UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF, individually and on behalf of other similarly situated individuals,

Plaintiff,

vs.

FIA CARD SERVICES, N. A. (Bank of America), ALASKA AIRLINES, INC. and HORIZON AIR INDUSTRIES, INC.,

Defendants.

CASE NO. _____

PLAINTIFF'S OPPOSITION TO ALASKA AIRLINES, INC. AND HORIZON AIR INDUSTRIES, INC. MOTION TO DISMISS

Plaintiff, Terrance D. Rutherford, hereby files this Opposition to the Motion to Dismiss filed jointly by Defendant Alaska Airlines, Inc. ("Alaska Airlines") and Defendant Horizon Air Industries, Inc. ("Horizon Airlines"), herein jointly referred to as "the airlines," and joined by Defendant FIA Card Services, N. A. ("Bank of America" or "BOA").[1] Bank of America, Alaska Airlines and Horizon Airlines are herein jointly referred to as "Defendants." For the reasons set forth in this Opposition, Plaintiff's Complaint states a claim upon which relief can be granted against the airlines.

I. INTRODUCTION

Plaintiff's Complaint is brought on behalf of himself and all airline employees who have participated, or are currently participating, in the Bank of America

[1] It is unclear which portions of the airline's Motion that BOA is joining. Its joinder is not noted until a footnote to the very last sentence of its own Motion to Dismiss in the section discussing unjust enrichment claims. Thus, it would seem that the joinder is limited to that claim. Further, since BOA's Motion makes arguments based on the application of Washington law, contrary to the present Motion, its joinder would seem to be limited to the circumstance where this Court finds that California law applies.

Visa/MBNA MasterCard incentive program ("the program"). Complaint at ¶1. To participate in the program, airline employees distribute pre-printed credit card applications. *Id.* at ¶21. BOA agreed to pay certain sums to employees for credit card applications that are thereafter submitted to BOA and "processed" and/or "approved." *Id.* at ¶¶19-20. The airlines also issue prizes to encourage employee participation in the program. *Id.* at ¶30. Plaintiff asserts that he, and Class members, are not paid for all processed and/or approved applications that they have submitted to BOA. *Id.* at ¶¶36-38. As such, Plaintiff's Complaint makes claims for breach of contract and, in the alternative, unjust enrichment. *Id.* at ¶¶53-69.

II. THE PLEADING STANDARD

The Supreme Court has explained the pleading requirements of Rule 8(a)(2) and the requirements for surviving a Rule 12(b)(6) motion to dismiss. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949, (2009); *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, (2007). "[A] complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*). Importantly, in reviewing a complaint for purposes of a motion to dismiss, Plaintiff's allegations of material fact must be taken as true and construed in the light most favorable to him. *See Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. (Mont.) 1989). Finally, although the scope of review generally is limited to the contents of the complaint, a court may also consider exhibits submitted with the complaint. *Hal Roach Studios, Inc. v. Richard Feiner & Co., Inc.*, 896 F.2d 1542, 1555 n. 19 (9th Cir. (Cal.) 1990).

III. A CONTRACT EXISTS BETWEEN DEFENDANTS AND CLASS MEMBERS

The Complaint alleges that Defendants made a written offer to Plaintiff (and other employees of the airlines) to contract, which was accepted, as follows:

As the Complaint states, "the terms and conditions of the contract relating to the …program were, and are, presented to [airline] employees directly by the airlines through various means including web, email, flyers, representatives from Bank of America and the airlines' liaison to Bank of America." Complaint at ¶ 17. These terms were and are provided to airline employees in writing. Indeed, the airlines advise their employees that BOA will pay a fixed amount (which has varied over the Class Period) to employees who submit credit card applications to BOA that are ultimately approved. *See, e.g.,* Complaint, Exhibit 4.[2] Specifically, airline employees are advised in writing that they will be "paid $30 for each approved US Visa card, Canadian MasterCard, upgraded accounts and for the US small business card," *id.* at ¶6, to be deposited into their airline paycheck approximately two months after the application processes. *Id.* at ¶2. Airline employees are also advised on where to obtain the script cards and applications, *id.* at ¶1, and how to best insure payout under the program. *Id.* at ¶3. This writing contains all of the necessary elements of a contract, to wit: the subject matter, the parties, a promise, the terms and conditions, and consideration. *See, Bogle & Gates, P.L.L.C. v. Zapel,* 90 P.3d 703, 705 (Wash. 2004) ("The essential elements of a contract are subject matter of the contract, parties, promise, terms and conditions, and (in some but not all jurisdictions) price or consideration").[3]

[2] Although this document is dated February 26, 2009, the same contract terms have been presented to class members since the beginning of the Class Period. Unfortunately, however, the airlines' online system does not allow access to archived information provided to employees concerning the program and this is the oldest version of the contract that Plaintiff had in his possession at the time of the filing of his Complaint.

[3] If the Court finds that California, and not Washington, law applies, a contract still has been formed. Under California law, "[i]t is essential to the existence of a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration." Cal.Civ.Code § 1550. Here, all parties are under no defect or disability that would render them incapable of contracting and, indeed, have consented to contract by their actions. Further, the program is a lawful object and sufficient consideration has been exchanged, to wit: employees are to be paid money and the airlines and BOA will obtain additional customers.

The terms of this written contract were subsequently modified, in writing. The airlines advised Plaintiff and Class members that they would be paid $45 for each approved credit card application submitted to BOA. *See, e.g.*, Complaint, Exhibit 5. In addition, at various times during the Class Period, Plaintiff and Class members are given written flyers modifying the terms of the contract such that they are entitled to obtain additional payments for simply submitting "processed" applications, whether or not they are approved by BOA.[4] *See, e.g.*, Complaint, Ex. 5, 6, and 7.[5] Finally, the airlines advise employees, in writing, of further revision to the terms of the contract: that they will issue prizes (including gift cards and products) to "top performers" of the program, to encourage employee participation. *See*, *e.g.*, Complaint Ex. 5, 7. Plaintiff and Class members accepted the modified terms by performing the required acts under the contract.

In sum, the Complaint alleges facts establishing that an offer to form a unilateral contract was made by the airlines and BOA to Plaintiff and Class members. The Complaint further alleges that Plaintiff, and other airline employees, accepted Defendants' offer by performing the actions outlined in the offer, to wit: submitting applications to BOA. Therefore, the facts alleged in the Complaint establish that a contract was formed between the airlines and BOA on the one hand, and Plaintiff and Class members on the other. The formation of the contract obligated BOA to pay Plaintiff and Class members a fixed incentive amount, and obligated the airlines to provide Plaintiff and Class members with the gift cards and products, based on their submission of "processed" and/or "approved" applications. Further, the contract obligated the airlines to pay Plaintiff and Class members these amounts along with their wages.

IV. WASHINGTON LAW APPLIES TO PLAINTIFF'S CLAIMS

[4] "Processed" applications are those which contain sufficient customer information to facilitate an "accept" or "decline" decision. Complaint at ¶20.

[5] These flyers were in Plaintiff's possession at the time of filing his Complaint but are merely examples of the numerous revisions to the contract terms during the Class Period.

This court has diversity jurisdiction over Plaintiff's claims. In deciding whether Defendants breached their duty to pay Plaintiff (and others), this Court must first determine which state's law applies to the contract and unjust enrichment claims. A federal court sitting in diversity must apply the choice-of-law rules of the forum state. *Costco Wholesale Corp. v. Liberty Mutual Insurance Co.*, 472 F.Supp.2d 1183 (S.D. Cal. 2007). As regards contract law, California utilizes two different choice of law tests: the statutory test under Civil Code § 1646 and the governmental interest test. *Id.* at 1197. California Courts also follow the Restatement (Second) of Conflict of Laws Section 188 when there is no choice of law provision in a contract. *See, e.g., ABF Capital Corp. v. Grove Properties,* 130 Cal.App.4th 825, 838 (2005).

A. <u>California Civil Code § 1646</u>

Under CA Civil Code § 1646, "[a] contract is to be interpreted according to the law and usage of the place where it is to be performed; or if it does not indicate a place of performance, according to the law and usage of the place where it is made." Where a contract is silent regarding the place of performance, as is the case here, courts typically construe § 1646 to require application of the law where the contract was made. *Costco*, 472 F.Supp.2d at 1197. Typically, a contract is made in the place of acceptance. *ABF Capital Corp. v. Grove Properties, Co.*, 126 Cal.App.4th 204, 222 (2005). Unilateral contracts, however, are accepted by performance. *See, e.g., Richardson v. Rose,* 197 Cal.App.2d 318 (1961). Thus, it follows that a unilateral contract is made at the place of performance. Unfortunately, that conclusion does not resolve the analysis in this case.

Here, the place of performance could arguably be numerous different states and/or Canada. First, performance could be the place where an employee makes the "pitch" for the credit card program and distributes the applications (either in the air or on land), which could be multiple states and the air over those states. Second, performance could be the place where an employee places a completed application in the mail to BOA, which could also be multiple states. Third, performance could be the

place where a customer places a completed application in the mail to BOA itself, again implicating multiple states. Fourth, performance could be the place where BOA receives the applications, which are mailed to addresses in Texas or Canada. Finally, performance could be the place where the determination of whether the applications can be "processed" and/or where they are "approved." It is not known at this time in what state (or states) BOA makes this determination. Therefore, it does not seem possible to determine which state's laws to apply using this method.

B. Restatement (Second) of Conflict of Laws

California courts also utilize the Restatement (Second) of Conflict of Laws, Section 188, to determine which state's laws to apply when there is no choice of law provision in a contract. *See, e.g., ABF Capital Corp. v. Grove Properties*, 130 Cal.App.4th 825, 838 (2005). This section sets forth the factors for determining choice of law in this circumstance, to wit: "the contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include: (a) the place of contracting, (b) the place of negotiation of the contract, (c) the place of performance, (d) the location of the subject matter of the contract, and (e) the domicil, residence, nationality, place of incorporation and place of business of the parties. These contacts are to be evaluated according to their relative importance with respect to the particular issue."

As regards these factors, (b) does not apply because, as a unilateral contract, there was no negotiation and (d) does not apply because there is no fixed subject matter. As discussed above, (a) and (c) would be the same place, and, because it could be numerous states and Canada, this factor does not aid the determination.[6] Therefore, the only factor remaining for consideration is (e). Here, Plaintiff is domiciled in

[6] In their Motion, Defendants assert that the place of contracting and the place of performance is California, citing to paragraph 37 of Plaintiff's Complaint. However, that paragraph merely sets forth a single example of when Plaintiff submitted certain applications pursuant to the contract and was not paid for those submissions. It does not indicate a place of submission, or aid in making the legal determination of where the contract was accepted or performed.

California. *Id.* at ¶ 5. However, "plaintiff's domicile has a minimum interest in the interpretation of a contract negotiated out of state between two parties domiciled elsewhere." *Costco,* 472 F.Supp.2d at 1199. Both Alaska Airlines and Horizon Airlines are incorporated in Washington and have their principal places of business in Washington. *See,* Complaint at ¶¶ 7-8. As airlines, these companies serve customers in numerous states, including California and Washington, however their interactions with their employees, including the terms of the contract at issue, are issued from their headquarters in Washington. *Id.* ¶ 41.

BOA is incorporated and has its principal place of business in Delaware. *Id.* at ¶ 6. BOA does business in the states of both California and Washington. The place that both the airlines and BOA do business with Plaintiff is Washington, where the unilateral offer to contract was issued, and where employees are paid for their participation in the program and receive wage statements from the airlines containing the payments for their participation. *Id.* at ¶¶ 27-28. Therefore, under this analysis, Washington law should apply as that state is the place of the airlines' incorporation, a state where *all* of the parties do business, and where Plaintiff is subject to the employment practices of the airlines and payment by BOA under the terms of the contract.

C. <u>Governmental Interest Analysis</u>

California Courts also utilize the "governmental interest analysis" when determining which state's laws apply. The first step in the test is to "identify the applicable rule of law in each potentially concerned state and [] show it materially differs from the law of California." *Costco,* 472 F.Supp.2d at 1198 (citations omitted). The second step is to "determine what interest, if any, each state has in having its own law applied to the case." *Id.* If the state with the materially different law has an interest in the application of its law, the third step is to "select the law of the state whose interests would be 'more impaired' if the law were not applied." *Id.* (citations

omitted).[7] The choice of law inquiry also "considers each jurisdiction's relevant contacts with the parties, property and the incident involved in order to compare the genuine interests of each jurisdiction having its laws applied." *Id.* (citations omitted). The analysis of the governmental interest of California versus Washington follows.

1. Applicable Law

a. Washington state law

i. Contract law

Under Washington law, "for a valid contract to exist, there must be mutual assent, offer, acceptance, and consideration" and "valid contract requires a meeting of the minds on the essential terms." *In re Marriage of Obaidi and Qayoum*, 226 P.3d 787, 790 (Wash.App. Div. 3,2010). A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Northwest Independent Forest Mfrs. v. Department of Labor and Industries*, 899 P.2d 6, 9 (Wash.App. Div. 2, 1995). The statute of limitations in Washington is six years for "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement." RCWA 4.16.040. Although a cause of action generally accrues upon breach, the statute of limitations may be tolled by concealment of material facts, misrepresentations, or a promise to pay in the future. *Stueckle v. Sceva Steel Bldgs*., Inc., 461 P.2d 555, 557 (Wash.App. 1969). Generally, a party injured by breach of contract is entitled (1) to recovery of all damages that accrue naturally from the breach and (2) to be put into as good a pecuniary position as he would have had if the contract had been performed. *Columbia Park Golf Course, Inc. v. City of Kennewick*, 248 P.3d 1067, 1076 (Wash.App. Div. 3, 2011) (citations omitted).

[7] "The impairment analysis includes a determination of (A) each state's relative commitment to its rule, (B) the history and current status of the different rules, and (C) the function and purpose of those rules." *Id.*

ii. Unjust enrichment

"Unjust enrichment is the method of recovery for the value of the benefit retained absent any contractual relationship because notions of fairness and justice require it." *Young v. Young*, 191 P.3d 1258, 1262 (Wash. 2008). A claim of unjust enrichment requires (i.e., the elements of a contract implied in law are) that: (1) the defendant receives a benefit, (2) the received benefit is at the plaintiff's expense, and (3) the circumstances make it unjust for the defendant to retain the benefit without payment. *Id.* A person is unjustly enriched when he or she profits or enriches himself or herself at the expense of another contrary to equity. *First American Title Ins. Co. v. Liberty Capital Starpoint Equity for Fund, LLC,* --- P.3d ----, No. 65251–6–I–I, 2011 WL 2449276, *7 (Wash.App. Div. 1, Feb. 28, 2011) (citations omitted). The doctrine of unjust enrichment applies only if the circumstances of the benefits received or retained make it unjust for the defendant to keep the benefit without paying. *Chandler v. Wash. Toll Bridge Auth.*, 137 P.2d 97 (Wash. 1943). Where the party seeking recovery is not at fault, reasonable value is measured by the amount which the benefit conferred would have cost the defendant had it obtained the benefit from some other person in the plaintiff's position. *Noel v. Cole*, 98 Wash.2d 375, 655 P.2d 245, 250 (Wash.,1982), citing Restatement (Second) of Contracts § 371, comment b (1981); 12 S. Williston, Contracts § 1485 (3d ed. 1970).

b. California state law

i. Contract law

Under California law, "[i]t is essential to the existence of a contract that there should be: 1. Parties capable of contracting; 2. Their consent; 3. A lawful object; and, 4. A sufficient cause or consideration." Cal. Civ. Code § 1550. The essential elements of a breach of contract claim under California law are: "(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff." *Reichert v. General Ins. Co.*, 68 Cal.2d 822, 830 (1968). The statute of limitations in California is four years for "[a]n action upon any

contract, obligation or liability founded upon an instrument in writing…." Cal. Code Civ. Proc. § 337. "[I]n ordinary tort and contract actions, the statute of limitations ... begins to run upon the occurrence of the last element essential to the cause of action." *El Pollo Loco, Inc. v. Hashim*, 316 F.3d 1032, 1039 (9th Cir. (Cal.), 2003) (citations omitted).

The discovery rule only applies to breach of contract cases when: 1) "[t]he injury or the act causing the injury, or both, have been difficult for the plaintiff to detect"; 2) "the defendant has been in a far superior position to comprehend the act and the injury"; or 3) "the defendant had reason to believe the plaintiff remained ignorant [that] he had been wronged." *Id.* The rationale underlying application of the discovery rule is that "plaintiffs should not suffer where circumstances prevent them from knowing they have been harmed ... [and] defendants should not be allowed to knowingly profit from their injuree's ignorance." *Id.* Thus, whether the statute of limitations will be tolled in a breach of contract action is dependent upon the claims and facts alleged.[8] *See, id., see also, April Enter., Inc. v. KTTV and Metromedia, Inc.*, 195 Cal.Rptr. 421, 435 (1983) (applying the discovery rule to breach of contract actions in narrow cases involving fraud or misrepresentation). As for damages, "[f]or the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom." Cal. Civ. Code § 3300.

ii. Unjust enrichment

It was recently held that:

[8] It is not certain whether the statute of limitations would be tolled where, as here, the Complaint alleges that BOA does not provide Plaintiff or Class members with any accounting of the number of applications that have been submitted by Planti9ff and Class members and those that BOA considers "processed" and/or those that it approves." Complaint at ¶34. And Plaintiff and Class members have no independent means of verifying whether applications that are submitted with employee information (either by the employee or the applicant) are considered by BOA to be "processed" and/or "approved." *Id.* at ¶35.

> [a]lthough the authority on this issue is somewhat split, the more recent and well-reasoned cases hold that "unjust enrichment does not describe a theory of recovery, but an effect: the result of a failure to make restitution under circumstances where it is equitable to do so." *In re Toyota Motor Corp. Unintended Acceleration Marketing, Sales*, 754 F.Supp.2d 1145, 2010 WL 4867562, at *39 (C.D.Cal.2010) (*quoting Melchior v. New Line Prod., Inc.*, 106 Cal.App.4th 779, 793, 131 Cal.Rptr.2d 347 (2003)). *See also id.* ("Unjust enrichment is a general principle, underlying various legal doctrines and remedies, rather than a remedy itself. Simply put, there is no cause of action in California for unjust enrichment."); *Multifamily Captive Group, LLC v. Assurance Risk Managers, Inc.*, 578 F.Supp.2d 1242, 1250 n. 13 (E.D.Cal.2008) ("The Court notes that there is no cause of action in California for unjust enrichment.").

Tait v. BSH Home Appliances Corp., No. SACV 10–711 DOC (ANx), 2011 WL 1832941, *6 (C.D.Cal. May 12, 2011). An argument for the existence of a cause of action for unjust enrichment in California can be made under prior precedent. The elements for a claim of unjust enrichment under California law are "(1) receipt of a benefit, and (2) unjust retention of the benefit at the expense of another." *See, e.g., Lectrodryer v. SeoulBank*, 77 Cal.App.4th 723, 726, (2000). "Under ... California ... law, unjust enrichment is an action in quasi-contract, which does not lie when an enforceable, binding agreement exists defining the rights of the parties." *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1167 (9th Cir.1996).

c. The laws of California and Washington materially differ

"A state's law is materially different from California law if application of the other state's law leads to a different result." *Costco*, 472 F.Supp.2d at 1199. As is clear from the foregoing, the laws of California and Washington materially differ. The first material difference regards the elements of a contract. Specifically, to establish breach of contract, California law requires that plaintiff prove that he performed or that he has an excuse for non-performance. Washington, on the other hand, requires proof that the contract imposes a duty on the defendant. These are distinct elements and cannot be proven by the same evidence such that if Plaintiff were to prove the elements

from one state, he would not meet the requirements of proving a contract under the other states' law.

The second material difference involves the statute of limitations and tolling for contract claims. California only has a four year statute of limitations and allows for tolling where plaintiff is able to prove that "[t]he injury or the act causing the injury, or both, have been difficult for the plaintiff to detect"; 2) "the defendant has been in a far superior position to comprehend the act and the injury"; or 3) "the defendant had reason to believe the plaintiff remained ignorant [that] he had been wronged." On the other hand, Washington provides for a six year statute of limitations and tolls the statute upon proof of concealment of material facts, misrepresentations, or a promise to pay in the future. Thus, application of one state's laws versus the other will result in a different result regarding the time period for which Plaintiff can bring claims. In addition, California has a much more specific requirement, and places a higher burden on Plaintiff, to prove that the statute of limitations should be tolled.

The third material difference arises from the two states' laws regarding the existence of a claim for unjust enrichment. California law, arguably, does not recognize such a claim. Indeed, while Plaintiff can, and will, certainly argue for the existence of a cause of action for unjust enrichment if this Court finds that a contract does not, in fact exist, it is not clear whether such a claim will ultimately be recognized under California law. Washington, on the other hand, does recognize such a cause of action and would allow Plaintiff to recover damages in an amount which the benefit conferred would have cost Defendants had they obtained the benefit from some other person in the plaintiff's position. Thus, application of California law as opposed to Washington law would lead to a much different result.

2. States' interest in having its laws applied and in the outcome of this litigation

a. Washington's interest in having its laws applied to this case

Washington has a significant interest in having its laws applied to this case. First, the parties to this litigation all have contacts with Washington. Both Alaska and Horizon are incorporated and have their principle place of business in the state and they do business from the state. BOA does business in Washington as well. Plaintiff is employed by a Washington company. Washington has a legal interest in the conduct of Washington corporations, and corporations who do business in Washington, regardless of where the conduct takes place.

Second, the offer to contract was issued to Plaintiff and Class members from Washington. *See,* Complaint, ¶41. Washington has an interest in the application of its laws to conduct within its borders. Third, Washington has an interest in applying its law where the relationship of the parties is based. Although this is not a dispute arising out of a contract of employment, the employment relationship between Class members and the airlines is based in Washington. *See,* Complaint, ¶40. Indeed, but for the employment relationship between Plaintiff and the airlines, the circumstances giving rise to the current litigation would not have existed. Finally, the payments arising under the contract are made to Plaintiff and Class members as part of their wages and appear on their wage statements, which are issued in Washington by the airlines who are Washington companies. *See,* Complaint, ¶28.

b. California's interest in having its laws applied to this case

As the forum state, California has an interest in applying its law to this case. *Costco*, 472 F.Supp.2d at 1201. However, California law acknowledges another state's interest in the application of that state's law where the events giving rise to the litigation took place within that state's borders. *Id.* Here, the Complaint alleges that the offer to contract that was made from Washington, *see, e.g.*, Complaint, ¶40-41, the later acceptance of the offer by performance in an undetermined state (or states), and the payment from Washington for services rendered, *id.*¶28. For certain, California has an interest in applying its law to residents of its state, particularly in the employment context. Here, however, the employment relationship between Plaintiff

and the airlines is based in Washington and the conduct at issue is not based on the employment relationship. As such, the failure to apply California law would only minimally impair California's interests.

3. Washington's interests would be more impaired if its law is not applied

If the state with the materially different law has an interest in the application of its law, the third step is to "select the law of the state whose interests would be 'more impaired' if the law were not applied." *Costco,* 472 F.Supp.2d at 1198. Each jurisdiction's relevant contacts with the parties, property and the incident involved must also be considered in order to compare the genuine interests of each jurisdiction having its laws applied. *Costco,* 472 F.Supp.2d at 1198.

As a preliminary matter, "[t]he balancing of impairment is slightly weighted by California's general preference for applying its own law." *Engel v. CBS Inc.*, 981 F.2d 1076, 1080-1081 (9th Cir. (Cal.) 1992) (citations omitted). Indeed, California also has contacts with the parties in that Plaintiff resides in California and the Defendants each do business in the state. However, the business that Defendants perform in California is unrelated to the specific issue in this litigation. In addition, the fact that Alaska and Horizon are airlines, and BOA is a bank and credit card provider, who service customers in this state, is irrelevant as regards the specific wrongful conduct alleged in this case involving Plaintiff's and Class members' participation in the program. Thus, these contacts with California do not increase California's interest in having its law applied nor support that such interest would be impaired if it were not done. Finally, applying Washington will not materially impair California's interest because the parties are disputing the terms of an agreement that is not tied to the state.

On the other hand, applying California law will greatly impair Washington's interests. As was discussed above, Washington has significant contacts with the parties (two of which are incorporated therein, one of which is employed by an employer therein, and all of which do business in the state) as regards the offer itself

which was made from Washington. Indeed, Washington has a great interest in the issues in this action because of its ties not only to the parties, but to the agreement itself. Failure to apply Washington law would disrupt that state's ability to govern the formation of contracts within its borders and the parties to those contracts who are incorporated and/or do business in the state. Further, failure to apply Washington law would impair Washington's interests in allowing recovery to be had for conduct occurring 6 years following a breach, and for the statute of limitations to be tolled to allow an even longer period of recovery. Finally, failure to apply Washington law would impair Washington's interests in allowing recovery for conduct that occurs within its borders to be compensable in equity (unjust enrichment).

In sum, the application of the governmental interest analysis dictates that this Court apply Washington law to the claims in this action.

V. PLAINTIFF HAS STATED A CLAIM FOR BREACH OF CONTRACT AGAINST THE AIRLINES UNDER WASHINGTON LAW

As stated previously, "for a valid contract to exist, there must be mutual assent, offer, acceptance, and consideration" *In re Marriage of Obaidi and Qayoum*, 226 P.3d at 790. Here, Plaintiff has pled each of these requirements. On the issue of "offer," Plaintiff specifically alleges that "[t]he terms and conditions of the contract relating to the Bank of America Visa/MBNA MasterCard incentive program were, and are, presented to Alaska Airlines or Horizon Airlines employees directly by the airlines through various means including web, email, flyers, representatives from Bank of America and the airlines' liaison to Bank of America." Complaint, ¶17. "Pursuant to the Bank of America Visa/MBNA MasterCard incentive, Bank of America agreed to pay certain sums to Alaska Airlines or Horizon Airlines employees for credit card applications that are submitted to Bank of America. *Id.* at ¶19.

"Alaska Airlines and Horizon Airlines employees are offered a sum certain for each 'approved' credit card application that is submitted to Bank of America and, during various times, are also offered a sum certain for each 'processed' credit card

application that is submitted to Bank of America, regardless of whether the application is ultimately approved. 'Processed' applications are those which contain sufficient customer information to facilitate an 'accept' or 'decline' decision. *Id.* at ¶20. "If Bank of America approves the credit card application, it is bound by the terms of the contract to pay Plaintiff and Class members a fixed incentive amount (which has varied during the Class Period and is, under the current contract, $45)." *Id.* at ¶24. "At various times during the Class Period, Plaintiff and Class members are also offered additional incentives for simply submitting 'processed' applications, whether or not they are approved." *Id.* at ¶25. "During those periods of time when an additional incentive applies to the Bank of America Visa/MBNA MasterCard incentive program, Bank of America is bound by the terms of a revised contract to pay Plaintiff and Class members a fixed incentive amount (which has varied during the Class Period and is, under the current contract, $5) for each processed application." *Id.* at ¶26.

In addition, "Alaska Airlines and Horizon Airlines issue prizes (including gift cards and products) to 'top performers' of the Bank of America Visa/MBNA MasterCard incentive program to encourage employee participation." *Id.* at ¶30. Also, "Bank of America also donates a fixed amount into the airlines' Employee Assistance Fund for every approved application." *Id.*at ¶29. Thus, these are the general terms of the offer made to Plaintiff and Class members.

As regards acceptance, Plaintiff alleges that: "[t]o participate in the Bank of America Visa/MBNA MasterCard incentive program, airline employees distribute pre-printed credit card applications for either the Bank of America Visa card or the MBNA MasterCard to third parties, including, but not limited to, the airlines' customers." *Id.* at ¶21. The Complaint also notes that "Plaintiff began participating in the credit card incentive program in or about March, 2005," *id.* at ¶5, and "Plaintiff and Class members accepted Bank of America's offer to contract by submitting credit card applications…." *Id.* at ¶58. In addition, "the various modifications to the contract terms relating to the additional, or increased, incentive payments by Bank of America,

and prizes offered by the airlines, were similarly accepted by the performance of Plaintiff and Class members after the revised terms were presented to them by all Defendants." *Id.* at ¶60. Also here, there was mutual assent by the parties as to the terms of the contract. Indeed, mutual assent is demonstrated by the conduct of Plaintiff and Class members in obtaining applications from the airlines and submitting those applications to BOA, *id.* at ¶58, by the conduct of BOA in providing payments for some sums due, by the conduct of the airlines including payments on wage statements, *id.* at ¶28, and in providing prizes to Class members. *Id.* at ¶30.

On the issue of consideration, BOA clearly receives consideration as a result of Bank of America issuing "Alaska Airlines" branded Visa and MasterCard credit cards. *Id.* at ¶12. Indeed, "[i]n the last four months of 2010, employee participation in the Bank of America Visa/MBNA MasterCard incentive program increased 26% which resulted in nearly a 350% increase in new Alaska Airlines credit card accounts for Bank of America and partnership dollars for the airlines." *Id.* at ¶33.

In addition, the airlines receive significant consideration. "Alaska Airlines and Horizon Airlines are paid by Bank of America for the miles they credit to cardholders' mileage plan accounts….In 2009, over $300 million dollars was paid to Alaska Airlines as a result of this credit card partnership." *Id.* at ¶¶14-15. Further, the promised payments set forth above are the consideration received by Plaintiff and Class members for their participation in the program. Therefore, Plaintiff has pled the existence of a contract as between the airlines and BOA on the one hand, and Plaintiff and Class members on the other.

In addition, Plaintiff has pled breach of that contract. Plaintiff must prove that the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant. *Northwest Independent Forest Mfrs.*, 899 P.2d at 9. Here, as alleged in the Complaint, in exchange for their participation in the program, the contract clearly imposes a duty on BOA and the airlines to pay Plaintiff and Class members certain sums and to give them gift cards and other products. Indeed, Plaintiff

has pled that "[a]t such time as Plaintiff and Class members [performed] the act of submitting credit card applications, a contract was formed and Bank of America thereafter had a duty to pay certain pre-set sums under the terms of the contract." Complaint, ¶59. In addition, the contract obligated the airlines to provide gift cards and other products, but also to pay the amounts earned by Plaintiff and Class members as part of their wages. *Id. at* ¶¶ 28, 55.

Plaintiff has also pled that Defendants have breached that duty. Indeed, "Bank of America does not provide Plaintiff or Class members with any accounting of the number of applications that have been submitted by Plaintiff and Class members and those that Bank of America considers 'processed' and/or those that it approves." *Id.* at ¶34. In addition, "Bank of America failed to pay Plaintiff and Class members all sums due under the Bank of America Visa/MBNA MasterCard incentive program and, therefore, were, and are, in breach of the contract relating to that program." *Id.* at ¶61. "By way of a single example only, and without limitation, in 2007 Plaintiff himself submitted approximately 1000 applications completed by members of his large church. He thereafter surveyed the applicants and determined that approximately 509 of those applications were approved by Bank of America. However, despite waiting for three months and beyond, no payment related to these approved applications was ever deposited into his paycheck, as was required under the contract." *Id.* at ¶37. Further, Plaintiff alleges that he "is informed and believes that Class members are also similarly not being compensated by Bank of America for all 'processed' and/or approved applications pursuant to the terms of the contract." *Id.* at ¶38.

Finally, Plaintiff has pled that Defendants' breach proximately caused damage to him and Class members. Indeed, the same is demonstrated by his allegation that "Bank of America failed to pay Plaintiff and Class members all sums due under the Bank of America Visa/MBNA MasterCard incentive program…." *Id.* at ¶61. More specifically, Plaintiff alleges that "[a]s a direct and proximate result of Bank of America's breach and failure to pay Plaintiff and Class members all sums due under

the Bank of America Visa/MBNA MasterCard incentive program, Plaintiff and Class members have been damaged in the amount of the incentive payments due to them under the contract, which sums are to be determined at the time of trial." *Id.* at ¶62. Indeed, but for the fact that BOA has not paid Plaintiff and Class members for all sums due as a result of their participation in the program, Plaintiff and Class members would have suffered no damage at all. As contracting parties, the airlines are also liable to Plaintiff and Class members for breach of the contract by BOA. *See, e.g., In re Tamen*, 22 F.3d 199 (9th Cir. 1994).

In sum, Plaintiff has pled a claim for breach of contract under Washington law. Plaintiff has alleged an express written contract between Defendants and Plaintiff and Class members and has set forth the essential terms thereof. In addition, Plaintiff has alleged that the Defendants had a duty to pay Plaintiff and Class members certain amounts (or to give them certain items). Finally, Plaintiff has pled that Defendants' breach proximately caused damage to him and Class members. As such, the Complaint alleges more than enough facts to state a claim for relief that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*). Therefore, Defendants' Motion to Dismiss this claim should be denied.

VI. EVEN IF CALIFORNIA LAW APPLIES, PLAINTIFF HAS STATED A CLAIM FOR BREACH OF CONTRACT AGAINST THE AIRLINES

Plaintiff has pled the essential elements of a breach of contract claim under California law. First, Plaintiff has pled the existence of a contract under California Civil Code § 1550. Specifically as pertains to the written agreement discussed in section III., above, there are parties capable of contracting, to wit: the airlines, BOA and Plaintiff were under no disabilities that would prevent them from entering into a contract. Further, the parties have clearly consented to contract. The airlines and BOA implicitly consented when they made the offer to contract and Plaintiff consented by performing the act required to make the contract. *See, e.g.*, Complaint ¶58. As discussed in section V., above, there was sufficient consideration. Indeed, Plaintiff and

Class members performed their responsibilities under the contract. *Id.* ("Plaintiff and Class members accepted Bank of America's offer to contract by submitting credit card applications…").

Plaintiff has also pled that Defendants have breached that duty for the reasons set forth in section V., above. Finally, Plaintiff has pled that Defendants' breach resulted in damage to him and Class members. Indeed, the same is demonstrated by his allegation that "Bank of America failed to pay Plaintiff and Class members all sums due under the Bank of America Visa/MBNA MasterCard incentive program…." *Id.* at ¶61. More specifically, Plaintiff alleges that "[a]s a direct and proximate result of Bank of America's breach and failure to pay Plaintiff and Class members all sums due under the Bank of America Visa/MBNA MasterCard incentive program, Plaintiff and Class members have been damaged in the amount of the incentive payments due to them under the contract, which sums are to be determined at the time of trial." *Id.* at ¶62. As contracting parties, the airlines are also liable to Plaintiff and Class members for breach of the contract by BOA. *See, e.g., In re Tamen,* 22 F.3d 199 (9th Cir. 1994). In sum, Plaintiff has pled a claim for breach of contract under California law.

VII. PLAINTIFF HAS STATED AN ALTERNATIVE CLAIM OF UNJUST ENRICHMENT OF THE AIRLINES UNDER WASHINGTON LAW

In the alternative to his breach of contract claim, Plaintiff has pled the essential elements of an unjust enrichment claim under Washington law. Specifically, Plaintiff has pled that the airlines and BOA have received a benefit at Plaintiff's and Class members' expense. For example, Plaintiff has pled that "[i]n the last four months of 2010, employee participation in the Bank of America Visa/MBNA MasterCard incentive program increased 26% which resulted in nearly a 350% increase in new Alaska Airlines credit card accounts for Bank of America and partnership dollars for the airlines." *Id.* at ¶33. In addition, "Alaska Airlines and Horizon Airlines are paid by Bank of America for the miles they credit to cardholders' mileage plan

accounts….In 2009, over $300 million dollars was paid to Alaska Airlines as a result of this credit card partnership." *Id.* at ¶¶14-15.

Indeed, Plaintiff and Class members actively market the Alaska Airlines branded Visa and MasterCard to third parties. Under these circumstances, where Plaintiff and Class members are submitting applications to BOA that result in new credit card customers (or revised terms with existing customers) and that also result in new airline customers (or in increasing existing customer loyalty) and marketing dollars for the airlines, the airlines and BOA are gaining significant financial (and other) benefits as a result of Plaintiff's and Class members' efforts. The airlines and BOA are therefore directly profiting at the expense of Plaintiffs and Class members efforts. Without the efforts of Plaintiff and Class members in working to solicit applications to be made to BOA, the airlines and BOA would not have received these profits. It would thus be unjust for these entities to retain the benefit without payment to Plaintiff and Class members.

VIII. EVEN IF CALIFORNIA LAW APPLIES, PLAINTIFF'S CLAIM OF UNJUST ENRICHMENT OF THE AIRLINES HAS BEEN PROPERLY PLED

Again, if the court finds that there is not a binding, enforceable agreement in this case, Plaintiff has pled that Defendants have been unjustly enriched under California law. For the same reasons as are set forth in section VII., above, it is clear that Defendants have received a benefit as a result of the efforts of Plaintiff and Class members and that it would be unjust for Defendants to retain that benefit at the expense of Plaintiff and Class members.

IX. SHOULD THE COURT FIND PLAINTIFF'S COMPLAINT DEFICIENT IN ANY RESPECT, PLAINTIFF REQUESTS LEAVE TO AMEND

If the Court finds that Plaintiff's Complaint is insufficient as to any specific defendant, or claim, Plaintiff hereby requests leave under Rule 15 of the Federal Rules of Civil Procedure to amend his complaint to correct the defects identified by the Court

and to add additional necessary factual allegations. Rule 15 provides that "[t]he court should freely give leave when justice so requires." Rule 15(a)(2). The United States Supreme Court has stated that the liberal amendment policy of Rule 15(a) is a mandate to be heeded. *Foman v. Davis*, 371 U.S. 178, 182, 83 S. Ct. 227, 230, 9 L. Ed. 2d 222 (1962). The Supreme Court described that policy as follows:

> if the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason -- such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc. -- the leave sought should, as the rules require, be 'freely given.' Of course, the grant or denial of an opportunity to amend is within the discretion of the District Court, but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion; it is merely abuse of that discretion and inconsistent with the spirit of the Federal Rules.

Id. As the Supreme Court has also noted, the rationale of Rule 15 "is that a party who has been notified of litigation concerning a particular occurrence has been given all the notice that statutes of limitations were intended to provide." *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, at 149-150 n.3, 104 S. Ct. 1723, at 1725 n.3, *citing* 3 J. Moore, Moore's Federal Practice, P 15.15[3], p. 15-194 (1984).

Here, Plaintiff seeks leave to amend at the nascent stages of this litigation. Thus, there is no undue delay, bad faith, or dilatory motive apparent on the part of the Plaintiff. In addition, at this early stage, Defendants will have ample opportunity to meet all issues. Therefore, in this case, justice requires that Plaintiff be allowed to amend his Complaint so as to present the Court with the merits of his claims against Defendants. Therefore, should the Court find Plaintiff's Complaint insufficient as to any specific issue, the Court should grant Plaintiff's request to amend his pleadings.

At a minimum, Plaintiff respectfully requests that any dismissal entered by the Court be *without prejudice*.

X. CONCLUSION

In sum, Plaintiff's Complaint meets the requirements of Rule 8, and the Supreme Court case law interpreting it, and states claims upon which relief can be granted against Defendants. Therefore, Defendants' Motion to Dismiss should be denied. In the alternative, should this Honorable Court find that Plaintiff's Complaint is insufficient in any respects, Plaintiff hereby requests leave to amend under Rule 15 of the Federal Rules of Civil Procedure.

[SIGNATURES]