

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
MASTERCARD INTERNATIONAL
INCORPORATED,

Plaintiff,

v.

FÉDÉRATION INTERNATIONALE DE
FOOTBALL ASSOCIATION,

Defendant.
-----X

06 Civ. 3036 (LAP)

**AMENDED
FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Introduction

Fédération Internationale de Football Association (“FIFA”) is the worldwide governing body of soccer and the organizer of the FIFA World Cup, a once-every-fourth-year tournament that its president calls “the world’s largest and most beloved sporting event.” As befits a sporting organization of this stature and renown, FIFA’s slogan is “fair play.”

MasterCard, the payment card services provider, has sponsored the World Cup in the financial services category for the last four cycles or sixteen years. Section 9.2 of MasterCard’s most recent sponsorship contract with FIFA gave MasterCard the first right to acquire the FIFA World Cup sponsorship for the next cycle. As is set out in detail below, FIFA breached its obligation under Swiss contract law to give MasterCard the first right to acquire the next round of sponsorship. In addition, **FIFA’s conduct in performing its obligation and in**

negotiating for the next sponsorship cycle was anything but "fair play" and violated the heightened obligation of good faith imposed by the applicable Swiss law (as well as FIFA's own notion of fair play as explained by its president). For example:

FIFA's negotiators lied repeatedly to MasterCard, including when they assured MasterCard that, consistently with MasterCard's first right to acquire, FIFA would not sign a deal for the post-2006 sponsorship rights with anyone else unless it could not reach agreement with MasterCard.

FIFA's negotiators lied to VISA when they repeatedly responded to the direct question of whether MasterCard had any incumbency rights by assuring VISA that MasterCard did not.

FIFA's negotiators provided VISA with blow-by-blow descriptions of the status of the FIFA-MasterCard negotiations while concealing from its long-time partner MasterCard both the fact of the FIFA-VISA negotiations as well as the status of those negotiations – an action FIFA's president admitted would not be "fair play."

FIFA's marketing director lied to both MasterCard, FIFA's long-time partner, and to VISA, its negotiating counterparty, to both of which FIFA, under Swiss law, owed a duty of good faith. When, pursuant to his engineering, VISA raised its bid to the same level as MasterCard's, he declined his subordinates' suggestion to give MasterCard the opportunity to submit a higher bid based on his concern for his own reputation with the FIFA Board. He also declined his subordinates' recommendation that he recommend to the FIFA Board that it continue with its prior approval of MasterCard as the post-2006 sponsor. Instead, he told the board it was difficult for him to make a recommendation and never mentioned MasterCard's first right to acquire the post-2006 sponsorship.

On the morning of the first of March 2006 FIFA board meetings and after all three FIFA boards had previously approved MasterCard as the post-2006 sponsor, FIFA's marketing director called VISA to say that if VISA increased its cash bid by \$30 million to the level of MasterCard's bid, VISA "would be the partner."

Even after MasterCard had signed the "FINAL version" of the post-2006 sponsorship agreement and returned it to FIFA, FIFA's negotiators delayed telling MasterCard that the FIFA Board had chosen VISA; instead they waited for the VISA board to ratify the VISA agreement.

After the FIFA boards had approved MasterCard as post-2006 sponsor and after MasterCard had agreed to FIFA's asking price and agreement had been reached on all other terms and after FIFA's in-house counsel had solicited FIFA members for items that might be used to claim that MasterCard breached the Agreement, FIFA pointed to a trademark issue that had been present since 2000 or 2001 to justify granting the post-2006 sponsorship to VISA and sent a letter to MasterCard -- after the commencement of this lawsuit -- purporting to terminate the Agreement and thus MasterCard's first right to acquire.

After MasterCard and FIFA waived, under Swiss law, both the 90-day time periods set out in section 9.2 by their "conclusive conduct," FIFA now seeks retroactively to revive one of the 90-day periods, but not the other, to justify its choice of VISA for the post-2006 sponsorship.

While the FIFA witnesses at trial boldly characterized their breaches as "white lies," "commercial lies," "bluffs," and, ironically, "the game," their internal emails discuss the "different excuses to give to MasterCard as to why the deal wasn't done with them," "how we (as FIFA) can still be seen as having at least some business ethics" and how to "make the whole f***-up look better for FIFA." They ultimately confessed, however, that "[I]t's clear somebody has it in for MC."

Thus, as set out in detail below, FIFA has breached its obligation under section 9.2 to give MasterCard the first right to acquire the post-2006 sponsorship, both under the applicable Swiss contract law and the applicable Swiss law requiring good faith. Because section 22 of the parties' Agreement permits the Court to grant equitable relief upon a finding of breach, the only equitable result is that FIFA be prohibited from proceeding with the subsequent FIFA-VISA agreement and be required to proceed with the 2007-2014 MasterCard Agreement that the parties agreed to and MasterCard signed and returned to FIFA.

The Parties

1. MasterCard is a corporation organized under the laws of the State of Delaware and having its principal place of business in Purchase, New York. (Complaint ¶ 5; Answer ¶ 5). MasterCard provides an inter-face for credit, deposit, electronic cash, business-to-business and other payment transactions between the over 25,000 financial institutions in its

211. Mr. Blatter then did his part to steer the FIFA Board's decision in favor of VISA. Addressing the FIFA Board, he "clearly stated that he was not aware that FIFA had a partner that was attacking the organization, and that FIFA should not accept threats" (Pl. Ex. 8; Fischer Tr. 57/21-57/24) – this, despite admitting in testimony that he had been aware of the trademark dispute between MasterCard and FIFA since "about the year 2000 or 2001" and that the dispute was no obstacle to his signing the sponsorship agreement with MasterCard in 2002 for the 2006 FIFA World Cup. (Blatter Tr. 158/6-159/14). Urs Linsi, the General Secretary of FIFA, then interjected "that MasterCard has not always been an easy partner" and that he expected MasterCard to cease its challenges to FIFA's marks "when entering negotiations." (Pl. Ex. 8).

212. Based on these proceedings, the FIFA Board decided on March 14, 2006: "Subject to contract, a deal with Visa in the financial services category will be signed." (Pl. Ex. 8). Neither Mr. Valcke nor anyone else on his team informed Mr. Stuart of MasterCard of the FIFA Board's decision.

213. Chuck Blazer, a member of the FIFA Executive Committee and the FIFA Marketing & TV AG Board (Trial Tr. p. 230, l. 20-22), testified as to the March 14, 2006 FIFA Marketing & TV AG Board meeting.

Mr. Blazer's testimony was generally without credibility based on his attitude and demeanor and on his evasive answers on cross-examination.⁹

⁹ For example:

Q. So it was okay in your view for Mr. Valcke to string John Stuart along for a few weeks until VISA ratified the deal?

A. I think it was okay for us to come back and make a determination at some point as one might have been needed again if the circumstances had turned out differently.

Q. Okay

A. It's too early to know the answer to that question. I'm not pressing it.

Q. I have no idea what you just said, Mr. Blazer.

A. Well, then, let me try it again for you.

Q. Let me try the question again.

A. I don't think I need it over again. I understood it. What I'm saying to you is, without

214. More particularly, Mr. Blazer testified on direct to comments that he supposedly made at the Marketing & TV AG Board meeting about FIFA's trademark issue with MasterCard to the effect that proceeding with MasterCard with the trademark issue outstanding was "unacceptable." (Trial Tr. p. 249, l. 7). Not only do Mr. Blazer's comments not appear in the official minutes of the meeting (Pl. Ex. 362, Bates # F15778-15801), but they do not appear in the handwritten notes from which the meeting secretary, Ms. Petra Fischer, prepared the minutes. (Pl. Ex. 362, Bates # F15802-15822). Mr. Blazer's supposed comments were serious and substantive and not the kind of remark that would have been omitted from the minutes,

knowing the course of events over the ensuing days, it is impossible to determine how that would have turned out. For example, had VISA not –

THE COURT: How does that answer the question?

THE WITNESS: How does it answer the question? Because he wanted to know --

[THE COURT: "Question: So it was okay in your view for Mr. Valcke to string John Stuart along for a few weeks until VISA ratified the deal?"]

THE WITNESS: Because I don't believe --

THE COURT: "Answer --

THE WITNESS: I don't think he was stringing him along.

THE COURT: Do you want to hear your answer or not? "I think it was okay for us to come back and make a determination at some point as one might have been needed again if the circumstances had turned out differently."

THE WITNESS: What I'm saying is I don't believe we were stringing him along. Is that it quite possibly could have been that the matter itself would have been up for discussion had it been that VISA did not approve.

Q. Mr. Blazer --

THE WITNESS: In other words, the concept of stringing somebody along is that there is nothing at the end, and I don't presume that we did something bad by not telling him that VISA was in and they were going to be out based on the decision that had been taken at that point in the meeting by the executive committee.

Since until the deal with VISA would be concluded, there was no closure on any of these issues. So it would have been required that the deal be closed for the category A to be closed and if not the category to be closed, then for any other category alternatively, but no decision had been taken with regard to any alternatives. So you start out first, the objection I have with the problem that he's referring to it as stringing him along. I don't believe we were stringing him along. I believe we were dealing fairly, given the circumstances, and that's why I answered it in that way. (Trial Tr. p.278, l. 11 – p.280, l. 11). (See also Trial Tr. p.256, l. 20 – p.259, l. 17) (where Mr. Blazer initially stated he did not "feel competent to answer" whether he considered a signed contract by a proposed sponsor as an offer that the Executive Committee is free to accept or reject but eventually conceded after being confronted with his deposition testimony).

particularly by a careful and competent secretary, as Mr. Blazer testified Ms. Fischer was. (Trial Tr. p. 261, l. 11-22).¹⁰ Indeed, Mr. Blazer testified that he does not recall having made any corrections to any of the minutes Ms. Fisher prepared. (Trial Tr. p. 262, l. 1-3). Thus, for that reason and based on his evasive answers and his attitude and demeanor, Mr. Blazer's testimony as to the March 14, 2006 Marketing & TV AG Board meeting is rejected as fabricated.

215. The next day, on March 15, 2006, the FIFA Finance Committee was scheduled to meet. At that time, however, FIFA had not agreed on a long-form contract with VISA and had no commitment from VISA to pay the \$180 million asking price other than Mr. Shepard's telephone call with Mr. Valcke the preceding day. The two sides thus devoted much of the day to confirming and documenting VISA's commitment to do the deal that the FIFA Board had just approved.

216. To that end, Mr. Rodrigues called Mr. Blatter to personally assure him that VISA had accepted the discussed terms. (Pl. Ex. 92).

217. Mr. Houseman, who the day before acknowledged "the urgency involved" and his willingness to "remain on stand-by to deal with any last minute" drafting changes (Pl. Ex. 418), and Mr. McCleary, in-house counsel of VISA, continued to negotiate the terms of the long-form agreement. (Pl. Exs. 43 & 46). Mr. Houseman was reluctant to agree to VISA's proposed changes, however, because, as he wrote in an e-mail to his team, FIFA's "ability to get promotional value out of the \$15m MIK is doubtful" and, as drafted, the marketing in kind commitment was "pretty meaningless." (Pl. Ex. 46).

¹⁰ Given the serious nature of Mr. Blazer's supposed remarks, a review of the remarks that were recorded by Ms. Fisher in her notes confirms that if Mr. Blazer had made the remarks he testified to, they certainly would have been recorded.