07-56377

IN THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TALINE SOUALIAN,
Plaintiff and Appellant,

vs.

INTERNATIONAL COFFEE AND TEA LLC,
Defendant and Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA
CASE NO. CV 07-502-RGK (JCX) • R. GARY KLAUSNER, UNITED STATES DISTRICT JUDGE

BRIEF OF AMICUS CURIAE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT AND APPELLEE INTERNATIONAL COFFEE & TEA LLC AND IN SUPPORT OF AFFIRMANCE

[SUBMITTED CONCURRENTLY WITH MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF]

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, the Chamber of Commerce of the United States of America hereby states that it has no parent corporation and no subsidiary corporation. No publicly held corporation owns 10% or more of its stock.

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INTRODUCTION AND STATEMENT OF INTEREST OF THE AMICUS

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million businesses and organizations of every size and in every industry sector. The Chamber's principal function is to represent the interests of its members by filing briefs in cases implicating issues of vital concern to the nation's business community.

The Chamber's members are extremely interested in the substance of this appeal. Here, Defendant International Coffee & Tea (Coffee Bean) provided Plaintiff Taline Soualian with a single receipt containing her credit card's expiration date. (Supplemental Excerpts of Record (SER) 87-88.) In this class action, Soualian contends Coffee Bean's receipts violated section 113 of the Fair and Accurate Credit Transactions Act (FACTA), 15 U.S.C.A. § 1681c(g) (West Supp. 2007), which prohibits those who accept credit and debit cards in business transactions from including "more than the last 5

digits of the card['s] number or the [card's] expiration date" on certain electronically printed receipts. The district court denied Soualian's motion for class certification, holding that her proposed class action was not the superior method of adjudication because, among other reasons, class certification would expose Coffee Bean to staggering classwide statutory damages even though Soualian did not (and could not) assert potential class members suffered any actual harm, and significant incentives exist for would-be class members to bring individual lawsuits. (ER, Ex. B at 3-5.) On appeal, Soualian argues the district court abused its discretion by examining the economic consequences of class certification.

The extent of a district court's discretion to decide whether a class action is the superior method of adjudication in FACTA lawsuits is of exceptional importance to the business community since plaintiffs nationwide brought hundreds of FACTA class actions against a diverse range of businesses, both large and small, after section 113 of FACTA began to apply to all merchants in December 2006. Indeed, how *this* court rules on the superiority issue could

be particularly significant to merchants because nearly half of all FACTA class actions were reportedly filed in California district courts, which follow this court's precedent and guidance.

Printing a credit or debit card's expiration date on a receipt—while a technical violation of FACTA—is a practice that experts and districts courts recognize cannot harm consumers. Nonetheless, since consumers may each recover $100 to $1,000 in statutory damages without proof of actual harm, punitive damages, attorney's fees, and costs for willful FACTA violations, FACTA class actions threaten countless businesses of every size with devastating classwide liability for harmless statutory violations. A survey of twenty-three FACTA lawsuits where courts denied or granted class certification—a small fraction of the more than *three hundred* FACTA class actions filed nationwide—reveals that the collective classwide statutory damages in those cases alone (without even accounting for statutory attorney fees) could reach nearly $35 billion, which would exceed the extensive

property damage caused by some of our nation's worst disasters, like Hurricane Andrew and the Northridge earthquake.

As we explain below, courts are not compelled to certify FACTA class actions where, as here, class certification would expose defendants to staggering classwide damages far out of proportion to any harm suffered by potential class members. District courts are vested with broad discretion to pragmatically evaluate the economic consequences of a class action and to deny class certification when they conclude class treatment is not superior to other methods of adjudication because—as in many FACTA lawsuits—economic reality shows that, on balance, class certification as compared against litigation of individual claims would lead to significant undesirable results.

The Chamber asks this court to ensure that district courts retain their discretion to decide on a case-by-case basis whether a class action is superior under these circumstances. Otherwise, as we highlight below, the business community may face ruinous consequences and the public could be exposed

to increased unemployment, higher consumer prices, and the loss of public services—without a correspondingly significant benefit to any injured consumers.

Soualian's counsel did not consent to the filing of this amicus brief. Thus, the Chamber has sought leave to file its brief in an accompanying motion pursuant to Rule 29 of the Federal Rules of Appellate Procedure.

ARGUMENT

I.

THIS COURT SHOULD PRESERVE DISTRICT COURTS' BROAD DISCRETION TO FIND A CLASS ACTION IS NOT THE SUPERIOR METHOD OF ADJUDICATION WHERE CERTIFICATION WOULD LEAD TO UNDESIRABLE RESULTS, ESPECIALLY IF POTENTIAL CLASS MEMBERS RETAIN STRONG INCENTIVES TO VINDICATE THEIR RIGHTS IN INDIVIDUAL LAWSUITS.

A. District courts may certify a damages class action only where class treatment would be the superior method of adjudication, and are entrusted with broad discretion to decide whether a class action is superior.

Soualian sought to certify a class action here under Rule 23(b)(3) of the Federal Rules of Civil Procedure, which governs class actions for damages. Rule 23(b)(3) permits certification only if "'a class action is superior to other available methods for the fair and efficient adjudication of the controversy.'" *Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 210 (9th Cir. 1975) (quoting Fed. R. Civ. P. 23(b)(3)). Superiority is lacking where other methods of adjudication

are as good as or better than class treatment. *Rutledge v. Elec. Hose & Rubber Co.*, 511 F.2d 668, 673 (9th Cir. 1975).

The superiority element is Rule 23(b)(3)'s "most important requirement." *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968). It mitigates dangers inherent in the rule by ensuring that courts will not certify a damages class action without first balancing undesirable results against efficiency.

Rule 23(b)(3), an "adventuresome innovation" added to the Federal Rules of Civil Procedure in 1966, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613-15 (1997) (quotation marks omitted), is the "most . . . controversial provision for class actions" since "it creates the greatest hazard for judicial miscalculations . . .," *Clark v. Cameron-Brown Co.*, 72 F.R.D. 48, 57 (M.D.N.C. 1976) (quotation marks omitted). Rule 23(b)(3)'s superiority element tempers the innovative nature of this provision by requiring courts "to balance, in terms of fairness and efficiency," the benefits of a damages class action against other methods of adjudication. *Georgine v. Amchem Prods., Inc.*, 83 F.3d

610, 632 (3d Cir. 1996), *aff'd sub nom. Amchem*, 521 U.S. 591; *see also Amchem*, 521 U.S. at 615 (superiority requirement allows a damages class action only where economies of time, effort, and expense are achieved "without sacrificing procedural fairness or bringing about other undesirable results" (quotation marks omitted)).

District courts are "in the best position to consider the most fair and efficient procedure for conducting any given litigation." *Doninger v. Pac. Nw. Bell, Inc.*, 564 F.2d 1304, 1309 (9th Cir. 1977) (quotation marks omitted). Thus, Rule 23(b)(3) vests district courts with "wide discretion" to evaluate superiority. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

B. A superiority analysis allows district courts to deny class certification where a pragmatic examination of economic reality shows that class certification would lead to undesirable results.

Notwithstanding the law that has developed refining the balancing process mandated by Rule 23(b)(3)'s superiority requirement, Soualian says a district court cannot consider the economic consequences a defendant would face in a class action or balance those consequences with the degree of harm potential class members suffered as a result of an alleged statutory violation when the court evaluates whether a class action is superior. (*See, e.g.*, Appellant's Opening Brief (AOB) 2, 12.) Nonsense.

With its focus on avoiding undesirable results, *see Amchem*, 521 U.S. at 615, the superiority analysis is by nature a pragmatic one, *J.M. Woodhull, Inc. v. Addressgraph-Multigraph Corp.*, 62 F.R.D. 58, 61 (S.D. Ohio 1974); *Berkman v. Sinclair Oil Corp.*, 59 F.R.D. 602, 608 (N.D. Ill. 1973). It compels courts to exercise their discretion "in a practical and realistic way." *City of New York v. Int'l Pipe & Ceramics Corp.*, 410 F.2d 295, 309 (2d Cir. 1969); *see also*

Wilcox v. Commerce Bank, 474 F.2d 336, 345, 349 (10th Cir. 1973) (superiority analysis should turn on "realistic and practical applications").

Accordingly, courts consider the economic realities presented by the cases before them—for example, by examining the economic harm to which a defendant would be exposed in a class action—as part of the superiority analysis. *See, e.g., Kline v. Coldwell, Banker & Co.*, 508 F.2d 226, 233-35 (9th Cir. 1974) (class action was not superior where defendants faced staggering class damages); *Wilcox*, 474 F.2d at 345-47 (district courts should not "close [their] eyes to [a class action's] possible consequences").

When district courts pragmatically examine the economic consequences of a class action, they "avoid results [that] appear[] procedurally unnecessary and overwhelming." *Wilcox*, 474 F.2d at 347. This comports with Rule 23(b)(3)'s requirement that "[s]uperiority must be looked at from the point of view . . . of the potential class members, . . . the present plaintiff, . . . [and] the defendant." *Kamm*, 509 F.2d at 212 (quotation marks omitted).

Also, analyzing a class action's consequences fulfills a court's obligation to consider the interests "of the public at large" in the superiority determination. *See id.* (quotation marks omitted). By reviewing all aspects of economic reality, district courts are better able to balance the interests of the proposed class and the public. Courts thus properly deny certification where potential class members suffer no actual harm and class treatment may harm the public because (1) many could face unemployment if classwide liability puts the defendant out of business, (2) consumers could pay higher prices for products if a defendant's business incurs significant classwide damages, or (3) residents may stand to lose public services if the municipality in which they reside is exposed to enormous damages as a defendant in a class action.[1/]

1/ *See, e.g.*, *Medrano v. Modern Parking*, 2007 U.S. Dist. LEXIS 82024, at *13-*15 (C.D. Cal. Sept. 17, 2007) (denying class certification in a FACTA action where the minimum classwide statutory damages award "would cripple [defendant] Pasadena's ability to provide public services"); *Evans v. U-Haul Co.*, 2007 U.S. Dist. LEXIS 82026, at *17-*18 (C.D. Cal. Aug. 14, 2007) (denying class certification in a FACTA action "[g]iven 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"); *Spikings v. Cost Plus*, 2007 U.S. Dist. LEXIS 44214, at *13, *17 (C.D. Cal. May 25, 2007) (same); (continued...)

Finally, an examination of the economic harm a defendant could suffer from class certification ensures consideration of a defendant's due process rights. For example, aggregating many claims asserting violations of a statutory scheme that provides consumers with minimum statutory damages (like FACTA) "may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages . . . ." *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003). "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments . . . ." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). Thus, where statutory damages are "wildly disproportionate" to any harm suffered by class members, these classwide damages threaten to violate a defendant's due

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1/(...continued)
Credit and Debit Card Receipt Clarification Act, H.R. 4008, 110th Cong. § 2(a)(7) (2007) [hereinafter Clarification Act], *available at* http://thomas.loc.gov/cgi-bin/query/z?c110:H.R.4008: (recognizing that FACTA class actions "could well raise prices to consumers without corresponding consumer protection benefit").

process rights. *Serna v. Costco Wholesale Corp.*, 2008 WL 234197, at *1 (C.D. Cal. Jan. 3, 2008).

A district court can prevent these due process violations by examining the damages a defendant faces in a class action. *See, e.g., Najarian v. Avis Rent A Car Sys.*, 2007 WL 4682071, at *5 (C.D. Cal. June 11, 2007) (deciding a FACTA class action was not superior "on due process grounds" where the plaintiff did not and could not allege actual harm and the defendant would face "up to $1.66 billion" in class liability).[2/]

Given all of these considerations, courts have long possessed the sound discretion to decide on a case-by-case basis that a class action is not superior where classwide "aggregated relief would be oppressive in consequence and

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2/ Soualian contends class treatment could not violate due process because a district court could reduce an excessive damages award. (*See* AOB 36.) However, courts may do so only after a *trial*, *see Local Union No. 38 v. Pelella*, 350 F.3d. 73, 89 (2d Cir. 2003), "[a]n overwhelming majority of [class actions] settle before reaching trial," *Franklin v. Kaypro Corp.*, 884 F.2d 1222, 1225 (9th Cir. 1989), and class action "settlement[s] . . . could not be reduced for unconstitutional excessiveness," *Vasquez-Torres v. McGrath's Publick Fish House*, 2007 WL 4812289, at *7 (C.D. Cal. Oct. 12, 2007) (quotation marks omitted).

difficult to justify" and the class' "complaint contains no indication of any actual damages in substantial or provable amount." *Wilcox*, 474 F.2d at 347; *see also London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (doubting plaintiff could satisfy superiority requirement where plaintiff suffered no economic harm and "the defendants' potential liability would be enormous and completely out of proportion to any harm suffered").[3/]

Notably, *this* court has held that class certification should be denied on superiority grounds where a class action would expose a defendant to enormous classwide liability, especially where potential class members enjoy significant incentives to hold a defendant accountable for legal violations in an individual action. *See Kline*, 508 F.2d at 233-35 & n.5 (reversing class certification where defendants faced "staggering" class damages and "safely assum[ing]" potential class members could prosecute their individual cases

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3/ *Cf. Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1378 (11th Cir. 1984) (affirming denial of class certification where plaintiffs asserting statutory violations presented no evidence they suffered actual harm); *Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 403-04 (6th Cir. 1980) (same).

in separate lawsuits because they could recover attorney's fees and costs in a successful action).[4/]

Soualian contends *Kline* neither controls nor offers guidance here because the threat posed by the liability in *Kline* supposedly derived from certifying a class of defendants who became jointly and severally liable for the massive classwide statutory damages wrought by the aggregation of claims against them. (*See* AOB 29-30.) Soualian misconstrues the scope of *Kline,* which in fact indicates that courts should *not* draw a distinction between cases

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4/ Other federal appellate courts agree that class actions are not superior where the availability of attorney's fees and punitive damages provide would-be class members with strong incentives to bring individual actions. *See, e.g., Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 328 (4th Cir. 2006) (attorneys would not be dissuaded from taking individual cases despite the small amount of the claims because they could recover punitive damages and attorney's fees); *Wilcox*, 474 F.2d at 346-49 (affirming denial of class certification where, among other considerations, statute provided attorney's fees, thereby "furnish[ing] encouragement and practicality for individual actions"); *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (holding that a class action was not superior in part because statutes provided prevailing parties with attorney's fees and punitive damages); *Bogus v. Am. Speech & Hearing Ass'n*, 582 F.2d 277, 290 (3d Cir. 1978) (affirming that a class action was not superior in part because "statutory attorneys' fees" were available).

where a party sought to certify a class of defendants rather than plaintiffs. *Kline* endorsed an analysis of economic realities based in part on *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *Ratner v. Chem. Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972). *See Kline*, 508 F.2d at 233-35. Like Soualian, the plaintiffs in *Eisen* and *Ratner* sought to certify a class of plaintiffs rather than defendants. *See Eisen*, 417 U.S. at 160-61 (explaining that "[e]conomic reality" required the lawsuit to proceed as a class action on behalf of plaintiffs "or not at all"); *Ratner*, 54 F.R.D. at 413-16 (refusing to certify a class of plaintiffs in part because of the class damages the defendant would face).[5/]

5/ Soualian also argues various U.S. Supreme Court and Ninth Circuit cases limit *Kline* or otherwise prohibit the consideration of economic consequences in superiority determinations. (AOB 19-21, 33-34.) Her reliance on these cases is misplaced, as Coffee Bean has explained. (*See* Appellee's Brief 28-29, 38.) All but one of them do not even address whether a damages class action is superior, much less discuss which factors courts may consider in their superiority analysis. (*See* Appellee's Brief 38.) Although Soualian contends *Six Mexican Workers v. Ariz. Citrus Growers*, 904 F.2d 1301 (9th Cir. 1990), limits *Kline* and the court there did consider superiority, that superiority discussion focused exclusively on whether that case was unmanageable because the defendant could not locate most of the class, *id.*

(continued...)

As we explain below, when the well-settled superiority standard is applied to FACTA lawsuits, it demonstrates that class treatment is not superior in numerous FACTA cases because many FACTA class actions threaten to devastate countless businesses and could imperil the interests of the public at large even though consumers suffered no actual harm and FACTA provides them with strong incentives to vindicate their FACTA rights in individual lawsuits.

5/(...continued)
at 1304-09, an issue with no bearing on this appeal.

II.

FACTA CLASS ACTIONS OFTEN ARE NOT SUPERIOR TO INDIVIDUAL LAWSUITS BECAUSE CLASS TREATMENT POSES A DEVASTATING THREAT TO BUSINESSES AND COULD EXPOSE THE PUBLIC TO INCREASED UNEMPLOYMENT, HIGHER CONSUMER PRICES, AND LOSS OF PUBLIC SERVICES.

A. Hundreds of FACTA class actions target countless businesses of every size and threaten the business community with staggering classwide statutory damages.

FACTA began to apply to all merchants on December 4, 2006, during the holiday shopping season, when businesses were likely fielding a tremendous number of credit and debit card transactions. *See Harris v. Circuit City Stores,* 2008 WL 400862, at *9 (N.D. Ill. Feb. 7, 2008); Kate Coscarelli, *Consumers Say Receipts Are Far Too Revealing: Customer Receipts Show Too Much Data*, Star Ledger, Aug. 6, 2007, at 1, *available at* 2007 WLNR 15083438 (Westlaw). Many merchants operated under the impression that the statute would be satisfied if they truncated credit and debit account numbers down to the last five digits, "based in part on the language of [FACTA] as well as

the publicity in the aftermath of the passage of the law." Clarification Act, H.R. 4008, § 2(a)(3); *see also* 15 U.S.C.A. § 1681c(g)(1) (West Supp. 2007) (prohibiting inclusion of "more than the last 5 digits . . . or the expiration date").[6/] Subsequently, however, courts construed FACTA as requiring the omission of expiration dates as well. *See, e.g.*, *Arcilla v. Adidas Promotional Retail Operations*, 488 F. Supp. 2d 965, 970 (C.D. Cal. 2007).

Consequently, thousands of businesses may now find they have violated FACTA's technical requirements millions of times over. *See* Allison Grant, *Too Much Credit Data on Receipts, Lawsuits Say*, Cleveland Plain Dealer, Dec. 4, 2007, at C1, *available at* 2007 WLNR 23961984 (Westlaw). And it's not because they gain any advantage from consumers by doing so.[7/]

6/ *Accord* Ted Frank, *A Billion-Dollar "Harm-Less" Lawsuit*, Liability Outlook (Am. Enter. Inst. for Pub. Policy Research, Wash., D.C.), Oct. 2007, at 1, *available at* http://www.aei.org/docLib/20071030_22374OctLOg.pdf (many businesses "interpreted [FACTA] to permit the printing of credit card and debit card receipts that included three to five . . . digits of the" card number "and the expiration date").

7/ *See* Richard M. Hoffman & Katherine K. Ivers, *Class Actions Under FACTA: Lots of Activity, But What Do They Actually Accomplish?*, 22 Legal (continued...)

After December 4, 2006, counsel for plaintiffs throughout the country reportedly brought more than three hundred FACTA class actions. *See* Grant, *supra*, at C1; John Gibson et al., *A Matter of FACTA (Part II): Recent Developments Favor Defendants in Defeating Class Actions Alleging Willful Violations*, Stay Current (Paul Hastings), Aug. 2007, at 1, http://www.paulhastings.com/assets/publications/747.pdf?wt.mc_ID=747.pdf. Seizing on the opportunity presented by the merchants' unwitting violations and FACTA's attorney fee-shifting provision, attorneys reportedly filed one hundred and thirty or more FACTA class actions in California alone. *See* Gibson, *supra* , at 1.[8/]

7/(...continued)
Backgrounder (#38) (Wash. Legal Found., Wash., D.C.), Sept. 21, 2007, at 3, *available at* http://www.wlf.org/upload/09-21-07hoffman.pdf ("there is no financial upside—no benefit to be gained—by failing to comply with the FACTA requirements").

8/ Remarkably, three firms may have collectively filed more than half of these California FACTA lawsuits. Plaintiff's counsel here, Spiro Moss Barness, reportedly filed more than forty FACTA class actions. *See* Robin Sidel, *Retailers Whose Slips Show Too Much Attract Lawsuits*, Wall St. J., Apr. 28, 2007, at B1, *available at* http://online.wsj.com/public/article/ (continued...)

These FACTA class actions were brought against "large national retailers, small mom and pop stores, restaurants, and everything in between." Hoffman & Ivers, *supra*, at 2. Thus, Soualian errs when she posits that all but a few large merchants complied with FACTA. *Compare* AOB 26 n.12 *with Troy v. Red Lantern Inn*, 2007 WL 4293014, at *1 (N.D. Ill. Dec. 4, 2007) (FACTA class action against operator of single restaurant), *Saunders*, 2007 WL 4812287, at *1 (FACTA class action against operator of nine restaurants), *Reynoso v. South County Concepts*, 2007 WL 4592119, at *1 (C.D. Cal. Oct. 15, 2007) (FACTA class action against operator of at least one restaurant), *Medrano*, 2007 U.S. Dist. LEXIS 82024, at *1-*2 (FACTA class action against operator of four parking garages and City of Pasadena).

8/(...continued)
SB117771144745785336-S1YwB4VdRuerW3MvcvSJBNlHLUg_20080428.html. Another firm, Keller Grover, apparently brought at least thirty-seven FACTA class actions. *See Saunders v. Louise's Trattoria*, 2007 WL 4812287, at *2 n.5 (C.D. Cal. Oct. 23, 2007). And the Law Offices of Herbert Hafif—which represents the plaintiff in *Reynoso v. South County Concepts* (Ninth Circuit Case Number 08-55079), the FACTA appeal this court calendered with the *Soualian* case here (*see* Appellee's Brief 2)—filed at least four FACTA class actions. *See, e.g., Vasquez-Torres,* 2007 WL 4812289, at *4 & n. 4 (noting Hafif's role in FACTA lawsuits).

FACTA's provision for statutory damages of $100 to $1,000, punitive damages, and attorney's fees and costs creates enormous exposure given the number of sales transactions at issue nationwide. *See* Randy J. Maniloff & Gale White, *Willy Wonka & the Money FACTAry: Examining Insurance Coverage for Violating the Information Requirements of a Credit Card Receipt*, 12 Mealey's Emerging Insurance Disputes (#21) (LexisNexis Mealey's Publications, King of Prussia, Pa.), Nov. 7, 2007, at 3, *available at* http://www.whiteandwilliams.com/CM/Articles/Emerging%20Insurance%20Disputes_White_Maniloff.pdf. Attorneys for plaintiffs *and* defendants agree businesses "could be forced to pay billions in damages" in FACTA class actions. Coscarelli, *supra*, at 1. Even the strongest businesses "could be wiped out." Maniloff & White, *supra*, at 3.

B. A survey of twenty-three FACTA cases illustrates the devastating consequences both defendants and the public face in FACTA class actions.

The following survey of twenty-three FACTA cases in which federal courts nationwide granted or denied class certification confirms the enormous impact FACTA class actions could have on countless businesses, with a collective possible price tag of nearly $35 *billion* dollars in those twenty-three cases alone.[9/] That's before accounting for the classwide punitive damages, attorney's fees, and costs consumers could recover under FACTA:

9/ The survey examines all FACTA cases where: (1) a court granted or denied class certification in a decision available on Westlaw or LEXIS; *and* (2) the decision or party briefs available on Westlaw or LEXIS identify the approximate amount of damages at issue or otherwise provide sufficient information (such as the number of credit or debit card transactions that occurred) to estimate those amounts.

FACTA CLASS ACTION SURVEY		
CASE NAME	**POTENTIAL CLASSWIDE STATUTORY DAMAGES**	**DISTRICT COURT RULING ON CLASS CERTIFICATION**
Spikings v. Cost Plus, 2007 U.S. Dist. LEXIS 44214 (C.D. Cal. May 25, 2007)	$340 million to $3.4 billion. *Id.* at *12.	Denied
Soualian **(this case)** ER, Ex. B	$4.8 million to $48 million. ER, Ex. B at 4.	Denied
Najarian v. Avis Rent A Car Sys., 2007 WL 4682071 (C.D. Cal. June 11, 2007)	Up to $1.66 billion. *Id.* at *5.	Denied
Najarian v. Charlotte Russe, 2007 U.S. Dist. LEXIS 59879 (C.D. Cal. June 12, 2007)	$220 million to $2.2 billion. *Id.* at *7.	Denied
Lopez v. KB Toys Retail, 2007 U.S. Dist. LEXIS 82025 (C.D. Cal. July 17, 2007)	$290 million to $2.9 billion. *Id.* at *14.	Denied
Torossian v. Vitamin Shoppe Indus., 2007 U.S. Dist. LEXIS 81961 (C.D. Cal. Aug. 7, 2007)	$22.7 to $227 million. *Id.* at *12.	Denied

FACTA CLASS ACTION SURVEY		
Evans v. U-Haul Co., 2007 U.S. Dist. LEXIS 82026 (C.D. Cal. Aug. 14, 2007)	$115 million to $1.5 billion. *Id.* at *15.	Denied
Price v. Lucky Strike Entm't, 2007 U.S. Dist. LEXIS 96072 (C.D. Cal. Aug. 29, 2007)	$3.3 million to $33 million. *Id.* at *13.	Denied
Medrano v. Modern Parking, 2007 U.S. Dist. LEXIS 82024 (C.D. Cal. Sept. 17, 2007)	$12.5 million to $125 million. *Id.* at *14.	Denied
Serna v. Big A Drug Stores, 2007 U.S. Dist. LEXIS 82023 (C.D. Cal. Oct. 9, 2007)	$20 million to $200 million. *Id.* at *13.	Denied
Vasquez-Torres v. McGrath's Publick Fish House, 2007 WL 4812289 (C.D. Cal. Oct. 12, 2007)	$54.15 million to $541.53 million. *Id.* at *7.	Denied
Medrano v. WCG Holdings, 2007 WL 4592113 (C.D. Cal. Oct. 15, 2007)	Alleging 32,000 credit or debit card transactions. *Id.* at *2. If each represents a class member, $3.2 million to $32 million.	Granted

FACTA CLASS ACTION SURVEY		
Reynoso v. South County Concepts, 2007 WL 4592119 (C.D. Cal. Oct. 15, 2007)	45,943 receipts contained expiration dates. *Id.* at *2. If each represents a class member, $4,594,300 to $45,943,000.	Granted
Hile v. Frederick's of Hollywood Stores, 2007 WL 3037552 (N.D. Cal. Oct. 17, 2007)	$31.4 million to $314 million. Brief of Defendants in Opposition to Motion for Class Certification at 1, 2007 WL 3191705 [hereinafter *Hile* Brief]	Denied
Saunders v. Louise's Trattoria, 2007 WL 4812287 (C.D. Cal. Oct. 23, 2007)	$6.85 million to $68.5 million. *Id.* at *2.	Denied
Vartanian v. Estyle, Inc., 2007 WL 4812286 (C.D. Cal. Nov. 26, 2007)	$7.1 million to $77.1 million. *Id.* at *1.	Denied
Halperin v. Interpark, Inc., 2007 WL 4219419 (N.D. Ill. Nov. 29, 2007)	$91 million to $910 million. Brief of Defendant in Opposition to Motion for Class Certification at 1, 3, 2007 WL 2959535 [hereinafter *Halperin* Brief].	Granted

FACTA CLASS ACTION SURVEY		
Troy v. Red Lantern Inn, 2007 WL 4293014 (N.D. Ill. Dec. 4, 2007)	$500,000 to $5 million. *Id.* at *4.	Granted
Azoiani v. Love's Travel Stops & Country Stores, 2007 WL 4811627 (C.D. Cal. Dec. 18, 2007)	$423 million to $4 billion. *Id.* at *5.	Denied
Serna v. Costco Wholesale, 2008 WL 234197 (C.D. Cal. Jan. 3, 2008)	$1.7 billion to $17 billion. *Id.* at *1.	Denied
Dister v. Apple-Bay East, 2008 WL 62280 (N.D. Cal. Jan. 4, 2008)	"'[I]n excess of $217 million.'" *Id.* at *2.	Denied
Blanco v. CEC Entm't Concepts, 2008 WL 239658 (C.D. Cal. Jan. 10, 2008)	$198 million to $1.98 billion. *Id.* at *2.	Denied
Kesler v. IKEA U.S., 2008 WL 413268 (C.D. Cal. Feb. 4, 2008)	2.4 million receipts contained expiration dates. *Id.* at *2. If each represents a class member, $240 million to $2.4 billion.	Granted
Total collective classwide statutory damages: *Approximately $5.7 billion to $34.7 billion*		

According to the courts or parties in those twenty-three FACTA class actions, even the minimum classwide statutory damages would have put at least eight of the defendants who were sued out of business.[10/] Nor were these the only economic consequences posed by the surveyed FACTA class actions. For example, class liability in one FACTA lawsuit "would [have] cripple[d] the City of Pasadena's ability to provide public services." *Medrano*, 2007 U.S. Dist. LEXIS 82024, at *14.[11/] In other instances, classwide statutory damages could have led a business to teeter close to the brink of financial ruin or eviscerated a defendant's net income or total sales for the prior year.[12/]

10/ *See Vasquez-Torres*, 2007 WL 4812289, at *7; *Medrano*, 2007 U.S. Dist. LEXIS 82024, at *14; *Evans*, 2007 U.S. Dist LEXIS 82026, at *15; *Lopez*, 2007 U.S. Dist. LEXIS 82025, at *14; *Charlotte Russe*, 2007 U.S. Dist. LEXIS 59879, at *7-*8; *Spikings*, 2007 U.S. Dist. LEXIS 44214, at *12; *Halperin* Brief, *supra*, at 1, 3; *Hile* Brief, *supra*, at 1, 10.

11/ Nor is the plaintiff in *Medrano* the only party to bring a class action against a municipality for FACTA violations. *See, e.g.*, Complaint, ¶¶ 1-29, *Cirignani v. City of Chicago*, No. 1:07CV02319 (N.D. Ill. Apr. 26, 2007), 2007 WL 1622069 (alleging Chicago violated FACTA).

12/ *See, e.g., Blanco*, 2008 WL 239658, at *2 (classwide statutory damages of $198 million to $1.98 billion "would completely swallow [defendant's] net income last year of $68,257,000"); *Vartanian*, 2007 WL 4812286, at *1 (continued...)

The twenty-three FACTA cases surveyed also demonstrate that the public at large could suffer if a court certifies a FACTA class action. For example, although Soualian appears to take comfort in the notion that large companies are the subjects of FACTA class actions (*see* AOB 26 n.12), those businesses likely maintain significant workforces. Several defendants in the cases surveyed above have these reported employment figures:

Charlotte Russe: 8,328 employees
Cost Plus: 6,741 employees
Interpark: approximately 1,800 employees
U-Haul Company of California: approximately 1,200 employees
Frederick's of Hollywood: at least 1,000 employees
KB Toys: at least 650 employees

12/(...continued)
("Defendant faces potential [classwide] liability of $7.1 million to $77.1 million," yet its "total sales for the twelve months ending January 27, 2007, was approximately $48.2 million."); *Price*, 2007 U.S. Dist. LEXIS 96072, at *13 (defendant faced classwide statutory damages of $3.3 million to $33 million but its 2006 financial statements revealed "a net loss of $5.5 million and a total negative net worth of $8.1 million"); *Torossian*, 2007 U.S. Dist. LEXIS 81961, at *12-*13 (defendant faced classwide statutory damages of $22.7 million to $227 million yet had "approximately $31 million in equity and $161 million in total assets"); Coscarelli, *supra*, at 2 (explaining Avis Rent A Car faces classwide statutory damages of $166 million to $1.66 billion and that "[e]ven the minimum damages sought could be more than two-thirds of the company's domestic rental car annual income").

Modern Parking: approximately 350 employees[13/]

Since even the minimum classwide statutory damages these companies faced in FACTA class actions would reportedly have put them out business (*see supra*, at 28 n.10), class certification in their seven respective FACTA lawsuits alone could well have led to the unemployment of approximately 20,000 people.

Additionally, Pasadena residents could have lost access to important municipal services had a FACTA class action "cripple[d] the City of

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13/ *See* Hoovers, Charlotte Russe Holdings, Inc., http://www.hoovers.com/charlotte-russe-holding/--ID__60770--/free-co-factsheet.xhtml (last visited on March 4, 2008); Hoovers, Cost Plus, Inc., http://www.hoovers.com/cost-plus/--ID__40781--/free-co-factsheet.xhtml (last visited March 4, 2008); Hoovers, Interpark Holdings, Inc., http://www.hoovers.com/Interpark-Holdings-Incorporated/--HD__fjrsyrrxs,src__dbi--/free-co-dnb_factsheet.xhtml (last visited March 4, 2008); Hoovers, U-Haul Co. of California, http://www.hoovers.com/U-Haul-Co-Of-California/--HD__rsckyfcrt,src__dbi--/free-co-dnb_factsheet.xhtml (last visited March 4, 2008); Hoovers, Frederick's of Hollywood, Inc., http://www.hoovers.com/frederick's-of-hollywood/--ID__11954--/free-co-factsheet.xhtml (last visited March 4, 2008); Hoovers, KB Toys, Inc., http://www.hoovers.com/kb-toys/--ID__102883--/free-co-factsheet.xhtml (last visited March 4, 2008); Hoovers, Modern Parking, Inc., http://www.hoovers.com/Modern-Parking,-Inc./--HD__xyhckfxfx, src__dbi--/free-co-dnb_factsheet.xhtml (last visited March 4, 2008).

Pasadena's ability to provide public services." *Medrano*, 2007 U.S. Dist. LEXIS 82024, at *14. Moreover, merchants "could well raise prices to consumers without corresponding consumer protection benefit" given the "significant burden" FACTA class actions place on businesses. Clarification Act, H.R. 4008, § 2(a)(7).

By comparison, Hurricane Andrew, the second most financially devastating hurricane in American history, reportedly wrought "roughly $26 billion in damages" after destroying 126,000 homes and 80% of the affected area's farms. *See* CBSNews.com, Hurricane Upgraded A Decade Later, http://www.cbsnews.com/stories/2002/08/21/earlyshow/main519456.shtml (last visited March 4, 2008). The 6.7 magnitude Northridge earthquake reportedly "caused more than $12.5 billion in damages, making it one of the costliest natural disasters in U.S. history." ABC7.com, Anniversary of Deadly Northridge Quake, http://abclocal.go.com/kabc/story?section=local&id=3819852 (last visited March 4, 2008). Since the collective classwide statutory damages in the twenty-three surveyed FACTA cases *alone* could

amount to nearly $35 billion, class certification of all three hundred or more FACTA lawsuits reportedly filed nationwide could be ruinous for our nation's business community and the public at large. *See, e.g.*, Clarification Act, H.R. 4008, §§ 2(a)(7), (b) (recognizing the "significant burden" posed by FACTA class actions).[14/]

14/ Some courts imply that insurance could alleviate the burdens posed by a FACTA class action. *See Harris*, 2008 WL 400862, at *10 (indicating that court could not say whether classwide liability would inflict "'irreparable' harm" because the defendant "ha[d] not disclosed whether [the FACTA] claim [was] insured"). But FACTA claims may well not be covered by most policies. *See* Maniloff & White, *supra*, at 7-12 (explaining why coverage may be denied). Indeed, insurers have successfully denied coverage where claims are based on class actions seeking massive statutory damages for alleged technical violations of federal statutes like the Telephone Consumer Protection Act. *See, e.g., ACS Sys., Inc. v. St. Paul Fire & Marine Ins. Co.*, 53 Cal. Rptr. 3d 786, 789, 797-98 (Ct. App. 2007).

C. Contrary to Soualian's argument, a district court's proper use of a superiority analysis does not render Rule 23 inapplicable in FACTA lawsuits, subvert the will of Congress, inappropriately consider the merits of a case, irrationally determine whether a class action is not superior, or employ an improper proportionality analysis.

Soualian argues that district courts cannot consider the economic consequences a defendant would face in FACTA class actions for at least four flawed reasons.

Incorrect statement #1: Soualian, relying on *Califano v. Yamasaki*, 442 U.S. 682 (1979), and *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006), contends that balancing the economic harm defendants could face in FACTA class actions against the harm potential class members suffered would render Rule 23 inapplicable to FACTA cases and subvert the will of Congress. (*See* AOB 22-23, 26-28.) Neither case supports Soualian.

In *Califano*, the U.S. Supreme Court simply held that, unless Congress explicitly states otherwise, the class action device is available where the "certification of a class action *otherwise is permissible*." *Califano*, 442 U.S. at 700

(emphasis added). That means the prerequisites for class certification continue to apply. *Califano* certainly does not mandate class certification where the requirements for class treatment are not satisfied. Moreover, *Califano* did not involve a Rule 23(b)(3) damages class action and did not address Rule 23(b)(3)'s superiority requirement.

Soualian's reliance on *Murray* is similarly misguided. Both Soualian and *Murray* erroneously assert that considering economic consequences in deciding whether to certify claims for damages under a Congressional statute prevents enforcement of the violated law. *See Murray*, 434 F.3d at 953-54. (*See also* AOB 22-23.) But under the approach properly followed by the district court here, the right to statutory awards remains fully intact, either through (1) a damages class action where class certification *would* be the superior method of adjudication or (2) in individual lawsuits where a class action is *not* superior (especially since FACTA provides strong incentives that make individual actions desirable (*see infra*, at 40-41)). Nothing in FACTA suggests consumers can vindicate their FACTA rights only in class actions.

Legally unsupported statement #2: Soualian insists that district courts may not examine defendants' liability exposure because this approach supposedly decides the merits of a case by assuming a class will prevail on its FACTA claims. (*See* AOB 44.) However, "courts are not only at liberty to but *must* consider evidence which goes to the requirements of Rule 23 [at the class certification stage] even [if] the evidence may also relate to the underlying merits of the case." *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168, 1177 n.2 (9th Cir. 2007) (quotation marks omitted). Since the economic consequences of class certification are directly relevant to whether a class action is superior, courts must examine these consequences in their superiority analysis. *See Kline*, 508 F.2d at 233-35 (reversing class certification where the defendant would have faced massive classwide damages). (*Accord supra*, at 9-16.)

Factually unsupported statement #3: Soualian argues that district courts act irrationally when they consider the economic impact of a class

action on a defendant because these defendants would owe the same amount of damages if potential class members brought individual lawsuits. (*See* AOB 34.)

Plaintiffs' argument sidesteps a central and undebatable truth about class action litigation: the aggregation of claims in one action has a synergistic effect in raising the class-wide *settlement* value beyond the true value of all the individual claims combined because proceeding to trial in a class action (as opposed to negotiating individual claims) so often presents the defendant with an all-or-nothing "bet the company" scenario. *See Castano*, 84 F.3d at 746 (class certification "results in significantly higher damage awards" as well as "creates insurmountable pressure on defendants to settle, whereas individual trials would not"); Fed. R. Civ. P. 23 advisory committee's 1998 notes ("granting certification . . . may force a defendant to settle rather than . . . run the risk of potentially ruinous liability"). Moreover, opt-out classes sweep in plaintiffs who, for philosophical or personal reasons, might not otherwise choose to pursue a statutory claim even when the statute provides for fee-shifting and other incentives to sue. It is thus simply not true that, as Soualian

posits, defendants have nothing to complain about when they are the targets of a class action lawsuit.

Nonsequitur argument #4: According to Soualian, the district court *here* erred in denying class certification because Coffee Bean is not "financially unable to bear the burden" of classwide FACTA liability. (AOB 37.)

This argument misconstrues the fundamental nature of the superiority requirement. The rule does not limit a district court's analysis to the narrow question whether the particular defendant before it would be pushed into bankruptcy by a classwide remedy. Rather, the discretion entrusted to the district court turns on a more nuanced superiority analysis that allows the court to deny class certification where classwide relief would be oppressive in comparison to the harm class members suffered, and any savings in judicial economy could not be justified. *See Wilcox*, 474 F.2d at 347-48. (*Accord supra*, at 9-16.)

III.

BECAUSE FACTA VIOLATIONS OFTEN CAUSE CONSUMERS NO HARM, AND YET CONSUMERS RETAIN SIGNIFICANT INCENTIVES TO PURSUE INDIVIDUAL LAWSUITS TO VINDICATE THEIR RIGHTS, A COMPARISON OF COMPETING INTERESTS CONFIRMS THAT FACTA CLASS ACTIONS FREQUENTLY ARE NOT THE SUPERIOR METHOD OF ADJUDICATION.

Most FACTA class actions to date are based on innumerable defendants' failures "to remove the expiration dates from customers' credit and debit card receipts." Hoffman & Ivers, *supra*, at 3; *see also* Clarification Act, H.R. 4008, § 2(a)(4) ("hundreds of [FACTA] lawsuits [have been] filed alleging that the failure to remove the expiration date was a willful violation . . . even where the account number was properly truncated"); Gibson, *supra*, at 1 (reporting that California FACTA class actions are "based largely on the appearance of an expiration date on an electronically-printed credit card receipt").[15/] Soualian's lawsuit here is no different. (*See* ER, Ex.

15/ *See, e.g.*, *Price*, 2007 U.S. Dist. LEXIS 96072, at *1, *3 (plaintiff commenced FACTA class action after receiving a receipt with an expiration date); *Evans*, (continued...)

B at 1) (commencing FACTA class action after receiving a receipt containing her credit card's expiration date).)

Unsurprisingly, in her complaint, Soualian did not contend she or other would-be class members suffered harm as a result of any failure to omit expiration dates from receipts. (*See* ER, Ex. B at 3.)[16/] Experts and courts agree that no consumers suffer actual harm where a merchant includes credit or debit card expiration dates on its receipts. *See, e.g.*, *Avis Rent A Car Sys.*, 2007 WL 4682071, at *2, *5 ("expert analysis shows that it is impossible for there to

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15/(...continued)
2007 U.S. Dist. LEXIS 82026, at *2-*3 (same); *Torossian*, 2007 U.S. Dist. LEXIS 81961, at *1-*3 (same).

16/ Soualian appears to contend that the failure to omit an expiration date "increase[s] risk of identity theft" and thus "constitutes 'actual harm.'" (AOB 10, 23.) Soualian is wrong. *See, e.g.*, *Randolph v. ING Life Ins. & Ann. Co.*, 486 F. Supp. 2d 1, 7-8 (D.D.C. 2007) (increased risk of identity theft is not an actual injury); *Bell v. Acxiom Corp.*, 2006 WL 2850042, at *2 & n.19 (E.D. Ark. Oct. 3, 2006) ("while there have been several lawsuits alleging an increased risk of identity theft, no court has considered the risk itself to be damage[;][o]nly where the plaintiff has actually suffered identity theft has the court found that there were damages"). Indeed, as explained above, experts and courts agree that consumers suffer no harm when their receipts include an expiration date.

be any injury" where defendant printed the expiration date of the plaintiff's credit card); Clarification Act, H.R. 4008, § 2(a)(6) ("Experts in the field agree that the 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.").[17/]

While attorneys in FACTA class actions thus seek massive classwide statutory damages even though their clients claim no harm, FACTA offers significant incentives to consumers to bring individual actions that, realistically, may be far more desirable to individuals than the usual trivial relief afforded to class members after their class counsel negotiate enormous fee payments and class-wide "coupon" remedies, for example.

Plaintiffs in a FACTA lawsuit do not need to prove much to win (for example, they need not show they suffered actual harm to establish a willful violation), and prevailing plaintiffs are entitled to attorney's fees and costs. 15 U.S.C.A. §§ 1681n(a)(1)(A), (a)(3) (West 1998). This fee-shifting provision

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17/ (*Accord* ER, Ex. B at 4; SER 29-31, 33-39.)

alone removes a major disincentive to sue that exists in other contexts. *See Castano*, 84 F.3d at 748 (statutes allowing prevailing parties to recover attorney's fees remove the most compelling reason for certifying a class action). Moreover, where merchants willfully violate FACTA, consumers are entitled to $100 to $1,000 in statutory damages, and may further recover punitive damages. 15 U.S.C.A. §§ 1681n(a)(1)(A), (a)(2) (West 1998).

In other words, FACTA provides consumers with every motivation to vindicate their statutory rights in individual lawsuits, making such actions at least equal to, and often superior to, adjudication in class actions, especially where potential class members like Soualian seek staggering classwide liability yet suffered no actual harm. (*See supra*, at 13-16 & n.4.) And consumers who are not motivated to sue individually may not get much out of a class action settlement anyway, since, "[i]n many cases, the vast majority of class members neglect to collect the money due them under the settlement." Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 Fla. L. Rev. 71, 119 (2007).

CONCLUSION

For the foregoing reasons, the Chamber respectfully asks this court to affirm the district court's denial of class certification.

Dated: March 5, 2008

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