UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF TENNESSEE

NASHVILLE DIVISION

GENESCO INC., Plaintiff, v. VISA U.S.A. INC.; VISA INC.; and VISA INTERNATIONAL SERVICE ASSOCIATION, Defendants.	No. 3:13-cv-00202 Judge Haynes

VISA DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS GENESCO'S SIXTH AND SEVENTH CAUSES OF ACTION

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I. INTRODUCTION

This case is, at its core, a dispute about the effect of two distinct and complex commercial contracts, only one of which involved Visa[1] and neither of which required Genesco to pay anything to Visa. Visa operates a global payments network and has contracts with participating member banks that require them to comply with the rules that govern the network. The governing Visa International Operating Regulations ("VIOR") include certain rules that allocate responsibilities and liabilities among Visa member banks when a data-security breach occurs that puts cardholder account data at risk. Visa administers the rules that govern the responsibilities and liabilities among the member banks that provide card-acceptance services to the breached entity (the "acquiring banks") and the banks that issue the potentially affected cards (the "issuing banks").

Genesco has separate contracts with two acquiring banks that provided Genesco with card-acceptance services allowing Genesco to accept Visa cards as a form of payment. Following a massive data compromise event at Genesco in which millions of cardholders' account data were put at risk, Visa exercised its contractual rights with respect to Genesco's acquiring banks to collect from these banks money designed to be a partial reimbursement for losses suffered by the banks that had issued the Visa cards that were put at risk by the deficiencies in Genesco's data security system. Genesco's acquiring banks then allegedly exercised separate and distinct contractual rights to indemnity or reimbursement that they allegedly had against Genesco. The Complaint acknowledges that these payments by Genesco's acquiring banks to Visa and by Genesco to its acquiring banks were pursuant to the express

[1] Defendants Visa U.S.A. Inc., Visa Inc., and Visa International Service Association are collectively referred to as "Visa" for the purposes of this motion.

terms and distinct legal obligations of the commercial contracts between Genesco's acquiring banks and Visa on the one hand, and the acquiring banks and Genesco on the other hand.

While Visa strongly believes that factual and legal flaws preclude the five contract causes of action, which are premised on rights allegedly assigned or subrogated to Genesco, those claims are not the subject of this Rule 12 motion. Rather, in this motion, Visa seeks dismissal of the two causes of action asserting equitable claims: the Sixth Cause of Action under California's statutory Unfair Competition Law ("UCL") and the Seventh Cause of Action for Money Had and Received or Restitution/Unjust Enrichment. Both the claim under California's UCL and the equitable, quasi-contract claim are barred given the express contracts that govern this dispute.

Specifically, Genesco's Sixth Cause of Action under California's UCL should be dismissed with prejudice on several grounds: (1) as California courts have recognized, UCL claims cannot be premised on a dispute between commercial entities involving matters covered by express contracts; (2) in connection with its claim under the UCL's "fraudulent prong," Genesco fails to identify any fraudulent statements affecting consumers or the public on which Genesco reasonably relied; and (3) the monetary award Genesco seeks is not restitution, which is the only type of monetary award available under the UCL.

In addition, Genesco's Seventh Cause of Action, for Money Had and Received or Restitution/Unjust Enrichment, should be dismissed with prejudice for several similar reasons: (1) such quasi-contractual claims are precluded when a dispute is covered by express commercial contracts; and (2) in any event, Genesco has failed to allege facts sufficient to satisfy the elements of a claim for Money Had and Received.

II. FACTUAL ALLEGATIONS[2]

Visa operates a global electronic payments and processing network involving thousands of financial institutions. (*See* Compl. ¶¶ 3–5.) Financial institutions enter contractual agreements with Visa authorizing them to participate as members in the Visa network, subject to the Visa International Operating Regulations ("VIOR"). (*See id.* ¶¶ 1, 9.) These participating banks may act as "issuers" or "issuing banks," which issue payment cards to cardholders. They may also act as "acquirers" or "acquiring banks," which sign up merchants to accept Visa-branded payment cards. (*See id.* ¶ 9.) The banks, not Visa, enter into separate contracts with the cardholders or merchants. (*See id*.) Among the many aspects of electronic payment transactions they address, the VIOR require the acquiring banks to ensure that their merchants comply with established Payment Card Industry Data Security Standards ("PCI DSS") governing the protection of cardholder data processed through merchants. (*Id.* ¶¶ 11, 15.)

At all times relevant to this action, Genesco was a merchant accepting Visa-branded payment cards through two acquiring banks: Wells Fargo Bank, N.A. and Fifth Third Financial Corporation (together, the "Acquiring Banks"). (*Id.* ¶ 10.) Genesco does not allege it had a direct contract with Visa. Rather, Genesco entered into separate merchant agreements with each of the Acquiring Banks, under which Genesco agreed to pay certain fees to the Acquiring Banks and to comply with applicable provisions of the VIOR. (*Id.* ¶¶ 10–11.) In exchange, the Acquiring Banks enabled Genesco to accept and process Visa card transactions at Genesco stores. (*Id.*) Under these separate contracts that Genesco entered into with its Acquiring Banks, Genesco also apparently agreed to indemnify the Acquiring Banks against certain assessments

[2] Visa's Rule 12 motion does not contest the Complaint's factual allegations, but Visa does not concede that those allegations are accurate.

relating to transactions at Genesco stores that Visa might impose on the Acquiring Banks pursuant to the VIOR. (*Id.* ¶ 12.)

Genesco experienced a cybercrime attack in which intruders targeted payment card data on Genesco's computer network (the "Genesco Data Compromise Event"). (*See id.* ¶ 17.) Specifically, the hackers installed malicious software in Genesco's computer network to obtain cardholders' account data as it was transmitted from Genesco to the Acquiring Banks. (*Id.* ¶ 20.) Visa determined that Genesco's Acquiring Banks were not compliant with their VIOR obligations to ensure that Genesco met the standards established by the PCI DSS. (*Id.* ¶ 39.)

The VIOR contain two processes for allocating between acquiring and issuing banks financial responsibility for an account data compromise event, such as the Genesco Data Compromise Event. The Account Data Compromise Recovery ("ADCR") program rules cover U.S. transactions, and the Data Compromise Recovery Solution ("DCRS") program rules cover international transactions. (*Id.* ¶ 23.) Both the ADCR and DCRS programs provide contractual mechanisms to determine responsibility for and the amount of counterfeit fraud recovery and operating expense recovery for issuing banks' losses associated with a compromise event. (*Id.* ¶¶ 23–24, 31.) Because it is the acquiring banks' responsibility under the VIOR to ensure compliance with the PCI DSS, acquiring banks are responsible under ADCR and DCRS for data compromises occurring at acquiring banks' merchants, if the event meets the criteria set forth in the VIOR. (*E.g.*, *id.* ¶¶ 25, 28–30 (ADCR); *id.* ¶¶ 31–32, 35 (DCRS).) Visa does not retain money assessed to acquiring banks under the ADCR and DCRS programs; rather, the purpose of Visa's programs is to distribute the funds to the affected issuing banks. (*See, e.g.*, *id* ¶¶ 1, 57, 63, 70.)

After the Genesco Data Compromise Event, Visa made assessments on the Acquiring Banks under the ADCR and DCRS programs for counterfeit fraud recovery and operating expense recovery totaling over $13 million. (*Id.* ¶¶ 40–41.) Visa also assessed $5,000 to each of the Acquiring Banks for Genesco's non-compliance with the PCI DSS. (*Id.* ¶ 39.) After Visa collected this money from the Acquiring Banks, those banks then exercised contractual rights they allegedly had against Genesco by collecting equal amounts from Genesco either by debiting that money from a settlement account set up for that purpose or by withholding those amounts from money otherwise due to Genesco. (*Id.* ¶¶ 42–44.)

Genesco seeks an award from Visa for the amounts Genesco paid to the Acquiring Banks under its contracts with those banks, as well as unspecified incidental damages related to those payments. (*See id.* ¶ 1.) Genesco does not allege that Visa took any money directly from Genesco, and Genesco does not have a direct relationship with Visa. To the contrary, the Complaint makes clear that Visa did not take money from Genesco—alleging instead that Visa made assessments against the Acquiring Banks. (*E.g.*, *id.* ¶ 1.) Genesco does not allege that Visa's enforcement of the requirements of the ADCR and DCRS programs against the Acquiring Banks was in any way dependent upon the terms of the Acquiring Banks' separate contracts with Genesco. Nor does Genesco allege that Visa's contractual right to collect the assessments from the Acquiring Banks was contingent on Genesco agreeing to reimburse or indemnify the Acquiring Banks. In addition, Genesco does not allege that Visa directed, or even encouraged, the Acquiring Banks to seek reimbursement or indemnification from Genesco pursuant to the banks' separate contracts with Genesco. Genesco's allegation is simply that Genesco's separately negotiated contracts with Acquiring Banks resulted in Genesco having an indemnity obligation to the Acquiring Banks for the banks' contractual obligations to Visa.

The Complaint recognizes in multiple places that Visa's assessments collected from the Acquiring Banks were premised only on Visa's contracts with the Acquiring Banks. (*E.g.*, Compl. ¶¶ 15, 23–24, 29.) The first five causes of action are premised on Genesco's purported contractual rights as a subrogee and/or assignee of the Acquiring Banks' contractual rights vis-à-vis Visa.[3] In addition to those contractual claims, however, Genesco asserts two causes of action against Visa directly: (1) the Sixth Cause of Action is for an alleged violation of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200,[4] and (2) the Seventh Cause of Action is an equitable claim for Money Had and Received (alternatively called Restitution/Unjust Enrichment). This motion seeks dismissal of the Sixth and Seventh Causes of Action for failure to state a claim.

III. ARGUMENT

The Complaint does not allege facts to support the UCL or equitable claims advanced in the Sixth and Seventh Causes of Action; indeed the facts alleged are contrary to the legal standards for those claims. Thus, the Court should dismiss both causes of action with prejudice.

The Federal Rules of Civil Procedure "require[] more than labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of the claims will not suffice, and the Court cannot assume the truth of conclusory allegations unsupported by facts. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679–80 (2009). Nor can the Court assume "the [plaintiff] can prove facts that it has not alleged." *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 526 (1983); *Harris v. Nationwide*

[3] Genesco's contract-based claims are factually and legally flawed, but they will be challenged at a later time and not on this motion.

[4] The Complaint erroneously refers to the statutory claim under California's Business and Professions Code § 17200 as a claim under the "Unfair Business Practices Act." That law is known as the "Unfair Competition Law."

Mut. Fire Ins. Co., 11-0412 WJH, 2012 U.S. Dist. LEXIS 97158, at *5 (M.D. Tenn. July 11, 2012). Where, as here, the facts alleged in the Complaint, stripped of their rhetoric and conclusory allegations, would not support a verdict for Genesco, the Complaint should be dismissed.

A. Plaintiffs Have Inadequately Pled That Visa Violated California's Unfair Competition Law

Genesco's Sixth Cause of Action alleges that Visa violated California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, because Visa's actions were "unfair" and "fraudulent." (*See* Compl. ¶¶ 146–147.) The claim fails because the UCL does not reach claims such as those here that arise out of express contracts involving commercial parties when no broader public or consumer harm is alleged. Furthermore, notwithstanding its broad, conclusory assertions, the Complaint does not include factual allegations establishing that Visa engaged in practices that were either "unfair" or "fraudulent" under the UCL. Finally, the monetary award Genesco seeks is not restitution, which is the only monetary relief available under the UCL.

1. Commercial Contracts Are An Improper Basis For Either A Fraudulent Or An Unfair Claim Under The UCL

Genesco's UCL claim fails under both the "fraudulent" and "unfair" prongs of the UCL because all of the allegations in the Complaint arise out of relationships covered by commercial contracts. The California Supreme Court has held that an "action under the UCL is not an all-purpose substitute for a tort or contract action." *Korea Supply Co. v. Lockheed Martin, Inc.*, 29 Cal. 4th 1150, 1151 (2003). Instead, the UCL focuses on protecting consumers and promoting fair competition. *See Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 135 (2007). Thus, the California Supreme Court also has cautioned that under the UCL, "[c]ourts may not simply impose their own notions of the day as to what is fair or unfair." *Cel Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*, 20 Cal. 4th 163, 182 (1999); *see also Van Slyke v.*

Capital One Bank, No. 07-00671 WHA, 2007 WL 3343943, at *11 (N.D. Cal. Nov. 7, 2007) (the "unfairness" prong cannot be an invitation for courts to "roam across the landscape . . . picking and choosing which they like and which they dislike").[5]

Courts regularly hold that commercial entities may not bring UCL claims alleging either "unfair" or "fraudulent" practices when the disputed conduct arises from a contract between commercial entities unless the matter also impacts the general public. *E.g.*, *Graphic Pallet & Transport, Inc. v. Balboa Capital Corp.*, 11-9101 EEB, 2012 WL 1952745, at *6 (N.D. Ill. May 30, 2012) ("In defining the limits of claims for unfair or fraudulent business practices, California courts have refused to allow commercial parties to use § 17200 to resolve disputes over their economic relationships."); *Dollar Tree Stores Inc. v. Toyama Partners LLC*, 875 F. Supp. 2d 1058, 1083 (N.D. Cal. 2012) (granting summary judgment on UCL claim that was "based on a breach of contract that does not implicate the public in general or individual consumers."); *Linear Tech.*, 152 Cal. App. 4th at 135 (dismissing UCL claim, holding that "where a UCL action is based on contracts not involving either the public in general or individual consumers who are parties to the contract, a corporate plaintiff may not rely on the UCL for the relief it seeks"); *In re Webkinz Antitrust Litig.*, 695 F. Supp. 2d 997, 998–99 (N.D. Cal. 2010) ("The allegations . . . fundamentally sound in contract and do not allege facts sufficient to demonstrate a connection to the protection of the public.").[6] This prohibition on

[5] Pursuant to the Local Rules, all unreported cases cited herein are attached as Exhibit A.

[6] One district court rejected a "fraudulent" practices claim under the UCL on this basis, but allowed an "unfair" practices claim to proceed before later dismissing it. *Cabo Brands, Inc. v. Mas Beverages, Inc.*, 11-1911 ODW, 2012 WL 2054923, at *5 (C.D. Cal. June 5, 2012) ("*Cabo I*"); *see also Cabo Brands, Inc. v. Mas Beverages, Inc.*, 11-1911 ODW, 2012 WL 5520775, at *4 (C.D. Cal. Nov. 14, 2012) ("*Cabo II*") (later decision dismissing claim). But *Cabo I*'s conclusion on the "unfair" prong is an outlier and contained no analysis; the one case it cited actually involved a consumer contract. 2012 WL 2054923, at *5 (citing *Puentes v. Wells*

UCL claims premised on commercial relationships extends to conduct that arguably falls outside of what is permissible under the contract as long as the relationship is generally defined by contract. *ConocoPhillips Co. Serv. Station Rent Contract Litig.*, 09-02040 RMW, 2011 WL 1399783, at *3 (N.D. Cal. Apr. 13, 2011) (finding even conduct not contemplated by governing contracts to be an inappropriate basis for a UCL claim when contracts governed overall business relationship between entities). The relative size of the commercial entities involved is irrelevant. *Webkinz*, 695 F. Supp. 2d at 998–99.

The Complaint makes clear that Genesco's UCL claim is precisely the type of commercial contract-based dispute that is disallowed. Visa's relationships with the Acquiring Banks are entirely defined by the commercial contracts between those entities, and the assessments were made under the provisions of the VIOR. (*E.g.*, Compl. ¶¶ 9, 23.) Genesco's UCL claim alleges that Visa acted improperly under those contracts (*id.* ¶ 146), and Genesco further alleges that this in turn resulted in the Acquiring Banks seeking money from Genesco pursuant to separate commercial contracts between the Acquiring Banks and Genesco. (*Id.* ¶¶ 10–11.) This dispute focuses on the parameters of and compliance with these various contractual provisions, and Genesco asserts five contract-based causes of action. The Sixth Cause of Action is nothing more than an attempt to convert a commercial contract dispute into an equitable claim under the UCL. The UCL does not permit such a claim, and the Sixth Cause of Action should be dismissed.

2. Genesco Fails To Allege That Visa Engaged In Fraudulent Practices

Genesco's UCL claim for alleged "fraudulent" conduct fails for additional reasons as well. The touchstone inquiry under the "fraudulent" prong is whether consumers or the general

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Fargo Home Mortg., Inc., 160 Cal. App. 4th 638, 645 (2008)). *Cabo I* thus is not persuasive authority and, in any event, certainly does not trump the long line of precedent cited above.

public are likely to be deceived by a defendant's conduct. *See, e.g.*, *Brakke v. Economic Concepts, Inc.*, 213 Cal. App. 4th 761, 772 (2013) (fraud claims under the UCL must plausibly allege likelihood of public deception); *In re Ins. Installment Fee Cases*, 211 Cal. App. 4th 1395, 1416–17 (2012) (finding no public deception likely as a result of insurance company collecting fees pursuant to valid contract); *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025–26 (9th Cir. 2008) (affirming dismissal of allegations containing only plaintiff-consumer's experience with defendants and not allegations that failure to disclose likely to deceive reasonable consumer); *Webkinz*, 695 F. Supp. 2d at 998–99 ("[T]he central issue presented under California law is whether the public at large, or consumers generally, are affected by the alleged unlawful business practice of defendants."). A plaintiff also must show harm resulting from actual reliance on an allegedly deceptive or misleading statement. *Kwikset Corp. v. Superior Court*, 51 Cal. 4th 310, 326–27 (2011); *Medrazo v. Honda of N. Hollywood*, 205 Cal. App. 4th 1, 12 (2012).

Genesco fails to allege that Visa made any statements or representations that were allegedly fraudulent. Its sole, conclusory assertion of fraudulent conduct is the allegation that "Visa misrepresented to the Acquiring Banks that [the disputed] amounts were due and owing to Visa under the VIOR and applicable law." (Compl. ¶ 147.) This allegation is no more than a thinly veiled claim that Visa breached its contracts with the Acquiring Banks in making the assessments. *See Korea Supply*, 29 Cal. 4th at 1151 (UCL is not catchall substitution for tort and contract claims). Even if accepted as true for purposes of this motion, the allegation does not establish any likelihood of consumer or public deception. Nor does Genesco even allege that it relied on the alleged misrepresentation. For these additional reasons, Genesco's Complaint fails to state a claim under the "fraudulent" prong of the UCL.

3. Restitution Is Unavailable To Genesco Because It Is Not A Direct Victim Of The Allegedly Unfair Or Fraudulent Conduct

The UCL claim also should be dismissed because the monetary award Genesco seeks is not restitution under the UCL.[7] In such circumstances, dismissal of the claim is appropriate. *Korea Supply*, 29 Cal. 4th at 1140, 1154, 1166 (holding that UCL claim should have been dismissed where claim seeks only a monetary award that is not restitution under the statute).[8]

Restitution is the only form of monetary relief available to private UCL litigants. *Korea Supply*, 29 Cal. 4th at 1148. In *Korea Supply*, the California Supreme Court rejected a UCL claim seeking monetary relief where "[a]ny award that plaintiff would recover from defendants would not be restitution as it would not replace any money or property that defendants took directly from plaintiff." *Id.* at 1149. Monetary recovery under the UCL is limited to "actual direct victims" of the allegedly unfair or fraudulent conduct, and the money to which plaintiff claims a vested interest must be clearly traceable to the funds in the defendants' possession. *Id.* at 1150.

Under this standard, Genesco's UCL claim fails. The face of the Complaint makes clear that Genesco does not allege that Visa took any money directly from Genesco. Rather, Visa assessed money from the Acquiring Banks pursuant to contracts between Visa and those Acquiring Banks. The Acquiring Banks then allegedly sought reimbursement pursuant to separate contracts to which Visa was not a party. (Compl. ¶¶ 10–11.) The Complaint makes no

[7] *See* Compl. ¶ 149 & Prayer. To the extent the Prayer refers to "damages," that relief is plainly inappropriate. *Korea Supply*, 29 Cal. 4th at 1150 (citing *Bank of the West v. Superior Court*, 2 Cal. 4th 1254, 1266 (1992)).

[8] Subsequent cases hold that standing under the UCL can be established where injury in fact is a result of the alleged unfair competition, regardless of whether restitution is available. *Kwikset*, 51 Cal. 4th at 335–37. But those standing cases apply to whether a plaintiff could pursue injunctive relief when restitution is unavailable. In contrast, where the only relief sought is monetary—as here, and as in *Korea Supply*—dismissal is warranted on the pleadings where the monetary relief sought as a matter of law does not constitute restitution under the UCL.

allegation that Visa either required or encouraged the Acquiring Banks to seek indemnity from Genesco.

Courts following *Korea Supply* have not allowed UCL restitution claims based on a sequence of alleged payments—one from a third party to the defendant, and another from the plaintiff to a third party—unless funds in defendants' possession can be traced to payments plaintiffs made through an intermediary or agent. *In re Ford Motor Co. E-350 Van Prod. Liab. Litig.*, 03-1687 GEB, 2011 WL 601279, at *7–8 (D.N.J. Feb. 16, 2011) (discussing cases and holding that tracing requirement for UCL restitution was not satisfied simply because Ford was paid for all vehicles sold, where consumer paid separate entity after Ford sold to the separate entity); *Trew v. Volvo Cars of N. Am.*, LLC, 05-1379 DFL, 2006 WL 306904, at *2–3 (E.D. Cal. Feb. 8, 2006) (declining to dismiss UCL restitution claim where defendant profited from monies paid by plaintiff to intermediary). Those cases contrast with the allegations here and reinforce why Genesco has no proper UCL restitution claim against Visa. Genesco makes no allegation that the funds Visa collected from the Acquiring Banks depended on Genesco reimbursing or indemnifying the Acquiring Banks. Indeed, Genesco's alleged indemnity payments were subsequent to Visa's collection (Compl. ¶¶ 42–44), and Visa would have had the same contractual rights against the Acquiring Banks, and would have obtained the same monies from the Acquiring Banks, regardless of whether Genesco did or did not provide indemnity to the Acquiring Banks. Genesco's conclusory allegation that "Visa knew, or had reason to know[] that . . . the [a]ssessments[] would be passed through to Genesco by the Acquiring Banks" (Compl. ¶ 145) is not enough to change these controlling facts and is not the test for eligibility for UCL restitution. Thus, the factual allegations establish that Genesco was not an "actual ***direct*** victim" of any Visa action (even if one accepts the allegation in the Complaint that Visa

acted wrongly), and the funds Visa collected from the Acquiring Banks are not clearly traceable to Genesco. *See Korea Supply*, 29 Cal. 4th at 1149.

Because restitution is not available to Genesco under the UCL, the UCL claim must be dismissed for this independent reason.

B. Genesco's Seventh Cause Of Action Asserting Equitable Claims Fails Because Express Contracts Govern the Dispute and Because Genesco Fails to Meet the Standards for Equitable Relief

Genesco's Seventh Cause of Action asserts an equitable claim titled "Money Had and Received or Restitution/Unjust Enrichment." (Compl. ¶¶ 150–57.) Regardless of how it is styled, this equitable quasi-contract claim fails for multiple reasons. First, it is well-settled that quasi-contract claims such as Money Had and Received and Unjust Enrichment are precluded when, as here, express contractual arrangements govern the dispute. Second, Genesco's Money Had and Received claim fails for the independent reasons that (a) Genesco does not, and cannot, allege that any of the money Visa obtained from the Acquiring Banks was for the use or benefit of Genesco, and (b) Genesco does not allege facts demonstrating that it was inequitable for Visa to apply the relevant contractual procedures for collecting money from the Acquiring Banks to partially reimburse issuing banks for losses they suffered as a result of account data-security deficiencies at Genesco.

The Complaint is silent as to which state's substantive law governs Genesco's Seventh Cause of Action, but precedents from both California and Tennessee support Visa's analysis. While the Court may apply Tennessee law without engaging a lengthy choice-of-law analysis in the absence of material differences between the two states' laws,[9] California law supports Visa's position and, to the extent differences exist, governs this dispute under the "most significant

[9] *E.g.*, *Instituform Techs. Inc. v. Per Aarsleeff A/S*, 534 F. Supp. 2d 808, 812 (W.D. Tenn. 2008).

relationship" test applied by Tennessee courts. California law governs under that test because the common-law equitable claims against Visa are based on conduct by Visa that occurred in California and was premised on Visa's actions with respect to a California contract (the VIOR). *See Montgomery v. Wyeth*, 580 F.3d 455, 459–60 (6th Cir. 2009); *Hari & Assocs. v. RNBC, Inc.*, 946 F. Supp. 531, 536 (M.D. Tenn. 1996). Genesco's reliance on California law for its Sixth Cause of Action further demonstrates that its claims against Visa depend on California law.

1. The Existence Of Express Contracts Governing The Dispute Precludes Genesco's Equitable Claims Premised On Quasi-Contract Principles

Money Had and Received is an equitable, quasi-contractual claim. *E.g.*, *Lowery v. Blue Steel Releasing, Inc.*, 02-00003, 04-8850 DSF, 2005 WL 6215612, at *7 (C.D. Cal. Nov. 23, 2005); *Bennett v. Visa U.S.A., Inc.*, 198 S.W.3d 747, 755 (Tenn. Ct. App. 2006). Courts discussing unjust enrichment likewise recognize that it is premised on notions of quasi-contract. *E.g.*, *In re Facebook Privacy Litig.*, 791 F. Supp. 2d 705, 718 (N.D. Cal. 2011)*; see also Bennett*, 198 S.W.3d at 755. Claims based on these equitable theories are precluded when all relevant aspects of the dispute are governed by express contracts. *E.g.*, *Lowery*, 2005 WL 6215612, at *7 (precluding money had and received); *In re Facebook*, 791 F. Supp. 2d at 718 (precluding unjust enrichment); *see also Daily v. Gusto Records, Inc.*, 14 Fed. Appx. 579, 587 (6th Cir. 2001) (addressing Tennessee law and citing *Jaffe v. Bolton*, 817 S.W.2d 19, 26 (Tenn. Ct. App. 1991) ("As a general rule, a contract cannot be implied at law when a valid contract exists on the same subject matter.")); *Jack Tyler Eng'g Co. v. TLV Corp.*, 07-2580 STA, 2008 WL 2998840, at *1 (W.D. Tenn. July 31, 2008); *Jones v. LeMoyne-Owen Coll.*, 308 S.W.3d 894, 906 (Tenn. Ct. App. 2009) ("Contracts implied in law have been described as a legal fiction that can only arise in the absence of an actual contract or contract implied in fact.") (quotations omitted). The relevant express agreements need not be directly between the plaintiff and defendant, so long as

the rights at issue are addressed in the contracts. *E.g.*, *Cal. Med. Ass'n v. Aetna U.S. Healthcare of Cal., Inc.*, 94 Cal. App. 4th 151, 172–73 (2001).

Here, there is no dispute that there are express contracts governing the relationships between Visa and the Acquiring Banks and between the Acquiring Banks and Genesco. As the Complaint details over many pages, Visa's assessments on the Acquiring Banks were the product of detailed rules specified in the governing contracts between Visa and the Acquiring Banks. (*E.g.*, Compl. ¶¶ 23–35, 46–70.) Likewise, as Genesco plainly alleges in the Complaint, the amounts allegedly collected by the Acquiring Banks from Genesco were the function of Genesco's own contractual arrangements with the Acquiring Banks. (Compl. ¶¶ 11–14, 36–38.) In the face of these express contractual relationships that resulted in the only alleged financial losses for which Genesco seeks redress, Genesco does not (and cannot) allege a quasi-contractual relationship between Visa and Genesco. As a matter of law, no equitable claim is viable. The Seventh Cause of Action should be dismissed.

2. Genesco Failed to Allege Facts Necessary to Establish Its Common-Law Equitable Claim.

Genesco's Seventh Cause of Action also fails for the independent reason that Genesco does not (and cannot) allege facts that, if proven, would satisfy the requisite elements of the equitable claim for Money Had and Received (or Unjust Enrichment).

Under California law, a claim for Money Had and Received has three elements: "(1) the defendant received money, (2) the money received by the defendant was for the use of the plaintiff and (3) the defendant is indebted to the plaintiff." *Fireman's Fund Ins. Co. v. Commerce & Indus. Ins. Co.*, 98-1060 VRW, 2000 WL 1721080, at *8 (N.D. Cal. Nov. 7, 2000). The plaintiff must also show that the defendant should "in good conscience" pay the defendant the specific sum in question. *Id*. The great weight of authority holds that California law does not

recognize "unjust enrichment" as a distinct cause of action.[10] Tennessee law likewise recognizes that a claim for Money Had and Received and a claim for Unjust Enrichment are essentially the same thing. *Bennett*, 198 S.W.3d at 755. It requires (1) "a benefit conferred upon the defendant by the plaintiff," (2) "appreciation by the defendant of such benefit," and (3) "acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof." *Id.* at 755.

The Complaint's factual allegations do not show that the money Visa obtained from the Acquiring Banks pursuant to the terms of the contract between Visa and the Acquiring Banks was "for the use of" Genesco, and therefore Visa is "indebted" to Genesco. *Fireman's Fund* is on point. A group of excess insurance carriers paid money to an insured after its property was destroyed by fire. The excess insurance carriers sued the defendant primary insurer to recover money, arguing that the defendant should reimburse them because the defendant recovered money from other third parties through a subrogation action. 2000 WL 1721080, at *1, 7. The excess insurance carriers alleged that the money the defendant received through the subrogation action was actually for the use of, and rightfully belonged to, the excess insurance carriers. *Id*. at *8. The court rejected this argument because the "plaintiffs [could] not establish that any portion of the money received by defendant was for plaintiffs' use." *Id*.; *see also Farmers Ins. Exch. v. Zerin*, 53 Cal. App. 4th 445, 460 (1997) (affirming trial court's dismissal of money had and received claim where the plaintiff had not shown that the defendant received money "for the use and benefit" of the plaintiff).

[10] *E.g.*, *Hill v. Roll Int'l Corp.*, 195 Cal. App. 4th 1295, 1307 (2011) ("Unjust enrichment is not a cause of action, just a restitution claim."); *Smith v Ford Motor Co.*, 462 Fed. Appx. 660, 665 (9th Cir. 2011); *Levine v. Blue Shield of Cal.*, 189 Cal. App. 4th 1117, 1138 (2010); *Jogani v. Superior Court*, 165 Cal. App. 4th 901, 911 (2008); *Herskowitz v. Apple Inc.*, --- F. Supp. 2d ---, 2013 WL 1615867 (N.D. Cal. Apr. 15, 2013).

In this case, Genesco makes only a conclusory allegation that Visa is indebted to Genesco because the money Visa obtained from the Acquiring Banks was "meant to be used for the benefit of Genesco." (Compl. ¶ 151.) This assertion is unsupported—and indeed is contradicted—by the factual allegations in the Complaint. First, the Complaint alleges that Visa obtained money from the Acquiring Banks under the ADCR and DCRS programs pursuant to Visa's contract with the Acquiring Banks. (*E.g.*, Compl. ¶¶ 23–35, 46–70.) Genesco does not (and cannot) allege that Visa obtained any money from Genesco. Second, Genesco does not (and cannot) allege any facts that, if proven, would demonstrate that the money Visa obtained from the Acquiring Banks was for Visa to hold or use for Genesco's benefit. The Acquiring Banks were contractually required to provide these funds to Visa irrespective of whether the Acquiring Banks had some contractual right for indemnity from Genesco. Accordingly, Genesco cannot allege facts necessary to establish a basic element of a claim for Money Had and Received.

Genesco's Seventh Cause of Action also fails because Genesco has not pled a sufficient equitable basis for the requested relief. Under no circumstances that could be alleged by Genesco would equity demand that Visa pay to Genesco the monies that the Acquiring Banks were contractually required to pay to Visa for the benefit of the issuing banks, or separately, an amount equal to what Genesco was contractually required to pay to its Acquiring Banks. Each of these payments was made pursuant to express, bargained-for commercial contracts. *See Durell v. Sharp Healthcare*, 183 Cal. App. 4th 1350, 1371 (2010) ("There is no equitable reason for invoking restitution when the plaintiff gets the exchange which he expected.") (quotations and citations omitted); *Bennett*, 198 S.W.3d at 756 (*citing Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 155 (Tenn. 1966)) ("If a third-party defendant 'has given any consideration to any person'

for the benefits received from the plaintiff, there is no injustice in allowing the defendant to retain those benefits without paying the plaintiff."). There is nothing inequitable or that violates good conscience about Visa following the contractual procedures that the Acquiring Banks agreed to for partially reimbursing issuing banks for counterfeit fraud losses suffered as a result of the account data security deficiencies at Genesco.

IV. CONCLUSION

For all of the foregoing reasons, Visa respectfully requests that the Court grant Visa's motion to dismiss with prejudice as to Genesco's Sixth and Seventh Causes of Action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served, via the Court's electronic filing system, on the following:

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This 20th day of May, 2013.

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