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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MICHAEL BATEMAN, individually
and on behalf of all others similarly
situated,

Plaintiffs,

vs.

AMERICAN MULTI-CINEMA,
INC., and DOES 1-10,

Defendants.

Case No. 2:07-cv-0171 FMC (AJWx)

ORDER DENYING PLAINTIFF'S
RENEWED MOTION FOR CLASS
CERTIFICATION

FOR PUBLICATION

This matter is before the Court on Plaintiff Michael Bateman's Renewed Motion for Class Certification (docket nos. 28, 48, 50), filed October 16, 2007 and September 22, 2008. The Court has considered the moving, opposition, and reply documents submitted in connection with this motion. The Court deems the matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. Accordingly, the hearing set for October 27, 2008, is removed from the Court's calendar. For the reasons and in the manner set forth below, the Court hereby DENIES Plaintiff's Motion for Class Certification.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This case arises out of the Fair and Accurate Credit Transactions Act

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1 (“FACTA”). FACTA requires, in relevant part, that credit or debit card receipts
2 issued to consumers shall not print more than the last 5 digits of the card number or
3 the expiration date upon the receipt. 15 U.S.C. § 1681c(g)(1). Plaintiff Michael
4 Bateman alleges that Defendant American Multi-Cinema issued credit and debit card
5 receipts from its automated box office kiosks that were in violation of FACTA.
6 Specifically, Defendant’s kiosks are alleged to have printed both the first 4 digits and
7 the last 4 digits of a credit card on each receipt. Plaintiff filed his Complaint on
8 January 5, 2007, alleging Defendant violated FACTA. However, the Complaint does
9 not allege that Plaintiff or any potential class members suffer or have suffered any
10 actual harm as a result of Defendant’s violation. Within two weeks of the Complaint
11 being filed, Defendant corrected its kiosks to fully comply with FACTA.

12 Plaintiff filed his original Motion for Class Certification on October 16, 2007
13 (docket no. 28). The Court denied Plaintiff’s original Motion because it failed to
14 satisfy the superiority requirement of Federal Rule of Civil Procedure 23(b)(3). The
15 Court found that if certified, the potential statutory damages to be awarded could be
16 enormous and completely out of proportion to any harm suffered by Plaintiff.
17 (Minute Order dated October 31, 2007.) The Court denied the Motion without
18 prejudice, however, as the Ninth Circuit had accepted interlocutory appeal of an
19 analogous case, *Soualian v. International Coffee and Tea LLC*, CV 07-502-RGK
20 (JCx) (C.D. Cal. filed June 11, 2007). The parties stipulated to a stay of the case
21 pending the Ninth Circuit’s decision in *Soualian*. However, the appeal was recently
22 dismissed after the parties in *Soualian* reached a settlement. The Court thereafter
23 permitted the parties in this case to submit supplemental briefing regarding the
24 impact on class certification of Congress’ recent amendment to FACTA, H.R. 4008.
25 (Minute Order dated Sept. 8, 2008.) Plaintiff thereafter filed his Renewed Motion
26 for Class Certification, and a Corrected Renewed Motion for Class Certification on
27 September 22, 2008 (docket nos. 48, 50).

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1 **II. LEGAL STANDARD**

2 “Before certifying a class, the trial court must conduct a ‘rigorous analysis’ to
3 determine whether the party seeking certification has met the prerequisites of Rule
4 23.” *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001)
5 (citing *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1233 (9th Cir. 1996)). The
6 party seeking class certification bears the burden of demonstrating that each of the
7 four requirements of Rule 23(a) and at least one requirement of Rule 23(b) has been
8 met. *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007).

9 Pursuant to Federal Rule of Civil Procedure 23, one or more members of a
10 class may sue as representative parties on behalf of the entire class only if all of the
11 following four elements are met:

- 12 (1) the class is so numerous that joinder of all members is
13 impracticable; (2) there are questions of law or fact common to the
14 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.

15 Fed. R. Civ. P. 23(a).¹

16 In addition, the Court must find that one of the conditions of Rule 23(b) has
17 been satisfied. Rule 23(b) provides that a class action may be maintained if: (1) the
18 prosecution of separate actions would create a risk of (a) inconsistent or varying
19 adjudications or (b) individual adjudications dispositive of the interests of other
20 members not a party to those adjudications; (2) the party opposing the class has acted
21 or refused to act on grounds generally applicable to the class; or (3) “questions of
22 law or fact common to the members of the class predominate over any questions
23 affecting only individual members, and that a class action is superior to other
24 available methods for the fair and efficient adjudication of the controversy.” Fed.
25 R. Civ. P. 23(b). In this case, Plaintiffs seek class certification pursuant to Rule

26 _____
27 ¹The four requirements for class representatives are commonly referred to by
28 the following shorthand labels, respectively: (1) numerosity, (2) commonality, (3)
typicality, and (4) adequacy.

1 23(b)(3).

2 Rule 23(b)(3) provides several factors to consider: “(A) the class members’
3 interests in individually controlling the prosecution or defense of separate actions;
4 (B) the extent and nature of any litigation concerning the controversy already begun
5 by or against members of the class; (C) the desirability or undesirability of
6 concentrating the litigation of the claims in the particular forum; (D) the likely
7 difficulties in managing a class action.” Fed. R. Civ. P. 23(b)(3).

8 **III. DISCUSSION**

9 In its Renewed Motion for Class Certification, Plaintiff submits three primary
10 arguments to support class certification: (1) Congress’ passage of H.R. 4008 reflects
11 Congressional approval of class actions based upon the printing of extraneous credit
12 card account numbers, (2) the outcome of FACTA class action settlements
13 demonstrates that damages will not be excessive or disproportionate, and (3) other
14 courts have certified FACTA class actions. Plaintiff also has filed a Request for
15 Judicial Notice of legislative materials and recent court decisions related to FACTA.
16 The Court finds that these documents are not subject to reasonable dispute and are
17 capable of accurate and ready determination by resort to sources whose accuracy
18 cannot reasonably be questioned. Fed. R. Evid. 201. Defendant also does not
19 dispute the accuracy or authentication of these materials and cites to them in its
20 Opposition papers. Plaintiff’s Request for Judicial Notice is therefore granted.

21 A. HR 4008

22 Congress passed the Fair and Accurate Credit Transactions Act (“FACTA”)
23 on December 4, 2003, which provides in relevant part, “no person that accepts credit
24 cards or debit cards for the transaction of business shall print more than the last 5
25 digits of the card number or the expiration date upon any receipt provided to the
26 cardholder at the point of the sale or transaction.” Pub. L. 108-159, 117 Stat. 1952,
27 codified at 15 U.S.C. § 1681c(g)(1). Congress imposed civil liability for willful
28 noncompliance in the amount of “any actual damages sustained by the consumer as

1 a result of the failure or damages of not less than \$100 and not more than \$1,000.”
2 15 U.S.C. § 1681n(a)(1)(A). Congress’ stated purpose for passing the Act was “to
3 prevent criminals from obtaining access to consumers’ private financial and credit
4 information in order to reduce identity theft and credit card fraud.” Pub. L. No. 110-
5 241, § 2, 122 Stat. 1565 (June 3, 2008).

6 After passage of FACTA, many merchants erroneously understood that its
7 mandate would be satisfied by truncating the account number down to the last five
8 (5) digits while leaving the expiration date displayed on the receipt. *Id.* After the
9 deadline for compliance passed, hundreds of lawsuits were filed alleging that the
10 failure to remove the expiration date willfully violated FACTA. *Id.* Congress found
11 that these lawsuits did not allege any actual harm, that proper truncation of the card
12 number by itself was sufficient to prevent fraud or identity theft, and that these
13 lawsuits represented a significant burden on commerce. *Id.* Congress therefore
14 enacted H.R. 4008, the Credit and Debit Card Receipt Clarification Act of 2007 on
15 June 3, 2008, to relieve businesses of potential liability for failing to remove
16 expiration dates from credit card receipts:

17 For the purposes of this section, any person who printed an expiration
18 date on any receipt provided to a consumer cardholder at a point of sale
19 or transaction between December 4, 2004, and June 3, 2008, but
20 otherwise complied with the requirements of section 1681c(g) of this
title for such receipt shall not be in willful noncompliance with section
1681c(g) of this title by reason of printing such expiration date on the
receipt.

21 Pub. L. No. 110-241, 122 Stat. 1565 (June 3, 2008) (codified at 15 U.S.C. §
22 1681n(d)). It is clear that H.R. 4008 does not provide Defendant with a safe-harbor
23 for truncating its credit card receipts to eight (8) digits rather than five (5).

24 Plaintiff argues that in passing H.R. 4008 and failing to provide relief for
25 Defendant’s situation, Congress implicitly approved of all class actions alleging
26 failure to properly truncate account numbers. Plaintiff cites various portions of the
27 legislative history indicating that legislators believed H.R. 4008 did not relieve
28 businesses from the duty to properly truncate credit card receipts. (Mot. at 6-7.) For

1 example, Representative Mahoney of Florida testified, “H.R. 4008 does not eliminate
2 a business’ obligation to properly truncate the account number or to redact the
3 expiration date from its receipts, and it does not protect merchants who printed more
4 than the account number permitted by the FACT Act.” H.R. 4008, 110th Cong., 154
5 Cong. Rec. H00000-29 (2008).

6 On the other hand, the congressional record also supports an inference that
7 members of Congress were primarily concerned with credit card receipts displaying
8 the entire credit card account number. As Defendant references in its Opposition,
9 Representative Bean testified, “it is noted by many identity theft experts that
10 individuals who commit fraud by stealing consumers’ credit and debit card numbers
11 cannot do so without having the entire correct account number.” *Id.* While
12 legislative history is often helpful in determining congressional intent, in this case,
13 it is far from clear whether Congress intended to approve class actions for printing
14 eight (8) digits rather than five (5). The congressional record simply does not
15 address the precise question whether lawsuits for failing to fully truncate credit card
16 receipts should proceed forward as class actions. However, Congress published
17 express findings regarding the purpose of H.R. 4008 within the bill itself:

18 Purpose. – The purpose of this Act is to ensure that consumers suffering
19 from any actual harm to their credit or identity are protected while
20 simultaneously limiting abusive lawsuits that do not protect consumers
but only result in increased cost to business and potentially increased
prices to consumers.

21 Pub. L. 110-241, § 2(b), 122 Stat. 1565 (June 3, 2008). This purpose and policy
22 resolves the case at hand, where Plaintiff has shown no actual harm to any potential
23 class members. Congress’ passing of H.R. 4008 reflects disapproval of class
24 certification for a case such as this.

25 B. Excessive Damages

26 Plaintiff points to a half dozen cases in this district that have approved FACTA
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1 class action settlements.² Plaintiff argues that the outcome of these cases
2 demonstrates it is unlikely that damages will ultimately be excessive or
3 disproportionate to the actual harm suffered by potential class members. For
4 example, in *Soualian*, Judge Klausner approved a settlement providing class
5 members with 45,000 certificates for one free coffee or tea beverage, worth over
6 \$300,000, as well as up to \$110,000 in attorneys' fees and up to \$2,500 for the class
7 representative. In *Bateman v. WF Cinema Holdings*, Magistrate Judge Johnson
8 approved a settlement awarding class members two movie tickets and two orders of
9 popcorn, \$100,000 in attorneys' fees and costs, and incentive awards of \$5,000 and
10 \$2,500 to the two class representatives. In other words, final resolution of these
11 cases largely involved awards of certificates, vouchers or coupons, and did not result
12 in excessive monetary awards based upon statutory damages, which in this case
13 range from \$29 million to \$290 million.

14 However, in none of these cases had the court previously certified the class
15 before considering a proposed settlement from the parties. For example, in *Soualian*,
16 Judge Klausner had previously denied class certification, and only granted class
17 status when presented with a fair and reasonable settlement:

18 In interpreting the superiority requirement previously . . . this Court
19 denied certification on the grounds that a class action was not the
20 superior method of adjudicating the class members' claims because a
21 potentially massive damage award (between \$4.8 million and \$48
million) would be disproportionate to any actual damage caused by the
alleged violations.

22 Now, the Parties are requesting conditional class certification for the
23 purposes of settlement only. The proposed settlement terms, which place
24 far less money at issue, ameliorate the Court's initial 23(b) concerns.

25 ² Plaintiff cites the following FACTA class action settlements: *Bateman v. WF*
26 *Cinema Holdings LP.*, CV 07-00213 (Johnson, Mag.); *Saunders v. Mann Theatres*,
27 CV 07-01021 (Johnson, Mag.); *Soualian v. Int'l Coffee & Tea, LLC*, CV 07-502
28 (Klausner, J.); *Clark v. Stein Mart, Inc.*, CV 07-0197 (Chapman, Mag.); *Leowardly*
v. Oakley, Inc., SACV 07-00053 (Carney, J.); *McGee v. Levy Restaurants*, CV 06-
7762 (Fairbank, J.).

1 *Soualian v. Int'l Coffee & Tea, LLC*, CV 07-502 (docket no. 178, at 5), available at
2 Plaintiff's Request for Judicial Notice, Ex 5, at 5. As no settlement similar to those
3 cited by Plaintiff has been presented to the Court in this case, Plaintiff's argument
4 that damages resulting from class certification will not be excessive or
5 disproportionate is premature and speculative. Plaintiffs have therefore failed to
6 show that the potential award of statutory damages is justified and proportional to
7 any actual injury suffered by potential class members. Accordingly, the Court
8 adopts its prior holding that Plaintiff's Motion for Class Certification fails to satisfy
9 the superiority requirement of Rule 23(b)(3), as the magnitude of Defendant's
10 statutory liability is enormous and completely out of proportion to any harm suffered
11 by Plaintiff or potential class members. Minute Order dated Oct. 31, 2007 (docket
12 no. 41) (citing *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir.
13 2003); *Kline v. Coldwell Banker & Co.*, 508 F.2d 226 (9th Cir. 1974)).

14 Furthermore, the Court is not persuaded by Plaintiff's argument that an
15 increased risk of identity theft, however slight, is sufficient to constitute actual harm.
16 (Reply at 3-4.) Plaintiff has not demonstrated how printing eight (8) digits on a
17 credit card receipt will result in harm to a consumer that is any greater than printing
18 five (5) digits. Plaintiff does not provide an example of a consumer who has actually
19 incurred measurable damages as a result of Defendant's kiosks. On the other hand,
20 Defendant has submitted the declaration of Mari Frank, an expert in identity theft
21 issues. Ms. Frank has declared that the mathematical probability of discerning the
22 remainder of the digits necessary to complete a transaction is minuscule, either
23 10,000,000:1 or 100,000,000:1.³ In comparison, the odds of correctly picking all the
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25 ³ Given a receipt that prints 8 digits, the probability is 10:000,000:1 for a credit
26 card account number that is 15 digits in length. The probability is 100,000,000:1 for
27 a credit card account number that is 16 digits in length. Presumably, the probability
28 of discerning the remaining digits of a credit card receipt properly truncated to 5 digits
is either 10,000,000,000:1 or 100,000,000,000:1.

1 numbers in California's Mega Millions Lottery game is 3,904,701:1. The Court
2 therefore rejects Plaintiff's argument that a slight increase in the risk of harm is
3 sufficient to justify class certification that may result in statutory damages ranging
4 from \$29 million to \$290 million.

5 C. Recent Decisions

6 Plaintiff cites a bundle of cases that have granted motions for class
7 certification based upon FACTA.⁴ The majority of these cases, however, were
8 decided in the Northern District of Illinois, which is bound by the Seventh Circuit's
9 decision in *Murray*. The Seventh Circuit declined to adopt the Ninth Circuit's
10 decision to refrain from certifying class actions where damages are disproportionate
11 to the actual harm suffered. *See Murray v. GMAC Mortgage Corp.*, 434 F.3d 948,
12 953-54 (7th Cir. 2006) (rejecting the district court's decision to deny class
13 certification based upon excessive damages). The only cases cited within this district
14 to have granted class certification based upon FACTA are the three cases decided by
15 Judge Selna, but these cases have been subsequently dismissed pursuant to the
16 passage of H.R. 4008. Furthermore, the court in *Pirian v. In-N-Out* ruled on a
17 Motion to Dismiss, not a Motion for Class Certification, and *White v. E-Loan, Inc.*
18 did not involve class certification for failure to truncate credit card receipts.

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20 ⁴ *Redmon v. Uncle Julio's of Illinois, Inc.*, 249 F.R.D. 290 (N.D. Ill. 2008);
21 *Meehan v. Buffalo Wild Wings, Inc.*, 249 F.R.D. 284 (N.D. Ill. 2008); *Matthews v.*
22 *United Retail, Inc.*, 248 F.R.D. 210 (N.D. Ill. 2008); *Harris v. Circuit City Stores*,
23 2008 WL 400862 (N.D. Ill. 2008); *Cicilline v. Jewel Food Stores, Inc.*, 542 F. Supp.
24 2d 831 (N.D. Ill. 2008); *Halperin v. Interpark Inc.*, 2007 WL 4219419 (N.D. Ill.
25 2007); *Troy v. Red Lantern Inn, Inc.*, 2007 WL 4293014 (N.D. Ill. 2007); *In re*
26 *Farmers Ins. Co., Inc. FCRA Litigation*, 2006 WL 1042450 (W.D. Ok. 2006);
27 *Klingensworth v. Max & Erma's Restaurants, Inc.*, 2007 WL 3118505 (W.D. Pa.
28 2007); *Reynoso v. South County Concepts*, SACV 07-373 (C.D. Cal. 2007) (Selna, J.);
Medrano v. WCG Holdings, Inc., SACV 07-0506 (C.D. Cal. 2007) (Selna, J.); *Kesler*
v. Ikea U.S. Inc., 2008 WL 413268 (C.D. Cal. 2008) (Selna, J.); *Pirian v. In-N-Out*
Burgers, 2007 WL 1040864 (C.D. Cal. 2007); *White v. E-Loan, Inc.*, 2006 WL
2411420 (ND. Cal. 2006).

1 Accordingly, the Court does not find Plaintiff's citations to be sufficiently persuasive
2 in its Renewed Motion for Class Certification.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiff's Renewed Motion for Class Certification
5 (docket nos. 28, 48, 50) is hereby **DENIED**.

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7 **IT IS SO ORDERED.**

8 Dated: October 24, 2008

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FLORENCE-MARIE COOPER, JUDGE
UNITED STATES DISTRICT COURT

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