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11 **UNITED STATES DISTRICT COURT**  
 12 **EASTERN DISTRICT OF CALIFORNIA**

13 CIRENA TORRES, on behalf of herself and ) 14 all others similarly situated, ) 15 <p style="text-align: center;">Plaintiff,</p> 16 v. ) 17 PICK-A-PART AUTO WRECKING (d/b/a ) Pick-A-Part); and DOES 1 through 10, 18 inclusive, ) 19 <p style="text-align: center;">Defendants.</p> )	Case No. 1:16-cv-01915-DAD-BAM  <b>NOTICE OF MOTION AND MOTION FOR          AWARD OF ATTORNEY'S FEES AND          COSTS TO CLASS COUNSEL AND          INCENTIVE PAYMENT TO THE CLASS          REPRESENTATIVE</b>  [Filed concurrently Declaration of Chant Yedalian]  <u><b>Hearing</b></u> Date: July 17, 2018 Time: 9:30 a.m. Courtroom: #5 (7 <sup>th</sup> Floor) Judge: Hon. Dale A. Drozd
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1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE THAT on July 17, 2018 at 9:30 a.m. or as soon thereafter as the  
3 matter may be heard before the Honorable Dale A. Drozd in Courtroom 5 (7<sup>th</sup> Floor), located at  
4 2500 Tulare Street, Fresno, California 93721, Plaintiff and Class Representative, Cirena Torres,  
5 and Class Counsel Chant Yedalian of Chant & Company A Professional Law Corporation, will  
6 and hereby do move the Court, pursuant to Federal Rules of Civil Procedure Rule 23, and the  
7 Stipulated Settlement Agreement and Release (hereinafter sometimes referred to as "Settlement"  
8 or "Agreement")<sup>1</sup>, for an Order:

9 1. Awarding \$65,000 in reasonable attorney's fees to Class Counsel, to be paid from  
10 the Cash Fund as set forth in the Agreement;

11 2. Awarding reasonable costs of \$1,082.78 to Class Counsel, to be paid from the Cash  
12 Fund as set forth in the Agreement, and

13 3. Awarding \$4,000 to the Class Representative, Cirena Torres, as a (incentive)  
14 service award, to be paid from the Cash Fund as set forth in the Agreement, to compensate her for  
15 her service as the representative of the Settlement Class.

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

20  
21 Respectfully submitted,

22 DATED: June 15, 2018

23 CHANT & COMPANY  
A Professional Law Corporation

24  
25 By: /S/ – Chant Yedalian  
26 Chant Yedalian  
Counsel For Plaintiff

27  
28 <sup>1</sup> A copy of the Agreement is attached to the Declaration of Chant Yedalian as Exhibit 1. Capitalized terms shall have the same meanings as in the Agreement, unless indicated otherwise.

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**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. INTRODUCTION**

As is more fully set forth in the Motion For Final Approval of Class Action Settlement set for hearing concurrently with this Motion, this is a class action case that, through the diligence of Class Counsel and the Class Representative, has resulted in a \$195,000 cash recovery, despite the extremely high risk of no recovery had this case been litigated given the status of recent case law concerning the Fair and Accurate Credit Transactions Act ("FACTA").

Class Counsel seeks an award of \$65,000 in reasonable attorney's fees and reasonable costs of \$1,082.78.

As explained further below, the fees are reasonable and supported by the risks and circumstances involved in this matter as well as by a crosscheck using Class Counsel's lodestar.

In addition, the Class Representative, Cirena Torres, respectfully seeks an (incentive) service award of \$4,000 which is fair and reasonable and similar to awards in other FACTA cases.

**II. THE LAW CONCERNING ATTORNEY'S FEES TO BE AWARDED**

"Generally, litigants in the United States pay their own attorneys' fees." *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 978 (9<sup>th</sup> Cir. 2008). One exception to this general principle is where the parties contractually agree to pay attorney's fees. Another exception to this general principle is "fee shifting statutes" which authorize an award of attorney's fees to promote the enforcement of important rights. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 257 (1975) ("[A]bsent statute or enforceable contract, litigants pay their own attorneys' fees"); *Kyocera Corp v. Prudential-Bache Trade Services, Inc.*, 299 F.3d 769, 793 (9<sup>th</sup> Cir. 2002) (same); *MRO Communications, Inc. v. AT&T Corp.*, 197 F.3d 1276, 1281 (9<sup>th</sup> Cir. 1999) ("[E]ach party must bear its own attorneys' fees in the absence of a rule, statute or contract authorizing such an award").

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

1 As further explained below, where a class settlement, such as here, results in a cash  
2 common fund, the Court may apply the percentage method or the lodestar method to determine a  
3 reasonable fee award. In addition, when using the percentage method, the Court may cross-check  
4 the reasonableness of the percentage method by considering the lodestar and any enhancement  
5 multiplier applied to the lodestar.

6 **A. Defendant Pick-A-Part Has Contractually Agreed To Pay Attorney's**  
7 **Fees As Part Of This Settlement**

8 As part of the Settlement, Pick-A-Part Auto Wrecking ("Defendant" or Pick-A-Part") has  
9 contractually agreed to establish a cash fund to be used to pay, among other things, attorney's fees  
10 and costs. Agreement ¶¶ 10(a) and 19.

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

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

17 In this case, Plaintiff asserted a single cause of action for violation of the FACTA, 15  
18 U.S.C. § 1681(c)(g)(1). FACTA is a subset of the Fair Credit Reporting Act ("FCRA"). *Bateman*  
19 *v. American Multi-Cinema, Inc.*, 623 F.3d 708, 717 (9<sup>th</sup> Cir. 2010). As such, FACTA and other  
20 provisions of the FCRA share the same remedy provisions which are embodied in 15 U.S.C. §  
21 1681n. *Bateman*, 623 F.3d at 715. That statute expressly provides for an award of "reasonable  
22 attorney's fees as determined by the court" "in the case of any successful action." 15 U.S.C. §  
23 1681n(a)(3). The Ninth Circuit has held that 15 U.S.C. § 1681n(a)(3) is a fee shifting statute.  
24 *Grove v. Wells Fargo Financial California, Inc.*, 606 F.3d 577, 579 (9<sup>th</sup> Cir. 2010).

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

27 As explained above, when Congress provides for fee shifting statutes, including those  
28 involving consumer protection, it does so "[i]n order to encourage private enforcement of the law."

1 *Camacho*, 523 F.3d at 978.

2 "[A]s FCRA is a consumer protection statute, we must construe it so as to further its  
3 objectives." *Reynolds v. Hartford Financial Services Group, Inc.*, 435 F.3d 1081, 1092 (9<sup>th</sup> Cir.  
4 2006).

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

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

10 In fact, both the FDCPA and the FCRA are part of the larger statutory scheme of the  
11 Consumer Credit Protection Act. "The FDCPA is part of the larger statutory scheme of the  
12 Consumer Credit Protection Act, 15 U.S.C. §§ 1601-1693r, which includes ... the Fair Credit  
13 Reporting Act, 15 U.S.C. §§ 1681-1681x." *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699,  
14 706 (9<sup>th</sup> Cir. 2010).

15 The fee shifting provisions of both statutes are almost identical. The FDCPA's fee shifting  
16 language provides "in the case of any successful action to enforce the foregoing liability, the costs  
17 of the action, together with a reasonable attorney's fee as determined by the court" (15 U.S.C. §  
18 1692k(a)(3)), and the FCRA's fee shifting language provides "in the case of any successful action  
19 to enforce any liability under this section, the costs of the action together with reasonable  
20 attorney's fees as determined by the court" (15 U.S.C. § 1681n(a)(3)).

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

23 "The FDCPA's statutory language makes an award of fees mandatory. [Citation.]  
24 'The reason for mandatory fees is that congress chose a `private attorney general'  
25 approach to assume enforcement of the FDCPA.' Id.; see also *Graziano v. Harrison*,  
26 950 F.2d 107, 113 (3d Cir. 1991) (noting that the FDCPA 'mandates an award of  
27 attorney's fees as a means of fulfilling Congress's intent that the Act should be  
28 enforced by debtors acting as private attorneys general')." *Camacho*, 523 F.3d at 978.

The Ninth Circuit has also recognized that such important "deterrent" effect is not just  
limited to the defendant sued but also deters other actual or potential violators of the law.

1 "The FDCPA is a consumer protection statute and was intended to permit, even  
 2 encourage, attorneys like Lemberg to act as private attorney generals to pursue  
 3 FDCPA claims.... Furthermore, certifying the class will serve a 'deterrent'  
 4 component to other debt collectors who are engaging, or consider engaging in this  
 5 type of debt collection tactic." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d  
 6 1015, 1032 and 1033 (9<sup>th</sup> Cir. 2012).

7 The Ninth Circuit espoused similar virtues of the FACTA, including the importance of its  
 8 deterrent purposes in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9<sup>th</sup> Cir. 2010). The  
 9 Ninth Circuit explained that "In fashioning FACTA, Congress aimed to 'restrict the amount of  
 10 information available to identity thieves'" and that the remedial purposes of FACTA include both a  
 11 compensatory purpose and a "deterrent purpose." *Id.* at 718. The Ninth Circuit further explained  
 12 that "we are quite sure that certification of a class here would preserve, if not amplify, the  
 13 deterrent effect of FACTA." *Id.* at 723.

14 **C. Percentage Method Or Lodestar Method To Determine Fee Award**

15 In the Court's Order granting preliminary approval of the Settlement, this Court explained  
 16 the percentage method and lodestar method as follows:

17 "The Ninth Circuit has approved two methods of calculating attorney's fees. See  
 18 *Hanlon*, 150 F.3d at 1029. In 'common-fund' cases where the settlement creates a  
 19 fund to be distributed to the class, 'the district court has discretion to use either a  
 20 percentage or lodestar method.' *Id.* The 'lodestar' calculation takes the number of  
 21 hours reasonably expended and multiplies that by a reasonable hourly rate. *Id.*  
 22 (citation omitted). The lodestar method is typically used where the settlement is  
 23 primarily injunctive relief, and the net value of the settlement is difficult to gauge.  
 24 *Id.* The percentage method, in contrast, awards the attorneys a percentage of the  
 25 fund 'sufficient to provide class counsel with a reasonable fee.' *Id.* (citation  
 26 omitted). The Ninth Circuit has established 25 percent as the benchmark for  
 27 attorney's fees under this latter method. *Id.* (citing *Six (6) Mexican Workers v. Ariz.*  
 28 *Citrus Growers*, 904 F.2d 1301, 1311 (9<sup>th</sup> Cir. 1990)). Courts may deviate from this  
 29 25 percent benchmark when there are special circumstances justifying a departure.  
 30 *Six (6) Mexican Workers*, 904 F.2d at 1311. Special circumstances may include, for  
 31 example:

32 [T]he extent to which class counsel achieved exceptional results for the  
 33 class, whether the case was risky for class counsel, whether counsel's  
 34 performance generated benefits beyond the cash settlement fund, the  
 35 market rate for the particular field of law (in some circumstances), the  
 36 burdens class counsel experienced while litigating the case (e.g., cost,  
 37 duration, foregoing other work), and whether the case was handled on a  
 38 contingency basis.

39 *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 954–55 (9<sup>th</sup> Cir. 2015)  
 40 (internal quotation marks omitted)." Order: Dkt. No. 21 at p. 7:11-19.

41 Class Counsel respectfully requests that the Court use the percentage method and award  
 42 attorney's fees equal to one-third (33 1/3%) of the Cash Fund. As will be explained below, this

1 request is supported by the results, risks, market rate, foregoing other work, and the contingency  
2 nature of the work performed. It is also supported by the lodestar in this case.

3 **III. BASED ON THE CIRCUMSTANCES OF THIS CASE, THE COURT SHOULD**  
4 **USE THE PERCENTAGE METHOD AND AWARD FEES EQUAL TO ONE-**  
5 **THIRD OF THE CASH FUND**

6 This Settlement resulted in a cash common fund and, as explained in Section II.C., above,  
7 when a cash common fund is involved, the usual preference is to use the percentage method to  
8 determine the amount of the fee award.

9 Class Counsel acknowledges that the general benchmark for awarding fees under the  
10 percentage method in this Circuit is 25% of the fund. However, as its name indicates, the  
11 benchmark is not a fixed rule and may be adjusted. *Paul, Johnson, Alston & Hunt v. Graulity*, 886  
12 F.2d 268, 272 (9<sup>th</sup> Cir. 1989).

13 District courts retain discretion concerning fee awards and awarding one-third (33 1/3%)  
14 of the cash or other pecuniary benefits is not an abuse of discretion. *In re Pacific Enterprises*  
15 *Securities Litigation*, 47 F.3d 373, 379 (9<sup>th</sup> Cir. 1995).

16 Indeed, this Court has recognized these principles and has awarded attorney's fees equal to  
17 one-third (33 1/3%) of the common fund in several cases. *Emmons v. Quest Diagnostics Clinical*  
18 *Labs., Inc.*, No. 1:13-cv-00474-DAD-BAM, 2017 WL 749018 \*7 (E.D. Cal. Feb. 27, 2017) ("one-  
19 third" of common fund awarded); *Aguilar v. Wawona Frozen Foods*, No. 1:15-cv-00093-DAD-  
20 EPG, 2017 WL 2214936 \*5-7 (E.D. Cal. May 19, 2017) ("one-third" awarded); *Syed v. M-I, LLC*,  
21 No. 1:12-cv-01718-DAD-MJS, 2017 WL 3190341 \*6-8 (E.D. Cal. July 27, 2017) ("one-third"  
22 awarded); *Dakota Medical, Inc. v. RehabCare Group, Inc.*, No. 1:14-cv-02081-DAD-BAM, 2017  
23 WL 4180497 \*10 (E.D. Cal. Sept. 21, 2017) ("one-third" awarded); see also *Barbosa v. Cargill*  
24 *Meat Sols. Corp.*, No. 1:11-cv-00275-SKO, 297 F.R.D. 431, 449 (E.D. Cal. July 2, 2013) (citing  
25 cases, explaining that "where recovery is uncertain, an award of one-third of the common fund as  
26 attorneys' fees has been found to be appropriate," and awarding "one-third").

27 The circumstances of this case support a fee award of one-third (33 1/3%) of the Cash  
28 Fund.

1           **A. The Results Support The Requested Fee Award**

2           The important thing to consider in this case when assessing the results achieved is the  
3 amount of the monetary recovery given the relatively low number of transactions. Stated another  
4 way, the value recovered per transaction is exceptional. "The result achieved in this case is fairly  
5 exceptional in proportional terms." *Dakota Medical*, 2017 WL 4180497 \*8 (viewing a "payment  
6 of approximately \$7.00 for each violation" of the TCPA sufficiently exceptional result for  
7 purposes of one-third fee award determination).

8           While the exact number of Settlement Class members is not known in this case, the  
9 number of Settlement Class members is likely much smaller than the 4,422 number of overall  
10 transactions because the number of transactions likely includes repeat customers who made  
11 multiple transactions (whether using the same card and/or with different credit or debit cards).

12           Even assuming *arguendo* that there were no repeat customers and that the 4,422 number of  
13 transactions reflects 4,422 unique Settlement Class members, the \$195,000 Settlement Fund  
14 would still represent a gross cash recovery of \$44.09 for each of the 4,422 transactions. A \$44.09  
15 cash per transaction recovery is an exceptional result on its own, as well as when compared to the  
16 value of other FACTA settlements (*e.g.*, *In re Toys "R" Us—Delaware, Inc.—Fair And Accurate*  
17 *Credit Transactions Act (FACTA) Litigation*, No. cv-08-01980 MMM (FMOx), 295 F.R.D. 438,  
18 447 (C.D. Cal. January 17, 2014) [benefit of non-cash vouchers having a maximum combined  
19 value of \$30.00]).

20           The monetary result is also exceptional considering all of the real risks of no recovery, as  
21 explained further below.

22           **B. The Risks Support The Requested Fee Award**

23           In addition to the risk of losing on the merits trying to establish willfulness and the risk of  
24 failing to achieve class certification, Class Counsel also took on at least two different types of  
25 other acute, substantial risks which have the potential effect of reducing the value of any recovery  
26 to \$0: (1) changes in case law and (2) legislative risk.

27 //

28 //

1                   **1.       Adverse Changes In Case Law And Risk Of No Recovery**

2                   In her motion for preliminary approval, Plaintiff had pointed out that, although the issue  
3 was not yet at the time resolved by the Ninth Circuit and that appeals were pending before the  
4 Ninth Circuit, many federal courts, including but not limited to at least three federal cases pending  
5 in the Washington federal courts (within the Ninth Circuit), and two federal courts of appeal, had  
6 already dismissed FACTA cases like this one which allege expiration date violations and seek  
7 statutory damages. The dismissals were based on the position that plaintiffs who allege expiration  
8 date violations without any accompanying actual injury do not sustain any "concrete injury"  
9 sufficient to satisfy Article III standing requirements in federal court. *Byles v. Ace Parking Mgmt.,*  
10 *Inc.*, Case No. C16-0834-JCC, Dkt. No. 24 (W.D. Wash. Oct. 4, 2016); *Israel v. Diamond Parking*  
11 *Servs. Inc.*, Case No. C16-0687-JCC, Dkt. No. 23 (W.D. Wash. Oct. 11, 2016); *Bassett v. ABM*  
12 *Parking Servs., Inc.*, C16-00947-TSZ, Dkt. No. 6 (W.D. Wash. July 21, 2016); *Meyers v. Nicolet*  
13 *Rest. of De Pere, LLC*, 843 F.3d 724 (7<sup>th</sup> Cir. 2016); *Crupar-Weinmann v. Paris Baguette*  
14 *America, Inc.*, 861 F.3d 76 (2<sup>nd</sup> Cir. 2017). These Article III arguments were circulating in the  
15 federal courts for years prior to the issuance of the above opinions and they also ultimately made  
16 their way up to the Supreme Court. See *Spokeo, Inc. v Robins*, 135 S.Ct. 1892 (certiorari granted  
17 April 27, 2015); see also *First Am. Fin. Corp. v. Edwards*, 131 S.Ct. 3022 (certiorari granted June  
18 20, 2011) but see *First Am. Fin. Corp. v. Edwards*, 132 S.Ct. 2536, 2537 (dismissed the writ of  
19 certiorari as improvidently granted on June 28, 2012).

20                   Following the motion for preliminary approval, the Ninth Circuit issued an opinion in  
21 *Bassett v. ABM Parking Services, Inc.*, 883 F.3d 776 (9<sup>th</sup> Cir. Feb. 21, 2018), affirming dismissal  
22 of a similar FACTA case involving expiration date violations and holding that there was no  
23 "concrete injury" sufficient to satisfy Article III standing requirements in federal court. As  
24 demonstrated by the Ninth Circuit's opinion, the risk of outright dismissal was neither overstated  
25 nor hypothetical. It was (and remains) very real. Yedalian Decl. ¶ 7.

26                   Indeed, Class Counsel has received several dismissal orders in FACTA expiration date  
27 cases and FACTA excess digit cases in federal and state court. *E.g.*, *Llewellyn v. AZ*  
28 *Compassionate Care Inc.*, No. 2:16-cv-04181-DGC, 2017 WL 1437632 (D. Ariz. Apr. 24, 2017);

1 *Gant v. Fondren Orthopedic Group. L.L.P.*, No. 4:16-cv-00648, 2017 WL 4479955 (S.D. Tex.  
2 May 23, 2017); *O'Shea v. P.C. Richard & Son, LLC*, No. 1:15-cv-09069-KPF, 2017 WL 3327602  
3 (S.D. N.Y. Aug. 3, 2017); *Batra v. RLS Supermarkets LLC*, No. 3:16-cv-02874-B, 2017 WL  
4 3421073 (N.D. Tex. Aug. 9, 2017); *Noble v. Nevada Checker Cab Corp.*, No. 2:15-cv-02322-  
5 RCJ-VCF, 2016 WL 4432685 (D. Nev. Aug. 19, 2016); *Miles v. The Company Store, Inc.*, No. 16-  
6 CVS-2346 (North Carolina Superior Court Nov. 16, 2017); *Nowe v. Essex Technology Group,*  
7 *LLC*, No. 17-1-3769-99 (Georgia Superior Court Jan. 12, 2018). Yedalian Decl. ¶ 8.

8 In short, FACTA litigation has been extremely high risk and the risks are not hypothetical  
9 as demonstrated by many actual losses by Class Counsel, as well as the Ninth Circuit's recent  
10 opinion in *Bassett*. Yedalian Decl. ¶ 9.

11 However, Pick-A-Part knows that Class Counsel will zealously prosecute matters, through  
12 conclusion. For example, Class Counsel appealed, briefed and recently argued the issue of Article  
13 III standing in a FACTA case involving the first digit and the last four digits before the Ninth  
14 Circuit Court of Appeals. *Noble v. Nevada Checker Cab Corp.*, 2018 WL 1223484 (9<sup>th</sup> Cir.  
15 March 9, 2018). Unfortunately, while that appeal resulted in an unfavorable and unpublished  
16 result on the issue of Article III concerning those particular facts, Class Counsel's pursuit of the  
17 appeal through the Ninth Circuit and his skilled determination for more than 11 years of  
18 prosecuting FACTA cases was a substantial motivation for Pick-A-Part to settle this matter.  
19 Yedalian Decl. ¶ 10. Pick-A-Part knows that Class Counsel has pursued appeals in other FACTA  
20 cases too. *Ibid*.

21 If this case proceeded to litigation, Pick-A-Part also contends that a state court would  
22 likewise not have subject-matter jurisdiction due to the purported lack of any actual damage.  
23 Yedalian Decl. ¶ 11. If Pick-A-Part is correct, then class members would not be able to recover  
24 anything in federal or state court. Class Counsel recently defeated a demurrer brought by another  
25 defendant in Los Angeles County Superior Court in another FACTA case where the defendant  
26 made just such an argument. *Ibid*. Although the Court overruled the demurrer, it noted it was a  
27 "very close question" and that defendant has since filed a motion for reconsideration and sought a  
28 writ. *Ibid*. At a minimum, litigation of this issue would cause delay and pose substantial risk,

1 including the risk of outright dismissal as has already occurred in many cases. *Ibid.* In light of the  
2 acute risk of outright dismissal, this factor alone renders the Settlement not only reasonable, but an  
3 exceptionally favorable result. *Ibid.*

4 **2. Legislative Risk**

5 As explained by the Ninth Circuit in *Bateman*, in 2008 (while many FACTA lawsuits  
6 were then pending) Congress enacted the Credit and Debit Card Receipt Clarification Act  
7 ("Clarification Act"). The Clarification Act retroactively granted a *temporary* immunity from  
8 statutory damages for FACTA violations to those defendants that printed an expiration date  
9 "between December 4, 2004, and June 3, 2008 [the date the Clarification Act was enacted]."  
10 *Bateman, supra*, 623 F.3d at 717. Stated another way, the effect of the Clarification Act was that  
11 it wiped-out liability for statutory damages for all then pending FACTA expiration date cases. As  
12 a result of the change of law imposed by the Clarification Act, many FACTA class action cases  
13 were dismissed without any recovery for consumers. Yedalian Decl. ¶ 28.

14 Even before the Clarification Act was enacted, it was apparent that many defendants  
15 believed that this immunity bill (H.R. 4008) was almost certain to pass. Yedalian Decl. ¶ 29. As a  
16 result, some defendants chose to settle by demanding and extracting very favorable terms to them  
17 while many others refused to budge at all knowing that complete immunity was on the horizon.  
18 *Ibid.*

19 Class Counsel had extensive first-hand experience of the devastating impact of the  
20 Clarification Act. Yedalian Decl. ¶ 30.

21 Class Counsel had invested thousands of hours and substantial expenses prosecuting many  
22 FACTA expiration date cases leading up to the time the Clarification Act was enacted and  
23 suffered a huge financial setback as a result of the retroactive immunity provided by the  
24 Clarification Act. Yedalian Decl. ¶ 31.

25 Legislative risk has already occurred with FACTA previously (so it is not just  
26 hypothetical), and it may occur again. Moreover, as explained above, Class Counsel has been  
27 directly and adversely affected by legislative risk which has materialized in the past specifically as  
28 to FACTA.

1           **C.     Market Rate**

2           An award of attorney's fees equal to one-third (33 1/3%) of the Cash Fund is within the fair  
3 market rate range for services. Yedalian Decl. ¶ 73.

4           Unless otherwise specifically proscribed by law (such as, for example, MICRA), the cases  
5 which Class Counsel handles on a contingency basis generally consist of a negotiated contingency  
6 fee of the gross recovery. Yedalian Decl. ¶ 73. A one-third contingent fee is well within the range  
7 of contingency fees freely negotiated in the legal marketplace for a matter involving the risks and  
8 issues of this litigation. *Ibid.* Class Counsel would not hesitate to ask a minimum of one-third of  
9 the gross recovery in a matter which involves significant risks of non-payment. *Ibid.*

10           **D.     Foregoing Other Work**

11           A practice like Class Counsel's can only properly litigate a limited number of cases at one  
12 time. Yedalian Decl. ¶ 71. Due to the commitment to and demands of litigating this matter, Class  
13 Counsel was precluded from taking on other matters, which were available, and where his time  
14 could have been otherwise spent.

15           **E.     Contingency Nature Of The Work Performed**

16           It should also not be lost on the Court that Class Counsel has borne, and continues to bear,  
17 the entire risk of litigation associated with this lawsuit on a pure contingency basis. Yedalian  
18 Decl. ¶ 71. Stated another way, "Class Counsel litigated the case on a contingency fee basis,  
19 which necessarily presented considerable risk." *Barbosa*, 297 F.R.D. at 450.

20           Additionally, this Court can appreciate that litigating a high-stakes and time-consuming  
21 class action case against a corporate defendant, with litigation potentially lasting for several years,  
22 is not appealing to most lawyers. Yedalian Decl. ¶ 72. Class Counsel undertook this lawsuit  
23 without any guarantee of any payment, and with any fees that he may recover entirely contingent  
24 on obtaining recovery. Thus, Class Counsel has borne, and continues to bear, the entire risk of  
25 obtaining a fee recovery in this case. Yedalian Decl. ¶ 72.

26           "[A]ttorneys whose compensation depends on their winning the case[ ] must make up in  
27 compensation in the cases they win for the lack of compensation in the cases they lose." *Dakota*

28

1 *Medical*, 2017 WL 4180497 \*8, quoting *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9<sup>th</sup>  
2 Cir. 2002).

3 "Absent successful resolution, none of this attorney time would have been compensated."  
4 *Emmons*, 2017 WL 749018 \*7, also quoting *Vizcaino*, 290 F.3d at 1048 for the principle that such  
5 "Risk is a relevant circumstance."

6 "No one expects a lawyer whose compensation is contingent on the success of his services  
7 to charge, when successful, as little as he would charge a client who in advance of the litigation  
8 has agreed to pay for his services, regardless of success." *Barbosa*, 297 F.R.D. at 450, quoting *In*  
9 *re Sumitomo Copper Litig.*, 74 F.Supp.2d 393, 396-98 (S.D.N.Y. 1999).

10 **IV. CLASS COUNSEL'S LODESTAR SUPPORTS THE REASONABLENESS OF THE**  
11 **FEES REQUESTED**

12 Class Counsel's lodestar supports the reasonableness of the fees requested.

13 The lodestar figure is calculated by multiplying the number of hours the attorney  
14 reasonably expended on the litigation by the reasonable hourly rate. *In re Bluetooth Headset*  
15 *Products Liability Litigation*, 654 F.3d 935, 941 (9<sup>th</sup> Cir. 2011); *Perdue v. Kenny A.*, 130 S. Ct.  
16 1662, 1669 (2010)

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

18 Up to June 15, 2018, Class Counsel Chant Yedalian has devoted 107.08 hours of his time  
19 on this case and expects to devote at least an additional 10 hours thereafter for matters such as  
20 appearing for the final approval hearing and work relating to the continuing administration of this  
21 Settlement. Yedalian Decl. ¶ 61.

22 The hours were worked by a skilled class action attorney who has the necessary skill and  
23 experience to litigate the nuances of a class action FACTA case. Yedalian Decl. ¶¶ 38-59.

24 To the extent the Court would like to review the different tasks performed by Class  
25 Counsel, Class Counsel has submitted for *in camera* review, along with the Chambers' copy of this  
26 Motion, an unredacted paper copy of his itemized time records which establish the hours devoted

27 //

28 //

1 by him. Yedalian Decl. ¶ 62.<sup>2</sup>

2 These itemized time records show the tasks performed by Class Counsel and the amount of  
3 time Class Counsel worked. Yedalian Decl. ¶ 63.

4 Each and every task concerns the FACTA cause of action prosecuted, and ultimately  
5 settled, in this case. Yedalian Decl. ¶ 64. The hours worked were therefore plainly reasonable to  
6 accomplish these tasks and could and would certainly have been billed to a private client who  
7 hired counsel to pursue such litigation. *Ibid; Moreno v. City of Sacramento*, 534 F.3d 1106, 1111  
8 (9<sup>th</sup> Cir. 2008) ("The number of hours to be compensated is calculated by considering whether, in  
9 light of the circumstances, the time could reasonably have been billed to a private client.")

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

15 "[F]ederal Courts, Including Our Own, Have Uniformly Held That Time Spent In  
16 Establishing The Entitlement To And Amount Of The Fee Is Compensable.' *In Re*  
17 *Nucorp Energy, Inc.*, 764 F.2d 655, 659-660 (9<sup>th</sup> Cir. 1985). This Is So Because It  
18 Would Be Inconsistent To Dilute A Fees Award By Refusing To Compensate  
19 Attorneys For The Time They Reasonably Spent In Establishing Their Rightful  
20 Claim To The Fee." *Camacho v. Bridgeport Financial, Inc.*, 523 F.3d 973, 981 (9<sup>th</sup>  
21 Cir. 2008).

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

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

30 Further, "[w]here a lodestar is merely being used as a cross-check, the court 'may use a  
31 'rough calculation of the lodestar.'" *Dakota Medical*, 2017 WL 4180497 \*8 and cases cited  
32 therein. Thus, "it can be performed with a less exhaustive cataloguing and review of counsel's  
33

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34 <sup>2</sup> Because the time records are unredacted, they contain sensitive and privileged information as  
35 well as work product, and they are therefore submitted for *in camera* review.

1 hours" and "need entail neither mathematical precision nor bean-counting." *Barbosa*, 297 F.R.D.  
2 at 451 also quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3<sup>rd</sup> Cir. 2005).

3 **B. Reasonable Hourly Rate**

4 Class Counsel, Mr. Yedalian's current hourly rate is \$650 and that rate is well supported by  
5 his skill and experience with class action and FACTA matters. Yedalian Decl. ¶¶ 65-69, 38-59.  
6 Mr. Yedalian is one of the most experienced FACTA class action attorneys in the nation. Yedalian  
7 Decl. ¶¶ 21-23, 40-54. He was among one of the first attorneys in the nation to prosecute FACTA  
8 cases and he has successfully prosecuted to conclusion several FACTA cases on a class basis.  
9 *Ibid.*

10 Class Counsel's rate is further supported by the fact that this is a class action case, and  
11 class action work requires specialized learning and experience. Yedalian Decl. ¶ 69.

12 Class Counsel's rate is also within the range of hourly rates in this District. "This court has  
13 previously accepted as reasonable for lodestar purposes hourly rates of between \$370 and \$495 for  
14 associates, and \$545 and \$695 for senior counsel and partners." *Aguilar*, 2017 WL 2214936 \*6;  
15 *Syed v. M-I, LLC*, 2017 WL 3190341 \*7; *Dakota Medical*, 2017 WL 4180497 \*9 and n.1.

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

18 The 117.08 hours of work devoted by Class Counsel, Mr. Yedalian, to this case multiplied  
19 by Class Counsel's \$650 hourly rate yields a lodestar of \$76,102. Yedalian Decl. ¶ 70.

20 **D. The Lodestar Supports The Requested Fee Award Even Without A Multiplier**

21 The fact that the lodestar exceeds the amount of the one-third fee award which is  
22 requested, is yet a further reason why the requested fee award is reasonable and should be granted.  
23 Indeed, when using the lodestar as a cross-check to determine if the amount of the fee award  
24 calculated under the percentage method is reasonable, a positive multiplier is typically applied to  
25 the lodestar: "Beyond simply the multiplication of a reasonable hourly rate by the number of hours  
26 worked, a lodestar multiplier is typically applied" and that multiplier typically ranges from 1 to 4  
27 and sometimes higher. *Dakota Medical*, 2017 WL 4180497 \*8 and authorities cited therein.  
28

1 "[M]ultiples ranging from one to four are frequently awarded in common fund cases when the  
2 lodestar method is applied." *Vizcaino*, 290 F.3d at 1051 n.6.

3 Here, in light of the fact that the lodestar (without any multiplier) exceeds the amount of  
4 fees requested, it is reasonable. Indeed, the Ninth Circuit has explained that the benchmark should  
5 be adjusted or replaced by the lodestar in such circumstances so as not to result in too low of an  
6 award: "This 'benchmark percentage should be adjusted, or replaced by a lodestar calculation,  
7 when special circumstances indicate that the percentage recovery would be either too small or too  
8 large in light of the hours devoted to the case or other relevant factors." *Torrissi v. Tucson Elec.*  
9 *Power Co.*, 8 F.3d 1370, 1372 (9<sup>th</sup> Cir. 1993) (emphasis added).

10 Accordingly, the lodestar supports the requested fee award.

11 **V. REIMBURSEMENT OF CLASS COUNSEL'S COSTS**

12 Class Counsel seeks reimbursement of costs in the amount of \$1,082.78 as set forth in  
13 Class Counsel Mr. Yedalian's Declaration at paragraph 74.

14 The Ninth Circuit has held that the FCRA's specific remedial provision at issue in this  
15 case, 15 U.S.C. § 1681n(a)(3), authorizes an award of all non-taxable costs "when it is `the  
16 prevailing practice in a given community' for lawyers to bill those costs separate from their hourly  
17 rates." *Grove v. Wells Fargo Financial California, Inc.*, 606 F.3d 577, 580-581 (9<sup>th</sup> Cir. 2010).  
18 All of the costs for which reimbursement is sought are costs that would be billed to a fee paying  
19 client separate from hourly rates, consistent with the prevailing practice. Yedalian Decl. ¶ 75.

20 **VI. THE INCENTIVE AWARD REQUESTED FOR THE CLASS REPRESENTATIVE**  
21 **IS REASONABLE AND CONSISTENT WITH AWARDS IN OTHER FACTA**  
22 **CASES**

23 Class Counsel respectfully requests that the named Plaintiff and only Class Representative,  
24 Cirena Torres, be awarded an incentive award in the amount of \$4,000.

25 In connection with the Court's Order granting preliminary approval of the Settlement, the  
26 Court analyzed this request for an incentive award and ruled that it is "approved on a preliminary  
27 basis" as follows:  
28

1 "In determining whether an incentive payment is excessive, a court should  
2 balance 'the number of named plaintiffs receiving incentive payments, the proportion  
of the payments relative to the settlement amount, and the size of each payment.' *Id.*

3 Here, plaintiff has requested an incentive payment of up to \$4,000, subject to  
4 the approval of the court. (Doc. No. 13 at 5.) This would represent approximately 2  
percent of the overall settlement. The maximum settlement recovery a class member  
5 could receive under the settlement proposed here is \$250. (Doc. No. 13 at 3.)  
6 Therefore, an incentive award of \$4,000 is 16 times the maximum amount that a  
class member could expect to receive in this litigation. Courts in this circuit have  
7 previously approved incentive awards in this range, and the court finds that the  
proposed incentive award is 'not outside the realm of what has been approved as  
8 reasonable by other courts.' *Aguilar v. Wawona Frozen Foods*, No. 1:15-cv-00093-  
DAD-EPG, 2017 WL 2214936, at \*8 (E.D. Cal. May 19, 2017) (and cases cited  
9 therein); see also *Brown v. Hain Celestial Grp., Inc.*, No. 3:11-cv-03082-LB, 2016  
10 WL 631880, at \*9 (N.D. Cal. Feb. 17, 2016) (approving an incentive award of  
\$7,500 to each class representative).

11 The requested incentive payment is thus approved on a preliminary basis."  
12 Order: Dkt. No. 21 at pp. 8:23—9:9.

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

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

20 "[N]amed plaintiffs, as opposed to designated class members who are not named  
21 plaintiffs, are eligible for reasonable incentive payments. The district court must  
22 evaluate their awards individually, using 'relevant factors includ[ing] the actions the  
23 plaintiff has taken to protect the interests of the class, the degree to which the class  
24 has benefitted from those actions, . . . the amount of time and effort the plaintiff  
25 expended in pursuing the litigation . . . and reasonabl[e] fear[s] of] workplace  
26 retaliation.'" *Staton*, 327 F.3d at 977.

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

29 First, were it not for the Class Representative stepping forward and shouldering the duties  
30 of protecting and prosecuting the interests of other Settlement Class members, it is likely the  
31 interests of the Settlement Class would neither have been prosecuted, nor benefited. Yedalian  
32 Decl. ¶ 77. Indeed, the parties have acknowledged that, to their knowledge, there is no other  
33 litigation, either pending or otherwise, on a class or individual basis, concerning the claims in this  
34 lawsuit. *Ibid.*

1           Moreover, Ms. Torres has done all things reasonably expected of her in his capacity as  
2 Class Representative. Yedalian Decl. ¶ 78. Ms. Torres was subjected to liability for defense costs  
3 in the event the litigation was unsuccessful. *Ibid.* By stepping forward to shoulder this action on  
4 behalf of the class, Ms. Torres also took on other risks, including the risk of subjecting herself to  
5 intrusive discovery. *Ibid.* Ms. Torres also regularly and consistently communicated with Class  
6 Counsel throughout the time this lawsuit was pending. *Ibid.* She also reviewed relevant  
7 documents, provided her input, and otherwise kept apprised of litigation related events and  
8 developments. *Ibid.* She also provided her ideas and input to Class Counsel in the various rounds  
9 of settlement negotiations and exchanges. *Ibid.* In sum, Ms. Torres contributed as much of her  
10 valuable time as this litigation demanded to ensure a vigilant prosecution of and favorable  
11 outcome for the best interests of the Settlement Class. *Ibid.* In addition to satisfying the first  
12 *Staton* factor, these facts further support an incentive award because they "recognize [a class  
13 representatives] willingness to act as a private attorney general." *Rodriguez v. West Publishing*  
14 *Corp.*, 563 F.3d 948, 958-959 (9<sup>th</sup> Cir. 2009).

15           Many of the facts supporting the first factor also support the second *Staton* factor in so far  
16 as that the Settlement Class has benefited from the Class Representative's actions. It is fair to say  
17 that but for Ms. Torres' actions, there would be no resulting benefit to individual Settlement Class  
18 members or *cy pres* benefits. Yedalian Decl. ¶ 79. She was also willing and stepped forward to  
19 act as a private attorney general where no other plaintiff has done so. *Ibid.*

20           The fact that the Court has already made a preliminary finding that the settlement is fair,  
21 adequate and reasonable, also supports the significance of the benefits achieved through the Class  
22 Representative's initiative and perseverance. Yedalian Decl. ¶ 80.

23           Third, it is estimated that Ms. Torres devoted approximately 5-10 hours of her time to  
24 pursue this matter. Yedalian Decl. ¶ 81. By definition, the time she devoted to this matter was  
25 time spent away from other matters in an effort to advance the interests of the entire class.

26           Although the fourth *Staton* factor (fear of workplace retaliation) is not applicable to this  
27 type of case, a similar concern, the Class Representative stepping forward and thereby taking on  
28

1 the risks of being subjected to intrusive discovery and defense costs in the event the litigation was  
2 unsuccessful, are factors discussed in connection with the first factor, above.

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

7 "An incentive award may be appropriate when a class representative will not  
8 gain any benefit beyond that he would receive as an ordinary class member. See  
9 *Razilov*, 2006 WL 3312024, at \*4 (approving the payment of an incentive award  
10 where the only benefit a class representative was going to receive from a settlement  
11 was the same statutory damages other class members would receive); *Van Vranken*,  
12 901 F.Supp. at 299 (where a class representative's claim made up 'only a tiny fraction  
of the common fund,' a substantial incentive award was appropriate). The named  
plaintiffs in this action will receive no relief beyond that available to members of the  
class in general; absent an incentive award, they will each be eligible to submit a  
claim for a \$5, \$15, or \$30 voucher. This factor, therefore, also favors approval of an  
incentive award." *Ibid*.

13 The amount requested is also reasonable in relation to other cases. In *Ingram v. The Coca-*  
14 *Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001), the court approved incentive awards of \$300,000  
15 to each named plaintiff in recognition of the services they provided to the class by responding to  
16 discovery, participating in the mediation process and taking the risk of stepping forward on behalf  
17 of the class. In *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 300 (N.D. Cal. 1995), a  
18 \$50,000 incentive award was approved for similar participation.

19 The amount requested is also consistent with (but less than) incentive awards in various  
20 other FACTA cases. Yedalian Decl. ¶ 84. For example, in *McGee, et al. v. Ross Stores, Inc, et*  
21 *al.*, C06-7496 CRB (N.D. Cal. January 9, 2009), the court awarded each of the two class  
22 representatives a \$5,000 incentive payment. In *Tchoboian v. Parking Concepts, Inc., et al.*,  
23 SACV09-422 DMG (ANx) (C.D. Cal. November 12, 2010) the court awarded the only class  
24 representative a \$5,000 incentive payment. In *Jarchaffian v. American Multi-Cinema, Inc., et al.*,  
25 CV09-03434 JHN (AJWx), 2011 U.S. Dist. LEXIS 158005 \*6, (C.D. Cal. October 6, 2011), the  
26 court awarded the only class representative a \$5,000 incentive payment. In *Sakamoto v. One*  
27 *Parking, Inc. et al.*, SACV11-1249 MLG (C.D. Cal. June 21, 2012) the court awarded the only  
28 class representative a \$5,000 incentive payment. In *In re Toys "R" Us—Delaware, Inc.—Fair And*

1 *Accurate Credit Transactions Act (FACTA) Litigation*, No. cv-08-01980 MMM (FMOx), 295  
2 F.R.D. 438, 472 (C.D. Cal. January 17, 2014), the court awarded each of the three class  
3 representatives a \$5,000 incentive payment.

4 In sum, the requested incentive payment of \$4,000 to Ms. Torres, the only Class  
5 Representative in this case, for the valuable time and resources she contributed to advance this  
6 litigation is fair and reasonable, and it is respectfully requested that the Court approve and award  
7 this amount as her incentive award. Yedalian Decl. ¶ 85.

8 **VII. CONCLUSION**

9 For all of the foregoing reasons, it is respectfully requested that the Court grant the Motion  
10 For Award Of Attorney's Fees And Costs To Class Counsel And Incentive Payment To The Class  
11 Representative.

12  
13 Respectfully submitted,

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15 DATED: June 15, 2018

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17 CHANT & COMPANY  
18 A Professional Law Corporation

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