

09/09/2022

Sherri R. Carter, Executive Officer / Clerk of Court

By: T. Lewis Deputy

1 Keith J. Keogh, Esq. (*pro hac vice*)
2 55 W. Monroe Street, Ste. 3390
3 Chicago, IL 60603
4 Telephone: (312) 726-1092
5 Facsimile: (312) 726-1093
6 Keith@KeoghLaw.com
7 *Attorneys for Plaintiffs*

8 BRET L. LUSSKIN, Esq.
9 (*pro hac vice*)
10 20803 Biscayne Blvd., Suite 302
11 Aventura, FL 33180
12 Telephone: (954) 454-5841
13 Facsimile: (954) 454-5844
14 blusskin@lusskinlaw.com

15 IACONIS FUSCO, LLP
16 Joseph Patrick Fusco
17 340 Trinity Place
18 Malverne, NY 11565
19 Telephone: (516) 535-9295
20 Facsimile: (516) 535-9295
21 jfusco@iaconisfusco.com

KAZEROUNI LAW GROUP APC
Abbas Kazerounian, Esq. (249203)
ak@kazlg.com
Matthew M. Loker, Esq. (279939)
ml@kazlg.com
245 Fischer Avenue, Unit D1
Costa Mesa, CA 92626
Telephone: (800) 400-6808

Scott D. Owens, Esq. (*pro hac vice*)
2750 N. 29th Ave., Ste. 209A
Hollywood, FL 33020
Telephone: (954) 589-0588
Facsimile: (954) 337-0666
scott@scottdowens.com

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES**

DR. DAVID S. MURANSKY, ADRIANA
TIBBETTS, DARRYL TIBBETTS, and
KRISTY ZHANG, *individually and on
behalf of a class of other similarly situated
individuals,*

Plaintiffs,

v.

THE CHEESECAKE FACTORY, INC., and
THE CHEESECAKE FACTORY
RESTAURANTS, INC. d/b/a THE
CHEESECAKE FACTORY,

Defendants

v.

GSK Software USA, Inc.
Third-Party Defendant.

Case No. 19 STCV 43875

**~~PROPOSED~~ FINAL ORDER APPROVING
SETTLEMENT, APPROVING PROPOSED
ALLOCATION OF SETTLEMENT FUNDS,
APPROVING CLASS COUNSEL'S
APPLICATION FOR ATTORNEYS' FEES,
EXPENSES, AND INCENTIVE AWARD
FOR CLASS REPRESENTATIVE, AND
FINAL JUDGMENT**

**DATE: August 23, 2022
TIME: 11:00 a.m.**

HON. DAVID S. CUNNINGHAM

Electronically Received 08/24/2022 03:04 PM

1 ~~PROPOSED~~ **FINAL ORDER APPROVING SETTLEMENT, APPROVING PROPOSED**
2 **ALLOCATION OF SETTLEMENT FUNDS, APPROVING CLASS COUNSEL'S**
3 **APPLICATION FOR ATTORNEYS' FEES, EXPENSES, AND INCENTIVE AWARD FOR**
4 **CLASS REPRESENTATIVE, AND FINAL JUDGMENT**

5 **THIS CAUSE** came before the Court on the Motion of Plaintiffs, Dr. David S. Muransky,
6 Adriana Tibbetts, Darryl Tibbetts and Kristy Zhang, for Final Approval of Class Action Settlement
7 ("Mot."), the proposed allocation and distribution of funds among the Settlement Class; and Class
8 Counsel's application for attorneys' fees, expenses, and an incentive award for the Class
9 Representative filed on April 20, 2022. Being fully advised, it is

10 **ORDERED AND ADJUDGED** as follows:

11 1. This Order of Final Approval and Judgment incorporates herein and makes a part
12 hereof, the Agreement, including all Exhibits thereto. Unless otherwise provided herein, the terms as
13 defined in the Agreement shall have the same meanings for purposes of this Final Order and
14 Judgment.

15 2. The Court has personal jurisdiction over the Class Representatives, Settlement Class
16 Members, Cheesecake Factory, Inc., and GK Software USA, Inc., for purposes of this Settlement
17 only, and has subject matter jurisdiction to approve the Agreement.

18 3. The Settlement Class previously certified by the Court includes:

19 The cardholders who hold the 1,000,000 unique credit or debit card numbers,
20 whose EMV debit or credit card was used to make a purchase at a payment terminal
21 at a Cheesecake owned, operated, or branded restaurant that was programmed to print
22 the first six and last four EMV card numbers on customer transaction receipts, for a
23 period of time commencing at select stores on November 10, 2016 and ending by no
24 later than February 4, 2017. Any transactions involving Cakepay; Branded Pre-Pay
25 or Mall-branded cards are excluded as those transactions did not print the first six and
26 last four EMV card numbers on customer transaction receipts.

27 A person whose credit card transaction does not match Cheesecake's records or
28 credit or debit card company records showing the EMV credit or debit card
transactions that occurred and which would have printed the first six and last four
EMV card numbers on a customer transaction receipt at a Cheesecake restaurant for a
period of time commencing at select stores on November 10, 2016 and ending by no
later than February 4, 2017 is not a class member.

Notwithstanding the foregoing, the Settlement Class specifically excludes the
following persons: The district judge and magistrate judge who originally presided

1 over this case, the judges of the United States Court of Appeals for the Second Circuit,
2 Eleventh Circuit and the Ninth Circuit or any trial or appellate court in the district
3 where this court is located, and the trial court and appellate court judges of the
California state court presiding over this Settlement, and all of their spouses and minor
children.

4 In addition, excluded from the Settlement Class is any individual who properly opted out of the
5 Settlement Class pursuant to the procedure described in the Agreement and this Court’s Order
6 certifying the Settlement Class and granting preliminary approval of the Settlement (“Preliminary
7 Approval Order”).

8 4. The record shows that Class Notice has been given to the Settlement Class in the
9 manner approved by the Court in its Preliminary Approval Order. The Court finds that such Class
10 Notice: (i) constitutes reasonable and the best notice that is practicable under the circumstances; (ii)
11 constitutes notice that was reasonably calculated, under the circumstances, to apprise Settlement Class
12 Members of the terms of the Agreement and the Class Settlement set forth in the Agreement (“Class
13 Settlement”), and the right of Settlement Class Members to object to or exclude themselves from the
14 Settlement Class and appear at the Fairness Hearing held on May 20, 2022; (iii) constitutes due,
15 adequate, and sufficient notice to all persons or entities entitled to receive notice; and (iv) meets the
16 requirements of due process, California Code of Civil Procedure § 382, and California Rules of
17 Court, Rules 3.760–3.771.

18 5. This Order shall have no force or effect on those persons who properly and timely
19 excluded themselves from the Settlement Class. The Claims Administrator reports there were twelve
20 requests for exclusion (see list attached as *Exhibit 1*), and no objections to the Settlement.

21 6. The Court finds that extensive arm’s-length negotiations have taken place in good
22 faith between Class Counsel and Counsel for Cheesecake Factory resulting in the Agreement.

23 7. The Court finds that the designated Class Representatives are adequate
24 representatives.

25 8. The Court has considered all of the factors enumerated in California Code of Civil
26 Procedure § 382, and California Rules of Court, Rules 3.760–3.771, and other California law and
27 finds that Class Counsel have fairly and adequately represented the interests of the Settlement Class.
28

1 9. Pursuant to California Code of Civil Procedure § 382, and California Rules of
2 Court, Rules 3.760–3.771, the Court hereby finally approves in all respects the Agreement and the
3 Class Settlement and finds that the Agreement, the Class Settlement, and the plan of distribution as
4 set forth in the Agreement, are, in all respects, fair, reasonable and adequate, and in the best interest
5 of the Settlement Class.

6 10. The Parties are hereby directed to implement and consummate the Class Settlement
7 according to the terms and provisions of the Agreement¹. The claims against Cheesecake Factory on
8 behalf of the Settlement Class in *Muransky et al v. Cheesecake Factory, Inc.*, Case No. 19 STCV
9 43875, are hereby dismissed with prejudice and without costs to any party, except as otherwise
10 provided herein.

11 11. Upon the Effective Date of the Agreement, the Settlement Class and each Settlement
12 Class Member, shall release and forever discharge Cheesecake Factory, GK Software, the GK
13 Software Releasees and the Cheesecake Factory Releasees from any and all Released Claims.

14 a. “Released Claims” means any and all claims, actions, causes of action, rights,
15 suits, defenses, debts, sums of money, payments, obligations, promises, damages, penalties,
16 attorney’s fees, costs, liens, judgments, and demands of any kind whatsoever that each member of
17 the Settlement Class may have or may have had in the past, whether in arbitration, administrative, or
18 judicial proceedings, whether as individual claims or as claims asserted on a class basis, whether past
19 or present, mature or not yet mature, known or unknown, suspected or unsuspected, whether based
20 on federal, state, or local law, statute, ordinance, regulations, contract, common law, or any other
21 source, that were or could have been asserted in the Litigation and all claims that relate to or arise
22 from printing too much information on any receipts from a Cheesecake Factory restaurant during the
23 settlement class period, including, but not limited to, any claims under arising under the Fair Credit
24 Reporting Act, 15 U.S.C. § 1681, *et seq.*, as amended by the Fair and Accurate Credit Transactions
25 Act, Pub. L. 108–159, and 15 U.S.C. § 1681c(g) (collectively, “FACTA”), for a violation of any

26
27
28 ¹ The Court will allow the 1,301 late, but otherwise valid claims as doing so does not create a material difference for those class members who timely submitted a claim.

1 consumer protection statutes, or regarding identity theft or the risk of identity theft, including the
2 Song-Beverly Credit Card Act or any state law similar to FACTA.

3 b. “Cheesecake Factory Releasees” means Cheesecake Factory, affiliates,
4 parents, subsidiaries, predecessors, successors, co-venturers, divisions, joint venturers, joint ventures
5 and assigns, as well as each of those entities’ past and present owners, investors, directors, officers,
6 employees, partners, managers, members, principals, agents, underwriters, insurers, co-insurers, re-
7 insurers, indemnitors, shareholders, attorneys, accountants and auditors, banks and investment
8 banks, consultants, vendors, contractors, licensors, franchisors, and assigns.

9 c. “GK Software Releasees” means GK Software, each of its affiliates, parents,
10 subsidiaries, members, predecessors, successors, co-venturers, divisions, joint venturers, joint
11 ventures, licensees, and assigns, as well as each of those entities’ past and present owners, investors,
12 directors, officers, employees, partners, managers, members, principals, agents, underwriters,
13 insurers, co-insurers, re-insurers, indemnitors, shareholders, attorneys, accountants and auditors,
14 banks and investment banks, consultants, vendors, contractors, licensors, and assigns.

15 d. The Settlement Class and each Settlement Class Member covenant and agree
16 that they shall not hereafter seek to establish liability against any Cheesecake Factory Releasee or
17 GK Software Releasee based, in whole or in part, on any of the Released Claims.

18 e. The Settlement Class and each Settlement Class Member expressly waive
19 and relinquish any and all rights which they may have under Section 1542 of the California Civil
20 Code or any similar statute in the United States. Section 1542 reads as follows:

21 **A general release does not extend to claims which the creditor does**
22 **not know or suspect to exist in his or her favor at the time of**
23 **executing the release, which if known by him or her must have**
24 **materially affected his or her settlement with the debtor.**

25 Even if the Settlement Class and each Settlement Class Member hereafter discover
26 facts in addition to or different from those which they now know or believe to be true with respect to
27 the subject matter of the Released Claims, each Settlement Class Member shall be deemed to have,
28 and by operation of this Order shall have, nevertheless, fully, finally, and forever waived, settled and

1 released any and all Released Claims, regardless of such subsequent discovery of additional or
2 different facts.

3 f. Each Class Representative and each Settlement Class Member hereby
4 releases and forever discharges any and all claims that he or she may have against any Cheesecake
5 Factory Releasee or GK Software Releasee.

6 12. Neither the Settlement Agreement, nor any of its terms and provisions, nor any of the
7 negotiations or proceedings connected with it, nor any of the documents or statements referred to
8 therein, nor this Final Order and Judgment, nor any of its terms and provisions, shall be offered by
9 any person or received against Cheesecake Factory, GK Software or any Cheesecake Factory or GK
10 Software Releasee as evidence of—or construed as or deemed to be evidence of—any presumption,
11 concession, or admission by Cheesecake Factory, GK Software or any Cheesecake Factory or GK
12 Software Releasee of the truth of the facts alleged, the validity of any claim that has been or could
13 have been asserted in the Litigation or in any other litigation or judicial or administrative proceeding,
14 the deficiency of any defense that has been or could have been asserted in the Litigation or in any
15 litigation, or of any liability, wrongdoing, or violation of any statute or law by Cheesecake Factory,
16 GK Software or any Cheesecake Factory or GK Software Releasee.

17 13. Class Counsel have moved pursuant to California Code of Civil Procedure § 382,
18 and California Rules of Court, Rules 3.760–3.771 for an award of attorneys’ fees and reimbursement
19 of expenses. Pursuant to California Code of Civil Procedure § 382, and California Rules of Court,
20 Rules 3.760–3.771, this Court makes the following findings of fact and conclusions of law:

21 (a) this Settlement confers substantial benefits on the Settlement Class
22 Members;

23 (b) the value conferred on the Settlement Class is immediately and readily
24 quantifiable upon this judgment becoming Final (as defined in the Agreement), and Settlement
25 Class Members who have submitted valid Settlement Claim Forms or Publication Notice Claim
26 Forms will receive payments that represent a significant portion of the damages that would be
27 available to them were they to prevail in an individual action under FACTA;

28

1 (c) Class Counsel vigorously and effectively pursued the Settlement Class
2 Members' claims before this Court in this complex case;

3 (d) this Settlement was obtained as a direct result of Class Counsel's
4 advocacy;

5 (e) this Settlement was reached following extensive arms'-length negotiation
6 between Class Counsel and Counsel for Cheesecake Factory and GK Software, facilitated by a
7 professional mediator, and was negotiated in good-faith and in the absence of collusion;

8 (f) during the prosecution of the claims in the Litigation, Class Counsel incurred
9 expenses in the aggregate amount of \$36,479.62, which included mediation and other expenses and
10 which the Court finds to be reasonable and necessary to the representation of the Settlement Class;

11 (g) Settlement Class Members were advised in the Class Notice approved by the
12 Court that Class Counsel intended to apply for an award of attorneys' fees in an amount up to one-
13 third of the Settlement Fund (\$1,583,333.00), to be paid from the Settlement Fund;

14 (h) no member of the Settlement Class has submitted a written objection to the
15 award of attorneys' fees and expenses;

16 (i) attorneys who recover a common benefit for persons other than themselves or
17 their clients are entitled to a reasonable attorneys' fee from the Settlement Fund as a whole. *See,*
18 *e.g., Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Laffitte v. Robert Half Int'l Inc.* (2016)
19 1 Cal. 5th 480, 488–489 (“California has long recognized ... the propriety of awarding an attorney
20 fee to a party who has recovered or preserved a monetary fund for the benefit of himself or herself
21 and others.”); and

22 (h) the requested one-third percentage fee award is consistent with other fee awards
23 for FACTA litigation. *See Altman v. White House Black Market, Inc.*, No. 21-A-735 (Cobb Cnty.,
24 Ga., Dec. 9, 2021 Order, ¶12(g) and ¶14 (FACTA case granting fee award of 40% of settlement
25 fund); *Donahue v. Everi Holdings, Inc.*, 2018 CH 15419 (Ill. Cir. Ct. Dec. 3, 2020 Order, ¶19 and
26 ¶26) (FACTA case granting fee award of 40% of settlement fund); *Mocek v. AllSaints USA, Ltd.*,
27 2016 CH 10056 (Ill. Cir. Ct. May 13, 2019 Order, ¶10 and ¶17) (FACTA case awarding 35% of
28 fund); *Muransky v. Godiva, Inc.*, 2020 CH 7156 (Ill. Cir. Ct. May 13, 2021 Order) (FACTA case

1 awarding one-third of fund); *Flaum v. Doctor's Assoc.*, 16-cv-61198, ECF 175, p.8 (S.D. Fla. March
2 11, 2019) (granting attorneys' fee award of one-third of a \$30.9 million FACTA settlement); *Legg*
3 *v. Spirit Airlines*, No. 0:14-cv-61978-JIC, ECF. 151, ¶15 (S.D. Fla. Aug. 2, 2016) (FACTA case
4 awarding one-third of gross recovery for fees, plus expenses); *Legg v. Laboratory Corp. of America*,
5 No. 0:14-cv-61543-RLR, ECF 227, p.7 (S.D. Fla. Feb. 18, 2016) (same); *Muransky v. Godiva*
6 *Chocolatier, Inc.*, No. 0:15-cv-60716-WPD (S.D. Fla., filed Apr. 6, 2015) (same).

7 14. Accordingly, Class Counsel are hereby awarded \$(1,583,333.00 from the Settlement
8 Fund as their fee award, which the Court finds to be fair and reasonable, and which amount shall be
9 paid to Class Counsel from the Settlement Fund in accordance with the terms of the Agreement.
10 Further, Class Counsel are hereby awarded \$36,479.62 for their expenses which the Court finds to
11 be fair and reasonable, and which amount shall be paid to Class Counsel from the Settlement Fund
12 in accordance with the terms of the Agreement. Class Counsel shall be responsible for allocating
13 and shall allocate this award of attorneys' fees, costs, and expenses among Class Counsel.

14 15. Dr. David Muransky is hereby compensated in the amount of \$10,000.00 for his
15 efforts in this case. Adriana Tibbetts and Darryl Tibbetts are hereby collectively compensated in the
16 amount of \$5,000.00 for their efforts in this case. Kristy Zhang is hereby compensated in the amount
17 of \$5,000.00 for her efforts in this case.

18 16. Without affecting the finality of this Order, the Court retains continuing and exclusive
19 jurisdiction over all matters relating to the administration, consummation, enforcement, and
20 interpretation of the Agreement and of this Order, to protect and effectuate this Order, and for any
21 other necessary purpose. The Class Representatives, Settlement Class Members, any Publication
22 Notice Class Members, Cheesecake Factory, and GK Software are hereby deemed to have
23 irrevocably submitted to the exclusive jurisdiction of this Court, for the purpose of any suit, action,
24 proceeding or dispute arising out of or relating to the Agreement or the applicability of the
25 Agreement, including the Exhibits thereto, but only for such purposes. Without limiting the
26 generality of the foregoing, and without affecting the finality of this Order, the Court retains exclusive
27 jurisdiction over any such suit, action, or proceeding. Solely for purposes of such suit, action, or
28 proceeding, to the fullest extent they may effectively do so under applicable law, the Parties are

1 deemed to have irrevocably waived and agreed not to assert, by way of motion, as a defense or
2 otherwise, any claim or objection that they are not subject to the jurisdiction of this Court, or that
3 this Court is, in any way, an improper venue or an inconvenient forum.

4 17. All Settlement Class Members, from this day forward, are permanently barred and
5 enjoined from: (a) asserting any Released Claims in any action or proceeding; (b) filing,
6 commencing, prosecuting, intervening in, or participating in (as class members or otherwise) any
7 action or proceeding based on any of the Released Claims; and (c) organizing Settlement Class
8 Members, or soliciting the participation of Settlement Class Members, for purposes of pursuing any
9 action or proceeding (including by seeking to amend a pending complaint to include class
10 allegations, or seeking class certification in a pending or future action or proceeding) based on any
11 of the Released Claims or the facts and circumstances relating thereto.

12 18. All Settlement Class Members shall dismiss with prejudice all claims, actions, or
13 proceedings that have been brought by any Settlement Class Member and that have been released
14 pursuant to the Settlement Agreement and this Final Order and Judgment.

15 19. A number of the banks Class Counsel subpoenaed for class member name and
16 contact information asked to be reimbursed for time, labor, and expense incurred gathering and
17 producing the information. The banks were previously notified of Class Counsel's
18 recommendations to the extent they deviated from the amounts billed. Below is a list of the banks
19 that requested compensation and the amount awarded:

<u>BANK</u>	<u>Allowed Payment</u>
Navy FCU	22.00
Regions Bank	1,200.00
US Bank	100.00
Fifth Third Bank	178.37
American Express	795.72

20
21
22
23
24
25
26 21. This Final Order, the final judgment to be entered pursuant to this Final Order, and
27 the Settlement Agreement (including the exhibits thereto) may be filed in any action against or by
28 any Cheesecake Factory Releasee or GK Software Releasee (as those terms are defined herein and

1 the Settlement Agreement) to support a defense of *res judicata*, collateral estoppel, release, good
2 faith settlement, judgment bar or reduction, or any theory of claim preclusion or issue preclusion
3 or similar defense or counterclaim.

4 22. Without further order of the Court, the Settling Parties may agree to reasonably
5 necessary extensions of time to carry out any of the provisions of the Settlement Agreement.

6 23. This Final Order, and the final judgment to be entered pursuant to this Final Order,
7 shall be effective upon entry. In the event that the Final Order and the final judgment to be entered
8 pursuant to this Final Order are reversed or vacated pursuant to a direct appeal in this Action or the
9 Settlement Agreement is terminated pursuant to its terms, all orders entered and releases delivered
10 in connection herewith shall be null and void.

11 24. Pursuant to California Code of Civil Procedure § 384 as amended, the Court
12 tentatively approves Electronic Frontier Foundation (<https://eee.eff.org/>) as a cy pres recipient
13 on behalf of the Class as that organization will promote the law consistent with the objectives
14 and purposes of the underlying cause of action.

15 25. Plaintiff is directed to file a summary of distribution supported by declarations prior to
16 August 28, 2023.

17 26. This matter is set for a non-appearance case review on August 28, 2023 at 8:30 a.m.
18 at which time the Court will determine whether to amend the judgment to approve Electronic Frontier
19 Foundation pursuant to § 384.

20 27. This Litigation is hereby dismissed on the merits and with prejudice against Class
21 Representatives and all other Settlement Class Members, without fees or costs to any party except as
22 otherwise provided herein.

23 **DONE and ORDERED** in _____, California, this _____ day of
24 09/09/2022, 2022.



A handwritten signature in black ink that reads "David S. Cunningham III".

26 David S. Cunningham III / Judge
27 **JUDGE DAVID S. CUNNINGHAM**

28 cc: counsel of record

Exhibit 1



Exclusion Report

Muransky et al. v. Cheesecake Factory, Inc

Number	First Name	Last Name
1	KWANYUEN	WANG
2	GARY	HERZBERG
3	JACOB	JOHNSON
4	DAVE	JOHNSON
5	OU	SUN
6	MERLE	STROMBERG
7	MORGAN	HOTTENSMITH
8	SUSAN	RIGGIO
9	HORVAT & CO	
10	PREEYA	GRUNWALD
11	NICOLAI	HUSARENKO
12	MELISSA	RUEHS BOTWINICK