

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

RYAN D. GESTEN, individually,)	
and on behalf of others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	Case No. _____
)	
BURGER KING CORPORATION d/b/a)	
BURGER KING,)	
)	
Defendant.)	
_____)	

NOTICE OF REMOVAL

Defendant Burger King Corporation d/b/a Burger King (“Burger King”), through the undersigned counsel, and pursuant to 15 U.S.C. § 1681, *et seq.* and 28 U.S.C. §§ 1331, 1441, and 1446, files its Notice of Removal of the action captioned as *Ryan D. Gesten v. Burger King Corp.*, Case No. 17-25296, from the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, to the United States District Court for the Southern District of Florida. As grounds for removing this action, Burger King states as follows:

1. On October 30, 2017, plaintiff Ryan Gesten filed a class action complaint (the “Complaint”) against Burger King in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida. This action was assigned Case No. 17-25296. A true and accurate copy of the Complaint is attached hereto as Exhibit 1. Copies of all other pleadings, process, orders, and materials in the state court action are also included chronologically in Exhibit 1.

2. Burger King was served with a copy of the Complaint and Summons on January 15, 2018. *See* Exhibit 1.

3. Plaintiff’s Complaint alleges a single count -- a willful violation of the Fair and Accurate Credit Transactions Act (“FACTA”), 15 U.S.C. § 1681, *et seq.* -- based on Burger King

allegedly providing plaintiff with a receipt bearing the first six and last four digits of his credit card number. *See* Complaint ¶¶ 1, 63-70.

4. Plaintiff brings his Complaint on behalf of himself and a proposed class of consumers, defined as follows:

(i) All persons in the United States (ii) who, when making payment at one of Burger King Corporation's restaurants across the country (iii) made such payment using a credit or debit card (iv) and were provided with a point of sale receipt (v) which displayed more than the last 5 digits of the card number and/or the expiration date of the credit or debit card (vi) within the two (2) years prior to the filing of the complaint.

See Complaint ¶ 54.

5. Based upon the allegations of the Complaint and for the reasons discussed below, Burger King timely removes this action pursuant to 28 U.S.C. § 1331 (federal question).

FEDERAL QUESTION JURISDICTION

6. District courts have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1331.

7. Plaintiff's sole cause of action is an alleged violation of a federal statute -- the Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681, *et seq.*

8. Although Burger King strongly contests liability and does not believe plaintiff or any putative class members are entitled to any relief whatsoever, federal question jurisdiction exists pursuant to 28 U.S.C. § 1331 because plaintiff's claims arise under federal law.

9. Because this Court may exercise original jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), removal is proper pursuant to 28 U.S.C. § 1441(a).

10. Contemporaneously herewith, Burger King provided plaintiff written notice of the filing of this Notice of Removal as required by 28 U.S.C. § 1446(d).

11. Pursuant to the requirements of 28 U.S.C. § 1446(d), Burger King will file a copy of this Notice of Removal with the Clerk of the Circuit Court of the Eleventh Judicial Circuit in

and for Miami-Dade County, Florida.

12. The Notice of Removal is timely filed under 28 U.S.C. § 1446(b) because Burger King was served with the Complaint on January 15, 2018, and Burger King is filing this Notice of Removal within thirty (30) days of service.

13. This Notice of Removal is filed in the District Court of the United States for the district and division in which the case is pending.

14. Burger King's Corporate Disclosure Statement is attached hereto as Exhibit 2.

15. Burger King's Notice of Related Case and Motion to Stay This Action Until the Eleventh Circuit Decides the Pending Appeal in *Tarr v. Burger King Corp.* are filed contemporaneously herewith as Exhibits 3 and 4 respectively. These documents will be separately filed once this case has been docketed and a judicial assignment has been made.

16. Burger King has given the undersigned attorneys authority to sign and file this Notice of Removal.

17. Because Burger King is the only named defendant, it need not obtain consent of any other party to effectuate removal of this case. *See* 28 U.S.C. § 1446(b)(2)(A).

WHEREFORE, Burger King respectfully requests that the action captioned as *Ryan D. Gesten v. Burger King Corp.*, Case No. 17-25296, pending in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida, be removed to this Court, and that this Court grant any other relief as it may deem just and proper.

Dated: February 5, 2018

Respectfully submitted,

/s/ Anthony Upshaw
Anthony Upshaw (Fla. Bar No. 861091)
McDermott Will & Emery LLP
333 Southeast 2nd Avenue, Suite 4500
Miami, Florida 33131-4336
305.358.3500
305.347.6500 fax
aupshaw@mwe.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and the foregoing document was served via electronic mail upon Scott D. Owens (*scott@scottdowens.com*), SCOTT D. OWENS, P.A., 3800 Ocean Dr., Ste. 235, Hollywood, Florida 33019; Bret L. Lusskin, Jr. (*blusskin@lusskinlaw.com*), BRET LUSSKIN, P.A., 20803 Biscayne Blvd., Ste. 302, Aventura, Florida 33180; Keith J. Keogh (*keith@keoghlaw.com*), KEOGH LAW, LTD., 55 W. Monroe St., Ste. 3390, Chicago, IL 60603, *Counsel for Plaintiff Ryan D. Gesten.*

/s/ Anthony Upshaw
Anthony Upshaw

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.) NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.

I. (a) PLAINTIFFS Ryan D. Gesten

DEFENDANTS Burger King Corporation

(b) County of Residence of First Listed Plaintiff Broward County (EXCEPT IN U.S. PLAINTIFF CASES)

County of Residence of First Listed Defendant Miami-Dade County (IN U.S. PLAINTIFF CASES ONLY)

(c) Attorneys (Firm Name, Address, and Telephone Number) Scott D. Owens, Scott D. Owens, P.A., 3800 S. Ocean Dr, Ste. 235, Hollywood, FL 33019, (954) 589-0588; Bret L. Lusskin, Jr., Bret

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED. Attorneys (If Known) Anthony Upshaw, McDermott Will & Emery LLP, 333 SE 2nd Ave., Ste. 4500, Miami, FL 33131 (305) 358-3500

(d) Check County Where Action Arose: [X] MIAMI-DADE [] MONROE [] BROWARD [] PALM BEACH [] MARTIN [] ST. LUCIE [] INDIAN RIVER [] OKEECHOBEE [] HIGHLANDS

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- [] 1 U.S. Government Plaintiff
[] 2 U.S. Government Defendant
[] 3 Federal Question (U.S. Government Not a Party)
[] 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- PTF DEF
Citizen of This State [] 1 [] 1
Citizen of Another State [] 2 [] 2
Citizen or Subject of a Foreign Country [] 3 [] 3
Incorporated or Principal Place of Business In This State [] 4 [] 4
Incorporated and Principal Place of Business In Another State [] 5 [] 5
Foreign Nation [] 6 [] 6

IV. NATURE OF SUIT (Place an "X" in One Box Only)

Grid of categories for nature of suit: CONTRACT, REAL PROPERTY, CIVIL RIGHTS, PERSONAL INJURY, TORTS, PRISONER PETITIONS, LABOR, IMMIGRATION, FORFEITURE/PENALTY, SOCIAL SECURITY, FEDERAL TAX SUITS, OTHER STATUTES.

V. ORIGIN (Place an "X" in One Box Only)

- [] 1 Original Proceeding [X] 2 Removed from State Court [] 3 Re-filed (See VI below) [] 4 Reinstated or Reopened [] 5 Transferred from another district (specify) [] 6 Multidistrict Litigation Transfer [] 7 Appeal to District Judge from Magistrate Judgment [] 8 Multidistrict Litigation - Direct File [] 9 Remanded from Appellate Court

VI. RELATED/ RE-FILED CASE(S) (See instructions): a) Re-filed Case [X] YES [] NO b) Related Cases [X] YES [] NO JUDGE: Robert N. Scola, Jr.; Federico A. Moreno DOCKET NUMBER: 1:17-cv-22541; 1:17-cv-2

VII. CAUSE OF ACTION Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause (Do not cite jurisdictional statutes unless diversity): 15 U.S.C. 1681 (Fair and Accurate Credit Transactions Act)

LENGTH OF TRIAL via days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT: CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ CHECK YES only if demanded in complaint: JURY DEMAND: [X] Yes [] No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE DATE February 5, 2018 SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # AMOUNT IFP JUDGE MAG JUDGE

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) Plaintiffs-Defendants. Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked. Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section III below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: [Nature of Suit Code Descriptions](#).

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Refiled (3) Attach copy of Order for Dismissal of Previous case. Also complete VI.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

Remanded from Appellate Court. (8) Check this box if remanded from Appellate Court.

VI. Related/Refiled Cases. This section of the JS 44 is used to reference related pending cases or re-filed cases. Insert the docket numbers and the corresponding judges name for such cases.

VII. Cause of Action. Report the civil statute directly related to the cause of action and give a brief description of the cause. **Do not cite jurisdictional statutes unless diversity.** Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

VIII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

Date and Attorney Signature. Date and sign the civil cover sheet.

Exhibit 1

Filing # 63494998 E-Filed 10/30/2017 02:56:16 PM

FORM 1.997. CIVIL COVER SHEET

The civil cover sheet and the information contained in it neither replace nor supplement the filing and service of pleadings or other documents as required by law. This form must be filed by the plaintiff or petitioner for the use of the Clerk of Court for the purpose of reporting judicial workload data pursuant to section 25.075, Florida Statutes. (See instructions for completion.)

I. CASE STYLE

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

Case No.: _____

Judge: _____

Ryan D Gesten

Plaintiff

vs.

Burger King Corporation

Defendant

II. TYPE OF CASE

- | | |
|--|---|
| <input type="checkbox"/> Condominium
<input type="checkbox"/> Contracts and indebtedness
<input type="checkbox"/> Eminent domain
<input type="checkbox"/> Auto negligence
<input type="checkbox"/> Negligence – other
<input type="checkbox"/> Business governance
<input type="checkbox"/> Business torts
<input type="checkbox"/> Environmental/Toxic tort
<input type="checkbox"/> Third party indemnification
<input type="checkbox"/> Construction defect
<input type="checkbox"/> Mass tort
<input type="checkbox"/> Negligent security
<input type="checkbox"/> Nursing home negligence
<input type="checkbox"/> Premises liability – commercial
<input type="checkbox"/> Premises liability – residential
<input type="checkbox"/> Products liability
<input type="checkbox"/> Real Property/Mortgage foreclosure
<input type="checkbox"/> Commercial foreclosure \$0 - \$50,000
<input type="checkbox"/> Commercial foreclosure \$50,001 - \$249,999
<input type="checkbox"/> Commercial foreclosure \$250,000 or more
<input type="checkbox"/> Homestead residential foreclosure \$0 – 50,000
<input type="checkbox"/> Homestead residential foreclosure \$50,001 - \$249,999
<input type="checkbox"/> Homestead residential foreclosure \$250,000 or more
<input type="checkbox"/> Non-homestead residential foreclosure \$0 - \$50,000
<input type="checkbox"/> Non-homestead residential foreclosure \$50,001 - \$249,999 | <input type="checkbox"/> Non-homestead residential foreclosure \$250,00 or more
<input type="checkbox"/> Other real property actions \$0 - \$50,000
<input type="checkbox"/> Other real property actions \$50,001 - \$249,999
<input type="checkbox"/> Other real property actions \$250,000 or more

<input type="checkbox"/> Professional malpractice
<input type="checkbox"/> Malpractice – business
<input type="checkbox"/> Malpractice – medical
<input type="checkbox"/> Malpractice – other professional
<input checked="" type="checkbox"/> Other
<input type="checkbox"/> Antitrust/Trade Regulation
<input type="checkbox"/> Business Transaction
<input checked="" type="checkbox"/> Circuit Civil - Not Applicable
<input type="checkbox"/> Constitutional challenge-statute or ordinance
<input type="checkbox"/> Constitutional challenge-proposed amendment
<input type="checkbox"/> Corporate Trusts
<input type="checkbox"/> Discrimination-employment or other
<input type="checkbox"/> Insurance claims
<input type="checkbox"/> Intellectual property
<input type="checkbox"/> Libel/Slander
<input type="checkbox"/> Shareholder derivative action
<input type="checkbox"/> Securities litigation
<input type="checkbox"/> Trade secrets
<input type="checkbox"/> Trust litigation |
|--|---|

COMPLEX BUSINESS COURT

This action is appropriate for assignment to Complex Business Court as delineated and mandated by the Administrative Order. Yes No

III. REMEDIES SOUGHT (check all that apply):

- Monetary;
 Non-monetary declaratory or injunctive relief;
 Punitive

IV. NUMBER OF CAUSES OF ACTION: ()
(Specify)1**V. IS THIS CASE A CLASS ACTION LAWSUIT?**

- Yes
 No

VI. HAS NOTICE OF ANY KNOWN RELATED CASE BEEN FILED?

- No
 Yes – If "yes" list all related cases by name, case number and court:

VII. IS JURY TRIAL DEMANDED IN COMPLAINT?

- Yes
 No

I CERTIFY that the information I have provided in this cover sheet is accurate to the best of my knowledge and belief, and that I have read and will comply with the requirements of Florida Rule of Judicial Administration 2.425.

Signature s/ Scott D Owens FL Bar No.: 597651
Attorney or party

(Bar number, if attorney)

Scott D Owens 11/01/2017
(Type or print name)

Date

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

RYAN D. GESTEN, individually,)
and on behalf of others similarly situated,)
)
Plaintiff,)
)
v.)
)
BURGER KING CORPORATION, a)
Florida corporation, d/b/a)
BURGER KING,)
)
Defendant.)
)

CLASS ACTION

JURY TRIAL DEMANDED

**CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE
FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (FACTA)**

Plaintiff Ryan D. Gesten (“Plaintiff”), on behalf of himself and others similarly situated individuals, alleges the following upon information and belief, and his own personal knowledge.

I. NATURE OF THE CASE

1. This action arises from Defendant’s violation of the Fair and Accurate Credit Transactions Act (“FACTA”) amendment to the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, as amended (the “FCRA”), which requires Defendant to truncate certain credit card information on receipts. Despite the clear language of the statute, and having been sued a virtually identical FACTA violation in the past, Defendant once again willfully, knowingly, or in reckless disregard of the statute, failed to comply with the FCRA. As such, Plaintiff and certain other consumers who conducted business with Defendant during the time frame relevant to this complaint, each of whom paid for goods using a credit or debit card and were entitled to receive a truncated receipt, suffered violations of § 1681c(g). As a result of Defendant’s unlawful

conduct, Plaintiff and the Class have been burdened with an elevated risk of identity theft, and are entitled to an award of statutory damages and other relief as further detailed herein.

II. JURISDICTION AND VENUE

2. This Court has jurisdiction over the claims stated herein as the matter in controversy exceeds \$15,000.00, exclusive of costs, interest, and attorney's fees.

3. This Court has personal jurisdiction over Defendant because Burger King is incorporated in Florida.

4. Venue is proper in Miami-Dade County pursuant to Florida Statutes §§ 47.011, 47.051 because Burger King's unlawful conduct occurred here, and Burger King conducts business transactions in Miami-Dade County.

III. PARTIES

5. Plaintiff Ryan D. Gesten ("Plaintiff") is a natural person who, at all times relevant herein, resides in Broward County, Florida.

6. Defendant, Burger King Corporation ("Burger King"), is a Florida corporation that does business under the fictitious name "Burger King[®]." Defendant's principal address is 5505 Blue Lagoon Drive, Miami, FL 33126, and its registered agent for service of process in the state of Florida is CT Corporation System, 1200 S. Pine Island Road, Plantation, FL 33324.

7. As of December 31, 2016, Burger King owns or franchises a total of 15,738 restaurants in more than 100 countries and U.S. territories. Burger King's business generates revenue from three sources: (i) franchise revenues, consisting primarily of royalties based on a percentage of sales reported by franchise restaurants and franchise fees paid by franchisees; (ii)

property revenues from properties we lease or sublease to franchisees; and (iii) sales at Company restaurants.¹

8. Burger King is one of the largest fast food restaurant chains in the world, operating more than 7,000 stores in the United States.

9. In 2006, Burger King selected MICROS® as its approved global vendor with respect to point of sale equipment and actively marketed its technology to more than 11,000 Burger King® brand restaurants.²

10. In 2008, Burger King announced that it would be utilizing the Oracle-based MICROS® point of sale system in every one of its company-owned restaurants in the United States.³

11. Micros System Inc.'s 2012 Form 10-K indeed confirms that “[m]ajor quick service chain restaurant customers (including customers who are franchisees of the chains listed below), include . . . Burger King.”⁴

IV. FACTUAL ALLEGATIONS

A. Background of FACTA

12. Identity theft is a serious issue affecting both consumers and businesses. In 2015, the FTC received over 490,000 consumer complaints about identity theft, representing a 47

¹ Restaurant Brands International Inc., Annual Report (10-K Form) (2017).

² *Burger King Corporation Selects MICROS as Approved Global Vendor*, PR NEWSWIRE (23 Jan, 2006), <http://www.prnewswire.com/news-releases/burger-king-corporation-selects-micros-as-approved-global-vendor-53819752.html>.

³ Burger King Corp. Selects MICROS RES 4.0 for All Company-owned Restaurants in the United States, RESTAURANT NEWS RESOURCE (July, 8 2008) <https://www.restaurantnewsresource.com/article33386.html>; *see also Oracle Cloud Platform Helps Leading Brands Worldwide Drive Innovation and Business Transformation*, ORACLE (October 27, 2015), <https://www.oracle.com/ae/corporate/pressrelease/oracle-cloud-platform-paas-customers-20151027.html>.

⁴ Micro System Inc., Annual Report (10-K Form) (2012).

percent increase over the prior year, and the Department of Justice estimates that 17.6 million Americans were victims of identity theft in 2014.⁵

13. Congress enacted FACTA to prevent actual harm. See Pub. L. No. 108-159 (December 4, 2003) (“An Act . . . to prevent identity theft . . . and for other purposes.”)

14. Upon signing FACTA into law, President George W. Bush remarked that “[s]lips of paper that most people throw away should not hold the key to their savings and financial secrets.” 39 Weekly Comp. Pres. Doc. 1746, 1757 (Dec. 4, 2003). President Bush added that the government, through FACTA, was “act[ing] to protect individual privacy.” *Id.*

15. One such FACTA provision was specifically designed to thwart identity thieves’ ability to gain sensitive information regarding a consumer’s credit or bank account from a receipt provided to the consumer during a point of sale transaction, which, through any number of ways, could fall into the hands of someone other than the consumer.

16. Codified at 15 U.S.C. § 1681c(g), this provision states the following:

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.

15 U.S.C. § 1681c(g) (the “Receipt Provision”).

17. After enactment, FACTA provided three (3) years in which to comply with its requirements, mandating full compliance with its provisions no later than December 4, 2006.

18. The requirement was widely publicized among retailers and the FTC. For example, on March 6, 2003, in response to earlier state legislation enacting similar truncation

⁵ *FTC Announces Significant Enhancements to IdentityTheft.gov*, *FTC* (Jan. 28, 2016), <https://www.ftc.gov/news-events/press-releases/2016/01/ftc-announces-significant-enhancements-identitytheftgov>.

requirements, then-CEO of Visa USA, Carl Pascarella, explained that, “Today, I am proud to announce an additional measure to combat identity theft and protect consumers. Our new receipt truncation policy will soon limit cardholder information on receipts to the last four digits of their accounts. The card’s expiration date will be eliminated from receipts altogether. . . . The first phase of this new policy goes into effect July 1, 2003 for all new terminals. . . .”⁶ Within 24 hours, MasterCard and American Express announced they were imposing similar requirements.

19. Card issuing organizations proceeded to require compliance with FACTA by contract, in advance of FACTA’s mandatory compliance date. For example, the publication, “Rules for Visa Merchants,” which is distributed to and binding upon all merchants that accept Visa cards, expressly requires that “only the last four digits of an account number should be printed on the customer’s copy of the receipt” and “the expiration date should not appear at all.”⁷

20. Because a handful of large retailers did not comply with their contractual obligations to the card companies and the straightforward requirements of FACTA, Congress passed The Credit and Debit Card Receipt Clarification Act of 2007 in order to make technical corrections to the definition of willful noncompliance with respect to violations involving the printing of an expiration date on certain credit and debit card receipts before the date of the enactment of this Act.⁸

⁶ *Visa USA Announces Account Truncation Initiative to Protect Consumers from ID Theft*, PR NEWSWIRE (Mar 06, 2003), <http://www.prnewswire.com/news-releases/visa-usa-announces-account-truncation-initiative-to-protect-consumers-from-id-theft-74591737.html>.

⁷ *Rules for Visa Merchants*, VISA (Sept. 1, 2007), http://www.runtogold.com/images/rules_for_visa_merchants.pdf.

⁸ *H.R. 4008 (110th): Credit and Debit Card Receipt Clarification Act of 2007*, GOVTRACK, <https://www.govtrack.us/congress/bills/110/hr4008/text> (last visited June 23, 2017).

21. Importantly, the Clarification Act did not amend FACTA to allow publication of the expiration date of the card number. Instead, it simply provided amnesty for certain past violators up to June 3, 2008.

22. In the interim, card processing companies continued to alert their merchant clients, including Defendants, of FACTA's requirements. According to a Visa Best Practice Alert in 2010:

Some countries already have laws mandating PAN truncation and the suppression of expiration dates on cardholder receipts. For example, the United States Fair and Accurate Credit Transactions Act (FACTA) of 2006 prohibits merchants from printing more than the last five digits of the PAN or the card expiration date on any cardholder receipt. (Please visit <http://www.ftc.gov/os/statutes/fcrajump.shtm> for more information on the FACTA.) To reinforce its commitment to protecting consumers, merchants, and the overall payment system, Visa is pursuing a global security objective that will enable merchants to eliminate the storage of full PAN and expiration date information from their payment systems when not needed for specific business reasons. To ensure consistency in PAN truncation methods, Visa has developed a list of best practices to be used until any new global rules go into effect.

See Visa Alert attached hereto as **Exhibit A**.

23. As noted above, the processing companies have required that credit card or debit card expiration dates not be shown since 2003 and still require it. For example, American Express requires:

Pursuant to Applicable Law, truncate the Card Number and do not print the Card's Expiration Date on the copies of Charge Records delivered to Card Members. Truncated Card Number digits must be masked with replacement characters such as "x," "*", or "#," and not blank spaces or numbers.

See **Exhibit B**, attached hereto.

24. Similarly, MasterCard required in a section titled Primary Account Number (PAN) truncation and Expiration Date Omission:

A Transaction receipt generated by an electronic POI Terminal, whether attended or unattended, must not include the Card expiration date. In addition, a Transaction receipt generated for a Cardholder by an electronic POI Terminal, whether attended or unattended, must reflect only the last four digits of the primary account number (PAN). All preceding digits of the PAN must be replaced with fill characters, such as "X," "*", or "#," that are neither blank spaces nor numeric characters.

See **Exhibit C**, attached hereto.

25. According to data from the Federal Trade Commission's 2015 Consumer Sentinel Network Data Book, Florida with its 306,133 complaints ranks No. 1 for the highest per capita rate of reported fraud and other types of complaints. For identity theft, Florida is ranked No. 3 in the country with a total of 44,063 complaints. Also, eight of the top 20 metro areas for identity theft are in Florida, according to the report. First is the Homosassa Springs area with 1290.0 complaints per 100,000 people, and the Miami area counts 482.3 complaints per 100,000 people.⁹

26. So problematic is the crime of identity theft that the three main credit reporting agencies, Experian, Equifax, and Transunion, joined to set-up a free website (<http://www.annualcreditreport.com>) in order to comply with FACTA requirements and to provide the citizens of this country with a means of monitoring their credit reports for possible identity theft.

27. FACTA clearly prohibits the printing of more than the last five (5) digits of the card number to protect persons from identity theft.

B. Defendants' Prior Knowledge of FACTA

⁹ *Consumer Sentinel Network Data Book for January-December 2015*, Federal Trade Commission (February 2016), <https://www.ftc.gov/system/files/documents/reports/consumer-sentinel-network-data-book-january-december-2015/160229csn-2015databook.pdf>.

28. Most of Defendant's business peers and competitors currently and diligently ensure their credit card and debit card receipt printing process remains in compliance with FACTA by consistently verifying their card machines and devices comply with the truncation requirement. Defendant could have readily done the same.

29. Most importantly, Burger King Corporation has been previously sued at least twice for violating the aforementioned federal statute. *See Cowley v. Burger King Corp.*, No. 07-21772-CIV, 2008 WL 8910653, at *1 (S.D. Fla. May 23, 2008); *Magolski v. Burger King Corp.*, No. 11-cv-01041 (E.D. Wis. Filed: November 11, 2011). In the course of one of the previous actions, Burger King conceded that it had knowledge of FACTA's truncation requirements since January 2007. *Cowley*, 2008 WL 8910653, at *4.

30. Not only was Defendant so informed not to print more than the last five (5) digits of credit or debit cards, it was contractually prohibited from doing so. Defendant accepts credit cards and debit cards from all major issuers; these companies set forth requirements that merchants, including Defendant, must follow, including FACTA's redaction and truncation requirements.

C. Plaintiff's Factual Allegations

31. On or about June 13, 2017, Plaintiff purchased certain goods from one of Defendant's restaurants located in Miami-Dade County, Florida.

32. Plaintiff paid for the subject goods using his personal credit card at which time he was presented with an electronically printed receipt bearing the first six (6), along with the last four (4) digits of his credit card account number.

33. In addition to bearing first six (6), along with the last four (4) digits of his credit card account number, the receipt identifies whether the subject method of payment is a debit card

(as opposed to a credit card), as well as the brand of credit or debit card (i.e., Visa, American Express, etc.), the store location, transaction date and time, and name of the cashier.

34. The inclusion of the first six digits of Plaintiff's card numbers on his receipts reduced the number of digits an identity thief would need to obtain thereby reducing the difficulty of guessing the card numbers in a way which can be calculated with mathematical precision.

35. Assuming a 16 digit credit card number, exposing ten digits, as was done here, means that only six digits need to be guessed and so there are 10^6 (ten to the sixth power) possible combinations or 1,000,000 choices for an identity thief to guess from. If instead only the five digits permitted under FACTA are exposed there are eleven digits that need to be guessed, and similarly 10^{11} (ten to the eleventh power) possible combinations of remaining digits, or 100,000,000,000.

36. Additionally, a cashier who handles Plaintiff's credit card would only need to commit six digits of Plaintiff's card number to memory, instead of eleven, and retain Plaintiff's carelessly discarded receipt in order to obtain Plaintiff's entire debit card number.

37. FACTA's truncation requirements were meant to reduce consumer risks of payment card fraud and identity theft, but Burger King's practices do the opposite by exposing account digits and by empowering criminals to commit effective social-engineering attacks.

D. Defendants' Misdeeds

38. At all times relevant herein, Defendant was acting by and through its agents, servants and/or employees, each of which were acting within the course and scope of their agency or employment, and under the direct supervision and control of Defendant.

39. At all times relevant herein, the conduct of the Defendant, as well as that of their agents, servants and/or employees, was in willful, knowing, or reckless disregard for federal law and the rights of the Plaintiff.

40. Upon information and belief, the violations at issue have taken place at dozens of Burger King's restaurants.

41. Burger King's method of truncation creates a 100,000-fold increase in the risk that account numbers could be guessed.

42. Most payment card account numbers have 16 digits. Therefore there are in theory more than 10,000 trillion different account number possibilities. FACTA's requirement to truncate at least the first 11 of these digits reduces this universe of theoretical possibilities from 10,000 trillion to 10 billion.

43. However, Burger King's receipt instead of concealing 11 digits, only truncate 6. This cuts the universe of theoretical possibilities from 10 billion to a mere 1 million, rendering much easier to guess-even if just by brute force-through 1,000,000 different possibilities than through 10 billion.

44. Burger King's failure to truncate does more than merely cause a 100,000-fold increase in the ease of brute-forcing payment card account numbers. It also creates a higher risk of social engineering attacks.

45. Social engineering involves the use of known information to manipulate consumers into revealing private information. For instance, criminals often collect and use specific information in order to deceive consumers into giving up other sensitive personal and financial information.

46. This type of informational fraud is facilitated when the criminals has access to more information so that they can establish the legitimacy of their impersonations and acquire sensitive financial and personal data from innocent consumers.

47. Here, in addition to revealing the last four digits of each payment card account number on receipts, Burger King also reveals the first six. These digits constitute the "Issuer Identification Number" ("IIN"), which can be used to uniquely identify both the card brand and the bank or institution that issued the card. Databases associating IINs with card brands and banks are widely and freely available online.

48. Accordingly, a criminal in possession of a Burger King receipt can establish exactly which bank and card brand that customer uses, as well as the date and amount of that customer's purchases.

49. This information, coupled with the ten digits of that customer's payment card account number could be used to impersonate that customer's bank (or other legitimate financial institutions) and convince that customer to communicate further sensitive information, including the remaining six digits of the payment card account number.

50. It is Defendant's policy and procedure to issue an electronically printed receipt to individuals at the point of sale – i.e., immediately upon receipt of credit or debit card payment.

51. Notwithstanding the fact that it has extensive knowledge of the requirements of FACTA and the dangers imposed upon consumers through its failure to comply, Defendant, as of the date this action was commenced, continues to issue point of sale receipts, which contain the first six (6) and last four (4) digits of credit and debit card account numbers.

52. By shirking the requirements of a federal privacy statute by not complying with the Receipt Provision, Defendant has caused consumers actual harm, not only because

consumers were uniformly burdened with an elevated risk of identity theft, but because a portion of the sale from credit or debit card transaction is intended to protect consumer data, including the censoring of credit or debit card digits as required by both state and federal laws.

53. Defendant also invaded Plaintiff's and other putative Class Members' privacy by disclosing their private information to those of Defendant's employees who handled the receipts, as well as other persons who might find the receipts in the trash or elsewhere.

V. CLASS ACTION ALLEGATIONS

54. Plaintiff brings this action, as set forth below, on behalf of herself and as a class action pursuant to the provisions of Florida Rule of Civil Procedure 1.220 on behalf of a class defined as:

(i) All persons in the United States (ii) who, when making payment at one of Burger King Corporation's restaurants across the country (iii) made such payment using a credit or debit card (iv) and were provided with a point of sale receipt (v) which displayed more than the last 5 digits of the card number and/or the expiration date expiration date of the credit or debit card (vi) within the two (2) years prior to the filing of the complaint.

55. Plaintiff falls within the class definition and is a member of the class. Excluded from the class is Defendant and any entities in which Defendant has a controlling interest, Defendant's agents and employees, Plaintiff's attorneys and their employees, the Judge to whom this action is assigned and any member of the Judge's staff and immediate family, and claims for personal injury, wrongful death, and/or emotional distress.

A. Class Certification Is Proper.

56. Certification of Plaintiff's claims for class-wide treatment is appropriate because Plaintiff can prove the elements of his claims on a class-wide basis using the same evidence as would be used to prove those elements in individual actions alleging the same claims.

57. **Numerosity.** The members of the Class are so numerous that individual joinder of all Class members is impracticable. Defendant operates hundreds of restaurants throughout the United States, accepts credit cards and debit cards at each and, upon information and belief, prints receipts reflective of credit card or debit card transactions. Therefore, based upon Defendant's volume of business,¹⁰ it is reasonable to conclude that the class is sufficiently numerous such that individual joinder of all members is impractical. Class members may be notified of the pendency of this action by recognized, Court-approved notice dissemination methods, which may include U.S. mail, electronic mail, Internet postings, and/or published notice. The Class can be identified through Defendant's records or Defendant's agents' records.

58. **Commonality and Predominance.** This action involves common questions of law and fact, which predominate over any questions affecting individual Class members, including, without limitation:

- a. Whether, within the two (2) years prior to the filing of this Complaint, Defendant and/or its agents accepted payment by credit or debit card from any consumer and subsequently gave that consumer a printed receipt upon which more than the last five (5) digits of the card number or the expiration date were displayed;
- b. Whether Defendant's conduct was willful and reckless;
- c. Whether Defendant is liable for damages, and the extent of statutory damages for each such violation; and

¹⁰ Burger King's parent company reports \$24 billion in system-wide sales and over 20,000 restaurants in more than 100 countries and U.S. territories as of December 31, 2016. ¹⁰ Restaurant Brands International Inc., Annual Report (10-K Form) (2017).

- d. Whether Defendant should be enjoined from engaging in such conduct in the future.

59. **Typicality.** Plaintiff's claim is typical of the other Class members' claims because, among other things, all Class members were comparably injured through the uniform prohibited conduct described above.

60. **Adequacy of Representation.** Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the other Class members she seeks to represent; she has retained counsel competent and experienced in complex commercial and class action litigation; and Plaintiff intends to prosecute this action vigorously. The interests of the Class members will be fairly and adequately protected by the Plaintiff and her counsel.

61. **Declaratory and Injunctive Relief.** Burger King has acted or refused to act on grounds generally applicable to Plaintiff and the other Class members, thereby making appropriate final injunctive relief and declaratory relief, as described below, with respect to the Class as a whole.

62. **Superiority.** A class action is superior to any other available means for the fair and efficient adjudication of this controversy, and no unusual difficulties are likely to be encountered in the management of this class action. The damages or other financial detriment suffered by Plaintiff and the other Class members are relatively small compared to the burden and expense that would be required to individually litigate their claims against Burger King, so it would be impracticable for Class members to individually seek redress for Burger King's wrongful conduct. Even if Class members could afford individual litigation, the court system could not. Individualized litigation creates a potential for inconsistent or contradictory judgments, and increases the delay and expense to all parties and the court system. By contrast,

the class action device presents far fewer management difficulties, and provides the benefits of single adjudication, economy of scale, and comprehensive supervision by a single court.

COUNT I – VIOLATIONS OF 15 U.S.C. § 1691(c)(g)

63. 15 U.S.C. §1681c(g) states as follows:

Except as otherwise provided in this subsection, no person that accepts credit cards or debit cards for the transaction of business shall print more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction.

64. This section applies to any “device that electronically prints receipts” (hereafter “Devices”) for point of sale transactions. 15 U.S.C. §1681c(g)(3).

65. Defendant employs the use of said Devices for point of sale transactions at the various locations of Defendant.

66. On or before the date on which this complaint was filed, Plaintiff and members of the class were provided receipt(s) by Defendant that failed to comply with the Receipt Provision.

67. At all times relevant to this action, Defendant was aware, or should have been aware, of both the Receipt Provision as well as the need to comply with said provision.

68. Notwithstanding the three-year period to prepare for FACTA and its accompanying provisions, including but not limited to the Receipt Provision; and having knowledge of the Receipt Provision and FACTA as a whole; Defendant knowingly, willfully, intentionally, and/or recklessly violated and continues to violate the FCRA and the Receipt Provision.

69. By printing more than the last five (5) digits of Plaintiff’s credit card number on Plaintiff’s transaction receipt, Defendant caused Plaintiff to suffer a heightened risk of identity theft; exposed Plaintiff’s private information to those of Defendant’s employees who handled the receipt and forced Plaintiff to take action to secure or destroy the receipts.

70. As a result of Defendant's willful violations of the FCRA, Plaintiff and members of the class continue to be exposed to an elevated risk of identity theft. Defendant is liable to Plaintiff and members of the class pursuant to 15 U.S.C. § 1681n for statutory damages, punitive damages, attorney's fees and costs.

WHEREFORE, Plaintiff, Ryan D. Gesten, respectfully requests that this Court enter judgment in his favor and the class, and against Defendant Burger King Corporation for:

- a. An Order granting certification of the Class;
- b. Statutory damages;
- c. Punitive damages;
- d. Injunctive relief;
- e. Attorneys' fees, litigation expenses and costs of suit; and
- f. Such other and further relief as the Court deems proper under the circumstances.

JURY DEMAND

Plaintiff demands a trial by jury on all counts.

Dated: October 30, 2017.

Respectfully submitted,

By: /s/ Scott D. Owens
Scott D. Owens, Esq.
Florida Bar No. 0597651
SCOTT D. OWENS, P.A.
3800 S. Ocean Dr., Ste. 235
Hollywood, FL 33019
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Exhibit A



Visa Best Practices for Primary Account Number Storage and Truncation

Introduction

Due to misinterpretation of Visa dispute processing rules, some acquirers require their merchants to unnecessarily store full Primary Account Numbers (PANs)¹ for exception processing to resolve disputes. The unnecessary storage of full card PAN information by merchants has led to incidents of data compromise, theft or unintended disclosure during disposal. Additional confusion exists due to inconsistent dispute resolution practices by issuers and acquirers in use across different geographies, leading some merchants to conclude that PAN data must be retained for all transactions.

*To clarify, Visa **does not** require merchants to store PANs, but **does recommend** that merchants rely on their acquirer / processor to manage this information on the merchants' behalf. Visa also recommends that acquirers / processors evolve their systems to provide merchants with a substitute transaction identifier to reference transaction details (in lieu of using PANs).*

Some countries already have laws mandating PAN truncation and the suppression of expiration dates on cardholder receipts. For example, the United States Fair and Accurate Credit Transactions Act (FACTA) of 2006 prohibits merchants from printing more than the last five digits of the PAN or the card expiration date on any cardholder receipt. (Please visit <http://www.ftc.gov/os/statutes/fcrajump.shtm> for more information on the FACTA.)

To reinforce its commitment to protecting consumers, merchants, and the overall payment system, Visa is pursuing a global security objective that will enable merchants to eliminate the storage of full PAN and expiration date information from their payment systems when not needed for specific business reasons. To ensure consistency in PAN truncation methods, Visa has developed a list of best practices to be used until any new global rules go into effect.

¹ A PAN is the 16-digit number embossed, engraved, or imprinted on a payment card.

PAN Truncation Best Practice

In addition to required compliance with applicable card data security standards, including the Payment Card Industry Data Security Standard (PCI DSS), and Visa Best Practices for Tokenization of Cardholder Information, Visa strongly recommends that acquirers and merchants follow these best practices:

Domain	Best Practice
Cardholder Receipts	<p>1. Disguise or suppress all but the last four digits of the PAN, and suppress the full expiration date, on the cardholder's copy of a transaction receipt created at a point of sale (POS) terminal or an ATM (already required for merchants in the U.S., Europe, and CEMEA; Visa will apply this rule across all regions in the near future to provide global consistency).</p> <ul style="list-style-type: none"> • Example: ██████████ for the PAN and XXXX for the expiration date.
Merchant Receipts	<p>2. Disguise or suppress the PAN to display a maximum of the first six and last four digits, and suppress the full expiration date, on the merchant's copy of a transaction receipt created at a POS terminal. Note: Many merchants already follow this best practice by truncating the PAN to the last four digits on both the cardholder's and merchant's receipts.</p> <ul style="list-style-type: none"> • Example: 412345XXXXXX6789 or ██████████ for the PAN and XXXX for the expiration date.
Merchant Transaction Data Storage by Acquirers	<p>3. Acquirers should support their merchants by providing transaction data storage, thereby allowing merchants to retain only disguised or suppressed PANs on the merchant's copy of an electronically generated receipt and in their transaction records (unless the merchant has a business need to retain the full card PAN).</p>
Enhanced Acquirer Systems	<p>4. Acquirers should enhance their systems to provide merchants with substitute transaction identifiers (such as the Visa Transaction Identifier) or software tokens to facilitate retrieval of transaction data stored by the acquirer, in lieu of using the PAN as a reference for individual transactions.</p>
Merchant Communications from Acquirers	<p>5. Acquirers should disguise or suppress all PANs sent to merchants in any communications (e-mail, reports, etc.).</p> <p>Reminder: PCI DSS already requires a PAN transmitted over a public network to be rendered unreadable by encryption, truncation, or hashing.</p>

Conclusion

Due to legacy practices and a misinterpretation by issuers and acquirers of Visa dispute resolution processing rules, many merchants unnecessarily store and/or print full card PANs on cardholder and merchant receipts. Visa rules do not require merchants to store full card PANs after settlement, and do allow merchant receipts with truncated PAN information to be retained for copy retrieval and dispute fulfillment.

Visa encourages 1) merchants to only print truncated PANs on cardholder and merchant receipts; and 2) acquirers to not require merchants to store PANs, and to provide alternate means for merchants to reference individual transactions. Visa has developed best practices to increase data security without affecting merchants' ability to meet dispute resolution requirements. Acquirers and processors are strongly encouraged to support their merchants in following these best practices.

Respond With Comments by August 31, 2010

Visa would appreciate stakeholder feedback on these best practices by August 31, 2010. Please submit any comments via e-mail to inforisk@visa.com with "PAN Truncation Best Practices" in the subject line.

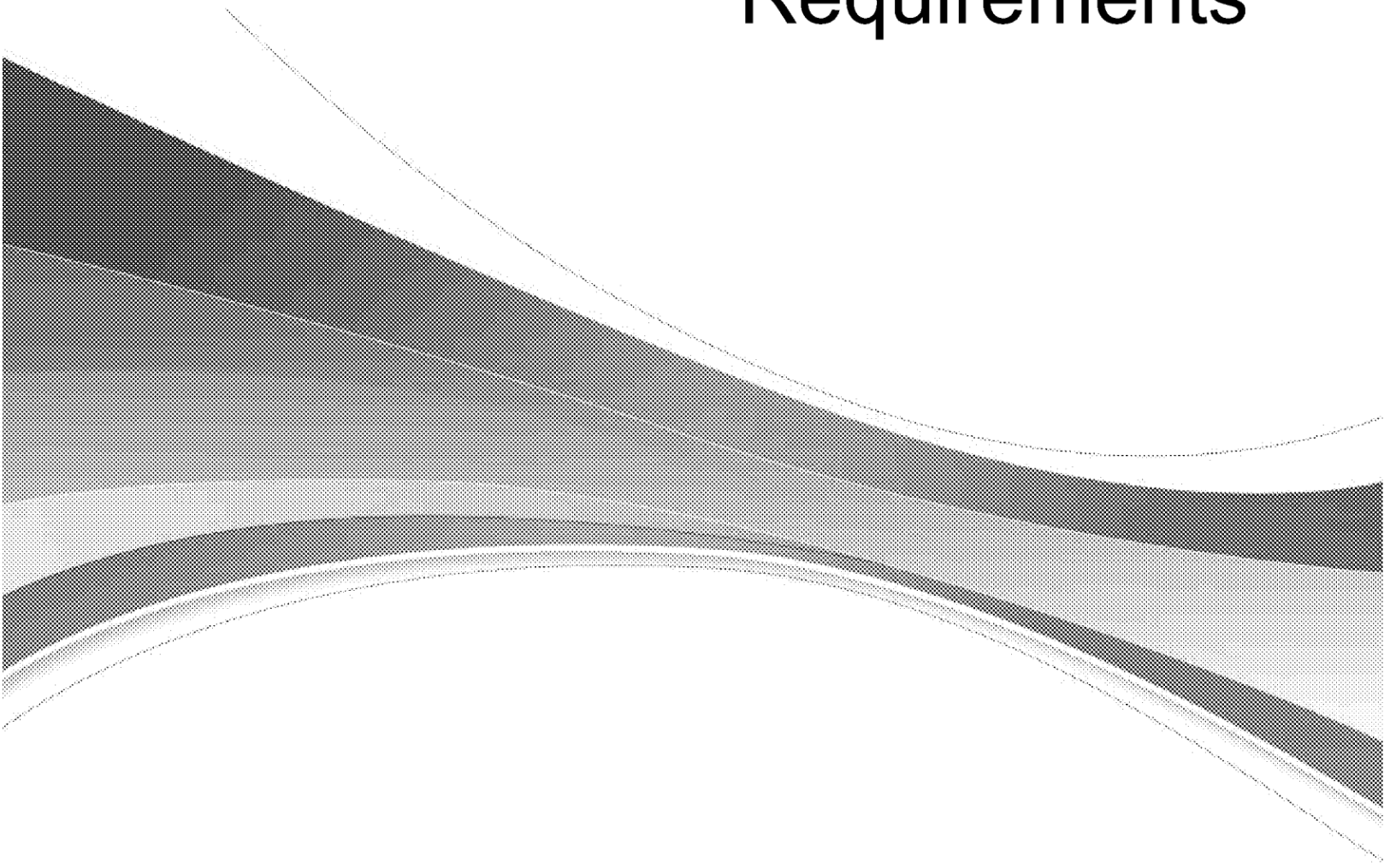
Related Documents

"Visa Best Practices for Data Field Encryption" – October 2009

"Visa Best Practices for Tokenization of Cardholder Information" – July 2010

Exhibit B

American Express
Merchant
Requirements



April 2014

For Internet Orders, Merchant must:

- use any separate Merchant Numbers (Seller ID) established for Merchant for Internet Orders in all Merchant's requests for Authorization and Submission of Charges,
- provide American Express with at least one (1) month's prior written notice of any change in Merchant's internet address, and
- comply with any additional requirements that American Express provides from time to time.

Additionally, if a Disputed Charge arises involving a Card Not Present Charge that is an Internet Electronic Delivery Charge, American Express may exercise Chargeback for the full amount of the Charge and place Merchant in any of its Chargeback programs. When providing Proof of Delivery, a signature from the Card Member or an authorized signer of the Card is not required.

4.5 Charge Records

Merchant must create a Charge Record for every Charge. For each Charge submitted electronically, Merchant must create an electronically reproducible Charge Record, and the Charge must comply with the Technical Specifications.

The Charge Record (and a copy of the customer's receipt) must disclose Merchant's return and/or cancellation policies. See Section 4.8, "Return and Cancellation Policies" for additional information.

If the Card Member wants to use different Cards for payment of a purchase, Merchant may create a separate Charge Record for each Card used. However, if the Card Member is using a single Card for payment of a purchase, Merchant shall not divide the purchase into more than one Charge, nor shall Merchant create more than one Charge Record.

For all Charge Records, Merchant must:

1. submit the Charge to American Express directly, or through Merchant's Processor, for payment.
2. retain the original Charge Record (as applicable) and all documents evidencing the Charge, or reproducible records thereof, for the timeframe listed in American Express' country-specific policies. See chapter 8, "Protecting Card Member Information" for additional information.
3. provide a copy of the Charge Record to the Card Member.

Merchant may be able to create more than one Charge Record if the purchase qualifies for a Delayed Delivery Charge. See Section 4.13, "Delayed Delivery Charges".

The retention time frame for Charge Records is twenty-four (24) months from the date Merchant submitted the corresponding Charge to American Express.

Pursuant to Applicable Law, truncate the Card Number and do not print the Card's Expiration Date on the copies of Charge Records delivered to Card Members. Truncated Card Number digits must be masked with replacement characters such as "X," "*", or "#," and not blank spaces or numbers.

Exhibit C

Primary Account Number (PAN) Truncation and Expiration Date Omission

A Transaction receipt generated by an electronic POI Terminal, whether attended or unattended, must not include the Card expiration date. In addition, a Transaction receipt generated for a Cardholder by an electronic POI Terminal, whether attended or unattended, must reflect only the last four digits of the primary account number (PAN). All preceding digits of the PAN must be replaced with fill characters, such as "X," "*", or "#," that are neither blank spaces nor numeric characters.

The Corporation strongly recommends that if an electronic POS Terminal generates Merchant copies of Transaction receipts, the Merchant copies should also reflect only the last four digits of the PAN, replacing all preceding digits with fill characters, such as "X," "*", or "#," that are neither blank spaces nor numeric characters.

NOTE

Additions and/or variations to this Rule appear in the "Canada Region" and "Europe Region" sections at the end of this chapter.

Returned Products and Canceled Services

A Merchant is required to accept the return of products or the cancellation of services unless specific disclosure was provided at the time of the Transaction.

Upon the return in full or in part of products or the cancellation of a service purchased with a Card, or if the Merchant agrees to a price adjustment on a purchase made with a Card, the following applies:

- If a MasterCard Card was used, the Merchant may not provide a price adjustment by cash, check, or any means other than a credit to the same Card Account used to make the purchase (or a Card reissued by the same Issuer to the same Cardholder). A cash or check refund is permitted for involuntary refunds by airlines or other Merchants only when required by law.
- If a Maestro Card was used, a Merchant may offer a price adjustment by means of a credit, provided the credit is posted to the same Card Account used to make the purchase (or a Card reissued by the same Issuer to the same Cardholder).

In a Card-present environment, the Merchant should ask the Cardholder for a Transaction receipt identifying (by means of a truncated PAN) the payment card used for the original purchase Transaction (but be aware that if a Contactless Payment Device was used, the PAN on a Card linked to the same Account may not match the PAN on the receipt). If the Card used to make the purchase is no longer available, the Merchant must act in accordance with its policy for adjustments, refunds, returns or the like.

Filing # 66182784 E-Filed 01/05/2018 04:13:44 PM

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY FLORIDA

RYAN D. GESTEN, individually,
and on behalf of others similarly situated,

CASE NO: 2017-025296-CA-01

Plaintiff,

CLASS ACTION

v.

JURY TRIAL DEMANDED

BURGER KING CORPORATION,
A Florida corporation, d/b/a
BURGER KING,

Defendant.

_____ /

SUMMONS

THE STATE OF FLORIDA

To All and Singular the Sheriffs of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in this action on defendant,

Burger King Corporation
c/o CT Corporation System, Registered Agent
1200 S. Pine Island Road
Plantation, FL 33324

Each defendant is required to serve written defense to the complaint or petition on plaintiff's attorney, to wit: SCOTT D. OWENS, ESQ., whose address is SCOTT D. OWENS, P.A., 3800 S. Ocean Dr., Ste. 235, Hollywood, FL 33019, within 20 days "Except when suit is brought pursuant to s. 768.28, Florida Statutes, if the State of Florida, one of its agencies, or one of its officials or employees sued in his or her official capacity is a defendant, the time to respond shall be 40 days. When suit is brought pursuant to, 768.28, Florida Statutes, the time to respond shall be 30 days." After service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the Clerk of this Court either before service on the Plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

WITNESS my hand and seal of this Court on this _____

Harvey Ruvin
Clerk of the Circuit Court

By: _____
As Deputy Clerk

Court Seal

"If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Eleventh Judicial Circuit Court's ADA Coordinator, Lawson E. Thomas Courthouse Center, 175 NW 1st Ave., Suite 2702, Miami, FL 33128, Telephone (305) 349-7175; TDD (305) 349-7174, Fax (305) 349-7355 at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711."

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY FLORIDA

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and on behalf of others similarly situated,

CASE NO: 2017-025296-CA-01

Plaintiff,

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1/11/2018

WITNESS my hand and seal of this Court on this _____

Harvey Ruvin
Clerk of the Circuit Court

By: Seass 17965
As Deputy Clerk



Court Seal

"If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Eleventh Judicial Circuit Court's ADA Coordinator, Lawson E. Thomas Courthouse Center, 175 NW 1st Ave., Suite 2702, Miami, FL 33128, Telephone (305) 349-7175; TDD (305) 349-7174, Fax (305) 349-7355 at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711."

RETURN OF SERVICE

State of Florida

County of Miami-Dade

Circuit Court

Case Number: 2017-025296-CA-01

Plaintiff:

RYAN D. GESTEN

vs.

Defendant:

BURGER KING CORPORATION D/B/A BURGER KING

For:

Scott D. Owens
Law Office of Scott D. Owens, Esq.
3800 S. Ocean Dr.
#235
Hollywood, FL 33019

Received by Caplan, Caplan & Caplan Process Servers on the 15th day of January, 2018 at 9:28 am to be served on **BURGER KING CORPORATION D/B/A BURGER KING CO CT CORPORATION SYSTEM, REGISTERED AGENT, 1200 S. PINE ISLAND RD, PLANTATION, FL 33324.**

I, Christopher Caplan, do hereby affirm that on the **15th day of January, 2018 at 11:15 am, I:**

served a **CORPORATION, REGISTERED AGENT** by delivering a true copy of the **SUMMONS, CIVIL COVER SHEET, CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (FACTA) AND EXHIBITS** with the date and hour of service endorsed thereon by me, to: **CT CORPORATION SYSTEM** as **REGISTERED AGENT** at the address of: **1200 S. PINE ISLAND RD, PLANTATION, FL 33324** on behalf of **BURGER KING CORPORATION D/B/A BURGER KING CO CT CORPORATION SYSTEM, REGISTERED AGENT**, and informed said person of the contents therein, in compliance with Florida State Statute 48.091.

Additional Information pertaining to this Service:

BY SERVING DONNA MOCH AS EMPLOYEE OF THE REGISTERED AGENT

I certify and know that the one so served to be the same as therein mentioned, that I am not a party to the cause nor concerned in the event thereof. Pursuant to FS 92.525(2), no notary is required.



Christopher Caplan
1487

Caplan, Caplan & Caplan Process Servers
12555 Orange Drive
Suite 106
Davie, FL 33330
(954) 462-1800

Our Job Serial Number: CPN-2018001709
Service Fee: _____

RETURN OF SERVICE

State of Florida

County of Miami-Dade

Circuit Court

Case Number: 2017-025296-CA-01

Plaintiff:
RYAN D. GESTEN

vs.

Defendant:
BURGER KING CORPORATION D/B/A BURGER KING

For:
Scott D. Owens
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3800 S. Ocean Dr.
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Received by Caplan, Caplan & Caplan Process Servers on the 15th day of January, 2018 at 9:28 am to be served on **BURGER KING CORPORATION D/B/A BURGER KING CO CT CORPORATION SYSTEM, REGISTERED AGENT, 1200 S. PINE ISLAND RD, PLANTATION, FL 33324.**

I, Christopher Caplan, do hereby affirm that on the **15th day of January, 2018 at 11:15 am, I:**

served a **CORPORATION, REGISTERED AGENT** by delivering a true copy of the **SUMMONS, CIVIL COVER SHEET, CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE FAIR AND ACCURATE CREDIT TRANSACTIONS ACT (FACTA) AND EXHIBITS** with the date and hour of service endorsed thereon by me, to: **CT CORPORATION SYSTEM as REGISTERED AGENT** at the address of: **1200 S. PINE ISLAND RD, PLANTATION, FL 33324** on behalf of **BURGER KING CORPORATION D/B/A BURGER KING CO CT CORPORATION SYSTEM, REGISTERED AGENT**, and informed said person of the contents therein, in compliance with Florida State Statute 48.091.

Additional Information pertaining to this Service:
BY SERVING DONNA MOCH AS EMPLOYEE OF THE REGISTERED AGENT

I certify and know that the one so served to be the same as therein mentioned, that I am not a party to the cause nor concerned in the event thereof. Pursuant to FS 92.525(2), no notary is required.



Christopher Caplan
1487

Caplan, Caplan & Caplan Process Servers
12555 Orange Drive
Suite 106
Davie, FL 33330
(954) 462-1800

Our Job Serial Number: CPN-2018001709
Service Fee: _____

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY FLORIDA

RYAN D. GESTEN, individually,
and on behalf of others similarly situated,

CASE NO: 2017-025296-CA-01

Plaintiff,

CLASS ACTION

v.

JURY TRIAL DEMANDED

RECEIVED

BURGER KING CORPORATION,
A Florida corporation, d/b/a
BURGER KING,

REC'D _____ JAN 15 2018
SERVED CT
DATE 1/15/18
TIME 11:15 AM
P.S. Chris Caplan
(PRINT/SIGN NAME)

Defendant.

SUMMONS

THE STATE OF FLORIDA

CERTIFIED IN THE CIRCUIT
COUNTY/COURT # 1487

To All and Singular the Sheriffs of the State:

YOU ARE COMMANDED to serve this summons and a copy of the complaint or petition in this action on defendant.

Burger King Corporation
c/o CT Corporation System, Registered Agent
1200 S. Pine Island Road
Plantation, FL 33324

98

Each defendant is required to serve written defense to the complaint or petition on plaintiff's attorney, to wit: SCOTT D. OWENS, ESQ., whose address is SCOTT D. OWENS, P.A., 3800 S. Ocean Dr., Ste. 235, Hollywood, FL 33019, within 20 days "Except when suit is brought pursuant to s. 768.28, Florida Statutes, if the State of Florida, one of its agencies, or one of its officials or employees sued in his or her official capacity is a defendant, the time to respond shall be 40 days. When suit is brought pursuant to 768.28, Florida Statutes, the time to respond shall be 30 days." After service of this summons on that defendant, exclusive of the day of service, and to file the original of the defenses with the Clerk of this Court either before service on the Plaintiff's attorney or immediately thereafter. If a defendant fails to do so, a default will be entered against that defendant for the relief demanded in the complaint or petition.

1/11/2018

WITNESS my hand and seal of this Court on this _____

Harvey Ruvin
Clerk of the Circuit Court

By: Seass 187965
As Deputy Clerk



Court Seal

"If you are a person with a disability who needs any accommodation in order to participate in this proceeding, you are entitled, at no cost to you, to the provision of certain assistance. Please contact the Eleventh Judicial Circuit Court's ADA Coordinator, Lawson E. Thomas Courthouse Center, 175 NW 1st Ave., Suite 2702, Miami, FL 33128, Telephone (305) 349-7175; TDD (305) 349-7174, Fax (305) 349-7355 at least 7 days before your scheduled court appearance, or immediately upon receiving this notification if the time before the scheduled appearance is less than 7 days; if you are hearing or voice impaired, call 711."

1709

Exhibit 2

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

RYAN D. GESTEN, individually,
and on behalf of others similarly situated,

Plaintiff,

v.

Case No. _____

BURGER KING CORPORATION d/b/a
BURGER KING,

Defendant.

**DEFENDANT'S CERTIFICATE OF INTERESTED PARTIES
AND CORPORATE DISCLOSURE STATEMENT**

Defendant Burger King Corporation d/b/a Burger King ("Defendant"), by and through its attorneys, hereby discloses the following pursuant to Rule 7.1 of the Federal Rules of Civil Procedure, that it is a non-governmental corporate entity, and submits this Certificate of Interested Parties and Corporate Disclosure Statement.

1. Defendant Burger King Corporation certifies that Defendant is a wholly-owned subsidiary of Burger King Holdings, Inc. Defendant further states that Restaurant Brands International Limited Partnership indirectly owns more than 10% of Defendant's stock. Restaurant Brands International Limited Partnership is owned by Restaurant Brands International Inc., which is also a publicly-held company and indirectly owns more than 10% of Defendant's stock.

2. Defendant also provides a full and complete list of all other persons, associations, firms, partnerships, or corporations having either a financial interest in or other interest which could be substantially affected by the outcome of this particular case:

- Ryan D. Gesten, Plaintiff

- Bret Leon Lusskin, Jr., Bret Lusskin, P.A., Counsel for Plaintiff
- Keith James Keogh, Keogh Law, Ltd., Counsel for Plaintiff
- Scott David Owens, Scott D. Owens, P.A., Counsel for Plaintiff
- Anthony Nolan Upshaw, McDermott Will & Emery LLP, Counsel for Defendant
- Kerry Alan Scanlon, McDermott Will & Emery LLP, Counsel for Defendant
- Jeremy Marc White, McDermott Will & Emery LLP, Counsel for Defendant

3. Defendant expressly reserves the right to amend or supplement this Disclosure

Statement in the future.

Dated: February 5, 2018

Respectfully submitted,

/s/ Anthony Upshaw
Anthony Upshaw (Fla. Bar No. 861091)
MCDERMOTT WILL & EMERY LLP
333 Southeast 2nd Avenue, Suite 4500
Miami, Florida 33131-4336
305.358.3500
305.347.6500 fax
aupshaw@mwe.com
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and the foregoing document was served via electronic mail upon Scott D. Owens (*scott@scottdowens.com*), SCOTT D. OWENS, P.A., 3800 Ocean Dr., Ste. 235, Hollywood, Florida 33019; Bret L. Lusskin, Jr. (*blusskin@lusskinlaw.com*), BRET LUSSKIN, P.A., 20803 Biscayne Blvd., Ste. 302, Aventura, Florida 33180; Keith J. Keogh (*keith@keoghlaw.com*), KEOGH LAW, LTD., 55 W. Monroe St., Ste. 3390, Chicago, IL 60603, *Counsel for Plaintiff Ryan D. Gesten.*

/s/ Anthony Upshaw
Anthony Upshaw

Exhibit 3

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

RYAN D. GESTEN, individually,)	
and on behalf of others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	Case No. _____
)	
BURGER KING CORPORATION d/b/a)	
BURGER KING,)	
)	
Defendant.)	
_____)	

DEFENDANT’S NOTICE OF RELATED CASE

Pursuant to Local Rule 3.8, defendant Burger King Corporation d/b/a Burger King (“Burger King”) hereby provides this notice of a related case.

Burger King’s Civil Cover Sheet identifies an identical case that was decided by Judge Robert N. Scola, Jr. on September 27, 2017, involving the same parties and the same cause of action -- a single claim under the Fair and Accurate Credit Transactions Act (“FACTA”). *Gesten v. Burger King Corporation*, Case No. 1:17-cv-22541-RNS (dismissed on Sept. 27, 2017) (“Gesten I”). The facts here are also nearly identical to another case, *Tarr v. Burger King Corporation*, Case No. 1:17-cv-23776-FAM, which was dismissed by Judge Federico A. Moreno on January 5, 2018 and is currently pending on appeal before the U.S. Court of Appeals for the Eleventh Circuit (Case No. 18-10279-CC). In *Tarr*, plaintiff claims that more than the last five (5) digits of his debit card number were printed on a receipt he allegedly received at a Burger King restaurant in Sunny Isles, Florida, which is the same Burger King location involved in this case. *Tarr*, Doc. 1, Compl. ¶¶ 31, 33, 36. In fact, plaintiff Tarr -- an attorney who previously served as co-counsel with plaintiff Gesten in another lawsuit -- alleges that he only became aware of a possible FACTA violation “due to the complaint previously filed against Burger King

for the same violation” in the *Gesten I* case. *Id.* ¶¶ 34 & n.11. The *Tarr* and *Gesten I* cases involved the same restaurant, the same defendant, the same attorneys, and the same cause of action as this case.

Dated: February 5, 2018

Respectfully submitted,

/s/ Anthony Upshaw
Anthony Upshaw (Fla. Bar No. 861091)
McDermott Will & Emery LLP
333 Southeast 2nd Avenue, Suite 4500
Miami, Florida 33131-4336
305.358.3500
305.347.6500 fax
aupshaw@mwe.com

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2018, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and the foregoing document was served via electronic mail upon Scott D. Owens (*scott@scottdowens.com*), SCOTT D. OWENS, P.A., 3800 Ocean Dr., Ste. 235, Hollywood, Florida 33019; Bret L. Lusskin, Jr. (*blusskin@lusskinlaw.com*), BRET LUSSKIN, P.A., 20803 Biscayne Blvd., Ste. 302, Aventura, Florida 33180; Keith J. Keogh (*keith@keoghlaw.com*), KEOGH LAW, LTD., 55 W. Monroe St., Ste. 3390, Chicago, IL 60603, *Counsel for Plaintiff Ryan D. Gesten.*

/s/ Anthony Upshaw
Anthony Upshaw

Exhibit 4

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

RYAN D. GESTEN, individually,)	
and on behalf of others similarly situated,)	
)	
Plaintiff,)	
)	
v.)	Case No. _____
)	
BURGER KING CORPORATION d/b/a)	
BURGER KING,)	
)	
Defendant.)	
_____)	

**DEFENDANT’S MOTION TO STAY THIS ACTION UNTIL THE ELEVENTH
CIRCUIT DECIDES THE PENDING APPEAL IN TARR v. BURGER KING CORP.**

Defendant Burger King Corporation d/b/a Burger King (“Burger King”) hereby moves to stay this action until the United States Court of Appeals for the Eleventh Circuit decides the pending appeal in *Tarr v. Burger King Corp.*, No. 18-10279-CC (11th Cir.).

PRELIMINARY STATEMENT

The *Tarr* appeal -- which involves the same FACTA claim, the same attorneys and the same Burger King restaurant -- raises identical issues of Article III standing and lack of concrete injury as plaintiff’s complaint in this case and which this Court recently addressed in granting Burger King’s motions to dismiss on two separate occasions. *See Gesten v. Burger King Corp.*, Case No. 1:17-cv-22541-RNS, 2017 WL 4326101 (S.D. Fla. Sept. 27, 2017) (hereinafter “*Gesten I*”); *Tarr v. Burger King Corp.*, Case No. 1:17-cv-23776-FAM, 2018 WL 318477 (S.D. Fla. Jan. 5, 2018). After the dismissal of *Gesten I* and *Tarr* for lack of subject-matter jurisdiction, plaintiff’s attorneys refiled *Gesten I* in Florida state court and around the same time appealed the *Tarr* decision to the Eleventh Circuit. The outcome of that appeal will directly impact whether this case should be litigated in state or federal court.

Plaintiff's attorneys' decision to proceed in both courts simultaneously has forced Burger King into a procedural catch-22, requiring it to remove this case from state court or otherwise lose its ability to do so in the future. While this Court in *Gesten I* properly concluded that plaintiff lacks standing to pursue his FACTA claim, if this case proceeds in state court during the pendency of the *Tarr* appeal, Burger King's 30-day removal period would expire and it would be irreparably harmed in the event the Eleventh Circuit reverses the decision on standing in *Tarr* and holds that jurisdiction is proper in federal court. As a result, a stay of this action until the Eleventh Circuit decides *Tarr* would prevent any irreparable harm to Burger King, promote judicial economy, permit any future proceedings in this case to be guided by the Eleventh Circuit's decision, and prevent the unnecessary expenditure of the parties' resources. Thus, Burger King's motion to stay should be granted.

FACTUAL BACKGROUND

On July 7, 2017, less than four weeks after purchasing a meal for \$7.16 from Burger King's restaurant in Sunny Isles Beach, Florida, plaintiff Ryan Gesten filed a lawsuit in the United States District Court for the Southern District of Florida seeking to certify a nationwide class of defendant's customers who, beginning on July 7, 2015, allegedly received printed receipts that display the first six and last four digits of their credit or debit card number in violation of FACTA. *Gesten I*, Doc. 1, Compl. ¶¶ 31, 44. In response, Burger King moved to dismiss plaintiff's case for lack of subject-matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1) because plaintiff, who maintained possession of his receipt at all times and has not been the victim of identity theft, failed to allege a concrete injury and therefore lacks Article III standing to pursue his claim. *Id.*, Doc. 12, Mot. to Dismiss. On September 27, 2017, Judge Robert N. Scola, Jr. granted Burger King's motion to dismiss finding that plaintiff alleged no actual harm or material risk of harm. *Gesten I*, 2017 WL 4326101, at *5.

Approximately two weeks later, on October 14, 2017, plaintiff's attorneys filed a nearly identical class action lawsuit against Burger King on behalf of Andrew Tarr, who claimed that he made purchases at the same Burger King restaurant in Sunny Isles Beach, Florida and received, but later discarded, receipts for transactions containing the first six and the last four digits of his debit card number. *Tarr*, Doc. 1, Compl. ¶¶ 31-33. Burger King again moved to dismiss plaintiff's case for lack of subject-matter jurisdiction. *Id.*, Doc. 12, Mot. to Dismiss. During the pendency of that case, plaintiff's attorneys allowed the appeal deadline for *Gesten I* to pass. On January 5, 2018, Judge Federico A. Moreno held that plaintiff Tarr also did not have standing to litigate his case in federal court because his complaint "alleges only bare procedural violations divorced from any concrete harm or material risk of harm" and "typifie[d] the abusive lawsuits brought under [FACTA]." *Tarr*, 2018 WL 318477, at *4.

Plaintiff refiled his FACTA lawsuit in the Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County Florida (*Gesten v. Burger King Corp.*, Case No. 17-25296 (hereinafter "*Gesten II*")) on October 30, 2017. More than two months later -- and just three days prior to filing a notice of appeal in *Tarr* (*Tarr*, Doc. 24, Notice of Appeal) -- plaintiff's attorneys served the *Gesten II* complaint on Burger King. In order to preserve its ability to litigate in federal court in the event that the Eleventh Circuit reverses the *Tarr* decision, Burger King timely filed its notice of removal of the *Gesten II* action with this Court.

LEGAL STANDARD

As the U.S. Supreme Court held in *Landis v. N. American Co.*, "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants [and] [h]ow this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." 299 U.S. 248, 254 (1936). Therefore, this Court has

broad discretion to stay this case “as an incident to its power to control its own docket.” *Clinton v. Jones*, 520 U.S. 681, 706-07 (1997); *see also Air Line Pilots Ass’n v. Miller*, 523 U.S. 866, 879 n.6 (1998); *White v. United States*, 2009 WL 10674926, at *2-3 (S.D. Fla. Sept. 15, 2009).

For example, a district court may “stay a case pending the resolution of related proceedings in another forum.” *Ortega Trujillo v. Conover & Co. Commc’ns, Inc.*, 221 F.3d 1262, 1264 (11th Cir. 2000); *see also NIACCF, Inc., v. Cold Stone Creamery, Inc.*, 2012 WL 1852941, at *1 (S.D. Fla. May 21, 2012) (Scola, J.) (same); *Miccosukee Tribe of Indians of Florida v. S. Florida Water Mgmt. Dist.*, 559 F.3d 1191, 1198 (11th Cir. 2009) (explaining that a stay may be warranted where a federal appellate decision in a related case “is likely to have a substantial or controlling effect on the claims and issues”). “[T]he general principle is to avoid duplicative litigation,” and this principle “rest[s] on considerations of ‘[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation.’ ” *I.A. Durbin, Inc. v. Jefferson National Bank*, 793 F.2d 1541, 1551 (11th Cir. 1986) (internal citations omitted). The stay cannot be “immoderate – that is to say, too long, too indefinite, or without proper justification. . . .” *NIACCF, Inc.*, 2012 WL 1852941, at *1 (internal quotations omitted); *CTI-Container Leasing Corp. v. Uiterwyk Corp.*, 685 F.2d 1284, 1288 (11th Cir. 1982). “To this end, courts also must consider the relative prejudice and hardship ‘worked on each party if a stay is or is not granted,’ and general efficiency.” *Jacobs v. Ocwen Loan Servicing, LLC*, 2017 WL 1733855, at *1 (S.D. Fla. Apr. 14, 2017) (Scola, J.) (citing *Fitzer v. Am. Institute of Baking, Inc.*, 2010 WL 1955974 (S.D. Ga. May 13, 2010)). This Court has both the discretion and good cause to stay this case until the Eleventh Circuit decides the appeal in *Tarr*.

ARGUMENT

Courts have routinely stayed a pending action until an appellate court has ruled on a

similar case. *See, e.g., Miccosukee Tribe of Indians of Florida*, 559 F.3d at 1198 (recognizing that “the reason for the district court’s stay was at least a good one, if not an excellent one: to await a federal appellate decision that is likely to have a substantial or controlling effect on the claims and issues in the stayed case” where the stayed case and the appealed case were “so similar”); *Tel. Sci. Corp. v. Hilton Grand Vacations Co., LLC*, 2015 WL 7444409, at *2 (M.D. Fla. Nov. 20, 2015) (exercising its discretion to stay a TCPA case where the Supreme Court’s decision in *Spokeo, Inc. v. Robins* would determine whether allegations of similar technical violations under the FCRA are sufficient to establish Article III standing); *Greco v. National Football League*, 116 F. Supp. 3d 744, 761 (N.D. Tex. 2015) (staying case pending the Fifth Circuit’s resolution of an appeal filed in “a related case with nearly identical factual and legal issues” because the issues would “very likely bear on [the] case” and “[t]he risk of duplicative litigation [was] too great for [the] Court to ignore”).

Similarly, in *White v. United States*, this District concluded that a stay was warranted where a similar, related case was pending before the Eleventh Circuit:

The factual scenarios underlying Case No. 08-60666 and the present case are virtually identical. Notably, the cases seek disposition of the very same assets ... [t]he cases are brought against the same defendants, and the siblings ... have been named plaintiffs in both suits. Moreover, the key jurisdictional issue of exhaustion of administrative remedies and *whether the appropriate forum for relief for plaintiffs is the Federal Circuit arises in both cases*. Accordingly, the Eleventh Circuit’s disposition of Case No. 08-60666, which is presently on appeal, will undoubtedly affect the disposition of this case. As a result, litigation in this Court would only serve to duplicate efforts, and would be a waste of the resources of the judiciary and the parties.

2009 WL 10674926, at *2-3 (emphasis added). In fact, several courts have granted motions to stay in light of a pending appeal in a similar FACTA case that will likely affect the court’s subject matter-jurisdiction. *See, e.g., Gennock v. Kirkland’s, Inc.*, 2018 U.S. Dist. LEXIS 15515, at *5-7 (W.D. Pa. Jan. 31, 2018) (granting defendant’s motion to stay pending the Third Circuit’s decision in *Kamal v. J. Crew Group, Inc.*, a similar FACTA action addressing the same issue of

Article III standing); *Salvatore v. Microbilt Corp.*, 2015 WL 5008856, at *2 (M.D. Pa. Aug. 20, 2015) (granting stay of FACTA action pending resolution of *Spokeo* where “any harm that the plaintiff may [have] arguably face[d] [was] substantially outweighed by . . . the benefits to be realized by placing the litigation on hold while [*Spokeo* was] decided”); *Jacobson v. Peter Pan, Inc.*, Case No. 4:16-cv-00596, Order, Doc. 26 (D. Ariz. Feb. 2, 2017) (granting motion to stay a pending FACTA action until the Ninth Circuit decides a similar case in *Noble v. Nevada Checker Cab Corp.*); *Zuniga v. The Men’s Warehouse, Inc.*, slip. op., No. 17-cv-05223, Doc. 41 (C.D. Cal. Oct. 13, 2017) (staying FACTA case because the outcome in *Noble v. Nevada Checker Cab Corp.* would “have a significant impact on the legal issue” in the case).

Here, a stay is warranted because a denial of the instant motion to stay would cause Burger King irreparable harm and hardship. Plaintiff’s attorneys have placed Burger King in an unusual posture where it must defend itself simultaneously in state and federal court in virtually identical cases, where it has already been determined there is no Article III standing. The *Tarr* appeal will resolve the issue of whether Article III standing is conferred to FACTA plaintiffs who have not suffered identity theft, which directly impacts whether this Court has subject-matter jurisdiction over plaintiff Gesten’s claim. In the event the Eleventh Circuit reverses the *Tarr* decision and concludes that FACTA plaintiffs, like Gesten, have standing to bring their claims in federal court, this case would proceed in federal court.¹

Having to simultaneously litigate parallel cases involving the same alleged FACTA violation and the same Burger King restaurant in both state and federal court would require the parties to expend significant resources and neither promotes judicial economy nor general

¹ Plaintiff’s attorneys have argued that there are four District Judges within the Eleventh Circuit who have ruled that FACTA plaintiffs who have not suffered identity theft still meet Article III’s standing requirements. Therefore, there is not an insignificant risk that *Tarr* will be reversed, which would extinguish Burger King’s removal rights if the stay is not granted.

efficiency. These duplicative litigations would also risk inconsistent rulings with respect to discovery motions, motions for class certification, and motions for summary judgment in the event the Eleventh Circuit reverses *Tarr* and that case proceeds in federal court while *Gesten II* continues to proceed in state court. More importantly, if the Eleventh Circuit reverses the standing decision in *Tarr*, this case would no longer be removable as 28 U.S.C. § 1446's 30-day deadline will have passed. Consequently, in order to preserve its ability to litigate in federal court, Burger King removed *Gesten II* to this Court. Granting a stay until the Eleventh Circuit decides the pending appeal in *Tarr* would prevent Burger King from being irreparably harmed.

Finally, a stay of discovery is warranted here because there will be no prejudice to plaintiff while *Tarr* is being decided given that plaintiff does not contend that he suffered any actual harm in the first place, much less that there is any ongoing injury. And plaintiff cannot assert that he will be harmed in any way given that he seeks only statutory damages. If *Tarr* is reversed, this case can easily resume with no prejudice to either party, and if the lower court's decision is affirmed, this case would be remanded to state court without any harm caused to the parties. Given that the *Tarr* appeal will not last indefinitely, Burger King's request to stay the proceedings until the conclusion of the appeal in *Tarr* is of a definite duration. *Salvatore*, 2015 WL 5008856, at *2 (granting stay of FACTA action pending resolution of *Spokeo* where briefing had not yet concluded); *Ramirez v. Trans Union, LLC*, 2015 WL 6159942, at *2 (N.D. Cal. June 22, 2015) (granting defendant's motion to stay FCRA action because "[t]he possible prejudice to Plaintiff that will result from a stay is minimal, as the *Spokeo* decision will likely be issued within a year"). Like Burger King, plaintiff will benefit from avoiding any unnecessary expenditure of time, effort, and resources during this short amount of time until the Eleventh Circuit decides the pending appeal in *Tarr*.

CONCLUSION

For all the foregoing reasons, Burger King respectfully requests that the Court grant its motion to stay this case until the Eleventh Circuit decides the pending appeal in *Tarr*.

CERTIFICATE OF GOOD-FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3), counsel for Burger King hereby certifies that its counsel met and conferred with plaintiff's counsel by email on February 2, 2018, who indicated that plaintiff opposes this motion.

Dated: February 5, 2018

Respectfully submitted,

/s/ Anthony Upshaw
Anthony Upshaw (Fla. Bar No. 861091)
McDermott Will & Emery LLP
333 Southeast 2nd Avenue, Suite 4500
Miami, Florida 33131-4336
305.358.3500
305.347.6500 fax
aupshaw@mwe.com

Attorneys for Defendant

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I hereby certify that on February 5, 2018, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and the foregoing document was served via electronic mail upon Scott D. Owens (*scott@scottdowens.com*), SCOTT D. OWENS, P.A., 3800 Ocean Dr., Ste. 235, Hollywood, Florida 33019; Bret L. Lusskin, Jr. (*blusskin@lusskinlaw.com*), BRET LUSSKIN, P.A., 20803 Biscayne Blvd., Ste. 302, Aventura, Florida 33180; Keith J. Keogh (*keith@keoghlaw.com*), KEOGH LAW, LTD., 55 W. Monroe St., Ste. 3390, Chicago, IL 60603, *Counsel for Plaintiff Ryan D. Gesten.*

/s/ Anthony Upshaw
Anthony Upshaw

ClassAction.org

This complaint is part of ClassAction.org's searchable class action lawsuit database and can be found in this post: [FACTA Class Action Against Burger King Removed to Southern District of Florida](#)
