No. 131444

IN THE SUPREME COURT OF ILLINOIS

CALLEY FAUSETT, individually and on behalf of others similarly situated,	)	On Appeal from the Illinois Appellate Court, Second Judicial District, No. 2-23-0105
Plaintiff-Appellee,	)	There on Appeal from the Circuit Court of the Nineteenth Judicial Circuit, Lake
v.	)	County, Illinois
WALGREEN COMPANY (d/b/a Walgreens),	)	No. 19 CH 00000675
Defendant-Appellant.	)	Honorable Donna-Jo R. Vorderstrasse, Judge Presiding

BRIEF OF *AMICI CURIAE* RETAIL LITIGATION CENTER, INC. AND ILLINOIS RETAIL MERCHANTS ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLANT WALGREEN CO.

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POINTS AND AUTHORITIES

INTEREST OF *AMICI CURIAE*

The Retail Litigation Center, Inc. (the "RLC") is a 501(c)(6) nonprofit trade association that represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC is the only trade organization solely dedicated to representing the retail industry in the courts. The RLC's members employ millions of people throughout the United States, provide goods and services to tens of millions more, and account for tens of billions of dollars in annual sales. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 250 *amicus* briefs on issues of importance to the retail industry. Its *amicus* briefs have been helpful to courts throughout the United States, as evidenced by citation to RLC *amicus* briefs in numerous precedential opinions. *See, e.g.*, *South Dakota v. Wayfair, Inc.*, 585 U.S. 162, 184 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *Chewy, Inc. v. United States Department of Labor*, 69 F.4th 773, 777-78 (11th Cir. 2023); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

The Illinois Retail Merchants Association ("IRMA") is a private not-for-profit association that benefits Illinois retailing through effective management with retailers, the general public, policy makers, and the media regarding the impact legislative and regulatory proposals will have on the success of retail operations. IRMA is the only statewide organization exclusively representing

retailers in Illinois. IRMA closely monitors legislative and regulatory activity, voicing opposition to anti-business proposals and supporting and passing business friendly initiatives. In addition to serving as retail lobbyists, IRMA provides services and resources to its members to assist with the development of their businesses. IRMA has offices in Springfield and Chicago.

The RLC and IRMA have a strong interest in this case. Retailers are frequently the targets of class actions under the federal Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681 *et seq.*, many of which involve alleged violations of statutory requirements that did not cause the plaintiff or any putative class member any actual harm. *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), appropriately curtailed such litigation by holding that uninjured class members cannot bring suit. The appellate court's decision, however, would sap *TransUnion* of all practical effect by permitting uninjured plaintiffs to bring no-injury FACTA claims in state court—even though *TransUnion* bars them from bringing those same claims in federal court. The RLC and IRMA have an interest in curbing such forum shopping and ensuring that uninjured plaintiffs cannot assert barred federal claims in *any* court, state or federal.

SUMMARY OF ARGUMENT

Plaintiff alleges that Walgreen Company ("Walgreens") violated FACTA. But it is undisputed that Plaintiff suffered no "actual injury or adverse effect beyond a[n] [alleged] statutory violation." *Fausett v. Walgreen Co.*, 2024 IL App

(2d) 230105, ¶ 25. As a result, Walgreens is correct that, under Illinois's law of standing, Plaintiff's claim cannot proceed.

But that is not the only reason why Plaintiff's claim must fail. This Court should hold, in the alternative, that permitting Plaintiff's claim to proceed would violate the federal Constitution. In *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021), the United States Supreme Court held that the Constitution barred uninjured class members from recovering damages for two reasons. First, the class members lacked Article III standing. *See id.* at 837-42. Second, but just as importantly, the lawsuit infringed on the President's authority under Article II. *See id.* at 429. While the Court's Article III holding applies in federal court only, its Article II holding applies equally in federal *and state* court. When a violation of federal law does not injure a private party, the President has exclusive authority to decide whether to enforce that law and hold the violator accountable. Private suits for statutory damages undermine that exclusive authority, and that is so regardless of whether the suit is brought in federal or state court.

If Plaintiff is correct that FACTA authorizes such no-injury suits, then FACTA is unconstitutional. Accordingly, the principle of constitutional avoidance counsels against interpreting FACTA to authorize Plaintiff to bring her no-injury suit in state court. So do two further principles of federal statutory interpretation. First, courts presume that plaintiffs falling outside of a federal statute's "zone of interests" cannot bring suit. Uninjured plaintiffs fall outside of FACTA's zone of interests and thus lack a cause of action under the statute—regardless of whether

they sue in federal or state court. Second, courts presume that the enforceability of federal statutes does not vary from state to state. The only way to vindicate that presumption is to hold that no-injury suits are unavailable in state court.

Finally, if FACTA really does authorize no-injury suits in federal court, then that portion of FACTA is unconstitutional and inseverable from the rest of the statute. Plaintiff posits that no-injury federal claims can proceed in state but not federal court. But that position would produce bizarre and harmful consequences that Congress never would have contemplated. For example, plaintiffs would counterintuitively have an incentive to argue that they are *not* injured, and FACTA—a federal statute that is supposed to be applied uniformly nationwide—would be privately enforceable in some states but not others. Under well-settled principles of severability, the Court should avoid those counterintuitive outcomes by holding that uninjured private plaintiffs cannot sue under FACTA in state court.

Accordingly, this Court should reverse the decision of the appellate court.

ARGUMENT

Amici agree with Walgreens that, under Illinois law, Plaintiff lacks standing to bring her suit. Plaintiff cannot show a "distinct and palpable" "injury in fact to a legally cognizable interest." *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999); *see also Petta v. Christie Business Holdings Co., P.C.*, -- N.E.3d --, 2025 IL 130337, ¶ 21 (Jan. 24, 2025) (citing *TransUnion* to hold that a plaintiff lacked standing to seek money damages based "only [upon] an *increased risk* that [her]

private personal data was accessed by an unauthorized third party"). Other state courts have recognized that plaintiffs lack standing to bring no-injury FACTA claims under similar state-law standing doctrines. *See, e.g.*, *Budai v. Country Fair, Inc.*, 296 A.3d 20, 28 (Pa. Super. Ct. 2023); *Saleh v. Miami Gardens Square One, Inc.*, 353 So. 3d 1253, 1254-56 (Fla. Dist. Ct. App. 2023); *Southam v. Red Wing Shoe Co.*, 343 So. 3d 106, 110 (Fla. Dist. Ct. App. 2022); *Kamel v. Metropolitan Transportation Commission*, Case No. 20-CV-01567 (Cal. Super. Ct. San Mateo County Dec. 8, 2020) (Exhibit A to this brief); *Miles v. The Company Store, Inc.*, No. 16-CVS-2346 (N.C. Super. Ct. Nov. 16, 2017) (Exhibit B to this brief). This Court should join those authorities in recognizing Plaintiff's lack of standing based on Illinois law.

That said, the RLC and IRMA submit this *amicus* brief to identify and discuss a separate, but equally imperative reason the Court should reverse the decision below: Regardless of the scope of state standing law, *federal* law bars Plaintiff's suit. That is so because, under the United States Supreme Court's decision in *TransUnion*, Article II of the federal Constitution prohibits Plaintiff's no-injury civil suit from proceeding in state court. And federal principles of constitutional avoidance, statutory interpretation, and severability all confirm that Plaintiff's suit cannot proceed.

I. Statutes Authorizing Uninjured Plaintiffs to File Suit Are Unconstitutional in Both Federal Court and State Court.

The Supreme Court's *TransUnion* decision establishes that Acts of Congress permitting uninjured plaintiffs to sue are unconstitutional under both Article III and Article II of the Constitution. While *TransUnion*'s Article III holding applies in federal court only, its *Article II* holding applies in state court, too. *TransUnion* therefore resolves this case in Walgreens' favor.

In *TransUnion*, the plaintiff brought a class action alleging that TransUnion violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, by failing to follow "reasonable procedures" to ensure the accuracy of information in class members' credit files. 594 U.S. at 418-21. The district court certified a class of 8,185 members, all of whom sought statutory damages from TransUnion. *See id.* at 421. But 6,332 of those class members were not injured by TransUnion's violation: while these class members had inaccurate information in their files, that inaccurate information was never transmitted to any third party. *See id.* at 422. Nonetheless, a jury found for the entire plaintiff class, awarding over $60 million in statutory and punitive damages. *See id.* at 421-22.

The Supreme Court held that the judgment was unconstitutional to the extent that it allowed the 6,332 uninjured class members to recover damages. *See id.* at 433-49. The Court rested its decision on two independent rationales.

First, the Court held that the judgment violated Article III. As the Court explained, to establish standing under Article III, "a plaintiff must show … that

he suffered an injury in fact that is concrete, particularized, and actual or imminent." *Id.* at 423. And "[e]very class member must have Article III standing in order to recover individual damages," because "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* at 431 (citation omitted). Thus, the Court held, the judgment awarding damages to uninjured class members violated Article III. *Id.* at 442.

Second, the Court held that the judgment *also* violated Article II, which states that "[t]he executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. As the Court explained, "[a] regime where Congress could freely authorize *unharmed* plaintiffs to sue defendants who violate federal law not only would violate Article III but also would infringe on the Executive Branch's Article II authority." *TransUnion*, 594 U.S. at 429. "[T]he choice of how to prioritize and how aggressively to pursue legal actions against defendants who violate the law falls within the discretion of the Executive Branch, not within the purview of private plaintiffs (and their attorneys)," who "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.*

In the decision under review, the appellate court dismissed *TransUnion*'s discussion of Article II as dicta, concluding that "the holding in *TransUnion* is rooted in [A]rticle III, not [A]rticle II." *Fausett*, 2024 IL App (2d) 230105, ¶ 47. But that is not so.

The Court in *TransUnion* held that permitting no-injury suits "*not only* would violate Article III *but also* would [violate] … Article II." 594 U.S. at 429 (emphases added). And immediately after explaining that private plaintiffs may not usurp the Executive's authority to "enforc[e] a defendant's general compliance with regulatory law," the Court concluded that "the concrete-harm requirement is essential to the Constitution's separation of powers." *Id.* It is clear, therefore, that the Court saw the "concrete-harm requirement" as vindicating not only Article III's Case-or-Controversy requirement, but also Article II's grant of exclusive law-enforcement authority to the President. And to further confirm the point, the Court went on to state that it was applying *both* of those "fundamental standing principles" to deem the award of damages to the 6,332 uninjured class members unconstitutional. *Id.* at 430.

Because the Court's Article III and Article II holdings were alternative bases for reversing the judgment in *TransUnion*, each holding is binding precedent. *See, e.g.*, *Woods v. Interstate Realty Co.*, 337 U.S. 535, 537 (1949) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum."); *cf. Lebron v. Gottlieb Memorial Hospital*, 237 Ill. 2d 217, 236-37 (2010) (stating that, under Illinois law, alternative holdings are "entitled to much weight and should be followed unless found to be erroneous").

Of course, *TransUnion*'s holding regarding Article III applies only in federal court. But as explained below, its Article II holding applies in both federal

and state court. As a result, permitting this class action to proceed, even in state court, would violate Article II.

Nothing about *TransUnion*'s Article II reasoning suggests that the Court's holding is confined to federal court. Rather than make any federal-state distinctions, the Court summarized both its Article III and Article II holdings by stating that "the concrete-harm requirement is *essential* to the Constitution's separation of powers." *TransUnion*, 594 U.S. at 429 (emphasis added). Those separation-of-powers concerns apply equally in state and federal court.[1] The Court reasoned that the President is vested with the right and responsibility to enforce federal law in the public interest. The *President* gets to decide when—and when not—to enforce a law to ensure general regulatory compliance, and he may delegate that authority to others in the Executive Branch. Consistent with that constitutional design, FACTA includes a detailed provision expressly authorizing the Federal Trade Commission and other Executive agencies to enforce FACTA. *See* 15 U.S.C. § 1681s. Those agencies have the authority—and the mandate—to enforce FACTA in the federal interest. When an uninjured private citizen sues to enforce FACTA, that citizen undermines the Executive Branch's exclusive law enforcement authority—no matter where the lawsuit is filed.

[1] While the dissent discussed the possibility of plaintiffs without concrete injuries attempting to bring claims in state court, it did so without considering or responding to the Court's Article II holding. *See TransUnion*, 594 U.S. 459 n.9 (Thomas, J., dissenting). Accordingly, the dissent's comment is neither controlling nor illustrative on the Article II implications of attempted private enforcement of federal laws by no-injury plaintiffs in state court.

Injured plaintiffs, of course, have the right to bring federal suits in state court. *See, e.g.*, *Yellow Freight System, Inc. v. Donnelly*, 494 U.S. 820, 823 (1990). But the calculus changes when a plaintiff who has suffered no actual damages attempts to prosecute a claim based on an alleged statutory violation that is purely technical. Those latter plaintiffs do not pursue their own claims but instead impermissibly step into the shoes of the Executive Branch. *See TransUnion*, 594 U.S. at 429-30. Article II forbids that arrangement in *all* courts, state or federal.

Indeed, permitting uninjured plaintiffs to bring suit in state court is arguably worse from a separation-of-powers perspective than permitting them to sue in federal court. The federal political branches are vested under Article I with the ultimate authority to oversee, and curb, the litigation and enforcement of federal statutes. For instance, the President appoints judges, subject to Senate confirmation. And Congress has the authority to legislate on civil procedure, subject to presidential veto. Finally, Congress has the budgetary authority to decide which efforts and agencies to fund, and at what levels and for which programmatic priorities. In state court, by contrast, the federal government has *no* influence over judicial selection, litigation procedures, or anything else. The Constitution does not contemplate that unaccountable private plaintiffs will enforce federal law in this type of forum. *See id.* at 429.

Worse yet, permitting uninjured plaintiffs to bring suit in state court will yield intolerable geographic disparities. Some states follow federal standing law. *See, e.g.*, *In re Abbott*, 601 S.W.3d 802, 807 (Tex. 2020) ("The Texas standing

requirements parallel the federal test for Article III standing."). In those states, uninjured plaintiffs can never enforce federal law, whether the suit is filed in federal or state court. By contrast, under Plaintiff's position, uninjured plaintiffs *could* enforce federal law in states with more relaxed standing doctrines.

The effect of Plaintiff's position would be that bare regulatory violations of federal law would be enforced more rigorously in some states than in others. That outcome would be antithetical not only to Article II, but to our entire constitutional design. Under Article II, the Executive Branch has discretion to decide which violations of federal law do, and do not, lead to enforcement actions. *See TransUnion*, 594 U.S. at 429. Yet under Plaintiff's position, whether or not a particular violation will lead to an enforcement action will turn not on the Executive Branch's exercise of discretion, but on the happenstance of whether a particular state's law of standing is more lenient than federal standing law.

Judge Newsom's concurring opinion interpreting *TransUnion* in *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022), *vacated on other grounds*, 77 F.4th 1366 (11th Cir. 2023), provides persuasive insight into why Article II bars uninjured private plaintiffs from bringing suit in state court. While Judge Newsom's concurrence is not binding precedent in this or any other court, it provides the most detailed elaboration on *TransUnion*'s discussion of Article II to date and hence warrants the Court's consideration.

In his concurrence, Judge Newsom "unpack[s] the *TransUnion* Court's brief discussion of executive enforcement discretion, by reference to both modern

doctrine and Framing-era history." *Id.* at 1291 (Newsom, J., concurring). As he explains, "the Executive Branch has exclusive authority and absolute discretion to decide whether to prosecute a case," including the discretion to bring "civil-enforcement actions." *Id.* (citations omitted). That discretion "flows not from a desire to give carte blanche to law enforcement officials but from recognition of the constitutional principle of separation of powers." *Id.* (citation omitted).

Moreover, "modern Article II doctrine—which holds that case-by-case enforcement discretion is a core and nondelegable component of the executive power—is firmly rooted in Founding-era history and practice." *Id.* at 1292. Both pre-American sources and the Constitution's Framers "saw the separation of the power to prosecute from the power to legislate as essential to preserving individual liberty." *Id.* (quoting *In re Aiken County*, 725 F.3d 255, 264 (D.C. Cir. 2013) (opinion of Kavanaugh, J.)). In particular, "[w]ere the President obliged to enforce congressional statutes to the hilt, the separation of executive and legislative functions would do nothing to moderate tyrannical laws." *Id.* at 1293 (citation omitted). "The separation of legislative and executive functions helps prevent tyranny *precisely because* a discretionary decision by executive officers intervenes between the enactment of the prohibition and its application to any particular individual." *Id.* (citation omitted).

As a result of the separation of powers embodied in the Constitution, *every* enforcement action—whether criminal or civil—involves an exercise of that constitutionally guaranteed discretion. "Executive Branch officials make these

sorts of discretionary enforcement judgments every day. In doing so, they carry out the Framers' design and check the ambition of potentially overzealous legislators. And for their choices, they are accountable—both politically, to the voters, and legally, to the Constitution." *Id.* at 1296 (emphasis omitted).

Permitting uninjured private plaintiffs to enforce federal law would overturn the Constitution's plan by vesting the authority to enforce the law in agents who are *not* charged with checking legislators' ambitions. "Unaccountable private parties (and their fee-conscious lawyers) have no incentive to play that role. By making enforcement decisions that are not only different from those that Executive Branch officials might make but are also unchecked by the sorts of political and legal constraints that bind government enforcers, private parties may actually exacerbate the risk of arbitrary power." *Id.* Of course, *injured* plaintiffs may assert their *own* rights without impinging on the President's executive authority to combat violations of federal law. But when *uninjured* plaintiffs bring suit, they are attempting to enforce federal law on behalf of the people of the United States; only the President may speak for the people.

Notably, in a recent concurring opinion, Justice Thomas—who authored a dissenting opinion in *TransUnion*—endorsed Judge Newsom's view that an overly expansive view of standing impinges on the President's Article II authority. *See Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 13 (2023) (Thomas, J., concurring in the judgment) (citing Judge Newsom's opinion in *Arpan* and stating that uninjured plaintiffs "'exercise the sort of proactive enforcement discretion

properly reserved to the Executive Branch,' with none of the corresponding accountability" (citation omitted)).

This case well illustrates the point. Plaintiff accuses Walgreens of violating FACTA. But Walgreens undisputedly hurt no one. If the allegations against it are true, then Walgreens committed, at most, a violation of federal law that injured the sovereign rather than any specific person. The Constitution vests the Executive Branch with the exclusive authority to decide whether this particular violation of federal law (if it occurred at all) should be punished. In making that decision in any given case, the Executive Branch will typically consider matters such as the extent of the alleged violations; the number of people who were actually affected; how the defendant's conduct compares to the conduct of other businesses; and innumerable other discretionary considerations. By contrast, no-injury plaintiffs and class counsel care about none of this. Instead, they are motivated solely by an attempt to obtain a share of threatened large class-wide statutory-damages awards (divorced from any actual damages), typically extracted via settlement. Permitting plaintiffs with these incentives and no actual injury to selectively enforce federal law would contradict the constitutional plan delegating to the President the responsibility to take care that the laws are "faithfully executed." U.S. Const., art. II, § 3.

II. As a Matter of Constitutional Avoidance and Statutory Interpretation, FACTA Does Not Permit Uninjured Plaintiffs to Pursue Claims in State Court.

The Court should alternatively hold that, as a matter of statutory interpretation, FACTA does not permit uninjured plaintiffs to file suit in state court. The principle of constitutional avoidance counsels against interpreting a federal statute in a manner that results in the statute's unconstitutionality, as Plaintiff's interpretation of FACTA does. And two further federal-law canons of interpretation point the way toward such an interpretation of FACTA. Although FACTA does not expressly exclude no-injury claims from its coverage, the statute must be construed in view of these background principles of statutory interpretation not to authorize such suits in state court.

Constitutional avoidance. At the outset, the canon of constitutional avoidance supports interpreting FACTA to bar no-injury suits in state court.

Holding a federal statute unconstitutional is strongly disfavored. *See Shelby County v. Holder*, 570 U.S. 529, 556 (2013). Thus, whenever possible, courts should strive to interpret statutes so as to avoid constitutional concerns rather than in a manner that would lead to striking them down. Under this canon of constitutional avoidance, when one interpretation of a statute would raise "serious constitutional doubts," courts should reject it in favor of another interpretation that will not, based on the "reasonable presumption that Congress did not intend the alternative [interpretation] which raises [such] doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005).

The canon of constitutional avoidance applies here. For willful violations, FACTA authorizes plaintiffs to recover either "actual damages" or "damages of not less than $100 and not more than $1,000." 15 U.S.C. § 1681n(a)(1)(A). Plaintiff interprets this authorization to obtain statutory damages as an authorization for *uninjured* plaintiffs to file lawsuits in both federal and state court. But such uninjured plaintiffs would be improperly exercising enforcement authority that the Constitution granted to the Executive Branch and which Congress cannot delegate away. Thus, if Plaintiff's interpretation is correct, Congress enacted an unconstitutional statute. At a minimum, under Plaintiff's interpretation, *TransUnion* creates doubt as to whether FACTA is constitutional under Article II and Article III. Hence, the Court should apply the canon of constitutional avoidance and hold that FACTA, as a matter of statutory interpretation, does not permit uninjured plaintiffs to sue, thereby avoiding the need to deem FACTA unconstitutional.[2]

That interpretation, moreover, is entirely sensible. The purpose of statutory damages is to "compensate plaintiffs in a situation where 'the damages may be obscure and difficult to prove,'" *Stone v. Travelers Corp.*, 58 F.3d 434, 438

[2] Even if these constitutional concerns arise only in federal court, an interpretation that avoids (or embraces) those constitutional concerns would apply both in federal court and in state court. *Clark*, 543 U.S. at 382 (a statute is not a "chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case").

(9th Cir. 1995) (citation omitted)—not to supply a get-out-of-injury-free card. That rationale applies with full force to FACTA:

> While some violations of FACTA will lead to easily quantifiable harms, other violations may lead to less tangible ones, such as a loss of privacy, heightened risk and anxiety over identity theft, or increased time spent monitoring one's financial security. In order to help a jury place a value on these intangible harms, FACTA provides for statutory damages between $100 and $1,000.

Stillmock v. Weis Markets, Inc., 385 F. App'x 267, 277 (4th Cir. 2010) (Wilkinson, J., concurring specially). Thus, "statutory damages serve a *compensatory* … function in FACTA's remedial scheme." *Id.* (emphasis added). As such, the best reading of FACTA—and the one that avoids constitutional concerns—is that if there is no concrete injury to compensate, statutory damages are unavailable.

The "zone-of-interests" test. In light of the canon of constitutional avoidance, the Court should apply the zone-of-interest test and interpret FACTA to bar no-injury suits. Federal courts "presume that a statutory cause of action extends only to plaintiffs whose interests 'fall within the zone of interests protected by the law invoked.'" *Lexmark International, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (citations omitted). This principle "is a requirement of general application; and … Congress is presumed to legislate against the background of the zone-of-interests limitation, which applies unless it is expressly negated." *Id.* (quotation marks, alteration, and citations omitted).

In *Lexmark*, for example, because the federal Lanham Act's false advertising provision sought to protect competitors from unfair competition, the

Supreme Court held that only plaintiffs who "allege an injury to a commercial interest in reputation or sales" fall within the Lanham Act's "zone of interests." *Id.* at 131-32. "A consumer who is hoodwinked into purchasing a disappointing product may well have an injury-in-fact cognizable under Article III, but he cannot invoke the protection of the Lanham Act." *Id.* at 132. This limitation does not expressly appear in the Lanham Act; instead, courts have inferred from the Lanham Act's purposes that such plaintiffs fall outside the zone of interests that the statute protects. *Id.* (collecting cases).

Where, as here, plaintiffs bring claims under federal law, applying the zone-of-interests test turns on "the meaning of the congressionally enacted provision creating a cause of action." *Id.* at 128. So the zone-of-interests test presents a question of federal law, not state law.

The Court should hold that uninjured plaintiffs fall outside the zone of interests protected by FACTA. FACTA was enacted to protect consumers from "identity thieves" who could harm their credit and their pocketbooks. S. Rep. No. 108-166, at 13 (2003). Consumers who have not experienced any impact to their credit or pocketbook and have not been a target of identity thieves, like Plaintiff here, do not fall within the "zone of interests" that Congress intended to protect under FACTA. Congress enacts statutes with the Constitution in mind; it is unlikely that Congress intended FACTA to protect uninjured plaintiffs who are constitutionally prohibited from bringing suit in federal court.

The canon that the applicability of federal law does not depend on state law. Courts must "start … with the general assumption that 'in the absence of a plain indication to the contrary, Congress when it enacts a statute is not making the application of the federal act dependent on state law.'" *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (alteration and citations omitted). "One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application." *Id.* (collecting cases). Federal statutes are typically not "administered in accordance with whatever different standards the respective states may see fit to adopt for the disposition of unrelated, local problems." *Id.* at 44 (citation omitted).

Considering those principles, the Court should interpret FACTA to bar uninjured plaintiffs from suing in any forum. Congress did not intend for FACTA to be administered differently in different states based on the vagaries of state standing law, which developed because of "unrelated, local problems." *Id.* (citation omitted). Instead, FACTA relief should be available either everywhere or nowhere. When plaintiffs are injured by a FACTA violation, relief is available everywhere, in both federal and state court; when they are uninjured, it is available nowhere. *See, e.g.*, *Corozzo v. Wal-Mart Stores, Inc.*, 531 S.W.3d 566, 574-75 (Mo. Ct. App. 2017) (finding that uninjured plaintiff could not bring Fair Credit Reporting Act claim in state court because where "the law at issue is a federal statute that provides concurrent jurisdiction in both state and federal

courts," there should be "consistency in the legal standards to be applied by our state courts and the [federal courts] if at all possible" (citations omitted)).

III. If FACTA Is Unconstitutional as Applied to Federal Court Suits, Severability Principles Require Invalidating FACTA as Applied to State-Court Suits, Too.

As argued above, the Court should hold that Article II prohibits this suit, or alternatively, interpret FACTA to exclude lawsuits by uninjured plaintiffs. But if this Court were instead to hold that the only bar to an uninjured plaintiff's bringing suit is Article III, a grave question of severability would arise and demand a fatal answer.

Under 15 U.S.C. § 1681p, FACTA lawsuits may be filed "in any appropriate United States district court, without regard to the amount in controversy, or in any other court of competent jurisdiction[.]" If FACTA, by its terms, permits uninjured plaintiffs to sue, then under *TransUnion*, the portion of Section 1681p authorizing suit "in any appropriate United States district court" is unconstitutional under Article III.

If that is so, this Court must then reckon with whether it can sever that unconstitutional provision from the remainder of the statute. If that provision is severable, then the portion of Section 1681p authorizing suit "in any other court of competent jurisdiction" remains in place. But if the provisions of Section 1681p are *in*severable, then the Court would hold that all of Section 1681p—including the authorization to sue in "any other court of competent jurisdiction" (such as state court)—is unconstitutional as applied to uninjured plaintiffs.

The Court should hold that the statute is inseverable. Because the authorization to sue in federal court is unconstitutional as applied to uninjured plaintiffs, the authorization to sue in state court must fall along with it.

A statute is inseverable when it is "evident that Congress would not have enacted those provisions which are within its power, independently of those which are not." *Murphy v. National Collegiate Athletic Ass'n*, 584 U.S. 453, 481 (2018) (alterations and citation omitted). "In conducting that inquiry," courts "ask whether the law remains 'fully operative' without the invalid provisions." *Id.* (citation omitted). Courts "cannot rewrite a statute and give it an effect altogether different from that sought by the measure viewed as a whole." *Id.* at 481-82 (citation omitted). In *Murphy*, for example, the Court invalidated a federal statute that barred states from authorizing privately operated sports gambling schemes. *Id.* at 460-62, 470-75. The Court then analyzed whether this provision was inseverable from several other surrounding provisions, such as a bar on state-run sports lotteries and a bar on private actors sponsoring sports gambling schemes pursuant to state law. *Id.* at 480-86. The Court held that those other provisions must also fall because they were intended to "work together" with the unconstitutional statute. *Id.* In the Court's view, leaving those surrounding provisions intact would lead to results that "would have seemed exactly backwards." *Id.* at 482-83; *see also id.* at 484 ("We do not think that Congress ever contemplated that such a weird result would come to pass.").

Here, too, permitting state courts but not federal courts to exercise jurisdiction over no-injury FACTA claims would produce "weird result[s]" that Congress would not have "contemplated … would come to pass." *Id.* at 484. Among them:

- Plaintiffs would now have a paradoxical incentive to plead that they were *not* injured, and devise class definitions encompassing only *uninjured* class members, to keep cases in state court. And if a defendant sought to remove such a case to federal court, the plaintiff would move to remand the case on the basis that he lacks Article III standing. Defendants, by contrast, would now have an incentive to respond that they *did* injure the plaintiffs, to ensure the putative class action remains in federal court. This leads to man-bites-dog litigation in which defendants argue that (if the underlying allegations are true) they injured the plaintiffs and the plaintiffs deny it—the opposite of how litigation typically works. Indeed, state courts in Illinois are now flooded with cases in which plaintiffs have gone out of their way to argue that they were uninjured. *See, e.g.*, *Thornley v. Clearview AI, Inc.*, 984 F.3d 1241, 1242 (7th Cir. 2021) (affirming dismissal of federal complaint in such a case and noting "peculiar" nature of this type of litigation); *see also Gorgas v. Amazon.com, Inc.*, No. 22-CV-5159, 2023 WL 4173051, at *4 (N.D. Ill. June 23, 2023) (granting plaintiffs' motion to remand based on

plaintiffs' own allegations that they were uninjured by defendant's conduct); *Halim v. Charlotte Tilbury Beauty Inc.*, No. 23-CV-94, 2023 WL 3388898, at *10 (N.D. Ill. May 11, 2023) (same); *Kashkeesh v. Microsoft Corp.*, No. 21-CV-3229, 2022 WL 2340876, at *2, *4 (N.D. Ill. June 29, 2022) (same); *Carpenter v. McDonald's Corp.*, No. 21-CV-2906, 2021 WL 6752295, at *5 (N.D. Ill. Nov. 1, 2021) (same).

- As a practical matter, FACTA would operate differently in different states. In states with lenient standing rules, businesses would face the persistent risk of class actions based on alleged technical violations that harmed no one. They would be forced to take precautionary measures to avoid potential litigation under even the most far-fetched interpretations of FACTA that a class-action lawyer could dream up. In states with more rigorous standing rules, by contrast, businesses could focus on protecting their customers' concrete interests. This two-track outcome is antithetical to Congress's goal of enacting a single federal rule.
- Relatedly, FACTA law would develop on two parallel tracks. One batch of cases—cases brought by injured plaintiffs or federal regulators—would be filed in (or removed to) federal court, leading to a line of federal cases interpreting FACTA. Another batch of cases—cases brought by uninjured plaintiffs—would be filed in state court, leading to a line of state cases interpreting FACTA in that

distinct procedural posture. Federal and state jurisprudence might diverge, with no possible way of reconciling the two lines of cases unless the Supreme Court weighs in. Congress never intended this outcome—it expected federal courts to have jurisdiction over *all* FACTA cases.

- State courts, which are already busy enough, would be forced by Congress to add a uniquely harmful type of class action to their dockets. While all class actions impose burdens on defendants, no-injury class actions are particularly pernicious. They tend to involve particularly large classes, leading to uniquely high settlement pressures on defendants. In addition, because they do not remedy any actual injury, such class actions benefit class counsel while doing little, if anything, for the class itself. Under Plaintiff's theory, Congress enacted a federal statute authorizing such class actions—while simultaneously burdening state courts with the exclusive responsibility to hear and resolve them.[3]

No rational legislator could have wanted or expected any of these outcomes. FACTA's authorization to sue in federal court is thus inseverable from FACTA's

[3] Of course, state courts could make their local standing rules more rigorous to avoid such suits, but they may not want to alter state law merely to avoid hearing federal claims. And if state courts refuse to hear no-injury federal claims while adhering to local standing rules for state claims, they would face a charge of impermissibly discriminating against federal law. *See, e.g.*, *Haywood v. Drown*, 556 U.S. 729, 740-41 (2009).

authorization to sue in state court. And so, if indeed FACTA is unconstitutional because it authorizes no-injury suits in federal court, its authorization of such suits in state court must likewise fall.

CONCLUSION

For the foregoing reasons, *amici curiae* the Retail Litigation Center, Inc. and the Illinois Retail Merchants Association urge this Court to reverse the judgment below.

Dated: June 4, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief conforms to the requirements of Illinois Supreme Court Rules 345(b) and 341(a) and (b). The length of this brief, excluding the pages or 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, and the certificate of service, is 6,007 words.

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EXHIBIT A

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN MATEO

ANTHONY KAMEL,

Plaintiff,

v.

METROPOLITAN TRANSPORTATION COMMISSION; AND DOES 1-10,

Defendants.

Case No. 20-CIV-01567

~~[PROPOSED]~~ ORDER SUSTAINING METROPOLITAN TRANSPORTATION COMMISSION'S DEMURRER TO PLAINTIFF'S COMPLAINT

Judge: Hon. Richard H. Du Bois

Complaint Filed: March 12, 2020
Trial Date: None Set

FILED
SAN MATEO COUNTY
DEC - 8 2020
Clerk of the Superior Court
By _____
DEPUTY CLERK

~~[PROPOSED]~~ ORDER

Defendant Metropolitan Transportation Commission's Demurrer to the Complaint is SUSTAINED, WITH LEAVE TO AMEND. The parties' requests for judicial notice are granted, but not for the truth of the matters asserted therein.

a. Plaintiff Filed a Non-Compliant Brief

Plaintiff Anthony Kamel's opposition to Defendant's Demurrer exceeds the 15-page limit. (Cal. Rules of Court, rule 3.1113(d).) His opposition is 22-pages long as the pages are numbered consecutively from pages 1 through 7 and then restarts again with page 1 through 15. Plaintiff did not apply to file a longer brief nor did the Court grant permission. (Cal. Rules of Court, rule 3.1113(e).) Furthermore, Plaintiff improperly appended an exhibit to his memorandum. Plaintiff neither requests judicial notice nor submits a declaration for that exhibit.

Failure to file rule-compliant briefs in the future may result in the Court striking it sua sponte (Cal. Rules of Court, rule 3.1113(g)) and/or sanctions.

b. The Fair and Accurate Credit Transactions Act of 2003

The Fair and Accurate Credit Transactions Act of 2003 ("FACTA") was enacted "in response to growing credit card fraud and identity theft." (*Bassett v. ABM Parking Services, Inc.* (9th Cir. 2018) 883 F.3d 776, 777 ("*Bassett*").)

> The legislative backdrop for this case centers on FACTA and FCRA. The Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), Pub. L. No. 108-159, 117 Stat. 1952, amended the Fair Credit Reporting Act ("FCRA") to limit the information printed on receipts: "[N]o 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). The statute provides that "[a]ny person who willfully fails to comply with [that requirement] with respect to any consumer is liable to that consumer" for statutory damages of between $100 and $1,000 per violation or "any actual damages sustained by the consumer," costs and

attorney's fees, and potential punitive damages. *Id.* § 1681n. (*Bassett, supra*, 883 F.3d at p. 777–778.

Plaintiff Anthony Kamel alleges that on March 5, 2020 he "used his personal debit card to purchase a fare through Defendant Metropolitan Transportation Commission]'s Clipper fare payment terminal at the Ferry Building . . . [the] electronically printed receipt [bore] the expiration date of his debit card," which required him "to take steps to safeguard the receipt" and "exposed Plaintiff to an increased risk of identity theft." (Complaint, ¶¶ 49 – 54.) Plaintiff asserts a single cause of action for willful violation of FACTA against Defendant pursuant to 15 U.S.C. §§ 1681c(g) and 1681n. (*Id.* at ¶¶ 74 – 83.)

> By printing the expiration date of Plaintiff's debit card on a transaction receipt, Defendants caused Plaintiff to suffer a heightened risk of identity theft, exposed Plaintiff's private information to others who handled the receipt and forced Plaintiff to take action to prevent further disclosure of the private financial information displayed on the receipt.

(Complaint, ¶ 81.) Plaintiff prays for statutory damages, punitive damages, attorney's fees and costs pursuant to 15 U.S.C. § 1681n. (*Id.* at ¶ 83.)

c. Plaintiff Lacks Standing to Bring This Action

Plaintiff has not sufficiently pled standing under FACTA. Plaintiff is correct that standing under the California Constitution differs from that of Article III of the federal Constitution.

> Unlike the federal Constitution, our state Constitution has no case or controversy requirement imposing an independent jurisdictional limitation on our standing doctrine. Typically, to have standing, a plaintiff must plead an actual justiciable controversy and have some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large.

(*San Diegans for Open Government v. Public Facilities Financing Authority of City of San Diego* (2019) 8 Cal.5th 733, 738.)

> First, standing in federal courts is limited by article III of the United States

> Constitution. "In assessing standing, California courts are not bound by the 'case or controversy' requirement of article III of the United States Constitution, ..." (*Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 370.) Second, a federal court's "interpretation of a federal statute's standing requirements does not determine the scope of standing provided by a California statute." (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385.)

(*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1217.) The Court finds the federal cases cited by Defendant pertaining to Article III standing does not determine the issue of standing here.

Separately, the Court notes that the parties' respective citations to other Superior Court rulings are not citable authority. "The rules of court do not permit citation to Superior Court decisions as authority (Cal. Rules of Court, rule 8.1115(a)," (*Huff v. Securitas Security Services USA, Inc.* (2018) 23 Cal.App.5th 745, 758, fn. 2.)

However, "[s]tanding requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted." (*Blumhorst v. Jewish Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.)

> In general terms, in order to have standing, the plaintiff must be able to allege injury—that is, some "invasion of the plaintiff's legally protected interests." (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 862, p. 320; *see* Code Civ. Proc., § 367 ["Every action must be prosecuted in the name of the real party in interest, except as otherwise provided by statute"].)
>
> Standing rules for actions based upon statute may vary according to the intent of the Legislature and the purpose of the enactment. (*Midpeninsula Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d 1377, 1385; *see also Librers v. Black* (2005) 129 Cal.App.4th 114, 124.)

(*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175.)

Here, the Ninth Circuit has found that the substantive right created by FACTA is the nondisclosure of a consumer's private financial information to identity thieves.

> *Bassett's* argument that Congress "created a substantive right that is invaded by a statutory violation" is unconvincing because it depends entirely on the framing of the right. One could fairly characterize the "right" granted to Bassett by the FCRA (from most abstract to most specific) as "the right to be free from identity theft," "the right to be free from disclosure to others of his full credit card information," or "the right to be free from receiving a receipt showing his credit card expiration date." Only the last "right" was violated in this case. Such a framing-dependent exercise is arbitrary, and thus bears minimally on whether Bassett suffered a concrete injury in fact. To the extent the FCRA arguably creates a "substantive right," it rests on nondisclosure of a consumer's private financial information to identity thieves. See Bateman, 623 F.3d at 717 (describing the FCRA's card number redaction requirements as "an effort to combat identity theft"). We recently held, for example, that a statute barring video service providers from disclosing knowingly and without consent a consumer's "personally identifiable information" to third parties establishes a "substantive right to privacy." See Eichenberger, 876 F.3d at 982–84. But here, Bassett's private information was not disclosed to anyone but himself, and therefore no such substantive right was invaded. See id. at 983–84 (noting that whereas "the FCRA outlines procedural obligations that sometimes protect individual interests, the [Video Privacy Protection Act] identifies a substantive right to privacy that suffers any time a video service provider discloses otherwise private information" to a third party).

(*Bassett v. ABM Parking Services, Inc.* (9th Cir. 2018) 883 F.3d 776, 782–783 (affirming the plaintiff lacked standing to bring for violation of Government Code section 11135). The Ninth Circuit's decision on a federal statute, FACTA, is given great weight by the Court.

> But, although not binding, we give great weight to federal appellate court decisions. (*Etcheverry v. Tri–Ag Service, Inc.* (2000) 22 Cal.4th 316, 320.)

> This is particularly true in the context of their determination of federal law, as happened here. (*See Spellman v. Securities, Annuities & Ins. Services, Inc.* (1992) 8 Cal.App.4th 452, 459 [federal court decisions are especially persuasive in interpretation of federal law].) Thus, in this instance, we believe it is appropriate to apply the principles of the law of the case.

(*Adams v. Pacific Bell Directory* (2003) 111 Cal.App.4th 93, 97–98.)

In this *instance*, Plaintiff does not allege the disclosure of his private financial information to identity thieves, but rather "[a]s a direct result of the receipt bearing the expiration date of his debit card, Plaintiff was required to take steps to safeguard the receipt." (Complaint, ¶ 51.) Accordingly, since Plaintiff has not sufficiently pled a violation of the substantive right created by FACTA, he has not sufficiently pled an invasion of his legally protected interest under that statute. Accordingly, Plaintiff lacks standing to bring this action for violation of FACTA.

d. Plaintiff Has Not Sufficiently Pled a Willful Violation

Assuming in arguendo Plaintiff has standing, Plaintiff has not pled sufficient facts to allege a willful violation of FACTA. (See 15 U.S.C. § 1681n.) "Willful violations of this act include both knowing and reckless violation." (*Komorowski v. All-American Indoor Sports, Inc.* (D. Kan., Sept. 4, 2013, No. 13-2177-SAC) 2013 WL 4766800, at *1.) Plaintiff has not sufficiently pled a knowing violation.

> Merely being aware of a statute, then, is insufficient to state a claim for willfulness. In cases where the Defendant is aware of a statute's requirements, the Plaintiff must also allege that there was something more than a negligent violation, *i.e.* a voluntary, deliberate, or intentional violation. McLaughlin, 486 U.S. at 132–33.

(*Vidoni v. Acadia Corp.* (D. Me., Apr. 27, 2012, No. 11-CV-00448-NT) 2012 WL 1565128, at *4 ("*Vidoni*").)

As a threshold matter, "[a] demurrer is a pleading used to test the legal sufficiency of other pleadings. I.e., it raises issues of law, not fact, regarding the form or content of the opposing party's pleading . . . ." (Weil & Brown, Cal. Prac. Guide: Civ. Proc. Before Trial (Rutter, Jun. 2020 Update)

¶ 7:5.) Defendant demurs for failure to plead facts sufficient pursuant to Code of Civil Procedure section 430.10, subdivision (e).

Plaintiff's argument that Defendant had knowledge imputed by an agency relationship with two retained law firms is not supported by the legal authority cited. In *Rosenaur v. Scherer*, the Court found that attorneys are the agents of the client for the recovery of attorney fees pursuant to Code of Civil Procedure section 425.16, subdivision (c), regardless of whether the attorney charged the client those fees – it did not contemplate the imputation of knowledge outside the scope of representation.

> Moreover, since attorneys are agents of their client, the phrase, "entitled to recover his or her attorney fees," can certainly include recovery of the fees that the defendant's agent-the attorney-has accrued on defendant's behalf, even if the agent has waived payment from defendant, but not their recovery otherwise.

(*Rosenaur v. Scherer* (2001) 88 Cal.App.4th 260, 282 (concluding "the plain language and purpose of section 425.16, as well as the decisional law, support the recovery of attorney fees that have accrued in representing the defendants here, notwithstanding counsel's agreement not to look to defendants for payment".)

In *Herman v. Los Angeles County Metropolitan Transit Authority*, although the Court acknowledged that the defendant "relie[d] on the general agency principle that an attorney is his client's agent, and that the agent's knowledge is imputed to the principal," the Court found that "section 1094.6 expressly requires notice to the parties," and notice on counsel was insufficient. (*Herman v. Los Angeles County Metropolitan Transportation Authority* (1999) 71 Cal.App.4th 819, 830 ("*Herman*").)

Plaintiff attempts to string together two distinct set of allegations that on the one hand, these law firms represented Defendant, and on the other hand, they represented other clients in FACTA-related matters. However, Plaintiff does not allege that these law firms represented Defendant in FACTA-related matters. (Complaint, ¶¶ 35 – 46.) "The uncommunicated knowledge of an agent is not imputed to the principal for the purpose of determining whether he acted in good faith since the

principal's good faith must be determined on the basis of facts of which he had actual knowledge." (*Herman, supra*, 71 Cal.App.4th at p. 828, fn. 7.)

Plaintiff has not sufficiently pled reckless violation.

> [W]illfulness reaches actions taken in "reckless disregard of statutory duty," in addition to actions "known to violate the Act." *Safeco*, 551 U.S. at 56–57. A party does not act in reckless disregard of the FCRA "unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless." *Id.* at 69.
>
> . . .
>
> The Supreme Court has specifically distinguished recklessness from negligence in the FCRA context, noting that a violation is only reckless (and therefore willful) where an employer adopts a reading of the statute that runs a risk of error "substantially greater than the risk associated with a reading that was merely careless." *Safeco*, 551 U.S. at 69 (emphasis added); see also id. at 70 ("Safeco's reading was not objectively unreasonable, and so falls well short of raising the 'unjustifiably high risk' of violating the statute necessary for reckless liability.")

(*Syed v. M-I, LLC* (9th Cir. 2017) 853 F.3d 492, 503 – 504). Here, Plaintiff alleges that the expiration date was not truncated (Complaint, ¶ 51), but is silent on how his debit card number was displayed on the receipt.

> The fact that the account number was properly truncated shows that the Defendant attempted to comply with FACTA, and given the fact that no additional protection of the consumer is achieved by deleting the expiration date, it can hardly be said that its action "entail[ed] an unjustifiably high risk of harm that is either known or so obvious that it should be known." Safeco, 551 U.S. at 68.

(*Gardner v. Appleton Baseball Club, Inc.* (E.D. Wis., Mar. 31, 2010, No. 09-C-705) 2010 WL

1368663, at *6.) Furthermore,

> To sustain a claim for recklessness, the Plaintiff is required to allege that the Defendant disregarded an "unjustifiably high risk of harm" to its customers by failing to omit expiration dates from its receipts. *See Safeco*, 551 U.S. at 68. Congress, however, has acknowledged that "[e]xperts in the field agree that proper truncation of the card number, by itself as required by the amendment made by the Fair and Accurate Credit Transactions Act, regardless of the inclusion of the expiration date, prevents a potential fraudster from perpetrating identity theft or credit card theft." *See* Clarification Act, § 2(a)(6).

(*Vidoni supra*, 2012 WL 1565128, at *5.) Accordingly, Plaintiff has not pled sufficient facts to allege a willful violation of FACTA.

IT IS SO ORDERED.

Dated: 12-8-2020

JUDGE OF THE SUPERIOR COURT

Judge Richard DuBois

EXHIBIT B

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
NO. 16-CVS-2346

TIMOTHY MILES, ON BEHALF OF HIMSELF , AND ALL OTHERS SIMILARLY SITUATED,

Plaintiff,

v.

THE COMPANY STORE, INC. and HANOVER COMPANY STORE, LLC,

Defendants.

ORDER

This cause came on for hearing before the undersigned judge at the October 9, 2017 setting of the Alamance County Superior Court upon Defendant's Motion to Dismiss for lack of subject matter jurisdiction, pursuant to rule 12(b)(1) of the North Carolina Rules of Civil Procedure. The Court, having reviewed the Defendants' Motion to Dismiss, having heard and considered arguments from counsel for the parties, and having reviewed the pleadings and briefs makes the following conclusions.

1. The Court does not making findings of fact on Defendants' Motion to Dismiss, but only recites those factual allegations of the Complaint that are relevant and necessary to the Court's determination of the motion.

2. Plaintiff alleges that Defendants provided a copy of a receipt which revealed the first six digits and the final four digits of their credit card. (Compl. ¶ 28)

3. Plaintiff claims that this violated the Fair and Accurate Credit Transactions Act ("FACTA") 15 U.S.C. §§ 1681, *et seq.* (Compl. ¶ 1). FACTA provides in relevant part 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. . . .upon any receipt provided at the point of the sale or transaction." 15 U.S.C. §§ 1681(c)(g)(1). (Compl. ¶¶ 2, 25). Plaintiff claims that Defendants "knowingly, willfully, intentionally, and recklessly violated FACTA's requirements (Compl. ¶¶ 41-42) and exposed Plaintiff to an increased risk of identity theft. (Compl. ¶ 43). Plaintiff does not allege that the receipt was seen by anyone other than himself or that he suffered identify theft.

4. According to the North Carolina Court of Appeals:

> Standing "refers to whether a party has a sufficient stake in an otherwise justiciable controversy that he or she may properly seek adjudication of the matter." *Lee Ray Bergman Real Estate Rentals v. N.C. Fair Housing Ctr.*, 153 N.C. App. 176, 179, 568 S.E.2d 883, 886 (2002) (citing *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361, 31 L. Ed. 2d 636 (1972)). "Standing is a necessary prerequisite to the court's proper exercise of subject matter jurisdiction." *Creek Pointe Homeowner's Ass'n v. Happ*, 146 N.C. App. 159, 164, 552 S.E.2d 220, 225 (2001), *disc. review denied*, 356 N.C. 161, 568 S.E.2d 191 (2002). "If a party does not have standing to bring a claim, a court has no subject matter jurisdiction to hear the claim." *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005) (citation omitted).

Dion v. Batten, __ N.C. App. _, _790 S.E.2d 844, 847-48 (N.C. Ct. App. 2016)

5. The North Carolina Court of Appeals has identified that the existence of standing most often turns on whether a party has alleged an injury in fact. *Coker v. DaimlerChrysler Corp.*, 172 N.C. App. 386, 391, 617 S.E.2d 306, 310 (2005). The term 'injury in fact' has been imported from federal standing doctrine. "An injury in fact is 'an invasion of a legally protected interest that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical . . . .'" *Id.*, 172 N.C. App. at 391-92, 617 S.E.2d at 310, (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

6. Numerous federal courts have determined that the exact injury alleged here does not meet the concreteness requirement. *See, e.g.*, *Hendrick v. Aramark Corp.*, No. CV 16-4069, 2017 WL 1397241, at *5 (E.D. Pa. Apr. 18, 2017); *Kamal v. J. Crew Grp., Inc.*, No. 2:15-0190 (WJM), 2016 WL 6133827, at *2 (D.N.J. Oct. 20, 2016); *Stelmachers v. Verifone Sys., Inc.*, No. 5:14-CV-04912-EJD, 2016 WL 6835084, at *3–4 (N.D. Cal. Nov. 21, 2016); *Thompson v. Rally House of Kansas City, Inc.*, No. 15-

00886-CV-W-GAF, 2016 WL 8136658, at *5 (W.D. Mo. Oct. 6, 2016). This court agrees that the injury alleged here does not meet the concreteness requirement to establish an injury in fact in order to support standing.

7. Plaintiff correctly notes that the Supreme Court of North Carolina has identified some circumstances where standing is proper in North Carolina even when it would not be proper under federal law. However, standing still requires a plaintiff to allege "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues." *Goldston v. State*, 361 N.C. 26, 30, 637 S.E.2d 876, 879 (2006)(citations omitted). For example, the Supreme Court identified that a plaintiff could maintain standing if they have shown they were "injuriously affected", even if they could not show an injury in fact which is concrete and particularized. *See Id.* 361 N.C. at 35, 637 S.E.2d at 882 (citations omitted). Here, Plaintiff has only alleged that Defendants provided him a copy of his own personal information, exceeding federal statutory limits. Since Plaintiff already has access to his personal information, this does not have an injurious effect or create any other personal stake in the controversy sufficient to assure concrete adverseness. Therefore Plaintiff does not have standing to pursue a claim.

8. Since Plaintiff lacks standing to bring this case, this court lacks the subject matter jurisdiction to decide it.

Now, therefore, it is **ORDERED, ADJUDGED AND DECREED** that the Defendants' Motion to Dismiss is **GRANTED** and Plaintiff's Complaint is **DISMISSED**.

This the 9th day of November, 2017.

Richard S. Gottlieb
Resident Superior Court Judge

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing Order of October 9, 2017 was served on the parties listed below by mailing and/or hand delivering a copy thereof to each of said parties, addressed, postage prepaid, as follows:

Mr. J. Wriley McKeown
McAngus Goudelock & Courie, PLLC
P.O. Box 30303
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Mr. Randall M. Roden
P.O. Box 1151
Raleigh, NC 27602

This the 16th day of November, 2017.

Sharon Boger
Trial Court Coordinator
15A Judicial District