

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IAN WALKER AND STEPHEN KRUSE, on behalf of themselves and all others similarly situated,)	
)	
Plaintiffs,)	No. 06 C 3447
)	Chief Judge Holderman
v.)	Magistrate Judge Ashman
S.W.I.F.T. SCRL,)	
)	
Defendant)	
)	
<hr style="border: 0.5px solid black;"/>		

SECOND AMENDED COMPLAINT

Plaintiffs, by their counsel, individually and on behalf of all others similarly situated, as and for their Second Amended Complaint against Defendant assert upon information and belief as follows:

PRELIMINARY STATEMENT OF THE CASE

1. This case challenges the legality of Defendant’s disclosure of financial records or other information to the United States Government. Upon information and belief such disclosure was done without consent or warrants and in violation of the United States Constitution and federal statutes.

2. On June 23, 2006, the *New York Times* revealed that Defendant SWIFT had disclosed to the United States Government “financial records... involving tens of thousands of Americans and others in the United States” in what later became known as the “Terrorist Finance Tracking Program” (the “TFTP”). See:

<http://select.nytimes.com/search/restricted/article?res=F40F1FFE3D540C708EDDAF0894DE40>

[4482](#) (password required, last accessed January 4, 2007). Prior to this revelation, Plaintiffs and class members had no reasonable opportunity to discover the existence of this disclosure or the violations of law alleged herein.

3. According to its website, Defendant SWIFT is “the financial industry-owned cooperative supplying secure, standardized messaging services and interface software to 7,800 financial institutions in more than 200 countries. SWIFT’s worldwide community includes banks, broker/dealers and investment managers, as well as their market infrastructures in payments, securities, treasury and trade.”

4. Upon information and belief, at all times during the Class Period, Defendant SWIFT acted as a financial institution or acted as an agent of a financial institution or institutions, many of which are member-shareholders of SWIFT. (See http://www.swift.com/index.cfm?item_id=1027, last accessed January 4, 2007.)

5. Plaintiffs are suing to stop this illegal conduct and hold Defendant responsible for its illegal conduct.

JURISDICTION AND VENUE

6. This court has subject matter jurisdiction over the federal claims pursuant to Article III of the United States Constitution, 28 U.S.C. §1331, 28 U.S.C. §2201, 12 U.S.C. §3416, 12 U.S.C. §3417, 12 U.S.C. §3418, and over the state claims pursuant to 28 U.S.C. §1332 and 28 U.S.C. §1367.

7. Plaintiffs are informed, believe and thereon allege that Defendant has sufficient contacts with this district generally and, in particular, with the events herein alleged, that

Defendant is subject to the exercise of jurisdiction of this court over the person of such Defendant and that venue is proper in this judicial district pursuant to 28 U.S.C. §1391.

8. Plaintiffs are informed, believe and thereon allege that, based on the places of business of Defendant identified above and/or on the national reach of Defendant, a substantial part of the events giving rise to the claims herein alleged occurred in this district and that Defendant and/or agents of Defendant may be found in this district. Plaintiffs and Defendant routinely engage in domestic and international financial transactions within and to this jurisdiction.

9. **Intradistrict Assignment:** Assignment to the Eastern Division is proper pursuant to Local Rule 5.1 and because a substantial portion of the events and omissions giving rise to this lawsuit occurred in this district and division.

PARTIES

10. Plaintiff Ian Walker is an individual residing in Washington, D.C. Walker, an office worker, has completed numerous domestic financial transactions and at least one international financial transaction since September 11, 2001.

11. Plaintiff Stephen Kruse is an individual residing in Chicago, IL. Kruse has completed numerous domestic financial transactions and at least one international financial transaction since September 11, 2001.

12. Defendant SWIFT is an international corporation with its principal American place of business in the State of New York.

FACTUAL ALLEGATIONS RELATED TO ALL COUNTS

13. Sometime after September 11, 2001, SWIFT began providing financial records from its vast international database to the United States Government. These records pertained to banking transactions involving thousands of Americans and others in the United States, according to government and industry officials.

14. SWIFT is described by the New York Times as “the nerve center of the global banking industry”. It is a crucial gatekeeper, providing electronic instructions on how to transfer money among 7,800 financial institutions worldwide. The cooperative is owned by more than 2,000 organizations, and virtually every major commercial bank, as well as brokerage houses, fund managers and stock exchanges, uses its services. SWIFT routes more than 11 million transactions each day, most of them across borders. According to the New York Times, SWIFT was described by a former government official as “the mother lode, the Rosetta stone” for financial data. One person close to the operation said “At first they got everything – the entire SWIFT database”.

15. SWIFT has reviewed international transfers involving “many thousands” of people or groups in the United States.

16. Upon information and belief, the United States Government did not seek individual court-approved warrants or subpoenas to examine specific transactions for millions of records.

17. According to U.S. Treasury Department under secretary Stuart Levey, at least one person has been removed from the operation for conducting a search considered inappropriate.

See:

<http://select.nytimes.com/search/restricted/article?res=F40F1FFE3D540C708EDDAF0894DE404482> (password required, last accessed January 4, 2007).

18. On August 23, 2006, the Data Protection Commission for the German *Lander* of Schleswig-Holstein found that “The turn over of European citizens’ financial data by SWIFT established in Belgium to United States authorities violates German and European data privacy law.” (See translation at [http://www.privacyinternational.org/article.shtml?cmd\[347\]=x-347-542162&als\[theme\]=Financial%20Surveillance](http://www.privacyinternational.org/article.shtml?cmd[347]=x-347-542162&als[theme]=Financial%20Surveillance), last accessed January 4, 2007.)

19. On September 27, 2006, the Privacy Commission of Belgium found that "SWIFT should have complied with its obligations under the Belgian privacy law, amongst which the notification of the processing, the information, and the obligation to comply with the rules concerning personal data transfer to countries outside the EU" and that Swift was a “controller in the processing of personal data via its SWIFTNet FIN service” and not “merely a processor, for example like a postal service.” (See translated summary at http://www.privacycommission.be/communiqu%E9s/summary_opinion_Swift_%2028_09_2006.pdf, last accessed January 4, 2007.)

20. On October 13, 2006, the Federal Data Protection and Information Commissioner of Switzerland concluded *inter alia* that “Swiss data protections laws must also have been infringed.” (See .pdf file available at <http://www.edoeb.admin.ch/aktuell/index.html?lang=en>, last accessed January 4, 2007.)

21. On November 22, 2006, the Article 29 Working Party of the European Commission concluded *inter alia* that “Both SWIFT and instructing financial institutions share joint responsibility, although in different degrees, for the processing of personal data as ‘data controllers’” and called upon SWIFT and the financial institutions “to take measures in order to

remedy the currently illegal state of affairs without delay.” (See

http://ec.europa.eu/justice_home/fsj/privacy/docs/wpdocs/2006/wp128_en.pdf, last accessed January 4, 2007.)

CLASS ACTION ALLEGATIONS

22. Pursuant to Federal Rules of Civil Procedure, Rule 23 (a) and (b), Plaintiff Walker brings this action on behalf of himself and a Nationwide Class of similarly situated persons defined as:

All individuals in the United States that have engaged in at least one domestic or international financial transaction since September, 2001.

23. The Nationwide Class seeks certification of claims for declaratory relief, injunctive relief and damages pursuant to 12 U.S.C. § 3417 and 12 U.S.C. § 3418.

24. Plaintiff Kruse also brings the claims on behalf of the following Illinois Subclass defined as:

All individuals that are residents of the State of Illinois and that have engaged in a domestic or international financial transaction since September 2001.

25. The Illinois Subclass seeks certification of claims for declaratory and injunctive relief, and for restitution.

26. Excluded from the Nationwide Class and Illinois Subclass are the officers, directors, and employees of Defendant, and the legal representatives, heirs, successors, and assigns of Defendant.

27. This action is brought as a class action and may properly be so maintained pursuant to the provisions of the Federal Rules of Civil Procedure, Rule 23. Plaintiffs reserve the

right to modify the Nationwide Class and the Illinois Subclass definitions and the class period based on the results of discovery.

28. **Numerosity of the Nationwide Class and Illinois Subclass:** Members of the Nationwide Class and Illinois Subclass are so numerous that their individual joinder is impracticable. The precise numbers and addresses of members of the Nationwide Class and Illinois Subclass are unknown to the Plaintiffs. Plaintiffs estimate that the Nationwide Class consists of millions of members and the Illinois Subclass consists of hundreds of thousands of members. The precise number of persons in both the Nationwide Class and Illinois Subclass and their identities and addresses may be ascertained from Defendant's records.

29. There is a well-defined community of interest in the questions of law and fact involved affecting the members of the Nationwide Class and Illinois Subclass. These common legal and factual questions include: (a) Whether Defendant has disclosed Nationwide Class members' financial records or other information to the United States Government, in violation of the First and Fourth Amendment to the United States Constitution and Chapter 35 of Title 12, U.S.C., "The Right to Financial Privacy Act" (the "RFPA"); (b) Whether Defendant's disclosure of Illinois Subclass members' communications constitutes unfair, unlawful and/or fraudulent business practices in violation of Illinois' Consumer Fraud and Deceptive Business Practices Act (CFDBPA); (c) Whether Plaintiffs and Illinois Subclass members are entitled to restitution, disgorgement of profits, or other equitable relief to remedy Defendant's unfair, unlawful and/or fraudulent business practices; (d) Whether Plaintiffs and class members are entitled to recover compensatory, statutory and punitive damages, whether as a result of Defendant's fraudulent, illegal and deceitful conduct, and/or otherwise; and (e) Whether Plaintiffs and class members are entitled to an award of reasonable attorneys' fees, pre-judgment interest, and costs of this suit.

30. **Typicality:** Plaintiffs' claims are typical of the claims of the members of the Nationwide Class and Illinois Subclass because Plaintiffs have completed an international or domestic financial transaction since September 11, 2001. Plaintiffs and all members of the Nationwide Class and Illinois Subclass have similarly suffered harm arising from Defendant's violations of law, as alleged herein.

31. **Adequacy:** Plaintiffs are adequate representatives of the Nationwide Class and Illinois Subclass because their interests do not conflict with the interests of the members of the classes they seek to represent. Plaintiffs have retained counsel competent and experienced in complex class action litigation and intend to prosecute this action vigorously. Plaintiffs and their counsel will fairly and adequately protect the interests of the members of the Nationwide Class and Illinois Subclass.

32. This suit may also be maintained as a class action pursuant to Federal Rules of Civil Procedure, Rule 23(b)(2) because Plaintiffs and both the Nationwide Class and Illinois Subclass seek declaratory and injunctive relief, and all of the above factors of numerosity, common questions of fact and law, typicality and adequacy are present. Moreover, Defendant has acted on grounds generally applicable to Plaintiffs and both the Nationwide Class and Illinois Subclass as a whole, thereby making declaratory and/or injunctive relief proper.

33. **Predominance and Superiority:** This suit may also be maintained as a class action under Federal Rules of Civil Procedure, Rule 23(b) (3) because questions of law and fact common to the Nationwide Class and Illinois Subclass predominate over the questions affecting only individual members of the classes and a class action is superior to other available means for the fair and efficient adjudication of this dispute. The damages suffered by each individual class member may be relatively small, especially given the burden and expense of individual

prosecution of the complex and extensive litigation necessitated by Defendant's conduct. Furthermore, it would be virtually impossible for the class members, on an individual basis, to obtain effective redress for the wrongs done to them. Moreover, even if class members themselves could afford such individual litigation, the court system could not. Individual litigation presents a potential for inconsistent or contradictory judgments. Individualized litigation increases the delay and expense to all parties and the court system presented by the complex legal issue of the case. By contrast, the class action device presents far fewer management difficulties, and provides the benefits of a single adjudication, economy of scale and comprehensive supervision by a single court.

COUNT I

Violation of Plaintiffs' and Class Members' Rights Under the First Amendment to the United States Constitution (Plaintiffs Walker and Kruse and the Nationwide Class [Including the Illinois Subclass] v. Defendant)

34. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

35. On information and belief, Plaintiffs and class members have a reasonable expectation of privacy in their financial transactions transmitted, collected, and/or stored by SWIFT.

36. Plaintiffs and class members have a Constitutionally guaranteed right to free speech in the form of financial donations, contributions, or other expression of political, religious, or other personal beliefs through their financial transactions.

37. On information and belief, Plaintiffs and class members use SWIFT's services to complete financial transactions.

38. On information and belief, at all relevant times, the U.S. Government knew of and/or acquiesced in all of the above-described acts of SWIFT, and failed to protect the First Amendment rights of the Plaintiffs and class members.

39. In performing the acts alleged herein, SWIFT had at all relevant times a primary or significant intent to assist or purpose of assisting the government in carrying out its “Terrorist Finance Tracking Program” (the “TFTP”) and/or other government investigations, rather than to protect its own property or rights.

40. By the acts alleged herein, SWIFT acted as an instrument or agent of the government, and thereby violated Plaintiffs’ and class members’ reasonable expectations of privacy and denied Plaintiffs and class members their rights to speak and receive speech privately under the First Amendment.

41. By the acts alleged herein, SWIFT’s conduct proximately caused harm to Plaintiffs and class members.

42. On information and belief, SWIFT’s conduct was done intentionally, with deliberate indifference, or with reckless disregard of, Plaintiffs’ and class members’ constitutional rights.

43. On information and belief, there is a strong likelihood that Defendant is now engaging in and will continue to engage in the above-described violations of Plaintiffs’ and class members’ constitutional rights, as agents of the government, and that likelihood represents a credible threat of immediate future harm.

44. Wherefore, Plaintiffs and class members pray for this court to declare that SWIFT has violated their rights under the First Amendment to the United States Constitution, and enjoin

Defendant and its agents, successors and assigns from violating the Plaintiffs' and class members' rights under the First Amendment to the United States Constitution.

COUNT II

Violation of Plaintiffs' and Class Members' Rights Under the Fourth Amendment to the United States Constitution (Plaintiffs Walker and Kruse and the Nationwide Class [Including the Illinois Subclass] v. Defendant)

45. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

46. On information and belief, the above-described acts of disclosure occurred without judicial or other lawful authorization, probable cause, and/or individualized suspicion.

47. By the acts alleged herein, SWIFT acted as an instrument or agent of the government, and thereby violated Plaintiffs' and class members' reasonable expectations of privacy and denied Plaintiffs and class members their right to be free from unreasonable searches and seizures as guaranteed by the Fourth Amendment to the Constitution of the United States.

48. Wherefore, Plaintiffs and class members pray for this court to declare that SWIFT has violated their rights under the Fourth Amendment to the United States Constitution, and enjoin Defendant and its agents, successors and assigns from violating the Plaintiffs' and class members' rights under the Fourth Amendment to the United States Constitution.

COUNT III

Disclosure of financial records or information contained therein in violation of 12 U.S.C. 3402 (Plaintiffs Walker and Kruse and the Nationwide Class [Including the Illinois Subclass] vs. Defendants)

49. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

50. In relevant part, 12 U.S.C. §3402 provides that: Except as provided by section 3403(c) or (d), 3413, or 3414 of this title no Government authority may have access to or obtain copies of, or the information contained in the financial records of any customer from a financial institution unless the financial records are reasonably described and – (1) such customer has authorized such disclosure in accordance with section 3404 of this title; (2) such financial records are disclosed in response to an administrative subpoena or summons which meets the requirements of section 3405 of this title; (3) such financial records are disclosed in response to a search warrant which meets the requirements of section 3406 of this title; (4) such financial records are disclosed in response to a judicial subpoena which meets the requirements of section 3407 of this title; or (5) such financial records are disclosed in response to a formal written request which meets the requirements of section 3408 of this title.

51. Upon information and belief, Defendant SWIFT disclosed information contained in customer financial records without reasonable description or any of the other five criteria enumerated above.

COUNT IV

Unfair, Unlawful and Deceptive Business Practices (Plaintiff Kruse and the Illinois Subclass vs. Defendants)

52. Plaintiffs repeat and incorporate herein by reference the allegations in the preceding paragraphs of this complaint, as if set forth fully herein.

53. Defendant has engaged in unfair, unlawful and/or fraudulent business practices as set forth above.

54. By engaging in the acts and practices described herein, Defendant has committed one or more unfair business practices within the meaning of the Illinois Consumer Fraud and Deceptive Business Practices Act (CFDBPA). Specifically, Defendant's business practices offend the public policies set forth in the Illinois Constitution.

55. Defendant's above-described deceptive and misleading acts and practices have deceived and/or are likely to deceive Plaintiffs and other Illinois Subclass members. Plaintiffs were, in fact, deceived as to the terms and conditions of services provided by Defendant. Plaintiffs and Illinois Subclass members have suffered harm as a result of Defendant's misrepresentations and/or omissions.

56. Defendant's acts and practices are also unlawful because, as described above, they violate the First and Fourth Amendment to the United States Constitution and 12 U.S.C. §3402.

57. Plaintiffs and the Illinois Subclass have suffered injury in fact and have lost money or property as a result of such unfair and unlawful business practices. Such injuries and losses include, but are not limited to, the service fees and other fees and charges paid to Defendant for its services. Neither the Plaintiffs nor any reasonable Illinois Subclass member would have paid such fees and charges for Defendant's services had they first known of Defendant's unlawful acts and practices.

58. On information and belief, there is a strong likelihood that Defendant is now engaging in and will continue to engage in the above-described disclosure, and that likelihood represents a credible threat of immediate future harm.

59. Plaintiffs and the Illinois Subclass seek restitution, disgorgement, injunctive relief and all other relief from Defendant allowed under the Illinois Consumer Fraud and Deceptive

Business Practices Act. Plaintiffs and the Illinois Subclass also seek attorneys' fees pursuant to the Illinois Consumer Fraud and Deceptive Business Practices Act, as well as such other and further relief as the Court deems just and proper.

PRAYER FOR RELIEF

WHEREFORE, the Plaintiffs for themselves and all others similarly situated respectfully request that the Court:

A. Declare that Defendant's disclosure of financial records as alleged herein violates applicable law including without limitation:

- (i) the First Amendment to the United States Constitution;
- (ii) the Fourth Amendment to the United States Constitution;
- (iii) 12 U.S.C. § 3402; and
- (iv) The Illinois Consumer Fraud and Deceptive Business Practices Act (CFDBPA) as to Plaintiffs and the Illinois Subclass.

B. Award equitable relief, including without limitation, a preliminary and permanent injunction prohibiting Defendants' continued or future participation in the TFTP:

- (i) Pursuant to the First and Fourth Amendment to the United States Constitution and 12 U.S.C. §3417, as to the Plaintiffs and the Nationwide Class; and
- (ii) Pursuant to the Illinois Consumer Fraud and Deceptive Business Practices (CFDBPA) as to Plaintiffs and the Illinois Subclass;

C. Award statutory damages to the extent permitted by law to each Plaintiff and class member in the sum of:

(i) \$100 per day for each day of violation of 12 U.S.C. §3402, pursuant to 12 U.S.C. §3417;

(ii) any actual damages sustained by the customer as a result of the disclosure pursuant to 12 U.S.C. § 3417;

D. Award punitive damages to the extent permitted by law to each Plaintiff and class member, including without limitation:

(i) An appropriate sum pursuant to 12 U.S.C. § 3417;

E. Award to Plaintiffs attorneys' fees and other costs of suit to the extent permitted by law, including without limitation pursuant to 12 U.S.C. §3417, and the Illinois Consumer Fraud and Deceptive Business Practices Act (CFDBPA);

F. Award restitution, disgorgement, preliminary and permanent injunctive relief and all other relief allowed under the Illinois Consumer Fraud and Deceptive Business Practices Act (CFDBPA) to Plaintiffs and the Illinois Subclass;

G. Grant such other and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs hereby request a jury trial for all issues triable by jury including, but not limited to, those issues and claims set forth in any amended complaint or consolidated action.

DATED: February 27, 2007

IAN WALKER AND STEPHEN KRUSE,
on behalf of themselves and all others
similarly situated.

By: /s/ Steven E. Schwarz

Steven E. Schwarz, Esq.

THE LAW OFFICES OF STEVEN E.
SCHWARZ, ESQ.
2461 W. Foster Ave., #1W
Chicago, IL 60625
Telephone: 773/837-6134
schwarzlaw@tmo.blackberry.net

BRUCE I. AFRAN, ESQ.
10 Braeburn Drive
Princeton, NJ 08540
609/924-2075

MAYER LAW GROUP
CARL J. MAYER, ESQ.
66 Witherspoon Street, Suite 414
Princeton, NJ 08542
Telephone: 609/921-8025
Facsimile: 609/921-6964