UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PRIORITY SEND

CIVIL MINUTES -- GENERAL

Case No. **CV 06-8125-JFW (AJWx)** Date: May 25, 2007

Title: Katherine E. Spikings v. Cost Plus, Inc.

PRESENT:

HONORABLE JOHN F. WALTER, UNITED STATES DISTRICT JUDGE

Shannon Reilly	**None Present**
Courtroom Deputy	**Court Reporter**

ATTORNEYS PRESENT FOR PLAINTIFFS:	**ATTORNEYS PRESENT FOR DEFENDANTS:**
None	None

PROCEEDINGS (IN CHAMBERS): **ORDER DENYING PLAINTIFF'S MOTION FOR CLASS CERTIFICATION PURSUANT TO FRCP 23 [filed 4/3/07; Docket No. 19]**

On April 3, 2007, Plaintiff Katherine E. Spikings ("Plaintiff") filed a Motion For Class Certification Pursuant to FRCP 23 ("Motion"). On April 30, 2007, Defendant Cost Plus, Inc. ("Defendant") filed its Opposition. On May 7, 2007, Plaintiff filed a Reply. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court found that this matter was appropriate for decision without oral argument. Accordingly, the hearing calendared for May 14, 2007, was vacated and the matter taken off calendar. After considering the moving, opposing, and reply papers and the arguments therein, the Court rules as follows:

I. FACTUAL AND PROCEDURAL BACKGROUND

The instant case was filed as a putative class action by Plaintiff against Defendant. Plaintiff contends that Defendant violated the Fair and Accurate Transactions Act ("FACTA")[1] by printing the last four digits of Plaintiff's credit card number *and* the credit card expiration date on Plaintiff's receipt for her purchase at one of Defendant's stores in Los Angeles on December 19, 2006.[2]

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[1] FACTA is a subset of the statutes contained within the Fair Credit Reporting Act ("FCRA"), codified at 15 U.S.C. § 1681, *et seq.* The FACTA requirements regarding credit card and debit card truncation became effective on December 4, 2006.

[2] Plaintiff also is the plaintiff in a putative class action against Bristol Farms in which she alleges violations of FACTA and is represented by the same counsel as in this case. *See, Katherine E. Spikings v. Bristol Farms*, Case No. CV 06-8205 DDP (RZx).

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Plaintiff asserts that this constitutes a willful violation of FACTA, which states: "[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) (emphasis added). Because Plaintiff has alleged a "willful" violation of FACTA, Plaintiff seeks statutory damages of not less than $100 and not more than $1,000, as well as punitive damages and attorney's fees. *See* 15 U.S.C. § 1681n.

Plaintiff moves for class certification under Federal Rule of Civil Procedure 23 and for Katherine E. Spikings to be appointed as class representative. The plaintiff class consists of:

> All persons in the United States to whom, on or after December 4, 2006, Defendant provided an electronically printed receipt at the point of a sale or transaction on which Defendant printed more than the last five digits of the person's credit card or debit card number and/or printed the expiration date of the person's credit or debit card (the "Plaintiff Class"). Excluded from the Plaintiff Class are Defendant and its directors, officers and employees.

Motion at 4:12-18; Complaint at ¶¶ 14-15. Plaintiff made a purchase with a credit card at one of Defendant's Los Angeles, California, stores on December 19, 2006, at 3:44 p.m. Deposition of Katherine E. Spikings ("Spikings Depo.") at 12:1-14; Exh. 1. Less than four business hours later, at 11:30 a.m. on December 20, 2006, Plaintiff filed her Complaint. The Complaint was served on Defendant on December 28, 2006. By January 11, 2007, Defendant had implemented a change to delete the expiration date from credit card and debit card receipts.[3] March Decl. at ¶ 5; Declaration of Tom Willardson ("Willardson Decl.") at ¶ 3. The change implemented by Defendant deleted the expiration date from credit card and debit card receipts at all but three of Defendant's stores as of January 11, 2007, and the expiration date on credit card and debit card receipts at those three remaining stores was deleted on or before January 29, 2007. *Id.*

II. LEGAL STANDARD

The party seeking to certify a class bears the burden of formulating a sufficiently concise class definition, and demonstrating that the class meets the four requirements of Rule 23(a) and at least one of the requirements of Rule 23(b). *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), *as amended*, 273 F.3d 1266 (9th Cir. 2001). *See also, Metcalf v. Edelman*, 64 F.R.D. 407, 409-10 (N.D. Ill. 1974) (stating "[a] class must be capable of concise and exact definition."). Under Rule 23(a), a class action is only proper if "(1) the 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 or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. Proc. 23(a). While Rule 23(b) provides for the maintenance of several different types of class actions, Plaintiff in this case is moving under Rule 23(b)(3), which allows a class to be certified if a court finds both that common questions of law or fact "predominate" over individual questions 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). Failure to carry this burden

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[3] Defendant has truncated credit card and debit card numbers on all receipts since May 2000. Declaration of Cliff March ("March Decl."), ¶ 2.

precludes the party from maintaining its complaint as a class action. *Rutledge v. Electric Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

In order to obtain class certification, the party must provide facts to satisfy these requirements: simply repeating the language of the rules in its moving papers is insufficient. *Doninger v. Pacific Northwest Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977). A district court must conduct a "rigorous analysis" of the moving party's claims to examine whether the requirements of Rule 23 are met. *Gen. Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982). Although the court should not judge the ultimate merits of the case at the class certification stage, it may consider evidence relating to the merits if such evidence also goes to the requirements of Rule 23. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

III. DISCUSSION

In this case, Plaintiff cannot satisfy Rule 23(b)(3), which allows a class to be certified if a court finds both that common questions of law or fact "predominate" over individual question 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). "The superiority requirement is unique to those class actions maintained under Rule 23(b)(3)." *Kamm v. California City Development Company*, 509 F.2d 205 (9th Cir. 1975). As the Advisory Committee explained in its Note to Amended Rule 23, the superiority requirement allows the Court to exercise its considerable discretion in deciding whether or not to certify a class for a category of cases for which a class action may not be the best method:

> In the situations to which this subdivision ((b)(3)) relates, class-action treatment is not as clearly called for as in those described above, (i.e. (b)(1) and (b)(2)), but it may nevertheless be convenient and desirable depending upon the particular facts. Subdivision (b)(3) encompasses those cases in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.

Note to Amended Rule 23, 39 F.R.D. 98, 102-03; *see also, Ratner v. Chemical Bank New Trust Co.*, 54 F.R.D. 412, 416 (S.D.N.Y.1972) ("Students of [Rule 23] have been led generally to recognize that its broad and open-ended terms call for the exercise of some considerable discretion of a pragmatic nature."); *Legge v. Nextel Comm., Inc.*, 2004 WL 5235587 (C.D. Cal. June 28, 2004) ("Courts bear a significant responsibility to insure that the great power wielded by plaintiffs (or more accurately their counsel) carrying the cudgel of a class action is used only in appropriate cases.").

In applying Rule 23(b)(3), many courts have denied class certification on the grounds that class treatment fails to meet the "superiority" requirement where the defendant's liability "would be enormous and completely out of proportion to any harm suffered by the plaintiff." *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n. 5 (11th Cir.2003) (*citing Kline v. Coldwell Banker & Co.*, 508 F.2d 226 (9th Cir.1974)). In these cases, certification is not denied solely because of the possible financial impact it would have on a defendant, but based on the disproportionality of a damage award that has little relation to the harm actually suffered by the class, and on the due

process concerns attendant upon such an impact. *See, e.g., Ratner*, 54 F.R.D. at 416 (denying class certification where TILA's minimum award of $100 each for some 130,000 class members would be a "horrendous, possibly annihilating punishment, unrelated to any damage to the purported class or to any benefit to defendant"). The first of these cases involved the Truth in Lending Act ("TILA").[4] *See, e.g., Ratner*, 54 F.R.D. 412; *Shields v. First Nat'l Bank of Ariz.*, 56 F.R.D. 442 (D. Ariz. 1972) (declining to certify class of 72,000 that sought $100 million in statutory damages); *Alsup v. Montgomery Ward & Co.*, 57 F.R.D. 89 (N.D. Cal. 1972) (denying certification in TILA case seeking $20 million in statutory damages for one class and $8 billion for another); *Rodriguez v. Family Publications Service, Inc.*, 57 F.R.D. 189 (C.D. Cal. 1972) (denying class treatment under TILA where the defendant faced over $25 million in statutory damages); *Mathews v. Book-of-The-Month Club, Inc.*, 62 F.R.D. 479 (N.D. Cal. 1974) (denying class certification where minimum statutory penalties under TILA would have been $50 million); *Wilcox v. Commerce Bank*, 474 F.2d 336 (10th Cir. 1973) (finding trial court did not abuse discretion is declining to certify class).

Other courts have relied on the same logic in denying class certification where the damages would be "ad absurdum." *See, e.g., London*, 340 F.3d at 1255 n. 5; *Forman v. Data Transfer*, 164 F.R.D. 400 (E.D. Pa.1995) ("A class action would be inconsistent with the specific and personal remedy provided by Congress to address the minor nuisance of unsolicited facsimile advertisements."); *Wilson v. American Cablevision of Kansas City*, 133 F.R.D. 573, 578 (W.D. Mo. 1990). In addition, some courts have denied class certification in FCRA cases where the damages that would be imposed on the defendant would be out of relation to the harm suffered by the plaintiff. *See, e.g., Legge*, 2004 WL 5235587 (C.D. Cal. June 28, 2004) (declining to certify class action where, due to the size of the class, even minimal damages would impose "super penalties" on the defendant in relation to the harm suffered).

In this case, if a class is certified and Plaintiff prevails, even the minimum statutory damages would be ruinous to Defendant. The class as defined by Plaintiff in this case would include approximately 3.4 million people nationwide who made purchases with credit cards or debit cards between December 4, 2006, when the FACTA truncation requirements went into effect, and January 11, 2007, when Defendant implemented a change to delete the expiration date from credit card and debit card receipts. If Plaintiff is able to prove that Defendant committed a "willful" violation of FACTA, each class member would be eligible to receive between $100 and $1,000 in statutory damages. For a class of 3.4 million people, statutory damages alone would range from a *minimum* of $340 million to a maximum of $3.4 billion. Defendant's entire net worth is approximately $316 million, with net sales revenues for fiscal year 2005 of approximately $20 million. Willardson Decl. at ¶ 2. Thus, an award of even the minimum statutory damages of $340 million would put Defendant out of business.

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[4] While it appears that the Ninth Circuit has never explicitly addressed the issue of FACTA statutory damages in class action lawsuits that is at issue in this case, it has cited favorably to these TILA cases. *See, e.g., Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir.1974) (relying on TILA cases to deny class certification, and holding that a class action was not a superior method of adjudicating the controversy because "[a]t some point the logic of the law leads in this situation to an ad absurdum result."). Moreover, while TILA has been amended to include a cap on statutory damages, the rationale of the TILA cases decided prior to the inclusion of a cap on statutory damages still applies to FACTA cases because there currently is no cap on statutory damages under FACTA.

In addition, Plaintiff has testified that she did not suffer any actual damage, such as identity theft, as a result of her expiration date appearing on her credit card receipt from Defendant's store, and there is no evidence that any customer making a purchase from Defendant's store between December 4, 2006, and January 11, 2007 suffered any actual harm due to the inclusion of the expiration date on credit card and debit card receipts. Spikings Depo., 17:24-19:3; 21:23-25. Furthermore, it appears unlikely, if not impossible, for the inclusion of the expiration date on a credit card or debit card receipt to result in identity theft or any other actual harm. Declaration of Mari J. Frank, ¶ 9.[5] Given the disastrous consequences to Defendant's business and the thousands of Defendant's employees that would be left without a job if a class is certified in this case and the lack of any actual harm suffered by members of the potential class, the Court find that certification of a class would be inappropriate in this case.

Moreover, as soon as becoming aware that having the expiration date on credit card and debit card receipts may have been a technical violation of FACTA, Defendant promptly began the process of removing the expiration date from these receipts, and had removed the expiration receipt from all its stores' credit card and debit card receipts within one month. Defendant's immediate action to comply with FACTA's requirements once becoming aware of Plaintiff's Complaint also supports denial of class certification in this case. For example, in *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1377 (11th Cir. 1984), the Eleventh Circuit upheld the district court's denial of class certification where the disclosure statement at issued technically violated TILA but the defendant's vice president testified that subsequent to the filing of the lawsuit, defendant had discontinued using the forms about which the plaintiff had complained and was having all its forms reevaluated by its attorneys. In upholding the denial of the class certification, the Eleventh Circuit found that "although technical violations of the complex TILA disclosure requirements are sufficient to establish the cause of action, the purpose of the Act is to insure compliance by creditors and not to punish an unwary violator." *Id.*; *see also, Wilson*, 133 F.R.D. 573 (denying class certification where notice that allegedly was in violation of the Cable Communications Act had been amended prior to filing of motion for class certification).

More importantly, denial of class certification in this case does not prevent any of Defendant's customers who may have suffered actual damages as a result of Defendant's conduct from proceeding with individual cases to recover those damages. Likewise, any individual who feels that his rights under FACTA have been violated but who has not suffered any actual harm can, as Plaintiff has, file a lawsuit to recover statutory damages and, if successful, attorney's fees. *See* 15 U.S.C. § 1681n. Therefore, a class action is not the only means of ensuring that Defendant can be held accountable for violations of FACTA. Thus, some of the concerns that

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[5] Plaintiff objects to paragraph 9 of Ms. Frank's declaration as "[i]rrelevant (FRE, Rule 402), improper argument of the merits in a purely procedural motion, and improper legal argument outside of party's memorandum of points and authorities, in circumvention of the page limit on party's brief." Plaintiff's Objections to Defendant's Declarations Submitted in Support of Opposition to Class Certification, Exh. 1 at 7:17-20. However, "[i]n reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action." *Newton v. Merrill Lynch, Pierce, Fevver & Smith, Inc.*, 259 F.3d 154, 168 (3rd Cir. 2001). Accordingly, Plaintiff's objections are overruled.

might favor certification in other consumer protection schemes that do not provide for the recovery of statutory damages or attorney's fees are not present here.

Finally, as other courts have found, a class action would not be the superior method for the fair and efficient adjudication of the controversy in a case such as this one because it could possibly open the potential for abuse by the attorneys in such a class action. For example, in *Buford v. American Finance Co.*, 333 F.Supp. 1243, 1251 (N.D. Ga. 1971), the court stated "the plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated." *See also, Shields*, 56 F.R.D. at 451 (holding that allowing a class action under TILA "could be the means of curing an illness by killing the patient and in the process promoting unnecessary litigation mainly for the benefit of a few lawyers ready and willing to promote such cases"). While the Court does not express an opinion on the propriety of the conduct of Plaintiff's counsel in this case, the Court agrees that such a potential for abuse is an additional reason why maintenance of a class action is not superior to individual actions under FACTA in cases such as this one where there is an enormous contrast between the huge liability suffered by Defendant and the lack of harm suffered by Plaintiff.

IV. CONCLUSION

For all the foregoing reasons, Plaintiff has failed to satisfy Rule 23(b)(3). Accordingly, the Court **DENIES** Plaintiff's Motion.

IT IS SO ORDERED.

The Clerk shall serve a copy of this Minute Order on all parties to this action.