

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

NAS

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ALIZA GOLDMAN, individually and on behalf of all
others similarly situated,

Index No. 1899/05

Plaintiff,

-against-

AMENDED
CLASS ACTION
COMPLAINT

SIMON PROPERTY GROUP, INC.,

Defendant.
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AUG 21 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE

AMENDED CLASS ACTION COMPLAINT

Plaintiff brings this class action on behalf of herself and all others similarly situated, by and through the undersigned attorneys, upon knowledge as to her own acts, and otherwise upon information and beliefs and alleges as follows:

PARTIES

1. Plaintiff brings this class action pursuant to CPLR § 901 on behalf of herself and all others similarly situated, whose joinder in this action is impracticable.

2. Plaintiff Aliza Goldman is an individual residing at 13 Nome Drive, Woodbury, New York 11797.

3. Defendant Simon Property Group, Inc. (“Simon”) is a Delaware corporation authorized to do business in New York State with its principal place of business in Indianapolis, Indiana.

4. At all relevant times herein, defendant Simon was and is engaged in the business of marketing, selling, and distributing SIMONGift cards (referred to herein as “Gift Cards”).

5. Simon sold Gift Cards at malls and through the internet.

6. Simon sold Gift Cards at stores with cardboard jackets or sleeves and on line through use of various pages on Simon’s website (collectively, “Associated Documentation”).

7. Plaintiff received a Gift Card from which Simon deducted certain fees beginning in the seventh month after the purchase of the Gift Card (“Dormancy Fees”).

8. Simon received and retained the Dormancy Fees.

9. Gift Cards are gift certificates.

10. The Class so represented by the plaintiff here, and of which the plaintiff is a member, consists of all persons who are subject to or were subjected to Dormancy Fees on Gift Cards purchased prior to April 30, 2005 who (a) reside in New York, and/or (b) hold or

held gift cards purchased in New York. The Class shall not include Simon, its officers, directors, affiliates, subsidiaries, and successors.

CLASS ACTION ALLEGATIONS

11. Plaintiff is a member of the class which she seeks to represent. The members of the class are so numerous that joinder is impractical. The class consists of, at least, thousands of members. The identity of each member of the class is within the knowledge of Simon and can be ascertained only through the records of Simon.

12. Class certification is appropriate because common questions of law and fact exist as to all members of the class and predominate over any questions affecting solely individual class members. Among the questions of law and fact common to the class are:

a. whether Simon's deduction of Dormancy Fees from the Gift Cards of the plaintiff and other class members beginning the seventh month after the purchase was a breach of its contract with class members and violated Simon's obligations of good faith and fair dealing;

b. whether the terms relating to the Dormancy Fees on the Gift Cards and Associated Documentation were unclear, illegible, inconspicuous, unconscionable, and unenforceable;

c. whether the Gift Cards and Associated Documentation were deceptive in failing to provide proper notice of the Dormancy Fees;

- d. whether the Gift Cards and Associated Documentation would mislead a reasonable holder and/or purchaser;
- e. whether Simon's conduct was an unfair and deceptive business practice in violation of N.Y. Gen. Bus. Law § 349;
- f. whether Simon's conduct violated N.Y. Gen. Bus. Law § 396-i;
- g. whether Simon was unjustly enriched;
- h. whether Simon is liable for money had and received; and
- i. whether Simon should be permanently enjoined from charging and/or collecting these fees.

13. Plaintiff's claims are typical of the claims of the other class members in that plaintiff and the other class members lost value of the Gift Card beginning in the seventh month after purchase.

14. The individual ascertainable losses and damages of the plaintiff and each class member are not sufficiently large to justify instituting individual actions.

15. Plaintiff will fairly and adequately represent and protect the interests of the other class members.

16. Plaintiff has retained competent and experienced counsel.

17. Plaintiff does not have any interests which are antagonistic to or are in conflict with the other members of the class whom plaintiff seeks to represent.

18. Bringing this action as a class action is superior to other available methods for the fair and efficient adjudication of the claims which are asserted, and no unusual difficulties are likely to be encountered in the management of this case as a class action. The prosecution of separate actions by class members would create a risk of inconsistent or varying adjudications which could confront Simon with incompatible standards of conduct or could lead to adjudications which could be dispositive of the interests of other class members not parties to the adjudication or substantially impair or impede their ability to protect their interests.

19. Damages to the individual class members are relatively small in comparison to the costs of litigation, making the expense of individual litigation of these claims prohibitive for plaintiff and the other class members.

20. This action is properly maintainable as a class action.

SUBSTANTIVE ALLEGATIONS

21. Simon entered into a contract with purchasers of the Gift Cards whereby Simon received a sum certain and, in exchange, purchasers received Gift Cards equal in value to the sum certain.

22. Pursuant to said contract, Simon agreed that purchasers and other holders of the Gift Cards (i.e., plaintiff and other class members) could purchase merchandise at Simon merchants for their personal use.

23. Pursuant to said contract, Simon agreed that purchasers of the Gift Cards could transfer the Gift Cards to others who would be entitled as holders of the Gift Cards to benefit from Simon's contract with the purchasers of the Gift Cards and to have the same rights as the purchaser.

24. On or about April 2003, plaintiff received from her employer a Gift Card sold by Simon. The Gift Card was purchased in New York State.

25. Simon began to automatically deduct \$2.50 per month as Dormancy Fees beginning the seventh month after the purchase of the Gift Card held by plaintiff without proper notice to plaintiff.

26. Simon made similar deductions of Dormancy Fees from other Gift Cards held by class members beginning the seventh month after their purchase without proper notice.

27. The Gift Card does not place the user on notice of the deduction of the Dormancy Fees.

28. The Gift Card was deceptive in its failure to provide reasonable notice of the deductions of Dormancy Fees.

29. Simon's sale, distribution, and marketing of the Gift Cards without providing proper notice of the deductions of Dormancy Fees was deceptive and materially misleading to plaintiff and was and is misleading to reasonable purchasers and holders of the Gift Cards acting reasonably under the circumstances.

30. The Gift Cards contained language on their reverse side which was in a print that was unclear, impermissibly small, inconspicuous, and illegible.

31. The print on the reverse side of the Gift Cards was less than eight points in depth or five and one-half points in depth for upper case type.

32. By application of New York law, print less than eight points in depth or five and one-half points in depth for upper case type is invalid and unenforceable against plaintiff and other class members.

33. The Associated Documentation similarly did not provide notice of the Dormancy Fees and the provisions regarding the Dormancy Fees were inconspicuous.

34. The Dormancy Fees were buried within the multiple page print on the jacket/sleeve of the Gift Cards.

35. The print on the jacket/sleeve of the Gift Cards relating to the Dormancy Fees was unclear, impermissibly small, illegible, invalid, and unenforceable.

36. Although the Dormancy Fees commenced beginning in the seventh month after purchase, Gift Cards and the Associated Materials did not give the non-purchasing holder notice of the purchase date of the Gift Cards.

37. By virtue of the Dormancy Fees, the Gift Cards could lose all of their value.

38. The Dormancy Fees, at a minimum, substantially lessened the value of the Gift Cards for which the purchaser paid and which the holder received.

39. The imposition of the Dormancy Fees after only six months from purchase rendered it likely that holders would receive less than the purchase price of the Gift Cards, to the profit of Simon.

40. The imposition of the Dormancy Fees was not reasonable and was unconscionable, particularly considering the lack of notice of the Dormancy Fees, the lack of notice of the purchase date for the non-purchasing holder, the fact that holders would be the recipients but not the purchasers of the Gift Cards and the expected delay in giving of the Gift Cards to the holder, the short period between purchase and commencement of the

Dormancy Fees, and the lack of any valid relationship between continuing nonuse of the Gifts Cards and expense to Simon.

41. By consent order and judgment brought in an action entitled The People of the State of New York, by Eliot Spitzer, Attorney General of the State of New York, Petitioners, against Simon Property Group, Inc. and Simon Property Group, LP, Supreme Court of the State of New York, County of New York, Index No. 400425/05, dated March 7, 2005, Simon among other things, was prohibited from collecting a monthly service fee prior to the thirteenth consecutive month of non-use of the Gift Cards for cards sold on or after October 18, 2004 and, commencing 60 days after execution of a stipulation and consent annexed to the consent order and judgment and entered into on or about March 1, 2005, from assessing any fees against the balance of the Gift Cards which were not clearly and conspicuously disclosed.

42. The consent order and judgment did not prohibit collection of Dormancy Fees subsequent to the thirteenth consecutive month or with respect to Gift Cards sold prior to October 18, 2004, or bar in its entirety the collection of Dormancy Fees on Gift Cards which were not clearly and conspicuously disclosed until on or about April 30, 2005 (60 days after execution of the stipulation and consent).

43. The consent order and judgment by its terms did not deprive any person from pursuing a private right of action.

44. Simon's conduct has proximately caused ascertainable monetary losses and damages to plaintiff and the other class members.

45. As a result of the foregoing, Simon has obtained and continues to obtain substantial profits and windfalls, while plaintiff and other class members suffered and continue to suffer actual damages and remain at risk for future damages.

AS AND FOR A FIRST CAUSE OF ACTION
BREACH OF CONTRACT/BREACH OF GOOD FAITH

46. Plaintiff repeats and realleges each and every preceding paragraph 1 through 45 as if fully set forth herein.

47. Simon has breached its contractual obligations to plaintiff and other class members.

48. Simon breached its contractual obligation of good faith and fair dealing.

49. The provisions regarding the Dormancy Fee are unconscionable and unenforceable.

50. By reason of the foregoing breach of contract, plaintiff and other class members have been damaged in an amount to be determined at trial together with interest thereon.

AS AND FOR A SECOND CAUSE OF ACTION
UNFAIR AND DECEPTIVE PRACTICES UNDER N.Y. GEN. BUS. LAW § 349

51. Plaintiff repeats and realleges each and every preceding paragraph 1 through 45 as if fully set forth herein.

52. The wrongful acts of Simon affected thousands of its customers.

53. The wrongful acts of Simon were consumer oriented.

54. By reason of the foregoing wrongful acts, Simon has violated Gen. Bus. Law § 349.

55. Plaintiff and other class members have been, are and will in the future continue to be damaged by the unlawful acts unless the putative class is awarded the relief sought herein.

56. Plaintiff and other class members have no adequate remedy at law to stop the collection of the Dormancy Fees.

57. By reason of the foregoing violation of Gen. Bus. Law § 349, plaintiff and other class members have been damaged in an amount to be determined at trial and are entitled to recover attorneys' fees.

AS AND FOR A THIRD CAUSE OF ACTION
VIOLATION OF N.Y. GEN. BUS. LAW § 396-i

58. Plaintiff repeats and realleges each and every preceding paragraph 1 through 45 as if fully set forth herein.

59. Simon violated N.Y. Gen. Bus. Law § 396-i because the terms of the Gift Cards regarding deduction of fees were not clear and conspicuous.

60. By reason of the foregoing, plaintiff and other class members are entitled to recover from Simon all damages and costs permitted by law with interest accruing from the time of payment, costs, disbursements and attorneys' fees.

AS AND FOR A FOURTH CAUSE OF ACTION
UNJUST ENRICHMENT

61. Plaintiff repeats and realleges each and every preceding paragraph 1 through 45 as if fully set forth herein.

62. Simon is entitled to no additional fees from the Gift Cards.

63. Simon deducted money from the Gift Cards and retained the money.

64. As a result of the aforesaid conduct, Simon has wrongfully collected from plaintiff and other class members, amounts of money in excess of those to which they are entitled.

65. The deduction of fees from the Gift Card commencing in the seventh month was improper and these unlawful fees has unjustly enriched, benefited and created a windfall for Simon, to the detriment and damage of plaintiff and other class members.

66. Simon cannot in equity and good conscience retain the money it deducted which lawfully belongs to plaintiff and other class members.

67. By reason of the foregoing, plaintiff and other class members are entitled to recover from Simon all damages and costs permitted by law including all amounts to which Simon has been unjustly enriched, with interest accruing from the time of payment, costs, disbursements and attorneys' fees.

AS AND FOR A FIFTH CAUSE OF ACTION
MONEY HAD AND RECEIVED

68. Plaintiff repeats and realleges each and every preceding paragraph 1 through 45 and 62-66 as if fully set forth herein.

69. Simon owes plaintiff and other class members all money had and received through its deductions of money from the Gift Cards, with interest accruing from the time of payment, costs, disbursements and attorneys' fees.

WHEREFORE, plaintiff and the other class members demand judgment as follows:

a. certifying this action as a class action on behalf of the proposed class, plaintiff as representative of the class, and plaintiff's counsel as counsel for the class;

b. awarding plaintiff and the other class members the following relief against Simon:

- (i) reimbursement for all amounts deducted in breach of the contract to be proven at trial with interest;
- (ii) reimbursement for all amounts deducted in violation of Gen. Bus. Law § 349 to be proven at trial with interest;
- (iii) reimbursement for all amounts deducted in excess of the statutory provision to be proven at trial with interest;
- (iv) a declaration that the acts of Simon was and continues to be unlawful;
- (v) an injunction enjoining and restraining Simon from further applying and implementing the polices and acts complained of herein;
- (vi) pre and post-judgment interest;
- (vii) attorneys' fees; and
- (viii) costs and disbursements of this action.

Dated: New York, New York
August 15, 2006

TRIEF & OLK

By: *Burton T. Olk*
Attorneys for Plaintiff
150 E. 58th Street, 34th Floor
New York, New York 10155
(212) 486-6060

TO: SILLS CUMMIS EPSTEIN & GROSS, P.C.
Attorneys for Defendant
30 Rockefeller Plaza
New York, NY 10112
212-643-7000