Firm No. 39042

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

DR. DAVID S. MURANSKY, individually, and on behalf of others similarly situated,	)	
Plaintiff,	)	CASE No. 2020 CH 7156
v.	)	Calendar 5
GODIVA CHOCOLATIER, INC. a New Jersey corporation,	)	Judge Cohen
Defendant.	)	

PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiff, Dr. David Muransky, pursuant to 735 ILCS 5/2-806, respectfully moves the Court for preliminary approval of the nationwide class action settlement ("Settlement") reached between Plaintiff and Defendant Godiva Chocolatier, Inc. ("Godiva"). The Settlement would resolve all claims in this action, and is one of the largest all-cash, non-reversionary settlements ever achieved in a lawsuit brought under the Fair and Accurate Credit Transactions Act, 15 U.S.C. §1681c(g) ("FACTA"). The settlement agreement is attached as *Appendix 1*.

The Settlement was previously approved by a federal district court and federal appeals court. However, a development in federal law that occurred after the Settlement was reached led to a jurisdictional dismissal, necessitating the re-filing of the Settlement in this court. Accordingly, by agreement of the parties, Plaintiff re-presents the Settlement for approval here.

The Nature of the Lawsuit

This suit alleges Godiva allowed its retail stores to print transaction receipts that disclosed more than the last five digits of purchasers' debit and credit card numbers, violating their FACTA

rights. Congress found criminals can use receipts disclosing more than the last five digits of a cardholder's sixteen-digit credit or debit card number to deduce the cardholders' full account information and commit identity theft, and thus it passed FACTA to eliminate this risk. *See Jeffries v. Volume Servs. Am.*, 928 F.3d 1059, 1065 (D.C. Cir. 2019) ("FACTA punishes conduct that *increases the risk* of third-party disclosure …") (italics in original); *see also Redman v. Radioshack Corp.,* 768 F.3d 622, 626 (7th Cir. 2014) ("the less information the receipt contains the less likely is an identity thief who happens to come upon the receipt to be able to figure out the cardholder's full account information and thus be able to make purchases that the seller will think were made by the legitimate cardholder.").

This risk is both real and substantial. For example, in just six seconds, a thief armed with only the first six and last four digits of a credit card number – the very information Plaintiff alleges Godiva was printing on its receipts here – can successfully make fraudulent online purchase using a "distributed guessing attack," *i.e.*, systematically attempting multiple online purchases with different number combinations until the thief deduces enough of the missing card information to complete a purchase. (Complaint at ¶13).[1]

The first six digits of a card number also reveal details about the account a thief can use to deduce the remaining digits by conducting "phishing" inquiries, *i.e.*, calling or emailing the cardholder posing as the store or bank, using the data to convince the cardholder the call is legitimate, to extract more data. (*Id.* at ¶15). For example, the first six digits identify the card-issuing bank, the card level (black, platinum, business), and any industry program associated with the card (*e.g.* airline or gas card). (*Id.*). Thus, by barring merchants from printing any but the last five digits of card account numbers on receipts, FACTA aims to eliminate these dangers.

[1] In connection with class certification, the complaint's allegations are taken as true. *S37 Mgmt. v. Advance Refrigeration Co.*, 2011 IL App (1st) 102496 at ¶15.

Finally, to encourage FACTA enforcement and compliance, Congress gave the law teeth. Specifically, Congress incorporated FACTA into the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq.* ("FCRA"), a statute that entitles a successful plaintiff to statutory damages, costs and attorneys' fees for any "willful" violation of the law. *See Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1306 (11th Cir. 2009) (*citing* 15 U.S.C. §1681n(a)(1)(A), and (2)).[2]

Consistent with Congress's intent, Plaintiff brought this action to resolve Godiva's systematic violation of FACTA by printing the first six and last four digits of its customers' debit and credit card numbers on their transaction receipts. Godiva vigorously denied Plaintiff's allegations, and denied Plaintiff or the proposed class was entitled to any relief.

Case History

Plaintiff originally filed suit in federal court on April 6, 2015, subsequently he amended his complaint in response to Godiva's initial motion to dismiss, and Godiva moved to dismiss the amended complaint for failure to state a claim, arguing Plaintiff had not adequately pled Godiva's alleged FACTA violations were "willful." The parties fully briefed that motion and, on September 2, 2015, the federal court denied it, ruling Plaintiff had adequately alleged a willful violation. *Appendix 2* (Sept. 2, 2015 Order). Godiva filed its answer and affirmative defenses on September 16, 2015.

Thereafter, Plaintiff served extensive discovery. In response, Godiva produced details about the scope of the putative class as well as information about the nature and cause of the alleged FACTA violations at issue. Because the FACTA claims at issue require Plaintiff and the class to prove that Godiva willfully violated the law, this information was critical to understanding the value of the case and the chance of success on the merits.

[2] Recoverable statutory damages for a willful violation are $100-$1,000. *Id.*

Subsequently, the parties discussed the prospect of settling the case. After the production and analysis of facts concerning the class and how Godiva's alleged violation of FACTA occurred, the parties attended a full-day mediation before a professional third-party mediator, Rodney Max, Esq., on November 3, 2015. However, the case did not settle at the mediation, and the parties then spent the next several weeks in additional negotiations to come to a framework of settlement. But even after agreeing to the framework, the parties spent two months negotiating the terms of the settlement agreement itself.

Under the Agreement, Godiva will pay Six Million, Three-Hundred-Thousand Dollars ($6,300,000.00) to a Settlement Fund. *Appendix 1* (Settlement Agreement) at p.9, Sec. D. The Settlement Fund will be divided *pro rata* among all class members who submit a valid claim, after payment of the costs of notice and administration and the approved attorneys' fee and class representative incentive awards. There will be no reversion, *i.e.*, no money will return to Godiva.

All told, the Settlement provides the class with a significant portion of the statutory damages available for a willful violation of FACTA. In addition, as a direct result of the lawsuit, Godiva brought its credit and debit card transaction receipts into compliance with FACTA. Given the hurdles facing the Class in this litigation and the difficulty of proving willfulness, the results achieved are outstanding.

On January 26, 2016, the federal district court certified the class and granted preliminary approval. *Appendix 3* (Order Granting Preliminary Approval). Because Godiva did not have the class members' names or contact information, Plaintiff's counsel had to embark on an extensive campaign to identify and locate them. This required issuing subpoenas to approximately thirty credit/debit card issuers and processors, including Bank of America, Capital One, American Express, Discover, Citibank, Chase, Wells Fargo, and others. *Appendix 4* (Declaration of Keith J. Keogh) at ¶16. The campaign also required extensive analysis, communications and negotiations

with the subpoenaed entities, as well as motion practice to protect the confidentiality of the credit and debit card transaction data, facilitate compliance with the subpoenas, and extend time to issue the class notice to accommodate the subpoenaed parties. *Appendix 4* (Keogh Decl.) at ¶16. As a result of Plaintiff's counsel's efforts to identify the class, notices were mailed to 318,453 class members. *See Appendix 5* (Declaration of Claims Administrator) at ¶14.

After notice of the Settlement and an opportunity to opt out or object, the Class members' reaction to the Settlement was overwhelmingly positive. A total of 63,575 class members filed valid claims to share in the Settlement's benefits (*Appendix 6* (Supplemental Declaration of Claims Administrator) at ¶2), an exceptionally-high claim rate compared to other approved class actions,[3] and thus a strong endorsement by the Class. Conversely, only 15 members sought exclusion, only 4 filed objections, and even then the objectors filed claims to receive the benefits of the "objectionable" settlement. *Appendix 5* (Declaration of Claims Administrator) at ¶19.

Consistent with the Class members' positive reaction, the federal district court granted final approval, determining the Settlement is fair, reasonable, and adequate, and the federal appeals court affirmed that decision. *Muransky*, 2016 U.S. Dist. LEXIS 133695 (S.D. Fla. Sept. 28, 2016), *aff'd* 922 F.3d 1175 (11th Cir. 2019), *vacated for lack of federal jurisdiction*. In doing so, both the federal district court and federal appeals court overruled the few objections to the Settlement.

After final approval, two objectors appealed with one claiming there was no federal jurisdiction to hear the case under a Supreme Court decision that came out after the settlement was

[3] *See Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1306 (9th Cir. 1990) ("Settlements of large class actions have been approved even where less than five percent of the class files claims.") (citing 2 Newberg on Class Actions at Appendix 8-2, §§ 8.44-45); and *compare e.g., North Suburban Chiropractic Clinic, Ltd v. Zydus Pharma. (USA) Inc.*, 13-cv-3105 (N.D. Ill.) (4.6% claim rate); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 489 and 493 (N.D. Ill. 2015) (2.5% claim rate); *Wood Dale Chiropractic, Ltd. v. DrFirst.com, Inc.*, 12-cv-780, (N.D. Ill) (1.67% claim rate).

reached, *Spokeo, Inc. v. Robins*, 136 S.Ct. 1540 (2016). The Eleventh Circuit affirmed approval of the settlement, including the incentive award and attorneys' fees. *Muransky*, 922 F.3d at 1197. Subsequently, the opinion was vacated for rehearing to consider the standing issue. *See Muransky*, 2019 U.S. App. LEXIS 29864 (Oct. 4, 2019). A year later, a divided Eleventh Circuit decided federal standing was not met and dismissed the case for lack of jurisdiction, delaying the Class members' recovery. *Muransky*, 979 F.3d 917 (11th Cir. 2020).

However, federal standing rules do not affect this Court's jurisdiction because "standing" is not jurisdictional in Illinois, but rather an affirmative defense. *Duncan v. FedEx Office & Print Servs.*, 2019 IL App (1st) 180857, ¶21 (standing exists for FACTA claims in Illinois, rejecting argument that federal standing law applies). Thus, to bring suit in a FACTA case in Illinois, a plaintiff need only allege a violation of his or her FACTA rights, as Plaintiff has done. *See id.* at ¶23; and *Soto v. Great Am.*, 2020 IL App (2nd) 180911 at ¶21 (FACTA case holding "plaintiffs had standing to pursue their statutory claims without pleading an actual injury beyond the violation of their statutory rights."). Accordingly, the "standing" argument raised in federal court is no barrier here.

Because federal jurisdiction was found lacking, and by agreement with Defendant, Plaintiff re-filed suit in this Court to seek certification of the same class and approval of the same settlement already approved by the federal district and appellate courts. For the same reasons the class was certified and this outstanding settlement was approved before, they should be certified and approved here, a supplemental notice should go out, and the class members should finally get paid.

Accordingly, Plaintiff hereby moves to: (a) conditionally certify the Settlement Class; (b) appoint Plaintiff as class representative; (c) appoint his attorneys Keogh Law, Ltd., Scott D. Owens, P.A., and Bret Lusskin, P.A. as class counsel, (d) enter an order granting preliminary approval of the Settlement and plan for giving notice of it to the class, and setting this matter for a

fairness hearing; and (e) grant such additional relief as deemed just.

II. SUMMARY OF THE PROPOSED SETTLEMENT

The key terms of the proposed settlement are as follows:

A. Class Definition. The Settlement Class is defined as follows:

> (i) All persons in the United States (ii) who, when making payment for goods or services at a Godiva retail store located in the United States, (iii) made such payment using a credit or debit card (iv) and were provided with a point-of-sale receipt (v) which displayed more than the last 5 digits of said credit or debit card number (vi) between April 6, 2013, and November 20, 2015.
>
> Notwithstanding the foregoing, in compliance with 28 U.S.C. §455, this class specifically excludes persons in the following categories: (A) The judge presiding over this case and the judges of the appellate court; (B) the spouses of those in category (A); (C) any person within the third degree of relationship of those in categories (A) or (B); and (D) the spouses of those within category (C).

The Settlement Class contains more than 300,000 members.

B. Structure of the Settlement Amount. The Agreement provides Godiva shall pay Six Million, Three-Hundred Thousand Dollars ($6,300,000.00) into a non-reversionary common fund for the benefit of the class. *Appendix 1* at p.9, §B, and at pp.11-12, §iii.

C. Individual Class Member Benefits. A Settlement Class member who submits a timely claim form will receive a *pro rata* share of the net settlement proceeds after payment of the cost of sending notice of the settlement to the class, settlement administration expenses, the attorneys' fee and expense award, and any class representative incentive award. Any class member who previously submitted a valid claim will not have to submit another claim, but will have the opportunity to opt out if they now want to. Based upon the large number of claims made, Plaintiff estimates each class member who makes a valid claim will receive approximately $55-$60 in cash.

D. Additional Relief. In addition to the individual relief to the class provided above, Godiva agreed to payment of the cost of preparing and sending notice of the Settlement to the class, including but not limited to establishment and maintenance of the settlement website, and the cost

of handling and disbursing funds to class members, from the Settlement Fund.

E. Compensation for the Class Representative. Subject to Court approval, Plaintiff Muransky shall apply for an incentive award not to exceed ten thousand dollars ($10,000), which is fully-consistent well incentive awards approved in other cases (including FACTA cases),[4] and the same amount approved by the federal court in this case.

F. Payment of Attorneys' Fees and Expenses. Subject to Court approval, Plaintiff's counsel may apply to this Court for an award of attorneys' fees not to exceed one-third of the Settlement Fund plus expenses, the same amount approved by the federal district and appeals courts, and well-within the range of fee awards commonly approved in class settlements in Illinois.[5] Furthermore, although the proposed fee award was found appropriate for work performed up through September 28, 2016, and although Class Counsel incurred substantial additional fees over the past several years defending the settlement on appeal, Counsel will not seek additional fees for that work. Finally, there is no "clear sailing" provision for the fee award, the fee motion will be filed when notice is sent out, and it also will be posted to the settlement website.

[4] Comparable incentive awards were granted in *Fauley v. Metro Life Ins. Co.*, 2016 IL App (2d) 150236, ¶1, ¶15 ($15,000 per class representative); *Ryan v. City of Chicago*, 274 Ill. App. 3d 913, 917 (1st Dist. 1995) ($10,000 awards); *Legg v. Lab. Corp. of Am. Holdings*, No. 14-61543-RLR, 2016 U.S. Dist. LEXIS 122695, *11 (S.D. Fla. Feb. 18, 2016) (FACTA case, $10,000 award); *Legg v. Spirit Airlines, Inc.*, No. 14-cv-61978-JIC, ECF No. 151, ¶16 (S.D. Fla.) (FACTA case, $10,000 award to each representative). Moreover, $10,000 is only 0.0016 of the Settlement Fund here, and thus consistent with the average incentive award. *See* Eisenberg & Miller, *Symposium: Emerging Issues in Class Action Law: Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1308 (Aug. 2006) (0.16% is the average).

[5] *See, e.g.*, *Svagdis v. Alro Steel Corp.*, 17-CH-12566 (Cir. Ct. Cook Cty. Jan. 14, 2019) (awarding 40% of common fund to class counsel as fee award in consumer class action settlement); *Zhirovetskiy v. Zayo Group*, 17-CH-09323 (Cir. Ct. Cook Cty. Apr. 8, 2019) (same); *McGee v. LSC Comm's. et al.*, 17-CH-12818 (Cir. Ct. Cook Cty. Aug. 7, 2019) (same); *Zepeda v. Kimpton Hotel & Rest. Grp.*, 18-CH-2140 (Cir. Ct. Cook Cty. Dec. 5, 2018) (same).

G. Release. In exchange for the relief described above, the release is applicable to all class members and releases any and all claims, as more fully set forth in the Settlement Agreement, related to or arising out of claims that were made or could have been made in this litigation regarding the disclosure, display, publication, provision or printing of credit or debit cardholder account information. The full scope of the release, and its exact terms, are set forth in §VI of the Settlement Agreement. *See Appendix 1* at p.18, §VI.

III. THE SETTLEMENT CLASS SHOULD BE RE-CERTIFIED

In connection with granting preliminary approval of a class settlement, the Court normally confirms certification of the Settlement Class is proper. *See, e.g., Mortimer v. River Oaks Toyota,* 278 Ill.App.3d 597, 598-599 (1st Dist. 1996) (generally describing class settlement approval process). As noted, here the federal court already found certification of the Settlement Class appropriate under Federal Rule 23. *Appendix 3* (Preliminary Approval Order) at pp.2-4. That determination should be given due consideration here "because the Illinois class action statute is patterned on Rule 23 of the Federal Rules of Civil Procedure." *Ballard RN Ctr. v. Kohll's Pharm. & Homecare,* 2015 IL 118644, ¶40 (2015).

Indeed, courts normally find FACTA classes meet the requirements for certification in both contested class proceedings and settlement proceedings. *See Bush v. Calloway Consol. Group River City, Inc.*, 2012 U.S. Dist. LEXIS 40450, *33 (M.D. Fla. Mar. 26, 2012) ("Courts routinely find class resolution superior in consumer protection actions, including those brought pursuant to FACTA.") (citing cases); *In re Toys "R" Us – Delaware, Inc. – Fair and Accurate Credit Trans. Act (FACTA) Litig.*, 300 F.R.D. 347, 376 (C.D. Cal. 2013) ("The vast majority of courts outside this district have similarly found that common questions predominate in FACTA class actions.").[6]

[6] Examples of the numerous decisions ruling class certification is proper in FACTA cases include *Altman v. White House Black Market, Inc.*, 2017 U.S. Dist. LEXIS 221939 (N.D. Ga. Oct. 25,

There is no reason for a different outcome here.

Class certification is a matter for the Court's discretion, which must be exercised within the framework of 735 ILCS 5/2-801. *Cruz v. Unilock Chicago, Inc.*, 383 Ill. App. 3d 752, 761 (2d Dist. 2008). The statute sets four requirements for a class: (1) the class is so numerous that joinder of all members as parties would be impracticable ("Numerosity"); (2) the class claims present common questions of law or fact, which predominate over any questions affecting only individual members ("Commonality"); (3) the plaintiff can fairly and adequately represent the class ("Adequacy"); and (4) a class action is an appropriate method for fairly and efficiently resolving the dispute. ("Appropriateness"). *See* 735 ILCS 5/2-801 and *C.E. Design, Ltd. v. C&T Pizza, Inc.*, 2015 IL App (1st) 131465, ¶10 ("These prerequisites are generally referred to as numerosity, commonality, adequacy of representation, and appropriateness.").

As explained below, and as already determined by the federal court, the Settlement Class satisfies each of these requirements, and thus class resolution is proper here.

A. Numerosity

A class is sufficiently numerous when it is so large that joinder of all members as party plaintiffs would be impracticable. *See Cruz*, 383 Ill. App. 3d at 760. "A class consisting of more

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2017), *R&R adopted*, 2018 U.S. Dist. LEXIS 169828 (N.D. Ga. Feb. 12, 2018); *Legg v. Spirit Airlines, Inc.*, 315 F.R.D. 383 (S.D. Fla. 2015); *Velasco v. Sogro, Inc.*, 2014 U.S. Dist. LEXIS 104047, *7-13 (E.D. Wis. July 30, 2014); *Rogers v. Khatra Petro, Inc.*, 2010 U.S. Dist. LEXIS 103599 (N.D. Ind. Sept. 29, 2010); *Miller-Huggins v. Mario's Butcher Shop, Inc.*, 2010 U.S. Dist. LEXIS 16493 (N.D. Ill. Feb. 22, 2010); *Shurland v. Bacci Café & Pizzeria*, 259 F.R.D. 151, 163 (N.D. Ill. 2009); *Harris v. Best Buy Co., Inc.*, 254 F.R.D. 82 (N.D. Ill. 2008); *Redmon v. Uncle Julio's of Illinois, Inc.*, 249 F.R.D. 290 (N.D. Ill. 2008); *Meehan v. Buffalo Wild Wings, Inc.*, 249 F.R.D. 284 (N.D. Ill. 2008); *Matthews v. United Retail, Inc.*, 248 F.R.D. 210 (N.D. Ill. 2008); *Brown v. 22nd Dist. Agric. Ass'n*, 2017 U.S. Dist. LEXIS 75439 (S.D. Cal. May 15, 2017) (settlement approval); *Harper v. Law Office of Harris & Zide LLP*, 2017 U.S. Dist. LEXIS 37367 (N.D. Cal. Mar. 15, 2017) (same); *Flaum v. Doctor's Assoc., Inc.*, 16-cv-61198-CMA, ECF No. 83, ¶5 (S.D. Fla. March 23, 2017) (same); *Guarisma v. Microsoft*, 15-cv-24326-CMA, ECF No. 57, ¶4 (S.D. Fla. Feb. 28, 2017) (same); *Legg v. Lab. Corp. of Am. Holdings*, 2016 U.S. Dist. LEXIS 122695, *3 (S.D. Fla. Feb. 18, 2016) (same); *In re Toys "R" Us*, 300 F.R.D. at 378.

than forty members generally satisfies the numerosity requirement …" *Chavez v. Don Stoltzner Mason Contr., Inc.*, 272 F.R.D. 450, 454 (N.D. Ill. 2011) (citing *Barragan v. Evanger's Dog & Cat Food Co.*, 259 F.R.D. 330, 333 (N.D. Ill. 2009)). The Settlement Class easily clears this low bar because it contains more than three-hundred thousand members. *Appendix 1* at p.3, Sec. I. Obviously, it is impracticable to join over three-hundred thousand persons as named plaintiffs.

B. Commonality

"Determining whether issues common to the class predominate over individual issues requires the court to identify the substantive issues that will control the outcome, assess which issues will predominate, and then determine whether these issues are common to the class." *Ramirez v. Midway Moving & Storage, Inc.*, 378 Ill.App.3d 51, 54 (1st Dist. 2007) (citation omitted). This requirement is met because all class members share the common issues of (1) whether Godiva's computerized payment system at its retail stores violated FACTA by printing credit or debit card transaction receipts that revealed more than the last five digits of each class member's credit or debit card, and (2) whether this violation was willful. *See* 15 U.S.C. §1681c(g)(1) and 15 U.S.C. §1681n(a)(1)(A); *see also Shurland*, 259 F.R.D. at 159.

Likewise, these questions predominate because Godiva's conduct was standardized across the class, and thus "the successful adjudication of the plaintiff's individual claims will establish a right of recovery in favor of the other class members." *S37 Mgmt. v. Advance Refrigeration Co.*, 2011 IL App (1st) 102496, ¶17 (*citing Hall v. Sprint Spectrum, L.P.*, 376 Ill.App.3d 822, 831 (5th Dist. 2007)); *see also In re Toys "R" Us*, 300 F.R.D. at 376 ("The vast majority of courts outside this district have similarly found that common questions predominate in FACTA class actions.") (citing cases).

C. Adequacy

A plaintiff will fairly and adequately represent class members if their interests are aligned, there are no conflicts of interest, and Plaintiff's counsel are qualified, experienced, and generally able to conduct the litigation. *See Steinberg v. Chicago Medical School*, 69 Ill.2d 320, 338-39 (1977); *Ramirez*, 378 Ill.App.3d at 56. That is the case here. Plaintiff's and the Settlement Class Members' interests are squarely aligned because his claims arise from the same allegedly unlawful practices as the class members' claims (*i.e.* violation of their FACTA rights by disclosing more than the last five digits of their card numbers on their transaction receipts), and he has already spent years seeking the same relief on the class's behalf, *i.e.*, statutory damages. *See Appendix 7* (Dr. Muransky Decl.) at ¶3-¶10. Likewise, Plaintiff's counsel are adequate because they have already spent years fighting for the class, plus they regularly engage in major complex litigation and have extensive experience in consumer class action lawsuits, particularly FACTA class actions, where they have achieved four of the top five all-cash class settlements, such as *Flaum v. Doctor's Associates* ($30.9 million) and *Legg v. Lab. Corp. of America* ($11 million). *See Appendix 4* (Keogh Decl.) at ¶4; *Appendix 8* (Declaration of Scott D. Owens); and *Appendix 9* (Declaration of Bret L. Lusskin); *see also Legg*, 315 F.R.D. at 390 (FACTA case finding Dr. Muransky's counsel here are "experienced and capable, and have served as class counsel in similar consumer class actions before.").

D. Appropriateness

A class action is appropriate for fairly and efficiently resolving a dispute when it "can best secure economies of time, effort and expense or accomplish the other ends of equity and justice that class actions seek to obtain." *Ramirez*, 378 Ill.App.3d at 56 (*quoting Walczak v. Onyx Acceptance Corp.*, 365 Ill.App.3d 664, 679 (2d Dist. 2006)). That is the case here because this Settlement will resolve hundreds-of-thousands of claims presenting the same legal and factual

issues in one shot, eliminating the need for individual litigation of the same issues over and over.

A class action also serves the ends of equity and justice because the class members are individuals, their claims are relatively small, and there is no reason to think most or many have the time and wherewithal to try to vindicate their rights on their own. As noted by the First District:

> Our courts have recognized that, 'in a large and impersonal society, class actions are often the last barricade of consumer protection.' *(Eshaghi*, 214 Ill.App.3d at 1004, 574 N.E.2d at 766.) The consumer class action is an inviting procedural device to address frauds that cause small damages to large groups. When brought by plaintiffs who have no other avenue of legal redress, the consumer class action provides restitution to the injured and deterrence to the wrongdoer.

Gordon v. Boden, 224 Ill.App.3d 195, 204 (1st Dist. 1991) (citation omitted). Accordingly, a class action is an appropriate method for resolving the claims at issue. *See Bush*, 2012 U.S. Dist. LEXIS 40450 at *33 ("Courts routinely find class resolution superior in consumer protection actions, including those brought pursuant to FACTA.").

Finally, although this case meets the appropriateness requirement as it is ordinarily applied, it must be noted that the analysis is relaxed here because class certification is being proposed as part of a settlement, and thus trial management considerations are not a factor. *See Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems … for the proposal is that there be no trial"). In short, the Settlement Class meets all requirements of 735 ILCS 5/2-801, and it should be certified.

V. THE SETTLEMENT SHOULD RECEIVE PRELIMINARY APPROVAL

Illinois law provides that "[a]ny action brought as a class action under Section 2-801 of this Act shall not be compromised or dismissed except with the approval of the court ..." 735 ILCS 5/2-806. The procedure for review of a proposed class action settlement is a well-established two-

step process. *See, e.g., Mortimer*, 278 Ill.App.3d at 598-599 (describing two-step approval process); and *Quick v. Shell Oil Co.*, 404 Ill.App.3d 277, 278 (3d Dist. 2010) (same).

The first step is a preliminary determination of whether the settlement is "within the range of possible approval." *Armstrong v. Bd. Of Sch. Directors*, 616 F.2d 305, 314 (7th Cir. 1980) (overruled on other grounds) (citing Manual for Complex Litig. §1.46 at 53-55). This is not a final determination of fairness. Rather, its purpose is to decide if sufficient grounds exist to consider sending the class notice of the settlement and then hold a fairness hearing. *See id.*

This preliminary approval is an "initial evaluation" of the proposed settlement's fairness made on the basis of written submissions and informal presentation from the settling parties. *See id.* and, *e.g., Quick*, 404 Ill.App.3d at 278 (referencing the preliminary approval stage). If the court decides the settlement is "within the range of possible approval," the case then proceeds to the second step in the review process after notice – the "fairness hearing." *Armstrong*, 616 F.2d at 314.

There is a strong public policy favoring the voluntary conciliation and settlement of litigation, particularly class litigation. *Security Pac. Fin. Servs. v. Jefferson*, 259 Ill.App.3d 914, 919 (1st Dist. 1994) ("there exists a strong policy in favor of settlement and the resulting avoidance of costly and time-consuming litigation…"); *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 595 (3d Cir. 2010) ("The strong judicial policy in favor of class action settlement contemplates a circumscribed role for the district courts in settlement review and approval proceedings."). With a settlement, class members are ensured a benefit as opposed to "the mere possibility of recovery at some indefinite time in the future." *In re Domestic Air Transport Litig.*, 148 F.R.D. 297, 306 (N.D. Ga. 1993); *see also Scott v. Util. Partners of Am., LLC*, 2017 U.S. Dist. LEXIS 17348, *8 (D. Kan. Feb. 6, 2017) ("the value of immediate recovery would likely outweigh the mere possibility of recovery after protracted litigation.").

Although approval of a class action settlement is a matter for the Court's discretion, proper consideration should be given to the consensual decision of the parties. *See Gautreaux v. Pierce*, 690 F.2d 616, 638 (7th Cir. 1982) ("Because settlement of a class action, like settlement of any litigation, is basically a bargained exchange between the litigants, the judiciary's role is properly limited to the minimum necessary to protect the interest of the class and the public. Judges should not substitute their own judgments as to optimal settlement terms for the judgment of the litigants and their counsel.") (citation omitted); *see also Fauley*, 2016 IL App (2d) 150236, ¶45 ("Given that a settlement is a compromise, a trial court is not to judge the legal and factual questions by the criteria employed in a trial on the merits."); *Greco v. Ginn Dev. Co., LLC*, 635 Fed. Appx. 628, 632 (11th Cir. 2015) ("absent fraud, collusion, or the like, the district court 'should be hesitant to substitute its own judgment for that of counsel.'") (citation omitted). Accordingly, courts "should always review the proposed settlement in light of the strong judicial policy that favors settlements." *Diakos v. HSS Systems, LLC*, 137 F. Supp. 3d 1300, 1311 (S.D. Fla. 2015) (citation omitted).

Here, the Settlement is well within the range of possible approval. This is demonstrated first and foremost by the fact the Settlement already was granted *final* approval by the federal district court charged with evaluating its fairness, and a federal appeals court affirmed that ruling. *See Muransky*, 922 F.3d at 1197 (affirming approval of the settlement), *vacated for en banc review.*

Second, on a per-class member basis, $6.3 million settlement for approximately 320,000 class members exceeds most FACTA class settlements entered into prior to this settlement, which often just provided coupons.[7] It also roughly matches the other all-cash FACTA settlements for

[7] *See, e.g., Lumas v. Sw. Airlines Co.*, No. 13-cv-01429 (S.D. Cal. 2013) ($1.8 million for up to 2,200,000 class members); *Brown v. 22nd Dist. Agric. Ass'n*, 2017 U.S. Dist. LEXIS 115321, at *2-3 (S.D. Cal. July 21, 2017) (FACTA settlement providing 50¢ reduction in admission prices to county fair); *Katz v. ABP Corp.*, 2014 U.S. Dist. LEXIS 141223, *2 (E.D.N.Y. Oct. 3, 2014) (FACTA settlement that gave class a choice to claim $9.60 in cash or a coupon for $15 off future purchases from defendant); *Hanlon v. Palace Entm't Holdings*, 2012 U.S. Dist. LEXIS 364, *14-

which Plaintiff's counsel has obtained approval.[8]

Finally, the Settlement is within the range of possible approval because it is the product of full knowledge of the material facts and arms-length negotiations between the parties, supervised by a professional, third-party mediator. Plaintiff's counsel briefed and defeated Godiva's motion to dismiss, and conducted discovery sufficient to determine the size of the class and evaluate the merits of their claims to ensure Plaintiff had full disclosure regarding the class, the conduct at issue and reasons for it, the potential damages, and the nature and strength of the defenses to class certification and the merits. *See Appendix 4* (Keogh Decl.) at ¶8-¶11.

Here it is worth noting Plaintiff and the class face the difficult burden of proving Godiva's violation was "willful" (which is necessary to recover statutory damages). *See Lavery v. Radioshack*, 2014 U.S. Dist. LEXIS 85190 at *8-9 (N.D. Ill. June 23, 2014) (FACTA case discussing "Judge Valdez's acknowledgement of the 'difficulty of proving willful violations of FACTA' and the high burden on the plaintiffs.") (citation omitted); *see also Flaum v. Doctor's Assocs.*, 2019 U.S. Dist. LEXIS 40626, *12-13 (S.D. Fla. Mar. 11, 2019) (noting the risk of continued litigation in approving settlement because "the failure to prove willfulness has spelled doom for the plaintiffs in many FACTA cases.") (citing cases). This issue presents a significant

15 (W.D. Pa. Jan. 3, 2012) (FACTA settlement that gave class admission tickets to defendant's amusement park); *Todd v. Retail Concepts Inc.*, 2008 U.S. Dist. LEXIS 117126, *16 (M.D. Tenn. Aug. 22, 2008) (FACTA settlement that gave class a $15 credit on next purchase of $125 or more from defendant); *Palamara v. Kings Family Restaurants*, 2008 U.S. Dist. LEXIS 33087, *9-10 (W.D. Pa. Apr. 22, 2008) (FACTA settlement that gave class vouchers worth an average of $4.38 to buy food at defendant's restaurants).

[8] For example, see *Mocek v. Allsaints USA*, 2016-CH-10056 (Cir. Ct. Cook Cty.) ($8 million for 436,861 class members); *Wood v. J Choo USA*, No. 15-CV-81487 (S.D. Fla. 2017) ($2.5 million for an estimated 123,799 class members), *Guarisma v. Microsoft Corp.*, 15-cv-24326-CMA (S.D. Fla.) ($1.2 million for 66,372 class members); *Legg v. Spirit Airlines, Inc.*, 14-cv-61978-JIC (S.D. Fla.) ($7.5 million for about 350,000 class members); *Kirchein v. Pet Supermarket*, 16-cv-60090-RNS (S.D. Fla.) ($580,000 for about 30,000 class members) (vacated on other grounds).

challenge because Godiva claims a third-party vendor caused its system to print receipts violating FACTA, and in similar circumstances courts have granted summary judgment to the merchant. *See id.* (citing *Keller v. Macon Cty. Greyhound Park, Inc.*, 2011 WL 1559555, at *4-5 (M.D. Ala. Apr. 25, 2011), *aff'd*, 464 F. App'x 824 (11th Cir. 2012) (summary judgment for merchant even though its system violated FACTA because violation caused by vendor who fixed the software after system crash)).

Plus, without the instant settlement, Plaintiff must still clear a number of major hurdles to secure relief, including contested class certification, summary judgment and trial proceedings, and any appeal. Godiva is represented by seasoned class action defense counsel, the outcome of each of these stages is never guaranteed and, even if Plaintiff clears every hurdle, he may recover statutory damages lower than the Settlement amount because, for example, the court might find a higher statutory damages award is unduly punitive. *See Aliano v. Joe Caputo & Sons - Algonquin, Inc.*, 2011 U.S. Dist. LEXIS 48323, at *13 (N.D. Ill. May 5, 2011) ("the Court cannot fathom how the minimum statutory damages award for willful FACTA violations in this case — between $100 and $1,000 per violation—would not violate Defendant's due process rights . . . . Such an award, although authorized by statute, would be shocking, grossly excessive, and punitive in nature.").

Against these uncertainties, the Settlement guarantees the class substantial cash relief. *See Gevaerts v. TD Bank, N.A.*, 2015 U.S. Dist. LEXIS 150354 at *38 (S.D. Fla. Nov. 5, 2015) ("Rather than facing more years of costly and uncertain litigation, [the] Settlement Class Members will receive an immediate cash benefit…") (brackets added); *see also*, *e.g.*, *EEOC v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 888 (7th Cir. 1985) ("In light of the risks of litigation, the court determined that the relief provided by the decree was fair and reasonable.").

Given the foregoing, plus the fact this settlement is among the largest all-cash FACTA settlements on record on a per-person basis, and matches or exceeds numerous other FACTA

settlements granted approval, the settlement easily qualifies as fair, reasonable, and adequate, if not outstanding. Thus, there should be no doubt that the Settlement is well within the range of reasonableness, and deserves preliminary approval again.

VI. THE CLASS NOTICE SHOULD BE APPROVED

A. The Class Notice Satisfies Due Process.

Before final approval is granted, the Illinois class action statute provides for notifying the class member to advise them of the Settlement, to give them the opportunity to comment on it or exclude themselves from the lawsuit. *See* 735 ILCS 5/2-806; *Miner v. Gillette Co.*, 87 Ill.2d 7, 15 (1981) (locatable class members must be given notice and chance to opt out); *Fauley*, 2016 IL App (2d) 150236 at ¶36 ("due process requires notice to be the 'best practicable, 'reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.'"") (quoting *Phillips Petroleum Co. v. Shutts*, 472 US. 797, 812 (1985)).

Here, Settlement Class members were previously given direct notice of the Settlement when the case was in federal court. After preliminary approval there, and after Class Counsel worked to subpoena the names and addresses of unknown class members from the banks that issued the class members' credit and debit cards (*Appendix 4* (Keogh Decl.) at ¶16), class members were sent notice by a regular mail in the form approved by the court describing the case, the major settlement terms (including the settlement benefits, proposed attorneys' fee award sought and basis for its calculation, and proposed incentive award), the class members' right to object to the settlement, opt-out, or submit a claim for a share of the settlement proceeds, how to exercise those rights and by when, and how to get more information free of charge. *See Appendix 5* (Claims Administrator Decl.) at ¶5; *see also Appendix 1* (Settlement Agreement) at Exhibit 2.

The parties have agreed to send a supplemental notice here that provides that any class member who previously submitted a claim need not submit another claim if they want to continue to participate, but they also have the option to now opt out or object if they want. It will also provide a means to update their address. A copy of the supplemental notice is attached as *Appendix 10*.[9] The notice is substantially the same as the form approved in federal court, but modified to reflect the re-filing of the case in this Court, and will be sent by direct mail.

A supplemental notice will further ensure class members who have not already filed a valid claim or opted out are made aware of the Settlement and their right to participate in it, comment on it, or exclude themselves, and thus received due process. The Illinois class action statute expressly grants the Court discretion to order this supplemental notice. *See* 735 ILCS 5/2-803 ("the court in its discretion may order such notice that it deems necessary to protect the interests of the class and the parties."). Accordingly, the proposed supplemental notice should be approved.

Plus, to further help class members make an informed decision, the prior mailed notice as well as the supplemental notice directs class members to a website set up and run by the court-appointed Claims Administrator (https://eclaim.kccllc.net/caclaimforms/gmy/Home.aspx). The site provides additional details about the settlement, including a "long-form" notice containing numerous "FAQs" about the case, the settlement terms and class members' rights to object or opt out, along with a copy of relevant court documents (*e.g.* the complaint, settlement agreement, preliminary approval motion, and preliminary approval order), and a toll-free number class members could call with additional questions. *See Appendix 1* at pp. 14-15 and at Ex. 3, ¶22 ("How

[9] The claim form sent with the mail notice, the "long form" class notice posted on the Settlement website, and the claim form available on the website for any class members who do not receive the form by mail will likewise be updated to make them consistent with the supplemental mailed notice. *See Appendix 11*, *12*, and *13*, attached.

do I get more information?"). Finally, the site provided an electronic claim form and procedure class members could use to conveniently file their claims online. *Appendix 1* at pp.14-15.

The notice program here is the best notice practicable under the circumstances. Indeed, mailed notice combined with a website for further information is commonly approved for giving notice in class settlements. *See, e.g., Fauley*, 2016 IL App (2d) 150236 at ¶37 (notice adequate because it "informed potential class members of the class action's pendency and the opportunity to object to the proposed settlement, and it provided a website containing the notice, preliminary approval order, and proposed settlement."); *Greco*, 635 Fed. Appx. at 634 ("all material facts were available to class members because a full copy of the settlement agreement, and the release, were available on a website referenced in the Notice."); *see also, e.g., Curry v. AvMed, Inc.*, 2014 U.S. Dist. LEXIS 48485 at *3 (S.D. Fla. Feb. 28, 2014); *Collins v. Erin Capital Management, LLC*, No. 12-cv-22839-CMA (S.D. Fla. Dec. 20, 2013) at ECF No. 133, ¶5; *Guarisma v. Adcahb Medical Coverages, Inc.*, No. 13-cv-21016-FAM (S.D. Fla. Mar. 2, 2015) at ECF No. 91, ¶11; *Soto v. The Gallup Organization, Inc.*, No. 13-cv-61747-MGC (S.D. Fla. June 6, 2015) at ECF No. 79, ¶9; *De Los Santos v. Millward Brown, Inc.*, No. 13-cv-80670-DPG (S.D. Fla. Feb. 10, 2015) at ECF No. 77, ¶11; *Cooper v. Nelnet, Inc.*, 14-cv-00314-RBD (M.D. Fla. Feb. 26, 2015) at ECF No. 72, ¶10; and *Legg v. E-Z Rent A Car, Inc.*, No. 14-cv-01716-PGB (M.D. Fla. May 28, 2015) at ECF No. 64, ¶10. Thus, the notice program satisfies Due Process.

VII. CY PRES RECIPIENT FOR UNCASHED SETTLEMENT CHECKS

This is a non-reversionary settlement, and thus all net settlement proceeds shall be paid to the Settlement Class members and any uncashed checks will be redistributed to those who cashed their checks. However, if any checks are still uncashed, those funds will be distributed to one or more *cy pres* recipients on behalf of the class. *Appendix 1* at pp.11-12 ("Remaining Funds").

If any funds remain from uncashed checks after the second distribution, and consistent with Illinois law,[10] the parties jointly suggest half be paid to the Electronic Frontier Foundation (an Illinois-registered charity devoted to privacy issues) and half to the Chicago Bar Foundation (devoted to equal access to justice) as *cy pres* recipients, and the notice so advises the class.

VIII. THE MATTER SHOULD BE SET FOR A FAIRNESS HEARING

After the supplemental notice is sent to the Settlement Class, a fairness hearing should be held to confirm that the Settlement is fair, reasonable and adequate. *See, e.g.*, *Fauley*, 2016 IL App (2d) 150236 at ¶45; *Chicago v. Korshak*, 206 Ill.App.3d 968, 971-72 (1st Dist. 1990).

IX. DEFENDANT DOES NOT OBJECT TO THE RELIEF SOUGHT IN THIS MOTION

Defendant agreed to the Settlement's terms and does not object to certification of the Settlement Class for the purposes of this proceeding, or the preliminary approval of the Settlement.

XI. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court (a) certify the Settlement Class; (b) appoint Plaintiff Dr. David Muransky as class representative; (c) appoint Keogh Law, Ltd., Scott D. Owens P.A., and Bret L. Lusskin P.A. as class counsel, (d) enter an order granting preliminary approval of the Settlement, directing supplemental notice to Settlement Class members, setting dates for issuing the notice and for class members to respond, and setting this matter for a fairness hearing; and (e) grant such additional relief as deemed just.

For the Court's convenience, Plaintiff hereby submits a proposed preliminary approval order, attached as *Appendix 14*.

[10] The Illinois class action statute requires at least half the residual fund be distributed to an "eligible organization," *i.e.* one that has been in existence and tax exempt for at least three years, in compliance with Illinois charitable trust and charitable solicitation laws, and has a principle purpose of promoting or providing services eligible for funding under the Illinois Equal Justice Act. *See* 735 ILCS 5/2-807(a) and (b).

XI. SUGGESTED SCHEDULE

As described in the proposed preliminary approval order, Plaintiff proposes the general scheduling outline below for evaluating and concluding this Settlement.

_____, 2021 [28 days after the date of the Preliminary Approval Order]	Deadline for sending supplemental notice of the Settlement to Settlement Class members who have not already filed a claim or opted out.
_____, 2021 [28 days after the date of the Preliminary Approval Order]	Deadline for Plaintiff's counsel to file petition for attorneys' fees and expenses, and class representative incentive award
_____, 2021 [88 days after the date of the Preliminary Approval Order]	Deadline for Settlement Class members to request exclusion or file objections in response to the supplemental notice (Opt-Out and Objection Deadline)
_____, 2021 [109 days after the date of the Preliminary Approval Order]	Deadline for Parties to file the following: (1) List of persons who made timely and proper Requests for Exclusion (under seal); (2) Proof of Class Notice; and (3) Motion and memorandum in support of final approval, and response to any objections.
_____, 2021 at ____ _.m. [123 days after the date of the Preliminary Approval Order]	Fairness Hearing

Respectfully Submitted,

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Plaintiff's Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 22, 2020, I filed **PLAINTIFF'S MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT** with the Clerk of the Circuit Court of Cook County and duly served a copy of the same on the person at the address on the service list below via email and the ECF system.

By: *s/ Keith J. Keogh*
Keith J. Keogh

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