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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

CIRENA TORRES, on behalf of herself and all others similarly situated,

Plaintiff,

v.

PICK-A-PART AUTO WRECKING (d/b/a Pick-A-Part); and DOES 1 through 10, inclusive,

Defendants.

Case No. 1:16-cv-01915-DAD-BAM

NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT

[Filed concurrently with Declaration of Christopher McElroy, Declaration of Christopher Q. Longley, Declaration of Chant Yedalian; and [Proposed] Order and Judgment, lodged herewith]

Hearing
Date: July 17, 2018
Time: 9:30 a.m.
Courtroom: #5 (7th Floor)
Judge: Hon. Dale A. Drozd

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE THAT on July 17, 2018 at 9:30 a.m. or as soon thereafter as the matter may be heard before the Honorable Dale A. Drozd in Courtroom 5 (7th Floor), located at 2500 Tulare Street, Fresno, California 93721, Plaintiff, Cirena Torres, on behalf of herself and on behalf of the Settlement Class, will and hereby does move the Court, pursuant to Federal Rule of Civil Procedure Rule 23, for an Order and Judgment granting final approval of the proposed class action settlement on the terms and conditions set forth in the Stipulated Settlement Agreement and Release (hereinafter sometimes referred to as "Settlement" or "Agreement").[1]

Plaintiff further moves the Court for an Order:

1. Confirming its previous findings that the requirements for class certification, for settlement purposes, are satisfied;
2. Certifying the Settlement Class for settlement purposes;
3. Appointing Plaintiff Cirena Torres as the Class Representative for the Settlement Class;
4. Appointing attorney Chant Yedalian of Chant & Company A Professional Law Corporation as Class Counsel for the Settlement Class;
5. Appointing Atticus Administration, LLC as the Settlement Administrator.
6. Finding that the Settlement is fair, adequate and reasonable and complies with Rule 23(e) of the Federal Rules of Civil Procedure;
7. Finding that the notice of Settlement directed to the Settlement Class has been completed in conformity with the Court's orders;
8. Binding all Settlement Class members who did not timely exclude themselves from the Settlement to the Agreement, including the release contained in paragraph 16 of the Agreement;
9. Directing the Parties and Settlement Administrator to effectuate all terms of the Agreement;

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

10. Providing that each of the Parties is to bear its own fees and costs except as expressly provided in the Agreement or in the Court's order(s) on Motion For Award Of Attorney's Fees And Costs To Class Counsel And Incentive Payment To The Class Representative; and

11. Dismissing the action with prejudice in accordance with the terms of the Agreement; however, the Court shall retain continuing jurisdiction: (i) to decide the Motion For Award Of Attorney's Fees And Costs To Class Counsel And Incentive Payment To The Class Representative and make and enter an order(s) wherein the Court will determine the amount of attorney's fees and costs to award to Class Counsel and the amount of the incentive payment to award to the Class Representative, and (ii) to interpret, implement and enforce the Settlement, and all orders and judgment entered in connection therewith.

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

Respectfully submitted,

DATED: June 15, 2018

CHANT & COMPANY
A Professional Law Corporation

By: /S/ – Chant Yedalian
Chant Yedalian
Counsel For Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

On January 5, 2018 this Court entered an Order granting preliminary approval of the proposed class action settlement. Dkt. No. 21. As part of the same Order, the Court approved a plan of notice to be directed to Settlement Class members and set deadlines by which Settlement Class members may opt-out, object or request to be heard at the final approval hearing. Dkt. No. 21, at pp. 18-19.

As explained in further detail below, notice to Settlement Class members has been provided in conformity with the Court's Orders, and no Settlement Class member has opted-out, objected or requested to be heard at the final approval hearing.

Plaintiff, Cirena Torres, on behalf of herself and on behalf of the Settlement Class, hereby respectfully moves the Court for an Order and Judgment granting final approval of the proposed class action Settlement.

II. FACTUAL SUMMARY

For several years ending on January 31, 2016, Defendant owned and operated a motor vehicle wrecking and recycling facility, located at 2274 E. Muscat Avenue, Fresno, California, which business included the retail sale of used auto parts. McElroy Decl. ¶ 2.

Plaintiff Cirena Torres was a customer of defendant Pick-A-Part. Complaint ¶ 24.

During the settlement class period of December 22, 2014 to October 28, 2015 ("Settlement Class Period"), Pick-A-Part provided Ms. Torres and other customers with electronically printed customer receipts which displayed the expiration date of their respective credit card or debit card and the last four digits of their respective card number. Complaint ¶¶ 34-35.

During the Settlement Class Period, Pick-A-Part had a total of 4,422 credit and debit card transactions. Agreement ¶ 9; McElroy Decl. ¶ 3.

Effective as of January 31, 2016, Defendant ceased all retail operations and sold all of the business furniture, fixtures, machinery, equipment (including motor vehicles, forklifts, etc.), and "junk" inventory on-hand to an unrelated third-party buyer that now owns and operates the

business. McElroy Decl. ¶ 4. The new owner is not affiliated with the Defendant and/or any of its principals. *Ibid.*

FACTA, which is a subset of the Fair Credit Reporting Act, provides that any merchant which accepts credit and/or debit cards is prohibited from printing on electronically printed receipts "more than the last 5 digits of the card number or the expiration date upon any receipt provided to the cardholder at the point of sale or transaction." 15 U.S.C. § 1681c(g)(1). A merchant who "willfully" fails to comply with FACTA is liable for (1) actual damages, if any, or statutory damages of not less than $100 and not more than $1,000, (2) punitive damages as may be awarded by the court, and (3) attorney's fees and costs. 15 U.S.C. § 1681n.

Ms. Torres commenced this action on December 22, 2016 by filing a proposed class action complaint against Pick-A-Part. Plaintiff's Complaint alleges, *inter alia*, that Pick-A-Part willfully violated FACTA by printing the expiration date of credit and debit cards on electronically printed customer receipts printed at a point of sale or transaction. Pick-A-Part denies any wrongdoing or violation of FACTA. Agreement ¶¶ 3 and 27.

III. SETTLEMENT DISCUSSIONS

Between January 2017 to June 2017, the Parties participated in extensive settlement discussions and exchanged information to facilitate those discussions. In June 2017, the Parties signed a Memorandum Of Understanding Of Settlement ("MOU") through which they agreed to a class-wide settlement of this action. The Parties promptly informed the Court of the MOU as well of the fact that there remained issues to work out, including the preparation of a long-form settlement agreement, including the Newspaper Notice, the Full Notice to the Settlement Class and the Claim Form. Dkt. No. 11. The Parties also explained to the Court that the MOU provides that if the Parties cannot agree on these remaining issues, the MOU shall nonetheless be fully enforceable by the Court and the Court shall resolve any such differences. *Ibid.*

Between June 2017 to September 2017, the Parties continued to work on the remaining issues. They reached agreement as to all issues in late September 2017, and the product of all of the negotiations and exchanges between January 2017 and September 2017 resulted in the Stipulated Settlement Agreement and Release (hereinafter sometimes referred to as "Settlement"

or "Agreement"), a copy of which is attached to the Yedalian Declaration as Exhibit 1.[2] Yedalian Decl. ¶¶ 2-3.

IV. NOTICE HAS BEEN PROVIDED TO SETTLEMENT CLASS MEMBERS IN CONFORMITY WITH THIS COURT'S ORDERS AND NOT A SINGLE CLASS MEMBER HAS OPTED-OUT, OBJECTED OR REQUESTED TO BE HEARD

Here, Pick-A-Part does not know, nor does Pick-A-Part have access to any information which would enable it to determine, the names, postal addresses, email addresses or facsimile numbers of absent Settlement Class members. McElroy Decl. ¶ 5. Moreover, Pick-A-Part ceased all retail operations before this lawsuit was filed. McElroy Decl. ¶ 5.

Thus, pursuant to the Court-approved notice plan, notice was to be provided to Settlement Class members in the following ways:

Newspaper Notice

Newspaper Notice in the form attached to the Agreement as Exhibit B was to be published on three separate dates in the Fresno Bee. Order: Dkt. No. 21 at p. 18:9-11; Agreement ¶ 11(a).

As set forth in the Declaration of Christopher Q. Longley on behalf of the Settlement Administrator Atticus Administration, LLC, the Newspaper Notice was published in the Fresno Bee on January 25, 2018, February 22, 2018 and April 2, 2018. Longley Decl. ¶ 6.

Settlement Website, Full Notice and Claim Form

For a period of at least 180 days (180 days is the duration of the claims period), the Settlement Administrator will provide a viewable and printable on-line long-form notice ("Full Notice"), which will be in the form attached to the Agreement as Exhibit C, via a Settlement Website containing a description of the settlement terms. Order: Dkt. No. 21 at p. 18:13-14; Agreement ¶ 11(b).

The Settlement Website will also provide viewable, printable, and downloadable copies of the Claim Form. Further, Settlement Class members also have the option of submitting their claim through the Settlement Website, by completing and submitting an electronic version of the Claim Form on the internet through the Settlement Website. Agreement ¶ 10(d).

[2] Capitalized terms shall have the same meanings as in the Agreement, unless indicated otherwise.

As also set forth in the Declaration of Christopher Longley (¶¶ 6, 10) this notice and ability to submit a claim has been provided to the Settlement Class in conformity with the Court-approved notice plan.

A. No Opt-Outs

Settlement Class members were provided until March 16, 2018 to opt-out. Order: Dkt. No. 21 at p. 18:15-16.

No Settlement Class member opted-out during the opt-out period. Longley Decl. ¶ 7.

B. No Objections

Settlement Class members were provided until March 16, 2018 to object to the terms of the Settlement. Order: Dkt. No. 21 at p. 18:15-16.

During the objection period, no Settlement Class member objected to the Settlement. Longley Decl. ¶ 8.

C. No Notice of Intention to Appear

In addition to allowing Settlement Class members an opportunity to opt-out or object, Settlement Class members were also provided an opportunity to request permission to appear and speak at the final approval hearing. Order: Dkt. No. 21 at p. 18:22-27.

Settlement Class members were provided until March 16, 2018 to make such a request. Order: Dkt. No. 21 at p. 18:22-27.

As demonstrated by the Court's records in this case, to date, no Settlement Class member has filed a request for permission to appear or speak at the final approval hearing.

V. CAFA NOTICE HAS BEEN PROVIDED TO THE APPROPRIATE GOVERNMENT OFFICIALS AND THEY HAVE NOT OBJECTED OR INTERVENED

On November 20, 2017, pursuant to the Class Action Fairness Act, 28 U.S.C. §1715, written notice of this lawsuit and settlement was provided to the appropriate government entities. Dkt. No. 20: Galfin Decl. ¶ 1.

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No response or objection has been received from the CAFA Coordinators of any government entity, nor have any of them intervened as is demonstrated by the Court's records in this case.

VI. THE LACK OF ANY OPT-OUTS, OBJECTIONS AND REQUESTS TO APPEAR PROVIDES FURTHER SUPPORT FOR THE SETTLEMENT

The lack of any opt-outs, objections and requests to appear provides further support for the Settlement. "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement action are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008) (quoting *Nat'l Rural Telecomms. Coop. v. DirecTV*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)). "The absence of a single objection to the Proposed Settlement provides further support for final approval of the Proposed Settlement." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 529.

The lack of any objection from or intervention by the CAFA Coordinators of any government entity likewise provides further support for the settlement.

VII. THE SETTLEMENT

Subject to the Court's approval pursuant to Federal Rules of Civil Procedure ("FRCP") Rule 23(e), the Parties have agreed to settle this matter upon the terms and conditions set forth in the Agreement.

A summary of the terms of the Settlement is as follows:

- This Settlement concerns a single location, 2274 E. Muscat Ave., Fresno, California 93725, which Defendant used to operate. Agreement ¶ 9; McElroy Decl. ¶¶ 2, 4.
- During the Settlement Class Period of December 22, 2014 to October 28, 2015, Pick-A-Part had a total of 4,422 credit and debit card transactions. Agreement ¶ 9; McElroy Decl. ¶¶ 2, 4.
- The parties are not aware of any customer who has sustained any actual damages as a result of the printing of the expiration date on any of the subject receipts in this case.

- For the purposes of the Settlement, Plaintiff and Pick-A-Part have stipulated to the certification of the following Settlement Class: "All consumers who, at any time during the period December 22, 2014 to October 28, 2015, were provided an electronically printed receipt at the point of a sale or transaction at Pick-A-Part (located at 2274 E. Muscat Ave., Fresno, CA 93725), on which receipt was printed the expiration date of the consumer's credit card or debit card." Agreement ¶ 9.

- Pick-A-Part will establish a non-reversionary cash fund in the amount of $195,000 (the "Cash Fund"). After subtracting from the Cash Fund Class Counsel's attorneys' fees and costs, an enhancement payment to the Class Representative, and Administration Costs, the remaining amount (the "Net Cash Fund") will be divided by the total number of Settlement Class members who submit a valid and timely claim to determine each claiming Settlement Class member's pro-rata share (the "Pro-Rata Share"). In the event the Pro-Rata Share is equal to or exceeds $250, each Settlement Class member who submits a valid and timely claim will be mailed a check in the amount of $250, to be paid from the Net Cash Fund. In the event the Pro-Rata Share is less than $250, each Settlement Class Member who submits a valid and timely claim will be mailed a check in the amount of the Pro-Rata Share, to be paid from the Net Cash Fund. Agreement ¶ 13(a) and (b).

- Each Settlement Class member may submit only one claim, regardless of whether they made one or more credit or debit card transactions during the period December 22, 2014 to October 28, 2015. A valid claim will require that a Settlement Class member produce evidence that he or she received a customer receipt from Pick-A-Part at any time during the period December 22, 2014 to October 28, 2015 that displays the expiration date of his or her credit or debit card. Proof of claim may consist of the original or a copy of either (1) a customer receipt containing the expiration date of his or her credit or debit card showing that he or she made a transaction at Pick-A-Part at any time during the period December 22, 2014 to October 28, 2015, or (2) a credit or debit card statement (which will be encouraged to be in redacted form) showing that he or she made a transaction at Pick-A-Part at any time during the period December 22, 2014 to October 28, 2015. Agreement ¶ 10(d).

- Given the nature of this particular consumer class action case, the fact that Pick-A-Part does not know, nor does Pick-A-Part have access to any information which would enable it to determine, the names, postal addresses, email addresses or facsimile numbers of absent Settlement Class members, the fact that Pick-A-Part ceased all retail operations before this lawsuit was filed, and experience with consumer class action claims-made rates, the Parties expect that relatively few claims will be made and that a residue will result. Agreement ¶ 10(b)(i). Accordingly, the Parties have agreed on a plan for the disposition of the anticipated residue. Thus, if any residual funds from the Net Cash Fund remain after claims payments are made to the Settlement Class members, any and all such residual funds will be distributed *cy pres* to the following 501(c)(3) charity: Legal Assistance for Seniors.

- The Parties agreed upon and the Court approved the notice plan set forth in Section IV., above. As also explained in Section IV., above, Settlement Class members were provided until March 16, 2018 to opt-out of or object to the Settlement, and no Settlement Class member opted-out or objected during this period.

- Settlement Class members will have until July 14, 2018 (180 days from the date Full Notice is first posted on the Settlement Website to submit a claim). Order: Dkt. No. 21 at p. 18:13-15; Agreement ¶ 10(d). Settlement Class members may submit a Claim Form (together with the required documentation) by postal mail or by facsimile. Agreement ¶ 10(d). Alternatively, Settlement Class members may submit a claim by completing and submitting an electronic version of the Claim Form (and uploading and submitting the required documentation) on the internet through the Settlement Website. *Ibid.*

- The Settlement, including the claims process, will be administered by Atticus Administration, LLC ("Settlement Administrator"), as approved by the Court. Order: Dkt. No. 21 at p. 19:17; Agreement ¶ 10(c). All fees and costs incurred or charged by the Settlement Administrator to administer the Settlement ("Administration Costs"), including but not limited to check issuance, Settlement Website, notice to Settlement Class Members, and envelope and postage charges, will be paid from the Cash Fund. Agreement ¶ 10(c).

- Class Counsel will apply to the Court for an incentive (service) award of up to $4,000 for the named Plaintiff, to be paid from the Cash Fund, to compensate her for her services as Class Representative. Agreement ¶ 18.
- Class Counsel will apply to the Court for an award of up to $65,000 for attorney's fees, plus an award of Class Counsel's litigation costs of up to $3,000, both to be paid from the Cash Fund. Agreement ¶ 19.
- Class Counsel's motion for an award of attorney's fees and costs and the Class Representative's motion for service (or incentive) award will be posted on the Settlement Website no later than June 17, 2018. Agreement ¶ 14(b) and (c). Any objection must be filed with the Court and also served on Class Counsel and counsel for Pick-A-Part no later than June 26, 2018. *Ibid;* Order: Dkt. No. 21 at p. 18:20-22;
- The Agreement includes a term of "No Admission" such that "Nothing contained in this Agreement, nor the consummation of the settlement, is to be construed or deemed an admission of liability, culpability, or wrongdoing on the part of any of the Parties." Agreement ¶ 27.

VIII. THE SETTLEMENT CLASS

For the purposes of the Settlement, the Parties have stipulated to the certification of the following Settlement Class: "All consumers who, at any time during the period December 22, 2014 to October 28, 2015, were provided an electronically printed receipt at the point of a sale or transaction at Pick-A-Part (located at 2274 E. Muscat Ave., Fresno, CA 93725), on which receipt was printed the expiration date of the consumer's credit card or debit card." Agreement ¶ 9.

The fundamental question "is not whether . . . plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). This action meets these governing standards for certification under Rule 23(a) and Rule 23(b)(3).

A. Numerosity

Under Rule 23(a)(1), a class action may be maintained where "the class is so numerous that joinder of all members is impracticable." "Although the absolute number of class members is

not the sole determining factor, where a class is large in numbers, joinder will usually be impracticable." *Jordan v. Los Angeles*, 669 F.2d 1311, 1319 (9th Cir. 1982).[3]

In *Jordan*, the Ninth Circuit determined that the proposed class sizes in that suit of 39, 64, and 71 were large enough such that the other factors need not be considered. *Ibid.* "The fact that the size of the proposed class has not been exactly determined is not a fatal defect in the motion; a class action may proceed upon estimates as to the size of the proposed class." *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 324 (D.C. N.Y. 1982); *In re Computer Memories Sec. Litig.*, 111 F.R.D. 675, 679 (N.D. Cal. 1986) (class certified where plaintiffs did not establish exact number of class members, but demonstrated that class would "obviously be sufficiently numerous").

Here, the 4,422 credit and debit card transactions during the Settlement Class Period (McElroy Decl. ¶ 3) demonstrates that the sheer number of class members easily surpasses the class sizes in *Jordan* which the Ninth Circuit deemed satisfied the numerosity requirement. The fact that, by the very nature of the Settlement Class, its members are unknown and cannot be readily identified, further dictates that joinder is impracticable. *Jordan*, 669 F.2d at 1319-1320.

B. Commonality

Rule 23(a)(2) requires that there be "questions of law or fact common to the class." This commonality requirement must be "construed permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "All questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Ibid.* Where a class is united by a common interest in determining whether a defendant's broad course of conduct is actionable, commonality is not defeated "by slight differences in class members' positions." *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975).

> "This analysis does not turn on the number of common questions, but on their relevance to the factual and legal issues at the core of the purported class' claims. Compare *Dukes*, 131 S.Ct. at 2556 **('We quite agree that for purposes of Rule**

[3] "Where the class is not so numerous, however, the number of class members does not weigh as heavily in determining whether joinder would be infeasible. In the latter situation, other factors such as the geographical diversity of class members, the ability of individual claimants to institute separate suits, and whether injunctive or declaratory relief is sought, should be considered in determining impracticability of joinder." *Jordan, supra,* 669 F.2d at 1319.

> **23(a)(2), even a single common question will do.')** (internal quotation marks omitted), *Wang v. Chinese Daily News*, 737 F.3d 538, 544 (9th Cir. 2013) ('Plaintiffs need not show that every question in the case, or even a preponderance of questions, is capable of classwide resolution.'), *Mazza*, 666 F.3d at 589 ('[C]ommonality only requires a single significant question of law or fact.'), with *Dukes*, 131 S.Ct. at 2551 ('What matters to class certification is not the raising of common `questions'—even in droves.')" *Jimenez v. Allstate Ins. Co.*, 765 F.3d 1161, 1165 (9th Cir. 2014).

Commonality cannot be disputed here.

All class members share two common legal questions – whether Pick-A-Part violated FACTA by printing the expiration date of debit and credit cards on receipts, and whether its practice of doing so was "willful." None of the relevant questions relates to the conduct of the class members, but rather all focus on Pick-A-Part conduct and culpability in violating FACTA. See, *e.g., Tchoboian v. Parking Concepts, Inc.*, 2009 WL 2169883 *5 (C.D. Cal. 2009), petition for permission to appeal grant of certification denied October 20, 2009, 9th Cir. Docket No. 09-80132 ("The overriding legal issue is whether [defendant']s alleged noncompliance was willful so that the class members are entitled to statutory damages. Moreover, whether [defendant] violated FACTA is a combined question of law and fact common to all members."); *Medrano v. WCG Holdings, Inc.*, 2007 WL 4592113 *2 (C.D. Cal. 2007) ("There is a common core of salient facts across the class. Each member of the proposed class received a non-compliant receipt from [Defendant] after the applicable compliance deadline."); *Kesler v. Ikea U.S., Inc., et al.*, 2008 WL 413268 *3 (C.D. Cal. 2008) ("In this case, the facts and legal issues of each class member's claim are nearly, if not entirely, identical. There is a common core of salient facts across the class. Each member of the proposed class received a non-compliant receipt from IKEA after the December 4, 2006 FACTA compliance deadline. The overriding legal issue is whether IKEA's noncompliance was willful, so that the class members are entitled to statutory damages.")

C. <u>Typicality</u>

Rule 23(a)(3) requires that the representative plaintiff have claims "typical of the claims ... of the class." "[R]epresentative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. Named plaintiffs need not be "identically situated" with all other class members; rather, "[i]t is enough if their situations share a 'common issue of law or fact' [citation] and are 'sufficiently

parallel to insure a vigorous and full presentation of all claims for relief.'" *Cal. Rural Legal Assistance, Inc. v. Legal Services. Corp.*, 917 F.2d 1171, 1175 (9th Cir. 1990). Moreover, typicality refers to the "nature of the claim … of the class representative, and not to the specific facts from which it arose or the relief sought." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). The test of typicality is thus "whether other members have the same or similar injury, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Ibid.*

Here, Plaintiff and all other class members allege the same injury, violation of their FACTA rights resulting from the same course of conduct — the printing of their card expiration date on credit or debit card receipts. Accordingly, this lawsuit is based on conduct which is not unique to Plaintiff, but on standardized, uniform conduct that is common to all class members. Moreover, the same relief, specifically, statutory damages under 15 U.S.C. § 1681n, is sought for all class members for Pick-A-Part's "willful" violation of FACTA. Accordingly, the typicality requirement is satisfied. *Tchoboian*, 2009 WL 2169883 *5 (C.D. Cal. 2009) (holding that typicality is satisfied because "[Plaintiff]'s claim is, in fact, 'substantially identical' to the claims of the proposed class members-namely, he alleges that [defendant] issued him a noncompliant receipt in willful violation of the FACTA"); *Medrano*, 2007 WL 4592113 *3 (same); *Kesler*, 2008 WL 413268 *4 (same); *Murray v. GMAC Mortgage Corp.*, 2007 WL 1100608 *5 (N.D. Ill. 2007) ("*Murray II*") (typicality satisfied where, despite minor factual discrepancies, all putative class members had "the same essential characteristics"); *In re Activision Securities Litigation*, 621 F.Supp. 415, 428 (N.D. Cal. 1985) (finding that "the only material variation among class members is the amount of damages to which each member is entitled" and that "[s]uch differences are insufficient to defeat class certification.")

D. Adequate Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." Representation is adequate if (1) class counsel is qualified and competent and (2) the class representative and his or her counsel are not disqualified by conflicts of interest. *Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978).

Here, there are no conflicts of interest between Plaintiff and Settlement Class members. Plaintiff and each class member assert identical claims for statutory damages arising from the same facts, *i.e.*, Pick-A-Part's printing of the expiration date of the respective credit or debit card on receipts. Thus, there is no potential for conflicting interests in this action. *Abels v. JBC Legal Group, P.C.*, 227 F.R.D. 541, 545 (N.D. Cal. 2005) (no conflict where claims asserted by plaintiff and class members arise from defendants' use of form letters allegedly violating the Fair Debt Collection Practices Act). Moreover, there is no basis for asserting against Plaintiff any unique defenses that Pick-A-Part could not assert against any other Settlement Class member. Nor is there any basis to suggest that Plaintiff lacks sufficient zeal or competence.

Nor are their any conflicts with Plaintiff's counsel. Plaintiff is represented by highly capable and competent counsel experienced in class action litigation, including FACTA lawsuits. Yedalian Decl. ¶¶ 38-59. *Local Joint Exec. Bd. of Culinary/Bartender Trust Fund v. Las Vegas Sands, Inc.*, 244 F.3d 1152, 1162 (9th Cir. 2001) (adequacy established by mere fact that counsel were experienced practitioners).

E. Rule 23(b)(3) Requirements Are Met

The Parties seek certification pursuant to Rule 23(b)(3), which authorizes certification if "the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." FRCP 23(b)(3). Rule 23(b)(3)'s predominance and superiority factors are satisfied.

1. Predominance of Common Questions

To satisfy predominance, common questions of law or fact must "present a significant aspect of the case" and be capable of resolution "in a single adjudication." *Hanlon*, 150 F.3d at 1022-1023; *Culinary/Bartender Trust Fund*, 244 F.3d at 1163.

The predominance inquiry focuses on whether the class is "sufficiently cohesive to warrant adjudication by representation." *Culinary/Bartender Trust Fund*, 244 F.3d at 1162. Central to this question "is the notion that the adjudication of common issues will help achieve judicial economy." *Zinser v. Accufix Research Institute, Inc.*, 253 F.3d 1188, 1189 (9th Cir. 2001).

In this case, whether Pick-A-Part violated FACTA "willfully" is the central issue that clearly predominates over any individual issues. Whether Pick-A-Part did so depends upon facts concerning its own conduct — conduct that applies uniformly to all class members in this case.

That common issues predominate is also bolstered by the fact that the available remedy in this case is statutory damages. As the Ninth Circuit explained in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708, 719 (9th Cir. 2010), "irrespective of whether Bateman and all the potential class members can demonstrate actual harm resulting from a willful violation, they are entitled to statutory damages."

That common issues predominate is also evidenced by the fact that all class members' claims involve the very same conduct by Pick-A-Part—the printing of receipts which contain the credit or debit card's expiration date.

"When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis." *Hanlon*, 150 F.3d at 1022 (internal quotation marks omitted).

2. Superiority

To determine whether the superiority requirements are satisfied, a court must compare a class action with alterative methods for adjudicating the parties' claims. Lack of a viable alternative to a class action necessarily means that a class action satisfies the superiority requirement. "[I]f a comparable evaluation of other procedures reveals no other realistic possibilities, [the] superiority portion of Rule 23(b)(3) has been satisfied." *Culinary/Bartender Trust Fund*, 244 F.3d at 1163; *Valentino v. Carter-Wallace*, 97 F.3d 1227, 1235-36 (9th Cir. 1996) ("a class action is a superior method for managing litigation if no realistic alternative exists").

In *Local Joint Executive Board of Culinary/Bartender Trust Fund*, the Ninth Circuit held that a class action met the superiority requirements of Rule 23(b)(3) where class members could recover, at most, damages in the amount of $1,330. Here, class members can recover, at most, statutory damages in an amount between $100 and $1,000 per violation. As in *Culinary/Bartender Trust Fund*, "This case involves multiple claims for relatively small individual

sums…. If plaintiffs cannot proceed as a class, some-perhaps most — will be unable to proceed as individuals because of the disparity between their litigation costs and what they hope to recover. 'Class actions ... may permit the plaintiffs to pool claims which would be uneconomical to litigate individually.'" *Id*. at 1163; see also *Hanlon*, 150 F.3d at 1023 (explaining that "In this sense, the proposed class action is paradigmatic"); *Yokoyama v. Midland Nat'l*, 594 F.3d 1087, 1094 (9th Cir. 2010); ($10,000-$15,000 not sufficient incentive to sue individually); *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087, 1095 (9th Cir. 2009) ("policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights"). In *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948, 953 (7th Cir. 2006), a case involving the *identical* remedy provisions of the FCRA[4], the Seventh Circuit held as follows: "Rule 23(b)(3) was designed for situations such as this, in which the potential recovery is too slight to support individual suits, but injury is substantial in the aggregate."

The Supreme Court has similarly held. *Phillips Petroleum Co., v. Shutts*, 472 U.S. 797, 809 (1985) ("this lawsuit involves claims averaging about $100 per plaintiff; most of the plaintiffs would have no realistic day in court if a class action were not available"); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980) ("damages claimed by the two named plaintiffs totaled $1,006.00. Such plaintiffs would be unlikely to obtain legal redress…. This, of course, is a central concept of Rule 23"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974) ("No competent attorney would undertake this complex antitrust action to recover so inconsequential an amount. Economic reality dictates that petitioner's suit [involving individual damage of $70] proceed as a class action or not at all").

In sum, as the Ninth Circuit explained in another FACTA case, the purpose of Rule 23(b)(3) is "to allow integration of numerous small individual claims into a single powerful unit." *Bateman*, 623 F.3d at 722.

[4] "FACTA and other provisions of the FCRA [the Fair Credit Reporting Act] share the same statutory damages provision, see 15 U.S.C. § 1681n." *Bateman, supra*, 623 F.3d at 715.

The above authorities clearly dictate that the superiority requirements of Rule 23(b)(3) are satisfied here.

Consideration of the factors listed in FRCP Rule 23(b)(3) bolsters this conclusion. Ordinarily, these factors are (A) the interest of class members in individually controlling the prosecution of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by other class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action. However, when a court reviews a class action settlement, the fourth factor does not apply. In deciding whether to certify a settlement class action, a district court "need not inquire whether the case, if tried, would present intractable management problems." *Amchem Products Inc. v. Woodward*, 521 U.S. 591, 620 (1997). The remaining factors set forth in FRCP Rule 23(b)(3) (A), (B) and (C) all favor class certification in this case.

First, class members have no particular interest in individually controlling the prosecution of separate actions. Statutory damages cannot exceed $1,000, and the fact of the matter is that there is no other known separate action filed or prosecuted by any other class members. Moreover, any Settlement Class member who desired to pursue actual damages could have opted out of the Settlement, but none did so.

Second, and as explained above, the parties are not aware of any other litigation regarding the FACTA violations at issue in this case.

Third, it is desirable to concentrate the litigation in this forum because all of the named parties, including Pick-A-Part, reside in California and the alleged FACTA violations originate from a single location in California. Moreover, Plaintiff and Pick-A-Part have reached a Settlement. "With the settlement in hand, the desirability of concentrating the litigation in one forum is obvious." *Elkins v. Equitable Life Ins. of Iowa*, 1998 WL 133747 *19 (M.D. Fla. 1998); *Strube v. American Equity Life Ins. Co.*, 226 F.R.D. 688, 697 (M.D. Fla. 2005) (third and fourth Rule 23(b)(3) factors are "conceptually irrelevant in the context of a settlement").

The conclusion is inescapable that there simply is no better method than a class action for resolving all the claims of the Settlement Class Members in this case. The conclusion of the court in *Murray II*, where the court certified a case involving claims for statutory damages under the FCRA, applies equally here:

> "This is a case where class certification presents the most efficient means of adjudicating the controversy. The class is numerous but the potential recovery for each class member is quite small. Indeed, it is exceedingly unlikely that many individuals would wish to go to court for a potential recovery of $100-or that they could find counsel willing to represent them." *Murray II*, 2007 WL 1100608 *7.

Finally, FACTA is a consumer protection statute which serves not just to compensate, but also to "deter" future violations. *Bateman*, 623 F.3d at 718. As the Ninth Circuit has also explained, this "deterrent purpose" of FACTA is served by certification: "we are quite sure that certification of a class here would preserve, if not amplify, the deterrent effect of FACTA." *Id.* at 723.

IX. THE TWO-STEP APPROVAL PROCESS

There is a "strong judicial policy that favors settlements," particularly in class actions and other complex cases where substantial resources can be conserved by avoiding the time, cost, and rigors of continued litigation. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

A settlement of class litigation must be reviewed and approved by the Court. FRCP Rule 23(e). This is done in two steps: (1) an early (preliminary) review by the trial court, and (2) a final review after notice has been distributed to the class members for their comment or objections.

This Court has already performed the first step, having granted preliminary approval of the proposed Settlement on January 5, 2018 (Dkt. No. 21), and this Motion concerns the second step.

At the second step of the approval process (usually referred to as the fairness hearing or final approval hearing), after class members have been notified of the proposed settlement and have had an opportunity to be heard, the court makes a final determination whether the settlement is "fair, reasonable and adequate" under Rule 23(e). *Armstrong v. Board of School Directors of the City of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980).

X. THE PRESUMPTION OF FAIRNESS

Courts presume the absence of fraud or collusion in the negotiation of a settlement unless evidence to the contrary is offered. In short, there is a presumption that the negotiations were conducted in good faith. *Newberg*, § 11:51, *In re Chicken Anti-Trust Litigation*, 560 F.Supp 957, 962 (N.D. Ga. 1980); *Priddy v. Edelman*, 883 F.2d 438, 447 (6th Cir. 1989); *Mars Steel Corp. v. Continental Illinois National Bank and Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987). Courts do not substitute their judgment for that of the proponents, particularly where, as here, settlement has been reached with the participation of experienced counsel familiar with the litigation. *Hammon v. Barry*, 752 F.Supp 1087, 1093 (D. D.C. 1990); *Steinberg v. Carey*, 470 F.Supp. 471, 474 (S.D. N.Y. 1979); *Sommers v. Abraham Lincoln Federal Savings & Loan Assoc.*, 79 F.R.D. 571, 573-574 (E.D. Pa. 1978); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995).

While the recommendations of counsel proposing the settlement are not conclusive, the Court should take them into account and afford them "great weight," particularly where, as here, they are capable and competent, have experience with this type of matter, and have been intimately involved in this litigation. *Nat'l Rural Telecomm. Coop. v. DirecTV*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) ("'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation. [citation.] This is because '[p]arties represented by competent counsel are better positioned than courts to produce a settlement that fairly reflects each party's expected outcome in the litigation.'"); *See also Newberg*, § 11:47.

XI. THIS SETTLEMENT IS FAIR AND REASONABLE

The Settlement is well within the range of reasonableness and final approval should be granted. No single criterion determines whether a class action settlement meets the requirements of Rule 23(e). In connection with final approval determinations, the Ninth Circuit has directed district courts to consider a variety of factors without providing an "exhaustive list" or suggesting which factors are most important. *Staton v. Boeing Co.*, 327 F.3d 938, 959 (9th Cir. 2003). "The relative degree of importance to be attached to any particular factor will depend upon and be dictated by the nature of the claim(s) advanced, the type(s) of relief sought, and the unique facts

and circumstances presented by each individual case." *Officers for Justice v. Civil Service Commission of City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982). Indeed, "one factor alone may prove determinative in finding sufficient grounds for court approval." *Nat'l Rural Telecomm. Coop. v. DirecTV*, 221 F.R.D. 523, 525 (C.D. Cal. 2004); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994).

Due to the impossibility of predicting any litigation result with certainty, a district court's evaluation of a settlement essentially amounts to "nothing more than 'an amalgam of delicate balancing, gross approximations and rough justice.'" *Officers for Justice*, 688 F.2d at 625. The ultimate touchstone, however, is whether "class counsel adequately pursued the interests of the class as a whole." *Staton*, 327 F.3d at 961. As the Ninth Circuit explained in *Officers for Justice*, the district court's role in evaluating a class action settlement is therefore tailored to meet that narrow objective. Review under Rule 23(e) "must be limited to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties." *Officers for Justice*, 688 F.2d at 625. Accordingly, the Ninth Circuit will not reverse a district court's approval of a class action settlement unless the settlement provisions clearly suggest the possibility that class interests gave way to self interest. *Staton*, 327 F.3d at 961. Some of the factors which were considered in evaluating the reasonableness of this Settlement are as follows:

A. <u>The Likelihood Of Success By Plaintiff; Risks, Duration And Expense Of Continuing Litigation</u>

Absent this Settlement, there are very real risks involved in continued litigation, including extensive delays, potential appeals and the possibility that Settlement Class members may ultimately end up with no recovery. Yedalian Decl. ¶ 5.

1. Outright Dismissal

In her motion for preliminary approval, Plaintiff had pointed out that, although the issue was not yet at the time resolved by the Ninth Circuit and that appeals were pending before the Ninth Circuit, many federal courts, including but not limited to at least three federal cases pending in the Washington federal courts (within the Ninth Circuit), and two federal courts of appeal, had

already dismissed FACTA cases like this one which allege expiration date violations and seek statutory damages. The dismissals were based on the position that plaintiffs who allege expiration date violations without any accompanying actual injury do not sustain any "concrete injury" sufficient to satisfy Article III standing requirements in federal court. *Byles v. Ace Parking Mgmt., Inc.*, Case No. C16-0834-JCC, Dkt. No. 24 (W.D. Wash. Oct. 4, 2016); *Israel v. Diamond Parking Servs. Inc.*, Case No. C16-0687-JCC, Dkt. No. 23 (W.D. Wash. Oct. 11, 2016); *Bassett v. ABM Parking Servs., Inc.*, C16-00947-TSZ, Dkt. No. 6 (W.D. Wash. July 21, 2016); *Meyers v. Nicolet Rest. of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016); *Crupar-Weinmann v. Paris Baguette America, Inc.*, 861 F.3d 76 (2nd Cir. 2017).

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

Indeed, Class Counsel has received several dismissal orders in FACTA expiration date cases and FACTA excess digit cases in federal and state court. *E.g.*, *Llewellyn v. AZ Compassionate Care Inc.*, No. 2:16-cv-04181-DGC, 2017 WL 1437632 (D. Ariz. Apr. 24, 2017); *Gant v. Fondren Orthopedic Group. L.L.P.*, No. 4:16-cv-00648, 2017 WL 4479955 (S.D. Tex. May 23, 2017); *O'Shea v. P.C. Richard & Son, LLC*, No. 1:15-cv-09069-KPF, 2017 WL 3327602 (S.D. N.Y. Aug. 3, 2017); *Batra v. RLS Supermarkets LLC*, No. 3:16-cv-02874-B, 2017 WL 3421073 (N.D. Tex. Aug. 9, 2017); *Noble v. Nevada Checker Cab Corp.*, No. 2:15-cv-02322-RCJ-VCF, 2016 WL 4432685 (D. Nev. Aug. 19, 2016); *Miles v. The Company Store, Inc.*, No. 16-CVS-2346 (North Carolina Superior Court Nov. 16, 2017); *Nowe v. Essex Technology Group, LLC*, No. 17-1-3769-99 (Georgia Superior Court Jan. 12, 2018). Yedalian Decl. ¶ 8.

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

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

If this case proceeded to litigation, Pick-A-Part also contends that a state court would likewise not have subject-matter jurisdiction due to the purported lack of any actual damage. Yedalian Decl. ¶ 11. If Pick-A-Part is correct, then class members would not be able to recover anything in federal or state court. Class Counsel recently defeated a demurrer brought by another defendant in Los Angeles County Superior Court in another FACTA case where the defendant made just such an argument. *Ibid.* Although the Court overruled the demurrer, it noted it was a "very close question" and that defendant has since filed a motion for reconsideration and sought a writ. *Ibid.* At a minimum, litigation of this issue would cause delay and pose substantial risk, including the risk of outright dismissal as has already occurred in many cases. *Ibid.* In light of the acute risk of outright dismissal, this factor alone renders the Settlement not only reasonable, but an exceptionally favorable result. *Ibid.*

2. "Willfulness"

In order to recover any statutory damages and other remedies under 15 U.S.C. § 1681n, Plaintiff must show that Pick-A-Part engaged in "willful" conduct. However, Pick-A-Part has vigorously denied that its conduct was willful. Yedalian Decl. ¶ 12. In contrast, Plaintiff believes, among other things, that the printing of the expiration date was reckless and obvious to Pick-A-Part and the result of a lack of adequate measures to safeguard consumer rights. Yedalian Decl. ¶ 12.

Regardless of how strongly the parties feel about the merits, the parties face issues and risks concerning how the legal requirements for a "willful" violation of FACTA will be applied to the particular facts of this case. Yedalian Decl. ¶ 13.

3. Class Certification

The parties have sharply divergent positions on class certification in this case, absent a settlement. Pick-A-Part has denied that for any purpose other than that of settling this lawsuit, this action is appropriate for class treatment. Agreement ¶¶ 3, 9 and 27; Yedalian Decl. ¶ 14.

Plaintiff believes that the Ninth Circuit's decision in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010), which reversed the denial of class certification in another FACTA case, strongly supports certification in this case. Yedalian Decl. ¶ 15.

Yet, absent a settlement, class certification remains a hotly contested matter in this case, and there are risks attendant in continued litigation of these issues, including, at a minimum, delays and potential appeals. Yedalian Decl. ¶ 16.

For example, after the Ninth Circuit's decision in *Bateman*, one district court within the Central District denied class certification in a FACTA case, *Martin v. Pacific Parking Systems, Inc.*, 2012 WL 2552694 (C.D. Cal. July 2, 2012). On September 6, 2012, the Ninth Circuit granted a Rule 23(f) petition for permission for discretionary leave to appeal the district court's denial of certification in *Martin* (9th Cir. Docket No. 12-80144), and on appeal it was held that the district court did not abuse its discretion based upon the facts in that case. 2014 WL 3686135 (July 25, 2014). Yedalian Decl. ¶ 17.

In sum, while Plaintiff feels strongly about certification in this case, *Martin* is an example of a FACTA case demonstrating the risks inherent in certification, including, at a minimum, delays and potential appeals. Yedalian Decl. ¶ 18.

4. Likely Duration Of Litigation And Future Expense

Litigation of the above issues, including through possible appeals, have the likely potential to take years and be costly. Yedalian Decl. ¶ 19.

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B. The Amount Of Discovery Or Evidence; Recommendation And Experience of Counsel

A substantial amount of information was obtained and exchanged, including specific figures concerning transactions during the Settlement Class Period. This information was targeted, took time and effort to obtain, and was used as the foundation necessary to have informed settlement discussions by counsel who has extensive experience with FACTA cases. Counsel's experience and perseverance also resulted in getting this information through informal, rather than formal, discovery. Yedalian Decl. ¶ 20. "[I]n the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000).

Indeed, counsel is among one of the first attorneys in the nation to prosecute FACTA cases, has extensive experience prosecuting FACTA cases from start to finish on a class basis, and has extensive experience with discovery and investigations in FACTA cases, including extensive expert related work concerning various payment card processing issues, including payment platforms, equipment and software, intermediaries involved in payment card acquisition and processing, and related data and processes. Yedalian Decl. ¶ 21. This experience did not occur overnight but required specialized learning and experience over the course of more than 10 years of FACTA litigation. Yedalian Decl. ¶ 22.

This experience, perseverance and track record not only allowed counsel to target and obtain information but also to achieve a settlement in the face of the substantial risk of outright dismissal. For all of the foregoing reasons and the further reasons articulated below, counsel believes this is a fair settlement, if not exceptional, given the real risks of dismissal as illustrated by the actual outcome in other FACTA cases. Yedalian Decl. ¶ 23.

C. Settlement Terms Provide Substantial Benefits of Settlement Compared to Risks of Continued Litigation

The Settlement provides for substantial benefits, particularly when compared to the risks of continued litigation. Yedalian Decl. ¶ 24.

The Settlement establishes a Settlement Fund in the amount of $195,000. Agreement ¶ 10(a).

Further, the value of the maximum settlement benefit to each Settlement Class member is considerable in that it is 250% of the minimum statutory damages ($100) available for a willful violation of FACTA. Although compared to the maximum possible recovery of $1,000 in statutory damages, $250.00 is a 25% value (which is not insubstantial), the propriety of awarding *full* statutory damages to Settlement Class members who do not claim actual monetary loss is strongly disputed. Many FACTA defendants have argued that lack of "actual harm" precludes, if not any award of statutory damages to begin with, at the very least "excessive" statutory damages. Since it remains to be seen how courts will resolve such constitutional challenges to statutory damage awards under FACTA, the value negotiated by the Parties represents a fair compromise well within the range of reasonableness. Yedalian Decl. ¶ 26.

"The proposed settlement is not to be judged against a hypothetical or speculative measure of what *might* have been achieved by the negotiators." *Officers for Justice*, *supra*, 688 F.2d at 625. Moreover, as long as the Settlement is reasonable, it does not matter that under the best case scenario, the potential value of the case may be much higher. *In re Cendant Corp., Derivative Action Litigation*, 232 F.Supp.2d 327, 336 (D. N.J. 2002) (approving settlement which provided less than 2% value compared to maximum possible recovery); *In re Heritage Bond Litigation*, 2005 WL 1594403 *27-28 (C.D. Cal. 2005) (median amounts recovered in settlement of shareholder class actions were between 2% - 3% of possible damages).

The up to $250 cash benefit is also reasonable when compared to the value of similar benefits in other FACTA cases. For example, in *In re Toys "R" Us–Delaware, Inc.—Fair And Accurate Credit Transactions Act (FACTA) Litigation*, No. cv–08–01980 MMM (FMOx), 295 F.R.D. 438, 447 (C.D. Cal. January 17, 2014), the Court found that the benefit of non-cash vouchers having a maximum combined value of $30.00 was reasonable in a case alleging nationwide FACTA violations against a much larger corporate defendant.

Additionally, while the exact number of Settlement Class members is not known, the number of Settlement Class members is likely much smaller than the 4,422 number of overall

transactions because the number of transactions likely includes repeat customers who made multiple transactions (whether using the same card and/or with different credit or debit cards). This distinction is important because it reflects on Defendant's position that the maximum $1,000 in statutory damages under § 1681n(a)(1)(A) are to be awarded on a per consumer basis, not a per transaction basis. The language of the applicable statute provides statutory damages to the "consumer in an amount equal to ... not more than $1,000." Defendant contends that this means that each consumer may recover at most $1,000 in statutory damages regardless of whether the consumer received one or more customer receipts with more than the last 5 digits. The Fourth Circuit adopted this view in *Stillmock v. Weis Markets, Inc.*, 385 Fed.Appx. 267, 272 (4th Cir. 2010) (agreeing with district court's holding that the $1,000 maximum in statutory damages under § 1681n(a)(1)(A) are to be awarded on a per consumer basis, not a per transaction basis).

Even assuming *arguendo* that there were no repeat customers and that the 4,422 number of transactions reflects 4,422 unique Settlement Class members, the $195,000 Settlement Fund would still represent a gross cash recovery of $44.09 for each of the 4,422 transactions. A $44.09 cash per transaction recovery is an exceptional result considering that there are no known Settlement Class members who have sustained any actual damages, the Ninth Circuit has affirmed a dismissal in a similar FACTA case, holding that there is no "concrete" injury to proceed in federal court (*Bassett v. ABM Parking Services, Inc.*, 883 F.3d 776 (9th Cir. 2018)), and when compared to the value of other FACTA settlements (*e.g.*, *In re Toys "R" Us–Delaware, Inc.—Fair And Accurate Credit Transactions Act (FACTA) Litigation*, No. cv–08–01980 MMM (FMOx), 295 F.R.D. at 447 [benefit of non-cash vouchers having a maximum combined value of $30.00]).

D. Agreement Provides That Change Of Law Before Final Approval of Settlement Will Not Compromise Settlement Class Members' Benefits

A further benefit of the Settlement assures that if there is an intervening change of law before final approval of the Settlement, the Settlement and Settlement benefits will continue to remain valid, enforceable and available to Settlement Class members. Agreement ¶ 20.

The significance of this benefit cannot be understated. For example, as explained by the Ninth Circuit in *Bateman*, in 2008 (while many FACTA lawsuits were then pending) Congress

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

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

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

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

The risks posed by potential changes in the law through judicial opinions likewise cannot be understated, particularly in the dynamic area of statutory damage issues. For example, as explained in XI.A.1., above, many federal courts, including now the Ninth Circuit and two other federal courts of appeal, have dismissed FACTA cases like this one which allege expiration date violations and seek statutory damages. Absent the Settlement, Pick-A-Part contends that this federal court and state court would not have subject-matter jurisdiction due to the purported lack of any actual damage. Despite the Ninth Circuit's opinion (and any possible future state court opinion), this provision of the Settlement ensures that the Settlement would nevertheless remain an enforceable settlement. Yedalian Decl. ¶ 32.

The effect of this Settlement provision is further reinforced by case law. For example, in *Ehrheart v. Verizon Wireless*, 609 F.3d 590, 596 (3rd Cir. 2010) even though "the Clarification Act eliminated the [plaintiffs]' cause of action" for statutory damages under the FACTA, the agreement to resolve the FACTA claims was an interest sufficient to allow the Court to maintain jurisdiction and grant relief: "[T]he Clarification Act did not change the District Court's ability to grant effective relief. The Appellants still had a 'personal stake in the outcome'—the settlement agreement—and the District Court continued to possess the ability and the authority to approve the settlement." *Id.* at 595-596. Similarly in another FCRA case, *Schumacher v. SC Data Ctr., Inc.*, 2016 U.S. Dist. LEXIS 164112 *10 (W.D. Mo. Nov. 29 2016), the court rejected a *Spokeo* Article III challenge to a settlement agreement, and explained that plaintiff "has a personal, concrete interest in whether the settlement agreement is enforced, and thus, the Court has the authority to review and approve it."

E. No Collusion; The Settlement Is The Product of Extensive Arm's-Length And Good-Faith Negotiations

The Agreement is the product of extensive, adversarial, good-faith, arm's-length discussions, negotiations, correspondence, factual and legal investigation and research, and careful evaluation of the respective parties' strengths and weaknesses, without any collusion between Plaintiff and Defendant or their respective counsel. Yedalian Decl. ¶¶ 1-3, 33-37.

F. The Findings Made In This Court's Order Granting Preliminary Approval Likewise Support The Grant of Final Approval

The findings made in this Court's Orders granting preliminary approval of settlement (Dkt. No. 21), are likewise adequate considerations that support the grant of final approval of the settlement.

G. The Lack Of Any Opt-Outs, Objections And Requests To Appear Also Supports The Grant of Final Approval

The lack of any opt-outs, objections and requests to appear also provides further support for the Settlement. "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class settlement

action are favorable to the class members." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008) (quoting *Nat'l Rural Telecomms. Coop. v. DirecTV*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)). "The absence of a single objection to the Proposed Settlement provides further support for final approval of the Proposed Settlement." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 529.

The lack of any objection from or intervention by the CAFA Coordinators of any government entity likewise provides further support for the settlement.

XII. CONCLUSION

The proposed class action Settlement is fair, adequate and reasonable. It is non-collusive, and it was achieved as the result of informed, extensive, and arm's-length negotiations conducted by experienced counsel.

It is respectfully requested that the Court grant final approval of the settlement and enter an order and judgment in the form proposed and submitted herewith.

Plaintiff also respectfully requests that the Court grant Plaintiff's Motion For Award Of Attorney's Fees And Costs To Class Counsel And Incentive Payment To The Class Representative (set for hearing concurrently with this instant Motion).

Respectfully submitted,

DATED: June 15, 2018

CHANT & COMPANY
A Professional Law Corporation

By: /S/ – Chant Yedalian
Chant Yedalian
Counsel For Plaintiff