No. 129783

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
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
Appellant.	))	Honorable Donna-Jo Vorderstrasse, Judge Presiding

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

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INTEREST OF *AMICI CURIAE*

The Retail Litigation Center, Inc. ("RLC") represents national and regional retailers, including many of the country's largest and most innovative retailers, across a breadth of retail verticals. The RLC provides courts with the perspective of the retail industry on important legal issues affecting its members, and on potential industry-wide consequences of significant court cases. Since its founding in 2010, RLC has participated as an *amicus* in over 200 cases of importance to retailers. RLC is dedicated to representing the Nation's retail industry in the courts. Its member retailers employ millions of workers throughout the United States, provide goods and services to hundreds of millions of consumers, and account for more than a trillion dollars in annual sales.

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.

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The RLC and IRMA have a strong interest in this case. Retailers are frequently the targets of class actions under the Fair and Accurate Credit Transactions Act ("FACTA"), including attempts to assert claims where the plaintiff and putative class members did not suffer any harm. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), appropriately curtailed such litigation by holding that uninjured class members could not bring suit. The circuit court's decision, however, would sap *TransUnion* of practical effect by permitting uninjured plaintiffs to bring federal claims in state court—even though they would be barred from bringing those claims in federal court. The RLC and IRMA have an interest in curbing forum-shopping and ensuring that uninjured plaintiffs cannot assert barred federal claims in state court.

SUMMARY OF ARGUMENT

Plaintiff alleges that Walgreen Company ("Walgreens") violated FACTA. But Plaintiff was not injured by Walgreens' alleged statutory violation. As Walgreens correctly argues, Plaintiff's claim cannot proceed under Illinois state standing law.

But that is not the only reason why Plaintiff's claim cannot proceed. This Court should hold, in the alternative, that permitting Plaintiff's claim to proceed would violate the federal Constitution. In *TransUnion*, the Supreme Court of the United States held that the Constitution barred uninjured class members from recovering damages for two reasons. First, the class members lacked standing under Article III. Second, the lawsuit impinged on the President's authority

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under Article II. The Court's Article III holding applies only in federal court, but the Court's Article II holding applies in both state and federal court. When no one is injured, the President has the exclusive authority to decide whether to enforce federal law, and that authority is undermined just as much by a state-court suit as by a federal-court suit.

Additionally, two principles of federal statutory interpretation establish that no-injury suits should be barred in state court. First, courts presume that plaintiffs falling outside of a federal statute's "zone of interests" cannot bring suit. Here, uninjured plaintiffs who cannot sue in federal court fall outside FACTA's "zone of interests," and therefore lack a cause of action in any 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.

The principle of constitutional avoidance further supports adopting this interpretation of FACTA. Accordingly, this Court should hold that Congress did not authorize no-injury suits in any court under FACTA; the alternative would be that Congress enacted an unconstitutional law and that outcome should be avoided.

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 court but not in federal court. But that position would produce bizarre and harmful

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consequences that Congress would have never 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 uniform 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 circuit court.

ARGUMENT

The RLC and IRMA 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. Cnty. of Marion*, 188 Ill. 2d 211, 221 (1999). Other state courts have recognized that plaintiffs lack standing under similar state law standing doctrines to bring no-injury FACTA claims. *See Budai v. Country Fair, Inc.*, 296 A.3d 20, 28 (Pa. Super. Ct. 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-CIV-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.

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The RLC and IRMA submit this *amicus* brief to identify and discuss a separate imperative reason the Court should reverse the decision below: namely, regardless of the scope of state standing law, *federal* law bars Plaintiff's suit. As recognized in *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), Article II of the United States Constitution prohibits Plaintiff's no-injury civil suit from proceeding in either state or federal court. Moreover, federal principles of statutory interpretation, constitutional avoidance and severability establish 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 the Supreme Court's Article III holding applies in federal court only, the Supreme Court's Article II holding applies both in state court and in federal court.

In *TransUnion*, the plaintiff brought a class action alleging that TransUnion violated the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. The plaintiff alleged that TransUnion failed to follow "reasonable procedures" to ensure the accuracy of information in their credit files. 141 S. Ct. at 2201-02. The district court certified a class of 8,185 members, each of whom sought statutory damages from TransUnion. Many of those class members were uninjured by TransUnion's violation: although they had inaccurate information in their files, that inaccurate information was never transmitted to any third party.

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Nonetheless, a jury found for the entire plaintiff class, yielding an award exceeding $60 million. *Id.* at 2202. The Ninth Circuit reduced the award to $40 million but otherwise affirmed. *Id.*

The Supreme Court ruled that the judgment was unconstitutional because it allowed uninjured class members to recover damages. The Supreme Court rested its decision on two independent rationales.

First, the Court held that the judgment violated Article III. As the Court explained, "Article III confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *Id.* at 2203. To satisfy that requirement, "a plaintiff must show … that he suffered an injury in fact that is concrete, particularized, and actual or imminent." *Id.* Further, "[e]very class member must have Article III standing in order to recover individual damages." *Id.* at 2208. "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not." *Id.* (citation omitted). Thus, the judgment awarding damages to uninjured class members violated Article III. *Id.* at 2214.

Second, the Court held that the judgment violated Article II. Article II provides in relevant part: "The executive Power shall be vested in a President of the United States of America." U.S. Const. art. II, § 1, cl. 1. 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*, 141 S. Ct. at 2207. "[T]he choice of how to prioritize and how aggressively to pursue

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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)." *Id.* "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.*

Each of these holdings is an alternative basis for finding that the lower-court judgment was unconstitutional. Each holding is thus binding precedent. *See 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 Mem'l Hosp.*, 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").

The Supreme Court's holding regarding Article III applies only in federal court. But as shown below, the Supreme Court's holding regarding Article II 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 the Court's Article II reasoning suggests that it is confined to federal court. Rather than make any federal-state distinctions, the Court summarized both the Article III and Article II holdings with the reminder that "the concrete-harm requirement is **essential** to the Constitution's separation of

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powers." *TransUnion*, 141 S. Ct. at 2207 (emphasis added).[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. The President exercises that authority via administrative agencies with leaders appointed by the President. Consistent with that constitutional plan, FACTA includes a detailed provision expressly authorizing the Federal Trade Commission and other agencies within the Executive Branch to enforce FACTA. 15 U.S.C. § 1681s. Those agencies have the authority and mandate to enforce laws in the federal interest. When an uninjured private citizen sues to enforce federal law, that citizen undermines the Executive Branch's exclusive law enforcement authority—no matter where the lawsuit is filed.

Injured plaintiffs have the right to bring federal suits in state court. *See Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990). However, the calculus changes when a plaintiff who has suffered no damages attempts to prosecute a claim based on an alleged violation that is purely technical. Then, those plaintiffs are not pursuing their own claims but are instead stepping into the shoes of the Executive Branch. *See TransUnion*, 141 S. Ct. at 2207. The

[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 Article II holding. See *TransUnion*, 141 S. Ct. at 2224 n.9 (Thomas, J., dissenting). The dissent's comment is neither controlling nor illustrative on Article II implications of attempted private enforcement of federal laws by no-injury plaintiffs.

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Constitution does not contemplate that private plaintiffs will pursue that role in *any* court, and certainly not state court.

Indeed, permitting uninjured plaintiffs to bring suit in state court is arguably worse from a separation-of-powers perspective than permitting uninjured plaintiffs to bring suit 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.

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 cannot enforce federal law, no matter if the suit is filed in federal court or in state court. By contrast, under Plaintiff's position, uninjured plaintiffs could enforce federal law in states with more relaxed standing doctrines.

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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 to Article II. 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*, 141 S. Ct. at 2207. 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 concurrence in *Laufer v. Arpan LLC*, 29 F.4th 1268 (11th Cir. 2022), *vacated on other grounds*, 77 F.4th 1366 (11th Cir. 2023), interpreting the *TransUnion* decision, provides persuasive insight into why Article II bars uninjured private plaintiffs from bringing suit. 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 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 Judge Newsom 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

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not from a desire to give carte blanche to law enforcement officials but from recognition of the constitutional principle of separation of powers." *Id.* (citations 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 (Newsom, J., concurring). Both pre-American sources and the country'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 Cnty.*, 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 (Newsom, J., concurring) (quoting Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 701 (2014)). "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.* (quoting Price, *supra*, at 702).

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

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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 (Newsom, J., concurring) (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 dissented 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*, No. 22-429, 2023 WL 8378965, at *6 (U.S. Dec. 5, 2023) (Thomas, J., concurring in judgment) (citing Judge Newsom's *Arpan* concurrence and stating that uninjured tester plaintiffs "exercise the sort of proactive enforcement

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discretion properly reserved to the Executive Branch, with none of the corresponding accountability" (internal quotation marks and 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. To protect liberty, the Constitution vests the Executive Branch with the authority to decide whether this particular violation of federal law (if it occurred) should be punished. In making that decision, the Executive Branch would 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 and 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 a settlement. Permitting plaintiffs with these incentives and no injury to selectively enforce federal law would contradict the constitutional plan delegating the responsibility to take care that the laws are faithfully enforced to the Executive Branch.

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

The Court should additionally hold that, as a matter of statutory interpretation, FACTA does not permit uninjured plaintiffs to file suit in state

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court. That holding would rest on federal law, and would not require analyzing Illinois state standing law.

Although FACTA does not expressly exclude no-injury claims from its coverage, the statute must be construed in view of background principles of statutory interpretation. Two interpretive principles—each rooted in federal law—support a construction of FACTA that would prevent these lawsuits from proceeding in state court. The constitutional avoidance canon provides a third basis that further militates in favor of adopting this construction.

The "zone of interests" test. 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 Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 129 (2014) (internal quotation marks and citations omitted). This principle applies even if a statute does not expressly recite it: "it 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.* (internal quotation marks, alteration and citations omitted).

For example, because the federal Lanham Act's false advertising provision was intended to protect competitors from unfair competition, 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

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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.*

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, as is the case 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 to protect a class of plaintiffs whose harms are so attenuated that they 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*

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Choctaw Indians v. Holyfield, 490 U.S. 30, 43 (1989) (internal quotation marks, alteration and citations omitted). "One reason for this rule of construction is that federal statutes are generally intended to have uniform nationwide application." *Id.* 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)); *Smith v. Ohio State Univ.*, No. 17AP-218, 2017 WL 6016627, at *3 (Ohio Ct. App. Dec. 5, 2017) ("To the extent the 'statutory standing' doctrine constitutes an exception to the traditional principles of standing in Ohio, we decline to extend that exception

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to this circumstance involving the application of a federal statute" because "there is no indication that Congress intended the pertinent FCRA statute to supplant the traditional requirements of standing in Ohio state court.").

Constitutional avoidance. The canon of constitutional avoidance likewise supports an interpretation of FACTA that would bar no-injury suits from proceeding in state court.

Holding a federal statute unconstitutional is strongly disfavored. *See Shelby Cnty. v. Holder*, 570 U.S. 529, 556 (2013) (noting that invalidating an Act of Congress is "the gravest and most delicate duty that this Court is called on to perform" (citation omitted)). When possible, courts should strive to interpret statutes so as to avoid constitutional concerns rather than in a manner that would lead to striking down the statutes. To that end, the Supreme Court has articulated the canon of constitutional avoidance. That canon provides that when one interpretation of a statute would raise "serious constitutional doubts," the 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

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uninjured plaintiffs to file lawsuits—including in federal court. In so doing, these plaintiffs are improperly exercising the enforcement authority the Constitution granted to the Executive branch that cannot be delegated away by Congress. Thus, if Plaintiff's interpretation is correct, Congress enacted an unconstitutional statute. At a minimum, under Plaintiff's interpretation, *TransUnion* creates constitutional doubt over 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 and, thereby, avoid deeming FACTA unconstitutional.[2]

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 should instead 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[.]" *Id.* If FACTA, by its terms, permits

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[2] Even if these constitutional concerns arise only in federal court, an interpretation that avoids 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").

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uninjured plaintiffs to sue, then under *TransUnion*, the portion of § 1681p authorizing suit "in any appropriate United States district court" is unconstitutional under Article III.

The Court must then reckon with whether it can sever that unconstitutional provision from the statute. If that provision is severable, then the portion of § 1681p authorizing suit "in any other court of competent jurisdiction" remains in place. If the provisions of § 1681p are inseverable, then the Court would hold that all of § 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.

For a statute to be inseverable, "it must be evident that Congress would not have enacted those provisions which are within its power, independently of those which are not." *Murphy v. Nat'l Collegiate Athletic Ass'n*, 138 S. Ct. 1461, 1482 (2018) (internal quotation marks, alterations and citation omitted). "In conducting that inquiry," courts "ask whether the law remains fully operative without the invalid provisions." *Id.* (internal quotation marks and 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.* (citation omitted). In *Murphy*, for example, the Court invalidated a federal statute that

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barred states from authorizing privately operated sports gambling schemes. *Id.* at 1475-81. 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 1482-84. 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 1483; *see also id.* at 1484 ("We do not think that Congress ever contemplated that such a weird result would come to pass.").

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

- Plaintiffs would now have an incentive to plead that they were *not* injured, and devise class definitions encompassing only *uninjured* class members, to keep cases in state court. Defendants, by contrast, would now have an incentive to respond that they *did* injure the plaintiffs. 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 the plaintiffs went out of their way to argue that they

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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 C 3229, 2022 WL 2340876, at *2, *4 (N.D. Ill. June 29, 2022) (same); *Carpenter v. McDonald's Corp.*, No. 21-cv-02906, 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, businesses could focus on protecting their customers' concrete interests. This outcome is antithetical to Congress's goal of enacting a single federal rule.

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- FACTA law would develop on two parallel tracks. One batch of cases—cases brought by injured plaintiffs or by 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. Under Plaintiff's theory, Congress enacted a federal statute authorizing such class actions—while foisting the burden on state courts to hear and resolve them.[3]

[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

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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 authorization to sue in state court. Because the former is unconstitutional, the latter must also fall.

CONCLUSION

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

Respectfully submitted,

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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).

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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 5,515 words.

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EXHIBIT A

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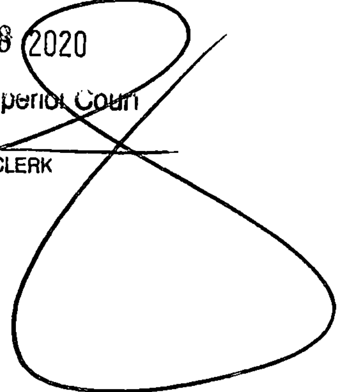
SUPERIOR COURT OF THE STATE OF CALIFORNIA

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



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[~~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

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1 attorney's fees, and potential punitive damages. *Id.* § 1681n. (*Bassett, supra*,
2 883 F.3d at p. 777–778.

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

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

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

17 **c. Plaintiff Lacks Standing to Bring This Action**

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

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

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

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

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1 Constitution. "In assessing standing, California courts are not bound by the
2 'case or controversy' requirement of article III of the United States
3 Constitution, ..." (*Bilafer v. Bilafer* (2008) 161 Cal.App.4th 363, 370.)
4 Second, a federal court's "interpretation of a federal statute's standing
5 requirements does not determine the scope of standing provided by a
6 California statute." (*Midpeninsula Citizens for Fair Housing v. Westwood*
7 *Investors* (1990) 221 Cal.App.3d 1377, 1385.)
8 (*Reycraft v. Lee* (2009) 177 Cal.App.4th 1211, 1217.) The Court finds the federal cases cited by
9 Defendant pertaining to Article III standing does not determine the issue of standing here.
10 Separately, the Court notes that the parties' respective citations to other Superior Court rulings
11 are not citable authority. "The rules of court do not permit citation to Superior Court decisions as
12 authority (Cal. Rules of Court, rule 8.1115(a)," (*Huff v. Securitas Security Services USA, Inc.* (2018)
13 23 Cal.App.5th 745, 758, fn. 2.)
14 However, "[s]tanding requirements will vary from statute to statute based upon the intent of the
15 Legislature and the purpose for which the particular statute was enacted." (*Blumhorst v. Jewish*
16 *Family Services of Los Angeles* (2005) 126 Cal.App.4th 993, 1000.)
17 In general terms, in order to have standing, the plaintiff must be able to
18 allege injury—that is, some "invasion of the plaintiff's legally protected
19 interests." (5 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 862, p. 320;
20 *see* Code Civ. Proc., § 367 ["Every action must be prosecuted in the name
21 of the real party in interest, except as otherwise provided by statute"].)
22 Standing rules for actions based upon statute may vary according to the
23 intent of the Legislature and the purpose of the enactment. (*Midpeninsula*
24 *Citizens for Fair Housing v. Westwood Investors* (1990) 221 Cal.App.3d
25 1377, 1385; *see also Librers v. Black* (2005) 129 Cal.App.4th 114, 124.)
26 (*Angelucci v. Century Supper Club* (2007) 41 Cal.4th 160, 175.)
27 Here, the Ninth Circuit has found that the substantive right created by FACTA is the
28 nondisclosure of a consumer's private financial information to identity thieves.

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> *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.)

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> 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)

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¶ 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

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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

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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

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EXHIBIT B

STATE OF NORTH CAROLINA

COUNTY OF ALAMANCE

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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

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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-

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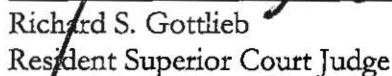
00886-CV-W-GAF, 2016 WL 8136658, at *5 (W.D. Mo. Oct. 6, 2016). This court agrees that the injury alleged here does not meet the concreteness requirement to establish an injury in fact in order to support standing.

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

SUBMITTED - 25495221 - Darla Simons - 12/14/2023 3:01 PM

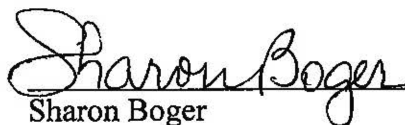
CERTIFICATE OF SERVICE

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
Charlotte, NC 28230

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

SUBMITTED - 25495221 - Darla Simons - 12/14/2023 3:01 PM