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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

AMANDA RUDD,

Plaintiff,

vs.

BORDERS, INC.,

Defendant.

CASE NO. 09cv832 BTM (NLS)

**ORDER GRANTING MOTION TO
DISMISS**

Defendant Borders, Inc. moves to dismiss Plaintiff Amanda Rudd's ("Rudd") Complaint for a lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) or for a failure to state a claim under Rule 12(b)(6). For the reasons explained below, the Court **GRANTS** Defendant's Motion to Dismiss without prejudice.

I. BACKGROUND

On March 19, 2009, Plaintiff filed a Complaint against Borders in California Superior Court. Plaintiff's Complaint alleges that she received a Borders gift card as a gift within four years preceding the date she filed her Complaint. (Compl. ¶ 5.) Plaintiff claims that her gift card provided that it was "not returnable or redeemable for cash." (Compl. ¶ 4.) Plaintiff asserts that she desired to redeem her gift card for cash. (Compl. ¶ 5.) Plaintiff allegedly still wishes to redeem her gift card for cash. (*Id.*)

1 Plaintiff filed her Complaint as a class action on behalf of herself and others who
2 received a Borders gift card not redeemable for cash. (Compl. ¶ 7.) Plaintiff's Complaint
3 brings two causes of action. First, she argues that Defendant violated the California Unfair
4 Competition Law, Cal. Bus. & Prof. Code § 17200, *et seq.* (the "UCL"), by engaging in unfair,
5 deceptive, or unlawful conduct. (Compl. ¶ 16.) Specifically, Plaintiff claims that Defendant
6 unlawfully violated California Civil Code § 1749.5. (Compl. ¶ 17.) Second, Rudd contends
7 that Borders has been unjustly enriched by its allegedly unfair and unlawful practice of
8 refusing cash redemptions on unused card balances, the result of which is that the funds
9 revert to Borders. (Compl. ¶ 23.)

10 On April 21, 2009, Borders removed this case to federal court and filed the instant
11 Motion to Dismiss.

12 13 14 **II. STANDARD OF REVIEW**

15 Defendant argues that the Court must dismiss Plaintiff's Complaint under Rule
16 12(b)(6) for failure to state a claim.

17 A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should be granted
18 only where a plaintiff's complaint lacks a "cognizable legal theory" or sufficient facts to
19 support a cognizable legal theory. Balistreri v. Pacifica Police Dept., 901 F.2d 696, 699 (9th
20 Cir. 1988). When reviewing a motion to dismiss, the allegations of material fact in the
21 plaintiff's complaint are taken as true and construed in the light most favorable to the plaintiff.
22 See Parks Sch. of Bus., Inc. v. Symington, 51 F.3d 1480, 1484 (9th Cir. 1995). Although
23 detailed factual allegations are not required, factual allegations "must be enough to raise a
24 right to relief above the speculative level." Bell Atlantic v. Twombly, 550 U.S. 544, 127 S. Ct.
25 1955, 1965 (2007). "A plaintiff's obligation to prove the 'grounds' of his 'entitle[ment] to
26 relief' requires more than labels and conclusions, and a formulaic recitation of the elements
27 of a cause of action will not do." Id.

28

1 **III. DISCUSSION**

2 A. First Cause of Action: Violation of California’s Unfair Competition Law

3 Plaintiff brings her first cause of action pursuant to California’s Unfair Competition
4 Law, Cal. Bus. & Prof. Code § 17200, *et seq* (the “UCL”). In order to state a claim under
5 California’s UCL, a Plaintiff must allege that Defendant engaged in an “unlawful, unfair or
6 fraudulent business act or practice” or “unfair, deceptive, untrue, or misleading advertising.”
7 Cal. Bus. & Prof. Code § 17200. “Virtually any law- federal, state or local - can serve as a
8 predicate for an action” under Section 17200. Smith v. State Farm Mutual Automobile Ins.
9 Co., 93 Cal. App. 4th 700, 718 (2001). Thus, Section 17200 permits the “borrowing” of
10 violations under other state and federal laws and treats these violations as independently
11 actionable unlawful practices. Chabner v. United of Omaha Life Ins. Co., 225 F.3d 1042,
12 1048 (9th Cir. 2000). If a plaintiff cannot state a claim under the predicate law, however, her
13 Section 17200 claim also fails. See Ingels v. Westwood One Broadcasting Services, Inc.,
14 129 Cal. App. 4th 1050, 1060 (2005) (“A defendant cannot be liable under § 17200 for
15 committing ‘unlawful business practices’ without having violated another law.”) (quotations
16 omitted); Rubio v. Capital One Bank (USA), N.A., 572 F. Supp. 2d 1157, 1168 (C.D. Cal.
17 2008) (dismissing plaintiff’s UCL claim because her predicate claim also failed).

18 The Court agrees with Defendant that Plaintiff has not sufficiently pled a claim for
19 relief. Borders properly argues that Plaintiff’s UCL cause of action hinges on Defendant’s
20 violation of Cal. Civ. Code § 1749.5(b)(1). Plaintiff claims that Section 1749.5(b)(1) requires
21 retailers to permit customers to redeem their gift certificates or gift cards for cash.¹ Thus,
22 Plaintiff argues, Defendant’s refusal to redeem her Borders gift card for cash unlawfully
23 denied her money to which she has a cognizable claim and invaded her legal rights under
24 state law. If, however, Section 1749.5(b)(1) does not require Borders to redeem Plaintiff’s
25 gift card for cash, Plaintiff has failed to state a viable claim.

26 Section 1749.5(b)(1) provides that:

27 _____
28 ¹ Plaintiff and Defendant do not dispute that Section 1749.5 covers both gift
certificates and gift cards.

1 Any gift certificate sold after January 1, 1997 is redeemable in cash for its cash
2 value, or subject to replacement with a new gift certificate at no cost to the
purchaser or holder. Id. (emphasis added).

3 Plaintiff argues that this provision affords the *owner* of the gift card the option of
4 redeeming her card in cash for its cash value, or replacing the gift card with a new one.
5 Defendant counters that only the *retailer* has the option of choosing whether to redeem a gift
6 card for cash or provide a new card to the customer. The Court agrees with Defendant.

7 Defendant cites a recent decision in a very similar case from this district, Marilao v.
8 McDonald's Corp., 632 F. Supp. 2d 1008 (S.D. Cal. 2009). The Court finds Marilao's
9 reasoning persuasive. In Marilao, the plaintiff sued McDonald's Corporation, bringing the
10 same causes of action as Rudd. See id. Marilao similarly desired to redeem his McDonald's
11 gift card for cash.² He claimed that McDonald's refusal to "cash out" his gift card violated the
12 UCL, by way of Section 1749.5(b)(1). Marilao also brought a claim for unjust enrichment.
13 As here, the plaintiff argued that Section 1749.5(b)(1) allowed him to demand the full cash
14 value of his gift card from the retailer.

15 Marilao relied upon California Civil Code §1448 to find that the plaintiff failed to plead
16 a violation of Section 1749.5(b)(1). Section 1448 defines a "Right of Selection" in the
17 performance of obligations under California's Civil Code. Section 1448 states:

18 If an obligation requires the performance of one of two acts, in the alternative,
19 the party required to perform has the right of selection, unless it is otherwise
provided by the terms of the obligation.

20 Marilao held, and this Court agrees, that Section 1749.5 requires the performance of
21 one of two acts. Specifically, when presented with a gift card or gift certificate sold after
22 January 1, 1997, the retailer must either redeem the card in cash for its cash value or replace
23 the card at no cost to the purchaser or holder. Thus, because the retailer is obligated to
24 perform, under Section 1448 the retailer has the right to select whether it will redeem the gift
25 card for cash value or replace the card with a new one. Although Plaintiff contends that
26 applying Section 1448 to interpret Section 1749.5(b)(1) results in a "butchered reading" of
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28 ² Marilao, like Rudd, did not allege the value of his gift card. Borders contends
that Rudd's gift card had a value of \$20 as of March 17, 2009. (Spouts Decl. ¶ 4(c).)

1 the latter provision, Plaintiff does not offer any authority to support her argument that the
2 Court should disregard the plain import of Section 1448.

3 The legislative history of Section 1749.5 supports the Court's interpretation of the
4 statute. Borders cites the Legislative Counsel's Opinion 1488, which responded to questions
5 regarding the interpretation of Section 1749.5 as it existed in 1997.³ The Legislative Counsel
6 concluded:

7 [Section 1749.5] imposes an obligation on a merchant or other issuer of a gift
8 certificate to continuously honor the gift certificate. This obligation may be met
9 by the merchant or other issuer by redeeming the certificate in cash for its cash
10 value or by replacing it with a new gift certificate at no cost to the purchaser or
11 holder. . . We do not think the Legislature intended to give a purchaser or
holder of a gift certificate the ability to automatically receive cash upon
presentation of the certificate. Such a construction would effectively render
meaningless the concept of a gift certificate, since it could be redeemed in
cash at any time after purchase. (Def.'s RJN, Ex. A at 30 (emphasis added).)

12 Plaintiff's citations to the legislative history do not support a different interpretation of
13 Section 1749.5(b)(1). The 1995–1996 Bill Analysis for AB 2466 states that the bill would
14 “require[] retailers to cash out or redeem a gift certificate whenever it is presented.” (Pl.'s
15 RJN, Ex. A at 7 (emphasis added).) Furthermore, the 2007–2008 Bill Analysis for SB 250
16 provides that “[w]hen a consumer has paid full value for a gift card, the retailer should be
17 prepared to give the customer the full value of the card, whether in cash, product, or
18 services.” (Pl.'s RJN, Ex. C at 5 (emphasis added).) Thus, the legislature clearly understood
19 Section 1749.5 to provide consumers the right to the cash value of their gift card, its value
20 in goods, or a replacement card, at the option of the retailer.

21 The Court agrees with Borders that recent amendments to Section 1749.5 only
22 confirm that Section 1749.5(b)(1) was not intended to give consumers the unilateral right to
23 cash out their gift cards. In 2007, the legislature amended Section 1749.5 to add paragraph
24 (b)(2), which provides that “[n]otwithstanding paragraph [b](1), any gift certificate with a cash

25
26 ³ At that time, the present provision (b)(1) of Section 1749.5 was incorporated
27 in paragraph (a). Section 1749.5(a) provided, “[o]n or after January 1, 1997, it is unlawful for
28 any person or entity to sell a gift certificate to a purchaser containing an expiration date. Any
gift certificate sold after that date shall be redeemable in cash for its cash value, or subject
to replacement with a new gift certificate at no cost to the purchaser or holder.” Cal. Civ.
Code §1749.5(a) (1998).

1 value of less than ten dollars (\$10) is redeemable in cash for its cash value.” As Defendant
2 argues, paragraph (b)(2) would be superfluous if paragraph (b)(1) entitled customers with a
3 gift certificate of *any* value to always redeem for cash. The Court finds incorrect Plaintiff’s
4 argument that the legislature added paragraph (b)(2) solely to allow owners of promotional
5 and rebate cards with small balances to redeem their cards for a cash value of less than ten
6 dollars. Paragraph (d) of Section 1749.5 specifically excludes from coverage of the section
7 gift certificates distributed pursuant to an “awards, loyalty, or promotional program.”

8 For the reasons discussed above, the Court holds that Plaintiff has no legal right to
9 redeem her Borders gift card for its cash value. Plaintiff does not claim that her card value
10 was less than ten dollars. Thus, she had no right to cash out her card under paragraph
11 (b)(2). As a result, Defendant did not violate Section 1749.5 and Plaintiff fails to state a claim
12 upon which relief may be granted. Therefore, the Court **GRANTS** Defendant’s Motion to
13 Dismiss as it applies to Plaintiff’s first cause of action.

14
15 B. Second Cause of Action: Unjust Enrichment

16 Plaintiff also claims that “[h]aving been paid fully for the Gift Cards at the initial point
17 of sale, Borders is unjustly enriched by its unfair and unlawful practice of refusing cash
18 redemptions on unused card balances, the result of which is that additional funds on unused
19 cards simply revert to Borders.” (Compl. ¶ 22.) As a remedy, Plaintiff “seeks restitution and
20 an injunction against Borders, requiring it to change its national policy and allow cash
21 redemptions on its purchased Gift Cards, together with partial balances thereon.” (Compl.
22 ¶ 23.)

23 To state a claim for unjust enrichment, a plaintiff must allege “the receipt of a benefit
24 and unjust retention of the benefit at the expense of another.” Lectrodryer v. SeoulBank, 77
25 Cal. App. 4th 723, 726 (2000). Plaintiff has not sufficiently pleaded a claim for unjust
26 enrichment. Borders’s practice of refusing cash redemptions on card balances over ten
27 dollars is not unlawful or unfair. Thus, Borders has not retained a benefit at the expense of
28 another. Plaintiff remains free to use her card to purchase goods at Borders or its affiliated

1 stores. If Plaintiff retains a partial balance on her card of less than ten dollars, Borders must
2 redeem her card in cash at her request. As Marilao noted, “[t]here is no equitable reason for
3 invoking restitution when the plaintiff gets the exchange which [she] expected.” 632 F. Supp.
4 2d at 1013 (quoting Comet Theatre Enterprises, Inc. v. Cartwright, 195 F.3d 80, 83 (9th Cir.
5 1952)). Therefore, the Court **GRANTS** Defendant’s Motion to Dismiss as it applies to
6 Plaintiff’s second cause of action.

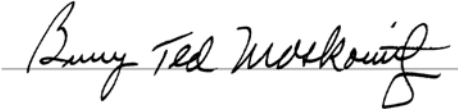
7 As noted above, when a customer requests to exchange a gift card that exceeds \$10
8 in value, the retailer can choose whether to exchange the card for cash or for a new card.
9 The retailer makes this choice when a customer presents the gift card for exchange. Plaintiff,
10 however, only alleges that she *desired* to exchange her card for cash. (Compl. ¶ 5.) She
11 does not allege that she ever presented her gift card to Borders for exchange. Therefore,
12 even if Plaintiff could state a cause of action, she has no standing because she has not
13 alleged injury by any action of Borders.

14
15 **III. CONCLUSION**

16 For the reasons explained above, the Court **GRANTS** Defendant’s Motion to Dismiss
17 in its entirety without prejudice. Plaintiff may file an amended complaint within twenty days
18 of the entry of this Order. If Plaintiff fails to files an amended complaint, the Court will direct
19 the Clerk to enter judgment dismissing this case without prejudice.

20 **IT IS SO ORDERED.**

21 DATED: November 24, 2009

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24 Honorable Barry Ted Moskowitz
25 United States District Judge
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