

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

ANNE L. STEWART, on behalf of herself and all others similarly situated,)	
)	
Plaintiff,)	Case No. 07 CV 6340
)	
v.)	Judge Coar
)	
)	Magistrate Judge Cole
GINO’S EAST RESTAURANT CORP. BRAVO RESTAURANTS, INC., BG EAST, LLC, EG SERVICES CORP., GINO’S EAST SERVICES, LLC, and DOES 1-10,)	
)	
Defendants.)	
<hr/>		
)	
BG EAST LLC,)	
)	
Defendant/Third-Party Plaintiff,)	
)	
v.)	
)	
DATA WAVE, INC.)	
)	
Third-Party Defendant.)	
<hr/>		

BG EAST, LLC’S THIRD-PARTY COMPLAINT

Defendant/Third-Party Plaintiff BG East, LLC (“BG”), by and through its attorneys, Daniel S. Kaplan and Marcia G. Cotler of Kaplan & Greenswag LLC, for its Third-Party Complaint against Data Wave, Inc. (“Data Wave”), states the following:

NATURE OF THE CASE

1. The Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681, *et seq.* (the “FACTA”) was passed in 2003. Specifically, *inter cilia*, the FACTA is alleged to prohibit businesses that accept payment via credit or debit card from including more

than the last five digits of a credit or debit card number or the card's expiration date on electronically printed receipts provided to consumers (the "Prohibited Information").

THE PARTIES

2. Plaintiff Anne L. Stewart, upon information and belief, is a resident of Orlando, Florida.

3. Defendant/Third-Party Plaintiff BG is an Illinois limited liability company with its principal place of business at 6801 W. Roosevelt Road, Berwyn, Illinois. BG East is authorized to, and does, conduct business in the State of Illinois and in the Northern District of Illinois. The members of BG East LLC are Joey Buona's Pizzeria Grille – Chicago, LLC and Gino's East Home, LLC.

4. Third-Party Defendant Data Wave is an Illinois corporation with its principal place of business at 1440 Kingsbury, Suite 5, Chicago, Illinois. Data Wave is authorized to, and does, conduct business in the State of Illinois and in the Northern District of Illinois.

JURISDICTION AND VENUE

5. This Court has jurisdiction over this action pursuant to the FACTA, which provides that "[a]n action to enforce any liability created under this subchapter may be brought in any appropriate United States district court, without regard to the amount in controversy...." 15 U.S.C. § 1681(p). This Court also has jurisdiction under 28 U.S.C. § 1331.

6. This Court has supplemental jurisdiction of the Third-Party Complaint pursuant to 28 U.S.C. §1367(a), in that the Third-Party Complaint seeks indemnification

against Third-Party defendant Data Wave for any liability of BG arising from the alleged violations of FACTA.

7. Venue is proper in this Court because the alleged acts arising under the claim asserted by Plaintiffs are alleged to have occurred in this District.

COUNT I
BREACH OF CONTRACT

8. BG adopts and incorporates by reference paragraphs 1 to 7.

9. Data Wave is a vendor and service provider of software and hardware used by merchants to process credit card transactions.

10. On or about April 17, 2002, Joey Buona's Pizzeria and Grille – Chicago ("Joey Buono's") entered into an agreement with Data Wave for the purchase and installation of software and hardware to process credit card transactions for a Joey Buona's restaurant located on Superior Street in Chicago, Illinois.

11. In the summer of 2006, Joey Buona's entered into a series of transactions whereby assets related to the Joey Buona's restaurant located on Superior Street were acquired by BG, including the software and hardware for processing credit card transactions at the Superior Street location.

12. Beginning in June 2006, Data Wave was retained by BG to perform all necessary upgrades and revisions to the software and hardware for processing credit card transactions at the Superior Street location and to convert said software and equipment for use as a Gino's East restaurant on Superior Street. Data Wave was to assure that the software and hardware were in compliance with all applicable laws. *A copy of the service invoice and a contract for said service is attached hereto as Exhibit "A".*

13. Data Wave made modifications to the software and hardware so that all but the last 4 digits of the consumer's credit card number on the printed receipt were suppressed. During relevant time periods, Data Wave did not suppress the expiration date.

14. Data Wave breached its agreement with BG by not advising BG that the expiration date needed to be suppressed, until after this lawsuit was filed and for failing to make such modifications to the software and hardware.

15. BG, in having to defend the above captioned action brought by Anne Stewart and others similarly situated, has suffered damages on account of Data Wave's breach of contract.

16. To the extent that BG is found liable to Stewart or other Plaintiffs similarly situated for alleged non-compliance with the FACTA, BG seeks indemnification from Data Wave for all damages, costs and attorneys fees for which BG is found liable.

WHEREFORE, BG East, LLC requests that judgment be entered in its favor and against Data Wave, Inc. on Count I in an amount deemed just and determined at trial.

Dated: March 17, 2008

Respectfully submitted,

BG East, LLC

By: /s/Daniel S. Kaplan
One of its attorneys

Daniel S. Kaplan (ARDC No. 6204533)
Marcia G. Cotler (ARDC No. 6201178)
Kaplan & Greenswag LLC
181 Waukegan Road Suite 205
Northfield, IL 60093
Ph: (847) 501-5300
Fax: (847) 501-5325

EXHIBIT A

BG EAST, LLC
600 WEST JACKSON BLVD., STE. 200
CHICAGO, ILLINOIS 60661-5612
TELE 312.463.1210 FAX 312.798.6761

DATE: June 9, 2006

RE:

TO: Datawave, Inc.
1440 N. Kingsbury
Ste 5
Chicago, IL 60622

ENCLOSED YOU WILL FIND:

NO. OF COPIES	ITEM	DATED	DESCRIPTION
2		5/24/2006	original signed contracts

1 SIGN AND RETURN 1 COPIES TO OUR OFFICE
PER YOUR REQUEST
1 FOR YOUR FILES AND USE
MAKE NECESSARY CORRECTIONS AND RETURN _____ COPIES TO OUR OFFICE
FOR YOUR REVIEW AND COMMENTS

COMMENTS:

Please mail one signed contract back to us.

Thanks!

FROM:

Ivan Himmel

BG EAST, LLC
600 W. JACKSON BLVD., STE 200
CHICAGO, IL 60661
312-463-1210 FAX 312-798-6761

CONSTRUCTION CONTRACT

May 24, 2006

Datawave, Inc.
Contractor
1440 N. Kingsbury, Suite 5
Address
Chicago, IL 60622
City, State Zip
(312)943-6255
Contact Name Phone

Code all invoices with the corresponding code number for the work done and with the appropriate costs for each item.

<u>Description</u>	<u>Code No.</u>	<u>Cost</u>
<u>POS (Point of Sales)</u>	<u>X9150 - est.</u>	<u>\$3000</u>

Contract for: Point of Sales – Pre-Opening

Agreement between BG East, LLC (Owner) and DataWave, Inc. (Contractor). Upon your written acceptance of this contract, on page 2 hereof, you are hereby authorized to furnish all labor and equipment to do the POS set up for the building located at 162 East Superior Street, Chicago, IL 60611 in accordance with the plans and specifications.

Dated: N/A Revised thru N/A By: N/A

Including but not limited to the following: (If additional space is required continue on Exhibit "A" hereto).

Estimate: 24 Hours System Evaluation and set-up at site (\$125.00 per hour). If greater time is required then owner's prior agreement is required

It is understood you are to commence work on or about: June 5, 2006
and shall be completed by: June 21, 2006.

We agree to pay for the above work, upon satisfactory completion and acceptance of the work.

Payment shall be made as follows:

1. When equipment items are delivered to the job site and accepted by owner the sum of N/A dollars (\$-0-) will be paid.
2. Balance due shall be paid after installation and proper test of the operations of each piece of equipment. Attach a lien waiver and affidavit with each payment request. No payment will be made without appropriate code numbers (see above).

3. Submit invoices in triplicate with code numbers visible.

Any claims for extra payments must be described in detail, and approved in writing by the owner, before such extra work is started.

All state and local taxes, fees, bonds, licenses, permits and imposts, if any, are to be furnished and paid in full, by you, as part of this contract.

Before proceeding with any phase of your work under this contract, you shall notify our office of any conflict between the work herein indicated and any other trades; check the progress of the work to date and follow the work of the other trades as construction progresses to insure no conflict between the trades. The work is intended to be complete and fully useable as a finished product or system and done in a professional workmanlike manner. Any additional work caused by your failure to do same will be at your own expense.

It is your responsibility to secure all workmen's compensation (applicable statutory but no less than \$100,000) and comprehensive general liability insurance (minimum limits of \$1,000,000) and to furnish acceptable insurance certificates of this coverage prior to the start of any work.

You shall, at all times, keep the building and premises clean of debris arising out of the operations of your work and protect finished work of other trades from damage caused by your operations and shall comply with all safety measure, applicable laws, rules regulations for the safety of all persons and property at the premises.

You do hereby warrant, that all material and equipment supplied for this job shall be new and free from faults and defects, and standard written equipment warranties shall be included and delivered to owner and also included is an one year warranty (from completion of the contract work) on all workmanship and materials.

You shall promptly submit shop drawings and samples.

Finally, if, your work is not being completed in a satisfactory manner or on a satisfactory work schedule, then seven days after a written notice, with complaints itemized, has been delivered to you, and in the opinion of the architect named above, the conditions named have not been corrected, then this agreement shall become null and void and the contract cancelled.

BG East, LLC, an Illinois Limited Liability Company

By:  _____

OK
AAE

Accepted: _____

By: _____

Date: _____

I, _____ certify that the _____ is a partnership, sole proprietorship, corporation and that _____ has full authority to execute this contract.

EXHIBIT "A"

**TO THE AGREEMENT DATED _____, 20 ____
BETWEEN BG EAST, LLC (OWNER)
AND _____ (Contractor)**

Item# Number Description Code Cost

Table with 5 columns: Item#, Number, Description, Code, Cost. The table contains 20 empty rows for data entry.



DataWave, Inc
1440 N. Kingsbury
Suite 5
Chicago, IL 60622

Service Invoice

7767

6/15/2006

Printed 7/7/2006

Phone: 312-943-6255
Fax: 312-943-8007
Email: Sales@data-wave.com

Bill To:

Gino's East Superior
 160 East Superior
 Chicago, IL 60611

Work Location:

Primary
 Gino's East Superior
 160 East Superior
 Chicago, IL 60611

Terms

Start Date: 6/15/2006		I_IMOLEMENTATION		Job Number:7570	
Date	Team	Qty	Description	Price	Extended Price
06/15/2006	Joedy Smith		Aloha Annual Phone Help Desk Contract: 18 Stations	\$2,950.00	\$2,950.00
06/15/2006	Joedy Smith		Phone Support for Del Module	\$100.00	\$100.00
06/15/2006	Joedy Smith	24.00	Training Hours - Standard. Mon-Fri: 9am - 6pm	\$125.00	\$3,000.00
06/15/2006	Joedy Smith	1.00	Aloah Key Name Change	\$150.00	\$150.00
06/15/2006	Lance Chasen	5.00	Travel Miles	\$0.49	\$2.45
06/15/2006	Lance Chasen		Parking	\$20.00	\$20.00
06/16/2006	Lance Chasen	5.00	Travel Miles	\$0.49	\$2.45
06/16/2006	Lance Chasen		Parking	\$22.00	\$22.00
06/22/2006	Cas Ficus	5.00	Travel Miles	\$0.49	\$2.45
06/22/2006	Cas Ficus		Parking	\$12.00	\$12.00
06/23/2006	Cas Ficus	3.00	After Hours Field Labor. Mon-Fri: 6pm - 9am	\$185.00	\$555.00
06/23/2006	Cas Ficus	8.50	Standard Field Labor. Mon-Fri: 9am - 6pm	\$125.00	\$1,062.50
06/23/2006	Cas Ficus	5.00	Travel Miles	\$0.49	\$2.45
06/23/2006	Cas Ficus		Parking	\$30.00	\$30.00
06/23/2006	Cas Ficus	8.00	RJ45 Wall Jack	\$6.95	\$55.60
06/23/2006	Cas Ficus	4.00	Wall Jack - 2 port surface mount	\$6.95	\$27.80
06/23/2006	Cas Ficus	18.00	RJ45 3' Patch Cable	\$6.95	\$125.10
06/23/2006	Cas Ficus	13.00	RJ45 7' Patch Cable	\$6.95	\$90.35
06/23/2006	Cas Ficus	4.00	RJ45 7' Patch Cable	\$6.95	\$27.80
06/23/2006	Cas Ficus	5.00	Cash Drawer Key	\$3.00	\$15.00
06/23/2006	Cas Ficus	1.00	Hard Drive - 20 Gig Refurb (90 day warranty)	\$86.80	\$86.80
06/23/2006	Cas Ficus	4.00	IBM: 4840 LCD Bulb	\$60.00	\$240.00
06/23/2006	Cas Ficus	2.00	Mini Keyboard and Tray Kit for Radiant 1510	\$180.00	\$360.00
06/23/2006	Cas Ficus	4.00	IBM 4840 SurePOS Power Supply	\$210.00	\$840.00
06/23/2006	Cas Ficus	2.00	IBM 4840 SurePOS Touch Glass	\$275.00	\$550.00
06/23/2006	Lance Chasen	5.00	Travel Miles	\$0.49	\$2.45
06/23/2006	Lance Chasen		Parking	\$30.00	\$30.00
06/27/2006	Lance Chasen	7.50	Standard Field Labor. Mon-Fri: 9am - 6pm	\$125.00	\$937.50
06/27/2006	Lance Chasen	5.00	Travel Miles	\$0.49	\$2.45
06/27/2006	Lance Chasen		Parking	\$30.00	\$30.00
06/27/2006	Lance Chasen	2.00	RJ45 Wall Jack	\$6.95	\$13.90
06/27/2006	Lance Chasen	2.00	Wall Jack - 2 port surface mount	\$6.95	\$13.90
06/27/2006	Lance Chasen	5.00	RJ45 3' Patch Cable	\$6.95	\$34.75
06/27/2006	Lance Chasen	2.00	RJ45 15' Patch Cable	\$10.95	\$21.90
07/05/2006	Gregory Collins	1.00	Service Call. M-F, 9am - 5pm: 0 - 10 Miles	\$75.00	\$75.00
07/05/2006	Gregory Collins	3.00	Standard Field Labor. Mon-Fri: 9am - 6pm	\$125.00	\$375.00

Please Pay From This Invoice

07/05/2006	Gregory Collins	6.00	Travel Miles	\$0.49	\$2.94
07/05/2006	Gregory Collins		Parking	\$30.00	\$30.00
07/05/2006	Gregory Collins	2.00	IBM: 4840 LCD Bulb	\$60.00	\$120.00

Subtotal:	\$12,019.54
Tax:	\$236.05
Paid:	\$0.00
Total:	\$12,255.59

1690



I hereby acknowledge the satisfactory completion of all services rendered, and agree to pay the cost of services as specified above.

Customer Signature _____ Date / /

Please Pay From This Invoice



DataWave, Inc
 1440 N. Kingsbury
 Suite 5
 Chicago, IL 60622

Phone: 312-943-6255
 Fax: 312-943-8007
 Email: Sales@data-wave.com

Service Invoice
 8107
 6/29/2006

Printed 7/7/2006

Bill To: Gino's East Superior 160 East Superior Chicago, IL 60611	Work Location: Primary Gino's East Superior 160 East Superior Chicago, IL 60611
Terms	

Start Date: 6/29/2006 PURCHASE REQUEST Job Number: 7925

Date	Team	Qty	Description	Price	Extended Price
06/29/2006	Patrick O'Donnell	5.00	Printer - Epson TM-U220B Serial	\$375.00	\$1,875.00

Subtotal: \$1,875.00
 Tax: \$168.75
 Paid: \$0.00
Total: \$2,043.75

1690

I hereby acknowledge the satisfactory completion of all services rendered, and agree to pay the cost of services as specified above.

Customer Signature _____ Date / /

Please Pay From This Invoice