UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

IN RE

PAYMENT CARD INTERCHANGE FEE AND MERCHANT DISCOUNT ANTITRUST LITIGATION

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MASTER FILE 05-MD-1720(JG)(JO)

MEMORANDUM OF LAW OF DEFENDANTS MASTERCARD INTERNATIONAL INCORPORATED AND MASTERCARD INCORPORATED IN SUPPORT OF THEIR MOTION TO DISMISS CLASS PLAINTIFFS' FIRST SUPPLEMENTAL CLASS ACTION COMPLAINT

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Defendants MasterCard International Incorporated and MasterCard Incorporated (collectively, "MasterCard") respectfully submit this memorandum of law in support of their motion to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Class Plaintiffs' First Supplemental Class Action Complaint (the "Supplemental Complaint" or "Supp. Compl.").

PRELIMINARY STATEMENT

In their Supplemental Complaint, Class Plaintiffs contend that MasterCard's recent initial public offering of stock (the "IPO") is an orchestrated pretext that violates § 7 of the Clayton Act and § 1 of the Sherman Act. Class Plaintiffs also assert that, in conjunction with the IPO, MasterCard's release of a right to assess members constituted a fraudulent conveyance. Yet, when viewed in light of the undisputed IPO terms that Class Plaintiffs incorporate into their pleading, it is readily apparent that these claims have no merit and should be dismissed.

Section 7 of the Clayton Act does not apply to the role of MasterCard in the IPO. That statute only governs an "acquirer" of stock or assets "of another person." Class Plaintiffs here can allege merely that MasterCard acquired its own stock through the IPO. Accordingly, Class Plaintiffs do not allege that MasterCard is an "acquirer," as required to state a § 7 claim, and Count 17 should be dismissed as a matter of law.

Furthermore, Class Plaintiffs' Section 7 and Sherman Act Section 1 claims (Counts 18 and 19) should be dismissed for the reasons set forth in Argument I.C of the Bank Defendants' brief, which is incorporated by reference herein. The allegations of the Supplemental Complaint provide no basis to conclude that the IPO threatens to substantially lessen competition. And Class Plaintiffs' purely conclusory and baseless allegation that MasterCard somehow acquired the "card-issuing and merchant-acquiring" assets of member banks cannot save these claims from dismissal.

Finally, Count 20, a fraudulent conveyance claim under §§ 270 and 273-a of the New York Debtor and Creditor Law, also should be dismissed. Class Plaintiffs cannot allege the existence of an unsatisfied judgment that is a precondition of any such claim, and they have not pleaded any fraud with the requisite particularity.

STATEMENT OF CLASS PLAINTIFFS' ALLEGATIONS

The factual allegations set forth below are drawn from the Supplemental Complaint, the accuracy of which is assumed for purposes of this motion only.

Class Plaintiffs allege that, prior to the IPO, MasterCard was an association of member banks that were horizontal competitors of each other. (Supp. Compl. ¶¶ 12, 43.) Class Plaintiffs contend that the member banks controlled MasterCard, and "larger banks (especially issuing banks) tended to have greater control as evidenced by their positions on the Board of Directors and other important committees of MasterCard." (*Id.* ¶ 44.)

Class Plaintiffs allege that MasterCard engaged in an IPO that was consummated on May 24, 2006. (Supp. Compl. ¶ 2.) The structure of the IPO is set forth in a Form S-1 registration statement filing made by MasterCard with the Securities Exchange Commission, which Class Plaintiffs rely upon extensively in their pleading. *See* MasterCard Incorporated, Amendment No. 8 to Form S-1 Registration Statement (Form S-1/A), at 1-10 (May 23, 2006) (hereinafter "S-1").[1]

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[1] A copy of the S-1 is attached to the accompanying Declaration of Adav Noti as Ex. A. Because the Supplemental Complaint incorporates MasterCard's S-1 by reference (*see* Supp. Compl. ¶¶ 10, 78, 107, 109, 111), the Court may consider this filing

In preparation for the IPO, MasterCard reclassified all of its approximately 100,000,000 outstanding shares of common stock, causing each of its existing stockholders (*i.e.*, the banks) to receive:

- 1.35 shares of Class B common stock for each share of common stock that they held prior to the reclassification, and
- a single share of Class M common stock.

(*Id.* at 6.) The Class B common stock is non-voting stock, while Class M common stock is also non-voting but entitles its holders as a group to elect up to three (but no more than 25% of) directors and, according to the Supplemental Complaint, "to veto: 1) any sale of all, or substantially all, of the company's assets; 2) any merger or consolidation of the company; 3) any waiver of beneficial ownership limitations in the certificate of incorporation; and 4) any discontinuation of the core payments business." (Supp. Compl. ¶ 83; *see also* S-1 at 6-9.)

Through the IPO, Class Plaintiffs allege, MasterCard issued 61,520,912 shares of Class A common stock to the public on May 24, 2006 for approximately $2.83 billion. (Supp. Compl. ¶ 2.) In addition, at the time of the offering, MasterCard issued

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without converting MasterCard's motion to dismiss to a motion for summary judgment. *See Subaru Distrib. Corp. v. Subaru of Am., Inc.*, 425 F.3d 119, 122 (2d Cir. 2005) ("In determining the adequacy of the complaint, the court may consider any written instrument . . . incorporated in the complaint by reference, as well as documents upon which the complaint relies and which are integral to the complaint."); *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991) ("In determining the adequacy of a claim under Rule 12(b)(6), consideration is limited to facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference, and to matters of which judicial notice may be taken."); *Peres v. Oceanside Union Free Sch. Dist.*, 426 F. Supp. 2d 15, 22 (E.D.N.Y. 2006) ("In considering a motion to dismiss for failure to state a claim . . ., a district court must limit itself to the facts stated in the complaint, documents attached to the complaint as exhibits, and documents incorporated by reference in the complaint.").

13,496,933 shares of Class A common stock as a donation to The MasterCard Foundation, a private charitable foundation. (S-1 at 6.) MasterCard then used all but $650 million of the proceeds from the IPO to redeem 61,520,912 shares of Class B common stock from its existing stockholders for approximately $2.2 billion. (*See id.*; Supp. Compl. ¶ 2.) Thus, MasterCard effectively used proceeds from the sale of Class A Common Stock to the public to redeem Class B common stock held by the banks.

The IPO resulted in the public holding Class A common stock representing 49% of MasterCard's equity and 83% of its general voting power, and The MasterCard Foundation holding Class A common stock representing 10% of the equity and 17% of the general voting power. (S-1 at 6.) The banks' share has been reduced to 41% of MasterCard's equity and none of its general voting power. (*Id.* at 6-7.)[2]

ARGUMENT

I. CLASS PLAINTIFFS FAIL TO STATE A CLAIM AGAINST MASTERCARD UNDER SECTION 7 OF THE CLAYTON ACT BECAUSE MASTERCARD DID NOT ACQUIRE THE STOCK OR ASSETS OF ANOTHER PERSON

The Seventeenth Claim of the Supplemental Complaint against MasterCard should be dismissed for Class Plaintiffs' failure to allege that MasterCard is an "acquirer" under Section 7 of the Clayton Act, 15 U.S.C. § 18. That statute, entitled "Acquisition by one corporation of stock of another," provides that:

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[2] These ownership and voting percentages differ to some extent from those that would result from the share-ownership figures in the Supplemental Complaint because the underwriters of the IPO exercised an option to purchase additional Class A shares. (*See* S-1 at 6-7.)

> No person . . . shall *acquire*, directly or indirectly, the whole or any part of the stock . . . [or] assets *of another person* . . . , where . . . the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18 (emphasis added).

On its face, therefore, the plain language of the statute confirms that it applies only when one entity acquires the stock or assets of a second entity. Stated differently, a corporation is only an acquirer within the meaning of Section 7 if it acquires the stock or assets of another corporation. *See United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957) (holding that Section 7 applies to "acquisition by one corporation of all or any part of the stock of *another corporation*, competitor or not") (emphasis added)); *Naso v. Park*, 850 F. Supp. 264, 273 (S.D.N.Y. 1994) ("Plaintiffs have failed to state a claim upon which relief can be granted under § 7 because they have not alleged that defendants acquired the stock of another corporation."); *Am. Crystal Sugar Co v. Cuban-Am. Sugar Co.*, 152 F. Supp. 387, 396 (S.D.N.Y. 1957), *aff'd*, 259 F.2d 524 (2d Cir. 1958) ("[Section 7] may be invoked when one company acquires any part of the stock of another company . . . .") (internal quotation omitted).

Class Plaintiffs appear to allege that MasterCard, through a "redemption and reclassification" as part of the IPO process, "acquired" the pre-IPO stock of MasterCard held by the member banks. (*See* Supp. Compl. ¶ 2.) Assuming the factual accuracy of this allegation, it would constitute, at most, the acquisition by MasterCard of shares in itself. Since the statute does not prohibit (or even apply to) the acquisition of a company's own shares, such a redemption cannot be grounds for Section 7 liability.

Perhaps recognizing this deficiency, Class Plaintiffs assert briefly that, through the IPO process, MasterCard may have also acquired certain of the member banks' "assets." (*See id.* ¶ 125.) Set forth in full, the relevant portions of the Supplemental Complaint state: "To the extent that this IPO is a fundamental change in the MasterCard network, it operates as an acquisition by the New MasterCard of portions of the card-issuing and merchant-acquiring functions of each Member Bank" (*id.* ¶ 113), and "[t]his acquisition of assets . . . has injured and will continue to injure Plaintiffs." (*Id.* ¶ 125.)

These conclusory allegations are devoid of any factual support and thus are insufficient to state a claim under Section 7. The Supplemental Complaint does not make any factual allegations identifying the bank assets MasterCard purportedly purchased, much less how or why it would purchase card issuing and acquiring assets for businesses in which MasterCard is not allegedly engaged. The only acquisition by MasterCard described factually in the Supplemental Complaint relates solely to MasterCard's own stock.[3] Absent more, the Supplemental Complaint's bald legal allegations cannot support a claim. *See Furlong v. Long Island Coll. Hosp.*, 710 F.2d 922, 927 (2d Cir. 1983) (noting that antitrust pleading requirement "does not permit conclusory statements to substitute for minimally sufficient factual allegations"); *Klebanow v. N.Y. Produce Exch.*, 344 F.2d 294, 299 (2d Cir. 1965); *E&L Consulting, Ltd. v. Doman Indus. Ltd.*, 360 F. Supp. 2d 465, 476 (E.D.N.Y. 2005) ("The conclusory and, at times, implausible nature of plaintiffs allegations fail to establish any antitrust injury and are not sufficient to make out a claim under the antitrust laws, even at this early stage of the litigation."); *Kasada, Inc. v. Access Capital, Inc.*, 01 Civ. 8893, 2004

[3] In fact, as the S-1 makes clear, MasterCard acquired no assets other than MasterCard stock from the member banks. (*See* S-1 at 1-9 (describing transaction).)

WL 2903776, *13 (S.D.N.Y. Dec. 14, 2004) (dismissing Section 7 claim where plaintiffs' "allegations of a 'merger' are conclusory and unsupported").

II. CLASS PLAINTIFFS FAIL TO STATE A CLAIM AGAINST MASTERCARD UNDER SECTION 7 OF THE CLAYTON AND SECTION 1 OF THE SHERMAN ACT BECAUSE THE ALLEGATIONS OF THE SUPPLEMENTAL COMPLAINT PROVIDE NO BASIS TO CONCLUDE THAT THE IPO THREATENS TO SUBSTANTIALLY LESSEN COMPETITION

As set forth in Argument I.C of the Bank Defendants' memorandum in support of their motion to dismiss, Counts 17, 18, and 19 of the Supplemental Complaint fail to state a claim for relief under Section 7 of the Clayton Act or Section 1 of the Sherman Act. MasterCard hereby incorporates those arguments in support of its motion to dismiss the same counts. In summary, these claims should be dismissed because MasterCard's alleged attempt to structure itself as a "single entity" does not threaten to lessen competition; the allegations that the post-IPO MasterCard will be a vehicle for collusion are irrelevant to the IPO; and the alleged ownership and control restrictions related to the IPO do not lessen competition. Moreover, the conclusory (and false) allegation that MasterCard acquired member bank card-issuing and merchant-acquiring assets cannot support the Section 1 claim set forth in Count 19 any more than it can support the Section 7 claim in Count 17. (*See* pp. 5-6, *supra*.)

III. CLASS PLAINTIFFS FAIL TO STATE A FRAUDULENT CONVEYANCE CLAIM UNDER THE NEW YORK DEBTOR AND CREDITOR LAW

Section VII(E) of the Supplemental Complaint (¶¶ 107-112)—entitled "The Release of MasterCard's Right of Assessment is a Fraudulent Conveyance"—purports to be the factual predicate for a fraudulent conveyance claim against MasterCard and the Bank Defendants. In sum, Class Plaintiffs allege that MasterCard's release of its "right to assess the Member Banks for 'liabilities arising out of . . . judgments in major litigation'" (Supp. Compl. ¶ 107) was without adequate consideration from the member banks, rendered MasterCard potentially unable to satisfy future judgment creditors, and, therefore, constituted a fraudulent conveyance.

In turn, Section XII of the Supplemental Complaint (¶¶ 144-149)—the "Twentieth Claim for Relief"—purports to allege the legal elements of a fraudulent conveyance claim against MasterCard and the Bank Defendants under the New York Debtor and Creditor Law ("NYDCL"). Conspicuously absent from this claim for relief, however, are allegations specifically tied to any particular cause of action under the NYDCL, other than a general reference to "§§ 270 and 273-a (2006)" in paragraph 146 of the Supplemental Complaint. Section 270 of the NYDCL simply sets forth the definitions of "assets," "conveyance," "creditor" and "debt." Section 273-a provides as follows:

> Every conveyance made without fair consideration when the person making it is a defendant in an action for money damages or a judgment in such an action has been docketed against him, is fraudulent as to the plaintiff in that action, without regard to the actual intent of the defendant *if, after final judgment for the plaintiff, the defendant fails to satisfy the judgment*.

N.Y. DEBT. & CRED. LAW § 273-a (2006) (emphasis added). As demonstrated below, Class Plaintiffs have not alleged, and cannot allege, a claim under Section 273-a of the NYDCL.

The "preeminent canon of statutory interpretation requires us to 'presume that [the] legislature says in a statute what it means and means in a statute what it says there.'" *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). When the "statute's language is plain, 'the sole function of the courts is to enforce it according to its terms.'" *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989) (quoting *Caminetti v. United States*, 242 U.S. 470, 485 (1917)). The language of NYDCL § 273-a is plain, and courts have consistently applied it according to its plain terms.

Thus, to establish a claim under NYDCL § 273-a, a plaintiff must show "(1) that the conveyance was made without fair consideration; (2) that the conveyor is a defendant in an action for money damages or that a judgment in such action has been docketed against him; and (3) that the defendant has failed to satisfy the judgment." *Grace v. Bank Leumi Trust Co. of N.Y.*, 443 F.3d 180, 188 (2d. Cir. 2006); *Petersen v. Vallenzano*, 849 F. Supp. 228, 230 (S.D.N.Y. 1994).[4]

Under the plain language of NYDCL § 273-a, "the existence of an unsatisfied judgment is an essential element" of a cause of action under this section. *Carey v. Crescenzi*, 923 F.2d 18, 20 (2d. Cir. 1991) (holding that, therefore, "the earliest that plaintiff's claim could have accrued was . . . the date of the judgment") (quoting *Frybergh v. Weissman*, 536 N.Y.S.2d 465, 466 (N.Y. App. Div. 1988)); *Grace*, 443 F.3d at 188-89 (stating that unsatisfied judgment is "a necessary predicate to bringing a DCL § 273-a case"); s*ee also Mega Personal Lines, Inc. v. Halton*, 780 N.Y.S.2d 409, 410-11 (N.Y. App. Div. 2004) ("In order to prevail under Debtor and Creditor Law § 273-a, respondents were required to prove that the transferor was a defendant in an action for money damages at the time of the transfer, the transferor has not satisfied the resulting judgment and the transfer was made without fair consideration.").

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[4] The *Petersen* court also noted that "[q]uestions of actual intent and insolvency are irrelevant" to a cause of action under NYDCL § 273-a. 849 F. Supp. at 230.

It makes sense that an unsatisfied judgment is a necessary element of a fraudulent conveyance claim under NYDCL § 273-a. For example, it would be unduly burdensome and wasteful to permit a plaintiff who is suing a defendant for breach of contract to simultaneously be prosecuting an action against the defendant alleging that the defendant had fraudulently transferred assets to avoid paying any future judgment on the breach of contract claim before it is determined that (1) the defendant actually is liable on plaintiff's breach of contract claim, and (2) the defendant cannot satisfy judgment on the breach of contract claim (*i.e.*, even if the defendant ultimately is held liable for breach of contract, the defendant may be capable of satisfying the judgment, making a fraudulent conveyance action unnecessary). Indeed, "[t]he purpose of § 273-a is to provide a remedy for a creditor who has brought an action for money damages against a party who, after being named a defendant in that action, conveys assets to a third party for less than fair consideration *leaving the ultimate judgment unpaid*." *Sklaroff v. Rosenberg*, 125 F. Supp. 2d 67, 74 (S.D.N.Y. 2000) (emphasis added).

Accordingly, to the extent Class Plaintiffs are asserting a claim under NYDCL § 273-a, it is premature and should be dismissed for failure to allege an unsatisfied judgment. *See Morin v. Trupin*, 738 F. Supp. 98, 106 n.9 (S.D.N.Y. 1990) (noting that claim by plaintiffs under NYDCL § 273-a "would at this point be premature since plaintiffs have not yet obtained any judgment against defendants"); *Cohan v. Misthopoulos*, 499 N.Y.S.2d 157, 158 (N.Y. App. Div. 1986) (dismissing cause of action to set aside conveyances as fraudulent under NYDCL § 273-a as premature where there was no "money judgment in favor of plaintiff and against the defendants . . . which is unsatisfied, an essential element of the [§ 273-a] cause of action pleaded in the plaintiff's complaint"); s*ee also Grace*, 443 F.3d at 183 (noting that, after granting motion to vacate judgment, "[t]he district court also dismissed the fraudulent conveyance actions, because without an uncollected judgment as a predicate, there could be no cause of action for fraudulent conveyances").

As noted above, aside from a general reference to Section 273-a, the Supplemental Complaint does not specifically cite any other particular fraudulent conveyance count under the NYDCL. Class Plaintiffs allege, however, that MasterCard and the Bank Defendants undertook the Agreements (as defined in the Supplemental Complaint) "with the intent to defraud potential judgment creditors, such as Plaintiffs." (Supp. Compl. ¶ 149), arguably attempting to assert a fraudulent conveyance claim under NYDCL § 276. Section 276 provides as follows:

> Every conveyance made and every obligation incurred with actual intent, as distinguished from intent presumed in law, to hinder, delay, or defraud either present or future creditors, is fraudulent as to both present and future creditors.

N.Y. DEBT. & CRED. LAW § 276 (2006). As demonstrated below, to the extent Class Plaintiffs attempt to assert such a claim, they have failed to do so.

It is well-settled that to state a claim under NYDCL § 276, a plaintiff must plead "actual intent" with particularity, as required by Federal Rule of Civil Procedure 9(b).[5] *Sharp Int'l Corp. v. State St. Bank & Trust Co.* (*In re Sharp Int'l Corp.*), 403 F.3d 43, 56 (2d. Cir. 2005) ("As actual intent to hinder, delay, or defraud [under NYDCL

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[5] Fed. R. Civ. P. 9(b) provides that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

§276] constitutes fraud, it must be pled with specificity, as required by Fed. R. Civ. P. 9(b).") (internal quotations and citation omitted); *Atlanta Shipping Corp. v. Chem. Bank*, 818 F.2d 240, 251 (2d. Cir. 1987) (affirming district court's decision that "allegations of violating DCL § 276 must plead the requisite mental state with particularity"); *Cargo Partner AG v. Albatrans Inc.*, 207 F. Supp. 2d 86, 116 (S.D.N.Y. 2002) ("[A]llegations of violating DCL § 276 must plead the requisite mental state with particularity.") (citing *Atlanta Shipping*, 818 F.2d at 251).[6] Here, Class Plaintiffs' lone conclusory assertion that "[t]he Agreements were undertaken . . . with the intent to defraud potential judgment creditors" falls woefully short of the requirements of Rule 9(b). *See Oppenheimer-Palmieri Fund, L.P. v. Peat Marwick Main & Co.* (*In re Crazy Eddie Securities Litigation*), 802 F. Supp. 804, 816 (E.D.N.Y. 1992) (finding claim under § 276 insufficient where "[t]he conclusory assertion in . . . the complaint that 'in the alternative' the payments to [defendant] were part of a scheme to defraud other creditors has not been supported by any facts suggesting that [debtor] made those payments for the purpose of defrauding other creditors").

Alternatively, courts sometimes allow "the pleader . . . to rely on 'badges of fraud' to support his case, *i.e.*, circumstances so commonly associated with fraudulent transfers that their presence gives rise to an inference of intent." *Sharp*, 403 F.3d at 56 (internal quotations omitted); *Sullivan v. Kodsi*, 373 F. Supp. 2d 302, 306 (S.D.N.Y. 2005) ("Courts may rely on certain 'badges of fraud' in finding the requisite 'strong

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6 "[T]he burden of proving 'actual intent' is on the party seeking to set aside the conveyance." *Sharp*, 403 F.3d at 56 (internal quotations omitted). In addition, such party must prove actual intent to hinder, delay, or defraud other creditors by clear and convincing evidence. *See In re Cambridge Capital, LLC*, 331 B.R. 47 (Bankr. E.D.N.Y. 2005) (analyzing allegations under NYDCL § 276).

inference of fraud.'"). Such "badges of fraud" include: "a close relationship between the parties to the alleged fraudulent transaction; a questionable transfer not in the usual course of business; inadequacy of the consideration; . . . retention of control of the property by the transferor after the conveyance," *Sharp*, 403 F.3d at 56; "whether the transfers were conducted in secrecy" and "the circumstances of the transfers," *Lippe v. Bairnco Corp.*, 249 F. Supp. 2d 357, 382 (S.D.N.Y. 2003); as well as "the financial condition of the party sought to be charged both before and after the transaction in question[,] the existence or cumulative effect of a pattern or series of transactions or course of conduct after the incurring of debt, onset of financial difficulties, or pendency or threat of suits by creditors[,] and the general chronology of the events and transactions under inquiry," *Sullivan*, 373 F. Supp. 2d at 307. Moreover, "[a]llegations of scienter are sufficient if supported by facts giving rise to a '*strong inference*' of fraudulent intent." *Quaknine v. MacFarlane*, 897 F.2d 75, 79-80 (2d. Cir. 1990) (emphasis added).

In addition to its failure to allege facts sufficient to directly establish "actual intent" to defraud, the Supplemental Complaint does not contain allegations sufficient to establish "badges of fraud" from which a "strong inference" of "actual intent" can be inferred. *See Nisselson v. Ford Motor Co.* (*In re Monahan Ford Corp. of Flushing*), 340 B.R. 1, 38 (Bankr. E.D.N.Y. 2006) (finding that alleged badges of fraud were insufficiently pled, even though complaint alleged scheme to defraud debtor, where complaint did not allege that, or how, transfers were made in furtherance of scheme); *Silverman* v. *Actrade Capital, Inc.* (*In re Actrade Fin. Techs. Ltd.*), 337 B.R. 791, 809-10 (Bankr. S.D.N.Y. 2005) (finding that complaint did not allege fraud with specificity required by federal pleading rules where it alleged "few, if any, badges of fraud" and nothing to show that defendant had knowingly participated in scheme to defraud debtor's creditors).

In fact, although the Supplemental Complaint quotes from MasterCard's S-1 filed with the United States Securities and Exchanges Commission (Supp. Compl. ¶¶ 78, 109) purportedly to support its fraudulent conveyance claims, such citations actually contradict the so-called "badges of fraud." First, they establish that the IPO involves the sale of stock to the public in the usual course of business and subject to the regulatory review of the Securities and Exchange Commission. Second, they illustrate that MasterCard manifestly did not undertake the Agreements, including the elimination of the right of assessment, in secret. Rather, as Class Plaintiffs themselves acknowledge, MasterCard publicly disclosed the terms of the Agreements, including the elimination of the assessment right and its potential effect on MasterCard, in the same public securities filing on which Class Plaintiffs rely. *See Lippe,* 249 F. Supp. 2d at 384 (fact that transactions "were reported in [defendants'] publicly-filed reporting statements . . . weighs heavily against a finding of fraud"). Third, these disclosures set forth the "legitimate business reasons" for entering into the Agreement, namely the "competitive[] advantage[]" arising from the changes to the corporate structure. (*See* Supp. Compl. ¶ 78 (citing S-1).) Such an allegation, without more, is insufficient to support a claim under NYDCL § 276. *Cf. Lippe*, 249 F. Supp. 2d at 383 ("Even assuming management's concern over the asbestos cases was a motivating factor [behind the transfers], there was nothing inappropriate about a company's management looking for lawful ways to reduce the adverse impact of asbestos litigation."); *see also In re Park S. Secs., LLC*, 326 B.R. 505, 518 (Bankr. S.D.N.Y. 2005) (suggesting that "evidence of a legitimate supervening purpose" can obviate inference of actual intent to defraud). In short, there is nothing other than Class Plaintiffs' conclusory speculation and conjecture supporting a claim under NYDCL § 276.

Thus, Class Plaintiffs manifestly fail to plead fraudulent intent with particularity and accordingly, to the extent that the Supplemental Complaint purports to state a claim under NYDCL § 276, that claim should be dismissed.

CONCLUSION

For the foregoing reasons, MasterCard respectfully requests that this Court enter an order dismissing with prejudice the First Supplemental Class Action Complaint.

Dated: September 15, 2006

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