IN THE COURT OF COMMON PLEAS
OF ALLEGHENY COUNTY, PENNSYLVANIA

MALINDA SMIDGA, ASHLEY POPA, MATILDA DAHLIN, CHRISTINA CALCAGNO, and BRIAN CALVERT, individually and on behalf of all others similarly situated,

Plaintiffs,

v.

BATH & BODY WORKS LLC and VICTORIA'S SECRET STORES LLC,

Defendants.

CIVIL DIVISION – CLASS ACTION

No. GD-21-009142

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Filed on behalf of Plaintiffs

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v.

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CIVIL DIVISION – CLASS ACTION

No. GD-21-009142

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

Plaintiffs Malinda Smidga, Ashley Popa, Matilda Dahlin, Christina Calcagno, and Brian Calvert ("Plaintiffs"), on behalf of themselves and all other members of the proposed Settlement Class, respectfully move this Court for an order granting final approval of the proposed Class Action Settlement Agreement ("Agreement" or "Settlement") between themselves and Defendants Bath & Body Works, LLC ("BBW") and Victoria's Secret Stores LLC ("VS" and, collectively with BBW, "Defendants");[1] finally certifying this class action for purposes of settlement; and entering final judgment as to the claims raised in the above-captioned class action (the "Action"). For the reasons described below, Plaintiffs respectfully request that their unopposed motion be granted.

A proposed final order and judgment, negotiated by the Parties as part of the Settlement, is submitted herewith.

[1] The Agreement is attached to Plaintiffs' Motion as **Exhibit A**.

I. BACKGROUND

The Action arises out of Defendants alleged printing of more than five digits of the Plaintiffs' and Settlement Class's credit card numbers on receipts in alleged violation of the Fair and Accurate Credit Transactions Act (hereinafter "FACTA"), 15 U.S.C. § 1681 *et seq.* This Action is a consolidation of several actions filed by Plaintiffs Malinda Smidga, Ashley Popa, Matilda Dahlin, Christina Calcagno, and Brian Calvert.

Following the Preliminary Approval Order, Plaintiffs now move for Final Approval of the proposed Settlement of the Action, which will result in an excellent recovery for the Settlement Class[2]—monetary relief of up to $15,000,000 via the issuance of Vouchers with a value of either $5 or $15 to Settlement Class Members.

A. Factual and Procedural Overview of the Litigation

Plaintiffs Smidga and Popa initiated a putative class action against BBW on August 3, 2021, in the Court of Common Pleas of Allegheny County, Pennsylvania, alleging claims for violations of FACTA. BBW sought to dismiss for lack of standing and failure to state a claim, and filed Preliminary Objections, which the Court subsequently overruled. On June 6, 2022, Plaintiffs Smidga and Popa filed a Motion for Class Certification, which was fully briefed by the parties. On June 22, 2022, BBW filed a Motion to Stay Proceedings and Hold Case in Abeyance based on then-pending appeals in *Budai et al. v. Kirkland Inc.*, 461 WDA 2022 and *Gennock v. Country Fair*, 462 WDA 2022.

Plaintiff Dahlin initiated a putative class action against BBW on September 8, 2021, in the Superior Court of Santa Barbara, California, alleging claims for violations of FACTA. BBW filed a Demurrer to the *Dahlin* Complaint on November 23, 2021, seeking to dismiss Plaintiff

[2] Capitalized terms not defined herein have the meaning associated with them in the Agreement.

Dahlin's claims for lack of standing and failure to state a claim. On July 11, 2022, the Superior Court overruled BBW's Demurrer. On November 28, 2022, Plaintiff Dahlin filed a Motion for Class Certification, which was fully briefed. BBW filed a Renewed Demurrer or Motion to Reconsider on December 12, 2022, based on the California Court of Appeal for the Fifth District's decision in *Limon v. Circle K Stores Inc.*, 300 Cal. Rptr. 3d 572 (Cal. App. Ct. 2022), which motion was fully briefed. The parties agreed to stay any ruling on Plaintiff Dahlin's class certification motion or on BBW's renewed demurrer to allow time for the Parties to mediate.

Plaintiff Calcagno initiated a putative class action against VS on September 20, 2022, in the Superior Court of California, County of San Diego, alleging claims for violations of FACTA. On December 21, 2022, VS filed a Motion to Stay or, in the alternative, dismiss the case based on the broader action filed in Pennsylvania. The parties agreed to stay the action pending mediation.

Plaintiff Calvert initiated a putative class action against VS on September 20, 2022, in the Court of Common Pleas of Allegheny County, Pennsylvania, alleging claims for violations of FACTA. The parties agreed to a stay of the *Calvert* action pending the Pennsylvania Superior Court's decision in *Country Fair/Kirkland*, in light of the stay of the *Smidga* action.

In the litigation of each of the Named Actions above, the parties conducted substantial formal discovery and informal investigation in connection with the claims asserted in the Named Actions and in connection with mediation. This included written discovery and depositions. Additionally, the parties engaged in substantial briefing on the relevant legal and factual issues arising out of the claims and defenses, including briefing on the preliminary objections, the demurrers, and the motions for class certification.

B. Negotiation of Proposed Settlement

The parties prepared for and engaged in a full-day formal mediation on May 8, 2023, before the Hon. Diane M. Welsh (Ret.), which resulted in an agreement to resolve the Named Actions.[3] Following this mediation, the parties continued negotiating and finalizing the Settlement Agreement over the course of several months and ultimately reached an agreement on general terms accepted by all parties. The parties worked together to draft and finalize the Settlement Agreement, proposed Class Notices, and proposed Claim Forms, and fully executed the Settlement Agreement.

On March 25, 2024, Class Counsel moved this Court for preliminary approval of the Settlement. Doc. 46–47. To effectuate the proposed Class Action Settlement, the Parties agreed that Plaintiffs would file an amended complaint to add Matilda Dahlin, Christina Calcagno, and Brian Calvert as plaintiffs and VS as a defendant. Plaintiffs' Amended Class Action Complaint was filed on April 3, 2024. Doc. 50. On April 9, 2024, this Court granted preliminary approval of the class settlement and provisional class certification of the following Settlement Class:

> All consumers who made a purchase at a Victoria's Secret, Pink, or Bath & Body Works store during the Relevant Time Period and were provided a printed receipt at the point of sale that displayed more than the last five digits of their credit card or debit card number.

Doc. 51. The Settlement Class excludes all individuals who, prior to the execution of this Settlement Agreement, commenced separate litigation or arbitration involving the Fair and Accurate Credit Transactions Act against any Defendant, regardless of the present status of such proceeding or any future developments therein. The Settlement Class also does not include any

[3] Prior to the successful mediation that led to this proposed Agreement, Plaintiffs Smidga, Popa, and Dahlin engaged in a day-long mediation sessions with BBW before the Hon. Morton Denlow (Ret.) on April 25, 2022. That mediation was ultimately unsuccessful.

person who timely excluded themselves from the Settlement Class, the trial judge presiding over the Named Actions or any member of the judge's immediate family, Defendants, as well as any parent, subsidiary, affiliate, officers, or directors of Defendants, Class Counsel and any heirs, assigns and successors of any of the above persons or organizations in their capacity as such. *Id.*

By the same Order, the Court conditionally certified Malinda Smidga, Ashley Popa, Matilda Dahlin, Christina Calcagno, and Brian Calvert as the Settlement Class Representatives and conditionally appointed the law firm of Lynch Carpenter, LLP as Settlement Class Counsel. *Id.* The Court also appointed Verita, LLC f/k/a KCC LLC as the Settlement Administrator, and approved the Parties' proposed Notice plan. *Id*.

C. Terms of the Proposed Settlement Agreement

a. Relief to Settlement Class Members

Under the terms of the settlement, Settlement Class Members who submit a Valid Claim Form shall receive a Voucher worth up to $15.00. (SA § II.A.1). Additionally, if a Settlement Class Member made purchases during the Relevant Time Period at both BBW and either VS or PINK, the Settlement Class Member may submit a Claim Form for both BBW and either VS or PINK. (SA § II.A.1.a). However, a Settlement Class Member may not receive more than one Voucher per Defendant, or two Vouchers total. *Id.* at b. If a BBW Loyalty Member or VS Cardholder does not submit a Valid Claim Form, he or she will automatically receive a Voucher worth up to $5.00. (SA § II.A.2). The maximum consideration distributed to the Settlement Class Members under this Settlement Agreement shall not exceed fifteen million dollars ($15,000,000), which includes all Vouchers that are delivered, whether or not they are redeemed. (SA § II.A.4). If more than $15,000,000 in Vouchers are claimed, the Settlement Administrator shall distribute Vouchers on a *pro rata* basis, reducing the value of the Vouchers as necessary in

order to comply with the $15,000,000 maximum consideration, applied first to the $15 Vouchers before any *pro rata* reduction in the automatic Vouchers. *Id*.

b. Attorneys' Fees, Costs, and Expenses of Litigation and Service Awards

As part of this Settlement Agreement, Defendants have agreed not to oppose Class Counsel's petition to be awarded up to three million dollars ($3,000,000.00) as Attorneys' Fees and Costs incurred in the prosecution of the Named Actions. (SA § VI.A.1). This three million dollars shall be in addition to the fifteen million dollars ($15,000,000) in maximum consideration. *Id*. The Court shall determine the final amount of Attorneys' Fees and Costs to be awarded. *Id*. Also as part of this Settlement Agreement, Defendants agreed not to oppose Service Awards to the Named Plaintiffs of $5,000 each (in addition to any Vouchers received as a Settlement Class Member) for their efforts on behalf of the class. (SA § VI.B.1).

Class Counsel separately requested approval of these service awards and attorneys' fees and costs on June 17, 2024. Doc. 52–54.

c. Releases

In exchange for the consideration provided by Defendants under the Agreement, Plaintiffs, the Settlement Class (including members who did not timely and validly opt-out of the Settlement), and their related persons will fully and finally release BBW and VS and their related persons and entities from any claims they may have related to the matters alleged in the Named Actions.

D. Report of the Results of the Notice Program

Following Preliminary Approval, Defendants provided the Settlement Administrator with data files identifying all BBW Loyalty Members and VS Cardholders. (Verita Decl. ¶ 2).[4] The data files permitted the Settlement Administrator to identity 1,812,656 Settlement Class Members. *Id.*

Notice began on May 17, 2024. *Id.* at ¶ 3. Notice in the form of Exhibit 6A to the Agreement, which provided an option to submit a Claim Form for a $15 Voucher or do nothing to automatically receive a $5 Voucher, was directly emailed to all BBW Loyalty Members and VS Cardholders. *Id.*

The Settlement Administrator also: posted a notice consistent with Exhibit 6B of the Agreement on the Settlement Website at www.factaclassactionsettlement.com; issued a press release consistent with Exhibit 6C to the Agreement to general media outlets and journalists nationwide; and deployed a digital media campaign, purchased programmatically over various websites via one of more ad exchanges and social media, which provided notice consistent with Exhibits 6D and 6E to the Agreement. *Id.* at ¶ 7.

On May 21, 2024, Verita received a report regarding the email campaign which stated that, of the 1,812,656 emails that were sent out as part of the notice program, 1,604,987 emails had been sent successfully without notification of a bounce, yielding a success rate of 88%. (Verita Decl. ¶ 4). Further, a total of 47,399,260 impressions were ultimately delivered, confirmation of which is attached to the Settlement Administrator's Declaration. (Verita Decl. ¶ 6). Additionally, Verita reports that, as of September 22, 2024, there have been 1,108,988 page

[4] The Declaration of Verita, LLC f/k/a KCC LLC is attached to Plaintiff's Motion as **Exhibit B**.

views of the Settlement Website and 493,783 active visits. (Verita Decl. ¶ 7). As of September 23, 2024, Verita also reports 124 phone calls to the telephone hotline. (Verita Decl. ¶ 8).

The cost of Notice and administration of the Settlement will be paid by Defendants, separate and apart from the consideration made available to the Settlement Class. (SA § II.D).

After final approval, Defendants will provide the Vouchers to the Settlement Administrator within thirty (30) days of the Effective Date of the Settlement, and the Settlement Administrator will distribute the Vouchers by email to all Settlement Class Members eligible to receive them pursuant to Section II.A.1 and II.A.2 of the Agreement within sixty (60) days of the Effective Date.

E. No Objections and Only One Request for Exclusion were Received

The Notices explained Class Members' ability to opt out of or object to the Settlement, consistent with Sections IV.E.4 and IV.G.2 of the Agreement. As of the July 1, 2024, the deadline to object to or request exclusion from the Settlement, the Settlement Administrator received no objections and only one request for exclusion from the Settlement. (Verita Decl. ¶ 10). Additionally, no opt-out requests or objections were received since the July 1, 2024, deadline. (Verita Decl. ¶ 10).

II. ARGUMENT

A. The Requirements for a Class Action are Satisfied and the Court Should Grant Final Class Certification of the Settlement Class.

Under the Pennsylvania Rules of Civil Procedure, the proponent of class certification must demonstrate that the prerequisites under Rule 1702 are satisfied. Pa. R. Civ. P. 1702; *see*

also Samuel-Bassett v. Kia Motors America, Inc., 34 A.3d 1, 16 (Pa. 2011).[5] Pursuant to Pa. R. Civ. P. 1710(d), the Court conditionally certified the proposed Settlement Class on May 6, 2024.

In deciding whether to certify a class action, the court is vested with broad discretion. *Cambanis v. Nationwide Ins. Co.*, 501 A.2d 635 (Pa. Super. Ct. 1985) ("Pennsylvania Rules of Civil Procedure . . . grant the court extensive powers to manage the class action."). Decisions in favor of maintaining a class action should be liberally made. *D'Amelio v. Blue Cross of Lehigh Valley*, 500 A.2d 1137, 1141 (Pa. Super. Ct. 1985). As explained below, the Settlement Class satisfies the class certification requirements of the Pennsylvania Rules of Civil Procedure, and this Court should finally certify this class action for settlement purposes.

a. The Settlement Class is so Numerous that Joinder of All Members is Impracticable.

Rule 1702(1) requires that the proposed class be "so numerous that joinder of all members is impracticable." Pa. R. Civ. P. 1702(1). While there is no specific minimum number needed for a class to be certified, there is a general presumption that numerosity is satisfied where the potential number of plaintiffs exceeds 40. *See Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 595 (3d Cir. 2012). Ultimately, whether a class is sufficiently numerous is based on the circumstances surrounding each individual case. *Janicik v. Prudential Ins. Co. of. Am.*, 451 A.2d 451, 456 (Pa. Super. Ct. 1982). And the Court should inquire "whether the number of potential individual plaintiffs would pose a grave imposition on the resources of the Court and an unnecessary drain on the energies and resources of the litigants should such potential plaintiffs sue individually." *Temple Univ. v. Pa. Dept. of Public Welfare*, 374 A.2d 911, 996 (Pa. Commw. Ct. 1977).

[5] Additionally, Rules 1708 and 1709 specify the factors considered in determining the last two requirements of Rule 1702 (adequacy of representation and fairness and efficiency). *Id.*

Here, the Settlement Class is sufficiently numerous. Violations of FACTA allegedly occurred in several BBW and VS locations, and, based upon discovery provided to Plaintiffs by Defendants, there are hundreds of thousands of Settlement Class Members. Thus, the proposed Settlement Class consists of more members than would be practicable to join.

b. There are Questions of Law or Fact Common to the Settlement Class.

Rule 1702(2) requires common questions of law and fact to exist. Where the "class members' legal grievances arise out of the 'same practice or course of conduct'" undertaken by the defendants, Rule 1702(2) is satisfied. *Janicik*, 451 A.2d at 457 (quoting *Ablin, Inc. v. Bell Telephone Co. of Pennsylvania*, 435 A.2d 208, at 213 (Pa. Super. Ct. 1981)).

Here, the Settlement Class meets the commonality standard because it is limited to those individuals whose transaction receipts were violative of FACTA's truncation requirements. As such, Plaintiffs' and Settlement Class Members' alleged injuries all stem from the same allegedly unlawful conduct by Defendants. These factual commonalities give rise to common legal issues such as whether Defendants' conduct of printing more than the last five digits of the credit card or debit card and/or the expiration date of the credit card or debit card violated FACTA, whether Defendants' conduct was willful, and whether Plaintiffs and Settlement Class Members are entitled to statutory damages. For these reasons, Rule 1702(2)'s commonality requirement is satisfied.

c. The Claims of the Representatives Plaintiffs are Typical of the Claims of the Settlement Class.

Rule 1702(3) requires that the "claims or defenses of the representative parties are typical of the claims or defenses of the class." Pa. R. Civ. P. 1702(3). This requirement is intended to ensure that "the class representative's overall position on the common issues is sufficiently aligned with that of the absent class members to ensure that her pursuit of her own interests will

advance those of the proposed class members." *Samuel-Bassett*, 34 A.3d at 30–31 (quoting *D'Amelio*, 500 A.2d at 1146). The typicality requirement is satisfied where the plaintiffs' and class members' claims arise "out of the same course of conduct and involve the same legal theories." *Samuel-Bassett*, 34 A.3d at 30–31 (citing *Dunn v. Allegheny County Prop. Assessment Appeals & Review*, 794 A.2d 416, 425 (Pa. Commw. Ct. 2002)). This does not mean that the plaintiffs' and class members' claims must be identical; only that the claims are similar enough to determine that the representative party will adequately represent the interests of the class. *Klusman v. Bucks Cty. Court of Common Pleas*, 564 A.2d 526, 531 (Pa. Commw. Ct. 1989), *aff'd*, 574 A.2d 604 (Pa. 1990). A finding that a named plaintiff is atypical must be supported by a clear conflict and be such that the conflict places the class members' interests in significant jeopardy. *Id.*

Similar to commonality, typicality is established because Plaintiffs' claims arise out of the same practice as the claims of each Settlement Class Member—Defendants' practice of printing more than the last five digits of the credit card or debit card and/or the expiration date of the credit card or debit card in violation of FACTA. Because this case is challenging the same alleged conduct which affects both the named Plaintiffs and the Settlement Class, there are no differences between Plaintiffs' overall position on the claims and those of the Settlement Class Members. Thus, typicality is satisfied.

d. The Representative Plaintiffs Will Fairly and Adequately Represent the Interests of the Settlement Class.

Rule 1702(4) requires that the "representative parties will fairly and adequately assert and protect the interests of the class under the criteria set forth in Rule 1709." Pa. R. Civ. P. 1702(4). In turn, Rule 1709 lists three requirements:

(1) whether the attorney for the representative parties will adequately represent the interests of the class,

(2) whether the representative parties have a conflict of interest in the maintenance of the class action, and
(3) whether the representative parties have or can acquire adequate financial resources to assure that the interests of the class will not be harmed.

Pa. R. Civ. P. 1709. The Class Representative Plaintiffs and Class Counsel meet these requirements.

i. Counsel for Plaintiffs have Adequately Represented the Interests of the Settlement Class.

Plaintiffs here have retained competent counsel experienced in consumer class action litigation. Unless proven otherwise, courts will generally assume that members of the bar are adequately skilled in the legal profession. *Janicik*, 451 A.2d at 458; *see also Haft v. U.S. Steel Corp.*, 451 A.2d 445, 448 (Pa. Super. Ct. 1982) (explaining that the Court is also permitted to presume counsel's adequacy in the absence of any demonstration to the contrary). "Courts may also infer the attorney's adequacy from the pleadings, briefs, and other material presented to the court, or may determine these warrant further inquiry." *Janicik*, 451 A.2d at 458. Settlement Class Counsel has demonstrated their adequacy and commitment to this litigation through their pursuit of these claims through years-long litigation, culminating in the proposed Settlement that provides substantial relief to members of the Settlement Class. For these reasons, the Court should find this factor is satisfied.

ii. There Are No Conflicts of Interest Between Representative Plaintiffs and the Settlement Class.

As with the adequacy of counsel requirement, the Court "may generally presume that no conflict of interest exists unless otherwise demonstrated." *Haft*, 451 A.2d at 448 (quoting *Janicik*, 451 A. 2d at 459). Plaintiffs are not aware of any "hidden collusive circumstances," *Haft*, 451 A.2d at 448, that could pose conflicts of interest between Plaintiffs and members of the Settlement Class. Plaintiffs and the Settlement Class have aligned interests: they were all subject

to Defendants' alleged FACTA violations. If Plaintiffs succeed in obtaining final approval of the proposed Settlement, the benefits will inure to Plaintiffs and all Settlement Class Members in a manner calculated to equitably correspond to the harm suffered by each Class Member.

iii. The Interests of the Settlement Class Members Have Not Been Harmed by Lack of Adequate Representation.

The requirement that the representative plaintiffs demonstrate access to adequate financial resources to ensure that interests of the class are not harmed may be met if "the attorney for the class representatives is ethically advancing costs." *Haft*, 451 A.2d at 448; *see also Janicik*, 451 A.2d at 459–60. That is the case here: Plaintiffs' counsel undertook this litigation pursuant to a standard contingent fee agreement, and, up through this point in the litigation, counsel have advanced all costs required to maintain the litigation. Under the terms of the Settlement, Settlement Class Counsel is ethically seeking reimbursement of its costs and payment of its fees as described in Plaintiffs' Application for Attorneys' Fees, Costs, and the Costs of Settlement Administration, and Service Awards to Representative Plaintiffs.

e. A Class Action is a Fair and Efficient Method of Adjudicating the Controversy.

Rule 1702(5) requires that the court determine whether a class action provides a "fair and efficient method of adjudicating the controversy," with reference to additional factors in Rule 1708. Pa. R. Civ. P. 1702(5). In turn, Rule 1708 lists the following factors for courts to consider:

> In determining whether a class action is a fair and efficient method of adjudicating the controversy, the court shall consider among other matters the criteria set forth in subdivisions (a), (b) and (c).
>
> (a) Where monetary recovery alone is sought, the court shall consider
> (1) whether common questions of law or fact predominate over any question affecting only individual members;
> (2) the size of the class and the difficulties likely to be encountered in the management of the action as a class action;
> (3) whether the prosecution of separate actions by or against individual members of the class would create a risk of

(i) inconsistent or varying adjudications with respect to individual members of the class which would confront the party opposing the class with incompatible standards of conduct;

(ii) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests;

(4) the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues;

(5) whether the particular forum is appropriate for the litigation of the claims of the entire class;

(6) whether in view of the complexities of the issues or the expenses of litigation the separate claims of individual class members are insufficient in amount to support separate actions;

(7) whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

(b) Where equitable or declaratory relief alone is sought, the court shall consider

(1) the criteria set forth in subsections (1) through (5) of subdivision (a), and

(2) whether the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final equitable or declaratory relief appropriate with respect to the class.

(c) Where both monetary and other relief is sought, the court shall consider all the criteria in both subdivisions (a) and (b).

Pa. R. Civ. P. 1708.

i. Common Questions of Law and Fact Predominate.

The predominance inquiry under Rule 1708(a)(1), while "more demanding" than the commonality standard, requires "merely" that the "common questions of fact and law . . . predominate over individual questions." *Samuel-Bassett*, 34 A.3d at 23. "[A] class consisting of members for whom *most* essential elements of its cause or causes of action may be proven through simultaneous class-wide evidence is better suited for class treatment than one consisting of individuals from whom resolution of such elements does not advance the interests of the entire class." *Id.* Where class members can demonstrate they were subjected to the same harm and they identify a "common source of liability," individualized issues such as varying amounts of

damages will not preclude class certification. *See id.* at 28 (citations and quotation marks omitted).

As explained above, the key issues in this case shared by Plaintiffs and Settlement Class Members involve Defendants' alleged violations of FACTA's truncation requirements. Defendants' conduct that is alleged to have violated FACTA was uniform as to the Settlement Class. Additionally, because FACTA provides for statutory damages on a per-person basis, there are no individualized questions related to damages. Here, questions relating to Defendants' alleged violations would be the primary focus of the continued litigation, and those questions would be resolved with answers uniform to Plaintiffs and the Settlement Class. These legal and factual issues predominate over individualized questions

ii. The Size of the Settlement Class and Manageability of the Case Weigh in Favor of Class Certification.

Rule 1708(a)(2) requires the Court to consider "the size of the class and the difficulties likely to be encountered in the management of the action as a class action." Pa. R. Civ. P. 1708(a)(2). Defendants conducted thousands of transactions constituting alleged violations and proceeding as a class action here for settlement purposes is fully manageable. Here, the Parties have agreed to a settlement structure and claims process designed to permit the Settlement Administrator to make a straightforward and simple determination of the amount each Settlement Class Member will receive under the Settlement where they either submitted a Valid Claim Form, or where they are a BBW Loyalty Member or VS Cardmember and did not submit a Valid Claim Form but will automatically receive a Voucher. In these circumstances, there are no potential manageability problems weighing against class certification.

iii. Prosecution of Separate Individual Action Creates a Risk of Inconsistent Rulings.

Rule 1708(a)(3) requires the Court to consider whether prosecution of separate individual actions, as opposed to a class action, would create risks of inconsistent or varying rulings which would confront the defendant with incompatible standards of conduct, and whether adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of others or impair their ability to protect their interests. Pa. R. Civ. P. 1708(a)(3). Where, as here, Plaintiffs and Settlement Class Members share an identical claim stemming from the same conduct on the part of Defendants, a class action "affords the speedier and more comprehensive statewide determination of the claim," and is "the better means to ensure recovery if the claim proves meritorious or to spare [defendant] repetitive piecemeal litigation if it does not." *Janicik*, 451 A.2d at 462–63. Indeed, because Plaintiffs sought to establish Defendants' liability under a theory that Defendants willfully violated the truncation requirements of FACTA which impacted all members of the Settlement Class, there is a substantial risk that individual actions would lead to varying outcomes. *Id.* at 462 ("Courts may, and often do, differ in resolving similar questions..."). Therefore, this factor weighs in favor of class certification.

iv. The Extent and Nature of Litigation by Other Settlement Class Members Weighs in Favor of Class Certification, and this Court is an Appropriate Forum.

Rule 1708(a)(4) requires the Court to consider "the extent and nature of any litigation already commenced by or against members of the class involving any of the same issues." Pa. R. Civ. P. 1708(a)(4). This factor weighs in favor of certification because there are no other Pennsylvania state court actions against Defendants related to their violations of the truncation requirements of FACTA, so there is no risk that class certification would impair the rights of

other litigants in other actions. While there was one other action file in Illinois related to BBW's alleged violation of FACTA,[6] that individual's claims are preserved and not affected by this Settlement because he is excluded from the Settlement Class. (*See* SA § I(32) ("The Settlement Class excludes all individuals who, prior to the execution of this Settlement Agreement, commenced separate litigation or arbitration involving the Fair and Accurate Credit Transactions Act against any Defendant, regardless of the present status of such proceeding or any future developments therein.").

Additionally, this Court is an appropriate forum because Defendants regularly conduct substantial business in this county, and it is the place of residence for a substantial number of members of the Settlement Class. As a result, there is "no one common pleas court which would be better to hear the action." *Baldassari v. Suburban Cable TV Co.*, 808 A.2d 184, 195 (2002) (quoting *Cambanis*, 501 A.2d at 641 n.19).

v. The Amounts at Issue, Complexities of the Issues, and Expenses of the Litigation Justify a Class Action Rather Than Individual Actions.

Rule. 1708(a)(6) requires the Court to consider whether, in light of the complexity of the issues and expenses of litigation, the separate claims of individual class members are insufficient in amount to support separate actions. Relatedly, Rule 1708(a)(7) requires the Court to consider whether it is likely that the amount which may be recovered by individual class members will be so small in relation to the expense and effort of administering the action as not to justify a class action.

Here, both factors support class certification. Under the statute, Defendants could be liable to individuals whose credit card or debit card numbers and/or the expiration dates were

[6] *See Blanco v. Bath & Body Works, LLC*, Case No. 2022-CH-00605 (Ill. Cir. Ct.).

printed on their receipts in violation of FACTA's truncation requirements for the amount of damages caused or damages of not less than $100 and not more than $1,000, along with discretionary punitive damages. *See* 15 U.S.C. § 1681n. Despite the potential for a substantial statutory damage recovery, the complexities of the litigation and its attendant costs would prevent many of these individuals from prosecuting their case in court. Moreover, the Settlement Class Members would be likely to recover nothing based on recent legal developments related to an individual's standing to pursue FACTA violations. *See Budai v. Country Fair, Inc.*, 296 A.3d 20 (Pa. Super. Ct. 2023); *Gennock v. Kirkland's Inc.*, 299 A.3d 900 (Pa. Super. Ct. 2023). As such, were the litigation to continue as individual actions rather than a class action, Settlement Class Members may not have the financial incentive to pursue litigation to vindicate their rights.

Importantly, the Settlement provides a reasonable compromise that, if finally approved, will accomplish a desirable outcome in this proceeding—those individuals who were subject to Defendants' alleged conduct have been provided an opportunity to submit claims to recover for the alleged violations without having to bring their own lawsuit. As a result, Settlement Class Members will be entitled to compensation if this action is certified, and the Settlement finally approved. When weighed against the prospects of individual litigation, the proposed Settlement here offers all the potential advantages of class certification—eliminating the possibility of numerous duplicative claims and redundant work for counsel and the courts, while providing a recovery for a large group without requiring each individual Settlement Class Member to shoulder the burden of litigation expenses despite potentially small recovery.

For these reasons, the factors described in Rule 1708(a)(6) & (7) both support certification.

B. The Settlement is Fair, Reasonable, and Adequate and Should be Approved.

"[S]ettlements are favored in class action lawsuits..." *Dauphin Deposit Bank & Trust Co. v. Hess,* 727 A.2d 1076, 1080 (Pa. 1999). As the United States Court of Appeals for the Third Circuit[7] has recognized, "[t]here is an overriding public interest in settling class action litigation, and it should therefore be encouraged." *In re Warfarin Sodium Antitrust Litig.,* 391 F.3d 516, 535 (3d Cir. 2004); *accord, In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.,* 55 F.3d 768, 784 (3d Cir. 1995) ("The law favors settlement, particularly in class actions and other complex cases where substantial judicial resources can be conserved by avoiding formal litigation.");[8] *see also Moore v. Comcast Corp.,* No. 08-773, 2011 WL 238821, at *3 (E.D. Pa. Jan. 24, 2011) ("Settlement of complex class action litigation conserves valuable judicial resources, avoids the expense of formal litigation, and resolves disputes that otherwise could linger for years.").

Pennsylvania Rule of Civil Procedure 1714(a) provides that "no class action shall be compromised, settled or discontinued without the approval of the court after hearing." In *Brophy v. Phila. Gas Works*, the court explained that "a trial court's approval of a class action settlement as fair involves a two-step process." 921 A.2d 80, 88 (Pa. Commw. Ct. 2007). Given the Court's preliminary approval of the Settlement, entry of the Preliminary Approval Order, and dissemination of the Notice, we are now at the second step: the Court's consideration of final approval.

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[7] Pennsylvania state courts have looked to federal courts in the context of complex class action litigation. *See, e.g., Milkman v. Am. Travellers Life Ins. Co.,* No. 011925, 2002 WL 778272, at *24 (Pa. Com. Pl. Apr. 1, 2002) (citing to Third Circuit and other federal case law when assessing a class action settlement).

[8] All internal quotation marks and citations are omitted unless otherwise noted.

The standard for determining whether to grant final approval to a class action settlement is whether the proposed settlement falls within a "range of reasonableness" after considering the following seven factors: (1) the risks of establishing liability and damages; (2) the range of reasonableness of the settlement in light of the best possible recovery; (3) the range of reasonableness of the settlement in light of all the attendant risks of litigation; (4) the complexity, expense, and likely duration of the litigation; (5) the state of proceedings and the amount of discovery completed; (6) the recommendations of competent counsel; and (7) the reaction of the class to the settlement. *Dauphin,* 727 A.2d at 1078 (quoting *Buchanan v. Century Fed. Say. & Loan Ass'n,* 393 A.2d 704, 709 (Pa. Super. Ct. 1978) (citing *Girsh v. Jepson,* 521 F.2d 153 (3d Cir. 1975))).[9]

Because a settlement is a compromise, the trial court should not decide the merits of the case. *See Buchanan,* 393 A.2d at 710–11. Moreover, the trial court should not attempt to substitute its own judgment for that of the parties, but rather, must consider all relevant factors and view the negotiated settlement as a whole. *See e.g., Buchanan*, 393 A.2d at 709 ("As with valuation problems in general, there will usually be a difference of opinion as to the appropriate value of a settlement. For this reason, judges should analyze a settlement in terms of a 'range of

[9] Federal Rule of Civil Procedure 23(e), to the extent its consideration is helpful to the Court, was amended to, among other things, specify that in considering approval of a settlement, courts should assess whether: (i) the class representatives and class counsel have adequately represented the class; (ii) the settlement was negotiated at arm's-length; (iii) the relief is adequate given "the costs, risks, and delay of trial and appeal," "the effectiveness of distributing the relief to the class," "the terms of any proposed award of attorney's fees," and "any agreements required to be identified under Rule 23(e)(3)"; and whether (iv) the settlement treats class members equitably relative to each other. *See* amendments to Rule 23(e)(2)(A)-(D). Many of these considerations are already among the factors that courts within Pennsylvania weigh, and each are readily satisfied here, as discussed below.

reasonableness' and should generally refuse to substitute their business judgment for that of the proponents.").

And where, as here, settlement results from "arms-length negotiations between experienced counsel, before an experienced and independent mediator," many courts hold that "an initial presumption of fairness" applies. *Galt v. Eagleville Hosp.*, 310 F. Supp. 3d 483, 493 (E.D. Pa. 2018); *see, e.g.*, *Milkman*, 2002 WL 778272, at *4–5 ("[A] settlement that is the product of arm's-length negotiations conducted by experienced counsel is presumed to be fair and reasonable.") (alteration in original); *Murphy v. Eyebobs, LLC*, 638 F. Supp. 3d 463, 479 (W.D. Pa. 2021) (same). Application of the relevant factors supports granting final approval of the Settlement.

a. The Risks of Establishing Liability

"One very significant factor in determining whether a settlement is reasonable is the risk involved in proving liability and damages." *Treasurer of State v. Ballard, Spahr, Andrews & Ingersoll LP,* 866 A.2d 479, 484 (Pa. Commw. Ct. 2005) (citing *Fischer v. Madway*, 485 A.2d 809 (Pa. Super. Ct. 1984). "The risks surrounding a trial on the merits are always considerable." *Milkman,* 2002 WL 778272, at *13 (quoting *In re Diet Drugs*, Nos. 1203, 99-20593, 2000 WL 1222042 (E.D. Pa. Aug. 28, 2000)). A reviewing court "must recognize the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Id.* (quoting *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). Although at the time Settlement Plaintiffs believed that the case against Defendants was strong, that confidence must be tempered by the fact that the Settlement is certain and that every case involves significant risk of no recovery. This is especially true where, as here, the litigation was

stayed pending appeals in similar cases, which created risk for both sides pending those decisions.

Establishing liability in this case would also require extensive discovery into Defendants' records regarding hundreds of thousands of transactions. Documentation of those transactions and their related paperwork would require extensive review. Further, in light of the statute's willfulness requirement for recovery of statutory damages, testimony from Defendants' employees regarding their knowledge of Defendants' practices would be necessary, which would further delay resolution of the claims. Ultimately, however, even if Plaintiffs could obtain such recovery, there is no guarantee that the facts would ultimately support Plaintiffs' claims as Defendants have maintained that Plaintiffs' claims would not be successful.

b. The Range of Reasonableness in Light of the Best Possible Recovery

Under the statute, entities who are willfully noncompliant with FACTA—as Plaintiffs allege Defendants have been—are liable to any consumer for only $100-$1,000. 15 U.S.C. § 1681n(a)(1)(A). However, this amount of recovery per person is the best-case scenario and does not account for the risks of litigation. If the Settlement is not approved, Plaintiffs and Class Members face a substantial risk of obtaining no recovery at all in light of the recent *Kirkland* and *Country Fair* decisions out of the Pennsylvania Superior Court.[10] Thus, it is increasingly likely that Plaintiffs would not be able to recover at all should the case proceed to trial, limiting drastically what can be considered the best possible recovery. In contrast, the Settlement provides an immediate, fair, and reasonable recovery for the Settlement Class without needing to risk further litigation.

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[10] *See Budai*, 296 A.3d 20; *Gennock*, 299 A.3d 900.

c. The Range of Reasonableness in Light of the Attendant Risks of Litigation

As detailed above (*see supra* § II.B.a), Defendants made numerous factual and legal arguments against Plaintiffs' claims which, if successful, would result in dismissal of this case and no recovery for the Class. While Plaintiffs overcame Defendants' Preliminary Objections, that was merely the first step of what would likely have become a drawn out and risky litigation. Plaintiffs would still have to conduct extensive discovery, successfully obtain class certification, survive summary judgment, prevail at trial, and potentially defend that victory on appeal.

d. The Complexity, Expense, and Likely Duration of the Litigation

The complexity, expense, and duration factor "captures the probable costs, in both time and money, of continued litigation." *In re Cedant Corp. Litigation*, 264 F.3d 201, 233 (3d Cir. 2001) (quoting *Gen. Motors Corp.*, 55 F.3d at 812). "Most class actions are inherently complex and settlement avoids the costs, delays and multitude of other problems associated with them." *Milkman*, 2002 WL 778272 at *17 (quoting *In re Austrian and German Bank Holocaust Litig.*, 80 F.Supp.2d 164, 174 (S.D.N.Y. 2000)("[C]lass actions have a well deserved reputation as being most complex.")) (internal citations omitted).

By settling this matter now, the Parties avoid the further expenses of motions for class certification and summary judgment, preparation for trial, uncertainty of the trial outcome, and likely appeals from the judgment, all while providing a substantial and direct benefit to Settlement Class Members now as opposed to some uncertain amount at some point in the future.

The Settlement, therefore, provides sizeable and tangible relief to the Settlement Class now, without subjecting Settlement Class Members to the risks, duration, and expense of continuing litigation.

e. The State of the Proceedings and the Amount of Discovery Completed

Courts also consider "whether counsel had an adequate appreciation of the merits of the case before negotiating," and to that end look at the state of the proceedings, as well as any discovery. *Milkman,* 2002 WL 778272, at *18 (citing *Gen. Motors Corp.*, 55 F.3d at 813).

A significant amount of work has already been done in this case. To date, Plaintiffs have responded to Preliminary Objections by fully briefing the issues, replied to Defendants' New Matter and Counterclaims, responded to Defendants' Motion to Stay Proceedings, filed an Amended Complaint to add Parties, and moved for Preliminary Approval. Further, Plaintiffs have already undertaken extensive discovery, including taking and sitting for depositions, issuing and responding to discovery requests, preparing for and participating in mediations, and meeting and conferring with Defendants on a host of issues. Because of this work, and counsel's prior experience in similar cases, counsel was in an adequate position to appreciate the merits of the case and attendant risks before reaching the Settlement.

f. The Recommendations of Competent Counsel

In evaluating the fairness of a settlement, the "opinion of experienced counsel is entitled to considerable weight." *Fischer*, 485 A.2d at 813; *Shaev v. Sidhu,* No. 0983, 2009 WL 1817728, at *20 (Pa. Com. Pl. Mar. 5, 2009) ("Although a judge must take care that there is no collusion between the proponents of the proposed class action settlement, if no indicia of collusion are present, and where there was extensive, adversarial discovery, then 'the recommendations and opinions of counsel are entitled to substantial consideration.'") (quoting *Buchanan*, 393 A.2d at 714 n.21); *see also Alves v. Main,* No. 01-cv-789, 2012 WL 6043272, at *22 (D.N.J. Dec. 4, 2012) ("[C]ourts in this Circuit traditionally 'attribute significant weight to the belief of

experienced counsel that settlement is in the best interest of the class.'"), *aff'd*, 559 F. App'x. 151 (3d Cir. 2014) (quoting *Austin v. Pennsylvania Dept. of Corrections*, 876 F.Supp. 1437, 1472 (E.D. Pa. 1995)); *In re Prudential Ins. Co. of Am. Sales Practices Litig.,* 962 F. Supp. 450, 543 (D.N.J. 1997) ("[T]he Court credits the judgment of Plaintiffs' Counsel, all of whom are active, respected, and accomplished in this type of litigation."), *aff'd,* 148 F.3d 283 (3d Cir. 1998).

Class Counsel is a nationally recognized law firm that specialize in complex consumer class actions and strongly recommends the Settlement. Counsel reached this conclusion after, among other things: (i) an extensive factual investigation leading to the filing of a detailed complaint that contained 89 paragraphs of detailed allegations across 17 pages, (ii) almost thirty pages of briefing on Defendants' Preliminary Objections, and (iii) an arm's-length mediation overseen by a former federal judge—all of which are further detailed above. Based upon all of this analysis and testing of the claims, as well their experience in similar litigation, Plaintiffs' Counsel concluded that the Settlement is fair, reasonable, and adequate, particularly when contrasted against the significant risks, costs, and uncertainties of continued litigation described above (*see supra* § II.B.a).

As a result, Plaintiffs and Class Counsel had a sound basis for assessing the strengths and weaknesses of the claims and Defendants' defenses when they engaged in mediation and agreed to the Settlement. Their judgment that the Settlement is in the best interest of the Settlement Class should therefore be given substantial weight.

g. The Reaction of the Settlement Class to the Settlement

The response of the Settlement Class to the Settlement has been positive. After a robust Notice program in which the Settlement Administrator successfully delivered e-mail notice to

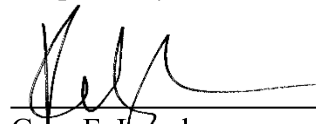
1,812,656 individuals and ran a digital media campaign that made over 45,300,000 impressions, no objections and only one valid opt outs was received either before the established July 1, 2024, deadline, or since. (Verita Decl. ¶ 10). The nonexistence of objections and the singular opt-out request weighs heavily in favor of approval. *See, e.g., Dauphin Deposit Bank & Tr. Co. v. Hess*, 698 A.2d 1305, 1310 (Pa. Super. Ct. 1997) (89 objections out of 4,315 supported reversal of trial court's denial of settlement with instructions to approve settlement), *aff'd* 727 A.2d 1076, 1079; *Fischer*, 485 A.2d at 813 (14 objections out of approximately 1,000 weighed in favor of approval). The Claims Administrator is still in the process of completing the deficiency notice process for deficient claims. (Verita Decl., ¶ 9). Accordingly, there is not yet a final count of Valid Claims; however, that information will be available at the final approval hearing.

III. CONCLUSION

For all the foregoing reasons, Plaintiffs respectfully request that the Court enter the Proposed Final Approval Order and Judgment, attached hereto, finally approving the proposed Settlement, finally certifying the Settlement Class for purposes of the Settlement, and entering final judgment.

Dated: September 26, 2024

Respectfully submitted,



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I hereby certify that on September 26, 2024, the foregoing was served by email on the following:

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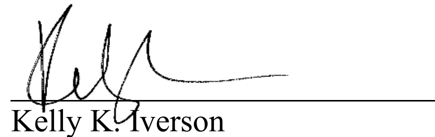

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