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THE HONORABLE SAMUEL S. CHUNG
Noting Date: March 2, 2018, 11:00 a.m.
(Continued by Court from February 23, 2018)

SUPERIOR COURT OF THE STATE OF WASHINGTON FOR KING COUNTY

ALBERT VIESSE, on behalf of himself and)
all others similarly situated,)
)
Plaintiff,)
)
v.)
)
SAAR'S INC., and DOES 1 through 100,)
inclusive,)
)
Defendants.)
)

Case No. 17-2-07783-6 SEA
**MOTION FOR AWARD OF ATTORNEYS'
FEES AND COSTS TO CLASS COUNSEL
AND INCENTIVE PAYMENT TO THE
CLASS REPRESENTATIVE;
MEMORANDUM OF POINTS AND
AUTHORITIES**

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE THAT Plaintiff and Class Representative, Albert Viesse, and
3 Class Counsel, Chant Yedalian of Chant & Company A Professional Law Corporation and James
4 A. Sturdevant, will and hereby do move the Court, pursuant to Superior Court Civil Rule 23, the
5 Stipulated Settlement Agreement and Release (hereinafter sometimes referred to as "Settlement"
6 or "Agreement")¹, and, to the extent applicable, Federal Rule of Civil Procedure Rule 23, for an
7 Order:

8 1. Awarding \$140,000.00 in reasonable attorneys' fees and costs to Class Counsel, to
9 be paid by Saar's Inc. ("Saar's") as set forth in the Agreement; and

10 2. Awarding \$5,000 to the Class Representative, Albert Viesse, as an incentive
11 (service) award, to be paid by Saar's as set forth in the Agreement, to compensate him for his
12 service as the representative of the Settlement Class.

13
14 This Motion is based upon this Motion and attached Memorandum of Points and
15 Authorities, the Declarations and Exhibits and other documents filed concurrently in support
16 thereof, the papers and pleadings on file in this action, and upon such other and further evidence as
17 the Court may adduce at the time of the hearing.

18
19 Respectfully submitted,



20 DATED: January 22, 2018
21 James A. Sturdevant, WSBA #:8016
22 119 North Commercial Street, #920
23 Bellingham, WA 98225
24 Phone: 360.671.2990
25 Email: sturde@openaccess.org

26 Chant Yedalian (*Pro Hac Vice*)
27 CHANT & COMPANY
28 A Professional Law Corporation
1010 N. Central Ave.
Glendale, CA 91202

¹ A copy of the Agreement is attached to the Declaration of Chant Yedalian as Exhibit 1. Capitalized terms shall have the same meanings as in the Agreement, unless indicated otherwise.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 As is more fully set forth in the Motion For Final Approval of Class Action Settlement set
4 for hearing concurrently with this Motion, this is a class action case that, through the diligence of
5 Class Counsel and the Class Representative, has resulted in a settlement fund in the amount of
6 \$475,000 in Gift Card value (the "Settlement Fund"), plus additional non-pecuniary benefits.

7 Class Counsel seeks an award of \$140,000.00 in reasonable attorneys' fees and costs.

8 As explained further below, the fees and costs are reasonable and supported by Class
9 Counsel's lodestar and costs in this case.

10 In addition, the Class Representative, Albert Viesse, respectfully seeks an incentive
11 (service) award of \$5,000 which is fair and reasonable and similar to awards in other FACTA
12 cases.

13 **II. THE BENEFITS OBTAINED BY THE SETTLEMENT**

14 As explained above, the Settlement has resulted in a settlement fund in the amount of
15 \$475,000 in Gift Card value (the "Settlement Fund"). Agreement ¶ 13(a).² Other pecuniary
16 benefits of the Settlement, include the fact that Saar's Inc. ("Saar's") has agreed to separately pay
17 for Class Counsel's fees and costs (\$140,000), incentive award to the Class Representative
18 (\$5,000), third-party settlement administrator's costs (estimated at \$23,075), plus notice and
19 posting costs.

20 Additionally, there are non-pecuniary benefits secured by the fact that in direct response to
21 Plaintiff's demands, Saar's modified its credit card transaction software such that, by July 18,
22 2016, Saar's stopped printing any portion of the credit/debit card expiration date on customer
23 receipts. Exh. 2: Saar's Decl. ¶ 4.

24 In addition, as part of the Settlement, Saar's shall implement a written policy which states
25 that it will not print more than the last five digits of the credit or debit card number nor the credit
26

27 ² Capitalized terms shall have the same meanings as in the the Stipulated Settlement Agreement
28 and Release (hereinafter sometimes referred to as "Settlement" or "Agreement"), unless indicated
otherwise.

1 or debit card expiration date upon any printed receipt provided to any customer that uses a credit
2 or debit card to transact business with Saar's. Agreement ¶ 13(f).

3 The change in transaction software, cessation of the printing of expiration date information
4 on customer receipts and implementation of a FACTA compliance policy ensures that Saar's will
5 not continue to violate the law, willfully, inadvertently or otherwise.

6 Such non-pecuniary benefits are properly considered in judging the results of the lawsuit
7 and using it as a basis to award fees. *See, e.g., Craft v. County of San Bernardino*, 624 F.Supp.2d
8 1113, 1121, (C.D. Cal. 2008) (taking into account fact that, in addition to monetary aspects, the
9 defendant stopped the practices at issue and explaining that "Attorneys' fees [in class action cases]
10 may be awarded even though the benefit conferred is purely non-pecuniary in nature."); see also,
11 *In re Pacific Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995). This is especially
12 true with a consumer protection statute such as FACTA which, as the Ninth Circuit has held,
13 serves both a compensatory and "deterrent purpose." *Bateman v. American Multi-Cinema, Inc.*,
14 623 F.3d 708, 718 (9th Cir. 2010). "In fashioning FACTA, Congress aimed to 'restrict the amount
15 of information available to identity thieves.'" *Ibid.*

16 **III. CR 23, FRCP RULE 23, AND FEDERAL AUTHORITIES**

17 Civil Rule 23 is nearly identical to its federal counterpart, Rule 23 of Federal Rules of
18 Civil Procedure ("FRCP"), and thus federal cases interpreting FRCP 23 are highly persuasive.
19 *Brown v. Brown*, 6 Wn. App.249, 252, 492 P.2d 581 (1971); *Schnall v. AT&T Wireless Servs.,*
20 *Inc.*, 171 Wn.2d. 260, 271, 259 P.3d 129 (2011) ("Because CR 23 is identical to its federal
21 counterpart, 'cases interpreting the analogous federal provision are highly persuasive.'").

22 **IV. THE LAW CONCERNING ATTORNEYS' FEES TO BE AWARDED**

23 "Generally, litigants in the United States pay their own attorneys' fees." *Camacho v.*
24 *Bridgeport Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008). One exception to this general
25 principle is where the parties contractually agree to pay attorney's fees. Another exception to this
26 general principle is "fee shifting statutes" which authorize an award of attorney's fees to promote
27 the enforcement of important rights. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S.

28

1 240, 257 (1975) ("[A]bsent statute or enforceable contract, litigants pay their own attorneys'
2 fees"); *Kyocera Corp v. Prudential-Bache Trade Services, Inc.*, 299 F.3d 769, 793 (9th Cir. 2002)
3 (same); *MRO Communications, Inc. v. AT&T Corp.*, 197 F.3d 1276, 1281 (9th Cir. 1999) ("[E]ach
4 party must bear its own attorneys' fees in the absence of a rule, statute or contract authorizing such
5 an award"). In sum, "[a]ttorney fees may be awarded only if authorized by 'contract, statute or
6 recognized ground in equity.'" *Bowles v. Dept. Retirement Systems*, 121 Wn.2d 52, 70, 847 P.2d
7 440 (1993).

8 Rule 23(h) of the Federal Rules of Civil Procedure ("FRCP") expressly recognizes these
9 principles and states as follows: "In a certified class action, the court may award reasonable
10 attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement."

11 **A. Saar's Has Contractually Agreed To Pay Attorneys' Fees As Part Of This**
12 **Settlement**

13 As part of the Agreement, Saar's has contractually agreed to pay, among other things,
14 attorneys' fees and costs. Agreement ¶ 22.

15 **B. The Fee Shifting Statute In This Case Likewise Provides A Basis**
16 **For Requiring Payment Of Attorneys' Fees**

17 "[I]n order to encourage private enforcement of the law ... Congress has legislated that in
18 certain cases prevailing parties may recover their attorneys' fees from the opposing side. When a
19 statute provides for such fees, it is termed a 'fee shifting' statute." *Camacho v. Bridgeport*
20 *Financial, Inc.*, 523 F.3d 973, 978 (9th Cir. 2008).

21 In this case, Plaintiff asserted a single cause of action for violation of the Fair and Accurate
22 Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681(c)(g)(1). FACTA is a subset of the Fair
23 Credit Reporting Act ("FCRA"). *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 717 (9th
24 Cir. 2010). As such, FACTA and other provisions of the FCRA share the same remedy
25 provisions which are embodied in 15 U.S.C. § 1681n. *Bateman*, 623 F.3d at 715. That statute
26 expressly provides for an award of "reasonable attorney's fees as determined by the court" "in the
27 case of any successful action." 15 U.S.C. § 1681n(a)(3). The Ninth Circuit has held that 15
28

1 U.S.C. § 1681n(a)(3) is a fee shifting statute. *Grove v. Wells Fargo Financial California, Inc.*,
2 606 F.3d 577, 579 (9th Cir. 2010).

3 **1. Fee-Shifting Statutes, Such As The One In This Case, Are Intended To**
4 **Promote And Encourage The Enforcement Of The Law**

5 As explained above, when Congress provides for fee shifting statutes, including those
6 involving consumer protection, it does so "[i]n order to encourage private enforcement of the law."
7 *Camacho*, 523 F.3d at 978.

8 "[A]s FCRA is a consumer protection statute, we must construe it so as to further its
9 objectives." *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1092 (9th Cir.
10 2006).

11 The Ninth Circuit's decisions concerning fee awards in Fair Debt Collection Practices Act
12 ("FDCPA") cases are also instructive.

13 Both the FDCPA and FACTA (which is a part of the FCRA) are consumer protection
14 statutes. "Like the FDCPA, the FCRA has the purpose of protecting consumers from unfair
15 practices." *Riley v. Giguere*, 631 F.Supp.2d 1295, 1315 (E.D. Cal. 2009).

16 In fact, both the FDCPA and the FCRA are part of the larger statutory scheme of the
17 Consumer Credit Protection Act. "The FDCPA is part of the larger statutory scheme of the
18 Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r, which includes ... the Fair Credit
19 Reporting Act, 15 U.S.C. §§ 1681-1681x." *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699,
20 706 (9th Cir. 2010).

21 The fee shifting provisions of both statutes are almost identical. The FDCPA's fee shifting
22 language provides "in the case of any successful action to enforce the foregoing liability, the costs
23 of the action, together with a reasonable attorney's fee as determined by the court" (15 U.S.C. §
24 1692k(a)(3)), and the FCRA's fee shifting language provides "in the case of any successful action
25 to enforce any liability under this section, the costs of the action together with reasonable
26 attorney's fees as determined by the court" (15 U.S.C. § 1681n(a)(3)).

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1 As the Ninth Circuit has explained, such language makes the award of fees mandatory as a
2 method of encouraging the enforcement of the law.

3 "The FDCPA's statutory language makes an award of fees mandatory. [Citation.]
4 'The reason for mandatory fees is that congress chose a `private attorney general'
5 approach to assume enforcement of the FDCPA.' Id.; see also *Graziano v. Harrison*,
6 950 F.2d 107, 113 (3d Cir. 1991) (noting that the FDCPA 'mandates an award of
7 attorney's fees as a means of fulfilling Congress's intent that the Act should be
8 enforced by debtors acting as private attorneys general')." *Camacho*, 523 F.3d at 978.

9 The Ninth Circuit has also explained that, in addition to encouraging suits to enforce the
10 law, class certification and the awarding of attorneys fees are particularly appropriate in cases
11 which have caused a defendant to cease the offending conduct. The Ninth Circuit has also
12 recognized that such important "deterrent" effect is not just limited to the defendant sued but also
13 deters other actual or potential violators of the law.

14 "The FDCPA is a consumer protection statute and was intended to permit, even
15 encourage, attorneys like Lemberg to act as private attorney generals to pursue
16 FDCPA claims. Moreover, plaintiffs have already benefitted and will continue to
17 benefit from this case. Mickell admits that he has ceased his practice of sending
18 letters to debtor's workplaces, a benefit to all class members. Furthermore, certifying
19 the class will serve a 'deterrent' component to other debt collectors who are engaging,
20 or consider engaging in this type of debt collection tactic.

21 Evon's suit resulted in Mickell abandoning his practice of sending debt collection
22 letters to debtors' workplaces. Thus the lawsuit has already achieved a significant
23 level of success." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1032 and
24 1033 (9th Cir. 2012).

25 The Ninth Circuit espoused similar virtues of the FACTA, including the importance of its
26 deterrent purposes in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010). The
27 Ninth Circuit explained that "In fashioning FACTA, Congress aimed to 'restrict the amount of
28 information available to identity thieves.'" *Id.* at 718. The Ninth Circuit further explained the
remedial purposes of FACTA include both a compensatory purpose and a "deterrent purpose."

Ibid.

"The mere fact that AMC changed the content of its receipts to comply with FACTA
after the lawsuit was filed does not suggest that certification of the class would have
limited deterrent effect. To the contrary, we are quite sure that certification of a class
here would preserve, if not amplify, the deterrent effect of FACTA." *Bateman*, 623
F.3d at 723.

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1 i. **The "Deterrent" Objectives Of FACTA Have Been**
2 **Effectuated As A Result Of This Case**

3 As explained above, there are non-pecuniary benefits secured by this case. Specifically, in
4 direct response to Plaintiff's demands, Saar's modified its credit card transaction software such
5 that, by July 18, 2016, Saar's stopped printing any portion of the credit/debit card expiration date
6 on customer receipts. Exh. 2: Saar's Decl. ¶ 4.

7 In addition, as part of the Settlement, Saar's shall implement a written policy which states
8 that it will not print more than the last five digits of the credit or debit card number nor the credit
9 or debit card expiration date upon any printed receipt provided to any customer that uses a credit
10 or debit card to transact business with Saar's. Agreement ¶ 13(f).

11 The change in transaction software, cessation of the printing of expiration date information
12 on customer receipts and implementation of a FACTA compliance policy ensures that Saar's will
13 not continue to violate the law, willfully, inadvertently or otherwise. Yedalian Decl. ¶ 28.

14 Thus, in addition to obtaining pecuniary relief for the Settlement Class, the Class
15 Representative and Class Counsel have also effectuated substantial change of conduct and policy,
16 thereby accomplishing the "deterrent" objectives of FACTA.

17 **V. CLASS COUNSEL'S LODESTAR SUPPORTS THE REASONABLENESS OF THE**
18 **FEES REQUESTED**

19 The Supreme Court in *Perdue v. Kenny A.*, 130 S.Ct. 1662, 1672 (2010) explained that the
20 "lodestar" figure has "become the guiding light of our fee-shifting jurisprudence." *Perdue*, 130
21 S.Ct. at 1672.

22 The Supreme Court further explained that the aim of the lodestar method is to induce a
23 capable attorney to undertake representation based on the statutory assurance the he will be paid a
24 "reasonable fee." "[I]f plaintiffs . . . find it possible to engage a lawyer based on the statutory
25 assurance that he will be paid a 'reasonable fee,' the purpose behind the fee-shifting statute has
26 been satisfied." *Perdue*, 130 S.Ct. at 1672. The Supreme Court held that "the lodestar method
27 yields a fee that is presumptively sufficient to achieve this objective." *Perdue*, 130 S.Ct. at 1673.
28

1 Similarly, the Washington Supreme Court has explained that "the lodestar method is
2 generally preferred when calculating *statutory* attorney fees." *Bowles v. Dept. Retirement*
3 *Systems*, 121 Wn.2d 52, 72, 847 P.2d 440 (1993).³

4 The lodestar figure is calculated by multiplying the number of hours the attorney
5 reasonably expended on the litigation by the reasonable hourly rate. *In re Bluetooth Headset*
6 *Products Liability Litigation*, 654 F.3d 935, 941 (9th Cir. 2011); *Perdue*, 130 S.Ct. at 1669.

7 **A. Hours Worked By Class Counsel**

8 Up to January 22, 2018, Class Counsel Chant Yedalian has devoted 189.33 hours of his
9 time on this case and expects to incur an additional 15 hours until its conclusion for a total of
10 204.33 hours for Mr. Yedalian. Yedalian Decl. ¶ 60.

11 Up to January 19, 2018, Class Counsel James Sturdevant has devoted 51.55 hours of his
12 time on this case and expects to incur an additional 5 hours until its conclusion for a total of 56.55
13 hours for Mr. Sturdevant. Sturdevant Decl. ¶ 2.

14 To the extent the Court would like to review all of the different tasks performed by Class
15 Counsel, Class Counsel have submitted for *in camera* review, an unredacted paper copy of each of
16 their respective itemized time records which establish the hours devoted by each of them.
17 Yedalian Decl. ¶ 61; Sturdevant Decl. ¶ 3.⁴

18 These itemized time records show the tasks performed by Class Counsel and the amount of
19 time Class Counsel worked on each task on each date. Yedalian Decl. ¶ 62; Sturdevant Decl. ¶ 4.

20 Each and every task concerns the FACTA cause of action prosecuted, and ultimately
21 settled, in this case. Yedalian Decl. ¶ 63; Sturdevant Decl. ¶ 5. The hours worked were therefore
22 plainly reasonable to accomplish these tasks and could and would certainly have been billed to a

23 _____
24 ³ In contrast to the lodestar method, the Ninth Circuit has held that where there is a common fund,
25 district courts have discretion concerning fee awards and that awarding one-third (33 1/3%) of the
26 benefits (under the percentage of benefits approach) is not an abuse of discretion. *In re Pacific*
27 *Enterprises Securities Litigation*, 47 F.3d 373, 379 (9th Cir. 1995). Moreover, under the
percentage of benefits approach, it is proper to include as part of the benefits things such as, but
not limited to, the "Cash Component [which] funded attorneys' fees and expenses, costs of notice
and administration, and incentive payments to class representatives." *In re Online DVD-Rental*
Antitrust Litigation, 779 F.3d 934, 940-941 (9th Cir. 2015).

28 ⁴ Because the time records are unredacted, they contain sensitive and privileged information as
well as work product, and they are therefore submitted for *in camera* review.

1 private client who hired counsel to pursue such litigation. *Ibid*; *Moreno v. City of Sacramento*,
2 534 F.3d 1106, 1111 (9th Cir. 2008) ("The number of hours to be compensated is calculated by
3 considering whether, in light of the circumstances, the time could reasonably have been billed to a
4 private client.")

5 This includes *all* steps that contribute to the ultimately successful resolution of this case
6 (even if, along the way, the district court does not adopt each contention raised). *Cabrales v.*
7 *County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991). Accordingly, and consistent with
8 this approach, Class Counsel's work related to the fee award motion is likewise time that is
9 reasonably incurred:

10 "[F]ederal courts, including our own, have uniformly held that time spent in
11 establishing the entitlement to and amount of the fee is compensable.' *In re Nucorp*
12 *Energy, Inc.*, 764 F.2d 655, 659-660 (9th Cir. 1985). This is so because it would be
13 inconsistent to dilute a fees award by refusing to compensate attorneys for the time
14 they reasonably spent in establishing their rightful claim to the fee." *Camacho v.*
15 *Bridgeport Financial, Inc.*, 523 F.3d 973, 981 (9th Cir. 2008).

16 The Ninth Circuit has also emphasized that district courts must by and large defer to a fee
17 proponents professional judgment on how much time was required to be spent on the case:

18 "It must also be kept in mind that lawyers are not likely to spend unnecessary time on
19 contingency fee cases in the hope of inflating their fees. The payoff is too uncertain,
20 as to both the result and the amount of the fee.... By and large, the court should defer
21 to the winning lawyer's professional judgment as to how much time he was required
22 to spend on the case; after all, he won, and might not have, had he been more of a
23 slacker." *Moreno*, 534 F.3d 1106, 1112.

24 The hours were worked by skilled class action counsel who has the necessary skill and
25 experience to litigate the nuances of a class action FACTA case. Yedalian Decl. ¶¶ 37-58.

26 **B. Reasonable Hourly Rate**

27 Class Counsel, Mr. Yedalian's current hourly rate is \$650 and that rate is well supported by
28 his skill and experience with class action and FACTA matters. Yedalian Decl. ¶¶ 64-68, 37-58.
Mr. Yedalian is one of the most experienced FACTA class action attorneys in the nation. Yedalian
Decl. ¶¶ 22-23, 40-53. He was among one of the first attorneys in the nation to prosecute FACTA
cases and he has successfully prosecuted to conclusion several FACTA cases on a class basis.
Ibid.

1 Class Counsel, Mr. Sturdevant's current hourly rate is \$400 and that rate is well supported
2 by his skill and experience. Sturdevant Decl. ¶¶ 6-7.

3 Class Counsel's rates are further supported by the fact that this is a class action case, and
4 class action work requires specialized learning and experience. Yedalian Decl. ¶ 68; Sturdevant
5 Decl. ¶ 6.

6 Class Counsel's rates are also within the range of hourly rates in Seattle. *Pelletz v.*
7 *Weyerhaeuser Co.*, 592 F.Supp.2d 1322, 1326 (W.D. Wash. 2009) (approving hourly rates in
8 Seattle in range of \$415 to \$760).

9 C. **Class Counsel's Lodestar: Hours Worked Multiplied By The**
10 **Reasonable Hourly Rate**

11 204.33 hours for Mr. Yedalian multiplied by his \$650 hourly rate yields a lodestar of
12 \$132,814.50. Yedalian Decl. ¶ 69.

13 56.55 hours for Mr. Sturdevant multiplied by his \$400 hourly rate yields a lodestar of
14 \$22,620.00. Sturdevant Decl. ¶ 8.

15 Thus, the total lodestar by Class Counsel equals \$155,434.50.

16 **VI. THE FEES ARE ALSO WELL SUPPORTED CONSIDERING OTHER**
17 **CIRCUMSTANCES OF THIS CASE**

18 As further explained in the companion Motion For Final Approval of Class Action
19 Settlement set for hearing concurrently with this Motion, there were substantial risks involved
20 with this lawsuit, including the real risk of no recovery, as has occurred with other FACTA cases.
21 Moreover, it should also not be lost on the Court that Class Counsel has borne, and continues to
22 bear, the entire risk of litigation associated with the lawsuit on a pure contingency basis, and that
23 as a result of the time committed by Class Counsel to this matter, Class Counsel was precluded
24 from taking on other matters which were available. Yedalian Decl. ¶ 70.

25 Additionally, this Court can appreciate that litigating a high-stakes and time-consuming
26 class action case against a corporate defendant, with litigation potentially lasting for several years,
27 is not appealing to most lawyers. Class Counsel undertook this lawsuit without any guarantee of
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1 any payment, and with any fees that Class Counsel may recover entirely contingent on obtaining
2 recovery. Thus, Class Counsel has borne, and continue to bear, the entire risk of obtaining a fee
3 recovery in this case. Yedalian Decl. ¶ 71.

4 **VII. REIMBURSEMENT OF CLASS COUNSEL'S COSTS**

5 Class Counsel seeks reimbursement of costs in the amount of \$1,933.45 as set forth in
6 Class Counsel Mr. Yedalian's Declaration at paragraph 72.⁵

7 The Ninth Circuit has held that the FCRA's specific remedial provision at issue in this
8 case, 15 U.S.C. § 1681n(a)(3), authorizes an award of all non-taxable costs "when it is `the
9 prevailing practice in a given community' for lawyers to bill those costs separate from their hourly
10 rates." *Grove v. Wells Fargo Financial California, Inc.*, 606 F.3d 577, 580-581 (9th Cir. 2010).
11 All of the costs for which reimbursement is sought are costs that would be billed to a fee paying
12 client separate from hourly rates, consistent with the prevailing practice. Yedalian Decl. ¶ 73.

13 **VIII. THE INCENTIVE AWARD REQUESTED FOR THE CLASS REPRESENTATIVE**
14 **IS REASONABLE AND CONSISTENT WITH AWARDS IN OTHER FACTA**
15 **CASES**

16 Class Counsel respectfully requests that the named Plaintiff and only Class representative,
17 Albert Viesse, be awarded an incentive award in the amount of \$5,000.

18 "Incentive awards are fairly typical in class action cases." *Rodriguez v. West Publishing*
19 *Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009). "[They] are intended to compensate class
20 representatives for work done on behalf of the class, to make up for financial or reputational risk
21 undertaken in bringing the action, and, sometimes, to recognize their willingness to act as a private
22 attorney general." *Ibid.*

23 In assessing incentive awards, courts may also apply the following guideposts articulated
24 in *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003):

25 "[N]amed plaintiffs, as opposed to designated class members who are not named
26 plaintiffs, are eligible for reasonable incentive payments. The district court must

27 ⁵ Although Class Counsel's combined lodestar and costs exceed \$140,000, through the Agreement
28 Saar's agreed to pay \$140,000 and Class Counsel is therefore seeking a combined request for fees
and costs of \$140,000.

1 evaluate their awards individually, using 'relevant factors includ[ing] the actions the
2 plaintiff has taken to protect the interests of the class, the degree to which the class
3 has benefitted from those actions, . . . the amount of time and effort the plaintiff
4 expended in pursuing the litigation . . . and reasonabl[e] fear[s of] workplace
5 retaliation.'" *Staton*, 327 F.3d at 977.

6 Each of these factors, as it applies to the Class Representative in this case, is explained as
7 follows:

8 First, were it not for the Class Representative stepping forward and shouldering the duties
9 of protecting and prosecuting the interests of other Settlement Class members, it is likely the
10 interests of the Settlement Class would neither have been prosecuted, nor benefited. Yedalian
11 Decl. ¶ 75. Indeed, the parties have acknowledged that, to their knowledge, there is no other
12 litigation, either pending or otherwise, on a class or individual basis, concerning the claims in this
13 lawsuit. *Ibid.*

14 Moreover, Mr. Viesse has done all things reasonably expected of him in his capacity as
15 Class Representative. Yedalian Decl. ¶ 76. Mr. Viesse was subjected to liability for defense costs
16 in the event the litigation was unsuccessful. *Ibid.* By stepping forward to shoulder this action on
17 behalf of the class, Mr. Viesse also took on other risks, including the risk of subjecting himself to
18 intrusive discovery. *Ibid.* Mr. Viesse also regularly and consistently communicated with Class
19 Counsel throughout the time this lawsuit was pending. *Ibid.* He also reviewed relevant
20 documents, provided his input, and otherwise kept apprised of litigation related events and
21 developments. *Ibid.* He also provided his ideas and input to Class Counsel in the various rounds
22 of settlement negotiations and exchanges. *Ibid.* He also participated in the process to finalize the
23 written settlement terms and documents, and the post-agreement phases that followed. *Ibid.* In
24 sum, Mr. Viesse contributed as much of his valuable time as this litigation demanded to ensure a
25 vigilant prosecution of and favorable outcome for the best interests of the Class. *Ibid.* In addition
26 to satisfying the first *Staton* factor, these facts further support an incentive award because they
27 "recognize [a class representatives] willingness to act as a private attorney general." *Rodriguez v.*
28 *West Publishing Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009).

Many of the facts supporting the first factor also support the second *Staton* factor in so far
as that the Class has benefited from the Class Representative's actions. It is fair to say that but for

1 Mr. Viesse actions, there would be no resulting benefit to individual Settlement Class members or
2 *cy pres* benefits. Yedalian Decl. ¶ 77. Moreover, it is as a result of Plaintiff's pursuit that
3 Defendant changed its transaction software, ceased the printing of expiration date information on
4 customer receipts and implemented a FACTA compliance policy. *Ibid.* Thus, Mr. Viesse
5 effectuated substantial change of conduct, thereby accomplishing the "deterrent" objectives of
6 FACTA. He was also willing and stepped forward to act as a private attorney general where no
7 other plaintiff has done so. *Ibid.*

8 The fact that the Court has already made a preliminary finding that the settlement is fair,
9 adequate and reasonable, also supports the significance of the benefits achieved through the Class
10 Representative's initiative and perseverance. Yedalian Decl. ¶ 78.

11 Third, it is estimated that Mr. Viesse devoted approximately 25 hours of his time to pursue
12 this matter. Yedalian Decl. ¶ 79. By definition, the time he devoted to this matter was time spent
13 away from work and/or leisure in an effort to advance the interests of the entire class.

14 Although the fourth *Staton* factor (fear of workplace retaliation) is not applicable to this
15 type of case, a similar concern, the Class Representative stepping forward and thereby taking on
16 the risks of being subjected to intrusive discovery and defense costs in the event the litigation was
17 unsuccessful, are factors discussed in connection with the first factor, above.

18 Another factor properly considered by the Court in assessing an incentive award is the
19 personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *In*
20 *re Toys "R" Us—Delaware, Inc.—Fair And Accurate Credit Transactions Act (FACTA) Litigation*,
21 No. cv-08-01980 MMM (FMOx), 295 F.R.D. 438, 472 (C.D. Cal. January 17, 2014):

22 "An incentive award may be appropriate when a class representative will not
23 gain any benefit beyond that he would receive as an ordinary class member. See
24 *Razilov*, 2006 WL 3312024, at *4 (approving the payment of an incentive award
25 where the only benefit a class representative was going to receive from a settlement
26 was the same statutory damages other class members would receive); *Van Vranken*,
27 901 F.Supp. at 299 (where a class representative's claim made up 'only a tiny fraction
28 of the common fund,' a substantial incentive award was appropriate). The named
plaintiffs in this action will receive no relief beyond that available to members of the
class in general; absent an incentive award, they will each be eligible to submit a
claim for a \$5, \$15, or \$30 voucher. This factor, therefore, also favors approval of an
incentive award." *Ibid.*

1 The amount requested is also reasonable in relation to other cases. In *Ingram v. The Coca-*
2 *Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001), the court approved incentive awards of \$300,000
3 to each named plaintiff in recognition of the services they provided to the class by responding to
4 discovery, participating in the mediation process and taking the risk of stepping forward on behalf
5 of the class. In *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 300 (N.D. Cal. 1995), a
6 \$50,000 incentive award was approved for similar participation.

7 The amount requested is also similar to incentive awards in various other FACTA cases.
8 Yedalian Decl. ¶ 82. For example, in *McGee, et al. v. Ross Stores, Inc, et al.*, C06-7496 CRB
9 (N.D. Cal. January 9, 2009), the court awarded each of the two class representatives a \$5,000
10 incentive payment. In *Tchoboian v. Parking Concepts, Inc., et al.*, SACV09-422 DMG (ANx)
11 (C.D. Cal. November 12, 2010) the court awarded the only class representative a \$5,000 incentive
12 payment. In *Jarchaffian v. American Multi-Cinema, Inc., et al.*, CV09-03434 JHN (AJWx), 2011
13 U.S. Dist. LEXIS 158005 *6, (C.D. Cal. October 6, 2011), the court awarded the only class
14 representative a \$5,000 incentive payment. In *Sakamoto v. One Parking, Inc. et al.*, SACV11-
15 1249 MLG (C.D. Cal. June 21, 2012) the court awarded the only class representative a \$5,000
16 incentive payment. In *In re Toys "R" Us—Delaware, Inc.—Fair And Accurate Credit Transactions*
17 *Act (FACTA) Litigation*, No. cv-08-01980 MMM (FMOx), 295 F.R.D. 438, 472 (C.D. Cal.
18 January 17, 2014), the court awarded each of the three class representatives a \$5,000 incentive
19 payment.

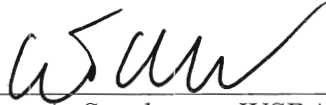
20 In sum, the requested incentive award of \$5,000 to Mr. Viesse, the only Class
21 Representative in this case, for the valuable time and resources he contributed to advance this
22 litigation is fair and reasonable, and it is respectfully requested that the Court approve and award
23 this amount as his incentive award. Yedalian Decl. ¶ 83.

24 **IX. CONCLUSION**

25 For all of the foregoing reasons, it is respectfully requested that the Court grant the Motion
26 For Award Of Attorneys' Fees And Costs To Class Counsel And Incentive Payment To The Class
27 Representative.

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Respectfully submitted,



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