

No. 129783

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.

OPENING BRIEF OF DEFENDANT-PETITIONER WALGREEN CO.

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12/6/2023 1:54 PMPM
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NATURE OF THE CASE

The federal Fair and Accurate Credit Transactions Act (“FACTA”) limits the number of digits of a customer’s credit or debit card that a merchant may print on a receipt when it “accepts credit cards or debit cards for the transaction of business.” 15 U.S.C. § 1681c(g). After Walgreens accepted cash from Plaintiff-Respondent Calley Fausett to reload a general purpose prepaid card, she received two receipts from Defendant-Petitioner Walgreen Co. bearing more digits than FACTA permits. She concedes that the additional digits that allegedly violate the federal statute identify only the bank that issued the card but provide no information about her. She produced no evidence that she suffered any harm from the printing of the receipts and does not claim or seek actual damages for the alleged violation. Instead, she seeks only statutory damages.

The circuit court denied a motion to dismiss for lack of standing. Following discovery concerning class issues, and over Walgreens’ objection that Fausett was not an adequate class representative because she lacks standing, the circuit court certified a nationwide class of individuals who received receipts for cash “reload transactions” that printed more than the last five digits of the card. It is undisputed that Walgreens’ system at the relevant time produced such receipts *only* for cash payments to reload prepaid cash cards. The circuit court’s decision rests on the premise that, under Illinois law and specifically this Court’s decision in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, a bare violation of a statute—without any accompanying injury in fact to a legally cognizable interest of the plaintiff—is sufficient to confer standing on that plaintiff.

ISSUE PRESENTED FOR REVIEW

Whether an alleged violation of a federal statute that provides for statutory damages by itself confers standing on a plaintiff to sue in Illinois courts, even when the plaintiff suffered no invasion of a legally cognizable interest or harm.

JURISDICTIONAL STATEMENT

The circuit court granted Fausett's motion for class certification on March 1, 2023. App. 2. Walgreens timely filed a petition for leave to appeal the order pursuant to Illinois Supreme Court Rule 306(a)(8) on March 29, 2023. The Appellate Court of Illinois, Second District, denied the petition in a Rule 23 summary order and entered its judgment on May 18, 2023. App. 1. No petition for rehearing was filed.

Pursuant to Rule 315(b), on June 22, 2023, Walgreens timely filed its petition for leave to appeal the decision of the Appellate Court on its Rule 306(a)(8) appeal. This Court granted the petition on September 27, 2023.

STATUTES INVOLVED

FACTA amended the Fair Credit Reporting Act ("FCRA"), and it is codified at 15 U.S.C. § 1681 *et seq.* As relevant here, section 1681c(g) provides:

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).

Section 1681n imposes civil liability for willful noncompliance of any requirement of FCRA (of which FACTA is a part). Section 1681n(a) provides:

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to

any consumer is liable to that consumer in an amount equal to the sum of—

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000[.]

15 U.S.C. § 1681n(a).

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 provides 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 reduce the risk of identity theft and credit card fraud by preventing the printing of entire card numbers and expiration dates on receipts. *See* Pub. L. No. 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 and identity theft”). 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 could enable someone

who finds the receipt to make unauthorized charges on the card.¹ Congress did not and has not found that each and every remaining digit is personally sensitive, such that the concealment of *all* of them is necessary to reduce the risk of identity theft. To the contrary, the undisputed evidence is that the six additional numbers that appear on a card reveal only information about the card-issuing bank and not personally identifying information about the cardholder. Those numbers therefore create no increased risk of identity theft. App. 255, ¶ 22; App. 262-63, ¶¶ 46-50.

Any person who willfully violates FCRA, including the FACTA truncation requirement at issue here, is liable for actual damages or statutory damages ranging from \$100 to \$1,000. 15 U.S.C. § 1681n(a)(1)(A).

II. Factual Background and Circuit Court Proceedings.

The named plaintiff, Calley Fausett, alleges that in March 2019 she used “her personal debit card to perform a fund-load transaction” at a Walgreens drug store in Arizona. App. 219, ¶ 26. As discovery showed, the “debit card” was in fact a general purpose reloadable prepaid card, which is not a conventional credit or debit card. App. 240-41, ¶¶ 2-8. At Walgreens, individuals must use cash to load (and reload) a prepaid card with value that can be used in transactions with the convenience of a credit or debit

¹ See Fair and Accurate Credit Transactions Act of 2003, 149 Cong. Rec. H8122-02, H8128 (Sept. 10, 2003) (statement of Rep. John Shadegg: “[T]he bill requires that ... [the credit-card] number has to be truncated so that someone who wants to steal your identity by grabbing ahold of your credit card number will not have the full number.”); *Creative Hospitality Ventures, Inc. v. U.S. Liability Ins. Co.*, 655 F. Supp. 2d 1316, 1333 (S.D. Fla. 2009) (“[T]he truncation provisions of [] FACTA arose from a desire to prevent identity theft that can occur when card holders’ private financial information, such as a card holder’s complete credit card number, is exposed on electronically printed payment card receipts.”), *rev’d in part*, 444 F. App’x 370 (11th Cir. 2011) (per curiam).

card. App. 240, ¶¶ 2-4. But, contrary to a traditional credit or debit card, the prepaid card is not linked to the customer's personal credit or banking information. App. 240, ¶ 2.

The receipts in the record also demonstrate that Ms. Fausett used cash to load funds onto her prepaid card at a Walgreens location.² App. 245-46; App. 241, ¶ 8. She received from Walgreens two electronically printed receipts. App. 219, ¶ 27. One receipt showed the amount of cash loaded onto the card and Walgreens' fee, and the other receipt showed those items plus the amount Fausett paid and the change she received. *See* App. 245-46. Each receipt bore the first six and last four digits of her prepaid card account number. App. 245-46; *accord* App. 219 ¶ 27; App. 240-41 ¶¶ 4-8. The remaining six digits in the middle 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—also called the Issuer Identification Number—and identify only the card brand (*e.g.*, Visa, Mastercard, etc.), the bank or institution that issued the card, and, Fausett alleges, whether the card is a consumer or business card. *See* App. 222-23, ¶ 45. Walgreens' receipts printed these numbers for cash transfers like Fausett's to ensure that the customer could, with the receipt alone, prove they had loaded cash onto the prepaid card and also identify which bank had received the cash transfer. *See* App. 240-41, ¶¶ 5-6. Walgreens' system prints bank-identifying numbers *only* for such cash reload transactions. App. 241, ¶ 7. There is no dispute that Walgreens truncates all but the

² The receipts (App. 236-37), properly submitted in connection with Walgreens' combined 2-615/2-619 motion, confirm that she paid in cash. *See, e.g., Buckner v. O'Brien*, 287 Ill. App. 3d 173, 176 (1st Dist. 1997) (documentary evidence controls over conclusory allegations).

last four digits of a card number on receipts whenever it “accepts credit cards or debit cards for the transaction of business,” that is, when Walgreens accepts cards as tender for payment. *See* App. 241, ¶ 7. Indeed, even when it accepts a prepaid cash card as tender for payment, it prints only the last four digits of the cash card. *Id.* Fausett has never argued or offered evidence to the contrary.

Fausett seeks to represent a nationwide class of persons who were given receipts that included more than the last five digits on their card when engaging in cash reload transactions of prepaid cards at Walgreens stores.³ C. 388. Fausett maintains, and Walgreens disputes, that FACTA’s truncation requirement applies to such cash reload transactions. *See* C. 129-34. However that dispute is resolved, Fausett’s complaint does not allege any actual harm to Fausett or anyone else from the bank-identifying number appearing on her receipts—only an “elevated risk of identity theft.” App. 224, ¶ 54. The complaint nowhere explains how printing numbers that identify only the card-issuing bank, and that reveals nothing about the identity of the cardholder, increases the risk of identity theft. Nonetheless, the complaint asserts that Walgreens “is liable to Plaintiff and members of the class ... for statutory damages, punitive damages, attorney’s fees and costs.” *Id.*

³ Fausett initially sought to represent a class of all individuals “who, within the time frame relevant to this action, engaged in one or more transactions using a debit card or credit card at a Walgreens 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 debit or credit card number used in the transaction on the customer’s receipt.” App. 221, ¶ 37. When Fausett filed an amended motion to certify, she amended her class definition to cover only those people who “engaged in one or more reload transactions” during the relevant time. *See* C. 388. The circuit court certified this class. App. 188-89.

The circuit court denied Walgreens' combined 2-615/2-619 motion to dismiss. With respect to standing, the circuit court, Judge Luis Berrones presiding, considered himself bound by the First District's decision in *Duncan v. FedEx Office & Print Services, Inc.*, which held that an alleged violation of FACTA automatically confers standing to sue in Illinois courts. 2019 IL App (1st) 180857, ¶ 25. As the court put it, "*Duncan* is right on point and, frankly, whether I agree with it or disagree, that is the law of the state" App. 25.⁴ The circuit court also rejected Walgreens' argument that Fausett had no basis to allege a "willful" violation under the standard established by the U.S. Supreme Court in *Safeco Insurance Co. v. Burr*, 551 U.S. 47 (2007), because no case has held, and there is nothing in FACTA to suggest, that FACTA applies where a retailer accepts cash for the transaction. *See* App. 174-75.

The parties proceeded to discovery and eventually Fausett sought class certification. Throughout discovery, Fausett has never claimed any injury to her or that anything about her identity was even potentially revealed by the receipt. She admitted under oath that she "is not presently aware of any harm to her credit or identity" resulting from the receipts. C. 664 (Fausett Supplemental Response to Interrogatory No. 8); C. 688 (Fausett Dep. Tr. at 82:1-83:7 (confirming response during her deposition)). She admitted that she has never been the victim of identity theft. C. 703 (Fausett Response to Interrogatory No. 15); *see also* C. 685 (Fausett Dep. Tr. 73:6-9) ("Q: Since March of 2019, have you been the victim of any identity theft, to your knowledge? A: No."). Indeed, given that the receipt concerned *only* a cash reload of a prepaid card, there is no

⁴ In fact, *Duncan* had been vacated by this Court the day before the motion to dismiss hearing. *See* C. 737.

reason to believe that any aspect of her identity or personal information *could* be stolen with the information revealed on the receipt. App. 255, ¶¶ 19-23; App. 262-69, ¶¶ 46-78. Unlike a credit card (which has a specific credit line associated with the cardholder at the card-issuing bank) or a debit card (which has a specific bank account associated with the cardholder), there is no account holding money unique to an individual's prepaid cash card. Instead, the card issuing bank holds the money associated with its various cards in a pooled account. App. 258, ¶ 30; App. 278. Moreover, when asked to identify who had seen the allegedly unlawful receipts, she identified only herself, the cashier, and her lawyers. C. 692 (Fausett Dep. Tr. at 99:9-100:17).

In light of this record, Walgreens opposed class certification, including on the ground that Fausett was an inadequate class representative because she lacked standing. Walgreens presented an expert with decades of experience in federal law enforcement and advising banks on cybercrime, identity theft, and credit card fraud who explained that there is no increased risk of identity theft or fraud by disclosure of a bank-identifying number in addition to the last four digits of a prepaid cash card. App. 255, ¶¶ 19-23; App. 262-69, ¶¶ 46-78. Fausett produced no evidence to the contrary.

At a hearing in March 2023, *see* App. 51-190, the circuit court (now with Judge Donna-Jo Vorderstrasse presiding) agreed that there “seem[ed] to be no dispute that Fausett is a no-injury plaintiff,” App. 169, but nevertheless certified a nationwide class of approximately 1.6 million people. App. 188-89 (certifying class); *accord* App. 176 (describing size of the class). As to standing, the circuit court's decision rested on its 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. It rejected defendant’s contention that redress under the act should be limited to those who can plead and prove that they sustained some actual injury or damage beyond the infringement of the rights afforded them under the law and held no additional consequences needed [to] be pleaded or proved. 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.

App. 172-73.

III. Appellate Court Proceedings.

Walgreens filed a petition for leave to appeal with the Appellate Court of Illinois, Second District, pursuant to Illinois Supreme Court Rule 306(a)(8). In its petition, Walgreens sought review of the circuit court’s class certification order, renewing its argument that Fausett lacked standing and therefore class certification was inappropriate. The Second District summarily denied Walgreens’ petition. App. 1. This Court granted Walgreens’ petition for leave to appeal.

STANDARD OF REVIEW

Although class certification orders are typically reviewed for an abuse of discretion, this Court “need not determine whether plaintiffs satisfy class requirements” if “as a threshold matter” Fausett cannot show that she is pursuing “an actionable claim.” *Barbara’s Sales, Inc. v. Intel Corp*, 227 Ill. 2d 45, 72 (2007). That is because the claim’s “validity ... is part and parcel of the overarching issue of whether the trial court abused its discretion in certifying the class.” *Alley 64, Inc. v. Soc’y Ins.*, 2022 IL App (2d) 210401, ¶ 79. “Without a valid claim,” the plaintiff “cannot establish the statutory elements of commonality and adequacy of representation necessary for class certification.” *Id.* Furthermore, 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). Whether the circuit court properly concluded that Fausett has standing to proceed on her FACTA claim, and is thus an adequate class representative, is a pure question of law reviewed *de novo*. See, e.g., *Midwest Com. Funding, LLC v. Kelly*, 2023 IL 128260, ¶ 13 (“We review issues of standing *de novo*.”).

ARGUMENT

This Court has long recognized 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 *Greer* court’s ruling that an injury in fact is required reflected what this Court referred to as the “universal agreement” among American courts. The injury-in-fact requirement is a core component of standing, which is designed to ensure that Illinois courts can manage “their dockets so as to preserve for consideration only those disputes which are truly adversarial and capable of resolution by judicial decision.” *Id.* at 488.

As this case arrives at this Court, the *only* basis for affirmance would be to hold that this Court’s decision in *Rosenbach v. Six Flags Entertainment Corp.*, 2019 IL 123186, fundamentally swept away many decades of Illinois standing law and set Illinois outside the scope of the widespread agreement among American legal jurisdictions. As a careful review of the decision makes clear, it did not. *Rosenbach* did not discuss, much less overrule, the line of cases recognizing and applying the injury-in-fact requirement. Rather, *Rosenbach* was focused on the interpretation of the statutory term “aggrieved” in the Illinois Biometric Information Privacy Act (“BIPA”), 740 ILCS 14/1 *et seq.* It held only that a person whose biometric information is collected, disclosed, or sold in violation of BIPA is “aggrieved” within the meaning of the statute, regardless of whether the individual alleges or proves any “additional consequences” or can establish actual

damages. 2019 IL 123186, ¶ 33; *see also id.* ¶ 36. The decision does not refer to standing and nothing in its holding or analysis breaks stride with Illinois' injury-in-fact requirement. Instead, this Court explained that when "a private entity fails to adhere to the statutory procedures" enshrined in BIPA, "the right of the individual to maintain [his or] her biometric privacy vanishes into thin air[, which is an] *injury* [that] is real and significant." *Id.* ¶ 34 (citation omitted; emphasis added). In short, *Rosenbach* stands for the proposition that the actual invasion of a genuine privacy interest *is* injury. The need for an injury in fact was not done away with by *Rosenbach*. To the contrary, it was reaffirmed and carried forward in the modern context of biometric privacy interests.

Fausett's claim, unlike *Rosenbach*'s, involves no actual invasion of any legally cognizable interest; it involves no injury at all. In this sense, an alleged and, at best, merely technical violation of FACTA is fundamentally different from an alleged violation of BIPA. The biometric data at issue in *Rosenbach* was unique to the plaintiff in *Rosenbach*, and anyone wrongfully in possession of that information would have invaded the plaintiff's legally cognizable interest in the privacy of that information. By contrast, the bank-identifying number for her prepaid cash card printed on Fausett's receipt are not unique to her and reveal nothing about her. Anyone in possession of that information would not have obtained any personal information about Fausett. *See App.* 262-69, ¶¶ 46-78.

Fausett thus represents an extreme example of an uninjured plaintiff. She does not claim to have been the victim of any identity theft. She cannot explain how disclosure of the extra numbers could have exposed her to an elevated risk of harm, and she cannot

identify any person besides herself, the cashier, or her lawyers who even saw the allegedly unlawful receipts.

The rationale that allows Fausett to bring her no-injury FACTA claim in Illinois courts would do violence to more than a long line of this Court's standing decisions. It would fundamentally strip this Court of the ability to set legal standards for the bringing of claims and the provision of relief in Illinois courts. This Court has long recognized that the question of standing is a component of justiciability. As such, it necessarily goes to the heart of the "judicial power" vested in Illinois courts. Under the circuit court's view, this Court in *Rosenbach* outsourced to the General Assembly the authority to declare when the State's "judicial power" may be invoked: It need only create a statutory obligation and a private cause of action. And it did so without even so much as a mention that it was fundamentally changing the scope of the "judicial power."

Worse still, as this case shows, the lower courts' reading of *Rosenbach* grants the United States Congress the authority to tax the courts of Illinois to resolve disputes that Congress knows federal courts will not consider because they are unworthy of federal judicial time, attention, and resources. Indeed, the U.S. Supreme Court has expressly held that absent some injury in fact a plaintiff lacks standing to bring a claim for statutory damages under the same provision (15 U.S.C. § 1681n(a)(1)) relied upon by Fausett. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204-07 (2021).

To be sure, Illinois standing law and federal standing need not track each other; the State and Federal Constitutions are not identical in word or design. But there is no reason Illinois courts should permit suits based on a federal statute in circumstances where the federal courts bar them. And if this Court does not correct this

misunderstanding, Illinois will attract a flood of burdensome suits brought by uninjured plaintiffs. Not only would such a scenario impose significant burdens on already crowded Illinois dockets, but it plainly was not the intention of Congress to authorize suits in state courts under FACTA that cannot be asserted in federal court. Such a reading of FACTA would raise serious separation of powers and Due Process concerns under the Federal Constitution and is therefore proper only if compelled by the text.

This Court should reverse the circuit court’s decision, make clear that the bare technical violation of a statute does not confer standing, and hold that Fausett lacks standing to pursue her claim or to represent the class. The order certifying a class should be reversed and the case remanded for further proceedings consistent with this Court’s ruling.

I. Recognizing That Plaintiff Lacks Standing To Bring Her Claim In Illinois Is Consistent With A Robust Body Of This Court’s Decisions.

A. This Court Has Long Held That An Injury In Fact To A Legally Cognizable Interest Is A Prerequisite To Invoking The Judicial Power.

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*, 2023 IL 128260, ¶ 13 (quoting *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999)); *see also Glazewski*, 108 Ill. 2d at 254 (“Standing requires some injury in fact to a legally recognized interest.”); *Stevens v. McGuireWoods LLP*, 2015 IL 118652, ¶ 23 (“The gravamen of standing is a real interest in the outcome of the controversy, and standing is shown by demonstrating some injury to a legally cognizable interest.”). Indeed, long ago this Court observed 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.

Most notably, this Court considered the core requirements of standing under Illinois law in *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462 (1988), over 35 years ago. The defendant in that case argued that “the proper test for assessing standing ... is that the party who asserts standing must demonstrate: (1) that the illegal action will cause the plaintiff to suffer injury in fact and (2) that the interest asserted by the plaintiff lies within the zone of interests arguably sought to be protected by the statute in question.” *Id.* at 487. This Court rejected the defendant’s proposed “zone of interests” requirement because such a requirement “tends to lead to confusion between standing and the merits of the suit,” and would “not in fact appreciably narrow the class of potential plaintiffs” and therefore “serves no useful purpose.” *Id.* at 492. But, in marked contrast, this Court steadfastly “adhere[d] to the principle that standing in Illinois requires [] some injury in fact.” *Id.*

As the Court explained, there has long been “universal agreement” among courts and other authorities that the injury-in-fact requirement is the core component of standing and that it “genuinely narrows the class of potential plaintiffs to those whose grievances may be redressed by [judicial] decisions.” *Id.* at 488. Standing doctrine—“[t]ogether with allied doctrines like mootness, ripeness, and justiciability”—“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.” *Id.* This narrowing function is important, the Court continued, because “[e]lementary justice

requires that *one who is hurt* by illegal action should have a remedy,” but the judicial function should be limited to only those disputes where someone is “adversely affected *in fact*” by the illegal action. *Id.* (citation omitted; emphases changed). To hold otherwise would unnecessarily tax judicial resources, open the floodgates to litigants without a real interest in the controversy (and thereby undermine the core value of adversarial testing of legal disputes), and in effect require courts to offer advisory opinions on abstract or purely hypothetical questions. *See id.* at 488, 492-93; *accord In re Marriage of Rodriguez*, 131 Ill. 2d 273, 279-80 (1989); *McAdam v. People*, 179 Ill. 316, 317-18 (1899) (dismissing case found to be collusive: “They are frauds upon the court, and persons engaging in them ... have no standing here. It is the duty of the court to dismiss all such cases when they are presented.”). All of these ills are not only contrary to the long history of the how the judicial function operates in Illinois, but they also erode the foundations of the accuracy and reliability of legal outcomes.

Accordingly, this Court held that, in order to have access to Illinois courts to adjudicate a claim, “the claimed injury, whether ‘actual or threatened’ must be: (1) ‘distinct and palpable’; (2) ‘fairly traceable’ to the defendant’s actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief.” *Greer*, 122 Ill. 2d at 492-93 (citations omitted). Applying this requirement, the Court held that the plaintiff had standing because he alleged an injury in fact: specifically, “a diminution in the value of property,” which was a classic “legally cognizable interest.” *Id.* at 493.

Eleven years later, this Court again was confronted with addressing the core requirements of standing under Illinois law in *Glisson v. City of Marion*, 188 Ill. 2d 211

(1999). And again, it reaffirmed the fundamental requirement of an injury in fact while rejecting an additional limitation on a plaintiff's ability to sue. There, the defendant urged the Court to "adopt the test for standing that was set forth in *Lynch v. Devine*, 45 Ill. App. 3d 743 ... (1977), as an additional requirement for standing." *Glisson*, 188 Ill. 2d at 222. The *Lynch* test provided that, "where the suit alleges injury due to violation of a statute, the doctrine of standing requires that the plaintiff be a member of the class designed to be protected by the statute, or one for whose benefit the statute was enacted, and to whom a duty of compliance is owed." *Id.* (citing *Lynch*, 45 Ill. App. 3d at 748). This Court rejected that requirement, reasoning that the *Lynch* test was "similar to the zone-of-interests test" rejected in *Greer*. *Id.* But this Court reaffirmed yet again the injury-in-fact requirement, reiterating "the general principle that standing requires some injury in fact to a legally cognizable interest," *id.* at 221 (citing *Greer*, 122 Ill. 2d at 492), as well as the specific requirements of a (1) "distinct and palpable" injury (2) "fairly traceable" to the defendant's actions and (3) "substantially likely to be prevented or redressed by the grant of the requested relief," *id.* (citing *Greer*, 122 Ill. 2d at 492-93). Applying this requirement, the Court held that the plaintiff, who filed suit under the Illinois Endangered Species Act to stop the construction of a dam that would pose danger to the Indiana crayfish, an endangered species, did not have standing. The plaintiff's purported legally cognizable interest in a "healthful environment" pursuant to article XI, section 2 of the Illinois Constitution of 1970 was insufficiently connected to the Indiana crayfish. *Id.* at 225-26. At most, he alleged "a self-proclaimed interest or concern about an issue," which was not enough to constitute an injury in fact to a legally cognizable interest. *Id.* at 231.

For decades since *Greer* and *Glisson*, Illinois courts, including this one, have repeatedly recognized and applied the injury-in-fact requirement. *See, e.g., Burgeson*, 125 Ill. 2d at 486 (“In Illinois, while seeking guidance from Federal cases such as *Flast* [*v. Cohen*, 392 U.S. 83 (1968)], we have defined standing under our State Constitution as the requirement of some injury in fact to a legally recognized interest.” (citation and internal quotation marks omitted)); *In re Marriage of Rodriguez*, 131 Ill. 2d at 280 (“This court has defined standing as requiring some injury in fact to a legally recognized interest.” (citation and internal quotation marks omitted)); *Almgren v. Rush-Presbyterian-St. Luke’s Med. Ctr.*, 162 Ill. 2d 205, 216 (1994) (“Standing requires injury in fact to a legally cognizable interest”); *People v. \$1,124,905 U.S. Currency*, 177 Ill. 2d 314, 329 (1997) (“[S]tanding in Illinois requires [] some injury in fact to a legally cognizable interest.” (citation and internal quotation marks omitted)); *Raintree Homes, Inc. v. Village of Long Grove*, 209 Ill. 2d 248, 262 (2004) (no standing because plaintiffs “did not allege any [] injury”); *Carr v. Koch*, 2012 IL 113414, ¶¶ 28-31 (no standing where plaintiffs failed to establish an injury in fact); *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); *Lewis v. Lead Indus. Ass’n*, 2020 IL 124107, ¶ 50 (“[S]uch a result cannot be squared with the basic principle of standing that requires some injury in fact to a legally cognizable interest.” (citation and internal quotation marks omitted)); *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” was an injury in fact and therefore conferred standing).

Throughout this history, this Court has been careful to note that federal standing law and Illinois standing law are not identical, but it has repeatedly cited with approval key U.S. Supreme Court decisions on the core injury-in-fact requirement and has said it is “guided ... by decisions of the United States Supreme Court” on issues of standing. *Burgeson*, 125 Ill. 2d at 485; *see also Greer*, 122 Ill. 2d at 492-93 (citing a U.S. Supreme Court case for each dimension of the injury-in-fact requirement).

B. *Rosenbach* Did Not Deviate From This Court’s View Of The Injury-In-Fact Requirement.

Despite this well-settled line of authority, the circuit court in this case concluded that “[i]n Illinois a violation of one’s rights in itself is sufficient for standing. That is how the Court reads *Rosenbach v. Six Flags*. ...”.⁵ App. 172-73. That is a misreading of *Rosenbach*.

Rosenbach did not hold that any violation of any statute automatically confers standing on a plaintiff. Indeed, the Court did not consider the issue of standing in *Rosenbach*, much less overrule the many Illinois cases—including recent decisions from this Court—that recognize the injury-in-fact requirement as essential to standing. Rather, the Court considered whether a plaintiff who alleged only a violation of the statute—that is, the unlawful taking of biometric data from the plaintiff—qualified as an “aggrieved” individual under BIPA. *Rosenbach*, 2019 IL 123186, ¶ 1. This was a question of *statutory* construction; not an effort to construe what counts as a “justiciable controversy” under the Illinois Constitution, which is what standing concerns. Ultimately, this Court

⁵ *Duncan*, 2019 IL App (1st) 180857, and *Soto v. Great America, LLC*, 2020 IL App (2d) 180911, decisions of which this Court granted review, and which were then vacated by this Court after the cases settled pending this Court’s review, also erroneously held that a violation of any statute automatically suffices to establish standing.

construed the statute to allow a suit by anyone alleging a violation of the statute and the rationale was rooted in the particular *personal* interests protected by BIPA that are absent here.

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. Instead, the General Assembly devised a statute to combat a new threat to an existing personal interest that arose in light of advances in technology and the ease of collecting and storing private information. *Id.* at ¶ 34. BIPA thus “*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; emphases added). The violation of an individual’s right to maintain his or her biometric privacy is the “precise *harm* the Illinois legislature sought to prevent” in enacting the statute. *Id.* (emphasis added). The invasion of an individual’s biometric privacy “is no mere ‘technicality,’” the Court explained. “The *injury* is real and significant.” *Id.* (emphasis added).

This Court in *Rosenbach* carefully *avoided* calling into question any of its standing decisions. Any such undertaking would have been substantial, including a historical review of this Court’s standing decisions, and an analysis of basic principles concerning the scope of legislative and judicial authority in connection with providing access to courts. *See cases cited infra* at 27-28. And the result would have marked a significant revolution in Illinois law because it would require abandoning a consistent bedrock rule of law, often repeated by this Court for decades. *Rosenbach* is not a revolutionary ruling. To the contrary, it carefully and clearly explained that BIPA was designed to protect a real privacy interest, the invasion of which produces a real injury regardless of whether the individual can show pecuniary losses.

Subsequent decisions of this Court have confirmed that *Rosenbach* recognized that BIPA codified a preexisting cognizable legal interest in the privacy in one’s unique biometric information. *See 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)); *McDonald v. Symphony Bronzeville Park, LLC*, 2022 IL 126511, ¶ 24 (“Through the [Privacy] Act, our General Assembly has *codified* that individuals possess a *right to privacy in and control over* their biometric identifiers and biometric information.” (quoting *Rosenbach*, 2019 IL 123186, ¶ 33) (emphases added)). “Accordingly, when a private entity fails to comply with one of [BIPA’s] requirements, that violation constitutes an invasion, impairment, or denial of the statutory rights of any person or customer whose biometric identifier or biometric information is subject to the breach.” *McDonald*, 2022 IL 126511, ¶ 24 (quoting *Rosenbach*, 2019 IL 123186, ¶ 33).

Given the 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). That is, BIPA authorized a legal claim for an “injury” (here, understood as the invasion of a legally cognizable interest) even in the absence of “damages” (here, understood as a *compensable monetary* harm). Because BIPA “codifies” a substantive privacy interest that was invaded by the failure to obtain consent alleged in *Rosenbach*, the question of standing was not at issue and required no discussion.⁶

Neither the plaintiff nor the lower courts have even tried to suggest that a FACTA violation, much less one involving a cash reload of a prepaid card, invades any pre-existing privacy interest or cognizable legal interest, as was the situation in *Rosenbach*. 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)

⁶ BIPA is hardly unique in this respect. Common law courts have long entertained certain claims even in the absence of any allegation of compensable harm. Trespass is perhaps the most familiar example. *See, e.g., Chi. Title Land Trust Co. v. JS II, LLC*, 2012 IL App (1st) 063420, ¶ 77 (“a plaintiff need not prove actual harm to recover damages for trespass; trespass occurs whenever [a] property interest is invaded”).

(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). Even an *entire* card number for a credit or debit card 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 card number.

What’s more, the record is clear that the technical FACTA violation at issue here did *not* reveal an entire card number, but revealed only the bank identification number. That information did not increase even the risk to Fausett of identity theft or fraud. App. 255, ¶¶ 19-23; App. 262-69, ¶¶ 46-78.

Ultimately, when FACTA applies, merchants cannot print more than five digits on a receipt, but *not* because doing so automatically and every time invades any personal interest of the cardholder. Rather, the FACTA truncation requirement was adopted to stop the practice of printing entire card numbers and expiration dates on receipts when that information is associated with the personal private account information of the cardholder. *See* Pub. L. No. 110-241, § 2(a)(1), 122 Stat. 1565 (2008); *Kamal v. J. Crew Grp., Inc.*, 918 F.3d 102, 106 (3d Cir. 2019); pp. 3-4 & n.1, *supra*. Prepaid cash cards are not linked to a bank account holding assets unique to the cardholder; they are connected to accounts

at a bank that pool all the assets that back various of their cash cards. App. 258, ¶ 30; App. 278. This Court expressly distinguished biometric data from data like card numbers used in the financial context at issue here. The Court noted that the General Assembly specifically found when it passed BIPA that “[b]iometrics 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” *Rosenbach*, 2019 IL 123186, ¶ 35 (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”).

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 may not gain access to Illinois courts unless they can allege facts explaining why the printing of extra digits on the receipt that do not identify anything about the plaintiff invaded a legally cognizable personal interest or caused actual damages.

C. Fausett Has Not And Cannot Establish Injury In Fact.

It is clear that Fausett has not and cannot satisfy the injury-in-fact requirement.

Fausett’s receipts disclosed the first six and last four digits of her prepaid card. App. 219, ¶ 27; App. 240-41 ¶¶ 3-8; App. 245-46. FACTA permits a merchant to disclose the last four digits of a credit or debit card, *see* 15 U.S.C. § 1681c(g)(1), so the

only question is whether the disclosure of the first six digits caused Fausett to suffer an injury in fact to a legally cognizable interest. It did not.

Fausett acknowledges that the first six digits disclose only the identification number for the card issuer and disclose nothing about Fausett personally. *See* App. 222-23, ¶ 45. Every United States Court of Appeals to address the issue has concluded that disclosure of a bank-identifying number does not cause any injury in fact to the cardholder. *See, e.g., Thomas v. TOMS King (Ohio), LLC*, 997 F.3d 629, 632, 636 (6th Cir. 2021) (“[P]rinting the first six digits does not inevitably lead to identity theft or increase the risk of it.”); *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 934-35 (11th Cir. 2020) (en banc) (plaintiff “failed to allege either a harm or a material risk of harm stemming” from the disclosure of the first six digits of his card); *Noble.*, 726 F. App’x at 584 (disclosing first digit of bank identification number “does not involve the sort of revelation of information that Congress determined could lead to identity theft”); *Kamal*, 918 F.3d at 116 (affirming dismissal where plaintiff could not “plausibly aver how [the defendant’s] printing of the six digits presents a material risk of concrete, particularized harm”); *Katz v. Donna Karan Co.*, 872 F.3d 114, 120 (2d Cir. 2017) (affirming dismissal; “the first six digits of a credit card number constitute the IIN for the card’s issuer, digits which can be easily obtained for any given issuer”); *see also In re Toys “R” Us – Delaware, Inc. – FACTA Litig.*, Nos. MDL 08-01980, 2010 WL 5071073, at *12 (C.D. Cal. Aug. 17, 2010) (denying class certification; “[T]he printing of the first six digits resulted in no actual harm to any potential class member, and a negligible increase in risk of harm.”). And because the allegedly wrongfully printed digits reveal only the identity of the card issuer and nothing about Fausett personally, they do not

invade or harm an intangible personal interest, such as the right to privacy or her reputation. *See* pp. 21-23, *supra*. So without any claim of pecuniary damages—and none are asserted here—Fausett has no standing to sue.

Nor is Fausett’s alleged unspecified “heightened risk” of identity theft adequate to satisfy the injury-in-fact requirement. *See* App. 219, ¶ 29; Fausett’s Answer to Petition for Leave to Appeal 25 (citing C. 82, ¶¶ 28-29). The record leaves no doubt that Fausett experienced no heightened risk of identity theft or fraud. She offered no evidence to question or counter the testimony of the experts submitted in opposition to class certification, each of whom carefully explained why revealing the bank identification number of her cash card on her reload receipt reveals no personal information and poses no risk of identity theft to her. *See* App. 255, ¶¶ 19-23; App. 262-69, ¶¶ 46-78; App. 277-78.

Instead of producing evidence, Fausett cited a British news headline that reads “Criminals can guess Visa card number and security code in just six seconds, experts find.” Fausett’s Answer to Petition for Leave to Appeal 7 n.6. This headline is rank hearsay. *See, e.g., McCall v. Devine*, 334 Ill. App. 3d 192, 203 (1st Dist. 2002) (“The contents of newspaper articles are hearsay and therefore inadmissible.”). But even taken at face value, the article does not help Fausett. The story behind the headline has nothing to do with receipts, the disclosure of bank identification numbers, or prepaid cash cards or cash reload transactions. Rather, as Walgreens’ expert explained, the article addresses a long-since corrected and unique vulnerability of VISA-branded traditional debit cards that was exploited at a specific bank in England in 2016 during a cyberattack on the bank.

App. 269-71, ¶¶ 79-84. All of this explains why the circuit court correctly found that “there seems to be no dispute that Fausett is a no-injury plaintiff.” App. 169.

The bald and ultimately baseless allegation of an alleged “increased risk” of harm cannot, as a matter of law, suffice. *Maglio*, 2015 IL App (2d) 140782, ¶ 24 (holding that a plaintiff’s “claims that they face an increased risk of ... identity theft are purely speculative and conclusory” and thus “their allegations fail to show a *distinct and palpable* injury”) (emphasis in original); *Flores v. AON Corp.*, 2023 IL App (1st) 230140, ¶¶ 13-14 (holding in the context of personal identifying information that standing requires actual disclosure of personal information to an unauthorized third party); *Petta v. Christie Business Holding Co., P.C.*, 2023 IL App. (5th) 220742, ¶ 14 (holding the same and stating in the context of a data breach that “none of the victims had been victimized [by identity theft] and speculation or fear alone was insufficient to confer standing”). Such allegations also cannot overcome the evidence Walgreens submitted in this case.

In sum, Fausett cannot allege facts explaining why the printing of the extra digits on her Walgreens receipts invaded a legally cognizable personal interest or caused actual damages. She therefore cannot satisfy Illinois’ injury-in-fact requirement and cannot lead a class to pursue her FACTA claims.

II. Adopting Plaintiff’s View Would Make Illinois An Outlier Both As A Matter Of Constitutional Standing Doctrine And The Interpretation Of FACTA.

The legal authorities recited above all provide more than sufficient reason for this Court to reject the lower courts’ overreading of *Rosenbach*. But there are both doctrinal and practical reasons to continue to adhere to this Court’s standing law that *Rosenbach* left undisturbed, especially in this case.

First, eliminating the injury-in-fact requirement would remove Illinois from the overwhelming majority view of courts that have adhered to an injury-in-fact requirement for standing. The amicus brief of Cinemark USA, Inc. catalogs the substantial body of authority among state courts. *See* Cinemark Brief 10-14 & Cinemark App. (table listing cases). Only a small number of courts have abandoned an injury-in-fact requirement, as Fausett urges this Court to do. Where they have done so, however, it has been based on legal history or constitutional language unique to those states. *See, e.g., Lansing Schools Educ. Ass'n v. Lansing Bd. of Educ.*, 792 N.W.2d 686, 699 (Mich. 2010) (reviewing historical Michigan-specific treatment of standing in the context of a Michigan statute regarding discipline in public-school context); *Comm. to Elect Dan Forest v. Emp's Political Action Comm.*, 853 S.E.2d 698, 733-34 (N.C. 2021) (reviewing North Carolina state constitution and historical jurisprudence in the context of a North Carolina statute regarding a campaign disclosure requirement). These cases represent the minority and come from states, unlike Illinois, where there is no long-standing and consistent body of caselaw requiring injury in fact for standing. Accepting Fausett's invitation to follow these outlier states would reflect an undeniable break from this Court's own caselaw as well as the history in Illinois of looking to the U.S. Supreme Court for guidance on standing.

Moreover, abandoning this Court's injury-in-fact requirement in *this* case is especially inappropriate. Walgreens is aware of no state appellate court that has squarely considered and ruled that the United States Congress has, through legislation creating a private right of action, conferred upon uninjured individuals a right to sue in state court even though Congress lacks authority to grant those individuals access to federal court.

Even those few states that have taken a more expansive view of standing than this Court by not requiring injury in fact have so ruled *only* when considering whether their state constitutions authorize their state legislators to determine when individuals may invoke the state's judicial power. *See, e.g., Lansing Schools*, 792 N.W.2d at 702 (“[W]e hold that plaintiffs have standing because plaintiffs have a substantial interest in the enforcement of MCL 380.1311a(1) that is detrimentally affected in a manner distinct from that of the general public if the statute is not enforced.”); *Comm. to Elect Dan Forest*, 853 S.E.2d at 734 (“Part of the Disclosure Statute creates a cause of action permitting the candidate targeted by the illegal ad to enforce the regulations by bringing suit”); *accord Housing Authority of Cnty. of Chester v. Pa. State Civ. Serv. Comm’n*, 730 A.2d 935, 939-41 (Pa. 1999) (explaining that Pennsylvania follows 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” (emphasis added)).

What plaintiffs here propose is a novel and dramatic step. Consistent with the majority of states and contrary to the minority view, this Court has rightly maintained that standing is a matter of justiciability, and thus properly a quintessential *judicial* question. *Burgeson*, 125 Ill. 2d at 485. Yet, by affirming here, Illinois would not only transform standing into a matter purely of legislative judgment, but it would empower a different legislature than our General Assembly (the U.S. Congress) to determine when individuals may invoke the judicial power of Illinois to further that other legislature’s policies. Respectfully, that is an implausible reading of the Illinois Constitution. Further, as discussed below, there is no reason to construe the federal statute at issue here to even present that question. *See* Section III, *infra*.

Second, Illinois would become an outlier with respect to the interpretation and application of FACTA. Federal courts have uniformly rejected the proposition that a violation of FACTA’s truncation provision confers standing without regard to some injury in fact. *See, e.g., Thomas*, 997 F.3d at 640 (no standing because receipt that includes bank identification number may violate FACTA but “would not offer any advantage to identity thieves” (citation omitted)); *Muransky*, 979 F.3d at 935 (allegation of receipt including bank identification number “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*, 872 F.3d at 120-21; *Meyers v. Nicolet Restaurant of De Pere, LLC*, 843 F.3d 724, 727 (7th Cir. 2016) (alleged FACTA violation did not establish “any appreciable risk of harm”). Indeed, the U.S. Supreme Court has now held that a bare violation of any provision of FCRA, which includes FACTA, does not confer standing. *TransUnion*, 141 S. Ct. at 2204-07.⁷

Given the strength of the federal consensus and the concerns identified by the Supreme Court in *TransUnion*, it is not surprising that the vast majority of Illinois’ sister states that have examined the question have decided to follow the federal consensus when faced with FACTA cases. *See Gennock v. Kirkland’s Inc.*, No. 462 WDA 2022, 2023 WL 3477873, at *5-6 (Pa. Super. Ct. May 16, 2023) (agreeing with the reasoning of the Third Circuit’s decision in *Kamal* and concluding that plaintiff failed to satisfy Pennsylvania’s

⁷ In the only case where a federal circuit court of appeals found standing for a violation of FACTA, the merchant exposed sufficient information on the receipt to allow anyone who comes into possession of it to access the plaintiff’s line of credit—it printed the entire credit card number, as well as the expiration date, on the customer’s receipt. *See Jeffries v. Volume Servs. Am., Inc.*, 928 F.3d 1059, 1066 (D.C. Cir. 2019). That decision predates and does not survive the Supreme Court’s holding in *TransUnion*, however.

“traditional standing doctrine”); *Saleh v. Miami Gardens Square One, Inc.*, No. 3D21-1724, 353 So. 3d 1253, 1255 (Fla. Dist. Ct. App. 2023) (rejecting plaintiff’s invitation “to broaden Florida’s standing requirements and exercise jurisdiction over the federal statutory claim” because “Florida law also imports an injury in fact requirement under [its] standing framework,” which plaintiff could not satisfy); *Southam v. Red Wing Shoe Co.*, 343 So. 3d 106, 110-13 (Fla. Dist. Ct. App. 2022) (plaintiff did not have “an injury-in-fact that is concrete and particularized to meet standing requirements” under Florida law); *see also Limon v. Circle K Stores Inc.*, 84 Cal. App. 5th 671, 707 (2022) (no standing for FCRA claim based on improper disclosures because plaintiff could not satisfy standing requirements under California law).

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. Here, not only is there uniformity among the federal lower courts but the U.S. Supreme Court has spoken on this issue, too, as further discussed below.

As a practical matter, this means that abandoning the injury-in-fact requirement for standing in this case would make Illinois a safe haven for no-injury FACTA cases that are rejected in federal courts and around the country. Illinois has already become a magnet for suits that other states would simply refuse to hear because they are unworthy of judicial resources. The effects of this shift are already reverberating in Illinois and elsewhere. *See Cinemark Br. 15-18; Richardson v. IKEA N. Am.*, 2021 CH 5392 (Ill. Cir.

Ct. Cook Cnty.); *Neal v. Cinemark USA, Inc.*, Case No. 21STCV44508 (Los Angeles Cnty.); *Rodriguez v. Cinemark USA, Inc.*, 2023 CH 1857 (Ill. Cir. Ct. Cook Cnty.). And this migration could well apply to other federal statutes, not just FACTA. *See, e.g., Stallworth v. Terrill Outsourcing Grp., LLC*, No. 2021-CH-02936, 2023 Ill. Cir. LEXIS 3 (Ill. Cir. Ct. Cook Cnty. Mar. 15, 2023) (rejecting 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).

The migration of no-injury FACTA cases to Illinois would likely lead to Illinois becoming the primary arbiter of the meaning of this federal statute. There is no reason to believe Congress intended such a state of affairs with respect to this or any other consumer protection statute.

In light of the interest in preserving uniformity of the law 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 this overwhelming consensus. As the Supreme Court has explained, "federal statutes are generally intended to have uniform nationwide application." *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989). It would be passing strange for the application of FACTA to hinge on the vagaries of state standing law, and the lack of uniformity is a result that Congress certainly would not have intended.

III. Congress Did Not Authorize An Uninjured Cardholder Like Plaintiff To Sue Under FACTA.

Beyond the question of Illinois standing law, this Court can and should reverse because FACTA should not be construed to allow a no-injury plaintiff barred from suing in federal court to nonetheless sue in state courts that have dispensed with the injury-in-

fact requirement. This provides a fully independent basis to reverse the class certification ruling.

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*, 141 S. Ct. at 2204-05 (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 2207. That is because 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.* at 2207. “Private plaintiffs are not accountable to the people and are not charged with pursuing the public interest in enforcing a defendant’s general compliance with regulatory law.” *Id.* Illinois law is the same. *People ex rel. Madigan v. United Constr. of Am., Inc.*, 2012 IL App (1st) 120308, ¶ 15 (distinguishing between the Attorney General, who may sue for statutory violations regardless of harm from the violations, and individual plaintiffs seeking to enforce a statute, who must themselves have suffered harm).

Federal courts have long recognized that federal statutes should not be interpreted in such a manner as to raise such a significant constitutional question, at least in the absence of clear language in the statute compelling such an interpretation. *See, e.g., United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (“A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional, but also

grave doubts upon that score.”); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). And Illinois courts have repeatedly recognized a similar principle. *See, e.g., Walker v. Chasteen*, 2021 IL 126086, ¶ 30 (“Statutes carry a strong presumption of constitutionality, and this court will construe a statute to preserve its constitutionality if reasonably possible.”); *People v. Clark*, 2014 IL 115776, ¶ 9 (“This court has a duty to construe a statute in a manner that upholds its constitutionality, if reasonably possible.”); *Presley v. P&S Grain Co.*, 289 Ill. App. 3d 453, 462 (5th Dist. 1997) (“Courts should avoid construing a statute in a manner that raises substantial questions concerning the statute’s constitutional validity.”). If this Court applies that presumption here, it would conclude that Congress has *not* authorized Fausett to bring her suit in Illinois any more than it has authorized her to bring her suit in federal court. There is certainly no clear statement in the statute that Congress intended to allow uninjured plaintiffs to sue in state courts open to such suits, but not in any federal court.

There are also strong practical reasons to read FACTA that way. Private plaintiffs suing to seek redress for invasions of legally cognizable interests can be counted upon to not distort the law in a manner that undermines the public interest. Private plaintiffs free to sue to enforce regulatory requirements untethered to any personal interest can pursue litigation for reasons unrelated to the policies advanced by the statute. In addition, were Illinois courts to remain open for FACTA claims not justiciable in federal courts, there is a risk that Illinois would be tasked with providing significant guidance on the

construction of federal law. That would disrupt the ordinary process of judicial consideration of questions of federal statutory construction, where district court rulings are subject to federal appellate review, whose judgments bind all district courts within their circuits. Given that the only federal court capable of reviewing an Illinois judgment is the U.S. Supreme Court, and such review is never a matter of right, there would develop a binding-in-Illinois-state-courts-only body of FACTA law. There is no reason to believe that Congress intended such an anomalous result.

Moreover, allowing uninjured plaintiffs to bring putative class actions seeking statutory damages raises serious due process concerns that Congress would not have intended. “When combined with the procedural device of the class action, aggregated statutory damages claims can result in absurd liability exposure in the hundreds of millions—or even billions—of dollars on behalf of a class whose actual damages are often nonexistent.” Sheila B. Scheuerman, “Due Process Forgotten: The Problem of Statutory Damages and Class Actions,” 74 *Mo. L. Rev.* 1, 2 (2009) (discussing FACTA claims in particular). If courts do not require an injury in fact in these cases and a class is certified, the class will invariably include uninjured members. Imposing an aggregate statutory damages remedy in such cases would be difficult, if not impossible, to square with the U.S. Supreme Court’s punitive damages decisions. Whenever uninjured class members recover statutory damages, the award would be punitive because it would bear no rational relationship to the class members’ harms. The extent of the issue is vividly demonstrated here, where the circuit court certified a 1.6 million member class based on a no-injury plaintiff in circumstances where statutory damages of \$100 to \$1,000 *per class member* is provided. As the Supreme Court has made clear, “[a] defendant should be

punished for the conduct that harmed the plaintiff’ and thus the Due Process Clause requires some reasonable ratio between actual and punitive damages. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996). Courts should assume Congress did not intend to place FACTA at odds with the Due Process Clause.

CONCLUSION

For the foregoing reasons, Walgreens respectfully requests that this Court reverse the order certifying a nationwide class of approximately 1.6 million people and direct the circuit court to dismiss the case for lack of standing.

Dated: December 6, 2023

Respectfully submitted,

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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 words contained in the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, 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 10,502 words.

/s/ Robert N. Hochman
Robert N. Hochman

No. 129783

IN THE SUPREME COURT OF ILLINOIS

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

NOTICE OF FILING AND PROOF OF SERVICE

I, Robert N. Hochman, an attorney, hereby certify that on December 6, 2023, I caused the foregoing Opening Brief and Appendix of Defendant-Petitioner Walgreen Co. to be electronically filed and served upon the Clerk of the Supreme Court of Illinois through the Illinois e-filing system. I further certify that on December 6, 2023, I caused a true and correct copy of the foregoing to be served via e-mail and by U.S. mail with proper postage upon the counsel of record listed below.

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Within five days of acceptance by the Court, the undersigned states that 13 paper copies of the Opening Brief and Appendix of Defendant-Petitioner bearing the court's file-stamp will be sent to the above court.

/s/ Robert N. Hochman
Robert N. Hochman

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 instrument are true and correct.

/s/ Robert N. Hochman
Robert N. Hochman

No. 129783

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.

**APPENDIX TO OPENING BRIEF OF DEFENDANT-PETITIONER
WALGREEN CO.**

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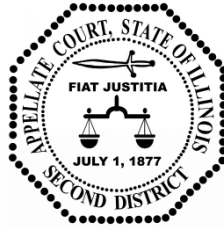
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**ILLINOIS APPELLATE COURT
SECOND DISTRICT**

**55 SYMPHONY WAY
ELGIN, IL 60120
(847) 695-3750**

May 18, 2023

Robert Maxwell Andalman
A&G Law LLC
542 South Dearborn Street, 10th Floor
Chicago, IL 60605

RE: Fausett, Calley v. Walgreen Co.
Appeal No.: 2-23-0105
County: Lake County
Trial Court No.: 19CH675

The court has this day, May 18, 2023, entered the following order in the above entitled case:

Appellant's petition for leave to appeal is denied. THIS ORDER IS FINAL AND SHALL STAND AS THE MANDATE OF THIS COURT.
(Mullen, McLaren, Jorgensen, JJ.)

Jeffrey H. Kaplan
Clerk of the Court

cc: Diana Carolina Guler
Keith James Keogh
Lake County Circuit Court
Michael Scott Hilicki
Rachael Cecelia Brennan Blackburn

IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS, CHANCERY DIVISION

FILED

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

Plaintiff,

v.

WALGREEN COMPANY
(d/b/a "Walgreens"),

Defendant.

Case No. 19CH00000675

MAR 01 2023

Hon. Donna-Jo Vorderstrasse

*Case Certified to Illinois
Circuit Court*

ORDER

This matter coming to be heard on the following motions: (1) Plaintiff's Amended Motion for Class Certification; and (2) Plaintiff's Unopposed Motion to File Confidential Material under Seal, IT IS HEREBY ORDERED:

1. Plaintiff's Amended Motion for Class Certification is granted for the reasons, and with the modifications to the proposed class definition, stated on the record at the March 1, 2023 hearing on the motion. The hearing transcript shall be filed with the Court.
2. Plaintiff's Unopposed Motion to File Confidential Material under Seal is granted.

SO ORDERED

Donna-Jo Vorderstrasse
Hon. Donna-Jo Vorderstrasse

03/01/2023

Prepared By:

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IN THE CIRCUIT COURT OF THE 19th JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS

CALLEY FAUSETT,)
)
Plaintiff,)
)
vs.) No. 19 CH 675
)
WALGREENS COMPANY,)
)
Defendant.)

REPORT OF PROCEEDINGS had and testimony taken at
the hearing of the above-entitled cause before the
Hon. Luis Berrones, Judge of said Court, commencing on
November 22, 2019 at 10:33 a.m., at the Lake County
Courthouse, 18 North County Street, Room C-204,
Waukegan, Illinois.

As Reported By: Susan R. Pilar
Certified Shorthand Reporter
CSR No. 84-003432



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On behalf of the Defendant.

1 MR. HILICKI: Good morning, Your Honor.
2 Michael Hilicki for the plaintiff. Do you prefer us
3 to stand on one side or the other?

4 THE COURT: It doesn't make any difference.

5 MR. HILICKI: Okay.

6 MR. ANDALMAN: Robert Andelman for Walgreens.

7 THE COURT: This is Walgreens' Motion to
8 Dismiss the First Amended Complaint.

9 MR. ANDALMAN: It is.

10 Your Honor, the motion presents a
11 pure issue of law which we think is dispositive of the
12 entire case. There's not any dispute about what
13 happened here.

14 Miss Fausett walked into a Walgreens
15 store in Phoenix in March. She took out \$205 in cash.
16 She used that cash which -- which Walgreens accepted
17 to load value on a prepaid card and she got change
18 back. She also received a receipt that included the
19 last four digits of the prepaid card number that was
20 loaded with value and also the first six digits.

21 The first six are known as the banner
22 bank identification number and it's to evidence the
23 bank that owed Miss Fausett the value loaded on the
24 card. The receipt states on its face that Walgreens

1 does not exchange or refund card value and that's the
2 only proof the customer has of a card cash fund load
3 is her receipt.

4 It's a cash transaction and that's
5 why Walgreens states on the receipt that the receipt
6 itself should be safeguarded and it includes the BIN
7 so that the customer has proof to go to the bank in
8 the event of a dispute and show that that is, in fact,
9 the bank that owes that cash value back to the
10 customer.

11 There are four reasons why this
12 doesn't state a claim from FACTA. FACTA doesn't apply
13 to transactions like this where cash is accepted. The
14 customer uses cash currency to pay for it.

15 THE COURT: Well, let me ask you this.

16 MR. ANDALMAN: Okay.

17 THE COURT: The FACTA -- I guess everybody's in
18 agreement FACTA is supposed to try to prevent identity
19 theft and, therefore, you need to truncate the numbers
20 on credit cards and debit cards and so forth.

21 And I understand your argument with
22 respect to what the statute says, but why -- and I
23 understand that they're -- you know, although they're
24 in disagreement why it's a cash-based transaction, but

1 it involves a debit card. A cash transaction to buy a
2 debit card basically is what it is, correct?

3 MR. ANDALMAN: Yeah. It's similar.

4 THE COURT: It's a gift card. It's similar to
5 getting a gift card.

6 MR. ANDALMAN: I was going to say before FACTA
7 was written the use of these what's called open gift
8 cards wasn't really around, but if you went in and
9 bought a gift card -- you go into Chili's or something
10 and buy a gift card, you're not using -- the store is
11 not accepting the gift card. Selling the gift card.
12 Same here. We're selling value. We're not selling --
13 we're accepting cash.

14 THE COURT: And if I understand it -- and
15 keeping in mind that FACTA is to prevent identity
16 theft, and I think I read in your -- your brief had
17 this person used that debit card Walgreens would have
18 complied with that, correct?

19 MR. ANDALMAN: Yeah. There's -- yes. Correct.

20 THE COURT: Correct?

21 MR. ANDALMAN: That's correct.

22 THE COURT: Why is that? What is the
23 qualitative difference between protecting an
24 individual from identify theft by when they sell the

1 card they say, you know, we can put all the numbers on
2 there, but if you're going to use it, we're going to
3 follow FACTA and truncate the number? What is the
4 distinction?

5 I mean you're still -- it's still --
6 it's the same risk because they have those numbers.
7 What is the distinction? Why is Walgreens saying if
8 you use this debit card -- and there's no question
9 it's a debit card. The issue is whether it's --
10 they're selling money to load -- they're loading the
11 debit card, but the card is a debit card, right?

12 MR. ANDALMAN: It says that.

13 THE COURT: It says on the face of it and on
14 the back this is just debit. Why is there a
15 distinction made by Walgreens and everybody else that
16 if you use this to buy a product, we're following
17 FACTA, but if we sell it to you, we don't have to
18 follow FACTA? The list is still the same.

19 MR. ANDALMAN: There's a practical answer to
20 that if I could -- if I could --

21 THE COURT: Go ahead.

22 MR. ANDALMAN: -- start there. The practical
23 answer to it is in Miss Glick's declaration when
24 customers come in and make purchases with a card,

1 whether it's a gift card or any other kind of card, it
2 just goes through the -- through one procedure. You
3 hand your card to the register and the register is set
4 to generate a receipt that truncates the numbers.

5 This kind of transaction, which only
6 began relatively recently at Walgreens, is universal
7 swipe reloads where Walgreens would load value onto a
8 card were designed I think it was in 2014 Miss Glick
9 says, and when they designed it, they said okay,
10 because this is a cash transaction and because the
11 customer needs to have that number in the event that
12 there's a dispute with the bank, it's helpful to the
13 customer, we are going to create a different -- a
14 procedure that -- that doesn't go through the
15 register. It's a different procedure.

16 It's not that FACTA has -- my view is
17 that FACTA doesn't apply if you used a general use
18 prepaid card to make a purchase. The point is it just
19 gets into the law of transactions at the register.

20 This was designed differently to help
21 customers so that they would have a basis since it's a
22 cash transaction, since there's no evidence of the
23 transaction but for the receipt to give them the
24 ability to go to the bank and say, you know, here's

1 the -- the evidence.

2 THE COURT: But they can do that. They have
3 the physical card. They have a truncated number on
4 the receipt. I mean it -- I see this all the time.
5 They can match it up and say okay, you know -- how
6 many -- how many -- how many cards do they issue that
7 have the same last four digits?

8 MR. ANDALMAN: Well, but the -- the customer
9 loses the card there's no remedy because they don't
10 have a relationship with the bank. I mean one of the
11 things that makes these cards different and why I
12 think it falls outside of FACTA is because these are
13 unbanked customers.

14 That's why people use these cards.
15 And so they don't have their own bank accounts. They
16 don't have relationships with the banks. They have a
17 card. They take cash. They put it on. So there is a
18 reason why you use it and, you know, this BIN number
19 in terms of the risk -- I know they attach this
20 declaration that they used in a case down in Atlanta
21 about the BIN numbers.

22 That wasn't involving prepaid cards,
23 but there's -- I don't know -- something like three
24 dozen cases that we either cite or we cite cases that

1 cite in our brief that say there's no harm from
2 disclosure of the BIN number.

3 So this isn't an issue where there's
4 a risk of -- an actual risk of identity theft, but
5 the -- the real point is from Walgreens' point of view
6 we -- we might debate and come to the conclusion that
7 even though it's a cash transaction, maybe FACTA
8 should be rewritten.

9 Maybe it should include any time a
10 card is involved in a transaction except as -- in lieu
11 of saying any time a card is accepted for the
12 transaction, but that is a variation of what the
13 statute says, and maybe that's because the statute was
14 written before these kinds of cards became so
15 predominant in the marketplace, but the -- but the
16 point is from Walgreens' perspective it has an --
17 certainly an objectively reasonable reading of this
18 statute.

19 THE COURT: Wait. But that's a different
20 issue.

21 MR. ANDALMAN: I understand.

22 THE COURT: I mean that's -- that's more of a
23 substantive. Here we're in a 2-615.

24 MR. ANDALMAN: Actually that's willfulness,

1 which willfulness that's -- this is a new thing
2 bringing these cases in state court because they
3 couldn't bring it in federal --

4 THE COURT: I know, but the federal courts --
5 there are Article 3 issues in federal court with
6 standing.

7 MR. ANDALMAN: But that's a federal statute.
8 So you have a federal statute, right? And the federal
9 courts deal with the willfulness issue on 12(b)(6)
10 every time. Every case we've cited on willfulness
11 where they say objectively reasonable --

12 THE COURT: But federal court judges have much
13 more leeway in dismissing cases than the state court
14 judges.

15 MR. ANDALMAN: I would say the opposite, Your
16 Honor, because we're a fact pleading state.

17 THE COURT: I understand.

18 MR. ANDALMAN: So where is the -- where is the
19 fact that's pleaded that -- that suggests that this --

20 THE COURT: Willfulness --

21 MR. ANDALMAN: -- reading of this --

22 THE COURT: Willfulness is a factual
23 determination by -- by the trier of fact, especially
24 when you're getting into this -- this whole issue of

1 well, you know, what's -- what's -- what was the
2 status of the law with the practice, is this something
3 new, and that -- I have to make factual determinations
4 that based on this being a case of first impression
5 that it is -- as a matter of law it is not -- it
6 cannot allege willfulness because as you said it was a
7 good faith -- they read the law. There was a good
8 faith.

9 There's nothing -- there's no federal
10 case that says that this is included. There's no
11 federal case that says it's not included. It just
12 hasn't been addressed.

13 MR. ANDALMAN: Well, the federal courts -- I
14 mean it is a federal statute. I think it is
15 appropriate for the Court to give some deference to
16 how federal courts have interpreted it.

17 Federal courts when they talk about
18 willfulness in this context, they say -- okay, one
19 argument that they make, knowledge of a violation, and
20 if you have a good faith basis to -- to do what you
21 did, there's a -- if you as the judge look at the
22 statute and have to say yeah, you know what, it
23 doesn't actually say on the face of the statute if the
24 card is involved in some way in the transaction. It

1 says if it's accepted for the transaction.

2 The Court applies customary and
3 normal usage of language when it interprets a statute,
4 and if you go into a --

5 THE COURT: Okay. Let's --

6 MR. ANDALMAN: -- a store and it says -- if you
7 go into the store and they say we accept credit cards,
8 you wouldn't -- you would understand that to mean --
9 anyone would understand that to mean I can buy
10 something with a credit card, not that they load value
11 onto prepaid cards.

12 THE COURT: So what does or transaction mean at
13 the end of the section that you -- that is at issue
14 here? I mean it says in general except as otherwise
15 provided in this subsection no person that accepts
16 credit cards or debit cards for the transaction of
17 business shall print more than the last five digits of
18 a card number or the expiration date upon any receipt
19 provided to the cardholder at the point of the sale or
20 transaction.

21 They didn't end it at the point of
22 the sale, which then I would agree with you. When you
23 go in and buy -- thought about buy something. This is
24 talking about more than just buying. At first I said

1 well, what does a transaction mean? It could be a
2 refund --

3 MR. ANDALMAN: That's exactly what it would be.

4 THE COURT: -- but it could be -- transaction
5 could be many, many things.

6 MR. ANDALMAN: It could, but there's -- it
7 couldn't have been this. I mean it has to be a
8 return, right? If it had said sale, then it wouldn't
9 apply to returns --

10 THE COURT: Yeah, but --

11 MR. ANDALMAN: -- so it would have to be
12 broader than that.

13 THE COURT: -- even if this didn't exist at the
14 time of the sale, if I give transaction its normal
15 everyday meaning, which I have to in interpreting
16 statutes, this would be included because it is a
17 transaction of a business who accepts credit cards or
18 debit cards and it involves a debit card. There's no
19 question this is a debit card.

20 MR. ANDALMAN: We disagree for the reasons we
21 gave but won't engage on that, but I will say you have
22 to look at both parts of it together. Did Walgreens
23 accept the card for the transaction or -- or --
24 whatever the transaction was. Did it accept the card

1 for the transaction? No. It accepted cash for the
2 transaction because in the normal use when you say do
3 you accept credit cards, it means do you accept them
4 to pay for the transaction.

5 You can't -- you can't parse the
6 statute the way they're trying to do with that
7 argument and say well, it says sale or transaction at
8 the bottom, yes, but it's if you accept the card for
9 the transaction or sale.

10 So accepting the card really only has
11 one common meaning, which is I accept the card to pay
12 for the transaction, and -- and what they're doing --
13 I give them credit. I mean it's creative, but there's
14 no regulation that's ever suggested that this is a
15 proper application. No statement by any
16 administrative agency and so --

17 THE COURT: But --

18 MR. ANDALMAN: -- and no Court has ever held --

19 THE COURT: -- if you look at the reason for
20 the statute, the reason for the statute is to protect
21 people from identity -- I mean you just can't look at
22 these sections in isolation. You have to look at what
23 the statute was meant to protect.

24 MR. ANDALMAN: Well, I don't know. If -- we're

1 not legislators in this room so --

2 THE COURT: I know. That's why I have to look
3 at the whole statute, what does the legislature intend
4 to do so that I can give the statute its appropriate
5 interpretation.

6 MR. ANDALMAN: But you start with whether or
7 not it's ambiguous before you start talking about --

8 THE COURT: Well, frankly, that was my other
9 question. I mean the way this is written it could
10 very well be ambiguous.

11 MR. ANDALMAN: It's -- they're arguing an
12 ambiguity that doesn't exist. They're saying well,
13 accept. Well, what does it mean to accept a credit
14 card?

15 Anyone outside of this room and in
16 the 1,200 cases before today would say oh, accepting a
17 credit card means to pay for the transaction. Now
18 they want to say no, accepting could be something
19 totally different.

20 THE COURT: Assuming I agree with that, then
21 what is for transaction? Because you don't accept a
22 credit card for a refund.

23 MR. ANDALMAN: Well, but --

24 THE COURT: I mean you're giving them -- an or

1 transaction could mean many other things. So what
2 is -- what is -- I have to give effect of all the
3 words in the statute. What does that mean?

4 MR. ANDALMAN: It could be a return. It could
5 be a refund.

6 THE COURT: But they're not accepting it -- a
7 credit card is not a return.

8 MR. ANDALMAN: It is a return. It is actually.

9 THE COURT: How do they accept -- okay. How --
10 how do they accept --

11 MR. ANDALMAN: Because when you -- if you've
12 ever done a return with a credit card --

13 THE COURT: I know, but --

14 MR. ANDALMAN: -- you hand the credit card to
15 the person, they accept the card, and they -- and they
16 refund it to that card --

17 THE COURT: And when they reload the card,
18 don't they hand the card to the person and they reload
19 it with money?

20 MR. ANDALMAN: Well, I mean they hand you a
21 KitKat when you buy it too, but they didn't use --
22 they don't -- they didn't accept the KitKat for a
23 transaction.

24 THE COURT: I mean this is not a distinction.

1 I mean they're taking the card. When you reload,
2 they're taking the card.

3 MR. ANDALMAN: It is the subject of the sale.
4 It is not being accepted for the transaction and so --
5 you know, that is what Congress said. I think we
6 probably would all agree that Congress was not
7 thinking about these cards.

8 THE COURT: Probably.

9 MR. ANDALMAN: They weren't certainly not
10 referenced anywhere in their legislative history. The
11 statute's been updated many times since then. It's
12 never been referred to. It's never been in over a
13 thousand cases argued this way.

14 THE COURT: Congress has never been accused of
15 having a lot of common sense so . . .

16 MR. ANDALMAN: No, but we're a state court here
17 and we're going to say you know what, probably should
18 have written this better. We think we know what you
19 Congressmen intended. We're going to try to turn the
20 language around to try to get to a resolve.

21 I mean it's -- it would be a
22 significant ruling. I mean I think we would probably
23 be back on a 308 motion in a couple weeks if you went
24 that way because it literally is a legislative

1 decision. Can't stop you from making it.

2 THE COURT: Well, I -- I make it based on what
3 I'm reading. I mean it's -- anyway, go ahead.

4 MR. ANDALMAN: If I can move on to this issue
5 of willfulness -- and I know we've touched on it
6 briefly, but it is decided in -- in all FACTA cases
7 that I have looked at as a matter of law on a 12(b)(6)
8 basis, and the issue is if it's an objectively
9 reasonable reading of the statute, number one, and,
10 number two, whether there is any contrary case law,
11 regulation or administrative guidance, and if those
12 things don't exist, then case after case that we've
13 cited, but starting with the Shlahtichman case that we
14 cited in our opening brief, it's a Seventh Circuit
15 case that said that there can't be willfulness as a
16 matter of law and without willfulness you don't have a
17 case like they do when there's no actual damage and
18 they're just seeking statutory damages.

19 In Shlahtichman the actual facts were
20 the Seventh Circuit was dealing with whether an
21 electronic transmission of a receipt constituted a
22 receipt under this statute and the Court said we don't
23 think it does, but even if we're wrong, there couldn't
24 be willfulness because no court has ever suggested

1 that getting it electronically is the same thing as
2 getting it on paper, and that was the holding of that
3 case.

4 Similar kind of debate. If they
5 wanted to say well, it's all about identity theft, you
6 would look at their computer hacked. People have
7 their email accessed. We think the most protective
8 thing would be to construe a receipt to include an
9 electronic receipt.

10 They didn't go there, but they said
11 even if we did go there, there wouldn't be a cause of
12 action here because here this party -- this retailer
13 acted reasonably. It's an objectively reasonable
14 interpretation, we didn't have a debate about it, and
15 there's absolutely no guidance out there to suggest
16 that it's wrong.

17 I'd also like to address -- we
18 touched on the debit card issue and I promised I
19 wouldn't argue it so I won't further, but the -- the
20 standing issue I think is significant, and the fact is
21 that Miss Fausett could not bring this case in federal
22 court in Arizona where her transaction happened and
23 where she lives.

24 She couldn't bring it in federal

1 court in the Seventh Circuit in Illinois because the
2 Seventh Circuit has held that technical violations of
3 FACTA just don't cause actual harm.

4 Since we started briefing this one of
5 the only federal circuits that came up differently,
6 the Eleventh Circuit, where two of the three cases
7 relied upon by the Duncan case came from. That
8 decision was vacated and is being reheard on bond by
9 the Seventh Circuit. The Eleventh Circuit. That
10 happened on October 4th of this year last month.

11 The federal courts pretty much
12 uniformly have said in cases involving disclosure of
13 the BIN that there just isn't enough harm there as a
14 matter of law to support standing.

15 The notion that we're going to come
16 to state court where the difference in standard is
17 actually -- it's characterized as actual harm in the
18 federal cases and it's characterized as distinct and
19 palpable harm in state cases, and as the Second
20 District held in Maglio, that's not a -- a distinction
21 with a difference. Not a substantive difference.

22 Here, though, the right that's at
23 issue is a federal right. Federal statutory right.
24 So what Miss Fausett is trying to do -- and I expect

1 other plaintiffs are going to be doing this since
2 there's pretty much uniformity is they're saying that
3 in this case where there is a federal statutory right
4 in the federal courts that construe the federal
5 statutes say this isn't the kind of harm that Congress
6 intended to allow for a private cause of action, we're
7 going to go to state court and have the state court
8 apply the federal law differently than the federal
9 court.

10 That kind of lawn shopping I think is
11 unsupportable and I think if this Court followed what
12 the Second District did and, hopefully, will do if we
13 get up there on this issue in Maglio -- and Maglio is
14 almost exactly like this.

15 Maglio is a case about identity
16 theft. There's an Illinois statute there, data
17 protection statute. If Illinois statute is allegedly
18 violated, the plaintiff came in and said I'm at
19 increased risk of identity theft, couldn't articulate
20 any way in which her identity had been compromised,
21 and the Second District held as a matter of law
22 confirming dismissal under a 2-619 or 2-615, one of
23 the two, confirmed dismissal as a matter of law
24 because they said that doesn't support standing under

1 Illinois law under this Illinois statute, just
2 thinking I might be under additional risk.

3 We're going to be up there. We're
4 going to argue that. It makes sense to me, frankly,
5 for this Court to be following the Second District's
6 rationale in that regard even with that Illinois
7 statute, but even more so where the federal courts
8 wouldn't allow this federal cause of action to proceed
9 using the exact same kind of reasoning.

10 THE COURT: Yeah, but even the federal courts
11 because of their constitution of limits on
12 jurisdiction have said what can't be brought in
13 federal court may very well be brought in state court.
14 I mean they -- they recognize that while they're
15 dismissing cases left and right.

16 MR. ANDALMAN: It happens sometimes, but it
17 doesn't happen generally with regard to federal
18 statutory causes of action. These cases aren't being
19 decided by reference to the -- to the Constitution so
20 much as they're being decided based on the fact that
21 they're saying the statute says, you know, you have a
22 private cause of action, but you need to have some
23 actual harm disclosure --

24 THE COURT: But the Constitution requires that



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1 under Article 3 for standing for federal jurisdiction.

2 MR. ANDALMAN: And Maglio says under Illinois
3 law if the standards in this -- other than the fact
4 it's a state statute and not a federal statute, the
5 Data Protection Act.

6 Other than that Maglio says just
7 saying hey, I might be under some potential additional
8 risk here isn't enough to give you standing under
9 Illinois law with an Illinois cause of action.

10 THE COURT: But, again, I mean -- and here's
11 the problem you have, and the problem is that Duncan
12 is right on point and, frankly, whether I agree with
13 it or disagree, that is the law of the state because
14 the Second District has not addressed that specific
15 issue. It was a different issue they've addressed on
16 it and, frankly, Maglio -- I don't know the viability
17 of Maglio after the Rosenbach case.

18 MR. ANDALMAN: Rosenbach is a completely
19 different case again because --

20 THE COURT: It was my case. I'm very familiar
21 with it, but the court -- the Supreme Court was very
22 expansive in the protection of the privacy interests.

23 MR. ANDALMAN: Yeah, but the standard they
24 applied -- I need my glasses for that, my notes are

1 too small -- 34 of Rosenbach was of real and
2 significant harm. An allegation of real and
3 significant harm. That's not this situation.

4 THE COURT: But the portions -- the portions
5 that were certified was was there any other harm that
6 was required to be alleged other than that a violation
7 of the statute occurred and they said no, that there
8 wasn't -- I mean they may have said something else,
9 but the ruling stands for the fact that a violation of
10 the statute is all that is needed for purposes of
11 standing in order to state a cause of action under
12 the --

13 MR. ANDALMAN: Under BIPA.

14 THE COURT: -- under BIPA, yes.

15 MR. ANDALMAN: Yeah.

16 THE COURT: I mean that's -- that's the
17 direction the courts are going.

18 MR. ANDALMAN: Yeah. I think BIPA is a
19 different kind of case. I don't -- I mean it's not
20 the direction we went in Maglio. It's definitely not
21 the direction that -- that the federal courts have
22 gone.

23 Duncan -- Duncan is a fundamentally
24 flawed case and, you know, maybe we'll argue -- end up

1 arguing that. Like I said, when I read Duncan -- I
2 was reading it yesterday -- and Duncan says the
3 federal courts -- we find most persuasive in the
4 federal courts these three decisions. None of them
5 are good law today. Not one of them. Either
6 reversed, vacated -- I mean they're not -- they're not
7 the law.

8 So when -- when I look at Duncan,
9 Duncan on each point, Duncan says well, you know,
10 Glick and Glisson -- or -- that they say -- or Greer
11 and Glisson they say Illinois provides much higher
12 standard, but when you look at the actual facts, the
13 actual holdings of those cases, you know, one of
14 them -- Greer involves actual diminution in property
15 value.

16 The other one, Glisson, involves a --
17 a challenge from environmental statutes and the
18 standing was based on an Illinois constitutional
19 provision that specifically says you have a right to a
20 healthy environment. They alleged I don't have a
21 healthy environment.

22 So there were actual distinct and
23 palpable harms. Not, you know, well, it's possible
24 because this receipt has the extra six digits that I

1 might be subject to additional risk of having my
2 identity disclosed.

3 Which violation? She says she kept
4 the receipts. She had them. She gave them to us. So
5 it's not like her identity is actually at risk right
6 now, I guess, unless someone breaks into her house and
7 steals the receipts or her lawyer's offices.

8 I mean the whole thing is so
9 speculative and unsupported. You know, it's -- on --
10 on certainly each of the three issues that we've
11 discussed it makes, you know, novel law and, you know,
12 Duncan -- you can say well, Duncan is established, but
13 a different First District panel first held the other
14 way and then after Duncan the First District vacated
15 it and -- or not vacated it. They said it was
16 unpublished. It's actually still the law --

17 THE COURT: Rule 23?

18 MR. ANDALMAN: It's Rule 23.

19 THE COURT: So it's not --

20 MR. ANDALMAN: That's why we didn't cite it.
21 That's why we didn't cite it, but I only raised it to
22 show that even within the First District there's
23 disagreement on this particular issue. This specific
24 issue.

1 So I would let my --

2 THE COURT: Go ahead.

3 MR. ANDALMAN: -- colleague say something.

4 MR. HILICKI: Thank you, Your Honor. Thank
5 you, Counsel.

6 I'll go back to the beginning here to
7 address a few points. Your Honor said a lot of things
8 I was going to say so I don't have to repeat them, but
9 the fact that Walgreens created its own internal
10 procedure and decided it's a good idea to violate the
11 statute by putting too much card information on these
12 fund loaded transaction receipts doesn't change what
13 the law is.

14 They still have to comply with the
15 law, and even if they deliberately chose to violate
16 it, it doesn't change the fact that they should be
17 held liable for that.

18 Second --

19 THE COURT: Well, if you do read this section,
20 it doesn't -- I mean when you say they deliberately
21 violated it, I mean it could be interpreted the way
22 Walgreens interpreted that when you provide a debit
23 card or credit card, you pay for it -- you pay in a
24 transaction, that that's when that takes effect or

1 that's when it applies.

2 MR. HILICKI: Well, Your Honor, I respectfully
3 disagree. I mean it can be read any way. Is it a
4 frivolous argument? I don't know if I want to go that
5 far, but I don't think it's a reasonable one given
6 that as you said it applies to any receipt provided to
7 the cardholder at the point of the sale or
8 transaction.

9 Now, counsel tried to make it sound
10 well, it says accept cards. Accept cards. What does
11 that mean? The statute doesn't start off talking
12 about accepting the particular card that the consumer
13 is using or -- or that's involved with the
14 transaction.

15 It says no person that accepts credit
16 cards -- plural -- or debit cards -- plural -- for the
17 transaction of business. So this is a general overall
18 hey, if you're the kind of operation that accepts
19 these cards, then this statute applies to you. It's
20 not talking about the particular card that you're
21 bringing to --

22 THE COURT: So you're not talking about the
23 particular transaction that's -- that's happening.

24 MR. HILICKI: Exactly. It's plural. It's not



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1 singular here. So it implies -- it's just saying hey,
2 if you have this kind of operation, then this statute
3 applies to you and you got to do what we say, which is
4 you must always, always, always truncate card numbers,
5 print no more than the last five digits on any
6 receipt, any receipt, provided to the cardholder at
7 the point of a sale if it's a sale or other
8 transaction.

9 And the return transaction is
10 actually a great example because a return transaction
11 you give them the card -- you give them the goods, you
12 give them the card and they put value on the card.
13 Value on the card for the goods you're returning.
14 Here when you fund load a transaction, you give them
15 the card, you give them the cash and they put the
16 value on the card.

17 It's the same thing. It's just the
18 money is coming from two different places. In a fund
19 load transaction it comes from the consumer. In a
20 return transaction it comes from the merchant, but
21 that statute doesn't distinguish where the money is
22 coming from. It doesn't care.

23 All it cares about is how many digits
24 are you are putting on that receipt because if you put



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1 too many on there, then Congress has decided that that
2 creates a real risk of identity theft and we need to
3 prevent that from happening.

4 So an identity thief can go find the
5 receipt in the trash, and it doesn't matter if it's a
6 return or an exchange or a card load or a purchase.
7 The identity thief doesn't care how the digits got on
8 the receipt. All he or she would care about is that
9 they found the receipt -- or she found the receipt in
10 the trash can or wherever or if it got lost.

11 Well, in this case counsel said she
12 kept the receipt. There's no risk. They -- they
13 attached it to their motion. It's in the court file.
14 They've broadcast it for the public.

15 So that sort of thing can happen.
16 Even if the customer keeps the receipt, they could
17 still lose it later or they could misplace it or if
18 they sue the merchant, the merchant can publish it in
19 the court file for all the world to see.

20 In fact, one of the cases we cite,
21 the Jeffries case, the most recent federal court
22 appellate opinion on the subject. It's out of the DC
23 Circuit.

24 It found that violating FACTA does



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1 create a real risk of harm. Or it didn't actually
2 find it itself. It said Congress found that.
3 Congress identified a real risk of harm in disclosing
4 more than the last five digits on the receipt. We
5 need to protect consumers against that risk or
6 cardholders against that risk and that's why we put
7 this truncation into place.

8 It's not like a Maglio case where the
9 consumer says I decided there's a risk of harm because
10 there was a data breach at this outfit and the statute
11 in question didn't say thou shalt not data breach.
12 It's a notice statute. You have to give notice of the
13 breach.

14 The plaintiff is trying to shoehorn
15 their facts, which is -- what I -- was risk of harm I
16 thought of into a statute that wasn't specifically
17 designed for that purpose.

18 Here the fact that exists precisely
19 for this circumstance applies precisely to this
20 situation, which is the generation of a receipt that
21 discloses more than the last five digits of the card
22 number. That's ten digits, which is two-thirds of the
23 credit -- or debit card number.

24 So if an identify thief finds this,

1 they're a long way towards getting the whole credit
2 card number, which is one of the risks talked about by
3 the expert report that we attach that creates from a
4 different case, but if this case proceeds, I'm sure we
5 will probably be engaging that same expert and he'll
6 be giving the same exact opinion that he gave in this
7 case.

8 So -- so the statute -- on its face
9 the statute applies and there's no reasonable
10 alternative reading. They try to read exceptions into
11 the statute that don't exist. You can't have a cash
12 purchase involved. The statute doesn't say anything
13 about it. The statute doesn't even require a purchase
14 for the reasons we have discussed.

15 Was Congress thinking about prepaid
16 debit cards? I would say it's highly likely because
17 the Federal Register section -- and I'll give you the
18 page number in case you want to peruse it later is --
19 here we go. It's 81 Federal Register 83934 and pin
20 site is 936, I believe.

21 November 22, 2016 is the -- this
22 talks about prepaid cards and it elaborates. It's
23 almost like a legislative history, if you will, or
24 maybe just an industry history, but it said in 2003 --

1 which is the year that FACTA was enacted. At that
2 point in time the prepaid card industry was already a
3 billion dollar industry. So there's a very good
4 chance it was on Congress's radar, and Congress
5 certainly would have known about return transactions,
6 exchange transactions, which is why when it wrote the
7 statute, it wrote it broadly.

8 It wanted to limit sales only. Like
9 you said they just lopped off the word transaction and
10 maybe tuned up that first sentence to say if you
11 accept a card -- or a debit card or a credit card,
12 then you must do this rather than just you accept in
13 general.

14 I think that's all I have to add
15 about -- oh, counsel said the statute has been amended
16 many times. They didn't change it to specify that it
17 should cover prepaid cards in the statute. It's all
18 been amended, and that was the Clarification Act that
19 was passed back in 2008, and that statute only deals
20 with expiration date claims.

21 They created a temporary amnesty for
22 claims arising under FACTA for failing to mask the
23 card expiration date. They didn't touch the language
24 that talks about masking the first six -- or masking

1 all but the last five digits of the card.

2 In fact, the legislative history for
3 that section, the preamble to that section, says that
4 the reason they're making -- they're creating this
5 temporary amnesty for expiration date claims is
6 because experts agree that proper truncation of the
7 card number, which is what we're dealing with here,
8 was enough to protect against the risk of identity
9 theft that Congress was trying to pass this statute
10 for.

11 So Congress thought they made
12 theirselves clear the first time around in 2003 and
13 that's why they haven't changed the statute for this
14 particular requirement.

15 On the willfulness there -- the
16 Safeco vs. Burr case -- Burr I guess if you're a
17 Hamilton fan -- case talks about -- it says there's
18 two different ways to establish willfulness. Either a
19 knowing violation, violation of the knowledge of law,
20 or recklessness, and in their brief all they talk
21 about -- both the opening brief and the reply brief --
22 is the test for recklessness, the objectively
23 reasonable reading of that.

24 They don't talk about knowing

1 violation of law. We pled both. But they've known
2 about the law since who knows when. They programmed
3 their computers to comply with it and payment
4 transactions, even including payment transactions
5 where they accept prepaid debit cards.

6 They are contractually obligated to
7 comply with the law through their relationships with
8 AmEx, Visa, MasterCard, and despite this awareness of
9 the statute, they did what they did here, which is
10 generate these receipts that displayed more than the
11 first -- it displayed ten digits of the card numbers.
12 So they don't -- there's no dispute being pled for
13 2-613. The 615 section of their brief pled a knowing
14 violation.

15 And then on the recklessness issue we
16 don't think they're reading the statute subjectively
17 reasonable. They haven't showed they even had it in
18 mind when they -- when they programmed their computers
19 to do what they did.

20 The Shal -- I can't even pronounce
21 it -- that Seventh Circuit case -- I'm going to call
22 it the 1-800 Contacts case because that was the
23 defendant -- that they relied so heavily on that case
24 touches on it very heavily, but it didn't really reach



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1 the issue because the bulk of the opinion found that
2 the defendant didn't violate the law to begin with.
3 So there's no violation. So there's no need to talk
4 about whether it was willful or not because there was
5 no violation in that case.

6 And also contrary to counsel -- I
7 think counsel said that case held that there's no --
8 no court has ever found that under the facts at issue,
9 which was they were dealing with email receipts as
10 opposed to receipts being printed at the point of
11 sale. No court had found any violation.

12 I believe some courts in that case
13 had actually -- there's some district court case that
14 says that they found that that was still a violation
15 so -- so there was some disagreement there but, again,
16 they didn't need to reach the issue of willfulness
17 because they disagreed with those other cases.

18 Their statutes are arguing that
19 they -- they don't have a local violation. They have
20 done a reckless violation. It seems to me they're --
21 they're kind of coming up with interpretations --
22 creative ones -- on their own, make up exceptions like
23 there's no cash sale -- cash sale exception or there
24 has to be a payment or -- for the debit card issue

1 funds can't be pooled.

2 You know, creating -- make up
3 arguments from ways to try and get around the statute
4 or have it not apply does not -- you know, does not a
5 reasonable interpretation make for lack of a better
6 expression.

7 Counsel says it's a technical
8 violation. It's not technical. It's violating the
9 Black Letter Law. The core of this statute is hide
10 those -- those card numbers. Don't put those digits
11 on the receipt. So it's right down Main Street. This
12 isn't they printed one digit. It's two-thirds of the
13 card number they put on -- on the receipt there.

14 And yet turning to the standing
15 issue, the Jeffries case mentioned out of the DC
16 Circuit that recognized that there is a harm here in
17 putting this information on the receipt because
18 Congress found there is, and Congress's judgment is
19 entitled to deference on this and the Supreme Court
20 knows that.

21 The courts can't just second guess
22 and say well, we don't believe it because that --
23 that's what Congress is there to do is to make these
24 findings and pass these laws and the courts are

1 supposed to . . .

2 The Maglio case I'd point out why
3 that's a distinguishable one. As Your Honor said,
4 none of them are legally binding. The standing rules
5 don't change based on the type of claim you have or
6 where the statute comes from.

7 The law of the United States is the
8 law of the states as well when it comes to the
9 substance of the law. I don't believe the states can
10 constitutionally say we're not going to enforce
11 federal statute unless the federal statute itself says
12 it doesn't apply there. There's no such limitation
13 here. Congress found the risk is real.

14 The Rosenbach case. That was a
15 unanimous decision. It was 7-0 so -- and standing was
16 raised in that issue and although the Court didn't
17 talk about the standing at length, I think
18 paragraph 12 mentioned it. The defendant raised
19 standing in that case.

20 Although the Court's opinion the guts
21 of it doesn't talk about standing so much, it would be
22 odd for the Court to find that all you need is a
23 statutory violation but then -- and not be thinking
24 the plaintiff had standing in that circumstance and

1 then turn around later and say well, you -- all you
2 need is a statutory violation to proceed, but you have
3 no standing the second time it goes up there if that
4 ever happens. So that wouldn't make any sense.

5 And I don't think I have any -- oh,
6 one last thing to add, and that is that -- this sort
7 of wraps it all up, but it touches on the first issue
8 and the standing issue, and that is it makes no sense
9 to say that Congress intended to require merchants to
10 mask hard digits on receipts in payment or sale
11 transactions, but at the same time decide to allow the
12 same merchants to disclose the exact same information
13 from the same card on receipts in other kinds of
14 transactions.

15 If you have to -- if you have to mask
16 this information on the prepaid debit card when you're
17 using that card to buy something, then why wouldn't
18 you have to mask that same information for that same
19 card on a receipt generated when you're doing a refund
20 or exchange or return? It doesn't make any sense to
21 think Congress would want those exempted.

22 That's all I have to say, Your Honor.
23 Thank you.

24 THE COURT: Go ahead.



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1 MR. ANDALMAN: Your Honor, I'll pick up that
2 last point. It's not the same kind of transaction or
3 the same card. He just said it's the same card. So
4 your debit card, which is linked to your bank account,
5 your credit card, which is linked to your credit
6 history, are substantively different than these
7 generally used prepaid cards which are for unbanked
8 customers and it reveals no private information.

9 If someone did hack into your card or
10 got your number, all they could ever get was the value
11 that's on the card, the \$200. They could never use --
12 take your identity because those cards aren't linked
13 to your identity. They're not reported to any of the
14 credit reporting agencies.

15 All -- the interests that drove the
16 FACTA law about identity theft don't apply on these
17 cards. They have the person's name on it, but they --

18 THE COURT: Don't I have to make those factual
19 determinations? I mean we're at -- we're at a
20 stage -- at the pleading stage where you want me to
21 dismiss this. I have to take what's alleged in the
22 Complaint as true.

23 What you -- what you're saying might
24 ultimately be true and you prevail, but right now

1 we're at a 2-615 and a 2-619 where I have to accept
2 what's being pled as being true.

3 MR. ANDALMAN: But that's something that as a
4 legal matter is true. The FDIC opinion that we cited
5 in our reply brief, which says that these accounts are
6 not insured by FDIC say the reason it's not insured is
7 because they don't belong to the customer. That's a
8 legal issue. So I -- I don't agree with that, but be
9 that as it may, if I could respond to some of these
10 other points.

11 With regards to his references to
12 Jeffries, I know why he has to cite it. It's the only
13 federal circuit court left that's held that way. The
14 Second Circuit specifically rejected that argument.
15 The Third Circuit rejected it. The Ninth Circuit
16 rejected it. The Eleventh Circuit just vacated a
17 panel decision that went that way, which means at
18 least five of the 12 judges on that circuit rejected
19 it, which also goes to his notion that this isn't just
20 a technical violation. Goes to the very heart of the
21 statute.

22 Then how come circuit after circuit,
23 three dozen different district court decisions to
24 which we directed the Court in our pleadings, they've

1 all said it doesn't really do any harm so you don't
2 have standing to bring the case in federal court.

3 If it was really this heart of the
4 issue, then you wouldn't have literally dozens of
5 courts in the majority of circuits saying you can't
6 sue because of it, you know.

7 It's the first time I've ever heard a
8 legislative history argument or a legislative intent
9 argument that isn't based on anything in the
10 Congressional record but on what counsel said was
11 well, they very well may have been thinking of that,
12 but it's not in the Congressional record.

13 You can't talk about Congressional
14 intent based on what you're speculating Congress may
15 have been thinking even though they never said
16 anything about it in the debate or any of the
17 Congressional reports, Senate report or House report
18 related to the statute.

19 You know, these cards are different.
20 We're not arguing for an exclusion or exception.
21 We're saying the statute on its face simply doesn't
22 apply to it. That's a different argument.

23 The other point that he made he said
24 that Walgreens decided to violate the law. I think

1 the Court correctly said well, actually it could be
2 interpreted as we're saying we didn't -- there's no
3 allegation -- this goes to the recklessness issue as
4 well -- there's no allegation that we knew that this
5 violated the law and violated it.

6 They haven't alleged that. All
7 they've said is well, look, Visa, MasterCard and
8 AmericanExpress gave them these guidelines. These
9 guidelines specifically talk about charging purchases.

10 I think if anything those guidelines
11 talk -- support Walgreens' position because none of
12 them say anything about fund loads and what they do
13 specifically call out is charge purchases meaning
14 credit card purchases, which is just like every case
15 they cite involves credit card purchases. So that
16 would be our response with regard to that.

17 The fact that the receipt is in the
18 file is such a -- an empty rhetoric because if they
19 really thought that this woman was at risk because the
20 receipt is in the file, then in the month and a half
21 or two months since we first filed our first version
22 of this motion they would have asked us hey, can you
23 guys redact that or they would have made a motion
24 saying our client is at risk.



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1 They want to preserve the rhetoric of
2 saying it's in the record. It could have been sealed.
3 It could have been stricken. They didn't make a
4 motion. They never contacted us and asked us about it
5 because it's not true. It's just rhetoric.

6 And so, you know, I'll close just by
7 saying, you know, our request to the Court is not to
8 accept their -- their request that you rewrite the
9 statute, and we believe it does need to be rewritten
10 in order to get them the results they want.

11 There is a reason why no court in
12 this nation has applied this statute the way they're
13 asking you to do it in 16 years.

14 THE COURT: Have they been asked? I mean when
15 you say it's not been done, it may very well be
16 because no one has ever asked.

17 MR. ANDALMAN: Maybe these are the cleverest
18 lawyers ever. I mean if all they do --

19 THE COURT: Their expert --

20 MR. ANDALMAN: Their expert, who they say
21 they're going to use again in this case, says that
22 he's testified in 676 cases. So I'm sure this will be
23 up around 700 by the time we get there in this case if
24 we actually do.



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1 THE COURT: You would be surprised. I mean
2 statutes exist for years and years and there's no
3 losses and all of a sudden -- this is the perfect
4 example of it.

5 MR. ANDALMAN: Well, this is relatively new,
6 but, you know, these guys this is what they do is
7 FACTA.

8 THE COURT: The statute's been on the books for
9 a while as far as --

10 (Multiple speakers.)

11 THE COURT: Anyway, I've considered your
12 arguments. You know, I'm -- I'm at the point where
13 this -- you know, I have to consider this as a 2-615
14 or a 2-619. I have to take what's been alleged as
15 true and with respect to the 2-619, I could look at
16 the statements of the additional information you
17 provided me with, but I think that the interpretation
18 of the statute at this point if you read it broadly
19 and I think it is -- it does cover what -- what has
20 been alleged in the Complaint.

21 Ultimately you may be able to prove
22 that this card is different than every other card and
23 that the risk there that is the -- that Congress tried
24 to protect against is not there, but at this point I

1 have to accept what's in the Complaint as true.

2 With respect to the standing issue,
3 I -- you know, the standing issue especially --
4 everybody always argues the federal court standing
5 issue with respect to the federal statutes, but I mean
6 I think the state cases are clear that I'm not bound
7 by them and the federal courts are restricted by the
8 Constitution as far as the jurisdiction they can
9 assert in the plaintiff's standing and that's not a
10 restriction that applies to a state court and standing
11 seems to be much more liberally granted in the state
12 court.

13 The willfulness, yeah, I think that's
14 a factual issue. I have to accept what they pled as
15 true and I think that may -- again, at the end of the
16 day you may be successful, you may not be, but at this
17 point in the proceedings that I have to make factual
18 determination I don't think as a matter of law I can
19 make a determination that there's -- there's no
20 willfulness. So I'm going to deny the motion. You
21 have 28 days to answer it.

22 MR. HILICKI: Thank you, Your Honor.

23 MR. ANDALMAN: Thank you, Your Honor, and thank
24 you for your time. I really do appreciate it.



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1 THE COURT: It's an interesting issue. I mean
2 it is an issue I wish I could keep, but I'm not going
3 to.

4 MR. ANDALMAN: We'll be back.

5 (End of proceedings

6 at 11:17 a.m.)
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PROCEEDINGS
 CALLEY FAUSETT vs WALGREENS

November 22, 2019
 48

1 STATE OF ILLINOIS)
) SS:
 2 COUNTY OF LAKE)

3

4 I, Susan R. Pilar, Certified Shorthand
 5 Reporter for the State of Illinois, do hereby certify
 6 that the foregoing was reported by stenographic and
 7 mechanical means, which matter was held on the date,
 8 November 22, 2019, and at the time and place set out
 9 on the title page hereof and that the foregoing
 10 constitutes a true and accurate transcript of same.

11 I further certify that I am not related to any
 12 of the parties, and I have no financial interest in
 13 the outcome of this matter.

14

15

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Susan R. Pilar

18

Susan R. Pilar, CSR
 License No. 084-003432

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 Appeared on behalf of Walgreen Company,
the Defendant.

1 THE COURT: This is the case of
2 19 CH 675 Calley Fausett, individually and on
3 behalf of other similarly situated plaintiff
4 vs. Walgreen Company doing business as
09:05 5 Walgreens, defendant. This comes forward today
6 on plaintiff's amended motion for class
7 certification and hearing thereon.

8 I would like the attorneys to
9 introduce themselves for the record.

09:05 10 MR. HILICKI: Your Honor, Michael
11 Hilicki and Keith Keogh for the plaintiff.

12 MR. KEOGH: Good morning, your
13 Honor.

14 THE COURT: Good morning.

09:05 15 MR ANDALMAN: Robert Andelman on
16 behalf of Walgreen Company.

17 THE COURT: Good morning to you as
18 well.

19 Now, there was a smaller motion
09:05 20 that is equally as important that you had asked
21 to be heard today as well. Will you just
22 summarize that for the record.

23 MR. HILICKI: Sure, your Honor.
24 It's our unopposed motion to file confidential

1 material under seal. There's certain path
2 lines in our applied brief in support of the
3 motion that we had redacted because it made
4 reference to the information that the Court had
09:06 5 already allowed to be filed under seal in
6 connection with the original motion so it's
7 just a follow onto that.

8 THE COURT: All right. So the Court
9 I understand is unopposed. Thank you. So the
09:06 10 Court will be allowing that to be filed under
11 seal and really I think it's only necessary to
12 file the one page. Do we agree?

13 MR. HILICKI: That's fine, your
14 Honor.

09:06 15 THE COURT: All right. Do you have
16 an additional copy of the under seal portion
17 that could be given to the clerk today or will
18 you just file it separately?

19 MR. HILICKI: We'll file it
09:06 20 separately, your Honor.

21 THE COURT: Thank you. All right.
22 So we are going to begin now with your
23 presentation of the motion and I understand
24 just to acknowledge for the record that we do

1 have the availability of some on-screen perhaps
2 Power Point. The Court has no problems with
3 that. If anybody has any difficulties hearing
4 or seeing anything that is presented on the
09:07 5 screen, please let the Court know. Okay. So
6 I'm going to start I believe it will be with
7 Mr. Hilicki on the amended motion for class
8 certification.

9 MR. HILICKI: Your Honor, may I
09:07 10 present from the podium?

11 THE COURT: Yes, you may.

12 MR. HILICKI: Thank you.

13 Good morning, again.

14 THE COURT: Good morning.

09:07 15 MR. HILICKI: First of all, your
16 Honor, before I get started, I want to know if
17 your Honor had any questions about the motion.

18 THE COURT: I thank you for that,
19 but you both briefed it so thoroughly I don't
09:07 20 have any questions. As you go through your
21 presentation, something may arise that I want
22 to follow up on, but off the top, no. Thank
23 you.

24 MR. HILICKI: Great. Thank you,

1 your Honor.

2 So in a nutshell, your Honor,
3 this case is ideal for class certification
4 because each class member's claim turned on
09:08 5 whether the contents of their identical
6 computer generated receipts violates FACTA and
7 whether Walgreens' alleged violation was
8 willful. So it's the same facts and law, each
9 class member provide for common resolution of
09:08 10 their claims.

11 Turning to the specific full
12 requirements of the class action statute, first
13 the numerosity requirement. Walgreens concedes
14 we meet that as it should because the class and
09:08 15 subclass each have hundreds of thousands of
16 members rendering joinder impracticable.

17 The second requirement, the
18 common questions predominate over questions,
19 any questions affecting individual class
09:08 20 members. Common issues predominate when
21 proving the plaintiff's claim will also wind up
22 proving the class members' claims so common
23 adjudication, that's certainly the case here
24 because we can prove all of their claims with

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1 common evidence as we described in our motion
2 and our reply.

3 For example, the evidence is
4 showing that Walgreens programmed its system to
09:08 5 print two reload receipts displaying ten digits
6 of its customers' debit card numbers instead of
7 being limited to the last five digits in every
8 reload transaction and, likewise, we'll present
9 evidence showing that Walgreens engaged in this
09:09 10 practice deliberately despite its awareness of
11 FACTA, its understanding of what FACTA requires
12 and even kept doing so for eight months after
13 we filed this lawsuit when they finally stopped
14 and when the motion to dismiss was defeated so
09:09 15 we meet the test.

16 However, I would point out it's
17 worth noting that we also meet the common
18 questions predominate test for a second reason
19 and that is the common questions also
09:09 20 predominate over any individual issues because
21 there are no individual issues for this class
22 and subclass. The alleged individual issues
23 that Walgreens has raised in its papers are
24 actually non-issues for the reasons we

1 explained in our reply.

2 For example, they are based on
3 purely hypothetical situations.

4 Hypothetically, they don't use the word
09:10 5 hypothetically, but they are hypothetical
6 because they haven't identified a shred of
7 evidence that the alleged individual issues
8 actually present themselves for any member of
9 the putative class.

09:10 10 And I'll also pause to note that
11 the Illinois Supreme Court in Miner vs.
12 Gillette and the Second District as well in
13 PJ's Concrete v. Nextel West hold that

14 hypothetical issues, the raising of
09:10 15 hypothetical issues cannot defeat class
16 certification, but that's all they raised plus
17 the hypothetical issues of the alleged
18 individual issues that they raised are also
19 legally irrelevant because they are based on
09:10 20 the existence of alleged requirements of things
21 that FACTA allegedly requires that the statute
22 does not actually require.

23 For example, they argue you have
24 to show each person actually accepted the

1 receipt that was offered to them and you don't.
2 The statute doesn't require that at all. It
3 simply requires that a receipt be provided
4 which is defined to mean offer or made
09:11 5 available to people and the undisputed evidence
6 from their principle witness, for example,
7 Alicia Glick said that they designed the system
8 to generate the receipt for the customer so
9 they would have proof of their reload. So it's
09:11 10 designed to provide for a receipt, actually two
11 receipts in all cases so they're always
12 providing the receipt. So actually that's the
13 common issue which we'll prove with that common
14 proof.

09:11 15 So because there are no general
16 individual issues raised against the common
17 questions, we meet the predominance test for
18 that second question as well. So we have
19 common proof, we've proved the claims of common
09:11 20 proof, that's one way and the mere absence of
21 individual issues is a second way.

22 This takes me to the third
23 requirement, adequacy of representation. The
24 actual test is simply whether the plaintiff's

1 interests are consistent with the class
2 members' interests and whether her counsel are
3 qualified to represent the class. There's no
4 dispute that we meet that actual test. There's
09:12 5 no dispute that her interests are four square
6 100 percent the same as the class members'
7 interest because she suffered the same
8 violation of her rights under the same statute
9 as them and seeks this exact same relief, same
09:12 10 statutory damage relief as they do and,
11 likewise, her counsel are qualified because we
12 have decades of class action experience
13 including extensive experience representing
14 classes in cases under FACTA.

09:12 15 So instead of contesting whether
16 we meet the actual test, once again Walgreens
17 raises non-issues like it did with the common
18 questions. It raises non-issues. For example,
19 it alleges -- it says it's got a waiver defense
09:12 20 against Ms. Fausett's individual claim but
21 that's not the test, you know. The Second
22 District held in the Walczak case,
23 W-A-L-C-Z-A-K, "individual counterclaims or
24 defenses do not render a case unsuitable for

1 class action." This was specifically discussed
2 in the adequacy requirement. Plus, as we
3 demonstrated in our reply, the alleged defense
4 is invalid. They don't meet the test for
09:13 5 waiver and they couldn't prove the defense even
6 if they could plead it correctly.

7 They claim that she doesn't know
8 enough about the case. Once again, the Second
9 District holds that the -- Fifth District in
09:14 10 Clark vs. TAP Pharmaceuticals you need only
11 have "marginal familiarity" of the case. I
12 mean, that's why they have lawyers to represent
13 them in the case, understanding the facts,
14 understanding the law, but it's not the test,
09:14 15 but, again, their contention is factually
16 inaccurate as well because Ms. Fausett has
17 demonstrated in her deposition testimony that
18 she has extensive knowledge about the case, is
19 very involved in it.

09:14 20 She knew, she understands what
21 FACTA is. She understands what class action
22 is. She understands she is a proposed class
23 representative. She understands her duties to
24 the class. It's her decision to bring the case

1 on a class basis. She knows she has other
2 decisions to make in the case in consultation
3 with her counsel. She has, in fact, consulted
4 with her counsel. She didn't simply talk to
09:14 5 one lawyer's paralegal as Walgreens stated.
6 That's an inaccurate statement.

7 She's answered written
8 discovery, produced documents on multiple
9 occasions, sat for deposition. She testified
09:14 10 she's actually concerned about Walgreen's
11 alleged violation of FACTA and she believed
12 Walgreens should be held account and this is in
13 stark contrast to the plaintiff in the Byer,
14 B-Y-E-R, case that they cite where the Court
09:15 15 found, quote -- the plaintiff "virtually no
16 concept of the case or interest in it." That
17 is not Ms. Fausett. There is no basis to
18 compare her to that named plaintiff.

19 And then they also claim that
09:15 20 she -- Walgreens also argued that she's given
21 some inconsistent testimony. Again, not part
22 of the test. It's factually wrong for the
23 reasons stated in our brief. We provide a
24 little chart, Exhibit 14, that lays out what

1 they provide she said and what her actual
2 testimony is to show that there are no
3 inconsistencies. And also it's worth noting
4 the alleged inconsistencies that they talk
09:15 5 about go to irrelevant matter.

6 Those aren't the facts
7 underpinning her claim. It's some collateral
8 that they want to talk about so this
9 distinguishes their argument from the Savino
09:15 10 case, S-A-V-I-N-O, where the alleged
11 inconsistencies in that case went to the actual
12 facts underpinning the plaintiff's claim. Here
13 they don't.

14 In point of fact, the class
09:16 15 claims here and her claims do not even turn on
16 her testimony at all. Instead, they turn on
17 the common evidence regarding whether
18 Walgreens' standard operating procedure here by
19 its FACTA and whether the violations meet the
09:16 20 test for willfulness. That's what the fight of
21 this case is about on Walgreens' own actions
22 and the common facts surrounding its conduct
23 and whether it was willful or not.

24 So to take us back to the

1 beginning of this requirement, again, adequacy
2 simply requires that her interest be the same
3 as the class members' interests and that her
4 counsel be qualified to represent the class,
09:16 5 there would be no dispute with the fact test
6 and so the adequacy requirement is met.

7 Whether a class action is
8 appropriate for the fair and efficient
9 adjudication of the case it's appropriate for
09:17 10 many reasons. No. 1, it's efficient. It's
11 going to resolve hundreds of thousands of
12 identical claims in one shot which is one of
13 the core purposes of having a class action.

14 No. 2, it promotes justice, and
09:17 15 enables members of the class who aren't aware
16 of their rights or who can't vindicate them
17 alone to get relief.

18 3, it's necessary to effectuate
19 FATCA's deterrent rules. One of the reasons
09:17 20 FACTA allows for statutory damages is to
21 incentivize merchants to actually comply with
22 its requirements. And this case is the poster
23 child for the need for having a class deterrent
24 effect because, again, Walgreens wasn't even

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1 deterred from the filing of this case. It kept
2 violating FACTA in the exact same way as we
3 allege for an additional eight months only
4 relenting after it lost its motion to dismiss.

09:18

5 So the class action here is
6 appropriate to vindicate the statute and
7 effectuate its deterrent goals, plus I would
8 note the Second District held in the Walczak
9 case, again, that where the first three
10 requirements for class certification have been
11 satisfied, the fourth requirement may be
12 considered fulfilled as well, and we definitely
13 met the first three requirements as I noted.

09:18

09:18

14 Walgreens claims the class
15 action isn't necessary for people to file
16 individual claims and get attorney's fees. If
17 necessary, it is a test. The test is simply
18 whether it's appropriate and we've given you a
19 variety of reasons why it's appropriate. For a
20 variety of reasons we demonstrate why it's
21 appropriate, plus the idea of there being
22 widespread individual enforcement of FACTA here
23 is not realistic. Given the work we need to
24 prove willfulness which in this case is

09:18

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1 required to date, us having to review several
2 hundred thousand pages of documents, take
3 depositions, we've had to deal with their
4 experts.

09:19 5 You can't expect many persons to
6 be able to find a lawyer willing to take a case
7 on that requires that kind of effort just to
8 recover a hundred to a thousand dollars in
9 statutory damages plus fees. And the cases
09:19 10 they cite do not show otherwise.

11 They cite the Grimes case where
12 the Court just assumed it would be easy because
13 the plaintiff said so, not because there was
14 any finding based on facts to that effect. The
09:19 15 Kim vs. Sussman case, it's an unpublished trial
16 court decision, it didn't involve FACTA, it
17 resolved TCPA. It didn't have a local
18 environment so that's why the discovery there,
19 that's why the work needed to prove the case
09:19 20 isn't near as onerous as what's needed to prove
21 willfulness here. In point of fact, Walgreens
22 hasn't shown a single example of such an
23 individual claim being brought under FACTA.

24 Finally, it claims that the

1 alleged individual issues it raised will make
2 the case unmanageable. As discussed, the
3 alleged individual issues are non-issues so
4 it's not going to create any manageability
09:20 5 problems for the class so this case couldn't be
6 more different than the Smith vs. Illinois
7 Central Railroad case they cite which is a
8 chemical spill mass tort case so there you're
9 going to have varying issues of causation and
09:20 10 damages.

11 Each class member is going to
12 get a doctor or a scientist or both to first
13 determine that they're sick, diagnosed illness
14 or figure out what might have caused it, could
09:20 15 there have been intervening causes there, you
16 name it, all of these different issues for each
17 individual class member.

18 Here by contrast that are no
19 cause of action issues. The focus is
09:20 20 exclusively on Walgreens' conduct and its
21 standard operating procedure and whether the
22 violation was willful and the entire class will
23 get identical statutory damages relief. This
24 is why the overwhelming weight of authority

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1 holds that FACTA class actions are not just
2 appropriate but superior to individual actions
3 as in the litany of certified FACTA class
4 actions that we listed throughout our briefs,
09:21 5 for example, the footnote to page 2 of our
6 motion, but we cited a variety of other cases.

7 So for all of these reasons,
8 your Honor, we meet all four requirements of
9 the class action statute and the class should
09:21 10 be certified.

11 What I'd like to do now is touch
12 on the merits or arguments they make in their
13 brief.

14 THE COURT: All right. May I ask
09:21 15 you just a couple of questions about this
16 portion of your argument?

17 MR. HILICKI: Sure.

18 THE COURT: Now, you didn't mention
19 one of the issues that they raise regarding the
09:21 20 commonality factor that individual issues
21 predominant over common issues and that being
22 whether this, the action that was taken with
23 the reloadable cards involved a business
24 transaction versus a consumer transaction.

1 Could you address that issue?

2 MR. HILICKI: Sure. Well, first of
3 all, it's a purely hypothetical issue that I
4 alluded to earlier because there's no evidence
09:22 5 that any class member or any member of the
6 putative class is business, that's No. 1. And
7 they've had the class, they produced the class
8 data to us back in almost two years ago now so
9 22 months ago in May of 2021 and despite having
09:22 10 the class data all this time neither they nor
11 their expert have been able to identify a
12 single business within that data. So that's
13 No. 1.

14 No. 2, far from being able to
09:22 15 identify any business user of these cards, they
16 have contended throughout the litigation and
17 their expert confirmed that the people that use
18 these cards, the demographic, the target, the
19 people that actually use them are the so-called
09:23 20 unbanked or under-banked, people would can't
21 get credit cards, people who can't get a
22 regular bank account. So this is what they
23 turn to as the alternative.

24 So that, by definition that's

1 not the business community. The business
2 community is financing and so forth. So we
3 have -- so if you will, all of the evidence
4 before you shows that these are not business
09:23 5 users so in addition to being speculative on
6 their part, the evidence you actually have
7 shows these are nonbusiness card users by their
8 own contention, by their experts' admission.

9 Also, I point out -- and I
09:23 10 remind the Court, again, the Illinois Supreme
11 Court in Miner vs. Gillette in the Second
12 District hold hypothetical issues cannot defeat
13 a class. They can't say hypothetically there
14 might be a business here using one of these
09:24 15 cards so you have to deny certification. They
16 can't do that. It has to be based on -- it
17 can't be a hardship issue.

18 I'd also point out that it's a
19 legally irrelevant contention because FACTA
09:24 20 itself does not distinguish between business
21 cards and nonbusiness cards. It applies on its
22 face to any receipts provided to the cardholder
23 at the point of sale or transaction and
24 although the remedy section allows a right of

1 action on behalf of a consumer, it defines
2 consumer as an individual, not an individual
3 using a nonbusiness card so --

09:24 4 THE COURT: So your position is
5 twofold, that FACTA would allow for a business
6 use of a reloadable card in this example.

7 MR. HILICKI: Absolutely. That's
8 No. 1.

09:25 9 THE COURT: Or that this is a
10 hypothetical and that it shouldn't be
11 considered as an issue that would
12 predominate --

13 MR. HILICKI: Exactly.

09:25 14 THE COURT: -- over the common
15 issues.

16 MR. HILICKI: Yes, your Honor.
17 Those are our two responses to that contention.

18 I'm sorry, I'd like to add one
19 thing to that.

09:25 20 THE COURT: Yes, please.

21 MR. HILICKI: If it actually became
22 an issue at some point, we've cited ample cases
23 to you that point out that business card users
24 are easily identified like the Lake vs. Spirit

1 Airlines case that we cited which is actually
2 one of our cases. There the defendant itself
3 was able to point out that 13 percent of the
4 people who generated, you know, got a receipt
09:25 5 were for corporate card uses so they were
6 readily able to identify. The Vasquez-Torres
7 case notes that it's easy to identify business
8 cards so even if we had to do it at some point
9 in time, it can be done. So that's the third
09:26 10 response to that. In all cases the Court
11 found -- in all those cases the Court found the
12 issue would not predominate even if it was an
13 issue.

14 THE COURT: Thank you for answering
09:26 15 that question. Now, please proceed with the
16 rest of your argument.

17 MR. HILICKI: Thank you, your Honor.
18 Turning to the Walgreens merits
19 arguments. Walgreens spends more than half of
09:26 20 its brief arguing the case merits effectively
21 seeking reconsideration of this Court's denial
22 of its motion to dismiss back in 2019 when the
23 Court found that Mr. Fausett has an actionable
24 claim.

1 Class certification is not the
2 place to seek reconsideration on rulings of
3 motion to dismiss. Walgreens really thought it
4 could win these issues. It would have moved to
09:26 5 reconsider years ago or it would have moved for
6 summary judgment now, not raise them here.
7 Instead, it made a strategic decision to raise
8 these issues in the class context to make a
9 very straightforward case for class
09:27 10 certification seem complicated. It's not. In
11 fact, the merits arguments that they make,
12 they're all common issues. They all affect all
13 class members and plaintiff equally.

14 For example, if they're right,
09:27 15 you can't bring suit under FACTA just to remedy
16 a violation of your rights unless you show some
17 additional harm. That's true for everybody or
18 if they're right the fact it doesn't apply to
19 the real transactions despite what the statute
09:27 20 actually says. That applies to everybody.

21 Those are all common issues that can be
22 resolved on a class basis so it doesn't
23 undermine the class certification motion one
24 iota.

1 In fact, if Walgreens actually
2 believed these arguments have merit, it should
3 stipulate to class certification so that it can
4 wipe out everyone's claim in one shot rather
09:27 5 than doing this piecemeal which is what would
6 happen if we have to have everybody file their
7 own claim which is exactly what a tort class
8 action is for.

9 But in any event, the Cruz vs.
09:28 10 Unilock case, C-R-U-Z, bars inquiry into the
11 ultimate merits at class stage. I believe we
12 discussed that case with your Honor in the
13 past. But it's a very important case for this
14 class certification motion, 383 Ill. App. 3d
09:28 15 752, Second District 2008, where the Court
16 reversed the denial of class certification
17 because the Court had ventured into the
18 ultimate merits in making the decision about
19 the ultimate merits in connection with class
20 certification and denied class certification on
21 that bases and in doing so it reversed that
22 decision and directed the class should be
23 certified, the Courts specifically said, "the
24 resolution of the common factual legal issues

1 will occur during proceedings on the merits."

2 So for that and the other
3 reasons in our reply brief which addresses
4 their arguments in more detail their various
09:28 5 arguments should be rejected and the class
6 should be certified.

7 And unless your Honor has any
8 additional questions, I'll yield the podium.

9 THE COURT: All right. Thank you.

09:29 10 Mr. Andalman.

11 MR ANDALMAN: Your Honor, good
12 morning.

13 We do believe that the threshold
14 issue here is whether or not the plaintiffs
09:30 15 have an actionable claim. In that regard the
16 Court is not bound by the allegations of the
17 complaint to decide that. The burden is on the
18 plaintiff with regard to every single element
19 and this is an issue that the Court has to
09:30 20 address.

21 The Second District said in
22 Alley 64 it must address now on the motion for
23 class certification. But we lead with Alley 64
24 because Cruz was decided in 2008 which is a

1 frightening distance from now, but it's 2023,
2 it's 15 years later and last year the Second
3 District issued its decision in Alley 64 and it
4 said a lot of things about the standards the
09:31 5 Court needs to apply and it also distinguished
6 Cruz in making its decision that the Court had
7 to address the merits.

8 And, interestingly, what
9 Alley 64 does in its distinction of Cruz, is it
09:31 10 says Cruz actually resolved a debate, a
11 difference in the case law as to what a trial
12 court can do on the certification motion,
13 because there were cases that Cruz cited which
14 said that the Court was bound to the
09:31 15 allegations of the complaint.

16 That's the argument Mr. Hilicki
17 just made. It's like a motion to dismiss, but
18 then there were other cases that Cruz dealt
19 with that said, no, the Court can go beyond the
09:31 20 allegations of the complaint and look to the
21 record of the motion for class certification.

22 Cruz according to Alley 64
23 concluded that the second camp was the correct
24 one, that there was in the words of the Court

1 no cogent basis for the Court to be confined to
2 the four corners of the complaint.

3 The issue in Cruz wasn't that
4 the trial court had gone beyond the allegations
09:32 5 of the complaint, the Appellate Court went
6 beyond the allegations of the complaint in
7 Cruz. The issue there was a wage and hour case
8 and the underlying issue was did the defendant
9 have a particular policy in place and both the
09:32 10 Appellate Court and the trial court said, well,
11 we've seen records now that show that the
12 policy existed.

13 What the Appellate Court said
14 the trial court went too far by going to the
09:32 15 motivation making factual findings as to the
16 motivation for the policy. They said that was
17 the step too far, but in Alley 64 the Court was
18 clear that you cannot proceed, you cannot
19 proceed without having a valid cause of action.
09:33 20 The plaintiff has to show that.

21 And so it cited in considering
22 whether to grant class certification the Court
23 must necessarily determine the underlying claim
24 is actionable. And Cruz wasn't alone. This

1 wasn't a new sort of factor in Illinois law.
2 In 2005 in the Avery case, Avery vs. State
3 Farm, the Illinois Supreme Court said "a class
4 cannot be certified unless the named plaintiffs
09:33 5 have a cause of action."

6 In 2007 the Illinois Supreme
7 Court said "we need not determine whether
8 plaintiffs satisfy class requirements because
9 as a threshold matter the representation
09:33 10 identified by the plaintiffs does not form the
11 basis of an actionable claim under the consumer
12 fraud act." It's the Barbara's Sales case and
13 in that case there's no question the Court
14 decided the merits on class certification.

09:34 15 The issue was had Intel made a
16 false and misleading statement about the
17 quality of its computers and the Court looked
18 at the allegation and the representation that
19 Intel had made and said, no, as a matter of law
09:34 20 we think on the merits there's no consumer
21 fraud here.

22 Other districts in addition to
23 the Second in Alley 64 are the same. In
24 Stefanski vs. City of Chicago First District

1 case, "A representative cannot adequately
2 represent a class when the representative does
3 not state a valid cause of action." In Coy
4 Chiropractor Health Center which I apologize in
09:34 5 the brief Mr. Hilicki pointed out we cited a
6 prior version, the vacated version that was
7 unpublished, this is the published version of
8 that decision, 409 Ill. App. 3, 114-118 "There
9 is no need to determine whether the
09:35 10 prerequisites of class action are satisfied if,
11 as a threshold matter, the record establishes
12 that the plaintiffs have not stated an
13 actionable claim."

14 Mr. Hilicki is saying none of
09:35 15 that's the law, pay no attention to it, but we
16 can't not pay attention to it because it's the
17 Illinois Supreme Court, it's the Second
18 District which is controlling in this Court and
19 it's consistent with the law of the other
09:35 20 districts.

21 Now, it's not that this is
22 something different than 2-801 of the Code of
23 Civil Procedure. It's part of 2-801 and so
24 Alley 64 explained, indeed, "The requirement

1 that the named representatives of the putative
2 class possess a valid cause of action is
3 subsumed in at least two of the aforementioned
4 elements under 2-801 of the Code, commonality
09:36 5 and adequacy of representation."

6 Again, that belies Mr. Hilicki's
7 argument that all that matters is could they
8 state a claim on a motion to dismiss. No, you
9 have to show here now on this record that you
09:36 10 have a claim and that's part of 2-801 because
11 as Alley 64 states, without a valid claim they
12 cannot establish the prerequisites of class
13 certification.

14 You are not bound by the
09:36 15 allegations of the complaint in this regard as
16 Judge Berrones was in 2019 on the motion to
17 dismiss. Cruz, like I said, resolved a
18 conflict on that point and this is the quote
19 from Alley 64 referenced in opening. "Cruz
09:36 20 found no cogent basis for the proposition that
21 the allegations of complaint are accepted as
22 true." They are not accepted as true in
23 resolving class certification motion and held
24 that the trial court may conduct any factual

1 inquiry necessary to resolve the issue of class
2 certification which as we just discussed
3 Alley 64 says includes whether the plaintiff
4 has a valid cause of action.

09:37

5 Courts do review the record.
6 That happens. It's not unusual. Second
7 District did it in Alley 64. The Fifth
8 District did it in Coy. It looked at contracts
9 and other record materials. The Illinois

09:37

10 Supreme Court did it in Barbara's Sales. It
11 looked at expert reports similar to the reports
12 that we submitted, deposition testimony,
13 discovery responses, all of those things in
14 making its conclusion. One of the bases for
15 the decision in Barbara's Sales had to do with
16 one of the named plaintiff's conduct as
17 revealed in discovery that demonstrated that
18 she lacked an actionable claim.

09:37

19 There is no attempt by
20 Mr. Hilicki and plaintiffs either today or in
21 the briefs to distinguish these cases, and
22 courts do it not only the courts that we just
23 cited, we cited in our brief the Turnipseed
24 decision which was a First District case, the

09:38

1 Stefanski decision which is another First
2 District case, both of which reversed class
3 certification after reaching the merits of the
4 claim.

09:38 5 Neither is the Court confined
6 here by what Judge Berrones did two and a half
7 years ago in November of 2019 when he denied
8 the motion to dismiss. That was an
9 interlocutory order. Every case just
09:38 10 discussed, every single one had an
11 interlocutory order on a motion to dismiss or a
12 motion for judgment on the pleadings that the
13 plaintiffs prevailed upon and it didn't stop
14 the Courts from saying we still need to do more
09:39 15 on class certification, because interlocutory
16 orders on motions to dismiss are revisited all
17 the time particularly, frankly, in this
18 circumstance where a new judge is sitting.

09:39 19 None of those cases, not one
20 could be decided under the rule that the
21 plaintiffs propound that if there's a motion to
22 dismiss then it's just a motion to reconsider
23 and you cannot raise the issue. None of them
24 would have come out the same way, not in front

1 of the Illinois Supreme Court, not in front of
2 the Second District.

3 As the Second District said in
4 the Commonwealth Edison case that we cited in
09:39 5 our briefs quoted on the screen, "ruling on a
6 motion to dismiss is never the law of the case.
7 The Second District holds it may be modified or
8 revised at any time prior to final judgment."
9 That's at 368 Ill. App. 3d at 742.

09:40 10 Moreover, the law has changed.
11 There's been a lot of changes in the law in
12 this specific area since November of 2019 and
13 the records developed is different, it's not
14 just accepting the allegations of the complaint
09:40 15 as true.

16 So, your Honor, we contend there
17 are four reasons why plaintiff does not have an
18 actionable claim. First, the U.S. Supreme
19 Court's decision last year, that was 2021, in
09:40 20 TransUnion vs. Ramirez; 2, they don't have
21 standing to sue under Illinois law; 3, the
22 plain language of FACTA; and 4, they have not
23 shown willful conduct under the applicable test
24 which is required for the damages that they

1 seek.

2 So I want to talk a little bit
3 first about TransUnion. TransUnion is a big
4 deal because it is the United States Supreme
09:41 5 Court issuing a decision on the very statute on
6 which they are suing. And to just put this in
7 some context because I think it gets a little
8 bit confusing in the way we talk about FACTA,
9 FACTA is actually an amendment to a broader
09:41 10 statute called FCRA, the Fair Credit Reporting
11 Act. FACTA is an amendment to it. And the
12 provision under which they sue is actually a
13 provision of FCRA. It's 15 U.S.C. 1581(n), I
14 believe, is the one that allows them to bring
09:41 15 this action for statutory damages.

16 That is the exact statute that
17 was at issue in TransUnion. TransUnion did not
18 involve receipts, it involved a leak of or hack
19 of TransUnion's credit information about
09:42 20 consumers and there were two classes,
21 subclasses, one, people whose information had
22 actually been somehow obtained by third parties
23 and had been used in some way and one who just
24 potentially had that risk that there was no

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1 evidence that their information had been
2 further disclosed through use.

3 With regard to that first group,
4 they were determined not to have a right to sue
09:42 5 and not to have standing to sue under FCRA
6 because any damage to them would be
7 hypothetical. Yes, their data was out there
8 somewhere, but it would be too speculative to
9 suggest they suffered any harm.

10 And the Supreme Court took that
11 case up on the issue of -- came up under a sur
12 question dealing with standing but the Court
13 did not limit its decision to standing, and the
14 oral arguments in this case show that this was
09:43 15 an issue that was a concern to what ended up
16 being the majority of the Court.

17 This is what the Court said
18 about this. It said, yes, there's a standing
19 issue here but it's not just standing under
09:43 20 Article 3, it's also an issue of separation of
21 powers. And it goes to whether Congress has
22 the power to authorize an uninjured, we call
23 them no-injury plaintiff to bring suit for
24 statutory damages. And the Court reasoned that

1 when you sue for statutory damages since you
2 haven't been harmed, what you're really doing
3 is you're enforcing a federal law and imposing
4 a penalty. And the Court said only the
09:43 5 executive can do that.

6 The Constitution vests
7 exclusively in the executive the power to
8 enforce the law and to seek fines and
9 penalties. Congress can authorize someone
09:43 10 who's been harmed in some way to sue, so, for
11 example, to the argument, well, FACTA plaintiff
12 could show \$10 in damages, they could sue for a
13 hundred to a thousand statutory damages, that
14 wouldn't run afoul of what TransUnion was
09:44 15 concerned about, but if you have a no-injury
16 plaintiff, that plaintiff can't be authorized
17 to run around enforcing federal law.

18 And the Supreme Court said in
19 its majority opinion a regime where Congress
09:44 20 could freely authorize unharmed plaintiffs to
21 sue defendants who violate federal law, would
22 violate Article 3, standing, but also would
23 infringe on the executive branch's Article 2
24 authority.

1 And on the same page of the
2 opinion the choice of how to prioritize and
3 aggressively pursue legal actions against
4 defendants who violate the law falls within the
09:44 5 discretion of the executive branch, not the
6 purview of private plaintiffs and their
7 attorneys.

8 And, finally, in sum the Court
9 said concrete harm requirement is essential to
09:45 10 the constitution separation of powers, not just
11 to Article 3 but to the separation of powers.
12 All of this, your Honor, all of it appears at
13 114 Supreme Court 2207 and it reflects the
14 considered opinion of the majority of the
09:45 15 United States Supreme Court.

16 And I suggest, respectfully,
17 that what the Court is saying is that Congress
18 simply wasn't empowered to allow private
19 plaintiffs who don't have an injury themselves
09:45 20 to sue to enforce federal law. Congress can't
21 authorize it and, therefore, they cannot have
22 an actionable claim.

23 And I would further respectfully
24 suggest that no Circuit Court in Illinois, no

1 trial court in the federal system has the right
2 or the power to say I disagree or I think
3 that's just an offhand remark by these five
4 justices. We just can't ignore what they say.
09:46 5 It marked a seminal change.

6 And in their briefs they say,
7 well, it's dicta so you can ignore it, but you
8 can't because it's a central part of the
9 Court's reasoning and there's this notion of
09:46 10 two types of dicta, obiter dicta and judicial
11 dicta. Obiter dicta might be just an offhand
12 remark the Court makes. It doesn't pertain to
13 its decision, but judicial dicta does pertain
14 to its decision. And it matters and it
09:46 15 particularly matters when we're talking about
16 in Federal Court, not the Federal Court, the
17 U.S. Court's interpretation of a federal
18 statute.

19 It would matter even if it
09:47 20 wasn't the U.S. Supreme Court because the
21 Illinois Supreme Court has instructed the lower
22 courts with regard to judicial dicta that it
23 should be received as given dispositive weight
24 in any inferior court and that's People vs.

1 Williams, 204 Ill. 2d at 206. It can't be
2 ignored.

3 Neither is it relevant as they
4 raised in their brief what Judge Conlon's
09:47 5 comments were in the intervention in Cook
6 County, obviously which the Court is aware.
7 Frankly, they should be estopped from even
8 making that argument.

9 It was in front of her they said
09:47 10 absolutely nothing you say or do here will have
11 any impact on Judge Vorderstrasse so you
12 shouldn't be allowed to intervene which, by the
13 way, she agreed with. She said at page 5 of
14 the transcript which was attached to their
09:47 15 reply, "The very distinguished Court in Lake
16 County will make the decision that it best
17 decides on record of facts and law. This
18 Circuit Court's decision has no binding effect
19 or value." She was saying you guys do what you
09:48 20 need to do up there. It wasn't really before
21 her. She was just not letting us intervene on
22 the merits.

23 Now, this marked a seminal
24 change in the law, but the record's been

1 developed, too, in ways that explain how
2 TransUnion applies here, because now there can
3 be no dispute that Ms. Fausett is a no-injury
4 FACTA plaintiff so we knew she alleged no
09:48 5 injury in the complaint.

6 Now, she has said under oath
7 either in interrogatory responses or in
8 deposition that she's unaware of any harm
9 resulting in the printing of the BIN on the
09:48 10 receipt. She testified that she's unaware of
11 any time that she's ever been the victim of
12 identity theft or fraud. She said that no one
13 but herself and her lawyers had ever seen her
14 receipts to her knowledge. So that's changed
09:49 15 since November of 2019 and I'm happy to give
16 you the citations to the record, your Honor, if
17 you want where you can find these, but I know
18 you've been studying it.

19 In addition, another thing
09:49 20 that's changed since 2019 is now every single
21 federal Circuit Court, every court of appeal in
22 the federal system that has been presented an
23 issue where these first six digits, the bank
24 identification number of a card had been

1 disclosed even on a purchase receipt, every
2 single one has now said there's no risk of harm
3 from that and, therefore, no standing.

4 When we were in front of
09:49 5 Judge Berrones there was a little bit of a
6 split but then because of the 11th Circuit,
7 that was reversed on bar by the 11th Circuit.
8 Moreover, to the extent there had been any
9 split on it, he would have been eviscerated by
09:50 10 TransUnion.

11 The only case they cite, only
12 federal case they cite on this point is the
13 Jeffries decision which comes from the
14 D.C. Circuit. Very different set of facts
09:50 15 because the entire 16 digit number was
16 disclosed on the receipt. It's not a BIN case
17 and it's a purchase transaction.

18 We also submitted the
19 declaration of Ken Jones. There was a report
09:50 20 of Ken Jones. Mr. Jones had risen to the
21 deputy head of the U.S. Postal Service which is
22 a several thousand agent agency which is in
23 charge of investigating cyber crimes, identity
24 theft. He then worked for UPS and other major

1 banks as a consultant and as an employee and he
2 testified that in his experience this
3 information even if the receipt did fall into
4 the wrong hands and, of course, Ms. Fausett
09:51 5 said she has no reason to believe that's the
6 case, but even if it did, it wouldn't hurt her,
7 wouldn't cause her any harm or even increase
8 her risk of harm.

9 And the plaintiffs who bore the
09:51 10 burden of proof and the burden of persuasion
11 here offer no evidence to the contrary, none,
12 so the record is actually undisputed that she
13 is a no-injury plaintiff.

14 On that round alone she has no
09:51 15 actionable claim. In addition, we think she
16 has no standing under Illinois law and they
17 make this argument that, oh, well, standing is
18 different under Illinois than federal. They
19 never articulate what the difference is. And I
09:51 20 think there's a reason for that because it's
21 really not that different.

22 So if you look at the Maglio
23 decision which is 2015 Second District, in
24 Maglio the Court said "federal standing

1 principles are similar to those in Illinois,
2 and the case law is instructive." The Court
3 then went on to decide the standing issue in
4 there with a mix of discussion of federal and
09:52 5 state laws. And the reason that they mix is
6 because the State standard, Illinois standard
7 for standing is there has to be a distinct and
8 palpable injury. And the federal standard is
9 there has to be a concrete injury and I
09:52 10 struggle, your Honor, to find a difference
11 between the distinct and palpable harm and a
12 concrete harm.

13 I mean, they're different words
14 for the same thing, but in a case when you have
09:52 15 no injury at all they clearly are both not
16 satisfied. And Maglio is such an interesting
17 case because it's a Second District and it's so
18 analogous to the circumstances here.

19 In Maglio four computers had
09:52 20 been stolen that included the plaintiff's
21 personal health and other information and the
22 defense raised the standing issue and the Court
23 agreed there was no standing because, first of
24 all, it was speculative that any of that

1 information would get into anybody's hands.
2 They didn't have any evidence of that. There
3 was no proof of it. And the plaintiffs said,
4 yeah, there's this privacy act, there's a
09:53 5 statute that was violated, and the Court said
6 that's not the point, right. It's not enough
7 that the statute is violated. There also has
8 to be some harm, some nonspeculative actual
9 harm and it concluded that there was no
09:53 10 standing.

11 Now, in their briefs I want to
12 address a couple of the cases that they rely
13 on. First of all, they try to argue that,
14 well, there may be an increased harm, increased
09:53 15 risk of harm. We can rely on that. That was
16 specifically rejected in the federal context by
17 TransUnion and it was also specifically
18 rejected by the Second District in Maglio.
19 Increased risk of harm doesn't establish
09:54 20 standing under either regime.

21 They rely on the Lebron vs.
22 Gottlieb Memorial Hospital, but that case
23 didn't reach standing. If you read it, it
24 actually says on appeal the standing issue had

1 been abandoned. That's L-E-B-R-O-N vs.
2 G-O-T-T-L-I-E-B, Memorial Hospital, 237 Ill. 2d
3 217 and 254. Note four is where they're
4 talking about the abandonment on appeal, the
09:54 5 standing argument.

6 They cite Rosenbach vs. Six
7 Flags. Rosenbach is not actually a standing
8 case. In Rosenbach if you read carefully in
9 the trial court there had been a 2-619.1
09:55 10 motion, 2-615 challenging the allegations for
11 failure to state a claim and 2-619 challenging
12 standing, but on appeal only the 2-615 went up,
13 not the 2-619 which the opinion notes.

14 So the issue in Rosenbach wasn't
09:55 15 standing, the issue was whether the general
16 assembly in Illinois could create a class of
17 aggrieved persons whose biometric information
18 had been taken. That was the issue. And the
19 Court concluded that they could, but they made
09:55 20 a really interesting observation. They said
21 and I quote, "biometrics are unlike other
22 unique identifiers used to access finances and
23 other sensitive information." Because we can't
24 change our faces, our eyes or fingerprints,

1 well, movies suggest we can make -- change our
2 fingerprints, but I don't know if it's true,
3 but we can easily change our card numbers, our
4 account numbers, we can even change our social
5 security number.

6 So the point the Court made was
7 that it was legitimate to create this aggrieved
8 class of people whose biometrics were taken
9 because as the Court put it are unlike other
09:56 10 unique identifiers, special case, and so they
11 said that the Illinois General Assembly could
12 create a cause of action for individuals whose
13 biometrics were taken. That's what Rosenbach
14 held.

09:56 15 The Illinois Supreme Court has
16 the final word on what the authority of the
17 Illinois General Assembly is just as the U.S.
18 Supreme Court does with regard to FACTA and
19 FCRA. Then they talk about congressional
09:56 20 power.

21 They also cite in Lake in the
22 Hills vs. Laidlaw Waste which is a little odd
23 to me that they would cite it. It's Lake in
24 the Hills vs. Laidlaw, L-A-I-D-L-A-W, Waste.

1 There the Court actually found as a matter of
2 law that the plaintiff didn't have standing.
3 In that case the issue was a village seeking an
4 injunction and the injunction was based in part
09:57 5 on the defendant's failure to abide by the
6 statutory notice requirement. So, again,
7 violation of a statute.

8 And the Court said no standing.
9 You don't have any standing because you don't
09:57 10 have any distinct and palpable harm. Too
11 abstract is what the Court said. You need to
12 have damage to property or something more. In
13 fact, they cite the Greer case for this idea
14 that it's a different standing, but in Greer
09:57 15 the plaintiff's standing was based on a
16 diminished value of their real estate, their
17 property so, yeah, that's a distinct, palpable
18 harm.

19 And lastly they fall back
09:57 20 on Lee vs. Buth-Na-Bodhaige,
21 B-U-T-H-N-A-B-O-D-H-A-I-G-E, which must mean
22 body shop in some language because that's the
23 company. It's 219 Ill. App. 180033. So that's
24 a FACTA case from the Fifth District. It is

1 not a standing case. It is not a standing
2 case. In that case there was a settlement and
3 then an individual objected to the settlement
4 and tried to raise the body shop's standing as
09:58 5 an objection to the settlement going through.

6 In the portion of the decision
7 that's cited by the plaintiffs in their brief,
8 paragraph 67 and 68 of the decision, they
9 talk -- the Court goes through some discussion
09:58 10 of standing law but then it notes that Illinois
11 Circuit Courts are courts of general
12 jurisdiction. And they say that means that any
13 justiciable dispute can come before a Circuit
14 Court so that's actually a distinction that Lee
09:59 15 makes between standing in Federal Court and
16 standing in state court. In Federal Court it's
17 jurisdictional. In state course it's not so a
18 case can be justiciable in state court but
19 there can be no standing whereas in Federal
09:59 20 Court the two are merged.

21 So then Lee goes on to say
22 here, paragraph 68, "The body shop chose not to
23 raise the issue of standing as an affirmative
24 defense and the objector Dickinson had no

1 standing to do so, no standing to raise
2 standing. Accordingly, Dickinson's objection
3 to Lee's lack of standing was properly denied.

4 So the decision in Lee when you
10:00 5 actually read it isn't a decision about
6 standing under FACTA, it says there's a
7 justiciable dispute here and standing is an
8 affirmative defense that was waived by body
9 shop and the objector lacks standing to raise
10:00 10 that affirmative defense. That's what the
11 whole thing is.

12 The fact is Maglio, the Second
13 District decision is what controls in this
14 Court. There the Court again held no standing
10:00 15 based on violation of the data protection or
16 data privacy act and that decision is entirely
17 consistent with the federal cases that talk
18 about FACTA and it's consistent with the
19 Illinois Supreme Court requirements of a
10:00 20 distinct and palpable injury.

21 So no standing, no right to
22 sue, no constitutional cause of action
23 consistent with TransUnion, also no violation
24 of FACTA.

1 So let's talk about FACTA for a
2 minute because, again, they talk about it
3 broadly. What they're really talking about
4 when they talk about FACTA is this one
10:01 5 provision 15 U.S.C. 1681(c)(g)(1). That's what
6 they mean by FACTA. And that is the text of
7 the statute up there on the screen. It
8 provides that no person that accepts credit
9 cards or debit cards for a transaction of
10:01 10 business shall print more than the last five
11 digits of the card number or the expiration
12 date upon any receipt provided to the
13 cardholder at the point of the sale or
14 transaction.

10:01 15 So it's describing a particular
16 transaction and it says in essence that if you
17 accept a card for the transaction then the
18 receipt for the transaction shouldn't include
19 any more than those numbers. That's what the
10:02 20 statute says.

21 They want to interpret it far
22 broader than that because there's no dispute on
23 this record that Walgreens complies with
24 exactly this rule for every transaction for

1 which it accepts a card, credit card or debit
2 card. There's no dispute. It's in Ms. Glick's
3 declaration that they submitted, but not only
4 that, this is a cash transaction.

10:02 5 No card was accepted in
6 Ms. Fausett's transaction. No credit or debit
7 card was accepted and they want to argue
8 that -- you know, and by the way on that point,
9 I asked her are you aware that Walgreens will
10:02 10 only do a reload, they will only accept cash
11 for reload and won't accept a credit card or
12 other form of payment and she answered, yes, I
13 do know that. And that's in her transcript at
14 page 99. No card was accepted for the

10:03 15 transaction, the specific transactions or
16 transaction that she alleges in her complaint.

17 So plaintiffs argue, well, but
18 accept could mean all kinds of things, right,
19 it's not just accept for payment. That's not
10:03 20 what the statute -- that's not the ordinary
21 meaning of the word. If you go into a retail
22 establishment and ask if they accept cards,
23 that means for payment, but it's -- so it's a
24 common understanding and it's also the

1 understanding that the Courts have used and
2 that's why I put the Shlahtichman decision on
3 the slide as well. That's
4 S-H-L-A-H-T-I-C-H-M-A-N, 615 F. 3d at 795.

10:03

5 Because the Seventh Circuit
6 Court of Appeals which is the Court of Appeals
7 that controls Illinois where Walgreens is based
8 in 2010 it describes FACTA as follows: FACTA
9 prohibits a vendor who accepts a credit or
10 debit card as a means of payment from printing
11 more than the last five digits or the
12 expiration date on any receipt provided to
13 the cardholder at the point of sale or
14 transaction.

10:04

15 The Seventh Circuit understands
16 the same way Walgreens does, the law applies
17 when a card is accepted as a means of payment.
18 Here, as I've just described, Ms. Fausett
19 agrees, this is a cash transaction. No card is
20 being accepted.

10:04

21 It's not just common
22 understanding in the Seventh Circuit. We cited
23 in our brief there's other portions of federal
24 statutory law that talk about accepted cards as

1 when a card is being accepted as tender for
2 payment and that's 15 U.S.C. 1602(m). We also
3 provided the report of Philip Philliou who is
4 an expert in the payments industry and he
10:05 5 explained that within the industry this is how
6 it's understood. It's as a means of payment as
7 the Seventh Circuit observed. As such, FACTA
8 simply doesn't apply to Ms. Fausett's
9 transaction on its face. It doesn't apply to
10:05 10 cash transactions.

11 Now, in addition to that, the
12 plaintiff to have a class certified, to show
13 that she has an actionable claim would have to
14 show first that this understanding of the
10:05 15 statute that we share with the Seventh Circuit
16 is completely irrational, has no basis in
17 statutory language, and there was some court
18 decision or administrative guidance and when
19 the Supreme Court established this test, this
10:06 20 is a test for willfulness established in Safeco
21 Insurance Co. vs. Burr, which is 551 U.S. 47,
22 69-70, a two-part objective test.

23 Does it have a foundation in
24 the statutory text and is there any contrary

1 guidance from a Court of Appeal or else a
2 regularly decision or guidance. That's the
3 Safeco test and it's critically important.

4 So in prior appearances here
10:06 5 Mr. Hilicki has suggested it's not an objective
6 test, it's a subjective test. It could depend
7 on what individual Walgreens employees think or
8 say. And the Supreme Court addressed that
9 argument in Safeco and this is what it said.
10:06 10 And it's important, it's a long quote, but it's
11 important.

12 It says, "To the extent they,"
13 plaintiffs, "argued that evidence of subjective
14 bad faith and support of willfulness finding
10:07 15 even when the company's reading of the statute
16 is objectively reasonable, their argument is
17 unsound. Whereas, here the statutory text and
18 relevant court and agency guidance allow for
19 more than one reasonable interpretation it
10:07 20 would defy history and current thinking to
21 treat a defendant who merely adopts such
22 interpretation as a knowing or reckless
23 violator."

24 Notice what the Supreme Court

1 says at the end of that sentence because they
2 have in the past tried to argue there's some
3 big distinction between knowing or reckless
4 violators and what the U.S. Supreme Court says
10:07 5 in interpreting this federal statute is it's
6 objective whether it's knowing or reckless.
7 Both of those fall within the rubric of
8 willfulness.

9 And, of course, that makes
10:08 10 sense because if you have a reasonable reading,
11 a reading that has a grounding in statute, and
12 there's no court decision that tells you you're
13 wrong, you're not going to be knowingly
14 violated. You're going to be doing what the
10:08 15 statute appears to permit and they don't allow
16 a finding of willfulness and, therefore,
17 statutory damages in that context.

18 What's interesting to me in
19 their plea, the best they can do is cite this
10:08 20 case Fuges vs. Southwest Financial Services,
21 F-U-G-E-S, 707 F.3d at 249 which actually
22 affirms summary judgment as a matter of law for
23 the defendant on the issue of the willfulness.
24 The case actually goes the other way for them.

1 And it confirmed in short the Safeco test is
2 one of objective reasonableness. The Court
3 explicitly rejected the argument that
4 subjective faith must be taken into account.
10:09 5 This is their case by the way that they cited
6 in their brief.

7 In deciding that subjective bad
8 faith is irrelevant, in deciding that it's
9 irrelevant, which is the law, the Court says,
10:09 10 and then it's the same quote as what we looked
11 at before. That's the law with regard to
12 willfulness, your Honor, and their own case law
13 establishes it. These decisions on willfulness
14 are made as a matter of law in every case.

10:09 15 They argue, well, it's
16 premature, this is for the jury to decide
17 willfulness, but not under Safeco because it's
18 not for the jury to make those determinations
19 whether there's case law out there, et cetera.

10:09 20 And every single case that we cited in our
21 brief, the cases that they cite in their brief
22 are motions to dismiss or motions for summary
23 judgment.

24 The Shlahtichman case that I

1 cited earlier, the Seventh Circuit dismissed
2 based on two grounds on motion to dismiss on
3 the pleadings. One was they agreed with the
4 defendant's reading of the statute, that like
10:10 5 this one was a case of first impression so I
6 haven't said it, but I've noticed other times
7 when I've been here FACTA has never been
8 applied to a cash transaction like this ever.
9 It was passed in 2003. This is a case of first
10:10 10 impression.

11 Shlahitichman also dealt with
12 the case of first impression. In that instance
13 it was electronic receipts that were emailed,
14 but is that really providing it. And the
10:10 15 Seventh Circuit said we don't think it is and
16 even if we're wrong about that, there's no
17 willfulness here and on the pleadings it
18 dismissed that case with prejudice. That is
19 how all of these cases are resolved.

10:10 20 The plaintiffs only cite one
21 case that didn't dismiss a FACTA case based on
22 willfulness, that was Factor, F-A-C-T-O-R, vs.
23 Hooters, the bar, but that case didn't involve
24 a case of first impression. It didn't involve

1 any kind of unique reading of the statute. No
2 one argued that there was any possibility that
3 the law is not applying there. It was simply
4 about printing extra digits on the receipt on a
10:11 5 purchase when a card was used when it was
6 accepted.

7 And it was on a motion to
8 dismiss, and what's so interesting is the case
9 later did get dismissed as a matter of law.
10:11 10 And this is a Lexis cite, it's an unpublished
11 decision, but it's 2021 U.S. District Lexis
12 180408, decided on January 14, 2021. That case
13 was ultimately resolved as a matter of law too.

14 So, your Honor, under these
10:12 15 cases there is no standing here. Plaintiff
16 makes no -- they make that argument that, well,
17 you knew FACTA existed. That's their big
18 argument on willfulness. Walgreens knew all
19 about FACTA. We've always said we knew about
10:12 20 FACTA. When we accept a card, debit or credit
21 card including these GPR cards we always comply
22 with the truncation requirements of the statute
23 we looked at a moment ago, but there's no
24 evidence in this record, it's not true, that

1 Walgreens ever thought that those requirements
2 applied when they accepted cash for the
3 transaction.

4 And in any event knowledge of
10:13 5 the law is never enough to satisfy Safeco, not
6 even really relevant under Safeco, but we cited
7 cases like the Bouton case, B-O-U-T-O-N, and
8 the Keller case, K-E-L-L-E-R, where the Court
9 held that more than just knowledge of FACTA was
10:13 10 required to show any kind of willfulness. You
11 needed to show knowledge that what you did
12 violated FACTA, specific knowledge that you
13 knew what you did violated FACTA and they don't
14 distinguish those cases.

10:13 15 Really, they just cite to the
16 fact that we complied with the law as to other
17 transactions and then they point to an email,
18 it's actually a partial email. It's fairly
19 obvious that they didn't give you the whole
10:14 20 thing because it starts in the middle of the
21 conversation, but the gist of it is pretty much
22 someone saying what is FACTA, right, and he
23 sends that to a lawyer, in-house lawyer at
24 Walgreens and she said I don't know what FACTA

1 is. I Googled it and this is what it shows.

2 And he says, well, I don't know
3 why this is for treasury, that's his
4 department, unless maybe it has something to do
10:14 5 with our old Walgreens branded prepaid cards
6 but we terminated that years ago so I don't
7 know. That's their evidence of willfulness.

8 Well, this is the problem with
9 the way discovery proceeded because they wanted
10:14 10 every document that referenced FACTA whether
11 these people had anything to do with the point
12 of sale system at Walgreens or not and so we
13 searched for the word FACTA and, frankly, we
14 had an argument over this document as to
10:14 15 whether or not it was privileged and they said,
16 well, this guy, he's not in a control group,
17 he's just a minor person, but now they say this
18 kind of oblique email demonstrates the
19 knowledge of the entire company.

10:15 20 That's not the law. The law
21 doesn't allow that. And, frankly, all you have
22 to do is look back at Safeco and Fuges, their
23 case, which says this kind of evidence is
24 irrelevant because finding one person, I don't

1 know how many employees Walgreens has but it's
2 tens of thousands of people, finding one person
3 who really doesn't know that says, I don't
4 know, maybe it has something to do with this,
10:15 5 that's not evidence of willfulness.

6 Evidence of willfulness
7 requires that Walgreens proceeded in a manner
8 that had no foundation in the statute. We know
9 that's not true. The Seventh Circuit
10:15 10 interpreted it the same way we did or that --
11 and that there was no court of appeal or
12 regulatory guidance to the contrary.

13 That second piece is important
14 because that's their other big argument about
10:16 15 willfulness because they say, well, we sued
16 them so obviously it was willful after we sued
17 them, but you'll note that in the Safeco test
18 it does not say in the second part that you've
19 been sued. It says no Court of Appeals
10:16 20 decision, in other words a controlling legal
21 decision or administrative guidance.

22 The fact that a lawyer came up
23 with a first impression theory and sued us
24 doesn't change what the statute says. So,

1 yeah, they did change it after the motion to
2 dismiss was denied because we were afraid of
3 copycat lawsuits, and as Ms. Glick explained in
4 her declaration, this was always done to help
10:16 5 consumers resolve disputes because it's a cash
6 transaction, the BIN number identified the bank
7 so if they gave the receipt to the person at
8 Walgreens they could easily find the bank and
9 track down what happened to that particular
10:17 10 deposit.

11 We took away that ability of
12 consumers because we were afraid of copycat
13 lawsuits after the motion to dismiss,
14 absolutely true, but it has nothing to do with
10:17 15 the Safeco standard and, frankly, it doesn't
16 have anything to do with willfulness because at
17 best it's a post suit remedial measure. It
18 would be irrelevant on the issue of willfulness
19 under Illinois Supreme Court law. But none of
10:17 20 that really matters because under Safeco it's
21 irrelevant. It's is there a Court of Appeals
22 decision or administrative guidance to the
23 contrary and there isn't.

24 Walgreens' conduct was entirely

1 consistent with industry standards. That's
2 also in the record, undisputed. Ms. Glick
3 testified that they relied on the card issuers
4 and that one of the issuers' income
10:17 5 specifically required the BIN to be on the
6 receipt. That's at pages 92 and 93 of her
7 transcript. They don't dispute it. There's no
8 contrary evidence.

9 We offered Mr. Philliou's
10:18 10 report, industry expert, citing that their
11 conduct was consistent with the industry
12 standards including what he referred to as the
13 PCI standard which is the data privacy standard
14 for the payments industry. Mr. Jones in his
10:18 15 report also refers to that and says that that
16 standard specifically says you can disclose and
17 not encrypt the first six and last four digits
18 of the card number.

19 All of that's in the record and
10:18 20 they had the burden if they wanted to to come
21 forward with evidence to contest it. They
22 chose not to because they want to hang their
23 hat on this idea that you shouldn't reach it,
24 but the law says you have to. The Second

1 District says you have to.

2 It's not premature to reach
3 this issue. They actually, I think, know that
4 on some level. That's why, you know,
10:18 5 20 percent of their original motion was
6 addressed to willfulness. They have a whole
7 heading on it. They just didn't introduce any
8 evidence in support.

9 Ultimately, a plaintiff can't
10:19 10 have an actionable claim based on a reading of
11 the statute. That is entirely consistent with
12 what the controlling Circuit Court in this
13 circuit, how it reads it. There's just no
14 cause of action there.

10:19 15 So four reasons no claim:
16 TransUnion; no standing under Illinois law;
17 plain language of FACTA; no willfulness.

18 Now, the supposed 2-801
19 factors. Unless, your Honor, I know last time
10:19 20 you had questions at the end of the first
21 section Mr. Hilicki gave. I'll give you the
22 same opportunity.

23 THE COURT: No, I think you covered
24 it well.

1 MR. ANDALMAN: Thank you.

2 Section 2-801 of the Code of
3 Civil Procedure lists these four factors;
4 numerosity, commonality sometimes also called
10:20 5 predominance, adequacy, and appropriateness.
6 And it is true, we are not contesting
7 numerosity in this case. They've got an expert
8 that says there's 1.1 million members of the
9 class. I think Illinois case law says if
10:20 10 there's more than 20 or 40 there's enough so
11 not an issue here, but we do dispute the other
12 factors.

13 The essence of Mr. Hilicki's
14 argument is FACTA cases get certified all the
10:20 15 time and this is a FACTA case. I don't
16 remember right now the fallacy that is and from
17 my logic class in college but it's a fallacy
18 because this isn't like other cases. Sometimes
19 FACTA cases aren't certified and we've cited a
10:20 20 lot. It's not like if FACTA, then class
21 certification.

22 As we've already discussed, or
23 I've already discussed, commonality and
24 adequacy based on Alley 64 subsume the issue of

1 this third actionable claim so I won't repeat
2 those arguments but they go to both of those
3 factors and there are other reasons.

4 And we started with the class
10:21 5 definition because that raises two issues that
6 you did touch on, Mr. Hilicki.

7 The definition that they
8 propose, the class definition is this, right,
9 all persons in the United States June 4, 2017,
10:21 10 or July 3, 2019, for the subclass through
11 February 29th of '20 engaged in one or more
12 reload transactions. So the problem with this
13 definition, two problems with it are that it
14 includes all persons, not just consumers, and
10:21 15 that it talks about engaging in reload
16 transactions and not being provided a receipt.

17 I mentioned this and I'll
18 highlight it again, you know, that the
19 subclass, there's no basis for the subclass in
10:22 20 this case because under Safeco the filing of
21 the lawsuit doesn't change anything about the
22 willfulness analysis. That doesn't render it
23 willful. We have a reasonable reading of the
24 law same as the Seventh Circuit, there's no

1 authority contrary and that didn't change
2 because plaintiffs came up with a creative
3 legal theory and sued us and then we appeared.

4 With regard to the business use
10:22 5 of the cards, individual issues get business
6 users and persons who were not provided
7 receipts, right. The issue of business use,
8 it's true that what they call FACTA which is
9 1681(g) subsection that we looked at
10:23 10 previously, it only talks about persons. It
11 also doesn't allow for lawsuits. It doesn't
12 provide for a private cause of action.

13 The private cause of action
14 comes from FCRA the broader statute and that is
10:23 15 15 U.S.C. 1681(n). 1681(n) allows suits only
16 with respect to any consumer so a consumer can
17 bring a cause of action. 1681(a)(c) defines
18 consumer to be an individual. 1681(a)(b) the
19 prior section has a definition of person. And
10:23 20 it says a person is "individual or partnership,
21 corporation, trust, estate, cooperative,
22 government entity," it goes on. So the
23 Congress views distinction between persons and
24 individuals or consumers.

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1 Only individual consumers have
2 a cause of action, but the class definition
3 here allows any person to, and the argument
4 that, well, but that individual might be
10:24 5 representing a company then they have a right
6 to sue, well, that would eviscerate the
7 distinction Congress made because all
8 companies, all partnerships, all estates, they
9 all act through individual people but not in
10:24 10 their individual capacities but in their
11 corporate capacities and their capacities as
12 employees.

13 They say, well, Walgreens
14 didn't give you any evidence of a particular
10:24 15 class member who was a business user. That
16 wasn't our burden. It was their burden. They
17 have the burden on every single element here
18 and what we did provide to you was
19 Mr. Philliou's report which oddly they cite
10:25 20 part of but they ignore another part because at
21 the top of page 4 of his report he says a very
22 common use case for these GPR cards is in lieu
23 of petty cash, gives the company much more
24 control.

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1 And we've also cited numerous
2 decisions including the Rowden decision,
3 R-O-W-D-E-N, the Lawrence decision, Lawrence
4 vs. South Florida Racing Association both of
10:25 5 which denied class certification because it was
6 recognized that business users use cards.
7 Individual people who work for businesses use
8 them on behalf of the business and they don't
9 have a cause of action, and so in both of those
10:25 10 cases the class certification was denied
11 because the definition could include persons
12 who were acting on behalf of a business. They
13 don't have a right to sue under FCRA.

14 Frankly, the demand for
10:26 15 individualized proof, well, show me which ones
16 in this 1.1 million were acting on behalf of
17 their businesses only points out why this case
18 isn't appropriate for summary judgment -- or
19 for class certification treatment because we
10:26 20 would have to do that analysis.

21 You can't form a class that
22 actually has a right to sue without first
23 determining were you using the card for
24 yourself or were you using it for business.

1 That's an individualized determination that
2 would have to be made. It's one reason why the
3 class isn't appropriate for class treatment.

4 Plaintiff's definition also
10:26 5 includes people who were not provided the
6 receipt. And they say, well, the system was
7 set up to generate a receipt and Ms. Glick,
8 what she actually said was it printed out for
9 the cashier to then offer it to the consumer.
10:27 10 And they say, well, that's all that's required
11 to provide is that it prints at the cashier and
12 the cashier is directed to do it but that
13 doesn't mean they do do it. And that's not
14 speculative. We've all been in retailers when
10:27 15 they say do you want your receipt and
16 oftentimes we say no.

17 So a lot of times they aren't
18 being provided the receipt. Again, in
19 Lawrence, the case I just mentioned, class was
10:27 20 denied on that ground, too, and another case we
21 cited, Delamarter vs. Supercuts the class was
22 denied on that ground. In fact, classes get
23 denied on exactly these two grounds all the
24 time in FACTA cases.

1 So to Mr. Hilicki's point that,
2 well, if I can show you enough cases it must be
3 true, there's a slide with at least five of
4 them, Rowden, Gist, that's G-I-S-T vs. Pilot
10:28 5 Travel Centers, Bouton, B-O-U-T-O-N, vs. Ocean
6 Properties, the Lawrence case that I mentioned,
7 Delamarter vs. Supercuts case, all of these are
8 cited in our brief and in every single one,
9 FACTA class certification was denied on these
10:28 10 two grounds, one or both of them.

11 And Delamarter is interesting
12 because Delamarter is a cite, does like a
13 survey of the law, it cites another half dozen
14 or more cases where class certification is
10:28 15 denied on exactly this ground.

16 They cite a number of cases,
17 your Honor, in which they talk about this
18 definition of what it means to provide a
19 receipt. They're not FACTA cases. There is no
10:29 20 case in the record that I'm aware of that holds
21 in the FACTA context that a FACTA case should
22 be certified after these issues are raised. I
23 don't know what the arguments were in the cases
24 where classes were certified. I'm not denying

1 that classes get certified, but I'm saying when
2 this is raised as an issue, these five cases
3 plus the six more that Delamarter cited say
4 that's a reason not to certify.

10:29

5 Delamarter said, the quote from
6 Delamarter is "Even in situations when a
7 corporate policy directed customers be provided
8 receipts, when determining whether putative
9 class members are cardholders, consumers, and
10 received a receipt involved an individual
11 inquiry, class claims in a FACTA case have
12 been found not to predominate in that
13 circumstance." That was the holding in
14 Delamarter.

10:30

15 Commonalty. In part the reason
16 that the cases are denying class certification
17 when these definitions are too broad is because
18 of the commonality issue like the Delamarter
19 quote I just read, it requires an individual
20 inquiry. Did you actually get a receipt? Were
21 you actually acting for yourself or for a
22 company.

10:30

23 Even if the defendants tried to
24 narrow it, the definitions, and they say, well,

1 you can try to rework it, they don't suggest
2 any way to rework it, I don't know that it can
3 be, but you would still have to have the same
4 individualized inquiry with regard to whether
10:30 5 or not someone was a class member that would
6 defeat the commonalty point.

7 And then there's the waiver
8 defense and they want to dismiss the waiver
9 defense, but they attach actually as Exhibit 13
10:31 10 to their motion our affirmative defenses and
11 they include waiver. They didn't move to
12 strike it. They answered it. It's an issue in
13 this case. Waiver is a defense to statutory
14 claims in Illinois.

10:31 15 We cited the Ferguson vs. Moore
16 case. It's a Second District case.
17 "Individuals may waive substantive rules of
18 law, statutory rights, and even constitutional
19 rights that are enacted for their benefit."

10:31 20 This issue of affirmative
21 defenses does defeat class certification in
22 FACTA cases. We cited in our brief the Holmes
23 case, H-O-L-M-E-S, and the Abdallah case,
24 A-B-D-A-L-L-A-H, both of which denied

1 certification because of individualized issues
2 relating to specific affirmative defenses. In
3 addition, the Illinois Supreme Court in Smith
4 stated that the Court has to look at defenses
10:32 5 in determining class certification issues.

6 The out-of-jurisdiction cases
7 that plaintiffs cite on this point actually
8 don't support their arguments. They cite
9 Staton, S-T-A-T-O-N, vs. State Acceptance which
10:32 10 is from the Middle District of North Carolina.
11 There the issue wasn't certification at all, it
12 was a motion to strike. No motion to strike
13 here.

14 It was a case under a different
10:32 15 section of FCRA, not FACTA, but what's really
16 interesting about it is they cited a section on
17 the estoppel defense, not waiver, where the
18 courts said estoppel as a matter of law wasn't
19 a defense and they struck it, but there was a
10:32 20 waiver defense in Staton and on that the Court
21 didn't strike it, the Court said I'm going to
22 give you leave to replead it. You don't give
23 leave to replead if it's not a defense as a
24 matter of law.

1 And so Staton actually stands
2 for the proposition that waiver is, can be a
3 defense in a FCRA case, exactly the opposite of
4 what they cited for and we searched a little
10:33 5 bit to see what other Middle District of North
6 Carolina cases there were and we found this
7 Kundemueller, K-U-N-D-U-M-E-U-L-L-E-R vs.
8 Pentagon Federal Credit Union, it's a 2021 case
9 from that court in which they held that
10:33 10 estoppel actually applied to the defense to a
11 FCRA claim so I guess that isn't even the law
12 on that issue anymore in that district.

13 FACTA is any trial in this case
14 is going to be dominated in large part, they
10:33 15 want to make it all about Walgreens. It's
16 going to be dominated a lot about Ms. Fausett
17 and her arguing the defense.

18 And as for the argument that it
19 doesn't dispose of her whole case because how
10:34 20 could she have waived her first transaction,
21 she testified at page 166 or her deposition
22 that she'd been using this card since 2017. So
23 the fact that the first transaction they allege
24 was from March of 2019 doesn't change the fact

1 that she was coming back to Walgreens again and
2 again knowing exactly what the receipts looked
3 like, what was on them, didn't matter to her,
4 wasn't important to her.

10:34

5 They try to draw this
6 distinction between commonality and typicality,
7 all both of which really fall under
8 predominance under Section 2-801 and I'd refer
9 the Court in that regard to Avery vs. State

10:34

10 Farm, an Illinois Supreme Court case,
11 216 Ill. 2d at 128 where the Court actually
12 held that the Circuit Court there had erred by
13 not addressing its certification whether the
14 class reps' claims could be adjudicated

10:35

15 uniformly with the rest of the class and that's
16 really the issue here is would Ms. Fausett's
17 trial be just like every other trial and it
18 wouldn't be because we do have unique defenses
19 with regard to her.

10:35

20 In a case by the way in Avery
21 the Supreme Court said it was error, reversed
22 certification, and also discussed this whole
23 concept of typicality and commonalty.
24 Typicality is generally discussed in the

1 context of Rule 23 in the Federal Court and
2 said really they all get to predominance and
3 the ultimate issue is would the trial look the
4 same for her and for the class members.

10:35

5 And actually they kind of turn
6 the rule upside down because in Smith vs.
7 Central Railroad the Illinois Supreme Court
8 noted that the predominance requirement,
9 commonality in the Illinois law is actually far
10:36 10 more demanding than the federal standard for
11 class certification and that is at 223 Ill. 2d
12 at 449.

13

There's my Delamarter slide.
14 Snuck in there.

10:36

15

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10:36

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15 Judge, this is an important
16 quotation from Smith, your Honor. "Inquiry
17 into class certification requires the Court to
18 look beyond the pleadings to understand the
19 claims, defenses, relevant facts and applicable
20 substantive law." That's the Illinois Supreme
21 Court directing. You have to look at the
22 defenses. The defenses are relevant to class
23 certification. They can't be ignored.

Adequacy. We are not

1 challenging the adequacy. We have Mr. Keogh
2 and Mr. Hilicki, they're experts in this field.
3 We don't doubt that, but they're wrong when
4 they say the test, I think Mr. Hilicki said
10:37 5 was, the only thing you need to remain a
6 plaintiff is that their interests are
7 consistent with those of the class. That would
8 actually eliminate any really inquiry into the
9 role of the class representative, just simply
10:37 10 where their interests are consistent. That's
11 not what it is.

12 And the Courts do reject
13 passive figureheads. We've got some quotes up
14 there from Byer Clinic & Chiropractic which
10:37 15 reverse certification because the reports were
16 it revealed the plaintiffs -- the record
17 revealed the plaintiffs to be a passive
18 figurehead. It's a requirement that the
19 plaintiff make decisions for the class. The
10:37 20 plaintiff has to be the one to decide what to
21 do and how to do it. It's not simply that
22 their interests are consistent.

23 And there's no record here that
24 she made the decision to pursue a class action.

1 She answered an ad on the website like
2 ClassActions.com. She is a passive figurehead.
3 She couldn't name her lawyers. She couldn't
4 name them. One of them she could name, Scott
10:38 5 Owens whom you've never met. The only person
6 she could name was just the first name of a
7 paralegal who she said that's who I have most
8 of my discussions with.

9 How is it possible that she's
10:38 10 making decisions about this class in this case.
11 Through the paralegal? The lawyers are
12 directing the case, she's not. And that's why
13 she's an inadequate class representative.

14 In addition, she is not an
10:38 15 adequate class representative because she has
16 unique defenses that only apply to her. She's
17 got her own personal interests that are
18 different than those of the class. And, yes,
19 we do point out, and I'm not going to belabor
10:39 20 it here because there are so many legal issues,
21 but her testimony is inconsistent. It's
22 implausible. The class shouldn't depend on her
23 as their representative.

24 The complaint alleges that the

1 information on these receipts was critically
2 important and had to be safeguarded and then
3 she testifies sometimes I throw it on the floor
4 in the store, that's why I don't have it.

10:39 5 Sometimes I just lose it. And then she said,
6 no, I keep every one and we said, well, where
7 are they all. Well, I was keeping them in the
8 glove box of a broken down car in my yard. And
9 what happened to those that were in the glove
10:39 10 box? Well, I sold the car. Did you take the
11 receipts out? No, the sale happened so quickly
12 I couldn't do that. It's absurd.

13 And then there were her
14 twisting testimony about why she kept going
10:40 15 back to Walgreens. She submitted a declaration
16 saying I kept going back to Walgreens because I
17 didn't have a car during that time period and
18 my landlord gave me his car but he would only
19 let me drive to Walgreens in it. That's my
10:40 20 only choice.

21 So it turns out that she was a
22 DoorDash driver which you have to provide your
23 own vehicle for. So whether it was hers or her
24 landlord's, she was driving all over delivering

1 food during this period.

2 It also turned out that there
3 were -- and I showed her this during her
4 deposition the Green Dot website showed about a
10:40 5 dozen places that she could walk to within a
6 mile of her house where you can do reloads.
7 She said, oh, that's 'cuz I tried all those
8 places, you couldn't do reloads there. They
9 didn't work. So we subpoenaed Green Dot. They
10:40 10 know the time period we subpoenaed Green Dot
11 for and they provided the data that showed that
12 during that period there were about 1500
13 reloads at these locations. She's not a
14 credible person, not credible witness. A
10:41 15 credible person is not fair.

16 So, look, we know she's not a
17 lawyer. No one expects class representatives
18 to be lawyers. They don't have to know every
19 nuance. I get that, but Ms. Fausett is --
10:41 20 she's an incredible person, her testimony is
21 incredible and she doesn't really know what's
22 happening in this case.

23 It's very similar to the other
24 case where she tried to be a class rep, this

1 CBC oil case up in California and I asked her
2 about that in her deposition and she said, oh,
3 yeah, that case I think nothing's been going on
4 in it for awhile. And I was like, oh. She was
10:41 5 like, I looked at the docket and it shows that
6 you voluntarily moved to dismiss it. She
7 didn't even know because that's not who she is.
8 She is not -- she's doing this because she
9 probably hopes there will be some kind of extra
10:41 10 amount for her in the end, but she's not
11 involved in this lawsuit.

12 Finally, your Honor, we don't
13 think this case is appropriate for class
14 certification for all the reasons that we've
10:42 15 been talking about really. There's so many
16 individual issues. It would be so difficult to
17 ascertain a class and it is significant under
18 Illinois law that there's a right to attorney's
19 fees. There's no problem finding a lawyer.
10:42 20 Mr. Hilicki said, well, who's going to pursue a
21 case for a thousand dollars plus attorney's
22 fees, but attorney's fees are attorney's fees,
23 whatever is reasonable to do, they would get.
24 That's the remedy Congress provided.

1 And we think that for all of
2 these reasons, for all of these reasons class
3 certification should be denied in this case.
4 Thank you.

10:42 5 THE COURT: Thank you very much,
6 Mr. Andalman.

7 Mr. Hilicki, you have the final
8 word on this.

9 MR. HILICKI: Hello again, your
10:43 10 Honor.

11 THE COURT: Hello again.

12 MR. HILICKI: Alley 64 didn't change
13 the law. It didn't reverse Cruz, didn't say
14 Cruz is wrong. The actual claims simply given
10:43 15 the law and what you're alleging is, you know,
16 do you see a cause of action, that's what
17 Alley 64 is talking about, and although it said
18 you should be, you know, you have to make sure
19 the plaintiff has an actionable claim when you
10:43 20 certify a class, it didn't say you make that
21 determination repeatedly throughout the case or
22 you make that decision multiple times.

23 I mean, here the Court already
24 determined she has an actionable claim in the

1 cases before Judge Berrones and they haven't
2 presented a basis to reconsider that decision.
3 Alley 64 does not deal with that circumstance.
4 And they say, well, okay, we're filing a stated
10:44 5 claim and now we're going to go check it out
6 over again and have the trial court do it
7 multiple times. You only need to do it once.
8 It was done here. It doesn't need to be done
9 again.

10:44 10 And it's not about taking the
11 allegations in the complaint as true. That's
12 not the issue. They're talking about going
13 beyond and taking evidence and making findings
14 of fact like you would do in summary judgment
10:44 15 or at trial but without we're going to ignore
16 the rules of evidence, we're going to cite you
17 hearsay reports. We're not going to consider
18 whether or not the testimony sworn to, we're
19 not going to imply the Supreme Court Rule 191.
10:44 20 Nothing in Alley 64 says that that's
21 permissible. What they're talking about there
22 is something stating a cause of action.

23 The Cruz case, the Barbara's
24 Sales, they mentioned that case. They said the

1 Court went and looked at the full record. Keep
2 in mind we're talking about the Appellate
3 Court, they're going to look at the full
4 record. The Appellate Court doesn't need to --
10:45 5 isn't the trial court, but most importantly, in
6 Barbara's Sales the Court decision that there
7 was no actionable claim wasn't based on
8 weighing the evidence or what the full record
9 stated or what the deposition testimony stated.

10:45 10 That case simply turned on
11 whether the expression Pentium 4 implied that
12 you're going to have a better product than what
13 the Pentium 3 was. It would be faster. And
14 they said, no, that's just inaction puffery, we
10:45 15 can tell that from the face of the allegations.
16 We don't need to go digging around in the
17 record and seeing who had the credible witness
18 or what some expert said to figure that out, we
19 can see on its face that it's not actionable.

10:45 20 That's why the Court found, you
21 know, talking about there being an actionable
22 claimant in that case. On its face the
23 allegations were not actionable. Cruz came
24 after Barbara's Sales. Cruz was well aware of

1 that decision.

2 Also, I would note that when
3 Judge Berrones decided their motion to dismiss,
4 he wasn't limited to the allegations in the
10:46 5 complaint. They brought their motion not only
6 under 2-615 but also 2-619 based on the same
7 declaration from Ms. Glick that we cite in
8 support of our motion class certification here.
9 So you're looking at the exact same facts
10:46 10 before the Court. It wasn't constrained by the
11 allegations in the complaint as they seemed to
12 suggest here.

13 Turning to the more specific
14 arguments that they make regarding standing.
10:46 15 Their motion heavily relies on federal courts
16 and federal law and the federal definition for
17 what constitutes an injury of fact. They say
18 that Illinois used a similar terminology, but
19 Illinois doesn't interpret the word the same
10:47 20 way. An injury in Illinois -- a violation of
21 your rights is an injury in Illinois. And, in
22 fact, it used to be an injury in Federal Court
23 until just recently. That was a change.

24 So what they're basically

1 saying is when federal law changed to be more
2 restrictive about what constitutes an
3 actionable injury and a violation of your
4 rights is no longer sufficient, they're saying
10:47 5 that Illinois law is somehow pegged to the
6 federal understanding in a federal injury test
7 and so that when the federal courts each time
8 the wind changes in the federal courts somehow
9 that magically changes the law in Illinois,
10:47 10 that's simply not how federalism works.

11 To the contrary, the
12 U.S. Supreme Court said in ASARCO, A-S-A-R-C-O,
13 vs. Kadish, K-A-D-I-S-H, that the constraints
14 of Article 3 which is the origin of the federal
10:48 15 state test do not apply to State courts and,
16 accordingly, the State courts are not bound by
17 the limitations of the case or controversy or
18 other Federal Rules of justiciability -- which
19 I think Mr. Andalman spelled earlier -- even
10:48 20 when they address issues of federal law, which
21 we're talking about federal statute here.

22 So he didn't -- Mr. Andalman
23 distinguished the Lebron case but he only
24 distinguished on its facts. He's ignoring what

1 it stands for which is that the Illinois
2 Supreme Court said that Illinois "has expressly
3 rejected federal principles of standing."
4 That's the Lebron vs. Gottlieb case again.

10:48 5 So the Illinois courts do not
6 follow federal law on what constitutes an
7 injury sufficient to bring a lawsuit. And
8 there are ample cases including cases recently
9 that confirm that a violation of one's rights
10:49 10 is sufficient to sue in state court in
11 Illinois.

12 We have the older case, the
13 Lake In The Hills case from the Second District
14 which said a direct injury to one's property or
10:49 15 rights, it confers standing. It may not have
16 found their standing in the case, but it
17 recognizes that a violation of one's rights
18 alone is sufficient grounds to bring a lawsuit.

19 And more recently, of course,
10:49 20 we have an Illinois Supreme Court's decisions
21 in McDonald vs. Symphony Bronzeville and
22 Rosenbach, R-O-S-E-N-B-A-C-H, vs. Six Flags
23 where the Court found that -- in fact,
24 Rosenbach, the Court specifically rejected

1 defendant's contention that redress under the
2 statute there should be limited to those who
3 can plead and prove that they sustained some
4 actual injury or damage beyond the infringement
10:50 5 of the rights afforded them under the law. And
6 they specifically said no additional
7 consequences need be pleaded or approved. The
8 violation in itself is sufficient.

9 And the Court did not limit
10:50 10 itself, didn't say -- I think Mr. Andalman said
11 the standing didn't take up one or two motions
12 that was raised in the trial court. The
13 Supreme Court and the appellate courts aren't
14 limited by which issue is taken up.

10:50 15 Their opinion applies to all
16 the issues before them. Their opinion applies
17 to standing in general. The Supreme Court's
18 decision doesn't make sense. It doesn't make
19 sense for them to say you have the right to sue
10:50 20 under the statute but you can still lack
21 standing to sue under the statute because you
22 didn't allege some injury.

23 They say you don't need an
24 injury. It would make no sense for this

1 unanimous Supreme Court decision to have
2 basically been an exercise in nothing because
3 someone can just turn around and say, look, you
4 have the right to sue under the statute without
10:51 5 alleging any additional injury, but to have
6 standing you still have to allege some sort of
7 injury. That makes absolutely no sense.

8 The Rosenbach case and McDonald
9 case stands for the proposition you have
10:51 10 standing to sue to remedy a violation of your
11 rights and you don't have to take my word for
12 it. The Second Districts case, the decision in
13 Soto, the case that we cite -- I'm looking for
14 the full cite here. I apologize, I don't have
10:52 15 the full cite handy.

16 THE COURT: Versus Great America.

17 MR. HILICKI: Thank you.

18 THE COURT: 2020 Ill. App. 2d
19 180911.

10:52 20 MR. HILICKI: Which was a FACTA
21 case. I realize it was vacated pursuant to
22 settlement because it was wrong, because the
23 parties agreed to that, but that's still -- it
24 may not be binding but it's absolutely

1 persuasive. It tells you what the Second
2 District thinks about what you need for
3 standing in a FACTA case.

4 The Second District found in
10:52 5 Soto paragraph 17, it cites Rosenbach for the
6 idea that no additional harm beyond the
7 violation of mere rights is needed. So the
8 Second District reads Rosenbach exactly the way
9 we do.

10:52 10 And consistent with Soto two
11 other appellate districts in Illinois have
12 ruled exactly the same way, the Lee case that
13 Mr. Andalman talked about, the Fifth District,
14 and Duncan from the First District. And
10:53 15 although Duncan was also vacated pursuant to
16 settlement, it's still persuasive. It tells
17 you how the appellate courts view this issue.

18 We've got three decisions on
19 FACTA cases. All three came out the exact same
10:53 20 way, a finding of standing based on the
21 violation and Soto's case based on Rosenbach.
22 But the Lee case is still good law. And
23 Walgreens tries to distinguish Lee saying,
24 well, they didn't really need to get there to

1 that issue because they found some other
2 problem with the objector's case, but it
3 doesn't matter because the issue was presented
4 to the Court and the Court expressly passed on
10:53 5 it, expressly ruled on it.

6 And our Illinois Supreme Court
7 in the Nudell case, N-U-D-E-L-L, expressly hold
8 that even if an Appellate Court decides an
9 issue that it turns out it wasn't necessary for
10:54 10 the disposition of the case, it is still
11 entitled to much weight and should be followed.
12 So effectively it's binding despite their
13 attempt to say it didn't really -- their
14 conclusion that the plaintiff had standing
10:54 15 wasn't necessary. That's still holding, that's
16 still binding authority and that must be
17 followed.

18 The Maglio case doesn't change
19 anything. First, I would point out that
10:54 20 Judge Berrones dealt with Maglio. They cited
21 Maglio back then just as they do today so the
22 argument that Maglio changed the outcome here
23 has already been rejected by the Court and
24 there's no basis to reconsider it.

1 Unlike Lee and unlike the
2 instant case, Maglio did not involve the
3 statute that provides for statutory damages,
4 did not provide a remedy, a right of action for
10:54 5 that remedy. As they acknowledge, Maglio faced
6 a claim under the Illinois Consumer Fraud Act,
7 Illinois Consumer Fraud and Deceptive Business
8 Practices Act. That statute does not provide a
9 statutory damages remedy. They said in another
10:55 10 statute that the plaintiffs in that case were
11 trying to bootstrap this privacy statute into
12 this ICFA claim. The privacy statute provides
13 no right of action on its own.

14 So what's significant about
10:55 15 Maglio dealing with the Illinois Consumer Fraud
16 Act or ICFA, instead of FACTA is that ICFA to
17 have a claim you have to show an economic
18 injury. You have no claim under the statute
19 otherwise. So that's why they had a standing
10:55 20 problem there.

21 By contrast, FACTA contains no
22 harm requirement. That's undisputed, but we
23 also cite cases which say that, the Jeffries
24 case, the Bateman case expressly says statutory

1 damages recoverable even where no actual harm
2 results.

3 This is why the First Appellate
4 district in Duncan which again is a FATCA case
10:56 5 found Maglio to be inapposite. It's a word I
6 try not to say outside this context. So it
7 said there that case there is no clear right of
8 action whereas in a FACTA context there is
9 without needing to show additional injury. In
10:56 10 any event, Maglio certainly cannot trump the
11 Court's decisions in McDonald or Rosenbach.
12 Those are controlling.

13 Also it's worth noting that
14 unlike in Federal Court Illinois standing
10:56 15 doctrine exists only to "preclude persons who
16 have no interest in the controversy from
17 bringing a suit." That's the Glisson case,
18 G-L-I-S-S-O-N, which we cite in our brief.
19 Here there's no dispute that Ms. Fausett has an
10:57 20 interest in this case. She alleges Walgreens
21 disclosed her debit card information in willful
22 violation of her FACTA rights entitling her to
23 statutory damages if she prevails. So very
24 clearly has an interest so in multiple ways

1 under Illinois law she has standing.

2 TransUnion vs. Ramirez didn't
3 change anything, not in Illinois anyway. It
4 addressed -- throughout the opinion the Court
10:57 5 makes clear that it is addressing standing to
6 sue "in Federal Court," page 2200 of that
7 opinion which also I would note that Judge
8 Conlon in the Circuit Court of Cook County
9 found the same thing. TransUnion is about and
10:57 10 only about standing in Federal Court. The rest
11 is not binding our authority here but I thought
12 I'd bring it up.

13 So in the Lebron case the
14 Illinois Supreme Court said we reject the
10:58 15 federal standing rules. TransUnion can't undo
16 that. Walgreens reads TransUnion creatively to
17 suggest that -- I think they actually argued in
18 their brief that TransUnion requires meeting
19 the federal version of the injury test, the
10:58 20 federal understanding of what is a concrete
21 injury in order to have an actionable claim for
22 statutory damages, but nowhere in that opinion
23 does it ever discuss what constitutes an
24 actionable claim under the statute. That was

1 simply not an issue.

2 The case is exclusively about
3 the standing to sue in Federal Court and this
4 is further -- the language of the opinion
10:58 5 itself this is demonstrated by Justice Thomas'
6 dissent which expressly notes that the majority
7 opinion did not limit the ability to sue in
8 state court and will drive litigants with valid
9 federal claims to force their federal rights in
10:59 10 state court. That's the footnote of that
11 opinion. The majority takes issue with a
12 number of statements from the dissent in that
13 case. They did not question that one.

14 I would also add that although
10:59 15 we may not meet the federal concept for an
16 injury in fact as federal courts now nearly
17 defined it the last couple of years, but we
18 still have injury. We have a violation of our
19 rights. We have the fact that we had to then
10:59 20 protect the receipts to make sure there would
21 be no further disclosure. It's a burden that
22 was imposed. Not a gigantic burden but still,
23 that's one of the harms the statute was
24 designed to avoid so people could actually use

1 their receipts and not have to worry about them
2 falling into the wrong hands.

3 In fact, I would -- along these
4 lines I would add that no court, they can't
10:59 5 site to a single court that accepted their
6 argument that TransUnion stands for the
7 proposition that it's unconstitutional to bring
8 a FACTA claim or any other federal claim in
9 state court without meeting the new federal
11:00 10 definition of a federal concrete injury of
11 fact. No court reads that case that way.

12 I think that covers the
13 standing.

14 THE COURT: Did you want to go into
11:00 15 Alley 64 at all?

16 MR. HILICKI: I started off with
17 Alley 64 just talking about how it didn't
18 change the law, it didn't change careers. It
19 simply said actionable claim, that's what they
11:00 20 stated cause of action. It's like a 2-615
21 motion or in this case they brought a 2-619
22 motion. It's already been ruled on. It
23 doesn't say you can go making free ranging
24 merits determinations, go ahead and look at

1 expert reports, decide if you think the
2 expert's credible, you know, ignoring rules of
3 evidence. Cruz categorically dealt with that
4 issue.

11:01 5 Alley 64 said you have to make
6 sure they have an actionable claim, but, again,
7 I pointed out Alley 64 doesn't require you to
8 have the Court make that determination more
9 than once. The Court already determined here
11:01 10 that there's an actionable claim. I realize
11 the appellate courts in some cases disagree
12 with the trial courts, but it doesn't mean you
13 make the determination over and over and over
14 again where you have to make a separate
11:01 15 determination at the class stage even though
16 you've already decided it before. That's not
17 Alley -- Alley 64 does not say that.

18 THE COURT: Thank you.

19 MR. HILICKI: Sure.

11:01 20 Whether FATCA applies. Again,
21 this is an issue Judge Berrones ruled on. He
22 rejected their argument. They're trying to
23 make a very creative reading of -- and creating
24 a charitable reading of the statute. FACTA

1 expressly covers any receipt provided to the
2 cardholder at the point of sale or transaction.
3 It doesn't limit itself to where, to cases
4 where a card is accepted as payment.

11:02 5 It doesn't say that. It only
6 uses the word accept to identify who the
7 statute applies to, i.e., any person that
8 accepts credit cards or debit cards for the
9 transaction of business. That's who the
11:02 10 statute applies to and then it goes on to tell
11 you when it applies, but that phrase at least
12 the word accepts, it doesn't talk about when it
13 applies, it just says who it applies to, but
14 when it applies, it applies to any receipt
11:02 15 provided at the point of the sale of
16 transaction.

17 If you were to limit FACTA
18 cases where a card is accepted as payment, then
19 that improperly reads unwritten exceptions and
11:02 20 limitations or conditions in the law that
21 Congress did not see fit to put there which is
22 contrary to rules of statutory construction.

23 And we know that it's not
24 limited to cases with instances where a credit

1 card is accepted as payment because it uses the
2 word or transaction at the end of describing
3 when it applies; any receipt provided at the
4 point of the sale or transactions, so it's not
11:03 5 even limited to sales. It's not even limited
6 to sales cases. It can also be for refunds,
7 returns, exchanges and reloads. It covers all
8 of that by the use of the word "transaction."

9 If you only limit it to cases
11:03 10 where a card is presented as payment or for
11 sale, if you will, then you're rendering
12 transactions superfluous which also violates
13 the rules of statutory construction which
14 require that effect be given to every single
15 word in the statute.

16 Finally, FACTA expressly limits
17 what kinds of situations it excludes, that's
18 that 1681(c)(g) Subsection 2 and it says, you
19 know, it lists kind of transactions it shall
11:04 20 not apply to. So by them saying, well, if it's
21 a so-called cash transaction or reload
22 transaction if you're reading the statute to
23 exclude those, basically you're reading the
24 addition into the exclusion provision, or

1 FACTA's exclusion provision that Congress did
2 not see fit to put in there.

3 Congress didn't -- Congress did
4 not -- the plain text of the statute doesn't
11:04 5 exclude, it doesn't require you to pay using a
6 card, it doesn't exclude reload transactions,
7 they're simply reading things into the statute
8 that aren't there and it's an unreasonable
9 reading of the statute. The statute cannot
10 reasonably be read to exclude reload
11 transactions.

12 The Shlahtichman case that they
13 cited several times doesn't say otherwise. It
14 didn't hold that the statute only applies when
11:05 15 a card is used to pay, but it still would be
16 described as a document case. But the issue of
17 whether you need to actually pay with a card
18 for the statute to be effective was not
19 presented and it wouldn't make sense for
11:05 20 Congress to limit that way because if you're
21 printing information on a transaction receipt
22 and you're concerned that the receipt can fall
23 into the hands of identity thieves which is
24 what Congress was concerned about, it makes no

1 sense to say we're concerned about someone --
2 we're concerned about that happening when you
3 use the card to make a payment, but we're not
4 concerned about that happening if you're doing
5 an exchange or return or reload transactions.

11:05

6 It's exactly the same danger.
7 The information is on the receipt where an
8 identity thief can find it and will if the
9 receipt gets lost or discarded or what have
10 you.

11 So on the willfulness issue
12 they go, again, way beyond whether it's an
13 actionable claim. They're citing you expert
14 reports that are not signed or sworn to.

11:06

15 They're claiming they acted reasonably.
16 They're asking you to make a final merits
17 determination summary judgment style on an
18 incomplete record without the cardinal rules of
19 evidence. Cruz categorically said you can't do
20 that, expressly criticized the trial court for
21 relying on expert opinions in that case to make
22 merits determinations as part of denying the
23 class certification.

11:06

24 Mr. Andalman talked at length

1 about the test for willfulness. I won't
2 belabor it. We disagree. The idea that
3 subjective bad faith isn't necessary isn't the
4 point. The test does not turn on whether there
11:07 5 are other opinions out there or whether this is
6 a case of first impression, it turns on whether
7 the violation was knowing or reckless.

8 Reckless as a standard is
9 objective. You can find recklessness based
11:07 10 upon if their conduct was unreasonable given
11 what the statute requires, but it doesn't mean
12 you pretend that the knowing dimension of the
13 statute doesn't exist. That's not the correct
14 analysis. The Fuges case accurately states the
11:07 15 test.

16 By the way, the reason that you
17 don't see other cases involving FACTA and
18 reloads is because their competitor complied
19 with the law. We produced our receipts to them
11:07 20 from Walmart, for example, as contemporaneous
21 to the defense in this case where they're
22 truncating the receipt correctly. So just
23 because their competitors are doing what
24 they're supposed to be doing doesn't mean --

1 and so the Court, we haven't been sued before
2 doesn't mean what they're doing is right or
3 consistent with the law. It violates the plain
4 language of the statute.

11:08

5 Likewise, they talk about
6 whether it's consistent with industry
7 standards. We submit that's unsupported.
8 Whether it benefits consumers, there's no
9 evidence in the record to show that it benefits
10 people to have the first two-thirds of the card
11 number splashed on the receipt.

11:08

12 They took that information off
13 there and started complying with the law after
14 eight months and there's no evidence that that
15 ever affected any consumer in any way, shape or
16 form. The information didn't need to be there.
17 It's the fact that they have the receipts
18 showing the reload, that's what benefits the
19 consumer not having the card number on there.

11:08

11:08

20 Finally, I'd like to return
21 back to the class certification. On the class
22 definition they make much of the word person
23 versus individual. If it was necessary to
24 change the word person to individual, we can do

1 that. That's not a big deal. It doesn't
2 change the outcome. They claim it's our burden
3 to disprove their subjective hypotheticals.
4 That's not the law. No case holds that.

11:09

5 The reason that the Illinois
6 Supreme Court holds hypothetical issues can't
7 defeat certification and the Second District
8 holds that is because they have no substance to
9 them so it's not incumbent upon us to disprove
10 whatever they think their lawyers can come up
11 with in their imagination.

11:09

12 It's incumbent upon them to
13 show that the alleged issue that they're
14 identifying and claiming predominates actually
15 exists and they don't dispute that they haven't
16 identified a shred of evidence to show that any
17 customer was not provided with a receipt and
18 there's not a shred of evidence to suggest that
19 any of the cards in question were business
20 cards as opposed to nonbusiness cards which
21 again, these are legally not issues as well.

11:09

11:09

22 FACTA does not distinguish
23 between a business card and a nonbusiness card
24 and the cases they cite didn't get into that.

1 They don't sit there and analyze the statute
2 and say, ah, here's the textural basis for
3 finding that the consumer, the business cards
4 are excluded. They assume that's the case
11:10 5 because they saw the word consumer and didn't
6 think past it.

7 So at the end of the day their
8 alleged individual issues remain speculative
9 hypotheticals and legally irrelevant.

11:10 10 Mr. Andalman on whether a
11 receipt was provided says, well, sometimes --
12 said the receipts always offered to the
13 customer for a reload but sometimes they don't
14 take it. We've all had situations where they
11:11 15 don't take the receipt. Again, take or accept
16 the receipt is not the standard, it simply
17 means, it simply has to be provided and the
18 U.S. Supreme Court and Illinois Appellate Court
19 define provided to mean offer or made available
11:11 20 which they admit they do.

21 And those may not have been
22 FACTA cases cited, but they weren't looking --
23 they weren't parsing the statute based on what
24 statue says, they were looking at the

1 contemporaneous dictionary definition of the
2 word provide or at least in the Supreme Court
3 case we cited and said the plain meaning of the
4 word provide is to offer or make available and
11:11 5 they don't cite you any case or dictionary or
6 resource that has a different definition for
7 the word provide.

8 And, likewise, on whether or
9 not there are business card users here, we
11:11 10 didn't cite Mr. Philliou's report, we cited his
11 deposition testimony where he conceded the
12 demographic, their expert, the demographic
13 users of these cards are the unbanked such as
14 low income people.

11:12 15 What they're talking about is
16 his report where he volunteered that there may
17 be some business use for these cards, but,
18 again, his report is hearsay, unsigned, not
19 sworn to. He cites no basis for the Court to
11:12 20 conclude he has a personal knowledge that
21 businesses are actually using these reloadable
22 cards designed for the unbanked and he cites no
23 document or data or anything else to show that
24 a business uses, businesses use these cards

1 with any regularity or any frequency let alone
2 at Walgreens or in the context of -- there's
3 simply zero evidence whatsoever that any member
4 of our class is a business and no reason to
11:12 5 conclude there is based on their admission that
6 the unbanked are the people who use these
7 cards, not businesses.

8 On the waiver issue that's
9 their defense, that's not a class issue. They
11:13 10 admit on page 15 of their brief it was unique
11 to Ms. Fausett so it can't create an individual
12 issue of class, and even if it applied to the
13 case, it applied the same way as Ms. Fausett.
14 They're saying, well, if you come back, if
11:13 15 you've gone multiple times that's automatically
16 a waiver. That's not the law. You have to
17 actually show that you could not possibly have
18 gone back for any reason other than you
19 intended to waive your rights which there's no
20 basis to conclude that.

21 The point is is that even if
22 there were an issue, it would be a common issue
23 the same as everything else but they aren't
24 even claiming that. They admit they've only

1 pled Ms. Fausett. So it has no impact on the
2 class whatsoever nor would their alleged
3 examination of her on that alleged issue, I
4 don't think it will get to trial, it will get
11:13 5 knocked out of the judgment pleadings
6 beforehand, but the class claims simply do not
7 turn on Ms. Fausett's testimony, they turn on
8 the common evidence of what Walgreens has done
9 here, a systematic violation of FACTA and
11:14 10 whether that violation is willful based on the
11 evidence that we've gathered to date and the
12 evidence we will continue to gather as we
13 finish discovery.

14 Likewise, their rendition of
11:14 15 what her testimony was, you know, as noted.
16 I'll say they're misreading her deposition for
17 sure. As we pointed out in Exhibit 14 in our
18 report, what she claimed she said, what they
19 claim are the inconsistencies are not existing.

11:14 20 Your Honor, may I have one
21 moment, please?

22 THE COURT: You may.

23 MR. HILICKI: For example,
24 Mr. Andalman talked about how she acknowledged

1 that there's 12 different places near her that
2 she could have reloaded her card and yet
3 claims, and somehow claimed in her deposition
4 she couldn't. She didn't testify about a dozen
11:15 5 locations. Walgreens -- Mr. Andelman only
6 specifically asked her about five. One of them
7 was CVS. She said I did not try that location.
8 Another was Circle K. She said I'm not sure if
9 she tried that location. So we're not talking
11:15 10 about a dozen locations here, we're talking
11 about three.

12 And then they claim the
13 information they subpoenaed from Green Dot
14 confirmed that when she went there, the other
11:15 15 three places, she could reload her card and so
16 she's not credible when she said she couldn't,
17 but the information they subpoenaed from Green
18 Dot does not prove that the locations, the
19 three locations that they're talking about
11:16 20 actually accepted reloads at the time that she
21 visited because Walgreens provides no data
22 information.

23 They did not get the dates of
24 her visits, they did not provide dates for any

1 of the transactions on the list from Green Dot.
2 There's no way to draw the conclusion that what
3 they produced to you that her testimony is
4 inconsistent with the truth.

11:16 5 Or they said, well, she
6 testified she kept every receipt, but then when
7 they asked why the receipts were not produced
8 in discovery she testified she lost or
9 misplaced them. The testimony doesn't state
11:16 10 that she kept every receipt. It said I saved
11 every receipt I had. So just two sentences
12 later she explained in her deposition I can't
13 find all the receipts, some of them I literally
14 dropped inside the store when they would hand
11:16 15 me two receipts. I don't have some copies and
16 I don't know why. I'm sure I don't know why.

17 So she's not talking about --
18 she never said I have all the receipts but I
19 just threw them on the ground. And here she's
11:17 20 not talking about reloads either. There's only
21 eight reload transactions at Walgreens she had
22 and she produced receipts from almost all of
23 them. They admitted they got about a half a
24 dozen receipts from her and there's eight

1 transactions, that's it. She might have lost a
2 couple somewhere along the way, but the point
3 is she was keeping the reload receipts and
4 trying to do so as she said she was.

11:17

5 They said she lost some
6 receipts but in her complaint she alleged she
7 safeguarded them and she did safeguard them as
8 best she could. She produced almost all
9 receipts, the reload receipts in question. And
10 the inconsistency they're trying to draw,
11 they're talking about a single allegation from
12 the complaint and the receipt there. And she
13 definitely saved that one because she produced
14 it in discovery before the case even began.

11:18

15 So -- and this goes back to the
16 eight transactions or there's only been eight
17 transactions. There hasn't been hundreds and
18 so to the extent she lost documents or lost
19 receipts, there's only -- she's talking about
20 receipts in general. Like Mr. Andalman said,
21 she's not a lawyer. You can't hold her to a
22 lawyer's precision standard in evaluating her
23 testimony, but it doesn't change the fact that
24 she's very much a committed class

11:18

1 representative.

2 And even if it isn't necessary
3 for her to have more than a marginal
4 familiarity with the case, and you know it's
11:18 5 not necessary for her to be as effective a
6 lawyer in the case, the reality is she knew a
7 ton about the case, her deposition testimony
8 supports that and she would make a fine --
9 she's as good as any class representative as
11:18 10 any other case, if not better than most.

11 So for all of these reasons,
12 your Honor, we believe the Court should certify
13 the class, we meet all the requirements and
14 their merits argument should be rejected for
11:19 15 the reasons we've discussed.

16 Thank you very much.

17 THE COURT: Thank you. I'm going to
18 take a five-minute break for the Court Reporter
19 and then I'll give you my ruling.

11:19 20 MR. HILICKI: Thank you, your Honor.
21 (Whereupon after a brief recess the
22 proceedings were resumed.)

23

24

RULING

1
2
3 THE COURT: I want to thank the
4 attorneys for an excellent presentation today
11:28 5 and the briefs were very helpful and very
6 informative. No matter where this is going,
7 you have preserved the record I think in a fine
8 form for any appeals that might be needed.

9 Now, we'll start with a little
11:28 10 bit of a summary. I'm going to go through your
11 arguments and my positions on each one of them.

12 We know that we are here today
13 on a motion for class certification. The Court
14 needs to determine under Section 801 of the
11:28 15 Illinois Code of Civil Procedure numerosity,
16 commonality, adequacy, and appropriateness.
17 Also under Section 802 the Court will make
18 orders and findings relative to the class and
19 it also allows for a subclass as the Court
11:28 20 determines is appropriate.

21 This revolves around what I'll
22 be referring to as FACTA which is the Fair and
23 Accurate Credit Transactions Act and both of
24 you have been referring to this act and the

1 sections that are 15 U.S.C. Section
2 1681(c)(g)(1) and (n). The bottom line is that
3 this is the case at hand. A violation is
4 alleged of the FACTA requirements under
11:29 5 especially (g)(1) that no person that accepts
6 credit cards or debit cards for the transaction
7 of business shall print more than the last five
8 digits of the card number or the expiration
9 date upon any receipt provided to the
11:29 10 cardholder at the point of sale or transaction.

11 This is what has been referred
12 to as FACTA's truncation requirement. FACTA
13 allows statutory damages of \$100 to \$1,000 per
14 individual for any willful violation of FACTA.

11:30 15 This case involves, the
16 transactions at issue involve debit cards that
17 enable the user to deposit additional funds
18 into their account at a merchant store instead
19 of at a bank. The cards say debit on their
11:30 20 face and on Walgreens' website there is a
21 reference to these reloadable prepaid cards,
22 and it states reloadable prepaid cards work
23 like traditional debit cards, customers can
24 load funds and use to shop, et cetera,

1 et cetera, et cetera.

2 Now, it is alleged that
3 plaintiff loaded funds onto her Green Dot debit
4 account card at her local Walgreens and
11:30 5 received receipts that disclosed ten digits of
6 her 16-digit account number. Plaintiff alleges
7 that Walgreens continued this practice after
8 being sued in this court. It received
9 plaintiff's complaint in June 2019 but did not
11:31 10 change its system to stop running more than the
11 last five digits of customers' debit card
12 account numbers on their reload receipts until
13 the end of February 2020 which was eight months
14 later, and this has a lot to do with the
11:31 15 request for the subclass which we will go into
16 in a moment.

17 Now, Walgreens had a prior
18 motion to dismiss in 2019. In that motion to
19 dismiss there were arguments under 2-615 and
11:31 20 2-619. These arguments took place in front of
21 Judge Berrones and Judge Berrones ruled on that
22 motion to dismiss in that he denied the motion
23 to dismiss and found that a valid cause of
24 action had been pled.

1 Now, those arguments back in
2 2019 had to do with reloadable debit cards not
3 being debit cards under FACTA, that FACTA does
4 not cover receipts generated in connection with
11:32 5 its reload transactions because the customer
6 pays cash for the reload, therefore, it's not a
7 transaction and that there is no standing to
8 sue because plaintiff does not allege
9 Walgreens' FACTA violations caused actual
11:32 10 damages so we know that there is a motion to
11 dismiss alleging all of that and that motion to
12 dismiss was ruled on.

13 Now, in its opposition brief in
14 response to plaintiff's motion for class
11:32 15 certification, Walgreens reiterates the
16 arguments raised in the motion to dismiss which
17 was denied by Judge Berrones. The Court
18 acknowledges that defendant's renewal of these
19 arguments at this stage as it is at least in
11:33 20 part due to new case law that has come out of
21 the U.S. Supreme Court and the Second District
22 Appellate Court of Illinois.

23 So as Walgreens has stated this
24 morning, it is renewing its arguments regarding

1 the standing issue, whether FACTA applies to
2 cash transactions in the first place and
3 whether Fausett can demonstrate that Walgreens
4 violated the statute willfully and basically
11:33 5 there's strong argument that they are making is
6 whether there's an actionable claim here, and
7 as we have heard very strongly pursuing this
8 Court to make that determination at this time
9 at this stage of class certification.

11:34 10 The defendant Walgreens relies
11 heavily on Alley 64 which is a case that
12 recently came down and argues that in
13 considering whether to grant class
14 certification a court must necessarily
11:34 15 determine whether the underlying claim is
16 actionable. Defendant quotes from Turnipseed
17 vs. Brown and Stefanski vs. City of Chicago to
18 support the claim that even after defendants
19 lost a motion to dismiss the Appellate Court
11:34 20 denied class certification because plaintiff
21 had no actionable claim.

22 Defendant also argues that
23 Judge Berrones relied heavily on the Duncan
24 case and that case has been vacated since his

1 ruling on the motion to dismiss though the
2 vacation seems to be due to settlement.
3 Defendant also argues that U.S. Supreme Court
4 case of TransUnion vs. Ramirez held that
11:35 5 no-injury plaintiffs like Fausett have no
6 actionable claim for statutory damages under
7 FACTA. In other words, Fausett cannot
8 demonstrate concrete harm under these cases and
9 there seems to be no dispute that Fausett is a
11:35 10 no-injury plaintiff.

11 Defendant Walgreens relies on
12 Maglio which held that risk of future harm from
13 thieves accessing plaintiff's personal data was
14 insufficiently distinct and palpable to satisfy
11:35 15 the Illinois requisite for standing and that an
16 unrealized increased risk of harm is
17 insufficient for standing in Illinois. As
18 pointed out by plaintiff, Maglio did not
19 involve a claim for statutory damages. It was
11:35 20 under the ICFA Act in Illinois.

21 Now, plaintiff has argued here
22 that the only issue really in this case is
23 whether it meets the four requirements of the
24 class action statute, not whether plaintiff

1 ultimately will prevail on the merits. And
2 plaintiff, of course, relies on Cruz. The
3 trial court's discretion is limited to an
4 inquiry into whether the plaintiff is asserting
11:36 5 a claim which assuming its merits will satisfy
6 the requirements of 2-801 as distinguished from
7 an inquiry into the merits of plaintiff's
8 individual claims. Thus the trial court is not
9 to determine the merits of the complaint but
11:36 10 only the propriety of class certification and
11 its factual inquiry and resolution of factual
12 issues is to be limited solely to that
13 determination.

14 There was some distinguishing
11:37 15 of some cases that defendant had relied on,
16 Alley 64 and Barbara's Sales. Barbara's Sales
17 referred to by plaintiff as, you know, a ruling
18 on nonactionable puffery and Alley 64 that it
19 was really not saying more than that, of
11:37 20 course, a class can't be certified unless the
21 named plaintiffs have a cause of action and the
22 argument being that Judge Berrones already
23 ruled that there is a cause of action here so
24 that Alley 64 doesn't really change anything.

1 This Court would also note in
2 Alley 64 it was an insurance company case,
3 coverage case where the Court had ruled on the
4 declaratory judgment action before class
11:37 5 certification. Plaintiff and defendant in that
6 case filed for declaration of coverage and
7 defendant moved for judgment on the pleadings.
8 The Court denied defendant's motion for
9 judgment and sui sponte entered judgment for
11:38 10 the plaintiff on the coverage issue.

11 The Court will note that in
12 Alley 64, that Court said the injection of the
13 underlying merits of the claim into the scope
14 of our review is also a function of the
11:38 15 procedural posture of the case. So because of
16 the facts of this case, the Court found
17 themselves in the position of reevaluating and
18 ruling on the merits of the case.

19 The trial court denied
11:38 20 defendant's motion for judgment on the
21 pleadings and sui sponte into judgment on the
22 pleadings in plaintiff's favor. At this point
23 the class was certified, coverage under the
24 policy was determined, so the issue relevant to

1 both class certification and the merits already
2 had been resolved by the trial court. That's
3 not the case that we have here.

4 Now, Barbara's Sales, I will
11:39 5 just mention that I do agree with plaintiff it
6 had a lot more to do, I think they use the word
7 nonactionable puffery, but it was a marketing
8 statement by Intel. It did not form the basis
9 of an actionable claim under the Consumer Fraud
11:39 10 and Deceptive Practice Act, another difference
11 from the case we have here.

12 Now, plaintiff also -- I want
13 to be clear that in Illinois plaintiff does not
14 need to satisfy the federal Article 3 concrete
11:39 15 injury test as standing. Judge Berrones found
16 the same thing. Federal standing rules do not
17 apply in state court even in cases based on
18 federal law. The Illinois Supreme Court has
19 expressly rejected federal principles of
11:40 20 standing.

21 In Illinois a violation of
22 one's rights in itself is sufficient for
23 standing. That is how the Court reads
24 Rosenbach vs. Six Flags. It rejected

1 defendant's contention that redress under the
2 act should be limited to those who can plead
3 and prove that they sustained some actual
4 injury or damage beyond the infringement of the
5 rights afforded them under the law and held no
6 additional consequences needed be pleaded or
7 proved.

8 Now, this wasn't a FATCA case,
9 the Court is aware of that, but the reasoning
10 is persuasive to find that a violation is
11 enough, is sufficient, a violation that is
12 alleged.

13 We have the Lee vs.
14 Buth-Na-Bodhaige case that rejected an
15 objection to standing. This was a FACTA case
16 where the plaintiff pleaded sufficient facts to
17 allege a willful violation of FACTA. It's a
18 Fifth District case, but the Court can look at
19 the reasoning and find it persuasive authority.
20 Then we get to TransUnion. It only addressed
21 federal standing and it is interesting to note
22 that Justice Thomas' dissent recognized that
23 the majority opinion does not limit the ability
24 to sue in state court and will drive litigants

1 to enforce their federal rights in state court
2 and that is where we are.

3 Now, having said that, I'm
4 going to hit very lightly on the objections to
11:41 5 the fact that reloadable cards are not covered
6 by FACTA and there wasn't a transaction and
7 even on the willfulness argument which I know
8 that Mr. Andalman argued very intently is
9 related to that there is no actionable cause of
11:42 10 action here, however, Judge Berrones ruled
11 specifically on those two things and I'm not
12 going to second-guess him at this stage of the
13 game.

14 I will say that willfulness is
11:42 15 a fact question for trial. I see it the same
16 way. So the issues raised by Walgreens were
17 heard and decided by Judge Berrones and the
18 recent case law that I've just gone through
19 does not necessitate a review of Judge
11:42 20 Berrones' decision by me.

21 The Court agrees with the
22 reasoning and ruling of the Cruz case. At the
23 class certification stage the Court should
24 ascertain the existence of common factual

1 issues but not resolve their merits. I won't
2 be trying the case at the class certification
3 stage and I am not going to reconsider
4 Judge Berrones' ruling on the motion to dismiss
11:43 5 finding that the new case law does not change
6 that opinion and that Judge Berrones' own
7 opinion stood outside of the new case law
8 meaning that it's totally, I see it in
9 conjunction with the new case law. The new
11:43 10 case law does not change what Judge Berrones
11 ruled in the end on the motion to dismiss.

12 So the Court does not feel
13 obliged to go into it any further than what I
14 have just said. I'm not going to reevaluate
11:43 15 his decision. It stands on its own and I feel
16 this is not an appropriate time to go into the
17 merits of the case.

18 So now let's go into the
19 arguments on class and evaluate the
11:44 20 prerequisites for the maintenance of a class
21 action. First of all, we do know that the
22 defendant argues the proposed class is
23 impermissibly broad. Individual issues
24 predominate over common issues. Fausett is not

1 an adequate representative and class treatment
2 is not the appropriate method for fairly and
3 efficiently adjudicating this matter.

4 As stated by Mr. Andalman, the
11:44 5 numerosity prerequisite is not in question
6 here. Plaintiff through discovery has
7 identified class members in the amount of
8 1,596,850 persons in the class and at least
9 598,893 persons in the subclass with no
11:45 10 objection and the Court finding that is a
11 numerous class. The Court finds the class is
12 so numerous that joinder of all members is
13 impracticable, therefore, the numerosity
14 requirement for class certification is
11:45 15 satisfied for the maintenance of a class
16 action.

17 I'm going to come back to
18 commonalty. Regarding appropriateness. A
19 class action is appropriate -- excuse me. I
11:45 20 think I skipped here. Yes, I apologize.

21 Regarding adequacy. The
22 requirement if met -- this requirement is met
23 if plaintiff's interests are aligned with class
24 members' interests and her attorneys are

1 qualified, experienced and generally able to
2 conduct the proposed litigation. Plaintiff
3 argues that plaintiffs' and the class members'
4 interests align perfectly because their claims
11:46 5 all arise from identical conduct, the same
6 systematic disclosure of two-thirds of their
7 debit cards on the receipts in violation of
8 FACTA and they're entitled to recover the same
9 relief, statutory damages, thus, the plaintiff
11:46 10 is adequate. Plaintiff's counsel, of course,
11 is adequate and is unchallenged here today as
12 adequate counsel.

13 Now, defendant argues in here
14 that Fausett is not an adequate class
11:46 15 representative because she lacks a demonstrated
16 ability to prosecute the claim, she's subject
17 to a waiver defense, and she is a passive
18 figurehead. In addition, her credibility is in
19 question. I mean, they cite to a case where
11:46 20 plaintiff was not an adequate representative
21 since she repeatedly provided false testimony
22 under oath.

23 Now, the response of the
24 plaintiff on this is that she is an adequate

1 representative if her interests are the same as
2 the interests of those who are not named, and I
3 already went through why they believe the
4 interests align perfectly, that defenses are
11:47 5 irrelevant to the determination of adequacy,
6 that there is a need to show involvement and
7 knowledge, but it's minimal, and the
8 plaintiff's class representative need only have
9 a marginal familiarity with the facts of the
11:47 10 case.

11 Now, looking at what has been
12 shown to the Court and argued here, Ms. Fausett
13 is an active, knowledgeable class
14 representative as best that she can be in this
11:47 15 circumstance. She sat for depositions,
16 answered written discoveries, produced
17 documents, she understands her responsibility
18 to the class in the basic terms where she has
19 stated be honest about everything, participate
11:48 20 and do the best I can for the whole class.

21 Now, in terms of her
22 credibility, counsel broke down the testimony
23 that was complained of and disputed it and I'm
24 not going to go into all of that because

1 credibility is for a judge and jury to -- or
2 jury to determine at trial, not this stage
3 unless it is egregious and it indicates
4 deception on the main allegations in the
11:48 5 lawsuit which it does not here.

6 So the Court does find that the
7 representative Fausett will fairly and
8 adequately protect the class and the adequacy
9 requirement for class certification is
11:48 10 satisfied by the plaintiff.

11 Appropriateness. A class
12 action is appropriate when it can best secure
13 economies of time, effort, and expense or
14 accomplish the other ends of equity and justice
11:49 15 that class actions seek to obtain. The
16 plaintiff argues that this is true here because
17 the proceeding on a class basis will resolve
18 over a million identical FACTA claims in one
19 fell swoop sparing the Courts the need to
11:49 20 decide the same issues over and over again. It
21 will promote justice by enabling members who do
22 not know their rights or unable to vindicate
23 them alone to get relief and it's necessary to
24 effectuate FACTA's deterrent goals as shown by

1 Walgreens choosing to keep violating the law
2 for eight months after being sued, and this is
3 plaintiff's argument.

4 This case has already involved
11:49 5 analyzing more than 200 pages of documents,
6 seven depositions and expert discovery. An
7 individual litigant would have a great deal of
8 trouble managing that. Defendant does argue
9 that FACTA provides for individual remedies and
11:50 10 an ability for individuals to bring their own
11 actions so class treatment is not necessary or
12 appropriate to resolve Fausett's claims.

13 Class actions are appropriate
14 for plaintiffs who have no other avenue of
11:50 15 legal redress and it's an argument basically
16 that an individual could handle this.
17 Manageability problems arise if each member has
18 to litigate separate issues here whether a
19 potential class member is a consumer, whether
11:50 20 the consumer actually received a noncompliant
21 receipt and whether individual customers waived
22 the rights so some of those arguments overlap
23 with what I'm going to discuss with commonality
24 here in a moment, but the plaintiff points out

1 that Walgreens claims a class action is not
2 necessary, but the test is whether a class
3 action is appropriate.

4 And with the amount of
11:51 5 complexity in this matter, with the amount of
6 individuals involved in the allegations that
7 have been made, the Court finds that the class
8 action is an appropriate method for the fair
9 and efficient adjudication of the controversy.
11:51 10 The appropriateness requirement for class
11 certification is satisfied.

12 Now, I'm going back to
13 commonality because there were a number of
14 arguments raised here that I wanted to go into
11:51 15 in a little more detail.

16 Now, class claims must present
17 at least one common issue of law or fact that
18 predominates over any issues affecting the
19 individual class members. The Court must
11:51 20 identify the substantive issues that will
21 control the outcome, assess which issues will
22 predominate and then determine whether these
23 issues are common to the class. Plaintiff
24 argues the substantive issues that control the

1 outcome are whether Walgreens' practice of
2 automatically providing two customer receipts
3 displaying the first six and last four digits
4 of the customer's debit card numbers in
11:52 5 universal swipe reload transaction violates
6 FACTA, and, two, whether Walgreens' FACTA
7 violations were willful, knowing or reckless
8 given its awareness of FACTA and its
9 requirements and given its decisions to
11:52 10 nevertheless deliberately print ten digits of
11 customer debit cards on the receipts.

12 Plaintiff argues they're the
13 same proofs, evidence showing Walgreens
14 programmed its system to automatically generate
11:52 15 two receipts displaying the first six and last
16 four digits of customer debit cards, the
17 evidence showing Walgreens deliberately engaged
18 in this practice despite its awareness of
19 FACTA, evidence showing that Walgreens
11:53 20 continued to engage in this conduct despite
21 being sued and, therefore, demonstrating a
22 willful violation of FACTA.

23 The liability issues and proof
24 needed to satisfy liability are argued to be

1 identical among the class members as is the
2 relief sought. And then, of course, the
3 statement that numerous courts have found that
4 common issues predominate in fact class
11:53 5 actions.

6 Now, of course, if I stop
7 there, I think plaintiff has made a very good
8 argument for why there are common issues among
9 all the class members, then the evidence that
11:53 10 would be needed to prove those issues is the
11 same.

12 Now, defendant argues that
13 individual issues predominate over the common
14 questions of law and fact. There are the
11:53 15 issues of how many potential class members
16 received a copy of a FACTA violating receipt or
17 how many are consumers and not businesses, how
18 many are the registered cardholders that
19 performed the transaction or whether each
11:54 20 waived their FACTA rights.

21 Defendant specifically argues
22 that Fausett is subject to a waiver defense due
23 to her acknowledged repeated transactions at
24 Walgreens after she knew Walgreens would

1 provide her a receipt that in her estimation
2 violated FACTA. So the individual issues
3 whether each class member was provided a
4 receipt, whether each class member is a
11:54 5 consumer or a business, whether each class
6 member waived their FACTA rights.

7 And even if -- and we're going
8 to go through those issues right now, the
9 question still will be even after analyzing
11:55 10 them, do they predominate over the common
11 questions.

12 Now, in response to whether
13 each class member was provided a receipt,
14 plaintiff says Walgreens programmed its system
11:55 15 to print and give two reload receipts to each
16 customer. Whether the person accepted the
17 receipt is not crucial, it is whether the
18 receipts were provided to the cardholder.

19 Plain meaning of provide is
11:55 20 simply make available. Congress' decision to
21 cover any receipt provided and not just those
22 accepted is consistent with FACTA's focus on
23 the conduct of merchants and FATCA's purpose
24 which is to decrease the risk that a consumer

1 would have his identity stolen as a result of
2 displaying their card information on the
3 receipt.

4 The Court agrees with that
11:55 5 analysis that the plain meaning of provide is
6 simply make available. The Court is aware
7 there are other jurisdictions, federal
8 jurisdictions in cases that have used this
9 question of whether a receipt was accepted as a
11:56 10 basis to deny a class but this Court does not
11 find that in this particular situation to
12 apply, and it is because Walgreens programmed
13 its system to print and give to reload
14 receipts.

15 In other cases I don't believe
16 that was there, but either way the Court finds
17 that them being made available, being provided
18 that the acceptance is not an issue in this
19 matter, and if it needs to be brought up as an
11:56 20 individual issue later, it does not predominate
21 over the common questions, but I can't see how
22 that would be even an issue or a defense in
23 this case. Whether a receipt was provided is a
24 nonissue in this Court's opinion but at best a

1 common issue plaintiff can prove class wide
2 with common evidence.

3 Now, regarding the second
4 issued raised which is whether each class
11:57 5 member is a consumer or a business. Now,
6 Walgreens offers no proof that a single
7 transaction of all these individuals was a
8 business user. Walgreens has had the list of
9 class data for almost two years. Debit cards
11:57 10 at issue are for the unbanked and lower income
11 people as Walgreens' own experts stated. It is
12 speculation that there is an individual that
13 used a reloadable card for business purposes.

14 In addition, consumer has been
11:57 15 defined as an individual and an individual that
16 uses a business card as an individual, these
17 are the plaintiff's arguments.

18 Now, the Court does find some
19 validity to defendant's position that there
11:58 20 could be individual issues regarding whether
21 the card was used for business or for personal,
22 but the Court can exclude business cards and
23 I'm going to suggest a change to the class in
24 order to accommodate that issue, but I do not

1 see it as an issue that predominates over all
2 the common questions, but this is a consumer
3 act to protect consumers and their individual
4 private identities so the Court does find
11:58 5 validity to excluding reloadable cards used for
6 business purposes though as stated by plaintiff
7 it is hard for me to imagine there is going to
8 be that many of them, if any, because these
9 cards are used mostly by people who don't have
11:59 10 bank accounts and cannot, are lower income
11 people so I don't see that being an obstacle
12 that cannot be overcome. So I am saying that
13 it is not predominating of the common
14 questions.

11:59 15 And then finally the waiver
16 argument that there is a defensive waiver here
17 and that that is an individual issue that is
18 going to predominate over the common issues.
19 Waivers are affirmative defense. It has been
11:59 20 pled and it would need to be proven at a trial.
21 It goes to the merits of the case, and as I've
22 said, I'm not going to rule on the merits of
23 this case. It hasn't really been spelled out
24 here under the legal doctrines for waiver

1 either, it's just generally alleged so right
2 now the defense can be made and it looks like
3 it might only be made against Fausett, but it
4 is a question whether that defense applies to
12:00 5 her first reload transaction because of the way
6 it is being pled here.

7 So looking at that, she is
8 still the representative that is aligned in the
9 interests with the other class and this does
12:00 10 not predominate over the common questions. So
11 the Court looking at arguments finds there are
12 questions of law and fact common to the class
13 which common questions predominate over any
14 individual -- any questions affecting
12:01 15 individual members.

16 So at this time the Court
17 laying out its reasoning, it will be certifying
18 the class. The suggestion that I am willing to
19 hear your response on, but I would like to see
12:01 20 the class modified under what I have outlined
21 to all individuals in the United States who
22 acting on their own behalf and not for a
23 business from June 4, 2017, through
24 February 29, 2020 engaged in one or more reload

1 transactions at a Walgreens location at the
2 time the Walgreens location system for
3 processing such transactions was programmed to
4 print more than the last five digits of the
12:01 5 card number used in the transaction on the
6 customer's receipt.

7 So I am including the issue to
8 do with they cannot have done this for business
9 purposes and then the subclass will stand as it
12:02 10 is. It already uses the word individual and it
11 just refers to them, the class, and narrows the
12 period of time for which it would apply.

13 Is there anything else that at
14 this time you feel needs to be on the record?

12:02 15 MR. HILICKI: No, your Honor. Thank
16 you very much.

17 THE COURT: All right.

18 Mr. Andalman.

19 MR ANDALMAN: No, your Honor. Thank
12:02 20 you.

21 THE COURT: All right. I will just
22 say on the record part of your goal that was
23 made clear to me many months ago was to
24 preserve this record in a good fashion and I

1 respect that and I respect a lot of arguments
2 today came from that effort to preserve a good
3 record on this. This is an important case and
4 important issues and the Court understands
12:03 5 that. So thank you for all the time you put
6 into it.

7 MR ANDALMAN: I really appreciate
8 your time.

9 MR. HILICKI: We appreciate your
12:03 10 time.

11 THE COURT: Thank you, and we are
12 done with the record.

13 (Which were all the proceedings
14 had in the above-entitled
12:03 15 matter.)

16 (Time now is 12:03 p.m.)
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1 STATE OF ILLINOIS)
) SS:
2 COUNTY OF L A K E)

3
4 I, SUSAN L. BRUESCH, CSR, a Notary Public
5 within and for the County of Lake and State of Illinois,
6 do hereby certify that I am a Certified Stenographic
7 Reporter doing business in the County of Lake and State
8 of Illinois; that I reported the foregoing proceedings
9 by means of stenographic machine shorthand and that the
10 foregoing is a true and correct transcript of my
11 stenographic shorthand notes taken to the best of my
12 ability as aforesaid.


13 I further certify that the reading and
14 signing of said proceedings was waived by the witness
15 and witness' counsel.

16 I further certify that the taking of
17 these proceedings was pursuant to notice and that there
18 were present at the taking of these proceedings counsel
19 on behalf of the plaintiff and counsel on behalf of the
20 defendant.

21 I further certify that I am not counsel
22 for, nor in any way related to any of the parties to
23 this suit, nor am I in any way interested in the outcome
24 thereof.

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In testimony whereof I have hereunto set
my hand and affixed my notarial seal this 5th day of
March, 2023, A.D.


SUSAN L. BRUESCH, CSR
Notary Public, Lake County, IL
CSR License No. 084003663

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IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS, CHANCERY DIVISION

CALLEY FAUSETT, individually,)	
and on behalf of others similarly situated,)	
)	
Plaintiff,)	CASE No.: 19 CH 00000675
)	
v.)	JURY TRIAL DEMANDED
)	
WALGREEN COMPANY)	
(d/b/a "Walgreens"),)	Judge Luis A. Berrones
)	
Defendant.)	

FIRST AMENDED CLASS ACTION COMPLAINT

Plaintiff, Calley Fausett, on behalf of herself and other similarly situated individuals, sues Defendant, Walgreens, and alleges:

INTRODUCTION

1. This action arises from Defendant's 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 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 debit card numbers on receipts provided to consumers. As a result of Defendant's unlawful conduct, Plaintiff and the Class, who 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.

JURISDICTION AND VENUE

1. The Court has jurisdiction over this action pursuant to 735 ILCS 5/2-209(a)(1) because Defendant conducts business in Illinois, and committed tortious acts within Illinois.

2. Venue is proper because Defendant is headquartered in Lake County.

PARTIES

3. Plaintiff, Calley Fausett, is a natural person who resides in Maricopa County, State of Arizona.

4. Defendant Walgreen Company (“Walgreens”) is one of the largest drugstore chains in the United States.¹ During the preceding two years and beyond, it owned and operated pharmacy retail stores throughout the United States, including in Phoenix Arizona. In addition to pharmaceuticals, health-related products, and general merchandise, Defendant’s stores sell pre-paid debit cards, as well as a means for consumers to load additional funds on to their cards.

FACTUAL ALLEGATIONS

Background of FACTA

5. Identity theft is a serious issue affecting both consumers and businesses. As of 2018, a Harris Poll revealed that nearly 60 million Americans have been affected by identity theft. There were a record high 16.7 million victims of identity fraud in 2017 alone, and account takeovers (when a thief opens a credit card account or other financial account using a victim’s name and other stolen information) tripled in 2017 from 2016, causing \$5.1 billion in losses.

6. 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

¹ See <http://www.walgreensbootsalliance.com/about/> (last accessed June 3, 2019).

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.

7. One such FACTA provision was specifically designed to thwart identity thieves’ ability to gain sensitive information regarding a consumer’s credit or debit card account from a receipt provided to the consumer at the point of sale, which, through any number of ways, could fall into the hands of someone other than the consumer. FACTA accomplishes this goal by requiring merchants to mask or “truncate” the card expiration date and most of the consumer’s credit or debit card account number on the transaction receipt provided to the consumer at the point of sale.

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

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”).

9. After enactment, FACTA provided three (3) years in which to comply with the Receipt Provision, mandating full compliance no later than December 4, 2006.

10. The Receipt Provision 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”

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

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

13. 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 temporarily change the definition of willful noncompliance with respect to violations involving the failure to mask card expiration dates on transaction receipts during a short period of time immediately after FACTA's effective date.

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

15. 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.

See **Exhibit A**, Visa Best Practices.

16. As noted above, the processing companies have required that credit card or debit card expiration dates and more than the last five digits of card account numbers 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.

See **Exhibit B**, American Express Operating Regulations.

17. 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.

See **Exhibit C**, Mastercard Acceptance Procedures.

18. 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>) to comply with FACTA requirements and provide the citizens with a means of monitoring their credit reports for possible identity theft.

19. FACTA prohibits the printing card expiration dates or more than the last five digits of card account numbers on receipts to protect persons from identity theft and other harms.

Defendant's Prior Knowledge of FACTA

20. Walgreens knows how to comply with FACTA. Its point-of-sale equipment for merchandise transactions is programmed to print transaction receipts that mask the card expiration date, as FACTA requires. Nevertheless, inexplicably, Walgreens still allows receipts to display ten, *i.e.*, more than two-thirds, of the card account number.

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

22. Indeed, on information and belief, it would have taken Defendant less than thirty seconds to run a test receipt in order to determine whether its point-of-sale systems were violating FACTA before using the systems.

23. Because Defendant's systems were partially FACTA compliant, Defendant had actual knowledge of FACTA's truncation requirements before it began violating those requirements *en masse*.

24. Furthermore, Defendant's knowledge and experience regarding federal laws governing financial transactions no doubt translates to Defendant having intimate knowledge of the requirements of FACTA.

25. Indeed, Defendant was not only clearly informed not to print more than the last five digits of card account numbers on transaction receipts, but it was contractually prohibited from doing so. Defendant accepts credit and debitcards 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) Defendant must follow, including

FACTA's redaction and truncation requirements found in the Receipt Provision. *See Hawkins v. Capital Fitness, Inc.*, 2015 IL App (1st) 133716, ¶14 (2015) (party signing a contract charged with knowledge of its contents and bound by it).

Plaintiff's Factual Allegations

26. On or about March 7, 2019, Plaintiff used her personal debit card to perform a fund-load transaction at the Walgreens store located at 2415 East Union Hill Drive, Phoenix, Arizona.

27. Defendant provided Plaintiff with two electronically-printed receipts bearing the first six (6) and last four (4) digits of her debit card account number.

28. As a direct result of Defendant printing the first (6) and last four (4) digits of her debit card account number on the receipts, Plaintiff was required to take steps to safeguard the receipt.

29. The disclosure of the first six (6) and last four (4) digits of her debit card account number was a breach of confidence and exposed Plaintiff to a heightened risk of identity theft.

Defendant's Misdeeds

30. At all times relevant herein, Defendant was acting by and through its subsidiaries, agents, servants and/or employees, each of whom were acting within the course and scope of their agency or employment, and under the direct supervision and control of Defendant.

31. At all times relevant herein, Defendant's conduct, as well as that of its subsidiaries, agents, servants and/or employees, were in knowing or reckless disregard for federal law and the rights of the Plaintiff and other members of the class.

32. Upon information and belief, Defendant implements, oversees, and maintains 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 Defendant uses to process credit and debit card transactions.

33. Upon information and belief, the point of sale systems used by Defendant has the capacity to maintain records of all payment transactions and have the ability to print duplicate copies of all receipts provided to customers.

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

35. By ignoring the requirements of this important federal statute, in an environment already ripe for identity theft and other evils, Defendant uniformly invaded Plaintiff's and the putative Class members' privacy. Defendant's conduct alleged herein resulted in the disclosure of Plaintiff's and the Class members' private financial information to the world, including to persons who might find the receipts in the trash or elsewhere.

36. Simply put, by printing numerous transaction receipts in wholesale violation of a well-known federal statute, Defendant has 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 Defendant. *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

37. Plaintiff brings this class action on behalf of herself 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 Walgreens 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 debit or credit card 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.

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

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

- a. Whether Defendant regularly printed transaction receipts that disclosed more than the last five digits of consumer debit or credit card numbers in violation of FACTA;
- b. Whether Defendant's FACTA violations were willful, *i.e.*, knowing or reckless, thus entitling Plaintiff and the proposed class to statutory damages; and
- c. The appropriate amount of statutory damages to award.

40. Plaintiff has no interests antagonistic to those of the Class and Defendant has no defenses unique to Plaintiff.

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

42. 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 wastefully

burden the judicial system with the need to resolve the common factual and legal questions this case presents over and over; (ii) requiring members of the Class to prosecute their own individual lawsuits would work an injustice, as it would prevent Class members who are unaware they have a claim, or who lack the ability or wherewithal to bring their own lawsuit and find a lawyer willing to take their case, to obtain relief; and (iii) requiring individual Class member lawsuits 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, or create conflicting and incompatible standards of conduct for Defendant;

43. Proceeding on a class basis will not create any significant difficulty in the management of this litigation.

44. The subject transactions occurred at Defendant's drugstores, a quintessentially consumer-shopping venue. As such, the overwhelming majority of transactions for which Defendant provided a FACTA-violative receipt, if not all of them, involved a consumer card, not a business card. To the extent this is an issue, the payments made with the two types of cards are easily discernible. Merchants are charged different interchange fees for card transactions that vary based on whether the card is a business card or a consumer card. There are different interchange categories and codes assigned to each transaction that distinguish whether a card used for a transaction is a business card or a consumer card. Defendant and its merchant bank(s) could easily identify whether a particular transaction involved a business card or a consumer card.

45. Further, the first six (6) digits of a debit or credit card would readily determine whether the corresponding card is a business or consumer card. That is because the first six (6)

digits of a credit or debit card number constitute what is known as the Bank Identification Number (“BIN”) that represents several items of information, including whether it is a consumer card or commercial (business) card. Finally, Visa, MasterCard, American Express and Discover only allow specific BINs and BIN ranges to identify consumer cards, and specific BINs and BIN ranges identify commercial (business) cards. Consumer cards and business cards do not share the same BINs or BIN ranges.

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

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

47. 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.

48. 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).

49. Defendant employs the use of said Devices for point of sale transactions at Walgreens stores throughout the United States.

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

51. At all times relevant to this action, Defendant was aware, or should have been aware, of both the Receipt Provision as well as its obligation to comply with said provision.

52. Notwithstanding the three-year period to comply with FACTA and its accompanying provisions, and the subsequent years since FACTA became effective, and having

knowledge of the Receipt Provision and FACTA as a whole, Defendant knowingly or recklessly violated, and continued to violate, the Receipt Provision.

53. By printing the first six (6) and the last four (4) digits of Plaintiff's debit card number on Plaintiff's transaction receipt, Defendant caused Plaintiff to suffer a heightened risk of identity theft, exposed Plaintiff's private information to others who may have handled the receipt, and forced Plaintiff to take action prevent further disclosure of the private information displayed on the receipt.

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

WHEREFORE, Plaintiff, Calley Fausett, respectfully requests that this Court enter judgment in her favor and the class, and against Defendant, 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

Plaintiff demands a trial by jury on all issues so triable.

Dated: August 9, 2019

Respectfully submitted,

s/Keith J. Keogh

Keith J. Keogh, Esq.
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ARDC #: 6225170
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Hollywood, FL 33019
Tel: (954) 589-0588

*Pending admission *pro hac vice*

“EXHIBIT A”



Visa Best Practices for Primary Account Number Storage and Truncation

Introduction

Due to misinterpretation of Visa dispute processing rules, some acquirers require their merchants to unnecessarily store full Primary Account Numbers (PANs)¹ for exception processing to resolve disputes. The unnecessary storage of full card PAN information by merchants has led to incidents of data compromise, theft or unintended disclosure during disposal. Additional confusion exists due to inconsistent dispute resolution practices by issuers and acquirers in use across different geographies, leading some merchants to conclude that PAN data must be retained for all transactions.

*To clarify, Visa **does not** require merchants to store PANs, but **does recommend** that merchants rely on their acquirer / processor to manage this information on the merchants' behalf. Visa also recommends that acquirers / processors evolve their systems to provide merchants with a substitute transaction identifier to reference transaction details (in lieu of using PANs).*

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.shtml> 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.

¹ A PAN is the 16-digit number embossed, engraved, or imprinted on a payment card.

PAN Truncation Best Practice

In addition to required compliance with applicable card data security standards, including the Payment Card Industry Data Security Standard (PCI DSS), and Visa Best Practices for Tokenization of Cardholder Information, Visa strongly recommends that acquirers and merchants follow these best practices:

Domain	Best Practice
Cardholder Receipts	<p>1. Disguise or suppress all but the last four digits of the PAN, and suppress the full expiration date, on the cardholder's copy of a transaction receipt created at a point of sale (POS) terminal or an ATM (already required for merchants in the U.S., Europe, and CEMEA; Visa will apply this rule across all regions in the near future to provide global consistency).</p> <ul style="list-style-type: none"> • Example: XXXXXXXXXXXXXXX1234 for the PAN and XXXX for the expiration date.
Merchant Receipts	<p>2. Disguise or suppress the PAN to display a maximum of the first six and last four digits, and suppress the full expiration date, on the merchant's copy of a transaction receipt created at a POS terminal. Note: Many merchants already follow this best practice by truncating the PAN to the last four digits on both the cardholder's and merchant's receipts.</p> <ul style="list-style-type: none"> • Example: 412345XXXXXX6789 or XXXXXXXXXXXXXXX1234 for the PAN and XXXX for the expiration date.
Merchant Transaction Data Storage by Acquirers	<p>3. Acquirers should support their merchants by providing transaction data storage, thereby allowing merchants to retain only disguised or suppressed PANs on the merchant's copy of an electronically generated receipt and in their transaction records (unless the merchant has a business need to retain the full card PAN).</p>
Enhanced Acquirer Systems	<p>4. Acquirers should enhance their systems to provide merchants with substitute transaction identifiers (such as the Visa Transaction Identifier) or software tokens to facilitate retrieval of transaction data stored by the acquirer, in lieu of using the PAN as a reference for individual transactions.</p>
Merchant Communications from Acquirers	<p>5. Acquirers should disguise or suppress all PANs sent to merchants in any communications (e-mail, reports, etc.).</p> <p>Reminder: PCI DSS already requires a PAN transmitted over a public network to be rendered unreadable by encryption, truncation, or hashing.</p>

Conclusion

Due to legacy practices and a misinterpretation by issuers and acquirers of Visa dispute resolution processing rules, many merchants unnecessarily store and/or print full card PANs on cardholder and merchant receipts. Visa rules do not require merchants to store full card PANs after settlement, and do allow merchant receipts with truncated PAN information to be retained for copy retrieval and dispute fulfillment.

Visa encourages 1) merchants to only print truncated PANs on cardholder and merchant receipts; and 2) acquirers to not require merchants to store PANs, and to provide alternate means for merchants to reference individual transactions. Visa has developed best practices to increase data security without affecting merchants' ability to meet dispute resolution requirements. Acquirers and processors are strongly encouraged to support their merchants in following these best practices.

Respond With Comments by August 31, 2010

Visa would appreciate stakeholder feedback on these best practices by August 31, 2010. Please submit any comments via e-mail to inforisk@visa.com with "PAN Truncation Best Practices" in the subject line.

Related Documents

"Visa Best Practices for Data Field Encryption" – October 2009

"Visa Best Practices for Tokenization of Cardholder Information" – July 2010

“EXHIBIT B”

C. 93



American Express
**Merchant
Requirements**

April 2014

For Internet Orders, Merchant must:

- use any separate Merchant Numbers (Seller ID) established for Merchant for Internet Orders in all Merchant's requests for Authorization and Submission of Charges,
- provide American Express with at least one (1) month's prior written notice of any change in Merchant's internet address, and
- comply with any additional requirements that American Express provides from time to time.

Additionally, if a Disputed Charge arises involving a Card Not Present Charge that is an Internet Electronic Delivery Charge, American Express may exercise Chargeback for the full amount of the Charge and place Merchant in any of its Chargeback programs. When providing Proof of Delivery, a signature from the Card Member or an authorized signer of the Card is not required.

4.5 Charge Records

Merchant must create a Charge Record for every Charge. For each Charge submitted electronically, Merchant must create an electronically reproducible Charge Record, and the Charge must comply with the Technical Specifications.

The Charge Record (and a copy of the customer's receipt) must disclose Merchant's return and/or cancellation policies. See Section 4.8, "Return and Cancellation Policies" for additional information.

If the Card Member wants to use different Cards for payment of a purchase, Merchant may create a separate Charge Record for each Card used. However, if the Card Member is using a single Card for payment of a purchase, Merchant shall not divide the purchase into more than one Charge, nor shall Merchant create more than one Charge Record.

For all Charge Records, Merchant must:

1. submit the Charge to American Express directly, or through Merchant's Processor, for payment.
2. retain the original Charge Record (as applicable) and all documents evidencing the Charge, or reproducible records thereof, for the timeframe listed in American Express' country-specific policies. See chapter 8, "Protecting Card Member Information" for additional information.
3. provide a copy of the Charge Record to the Card Member.

Merchant may be able to create more than one Charge Record if the purchase qualifies for a Delayed Delivery Charge. See Section 4.13, "Delayed Delivery Charges".

The retention time frame for Charge Records is twenty-four (24) months from the date Merchant submitted the corresponding Charge to American Express.

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.

“EXHIBIT C”

C. 96

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.

The Corporation strongly recommends that if an electronic POS Terminal generates Merchant copies of Transaction receipts, the Merchant copies should also reflect only the last four digits of the PAN, replacing all preceding digits with fill characters, such as "X," "*", or "#," that are neither blank spaces nor numeric characters.

NOTE

Additions and/or variations to this Rule appear in the "Canada Region" and "Europe Region" sections at the end of this chapter.

Returned Products and Canceled Services

A Merchant is required to accept the return of products or the cancellation of services unless specific disclosure was provided at the time of the Transaction.

Upon the return in full or in part of products or the cancellation of a service purchased with a Card, or if the Merchant agrees to a price adjustment on a purchase made with a Card, the following applies:

- If a MasterCard Card was used, the Merchant may not provide a price adjustment by cash, check, or any means other than a credit to the same Card Account used to make the purchase (or a Card reissued by the same Issuer to the same Cardholder). A cash or check refund is permitted for involuntary refunds by airlines or other Merchants only when required by law.
- If a Maestro Card was used, a Merchant may offer a price adjustment by means of a credit, provided the credit is posted to the same Card Account used to make the purchase (or a Card reissued by the same Issuer to the same Cardholder).

In a Card-present environment, the Merchant should ask the Cardholder for a Transaction receipt identifying (by means of a truncated PAN) the payment card used for the original purchase Transaction (but be aware that if a Contactless Payment Device was used, the PAN on a Card linked to the same Account may not match the PAN on the receipt). If the Card used to make the purchase is no longer available, the Merchant must act in accordance with its policy for adjustments, refunds, returns or the like.

EXHIBIT A

Walgreens

#03132 2415 E UNION HILLS DR
PHOENIX, AZ 85050
602-867-0561

200 0184 0021 03/07/19 10:12

UNIVERSAL SWIPE P1001	200.00
*****334	
UNIVERSAL SWIPE REFUND FEE2	4.95
41000200001	
TOTAL	204.95
	205.00
CHANGE	0.05

THANK YOU FOR SHOPPING AT WALGREENS

GET MORE WITH BALANCE REWARDS,
REDEEM POINTS FOR SOMETHING EXTRA
IN A FUTURE PURCHASE. RESTRICTIONS
APPLY. FOR FULL DETAILS SEE
WALGREENS.COM/BALANCE

Walgreens

PREPAID CARD

UNIVERSAL RELOAD

██████████ *****3564 200.00

FEE 4.95

Keep your receipt as proof of your reload. Check with your card provider for your updated account balance. Store cannot provide refunds or exchanges.

94 0021 03/07/2019 10:11

EXHIBIT 4

C. 444

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS, CHANCERY DIVISION**

CALLEY FAUSETT, individually and on behalf of others similarly situated,)	
)	
Plaintiff,)	Case No. 19 CH 00000675
)	
v.)	Judge Luis A. Berrones
)	
WALGREEN COMPANY)	
(d/b/a Walgreens),)	
)	
Defendant.)	

DECLARATION OF ALICIA GLICK

My name is Alicia Glick and I submit the following Declaration in support of Walgreen Co.'s ("Walgreens") motion to dismiss the complaint in this case, pursuant to Sections 2-615, 2-619 and 2-619.1 of the Code of Civil Procedure, or alternatively for summary judgment, pursuant to Section 2-1005 of the Code of Civil Procedure. If called upon to do so, I would testify to the following facts from my own personal knowledge.

1. I have worked for Walgreens since 1998 as a Business Analyst. Prior to approximately 2012, I was focused on point-of-sale or in-store experience for Walgreens' customers. My responsibilities included designing and implementing processes from a customer-facing perspective related to processing credit and debit card payments, as well as the sale of payment products like General Purpose Reloadable pre-paid cards ("GPR cards") and gift cards. Since approximately 2012, my responsibilities have continued to include design and implementation of payment systems and products, but less from an in-store perspective and more from Walgreens' perspective with banks, payment processors and sellers of these products. In this capacity, I work closely with payment processors (like Visa and Mastercard) as well as with companies that sell GPR cards (like Green Dot Corporation and Incomm).

2. GPR cards are prepaid products designed to serve customers who do not have credit (to obtain credit cards) or bank accounts (to obtain debit cards). With GPR cards, individuals can use cash to load a card that can be used in transactions like a credit or debit card but that is not linked to the customer's personal credit or banking information. The cards are loaded with value upon purchase. They can then be reloaded with additional value, up to \$500.

3. Until 2014, Walgreens sold GPR cards that could be used to make purchases at Walgreens, but the GPR cards could not be reloaded with value at Walgreens.

4. In approximately 2014, I was part of a team at Walgreens that developed a product called Universal Swipe Reload ("Universal Swipe"). Universal Swipe allowed customers to reload value on GPR cards using cash. We built into the system the function that cash was required to load a GPR card with value. GPR cards cannot be reloaded by Universal Swipe using a credit or debit card.

5. We designed the Universal Swipe system to generate a receipt for the customer so that he or she could prove the cash load had occurred. To do so, the receipt for a Universal Reload transaction includes: the total loaded; the total fee Walgreens charged to complete the reload; the cash tendered for the transaction; and any change provided to the customer. In addition to a transaction receipt, Universal Reload generates a second "stub receipt" that includes the amount loaded on the GPR card. Both the receipt and stub receipt include the first six digits of the GPR card number and the last four digits.

6. The first six digits of a GPR card number is the "BIN" or "bank identification number." It identifies the card-issuing bank. The last four digits are specific to the particular card. Walgreens includes the BIN number on Universal Reload receipts because these transactions are, by program design, necessarily cash transactions and we wanted the customer to

have a receipt that he or she could use with the particular bank identified by the BIN to demonstrate that that the bank has an obligation to the particular customer.

7. For transactions in which a credit or debit card is used to make a purchase, Walgreens obscures the BIN of the credit card or debit card on the receipt and only prints the last four digits of the card number on the receipt. In fact, even when a GPR card is used to make a purchase, Walgreens does this. As I have explained, in the case of Universal Reload transactions, because they are cash transactions for which the customers benefit from having information about the issuing bank, the BIN number is included on the receipt.

8. I have reviewed the receipts provided by the plaintiff in this case. They reflect a Universal Swipe cash transaction and include the BIN number of the GPR card that was being loaded with value. In this case, that number identifies the product loaded with cash as a GPR card sold by Green Dot Corporation. Green Dot GPR cards indicate on their face that they are issued by Green Dot.

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 instrument are true and correct, except as to matters therein stated to be on information and belief and as to such matters the undersigned certifies as aforesaid that he verily believes the same to be true.

Dated: August 20, 2019



A handwritten signature in cursive script that reads "Alicia Glick". The signature is written over a solid horizontal line.

Alicia Glick

CERTIFICATE OF SERVICE

I, Robert M. Andalman, hereby certify that on August 23, 2019 I caused to be electronically filed the foregoing ***DECLARATION OF ALICIA GLICK***, true and correct copies of which will be served via the Court's EF/ECM system on all parties of record. Copies will also be served by email to the following parties of record:

Keith J. Keogh (keith@keoghlaw.com)
Michael Hilicki (mhilicki@keoghlaw.com)
Koegh Law, Ltd.
55 W. Monroe St., Suite 3390
Chicago, IL 60603

Bret L. Lusskin Jr. (blusskin@lusskinlaw.com)
Bret Lusskin P.A.
20803 Biscayne Blvd., Suite 302
Aventura, FL 33180

Scott D. Owens (scott@scottdowens.com)
Scott D. Owens, P.A.
3800 S. Ocean Dr., Suite 235
Hollywood, FL 33019

/s/ Robert M. Andalman

EXHIBIT A

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

From: Keith J. Keogh [mailto:keith@keoghlaw.com]
Sent: Monday, June 17, 2019 9:21 AM
To: Osmond, Darin
Cc: Michael S. Hilicki
Subject: Fausett v. Walgreens, 19 CH 675 (Lake County)

Dear Mr. Osmond,

Please see the attached receipts per our call this morning. Plaintiff was provided both receipts as part of the same transaction and both have the additional credit card information on it.

Keith J. Keogh
Keogh Law, LTD.
55 W. Monroe St., Ste. 3390
Chicago, IL 60603
312.374.3403 (Direct)
312.726.1092 (Main)
312.726.1093 (Fax)
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www.KeoghLaw.com

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This e-mail and any attachments may contain confidential material or other matters protected by the attorney-client privilege. Unless you are the addressee (or authorized by the addressee to receive this e-mail for the addressee) you may not copy, use or distribute it. If you received this e-mail in error, please contact the sender.

Walgreens

#03132 2415 E UNION HILLS DR
PHOENIX, AZ 85050
602-867-0561

200 0184 0021 03/07/19 10:12

UNIVERSAL SWIPE BELOW	
[REDACTED]	200.00
UNIVERSAL SWIPE FEE2	
41000200001	4.95
TOTAL	204.95
	205.00
CASH	0.05

THANK YOU FOR SHOPPING AT WALGREENS

GET MORE WITH BALANCE REWARDS,
REDEEM POINTS FOR SOMETHING EXTRA
IN A FUTURE PURCHASE. RESTRICTIONS
APPLY. FOR FULL DETAILS SEE
WALGREENS.COM/BALANCE

Walgreens

PREPAID CARD

UNIVERSAL RELOAD

FEE

4.95

200.00

Keep your receipt as proof of your reload. Check with your card provider for your updated account balance. Store cannot provide refunds or exchanges.

0034 0021 03/07/2019 10:11

Exhibit 4

**IN THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT
LAKE COUNTY, ILLINOIS, CHANCERY DIVISION**

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

v.

WALGREEN COMPANY
(d/b/a “Walgreens”),
DEFENDANT.

CASE NO.: 19 CH 00000675

—————
EXPERT REPORT AND DISCLOSURE OF
KENNETH R. JONES

SUBMITTED OCTOBER 14, 2022

EXHIBITS:

Exhibit 1: Curriculum Vitae

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I. PROFESSIONAL BACKGROUND

1. I am a Senior Managing Director in the Global Risk & Investigations Practice within the Forensic & Litigation Consulting segment of FTI Consulting, Inc. (“FTI”). I have a combined 9 years of consulting experience, where I have advised clients with compliance, risk, investigative and remediation strategies and mitigation.
2. I am a retired Deputy Chief Postal Inspector of the US Postal Inspection Service (USPIS) and an expert in criminal methods of operation, law enforcement and corporate methods of investigation and more specifically; in the areas of fraud and financial crime, narcotics distribution, child sexual exploitation and money laundering. The USPIS is America’s oldest federal law enforcement agencies dating back to 1772. There are approximately 1,200 Postal Inspectors, but the agency also includes a law department, armed federal Postal Police Officers, a crime laboratory and a fully accredited federal law enforcement academy. Postal Inspectors are armed federal law enforcement officers. They conduct investigations, execute search warrants and work with the U.S. Attorneys’ Offices to investigate and prosecute thousands of criminal investigations every year. For example, in 2021 the Postal Inspectors reported 5,141 arrests and 3,784 convictions for federal crimes, including mail fraud and other federal criminal statutes. The agency has one of the broadest criminal investigative mandates. The USPIS is highly respected by the US Department of Justice (DOJ) and various regulators, such as; the Securities and Exchange Commission (SEC), the Federal Trade Commission (FTC), the Consumer Financial Protection Bureau (CFPB), Commodity Futures Trading Commission (CFTC) and many other regulators. The USPIS has several US-based field divisions and posts agents in various global locations. The USPIS is primarily known for conducting both domestic and international fraud investigations. Postal Inspectors are both leading and participating in fraud task forces at most United States Attorneys’ Offices throughout the United States and manages a fraud task force inside the US Department of Justice, Criminal Division Fraud Section. The USPIS uses statutes related to mail fraud, wire fraud, conspiracy and a variety of other criminal statutes to investigate fraud.
3. As Deputy Chief Postal Inspector, I managed all of the criminal investigative programs and field division operations.
4. I have held a number of positions within the USPIS, including, a variety of agent-level positions, supervisory agent positions, Assistant Inspector in Charge positions and Senior

Executive Service (SES) Inspector in Charge positions before becoming the Deputy Chief Postal Inspector, which is the second-in-command for this nearly 200-year-old US Federal law enforcement agency.

5. As part of my responsibilities with the USPIS, I have had expansive direct experience in investigations involving all varieties of fraud and financial crime including, cyber crime, identity theft, identity fraud, card fraud, narcotics, child sexual exploitation/pornography, workers' compensation fraud, embezzlements, loss prevention investigations, a variety of fraud schemes against corporations, black mail/extortion, revenue fraud investigations, False Claims Act investigations and more. As Deputy Chief Postal Inspector, I was responsible for policy, strategy and operations for federal agents, uniformed federal police officers and non-law enforcement personnel, such as contract fraud analysts.
6. Credit, debit and pre-paid card fraud was a primary area of criminal investigation for the USPIS. Due to a significant portion of cards being delivered via the US Mail, Postal Inspectors have been involved with card-related thefts and frauds for decades. Two of the primary criminal statutes utilized by Postal Inspectors for card-related crimes were Title 18, United States Code, Section 1708, entitled "Theft or receipt of stolen mail matter generally" and more commonly known as the 'Mail Theft Statute' and Title 18, United States Code, Section 1341, entitled "Frauds and Swindles" and more commonly known as the 'Mail Fraud Statute.' As a result, in addition to the criminal investigations, Postal Inspectors have long been involved in private/public efforts to prevent and early detect card-related frauds.
7. In an earlier executive level position, I was the head of the USPIS Career Development Division, where I was responsible for basic training for new Postal Inspectors, basic training for new uniformed federal police officers, in-service training for existing postal inspectors, postal police officers, crime laboratory personnel, investigative analysts and other personnel. Training and educational topics included a variety of subjects designed to develop and enhance investigative and other law enforcement and security skills in order to accomplish the investigative and security (Chief Security Officer role) mandate of the USPIS. Under my direction as the Inspector in Charge, the USPIS federal law enforcement training academy was one of the first federal law enforcement academies to receive both academy and training program accreditation from the Federal Law Enforcement Training Accreditation body.

8. Subsequent to my career in the USPS, I was a Director in the Fraud Risk Management practice at KPMG, a ‘Big 4’ audit/advisory firm, from 2008 to 2014. I was responsible for supporting a variety of national and multinational corporations, across a variety of client industries, with the development, or risk assessment, of global security programs, investigative programs, financial crime risk management programs, regulatory compliance programs, counterfeit mitigation, forensic intelligence capabilities and their use of data analytics and case management systems. I was part of the US team aligned with the firm’s Global Centre of Excellence for Justice and Security supporting global strategies and both public and private clients on security and investigations. I was also the “Forensic Liaison” to the firm’s 600-person Federal Advisory and Federal Audit practices having direct involvement with the Departments of Health and Human Services, Commerce, Justice, Homeland Security, Treasury, the FBI, Secret Service, DEA, Customs and Border Patrol, the Office of the Director of National Intelligence.
9. Subsequent to KPMG, I was the UBS Americas Region Head of Fraud Risk Management and Investigations where I managed fraud investigations and supported internal investigations managed by the legal department. I counseled the business on identity theft, identity security and identity fraud issues. I implemented several fraud risk enhancement programs, including several card fraud programs. I was also the head of Anti-money Laundering (AML) Investigations, where I managed AML investigations relating to retail banking, private banking, wealth management, investment banking and asset management lines of business within UBS. I was also the head of the Financial Intelligence Unit and the Cyber/Cyber-fraud Crisis Response Incident Manager.
10. My curriculum vitae is attached as Exhibit 1.
11. My firm was engaged for this assignment at the hourly billing rates of the individuals assigned plus expenses. My billing rate is \$700.00 per hour. My firm’s fees are not contingent upon the opinions expressed herein or the outcome of this matter.

II. SCOPE OF ASSIGNMENT AND INFORMATION RELIED UPON

This matter relates to the Plaintiff, Calley Fausett, representing the “class” and alleging that Walgreen Co. (d/b/a “Walgreens”), the defendant “failed to comply with FACTA by printing the first six (6) and the last (4) of debit card numbers on receipts provided to consumers.” The Plaintiff further alleges those actions by Walgreens were a violation of the Plaintiff’s statutory rights under Title 15 USC § 1681c(g), an invasion of privacy and an “elevated risk of identity theft.”

12. I have been retained by A&G Law, LLC (“Counsel”), on behalf of Walgreens to provide expert testimony.
13. The scope of this report does not include an opinion of whether there was a violation of 15 USC § 1681c(g) as Plaintiff alleges; however, it will address any allegations of an invasion of privacy and allegations of any elevated risk of identity theft and the potential for committing fraud on the Plaintiff’s accounts based on the receipts she allegedly received.
14. The expert testimony concerning this matter will focus on:
 - a historical summary of pre-paid cards;
 - descriptions, similarities and differences between closed loop cards and open loop cards;
 - the unique nature of prepaid cards and the difference between prepaid and other card types with underlying accounts;
 - a summary of card fraud being committed at the time of the enactment of The Fair and Accurate Credit Transactions Act (FACTA);
 - a summary of pre-paid card fraud and related criminal methods of committing fraud at the time of the complainant’s receiving the receipt(s) in question;
 - a summary of invasion of privacy definitions and concerns, specifically as it pertains to financial risk;
 - an opinion on the Plaintiff’s allegations that as a result of an alleged violation of their statutory rights under § 1681c(g), they suffered an “invasion of their privacy”;
 - an opinion on the Plaintiff’s allegations that as a result of an alleged violation of their statutory rights under § 1681c(g), they were “burdened with an elevated risk of identity theft”; and
 - an opinion of the likelihood that identity fraud related to the Plaintiff could occur as a result of having the first six digits of her general purpose reloadable (GPR) card revealed in addition to the last four digits on a physical receipt.

15. This report reflects my opinions and the analysis upon which they are based. In rendering my opinions, Counsel has not requested that I make any assumptions.

16. My opinions are based on my skills, knowledge, experience, education, and training as well as on information gathered and provided to me as of the date of this report. The specific procedures performed in reaching my opinions were performed by me. I have considered legal filings, documents produced in this litigation, depositions, and publicly available information, amongst other sources. Materials that I have considered include:

- i. The “First Amended Class Action Complaint” in this matter, dated August 9, 2019;
- ii. The Federal Credit Reporting Act (“FCRA”); as enacted into federal law by congress on April 25, 1971;
- iii. The Fair and Accurate Credit Transactions Act (“FACTA”), as enacted into federal law by congress in 2003;
- iv. The Office of Management and Budget (“OMB”) Memorandum M-07-1616;
- v. The appendix of OMB M-10-23¹;
- vi. The Office of Management and Budget Memorandum M-17-12, on January 3, 2017²;
- vii. The Department of Homeland Security (“DHS”) “Handbook for Safeguarding Sensitive Personally Identifiable Information,” 2012³;
- viii. Copies of receipts identified by or related to the Plaintiff;
- ix. The UK Financial Conduct Authority (FCA) Final Notice on the Tesco incident;
- x. A 12/2/2016 news article from The Independent (UK) on the Tesco incident entitled, “Criminals can guess VISA card number and security code in just six seconds, experts find; The ‘guessing’ method is thought to have been used in the Tesco Bank hack.”;
- xi. A 2017 Newcastle University article, Does the Online Card Payment Landscape Unwittingly Facilitate Fraud? On the Tesco incident;
- xii. List of customer complaints to Walgreens;
- xiii. Deposition of Calley Fausett and Declaration Alicia Glick;
- xiv. The 2013 Federal Reserve Payments Study: Recent and Long-Term Payment Trends in the United States: 2003 – 2012;
- xv. FTC Consumer Protection Data Spotlight – Social Media a Gold Mine for Scammers in 2021. <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/01/social-media-gold-mine-scammers-2021>; and

¹ https://obamawhitehouse.archives.gov/sites/default/files/omb/assets/memoranda_2010/m10-23.pdf

² https://obamawhitehouse.archives.gov/sites/default/files/omb/memoranda/2017/m-17-12_0.pdf

³ https://www.dhs.gov/sites/default/files/publications/handbookforsafeguardingsensitivePII_march_2012_webversion_0.pdf

xvi. FTC Consumer Sentinel Network, Fraud Reports by Contact Method, Year: 2022 (as of 6/30/22), <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/LossesContactMethods>.

17. In connection with my anticipated trial testimony in this action, I may use as exhibits various documents produced in this litigation which refer to or relate to the matters discussed in this report. In addition, I may create or assist in the creation of certain demonstrative exhibits to assist me in my testimony.
18. This report, prepared in connection with the above referenced case, is to be used for the specific purposes of this class action suit, and is not to be used for any other purpose without the express written consent of myself or my firm.

III. SUMMARY OF OPINIONS

19. Based on my experience, my research, discussions with Counsel, and the facts and circumstances of this matter, it is my opinion that:
20. As a result of providing the Plaintiff with a receipt that included the first six and last four digits of a debit card, Walgreens did not invade the privacy of the Plaintiff.
21. Plaintiff did not suffer a loss of personal identifying information as a result of Walgreens including “the first six (6) and the last (4) of debit card numbers on receipts provided to consumers.” In certain circumstances, the law and industry practice calls for the truncation of card numbers and lays out specific requirements for how they should be truncated. Truncation was required to prevent identity theft and identity fraud from occurring when full card information was obtained by criminals. Research on the topic indicates that full card numbers are considered PII. A truncated card number is not PII.
22. Plaintiff did not experience an “elevated risk of identity theft” as a result of Walgreens including “the first six (6) and the last (4) of debit card numbers on receipts provided to consumers.” Criminal Modus Operandi has evolved since the passage of the laws and regulations in question. The additional digits on a pre-paid card in no way elevated the risk to the Plaintiff. The additional digits did not enhance any criminals’ ability to obtain any information about name, date of birth, social security number or other PII that would help them steal the Plaintiff’s identity.
23. Plaintiff did not experience identity fraud as a result of Walgreens including “the first six (6) and the last (4) of debit card numbers on receipts provided.” Criminals commit identity theft in order to perpetrate identity fraud. In the material provided to me on the known facts of the matter, I see no evidence of identity fraud, nor do I see any opportunity to commit identity fraud.

IV. ANALYSIS OF THE FACTS AND OPINIONS I EXPECT TO OFFER

24. In arriving at my opinions and basis and reasoning thereof, I have performed the following procedures:

- Researched government and industry definitions of personal identifying information;
- Researched government and industry definitions of identity theft;
- Reviewed court filings and deposition testimony in this and related matters;
- Analyzed the receipts identified in this matter;
- Analyzed how technology has changed since the enactment FACTA; and
- Analyzed how prevalent criminal methods of operation have changed since the enactment of FACTA.

25. The substance of the facts and opinions as to which I will testify is as follows:

A Historical Summary of Pre-paid Cards

26. Pre-paid cards, also known as stored-value cards, emerged in the 1970s as transit and college campus cards and then were adopted in the 1980s by the telecommunications industry in the form of pre-paid phone cards.⁴ These initial cards were also referred to as closed loop cards and were limited to a single merchant.⁵ In the 1990s, closed loop cards were utilized by retail chains as gift cards to supplant paper-based gift certificates. Neiman Marcus, the department store chain, and Blockbuster, the former movie rental company, were the first to sell the cards.⁶ Another subset of prepaid cards are open loop cards, which are not limited to a single merchant and can be used at most locations where credit or debit cards are accepted.⁷ Open loop cards debuted following the “Personal Responsibility and Work Opportunity Reconciliation Act of 1996.”⁸ This legislation replaced paper food-stamps with electronic benefits transfer (“EBT”) cards. For EBT cards to be effective they had to be tied to benefits accounts

⁴ “A Summary of the Roundtable Discussion on Stored-Value Cards and Other Prepaid Products,” *The Federal Reserve Board*, January 12, 2005; <https://www.federalreserve.gov/paymentsystems/storedvalue/default.htm#fn3>

⁵ “What You Need to Know About Stored Value Cards,” *FIS Global*, August 5, 2019; <https://www.fisglobal.com/en/insights/merchant-solutions-worldpay/article/what-you-need-to-know-about-stored-value-cards>

⁶ Rose Eveleth, “The Gift Card was Invented by Blockbuster in 1994,” December 23, 2013; <https://www.smithsonianmag.com/smart-news/the-gift-card-was-invented-by-blockbuster-in-1994-180948191/>

⁷ “What You Need to Know About Stored Value Cards,” *FIS Global*, August 5, 2019; <https://www.fisglobal.com/en/insights/merchant-solutions-worldpay/article/what-you-need-to-know-about-stored-value-cards>

⁸ <https://www.congress.gov/104/plaws/publ193/PLAW-104publ193.pdf>

and widely accepted by retailers. Soon after, open loop prepaid cards were adopted by major credit card companies such as Visa, Mastercard, and American Express.

27. Pre-paid cards continued to grow in popularity, increasing from 4% in 2006 (of the payment methods tracked in the 2013 Federal Reserve Payments Study) to 8% in 2012. However, they remained small (8% in 2012) in comparison to credit cards (21% in 2012) and debit cards (38% in 2012).⁹ Consistent with industry standards the government reports recognize that prepaid cards are a separate and distinct product from credit and debit cards.



28. A June 2020 published study titled, “Prepaid Cards in the U.S. 7th Edition,” forecasted the pre-paid card market to grow by 6% annually from 2020 to 2024.¹⁰

Descriptions, Similarities and Differences Between Closed Loop Cards and Open Loop cards

29. Closed loop cards are an electronic form of payment that is relegated to a single merchant or for a specific purpose. Examples of a closed loop card include a card administered by a fast-food chain that can only be used in their restaurants or a pre-paid phone card used for international calls. Open loop cards can be used at most locations if the issuer is accepted by the merchant, for example, when a card is issued by American Express and the retailer accepts American Express cards. Open loop cards resemble, but are not identical to credit or debit cards. Other examples of open loop cards include payroll cards issued by employers and EBT cards. Both cards have had a rising popularity in the

⁹ The 2013 Federal Reserve Payments Study

¹⁰ “United States Prepaid Cards Market 2020-2024: COVID-19 Pandemic Reshaping the Industry,” *CISON*, June 30, 2020; <https://www.prnewswire.com/news-releases/united-states-prepaid-cards-market-2020-2024-covid-19-pandemic-reshaping-the-industry-301085780.html>

current retail climate and assist those without a credit or debit cards, also referred to as the “unbanked consumer,” obtain access to the financial system and complete purchases where cash is not accepted.¹¹

The Unique Nature of Pre-paid Cards and the Difference Between Pre-paid and Other Card Types with Underlying Accounts

30. The use of open loop pre-paid cards is similar to debit and credit cards when the cards are accepted as tender for purchases and the like. However, they differ in how they are funded. Unlike credit cards which are affixed to a set limit that is then paid over time, or a debit card that is linked to a person’s bank account, prepaid cards do not have any value until the funds are loaded onto the card. Pre-paid cards are generally not linked to a consumer’s bank checking account or to a consumer’s credit union shared draft account like debit cards.¹² Rather, the value associated with the card is maintained in a pooled account owned by the issuer.
31. Another key difference is the amount of funds at risk. As stated above, debit cards are linked to a consumer’s bank accounts and pose a much higher risk if compromised. Credit cards can have extremely high limits and although credit card companies often cover initial fraud losses when the card is compromised, the burden can fall on the card holder if the fraud is not identified and reported promptly. In some cases, this can be tens of thousands of dollars of fraud risk to the card holder. Pre-paid card risks are much lower because they are limited to the amount pre-loaded on the card and are inherently smaller amounts than debit or credit cards.

A Summary of Card Fraud Being Committed at the Time of The Fair and Accurate Credit Transactions Act (FACTA)

32. The FCRA was passed in 1970 and enacted to protect the privacy of consumer information that is stored by consumer reporting agencies.¹³
33. The “Fair and Accurate Credit Transactions Act of 2003” (“FACTA”) is a federal law enacted by Congress in 2003 to increase consumer protections. FACTA was an amendment to FCRA. The act states its primary purpose is to “amend the Fair Credit Reporting Act, prevent identity theft, improve resolution of consumer disputes, improve the accuracy of consumer records, make improvements in

¹¹ “What You Need to Know About Stored Value Cards,” FIS Global, August 5, 2019; <https://www.fisglobal.com/en/insights/merchant-solutions-worldpay/article/what-you-need-to-know-about-stored-value-cards>

¹² “What is the Difference Between a Prepaid Card, a Credit Card, and a Debit Card,” *Consumer Financial Protection Bureau*, April 1, 2019; <https://www.consumerfinance.gov/ask-cfpb/what-is-the-difference-between-a-prepaid-card-a-credit-card-and-a-debit-card-en-433/>

¹³ “Consumer Reports: What Information Furnishers Need to Know,” Federal Trade Commission, January 2021; <https://www.ftc.gov/tips-advice/business-center/guidance/consumer-reports-what-information-furnishers-need-know#Additional%20Responsibilities>

the use of, and consumer access to credit information, and for other purposes.”¹⁴ The law was created in response to increased cases of identity theft and to heighten consumer protection.¹⁵ Leading up to the legislation, identity theft was occurring through various means, such as lost wallets or purses, mail theft, dumpster diving, telemarketing scams and online data breaches. In February 2001, the Federal Trade Commission (“FTC”) reported the increasing level of identity theft but primarily attributed it to “lost wallets or purses, and mail theft.”¹⁶

34. In 2001, a hacker from Yugoslavia breached the website Babygear.com, a baby products retailer, and stole credit card information belonging to 139 customers.¹⁷ The perpetrator attempted to use the stolen information to purchase goods online.
35. In March 2000, the FTC issued a release warning people about “automatic debit scams” that occur when fraudulent telemarketers get consumers to give up valuable information such as their checking account number and additional valuable information printed on a check.¹⁸
36. In 1997, an individual’s debit card was stolen and used to purchase \$1,775 worth of airline tickets. Her debit card information was acquired by a dumpster diver, who allegedly had done this to a number of individuals.¹⁹
37. In summary, as of the passage of FACTA in 2003, people were concerned about hard copy receipts. Identity fraud was committed using whole card numbers via dumpster diving, taking receipts out of trash cans next to gasoline pumps and other methods. From 2003, when truncation was required, criminal methods of operation began to shift. In the late 20-teens, toward 2019, the shift was toward phishing attacks and cyber intrusions of large organizations and other more sophisticated methods of identity theft and identity fraud.
38. After the passage of the initial legislation in 2003, the method of reported card fraud shifted away from obtaining information through dumpster diving and the theft of a person’s belongings (wallet or purse). In August 2008, the Department of Justice (“DOJ”) issued a press release that it charged eleven individuals with hacking nine major retailers and the theft and sale of more than 40 million credit

¹⁴ “Fair and Accurate Credit Transactions Act of 2003”

¹⁵ <https://www.congress.gov/108/plaws/publ159/PLAW-108publ159.pdf>

¹⁶ Dan Verton, “Identity Thefts Skyrocket, but Less than 1% Occur Online,” *Computerworld*, February 12, 2001; <https://www.computerworld.com/article/2590592/identity-thefts-skyrocket--but-less-than-1--occur-online.html>

¹⁷ Linda Rosencrance, “Victims of Credit Card Fraud Tell Their Stories,” *Computerworld*, March 23, 2001; <https://www.computerworld.com/article/2591492/victims-of-credit-card-fraud-tell-their-stories.html>

¹⁸ “Automatic Debit Scams,” Federal Trade Commission; <https://www.consumer.ftc.gov/articles/0196-automatic-debit-scams>

¹⁹ “Debit Cards and Fraud: A Former Debit Card User Tells Her Story,” *Privacy Rights Clearinghouse*, October 1, 2002; <https://privacyrights.org/resources/debit-cards-and-fraud-former-debit-card-user-tells-her-story>

cards.²⁰ The hackers employed sophisticated methods to embed themselves in the companies' systems and steal credit card information. In short, the method of operation of fraudsters shifted from obtaining hard copy receipts to hacking systems to obtain large quantities of card numbers and PII.

39. Another current method of card fraud is the installation of skimming devices to steal people's credit or debit card information. An illicit card skimmer is installed to payment terminals and when the victim enters the card into the terminal, the device reads the magnetic strip on the card and stores the card holder's number, name, and expiration date. In 2008, 80 people in San Jose, California who used their debit card at the same gas station had a total of \$45,000 stolen from their bank accounts.²¹ The perpetrator stole their information through the skimming device.
40. In addition, fraudsters target individuals through sophisticated phishing techniques either on the phone or the computer. In 2005, NBC News reported that due to phishing and lapses in banking security measures there was a rise in debit card theft from ATMs.²² For example, an individual was tricked into entering personal identifiable information on a form that they believed was emailed to them from their bank. The perpetrator then used that information to print fraudulent debit cards and withdraw money around Russia, Latvia and Ukraine.²³

A Summary of Payment Card Fraud and Related Criminal Methods of Committing Fraud at the Time of the Complainant's Receiving the Receipt(s) in Question

41. As consumers continue to move away from cash and engage in e-commerce, the methods of fraudsters have become increasingly more sophisticated and varied. Fraud methods include targeted phishing through email, SMS messaging or phone calls, skimming machines, Wi-Fi hotspots and data breaches.^{24 25}
42. In January 2020, the FTC published the Consumer Sentinel Network, which featured data provided by consumers regarding problems in the marketplace including reports of fraud and identity theft.²⁶ According to the report, fraud was primarily initiated through the phone accounting for 821,862

²⁰ <https://www.justice.gov/archive/opa/pr/2008/August/08-ag-689.html>

²¹ John Coté, "San Jose Gas Station Center of Debit Card Scam," *SF Gate*, May 30, 2008; <https://www.sfgate.com/bayarea/article/San-Jose-gas-station-center-of-debit-card-scam-3282274.php>

²² Bob Sullivan, "ATMs may be an Easy Target for Thieves," *NBC News*, August 2, 2005; <https://www.nbcnews.com/id/wbna8743446>

²³ Bob Sullivan, "Know Your Rights on Bank Account Fraud," *NBC News*, August 12, 2005; <https://www.nbcnews.com/id/wbna8915217>

²⁴ Hillary Hoffower, "There's a Good Chance You're a Victim of Credit Card Scams and You Don't Even Know it- Here's What to Do," *Business Insider*, October 14, 2018; <https://www.businessinsider.com/credit-card-fraud-scams-what-to-do-2018-8>

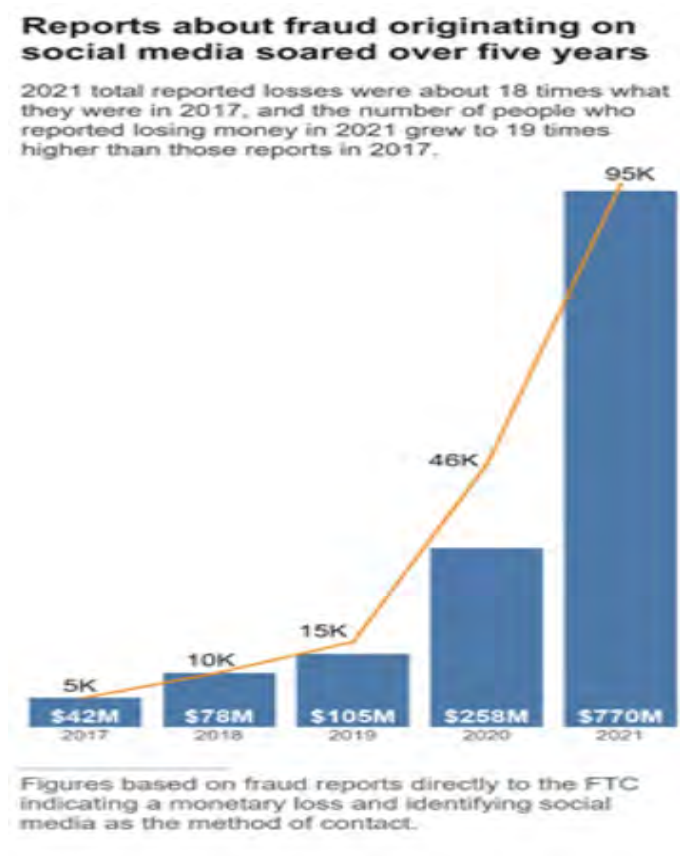
²⁵ Mary Hadar, "Think your credit card is safe in your wallet? Think again," *The Washington Post*, September 11, 2019;

https://webcache.googleusercontent.com/search?q=cache:OJU3AJt3ptkJ:https://www.washingtonpost.com/business/think-your-credit-card-is-safe-in-your-wallet-think-again/2019/09/11/05e316e4-be0e-11e9-b873-63ace636af08_story.html+&cd=19&hl=en&ct=clnk&gl=us

²⁶ Federal Trade Commission, Consumer Sentinel Network, January 2020; https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-2019/consumer_sentinel_network_data_book_2019.pdf

reports. Following phone contact, was website/other with 99,215 reports of fraud and fraud through email totaling 92,323 cases. Consumer-initiated contact only totaled 50,805 fraud cases while criminals committing fraud by mail represented 31,928 cases.²⁷

43. As an example of changing criminal methods of operation, an FTC report outlined a major increase in frauds originating via social media, increasing *18 fold* from 2017 to 2021.²⁸

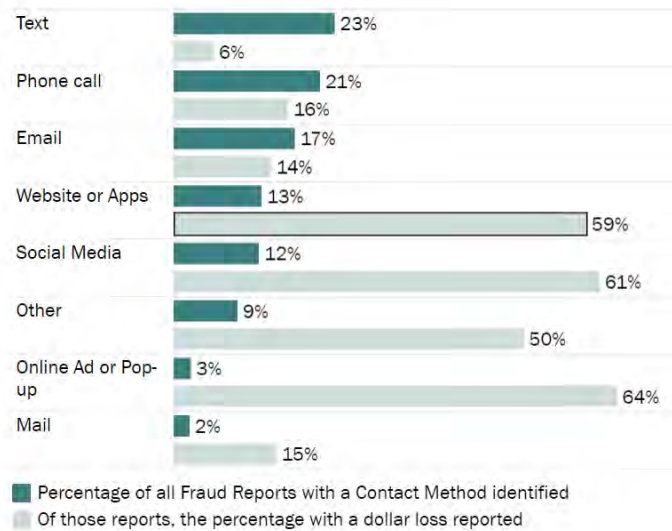


44. The Federal Trade Commission also collected data on how fraudsters approached victims to initiate a fraud. Fraudsters stealing a person’s hard copy receipt was not mentioned. The chart below shows the data and the areas of text, social media, email and other categories are further evidence of the shift from the advent of the FACTA.²⁹

²⁷ Ibid.

²⁸ FTC Consumer Protection Data Spotlight – Social Media a Gold Mine for Scammers in 2021. <https://www.ftc.gov/news-events/data-visualizations/data-spotlight/2022/01/social-media-gold-mine-scammers-2021>

²⁹ FTC Consumer Sentinel Network, Fraud Reports by Contact Method, Year: 2022 (as of 6/30/22), <https://public.tableau.com/app/profile/federal.trade.commission/viz/FraudReports/LossesContactMethods>



45. According to a 2019 article published by *The Washington Post*, microchips installed in credit cards led to a decrease of in-person fraud transactions. Criminals now prefer to target “card not present transactions,” that occur over the phone or online.³⁰ “Card not present” card fraud increased by 34% from 2015 to 2016 totaling \$4.57 billion.³¹

A Summary of Invasion of Privacy Definitions and Concerns, Specifically as it Pertains to Financial Risk

46. The first six digits on a debit card are not Personal Identifying Information. They identify the issuing bank and nothing specific to the Plaintiff’s personal information is revealed. They do not represent any ‘personal’ identifiers relating to the Plaintiff, they do not represent an invasion of the Plaintiff’s privacy and providing them is in no way a theft of the Plaintiff’s identity.
47. Walgreens did not, without the permission of the Plaintiff, obtain or release private information belonging to the Plaintiff.
48. Consumer privacy relates to the handling and protection of sensitive Personal Identifying Information (PII) belonging to the customer that if disclosed could result in identity theft and financial fraud. Examples of PII include an individual’s name, address, telephone number, Social Security Number, passport or driver’s license number, bank account number, credit or debit card number, and biometrical

³⁰ Ibid.

³¹ Ibid.

data. The first six digits of a debit card number is not considered PII and therefore its disclosure is not considered an invasion of privacy.

49. Understanding Debit Cards: It is important to understand the information from a payment card number vs other account numbers like bank account numbers. A payment card has 16 digits, which are referred to as the Permanent Account Number (PAN).

50. The first six digits of a payment card make up the Bank Identification Number (BIN). The first of these six digits is known as the Major Industry Identifier (MII) and assigns 0 thru 9 for specific industries. For example, 1 and 2 pertain to the airline industry cards and 4 and 5 pertain to the banking and financial industry. 4 is for VISA and 5 is for MasterCard.

51. The next 5 digits (digits 2 – 6) are known as the Issuer Identification Number (IIN) and tell us which financial institution issued the card.

52. For example, a card beginning with 531348, would indicate:

5 = Mastercard

31348 = Green Dot Bank was the issue financial institution

53. The first six digits were printed on the Plaintiff's receipt.

54. The next 9 digits are an internal identifier for the bank that issued the card. They are not the Plaintiff's bank account number.

55. The last digit of a card number is known as a check sum to determine if a card is indeed valid. The "check number" or "key" is created by a formula known as the Luhn Algorithm. The algorithm can immediately detect errors when people inaccurately transcribe card numbers. It can tell, for instance, when someone accidentally hits the 9 key instead of the 6 key, as well as many other common errors.³²

An Opinion on the Plaintiff's Allegations that as a Result of an Alleged Violation of Her Statutory Rights Under § 1681c(g), She Suffered an "invasion of their privacy"; was "burdened with an elevated risk of identity theft"; and That She was Exposed to a Higher Likelihood of Identity Fraud

³² What is a credit card number, <https://www.discover.com/credit-cards/card-smarts/what-is-a-credit-card-number/#:~:text=Key%20Points%20About%3A%20Credit%20Card%20Numbers&text=Considering%20card%20numbers%20means%20understanding,the%20card's%20numbers%20during%20transactions>.

56. The Office of Management and Budget (OMB) prepared a memo (M-17-12) for all government agencies, dated January 3, 2017, entitled, “Preparing for and Responding to a Breach of Personally Identifiable Information.” In the memo, the OMB describes PII, “The PII may range from common data elements such as names, addresses, dates of birth, and places of employment, to identity documents, social security numbers or other government-issued identifiers, precise location information, medical history, and biometrics.”³³
57. The OMB memo further outlines, “Factors for Assessing the Risk of Harm to Potentially Affected Individuals” which include, the nature and sensitivity of the PII potentially compromised by the breach, likelihood of access and use of PII and the type of breach. Key elements of the factors include the theft of actual PII, the combination of additional pieces of stolen PII and the evidence of actual misuse – none of which are present in the issuance of a receipt from Walgreens to the Plaintiff.³⁴
58. With the OMB definition of PII, a receipt with a partial card number with the first six digits cannot be considered to include PII.
59. A social security number, or even a truncated social security number is PII. The same thing is not true of a partial prepaid card number. The difference is two-fold. First, the social security number, although never intended to be so by the Internal Revenue Service, is seen as the universal financial identifier for individuals in the United States. It is required when opening bank accounts, buying homes and the last four digits of a social security number are often used when verifying an individual’s identity as a challenge question. Second, if a criminal knows your date of birth, your home address and the last 4 digits of your social security number, he/she is in a much better position to steal your identity and commit fraud. As an example of the difference, the United States Archives lists the full social security number as stand-alone PII and a truncated social security number (such as last four digits) as an example of Sensitive Personally Identified Information (SPII), but does not list a truncated credit, debit or prepaid card number as either.³⁵ In short, a social security number is unique to an individual and both the full social security number and the last four digits of a social security number are frequently used as personal identifiers. The first 6 digits of a card, the BIN, is not unique to an individual and they are not PII.

³³ OMB Memorandum M-17-12, Preparing for and Responding to a Breach of Personally Identifiable Information, January 3, 2017

³⁴ Ibid

³⁵ US Archives, “Controlled Unclassified Information (CUI)” September 7, 2018, <https://www.archives.gov/cui/registry/category-detail/sensitive-personally-identifiable-info>

60. There is no “elevated risk of identity theft.” Typical data that fraudsters seek to obtain to commit fraud includes a combination of data, starting with your name. According to Experian, “In many identity theft situations, the key is matching your name with other identification quantifiers.”³⁶ Experian outlines three common combinations of PII required to commit identity theft and identity fraud:

Example A: You lost your wallet with your Social Security card and driver’s license tucked inside.

The thief now has your home address and a picture of you, as well as your full name and social security number. He types your name into a search engine and discovers where you work, thanks to the online directory and knowing its proximity to your hometown. With the information readily at hand, he is able to file a tax return in your name.

Example B: A thief has your name and your email address, but to get your passwords for various websites, he needs the answers to your security questions.

He visits your social media pages and in a questionnaire being shared on the site, he discovers the name of your high school’s mascot, your grandmother’s maiden name, and the model of your first car—all options for security questions. This provides him the access he needs to get into any number of your accounts.

Example C: You use the computer at your public library. You checked your email and did some shopping, but when you left, you forgot to log off or delete the cookies.

The next person who was sitting next to you at the computer checks through the history and discovers he has access to your recent activity. There are purchases using your credit card, and thanks to the open email, there is now access to contacts and a variety of personal information to use for further identity-theft opportunities.

61. The receipts received by the Plaintiff do not contain any of these examples of PII, nor any other PII, and the above scenarios are not possible.
62. Even if a criminal had all digits of the card in question, they would not have a Card Verification Value (CVV), expiration date, zip code or the name of the card holder. Nor would they have a bank account number, date of birth, social security number, address or access to any account information.
63. Walgreens provided hard copy receipts with the first six digits and the last four digits of a prepaid card following a cash reload transaction. This is vastly different than a loss of data from cyber breach or an online data theft incident. In a data breach, PII is sought and often taken by cyber criminals. In those matters, the PII is lost along with the ability to control where it goes and who has access to it.

³⁶ “What is Personally Identifying Information” Experian, <https://www.experian.com/blogs/ask-experian/what-is-personally-identifiable-information/> May 31, 2018

64. In this matter, the hard copy receipt was only given to the Plaintiff. It was not stolen nor was it unwittingly sent to the wrong person – only the Plaintiff received it. Furthermore, as stated, it did not contain any PII.
65. The focus of criminal methods has become large scale data attacks, not prepaid cards. Compared to the level of effort for higher reward fraud attempts by criminals, actively pursuing fraud via information on a single receipt is minimal. As previously described, cyber intrusions of major e-commerce retailers and others who hold large amounts of PII are the more preferred method of stealing PII. To confirm that receipts-based fraud is not a realistic risk, I reviewed a list of all complaints to Walgreens from customers related to prepaid cards from June 2017 through November 2020. The list included 14,656 items. Not one involved a complaint which related to receipt-based fraud.
66. Even the degree of risk resulting from a massive actual privacy breach varies depending on the sensitivity of the information obtained and if it was acquired in conjunction with other PII (such as name, date of birth, and address). It is the combination of more than one piece of stolen PII that is most often the cause of fraud.
67. Industry standards allow corporations to retain the first six and last four digits in large databases: The Payments Card Industry (PCI), through their Security Standards Council (SCC) provides a Data Security Standard (DSS) for the industry. In matters where companies electronically store card information in large data files, the industry practice is to eliminate only the middle six digits. Section 3.3 is titled: “Mask PAN when displayed (the first six and last four digits are the maximum number of digits to be displayed).”³⁷ This reflects the industry standard that it sufficiently protects customer privacy to mask account numbers in the precise manner as the receipt given to Plaintiff. In short, financial institutions and others in the business of providing cards allow their internal employees to see the first six digits for the purpose of helping clients and managing accounts. They allow them to see the first six digits, in line with the PCI DSS standards, because they know their employees cannot commit fraud with only these digits.
68. Further, the PCI standards are not limited to databases, providing: “This requirement relates to protection of PAN displayed on screens, paper receipts, printouts, etc.”³⁸

³⁷ Payments Card Industry, Data Security Standard, May 2018, https://www.pcisecuritystandards.org/documents/PCI_DSS_v3-2-1.pdf?agreement=true&time=1634150212764

³⁸ Ibid

69. To further demonstrate this point, in an article by Richard Rohena, entitled, Acceptable Formats for Truncation of Primary Account Numbers, he describes the proper storage – in large data systems – of debit card numbers and demonstrates that the first six and last four digits are not cardholder data, “In order to consider PAN data truncated appropriately for storage in a PCI-DSS compliant manner, the data cannot exceed the first six last four digits of the PAN. Once the middle six digits are removed, the PAN is no longer considered cardholder data and is considered unreadable.”³⁹
70. Thus, financial institutions are allowed to store debit card information, including the first 6 digits and the last 4 digits, because that level of truncation is both accepted as an industry standard and not considered to contain card holder data.
71. Current-day cyber criminals utilize sophisticated algorithms to identify bank and other accounts - once they have a sufficient combination of known PII. Even the full account information is useless without additional PII, such as at least the account holder’s name in combination with their address, email, phone number, CVV number, challenge questions, passwords, etc.
72. In the case of the Plaintiff, her bank account is not identified on the subject receipts. It only discloses the BIN number which relates to the financial institution and is not PII.
73. There is no elevated risk of identity theft or identity fraud from this receipt compared to other documents the Plaintiff receives routinely. The Plaintiff, like virtually all adult US citizens, either currently or in the past has received numerous printed documents which contained PII. Unlike the Walgreens receipt at issue, these documents actually contain PII and financial information associated with an individual.
- Bank statements identify the last four digits of the account holder’s actual bank account. They also include the name of the bank, along with account holder’s name, the account holder’s address and a list of transactions.
 - Bank statements also include where the Plaintiff makes payments and purchases.
 - Identity documents or forms of identification, like a driver’s license, also contain PII and people often carry these documents in wallets along with payment cards that contain the full PAN.

³⁹ Rohena, Global Payments Integrated, Dec. 10, 2019, <https://www.globalpaymentsintegrated.com/en-us/blog/2019/12/10/acceptable-formats-for-truncation-of-primary-account-numbers>

- In addition to bank statements, hard copy documents that actually contain PII may include accounts with credit card companies, mortgage, rent, utilities, health benefits, Amazon and other e-commerce shippers, merchants, etc.

74. The above hard copy documents all contain PII and financial information. They should be shredded when no longer needed and provided some level of security if retaining them is desired or required. In contrast the receipt at issue does not contain PII.

75. Finally, there is no elevated risk to having the card receipt with the first 6 digits and the last 4 digits, especially when the Plaintiff carries the actual card with all of the digits.

76. Below are examples of protections required by any person to protect PII on phones, computers and stored at banks, merchants and others, none of which apply to the subject receipt:

- If any of the above-described hard copy documents were received via email or accessed online, a person is actually at risk if she has opened emails that contained malware, which could give cyber criminals access to her emails, data stored on her phone or computer, text messages and more.
- Security experts emphasize the precautions necessary to protect your PII, inclusive of update software security, changing passwords regularly, not using the same password, not opening unknown emails and more. These are solid protections against true risks.
- Opening an email on the same device used to access a bank account may be an exposure to malware.
- Using those same devices to make payments and order merchandise is potentially providing cyber criminals multiple opportunities to steal PII.
- Stored passwords in a written form is potential additional exposure to identity theft.
- Not using password protection programs is potential additional exposure to identity theft and identity fraud.
- Using the same password more than once is exposure to identity theft and identity fraud.

77. The security needed for the receipt the Plaintiff received from Walgreens requires less safeguarding than those from credit card companies, mortgage, rent, utilities, health benefits, Amazon, merchants, etc. Many of

those accounts include the Plaintiff's name, address and in the case of financial institutions (like the Walgreens receipts) the financial institution is identified.

78. In short, the Walgreens receipt does not contain PII or financial information and does not require measures to protect the Plaintiff from an elevated risk of identity theft or fraud.
79. I understand that the Plaintiff cited a December 2, 2016 news article from The Independent (UK) about an incident at Tesco Bank in England. The article is entitled, *Criminals can guess VISA card number and security code in just six seconds, experts find; The 'guessing' method is thought to have been used in the Tesco Bank hack.*
80. The Tesco Bank incident had nothing to do with receipts, disclosure of BIN numbers or GPR cards. Moreover, regardless of the article headline, it is not the case that guessing can allow a criminal to obtain a VISA card number and security code in six seconds. In the case that was the subject of that article, the U.K. Financial Conduct Authority (FCA) alleged that the incident began with a "cyber attack" in which, "The attackers most likely used an algorithm which generated authentic Tesco Bank debit card numbers and, using those "virtual cards", they engaged in thousands of unauthorised debit card transactions." (Authority, 2016)⁴⁰
81. The FCA alleged the cyber criminals took advantages of several deficiencies in Tesco Bank. The FCA stated that Tesco Bank failed to exercise due skill, care and diligence to:
 - A. Design and distribute its debit card:
 1. Tesco Bank never intended for its debit cards to be used for contactless MSD transactions, but card users could still use that payment method or "channel".
 2. Tesco Bank inadvertently issued debit cards with sequential PAN numbers. This increased the likelihood that the attackers would find the next PAN number in the sequence.
 - B. Configure specific authentication and fraud detection rules:
 1. Tesco Bank configured its authorisation system to check whether the debit card expired on a date in the future instead of an exact date and month.

⁴⁰ Financial Conduct Authority letter to Tesco Personal Finance plc dated October 1, 2018

2. Tesco Bank programmed its fraud analysis management system at account level instead of card level. This meant that debit card transactions for cards that had been replaced did not go through the fraud analysis management system.

82. Pertaining to the Tesco attack, Newcastle University academic research points out that the Distributed Guessing Attack or Brute Force Attack that occurred at Tesco Bank in 2016 does not work on MasterCard cards: “The vulnerabilities described in this article apply to cards that do not enforce centralised checks across transactions from different sites. Our experiments were conducted using Visa and MasterCard only. Whereas MasterCard’s centralised network detects the guessing attack after fewer than 10 attempts (even when those attempts were distributed across multiple websites), Visa’s payment ecosystem does not prevent the attack.” “When the attack is applied to a MasterCard, the distributed attack is detected. This suggests that the payment networks have the capability to detect and prevent a distributed attack where the network is globally integrated.”⁴¹

83. Subsequent to the November 2016 Tesco Bank cyber attack, Visa implemented the Account Attack Intelligence service, which identify where hackers are using account enumerations to guess PANs, expiration dates or CVV2.

84. To summarize the stark differences in the Tesco attack compared to the matter at hand:

- The Tesco Bank incident had nothing to do with disclosures on receipts.
- The Plaintiff utilized a MasterCard whereas MasterCard is not subject to the risks of a guessing attack because it utilizes a centralized network that recognizes the guessing after fewer than ten guesses.
- This was a technology attack, not the obtaining of a physical receipt.
- The fraudsters in this matter had obtained actual full card numbers and then were able to generate potential additional numbers electronically and submit large numbers of transactions electronically, effectively guessing alternative numbers.
- Tesco inadvertently issued debit cards with sequential PAN numbers – helping the attackers to find the next PAN number in the sequence. Identifying a sequential PAN number from the partial numbers provided by Walgreens is not possible as the middle digits are omitted.
- Frauds occurred electronically, using debit card numbers to access consumer bank accounts at Tesco Bank. No such account exists in connection with the Plaintiff’s GPR card.
- Tesco is a bank, where the victim’s funds were stolen. Walgreens is a retailer and no information on the Walgreens receipt is in any way associated with a bank account number.

⁴¹ Newcastle University research article entitled, “Does The Online Card Payment Landscape Unwittingly Facilitate Fraud?” Authors Mohammed Aamir Ali, Budi Arief, Martin Emms, and Aad van Moorsel

- The FCA found that Tesco conducted fraud analysis at the account level, not the card level, thus replacement cards did not go through a fraud analysis.
- VISA had warned its members of this type of fraud. Subsequently Tesco had protected credit cards but not debit cards from this fraud.
- This incident is unique to VISA and Tesco Bank at the time of the fraud in 2016. The controls in place subsequent to the Tesco incident would preclude this type of attack from occurring now, even at Tesco Bank. I note further that none of the GPR cards issued in this matter were issued by Tesco Bank.

85. In summation, by providing the Plaintiff with the receipt in question, Walgreens did not cause or increase the risk of an invasion of the Plaintiff's privacy, identity theft or cause an elevated risk of identity theft or identity fraud.

86. My report, with my CV is contained herein, and presents my opinion and the bases and reasons thereof. To the extent any additional information is produced by either party, I reserve the right to incorporate such additional information into my report. This report was prepared solely for the above-captioned matter and should not be used for any other purpose without prior written authorization.

By:

Kenneth R. Jones

Date: October 14, 2022

Exhibit #1: Curriculum Vitae

Ken Jones, CAMS

Senior Managing Director – Forensic & Litigation Consulting

Ken.jones@fticonsulting.com



New York, NY

Wayne, PA

Tel: +1 267-495-6855

EDUCATION

B.A., Criminology,
Mansfield University

M.A., Criminology,
Indiana University of
Pennsylvania

CERTIFICATIONS

Certified Anti-money
Laundering Specialist
(CAMS)

PROFESSIONAL AFFILIATIONS

Chairperson, Economic
and Cybersecurity
Institute, Utica College

Ken Jones is a Senior Managing Director in the Global Risk & Investigations Practice (GRIP), within the Forensic & Litigation Consulting segment, supporting clients with operational risk, compliance and financial crime expertise. He has provided expert witness testimony, along with risk assessment, investigative and remediation strategies. His expert witness testimony engagements include financial crime-related areas and criminal and corporate investigative expertise. He has supported several clients with compliance remediation and risk assessments relating to third parties, financial crime risks and assessments of their internal and external intelligence and analytical capabilities.

Prior to joining FTI Consulting, he was at UBS, where he managed the Americas region AML investigations, fraud risk management and investigations, the financial intelligence unit (FIU) and he was the cyber/cyber-fraud crisis incident manager. He was played a major role in the global compliance and financial crime strategy development and implementation.

Deputy Chief Postal Inspector: his federal law enforcement career spanned more than 20 years from line agent to senior executive and included a wide variety of global risk management, investigative, compliance, security and leadership experiences. He managed all criminal programs, including all varieties of fraud and false claims.

During his six years at a 'Big 4' audit and consulting firm, he helped many global corporations develop or improve their Financial Crime (AML, FIU, Fraud, ABC, Sanctions) compliance, risk assessment and investigative programs. He supporting companies with fraud and false claims litigation and compliance remediation.

Mr. Jones serves as the Chairperson for the Economic Crime and Cybersecurity Institute (ECCI) of Utica College. Utica College has been designated as a center of excellence for cybersecurity by both the NSA and Homeland Security.

Mr. Jones has a Master of Arts degree in Criminology from Indiana University of Pennsylvania and a Bachelor of Arts degree in Criminology from Mansfield University.

Financial Crime Expert

Mr. Jones has served as an expert in financial crime matters ranging from fraud to regulatory matters involving the Consumer Financial Protection Bureau (CFPB) to civil matters.

Ken Jones, CAMS

Senior Managing Director – Forensic & Litigation Consulting

Ken.jones@fticonsulting.com

Professional Experience

UBS Americas Region Head of AML Investigations, Anti-Fraud, FIU and Cyber Crisis Incident Response Manager: While at UBS he played a key role in the development of the annual compliance plan to ensure the continued viability of the firm's risk appetite and risk profile were in line with both regulatory and broader operational risk objectives. Based on forecasting, he developed staffing capacity plans, inclusive of staffing triggers based on workload and management approved staffing remediation plans based on volume and staffing triggers. This resulted in both the required quality compliance program and the most efficient staffing plan for both personnel and technical resources.

He developed and managed a risk management committee inclusive of high-level front line business leaders, legal and other compliance executives. The committee was made aware of new regulatory change requirements, emerging financial crime trends, risk assessments, significant incident escalations, compliance and financial crime goal metrics and compliance strategies and implementation plans related to new client segments, new geographies, new products and new or changing delivery channels.

He played a key role in the global roll up of compliance aggregated risk management via risk radars. He was able to provide both a static point in time view of various risks based on risk taxonomies, as well as; periodic (monthly, quarterly and annual) risk radars and appetite assessments.

He developed strategies and implemented enhancements in fraud, AML, FIU and crisis response related to improved policies, procedures, management information (MIS), investigative quality, investigative efficiencies, intelligence, analytical, training, performance management and meeting regulatory expectations and overall risk management programs. His focus on internal fraud included efforts to integrate trade surveillance, fraud analytics and intelligence on high-risk financial advisors.

Knowledgeable of both the traditional banking, digital banking and the crypto-currency risks, channel risks and product and services risks.

Broad Industry Consulting Experience: he has supported a variety of client industries with the development, or risk assessment, of global security programs, investigative programs, financial crime risk management programs, regulatory compliance programs, counterfeit mitigation, forensic intelligence capabilities and their use of data analytics, case management systems and other technologies.

Deputy Chief Postal Inspector, US Postal Inspection Service: He held a variety of agent-level positions, Supervisory Agent positions, Assistant Inspector in Charge positions and Senior Executive Scale (SES) Inspector in Charge positions before becoming the Deputy Chief Postal Inspector, which is the second-in-command for this nearly 200-year-old, federal law enforcement agency.

The US Postal Inspection Service has one of the broadest areas of investigative responsibilities among all US federal law enforcement agencies. Direct experience – at all levels – in investigations involving all varieties of financial crime, narcotics, child sexual exploitation/pornography, workers' compensation fraud, embezzlements, loss prevention investigations, cyber investigations, a variety of fraud schemes against corporations, revenue fraud investigations, False Claims Act investigations, counterfeits cards, check fraud and more.

In addition to the law enforcement responsibilities, the agency serves as the Chief Security Officer for the parent organization, the U.S. Postal Service (USPS). He was second in command with responsibility for physical security of 33,000 facilities, personnel security for 700,000 employees. The organization also maintains one of the largest IT platforms in the United States and the current and past CISOs are Postal Inspectors.



EXPERTS WITH IMPACT™

Exhibit 8

Expert Report of Philip J. Philliou in Fausett vs. Walgreen Co.

I have been asked to assist the court in providing an overview of the three principal consumer payment card solutions. Those three solutions are credit, debit, and prepaid cards. Regarding prepaid cards, my opinion relates to General Purpose Reloadable cards which are commonly referred to as GPR cards. My opinion discusses how these solutions are different and unique. I also provide an overview of cash reloading on a GPR card generally and at Walgreens. My expert witness testimony is based on my 20-plus years of experience in the payment industry and my review of documents, such as the Incomm Swipe Reload Integration Merchant Guide, provided by the law firm. My outside resources were the www.mastercard.com website and a review of the Terms and Conditions of the Green Dot MasterCard GPR card, published on the Consumer Financial Protection Bureau's agreement database.

I am a graduate of Fordham University's Gabelli School of Business (1990) and Fordham Law School (1993). From July 1996 to November 1999, I worked for American Express's merchant acceptance group. From November 1999 to April 2005, I worked for MasterCard in various product roles. From April 2005 to March 2006, I worked for UnitedHealth Group as Chief Product Officer for financial services. From 2006-2014, I managed a payments consulting business, and my first client was a major tax prep business where we launched a reloadable prepaid card program for tax refunds. With the success of that program, we advised banks, retailers, and the card networks on prepaid card programs. From April 2014 to March 2016, I started a software company supporting point-of-sale terminals. I sold the company to First Data Corporation. I worked for First Data Corporation until August 2019. From September 2019 to the present date, I have been the CEO of a B2B loan origination business.

On the MasterCard website, under a section, Find Your Card, it describes four consumer payment card types to explore, credit, debit, prepaid, and gift. The website educates a consumer on what credit, debit, and prepaid card are and how they are different. Credit, debit, and prepaid distinctions are universally understood within the payments industry. Within the industry, prepaid and debit cards are considered to be very different solutions. For example, both Visa and Mastercard have product and marketing people with specific responsibilities for each solution, e.g., VP Prepaid Product. Industry professionals would not consider a reference to debit cards as referring to prepaid card solutions, and vice versa.

At a basic level, a credit card is a loan, a debit card is tied to a checking account, and a prepaid card is a pre-funded account. The financial exposure to a consumer in the event their card is stolen or compromised may be significant with a credit card as the associated credit line and a consumer's credit score may be at risk; a debit card carries the risk of putting the debit cardholder's bank account at risk as the debit card is an access device to that account; and a prepaid card's risk is limited to the funds deposited on that card.

Credit Cards

With a credit card, a card-issuing bank extends credit to a consumer to purchase goods or services at an approved merchant. Credit is a form of revolving credit that the consumer has to pay back. When a consumer purchases from an approved merchant, the card number and the amount of purchase, along with other relevant information, are transmitted via the processing network to a processing center which verifies that the card has not been reported lost or stolen and that the card's credit limit has not been exceeded. The consumer is required to pay the bank for the purchases, generally every month. The consumer typically incurs a finance charge if not fully repaid by the due date. Access to credit is sought after as it enables consumers to purchase goods and services when they want to.

Debit Cards

Debit cards, commonly referred to as ATM cards, are linked to the cardholder's deposit account at a bank. When a consumer makes a purchase using online debit, the consumer inputs a PIN to a terminal that is connected to a central processing center over a network. The center verifies the card number and PIN during the transaction, and the linked deposit account immediately debits the purchase amount. Credit and Debit cards work on what is described as an Open Network in which MasterCard or Visa provides the connectivity that enables issuing banks, merchants, merchant acquirers, processors, and merchant banks to communicate with each other in fractions of a second globally.

Prepaid Cards

Another type of consumer card is the prepaid card. There are generally two types of prepaid cards, gift cards and General-Purpose Reloadable Cards (GPR cards). Gift cards are issued for use with particular merchants, such as the Olive Garden Gift Card. The limitations are the dollar amount and its usage in that specific merchant. The value is preloaded before a purchase is made. Users of a prepaid card have no demand deposit account relationship with the financial institution that holds the prepaid card funds. When a consumer uses a prepaid card of either type to make a purchase, the data indicating the value currently associated with the card is decreased by the amount of the purchase and any fees, if applicable. For gift cards, the card is typically discarded when the card's value is depleted.

General Purpose Reloadable (GPR) cards have existed since the early 2000s. MasterCard's patent for a GPR card was filed in 2002 and published in 2007. That patent makes use of the name, reloadable prepaid card. Today, GPR cards are a widely available form of open-loop prepaid products. It is open loop in that banks issue the cards as either a Visa or MasterCard branded product and can be used anywhere Visa or MasterCard are accepted. Consumers purchase or acquire GPR cards at retail locations, directly from financial institutions, or online. Consumers typically pay an up-front purchase fee when buying a GPR card at a retail location. The retailer usually loads a GPR card at the time of purchase with funds provided by the consumer. Some GPR cards purchased at retail are activated at the time of purchase so that the card can be used immediately for point-of-sale purchases. Other GPR cards require the consumer to contact the financial institution or program manager online or by phone to activate the card before it can be used. The consumer must register a GPR card with the financial institution or program manager to make ATM withdrawals and to be able to reload the card.

After registration, the financial institution sends a permanent card embossed with the individual's name that, once activated, replaces the temporary card the consumer acquired from the retailer. The issuing bank requires Customer Identification Program (CIP) information at the time of registration. This can include full name, domestic residential address, date of birth, and a Social Security Number or Taxpayer Identification Number. The financial institution or program manager uses the information to verify the individual's identity. If the individual's identity cannot be verified, the card is not considered registered; the individual can typically spend down the card balance at POS but cannot withdraw funds at an ATM and cannot reload the card.

It is crucial to keep in mind that although a GPR card is described as an Open Loop card because of its MasterCard and Visa connectivity, other aspects of the card, such as Cash Reloading or Loyalty Program, may be closed loop or functionality that is unique to that specific merchant or the processor of the card.

How are funds held?

GPR cards differ from traditional debit cards because the underlying funds are typically held in a pooled account at a depository institution. This means that rather than establish individual accounts for each cardholder, a program manager establishes a single account at a depository institution in its name.

A prepaid card is not tied to a consumer's checking account. Instead, it is "loaded" with a balance of funds at the time of purchase. The money is held in a pooled account owned by the card issuer or program manager. Upon a purchase, the money is debited from that pooled account. The card issuer or program manager accounts for the reduced balance associated with the particular card. It is a prepaid debit account in the sense that the money comes out of the issuer or program manager's pooled account and is debited against the balance associated with that card. Consumers cannot spend more money than is loaded onto a prepaid card.

Prepaid cards vs. credit cards and debit cards:

When you use a credit card, you are borrowing money and building up a balance of debt you owe. With prepaid cards, you are spending money that has already been loaded onto the card. Unlike credit cards, prepaid cards do not incur interest charges and do not require a credit check to obtain. Using a GPR card will not help you build your credit rating since, unlike a credit card, spending on your prepaid card is not reported to the credit bureaus.

For consumers who lack access to bank accounts and credit cards, GPR cards are appealing. It is a common misunderstanding that anyone can open a bank account. Aside from the intimidation factor of going into a bank to open a bank account, lower-income people are often denied from opening a checking account based on prior history. While CIP requirements for checking and savings accounts also apply to GPR cards, banks review credit and banking information about a prospective customer before opening an account. Banks rely on third-party reporting agencies for that information. These reporting agencies can reveal a prior history of involuntary account closure, unsatisfied balances, bankruptcy, and other issues with prior account use. Sometimes the Chex database has wrong information. Financial institutions evaluate potential checking account customers for credit risk as the financial institution does have some risk exposure. For example, a bank could lose money if a deposited check is returned unpaid. Approval for credit cards is based on a credit underwriting process to determine whether an applicant is an appropriate credit risk. In contrast, neither financial institutions nor retailers engage in screening or underwriting GPR customers (aside from CIP) because the product involves little credit risk.

Even if a consumer qualifies for a checking account, overdraft fees deter lower-income people with unstable cash flows. It is well-known that overdraft fees on consumer checking accounts are a significant expense that often hits the most vulnerable demographic in our society.

In light of these distinctions, it is not surprising that a sizeable segment of the consumer base that use GPR cards on a regular basis are comprised of individuals who lack access to more established financial products such as debit cards (that have a corresponding bank account) and credit cards. Moreover, as a Visa or MasterCard branded product, GPR cards provide a method that enables people to make purchases that credit-approved people take for granted, such as online purchases, paying for parking meters, EZ Pass. In my experience in launching GPR programs, one of the most satisfying results is when people can transact for the first time using a method that was once unavailable to them.

It should also be noted that another popular, unintended use case for GPR Cards is petty cash for small businesses. The GPR Card provides the business owner with the benefit of not having cash or loose change on hand that can be lost or stolen and needs to be replenished. The GPR Card statement provides the business owner with a statement for tracking. If the GPR Card is lost or stolen, at worst, the business owner is out of the balance of whatever they had on the card.

Loading Value onto a GPR Card

Funds can be loaded onto a GPR Card in a variety of ways, including

1. Direct deposit payroll or government checks.
2. Load cash at a retail location.

To facilitate loading cash to the card in-store, Walgreens had several options. Walgreens could have utilized Visa or MasterCard's reload networks, or several proprietary reload networks. Instead, Walgreens worked with two leading prepaid partners, Incomm and GreenDot, and launched the Universal Reload program. The idea was to utilize Walgreen's Point of Sale for Swipe Reloading. The partners simplified the Swipe Transaction System flow to involve only the three. The beauty of that simplified design is that fewer partners equate to less cost and more control over the product, and it is more secure with encrypted data passing only from the retailer to the partner over a secure network.

Cash Reload is a Cash Transaction

In Chapter 1 of the Incomm Swipe Reload Integration Merchant Guide, Incomm stated that "swipe reload transactions do not involve the sale of a physical product." The transaction receipt depicted in Fausett vs. Walgreens Co involves a cash reload. This was not a transaction where the GPR card was being utilized to make a purchase of a good or service at Walgreens, rather it was a cash transaction. Cash, not the GPR card, was being accepted by Walgreens to be added to the cardholder's GPR card account balance. "Accepted" in this context is understood in the payments industry to mean tendered for the payment of goods or services. Because cash was accepted for the reload transaction, the receipt describes a cash transaction. This distinguishes a reload transaction from a purchase transaction in which the GPR card is accepted and the Mastercard or Visa networks are validating the transactions and assessing interchange fees between the parties.

It was reasonable for Walgreens to print the first six and last four numbers on the receipt because Walgreens had the burden of having to respond to customer issues regarding these cash transactions. In particular, the first six digits, referred to as the Bank Identification Number (BIN) provided any Walgreens employee who had the receipt with a means for identifying the issuing bank and program manager should any issue arise with value being loaded to the card. Moreover, inclusion of the BIN was an Incomm requirement. It is typical for a retailer like Walgreens to rely on its partners for the expertise and best practices regarding accepting cash for reloading cards. Typically partners such as Incomm and GreenDot have staff assigned to an important retailer like Walgreens. The partner's assigned staff review all aspects of the GPR card with the merchant, including field review of the reload process and receipts. With so many expert eyeballs scrutinizing the program, Walgreens would have reasonably felt assured that it was following industry best practices.

[Stallworth v. Terrill Outsourcing Grp., LLC](#)

Circuit Court of Cook County, Illinois, County Department, Chancery Division

March 15, 2023, Decided

Case No.: 2021-CH-02936

Reporter

2023 Ill. Cir. LEXIS 3 *

MELINDA STALLWORTH, Individually and on behalf of all others similarly situated, Plaintiff, v. TERRILL OUTSOURCING GROUP, LLC D/B/A SUPERLATIVE RM and BUREAUS INVESTMENT GROUP PORTFOLIO NO 15, LLC, Defendants.

Judges: [*1] Hon. Eve M. Reilly, Judge.

Opinion by: Eve M. Reilly

Opinion

ORDER

This matter, coming before the Court on Defendants' Motions to Dismiss pursuant to [735 ILCS 5/2-619.1](#), IT IS HEREBY ORDERED:

On June 16, 2021, Plaintiff filed a class action complaint against Defendants for violations of the Fair Debt Collection Practices Act, [15 U.S.C 1692, et seq.](#) ("FDCPA" or "Act"). In her complaint, Plaintiff alleges that she incurred a debt which subsequently entered default. Compl. at ¶¶ 18, 20. Defendant Terrill Outsourcing Group, LLC, d/b/a Superlative RM ("TOG") was then retained to collect the debt from Plaintiff on behalf of Defendant Bureaus Investment Group Portfolio No. 15, LLC ("BIG 15"). *Id.* at ¶ 21. On January 8, 2021, Plaintiff received a collection letter from TOG which conveyed information about her debt and which was sent by a third-party letter vendor. See *id.* at ¶¶ 22-23, 25-26, Ex. A. Plaintiff further alleges that, without her consent, Defendants communicated her private information to a third-party letter vendor. See *id.* at ¶¶ 22-28. Plaintiff claims that Defendants actions were in violation of section 1692c(b) of the Act which provides:

Except as provided in section 1692b of this title, without the prior consent of the consumer given

directly to [*2] the debt collector, or express permission of a court of competent jurisdiction, or as reasonable necessary to effectuate a postjudgment judicial remedy, a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer, his attorney, a consumer reporting agency if otherwise permitted by law, the creditor, the attorney of the creditor, or the attorney of the debt collector.

[15 U.S.C. 1692c\(b\)](#) (emphasis added).

On August 13, 2021, Defendants removed the case to federal court. Following briefing on Plaintiff's Motion to Remand and Plaintiff's stipulation that she has not suffered any actual damages,¹ this matter was remanded back to state court on June 1, 2022. On August 25, 2022, TOG filed a motion to dismiss pursuant to section 735 ILCS 5/2-619.1, which BIG 15 joined. Defendants argue that Plaintiff lacks standing pursuant to [735 ILCS 5/2-619\(a\)\(9\)](#) and failed to state a claim under section 1692c(b) of the Act pursuant to [735 ILCS 5/2-615](#). This Court heard oral argument on February 1, 2023 and took the matter under advisement.

I. Motion to Dismiss pursuant to [Section 2-619\(a\)\(9\)](#) for Lack of Standing

While this matter was remanded from federal court for lack of Article III standing, Illinois courts are not required to follow federal law on issues [*3] of justiciability and standing. See *Duncan v. FedEx Office & Print Servs.*, 2019 App (1st) 180857, ¶ 21; [Greer v. Ill. Hous. Dev. Auth.](#), 122 Ill. 2d 462, 491, 524 N.E.2d 561, 120 Ill. Dec. 531 (1988). [Section 1692k\(a\)\(2\)\(B\)](#) of the FDCPA

¹ Plaintiff has stipulated that she only seeks statutory damages pursuant to [15 U.S.C 1692k](#).

awards damages in class action cases in an amount equal to the:

. . . amount for each named plaintiff as could be recovered under subparagraphs (A), and (ii) such amount as the court may allow for all other class members, without regard to a minimum individual recovery, not to exceed the lesser of \$500,000 or 1 per centum of the net worth of the debt collector . . .

[15 U.S.C. 1692k](#) (subsection (b)(2) lists factors for the court to consider when awarding damages pursuant to subsection (a)(2)(B)) (emphasis added). In claims arising under FACTA and BIPA violations, Illinois courts have held that plaintiffs have state court standing where they seek statutory damages for a statutory violation of these acts based upon the wording of the acts and the "intangible harms associated" with violations thereof, even though no actual damages are alleged. See *Duncan*, 2019 App (1st) 180857; [Rosenbach v. Six Flags Entm't Corp.](#), 2019 IL 123186, 432 Ill. Dec. 654, 129 N.E.3d 1197. Although Plaintiff has stipulated that she has not suffered any actual damages, this Court finds the reasoning which supports state court standing for statutory damages in FACTA and BIPA cases applicable to the FDCPA violation which Plaintiff alleges here.

Furthermore, lack of standing is an affirmative matter that is the defendant's burden to plead and [*4] prove. *Duncan*, 2019 App (1st) 180857, ¶ 21. To that extent, Defendants have not sufficiently pleaded or proven that Plaintiff does not have state court standing for a statutory FDCPA violation and statutory damages thereunder. *Id.* at ¶ 22 ("Standing in Illinois requires that the injury-in-fact. . . be (1) distinct and palpable; (2) fairly traceable to the defendant's actions; and (3) substantially likely to be prevented or redressed by the grant of the requested relief."); see [Greer](#), 122 Ill. 2d at 491 ("[T]o the extent that State law of standing varies from Federal law, it tends to vary in the direction of greater liberality . . ."). Defendants' argument for dismissal pursuant to [735 ILCS 5/2-619\(a\)\(9\)](#) for lack of standing is denied and this Court declines to limit standing for plaintiffs seeking redress under the FDCPA.

II. Motion to Dismiss pursuant to [Section 2-615](#) for Failure to State a Claim

Defendants further argue that Plaintiff has failed to and cannot state a claim under section 1692c(b) of the Act. The stated purpose of the FDCPA is:

[T]o eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against [*5] debt collection abuses.

[15 U.S.C. 1692\(e\)](#); see *id.* at [§ 1692\(a\)](#) (summarizing abusive practices and their effects); S. Rep. No. 95-382, at 2 (1977) (legislative history discussing abusive debt collection practices). It is clear that, in enacting the FDCPA, Congress did not intend to eliminate debt collection practices, but rather sought to prevent those collection practices which are abusive. To that end, [section 1692c\(b\)](#) prohibits a debt collector from communicating with a third-party in connection with the collection of a debt. See [15 U.S.C. 1692c\(b\)](#) ("a debt collector may not communicate, in connection with the collection of any debt, with any person other than" the consumer, debt collector, creditor, the parties' respective attorneys, and credit reporting agencies).

Defendants raise three distinct arguments in support of their position that Plaintiff has not and cannot factually plead a [section 1692c\(b\)](#) violation: (1) the transmission of data from TOG to the letter vendor was not a "communication," (2) even if the transmission was a "communication," it was not made "in connection with collection of a[] debt," and (3) Plaintiff's interpretation of the FDCPA is not supported by the purpose of the statute, legislative history, or recent authority analyzing the [*6] use of letter vendors.

As defined by the FDCPA, a "communication" is the "conveying of information regarding a debt directly or indirectly to any person through any medium." *Id.* at § 1692a(2). Defendants argue that letter vendors are not persons, but rather that they are the mediums used to pass information through to a person, the consumer. See Del TOG's Mem. in Supp. of Mot. to Dismiss at 5-7. Thus, as Defendants argue, transmissions from a debt collector to a letter vendor are not communications as defined by the Act such that these transmissions would violate [section 1692c\(b\)](#). *Id.* In support of this argument, Defendants raise the point that "modern mailing vendors' systems are largely automated and the data . . . process[ed] likely do[es] not see any human eyes." *Id.* at 6. However, this argument asks the Court to improperly consider additional facts that are not contained in Plaintiffs well-pled complaint. Further, this argument attempts to reframe communications made to a third party as "transmissions," rather than "communications," so long as the communication

conveys necessary information that the debt collector ultimately wants the consumer to receive. This argument asks the Court to construe the reasonable [*7] inferences which can be made from Plaintiff's well-pled complaint against Plaintiff, rather than in Plaintiff's favor and ignores the plain wording of the statute. This argument is improper under a [section 2-615](#) motion to dismiss. See [Visvardis v. Eric P. Ferleger, P.C.](#), 375 Ill. App. 3d 719, 873 N.E.2d 436, 313 Ill. Dec. 812 (1st Dist. 2007) ("A court must take as true all well-pled allegations of fact contained in the complaint and construe all reasonable inference therefrom in favor of the plaintiff. In ruling on a motion to dismiss, the court will construe pleadings liberally."). Additionally, Defendants cite a number of subsections within the Act which allow debt collectors to serve legal process on consumers and use telephones and telegrams to communicate with consumers in an attempt to analogize letter vendors to these "mediums" which information passes through to the consumer. *Id.* at 5-6. However, the cited subsections only permit certain means of communication, they do not expand the scope of who communications may be made to. Plaintiff has sufficiently alleged that Defendants communicated Plaintiff's debt information to another person, the third-party letter vendor. Defendants' arguments fail on a [section 2-615](#) motion to dismiss at the pleading stage and are therefore rejected.

Next, Defendants argue that, [*8] even if the transmission from Defendants to the letter vendor was a communication, such communication was not made *in connection with the collection of a debt*. See [15 U.S.C. 1692c](#) ("a debt collector may not communicate, in connection with the collection of any debt, with any person other than the consumer . . ."). The clear wording of the statute does not apply to every communication made to a third party. Most federal circuits have determined that "for a communication to be in connection with the collection of a debt, an animating purpose of the communication must be to induce payment by the debtor." See [Mclvor v. Credit Control Servs.](#), 773 F.3d 909, 914 (8th Cir. 2014); [Gburek v. Litton Loan Servicing LP](#), 614 F.3d 380, 385 (7th Cir. 2010) (noting that a communication need not make an explicit demand for payment in order to fall under the scope of the FDCPA); [Grden v. Leikin Ingber & Winters PC](#), 643 F.3d 169, 173 (6th Cir. 2011) ("[A] letter that is not itself a collection attempt, but that aims to make . . . such an attempt more likely to succeed, is one that has the requisite connection."); [Simon v. FIA Card Servs., N.A.](#), 732 F.3d 259, 266-67 (3rd Cir. 2013). "Whether a communication was sent 'in connection with the

collection of any debt' is an objective question of fact," and is not based upon the subjective intentions of the debt collector, or the subjective understanding of the consumer. See [Schlaf v. Safeguard Prop., LLC](#), 899 F.3d 459, 467 (7th Cir. 2018); [Ruth v. Triumph P/Ships](#), 577 F.3d 790, 798 (7th Cir. 2009); [Ostojich v. Specialized Loan Servicing, LLC](#), 618 F. Supp. 3d 778, 2022 U.S. Dist. LEXIS 136054, 15-16. The 7th Circuit has offered a non-exhaustive list of factors [*9] to determine whether a communication from a debt collector is made in connection with the collection of any debt. These factors include (a) a demand for payment, (b) the nature of the parties' relationship, and (c) the purpose and context of the communications viewed objectively. [Gburek](#), 614 F.3d at 384-86.

Here, the relevant communication which must be considered is the communication from Defendants to the letter vendor. First, Plaintiff does not allege that Defendants made a demand for payment when they conveyed Plaintiff's personal information to the letter vendor, nor would it make sense for Defendants' communication to make a demand for payment to a third party who has no relationship to Plaintiff. Second, the nature of the parties' relationships shows that the purpose of Defendants' communication was not to induce payment. Plaintiff's own allegations state that Defendants' relationship and communication with the letter vendor was one that was "a matter of course." Compl. at ¶ 28. Plaintiff does not allege that she herself had any relationship with the letter vendor such that a communication from Defendants to the letter vendor would have induced Plaintiff or the third party to pay her debt. Lastly, the objective [*10] purpose and context of Defendants' communication was not intended to induce payment. As stated above, Plaintiff's allegations describe the communication as "a matter of course" and state that the letter vendor used Defendants' communication to "populate[] the template letter and communicate this information to Plaintiff." *Id.* Plaintiff also alleges that the collection letter was subsequently sent to Plaintiff *Id.* at ¶¶ 22-23. Objectively, the purpose and context of Defendants' communication to the letter vendor was not to induce payment, rather it was to provide necessary information for the letter vendor to populate a letter on behalf of Defendants. Plaintiff's own allegations are worded in such a way that supports Defendants' argument that their communication was not intended to induce payment. Even in construing the facts in a light most favorable to Plaintiff, it is clear that Defendants' communication to the letter vendor was not made in connection with the collection of a debt.

Lastly, as the statute is clear the court need not consider any legislative history. However, this Court does find the arguments and authority cited by Defendants to be instructive as the Court agrees that [*11] these types of communications do not fall within the purpose or legislative history of the FDCPA. See [15 U.S.C. 1692\(e\)](#) (the purpose of the FDCPA is "to eliminate *abusive* debt collection practices" (emphasis added)); S. Rep. 95-382, 2, 1977 U.S.C.C.A.N. 1695, 1696 (explaining that the FDCPA arose from the need to protect consumers from various collection abuses such as "disclosing a consumer's personal affairs to friends, neighbors, or an employer"); [Quaglia v. NSI93, LLC, 2021 U.S. Dist. LEXIS 254290, 6-7](#) ("[I]t is difficult to imagine Congress intended for the FDCPA to extend so far as to prevent debt collectors from enlisting the assistance of mailing vendors to perform ministerial duties, such as printing and stuffing the debt collectors' letters, in executing the task entrusted to them by the creditors . . . such a scenario runs afoul of the FDCPA's intended purpose to prevent debt collectors from utilizing truly offensive means to collect a debt"); see also [85 Fed. Reg. 76734, 76738 \(Nov. 30, 2020\)](#), [86 Fed. Reg. 5766, 5845 n.446 \(Jan. 19, 2021\)](#) (to be codified at 12 C.F.R. § 1006) (Consumer Financial Protection Bureau Rules and Regulations which contemplate the use of letter vendors by debt collectors); [Trans Union LLC v. Ramirez, 141 S. Ct. 2190, 2210 fn.6, 210 L. Ed. 2d 568](#) (dicta indicating that American courts typically do not recognize disclosures to printing vendors as actionable). Based upon the purpose and [*12] legislative history of the FDCPA, this Court does not believe that the type of communications at issue here are the type of abusive debt collection practices the FDCPA was meant to prevent.

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III. Conclusion

The Court finds that the communication alleged by Plaintiff was not made in connection with the collection of any debt as defined by federal courts and in considering the stated purpose of the FDCPA. Defendants' Motion to Dismiss is GRANTED pursuant to [735 ILCS 5/2-615](#), and Plaintiffs Complaint is dismissed with prejudice.

SO ORDERED:

/s/ Eve M. Reilly

Judge Eve M. Reilly

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.

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ORAL ARGUMENT REQUESTED

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