

8/18

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

CHRISTOPHER R. LONNER, individually and
on behalf of all others similarly situated,

Plaintiff,

-vs.-

SIMON PROPERTY GROUP, INC.

Defendant.

Index No. 04-2246
(Rudolph, J.)

**AMENDED CLASS
ACTION COMPLAINT**

Plaintiff CHRISTOPHER R. LONNER ("plaintiff" or "Lonner"), individually and on behalf of all others similarly situated, by his undersigned attorneys, alleges upon personal information as to himself and upon information and belief as to all other allegations, for his Amended Class Action Complaint against defendant SIMON PROPERTY GROUP, INC. ("Simon" or "defendant") as follows:

RECEIVED

AUG 18 2006

TIMOTHY C. IDONI
COUNTY CLERK
COUNTY OF WESTCHESTER

NATURE OF THE ACTION

1. Plaintiff brings this action on behalf of a class comprised of (i) all persons residing within the State of New York who hold or held Simon Gift Cards sold by Simon on or before April 29, 2005 ("Card(s)") that are or were subject to a decrease in value resulting from the unlawful and inequitable imposition by Simon of \$2.50 monthly charges automatically deducted by defendant from any Card balance remaining more than six months after Card issuance ("Dormancy Fees"); and (ii) all other persons who hold or held Cards sold by Simon within the State of New York on or before April 29, 2005 that are or were subject to the Dormancy Fees (the "Class").

2. As further alleged herein, the Dormancy Fees that defendant has unilaterally, unconscionably and illegally imposed on plaintiff and the other members of the Class are, inter alia, unenforceable under the governing principles of contract law of New York. The deceptiveness and inequity of defendant's conduct is further compounded by (i) the unreasonably short period unilaterally established by defendant before the Dormancy Fees are imposed, (ii) defendant's failure to provide the recipient with any document stating the exact date of issuance, and (iii) defendant's hiding the existence of the Dormancy Fees in the six panel, double-sided folder provided with the Cards, which contains the Card agreement and which buries the term regarding the existence of the Dormancy Fees at the very end in type face substantially smaller than the minimum type required in connection with contracts under New York Civil Practice Law and Rules ("CPLR") § 4544. As a result of defendant's unlawful, deceptive and inequitable conduct, plaintiff and other Class members are and have been wrongfully subjected to the Dormancy Fees – in some instances exorbitantly constituting as much as 12.5% of the remaining Card balance each month.

3. By this action, plaintiff seeks to remedy the harm caused by defendant's wrongful and inequitable conduct. As set forth below, plaintiff and all those similarly situated should be awarded compensatory damages, restitution and/or other relief to redress defendant's unlawful, deceptive and inequitable conduct constituting breach of contract and/or unjust enrichment and in violation of New York General Business Law ("GBL") § 349, and defendant should be enjoined from imposing and/or collecting any Dormancy Fees against the Cards held by the Class.

JURISDICTION AND VENUE

4. This court has jurisdiction under CPLR § 302, because defendant regularly transacts business within the State of New York.

5. Venue is appropriate in this court under CPLR § 503, because plaintiff resides in this county.

THE PARTIES

6. Plaintiff Lonner is a resident of the Village of Scarsdale, County of Westchester, New York. Lonner was given and is the holder of a Card, and has been charged Dormancy Fees and been subjected to defendant's unlawful and inequitable conduct complained of herein.

7. (a) Defendant Simon is a Delaware corporation with its principal executive offices located in Indianapolis, Indiana. Simon is a self-administered and self-managed real estate investment trust. Through Simon's majority owned Delaware limited partnership subsidiary, Simon Property Group, L.P. ("Simon LP"), of which Simon is the General Partner and thus generally liable for all Simon LP debts, defendant engages in the ownership, operation, leasing, management, acquisition, expansion and development of income-producing real estate properties, primarily regional malls and community shopping centers. As of September 30, 2003, Simon owned or held an interest in 238 income-producing properties in 36 states in the United States, including 169 regional malls and 64 community shopping centers. A number of the regional malls and shopping centers are located within New York State, including, inter alia, The Westchester Mall, where plaintiff's Card was purchased. Both Simon

and Simon LP are registered with the Division of Corporations of the New York Department of State.

(b) Through Simon Brand Ventures (a Simon LP subsidiary for which Simon LP is the general partner, and thus Simon LP and Simon are liable for all liabilities), Simon pursues mall marketing initiatives, including the sale of the Cards. First introduced on a limited basis during 2001, and then increased to 47 Simon malls during 2002, the Cards are now offered for sale at substantially all of the 160+ Simon Malls nationwide, as well as through the Simon website, www.simon.com. The Cards, which are sold under the same uniform terms, including the imposition of the Dormancy Fees, are available in increments from \$20-\$500, and generally can be used wherever Visa cards are accepted.

(c) At all relevant times from the commencement of this action through April 29, 2005, the only Simon-related entities involved with the sale of the Cards authorized and registered to do business in the State of New York were Simon and Simon LP. Additionally, at all times relevant, no Simon-related entity other than Simon was mentioned anywhere on the Card, or in the terms of the Card Agreement with plaintiff and the Class, or anywhere on the Simon Card website (www.simoncard.com). Furthermore, in prior litigation in this matter, Simon admitted that Card was not sold or the Dormancy Fees charged by a national bank.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action as a class action, pursuant to Article 9 of the CPLR, on behalf the Class consisting of (i) all persons residing within the State of New York who hold or held Cards sold by Simon on or before April 29, 2005 that are or were subject to

Dormancy Fees; and (ii) all other persons who held Cards sold by Simon within the State of New York on or before April 29, 2005 that are or were subject to the Dormancy Fees. Excluded from the Class are Simon, and defendant's directors, officers, parents, affiliates, subsidiaries and successors.

9. The Class satisfies the numerosity, commonality, typicality, adequacy, predominance and superiority requirements of CPLR § 901.

10. The members of the Class are so numerous that joinder of all members is impracticable. Although the precise number of Class members is unknown to plaintiff at this time and can be determined only by appropriate discovery, it is reasonably estimated that the Class consists of at least tens of thousands of members who are geographically dispersed throughout New York and the United States.

11. Because plaintiff is a holder of defendant's Card and has been subject to the imposition and collection of the unlawful and inequitable Dormancy Fees, plaintiff is a member of the Class whose claims are typical of the claims of the members of the Class. The harm suffered by plaintiff and all other Class members was and is caused by the same conduct by defendant, viz., defendant's wrongful and inequitable imposition and/or collection of the Dormancy Fees.

12. Plaintiff will fairly and adequately represent and protect the interests of the Class, in that plaintiff has no interests antagonistic to, nor in conflict with, the Class. Plaintiff has retained competent counsel, experienced in consumer and commercial class action litigation, to further ensure such protection and who intend to prosecute this action vigorously.

13. A class action is superior to other available methods for the fair and efficient adjudication of this controversy. Because the monetary damages suffered by individual Class members are relatively small, the expense and burden of individual litigation make it virtually impossible for individual Class members to seek redress for the wrongful conduct alleged herein. If Class treatment of these claims were not available, defendant would likely continue its wrongful conduct, and also would unfairly receive many hundreds of thousands or millions of dollars in unlawfully collected and retained Dormancy Fees, or would otherwise escape liability for its wrongdoing as alleged in this Complaint.

14. Common questions of law and fact exist as to all members of the Class which predominate over any questions that may affect individual Class members. Among the questions of law and fact common to the Class are the following:

- (a) whether the Dormancy Fees sought to be imposed and/or collected by defendant under the terms of the Card agreement are unenforceable under contract law;
- (b) whether the term of the Card agreement imposing the Dormancy Fee is unconscionable;
- (c) whether the imposition and/or collection of the Dormancy Fees by defendant is a breach of the implied covenant of good faith and fair dealing imposed under the uniform agreements between defendant and plaintiff and the Class;
- (d) whether defendant has violated GBL § 349 by its imposition and/or collection of the Dormancy Fees;
- (e) whether defendant has been unjustly enriched by its imposition and/or collection of the Dormancy Fees;

(f) whether defendant should be enjoined from seeking to impose and/or collect the Dormancy Fees for all Cards sold on or before April 29, 2005; and

(g) the appropriate measure of damages, restitution and/or other relief.

15. The Class is readily definable, and prosecution of this action as a Class action will reduce the possibility of repetitious litigation. Information concerning the Cards sold by defendant is available from defendants' books and records. Plaintiff knows of no difficulty which will be encountered in the management of this litigation which would preclude its maintenance as a Class action.

FACTUAL ALLEGATIONS

16. The sale of gift cards by Simon and others is a major growth area in United States consumer spending practices. According to one Simon press release:

The use of gift cards is on the rise, with estimated sales of approximately \$300 billion annually. Last year, Americans purchased an average 4.6 gift cards per person, compared to 4.1 the previous year, according to Card Trak. The . . . average value of purchased cards is on the rise, with a \$50 average in 2002 compared to \$44 the prior year.

17. At the end of 2002, the sales of Cards at the 47 Simon malls offering them were up 30% compared to the sale of Simon gift certificates at those same properties in 2001. Comparable 30% growth was experienced by defendant in 2003, when the Cards were being offered for sale at virtually all of the Simon mall properties. At year end 2002, Simon's audited balance sheet included more than \$170 million related to the Cards and other gift certificate programs.

18. The Cards are in the form of credit-card sized plastic cards with a magnetic strip on the back. The consumer specifies the amount he or she wishes to place on the Card, and the Card is programmed to establish a balance in that denomination.

19. After the Card has been activated, the card is placed in a cardboard sleeve. The sleeve is styled as a cardboard folding "book" with the sleeve at the top into which the Card is inserted, and five additional folding double-sided "pages" which are attached to the sleeve. On the front five "pages" general information about the Card and its use is included, and on the back five "pages" is the Cardholder agreement and terms and conditions.

20. The Card at issue in this action does not contain or state the issue date from which the six month period commences before the Dormancy Fees are imposed. Nor during the relevant period did defendant provide the Cardholder with a printed document indicating the issue date or have a practice by which such information is inserted into the sleeve with the newly-activated Card. And because the Cards are not issued for uniform periods before expiration, the issue date cannot be computed based on the expiration date that does appear on the Card.

21. The cardboard sleeve provided with the Card does, however, include a blank space on the back at the top for which the "purchase date" can be filled in, but defendant did not during the relevant period have a uniform, confirmable procedure in place for the insertion of that date on the sleeve by Simon employees.

22. The five "pages" on the back of the Card sleeve that contain the terms and conditions of the Card are in minuscule type. In fact, the terms and conditions of the Card on the back of the Card sleeve were in even smaller print than the general information in small print on

the front of the Card sleeve. One reference to the Dormancy Fees is buried in small print on the last of the five front folding "pages" of information included with the Card sleeve, in a section entitled "Do I ever expire?" The actual Card term regarding the Dormancy Fees is buried on the very last page on the back of the ten folding "pages" of information included with the Card sleeve, and states: 1

If a balance remains on the Gift Card after the sixth month, the Gift Card will be charged a \$2.50 monthly service fee. The fee will be deducted automatically, starting on the seventh month after the month of purchase, from any remaining value on the card on the first day of the month until the value reaches zero.

Although a third reference to the Dormancy Fees appears in small print on the back of the Card itself, nothing anywhere in the Card sleeve or the ten folding "pages" meaningfully refers the Cardholder to the back of the Card or directs them to take out the Card and read its back.

23. The terms of consumer contracts are not supposed to be buried in the fine print at the very end, where discovery of their existence by a reasonable consumer is intentionally rendered unlikely. Indeed, the minuscule fonts used by defendant to set out the Card terms including the Dormancy Fees, and the reference to the Dormancy Fees in the information panel on the front of the ten folding "pages" and on the back of the Card, are materially less than the point requirement of CPLR 4544.

24. Furthermore, and additionally in light of defendant's failure to provide anything to the Cardholder specifically advising of the Card's actual purchase date, defendant's presentation of the Card terms also violates GBL § 396-i (2), both as in effect prior to October 18, 2004 and as amended effective on that date, and both of which versions require that the terms of the Cards be clearly and "conspicuously" stated on the Cards.

25. Simon did not and does not negotiate the contents of any of these pre-printed, standard "terms and conditions," and offers Cards on a "take-it-or leave-it-basis." And as the Cards are intended to be a "gift card," in the great majority of instances the ultimate holder of the Card is not even the initial purchaser. Accordingly, the Card, including its terms and conditions, constitutes a classic consumer contract of adhesion.

26. The amount of the monthly Dormancy Fees is grossly excessive and bears no reasonable relationship to the actual costs incurred by defendant to maintain the Card balance beyond the prescribed six month period. At issuance, the new Card is established on defendant's database, and the absence of any activity not only earns defendant interest on the amounts not used, but involves the incurrence of no material costs to defendant each month once the Card has been established on the database.

27. The \$2.50 monthly Dormancy Fee is particularly excessive and unreasonable in light of the multiplicity of small denomination Cards sold by Simon, and the impact that the imposition of Dormancy Fees has on those Cards' value. For example, if a Cardholder receives but fails to use a Card with the minimum incremental balance of \$20.00, then in the first and each subsequent month after the completion of the prescribed (but not clearly disclosed) six month period, the Card's original value is diminished by 12.5%. And regardless of the Card amount, the Dormancy Fees are excessive and unreasonable in light of Simon's actual minimal costs to maintain the Cards more than six months.

28. The prescribed six month period in which the holder must use the entire Card balance before Dormancy Fees begin to be imposed also is an unreasonably short time period in which to require the use of the Card. Furthermore, the full six month period is rarely

ever available to the holder because of the time that passes between the Card's purchase and the date when the Card is actually presented to the holder by the purchaser.

29. Additionally, the Card terms and the front five folding "pages" of information are unclear and ambiguous regarding the imposition of the Dormancy Fees on Cards that are reissued because of remaining balances at the time of expiration. According to the term printed in minuscule type on the last panel on the back of the ten folding "pages:"

The Gift Card expires when the remaining value is \$0 or on the expiration date shown on the front of the card, whichever comes first. If there is any balance remaining after the expiration date, cardholder can call 1-888-203-9678 at any time during the next 12 months (or any longer period required by law) to request that a new Gift Card be issued. The new Gift Card will have a value equal to the remaining balance of the expired card minus a \$7.50 reissue fee. The expiration date on the new Card will be at least one year from the date of reissue.

It is unclear whether Dormancy Fees continue to be assessed by defendant against the balance on the reissued Card from its reissue date and during the entire life of the reissued Card. Nothing in the Card information or terms clearly indicates that such fees will not be assessed. Furthermore, the term actually setting out the Dormancy Fees quoted in ¶ 22, supra, specifically states that the Dormancy Fees will continue "until the value reaches zero." Thus, it is likely that the charges imposed by defendant for reissuing an expired card include not only the \$7.50 reissue fee but also the \$2.50 Dormancy Fee assessed monthly during the life of the reissued card.

30. New York GBL § 396-i was substantially amended effective October 18, 2004. As stated in the enabling bills (L.2004, c. 507, § 3; L.2004, c. 171, § 2, L.2004, c. 170, § 2), amended GBL § 396-i "shall apply to gift certificates sold or issued on and after such effective date."

31. Under amended GBL § 396-i(1), the term "gift certificate" is specifically defined to include an "electronic payment device that . . . is usable at multiple, unaffiliated merchants or service providers" – in other words, a Card. Section 2 of amended GBL § 396-i requires the "conspicuous" disclosure of the existence of the terms and conditions applicable to the gift cards – at all sale sites, in all advertisements, and on the internet before the gift card can be purchased. Additionally, section 3 of amended GBL § 396-i specifically requires the expiration date, and any fees that can be assessed against the balance or charged for the replacement of a lost or stolen card, to be included "conspicuously" on the card itself.

32. Most important for consumers, § 5 of GBL § 396-i now specifically (but only prospectively) precludes the imposition of defendant's Dormancy Fees, as follows:

5. (a) No retroactive fees shall be assessed against a gift certificate.

(b) No monthly service fees may be assessed against the balance of a gift certificate prior to the thirteenth month of dormancy.

(c) For the purposes of this subdivision, "dormancy" shall mean non-use of a gift certificate. Use of a gift certificate shall include, but not be limited to, adding value, or purchases.

33. By Press Release dated February 4, 2005, the New York Attorney General announced the commencement of an enforcement action against defendant (and Simon LP) in the Supreme Court for New York County in connection with defendant's ongoing violations of amended GBL § 396-1. By Press Release dated March 1, 2005, the New York Attorney General announced the settlement of the enforcement action, and defendant's agreement to comply with amended § 396-i and pay \$125,000 in penalties and costs (the "Settlement"). Simon and Simon LP were the only defendant parties to the Settlement.

