UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL CROOKS and MATTHEW MILLER, individually and on behalf of all others similarly situated, Plaintiffs, v. DUNKIN' BRANDS GROUP INC. and SVC SERVICE II LLC, Defendants.	Civil Action No.: 1:22-cv-10738-PBS **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FIRST AMENDED CLASS ACTION COMPLAINT**

INTRODUCTION

Like the original Complaint, Plaintiffs' First Amended Class Action Complaint ("FAC") alleges that Defendants have a "policy" of never allowing cash-back refunds of gift card balance even where required by law, despite the statement to the contrary that is written on Defendants' gift cards. Also like the original Complaint, the FAC provides no factual detail about Defendants' alleged policy. And Plaintiff Daniel Crooks still does not allege that he ever went to a store and requested a cash-back refund of his gift card balance.

The FAC attempts unsuccessfully to correct problems identified in Defendants' first motion to dismiss—in which Defendants pointed out that the allegations about Crooks did not come close to stating a claim—by identifying a new plaintiff. The FAC alleges that Plaintiff Matthew Miller, a California resident, requested a cash-back refund of his gift card balances at two Dunkin' stores and was denied a refund. Miller asserts a claim under California's consumer protection statute in parallel with Crooks's claim under the New Jersey consumer protection statute. That new claim also fails as a matter of law because Miller has not pled facts showing

reliance, injury sufficient for statutory standing, or a policy or practice of refusing to provide cash refunds of gift card balances under $10. At most, Plaintiff Miller has pled several isolated, sporadic failures by front-line employees of Dunkin' franchisees. Such allegations have been held to be insufficient to state a claim under California's consumer protection law.

In sum, the FAC asserts violations of three consumers protection statutes—New Jersey, California, and Massachusetts statutes—as well as unjust enrichment and breach of contract claims. All five claims should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

FACTUAL ALLEGATIONS[1]

Plaintiffs filed their First Amended Class Action Complaint against Dunkin' Brands Group Inc. ("Dunkin'") and SVC Service II Inc. ("SVC") (together, "Defendants") on July 22, 2022.[2] Plaintiffs allege that Defendants provide reloadable gift cards for use in their coffee and snack shops ("Gift Cards"). FAC ¶ 1. Specifically, Plaintiffs allege that Dunkin' "operates coffee and snack shops throughout the United States," and SVC "is the issuer of the Gift Cards and services the Gift Cards at [Dunkin's] direction." *Id*. ¶¶ 24–25. The Gift Cards can be purchased and refilled at Defendants' stores nationwide. *Id*. ¶ 3.

The Gift Cards state that the "Card Value may not be redeemed for cash, check or credit unless required by law." FAC ¶ 5. Plaintiff alleges, however, that Defendants do not in fact allow Gift Card refunds even if the refund is required by law. *Id*. ¶¶ 6–9. According to Plaintiff, "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.*

[1] The factual allegations in the FAC are accepted as true for purposes of this motion only. *See Ferring Pharms. Inc. v. Braintree Labs, Inc.*, 38 F. Supp. 3d 169, 174 (D. Mass. 2014).

[2] SVC Service II Inc. was incorrectly named as SVC Service II LLC.

¶ 6. And "Defendants do not reveal that their Gift Card balances are completely non-refundable until users attempt to obtain their remaining balances." *Id*. ¶ 9.

Plaintiff Daniel Crooks ("Crooks") is a resident of New Jersey who received a Gift Card as a gift in March 2021. FAC ¶ 21. His Gift Card originally contained more than $5 but currently contains a balance of $4.54. *Id*. Notably, Crooks does not even attempt to allege that he himself requested a cash redemption of his gift card or that *anyone* requested a cash redemption of the gift card at any Dunkin' location. Rather, the FAC alleges:

> Mr. Crooks attempted to obtain a refund of the balance of his Gift Card in cash in May 2022 before filing suit. First, Mr. Crooks had his Counsel call the telephone number on the back of his Gift Card, but there was no mechanism by which to request a refund. Second, Mr. Crooks sent a letter via certified mail return receipt requested, through his Counsel to Defendants (See Exhibit 1). Defendants did not provide a refund.

Id.

Plaintiff Matthew Miller ("Miller") is a resident of California who allegedly holds multiple Gift Cards with values below $10. FAC ¶ 22. The FAC alleges that, in January 2022, Miller went to two different Dunkin' stores and requested the balance of his Gift Cards, but "Dunkin' employees informed him that he was not able to recover the balance and in fact the employees did not have a way for them to refund the balance on Gift Cards." *Id*. Miller then emailed customerservice@dunkinbrands.com, requesting a refund of the balance of his Gift Cards. According to the FAC, "Defendants responded that they 'are unable to process these requests over email or telephone. Therefore, we recommend you go to your nearest Dunkin' location for this

request to be completed.'" *Id*. Miller again visited the two stores, but employees told him the same thing as before. *Id*.[3]

Plaintiffs seek to represent a class defined as "all persons in the United States who possess Gift Cards that are maintained by Defendants" (the "Class"). FAC at ¶ 30. Additionally, Crooks seeks to represent a subclass defined as "all Class members who reside in New Jersey who possess Gift Cards that are maintained by Defendants" (the "New Jersey Subclass"). *Id*. ¶ 31. And Miller seeks to represent a subclass defined as "all Class members who reside in California who possess Gift Cards that are maintained by Defendants" (the "California Subclass"). *Id*. ¶ 32.

ARGUMENT AND AUTHORITY

Plaintiffs assert five claims: (1) violation of the New Jersey Truth in Consumer Contract, Warranty and Notice Act ("TCCWNA"); (2) unjust enrichment; (3) breach of contract; (4) violation of the Massachusetts Unfair and Deceptive Business Practices Act ("MUDBPA"); and (5) violation of the California Unfair Competition Law ("UCL").[4]

All five claims should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. While the law does not require "detailed factual allegations . . . a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint must contain sufficient factual matter to show that the plaintiff's allegations are not

[3] As Defendants noted in their previous motion to dismiss, the facts alleged in the FAC make clear that the claims asserted will require individualized factual inquiries such that the putative Class and Subclasses in this action could never be certified. *See, e.g., Dugan v. TGI Fridays, Inc*., 231 N.J. 24, 71, 73 (2017) (finding that individual questions would predominate because "the requirement that a plaintiff be an 'aggrieved consumer' in order to pursue a TCCWNA claim gives rise to a range of individual questions regarding the interaction between the customer and the server . . .").

[4] The FAC also references statutes in other jurisdictions. *See* FAC ¶ 17 n.1. The FAC does not, however, set forth any claim for relief asserting that Defendants have violated those statutes. *See id*. ¶¶ 38–98.

merely possible, but plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A claim has facial plausibility only "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*.

As an initial matter, the FAC, like the original Complaint, improperly asserts general allegations about "Defendants'" conduct, without specifying which Defendant did what. *See, e.g.*, FAC ¶¶ 1–9. Because the FAC makes "a number of generic allegations to the Defendants collectively without explaining how each particular Defendant" allegedly caused harm, the FAC does not pass muster at the pleading stage and should be dismissed. *Barnstable Cnty. v. 3M Co.*, No. 17-40002, 2017 U.S. Dist. LEXIS 207414, at *34–36 (D. Mass Dec. 18, 2017). Plaintiffs' new allegation that "[e]ach of the Defendants acted jointly to perpetrate the acts described herein" does not alter the analysis. FAC ¶ 26; *Benet-Soto v. Chase Manhattan Bank*, N.A., 791 F. Supp. 914, 920 (D.P.R. 1992) (dismissing Plaintiff's complaint where "[i]t is not stated what role each defendant played" in the conduct at issue); *Shirokov v. Dunlap, Grubb & Weaver PLLC*, No. 10-12043-GAO, 2012 U.S. Dist. LEXIS 42787, at *81-82 (D. Mass. Mar. 1, 2012) (dismissing claims against GuardaLey where the complaint only alleges that it acted jointly with other defendants without identifying specific wrongful conduct).

I. The FAC Fails to State a Claim Under the TCCWNA.

Crooks asserts a TCCWNA claim individually and on behalf of the members of the New Jersey Subclass. To state a claim under the TCCWNA, a plaintiff must allege that a "seller, lessor, creditor, lender or bailee" "offer[ed] . . . or enter[ed] into any written consumer contract or g[a]ve or display[ed] any written consumer warranty, notice or sign . . . which includes any provision that violates any clearly established legal right of a consumer or responsibility of a seller . . . as

established by State or Federal law[.]" N.J.S.A. § 56:12-15. The plaintiff must also show that he or she is an "aggrieved consumer." N.J.S.A. § 56:12-17.

Assuming for purposes of this motion that Crooks is a "consumer" and the Gift Card constitutes a "written consumer warranty, notice or sign" within the meaning of the TCCWNA, Crooks's TCCWNA claim fails because Crooks has not properly pled (a) that any written provision violates the law, (b) that Defendants are "sellers" under the TCCWNA, or (c) that there was any violation of a clearly established legal right.

a. The FAC Does Not Allege That a Writing Violated the Law.

To state a TCCWNA claim, a plaintiff must show that a provision of a "written consumer contract" or "written consumer warranty, notice or sign" violates state or federal law. N.J.S.A. § 56:12-15. The FAC fails to identify any written provision that violates state or federal law.

The FAC alleges that "[t]he Gift Card statements that state 'Card Value may not be redeemed for cash, check or credit unless required by law', are written consumer warranties, notices, and/or signs offered, given, and/or displayed to consumers . . . ." FAC ¶ 41. The FAC does not allege, however, that the language of the Gift Card itself violates the law. Instead, the FAC attempts to establish a TCCWNA violation by alleging that Defendants have a policy that contradicts the Gift Card language. *See, e.g., id.* ¶ 56 ("Defendants did not disclose that their Gift Card balances were non-refundable despite the explicit terms stating that the balances were refundable under certain conditions.").

Courts interpreting the TCCWNA have found 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[.]" *Cannon v. Ashburn Corp.*, No. 16-1452 (RMB/AMD), 2016 U.S. Dist.

LEXIS 169040, at *27–28 (D.N.J. Dec. 7, 2016). In enacting the TCCWNA, the New Jersey legislature identified examples of the types of provisions the law was targeting:

> Examples of such provisions are those that deceptively claim that a seller or lessor is not responsible for any damages caused to a consumer, even when such damages are the result of the seller's or lessor's negligence. These provisions provide that the consumer assumes all risks and responsibilities, and even agrees to defend, indemnify and hold harmless the seller from all liability. Other provisions claim that a lessor has the right to cancel the consumer contract without cause and to repossess its rental equipment from the consumer's premises without liability for trespass.

McGarvey v. Penske Auto Grp., Inc., 486 F. App'x 276, 280 n.5 (3d Cir. 2012) (citing Statement, Bill No. A1660, 1981 N.J. Laws, ch. 454, Assemb. No. 1660, at 2-3). Therefore, to state a claim under the TCCWNA, a plaintiff must allege that a "contract's [or other writing's] own terms[] violate . . . clearly established legal rights." *Cannon*, 2016 U.S. Dist. LEXIS 169040, at *28. The alleged ***conduct*** of a defendant, even if unlawful, is insufficient. *Id*.

As such, a defendant's policy "would only violate the TCCWNA if it was a provision of a written contract." *Feder v. Williams-Sonoma Stores, Inc.*, No. 2:11-03070 (WHW), 2011 U.S. Dist. LEXIS 109739, at *8 (D.N.J. Sept. 26, 2011). Here, even assessing the allegations in the light most favorable to Crooks, Crooks makes no allegation that the policy of which he complains was written into any contract, warranty, notice or sign issued by Defendants. That is fatal to Crooks's claim for violation of the TCCWNA. *Id*.

What is more, it cannot be argued that the Gift Card language violates a clearly established legal right because the Gift Card language comports with the express text of N.J.S.A. § 46:30B-42.1(h) (the "New Jersey Cash-Back Law"). Under the New Jersey Cash-Back Law, a retailer has no obligation to inform consumers of the availability of a refund balance redemption. N.J.S.A. § 46:30B-42.1(h). Rather, a retailer may simply "include a statement on the stored value card or

other marketing materials that the card 'is not redeemable for cash except as required by law' or similar statement." *Id*. The Gift Cards at issue here contain just such a statement. *See* FAC ¶ 5.[5]

b. The FAC Does Not Adequately Allege That Defendants Are "Sellers."

The FAC alleges that "Defendants are 'sellers' within the meaning of N.J.S.A. § 56:12-15." FAC ¶ 43. "The terms 'seller, lessor, lender, or bailee' are not defined by statute. Thus, to define those terms, a reviewing court must rely on the plain language of the statute and give the language its ordinary meaning." *Boyko v. Am. Int'l Grp., Inc.*, No. 08-2214 (RBK/JS), 2009 U.S. Dist. LEXIS 119339, at *15 (D.N.J. Dec. 23, 2009). In the gift card context, it is not clear who, if anyone, is a "seller," so the TCCWNA may not apply in this context at all.

Nonetheless, the FAC implies that Plaintiffs' Gift Cards were purchased from stores that are owned, operated, or otherwise affiliated with Dunkin', somehow making "Defendants" the sellers without differentiating between the two entities. But the FAC does not actually state who sold the Gift Cards at issue to the unidentified consumers who purchased them, or what the relationship was between those sellers and Defendants. Nor does the FAC specify the corporate relationship between Defendants and the stores or employees with whom Plaintiffs interacted. Thus, the FAC, like the original Complaint, attempts to conceal a problematic fact: Dunkin's franchised business model. *See* https://www.sec.gov/Archives/edgar/data/1357204/000135720420000015/dnkn-20191228x10k.htm (Form 10-K); https://www.dunkinfranchising.com/ (Dunkin' Website); *see*

[5] Plaintiff cites *Shelton v. Restaurant.com, Inc.*, 214 N.J. 419, 428, 70 A.3d 544 (2013), for the proposition that "a contract or notice cannot simply state in a general, nonparticularized fashion that some of the provisions of the contract or notice may be void, inapplicable, or unenforceable in some states." FAC ¶ 47. The citation is misplaced. *Shelton* did not involve the New Jersey Cash-Back Law, which expressly authorizes the Gift Card language notwithstanding N.J.S.A. § 56:12-16. Further, the language on the certificates in *Shelton* is not comparable to the Gift Card language.

also, e.g., *Boulanger v. Dunkin' Donuts, Inc*., 442 Mass. 635, 636, 815 N.E.2d 572 (2004) ("The defendant is a worldwide franchisor of doughnut and coffee shops that contracts with independent business persons who use the trade names, trademarks, recipes, and system developed by the defendant."); *Bartolotta v. Dunkin' Brands Grp., Inc*., No. 16 CV 4137, 2016 U.S. Dist. LEXIS 168125, at *10 (N.D. Ill. Dec. 6, 2016) (discussing publicly available sample franchise agreement of Dunkin' Brands Group, Inc.).

Assuming Plaintiffs' Gift Cards were purchased from a store, they may have been purchased from a Dunkin' franchisee or some other store for which Defendants cannot be held vicariously liable. Defendants cannot be held liable under the TCCWNA if they did not directly engage in "selling" the Gift Cards at issue. *Cf. Boyko*, 2009 U.S. Dist. LEXIS 119339, at *16 ("[A]ssuming that Plaintiff has alleged sufficient facts to support a principal-agent relationship, CCS cannot be liable under the TCCWNA for its acts on behalf of the other Defendants where CCS's acts did not involve selling, leasing, lending, or bailing.").

The allegation that "Defendants are 'sellers' within the meaning of N.J.S.A. § 56:12-15" is a conclusory allegation not entitled to the assumption of truth. *See Iqbal*, 556 U.S. at 678. Because the FAC fails to plead any "factual content" showing that Defendants are "sellers" within the meaning of the TCCWNA, it fails to state a claim under the TCCWNA.

c. The FAC Does Not Allege a Violation of a Clearly Established Legal Right.

As the predicate for the TCCWNA claim, the FAC identifies two New Jersey statutes as the alleged source of "clearly established legal rights." The FAC asserts that "[t]he rights of consumers to obtain a refund of the balance of their Gift Cards when the balance is less than $5, as well as the right to avoid deception caused by false and misleading statements on the Gift Card labels and marketing materials" are clearly established by the New Jersey Cash-Back Law

(N.J.S.A. § 46:30B-42.1) and N.J.S.A. § 56:8-2 (a provision of the New Jersey Consumer Fraud Act ("CFA")). FAC ¶ 44.

The New Jersey Cash-Back Law. The New Jersey Cash-Back Law provides that, "if a stored value card is redeemed and a balance of less than $5 remains on the card after redemption, at the owner's request the merchant or other entity redeeming the card shall refund the balance in cash to the owner." N.J.S.A. § 46:30B-42.1(h). By its express terms, this law only requires a refund if the owner requests it. *See id*. In the Original Complaint, Crooks did not allege that he requested a refund of the balance on his Gift Card; he merely alleged that he "would like to obtain the balance of his gift card in cash but Defendants' policies and practices do not permit him to do so." Doc. 1 ¶ 18. Now, in the FAC, Crooks references actions by his counsel but notably avoids actually pleading facts establishing that he (or his counsel) requested a refund prior to filing suit. *See* FAC ¶ 21 (stating only that "Crooks had his Counsel call the telephone number on the back of his Gift Card" and "sent a letter via certified mail return receipt requested, through his Counsel to Defendants").[6] Just as notably, Crooks does not allege that he ever presented his Gift Card for cash redemption at any Dunkin' location. Crooks also appears to have avoided making a direct request despite ample opportunity to do so before and after filing his original Complaint. Accordingly, Crooks still fails to plead a violation of the New Jersey Cash-Back Law.

N.J.S.A. § 56:8-2. Crooks also seeks to rely on the CFA to supply a "clearly established legal right," namely "the right to avoid deception caused by false and misleading statements on the Gift Card labels and marketing materials." FAC ¶ 44.

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[6] The FAC indicates that it attaches as Exhibit 1 a letter from Crooks's counsel to Defendants on May 17, 2022 (FAC ¶¶ 21, 81), but the FAC does not in fact have an attachment. Assuming that letter is actually the letter dated May 10, 2022, it is a formal pre-suit demand under Mass. Gen. Laws Ch. 93A sent no more than *two days* before (and potentially after) this suit was filed. There is no allegation that Miller sent such a letter.

Crooks's reliance on N.J.S.A. § 56:8-2 first fails because that provision does not create a "clearly established legal right" to be given cash back when a gift card has a balance of less than $5. N.J.S.A. § 56:8-2 consists merely of a general prohibition on unconscionable commercial practices, fraud, and the like. Crooks cannot establish a "clearly established legal right" sufficient to support his TCCWNA claim by referring, at a high level of generality, to the "[r]esponsibility of a seller to refrain from the employment of any unconscionable commercial practice, deception, fraud, false pretense, or misrepresentation, and to refrain from the knowing concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of merchandise, and to refrain from selling products with labels that make false statements about the products." FAC ¶ 45. New Jersey law requires a more specific inquiry. Moreover, failure to honor a request for a refund is not "a misrepresentation . . . with intent that others rely upon [a] concealment, suppression or omission."

If Crooks could rely on the CFA for merely "the right to avoid deception caused by false and misleading statements on the Gift Card labels and marketing materials," he would fail to state a claim under that statute in any event. In order to have an actionable claim under the CFA, "a plaintiff must allege three elements: (1) unlawful conduct by the defendants; (2) an ascertainable loss on the part of the plaintiff; and (3) a causal relationship between the defendants' unlawful conduct and the plaintiff's ascertainable loss." *N.J. Citizen Action v. Schering–Plough Corp.*, 367 N.J. Super. 8, 12–13, 842 A.2d 174 (Super. Ct. App. Div. 2003) (citing *Cox v. Sears Roebuck Co.*, 138 N.J. 2, 24, 647 A.2d 454 (1994)). Assuming Crooks has properly alleged unlawful conduct and an ascertainable loss (and he has not with respect to these Defendants), he has clearly failed to establish a link between the two. Any alleged deception or fraud under the CFA must necessarily have been intended to induce a customer to purchase a gift card, and Crooks

does not allege that he purchased the card. As a result, he has no ascertainable loss stemming from Defendants' allegedly "misleading statements." He still has the full value of his gift card, and, as noted above, it is not clear from the FAC whether he has actually requested a refund of the amount on his card.

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Because Plaintiff does not plead a violation of the New Jersey Cash-Back Law, N.J.S.A. § 56:8-2, or any other "clearly established legal right," Plaintiff cannot establish a violation of the TCCWNA. *See Robey v. PVH Corp.*, 495 F. Supp. 3d 311, 323 (S.D.N.Y. 2020); *Wilson v. Kia Motors Am., Inc.*, No. 13-cv-1069, 2015 U.S. Dist. LEXIS 82332, at *12 (D.N.J. June 25, 2015). Thus, there are three independently sufficient reasons why Crooks's TCCWNA claim should be dismissed.

II. The FAC Fails to Plead an Unjust Enrichment Claim.

Count II of the FAC alleges that Plaintiffs "conferred benefits on Defendants by paying money to Defendants . . . for the Gift Cards" and that "Defendants have been unjustly enriched in retaining the revenues derived from Plaintiffs' . . . Gift Card balance remainders." FAC ¶¶ 54, 56. The FAC does not identify under which state's doctrine of unjust enrichment it asserts this claim. Nor does it state whether the terms of the Gift Card provide that a particular state's law will govern. But under any of the states' laws potentially at issue in this Motion, Plaintiffs have failed to state a claim.

To state a claim for unjust enrichment under New Jersey law, "a plaintiff must show both that defendant received a benefit and that retention of that benefit without payment would be unjust. The unjust enrichment doctrine requires that plaintiff show that it expected remuneration from the defendant at the time it performed or conferred a benefit on defendant and that the failure

of remuneration enriched defendant beyond its contractual rights." *VRG Corp. v. GKN Realty Corp.*, 135 N.J. 539, 554, 641 A.2d 519 (1994) (citations omitted). To state a claim for unjust enrichment under Massachusetts law, a plaintiff must allege: "(1) a benefit conferred upon the defendant by the plaintiff; (2) an appreciation or knowledge by the defendant of the benefit; and (3) acceptance or retention by the defendant of the benefit under the circumstances would be inequitable without payment for its value." *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 57 (1st Cir. 2009); *accord Stevens v. Thacker*, 550 F. Supp. 2d 161, 165 (D. Mass. 2008). Similarly, under California law, to the extent unjust enrichment is even a valid legal claim, the elements are the "receipt of a benefit and unjust retention of the benefit at the expense of another." *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723, 726 (2000).[7]

Plaintiffs plead no facts to support a claim for unjust enrichment under any of these states' laws. Even putting aside the fact that there is no allegation before the Court that Plaintiffs paid for the Gift Cards at issue, Defendants have not been unjustly enriched because Plaintiffs have not yet used their Gift Cards fully, and Crooks's Gift Card has a balance of $4.94. FAC ¶ 21. Similarly, Miller's Gift Cards contain balances below $10. *Id.* ¶ 22. Plaintiffs retain the full benefit and use of the balances on their Gift Cards. They may use those balances to buy goods from a store, and they may refill their Gift Cards with additional funds. *Id.* ¶¶ 1–3. Or they may properly request redemption in accordance with relevant law. The FAC contains no allegation that the remaining Gift Card funds somehow reverted back to Defendants.

[7] There is a line of authority that suggests that "under California law, there is no claim for unjust enrichment; rather, it is an equitable remedy." *Ubaldi v. SLM Corp.*, 852 F. Supp. 2d 1190, 1203 (N.D. Cal. 2012) (citing *Melchior v. New Line Prods., Inc.*, 106 Cal. App. 4th 779, 793 (2003) ("there is no cause of action in California for unjust enrichment")).

Further, "[o]rdinarily a claim of unjust enrichment will not lie where there is a valid contract that defines the obligations of the parties." *Metro. Life Ins. Co. v. Cotter*, 464 Mass. 623, 641, 984 N.E.2d 835 (2013). Plaintiffs themselves claim that they entered into "binding contracts with Defendants by accepting Defendants' offer to purchase Defendants' Gift Cards in accordance with the terms . . . located on the back of the Gift Cards[.]" FAC ¶ 61. To the extent the Gift Cards constitute contracts—which they do not for the reasons discussed below—there can be no claim for unjust enrichment. *See Baker v. Inter Nat'l Bank*, No. 08-5668, 2012 U.S. Dist. LEXIS 6920, at *30 (D.N.J. Jan.19, 2012) (dismissing claim for unjust enrichment where plaintiff's allegations were based on gift card, its packaging, and terms and conditions); *accord Loiseau v. Visa USA, Inc.*, No. 09-CV-2177-H (JMA), 2009 U.S. Dist. LEXIS 137414, at *9 (S.D. Cal. Nov. 17, 2009); *Klauber v. VMware, Inc.*, No. 19-12498-FDS, 2022 U.S. Dist. LEXIS 72238, at *31 (D. Mass. Apr. 20, 2022).

For these reasons, Plaintiffs' unjust enrichment claim should be dismissed.[8]

III. The FAC Fails to Plead a Breach of Contract Claim.

Count III asserts breach of contract. Plaintiffs state that they entered into "binding contracts with Defendants by accepting Defendants' offer to purchase Defendants' Gift Cards in accordance with the terms . . . located on the back of the Gift Cards." FAC ¶ 61. These terms included the provision that "Card Value may not be redeemed for cash, check or credit, unless required by law."

[8] Plaintiffs' unjust enrichment claims should be dismissed under any of the three potentially applicable state laws for the reasons argued. To the extent the Court allows the claim to proceed, Massachusetts law cannot apply. Unjust enrichment is a "consumer protection claim[], and state consumer protection laws aim to protect in-state consumers . . . ." *Camey v. Force Factor, LLC*, NO. 14-14717-RWZ, 2016 U.S. Dist. LEXIS 200795, at *20-21 (D. Mass. May 16, 2016) (citing *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 947 (6th Cir. 2011)). Massachusetts's choice of law principals "favor applying the . . . unjust enrichment law of each state to transactions that occurred there." *Id.* at *20.

Id. Plaintiff claims that "Defendants breached this agreement by failing to allow Plaintiffs . . . to redeem their Gift Cards for cash" and that Plaintiffs have "suffered damages as a direct and proximate result of Defendants' breach[.]" *Id*. ¶¶ 63–64.

Under any state's law, a breach of contract claim requires a showing of a valid contract, breach, and damages. *See, e.g.*, *Netcracker Tech. Corp. v. Laliberté*, No. 20-11054-RGS, 2020 U.S. Dist. LEXIS 202610, at *14-15 (D. Mass. Oct. 30, 2010).

First, Plaintiffs do not plead a valid contract. Plaintiffs do not claim that they purchased the cards themselves, do not identify the entities the Gift Cards were purchased from, and do not allege that they paid Defendants for their Gift Cards. Plaintiffs' unsupported assertion that the Gift Cards constitute contracts between themselves and "Defendants" is insufficient to plead a valid contract. FAC ¶ 61. Furthermore, Plaintiffs have not properly pled that the Gift Cards constitute contracts given the lack of allegations concerning the circumstances surrounding the purchase or receipt of the Gift Cards, the amount paid for the Gift Cards, any fees associated with the Gift Cards, or any other terms and conditions on the Gift Cards. *Cf., e.g., Ace European Grp., Ltd. v. Abercrombie & Fitch Co.*, 621 F. App'x 338, 341 (6th Cir. 2015) (gift cards constituted consideration for separate sales contract but were not contracts in and of themselves).

Second, Crooks does not appear plead a breach. Under the New Jersey Cash-Back Law applies, the cash-back provision of the Gift Card does not require Defendants to provide a refund except "at the owner's request." N.J.S.A. § 46:30B-42.1(h). Thus, in order to show that Defendants breached the cash-back provision of the Gift Card, Crooks would have to allege, at a minimum, that he made a request to redeem the remaining value of his gift card for cash, and Defendants denied the request. As discussed above, the actual facts alleged in the FAC do not support this claim.

Plaintiff's claim for breach of contract is unsupported and should be dismissed.

IV. The FAC Fails to State a Claim Under the Massachusetts UDBPA.

Attempting to expand the putative Class nationwide[9], both Plaintiffs assert a claim for recovery under the Massachusetts Unfair and Deceptive Business Practices Act ("MUDBPA"), Mass. Gen. Laws Ch. 93A *et seq*. Like their claims under the New Jersey TCCWNA and California UCL, Plaintiffs' claim under the MUDBPA sounds in fraud and misrepresentation. Specifically, Plaintiffs allege that "Defendants' misrepresentations deceive and have a tendency to deceive a reasonable consumer and the general public" (FAC ¶ 72), "Defendants' acts and omissions are material, in that a reasonable person would attach importance to the information and would be induced to act on the information in making purchase decisions" (*id*. ¶ 73), and "Defendants' conduct is also misleading in a material way because it fails to comport with Massachusetts' M.G.L.A. 200A § 5D, in that Defendants' policies . . . do not allow purchasers or holders to make an election to receive the balance in cash or continue using the gift certificate" (*id*. ¶ 74). These conclusory statements notwithstanding, Plaintiffs have failed to state a claim under the MUDBPA.

First, consumer protection claims sounding in fraud and misrepresentation, when pled like Plaintiffs' claim in this case, are governed by the plaintiff's home state laws. "Generally, when confronting a choice of law question in a diversity case, a court must look to the choice of law rules of the forum state." *Trent Partners & Assocs., Inc. v. Digital Equip. Corp.*, 120 F. Supp. 2d 84, 94-95 (1st Cir. 1999) (citing *Klaxon Co. v. Stentor Elec. Mfg. Co*., 313 U.S. 487, 496 (1941)). A MUDBPA "cause of action may only be properly before [the Court] if Massachusetts law applies to the issues underlying the claim." *Id*. at 97. Claims resting on allegations of fraud and

[9] Notably, the FAC identifies only "10 states [that] have statutes that require retailers to provide a cash refund up to a certain amount for a gift card's remaining value." FAC ¶ 17.

misrepresentation rather than contract, like the claims in this case, are considered tort claims for purposes of a choice of law analysis. *Id.* And under Massachusetts' choice of law rules, "tort claims are governed by the law of the state where the injury occurred, unless another state has a more significant relationship to the underlying cause of action." *Watkins v. Omni Life Sci., Inc.*, 692 F. Supp. 2d 170, 174 (D. Mass. 2010).

Plaintiffs reside in New Jersey and California. Plaintiffs do not allege that Massachusetts has a greater interest in this case than their home states do. To the contrary, they assert claims under their equivalent home state laws, which were designed to protect the consumers in those states. As a result, their tort-based consumer protection claims in this case should be governed by New Jersey and California law, and Count IV should be dismissed with prejudice.

Second, even if the MUDBPA governed Plaintiffs' consumer protection claims (and to be clear it does not), Plaintiffs have failed to properly plead a violation of the MUDBPA. Plaintiffs accuse Defendants of committing a "deceptive" act, which the MUDBPA defines as one that "could reasonably be found to have caused a person to act differently from the way he otherwise would have acted." FAC ¶ 68 (quoting *Tagliente v. Himmer*, 949 F.2d 1, 7 (1st Cir. 1991)). Plaintiffs wholly fail to plead any facts to show that they were "deceived" by any actions by Defendants or caused to act differently from the way they otherwise would have acted. They do not claim to have purchased the Gift Cards at issue. Nor do they claim to have decided to take possession of the Gift Cards based on the representations shown on the Gift Cards. Nor do they otherwise explain how they would have—or even could have—acted differently with respect to the Gift Cards had they known that they would not receive the balance of the Gift Card amounts.[10]

[10] To Defendants' knowledge, no court has ever held that an alleged refusal to provide a cash-back refund of gift card funds constitutes a violation of the MUDBPA. Plaintiffs incorrectly equate an alleged violation of Massachusetts' gift card law with a violation of the MUDBPA.

As explained in greater detail below, Plaintiffs have not pled a scheme or policy whereby Defendants would refuse any and all requests to refund Gift Card balances. At best, they have identified individual acts where franchisees' employees failed to fulfill their requests. Plaintiffs have failed to plead a claim under the MUDBPA, and this claim should be dismissed.

V. The FAC Fails to State a Claim Under the California UCL.

In Count V, Miller claims that Defendants violated California Business & Professional Code section 17200, commonly referred to as the UCL. The UCL prohibits "any unlawful, unfair or fraudulent business act or practice." *Marilao v. McDonald's Corp.*, 632 F. Supp. 2d 1008, 1011 (S.D. Cal. 2009) ("*Marilao I*") (quoting Cal. Bus. & Prof. Code § 17200). Miller alleges a UCL violation based on the UCL's unfair and unlawful prongs. Specifically, Miller alleges that:

- "Defendants' conduct violates the UCL's 'unfair' prong insofar as Defendants regularly, knowingly, and intentionally make false or misleading representations that they will refund money if required to do so by law" (FAC ¶ 88); and
- "Defendants' conduct also violates the UCL's 'unlawful' prong insofar as Defendants refuse to refund the balances of Gift Cards that Plaintiff Miller and California Subclass members hold despite being required to by California law. In fact, Defendants have not even provided a system that allows Gift Card holders to request a refund" (FAC ¶ 89).

Miller has failed to state a claim for relief under the "unfair" prong because he has not pled reliance on any statements by Defendants. He also fails to plead an "unlawful" violation based on either Cal. Civ. Code § 1749.5(b)(1) or (b)(2).

a. Miller fails to state a claim under the UCL's unfair prong.

The crux of Miller's claim under the UCL's "unfair" prong is that the Defendants made "false or misleading representations that they will refund money if required to do so by law." FAC

¶ 88. According to Miller, "[s]uch misrepresentations and omissions misled Plaintiff Miller and are likely to mislead the public." *Id.* ¶ 95. Miller therefore "seeks to enjoin Defendants from misrepresenting and/or omitting this material and accurate information in the documents that it makes available to existing Gift Card holders and the general public." *Id.*.

"[W]hen the 'unfair competition' underlying a plaintiff's UCL claim consists of a defendant's misrepresentation, a plaintiff must have actually relied on the misrepresentation, and suffered economic injury as a result of that reliance, in order to have standing to sue." *In re iPhone Application Litig.*, 6 F.Supp.3d 1004, 1013 (N.D. Cal. 2013). *See also Cattie v. Wal-Mart Stores, Inc*, 504 F. Supp. 2d 939, 947-49 (S.D. Cal. 2007); *Laster v. T-Mobile USA, Inc.*, 407 F. Supp. 2d 1181, 1194 (S.D. Cal. 2005), *aff'd*, 252 F. App'x 777 (9th Cir. 2007); *Stickrath v. Globalstar, Inc.*, 527 F. Supp. 2d 992, 996 (N.D. Cal. 2007). "The actual reliance requirement 'applies whenever the underlying misconduct in a UCL action is fraudulent conduct,' including when the claim arises under the UCL's unlawful or unfair prongs." *Rothman v. Equinox Holdings, Inc.*, No. 2:20-cv-09760-CAS-MRWx, 2021 U.S. Dist. LEXIS 6839, at *11 (C.D. Cal. 2021) (internal quotation marks omitted).

Miller fails to properly plead that he relied on Defendants' representations or that such reliance caused him actual injury. Miller does not allege that he himself purchased the cards or that he requested that anybody purchase the cards for him. Miller also fails to plead whether the representations that money will be refunded if required by law had any impact on anyone's decisions to purchase the card. In fact, Miller does not even indicate when he first became aware of the relevant language on the cards, pleading only that he "learned about Defendants' policies regarding refunds when he attempted to obtain the balance of his Gift Cards in cash and was refused." FAC ¶ 22. In *Marilao II*, the plaintiff alleged that similar gift card language, which stated

that "[t]he value on this card may not be redeemed for cash . . . unless required by law" was deceptive and misleading. *Marilao v. McDonald's Corp*., No. 09-CV-01014-H (AJB), 2009 U.S. Dist. LEXIS 86150, at *9 (S.D. Cal. Sept. 21, 2009) ("*Marilao II*"). The court held that the plaintiff failed to plead standing to assert a claim under the UCL based upon the gift card language because the plaintiff failed to plead reliance on the gift card language. *Id*. at *11. The same result should obtain here.

Miller attempts to circumvent the reliance requirement by baldly stating that he "and members of the California Subclass relied on Defendants' misrepresentations and omissions in that Miller received and reviewed the materials provided by Defendants, and like any reasonable Gift Card holder, understood these documents to mean that he could obtain the balance of his Gift Card if it was below $10." FAC ¶ 96. This conclusory allegation is illogical and puts the cart before the horse. Miller *does not* allege anywhere in the FAC that he was the purchaser of the gift cards that he holds or that he reviewed the relevant representations prior to his coming into possession of the gift cards. But even putting this defect aside and taking these allegations as true, the fact that Miller may have reviewed the materials after receiving the Gift Cards and understood them is not enough. "[I]t is not 'enough to 'receive' a misrepresentation in a document; a plaintiff must see, read, or hear the alleged misrepresentation and rely on it." *Rothman*, 2021 U.S. Dist. LEXIS 6839, at *14. Simply put, there is no allegation that Miller's exposure to any representations of the Defendants had any impact on Miller's receipt and use of the cards.

Like the plaintiff in *Rothman*, Miller has offered nothing but a conclusory allegation of reliance on the representation on the gift cards that they could be redeemed for cash where required by law. "That conclusory allegation, which specifies neither when—if at all—plaintiff viewed the alleged misrepresentation nor what actions he took as a result, is insufficient to plead that plaintiff

actually relied on the alleged misrepresentation" in any way. 2021 U.S. Dist. LEXIS 6839, at *14–15.

Further, Miller "is not entitled to an inference that he relied on defendant's statements however material absent an allegation that he actually viewed those statements" prior to taking possession of the gift cards. *Rothman*, 2021 U.S. Dist. LEXIS 6839, at *16–17. Because Miller has not adequately alleged actual reliance upon any representation or omission by Defendants, he has failed to allege his standing to bring his unfair UCL claim against Defendants.

b. Miller Has Not Stated an Unlawful Business Practice Claim.

"A defendant cannot be liable under § 17200 for committing 'unlawful business practices' without having violated another law." *Ingels v. Westwood One Broad. Servs., Inc.*, 129 Cal. App. 4th 1050, 1060 (2005). If a plaintiff alleging unlawful business practices fails to state a claim under the predicate law, the plaintiff's UCL claim also fails. *See R.N. Beach v. Country Visions, Inc.*, No. 2:15-cv-0214-TLN-CKD, 2016 U.S. Dist. LEXIS 56295, at *21 (E.D. Cal. Apr. 27, 2016) (dismissing plaintiff's UCL claim because its predicate claim also failed).

To support Miller's claim under the UCL's "unlawful" prong, the FAC cites Cal. Civ. Code § 1749.5(b)(1). FAC ¶¶ 15, 94. Subsection (b)(1) states: "Any gift certificate sold after January 1, 1997, is redeemable in cash for its cash value, or subject to replacement with a new gift certificate at no cost to the purchaser or holder." Plaintiffs likely meant to cite instead Subsection (b)(2), which provides: "[A]ny gift certificate with a cash value of less than ten dollars ($10) is redeemable in cash for its cash value." Cal. Civ. Code § 1749.5(b)(2); *see* FAC ¶ 15 (citing Subsection (b)(1) but quoting Subsection (b)(2)).

Miller fails to properly plead that Defendants have violated any predicate law. Whether he intends to proceed under Cal. Civ. Code § 1749.5(b)(1) or, more likely, Cal. Civ. Code § 1749.5(b)(2), he fails to state a claim under either subsection.

i. Miller Fails to State a Claim Based On § 1749.5(b)(1).

Cal. Civ. Code § 1749.5(b)(1) states: "Any gift certificate sold after January 1, 1997, is redeemable in cash for its cash value, or subject to replacement with a new gift certificate at no cost to the purchaser or holder." Miller alleges that Defendants violated § 1749.5(b)(1) "by representing that they would refund the balance of Gift Cards if the law required it despite maintaining a policy of declining to refund the balance to gift card holders even when California law required it." FAC ¶ 94.

Even taking these allegations as true, Miller does not allege a violation of section 1749.5(b)(1). Subsection (b)(1) says nothing at all about a merchant's representations or policies and does not establish a right of action for a false or misleading representation. There is simply nothing about Defendants' representations that is actionable under section 1749.5(b)(1). Further, California courts have rejected claims nearly identical to the claim that Miller makes here.

In *Marilao I*, 632 F. Supp. 2d 1008, the Southern District of California dismissed the plaintiff's cause of action for a violation of the UCL predicated on a violation of section 1749.5(b)(1). Like the case at bar, the plaintiff in *Marilao I* alleged that the defendant failed to redeem his gift card for cash despite language on the back of the card that stated "[t]he value on this card may not be redeemed for cash… unless required by law." *Id*. at 1010.

To aid it in analyzing the meaning of subsection (b)(1), the court relied on Cal. Civ. Code § 1448, entitled "Right of Selection." That section provides: "[i]f an obligation requires the performance of one of two acts, in the alternative, the party required to perform has the right of

selection, unless it is otherwise provided by the terms of the obligation." Cal. Civ. Code § 1448. The court held that "it is the vendor who holds the right to select whether to redeem a gift card in cash for its cash value or to provide a replacement card at no cost to the purchaser or holder. Accordingly, Plaintiff's allegation that McDonald's violated § 1749.5(b)(1) by failing to provide a full cash refund upon demand is without merit." *Marilao I*, 632 F. Supp. 2d at 1012. The court also relied on an Opinion of the Legislative Counsel of California, which states that "section 1749.5 allows the merchant or other issuer to choose one of the available options to meet his or her obligation" and "does not require a merchant to redeem a gift certificate in cash whenever it is presented by a consumer." Ops. Cal. Legis. Counsel, No. 1448, pp. 2-3 (Feb. 11, 1997). The court held squarely that "§ 1749.5(b)(1) does not require a merchant to redeem a gift card in cash for its cash value whenever presented by a purchaser or holder[.]" *Marilao I*, 632 F. Supp. 2d at 1012. *See also Rudd v. Borders, Inc.*, No. 09cv832 BTM (NLS), 2009 U.S. Dist. LEXIS 110064, at *5-6 (S.D. Cal. Nov. 25, 2009) ("Plaintiff argues that [subsection (b)(1)] affords the *owner* of the gift card the option of redeeming her card in cash for its cash value, or replacing the gift card with a new one. Defendant counters that only the *retailer* has the option of choosing whether to redeem a gift card for cash or provide a new card to the customer. The Court agrees with Defendant.").

Like the plaintiff in *Marilao I*, Miller has failed to plead a violation of section 1749.5(b)(1). Miller alleges that at various times he visited "Dunkin' stores," requested the balance of his Gift Cards in cash, and was denied. FAC ¶ 22. By its terms, section 1749.5(b)(1) did not require those stores to provide Miller with a cash refund. Inasmuch as Plaintiffs' UCL claim is premised on a violation of Cal. Bus. & Prof. Code § 1749.5(b)(1), the claim should be dismissed.

ii. Miller Fails to State a Claim Based On § 1749.5(b)(2).

Cal. Civ. Code § 1749.5(b)(2) states: "Notwithstanding paragraph (1), any gift certificate with a cash value of less than ten dollars ($10) is redeemable in cash for its cash value." The crux of Miller's "unlawful" UCL claim is his allegation that "Defendants refuse to refund the balances of Gift Cards that Plaintiff Miller and California Subclass members hold despite being required to by California law." FAC ¶ 89. He claims that "Defendants have not even provided a system that allows Gift Card holders to request a refund." *Id*.

There is little case law on point. But at least one California state trial court determined that allegations such as those in the FAC do not adequately allege a policy or practice of refusing to provide cash refunds of gift card balances under $10 as required by the UCL. In *Greiner v. Einstein Noah Rest. Grp.*, No. RG16811866, 2016 Cal. Super. LEXIS 38006 (Alameda Super. Ct. Oct. 4, 2016), the plaintiff alleged violations of the UCL predicated on allegations that the defendants had a policy or practice of refusing to provide cash refunds of gift-card balances under $10, and the court concluded:

> Plaintiff has not in fact alleged that Defendants have an express policy or a general policy or practice of refusing to provide cash refunds of gift-card balances under $10. At most, the FAC alleges several incidents in which first-line employees refused such refunds (FAC, 17-19, 22-24) and other incidents in which stores provided refunds. Plaintiff cannot plead a present, actual controversy by alleging what may be no more than isolated, sporadic failures by first-line employees to comply with a policy that in fact satisfies the gift card statute.

Id. at *3.

Like the plaintiff in *Greiner*, Miller has not adequately alleged "an express policy or a general policy or practice of refusing to provide cash refunds of gift-card balances under $10." Although the FAC alleges that "Defendants' policy is that the Gift Cards are completely non-refundable" (FAC ¶ 6), that bare allegation is unsupported by any factual detail as to the nature, source, content, form, and implementation of the alleged policy. In fact, Miller's factual allegations

appear to make clear that Defendants *do* have a policy for refunding gift card amounts as required by the law. Upon inquiring with "Defendants" about how to secure his refund, Miller was advised to "go to his nearest Dunkin' location for this request to be completed." *Id.* ¶ 22. At most, Plaintiffs have alleged that two stores' employees failed to comply with Defendants' stated policy of redeeming gift card balances for cash when required by law.

Furthermore, Miller does not have standing to bring his UCL claim because Miller has not alleged that he does not want to use his gift cards towards the purchase of Dunkin' products. As such, because Miller's cards retain their balance, Miller has failed to adequately allege that he suffered a loss of money or property. *Greiner*, 2016 Cal. Super. LEXIS 38006, at *14–15 ("Plaintiff . . . has not alleged that she does not want any of the products of Defendants for which she undisputedly could exchange the gift card . . . Plaintiff accordingly has not pled injury in fact and loss of money or property required to establish standing under the UCL."); *compare Marilao*, 2009 U.S. Dist. LEXIS 86150, at *8 (finding that plaintiff had standing to bring UCL claim because plaintiff "alleged that he [did] not want McDonald's products" and that the gift card "[could] only be used for products he [did] not wish to consume").[11]

Miller has therefore failed to establish an unlawful business practice under the UCL predicated on a violation of Cal. Civ. Code § 1749.5(b)(2).

[11] In *Marilao II*, McDonald's "argue[d] that Plaintiff lack[ed] standing to assert a UCL claim based upon a violation of § 1749.5(b)(2) because he could still redeem his gift card for McDonald's products and therefore did not lose money or property as a result of the unlawful conduct." 2009 U.S. Dist. LEXIS 86150 at *7. The court in *Marilao II* did not address the argument raised here and in *Greiner* that Plaintiffs alleged only isolated, sporadic failures and not a policy or practice of denying cash-back refunds.

CONCLUSION

For these reasons, the Court should grant Defendants' Motion to Dismiss the First Amended Class Action Complaint for failure to state a claim.

Respectfully submitted this 19th day of August, 2022.

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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

DANIEL CROOKS, individually and on behalf of all others similarly situation, Plaintiff, v. DUNKIN' BRANDS GROUP INC. and SVC SERVICE II LLC, Defendants.	Civil Action No.: 1:22-cv-10738-PBS **CERTIFICATE OF SERVICE**

I hereby certify that on this day I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system, which will automatically send e-mail notification of such filing to the following attorneys of record:

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