

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**

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

14 Plaintiff,

15 v.

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

18 Defendants.
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Case No.: 15cv2578-JAH (DHB)

Honorable David H. Bartick

**NOTICE OF MOTION AND
 UNOPPOSED MOTION FOR
 PRELIMINARY APPROVAL OF
 CLASS ACTION SETTLEMENT**

DATE: October 13, 2016
TIME: 3:30 p.m.
COURTROOM: 1D

TO THE COURT AND TO ALL PARTIES:

PLEASE TAKE NOTICE that on October 13, 2016, at 3:30 p.m., in Courtroom Courtroom 1D of the United States District Court for the Southern District of California, located at 221 W. Broadway, San Diego, California 92101, Plaintiff Gillian Brown will, and hereby does, move this Honorable Court for an order:

- (1) of preliminary approval and conditionally certifying a proposed settlement class;
- (2) directing that notice of the proposed settlement agreement be provided through the mechanism agreed to by and between the parties;
- (3) scheduling a final fairness hearing for final approval of the proposed class action settlement.

This motion will be based on this Notice and accompanying Memorandum of Points and Authorities, the Declaration of Daniel F. Gaines, the Class Action Settlement Agreement and Release (including exhibits), all filed herewith, and on such further evidence and argument as may be presented at the hearing.

DATED: September 7, 2016

Respectfully submitted,
GAINES & GAINES,
A Professional Law Corporation

By: /s/ Alex P. Katofsky
DANIEL F. GAINES
ALEX P. KATOFSKY
Attorneys for Plaintiff Gillian Brown
and Proposed Class Counsel

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1 **I. INTRODUCTION**

2 The parties to this action are pleased to report that they have reached a fair and
3 reasonable agreement to settle this matter following the exchange of discovery and
4 arm’s-length negotiations with the assistance of a skilled Magistrate Judge. Plaintiff
5 Gillian Brown (“Plaintiff” or “Brown”), on behalf of herself and others similarly
6 situated, Defendant 22nd District Agricultural Association (“Defendant” or
7 “Association”), and Third Party Defendant Solar On Set, LLC (“Solar”) (Brown,
8 Association, and Solar are collectively referred to herein as the “Parties”) seek
9 preliminary approval of their proposed class action settlement.

10 The settlement provides real and valuable relief to visitors of the San Diego
11 County Fair (“County Fair”).

12 The Association is a government entity of the State of California, the principal
13 purpose of which is managing the Del Mar State Fairgrounds (“Fairgrounds”) and the
14 annual County Fair which takes place there every summer. Plaintiff brought this
15 action against the Association, after being subject to its failure to truncate the
16 expiration dates on her credit card receipt when she made a purchase at the County
17 Fair in July, 2015. The Complaint alleges that the Association violated the Fair and
18 Accurate Credit Transaction Act (“FACTA”), itself an amendment to the Fair Credit
19 Reporting Act, 15 U.S.C. §§ 1681, *et seq.* (“FCRA”), by printing a receipt containing
20 the expiration date of Plaintiff’s credit card.¹

21 During the applicable statutory period, September 10, 2010 through the date of
22 preliminary approval, Defendant estimates that it generated approximately 100,000
23 allegedly defective receipts failing to properly truncate credit and debit cards’
24

25
26 ¹ Defendant does not believe that any liability to Plaintiff or Class Members exists, or
27 that Plaintiff or Class Members are entitled to any recovery. In addition, Defendant
28 contends that Plaintiff’s claims are not suitable for class action treatment. However,
Defendant has made a business decision to resolve the matter on the terms set forth in
the settlement agreement submitted hereto for approval by this Court.

1 expiration dates as required by FACTA². Plaintiff alleges that the Defendant's
2 actions were willful within the meaning of FACTA and that she and the Class are
3 entitled to millions of dollars in statutory penalties, plus attorneys' fees, punitive
4 damages, and costs. Declaration of Daniel F. Gaines in Support of Unopposed
5 Motion for Preliminary Approval of Class Action Settlement ("Gaines Decl.") at ¶
6 27.

7 The Parties have agreed to settle this matter for a settlement package valued at
8 \$925,000. As a result of this settlement, Defendant has agreed that the practice at the
9 heart of this litigation – the failure to redact private information from consumers'
10 credit and debit card receipts – has ceased and will not occur in the future. Gaines
11 Decl. at ¶ 25.

12 Although the Parties understand that no Class Member, including Plaintiff, has
13 suffered any actual damages from the violations alleged, the compromise provides
14 each and every attendee of the 2017 San Diego County Fair reduced entry fees – fifty
15 cents below the then-current fair market value of such admission prices, as to be
16 determined by an expert or otherwise agreed upon between Plaintiff and the
17 Association. Gaines Decl. at ¶ 28. To the extent the total discount at the 2017
18 County Fair does not reach \$750,000, additional discounts will be extended for 2018
19 County Fair admission prices so the \$750,000 cumulative discount is reached.
20 Gaines Decl. at ¶ 29.

21 This proposed settlement³ resolves all of the Named Plaintiff's and Settlement
22 Class members' claims against Defendant and Solar (and the Third Party Complaint
23 by the Association against Solar), and satisfies all of the criteria for preliminary
24

25 _____
26 ² The truncation issue affected only a small portion of the total receipts issued by the
Association and other vendors at the County Fairs between 2011 and 2015.

27 ³ The Parties' Class Action Settlement Agreement and Release ("Settlement",
28 "Stipulation", or "Stip.") is attached to the Declaration of Daniel F. Gaines, submitted
herewith as **Exhibit B**.

1 settlement approval under federal law, and is fair, reasonable, and adequate.
2 Accordingly, the Parties request that the Court:

- 3 1. Provisionally certify the proposed settlement class for settlement
4 purposes;
- 5 2. Grant preliminary approval of the proposed Settlement;
- 6 3. Approve the proposed notice program and the forms proposed by the
7 Parties (collectively the “Settlement Documents”);
- 8 4. Confirm the appointment of Plaintiff Gillian Brown as Class
9 Representative;
- 10 5. Confirm the appointment of Kenneth S. Gaines, Daniel F. Gaines, and
11 Alex P. Katofsky of Gaines & Gaines, APLC as Settlement Class
12 Counsel;
- 13 6. Confirm the appointment of Simpluris, Inc. as settlement administrator;
- 14 7. Set deadlines for issuing class notice and for opting out of, or objecting
15 to, the settlement; and
- 16 8. Schedule a final approval hearing.

17 **II. PROCEDURAL HISTORY AND FACTUAL BACKGROUND**

18 On September 30, 2016, Plaintiff initiated the Action by filing a putative class
19 action Complaint in the Superior Court of the State of California, County of San
20 Diego entitled *Gillian Brown v. 22nd District Agricultural Association*, Case No. 37-
21 2015-00033027-CU-MC-CTL. The Complaint alleges that the Association violated
22 FACTA by printing a receipt containing the expiration date of Plaintiff’s credit card
23 used in a transaction at the 2015 County Fair. Gaines Decl. at ¶ 7; Stip. 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 ¶ 8; Stip. at ¶ 1.5.

26 On November 17, 2015, the Association removed the Action to United States
27 District Court for the Southern District of California. Gaines Decl. at ¶ 9; Stip. at ¶
28 1.6.

1 On February 8, 2016, the Association filed its Third Party Complaint (“Third
2 Party Complaint”) against Solar alleging the following causes of action against Solar:
3 Breach of Contract, Breach of the Implied Covenant of Good Faith and Fair Dealing,
4 Express Contractual Indemnity, Comparative Indemnity, Equitable Indemnity, and
5 Declaratory Relief. Gaines Decl. at ¶ 10; Stip. at ¶ 1.7.

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

14 The Association further alleges that, had any violations of FACTA or the
15 FCRA occurred at the County Fair, which it expressly denies, such violations were
16 the direct result of actions and omissions of Solar. Gaines Decl. at ¶ 12; Stip. at ¶ 1.9.

17 Solar denies all material allegations of the Third Party Complaint. Solar
18 specifically disputes that Solar breached a contract with the Association, disputes that
19 Solar breached an implied covenant of good faith and fair dealing with the
20 Association, disputes that Solar violated any provision of FACTA or the FCRA, and
21 disputes that the Association, Plaintiff, and putative class members are entitled to any
22 relief from Solar. Gaines Decl. at ¶ 13; Stip. at ¶ 1.10.

23 The Parties recognize and acknowledge the expense and length of continued
24 proceedings necessary to prosecute the claims through trial, possible appeals and
25 ancillary actions. The Parties also have taken into account the uncertain outcome and
26 the risk of any litigation, especially in multi-party actions such as this proceeding, as
27 well as the difficulties and delays inherent in such litigation. The Parties also are
28 mindful of the potential problems of proof in establishing the claims and defenses

1 asserted in this proceeding and the uncertainty of whether and to what extent the
2 Association and Solar have insurance coverage or other available funding in the event
3 of any success in this litigation. Gaines Decl. at ¶ 14; Stip. at ¶ 1.11.

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

15 At all times, the Parties' settlement negotiations have been non-collusive,
16 adversarial, and at arm's length. Gaines Decl. at ¶ 19.

17 Discussions between counsel for the Parties, informal discovery, as well as the
18 investigation and evaluation of the claims of Plaintiff by the Parties, have permitted
19 each side to assess the relative merits of the claims and the defenses to those claims.
20 The Parties agree that the above-described investigation and evaluation, as well as the
21 information exchanged during settlement negotiations and mediation, are more than
22 sufficient to assess the merits of the respective Parties' positions and to compromise
23 the issues on a fair and equitable basis. Based on their own independent
24 investigations and evaluations, Class Counsel is of the opinion that the consideration
25 and terms of the Settlement as described herein, considering the risk of loss on class
26 certification, the risk of loss on the merits, the risk of Defendant's ability to pay a
27 substantial judgment, and the risk of a reduction in any damages sought or awarded,
28 is fair, reasonable, and adequate in light of all known facts and circumstances, and is

1 in the best interests of the Class.

2 **III. SUMMARY OF SETTLEMENT TERMS**

3 The significant terms of Stipulation of Settlement are set forth below.

4 **A. The Settlement Class**

5 The Settlement Class is defined as:

6 [T]hose persons who were issued an electronically printed
7 debit and/or credit card receipt during the San Diego
8 County Fair at the Del Mar Fairgrounds in violation of the
9 truncation requirements of FACTA at any time between
10 September 30, 2010 and the date of preliminary approval of
11 [the Settlement].

12 Stip. at ¶ 2.31.

13 **B. Economic Relief**

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

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

28 The Common Fund. The Association and Solar shall also pay a Common Fund
of exactly \$175,000 (\$170,000 by the Association and \$5,000 by Solar) which shall

1 be used to compensate (1) the Settlement Administrator for its services in providing
2 publication and website notice and other settlement administration services (as
3 detailed herein), (2) Plaintiff Gillian Brown for an incentive award (subject to Court
4 approval), (3) Class Counsel for their attorneys' fees and costs (subject to Court
5 approval), and (4) the Neutral Expert described above. Any unawarded or
6 unrequested portion of the Common Fund shall be paid to a privacy protection-related
7 *cy pres* recipient to be proposed to the Court in connection with the Motion for Final
8 Approval.⁴ Stip. at ¶ 9.2(B).

9 **C. The Release by Plaintiff and Class Members**

10 The release, to which all Class Members (except for those who submit a valid
11 and timely request for exclusion) will be bound, is as follows:

12 All Releasing Parties will be deemed to have fully released
13 and forever discharged the Released Parties from any and
14 all claims, causes of action, suits, obligations, debts,
15 demands, agreements, promises, liabilities, damages, losses,
16 controversies, costs, expenses, and attorneys' fees of any
17 nature whatsoever, whether based on any federal law, state
18 law, common law, territorial law, foreign law, contract,
19 rule, regulation, any regulatory promulgation (including,
20 but not limited to, any opinion or declaratory ruling),
21 common law or equity, whether known or unknown,
22 suspected or unsuspected, asserted or unasserted, foreseen
23 or unforeseen, actual or contingent, liquidated or
24 unliquidated, punitive or compensatory, as of the Effective
25 Date, that arise out of or relate in any way to the Released
26 Parties' printing of information on receipts provided to
27 Settlement Class Members at the San Diego County Fair at
28 the Del Mar Fairgrounds in the City of Del at any time
between September 30, 2010 and the date of preliminary
approval of the settlement, to the fullest extent that those
terms are used, defined or interpreted by the FCRA,

⁴ The Association represents and warrants that its adult admission entrance fees between 2005 and 2016 are as stated in Exhibit 3 to the Settlement. The Association also represents that the attendance at the 2015 County Fair was no fewer than 1.5 million people.

1 including FACTA, relevant regulatory or administrative
2 promulgations and case law, including, but not limited to,
3 claims under or for a violation of the FCRA and any other
4 statutory or common law claim arising from the printing of
5 information on receipts provided to Plaintiff and/or
6 Settlement Class Members (collectively, the “Released
7 Claims”).

8 Stip. at ¶ 15.2.

9 **IV. PRELIMINARY SETTLEMENT APPROVAL PROCESS**

10 A class action may not be dismissed, compromised or settled without court
11 approval. Fed. R. Civ. P. (“FRCP”) 23(e). “The purpose of Rule 23(e) is to protect
12 the unnamed members of the class from unjust or unfair settlements affecting their
13 rights.” *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1100 (9th Cir.2008).

14 Judicial proceedings under the Federal Rules of Civil Procedure have led to a
15 defined procedure and specific criteria for settlement approval in class actions that are
16 thoroughly described in the Manual for Complex Litigation (Fourth) (“*Manual*
17 (*Fourth*)”) § 21.62 (2004). Federal Rule of Civil Procedure 23(e) sets forth a “two-
18 step process in which the Court first determines whether a proposed class action
19 settlement deserves preliminary approval and then, after notice is given to class
20 members, whether final approval is warranted.” *Nat’l Rural Telecomms. Coop. v.*
21 *DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004) (citing Manual for Complex
22 Litigation (Third) § 30.41 (1995)).

23 [T]he Court may grant preliminary approval of a settlement
24 and direct notice to the class if the settlement: (1) appears to
25 be the product of serious, informed, non-collusive
26 negotiations; (2) has no obvious deficiencies; (3) does not
27 improperly grant preferential treatment to class
28 representatives or segments of the class; and (4) falls within
the range of possible approval. *See Alvarado v. Nederend*,
2011 WL 90228, at *5 (E.D. Cal. Jan.11, 2011) (granting
preliminary approval of settlement in wage and hour class
action); *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666
(E.D.Cal.2008); *Collins v. Cargill Meat Solutions Corp.*,

1 2011 WL 837140, at *6 (E.D.Cal. Mar.9, 2011) (granting
2 preliminary approval of settlement in wage and hour class
3 action); Joseph M. McLaughlin, *McLaughlin on Class*
4 *Actions: Law and Practice* § 6.6 (7th ed. 2011)
5 (“Preliminary approval is an initial evaluation by the court
6 of the fairness of the proposed settlement, including a
7 determination that there are no obvious deficiencies such as
8 indications of a collusive negotiation, unduly preferential
treatment of class representatives or segments of the class,
or excessive compensation of attorneys. . . .”). Closer
scrutiny is reserved for the final approval hearing.

9 *Harris v. Vector Marketing Corp.*, 2011 WL 1627973, *7 (N.D. Cal. April 29, 2011).
10 *See also In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal.
11 2007); *Hanlon v. Chrysler Corp.*, 150 F. 3d 1011, 1027 (9th Cir. 1998) (the court’s
12 task is to “balance a number of factors,” including “the risk, expense, complexity, and
13 likely duration of further litigation,” “the extent of discovery completed and the stage
14 of the proceedings,” and “the amount offered in settlement”). This procedure for
15 preliminary approval of settlement agreements, endorsed by the leading class action
16 commentator, Professor Newberg, and commonly used by Federal courts, safeguards
17 class members’ procedural due process rights and enables a court to fulfill its role as
18 the “guardian” of the class. *See* 4 Alba Conte & Herbert B. Newberg, *Newberg on*
19 *Class Actions* (“*Newberg*”), § 11.22 (4th ed. 2002).

20 The approval or rejection of the proposed settlement is committed to the
21 Court’s sound discretion. *See Class Plaintiffs v. City of Seattle*, 955 F. 2d 1268, 1276
22 (9th Cir. 1992) (in the context of a class action settlement, appellate court cannot
23 “substitute [its] notions of fairness for those of the [trial] judge and the parties to the
24 agreement,” and will reverse only upon a strong showing of abuse of discretion).

25 The Court’s preliminary evaluation of the proposed settlement purports to
26 determine whether it is within the permissible “range of reasonableness” and thus,
27 whether the notice to the class is appropriate. 4 *Newberg* § 11.25-26; *Manual for*
28 *Complex Litigation (Third)* (“*Manual (Third)*”) § 30.41 (1995).

1 **A. Provisional Certification of the Settlement Class**

2 The Parties request that the Court provisionally certify the proposed Settlement
3 Class. Stip. at ¶ 3.2. Provisional class certification is appropriate at the preliminary
4 approval stage where, as here, the proposed Settlement Class (as defined in the
5 parties' Settlement) has not previously been certified by the Court, and the
6 requirements for certification are met. 4 *Newberg* § 11.22; *see generally*, Gaines
7 Decl. at ¶¶ 30-39. Pragmatically, provisional class certification facilitates distribution
8 of notice on the terms of the proposed settlement and the date and time of the final
9 approval hearing to all settlement class members. *See Manual* (Third) § 30.41.

10 The additional rulings sought by this motion – approving the form, content and
11 dissemination of the class notice and scheduling a formal fairness hearing – facilitate
12 the settlement approval process, and are also traditionally made at this preliminary
13 approval stage. 4 *Newberg* § 11.26.

14 **B. Settlement Administration Timeline**

15 The following schedule sets forth a proposed sequence for the relevant dates
16 and deadlines embodied in the Settlement, conditioned upon this Court granting
17 preliminary approval of the proposed Settlement. This is outlined in the Proposed
18 Order filed herewith. *See Stip.* at ¶¶ 7.1, 8.1, 8.2:

19 Deadline for the Settlement Administrator to make 20 available to the public the Website for this Settlement 21 (exact requirements of Website are set forth in Paragraph 22 8.1(A) of the Stipulation)	No later than 45 calendar days after the entry of the Preliminary Approval Order
23 Last day for requests for exclusion from the settlement to 24 be postmarked by Class Members to the Settlement Administrator	60 calendar days after notice is initially made available to the Class Members
25 Last day for objections to the settlement to be postmarked 26 by Class Members to the Settlement Administrator	60 calendar days after notice is initially made available to the Class Members
27 Last day for Plaintiff to file application for attorneys' fees 28 and costs, and class representative's service payment	No later than 45 calendar days after the

1		entry of the Preliminary Approval Order
2		
3	Last day for Plaintiff to file motion for final approval of settlement	20 calendar days prior to final fairness hearing
4		
5	Hearing on motion for final approval of settlement and application for attorneys' fees and costs and class representative's service payment	No earlier than 135 calendar days after the Preliminary Approval Order is entered
6		
7		

8 **V. PRELIMINARY APPROVAL OF THE SETTLEMENT IS**
9 **APPROPRIATE**

10 The law favors settlement, particularly in class actions and other complex cases
11 where substantial resources can be conserved by avoiding the time, cost and rigors of
12 formal litigation. *See 4 Newberg* § 11.41 (and cases cited therein); *Van Bronkhorst v.*
13 *Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976).

14 Preliminary evaluation of class action settlements is intended to determine only
15 whether the proposed settlement is within the range of possible approval or whether it
16 is potentially fair, as the Court will make a final determination on adequacy at the
17 final approval hearing. *See Acosta v. Trans Union LLC*, 243 F.R.D. 377, 386 (C.D.
18 Cal. 2007); *In re Traffic Exec. Ass'n*, 627 F.2d 631, 633-34 (2d Cir. 1980); 4
19 *Newberg* § 11.25.

20 The Court thus has broad powers to determine whether a proposed settlement is
21 fair under the circumstances of the case, *see Torrasi v. Tucson Elec. Power Co.*, 8
22 F.3d 1370, 1375 (9th Cir. 1993); *Acosta*, 243 F.R.D. at 384 (citing *Yamamoto v.*
23 *Omiya*, 564 F.2d 1319, 1325 (9th Cir. 1977)), and preliminary approval of a
24 settlement agreement should be granted unless there are reasons to doubt its fairness
25 or there are other "obvious deficiencies" in the proposed settlement making it clear it
26 would not ultimately weather a final approval hearing. *See In re Prudential*
27 *Securities, Inc.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995).

1 To make this fairness determination, courts consider several relevant factors,
2 including the strength of the plaintiffs' case, the risk, expense, complexity and likely
3 duration of further litigation, the risk of maintaining class action status through trial,
4 the amount offered in settlement, the extent of discovery completed and the stage of
5 the proceedings, as well as the experience and views of counsel. *Torrisi*, 8 F.3d at
6 1375. This list of factors is not exclusive, however, and the court may balance and
7 weigh factors differently depending on the factual circumstances of each case. *See id.*
8 at 1376.

9 The *Manual* summarizes the preliminary approval criteria as follows:

10 If the preliminary evaluation of the proposed settlement
11 does not disclose grounds to doubt its fairness or other
12 obvious deficiencies, such as unduly preferential treatment
13 of class representatives or of segments of the class, or
14 excessive compensation for attorneys, and appears to fall
15 within the range of possible approval, the court should
16 direct that notice . . . be given to the Class Members of a
formal fairness hearing, at which arguments and evidence
may be presented in support of and in opposition to the
settlement.

17 *Manual* (Third) § 30.41; *see also* 4 *Newberg* § 11.25.

18 When examining settlement agreements, a presumption of fairness exists
19 where: (1) the settlement is reached through arm's-length bargaining; (2)
20 investigation and discovery are sufficient to allow counsel and the court to act
21 intelligently; (3) counsel is experienced in similar litigation; and (4) the percentage of
22 objectors is small. 4 *Newberg* § 11.41.

23 Here, the proposed Settlement falls well within the range of reasonableness as
24 the terms of the agreement are fair and adequate and provide a good result for
25 Plaintiff and Class Members, especially considering the complexities of the case, the
26 substantial risk inherent in non-certification, and the risks of not prevailing on the
27 merits at trial. *Gaines Decl.* at ¶¶ 19-26. Further, Plaintiff has engaged in an
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1 exchange of discovery, as well as extensive research into the applicable areas of law
2 and the unique defenses proffered by the Association, including some reserved for
3 governmental entities. The Parties have conducted informed, good faith, arms-length
4 negotiations with adequate access to necessary information, and did so with the
5 assistance of a highly regarded and experienced mediator. *See generally* Gaines
6 Decl. at ¶¶ 19-26.

7 Both Plaintiff's counsel and Defendant's counsel are experienced in class
8 action matters and are capable of assessing the strengths and weaknesses of claims
9 and the benefits of the proposed Settlement under the circumstances of the case and
10 in the context of a private, consensual agreement. Plaintiff's counsel believes the
11 Settlement offers a fair result to Class Members, commensurate with the risks of
12 further litigation. Accordingly, preliminary approval of the Settlement is appropriate.
13 Gaines Decl. at ¶ 2-6, 35-37.

14 **A. The Terms of the Proposed Settlement Provide Reasonable**
15 **Compensation for Plaintiff's and Class Members' Damages.**

16 Ultimately, a settlement should stand or fall on the adequacy of its terms. *In re*
17 *Corrugated Container Antitrust Litig.*, 643 F.2d 195, 211 (5th Cir. 1981). The
18 Settlement reflects an excellent compromise.

19 **1. The Settlement Provides a Significant Monetary Benefit to Class**
20 **Members**

21 During the applicable statutory period, September 10, 2010 through the date of
22 entry of the Preliminary Approval Order, it is estimated that Defendant generated
23 approximately 100,000 allegedly defective receipts at the 2011-2015 County Fairs.
24 As such, Plaintiff alleges that she and the Class are entitled to minimum statutory
25 penalties of \$10,000,000, plus attorneys' fees, punitive damages, and costs. Gaines
26 Decl. at ¶ 24. The Parties have agreed to settle this matter for a settlement package
27 valued at \$925,000. As a result of this settlement, Defendant has amended its
28 practices so that the practice at the heart of this litigation – the failure to redact

1 private information from consumers' credit and debit card receipts – will cease going
2 forward. Gaines Decl. at ¶ 25.

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

9 Attorneys' fees and costs are recoverable under FACTA (15 U.S.C. §
10 1681n(a)(3)), and Defendant and Solar have agreed to pay Plaintiff's counsel Court
11 awarded attorneys' fees and costs, not to exceed \$150,000, without opposition –
12 approximately 26% of the consideration to be paid under the Settlement, and well
13 below the Ninth Circuit common fund attorney fee benchmark of 25%. Stip. at ¶
14 2.20.

15 Further, Defendant and Solar have agreed to pay the named Plaintiff an
16 incentive award, not to exceed \$5,000, subject to the Court's approval. Stip. at ¶
17 2.20.

18 In addition, Defendant and Solar have agreed to pay all costs necessary to
19 administer the settlement and provide class notice as detailed in the Settlement
20 Agreement, estimated to be \$15,000. Stip. at ¶ 2.20.

21 Finally, Defendant and Solar have agreed to pay up to \$5,000 for a Neutral
22 Expert to consult and opine regarding the fair market value of admission prices of the
23 2017 and 2018 County Fairs, which will be used as a basis to compute the fifty-cent
24 reduction required by the Settlement. Stip. at ¶¶ 2.20, 2.21.

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1 **2. The Settlement’s Financial Terms Reflect a Fair Discount off the**
2 **Maximum Value of the Case Based on Litigation Risks, and The**
3 **Terms Are Far More Favorable Than Other Similar FACTA**
4 **Settlements**

5 While Plaintiff projects the exposure to the Association at up to \$10,000,000
6 (at the rate of \$100 per allegedly defective receipt issued), the discount proposed by
7 the Settlement is reasonable and fair in light of the facts of this case, the litigation
8 risks, the class certification risks, the fact that the Association is a government entity
9 funded in part by taxpayer dollars, and the settlement values in other similar FACTA
10 cases.

11 Class certification is challenging to obtain in FACTA cases, and when it can be
12 obtained, some Courts have declined to certify a class as broad as Plaintiff seeks. In
13 *Rowden v Pacific Parking Systems*, 282 F.R.D. 581, 587 (C.D. Cal. 2012), Judge
14 Carney declined to certify a class on FACTA claims, finding that a class action was
15 not a superior means to adjudicate the case, the class was not ascertainable, and a
16 class action would be unfair. In *Tchoboian v. FedEx Office and Print Services, Inc.*,
17 (C.D. Cal., No. 8:10-cv-01008-JAK-MLGx), Judge Kronstadt tentatively certified a
18 class on FACTA claims, but limited it to only those individuals who have maintained
19 their printed receipts displaying the allegedly improper digits with such transactions
20 and account numbers concerning only consumer cards (Docket no. 135, Civil
21 Minutes dated April 23, 2012). Of the many class certification orders regarding
22 FACTA claims, some are certified, some are not, and the risk that this Court would
23 not certify Plaintiff’s claims (and the Association’s actions would go unchallenged by
24 any Class Members) represents a significant risk which required a discount for
25 purposes of settlement.

26 Recovery on the merits on a classwide basis is also not guaranteed here.
27 Defendant’s defenses to certification and liability are an important basis for
28 validating the reasonableness of the settlement amount. Defendant has consistently

1 maintained that it has ample legal and factual grounds for defending this action on
2 both class and merits issues. For example, Defendant argues that it did not
3 “willfully” violate FACTA (and, hence, has no liability to Plaintiff or Class Members
4 under the statute) because it did not discover it was printing expiration dates, and had
5 hired a company, Solar, that represented it was an expert for installing point of sale
6 systems for electronic purchases and certified that its system was legally compliant.
7 It also contends that California Government Code § 818 precludes the award of
8 statutory damages (like those Plaintiff seeks under FACTA) against a government
9 entity. These risks militate in favor of the Settlement’s approval. Gaines Decl. at ¶
10 21.

11 **3. The Settlement’s Allocation Formula Is Fair and Appropriate**

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

20 Consequently, the Parties agreed on an allocation of settlement proceeds which
21 yields a reduction in admission fees for those most likely to be Class Members –
22 future fairgoers. It is not a perfect solution, but given the circumstances here, the
23 Parties believe it is most likely to yield the most benefit to those who are Class
24 Members. Gaines Decl. at ¶ 23.

25 The Ninth Circuit has approved such distribution formulas in the context of
26 class action settlements where attempting to pay Class Members directly would be
27 prohibitively expensive, impossible, or futile. *See Lane v. Facebook, Inc.*, 696 F.3d
28

1 811, 821 (9th Cir. 2012) (“The cy pres remedy the settling parties here have devised
2 bears a direct and substantial nexus to the interests of absent class members and thus
3 properly provides for the “next best distribution” to the class.”). The proposed
4 allocation formula is therefore fair and appropriate in the best interests of the Class.

5 **B. The Settlement is the Product of Serious, Arm's-Length, Informed**
6 **Negotiations and There are no Indications Present to Doubt its**
7 **Fairness**

8 The Parties engaged in arm’s-length, informed negotiations during the course
9 of this litigation in order to reach the proposed Settlement. Gaines Decl. at ¶ 19.

10 The judgment of experienced counsel is an important factor in a court’s
11 determination that negotiations were fair and informed. Absent fraud and collusion,
12 the court may not only *rely* upon the judgment of experienced counsel, but should be
13 hesitant to “substitute its own judgment for that of counsel.” *Cotton v. Hinton*, 559
14 F.2d 1326, 1330 (5th Cir. 1977); *see also Officers for Justice v. Civ. Serv. Comm’n of*
15 *San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Furthermore, the involvement of
16 an objective, third-party neutral tends to demonstrate the presence of arm’s-length
17 negotiations. *See Martens v. Smith Barney*, 181 F.R.D. 243, 262-63 (S.D.N.Y. 1998).

18 Class Counsel have conducted significant investigation and discovery into the
19 facts of this class action case. Defendant has produced documents and information,
20 all of which were reviewed and analyzed in advance of settlement negotiations.
21 Gaines Decl. at ¶¶ 14-15.

22 Based on this investigation and evaluation, Plaintiff’s counsel firmly believe
23 that the Settlement, on the terms set forth in the Stipulation, is fair, reasonable,
24 adequate, and is in the best interest of the Settlement Class in light of all known facts
25 and circumstances, including the risk of significant delay, the risk the Settlement
26 Class will not be certified by the Court, defenses asserted by Defendant, and
27 numerous potential appellate issues. Preliminary approval of the Stipulation of
28 Settlement is appropriate. Gaines Decl. at ¶¶ 6, 23-26.

VI. PROVISIONAL CLASS CERTIFICATION IS APPROPRIATE

The Named Plaintiff may, at the preliminary approval stage, request that the Court provisionally approve certification of the class for settlement purposes, conditioned upon final approval of the settlement. 4 *Newberg* § 11.26 (the court’s findings “at a preliminary hearing or conference concerning a tentative settlement proposal . . . may be set out in conditional orders granting tentative approval to the various items.... These conditional rulings may approve a temporary settlement class, the proposed settlement, and the class counsel’s application for fees and expenses.”) Before a court evaluates a settlement under Federal Rule of Civil Procedure 23(e), it must determine that the settlement class satisfies the requirements enumerated under Rule 23(a) and at least one of the requirements in Rule 23(b). *Molski v. Gleich*, 318 F.3d 937, 946 (9th Cir. 2003). As discussed below, the proposed class meets all of the requirements of certification for settlement purposes.

A. FRCP 23(a) Requirements For Class Certification Are Met

Preliminary approval of the Settlement is justified because the class certification requirements exist for the Settlement Class. Rule 23(a) provides the factors that the Court looks to for class certification: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. All four of these elements are satisfied by the proposed class for Settlement purposes.

1. Numerosity

If the class is sufficiently large that joinder of all members is impractical or that individual joinder is impractical, the numerosity requirement is met. *See Cox v. American Cast Iron Pipe*, 784 F.2d 1546, 1557 (11th Cir. 1986).

During the applicable statutory period, September 10, 2010 through the date of preliminary approval, it is estimated that Defendant generated approximately 100,000

1 allegedly defective receipts. The number of Class Members, while not precisely
2 known, is large – likely in excess of 50,000 individuals. Therefore, joinder of
3 individual claims would be impractical and the numerosity requirement is satisfied
4 for settlement purposes. Gaines Decl. at ¶ 32.

5 **2. Commonality**

6 The commonality requirement of Rule 23(a) is met if there are common
7 questions of fact and law among the class. *Hanlon*, 150 F.3d at 1019 (“The existence
8 of shared legal issues with divergent factual predicates is sufficient, as is a common
9 core of salient facts coupled with disparate legal remedies within the class”). Here,
10 the Class Members all seek the same remedies under the identical federal law under
11 the same theories of recovery, all relating to the Defendant’s alleged failure to
12 truncate the expiration dates of Class Members’ credit and debit cards during the
13 applicable class period, in violation of FACTA. The same factual predicates apply to
14 each and every Class Member. The Settlement compensates Class Members for these
15 identical claims. Gaines Decl. at ¶ 33. Under these circumstances, the commonality
16 requirement is satisfied for settlement purposes. *Id.* at 1019-20; *see also Cox*, 784
17 F.2d at 1557.

18 **3. Typicality**

19 The typicality requirement of Rule 23(a) is met if the claims of the Named
20 Plaintiff are typical of the class, though “they need not be substantially identical.”
21 *Hanlon*, 150 F.3d at 1020. Factual differences may exist between the Class and the
22 Named Plaintiff, provided the claims arise from the same events or course of conduct
23 and are based upon the same legal theories. *Id.* Moreover, the typicality and
24 commonality elements of Rule 23(a) “tend to merge” because both assess whether the
25 claims of the class and the named plaintiffs are sufficiently interrelated to make class
26 treatment appropriate. *Gen. Tel. Co. of the SW v. Falcon*, 12 S.Ct. 2364, 457 U.S.
27 147, 157 n. 13 (1982).

1 Here, Plaintiff Brown's claims are not only typical of those of all Class
2 Members – they are identical. Plaintiff alleges the Defendant failed to truncate the
3 expiration date of her credit card number on the printed receipt that Defendant
4 provided to her at the point of sale – Plaintiff Brown alleges that this violates FACTA
5 and subjects Defendant to statutory penalties. This is the same claim alleged on
6 behalf of all Class Members. Gaines Decl. at ¶ 34. Plaintiff satisfies the typicality
7 requirement for settlement purposes because his claims arise from the same factual
8 basis and are based on the same legal theories as those applicable to all Settlement
9 Class Members. *Welmer v. Syntex* 117 F.R.D. 641, 644 (N.D. Cal. 1987).

10 4. Adequacy of Representation

11 Rule 23(a)(4) requires that the named plaintiff and class counsel fairly and
12 adequately represent and protect the interests of the class. If the Named Plaintiff and
13 Class Counsel have no interests adverse to the interest of the proposed class members
14 and are committed to vigorously prosecuting the case on behalf of the class, then the
15 adequacy requirement is met. *Hanlon*, 150 F.3d at 1020; *see also Griffin v. Carlin*,
16 755 F.2d 1516 (11th Cir. 1985).

17 Here, Plaintiff Brown has interests directly aligned with all Class Members and
18 has prosecuted this case on their behalf. She has no apparent conflicts with Class
19 Members. She has demonstrated his commitment to prosecute this Action on their
20 behalf through its conclusion. Gaines Decl. at ¶ 35.

21 Under the proposed Settlement, Ms. Brown will request a small enhancement
22 payment – \$5,000 – for her time and efforts, including assisting Class Counsel with
23 factual issues surrounding the case as well with settlement discussions and
24 participation at the mediation. This award represents a small percentage of the total
25 value of the settlement consideration, and therefore does not constitute a sufficient
26 conflict of interest to foreclose fulfilling the adequacy requirement. *See* Gaines Decl.
27 at ¶ 36.

28

1 Additionally, Plaintiff’s counsel are highly experienced litigators, with more
2 than six decades of collective litigation experience. As evidenced by the declarations
3 of Daniel F. Gaines filed herewith, Gaines & Gaines, APLC has substantial
4 experience prosecuting complex class action cases, both in the consumer and
5 employment contexts. As such, there is no conflict of interest between the Named
6 Plaintiff, proposed Class Counsel, and the Settlement Class Members, and the
7 adequacy element is met. Gaines Decl. at ¶¶ 2-5, 37.

8 **B. FRCP 23(b)(3) Requirements for Class Certification are Met**

9 The proposed Settlement Class also meets the requirements of Rule 23(b)(3)
10 for settlement purposes because: 1) common questions predominate over questions
11 that affect individual members; and 2) class resolution is superior to other available
12 methods of adjudication. When assessing predominance and superiority, the Court
13 may consider that the class will be certified for settlement purposes only. *Amchem*
14 *Prods., Inc. v. Windsor*, 521 U.S. 591, 618-620 (1997). A showing of manageability
15 at trial is unnecessary; the dispositive inquiry at this stage is “whether the proposed
16 classes are sufficiently cohesive to warrant adjudication by representation.” *Id.* at
17 618-20, 623; *see also Hanlon*, 150 F.3d at 1022.

18 **1. Predominance**

19 The claims of the Settlement Class here are sufficiently cohesive to warrant
20 certification. For settlement purposes, common questions of fact and law affecting
21 proposed Class Members in this case clearly predominate over questions that may
22 affect individual members. In analyzing predominance, as with commonality, “[i]t is
23 not necessary that all questions of fact or law be common, but only that some
24 questions are common and that they predominate over individual questions.” *Cox*,
25 784 F.2d at 1557. The test is whether the proposed class is sufficiently cohesive to
26 warrant adjudication by representation. Here, the proposed Settlement Class is
27 sufficiently cohesive because all Settlement Class Members share a common nucleus
28 of facts and potential legal remedies – the same facts and law govern their claims;

1 this Court could try their claims in representative fashion by common evidence
2 regarding Plaintiff's and Class Members' claims, and identical law applies. All of the
3 Settlement Class Members seek statutory damages based on the same allegations. As
4 a result, common questions of law and fact predominate here. Gaines Decl. at ¶ 38.

5 **2. Superiority**

6 Particularly in the settlement context, class resolution is superior to other
7 available methods for the fair and efficient adjudication of the controversy. *See*
8 *Hanlon*, 150 F.3d at 1023. The superiority requirement involves a "comparative
9 evaluation of alternative mechanisms of dispute resolution." *Id.* Here, as in *Hanlon*,
10 the alternative method of resolution is thousands of individual claims for relatively
11 small amounts of damages, proving uneconomical for potential plaintiffs because the
12 cost of litigation dwarfs potential recovery. *Id.*

13 **VII. THE PROPOSED CLASS NOTICE IS APPROPRIATE**

14 **A. The Class Notice Satisfies Due Process**

15 The proposed forms of notice meet the standards set forth in Rule 23(c)(2)(B)
16 for classes certified under Rule 23(b)(3). Defendant represents that it does not have
17 the names and addresses of consumers who have paid by credit or debit card during
18 the Class Period and that it cannot provide personal notice to all of the Class
19 Members. As a result, the Parties have agreed to provide the best notice practicable
20 which they propose as follows:

21 Settlement Website Notice. The Settlement Administrator will establish and
22 maintain the Settlement Website dedicated to the Settlement called
23 <http://classactionsandiegocountyfair.com> or similar, on which will be posted the
24 Website Notice, a copy of this Agreement, the Preliminary Approval Order, the
25 operative Complaint, the Motion for Preliminary Approval, the Motion for Attorneys'
26 Fees, Costs and Incentive Award (promptly when filed with the Court), the Motion
27 for Final Approval (promptly when filed with the Court), and any other materials the
28 Parties agree to include. Additionally, there shall be included a Website Notice in a

1 form substantially similar to the form attached to the Settlement as Exhibit 1. These
2 documents shall be available on the Settlement Website beginning no later than the
3 Notification Deadline ending no earlier than thirty (30) calendar days after the last
4 day of the 2018 San Diego County Fair unless the reduction cap described in Section
5 9.2(A) has been satisfied through reduction at the 2017 San Diego County Fair, under
6 which circumstance the documents shall be available ending no later than thirty (30)
7 calendar days after the last day of the 2017 San Diego County Fair. The Settlement
8 Administrator shall secure a URL for the Settlement Website proposed by Class
9 Counsel and approved by the Association. Stip. at ¶ 10.2(A).

10 Association Website Notice. Notice shall include a link to the Settlement
11 Website and brief description of the Action (no more than two (2) sentences in
12 length) on the landing page of the San Diego County Fair (www.sdfair.com) during
13 the 60 calendar days following the Notice Deadline. Stip. at ¶ 10.2(B)

14 Newspaper Publication. Notice shall include a newspaper publication notice,
15 substantially in the form attached to the Settlement as Exhibit 2, in a newspaper of
16 regional circulation in Southern California, published two times during the first 30
17 days following the Notice Deadline. Stip. at ¶ 10.2(C).

18 **B. The Proposed Notices Are Accurate And Informative**

19 The proposed notices provide information on the meaning and nature of the
20 proposed settlement and Settlement Class, the terms and provisions of the Settlement,
21 the relief the Settlement will provide Settlement Class Members, the amount of the
22 proposed service payment to Named Plaintiff, the amounts of attorneys' fees and
23 costs that Class Counsel may request, and the date, time and place of the final
24 approval hearing. The notices clearly and accurately describe the nature of the action,
25 the definition of the Settlement Class, and the class claims. *See* Exhibits 1 and 2 to
26 Stipulation. The notices also inform class members that they may enter an
27 appearance through counsel if they so desire, indicate that the Court will exclude
28 from the class any member who requests exclusion, and explains the binding nature

1 of class judgment under Rule 23(c)(3). *Id.* The notice also provides class members
2 with an opportunity to file objections to the settlement as required by Rule
3 23(e)(4)(A). *Id.*

4 Further, the notice also fulfills the requirement of neutrality in class notice. *See*
5 *2 Newberg* § 8.39. They summarize the proceedings to date, Plaintiff’s allegations,
6 and the terms and conditions of the Settlement, in an informative and coherent
7 manner, in compliance with the *Manual’s* statement that “the notice should be
8 accurate, objective, and understandable to Class Members. . . .” *Manual* (Third) at §
9 30.211. The notice clearly states that the Settlement does not constitute an admission
10 of liability, and recognizes that the Court has not ruled on the merits of the action. It
11 also states that the final Settlement approval decision has yet to be made.
12 Accordingly, the notice complies with the standards of fairness, completeness and
13 neutrality required of a settlement class notice disseminated under authority of the
14 Court. *See* Fed. R. Civ. P. 23(c)(2), 23(e); *2 Newberg* §§ 8.21, 8.39; *Manual* (Third)
15 §§ 30.211, 30.212.

16 **VIII. A FINAL APPROVAL HEARING SHOULD BE SCHEDULED**

17 The last step in the settlement approval process is the formal hearing, at which
18 the Court may hear all evidence and argument necessary to evaluate the Settlement.
19 At that hearing, proponents of the Settlement may explain and describe its terms and
20 conditions and offer argument in support of Settlement approval, and members of the
21 Settlement Class, or their counsel, may be heard in support of or in opposition to the
22 Settlement Agreement. The parties recommend that the hearing be held
23 approximately 135 days after preliminary approval by the Court, which would give
24 the Parties sufficient time to complete the administration process and the notice
25 program. Before the notice period begins, Plaintiff will brief, file, and post on the
26 settlement website her application for an award of attorneys’ fees and costs, and for
27 the Plaintiff’s service enhancement.

28 \\\

1 **IX. CONCLUSION**

2 The Settlement is fair and reasonable and all of the requirements for
3 preliminary approval are met. The Court is therefore requested to grant this motion
4 and enter an order in the form submitted concurrently herewith.

5
6 DATED: September 7, 2016

Respectfully submitted,
7 GAINES & GAINES,
8 A Professional Law Corporation

9
10 By: /s/ Alex P. Katofsky
11 DANIEL F. GAINES
12 ALEX P. KATOFSKY
13 Attorneys for Plaintiff Gillian Brown
14 and Proposed Class Counsel
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