

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**JASON C. MONACO**

Plaintiff

– and –

**CANADIAN IMPERIAL BANK OF COMMERCE**

Defendant

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**STATEMENT OF DEFENCE AND COUNTERCLAIM**

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1. The defendant (“CIBC”) admits the allegations contained in paragraphs 2-3, the first sentences of paragraphs 11 and 13, paragraphs 15-17, and 20 of the Statement of Claim.
  
2. CIBC denies the allegations contained in paragraphs 4-10, 12, the last sentence of paragraph 13, paragraphs 14, 18, 19 and 21-22 of the Statement of Claim. CIBC specifically denies the plaintiff is entitled to the relief set out in paragraph 1 of the Statement of Claim.

3. CIBC has no knowledge in respect of the allegations contained in paragraph 7 and the last sentences of paragraph 11 of the Statement of Claim.

4. The plaintiff's use of his CIBC Visa card was at all times governed by the CIBC Visa Cardholder Agreement. As of the dates of the June 9 and 10 transactions, as well as the date on which the plaintiff reported the fraudulent transactions to CIBC, the April 2010 version of the Cardholder Agreement (the "April 2010 Agreement") was in force.

5. The plaintiff's Visa card utilizes "chip and PIN" technology consisting of a computer chip embedded in the card and read by a vendor computer terminal, for which transactions are completed by entering a digital PIN number via keypad in lieu of a signature.

6. The transaction of \$81,276.00 (being the only transaction for which relief is sought in this action) was completed by the use of chip and PIN technology. It is not possible to process a chip and PIN transaction without the Visa card and the confidential PIN.

7. In addition to the provision noted in paragraph 16 of the Statement of Claim, the April 2010 Agreement provides as follows:

This Agreement replaces any prior agreements which governed your Visa Account. It is important that you read and understand this Agreement because you will indicate your acceptance of this Agreement if you sign, use or activate a Card, access your Visa Account in any way or make a payment on your Visa Account.

8. CIBC pleads that the plaintiff did indeed indicate acceptance of the terms of the April 2010 Agreement in one or more of the above-described ways and in doing so became bound by its terms.

9. CIBC pleads that the plaintiff is the "Primary Cardholder," as defined by the April 2010 Agreement, for his Visa card.

10. The April 2010 Agreement also provides as follows:

PIN means a personal identification number or password which is provided by CIBC or selected by the Cardholder and which authenticates a Cardholder when a Card is used at merchant terminals, ABMs or other devices which require a pin.

...

You may use your Visa Account to make Transactions wherever Visa cards are accepted, provided we permit you to do so and you comply with this Agreement.

The Primary Cardholder is liable for any Transactions made on the Visa Account and any interest, fees, and losses incurred if any Cardholder: (i) signs a Transaction receipt or Cash Advance draft or presents the Card at a merchant terminal which accepts contactless payment cards; (ii) uses a PIN to make the Transaction; (iii) uses the Visa Account number or a Card number to make the Transaction without presenting the Card (including mail order, telephone or online Purchases); or (iv) indicates acceptance of the Transaction through any other means (electronic or otherwise).

If a Cardholder fails to comply with any obligation in the section of this Agreement entitled "Personal Identification Number (PIN)," until we receive written or verbal notice from a Cardholder that the Card was lost or stolen, all Transactions that occur after such

failure are deemed to be authorized by the Cardholder which means that if someone other than the Cardholder makes any PIN-authorized Transactions on the Visa Account, the Primary Cardholder will be liable for those Transactions and any interest, fees and losses incurred (this includes Transactions which occur after a Card is lost or stolen).

The Primary Cardholder is not liable if a Card is lost or stolen and unauthorized Transactions are made without a PIN or if the Visa Account is otherwise accessed without a PIN and without authorization by any Cardholder.

...

You will not allow any person whose name is not embossed on a Card to use a Card or the Visa Account. If this happens, the Primary Cardholder will be liable for all resulting Transactions and any interest, fees and losses incurred, even if the other person was a minor or did not comply with any limitations you placed on their use of the Card or the Visa Account.

...

### **Personal Identification Number (PIN)**

Your PIN is equivalent to your signature. Therefore, whether you are a Primary Cardholder or an authorized User, you must keep your PIN absolutely confidential; it is for your use alone. You will not tell anyone else (including a close family member or friend, or any bank, public official or merchant) what your current PIN is. When choosing a PIN, you will not use all or any part of:

- Your name, or a close relative's name;
- Your birth date, year of birth, telephone number or address, or those of a close relative;
- A number on your Card, or any other account number;

- A number on any identification card you keep with or near your Card (such as your social insurance number or driver's licence number); or
- Any other number which can be easily obtained by someone else.

You understand that you should memorize your PIN rather than keep any written record of it. Therefore, when you receive the PIN we send you for your Card you will destroy the document on which the PIN is printed. However, if you decide that you truly need to keep a written record, you agree that:

- You will store the PIN in a safe place;
- You will not record any PIN on, or near, your Card;
- Your PIN must be disguised within the written record you make, so that no one else can easily guess that it is a record of your PIN; and
- You will not record your PIN on, or near, a telephone.

In the event that you know or suspect that someone else knows your PIN, you must change your PIN immediately, and contact us by telephone.

...

**Visa E-Promise and Visa Zero Liability Policy**—...The Visa Zero Liability Policy protects Cardholders who experience fraud through unauthorized use of their Card after it is stolen or lost; provided they have complied with this Agreement (other conditions and restrictions may apply).

[emphasis added]

11. The section titled “Visa Zero Liability Policy” quoted notes explicitly that the policy applies only where (i) the card has been lost or stolen, and where (ii) the cardholder is in compliance with the agreement. As the plaintiff pleads that his card was not lost or stolen, CIBC pleads that the plaintiff is in breach of the April 2010 Agreement, as the same card was used as was the plaintiff’s PIN.

12. As the June 9, Transaction was a chip and PIN transaction, CIBC pleads that the “Personal Identification Number (PIN)” portions of the April 2010 Agreement (as set out above) apply to the June 9 Transaction.

13. The June 10 Transaction, which is not at issue in this action though pleaded by the plaintiff, was not completed via chip and PIN technology but rather by the vendor’s obtaining the physical imprint of a credit card, along with a traditional signature by the purchaser.

14. In the alternative, if the June 9 Transaction was completed without the plaintiff’s PIN but with both the plaintiff’s Visa card and the computer hardware and software required to circumvent the PIN authentication protocol, then the transaction was completed using a card the plaintiff had either (i) authorized that person to use or (ii) had failed, as of the June 9 Transaction, to report lost or stolen.

15. CIBC pleads that in either event, the plaintiff was in breach of the April 2010 Agreement and is accordingly liable for the alleged loss occasioned by the June 9 Transaction.

16. CIBC therefore asks that this action be dismissed, with costs on a substantial indemnity basis.

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### COUNTERCLAIM

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17. CIBC claims against the plaintiff (defendant to the counterclaim)

- (a) damages in the amount of \$81,276.00;
- (b) prejudgment interest at the rate prescribed by the April 2010 Agreement or, in the alternative, prejudgment interest thereupon pursuant to s. 128 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and
- (c) its costs of this counterclaim on a substantial indemnity basis.

18. CIBC repeats and relies on the allegations made in its Statement of Defence herein.

19. The April 2010 Agreement provides that the Primary Cardholder—in this case, the plaintiff—must repay the Balance, defined as “the total amount of all Transactions, and all fees, interest and other amounts payable under this Agreement, less any payments or other

credits which have been posted to your Visa Account.” Outstanding balances are subject to interest calculated in accordance with the terms of the April 2010 Agreement.

20. CIBC has advised the plaintiff that he is liable for the June 9 Transaction. As of the date on which this action was commenced, the amount of the transaction remains unpaid and thus remains an outstanding balance on the plaintiff's Visa account.

21. Despite demand, the plaintiff has refused to pay the outstanding balance.

22. CIBC pleads that it is entitled to repayment of the amount of the June 9 Transaction, plus interest at the rate prescribed by the April 2010 Agreement.



Date: April 15, 2011

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