Humphrey v. First Century Bankcorp et al

2019 | Cited 0 times | N.D. Ohio | January 8, 2019

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF OHIO
---------- : AMBER HUMPHREY, : on behalf of herself and the class, :

: CASE NO. 1:18-CV-1050 Plaintiff, : :

vs. : OPINION & ORDER : [Resolving Docs. 44, 51] STORED VALUE CARDS, D/B/A NUMI : FINANCIAL, et al. : :

Defendants. : : ---------- JAMES S. GWIN, UNITED STATES DISTRICT JUDGE:

Plaintiff Amber Humphrey sues Defendants Stored Bank Cards, doing business as With their complaint, Plaintiffs claim that Defendants violated the Electronic Funds Transfer Act when the Defendants issued unsolicited debit cards. Plaintiffs say these unsolicited cards then charged fees that Plaintiffs had not agreed to. They allege that this unsolicited card issuance and violated EFTA and Ohio law. Defendants move to dismiss the complaint for failure to state a claim 1

and move for summary judgment. 2 For the following reasons, the Court DENIES GRANTS IN PART and DENIES IN PART

1 Doc. 44. Plaintiffs oppose. Doc. 48. Defendants reply. Doc. 52. The legal arguments presented in this motion are largely the same as those in their motion for summary judgment. 2 Doc. 51. Plaintiffs oppose. Doc. 53. Defendants reply. Doc. 54. Plaintiffs surreply. Doc. 58.

I. Background A. Plaintiff Humphrey

In August 2017, Plaintiff Humphrey served a thirty-day drug paraphernalia possession sentence at the Lorain County Jail. 3

When she entered the jail, she had sixty dollars cash. 4

The jail took this money and placed in an inmate trust account. During her incarceration, Humphrey used some of her inmate trust money to purchase food and hygiene items at the commissary. 5

When Humphrey was released in September 2017, the jail gave Humphrey an already validated 6

prepaid debit card with the inmate trust account balance. 7

The card carried the Numi brand name and Humphre s funds were put in a Republic bank account. 8

At her deposition, Plaintiff testified that no one provided her with paperwork stating the . 9

Plaintiff Humphrey states that she used the card for purchases and then used it to withdraw cash from an ATM. 10

3 Doc. 51-3 at 30 (Humphrey Dep.). Plaintiff was initially diverted into an intensive outpatient substance abuse program, in lieu of a jail sentence. She states that she decided to finish the program because the logistical burdens of the program were too heavy in light of her discovery, in May 2018, that she was pregnant. Id. at 31-32. 4 Id. at 37. 5 Id. 6 A See 15 U.S.C. § 1693i. 7 Id. at 50. 8 Doc. 51-17 at 3. 9 Doc. 51-3 at 55. 10 Id. at 71. B.

Defendant Republic Bank sponsored the prepaid card program. Republic oversees the program, sets the terms of service, and holds and controls the cardholder funds. 11 Defendant Numi manages the card program by servicing the cards and markets the program to correctional institutions.

Republic keeps ting account. 12

That is, each prepaid card is not connected to an individual account. Instead, a single bank account holds funds for thousands of released inmates. 13

Individual card expenditures are tracked in a sub-ledger. 14

The prepaid cards charge high fees for taking certain actions. For example, there is a $2.95 fee for using an ATM, and a $1.50 fee for performing an ATM balance inquiry. 15 The cards also impose fees for inaction; if there is money remaining on the card five days after issuance, Republic charges a $5.95 monthly maintenance fee for sitting on the . 16

A cardholder can request a paper check for the account balance at no charge but only if the request is made within the five days the card is issued. 17

Defendant Numi contracts with correctional facilities to distribute prepaid cards to inmates. These Numi correctional facility contracts include provisions requiring the jails provide cardholder terms when jails give the cards to inmates when the inmates are

11 Doc. 51-17 at 2 (Nelson Decl.). 12 Id. 13 Id. 14 Id. 15 Doc. 51-13 (Cardholder agreement). 16 Id. 17

Id. After this five-day grace period, a check costs $9.95. released. 18

Officer Frank Machovina, a Lorain County Jail correctional officer who gave the prepaid cards to released inmates, states that in particular, he usually gives the card terms and conditions to each inmate. 19

II. Discussion A. Legal Standard

S genuine dispute as to any material fact and that [they are] entitled to judgment as a matter

20 Where the nonmoving party bears the burden of proof at trial, Rule 56 requires plaintiffs that

21 Summary judgment is appropriate where the moving

22 B. The Court Grants in Part and Denies in

Plaintiffs allege that the inmate prepaid debit card program violates two EFTA provisions: 15 U.S.C. § 1693i, which prohibits the unauthorized issuance of debit cards, and 15 U.S.C. § 1693l-1, which prohibits general-use prepaid card service fees. The Court addresses each claim in turn.

18 Doc. 51-12 at 7. 19 Doc. 51-19. 20 Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986) (quoting Fed. R. Civ. P. 56). 21 Id. at 324 (quoting Fed. R. Civ. P. 56(e)). 22 Id. at 325. i. Unauthorized Issuance

Plaintiffs bring claims under 15 U.S.C. § 1693i. That provides that [N]o person may issue to a consumer any card, code, or other means of access to such consumer's account for the purpose of initiating an electronic fund transfer other than-- (1) in response to a request or application therefor; or (2) as a renewal of, or in substitution for, an accepted card, code, or other means of access, whether issued by the initial issuer or a successor. 23 This provision stops the issuance of unsolicited but activated debit cards.

against the issuance of unsolicited debit cards. Defendant contend that because inmate

funds were kept in a pooled account that EFTA does not apply to its card issuance.

EFTA defines account . . . as described in regulations of the Bureau, established primarily for personal,

24 demand deposit (checking), savings, or other consumer asset account (other than an occasional or incidental credit balance in a credit plan) held directly or indirectly by a financial institution and established primarily for personal, family, or household 25

With their motions, Defendants argue that the pooled custodial account used for the s asset account as defined in the regulation. They offer two arguments in favor of this view, one textual and one historical.

23 15 U.S.C. § 1693i(a). Defendants do not argue that they are eligible for the 1693i(b) statutory exception. 24 15 U.S.C. § 1693a. 25 12 C.F.R. § 1005.2 (emphasis added).

that an other consumer asset account must be an account that is kept for the benefit of a single consumer. Apparently, Defendant reason Because Plaintiffs funds were held in a pooled account shared by many inmate cardholders, Defendants contend that the regulation does not apply.

There is simply no textual basis to narrow the regulatory definition this way. 26

The adjectival function of the means to limit the account to accounts used for personal, rather than business, purposes. 27

The Court is unaware of any dictionary defining the term that the account must be held one held by a single individual rather than a number of persons.

Further, Defendants reading is inconsistent with the ejusdem generis canon of statutory interpretation. The as a generic term in a series describing asset account types: , savings, or other consumer When general terms follow specific ones in such a series, the canon dictates that

28 the canon because the first two terms in the serieschecking and savingsare accounts that can be held jointly.

26 The court accepts, for the sake of argument, that the regulation statute other consumer 27 Cf. Consumer Product e personal, family, or consumer purposes); Consumer Transaction bargain or deal in which a party acquires property or services primarily for a personal, family or household

purpose. 28 Circuit City Stores Inc., v. Adams, 532 U.S. 105, 114-15 (2001). interpretation, which would only include individual accounts, makes the general term unlike the terms it follows. Thus, textual argument fails.

2016 amendments to Regulation These regulations, that will become effective April 1, 2019, add a section to 12 C.F.R.

§ 1005.2(b) separately amendment would be unnecessary if prepaid accounts already fell under the regulation.

Further, Defendants point out that in 2006, regulators considered (and ultimately declined to

implement) an amendment that would have specifically covered prepaid card accounts.

This argument is also unpersuasive. That the CFPB chose to single out prepaid accounts for additional regulation does not mean that they were not covered by prior regulation or statute. On the contrary, the CFPB based broad statutory . In the Federal Register entry discussing the 2016 count broadly to include any other asset account

29 Additionally, the CFPB explained that its 2006 decision not to issue prepaid-card- specific regulations was because it was . It explained that view [in 2006] consumers did not often use prepaid cards in the same way that they used payroll cards. 30

The subsequent growth of prepaid cards led to the expansion of the

29 Prepaid Accounts Under the Electronic Fund Transfer Act (Regulation E) and the Truth in Lending Act (Regulation Z), 79 Fed. Reg 426, 77127 (Dec. 23, 2014) (emphasis added). 30 Id. The 2006 rulemaking did promulgate specific rules covering payroll cards. regulation in 2016. This decision was not, as Defendants contend, premised on the view

§ 1693i claim.

ii. The Inmate Prepaid Card Is N -

15 U.S.C. § 1693l-1, which -use

prepaid cards.

Defendants argue that the prepaid cards are not covered by this statute and regulation because the statute excludes marketed to the general

31 to the general public if [it] is directly or indirectly offered, advertised, or otherwise

32 Plaintiffs counter that the exception does not apply because they are members of the general public.

Here, Defendants are correct. While Plaintiffs are now members of the public, there is no record evidence suggesting that the card was ever advertised, or otherwise p to them. Indeed, given that the Plaintiffs had no choice but to receive the cards, marketing would serve no purpose. 33

Defendant Numi does perform marketing for the program, but it is program marketing (not card marketing) to

31 15 U.S.C. § 1693l-1(a)(2)(D)(iv); 12 C.F.R. § 1005.20(b)(4). 32 Consumer Financial Protection Bureau's Official Staff Commentary on Regulation E, FRRS 6-5480.74, 2012 WL 2563634, at *9. 33 The Court notes that the informational materials to be provided to inmates upon receipt of their cards However, this upgraded card seems to be different from the card actually issued on release. See Doc. 51-5 at 3. correctional institutions. 34 § 1693l-1 claim. C. Defendant is Not Entitled to Summa Law Claims

Plaintiffs bring Ohio state law unjust enrichment and conversion claims. Plaintiffs may recover for unjust enrichment if they 1) conferred a benefit upon the Defendants; 2) Defendants knew of that benefit; and 3) the Defendants retained that benefit under circumstances where it would be unjust to do so without payment. 35

To prevail on a claim

property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of plaintiff's property rights; and (3) damages

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i. Unjust Enrichment Defendants argue that they should receive enrichment claim because the from a lawful contract between

Defendant Numi and Lorain County. Defendants cite to Mickelson v. Cty. of Ramsey, where a district court dismissed similar claims under Minnesota law on these grounds. 37 The Court is not persuaded that the ostensibly lawful contract between Numi and Lorain County, standing alone, justifies the of fees. If, as Plaintiffs allege, the unsolicited issuance of the cards violated federal law, then the whole prepaid

34 Doc. 51-11 at 7. 35 Stratmar Retail Servs., Inc. v. Firstenergy Serv. Co., No. 5:14CV780, 2015 WL 5662534, at *9 (N.D. Ohio Sept. 24, 2015) 36 Dream Makers v. Marshek, 8th Dist. Cuyahoga No. 81249, 2002-Ohio-7069, 2002 WL 31839190, ¶ 19. 37 No. 13-CV-2911, 2014 WL 4232284, at *15 (D. Minn. Aug. 26, 2014) (dismissing claim that fee , aff'd, 823 F.3d 918 (8th Cir. 2016). card programincluding the retention of feeswas unlawful notwithstanding the existence of an otherwise valid contract between Defendant Numi and the Lorain County Jail. Further, the legality of the contract between Numi and the Lorain Jail does not necessarily dictate that the involuntary imposition of fees on third parties is justified. 38

Defendants also argue that Plaintiffs cannot recover fees under a theory of unjust enrichment because there was a binding contract between them and the Plaintiffs. 39 Defendants contend that Plaintiffs entered into a contract, regardless of whether they received the card terms and conditions at issuance. Defendants say that Plaintiffs card use to withdraw their money should be found to be an acceptance of the terms and conditions.

In support of this argument, Defendants cite to Heiges v. JP Morgan Chase Bank , N.A., in which a district court found that the plaintiff had entered into a binding arbitration agreement with the bank by using a credit card, even though the bank could not produce a signed cardholder agreement. 40

In that case, however, the plaintiff had personally and affirmatively opened the credit card account at issue, giving rise to the presumption that

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38 A district court in Oregon reached the same conclusion regarding Oregon common-law unjust enrichment claims involving a nearly-identical inmate prepaid program. See Brown v. Stored Value Cards, Inc., No. 3:15-CV-01370, 2016 WL 4491836, at *5 (D. Or. Aug. 25, 2016) Defendants to act is at least some evidence that some people in society would find Defendants' retention of fees acceptable, but it hardly seems to be the per se ban on an unjust enrichment claim that Defendants 39 See R.J. Wildner Contracting Co. v. Ohio Tpk. Comm'n, 913 F. Supp. 1031, 1043 (N.D. Ohio 1996) (recovery for unjust enrichment prohibited where express contract covers same subject). 40 Heiges v. JP Morgan Chase Bank, N.A., 521 F. Supp. 2d 641, 647 (N.D. Ohio 2007) 41 The same is true for Karmolinski v. Equifax Info. Servs., LLC, No. CIV. 04-1448-AA, 2005 WL 7213289, at *2 (D. Or. Oct. 31, 2005), another case cited by the defendants. There, the Plaintiff had sent the bank a signed credit card application.

Here, in contrast, there is no evidence that Plaintiffs voluntarily requested the prepaid debit cards or showed any intention of entering into a bargain prior to card issuance. Additionally, Plaintiff has raised a dispute of material fact as to whether inmates received the card terms and conditions at issuance. Given this dispute, it is not clear that the Defendants made a sufficiently definit cards represented acceptance. 42

Further, some class members may have incurred the $5.95 monthly maintenance fee without ever actually using the card. Even if that card use were assent to the card terms and conditions, class members who never used to card to withdraw money incurred this monthly fee through inaction. For these class members, there is no colorable argument that they have entered into a contract with Defendants.

ii. Conversion

claim because a conversion claim does not lie where the claim is for a sum certain, as

opposed to specific and identifiable monies. 43

Defendants argue that because the Plain funds were held in the a pooled custodial account and were not sequestered, the funds at

issue are not specific are not identifiable.

Plaintiffs have presented sufficient evidence for a jury to conclude that the allegedly converted funds are specific and identifiable. Under Ohio law, a claim for conversion may

42 See Gen. Motors Corp. v. Keener Motors, Inc., 194 F.2d 669, 67576 (6th Cir. 1952) definite in its terms, or must require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reason 43 See Carter v. PJS of Parma, Inc., No. 1:15 CV 1545, 2016 WL 1316354, at *2 (N.D. Ohio Apr. 4, 2016) (dismissing conversion claim brought by former servers because the allegedly converted tips were not specific and identifiable). lie where the disputed funds are held in trust. 44

Here, record evidence shows that the such a trust account. 45

Because of this trust arrangement, there is sufficient record evidence to show that correctional facilities had an obligation to return the specific funds surrendered on entrynot merely a certain amount of money upon release.

III. Conclusion For the foregoing reasons, the Court DENIES GRANTS IN PART and DENIES IN PART

Dated: January 8, 2019 s/ James S. Gwin JAMES S. GWIN UNITED STATES DISTRICT JUDGE

44 See Haul Transp. of VA, Inc. v. Morgan, No. CA 14859, 1995 WL 328995, at *4 (Ohio Ct. App. June 2, 1995) 45 See Doc. 51-18 at 1. (e booking).