

1 Chant Yedalian, State Bar No. 222325
(chant@chant.mobi)
2 CHANT & COMPANY
A Professional Law Corporation
3 1010 N. Central Ave.
Glendale, CA 91202
4 Phone: 877.574.7100
Fax: 877.574.9411
5 Counsel for Plaintiff
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7
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10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **COUNTY OF LOS ANGELES**
12

13 LARRY TRAN, on behalf of himself and all)
others similarly situated,)
14 Plaintiff,)
15 v.)
16 FASTENAL COMPANY (d/b/a Fastenal);)
17 and DOES 1 through 100, inclusive,)
18 Defendants.)

Case No. BC717323
**NOTICE OF MOTION AND MOTION FOR
FINAL APPROVAL OF CLASS ACTION
SETTLEMENT, AND FOR AWARD OF
ATTORNEY'S FEES AND COSTS TO
CLASS COUNSEL AND INCENTIVE
AWARD TO THE CLASS
REPRESENTATIVE**

[Filed concurrently with:
(1) Declaration of Christopher Longley,
(2) Declaration of Larry Tran,
(3) Declaration of John Milek,
(4) Declaration of Tricia Wing,
(5) Declaration of Chant Yedalian,
(6) [Proposed] Order and Judgment, lodged
herewith, and
(7) Proof of Service of above documents]

HEARING
Date: October 14, 2020
Time: 10:00 a.m.
Dept.: 7
Judge: Hon. Amy D. Hogue

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:

2 PLEASE TAKE NOTICE THAT on October 14, 2020 at 10:00 a.m. or as soon thereafter
3 as the matter may be heard before the Honorable Amy D. Hogue in Department 7, located at 312
4 North Spring Street, Los Angeles, California 90012, Plaintiff, Larry Tran, on behalf of himself and
5 on behalf of the Settlement Class, will and hereby does move the Court, pursuant to California
6 Code of Civil Procedure § 382 and California Rules of Court Rule 3.769 for an Order and
7 Judgment granting final approval of the proposed class action settlement on the terms and
8 conditions set forth in the Amended Stipulated Settlement Agreement and Release (hereinafter
9 sometimes referred to as "Settlement" or "Agreement")¹ and awarding attorney's fees and costs to
10 Class Counsel and an incentive award to the Class Representative.²

11 Plaintiff further moves the Court for an Order:

- 12 1. Confirming its previous findings that the requirements for class certification, for
13 settlement purposes, are satisfied;
- 14 2. Certifying the Settlement Class for settlement purposes;
- 15 3. Appointing Plaintiff Larry Tran as the Class Representative for the Settlement
16 Class;
- 17 4. Appointing attorney Chant Yedalian of Chant & Company A Professional Law
18 Corporation as Class Counsel for the Settlement Class;
- 19 5. Appointing Atticus Administration, LLC as the Settlement Administrator;
- 20 6. Finding that the Settlement is fair, adequate and reasonable and complies with
21 California Code of Civil Procedure § 382 and California Rules of Court Rule
22 3.769;
- 23 7. Finding that the notice of Settlement directed to the Settlement Class members has
24 been completed in conformity with the Court's orders;

25
26 _____
27 ¹ A copy of the Agreement is attached as Exhibit 1 to the concurrently filed Declaration of
Chant Yedalian.

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

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- 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 the Settlement Administrator to effectuate all terms of the Agreement;
- 10. Awarding to Class Counsel \$433,333.33 in reasonable attorney's fees to be paid from the Cash Fund and \$12,571.94 in costs also to be paid from the Cash Fund; and
- 11. Awarding \$5,000 to the Class Representative, to be paid from the Cash Fund as an incentive (service) award to compensate him for his services as the representative of the Settlement Class.

This Motion is based upon this Notice of Motion and Motion and the Declarations, Exhibits and other documents filed or otherwise provided to the Court 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.

DATED: August 27, 2020

CHANT & COMPANY
A Professional Law Corporation

By: 
Chant Yedalian
Counsel For Plaintiff

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Other Authorities

Judicial Council of California/Administrative Office of the Courts'
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 After extensive negotiations, including settlement discussions before mediation, mediation
4 with Mr. Martin Quinn of JAMS in San Francisco on March 1, 2019, continued negotiations with
5 Mr. Quinn's assistance until April 10, 2019, and further negotiations which thereafter followed,
6 Plaintiff and Defendant Fastenal Company ("Fastenal") reached a proposed class-wide settlement
7 of this lawsuit.

8 On July 8, 2019, Plaintiff filed his motion for preliminary approval of the class settlement.

9 Prior to the continued preliminary approval hearing date of November 21, 2019, the Parties
10 jointly filed additional supporting documents.

11 The Court held a preliminary approval hearing on November 21, 2019 and requested
12 supplemental information and briefing, as well as a revised long-form settlement agreement
13 (including revised notice documents).

14 On February 18, 2020, the Parties filed the requested supplemental information and
15 briefing together with supporting declarations, as well as a revised long-form settlement
16 agreement (including revised notice documents).

17 The Court held a further preliminary approval hearing on March 11, 2020.

18 At the March 11, 2020 further preliminary approval hearing, the Court entered an Order
19 granting preliminary approval of the proposed class settlement. As part of the same Order, the
20 Court approved a plan of notice to be directed to Settlement Class members, set deadlines by
21 which Settlement Class members may opt-out or object, and scheduled a final approval hearing to
22 take place on October 14, 2020. March 11, 2020 Order ¶¶ 8-13, 15.

23 As further explained below, notice has been completed in conformity with the Court's
24 Orders and not a single Settlement Class member has opted out or objected to the proposed
25 Settlement.

26 Plaintiff, Larry Tran, on behalf of himself and on behalf of the proposed Settlement Class,
27 hereby respectfully moves the Court for an Order and Judgment granting final approval of the
28

1 proposed class action settlement and awarding attorney's fees and costs to Class Counsel and an
2 incentive award to the Class Representative.

3 **II. FACTUAL SUMMARY**

4 Fastenal is a corporation which operates stores in the United States, including in
5 California, through which it sells, nuts, bolts, washers, various fasteners and other goods to its
6 retail customers. Complaint ¶ 25.

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

15 Plaintiff Larry Tran is a customer of Fastenal. In August 2018, Mr. Tran made a purchase
16 from a Fastenal store located at 5380 E. Washington Blvd., Commerce, California. Tran Decl. ¶ 3.
17 Mr. Tran paid for his purchase with his credit/debit card. *Ibid.* Mr. Tran was provided at the point
18 of sale with a customer receipt which had his card's expiration date and first four and last four
19 digits of his card number printed on the receipt. *Ibid.*; Complaint ¶ 46.

20 FACTA's remedial provisions apply only to consumers. More specifically, the remedial
21 statute (15 U.S.C. § 1681n) provides a cause of action to any "consumer" whose FACTA rights
22 (15 U.S.C. § 1681c(g)(1)) were violated because more than the last 5 digits of their card number or
23 their card's expiration date was printed on a receipt. See, *e.g.*, *Armes v. Sogro, Inc.*, 2011 U.S.
24 Dist. LEXIS 33241 *7 (E.D. Wis. 2011). The corollary to this is that if a card is a commercial
25 card, such as, for example, a card issued to a corporation, FACTA's remedial provisions are not
26 available.

27 On August 21, 2018, Plaintiff, through his counsel, sent to Fastenal a letter entitled Notice
28 To Cease And Desist FACTA Violations; And Notice Of Intended Class Action Lawsuit.

1 Agreement ¶ 11(e); Wing Decl. ¶¶ 2-3. Enclosed with the August 21, 2018 letter was a copy of
2 the Complaint which was about to be filed. *Ibid.* In response to the August 21, 2018 letter and
3 Plaintiff's Complaint filed on August 22, 2018, Fastenal took measures to change its Point of Sale
4 ("POS") equipment such that by September 6, 2018 all of its stores ceased printing more than the
5 last five digits of the credit or debit card number and the credit or debit card expiration date on
6 printed receipts issued to customers. *Ibid.*

7 Plaintiff commenced this action on August 22, 2018 by filing a proposed class action
8 complaint against Fastenal. Plaintiff's Complaint alleges, *inter alia*, that Fastenal willfully
9 violated FACTA by printing more than the last five digits and the expiration date of credit and
10 debit cards on electronically printed customer receipts printed at a point of sale or transaction.
11 Fastenal denies any wrongdoing or violation of FACTA.

12 **III. SETTLEMENT DISCUSSIONS, INCLUDING THE EXTENSIVE MEDIATION** 13 **NEGOTIATIONS WITH THE MEDIATOR**

14 While the Parties had initial settlement discussions through their counsel, these discussions
15 focused mainly on legal issues and disputes and did not make much material progress towards
16 settlement. Yedalian Decl. ¶ 7. Additionally, a substantial factual dispute arose regarding the
17 nature and extent of Fastenal's conduct. Although many other issues and disputes remained, that
18 particular factual dispute was resolved, due at least in part to the fact that prior to filing suit,
19 Plaintiff's counsel investigated certain of Fastenal's store locations to determine their receipt-
20 printing practices, including equipment and processes used, as well as whether such was consistent
21 with the experience Plaintiff had previously had when he had received his receipt. *Id.* at ¶ 7.
22 Further discussions thereafter ultimately resulted in an agreement to participate in a mediation
23 with the hope that a mediator could assist Plaintiff and Fastenal in resolving (or at least narrowing)
24 their disputes and differences. *Id.* at ¶ 8. Plaintiff and Fastenal ultimately expressed to this Court
25 their agreement and desire to participate in a mediation with Mr. Martin Quinn of JAMS. *Id.* at ¶
26 9.

27 In preparation for the mediation, additional underlying facts and information were
28 exchanged between Plaintiff and Fastenal to facilitate the discussions. *Id.* at ¶ 10.

1 A mediation was scheduled to take place with Mr. Quinn in San Francisco on March 1,
2 2019. *Id.* at ¶ 11.

3 Also as part of the preparation for the March 1, 2019 mediation, Mr. Quinn requested
4 briefs from each of the Parties addressing the pertinent issues and disputes. *Id.* at ¶ 12. Plaintiff
5 prepared his brief detailing the pertinent issues and disputes and an extensive legal analysis of
6 same, and was informed that Fastenal did too. *Id.* at ¶ 12. Additional supplemental material was
7 also thereafter prepared by Plaintiff and brought to the mediation to assist with the negotiations.
8 *Id.* at ¶ 13.

9 The Parties made substantial progress at the mediation and agreed to continue their
10 settlement discussions. *Id.* at ¶ 14. With the assistance of the mediator, the Parties continued their
11 negotiations until April 10, 2019 by which time they reached agreement, in principle, on certain
12 key terms of a class-wide settlement. *Id.* at ¶ 14.

13 Thereafter, the Parties worked on memorializing, in writing, all key terms. On April 30,
14 2019 the Parties finalized the memorialization of all key terms of a proposed class-wide settlement
15 in a written Memorandum of Understanding of Settlement ("MOU"). *Id.* at ¶ 15. The MOU was
16 thereafter circulated for signatures and fully executed on May 1, 2019. *Ibid.*

17 Although the MOU was finalized and executed, it was with the understanding that the
18 Parties still had matters that they were working on and that they would prepare a long-form
19 settlement agreement and related documents. *Id.* at ¶ 16. The Parties informed the Court of their
20 status through a written report on May 3, 2019 and appeared before the Court on May 8, 2019 to
21 provide a further update. *Ibid.*

22 The Parties thereafter continued their efforts, as well as continued to consult with the
23 Settlement Administrator Atticus Administration, LLC, until July 2, 2019 when they reached final
24 agreement on the long-form settlement agreement and related class notices. *Id.* at ¶ 17.

25 The long form settlement agreement was subsequently amended by the Parties, and then
26 amended again at the request of the Court after the initial preliminary approval hearing. *Id.* at ¶
27 18.

28

1 The long-form settlement agreement, entitled Amended Stipulated Settlement Agreement
2 and Release (hereinafter sometimes referred to as "Settlement" or "Agreement") (which includes
3 the various notices to the Settlement Class) is a product of the extensive research, investigation,
4 exchanges and negotiations, including but not limited to the mediation efforts with Mr. Quinn and
5 the comments and input of this Court. Exh. 1; Yedalian Decl. ¶ 18.

6 **IV. NOTICE HAS BEEN PROVIDED TO SETTLEMENT CLASS MEMBERS IN**
7 **CONFORMITY WITH THIS COURT'S ORDERS AND NOT A SINGLE CLASS**
8 **MEMBER HAS OPTED-OUT OR OBJECTED**

9 Here, Fastenal does not know, nor does Fastenal have access to any information which
10 would enable it to determine, the postal addresses, email addresses or facsimile numbers of absent
11 Settlement Class members. Wing Decl. ¶ 7; Agreement ¶ 11(b)(i).

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

14 **Short-Form Notice**

15 For a period of at least 180 days (180 days is the duration of the Claims Period), multiple
16 copies of the Short-Form Notice in English and, separately, also in Spanish, shall be prominently
17 posted at or near the following locations within each of the Fastenal stores that print receipts at the
18 point of sale in the United States: (1) front door or (2) each cash register. Agreement ¶ 12(a) and
19 Exh. B. The Short-Form Notice shall include the Settlement Website address and Settlement
20 Administrator's toll-free telephone number which Settlement Class members may use to obtain
21 further information. Agreement, Exh. B. Fastenal shall separately pay for all costs associated
22 with the printing and posting of the Short-Form Notice and shall be responsible for posting the
23 Short-Form Notice at each of the Fastenal stores. Agreement ¶ 12(a).

24 **Newspaper Notice**

25 Newspaper Notice, which will be substantially in the form attached to the Agreement as
26 Exhibit C, will also be provided as follows: The Newspaper Notice, with a portion published in
27 Spanish, will be published on three separate dates in the USA Today in approximately a quarter
28 page size, with the first date to occur within 20 days after the Court's preliminary approval of the

1 Settlement, the second date to occur within 30 days of the first date, and the third date to occur
2 within 80 days after the first date. Agreement ¶ 12(b).

3 **Targeted Internet Notice**

4 In addition to the Newspaper Notice, Targeted Internet Notice consisting of targeted
5 internet ads will be provided, in rotating English and Spanish. Agreement ¶ 12(b). The
6 Settlement Administrator, Atticus Administration, LLC, previously provided in connection with
7 preliminary approval a declaration setting forth a detailed plan and its expert opinion concerning
8 the Targeted Internet Notice, including the methodology, process, means of targeting and delivery
9 and response mechanism, and analysis as to its sufficiency.

10 **Settlement Website Notice**

11 The Settlement Administrator will also provide a Settlement Website which contains a
12 description of the settlement terms. Agreement ¶ 12(c).

13 **Full Notice and Claim Form**

14 The Settlement Website will also provide, free of charge, viewable, printable, and
15 downloadable copies of relevant documents, including the Full Notice and Claim Form. Further,
16 Settlement Class members also have the option of submitting their claim through the Settlement
17 Website, by completing and submitting an electronic version of the Claim Form on the internet
18 through the Settlement Website. The Full Notice and Claim Form are also made available in
19 Spanish, and the Settlement Website shall also have an option where viewers can click to view in
20 Spanish. Agreement ¶ 12(c) and ¶ 11(d); Longley Decl. ¶¶ 3(a), 4.

21 **Declarations Concerning Compliance With Notice Plan**

22 Filed concurrently with this Motion is the Declaration of Christopher Longley of Atticus
23 Administration, LLC (¶¶ 3-9) concerning compliance with the notice plan and administration.
24 Pursuant to the Agreement (¶ 12(a)), and also filed concurrently with this Motion, is the
25 Declaration of John Milek, on behalf of Fastenal, attesting that the Short-Form Notice has been
26 posted at the applicable Fastenal stores. Together, these Declarations establish that notice to the
27 Settlement Class has been provided in conformity with the Court-approved notice plan.

28 //

1 **A. No Opt-Outs**

2 Settlement Class members were provided a 180-day opt-out period after the date the Full
3 Notice is first posted to exclude themselves from the settlement (the "Opt-Out Deadline"). March
4 11, 2020 Order ¶¶ 10, 16; Agreement ¶ 14(a).

5 This opt-out period expires on September 28, 2020. March 11, 2020 Order ¶ 16; Longley
6 Decl. ¶ 8.

7 No Settlement Class member has thus far opted out. Longley Decl. ¶ 8.

8 **B. No Objections**

9 Settlement Class members were provided a 180-day period after the date the Full Notice is
10 first posted to object to the terms of the Settlement and/or to the attorney's fees, costs or incentive
11 award. March 11, 2020 Order ¶¶ 11-13, 16; Agreement ¶ 15.

12 The objection period expires on September 28, 2020. March 11, 2020 Order ¶ 16; Longley
13 Decl. ¶ 8.

14 No Settlement Class member has thus far objected. Longley Decl. ¶ 8.

15 There was one correspondence received by Class Counsel from someone who identified
16 herself as Jameelia Matheson claiming she is writing about a "Fastenal Credit Card Recall Class
17 Action" and requesting "Mediation" and summarily claiming that "\$1,000.00 isn't sufficient for
18 such Violation." Exh. 2 (redacted). The correspondence does not comply with the objection
19 process (it does not contain the required contents and was not mailed to the Settlement
20 Administrator) and does not even establish Ms. Matheson as a Settlement Class member
21 (objection requires, among other things, proof of Settlement Class membership). March 11, 2020
22 Order ¶¶ 11, 13; Agreement ¶ 15. However, to the extent Ms. Matheson were a member of
23 Settlement Class and the correspondence were considered an objection, the Court should overrule
24 it because it is without merit. This is not a "Recall" case and the complaint about \$1,000.00 not
25 being sufficient is misinformed, particularly since Congress established the statutory damage
26 range of \$100-\$1,000, and \$1,000 is the *maximum* statutory damage award for a FACTA
27 violation. 15 U.S.C. § 1681n.

28 //

1 **V. THE LACK OF ANY OPT-OUTS AND OBJECTIONS PROVIDES FURTHER**
2 **SUPPORT FOR THE SETTLEMENT**

3 The lack of any opt-outs and objections provides further support for the Settlement. "It is
4 established that the absence of a large number of objections to a proposed class action settlement
5 raises a strong presumption that the terms of a proposed class settlement action are favorable to the
6 class members." *In re Omnivision Techs., Inc.*, 559 F.Supp.2d 1036, 1043 (N.D. Cal. 2008)
7 (quoting *Nat'l Rural Telecomms. Coop. v. DirecTV*, 221 F.R.D. 523, 529 (C.D. Cal. 2004)). "The
8 absence of a single objection to the Proposed Settlement provides further support for final
9 approval of the Proposed Settlement." *Nat'l Rural Telecomm. Coop.*, 221 F.R.D. at 529; *Dunk v.*
10 *Ford Motor Co.*, 48 Cal.App.4th 1794, 1802 (1996).

11 **VI. THE SETTLEMENT**

12 Subject to the Court's approval, the Parties have agreed to settle this matter upon the terms
13 and conditions set forth in the Agreement. A summary of the Settlement terms is as follows:

14 • For the purposes of the Settlement, Plaintiff and Fastenal stipulated to the
15 certification of the following Settlement Class: All consumers who, at any time during the period
16 August 22, 2016 to September 6, 2018, were provided an electronically printed receipt at the point
17 of a sale or transaction at any Fastenal store within the United States, on which receipt was printed
18 more than the last 5 digits and/or the expiration date of the consumer's credit card or debit card.
19 Excluded from the Settlement Class are all current and former employees, directors and officers of
20 Fastenal. Agreement ¶ 10.

21 • Fastenal will establish a non-reversionary cash fund in the amount of \$1,300,000
22 (the "Cash Fund") that will be used to pay for claims, Class Counsel's fees and expenses, notice
23 and administration costs, and an enhancement award to the Class Representative. Agreement ¶
24 11(a)-(b).

25 • The Settlement allows each Settlement Class member to submit a Claim Form,
26 together with required documentation, for up to a \$1,000 payment. Agreement ¶ 11(b) and (d).

27 • Each Settlement Class member may submit only one claim, regardless of whether
28 they made one or more credit or debit card transactions during the Settlement Class Period. A

1 valid claim will require that a Settlement Class member produce evidence that he or she received a
2 customer receipt from Fastenal during the Settlement Class Period that displays more than the last
3 5 digits and/or expiration date of his or her credit or debit card, and to state that he or she used
4 their own personal card for such transaction. In addition to stating that he or she used their own
5 personal card for the subject transaction, proof of claim may consist of the original or a copy of
6 either (1) a customer receipt containing more than the last 5 digits and/or expiration date of his or
7 her credit or debit card showing that he or she made a transaction at any Fastenal store in the
8 United States at any time during the period August 22, 2016 to September 6, 2018, or (2) a credit
9 or debit card statement (which will be encouraged to be in redacted form) showing that he or she
10 made a transaction at any Fastenal store in the United States at any time during the period August
11 22, 2016 to September 6, 2018. Agreement ¶ 11(d).

12 • In addition to monetary relief, the Settlement also provides for equitable relief
13 whereby a FACTA compliance policy shall be implemented as follows: Not later than twenty days
14 after the Settlement Date, Fastenal shall implement a written company policy which states that it
15 will not print more than the last five digits of the credit or debit card number nor the credit or debit
16 card expiration date upon any printed receipt provided to any customer that uses a credit or debit
17 card to transact business with Fastenal. Agreement ¶ 11(e).

18 • Given the nature of this particular consumer class action case, the fact that Fastenal
19 does not know, nor does Fastenal have access to any information which would enable it to
20 determine, the postal addresses, email addresses or facsimile numbers of absent Settlement Class
21 members, and experience with consumer class action claims-made rates, the Parties expected that
22 relatively few claims will be made and that a residue will result. Accordingly, the Parties agreed
23 on a plan for the disposition of the anticipated residue. If any residual funds from the Net Cash
24 Fund remain after claims payments are made to the Settlement Class members, any and all such
25 residual funds will not revert to Defendant and, instead, will be distributed *cy pres* to Legal
26 Assistance For Seniors ("LAS") as the *cy pres* beneficiary of any residual funds. Agreement ¶
27 11(b)(i).

28

1 • The Parties agreed upon and the Court approved the notice plan set forth in section
2 IV., above. As also explained in Section IV., above, Settlement Class members were provided
3 until September 28, 2020 to opt-out of or object to the Settlement, and, thus far, no Settlement
4 Class member has opted-out or objected.

5 • The Settlement, including the claims process, will be administered by Atticus
6 Administration, LLC, subject to the Court's approval. Agreement ¶ 11(c).

7 • Plaintiff hereby applies to the Court for an incentive (service) award of \$5,000, to
8 be paid from the Cash Fund, to compensate him for his services as Class Representative.
9 Agreement ¶ 18.

10 • Plaintiff and Class Counsel apply to the Court for an attorney's fees award of
11 \$433,333.33, to be paid from the Cash Fund, plus an award of Class Counsel's litigation costs of
12 \$12,571.94, also to be paid from the Cash Fund. Agreement ¶ 19.

13 • Class Counsel's motion for an award of attorney's fees and costs and the Class
14 Representative's motion for service (or incentive) award will be posted on the Settlement Website
15 no later than August 28, 2020. March 11, 2020 Order ¶ 16.

16 • The Agreement includes a "No Admission" term whereby "Nothing contained in
17 this Agreement, nor the consummation of the Settlement, is to be construed or deemed an
18 admission of liability, culpability, or wrongdoing on the part of any of the Parties." Agreement ¶
19 28.

20 **VII. CERTIFICATION FOR SETTLEMENT PURPOSES IS WARRANTED**

21 For the reasons set forth more fully below, the Settlement Class satisfies the prerequisites
22 for certification under Code of Civil Procedure § 382. Section 382 provides in pertinent part:

23 [W]hen the question is one of a common or general interest, of many persons, or
24 when the parties are numerous, and it is impracticable to bring them all before the
25 court, one or more may sue or defend for the benefit of all.

26 There are two requirements to section 382: "(1) There must be an ascertainable class; and
27 (2) there must be a well-defined community of interest in the questions of law and fact involved
28 affecting the parties to be represented." *Daar v. Yellow Cab Co.*, 67 Cal.2d 695, 704 (1967)
(citations omitted). To clarify these requirements, the California Supreme Court has looked to

1 Federal Rule of Civil Procedure 23 to explain that the community-of-interest requirement itself
2 embodies three factors: "(1) predominant common questions of law or fact; (2) class
3 representatives with claims or defenses typical of the class; and (3) class representatives who
4 can adequately represent the class." *Richmond v. Dart Indus., Inc.*, 29 Cal.3d 462, 470 (1981).

5 California law and policy favor the fullest and most flexible use of the class action
6 device. *Richmond*, 29 Cal.3d at 469-473. Indeed, "Courts long have acknowledged the
7 importance of class actions as a means to prevent a failure of justice in our judicial system"
8 particularly where the rights of consumers are at issue. *Linder v. Thrifty Oil Co.*, 23 Cal.4th 429,
9 434, 445 (2000). Any doubt as to the appropriateness of class treatment should be resolved in
10 favor of certification. *Richmond*, 29 Cal.3d at 473-475.

11 **A. The Proposed Class Is Ascertainable**

12 The ascertainability requirement assures that the class will be readily definable. Subsumed
13 within this requirement is the requirement that the class be so numerous that joinder of all parties
14 is impracticable. C.C.P. § 382.

15 **1. The Class Is Readily Definable**

16 The law is well-established that a class is ascertainable if it is adequately defined by
17 objective characteristics, even if class members cannot be individually identified. *Daar*, 67 Cal.2d
18 at 706. Indeed, all that is required is that the class describe "a group of unnamed plaintiffs by
19 describing a set of common characteristics sufficient to allow a member of that group to identify
20 himself or herself as having a right to recover based on the description." *Bartold v. Glendale Fed.*
21 *Bank*, 81 Cal.App.4th 816, 828 (2000). "The goal in defining the class is to use terminology that
22 will convey sufficient meaning to enable persons hearing it to determine whether they are
23 members of the class." *Cho v. Seagate Tech. Holdings, Inc.*, 177 Cal.App.4th 734, 746 (2009).

24 Here, the proposed Settlement Class is readily definable by objective characteristics and
25 consists of "All consumers who, at any time during the period August 22, 2016 to September 6,
26 2018, were provided an electronically printed receipt at the point of a sale or transaction at any
27 Fastenal store within the United States, on which receipt was printed more than the last 5 digits
28 and/or the expiration date of the consumer's credit card or debit card. Excluded from the

1 Settlement Class are all current and former employees, directors and officers of Fastenal."
2 Agreement ¶ 10. The definition clearly uses terminology "to enable persons hearing it to
3 determine whether they are members of the class." *Cho*, 177 Cal.App.4th at 746.³

4 **2. Joinder Of All Parties Is Impracticable**

5 In addition to being ascertainable, a class may be certified when the proposed class is so
6 numerous as to make joinder impracticable. "[I]mpracticability does not mean impossibility but
7 only that it would be difficult or inconvenient to have all members of the class come before the
8 court individually." *Occidental Land, Inc. v. Superior Court*, 18 Cal.3d 355, 364 n.7 (1976). As
9 few as 40 class members can raise a presumption that joinder is impracticable (1 *Newberg on*
10 *Class Actions*, 4th Ed. 2002, §3.5), although more often, certified classes are larger (see, e.g.,
11 *Occidental Land, Inc.*, 18 Cal.3d at 364 n.7 ["more than 150 individuals"]; *Chance v. Superior*
12 *Court*, 58 Cal.2d 275, 291 (1962) ["[I]t is impracticable to bring all the over 2,000 investors before
13 the court other than by class action"]).

14 Here, while the exact number of Settlement Class members is not known, to date the
15 Settlement Administrator has already approved 589 valid claims by Settlement Class members.
16 Longley Decl. ¶ 7. This 589 number far exceeds the 40 threshold courts consider as warranting
17 class treatment.

18 **B. Common Questions Of Law And Fact Predominate**

19 The predominance requirement simply means that there are questions of law or fact
20 common to class members which predominate over individual issues. *Hicks v. Kaufman & Broad*
21 *Home Corp.*, 89 Cal.App.4th 908, 916 (2001).

22 In assessing whether common issues predominate over individual issues, it is not
23 necessary that the class members' claims or circumstances be identical. *L.A. Fire & Police*
24 *Protective League v. Los Angeles*, 23 Cal.App.3d 67, 74 (1972). Indeed, as the California
25 Supreme Court has explained:

27 ³ California's policy in favor of class actions also provides that: "[I]f necessary to preserve
28 the case as a class action, the court itself can and should redefine the class where the evidence
before it shows such a redefined class would be ascertainable." *Cho*, 177 Cal.App.4th at 748.

1 "We long ago recognized 'that each class member might be required ultimately
2 to justify an individual claim does not necessarily preclude maintenance of a class
3 action.' (*Collins v. Rocha, supra*, 7 Cal.3d at p. 238,.) Predominance is a comparative
4 concept, and **'the necessity for class members to individually establish eligibility
5 and damages does not mean individual fact questions predominate.'**

6 ...

7 **Nor is it a bar to certification that individual class members may
8 ultimately need to itemize their damages. We have recognized that the need for
9 individualized proof of damages is not per se an obstacle to class treatment."**
10 *Sav-on Drug Stores, Inc. v. Superior Court*, 34 Cal.4th 319, 334 (2004) (emphasis
11 added).

12 As the California Supreme Court has also explained:

13 **"As a general rule if the defendant's liability can be determined by facts common
14 to all members of the class, a class will be certified even if the members must
15 individually prove their damages."** *Brinker Restaurant Corp. v. Superior Court*, 53
16 Cal.4th 1004, 1022 (2012). (emphasis added).

17 Thus, as set forth above, the predominance standard recognizes that permissible variations
18 may exist among the claims of individual class members and that, as long as common issues
19 predominate over the individual issues, the variations will not defeat class certification.
20 *Richmond*, 29 Cal.3d at 473-476. Further, and as also explained above, the possibility that some
21 matters may require separate proof for liability or damages likewise will not defeat class
22 certification. *Vasquez v. Superior Court*, 4 Cal.3d 800, 815 (1971).

23 "Individual issues will often be present in a class action, especially in connection with
24 individual defenses against class plaintiffs, rights of individual class members to
25 recover in the event a violation is established, and the type or amount of relief
26 individual class members may be entitled to receive. Nevertheless, it is settled that
27 the common issues need not be dispositive of the litigation. The fact that class
28 members must individually demonstrate their right to recover, or that they may suffer
varying degrees of injury, will not bar a class action; nor is a class action precluded
by the presence of individual defenses against class plaintiffs." *Ticconi v. Blue Shield
of Cal. Life & Health Ins. Co.*, 160 Cal.App.4th 528, 546 (2008).

Here, all class members share two common legal questions – whether Fastenal violated
FACTA by printing more than the last five digits and 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 Fastenal's 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

1 [defendant]'s alleged noncompliance was willful so that the class members are entitled to statutory
2 damages. Moreover, whether [defendant] violated FACTA is a combined question of law and fact
3 common to all members."); *Medrano v. WCG Holdings, Inc.*, 2007 WL 4592113 *2 (C.D. Cal.
4 2007) ("There is a common core of salient facts across the class. Each member of the proposed
5 class received a non-compliant receipt from [Defendant] after the applicable compliance
6 deadline."); *Kesler v. Ikea U.S., Inc.*, 2008 WL 413268 *3 (C.D. Cal. 2008) ("In this case, the facts
7 and legal issues of each class member's claim are nearly, if not entirely, identical. There is a
8 common core of salient facts across the class. Each member of the proposed class received a non-
9 compliant receipt from IKEA after the December 4, 2006 FACTA compliance deadline. The
10 overriding legal issue is whether IKEA's noncompliance was willful, so that the class members are
11 entitled to statutory damages.")

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

17 **C. Plaintiff's Claims Are Typical Of Those Of The Settlement Class**

18 The typicality requirement is satisfied if a representative plaintiff's claims arise from a
19 similar event, practice, or course of conduct that gives rise to the claims of other class members, or
20 if his or her claims are based upon similar legal theories. *Classen v. Weller*, 145 Cal.App.3d 27,
21 46-47 (1983) ("[I]t has never been the law in California that the class representative must have
22 *identical* interests with the class members"). Indeed, "only a conflict that goes to the very subject
23 matter of the litigation will defeat a party's claim of representative status." *Richmond*, 29 Cal.3d at
24 470. Thus, as with commonality, typicality does not require that Plaintiff's claims be identical to
25 those of other class members, only that the claims and the defenses applicable to them are
26 sufficiently similar to those of other class members. *Classen*, 145 Cal.App.3d at 46-47.

27 Here, Plaintiff and all other Settlement Class members allege the same injury, violation of
28 their FACTA rights resulting from the same course of conduct — the printing of more than the last

1 five digits and the expiration date of their card on debit or credit cards receipts. Accordingly, this
2 lawsuit is based on conduct which is not unique to Plaintiff, but on standardized, uniform conduct
3 that is common to all class members. Moreover, the same relief, specifically, statutory damages
4 under 15 U.S.C. § 1681n, is sought for all class members for Fastenal's "willful" violation of
5 FACTA. Accordingly, the typicality requirement is satisfied. *Tchoboian*, 2009 WL 2169883 *5
6 (C.D. Cal. 2009) (holding that typicality is satisfied because "[Plaintiff]'s claim is, in fact,
7 'substantially identical' to the claims of the proposed class members-namely, he alleges that
8 [defendant] issued him a noncompliant receipt in willful violation of the FACTA"); *Medrano*,
9 2007 WL 4592113 *3 (same); *Kesler*, 2008 WL 413268 *4 (same); *Murray v. GMAC Mortgage*
10 *Corp.*, 2007 WL 1100608 *5 (N.D. Ill. 2007) ("*Murray II*") (typicality satisfied where, despite
11 minor factual discrepancies, all putative class members had "the same essential characteristics").

12 **D. Plaintiff And Counsel Fairly And Adequately Represent the Settlement Class**

13 The adequacy requirement is met by satisfying two conditions. Plaintiff must demonstrate
14 that "plaintiff's attorney is qualified to conduct the proposed litigation and the plaintiff's interests
15 are not antagonistic to the interests of the class." *McGhee v. Bank of America*, 60 Cal.App.3d 442,
16 450 (1976). Again, "only a conflict that goes to the very subject matter of the litigation will defeat
17 a party's claim of representative status." *Richmond*, 29 Cal.3d at 470. Thus, the conflict must be
18 "irreconcilable" for it to be of any relevance. *Nat'l Solar Equip. Owners Ass'n v. Grumman Corp.*,
19 235 Cal.App.3d 1273, 1286 (1991). Plaintiff meets both of the criteria for adequacy of
20 representation.

21 First, Plaintiff's counsel is qualified to handle this litigation. Plaintiff is represented by
22 highly capable and competent counsel experienced in class action litigation, including FACTA
23 lawsuits. Yedalian Decl. ¶¶ 42-63.

24 Second, Plaintiff has no conflict with the other Settlement Class members since each of
25 them has been exposed to the same business practice, the identical FACTA cause of action is
26 asserted on behalf of Plaintiff and the Settlement Class, and the same types of remedies are sought
27 for all of them in the form of statutory damages arising from the same facts, *i.e.*, Fastenal's
28 printing of more than the last five digits and expiration date of the respective credit or debit card

1 on receipts. Tran Decl. ¶ 4. Further, Plaintiff has shouldered the responsibility of serving as Class
2 Representative in this litigation and is committed to continue to pursue his responsibilities in this
3 case. Tran Decl. ¶¶ 5-6.

4 Thus, there is no question that Plaintiff and his counsel will continue to vigorously and
5 competently pursue the interests of the Settlement Class.

6 **E. A Class Action Is Also Superior For The Resolution Of This Controversy**

7 Class certification is also appropriate because it is the only economically feasible method
8 for fair and efficient adjudication. Any individual Settlement Class member's recovery remains
9 modest relative to the time and expense required to properly prosecute the claims. As repeatedly
10 recognized by the California Supreme Court, "class actions are appropriate 'when numerous
11 parties suffer injury of insufficient size to warrant individual action and when denial of class relief
12 would result in unjust advantage to the wrongdoer.'" *Linder*, 23 Cal.4th at 446.

13 The United States Supreme Court has similarly held. *Phillips Petroleum Co., v. Shutts*,
14 472 U.S. 797, 809 (1985) ("this lawsuit involves claims averaging about \$100 per plaintiff; most
15 of the plaintiffs would have no realistic day in court if a class action were not available"); *Deposit*
16 *Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 338 n.9 (1980) ("damages claimed by the two named
17 plaintiffs totaled \$1,006.00. Such plaintiffs would be unlikely to obtain legal redress.... This, of
18 course, is a central concept of Rule 23"); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 161 (1974)
19 ("No competent attorney would undertake this complex antitrust action to recover so
20 inconsequential an amount. Economic reality dictates that petitioner's suit [involving individual
21 damage of \$70] proceed as a class action or not at all").

22 Likewise, as the Ninth Circuit explained in another FACTA case, the purpose of the class
23 action device is "to allow integration of numerous small individual claims into a single powerful
24 unit." *Bateman*, 623 F.3d at 722.

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

1 **VIII. THE TWO-STEP APPROVAL PROCESS**

2 Any settlement of class litigation must be reviewed and approved by the court. California
3 Rules of Court, Rule 3.769. Approval occurs in two steps: (1) an early (preliminary) review by
4 the trial court, and (2) a subsequent (final) review after notice has been distributed to the class
5 members for their comments or objections. California Rules of Court, Rule 3.769 (c)-(g). The
6 preliminary approval hearing and final approval (fairness) hearing coincide with these two
7 required steps. This Court previously granted preliminary approval and the present motion seeks
8 final approval of the Settlement.

9 **IX. THE PRESUMPTION OF FAIRNESS**

10 Courts presume the absence of fraud or collusion in the negotiation of a settlement unless
11 evidence to the contrary is offered. In short, there is a presumption that the negotiations were
12 conducted in good faith. *Newberg*, § 11:51.

13 Courts do not substitute their judgment for that of the proponents, particularly where, as
14 here, settlement has been reached with the participation of experienced counsel familiar with the
15 litigation. *Hammon v. Barry*, 752 F.Supp 1087, 1093 (D. D.C. 1990); *Steinberg v. Carey*, 470
16 F.Supp. 471, 474 (S.D. N.Y. 1979); *Sommers v. Abraham Lincoln Federal Savings & Loan*
17 *Assoc.*, 79 F.R.D. 571, 573-574 (E.D. Pa. 1978); *In re Pacific Enters. Sec. Litig.*, 47 F.3d 373,
18 378 (9th Cir. 1995).

19 While the recommendations of counsel proposing the settlement are not conclusive, the
20 Court should take them into account and afford them "great weight," particularly where, as here,
21 they are capable and competent, have experience with this type of matter, and have been
22 intimately involved in this litigation. *Nat'l Rural Telecomm. Coop. v. DirecTV*, 221 F.R.D. 523,
23 528 (C.D. Cal. 2004) ("Great weight' is accorded to the recommendation of counsel, who are
24 most closely acquainted with the facts of the underlying litigation. [citation.] This is because
25 '[p]arties represented by competent counsel are better positioned than courts to produce a
26 settlement that fairly reflects each party's expected outcome in the litigation."); *Newberg*, §
27 11:47; *Dunk v. Ford Motor Co.*, 48 Cal.App.4th 1794, 1800-1801 (1996).

28

1 As further explained below, this presumption of fairness is further bolstered by the fact
2 that the Settlement was reached through the extensive negotiations that occurred with the
3 assistance of a mediator. *Dunk*, 48 Cal.App.4th at 1803; *Satchell v. Fed. Express Corp.*, 2007 WL
4 1114010 *4 (N.D. Cal. 2007).

5 **X. THIS SETTLEMENT IS FAIR AND REASONABLE**

6 The Settlement is well within the range of reasonableness and final approval should be
7 granted. Fairness is presumed when: (1) the settlement is reached through arm's-length
8 bargaining; (2) investigation is sufficient to allow counsel and the court to act intelligently; (3)
9 counsel is experienced in similar litigation; and (4) the percentage of objectors (after notice is
10 given to the class) is small. *Dunk*, 48 Cal.App.4th at 1802. "The trial court has broad discretion to
11 determine whether the settlement is fair" and can consider factors tailored to the specific facts and
12 circumstances of each particular case. *Dunk*, 48 Cal.App.4th at 1801. Thus, "the list of factors
13 [that the court may consider] is not exhaustive" and no single factor is required to determine
14 whether a class action settlement is fair. *Dunk*, 48 Cal.App.4th at 1801. Indeed, "one factor alone
15 may prove determinative in finding sufficient grounds for court approval." *Nat'l Rural Telecomm.*
16 *Coop. v. DirecTV*, 221 F.R.D. 523, 525 (C.D. Cal. 2004); *Torrisi v. Tucson Elec. Power Co.*, 8
17 F.3d 1370, 1376 (9th Cir. 1993), *cert. denied*, 512 U.S. 1220 (1994).

18 Due to the impossibility of predicting any litigation result with certainty, a court's
19 evaluation of a settlement essentially amounts to "nothing more than `an amalgam of delicate
20 balancing, gross approximations and rough justice.'" *Dunk*, 48 Cal.App.4th at 1801.

21 "Due regard should be given to what is otherwise a private consensual agreement
22 between the parties. The inquiry 'must be limited to the extent necessary to reach a
23 reasoned judgment that the agreement is not the product of fraud or overreaching by,
24 or collusion between, the negotiating parties, and that the settlement, taken as a
whole, is fair, reasonable and adequate to all concerned.' [Citation.] "Ultimately, the
[trial] court's determination is nothing more than `an amalgam of delicate balancing,
gross approximations and rough justice.'" *Dunk*, 48 Cal.App.4th at 1801.

25 Some of the factors considered in evaluating the fairness of this Settlement are as follows:

26 **A. Risks of Continuing Litigation**

27 Absent this Settlement, there are very real risks involved in continued litigation, including
28 extensive delays, potential appeals and the possibility that Settlement Class members may

1 ultimately end up with no recovery. Yedalian Decl. ¶ 19.

2 **1. Outright Dismissal**

3 As explained in XI.C.1 below, the risk of outright dismissal of FACTA cases is a real,
4 acute risk with many FACTA cases (including many by Class Counsel) having been dismissed.

5 **2. "Willfulness"**

6 In order to recover any statutory damages and other remedies under 15 U.S.C. § 1681n,
7 Plaintiff must show that Fastenal engaged in "willful" conduct. However, Fastenal has vigorously
8 denied that its conduct was willful. Yedalian Decl. ¶ 22. In contrast, Plaintiff believes, among
9 other things, that the printing of more than the last five digits and expiration date of credit and
10 debit cards was reckless and obvious to Fastenal and the result of a lack of adequate measures to
11 safeguard consumer rights. Yedalian Decl. ¶ 22.

12 Regardless of how strongly the Parties feel about the merits, the Parties face issues and
13 risks concerning how the legal requirements for a "willful" violation of FACTA will be applied to
14 the particular facts of this case. Yedalian Decl. ¶ 23.

15 **3. Class Certification**

16 The Parties have sharply divergent positions on class certification in this case, absent a
17 settlement. Fastenal has denied that for any purpose other than that of settling this lawsuit, this
18 action is appropriate for class treatment. Yedalian Decl. ¶ 24.

19 Plaintiff believes that the Ninth Circuit's decision in *Bateman v. American Multi-Cinema,*
20 *Inc.*, 623 F.3d 708 (9th Cir. 2010), which reversed the denial of class certification in another
21 FACTA case, strongly supports certification in this case. Yedalian Decl. ¶ 25.

22 Yet, absent a settlement, class certification remains a hotly contested matter in this case,
23 and there are risks attendant in continued litigation of these issues, including, at a minimum,
24 delays and potential appeals. Yedalian Decl. ¶ 26.

25 For example, after the Ninth Circuit's decision in *Bateman*, one district court within the
26 Central District denied class certification in a FACTA case, *Martin v. Pacific Parking Systems,*
27 *Inc.*, 2012 WL 2552694 (C.D. Cal. July 2, 2012). On September 6, 2012, the Ninth Circuit
28 granted a Rule 23(f) petition for permission for discretionary leave to appeal the district court's

1 denial of certification in *Martin* (9th Cir. Docket No. 12-80144), and on appeal it was held that the
2 district court did not abuse its discretion based upon the facts in that case. 2014 WL 3686135
3 (July 25, 2014). Yedalian Decl. ¶ 27.

4 As another example, the Judicial Council of California/Administrative Office of the
5 Courts' "Findings of the Study of California Class Action Litigation, 2000-2006" shows that well
6 under 21.4% of all class actions are successfully certified by way of a contested motion.⁴

7 In sum, despite these statistics, Plaintiff feels strongly about the prospect of certification in
8 this case. However, *Martin* is an example of a FACTA case demonstrating the risks inherent in
9 certification, including, at a minimum, delays and potential appeals. Yedalian Decl. ¶ 29.

10 As explained in XI.C.3 below, the risk of an adverse class certification outcome recently
11 materialized in a published appellate opinion in New Jersey state court in another FACTA case
12 prosecuted by Class Counsel.

13 **B. Substantial Benefits of Settlement Compared to Risks of Continued Litigation**

14 The Settlement provides for substantial benefits. The Settlement establishes a non-
15 reversionary Settlement Fund in the amount of \$1,300,000, from which Settlement Class members
16 may submit a claim of up to \$1,000. Agreement ¶ 11(a) and (b).

17 The language of the applicable statute, § 1681n(a)(1)(A), provides statutory damages to
18 the "consumer in an amount equal to ... not more than \$1,000." Fastenal contends that this means
19 that each consumer may recover at most \$1,000 in statutory damages regardless of whether the
20 consumer received one or more customer receipts during the Settlement Class Period. The Fourth
21 Circuit adopted this view in *Stillmock v. Weis Markets, Inc.*, 385 Fed.Appx. 267, 272 (4th Cir.
22 2010) (agreeing with district court's holding that the \$1,000 maximum in statutory damages under
23 § 1681n(a)(1)(A) are to be awarded on a per consumer basis, not a per transaction basis).

24 The potential amount of up to \$1,000 made available to Settlement Class members is a
25 100% value compared to the maximum possible recovery of \$1,000 in statutory damages. This is
26 an excellent value particularly when the propriety of awarding full statutory damages to
27 Settlement Class members who do not claim actual monetary loss is strongly disputed. Many
28

⁴ Available at <http://www.courts.ca.gov/documents/class-action-lit-study.pdf>.

1 FACTA defendants have argued that lack of "actual harm" precludes, if not any award of statutory
2 damages to begin with, at the very least "excessive" statutory damages. Since it remains to be
3 seen how courts will resolve such constitutional challenges to statutory damage awards under
4 FACTA, the value negotiated by the Parties represents a fair compromise well within the range of
5 reasonableness. Yedalian Decl. ¶ 32.

6 Settlement is favored, and settlement agreements are realistically assessed. *Stamburgh v.*
7 *Superior Court*, 62 Cal.App.3d 231, 236 (1976). "The proposed settlement is not to be judged
8 against a hypothetical or speculative measure of what might have been achieved had plaintiffs
9 prevailed at trial." *Wershba v. Apple Computer, Inc.*, 91 Cal.App.4th 224, 238 (2001). Moreover,
10 as long as the Settlement is reasonable, it does not matter that under the best case scenario, the
11 potential value of the case may be much higher. *In re Cendant Corp., Derivative Action*
12 *Litigation*, 232 F.Supp.2d 327, 336 (D. N.J. 2002) (approving settlement which provided less than
13 2% value compared to maximum possible recovery); *In re Heritage Bond Litigation*, 2005 WL
14 1594403 *27-28 (C.D. Cal. 2005) (median amounts recovered in settlement of shareholder class
15 actions were between 2% - 3% of possible damages).

16 "In the context of a settlement agreement, the test is not the maximum amount
17 plaintiffs might have obtained at trial on the complaint, but rather whether the
18 settlement is reasonable under all of the circumstances.

18 ...

19 A settlement need not obtain 100 percent of the damages sought in order to be fair
20 and reasonable. (See *Rebney v. Wells Fargo Bank, supra*, 220 Cal.App.3d at p. 1139,
21 269 Cal.Rptr. 844 [settlements found to be fair and reasonable even though monetary
22 relief provided was 'relatively paltry']; *City of Detroit v. Grinnell Corp., supra*, 495
23 F.2d at p. 455 [settlement amounted to only 'a fraction of the potential recovery'.])
24 Compromise is inherent and necessary in the settlement process. Thus, even if 'the
25 relief afforded by the proposed settlement is substantially narrower than it would be if
26 the suits were to be successfully litigated,' this is no bar to a class settlement because
27 'the public interest may indeed be served by a voluntary settlement in which each side
28 gives ground in the interest of avoiding litigation.'" *Wershba*, 91 Cal.App.4th at 241.

24 The up to \$1,000 in *cash* is also reasonable when compared to the value of benefits in
25 other FACTA cases. For example, in *In re Toys "R" Us-Delaware, Inc.—Fair And Accurate*
26 *Credit Transactions Act (FACTA) Litigation*, No. cv-08-01980 MMM (FMOx), 295 F.R.D. 438,
27 447 (C.D. Cal. January 17, 2014), the court found that the benefit of non-cash vouchers having a
28

1 maximum combined value of \$30.00 was reasonable in a case alleging nationwide FACTA
2 violations against a large corporate defendant.

3 Another benefit of this lawsuit and Settlement is the fact that, as part of the Settlement,
4 Fastenal shall implement a written company policy which states that it will not print more than the
5 last five digits of the credit or debit card number nor the credit or debit card expiration date upon
6 any printed receipt provided to any customer that uses a credit or debit card to transact business
7 with Fastenal. Agreement ¶ 11(e). This FACTA compliance policy ensures that Fastenal will not
8 continue to violate the law, willfully, inadvertently or otherwise. Yedalian Decl. ¶ 33.

9 Such non-pecuniary benefits are properly considered in judging the results of the lawsuit.
10 *See, e.g., Craft v. County of San Bernardino*, 624 F.Supp.2d 1113, 1121, (C.D. Cal. 2008) (taking
11 into account fact that, in addition to monetary aspects, the defendant stopped the practices at
12 issue). This is especially true with a consumer protection statute such as FACTA which, as the
13 Ninth Circuit has held, serves both a compensatory and "deterrent purpose." *Bateman*, 623 F.3d at
14 718. "In fashioning FACTA, Congress aimed to 'restrict the amount of information available to
15 identity thieves.'" *Ibid.* The non-pecuniary benefits achieve that substantial purpose.

16 **C. Agreement Provides That Change Of Law Before Final Approval**
17 **of Settlement Will Not Compromise Settlement Class Members' Benefits**

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

21 As explained in XI.C.4 below, the significance of this benefit cannot be understated in
22 light of the real risk of adverse legislative action.

23 **D. The Settlement Is The Product of Extensive Arm's-Length Negotiations**

24 The Agreement is the product of extensive, adversarial, arm's-length discussions,
25 negotiations, correspondence, factual and legal investigation and research, and careful evaluation
26 of the respective parties' strengths and weaknesses. Yedalian Decl. ¶¶ 36-40.

27 The Agreement was also reached through the extensive negotiations that occurred with the
28 assistance of the mediator Mr. Quinn. Yedalian Decl. ¶¶ 8-14. "The assistance of an experienced

1 mediator in the settlement process confirms that the settlement is non-collusive." *Satchell v. Fed.*
2 *Express Corp.*, 2007 WL 1114010 *4 (N.D. Cal. 2007); *Dunk*, 48 Cal.App.4th at 1803.

3 **XI. THE REQUESTED ATTORNEY'S FEES AND COSTS ARE REASONABLE AND**
4 **SHOULD BE AWARDED TO CLASS COUNSEL**

5 Class Counsel requests an award of \$433,333.33, to be paid from the Cash Fund, plus an
6 award of Class Counsel's litigation costs of \$12,571.94, also to be paid from the Cash Fund, to
7 compensate Class Counsel for attorney's fees and costs incurred for investigating the facts,
8 prosecuting the lawsuit, negotiating the Settlement, drafting the Settlement documents, attempting
9 to obtain the Court's preliminary and final approval of the Settlement, causing Fastenal to change
10 its Point of Sale ("POS") equipment and its receipt printing processes and implement a new
11 written company policy concerning FACTA, and ensuring that the Settlement is properly
12 administered and implemented. Yedalian Decl. ¶ 65; Agreement ¶ 19.

13 As explained below, the fees are reasonable and supported by the percentage method. A
14 crosscheck of the percentage method using the lodestar with a reasonable multiplier also supports
15 the fees requested. In addition to the cash recovery, the non-cash benefits achieved in this case
16 further support the fees requested and vindicate the purposes of FACTA.

17 **A. The Fees Are Reasonable Under The Percentage Method**

18 The custom and practice in class actions is to award approximately one-third of a fund as
19 a fee award. *Chavez v. Netflix, Inc.*, 162 Cal.App.4th 43 162, 66 n.11 (2008) ("Empirical studies
20 show that, regardless whether the percentage method or the lodestar method is used, fee awards in
21 class actions average around *one-third* of the recovery.") (emphasis added); *Laffitte v. Robert*
22 *Half Internat. Inc.*, 231 Cal.App.4th 860, 878 (2014) ("the trial court's use of a percentage of 33
23 1/3 percent of the common fund is consistent with, and in the range of, awards in other class
24 action lawsuits").

25 Recently, in *Laffitte v. Robert Half International, Inc.*, 1 Cal.5th 480, 502 (2016), the
26 California Supreme Court resolved any remaining doubt that a percentage basis award of
27 attorney's fees may be the primary basis of a trial court's calculation of a fee award. *Id.* at 502,
28 506 (approving attorney's fees equal to one-third of the \$19 million dollar gross settlement fund).

1 Class counsel in contingency-fee cases typically receive attorney's fees of one-third or
2 more of the common fund. *See, e.g., Evans et al. v. Coca-Cola* (Los Angeles County Super. Ct.
3 2001 Case No. BC 220525 (Hon. Richard C. Hubbell)) (approving an award of attorney's fees of
4 at least 33-1/3% of the settlement); *Moreno v. Miller Brewing* (Los Angeles County Super. Ct.
5 April 2004 BC 278170 (Hon. David M. Minning)) (same); *Josiah Eaton, et al. v. Adolph Coors*
6 *Company* (Orange County Super. Ct. 2003 Case No. 01CC00140 (Hon. Stephen J. Sundvold)) (at
7 least same award); *Kimbell v. Abercrombie & Fitch Stores, Inc.* (Los Angeles County Super. Ct.
8 2006 Case No. BC 277359 (Hon. Kenneth R. Freeman)) (same); *Daum v. Claim Jumper*
9 *Restaurants* (Orange County Super. Ct. 2006 Case No. 02CC10201 (Hon. Ronald L. Bauer)) (final
10 approval of same); *Moore v. IKEA* (Los Angeles County Super. Ct. 2006 Case No. BC 263646
11 (Hon. Peter Lichtman)) (final approval of same); *Big Lots Overtime Cases* (San Bernardino
12 County Super. Ct. February 2004, JCCP Proceeding No. 4283 (Hon. Walter L. Blackwell, III))
13 (same); and *Fitzpatrick v. Baja Fresh* (Los Angeles Super. Ct. Case No. BC 265578 (Hon.
14 Anthony J. Mohr)) (same). In *Crandall v. U-Haul* (Los Angeles County Super. Ct., Case No.
15 BC178775), the Honorable Steven Czuleger awarded a 40% attorney fee request in an overtime-
16 exemption class action. In *Bushnell v. Cremar, Inc.* (Orange County Super. Ct., Case No.
17 657778), the Honorable Donald E. Smallwood awarded attorney's fees in the amount of 38%. In
18 *Abzug v. Kerkorian*, CA000981 (Los Angeles County Super. Ct., November 1990), the Honorable
19 R. William Schoettler awarded a 45% fee; in *Haitz v. Meyer, et al.*, Alameda County Super. Court,
20 8-20-1990 No. 572968-3, the court awarded a 40% fee. In *Elliott v. Clothestime* (Orange County
21 Super. Ct., Case No. 01-CC00333), the Honorable Jonathan Cannon awarded a 40% fee in a
22 wage-and-hour class action which had not yet proceeded to the class certification stage. California
23 federal courts also routinely award similar percentage based fees. *See, e.g., Morris v. Lifescan,*
24 *Inc.*, 54 Fed. Appx. 663 (9th Cir. 2003) (affirming attorney's fees of 33% of the recovery); *In re*
25 *Pacific Enters. Sec. Litig.*, 47 F.3d 373, 378-379 (9th Cir. 1995) (affirming attorney's fees of 33%
26 of the recovery); *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026, 1027 (9th Cir.
27 1997) (33% of total fund awarded); *Vasquez v. Coast Valley Roofing, Inc.*, 266 F.R.D. 482, 491-
28 492 (E.D. Cal. 2010) (citing to five federal district courts decisions approving attorney fee awards

1 ranging from 30 to 33% in class actions); *Singer v. Becton Dickinson & Co.*, 2010 WL 2196104
2 *8 (S.D. Cal. June 1, 2010) (approving attorney fee award of 33.33% of the common fund and
3 holding that award was similar to awards in three other cases); *Rippee v. Boston Market*
4 *Corporation*, Case No. 05-CV-1359 BTM (JMA) (S.D. Cal 2005) and *Barile v. Boston Market*
5 *Corporation*, Case No. 05-CV-1360 BTM (JMA) (S.D. Cal 2005) (awarding a 40% fee to
6 plaintiffs' counsel in class actions that had not proceeded to the class-certification stage); *Van*
7 *Vranken v. Atlantic Richfield Co.*, 901 F.Supp. 294, 297-298 (N.D. Cal. 1995) (observing that
8 "[m]ost of the cases Class Counsel have cited in which high percentages such as 30-50 percent of
9 the fund were awarded involved relatively smaller funds of less than \$10 million.")

10 Here, Defendant has no objection to Settlement Class Counsel's request for 33-1/3 percent
11 of the common fund, which is aligned with the one-third typically awarded in class actions
12 throughout California.

13 Moreover, the requested attorneys' fees of \$433,333.33, or one-third of the recovery, was
14 disclosed to the Settlement Class members in the long-form Full Notice (as well as other
15 documents), and not a single Settlement Class member objected to the request. Longley Decl. ¶
16 8.

17 Consideration of the other valuable benefits of this Settlement, which obviously have
18 additional value, would result in the fees award representing less than one-third of the overall
19 benefits to the Settlement Class. In particular, there are non-pecuniary benefits resulting from the
20 fact that this lawsuit caused Fastenal to change its Point of Sale ("POS") equipment such that all
21 of its stores ceased printing information prohibited by FACTA, and the Settlement requires
22 Fastenal to implement a written FACTA compliance policy. *See, e.g., Craft v. County of San*
23 *Bernardino*, 624 F.Supp.2d 1113, 1121, (C.D. Cal. 2008) (taking into account fact that, in
24 addition to monetary aspects, the defendant stopped the practices at issue and explaining that
25 "'Attorneys' fees [in class action cases] may be awarded even though the benefit conferred is
26 purely non-pecuniary in nature.'").

27 The Ninth Circuit has also explained that, in addition to encouraging suits to enforce the
28 law, class certification and the awarding of attorney's fees are particularly appropriate in cases

1 which have caused a defendant to cease the offending conduct. The Ninth Circuit has also
2 recognized that such important "deterrent" effect is not just limited to the defendant sued but also
3 deters other actual or potential violators of the law.

4 "The FDCPA is a consumer protection statute and was intended to permit, even
5 encourage, attorneys like Lemberg to act as private attorney generals to pursue
6 FDCPA claims. Moreover, plaintiffs have already benefitted and will continue to
7 benefit from this case. Mickell admits that he has ceased his practice of sending
8 letters to debtor's workplaces, a benefit to all class members. Furthermore, certifying
9 the class will serve a 'deterrent' component to other debt collectors who are engaging,
10 or consider engaging in this type of debt collection tactic.

11 Evon's suit resulted in Mickell abandoning his practice of sending debt collection
12 letters to debtors' workplaces. Thus the lawsuit has already achieved a significant
13 level of success." *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1032 and
14 1033 (9th Cir. 2012).

15 The Ninth Circuit espoused similar virtues of the FACTA, including the importance of its
16 deterrent purposes in *Bateman v. American Multi-Cinema, Inc.*, 623 F.3d 708 (9th Cir. 2010). The
17 Ninth Circuit explained that "In fashioning FACTA, Congress aimed to 'restrict the amount of
18 information available to identity thieves.'" *Id.* at 718. The Ninth Circuit further explained the
19 remedial purposes of FACTA include both a compensatory purpose and a "deterrent purpose."
20 *Ibid.*

21 "The mere fact that AMC changed the content of its receipts to comply with FACTA
22 after the lawsuit was filed does not suggest that certification of the class would have
23 limited deterrent effect. To the contrary, we are quite sure that certification of a class
24 here would preserve, if not amplify, the deterrent effect of FACTA." *Bateman*, 623
25 F.3d at 723.

26 In addition to obtaining monetary compensation through the Cash Fund, the "deterrent"
27 objectives of FACTA have been effectuated as a result of this case. As explained above, Fastenal
28 not only changed its Point Of Sale ("POS") equipment at its stores such that they would not print
any customer receipts with information prohibited by FACTA (Wing Decl. ¶ 3), but the
Settlement requires it to also implement a written company-wide FACTA compliance policy
(Agreement ¶ 11(e)). This FACTA compliance policy ensures that Fastenal will not continue to
violate the law, willfully, inadvertently or otherwise. Yedalian Decl. ¶ 33.

Thus, in addition to obtaining monetary relief for the Settlement Class, the Class
Representative and Class Counsel have also effectuated substantial change of conduct and policy,
thereby accomplishing the "deterrent" objectives of FACTA. Yedalian Decl. ¶¶ 33, 107.

1 An award of attorney's fees equal to one-third (33 1/3%) of the Cash Fund is also within
2 the fair market rate range for services. Yedalian Decl. ¶ 70. Unless otherwise specifically
3 proscribed by law (such as, for example, MICRA), the cases which Class Counsel handles on a
4 contingency basis generally consist of a negotiated contingency fee of the gross recovery.
5 Yedalian Decl. ¶ 70. A one-third contingent fee is well within the range of contingency fees
6 freely negotiated in the legal marketplace for a matter involving the risks and issues of this
7 litigation. *Ibid.* Class Counsel would not hesitate to ask a minimum of one-third of the gross
8 recovery in a matter which involves significant risks of non-payment. *Ibid.*

9 **B. Class Counsel's Lodestar Also Supports The Reasonableness Of The Fees**
10 **Requested**

11 "[T]he lodestar is calculated by multiplying the reasonable hours expended by a
12 reasonable hourly rate." *Wershba*, 91 Cal.App.4th at 254. The court may then enhance the
13 lodestar with a multiplier, and "[m]ultipliers can range from 2 to 4 or even higher." *Id.* at 254-
14 255.

15 **1. Hours Worked By Class Counsel**

16 Up to August 27, 2020, Class Counsel Chant Yedalian has devoted 415.17 hours of his
17 time on this matter. Yedalian Decl. ¶ 71. Class Counsel Mr. Yedalian expects to devote
18 approximately 30 hours of additional time after August 27, 2020, including for matters such as
19 preparing for and appearing for the final approval hearing and work relating to the continuing
20 administration of this Settlement, including such matters as follow-up with the Court and class
21 member and *cy pres* distribution issues. Yedalian Decl. ¶ 71.

22 Although the submission of time records is not required to support fees, to the extent the
23 Court would like to review all of the different tasks performed by Class Counsel, Class Counsel
24 has submitted an unredacted paper copy of his itemized time records for the Court's *in camera*
25 review. Yedalian Decl. ¶ 72.⁵

26
27
28 ⁵ Because the time records are unredacted, they contain sensitive and privileged
information as well as work product, and they are therefore submitted for *in camera* review.

1 Each and every task concerns the FACTA cause of action prosecuted, and ultimately
2 settled, in this case. Yedalian Decl. ¶ 74. The hours worked were therefore plainly reasonable to
3 accomplish these tasks and could and would certainly have been billed to a private client who
4 hired counsel to pursue such litigation. *Ibid*; *Moreno v. City of Sacramento*, 534 F.3d 1106, 1111
5 (9th Cir. 2008) ("The number of hours to be compensated is calculated by considering whether, in
6 light of the circumstances, the time could reasonably have been billed to a private client.")

7 This includes *all* steps that contribute to the ultimately successful resolution of this case
8 (even if, along the way, the district court does not adopt each contention raised). *Cabrales v.*
9 *County of Los Angeles*, 935 F.2d 1050, 1053 (9th Cir. 1991). Accordingly, and consistent with
10 this approach, Class Counsel's work related to the fee award motion is likewise time that is
11 reasonably incurred. *Camacho v. Bridgeport Financial, Inc.*, 523 F. 3d 973, 981 (9th Cir. 2008).

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

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

20 Further, "[w]here a lodestar is merely being used as a cross-check, the court 'may use a
21 rough calculation of the lodestar.'" *Dakota Medical, Inc. v. RehabCare Group, Inc.*, 2017 WL
22 4180497 *8 (E.D. Cal. Sept. 21, 2017) and cases cited therein. Thus, "it can be performed with a
23 less exhaustive cataloguing and review of counsel's hours" and "need entail neither mathematical
24 precision nor bean-counting." *Barbosa v. Cargill Meat Sols. Corp.*, 297 F.R.D. 431, 451 (E.D.
25 Cal. July 2, 2013) also quoting *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 306 (3rd Cir. 2005).

26 The hours were worked by a skilled class action attorney who has the necessary skill and
27 experience to litigate the nuances of a FACTA case. Yedalian Decl. ¶¶ 42-63.

28 **2. Reasonable Hourly Rate**

Class Counsel, Mr. Yedalian's current hourly rate is \$650 and that rate is well supported by
his skill and experience with class action and FACTA matters. Yedalian Decl. ¶¶ 75-76. Mr.
Yedalian is one of the most experienced FACTA class action attorneys in the nation. Yedalian

1 Decl. ¶¶ 42-63. He was among one of the first attorneys in the nation to prosecute FACTA cases
2 and he has successfully prosecuted to conclusion several FACTA cases on a class basis. *Ibid.*

3 Class Counsel's rate is further supported by the fact that this is a class action case, and
4 class action work requires specialized learning and experience. Yedalian Decl. ¶ 76.

5 **3. Class Counsel's Lodestar: Hours Worked Multiplied By The**
6 **Reasonable Hourly Rate**

7 The 415.17 hours of work devoted to date by Class Counsel, Mr. Yedalian, to this case,
8 plus the 30 additional hours expected, multiplied by Class Counsel's \$650 hourly rate yields a
9 lodestar of \$289,360.50. Yedalian Decl. ¶ 77.

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

12 It must also be kept in mind that lawyers are not likely to spend unnecessary time on
13 contingency fee cases in the hope of inflating their fees. The payoff is too uncertain,
14 as to both the result and the amount of the fee.... By and large, the court should defer
15 to the winning lawyer's professional judgment as to how much time he was required
16 to spend on the case; after all, he won, and might not have, had he been more of a
17 slacker. *Moreno v. City of Sacramento*, 534 F.3d 1106, 1112 (9th Cir. 2008)

18 Further, “[w]here a lodestar is merely being used as a cross-check, the court may use a
19 rough calculation of the lodestar.” *Dakota Medical, Inc. v. RehabCare Group, Inc.*, 2017 WL
20 4180497 *8 (E.D. Cal. Sept. 21, 2017) and cases cited therein, internal quotation marks omitted.
21 Thus, “it can be performed with a less exhaustive cataloguing and review of counsel’s hours” and
22 “need entail neither mathematical precision nor bean-counting.” *Barbosa v. Cargill Meat Sols.*
23 *Corp.*, 297 F.R.D. 431, 451 (E.D. Cal. July 2, 2013) also quoting *In re Rite Aid Corp. Sec. Litig.*,
24 396 F.3d 294, 306 (3rd Cir. 2005).

25 **4. Applying A Multiplier To The Lodestar**

26 "Beyond simply the multiplication of a reasonable hourly rate by the number of hours
27 worked, a lodestar multiplier is typically applied." *Dakota Medical*, 2017 WL 4180497 *8 and
28 authorities cited therein. "Multipliers can range from 2 to 4 or even higher." *Wershba*, 91
Cal.App.4th at 255; accord *Vizcaino v. Microsoft, Corp.*, 290 F.3d 1043 (9th Cir. 2002) (3.65
multiplier), but see, e.g., *Wilson v. Bank of Am. Natl. Trust & Savs. Assn.*, No. 643872 (Cal. Sup.
Ct. Aug. 16, 1982) (multiplier of 10); *Glendora Comm. Redev. Agency v. Demeter*, 155

1 Cal.App.3d 456, 465 (1984) (affirming multiplier of 12, and expressly rejecting argument that fee
2 was either exorbitant or unconscionable). *See also, Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396
3 F.3d 96, 123 (2nd Cir. 2005) (“multipliers of between 3 and 4.5 have become common”); *In re*
4 *Superior Beverage/Glass Container Consol. Pretrial*, 133 F.R.D. 119, 131 (N.D. Ill. 1990)
5 (courts have characterized multipliers of 3 or higher as average in many class actions).

6 Here, it takes a multiplier of less than 1.498 applied to Class Counsel's lodestar of
7 \$289,360.50 to yield the \$433,333.33 amount in fees requested.

8 Thus, a cross-check using the lodestar with multiplier demonstrates that the amount of the
9 fees requested is reasonable.

10 Although the multiplier here is close to the very low end of multipliers and does not need
11 any justification, it nonetheless bears emphasizing that there are additional very compelling
12 circumstances in this case that support the fees requested. As explained below, the actual risks
13 Class Counsel undertook are significant.

14 The risks of loss were not just hypothetical possibilities. As set forth in X.C., below,
15 FACTA litigation has been so extremely high risk that it is demonstrated by many actual losses
16 and financial setbacks by Class Counsel. Yedalian Decl. ¶¶ 80-101.

17 “[A]ttorneys whose compensation depends on their winning the case[] must make up in
18 compensation in the cases they win for the lack of compensation in the cases they lose.” *Dakota*
19 *Medical, Inc. v. RehabCare Group, Inc.*, 2017 WL 4180497 *8 (E.D. Cal. Sept. 21, 2017), quoting
20 *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051 (9th Cir. 2002).

21 “Absent successful resolution, none of this attorney time would have been compensated.”
22 *Emmons v. Quest Diagnostics Clinical Labs., Inc.*, 2017 WL 749018 *7 (E.D. Cal. Feb. 27, 2017),
23 also quoting *Vizcaino*, 290 F.3d at 1048 for the principle that such “Risk is a relevant
24 circumstance.”

25 Further, it should not be lost on the Court that Class Counsel has borne, and continues to
26 bear, the entire risk of litigation associated with the lawsuit on a pure contingency basis, and that
27 as a result of the time committed by Class Counsel to this matter, Class Counsel was precluded
28 from taking on other matters which were available. Yedalian Decl. ¶ 67.

1 Additionally, this Court can appreciate that litigating a high-stakes and time-consuming
2 class action case against a corporate defendant, with litigation potentially lasting for several years,
3 is not appealing to most lawyers. Class Counsel undertook this matter without any guarantee of
4 any payment, and with any fees that Class Counsel may recover entirely contingent on obtaining
5 recovery. Thus, Class Counsel has borne, and continues to bear, the entire risk of obtaining a fee
6 recovery in this matter. Yedalian Decl. ¶ 68.

7 **C. The Acute, Real World Risks And Losses by Class Counsel In Other FACTA**
8 **Cases Also Support The Reasonableness Of The Fees Requested**

9 The acute, real world risks that have led to actual losses by Class Counsel in other FACTA
10 cases are especially compelling and relevant factors which further support the reasonableness of
11 the fess requested.

12 **1. Outright Dismissal**

13 Many federal courts, including the Ninth Circuit, Second Circuit and Seventh Circuit have
14 dismissed FACTA cases which allege expiration date violations that seek statutory damages. The
15 dismissals are based on the position that plaintiffs who allege such violations without any
16 accompanying actual injury do not sustain any "concrete injury" sufficient to satisfy Article III
17 standing requirements in federal court. *Bassett v. ABM Parking Servs., Inc.*, 883 F.3d 776 (9th Cir.
18 2018)⁶; *Crupar-Weinmann v. Paris Baguette America, Inc.*, 861 F.3d 76 (2nd Cir. 2017); *Meyers v.*
19 *Nicolet Rest. of De Pere, LLC*, 843 F.3d 724 (7th Cir. 2016).

20 In addition, the Second Circuit has dismissed a FACTA excess digits case involving the
21 printing of the first six digits and last four digits on Article III grounds while suggesting (albeit
22 wrongly in Class Counsel's view) that the first six digits of a card number do not result in an
23 increased risk of harm and are therefore not the digits Congress sought to protect against. *Katz v.*
24 *Donna Karan Company, L.L.C.*, 872 F.3d 114, 120 (2nd Cir. 2017). Several other district courts
25 have followed suit. *E.g.*, *Tarr v. Burger King Corp.*, 2018 U.S. Dist. LEXIS 2176 (S.D. Fla. Jan.
26 5, 2018); *Gesten v. Burger King Corp.*, 2017 U.S. Dist. LEXIS 158173 (S.D. Fla. Sept. 27, 2017).

27 ⁶ Prior to the Ninth Circuit's opinion, Class Counsel had obtained a published opinion from
28 a federal district court holding that a FACTA expiration date violation satisfied Article III.
Deschaaf v. American Valet & Limousine, Inc., 234 F.Supp.3d 964 (D. Ariz. Feb. 15, 2017).

1 Class Counsel has received several dismissal orders in FACTA expiration date cases and
2 FACTA excess digit cases in federal and state court. *E.g.*, *Jacobson v. Peter Piper Inc.*, No. 4:16-
3 cv-00596-JAS-LCK (D. Ariz. Aug. 3, 2018); *Llewellyn v. AZ Compassionate Care Inc.*, No. 2:16-
4 cv-04181-DGC, 2017 WL 1437632 (D. Ariz. Apr. 24, 2017); *Gant v. Fondren Orthopedic Group*.
5 *L.L.P.*, No. 4:16-cv-00648, 2017 WL 4479955 (S.D. Tex. May 23, 2017); *O'Shea v. P.C. Richard*
6 *& Son, LLC*, No. 1:15-cv-09069-KPF, 2017 WL 3327602 (S.D. N.Y. Aug. 3, 2017); *Batra v. RLS*
7 *Supermarkets LLC*, No. 3:16-cv-02874-B, 2017 WL 3421073 (N.D. Tex. Aug. 9, 2017); *Noble v.*
8 *Nevada Checker Cab Corp.*, No. 2:15-cv-02322-RCJ-VCF, 2016 WL 4432685 (D. Nev. Aug. 19,
9 2016); *Miles v. The Company Store, Inc.*, No. 16-CVS-2346 (North Carolina Superior Court Nov.
10 16, 2017); *Nowe v. Essex Technology Group, LLC*, No. 17-1-3769-99 (Georgia Superior Court
11 Jan. 12, 2018). Yedalian Decl. ¶ 83.

12 During the time the Parties were negotiating settlement in this case, the Third Circuit also
13 issued an opinion dismissing a FACTA case involving the first 6 and last 4 digits. *Kamal v. J.*
14 *Crew Grp., Inc.*, 918 F.3d 102 (3rd Cir. March 8, 2019). Yedalian Decl. ¶ 84.

15 After the MOU but before the long-form Agreement was reached, Class Counsel received
16 a dismissal order in another FACTA case involving the disclosure of excess digits, *McCloud v.*
17 *Save-A-Lot Knoxville, LLC*, 2019 WL 2250269 (E.D. Tenn. May 24, 2019). Yedalian Decl. ¶ 85.

18 More recently, in a case involving the printing of the first 6 digits and the last 4 digits,
19 Class Counsel received another dismissal from the United States District Court for the Northern
20 District of California where the court ruled that the printing of such digits does not violate the
21 FACTA statute and dismissed the case with prejudice on the merits. *Marshall v. Motel 6*
22 *Operating L.P.*, No. 4:19-cv-03095-JSW (N.D. Cal. October 22, 2019)(Doc. Nos. 28-29).⁷ In
23 *Marshall* the defense made other arguments, including that the court does not have personal

24 _____
25 ⁷ This outcome flies in the face of the express language of the statute which prohibits the
26 printing of any more than the last five digits of the card number. For example, Class Counsel has
27 successfully defeated attempts to dismiss based on the printing of the first two digits and last four
28 digits. *Tchoboian v. Fedex Office & Print Services, Inc.*, 2011 WL 12842228 *2 (C.D. Cal.
January 28, 2011)(Judge Guilford)("The language of 15 U.S.C. § 1681c(g) is unambiguous.
Section 1681c(g) clearly makes the display of 'more than the last 5 Digits' a violation of FACTA.
In fact, it would have been difficult for Congress to be more clear in its language."); *Tchoboian v.*
Fedex Office & Print Services, Inc., 2011 WL 12842230 *3-4 (C.D. Cal. November 14,
2011)(Judge Kronstadt)(same).

1 jurisdiction over non-resident class members (something which Fastenal has also argued during
2 discussions as a defense to class certification) but the court dismissed the case in its entirety and
3 did not reach that issue. Class Counsel has appealed the dismissal to the Ninth Circuit (Ninth Cir.
4 Case No. 19-17316), the appeal was just recently fully briefed and the Ninth Circuit has set oral
5 argument for October 13, 2020. Yedalian Decl. ¶ 86.

6 In short, FACTA litigation has been extremely high risk and the risks are not hypothetical
7 as demonstrated by many actual losses by Class Counsel. Yedalian Decl. ¶ 87.

8 However, Fastenal knows that Class Counsel will zealously prosecute matters, through
9 conclusion. For example, Class Counsel appealed, briefed and argued the issue of Article III
10 standing in a FACTA case involving the first digit and the last four digits before the Ninth Circuit
11 Court of Appeals. *Noble v. Nevada Checker Cab Corp.*, 2018 WL 1223484 (9th Cir. March 9,
12 2018). Unfortunately, while that appeal resulted in an unfavorable and unpublished result on the
13 issue of Article III concerning those particular facts, Class Counsel's pursuit of the appeal through
14 the Ninth Circuit and his skilled determination for more than 12 years of prosecuting FACTA
15 cases was a substantial motivation for Fastenal to settle this matter. Yedalian Decl. ¶ 88.

16 Fastenal knows that Class Counsel has pursued appeals in other FACTA cases too. *Ibid.*

17 For example, Mr. Yedalian argued an appeal before the Eleventh Circuit on January 29,
18 2019 in a FACTA case involving both excess digits and expiration date. *Taylor v. Fred's, Inc.*,
19 Eleventh Circuit No. 18-10832. Yedalian Decl. ¶ 89.

20 Mr. Yedalian received a published opinion from the D.C. Circuit in another appeal which
21 he and his co-counsel were prosecuting and they successfully obtained a reversal of the district
22 court's dismissal order in that FACTA case. *Jeffries v. Volume Services America, Inc.*, 928 F.3d
23 1059 (D.C. Cir. July 2, 2019); Yedalian Decl. ¶ 90.

24 If this case proceeded to litigation, Fastenal also contends that a state court would likewise
25 not have subject-matter jurisdiction due to the purported lack of any actual damage. Yedalian
26 Decl. ¶ 91. If Fastenal is correct, then class members would not be able to recover anything in
27 federal or state court. Mr. Yedalian defeated a demurrer brought by another defendant in Los
28 Angeles County Superior Court in another FACTA case where the defendant made just such an

1 argument. *Ibid.* Although the Court overruled the demurrer, it noted it was a "very close
2 question." Defendants filed a writ petition and Mr. Yedalian filed opposition papers with the
3 California Court of Appeal. The Court of Appeal denied the writ petition. *Ibid.* At a minimum,
4 litigation of this issue would cause delay and pose substantial risk, including the risk of outright
5 dismissal as has already occurred in many cases. *Ibid.* In light of the acute risk of outright
6 dismissal, this factor alone renders the Settlement not only reasonable, but an exceptionally
7 favorable result. *Ibid.*

8 **2. Actual Bankruptcies**

9 Three of Class Counsel's FACTA cases (against merchants Fred's, J. Crew, and Men's
10 Wearhouse) have recently been met by actual bankruptcy filings. Yedalian Decl. ¶ 92. The
11 unfortunate result of these bankruptcies is that, even if there is any recovery for the FACTA
12 claims, the recovery will likely be not more than a few pennies on the dollar versus the expected
13 recovery had the bankruptcies not taken place. *Ibid.* Moreover, recovery in bankruptcy is far
14 from guaranteed and the battle over merits and other issues continue in the context of the
15 bankruptcies. The practical real world effect and impact of these bankruptcies mean substantial
16 financial hits to Class Counsel, who had previously devoted substantial time and resources to such
17 cases. *Ibid.* For example, in Fred's, Class Counsel had already argued an appeal before the
18 Eleventh Circuit and while awaiting the outcome on appeal, the merchant filed for bankruptcy.
19 *Ibid.* In J. Crew, the matter had been litigated by Class Counsel in three different courts (state
20 and federal) before the merchant filed for bankruptcy. *Ibid.* The Men's Wearhouse case was filed
21 on May 15, 2017 with the bankruptcy filing occurring more than three years later on August 2,
22 2020. *Ibid.*

23 **3. Class Certification**

24 The risk of an adverse class certification outcome recently materialized in a published
25 appellate opinion in New Jersey state court in another FACTA case prosecuted by Class Counsel.
26 In *Baskin, et al. v. P.C. Richard & Son, LLC*, No. OCN-L-000911-18 (N.J. Superior 2018), on a
27 motion to dismiss, the lower court struck the class allegations and dismissed the entirety of the
28 case, holding, among other things, that a FACTA claim does not warrant class treatment as such is

1 not a superior method of adjudication. Yedalian Decl. ¶ 93. Class Counsel appealed and argued
2 the matter before the New Jersey appellate court (known as the Superior Court Of New Jersey
3 Appellate Division). *Ibid.*

4 In a published opinion, the appellate court affirmed the dismissal of the class allegations
5 but reinstated one plaintiff's individual FACTA claim. *Baskin, et al. v. P.C. Richard & Son, LLC*,
6 No. A-2662-18T1 (N.J. App. Div. March 2, 2020).

7 Class Counsel filed a Petition For Certification to the New Jersey Supreme Court seeking
8 the court's discretion to hear and review the matter. Yedalian Decl. ¶ 95. On June 16, 2020, the
9 New Jersey Supreme Court granted the petition limited to the class certification issues. *Ibid.*
10 Oral argument is not expected until several months from now and an opinion expected to follow
11 sometime thereafter. *Ibid.*

12 This is yet another example of the difficulties faced in these cases and the perseverance
13 required to pursue to them. Yedalian Decl. ¶ 96.

14 **4. Legislative Risk**

15 Class Counsel has previously experienced adverse legislative action and such may recur.
16 Yedalian Decl. ¶ 97. As explained by the Ninth Circuit in *Bateman*, in 2008 (while many FACTA
17 lawsuits were then pending) Congress enacted the Credit and Debit Card Receipt Clarification Act
18 ("Clarification Act"). The Clarification Act retroactively granted a *temporary* immunity from
19 statutory damages for FACTA violations to those defendants that printed an expiration date
20 "between December 4, 2004, and June 3, 2008 [the date the Clarification Act was enacted]."
21 *Bateman, supra*, 623 F.3d at 717. Stated another way, the effect of the Clarification Act was that
22 it wiped-out liability for statutory damages for all then pending FACTA expiration date cases.
23 Yedalian Decl. ¶ 97. As a result of the change of law imposed by the Clarification Act, many
24 FACTA class action cases were dismissed without any recovery for consumers. *Ibid.*

25 Even before the Clarification Act was enacted, it was apparent that many defendants
26 believed that this immunity bill (H.R. 4008) was almost certain to pass. Yedalian Decl. ¶ 98. As a
27 result, some defendants chose to settle by demanding and extracting very favorable terms to them
28

1 while many others refused to budge at all knowing that complete immunity was on the horizon.

2 *Ibid.*

3 Class Counsel had extensive first-hand experience of the devastating impact of the
4 Clarification Act. Yedalian Decl. ¶ 99.

5 Class Counsel had invested thousands of hours and substantial expenses prosecuting many
6 FACTA expiration date cases leading up to the time the Clarification Act was enacted and
7 suffered a huge financial setback as a result of the retroactive immunity provided by the
8 Clarification Act. Yedalian Decl. ¶ 100.

9 The potential for legislative risk is therefore not some hypothetical outlier. Yedalian Decl.
10 ¶ 101. It has already occurred with FACTA with devastating consequences, and it may occur
11 again. *Ibid.*

12 **XII. REIMBURSEMENT OF CLASS COUNSEL'S COSTS**

13 Class Counsel seeks reimbursement of costs in the amount of \$12,571.94 as set forth in
14 Class Counsel Mr. Yedalian's Declaration at paragraph 102.

15 The FCRA's specific remedial provision at issue in this case, 15 U.S.C. § 1681n(a)(3),
16 authorizes an award of all non-taxable costs "when it is `the prevailing practice in a given
17 community' for lawyers to bill those costs separate from their hourly rates." *Grove v. Wells Fargo*
18 *Financial California, Inc.*, 606 F.3d 577, 580-581 (9th Cir. 2010). All of the costs for which
19 reimbursement is sought are costs that would be billed to a fee paying client separate from hourly
20 rates, consistent with the prevailing practice. Yedalian Decl. ¶ 95.

21 **XIII. THE INCENTIVE AWARD REQUESTED FOR THE CLASS REPRESENTATIVE** 22 **IS REASONABLE AND CONSISTENT WITH AWARDS IN OTHER FACTA** 23 **CASES**

24 Class Counsel respectfully requests, on behalf of the named plaintiff, Larry Tran, an
25 incentive (service) award of \$5,000 (Agreement ¶ 18), to compensate him for his services as the
26 representatives of the Settlement Class.

27 "[I]ncentive awards are fairly typical in class action cases.... These awards 'are
28 discretionary, [citation], and are intended to compensate class representatives for work done on

1 behalf of the class, to make up for financial or reputational risk undertaken in bringing the action,
2 and, sometimes, to recognize their willingness to act as a private attorney general." *In re*
3 *Cellphone Termination Fee Cases*, 186 Cal.App.4th at 1393-1394.

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

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

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

12 First, were it not for the Class Representative stepping forward and shouldering the duties
13 of protecting and prosecuting the interests of other Settlement Class members, it is likely the
14 interests of the Settlement Class would neither have been prosecuted, nor benefited. Yedalian
15 Decl. ¶ 105. Indeed, the parties have acknowledged that, to their knowledge, there is no other
16 litigation, either pending or otherwise, on a class or individual basis, concerning the claims in this
17 lawsuit. *Ibid.*

18 Moreover, the Class Representative has done all things reasonably expected of him in his
19 capacity as Class Representative. Yedalian Decl. ¶ 106; Tran Decl. ¶ 5-6. He was subjected to
20 liability for defense costs in the event the litigation was unsuccessful. *Ibid.* By stepping forward
21 to shoulder this action on behalf of the class, he also took on other risks, including the risk of
22 subjecting himself to intrusive discovery. *Ibid.* He also regularly and consistently communicated
23 with Class Counsel throughout the time this lawsuit was pending. *Ibid.* He also reviewed
24 relevant documents, provided his input, and otherwise kept apprised of litigation related events
25 and developments. *Ibid.* He also traveled from San Diego to San Francisco to participate in the
26 mediation in-person, and otherwise provided his ideas and input to Class Counsel in the various
27 rounds of settlement negotiations and exchanges. *Ibid.* In sum, the Class Representative
28 contributed as much of his valuable time as this litigation demanded to ensure a vigilant

1 prosecution of and favorable outcome for the best interests of the Settlement Class. *Ibid.* In
2 addition to satisfying the first *Staton* factor, these facts further support an incentive award because
3 they "recognize [a class representatives] willingness to act as a private attorney general." *In re*
4 *Cellphone Termination Fee Cases*, 186 Cal.App.4th at 1393-1394; *Rodriguez v. West Publishing*
5 *Corp.*, 563 F.3d 948, 958-959 (9th Cir. 2009).

6 Many of the facts supporting the first factor also support the second *Staton* factor in so far
7 as that the Settlement Class has benefited from the Class Representative's actions. It is fair to say
8 that but for the Class Representative's actions, there would be no resulting benefit to individual
9 Settlement Class members or *cy pres* benefits. Yedalian Decl. ¶ 107. Moreover, it is only as a
10 result of the Class Representative's actions that the Defendant ceased its offensive conduct and
11 agreed to implement a written FACTA compliance policy. *Ibid.* Thus, the Class Representative
12 effectuated substantial change of conduct, thereby accomplishing the "deterrent" objectives of
13 FACTA. He was also willing and stepped forward to act as a private attorney general where no
14 other plaintiff has done so. *Ibid.*

15 The fact that the Court has already made a preliminary finding that the settlement is fair,
16 adequate and reasonable, also supports the significance of the benefits achieved through the Class
17 Representative's initiative and perseverance. Yedalian Decl. ¶ 108.

18 Third, it is estimated that the Class Representative devoted approximately 45-50 hours of
19 his time to pursue this litigation. Yedalian Decl. ¶ 109; Tran Decl. ¶ 5-6. By definition, the time
20 he devoted to this litigation was time spent away from work and/or leisure in an effort to advance
21 the interests of the entire class. *Ibid.*

22 Although the fourth *Staton* factor (fear of workplace retaliation) is not applicable to this
23 type of case, a similar concern, the Class Representative stepping forward and thereby taking on
24 the risks of being subjected to intrusive discovery and defense costs in the event the litigation was
25 unsuccessful, are factors discussed in connection with the first factor, above.

26 Another factor properly considered by the Court in assessing an incentive award is the
27 personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *In*
28

1 *re Toys "R" Us—Delaware, Inc.—Fair And Accurate Credit Transactions Act (FACTA) Litigation*,
2 No. cv-08-01980 MMM (FMOx), 295 F.R.D. 438, 472 (C.D. Cal. January 17, 2014):

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

14 The amount requested is also reasonable in relation to other cases. In *Ingram v. The Coca-*
15 *Cola Co.*, 200 F.R.D. 685, 694 (N.D. Ga. 2001), the court approved incentive awards of \$300,000
16 to each named plaintiff in recognition of the services they provided to the class by responding to
17 discovery, participating in the mediation process and taking the risk of stepping forward on behalf
18 of the class. In *Van Vranken v. Atl. Richfield Co.*, 901 F.Supp. 294, 300 (N.D. Cal. 1995), a
19 \$50,000 incentive award was approved for similar participation.

20 The amount requested is also similar to incentive awards in various other FACTA cases.
21 Yedalian Decl. ¶ 112. For example, in *McGee, et al. v. Ross Stores, Inc, et al.*, C06-7496 CRB
22 (N.D. Cal. January 9, 2009), the court awarded each of the two class representatives a \$5,000
23 incentive payment. In *Tchoboian v. Parking Concepts, Inc., et al.*, SACV09-422 DMG (ANx)
24 (C.D. Cal. November 12, 2010) the court awarded the class representative a \$5,000 incentive
25 payment. In *Jarchaffian v. American Multi-Cinema, Inc., et al.*, CV09-03434 JHN (AJWx), 2011
26 U.S. Dist. LEXIS 158005 *6, (C.D. Cal. October 6, 2011), the court awarded the class
27 representative a \$5,000 incentive payment. In *Sakamoto v. One Parking, Inc. et al.*, SACV11-
28 1249 MLG (C.D. Cal. June 21, 2012) the court awarded the class representative a \$5,000 incentive
29 payment. In *In re Toys "R" Us—Delaware, Inc.—Fair And Accurate Credit Transactions Act*
30 *(FACTA) Litigation*, No. cv-08-01980 MMM (FMOx), 295 F.R.D. 438, 472 (C.D. Cal. January
31 17, 2014), the court awarded each of the three class representatives a \$5,000 incentive payment.

32 In sum, the requested incentive payment of \$5,000 to the Class Representative in this case,
33 for the valuable time and resources he contributed to advance this litigation is fair and reasonable,

1 and it is respectfully requested that the Court approve and award this amount to him as his
2 incentive award. Yedalian Decl. ¶ 113.

3 **XIV. CURRENT ACCOUNTING**

4 A current accounting of distributions is set forth below.

5 **\$1,300,000.00 Cash Fund (Defined at Agreement ¶ 11(a))**
6 (167,662.00) Notice and Administration
7 (433,333.33) Class Counsel Fees
8 (12,571.94) Class Counsel Costs
9 (5,000.00) Class Representative Incentive Award
10

11 = **\$681,432.73 Net Cash Fund (Defined at Agreement ¶ 11(b))**

12 Expected distributions to Settlement Class members based on the number of valid claims
13 to date and resulting residual available for *cy pres* distribution are set forth below.

14 **\$681,432.73 Net Cash Fund (Defined at Agreement ¶ 11(b))**
15 (589,000.00) Valid Claims by Settlement Class Members To Date (589 x \$1,000)
16

17 = **\$92,432.73 Residual Currently Available for *Cy Pres* Distribution**
18 **(Defined at Agreement ¶ 11(b)(i))**

19
20 **XV. CONCLUSION**

21 The proposed class action Settlement is well within the range of reasonable settlements. It
22 is non-collusive, and it was achieved as the result of informed, extensive, and arm's-length
23 negotiations conducted by experienced counsel and with the assistance of mediator Mr. Quinn.

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1 Plaintiff respectfully requests that the Court grant final approval of the proposed settlement
2 and the award of fees and costs to Class Counsel and incentive award to the Class Representative,
3 and sign and enter the proposed Order and Judgment submitted herewith.

4
5 Respectfully submitted,

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7 DATED: August 27, 2020

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10 CHANT & COMPANY
11 A Professional Law Corporation

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By: 
Chant Yedalian
Counsel For Plaintiff