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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

WILLIAM D. HOFFMAN et al., Plaintiffs and Appellants, v. AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., et al., Defendants and Appellants.	A127347 (Alameda County Super. Ct. No. 2001-022881)

This consumer class action challenged the way American Express Travel Related Services Company, Inc. (Amex) billed customers for its fee-based, per-trip travel insurance programs. After almost a decade of litigation and a lengthy bench trial, the court granted judgment for defendants Amex and Amex Assurance Company (Amex Assurance). On appeal, plaintiffs challenge the pretrial grant of summary adjudication on their claims for conversion and unjust enrichment and assert the trial court misinterpreted key contract terms in deciding the first phase of the trial. Thus, they maintain, it erroneously rejected their contractual and statutory claims. We conclude there was no error, and affirm.

BACKGROUND

Amex offers flight and baggage insurance programs, primarily underwritten by Amex Assurance, through which enrolled cardholders are automatically billed a premium for flights charged to their American Express card. William Hoffman sued Amex and Amex Assurance on behalf of a class of present and former American Express

cardholders who had purchased travel insurance since 1983. Plaintiffs' operative complaint alleged that Amex said it would bill enrolled cardholders for travel insurance only when they actually flew, and would refund or credit premiums assessed for cancelled flights and unused tickets. Instead of doing so, plaintiffs alleged that Amex engaged in a scheme to cheat and defraud its cardholders by assessing premiums for trips it knew were never taken, billed cardholders for services they did not receive, billed for flight insurance when cardholders upgraded a ticket or changed a reservation, and failed to refund premiums when flights were cancelled. (See *Aviation Data, Inc. v. American Express Travel Related Services Co., Inc.* (2007) 152 Cal.App.4th 1522, 1526.) The complaint asserted causes of action for breach of contract, unjust enrichment, conversion, and deceptive business practices under New York and California statutes.

The trial court granted summary adjudication for Amex on plaintiffs' unjust enrichment and conversion claims. The remaining causes of action were tried in two phases. Phase I identified the documents that constituted the relevant contract and resolved disputes about its interpretation. The court determined that the contract consisted of master insurance policy agreements, descriptions of coverage, and cardholder enrollment forms. After it identified the contractual language, the court found the disputed terms were not ambiguous and that they expressly authorized the billing practices plaintiffs alleged were improper or illegal. The court further found Amex had no contractual obligation to refund or credit incorrect charges for premiums unless requested by the cardholder and that the cardholder's request for a refund was a condition precedent to Amex's obligation to provide one.

Phase II of the trial addressed whether Amex's billing and refund practices for the travel insurance programs violated New York and California statutes, whether the contract terms as construed in Phase I were unconscionable, and whether cardholders were equitably excused for failing to request refunds. After plaintiffs rested their case in chief, Amex successfully moved for judgment on all claims. This appeal challenges the court's findings after trial and its prior summary adjudication rulings on conversion and unjust enrichment.

DISCUSSION

I. The Trial Court Properly Interpreted the Disputed Contract Terms

Plaintiffs' primary contention in this appeal challenges the trial court's interpretation of what the parties refer to as the "Billing Term." It provides: "Premiums: A [dollar amount] premium charge will be billed to the enrolled American Express Card account each time a Scheduled Airline fare is charged to that Account. As long as the Basic Cardmember remains a Cardmember, this coverage will be automatically renewed until the Cardmember contacts American Express and cancels. There may be occasions when premiums are billed to the enrolled Account for cancelled trips, Uninsured Persons, itinerary changes, ticket upgrading, non-Scheduled Airline flights, baggage, or other such non-covered airline services. If any such charges are billed to the enrolled Account, the Cardmember must contact American Express for a refund."

"When the meaning of the words used in a contract is disputed, the trial court engages in a three-step process. First, it provisionally receives any proffered extrinsic evidence that is relevant to prove a meaning to which the language of the instrument is reasonably susceptible. [Citations.] If, in light of the extrinsic evidence, the language is reasonably susceptible to the interpretation urged, the extrinsic evidence is then admitted to aid the court in its role in interpreting the contract. [Citations.] When there is no material conflict in the extrinsic evidence, the trial court interprets the contract as a matter of law." (*Wolf v. Walt Disney Pictures & Television* (2008) 162 Cal.App.4th 1107, 1126.) The trial court found the Billing Term was not ambiguous on its face; that extensive extrinsic evidence received provisionally at trial (see *id*. at p. 1126–1127) did not reveal any latent ambiguity; and, assuming arguendo that the contract language was ambiguous, the extrinsic evidence did not alter its import.

A. "*There May Be Occasions*"

Plaintiffs contend the court erred when it interpreted the phrase "there may be occasions" that begins the last sentence of the Billing Term. They argue that this phrase permits only infrequent billing mistakes that are due to non-systematic causes — i.e., those not caused by the system "automatically and routinely" charging a premium every

time an enrolled cardholder incurred an airline charge over a threshold amount. Amex, on the other hand, contends the contracts permit it to bill enrolled cardholders when they use their American Express cards for airline charges other than tickets, and that the disputed sentence says nothing about how frequently this might occur for any given cardholder or whether its occurrence may be due to limitations in Amex's computer billing program.

We review the court's interpretation of the disputed contract language de novo. (*Steiner v. Thexton* (2010) 48 Cal.4th 411, 417–418, fn 7; *Parsons v. Bristol Development Co.* (1965) 62 Cal.2d 861, 864, 865–867 [de novo review where extrinsic evidence is not in conflict and interpretation does not turn on witness credibility].)

1. Background

The policies provide that cardholders are covered by trip insurance, and assessed a premium, whenever they use their American Express cards to purchase scheduled airline tickets for a trip actually taken by "covered persons," generally defined as enrolled cardholders and specified family members and business associates. However, the information that airlines and travel agencies provided to Amex about ticket purchases and other travel-related charges was often insufficient to identify whether the passenger was a "covered person," whether a ticket was used or cancelled, or whether a charge was for a ticket or other services such as an upgrade, itinerary change or excess baggage fee. Before and during the 13-year class period (1995–2008) Amex made various changes to its billing system to prevent non-covered transactions from triggering premiums. For example, it stopped billing premiums on transactions for enrollees that were below a certain dollar threshold (the precise amount varied from $40 to $49 at various points in time during the class period). It also instituted various transaction codes for airlines to use so the computer billing system would discriminate between premium and non-premium transactions. However, Amex was unable to automatically screen out all inappropriate charges or consistently provide automatic refunds.

Important context to the meaning of "there may be occasions" as it appears in the Billing Term is derived from its origin as a negotiated phrase in the 1983 settlement of

two prior class actions, referred to as the *Lifschitz-Corrado* settlement. Like the current action, the *Lifschitz-Corrado* litigation alleged that Amex failed to adequately disclose it would assess premiums on non-ticket charges and tickets purchased for non-covered passengers and would not automatically refund premiums for cancelled tickets. As part of the settlement, Amex agreed to modify its travel insurance enrollment form to state that "there may be occasions" when charges are billed to the cardholder "for cancelled trips, uninsured persons, itinerary changes, ticket upgrading, non-scheduled airline flights, baggage or other such non-covered airline services." The modified enrollment form also included an agreement by the cardholder to contact Amex for a refund of any improper charges.

At the conclusion of Phase I, the court rejected plaintiffs' interpretation of the Billing Term and agreed with Amex's. "The Court finds that neither the word 'occasions' nor the sentence as a whole is ambiguous. Plaintiffs' reading would require qualifiers and restrictions about frequency and causation that do not exist in the plain language of the contract term. The language of the sentence does not state that the causes of any such occasions must be non-systematic or that the occasions will occur with a particular frequency. Accordingly, the Court concludes that the contracts permitted [Amex] to bill premiums for the Programs to enrollees in connection with charges other than for scheduled airline tickets." Addressing plaintiffs' contention that "occasion" means "something special or out of the ordinary" and "infrequent," the court ruled "[i]t would be unreasonable to attribute that connotation in this context. An occasion is simply an occurrence or happening, and 'there may be occasions' means simply that there might be instances when the account is billed a premium in connection with non-covered charges. The phrase is not ambiguous in the context of the Billing Term or with respect to the contract documents and solicitation materials considered as a whole."

Further, the court reasoned, plaintiffs' position that the sentence refers to isolated mistakes rather than erroneous charges that are routinely or systematically billed "presents a false choice. The evidence showed that during the class period American Express's billing systems employed various filters to prevent non-flight charges from

triggering premiums, but that not all such charges were screened by the filters. The resulting premium charges are fairly characterized as mistakes even if their occurrence is systematic as a result of the way in which the computers are programmed. The evidence showed that, in the context of the Programs, the Program disclosures, and the computer systems used to bill premium charges, a premium charge that a cardmember is not required to pay under the terms of the Programs because it is billed in connection with a non-covered airline charge would fairly be characterized as a mistake. [Footnote omitted.] Finally, Plaintiffs' assertion that the cause of the 'occasions' may not be systematic is also inconsistent with the evidence from the *Corrado- Lifschitz* settlement, which shows that, when the term was negotiated, the parties understood that those premium charges would be billed systematically on airline charges because of the way in which the computers were programmed."

2. Analysis

We agree with the trial court's analysis. Under New York law, as in California, words and phrases in a contract must be given their ordinary meaning. (*R & D Maidman Family v. Scottsdale Ins. Co.* (2004) 783 N.Y.S.2d 205, 211 [insurance contract]; *Brook Group Ltd. v. JCH Syndicate 488* (1996) 640 N.Y.S.2d 479, 482; Civ. Code § 1644.) Plaintiffs refer us to a number of legal and non-legal usages, ranging from a cleric's position on end-of-life care to the writings of James Madison and to a national park website, as proof that "there may be occasions" means something that occurs *as an exception* to a general rule. We are not persuaded. "There may be occasions" has a more general meaning than "there may be occasions when something occurs as an exception to a general rule." As the trial court observed, "[a]n occasion is simply an occurrence or happening, and 'there may be occasions' means simply that there might be instances when the account is billed a premium in connection with non-covered charges." Plaintiffs' interpretation, on the other hand, "would require qualifiers and restrictions about frequency or causation that do not exist in the plain language of the contract term." Plaintiffs' reliance on a dictionary definition of "occasion" as "a particular time especially as marked by certain circumstances or occurrences" does not help them, as it is

at least equally, if not more, consistent with the trial court's interpretation as with their own. The trial court correctly gave the contract language its ordinary meaning and rejected plaintiffs' bid to read into "occasions" qualifications that are simply not there.

B. Condition Precedent

1. The Billing Term Includes a Condition Precedent

Plaintiffs also challenge the trial court's interpretation of the last sentence of the Billing Term, which describes what cardholders must do if they are billed a premium in error. It states: "If any such charges are billed to the enrolled Account, the Cardmember must contact [Amex] for a refund." Plaintiffs argue that this language does not create a condition precedent, and contend instead that Amex must provide refunds whether or not cardholders request them. Alternatively, they maintain, if the language is a condition precedent, it is unenforceable as against public policy, and, if it is enforceable, this lawsuit fulfills it.

Here, too, the trial court rejected plaintiffs' interpretation. It explained: "The phrase 'must contact' consists of common words that are used in a manner consistent with their plain meaning. The plain meaning of this sentence is that cardmembers were obligated to 'contact American Express for a refund' if any premium charges were billed to their accounts for cancelled tips, Uninsured Persons, itinerary changes, ticket upgrading, non-Scheduled Airline flights, baggage, or other such non-covered airline services. This conclusion follows from the clear and unambiguous language of the contract."

Again, we agree. The obvious, ordinary meaning of "must contact" is that cardholders who have been billed for non-covered charges must contact Amex to obtain a refund, and plaintiffs identify no evidence that shows the phrase is ambiguous. Indeed, the court's interpretation, but not plaintiffs', is fully consonant with its finding after Phase 2 that "the refund process existed because the airline data did not clearly identify non-covered charges and enrollees were in the best position to do so." " '[I]n reviewing a judgment based upon a statement of decision following a bench trial, "any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support

of the determination of the trial court decision." ' " (*Cuiellette v. City of Los Angeles* (2011) 194 Cal.App.4th 757, 765.)

Plaintiffs' arguments on this point strain credulity. They protest that the Billing Term does not contain the words "condition" or "condition precedent" or use phrases like "unless and until," "provided that," or "subject to." But the law does not prescribe any certain shibboleth to create a condition precedent. (See, e.g., *Seaport Park v. Greater N.Y. Mut. Ins. Co.* (2007) 828 N.Y.S.2d 381, 382, 384 [condition precedent created by contract language that "You must see that the following are done in the event of loss or damage . . . "].)

The final phrase of the Billing Term directs cardholders to "contact American Express for a *refund*." (Italics added.) Plaintiffs ascribe undue significance to Amex's use of the word "refund," rather than "return." In their view, the word "refund" applies only when a "customer has paid money, but then decides not to go through with the purchase," whereas "[p]roperty that actually belongs to another is 'returned.' The returning party has usually borrowed property, found it, or received it by mistake. The recipient then 'returns' it. He does not 'refund' it." Plaintiffs' purported distinction defies common sense. "Refund" simply means "to give or put back" or "to return (money) in restitution, repayment, or balancing of accounts." (Merriam-Webster's 10th Collegiate Dictionary (2001) p. 981.) The language that requires cardholders to contact Amex for a refund of mistakenly billed premiums is clear, unambiguous and stated in unmistakable language. No reasonable English speaker would conclude it was not necessary to contact Amex to correct an erroneous billing because the sentence uses the word "refund" rather than "return."

Equally unconvincing is plaintiffs' assertion that "must contact" as used in the last phrase of the Billing Term was merely to inform cardholders which of the American Express entities, Amex or Amex Assurance, handled refunds. This interpretation ignores the plain meaning of the sentence. Moreover, as so interpreted the sentence would be superfluous, as every billing statement with a travel insurance premium charge included

both a refund coupon and a toll-free number cardholders could call to delete erroneous premium charges from their bills or obtain refunds.

Plaintiffs further assert the trial court "did not consider" the import of similar language in enrollment forms, which stated "I agree to contact [Amex] for a refund," or in the master insurance policies, which said Amex "must be contacted" for a refund. Not so. The court expressly considered and rejected plaintiffs' argument that these minor variations in phrasing created an ambiguity in the Billing Term. It also considered and rejected plaintiffs' argument that the words "I agree" cannot create a condition precedent under New York law. On appeal, plaintiffs provide no substantive reasoning that would lead us to conclude those determinations were erroneous.

Plaintiffs also argue that the language stating Amex "must be contacted" in the master policies between Amex and its travel insurance underwriters does not create a condition precedent because, as we understand their argument, the phrase is in the passive tense. No matter. Cardholders were not privy to the master policies. This contention fails even if the use of the passive voice can be construed to mean cardholders need not do anything to obtain a refund. But as a matter of plain English, it seems quite clear that it cannot be so construed.

Finally, plaintiffs argue that this lawsuit is "the functional equivalent of each class member asking for its money back" and, therefore, the lawsuit satisfies the condition precedent. The trial court correctly found that "contact" means "contact," not "sue." Moreover, Plaintiffs' position depends on a highly improbable interpretation of the contract. As the trial court found, "[t]he contract as a whole, and the Billing Term in particular, contemplates that American Express may bill premium charges in connection with non-covered airline services, and that cardmembers may have those charges refunded upon request. It is not a reasonable interpretation of this term to conclude that the objective intent of the parties was to provide that cardmembers could or should sue American Express to obtain a refund of these premium charges that the contract permitted American Express to bill."

Beyond the unreasonable construction argued by the plaintiffs, the court found the extrinsic evidence did not reveal any ambiguity in the meaning of the word "contact." "The evidence showed that American Express printed a refund coupon on cardmember statements containing premium charges or airline credits. Cardmembers could use the coupon either to avoid payment of any charges billed for non-covered airline services or to obtain refunds of charges they had already paid. The coupon also included a toll-free number that cardmembers could call. The class representatives testified that they knew about the refund procedure and had used it in the past. This process — including the printing of coupons on billing statements and the ability to deduct charges prior to payment by sending in the coupon — was negotiated as part of the *Corrado-Lifschitz* settlement. . . . [I]t is not reasonable to suppose that the *Corrado-Lifschitz* parties agreed to settle those earlier class actions by negotiating for a particular refund process yet also intended that cardmembers could also seek refunds by suing American Express." We agree. None of the plaintiffs' arguments undermine the plain meaning of the contract language or the trial court's assessment of the extrinsic language.[1]

2. The Condition Precedent Is Enforceable

In Phase 2 of the trial, plaintiffs argued the condition precedent was unconscionable, and therefore unenforceable, or that compliance with it should be excused to avoid the forfeiture of class members' money. The trial court properly rejected these contentions.

Where, as here, the trial court resolves conflicts, makes credibility determinations, and issues a judgment for the defendant at the completion of the plaintiff's case, we review its ruling under the substantial evidence standard. (*Kinney v. Overton* (2007) 153 Cal.App.4th 482, 487.) " ' "[A]ny conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court

[1] Plaintiffs correctly acknowledge that the viability of their claims under New York and California consumer protection statutes depends on the success of their contention that the trial court misinterpreted the Billing Term. Since it did not, their challenge to the judgment on the statutory claims thus fails.

decision. [Citations.]" [Citation.] In a substantial evidence challenge to a judgment, the appellate court will "consider all of the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference, and resolving conflicts in support of the [findings]. [Citations.]" [Citation.] We may not reweigh the evidence and are bound by the trial court's credibility determinations. [Citations.] Moreover, findings of fact are liberally construed to support the judgment.' " (*Cuiellette v. City of Los Angeles, supra,* 194 Cal.App.4th at p. 765.)

The trial court's factual findings after Phase 2 of the trial are supported by substantial evidence, and are dispositive of plaintiffs' arguments on appeal. In rejecting plaintiffs' contention that the operation of the travel insurance programs in general and the condition precedent specifically were unconscionable or violated California's unfair business practices laws, the court found that the factual bases for those arguments "were not established by the evidence presented at trial. Plaintiffs presented no evidence that Defendants knew or could have known when a cardholder purchased an airline ticket for an uninsured passenger. Similarly, the evidence showed that airline data was inconsistent and unreliable, and did not clearly identify the nature of the charge. Plaintiffs' airline expert, Mr. Neylan, was frequently unable to say whether charges were for tickets when he reviewed transaction records received by [Amex]. Dr. Kalyanam[2] testified that nothing in the data states whether a charge is actually for a ticket, and he referred to conflicts and anomalies in the data. Mr. Jones testified that airline data is not always reliable and that Defendants currently uses a very conservative method that likely treats certain airline tickets as non-ticket charges. Plaintiffs offered no evidence that there was

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[2] Dr. Kalyanam, a marketing professor, was plaintiffs' expert in quantitative marketing, statistics, the use of survey data, data analysis, data mining, the analysis of large datasets, and econometrics. The trial court found Dr. Kalyanam's testimony and calculations unconvincing for a variety of reasons that included errors, gaps and contradictions in his data, reliance on questionable computer data analysis and information not offered at trial, and inconsistencies in his testimony. The trial court concluded that "Dr. Kalyanam's testimony helped convince the Court that the data submitted to Defendants by airlines and other submitters was not of the consistency or quality that could justify calculations of 'overcharges' for the purpose of Phase 2."

any process or information that would have allowed Defendants to credit premiums automatically where there was no credit from an airline, and failed to establish that, where [Amex] did receive such credits, its billing systems could match them to previous airline charges and determine the cardmember's entitlement to a premium refund. The evidence did not establish that Defendants knew or could have known when cardholders had airline charges that were ineligible for insurance coverage, or that Defendants had the power to cause airlines to provide different or better data."

In short, because the inconsistencies and limitations in the data rendered the identification of non-covered charges speculative and unreliable in the absence of information received from cardholders, the court concluded that Amex's reliance on cardholders to identify improperly assessed premium charges "was not only reasonable but unavoidable." These findings are amply supported by the evidence. Accordingly, they are fatal to plaintiffs' contention that the condition precedent was substantively unconscionable because it allowed Amex to keep premiums it knew were billed for non-covered charges and put the burden on cardholders to claim a refund.

Plaintiffs claim the trial court's findings were ambiguous and that the court failed to clarify them in response to plaintiffs' objections. Therefore, they argue, we are barred on appeal from inferring that the trial court decided the relevant facts against them.[3] This assertion borders upon frivolous. The statement of decision is notably fact-specific, intensively detailed and comprehensive. Plaintiffs' specific complaint is that the trial court did not say whether the data provided to Amex was "not consistent or not reliable . . . <u>sufficiently</u> <u>often</u> to justify defendants <u>entirely</u> <u>ignoring</u> this information for the purpose of billing plaintiffs for insurance" or, if so, during which part of the 13-year class period this was the case. There was no such deficiency in the court's decision. The trial

[3] Under Code of Civil Procedure section 634, "When a statement of decision does not resolve a controverted issue, or if the statement is ambiguous and the record shows that the omission or ambiguity was brought to the attention of the trial court . . . , it shall not be inferred on appeal . . . that the trial court decided in favor of the prevailing party as to those facts or on that issue."

court expressly found that plaintiffs asserted the data submitted to Amex "during *the class period*" was sufficient to inform it whether a charge was eligible for insurance. (Italics added.) It then found that plaintiffs did not prove their assertion, and, specifically, that "the transaction data that Defendants received *during the class period"* was not sufficient for erroneous charges to be consistently or reliably identified. (Italics added.) It is clear that the finding, like plaintiffs' assertion, concerned the entire class period. Moreover, plaintiffs neither claim to have asserted during the trial, nor provide any record citations to an assertion, that the information was sufficiently reliable during some particular portion of the class period. They cannot fault the trial court for failing to clarify a factual issue that was neither raised at trial nor apparent from the evidence.

II. The Court Properly Granted Summary Adjudication on the Unjust Enrichment and Conversion Claims

Plaintiffs' second cause of action alleged under New York law that defendants unjustly enriched themselves by charging unauthorized premiums and failing to refund or credit premiums for flights for which tickets were cancelled or not used. The fourth cause of action, also under New York law, alleged that defendants unlawfully deprived plaintiffs of their money and converted it to their own use. The trial court granted summary adjudication on both claims. Our review is de novo, " 'considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports.' [Citation.] The moving party's evidence is strictly construed, while that of the opponent is liberally construed, and 'any doubts as to the propriety of granting the motion' are resolved in the opponent's favor." (*Greenberg v. Superior Court* (2009) 172 Cal.App.4th 1339, 1346.)

A. Unjust Enrichment

The trial court correctly found Amex entitled to summary adjudication on the unjust enrichment claim because, under New York law, "unjust enrichment . . . can exist only when there is no express agreement between the parties on the same subject." New York law is quite clear on this point. "The existence of a valid and enforceable written

contract governing a particular subject matter ordinarily precludes recovery in quasi contract for events arising out of the same subject matter. [Citations.] A 'quasi contract' only applies in the absence of an express agreement, and is not really a contract, but rather a legal obligation imposed in order to prevent a party's unjust enrichment. [Citations.] . . . . 'Briefly stated, a quasi-contractual obligation is one imposed by law *where there has been no agreement or expression of assent, by word or act, on the part of either party involved*. The law creates it, regardless of the intention of the parties, to assure a just and equitable result.' " (*Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company* (1987) 70 N.Y.2d 382, 388 (*Clark-Fitzpatrick*).) Conversely, such actions are barred where the parties have entered into a contract "the scope of which clearly covers the dispute between the parties." (*Id.* at p. 389; see also *Cox v. NAP Constr. Co., Inc.* (2008) 10 N.Y.3d 592, 607 ["a party may not recover in quantum meruit or unjust enrichment where the parties have entered into a contract that governs the subject matter"]; *Goldman v. Metro. Life Ins. Co.* (2005) 5 N.Y.3d 561, 572; *Fyrdman & Co. v. Credit Suisse First Boston* (2000) 708 N.Y.S.2d 77; *cf. Sterlacci v. Gurfein* (2005) 794 N.Y.S.2d 362.)

Here, the court found on undisputed facts that the parties' dispute is within the scope of their contract. Plaintiffs conceded their unjust enrichment claim incorporated the contract allegations and sought to "recover the same alleged mistaken premium charges." It does not matter whether the controlling law is more accurately stated as barring unjust enrichment claims where a contract covers the same "subject matter," as Amex says, or only if it covers the "exact dispute," as plaintiffs say, because, under either formulation, the Billing Term bars unjust enrichment claims due to Amex's alleged misbilling and failure to provide credits and refunds. (See *Telstar Res. Group, Inc. v. MCI, Inc.* (S.D.N.Y. 2007) 476 F.Supp.2d 261, 275 [unjust enrichment claim barred by existence of contract in action alleging MCI billed customers for improper fees].)

Plaintiffs try to avoid this result by arguing that the Billing Term does not authorize Amex to treat improperly billed premiums as profit until or unless the customer requests a refund. The same argument, we observe, could be made about profits obtained

through *any* breach of contract, and to endorse it would create an exception that swallows the *Clark-Fitzpatrick* rule. We will not do so. The trial court properly granted summary adjudication on plaintiffs' unjust enrichment claim.

B. Conversion

Plaintiffs' conversion claim fails for similar reasons. The court granted summary adjudication on this claim because, as with unjust enrichment, New York law limits conversion to the breach of a noncontractual duty. For example, *Wolf v. National Council of Young Isr.* (N.Y.App.Div. 1999) 694 N.Y.S.2d 424 affirmed the dismissal of a conversion claim premised on allegations that the lender improperly deducted late fees from the plaintiff's mortgage payments in a manner not authorized by the mortgage agreements. "[A] claim to recover damages for conversion cannot be predicated on a mere breach of contract. [Citations.] Since the appellant's conversion counterclaim does not stem from a wrong which is independent of the alleged breach of the mortgage agreements, it was properly dismissed." (*Id.* at p. 417.) Numerous other New York cases confirm that conversion does not lie where there is a duplicative contract claim unless the defendant breached a duty independent of the contract. (See, e.g., *Ironforge.com v. Paychex, Inc.* (2010) 747 F.Supp.2d 384, 398 [where contract authorized defendant payroll service to make certain withdrawals from plaintiffs' accounts, allegations that defendant also made unauthorized withdrawals did not support conversion]; *Sutton Park Development v. Guerin & Guerin* (N.Y.App.Div. 2002) 745 N.Y.S.2d 622 (*Sutton Park*) [conversion claim based on broker's alleged failure to use plaintiff's quarterly payments to purchase insurance dismissed where plaintiff allegedly contracted with insurance

broker to procure insurance]; *East End Labs., Inc. v. Sawaya* (N.Y.App.Div. 2010) 914 N.Y.S.2d 250; *D'Ambrosio v. Engel* (N.Y.App. 2002) 741 N.Y.S.2d 42.)[4]

Plaintiffs rely heavily on *Apple Records, Inc. v. Capitol Records, Inc.* (1988) 529 N.Y.S.2d 279 (*Apple*)), which does not help their cause. *Apple* explains that the focus of circumstances in which a party to a contract may be held liable in tort "is not . . . on whether the tortious conduct is separate and distinct from the defendants' breach of contractual duties, for it has long been recognized that liability in tort may arise from and be inextricably intertwined with that conduct which also constitutes a breach of contractual obligations. [Citation.] Rather, the focus is on whether a noncontractual duty was violated; a duty imposed on individuals as a matter of social policy, as opposed to those imposed consensually as a matter of contractual agreement." (*Id.* at pp. 281–282.) The court found allegations that the defendants betrayed longstanding fiduciary duties they owed to the plaintiffs (the Beatles), their duty as bailees of the Beatles' recordings, and their duty to respect the Beatles' property rights were based on violations of duties *distinct from* their contractual obligations, and therefore sufficient to state a conversion claim. But the court cautioned: "As to the . . . cause of action for conversion, . . . were we limited to reviewing merely the [allegations] that defendants have unlawfully withheld and converted to their own use certain 'funds' to which plaintiffs had a superior right of possession, *the complaint would be insufficient to state a tort cause of action truly independent of the contract claims*." (*Id*. at pp. 283–284, italics added.) Here, plaintiffs' attempt to identify a duty distinct from the contract is based solely on their claim that Amex "took plaintiffs' money as their own" and used it for an unauthorized purpose. Accordingly, it falls squarely within *Apple's* limiting caveat, not its holding.

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[4] Plaintiffs go to great lengths to try to distinguish *Sutton Park*, an attempt marked by interpolations of facts not to be found in the opinion itself. They argue the fact that the court also struck a gross negligence claim against the broker implies that the broker must not have done anything improper "such as taken the plaintiffs' money for himself," and statements that the insurer had "canceled" a policy must mean that the broker actually sent the plaintiffs' payment to the insurer, which then refused it as insufficient. These suppositions cannot fairly be read into the opinion.

Plaintiffs' other authorities are also unpersuasive. The plaintiff in *Meyers v. Waverly Fabrics, Div. of F. Schumacher & Co.* (1985) 65 N.Y.2d 75, 79, alleged the defendant breached an oral contract to use a design on fabrics by using it on products other than fabrics and licensing it to others while taking credit for the design. The court noted that the alleged contract did not preclude the plaintiff from also pursuing a tort claim, because "[d]efendant's liability on that cause of action will arise, if at all, not from the use of the design on products other than fabric in violation of the contract, but from its violation of the law of unfair competition by misrepresenting the design, which it knew to be plaintiff's, as its own." Thus, the fact that the alleged tort "ha[d] its genesis" in a contractual relationship was not dispositive because the complaint also alleged the breach of an independent, noncontractual duty not to deceive the public through mislabeling. (*Id*. at p. 80 & fn. 2.)

Similarly, contract and conversion claims asserted in *Hamlet Willow Creek Dev. v. N.E. Land Dev.* (2009) 878 N.Y.S.2d 97, 117–118 were not duplicative because the defendant's alleged excavation of more material than agreed to in its contract gave rise to a contract claim, while the alleged unauthorized removal of that material from the plaintiff's property supported a conversion claim. Though both claims had their genesis in the parties' contractual relationship, the court explained, "the two causes of action . . . rest[ed] on separate duties" the defendant owed to the plaintiff: the contractual duty not to over-excavate, and the common-law duty not to assume ownership over the plaintiff's property. (*Id*. at p. 118.)

Here, in contrast, plaintiffs identify no separate, noncontractual duty. Plaintiffs' conversion theory expressly incorporates their contract allegation, adding only that Amex used the erroneously billed premiums for "unauthorized purpose[s]." Again, the same reasoning would convert *any* profitable breach of contract into a conversion action. That is not the law. Plaintiffs have identified no extracontractual duty owed or breached by Amex, so summary adjudication was proper.

III. Costs

The trial court awarded Amex costs of $392,448.61 and imposed the obligation on the two class representatives, Greg Carr and Aviation Data Inc., subject to their ability to pay. Plaintiffs contend public policy and class action principles require that the costs be assessed against the entire class. Otherwise, they maintain, the threat of large cost awards would discourage potential class representatives from pursing consumer class actions, and class representatives might act against the class's interests in order to avoid amassing large potential cost awards.

The court in *Van de Kamp v. Bank of America* (1988) 204 Cal.App.3d 819, 869 rejected this same argument saying "the imposition of the cost burden on the entire class of plaintiffs (1) increases the costs of the litigation and such costs may be prohibitive, and (2) is unfair to unnamed plaintiffs who took no part in the litigation. While imposition of the entire cost burden on the named plaintiffs may have a chilling effect on the willingness of plaintiffs to bring class action suits, this effect easily may be outweighed by the potential recovery. All potential litigants must weigh costs of suit against likelihood of success and possible recovery before deciding to file suit. Those who choose to take the risks of litigation should be the ones who bear the cost when they are unsuccessful, not those who did not make the choice." The *Van De Kamp* court, accordingly, held it was an abuse of discretion to impose costs on the entire plaintiff class. (*Ibid.*; *accord, Earley v. Superior Court* (2000) 79 Cal.App.4th 1420, 1432–1436.) We agree with its reasoning. There was no abuse of discretion here.

Plaintiffs' reliance on *Civil Service Employees Ins. Co. v. Superior Court* (1978) 22 Cal.3d 362, 377–382 is misplaced. The court there held that requiring a class action defendant to bear the initial cost of notifying absent class members of the lawsuit violated neither substantive nor procedural due process. That holding has no bearing on whether the final cost order challenged here was within the trial court's discretion.

DISPOSITION

The judgment is affirmed. Amex's protective cross-appeal from the trial court orders granting plaintiffs' motion for class certification and denying a later motion to decertify the class is dismissed as moot. Amex is entitled to costs on appeal.

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Siggins, J.

We concur:

_____
McGuiness, P.J.

_____
Jenkins, J.