Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Christopher Delamarter,

Plaintiff,

vs

Supercuts, Inc.,

Defendant.

ORDER GRANTING MOTION TO COMPEL AND DENYING MOTION FOR CLASS CERTIFICATION

Court File No. 27-CV-19-19280
The Honorable Patrick D. Robben

The above-entitled matter came before the Honorable Patrick D. Robben, Judge of the District Court in Hennepin County, Minnesota, on December 3, 2021, following Plaintiff's Motions to Compel Discovery and Motion for Class Certification.

David Carrier, Esq., Claire Kueffner, Esq., and Christopher Young, Esq., appeared on behalf of Defendant, Supercuts, Inc.

Theodore Hargrove II, Esq., Kelly Iverson, Esq., Elizabeth Pollock Avery, Esq., and Christopher Renz, Esq., appeared on behalf of Plaintiff, Christopher Delamarter.

Based upon the arguments of counsel, all files, records, and proceedings herein adduced:

DISCUSSION

Factual Background

1. On November 19, 2019, Christopher Delamarter ("Plaintiff") filed this class action complaint against Supercuts, Inc. ("Defendant") for an alleged violation of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"), 15 U.S.C. §§ 1681 *et seq.* Compl. ¶ 4. The alleged violation revolves around receipts for purchase that display more than four digits of the purchaser's

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

credit or debit card number.

2. Defendant is a wholly owned subsidiary of Regis Corporation ("Regis"), a publicly traded company which owns, operates, and franchises Supercuts-branded beauty salons around the country. Compl. ¶14.

3. Over 2,600 franchised salons exist and are subject to standardized Franchise Agreements. Among other things, pursuant to these agreements, all franchisees "must use" Supercut's "currently-designated supplier" ProPoint Solutions, LLC. Pl. Motion to Compel Memo., at 2.

4. ProPoint Solutions is a software development company located in Minneapolis, Minnesota. Regis contracted with ProPoint to provide a POS (point of sale) system, called SuperSalon, to be used by all Supercuts franchisees. *Id.*

5. In November 2015, Regis and ProPoint signed a formal agreement designating SuperSalon as the required POS system for all Supercuts franchises followed by a March 2017 mandate to do so. *Id.*

6. On October 5, 2018, Plaintiff made a purchase at a Supercuts store in Pittsburgh, Pennsylvania, with his debit/credit card. Plaintiff was provided a paper receipt which displayed the first and last four digits of his card number in violation of the Fair and Accurate Credit Transactions Act, 15 U.S.C. §§ 1681c(g) *et seq.*

7. FACTA provides "no person that accepts credit or debit cards for the transaction of business shall print more than the last 5 digits of the card number . . . upon any receipt provided to the cardholder at the point of sale or transaction."

8. Plaintiff alleges the violation has put him and those similarly situated at higher risk of identity theft and payment card fraud. Compl. ¶ 19.

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

Procedural Background

9. This lawsuit began when Plaintiff filed a summons and complaint on Defendants on November 22, 2019.

10. Defendant filed a Notice of Removal to Federal Court on December 26, 2019, challenging the District Court's subject matter jurisdiction. *Case No. 19-3158-DSD-TNL*. On September 30, 2021, Senior Judge David S. Doty issued an order determining that the U.S. District Court District of Minnesota lacked jurisdiction to preside over the matter.

11. On remand, Defendant refused to produce certain documents in response to discovery requests under assertions of privilege.

12. Defendant has provided two privilege logs—one dated March 3, 2021, and the other dated May 21, 2021. Pl. Motion to Compel Memo. at 2.

13. The May 2021 privilege log identifies 173 documents exchanged between Defendant and ProPoint which Defendant claims are subject to the common interest/joint defense privilege as well as attorney-client and work product privilege. *Id.*

14. On November 5, 2021, Plaintiff filed a Motion for Class Certification followed a week later, on November 12, 2021, by a Motion to Compel Defendant to produce the documents listed on the May 2021 privilege log.

15. Oral argument was heard on December 3, 2021. At the hearing, Defendant advised through counsel it was withdrawing the privilege objections to certain documents on its privilege log.

16. On December 22, 2021, Defendant's counsel submitted a letter to the Court setting forth the specific documents for which it was withdrawing a privilege objection.

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

Analysis

17. **Plaintiff's Motion to Compel Discovery.** Minn. R. Civ. Pro. 26.02(b) allows parties to "obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *Id.* If information otherwise discoverable is withheld by a party "claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that . . . will enable other parties to assess the applicability of the privilege or protection." Minn. R. Civ. Pro. 26.02(f)(1). The party claiming privilege bears the burden of establishing the information is immune from discovery. *In re Comm'r of Pub. Safety*, 735 N.W.2d 706, 712 (Minn. 2007).

18. Defendant claims that the documents Plaintiff seeks are privileged under the common interest doctrine. The doctrine has been described as "an exception to the general rule . . . attorney client privilege is waived when privileged information is disclosed to a third party, and it applies if the privilege-holder discloses privileged documents to a third party with which it shared common interest." *Energy Pol'y Advocs. v. Ellison*, 963 N.W.2d 485, 500 (Minn. Ct. App. 2021) (quoting *Shukh v. Seagate Tech. LLC.*, 872 F. Supp. 2 851, 855 (D. Minn. 2012).

19. When applying the rules of evidence, the Court does not have the ability to "promulgate the rules . . . which conflict, modify or supersede" statutory privileges. *State v. Expose*, 872 N.W.2d 252, 259 (Minn. 2015) (quoting Minn. R. Evid. 501, committee comment). As the law stands now, Minnesota does not recognize the common interest doctrine. The rules of privilege are codified by statute and the common interest exception is not within them. Minn. Stat. § 502. In its assessment of whether privilege applies, the Court is limited in its ability to deny the Motion to Compel based on the current state of the law. The Minnesota Court of Appeals in *Energy*

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

Pol'y Advocs. v. Ellison held the common interest doctrine has not been recognized in Minnesota and, at the Respondent's urging, refused to do so. The Court of Appeals emphasized that "the task of extending existing law falls to the supreme court or the legislature, but it does not fall to this court." *Energy Pol'y Advocs.*, 963 N.W.2d at 501 (quoting *Tereault v. Palmer*, 413 N.W.2d 283, 286 (Minn. Ct. App. 1987). This Court has no option but to grant Plaintiff's Motion to Compel Discovery.

20. Underlying documents or facts are not protected simply because they have been attached to counsel correspondence. The threshold inquiry in a privilege analysis is determining "whether the contested document embodies a communication in which legal advice is sought or rendered." *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 444 (Minn. 1998). A document is "not cloaked with the privilege merely because it bears the label 'privileged' or 'confidential.'" *Id.* at 441. Because "the attorney-client privilege is a barrier to disclosure and tends to suppress relevant facts and, as such, must be strictly construed." *Leer v. Chi., Milwaukee, St. Paul & Pac. Ry.*, 308 N.W.2d 305, 309 (Minn. 1981).

21. Supercuts asserts that the documents it has identified on its log constitute (1) communications between counsel and their clients discussing the case and legal strategy; (2) communications between counsel and their respective clients regarding the case and legal strategy; or (3) documents attached to those communications. Def.'s Memo in Opp. Mot. to Compel, at 10. Plaintiff asserts that Supercuts has failed to offer more than conclusory allegations for this assertion. *See In re Nat'l Hockey League Players' Concussion Inj. Litig.*, No. 14-MD-2551 (SRN/JSM), 2016 WL 11409905, at *2 n. 1 (D. Minn. June 8, 2016) ([T]he party asserting the attorney-client privilege cannot rest on conclusory arguments in their memorandum of law in support of their invocation of the attorney-client privilege or work product doctrine.").

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

22. From the log provided, whether the underlying attached documents are privileged is difficult to glean from the somewhat conclusory descriptions provided. If necessary, should a common-interest privileged be defined by the state high court, review of the documents by a special master to determine the applicability of an underlying attorney-client or work product privilege is appropriate.

23. **Stay of Decision.** The Minnesota Supreme Court granted review to hear Respondent's appeal from the Court of Appeals decision on August 10, 2021, with oral arguments taking place on January 12, 2022. "It is apparent that the power to stay proceedings pending appeals is inherent in the courts and exists notwithstanding the statutes may be silent on the matter." *State v. Northern Pacific Railway Co.*, 22 N.W.2d 569 (Minn. 1946). "[E]xcept as otherwise provided by rule or statute, an appeal from a judgment or order does not stay enforcement of the judgment or order in the trial court unless that court orders relief in accordance with rule 108.02." Minn. Ct. R. 108.01, subd. 1. Rule 108.02(1) allows a party seeking relief to move the trial court for "a stay of enforcement of the judgment or order of a trial court pending appeal." Although this is generally in reference to appeal of an issue within the trial court case itself, the reasoning is applicable in the case at hand.

24. "Divesting a trial court of jurisdiction [under Minnesota Court Rule 108.03] is designed to avoid the confusion and waste of time potentially arising from having the same issues before two courts at the same time." *Spaeth v. City of Plymouth*, 344 N.W.2d 815, 825 (Minn. 1984) (citing *Terket v. Lund*, 623 F.2d 29, 33 (7th Cir. 1980). In *State v. Hulsebus*, a decision by the Minnesota Court of Appeals was stayed pending a decision before the supreme court in *State v. Phillips*. *State v. Hulsebus*, 2019 WL 272934 *3 (Minn. Ct. App. 2019). The stay was further continued while awaiting the final disposition in two other supreme court cases: *Morehouse v.*

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

Comm'r of Pub. Safety, 911 N.W.2d 503 (Minn. 2018) and *Johnson v. Comm'r of Pub. Safety*, 911 N.W.2d 506 (Minn. 2018). Although *Hulsebus* is not binding authority, it is indicative of the pragmatic nature of staying a decision when an issue before another court is so on point that it would be futile to try and predict how the higher court would rule. The decision in *Energy Pol'y Advocs. v. Ellison* will dictate whether Minnesota courts will recognize the common interest privilege doctrine. If a common interest privilege is recognized, the supreme court will presumably set forth the exact contours of that privilege.

25. Enforcing the Court's decision on the Motion to Compel would irreversibly influence the trajectory of this case; once the documents Defendants assert are privileged are turned over, they cannot be "unseen" by Plaintiff's counsel. Once squeezed it is impossible to put the toothpaste back in the tube. Pending the decision of the Minnesota Supreme Court, the implementation of this Court's Motion to Compel is stayed until such time as the published opinion is released.

26. **Plaintiff's Motion for Class Certification.** Trial courts have considerable discretion when deciding whether to certify a class and "must conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met." *Palmer v. 3M*, 2007 WL 1879844 (citing *O'Connor v. Boeing N. Am.*, 184 F.R.D. 311, 318 (C.D.Cal. 1998)) (internal citation omitted).

27. If one or more members of a class may sue or be sued under Rule 23.01, class certification is appropriate when four prerequisites are met: (a) the class is so numerous that joinder of all members is impracticable; (b) there are questions of law and fact common to the class; (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (d) the representative parties will fairly and adequately protect the interests of the class. Minn. R. Civ. P. 23.01. The moving party bears the burden of showing each prerequisite is met. *Castano*

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

v. Am. Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996); *Jensen v. Eveleth Taconite Co.*, 139 F.R.D 657, 659 (D. Minn. 1991). Trial courts retain considerable discretion in determining whether a class action may be maintained. *Keating v. Phillip Morris, Inc.*, 417 N.W.2d 132, 137 (Minn. Ct. App. 1987).

28. **Clearly defined.** These four prerequisites are frequently referred to as: (a) numerosity; (b) commonality; (c) typicality; and (d) adequacy of representation. A class must be ascertainable "based on definite standards and capable of being identified without difficult managerial and administrative problems." *Peridot, Inc. v. Kimberly-Clark Corp.*, 2000 WL 673933, at *6 (Minn. Dist. Ct. Feb. 7, 2000).

29. The parties disagree over the appropriate standard of ascertainability. Plaintiff advocates that a class is clearly defined with reference to objective criteria. Membership within the class is dependent on the potential member: 1) entering a transaction at a Supercuts location; 2) after November 19, 2017; 3) using a debit or credit card; and 4) received a receipt displaying more than the last five digits of the payment card.

30. Defendants argue that a heightened standard is necessary. Namely, 1) the class is defined with reference to objective criterial; and 2) there is a reliable and administratively feasible mechanism for determining whether a member is in the class or not. *See Byrd v. Aaron's Inc.*, 784 F.3d 154, 163 (3d Cir. 2015). Defendant asserts that Plaintiff's class definition fails to meet this standard.

31. The Court is persuaded by reasoning from precedent in the Eighth Circuit which has noted that "[a] class may be ascertainable when its members may be identified by reference to objective criteria." *McKeage v. TMBC, LLC.*, 847 F.3d 992, 998, (8th Cir. 2019); *see also Sandusky v. Wellness Ctr., LLC. v. Medtox Sci, Inc.*, 821 F.3d 992, 996 (declining to adopt

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

heightened standard and citing *Mullins v. Direct Digital, LLC.*, 795 F.3d 654, 659 (7th Cir. 2015), which noted a "weak" version of ascertainability recognized by the Seventh Circuit). Ultimately, the Court must determine if the proposed class definition meets the requirements of Rule 23 as ascertained by objective criteria.

32. "To determine whether a class is adequately defined, a court considers whether the proposed definition 'specifies a particular group that was harmed during a particular time frame, in a particular location, in a particular way' and if it 'facilitat[es] the court's ability to ascertain [class] membership in in some objective manner.'" *Palmer*, 2007 WL 1879844. The court in *Palmer* found class certification was inappropriate because the proposed class was not adequately ascertainable. *Id.* The plaintiffs' proposed definition failed to show a connection between the alleged water contamination and defendant 3M's conduct. The court held "water district maps do not provide an objective means to determine whether each resident's water has been contaminated with PFCs…[and]…there appears to be no way to determine if potential class members use or have used the water source for drinking as is required by the proposed definition." *Id.*

33. In this case, the alleged class can be ascertained using objective criteria. The particular group—patrons who visited a Supercuts salon, during a specified window of time (after November 19, 2017)—received FACTA violating receipts. Although it would be difficult to extrapolate the violations across 2,600 Supercuts salons nationwide, this is not fatal to its ascertainability.

34. **Numerosity.** "In satisfying the numerosity requirement for a class action, a plaintiff need only show some evidence or reasonable estimate of the number of purported class members." *Lewy 1990 Tr. ex rel. Lewy v. Inv. Advisors, Inc.*, 650 N.W.2d 445, 452 (Minn. Ct. App. 2002). However, "[m]ere speculation as to the size of the class is insufficient to satisfy the numerosity

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

requirement." *Id.* (quoting *Irvin E. Schermer Tr. v. Sun Equities Corp.*, 116 F.R.D. 334, 336 (D. Minn. 1987)). Plaintiff cites the number of transactions from a sample window of the class period where 688 FACTA-violating receipts were printed.

35. Defendant contends that this group of transactions is mere speculation and not indicative of how many FACTA violations occurred. Defendant relies on *Peridot* and *Palmer* to support its argument. In *Peridot*, the plaintiffs alleged defendant, a commercial tissue manufacturer, entered into a price fixing endeavor. Because defendant served as producer of 74-75% of the national commercial tissue market, plaintiff asserted that the inflated price of their products was passed on to "first-tier distributors" and then ultimately plaintiff's purported class. The District Court of Minnesota in *Peridot* refused to recognize the class, citing inadequate means of identifying the class. The court reasoned it would be necessary to "trace back along the distribution chain the actual commercial tissue products that were shipped to the first-tier business entities…[and] the only way to establish whether the distributor acquired the product from one of the defendant manufacturers or from another distributor." *Peridot*, 2000 WL 673933 at *6. Plaintiff was unable to provide a viable mechanism for calculating liability and damages which the court held was a "highly complex, if not impossible, task, neither managerially nor administratively feasible." *Id.*

36. Here, at least with respect to numerosity, it appears that Supercuts locations were printing noncompliant receipts in connection with hair styling service or hair product transactions. Supercuts policy recommended providing customers receipts. While the exact size cannot be determined, it appears that it is more than speculation to find that the number of potential class members would be sufficiently numerous.

37. **Commonality.** Plaintiff must demonstrate that there are questions of law or fact

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

common to the class. Minn. R. Civ. P. 23.01(b). "[A] common question is one where the same evidence will suffice for each member to make a prima facie showing or the issue is susceptible to generalized class-wide proof." *Custom Hair Designs by Sandy v. Central Payment Co., LLC.*, 984 F.3d 595, 601 (8th Cir. 2020) (quoting *Tyson Foods, Inc. v Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016)). Plaintiff believes that commonality is satisfied by five key questions which, when answered, would be uniform among the class and drive the outcome of the litigation. Pl. Motion for Class Cert., at 9. Defendant argues that there is no common level grievance between the class and Plaintiff who has suffered actual damages. Defendant asserts this lack of alignment between members of the class is "fatal to commonality." Def. Memo. Opposing Class Cert., at 15 (citing *Wilson v. Polaris Indus.*, 1998 WL 779033 (Ct. App. Nov. 10, 1998). The Court finds Plaintiff's proposed class definition—"All persons who, on or after November 19, 2017, were provided a receipt at the point of sale or transaction from a Supercuts-branded salon displaying more than the last five digits of the person's credit card or debit card number"—to be a sufficient question of law common to the class.

38. **Typicality.** The typicality requirement is meant to establish whether a proposed class representative has "an interest compatible with that of the class sought to be represented." *Peterson v. BASF Corp.*, 618 N.W.2d 821, 825 (Minn. Ct. App. 2000). It is "fairly easily met so long as other class members have claims similar to the named plaintiffs." *DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th Cir. 1995). Plaintiff argues typicality has been satisfied because Plaintiff's assertion that Defendant violated FACTA by providing a receipt with more than five digits of his credit/debit card number is the same claim a class would bring. The class would use the same unlawful conduct as their basis for recovery premised on the same legal theory and statutory provisions as Plaintiff.

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

39. Defendant purports that typicality is not met because Plaintiff is the only individual to come forward with evidence of actual injury under FACTA and has failed to identify any other class members that suffered the same actual injury. Defendant claims the rest of the suggested class would only be able to claim statutory damages versus actual damages based on Plaintiff having to safeguard his receipt and provide it to his attorney to bring suit.

40. Plaintiff has specifically disclaimed seeking any actual damages; he is only seeking statutory damages. Plaintiff's interest is compatible with that of the suggested class, therefore, typicality is not defeated based on his eligibility for actual damages.

41. **Adequate Representative.** To be an adequate representative for the class, Plaintiff must show: 1) that counsel is qualified; and 2) the representative plaintiff's interests coincide with the interest of the rest of the class. *Ario v. Metro. Airports Com.*, 367 N.W.2d 509, 513 (Minn. 1985). The Court may consider if the first requirement is satisfied through factors such as:

> (1) whether the representatives' interests are sufficiently identical to those of absent class members so that the representatives will vigorously prosecute the suit on their behalf; (2) whether the attorneys are qualified, experienced, and capable of conducting the litigation; and (3) whether the representatives have any interest in conflict with the objective of the class they represent.

Streich v. Am. Fam. Mut. Ins. Co., 399 N.W.2d 210, 215 (Minn. Ct. App. 1987).

42. This Court is satisfied that Plaintiff's interest is sufficiently identical to those of the proposed class and, based on their participation thus far, it is apparent that Plaintiff's counsel will vigorously prosecute the suit. All attorneys for the parties are qualified, experienced, and capable of conducting the litigation. Plaintiff does not appear to have an interest in conflict with the objective of the class. The Court is not persuaded by Defendant's argument that Plaintiff's claim of actual injury is so separate and distinct from that of the potential class that it creates an insurmountable conflict rendering Plaintiff an inadequate class representative.

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

43. **Rule 23.02—Common Question of Law and Fact Predominate.** To certify the class, Plaintiff must prove that questions of law or fact common to the putative class members predominate over any questions affecting individual class members. Minn. R. Civ. P. 23.02(c). Courts must consider the manageability of the claim as part of the inquiry. *Keating*, 417 N.W.2d at 137. Class issues do not predominate where individual class members would need to establish pertinent facts on a transaction-by-transaction basis to prove liability. *Id.* If such individual issues require "mini-trials" to resolve each class member's claim, common issues do not predominate. *Id.*

44. Plaintiff argues that Defendant conflates ascertainability with predominance and individual inquiries are not required. Each individual class member would be required to prove each FACTA element including that they: 1) used their own card to make the purchase; 2) were consumers rather than business purchasers; and 3) actually took their receipts. In *Keating*, the Minnesota Court of Appeals refused to certify a class because the "only common question was whether there was a violation of the antitrust laws" relevant to the case. *Id.* This required any potential class member to prove the fact and amount of damage. The trial court noted "[a]ny determination of fact or amount of individual damage will require thousands of factual examinations done on a retailer by retailer basis, and a transaction by transaction basis. The class action would quickly degenerate into thousands of individual trials." *Id.*

45. Here, each potential class members would need to establish the elements of FACTA to establish they suffered the same damage as Plaintiff. This would quickly become a logistical burden and akin to each class member pursuing their own individual claim under FACTA which they are free to do already.

46. It is nearly impossible for Plaintiff, regardless of the extent of discovery procedures,

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

to provide evidence that potential class members actually received a copy of a FACTA violating receipt as opposed to any number of other outcomes *e.g*. the cashier throwing it in the trash at the request of the customer, or not offering it to the payor. It is not enough to point to a group of transactions and claim it is sufficient to create a common question. Even in situations when a corporate policy directed customers be provided receipts, when determining whether putative class members are "cardholders," "consumers," and received a receipt involves an individual inquiry, class claims in a FACTA case have been found not to predominate. *See Ticknor v. Rouse's Enterpr., LLC.*, Civil Action Nos. 12-1151, 12-2964, 2014 WL 1764738, at *8 (E.D. La. May 2, 2014) ("[t]he frequency or infrequency with which class members prove these elements of the right to recovery does not lessen Plaintiffs' burden of proof as to these individualized issues"), *aff'd* 592 Fed. Appx. 276 (5th Cir. 2014); *see also, e.g., Bouton v. Ocean Properties, Ltd.*, 322 F.R.D. 683, 701 (S.D. Fla. 2017) (Plaintiff failed to demonstrate that common questions indeed predominated over individual ones when individual inquiries over whether class members received a receipt that violated FACTA); *Meyers v. Nicolet Rest. of de Pere, LLC.*, Case No. 15-C-444, 2016 WL 1275046 (E.D. Wis. Apr. 1, 2016), *vacated on other grounds*, 843 F.3d 724 (7th Cir. 2019) (finding lack of predominance as the court "would expect that the vast majority of the time . . . in this case would entail determining whether individual plaintiffs were actually provided receipts. Assuming—as both parties do here—that the vast majority of people will not have kept their receipts from eating at Defendant's restaurant, Defendant would be entitled to cross-examine each plaintiff and challenge their assertion that they opted to take a copy of the receipt."); (*Gist v. Pilot Travel Centers, LLC.*, No. 5:08-293-KKC, 2013 WL 4068788, at *7 (E.D. Ken. Aug. 12, 2013) (common questions did not predominate when the finder of fact must individually determine whether each consumer within the class was "provided" a receipt to establish a FACTA violation);

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

Todd v. Target Corp., No. 10 C V 05598, 2012 WL 1080355, at *6 (N.D. Ill. Mar. 30, 2012) (common issues did not predominate when crucial question turns on what happened at each point of sale, and individual, sale-by-sale questions will predominate); *Evans v. U-Haul Co. of Calif.*, No. CV 07-2097-JFW (JCx) 2007 WL 7648595, at *3 (C.D. Cal. Aug. 14, 2007) (common questions did not predominate in FACTA case when individual questions regarding which customers were consumers who received receipts involved).

47. Granted, there may be other district court decisions that have found common issues predominate in cases involving FACTA-noncompliant receipts printed by retailers. *See, e.g., Shurland v. Bacci Café & Pizzeri on Ogden Inc.*, 259 F.R.D. 151 (N.D. Ill. 2009) (creation of computer-generated credit card receipts was uniform across the class and defendant conceded it violated FACTA's truncation requirement). However, the Court must consider the particular circumstances of this case—the type of good or service, whether the retail sites are corporate owned or franchises, the manner in which the receipt is provided (electronically versus handing over at the point of sale), the amount of guidance to point-of-sale staff as to how to handle receipts, and whether it could be typical for a consumer to take or keep a receipt for such a good or service transaction, etc. Here, the transactions in question involve low-cost haircuts given through a system of franchise managed locations for a service that cannot be "returned or exchanged" and for which a payor would not likely have a clear reason to accept or maintain a printed receipt that would be physically handed over by a cashier. Plaintiff has not established that common issues would or could be anticipated to predominate.

48. **Superior Method of Adjudication.** If the Court were to look past the common questions failure, Plaintiff asserts that a class action is a superior method of adjudicating this controversy. The relevant test considers: 1) the interest of members of the class in individually

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

controlling the prosecution or defense of separate actions; 2) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; 3) the desirability or undesirability of concentrating litigation of the claims in the particular forum; and 4) the difficulties likely to be encountered in the management of a class action. Minn. R. Civ. P. 23.02(c). Class actions are superior when "collective adjudication promises substantial benefits or makes it possible for class members with small claims to bring suit and enforce the substantive law." *Lewy 1900 Tr. ex rel. Lewy*, 650 N.W.2d at 457.

49. Plaintiff relies on the limited statutory damages available for FACTA violation actions under 15 U.S.C. § 1681n(a)(1)(A) ($100-$1000) and as a result, alleges few class members would initiate their own litigation. Defendant cites the legislative intent of Congress which "anticipated this very issue and took significant steps to address it, including making attorney's fees, costs, and punitive damages available to individual litigants who choose to pursue claims for FACTA violations." Def. Memo. Opposing Class Cert. at 25 (citing 15 U.S.C. § 1681n(a)(2)-(3)).

50. From a financial standpoint, it does not appear there is much to be gained litigating as a class versus on your own. Further, certification would risk creating a situation in which large class action costs, in a situation in which it is not clear the extent to which class members have suffered any actual harm, could be "enormous and completely out of proportion to any harm suffered by the plaintiff." *Serna v. Big A Drug Stores, Inc.*, No. SACV 07-0276 CJC (MLGx), 2007 U.S. Dist. LEXIS 82023, *10, 2007 WL 7665762 (C.D. Cal. Oct. 9, 2007) (quoting *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003)).

51. Further, as noted above, determining whether each class member would have a valid FACTA claim would involve individual determinations. As such, the amount of individualized fact-findings would create logistical complications and impede the manageability

Filed in District Court
State of Minnesota
3/1/2022 11:16 AM

of the class. "[A]ny efficiency gained by the deciding the common elements [of liability] will be lost when separate trials are required … to determine each member's entitlement to the requested relief. *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 273 (S.D. Fla. 2003). Plaintiff failed to prove superiority.

ORDER

1. Plaintiff's Motion to Compel Discovery is GRANTED. Defendant's objection to the motion to compel on the grounds that the subject documents are covered by the common interest privilege is denied based on existing law. The Court shall issue further guidance regarding compliance with this Order, or solicitation of a motion for reconsideration, following issuance by the Minnesota Supreme Court of its decision in *Energy Pol'y Advocs. v. Ellison*, (A20-1344). The parties are ordered to fully cooperate to identify a proposed special master for purposes of reviewing the documents for which privilege is asserted should the Supreme Court determine a common-interest doctrine applies and review of whether the documents had protected through an underlying attorney-client or work-product privilege is appropriate.

2. Plaintiff's Motion for Class Certification is DENIED.

IT IS SO ORDERED:

BY THE COURT:

Date: March 1, 2022

Robben, Patrick
Jud District Court Judge
Mar 1 2022 11:05 AM

Patrick D. Robben
Judge of District Court