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**SUPREME COURT-STATE OF NEW YORK**
**SHORT FORM ORDER**
**Present:**

**HON. TIMOTHY S. DRISCOLL**
**Justice Supreme Court**

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**LEIGH SHARABANI, an infant under the age of fourteen, by AVI SHARABANI, her parent and natural guardian on behalf of, herself and all others similarly situated,**

**Plaintiff,**

**-against-**

**SIMON PROPERTY GROUP, INC. and METABANK,**

**Defendants.**

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**TRIAL/IAS PART: 22**
**NASSAU COUNTY**

**Index No: 015224-09**
**Motion Seq. No: 3**
**Submission Date: 3/4/10**

**Papers Read on this Motion:**

**Notice of Motion, Affirmation in Support and Exhibits........................x**
**Affidavit of B. Hanson in Support.........................................................x**
**Affidavit of M. Sullender in Support and Exhibits................................x**
**Defendants' Memorandum of Law in Support.......................................x**
**Affirmation in Opposition and Exhibits.................................................x**
**Plaintiff's Memorandum of Law in Opposition......................................x**
**Reply Memorandum of Law.....................................................................x**

This matter is before the court on the motion by Defendants Simon Property Group, Inc. ("Simon") and MetaBank (collectively "Defendants"), filed on January 22, 2010. By decision dated April 22, 2010 ("Prior Decision"), the Court directed oral argument on the motion, which the Court held on May 19, 2010. For the reasons set forth below, the Court concludes that Plaintiff's action is federally preempted, grants Defendant's motion and dismisses the Complaint.

## BACKGROUND

A. Relief Sought

Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1) and (7) or, alternatively, CPLR § 3212, dismissing the Amended Class Action Complaint ("Complaint").

Plaintiff Leigh Sharabani ('Leigh"), an infant under the age of fourteen, by Avi Sharabani ("Avi"), her parent and natural guardian on behalf of herself and all others similarly situated ("Plaintiff") opposes Defendants' motion.

B. The Parties' History

The Parties' History, which was set forth in the Prior Decision, is as follows:

The Complaint (Ex. B to Ds' motion) alleges as follows:

Avi and Leigh, his daughter, reside in Great Neck, New York. Simon is a Delaware corporation with offices in Indiana and MetaBank is a federally chartered savings association with its principal office in South Dakota. Simon owns and/or operates retail shopping centers in the state of New York ("New York") including Roosevelt Field in Nassau County and Walt Whitman Mall in Suffolk County. Simon, incidental to its operation of these shopping centers, sells gift cards ("Gift Cards") to persons and entities in New York. MetaBank is also engaged in the business of selling Gift Cards to persons and entities in New York.

In or about 2005, Simon and MetaBank worked together in issuing and selling Gift Cards and, upon information and belief, sold and issued thousands of Gift Cards in New York. A Gift Card is analogous to a debit card in that it contains an available balance initially chosen by the purchaser. The recipient ("Holder") may use the Gift Card until the expiration date on the Gift Card. The issuing bank and its selling agent receive fees and commissions as well as interest earned on the money received for the Gift Card.

Plaintiff alleges that the issuance of Gift Cards constitutes a "consumer transaction" within the meaning of CPLR § 4544. Plaintiff further alleges that 1) the relationship between the issuer and Holder is created by contract and is a debtor (issuer)-creditor (Holder) relationship; and 2) the Holder of a Gift Card becomes a third party beneficiary of any contract created by the issuance of a Gift Card.

In or about May of 2007, Leigh received as a birthday present a MetaBank gift card marketed by Simon. The Gift Card that Leigh received ("Leigh's Gift Card"), Number 4016

6164 5124 0318, was issued in New York and had an initial balance of $40.00 and expiration date of 04/09. The literature accompanying the sale of Leigh's Gift Card reflected that it was being sold subject to certain conditions and included the following language regarding its expiration ("Expiration Provision"):

> When the Giftcard expires, it will be closed and any unused balance will be handled according to applicable law.

(Compl. at ¶ 13)

Plaintiff alleges that Simon, within six (6) years from the date this action was filed, has marketed Gift Cards for financial institutions other than MetaBank with the same Expiration Provision. Plaintiff alleges that MetaBank has also marketed Gift Cards with this Expiration Provision.

On January 19, 2008, Leigh used her Gift Card to make a purchase for $8.69. On January 2, 2009, she again used her Gift Card to make a purchase for $13.60, leaving an available balance of $17.71. On or about July 22, 2009, Leigh attempted to make a purchase with her Gift Card but was advised that a $15.00 renewal fee would be assessed, leaving an available balance of $2.71, which was insufficient for her intended purchase.

Plaintiff alleges that the Gift Cards issued by or on behalf of Simon and MetaBank are gift certificates subject to the provisions of GBL § 396-i which requires that the terms and conditions of a gift certificate store credit shall be clearly and conspicuously stated on the gift certificate. Plaintiff further alleges that Leigh's Gift Card 1) was unclear and illegible and any conditions were in smaller print than required by CPLR § 4544; and 2) did not address how the unused balance remaining on expiration ("Unused Balance") would be handled. Thus, Plaintiff, submits, the conditions on the Gift Card are unenforceable.

Plaintiff further alleges that the literature provided by Simon and/or Metabank fraudulently represented to the Holder that the only option available upon expiration to obtain a portion of the Unused Balance was to pay a fee and renew the Gift Card for a period of at least twenty (20) months. Plaintiff submits that this representation was false and fraudulent because the Holder was entitled, under applicable law, to the return of the unused Balance then remaining without having to pay additional fees and expenses.

In the Complaint, Plaintiff outlines the reasons that, it submits, this action satisfies the prerequisites of class action treatment pursuant to CPLR § 901. Plaintiff seeks to represent the following classes of persons:

> Sub-Class A: The purchasers or holders of Gift Cards sold in New York from Simon, prior to its relationship with MetaBank as its agent, where Simon asserted a proprietary interest in the Unused Balance.
>
> Sub-Class B: The purchasers or holders of Gift Cards sold in New York from Simon and/or MetaBank where Simon and/or MetaBank asserted a proprietary interest in the Unused Balance.
>
> Sub-Class C: The purchasers or holders of Gift Cards sold in New York from MetaBank operating independently of Simon where MetaBank asserted a proprietary interest in the Unused Balance.

The Complaint contains six (6) causes of action: [1]

First: Simon and/or MetaBank continue to impose renewal fees and to assert a proprietary interest in the Unused Balance. Plaintiff seeks injunctive relief.

Second: By claiming a proprietary interest in the Unused Balance, Defendants violated their obligation of good faith and fair dealing owed to Plaintiff and the other putative class action members ("Classes").

Third: Defendants breached their Contract with Plaintiff and the Classes by failing to advise them of their legal rights and improperly asserting a proprietary interest in the Unused Balance.

Fourth: Defendants engaged in fraud by failing to advise Plaintiff and the Classes of their legal rights and improperly asserting a proprietary interest in the Unused Balance.

Fifth: Defendants are indebted to Plaintiff and the Classes for money had and received.

Sixth: Defendants have been unjustly enriched by wrongfully converting to their own use and profit money belong to Plaintiff and the Classes.

In addition to injunctive relief, Plaintiff and the Classes seek compensatory damages and costs and expenses including attorney's and accountant's fees.

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[1] Although the Complaint contains what purports to be a "Seventh Cause of Action," it does not contain a Sixth Cause of Action. Thus, the "Seventh Cause of Action" is the Sixth Cause of Action.

In her Affidavit in Support dated January 15, 2010, Michele C. Sullender ("Sullender") affirms as follows:

Sullender is Vice President of Product Development for Simon Brand Ventures ("SBV"), an affiliate of Simon, and has worked for SBV since 2000. In this position, Sullender manages and directs all activities of the Simon Visa Giftcard ("SVG") program and was personally involved in the development and implementation of that program.

Simon, through affiliated business entities, owns, operates and manages regional shopping malls ("Malls") throughout the United States. SBV manages and markets the SVG Program on behalf of SPGGC, LLC [2] ("SPGGC") and issuing banks, and provides other services for programs and products offered to consumers.

SVGs were first sold at Simon Malls in New York in March of 2003, and over the internet beginning in May of 2003. The SVG was initially issued by Bank of America ("BOA"), a national bank, under two successive programs in New York beginning in March of 2003. Under the first BOA program, in effect through January of 2005, BOA designed the SVG and was identified as its issuer. Proceeds from the sale of these SVGs were remitted to SPGGC, and BOA received a Visa interchange fee for each transaction involving a BOA-issued SVG. SPGGC was responsible for marketing, selling and servicing the BOA-issued SVGs under this first program.

Under the second BOA program, in effect between February and August of 2005, all proceeds from the sale of SVGs issued by BOA were remitted to BOA and SPGGC was compensated for its role in this program. SPGGC retained only an initial handling fee, and BOA controlled all the other fees and proceeds from this second program.

Beginning September 1, 2005, SVGs sold at Simon Malls have been issued by U.S. Bank, N.A. ("U.S. Bank") and most specialty giftcards, like the one purchased by Plaintiff in the matter at bar and those sold on Simon's website, have been issued by MetaBank, d/b/a Meta Payment Systems ("MetaBank"). U.S. Bank is a national bank regulated by the federal Office of

[2] SPGGC, Inc., a Virginia corporation, was the entity working with Bank of America, U.S. Bank and MetaBank until 2005 which was responsible for the implementation of the gift card program at Simon Malls. Effective November 17, 2005, SPGGC, Inc. merged as the non-surviving entity into SPGGC, LLC, a Virginia limited liability company. SPGGC, LLC ("SPGGC") is the entity that currently works with U.S. Bank and MetaBank to market and sell Simon Visa Giftcards at Simon malls and on Simon's website (Sullender Aff. at ¶ 8).

the Comptroller of the Currency ("OCC") and MetaBank is a federally chartered thrift regulated by the federal Office of Thrift Supervision ("OTS"). SPGGC acts as the Program Manager and its responsibilities include administering the operational aspects of the SVG program which entails, *inter alia*, proposing fee structures and marketing. MetaBank may reject SPGGC's proposals, and is solely responsible for determining the terms and conditions of the cardholder agreements. SPGGC has agreed to comply with all regulations of the FDIC and OTS related to Visa giftcards, and to submit to examination by the OTS.

Sullender affirms that, under Simon's arrangements with U.S. Bank and MetaBank, 1) the giftcards issued by U.S. Bank are national bank products within the meaning of the National Bank Act; 2) MetaBank issues giftcards pursuant to OTS regulations that permit a federally chartered thrift to engage a third party agent, such as SPGGC, to market and sell giftcards with expiration dates and administrative fees; and 3) U.S. Bank and MetaBank control the fees and proceeds related to these giftcards.

Sullender explains that the SVG is a Visa prepaid, electronic stored value card. It contains a magnetic strip on the back "that operates on the Visa debit infrastructure" (Sullender Aff. at ¶ 9). The purchaser specifies the amount to be placed on the SVG between $20 and $500 and the SVG is programmed to establish a balance in that amount. The SVG may then be used to purchase goods and services up to the dollar value of the SVG.

The consumer is advised of specific information regarding the SVG in the following ways: 1) the Terms and Conditions are printed on the card carrier in which the card is delivered to the purchaser, and are available on the internet; 2) the bank fees, including the $15 fee to replace an expired card, are contained on a sticker attached to the face of the SVG under the heading "Card Service Fee Schedule" in bold letters; 3) associated fees are disclosed to consumers at the time of sale, and Sullender provides a sample of a sign (Ex. A to Sullender Aff.) posted at the booth at which SVGs are sold, which advises consumers of U.S. Bank and MetaBank Fee Schedules; and 4) before purchasing a SVG through the Simon giftcard website, a purchaser must agree to the Terms and Conditions, including applicable fees, which are available for viewing in full size font.

The SVG may be used anywhere that Visa debit cards are accepted, including locations not affiliated with Simon Malls. It may be replaced if lost or stolen, and the cardholder is not responsible for unauthorized use of the SVG. The fees charged with the SVG program are the primary source of revenues by which issuing banks and SPGCC recover their costs for operating the gift card program.

Leigh's Gift Card was issued by MetaBank and was purchased at the Roosevelt Field Mall. Sullender provides a sample ("Sample") of the Gift Card issued by MetaBank and sold in the Roosevelt Field Mall in May of 2007 (Ex. B to Sullender Aff.). The front of the Sample contains a section titled "Card Service Fee Schedule" which reads as follows:

> Purchaser pays a handling fee upon card purchase - \$2.50 administrative fee each month after thirteen consecutive months of nonuse - Card plastic expires on "VALID THRU" date shown on card - \$15 fee to renew expired card - \$5 replacement fee if lost or stolen - See cardholder agreement for complete details.
> This Card is Issued by MetaBank

The front of the Sample also contains the "Valid Thru" date.

The back of the Sample contains language reflecting, *inter alia*, that 1) the card expires on the date shown on the front of the card, unless otherwise required by law; 2) the card is not a credit card and is not redeemable for cash; 3) a \$2.50 administrative monthly fee after 13 months of nonuse may be deducted from the card each month, subject to applicable law; and 4) other fees, including a \$5.00 lost/stolen replacement card fee, may apply. The back of the Sample also contains the language "Issued by MetaBank pursuant to a license from Visa U.S.A. Inc."

Sullender affirms that the following MetaBank fee schedule applied to Leigh's Gift Card: 1) a \$3.00 handling fee, \$1.00 of which was paid to the participating charity, 2) a \$2.50 monthly maintenance fee charged in New York after 13 months of nonuse, 3) a \$5.00 lost or stolen card fee, and 4) a \$15.00 fee to replace an expired card. All proceeds from Leigh's Gift Card were the property of MetaBank, and were deposited into a fund controlled by MetaBank.

Sullender further avers that Leigh's Gift Card was "inserted into an accordion-like cardboard sleeve" (Sullender Aff. at ¶ 25) ("Sleeve") (Ex. C to Sullender Aff.). The Sleeve contains language reflecting, *inter alia*, that 1) there was a \$15.00 expired card fee; 2) different fees, including the \$5.00 lost/stolen fee and \$2.50 administrative fee, might be imposed; and 3) if the cardholder had a balance remaining after the expiration date, h/she could call a designated number to request a new giftcard that would have the value equal to the remaining balance of the expired giftcard, minus an expired card fee. Sullender affirms, further, that these disclosures are "conspicuously posted" (Sullender Aff. at ¶ 26) on the SVG website.

In his Affidavit in Support dated January 14, 2010, Brad Hanson ("Hanson") affirms as follows:

Hanson is the President of the Meta Payment Systems Division of Metabank. Metabank is a federally charted savings association, or thrift, located in South Dakota and governed by the Home Owner's Loan Act of 1933 ("HOLA"), 12 U.S.C. § 1461, *et seq* and regulations issued by OTS.

In 2004, MetaBank started a new division called Meta Payment Systems which issues three (3) basic types of prepaid products: 1) non-reloadable cards, such as the Giftcards involved in the matter *sub judice*, which are marketed for gift giving or rewards purposes, 2) reloadable cards marketed for general and everyday spending, and 3) reloadable cards for payment of medical or employment related benefits. The Giftcards provide consumers with advantages, including 1) they are gift idea alternatives; 2) they are a substitute for cash when traveling; and 3) they provide a mechanism for parents to limit their children's spending while away at school or on vacation. MetaBank has made a strategic business decision to enter into arrangements with third parties, like SPGGC, to market and promote prepaid cards.

Hanson submits that MetaBank's payment system provides consumers with benefits including 1) the Giftcards are accepted anywhere that Visa is accepted; 2) consumers may track their transactions and balances by calling customer services or accessing the website; and 3) if a card is lost or stolen, MetaBank will replace the card and ensure that the customer is not charged for unauthorized transactions.

Hanson also submits that "[t]he central element of MetaBank's Visa Giftcard program is its disclosures" (Hanson Aff. at ¶ 6). Those disclosures 1) reflect how the card operates and is used; 2) set forth when fees may be incurred; and 3) are prominently displayed on the card itself, and on the packaging accompanying the cards.

Hanson affirms that the Visa Giftcards are payment instruments, like checks or money orders in that 1) funds paid by the cardholder are transferred the same day or the next business day to MetaBank which holds them in accounts it owns and controls; 2) MetaBank gives the cardholder immediate access to the funds; and 3) "[s]ub accounts" (Hanson Aff. at ¶ 11) are created for each cardholder which enables MetaBank to track the transactions and balances for the cardholders' benefit.

Hanson submits that the prepaid cards are a bank product, and that issuance of those cards constitutes authorized banking activity, citing Section 1370 of the OTS' Examination Handbook on Consumer Affairs Laws and Regulations. Hanson further submits that the OTS regulations expressly preempt state laws purporting to impose requirements on abandoned or unclaimed property, disclosures and fees. Hanson further contends that OTS rules expressly authorize the type of third-party arrangement between MetaBank and SPGGC. In February of 2007, OTS issued a Guidance on Giftcard programs that sets forth OTS' expectations as to how federally chartered thrifts, such as MetaBank, should conduct their giftcard programs.

Hanson contends that MetaBank's arrangement with SPGGC complies with OTS' regulations and guidance because MetaBank 1) makes clear that it issues the cards and controls every aspect of the giftcard program; 2) monitors the program and oversees SPGGC's compliance; 3) has final approval over all aspects of the giftcards including disclosures, terms and conditions, and packaging; 4) receives and controls all proceeds from the sale of giftcards; and 5) monitors the operational aspects of the giftcard program which includes the receipt and review of relevant financial reports. In addition, SPGGC has specifically agreed to comply with all FDIC and OTS regulations, and to submit to examination by the OTS.

In Defendant's Affirmation in Support, Defendant provides, *inter alia*, a letter dated June 9, 2006 from OTS (Ex. D to Greenberg Aff. in Support) in which OTS provides a legal opinion on whether a federal savings association must comply with five (5) types of state law restrictions on gift cards. In that letter, OTS "conclude[s] that federal law preempts these restrictions for federal savings associations and their operating subsidiaries."

C. <u>The Parties' Positions</u>

Defendants submit, *inter alia*, that 1) Plaintiff's claims are preempted by federal law, including the HOLA, which is regulated by OTS; 2) Plaintiff's claims are based on two misunderstandings of the law which are fatal to her claims, specifically: a) Plaintiff's reliance on New York's Abandoned Property Law ("APL") is misplaced because the APL permits fees to be charged against abandoned property pursuant to contract; and b) Plaintiff incorrectly alleges that General Business Law ("GBL") § 396-i(c) requires all terms of a Gift Card to appear on the Card itself when, in fact, this provision of the GBL permits terms and conditions applicable to Gift Cards to appear on materials accompanying the Gift Card; 3) Plaintiff lacks standing to challenge a) the imposition of the fee to renew an expired card ("Expired Card Fee"), which she did not pay, and b) the mechanism for obtaining access to the card balance after expiration, which she did not follow; 4) the Complaint has fatal pleading deficiencies including a) the claims under the APL and GBL are defective because neither statute creates a private right of action; b) the claim for breach of the obligation of good faith and fair dealing does not rely on facts independent of the breach of contract claim which is itself insufficient because it does not adequately allege all necessary elements; c) the claim under GBL § 349 fails because Plaintiff was not deceived and sustained no injury as a result of any deception, and because it is impermissibly asserted on behalf of a putative Class beyond the applicable three-year statute of limitations; 5) Plaintiff's claims for money had and received, and for unjust enrichment, fail because Plaintiff was never paid and was never charged the Expired Card Fee; and 6) Plaintiff has sued the incorrect party because a) her Card was issued by MetaBank through an arrangement with an entity other than Simon; b) no Simon entity is a party to any contract with Plaintiff; and c) no Simon entity holds the Expired Card Fee or Card balances.

Plaintiff opposes Defendants' motion submitting that "[t]he Defendants, have not, and cannot, cite to any provision of "applicable law" which allows them to retain the unused balance in those circumstances where the holder of the Gift Card has not chosen to renew the Gift Card and has not paid an additional fee for that privilege" (P's Memorandum of Law at pp. 1-2). Plaintiff submits that her claim, on behalf of herself and those similarly situated, is predicated on Defendants' alleged violation of its promise to handle the Unpaid Balance according to applicable law by retaining the Unpaid Balance in violation of the express provisions of the contract between the parties.

In their Reply Memorandum of Law, Defendants submit that 1) Plaintiff 's opposition ignores the explicit OTS regulations and related case law supporting Defendants' contention that Plaintiff's claims are preempted by federal law; and 2) Plaintiff's opposition asserts, for the first time, that Plaintiff is entitled to a refund of the full cash value of the unused balance of her expired Gift Card. Defendants contend that "[Plaintiff] does this by rewriting the Terms and

Conditions of her Card and introducing 'non-applicable' law in an attempt to transform her Card into a general bank deposit account" (Ds' Reply Memorandum of Law at p. 1).

At oral argument, Defendants expounded on the arguments set forth in its Memorandum of Law. Defendants submitted that MetaBank's status as the dominant party in its arrangement with SPGGC supports Defendants' argument that Plaintiff's claims are federally preempted. Defendants cited, *inter alia*, *SPGGC, LLC v. Ayotte*, 488 F.3d 525 (1st Cir. 2007), one of the cases addressed in their Memorandum of Law, in support of their preemption argument. Defendant also argued that Plaintiff, who never paid the $15 expiration fee, lacks standing to pursue this action.

At oral argument, Plaintiff submitted that there is no federal preemption issue here, but rather that the issues are 1) whether there was a breach of contract; and 2) whether the recipient or holder of the gift card may rely on the representations on the gift card that, at the expiration of the card, the balance will be applied in accordance with applicable law.

RULING OF THE COURT

A. Dismissal Standards

On a motion interposed pursuant to CPLR §3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, the Court must deny the motion if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the plaintiff every favorable inference which may be drawn therefrom. *Leon v Martinez, supra*. On such a motion, however, the Court will not presume as true bare legal conclusions, inherently incredible assertions and factual claims that are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002); *Daub v. Future Tech Enterprise, Inc.*, 885 N.Y.S.2d 115, 116-117 (2d Dept. 2009), *quoting Well v. Yeshiva Rambam*, 300 A.D.2d 580, 581 (2d Dept. 2002); *see also Maas v. Cornell Univ.*, 94 N.Y.2d 87, 91-92 (1999); *Kaisman v. Hernandez*, 61 A.D.3d 565, 566 (1st Dept. 2009).

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

B. Summary Judgment

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

C. Federal Preemption

The doctrine of preemption takes its origins from the Supremacy Clause of the United States Constitution, which provides that "the Laws of the United States . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution of Laws of any State to the Contrary notwithstanding." U.S. Const. Art. VI, cl. 2. Federal preemption of state statutory and common law occurs in either of three ways: (1) Congress expressly preempts state law by explicit statutory language; (2) Congress legislates so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; or (3) federal law irreconcilably conflicts with state law. *Barnett Bank of Marion County, N.A. v. Nelson,* 517 U.S. 25, 31 (1996). Federal statutes and regulations have a similar preemptive effect on state and common law. *Fid. Fel. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141 (1982). There are three cases that are central to the Court's analysis of whether preemption applies here. Each will be discussed separately.

1. *McAnaney v. Astoria Fin. Corp.*

*McAnaney v. Astoria Fin. Corp.*, 665 F. Supp. 2d 132 (E.D.N.Y. 2009) provides somewhat of a starting point for understanding the interaction of preemption and HOLA. There, a number of borrowers filed a class action against various financial institutions for violations of the Truth in Lending Act ("TILA"), 15 U.S.C. § 1601, *et seq.*, state consumer protection statutes, New York Real Property Law ("RPL") § 274-a, New York Real Property Actions & Proceedings Law ("RPAPL") § 1921, and common law claims for breach of contract, fraud and unjust enrichment. *Id.* at 135.[3] The court had previously certified the following class of plaintiffs:

> All consumers or borrowers in the [U.S.] who had or currently have a mortgage or residential loan originated or purchased by any of the defendants and who wrongfully paid or will be demanded to pay closing fees, satisfaction fees, discharge fees, prepayment fees (or penalties), refinance fees (or penalties), attorney document preparation fees, facsimile fees, recording fees and any other fees, charges, false debts or finance charges in contravention of their mortgage or loan contracts or applicable laws.
>
> *Id.*

The defendants in *McAnaney* argued that plaintiffs' state law claims were preempted by federal law, specifically by HOLA, and its implementing regulations. *Id.* at 156. The Court agreed that plaintiffs' statutory claims under RPL § 274-a and RPAPL § 1921 were preempted against all remaining defendants, [4] but held that plaintiffs' New York common law claims for breach of contract, unjust enrichment and fraud, and the statutory claim under GBL § 349 were not preempted by HOLA and its implementing regulations. *Id.*

In reaching that conclusion, the Court outlined the history of HOLA, which ultimately led to the creation of OTS. HOLA was enacted in 1933, in reaction to the Great Depression, to provide emergency relief with respect to home mortgage indebtedness, as a radical and comprehensive response to inadequate existing state systems. *McAnaney*, 665 F. Supp. 2d at 156-157, quoting *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 159-160 (1982). HOLA thus provided for the creation of federal savings and loan associations. Further, it delegated authority to the Federal Home Loan Bank Board to regulate those associations, and thereby to preempt state law. *Id.* at 157, citing *Fidelity Fed. Sav., supra*, at 159. In 1989, Congress replaced the Federal Home Loan Bank Board with OTS. *Id.* at 157. Pursuant to HOLA, the Director of OTS has broad authority to promulgate regulations regarding federal savings associations. *Id.*, citing 12 U.S.C. §§1463(a) and 1464(a).

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[3] Some of the plaintiffs' TILA claims were previously dismissed as untimely, but those individuals continued to be named plaintiffs with respect to all of the state law causes of action. *McAnaney*, 665 F. Supp. 2d at fns. 1, 5, and 6.

[4] The bank holding company defendants had been dismissed from the lawsuit.

Those regulations provide the framework for determining whether a state statute or judicial decision, *inter alia*, is preempted. *Id.* Pursuant to 12 C.F.R. § 560.2(a), state law that affects the activities of federal savings associations are broadly preempted, except where otherwise provided in the regulations. *Id.* Subsection (b) provides examples of state laws that are preempted which include, but are not limited to, state laws that impose requirements on loan-related fees, including without limitation, initial charges, late charges, prepayment penalties, servicing fees, and overlimit servicing fees. *Id.*, citing 12 C.F.R. § 560.2(b)(5). Subsection (c) carves out certain classes of state laws that are not preempted by providing as follows:

> State laws of the following types are not preempted to the extent that they only incidentally affect the lending operations of Federal savings associations or are otherwise consistent with the purposes of paragraph a of this section: (1) Contract and commercial law; (2) Real property law; (3) Homestead laws specified in 12 U.S.C. 1462a(f); (4) Tort law; (5) Criminal law; and (6) Any other law that OTS, upon review, finds: (i) Furthers a vital state interest; and (ii) Either has only an incidental effect on lending operations or is not otherwise contrary to the purposes expressed in paragraph (a) of this section.

*Id.*, citing 12 C.F.R. § 560.2(c).

The *McAnaney* court ultimately rejected plaintiffs' arguments, *inter alia*, that 1) state law claims regarding conduct which violates federal law cannot be preempted under § 560.2 as a matter of law; and 2) defendants' incorporation of state law into their contracts automatically precluded their availing themselves of the preemptive effect of HOLA and its implementing regulations. *Id.* at 158-160.

The *McAnaney* Court concluded that plaintiffs' breach of contract claim, which alleged that the collection of certain disputed fees was prohibited by their mortgage agreements with defendants, was not preempted because it "[did] not seek to impose specific substantive requirements upon the operations of defendants, apart from compliance with specific contractual obligations." *Id.* at 164. The Court also concluded that the GBL § 349 claim was not preempted only to the extent that plaintiffs were seeking recovery for alleged deceptive business practices incident to the alleged breach of contract. *Id.* at 168. Similarly, the Court held that the unjust enrichment and fraud claims were not preempted because those causes of action were not state laws that imposed specific substantive standards that more than incidentally affected lending operations. *Id.* at 169.

2. *SPGGC, LLC; Metabank; U.S.Bank, N.A. v. Ayotte*

*SPGGC, LLC; Metabank; U.S.Bank, N.A. v. Ayotte*, 488 F.3d 525 (1st Cir. 2007) is instructive because it involves a giftcard program remarkably similar to the present case. There, the plaintiffs (two of whom are defendants in the present case) sought injunctive relief and a declaratory judgment with respect to a New Hampshire state statute that restricted the sale of gift certificates, including giftcards issued by national banks and national thrifts, that carried expiration dates or were subject to administrative fees. The plaintiffs contended that the state statute at issue was preempted by the National Banking Act, HOLA, and the regulations promulgated thereunder. *Id.* at 527. The First Circuit affirmed the District Court's order granting summary judgment to plaintiffs on the grounds that the state statute was preempted as applied to products sold by national banks and thrifts. *Id.*

*Ayotte* discussed in detail a prior giftcard arrangement between Simon and BOA, which led to litigation that was stayed pending the *Ayotte* court's determination of the case before it. *Id.* at 527-529. The *Ayotte* court noted that, in September of 2005, Simon terminated its relationship with BOA and entered into contracts with U.S. Bank and Metabank to sell giftcards at Simon Malls. *Id.* The *Ayotte* court's description of the parties' responsibilities with respect to the giftcards, the physical appearance of the giftcards, and the designated fees, corresponds with the description provided by Hanson and Sullender in their Affidavits regarding the giftcards at issue here.

The *Ayotte* court concluded that the National Bank Act authorizes national banks to issue stored value gift cards like those at issue, and to market and sell them through third party agents. *Id.* at 532. The court rejected defendant's argument that the state statute, which prohibited the sale of a giftcard with a value of less than $100 that carried an expiration date or administrative fees, did not conflict with the National Bank Act because it regulated only Simon, a company that is not a bank. *Id.* at 532-533. The state statute regulated the terms and conditions of the giftcards issued by U.S. Bank, specifically expiration dates and administrative fees, which govern the relationship between the purchaser of the giftcard and U.S. Bank. Thus, the court concluded, the state statute regulated the activities of a national bank. *Id.* at 533.

The *Ayotte* court distinguished several cases cited by defendants and concluded that, as Simon's role was limited to acting as USB's agent in marketing and selling the giftcards, the facts supported a finding of preemption. *Id.* at 534. The court held that the National Bank Act and its regulations preempt the enforcement of the state statute to prohibit Simon from selling national bank-issued giftcards that carried expiration dates and administrative fees. *Id.* Furthermore, the *Ayotte* court noted that the OTS has interpreted its regulations to allow national thrifts to issue stored value giftcards. *Id.* at 535. The HOLA and OTS regulations permit national thrifts to engage third party agents to assist in the exercise of national thrift powers, and OTS has issued an opinion stating that national thrifts may use third parties to market and sell their financial products. *Id.* at 535-536. Thus, the *Ayotte* court concluded that HOLA and OTS regulations permit a national thrift to engage third parties to market and sell stored value giftcards. *Id.* at 536.

The *Ayotte* court concluded that the HOLA and OTS regulations preempted the state statute to the extent that the state statute prohibited Simon from selling national bank-issued and national thrift-issued giftcards with expiration dates and administrative fees. *Id.* Moreover, in light of HOLA and OTS regulations permitting banks to use third party agents to sell stored value giftcards over $100 with expiration dates and administrative fees, and the provisions of the state statute that prohibited third party agents from selling the Metabank-issued cards, the state statute effectively prohibited a national thrift from exercising powers granted to it under HOLA and OTS regulations. *Id.*

3. *Goldman v. Simon Prop Group, Inc.*

In reaching its decision, the Court has reviewed the Second Department's decision in *Goldman v. Simon Prop. Group, Inc.*, 31 A.D.3d 382 (2d Dept. 2006), *app. after remand,* 58 A.D.3d 208 (2d Dept. 2008), and concludes that *Goldman* is distinguishable from the matter at bar. In reversing the trial court's dismissal of plaintiff's claims on the grounds of federal preemption, the *Goldman* court held that:

> Contrary to the Supreme Court's determination, nothing in the record "conclusively establishes" [citations omitted] that the national bank, as opposed to the defendant, is the real party in interest [citations omitted]. The record indicates that the defendant and the national bank are separate entities [citations omitted]. More importantly, the record indicates that it is the defendant, and not the bank, that sells and markets the card, and charges and collects the disputed fees [citation omitted].
>
> *Id.*

D. Application of Legal Principles to the Instant Action

In contrast to *Goldman*, the undisputed evidence before the Court demonstrates that MetaBank, a federal chartered savings institution, is the real party in interest here, and thus the present causes of action against it are preempted. The Court reaches this conclusion in light of the facts that MetaBank 1) issues the cards and controls every aspect of the giftcard program; 2) monitors the program and oversees SPGGC's compliance; 3) has final approval over all aspects of the giftcards including disclosures, terms and conditions, and packaging; 4) receives and controls all proceeds from the sale of giftcards; and 5) monitors the operational aspects of the giftcard program which includes the receipt and review of relevant financial reports. Moreover, each giftcard itself contains a sticker stating that the card has been issued by MetaBank. These facts differ markedly from *Goldman*, where Simon pervasively controlled the giftcard program. Because MetaBank controls the Gift Cards at issue here, the present action would conflict with the obligations already imposed on Metabank by federal regulations, including those set forth in 12 C.F.R. § 560.2. The present action is thus preempted. Indeed, the Court's conclusion that the present complaint is preempted is further compelled by the reasoning of *Ayotte,* where the giftcard scheme appears exactly the same as that in the present case.

While preemption alone would warrant dismissal of Plaintiff's claims, there are other grounds for dismissal that are worth noting as well. First, Plaintiff lacks standing to pursue her claims, as her claims are predicated on an expiration fee that she did not actually pay. Second, while Plaintiff asserts a claim sounding in contract, she does not sufficiently state the nature of that contract, much less how she has been damaged by the alleged breach of contract. Third, to the extent that Plaintiff could allege the existence of a contract, any contract is between Plaintiff and Metabank, which is set forth in the extensive documentation provided with the card.

In light of the foregoing, the Court dismisses the Complaint.

All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

ENTER

DATED: Mineola, NY

July 13, 2010

HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED
JUL 20 2010
NASSAU COUNTY
COUNTY CLERK'S OFFICE