

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

L.L. BEAN, INC.,)	
)	
PLAINTIFF)	
)	
v.)	CIVIL No. 08-177-P-H
)	
BANK OF AMERICA, ET AL.,)	
)	
DEFENDANTS)	

**ORDER AFFIRMING THE RECOMMENDED DECISION
OF THE MAGISTRATE JUDGE**

After oral argument on June 23, 2009, and upon de novo review, I adopt the Report and Recommended Decision of Magistrate Judge Martin (Docket Item 125).

I make these additional observations.

1. At this point, there is room for reasonable minds to differ over the meaning of the term “replace” in the contract and whether that contractual requirement is satisfied by issuance of new cards to consumers coupled with instructions to those consumers to destroy the old cards, or whether it requires the card issuer to decline a transaction and/or have the old card seized when a consumer tries to use it. See L.L. Bean, Inc.’s Objections to Report and Recommendation at 3 (Docket Item 130); Defs.’ Response to Pl.’s Objections at 2 (Docket Item 139).

2. I understand that L.L. Bean does not demand that the defendants deactivate all accounts, or change all the account numbers or prevent telephone and

internet use of the account numbers, but instead seeks to prevent only the physical use of the old L.L. Bean card at a point of sale in the marketplace. L.L. Bean, Inc.'s Objections to Report and Recommendation at 7.

3. There is room for reasonable minds to differ over whether a consumer's physical presentation of the old card at a point of sale results in the defendants' "use" of the Bean trademark when the defendants accept the transaction. See id. at 7-8; Defs.' Response to Pl.'s Objections at 6-7.

4. I accept L.L. Bean's concern that any use of its mark is objectionable, but I also observe that the record fails to provide evidence about the scope of the problem, *i.e.*, how many consumers continue to use the old plastic despite the instructions not to.

Ultimately, I conclude with the Magistrate Judge that L.L. Bean has not met its burden of satisfying the standards for the preliminary injunction that it requests. L.L. Bean's motion for preliminary injunction is **DENIED**.

SO ORDERED.

DATED THIS 25TH DAY OF JUNE, 2009

/s/D. BROCK HORNBY

D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

**U.S. DISTRICT COURT
DISTRICT OF MAINE (PORTLAND)
CIVIL DOCKET FOR CASE #: 2:08cv177 (DBH)**

L.L. Bean, Inc.,

Plaintiff

Represented By **George S. Isaacson
Matthew P. Schaefer**

Brann & Isaacson
P.O. Box 3070
Lewiston, ME 04243
(207) 786-3566
email: gisaacson@brannlaw.com
mschaefer@brannlaw.com

v.

Bank Of America Corporation

and

FIA Card Services, N.A.,

Defendants

Represented By **Allyson E. Kurker
S. Elaine McChesney**

Bingham McCutchen LLP
1 Federal Street
Boston, MA 02110
(617) 951-8000
email: allyson.kurker@bingham.com
elaine.mcchesney@bingham.com

Corin R. Swift

Bingham McCutchen LLP
85 Exchange Street, Suite 300
Portland, ME 04101
(207) 780-8276
email: corin.swift@bingham.com

Angela H. Zimmern

Bradley R. Kutrow

Grant D. Goldenberg

McGuire Woods LLP
Bank Of America Corporate Center
100 North Tryon Street, Suite 2900
Charlotte , NC 28202-4011
(704) 343-2163
email: azimmern@mcguirewoods.com
email: bkutrow@mcguirewoods.com
ggoldenber@mcguirewoods.com