



AlaFile E-Notice

69-CV-2022-900008.00

Judge: HON. BURT SMITHART

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NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA

LAKESHA CLIATT V. HIBBETT RETAIL, INC. ET AL
69-CV-2022-900008.00

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**IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA
 EUFAULA DIVISION**

CLIATT LAKESHA,)	
Plaintiff,)	
)	
V.)	Case No.: CV-2022-900008.00
)	
HIBBETT RETAIL, INC.,)	
CITY GEAR, LLC,)	
Defendants.)	

**ORDER PRELIMINARILY APPROVING PROPOSED SETTLEMENT, CERTIFYING
 CONDITIONAL SETTLEMENT CLASS, APPOINTING SETTLEMENT CLASS
 COUNSEL AND CLASS REPRESENTATIVES, APPROVING AND DIRECTING
 NOTICE PLAN, APPOINTING SETTLEMENT ADMINISTRATOR AND
SCHEDULING FINAL APPROVAL HEARING**

THIS CAUSE came before the Court on the Unopposed Motion for Conditional Certification of a Settlement Class and for Preliminary Approval of Settlement (“Motion for Preliminary Approval”). After carefully considering the Motion for Preliminary Approval and the accompanying materials, and the positions of the Parties, the Court finds as follows:

On February 25, 2022, Plaintiff Cliatt initiated this class action lawsuit against Hibbett Retail, Inc. and City Gear, LLC (“Defendants”). Plaintiffs Cliatt and Hill filed an Amended Complaint on April 22, 2022. Plaintiffs assert two (2) causes of action for negligence and violations of 15 U.S.C. § 1681c(g) and seek damages arising from Defendants’ alleged unauthorized disclosure of Plaintiffs’ personal and confidential information by printing the first six digits and last four digits of their credit cards on their receipts. According Plaintiffs, such conduct resulted in the unauthorized disclosure of customer credit or debit card magnetic strip information that was in the care, custody or

control of Defendants and violates the Fair and Accurate Credit Transactions Act (“FACTA”) amendment to the Fair Credit Reporting Act, 15 U.S.C. 1681 et seq., as amended, a statute which requires merchants to truncate certain credit card and debit card information on printed receipts provided to consumers.

Plaintiffs allege that they suffered a substantial and heightened risk of identity theft, that Defendants invaded their legally protected privacy interest and they have had to spent time and effort mitigating the risk of harm from the alleged conduct. Defendants vigorously deny each and every one of Plaintiffs’ allegations of wrongful conduct, injury and damages, and intend to vigorously defend against the merits of the lawsuit. Defendants have further denied that this case could be tried as a class action under Rule 23 if it were to be litigated to conclusion.

During the litigation and through settlement discussions and mediation, Plaintiffs received information regarding Defendants’ practices and defenses, including information specifically relating to the nature, scope, and extent of the alleged FACTA violations at issue, as well as information regarding the number and scope of affected transactions and consumers. Plaintiffs also received information regarding Defendants’ remedial efforts and knowledge of the alleged statutory violations. Ultimately, the Parties agreed to mediate this class action lawsuit. As a result of the mediation process conducted by former Alabama State Bar President Lee Copeland of Copeland, Franco, Screws & Gill in Montgomery, Alabama, which covered four in-person sessions and numerous conference calls over a four month period, Plaintiffs and Defendants ultimately reached a settlement agreement (“Settlement Agreement”) to settle this litigation on a class-wide basis, subject to the Court’s approval.

The Parties' Settlement Agreement is attached to the Plaintiffs' Unopposed Motion for Preliminary Approval. The Court has considered the terms of the Settlement Agreement and the Motion for Preliminary Approval. In light of the issues presented by the pleadings, the complexity of the proceedings, the absence of any indication of collusion between adversaries, and the experience of Plaintiffs' Counsel in this matter, the Court is preliminarily satisfied that the Settlement Agreement is fair, reasonable, and consistent with the requirements of applicable laws. The Court is also satisfied that the proposed Notice Plan and draft Notice and Claim Form are adequate and sufficiently informative as to the terms and effect of the proposed settlement and the conditional certification of the class. Accordingly, the Court finds that the Motion for Preliminary Approval should be granted.

I. Conditional Certification of Settlement Class

This Court finds that the Settlement Class as proposed in the Settlement Agreement meets all the requirements for certification of a Settlement Class under Rule 23 of the Alabama Rules of Civil Procedure. Accordingly, it is Ordered as follows:

1. The Court conditionally certifies the following Settlement Class:

All persons in the United States (i) who, when making payment at a Hibbett, City Gear or Sports Additions retail store located in the United States, (ii) made such payment using a credit or debit card (iii) and for whom Hibbett, City Gear or Sports Additions printed a point-of-sale receipt (iv) which displayed more than the last 5 digits of the credit or debit card (v) between December 15, 2020 and February 23, 2022.

Notwithstanding the foregoing, this class specifically excludes persons in the following categories: (A) The judge presiding over this case and the judges of the appellate court; (B) the spouses of those in category (A); (C) any person within the third

degree of relationship of those in categories (A) or (B); (D) the spouses of those within category (C) and (E) any person whose claim is subject to discharge in a pending bankruptcy proceeding or has been discharged as part of a closed bankruptcy proceeding.

2. In particular, given the Settlement Agreement, the Court is able to make the following findings with respect to the elements of Rule 23 for settlement purposes:

- The conditional Settlement Class, estimated to include more than 1,000,000 members, satisfies the numerosity requirement of Rule 23(a)(1).
- The commonality requirement of Rule 23(a)(2) is met for settlement purposes because Plaintiffs and Class Members allege that they entered into substantially similar payment card transactions with Defendants. Given Plaintiffs' allegations with respect to Defendants' alleged violations of FACTA, common questions of law or fact will apply to the disputes addressed in this case. These common questions of law and fact predominate over questions affecting only individual members of the Settlement Class.
- The typicality requirement of Rule 23(a)(3) is met for settlement purposes because for this Settlement Class, Plaintiffs' claims are typical of the claims of the members of the Settlement Class. Plaintiffs alleges that Defendants engaged in a uniform course of conduct and violated FACTA. The alleged injuries suffered by Plaintiffs as a result of the alleged FACTA violations are typical to those alleged to be suffered by Class Members. Consequently, Plaintiffs' claims satisfy the typicality requirement of Rule 23(a).
- The Class Representatives and their Counsel are adequate representatives of the conditional Settlement Class under Rule 23(a)(4). In reaching this determination, the Court considered: (1) whether Class Counsel are qualified, experienced, and generally able to conduct the proposed litigation and (2) whether the Class Representatives have interests antagonistic to those of the rest of the class. The Court finds that these requirements are also met. The Court finds that Class Counsel are qualified and the Class Representatives have no interests antagonistic to those of other Settlement Class Members.
- Certification under Section Rule 23(b)(3) is appropriate for settlement purposes based upon Plaintiffs' allegations that Defendants violated FACTA. Because this case is being settled, the Court does not "need to inquire whether the case, if tried, would present intractable management problems. . . for the proposal is that there be no trial."

Amchem Products Inc. v. Windsor, 521 U.S. 591, 620 (1997).

- In the context of this settlement, the Parties have agreed to provide uniform compensation to Settlement Class Members. As a result of this uniform benefit to all members of the Settlement Class, the proposed Settlement Class is ascertainable from Defendants' business records.
- In the context of this settlement, given the likely costs and expenses associated with individual claims when weighed against the potential recoveries, and the potential waste of judicial resources, the superiority requirement of Rule 23(b)(3) is also satisfied.

3. This Order addresses only the conditional certification of a Settlement Class. As such, this Order shall not constitute nor be construed as a determination by this Court that in the absence of a settlement, a class action in this matter could be sustained under the Alabama Rules of Civil Procedure. Entry of this Order is without prejudice to the rights of Defendants to: (a) oppose certification in this Action, should the settlement not be approved or implemented for any reason; (b) oppose class certification in any other proposed or certified class action; (c) use the certification of a Class in this Action to oppose certification of any other proposed or existing class relating to or purporting to assert any Released Claims; or (d) terminate the Settlement Agreement as provided therein. The provisions and findings of this Order are strictly limited to the specific facts and circumstances of this case.

II. Appointment of Class Counsel and Class Representative

4. Having certified this conditional Settlement Class under Rule 23, this Court is now required to appoint Class Counsel. Having considered the work Plaintiff's counsel have done in identifying and investigating potential claims in this action, the Court's extensive knowledge of counsel's experience in handling class actions, counsel's knowledge of the applicable law, and the resources counsel will continue to

commit in representing the class, the following attorneys are designated Class Counsel: R. Brent Irby, Esq., Wm. Eric Colley, Esq. and Christy D. Crow, Esq. The Plaintiffs, Lakesha Cliatt and Marketha Hill, are designated as Class Representatives.

III. Preliminary Approval of Proposed Settlement

5. As a matter of public policy, the law favors and encourages settlements. *Amoco Prod. Co. v. Fed. Power Comm'n*, 465 F.2d 1350, 1354-55 (10th Cir. 1972). Indeed, there is an “overriding public interest in favor of settlement” in class actions. *Kincade v. General Tire & Rubber Co.*, 635 F.2d 501, 507 (5th Cir. 1981); *see also Desktop Direct, Inc. v. Digital Equip. Corp.*, 993 F.2d 755, 758 (10th Cir. 1993) (agreeing that “encouragement of out-of-court settlement is desirable”), *aff'd*, 511 U.S. 863 (1994).

6. Approval of a class-action settlement is a two-step process. In the first step, the Court determines whether the proposed settlement should be preliminarily approved. See David F. Herr, *Annotated Manual for Complex Litigation* 21.632 (4th ed. 2004). At the preliminary-approval stage in the process, the Court is required to “make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms.” *Id.* 21.632. The primary question is whether the proposed settlement “falls within the range of possible approval.” *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 671, 675 (D. Kan. 2009). Courts “will ordinarily grant preliminary approval where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval.” *Id.* (internal citations omitted).

7. In the second stage, following appropriate notice to the class and after hearing from any potential objectors, the Court makes a final decision whether to approve the proposed settlement. See Annotated Manual for Complex Litigation 21.633-35. Although the Court will not make a final decision regarding approval of the Settlement Agreement until later at the Final Approval Hearing, the Court is well aware that its preliminary approval of the proposed settlement here will result in notice of the settlement being provided to the Settlement Class members at substantial cost.

8. Turning to the specific terms of the Settlement Agreement, Defendants have agreed to provide relief in the following form: A single payment of twenty dollars (\$20.00) will be made to settlement class members who submit a timely and complete Claim Form, with Hibbett having the right to make the payment to the eligible settlement class members' Hibbett | City Gear Rewards account. Defendants have also agreed to the following nonmonetary relief: Prior to the final effective date of this settlement, Defendants will implement appropriate steps, practices and a written company policy to help ensure that Defendants' stores are in compliance and remain in compliance, with FACTA on a going forward basis.

9. In evaluating the proposed settlement and considering whether it should be preliminarily approved as fair, reasonable, and adequate, the Court has considered the following factors: (a) the absence of any collusion among the parties; (b) the significant risks of continued litigation; (c) the complexity, expense, and duration of the litigation; (d) the substantial, uniform relief by category that will be provided to all Class Members under the proposed settlement; (e) the stage of the litigation; and (f) the judgment of experienced counsel for the parties. See *Bennett v. Behring Corp.*, 737

F.2d 982, 986 (11th Cir. 1984).

10. First, given the multiple mediations conducted by a respected mediator and former Alabama Bar President, Lee Copeland, and months of ensuing in-person and telephonic negotiations, there is no evidence of collusion in this proposed settlement, which favors preliminary approval. The parties vigorously and professionally represented the interests of their respective clients throughout the litigation.

11. Second, both Parties face significant risks from continued litigation, which also favors preliminary approval of the settlement. Plaintiffs have not yet established any violation of FACTA, and Defendants have denied any such violations. Further, the class certification issue has not yet been litigated and the Parties have opposing positions with respect to potential certification of a class for litigation purposes. For example, Plaintiffs contend that certification of a class would be appropriate, in part, due to the uniformity of the federal statute to be applied. On the other hand, and without limiting Defendants' objections under Rule 23, Defendants have at all times maintained that their practices were proper and in accordance with federal law and any regulatory requirements. In addition, Defendants steadfastly contend this case is wholly unsuitable for class treatment and could never be tried as a class action. In particular, Defendants argue a class cannot be certified due to: (a) differing facts and differing evidence that could come into play for each putative class member; (b) differing evidence applicable to each putative class member's damages claim; and (c) the existence of individualized evidence necessary to determine the outcome of Defendants' defenses. Obviously, there is a risk that if the issues were to be litigated, the Court could find that the Plaintiffs' proposed class could or could not be certified for trial purposes, or that only a

class smaller than the Settlement Class could be certified. Defendants also face the costs and risks of continued litigation if the Class were to be certified for trial purposes.

12. The Court also finds the complexity, expense, and duration of this litigation favor preliminary approval of the proposed Settlement Agreement. Were this matter to continue, numerous, complex issues of law would have to be resolved at the cost of considerable time and expense to the parties and the Court.

13. The substantial benefits to be provided under the proposed settlement also favors preliminary approval.

14. The stage of the litigation and the judgment of experienced counsel for the Parties is a factor in favor of preliminary approval. The Parties have engaged in substantial investigation, exchange of information and legal positions, and debated the strengths and weaknesses of their merits and class certification claims and defenses, including with the help of a respected mediator with significant experience in class action litigation. Therefore, the Parties are well placed to assess the strength of this case and the comparative benefits of the proposed settlement. Moreover, this proposed settlement is supported by experienced counsel for the Parties. Plaintiffs are represented by highly respected attorneys with significant experience in other class actions. Defendants are also represented by attorneys from a respected law firm experienced in class action litigation. The unanimous support of counsel for this settlement weighs in favor of its approval.

15. The Court has also considered that the Settlement Agreement and conditional class certification make adequate provision for the interests of Class Members to opt out or to object to its terms.

16. Based on the foregoing conclusions, the proposed settlement is hereby preliminarily approved as fair, reasonable, and adequate, subject to further consideration at the final approval hearing described below. Plaintiffs and Defendants are authorized to take all actions that may be required prior to the Final Approval Hearing.

IV. Approval Of The Proposed Notice Plan

17. Once preliminary approval of a settlement is granted, Rule 23(c)(2) requires the Court to “direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”

18. The Parties have proposed to use A. B. Data Group (“A. B. Data”) as the Settlement Administrator. The Court has reviewed materials about the Settlement Administrator and has concluded that it has extensive and specialized experience and expertise in class-action settlements and notice programs.

19. The Court hereby appoints A. B. Data to assist and provide professional guidance in the implementation of the Notice Plan and other aspects of the settlement administration.

20. The Court has evaluated the proposed Notice Plan to determine if it is reasonable and in accord with the requirements of Alabama law. The Notice Plan that the Parties have agreed upon in the Settlement Agreement is direct and appropriate. It employs a Notice and Claim Form delivered by electronic mail or first-class mail to a high percentage of Class Members -- most of which are existing Hibbett | City Gear Rewards accountholders -- which is the best practicable notice and an appropriate form

of notice when Class Members can be identified. The Notice Plan also provides for the creation of a class settlement website, which will contain important settlement documents, including the Settlement Agreement and this Order. The website will also include a description of the settlement relief, answers to questions class members may have, and updates on the status of the settlement approval process. There will also be a toll-free telephone number, which provides Settlement Class members with access to information regarding the settlement.

21. This Court has also reviewed both the Notice and Claim Form attached as an Exhibit to the Settlement Agreement. After careful review of the documents, the Court has concluded that they clearly state in plain, easily understood language, the nature of the action; the definition of the classes certified; the ability of a class member to opt out or otherwise object and appear in this matter; and the binding effect of a class judgment on class members. The notice is designed to reach a significant number of class members and is otherwise proper under Rule 23(c)(2) and 23(e). Non-material modifications to these Notices may be made by agreement between the Parties without further need for Court approval.

22. Based on the foregoing, the Court hereby approves the Notice Plan and directs that it be implemented according to the Settlement Agreement. The Court finds that the Notice Plan constitutes reasonable notice under Rule 23(c)(2) and 23(e) and satisfies due process.

23. The cost of the Notice Plan shall be paid according to the terms of the Settlement Agreement. The Notice and Claim Form shall be mailed in accordance with the Notice Plan commencing within fourteen (14) days of this Order.

V. Procedure for Objection

24. Any Settlement Class Member, on his or her own, or through an attorney hired at his or her own expense, may object to the terms of the settlement. To be effective, any such objection must be in writing, filed with the Court and mailed to Plaintiffs and Defendants' Counsel with a timely postmark, and include: (1) a reference at the beginning to this matter, *Clatt et al. v. Hibbett Retail, Inc., et al.*; (2) the objector's full name, address, and telephone number, and, if available, email address; (3) proof of Settlement Class Membership consisting of the original or a copy of either (i) a customer receipt containing more than the last 5 digits of his or her credit or debit card showing that he or she made a transaction at a Hibbett Retail, Sports Additions or City Gear store between December 15, 2020 and February 23, 2022, or (ii) a credit or debit card statement showing that he or she made a transaction at a Hibbett Retail, Sports Additions or City Gear store between December 15, 2020 and February 23, 2022; (4) a written statement of all grounds for the objection, accompanied by any legal support for such objection; (5) copies of any papers, briefs, or other documents upon which the objection is based; (6) a list of all persons who will be called to testify in support of the objection; (7) a statement of whether the objector intends to appear at the fairness hearing; if the objector intends to appear at the fairness hearing through counsel, the objection must also state the identity of all attorneys representing the objector who will appear at the fairness hearing; (8) regarding any counsel who represents the objector or has a financial interest in the objection: (i) a list of cases in which the objector's counsel and/or counsel's law firm have objected to a class action settlement within the preceding five years, and (ii) a copy of any orders concerning a ruling upon counsel's or

the firm's prior objections that were issued by the trial and/or appellate courts in each listed case; (9) a statement by the objector under oath that: (i) he or she has read the objection in its entirety, (ii) he or she is a member of the Settlement Class, (iii) states the number of times in which the objector has objected to a class action settlement within the five years preceding the date that the objector submitted the objection, (iv) identifies the caption of each case in which the objector has made such objection, and (v) authenticates any orders concerning a ruling upon the objector's prior such objections that were issued by the trial and/or appellate courts in each listed case, attaching such orders to the statement. Any Settlement Class Member who fails to timely submit a written objection containing all of the information listed in the items (1) through (9) of this paragraph, including notice of his/her intent to appear at the Final Approval Hearing, shall not be permitted to object to the settlement and shall be foreclosed from seeking any review of the settlement or the terms of the Settlement Agreement by any means. Any Settlement Class Member who submits a timely written objection shall consent to deposition at the request of Settlement Class Counsel or Hibbett's counsel, to occur at least 5 days prior to the Final Approval Hearing.

VI. Procedure for Opting Out

25. Settlement Class Members may opt out of the Settlement Class at any time during the Opt Out Period. To exercise the opt out right, a Settlement Class Member must send to the Claims Administrator a written Request for Exclusion, which request should contain the Settlement Class Member's name, address, and telephone number. Such Request for Exclusion must be postmarked before December 26, 2022. All Settlement Class Members who do not opt out in accordance with this Order and the

Settlement Agreement during the Opt Out Period will be deemed Settlement Class Members. Any Person who timely opts out shall no longer be a Settlement Class Member, is not entitled to object to the approval of the settlement and is not entitled to any relief under and is not affected by the settlement.

26. Prior to the entry of the Final Approval Order, any Person who has elected to opt out may withdraw that election by notifying the Claims Administrator in writing that he/she/it wants to be a member of the Settlement Class. The Claims Administrator shall maintain records of all withdrawn opt outs and shall provide such information to the Parties and to the Court. At any time after the entry of the Final Approval Order, any Person who has elected to opt out of the settlement may withdraw that election only upon receiving the written consent of Hibbett and Court approval

VII. Final Approval Hearing

27. A Final Approval Hearing shall be held on **January 9, 2023 at 8:30 a.m.** for the purpose of determining whether the proposed settlement set forth in the Settlement Agreement shall be approved finally by the Court and whether final judgment dismissing the litigation with respect to Defendants is appropriate. The Court will also consider Class Counsel's request for attorneys' fees, and expenses, and Plaintiffs' request for an incentive award. The hearing will be held at the Circuit Court of Barbour County, Alabama (Eufaula Division).

28. The Court hereby sets the following dates and deadlines:

"Notice Date" (date by which dissemination of Notice must have begun)	=	14 Days from the Date of this Order
"Opt-Out Deadline" (deadline for post-marking and serving Request for Exclusion)	=	December 26, 2022

“Objection Date” (deadline for post-marking, filing and serving written objections)	=	December 26, 2022
“Final Approval Hearing”	=	January 9, 2023 at 8:30 a.m.

29. The findings and rulings in this Order are made solely for the purposes of Settlement and may not be cited or otherwise used to support the certification of any contested class or subclass in this Action or any other action.

30. If logistical problems arise from implementation of this Order, then the parties shall bring them to the attention of this Court for resolution by subsequent order of this Court.

31. The Parties are directed to send the Notice and Claim Form (contained as exhibits to the Motion for Preliminary Approval) approved by this Order, with such modifications as may be authorized by this Order.

32. This Court shall retain exclusive jurisdiction for all matters related to this Order. All Settlement Class Members and persons in privity with them, including all persons represented by them and any person acting on any Settlement Class Member’s behalf, are barred and enjoined from commencing or continuing any suit, action, proceeding, case, controversy, or dispute in any court, arbitration, or any other dispute resolution procedure or venue, arising from or relating to: (1) the claims alleged herein and as discussed in the Settlement Agreement, including any and all Released Claims identified in the Settlement Agreement; (2) the Settlement Agreement; and/or (3) performance or breach of same. Such Persons are further barred and enjoined from seeking to raise any objections or challenges to the Settlement, in any state or federal court or other body other than the Circuit Court of Barbour County, Alabama (Eufaula

Division).

33. This Order shall become null and void, and shall be without prejudice to the rights of the Parties, all of whom shall be restored to their respective positions existing immediately before this Court entered this Order, if (i) the proposed Settlement is not finally approved by the Court, or does not become Final (as defined in the Settlement Agreement), pursuant to the terms of the Settlement Agreement; or (ii) the Settlement Agreement is terminated or does not become Final, as required by the terms of the Settlement Agreement, for any other reason. In such event, and except as provided therein, the proposed Settlement and Settlement Agreement shall become null and void and be of no further force and effect; the preliminary certification of the Settlement Class for settlement purposes shall be automatically vacated; neither the Settlement Agreement nor this Order shall be used or referred to for any purpose whatsoever; and the Parties shall retain, without prejudice, any and all objections, arguments, and defenses with respect to class certification, including the right to argue that no class should be certified for any purpose.

34. This Order shall be of no force and effect if the Settlement does not become Final and shall not be construed or used as an admission, concession, or declaration by or against Defendants of any fault, wrongdoing, breach, or liability, or by or against Plaintiffs, Settlement Class Members that their claims lack merit or that the relief requested in the Complaint in this action is inappropriate, improper, or unavailable, or as a waiver by any party of any defenses or arguments it may have.

35. Counsel are directed to file any remaining briefs in support of the proposed settlement no later than **January 5, 2023**. Class Counsel are directed to file

any material in support of their fee motion no later than **December 12, 2022**. The Final Approval Hearing will be held at 8:30 a.m. on **January 9, 2023**.

36. The Court may (i) approve the Settlement Agreement, with such modifications as may be agreed to by the parties, without further notice; (ii) adjourn the final approval hearing from time to time by oral announcement at the hearing without further notice. The Court retains exclusive jurisdiction over the Action to consider all further matters arising out of or in connection with the proposed settlement.

Accordingly, the Motion for Preliminary Approval of Proposed Settlement is **GRANTED**, consistent with this Order.

DONE this 31st day of October, 2022.

/s/ BURT SMITHART

CIRCUIT JUDGE