IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN

JEREMY MEYERS, individually, and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	No. 15-cv-445
ONEIDA TRIBE OF INDIANS OF WISCONSIN,	)	
Defendant.	)	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

Plaintiff has requested that this Court enter an order determining that this action, alleging a violation of the Fair and Accurate Credit Transactions Act ("FACTA") amendment to the Fair Credit Reporting Act ("FCRA"), be certified as a nationwide class action pursuant to Fed.R.Civ.P. 23(a) and 23(b)(3). This memorandum is submitted in support of that motion.

INTRODUCTION

In order to curb identity theft, 15 U.S.C. § 1681c(g), provides that: "No person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction." This provision "expressly prohibits printing more than the last five digits of the credit/debit card numbers and also prohibits printing the card's expiration date." *Pirian v. In-N-Out Burgers*, 2007 WL 1040864 at *3 (C.D.Cal. 2007). FACTA required full compliance with its provisions no later than December 4, 2006 for all machines in use and for all transactions. 15 U.S.C. §1681c(g)(3)(A).

When a plaintiff can establish that the defendant "willfully" failed to comply with the FACTA requirements, then he or she can recover actual or statutory damages under the statute.

15 U.S.C. § 1681n(a) ("Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable. ..."). The consumer may 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). Negligent violations of FACTA (including the truncation provisions) require a showing of actual damages. 15 U.S.C. § 1681o(a)(1).

This case is ideal for certification. The Seventh Circuit Court of Appeals forcefully ruled that class certification in FCRA cases is appropriate in *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006) (reversing district court's denial of class certification). Since *Murray*, at least twelve (12) other cases seeking damages under FACTA have been certified in district courts in the Seventh Circuit, including the Eastern District of Wisconsin. See, *e.g.*,

i. *Armes v. Sogro, Inc.*, 932 F. Supp. 2d 391, 08 cv 0244 (Judge Clevert, E.D. Wis March 18, 2013), *renamed Velasco v. Sogro, Inc.*, 2014 WL 3737971, 08 cv 0244 (Judge Clevert July 30, 2014);

ii. *Troy v. Red Lantern Inn, Inc*., 2007 WL 4293014, 07 cv 2418 (Judge Aspen, N.D. Ill. Dec. 4, 2007);

iii. *Halperin v. Interpark, Inc*., 2007 WL 4219419, 07 cv 2161 (Judge Bucklo, N.D. Ill. Nov. 29, 2007);

iv. *Miller-Huggins v. Mario's Butcher Shop, Inc.*, 2010 WL 658863, 09 cv 3774 (Judge Hart, N.D. Ill. Feb. 22, 2010);

v. *Shurland v. Bacci Cafe & Pizzeria on Ogden Inc.*, 259 F.R.D. 151, 08 cv 2259 (Judge Pallmeyer, N.D. Ill. Aug. 19, 2009);

vi. *Beringer v. Standard Parking Corp*., 2008 WL 4390626, 07 cv 5027, 07 cv 5119 (Judge Pallmeyer, N.D.Ill. Sept. 24, 2008);

vii. *Cicilline v. Jewel Food Stores, Inc.*, 542 F.Supp.2d 831, 07 cv 2333 (Judge Dow, N.D. Ill. Mar. 31, 2008);

viii. *Harris v. Best Buy Co., Inc.*, 254 F.R.D. 82, 07 cv 2559 (Judge St. Eve, N.D. Ill. Mar. 20, 2008);

ix. *Redmon v. Uncle Julio's of Ill., Inc.*, 249 F.R.D. 290, 07 cv 2350 (Judge Castillo, N.D. Ill. Mar. 7, 2008);

x. *Matthews v. United Retail, Inc.*, 248 F.R.D. 210, 07 cv 2487 (Judge Castillo, N.D. Ill. Mar. 5, 2008);

xi. *Meehan v. Buffalo Wild Wings, Inc.*, 249 F.R.D. 284, 07 cv 4562 (Judge Lindberg, N.D. Ill. Feb. 26, 2008);

xii. *Harris v. Circuit City Stores, Inc.*, 2008 WL 400862, 07 cv 2512 (Mag. Judge Schenkier, N.D. Ill. Feb. 7, 2008).

Clearly, all of Rule 23's requirements are satisfied here, as well.

FACTS

The primary question in this case is whether Defendant's actions amount to a willful, reckless or merely negligent failure to comply with FACTA truncation requirements.

There are allegations showing that Defendant had actual or constructive knowledge of the truncation requirements and was willfully violating FACTA's truncation requirements by failing to take appropriate and prudent actions to prevent truncation violations. (See, Plaintiff's Class Action Complaint ("Plf. Compl."), Docket No. 1, Paras. 28-54).

ARGUMENT

Class actions encourage individuals—who might otherwise lack incentive to file individual actions because their damages are limited—to join with others in a single action to

vindicate their rights. *Hansberry v. Lee*, 311 U.S. 32, 41 (1940); *Phillips Petroleum v. Shutts*, 472 U.S. 797, 808-809 (1985) ("Class actions ... permit the Plaintiffs to pool claims which would be uneconomical to litigate individually. [In such a case,] most of the Plaintiffs would have no realistic day in court if a class action were not available.") Such cases aggregate "the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1977).

The Seventh Circuit's decision in *Murray* supports class certification in this case. In pertinent part, *Murray* held that:

- The class action procedure "was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate." *Id.* at 953;
- Statutory damages provide relief for actual losses that are small and hard to quantify, without proof of injury. *Id.*; and
- Whether a document complies with a statute "may be resolved for a class as a whole." *Id.* at 956.

Further demonstrating that certification is proper in this case, as set forth above many courts within the Seventh Circuit have previously certified classes involving FACTA statutory damage claims on facts nearly identical to those in this case.

A. <u>Standard For Class Certification.</u>

To achieve class certification, the Plaintiff must demonstrate that Rule 23(a)'s four prerequisites are satisfied: (1) the proposed class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the representative party are typical of the claims of the class; and (4) the representative party will fairly and adequately protect the interests of the class. Fed. R. Civ. P. 23(a).

To certify a class under Rule 23(b)(3), the Plaintiff must show that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy." Fed. R. Civ. P. 23(b)(3). Additionally, pursuant to Fed. R. Civ. P. 23(g) the court must appoint class counsel.

B. Proposed Class Definition.

Plaintiff defines the class as follows:

> **all persons to whom Defendant or a Defendant affiliate provided an electronically printed receipt at the point of sale or transaction, in a transaction occurring in the United States after June 3, 2008, which receipt displays more than the last five digits of the person's credit card or debit card number, or displays the expiration date of the person's credit card or debit card.**

(See, Plf. Compl., Docket No. 1, ¶ 16).

C. Numerosity.

To satisfy the numerosity requirement, a class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "When the class is large, numbers alone are dispositive. ..." *Riordan v. Smith Barney,* 113 F.R.D. 60, 62 (N.D. Ill. 1986). Where the class numbers at least 40, joinder is generally considered impracticable. *McCabe v. Crawford &* Co., 210 F.R.D. 631, 643 (N.D. Ill. 2002).

Upon information and belief there are over 50 alleged FACTA violations at issue. (See, Plfs. Compl., Docket No. 1, ¶ 17). Since its first store opened in 1985, the Oneida Tribe has opened stores in fifteen locations in northern Wisconsin.[1] Many of the Oneida stores also contain casinos and slot machines for visitors to use.[2] The popularity of Oneida stores has

[1] *See Oneida One Stop locations Oneida Smoke Shop locations – Our Locations*, Oneida Retail, *available at* www.oneidaretail.com/?id=13 (*last visited* March 24, 2015).
[2] *See One-Stop Casinos*, Oneida Bingo and Casino, *available at:* www.oneidabingoandcasino.net/locations/one-

helped them to become a "profitable growing enterprise for more than twenty-five years."[3] Even if Defendant disputes that exact number, "the court is entitled to make common sense assumptions in order to support a finding of numerosity." *Stawski v. Secured Funding Corp.*, 06-CV-0918, 2008 WL 647024, at *1 (E.D. Wis. Mar. 6, 2008), *citing Patrykus v. Gomilla*, 121 F.R.D. 357, 360 (N.D. Ill. 1988). Thus, the numerosity requirement is satisfied.

D. Commonality.

Rule 23(a)'s second requirement is that there must be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The "commonality" requirement is satisfied by showing "a common nucleus of operative fact." *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). The requirement is usually met in cases where "the Defendant has engaged in standardized conduct towards members of the proposed class by mailing to them allegedly illegal form letters." *Id.* (internal citations omitted). Cases dealing with the legality of standardized documents or conduct are generally appropriate for resolution by means of a class action because the document or conduct is the focal point of the analysis. *Halverson v. Convenient Food Mart, Inc.*, 69 F.R.D. 331 (N.D. Ill. 1974). This is true even though the nature and amount of damages may differ among the members of the class. *Heastie v. Community Bank*, 125 F.R.D. 669 (N.D. Ill. 1989).

Defendant engaged in standardized conduct involving a common nucleus of operative facts. The case involves common fact questions about Defendant's FACTA violations and common legal questions under FACTA, such as:

(a) Whether Defendant had a practice of providing customers with a sales or transaction receipt on which Defendant printed more than the last five digits of the credit card or debit card number, or printed the expiration date of the credit card or debit card;

(b) Whether Defendant thereby violated FACTA;

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stop-casinos/ (*last visited* March 24, 2015).

[3] *See Oneida Tribe*, Oneida Retail, *available at* www.oneidaretail.com/?id=11 (*last visited* March 24, 2015).

(c) Whether Defendant's conduct was negligent, reckless or willful.

(See, Plf. Compl., Docket No. 1, Para. 19).

Defendant's alleged failure to comply with FACTA is the same for each person who received a noncompliant receipt; thus, each Class member has the same claim. *Matthews* held that this sort of question does not require any individualized inquiry. 248 F.R.D. at 215. Accordingly, whether noncompliant receipts were provided and whether the FACTA violations were willful or merely negligent depends on facts involving Defendant's activities, and not the activities of Plaintiff or the Class members.

The fact that some members of the putative class might possibly have claims for actual damages does not defeat class certification. The Seventh Circuit has held that the need for "separate proceedings of some character … to determine the entitlements of the individual class members to relief" should "not defeat class treatment of the question whether Defendant violated [the law]." *Carnegie v. Household Int'l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004). "Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class member concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." *Id*. Therefore, the "commonality" requirement is satisfied.

E. <u>Typicality</u>.

Rule 23(a)'s third requirement is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "A plaintiff's claim

is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

In this case, typicality is inherent in the Class definition. Each of the Class members, including Plaintiff, was subjected to the same illegal conduct. Further, each Class member's claim is based on the same legal theory. Therefore, the "typicality" requirement is satisfied.

F. Adequacy of Representation.

1. Rule 23(a)(4) Adequacy Requirement.

Rule 23(a)'s final requirement is that the class representative must "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). The requirement that the class representative be adequate is relatively modest and will generally be satisfied if the plaintiff does not have interests that are antagonistic to those of the other class members. *Reliable Money Order, Inc. v. McKnight Sales Co., Inc.*, 281 F.R.D. 327, 333 (E.D. Wis. 2012) *aff'd*, 704 F.3d 489 (7th Cir. 2013)). Courts look for two things: (1) the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation; and (2) the plaintiff must not have interests antagonistic to those of the other class members. "As long as the plaintiff has some basic knowledge of the lawsuit and is capable of making intelligent decisions based upon his lawyer's advice, there is no reason that he may not delegate further factual and legal investigation to his attorneys." *Nielsen v. Dickerson*, 1999 WL 350649, *7 (N.D. Ill. 1999), *quoting Kaplan v. Pomerantz*, 131 F.R.D. 118, 122 (N.D. Ill. 1990).

Plaintiff understands the obligations of a class representative and the nature of the claims, is involved in the litigation, and has an interest in representing the Class and enforcing FACTA.

Plaintiff and the other Class members all seek statutory damages under the FCRA. Given the identity of claims between Plaintiff and Class members, there is no potential for conflicting interests. There is no antagonism between the interests of Plaintiff and those of the other Class members, which is the key factor to determine whether a plaintiff is an adequate representative, as the amount of damages available to each individual Class member is independent of the other Class members. Thus, Rule 23(a)(4)'s "adequacy" requirement is satisfied.

2. Rule 23(g) Class Counsel Adequacy Requirement.

Class counsel's adequacy is determined by four factors: (i) the work counsel has done in identifying or investigating potential claims; (ii) counsel's experience in handling class actions; (iii) counsel's knowledge of the applicable law; and (iv) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A).

Here, Plaintiff's counsel has thoroughly discovered the ins-and-outs of Defendant's alleged FACTA violations. Plaintiff's counsel are experienced class action lawyers. They have been appointed as lead or co-lead counsel in many class actions and have recovered substantial monies for their clients and the Class members. Further, Plaintiff's counsel have successfully negotiated several class-wide settlements on behalf of the plaintiff's Class. (See, Declaration of Mark A. Eldridge, Exhibit E). Plaintiff's counsel will continue to commit adequate resources (staffing and monetary) to ensure that the Class is properly represented.

G. Predominance.

Rule 23(b)(3) requires that Plaintiff show that common questions of law or fact predominate over any individual questions. For the reasons discussed above regarding commonality and typicality, there is no reason to believe that any individual question will predominate over the common questions in this litigation. Common legal issues predominate

because the Class members' claims arise under the same federal statute—the FCRA and its concomitant FACTA amendments. Common fact issues predominate because the Class members' claims are focused on Defendant's conduct of providing non-compliant receipts to Plaintiff and other customers from June 3, 2008 to the present.

H. Superiority.

Rule 23(b)(3) requires that a class action be the superior method of adjudicating the claims at issue. In *Murray,* the Seventh Circuit held that cases like this one, where many people have exactly the same claim, are well-suited for class resolution:

> [Rule] 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate. [citation] Reliance on federal law avoids the complications that can plague multi-state classes under state law, [citation], and society may gain from the deterrent effect of financial awards. The practical alternative to class litigation is punitive damages, not a fusillade of small-stakes claims. [citation]

Murray, 434 F.3d at 953 (citations omitted).

Generally speaking, efficiency is the primary focus in determining whether the class action is the superior method for resolving the controversy presented. *Eovaldi v. First Nat'l Bank,* 57 F.R.D. 545 (N.D. Ill. 1972). The court determines the best available method for resolving the controversy in keeping with judicial integrity, convenience, and economy. *Scholes v. Stone, McGuire & Benjamin,* 143 F.R.D. 181, 189 (N.D. Ill. 1992). It is proper for a court, in deciding the "best" available method, to consider the "[i]nability of the poor or uninformed to enforce their rights, and the improbability that large numbers of class members would possess the initiative to litigate individually." *Haynes v. Logan Furniture Mart, Inc.,* 503 F.2d 1161, 1165 (7th Cir. 1974). The fact there is a large number of Class members "is no argument at all" against certification. As set forth in *Carnegi*:

> The more claimants there are, the more likely a class action is to yield substantial economies in litigation. It would hardly be an improvement to have in lieu of this single class action 17 million suits each seeking damages of $15 to $30 ... The realistic alternative to a class action is not 17 million suits, but zero individual suits, as only a lunatic or fanatic sues for $30. But a class action has to be unwieldy indeed before it can be pronounced an inferior alternative—no matter how massive the fraud or other wrongdoing that will go unpunished if class treatment is denied—to no litigation at all.

376 F.3d at 660-61.

Here, there is no better method available for the adjudication of the claims. The vast majority of consumers are undoubtedly unaware that their rights were violated and their identity compromised. Furthermore, the filing of numerous cases against Defendant would be unduly burdensome to the courts. Judicial efficiency would be greatly promoted by the adjudication of identical claims through a single proceeding.

From the perspective of the court system and the Class members, a class action is a superior means of resolving the issues regarding Defendant's FACTA violations, especially when compared to individual actions, because the maximum statutory recovery for each Class member is only $1,000. Allowing this case to proceed as a class action will be an efficient use of judicial resources and will be superior to individual lawsuits, especially considering the large number of potential individual lawsuits.

Further, Plaintiff will be able to satisfy the notice requirement. Discovery is ongoing as to class certification issues, and Plaintiff anticipates that he will be able to ascertain the identities of the members of the Class. In the alternative, the identities of the Class members can be verified after notice is provided and claims are made. Notice can be posted in Defendant's stores, and this would reasonably inform potential Class members of the suit. Indeed, Judge Hart of the Northern District of Illinois recently approved class notice to be posted at the checkouts and customer service desk of a defendant's retail store in a FACTA case after a class was

certified. *Miller-Huggins*, 09 cv 3774, Docket No. 45.

In any event, the fact that Plaintiff has not yet identified every Class member is not a basis for defeating class certification. Rule 23(b)(2) provides that notice may be met through a variety of means, including, if other methods do not work, publication. *Mirfashihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (7th Cir. 2004) (publication notice approved for a class of 1.4 million members where Defendant's records were incomplete). Those who made claims can be asked to attach to the claim form a copy of the receipt they received from Defendant or a copy of a redacted bank statement showing that they made purchases at Defendant's places of business during the relevant time period. Bank records are fairly simple for consumers to obtain, as they are usually computerized and available upon request.

As set forth above, many courts in this Circuit have certified classes under nearly identical circumstances, where the identities of individual class members were not yet ascertained. See, *e.g.*, *Shurland*, 259 F.R.D. 151; *Beringer*, 2008 WL 4390626 at *6; *Cicilline*, 542 F.Supp.2d at 835; *Harris*, 254 F.R.D. at 84, 90; *Redmon*, 249 F.R.D. at 297-298; *Meehan*, 249 F.R.D. at 287.

Accordingly, Rule 23(b)(3)'s "superiority" requirement is satisfied.

I. Possibility of Excessive Damages.

Seventh Circuit precedent has made it clear that a defendant's lack of ability to pay a large judgment is not a viable reason for not certifying a class. *Murray*, 434 F.3d at 953. This Court has the discretion to adjust the statutory damages, if necessary, to address any concerns about the size of a potential award to the Class, after class certification is granted. *Id*. at 954, citing *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003). However, at this stage of the proceedings, where the degree of willfulness has not yet been

established, a finding as to the potential excessiveness is premature.

Murray held that: "Reducing recoveries by forcing everyone to litigate independently—so that constitutional bounds are not tested, because the statute cannot be enforced by more than a handful of victims—has little to recommend it." *Murray,* 434 F.3d at 954.

Thus, the possibility of excessive damages "might be invoked, not to prevent certification, but to nullify that effect and reduce the aggregate damage award." *Parker v. Time Warner Entertainment Co.,* 331 F.3d 13, 22, 27-28 (2nd Cir. 2003); *State of Texas v. American Blast Fax, Inc.,* 164 F. Supp. 2d 892 (W.D.Tex. 2001) (same in case under Telephone Consumer Protection Act); *Travel 100 Group, Inc. v. Empire Cooler Service, Inc.,* 03 CH 14510, 2004 WL 3105679 (Cook Co. Cir. Ct., Oct. 19, 2004) (same).

In short, class certification will provide an efficient and appropriate resolution of the controversy. *Zanni v. Lippold,* 119 F.R.D. 32, 35 (C.D. Ill. 1988).

CONCLUSION

The proposed Class meets the requirements of Rules 23(a), (b)(3) and (g). Therefore, Plaintiff requests that the Court certify the Class as defined above, appoint Plaintiff as the Class representatives, and appoint Plaintiff's attorneys as Class counsel.

Plaintiff JEREMY MEYERS, individually, and on behalf of all others similarly situated,

By: s/ Mark A. Eldridge

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