

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

CYNTHIA M. FULLWOOD,)	
INDIVIDUALLY AND ON BEHALF)	Case No. 13-cv-07174-KPF
OF ALL OTHERS SIMILARLY)	
SITUATED,)	
)	SECOND AMENDED
Plaintiff,)	CLASS ACTION COMPLAINT
)	
v.)	
)	JURY TRIAL DEMANDED
WOLFGANG’S STEAKHOUSE, INC.)	
AND ZMF RESTAURANTS LLC,)	
)	
Defendants.)	

Plaintiff, Cynthia M. Fullwood, by her attorneys, states as follows for her Second Amended Class Action Complaint against defendants Wolfgang’s Steakhouse, Inc. and ZMF Restaurants LLC (collectively, “Defendants” or “Wolfgang”):

NATURE OF THE CASE

1. This is a class action based upon Defendants’ violation of the Fair and Accurate Credit Transactions Act (“FACTA”) amendment to the Fair Credit Reporting Act, 15 U.S.C. §1681, *et seq., as amended*. FACTA is designed to protect credit and debit cardholders from identity theft and fraud. The statute prohibits merchants who accept credit cards or debit cards from issuing electronically-generated receipts at the point of sale that display the expiration date, thus limiting an identity thief’s ability to obtain the consumer’s account information, among other things.

2. Defendants have violated FACTA repeatedly by printing the credit card and debit card expiration date on sales receipts.

3. Plaintiff seeks, on behalf of herself and the class, statutory damages, punitive damages, costs, and attorneys fees, all of which are made expressly available by statute, 15 U.S.C. §1681, *et seq.*

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction under 28 U.S.C. §§1331 and 1337, and 15 U.S.C. §1681p, which provides that “An action to enforce any liability created under this title may be brought in any appropriate United States district court, without regard to the amount in controversy”

5. Venue in this district is proper pursuant to 28 U.S.C. §1391 because Defendant transacts business in this District.

PARTIES

6. Plaintiff Cynthia M. Fullwood, on October 3, 2013, ate at Defendants’ Park Avenue location (4 Park Avenue, New York, New York), paid for her meal with a credit card, received an electronically printed receipt displaying the expiration date, and was damaged thereby.

7. Defendants Wolfgang’s Steakhouse, Inc. and ZMF Restaurant LLC are a New York corporation and limited liability company, respectively. On information and belief, together, Wolfgang’s Steakhouse, Inc. and ZMF Restaurant LLC own and operate restaurants in this District, as well as restaurants in California, Florida and Hawaii.

8. At all relevant times, Defendants comprise a “person that accepts credit cards or debit cards for the transaction of business” within the meaning of FACTA.

CLASS ALLEGATIONS

9. This action is brought on behalf of Plaintiff individually and as a class action on behalf of all persons or entities to whom Defendants provided an electronically printed receipt at the point of sale or transaction, in a sale or transaction occurring on or after October 10, 2008, which receipt displayed the expiration date of the customer's credit card or debit card. Excluded from the Class are the officers and directors of Defendants at all relevant times, members of their immediate families and their legal representatives, heirs, successors or assigns, and any entity in which Defendants have or had a controlling interest.

10. Because Defendants have numerous restaurants that serve hundreds, if not thousands, of meals that were paid for with debit cards and credit cards, joinder of all individual members would be impracticable. While the exact number of Class members can only be determined by appropriate discovery, Plaintiff believes there are thousands of members of the Class. Members of the Class may be identified from records maintained by Defendants and its credit card processing company and may be notified of the pendency of this action by United States mail.

11. Plaintiff's claims are typical of the claims of the other members of the Class, as all members of the Class are similarly affected by Defendants' wrongful conduct in violation of federal law that is complained of herein.

12. There are common questions of law and fact affecting members of the class, which common questions predominate over questions which may affect individual members.

These include the following:

- (a) Whether Defendants had a practice of issuing and providing customers with electronically printed receipts which show the expiration date;
- (b) Whether Defendants' conduct was willful, knowing or reckless; and

- (c) Whether Plaintiff and the other members of the class are entitled to statutory damages, punitive damages, costs, or attorneys fees for Defendants' acts and conduct.

13. Plaintiff will fairly and adequately represent the class members. Plaintiff has no interests that conflict with the interests of other class members. Plaintiff has retained counsel competent and experienced in the prosecution of class action litigation.

14. A class action is superior to all other available methods for the fair and efficient adjudication of this controversy since joinder of all members is impracticable. Furthermore, as the damages suffered by individual Class members may be relatively small, the expense and burden of individual litigation make it impossible for members of the Class to redress individually the wrongs done to them. There will be no difficulty in the management of this action as a class action.

FACTS

PLAINTIFF'S TRANSACTION

15. On October 3, 2013, Plaintiff ate at Defendants' Park Avenue location (4 Park Avenue, New York, New York), paid for her meal with a credit card, and received an electronically printed receipt displaying the expiration date.

16. Upon information and belief, Defendants used standardized computer software to print the offending receipts and that software printed the receipts the same way for each transaction.

17. Upon information and belief, at the time of Plaintiff's transaction described above, Defendants were routinely presenting receipts to its customers at the point of sale at its

various retail stores which displayed the expiration dates of the customers' credit and/or debit cards, in violation of the requirements of FACTA.

IDENTITY THEFT IS A HUGE RECOGNIZED PROBLEM

18. The purpose of FACTA is to prevent identity theft. The Federal Trade Commission estimates that over 9 million persons each year have their identity assumed by criminals for financial gain, causing losses in excess of \$50 billion.

19. One common modus operandi of identity thieves is to obtain credit card receipts that are lost or discarded, or through theft, and use the information on them to engage commit fraud and theft. Identity thieves who do this are known as "carders" and "dumpster divers." This modus operandi is more common than the use of sophisticated electronic means to obtain the information. Robin Sidel, "Identity Theft - Unplugged Despite the High-Tech Threat, When You Get Ripped Off It's Usually Still the Old Way," WALL STREET JOURNAL, Oct. 5, 2006, p. B1.

20. In early 2003, the payment card industry and Congress announced that they were working together to combat identity theft. A critical part of this joint effort was the truncation of personal data from credit and debit card receipts presented to consumers at the point of sale.

21. On March 6, 2003, Visa CEO Carl Pascarella held a joint press conference with Senators Judd Gregg, Jon Corzine, Patrick Leahy, and Dianne Feinstein to announce Visa USA's new account truncation program to protect consumers from identity theft. At the press conference, Mr. Pascarella stated:

Today, I am proud to announce an additional measure to combat identity theft and protect consumers. Our new receipt truncation policy will soon limit cardholder information on receipts to the last four digits of their accounts. The card's expiration date will be eliminated from receipts altogether

The first phase of this new policy goes into effect July 1, 2003 for all new terminals. I would like to add, however, that even before this policy goes into effect, many merchants have already voluntarily begun truncating receipts, thanks to the groundwork that we began together several years ago.

* * *

Visa USA is pleased to be working with Senator Feinstein, and the other senators here today in the fight to protect consumers from identity theft. After all, we share the same goals.

22. On July 9, 2003, L. Richard Fischer, presented a written statement to the United States House of Representatives Committee on Financial Services on behalf of Visa USA, Inc., supporting the truncation requirements of what ultimately became FACTA. Therein, Mr. Fischer stated:

Although Visa generally believes that the details of preventing identity theft should be left to financial institutions that are best suited to address ever evolving fraud techniques, Title II could provide important benefits to consumers and financial institutions alike by establishing workable identity theft provisions and ensuring that these provisions benefit from national uniformity. For example, Section 203 of Title II would prohibit any merchant or other entity that accepts credit and debit cards from printing more than the last four digits of the card account number or the expiration date upon receipts provided to cardholders at the point of sale.

23. Merchants generally will not honor a credit card in a card-not-present transaction (telephone, internet or fax) without both the correct expiration date and the card number. The expiration date is almost always necessary for misuse of a credit card or debit card.

24. Identity thieves commonly obtain credit card or debit card receipts that are lost or discarded, or through theft, and use the information to engage in unauthorized credit or debit transactions.

25. Also, sophisticated identity thieves can find a credit card or debit card number using the expiration date and the last five digits of the card number, or more easily obtain sufficient information to use another's credit card or debit card.

CONGRESS ACTED TO STEM CREDIT CARD FRAUD

26. The Fair and Accurate Credit Transaction Act was passed by Congress on November 22, 2003, and signed by President Bush on December 4, 2003, to assist in the prevention of identity theft and credit and debit card fraud. The statute makes it more difficult for identity thieves to obtain consumers' credit and debit card information by reducing the amount of information identity thieves could retrieve from found or stolen credit or debit card receipts. In his statement during the signing of the bill, President Bush declared that:

This bill also confronts the problem of identity theft. A growing number of Americans are victimized by criminals who assume their identities and cause havoc in their financial affairs. With this legislation, the Federal Government is protecting our citizens by taking the offensive against identity theft.

27. The main provision of FACTA (codified as 15 U.S.C. §1681c(g) of the Fair Credit Reporting Act) provides that:

[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 sale or transaction.

28. FACTA details the liability for willful noncompliance:

§1681n. Civil liability for willful noncompliance

(a) In general, any person who willfully fails to comply with any requirement imposed under this title 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

* * *

(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 this action together with reasonable attorneys fees as determined by the court ...

29. Congress gave merchants who accept credit cards and/or debit cards three years to truncate the credit/debit card number and to redact the expiration date— until December 4, 2006.

**THERE WAS AN EXTENSIVELY ADVERTISED
THREE YEAR PHASE-IN PERIOD**

30. FACTA’s requirement that merchants not print credit and debit card expiration dates was phased in over a three year period. During the three year phase-in period, there was extensive publicity regarding the law’s requirements.

31. In the January 2005 edition of the Massachusetts Restaurant Association Newsletter, an article appeared apprising Association members that both Visa and MasterCard require truncation of the entire expiration date and all but the last four digits of the cardholder account number.

32. The April 2005 edition of the FOOD INDUSTRY ADVISOR, the newsletter for the Pennsylvania Food Merchants Association and Pennsylvania Convenience Store Council, included an article regarding the requirements of credit card truncation under FACTA which included the following language:

[A]ccording to the FACT Act, “no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction. . . .”

This same article appeared in the April 2005 Edition of the NACS Magazine, published by the National Association of Convenience Stores.

33. The Independent Insurance Agents & Brokers of America circulated a report to its members dated June 5, 2010 titled: “Overview of the Fair Credit Reporting Act, The Fair and

Accurate Credit Transactions Act, and the Drivers Privacy Protection Act.” In relevant part, this publication stated:

Under the FACTA Act, businesses and others accepting credit or debit cards for payment may not print more than the last five digits of the card number nor may they print the expiration date upon any receipt provided to the cardholder at the point of sale.

34. The Office of Thrift Supervision, United States Department of Treasury (“OTS”), is responsible, *inter alia*, for monitoring financial institution compliance with FACTA. Toward this end, the OTS publishes an Examination Handbook (“Handbook”) which assists OTS field personnel when they perform an examination, or compliance audit, of a given financial institution. The April 2011 Edition of the Handbook states, in relevant part:

Truncation of Credit and Debit Card Account Numbers

Ensure that electronically generated receipts from ATM and POS terminals or other machines do not contain more than the last five digits of the card number and do not contain the expiration dates.

35. Many restaurant and retail trade associations apprised their merchant members that FACTA requires truncation of the entire expiration date and all but the last five digits of the cardholder account number.

36. For example, the cover-article in the Winter 2007 edition of TEXAS BUSINESS TODAY includes an extensive discussion of the truncation requirements of FACTA.

CONGRESS CLARIFIED THE FACTA PROHIBITIONS

37. Merchants, however, claimed to have misunderstood FACTA, despite it being not ambiguous. They had truncated the credit card number, but had printed the expiration date.

38. On June 3, 2008, in the face of an avalanche of class action lawsuits against such noncomplying merchants, House Bill HR 4008 (known as the Credit and Debit Card Receipt Clarification Act of 2007, Pub.L. 110-241, §3(a), June 3, 2008, 122 Stat. 1566) (the

“Clarification Act”) (15 U.S.C. §1681n(d)), was passed by Congress and signed into law by the President.

39. The Clarification Act did not change FACTA, 15 U.S.C. §1681c(g).

40. The Clarification Act provided amnesty to those merchants that had printed expiration dates on electronically printed receipts prior to June 3, 2008. The Clarification Act was essentially a “get out of jail free card” for noncomplying merchants.

41. But, the Clarification Act does not protect those merchants that had printed expiration dates on credit/debit card receipts after June 4, 2008.

42. The Clarification Act also made clear that partial compliance by redacting the credit or debit card number, but not the expiration date, failed to comply with FACTA.

43. Congress, although faced with numerous class actions seeking statutory penalties from FACTA violating merchants, did not change the penalty provisions. Thus, Congress made clear that it expected consumers to enforce FACTA by filing class actions.

44. Indeed, since the statutory penalty for willful non-compliance is only \$100 to \$1,000, class actions are the only viable means for private enforcement.

45. The passage of the Clarification Act was championed by the pro-business lobbying organization Chamber of Commerce and added to the extensive amount of publicity regarding the requirements of FACTA.

46. In May 2007, the Federal Trade Commission published a widely circulated and extensively publicized FTC Business Alert which reiterated the truncation requirements of FACTA.

47. Since approximately 2007, The Department of Justice (“DOJ”) has intervened on behalf of Plaintiffs in private FACTA class actions. In *Papazian v. Burberry Limited*, 07-cv-

1479, (C.D. Cal.), for example, the DOJ filed a brief which, among other things, explained the purpose of FACTA and why not printing expiration dates is so important:

Congress sought with FACTA to “assist [] consumers in preventing identity theft and for mitigating its consequences once the crime has occurred.” *See* 108 H. Rep. No. 263 (2003). The goal of the provision that became §1681c(g) was “to limit the opportunities for identity thieves to ‘pick off’ key card account information.” S. Rep. No. 108-166 (2003). FACTA followed enactment of laws in at least 20 states with provisions similar to §1681c(g) that prohibited printing the full card number as well as the expiration date on receipts

Defendant claims that expiration dates accompanied only by truncated card numbers need no protection from would-be fraudsters. Defendant submitted with its opposition to Plaintiff’s motion the declaration of a former MasterCard employee who stated that a full expiration date and a truncated card number cannot be used to make fraudulent transactions Defendant also contends, based on the same declaration, that card companies routinely complete transactions with incorrect expiration dates so long as the expiration date provided to the merchant is in the future

Defendant’s argument that a thief would not be able to make fraudulent charges using *only* a truncated card number and the full expiration date misses the point. Thieves might piece together (or ‘pick-off,’ in the words of Congress) different bits of information from different sources. The expiration date of a customer’s credit/debit card, until recently printed on Defendant’s receipts, is one of several pieces of information that can make it easier for criminals to rack up fraudulent charges. These dates are worth protecting even when not accompanied by other important financial information. (internal footnote omitted).

Congress’ actions comport with common experience, testimony provided in support of the legislation, and the instructions credit card companies give to merchants

48. Now, over five years after the passage of the Clarification Act, and ten years after the passage of FACTA, merchants still fail to comply. By failing to comply Defendants have deprived consumers of the protections that the statute was designed to confer, and exposes cardholders to increased risk of identity theft.

DEFENDANTS KNEW NOT TO PRINT THE EXPIRATION DATE

49. Defendants had actual knowledge of FACTA's truncation requirements specifically including the requirement that credit and debit card expiration dates not be printed on receipts presented to consumers at the point of sale.

50. VISA, MasterCard, the PCI Security Standards Council – a consortium founded by VISA, MasterCard, American Express, and JCB – companies that sell cash registers and other devices for the processing of credit card and debit card payments, and other entities directly informed Defendants about FACTA, including its specific requirements concerning the redaction of credit card and debit card numbers and prohibition of the printing of expiration dates.

51. Defendants accept Discover, American Express, Visa, and MasterCard branded credit and debit cards.

52. Upon information and belief, during all times relevant to this Complaint, Defendants had contracts with their credit card issuers, including VISA, MasterCard, American Express, and others, and those contracts prohibited Defendants from printing credit and debit card expiration dates.

53. Visa USA's contracts with the American merchants which accept Visa brand credit or debit cards are defined in part in a manual entitled CARD ACCEPTANCE GUIDELINES FOR VISA MERCHANTS ("Visa Rules"). The latest edition is the 2011 edition.

The Card Acceptance Guidelines for Visa Merchants is a comprehensive manual for all businesses that accept Visa transactions in the card-present and/or card absent environment. The purpose of this guide is to provide merchants and their back-office sales staff with accurate, up-to-date information and best practices to help merchants process Visa transactions, understand Visa products and rules, and protect cardholder data while minimizing the risk of loss from fraud.

54. Under the heading "Visa Rules," (page 11), it states that "Merchants must follow basic card acceptance rules for all Visa transactions."

55. Visa Rules (page 13) prohibits the printing of the expiration date on credit/debit card receipts:

Suppressed Account Number and Expiration Date

Ensure that the Visa account number is suppressed in accordance with Visa rules and local laws and regulations. Visa recommends that all but the last four digits of the account number be suppressed on the cardholder copy of the transaction receipt, unless otherwise required under local law.

The expiration date should not appear at all on the cardholder copy of the transaction receipt. Existing point-of-sale terminals must comply with these requirements. To ensure that your point-of-sale terminals are properly set up for account number and expiration date suppression, contact your acquirer. (Emphasis added.)

56. The truncation standards set forth in the Visa Rules are part of the contract between Visa and the merchants which accept its debit and/or credit cards, here, Defendants.

57. Similarly, MasterCard’s agreements with the American merchants which accept MasterCard brand credit or debit cards are defined in part in a manual entitled SECURITY RULES AND PROCEDURES, Merchant Edition (“MasterCard Rules”). The latest edition is dated 30 August 2013.

58. Under the heading “Customer Obligations, 1.1 Compliance with the Standards,” (page 1-1), it states that “This manual contains Standards. Each Customer must comply fully with these Standards.”

59. MasterCard Rules (page 3-8) prohibits the printing of the expiration date on credit/debit card receipts:

3.11.4 Primary Account Number Truncation and Expiration Date Omission

The Cardholder and Merchant receipts generated by all electronic POS Terminals, whether attended or unattended, cash disbursement receipts generated by electronic POS Terminals at financial institutions, and each printed ATM Terminal receipt **must omit the Card expiration date.** In addition, the Cardholder receipt generated by all electronic POS Terminals, whether attended

or unattended, and each printed ATM Terminal receipt must reflect only the last four (4) digits of the PAN. All preceding digits of the PAN must be replaced with fill characters, such as “X,” “*,” or “#,” that are neither blank spaces nor numeric characters. (Emphasis added.)

60. The truncation standards set forth in the MasterCard Rules are part of the contract between MasterCard and the merchants which accept its debit and/or credit cards, here, Defendants.

61. Upon information and belief, prior to the transaction at issue, Defendants received periodic communications from credit card issuers advising them to not print credit and debit card expiration dates.

62. Upon information and belief, prior to the transaction at issue, Defendants received monthly statements from its merchant bank (or other similar entity that performed credit and debit card payment clearing services for Defendants) which apprised Defendants of its obligation to not print credit and debit card expiration dates.

63. Upon information and belief, prior to the transaction at issue, Defendants received written information from its POS (Point of Sale) provider(s) apprising Defendants not print credit and debit card expiration dates.

64. Upon information and belief, prior to the transaction at issue, Defendants received information from trade associations and/or other similar entities apprising Defendants of its obligation to not print credit and debit card expiration dates.

65. Defendants’ knowledge of the FACTA requirements is also evidenced by its change to the credit and debit card receipts to remove all but the last four digits of the card number.

66. Moreover, Defendants are well aware of the threat of identity theft. In November 2011, a ring of identity thieves at a number of steakhouses in the New York Metropolitan area,

including Wolfgang's, was indicted for stealing the credit card information from the restaurants' patrons. At the time, Manhattan District Attorney Cyrus R. Vance, Jr. said that identity theft was "one of the fastest growing crimes in Manhattan." Rosenberg, N. "28 Are Indicted in the Theft of Steakhouse Patrons' Credit Card Information." *New York Times* Nov. 19, 2011: A17. Print.

**DEFENDANTS' FAILURE TO ELIMINATE A LIABILITY
FOR WHICH IT HAD BEEN DENIED INSURANCE
COVERAGE IS EITHER KNOWING OR RECKLESS**

67. On October 29, 2013, Defendants' insurance carrier, Indemnity Insurance Corporation, notified Plaintiff's counsel that it was denying coverage to Defendants because, among other things, "The Policy specifically excludes violations of the Fair and Accurate Credit Transactions Act."

68. Commercial insurance coverage is negotiated for and bound only by the signature of senior management and the specifics of the coverage are closely monitored.

69. In addition, the exclusions from an insurance policy can often be added back in by riders—at additional cost. That is part of the negotiation.

70. Defendants' failure to eliminate a liability for which it had been denied insurance coverage is either knowing or reckless.

COUNT I

VIOLATION OF FACTA

71. Plaintiff hereby incorporates by reference the allegations contained in the above paragraphs of this Complaint as if fully set forth herein.

72. Defendants accept credit cards and debit cards in the course of transacting business with persons such as Plaintiff and the other class members. In transacting such business,

Defendants use cash registers or other machines or devices that print receipts electronically for credit card and debit card transactions.

73. After June 3, 2008, the deadline for compliance as extended by the Clarification Act, Defendants, at the point of sale or transaction, provided Plaintiff and the other class members with electronically printed receipts, each of which included the credit or debit card expiration date. However, the Class Period will start October 10, 2008, due to statute of limitations issues.

74. Defendants knew of the prohibition of the printing of expiration dates or were reckless not knowing in light of the information readily available to it.

75. Defendants accept Discover, American Express, Visa, and MasterCard branded credit and debit cards and, therefore, is a party to contracts requiring compliance with the foregoing requirements.

76. Defendants' use of software, devices and machines that print receipts in violation of FACTA was willful as set forth above.

WHEREFORE, Plaintiff requests the Court to enter judgment in favor of Plaintiff and the class members and against defendants Wolfgang's Steakhouse, Inc. and ZMF Restaurants LLC, jointly and severally, as follows:

- a. Statutory damages of \$100 to \$1,000 per violation;
- b. Attorneys fees, litigation expenses, and costs;
- c. Such other and further relief as the Court may deem proper, including punitive damages.

Dated: New York, New York
December 1, 2014

FRANK & BIANCO LLP

By: /s/ Marvin L. Frank

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