

1 KENNETH S. GAINES, ESQ. SBN 049045
 ken@gaineslawfirm.com
 2 DANIEL F. GAINES, ESQ. SBN 251488
 daniel@gaineslawfirm.com
 3 ALEX P. KATOFISKY, ESQ. SBN 202754
 alex@gaineslawfirm.com
 4 SEPIDEH ARDESTANI, ESQ. SBN 274259
 sepideh@gaineslawfirm.com
 5 **GAINES & GAINES, APLC**
 27200 Agoura Road, Suite 101
 6 Calabasas, California 91301
 Telephone: (818) 703-8985
 7 Facsimile: (818) 703-8984

8 Attorneys for Plaintiff Gillian Brown
 and Proposed Class Counsel
 9

10 **UNITED STATES DISTRICT COURT**
 11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 GILLIAN BROWN, on behalf of
 13 herself and all others similarly situated,

14 Plaintiff,

15 v.

16 22ND DISTRICT AGRICULTURAL
 ASSOCIATION, a State entity; and
 17 DOES 1 through 10, inclusive,

18 Defendants.
 19

Case No.: 15cv2578-JAH (DHB)

Honorable David H. Bartick

**DECLARATION OF DANIEL F.
 GAINES IN SUPPORT OF
 UNOPPOSED MOTION FOR
 PRELIMINARY APPROVAL OF
 CLASS ACTION SETTLEMENT**

DATE: October 13, 2016

TIME: 3:30 p.m.

COURTROOM: 1D

20 I, DANIEL F. GAINES, hereby declare and state as follows:

21 1. I am an attorney duly admitted to the practice of law in the State of
 22 California. I am a shareholder of Gaines & Gaines, APLC, counsel for Plaintiff
 23 Gillian Brown and proposed Class Counsel in this action. I have personal
 24 knowledge of the facts set forth herein and if called as a witness to testify to them, I
 25 could and would do so competently.

26 \\
 27 \\
 28

1 **Class Counsel’s Experience and Recommendation**

2 2. I obtained my BS degree from the University California at Berkeley in
3 2003. I majored in Business Administration at the Haas School of Business.

4 3. Thereafter, I attended the University of Virginia School of Law. At
5 Virginia, I was a member of the editorial board of the Virginia Tax Review. I was
6 also the recipient of the Lacy Armour Scholarship, awarded to recognize academic
7 excellence. At Virginia, I focused my studies on tax and real estate. I earned my JD
8 and became a member of the California Bar in 2007.

9 4. Since becoming a member of the Bar, I have practiced law with my
10 partner/father, Kenneth, at Gaines & Gaines, APLC. Our practice specializes in
11 litigation, with an emphasis in employment, privacy, and consumer class action
12 matters like this one.

13 5. My firm has participated in and has been certified as class counsel in
14 dozens of class action matters since my admission to the Bar. A list of the cases in
15 which I have been appointed as class counsel is attached hereto as **Exhibit A**.

16 6. Based on my own investigation and evaluation, I am of the opinion that
17 the Settlement, its allocation among Class Members, and the recovery for each Class
18 Member, is fair and reasonable. I believe I have a strong understanding of the trends
19 in both the likelihood of certification of FACTA class action cases and the value of
20 settlements of cases such as this one. My opinion takes into consideration the
21 amounts received in other similar class actions, the risks inherent in litigation of this
22 genre, and the reasonable tailoring of each Class Member’s claim to the amount
23 received in settlement. Based on that knowledge, I am of the opinion the settlement
24 is fair, reasonable and adequate and is in the best interests of the Class.

25 **Procedural History of the Action**

26 7. On September 30, 2016, Plaintiff initiated the Action by filing a putative
27 class action Complaint in the Superior Court of the State of California, County of
28 San Diego entitled *Gillian Brown v. 22nd District Agricultural Association*, Case

1 No. 37-2015-00033027-CU-MC-CTL. The Complaint alleges that the Association
2 violated FACTA by printing a receipt containing the expiration date of Plaintiff's
3 credit card used in a transaction at the 2015 County Fair.

4 8. The Association answered the Complaint and asserted various
5 affirmative defenses in the State Court on November 16, 2015.

6 9. On November 17, 2015, the Association removed the Action to United
7 States District Court for the Southern District of California.

8 10. On February 8, 2016, the Association filed its Third Party Complaint
9 ("Third Party Complaint") against Solar alleging the following causes of action
10 against Solar: Breach of Contract, Breach of the Implied Covenant of Good Faith
11 and Fair Dealing, Express Contractual Indemnity, Comparative Indemnity, Equitable
12 Indemnity, and Declaratory Relief.

13 11. The Association denies all material allegations of the Complaint. The
14 Association specifically disputes that it printed a non-compliant receipt pursuant to
15 FACTA, either willfully or negligently, at any relevant time to Plaintiff or putative
16 class members, disputes that it violated any provision of the FCRA, and disputes that
17 Plaintiff and putative class members are entitled to any relief from the Association.
18 The Association further contends that the Action would not be amenable to class
19 certification if class certification were sought by Plaintiff and opposed by the
20 Association.

21 12. The Association further alleges that, had any violations of FACTA or the
22 FCRA occurred at the County Fair, which it expressly denies, such violations were
23 the direct result of actions and omissions of Solar.

24 13. Solar denies all material allegations of the Third Party Complaint. Solar
25 specifically disputes that Solar breached a contract with the Association, disputes
26 that Solar breached an implied covenant of good faith and fair dealing with the
27 Association, disputes that Solar violated any provision of FACTA or the FCRA, and
28

1 disputes that the Association, Plaintiff, and putative class members are entitled to
2 any relief from Solar.

3 **Investigation and Settlement Negotiations**

4 14. The Parties recognize and acknowledge the expense and length of
5 continued proceedings necessary to prosecute the claims through trial, possible
6 appeals and ancillary actions. The Parties also have taken into account the uncertain
7 outcome and the risk of any litigation, especially in multi-party actions such as this
8 proceeding, as well as the difficulties and delays inherent in such litigation. The
9 Parties also are mindful of the potential problems of proof in establishing the claims
10 and defenses asserted in this proceeding and the uncertainty of whether and to what
11 extent the Association and Solar have insurance coverage or other available funding
12 in the event of any success in this litigation.

13 15. The Agreement resulted from, and is the product of, extensive, good
14 faith and arm's length settlement negotiations over many months, including
15 numerous telephonic and in-person negotiations, all of which followed the exchange
16 of informal discovery and factual and legal analysis by the Parties regarding the
17 claims alleged. The Parties participated in mediation vis-à-vis the District Court's
18 Early Neutral Evaluation conference held on March 10, 2016 ("ENE"), as well as
19 follow-up meetings and negotiations for nearly four months thereafter, to reach a
20 resolution in principle. The Parties also participated in numerous telephone calls
21 prior to the ENE in order to lay the ground work for mediation. The Parties
22 submitted detailed ENE statements to the Honorable David H. Bartick setting forth
23 their respective views as to the strengths of the case.

24 **Summary of Settlement Terms**

25 16. The Settlement Class is defined as: "[T]hose persons who were issued an
26 electronically printed debit and/or credit card receipt during the San Diego County
27 Fair at the Del Mar Fairgrounds in violation of the truncation requirements of
28

1 FACTA at any time between September 30, 2010 and the date of preliminary
2 approval of [the Settlement].”

3 17. The economic relief provided in the Settlement is as follows:

4 a. The Reduced Admission Prices. Each admission entrance fee for the
5 2017 San Diego County Fair (subject to a \$750,000 total reduction
6 cap) shall be reduced fifty (50) cents from the then-current fair
7 market value of such admission prices as determined by the Neutral
8 Expert or as otherwise agreed upon between Class Counsel and the
9 Association and the Association’s Counsel. To the extent the
10 reduction cap has not been met through the 2017 San Diego County
11 Fair fee reduction, each admission entrance fee for the 2018 San
12 Diego County Fair (subject to a \$750,000 total reduction cap,
13 inclusive of the previous year reduction) shall be reduced pro rata
14 based on a calculation of the expected 2018 attendance and the
15 remaining amount under the reduction cap. The Neutral Expert shall
16 conduct its analysis and provide its recommendations no later than
17 the Opt-Out and Objection Deadline, and the final agreed upon
18 pricing for the 2017 San Diego County Fair shall be submitted to the
19 Court in connection with the Motion for Final Approval.

20 b. The Common Fund. The Association and Solar shall also pay a
21 Common Fund of exactly \$175,000 (\$170,000 by the Association and
22 \$5,000 by Solar) which shall be used to compensate (1) the
23 Settlement Administrator for its services in providing publication and
24 website notice and other settlement administration services (as
25 detailed herein), (2) Plaintiff Gillian Brown for an incentive award
26 (subject to Court approval), (3) Class Counsel for their attorneys’ fees
27 and costs (subject to Court approval), and (4) the Neutral Expert
28 described above. Any unawarded or unrequested portion of the

1 Common Fund shall be paid to a privacy protection-related cy pres
2 recipient to be proposed to the Court in connection with the Motion
3 for Final Approval.

4 18. The release, to which all Class Members (except for those who submit a
5 valid and timely request for exclusion) will be bound, is as follows: “All Releasing
6 Parties will be deemed to have fully released and forever discharged the Released
7 Parties from any and all claims, causes of action, suits, obligations, debts, demands,
8 agreements, promises, liabilities, damages, losses, controversies, costs, expenses,
9 and attorneys’ fees of any nature whatsoever, whether based on any federal law, state
10 law, common law, territorial law, foreign law, contract, rule, regulation, any
11 regulatory promulgation (including, but not limited to, any opinion or declaratory
12 ruling), common law or equity, whether known or unknown, suspected or
13 unsuspected, asserted or unasserted, foreseen or unforeseen, actual or contingent,
14 liquidated or unliquidated, punitive or compensatory, as of the Effective Date, that
15 arise out of or relate in any way to the Released Parties’ printing of information on
16 receipts provided to Settlement Class Members at the San Diego County Fair at the
17 Del Mar Fairgrounds in the City of Del at any time between September 30, 2010 and
18 the date of preliminary approval of the settlement, to the fullest extent that those
19 terms are used, defined or interpreted by the FCRA, including FACTA, relevant
20 regulatory or administrative promulgations and case law, including, but not limited
21 to, claims under or for a violation of the FCRA and any other statutory or common
22 law claim arising from the printing of information on receipts provided to Plaintiff
23 and/or Settlement Class Members (collectively, the “Released Claims).”

24 **Counsel’s Due Diligence and Assessments Regarding Settlement**

25 19. At all times, the Parties’ settlement negotiations have been non-
26 collusive, adversarial, and at arm’s length.

27 20. Although we are reasonably confident that Plaintiff would have
28 prevailed on her motion for class certification, there was a risk the Court would deny

1 certification and find that individual issues predominate over class members' claims.
2 The risk that Defendant would defeat certification on Plaintiff's claims supports
3 settlement at this juncture, especially because most class members' claims are so
4 small that individual litigation of their claims (required in the event certification was
5 denied) is simply not feasible or realistic.

6 21. Recovery on the merits on a classwide basis is also not guaranteed here.
7 Defendant's defenses to certification and liability are an important basis for
8 validating the reasonableness of the settlement amount. Defendant has consistently
9 maintained that it has ample legal and factual grounds for defending this action on
10 both class and merits issues. For example, Defendant argues that it did not
11 "willfully" violate FACTA (and, hence, has no liability to Plaintiff or Class
12 Members under the statute) because it did not discover it was printing expiration
13 dates, and had hired a company, Solar, that represented it was an expert for installing
14 point of sale systems for electronic purchases and certified that its system was
15 legally compliant. It also contends that California Government Code § 818
16 precludes the award of statutory damages (like those Plaintiff seeks under FACTA)
17 against a government entity. These risks militate in favor of the Settlement's
18 approval.

19 22. Defendant and Solar cannot independently identify who is a Settlement
20 Class Member – their contact information is not retained and not available. As a
21 result, it would be impossible to put consideration directly into the pockets of Class
22 Members here without some form of claims process, which would be difficult or
23 impossible to administer due to Defendant's lack of records, inevitably involve a
24 small claims rate (claims rate of well under 1% are typical in consumer class action
25 settlements), and involve enormous notice expenses that may eclipse the value of the
26 Settlement altogether.

27 23. Consequently, the Parties agreed on an allocation of settlement proceeds
28 which yields a reduction in admission fees for those most likely to be Class

1 Members – future fairgoers. It is not a perfect solution, but given the circumstances
2 here, the Parties believe it is most likely to yield the most benefit to those who are
3 Class Members.

4 24. During the applicable statutory period, September 10, 2010 through the
5 date of entry of the Preliminary Approval Order, it is estimated that Defendant
6 generated approximately 100,000 allegedly defective receipts at the 2011-2015
7 County Fairs. As such, Plaintiff alleges that she and the Class are entitled to
8 minimum statutory penalties of \$10,000,000, plus attorneys' fees, punitive damages,
9 and costs.

10 25. The Parties have agreed to settle this matter for a settlement package
11 valued at \$925,000. As a result of this settlement, Defendant has amended its
12 practices so that the practice at the heart of this litigation – the failure to redact
13 private information from consumers' credit and debit card receipts – will cease going
14 forward.

15 26. If the Court approves the Settlement, the entry fee for all attendees of the
16 2017 County Fair shall be reduced fifty (50) cents from the then-current fair market
17 value of such admission prices as determined by the Neutral Expert or as otherwise
18 agreed upon between Class Counsel and the Association and the Association's
19 Counsel (up to \$750,000 reduction cap); the exact reduction will be disclosed to the
20 Court in connection with the final approval process.

21 **The Settlement Provides a Significant Monetary Benefit to Class Members**

22 27. During the applicable statutory period, September 10, 2010 through the
23 date of preliminary approval, Defendant estimates that it generated approximately
24 100,000 allegedly defective receipts failing to properly truncate credit and debit
25 cards' expiration dates as required by FACTA (the truncation issue affected only a
26 small portion of the total receipts issued by the Association and other vendors at the
27 County Fairs between 2011 and 2015). Plaintiff alleges that the Defendant's actions
28 were willful within the meaning of FACTA and that she and the Class are entitled to

1 millions of dollars in statutory penalties, plus attorneys' fees, punitive damages, and
2 costs.

3 28. Although the Parties understand that no Class Member, including
4 Plaintiff, has suffered any actual damages from the violations alleged, the
5 compromise provides each and every attendee of the 2017 San Diego County Fair
6 reduced entry fees – fifty cents below the then-current fair market value of such
7 admission prices, as to be determined by an expert or otherwise agreed upon
8 between Plaintiff and the Association.

9 29. To the extent the total discount at the 2017 County Fair does not reach
10 \$750,000, additional discounts will be extended for 2018 County Fair admission
11 prices so the \$750,000 cumulative discount is reached.

12 **Suitability of the Action for Class Certification:**

13 30. To date, no class has been certified. The Settlement Stipulation reached
14 among the Parties contains a provision pursuant to which we stipulate to the Court's
15 provisional certification of the Settlement Class, but do so for purposes of this
16 settlement only.

17 31. As proposed Class Counsel, and based on the discovery to date, I feel
18 confident that Plaintiff could successfully prove that this action meets the
19 requirements of class certification under Rule 23.

20 32. During the applicable statutory period, September 10, 2010 through the
21 date of preliminary approval, it is estimated that Defendant generated approximately
22 100,000 allegedly defective receipts. The number of Class Members, while not
23 precisely known, is large – likely in excess of 50,000 individuals. Therefore, joinder
24 of individual claims would be impractical and the numerosity requirement is
25 satisfied for settlement purposes.

26 33. Here, the Class Members all seek the same remedies under the identical
27 federal law under the same theories of recovery, all relating to the Defendant's
28 alleged failure to truncate the expiration dates of Class Members' credit and debit

1 cards during the applicable class period, in violation of FACTA. The same factual
2 predicates apply to each and every Class Member. The Settlement compensates
3 Class Members for these identical claims.

4 34. Here, Plaintiff Brown's claims are not only typical of those of all Class
5 Members – they are identical. Plaintiff alleges the Defendant failed to truncate the
6 expiration date of her credit card number on the printed receipt that Defendant
7 provided to her at the point of sale – Plaintiff Brown alleges that this violates
8 FACTA and subjects Defendant to statutory penalties. This is the same claim
9 alleged on behalf of all Class Members.

10 35. Plaintiff contends that she is an adequate class representative and his
11 chosen counsel are qualified to act as Class Counsel in this litigation. Plaintiff
12 Brown has interests directly aligned with all Class Members and has prosecuted this
13 case on their behalf. She has no apparent conflicts with Class Members. She has
14 demonstrated his commitment to prosecute this Action on their behalf through its
15 conclusion.

16 36. Under the proposed Settlement, Ms. Brown will request a small
17 enhancement payment – \$5,000 – for her time and efforts, including assisting Class
18 Counsel with factual issues surrounding the case as well with settlement discussions
19 and participation at the mediation. This award represents a small percentage of the
20 total value of the settlement consideration, and therefore does not constitute a
21 sufficient conflict of interest to foreclose fulfilling the adequacy requirement.

22 37. Additionally, Plaintiff's counsel are highly experienced litigators, with
23 more than six decades of collective litigation experience. My firm has substantial
24 experience prosecuting complex class action cases, both in the consumer and
25 employment contexts. As such, there is no conflict of interest between the Named
26 Plaintiff, proposed Class Counsel, and the Settlement Class Members, and the
27 adequacy element is met.

28

