

United States District Court
Northern District of California

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CARL BARRETT, et al.,
Plaintiffs,
v.
APPLE INC., et al.,
Defendants.

Case No. [5:20-cv-04812-EJD](#)

AMENDED ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS FIRST AMENDED COMPLAINT; DENYING MOTION FOR PROTECTIVE ORDER TO STAY 30(B)(6) DEPOSITION

Re: Dkt. No. 61

Plaintiffs Carl Barrett, Michel Polston, Nancy Martin, Douglas Watson, Eric Marinbach, Michael Rodriguez, Maria Rodriguez, Guanting Qiu, and Andrew Hagene bring this putative class action against Defendants Apple, Inc., Apple Value Services LLC (collectively, “Apple”), and Does 1-100. In their First Amended Complaint (“FAC”), Plaintiffs assert the following claims: (1) unfair practices in violation of the California Consumers Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750 et seq.; (2) unfair practices in violation of the California Unfair Competition Law (“UCL”), Cal. Bus. & Prof. Code § 17200; (3) unlawful practices in violation of the CLRA; (4) unlawful practices in violation of the UCL; (5) deceptive practices in violation of the CLRA; (6) deceptive practices under the UCL; (7) violation of the California False Advertising Law (“FAL”), Cal. Bus. & Prof. Code § 17500; (8) receiving, retaining, withholding, or concealing stolen property in violation of California Penal Code § 496; (9) conversion; (10) aiding and abetting intentional torts; and (11) declaratory judgment under 28 U.S.C. § 2201. First Am. Class Action Compl. (“FAC”), Dkt. No. 59.

Case No. [5:20-cv-04812-EJD](#)

1 Before the Court is Apple's motion to dismiss the FAC pursuant to Federal Rule of Civil
 2 Procedure 12(b)(6), as well as Apple's motion for a protective order to stay depositions pursuant
 3 to Rule 30(b)(6). Defs. Apple Inc. and Apple Value Servs., LLC's Not. of Mot. and Mot. to
 4 Dismiss First Am. Compl. ("Mot."), Dkt. No. 61; Defs. Apple Inc. and Apple Value Servs., LLC's
 5 Not. of Mot. and Mot. for Protective Order to Stay 30(b)(6) Deposition, Dkt. No. 85. The Court
 6 finds the matter suitable for resolution without oral argument. Civ. L.R. 7-1(b). Having
 7 considered the parties' written submission, the Court GRANTS IN PART and DENIES IN PART
 8 the motion to dismiss and DENIES the motion for a protective order.

9 I. BACKGROUND

10 A. Factual Background

11 Defendant Apple Inc. is a California corporation with its principal place of business in
 12 Cupertino, California. FAC ¶ 16. Apple Value Services, LLC, is a Virginia corporation with its
 13 principal place of business in Cupertino, California. *Id.* ¶ 17. Plaintiffs are residents of Maryland,
 14 Oregon, California, New York, Massachusetts, and Missouri, all of whom fell victim to scams
 15 involving the purchase of Apple's App Store & iTunes gift cards. *Id.* ¶¶ 7-15, 112-177.

16 The Federal Trade Commission has reported that, between 2015 and 2019, scammers stole
 17 more than \$93.5 million by carrying out a formulaic gift card scam. FAC ¶ 58. FTC data
 18 indicates that gift card scammers steal more and more money with each passing year. *Id.* Gift
 19 card scammers stole approximately \$24.4 million in 2019 alone, and \$29.4 million in 2020 alone.
 20 *Id.* These figures may indicate only a fraction of the theft occurring each year, as many scam
 21 victims may not file a report. *Id.* About a quarter of all reported gift card scams involve Apple
 22 gift cards. *Id.*

23 According to Plaintiffs, the scam works as follows: The scammer contacts an individual.
 24 *Id.* ¶¶ 63-71. The scammer induces panic or urgency in the individual or otherwise induces the
 25 individual to give money to the scammer. *Id.* The scammer may, for example, tell the individual
 26 that the individual has a time-sensitive opportunity to receive a vaccine for COVID-19. *Id.* The
 27 scammer tells the individual that the individual can transfer money to the scammer by using

28 Case No. 5:20-cv-04812-EJD

1 iTunes gift cards. *Id.* The scammer tells the individual to go to a nearby retailer to buy one or
 2 more gift cards. *Id.* The scammer tells the individual to give to the scammer the unique code(s)
 3 located on the back of the gift card(s). *Id.* If the individual complies, the scammer may ask the
 4 individual to purchase more gift cards and share their codes as well. *Id.*

5 Once the scammer is in possession of a gift card code, the scammer is in possession of the
 6 value associated with the gift card—at least until the individual who was the victim of the scam or
 7 someone else with access to the code uses up that value. *Id.* At this point, the scammer does one
 8 of two things. *Id.* The scammer may sell the code to a third party in exchange for money. *Id.*
 9 Alternatively, the scammer may input the code into an Apple ID account controlled by the
 10 scammer. *Id.* If the scammer inputs the code into their Apple ID account, the scammer can use
 11 the value of the gift card as if it were their own and carry out transactions in either the iTunes
 12 Store or the App Store. *Id.* For example, the scammer may purchase songs or movies on iTunes,
 13 or they may spend the money on or within applications (“apps”) controlled by a third party. *Id.*
 14 Some apps are free but some cost money to download; moreover, some apps allow or induce users
 15 to pay money within the app itself—for example, to get access to special features of the app. *Id.*

16 In a typical version of the scam, however, the scammer will not spend the gift card value in
 17 the iTunes Store or on or within third-party apps. *Id.* Instead, scammers spend the value on or
 18 within an app that the scammer themselves controls. *Id.* This means that, prior to contacting the
 19 individual and inducing the individual to buy a gift card, the scammer has often already created
 20 their own app or otherwise obtained control over an app someone else created. *Id.* In order to
 21 create an app offered in Apple’s App Store, one must become an Apple Developer. *Id.* ¶¶ 33-36.
 22 To become an Apple Developer, one must create an Apple ID, enroll in the Apple Developer
 23 Program, enter into the Apple Developer Program License Agreement, and pay a fee of \$99 per
 24 year. *Id.* Whenever a purchase is made on or within an app (either with gift card value or with
 25 other loaded monetary value), Apple retains 100% of the value of that purchase until
 26 approximately 45 days after the end of the fiscal month, at which point Apple either pays 70% of
 27 the value to the Apple Developer controlling the app or retains the entire amount based on indicia

1 of fraud. *Id.* ¶¶ 5-6, 71. Either way, Apple retains at least 30% of the value. *Id.* The scam, or at
 2 least one cycle of the scam, is complete when the Apple Developer-scammer receives their
 3 payment from Apple. The scammer has at this point effectively converted gift card codes into
 4 money.

5 Plaintiffs allege that Apple has control of its iTunes and App Store such that it knew or
 6 should have known about specific iTunes gift card scams as they were occurring or soon after they
 7 occurred. *See, e.g., id.* ¶ 25. Plaintiffs allege that Apple knew or should have known: which
 8 Apple IDs had uploaded the codes of stolen gift cards; which iTunes Store or App Store purchases
 9 had been made with the value uploaded from stolen gift cards; and which Apple Developer
 10 accounts were associated with purchases made with the value uploaded from stolen gift cards. *See,*
 11 *e.g., id.* ¶ 73. More generally, Plaintiffs allege that Apple knew or should have known how the
 12 iTunes gift card scam works, and that it is a widespread and impactful phenomenon. *See, e.g.,*
 13 FAC ¶ 63. Plaintiffs allege that Apple could have used its knowledge and control of its online
 14 stores to suspend Apple ID accounts and Apple Developer accounts associated with suspicious
 15 activity, to refuse to pay Apple Developer accounts that seemed to be involved with scams, and to
 16 refund to scam victims Apple's 30% commission on purchases associated with scams (if not the
 17 full 100% loss of the stolen gift card value). *Id.* ¶¶ 97-98. Plaintiffs point out that in 2012 Apple
 18 started producing gift cards in \$500 denominations, potentially increasing the impact of individual
 19 scams. *Id.* ¶ 106. Plaintiffs allege that Apple's actions or failures to act indicate that Apple is
 20 aiding and abetting the scams, or is otherwise violating California fair competition statutes by
 21 knowingly paying scammers and keeping funds received because of the scams. *See, e.g., id.* ¶¶
 22 108-110.

23 Apple provides warning language in bold red lettering on the backs of iTunes gift cards.
 24 *Id.*; *see also* Req. for Jud. Not. in Supp. of Apple's Mot. to Dismiss Plfs.' First Am. Compl.
 25 ("RJN"), Dkt. No. 62, Ex. 1.¹ This warning language reads as follows: "Do not share your code

26
 27 ¹ As discussed below, the Court grants Apple's motion to request judicial notice of this language
 and the other exhibits referenced throughout this Order. *See infra* Section III.A.

1 with anyone you do not know.” *Id.*; FAC ¶ 110. Apple has created a webpage on which it shares
 2 information regarding gift card scams, including information about how to avoid scams and what
 3 to do in case a scam has occurred. RJN, Ex. 3. This webpage is titled “About Gift Card Scams.”
 4 *Id.* The language on the website states, among other things: “If you believe you’re the victim of a
 5 scam involving Apple Gift Cards, App Store & iTunes Gift Cards, or Apple Store Gift Cards, you
 6 can call Apple at 800-275-2273 (U.S.) and say ‘gift cards’ when prompted.” *Id.* at 1. The
 7 website also includes the following language: “Never provide the numbers on the back of a Gift
 8 Card to someone you do not know. Once those numbers are provided to the scammers, the funds
 9 on the card will likely be spent before you are able to contact Apple or law enforcement.” *Id.*

10 Apple gift cards are subject to Terms and Conditions. *See, e.g., id.* ¶¶ 43-46. A partial
 11 version of the Terms and Conditions appears on the back of the packaging sleeve for iTunes gift
 12 cards. RJN, Ex. 1. This partial version refers users to the full Terms and Conditions on Apple’s
 13 website. *See, e.g.,* FAC ¶¶ 43-46. There is also a reference to the Terms and Conditions website
 14 on the back of the gift card itself. RJN, Ex. 1. The Terms and Conditions language on the gift
 15 card packaging includes the following: “Neither Apple nor Issuer is responsible for any loss or
 16 damage resulting from lost or stolen cards or for use without permission.” FAC ¶¶ 43-46. The
 17 Terms and Conditions on Apple’s website includes the following:

18 We reserve the right, without notice to you, to void or deactivate
 19 [iTunes gift cards] (including a portion of your Account balance)
 20 without a refund, suspend or terminate customer accounts, suspend
 21 or terminate the ability to use the Services, cancel or limit orders and
 22 bill alternative forms of payment if we suspect Store Credit was
 23 obtained, used, or applied to an Apple ID fraudulently, unlawfully,
 24 or otherwise in violation of these terms and conditions.

25 *Id.* ¶ 44. The version of the Terms and Conditions at issue here state that California law applies.

26 *Id.*

27 Plaintiffs cite an April 2016 NBC News report, in which an Apple spokesperson stated:

28 [I]f someone contacts Apple Support after sending off the gift card
 29 code – and the money has not been drained from the card – [the
 30 scam victim] can freeze the account and have the money refunded to
 31 them. If the money is already gone, Apple advises people to file a
 32 complaint with the FTC.

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.