

United States District Court, Northern District of Illinois

Name of Assigned Judge or Magistrate Judge	David H. Coar	Sitting Judge if Other than Assigned Judge	
CASE NUMBER	08 C 2694	DATE	2/26/2009
CASE TITLE	David Soprych v. T.D. Dairy Queen, Inc., et al.		

DOCKET ENTRY TEXT

For the reasons set forth below, Defendant T.D. Dairy Queen, Inc.'s motion to dismiss Plaintiff's Amended Complaint [47] is DENIED.

■ [For further details see text below.]

Docketing to mail notices.

STATEMENT

Before the court is defendant T.D. Dairy Queen, Inc.'s ("TD") motion under Federal Rule of Civil Procedure 12(b)(6) to dismiss plaintiff David Soprych's amended complaint. For the following reasons, the motion is DENIED.

In his amended complaint, Soprych alleges that the defendants willfully violated the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.* (FCRA), as amended by the Fair and Accurate Credit Transactions Act ("FACTA"), by printing more than the last five digits of credit and debit card numbers, and/or the card's expiration date, on receipts given to cardholders who transacted business with the defendants after December 2006. Soprych, in particular, says he received from defendants DQ Batavia and Thomas Kowske a receipt with more than five digits of his credit-card number, along with its expiration date, after he transacted business at a Dairy Queen in April 2008. Soprych intends to represent a class of similarly situated individuals, and he seeks statutory damages for each of the defendants' willful violations. He does not allege actual damages.

TD has filed a Rule 12(b)(6) motion to dismiss the complaint on the ground that FACTA's damages provision, *see* 15 U.S.C. §1681n, is unconstitutionally vague on its face, in violation of the Fifth Amendment's guarantee of due process. TD relies entirely on the arguments that Judge Acker found persuasive when this issue arose before his court in the Northern District of Alabama. *See Grimes v. Rave Motion Pictures Birmingham, LLC*, 552 F.Supp.2d 1302 (N.D. Ala. 2008). Specifically, TD argues that (1) the statutory damages range of \$100 to \$1,000 provides no guidance regarding how much a defendant should be penalized within the range, (2) the statutory damages are in fact punitive, causing "double punishment";

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STATEMENT

and (3) without actual damages, penalties are bound to be excessive and disproportionate to the harm caused by the defendant's conduct.

Since the *Grimes* decision, a number of courts have disagreed with Judge Acker's reasoning. *See, e.g., Ashby v. Farmers Ins. Co. of Oregon*, No. 01-CV-1446, 2008 U.S. Dist. LEXIS 105612 (D. Or. Dec. 12, 2008); *Turner v. Creative Hospitality Ventures, Inc.*, No. 08-61040, 2008 U.S. Dist. LEXIS 97298 (S.D. Fla. Dec. 2, 2008); *Smith v. MSV Sales & Servs., LLC*, No. 08-61436, 2008 U.S. Dist. LEXIS 93996 (S.D. Fla. Nov. 18, 2008); *Smith v. Casino Ice Cream, LLC*, No. 08-61285, 2008 U.S. Dist. LEXIS 81550 (S.D. Fla. Oct. 9, 2008). Most recently, Judge Leinenweber rejected the same arguments advanced by TD. *See Irvine v. Skydeck, LLC*, No. 08 C 4939, 2009 U.S. Dist. LEXIS 10660 (N.D. Ill. Feb. 12, 2009).

This court agrees with and adopts Judge Leinenweber's reasoning from the *Skydeck* decision. First, the lack of guidance regarding the amount of damages within the \$100-\$1,000 range is not constitutionally problematic; it is enough that businesses are on notice that they could pay up to \$1,000 in statutory damages if they do not conform their conduct to the law. Second, the potential sanction of two forms of "punitive" damages is not constitutionally problematic; the double jeopardy clause applies to criminal, not civil, penalties. Third, it would be premature to dismiss the complaint based on the potential for a constitutionally excessive damages award. If there is an award, and if it is unconstitutionally excessive, the court may reduce it. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 954 (7th Cir. 2006).

Accordingly, the motion is DENIED.