

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
DANIEL CROOKS and MATTHEW MILLER,)	
individually and on behalf of all)	
persons similarly situated,)	
)	
Plaintiffs,)	
)	Civil Action
v.)	No. 22-10738-PBS
)	
DUNKIN' BRANDS GROUP INC. and)	
SVC SERVICE II LLC)	
)	
Defendants.)	
_____)	

ORDER

December 13, 2022

Saris, D.J.

In this proposed class action, Plaintiffs allege that Defendants Dunkin' Brands Group Inc. and SVC Service II LLC (collectively) ("Dunkin") have a policy of not allowing consumers to redeem their Gift Cards for cash when the balance falls below a certain amount as required by state law. Defendants have moved to dismiss all counts.

I **ALLOW** the motion to dismiss the claim under the New Jersey Truth-in-Consumer Contract, Warranty, and Notice Act, N.J. Stat. § 56:12-15 ("TCCWNA") (Count I) but **DENY** the motion to dismiss the other counts. The Gift Cards state that the "Card Value may not be redeemed for cash, check or credit unless required by law." First Am. Compl., Dkt. 17 ¶ 5. Plaintiffs allege that "despite this

affirmation, Defendants' policy is that the Gift Cards are completely non-refundable and in fact have no mechanism to refund the value of the Gift Cards, even in situations where state law requires it." Id. at ¶ 6. Plaintiffs also allege that Defendants fail to disclose that Defendants "do not reveal that their Gift Card balances are completely non-refundable until users attempt to obtain their remaining balances." Id. at ¶ 9. Plaintiffs argue that Dunkin violated state law "by misrepresenting that the Gift Cards complied with state law when in fact they did not." Id. at ¶ 48.

Defendants argue in part that Plaintiff's claim under the TCCWNA fails because Plaintiffs do not allege that the Gift Cards contain a written provision that "violates any clearly established legal right of a consumer or responsibility" under State law. Dkt. 25 at 6. One district court has stated that "[t]he statutory language and history make clear that, through the TCCWNA, the legislature sought to regulate the actual terms and provisions included in consumer contracts, rather than the conduct of parties, which is already governed by other laws, such as the NJCFA [New Jersey Consumer Fraud Act] or state contract law." Cannon v. Ashburn Corp., Civil No. 16-1452 (RMB/AMD), 2016 WL 7130913, at *11 (D.N.J. Dec. 7, 2016) (emphasis omitted). In Cannon, the court dismissed plaintiffs' TCCWNA claim because it was only defendants' conduct of failing to provide the product (a bottle of wine) at

the advertised original price that would give rise to liability, and not a contractual provision. That court went on to say “[t]he inclusion of an original price in the contract does not, by that contract’s own terms, violate any clearly established legal right.” Id.

Here, similarly, the inclusion of the language on the Gift Card by itself does not violate any clearly established legal right. It was the alleged conduct of not producing a mechanism to refund the balance which gives rise to liability.

Plaintiffs underscore the New Jersey Supreme Court’s language that a plaintiff can claim a violation of the TCCWNA if the consumer protection statute “clearly prohibited the contractual provision or other practice that is the basis for the TCCWNA claim.” See Dugan v. TGI Fridays, Inc., 171 A.3d 620, 647 (N.J. 2017) (emphasis added). In Dugan, plaintiffs alleged that TGI Fridays violated the TCCWNA by omitting beverage prices on their menus when state law required that they “plainly mark” the beverages in the location where they were offered for sale. Id. at 648. In rejecting the motion for class certification, the New Jersey Supreme Court expressly stated it was not determining “whether a defendant restaurant’s presentation of a menu that omits beverage prices gives rise to a TCCWNA claim.” Id.

The post-Dugan case law is unclear as to the meaning of the term “practice.” The Third Circuit concluded that TCCWNA liability

can be triggered when "affirmative offers or pricing, included in covered writings . . . are rendered inaccurate or fraudulent by the circumstances of their presentation." See Watkins v. DineEquity, Inc., 591 Fed. Appx. 132, 136 (3d Cir. 2014) (unpublished). In this case, however, there is nothing alleged about the circumstances of the Gift Card presentation that renders the statement on the Gift Card fraudulent.

The big donut hole in the case law is whether the TCCWNA can apply to a practice which renders a statement in a gift card misleading if the contract itself does not contain an unlawful provision. "A federal court sitting in diversity cannot be expected to create new doctrines expanding state law." See Gill v. Gulfstream Park Racing Ass'n, Inc., 399 F.3d 391, 402 (1st Cir. 2005). Therefore, Plaintiffs' TCCWNA claim is dismissed.

For the reasons stated in Court, I **DENY** the motion to dismiss the claims of unjust enrichment (Count II), breach of contract (Count III), a violation of Chapter 93A (Count IV), and a violation of the California Unfair Competition Law (Count V).

SO ORDERED.

/s/ PATTI B. SARIS

Hon. Patti B. Saris
United States District Judge