Nos. 14-1471, 14-1470, 14-1658

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SCOTT D.H. REDMAN, individually and on behalf of all others similarly situated, et al.,
Plaintiffs-Appellees,

v.

RADIOSHACK CORPORATION,
Defendant-Appellee.

Appeals of: Michael Rosman et al. and Vanita Gupta et al.,
Objectors-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
Case No. 1:11-cv-6741, consolidated with No. 1:11-cv-7819.
The Honorable Maria Valdez, Magistrate Judge

Response Brief of Defendant-Appellee

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JURISDICTIONAL STATEMENT

The Gupta Objectors' Jurisdictional Statement is complete and correct.[1]

STATEMENT OF ISSUES

Defendant-Appellee RadioShack Corporation addresses only the first two arguments (Sections II and III) raised by the Gupta Objectors. Plaintiffs-Appellees will address the third issue (Section IV) of the Gupta Objectors' Appellant Brief, along with the issues raised by the Rosman Objectors.[2] The issue addressed in this brief by RadioShack is: Whether the district court, in assessing whether this class action settlement is fair, reasonable and adequate, properly exercised its discretion when analyzing the strength of plaintiffs' case (the first factor set forth in *Synfuel Techs., Inc. v. DHL Express (USA) Inc.*, 463 F.3d 646 (7th Cir. 2006) and the only factor challenged by any objector) by:

(1) treating the issue of a "willful" violation under 15 U.S.C. § 1681n(a)(1) of the Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681c(g)(1), as a question of fact rather than as a question of law and concluding that Plaintiffs would have a difficult road ahead in winning and securing FACTA damages; and

(2) finding more value in a present settlement than continued litigation without a guarantee of an award of damages.

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[1] Objectors-Appellants Vanita Gupta, Gregory Runyard, Charles H. Warner, Jr. and Eduardo Vasquez are referred to as the Gupta Objectors.

[2] Objectors-Appellants Michael Rosman, Jessica Kasten and Robert Scott are referred to as the Rosman Objectors.

STATEMENT OF THE CASE

These consolidated cases turn on a single claim under FACTA, which amended the Fair Credit Reporting Act ("FCRA") in 2003. FACTA requires merchants, when providing customers with electronically-printed credit or debit card receipts, to truncate all but the last five digits of the payment card number and not to include the card's expiration date. The only claim in this case relates solely to the receipts printed by a new point of sale ("POS") system that RadioShack rolled out from August 2010 through November 2011 throughout its national chain of stores to replace its existing POS system. Indeed, it was the filing of these cases that informed RadioShack that the new POS system was mistakenly printing out expiration dates on receipts, even though the new POS system was intended to be FACTA compliant, just like the POS system it was replacing.

On September 26, 2011, Plaintiff Scott Redman filed a complaint against RadioShack. The complaint alleged that Redman made a purchase at a RadioShack store with a MasterCard credit card, and that the information printed on his receipt included the expiration date of the card in violation of FACTA (though the card's digits were appropriately truncated). (Rosman App. A43 (Dkt. Entry 1).) Redman's complaint was the first notice to RadioShack that its new POS system was printing the month and year of credit card expiration dates on customer receipts. (Gupta App. AG 5); *see also* 15 U.S.C. § 1681n(d).

Plaintiffs Mario Aliano and Victoria Radaviciute then brought suit based on an October 24, 2011 transaction, before RadioShack had completed the implementation of the fix for the printing error in all of its thousands of stores nationwide. (Dkt. No. 23-1.) The Court consolidated the cases as related on January 11, 2012. (Rosman App. A45 (Dkt. Entry 26).)[3] Both cases sought to certify a class on behalf of all RadioShack customers whose receipt displayed the expiration date of the credit or debit card used to make a purchase through the new POS system.

Beginning in March 2012, the parties engaged in several rounds of arms-length settlement negotiations, including settlement conferences with Magistrate Judge Valdez. (Rosman App. A46-50 (Dkt. Entries 36, 40, 45, 50, 59, 67, 70, 73, 76, 84, 96).) At the same time, the parties exchanged extensive written and document discovery. (Rosman App. A47 (Dkt. Entries 51-53, 55).) On May 16, 2013, after over a year of settlement negotiations and two settlement conferences with Magistrate Judge Valdez, the parties reached an agreement and Plaintiffs filed a motion for preliminary approval of the class settlement. (Rosman App. A50 (Dkt. Entry 94).) The parties consented to the jurisdiction of Magistrate Judge Valdez for resolution of the motion. (Rosman App. A50 (Dkt. No. 97).)

The district court granted preliminary approval of the parties' settlement on May 29, 2013. (Rosman App. A76-79 (Dkt. No. 101).) In so doing, the court

[3] "App. A*n*" refers to page *n* of the Rosman Objectors' appendix and "App. AG*n*" refers to page *n* of the Gupta Objectors' appendix.

approved the parties' proposed notice plan that included notice by email, postcard and publication in several national magazines and newspapers, appointed Plaintiffs' counsel as settlement class counsel, and set a fairness hearing for final approval of the settlement. (*Id.*) Notice was then sent to class members; 83,332 class members responded by submitting claim forms. (Rosman App. A13 (Dkt. No. 158, Memorandum Opinion and Order (hereinafter "Mem. Op.")).) The district court then held a fairness hearing on the proposed settlement on September 17, 2013. (Rosman App. A53 (Dkt. Entry 142).) The Gupta Objectors and Michael Rosman and Jessica Kasten appeared at the fairness hearing through counsel to object to the settlement. (Rosman App. A111-12 (Dkt. No. 150).)

Members of the settlement class include all customers "who, between August 24, 2010 and November 21, 2011, paid by credit or debit card for products or services and received an electronically-printed receipt from any Store that contained the expiration date of the person's credit or debit card." (Rosman App. A61 (Dkt. No. 94-1).) The class period covered the entire time that the new POS system was in use in any store throughout the country up to the time that the error was completely fixed in every such store. The class was estimated to include up to 16 million customers, as approximately 16 million transactions were at issue. (*See* Mem. Op., Rosman App. A13.)

Under the Settlement Agreement, RadioShack agreed to pay up to $5.35 million as a benefit to the class, consisting of settlement vouchers, *cy pres*, notice to the class, administration costs and attorneys' fees. (Rosman App.

A61.) Pursuant to the Settlement Agreement, each class member who submitted a claim would receive a $10 Settlement Voucher redeemable in RadioShack stores or online at RadioShack.com. (Rosman App. A62.) The Settlement Vouchers do not require a minimum purchase amount before they can be used. (*Id.*) The Settlement Vouchers are fully transferable and stackable in that up to three vouchers may be used at one time. (*Id.*) The Settlement Agreement also provided for a *cy pres* distribution in the event disbursements and claims under the agreement totaled less than $3.25 million. (Rosman App. A63.) The high number of claims—83,332—mooted the possibility of a *cy pres* distribution because expenditures for Settlement Vouchers, together with notice and administration costs and attorneys' fees and incentive awards, exceeded the $3.25 million minimum payment. (Mem. Op., Rosman App. A13.)

On February 7, 2014, the district court issued its Memorandum Opinion, overruling all objections and approving the settlement as fair, reasonable and adequate under Federal Rule of Civil Procedure 23. (*Id.* A37.) The district court issued its Final Approval Order on February 25, 2014. (Rosman App. A38 (Dkt. No. 161).)

After the Final Approval Order was issued, three sets of Objectors filed Notices of Appeal (Dkt. Nos. 162, 164 and 182), and the appeals have been consolidated.

SUMMARY OF ARGUMENT

The district court properly exercised its discretion in approving this class action settlement as fair, reasonable and adequate. The district court thoroughly assessed the five factors this Court mandated it "must consider," namely, "the strength of plaintiffs' case compared to the amount of defendants' settlement offer; an assessment of the likely complexity, length, and expense of the litigation; an evaluation of opposition to the settlement among affected parties; the opinion of competent counsel; and the stage in the proceedings and the amount of discovery completed at the time of settlement." *Synfuel Techs., Inc. v. DHL Express (USA) Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (quoting *Isby v. Bayh*, 75 F.3d 1191, 1199 (7th Cir. 1996)).

Under the first *Synfuel* factor, the district court concluded that Plaintiffs faced a heavy burden in proving that RadioShack's FACTA violation was willful, as would have been required to secure damages. The Gupta Objectors challenge only the district court's assessment under the first *Synfuel* factor.

The district court also carefully analyzed the value of the settlement benefit as compared to potential benefits associated with lengthy and difficult litigation and concluded that the $10 Settlement Vouchers offered to class members were adequate compensation. In reaching this conclusion, the district court reasoned that the Settlement Vouchers, which require no minimum purchase and are freely transferrable and stackable, provide both a guaranteed and immediate value to class members who have suffered no harm and who would not otherwise be guaranteed an award.

For these reasons, it was well within the sound discretion of the district court to approve the settlement under Federal Rule of Civil Procedure 23 as fair, reasonable and adequate.

ARGUMENT

Under FACTA, a merchant's negligent failure to properly truncate card numbers or expiration dates carries with it liability for actual damages suffered by a consumer. *See* 15 U.S.C. § 1681o(a)(1) (creating a negligence cause of action for "actual damages"). If a consumer can plead and prove that the merchant "willfully fail[ed] to comply" with the statutory truncation requirements, however, then he can choose not to seek and prove actual damages but instead can seek statutory damages of $100 to $1,000 per consumer, regardless of whether he suffered any harm. *See id.* § 1681n(a). Here, Plaintiffs do not allege any injury or seek actual damages; they seek only statutory damages.

According to Congress, the purpose of FACTA and its accompanying statutory damages provisions is to "prevent identity theft." H.R. Rep. 108-263. As Congress has recognized, "experts in the field agree that proper truncation of the card number, by itself . . . *regardless of the inclusion of the expiration date*, prevents a potential fraudster from perpetrating identity theft or credit card fraud." Finding 6, Pub. L. 110-241, § 2, 122 Stat. 1565 (June 3, 2008) (emphasis added). Nevertheless, the statute permits a consumer to pursue a claim solely for the inclusion of the expiration date on a receipt, even if the

credit card digits are properly truncated. The consumer, however, has the burden of proving that the merchant's violation of FACTA was willful.

In assessing the fairness of the settlement here under Rule 23(e)(3), the district court applied the factors set forth in *Synfuel*: "the strength of plaintiffs' case compared to the amount of defendants' settlement offer; an assessment of the likely complexity, length, and expense of the litigation; an evaluation of opposition to the settlement among affected parties; the opinion of competent counsel; and the stage in the proceedings and the amount of discovery completed at the time of settlement." *Synfuel*, 463 F.3d at 653 (quoting *Isby*, 75 F.3d at 1199). None of the factors is itself sufficient to warrant approval or disapproval of a settlement; rather the court's analysis should focus on whether, on balance, the factors weigh in favor of the settlement. *See Isby*, 75 F.3d at 1199. In this case, the district court found that "each of the five *Synfuel* factors support the conclusion that the settlement is fair, reasonable, and adequate and therefore warrants final approval." (*See* Mem. Op., Rosman App. A16.)

The two sets of objectors before this Court raise the following points:

1. The Rosman Objectors do not take issue with any aspect of the district court's analysis of the settlement under *Synfuel*, but instead challenge only the reasoning for the district court's approval of attorneys' fees.

2. In addition to challenging the reasoning for the fee award, the Gupta Objectors take issue only with the district court's conclusion under the first *Synfuel* factor that balancing the strength of the plaintiffs' case on the

merits against the amount offered in settlement weighed in favor of approval. (Gupta Am. Br. at 5-16.) No objector takes issue with the district court's analysis of the remaining four *Synfuel* factors.

Plaintiffs-Appellees' brief addresses all of the objectors' challenges to fees. RadioShack agrees that the district court did not err in awarding the attorneys' fees. RadioShack addresses here only the Gupta Objector's challenge to the district court's approval of the settlement. As discussed below, the arguments that the Gupta Objectors raise can be readily dispatched. The willfulness inquiry at the heart of this matter is clearly a question of fact, not a question of law as the Gupta Objectors argue. Moreover, in concluding that receipt of a $10 freely transferrable Settlement Voucher now more than compensated each class member, the district court did not abuse its discretion by taking into account the real (indeed, likely) possibility that class members could end up recovering no damages after years of lengthy and difficult litigation.

A. Standard of Review

As the Gupta Objectors acknowledge (*see* Gupta Am. Br. at 5), this Court reviews the district court's approval of a settlement under Federal Rule of Civil Procedure 23(e)(3) only for an abuse of discretion. *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011).

B. The District Court Correctly Concluded That The Willfulness Inquiry Would Be Fact Specific.

When evaluating the strength of Plaintiffs' case, the district court correctly recognized that because no actual damages were claimed, "the only avenue for monetary relief would be proof that Defendant acted willfully."

(Mem. Op., Rosman App. A9.) The district court concluded that this would be "a heavy burden to meet" considering how plaintiffs in previous FACTA class actions "have struggled to show conclusive evidence of willful violations." (*Id.*) That conclusion is unassailable.

In contending otherwise, the Gupta Objectors initially argue that it was an abuse of discretion for the district court to assume that willfulness would be a question of fact rather than one of law. Not so. Indeed, it is black-letter law that "whether conduct is willful under the Act *is generally a question of fact*." *Germain v. Bank of Am., N.A.*, 13-cv-676-bbc, 2014 U.S. Dist. LEXIS 45165, at *10 (W.D. Wisc. Apr. 2, 2014) (emphasis added) (quoting *Safeco*, 551 U.S. at 68-69); *see also Edwards v. Toys 'R' Us*, 527 F. Supp. 2d 1197, 1210 (C.D. Cal. 2007) ("Willfulness under the FCRA is generally a question of fact for the jury.").

The Supreme Court defined willfulness under the FCRA to encompass knowing and reckless violations of the standard. *Safeco Ins. Co. v. Burr*, 551 U.S. 47, 57 (2007). The Supreme Court clarified that "recklessness" is "conduct violating an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known." *Id.* at 68. The majority of FACTA cases involve situations like the one here, where the defendant knew of the law but did not know of the violation. Thus, there is no knowing violation of the law. In such cases, as in *Germain* and *Toys 'R' Us*, courts unanimously have found the issue of whether the defendant's conduct was reckless, and therefore willful, to be a question of fact, and one that is dauntingly difficult to prove. *See, e.g.*, *Armes v. Sogro*, 932 F. Supp. 2d 931

(E.D. Wisc. 2013) (denying plaintiff's and defendant's motions for summary judgment because a reasonable jury could find defendant acted carelessly but not willfully); *Aliano v. Joe Caputo & Sons-Algonquin, Inc.*, 09 C 910, 2011 WL 1706061, at *4 (N.D. Ill. May 5, 2011) (denying defendant's motion for summary judgment on issue of willfulness because of presence of genuine issue of material fact); *Hammer v. JP's Sw. Foods, L.L.C.*, 739 F. Supp. 2d 1155, 1166-68 (W.D. Mo. 2010) (denying summary judgment to plaintiff where questions of material fact existed as to whether defendant's owner was aware of the FACTA requirements despite nine notices from its credit card processing company and alerts from customers). In fact, "no FACTA class action alleging a willful failure to truncate credit card numbers has been decided in favor of a plaintiff at the summary judgment stage." *Shurland v. Bacci Cafe & Pizzeria on Ogden, Inc.*, No. 08 C 2259, 2011 WL 3840339, at *5 (N.D. Ill. Aug. 30, 2011) (noting that "[i]n seeking summary judgment on this issue, Plaintiff acknowledges that 'the issue of willfulness is generally a question of fact for the jury.'").

The Gupta Objectors ignore all of this caselaw, and instead argue that whether RadioShack willfully violated FACTA is a legal question hinging on whether RadioShack interpreted the statute in an objectively reasonable manner. (Gupta Am. Br. at 6.) But RadioShack did not argue that it had interpreted FACTA as allowing the printing of receipts with a payment card's expiration date. Rather, RadioShack's defense was that the printing of the expiration dates was the result of a mistake in how its new POS system was

programmed. The Gupta Objectors miss the point entirely by citing cases addressing only whether a defendant's mistaken interpretation of FACTA was objectively reasonable, such that the resulting FACTA violation could not be willful as a matter of law.[4] The Gupta Objectors completely ignore the bulk of FACTA cases, which require a factual inquiry into whether the defendant's action in printing payment card information on customer receipts despite their knowledge of the existence of FACTA amounted to a willful violation. The requisite assessment of the nature of a defendant's actions amounts to "a factual determination as to whether Defendant's actions were negligent, or were reckless or otherwise willful. *That determination must be made by a jury*." *See, e.g.*, *Shurland*, 2011 WL 3840339, at *7 (emphasis added).

[4] The Gupta Objectors focus only on *Van Straaten v. Shell Oil Prods. Co., LLC*, 678 F.3d 486, 487-88 (7th Cir. 2012) (Gupta Am. Br. 6, 8) (evaluating the reasonableness of defendant's interpretation of FACTA as allowing for the printing of the last four digits of the account number, rather than card number, as a matter of law); *Long v. Tommy Hilfiger U.S.A., Inc.*, 671 F.3d 371 (3d Cir. 2012) (Gupta Am. Br. 7, 8) (granting summary judgment to defendant because its interpretation of FACTA (that it could print the month but not the year of a payment card's expiration date) was not objectively unreasonable); *Todd v. Target Corp.*, 10 C 5598, 2012 U.S. Dist. LEXIS 44362, at *6 (N.D. Ill. Mar. 30, 2012) (Gupta Am. Br. 7, 8) (denying defendant's motion for summary judgment because defendant's interpretation of the law (that merchant copies are exempt from FACTA), even if reasonable, was insufficient to insulate the defendant from liability if a cashier intentionally provided a customer with the merchant copy). These cases are inapposite, as are the remaining cases the Gupta Objectors cite on page 7 of their Amended Brief, which merely stand for the proposition that FACTA prohibits the printing of electronic receipts containing the payment card's expiration date.

C. The District Court Correctly Assessed The Difficulty of Proving Willfulness.

The Gupta Objectors next contend that, even if willfulness were a question of fact, the district court erred because it did not include "any analysis, as a factual matter, on the exact difficulty in proving that RadioShack's conduct was at a minimum 'reckless' and therefore 'willful' under *Safeco* in light of it being sued in 2006 in *Ferron* for the exact same conduct." (Gupta Am. Br. at 9.) To the contrary, the district court was not required to analyze the "exact difficulty" of proving willfulness. Instead, the district court was entitled to rely on Plaintiffs' counsel's assessment of the difficulty in proving willfulness in the case based upon counsel's knowledge of the law and review of a substantial discovery production. *See Gautreaux v. Pierce*, 690 F.2d 616, 634 (7th Cir. 1982) ("As we have previously noted the district court was entitled to rely heavily on the opinion of competent counsel") (citations and internal quotation marks omitted). This Court has made clear that district court judges reviewing class action settlements "should not substitute their own judgment as to optimal settlement terms for the judgment of the litigants and their counsel." *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 315 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873, 875 (7th Cir. 1998)).

Rather than substituting its own judgment for the opinion of counsel, the district court carefully reviewed existing case law identifying the difficulties plaintiffs face in proving willfulness. (Mem. Op., Rosman App. A9.) The district court recognized that it would likewise be difficult for Plaintiffs to prove

willfulness in this case and also relied on Class Counsel's representation to that effect. (*Id.* A10.)

In any event, the points that the Gupta Objectors raised before the district court and now argue the district court did not adequately consider actually contradict their contentions. The Gupta Objectors argue that the district court should have given more weight to the relevance of a prior suit against RadioShack, the *Ferron* matter, relating to the printing of expiration dates on certain receipts by a different POS system, and to RadioShack's acknowledgement that it was aware of FACTA's requirements. These points show only that RadioShack had knowledge of FACTA's requirements. Willfulness under *Safeco*, however, requires more than knowledge of the law plus failure to comply. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 129 (1985) ("*TWA*") (rejecting argument that a violation of the Age Discrimination in Employment Act is "willful" if the employer knew about the applicability of the Act, and yet failed to comply); *see also Fuges v. Southwest Fin. Servs., Ltd.*, 707 F.3d 241, 248 n.13 (3d Cir. 2012) (recognizing that "knowing noncompliance . . . constitutes a willful FCRA violation" but declining to find willfulness on that basis because the record "contain[ed] no evidence that [the defendant] knew it was in violation of the FCRA"); *Shurland*, 2011 WL 3840339, at *5-6 (citing cases where plaintiff's motion for summary judgment was denied despite the fact that defendant "unquestionably knew about the requirements of FACTA yet failed to comply with the statute" and explaining that knowledge plus noncompliance, in and of itself, is not sufficient to

establish willfulness as a matter of law). As the Supreme Court has explained, if a finding of "willfulness" required only knowledge, plus failure to comply, it "would result in an award of [statutory] damages in almost every case," thus "frustrat[ing] . . . Congress['s] intended . . . two-tiered liability scheme." *See TWA*, 469 U.S. at 128.

Judge Grady made that very point in this case during the court hearing to which the Gupta Objectors cite: "I'm used to dealing with willfulness in all kinds of contexts and *I've never heard of willfulness that was synonymous with knowledge of what the law is.* I mean that's . . . completely new to me." (Gupta App. AG 12 (emphasis added).)

"In order to allege a willful violation, there must be some allegation that the Defendant knew of the standard and voluntarily or intentionally violated it." *Vidoni v. Acadia Corp.*, No. 11-cv-00448-NT, 2012 WL 1565128, at *3 (D. Me. Apr. 27, 2012). Not surprisingly, as noted above, the Gupta Objectors have not uncovered a single FACTA case where a plaintiff has proven willfulness. On the other hand, in several instances, defendants have been granted summary judgment where plaintiffs did not present sufficient facts for a reasonable jury to find that defendant engaged in reckless disregard of the statute.[5] The same

[5] For example, in *Keller v. Macon Cty. Greyhound Park, Inc.*, the district court granted (and the Eleventh Circuit affirmed) summary judgment to defendants, reasoning that plaintiff failed to present evidence of reckless disregard when the evidence showed that: (1) defendant obtained and contracted with a consultant to install and maintain point-of-sale software; (2) that software crashed; (3) a consultant restored the system to functionality and incorrectly configured it to print all 16 digits of the card numbers; and (4) defendant, working in connection with the consultant, rectified the situation

result would have been appropriate here; at the very least, it further buttresses the reasonableness of the settlement.

D. The Court Correctly Found the Settlement Fair, Reasonable and Adequate in Light of Uncertain Prospects of Recovery if Litigation Were to Continue.

Finally, in the course of analyzing the fairness of the settlement in light of Plaintiffs' case under the first *Synfuel* factor, the district court thoroughly assessed the value of continued litigation to the class. The court found it to be low in light of the very real possibility that Plaintiffs may not be able to succeed on the merits, and thus, could recover absolutely nothing. (Mem. Op., Rosman App. A11-12.) The Gupta Objectors cannot deny that when the district court evaluated this settlement (or, for that matter, since), there had not been a case where a plaintiff had actually prevailed on the merits of a FACTA claim. By its very nature, as the district court concluded, a settlement represents "a compromise that affords a lower award with certainty," which is formulated based on the parties' relative litigation risks. (Mem. Op., Rosman App. A18 (quoting *Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 952 (7th Cir. 2006)).)

The district court also took into account that RadioShack's financial condition may limit the class's recovery even if Plaintiffs were successful in

(continued…)

promptly upon learning of the incorrect printing. No. 3:07-cv-1098-WKW, 2011 WL 1559555 (M.D. Ala. Apr. 25, 2011), *aff'd*, 2012 WL 919177 (11th Cir. Mar. 20, 2012). And in *Vidoni v. Acadia Corp.*, the court actually dismissed the complaint on defendant's Rule 12(b)(6) motion where plaintiff pled only that defendant knew of the law's requirements, based on the fact that it was FACTA compliant at other restaurant locations, but failed to comply with FACTA at the location where plaintiff made his purchase. 2012 WL 1565128, at *3-5.

their suit, thereby reducing the expected value of continued litigation. The difficulties faced by Plaintiffs in securing an award in the event of a successful suit further reinforce the court's conclusion that "the $10 vouchers that are available to class members under the settlement agreement are adequate compensation." (*Id.* A10-11; *see also id.* A19.)

Finally, the district court took into account that the settlement would produce an immediate benefit to class members, as opposed to an uncertain future benefit. (Mem. Op., Rosman App. A19 (quoting *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277, 284 (7th Cir. 2002) ("To most people, a dollar today is worth a great deal more than a dollar ten years from now.")).)

The Gupta Objectors' challenge to the district court's valuation is based on just two cases (*GMAC* and *Reynolds*) that the district court actually considered at length in its opinion. (*See* Mem. Op., Rosman App. A17-19.) But these two cases do not, contrary to the Gupta Objectors' suggestion, stand for the proposition that the district court needed to make an actual "dollar determination of the net expected value of the case going forward." (*See* Gupta Am. Br. 11-12.)

In *Reynolds*, the court found evidence of collusion between defendants and class counsel in a case where class members suffered real, and often significant, harm and on whose behalf other class actions were pending with claims that would be released under the Settlement Agreement. *See Reynolds*, 288 F.3d 283-84. Under those "suspicious circumstances," the Seventh Circuit ruled the district court should have made some effort to quantify the

net expected value of continued litigation to the class. *See id.* In contrast, here the district court specifically addressed and rejected the spurious allegations of collusion raised by the Gupta Objectors below. (Mem. Op., Rosman App. A32.) In *GMAC*, the court dealt with a class settlement that left class members with less than 1% of the minimum statutory damages (as opposed to 10% here). This Court noted in dicta that in settlements where class members receive virtually nothing (pennies), larger payments to named plaintiffs and class counsel may make the settlement look like a sellout. *GMAC*, 434 F.3d at 954. Notably, however, the *GMAC* court did not ascribe a minimum value to what a settlement award must be, nor did it require the district court to engage in a precise mathematical calculation of the net expected benefit to the class that could be obtained through litigation, as compared to the benefit of the settlement award.

Likewise, the Gupta Objectors' argument that there should have been more specific analysis as to the parameters of a possible RadioShack bankruptcy (*see* Gupta Am. Br. 12) can be readily dismissed. There was no reason for the district court to go beyond taking Plaintiffs' concerns relating to RadioShack's financial condition into account, as Plaintiffs asked the district court to do. There is nothing in the law that requires courts to analyze all possible ways in which a company might reorganize in the future or to conduct an independent analysis of publicly available financial information about a class action defendant. The court properly reviewed RadioShack's financial

information and Plaintiffs' concerns of potential bankruptcy. (*See* Mem. Op., Rosman App. A19.) Nothing further was required.

The Gupta Objectors also challenge the district court's failure to place a dollar value on the $10 Settlement Voucher to class members and to RadioShack.[6] The district court properly found the Settlement Vouchers valuable because they did not require any additional purchase to be used and RadioShack has more than 6,000 different items that can be purchased for under $10. (S*ee* Dkt. No. 128, Plaintiffs' Response to Gupta et al., at 8.) As the district court noted (*see* Mem. Op., Rosman App. A11, A18), the vouchers are freely transferrable, enabling class members to transfer their vouchers to others. *See In re: Toys R Us – Delaware, Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 453 (C.D. Cal. 2014) (finding tangible value in freely transferrable settlement gift cards).

The class settlement reached by RadioShack in this case, where the class was estimated at approximately 16 million members (*see* Rosman App. A13), is analogous to other, similarly-sized FACTA settlements that have been approved without issue. For example, in *Dudzieneski v. GMRI, Inc. d/b/a The Olive Garden Italian Restaurant*, No. 1:07-cv-03911 (N.D. Ill.) (Cole, J.), a FACTA

[6] The Gupta Objectors' admonition that the district court "must consider the real monetary value and likely utilization rate of the coupons provided by the settlement" under 28 U.S.C. § 1712(d) (Gupta Am. Br. 14-15) has no bearing in this case, where the $10 Settlement Vouchers are not coupons within the meaning of the Class Action Fairness Act ("CAFA"). RadioShack refers this Court to the arguments raised by Plaintiffs-Appellees in their Response Brief as to why the Settlement Vouchers are not coupons within the meaning of CAFA.

class action involving 36 million transactions, the class settled for a voucher for a free appetizer (up to $9.00 in value), redeemable in the restaurants with no minimum purchase. *See* July 19, 2009 Final Approval Order, *Dudzieneski v. GMRI, Inc. d/b/a The Olive Garden Italian Restaurant*, No. 1:07-cv-03911 (N.D. Ill.), Doc. No. 68. That settlement was not appealed. And in *Stillmock v. Weis Markets, Inc.*, No. 1:07-cv-1342 (D. Md.), a 15 million person class settled for a $7.50 voucher for use in the supermarket, which voucher would be reduced pro rata if the value of claimed vouchers, together with attorneys' fees and notice costs, exceeded $2 million. *See* July 25, 2011 Final Approval Order, *Stillmock v. Weis Markets, Inc.*, No. 1:07-cv-1342 (D. Md.), Doc. No. 127. The settlement was not appealed. Finally, and most recently, in *In Re: Toys 'R' Us – Delaware, Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litigation*, MDL No. CV 06-08163 MMM (C.D. Cal., approved January 17, 2014), a nationwide class comprising over 13 million transactions settled for vouchers of "between $5 and $30," which are fully transferrable and valid for six months after their issuance for use at Toys 'R' Us stores. *See In re: Toys R Us – Delaware, Inc. – Fair and Accurate Credit Transactions Act (FACTA) Litig.*, 295 F.R.D. 438, 447 (C.D. Cal. 2014). No party objected to the settlement. *Id.* at 456.[7]

[7] As they did before the district court, the Gupta Objectors request the Court to consider the settlement approved on March 27, 2013 in *Sosinov v. RadioShack Corp.*, Case No. BC448675 (Cal. Sup. Ct., L.A. Cty.) in determining whether the instant settlement is a "sell out." (*See* Gupta Am. Br. at 16.) In *Sosinov*, all class members who did not opt out received an $11 settlement certificate that expired in six months. (*See id.*) Contrary to the Gupta

In this case, over 83,000 potential class members opted to receive Settlement Vouchers. The large number of claims submitted demonstrates that class members themselves view the $10 Settlement Voucher as a worthwhile award, especially given that not a single class member was alleged to have been harmed in any way.

CONCLUSION

For all of these reasons, this Court should affirm the district court's approval of the settlement as fair, reasonable and adequate.

(continued…)

Objectors' contention, the settlement reached here is quite comparable—both are settlement certificates of similar value ($11 and $10), amounts which are sufficient to cover the entire purchase price of a number of items in stores or at radioshack.com. The certificates could be sent automatically in *Sosinov* because, due to the very nature of the case (which involved alleged collection of personal information in violation of the California Song-Beverly Act), each person for whom RadioShack had contact information was necessarily a class member. In this case, on the other hand, RadioShack had no assurance that customers who used payment cards during the class period were indeed class members without information from the claimant as to the location and date of purchase.

Dated: June 2, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned attorney for Defendant-Appellee certifies that the foregoing brief

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 5,591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as supplemented by Circuit Rule 32(b), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office 2007 in 12-point Bookman Old Style.

Dated: June 2, 2014

/s/ James R. Daly
James R. Daly

ADDENDUM—REPRODUCTION OF STATUTES AT ISSUE

15 U.S.C. § 1681c(g)

Truncation of credit card and debit card numbers
(1) In general
Except as otherwise provided in this subsection, 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 the sale or transaction.
(2) Limitation
This subsection shall apply only to receipts that are electronically printed, and shall not apply to transactions in which the sole means of recording a credit card or debit card account number is by handwriting or by an imprint or copy of the card.
(3) Effective date
This subsection shall become effective—

(A) 3 years after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is in use before January 1, 2005; and
(B) 1 year after December 4, 2003, with respect to any cash register or other machine or device that electronically prints receipts for credit card or debit card transactions that is first put into use on or after January 1, 2005.

15 U.S.C. § 1681n(a), (d)

(a) In general
Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of—
(1)

(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or
(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and
(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

(d) Clarification of willful noncompliance
For the purposes of this section, any person who printed an expiration date on any receipt provided to a consumer cardholder at a point of sale or transaction

between December 4, 2004, and June 3, 2008, but 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.

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ James R. Daly
James R. Daly