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15 and Proposed Class Counsel

16 **UNITED STATES DISTRICT COURT**  
17 **SOUTHERN DISTRICT OF CALIFORNIA**

18 GILLIAN BROWN, on behalf of  
19 herself and all others similarly situated,

20 Plaintiff,

21 v.

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

25 Defendants.

CASE NO: 15-cv-2578-DHB

CLASS ACTION

**NOTICE OF MOTION AND MOTION  
FOR AWARD OF REASONABLE  
ATTORNEYS' FEES AND COSTS  
AND CLASS REPRESENTATIVE  
ENHANCEMENT; MEMORANDUM  
OF POINTS AND AUTHORITIES IN  
SUPPORT**

Date: May 11, 2017  
Time: 3:30 p.m.  
Courtroom: 1D  
Judge: Hon. David H. Bartick

1 PLEASE TAKE NOTICE that on May 11, 2017, at 3:30 p.m., or as soon  
 2 thereafter as the matter may be heard, in Courtroom 1D of the United States District  
 3 Court of the Southern District of California, located at 221 W. Broadway, San  
 4 Diego, California 92101, the Honorable Magistrate Judge David H. Bartick  
 5 presiding, Plaintiff Gillian Brown will and hereby does move this Court an order (1)  
 6 granting Class Counsel’s application for an award of reasonable attorneys’ fees in  
 7 the amount of \$145,130.29 and reimbursement of out-of-pocket costs in the amount  
 8 of \$4,869.71, and (2) approving an enhancement award for Class Representative  
 9 Gillian Brown in the amount of \$5,000. Defendant 22nd District Agricultural  
 10 Association (the “Association”) and Third Party Defendant Solar On Set, LLC  
 11 (“Solar”) do not oppose this motion.

12 The motion is based on this notice of motion and motion, the attached  
 13 memorandum of points and authorities, the Class Action Settlement Agreement and  
 14 Release, the Declaration of Daniel F. Gaines, the declaration submitted by the Class  
 15 Representative Gillian Brown, the pleadings and papers filed in this case, and any  
 16 oral argument this Court permits.

17  
 18 Dated: January 25, 2017

GAINES & GAINES, APLC

19  
 20 By: /s/Alex P. Katofsky  
 21 ALEX P. KATOFISKY  
 22 Attorneys for Plaintiff  
 23 Gillian Brown and the Proposed Class  
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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

Plaintiff Gillian Brown (“Plaintiff” or “Brown”) moves this Court for an award of reasonable attorneys’ fees and costs for Class Counsel’s work in achieving a settlement package valued at \$925,000 for the Fair and Accurate Credit Transactions Act (“FACTA”), 15 U.S.C. § 1681(c)(g) class claims alleged against Defendant 22nd District Agricultural Association (“Defendant” or “Association”), which the Court preliminarily approved on December 13, 2016. *See* Docket (“Dkt.”) No. 38. Plaintiff seeks an award of \$145,130.29 for Class Counsel’s attorneys’ fees, which represents 16% of the total settlement fund, and reimbursement of \$4,869.71 of Class Counsel’s out-of-pocket costs incurred litigating this action, both amounts as set forth in the Class Action Settlement Agreement and Release (“Stipulation of Settlement”).<sup>1</sup> The common fund methodology is appropriate because the settlement class members will receive an ascertainable monetary benefit upon the Court’s final approval of the proposed settlement, which enables the Court to determine a reasonable, percentage-based fee with “some exactitude.” *Paul, Johnson, Alston & Hunt v. Grauly*, 886 F.2d 268, 271 (9th Cir. 1989). The requested fee amount falls well below the presumptively reasonable “benchmark” within the Ninth Circuit. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048-50 (9th Cir. 2002).

A lodestar “cross-check” confirms the reasonableness of Plaintiff’s fee request. Class Counsel’s hourly rates are reasonable in light of their significant experience, skill, and expertise, as well as fee awards by judges throughout California. Declaration of Daniel F. Gaines (“Gaines Decl.”) at ¶¶ 2-5, 36-48. The

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<sup>1</sup> The Class Action Settlement Agreement and Release is attached as Exhibit B to the Declaration of Daniel F. Gaines submitted herewith (“Gaines Decl.”). All “Ex.” references are to exhibits to the Gaines Declaration unless otherwise stated.

1 number of hours expended by Class Counsel is also reasonable. Class counsel has  
2 provided a detailed summary of Class Counsel's hours spent litigating this action  
3 and hourly rates. *Id.* at ¶¶ 36-48; Exhibit C.

4 Plaintiff also seeks the Court's approval of a modest enhancement award to  
5 the Class Representative for her contributions to the litigation of this matter,  
6 including initiating this lawsuit on behalf of the settlement class, safeguarding class  
7 members' interests throughout the litigation, and assisting in the settlement,  
8 including attendance at a full-day early neutral evaluation conference in San Diego.  
9 Plaintiff seeks payment of the reasonable amount of \$5,000 for the Class  
10 Representative, as set forth in the Stipulation of Settlement (Ex. B at ¶ 6.2) in  
11 acknowledgment of her time and effort seeking enforcement of her and the class'  
12 rights, including seeking experienced counsel, participating in the investigation and  
13 preparation of the complaint, and her risk in bringing forth class claims against the  
14 Association.

## 15 **II. PROCEDURAL HISTORY AND SUMMARY OF RELEVANT FACTS**

### 16 **A. The Complaint and Claims Alleged**

17 On September 30, 2016, Plaintiff initiated the Action by filing a putative  
18 class action Complaint in the Superior Court of the State of California, County of  
19 San Diego entitled *Gillian Brown v. 22nd District Agricultural Association*, Case  
20 No. 37-2015-00033027-CU-MC-CTL. The Complaint alleges that the Association  
21 violated FACTA by printing a receipt containing the expiration date of Plaintiff's  
22 credit card used in a transaction at the 2015 County Fair. Gaines Decl. at ¶ 6; Stip.  
23 at ¶ 1.4.

24 The Association answered the Complaint and asserted various affirmative  
25 defenses in the State Court on November 16, 2015. Gaines Decl. at ¶ 7; Stip. at ¶  
26 1.5.

27  
28

1 On November 17, 2015, the Association removed the Action to United States  
2 District Court for the Southern District of California. Gaines Decl. at ¶ 8; Stip. at ¶  
3 1.6.

4 On February 8, 2016, the Association filed its Third Party Complaint (“Third  
5 Party Complaint”) against Solar alleging the following causes of action against  
6 Solar: Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair  
7 Dealing, Express Contractual Indemnity, Comparative Indemnity, Equitable  
8 Indemnity, and Declaratory Relief. Gaines Decl. at ¶ 9; Stip. at ¶ 1.7.

9 The Association denies all material allegations of the Complaint. The  
10 Association specifically disputes that it printed a non-compliant receipt pursuant to  
11 FACTA, either willfully or negligently, at any relevant time to Plaintiff or putative  
12 class members, disputes that it violated any provision of the FCRA, and disputes  
13 that Plaintiff and putative class members are entitled to any relief from the  
14 Association. The Association further contends that the Action would not be  
15 amenable to class certification if class certification were sought by Plaintiff and  
16 opposed by the Association. Gaines Decl. at ¶ 10; Stip. at ¶ 1.8.

17 The Association further alleges that, had any violations of FACTA or the  
18 FCRA occurred at the County Fair, which it expressly denies, such violations were  
19 the direct result of actions and omissions of Solar. Gaines Decl. at ¶ 11; Stip. at ¶  
20 1.9.

21 Solar denies all material allegations of the Third Party Complaint. Solar  
22 specifically disputes that Solar breached a contract with the Association, disputes  
23 that Solar breached an implied covenant of good faith and fair dealing with the  
24 Association, disputes that Solar violated any provision of FACTA or the FCRA,  
25 and disputes that the Association, Plaintiff, and putative class members are entitled  
26 to any relief from Solar. Gaines Decl. at ¶ 12; Stip. at ¶ 1.10.

27 \\\

28 \\\

1                   **B. Class Counsel's Work Litigating and Settling the Action**

2                   The Parties recognized and acknowledged the expense and length of  
3 continued proceedings necessary to prosecute the claims through trial, possible  
4 appeals and ancillary actions. The Parties also have taken into account the  
5 uncertain outcome and the risk of any litigation, especially in multi-party actions  
6 such as this proceeding, as well as the difficulties and delays inherent in such  
7 litigation. The Parties also are mindful of the potential problems of proof in  
8 establishing the claims and defenses asserted in this proceeding and the uncertainty  
9 of whether and to what extent the Association and Solar have insurance coverage or  
10 other available funding in the event of any success in this litigation. Gaines Decl. at  
11 ¶ 13; Stip. at ¶ 1.11.

12                   The Settlement Agreement resulted from, and is the product of, extensive,  
13 good faith and arm's length settlement negotiations over many months, including  
14 numerous telephonic and in-person negotiations, all of which followed the  
15 exchange of informal discovery and factual and legal analysis by the Parties  
16 regarding the claims alleged. The Parties participated in mediation vis-à-vis the  
17 District Court's Early Neutral Evaluation conference held on March 10, 2016  
18 ("ENE"), as well as follow-up meetings and negotiations for nearly four months  
19 thereafter, to reach a resolution in principle. The Parties also participated in  
20 numerous telephone calls prior to the ENE in order to lay the ground work for  
21 mediation. The Parties submitted detailed ENE statements to the Honorable David  
22 H. Bartick setting forth their respective views as to the strengths of the case.  
23 Gaines Decl. at ¶ 14; Stip. at ¶ 1.12.

24                   At all times, the Parties' settlement negotiations have been non-collusive,  
25 adversarial, and at arm's length. Gaines Decl. at ¶ 15.

26                   Discussions between counsel for the Parties, informal discovery, as well as  
27 the investigation and evaluation of the claims of Plaintiff by the Parties, have  
28 permitted each side to assess the relative merits of the claims and the defenses to

1 those claims. The Parties agree that the above-described investigation and  
2 evaluation, as well as the information exchanged during settlement negotiations and  
3 mediation, are more than sufficient to assess the merits of the respective Parties'  
4 positions and to compromise the issues on a fair and equitable basis. Gaines Decl.  
5 at ¶ 16. Based on their own independent investigations and evaluations, Class  
6 Counsel is of the opinion that the consideration and terms of the Settlement as  
7 described herein, considering the risk of loss on class certification, the risk of loss  
8 on the merits, and the risk of a reduction in any damages sought or awarded, is fair,  
9 reasonable, and adequate in light of all known facts and circumstances, and is in the  
10 best interests of the Class. Gaines Decl. at ¶ 17.

11 Class Counsel drafted a detailed, formalized settlement agreement and  
12 exhibits and negotiated the language and terms with Defense Counsel. Gaines  
13 Decl. at ¶ 18; *see also*, Ex. B.

14 Class Counsel also drafted and filed the motion for preliminary approval of  
15 the proposed class settlement and supporting papers, which were filed on September  
16 8, 2016. Gaines Decl. at ¶ 19; Dkt. No. 35.

17 Class Counsel expects to spend significant additional time working with the  
18 settlement administrator through the conclusion of the settlement administration  
19 process, moving for final approval of the settlement, attending the final fairness  
20 hearing, and concluding the settlement administration. Gaines Decl. at ¶ 20.

### 21 **C. The Named Plaintiff's Participation in the Action**

22 Plaintiff Brown has actively participated in the litigation of this matter. Prior  
23 to bringing this action, Plaintiff Brown provided substantive information to Class  
24 Counsel regarding her claims. Before the complaint was filed on September 30,  
25 2015, Plaintiff Brown discussed her claims and the circumstances surrounding her  
26 transactions with Defendant with her counsel. Declaration of Gillian Brown  
27 ("Brown Decl.") at ¶¶ 4-5; Gaines Decl. at ¶ 51.

28

1 After the complaint was filed, Plaintiff Brown regularly communicated with  
2 Class Counsel regarding the progress of the litigation and the settlement. Plaintiff  
3 assisted in the discovery process and attended the ENE. Brown Decl. at ¶¶ 9-10;  
4 Gaines Decl. at ¶ 52.

#### 5 **D. Preliminary Approval of the Settlement**

6 On December 13, 2016, the Court granted preliminary approval of the  
7 settlement. Dkt. No. 38.

8 The notice procedure set forth in the Stipulation of Settlement and approved  
9 by the Court's preliminary approval order requires that notice of the class  
10 settlement be provided in three ways: publication on the Internet via a settlement  
11 website, a link to the settlement website on the Association's website, and  
12 publication on two separate occasions in a regional newspaper in San Diego. *See*  
13 *Ex. B* at ¶ 10.2.

14 Accordingly, Simpluris, the Court-approved settlement administrator, will  
15 publish the settlement website. *Ex. B* at ¶ 10.2(A). Also, as required by the  
16 preliminary approval order, Simpluris will cause the Notice to appear in the a  
17 regional newspaper, on two separate occasions, in the manner required by the  
18 Court's order. *Ex. B* at ¶ 10.2(C).

19 Pursuant to the Preliminary Approval Order, Class Counsel is required to file  
20 this motion for attorneys' fees, reimbursement of costs, and a service payment to  
21 the Class Representative no later than the notice deadline (January 27, 2017). As  
22 such, no class member participation data is available as of the date of this filing.  
23 *Gaines Decl.* at ¶ 25.

### 24 **III. TERMS OF THE SETTLEMENT**

#### 25 **A. The Settlement Class**

26 The Stipulation of Settlement defines the Settlement Class as follows:

27 [T]hose persons who were issued an electronically  
28 printed debit and/or credit card receipt during the San  
Diego County Fair at the Del Mar Fairgrounds in

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

4 Ex. B at ¶ 2.31.

5 The number of Class Members, while not precisely known, is likely more  
6 than 100,000 based on an analysis used by the Parties. Ex. B.

7 **B. Economic Relief**

8 The economic relief provided in the Settlement is as follows:

9 *The Reduced Admission Prices.* Each admission entrance fee for the 2017  
10 San Diego County Fair (subject to a \$750,000 total reduction cap) shall be reduced  
11 fifty (50) cents from the then-current fair market value of such admission prices as  
12 determined by the Neutral Expert or as otherwise agreed upon between Class  
13 Counsel and the Association and the Association's Counsel. To the extent the  
14 reduction cap has not been met through the 2017 San Diego County Fair fee  
15 reduction, each admission entrance fee for the 2018 San Diego County Fair (subject  
16 to a \$750,000 total reduction cap, inclusive of the previous year reduction) shall be  
17 reduced *pro rata* based on a calculation of the expected 2018 attendance and the  
18 remaining amount under the reduction cap. The Neutral Expert shall conduct its  
19 analysis and provide its recommendations no later than the Opt-Out and Objection  
20 Deadline, and the final agreed upon pricing for the 2017 San Diego County Fair  
21 shall be submitted to the Court in connection with the Motion for Final Approval.  
22 Stip. at ¶ 9.2(A).

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

1 (subject to Court approval), and (4) the Neutral Expert described above. Any  
 2 unawarded or unrequested portion of the Common Fund shall be paid to a privacy  
 3 protection-related *cy pres* recipient to be proposed to the Court in connection with  
 4 the Motion for Final Approval.<sup>2</sup> Stip. at ¶ 9.2(B).

5 **C. The Stipulation of Settlement Clearly States the Attorneys’**  
 6 **Fees and Costs**

7 Attorneys’ fees and costs are recoverable under FACTA (15 U.S.C. §  
 8 1681n(a)(3)), and Defendant and Solar have agreed to pay Plaintiff’s counsel Court  
 9 awarded attorneys’ fees and costs, not to exceed \$150,000, without opposition –  
 10 approximately 16% of the total consideration to be paid under the Settlement (a  
 11 total of \$925,000, comprised of \$750,000 in admission price reductions, \$150,000  
 12 in attorneys’ fees and costs, \$5,000 enhancement to the Class Representative,  
 13 \$15,000 in administration expenses, and \$5,000 to the Neutral Expert), and well  
 14 below the Ninth Circuit common fund attorney fee benchmark of 25%. Stip. at ¶¶  
 15 2.20; 6.1. The fee is intended to compensate Class Counsel for the benefits  
 16 achieved for the class, the efficient and fair resolution of the class claims, the risk  
 17 of taking on a complex class action on a contingency basis, the preclusion of  
 18 accepting other work, plus all of the work that Class Counsel already performed in  
 19 litigating this action and will perform in securing approval of the settlement,  
 20 making sure that the settlement is fairly administered and implemented, and  
 21 obtaining dismissal of the action. Gaines Decl. at ¶ 34.

22 **D. Class Representative’s Enhancement Award**

23 The Stipulation of Settlement provides for a modest enhancement award for  
 24 the named Plaintiff and Class Representative, subject to the Court’s approval.

25 \_\_\_\_\_  
 26 <sup>2</sup> The Association represents and warrants that its adult admission entrance fees  
 27 between 2005 and 2016 are as stated in Exhibit 3 to the Settlement. The  
 28 Association also represents that the attendance at the 2015 County Fair was no  
 fewer than 1.5 million people.



1 Gaines Decl. at ¶ 50. Plaintiff Brown requests an enhancement award of \$5,000  
2 and has provided a declaration, submitted with this brief, explaining her efforts in  
3 the litigation and settlement of this action. *See* Declaration of Gillian Brown.

#### 4 **IV. LEGAL ARGUMENT**

##### 5 **A. Plaintiff's Released Claims Provide for an Award of Attorneys' Fees** 6 **and Costs**

7 The Settlement Stipulation sets forth the claims to be released by Plaintiff  
8 and the participating Class Members through the Settlement. The claims to be  
9 released include Plaintiff's and participating Class Members' claims under FACTA,  
10 15 U.S.C. § 1681c(g), which is subject to the attorneys' fees and costs provision of  
11 15 U.S.C. § 1681n(a)(3). *See id.* Section 1681n of FACTA provides that "[a]ny  
12 person who willfully fails to comply with any requirement imposed under this  
13 subchapter with respect to any consumer is liable to that consumer . . . , in the case  
14 of any successful action to enforce any liability under this section, the costs of the  
15 action together with reasonable attorney's fees as determined by the court." 15  
16 U.S.C. § 1681n(a)(3).

17 Therefore, the statutory provisions included in the released claims set forth in  
18 the Stipulation of Settlement support an award of attorneys' fees and costs in  
19 relation to the settlement of the Plaintiff's and Class Members' claims.

##### 20 **B. Plaintiff Seeks a Fee Award Under the Percentage of the Common** 21 **Fund**

22 District Courts may award attorneys' fees and costs to a prevailing plaintiff  
23 where "(1) fee shifting is expressly authorized by the governing statutes; . . . or (3)  
24 the successful litigants have created a common fund for recovery or extended  
25 substantial benefit to the class." *In re Bluetooth Headset Products Liab. Litig.*, 654  
26 F.3d 935, 941 (9th Cir. 2011) ("*In re Bluetooth*") (citing *Alyeska Pipeline Serv. Co.*  
27 *v. Wilderness Soc'y*, 421 U.S. 240, 275 (1975)). In the class action context, courts  
28 generally award attorneys' fees and costs pursuant to the common fund or statutory  
fee-shifting methodologies. *In re Bluetooth*, 654 F.3d at 941. Where there is a

1 common fund, “the primary basis of the fee award remains the percentage method.”  
2 *Vizcaino*, 290 F.3d at 1050; *In re Bluetooth*, 654 F.3d at 942. The Ninth Circuit has  
3 consistently awarded attorneys’ fees under the common fund method, reasoning  
4 that “a lawyer who recovers a common fund for the benefit of persons other than  
5 himself or his client is entitled to a reasonable attorney’s fee from the fund as a  
6 whole.” *Staton v. Boeing Co.*, 327 F.3d 938, 967 (9th Cir. 2003) (quoting *Boeing*  
7 *Co. v. Van Gemert*, 444 U.S. 472, 478 (1980)). “The common fund doctrine is  
8 properly applied, however, only if (1) the class of beneficiaries is sufficiently  
9 identifiable, (2) the benefits can be accurately traced, and (3) the fee can be shifted  
10 with some exactitude to those benefiting.” *Paul*, *supra*, 886 F.2d at 271 (internal  
11 quotations omitted). These requirements are met where “each member of a certified  
12 class has an undisputed and mathematically ascertainable claim to part of a lump-  
13 sum [settlement] recovered on his behalf.” *Id.*, quoting *Boeing*, 444 U.S. at 478-79.

14 In the Ninth Circuit, 25% of the common fund represents the “benchmark.”  
15 *Vizcaino*, 290 F.3d at 1048-50. The 25% benchmark is considered presumptively  
16 reasonable and can be adjusted upward or downward to account for any unusual  
17 circumstances in a particular case. *In re Bluetooth*, 654 F.3d at 942; *Ko v. Natura*  
18 *Pet Products, Inc.*, No. C 09-02619 SBA, 2012 WL 3945541, at \*14-15 (N.D. Cal.  
19 Sept. 10, 2012) (recognizing that the Ninth Circuit considers 25% to be  
20 “presumptively reasonable”). The benchmark may be adjusted upward or  
21 downward based on several factors, including: (1) the results achieved; (2) the risk  
22 of litigation; (3) the skill required; (4) the quality of work; (5) the contingent nature  
23 of the fee and the financial burden; and (6) the awards made in similar cases.  
24 *Vizcaino*, 290 F.3d at 1048-50; *Wren v. RGIS Inventory Specialists*, No. C-06-  
25 05778 JCS, 2011 WL 1230826, at \*27-28 (N.D. Cal. Apr. 1, 2011); *Vasquez v.*  
26 *Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 492 (E.D. Cal. 2010) . In the  
27 settlement approval context, the class members’ reaction to the requested fee also is  
28 a relevant factor. *In re Heritage Bond Litig.*, No. 02-ML-1475-DT(RCX), 2005

1 WL 1594389, at \*15 (C.D. Cal. June 10, 2005) (“absence of objections from the  
2 class is also a factor in determining the proper fee award”). The “usual range” of  
3 common fund awards is 20-30%. *Vizcaino*, 290 F.3d at 1047-50.

4 **1. The Requested Fee Is Reasonable Under the Common Fund**  
5 **Doctrine**

6 Class Counsel respectfully requests that the Court approve the requested fees  
7 and costs to be paid in this action. Class Counsel seeks an award of 16% of the  
8 total value of the common fund. Courts have long recognized the “common fund”  
9 or “common benefit” doctrine, under which attorneys who create a common fund or  
10 benefit for a group of persons may be awarded their fees and costs to be paid out of  
11 the fund. *See e.g., Hanlon*, 150 F.3d at 1029; *Staton*, 327 F.3d at 972 (“[A] lawyer  
12 who recovers a common fund for the benefit of persons other than himself or his  
13 client is entitled to a reasonable attorney’s fee from the fund as a whole,” quoting  
14 *Boeing Co.*, 444 U.S. at 478 ); *In re Activision Sec. Litig.*, 723 F. Supp. 1373,  
15 1378-79 (N.D. Cal. 1989). Here, the Stipulation of Settlement sets forth a specific  
16 lump sum allocation to the Class (through \$750,000 in discounted admission prices  
17 to the 2017 and, potentially, 2018 County Fairs). In this context, the percentage of  
18 common fund doctrine appropriate.

19 Where the settlement applies distribution formulas by which each class  
20 member who submits a valid claim will receive a mathematically ascertainable  
21 payment, application of the percentage of common fund doctrine is appropriate.  
22 *See Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491 (E.D.Cal.2010).  
23 Such an allocation is analogous to the compensation structure here, where those  
24 persons who elect to attend the 2017 and 2018 County Fairs will receive a discount  
25 off the admission prices.

26 In the Ninth Circuit, the benchmark for percentage of recovery awards is 25  
27 percent of the total settlement award, which may be adjusted up or down. *Hanlon*,  
28 150 F.3d at 1029; *Ross v. U.S. Bank Nat'l Ass'n*, No. C 07–02951 SI, 2010 WL  
3833922, at \*2 (N.D.Cal. Sept. 29, 2010) (stating selection of benchmark must be

1 based on all circumstances of the case). In “megafund” cases of \$50–100 million,  
2 fees more commonly will be under the 25 percent benchmark in this Circuit. *Lopez*  
3 *v. Youngblood*, No. CV–F–07–0474 DLB, 2011 WL 10483569, at \*13 (E.D.Cal.  
4 Sept.2, 2011). In contrast, in cases under \$10 million, the awards more frequently  
5 will exceed the 25 percent benchmark. *Id.*

6 Here, counsel’s requested 16 percent award falls well below the 25 percent  
7 benchmark. Factors that courts consider in awarding attorneys’ fees (and which  
8 may justify departure from the benchmark) include: (1) the result obtained; (2)  
9 counsel's efforts, experience, and skill; (3) the complexity of the issues; (4) the risks  
10 of nonpayment assumed by counsel; (5) the reaction of the class; (6) non-monetary  
11 benefits, such as clarification of certain points of law; and (7) comparison with the  
12 lodestar. *Vizcaino*, 290 F.3d at 1048–50. Additional factors include whether  
13 counsel receives a disproportionate distribution of the settlement, whether the  
14 parties have agreed to a “clear sailing” arrangement, as here, whereby defendant  
15 will not object to counsel's request for fees, and whether any fees not awarded will  
16 revert to defendant rather than be added to the class fund. *Bluetooth*, 654 F.3d at  
17 947.

18 **a. The Result Obtained**

19 The result obtained is a significant factor to be considered in making a fee  
20 award. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933, 76 L.Ed.2d 40  
21 (1983); *Wilcox v. City of Reno*, 42 F.3d 550, 554 (9th Cir.1994). Courts have  
22 consistently recognized that the result achieved is a major factor to be considered in  
23 making a fee award. *Hensley v. Eckerhart*, 461 U.S. 424, 436, 103 S.Ct. 1933,  
24 1941 (1983) (“most critical factor is the degree of success obtained”); *In re King*  
25 *Resources Co. Sec. Litig.*, 420 F. Supp. 610, 630 (D. Colo. 1976) (“the amount of  
26 the recovery, and end result achieved are of primary importance, for these are the  
27 true benefit to the client”); *Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-  
28 48 (S.D. Fla. 1988) (“The quality of work performed in a case that settles before

1 trial is best measured by the benefit obtained.”), *aff'd*, 899 F.2d 21 (11th Cir. 1990).  
2 Indeed, many courts have recognized that the most critical factor for determining  
3 the reasonableness of a fee award is the overall result and benefit to the class from  
4 the settlement. *In Re Omnivision Technologies, Inc.*, 2008 WL 123936, at \*9 (N.D.  
5 Cal. 2008); *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13627, at \*27 (C.D.  
6 Cal. 2005).

7 Class Counsel achieved an exceptional result in this case, under all the  
8 circumstances. The parties reached a non-collusive, arms-length settlement, with  
9 the assistance of a respected Magistrate Judge. Gaines Decl. at ¶¶ 28-33.  
10 Moreover, while the Association did not dispute that it in fact printed prohibited  
11 information on customer receipts, it strongly denied liability for statutory damages,  
12 challenged Plaintiff’s ability to certify the class and prove a willful violation of  
13 FACTA. Continued litigation of this lawsuit presented Plaintiff with substantial  
14 legal risks of certifying the class, proving liability and defeating any appeals  
15 relating to liability, damages or class certification. *Id.*

16 The Settlement provides an excellent result for class members who suffered  
17 no actual monetary loss as a result of the Association’s conduct. Class Counsel in  
18 this case negotiated a settlement which ensures that Class Members (and others  
19 who attend the 2017 and, potentially 2018 County Fairs) will receive a real cash  
20 benefit. The admission fee for all attendees of the 2017 (and potentially 2018)  
21 County Fair shall be reduced fifty (50) cents from the then-current fair market value  
22 of such admission prices as determined by the Neutral Expert or as otherwise  
23 agreed upon between Class Counsel and the Association and the Association’s  
24 Counsel (up to \$750,000 reduction cap). Gaines Decl. at ¶ 32.

25 If the Action had not settled and, *if* Plaintiff succeeded in overcoming the  
26 significant hurdle of class certification *and* proved the Association’s liability at  
27 trial, the class members would have been seeking FACTA statutory damages,  
28 which are limited to between \$100 and \$1,000. 15 U.S.C. § 1681n(a)(1)(A). The

1 Settlement provides the class members with a monetary payment and does so at this  
2 juncture, avoiding the very real risk of not succeeding at the liability phase, which  
3 likely would take years to determine. These are significant benefits for the Class  
4 Members and the efficiency with which this litigation was conducted and resolved  
5 should be rewarded. *See* Gaines Decl. at ¶ 33; *see also, e.g., Heritage Bond*, 2005  
6 U.S. Dist. LEXIS 13627, at \*27-28 (median amounts recovered in settlement of  
7 shareholder class actions were between 2%-3% of possible damages).

8 **b. Counsel’s Efforts, Experience and Skill**

9 The complexity of issues and skills required may weigh in favor of a  
10 departure from the benchmark fee award. *See In re Heritage Bond Litig.*, 2005  
11 U.S. Dist. LEXIS 13555, at \*66 (C.D. Cal. June 10, 2005) (“Courts have  
12 recognized that the novelty, difficulty and complexity of the issues involved are  
13 significant factors in determining a fee award”). Class Counsel is experienced in  
14 complex class litigation including many FACTA and other consumer and  
15 employment class actions. *See* Gaines Decl. at ¶¶ 2-6, 28-33. Class Counsel’s  
16 skills in developing the factual record and persuading the Association and Solar of  
17 the costs and risks of prolonged litigation were helpful in achieving the Settlement.  
18 Through their skill and experience, Class Counsel was able to obtain a settlement  
19 that provides an outstanding result for the Class Members.

20 **c. Complexity and Novelty of the Issues**

21 Class Counsel is unaware of any case where a defendant has been found  
22 liable for a willful violation of FACTA. Gaines Decl. at ¶ 34. Class Counsel  
23 therefore faced complex and novel issues concerning the interpretation of FACTA  
24 and the requirements for a “willful” violation of FACTA and determining how best  
25 to litigate the Action so that willful violations could be established on a class basis.

26 *Id.*

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**d. The Risks Of Nonpayment Assumed By Counsel**

From the outset of the case to the present, prosecution of this action has involved significant financial risk for Class Counsel. Gaines Decl. at ¶ 26. Class Counsel undertook this matter solely on a contingent basis, with no guarantee of recovery. Class Counsel has placed at risk their own resources to prosecute this action with no guarantee of success. Gaines Decl. at ¶¶ 26-27. The risks of this case are apparent in the expected battles over class certification and on the merits of the action. Even if Plaintiff would have succeeded at certification, there was no assurance that Plaintiff would succeed at trial. Despite such challenges, Class Counsel were able to persuade the Association and Solar that they faced significant exposure such that they were willing to provide \$925,000 in settlement value to settle Plaintiff's claims.

Class Counsel's commitment to this litigation should not be overlooked in assessing the reasonableness of the fee request. Class Counsel was forced to forego other employment in order to devote the time necessary to pursue this litigation. See Gaines Decl. at ¶ 35.

**e. Size of the Total Settlement Value**

The Parties have agreed to settle this matter for a settlement package valued at \$925,000. Fee award percentages generally are higher in cases where the common fund is relatively small, *i.e.*, below \$10 million. *Van Vranken v. Atlantic Richfield Co.*, 901 F. Supp. 294, 297-98 (N.D. Cal. 1995) (percentages of more than 30% tended to be awarded in cases with class funds of less than \$10 million); *Craft v. Cnty. of San Bernardino*, 624 F. Supp. 2d 1113, 1127 (C.D. Cal. 2008) ("Cases of under \$10 Million will often result in fees above 25%."). In settlements of this size, fee percentages above the 25% benchmark are commonly awarded. *Van Vranken*, 901 F. Supp. at 297-98. Notwithstanding the size of the total common fund in this case, the 16% award requested is reasonable.

1           **C. A Cross-Check Under The Lodestar Method Confirms The**  
2           **Reasonableness Of The Fee Requested**

3           When the common fund theory is applied, courts may “cross-check” the  
4           percentage of the common fund against the lodestar to ensure reasonableness of the  
5           fee award. *Glass v. UBS Fin. Servs., Inc.*, 331 F. App’x 452, 456 (9th Cir. 2009)  
6           (approving the district court’s “informal lodestar cross-check” for confirming the  
7           reasonableness of the percentage award); *Vizcaino*, 290 F.3d at 1050 (similar). The  
8           goal of both the lodestar and percentage of the common fund methodologies is the  
9           determination of a reasonable fee that is consistent with market rates. *In re*  
10          *Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 109 F.3d  
11          602, 607 (9th Cir. 1997) (“Reasonableness is the goal, and mechanical or formulaic  
12          application of either method, where it yields an unreasonable result, can be an abuse  
13          of discretion.”); *Matter of Cont’l Illinois Sec. Litig.*, 962 F.2d 566, 568 (7th Cir.  
14          1992) (a court should “determine what the lawyer would receive if he were selling  
15          his services in the market rather than being paid by court order.”); *Vizcaino v.*  
16          *Microsoft Corp.*, 142 F. Supp. 2d 1299, 1304 (W.D. Wash. 2001) *aff’d*, 290 F.3d  
17          1043 (9th Cir. 2002) (same).

18          A “lodestar” calculation multiplies the number of hours reasonably  
19          expended on the litigation by counsel’s reasonable hourly rates. *In re Bluetooth*,  
20          654 F.3d at 941. That lodestar calculation, however, is only the starting point for  
21          determining an appropriate fee. *Id.*; *Staton*, 327 F.3d at 965; *City of Burlington v.*  
22          *Dague*, 505 U.S. 557, 562 (1992). A court may reduce or enhance the lodestar  
23          figure based on several “reasonableness” factors, including the following: 1) the  
24          quality of the representation; 2) the benefit obtained for the class; 3) the complexity  
25          and novelty of the issues presented; and 4) the risk of non-payment. *In re*  
26          *Bluetooth*, 654 F.3d at 942, citing *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1029  
27          (9th Cir. 1998). Here, Class Counsel seeks a small enhancement of the lodestar,  
28          yielding a multiplier of 1.56. The “reasonableness” factors are addressed in section



1 IV.B.1 above and militate in favor of awarding Class Counsel 16% of the common  
2 fund as a reasonable fee award.

3 Class Counsel will invest over 198 hours of attorney time litigating this class  
4 action. Gaines Decl. at ¶¶ 38. Class Counsel calculates its lodestar be \$93,050  
5 based on reasonable hourly rates. Gaines Decl. at ¶¶ 40-45. This amount includes a  
6 conservative projection of the time attorneys at Gaines & Gaines, APLC will  
7 expend finalizing and filing this motion, preparing and filing the final approval  
8 motion and attending the Final Fairness Hearing, and making sure that the  
9 settlement is successfully administered. The \$145,130.29 fee award requested  
10 represents Class Counsel's lodestar with a multiplier of 1.56. Gaines Decl. at ¶ 48.  
11 In light of Class Counsel's reasonable hourly rates and reasonable hours worked, in  
12 addition to the substantial benefits obtained for the class, the quality of  
13 representation, complexity of the issues, and risk of non-payment, the \$145,130.29  
14 fee request is reasonable.

15 **1. Class Counsel's Hourly Rates are Reasonable**

16 Under the lodestar method, courts should apply rates commensurate with  
17 hourly rates for private attorneys conducting non-contingent litigation of the same  
18 type. *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 979 (9th Cir. 2008).  
19 Ordinarily, reasonable hourly rates are based on each attorney's current hourly  
20 rates. *Vizcaino*, 290 F.3d at 1051 ("calculating fees at [current hourly  
21 rates]...compensate[s] for delay in receipt of payment").

22 Many Courts in the Los Angeles area (where Class Counsel are based), the  
23 San Francisco Bay Area, and other counties throughout California have approved  
24 attorneys' rates at Gaines & Gaines as follows: \$300 per hour for Evan S. Gaines, a  
25 third year associate; \$350 per hour for Sepideh Ardestani, a fifth year associate with  
26 an LLM; \$450 per hour for Daniel F. Gaines, a tenth year lawyer (and managing  
27 shareholder of the firm); \$500 per hour for Alex P. Katofsky, a 16 year lawyer; and  
28

1 \$650 per hour for Kenneth S. Gaines, a pillar of the Los Angeles legal community  
2 with nearly 45 years in law practice. Gaines Decl. at ¶¶ 40-45.

3 All of the attorneys that contributed work to this action specialize in complex  
4 class actions and regularly litigate cases in California federal and state courts. The  
5 partners managing the litigation have extensive histories of success in litigating  
6 high-stakes complex class action cases. Gaines Decl. at ¶¶ 40-48. Class Counsel's  
7 years of class action experience and expertise led to Plaintiff's success in resolving  
8 the action early in the litigation. *See id.* Reaching a settlement in the face of the  
9 Defendants' hard fought opposition to the class claims is evidence of Class  
10 Counsel's skill and high quality of representation.

## 11 **2. Class Counsel's Hours are Reasonable**

12 Class Counsel has spent approximately 127 hours litigating this case to date.  
13 Gaines Decl. at ¶ 39. Class Counsel expects to spend at least another 72 hours over  
14 the next six months (approximately 12 hours per month on average through the  
15 conclusion of administration) preparing the final approval motion, preparing for and  
16 attending the Final Approval Hearing, and dealing with claims administration  
17 issues through the conclusion of this matter. *Id.* Reasonable hours include, in  
18 addition to time spent during litigation, the time spent before the action was filed,  
19 including time spent interviewing the clients, investigating the facts and the law,  
20 preparing the initial pleadings and litigating the case. *Webb v. Board of Educ.*, 471  
21 U.S. 234 (1985). In addition, the fee award should include time spent to establish  
22 and support the attorneys' fee claim. *Serrano v. Priest* ("*Serrano IV*"), 32 Cal.3d  
23 621, 639 (1982). The summarized time entries appended to the Gaines Declaration  
24 at Exhibit C describe the work performed by Class Counsel, which included fact  
25 investigation, drafting the complaint, conducting discovery, drafting a  
26 mediation/ENE brief, preparing for and attending the ENE, negotiating the  
27 settlement, and preparing this fee motion, among other tasks necessary to this  
28 litigation. *See* Gaines Decl. at ¶¶ 40-48. This showing is more than sufficient to

1 establish Class Counsel's lodestar. *Lobatz v. U.S. Cellular of Cal., Inc.*, 222 F.3d  
2 1142, 1148-49 (9th Cir. 2000) (detailed time sheets were not required where fees  
3 were agreed upon in settlement agreement); *see also, Wershba v. Apple Computer,*  
4 *Inc.*, 91 Cal. App. 4th 224, 255 (2001) (detailed time sheets are not required for fee  
5 awards).

### 6 **3. A Multiplier Is Warranted Here**

7 Based on the reasonable hourly rates and hours suggested by Class Counsel,  
8 the requested fee award represents a multiplier of 1.56 – an amount well within the  
9 accepted range for class action cases. *See 4 Newberg on Class Actions* 4th (4th ed.  
10 2002) § 14.6 (“[m]ultiples ranging from one to four frequently are awarded in  
11 common fund cases when the lodestar method is applied.”). Class Counsel seek a  
12 fee that is fair to both them and the Class. Based on the factors detailed herein, the  
13 proposed fee of \$145,130.29 is fair to Class Counsel and fair to the Class.

### 14 **D. Class Counsel's Request for Costs is also Reasonable**

15 In the course of this litigation, Class Counsel has incurred out-of-pocket costs  
16 of \$3,369.71 to date. Class Counsel expects to incur additional costs totaling  
17 \$1,500 before the conclusion of the matter. Gaines Decl. at ¶ 49, Ex. D. Generally,  
18 recoverable costs include “out-of-pocket expenses that would normally be charged  
19 to a fee paying client.” *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir. 1994)  
20 (internal citations and quotations omitted). As demonstrated in the Gaines  
21 Declaration submitted herewith, the incurred costs included filing fees, travel  
22 expenses, parking fees, research fees, courier charges, mailing costs, and Federal  
23 Express charges. Gaines Decl. at ¶ 49, Exhibit D (detailing of all categories of  
24 costs incurred). Such costs are appropriate for cost reimbursement in these types of  
25 cases. *See e.g., In re United Energy Corp. Sec. Litig.*, MDL No. 726, 1989 WL  
26 73211, at \*6 (C.D. Cal. 1989) (quoting *Newberg, Attorney Fee Awards*, § 2.19  
27 (1987)); *see also, In re GNC Shareholder Litig.*, 668 F. Supp. 450, 452 (W.D. Pa.  
28 1987).

1 The costs incurred by Class Counsel in this litigation benefited Class  
2 Members. In light of the litigation costs that Class Counsel needed to incur to  
3 prosecute this action and the positive reaction of Class Members, the request for  
4 reimbursement of \$4,869.71 in Class Counsel's costs is reasonable and should be  
5 granted.

6 **E. The Enhancement Award for the Class Representative is Reasonable**

7 Plaintiff requests a service award of \$5,000. Service awards are common in  
8 class action cases. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)  
9 (“Incentive awards are fairly typical in class action cases.”); *In re Mego Fin. Corp.*  
10 *Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000); *Van Vranken v. Atl. Richfield Co.*,  
11 901 F. Supp. 294, 299 (N.D. Cal. 1995); *Ingram v. The Coca-Cola Co.*, 200 F.R.D.  
12 685, 694 (N.D. Ga. 2001) (“Courts routinely approve incentive awards to  
13 compensate named plaintiffs for the services they provided and risks they incurred  
14 during the course of the class action litigation”). An award to the named plaintiff is  
15 “intended to compensate class representatives for work done on behalf of the class,  
16 to make up for financial or reputational risk undertaken in bringing the action, and,  
17 sometimes, to recognize their willingness to act as a private attorney general.”  
18 *Rodriguez*, 563 F.3d at 958-59. A service award is appropriate as an incentive to the  
19 named plaintiff to participate in the suit. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th  
20 Cir. 1998).

21 The approval of service awards falls squarely within the discretion of the  
22 Court. See *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d at 463; *Van Vranken*, 901 F.  
23 Supp. at 299. In exercising that discretion, district courts are “to scrutinize  
24 carefully the awards so that they do not undermine the adequacy of the class  
25 representatives.” *Radcliffe v. Experian Info. Solutions Inc.*, 715 F.3d 1157, 1163  
26 (9th Cir. 2013).

27 Incentive awards of \$5,000 are typical in the District Court for cases like this  
28 one, where the class representative initiated the lawsuit, contributed effort to the

1 litigation, participated as necessary to advance the interests of the class, attended a  
2 settlement conference, and remained an active, engaged, and willing participant in  
3 the lawsuit for the benefit of Class Members. Gaines Decl. at ¶ 50. *See generally*  
4 the Declaration of Gillian Brown. *See Ross v. Bar None Enterprises, Inc.*, No.  
5 2:13-CV-00234-KJM, 2015 WL 1046117, at \*11 (E.D. Cal. Mar. 10, 2015)  
6 (approving a \$5,000 enhancement award in a class action); *Barbosa v. Cargill Meat*  
7 *Solutions Corp.*, 297 F.R.D. 431, 455 (E.D. Cal. 2013) (approving enhancement  
8 awards of \$5,000 each for two class representatives); *Franco v. Ruiz Food*  
9 *Products, Inc.*, No. 1:10-CV-02354-SKO, 2012 WL 5941801, at \*23 (E.D.Cal.  
10 Nov. 27, 2012) (approving a \$7,000 enhancement award in a class action); *Murillo*  
11 *v. Pac. Gas & Elec. Co.*, No. 2:08-1974 WBS GGH, 2010 WL 2889728, at \*12  
12 (E.D.Cal. July 21, 2010) (finding a \$10,000 enhancement award reasonable in a  
13 class action).

14 The requested modest enhancement award is a fair way to laud the efforts of  
15 the Class Representative and incentivize her and future consumers to pursue justice  
16 for others through the class action device. Had Ms. Brown pursued her claims on  
17 an individual basis, with a maximum value of \$1,000 (the maximum statutory  
18 damage award), she would have likely been able to obtain a fair resolution of her  
19 claims with a simple demand letter – no attorneys or litigation required. She chose  
20 to “fight the good fight” on behalf of others who likely were unaware of the  
21 Association’s actions altogether. She will have waited for nearly two years to  
22 receive any payment (by the time the settlement is finally approved and payments  
23 are disbursed). The requested enhancement is fair to her and fair to the Class and  
24 should be approved.

## 25 **V. CONCLUSION**

26 For the foregoing reasons, Plaintiff respectfully requests that the Court grant  
27 this motion and approve (1) a total payment of \$150,000 to Class Counsel of which  
28 \$145,130.29 represents Class Counsel’s attorneys’ fees and \$4,869.71 represents

1 reimbursement of Class Counsel's out-of-pocket costs incurred in the litigation of  
2 this action, and (2) payment of an enhancement award of \$5,000 to Plaintiff and  
3 Class Representative Gillian Brown.

4 Dated: January 25, 2017 GAINES & GAINES, APLC

5  
6 By: /s/Alex P. Katofsky  
7 ALEX P. KATOFSKY  
8 Attorneys for Plaintiff  
9 Gillian Brown and the Proposed Class  
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