

COMMONWEALTH OF MASSACHUSETTS
SUPERIOR COURT DEPARTMENT
BUSINESS LITIGATION SESSION

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AUG - 5 2024

SUPERIOR COURT - CIVIL,
JOHN E. POWERS, III
ACTING CLERK/MAGISTRATE

Mary Carr, individually and on behalf of all
others similarly situated,

Plaintiff,

v.

BG Retail, LLC and Caleres, Inc.,

Defendants.

C.A. No.: 2484CV02860

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Plaintiff Mary Carr ("Plaintiff"), by and through her attorneys, makes the following allegations pursuant to the investigation of her counsel and based upon information and belief, except as to allegations specifically pertaining to herself and her counsel, which are based on personal knowledge, against Defendants BG Retail, LLC and Caleres, Inc. (collectively, "Defendants" or "Famous Footwear").

NATURE OF THE ACTION

1. This is a class action suit brought against Defendants BG Retail, LLC and Caleres, Inc. for encroaching upon Plaintiff's and other similarly situated individuals' privacy rights under Mass. Gen. Laws ch. 93, § 105 (the "Massachusetts Consumer Privacy in Commercial Transactions Act" or "CPICTA").

2. The CPICTA, at § 105(a), reads:

No person, firm, partnership, corporation or other business entity that accepts a credit card for a business transaction shall write, cause to be written or require that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction form. Personal identification information shall include, but shall not be limited to, a credit card holder's address or telephone number.

The provisions of this section shall apply to all credit card transactions; provided, however, that the provisions of this section shall not be construed to prevent a

person, firm, partnership, corporation or other business entity from requesting information is necessary for shipping, delivery or installation of purchased merchandise or services or for a warranty when such information is provided voluntarily by a credit card holder.

3. To summarize, the CPICTA prohibits companies such as Defendants from requiring consumers to providing their personal information (*e.g.*, address, telephone number) when making a credit card transaction, unless such information is necessary for the transaction (*e.g.*, shipping or delivery).

4. Per the Supreme Judicial Court of Massachusetts, this provision’s “purpose was to safeguard consumer privacy and more particularly to protect consumers using credit cards from becoming the recipients of unwanted commercial solicitations from merchants with access to their identifying information.” *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 498 (2013).

5. Nonetheless, and in contravention of the CPICTA, Famous Footwear requires each of its online shoppers paying by credit card and checking out via its website’s credit card transaction form to write personal identification information not required by credit card issuers—their email address.

6. Famous Footwear then uses the collected email addresses to send unwanted commercial solicitations—namely, spam marketing emails (“Spam”)—to said consumers.

7. Mass. Gen. Laws ch. 93, § 105(d) states: “Any violation of the provisions of this chapter shall be deemed to be an unfair and deceptive trade practice, as defined in section 2 of chapter 93A.”

8. Plaintiff therefore brings this action individually and on behalf of a class of all other similarly situated consumers to recover damages and restitution under the Massachusetts Unfair and Deceptive Business Practices Act, Mass. Gen. Laws Ch. 93A (“Chapter 93A”) predicated upon Defendants’ violations of the CPICTA.

PARTIES

9. Plaintiff Mary Carr is a citizen of Massachusetts who resides in Attleboro, Massachusetts. In or around September 2023, Ms. Carr purchased a pair of boots from Famous Footwear, paid by credit card, and checked out via the Famous Footwear website's credit card transaction form (located at www.famousfootwear.com). As part of this process, Ms. Carr was required by Famous Footwear to write personal identification information not required by credit card issuers—her email address. Ms. Carr's email address was not a necessary part of the transaction, as it was not required for shipping, delivery, installation, or any other purpose. Shortly after completing her online Famous Footwear purchase, Ms. Carr began receiving spam marketing emails from Famous Footwear. Ms. Carr never signed up for or otherwise consented to the receipt of this Spam. Further, the Spam is a nuisance, Famous Footwear caused Ms. Carr to waste her time reading or otherwise addressing the Spam, and the Spam consumed valuable storage space in Ms. Carr's email mailbox.

10. Defendant Caleres, Inc. is a New York corporation with its principal place of business at 8300 Maryland Avenue, St. Louis, Missouri 63105. Defendant is one of the largest footwear companies in the nation, and it operates Famous Footwear retail locations throughout the Commonwealth.¹ Defendant targets consumers whom it knows to reside in Massachusetts (based on shipping information provided during checkout) with Spam.

11. Defendant BG Retail, LLC is a Delaware limited liability company with its principal place of business at 8300 Maryland Avenue, St. Louis, Missouri 63105. Defendant operates the Famous Footwear website, www.famousfootwear.com, on behalf of Defendant Caleres, Inc. Defendant targets consumers whom it knows to reside in Massachusetts (based on

¹ <https://www.famousfootwear.com/stores>

shipping information provided during checkout) with Spam.

JURISDICTION AND VENUE

12. This Court has jurisdiction over this matter pursuant to Mass. Gen. Laws ch. 212, §§ 3 and 4.

13. This Court has personal jurisdiction over Defendants pursuant to Mass. Gen. Laws ch. 223A § 3(a) and (b) because Defendants regularly transact business and contract to supply services in Massachusetts.

14. Venue is proper in this County because this County was the location of the transactions that gave rise to Plaintiff's claims, and this County is thus the location of Plaintiff's primary injury.

15. Venue is proper in the Business Litigation Session ("BLS"), pursuant to Superior Court Administrative Directive No. 17-1, because this case is complex and is brought as a class action which will require substantial case management.

FACTUAL ALLEGATIONS

16. As industry leaders,² trade groups,³ and courts⁴ agree, an email address is "personal identification information[.]" The Supreme Judicial Court of Massachusetts has held that "a zip code may well qualify as personal identification information under § 105 (a). This is so because . . . a consumer's zip code, when combined with the consumer's name, provides the

² <https://www.adexchanger.com/data-exchanges/can-email-be-the-next-big-online-identifier/> (quoting Tom Kershaw, CTO of Magnite, who said "[a]n email address is universally considered to be PII[.]").

³ https://thenai.org/wp-content/uploads/2021/07/nai_code2020.pdf (the Network Advertising Initiative Code of Conduct, identifying email as PII).

⁴ See *United States v. Hastie*, 854 F.3d 1298, 1303 (11th Cir. 2017) ("Email addresses fall within the ordinary meaning of information that identifies an individual. They can prove or establish the identity of an individual.").

merchant with enough information to identify through publicly available databases the consumer's address or telephone number[.]” *Tyler v. Michaels Stores, Inc.*, 464 Mass. 492, 499–501 (2013). In interpreting California's analogous Song-Beverly Credit Card Act of 1974, Cal. Civ. Code § 1747, *et seq.*, the United States District Court for the Eastern District of California compared zip codes and email addresses, finding: “[A] cardholder's email address ‘pertain[s] to or regards to a cardholder’ in a more specific and personal way than does a ZIP code. . . . Therefore, this Court predicts that the California Supreme Court would decide that an email address constitutes ‘personal identification information[.]’” *Capp v. Nordstrom, Inc.*, No. 2:13-CV-00660-MCE-AC, 2013 WL 5739102, at *6 (E.D. Cal. Oct. 22, 2013) (citations omitted). That is, just like a zip code, a consumer's email address provides merchants like Defendant with enough information to identify through publicly available databases a consumer's address or telephone number.⁵ And as the United States District Court for the Eastern District of California went on to conclude: “Defendant's alleged conduct in this case—acquiring Plaintiff's email address for one reason, . . . and then using the address for another reason, to send him promotional emails . . . directly implicates the purposes of the statute[.]” *Id.* at *7.

17. When checking out from Defendants' website, www.famousfootwear.com, online

⁵ Various companies claim the ability to reverse append email addresses to obtain customers' street addresses and telephone numbers. *See, e.g.*, <https://www.edq.com/email-verification/append/> (“Reverse email append service takes email addresses and matches other information you lack”); <https://docs.experianaperture.io/identity-append/experian-identity-append/overview/introduction/#reverse-email-append> (“Reverse email append is a service that allows you to input an email address and receive the name and address of the individual associated with that email.”); <https://www.listsolutions.com/our-services/> (“Reverse Email Append[:] Overlay name and address postal information to your email only database”); https://cdn2.hubspot.net/hub/68599/file-310417248-pdf/docs/towerdata_reverseemailappend.pdf (“TowerData's Reverse Email Append service can enhance your email database by adding the names and postal addresses of your customers. You'll gain the ability to market to them through direct mail”); <https://dmdatabases.com/data-append/reverse-email-append/> (“What is reverse email append? If you have a database only consisting of email addresses, then we can match the email addresses against a massive cooperative database to append postal addresses, contact names, cell phone numbers, and other valuable data”).

shoppers who wish to maintain their privacy, like Plaintiff and other Class Members, are presented with the option to “Continue as a Guest”:

The screenshot shows the Famous Footwear website's sign-in and guest user options. The page is titled "FAMOUS footwear". On the left, there is a "Sign In" section with a "Back to Cart" link. Below the title, there is a promotional message: "Sign in to use Reward Cash and Extras, plus earn up to 69 points on today's order, and get FREE SHIPPING, no minimum." There are two input fields: "Email address*" and "Password*" (with a note "Must include 6 characters" and a "Show" button). Below the password field is a "Forgot password?" link and a checkbox labeled "Keep me signed in" with a help icon. A "SIGN IN" button is at the bottom. On the right, there is a "Guest User" section with the text: "Continue as a guest and we can sign you up for a new account after checkout." Below this is a large "CONTINUE AS A GUEST" button. Underneath is a horizontal line with "Or sign up With" and a "Sign up with Google" button. At the bottom right, there is a small disclaimer: "By creating an account, you agree to our Privacy Policy and Terms & Conditions and consent to receiving marketing emails. Update your privacy settings here. Do Not Sell or Share My Personal Information."

18. After making this selection, shoppers are required to enter their email address and shipping address into the Famous Footwear website’s credit card transaction form, to proceed with the checkout process. If a consumer attempts to opt out of Famous Footwear’s email collection by leaving the email field blank, they are shown an error message that declares, “Please enter your email address” and they are precluded from continuing to the next checkout stages. Until recently, Defendants *appeared* to solicit consent to send future emails to shoppers (with a checkbox marked, “By entering your email, you agree to receive emails from us about new products, exclusive offers, and updates. Please see our privacy policy to learn more about how we use your information.”). But *even if consumers chose not to click this box*, Defendants still sent shoppers marketing emails. Now, the email field on www.famousfootwear.com merely states, in small, difficult-to-see font: “By placing your order you agree to receive marketing emails from Famous Footwear, unless you’ve previously unsubscribed. See our privacy policy to learn how we use your information. You can unsubscribe at any time.” These versions of Defendants’ checkout process are pictured below, with the former pictured first and the latter pictured second:

7

CONTINUE TO SHIPPING

Phone number

Phone*

Please enter your city

Please select your state

Please enter your ZIP

City*

State*

ZIP*

Apartment, Suite, or P.O. Box (Optional)

Please enter your street address

Street Address*

Please enter your first name

Please enter your last name

First Name*

Last Name*

Shipping Address

Please enter your e-mail address

Participating mail carrier

Email Address*

Contact Information

1. Delivery

or continue below for all payment methods

FAMOUS FOOTWEAR

[Back to Cart](#)

Estimated Total: \$77.93

or payments of \$18.00 with **Zip**

Item available in stock

Women's Court Vision Law Seeker

Size 6.5

White Mesh

Color White/Blue

SKU #13338

\$69.98 \$79.99

1. Delivery

or continue below for all payment methods

FAMOUS FOOTWEAR

[Back to Cart](#)

Check out quickly with **PayPal**

Shipping Address

Please enter your e-mail address

Participating mail carrier

Email Address*

Contact Information

Please enter your first name

Please enter your last name

First Name*

Last Name*

Street Address*

Enter a location

Order Summary

Subtotal: \$79.99

Estimated Shipping: \$79.99

Estimated Total: \$209.94

or a payment of \$7.25 with **Zip**

Item available in stock

Women's 5 Pack Ankle Socks

Color Assorted

SKU #44968

\$12.99

THIS ITEM IS EXCLUDED FROM 9000

19. As the foregoing makes clear, there is no reason why a customer must provide their email addresses for a credit card transaction. A customer furnishes their shipping address for delivery, and they must also provide their phone number (presumably for communications).

20. To test Defendants' email-related practices, Plaintiff's counsel purchased an item online from Famous Footwear with a credit card on or around December 13, 2023. Plaintiff's counsel entered an email address but did not check the box labeled "By entering your email, you agree to receive emails from us about new products, exclusive offers, and updates. Please see our privacy policy to learn more about how we use your information." Despite not clicking the box, Defendants then sent Plaintiff's counsel numerous emails over the following months. While some of these emails related to a purchase, the others were solicitations.

21. For individuals like Plaintiff and other Class Members, these commercial solicitations constitute unwanted Spam. Plaintiff and Class Members were never given the option to not to provide their email address, and they were sent emails regardless of whether or not they checked any consent box.

22. The Spam is a nuisance because it interferes with Plaintiff and other Class Members' use and enjoyment of their email mailboxes by, *inter alia*, causing irritation; acting as a distraction; displacing other, more important (and consented-to) emails; and creating visual clutter.

23. By sending Spam, Famous Footwear caused Plaintiff and fellow Class Members to waste their time reading or otherwise addressing the Spam (i.e., discerning how, if possible, to unsubscribe from the Spam; block Famous Footwear as a sender; and/or report the Spam to their email provider).

24. The Spam also consumed valuable storage space in Plaintiff and other Class Members' email mailboxes. Many of the most popular free email mailboxes (i.e., Apple's

iCloud, Google's Gmail, Microsoft's Outlook, and Proton AG's Proton Mail) have storage limits. Spam emails, as sent by Defendants, can quickly eat into free email mailbox storage space and force users to expend either time and labor to delete messages or money to procure additional storage space. For paid email mailbox users, spam emails deplete storage space that has been acquired with hard-earned savings.

CLASS REPRESENTATION ALLEGATIONS

25. Plaintiff seeks to represent a class defined as

All persons in Massachusetts who made a purchase on www.famousfootwear.com using a credit card (The "Class").

26. Members of the Class are so numerous that their individual joinder herein is impracticable. On information and belief, members of the Class number in the thousands. The precise number of Class members and their identities are unknown to Plaintiff at this time but may be determined through discovery. Class members may be notified of the pendency of this action by mail and/or publication through the distribution records of Defendant and third-party retailers and vendors.

27. Common questions of law and fact exist as to all Class members and predominate over questions affecting only individual Class members. Common legal and factual questions include, but are not limited to:

- (a) whether Defendants' conduct as alleged herein violates Massachusetts law, including the provisions of the CPICTA;
- (b) whether each Defendant is a "person, firm, partnership, corporation or other business entity that accepts a credit card for a business transaction" under Mass. Gen. Laws ch. 93, § 105(a);
- (c) whether an email address constitutes "personal identification information" under Mass. Gen. Laws ch. 93, § 105(a);
- (d) whether Plaintiff and Class members were injured by Defendants' conduct;

- (e) whether Plaintiff and Class members are entitled to damages under Chapter 93A; and
- (f) whether Plaintiff and the other members of the Class are entitled to equitable relief, including but not limited to injunctive or declaratory relief.

28. The claims of the named Plaintiff are typical of the claims of the Class in that the named Plaintiff purchased a pair of boots online, in or around September 2023, from Famous Footwear, paid by credit card, and checked out via the Famous Footwear website's credit card transaction form. As part of this process, Plaintiff, like all other Class Members, was required by Famous Footwear to write personal identification information not required by credit card issuers—her email address. Shortly after completing her online Famous Footwear purchase, Plaintiff, like all other Class Members, began receiving Spam from Famous Footwear. Plaintiff, like all other Class Members, never signed up for or otherwise consented to the receipt of this Spam. Further, like all other Class Members, Plaintiff experienced how the Spam is a nuisance, Famous Footwear caused Plaintiff to waste her time reading or otherwise addressing the Spam, and the Spam consumed valuable storage space in Plaintiff's email mailbox.

29. Plaintiff is an adequate representative of the Class because her interests do not conflict with the interests of the Class Members she seeks to represent, Plaintiff has retained competent counsel experienced in prosecuting class actions, and they intend to prosecute this action vigorously. The interests of Class members will be fairly and adequately protected by Plaintiff and her counsel.

30. The class mechanism is superior to other available means for the fair and efficient adjudication of the claims of Class members. Each individual Class member may lack the resources to undergo the burden and expense of individual prosecution of the complex and extensive litigation necessary to establish Defendants' liability. Individualized litigation increases the delay and expense to all parties and multiplies the burden on the judicial system

presented by the complex legal and factual issues of this case. Individualized litigation also presents a potential for inconsistent or contradictory judgments. In 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 on the issue of Defendants' liability. Class treatment of the liability issues will ensure that all claims and claimants are before this Court for consistent adjudication of the liability issues.

COUNT I
Violation Of Chapter 93A
Based On Violation Of The CPICTA

31. Plaintiff incorporates by reference and re-alleges each and every allegation set forth above as though fully set forth herein.

32. Plaintiff brings this claim individually and on behalf of the members of the Class against Defendants.

33. The CPICTA reads:

No person, firm, partnership, corporation or other business entity that accepts a credit card for a business transaction shall write, cause to be written or require that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction form. Personal identification information shall include, but shall not be limited to, a credit card holder's address or telephone number.

The provisions of this section shall apply to all credit card transactions; provided, however, that the provisions of this section shall not be construed to prevent a person, firm, partnership, corporation or other business entity from requesting information is necessary for shipping, delivery or installation of purchased merchandise or services or for a warranty when such information is provided voluntarily by a credit card holder.

Mass. Gen. Laws ch. 93, § 105(a).

34. Defendant BG Retail, LLC and Caleres, Inc. are each a “corporation or other business entity[.]”

35. Famous Footwear “accepts a credit card for business transactions[.]” including for

its online sales of goods to consumers like Plaintiff and other Class Members.

36. In contravention of the CPICTA, Famous Footwear “require[s] that a credit card holder write personal identification information, not required by the credit card issuer, on the credit card transaction form.” Namely, Famous Footwear requires each of its online shoppers paying by credit card and checking out via its website’s credit card transaction form (located at www.famousfootwear.com) to write their email address.

37. An email address is “personal identification information” because it provides merchants like Defendants with enough information to identify, through publicly available databases, a credit card holder (including their address and telephone number).

38. An email address is “not required by the credit card issuer.” Cardholder name, credit card number, expiration date, and/or card verification code are the only four details that credit card issuers require merchants, like Defendants, to collect for online transactions.⁶

39. The Famous Footwear website’s credit card transaction form (located at www.famousfootwear.com) is a “credit card transaction form.”

40. The CPICTA’s limited exception does not apply because an email address is not necessary for shipping, delivery, installation or a warranty, yet Defendants required consumers to provide an email address.

⁶ <https://upgradedpoints.com/credit-cards/security-code-cvv/> (“all merchants require . . . the cardholder’s name, card number, and expiration date. Most merchants also require a CVV code when purchasing online[.]”). *See also* <https://www.chase.com/personal/credit-cards/education/basics/why-do-some-sites-not-require-cvv/> (“when you’re making a credit card purchase online[,] . . . in addition to the credit card number and expiration date, you may also be asked for the CVV[.]”); <https://money.com/what-is-a-credit-card-cvv/> (“The merchant collects a customer’s card information: the account number, the expiration date and the CVV number.”); https://listings.pcisecuritystandards.org/documents/Protecting_Telephone_Based_Payment_Card_Data_v3-0_nov_2018.pdf (“[f]or card-not-present (CNP) fraud, a criminal only needs to obtain the PAN [(Primary Account Number, which is the card number)], cardholder name, expiry date and, sometimes, the card verification code[.]”).

41. Per the Supreme Judicial Court of Massachusetts, “When a merchant acquires personal identification information in violation of § 105 (a) and uses the information for its own business purposes, whether by sending the customer unwanted marketing materials or by selling the information for a profit, the merchant has caused the consumer an injury that is distinct from the statutory violation itself and cognizable under G.L. c. 93A, § 9.” *Tyler*, 464 Mass. at 503-04.

42. “[R]eceipt of unwanted marketing material as a result of a § 105 (a) violation represents an invasion of the consumer's personal privacy causing injury or harm worth more than a penny, and the consumer is thus entitled to the minimum statutory damage award of twenty-five dollars under G.L. c. 93A, § 9(3).” *Tyler*, 464 Mass. at 504 n.20.

43. Absent injunctive relief, Defendants may continue to violate the law and violate the rights of Massachusetts credit card holders. Plaintiff thus asks this court to declare Defendants’ conduct to be unlawful under the CPECTA and enjoin Defendants from continuing to violate Massachusetts law.

44. Plaintiff also seeks damages as a result of Defendants’ violations of Mass. Gen. Laws ch. 93, § 105. Mass. Gen. Laws ch. 93, § 105(d) states: “Any violation of the provisions of this chapter shall be deemed to be an unfair and deceptive trade practice, as defined in section 2 of chapter 93A.” Thus, Plaintiff seeks statutory damages of not less than twenty-five dollars per violation, the recovery of up to three but not less than two times this amount because Defendants acted willfully and knowingly (*see infra*), and attorney's fees and costs, pursuant to the Massachusetts Unfair and Deceptive Business Practices Act, Mass. Gen. Laws Ch. 93A, *et seq.*

45. In accordance with Mass. Gen. Laws Ch. 93A, § 9(3), on June 20, 2024, Plaintiff counsel served Defendants with written notice of their violation of Ch. 93A and a demand for relief. A true and correct copy of the letter is attached hereto as **Exhibit 1**. Defendants did not make a written tender of settlement for the putative class and denied all wrongdoing.

RELIEF DEMANDED

WHEREFORE, Plaintiff, individually and on behalf of all others similarly situated, seeks judgment against Defendants, as follows:

- a. For an order certifying the Class and naming Plaintiff as representative of the Class and Plaintiff's attorneys as Class Counsel to represent the Class;
- b. For an order declaring that Defendants' conduct violates the statutes referenced herein;
- c. For an order finding in favor of Plaintiff and the Class, on all counts asserted herein;
- d. For compensatory, statutory, and punitive damages in amounts to be determined by the Court and/or jury;
- e. For prejudgment interest on all amounts awarded;
- f. For an order of restitution and all other forms of equitable monetary relief;
- g. For an order enjoining Defendants from continuing the illegal practices detailed herein and compelling Defendants to undertake a corrective advertising campaign; and
- h. For an order awarding Plaintiff and the Class their reasonable attorneys' fees and expenses and costs of suit.

JURY TRIAL DEMANDED

Plaintiff demands a trial by jury on all claims so triable.

Dated: August 5, 2024

Respectfully submitted,

SMITH KRIVOSHEY, P.C.

By: /s/ Joel D. Smith
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**Pro Hac Vice Forthcoming*

Attorneys for Plaintiff