Appx' 456 (2d Cir. 2002)..... | 3 |
| <i>Presutti v. F.D.I.C.</i> , 24 F. App'x 92 (2d Cir. 2001) | 3 |
| <i>Volga-Inconsult-Invest v. United Mgmt. Corp.</i> , No. CV 93 4229(RJD), 1997 WL 139005 (E.D.N.Y. Mar. 4, 1997)..... | 3 |
| RULES | |
| Fed. R. Civ. P. 50..... | 1, 2, 3 |

I. INTRODUCTION

Pursuant to Rule 50(b), Fed. R. Civ. P., defendant MasterCard moves for judgment as a matter of law against ICC's conversion claim (Second Amended Complaint ("SAC"), Count III). Far from carrying its burden of proving that MasterCard's drawdown statement was false, ICC presented no evidence whatever at trial showing that any part (much less all) of the sum drawn down did not reflect amounts due and payable to MasterCard merchants. To the contrary, ICC both conceded that it had no evidence to make such a showing, and flatly admitted that amounts were in fact due and payable to MasterCard merchants at the time of the drawdown and for at least months thereafter -- as confirmed by extensive other evidence in the case. *See, e.g.*, Ex. 2 (DX 466);¹ Ex. 3 (Trial Tr.) at 106:17-19, 134:8-135:25; Ex. 4 (Trial Tr.) at 733:11-23.

Likewise, ICC adduced no evidence that MasterCard knew that its drawdown statement was false. Nor could ICC have done so, since: MasterCard had extensive reason to believe that ICC, like any acquirer, had amounts due and payable to merchants at any given time; MasterCard understood that it had \$4 million in exposure to ICC for acquiring risk under objectively-based calculations previously done by Jenifer D'Souza; and MasterCard knew that ICC had a substantial backlog of late payments due and payable to merchants. Ex. 3 (Trial Tr.) at 425:25-426:4, 429:23-430:11; Ex. 4 (Trial Tr.) at 608:8-12, 644:2-6. In any event, ICC cannot attribute any wrongful knowledge to MasterCard when ICC had repeatedly, and in breach of contract, refused to provide MasterCard with the very information that would have informed it of ICC's merchant payment status.

¹ Citations in the form "Ex. #" are attached to the Declaration of Denise Plunkett, Esq. dated May 10, 2017. Citations in the form "D.E. #" are to the Court's Docket Entries.

II. BACKGROUND

ICC's conversion claim challenges MasterCard's drawdown on a \$2.78 million letter of credit, which ICC had posted as collateral under the MasterCard Rules. D.E. 14 (SAC) ¶¶ 119-126. The letter of credit allowed MasterCard to draw down on it for, *inter alia*, amounts "due and payable to MasterCard merchants" Ex. 5 (PX 65) at M0000315-16. On April 1, 2013, MasterCard drew down on the letter of credit for \$2.78 million, reciting this language. *Id.* at M0000320.

The jury held in favor of ICC on its conversion claim. Ex. 4 (Trial Tr.) at 864:14-15. It then awarded as damages the entire \$2.78 million drawn down (*id.* at 864:16-17), thus declaring that ICC had proven that \$0 was due and payable by ICC to any MasterCard merchant at the time of the drawdown. Inconsistently, the jury also found that ICC had breached its contract with MasterCard by paying merchants late and/or refusing to provide MasterCard with information it had requested (*id.* at 864:18-21), thus recognizing that amounts were due and payable by ICC to its merchants and/or that MasterCard did not know that its drawdown was false.

After the jury verdict, on April 24, 2017 MasterCard returned to ICC the amount drawn down on the letter of credit, \$2.78 million. Plunkett Decl. ¶ 2. *Compare* Ex. 4 (Trial Tr.) at 797:12-16 (ICC Closing argument: "Members of the jury, if you think MasterCard is just going to return these amounts at the conclusion of this trial, think twice. It's been four years. There is no reason to think anything is going to change, unless you intervene, no matter what Mr. Fastow promised during his opening.").

III. APPLICABLE LAW

MasterCard timely moved for judgment as a matter of law on this claim under Rule 50(a), when plaintiff rested and at the conclusion of all evidence, and the Court reserved decision. *See* Ex. 4 (Trial Tr.) at 548:17-549:5; *see also* D.E. 321 ("WHEREAS, on the same day the jury

rendered its verdict, MasterCard stated its intent to file a motion for judgment as a matter of law and/or new trial.”).

MasterCard now renews its motion under Rule 50(b), because “a reasonable jury would not have a legally sufficient evidentiary basis” to find for ICC on its Count III. Fed. R. Civ. P. 50(b) (where motion under Rule 50(a) was timely made but the ruling was deferred until after the jury verdict, “the court is considered to have submitted the action to the jury subject to the court’s later deciding the legal questions raised by the motion”); *see Presutti v. F.D.I.C.*, 24 F. App’x 92, 95 (2d Cir. 2001) (upholding grant of defendant’s motion for judgment as a matter of law against plaintiff’s conversion claim, notwithstanding jury verdict in plaintiff’s favor); *Frink Am., Inc. v. Champion Rd. Mach. Ltd.*, No. 7:96-CV-486, 2001 WL 34124761, at *10 (N.D.N.Y. Aug. 9, 2001), *aff’d*, 43 F. App’x 456 (2d Cir. 2002) (granting defendant’s motion for judgment as a matter of law against plaintiff’s conversion claim; “[b]ecause the evidentiary basis for such a finding is completely lacking, the jury’s verdict must be overturned”).

New York law governs ICC’s conversion claim (D.E. 136 (Summary Judgment Decision at 9)), and “clearly establishes the proposition that a conversion claim cannot be predicated on a mere breach of contract.” *Volga-Inconsult-Invest v. United Mgmt. Corp.*, No. CV 93 4229(RJD), 1997 WL 139005, at *4 (E.D.N.Y. Mar. 4, 1997).² Rather, in its final instructions to the jury, the Court explained the controlling law as follows:

1. ICC has the burden to prove that MasterCard’s drawdown was intentional and without authority, i.e., that MasterCard’s recital of amounts due and payable to MasterCard merchants was false and known by MasterCard to be false. *See* Ex. 4 (Trial Tr.) at 781:3-18; *id.*

² At the charging conference, the Court observed that ICC’s failure to pursue a breach of contract claim regarding the collateral “calls into question whether [ICC has] a valid claim.” Ex. 4 (Trial Tr.) at 741:6-7.

at 781:12-18 (The Court: “The question you need to resolve is whether ICC has carried its burden of proving by a preponderance of the evidence that Mastercard acted intentionally and without authority when it drew down on ICC’s letter of credit. You may conclude that MasterCard acted without authority if you find that it made a representation that was false and that it knew was false when it drew down on the letter of credit.”).

2. ICC also has the burden to prove the amount, if any, by which the drawdown exceeded the amounts due and payable to MasterCard merchants. *See id.* at 782:15-18 (The Court: “The damages should equal the \$2.78 million or any portion of that amount that you find MasterCard intentionally and without authority drew down on ICC’s letter of credit.”); *see also id.* at 777:20-21.

3. The law of conversion does not impose any obligation on MasterCard with regard to use of the funds after the drawdown. *Id.* at 781:18-22 (The Court: “You should consider only whether MasterCard’s draw down was without authority. The letter of credit does not create any obligation for MasterCard to use the funds for any particular purpose after the draw down.”).

ICC’s closing argument invited the jury to disregard these legal principles. It repeatedly suggested that MasterCard has the burden of proof on the elements of this claim,³ and urged the jury to focus on MasterCard’s retention of the collateral, as opposed to only whether the drawdown statement was false and known to be false.⁴

³ *See, e.g., Ex. 4* (Trial Tr.) at 795:25-796:3 (ICC’s counsel: “MasterCard has not presented a shred of evidence” that amounts were due and payable to ICC merchants); *id.* at 808:12-23 (ICC’s counsel: “MasterCard had no idea about any amounts due and payable to merchants.”) *id.* at 809:11-15 (ICC’s counsel: “[Y]ou heard from MasterCard’s witnesses that admitted that they had no idea about any amounts due and payable to ICC merchants.”).

⁴ *See, e.g., id.* at 796:4-5 (ICC’s counsel: “In fact, four years later, the money from the standby letter of credit still sits in MasterCard’s corporate account.”); *id.* at 797:8-11 (ICC’s counsel: “What MasterCard did is take the money held in the letter of credit for specific purposes and converted it into the cash collateral that had far fewer restrictions and which MasterCard could

IV. ARGUMENT

A. A Reasonable Jury Could Not Find That ICC Has Carried Its Burden To Prove That No Amount Was Due And Payable To MasterCard Merchants At The Time Of The Drawdown

While ICC has the burden of proving that all, or some specified portion, of the drawdown did not reflect amounts due and payable to MasterCard merchants, ICC has admitted that it has no such evidence. Pre-drawdown, MasterCard asked ICC for “a consolidated list of all current O/S [outstanding] payables with their Ageing,” Ex. 6 (DX 292), the type of information ICC would have needed to try to prove that MasterCard’s drawing statement was false. At trial, ICC’s CEO Mr. Alami testified that ICC does not have such information. Ex. 3 (Trial Tr.) at 106:19 (“the information did not exist”).

Moreover, as this Court and Magistrate Judge Netburn both held, whether or not ICC actually has this information, it failed to provide it in this case. *See* D.E. 136 (May 26, 2016 Order (Schofield, J.)), at 6 (“[N]o records from ICC establish when payments to merchants were made”); D.E. 76 (Jan. 8, 2015 Order (Netburn, M.J.)), at 3-4 (“ICC has failed to provide any responsive documents to discovery targeting” the timeliness of ICC’s merchant payments). Indeed, ICC has admitted that it never provided such information to MasterCard. Ex. 7 (DX 751) (Request For Admission No. 59: “Admit that ICC never provided MasterCard with a consolidated list of all current outstanding payables owed to ICC merchants for MasterCard Transactions with information regarding the age of the payables.” ICC’s Response: “Admit.”).

Not only did ICC lack the information necessary to carry its burden of proof, but it expressly admitted its conversion claim away -- conceding that it had substantial amounts due and payable to MasterCard merchants at the time of the drawdown. In response to a question

control at its whim, and that is wholly improper and contrary to the law.”); *id.* at 797:6-13 (ICC’s counsel at closing telling jury that no distributions have been made from the collateral).

from the Court, ICC's CEO Mr. Alami testified that, at least for months after the drawdown, ICC had not fully paid off its merchants for previous transactions:⁵

THE COURT: So how long did it take until the last merchant was paid?

THE WITNESS: I don't have a precise estimate, but we distributed all the checks, and then merchants would come up if they -- you know, if they had to pick up any checks, they would come and -- I haven't seen merchants for a very long time now, but I don't know the exact date what time.

THE COURT: Okay. Was it a matter of days or weeks or months?

THE WITNESS: For everybody to pick up everything?

THE COURT: Yes.

THE WITNESS: I think it was a couple of months, my guess would be.

Ex. 4 (Trial Tr.) at 733:11-23. This admission is confirmed by an internal ICC email to Mr. Alami in November 2013, which showed an "Un Paid Total" of amounts outstanding to merchants from March 2013. Ex. 2 (DX 466); Ex. 3 (Trial Tr.) at 134:8-135:25.

The existence of such amounts due and payable at the time of drawdown is wholly predictable even if ICC had been complying with its contractual obligations to its merchants. ICC stipulated that its required time to pay merchants was almost always five business days from receipt of the transaction. D.E. 268 at 16 (Stipulated Fact 32). Accordingly, if hypothetically ICC had been paying all of its transactions exactly on time, five business days of transaction amounts would have been due and payable to its merchants on any given day, including April 1, 2013. See Ex. 3 (Trial Tr.) at 95:5-6, 214:5-6. This conclusion is exemplified by the Paid Checks spreadsheet created by ICC, which showed that, on March 31, 2013, the day before the drawdown, only one of 94 checks had been paid within one business day of even the date of the

⁵ ICC's MasterCard membership was terminated the next day, and no new MasterCard transactions could have been effected by its merchants thereafter. Ex. 8 (PX 17) (April 2, 2013 Termination Letter); Ex. 4 (Trial Tr.) at 733:6-10.

check, which itself is after the receipt of the transaction. *See* Ex. 9 (DX 464); Ex. 3 (Trial Tr.) at 164:13-173:25.

But ICC was not at all meticulous in paying its merchants on time. As ICC itself admitted, it was late in paying many merchants. *See, e.g.*, Ex. 11 (DX 194) (draft ICC Strategic Plan listing “[l]ate payments to merchants” as its first weakness); Ex. 6 (DX 292) (ICC admitting on December 24, 2012 that only “over 80% of the merchants that create over 90% of our volume are up to date”); Ex. 12 (DX 297) (ICC “confess[ing] [on December 31, 2012] to some delay in the past for some merchant payments”).

The ICC-created Paid Checks spreadsheet quantifies the substantial lateness of its payments. *See* Ex 9 (DX 464). When the arithmetic was done correctly, ICC’s own information showed that, on March 23, 2013, over 38% of ICC’s payments were late, Ex. 10 (DX 464-a), and that for the month of March 2013, ICC was late in paying its merchants roughly 1/3 of the time -- even excluding amounts ICC had not paid at all, and starting the timeliness clock from the writing of a check rather than the required earlier time of the receipt of the transaction from the merchant. *Id.*

ICC thus presented the jury with no evidence showing that any amount drawn down did not reflect amounts due and payable to MasterCard merchants, and, *a fortiori*, no evidence showing that not a penny of the \$2.78 million reflected amounts so due and payable. The evidence -- including ICC’s myriad admissions -- was universally to the contrary.

B. A Reasonable Jury Could Not Find That ICC Has Carried Its Burden To Prove that MasterCard Knew At The Time Of The Drawdown That No Amount Was Due And Payable To MasterCard Merchants

ICC also failed to adduce any evidence to support the requirement that MasterCard knew that its drawing statement was false. Instead, as described *supra* at 1-2, MasterCard had every reason to believe that, like every MasterCard acquirer, ICC would at any given time have

amounts due and payable to its merchants even if it had been making all its payments exactly as agreed. *See* D.E. 268 at 16 (Stipulated Fact 28); Ex. 3 (Trial Tr.) at 95:5-6, 214:5-6. The evidence further showed that: based on pre-drawdown, objective calculations done by Ms. D'Souza, MasterCard reasonably understood that it was exposed to ICC for acquiring risk in the amount of \$4 million (Ex. 3 (Trial Tr.) at 426:18-21, 429:18-430:20, 435:15-19), well in excess of the \$2.78 million MasterCard drew down (*id.* at 426:18-21; Ex. 4 (Trial Tr.) at 670:2-18); and MasterCard had extensive grounds to conclude that ICC was paying many of its merchants late, as ICC itself had confessed to MasterCard prior to the drawdown. *See supra* at 6-7.

Against this evidence, ICC offered only the assertion that MasterCard was not aware of specific amounts due and payable to specific merchants. *See, e.g.*, Ex. 4 (Trial Tr.) at 791:16-24. But the letter of credit required no such granular precision, and any such gap in MasterCard's knowledge was ICC's own fault.

Despite repeated requests by MasterCard, ICC refused -- in violation of MasterCard's Rules 3.6.1 and 2.13.10, Ex. 13 (DX 001) -- to provide MasterCard information as to the status of ICC's payment obligations to its merchants. On Oct. 22, 2012, MasterCard requested "a consolidated list of all current O/S payables with their Ageing." Ex. 6 (DX 292). On Feb. 19, 2013 MasterCard requested "a list for the outstanding balances with all your merchants along with your payment plan." Ex. 14 (DX 340); *see also* Ex. 15 (DX 404) (April 7, 2013: "[P]lease send us a detailed report of all outstanding International Cards Company merchant balances related to the MasterCard acquiring transactions"; April 17, 2013: "[P]lease send us a report of any remaining payments that are due to merchants for MasterCard related transactions"). Yet, as ICC admitted in response to MasterCard's Request for Admission No. 59, it never provided MasterCard this information. *See supra* at 5-6 (ICC failed to provide this evidence in discovery).

ICC's refusal to provide this information prevents it from now claiming that MasterCard knew that its drawdown representation was false. *See Eastland Bank v. Massbank for Sav.*, 767 F. Supp. 29, 33 (D.R.I. 1991), *aff'd*, 953 F.2d 633 (1st Cir. 1991) ("in order for a document to be fraudulent, the beneficiary must know that it is false when he presents it to the issuer"); N.Y. Pattern Jury Instr.-- Civil 3:10 (a defendant lacks the requisite intent to exercise unauthorized control where the plaintiff induced any alleged mistake or the defendant possessed a reasonable belief as to its authority).

V. CONCLUSION

The Court should enter judgment as a matter of law against ICC on its conversion claim (Second Amended Complaint, Count III).

Dated: May 10, 2017

BALLARD SPAHR LLP

By: /s/ Jay N. Fastow
Jay N. Fastow, Esq.
FastowJ@Ballardspahr.com
Denise L. Plunkett, Esq.
PlunkettD@Ballardspahr.com
Justin W. Lamson, Esq.
LamsonJW@Ballardspahr.com
919 Third Avenue
New York, NY 10022
Telephone: (212) 223-0200
Facsimile: (212) 223-1942

*Attorneys for Defendant
MasterCard International Incorporated*