

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

GS TIFFANY BOUNDAS and DOROTHY)
STOJKA, individually and on behalf of a class,)
)
Plaintiffs,)
)
v.)
)
ABERCROMBIE & FITCH STORES, INC.,)
an Ohio corporation,)
)
Defendant.)

Civil Action No. 10-4866

Judge Shadur

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiffs, GS Tiffany Boundas (“Boundas”) and Dorothy Stojka (“Stojka”), bring this action to secure redress for unlawful practices of Defendant, Abercrombie & Fitch Stores, Inc. (“Abercrombie”), in connection with a gift card expiration policy. Plaintiffs allege Breach of Contract (Counts I and II) and Consumer Fraud (Counts III and IV).

INTRODUCTION

1. This is an action for Breach of Contract and Consumer Fraud for Defendant’s failure to honor the terms of a contract set forth on gift cards issued by Defendant.
2. Defendant promotes and sells retail casual wear clothing and accessories throughout the United States, including numerous locations in Illinois.
3. In or around December 2009, Defendant conducted a promotion in which consumers buying at least \$100 worth of merchandise at Defendant’s locations across the nation, including the Northern District of Illinois, were promised in return a \$25 gift card for use at Defendant’s stores.
4. The \$25 gift cards state “No expiration date.”

5. Despite the “No expiration date” term, Defendant on or around January 30, 2010 voided the \$25 gift cards by eliminating all remaining credit on said cards.

6. As a result of this breach, Plaintiffs and the putative classes have been damaged in the amount of the cumulative total of all the credit unilaterally eliminated from the gift cards by Defendant. Defendant admits that more than 200,000 unused promotional gift cards from the promotion at issue in the case exist, and that the face value of those same unused promotional gift cards exceeds \$5 million (See Exhibit A).

JURISDICTION AND VENUE

7. Jurisdiction is conferred pursuant to Defendant’s removal of this cause of action under 28 U.S.C. 1453.

8. Venue is proper as Defendant has and continues to transact business in Northern District of Illinois.

PARTIES

9. Plaintiff, GS Tiffany Boundas, is an individual residing in Willowbrook, Illinois.

10. Plaintiff, Dorothy Stojka, is an individual residing in Oak Brook, Illinois.

11. Defendant, Abercrombie & Fitch Stores, Inc., is an Ohio corporation with its principal place of business located at 6301 Fitch Path, New Albany, Ohio 43054. Abercrombie promotes and sells retail casual wear clothing and accessories throughout the United States, including the Northern District of Illinois.

STOJKA’S ALLEGATIONS

12. In or around December 2009, Abercrombie conducted a Christmas 2009 promotion. Abercrombie promised a \$25 gift card (“Gift Card”) to consumers buying at least \$100 worth of Abercrombie merchandise in a single transaction.

13. In or around December 2009, Stojka and each member of the putative class bought at least \$100 worth of Abercrombie merchandise. Specifically, Stojka purchased approximately \$300 worth of Abercrombie merchandise at an Abercrombie store located in Oak Brook, Illinois.

14. Pursuant to Abercrombie's promise, Stojka and all members of the putative class received Gift Cards worth the value of the multiple of hundreds of dollars each spent. For example, Stojka spent approximately \$300 and received Gift Cards with a cumulative value of \$75.

15. The back of each Gift Card contained the card's terms and conditions. The terms printed on the back of each Gift Card, drafted solely by Abercrombie, state:

This gift card is redeemable at all Abercrombie & Fitch/abercrombie locations, Abercrombie.com and abercrombiekids.com. This card may not be used for payment on any credit card account, to purchase another gift card, towards previously purchased merchandise, and is not redeemable for cash unless otherwise required by applicable law. If lost, stolen, or destroyed, abercrombie may replace this card upon satisfactory proof of purchase. The replacement card will be the value of the gift card at the time abercrombie receives your report of loss, theft, or unauthorized use. Purchases in a currency different than the currency of this card will be subject to an exchange rate conversion on the day of payment. *No expiration date.*

(Exhibit B) (emphasis added).

16. On or around January 30, 2010, despite the "No expiration date" term, Abercrombie unilaterally voided the Gift Cards by eliminating all remaining credit on the cards, making it impossible for Stojka and each member of the putative class to receive the benefit of their bargain, \$25 worth of Abercrombie merchandise per gift card.

17. Defendant received the benefit of its bargain when Stojka and the other members of the putative class purchased at least \$100 worth of Abercrombie merchandise.

18. Stojka has notified Abercrombie in writing of the above described conduct, constituting breaches of contracts and consumer fraud (Exhibit C).

BOUNDAS' ALLEGATIONS

19. In or around April 2010, Boundas attempted to use Gift Cards at an Abercrombie store in Oak Brook, Illinois. She had received the cards as a gift.

20. The Oak Brook Abercrombie refused Boundas' Gift Cards and told her that on or around January 30, 2010, despite the "No expiration date" term, Abercrombie voided the Gift Cards by eliminating all remaining credit on the cards.

21. Boundas bought approximately \$100 worth of Defendant's merchandise despite the refusal of her Gift Cards.

22. Boundas has notified Abercrombie in writing of the above described conduct, constituting breach of contract and consumer fraud (Exhibit D).

CLASS ALLEGATIONS

23. Plaintiffs bring Counts I and III of this action as a nation-wide class action on behalf of the following class of persons, defined as follows: "All consumers who purchased at least \$100 worth of Abercrombie merchandise during Abercrombie's Christmas 2009 promotion, received one or more Gift Cards, and whose Gift Cards were not used in full on or before January 30, 2010."

24. Plaintiffs bring Counts II and IV of this action as a nation-wide class action on behalf of the following class of persons, defined as follows: "All consumers owning Gift Cards that Defendant voided on or after January 30, 2010."

25. Plaintiffs are informed and believe that there are potentially thousands of members of the putative classes as described above. Although the precise number and identities of the class members are currently unknown to Plaintiffs, Defendant admits that more than

200,000 unused promotional gift cards from the promotion at issue in the case exist, and that the face value of those same unused promotional gift cards exceeds \$5 million (See Exhibit A).

26. The members of the putative classes are so numerous that joinder of all members is impracticable.

27. Questions of fact and law as to all putative class members predominate over any questions affecting any individual member of the putative classes, including, but not limited to whether: (1) Defendant breached contracts when it unilaterally voided the Gift Cards on or around January 30, 2010; and (2) Defendant's conduct constituted an unfair and deceptive practice.

28. Plaintiffs' claims are typical of the claims of the putative classes, because Defendant's refusal to accept the Gift Cards after January 30, 2010, despite the "No expiration date" term, affected them and the classes uniformly and in precisely the same manner.

29. Plaintiffs will fairly and adequately represent and protect the interests of the putative classes. They have retained experienced class action counsel. The interests of Plaintiffs are coincident with and not antagonistic to the interests of the other putative class members.

30. The questions of law and fact common to the members of the putative classes predominate over any questions affecting only individual members, including legal and factual issues relating to liability and damages.

31. A class action is superior to other available methods for the fair and efficient adjudication of this controversy, because joinder of all putative class members is impracticable.

32. Moreover, because the damages suffered by individual members of the putative classes are relatively small, the expense and burden of individual litigation makes it impossible for the members of the putative classes to redress the wrongs done to them individually.

33. Finally, the putative classes are readily definable and prosecution of the action as a class action will eliminate the possibility of repetitious litigation. There will be no difficulty in the management of this action as a class action.

COUNT I
(STOJKA)
BREACH OF CONTRACT

34. Plaintiffs reallege paragraphs 1-33.

35. Defendant formed a contract with Stojka and each member of the putative class when it delivered to them the Gift Cards in consideration for their purchase of at least \$100 worth of Defendant's merchandise.

36. On or around January 30, 2010, Defendant breached every contract between itself and each member of the putative class, including Stojka, when it unilaterally voided the Gift Cards by eliminating the remaining credit on said cards, violating the valid and enforceable term stating that the Gift Cards had "No expiration date."

37. Stojka and the putative class members sustained damages as a result of Defendant's breaches.

WHEREFORE, Plaintiffs request that the Court enter judgment in favor of Plaintiffs and the putative class and against Defendant, granting the relief specified below:

- (A) actual damages;
- (B) costs; and
- (C) such other and further relief as the Court deems proper.

COUNT II
(BOUNDAS)
BREACH OF CONTRACT

38. Plaintiffs reallege paragraphs 1-37.

39. Defendant formed a contract with each individual spending over \$100 during the promotion by delivering Gift Cards to such individuals in consideration for their purchases of at least \$100 worth of Defendant's merchandise.

40. The Gift Cards had no restrictions on assignment. They were redeemable by anyone having ownership of them.

41. On or around January 30, 2010, Defendant breached every contract between itself and each member of the putative class, including Boundas, when it unilaterally voided the Gift Cards by eliminating the remaining credit on said cards, violating the valid and enforceable term stating that the Gift Cards had "No expiration date."

42. Boundas and the putative class members sustained damages as a result of Defendant's breaches.

WHEREFORE, Plaintiffs request that the Court enter judgment in favor of Plaintiffs and the putative class and against Defendant, granting the relief specified below:

- (A) actual damages;
- (B) costs; and
- (C) such other and further relief as the Court deems proper.

COUNT III
(STOJKA)
VIOLATION OF THE OHIO CONSUMER SALES PRACTICES ACT

43. Plaintiffs reallege paragraphs 1-42.

44. At all times relevant hereto, there was in full force and effect the Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. § 1345.01 et seq. (the "Act").

45. Section 1345.02 of the Act provides in relevant part as follows:

- (A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a

supplier violates this section whether it occurs before, during, or after the transaction.

(B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:

- (1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;
- (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

Ohio Rev. Code Ann. § 1345.02(A) and (B)(1)-(2)

46. Stojka and all other members of the putative class were consumers involved in a consumer transaction with Defendant within the meaning of the Act.

47. Defendant engaged in unfair and deceptive acts and practices, in violation of Ohio Rev. Code Ann. § 1345.02(A) and (B)(1)-(2), by:

(A) stating that the subject of a consumer transaction, the Gift Cards, had a use or benefit of not expiring, but imposing an expiration date on them; and

(B) stating that the subjects of a consumer transaction, the Gift Cards, were of a particular standard, non-expiring, but imposing an expiration date on them.

48. Defendant engaged in such conduct in the course of trade and commerce.

49. Defendant's conduct damaged Stojka and each putative class member by misrepresenting material facts through the deceptive acts described in paragraph 47. Defendant through its acts misrepresented to Stojka and each putative class member that the Gift Cards were good until used, when in fact the Defendant unilaterally voided the Gift Cards by eliminating all remaining credit on the cards on or around January 30, 2010.

50. Defendant has committed deceptive acts or practices within the meaning of the Act by engaging in the acts and practices alleged herein.

51. As a direct and proximate result of the unfair acts or practices of Defendant alleged herein, Stojka and the other members of the putative class were damaged.

WHEREFORE, Plaintiffs request that this Court enter judgment in favor of Plaintiffs and the putative class and against Defendant, granting the following relief:

- A. compensatory damages;
- B. punitive damages;
- C. attorneys' fees, expenses and costs of suit; and
- D. such other further relief as the Court deems proper.

COUNT IV
(BOUNDAS)
VIOLATION OF THE OHIO CONSUMER SALES PRACTICES ACT

52. Plaintiffs reallege paragraphs 1-51.

53. The Gift Cards had no restrictions on assignment. They were redeemable by anyone having ownership of them.

54. At all times relevant hereto, there was in full force and effect the Ohio Consumer Sales Practices Act, Ohio Rev. Code Ann. § 1345.01 et seq. (the "Act").

55. Section 1345.02 of the Act provides in relevant part as follows:

- (A) No supplier shall commit an unfair or deceptive act or practice in connection with a consumer transaction. Such an unfair or deceptive act or practice by a supplier violates this section whether it occurs before, during, or after the transaction.
- (B) Without limiting the scope of division (A) of this section, the act or practice of a supplier in representing any of the following is deceptive:
 - (1) That the subject of a consumer transaction has sponsorship, approval, performance characteristics, accessories, uses, or benefits that it does not have;
 - (2) That the subject of a consumer transaction is of a particular standard, quality, grade, style, prescription, or model, if it is not;

Ohio Rev. Code Ann. § 1345.02(A) and (B)(1)-(2)

56. Boundas and other members of the putative class were consumers involved in a consumer transaction with Defendant within the meaning of the Act.

57. Defendant engaged in unfair and deceptive acts and practices, in violation of Ohio Rev. Code Ann. § 1345.02(A) and (B)(1)-(2), by:

(A) stating that the subject of a consumer transaction, the Gift Cards, had a use or benefit of not expiring, but imposing an expiration date on them; and

(B) stating that the subjects of a consumer transaction, the Gift Cards, were of a particular standard, non-expiring, but imposing an expiration date on them.

58. Defendant engaged in such conduct in the course of trade and commerce.

59. Defendant's conduct damaged Boundas and each putative class member by misrepresenting material facts through the deceptive acts described in paragraph 57. Defendant through its acts misrepresented to Boundas and each putative class member that the Gift Cards were good until used, when in fact the Defendant unilaterally voided the Gift Cards by eliminating all remaining credit on said cards on or around January 30, 2010.

60. Defendant has committed deceptive acts or practices within the meaning of the Act by engaging in the acts and practices alleged herein.

61. As a direct and proximate result of the unfair acts or practices of Defendant alleged herein, Boundas and the other members of the putative class were damaged.

WHEREFORE, Plaintiffs request that this Court enter judgment in favor of Plaintiffs and the putative class and against Defendant, granting the following relief:

- A. compensatory damages;
- B. punitive damages;

- C. attorneys' fees, expenses and costs of suit; and
- D. such other further relief as the Court deems proper.

GS TIFFANY BOUNDAS and DOROTHY
STOJKA

By: s/ Vincent L. DiTommaso
One of Their Attorneys

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CERTIFICATE OF SERVICE

I, Vincent L. DiTommaso, the undersigned attorney, hereby certify that on the 3rd day of September, 2010, I served a copy of this First Amended Class Action Complaint, via ECF, on all counsel of record.

s/ Vincent L. DiTommaso _____
Vincent L. DiTommaso

EXHIBIT A

Dustin Jensen

From: Brian J Murray [bjmurray@JonesDay.com]
Sent: Tuesday, August 10, 2010 3:54 PM
To: Vincent DiTommaso
Cc: Dustin Jensen; Elizabeth Kessler; James Shedden; Kelli J Stiles; Lawrence W. Schad; Matt Burns; Peter S. Lubin; DiTommaso Lubin PC
Subject: RE: Boundas v. Abercrombie
Attachments: ATT17943.gif; ATT17944.gif; ATT17945.gif

Vince -

Following up on our call today, this will confirm that Abercrombie & Fitch Stores, Inc. admits that the face value of the unused promotional gift cards from the promotion referenced in the complaint in this matter exceeds \$5 million.

Let me know if you have any additional questions.

Thanks very much.

bjm



Brian J. Murray

77 W. Wacker Drive, Chicago, IL 60601-1692 • Direct: 312.269.1570 • Fax: 312.782.8585 • bjmurray@jonesday.com

From: "Vincent DiTommaso" <vdt@ditommasolaw.com>
To: "Kelli J Stiles" <kjstiles@JonesDay.com>
Cc: "Dustin Jensen" <djensen@ditommasolaw.com>, "James Shedden" <jshedden@lawsds.com>, "Lawrence W. Schad" <lschad@lawsds.com>, "Matt Burns" <mburns@lawsds.com>, "Peter S. Lubin" <psl@ditommasolaw.com>, "DiTommaso Lubin PC" <works@ditommasolaw.com>, "Elizabeth Kessler" <ekessler@JonesDay.com>, "Brian J Murray" <bjmurray@JonesDay.com>
Date: 08/09/2010 04:05 PM
Subject: RE: Boundas v. Abercrombie

Kelli:

Without admitting liability whatsoever, are you saying that Abercrombie & Fitch Stores, Inc. admits that there are more than 200,000 unused promotional gift cards from the promotion at issue in this case and the face value of those same unused promotional gift cards exceeds \$5,000,000? I am not trying to be difficult but I am confused about the wording of your August 9, 2010 letter (that was attached to your email).

Please let me know as soon as possible.

Vince

Vincent L. DiTommaso
Tel: 630.333.0000
Fax: 630.333.0333
vdt@ditommasolaw.com

EXHIBIT B

30-5485

EST. 1892

abercrombie

NEW YORK

This gift card is redeemable at all Abercrombie & Fitch stores or www.abercrombie.com and abercrombiekids.com. This card may not be used for payment on any credit card account. To purchase another gift card, to send as a primary or secondary merchandise card, is not redeemable for cash unless otherwise required by applicable law. If lost, stolen, or destroyed, Abercrombie may replace this gift card upon satisfactory proof of purchase. The replacement card will be the value of this gift card at the time Abercrombie receives your report of loss, theft, or destruction. Use of this card in a currency different than the currency of this card will be subject to an exchange rate conversion on the day of payment. An expiration date

For balance inquiry
 visit www.abercrombiekids.com/balance
 or call 1-877-529-5901

Card # **6047 7882 0322**

EXP. DATE 

EXHIBIT C

July 22, 2010

Abercrombie & Fitch Stores, Inc.
6301 Fitch Path
New Albany, Ohio
43054

Re: Gift Promotion.

I am notifying Abercrombie & Fitch Store, Inc. of breaches of contract and conduct constituting consumer fraud regarding gift cards given out as a part of a Christmas 2009 promotion.

In December 2009, Abercrombie ran a promotion where customers, like me, purchasing \$100 worth of Abercrombie merchandise in a single transaction could receive a \$25 gift card. Pursuant to the promotion, I along with any other customer who participated received \$25 gift cards after purchasing \$100 worth of Abercrombie merchandise. My standard form gift card contained terms printed on the back, stating that the card had "No expiration date." Despite this promise, Abercrombie changed the balance on all gift cards to \$0 on January 30, 2010 and refused to honor the gift card after that date. As a result, I and other customers did not receive the promised \$25 benefit.

I am putting Abercrombie on notice that I along with the other customers in the same position as me were denied use of the gift cards due to the early expiration when Abercrombie represented that there would be "No expiration" date.

Sincerely yours,

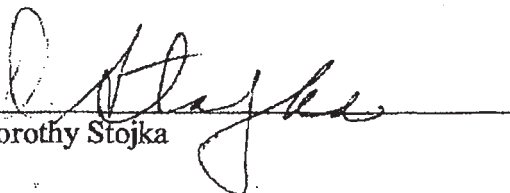

Dorothy Stojka

EXHIBIT D

June 29, 2010

Abercrombie & Fitch Stores, Inc.
6301 Fitch Path
New Albany, Ohio
43054

Re: Gift Promotion.

As I notified you on the phone and in my many emails

I am notifying Abercrombie & Fitch Store, Inc. of breaches of contract, promissory estoppel, unjust enrichment, and conduct constituting consumer fraud regarding gift cards given out as a part of a Christmas 2009 promotion.

In December 2009, Abercrombie ran a promotion where customers, like me, purchasing \$100 worth of Abercrombie merchandise in a single transaction could receive a \$25 gift card. Pursuant to the promotion, I along with any other customer who participated received \$25 gift cards after purchasing \$100 worth of Abercrombie merchandise. My standard form gift contained terms printed on the back, stating that the card had "No expiration date." Despite this promise, Abercrombie changed the balance on all gift cards to \$0 on January 31, 2010 and refused to honor the gift card after that date. As a result, I and other customers did not receive the promised \$25 benefit.

I am putting Abercrombie on notice that I along with the other customers in the same position as me were denied use of the gift cards due to the early expiration when Abercrombie represented that there would be "No expiration" date.

Sincerely yours,

Tiffany Boudas

TIFFANY BOUDAS