No. 131444

IN THE
SUPREME COURT OF ILLINOIS

CALLEY FAUSETT, individually and on behalf of others similarly situated, Plaintiff, v. WALGREEN CO., Defendant.	On Petition for Leave to Appeal from the Appellate Court of Illinois, Second Judicial District, Appeal No. 2-23-0105. There Heard On Appeal from the Nineteenth Judicial Circuit Court, Lake County, Illinois, Case No. 19 CH 675. The Hon. Donna-Jo Vorderstrasse, Judge Presiding.

BRIEF AND APPENDIX OF AMICUS CURIAE CINEMARK, USA, INC. IN SUPPORT OF DEFENDANT-APPELLANT

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INTEREST OF AMICUS CURIAE

This brief in support of Walgreen Company ("Walgreen") is submitted by Cinemark USA, Inc., a Texas corporation ("Cinemark"). Like Walgreen, Cinemark is a defendant in a putative national class action asserting a claim under the federal Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq, which Cinemark moved for the court to dismiss for lack of standing. That motion was denied, but Cinemark has moved the court to stay the proceedings pending this appeal.[1]

Cinemark submits this brief because its experience litigating FACTA claims in state courts provides an important perspective on the forum-shopping that would be tacitly encouraged if this Court were to expand the doctrine of standing under Illinois law to allow parties to bring no-injury FACTA claims in Illinois courts—particularly with respect to claims asserted on behalf of individuals located outside of Illinois whose FACTA claims would be barred in both the courts of their home states and all federal courts. Cinemark also submits this brief because the outcome of this appeal may, by operation of stare decisis, materially affect the outcome of lawsuit in *Rodriguez*.

[1] *See* Complaint, *Rodriguez v. Cinemark USA, Inc.*, No. 2023-CH-01857 (Ill. Cir. Ct. Cook Cnty. Feb. 24, 2023) ("*Rodriguez*") (A-34); Cinemark Motion to Dismiss, *Rodriguez*, *supra* (May 22, 2023) (A-7); Order Granting Motion to Stay, *Rodriguez*, *supra* (Nov. 3, 2023) (A-81); Cinemark Motion for Stay, *Rodriguez v. Cinemark USA, Inc.* ("*Rodriguez*"), No. 2023-CH-01857 (Ill. Cir. Ct. Cook Cnty. April 1, 2025) (A-97). The Court may take judicial notice of these documents. *See* Ill. R. Evid. 201(b). Another defendant in the *Rodriguez* action, Cinemark Holdings, Inc., contests personal jurisdiction and, out of an abundance of caution to avoid waiver of that defense, does not join this brief.

BACKGROUND

Like Walgreen, Cinemark is a defendant in a pending putative national FACTA class action lawsuit in Illinois court. *See* Complaint, *Rodriguez*, *supra* note 1 (A-34). The plaintiff in *Rodriguez*, like the plaintiff here, alleges no concrete injury, basing his claim on an asserted bare violation of the federal statutory requirement that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1); Complaint ¶¶ 42-46, 56-64, *Rodriguez*, *supra* note 1 (A-34, 44-45, 47-48).

Directly relevant to the issues raised in this amicus brief, however, the FACTA suit against Cinemark was not originally filed in Illinois. Rather, *Rodriguez* is a copycat of a suit filed against Cinemark in California by most of the same attorneys roughly a year earlier.[2] The original California complaint, like the subsequent Illinois complaint, asserted the same no-injury FACTA claim based on substantially identical allegations.[3] Assuming that California might grant standing to its citizens to bring no-injury FACTA claims, Cinemark initially sought dismissal in the California action only as to the national class allegations. Joint Stipulation and Order ¶ 3, *Neal*, *supra* note 2 (Sept. 29, 2022) (A-83, 85).

In *Limon v. Circle K Stores, Inc.*, 84 Cal.App.5th 671 (2022), *review denied* (Jan. 25, 2023), however, California subsequently determined, consistent with federal law, that plaintiffs must [or "are required to"] allege a concrete injury-in-fact beyond a bare alleged

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[2] *See* Complaint, *Neal v. Cinemark USA, Inc.* ("*Neal*"), No. 21-ST-CV-44508 (L.A. Cty. Sup. Ct. Dec. 7, 2021) (A-57).

[3] *Compare* Complaint ¶¶ 42-46, 56-64, *Rodriguez*, *supra* note 1 (A-34, 44-45, 47-48), *with* Complaint ¶¶ 43-49, 59-67, *Neal*, supra note 2 (A-57, 68-70, 72-73).

FCRA violation to possess standing to sue. *See id*. at 706 (finding plaintiff was required to allege actual injury to have standing to sue on FCRA claim).[4] Shortly after the *Limon* decision, the court in *Neal* entered an order reasoning that, because the decision in *Limon* "cast doubt about Plaintiffs' ability to meet the standing requirements of this state," it would defer ruling on Cinemark's motion to strike the national class allegations until it addressed the question of plaintiff's individual standing under California law, and ordered further briefing on that specific issue. Tentative Ruling for 1/10/23, *Neal*, *supra* note 2 (Jan. 9, 2023) (A-89).

Recognizing the ruling in *Limon* jeopardized the viability of their no-injury FACTA suit in California, plaintiffs' counsel filed the copycat *Rodriguez* suit in Illinois and, three days later, voluntarily dismissed their California action in order to pursue their Illinois suit. *See* Plaintiffs' Request for Dismissal, *Neal*, *supra* note 2 (Feb. 27, 2023) (A-76); Complaint, *Rodriguez*, *supra* note 1 (Feb. 24, 2023) (A-34). Plaintiffs' counsel explicitly admitted that this was a forum-shopping effort, based on their perception that Illinois would provide a more friendly forum for plaintiffs' no-injury claims:

> [O]n February 27, 2023 [sic], a class action against Defendants was filed in the Circuit Court of Cook County, Illinois (*Rodriguez v. Cinemark USA, Inc. and Cinemark Holdings, Inc.*, Case No. 2023CH01857), and in Illinois there is appellate case law establishing standing to sue under FACTA. . . . Plaintiffs are part of the class alleged in *Rodriguez* and believe their interest can be better represented in the *Rodriguez* action where the plaintiff's standing cannot be disputed.[5]

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[4] While *Limon* involved a FCRA claim regarding allegedly incomplete disclosures concerning credit reports, its holding applies equally to claims under FACTA, which is part of FCRA, regarding truncation requirements for card transaction receipts.

[5] Notably, a similar situation is at play in *Fausett*. Paragraph 26 of the Complaint alleges that the statutory violation against Fausett took place at a Walgreen's in Arizona. Cinemark

Plaintiffs' Request for Dismissal at 2, *Neal*, *supra* note 2 (A-76, 77).

Notably, although the *Rodriguez* suit has a different named plaintiff than did *Neal*, it is brought by the same attorneys, with the addition of Illinois counsel. *Compare* Complaint at 18, *Neal*, *supra* note 2 (A-57, 74) (plaintiffs represented by John R. Habashy, Scott D. Owens, and Andree Quaresima), *with* Complaint at 15-16, *Rodriguez*, *supra* note 1 (A-34, 48-49) (plaintiff represented by Keith J. Keogh, Michael Hilicki, John R. Habashy, Scott D. Owens, and Andree Quaresima).

Cinemark moved to dismiss *Rodriguez* for lack of standing. Cinemark Motion to Dismiss, *Rodriguez*, *supra* note 1 (May 22, 2023) (A-7). The *Rodriguez* court initially stayed consideration of Cinemark's motion to dismiss specifically in deference to this Court's resolution of the original *Fausett* Petition for Leave to Appeal. Order Granting Motion to Stay, *Rodriguez*, *supra* note 1 (Nov. 3, 2023) (A-81). When this Court thereafter remanded *Fausett* to the Second District on procedural grounds, but with direction to consider the substance of Walgreen's appeal, the *Rodriguez* court lifted its stay and denied Cinemark's Motion to Dismiss. Cinemark Motion for Stay, *Rodriguez, supra* note 1 (A-140-41; A-108). Now that Walgreen's new Petition for Leave to Appeal has again been granted, Cinemark has again moved for a stay of *Rodriguez*. *Id.* (A-168; A-97). The hearing on that Motion for Stay is set for August 7, 2025. Cinemark Order Setting Hearing on Motion for Stay, *Rodriguez v. Cinemark USA, Inc.* ("*Rodriguez*"), No. 2023-CH-01857 (Ill. Cir. Ct. Cook Cnty. April 1, 2025) (A-184).

Motion for Stay, *Rodriguez, supra* note 1 (A-143). Nonetheless, Fausett chose to sue in Illinois and to attempt to bring a national class action in this state.

ARGUMENT

I. This Court should hold, as a matter of Illinois law, that a no-injury plaintiff alleging only a bare FCRA/FACTA violation lacks standing.

The putative *Rodriguez* class action against Cinemark, like the instant case against Walgreen, alleges only a bare FACTA violation and no concrete injury. But Illinois standing law requires more than this—it requires "some injury in fact to a legally cognizable interest." *State ex rel. Leibowitz v. Fam. Vision Care, LLC*, 2020 IL 124754, ¶ 28 (citing *In re Est. of Wellman*, 174 Ill. 2d 335, 345 (1996)). Because no source of law, federal or state, establishes a cognizable interest in FCRA/FACTA compliance in the absence of concrete injury, a plaintiff alleging only that he was provided a receipt reflecting more digits than prescribed by FACTA lacks standing under Illinois law.

A. Federal law does not, because it cannot, create a legally cognizable interest in FCRA/FACTA compliance absent a concrete injury.

This Court is bound by the decisions of the U.S. Supreme Court regarding whether federal law creates a legally cognizable interest to sue for mere noncompliance with a federal statute absent any concrete injury. *See, e.g.*, *Ammons v. Canadian Nat'l Ry. Co.*, 2019 IL 124454, ¶ 18 ("[U.S.] Supreme Court interpretation of federal law is clearly binding.").

The U.S. Supreme Court has held that Congress lacks authority to elevate bare regulatory compliance, with no corresponding concrete injury, into a legally cognizable interest. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2201, 2209 (2021) (holding that a violation of FCRA based on the presence of "misleading" information in plaintiffs' credit report files erroneously matching them to the Treasury Department's national security watch list is not an injury-in-fact unless the report is disseminated to third parties); *see,*

e.g., *Pierre v. Midland Credit Mgmt., Inc.*, 29 F.4th 934, 936, 939 (7th Cir. 2022) (applying *TransUnion* to hold that receipt of a dunning letter sent in violation of the Fair Debt Collection Practices Act did not constitute an injury-in-fact, despite the fact that there was a clear violation of the statute, in a case where the plaintiff sought statutory damages). In *Pierre*, the Seventh Circuit specifically explained that Congress may list types or categories of harm that might constitute an injury under a piece of legislation, but that Congress cannot create an injury based on a mere statutory violation.

> Congress's decision to create a statutory cause of action may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *Lujan*, 504 U.S. at 578, 112 S.Ct. 2130. This does not mean, however, that Congress may "enact an injury into existence, using its lawmaking power to transform something that is not remotely harmful into something that is." *TransUnion*, 141 S. Ct. at 2205 (quotation marks omitted). History and tradition remain our ever-present guides, and legislatively identified harms must bear a close relationship in kind to those underlying suits at common law. *See Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462–63 (7th Cir. 2020).

Id. at 938. As a result, the Pierre court found that a mere violation of the Fair Debt Collection Practices Act was not a concrete injury—nor was the fact that the named plaintiff therein had to call Midland Credit to dispute the debt and contact a lawyer for advice, as those are not "legally cognizable" harms. *Id*. at 939.

For the federal legislature to create such a legally cognizable interest absent any concrete injury would violate the U.S. Constitution's separation of powers, including not just the judiciary's Article III authority to hear "cases and controversies," but also "the Executive Branch's Article II authority" to decide "how to prioritize and how aggressively to pursue" statutory violations. *TransUnion*, 141 S. Ct. at 2207.

Because the federal Congress has no authority to create a legally cognizable interest in statutory compliance absent any concrete injury "based only on [its] say-so," *Id*. at 2205

(quoting *Trichell v. Midland Credit Mgmt., Inc.*, 964 F.3d 990, 999, n.2 (11th Cir. 2020)), the federal FCRA and FACTA statutes provide no basis for this Court to conclude that a bare alleged FCRA/FACTA violation constitutes an injury-in-fact for purposes of standing to sue.

B. Nothing in Illinois law elevates a bare FCRA/FACTA violation into an injury-in-fact.

The Illinois legislature ***has not*** elevated any inherent interest that its citizens (let alone citizens of other States) may have in the contents of payment card receipts into a legally cognizable interest, still less a concrete injury, in the event of noncompliance with federal FACTA requirements. Stated differently, no Illinois statute provides a basis for this Court to hold that a bare FCRA/FACTA violation amounts to an injury-in-fact for purposes of standing to sue in Illinois state courts. The situation here is entirely unlike that in *Rosenbach v. Six Flags Ent. Corp*., where this Court considered an Illinois statute, the Biometric Information Privacy Act ("BIPA"), codifying a substantive "right to privacy in and control over [one's] biometric identifiers and biometric information." *Rosenbach v. Six Flags Ent. Corp.*, 2019 IL 123186, ¶ 33. As this Court explained, the Illinois legislature enacted BIPA to protect the substantive privacy interest flowing from the fact that an individual's "unique biometric identifiers" cannot be changed if compromised or misused—and emphasized that, in enacting BIPA, the legislature had "noted that 'Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information . . . [because] . . . once compromised, the individual has no recourse." *Id*. at ¶¶ 34-35 (quoting 740 ILCS 14/5(c)). Accordingly, this Court concluded in *Rosenbach* that, because of the unique substantive right to privacy conferred by the Illinois legislature in BIPA, if a "private entity fails to adhere to the statutory procedures, … 'the

right of the individual to maintain his or her biometric privacy vanishes into thin air'"—which this Court recognized as a "real and significant" injury. *Id.* at ¶ 34 (quoting *Patel v. Facebook, Inc.*, 290 F. Supp. 3d 948, 954 (N.D. Cal. 2018), *aff'd* 932 F.3d 1264 (9th Cir. 2019), *cert denied*, 140 S.Ct. 937 (2020)).

Consistent with *Rosenbach*, numerous courts have recognized that the substantive privacy injury necessarily resulting from a BIPA violation is not comparable to the lack of injury from a bare alleged FACTA violation. *See, e.g.*, *Bryant v. Compass Grp. USA, Inc.,* 958 F.3d 617, 624 (7th Cir. 2020) (BIPA violation was "no bare procedural violation; it was an invasion of her private domain, much like an act of trespass would be"); *Bassett v. ABM Parking Servs*., Inc., 883 F.3d 776, 780-81 (9th Cir. 2018) (distinguishing FACTA truncation violations from "cases where we have recognized a privacy-based injury"); *Patel*, 290 F. Supp. 3d at 953-954 ("[Given] the legislature's judgment that a violation of BIPA's procedures would cause actual and concrete harm . . . the abrogation of the procedural rights mandated by BIPA necessarily amounts to a concrete injury. This injury is worlds away from the trivial harm of a mishandled zip code or credit card receipt.'").

Instead, in the FCRA/FACTA context, the Supreme Court of Illinois should apply its default standing test (which it has laid out again this year). Under Illinois law, the alleged injury must be "concrete," and a "primary factual allegation that . . . the putative national class faced only an increased risk that their private personal data was accessed by an unauthorized third party" is insufficient. *Petta v. Christie Business Holdings Company, P.C.*, --- N.E.3d ---- 2025, 2025 IL 130337 at *4, ¶¶ 18 & 21 (citing *Transunion*, *see* Supra at 5, for the proposition that "an unmaterialized risk of future harm, without more, is insufficiently concrete to confer standing to sue for damages in federal court").

II. This Court should not confer standing in Illinois courts for bare FCRA/FACTA violations because to do so would offend comity, raise federalism concerns, and invite forum shopping.

Beyond the foregoing legal precedent, there are strong prudential reasons for this Court to reach the same result. First, fundamental principles of federalism and comity strongly counsel against inviting the filing in the courts of this state federal claims that the federal Constitution bars from being brought in federal courts. Second, because no other state has found or is likely to find that standing exists for bare FCRA/FACTA violations, for Illinois to confer such standing would invite pernicious forum shopping—particularly by non-residents of Illinois whose no-injury claims did not occur in or have any connection to Illinois and could not be brought in either the state or federal courts of their home states.

A. For bare FCRA/FACTA violations to confer standing in Illinois courts would offend comity and federalism.

Under federal law, a bare FCRA/FACTA violation does not amount to an injury-in-fact, and so, as a constitutional matter, does not create standing to sue in federal court. *See TransUnion*, 141 S. Ct. at 2213. Illinois law also requires plaintiffs have an injury in fact in order to bring claims in Illinois. *State ex rel. Leibowitz*, 2020 IL 124754, ¶ 28. If Illinois were to confer standing on bare FCRA violations, it would allow plaintiffs to bring in Illinois courts federal claims that are barred from federal court, notwithstanding that both Illinois and federal law require a plaintiff to have suffered an injury-in-fact. Such a counterintuitive result—*i.e.*, that the standard for whether a plaintiff has suffered the "injury-in-fact" necessary to pursue the identical claim would differ depending on where suit is filed—raises serious issues of federalism and comity.

As this Court has explained, comity is "a common law doctrine" under which "the courts of one state or jurisdiction will give effect to the laws and judicial decisions of

another, not as a matter of obligation, but out of deference and respect." *Schoeberlein v. Purdue Univ.*, 129 Ill. 2d 372, 377-78 (1989) (citation and quotation marks omitted). Comity requires state courts to follow federal interpretations of federal law "to the end that such laws may be given uniform application." *Carr v. Gateway, Inc.*, 241 Ill.2d 15, 21 (2011); *see also Felder v. Casey*, 487 U.S. 131, 153 (1988) ("A law that predictably alters the outcome of [federal statutory] claims depending solely on whether they are brought in state or federal court within the same State is obviously inconsistent with th[e] federal interest in intrastate uniformity."). The uniformity desirable when applying a federal law creating a cause of action includes uniformity in the requirements for that cause of action to be in court in the first place. *See U.S. Dep't of Lab. v. Triplett*, 494 U.S. 715, 721 (1990) (reviewing a state-court decision respecting third-party standing in state court for a federal cause of action, and describing as "questionable" the proposition that state courts "have the power, by granting or denying . . . standing, to create or destroy federal causes of action").

Unsurprisingly, there are vanishingly few instances of state courts entertaining federal causes of action that a federal court would reject for lack of cognizable injury—indeed, this *amicus* has identified none. Accordingly, this Court should as a matter of comity decline to assert jurisdiction over federal causes of action that cannot be asserted in federal court.

B. For a bare FCRA violation to confer standing in Illinois courts would invite undesirable class-action forum shopping.

In addition to federalism and comity, this case implicates Illinois's strong and justified public policy against class-action forum shopping. If this Court were to confer standing to sue in Illinois courts based on bare FCRA violations, it would make Illinois an

extreme outlier—and invite exactly the forum shopping this Court has held to be pernicious.

1. Illinois has a strong and justified public policy against forum shopping, particularly in the class action context.

As this Court has long and consistently recognized, "courts have never favored forum shopping." *Dawdy v. Union Pac. R.R. Co.*, 207 Ill. 2d 167, 174 (2003) (citing *Espinosa v. Norfolk & W. Ry. Co.*, 86 Ill. 2d 111, 122-23 (1981)); *see Fennell v. Illinois Cent. R. Co.*, 2012 IL 113812, ¶ 18 ("Decent judicial administration cannot tolerate forum shopping."); *Merritt v. Goldenberg*, 362 Ill.App.3d 902, 910 (Ill. 5th Dist. 2005) ("A plaintiff's use of forum shopping . . . is against Illinois's public policy.").

Illinois courts disfavor forum shopping for several reasons, including that it imposes unjustified "burdens of litigation [on] the public" by requiring the state judiciary to expend resources adjudicating the claims, *Fennell*, 2012 IL 113812, ¶ 45; that it subjects defendants to "vexatious and harassing suits," *Dawdy*, 207 Ill. 2d at 175 (quoting *Espinosa*, 86 Ill. 2d at 123 (quoting *Miles v. Illinois Central R.R. Co.*, 315 U.S. 698, 706 (1942) (Jackson, J., concurring)); and that it threatens the "good name" of the Illinois courts, *id*. at 174.

Although the harms of forum shopping typically arise when deciding *forum non conveniens* motions, Illinois courts have also identified the problem in the class action context, where many of the same prudential considerations apply. For example, in *Portwood v. Ford Motor Co*., this Court rejected an argument that it should "[t]oll[] a state statute of limitations during the pendency of a federal class action," referred to as "cross-jurisdictional tolling," because doing so would invite forum-shopping:

> [Cross-jurisdictional tolling] may actually increase the burden on that state's court system, because plaintiffs from across the country may elect to file a subsequent suit in that state solely to take advantage of the generous tolling rule. *Unless all states simultaneously adopt the rule* of cross-jurisdictional class action tolling, *any state which independently does so will invite into its courts a disproportionate share of suits which the federal courts have refused* to certify as class actions after the statute of limitations has run. . . . Given [that few states have considered, let alone adopted it], it is clear that adoption of cross-jurisdictional class tolling in Illinois would encourage plaintiffs from across the country to bring suit here following dismissal of their class actions in federal court. *We refuse to expose the Illinois court system to such forum shopping*.

Portwood v. Ford Motor Co., 183 Ill. 2d 459, 465-66 (1998) (emphasis added). The reasoning of *Portwood* applies with equal force to the question currently before this Court.

2. If this Court were to confer standing to sue on bare FCRA/FACTA violations, it would make Illinois an outlier among the states.

Several state courts have held that a bare FCRA/FACTA violation does not, as a matter of state law, confer standing—and no state court after *TransUnion* has found to the contrary. If this Court were to elect to allow Illinois to be an outlier, that would invite the kind of forum shopping that this Court in *Portwood* was keen to deter.

To begin, Florida, Missouri, and California state courts have published opinions dismissing no-injury FCRA/FACTA claims for lack of standing.

For example, a Florida appellate court affirmed dismissal for lack of standing where plaintiff—identically to the plaintiffs in this case and in *Rodriguez*—brought a FACTA claim alleging that he was given a receipt displaying ten digits of his credit card number, but did not allege that his credit card was used, lost, or stolen. *See Southam v. Red Wing Shoe Co.*, 343 So.3d 106, 107-08, 111-12 (Fla. 4th DCA 2022), *review denied*, No. SC22-1052, 2022 WL 16848677 (Fla. Nov. 10, 2022). Adopting the concrete injury requirements

of *TransUnion* as Florida law, the court explained that the bare alleged FACTA violation did not confer standing to sue because the plaintiff did not allege any "'economic' injury, nor any 'distinct or palpable' injury," so he had "'no concrete harm, [and thus] no standing [under Florida law].'" *Id.* at 108 (citing *TransUnion*, 141 S. Ct. at 2200); *see also Southam v. Red Wing Shoe Co., Inc.*, 343 So. 3d 106, 112–13 (Fla. Dist. Ct. App. 2022) (holding that consumer did not plausibly allege injury-in-fact resulting from FACTA violation based on standing analysis in *State v. J.P.*); *Saleh v. Miami Gardens Square One, Inc.*, 353 So. 3d 1253 (Fla. Dist. Ct. App. 2023) (affirming trial court's motion to dismiss for lack of standing "in all respects based on the standing analysis in *Southam v. Red Wing Shoe Co.*").

Similarly, a Missouri appellate court affirmed dismissal for lack of standing where a suit alleged a "bare procedural violation [of FCRA], divorced from any concrete harm," *Corozzo v. Wal-Mart Stores*, 531 S.W.3d 566, 573-76 (Mo. App. 2017) (citation omitted). And, as discussed above, a California court relied on *TransUnion* in concluding that a plaintiff alleging a bare FCRA violation lacked standing under California law. *See Limon*, 84 Cal.App.5th at 706.

Additional states' courts have, in unpublished decisions, reached the same result. *See, e.g.*, *Steichen v. 1223 Spring St. Owners Ass'n*, No. 82407-4-I, 2023 WL 6973845, at *12 (Wash. Ct. App. Oct. 23, 2023) (unpublished) (finding that claim was properly dismissed because plaintiff did not "provide evidence that [defendant's] alleged procedural violation caused him concrete harm"); *Gennock v. Kirkland's Inc.*, No. 462 WDA 2022, 2023 WL 3477873, at *4–6 (Pa. Super. Ct. May 16, 2023) (unpublished) (dismissing no-injury FACTA claim because "the mere printing of a receipt in violation of FACTA" did

not satisfy the "foundational components of standing"—"an interest that is substantial, direct, and immediate").

Further, the courts of many other states would certainly reach the same result as *TransUnion* because their standing requirements track those of federal law regarding the requirement of an injury in fact. Twenty-two states explicitly incorporate the federal injury-in-fact requirement into their standing laws. *See* A-1, tbl.1. For example, "the *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware," *Dover Hist. Soc. v. City of Dover Plan. Comm'n*, 838 A.2d 1103, 1111 (Del. 2003); so Delaware courts are precedent-bound to deny standing for no-injury FCRA/FACTA claims just as did Florida—which also follows federal standing law, *see State v. J.P.*, 907 So. 2d 1101, 1113 (Fla. 2004) (adopting the federal "irreducible constitutional minimum for standing"). Seventeen more states will likely reach the same result because their standing law—like that of Illinois—includes requirements substantively parallel to the federal injury-in-fact requirement. *See* A-3, tbl.2. In Virginia, for example, standing requires a "particularized injury," *Wilkins v. West*, 571 S.E.2d 100, 107 (Va. 2002), and Virginia courts would likely follow federal standing law (which they often cite) to hold that a bare FCRA/FACTA violation is not actionable injury. Thus, all told, at least thirty-nine states have held, or if presented the question before this Court would in all likelihood hold, that no-injury FCRA/FACTA claimants lack standing.

Moreover, while the remaining eleven states sometimes allow standing to no-injury plaintiffs, they tend to do so ***only*** in deference to determinations by their own ***state*** legislatures to grant standing in such circumstances, which the Illinois legislature has not

done here. *See* A-5, tbl.3. For example, Pennsylvania follows federal standing precedents as to injury except when "a statute properly enacted by the ***Pennsylvania legislature*** furnishes the authority for a party to proceed in Pennsylvania's courts." *Hous. Auth. of Cnty. of Chester v. Pennsylvania State Civ. Serv. Comm'n*, 730 A.2d 935, 939 (Pa. 1999) (emphasis added); *see also Nat'l Ass'n of Mut. Ins. Companies v. Dep't of Bus. & Indus., Div. of Ins.*, 524 P.3d 470 (Nev. 2023) ("We . . . recognize statutory standing in cases where the [Nevada] Legislature has created a right and provided a statutory vehicle to vindicate that right that ***relaxes*** otherwise applicable standing requirements.") (emphasis added); *Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 591 A.2d 592, 604 (N.J. 1991) (explaining that, although New Jersey standing law is more liberal than federal standing law, nevertheless, a plaintiff who lacks standing for a federal cause of action in federal court also lacks standing to bring that claim in state court).[6] Since FCRA is a federal statute, and *TransUnion* held that a bare FCRA violation does not confer standing, there is no reason to expect that the courts of these eleven states would conclude otherwise as a matter of state law.[7] Indeed, apart from the instant case, ***no*** state appellate court to consider

[6] The District of Columbia has adopted a similar clear-statement rule for standing, under which an injury-in-fact is required absent "a clear expression of an intent by the [D.C.] Council to eliminate our constitutional standing requirement." *Grayson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011).

[7] Pennsylvania is once again a perfect example. *In Budai v. Country Fair, Inc.*, the court disagreed

> "with Plaintiffs' contention that FACTA conferred upon them statutory standing. Notably absent from FACTA is a provision, like those in the Child Custody Act, delineating who has standing to pursue an action thereunder. Thus, while FACTA includes liability provisions that create private rights of action, there is no standing provision that "expressly prescribes the parties who may pursue a [FACTA] action in Pennsylvania courts[.]"

TransUnion has held that an allegation of a bare FCRA/FACTA violation creates a sufficiently concrete injury to confer standing.[8]

In sum, it is highly likely that other states' courts will decline to confer standing on the kind of no-injury FCRA/FACTA claim that *TransUnion* barred from federal court. If Illinois were to grant standing for such claims, it would "encourage plaintiffs from across the country to bring suit here," thus "expos[ing] the Illinois court system" to the very forum shopping against which this Court has previously warned. *See Portwood*, 183 Ill. 2d at 466.

C. Conferring standing to bring no-injury FCRA/FACTA claims on behalf of non-residents who cannot sue individually in any other court would exacerbate the comity and forum shopping problems.

This Court should deny standing to no-injury FCRA/FACTA putative class actions to the extent brought on behalf of non-resident putative class members whose claims accrued outside Illinois. Endorsing such class actions would not only encourage forum-shopping to Illinois on behalf of class members who could not sue in their home states, it

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2023 PA Super 85, 296 A.3d 20 (2023), *appeal denied*, 307 A.3d 1198 (Pa. 2023) (holding no-injury FACTA claim did not confer statutory standing upon putative class).

[8] The only counterexample we can identify is the same one identified by the Appellate Court in *Fausett*, *Kenn v. Eascare, LLC*, 226 N.E.3d 318, 324 (Mass. App. Ct. 2024). However, the *Kenn* court—contrary to Illinois' *Greer* decision—determined that "legal injury," as opposed to an injury in fact, was sufficient to confer standing under Massachusetts law. *See id.* at 325-27. *Kenn* was an intermediate appellate court decision that does not appear to have been appealed to the Supreme Court of Massachusetts, where it is questionable that it would have been upheld. After all, in *Pugsley v. Police Dep't of Bos*., the state supreme court cited federal precedents to support the proposition that standing requires an injury and that "injuries that are speculative, remote, and indirect do not confer proper standing." 34 N.E.3d 1235, 1239 (Mass. 2015) (cleaned up). Moreover, while the New Jersey Supreme Court, two months after *TransUnion*, did allow a no-injury FCRA putative class action to proceed past the pleadings, its opinion does not discuss *TransUnion*, and indeed does not address standing, which the defendants did not challenge. *See Baskin v. P.C. Richard & Son, LLC*, 249 A.3d 461, 466 (N.J. 2021) (holding that plaintiffs had "sufficiently pled" the class action requirements of numerosity, predominance, and superiority).

would improperly permit the procedural device of a class action to be used to deprive defendants of dispositive standing defenses.

It is well-established that a class action is merely a "procedural device," and that it violates Due Process to allow the use of this mere "procedural device" to grant rights that a party would not otherwise have in an individual case, or deprive a defendant of defenses which it would have in an individual case. *See, e.g.*, *Smith v. Ill.s Cent. R.R. Co.*, 223 Ill.2d 441, 451 (2006) (stating that the "procedural device" of a class action "may not be construed to enlarge or diminish any [parties'] substantive rights or obligations").

Further, the U.S. Supreme Court in *TransUnion* held that ***all*** class members—not just the named plaintiffs—must have suffered concrete injury from a FCRA violation in order to seek or recover statutory damages. 141 S. Ct. at 2208 ("Every class member must have Article III standing in order to recover individual damages"). Indeed, *TransUnion* reversed a class judgment for $60 million in statutory damages, holding that the claims of those class members whose erroneous credit reports had not been disseminated to third parties had to be dismissed because they lacked ***individual*** standing to sue. *See id.* at 2202-03, 2206, 2208-12.

As detailed above, non-resident putative class members whose claims arose outside of Illinois and have no connection to Illinois lack standing to bring no-injury FCRA/FACTA claims both in federal court, *see TransUnion*, 141 S. Ct. at 2200, and in their home state courts, *see supra* Section II.B.2.[9] To allow out-of-state class members

[9] Nor could out-of-state putative class members bring individual no-injury FCRA/FACTA claims in Illinois against defendants not subject to general personal jurisdiction in Illinois, and as to whom there would be no basis for the Illinois courts to assert specific personal jurisdiction because none of the out-of-state plaintiffs' claims arise from or relate to any Illinois conduct by the defendant. *See, e.g.*, *Ford Motor Co. v. Montana Eighth Jud. Dist.*

without standing to bring a no-injury FCRA/FACTA claim to participate in a class action where their standing could not be challenged would distort the mere "procedural [class] device" into a fount of substantive rights, while violating defendants' Due Process rights by depriving them of a dispositive standing defense.

III. As Cinemark's experience shows, forum shopping is more than a hypothetical concern—it is a concrete problem.

Cinemark's experience exemplifies precisely the kind of forum shopping that would be incentivized by permitting out-of-state plaintiffs and putative class members to bring no-injury claims in Illinois that they could not sustain elsewhere. If this Court holds that Illinois law confers standing on a bare FCRA/FACTA violation, such forum shopping will only increase.

A. Cinemark has been subject to blatant, and indeed admitted, forum shopping.

Cinemark was named defendant in a California no-injury FACTA class action on December 7, 2021. Complaint, *Neal*, *supra* note 2 (A-57). Only ***after*** the California court indicated that it was likely to find that the *Neal* plaintiffs lacked standing, based on the *Limon* decision adopting *TransUnion*'s standing holding as California law, did the California plaintiffs request dismissal. Plaintiffs' Request for Dismissal, *Neal*, *supra* note 2 (February 27, 2023) (A-76); Tentative Ruling for 1/10/23, *Neal*, *supra* note 2 (January 9, 2023) (A-89). And, almost simultaneously with their request for dismissal of the California *Neal* suit, plaintiffs' attorneys coordinated the filing of a new class action in Illinois. Complaint, Rodriguez, *supra* note 1 (February 24, 2023) (A-34).

Ct., 141 S. Ct. 1017, 1024-25 (2021) (describing the law of "general (sometimes called all-purpose) jurisdiction and specific (sometimes called case-linked) jurisdiction").

Although the named plaintiff in the Illinois class action against Cinemark differs from the named plaintiffs in the California case, the circumstances here make the forum shopping blatant. Indeed, the California plaintiffs explicitly admitted in their request for dismissal of the *Neal* suit that they believed Illinois would provide a more favorable forum. Request for Dismissal at 2, *Neal*, *supra* note 2 (A-76, 77). In other words: the California plaintiffs—or, rather, their attorneys—realized that California courts were unwilling to confer standing based on a violation of a federal statutory requirement whose violation did not suffice for standing in federal court, but they believed Illinois would confer standing on no injury FCRA/FACTA claims. Accordingly, the attorneys engineered a new class action in Illinois and, three days later, had their California named plaintiffs request to dismiss the *Neal* suit in order to participate as class members in the Illinois *Rodriguez* case, despite having no claim which they could bring as an individual action in ***any*** court.

B. Cinemark is not the only defendant who has been subject to such forum shopping, and if this Court confers standing on bare FCRA/FACTA violations, it will not be the last.

While Cinemark's experience is instructive, it is not unique. Indeed, counsel for no-injury FCRA/FACTA plaintiffs are flocking to Illinois state court on the false legal premise that Illinois courts are open to federal statutory claims that have been rejected by both federal and sister state courts. For example, plaintiffs—represented by the same attorneys who brought both the *Rodriguez* action against Cinemark and this case against Walgreen—initially filed a no-injury FACTA putative class action against IKEA in California court.[10] But, after litigating that case in California for over a year, the parties

[10] Declaration of John Habashy ¶¶ 3-4, *Richardson v. IKEA N. America Servs., LLC.* ("*Richardson I*"), 19-ST-CV-37280 (L.A. Cty. Sup. Ct., Oct. 18, 2019) (A-91, 92) (describing case history).

entered into a settlement term sheet that called for a duplicative class action to be filed in Illinois.[11] As plaintiffs' attorneys again admitted, they chose to re-file in Illinois to "avoid [] standing objections," Declaration of John Habashy ¶ 4, *Richardson I*, *supra* note 10 (Sept. 6, 2022) (A-91, 92)—that is, they believed that Illinois courts would more favorably entertain no-injury FACTA claims and, thus, provide a vehicle for obtaining court approval of a national class settlement.

These instances of forum shopping have occurred simply because subsequently-vacated, pre-*TransUnion*, intermediate Illinois appellate court decisions had ***arguably*** supported standing for no-injury FCRA/FACTA claims.[12] If the arguable becomes the indubitable, such forum shopping will only increase.

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[11] *Richardson v. IKEA N. America Servs., LLC* ("*Richardson II*"), 2021-CH-05392 (Cir. Ct. Cook Cty. Oct. 21, 2021.

[12] The pre-Transunion decisions are *Soto v. Great America LLC*, 2020 IL App (2d) 180911, *petition granted*, 439 Ill. Dec. 13 (May 27, 2020), *decision vacated*, No. 125806 (Ill. July 16, 2021), *Duncan v. FedEx Office & Print Servs., Inc.*, 2019 IL App (1st) 180857, *petition granted*, 433 Ill. Dec. 509 (Sept. 25, 2019), *decision vacated*, No. 124727 (Ill. Nov. 21, 2019), and *Lee v. Buth-Na-Bodhaige*, Inc., 2019 IL App (5th) 180033, 143 N.E.3d 645. The post-*TransUnion* decisions that go in the no-injury plaintiffs' favor are based almost exclusively on *Lee*, which has not been vacated, but in which the defendant never challenged standing. *See, e.g. Toby v. Ikea N.A. Svcs., LLC et al.*, No. 23-CH-08217, at *A-186-88 (Ill. Ch., Cook County, July 29, 2024); Cinemark Motion to Dismiss Hearing Transcript, *Rodriguez v. Cinemark USA, Inc.* ("*Rodriguez*"), No. 2023-CH-01857 (Ill. Cir. Ct. Cook Cnty. Dec. 5, 2023) (A-189). The only written, post-*TransUnion* decision that is not already before this court and granted no-injury plaintiffs FACTA standing in Illinois is *Toby*, which was based on that trial court's finding that *Lee* is binding precedent. But *Lee* is not binding. It did not hold that uninjured plaintiffs have standing whenever they allege a FACTA violation. Rather, that ruling appears to be premised on the fact that the defendant in that case did not clearly explain the *Lee* holding and some of the Illinois law intricacies upon which it touches. Specifically, the *Lee* Court said that it would "consider" a settlement objector's position that Lee did not have standing. *Id*. at ¶ 62. But after considering this argument, the *Lee* Court did not rule "yes" or "no" as to standing—it rather held (1) that the argument was improper coming from an objector, and (2) that no proper party (*i.e.*, the defendant) raised the issue. *Id*. at ¶ 68.

For Illinois courts to entertain nationwide no-injury FCRA/FACTA class actions would be highly prejudicial to defendants obliged to litigate standing sequentially in the court of plaintiffs' first choice, then in Illinois court as a last resort in the event the first court denies standing. Neither would it be fair to the people of Illinois, who have no interest in adjudicating disputes between non-Illinois class members and non-Illinois defendants regarding transactions having no connection to Illinois, and where the out-of-state class members' claims are barred from the courts of every other jurisdiction. To avoid this unjust and wasteful outcome, this Court should hold that an allegation of a bare FCRA/FACTA violation does not create the concrete injury requisite to confer standing in Illinois courts. At a minimum, the Court should decline to entertain such claims on behalf of non-resident putative class members whose claims would be barred by the laws of their home states.

CONCLUSION

For the foregoing reasons, the Court should hold that an allegation of a bare FCRA violation does not meet Illinois law's standing requirements. At a minimum, the Court should hold that the procedural device of a national class action cannot be utilized to grant standing to sue on behalf of putative class members outside of Illinois who lack standing under the laws of their home states or in any federal court.

June 4, 2025

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rule 341(a) and (b). The length of this brief, excluding the words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 5548 words.

June 4, 2025 By: /s/ Tina C. Wills

APPENDIX

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SUPPORTING CITATIONS FOR STATE STANDING REQUIREMENTS

Table 1. Twenty-two states have explicitly adopted *Lujan*'s requirement of an alleged injury in fact to a legal interest.

STATE	AUTHORITY
1. Alabama	*Ex parte King*, 50 So.3d 1056, 1059 (Ala. 2010) (explaining that Alabama has adopted *Lujan*, including the injury in fact requirement).
2. Delaware	*Dover Hist. Soc. v. City of Dover Plan. Comm'n*, 838 A.2d 1103, 1111 (Del. 2003) ("[T]he *Lujan* requirements for establishing standing under Article III to bring an action in federal court are generally the same as the standards for determining standing to bring a case or controversy within the courts of Delaware.").
3. Florida	*State v. J.P.*, 907 So. 2d 1101, 1113 (Fla. 2004) (adopting the federal "irreducible constitutional minimum for standing" that "a plaintiff must demonstrate an injury in fact, which is concrete, distinct and palpable, and actual or imminent" (cleaned up)). *Southam v. Red Wing Shoe Co., Inc.*, 343 So. 3d 106, 112–13 (Fla. Dist. Ct. App. 2022) (holding that consumer did not plausibly allege injury-in-fact resulting from FACTA violation based on standing analysis in *State v. J.P.*). *Saleh v. Miami Gardens Square One, Inc.*, 353 So. 3d 1253, 1254–55 (Fla. Dist. Ct. App. 2023) (affirming trial court's grant of motion to dismiss for lack of standing "in all respects based on the standing analysis in *Southam v. Red Wing Shoe Co., Inc.*").
4. Georgia	*Sons of Confederate Veterans v. Henry Cnty. Bd. of Commissioners*, 880 S.E.2d 168, 185-86 (Ga. 2022) (explaining that the Georgia constitution limits the judicial power to "controversies in which there is a cognizable injury," a requirement that "the General Assembly lacks the authority to set . . . aside by statute").
5. Hawaii	*Kilakila 'O Haleakala v. Bd. of Land & Nat. Res.*, 317 P.3d 27, 38 (Haw. 2013) ("This court evaluate[s] standing using the 'injury in fact' test requiring: (1) an actual or threatened injury, which, (2) is traceable to the challenged action, and (3) is likely to be remedied by favorable judicial action," although standing requirements are less strictly applied "in cases involving native Hawaiian and environmental interests").
6. Idaho	*State v. Philip Morris, Inc.*, 354 P.3d 187, 194 (Id. 2015) ("Idaho has adopted the constitutionally based federal justiciability standard.").
7. Iowa	*LS Power Midcontinent, LLC v. State*, 988 N.W.2d 316, 329-30 (Iowa 2023), *reh'g denied* (Apr. 26, 2023) (explaining that "[a] complaining party must (1) have a specific personal or legal interest in the litigation and (2) be injuriously affected," and that "[t]he injury cannot be 'conjectural' or 'hypothetical,' but must be 'concrete' and 'actual or imminent'").

8. Kentucky	*Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 188 (Ky. 2018) (adopting *Lujan*, including the injury in fact requirement).
9. Maine	*City of S. Portland v. Maine Mun. Ass'n Prop. & Cas. Pool*, 158 A.3d 11, 15 (Me. 2017) (endorsing *Lujan*'s requirement of "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical").
10. Nebraska	*Griffith v. Nebraska Dep't of Corr. Servs.*, 934 N.W.2d 169, 175 (Neb. 2019) (following federal law in holding that a plaintiff alleging a procedural violation "suffers the requisite injury for standing purposes only if they also suffered a concrete injury as a result of the disregarded procedural requirement").
11. New Hampshire	*Duncan v. State*, 102 A.3d 913, 923 (N.H. 2014) (explaining that federal precedents are persuasive regarding standing because the New Hampshire constitution imposes requirements similar to those of the U.S. Constitution, including that the plaintiff must allege a "concrete, personal injury" to a "personal legal or equitable right[]").
12. New Mexico	*ACLU of N.M. v. City of Albuquerque*, 188 P.3d 1222, 1226-28 (N.M. 2008) (declining to eliminate the injury-in-fact requirement New Mexico courts borrowed from *Lujan*).
13. Ohio	*Moore v. Middletown* 975 N.E.2d 977, 982 (Ohio 2012) (quoting *Lujan* and adopting its three-part test for standing).
14. Oklahoma	*Toxic Waste Impact Group, Inc. v. Leavitt*, 890 P.2d 906, 911 (Ok. 1994) (adopting *Lujan*, including the injury in fact requirement).
15. Rhode Island	*Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997) (quoting *Lujan* in defining the state's injury in fact requirement).
16. South Carolina	*ATC South, Inc. v. Charleston Cnty.,* 669 S.E.2d 337, 339 (S.C. 2008) (requiring a concrete and particularized injury in fact and quoting *Lujan*).
17. South Dakota	*Cable v. Union County Bd. Of County Com'rs*, 769 N.W.2d 817, 825-26 (S.D. 2009) (adopting *Lujan*, including its requirement of "an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent" (cleaned up)).
18. Tennessee	*City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) (citing *Lujan* and explaining that the Tennessee constitution requires the same "three indispensable elements" of standing).
19. Texas	*DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008) (citing federal precedents for the proposition that a "a plaintiff must be personally aggrieved; his

	alleged injury must be concrete and particularized, actual or imminent, not hypothetical").
20. Vermont	*Hinesburg Sand & Gravel Co. v. State*, 693 A.2d 1045, 1048 (Vt. 1997) (citing federal precedents for the proposition that standing require an "[i]njury in fact . . . defined as the invasion of a legally protected interest" (cleaned up)).
21. West Virginia	*Blair v. Brunett*, 889 S.E.2d 68, 74 (W. Va. 2023) (stating that West Virginia had adopted the *Lujan* test for standing, including the requirement of an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical").
22. Wyoming	*Miller v. Wyo. Dep't of Health*, 275 P.3d 1257, 1261 (Wyo. 2012) (citing *Lujan* for the proposition that a plaintiff must have suffered an injury in fact to a legally protected interest).

Table 2. Seventeen states have adopted injury-in-fact requirements similar to that of *Lujan*.

STATE	AUTHORITY
1. Alaska	*Keller v. French*, 205 P.3d 299, 304 (Alaska 2009) ("To establish interest-injury standing plaintiffs must demonstrate that they have a sufficient personal stake in the outcome of the controversy and an interest which is adversely affected by the complained-of conduct." (cleaned up)).
2. Arizona	*Brewer v. Burns,* 213 P.3d 671, 674 (Ariz. 2009) ("To have standing, a party generally must allege a particularized injury that would be remediable by judicial decision.").
3. Arkansas	*Toland v. Robinson*, 590 S.W.3d 146, 150 (Ark. 2019) ("To be a proper plaintiff in an action, one must have an interest which has been adversely affected or rights which have been invaded." (cleaned up)).
4. Colorado	*Schaden v. DIA Brewing Co., LLC*, 478 P.3d 1264, 1274 (Colo. 2021) (adopting *Lujan*'s requirement that a plaintiff must demonstrate "that (1) he or she has suffered an injury in fact and (2) the injury was to a legally protected interest.").
5. Illinois	*State ex rel. Leibowitz v. Fam. Vision Care, LLC*, 2020 IL 124754, ¶ 28 (standing requires "some injury in fact to a legally cognizable interest").
6. Indiana	*City of Gary v. Nicholson*, 190 N.E.3d 349, 351 (Ind. 2022) (citing *Lujan* approvingly, and stating explicitly that "a statute can confer a party with standing but only if the statute requires an injury").
7. Kansas	*Gannon v. State*, 319 P.3d 1196, 1210 (Kan. 2014) ("Under the traditional test for standing in Kansas, a person must demonstrate that he or she suffered a cognizable

	injury and that there is a causal connection between the injury and the challenged conduct. We have also referred to the cognizable injury as an injury in fact.").
8. Louisiana	*Louisiana Associated Gen. Contractors, Inc. v. State Through Div. of Admin., Off. of State Purchasing*, 669 So. 2d 1185, 1192 (La. 1996) (explaining that Louisiana standing requirements resemble federal requirements, in that standing is limited to a "justiciable controversy," that is, "an existing actual and substantial dispute" in which "the plaintiff should have a legally protectable and tangible interest at stake").
9. Mississippi	*Hotboxxx, LLC v. City of Gulfport*, 154 So. 3d 21, 27 (Miss. 2015) (explaining that standing in Mississippi court requires a "colorable interest," defined as "a right to judicial enforcement of a legal duty of the defendant or . . . a present, existent actionable title or interest . . . complete at the time of the institution of the action").
10. Missouri	*Schweich v. Nixon*, 408 S.W.3d 769, 774 (Mo. 2013) (standing requires "a threatened or actual injury" to a "legally protectable interest").
11. Montana	*Heffernan v. Missoula City Council*, 255 P.3d 80, 91-92 (Mont. 2011) (explaining the federal requirements of standing before stating that "[s]imilarly, in Montana, to meet the constitutional case-or-controversy requirement, the plaintiff must clearly allege a past, present, or threatened injury to a property or civil right").
12. New York	*Mental Hygiene Legal Service v. Daniels*, 33 N.Y.3d 44, 50 (N.Y. 2019) (explaining that New York's "injury in fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm").
13. North Dakota	*Flatt ex rel. Flatt v. Kantak*, 687 N.W.2d 208, 225 (N.D. 2004) (relying on federal precedents for the proposition that "abstract injury [is] not sufficient to establish standing, because parties who invoke judicial power must show they have sustained, or are in immediate danger of sustaining, some direct injury").
14. Utah	*Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 971 (Utah 2006) (citing *Lujan* as persuasive authority, and explaining that standing requires a "distinct and palpable injury').
15. Virginia	*Wilkins v. West*, 571 S.E.2d 100, 107 (Va. 2002) (citing federal standing law as persuasive authority, and explaining that standing in Virginia requires a "particularized injury").
16. Washington	*To-Ro Trade Shows v. Collins*, 27 P.3d 1149, 1156 (Wash. 2001) ("[A] party lacking a direct, substantial interest in the dispute will lack standing.").
17. Wisconsin	*Friends of Black River Forest v. Kohler Co.*, 977 N.W.2d 342, 346 (Wisc. 2022) (explaining that Wisconsin standing law "looks to federal case law as persuasive

	authority," and imposes a similar requirement of a "direct[] . . . injury to . . . [an] interest recognized by law" (cleaned up)).

Table 3. Eleven states and the District of Columbia allow standing absent an injury in fact—but only when a statute authorizes such standing.

STATE	AUTHORITY
1. California	*Jasmine Networks, Inc. v. Superior Ct.*, 180 Cal. App. 4th 980, 993, 103 Cal. Rptr. 3d 426, 434 (2009) (holding that the California constitution does not impose any standing requirement separate from the plaintiff's obligation to prove the elements of his cause of action).
2. Connecticut	*Smith v. Snyder*, 839 A.2d 589, 594 (Conn. 2004) ("Standing is established by showing that the party claiming it is authorized by statute to bring suit or is classically aggrieved . . . [i.e., a] specific personal and legal interest has been specially and injuriously affected by the challenged action." (cleaned up)).
3. District of Columbia	*Grayson v. AT&T Corp.*, 15 A.3d 219, 235 n.38 & 243-44 (D.C. 2011) (adopting a clear statement rule for abolition of the injury-in-fact requirement, under which, "without a clear expression of an intent by the Council to eliminate our constitutional standing requirement," the creation of a cause of action does not eliminate the need for an injury in fact).
4. Maryland	*State Ctr., LLC v. Lexington Charles Ltd. P'ship*, 92 A.3d 400, 430 (Md. 2014) (adopting an approach which "groups the traditionally distinct concepts of standing and cause of action into a single analytical construct").
5. Massachusetts	*Pugsley v. Police Dep't of Bos.*, 34 N.E.3d 1235, 1239 (Mass. 2015) (citing federal precedents to support the proposition that standing requires an injury and that "injuries that are speculative, remote, and indirect do not confer proper standing" (cleaned up)).
6. Michigan	*Lansing Sch. Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 699 (Mich. 2010) (rejecting *Lujan* in favor of the rule that "a litigant has standing whenever there is a legal cause of action").
7. Minnesota	*In re Custody of D.T.R.*, 796 N.W.2d 509, 512 (Minn. 2011) ("Standing to bring an action can be conferred in two ways: either the plaintiff has suffered some 'injury-in-fact' or the plaintiff is the beneficiary of some legislative enactment granting standing." (cleaned up)).
8. Nevada	*Nat'l Ass'n of Mut. Ins. Companies v. Dep't of Bus. & Indus., Div. of Ins.*, 524 P.3d 470, 476 (Nev. 2023) ("We . . . recognize statutory standing in cases where the Legislature has created a right and provided a statutory vehicle to vindicate that right that relaxes otherwise applicable standing requirements.").

9. New Jersey	*Watkins v. Resorts Int'l Hotel & Casino, Inc.*, 591 A.2d 592, 604 (N.J. 1991) (noting that New Jersey standing law is more liberal than federal standing law, but declining to distinguish standing from cause of action, such that if a plaintiff lacks standing for a federal cause of action in federal court, it also lacks standing in state court).
10. North Carolina	*United Daughters of the Confederacy v. City of Winston-Salem ex rel. Joines*, 881 S.E.2d 32, 44 (N.C. 2022) ("[W]hen a person alleges the infringement of a legal right directly under a cause of action at common law, a statute, or the North Carolina Constitution . . . the legal injury itself gives rise to standing."(cleaned up)).
11. Oregon	*Kellas v. Dep't of Corr.*, 145 P.3d 139, 145 (Or. 2006) (holding that standing is a matter purely of legislative intent).
12. Pennsylvania	*Hous. Auth. of Cnty. of Chester v. Pennsylvania State Civ. Serv. Comm'n*, 730 A.2d 935, 939 (Pa. 1999) (explaining that Pennsylvania courts follow federal standing precedents except when "a statute properly enacted by the Pennsylvania legislature furnishes the authority for a party to proceed in Pennsylvania's courts"). *Budai v. Country Fair, Inc.*, 2023 PA Super 85, 296 A.3d 20, 26 (Pa. Super. Ct. 2023), *appeal denied*, 307 A.3d 1198 (Pa. 2023) (holding FACTA did not confer upon putative class action statutory standing).

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and On behalf of others similarly situated,	)	
Plaintiff,	)	Case No.: 2023CH01857
vs.	)	
CINEMARK, USA, INC., a Texas corporation; CINEMARK HOLDINGS, INC., a Delaware Corporation,	)	
Defendants.	)	

CINEMARK, USA, INC.'S[1] MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-619

Dated: May 22, 2023

BY /s/ Meghan E. Tepas

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[1] In the event that the Court does not dismiss the suit against Cinemark Holdings, Inc. on personal jurisdiction grounds, it adopts and incorporates by reference this Memorandum pursuant to 735 ILCS 5/2-619.

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Defendant Cinemark USA, Inc. ("CUSA" or "Cinemark") moves to dismiss Plaintiff Gerardo Rodriguez's ("Plaintiff") Class Action Complaint ("Complaint"), attached as Exhibit 1, under 735 ILCS 5/2-619 because Plaintiff lacks standing to sue, as do the vast majority of putative class members in this proposed national class action.

I. SUMMARY OF PLAINTIFF'S ALLEGATIONS

Plaintiff alleges that he used his debit card to purchase movie tickets at a Cinemark theatre in Melrose Park, Illinois, and received an electronically printed receipt that displayed the first six and last four digits of his debit card number. (Complaint ¶¶ 37-38.) Plaintiff alleges that this violated the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., a federal statute directing merchants to truncate certain credit and debit card information on printed receipts provided to consumers. (*See id.*) Plaintiff purports to sue on behalf of a putative national class of persons who received similar debit or credit card receipts for purchases at Cinemark theatres. (*Id.* ¶ 47.)

Plaintiff alleges that, as a result of having more than the last 5 digits of the card number printed on the receipt, he and the putative class members (i) suffered a "violation of their statutory rights," (ii) were exposed to a "heightened risk of identity theft," and (iii) had to "take action to prevent further disclosure of the private information displayed on the receipts." (*See* Complaint ¶¶ 2, 63.) Plaintiff, however, does not identify what "action" he supposedly took to "prevent further disclosure" of his receipt, nor allege that he (or any putative class member) actually suffered identity theft or any other concrete form of injury because of the number of digits printed on their receipts. And, consistent with this lack of alleged actual or concrete injury, Plaintiff does not claim or seek an award of any "actual damages" in this case, limiting the prayer to requests for "statutory damages" and "punitive damages" pursuant to 15 U.S.C. § 1681n(a). (*See* Complaint, p. 15.)

II. SUMMARY OF ARGUMENT

Plaintiff sues for an alleged violation of a federal statute, but alleges no concrete injury. The U.S. Supreme Court, in *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2207-13 (2021), found relatively recently that plaintiffs ***lack standing*** to bring ***no-injury claims*** for statutory damages under FCRA, of which FACTA is a component. All federal appellate courts to have considered the issue since *TransUnion* have held that concrete injury is required to pursue this federal claim. In this case, the issue is whether Plaintiff can bring his no-injury federal claim in Illinois state court. And while Article III standing analysis is not identical to the standing analysis performed by Illinois courts, the same conclusion reached by the U.S. Supreme Court and other federal courts—a plaintiff without concrete injury lacks standing to sue for statutory damages based on a bare alleged violation of FCRA/FACTA—is equally required in this case.

To be sure, Illinois law on this point is currently arguably unsettled. Only three Illinois courts have considered the issue, and all did so prior to *TransUnion*. Moreover, two of those decisions were explicitly vacated by the Illinois Supreme Court, and in the third, the defendant did not challenge standing. Further, longstanding Illinois precedent makes clear that Illinois courts are to treat as binding U.S. Supreme Court interpretations of federal statutes. Thus, pursuant to *TransUnion* as detailed herein, the correct ruling is that, in order to maintain standing to sue, Illinois plaintiffs asserting a FACTA claim for statutory damages ***must allege concrete injury***, which Plaintiff has not done in this case.

If the Court were to elect not to follow *TransUnion* and thereby dismiss Plaintiff's claim for lack of standing, the putative national class allegations should nonetheless be stricken. The putative class consists almost entirely of citizens of other states, who did

not transact in Illinois, and who lack standing to sue for no-injury FACTA claims in ***either*** the ***state courts*** of their home states or in ***any federal court***. While Illinois may grant its own citizens standing to sue on ***state law*** claims more broadly than permitted under the U.S. Constitution, principles of comity and Due Process compel that Illinois cannot, via class treatment, grant such expansive standing to citizens of other states alleging a ***federal claim*** regarding transactions with no relation to Illinois. Any other result would incentivize forum shopping to Illinois. Thus, if the Court does not dismiss this suit in its entirety based upon Plaintiff's lack of standing, Cinemark moves to strike all national class allegations and limit the putative class to citizens of Illinois and New Jersey.

III. SECTION 2-619 MOTION TO DISMISS

Section 2-619 motions "dispose of issues of law and easily proved issues of fact at the outset of the litigation." *Van Meter v. Darien Park Dist.*, 207 Ill.2d 359, 367 (2003). A 2-619 motion admits to legal sufficiency, but "asserts certain defects or defenses." *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ 13, 996 N.E.2d 1151.

A. PLAINTIFF LACKS STANDING TO BRING HIS INDIVIDUAL FACTA CLAIM

i. LEGAL STANDARD

Under Illinois law, lack of standing is an affirmative defense, but where (as here) it is demonstrated that the plaintiff does not have standing, "the proceedings must be dismissed." *Wexlr v. Wirtz Corp.*, 211 Ill.2d 18, 22 (2004). To have standing a plaintiff must have suffered a "distinct and palpable" "injury in fact to a legally cognizable interest." *See Cedarhurst of Bethalto Real Estate, LLC v. Village of Bethalto*, 2018 IL App (5th) 170309, ¶¶ 19 and 26, 116 N.E.3d 377 (finding no standing where plaintiff "ha[d] no direct personal injuries, i.e., no injury in fact"). In fact, "[f]ederal standing principles are similar to those in Illinois, and the case law is instructive." *Maglio v. Advocate Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶¶ 24-29, 40 N.E.3d 746

(holding that plaintiff's speculative allegations of an increased risk of identity theft due to breach of an Illinois data protection statute did not constitute sufficiently "distinct and palpable" injury to convey standing); *see also People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 37, 49 N.E.3d 428 ("We find . . . federal authority [on standing] to be persuasive.").

ii. NO BINDING PRECEDENT IN ILLINOIS ALLOWS NO-INJURY FACTA CLAIMS

Plaintiff will likely contend that *Duncan v. FedEx Office & Print Svcs., Inc.*, *Soto v. Great America LLC*, and *Lee v. Buth-Na-Bodhaige, Inc.* permit Illinois plaintiffs to bring FACTA claims even where, as here, they have suffered no actual injuries. 2019 IL App (1st) 180857, 123 N.E.3d 1249; 2020 IL App (2d) 180911, 165 N.E.3d 935; 2019 IL App (5th) 18033, 143 N.E.3d 645. However, none of these cases are valid Illinois precedents for that proposition. It is true that those courts originally allowed plaintiffs to move forward with no-injury FACTA claims. However, in both *Duncan* and *Soto*, the Illinois Supreme Court permitted leave to appeal the intermediate appellate court's ruling (*Duncan v. FedEx Office & Print Svcs., Inc.*, 132 N.E.2d 347 (Table), 433 Ill.Dec. 509 (2019); *Soto v. Great America LLC*, 147 N.E.3d 688 (Table), 439 Ill.Dec. 13 (2020)), and both opinions were ordered ***vacated*** by the Supreme Court pursuant to settlements before final review. *See Soto v. Great America LLC*, No. 125806 (Ill. July 16, 2021); *Duncan v. FedEx Office & Print Svcs, Inc.*, No. 124727 (Ill. Nov. 21, 2019).[2]

Decisions accepted for Illinois Supreme Court review are not entitled to precedential weight when they are settled or otherwise dismissed before the appeal's merits are addressed. *See In re Marriage of Eckersall*, 2015 IL 117922, ¶ 20, 28 N.E.3d 742. Similarly, vacated decisions, like *Soto* and *Duncan*, "carr[y] no precedential weight."

[2] Exhibits 2 and 3 are the copies of these orders vacating the *Duncan* and *Soto* appellate court opinions.

Mohanty v. St. John Heart Clinic, S.C., 225 Ill.2d 52, 66 (2006). Moreover, even if this Court were inclined to consider the now-vacated decisions as potentially persuasive, it is noteworthy that *Soto* and *Duncan* both addressed a ***pre-TransUnion*** federal circuit split regarding standing to bring no-injury FACTA claims. *See Duncan*, 2019 IL App (1st) 180857 at ¶ 18-20; *Soto*, 2020 IL App (2d) 180911 at ¶ 21-22; *see also Lee*, 2019 IL App (5th) 180033 at ¶ 66 n. 7 (laying out the then-extant significant dispute among federal courts). In particular, *Duncan* was largely predicated on the court's view that the federal cases finding that no-injury FACTA plaintiffs had standing were "better reasoned." *Duncan*, 2019 IL App (1st) 180857 at ¶ 20. But, that reasoning is now untenable, given that the U.S. Supreme Court's *TransUnion* decision, discussed below, has abrogated the federal decisions on which *Duncan* relied.[3]

Further, the only non-vacated Illinois no-injury FACTA decision—*Lee* (again, also pre-*TransUnion*)—did not consider or address whether the defendant could have prevailed on an affirmative defense of standing, because the defendant "***chose not to raise the issue***." *Lee*, 2019 IL App (5th) 180033 at ¶ 68 (emphasis added).[4]

iii. FACTA PLAINTIFFS IN ILLINOIS MUST DEMONSTRATE A CONCRETE INJURY BECAUSE THE *TRANSUNION* DECISION IS BINDING AUTHORITY

As noted, in *TransUnion* the U.S. Supreme Court held that all class members who did not suffer concrete injury due to a FCRA violation lacked standing to sue for statutory damages. 141 S. Ct. at 2207-13. Indeed, *TransUnion* held that it would be an unconstitutional violation of the Separation of Powers for Congress to grant standing to

[3] Every federal appellate court facing a no-injury FCRA or FACTA claim since *TransUnion* has found that the plaintiff lacks standing. *See, e.g., Pierre v. Midland Credit Mgmt., Inc.,* 29 F.4th 934, 936 (7th Cir. 2022).
[4] The issue was, instead, raised only by an objector to the class settlement, who "had no standing to do so." *See id.* Thus, any discussion in *Lee* about standing to bring a no-injury FACTA suit was pure *dictum*.

plaintiffs to bring no-injury FCRA claims. *See Id.* at 2207 (concluding that it "would infringe on the Executive Branch's Article II authority" for Congress through FCRA to grant unharmed plaintiffs standing to sue); *see also id.* at 2205 (explaining that ***the Legislative Branch "may not simply enact an injury into existence,"*** by equating bare statutory violation with concrete injury) (emphasis added). And although Article III standing requirements do not always apply to Illinois courts,[5] it is clear that with respect to FCRA/FACTA claims, they do.[6]

As a starting point, no authority provides that Illinois can apply a more lenient standard so as to grant standing to sue on a ***federal*** claim to plaintiffs who did not suffer an actual, concrete injury as required to bring ***that federal claim*** in federal court. Such a remarkable proposition would mean that Congress's grant of concurrent jurisdiction to state courts could change the proof requirements of the ***same federal claim*** as between Illinois, other states' courts, and federal courts, which is not federal law. *See, e.g., McKenna v. Powell,* No. 10-017ML, 2010 WL 2474037, at *2 (D.R.I. April 28, 2010) (explaining that state law cannot alter "elements or defenses" to a federal claim "even when . . . [the] case is brought in state court" merely because there is concurrent jurisdiction over the claim) (citing *Howlett v. Rose,* 496 U.S. 356, 375-76 (1990) (holding that state law immunity did not apply to Section 1983 claim because "[t]he ***elements*** of, and the ***defenses*** to, a federal cause of action are ***defined by federal law***") (emphasis added)). Nor is that the law of Illinois, under which the U.S. Supreme Court's interpretation of federal statutes, like FCRA, is ***binding*** on state courts. *See Ammons v.*

[5] S*ee, e.g.*, *Greer v. Illinois Housing Dev. Auth.*, 122 Ill.2d 462, 491 (1988) (explaining Illinois law "tends to vary [from federal standing law] in the direction of greater liberality").
[6] As noted, FACTA is a component of FCRA. *See* 15 U.S.C. § 1681.

Canadian Nat'l Ry. Co., 2019 IL 124454, ¶ 18, 161 N.E.3d 890 ("[U.S.] Supreme Court interpretation of federal law is clearly binding"); *Williams v. Bd. of Review*, 241 Ill.2d 352, 360 (2011) (same); *Carr v. Gateway, Inc.,* 241 Ill.2d 15, 21 (2011) (explaining federal courts' decisions are binding in Illinois "to the end that such laws may be given ***uniform application***") (emphasis added). Thus, *TransUnion* makes clear that plaintiffs must have a concrete injury sufficient to confer federal Article III standing in order to have standing to bring a FACTA claim for statutory damages in Illinois state court.

Plaintiff will argue this rule conflicts with *Rosenbach v. Six Flags Ent. Corp*., in which the Illinois Supreme Court found that a plaintiff had standing to sue for a bare "technical violation" of Illinois's Biometric Information Privacy Act despite alleging no actual injury. 2019 IL 123186, 129 N.E.3d 1197, 1207. But, such an argument is incorrect. *Rosenbach* began from the premise that the state Legislature has a long history of expressly providing in Illinois statutes whether actual damage is required— concluding that, where an Illinois statute requires actual damage as part of the claim, concrete injury is required for standing; but where, in contrast, the state law grants a right of action to anyone "aggrieved by" a violation, plaintiff need not have concrete injury to have standing. *Rosenbach*, 129 N.E.3d at 1204-05. Thus, *Rosenbach* held that a bare statutory violation afforded standing to sue under the Biometric Information Privacy Act because, ***as a matter of state law***, the Legislature granted a cause of action to anyone "aggrieved." *See id*.

Rosenbach is thus inapposite for three interrelated reasons. First, Plaintiff here asserts a federal claim, not an Illinois statutory claim. Second, *Rosenbach's* reasoning does ***not*** apply to the interpretation of the standing requirements to assert a federal claim

under FCRA/FACTA; rather, the U.S. Supreme Court's interpretation of ***federal statutes***, like FCRA, is ***binding in Illinois***. *See Ammons*, 2019 IL 124454 at ¶ 18; *Williams*, 241 Ill.2d at 360; *Carr*, 241 Ill.2d at 21. And third, the U.S. Supreme Court's *TransUnion* decision plainly held that concrete injury is ***always*** a component of Article III standing to assert a FCRA/FACTA claim, and that it would be an unconstitutional violation of the Separation of Powers to hold otherwise. *TransUnion*, 141 S. Ct. at 2207-13. Accordingly, Plaintiff must allege concrete injury to establish standing to sue for statutory damages under FACTA.

iv. PLAINTIFF HAS NOT ALLEGED A CONCRETE INJURY

In this case, Plaintiff alleges "injuries" consisting of; (1) violation of his statutory rights, (2) risk of identity theft, (3) potential disclosure of his financial information to third parties, including Cinemark employees, and (4) taking unspecified action to prevent further disclosure. (Complaint ¶¶ 2, 27-30, 39, 45-46, 63.) None of these allegations demonstrate the concrete injury necessary for Plaintiff to have standing. Initially, *TransUnion* expressly held that merely suffering a violation of statutory rights (there, recording inaccurate information in class members' credit files in violation of FCRA), and an asserted "risk of future harm" from "potential" future disclosure to third parties, did not constitute concrete injury, such that those individuals lacked standing to sue. 141 S. Ct. at 2201; 2210-11.[7] The first three "injuries" Plaintiff alleges here are identically deficient, as they merely assert a statutory violation and "risk" of future harm that has not materialized. As *TransUnion* is binding authority on Illinois courts regarding standing

[7] The Supreme Court held that only those individuals whose information was actually conveyed by TransUnion to third parties had suffered a concrete injury so as to have standing to sue under FCRA. *Id.* at 2208-09.

to sue on a federal statutory claim, those asserted injuries do not afford Plaintiff standing to sue.

Plaintiff's final claimed "injury"—that he had to take some unspecified further action to prevent disclosure—is an attempted end-run around *TransUnion*. Indeed, the case cited in Plaintiff's Complaint for the proposition that taking steps to "safeguard" a receipt constitutes concrete injury ***was vacated by the 11th Circuit***, and a subsequent decision in the ***same exact lawsuit*** explicitly rejected Plaintiff's theory. *Compare Muransky v. GoDiva Chocolatier, Inc.*, 905 F.3d 1200 (11th Cir. 2018), vacated and superseded by *Muransky v. GoDiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019), *with Muransky v. GoDiva Chocalatier, Inc.*, 979 F.3d 917 (11th Cir. 2020). Further, Plaintiff does not allege anything he actually did to safeguard his receipt; and even if he had, that would not create standing to sue. *See, e.g.*, *Muransky*, 979 F.3d at 931 ("even if Muransky had alleged that he spent additional time destroying or safeguarding his receipt, he would not succeed on this theory"); *Clapper v. Amnesty Intern., USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm"); *Kim v. McDonald's USA, LLC*, No. 21-cv-05287, 2022 WL 4482826, at *6 (N.D. Ill. Sept. 27, 2022) (same). Plaintiff's allegations fail to demonstrate he suffered any concrete injury, and the Court should dismiss this action for lack of standing.

B. EVEN IF THE COURT FINDS PLAINTIFF HAS STANDING, ALL CLAIMS OF PUTATIVE CLASS MEMBERS OUTSIDE OF NEW JERSEY AND ILLINOIS SHOULD BE STRICKEN

A determination that Plaintiff lacks standing to sue would result in the dismissal of this case. However, even if Plaintiff were permitted to proceed, the Court should nonetheless strike Plaintiff's national class allegations, as the vast majority of the

putative class members are citizens of other states, did not conduct transactions in Illinois, and lack individual standing to sue on the FACTA claim alleged herein in either their home states or any federal court. Thus, constitutional considerations of comity and due process compel the conclusion that Illinois should not grant standing to ***other states'*** citizens to sue on federal claims for conduct that did not occur in Illinois when those individuals lack standing to sue in either the state or federal courts of their home states.

i. THE VAST MAJORITY OF PUTATIVE CLASS MEMBERS LACK STANDING TO SUE

Here, putative class members in ***at least 34 states*** outside of Illinois lack standing to sue on the no-injury FACTA claim alleged herein in the courts of their home states, just as they would under *TransUnion* if they sued in any federal court. State supreme court decisions from Delaware, Iowa, and Ohio helpfully illustrate the issue. Each of Delaware, Iowa, and Ohio require that, to possess standing to sue, a plaintiff must meet requirements identical to the Article III standards set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), which, as explained above, have been uniformly held not to confer standing to sue for no-injury FACTA claims. *See, e.g.*, *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1111 (Del. 2003) (holding that the *Lujan* requirements "are generally the same as the standards for determining standing" to sue in Delaware); *Iowa Citizens for Comm. Improvement v. State*, 962 N.W.2d 780, 790 (Iowa 2021) ("Our court has interpreted the 'injuriously affected' prong of standing as incorporating the *Lujan* three-part test."); *Moore v. City of Middletown*, 133 Ohio St.3d 55, 975 N.E.2d 977, 982 (Ohio 2012) (same).

Similarly, appellate courts in Florida, Missouri, and California have dismissed for lack of standing exactly the type of no-injury FCRA/FACTA lawsuits brought by Plaintiff here. For example, *Southam v. Red Wing Shoe Co.*, 343 So.3d 106 (Fla. 4th DCA 2022),

affirmed dismissal for lack of standing where plaintiff alleged that he was given a receipt displaying ten digits of his credit card number, but did not allege that his credit card was used, lost, or stolen. *Id*. at 107-08, 111-12, review denied, No. SC22-1052, 2022 WL 16848677 (Fla. Nov. 10, 2022). Adopting the requirements of *Lujan* and *TransUnion* as Florida law, the *Southam* court explained that the bare alleged FACTA violation did not confer standing to sue because Plaintiff did not allege any " 'economic' injury, nor any 'distinct or palpable' injury," so he had " 'no concrete harm, [and thus] no standing.' " *Id*. at 108 (citing *TransUnion*, 141 S. Ct. at 2200). In *Corozzo v. Wal-Mart Stores*, 531 S.W.3d 566 (Mo. App. 2017), a Missouri court affirmed dismissal for lack of standing where the suit alleged a "bare procedural violation [of FCRA], divorced from any concrete harm." *Id*. at 573-76 (citation omitted); *see also Limon v. Circle K Stores*, 84 Cal.App.5th 671, 706 (2022) (finding plaintiff was required to allege actual injury to have standing to sue on a FCRA claim).

These six states are not remotely unique in requiring "concrete injury" to maintain standing. Consistent with the law in the foregoing states, putative class members in at least 34 states outside of Illinois lack standing to sue on the FACTA claim asserted here.[8]

Cinemark acknowledges that, pre-*TransUnion*, a New Jersey court appears to have held, in contrast, that its citizens could sue for statutory damages based on allegations of bare FACTA violations. *Baskin v. P.C. Richard & Son, LLC*, No. A-2662-18T1, 2020 WL

[8] A chart identifying the 28 additional states (i.e. those not discussed above) that apply the federal Article III/*Lujan* injury-in-fact standard, or a substantively parallel one—meaning those states' citizens lack standing to sue on the claim putatively asserted on their behalf by Plaintiff—is Appendix 1 hereto. Further, in other states where injury requirements have been less fulsomely articulated, Cinemark submits that, if presented the question squarely, those states' courts would similarly conclude that a FACTA plaintiff without concrete injury lacks standing to sue based on a bare statutory violation. *See, e.g.*, *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 888 A.2d 655, 660 (2005) (explaining that the key to standing in Pennsylvania "is that the person must be negatively impacted in some real and direct fashion"); *McClary v. Jenkins*, 299 Va. 216, 222 (Va. 2020) ("Typically, to establish standing a plaintiff must allege a particularized injury.").

989191, at *2-3, 11 (N.J. Super. Ct. App. Div. Mar. 2, 2020). The existence of one such state holding, however, does not alter that constitutional Due Process and prudential comity dictate that Illinois cannot grant its state courts subject matter jurisdiction over the federal claims of putative class members in other states who lack standing to sue in their home states regarding conduct that occurred outside of Illinois. Accordingly, Cinemark requests that the Court strike the national class allegations (Complaint ¶¶ 47-55) and, instead, limit the scope of the putative class to persons whose transactions occurred in Illinois and, perhaps, New Jersey.

ii. PURSUANT TO *TRANSUNION*, THE COURT SHOULD STRIKE PUTATIVE CLASS CLAIMS BROUGHT ON BEHALF OF PUTATIVE CLASS MEMBERS WHO PLAINLY LACK STANDING

Plaintiff will likely argue that the Court should assess the standing to sue of only the named plaintiff, but not putative class members, citing cases such as *I.C.S. Illinois, Inc. v. Waste Mgmt. of Ill., Inc.*, 403 Ill.App.3d 211, 221 (2010), *Maglio*, 2015 IL App (2d) 140782 at ¶ 21, and *Elliot v. Chicago Transit Auth.*, 2019 IL App (1st) 181892-U, ¶ 22, 2019 WL 5296835. However, each of these cases concerned putative classes of ***only*** persons complaining of conduct occurring ***in Illinois***. Thus, none addresses whether an Illinois court may use the purely procedural class action device to confer standing on a class comprised almost entirely of people outside of Illinois who lack standing to sue individually. As a result, those cases are simply not relevant to this Court's analysis.

Moreover, all three were decided before *TransUnion*, which held that ***all*** class members—not just the named plaintiffs—must have suffered concrete injury from a FCRA violation to recover statutory damages. *TransUnion*, 141 S. Ct. at 2207-13. Indeed,

TransUnion reversed a class judgment for $60 million in statutory damages as to all of the class members who ***individually*** lacked standing. *Id.* at 2202-03, 2206, 2208-12.

The seminal Illinois case in this area, *I.C.S.*, relied entirely on pre-*TransUnion* U.S. Supreme Court authority that has now been abrogated. *See*, *e.g.*, *I.C.S.*, 403 Ill.App.3d at 221. In fact, the Northern District of Illinois has recognized that, following *TransUnion*'s clarification that "[e]very class member must have Article III standing in order to recover individual damages," it is an open question whether a class action can proceed to certification without a showing that each putative class member has standing. *See, e.g.*, *Angulo v. Truist Bank*, No. 22 C 923, 2023 WL 1863049, at *3 n. 3 (N.D. Ill. Feb. 9, 2023) (quoting *TransUnion*, 141 S.Ct. at 2208 n. 4).

The argument for considering the standing of putative class members—not just that of the named plaintiffs—becomes even more compelling where, as here, a class action proceeding in Illinois would afford recovery rights upon citizens of other states who would have no such substantive rights in their own states for conduct occurring ***in those other states***. Such a combined application of Illinois standing law and class action procedure would deprive Cinemark of substantive, indeed ***dispositive***, defenses against huge numbers of class members' claims, in direct violation of Cinemark's Due Process rights. It is black letter law that the procedural class mechanism cannot be used to grant a party rights it would not have in an individual case or deprive a party of its substantive rights or defenses. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("a class cannot be certified on the premise that [a defendant] will not be entitled to litigate . . . defenses to individual claims"); *Marshall v. H&R Block Tax Svcs., Inc.*, 564 F.3d 826, 829 (7th Cir. 2009) (class action procedures "shall not abridge, enlarge or modify

any substantive right.") (internal quotations omitted). The Illinois Supreme Court has recognized this rule as well. *Smith v. Illinois Cent. R.R. Co.*, 223 Ill.2d 441 (2006) (The "procedural device" of a class action "may not be construed to enlarge or diminish any [parties'] substantive rights or obligations") (internal citation and quotations omitted). Thus, Illinois's highest court, like the U.S. Supreme Court, recognizes that Illinois courts cannot by class procedure prevent Cinemark from fully defending on all substantive grounds, including lack of standing, the claims of putative plaintiffs from, *e.g.*, California, Delaware, Florida, Iowa, Missouri, or Ohio.

Given that Cinemark's substantive rights with respect to putative class members' claims cannot be diminished by class treatment, this Court should conclude that standing is required for all putative class members, not just Plaintiff. Accordingly, the Complaint's national class allegations should be stricken, or at least limited to citizens of Illinois and New Jersey.

C. ALLOWING PLAINTIFF'S NO-INJURY PUTATIVE NATIONAL CLASS CLAIMS TO PROCEED WOULD INVITE FORUM SHOPPING

In light of *TransUnion* and resulting case law across the country, refusing to require (i) actual injury and (ii) standing for absent class members would incentivize forum shopping to Illinois. Longstanding precedent strongly counsels Illinois courts against incentivizing forum shopping. *Merritt v. Goldenberg*, 362 Ill.App.3d 902, 910 (2005) ("A plaintiff's use of forum-shopping . . . is against Illinois's public policy."); *Fennel v. Ill. Cent. R. Co.*, 2012 IL 113812, ¶ 19, 987 N.E.2d 355 ("Decent judicial administration cannot tolerate forum shopping.").

Indeed, this case exemplifies precisely the kind of forum shopping that would be incentivized by permitting plaintiffs to bring no-injury FACTA suits in Illinois that they could not sustain elsewhere. Two of Plaintiff's lawyers originally filed an identical suit in California, styled

LaKeenya Neal et. al. v. Cinemark USA Inc., et. al., but voluntarily dismissed it because they believed the *Limon* decision (requiring concrete injury for standing) impacted the viability of the suit in California, while Illinois would provide a more favorable forum.[9] Adopting a rule that would allow Plaintiff's no-injury suit to proceed on behalf of a national class of people who could not sue individually in their home states or any federal court would plainly reward forum shopping and run afoul of Illinois's public policy. *See Merritt*, 362 Ill.App.3d at 910.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's suit because he lacks standing to sue on his no-injury claim for statutory damages under FACTA. But, if the Court were to elect not to follow *TransUnion* and dismiss Plaintiff's claim for lack of standing, the putative national class allegations should nonetheless be stricken (or at least limited to citizens of Illinois and New Jersey) on the grounds that Illinois cannot grant to citizens of other states standing to sue on a federal claim that they could not bring in either the courts of their home states or in any federal court.

WHEREFORE, Cinemark respectfully requests that this Court enter an Order granting this Motion, dismissing Plaintiff's claim against it for lack of standing with prejudice, and for such other and further relief this Court deems equitable, just, and proper.

[9] Cinemark asks the Court to take judicial notice of the Complaint in *Neal*, as well as of the plaintiffs' request for dismissal, which admits and explains the reasoning for the dismissal there. These documents are Exhibits 4 and 5, respectively.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 22, 2023, she caused a true and correct copy of the foregoing document(s) to be filed via the Court's Electronic Case Filing (ECF) system and thereby served on counsel and all other parties of record:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this certificate of service are true and correct.

Appendix 1

Supporting Citations for Additional States that Track *Lujan* and Require Injury in Fact to Have Standing to Sue

APPENDIX 1: SUPPORTING CITATIONS FOR ADDITIONAL STATES THAT TRACK *LUJAN* AND REQUIRE INJURY IN FACT TO HAVE STANDING TO SUE

State	Authority
1. Alabama	*Ex parte King,* 50 So.3d 1056, 1059 (Ala. 2010) ("This Court has adopted the *Lujan* test as the means of determining standing in Alabama.").
2. Alaska	*Wagstaff v. Superior Court*, 535 P.2d 1220, 1225 (Alaska 1975) (explaining that Alaska employs an injury in fact test).
3. Arizona	*Brewer v. Burns,* 213 P.3d 671, 674 (Ariz. 2009) ("To have standing, a party generally must allege a particularized injury that would be remediable by judicial decision.").
4. Colorado	*Schaden v. DIA Brewing Co., LLC*, 478 P.3d 1264, 1274 (Colo. 2021) ("In order to establish standing, a plaintiff must demonstrate that (1) he or she has suffered an injury in fact and (2) the injury was to a legally protected interest.").
5. Connecticut	*State Marshal Association of Connecticut, Inc. v. Johnson*, 198 Conn.App. 392, 234 A.3d 111, 125 (Ct. App. 2020) ("standing requires 'some direct injury for which the plaintiff seeks redress'") (quoting *Connecticut Assn. of Health Care Facilities, Inc. v. Worrell*, 199 Conn. 609, 613, 508 A.2d 743 (1986)).
6. District of Columbia	*Grayson v. AT&T Corp*., 15 A.3d 219, 235 n. 38 and 243-44 (D.C. 2011) (determining that a statute which plaintiff alleged removed the District's injury requirement did not do so, reasoning that "[e]limination of our constitutional standing requirement would be so unusual that we will not lightly infer such intent on the part of the Council. Thus, without a clear expression of an intent by the Council to eliminate our constitutional standing requirement, we conclude that a lawsuit under the CPPA does not relieve a plaintiff of the requirement to show a concrete injury-in-fact to himself.").
7. Georgia	*Oasis Goodtime Emporium I, Inc. v. City of Doraville*, 773 S.E.2d 728, 734 n. 9 (Ga. 2015) ("This Court has previously cited *Lujan* in assessing standing under Georgia law.").
8. Hawai'i	*Community Assn's of Hualalai, Inc. v. Leeward Planning Comm'n*, 150 Hawai'i 241, 500 P.3d 426, 443 (2021) ("This court evaluate[s] standing using the 'injury in fact' test requiring: (1) an actual or threatened injury, which, (2) is traceable to the challenged action, and (3) is likely to be remedied by favorable judicial action.").
9. Idaho	*Knox v. State ex rel. Otter*, 148 Idaho 324, 336, 223 P.3d 266, 278 (2009) ("To satisfy the requirement of standing litigants must allege an injury in fact, a fairly traceable causal connection between the claimed injury and the challenged conduct, and a

	substantial likelihood that the judicial relief requested will prevent or redress the claimed injury.").
10. Indiana	*City of Gary v. Nicholson*, 190 N.E.3d 349 (Ind. 2022) ("Indiana law is clear that standing requires an injury. But the plaintiffs, acknowledging they have alleged no injury, argue instead that lack of injury is 'irrelevant' here because they have statutory and public standing. We disagree.").
11. Kansas	*Gannon v. State*, 319 P.3d 1196, 1210 (Kan. 2014) ("Under the traditional test for standing in Kansas, a person must demonstrate that he or she suffered a cognizable injury and that there is a causal connection between the injury and the challenged conduct. We have also referred to the cognizable injury as an injury in fact.").
12. Kentucky	*Commonwealth Cabinet for Health & Fam. Servs., Dep't for Medicaid Servs. v. Sexton ex rel. Appalachian Reg'l Healthcare, Inc.*, 566 S.W.3d 185, 188 (Ky. 2018) (explaining that Kentucky uses the *Lujan* requirements).
13. Minnesota	*In re Custody of D.T.R.*, 796 N.W.2d 509, 512-13 (Minn. 2011) (explaining that to demonstrate an injury in fact the plaintiff must show "a concrete and particularized invasion of a legally protected interest").
14. Montana	*Heffernan v. Missoula City Council*, 2011 MT 91, 360 Mont. 207, 255 P.3d 80, 91-92 (2011) (explaining the federal requirements of standing before stating that "[s]imilarly, in Montana, to meet the constitutional case-or-controversy requirement, the plaintiff must clearly allege a past, present, or threatened injury to a property or civil right").
15. Nebraska	*Central Neb. Pub. Power Dist. v. North Platte NRD,* 280 Neb. 533, 788 N.W.2d 252, 260 (2010) ("[A] litigant first must clearly demonstrate that it has suffered an injury in fact.").
16. Nevada	*Titus v. Umpqua Bank*, 132 Nev. 1037, 2016 WL 1335613, at *1 (2016) (citing federal standing precedent for the proposition that "to pursue a legal claim, an injury in fact must exist").
17. New Mexico	*ACLU of N.M. v. City of Albuquerque*, 144 N.M. 471, 188 P.3d 1222, 1226-28 (2008) (declining to eliminate injury in fact requirement).
18. New York	*Mental Hygiene Legal Service v. Daniels*, 33 N.Y.3d 44, 50 (N.Y. 2019) (explaining that New York's "injury in fact requirement necessitates a showing that the party has an actual legal stake in the matter being adjudicated and has suffered a cognizable harm").
19. Oklahoma	*Toxic Waste Impact Group, Inc. v. Leavitt*, 890 P.2d 906, 911 (Ok. 1994) (adopting the three part test from the Supreme Court's *Lujan* decision).

20. Rhode Island	*Pontbriand v. Sundlun*, 699 A.2d 856, 862 (R.I. 1997) (quoting *Lujan* in defining the state's injury in fact requirement).
21. South Carolina	*ATC South, Inc. v. Charleston Cnty.,* 380 S.C. 191, 195, 669 S.E.2d 337, 339 (2008) (requiring a concrete and particularized injury in fact and quoting *Lujan*).
22. South Dakota	*Cable v. Union County Bd. Of County Com'rs*, 769 N.W.2d 817, 825-26 (S.D. 2009) ("First, the plaintiff must establish that he suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical.").
23. Tennessee	*City of Memphis v. Hargett*, 414 S.W.3d 88, 98 (Tenn. 2013) ("First, a party must show an injury that is distinct and palpable.").
24. Texas	*DaimlerChrysler Corp. v. Inman*, 252 S.W.3d 299, 304-05 (Tex. 2008) (explaining that a "a plaintiff must be personally aggrieved; his alleged injury must be concrete and particularized, actual or imminent, not hypothetical").
25. Utah	*Southern Utah Wilderness Alliance v. Kane County Comm'n*, 2021 UT 7, 484 P.3d 1146, 1153 (2021) (explaining that, like in federal court, a concrete and particularized injury is required in Utah).
26. Vermont	*Brod v. Agency of Natural Resources*, 182 Vt. 234, 936 A.2d 1286, 1289 (2007) ("To satisfy the [standing requirements], plaintiffs must show (1) injury in fact, (2) causation, and (3) redressability.").
27. West Virginia	*Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W. Va. 80, 576 S.E.2d 807 (2002) ("First, the party attempting to establish standing must have suffered an 'injury-in-fact'—an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent and not conjectural or hypothetical.").
28. Wyoming	*Miller v. Wyo. Dep't of Health*, 275 P.3d 1257, 1262 (Wyo. 2012) (citing *Lujan* for the proposition that a plaintiff must have suffered an injury in fact).

EXHIBIT 1

Firm 39042

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and on behalf of others similarly situated, Plaintiff, v. CINEMARK USA, INC., a Texas corporation; CINEMARK HOLDINGS, INC., a Delaware corporation, Defendants.	)	Case No.: 2023CH01857

CLASS ACTION COMPLAINT

Plaintiff, Gerardo Rodriguez, on behalf of himself and other similarly situated individuals, sues Defendants Cinemark USA, Inc. and Cinemark Holdings, Inc., and alleges the following:

INTRODUCTION

1. This action arises from Defendants' violation of the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., as amended ("FCRA"), a federal statute which requires merchants to mask certain credit card and debit card information on receipts provided to consumers.

2. Despite the clear language of the statute, Defendant knowingly or recklessly failed to comply with FACTA by printing the first six (6) and the last (4) of credit or debit card numbers on receipts provided to consumers. As a result of Defendant's unlawful conduct, Plaintiff and the proposed Class, each of whom conducted business with Defendant during the time frame relevant to this complaint, suffered a violation of their statutory rights under § 1681c(g), an invasion of their privacy, and were burdened with an elevated risk of identity theft. Accordingly, Plaintiff and

the proposed Class members are entitled to an award of statutory damages as provided by 15 U.S.C. § 1681n.

JURISDICTION AND VENUE

3. This Court has jurisdiction over this action pursuant to 735 ILCS 5/2-209(a)(1) because Defendants conduct substantial business in Illinois, and because the tortious acts complained of occurred in substantial part within Illinois.

4. Venue is proper in Cook County because a substantial part of the events or omissions giving rise to the claims herein occurred in this judicial district.

PARTIES

5. Plaintiff, Gerardo Rodriguez, is a natural person who resides in Cook County, State of Illinois.

6. Defendant Cinemark USA, Inc. is Texas corporation whose headquarters are located at 3900 Dallas Parkway, Ste. 500, Plano, Texas 75093, and whose registered agent for service of process is Illinois Corporation Service Company, 801 Adlai Stevenson Drive, Springfield, Illinois 62703.

7. Defendant Cinemark Holdings, Inc., is a Delaware corporation whose headquarters are located at 3900 Dallas Parkway, Ste. 500, Plano, Texas 75093, and whose registered agent for service of process is Corporation Service Company, 251 Little Falls Drive, Wilmington, Delaware 19808.

8. Defendants are leaders in the theatrical exhibition industry and collectively exercise control over 517 theatres and 5,835 screens in the U.S. and Latin America as of September 30,

2022 with seven of them located in Illinois.[1]

FACTUAL ALLEGATIONS

Background of FACTA

9. Identity theft is a serious issue affecting both consumers and businesses. In 2021, nearly 42 million Americans were victims of identity theft, costing consumers $52 billion in total losses. https://www.aarp.org/money/scams-fraud/info-2022/javelin-report.html. Furthermore, according to a 2021 study, 22% of U.S. adults were victims of account takeovers (when a thief commits fraud using a victim's stolen information). See https://www.consumeraffairs.com/finance/identity-theft-statistics.html#:~:text=In%20its%202021%20Annual%20Data,of%201%2C506%20set%20in%202017

10. Upon signing FACTA into law, President George W. Bush remarked that "[s]lips of paper that most people throw away should not hold the key to their savings and financial secrets." 39 Weekly Comp. Pres. Doc. 1746, 1757 (Dec. 4, 2003). President Bush added that the government, through FACTA, was "act[ing] to protect individual privacy." Id.

11. Years later the FTC explained "[c]redit card numbers on sales receipts are a 'golden ticket' for fraudsters and identity thieves." https://www.ftc.gov/tips-advice/business-center/guidance/slip-showing-federal-law-requires-all-businesses-truncate

12. One FACTA provision was specifically designed to thwart identity thieves' ability to gain sensitive information regarding a consumer's credit or bank account from a receipt provided to the consumer during a point-of-sale transaction, which, through any number of ways, could and at times have fallen into the hands of someone other than the consumer.

[1] Source: https://ir.cinemark.com/company-information (last viewed Feb. 22, 2023).

13. Codified at 15 U.S.C. § 1681c(g), this provision states the following:

> ***"Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."***

15 U.S.C. § 1681c(g)(1) (the "Receipt Provision").

14. After enactment, FACTA provided three (3) years in which to comply with its requirements, mandating full compliance with its provisions no later than December 4, 2006.

15. The requirement was widely publicized among retailers and the FTC. For example, on March 6, 2003, in response to earlier state legislation enacting similar truncation requirements, then-CEO of Visa USA, Carl Pascarella, explained;

> "Today, I am proud to announce an additional measure to combat identity theft and protect consumers. Our new receipt truncation policy will soon limit cardholder information on receipts to the last four digits of their accounts. The card's expiration date will be eliminated from receipts altogether.... The first phase of this new policy goes into effect July 1, 2003, for all new terminals ...."

16. Within 24 hours, MasterCard and American Express announced they were imposing similar requirements.

17. Card issuing organizations proceeded to require compliance with FACTA **by contract**, in advance of FACTA's mandatory compliance date. For example, the publication, "Rules for Visa Merchants," which is distributed to and binding upon all merchants that accept Visa cards, expressly requires that ***"Visa requires that all new electronic POS terminals provide account number truncation on transaction receipts. This means that only the last four digits of an account number should be printed on the customer's copy of the receipt, and the expiration***

date should not appear at all."[2]

18. Because a handful of large retailers did not comply with their contractual obligations to the card companies and FACTA's straightforward requirements, Congress passed The Credit and Debit Card Receipt Clarification Act of 2007, to make technical corrections to the definition of willful noncompliance with respect to violations involving the printing of an expiration date on certain credit and debit card receipts before the date of the enactment of this Act.

19. Importantly, the Clarification Act did not amend FACTA to allow disclosure of card expiration dates. Instead, it simply provided amnesty for certain past violators up to June 3, 2008.

20. In the interim, card processing companies continued to alert their merchant clients, including Defendant, of FACTA's requirements. According to a Visa Best Practice Alert in 2010:

> Some countries already have laws mandating PAN truncation and the suppression of expiration dates on cardholder receipts. For example, the United States Fair and Accurate Credit Transactions Act (FACTA) of 2006 prohibits merchants from printing more than the last five digits of the PAN or the card expiration date on any cardholder receipt. (Please visit http://www.ftc.gov/os/statutes/fcrajump.shtm for more information on the FACTA.) To reinforce its commitment to protecting consumers, merchants, and the overall payment system, Visa is pursuing a global security objective that will enable merchants to eliminate the storage of full PAN and expiration date information from their payment systems when not needed for specific business reasons. To ensure consistency in PAN truncation methods, Visa has developed a list of best practices to be used until any new global rules go into effect.

21. As noted above, the processing companies have required that credit card or debit card expiration dates not be shown since 2003 and still require it. For example, American Express

[2] Source: https://usa.visa.com/dam/VCOM/download/about-visa/visa-rules-public.pdf, at p. 21 (last viewed Feb. 11, 2023).

requires:

> Pursuant to Applicable Law, truncate the Card Number and do not print the Card's Expiration Date on the copies of Charge Records delivered to Card Members. Truncated Card Number digits must be masked with replacement characters such as “x,” “*,” or “#,” and not blank spaces or numbers.

22. Similarly, MasterCard required in a section titled Primary Account Number (PAN) truncation and Expiration Date Omission:

> A Transaction receipt generated by an electronic POI Terminal, whether attended or unattended, must not include the Card expiration date. In addition, a Transaction receipt generated for a Cardholder by an electronic POI Terminal, whether attended or unattended, must reflect only the last four digits of the primary account number (PAN). All preceding digits of the PAN must be replaced with fill characters, such as "X," "*," or "#," that are neither blank spaces nor numeric characters.

23. In sum, FACTA clearly prohibits the printing of more than the last five digits of the card number primarily to help protect persons from identity theft.

24. The risk of identity theft caused by disclosing of the first six digits of a debit or credit card number on customer transaction receipts is substantial, as it enables a thief who finds the receipt to generate the customer’s full card information and commit fraud.

25. For example, at least one study demonstrated that in just six seconds, a thief armed with nothing more than the first six and last four digits of a credit card account number – the very information disclosed on Plaintiff’s receipt here – can deduce the missing digits and make a fraudulent purchase online using a “distributed guessing attack,” *i.e.*, systematically attempting multiple online purchases with different number combinations. (*The Independent*, “Criminals can guess Visa card number and security code in just six seconds, experts find.”).

26. These kinds of attacks have increased. Visa recently reported “enumeration attacks” which, like the distributed-guessing attack above, involve fraudsters using automated computer programs to systematically submit multiple variations of card data (including the card number,

expiration date, and security or CVV code) to try to correctly guess a working set of numbers, are on the rise. (Visa Business News, Best Practices, Sept. 13, 2021) ("Visa has observed a sustained increase in enumeration attacks …"). This is further confirmed by the PCI Security Standards Council and National Cyber-Forensics and Training Alliance October 21, 2020 bulletin, which expressly describes these enumeration attacks as "an ongoing threat that requires urgent attention."

27. Defendants' practice of printing the last four digits of the card number on the receipt along with the first six also enhances a thief's ability to conduct these attacks because the last digit of the card number is a "check digit," *i.e.*, a digit whose value is determined based on the other digits of the card number using a formula called the Luhn algorithm. This significantly limits the number of possible combinations a thief will need to attempt to discover the missing digits.

28. The first six digits of a card also reveal details merchants do not normally print on the receipt that a thief can use to deduce missing account information needed to commit fraud via "phishing" inquiries, *i.e.*, using the first six digits and information about the cardholder's account learned from it, the thief can call or email the consumer posing as the store or bank and convince the consumer the call is legitimate, to extract more data. *See, e.g.*, *Redman*, 768 F.3d at 626 (data FACTA prohibits merchants from printing on the receipt can "bolster the credibility of a criminal" in "phishing scams"). Account information revealed by the first six digits includes, but is not limited to, the name of the card-issuing institution, the card level (black, platinum, business), and the card industry program (*e.g.* airline or gas card) or merchant program (such as American Airlines AAdvantage Miles, Hilton Honors Points, etc.). As one resource succinctly puts it: "**The BIN/IIN [*i.e.* the first six digits] provides merchants with a lot of other information besides**

just the issuing entity.").[3]

29. Disclosing FACTA-prohibited information on the receipt also gives thieves multiple ways to access it. In addition to finding the receipt if discarded or lost, expert testimony to Congress established printing the information where it can be seen risks its capture by "unscrupulous employees" or "shoulder-surfers" (persons standing nearby) who see the receipt.

30. The only reason Plaintiff was exposed to these real risks is because Defendants printed the first six and last four digits of his card number on his receipt. Absent Defendants' memorialization of the first six digits of Plaintiff's card on the receipt, a thief has no practical way to learn that information because banks issue cards using multiple first-six digit combinations, sometimes hundreds by a single bank, and thus without the receipt a thief cannot determine which first-six-digit combination is on Plaintiff's card.

Defendants' Prior Knowledge of FACTA

31. Defendants had actual knowledge of FACTA's truncation requirement long before they began failing to comply with the requirement *en masse*.

32. Despite the many warnings Defendants received regarding FACTA and its requirements, a federal lawsuit was filed on February 5, 2007, against Cinemark USA, Inc. for failing to comply with FACTA's requirements at one of their California locations. See *Vigdorchik v. Century Theatres Inc., and Cinemark USA, Inc*., No. 07-cv-00736 (N.D. Cal.). In addition, on May 29, 2013, Cinemark purchased another movie theater chain which had also been sued—in

[3]See https://chargebacks911.com/bank-identification-numbers/#:~:text=The%20BIN%2FIIN%20provides%20merchants,funds%20will%20be%20transferred%20from at "How Bank Identification Numbers Help" (bold and brackets added).

this instance multiple times—for violation of FACTA.[4] *See Grimes v. Rave Motion Pictures Birmingham, L.L.C.*, 264 F.R.D. 659 (N.D. Ala. 2010); *Rave Motion Pictures Little Rock, L.L.C., et al.*, Case 4:07-cv-00659-JLH (July 30, 2007 E.D. Ark.).[5]

33. Now, despite having been previously sued for violating FACTA on at least three other occasions, Defendants have once again knowingly or recklessly violated the aforesaid federal law by printing the first six and last four digits of customers' credit and debit card numbers on transaction receipts at one or more of their movie theaters within the United States, including but not limited to theaters in Illinois. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014) (Posner, J.) (willfulness in FACTA class action lawsuit was "straightforward" wherein defendant violated a parallel state statute years earlier).

34. Defendants were not only clearly informed not to print more than the last five digits of credit or debit cards on their receipts, but were contractually prohibited from doing so. Defendants accept credit and debit cards from all major issuers, such as Visa, MasterCard, American Express and Discover Card. Each of these companies sets forth requirements that merchants such as (and including) Defendants must follow, including FACTA's redaction and truncation requirements found in the Receipt Provision. *See. e.g., Operating Engineers Pension*

[4] Source: https://ir.cinemark.com/sec-filings/all-sec-filings/content/0001193125-14-183653/0001193125-14-183653.pdf, p.9 (last viewed Feb. 11, 2023).

[5] Rave Motion Pictures' knowledge of FACTA on the basis the previous lawsuits can be imputed to Cinemark because of Cinemark's acquisition of Rave. *See S'holder Representative Servs. LLC v. RSI Holdco*, No. CV 2018-0517-KSJM, 2019 WL 2290916 (Del. Ch. May 29, 2019) ("all assets of a target company, including privileges over attorney-client communications, transfer to the surviving company unless the sellers take affirmative action to prevent transfer of those privileges"); *Wells Fargo & Co. v. United States*, 117 Fed. Cl. 30, 38 (2014) ("Because the surviving corporation steps into the shoes of the acquired entity and the surviving corporation is liable retroactively for the tax payments of its predecessors, it does not matter when the initial payments were made. Put another way, following a merger, the law treats the acquired corporation as though it had always been part of the surviving entity").

Trust v. Gilliam, 737 F.2d 1501, 1504 (9th Cir.1984) ("[one] who signs a written agreement generally is bound by its terms, even though he neither reads it nor considers the legal consequences of signing it.") (applying California law); *Wilton Properties, II v. 99 West, Inc*., 2000 WL 33170832 (Mass.Super.2000) ("[I]in the absence of fraud, one who signs a written agreement is bound by its terms whether he reads and understands it or not or whether he can read or not.").

35. Most of Defendants' business peers and competitors currently and diligently ensure their credit card and debit card receipt printing process remains in compliance with FACTA by consistently verifying their card machines and devices comply with the Receipt Provision. Defendants could very easily have done the same.

36. Plaintiff is informed and believes, and thereupon alleges, that had Defendants chosen to do so, it would have taken less than thirty seconds to run a test receipt in order to determine whether or not their point-of-sale system was printing FACTA-violative receipts.

Plaintiff's Factual Allegations

37. On or about November 23, 2021, Plaintiff used his personal VISA debit card to purchase a ticket the Cinemark movie theater in Melrose Park, IL.

38. After making his purchase, Plaintiff was subsequently presented with an electronically printed receipt showing the first six (6) and last four (4) digits of his debit card number.

39. As a direct result of the receipt showing ten (10) digits of his debit card number, Plaintiff felt it necessary to take steps to safeguard the receipt.

40. The printing of the first six (6) and last four (4) digits of his debit card number compromised the privacy of Plaintiff's sensitive financial information.

41. The printing of the first six (6) and last four (4) digits of his debit card number was

also a breach of confidence in the safe handling of his sensitive financial information, as well as a breach of an implied bailment.

Defendants' Misdeeds

42. Plaintiff is informed and believes, and thereupon alleges, that Defendants implement, oversee, and maintain control over the same uniform debit and credit card payment processing policies, practices, and procedures for the transactions at issue in this case – including, without limitation, negotiating, entering into, and acting pursuant to various contracts and agreements with the electronic payment processing company whose technology Defendants use to process all such transactions at their movie theater locations.[6]

43. The point-of-sale systems used by Defendants maintain records of all payment transactions and have the ability to print duplicate copies of all payment receipts provided to customers.

44. Notwithstanding their extensive knowledge of the requirements of FACTA and the well-documented dangers imposed upon consumers through their failure to comply, Defendants issued thousands of point of sale receipts containing the first six (6) plus the last four (4) digits of credit and debit card account numbers.

[6] Source: Cinemark Form 10-k years 2012, 2013, 104, 2015, available at https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-12-089012/0001193125-12-089012.pdf; https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-13-083890/0001193125-13-083890.pdf https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-13-083890/0001193125-13-083890.pdf; https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-14-077445/0001193125-14-077445.pdf; https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-15-069425/0001193125-15-069425.pdf (last visited Dec. 3, 2021) ("We have developed our own proprietary point of sale system to enhance our ability to maximize revenues, control costs and efficiently manage operations. The system is currently installed in all of our U.S. theatres.")

45. By ignoring the requirements of this important federal statute, in an environment already ripe for identity theft and other evils, Defendants uniformly invaded Plaintiff's and the proposed Class members' privacy. Defendants' conduct alleged herein resulted in the potential disclosure of Plaintiff's and the proposed Class members' private financial information to the world, including, but not limited to, persons who might find the receipts in the trash or elsewhere, dedicated identity thieves who thrive in environments such as Defendants' various locations, and Defendants' agents or employees who handled the receipts.

46. Simply put, by printing numerous transaction receipts in wholesale violation of a well-known federal statute, Defendants have caused – to paraphrase the words of the Honorable Judge Posner (Ret.) – "an unjustifiably high risk of harm that [wa]s either known or so obvious that it should [have been] known" to Defendants. *Redman v. RadioShack Corp.*, 768 F.3d 622, 627 (7th Cir. 2014) (quoting *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

CLASS ACTION ALLEGATIONS

47. Plaintiff brings this class action on behalf of himself and all persons in the United States who, within the time frame relevant to this action, engaged in one or more transactions using a debit card or credit card at a Cinemark location at a time when the point-of-sale system used to process the transaction was programmed to print more than the last five digits of the credit or debit card account number used in the transaction on the customer's receipt. Plaintiff is a member of this class. Excluded from the Class are the Judge to whom this case is assigned, any members of the Judge's immediate family, and counsel of record in this action.

48. Members of the proposed Class are so numerous that joinder of all members would be impracticable.

49. There are questions of law and fact common to all the members of the proposed Class that predominate over any questions affecting only individual members.

50. Plaintiff's claims are typical of the claims of other members of the proposed Class.

51. Plaintiff has no interests antagonistic to those of the proposed Class and Defendants have no defenses unique to Plaintiff.

52. Plaintiff will fairly and adequately protect the interests of the proposed Class, and has retained attorneys experienced in class and complex litigation.

53. A class action is superior to all other available methods for this controversy because: (i) the prosecution of separate actions by the members of the proposed Class would create a risk of adjudications with respect to individual members of the proposed Class that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; (ii) the prosecution of separate actions by the members of the proposed Class would create a risk of inconsistent or varying adjudications with respect the individual members of the proposed Class, which would establish incompatible standards of conduct for Defendants; (iii) Defendants acted or refused to act on grounds generally applicable to the proposed Class; and (iv) questions of law and fact common to members of the proposed Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

54. Plaintiff does not anticipate any difficulty in the management of this litigation.

55. The questions of law and fact which predominate over questions that may affect any individual proposed Class member include the following:

a. Whether Defendants and/or their agents generated customer transaction receipts displaying more than the last five digits of customer debit or credit card numbers, violating FACTA;

b. Whether Defendants' conduct was knowing or reckless;

c. Whether Defendants are liable for statutory damages, and the extent of such damages.

COUNT I – VIOLATIONS OF 15 U.S.C. § 1681(c)(g)

56. Plaintiff incorporates the foregoing paragraphs as if fully set forth herein.

57. 15 U.S.C. §1681c(g)(1) states as follows:

> ***"Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction."***

58. This section applies to any "device that electronically prints receipts" (hereafter "Devices") at point of sale or transaction. 15 U.S.C. §1681c(g)(3).

59. Defendants employ the use of said Devices for point-of-sale transactions at their movie theater locations in the United States.

60. On or before the date on which this complaint was filed, Defendants provided Plaintiff and members of the proposed Class with receipt(s) that failed to comply with the Receipt Provision.

61. At all times relevant to this action, Defendants were aware of both the Receipt Provision as well as the requirement to comply with said provision.

62. Notwithstanding the three-year period to comply with FACTA and its accompanying provisions, nor the subsequent years since FACTA became effective; and having

knowledge of the Receipt Provision and FACTA as a whole; Defendants knowingly or recklessly violated the FCRA and the Receipt Provision.

63. By printing the first six (6) and last four (4) digits of Plaintiff's debit card numbers on his transaction receipt, Defendants have caused Plaintiff to suffer a heightened risk of identity theft, compromised the privacy of Plaintiff's personal and private financial information, exposed Plaintiff's private information to those of Defendants' employees and who may have handled the receipt and compelled Plaintiff to take action to prevent further disclosure of the private information displayed on the receipts. *See Muransky*, 2018 WL 4762434, at *6.

64. As a result of Defendants' willful violations of the FCRA, Defendants are liable to Plaintiff and members of the proposed Class pursuant to 15 U.S.C. § 1681n for statutory damages, punitive damages, attorney's fees and costs.

* * *

WHEREFORE, Plaintiff respectfully requests that this Court enter judgment in his favor and that of the proposed Class, and against Defendants as follows:

a. Granting certification of the Class;

b. Awarding statutory damages;

c. Awarding punitive damages;

e. Awarding attorneys' fees, litigation expenses and costs of suit; and

f. Awarding such other and further relief as the Court deems proper under the circumstances.

Dated: February 24, 2023

Respectfully submitted,

s/Keith J. Keogh
Keith J. Keogh

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Illinois Supreme Court Rule 222 Affidavit

I, Keith J. Keogh, an attorney, certify under penalty of perjury that the amount sought in this action exceeds $50,000.

s/Keith J. Keogh
Keith J. Keogh

EXHIBIT 2

IN THE

SUPREME COURT OF ILLINOIS

Karen Duncan, Individually and on Behalf of All Others Similarly Situated,	)	
Appellee	)	Petition for Leave to Appeal from Appellate Court
v.	)	First District
	)	1-18-0857
FedEx Office and Print Services, Inc., a Texas corporation,	)	17CH14517
Appellant	)	

ORDER

This cause coming to be heard on the joint motion of the parties, and the Court being fully advised in the premises;

IT IS ORDERED that the motion to dismiss the appeal is allowed. The appeal is dismissed. The Appellate Court, First District, is directed to vacate its January 25, 2019, judgment in case No. 1-18-0857. The appellate court is directed to remand the case to the circuit court with directions to dismiss the complaint with prejudice.

Order entered by the Court.

FILED
November 21, 2019
SUPREME COURT
CLERK

EXHIBIT 3

IN THE

SUPREME COURT OF ILLINOIS

Hugo Soto and Sharon Soto, Individually and on behalf of similarly situated persons, Appellees v. Great America LLC, d/b/a Six Flags Great America and Six Flags Hurricane Harbor and Does 1 to 20, Appellant	)	Petition for Leave to Appeal from Appellate Court Second District 2-18-0911 17CH1118

ORDER

This cause coming to be heard on the joint motion of the parties, and the Court being fully advised in the premises;

IT IS ORDERED that the joint motion to dismiss appeal is allowed. In the exercise of this Court's supervisory authority, the Appellate Court, Second District, is directed to vacate its judgment and opinion in Soto, Hugo, et al. v. Great America LLC, 2020 IL App (2d) 180911.

Order entered by the Court.

FILED
July 16, 2021
SUPREME COURT
CLERK

EXHIBIT 4

21STCV44508

Electronically FILED by Superior Court of California, County of Los Angeles on 12/07/2021 01:41 PM Sherri R. Carter, Executive Officer/Clerk of Court, by R. Lozano, Deputy Clerk

SUM-100

SUMMONS
(CITACION JUDICIAL)

FOR COURT USE ONLY
(SOLO PARA USO DE LA CORTE)

NOTICE TO DEFENDANT:
(AVISO AL DEMANDADO):

CINEMARK USA, INC., a Texas corporation; CINEMARK HOLDINGS, INC., a Delaware corporation

YOU ARE BEING SUED BY PLAINTIFF:
(LO ESTÁ DEMANDANDO EL DEMANDANTE):

LAKEENYA NEAL, and ROBERTO A. MENDOZA, individually and on behalf of a class of other similarly situated individuals,

NOTICE! You have been sued. The court may decide against you without your being heard unless you respond within 30 days. Read the information below.

You have 30 CALENDAR DAYS after this summons and legal papers are served on you to file a written response at this court and have a copy served on the plaintiff. A letter or phone call will not protect you. Your written response must be in proper legal form if you want the court to hear your case. There may be a court form that you can use for your response. You can find these court forms and more information at the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), your county law library, or the courthouse nearest you. If you cannot pay the filing fee, ask the court clerk for a fee waiver form. If you do not file your response on time, you may lose the case by default, and your wages, money, and property may be taken without further warning from the court.

There are other legal requirements. You may want to call an attorney right away. If you do not know an attorney, you may want to call an attorney referral service. If you cannot afford an attorney, you may be eligible for free legal services from a nonprofit legal services program. You can locate these nonprofit groups at the California Legal Services Web site (*www.lawhelpcalifornia.org*), the California Courts Online Self-Help Center (*www.courtinfo.ca.gov/selfhelp*), or by contacting your local court or county bar association. NOTE: The court has a statutory lien for waived fees and costs on any settlement or arbitration award of $10,000 or more in a civil case. The court's lien must be paid before the court will dismiss the case.
¡AVISO! Lo han demandado. Si no responde dentro de 30 días, la corte puede decidir en su contra sin escuchar su versión. Lea la información a continuación.

Tiene 30 DÍAS DE CALENDARIO después de que le entreguen esta citación y papeles legales para presentar una respuesta por escrito en esta corte y hacer que se entregue una copia al demandante. Una carta o una llamada telefónica no lo protegen. Su respuesta por escrito tiene que estar en formato legal correcto si desea que procesen su caso en la corte. Es posible que haya un formulario que usted pueda usar para su respuesta. Puede encontrar estos formularios de la corte y más información en el Centro de Ayuda de las Cortes de California (www.sucorte.ca.gov), en la biblioteca de leyes de su condado o en la corte que le quede más cerca. Si no puede pagar la cuota de presentación, pida al secretario de la corte que le dé un formulario de exención de pago de cuotas. Si no presenta su respuesta a tiempo, puede perder el caso por incumplimiento y la corte le podrá quitar su sueldo, dinero y bienes sin más advertencia.

Hay otros requisitos legales. Es recomendable que llame a un abogado inmediatamente. Si no conoce a un abogado, puede llamar a un servicio de remisión a abogados. Si no puede pagar a un abogado, es posible que cumpla con los requisitos para obtener servicios legales gratuitos de un programa de servicios legales sin fines de lucro. Puede encontrar estos grupos sin fines de lucro en el sitio web de California Legal Services, (www.lawhelpcalifornia.org), en el Centro de Ayuda de las Cortes de California, (www.sucorte.ca.gov) o poniéndose en contacto con la corte o el colegio de abogados locales. AVISO: Por ley, la corte tiene derecho a reclamar las cuotas y los costos exentos por imponer un gravamen sobre cualquier recuperación de $10,000 ó más de valor recibida mediante un acuerdo o una concesión de arbitraje en un caso de derecho civil. Tiene que pagar el gravamen de la corte antes de que la corte pueda desechar el caso.

The name and address of the court is:
(El nombre y dirección de la corte es): Los Angeles Superior Court
111 N. Hill Street, Los Angeles CA 90012

CASE NUMBER: *(Número del Caso):*
21STCV44508

The name, address, and telephone number of plaintiff's attorney, or plaintiff without an attorney, is: *(El nombre, la dirección y el número de teléfono del abogado del demandante, o del demandante que no tiene abogado, es):*
John R. Habashy, Esq.; Lexicon Law PC, 633 W. 5th Street 28th Floor, Los Angeles, CA 90071

DATE: *(Fecha)* 12/07/2021

Sherri R. Carter Executive Officer / Clerk of Court
Clerk, by *(Secretario)* R. Lozano, Deputy *(Adjunto)*

(For proof of service of this summons, use Proof of Service of Summons *(form POS-010).)*
(Para prueba de entrega de esta citatión use el formulario Proof of Service of Summons, *(POS-010)).*

[SEAL]

NOTICE TO THE PERSON SERVED: You are served

1. [ ] as an individual defendant.
2. [ ] as the person sued under the fictitious name of *(specify)*:
3. [X] on behalf of (specify): CINEMARK HOLDINGS, INC., a Delaware corporation
   under: [X] CCP 416.10 (corporation) [ ] CCP 416.60 (minor)
   [ ] CCP 416.20 (defunct corporation) [ ] CCP 416.70 (conservatee)
   [ ] CCP 416.40 (association or partnership) [ ] CCP 416.90 (authorized person)
   [ ] other *(specify)*:
4. [ ] by personal delivery on *(date)*:

Form Adopted for Mandatory Use
Judicial Council of California
SUM-100 [Rev. July 1, 2009]

SUMMONS

Code of Civil Procedure §§ 412.20, 465
www.courts.ca.gov

21STCV44508
Assigned for all purposes to: Spring Street Courthouse, Judicial Officer: Daniel Buckley

Electronically FILED by Superior Court of California, County of Los Angeles on 12/07/2021 01:41 PM Sherri R. Carter, Executive Officer/Clerk of Court, by R. Lozano, Deputy Clerk

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

LAKEENYA NEAL, and ROBERTO A. MENDOZA, individually and on behalf of a class of other similarly situated individuals,

Plaintiffs,

v.

CINEMARK USA, INC., *a Texas corporation;* CINEMARK HOLDINGS, INC., *a Delaware corporation*;

Defendants.

CASE NO: 21STCV44508

CLASS ACTION

VIOLATION OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (FACTA)

JURY TRIAL DEMANDED

Plaintiffs, Lakeenya Neal ("Plaintiff Neal") and Roberto A. Mendoza ("Plaintiff Mendoza" and collectively with Plaintiff Neal, the "Plaintiffs"), on behalf of themselves and

other similarly situated individuals, sue Cinemark USA, Inc. and Cinemark Holdings, Inc. ("Defendants" or "Cinemark"), and allege the following:

INTRODUCTION

1. This action arises from Defendants' violation of the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., as amended (the "FCRA"), a federal statute which requires merchants to truncate certain credit card and debit card information on printed receipts provided to consumers.

2. Despite the clear language of the statute and having been previously sued for similar violations of FACTA, Defendants knowingly or recklessly failed to comply with FACTA by printing more than the last five digits of consumers' debit and credit cards on receipts provided to consumers. As a result of Defendants' unlawful conduct, Plaintiffs and the Class who have conducted business with Defendants during the time frame relevant to this complaint have suffered a violation of their statutory rights under § 1681c(g), an invasion of their privacy and have been burdened with an elevated risk of identity theft.

3. This Court has recently held that "California law [] does not restrict courts from enforcing substantive legal rights created by a legislature in favor of an individual even when the individual can show no injury other than the invasion of the substantive legal right". *Escobar v. Major League Baseball, et al.*, Case No. 18STCV02491 (Cal. Super. Ct., County of Los Angeles, May 8, 2019) (Order overruling defendant's demurrer). This Court also noted that California courts are not bound by the case and controversy requirement of Article III. *Id.*; *see also Tran v. Kohl's Corp.*, 2018 WL 11226904, at *4 (Cal. Super.) ("The Court rejects Kohl's argument that the Plaintiff lacks standing because Congress made clear that the FACTA is meant to prevent identity theft and credit card fraud, including an expiration date on a receipt does not

increase the risk of identity theft or credit card fraud, and that the FACTA is not meant to protect consumers who have suffered no actual harm to their credit or identity. The law, as written, is not so limited."); *Keim v. Trader Joe's*, Case No. BC683803 (Cal. Super. Ct., County of Los Angeles, May 4, 2021) ("As noted above, '[t]he Legislature defined PAGA standing in terms of violations, not injury." *Kim*, 9 Cal.5th at 84. Thus, under PAGA's plain language, a plaintiff need not allege actual harm to have standing to pursue PAGA penalties. As with PAGA, the plain language of FACTA does not require a plaintiff to allege actual harm to pursue a claim for willful violation of FACTA. To read a requirement of actual harm into Section 1681n(a)(1)(A) would be to ignore the Supreme Court's clear admonition that courts should not insert additional elements of proof into a statute that the Legislature clearly did not intend.").

JURISDICTION AND VENUE

4. Subject matter jurisdiction is proper in this Court as the amount in controversy is not less than the jurisdictional limit of this Court.

5. *In personam* jurisdiction over the Defendants is proper in this Court as the Defendants, or some of them, conduct substantial business within the State such that their affiliation is continuous and systematic.

6. Venue is proper in this Court as the violations of federal law complained of herein occurred within the City and County of Los Angeles, State of California.

PARTIES

7. Plaintiff Neal is a natural person over the age of eighteen (18) who resides in Los Angeles County, State of California.

8. Plaintiff Mendoza is a natural person over the age of eighteen (18) who resides in Los Angeles County, State of California.

9. Defendant Cinemark USA, Inc. is a Texas corporation with its headquarters located at 3900 Dallas Parkway, Ste 500, Plano, Texas 75093.

10. Defendant, Cinemark Holdings, Inc. is a corporation incorporated in Delaware, with its headquarters located at 3900 Dallas Parkway, Ste 500, Plano, Texas 75093. Cinemark Holdings, Inc. is a leader in the motion picture exhibition industry with 524 theatres and 5,897 screens in the U.S. and Latin America as of September 30, 2021.

11. Defendants collectively exercise control over the Cinemark movie theaters, including but not limited to, the type of point of sale (POS) terminals utilized to print receipts at Cinemark movie theaters in California and throughout the United States.

FACTUAL ALLEGATIONS

Background of FACTA

12. Congress enacted FACTA to prevent identity theft and related harm. See Pub. L. No. 108-159 (December 4, 2003) ("An Act . . . to prevent identity theft . . . and for other purposes.").

13. The "[s]tatutory text, legislative history, and public policy make clear that Congress, in passing FACTA, recognized that consumers have a concrete interest in using their cards without fear that each swipe will raise their risk of identity theft." *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 939 (11th Cir. 2020).

14. Upon signing FACTA into law, President George W. Bush remarked that "[s]lips of paper that most people throw away should not hold the key to their savings and financial secrets." 39 Weekly Comp. Pres. Doc. 1746, 1757 (Dec. 4, 2003). President Bush added that the government, through FACTA, was "act[ing] to protect individual privacy." *Id.*

15. Along those lines, one such FACTA provision was specifically designed to

thwart identity thieves' ability to gain sensitive information regarding a consumer's credit or bank account from a receipt provided to the consumer during a point-of-sale transaction, which, through any number of ways, could fall into the hands of someone other than the consumer.

16. Codified at 15 U.S.C. § 1681c(g), this provision states the following:

> *Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.*

15 U.S.C. § 1681c(g) (the "Receipt Provision").

17. The requirement was widely publicized among retailers and the FTC. For example, on March 6, 2003, in response to earlier state legislation enacting similar truncation requirements, then-CEO of Visa USA, Carl Pascarella, explained that,

> "Today, I am proud to announce an additional measure to combat identity theft and protect consumers. Our new receipt truncation policy will soon limit cardholder information on receipts to the last four digits of their accounts. The card's expiration date will be eliminated from receipts altogether . . . The first phase of this new policy goes into effect July 1, 2003 for all new terminals."[1]

Within 24 hours, MasterCard and American Express announced they were imposing similar requirements.

18. Card-issuing organizations proceeded to require compliance with FACTA by contract, in advance of FACTA's mandatory compliance date. For example, the publication, *Rules for Visa Merchants*, which is distributed to and binding upon all merchants that accept

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[1] *Visa USA Announces Account Truncation Initiative to Protect Consumers from ID Theft*, PR NEWSWIRE (Mar 06, 2003) https://www.finextra.com/newsarticle/8206/visa-to-hide-card-numbers-in-bid-to-cut-identity- (Last viewed: Dec. 3, 2021).

Visa cards, expressly requires that "only the last four digits of an account number should be printed on the customer's copy of the receipt" and "the expiration date should not appear at all."[2]

19. However, because of apparent confusion surrounding the otherwise straightforward requirements of FACTA, a handful of large retailers failed to comply with their contractual obligations to the card companies and with FACTA. Accordingly, Congress passed *The Credit and Debit Card Receipt Clarification Act of 2007*, extending the compliance date to June 3, 2008, and making allowances to the definition of willful noncompliance with respect to violations involving the printing of an expiration date on certain credit and debit card receipts before the date of the enactment of this Act.[3] Importantly, the Clarification Act did not amend FACTA to allow disclosure of a credit or debit card's expiration date, nor did it excuse violations for printing more than the last five digits of a card's account number. Instead, it simply provided amnesty to past violators in connection with the printing of expiration dates only, up to June 3, 2008.

20. Meanwhile, card processing companies continued to alert their merchant clients, including Defendants, of FACTA's requirements. According to a Visa Best Practice Alert in 2010:

> Some countries already have laws mandating PAN truncation and the suppression of expiration dates on cardholder receipts. For example, the United States Fair and Accurate Credit Transactions Act (FACTA) of 2006 prohibits merchants from printing more than the last five digits of the PAN or the card expiration date on any cardholder receipt. (Please visit

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[2] *Rules for Visa Merchants*, VISA (Sept. 1, 2007), http://www.runtogold.com/images/rules_for_visa_merchants.pdf (Last viewed: Dec. 3, 2021).

[3] Source: https://www.govinfo.gov/content/pkg/BILLS-110hr4008enr/pdf/BILLS-110hr4008enr.pdf (Last viewed: Dec. 3, 2021).

> http://www.ftc.gov/os/statutes/fcrajump.shtm for more information on the FACTA.)
>
> To reinforce its commitment to protecting consumers, merchants, and the overall payment system, Visa is pursuing a global security objective that will enable merchants to eliminate the storage of full PAN and expiration date information from their payment systems when not needed for specific business reasons. To ensure consistency in PAN truncation methods, Visa has developed a list of best practices to be used until any new global rules go into effect.
>
> *Visa Best Practices for Primary Account Number Storage and Truncation.* [4]

21. As noted above, the processing companies have required that credit card or debit card expiration dates not be shown since 2003 and still require it. For example, American Express requires:

> Pursuant to Applicable Law, truncate the Card Number and do not print the Card's Expiration Date on the copies of Charge Records delivered to Card Members. Truncated Card Number digits must be masked with replacement characters such as "x," "*," or "#," and not blank spaces or numbers.
>
> *American Express Merchant Regulations.*[5]

22. Similarly, MasterCard required in a section entitled Primary Account Number (PAN) truncation and Expiration Date Omission:

> A Transaction receipt generated by an electronic POI Terminal, whether attended or unattended, must not include the Card expiration date. In addition, a Transaction receipt generated for a Cardholder by an electronic POI Terminal, whether attended or unattended, must reflect only the last four digits of the primary account number (PAN). All preceding digits of the PAN must be replaced with fill characters, such as "X," "*," or "#," that are neither blank spaces nor numeric characters.

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[4] Source: https://www.visa.com.hk/content/dam/VCOM/global/support-legal/documents/bulletin-pan-truncation-best-practices.pdf (Last viewed: Dec. 3, 2021).

[5] Source: https://www.aexp-static.com/cdaas/merchant-interactive-content/infopros/weboutput-international-Regs-latest/index.html#t=Topics%2F2_General-Policies-6.htm (Last viewed: Dec. 3, 2021).

See Mastercard Acceptance Procedures.[6]

23. Despite FACTA, however, identity theft remains a serious issue affecting both consumers and businesses. In 2018, a Harris Poll revealed that nearly 60 million Americans have been affected by identity theft.[7] There were 16.7 million victims of identity theft in 2017, and account takeovers (when a thief opens a credit card or other financial account using a victim's name and other stolen information) tripled in 2017 form 2016, causing $5.1 billion in losses.

24. So problematic is the crime of identity theft that the three main credit reporting agencies, Experian, Equifax, and Transunion, joined to set-up a free website (http://www.annualcreditreport.com) in order to comply with FACTA requirements and to provide the citizens of this country with a means of monitoring their credit reports for possible identity theft.

25. FACTA clearly prohibits the printing of more than the last five (5) digits of the card number, including the expiration date, to protect persons from identity theft.

Defendants' Prior Knowledge of FACTA

26. Defendants had actual knowledge of FACTA's truncation requirement before they began failing to comply with the requirement *en masse*. There are numerous California statutes that require Defendants to maintain their locations in full compliance with state and federal regulations such as FACTA.

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[6] Source: https://www.aibms.com/wp-content/uploads/2014/12/Transaction_Processing_Rules_13_December_2013.pdf (Last viewed: Dec. 3, 2021).

[7] Source: https://lifelock.com/learn-identity-theft-resources-how-common-is-identity-theft.html. (Last viewed: Dec. 3, 2021).

27. Defendants' knowledge and experience regarding federal laws governing financial transactions no doubt translate to Defendants having intimate knowledge of the requirements of FACTA, a federal law governing financial transactions.

28. Most of Defendants' business peers and competitors currently and diligently ensure their credit card and debit card receipt printing process remains in compliance with FACTA by consistently verifying their card machines and devices comply with the Receipt Provision. Defendants could very easily have done the same.

29. Despite the many warnings Defendants received regarding FACTA and its requirements, a federal lawsuit was filed on February 5, 2007, against Cinemark USA, Inc. for failing to comply with FACTA's requirements at one of their California locations. See *Vigdorchik v. Century Theatres Inc., and Cinemark Usa, Inc.*, No. 07-cv-00736 (N.D. Cal.). In addition, on May 29, 2013, Cinemark purchased another movie theater chain which had also been sued, in this instance multiple times, for violation of FACTA.[8] *See Grimes v. Rave Motion*

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[8] Source: https://ir.cinemark.com/sec-filings/all-sec-filings/content/0001193125-14-183653/0001193125-14-183653.pdf (last viewed: Dec. 3, 2021) ("On May 29, 2013, the Company acquired 32 theatres with 483 screens from Rave Real Property Holdco, LLC and certain of its subsidiaries, Rave Cinemas, LLC and RC Processing, LLC (collectively "Rave") in an asset purchase for approximately $236,875 in cash plus the assumption of certain liabilities (the "Rave Acquisition"). The acquisition resulted in an expansion of the Company's domestic theatre base into one new state and seven new markets. The transaction was subject to antitrust approval by the Department of Justice or Federal Trade Commission. The Department of Justice required the Company to agree to divest of three of the newly-acquired theatres, which occurred during August 2013"); https://ir.cinemark.com/sec-filings/all-sec-filings/content/0000950170-21-003150/0000950170-21-003150.pdf (last viewed: Dec. 3, 2021) ("Headquartered in Plano, TX, Cinemark (NYSE: CNK) is one of the largest and most influential movie theatre companies in the world. Cinemark's circuit, comprised of various brands that also include Century, Tinseltown ***and Rave***, operates 524 theatres with 5,897 screens in 42 states domestically and 15 countries throughout South and Central America.") (emphasis added).

Pictures Birmingham, L.L.C., 264 F.R.D. 659 (N.D. Ala. 2010); *Rave Motion Pictures Little Rock, L.L.C., et al.*, Case 4:07-cv-00659-JLH (July 30, 2007 E.D. Ark.).[9]

30. Now, despite having been previously sued for violating FACTA on at least three other occasions, Defendants have once again knowingly and willfully violated the aforesaid federal law by printing the first six and last four digits of customers' credit and debit card numbers on transaction receipts at one or more of their movie theaters within the United States, including but not limited to theaters in California. *See Redman v. RadioShack Corp.*, 768 F.3d 622, 638 (7th Cir. 2014) (Posner, J.) (willfulness in FACTA class action lawsuit was "straightforward" wherein defendant violated a parallel state statute years earlier).

31. Defendants were not only clearly informed not to print more than the last five digits of credit or debit cards, but were contractually prohibited from doing so. Defendants accept credit and debit cards from all major issuers, such as Visa, MasterCard, American Express and Discover Card. Each of these companies sets forth requirements that merchants such as (and including) Defendants must follow, including FACTA's redaction and truncation requirements found in the Receipt Provision. *See Operating Engineers Pension Trust v. Gilliam*, 737 F.2d 1501, 1504 (9th Cir.1984) ("[one] who signs a written agreement generally is bound

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[9] Rave Motion Pictures' knowledge of FACTA on the of basis the previous lawsuits can be imputed to Cinemark because of Cinemark's acquisition of Rave. *See S'holder Representative Servs. LLC v. RSI Holdco*, No. CV 2018-0517-KSJM, 2019 WL 2290916 (Del. Ch. May 29, 2019) ("all assets of a target company, including privileges over attorney-client communications, transfer to the surviving company unless the sellers take affirmative action to prevent transfer of those privileges"); *Wells Fargo & Co. v. United States*, 117 Fed. Cl. 30, 38 (2014) ("Because the surviving corporation steps into the shoes of the acquired entity and the surviving corporation is liable retroactively for the tax payments of its predecessors, it does not matter when the initial payments were made. Put another way, following a merger, the law treats the acquired corporation as though it had always been part of the surviving entity")

by its terms, even though he neither reads it nor considers the legal consequences of signing it.") (applying California law); Restatement 2d Contracts § 23, Comments b, e (1981); *McClure v. Cerati*, 86 Cal.App.2d 74, 84-85, 194 P.2d 46 (1948) (party signing a contract should be charged with knowledge of its contents).

32. The crime of identity theft is on the rise and it has become a significant problem for the Los Angeles Police Department and for people who reside in the City of Los Angeles.[10] As such, companies operating in the sector should apply extra care in preserving customers' data and preventing identity theft. Given the size and years of experience of Defendants' business, and the various state and federal regulations governing their business, at minimum Defendants were acting with reckless disregard of the FACTA requirements and purpose when they printed the first six (6) along with the last four (4) digits of the account number on ticket receipts.

33. Plaintiffs are informed and believe, and thereupon allege, that Defendants knew about the requirement that they truncate credit and debit card digits on transaction receipts. This is evidenced by the fact that in the years prior to the illegal conduct alleged herein, Defendants formerly truncated credit and debit card account numbers on transaction receipts in compliance with FACTA.

34. Furthermore, Plaintiffs are informed and believe that Defendants' officers have knowledge of FACTA's truncation requirement.

35. Plaintiffs are informed and believe, and thereupon allege, that it would take an individual less than thirty seconds to run a test receipt in order to determine whether Defendants'

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[10] Source: http://www.lapdonline.org/search_results/content_basic_view/1364 (Last Viewed: Dec. 3, 2021).

point-of-sale system that printed the FACTA violative receipts was in fact in compliance with federal law(s).

Plaintiffs' Factual Allegations

36. On or about November 6, 2021, Plaintiff Neal used her personal debit card to purchase a ticket at one of Defendants' movie theaters in Palmdale, California.

37. After making her purchase, Plaintiff Neal was subsequently presented with an electronically printed receipt showing the first six (6) and last four (4) digits of her debit card account number.

38. On or about December 1, 2021, Plaintiff Mendoza used his personal debit card to purchase a ticket at one of Defendants' movie theaters in North Hollywood, California.

39. After making his purchase, Plaintiff Mendoza was subsequently presented with an electronically printed receipt showing the first six (6) and last four (4) digits of his debit card account number.

40. As a direct result of the receipts showing ten (10) digits of each of their debit card account numbers, Plaintiffs were required to take steps to safeguard the receipts.

41. The printing of the first six (6) and last four (4) digits of their card account numbers invaded Plaintiffs' privacy as it disclosed their private financial information.

42. The printing of the first six (6) and last four (4) digits of their card account numbers was a breach of confidence and breach of an implied bailment.

Defendants' Misdeeds

43. At all times relevant herein, Defendants were acting by and through their subsidiaries, agents, servants and/or employees, each of which were acting within the course and scope of their agency or employment, and under the direct supervision and control of

Defendants.

44. At all times relevant herein, the conduct of Defendants, as well as that of their subsidiaries, agents, servants and/or employees, were in willful, knowing, or reckless disregard for federal law and the rights of the Plaintiffs and other members of the class.

45. Plaintiffs are informed and believe, and thereupon allege, that Defendants implement, oversee, and maintain control over the same uniform debit and credit card payment processing policies, practices, and procedures for the transactions at issue in this case – including, without limitation, negotiating, entering into, and acting pursuant to various contracts and agreements with the electronic payment processing company whose technology Defendants use to process all such transactions at their movie theater locations.[11]

46. Upon information and belief, the point-of-sale systems used by Defendants maintain records of all payment transactions and have the ability to print duplicate copies of all payment receipts provided to customers.

47. Notwithstanding their extensive knowledge of the requirements of FACTA and the well-documented dangers imposed upon consumers through their failure to comply, Defendants issued thousands of point of sale receipts containing the first six (6) plus the last

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[11] Source: Cinemark Form 10-k years 2012, 2013, 104, 2015, available at https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-12-089012/0001193125-12-089012.pdf; https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-13-083890/0001193125-13-083890.pdf https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-13-083890/0001193125-13-083890.pdf; https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-14-077445/0001193125-14-077445.pdf; https://ir.cinemark.com/sec-filings/annual-reports/content/0001193125-15-069425/0001193125-15-069425.pdf (last visited Dec. 3, 2021) ("We have developed our own proprietary point of sale system to enhance our ability to maximize revenues, control costs and efficiently manage operations. The system is currently installed in all of our U.S. theatres.")

four (4) digits of credit and debit card account numbers.

48. By ignoring the requirements of this important federal statute, in an environment already ripe for identity theft and other evils, Defendants uniformly invaded Plaintiffs' and the other putative Class members' privacy. Defendants' conduct alleged herein resulted in the disclosure of Plaintiffs' and the Class members' private financial information to the world, including to persons who might find the receipts in the trash or elsewhere, including identity thieves who thrive in environments such as Defendants' various locations, as well Defendants' employees who handled the receipts.

49. Simply put, by printing numerous transaction receipts in wholesale violation of a well-known federal statute, Defendants have caused – to paraphrase the words of the Honorable Judge Posner (Ret.) – "an unjustifiably high risk of harm that [wa]s either known or so obvious that it should [have been] known" to Defendants. *Redman v. RadioShack Corp.*, 768 F.3d 622, 627 (7th Cir. 2014) (quoting *Farmer v. Brennan*, 511 U.S. 825, 836, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

CLASS ACTION ALLEGATIONS

50. Plaintiffs bring this class action on behalf of themselves and all persons in the United States who, within the time frame relevant to this action, engaged in one or more transactions using a debit card or credit card at one or more of the Cinemark movie theatres in the State of California, and was thereupon provided an electronically printed receipt displaying the first six (6) and last four (4) digits of the credit or debit card account number used in connection with such transaction(s). Plaintiffs are members of this class. Excluded from the Class are the Judge to whom this case is assigned, any members of the Judge's immediate family, and counsel of record in this action.

51. Plaintiffs also bring this following subclass on behalf of themselves and all persons in the United States who, within the time frame relevant to this action, engaged in one or more transactions using a debit card or credit card at one or more of the Cinemark movie theatres in the United States and was thereupon provided an electronically printed receipt displaying the first six (6) and last four (4) digits of the credit or debit card account number used in connection with such transaction(s). Plaintiffs are members of this class. Excluded from the Class are the Judge to whom this case is assigned, any members of the Judge's immediate family, and counsel of record in this action.

52. Members of the Class are so numerous that joinder of all members would be impracticable.

53. There are questions of law and fact common to all the members of the Class that predominate over any questions affecting only individual members.

54. Plaintiffs' claims are typical of the claims of other class members of the Class. Plaintiffs have no interests antagonistic to those of the Class and Defendants have no defenses unique to Plaintiffs.

55. Plaintiffs will fairly and adequately protect the interests of the Class, and have retained attorneys experienced in class and complex litigation.

56. A class action is superior to all other available methods for this controversy because: (i) the prosecution of separate actions by the members of the Class would create a risk of adjudications with respect to individual members of the Class that would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications, or substantially impair or impede their ability to protect their interests; (ii) the prosecution of separate actions by the members of the Class would create a risk of inconsistent or varying

adjudications with respect the individual members of the Class, which would establish incompatible standards of conduct for Defendants; (iii) Defendants acted or refused to act on grounds generally applicable to the Class; and (iv) questions of law and fact common to members of the Class predominate over any questions affecting only individual members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

57. Plaintiffs do not anticipate any difficulty in the management of this litigation.

58. The questions of law and fact to the class predominate over questions that may affect individual Class Members, including the following:

a. Whether, within the two (2) years prior to the filing of this Complaint, Defendants and/or their agents completed transactions by credit or debit card from any consumer and subsequently gave that consumer a printed receipt which displayed the first six (6) and last four (4) digits the debit or credit card account number;

b. Whether Defendants' conduct was knowing or reckless;

c. Whether Defendants are liable for damages, and the extent of statutory damages for each such violation; and

COUNT I – VIOLATIONS OF 15 U.S.C. § 1681(c)(g)

59. Plaintiffs incorporate the foregoing paragraphs as if fully set forth herein.

60. 15 U.S.C. §1681c(g) states as follows:

> ***Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.***

61. This section applies to any "device that electronically prints receipts" (hereafter

"Devices") at point of sale or transaction. 15 U.S.C. §1681c(g)(3).

62. Defendants employ the use of said Devices for point-of-sale transactions at their movie theater locations in California.

63. On or before the date on which this complaint was filed, Defendants provided Plaintiffs and members of the class with receipt(s) that failed to comply with the Receipt Provision.

64. At all times relevant to this action, Defendants were aware, or should have been aware, of both the Receipt Provision as well as the requirement to comply with said provision.

65. Notwithstanding the three-year period to comply with FACTA and its accompanying provisions, nor the subsequent years since FACTA became effective; and having knowledge of the Receipt Provision and FACTA as a whole; Defendants knowingly, willfully, intentionally, and/or recklessly violated and likely continue to violate the FCRA and the Receipt Provision.

66. By printing the first six (6) and last four (4) digits of Plaintiffs' card account numbers on their transaction receipt, Defendants caused Plaintiffs to suffer a heightened risk of identity theft, exposed Plaintiffs' private information to those of Defendants' employees who handled the receipts and forced Plaintiffs to take action to prevent further disclosure of the private information displayed on the receipts. *See Muransky*, 2018 WL 4762434, at *6.

67. As a result of Defendants' willful violations of the FCRA, Plaintiffs and members of the class continue to be exposed to an elevated risk of identity theft. Defendants are liable to Plaintiffs and members of the class pursuant to 15 U.S.C. § 1681n for statutory damages, punitive damages, attorney's fees and costs.

* * *

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and the class, and against Defendants as follows:

a. Granting certification of the Class;

b. Awarding statutory damages;

c. Awarding punitive damages;

e. Awarding attorneys' fees, litigation expenses and costs of suit; and

f. Awarding such other and further relief as the Court deems proper under the circumstances.

JURY DEMAND

68. Plaintiffs demand a trial by jury on all issues so triable.

Dated: December 7, 2021.

Respectfully submitted,

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Scott D. Owens (FL 0597651)
(pending admission *pro hac vice*)
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EXHIBIT 5

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Attorney for Plaintiffs and the Proposed Class
LAKEENYA NEAL and ROBERTO A. MENDOZA

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

LAKEENYA NEAL and ROBERTO A. MENDOZA, individually and on behalf of a class of other similarly situated individuals, Plaintiffs. v. CINEMARK USA, INC., a Texas Corporation; CINEMARK HOLDINGS, INC., a Delaware corporation	**CASE NO. 21STCV44508** **CLASS ACTION** **REQUEST FOR DISMISSAL; [PROPOSED] ORDER** ***[Declaration filed Concurrently]*** Judge: Hon. Stuart M. Rice Department: 1 Location: Los Angeles Superior Court – Spring Street Courthouse 312 N. Spring Street, Los Angeles, CA 90012

Plaintiffs LAKEENYA NEAL AND ROBERTO A. MENDOZA ("Plaintiffs") hereby request, by and through their counsel of record:

WHEREAS, on or December 7, 2021, Plaintiffs filed in the Superior Court in and for the State of California, County of Los Angeles, an action entitled *Neal et al. v. Cinemark USA, Inc. and Cinemark Holdings, Inc.*, Case No. 21STCV44508 ("the Lawsuit") in which Plaintiffs alleged a cause of action pursuant to the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681, *et seq.* ("FACTA") arising from Defendants allegedly printing more than the last five (5) digits of their debit card onto their receipt;

WHEREAS, Defendants anticipated they intend to challenge Plaintiffs' standing before this Court in light of the recent holding in *Limon v. Circle K Stores, Inc*. (5th Dist. 2022), 84 Cal. App. 5th 671;

WHEREAS, on February 27, 2023, a class action against Defendants was filed in the Circuit Court of Cook County, Illinois (*Rodriguez v. Cinemark USA, Inc. and Cinemark Holdings, Inc.*, Case No. 2023CH01857), and in Illinois there is appellate case law establishing standing to sue under FACTA. See *Duncan v. Fedex Office & Print Services*, 123 N.E.3d 1249 (App. Ct. 2019); *Lee v. Buth-Na-Bodhaige, Inc*., 143 N.E.3d 645 (App. Ct. 2019);

WHEREAS, Plaintiffs are part of the class alleged in *Rodriguez* and believe their interest can be better represented in the *Rodriguez* action where the plaintiff's standing cannot be disputed;

WHEREAS, the allegations asserted on behalf of a putative class may properly be dismissed consistent with California Rules of Court, Rule 3. 770;

WHEREAS, Plaintiffs have set forth the material terms the facts upon which the Plaintiffs rely to dismiss the lawsuit through the Declaration of John R. Habashy, filed concurrently herewith, consistent with California Rules of Court, Rule 3. 770(a); and

WHEREAS, pursuant to California Rules of Court, Rule 3.770(c), if the Court has not ruled on class certification, or if the Court has ruled on class certification but notice of the pendency of the action has not also been provided to class members in a case in which such notice is required, the Court may dismiss the action "without notice to the [putative class members] if the court finds that the dismissal will not prejudice them." No class has been certified in this Action. Furthermore, no notice has been individually sent to putative class members in this Action. None of the putative class members should be prejudiced in any way by the dismissal of the class claims without prejudice, in the absence of notice;

NOW, THEREFORE, Plaintiffs hereby request an Order dismissing Plaintiffs' individual claims and the class claims without prejudice.

Dated: 02/27/2023

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[PROPOSED] ORDER RE DISMISSAL

The Court, having reviewed Plaintiffs' Request for Dismissal and the Declaration of John R. Habashy, filed concurrently, and finding good cause, hereby issues an Order to:

1. Dismiss the named Plaintiffs, LAKEENYA NEAL AND ROBERTO A. MENDOZA and the putative class, without prejudice.

IT IS SO ORDERED.

_____
DATED:

_____
HONORABLE STUART M. RICE
SUPERIOR COURT JUDGE

PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen (18) years and not a party to the within action. My business address is: **633 W. 5th Street, 28th Floor, Los Angeles, CA 90071**

On the date below, I served the foregoing document(s) described as: **REQUEST FOR DISMISSAL; [PROPOSED] ORDER** in the matter of ***Neal et al. v. Cinemark USA, Inc. and Cinemark Holdings, Inc.,*** **Case No. 21STCV44508** on the interested parties in this action:

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Attorneys for Defendants CINEMARK USA, INC. and CINEMARK HOLDINGS, INC.

( ) (BY MAIL) I placed said copy(ies) in a sealed envelope(s), postage thereon fully prepaid, and placed for collection and processing for mailing following the business's ordinary practice, with which I am readily familiar. Under that practice it would be deposited with U.S. postal service on that same day with postage fully prepaid in the city indicated below in the ordinary course of business.

(X) (BY CASE ANYWHERE) By electronic service, pursuant to the Court's Order at the Initial Status Conference on March 3, 2020 and the parties' agreement, via the file transfer protocol at www.CaseAnywhere.com. Case Anywhere is the online service provider designated in this case.

(X) (BY E-MAIL DELIVERY) I caused such electronic envelope to be delivered electronically to the offices of the addressee.

Executed on February 27, 2023 at Los Angeles, California.

(X) (STATE) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Enny Echegoyen, Declarant

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	Case No. 2023CH01857
v.	)	Hon. Anna M. Loftus
CINEMARK USA, INC., A Texas corporation; CINEMARK HOLDINGS, INC., a Delaware corporation,	)	
Defendants.	)	

ORDER

This matter, coming before the Court for hearing on Defendants' Notice of Supplemental Authority and Motion to Stay (the "Motion to Stay") and Defendant Cinemark USA, Inc.'s Motion to Dismiss, all counsel being present and the Court hearing oral argument and being duly advised, it is hereby ordered that:

1) Defendants' Motion to Stay is granted for the reasons stated in open court. This case is stayed generally pending the outcome of *Fausett v. Walgreens* currently before the Illinois Supreme Court.

2) This matter is set for status on April 4, 2024 at 10:00 am to proceed via Zoom. Zoom Meeting ID is 955 3557 3920

Judge Anna M. Loftus
NOV 03 2023
Circuit Court-2102

ENTERED:

/s/ Anna M. Loftus

Judge Anna M. Loftus, No. 2102

SGR/6348652.1

Prepared by:
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(*attorneys for Plaintiffs listed on following page*)

Electronically Received 08/23/2022 12:20 PM

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

LAKEENYA NEAL, and ROBERTO A. MENDOZA, individually and on behalf of a class of other similarly situated individuals,

Plaintiffs,

v.

CINEMARK USA, INC., a Texas corporation; CINEMARK HOLDINGS, INC., a Delaware corporation,

Defendants.

Case No. 21STCV44508

Assigned For All Purposes To The Honorable Stuart Rice

JOINT STIPULATION AND [~~PROPOSED~~] ORDER RE: (1) PRESERVATION OF PERSONAL JURISDICTION DEFENSES, (2) CLARIFICATION OF STATUTE OF LIMITATIONS ALLEGATIONS, AND (3) SETTING BRIEFING AND HEARING SCHEDULE ON DISPUTED THRESHOLD LEGAL ISSUE

Action Filed: December 7, 2021
Trial Date: None Set

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Attorneys for Plaintiffs, Lakeenya Neal, Roberto A. Mendoza, and the Proposed Class

STIPULATION

Pursuant to the pre-motion conference conducted by the Court on May 31, 2022, with counsel for defendants Cinemark Holdings, Inc. ("CHI") and Cinemark USA, Inc. ("CUSA") (collectively, "Defendants"), and counsel for plaintiffs Lakeenya Neal and Roberto Mendoza (collectively, "Plaintiffs"), and the Court's comments and guidance provided therein, the parties have further met and conferred and hereby stipulate and agree to the following:

1. Notwithstanding any otherwise applicable law, Defendant CHI shall not waive any personal jurisdiction defenses, nor be deemed to have consented to personal jurisdiction in California, by filing an Answer in this Action or by otherwise participating in the proceedings in this Action. CHI shall reserve its personal jurisdiction defenses and may assert such defenses at a later stage of proceedings in this Action via a motion to quash service of summons for lack of personal jurisdiction in accordance with and subject to the standards for resolution of such a motion pursuant to the California Civil Code of Procedure.

2. With respect to Plaintiffs' allegations in Paragraphs 50-51 of their Complaint defining the putative class(es) as persons who engaged in certain debit or credit card transactions "within the time frame relevant to this action," the phrase "time frame relevant to this action" is intended to refer to the two year statute of limitations pursuant to 15 U.S.C. § 1681p and to Plaintiffs' contention that the statute of limitations was tolled for an additional 180 days pursuant to Emergency Rule 9 of the California Rules of Court, and any other applicable law or event which may toll the statute of limitations in this case.

3. Defendants wish to raise the issue of whether claims may be asserted in this action on behalf of putative class members:

(a) who reside in states located outside of California;

(b) whose allegedly violative credit or debit card transactions occurred in states other than California; and

(c) whose claims would be barred based on lack of standing if asserted in their home states.

4. The parties agree that the Court may set a briefing and hearing schedule with

respect to the above-described disputed issue for resolution pursuant to the standards applicable to a motion to strike class allegations. In the event the Court sets a hearing date that presents a conflict for one of the parties, such party shall post a message on the noticeboard within 48 hours of the entry of the Order hereon requesting the Court re-set the hearing date.

5. This stipulation may be executed in counterparts with electronic signatures.

6. The Court may enter an order hereon.

Dated: August 23, 2022

NORTON ROSE FULBRIGHT US LLP
JOSHUA D. LICHTMAN
MICHAEL A. SWARTZENDRUBER
LARA KAKISH
PHILLIP DI TULLIO

By _____
JOSHUA D. LICHTMAN
Attorneys for Defendants CINEMARK USA, INC. and CINEMARK HOLDINGS, INC.

Dated: August 23, 2022

LEXICON LAW, P.C.
JOHN R. HABASHY

SCOTT D. OWENS, P.C.
SCOTT D. OWENS (*PRO HAC VICE* PENDING)

By */s/ John R. Habashy*
JOHN R. HABASHY
Attorneys for Plaintiffs LAKEENYA NEAL and ROBERTO MENDOZZA

~~[PROPOSED]~~ ORDER

Pursuant to the foregoing Stipulation, the Court ORDERS as follows:

1. Notwithstanding any otherwise applicable law, Defendant CHI shall not waive any personal jurisdiction defenses, nor be deemed to have consented to personal jurisdiction in California, by filing an Answer in this Action or by otherwise participating in the proceedings in this Action. CHI shall reserve its personal jurisdiction defenses and may assert such defenses at a later stage of the proceedings in this Action via a motion to quash service of summons for lack of personal jurisdiction in accordance with and subject to the standards for resolution of such a motion pursuant to the California Civil Code of Procedure.

2. The Court accepts the Parties' agreement concerning the meaning of the phrase "within the time frame relevant to this action" in Paragraphs 50-51 of Plaintiffs' Complaint set forth in paragraph 2 of the foregoing Stipulation.

3. The Court sets the following briefing and hearing schedule for resolution of the disputed issue set forth in paragraph 3 of the foregoing Stipulation pursuant to the standards applicable to a motion to strike class allegations:

(a) Defendants' Opening Brief: filed by October 21, 2022; (limited to 20 pages)

(b) Plaintiffs' Responding Brief: filed by Nov. 15, 2022; (limited to 20 pages)

(c) Defendants' Reply Brief: filed by December 6, 2022; and (limited to 10 pages)

(d) Hearing: January 10, 2023, ~~, 2022~~, at 1:45 ~~a.m.~~/p.m.

IT IS SO ORDERED.

Dated: ~~August __, 2022~~
09/29/2022

Stuart M. Rice / Judge

The Honorable Stuart Rice
Judge of the Superior Court

PROOF OF SERVICE

I, Matthew Park, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 South Flower Street, Forty-First Floor, Los Angeles, California 90071. On August 23, 2022, I served a copy of the within document(s):

JOINT STIPULATION AND [PROPOSED] ORDER RE: (1) PRESERVATION OF PERSONAL JURISDICTION DEFENSES, (2) CLARIFICATION OF STATUTE OF LIMITATIONS ALLEGATIONS, AND (3) SETTING BRIEFING AND HEARING SCHEDULE ON DISPUTED THRESHOLD LEGAL ISSUE

☒ by transmitting via CASEANYWHERE forth below on this date before 5:00 p.m.

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Attorney for Plaintiffs
Lakeenya Neal and Roberto A. Mendoza

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 23, 2022, at Los Angeles, California.

Matthew Park
Matthew Park

Joshua D. Lichtman

From: service@caseanywhere.com
Sent: Monday, January 9, 2023 3:25 PM
To: Joshua D. Lichtman
Subject: Message Posted in Neal, et al. v. Cinemark USA, Inc., et al., Case No. 21STCV44508

[External Email – Use Caution]

case anywhere

The following message has been posted in **Neal, et al. v. Cinemark USA, Inc., et al.**, 21STCV44508:

Message Title: Tentative Ruling for 1/10/2023
To: Court and All Counsel
Posted By: Hon. Stuart Rice
Representing: Los Angeles Superior Court
Posting Date: 1/9/23
Time of Posting: 3:21 PM

Message:
The Court is in receipt of the parties' briefs concerning the striking of the nationwide class allegations from Plaintiffs' case in connection with a motion scheduled for January 10, 2023. On October 25, 2022, four days after Defendants filed their opening brief, the Court of Appeal decided Limon v. Circle K Stores (2022) 84 Cal.App.5th 671, which addresses California standing requirements for suits brought under the Fair Credit Reporting Act, or FCRA (15 U.S.C. § 1681 et seq.). Plaintiffs' claims in this action derive from 15 U.S.C. § 1681c(g), part of FCRA which was enacted as the Fair and Accurate Credit Transactions Act (FACTA).

It would not be an effective use of court resources to rule on the propriety of the national class allegations (which apparently depends on the standing requirements of other states) where the Limon decision could potentially cast doubt about Plaintiffs' ability to meet the standing requirements of this state. The Court will therefore defer ruling on the motion to strike the national class allegations until Plaintiffs' California standing has been addressed.

The Court will confer with the parties at the currently scheduled hearing about a briefing schedule on this threshold issue brought about by the recent Court of Appeal decision in Limon.

To reply to this message online, please click here. This message will also be saved as part of the case file. You will be directed to the Case Anywhere log in page. After entering your username and password, you will be taken to the requested message thread. If you have saved your log in information by selecting the "Remember me at this computer" option, you will be automatically logged in and directed to this posting.

If your organization is no longer involved in the above-referenced matter, or if there is any other reason your organization's subscription should be terminated or billing should be modified, please contact us immediately. It is your organization's responsibility to request removal from the case site and conclusion of your subscription for this matter. If your organization is being billed for this matter, it will continue to be billed until we are notified of any such change.

Please contact us by phone at (800) 884-3163 or (818) 650-1040 or by email at support@caseanywhere.com if you have any questions.

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Attorneys for Plaintiff
WILLARD D. RICHARDSON,
JAMIE YEOMANS, and the
proposed class

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF LOS ANGELES

WILLARD D. RICHARDSON, and JAMIE YEOMANS individually and on behalf of a class of other similarly situated individuals,

Plaintiffs,

v.

IKEA NORTH AMERICA SERVICES, LLC; IKEA U.S. RETAIL, LLC,

Defendants.

Case No. 19STCV37280

(Assigned for all purposes to Hon. William F. Highberger, Department 10)

DECLARATION OF JOHN HABASHY RE: CASE PENDING IN COOK COUNTY, ILLINOIS

Action Filed: October 18, 2019

DECLARATION OF JOHN R. HABASHY

I, John R. Habashy, declare as follows:

1. I am an attorney with Lexicon Law, PC, and am an attorney of record for the Plaintiffs Willard Richardson and Jamie Yeomans the putative class in the above-captioned civil matter, Case No**.** 19STCV37280, filed on October 18, 2019.

2. The facts stated in this declaration are within my personal knowledge, and if called upon to testify hereto I can and will do so competently.

3. On December 14, 2020, Plaintiffs, individually and on behalf of all the Settlement Class, and Defendants IKEA North America Services, LLC and IKEA US RETAIL LLC ("Defendant" or "IKEA") reached an agreement through a mediation process overseen by the Honorable Edward A. Infante (ret.) regarding the settlement of all claims that Plaintiffs have asserted against IKEA in this case. A final written agreement was signed on September 15, 2021.

4. On October 5, 2021, the Court called the matter for hearing to confer about the pending settlement. The parties apprised the Court of their intention to seek approval of the matter in Illinois to avoid baseless standing objections as described in more detail below. The parties requested a stay of the Los Angeles matter.

5. Plaintiffs recognize they should have followed up with a formal motion to stay so that the docket was clear on the status of the case and apologize to the Court for failing to do so.

6. The agreement the parties have reached would be the second largest FACTA class settlement in the history of FACTA, would be a $24 million non-revisionary common fund, provide direct notice to the class and does not provide any clear sailing for either an incentive award to Plaintiffs or attorneys' fees for Plaintiffs' counsel. Plaintiffs and Plaintiffs' counsels are very proud of this settlement and believe it to be an excellent result for the class.

7. Lately, FACTA class action settlements (including several filed by Class Counsel) have been the target of professional objectors, who object to the settlement to try to negotiate a payout to go away and, when rebuffed, threaten to destroy the settlement for the entire class by attacking the plaintiff's standing to bring the lawsuit. Initially these objectors argued in Federal Courts there was no Article III standing for these FACTA claims so the claims should be dismissed, and the class should get nothing. These appeals delayed the class obtaining the class benefits for years – at little cost to the objector – with a lengthy appeal of the issue. (*See, e.g.*, *Muransky v. Godiva Chocolatier, Inc*. (11th Cir. 2019) 922 F.3d 1175 [affirming FACTA class settlement was fair and reasonable as well as rejecting Article III standing argument], *vacated for rehearing en banc* (11th Cir. 2019) 939 F.3d 1279; *see also Wood v. J Choo USA, Inc*. (S.D. Fla. Apr. 7, 2017) 15-cv-81487-BB Dkt. 91 [order rejecting Muransky objector's attempt to challenge plaintiff's standing as amicus curiae].)

8. The *Muransky* case is a prime example, as the Plaintiff there achieved a near-record, multimillion-dollar cash settlement in January 2016, which was approved, yet more than four years later, the case was still tied up on appeal by a professional objector's standing argument. *See Muransky, supra.*

9. Although Plaintiffs are confident that they have standing to prosecute their FACTA claim under the law of this State,[1] there is no binding authority to that effect. Thus, in a large class action like this, Plaintiffs face the real risk of at least one professional objector raising standing as an issue, and years of resulting delay defeating that contention, when the settlement money should instead be put in the hands of the class members, who need it now, as promptly as possible.

[1] *See Varoz v Allsaints USA Ltd*. (Superior Court for San Diego County, May 30, 2017) 37-2016-00032584-CU-MC-CTL [overruling demurrer in a FACTA case because FACTA violation established standing].

10. Therefore, to eliminate this real risk and its consequences, the parties previously advised the Court of their plan to move the case to the State of Illinois. This will make any objection to Plaintiffs' standing virtually impossible, because binding Illinois authority holds FACTA plaintiffs do have standing. (*See Soto v. Great Am. LLC* (Ill. App. 2020) 2020 IL App (2d) 180911, P21 [stating that "[g]uided by the above principles and FACTA's plain language, we hold that plaintiffs had standing to pursue their statutory claims without pleading an actual injury beyond the violation of their statutory rights"]; *Lee v. Buth-Na-Bodhaige, Inc*. (Ill. App. 2019) 2019 IL App (5th) 180033 at P67-P68 [finding FACTA plaintiff had standing].)

11. It is important to note that *Lee* was appealed by a professional objector who raised lack of standing even though there were trial court orders in Illinois finding standing for FACTA cases. In other words, these professional objectors will continue to raise these arguments unless there is binding authority to the contrary, which Illinois has but California does not as of yet.

12. Accordingly, on October 21, 2021, Plaintiffs filed a complaint against Defendants in Cook County Illinois as it has binding authority that there is standing to prosecute these FACTA claims, which will preclude one of the main arguments that professional objectors have used to unnecessarily delay benefits to class members.

13. After two hearings to answer the Illinois' court's questions, Plaintiffs obtained preliminary approval in Illinois on March 11, 2022.

14. Currently Plaintiffs have subpoenaed card issuing banks to obtain card holder names and contact information and have recently begun to obtain the subpoenaed information. As such, the Plaintiffs by agreement with Defendant requested the Illinois Court extend the due dates for issuing class notices to December 2, 2022, and thereby extending the schedule in the Preliminary Approval Order.

15. Once again, Plaintiffs apologize to the Court for failing to file a formal motion to stay after the October 5, 2021 status hearing.

I declare under penalty of perjury under the laws of the United States of California that the foregoing is true and correct.

Executed this 8th day of September, 2022 at Los Angeles, California.

By:_____

JOHN R. HABASHY, ESQ.

PROOF OF SERVICE

Case: *Richardson v. Inter Ikea Systems B.V., et al*
No: 19STCV37280

I, Jackeline Valiente, am employed in the City of Los Angeles. I am over the age of eighteen (18) years and am not a party to the within action. My business address is 633 W. 5th Street, 28th Floor, Los Angeles, CA 90071.

On the date below, I served the attached **DECLARATION OF JOHN HABASHY RE: CASE PENDING IN COOK COUNTY, ILLINOIS**, on the interested parties in this action by placing a true and correct copy thereof in sealed envelope(s) addressed as follows:

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Representing: Ikea North America Services, LLC

(X) (BY CASE ANYWHERE) I caused the document to be electronically transmitted to the parties listed above which is maintained by Case Anywhere, LLC as agreed by the parties.

Executed on September 8, 2022, at Los Angeles, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Jackeline Valiente

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and On behalf of others similarly situated, Plaintiff, vs. CINEMARK, USA, INC., a Texas corporation; CINEMARK HOLDINGS, INC., a Delaware Corporation, Defendants.	Case No.: 2023CH01857 Hon. William B. Sullivan

CINEMARK, USA, INC.'S MOTION FOR STAY

Defendant Cinemark USA, Inc. ("CUSA") moves for a stay of this action, including all discovery, until resolution by the Illinois Supreme Court ("Supreme Court") of *Calley Fausett, Indv., etc., respondent v. Walgreen Co., petitioner* (hereinafter "*Fausett*"). On March 26, 2025, the Supreme Court issued an Order allowing a Petition for Leave to Appeal the issue of whether a plaintiff has standing to sue under the Fair and Accurate Credit Transactions Act ("FACTA") in Illinois despite a lack of concrete injury. As this Court has previously recognized, the issue now before the Supreme Court in *Fausett* is identical to a central, potentially dispositive, issue in this case. Indeed, this Court previously granted a stay of this action while *Fausett* was previously pending before the Supreme Court. It was only *Fausett's* remand on a procedural technicality that resulted in the stay being lifted. So it naturally follows that *Fausett's* return to the Supreme Court docket for resolution of the standing issue on its merits should result in a re-issuance of this Court's stay.

I. INTRODUCTION

A central issue in this case is whether a Plaintiff who suffered no actual harm lacks standing to sue under FACTA in Illinois.[1] This was the primary issue relevant to the parties' substantive Motion to Dismiss briefing. *See, e.g.*, CUSA's 2-619 Motion to Dismiss, Ex. 2. CUSA's 2-619 Motion to Dismiss briefing noted that in multiple prior cases addressing FACTA, the Supreme Court granted review of the intermediate appellate decisions finding that no-injury plaintiffs had standing. *Id*. at 4, citing *Soto v. Great America LLC*, 2020 IL App (2d) 180911, *petition granted*, 439 Ill. Dec. 13 (May 27, 2020); *Duncan v. FedEx Office & Print Servs., Inc.*, 2019 IL App (1st) 180857, *petition granted*, 433 Ill. Dec. 509 (Sept. 25, 2019). At that point in each case, the plaintiffs decided to settle, resulting in the intermediate appellate decisions in each case being vacated. *See Duncan v. FedEx Office & Print Svcs, Inc*., No. 124727 (Ill. Nov. 21, 2019); *Soto v. Great America LLC*, No. 125806 (Ill. July 16, 2021). In September 2023, the Illinois Supreme Court accepted review of this issue, for a third time, in *Fausett*. *See* Ex. 3. As a result, on November 3, 2023, Judge Loftus ordered that this "case is stayed generally pending the outcome of *Fausett v. Walgreen* currently before the Illinois Supreme Court." Ex. 4.

However, in May 2024, after full briefing on the standing issue, the Illinois Supreme Court remanded *Fausett*, without making any substantive findings, based on a procedural technicality, but in so doing directed the intermediate appellate court to determine the standing issue on its merits based on the parties' prior briefing to the Supreme Court. *See* Ex. 5. After the Second District did so (concluding that Fausett had standing to bring her no-injury claim), the Supreme Court has now again granted review in *Fausett—i.e.*, the same question of no-injury standing under

[1] In December 2024, while *Fausett* was on remand to the Second District, Judge Loftus denied CUSA's motion to dismiss in this case, concluding at that time that Plaintiff does have standing herein. *See* Ex. 1.

FACTA has now been accepted for review by the Supreme Court for the ***fourth time***. *See* Exs. 6 and 7, filed in *Fausett* on Jan. 22, 2025, and Mar. 26, 2025, respectively.

In *Fausett*, like Plaintiff here, the named plaintiff asserts that Walgreen Co. ("Walgreens") issued a receipt for her transaction that displayed more of the "digits on her card than FACTA permits." Ex. 6 at 2. Fausett, like Plaintiff here, does not assert any concrete injury, and purports to sue on behalf of a large putative class based solely on the alleged bare statutory violation. *See id.* at 2–4. The Supreme Court's grant of review in such a case for the ***fourth*** time strongly suggests that the Court intends to clarify the requirements for individual standing in FACTA cases brought in this State. Such a ruling could well be dispositive of Plaintiff's individual and putative class claims asserted in this case, which presents the same question of no-injury standing at issue in *Fausett*.

Meanwhile, since December 2024—when this Court lifted its prior stay—CUSA has been engaged in costly merits discovery. CUSA has provided comprehensive responses and objections to Plaintiff's Requests for Admission, Requests for Production, and Interrogatories, including via follow up and supplementation. Further, CUSA is currently engaged in extensive and ongoing document review and production efforts. Pursuant to an agreement reached during a Rule 201(k) Conference with Plaintiff's Counsel on February 13, 2025, CUSA is making regular rolling productions of documents.

As this Court has previously recognized, a Defendant-friendly decision in *Fausett* would essentially end this case, including any need for merits discovery or class certification proceedings. As a result, continuing the merits discovery and other proceedings in this case while *Fausett* is pending before the Illinois Supreme Court is unnecessarily burdensome and unreasonable. CUSA has demonstrated that the relevant documents are being preserved, and CUSA can restart the

document review at any time if the Supreme Court rules in the *Fausett* plaintiff's favor.[2] Continuing this merits discovery would, thus, result in substantial and unnecessary prejudice to CUSA, and there is no countervailing prejudice to Plaintiff because there is no real risk of losing track of documents. Additionally, since this matter is factually uncomplicated, the risk of faded witness memories is miniscule.

II. LEGAL STANDARD

In Illinois, motions for stay pending a decision in a separate lawsuit are within the discretion of the presiding judge. *See A.E. Staley Manufacturing Co. v. Swift & Co.,* 84 Ill.2d 245, 252-53 (Ill. 1980). "The power of the trial court to stay proceedings is an attribute of its inherent power to control the disposition of cases before it." *Vasa North Atlantic, Ins. Co. v. Selcke*, 261 Ill. App.3d 626, 628 (1st. Dist. 1994). When determining whether to stay subsequent litigation in light of other, more mature litigation, courts consider "the orderly administration of justice, judicial economy, comity; prevention of multiplicity, vexation and harassment; likelihood of obtaining complete relief in the foreign jurisdiction and the *res judicata* effect of a foreign judgment in the local forum." *J.S.A. v. M.H.*, 384 Ill. App. 3d 998, 1005 (3d Dist. 2008).

III. ARGUMENT

A. *FAUSETT* AND THIS CASE INVOLVE THE EXACT SAME ISSUE—NO-INJURY STANDING UNDER FACTA IN ILLINOIS.

A stay is appropriate where, like here, litigation pending in the Supreme Court involves an issue identical to one before the trial court. *Selcke*, Ill. App.3d at 629 (granting stay where "[t]he underlying cases here, and [the case pending before the Supreme Court] involve the ***identical issue***

[2] As this Court has previously recognized, a determination that Plaintiff lacks standing to sue CUSA would also doom his suit against CHI, even if CHI were subject to personal jurisdiction. *See* Order entered June 7, 2023, ¶ 4. So, the Supreme Court's resolution of *Fausett* could result in complete dismissal of this action and moot the question of whether CHI is subject to personal jurisdiction.

of whether the privilege tax is unconstitutional") (emphasis added). Here, the issue presented by CUSA in its Motion to Dismiss briefing, among other things, was that Plaintiff (1) did not and cannot allege that he suffered an actual injury, and (2) must have suffered an actual injury in order to have standing to bring his FACTA claim against CUSA. *See* CUSA's 2-619 Motion to Dismiss, Ex. 2 at 2, 5–9. In *Fausett*, the defendant makes precisely the same argument.

> This Court has already determined three times that the question presented in this case, which goes to the heart of standing law in Illinois, warrants this Court's review. In the first two cases, the parties settled and this Court ordered the underlying Appellate Court decisions vacated. On the third occasion, the Court vacated its decision to hear this appeal, ordering that the Appellate Court first accept review and issue a decision. The Appellate Court has now done so and that ruling addresses fundamental questions of law about the injury-in-fact requirement that only this Court may ultimately resolve. This Court should, once again, grant this petition and determine **whether, as a matter of Illinois law, a plaintiff may sue in Illinois courts for an alleged violation of a statute even though the plaintiff cannot allege that the defendant's conduct caused any injury in fact to a legally cognizable interest personal to the plaintiff.**
>
> The prior cases in which this Court granted review of this issue were *Soto v. Great America LLC*, 2020 IL App (2d) 180911, *petition granted*, 439 Ill. Dec. 13 (May 27, 2020), and *Duncan v. FedEx Office & Print Services, Inc.*, 2019 IL App (1st) 180857, *petition granted*, 433 Ill. Dec. 509 (Sept. 25, 2019). On both occasions, this Court's ability to clarify Illinois law on this important question was frustrated by the parties' settlement. *See Soto*, No. 125806, July 16, 2021 order (App. 280); *Duncan*, No. 124727, November 21, 2019 order (App. 278).

Ex. 6 at 1–2 (emphasis added). CUSA's challenge to Plaintiff's standing thus raises the exact same arguments that are before the Supreme Court in *Fausset*. Ex. 2 at 4 ("Plaintiff will likely contend that *Duncan v. FedEx Office & Print Svcs., Inc.*, *Soto v. Great America LLC*, and *Lee v. Buth-Na-Bodhaige, Inc.* permit Illinois plaintiffs to bring FACTA claims even where, as here, they have suffered no actual injuries. However, none of these cases are valid Illinois precedents for that proposition.") (emphasis added) (internal citations omitted). In fact, the entirety of section III(A)(ii) of CUSA's 2-619 brief was dedicated to laying out the unsettled nature of this question of whether **a plaintiff may sue in Illinois courts for an alleged bare violation of a statute** in

Illinois. *See, e.g.*, Ex. 2 at 4–5. Of course, if *Fausett* is resolved in Walgreens's favor, that issue will no longer be unsettled. The question of whether a plaintiff may sue in Illinois courts for an alleged bare violation of a statute—specifically FACTA, both here and in *Fausett*—will at that point be resolved.

Further, while CUSA anticipates that Plaintiff will argue that little import should be attributed to the Supreme Court's order granting review again in *Fausett*, and a stay should be denied, because the issue of no-injury standing in Illinois courts was purportedly decided in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186 (2019), such argument should be rejected. As noted by CUSA in its 2-619 Motion, the issue in *Rosenbach* (and the holding of the Supreme Court therein) was limited and specific to claims under the Biometric Information Privacy Act ("BIPA"), which presents and protects unique privacy interests missing from no-injury FACTA claims. Ex. 2 at 7–8. Walgreens has raised a substantively identical argument before the Supreme Court in *Fausett* with respect to whether *Rosenbach* applies to the question of plaintiffs' standing to bring no injury FACTA claims in Illinois. For example, Walgreens argues that:

> Illinois courts have overread *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, and concluded that this Court has abandoned the requirement that, for standing, a plaintiff must have suffered some discrete and palpable injury to a legally cognizable interest. . . .
>
> *Rosenbach* did not hold that any alleged violation of any statute suffices to confer standing . . . . Rather, the Court considered whether a plaintiff who suffered no actual damages could state a claim as an 'aggrieved' individual under the Biometric Information Privacy Act ("BIPA"). *Rosenbach*, 2019 IL 123186, ¶ 1. It held that the answer is 'yes,' and its rationale was rooted in the particular personal interests protected by BIPA that are missing here and which the appellate court did not address.

Ex. 6 at 2, 13. CUSA's 2-619 Motion and Reply effectively made the identical argument that *Rosenbach* does not "stand for the broad proposition that 'a violation of one's rights alone is a sufficient injury to sue,' as Plaintiff suggests," and was, instead, limited to and dependent on the unique features of BIPA not applicable to Plaintiff's no-injury FACTA claim. Ex. 2 at 7–8; Ex. 8

at 5. If the Supreme Court believed that its decision in *Rosenbach* was not limited to the BIPA context and, instead, set forth a rule broadly granting standing to sue in Illinois courts for all statutory violations absent concrete injury, then it could simply have turned away Walgreens' latest Petition for Leave to Appeal. However, rather than do that, on March 26, 2025, the Supreme Court issued its Order allowing Walgreens to again file its Petition for Leave to Appeal, indicating that the Supreme Court does not view *Rosenbach* as dispositive of the question of no-injury standing to sue in Illinois courts under FACTA. Ex. 7.

The Supreme Court has now accepted the exact same FACTA no-injury standing issue ***four times***, expressing its clear desire to rule on the substance of the issue. The last time the Supreme Court accepted this issue, under the exact same circumstances, this Court granted CUSA's Motion to Stay pending the resolution of *Fausett* because the Court understood that the *Fausett* decision would directly affect the issue of standing in the case herein. *See* Judge Loftus's Order Granting CUSA's Motion to Stay, Ex. 4. This Court should now again stay this case pending the Illinois Supreme Court's resolution of *Fausett*.

"A stay is generally considered 'a sound exercise of discretion' if the other proceeding 'has the potential of being completely dispositive.'" *Cholipski v. Bovis Lend Lease, Inc.*, 2014 IL App (1st) 132842, ¶ 40, 16 N.E.3d 345 (quoting *Khan v. BDO Seidman, LLP*, 2012 IL App (4th) 120359, ¶ 60, 977 N.E.2d 1236). That standard is satisfied here. If the Supreme Court rules in favor of Walgreens, CUSA's position on this identical issue will prevail. As a result, CUSA respectfully suggests that the orderly administration of justice, judicial economy, and the prevention of a multiplicity of actions would all be served by a stay of the instant lawsuit pending the Supreme Court's decision in *Fausett*. *See Selcke*, 261 Ill. App.3d at 869 ("Judicial economy is

clearly served by the stay order. The [lawsuit interpreting the identical tax provision] is currently pending before the Illinois Supreme Court.").

B. THE PREJUDICE OF CONTINUING DISCOVERY AND OTHER PROCEEDINGS IS EXTREME FOR CUSA AND MINISCULE FOR PLAINTIFF.

Moreover, the burden on CUSA in having to continue participating in a putative national class action would be substantial—and unjustified—in light of the fact that *Fausett* could dispose of the case against both defendants without further burden to CUSA. *See Health Service Corp. v. Walgreen Co.*, 2023 IL App (1st) 230547, ¶¶ 33 & 35, --- N.E.3d ---- (finding, in response to third party defendant's argument that "it would be a burden . . . to participate in the discovery of the fraud claims," that "it would be a burden . . . to participate in the underlying actions when it may have no liability").

Further, CUSA has incurred—and continues to incur—substantial costs due to extensive responses and objections to (and supplements thereto) Plaintiff's discovery requests. CUSA's discovery burden continues today due to ongoing document and ESI review and production efforts, including, but not limited to; conducting in-depth analysis of search terms, engagement of a third-party review team, review of thousands of documents in order to make regular productions to Plaintiff, and complying with Illinois Supreme Court Rule 214 and the level of granularity with which CUSA must describe the categories of documents produced. To require CUSA to continue participating in ongoing review and production of documents and additional supplementation of its written discovery responses—let alone depositions and substantial class certification briefing—would cause unjustified prejudice to CUSA, especially considering that all of those burdens and expenses will be rendered ***unnecessary*** if the Supreme Court rules in Walgreens's favor.

On the other hand, if the Supreme Court rules against Walgreens, this Court and the parties can pick up the case in the exact position it is in now and move forward with clarity.[3] The parties are currently in the midst of email discovery and any emails relevant to the litigation have been securely stored and are not at risk of being lost—meaning there is no risk of prejudice to Plaintiff. Given the uncomplicated nature of the facts in this case, any concerns about potential witnesses' fading memories are miniscule and will not prejudice Plaintiff. Further, ***any*** claim of prejudice to Plaintiff or putative class members from delay is belied by the fact that they have no actual losses and disclaim having suffered any ***actual damages***. Rather, the remedy pursued by Plaintiff is purely statutory. (*See* Complaint ¶¶ 2, 63-64 and request for judgment, ¶¶ (a) (f)).

IV. CONCLUSION

WHEREFORE, Cinemark respectfully requests a stay of this lawsuit until the Supreme Court resolves the *Fausett* case.

[3] The other factors frequently considered in courts' stay analyses—comity, likelihood of obtaining complete relief in the foreign jurisdiction, and the *res judicata* effect of a foreign judgment in the local forum—do not need to be analyzed in this case, where both lawsuits at issue are in Illinois.

Dated: **April 1, 2025**

BY /s/ *Tina Wills*

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ATTORNEYS FOR DEFENDANTS CINEMARK USA, INC. AND CINEMARK HOLDINGS, INC.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 1, 2025, she caused a true and correct copy of the foregoing document(s) to be filed with the Clerk of the Circuit Court of Cook County and served upon registered counsel via Odyssey e-filing system and/or by separate email.

/s/ *Tina Wills*

EXHIBIT 1

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	Case No. 2023CH01857
v.	)	Hon. Anna M. Loftus
CINEMARK USA, INC., A Texas corporation; CINEMARK HOLDINGS, INC., a Delaware corporation,	)	
Defendants.	)	

ORDER

This matter, coming before the Court on Defendants' § 2-619 Motion to Dismiss, the parties appearing via counsel to present argument, and the Court being duly advised, IT IS HEREBY ORDERED:

1) For the reasons stated on the record during the hearing, for which a court reporter was present, the motion is denied, however the denial is without prejudice as to Defendants' request to strike the class allegations;

2) The discovery stay is lifted;

3) Defendants shall answer the complaint by no later than January 17, 2025; and

4) This matter is set for status on January 31, 2025, at 10:00 a.m. The parties may attend by Zoom (https://circuitcourtofcookcounty.zoom.us/i/95535573920; Meeting ID 955 3557 3920; no password).

SO ORDERED.

ENTERED:

/s/ Anna M. Loftus

Judge Anna M. Loftus, No. 2102

Prepared by:
Michael S. Hilicki
Keogh Law, Ltd.

Judge Anna M. Loftus
DEC 5 2024
Circuit Court-2102

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EXHIBIT 2

IN THE CIRCUIT COURT
OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and On behalf of others similarly situated,	)	
Plaintiff,	)	Case No.: 2023CH01857
vs.	)	
CINEMARK, USA, INC., a Texas corporation; CINEMARK HOLDINGS, INC., a Delaware Corporation,	)	
Defendants.	)	

CINEMARK, USA, INC.'S[1] MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-619

Dated: May 22, 2023

BY /s/ Meghan E. Tepas
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ATTORNEYS FOR DEFENDANTS CINEMARK USA, INC. AND CINEMARK HOLDINGS, INC.

[1] In the event that the Court does not dismiss the suit against Cinemark Holdings, Inc. on personal jurisdiction grounds, it adopts and incorporates by reference this Memorandum pursuant to 735 ILCS 5/2-619.

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TABLE OF AUTHORITIES

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Cases

Rules and Statutes

Defendant Cinemark USA, Inc. ("CUSA" or "Cinemark") moves to dismiss Plaintiff Gerardo Rodriguez's ("Plaintiff") Class Action Complaint ("Complaint"), attached as Exhibit 1, under 735 ILCS 5/2-619 because Plaintiff lacks standing to sue, as do the vast majority of putative class members in this proposed national class action.

I. SUMMARY OF PLAINTIFF'S ALLEGATIONS

Plaintiff alleges that he used his debit card to purchase movie tickets at a Cinemark theatre in Melrose Park, Illinois, and received an electronically printed receipt that displayed the first six and last four digits of his debit card number. (Complaint ¶¶ 37-38.) Plaintiff alleges that this violated the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. § 1681 et seq., a federal statute directing merchants to truncate certain credit and debit card information on printed receipts provided to consumers. (*See id.*) Plaintiff purports to sue on behalf of a putative national class of persons who received similar debit or credit card receipts for purchases at Cinemark theatres. (*Id.* ¶ 47.)

Plaintiff alleges that, as a result of having more than the last 5 digits of the card number printed on the receipt, he and the putative class members (i) suffered a "violation of their statutory rights," (ii) were exposed to a "heightened risk of identity theft," and (iii) had to "take action to prevent further disclosure of the private information displayed on the receipts." (*See* Complaint ¶¶ 2, 63.) Plaintiff, however, does not identify what "action" he supposedly took to "prevent further disclosure" of his receipt, nor allege that he (or any putative class member) actually suffered identity theft or any other concrete form of injury because of the number of digits printed on their receipts. And, consistent with this lack of alleged actual or concrete injury, Plaintiff does not claim or seek an award of any "actual damages" in this case, limiting the prayer to requests for "statutory damages" and "punitive damages" pursuant to 15 U.S.C. § 1681n(a). (*See* Complaint, p. 15.)

II. SUMMARY OF ARGUMENT

Plaintiff sues for an alleged violation of a federal statute, but alleges no concrete injury. The U.S. Supreme Court, in *TransUnion v. Ramirez*, 141 S. Ct. 2190, 2207-13 (2021), found relatively recently that plaintiffs ***lack standing*** to bring ***no-injury claims*** for statutory damages under FCRA, of which FACTA is a component. All federal appellate courts to have considered the issue since *TransUnion* have held that concrete injury is required to pursue this federal claim. In this case, the issue is whether Plaintiff can bring his no-injury federal claim in Illinois state court. And while Article III standing analysis is not identical to the standing analysis performed by Illinois courts, the same conclusion reached by the U.S. Supreme Court and other federal courts—a plaintiff without concrete injury lacks standing to sue for statutory damages based on a bare alleged violation of FCRA/FACTA—is equally required in this case.

To be sure, Illinois law on this point is currently arguably unsettled. Only three Illinois courts have considered the issue, and all did so prior to *TransUnion*. Moreover, two of those decisions were explicitly vacated by the Illinois Supreme Court, and in the third, the defendant did not challenge standing. Further, longstanding Illinois precedent makes clear that Illinois courts are to treat as binding U.S. Supreme Court interpretations of federal statutes. Thus, pursuant to *TransUnion* as detailed herein, the correct ruling is that, in order to maintain standing to sue, Illinois plaintiffs asserting a FACTA claim for statutory damages ***must allege concrete injury***, which Plaintiff has not done in this case.

If the Court were to elect not to follow *TransUnion* and thereby dismiss Plaintiff's claim for lack of standing, the putative national class allegations should nonetheless be stricken. The putative class consists almost entirely of citizens of other states, who did

not transact in Illinois, and who lack standing to sue for no-injury FACTA claims in ***either*** the ***state courts*** of their home states or in ***any federal court***. While Illinois may grant its own citizens standing to sue on ***state law*** claims more broadly than permitted under the U.S. Constitution, principles of comity and Due Process compel that Illinois cannot, via class treatment, grant such expansive standing to citizens of other states alleging a ***federal claim*** regarding transactions with no relation to Illinois. Any other result would incentivize forum shopping to Illinois. Thus, if the Court does not dismiss this suit in its entirety based upon Plaintiff's lack of standing, Cinemark moves to strike all national class allegations and limit the putative class to citizens of Illinois and New Jersey.

III. SECTION 2-619 MOTION TO DISMISS

Section 2-619 motions "dispose of issues of law and easily proved issues of fact at the outset of the litigation." *Van Meter v. Darien Park Dist.*, 207 Ill.2d 359, 367 (2003). A 2-619 motion admits to legal sufficiency, but "asserts certain defects or defenses." *Dratewska-Zator v. Rutherford*, 2013 IL App (1st) 122699, ¶ 13, 996 N.E.2d 1151.

A. PLAINTIFF LACKS STANDING TO BRING HIS INDIVIDUAL FACTA CLAIM

i. LEGAL STANDARD

Under Illinois law, lack of standing is an affirmative defense, but where (as here) it is demonstrated that the plaintiff does not have standing, "the proceedings must be dismissed." *Wexlr v. Wirtz Corp.*, 211 Ill.2d 18, 22 (2004). To have standing a plaintiff must have suffered a "distinct and palpable" "injury in fact to a legally cognizable interest." *See Cedarhurst of Bethalto Real Estate, LLC v. Village of Bethalto*, 2018 IL App (5th) 170309, ¶¶ 19 and 26, 116 N.E.3d 377 (finding no standing where plaintiff "ha[d] no direct personal injuries, i.e., no injury in fact"). In fact, "[f]ederal standing principles are similar to those in Illinois, and the case law is instructive." *Maglio v. Advocate Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶¶ 24-29, 40 N.E.3d 746

(holding that plaintiff's speculative allegations of an increased risk of identity theft due to breach of an Illinois data protection statute did not constitute sufficiently "distinct and palpable" injury to convey standing); *see also People v. Avila-Briones*, 2015 IL App (1st) 132221, ¶ 37, 49 N.E.3d 428 ("We find . . . federal authority [on standing] to be persuasive.").

ii. NO BINDING PRECEDENT IN ILLINOIS ALLOWS NO-INJURY FACTA CLAIMS

Plaintiff will likely contend that *Duncan v. FedEx Office & Print Svcs., Inc.*, *Soto v. Great America LLC*, and *Lee v. Buth-Na-Bodhaige, Inc.* permit Illinois plaintiffs to bring FACTA claims even where, as here, they have suffered no actual injuries. 2019 IL App (1st) 180857, 123 N.E.3d 1249; 2020 IL App (2d) 180911, 165 N.E.3d 935; 2019 IL App (5th) 18033, 143 N.E.3d 645. However, none of these cases are valid Illinois precedents for that proposition. It is true that those courts originally allowed plaintiffs to move forward with no-injury FACTA claims. However, in both *Duncan* and *Soto*, the Illinois Supreme Court permitted leave to appeal the intermediate appellate court's ruling (*Duncan v. FedEx Office & Print Svcs., Inc.*, 132 N.E.2d 347 (Table), 433 Ill.Dec. 509 (2019); *Soto v. Great America LLC*, 147 N.E.3d 688 (Table), 439 Ill.Dec. 13 (2020)), and both opinions were ordered ***vacated*** by the Supreme Court pursuant to settlements before final review. *See Soto v. Great America LLC*, No. 125806 (Ill. July 16, 2021); *Duncan v. FedEx Office & Print Svcs, Inc.*, No. 124727 (Ill. Nov. 21, 2019).[2]

Decisions accepted for Illinois Supreme Court review are not entitled to precedential weight when they are settled or otherwise dismissed before the appeal's merits are addressed. *See In re Marriage of Eckersall*, 2015 IL 117922, ¶ 20, 28 N.E.3d 742. Similarly, vacated decisions, like *Soto* and *Duncan*, "carr[y] no precedential weight."

[2] Exhibits 2 and 3 are the copies of these orders vacating the *Duncan* and *Soto* appellate court opinions.

Mohanty v. St. John Heart Clinic, S.C., 225 Ill.2d 52, 66 (2006). Moreover, even if this Court were inclined to consider the now-vacated decisions as potentially persuasive, it is noteworthy that *Soto* and *Duncan* both addressed a ***pre-TransUnion*** federal circuit split regarding standing to bring no-injury FACTA claims. *See Duncan*, 2019 IL App (1st) 180857 at ¶ 18-20; *Soto*, 2020 IL App (2d) 180911 at ¶ 21-22; *see also Lee*, 2019 IL App (5th) 180033 at ¶ 66 n. 7 (laying out the then-extant significant dispute among federal courts). In particular, *Duncan* was largely predicated on the court's view that the federal cases finding that no-injury FACTA plaintiffs had standing were "better reasoned." *Duncan*, 2019 IL App (1st) 180857 at ¶ 20. But, that reasoning is now untenable, given that the U.S. Supreme Court's *TransUnion* decision, discussed below, has abrogated the federal decisions on which *Duncan* relied.[3]

Further, the only non-vacated Illinois no-injury FACTA decision—*Lee* (again, also pre-*TransUnion*)—did not consider or address whether the defendant could have prevailed on an affirmative defense of standing, because the defendant "***chose not to raise the issue***." *Lee*, 2019 IL App (5th) 180033 at ¶ 68 (emphasis added).[4]

iii. FACTA PLAINTIFFS IN ILLINOIS MUST DEMONSTRATE A CONCRETE INJURY BECAUSE THE *TRANSUNION* DECISION IS BINDING AUTHORITY

As noted, in *TransUnion* the U.S. Supreme Court held that all class members who did not suffer concrete injury due to a FCRA violation lacked standing to sue for statutory damages. 141 S. Ct. at 2207-13. Indeed, *TransUnion* held that it would be an unconstitutional violation of the Separation of Powers for Congress to grant standing to

[3] Every federal appellate court facing a no-injury FCRA or FACTA claim since *TransUnion* has found that the plaintiff lacks standing. *See, e.g., Pierre v. Midland Credit Mgmt., Inc.,* 29 F.4th 934, 936 (7th Cir. 2022).
[4] The issue was, instead, raised only by an objector to the class settlement, who "had no standing to do so." *See id.* Thus, any discussion in *Lee* about standing to bring a no-injury FACTA suit was pure *dictum*.

plaintiffs to bring no-injury FCRA claims. *See Id.* at 2207 (concluding that it "would infringe on the Executive Branch's Article II authority" for Congress through FCRA to grant unharmed plaintiffs standing to sue); *see also id.* at 2205 (explaining that ***the Legislative Branch "may not simply enact an injury into existence,"*** by equating bare statutory violation with concrete injury) (emphasis added). And although Article III standing requirements do not always apply to Illinois courts,[5] it is clear that with respect to FCRA/FACTA claims, they do.[6]

As a starting point, no authority provides that Illinois can apply a more lenient standard so as to grant standing to sue on a ***federal*** claim to plaintiffs who did not suffer an actual, concrete injury as required to bring ***that federal claim*** in federal court. Such a remarkable proposition would mean that Congress's grant of concurrent jurisdiction to state courts could change the proof requirements of the ***same federal claim*** as between Illinois, other states' courts, and federal courts, which is not federal law. *See, e.g., McKenna v. Powell,* No. 10-017ML, 2010 WL 2474037, at *2 (D.R.I. April 28, 2010) (explaining that state law cannot alter "elements or defenses" to a federal claim "even when . . . [the] case is brought in state court" merely because there is concurrent jurisdiction over the claim) (citing *Howlett v. Rose,* 496 U.S. 356, 375-76 (1990) (holding that state law immunity did not apply to Section 1983 claim because "[t]he ***elements*** of, and the ***defenses*** to, a federal cause of action are ***defined by federal law***") (emphasis added)). Nor is that the law of Illinois, under which the U.S. Supreme Court's interpretation of federal statutes, like FCRA, is ***binding*** on state courts. *See Ammons v.*

[5] S*ee, e.g.*, *Greer v. Illinois Housing Dev. Auth.*, 122 Ill.2d 462, 491 (1988) (explaining Illinois law "tends to vary [from federal standing law] in the direction of greater liberality").
[6] As noted, FACTA is a component of FCRA. *See* 15 U.S.C. § 1681.

Canadian Nat'l Ry. Co., 2019 IL 124454, ¶ 18, 161 N.E.3d 890 ("[U.S.] Supreme Court interpretation of federal law is clearly binding"); *Williams v. Bd. of Review*, 241 Ill.2d 352, 360 (2011) (same); *Carr v. Gateway, Inc.,* 241 Ill.2d 15, 21 (2011) (explaining federal courts' decisions are binding in Illinois "to the end that such laws may be given ***uniform application***") (emphasis added). Thus, *TransUnion* makes clear that plaintiffs must have a concrete injury sufficient to confer federal Article III standing in order to have standing to bring a FACTA claim for statutory damages in Illinois state court.

Plaintiff will argue this rule conflicts with *Rosenbach v. Six Flags Ent. Corp*., in which the Illinois Supreme Court found that a plaintiff had standing to sue for a bare "technical violation" of Illinois's Biometric Information Privacy Act despite alleging no actual injury. 2019 IL 123186, 129 N.E.3d 1197, 1207. But, such an argument is incorrect. *Rosenbach* began from the premise that the state Legislature has a long history of expressly providing in Illinois statutes whether actual damage is required— concluding that, where an Illinois statute requires actual damage as part of the claim, concrete injury is required for standing; but where, in contrast, the state law grants a right of action to anyone "aggrieved by" a violation, plaintiff need not have concrete injury to have standing. *Rosenbach*, 129 N.E.3d at 1204-05. Thus, *Rosenbach* held that a bare statutory violation afforded standing to sue under the Biometric Information Privacy Act because, ***as a matter of state law***, the Legislature granted a cause of action to anyone "aggrieved." *See id*.

Rosenbach is thus inapposite for three interrelated reasons. First, Plaintiff here asserts a federal claim, not an Illinois statutory claim. Second, *Rosenbach's* reasoning does ***not*** apply to the interpretation of the standing requirements to assert a federal claim

under FCRA/FACTA; rather, the U.S. Supreme Court's interpretation of ***federal statutes***, like FCRA, is ***binding in Illinois***. *See Ammons*, 2019 IL 124454 at ¶ 18; *Williams*, 241 Ill.2d at 360; *Carr*, 241 Ill.2d at 21. And third, the U.S. Supreme Court's *TransUnion* decision plainly held that concrete injury is ***always*** a component of Article III standing to assert a FCRA/FACTA claim, and that it would be an unconstitutional violation of the Separation of Powers to hold otherwise. *TransUnion*, 141 S. Ct. at 2207-13. Accordingly, Plaintiff must allege concrete injury to establish standing to sue for statutory damages under FACTA.

iv. PLAINTIFF HAS NOT ALLEGED A CONCRETE INJURY

In this case, Plaintiff alleges "injuries" consisting of; (1) violation of his statutory rights, (2) risk of identity theft, (3) potential disclosure of his financial information to third parties, including Cinemark employees, and (4) taking unspecified action to prevent further disclosure. (Complaint ¶¶ 2, 27-30, 39, 45-46, 63.) None of these allegations demonstrate the concrete injury necessary for Plaintiff to have standing. Initially, *TransUnion* expressly held that merely suffering a violation of statutory rights (there, recording inaccurate information in class members' credit files in violation of FCRA), and an asserted "risk of future harm" from "potential" future disclosure to third parties, did not constitute concrete injury, such that those individuals lacked standing to sue. 141 S. Ct. at 2201; 2210-11.[7] The first three "injuries" Plaintiff alleges here are identically deficient, as they merely assert a statutory violation and "risk" of future harm that has not materialized. As *TransUnion* is binding authority on Illinois courts regarding standing

[7] The Supreme Court held that only those individuals whose information was actually conveyed by TransUnion to third parties had suffered a concrete injury so as to have standing to sue under FCRA. *Id.* at 2208-09.

to sue on a federal statutory claim, those asserted injuries do not afford Plaintiff standing to sue.

Plaintiff's final claimed "injury"—that he had to take some unspecified further action to prevent disclosure—is an attempted end-run around *TransUnion*. Indeed, the case cited in Plaintiff's Complaint for the proposition that taking steps to "safeguard" a receipt constitutes concrete injury ***was vacated by the 11th Circuit***, and a subsequent decision in the ***same exact lawsuit*** explicitly rejected Plaintiff's theory. *Compare Muransky v. GoDiva Chocolatier, Inc.*, 905 F.3d 1200 (11th Cir. 2018), vacated and superseded by *Muransky v. GoDiva Chocolatier, Inc.*, 922 F.3d 1175 (11th Cir. 2019), *with Muransky v. GoDiva Chocalatier, Inc.*, 979 F.3d 917 (11th Cir. 2020). Further, Plaintiff does not allege anything he actually did to safeguard his receipt; and even if he had, that would not create standing to sue. *See, e.g.*, *Muransky*, 979 F.3d at 931 ("even if Muransky had alleged that he spent additional time destroying or safeguarding his receipt, he would not succeed on this theory"); *Clapper v. Amnesty Intern., USA*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm"); *Kim v. McDonald's USA, LLC*, No. 21-cv-05287, 2022 WL 4482826, at *6 (N.D. Ill. Sept. 27, 2022) (same). Plaintiff's allegations fail to demonstrate he suffered any concrete injury, and the Court should dismiss this action for lack of standing.

B. EVEN IF THE COURT FINDS PLAINTIFF HAS STANDING, ALL CLAIMS OF PUTATIVE CLASS MEMBERS OUTSIDE OF NEW JERSEY AND ILLINOIS SHOULD BE STRICKEN

A determination that Plaintiff lacks standing to sue would result in the dismissal of this case. However, even if Plaintiff were permitted to proceed, the Court should nonetheless strike Plaintiff's national class allegations, as the vast majority of the

putative class members are citizens of other states, did not conduct transactions in Illinois, and lack individual standing to sue on the FACTA claim alleged herein in either their home states or any federal court. Thus, constitutional considerations of comity and due process compel the conclusion that Illinois should not grant standing to ***other states'*** citizens to sue on federal claims for conduct that did not occur in Illinois when those individuals lack standing to sue in either the state or federal courts of their home states.

i. THE VAST MAJORITY OF PUTATIVE CLASS MEMBERS LACK STANDING TO SUE

Here, putative class members in ***at least 34 states*** outside of Illinois lack standing to sue on the no-injury FACTA claim alleged herein in the courts of their home states, just as they would under *TransUnion* if they sued in any federal court. State supreme court decisions from Delaware, Iowa, and Ohio helpfully illustrate the issue. Each of Delaware, Iowa, and Ohio require that, to possess standing to sue, a plaintiff must meet requirements identical to the Article III standards set forth in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), which, as explained above, have been uniformly held not to confer standing to sue for no-injury FACTA claims. *See, e.g.*, *Dover Historical Soc. v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1111 (Del. 2003) (holding that the *Lujan* requirements "are generally the same as the standards for determining standing" to sue in Delaware); *Iowa Citizens for Comm. Improvement v. State*, 962 N.W.2d 780, 790 (Iowa 2021) ("Our court has interpreted the 'injuriously affected' prong of standing as incorporating the *Lujan* three-part test."); *Moore v. City of Middletown*, 133 Ohio St.3d 55, 975 N.E.2d 977, 982 (Ohio 2012) (same).

Similarly, appellate courts in Florida, Missouri, and California have dismissed for lack of standing exactly the type of no-injury FCRA/FACTA lawsuits brought by Plaintiff here. For example, *Southam v. Red Wing Shoe Co.*, 343 So.3d 106 (Fla. 4th DCA 2022),

affirmed dismissal for lack of standing where plaintiff alleged that he was given a receipt displaying ten digits of his credit card number, but did not allege that his credit card was used, lost, or stolen. *Id*. at 107-08, 111-12, review denied, No. SC22-1052, 2022 WL 16848677 (Fla. Nov. 10, 2022). Adopting the requirements of *Lujan* and *TransUnion* as Florida law, the *Southam* court explained that the bare alleged FACTA violation did not confer standing to sue because Plaintiff did not allege any " 'economic' injury, nor any 'distinct or palpable' injury," so he had " 'no concrete harm, [and thus] no standing.' " *Id*. at 108 (citing *TransUnion*, 141 S. Ct. at 2200). In *Corozzo v. Wal-Mart Stores*, 531 S.W.3d 566 (Mo. App. 2017), a Missouri court affirmed dismissal for lack of standing where the suit alleged a "bare procedural violation [of FCRA], divorced from any concrete harm." *Id*. at 573-76 (citation omitted); *see also Limon v. Circle K Stores*, 84 Cal.App.5th 671, 706 (2022) (finding plaintiff was required to allege actual injury to have standing to sue on a FCRA claim).

These six states are not remotely unique in requiring "concrete injury" to maintain standing. Consistent with the law in the foregoing states, putative class members in at least 34 states outside of Illinois lack standing to sue on the FACTA claim asserted here.[8]

Cinemark acknowledges that, pre-*TransUnion*, a New Jersey court appears to have held, in contrast, that its citizens could sue for statutory damages based on allegations of bare FACTA violations. *Baskin v. P.C. Richard & Son, LLC*, No. A-2662-18T1, 2020 WL

[8] A chart identifying the 28 additional states (i.e. those not discussed above) that apply the federal Article III/*Lujan* injury-in-fact standard, or a substantively parallel one—meaning those states' citizens lack standing to sue on the claim putatively asserted on their behalf by Plaintiff—is Appendix 1 hereto. Further, in other states where injury requirements have been less fulsomely articulated, Cinemark submits that, if presented the question squarely, those states' courts would similarly conclude that a FACTA plaintiff without concrete injury lacks standing to sue based on a bare statutory violation. *See, e.g.*, *Pittsburgh Palisades Park, LLC v. Commonwealth*, 585 Pa. 196, 888 A.2d 655, 660 (2005) (explaining that the key to standing in Pennsylvania "is that the person must be negatively impacted in some real and direct fashion"); *McClary v. Jenkins*, 299 Va. 216, 222 (Va. 2020) ("Typically, to establish standing a plaintiff must allege a particularized injury.").

989191, at *2-3, 11 (N.J. Super. Ct. App. Div. Mar. 2, 2020). The existence of one such state holding, however, does not alter that constitutional Due Process and prudential comity dictate that Illinois cannot grant its state courts subject matter jurisdiction over the federal claims of putative class members in other states who lack standing to sue in their home states regarding conduct that occurred outside of Illinois. Accordingly, Cinemark requests that the Court strike the national class allegations (Complaint ¶¶ 47-55) and, instead, limit the scope of the putative class to persons whose transactions occurred in Illinois and, perhaps, New Jersey.

ii. PURSUANT TO *TRANSUNION*, THE COURT SHOULD STRIKE PUTATIVE CLASS CLAIMS BROUGHT ON BEHALF OF PUTATIVE CLASS MEMBERS WHO PLAINLY LACK STANDING

Plaintiff will likely argue that the Court should assess the standing to sue of only the named plaintiff, but not putative class members, citing cases such as *I.C.S. Illinois, Inc. v. Waste Mgmt. of Ill., Inc.*, 403 Ill.App.3d 211, 221 (2010), *Maglio*, 2015 IL App (2d) 140782 at ¶ 21, and *Elliot v. Chicago Transit Auth.*, 2019 IL App (1st) 181892-U, ¶ 22, 2019 WL 5296835. However, each of these cases concerned putative classes of ***only*** persons complaining of conduct occurring ***in Illinois***. Thus, none addresses whether an Illinois court may use the purely procedural class action device to confer standing on a class comprised almost entirely of people outside of Illinois who lack standing to sue individually. As a result, those cases are simply not relevant to this Court's analysis.

Moreover, all three were decided before *TransUnion*, which held that ***all*** class members—not just the named plaintiffs—must have suffered concrete injury from a FCRA violation to recover statutory damages. *TransUnion*, 141 S. Ct. at 2207-13. Indeed,

TransUnion reversed a class judgment for $60 million in statutory damages as to all of the class members who ***individually*** lacked standing. *Id.* at 2202-03, 2206, 2208-12.

The seminal Illinois case in this area, *I.C.S.*, relied entirely on pre-*TransUnion* U.S. Supreme Court authority that has now been abrogated. *See*, *e.g.*, *I.C.S.*, 403 Ill.App.3d at 221. In fact, the Northern District of Illinois has recognized that, following *TransUnion*'s clarification that "[e]very class member must have Article III standing in order to recover individual damages," it is an open question whether a class action can proceed to certification without a showing that each putative class member has standing. *See, e.g.*, *Angulo v. Truist Bank*, No. 22 C 923, 2023 WL 1863049, at *3 n. 3 (N.D. Ill. Feb. 9, 2023) (quoting *TransUnion*, 141 S.Ct. at 2208 n. 4).

The argument for considering the standing of putative class members—not just that of the named plaintiffs—becomes even more compelling where, as here, a class action proceeding in Illinois would afford recovery rights upon citizens of other states who would have no such substantive rights in their own states for conduct occurring ***in those other states***. Such a combined application of Illinois standing law and class action procedure would deprive Cinemark of substantive, indeed ***dispositive***, defenses against huge numbers of class members' claims, in direct violation of Cinemark's Due Process rights. It is black letter law that the procedural class mechanism cannot be used to grant a party rights it would not have in an individual case or deprive a party of its substantive rights or defenses. *See, e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("a class cannot be certified on the premise that [a defendant] will not be entitled to litigate . . . defenses to individual claims"); *Marshall v. H&R Block Tax Svcs., Inc.*, 564 F.3d 826, 829 (7th Cir. 2009) (class action procedures "shall not abridge, enlarge or modify

any substantive right.") (internal quotations omitted). The Illinois Supreme Court has recognized this rule as well. *Smith v. Illinois Cent. R.R. Co.*, 223 Ill.2d 441 (2006) (The "procedural device" of a class action "may not be construed to enlarge or diminish any [parties'] substantive rights or obligations") (internal citation and quotations omitted). Thus, Illinois's highest court, like the U.S. Supreme Court, recognizes that Illinois courts cannot by class procedure prevent Cinemark from fully defending on all substantive grounds, including lack of standing, the claims of putative plaintiffs from, *e.g.*, California, Delaware, Florida, Iowa, Missouri, or Ohio.

Given that Cinemark's substantive rights with respect to putative class members' claims cannot be diminished by class treatment, this Court should conclude that standing is required for all putative class members, not just Plaintiff. Accordingly, the Complaint's national class allegations should be stricken, or at least limited to citizens of Illinois and New Jersey.

C. ALLOWING PLAINTIFF'S NO-INJURY PUTATIVE NATIONAL CLASS CLAIMS TO PROCEED WOULD INVITE FORUM SHOPPING

In light of *TransUnion* and resulting case law across the country, refusing to require (i) actual injury and (ii) standing for absent class members would incentivize forum shopping to Illinois. Longstanding precedent strongly counsels Illinois courts against incentivizing forum shopping. *Merritt v. Goldenberg*, 362 Ill.App.3d 902, 910 (2005) ("A plaintiff's use of forum-shopping . . . is against Illinois's public policy."); *Fennel v. Ill. Cent. R. Co.*, 2012 IL 113812, ¶ 19, 987 N.E.2d 355 ("Decent judicial administration cannot tolerate forum shopping.").

Indeed, this case exemplifies precisely the kind of forum shopping that would be incentivized by permitting plaintiffs to bring no-injury FACTA suits in Illinois that they could not sustain elsewhere. Two of Plaintiff's lawyers originally filed an identical suit in California, styled

LaKeenya Neal et. al. v. Cinemark USA Inc., et. al., but voluntarily dismissed it because they believed the *Limon* decision (requiring concrete injury for standing) impacted the viability of the suit in California, while Illinois would provide a more favorable forum.[9] Adopting a rule that would allow Plaintiff's no-injury suit to proceed on behalf of a national class of people who could not sue individually in their home states or any federal court would plainly reward forum shopping and run afoul of Illinois's public policy. *See Merritt*, 362 Ill.App.3d at 910.

IV. CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's suit because he lacks standing to sue on his no-injury claim for statutory damages under FACTA. But, if the Court were to elect not to follow *TransUnion* and dismiss Plaintiff's claim for lack of standing, the putative national class allegations should nonetheless be stricken (or at least limited to citizens of Illinois and New Jersey) on the grounds that Illinois cannot grant to citizens of other states standing to sue on a federal claim that they could not bring in either the courts of their home states or in any federal court.

WHEREFORE, Cinemark respectfully requests that this Court enter an Order granting this Motion, dismissing Plaintiff's claim against it for lack of standing with prejudice, and for such other and further relief this Court deems equitable, just, and proper.

[9] Cinemark asks the Court to take judicial notice of the Complaint in *Neal*, as well as of the plaintiffs' request for dismissal, which admits and explains the reasoning for the dismissal there. These documents are Exhibits 4 and 5, respectively.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on May 22, 2023, she caused a true and correct copy of the foregoing document(s) to be filed via the Court's Electronic Case Filing (ECF) system and thereby served on counsel and all other parties of record:

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Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this certificate of service are true and correct.

EXHIBIT 3

SUPREME COURT OF ILLINOIS

WEDNESDAY, SEPTEMBER 27, 2023

THE FOLLOWING CASES ON THE LEAVE TO APPEAL DOCKET WERE DISPOSED OF AS INDICATED:

125726 - People State of Illinois, respondent, v. Lorenzo Guye, petitioner. Leave to appeal, Appellate Court, First District. 1-17-0136
Petition for Leave to Appeal Denied.

125775 - People State of Illinois, respondent, v. Rolando Aguallo, petitioner. Leave to appeal, Appellate Court, First District. 1-18-1108
Petition for Leave to Appeal Denied.

125851 - People State of Illinois, respondent, v. Flynard Miller, petitioner. Leave to appeal, Appellate Court, First District. 1-17-0788
Petition for Leave to Appeal Denied.

Rochford, J. took no part.

125964 - People State of Illinois, respondent, v. Edward Willingham, petitioner. Leave to appeal, Appellate Court, First District. 1-16-3370
Petition for Leave to Appeal Denied.

Neville, J. took no part.

126003 - People State of Illinois, respondent, v. Billy J. Porras, petitioner. Leave to appeal, Appellate Court, Second District. 2-17-0717
Petition for Leave to Appeal Denied.

126132 - People State of Illinois, respondent, v. Douglas White, petitioner. Leave to appeal, Appellate Court, Fifth District. 5-17-0345
Petition for Leave to Appeal Denied.

126244 - People State of Illinois, respondent, v. George Rivera, petitioner. Leave to appeal, Appellate Court, First District. 1-17-1430
Petition for Leave to Appeal Denied.

129783 - Calley Fausett, Indv., etc., respondent, v. Walgreen Co., petitioner. Leave to appeal, Appellate Court, Second District. 2-23-0105
Petition for Leave to Appeal Allowed.

129784 - People State of Illinois, respondent, v. Antuan Joiner, petitioner. Leave to appeal, Appellate Court, First District. 1-21-1553
Petition for Leave to Appeal Allowed.

129785 - New Capital Home, Inc., respondent, v. Stephan Kogut et al. (Wieslaw Kogut et al., petitioners). Leave to appeal, Appellate Court, First District. 1-22-0940
Petition for Leave to Appeal Denied.

129786 - Peter Gakuba, petitioner, v. The Illinois Prisoner Review Board, respondent. Leave to appeal, Appellate Court, First District. 1-22-1509
Petition for Leave to Appeal Denied.

129787 - People State of Illinois, petitioner, v. Wayne Willis, respondent. Leave to appeal, Appellate Court, First District. 1-22-0098
Petition for Leave to Appeal Denied.

129788 - People State of Illinois, respondent, v. Willie Buckhana, petitioner. Leave to appeal, Appellate Court, Second District. 2-21-0655
Petition for Leave to Appeal Denied.

129789 - James Ivetic, etc., et al., respondents, v. The Bensenville Fire Protection District No. 2, petitioner. Leave to appeal, Appellate Court, First District. 1-22-0879
Petition for Leave to Appeal Denied.

129790 - People State of Illinois, respondent, v. Gerson Carnalla-Ruiz, petitioner. Leave to appeal, Appellate Court, First District. 1-20-1183
Petition for Leave to Appeal Denied.

129791 - June Brunton, petitioner, v. Robert Kruger, etc., et al., respondents. Leave to appeal, Appellate Court, Fourth District. 4-22-0924
Petition for Leave to Appeal Denied.

EXHIBIT 4

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and on behalf of others similarly situated,	)	
Plaintiffs,	)	Case No. 2023CH01857
v.	)	Hon. Anna M. Loftus
CINEMARK USA, INC., A Texas corporation; CINEMARK HOLDINGS, INC., a Delaware corporation,	)	
Defendants.	)	

ORDER

This matter, coming before the Court for hearing on Defendants' Notice of Supplemental Authority and Motion to Stay (the "Motion to Stay") and Defendant Cinemark USA, Inc.'s Motion to Dismiss, all counsel being present and the Court hearing oral argument and being duly advised, it is hereby ordered that:

1) Defendants' Motion to Stay is granted for the reasons stated in open court. This case is stayed generally pending the outcome of *Fausett v. Walgreens* currently before the Illinois Supreme Court.

2) This matter is set for status on April 4, 2024 at 10:00 am to proceed via Zoom. Zoom Meeting ID is 955 3557 3920

Judge Anna M. Loftus
NOV 03 2023
Circuit Court-2102

ENTERED:

/s/ Anna M. Loftus

Judge Anna M. Loftus, No. 2102

SGR/6348652.1

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EXHIBIT 5

SUPREME COURT OF ILLINOIS

SUPREME COURT BUILDING
200 East Capitol Avenue
SPRINGFIELD, ILLINOIS 62701-1721

CYNTHIA A. GRANT
Clerk of the Court

(217) 782-2035
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May 17, 2024

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In re: Fausett v. Walgreen Co.
129783

Dear Counsel:

Enclosed is an order entered May 17, 2024, by Supreme Court of Illinois in the above-captioned cause.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

cc: All Counsel of Record
Clerk of the Appellate Court, Second District

129783

IN THE

SUPREME COURT OF ILLINOIS

Calley Fausett, Individually and on behalf of others similarly situated,	)	
Appellee	)	Petition for Leave to Appeal from Appellate Court
v.	)	Second District
	)	2-23-0105
Walgreen Co.,	)	19CH675
Appellant	)	

O R D E R

On the court's own motion:

IT IS ORDERED as follows: The court finds that the petition for leave to appeal was improvidently granted. The appellate court denied Walgreen Co.'s petition for leave to appeal the judgment of the circuit court pursuant to Supreme Court Rule 306(a)(8). The case is before this court pursuant to Supreme Court Rule 315 ("Leave to Appeal From the Appellate Court to the Supreme Court"). However, before this court, the parties are not arguing that the appellate court abused its discretion in denying the petition for leave to appeal, nor are they arguing against any action of the appellate court. Rather, the parties' briefs are focused solely on arguing the merits of the circuit court's judgment. Accordingly, this court's September 27, 2023, order allowing the petition for leave to appeal is vacated. The petition for leave to appeal is denied.

In the exercise of this court's supervisory authority, the Appellate Court, Second District, is directed to vacate its May 18, 2023, order in case No. 2-23-0105, denying the petition for leave to appeal pursuant to Supreme Court Rule 306(a)(8). The appellate court is directed to allow the petition for leave to appeal. The briefs filed in this court shall stand as the parties' briefs in the appellate court.

FILED
May 17, 2024
SUPREME COURT
CLERK

EXHIBIT 6

E-FILED
1/22/2025 11:53 AM
CYNTHIA A. GRANT
SUPREME COURT CLERK

No. _____

In the

Supreme Court of Illinois

CALLEY FAUSETT, individually and on behalf of others similarly situated,

Plaintiff-Respondent,

v.

WALGREEN CO.,

Defendant-Petitioner.

On Petition for Leave to Appeal from the Appellate Court of Illinois,
Second Judicial District, Appeal No. 2-23-0105,
There Heard On Appeal from the Nineteenth Judicial Circuit Court,
Lake County, Illinois, Case No. 19 CH 675, the Hon. Donna-Jo Vorderstrasse, Judge Presiding.

PETITION FOR LEAVE TO APPEAL PURSUANT TO ILLINOIS SUPREME COURT RULE 315

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ORAL ARGUMENT REQUESTED

PRAYER FOR LEAVE TO APPEAL

Pursuant to Illinois Supreme Court Rule 315, Defendant-Petitioner Walgreen Co. ("Walgreens") respectfully petitions for leave to appeal the decision of the Illinois Appellate Court, Second District, affirming an order by the circuit court certifying a nationwide class of approximately 1.6 million individuals under the federal Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681 *et. seq.*

STATEMENT OF DATE UPON WHICH JUDGMENT WAS ENTERED

The Appellate Court issued its judgment, with opinion, on December 18, 2024. *Fausett v. Walgreen Co.*, 2024 IL App (2d) 230105; App. 1-36. No petition for rehearing was filed. This timely petition follows. *See* Ill. S. Ct. R. 315(b)(1).

STATEMENT OF POINTS RELIED UPON FOR REVIEW

This Court has already determined three times that the question presented in this case, which goes to the heart of standing law in Illinois, warrants this Court's review. In the first two cases, the parties settled and this Court ordered the underlying Appellate Court decisions vacated. On the third occasion, the Court vacated its decision to hear this appeal, ordering that the Appellate Court first accept review and issue a decision. The Appellate Court has now done so and that ruling addresses fundamental questions of law about the injury-in-fact requirement that only this Court may ultimately resolve. This Court should, once again, grant this petition and determine whether, as a matter of Illinois law, a plaintiff may sue in Illinois courts for an alleged violation of a statute even though the plaintiff cannot allege that the defendant's conduct caused any injury in fact to a legally cognizable interest personal to the plaintiff.

The prior cases in which this Court granted review of this issue were *Soto v. Great America LLC*, 2020 IL App (2d) 180911, *petition granted*, 439 Ill. Dec. 13 (May 27, 2020), and *Duncan v. FedEx Office & Print Services, Inc.*, 2019 IL App (1st) 180857, *petition granted*, 433 Ill. Dec. 509 (Sept. 25, 2019). On both occasions, this Court's ability to clarify Illinois law on this important question was frustrated by the parties' settlement. *See Soto*, No. 125806, July 16, 2021 order (App. 280); *Duncan*, No. 124727, November 21, 2019 order (App. 278). Now, the Second District has chosen to stand by its position in *Soto*. Its decision demonstrates how some Illinois courts have overread *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, and concluded that this Court has abandoned the requirement that, for standing, a plaintiff must have suffered some discrete and palpable injury to a legally cognizable interest. This pure question of law is important, as further confirmed by the robust participation of amici on both sides of the issue that occurred after this Court granted Walgreens' first petition for leave to appeal. It is cleanly presented here. And it should be addressed by this Court before this incorrect view of Illinois standing law becomes further entrenched.

This case involves the federal Fair and Accurate Credit Transactions Act ("FACTA"), through which Congress has, among other things, limited the number of digits of a customer's credit card that a merchant may print on an electronically printed receipt. 15 U.S.C. § 1681c(g)(1). Congress also provided that private parties may seek statutory damages for willful violations of the law. *Id.* § 1681n. The plaintiff here asserts that, after she added value to her prepaid cash card, Walgreens issued a receipt that revealed more digits on her card than FACTA permits. The additional digits revealed nothing about her and could not cause her any actual harm. Indeed, every other similarly

branded card issued by the same bank has the same numbers as those displayed on the plaintiff's receipt, which have no unique connection to her. Yet the circuit court denied a 2-619 motion to dismiss for lack of standing, and later granted class certification over Walgreens' argument that the plaintiff cannot be an adequate representative because she lacks standing to sue. The Appellate Court affirmed, relying heavily on *Rosenbach* and holding that "under principles of standing in Illinois, an alleged willful violation of an individual's statutory rights under section 1681c(g)(1) … is sufficient to confer standing *even in the absence of an allegation of any actual injury or adverse effect*." 2024 IL App (2d) 230105, ¶ 2 (emphasis added); *see also id.* ¶¶ 35-37.

Respectfully, that ruling is incorrect, not least because *Rosenbach* did not present an issue of standing. Rather, *Rosenbach* came to the Court on a 2-615 motion concerning whether the plaintiff stated a claim, not a 2-619 motion raising standing as an affirmative matter. This Court was not presented with the question, and did not decide, whether to abandon the rule that standing to sue in Illinois courts requires, among other things, "some injury in fact to a legally cognizable interest." *Greer v. Ill. Housing Dev. Authority*, 122 Ill. 2d 462, 492 (1988). The Court in *Rosenbach* did not even cite *Greer.* And *Rosenbach* itself discussed the invasion of a personal interest specific to the plaintiff that would have, under the rule now abandoned by the Appellate Court, sufficed for standing under *Greer*.

Under the Appellate Court's rule, standing collapses with the merits of a statutory claim. By its account, whenever a statute creates a cause of action and provides for statutory damages, then as a matter of law the plaintiff who can plead a violation has standing. *Greer* has specifically cautioned against treating standing and the merits as

identical in this manner, and only this Court can maintain that important distinction.

The practical consequences of this misreading of *Rosenbach* counsel in favor of this Court's review. First, Walgreens now faces the threat of massive, class-wide statutory damages on a novel theory of *federal* law (FACTA has never been applied to a cash transaction like the one here), and all the attendant pressures to settle. If this Court does not intervene now, it may lose the opportunity to address this issue at a later stage in this case, and the seemingly-settled-but-highly-doubtful state of the law will persist, as in *Soto* and *Duncan*. This posture adds urgency and supports review here.

Second, this Court's control over the "judicial power" vested in Illinois courts is at stake. Standing doctrine ensures that Illinois courts maintain sufficient control over their dockets and their resources to address actual wrongs that invade personal interests. Yet the Appellate Court has fully outsourced to the General Assembly, and indeed *any* legislature in the nation, including the U.S. Congress here, the authority to declare when the "judicial power" may be invoked. And the Appellate Court has done so in circumstances in which the U.S. Supreme Court has expressly stated that Congress is ***not*** authorized to empower a plaintiff to bring this very claim in the absence of an injury in fact to her. *See TransUnion LLC v. Ramirez*, 594 U.S. 413, 424-42 (2021). Indeed, the Appellate Court has read the federal statute and *TransUnion* in a way that creates rather than avoids doubts about the statute's constitutionality under Article II of the U.S. Constitution. This Court should seize this opportunity to clarify that the Appellate Court's view is not the law.

No factual issues are in dispute; plaintiff suffered no harm and no injury in fact to any legally cognizable interest. Neither is there any dispute that, as a matter of law, a

plaintiff without standing to sue cannot be an adequate representative of a class. *Glazewski v. Coronet Ins. Co.*, 108 Ill. 2d 243, 254 (1985); *see also Barbara's Sales, Inc. v. Intel Corp.*, 227 Ill. 2d 45, 72 (2007) (class certification requires "an actionable claim"). This issue is important and cleanly presented by the Appellate Court's decision. Leave to appeal should be granted.

STATEMENT OF FACTS

I. Statutory Background.

The Fair and Accurate Credit Transactions Act of 2003 is an amendment to the Fair Credit Reporting Act ("FCRA"). Pub. L. No. 108-159, 117 Stat. 1952 (2003). As relevant here, FACTA instructs that "no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). This "truncation requirement" was intended to stop the practice of printing entire card numbers and expiration dates on receipts to reduce the risk of identity theft and credit card fraud. *See* Pub. L. 110-241, § 2(a)(1), 122 Stat. 1565 (2008); *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 106 (3d Cir. 2019) (FACTA was "[e]nacted to combat credit card fraud and identity theft"). The disclosure of more than the last five digits, by itself, identifies *nothing* about the cardholder. But, by prohibiting merchants from printing the entire credit card number and expiration date, the truncation requirement ensures that if a receipt is lost or discarded, it does not reveal the cardholder's entire credit card number and expiration date, which would potentially enable someone who finds the receipt to make unauthorized charges on the card.

Any person who willfully violates FCRA, including the FACTA truncation requirement at issue here, is liable for actual damages (if any) or statutory damages

ranging from $100 to $1,000 per consumer. 15 U.S.C. § 1681n(a)(1)(A).

II. Circuit Court Proceedings.

The named plaintiff, Calley Fausett, alleges that she used cash to perform a "fund-load transaction" on her personal debit card at a Walgreens drug store in Arizona. App. 257, ¶ 26. She received two electronically printed receipts bearing the first six and last four digits of her debit card account number. *Id.* ¶ 27. The middle six digits were not printed. It is undisputed that the first six digits of Fausett's card number do not identify anything about her; instead, as the complaint acknowledges, these digits represent the Bank Identification Number ("BIN")—also called the Issuer Identification Number ("IIN"). *See* App. 260-61, ¶ 45; 2024 IL App (2d) 230105, ¶ 20.

Fausett seeks to represent a nationwide class of persons who engaged in similar cash fund-load transactions at Walgreens stores who were given receipts that included more than the last five digits of the card onto which funds were loaded. App. 259, ¶ 37. Fausett's complaint does not allege any actual harm to Fausett or anyone else—only an "elevated risk of identity theft," App. 262, ¶ 54, which, as discussed below, was proven false by undisputed evidence at the class certification stage.

Walgreens brought a combined 2-615/2-619 motion to dismiss pursuant to Section 2-619.1 of the Code of Civil Procedure. The receipts demonstrated Fausett had paid cash to load a general purpose reloadable card, sometimes referred to as a prepaid card. C. 103, C. 119-20. Walgreens' fund-load system accepts only cash for fund-load transactions. App. 275. Because they are cash transactions, Walgreens designed the fund-load system to generate receipts that included the BIN to allow the customer to prove they loaded cash onto the card and to identify the bank or institution that received the cash value. App. 275-76. Walgreens argued that Fausett could not allege a "willful"

violation as federal law required, *see Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), in these circumstances because no court or administrative guidance or decision has ever concluded that FACTA applies to cash transactions like those here. C. 109-11. The circuit court denied the motion. App. 86.

Walgreens also argued that Fausett lacked standing to sue because she alleged no injury in fact. C. 111-15. The circuit court denied that motion as well. C. 207. As relevant here, with respect to standing, the circuit court felt bound by the First District's decision in *Duncan*: "*Duncan* is right on point and, frankly, whether I agree with it or disagree, that is the law of the state … ." App. 63.[1]

The parties proceeded to discovery and Fausett sought class certification. Fausett did not claim, and had no evidence of, any injury to her or that anything about her was even potentially revealed by the receipt. App. 207; C. 642-44; C. 664; C. 685, C. 688; C. 692, C. 703 & 722-29. Walgreens also submitted expert testimony, which Fausett did not rebut, demonstrating that the disclosure of the additional digits could not create a heightened risk of harm to Fausett. C. 255 & C. 262-69. So Walgreens argued, among other things, that Fausett was an inadequate class representative because she lacked standing. Yet the circuit court rejected Walgreens' standing argument and granted Fausett's motion, certifying a nationwide class of approximately 1.6 million people. App. 226-27; *accord* App. 214. It relied upon the following reading of *Rosenbach*:

> In Illinois a violation of one's rights in itself is sufficient for standing. That is how the Court reads *Rosenbach v. Six Flags*. … Now, [*Rosenbach*] wasn't a FACTA case, the Court is aware of that, but the reasoning is persuasive to find that a violation is enough, is sufficient.

[1] In fact, *Duncan* had been vacated by this Court the day before the motion to dismiss hearing. *See* App. 278.

App. 210-11.

III. Appellate Court Proceedings.

Walgreens filed with the Appellate Court a petition for leave to appeal pursuant to Illinois Supreme Court Rule 306(a)(8). Walgreens argued, among other things, that the circuit court misapplied *Rosenbach* and that Fausett was not an adequate class representative because she lacked standing to sue. The Appellate Court denied the petition in a summary order under Rule 23. App. 40.

Walgreens then sought review by this Court under Illinois Supreme Court Rule 315. This Court allowed the petition for leave to appeal. App. 39. The parties fully briefed the appeal, and multiple amici filed briefs on both sides of the issue. Shortly before oral argument, this Court entered an order vacating the prior order allowing the petition for leave to appeal and directing the Appellate Court to allow the petition, specifying that the briefs filed in this Court "shall stand as the parties' brief in the appellate court." App. 38.

The Appellate Court then heard oral argument and affirmed the circuit court's certification ruling. App. 1-36. It held that Fausett "has standing in Illinois to pursue her statutory claim" because she "alleged a violation of her rights under FACTA and seeks the [statutory] damages the statute provides." 2024 IL App (2d) 230105, ¶ 22. Contrary to Walgreens' argument, it concluded that standing under *Rosenbach* required no invasion of any pre-existing personal right; that is, no invasion of a right separate and apart from the statutory award created by the statute itself. As the Appellate Court put it, "we remain steadfast that plaintiff has standing in Illinois to pursue her statutory claim without pleading an actual injury beyond a violation of her statutory rights." *Id.* ¶ 31. In its view, that holding "does not abandon the injury-in-fact requirement." *Id.* ¶ 39.

Justice McLaren dissented. He agreed that a bare violation of a statute is sufficient to confer standing under Illinois law but would have vacated the circuit court's certification order given the host of other issues with Fausett's attempt to certify a class. 2024 IL App (2d) 230105, ¶¶ 59-63.

ARGUMENT

I. This Court Should Grant Review To Clarify That *Rosenbach* Did Not Abrogate The Injury-In-Fact Requirement And That The Alleged Violation Of A Statutory Obligation Does Not Automatically Confer Standing.

This case presents the exact same legal question on which this Court previously granted leave to appeal here, and in *Duncan* and *Soto*. The same considerations that supported review at those times apply here, too. This Court now has the benefit of the Appellate Court's opinion, too, which further crystallizes the issue and demonstrates the extent to which an erroneous view of Illinois standing law is becoming entrenched in the lower courts. This Court should grant the petition to clarify that *Rosenbach* did not abrogate the injury-in-fact requirement, which has been and should remain a bedrock principle of justiciability under Illinois standing law, and to make clear that a mere violation of a statute is not an injury in fact and does not automatically confer standing on a plaintiff.

A. An Injury In Fact Has Long Been And Remains, Even After *Rosenbach*, An Essential Prerequisite To Standing To Sue In Illinois.

Standing is "a component of justiciability" and "must [] be judicially defined." *In re Estate of Burgeson*, 125 Ill. 2d 477, 485 (1988). It is axiomatic under Illinois law that "[s]tanding requires 'some injury in fact to a legally cognizable interest.'" *Midwest Com. Funding, LLC v. Kelly*, 2023 IL 128260, ¶ 13 (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999)); *see also Davis v. Yenchko*, 2024 IL 129751, ¶ 17; *Stevens v.*

McGuireWoods LLP, 2015 IL 118652, ¶ 23. Indeed, long ago this Court observed that courts were in "universal agreement" that the injury-in-fact requirement is a central element of standing, and it preserved this requirement even while declining to import additional requirements into the framework for analyzing whether a plaintiff has standing. *Greer*, 122 Ill. 2d at 491-93 (confirming injury-in-fact requirement but rejecting additional "zone-of-interests" test); *Glisson*, 188 Ill. 2d at 221-22 (reiterating injury-in-fact requirement but rejecting additional requirement that plaintiff "be a member of the class designed to be protected by the statute").

Accordingly, for decades it has been settled in Illinois that a plaintiff who had sustained no injury in fact had no standing to sue. *Compare*, *e.g.*, *Carr v. Koch*, 2012 IL 113414, ¶ 28 (no standing where plaintiffs failed to establish an injury in fact); *Glisson*, 188 Ill. 2d at 231-32 (plaintiff lacked standing to sue for bare violations of an Illinois state law: "a party cannot gain standing merely through a self-proclaimed interest or concern about an issue, no matter how sincere"); *Maglio v. Advocate Health & Hospitals Corp.*, 2015 IL App (2d) 140782, ¶¶ 22-31 (no standing where plaintiff complained of data breach but there was no indication that plaintiff's data had been used or that plaintiff had been victim of identity theft or fraud), *with Midwest Com. Funding*, 2023 IL 128260, ¶ 14 (judgment creditor had standing because creditor was "asserting her own right to payment" and her "injury of losing her lien priority" conferred standing).

Despite this once-settled rule, a disagreement has emerged about whether a plaintiff who alleges a bare violation of a statute—a violation that invades no personal interest of the plaintiff, that is, a violation *without* an injury *in fact*—has standing to sue. Illinois appellate and circuit courts have held in three separate FACTA cases, including

this one, that a bare violation of FACTA is sufficient to confer standing on a plaintiff. In so doing, these courts have eviscerated the injury-in-fact requirement.

The confusion began with *Duncan.* There, the trial court dismissed a FACTA claim for lack of standing where the plaintiff—like Fausett here—alleged that the defendant printed more than the last five digits of her credit card on a receipt but failed to allege any actual harm. 2019 IL App (1st) 180857, ¶¶ 1, 8. The First District reversed. The court gave lip service to the injury-in-fact requirement, *id.* ¶ 22, but then held that "under Illinois law, when a plaintiff alleges a statutory violation, no 'additional requirements' are needed for standing," *id.* ¶ 23 (quoting *Glisson*, 188 Ill. 2d at 222).[2] According to the First District, in enacting FACTA, "Congress elevated intangible harms associated with the printing of more than the last five digits of a person's card number to the status of legally cognizable injuries," and therefore a bare violation of the statute was sufficient to establish standing. *Id.* ¶ 25.

This Court vacated the decision in *Duncan*, but due to a settlement was unable to decide the standing issue on the merits. *See* App. 278. And on the same day the First District's decision in *Duncan* was issued, this Court issued its opinion in *Rosenbach*, which the Second District subsequently misread to confirm the *Duncan* court's understanding that an alleged violation of a statute always confers standing.[3]

In *Soto v. Great America LLC*, the trial court concluded that an alleged bare

[2] In *Glisson*, this Court affirmed the circuit court's dismissal for lack of standing because the plaintiff could not plead any injury in fact. 188 Ill. 2d at 231-32.

[3] The Fifth District likewise favorably cited *Duncan* in *Lee v. Buth-Na-Bodhaige, Inc.*, which suggested standing existed in that case, but the *Lee* court ultimately concluded that the defendant "chose not to raise the issue of standing as an affirmative defense, and [the] objector [] had no standing to do so." 2019 IL App (5th) 180033, ¶ 68.

violation of FACTA does not confer standing on a plaintiff. 2020 IL App (2d) 180911, ¶¶ 6-7. The Second District—like the First District in *Duncan*—reversed, holding that "plaintiffs are not required under Illinois law to plead an injury other than a willful violation of their statutory rights to pursue their claims of statutory damages under FACTA." *Id.* ¶ 25. *Soto* expressly relied on *Rosenbach*. The Second District observed that "an individual need not allege some actual injury or adverse effect, beyond violation of his or her rights under the [Biometric Information Privacy] Act, in order to qualify as an 'aggrieved' person and be entitled to seek liquidated damages and injunctive relief pursuant to the Act." *Id.* ¶ 26 (quoting *Rosenbach*, 2019 IL 123186, ¶ 40). The Second District thought that the same rationale applied to a FACTA claim: any alleged violation of a provision of FACTA allows a cardholder access to Illinois courts for a lawsuit under FACTA. *Id.* ¶¶ 25-26.

The circuit court here likewise read *Rosenbach* to mean that the alleged violation of *any* provision of *any* Act, when accompanied by statutory authorization to sue, suffices to provide standing as a matter of law. As the circuit court put it, "In Illinois a violation of one's rights in itself is sufficient for standing." App. 210 (discussing *Rosenbach*). In affirming, the Appellate Court agreed: "Although *Rosenbach* and this case involve different statutes, the rationale for the supreme court's holding in that case is equally applicable here. That is because both statutes provide for a right of action based on a violation of an individual's statutory rights, even in the absence of any actual harm or adverse effect." 2024 IL App (2d) 230105, ¶ 36.

In fact, both the Second District and the circuit court here improperly extended the holding of *Rosenbach*. And that extension warrants review.

Rosenbach did not hold that any alleged violation of any statute suffices to confer standing as a matter of law. The Court did not consider standing in *Rosenbach*, much less overrule the many Illinois cases that recognize the injury-in-fact requirement as a standing requirement. Rather, the Court considered whether a plaintiff who suffered no actual damages could state a claim as an "aggrieved" individual under the Biometric Information Privacy Act ("BIPA"). *Rosenbach*, 2019 IL 123186, ¶ 1. It held that the answer is "yes," and its rationale was rooted in the particular *personal* interests protected by BIPA that are missing here and which the appellate court did not address.

In *Rosenbach*, this Court explained that the nonconsensual retention and use of private biometric data—which reveals something personal and unalterable about the individual—itself invades a legally cognizable privacy interest. That personal interest exists apart from any statutory obligation. The General Assembly did not create that personal interest from nothing. To the contrary, BIPA "*codified* that individuals possess a *right to privacy in and control over* their biometric identifiers and biometric information." *Id.* ¶ 33 (emphasis added). The statute's notice and consent provisions "vest[] in individuals and customers *the right to control their* biometric information." *Id.* ¶ 34 (emphasis added). An "individual's unique biometric identifiers … cannot be changed if compromised or misused," and, if "a private entity fails to adhere to the statutory procedures, … the *right of the individual to maintain his or her biometric privacy* vanishes into thin air." *Id.* (brackets, citations, and internal quotation marks omitted; emphasis added). "This is no mere 'technicality,'" the Court explained. "The injury is real and significant." *Id.*; *see also Cothron v. White Castle Sys., Inc.*, 2023 IL 128004, ¶ 36 ("This court recognized in *Rosenbach* that the Act operates to *codify* an

individual's *right to privacy in and control over* his or her biometric identifiers and information." (emphases added)).

Given this personal interest in one's biometric data, which exists independent of the statute, the General Assembly could broadly authorize a private party to sue for the invasion of that personal interest, even if the plaintiff suffered no pecuniary loss. That is why the Court understood the statutory term "aggrieved" to mean "having a substantial grievance, a denial of some personal or property right." *Rosenbach*, 2019 IL 123186, ¶ 30 (quoting *Glos v. People*, 259 Ill. 332, 340 (1913)). As the Court explained, "[a] person is prejudiced or aggrieved, in the legal sense, when a legal right is invaded by the act complained of *or* his pecuniary interest is directly affected by the decree or judgment." *Id.* (quoting *Glos*, 259 Ill. at 340). Because BIPA "codifies" a substantive privacy interest that is invaded whenever a defendant engages in conduct that violates the statute, the question of standing was not at issue and required no discussion.

FACTA lacks the link between its regulatory requirement and the invasion of a pre-existing personal interest present in the BIPA context. As many courts have recognized, unlike with BIPA, FACTA's truncation provision is not about protecting "the right to control" or "privacy rights" in credit card numbers. *See, e.g.*, *Noble v. Nev. Checker Cab Corp.*, 726 F. App'x 582, 583-84 (9th Cir. 2018) (distinguishing "a FACTA violation" from a "breach of privacy"); *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776, 780-81 (9th Cir. 2018) (distinguishing FACTA truncation violations from "cases where we have recognized a privacy-based injury"); *Kamal v. J. Crew Grp., Inc.*, No. 2:15-cv-0190 (WJM), 2017 WL 2443062, at *3 (D.N.J. June 6, 2017) ("There is no meaningful relationship between [printing a card's first six digits] and any privacy

interest historically recognized at common law."), *aff'd*, 918 F.3d 102 (3d Cir. 2019). A credit card number is not a private, immutable identifier that belongs to a cardholder and that the cardholder has a right to "control." Instead, it is a number *assigned by the card issuer*, who may change it from time to time as necessary. Card issuers, merchants, and credit reporting agencies are free under FACTA to retain, store, and use the customer's entire credit card number. Merchants cannot print more than five digits on a receipt, but *not* because doing so itself invades any personal interest of the cardholder. Rather, as noted above, the FACTA truncation requirement when it was adopted was thought to reduce the risk of identity theft and credit card fraud by stopping the practice of printing entire card numbers and expiration dates on receipts. *See supra*, p. 5.

This Court expressly distinguished the biometric data at issue in *Rosenbach* and identifiers like card numbers used in the financial context, as in FACTA cases. *See Rosenbach*, 2019 IL 123186, ¶ 35 ("Biometrics are unlike other unique identifiers that are used to access finances or other sensitive information. … Biometrics … are biologically unique to the individual; therefore, once compromised, the individual has no recourse … ." (citation omitted)). Federal courts have likewise distinguished the standing analysis for biometrics cases from bare procedural requirements such as the FACTA truncation requirement. *See Bryant v. Compass Grp. USA, Inc.*, 958 F.3d 617, 624 (7th Cir. 2020) (BIPA violation was "no bare procedural violation; it was an invasion of her private domain, much like an act of trespass would be"). The Appellate Court did not acknowledge this distinction. *See* 2024 IL App (2d) 230105, ¶¶ 36-37.

Because FACTA is not a privacy-based statute and does not codify any legally cognizable interest that is necessarily lost whenever its provisions are violated, a

violation of FACTA does not automatically confer standing on a plaintiff. Rather, consistent with this Court's standing jurisprudence, plaintiffs should gain access to Illinois courts only if they can allege (and eventually prove) facts showing that any extra digits on a receipt either caused actual damages to plaintiff or else otherwise caused an injury in fact to plaintiff's legally cognizable interests. If courts do not impose this injury-in-fact requirement, and instead ask only whether the plaintiff has stated a claim for a statutory violation, it will eviscerate standing as a doctrine in statutory cases. As this Court explained in *Greer*, this would relegate standing to too "feeble" barrier to suit and "tends to lead to confusion between standing and the merits of the suit." *See Greer*, 122 Ill. 2d at 492.

B. The Decision Below Conflicts With The Great Weight Of Authority From Other Jurisdictions And Raises Separation-Of-Powers Concerns.

If this Court does not intervene, Illinois will stand as an extreme outlier. Federal courts have uniformly rejected the proposition that a violation of FACTA automatically confers standing on a plaintiff. *See, e.g.*, *Thomas v. TOMS King* (*Ohio II*)*, LLC*, 997 F.3d 629, 640 (6th Cir. 2021) (no standing because receipt that includes BIN may violate FACTA but "would not offer any advantage to identity thieves" (citation omitted)); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 935 (11th Cir. 2020) (*en banc*) (allegation of receipt including BIN "failed to allege either a harm or a material risk of harm stemming from the FACTA violation"); *Kamal*, 918 F.3d at 106-07; *Noble*, 726 F. App'x at 584; *Katz v. Donna Karan Co.*, 872 F.3d 114, 120-21 (2d Cir. 2017); *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 725 (7th Cir. 2016). And the U.S. Supreme Court has held that a bare violation of any provision of FCRA, which includes FACTA, is always insufficient to confer standing. *TransUnion*, 594 U.S. at 424-30.

To be sure, Illinois and federal standing law are not identical and Illinois courts are not bound to follow federal standing law. But this Court has long recognized that "uniformity of the law continues to be an important factor in deciding how much deference to afford federal court interpretations of federal law," and "if the lower federal courts are uniform on their interpretation of a federal statute, this court, in the interest of preserving unity, will give considerable weight to those courts' interpretations of federal law." *State Bank of Cherry v. CGB Enters., Inc.*, 2013 IL 113836, ¶ 35. Moreover, Illinois courts should examine carefully any proposed interpretation of a federal statute that necessarily means Congress has authorized a private right of action in state court that could not be filed in federal court. Indeed, in *Duncan* and *Soto* the courts noted that the U.S. Supreme Court had not yet addressed the issue and, as of 2019 and 2020, there appeared to be a split among federal courts. *Duncan*, 2019 IL App (1st) 180857, ¶¶ 19-20; *Soto*, 2020 IL App (2d) 180911, ¶ 22. That split was resolved in *TransUnion*.

It is not just federal courts that have rejected the lower courts' approach here. Courts of Illinois' sister states have examined the question and decided to follow the federal consensus as well. *See Gennock v. Kirkland's Inc.*, No. 462 WDA 2022, 2023 WL 3477873, at *5-6 (Pa. Super. Ct. May 16, 2023); *Limon v. Circle K Stores Inc.*, 84 Cal. App. 5th 671, 707 (2022); *Southam v. Red Wing Shoe Co.*, 343 So. 3d 106, 110-13 (Fla. Dist. Ct. App. 2022). The only counterexample identified by the Appellate Court is *Kenn v. Eascare, LLC*, 226 N.E.3d 318, 324 (Mass. App. Ct. 2024), but that court—contrary to *Greer*—determined that "legal injury," as opposed to an injury *in fact*, was sufficient to confer standing under Massachusetts law. *See id.* at 325-27.

Deviating from this overwhelming consensus would be especially inappropriate

here because it would offend separation-of-powers principles protected by Article II of the U.S. Constitution. Congress legislates against the backdrop of the Federal Constitution and that Constitution does not empower Congress to "elevate" statutory violations into injuries that trigger the judicial power to resolve controversies. *TransUnion*, 594 U.S. at 425-26 (citation omitted). "A regime where Congress could freely authorize unharmed plaintiffs to sue defendants who violate federal law not only would violate Article III [relevant to standing] *but also would infringe on the Executive Branch's Article II authority*." *Id.* at 429 (emphasis added). Allowing uninjured private plaintiffs to sue defendants who violate federal law would infringe on the Executive Branch's Article II authority to choose "how to prioritize and how aggressively to pursue legal actions." *Id*. The Appellate Court dismissed *TransUnion*'s discussion of Article II as dicta, *see* 2024 IL App (2d) 230105, ¶ 47, but misunderstood the U.S. Supreme Court's reasoning. The Article II problem was avoided in *TransUnion* precisely because the Court held that the plaintiffs' claim did not satisfy Article III's standing requirement. Here, however, the Appellate Court held that Fausett had standing in spite of the fact that she suffered no injury, which runs headlong into the Article II problem that was explicitly recognized by a majority of the U.S. Supreme Court but that was avoided in *TransUnion* because of the Court's decision as to standing.

Given the interest in preserving uniformity and the fact that the interests animating this Court's decision in *Rosenbach* do not apply here, there is no good reason for Illinois to deviate from the widespread view of other courts, contrary to Article II.

II. This Case Offers An Excellent Vehicle For Resolving The Question Presented, And There Is An Urgent Need To Review It.

This case presents an excellent opportunity to resolve the question. The case

presents a pure legal issue. That plaintiff suffered no injury in fact is undisputed. There is also no dispute that plaintiff cannot adequately represent a class absent standing. *Glazewski*, 108 Ill. 2d at 254; *see also Barbara's Sales*, 227 Ill. 2d at 72.

Forcing Walgreens to appeal after conclusion of the case may frustrate this Court's ability to review this important question. "[A] grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff's probability of success on the merits is slight. Many corporate executives are unwilling to bet their company that they are in the right in big-stakes litigation, and a grant of class status can propel the stakes of a case into the stratosphere." *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999). That is true here, where the class is comprised of approximately 1.6 million individuals, and each class member is seeking between $100 and $1,000. Accordingly, the "interaction of [class action] procedure with the merits justifies an earlier appellate look" because otherwise "it [could] be too late." *Id.*

Finally, the practical consequences of the courts' misreading of *Rosenbach* counsel in favor of review. "Together with allied doctrines like mootness, ripeness, and justiciability, the standing doctrine is one of the devices by which courts attempt to cull their dockets so as to preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision." *Greer*, 122 Ill. 2d at 488. To that end, the injury-in-fact requirement conserves judicial resources by ensuring that the plaintiff "is entitled to have the court decide the merits of a dispute," and that courts are deciding only "actual, specific controversies and not abstract questions." *State ex rel. Leibowitz v. Family Vision Care, LLC*, 2020 IL 124754, ¶¶ 27-28.

According to the lower courts, this Court has fully outsourced to any legislature

the authority to declare justiciability, abrogating the injury-in-fact requirement in any case involving a statutory cause of action. Worse, Congress can require Illinois courts to resolve disputes that federal courts recognize are unworthy of federal judicial resources. There is a real possibility that if the pattern represented by *Soto*, *Duncan*, and the decision here is allowed to stand, plaintiffs with statutory claims but no injury in fact will flood Illinois courts, and not just with suits under FACTA. As one amicus highlighted after Walgreens' first petition for leave to appeal was granted, there is already evidence of this. *See* Brief of Amicus Curiae Cinemark, USA Inc. (filed on December 8, 2023) at 15-18. Moreover, a recent Illinois trial court decision extended *Duncan*—even though it has been vacated—to reject a defendant's standing challenge in a lawsuit brought under the federal Fair Debt Collection Practices Act, 15 U.S.C. § 1692 *et seq.*, where the plaintiff conceded that she suffered no injury in fact. *See Stallworth v. Terrill Outsourcing Grp., LLC*, No. 2021-CH-02936, 2023 Ill. Cir. LEXIS 3 (Ill. Cir. Ct. Cook Cnty. Mar. 15, 2023) (*see* App. 282-85). Illinois courts do not exist to adjudicate federal claims that federal and sister state courts reject for lack of a justiciable controversy.

This Court should seize this opportunity to clarify that the injury-in-fact requirement remains the law in Illinois.

CONCLUSION

For the foregoing reasons, Walgreens respectfully requests that this Court grant its petition for leave to appeal.

Dated: January 22, 2025

Respectfully submitted,

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SUPREME COURT RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages or words contained in the Rule 341(d) cover, the Rule 341(c) certificate of compliance, the certificate of service, and those matters to be appended to the brief under Rule 342(a), is 20 pages.

Dated: January 22, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert N. Hochman, an attorney, hereby certify that on January 22, 2025, I caused a true and correct copy of the foregoing **Petition for Leave to Appeal of Defendant Walgreen Co.** and accompanying **Appendix** to be filed electronically via Odyssey eFileIL with the Clerk of the Illinois Supreme Court, and copies to be served by electronic mail upon the counsel of record listed on the below Service List.

/s/ Robert N. Hochman

One of the Attorneys for Walgreen Co.

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EXHIBIT 7

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March 26, 2025

In re: Calley Fausett, Indv., etc., Appellee, v. Walgreen Company, etc., Appellant. Appeal, Appellate Court, Second District.
131444

The Supreme Court today ALLOWED the Petition for Leave to Appeal in the above entitled cause. We call your attention to Supreme Court Rule 315(h) concerning certain notices which must be filed with the Clerk's office.

With respect to oral argument, a case is made ready upon the filing of the appellant's reply brief or, if cross-relief is requested, upon the filing of the appellee's cross-reply brief. Any motion to reschedule oral argument shall be filed within five days after the case has been set for oral argument. Motions to reschedule oral argument are not favored and will be allowed only in compelling circumstances. The Supreme Court hears arguments beginning the second Monday in September, November, January, March, and May. Please see Supreme Court Rule 352 regarding oral argument.

Very truly yours,

Cynthia A. Grant

Clerk of the Supreme Court

EXHIBIT 8

Hearing Date: No hearing scheduled
Location: <<CourtRoomNumber>>
Judge: Calendar, 15

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8/7/2023 5:49 PM
IRIS Y. MARTINEZ
CIRCUIT CLERK
COOK COUNTY, IL
2023CH01857
Calendar, 15
23861873

FILED DATE: 8/7/2023 5:49 PM 2023CH01857

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and On behalf of others similarly situated,	)	
Plaintiff,	)	Case No.: 2023CH01857
vs.	)	Judge Anna Loftus
CINEMARK, USA, INC., a Texas corporation; CINEMARK HOLDINGS, INC., a Delaware Corporation,	)	
Defendants.	)	

CINEMARK USA, INC.'S REPLY TO PLAINTIFF'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS PURSUANT TO 735 ILCS 5/2-619

Dated: August 7, 2023

BY /s/ *Meghan E. Tepas*

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CERTIFICATE OF SERVICE

The undersigned attorney certifies that a copy of this document, as well as the Motion to Dismiss was electronically sent to Plaintiff for service on the attorneys of record in this case on August 7, 2023.

/s/ *Meghan E. Tepas*

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Defendant Cinemark USA, Inc. ("CUSA") files this Reply to Plaintiff's Response in Opposition to CUSA's Motion to Dismiss Pursuant to 735 ILCS 5/2-619 ("Response").

I. SUMMARY OF ARGUMENT

The Court should dismiss Plaintiff's claim because, taking all Plaintiff's allegations as true, he cannot allege a concrete injury. Fundamentally, Plaintiff's Response demonstrates a misunderstanding of the basis for CUSA's Motion. For example, Plaintiff argues that states are not required to follow Article III's standing requirements. While true, this misses the point, which is that Illinois has **chosen** to follow U.S. Supreme Court interpretations of federal statutes. *See, e.g.*, *Ammons v. Canadian Nat'l Ry. Co.*, 2019 IL 124454, ¶ 18 (Ill. 2019), 161 N.E.3d 890. As explained in CUSA's Motion, in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the U.S. Supreme Court held that plaintiffs suing for redress of a mere violation of the federal Fair Credit Reporting Act ("FCRA")—even when claiming an increased risk of identity theft—lack concrete injury to have standing. *Id*. at 2205-13. Thus, consistent with longstanding Illinois precedent that U.S. Supreme Court interpretation of federal law is binding, this Court should hold, too, that as a matter of ***Illinois*** law, Plaintiff lacks standing to assert his claim for statutory damages under FACTA, a component of FCRA.

If the Court were not to follow *TransUnion* and thus allow Plaintiff's no-injury claim to move forward, the majority of the putative national class on whose behalf he purports to sue—*i.e.*, all putative class members located in states other than Illinois and New Jersey—should nonetheless be removed from this lawsuit, as it is undisputed they lack standing to sue on their no-injury claims. Plaintiff's Response claims that Illinois courts always assess standing based solely on the named plaintiff. But the cases Plaintiff cites involved solely intra-state class members who could have sued individually in Illinois. Here, on the other hand, Plaintiff asks this Court to grant standing to a huge number of unnamed class members located out of state, who lack standing to bring their

claims in the state or federal courts of their home states and could not sue on their claims in Illinois because those claims, based solely on out-of-state transactions and conduct, have no connection to Illinois. Allowing the alleged class to move forward would thus deprive CUSA of a dispositive defense against each of these class members. Even if the Court does not dismiss this action in its entirety, under basic principles of comity and Due Process, the Court should not allow the class action mechanism to divest CUSA of its rights by removing dispositive defenses it would have against a huge portion of the class.

II. ARGUMENT

A. PLAINTIFF LACKS STANDING TO SUE ON HIS FACTA CLAIM

1. Plaintiff Admits *Duncan* and *Soto* are Not Binding, and Mischaracterizes *Lee*

CUSA's Motion explained that there is no binding authority in Illinois allowing no-injury FACTA claims of the type Plaintiff brings in this lawsuit. Plaintiff's Response purports to rely on precisely the three cases discussed in CUSA's Motion. See Duncan v. FedEx Office & Print Svcs., Inc., 2019 IL App (1st) 180857, 123 N.E.3d 1249; Soto v. Great America LLC, 2020 IL App (2d) 180911, 165 N.E.3d 935; Lee v. Buth-Na-Bodhaige, Inc. 2019 IL App (5th) 18033, 143 N.E.3d 645. Plaintiff admits that Duncan and Soto are, indeed, not precedential authority in Illinois. See Resp. at 1, n. 1. And while Plaintiff attempts to argue that these decisions should be given persuasive weight because they were vacated and the cases settled, that argument is without merit for two reasons. First, Plaintiff ignores that, in both Duncan and Soto the Illinois Supreme Court granted review of the intermediate appellate decisions finding standing, and it was at that point that the plaintiffs therein elected to settle. This is exactly why Illinois does not assign vacated decisions precedential weight. See, e.g., Mohanty v. St. John Heart Clinic, S.C., 225 Ill.2d 52, 66 (Ill. 2006) (explaining that vacated decisions "[c]arry no precedential weight") (emphasis added).

Second, these decisions predated the U.S. Supreme Court's TransUnion decision, which, as explained infra, is binding on this Court pursuant to Illinois authority.

Lee was not vacated, but it too was decided pre-*TransUnion*. More importantly, the *Lee* Court **did not** address whether the defendant could have prevailed on an affirmative defense of standing, because it "**chose not to raise the issue**." *Lee*, 2019 IL App (5th) 180033 at ¶ 68 (emphasis added). Plaintiff's claim that "[t]he objector who brought the appeal squarely challenged standing, and the court squarely decided the issue," (Resp. at 7) is directly belied by the plain language of the *Lee* opinion, which held that the objector himself lacked standing to raise the underlying standing issue:

> The Body Shop chose not to raise the issue of standing as an affirmative defense, and objector Dickenson had no standing to do so. Accordingly, Dickenson's objection to Lee's lack of standing was properly denied.

Lee, 2019 IL App (5th) 180033 at ¶ 68. The Court, thus, never ruled on the merits of the standing objection—there was no need, as Illinois courts have long held that a defendant's failure to raise standing at the trial court results in waiver. *See, e.g.*, *Greer v. Illinois Housing Dev. Auth.*, 122 Ill.2d 462, 508 (Ill. 1988) ("[L]ack of standing in a civil case is an affirmative defense, which will be waived if not raised in a timely fashion in the trial court."). *Lee* merely decided that the affirmative defense of standing had not been properly raised. Thus, none of the three cases Plaintiff relies upon support finding standing here. In contrast, recent U.S. Supreme Court authority provides the opposite.

2. Binding Illinois Precedent Holds that the U.S. Supreme Court's Interpretation of FCRA Must be Followed by Illinois Courts

Regardless, even if the prior FACTA decisions were at one time valid precedents, the U.S. Supreme Court's subsequent *TransUnion* decision is binding on this Court based on longstanding **Illinois** precedent. The *TransUnion* decision interpreted the FCRA, of which FACTA is a part.

There, the U.S. Supreme Court held that all class members who did not suffer concrete injury as a result of a FCRA violation lacked standing to sue for statutory damages. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207-13 (2021). Moreover, the Court held that it would be an unconstitutional violation of the U.S. Constitution's Separation of Powers for Congress to grant standing to no-injury plaintiffs by permitting a bare statutory violation of FCRA to be equated with concrete injury. *See id.* at 2207 (concluding that it "would infringe on the Executive Branch's Article II authority" for Congress through FCRA to grant unharmed plaintiffs standing to sue); *see also id.* at 2205 (explaining that **the Legislative Branch "may not simply enact an injury into existence**," by deeming a bare statutory violation to constitute concrete injury) (emphasis added).

No doubt, Article III's standing requirements do not apply directly to Illinois courts, but that is not the relevant inquiry. CUSA does not dispute—and did not dispute in its Motion—the validity of the U.S. Supreme Court's holding in *ASARCO v. Kadish*, repeatedly cited by Plaintiff, that state courts need not apply federal law on justiciability when addressing federal statutes. 490 U.S. 605, 617 (1989). Plaintiff's reliance on *ASARCO*, however, mischaracterizes CUSA's argument. CUSA does not contend that Article III applies directly to Illinois courts, but rather, that Illinois has exercised its right to **choose** to interpret federal law in the same manner as the U.S. Supreme Court. *Ammons*, 2019 IL 124454 at ¶ 18 ("[U.S.] Supreme Court interpretation of federal law is clearly binding on this court."); *Williams v. Bd. of Review*, 241 Ill.2d 352, 360 (Ill. 2011) (same).[1] Indeed, Illinois courts have long held that its courts' interpretations of federal law should,

[1] It is notable that, notwithstanding its featured status in CUSA's Motion, the Plaintiff conspicuously avoided even addressing *Ammons*, *Williams*, or any similar Illinois authority in its Response. Moreover, in both trial level FACTA decisions cited in the Response at Exhibits 1 and 2—*Richardson v. Ikea N. Am. Servs.*, 2021 CH 5392 (Circuit Court of Cook County, Dec. 5, 2022), and *Fausett v. Walgreen Co.*, 19 CH 675 (19th Judicial Circuit, Mar. 1, 2023)—the defendants failed to raise *Ammons*, *Williams*, or the similar case law, and neither trial court addressed the *TransUnion* Separation of Powers ruling. Further, trial court decisions are not binding in this state. *People v. Amor*, 2020 Il App (2d) 190475, ¶ 21, 180 N.E.3d 170 (citing *People v. Mann*, 397 Ill. App. 3d 767, 769, 922 N.E.2d 533 (2d Dist. 2010)).

where possible, encourage nationwide uniformity in the interpretation of that law.[2] *See, e.g.*, *Carr v. Gateway, Inc.,* 241 Ill.2d 15, 21 (Ill. 2011) (explaining federal courts' decisions are binding in Illinois "to the end that such laws may be given uniform application"); *Wilson v. Norfolk & Western Ry. Co.*, 187 Ill.2d 369, 374 (Ill. 1999) (same).

This is why *Soto*, *Duncan*, and *Lee* all addressed the **pre-*TransUnion*** federal circuit split regarding standing to bring no-injury FACTA claims. *See Duncan*, 2019 IL App (1st) 180857 at ¶ 18-20; *Soto*, 2020 IL App (2d) 180911 at ¶ 21-22; *Lee*, 2019 IL App (5th) 180033 at ¶ 66 n. 7. Of course, given that circuit split, those courts did not have the option to apply Illinois and federal law in a uniform fashion, but now that *TransUnion* has resolved that circuit split, this Court does.

3. Plaintiff's Reliance on Rosenbach and McDonald is Misplaced

As predicted in CUSA's Motion, Plaintiff relies on *Rosenbach* and its progeny—namely, *McDonald*—as purported precedents for the question before this Court. Resp. at 5-6. But neither *Rosenbach* nor *McDonald* stand for the broad proposition that "a violation of one's rights alone is a sufficient injury to sue," as Plaintiff suggests. Resp. at 7. Those decisions were nuanced. They were specific to and dependent upon the statute at issue in both cases—Illinois's Biometric Information Privacy Act. Indeed, *Rosenbach* specifically explained that when the **Illinois legislature** writes a law granting a right of action to anyone "aggrieved by" a violation of the statute, it intends to allow plaintiffs to sue based on any statutory violation, regardless of the existence of an injury beyond that violation. *Rosenbach v. Six Flags Ent. Corp*., 2019 IL 123186,

[2] Notably, Florida and California were two of the three non-Illinois states where, pre-*TransUnion*, no-injury plaintiffs could bring FCRA/FACTA claims; but post-*TransUnion* decisions have encouraged uniformity with clear federal law by concluding, as a matter of state law, that plaintiffs lack standing to assert no-injury FACTA/FCRA claims. *See Southam v. Red Wing Shoe Co*., 343 So.3d 106, 108 (Fla. 4th DCA 2022) (adopting the requirements of *TransUnion* to dismiss for lack of standing a no-injury FACTA claim); *Limon v. Circle K Stores*, 84 Cal.App.5th 671, 706 (Cal. Ct. App. 2022) (finding plaintiff was required to allege actual injury to have standing to sue on a FCRA claim).

129 N.E.3d 1197, 1204-05 (Ill. 2019). On the other hand, where the Illinois legislature has intended to require injury, it has done so explicitly. *See id.* at 1204 (citing 815 ILCS 505/10a(a)).

Of course, FACTA is not an Illinois statute, and *Rosenbach's* focus on whether an Illinois statute grants standing to those "aggrieved" by a violation is inapplicable here. As made clear in *TransUnion*, Congress lacks the power to create a right of action for a bare statutory violation without concrete injury. *See* 141 S. Ct. at 2205 (the Legislative Branch "may not simply enact an injury into existence," by equating bare statutory violation with concrete injury). Thus, *TransUnion* held that it would violate the Constitution's Separation of Powers to grant FCRA plaintiffs standing to bring no-injury claims. 141 S. Ct. at 2207. Because concrete injury is a requisite component of a FCRA claim, Congress—unlike the Illinois Legislature in *Rosenbach*—did not (and could not) draft FCRA or FACTA to permit suits by merely "aggrieved" persons who lack concrete injury. And the Illinois Legislature certainly has not acted to grant persons merely "aggrieved" under FACTA standing to sue in Illinois courts absent concrete injury. On the contrary, the Illinois Supreme Court has held that Illinois will adhere to U.S. Supreme Court requirements when enforcing federal laws. *See Ammons*, 2019 IL 124454, ¶ 18 ("[U.S.] Supreme Court interpretation of federal law is clearly binding on this court.").[3] Consistent with both U.S. and Illinois Supreme Court law, the Court should dismiss Plaintiff's self-pleaded "no-injury" FACTA claim for lack of standing.

4. This Lawsuit May be Properly Dismissed Under 2-619

Finally, Plaintiff's procedural argument relating to the section of the Illinois Code of Civil Procedure that properly applies to the standing motion is also wrong and should be rejected. While

[3] Plaintiff asks the Court to reach an absurd result equating to the conclusion that Congress sought to create a statutory claim for which no injury is required, even though such a standard would violate the Constitution. Construing FACTA in that manner would contravene a basic principle of interpreting legislative intent: "presuming the legislature did not intend to create absurd, inconvenient, or unjust results." *In re B.L.S.*, 202 Ill.2d 510, 514-15 (Ill. 2002).

true that an Illinois plaintiff is not required to plead standing, if the complaint's factual allegations, accepted as true, demonstrate that the lack of standing, a motion to dismiss under section 2-619 is the proper vehicle for dismissing the lawsuit. *See In Re Estate of Schlener*, 209 Ill.2d 456, 462 (Ill. 2004) ("Where standing is challenged in a motion to dismiss under section 2-619, a court must accept as true all well-pleaded facts in plaintiff's complaint and all inferences that can reasonably be drawn in plaintiff's favor."); *Mareskas-Palcek v. Schwartz, Wolf & Bernstein, LLP*, 2017 IL App (1st) 162746, ¶ 29, 90 N.E.3d 463 ("A plaintiff's lack of standing is a proper affirmative matter pursuant to section 2-619(a)(9), as it completely defeats the plaintiff's ability to successfully prosecute its claim against the defendants.").

Plaintiff argues that "[a]lthough Cinemark challenges Plaintiff's standing under 2-619, it does not present an affidavit or other 'affirmative matter' to try to meet its burden." Resp. at 4. Cinemark is not required to submit an affidavit to support its 2-619 Motion, however, because the "affirmative matter" can be apparent on the face of the complaint. *See, AIDA v. Time Warner Entm't Co., L.P.*, 332 Ill.App.3d 154, 158 (1st Dist. 2002) ("[A] section 2-619 motion admits the legal sufficiency of the complaint, but raises defects, defenses or other affirmative matter **appearing on the face of the complaint or** established by external submissions which defeat the action . . . .") (emphasis added) (internal citations omitted).

When a plaintiff's lack of standing is apparent from the face of the Complaint, a claim is properly dismissed under 2-619(a)(9). That is all CUSA seeks here.

B. EVEN IF THE COURT FINDS PLAINTIFF HAS STANDING, CLAIMS OF PUTATIVE CLASS MEMBERS OUTSIDE OF NEW JERSEY AND ILLINOIS SHOULD BE STRICKEN[4]

[4] Plaintiff also argues that those putative class claims cannot be stricken under 2-619. But while a traditional motion to strike is brought under 2-615(a) because such a motion is based on a legally insufficient pleading, here CUSA argues that the class members (i) must demonstrate standing and (ii) cannot do so. CUSA is arguing affirmatively that

As CUSA predicted in its Motion, Plaintiff argues that standing is only to be assessed for the named plaintiff. Plaintiff invokes *I.C.S.*—the seminal Illinois case for that proposition—claiming that it should apply here because the *I.C.S.* class was, purportedly, not "limited to Illinois." Resp. at 12. Not so. In *I.C.S.*, the plaintiffs argued:

> that defendant Waste Management (of Illinois, Inc.) **contracted with the City of Chicago** as a primary contractor to construct and maintain recycling facilities and was obligated by contract and municipal ordinance to hire [certified Minority-Owned Business Entities] as subcontractors or purchase goods and services from MBE entities in performing that primary contract.

I.C.S. Illinois, Inc. v. Waste Mgmt. of Ill., Inc., 403 Ill.App.3d 211, 212-13 (1st Dist. 2010) (emphasis added). Clearly then, *I.C.S.* is not applicable here, because in *I.C.S.* **all** class members' claims concerned the award of contracts for the construction and operation of recycling facilities in Chicago and alleged violations of the Chicago Municipal Code. *See id*. at 212-18.

The same is true for each Illinois case stating that standing should be assessed only with respect to the named plaintiff. *See, e.g.*, *Maglio v. Advocate Health & Hosps. Corp.*, 2015 IL App (2d) 140782, ¶¶ 3, 21, 40 N.E.3d 746 (noting that the claims concerned a data breach involving "a network of affiliated doctors and hospitals that treat patients **throughout the state**") (emphasis added); *Elliot v. Chicago Transit Auth.*, 2019 IL App (1st) 181892-U, ¶¶ 2, 6, 22, 2019 WL 5296835 (addressing putative class action for quintessentially local claims that homeschooled children were unlawfully denied reduced fare cards for use on CTA and Pace trains operating in "Cook County and other surrounding counties."). As Plaintiff's lack of citations on this point admits, no Illinois decisions hold that Illinois courts can use the purely procedural class action device to

---

the class members lack standing based on the face of the Complaint, and this Motion is thus proper under 2-619, just as CUSA's Motion to Dismiss for lack of standing was properly brought under 2-619.

confer standing on plaintiffs living and allegedly aggrieved **outside of Illinois** and who lack standing to sue individually.[5]

Moreover, *I.C.S.* relied entirely on pre-*TransUnion* decisions that were abrogated by *TransUnion*. After all, *TransUnion* made clear that "**[e]very class member**" must have standing to recover damages. *TransUnion*, 141 S. Ct. at 2208 (emphasis added). Here, however, unlike in *I.C.S.*, *Maglio*, and *Elliot*, Plaintiff's putative class consists of members—a vast majority of them—who do not reside in Illinois, whose FACTA claims bear no factual or other relation to Illinois, and who could not sue on these claims in their home states.[6] Allowing this class action to move forward would open Illinois courts to, and confer potential recovery rights upon, other states' citizens whose own home states would grant them no such rights for conduct occurring in those states.

Further, contrary to longstanding Illinois Supreme Court precedent, allowing this national class action to proceed would only encourage forum shopping in Illinois. *Portwood v. Ford Motor Co*., 183 Ill.2d 459, 466 (Ill. 1998) ("We refuse to expose the Illinois court system to such forum shopping."); *Merritt v. Goldenberg*, 362 Ill.App.3d 902, 910 (5th Dist. 2005) ("A plaintiff's use of forum shopping . . . is against Illinois's public policy."); *Fennel v. Ill. Cent. R. Co.*, 2012 IL 113812 (Ill. 2012), ¶19, 987 N.E.2d 355 ("Decent judicial administration cannot tolerate forum shopping.").

Finally, permitting a national class action would violate black-letter law by allowing the class mechanism to deprive CUSA of dispositive defenses. Both the U.S. and Illinois Supreme Courts have made clear that class actions cannot deprive defendants

[5] CUSA does not dispute that *Lee* involved a national class. 2019 IL App (5th) 18033, at ¶ 58. But, as demonstrated repeatedly, no defense to the plaintiff's standing was properly raised or decided in *Lee*.

[6] As laid out at pages 10-11 of CUSA's Motion and Appendix 1 thereto, putative class members in at least 34 states outside of Illinois lack standing to sue on the FACTA claim asserted here.

of defenses to individual claims. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) ("a class cannot be certified on the premise that [a defendant] will not be entitled to litigate . . . defenses to individual claims"); *Smith v. Illinois Cent. R.R. Co.*, 223 Ill.2d 441, 451 (Ill. 2006) ("procedural device" of a class action "may not be construed to enlarge or diminish any [parties'] substantive rights or obligations") (cleaned up).

Absent the requirement of standing for all putative class members, CUSA would be deprived of dispositive defenses against, at minimum, a majority of the class members. Accordingly, the Complaint's national class allegations should be stricken or at least limited to citizens of Illinois and New Jersey.

III. CONCLUSION

For the foregoing reasons, the Court should (i) dismiss Plaintiff's suit because he lacks standing to sue, or, at a minimum, (ii) strike the nationwide class allegations as requested and detailed in CUSA's Motion and herein.

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

GERARDO RODRIGUEZ, individually and on behalf of others similarly situated, Plaintiff, v. CINEMARK USA, INC., a Texas corporation; CINEMARK HOLDINGS, INC., a Delaware corporation, Defendants.	Case No. 2023 CH 01857 Hon. William B. Sullivan

ORDER

This matter, coming before the Court on Status, all counsel being present and the Court duly advised, it is hereby ordered that:

1) Defendants' Motion to Stay this action until the Illinois Supreme Court resolves *Calley Fausett, Indv., etc., respondent v. Walgreen Co., petitioner* ("Motion to Stay"), filed on April 1, 2025, and set for presentment on April 16, 2025, is advanced to this date;

2) Plaintiff shall file his opposition to the Motion to Stay on or before May 6, 2025, and Defendant Cinemark USA, Inc. shall file its reply in support of the Motion to Stay on or before June 3, 2025;

3) The Motion to Stay is set for hearing in this Court on August 7, 2025, at 10:30 a.m., and the presentment of the Motion to Stay set for April 16, 2025 is vacated.

Dated: April 8, 2025

ENTERED:

By: _____
Hon. William B. Sullivan

Judge William B. Sullivan
APR ' 8 2025
Circuit Court - 2142

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IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CHANCERY DIVISION

SANJEET TOBY, individually and on behalf of others similarly situated, *Plaintiff*, v. IKEA NORTH AMERICA SERVICES, LLC and IKEA U.S. RETAIL, LLC, *Defendants*.	Case No. 23 CH 08217 Judge Celia Gamrath Calendar 6

ORDER

This matter came on Defendants' Motion to Dismiss for Lack of Standing or, In the Alternative, to Stay Proceedings. The Motion is denied.

Lee v. Buth-Na-Bodhaige, Inc., 2019 IL App (5th) 180033, is directly on point and binding and precedential. Although Defendants argue it is inapposite because the defendant did not raise standing as an affirmative defense, the issue was raised by a settlement class member (Dickenson) and squarely addressed by the Appellate Court, which stated: "Because the determination of this objection is critical to other issues raised in this appeal, we will consider Dickenson's protestation that Lee has no claim under FACTA and, therefore, has no standing to represent the settlement class." *Id.* at ¶ 62.

In deciding the issue of standing, *Lee* held:

> In this case, Lee alleged a willful violation of FACTA, a statute intended to protect consumers from the risk posed when credit card account information is displayed on printed receipts at the point of sale. 15 U.S.C. § 1681c(g) (2012). When an entity willfully fails to comply with FACTA's truncation requirements, FACTA provides a private cause of action for statutory damages and does not require a person to suffer actual damages in order to seek recourse for a willful violation of the statute. See 15 U.S.C. § 1681n (2012). This is consistent with the preventative and deterrent purposes of FACTA.
>
> Dickenson claims, however, that when an entity negligently fails to comply with FACTA, the consumer who suffers an actual injury may also have a claim. See 15 U.S.C. § 1681o (2012). Dickenson concludes that because Lee suffered no actual injury under FACTA, he cannot adequately act as the class representative for members of the settlement class who have or may have future claims for actual damages. In support of her objection, Dickenson argues that the United States Supreme Court has held that article III of the United States Constitution requires plaintiffs pursuing statutory damages claims in federal court under section 1681n(a) (15 U.S.C. § 1681n(a) (2012)) to demonstrate that they

actually suffered a "concrete" injury as a result of any statutory violations alleged to have been committed, and she relies on *Spokeo, Inc. v. Robins,* 578 U.S. ___, 136 S. Ct. 1540 (2016).

By its terms, article III of the United States Constitution limits federal court jurisdiction to actual cases and controversies. U.S. Const., art. III, § 2. As a result, the doctrine of article III standing has developed to ensure that federal courts do not exceed this authority. *Spokeo*, 578 U.S. at ___, 136 S. Ct. at 1547. To satisfy the cases and controversies requirement and establish standing, a plaintiff must have "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo*, 578 U.S. at ___, 136 S. Ct. at 1547. With regard to the "injury in fact" requirement, a plaintiff must demonstrate "that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.' " *Spokeo*, 578 U.S. at ___, 136 S. Ct. at 1548 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). In considering what constitutes an "injury in fact," the United States Supreme Court has recognized that Congress may enact laws that "define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before." (Internal quotation marks omitted.) *Spokeo*, 578 U.S. at ___, 136 S. Ct at 1549. With regard to FACTA claims, it appears the federal courts are divided on what constitutes an actual injury. [Footnote omitted.] We need not, however, decide which path is more appropriate to follow under the circumstances of this case, as Illinois courts are not required to follow federal law on issues of justiciability or standing. *Greer v. Illinois Housing Development Authority,* 122 Ill. 2d 462, 491 (1988).

In *Greer,* the Illinois Supreme Court recognized that state courts are more liberal in recognizing the standing of parties than the federal courts. *Greer*, 122 Ill. 2d at 491. The *Greer* court held that standing in Illinois requires only "some injury in fact to a legally cognizable interest." *Greer*, 122 Ill. 2d at 492. Thus, an injury, whether actual or threatened, must be distinct and palpable, fairly traceable to defendant's actions, and substantially likely to be redressed by the grant of the requested relief. *Greer*, 122 Ill. 2d at 492-93; see *Duncan v. FedEx Office & Print Services, Inc*., 2019 IL App (1st) 180857, ¶¶ 24-25. The Illinois Constitution vests the circuit courts with "jurisdiction to adjudicate all controversies." *Steinbrecher v. Steinbrecher*, 197 Ill. 2d 514, 530 (2001); Ill. Const. 1970, art. VI, § 9. So long as a case presents a justiciable matter, the circuit court has jurisdiction. See *People ex rel. Scott v. Janson*, 57 Ill. 2d 451, 459 (1974) (where a complaint states a case belonging to a general class over which the authority of the circuit court extends, jurisdiction attaches). Under Illinois law, standing is not jurisdictional. Rather, standing is an affirmative defense that is typically the defendant's burden to plead and prove. *People v. $1,124,905 U.S. Currency & One 1988 Chevrolet Astro Van,* 177 Ill. 2d 314, 330 (1997).

After reviewing the record, we find that Lee pleaded sufficient facts to allege a willful violation of FACTA and prayed for statutory damages.

> Therefore, Lee pleaded a justiciable claim over which the circuit court had jurisdiction.

Lee, 2019 IL App (5th) 180033, ¶¶ 64-69.

The court is mindful of the *Lee* Court's recognition that the defendant "chose not to raise the issue of standing as an affirmative defense, and objector Dickenson had no standing to do so." *Id.* at ¶ 69. However, this does not eviscerate the thoughtful analysis and well-reasoned holding in *Lee* that a FACTA violation is sufficient to confer standing in Illinois without alleging or proving an actual injury. This same rationale has been repeated time-and-time again in recent cases involving violations of the Biometric Information Privacy Act (BIPA) and the court sees no sound reason to deviate from this well-established case law.

Nor is there a reason to stay this case pending an appeal in *Fausett v. Walgreen Co.,* which is pending in the Second District Appellate Court, not the Illinois Supreme Court. The instant case has already been unduly prolonged by Defendants having filed two separate Motions to Dismiss piecemeal: the first for lack of personal jurisdiction, and now this one for lack of standing. To this end, the court, in its discretion, cognizant of the Illinois Uniform Time Standards and weighing the potential prejudice and interests of all, finds a stay would not be prudent and the harms of a stay would outweigh any benefits. For example, the longer this litigation continues, the greater risk to Plaintiff that the credit card information remains at risk, alleged violations will continue, and there will be an increased likelihood that key witnesses' memories will fade and documents and other evidence will be lost or misplaced.

Moreover, even if the Second District Appellate Court rules differently in *Fausett* than the Fifth District did in *Lee,* a Cook County Circuit Court judge sitting in the First Appellate District has discretion in which one to follow. Certainly, the court will consider *Fausett*, if an appropriate motion to reconsider is made. However, it is not a foregone conclusion that today's decision will be decided differently even if *Fausett* is decided in favor of the defendant.

IT IS ORDERED:

1. The court denies, without prejudice, Defendants' Motion to Dismiss for Lack of Standing or, In the Alternative, to Stay Proceedings.
2. If *Fausett v. Walgreen Co.* is decided while this case is still pending, Defendants may file a motion to reconsider or any other type of motion they deem appropriate, depending on the outcome in *Fausett*.
3. Defendants shall answer Plaintiff's Complaint within 35 days and may file any affirmative defenses within the same timeframe. Plaintiffs shall reply to any affirmative defenses within 21 days.
4. The parties shall commence or continue discovery forthwith.
5. The October 9, 2024, status date is stricken as unnecessary.
6. Status on the pleadings and discovery is set for November 18, 2024, at 9:00 AM via ZOOM.

Judge Celia G. Gamrath

JUL 29 2024

Circuit Court-2031

ENTERED:

Judge Celia Gamrath, #2031

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT - CHANCERY DIVISION

GERARDO RODRIGUEZ, Individually and on behalf of others similarly situated, Plaintiffs,	
-vs-	No. 2023 CH 01857
CINEMARK USA, INC., a Texas corporation, CINEMARK HOLDINGS, INC., a Delaware corporation, Defendants.	

Record of proceedings before the Honorable Judge ANNA LOFTUS, Judge of the Circuit Court of Cook County, Illinois, commencing at 3:00 p.m. on the 5th day of December, A.D. 2024 upon the hearing of the above-entitled case.

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REPORTED BY:
CAROL CONNOLLY, CSR, CRR
CSR License No. 84-3113

THE COURT: So we -- we have Rodriguez versus Cinemark, 2023 CH 1307. If the parties would introduce themselves for the record.

MR. HILICKI: Michael Hilicki for the Plaintiff.

MR. SWARTZENDRUBER: Michael Swartzendruber with Norton Rose Fulbright on behalf of the Defendant Cinemark. With me is Prescott Glasscock also from Norton Rose Fulbright.

MR. SHEAHAN: Terrence Sheahan from Smith Gambrell Russell behalf of the Defendant.

THE COURT: Okay. Welcome. So we did surbriefing on the standing issue. I also wanted to mention in looking over my notes, I did not address the motion to strike class members. I didn't -- I'm prepared to address that today, but that may be a surprise to y'all so we can set that over, or we can address it today.

MR. HILICKI: I think it was in the briefing on their motion to dismiss all part and parcel of the same. I'm happy to present today on that. I know counsel might. I saw in his presentation he has that covered as well.

MR. SCHWARTZENDRUBER: I do have it covered. The thing I was going to ask your Honor is since it is a bit of a separate issue, and little bit of an independent

issue, although related, did you want me to just cover the standing issue with respect to the Plaintiff first, complete argument on that, and then address the second issue with respect to motion to strike?

THE COURT: Yes, I think that's the best way forward to keep track of things. We'll address the standing issue first in its entirety, then we'll address the separate motion to strike.

MR. SCHWARTZENDRUBER: Makes sense to me.

THE COURT: Okay. All right. Go ahead, Counsel, if you'd like to address -- Let me just state for the record we had previous argument and then had surbriefing so I'm happy to entertain some additional oral argument on the surbriefing if you'd like.

MR. SCHWARTZENDRUBER: Yes, absolutely, your Honor. And if I might, I've got some slides I would like to run through today. This is all --

THE COURT: Have you seen this?

MR. HILICKI: I have, your Honor.

MR. SCHWARTZENDRUBER: This is all out of our briefing. I don't know whether you need any extra copies or --

THE COURT: No.

MR. SCHWARTZENDRUBER: All right. So, as I said,

we're here today on two motions. I want to take up first the motion to dismiss for lack of standing. That has to do, in particular, with the standing of the individual plaintiff, Plaintiff Rodriguez.

And the first point I want to make is a point of pure Illinois law. If you turn to slides 2 and 3, I want to talk about the injury prong of standing under Illinois law. Illinois law, wholly independent of Article 3 or federal law or anything else, requires distinct and palpable injury for standing to sue in Illinois. And that is true that as a matter of Illinois law there's been a lot of briefing on saying that Cinemark is here trying to impose Article 3 upon Illinois courts, or force Illinois courts to follow Article 3. That is not what's going on. We recognize fully that Article 3 does not apply in Illinois. The Illinois courts have held that, federal courts have held that. That's not the issue here today.

The issue here today is based upon the fact that unless Illinois's legislature provides otherwise, and we'll discuss in connection with the Rosenbach case exactly how Illinois courts know how to do that, but unless they provide otherwise, that is the mere statutory violation, gives rise to an injury in and of itself, then

distinct and palpable injury is the standard. Under Illinois law, that's the midwest.com case cited down there at the bottom, cites Cedarhurst case. The distinct and palpable phrasing is used in a number of federal supreme court cases that we have cited there as well, which the Court has I'm sure quite certain used interchangeably, is often the concept of concrete injury or injury in fact. The point being that the injury has to be something that is distinct and that has materialized. It is not merely the risk of something that has not yet occurred but might occur in the future. That's Illinois law.

If you turn to page 4, the Plaintiff has not alleged concrete injury as required to meet legal requirements for standing in the State of Illinois. And we know that not only because of the law that I just cited to you but because the Illinois Supreme Court, and I'm referring to slide 5, has specifically held that United States Supreme Court precedent with regard to the interpretation of federal law is binding in the State of Illinois when the State of Illinois is addressing a federal statute or otherwise federal law.

THE COURT: But that doesn't mean that I looked at federal law to determine standing.

MR. SCHWARTZENDRUBER: It does not. What it means is -- what it means though is that you look to federal law interpreting what constitutes injury under a particular federal statute in order to then apply Illinois standing law to that articulation of whether or not there has been an injury under the federal statute at issue here, FACTA. Does that make sense? I'm happy to restate that.

THE COURT: I'm just looking for my law clerk. It does, but I'm -- I guess I'll wait and hear from Mr. Hilicki, but it seems like you have to filter it all through the lens of the Illinois law if you have a state case and factor it through the lens of Article 3 if you have a federal case. So I guess if you could address it a little bit more granularly, that would be helpful.

MR. SCHWARTZENDRUBER: Sure. So here's the articulation as I would put it, and we're going to walk through how federal law relates to this in connection with the TransUnion case.

Illinois has its own standing law independent of Article 3. As we're going to see, that standing law, or as we've seen, that standing law is highly similar, particularly with respect to the issue of distinct and palpable injury to Article 3's requirement.

THE COURT: Do you have a case that provides that? I'd love to --

MR. SCHWARTZENDRUBER: Yes, if we go back to -- turn back to slide 3, your Honor, the midwest.com case that elaborates on the requirement of standing under Illinois law, not under Article 3, harm must be distinct and palpable, fairly traceable to the Defendant's, actions and substantially likely to be prevented or redressed.

And then if you look at Lujan, that's the case we're often most familiar with, the requirements there are almost identical. They refer there to the standards as being concrete injury in fact. Other United States Supreme Court cases --

THE COURT: I think we already went through this, but I'm not -- I don't think that's what we were talking about. We were talking about that if the Supreme Court -- U.S. Supreme Court -- Illinois follows what the U.S. Supreme Court says, but I said it doesn't apply when we're looking at standing. I use Illinois law. But you're saying that I need to look at federal court interpretation of the federal statute to determine if there's injury. My statement was, well, if I'm going to look at Illinois law, it filters to that, that prism, and if you could explain how that would lead to a result in

your client's favor, that would be helpful.

MR. SCHWARTZENDRUBER: Yes. So we first have to look at what the TransUnion case held and what it did not hold. And there's no question that the United States Supreme Court case in TransUnion addressed Article 3 standing. No question about it. But in that context, the Court also addressed and specifically made a holding with respect to what is and what is not concrete injury in fact under the particular statute at issue, which is the FCRA of which FACTA is a component, and the Court looked at that issue. You can't address what constitutes an injury divorced from whatever law you're looking at. The Court in TransUnion actually discussed that. They talked about that there would be different forms of injury with respect to different causes of action, and, indeed, the Court even uses an example in TransUnion of when it's explaining why the injury has to be concrete or what it takes to be concrete. Talks about a case of potential driving negligence, and it talks about the fact that if someone swerves into a lane, they have -- they may have acted negligently, and they have increased the risk of a palpable and distinct injury to the opposing driver, but no injury was realized.

And they similarly say that with respect to

FACTA itself, which, of course, requires truncation of the number of digits on a credit card, that the issue is not whether or not there has been a mere violation of the statute, but that the statute only provides for a cause of action when there has been actual concrete harm.

THE COURT: So I'm looking at the case, and I'm not knowing where you're actually referring to now, but paragraph 17 -- headnote 17 -- I'm sorry. Might be headnote 17.

MR. SCHWARTZENDRUBER: In TransUnion, your Honor?

THE COURT: Yes. The second paragraph starts: To appreciate how the Article 3, quote, concrete harm, unquote, principle operates in practice. So they're referring to concrete harm under Article 3.

MR. SCHWARTZENDRUBER: Yes. Unquestionably.

THE COURT: So I'm not going to take that interpretation and use it in my Illinois standing analysis.

MR. SCHWARTZENDRUBER: But in both -- under both Illinois standing analysis and Article 3 standing analysis, one has to look at what constitutes distinct and palpable -- pardon me -- injury, under the statute at issue. Unquestionably, in the TransUnion case, there is no question that the context for making that decision was

Article 3, but in the context of that -- of Article 3, the Court decided specifically that there's no concrete injury for several types of things.

THE COURT: No Article 3 concrete injury. So I'm not going to take that sentence and then say there's no Illinois state court standing concrete harm, right? I think -- I can't -- I can't -- it's a round peg, square hole type situation.

MR. SCHWARTZENDRUBER: Except for the fact that the Court -- the Court must evaluate distinct and palpable injury under Illinois's own law, correct, and then the Illinois Supreme Court has said that with respect to interpretation of issues of the federal law that Illinois must defer to federal courts, not on Article 3 standing. I agree with the Court completely on that.

THE COURT: Why am I deferring to federal court then, their interpretation of Article 3 concrete injuries because it's just bootstrapping?

MR. SCHWARTZENDRUBER: Their interpretation of what constitutes an injury under the federal statute the way the federal statute was crafted, this actually goes to the question the Court asked us to brief with respect to the intent of Congress in terms of what they intended to redress. Did they intend to make a mere statutory

violation, a violation of FACTA, or did they intend to require actual concrete injury, and I've got -- we did briefing on that, and I've got some slides on that as well, because this is one of the things I think the Court specifically asked us to look at.

If you would look at slide 16, this slide deals with -- if you recall when we had our discussion, the Court said as part of the supplemental briefing you would like to understand the legislative intent behind what Congress intended with respect to when there would be a cause of action or an injury under FACTA, and so we went back and did that.

Opposing counsel said that's a misplaced inquiry, but we thought it was appropriate to address it given the Court's instruction. And the legislative history clearly demonstrates that Congress did not sanction no injury claims when it passed the statute. And that's true for both the legislative history itself and federal courts that have looked at that legislative history.

We have cited you there to the 7th Circuit explanation through the Clarification Act that Congress sought to limit FACTA lawsuits to consumers suffering from any actual harm.

THE COURT: But, again, when you're -- I think you're taking that out of context. In reading the case, Meyers versus Nicolet, N-I-C-O-L-E-T --

MR. SCHWARTZENDRUBER: Yes.

THE COURT: For the court reporter, Rest, R-E-S-T, period of D E -- D-E then P-E-R-E, LLC -- I'm not sure how to say that. You're inferring that the term actual harm means there has to be an actual injury.

MR. SCHWARTZENDRUBER: That's correct.

THE COURT: Not just a violation of the statute. I'm not sure that's what the Meyers case stands for.

MR. SCHWARTZENDRUBER: Well, I think the legislative history behind the Clarification Act --

THE COURT: I think what they're trying to say -- the Clarification Act was to say, hey, if you put the expiration date on there, that's not harm, that's not an actual harm because that's not going to -- that is not likely to result in identity theft. But when you put the -- all of the digits of the credit card, that can result in actual of harm because you can actually use that to commit identity theft, I think. I'm not remembering all the language, but that's the actual harm they're talking about, at least from what I read in the Meyers case. It does not indicate that you have to have an actual injury

such that there has to be identity theft before you can bring a claim. I did not get that from the Act itself or from the Meyer's case which you cited here.

MR. SCHWARTZENDRUBER: And the legislative history below I feel supports that point as well, your Honor, which is that if you look at the findings there, the Fair and Accurate Credit Transactions Act commonly referred to FACTA, was enacted blah, blah, blah, one of the purposes of such act was to prevent criminals from having access to consumers private financial and credit information in order to reduce identity theft and credit card fraud.

THE COURT: But it's to prevent them obtaining access to credit and financial information.

MR. SCHWARTZENDRUBER: Correct.

THE COURT: So if it's on the receipt, the idea they could get access to that --

MR. SCHWARTZENDRUBER: 100 percent. We're not arguing -- if what they say is true, your Honor, we are not arguing that there's not been a violation of the statute. Every federal court that has looked at this issue though has found that the four things that they have pleaded -- including TransUnion -- that the four things that they have pleaded are not actual injury under the statute. And that's -- that's in TransUnion. They

specifically looked at, and I can -- I can go to TransUnion for the top three and one other case for the fourth piece, if you look at slide 6 --

THE COURT: I want to go back to this though because it seems to me the actual harm that the legislature is referring to is you're going to suffer actual harm if your credit card numbers are on -- full credit card numbers are on the receipt, but if the expiration date is on there, that's not going to result in actual harm because nobody can do anything with that. So that's how I read it. I don't see how it talks -- how actual harm translates into you must show that you have actually suffered from identity theft before you can bring such a claim.

MR. SCHWARTZENDRUBER: Well, and --

THE COURT: I think it's a leap.

MR. SCHWARTZENDRUBER: With all due respect, your Honor, I fully understand that the Court believes that TransUnion is an Article 3 case. As I've said, I don't --

THE COURT: I don't believe that it is.

MR. SCHWARTZENDRUBER: Correct. And I concur with that view. But it is also a case that talks about what is in fact injury that was intended to be redressed by

FACTA. And if you look at slide 4, I hope this is addressing -- I'm not trying to avoid your questions. I want to talk about how the law applies specifically to what's been pleaded in this case.

Plaintiff's injuries are a violation of a statutory right, risk of identity theft --

THE COURT: Tell me where you're ready.

MR. SCHWARTZENDRUBER: The top of page 6, your Honor.

THE COURT: Let me get -- is that -- Is this in TransUnion?

MR. SCHWARTZENDRUBER: Yes.

THE COURT: Plaintiff's injuries are coming from the complaint.

MR. SCHWARTZENDRUBER: Plaintiff's injuries are coming from the complaint, but we talk about what TransUnion held. The four injuries are directly taken from the Plaintiff's complaint, violation of the statutory rights, risk of identity theft, potential disclosure of financial information to third parties. So exactly what you're talking about, your Honor, which is potential disclosure to third parties because he's the only one that's been given this receipt, there's no allegation anyone else got this information. No

allegation whatsoever.

And then the last one is taking unspecified action to prevent further disclosure. By unspecified there what we mean is he said they took further action, but the pleading doesn't say what that is.

The first three, therefore, assert two things, apparent statutory violation and risk of future harm. TransUnion held that a mere violation of the statutory rights and a risk of future harm from potential disclosure to third parties does not constitute concrete injury under the FCRA.

THE COURT: Concrete under the Article 3 framework. It's -- concrete injury is analyzed through the Article 3 framework of federal court standing. I cannot separate those.

MR. SCHWARTZENDRUBER: You cannot separate them, but at the end of the day, if the standing requirement of injury is the same under -- under Illinois law, which is that you require a distinct and palpable injury --

THE COURT: No one has ever said that. What Court says that? Your premise is lost on me. I guess I need to see something that actually says that.

MR. SCHWARTZENDRUBER: It is on slide 3, midwest.com versus Kelly case, 2023, Illinois 128, 260 --

THE COURT: I mean, you have -- the standard is in Illinois a harm must be distinct and palpable, fairly traceable to Defendant's actions and substantially likely to be prevented or redressed. You would acknowledge from a review of federal case law and Illinois case law that even though there are some of the same words that the interpretation of standing is very different.

So something could have standing in -- in state court which it could not have standing in federal court such as one subsection of BIPA.

MR. SCHWARTZENDRUBER: BIPA. That was exactly where I was going to go, your Honor.

THE COURT: So the fact that the words may be somewhat similar does not establish that again there through the lens of the Illinois courts versus Article 3 standing.

MR. SCHWARTZENDRUBER: Correct. But one cannot divorce an injury, what constitutes a palpable and distinct injury from the cause of action. TransUnion tells us that, you got to look at what the standard -- what the case is. Concrete injury in the context of negligent driving, concrete injury in the context of the antitrust laws, concrete injury in the context of this particular statute are all going to be different.

THE COURT: You're saying that -- Okay. I don't see -- Lujan you said has concrete injury, that's U.S. Supreme Court, correct.

MR. SCHWARTZENDRUBER: Right.

THE COURT: With all the Illinois cases it's distinct and palpable, fairly traceable to Defendant's actions and substantially likely to be prevented or redressed.

MR. SCHWARTZENDRUBER: Correct.

THE COURT: That's language that I am looking at. That's the language that I care about here when I have an Illinois state court case.

MR. SCHWARTZENDRUBER: I agree with that.

THE COURT: Concrete injury is not something that I'm going to consider.

MR. SCHWARTZENDRUBER: Okay. Well, the federal courts have also said that distinct and palpable -- United States Supreme Court has used that term interchangeably. So let's go with distinct and palpable. But when we come back to -- I agree that you -- you must evaluate distinct and palpable under Illinois law.

Rosenbach, which is the BIPA case that -- kind of the seminal BIPA case that teaches that, and it specifically taught those three -- goes through a

detailed discussion about two things, number 1, that BIPA created -- I've actually got a slide on this. It's Slide 13, your Honor.

It -- Counsel has argued that Rosenbach stands for the broad proposition that when you have a statute that prohibits something, a mere violation of that statute, in this case BIPA, gives rise to a palpable and distinct injury, that is, gives rise to standing under Illinois law. That's not what Rosenbach says. Rosenbach goes through a detailed analysis of two distinct issues. One is that the legislature recognized that one has an inherent right to privacy over biometric information, and, therefore, that someone taking or utilizing that biometric information is in and of itself not only a violation of the statute, but an injury to that person, a real and significant injury that occurs by virtue of violation of the statute itself.

But I think more importantly for our discussion here, your Honor, the Court also engaged in a detailed discussion of the Illinois legislature's history of requiring concrete injury unless it specifically provides that there be a cause of action for one, quote, aggrieved by the statute, which is what BIPA does.

And the Court explains that the Illinois

legislature knows how to make a pure statutory violation an injury. And I'm in agreement with you that because the court -- because Illinois courts are not bound by Article 3, couldn't do that under Article 3, TransUnion also tells us that, the legislature can't just enact an injury into existence, but the Illinois legislature can for the purposes of Illinois standing, but when it does that, or wants to do that, it knows how to do that by virtue of saying that it's granting a right of action to anyone who is aggrieved by the statute.

And in this instance, we simply don't have that. We have -- we have a federal statute, and the Illinois legislature has never acted under that federal statute or on its own to say that we're going to give standing in Illinois to anyone who is aggrieved by that. Rather, you're left with the distinct and palpable standard which we would submit every single court that has addressed this issue has determined is insufficient except for Soto and Duncan, which both went up to the Supreme Court and both were ultimately vacated, meaning they have no precedential authority.

THE COURT: I'm looking at our citation of Rosenbach paragraphs 33 and 34. I see no reference to concrete injury. I see an analysis about the word aggrieved.

MR. SCHWARTZENDRUBER: Correct. And they say that that's what creates a standing for a bare statutory violation.

THE COURT: Why do I see concrete injury in your slide then?

MR. SCHWARTZENDRUBER: Because that's the alternative.

THE COURT: Where does it say that here?

MR. SWARTZENDRUBER: It doesn't say that there. It says that as a matter of the earlier case law we looked at that said you have to have a distinct and palpable injury.

THE COURT: Then you use distinct and palpable. I don't know why you keep talking about concrete injury.

MR. SCHWARTZENDRUBER: I'm sorry, your Honor, because I believe the federal courts use those two terms interchangeably.

THE COURT: I'm not the federal court.

MR. SCHWARTZENDRUBER: I understand. I'm not going to run from my argument. I'm arguing that the standard under a federal statute pursuant to Illinois law needs to be measured according to -- not for standing, but for what constitutes palpable injury -- needs to be measured by reference to federal law on that issue. And federal

law on that issue teaches that there's no distinct and palpable injury because that doesn't exist when you only have a risk of harm.

There are also cases saying it doesn't exist when you supposedly take additional actions like tearing up the credit card receipt to prevent someone else from getting it.

THE COURT: On slide 5, I'm not understanding how the Salmon or the Williams cases that you cite mean that federal law must be used to determine if there's an injury, a distinct and palpable injury.

MR. SCHWARTZENDRUBER: Because federal law in the form of the United States Supreme Court, and also in the form of the Carr case which we haven't gotten to, Carr versus Gateway --

THE COURT: Was that cited in any of your materials?

MR. SCHWARTZENDRUBER: Yes. I'm wrong, your Honor. It's not a federal court case. It's an Illinois case. It goes to the fourth point. It's the fourth point that was made about the fourth type of alleged injury which I told you was not addressed in the TransUnion case. It was rather addressed in the Carr case. And basically if you go back one side to slide 7, there have been two cases that were cited by opposing counsel to say there is

distinct and palpable injury or concrete injury as I believe they used it there when someone must take extra steps to try to ensure that the credit card receipt with too many digits on it is not discovered by somewhere else like tearing up the receipt.

Both of those cases, one by the 11th Circuit and one by the 9th Circuit respectively, were superseded, overturned, and vacated, and each of the other cases determined that that was not sufficient under FACTA to constitute a concrete injury, and I believe they did use the term concrete, your Honor, even if --

THE COURT: These were federal court cases.

MR. SCHWARTZENDRUBER: These are federal court cases.

THE COURT: That's why they used that term probably because that's the definition in the federal Article 3 standard, correct?

MR. SCHWARTZENDRUBER: As is distinct and palpable also used twice by the United States Supreme Court interchangeably with that term.

THE COURT: Okay.

MR. SCHWARTZENDRUBER: I think the only other things I think -- we've discussed the legislative history here, we've discussed what Congress intended and what it didn't

intend, which the Court had asked. I think the only other thing to be discussed, your Honor, is the Lee case. The Lee case is -- did not end up deciding the standing issue, your Honor. There's a huge amount of discussion of standing in the Lee case. They -- the court readily says we're going to consider the arguments of an objector in that case and goes through a bunch of analysis of standing, but at the end of the day, they don't make any determination about standing based upon distinct and palpable injury. Instead, what they ultimately decide is what's on slide 11.

THE COURT: I'm pulling up my notes on Lee. It was -- oh. Go ahead on Lee.

MR. SCHWARTZENDRUBER: Yes, your Honor. If you would turn to slide 11.

THE COURT: I'm there.

MR. SCHWARTZENDRUBER: What was at issue in Lee was originally whether or not there had been an adequate pleading of a willful injury under FACTA. That was actually what was raised by the Defendant. And in the course of raising an objection, an objector came in and said there's no standing here and made the arguments, all the arguments we're having today from Soto and Duncan, et cetera, and the Court said, well, because it goes to

other issues, I'm going to consider the objector's position with respect to standing and went through a quite lengthy discussion of standing in places quite frankly sounding like I would admit that if they were going to address the issue, the lead court would have potentially decided the way Mr. Hilicki wants you to decide, but at the end, they simply didn't do that.

They go through the analysis, they never decide anything about standing. Instead, what they decide, is that there were sufficient facts pleaded for willful violation of FACTA, and yet the Defendant chose not to raise the issue of standing as an affirmative defense.

The objector is Dickinson possesses no standing to raise that issue, and, accordingly, his objection to Lee's lack of standing was denied. So there's nothing in there that is a holding. And Mr. Hilicki's briefing suggests that the Lee court is binding, suggests that Judge Gamrath's recent opinion found it to be binding and your Honor --

THE COURT: Well, she did. I don't think he suggests -- he suggested, but she's right she did find --

MR. SCHWARTZENDRUBER: I agree she found it. But with all due respect to Judge Gamrath, that's not what Lee did. I wasn't there for the argument. I don't know

how argument was presented. Judge Gamrath's decision -- Lee was well before TransUnion, and Judge Gamrath's decision doesn't even discuss TransUnion. So I don't even know that that was argued in terms of the issue of whether or not TransUnion actually speaks to the requirement of injury under FACTA as opposed to exclusively with respect to Article 3.

I guess -- I said I was done. I think the last thing that should be pointed out is obviously the Court is aware from the -- these proceedings and the fact that we've been in here on these issues before, that the Walgreen case was pending on this very issue. It was the third case taken up by the Illinois Supreme Court to decide this very issue, and it was sent back to the Second District Court with instructions to determine this issue based solely and exclusively as I read the order upon the briefing that was already submitted to the Supreme Court. So this issue is going to be decided by the Second District, the very issue we're talking about here.

THE COURT: Not soon enough for us it appears though unfortunately. Anything else before I turn it over to Mr. Hilicki?

MR. SCHWARTZENDRUBER: I don't believe so, your

Honor.

THE COURT: We'll come back to you for reply as well so you'll have another chance to address these issues.

Go ahead.

MR. HILICKI: Thank you, your Honor. So I'll start by reminding the Court that every Illinois Appellate Court to address this issue has ruled the exact the same way unanimously each time and found that when someone brings a FACTA claim all they need to do is allege violation -- willful violation of the rights entitling them to statutory damages, and that is injury enough for standing to bring suit, end of story.

And despite the Defendant's protestations to the contrary, Lee is binding -- still binding on this court and on all the trial courts because it was not vacated pursuant to settlement like Soto and Duncan were. By, which the way, it's important to note, Soto -- Duncan and Soto were not vacated because they were wrong. They were simply vacated because the parties agreed to it. So they remain persuasive authority. But Lee is still binding.

And, again, it's not just our say-so, it's judge -- now Justice Gamrath's say-so, and not just her say-so, she reasoned through it and explains why she

found Lee to be directly on point, binding, and precedential.

To counsel's point that Justice Gamrath didn't need -- didn't cover TransUnion in her opinion, she didn't need to, because as I think your Honor was getting there with counsel throughout his presentation, TransUnion is a federal case that exclusively decided standing under federal Article 3. It didn't address Illinois -- the test for standing in Illinois. TransUnion has nothing to say about the test for standing in Illinois and, therefore, there would be no reason to cover that case in the Toby versus Ikea case that Justice Gamrath decided. Lee remains binding. It squarely addressed the issue, has an entire issue called standing. And as counsel pointed out, Lee just decided whether or not the Plaintiff stated a cause of action. That's because that's all you need for an injury to have standing in the State of Illinois. All you have to do is to show your rights were violated and that you're entitled to relief under the statute, or if the common law if that applies, and then you're there. That's all the State of Illinois requires for standing.

We are not in federal court. We don't consider federal cases to decide our standing orders. In fact,

the contrary. The Illinois Supreme Court said on many occasions that Lebron, in Greer, in Glisson, we reject federal standing. So we can't go there when we are requiring to determine the standing question presented before this Court. It said it should start and finish with Lee.

But even if we were to go past Lee for a second, and I'm going to because I've got something to say about this stuff, the whole conception of what an injury is in the Defendant's mind is wrong for the State of Illinois. They believe an injury is when you suffer some sort of resulting harm after a violation of your rights. They don't equate violation of your rights alone with the concept of injury, or they think it's not an injury when your rights are violated, and that's not the law in Illinois.

THE COURT: I think Counsel is saying that because the federal courts have determined when an injury occurs with respect to a federal statute that we need to give credence to it.

MR. HILICKI: There's no support for that argument. It's not a case-by-case or statute-by-statute analysis. When the federal courts are talking about standing, they're talking about one thing, that is Article 3. And

Article 3 has no application here. They do not say well, what are the standing rules going to be today because -- what statute are we talking about, let's talk about that first. You don't find that analysis in TransUnion. You won't find that analysis in any federal course they said or otherwise. All you will find is what does Article 3 require.

By the way, I should note, Judge, that federal standing rules used to be just like Illinois, used to be a violation of your right under FACTA was enough. These cases were brought exclusively in federal court for over a decade. In fact, we cite one being Hammer versus Sam's East, Eighth Circuit, it was as recent as 2014, just before Spokeo came. That case expressly dealt with the questions whether or not a violation of FACTA rights confer Article 3 standing. They say absolutely it's not controversial, it's always been the law, in Supreme Court no less that a violation of one's -- the injury required by Article 3 can arise simply by violation of one's rights under a statute, can be conferred simply by statute that Congress has created, something along those lines. That was the law of the land until Spokeo came about and the Supreme Court started messing with it. Just because the federal courts have decided to change

the standing test and restrict it and say, okay, we're going to no longer say that a violation of your rights is an injury, now you have to show some downstream harm, that doesn't mean that that concept got carried over to the State of Illinois.

To the contrary, again, the Illinois Supreme Court has said over and over again, we reject federal standing rules. And the Rosenbach case puts a pretty good exclamation point on it because they squarely said violation of your rights alone means you're aggrieved, i.e., injury and you have a right to proceed.

THE COURT: But I don't think the Rosenbach case went so far as to say any statutory violation is sufficient. I think it -- I don't think -- I know that it evaluated the language of the statute which talked about when a party is aggrieved. So that would be an injury. So I don't know if -- I don't think that means anything for our case. It just doesn't mean it's a fait accompli.

MR. HILICKI: I see what you're saying. I'm not suggesting any old statutory violation anywhere amounts to an injury, but when the legislature has decided that you have these rights and that these rights are enforceable under the statute and those rights are

violated and provide a remedy, then you absolutely have standing. That's what Rosenbach stands for at the very least.

So we don't have to talk about violations of other statutes. We are just talking about statutes that confer an express private right of action when the conditions for the statute are met and provide a remedy. Then you have -- then you have standing. That is what Rosenbach stands for, and that's what we have here.

Because they filed a 2-619 motion, they concede that we have pled a claim -- in fact, I think Mr. Swartzendruber even said we are not disputing there's a violation here, but they don't -- they concede by virtue of the nature of the motion they filed we have a cause of action, and so we're entitled to proceed.

But to hammer home the point that injury doesn't mean resulting crime, violation of rights equals injury under Illinois law, we gave you a couple cases. White versus Touche and Ross case, 163 Ill. App. 3d, 94, First District, 1987, quote, injury has been defined as an invasion of a person's interest, even if there is no immediate harm or if that harm is speculative.

So that is the illustration of why or how an injury in the State of Illinois does not require harm.

Violation of rights is an injury.

Likewise, we cited in Nordness versus Miltek, M-I-L-T-E-K, Corporation Surgical Products, 286 Ill. App. 3d, 761, again First District, 1997. Quote, Injury of the legal invasion of a legal right. It's not talking about harm or resulting harm. A legal invasion of legal right is an injury. That's what we have here. They illegally violated our rights under FACTA by disclosing two-thirds of my client's credit card information on the receipt. In violation of an express statutory command, we allege they willfully did so, and that gives us a right to sue for statutory damages in court.

In fact, if Illinois standing requires harm beyond the violation of one's rights, so if the Illinois Courts have to see some harm beyond the violation of one's rights in order to find there's been a injury, then the Rosenbach makes no sense whatsoever because you can't reconcile it to you. You can't say oh, you need some resulting harm, some downstream consequences for there to be an injury, but then you have 7 -- unanimous Supreme Court of Illinois saying this case gets to process because you pled violation of your rights. You're aggrieved, you have the right to go forward and collect statutory damages if you can prove your case. That's the

same thing here.

To that I would add that in Counsel's presentation he said a pure statutory violation can be an injury if the legislature allows. He said that in his presentation. Once again, that statement is true, and it makes no sense if you buy the rest of their argument that you have to show some sort of resulting harm in order to have an injury.

So for all -- their arguments is a house of cards. Once you have get over the idea -- get past their argument that injury requires resulting harm, then everything collapses because now all that's left is what Illinois law provides, which is, a violation of your rights is an injury, which we plead here. And so if you have an injury, then you have standing, and you can proceed.

So turning -- the way they try to get around that is they talk about TransUnion. They say well, it's interpreting what a concrete injury is for purposes of this particular statute. As I noted before, you know, it's not a statute-by-statute analysis. Federal courts just look at Article 3, and that's it. As your Honor pointed out, it doesn't apply here.

Counsel keeps using the expression concrete

injury. You won't find that in the Illinois case law. That's a federal Article 3 concept. Concrete injury in federal court may require resulting harm. I don't know if that's in all cases, but that certainly seems to be what TransUnion says. That's fine for the federal courts, that's not Illinois courts. Illinois courts don't require resulting harm to have an injury. A violation of your rights is sufficient.

So -- and just to make it -- to really put this point home here we have the -- if there's any question about how far TransUnion goes, it said the question in this case is whether the 8,185 class members have Article 3 standing. Again, that's not our say-so. That's also Judge Conlin in the Richardson case we cited here, Judge Vordestrasse in the Fausett case we cited to you. It's just also Justice Thomas' dissent in the TransUnion case itself. He says by declaring that federal courts lack jurisdiction over these claims going forward, quote, the Court is thus insured that state courts will exercise exclusive jurisdiction over these sorts of class actions, and the majority opinion didn't disagree with him. They had no problem with that statement.

So Counsel also spent some time talking about

we did allege harms in addition to the violation of our rights so we have additional injuries. He said those don't qualify as -- those won't satisfy the concrete injuries under Article 3. Again, so what? Doesn't matter. We are not talking about Article 3 here. But exposure to a risk of material identity theft which is what the statue exists to prevent, it's a preventative measure. It's not designed to remedy harm after the fact. It's trying to stop it from happening in the first place, because once you suffer identity theft, your life is ruined. All the damages in world -- you're not going to be able to put a price on it. It's endless aggravation and harm.

So they want to stop it in its tracks and create an enforceable mechanism enforced by private right of action to make sure that companies stay in line. And Congress is allowed to do that, Illinois courts have jurisdiction over these cases, and Plaintiffs have standing to enforce their rights here. Even if they no long have the ability to do so in federal court.

Plus, by disclosing the information on their receipt, they forced him to act, to take action to keep the receipt, protect it, make sure it didn't get disclosed to anybody else, prevent further disclosure.

This is an aggravation that Congress put on the merchant to say don't put the information there so people don't have to do that. So that's an additional harm we've alleged.

They say it's not sufficient for Article 3 concrete injury test. Doesn't matter. We're not applying Article 3. It's still a harm, and a recognized harm. We gave you a case, Deschaff, D-E-S-C-H-A-A-F, it's a federal case, but even then in that case they recognized that the harms I've just described to you are harm -- recognized harms, and, in fact, it went so far as to find they were concrete injuries under Article 3. I don't know if the case -- that analysis would hold up today, but it doesn't change the fact that we have courts that recognize that my client suffered harm. Even if it's not a harm that qualifies in the federal courts, still would qualify here.

So just to summarize on these points, all we need to show is a violation of our right to establish an injury, then we're done, but we actually have some actual harms here we presented in our complaint, and doesn't matter if any one of those things satisfied Article 3, they satisfy the Illinois injury test.

They cited some cases on deferring to federal

interpretations of federal statutes. I want to touch on that briefly because Counsel mentioned it. TransUnion and the federal standing cases they cite aren't interpreting federal -- a federal statute here. They're simply talking about Article 3 as I mentioned. The rule the Illinois courts should defer to federal court interpretations, that only applies when they're actually interpreting what the statute means, but TransUnion doesn't interpret what the FCRA means or FACTA means, and none of the federal standing cases they cite interpret what the statute means or requires. They're simply talking about Article 3 standing, and so the rule -- this deference rule has no application here.

Legislative history, they mentioned that, and that came up in the supplemental briefing. By the way, the Deschaaf case, your Honor, in case you're looking for it, is in our surresponse on page 8. Footnote 5.

Legislative history, I agree -- we shouldn't be considering legislative history at this stage because it goes to whether there's a cause of action, and because they file a 2-619 motion, they can see we have a cause of action. I submit it's premature to address it, but since it's been brought up, since your Honor asked them to cover it, plainly Congress didn't intend to require

resulting harm in order to establish a violation or a right to sue under FACTA because, one, the statutory text contains no harm requirement whatsoever, so in order to find one you have to read the language in the statute that simply does not exist, which is a violation of Black Letter rules of statutory interpretation prohibiting us from doing that. We got to play it where it lays.

Second, every single Illinois and federal Appellate Court to address the issue holds that FACTA, and more specifically, the FCRA and its remedy provision do not require actual harm. So that's the Lee case, it's the Duncan case, it's the Soto case, Jeffreys, it's a federal case from the DC circuit, Bateman from the Ninth Circuit, these are -- all five of these cases dealt with FACTA specifically, and then you can go beyond that to the Santos case which talks about FCRA specifically which use the same remedy provisions, says you don't need to show actual damages to have a claim. So the statute -- Congress didn't require actual harm to bring a claim.

The Clarification Act didn't change that either, by the way. We were so confident about that argument, Judge, we fronted it in our surresponse. So we brought it up first because the Defendants like to use it as a tactic. They take some language from its

legislative history out of context and try to make a big deal out of it.

THE COURT: I wanted to do this. I think the idea was really to focus on legislative intent.

MR. HILICKI: Sure.

THE COURT: I think I may have misspoken when I said history because I can't look to the history unless I determine that the intent can't be determined from the plain language.

MR. HILICKI: Exactly.

THE COURT: I apologize if I misled anybody along those lines, but I think what you're talking about as far as legislative intent -- so continue.

MR. HILICKI: Sure. The Clarification Act didn't state the purpose of FACTA is to prohibit harm. It says the purpose of itself is to protect people who are harmed, so it's not describing the purpose of FACTA itself. And the language it added to FACTA doesn't mention harm. So, once again, it didn't change the statute to add a harm requirement, let alone implicitly or otherwise, it certainly didn't create it expressly, because --

THE COURT: Do you agree that the language, quote, unquote, actual harm is addressing you're more likely to

have actual harm if your credit card -- full credit card number is on the receipt as opposed to if you have your expiration date on the receipt.

MR. HILICKI: Congress certainly thought so and that's why Congress passed the Clarification Act. It said if you properly truncate the number, which they didn't do here, then you're fine, then consumers are protected, and that's why they are creating this amnesty, if you will, for violations involving expiration dates, but we don't have an expiration date case here. We have a case involving a disclosure of too much of the card number. So it's exactly what Congress said it was concerned about, that's what happened here.

THE COURT: But if using the reference actual harm it wasn't -- the Clarification Act does not read into the fact that you have to show actual harm for a claim.

MR. HILICKI: You got it. That is absolutely correct, because, again, the language it added was simply an amnesty provision that said for the purposes of cases brought before June 3rd of 2008, if you're alleging that only violation that occurred was the disclosure of the expiration date, then you, by definition, cannot prove a willful violation and you're out. So that was it. Just expiration date cases, it was only amnesty. It said

nothing about adding a harm. In other words, could make no change whatsoever to the substance of FACTA itself.

So it didn't alter its unambiguous text to create any harm in a way, shape or form. I would note that the amnesty it did create for expiration date claims expired 16 years ago. It couldn't be more irrelevant to this case.

In terms of legislative intent, I would also note that Congress could not have possibly intended FACTA to incorporate Article 3's harm -- current harm requirement because it didn't exist when FACTA was passed, both in its original incarnation in 2003 and at the time the Clarification Act was passed in 2007, I believe because the current restrictive Article 3 injury and fact test came about in Spokeo which didn't come down in 2016, so 8 years later. Obviously Congress couldn't have had that in mind at the time it passed FACTA. As I said before, back then violations of your rights with a remedy, that gave you access to the court house. Didn't mean you were going to win when you got there, maybe we won't necessarily win here, but we at least should get to present our case. We have standing.

So I guess the final point I would add to that is we talk about Lee, Soto, Duncan, Rosenbach, you know,

we have 12 judges -- 12 judges and justices in the State of Illinois, 19 if you include the unanimous Rosenbach court agree with us that we have standing here, zero agree with the Defendant's position. And so we ask that the Court deny their motion to dismiss for lack of standing.

THE COURT: Okay. Counsel, go ahead.

MR. SCHWARTZENDRUBER: Yes, your Honor. I'm going to address some thing kinds of in a bit of reverse order because I think that may be the easiest way to do it.

First of all, he said that counsel -- Counsel said that the Congress couldn't have intended to enact a claim that required injury because FACTA was passed before Soto or before Spokeo. If you look at slide 14, this is again a TransUnion quote, but to be clear, TransUnion held that the legislative branch may not simply act into -- injury into existence. They can't do it because of the separation of powers. Now, I will absolutely concede that is part of the Article 3 discussion, but when Counsel says they couldn't have intended to require injury by virtue of this statute, the Supreme Court has absolutely held otherwise.

MR. HILICKI: Your Honor, I object. He's misstating what I said. I didn't say injury. I said harm. There's

no harm. Harm and injury aren't the same thing. They keep falsely equating the two.

MR. SCHWARTZENDRUBER: The two are actually used quite interchangeably --

THE COURT: I'm not sure they are here. You can be harmed by violation of the statute without it actual injury to your credit I think is what you're kind of referring --

MR. HILICKI: I'm saying violation of your rights itself is a form of injury that's what the cases say. You don't have to have resulting harm to have injury. They say you have to have harm to have resulting injury. That's the federal court's position today. That's not Illinois, it never has been.

THE COURT: Back to you.

MR. SCHWARTZENDRUBER: What that does it takes us back to where I think this in some ways, I mean, it -- I'm not going to say begins and ends. He said Rosenbach wouldn't make any sense if we were right. Rosenbach wouldn't make any sense if he were right, your Honor. Rosenbach does not stand, as I think the Court recognized in your comments, for a bare proposition that any statutory violation in and of itself creates harm. The discussion in Rosenbach is a detailed two-pronged

discussion of the BIPA statute. One portion of that tells us that biometric information is inherently private, and the invasion or distribution in any way, shape, or form of someone's own personal biometric information is in and of itself an injury period. The Court says that, the Court says that about that statute.

The Court then goes on to talk about the language we have talked about, which is when the Court wants to make something -- a violation of the statute itself inherently injurious, when the legislature wants to -- I think I just said the Court -- it knows how to do that, and it does that by the aggrieved grieved language the Court discusses in detail.

Counsel said something very interesting. He said that, and when the legislature has done that, when it has said that a violation suffices, we got a cause of action no matter what. Well, that's the exact point, your Honor, the legislation hasn't done that. The Illinois legislature has not done what Rosenbach talks about what it could have done. There is absolutely nothing that would prevent the Illinois legislature if they wanted to from saying we passed the statute that says anyone aggrieved by a violation of federal FACTA law has a cause of action. They could absolutely do that.

They've never done that.

In terms of every single court that has -- every single Illinois court having disagreed with me, every single Illinois court at issue has either had its decision vacated, or as is the case in Lee, didn't decide the issue.

THE COURT: I think it needs to be made clear that vacation of the orders was not because they were -- the decision was not because they were wrong, it was because of settlement. So please don't use those cases. Let's just take them out of the discussion right now if you're talking about Duncan and Soto.

MR. SCHWARTZENDRUBER: Duncan and Soto, yes, they were, but we cited the Court to law that says vacated decisions, even if they were vacated by way of settlement don't have precedential value.

THE COURT: But you can't use them to your advantage.

MR. SCHWARTZENDRUBER: Quite frankly, I'm not. No, I disagree with those cases, and I believe the Second Circuit is going to decide exactly otherwise in the Walgreen case, which is why I believe that the Supreme Court has taken up this issue three times and sent it back to the Second District with instructions not to

accept anymore briefing but to simply see that the briefing has been -- say the briefing has been fully done but this needs to be decided before it can possibly come back to us.

With respect to Lee, the issue of standing was simply not decided. I talked at length about what the decision actually was in Lee. We've got a slide in here on it. Counsel said there's a whole section in there entitled standing. He's right. There is. Because they say we're going to consider the position of the objector. If the Court looks at the standing section, which begins at paragraph 62, and takes it all the way over to paragraph 68, what the Court will find is there's a long discussion of standing that discusses many of these points, and then the Court doesn't decide anything. What it does is comes to the conclusion that we quoted in our slide, which is after reviewing the record, we have determined a few things.

Number 1, the Plaintiff pleaded a willful cause of action with the violation. Number 2, the Defendant failed to raise it by 2-619. Number 3, the objector has no standing to do so. So the Court got it right in denying the standing objection. That is the sole and only holding of Lee, and we would ask that you look at

that.

THE COURT: Can we look at the last sentence of paragraph 62, which provides -- Let me give a little bit more. Preliminarily, we note that the issue of standing is one usually raised by the opposing party. Here Dickinson's status is that simply that of a settlement class them. She did not seek to intervene in this action, although as a settlement class member she had a right to do so. Had Dickinson filed a motion to intervene then with Court approval, she would have been allowed to appear as a party in this action. Instead she chose to remain a nonparty seeking to file a pleading in the nature of a motion to dismiss.

However, then the Court says, because the determination of this objection is critical to other issues raised in this appeal, we will consider Dickinson's protestation that Lee has no claim under FACTA and, therefore, has no standing to represent the settlement class.

It does consider it, it finds it critical and it considers it and it rules on it.

MR. SCHWARTZENDRUBER: It considers it, but I would --

THE COURT: You can't get to the end of the decision

without concluding that they've ruled on standing.

MR. SCHWARTZENDRUBER: I would respectfully disagree, your Honor. I think you can't get to the end without saying what I fully admitted to the Court earlier, which is, if you read through it it sounds like they're going to come to a conclusion like Mr. Hilicki would like this Court to come to. I fully agree with that. They don't get there. Instead they makes the ruling in paragraph 68 we've highlighted in our slides.

THE COURT: So let's move to that, 68. She pleaded insufficient facts to allege willful violation of FACTA. That alone indicates if she didn't plead an actual harm, a violation of the statute alone was sufficient meaning standing is sufficient. They don't actually say she has standing, but by concluding Lee pleaded sufficient facts to allege willful violation of FACTA and statutory damages, she pleaded a claim of which standing is a part over which the Circuit Court has jurisdiction.

I don't know how I can conclude based on the reading of those two sentences that the Court did not conclude that she had standing.

MR. SCHWARTZENDRUBER: If that's -- even if that is the only conclusion to be drawn from that, that's pure dicta, your Honor. That's not binding upon this Court.

THE COURT: Okay. Tell me how that's dicta. You may not think it was required, but the Court did, right.

MR. SCHWARTZENDRUBER: The Court said it was important to consider --

THE COURT: Critical.

MR. SCHWARTZENDRUBER: -- to consider in light of other issues.

THE COURT: And then it concluded -- it went through the analysis and concluded that she properly pled a willful violation and prayed for statutory damages and she pled justiciable claim. But the Court said it was a critical requirement to go through that process. Whether or not you think it should have or -- whether you think it's critical is really not what's at issue because dicta is if the Court just says hey, we are going to address it even though nobody addressed this -- let's look at the -- almost look at the information I have here about dicta, which I always forget. Obiter dicta are comments in a judicial opinion that are unnecessary to the disposition of the case.

Here the Court truly thought it was necessary. It said it was critical. And then judicial dicta are comments in a judicial opinion that are unnecessary to the disposition of the case but do not involve an issue

briefed and argued by the party.

Again, the Court felt it was necessary, and I don't -- I don't know how we can look at it now and say it was unnecessary so, therefore, it's dicta.

MR. SCHWARTZENDRUBER: They clearly considered the protestation. The Lee court clearly thought it was part of its consideration. My point merely is at the end of the day the determination and the ruling was based upon the fact that the objector had no standing to raise the issue. And, therefore, I don't believe it's binding on this Court as counsel has said. I mean, obviously it can have all of the persuasive effect with this Court that it wants, but, again, the issue will actually be decided by the Second Circuit.

THE COURT: How --

MR. SCHWARTZENDRUBER: Second District.

THE COURT: What was the objector's names again in this?

MR. SCHWARTZENDRUBER: Dickinson.

THE COURT: The Court says Lee pleaded sufficient fact to allege willful violation of FACTA and she pled justiciable claim. After saying that we considered Dickinson's protestation that Lee has no claim under FACTA and, therefore, has no standing to represent this

settlement class. How is that just deciding that Dickinson had no standing to raise the standing issue? I don't -- I cannot see that.

MR. SCHWARTZENDRUBER: Well, if you continue to look down at the sentence beginning with body shop in paragraph 68, the body shop not -- chose not to raise the issue of standing as an affirmative defense, clearly suggesting that it could have done so in the face of the pleadings, and Objector Dickinson had no standing to do so. Accordingly --

THE COURT: It doesn't -- it doesn't mean that the Court didn't consider standing with respect to Lee.

MR. SCHWARTZENDRUBER: The Court absolutely considered and said it considered the issue. I'm merely saying it's not part of the Court's ruling, it's not part of the Court's decision and I'm not sure it's not binding this Court.

THE COURT: After reviewing the record, we find -- we find that Lee pleaded sufficient fact. How is that not the Court's ruling?

MR. SCHWARTZENDRUBER: I fear at this point I'm just quarreling with the Court.

THE COURT: No. I'm trying to understand. I'm just --

MR. SCHWARTZENDRUBER: The actual ruling of the Court is -- I believe is one based upon lack of standing from the objector standing. I'm denying anything about the content of the other discussion. I'm not denying that I believe the Lee court believed what Mr. Hilicki believes.

THE COURT: What about the paragraph 67 that goes through standing as -- standing -- talks about Greer and then goes after reviewing the record we find that Lee pleaded sufficient facts to allege willful violation? You're saying that the Court only went -- what was the purpose of all that then?

MR. SCHWARTZENDRUBER: They were going through -- they were going through an analysis of standing under Illinois law, but I will also point out that in law that Mr. Hilicki has pointed out, my understanding of Illinois law is that Illinois law doesn't require you to plead standing at all. The issue becomes if you do face -- and therefore, under 2-619, I believe it's (a)(9) is the appropriate affirmative matter section, the Defendant can raise an objection and must raise an objection to standing, or it is assumed, based upon one of two things, external evidence, which he says we didn't put in -- we didn't put in a declaration, we didn't have to, because

the case law says that 2-619 does take at face value what is pleaded, and, therefore, in this instance, what is pleaded is apparent on the face of the complaint, that's the Aida or Aida versus Time Warner case, this is all in slide 24, your Honor, and it says -- this is the Aida case -- says a Section 2-619 motion admits the legal sufficiency of the complaint, but raises defects, defenses, or other affirmative matter appearing on the face of the complaint.

And our position is that four things appear on the face of his complaint, their violation of the statute, their prospective injury, their need to take other actions, and we contend for the reasons we've discussed here today, and based upon Rosenbach, that those don't constitute -- those don't constitute distinct and palpable injury under Illinois law, period, end of story, and that's what we believe the Second District is going to decide.

The last thing, and then I will -- well, two last points. Counsel has said that, you know, the legislative history with regard to the Clarification Act, I believe there were questions about whether or not they had talked about, you know, actual injury being required or not. The whole point of that was Congress explaining

that the intention had been specifically to give rights to consumers who had been harmed, and we've cited you at page 6 of our brief -- I don't have this all in the slides -- but page 6 of our surreply brief we talk about it is important to note while the lawsuits filed against these companies are seeking damages totaling in the hundreds of millions, if not billions of dollars, none of the 500 lawsuits that have been filed make any allegation of consumer harm. That's the Congressional record.

Let me be clear. Not one of these suits has alleged any harm to the consumer. In the event that a consumer does experience identity theft, account fraud, or some other harm, my legislation preserves the consumer's rights to sue. That would be in the context of the zip code data. I believe it was zip code data. I agree it was a different part of FACTA that was amended.

And they then go on to talk about it being a very important bill. It may not seem like much, but the credit and debit card receipt Clarification Act closes a loophole. It liberates American businesses, usually small businesses, from frivolous lawsuits. And frivolous lawsuits there equates to lawsuits where there has been no actual injury, but instead where there has been a mere statutory violation, an increased chance of potential

injury in the future or a claim that someone needed to tear up their receipt in order to avoid an injury. Cases goes on to say, you can't do that you can't manufacture your own injury, you already have control over the receipt.

The last thing I want to mention is Counsel made a point about the Deschaff case and the fact that it talked about these things actually being injuries. You may recall that in his comments. This is at slide 7, your Honor. The Deschaff case was overruled by Marshall versus Motel 6 Operating, 825 Federal Appendix 527 at 528 by the Ninth Circuit in 2020. And that's the same thing, they made the same argument with regard to the Moranski case. That was an original opinion out of the 11th Circuit. The 11th Circuit vacated and superceded its own opinion and issued a new opinion at 979 F. 3d, 917 in 2020, finding that this issue of taking action to prevent the disclosure where there had been a facial violation is not injury.

And I believe in one of those cases -- I'm not going to swear to the Court it's one of these two, but in one of these, the allegation was that the violating party had printed all of the digits of the credit card number, and that's not what we have here. And we could argue

about the likelihood of the increased risk of theft since it's the first six digits only identify the financial institution. If one actually knows how this works, that's true, but that's not a legal point. That's simply a factual point that goes to the Court's I believe impression that some types of FACTA violations are different than others in terms of what they increase.

The reality of it is, last four are always permitted to be produced and -- to be printed and the first six only identify the type of -- I misspoke -- the type of card and the financial institution. So is it Visa, is it a MasterCard, is it an Amex, the financial institution.

That's all I have to say on this point, your Honor. And then depending upon how the Court wants to proceed or where we want to go from here, I'm happy to address the motion to strike the class allegations with respect to parties from other states, which you'd only get to if you agree with Mr. Hilicki and decide that we have failed in our challenge to standing.

THE COURT: Since I feel -- Well, I would like about 5 minutes to kind of collect my thoughts on this one, but I don't want to take time out of -- but I also don't want to have you argue unnecessarily. So maybe I do that

right now, just take about minute. We don't have a lot of time here. So just have a seat. I will be right back.

(Off the record)

THE COURT: All right. You all can have a seat. It's not going to take too long. So it's not -- but go ahead and have a seat. I've heard a lot and reviewed a lot. Again, we did supplemental briefing on this so there's a lot to consider. There's a number of different cases at varying levels of importance and relevance. But I'm in the First District and Lee versus Buth-Na-Aboide, B-U-T-H, N-A, B-O-D-I-G-E, Inc. is precedent and it's binding.

Although one could conclude based upon what is contained in the decision itself, that the Fifth District did not need to address standing, the Court nonetheless made an express ruling on whether the Plaintiff -- a Plaintiff lacking an actual injury had standing to bring a claim under FACTA.

The Court states in paragraph 62, as I said, because the determination of this objection which is Dickinson's objection to Plaintiff's standing is critical to other issues raised in this appeal we will consider Dickinson's protestation that Lee has no claim under

FACTA and, therefore, has no standing to represent the settlement class.

We go down to the 68, paragraph 68. The Court then concludes that Lee has standing, and then also states that Dickinson had no standing to do so. I'm not sure why the Court addressed standing, but it did. And that is not dicta.

I will note again, as I said, which I had to go back to the books on this, obiter dicta are comments in the judicial opinion that are unnecessary to the disposition of the case. While some may think that the analysis and the conclusion with respect to the Plaintiff's standing was unnecessary, the Court clearly felt it was necessary because it considered it.

I don't think that's a subjective analysis. I think dicta you have to look at what the Court determined was necessary or unnecessary, not what someone else might think was necessary.

Again, it doesn't fall under judicial dicta either which are comments in a judicial opinion that are unnecessary to the disposition of the case, but involve an issue briefed and argued by the parties. These are not just comments. The Court does address and conclude Plaintiff has standing.

The facts of our case are not meaningfully distinct from Lee. Both Plaintiffs allege that Defendants failed to comply with the FACTA's truncation requirements with respect to credit card numbers on written receipts. Neither Plaintiff alleged an injury beyond the violations of the statute itself. And the finding in Lee is, therefore, completely on point.

Defendant argues that the analysis in Lee is postdated by TransUnion which changed how federal courts handled standing for informational injuries. This is true, but TransUnion does not bind state courts with respect to standing. Lee may have been informed by the Spokeo line of cases, but ultimately the federal standing cases were only persuasive material for Illinois standing law. That's consistent with Greer, G-R-E-E-R, versus Illinois Housing Development Authority.

Lee at this point remains good and binding law. The higher court may revisit standing to address TransUnion either through Walgreens -- Fausett versus Walgreens, but until they do, we will not follow nonprecedential TransUnion over precedential.

If Fausett versus Walgreen creates a circuit split, the Defendant may bring a renewed challenge to standing.

With respect to the other arguments, I am bound by this case, and I don't find them to be persuasive at this time.

So do I look forward to hear what's done with Fausett, but at this point my ruling is that the motion to dismiss on that is denied, on standing is denied.

If the parties want to address the motion to strike class members, I have a couple of additional questions that may kind of truncate the argument. If I may be so bold as to ask those questions first.

MR. SCHWARTZENDRUBER: Do you want us to approach, your Honor?

THE COURT: Yeah. I guess, it's hard for me to look around our Plexiglass.

So we're here on the motion to strike class members, and I think my first question is we don't -- you're seeking to strike some putative class members, but we don't actually have class members yet, and I don't have claims before the Court so I'm not sure what I can do, if anything, with respect to them at this point.

MR. SCHWARTZENDRUBER: The request is that you strike the allegations with regard to those individuals, the point being that the law is clear that those individuals don't have standing to sue in any federal

court for something that happened in Oklahoma, Texas, Kansas. And they don't have standing in their own states because their own states do follow Article 3 whether they incorporate Article 3 or they just say our standards are concurrent with Article 3.

So had they have no standing to bring claims, they would have no standing under TransUnion where you have to measure the standing of every individual, and accordingly, the only way those individuals would have standing to pursue claims in this court is by virtue of them being granted surrogate status, surrogate standing to do so. Opposing counsel has said well, but wait, the cases hold that -- the cases hold that you only have to in Illinois measure the standing of the named plaintiff, but the problem with that is every single one of those cases, including the seminal ICS case, dealt with Illinois only plaintiffs, or plaintiffs who claim they were wrongfully treated in Illinois.

ICS, for example, Counsel said, well, that wasn't limited to a class in Illinois, and, in fact, when you look at it, the class was defined as individuals who contracted for various services, cleaning services, other types of services with the City of Chicago.

THE COURT: Can we take a step back? Tell me which

allegations you want to strike.

MR. SCHWARTZENDRUBER: I have to look at the complaint, your Honor, but all of the allegations asking for certification of a class.

THE COURT: Well, you can object to certification of a class when that comes. I think that's more appropriate.

MR. SCHWARTZENDRUBER: Here -- May I be heard on that?

THE COURT: Sure.

MR. SCHWARTZENDRUBER: Here's the one thing. The courts have made clear -- federal courts, courts here that -- that, A, the class mechanism cannot be used to take away defenses that Illinois is not --

THE COURT: Substantive defenses.

MR. SCHWARTZENDRUBER: Substantive defenses, that's absolutely correct. And Cinemark would have substantive defenses against each and every one of those individuals based upon lack of standing.

THE COURT: Which you could address at the certification phase.

MR. SCHWARTZENDRUBER: Yes. But with all due respect here, your Honor, here's the other problem. The cases also teach against allowing a class mechanism to be

used in an interim way that causes the defendants to have to face potentially nationwide liability in a case that here Cinemark has seven or eight theaters in the state, it has 1200 nationwide. And Counsel is going to -- I can assure you -- because he's already asked me for it, ask for nationwide discovery with respect to all of those other plaintiffs because he's going to say I'm entitled to find out what my damages are, I'm entitled to try to negotiate a settlement on that basis, I'm entitled to do all of those things. So as a matter of proper proceeding in light of the fact that I agree with you, we can also challenge their standing at class certification stage, we can also raise a number of other arguments, but the problem with that is that's putting Cinemark to massive cost in connection with what members of Congress have said are frivolous lawsuits where no one was hurt and many, many, many other states agree with that position.

THE COURT: But not in Illinois at this point. So let me ask you. Please tell me what allegations you'd like to have stricken. I think that's key because if it's an allegation that doesn't address a particular state, I'm not sure how I would -- how that would get you what you want. I'm sorry. I don't have that handy.

MR. SCHWARTZENDRUBER: You don't have the pleading

handy?

THE COURT: I do have the pleading, and I just don't have the paragraphs you'd like stricken.

MR. SCHWARTZENDRUBER: Okay. What I would like stricken are the references to in paragraph 47 to all persons in the United States and to have that limited to all persons in the State of Illinois.

THE COURT: I'm not sure I could do that. I'm not sure how I could do that. This is not making any determination as to whether someone in another -- I don't remember all the states, but someone in, say, Nevada doesn't have standing in Nevada so they're bringing a case here, I don't see how that relates to your argument.

MR. SCHWARTZENDRUBER: It relates --

THE COURT: He can bring a nationwide class action. If there's -- because certainly there are some states where -- at least one, I'm forgetting the state that is --

MR. SCHWARTZENDRUBER: New Jersey is a possibility, yes.

THE COURT: I'm not sure how removing that language -- I'm not sure how I could remove that language at this point given what you presented.

MR. SCHWARTZENDRUBER: Because I do believe the

issue remains that those individuals lack standing, there's no question that --

THE COURT: They don't lack standing in Illinois. You haven't established that.

MR. SCHWARTZENDRUBER: They lack standing in their own state.

THE COURT: You haven't -- you haven't established that, and that fact means they don't have standing here. I haven't seen the leap. I've seen you say they don't have standing in, say, California, but you haven't established that that means they don't have standing here.

MR. SCHWARTZENDRUBER: TransUnion has said that we have to evaluate the standing of everyone, and that was a nationwide class. I understand --

THE COURT: Once we get to certification.

MR. SCHWARTZENDRUBER: Okay. Then I guess I'll preview. What I'm arguing for, your Honor, and what I may in fact be asking for is some sort of curbs on discovery, because there are -- this is -- whether the Court agrees with me or not, there is no question that this is a material issue with regard to defense costs to Cinemark associated with a case where the Second District may go an entirely different direction, and, as you said,

we would then, of course, make a renewed motion, and where, in my humble view, there are material hurdles to ever getting past any of the Rule 23 requirements with respect to individuals who cannot pursue claims in their own states or in any federal court in the United States, and yet we would be put to the burden of discovery with regard to 1200 theaters. I only want to preview.

THE COURT: What discovery is going to be done? You're probably going to be seeking number of class members in each state?

MR. HILICKI: Yes, some data. It's electronic data.

THE COURT: I don't know how that would be so overburdensome. I mean, it's probably a lot of people, but it's not like you have to -- I don't know -- is there going to be redacting? Maybe you have to redact some documents.

MR. SCHWARTZENDRUBER: I think -- we are going to have to look at the nature of the personal information if that's what we're talking about. That will alleviate my concerns if we are talking merely about data. I don't believe that's what the discovery requests we received were reflective of it, but I will tell the Court I haven't looked at those in a while. I just know there were a lot of numbers there to only amount to seeking

data.

THE COURT: You can certainly seek a protective data. We're seeing more and more of those lately, which is -- I'll leave my comments out.

But if you cannot come to an understanding with respect to discovery, you can certainly bring a protective order, Counsel can respond. We can figure out what discovery should be undertaken at this point.

Fausett did have oral argument as I understand. I don't know what that means, if you have any idea, Mr. Hilicki, in terms of timing as to when we might expect a decision.

MR. HILICKI: I believe the argument was October. I don't know when the decision is coming out. I don't know how the Second District works in that regard. I don't know if it's going to be after the holiday. Who knows. But --

THE COURT: But do you have any inkling as to how long it usually takes them?

MR. HILICKI: I honestly don't because I work in the First District. Second District is foreign territory for me. We had different counsel argue that case for us.

But I will say counsel's remarks about discovery, there's been absolutely zero support for the

idea that discovery we seek here is going to impose any kind of significant burden -- a burden that's so onerous and so beyond the pale that a protective order wouldn't make any sense. This is a publicly traded company we're talking about. They brought three lawyers into the court today, Judge, so they can handle it and, you know, we can't assume we're going to lose and then deny us the discovery. We need to go and figure out what the outcome is going to be. That's backward. That's putting the cart before the horse.

THE COURT: I think that's my concern is this is not the appropriate time to address it, and to the extent that the Defendant has to undergo some discovery, albeit he certainly can bring a protective order if he feels I will take a look at it, but I can't foresee what's going to happen, then either Fausett comes out or we get to certification and I make the determination.

MR. HILICKI: I'd also say there's absolutely no authority for the argument people have to show they meet the requirement of standing in some other court. Imagine my client an Illinois guy went down to Texas where they follow Article 3 apparently, and said, hey, I can bring my case here when even though your standing rules say no because Illinois says no. That wouldn't make any sense.

THE COURT: I also haven't seen -- maybe Counsel since we are getting into it a little bit, we only have a few minutes.

MR. SCHWARTZENDRUBER: Certainly, your Honor.

THE COURT: I think just to preface or to give you some -- something to chew on for lack of a better term, I don't -- we are in Illinois, I use Illinois standing law, that does not require that I look to see if a party has a standing in some other jurisdiction. So the fact that they don't have standing in another jurisdiction does not come into play when I'm looking at the standing analysis in Illinois.

There may be some other thing that I have to consider, but I haven't seen it yet, so keep that in mind for when we come back to this.

MR. SCHWARTZENDRUBER: I just -- I agree we haven't briefed any of this. I merely wanted to preview for the Court the issues and my thinking on the issues in terms of why now versus later.

THE COURT: And I don't consider, you know -- I'm thinking here that the discovery is going to be a little more straightforward than many of the cases that I've seen -- many cases that I see because it's about class members. It's essentially what you're going to be

focusing on, is that correct, Counsel?

MR. HILICKI: We're going to be focusing on class members. We're also going to be focusing on standard operating procedures for all theaters, not going to be on theater-by-theater basis to determine that they're doing. The issue for the class at least what policies and procedures were they following regarding these receipts. Generally -- if they were using software, computers that generate receipts that show this information on a systematic basis, great, we are going to need the manual showing how the system worked, we are going to need to know what kind of testing they did.

THE COURT: Why do you need that? Because if you know they've done it, you know they've put 6 digits there, isn't that all you need to know, and the number of people that had that happen to them?

MR. HILICKI: No because we know what argument their going to suggest we don't meet the commonality requirement, for example. We need to know everything we can use to show one system programmed to do the exact same thing in every single instance is going to go into proving commonality.

MR. SCHWARTZENDRUBER: Which assumes that that's not a theater-by-theater review --

MR. HILICKI: It's not.
THE COURT: I will leave that. I'm not going to go into that but then you all can have conversations.
MR. HILICKI: Certainly.
MR. SCHWARTZENDRUBER: Certainly.
THE COURT: I encourage you to do as much as you possibly can before you resort to motion, but you do have that opportunity. Okay.
So at this point the motion is denied without prejudice to raising it in some future date. The motion to strike I should say. And I think we're done, and I'm sorry about our weather. Certainly did not cooperate for you turning so cold last two days.
MR. SCHWARTZENDRUBER: It was advertised, and we were as prepared as Texans get.
THE COURT: I was not prepared. I did not pay attention to the weather.
MR. HILICKI: For clarity, so I suppose we need to submit an order?
THE COURT: You can do so.
MR. HILICKI: 2-619 motion is denied, correct?
THE COURT: Yes.
MR. HILICKI: And motion to strike -- Is that part of the 2-619?

THE COURT: It seemed like a separate motion.
MR. SCHWARTZENDRUBER: A separate motion.
THE COURT: That would be denied without prejudice.
MR. HILICKI: Okay.
THE COURT: Absolutely.
MR. HILICKI: Your Honor, we talked about discovery. I believe some discovery was stayed pending outcome of these motions. That stay needs to be lifted.
THE COURT: It has to, and I would say as soon as you get something from Fausett, I'll probably already know, but if -- why don't you send it to me as well, and then if it affects your position, then you can stop what you're doing and come in, as soon as you can.
MR. SCHWARTZENDRUBER: Is there any -- is there any appetite for at least postponing discovery until after the holidays so we see if anything comes out from Fausett before end of the year -- it's been stayed for long enough. You're not suffering any prejudice at this point.
MR. HILICKI: That's what you said the first time. My client had to wait this long just to get to the motion to dismiss stage. I want to be able to get started. I'm not going to file a motion to compel this month, that's not going to happen, but I want to at least be able to

start having discussions with them.

THE COURT: Craft what it is -- it may looking at the issues and make sure it's what you want to give to them and maybe some conversations. I'm not going to stay discovery unless counsel agrees to it. We'll move forward understanding that, you know, at some point we may hear from the Fausett court, and then you can come in if it's in your favor, come in, we can talk about it right away.

MR. HILICKI: Sure. For purposes of today's order, stay on discovery is lifted.

THE COURT: Yes.

MR. HILICKI: Have a great holiday.

(Off the record at 4:43 p.m.)

COURT REPORTER: Are you ordering this?

MR. SCHWARTZENDRUBER: Yes, please. Regular delivery.

MR. HILICKI: Not yet. I'll think about it.

(Off the record)

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STATE OF ILLINOIS)
) SS:
COUNTY OF C O O K)

CAROL CONNOLLY, being first duly sworn, deposes and says that she is a Certified Shorthand Reporter in Cook County, Illinois, and reporting proceedings in the Courts in said County;

That she reported in shorthand and thereafter transcribed the foregoing proceedings;

That the within and foregoing transcript is true, accurate and complete and contains all the evidence which was received and the proceedings had upon the within cause.

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CERTIFICATE OF SERVICE

I certify that on June 4, 2025, I caused a true and correct copy of the foregoing **Brief and Appendix of Amicus Curiae Cinemark USA, Inc. in Support of Defendant-Appellant** to be filed via the Odyssey eFileIL system, and thereby served on counsel listed below via the Odyssey eFileIL system:

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Under penalties as provided by law pursuant to section 1-109 of the Illinois Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct.

June 4, 2025 By: /s/ Tina C. Wills