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7
8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**
10

11 MICHAEL BATEMAN, individually
12 and on behalf of all others similarly
13 situated,

14 Plaintiffs

15 v.

16 AMERICAN MULTI-CINEMA, INC.;;
17 and DOES 1-10,

18 Defendants.
19

) Case No. CV 07-00171 JHN-AJWx

) **CLASS ACTION**

) **SUPPLEMENTAL DECLARATION**
) **OF GREGORY N. KARASIK IN**
) **SUPPORT OF MOTION FOR**
) **AWARD OF ATTORNEY'S FEES,**
) **COSTS AND ENHANCEMENT**
) **PAYMENT**

) Date: September 26, 2011

) Time: 10:00 a.m.

) Ctrm: 790 (Roybal)
20

21 I, Gregory N. Karasik, declare:

22 1. I am an attorney licensed to practice law in the state of California and
23 have been admitted to practice before this Court. I am lead counsel for plaintiff
24 Michael Bateman ("Plaintiff") in this action. I have personal knowledge of the
25 matters stated herein and if called and sworn as a witness, I would and could
26 competently testify under oath thereto.

27 Current Value of Lodestar

28 2. Since the submission of Plaintiff's moving papers in support of his

1 motion for an award of fees, costs and an enhancement, I have spent a total of 5.3
2 additional hours (2.4 hours on July 11, 1.2 hours on July 12, and 1.7 hours on July
3 14) on this case engaged in the following tasks: preparing the memorandum of points
4 and authorities and declaration in support of Plaintiff's motion for final approval;
5 email correspondence with defense counsel regarding a stipulation regarding the
6 applicability of CAFA; and reviewing and revising a proposed stipulation. Thus, to
7 date the current value of my lodestar (which does not include more than 20 hours
8 engaged in tasks related to Plaintiff's motion for an award of fees, costs and an
9 enhancement) is 430.9 hours x \$700 an hour = \$301,630.

10 Legal Research

11 3. As reflected by the time records previously submitted to the Court, I
12 spent 29.6 hours engaged in legal research during the course of this litigation. The
13 specific topics I researched include the following: the truncation requirements of
14 FACTA; the element of willfulness under FACTA; the applicability of defendant's
15 affirmative defenses; motions to dismiss affirmative defenses; standing under
16 FACTA; whether increased risk of harm constitutes "injury;" due process challenges
17 to statutory penalties; due process challenges to FACTA on the grounds of
18 vagueness; pleading requirements with respect to willfulness; the propriety of
19 determining willfulness on summary judgment; the requirements for class
20 certification in general; the class certification requirement of superiority; challenges
21 to superiority requirement on the grounds of disproportional or annihilating damages;
22 standards for appeal from denial of class certification; rules and procedures governing
23 appeals; standards for approval of class action settlements; and objections by class
24 members to class action settlements. Apart from the sheer volume of areas requiring
25 legal research, another reason my time records reflect so many entries for legal
26 research is the fact that the wave of FACTA lawsuits that ensued after FACTA took
27 effect generated many legal decisions on matters of first impression, and we were
28 constantly monitoring new FACTA decisions and developments. Of particular import

1 during this lawsuit were the Supreme Court's decision in *Safeco Insurance Co. of*
2 *America v. Burr* (2007) 127 S.Ct. 2201 and passage by Congress in 2008 of the
3 Clarification Act that retroactively amended FACTA to insulate from liability
4 merchants that had violated FACTA by printing credit card expiration dates on
5 receipts. All of the entries for legal research reflected on my time sheets accurately
6 record the amount of time I spent performing legal research related to this lawsuit.

7 Other FACTA Settlements

8 4. Attached hereto as Exhibit 1 is a true and correct copy of the
9 Memorandum of Points and Authorities filed in support of the parties' motion for
10 final approval of the class action settlement in *Soualian v. International Coffee &*
11 *Tea, LLC*, Case No. 07-00502, United States District Court, Central District of
12 California. As set forth therein at page 6, the settlement in *Soualian* resulted in
13 distribution of 48,000 certificates for a beverage that, according to the defendant,
14 were cumulatively worth \$310,000. The fee award of \$95,480.94 is equivalent to
15 approximately 30% of the value of the settlement benefits distributed to *Soualian*
16 class members.

17 5. Attached hereto as Exhibit 2 is a true and correct copy of the
18 Memorandum in Support of Joint Motion for Final Approval of the class action
19 settlement in *Dudzienski v. Darden Restaurants, Inc.*, Case No. 07 cv 3911, United
20 States District Court, Northern District of Illinois. As set forth therein at page 4, the
21 settlement in *Dudzienski* resulted in the distribution of 12,628 vouchers, to only those
22 class members who submitted claims, for a voucher with a face value of \$9.00 that
23 could only be used towards the purchase of an appetizer. The total value of the
24 monetary relief to class members in *Dudzienski* was therefore only \$113,652 even
25 though, as set forth at page 3 of the Memorandum, defendant admittedly violated
26 FACTA more than 36 million times.

27 6. Attached hereto as Exhibit 3 is a true and correct copy of the Settlement
28 Agreement in *Masters v. Lowe's Home Centers, Inc.*, Case No. 09-cv-255, United

1 States District Court, Southern District of Illinois. As set forth therein at page 8, the
2 settlement in *Lowe's* required the distribution of between \$3.5 million and \$7.0
3 million worth of gift cards.

4 7. Attached hereto as Exhibit 4 is a true and correct copy of the Order of
5 Final Approval in *Lowe's* issued on July 14, 2011. As set forth therein at page 10,
6 paragraph 13, plaintiff's counsel in *Lowe's* was awarded \$1,724,000 in attorney's fees
7 and expenses. \$1,724,000 is equivalent to 24.6% of the maximum value of
8 \$7,000,000 worth of gift cards that was potentially available but not actually
9 distributed to the class members in *Lowe's*.

10 Risk

11 8. Spiro Moss decided to take this case with the expectation that, if we
12 prevailed, we would receive an attorney's fee award based on a percentage of the fund
13 created for class members or our lodestar enhanced by, at the very least, a risk
14 multiplier. This lawsuit, like all the other FACTA lawsuits filed by our firm, was
15 much riskier than the typical wage and hour lawsuit brought by Spiro Moss because
16 we were trying to enforce a new law that raised many novel legal issues of first
17 impression. Because most district courts denied class certification and FACTA was
18 amended by the Clarification Act, we only obtained favorable class action settlements
19 in a small percentage of the FACTA cases brought, far below our typical success rate.
20 Although this case was much riskier than a typical wage and hour class action
21 lawsuit, that additional risk is not reflected in the hourly rate we use for lodestar
22 purposes. Regardless of the type of case or risk, our hourly rates in general, and my
23 hourly rate of \$700 for this case in particular, remain the same.

24 Petition for Rehearing

25 9. Attached hereto as Exhibit 5 is a true and correct copy of the Petition for
26 En Banc And/or Panel Rehearing filed by defendant after the Ninth Circuit issued its
27 opinion in this case. As set forth at page 1 therein, defendant contended that en banc
28 review or rehearing was warranted because the Ninth Circuit's opinion "threatens

1 national, systematic consequences for the class adjudication of claims involving
2 statutory penalties or damages." As set forth at page 4 therein, defendant further
3 argued that review or rehearing was warranted because the case involved a "legal
4 question of national importance."

5 Supplemental Class Notice

6 10. After the parties modified the settlement following denial of preliminary
7 approval, as suggested by the Court, to include a claims process giving class members
8 the opportunity to submit claims for Voucher Packets prior to their distribution at
9 AMC theaters, I decided that it would be in the best interests of class members to
10 publicize the settlement through the Top Class Actions website to promote claims.
11 Although I did not believe this supplemental notice was required for due process
12 purposes, I knew from my experience with our firm's FACTA lawsuit against Mann
13 that, the kind of notice required by the settlement, while adequate for due process
14 purposes, would not generate a high claims rate. In Mann, where notice was posted at
15 Mann theaters and on the internet, the settlement initially provided for distribution of
16 vouchers only to class members who submitted claims. When the claims rate turned
17 out to be incredibly low -- fewer than 100 claims were filed - the parties modified the
18 settlement to provide for distribution of vouchers at Mann theaters. While the
19 settlement in this case already provided for distribution of unclaimed Voucher
20 Packets at AMC theaters, I nevertheless felt that supplemental notice would result in
21 a relatively higher claims rate. I have no doubt that, if we had not publicized the
22 settlement on the Top Class Actions website, we would have received far fewer than
23 the 905 claims we received from class members.

24 I declare under penalty of perjury that the foregoing is true and correct and that
25 this declaration was executed in Los Angeles, California.

26
27 Dated: July 15, 2011

/s/ Gregory N. Karasik
Gregory N. Karasik

Exhibit 1

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13

14 UNITED STATES DISTRICT COURT

15 CENTRAL DISTRICT OF CALIFORNIA

16 WESTERN DIVISION

17

18 TALINE SOUALIAN, individually
and on behalf of all others similarly
19 situated,

20 Plaintiffs,

21 vs.

22 INTERNATIONAL COFFEE & TEA,
LLC and DOES 1-10,

23 Defendants.
24

No. CV 07-00502 RGK (JCx)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF JOINT MOTION
FOR FINAL APPROVAL OF
CLASS ACTION
SETTLEMENT**

Date: July 14, 2008

Time: 9:00 a.m.

Crt Rm: 850

Judge: Hon. R. Gary Klausner

Complaint filed: January 19, 2007

Trial Date: July 14, 2008

27

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TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1.	BACKGROUND	1
2.	TERMS OF THE SETTLEMENT	5
3.	THE SETTLEMENT MERITS FINAL APPROVAL	8
A.	The Court Has Already Found That Plaintiff's Claims Merit Class Certification for Settlement Purposes	10
B.	Strong Judicial Policy Favors Approving the Settlement	10
C.	The Settlement is Fair, Reasonable and Adequate	12
D.	Similar FACTA Settlements Have Been Approved By Other Courts	16
4.	CONCLUSION	17

TABLE OF AUTHORITIES

1		
2		
3	Federal Cases	
4	Acosta v. Trans Union LLC (C.D. Cal. 2007) 243 F.R.D. 377,	
5	383	10
6	Armstrong v. Board of School Directors of the City of Milwaukee	
7	(6th Cir. 1980) 616 F.2d 305, 314	8, 9
8	Bell Atlantic Corp. v. Bolger, 2 F.3d 1304, 1314 n.16 (3d Cir.	
9	1993)	11
10	Class Plaintiffs v. Seattle, 955 F.2d 1268, 1276 (9th Cir. 1992)	11
11	Cotton v. Hinton, 559 F.2d 1326, 1330 (5th Cir. 1977)	12
12	Hanlon v. Chrysler Corp. (9th Cir. 1998) 150 F.3d 1011, 1022	10
13	Hanrahan v. Britt, 174 F.R.D. 356, 366-368 (E.D. Pa. 1997)	12
14	In re Equity Funding Corp. of America (9th Cir. 1979) 603 F.2d	
15	1353, 1361	9
16	In re General Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.,	
17	55 F.3d 768, 785 (3d Cir.), cert. denied, 516 U.S. 824	
18	(1995)	11
19	In re Gypsum Antitrust Cases (9th Cir. 1977) 565 F.2d 1123,	
20	1125	9
21	In re Omnivision Technologies, Inc., 2008 WL 123936, *4 (N.D.	
22	Cal. Jan. 9, 2008)	14, 15
23	National Rural Telecom. Cooperative v. DIRECTV, Inc., 221	
24	F.R.D. 523, 528 (C.D. Cal. 2004)	12, 15, 16
25	Officers for Justice v. Civil Service Comm'n of the City and	
26	County of San Francisco, 688 F.2d 615, 625 (9th Cir.	
27	1982)	11, 12, 13
28	Reynolds v. National Football League (8th Cir. 1978) 584 F.2d	
29	280, 285	9
30	Staton v. Boeing Co. (9th Cir. 2003) 327 F.3d 938, 952	9, 10, 12, 13
31	Van Bronkhorst v. Safeco Corp. 529 F.2d 943, 950 (9th Cir.	
32	1976)	8
33	Weiss v. Mercedes-Benz, 899 F.Supp.1297, 1300-01 (D.N.J.	
34	1995), aff'd without op., 66 F.3d 314 (3d Cir. 1995)	11
35	Federal Statutes	

1	15 U.S.C. § 1681	1
2	15 U.S.C. § 1681c(g)	1
3	15 U.S.C. § 1681c(g)(1)	5
4	15 U.S.C. § 1681c(g)(3)	5
5	15 U.S.C. § 1681n	1
6	15 U.S.C. 1681n	1
7	H.R. 4008	passim
8	Federal Rules	
9	Fed. R. Civ. P. 16(a)(5)	11
10	Fed. R. Civ. P. 23(f)	2
11	FRCP 30(b)(6)	3
12	Newberg on Class Actions § 11.41	12
13	State Rules	
14	Federal Rule of Civil Procedure 23(c)(2)(B)	9
15	State Regulations	
16	L.R. 16-15 to 15.9	11
17	L.R. 16-2.9	11
18		
19		
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1 TO THE HONORABLE R. GARY KLAUSNER, UNITED STATES
2 DISTRICT COURT JUDGE:

3 Plaintiff Taline Soualian (“Plaintiff”) and Defendant International
4 Coffee & Tea, LLC (“Coffee Bean”) (collectively referred to as the “Parties”)
5 by and through their undersigned counsel, respectfully submit this
6 Memorandum of Points and Authorities in support of their Joint Motion for
7 Final Approval of Class Action Settlement.

8 **1. BACKGROUND OF THE LITIGATION AND SETTLEMENT**

9 Plaintiff filed the instant action on January 19, 2007. On behalf of
10 herself and other putative class members, Plaintiff alleges that Coffee Bean
11 violated 15 U.S.C. § 1681c(g) of the Fair Credit Reporting Act (“FCRA”),
12 codified at 15 U.S.C. § 1681, *et seq.* Section 1681c(g) (“Truncation of credit
13 card and debit card numbers”) is a provision of the Fair and Accurate Credit
14 Transactions Act of 2003 (“FACTA”), a subset of the FCRA. Section
15 1681c(g)(1), as it existed at the time the Settlement was reached, provides, in
16 pertinent part:

17 [N]o person that accepts credit cards or debit cards for the
18 transaction of business shall print more than the last five digits of
19 the card number or the expiration date upon any receipt provided
to the cardholder at the point of sale or transaction.

20 Plaintiff further alleges that Coffee Bean willfully violated Section 1681c(g)
21 within the meaning of 15 U.S.C. § 1681n (“Civil liability for willful
22 noncompliance”), a provision of FCRA enacted as part of the Consumer
23 Credit Reporting Reform Act of 1996.¹

24 _____
25 ¹ After preliminary approval was granted by this Court, H.R. 4008 was signed
26 into law on June 3, 2008. H.R. 4008 adds the following new subsection to
15 U.S.C. 1681n:

27 (d) Clarification of Willful Noncompliance- For the purposes of
28 this section, any person who printed an expiration date on any
receipt provided to a consumer cardholder at a point of sale or
(continued...)

1 Coffee Bean received notice of this action on January 22, 2007 and was
2 served with the Complaint on January 24, 2007. On May 22, 2007 this Court
3 denied Coffee Bean's Motion to Dismiss and Motion to Strike, or in the
4 Alternative, Motion for a More Definite Statement. On June 4, 2007, Coffee
5 Bean filed its Answer to the Complaint.

6 On June 11, 2007, this Court denied Plaintiff's Motion for Class
7 Certification on the ground that a class action was not a superior method due
8 to the potential for a massive damage award disproportionate to any actual
9 damage caused by the alleged violations. Plaintiff did not allege that she had
10 suffered any monetary loss, and this Court held that neither Plaintiff nor any
11 putative class member had suffered any harm or risk of harm. Plaintiff filed a
12 petition seeking immediate review pursuant to Fed. R. Civ. P. 23(f), which
13 was granted, and the denial of class certification is currently before the Ninth
14 Circuit. The Parties have submitted their opening briefs and other parties have
15 sought leave to file *amicus curiae* briefs.

16 During summer and fall of 2007, Plaintiff served multiple sets of written
17 discovery on Coffee Bean. Coffee Bean served timely responses to those
18 requests, and ultimately produced thousands of pages of documents for review
19 by Plaintiff's counsel. Plaintiff also responded to written discovery, and
20 sought discovery from third parties.

21 _____
22 (...continued)

23 transaction between December 4, 2004, and the date of the
24 enactment of this subsection but otherwise complied with the
25 requirements of section 605(g) for such receipt shall not be in
26 willful noncompliance with section 605(g) by reason of printing
27 such expiration date on the receipt.

28 The Parties' Settlement contains a waiver of any advantage derived from the
possible passage of H.R. 4008, meaning it does not prevent the Settlement
from being enforced despite its retroactive application to cases that are not
final as of its date of passage, i.e., as of June 3, 2008. Moore Decl. Ex. 1
(Settlement Agreement) at ¶ 2.1.3.

1 On or about May 15, 2007, Coffee Bean took Plaintiff's deposition. In
2 December 2007 and January 2008, Plaintiff deposed numerous Coffee Bean
3 employees and a FRCP 30(b)(6) witness designated by Fifth Third Bank,
4 Coffee Bean's merchant bank.²

5 On February 9, 2008 this Court denied Coffee Bean's Motion for
6 Summary Judgment finding that there was a triable issue of fact as to the issue
7 of willfulness.³

8 Pursuant to court order, the Parties participated in a mediation on
9 February 27, 2008 before Hon. John W. Ouderkirk (Ret.). Plaintiff Soualian, a
10 corporate representative of Coffee Bean, and the Parties' respective counsel
11 attended the mediation. Substantial progress towards settlement was made at
12 the mediation, although a settlement was not reached at that time. After the
13 mediation, the Parties engaged in ongoing discussions regarding a possible
14 settlement of the putative class claims in dispute.

15 On or about March 13, 2008, after further arms-length negotiations, the
16 Parties arrived at an agreement in principle regarding a proposed class action
17 settlement. Thereafter, and only upon completion of negotiations regarding
18 proposed relief for the putative class, the Parties commenced negotiations
19 regarding proposed counsel fees and a proposed plaintiff incentive payment.
20 The Parties reached agreement regarding these items on or about March 14,
21 2008. The Parties executed a Class Action Settlement Agreement ("Settlement
22 Agreement") on or about March 14, 2008.⁴

23 _____
24 ² The facts discussed in this Section, to the extent not established by the
25 Court's docket, are addressed in the Declaration of J. Mark Moore filed
herewith.

26 ³ The matter was heavily litigated, as reflected by the 170-plus entries in the
Court's docket.

27 ⁴ A copy of the Settlement Agreement is attached as Exhibit 1 to the
28 Declaration of J. Mark Moore filed herewith.

1 Pursuant to this agreement, the Parties agreed to certification, for
2 settlement purposes only, of the following Class:

3 All consumer cardholders who received electronically printed
4 receipts from Coffee Bean at the point of sale or transaction, in a
5 transaction occurring between January 1, 2005 and the date of
6 Final Approval, and wherein the receipt displayed (1) more than
7 the last five digits of the consumer cardholder's credit card or
8 debit card number, and/or (2) the expiration date of the consumer
9 cardholder's credit card or debit card.

10 On March 28, 2008, the parties jointly moved for conditional
11 certification and for preliminary approval of the Settlement ("Motion
12 for Preliminary Approval").

13 On April 25, 2008, the Court granted the Motion for Conditional
14 Certification of Settlement Class and for Preliminary Approval of Class
15 Action Settlement ("Order"). On May 15, 2008, the Court entered an
16 Order Granting Stipulation Seeking Clarifying Amendments to Order
17 Granting Preliminary Approval of Class Settlement ("Clarification
18 Order") Among other things, the May 15, 2008 Clarification Order set
19 the hearing for Final Approval of the Settlement for July 14, 2008.

20 On May 30, 2008, the Summary Notice approved by the Court
21 was published in the U.S.A Today and the dedicated website
22 (www.coffeebeansettlement.com) containing the Full Notice and other
23 documents became operable. Notice on Coffee Bean's receipts as
24 approved by the Court was printed from May 30-June 1, as
25 contemplated by the Settlement Agreement. Declaration of Mel Elias
26 ("Elias Decl."), filed concurrently herewith, at ¶¶5-7.

27 The Summary Notice and Full Notice advised class members that
28 they needed to opt out of the settlement class or object by June 29,
2008. To date, *no objections* have been received by Class Counsel or,

1 to the Parties' knowledge, filed with the Court.⁵ One opt-out form has
2 been received. Moore Decl., 19.

3 As previously noted, on June 3, 2008, H.R. 4008 became law,
4 resolving the issue of willfulness in favor of defendant merchants in all
5 non-final FACTA actions where the noncompliance was limited to
6 printing expiration dates on receipts.

7 **2. THE TERMS OF THE SETTLEMENT**

8 On January 10, 2007, Plaintiff received from the Coffee Bean store in
9 Glendale California, a receipt containing her credit card's expiration date.
10 Investigation determined that before December 4, 2006,⁶ Coffee Bean was
11 printing credit and debit card expiration dates on its customer credit card
12 receipts for purchases in excess of \$25. 15 U.S.C. § 1681c(g)(1).
13 Investigation also revealed that Defendant had been truncating account digits
14 on receipts, as required by FACTA, since before January 1, 2005.

15 Defendant contends that neither Plaintiff, nor any putative Class
16 Member, has suffered any actual monetary injury as a result of the FACTA
17 claims at issue. Plaintiff has not alleged that she or class members suffered
18 actual monetary loss as a result of Defendant's conduct, and she and her
19 counsel are unaware of any actual monetary loss to any proposed settlement
20 class member caused by Defendant's conduct in the present case.

21

22

23

24 ⁵ Given the Final Approval of the Settlement hearing date, the present motion
25 must be filed before the deadline to opt-out or object. The Parties will notify
the Court in the event any objections or opt-outs are received after this
motion is filed but before the June 29, 2008 deadline.

26 ⁶ New cash registers installed after January 1, 2005 were required to be
27 compliant with FACTA as of the date they were installed. 15 U.S.C. §
1681c(g)(3). Many of Coffee Bean's cash registers were installed prior to
28 January 1, 2005.

1 Against this backdrop, and in the interest of avoiding protracted and
2 costly litigation, the Parties have agreed to a proposed settlement with the
3 following basic terms:

4 Coffee Bean, according to the terms, conditions and procedures set forth
5 in the Settlement Agreement, on the date specified in the Full Notice and
6 Summary Notice (September 1, 2008), shall provide 48,000 Settlement
7 Certificates, one per customer, that can be used to obtain one free hot or cold
8 bar beverage of the customer's choosing, inclusive of sales tax, at any store
9 owned by Coffee Bean, but which cannot be used for any other purchase and
10 will have no cash value. No purchase is required, and class members shall not
11 have to submit a claim form to obtain a Settlement Certificate, but shall only
12 have to request one at any store on the specified date.⁷

13 These Settlement Certificates will be distributed on a first-come, first-
14 served basis on the date designated in the Notice and are limited to one
15 Settlement Certificate per party per visit.⁸ There are, however, no restrictions
16 on transferability. As the Court previously recognized, the retail value of the
17 Settlement Certificates available to class member customers potentially
18 exceeds \$310,000, based on current prices and tax rates. April 25, 2008 Order
19 at p. 2; *see also* Moore Declaration at ¶ 9. The value of benefits ultimately
20 utilized by class members may well fall below that figure, in part since 100%
21 participation is unlikely, but Coffee Bean believes that utilization by class
22 members will still be in the \$100,000 range. Elias Decl. ¶ 4.

23 _____
24 ⁷ Coffee Bean has disclosed that the majority of its customers, and thus the
25 class members, are repeat customers (who thus would be likely to return to
26 Coffee Bean and to find the Settlement Certificates useful). This is borne
out by the experience of the Class Representative, who testified in deposition
that she visits Coffee Bean on practically a daily basis.

27 ⁸ Additionally, the Settlement Certificate may not be used in combination with
28 any other certificate or coupon. Original Settlement Certificates must be
presented—no copies will be accepted.

1 Defendant began masking expiration dates on customer receipts when it
2 learned of Plaintiff's lawsuit. As part of the benefits of the Settlement,
3 Defendant has agreed to institute a periodic monitoring program to ensure it
4 remains in future compliance with Section 1681c(g).

5 In addition, Defendant agreed to forego any advantage it might derive
6 from the potential passage of H.R. 4008, which seeks to relieve merchants like
7 Defendant from any prospect of willfulness liability based on the printing of
8 expiration dates on customer credit card receipts. As discussed above, after
9 the Settlement was reached, H.R. 4008 became law on June 3, 2008.
10 Accordingly, but for this Settlement, H.R. 4008 would leave class members
11 with nothing (assuming Plaintiff could not defeat the new law's enforcement
12 on constitutional grounds, at best a difficult task). As it turns out, this aspect
13 of the Settlement has become more important because of the unexpectedly
14 quick passage of H.R. 4008.

15 Defendant also has agreed to pay all costs of notice and administration.
16 In addition, Defendant has agreed not to object to a request by Class Counsel
17 to the Court for an award of reasonable attorneys' fees, costs, and expenses not
18 to exceed \$110,000.00 (representing \$14,519.06 in costs and expenses and
19 \$95,480.94 in attorneys fees), which sum is to be paid by Defendant. Class
20 Counsel has agreed not to seek any award exceeding \$110,000.00 in total, and
21 the Parties agree that Defendant shall not have to pay more than that. The
22 Court held in its April 25, 2008 Order that "[t]he amount of attorney's fees, in
23 addition to reasonable costs and expenses, will be determined by the
24 application to the Court and subject to the Court's discretion, but in any event
25 shall not exceed \$110,000." Order at 6.

26 Further, Defendant has agreed not to object to a request by Class
27 Counsel to the Court for an incentive award to the Class Representative not to
28

1 exceed \$2,500.00, which is to be paid by Defendant. Class Counsel has
2 agreed that it will not seek, and the Parties have agreed that Defendant shall
3 not have to pay, any incentive award exceeding \$2,500.00 for the Class
4 Representative. The Court held in its April 25, 2008 Order that “[t]he amount
5 of the Class Representative’s incentive award will be subject to the Court’s
6 discretion, but in any event shall not exceed \$2,500.” Order at 6.

7 **3. THE SETTLEMENT MERITS FINAL APPROVAL**

8 The law favors settlement, particularly in class actions and other
9 complex cases where substantial resources can be conserved by avoiding the
10 time, cost, and rigors of formal litigation. *Van Bronkhorst v. Safeco Corp.*
11 529 F.2d 943, 950 (9th Cir. 1976). These concerns apply with particular force
12 in a case such as this where an allegedly illegal practice affected tens of
13 thousands of consumers.

14 Rule 23(e)(C)(1) provides that a court may approve a settlement of a
15 class action only when it finds after a hearing that the settlement is “fair,
16 reasonable, and adequate,” and Rule 23(e)(C)(4) provides that any class
17 member may object to a proposed settlement. Judicial review of a class action
18 settlement thus entails a two step process. “The first step is a preliminary, pre-
19 notification hearing to determine whether the proposed settlement is ‘within
20 the range of possible approval.’” This hearing is not a fairness hearing; its
21 purpose, rather is to ascertain whether there is any reason to notify the class
22 members of the proposed settlement and to proceed with a fairness hearing.”
23 *Armstrong v. Board of School Directors of the City of Milwaukee* (6th Cir.
24 1980) 616 F.2d 305, 314 [quoting Manual for Complex Litigation s 1.46, at
25 53-55 (West 1977)]. (Emphasis added.)

26 At the second stage of the approval process, after class members have
27 had a chance to object to the settlement, the court makes a final determination
28

1 whether the settlement is “fair, reasonable and adequate” under Rule 23(e).
2 *Armstrong*, 616 F.2d at 314.

3 This case is now at the second stage, as the Court has already
4 preliminarily approved the settlement. In accordance with the Court’s order,
5 the class has been given notice of the Settlement in the manner most
6 practicable under the circumstances (i.e., by publication, by placement on
7 Defendants’ receipts, and by inclusion of the full notice, opt-out form and
8 other relevant documents in a dedicated settlement website at
9 www.coffeebeansettlement.com, with a hyperlink from Defendant’s corporate
10 homepage). The Court previously found such notice to be sufficient.⁹

11 Especially since no class members have objected to the Settlement, the
12 Court should now grant final approval of the Settlement.

13 In reviewing a class action settlement, a court undertakes two
14 fundamental inquiries. “First, the district court must assess whether a class
15 exists.” *Staton v. Boeing Co.* (9th Cir. 2003) 327 F.3d 938, 952. In other
16 words, the court must determine that the lawsuit qualifies as a class action
17 under Rule 23 to begin with. *See, e.g., Hanlon v. Chrysler Corp.* (9th Cir.

18 _____
19 ⁹ Federal Rule of Civil Procedure 23(c)(2)(B) states, “[f]or any class
20 certified under Rule 23(b)(3), the court must direct to class members the best
21 notice practicable under the circumstances. . . .” Rule 23(e)(B) similarly
22 requires, “[t]he court must direct notice in a reasonable manner to all class
23 members who would be bound by a proposed settlement, voluntary dismissal,
24 or compromise.” The fundamental purpose of notice of a proposed class
25 action settlement is to apprise absent class members of their rights to object to
26 the proposed settlement or exclude themselves from the settlement. *See*
27 *Officers for Justice v. Civil Service Commission of City and County of San*
Francisco (9th Cir. 1982) 688 F.2d 615, 624; *In re Equity Funding Corp. of*
America (9th Cir. 1979) 603 F.2d 1353, 1361; *In re Gypsum Antitrust Cases*
(9th Cir. 1977) 565 F.2d 1123, 1125. “Due process requires no more.”
Reynolds v. National Football League (8th Cir. 1978) 584 F.2d 280, 285.

28

1 1998) 150 F.3d 1011, 1022 (reviewing settlement to ensure compliance with
2 requirements of Rule 23(a) and Rule 23(b)(3)). This Court has done that
3 already, in the course of analyzing the propriety of conditional certification for
4 settlement purposes, and, in its April 25, 2008 order, determined that such
5 certification is appropriate under Rule 23. Order at 3-5.

6 Second, a reviewing court must determine whether the settlement is
7 “fair, adequate, and reasonable.” *Staton*, 327 F.3d at 952. As one court
8 summarized recently, when parties reach a settlement agreement prior to class
9 certification, “courts must peruse the proposed compromise to ratify both the
10 propriety of the certification and the fairness of the settlement.” *Acosta v.*
11 *Trans Union LLC* (C.D. Cal. 2007) 243 F.R.D. 377, 383.

12 **A. The Court Has Already Found That Plaintiff’s Claims Merit**
13 **Class Certification for Settlement Purposes**

14 In granting the Parties’ joint motion for preliminary approval, this Court
15 previously found that class certification, for purposes of settlement, is
16 appropriate. Order at 3-5. The Court’s April 25, 2008 Order aptly set forth
17 the reasons why certification was and is appropriate for purposes of the
18 present settlement. *Id.* Nothing has changed since the Court found
19 conditional certification appropriate, except that the Parties can now report
20 that to date no class members have objected that certification is improper or
21 that any other aspect of the Settlement is inappropriate. Therefore, the Parties
22 do not restate the arguments for class certification for settlement purposes that
23 they asserted in the Motion for Preliminary Approval, but rather rely on their
24 previous briefing and this Court’s findings in the April 25, 2008 Order.
25

26 **B. Strong Judicial Policy Favors Approving the Settlement**
27
28

1 There is a strong judicial policy that favors settlements, particularly
2 where complex class action litigation is concerned. *Class Plaintiffs v. Seattle*,
3 955 F.2d 1268, 1276 (9th Cir. 1992). The Ninth Circuit has specifically stated
4 that, “it must not be overlooked that voluntary conciliation and settlement are
5 the preferred means of dispute resolution. This is especially true in complex
6 class action litigation....” *Officers for Justice v. Civil Service Comm’n of the*
7 *City and County of San Francisco*, 688 F.2d 615, 625 (9th Cir. 1982).¹⁰

8 When a settlement is reached on terms agreeable to all parties, it is to be
9 encouraged. *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, 1314 n.16 (3d Cir.
10 1993). A federal district court articulated the rationale for this policy as
11 follows:

12 [W]hen parties negotiate a settlement they have far greater
13 control of their destiny than when a matter is submitted to a jury.
14 Moreover, the time and expense that precedes the taking of such a
15 risk can be staggering. This is especially true in complex
commercial litigation.

16 *Weiss v. Mercedes-Benz*, 899 F.Supp.1297, 1300-01 (D.N.J. 1995), *aff’d*
17 *without op.*, 66 F.3d 314 (3d Cir. 1995).

18 The proposed settlement in this case enjoys a presumption of fairness
19 because it is the product of arm’s-length negotiations conducted by
20 experienced counsel who are fully familiar with all aspects of class action
21 litigation. *In re General Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.*,
22 55 F.3d 768, 785 (3d Cir.), *cert. denied*, 516 U.S. 824 (1995) (“This
23 preliminary determination establishes an initial presumption of fairness when

24 _____
25 ¹⁰ This policy is reflected in the Federal Rules of Civil Procedure and the Local
26 Rules of this court, which encourage facilitating the settlement of cases. See
27 Fed. R. Civ. P. 16(a)(5) (one of the five purposes of a pretrial conference is
28 to facilitate settlement); L.R. 16-2.9 (requiring parties to exhaust all
possibilities of settlement); L.R. 16-15 to 15.9 (setting forth policies and
procedures for settlement including encouraging disposition of civil
litigation by settlement by any reasonable means).

1 the court finds that: (1) the negotiations occurred at arm's length....(3) the
2 proponents of the settlement are experienced in similar litigation. . . ."); *see*
3 also 4 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 11.41 at
4 90 (2002); *Manual for Complex Litigation* (Third) § 30.42 (1995).

5 "Great weight' is accorded to the recommendation of counsel, who are
6 most closely acquainted with the facts of the underlying litigation." *National*
7 *Rural Telecom. Cooperative v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D.
8 Cal. 2004) (citation omitted). This is because parties "represented by
9 competent counsel are better positioned than courts to produce a settlement
10 that fairly reflects each party's expected outcome in the litigation." *Id.*
11 (citation omitted). "Thus, 'the trial judge, absent fraud, collusion, or the like,
12 should be hesitant to substitute its own judgment for that of counsel.'" *Id.*
13 (citing *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)). *See also*
14 *Officers for Justice*, 688 F.2d at 625 (a court's inquiry is ultimately limited "to
15 the extent necessary to reach a reasoned judgment that the agreement is not the
16 product of fraud or overreaching by, or collusion between, the negotiating
17 parties."); *Hanrahan v. Britt*, 174 F.R.D. 356, 366-368 (E.D. Pa. 1997)
18 (presumption of correctness applies to a class action settlement reached in
19 arms-length negotiations between experienced, capable counsel after
20 meaningful discovery).

21 C. **The Settlement is Fair, Reasonable and Adequate**

22 No single criterion determines whether a class action settlement meets
23 the requirements of Rule 23(e). The Ninth Circuit has directed district courts
24 to consider a variety of factors without providing an "exhaustive list" or
25 suggesting which factors are most important. *See Staton*, 327 F.3d at 959.

26 Thus, in determining whether a proposed settlement is fundamentally
27 fair, adequate and reasonable, a court may consider any or all of the following

28

1 factors, if applicable: the strength of the plaintiffs' case; the risk, expense,
2 complexity and likely duration of further litigation; the risk of maintaining
3 class action status through trial; the amount offered in settlement; the extent of
4 discovery completed, and the stage of the proceedings; the experience and
5 views of counsel; the presence of a governmental participant; and the reaction
6 of the class members to the settlement. *Officers for Justice*, 688 F.2d at 625.
7 "The relative degree of importance to be attached to any particular factor will
8 depend upon and be dictated by the nature of the claim(s) advanced, the
9 type(s) of relief sought, and the unique facts and circumstances presented by
10 each individual case." *Id.*

11 Given the impossibility of predicting any litigation result with certainty,
12 a district court's evaluation of a settlement essentially amounts to "nothing
13 more than 'an amalgam of delicate balancing, gross approximations and rough
14 justice.'" *Id.* The ultimate touchstone, however, is whether "class counsel
15 adequately pursued the interests of the class as a whole." *Staton*, 327 F.3d at
16 961. As explained in *Officers for Justice*, the district court's role in evaluating
17 a class action settlement is therefore tailored to meet that narrow objective.
18 Review under Rule 23(e) "must be limited to the extent necessary to reach a
19 reasoned judgment that the agreement is not the product of fraud or
20 overreaching by, or collusion between, the negotiating parties." *Officers for*
21 *Justice*, 688 F.2d at 625.

22 Here, approval is plainly warranted when the Court considers the factors
23 the Ninth Circuit has laid out for guidance in the Rule 23(e) determination.
24 First, in terms of the strength of Plaintiff's case, this Court previously
25 suggested in denying summary judgment that Plaintiffs' evidence of
26 willfulness was "weak." (Plaintiff does not necessarily agree, but proving
27 willfulness was certainly not going to be an easy task at trial.) Additionally,
28

1 Plaintiff's class certification motion was denied by this Court, although
2 interlocutory review of that ruling was granted by the Ninth Circuit and the
3 appeal remained pending when the Settlement was reached.

4 Moreover, as previously discussed, H.R. 4008 has now become law,
5 effectively foreclosing any chance of monetary recovery by Plaintiff and the
6 class, if not for Defendant's agreement as part of the Settlement to waive any
7 advantages arising out of H.R. 4008. Given all this, the Settlement is a very
8 good result for the class.

9 Relatedly, in terms of the risks of further litigation, the parties were
10 approaching a trial date at the time the Settlement was reached. In addition,
11 Plaintiff's appeal of the ruling relating to class certification was pending, and,
12 absent a settlement or a reversal of the class certification ruling, the class
13 would take nothing given the denial of Plaintiff's class certification motion.
14 The outcome of trial is, as always, uncertain, and there would likely have been
15 additional appeals after any verdict. If, for example, Defendant "were to
16 appeal a jury verdict in favor of Plaintiffs, it could be years before Plaintiffs
17 would see a dollar." *In re Omnivision Technologies, Inc.*, 2008 WL 123936,
18 *4 (N.D. Cal. Jan. 9, 2008). Moreover, above and beyond these more
19 traditional risks of further litigation in any class action, H.R. 4008 arguably
20 disposes of Plaintiff's entire case.¹¹ The Settlement has prevented Defendant
21 from seeking dismissal of Plaintiff's claims based on H.R. 4008.

22 The extent of discovery and the stage of the proceedings also militate
23 strongly in favor of approval here. Discovery, as shown by the Moore
24 Declaration, was extensive and complete when the Settlement was reached
25 shortly before trial. *See, e.g., in re Omnivision, supra* at *5; *National Rural*

26 _____
27 ¹¹ Plaintiff does not concede that H.R. 4008 is constitutional, but recognizes
28 that establishing that it is not would be a very difficult task for a number of
reasons, including the fashion in which it was drafted.

1 *Telecomm. Cooperative*, 221 F.R.D. at 527-28 (“[a] settlement following
2 sufficient discovery and genuine arms-length negotiation is presumed fair”).
3 Class Counsel was sufficiently informed about the facts and the issues to
4 engage in reasonable settlement discussions, in view of the litigation and
5 discovery that had taken place.

6 The views of Class Counsel also weigh in favor of the Settlement.
7 Counsel for the class are experienced in litigating this type of class action, as
8 this Court already agreed in its April 25, 2008 Order. Order at 6. Class
9 Counsel and the class representative believe the Settlement should be
10 approved as fair, reasonable and adequate, particularly now that H.R. 4008
11 would otherwise likely wipe out any possibility of recovery for the class.
12 “There is nothing to counter the presumption that Lead Counsel’s
13 recommendation is reasonable. Therefore, the recommendation of counsel
14 also weighs in favor of approving the Settlement.” *In re Omnivision, supra* at
15 *6.

16 Finally, the reaction of the class is a relevant consideration. Here, no
17 objections to the Settlement have been received by Class Counsel. Moore
18 Declaration at ¶ 19. Nor, to the Parties’ knowledge, have any objections been
19 sent to or filed with the Court. Only one opt-out form has been received. *Id.*
20 “It is established that the absence of a large number of objections to a
21 proposed class action settlement raises a strong presumption that the terms of a
22 proposed class settlement action are favorable to the class members.” *Nat’l*
23 *Rural Telecomm. Coop.*, 221 F.R.D. at 529; *see also In re Omnivision, supra*
24 at *6. “The absence of a single objection to the Proposed Settlement provides

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26
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1 further support for final approval” *Nat’l Rural Telecomm. Coop.*, 221
2 F.R.D. at 529.¹²

3 For all of the reasons discussed above, the arms-length settlement
4 reached by the Parties in this case, after extensive litigation, is unquestionably
5 fair, reasonable and adequate. As this Court noted in its April 25, 2008 Order,
6 a settlement is presumed fair when it is reached through arm’s length
7 agreement, investigation and discovery are sufficient to allow counsel to act
8 intelligently, counsel is experienced in similar litigation and the percentage of
9 objectors is small. Order at 5. All these conditions are met here. The
10 Settlement provides valuable, tangible benefits to Defendant’s customers
11 which the Parties believe they will likely appreciate and make use of, and it
12 eliminates the risks and expense of further litigation, including the risk that
13 H.R. 4008 would be applied to leave class members with nothing. Final
14 approval under Rule 23(e) should be granted.

15 **D. Similar FACTA Settlements Have Been Approved By**
16 **Other Courts**

17 Finally, it bears noting again that a number of judges in this District and
18 elsewhere have entered final approval of class settlements in other FACTA
19 truncation cases where the settlements involved non-cash benefits to class
20 members and awards of reasonable fees and costs, and incentive awards,
21 similar to those here. Moore Declaration, ¶¶ 16-17. This case, which was far
22 more heavily litigated than any of the other settled cases, now merits a similar
23 result.

24 ¹² The fact that no one has objected is not surprising. As the parties noted in
25 their preliminary approval motion and in the Notice that was provided to the
26 class, they are unaware of any class member who has suffered any actual
27 damages as a result of Defendant’s alleged illegal conduct. As such, there
28 would be very little reason for anyone to object to a settlement that provides
customers of Coffee Bean with free beverages of their choosing, without any
steps required of them except to visit the store they likely visit on a regular if
not daily basis.

1 **4. CONCLUSION**

2 In light of the foregoing, the Parties respectfully request that this Court
3 enter an order:

- 4 1) confirming its previous findings that the requirements for class
5 certification, for settlement purposes, are satisfied;
- 6 2) finding that the Settlement is fair, reasonable and adequate;
- 7 3) finally approving the Settlement;
- 8 4) finding that proper Notice of the Settlement was given;
- 9 5) directing distribution of settlement benefits as agreed in the
10 Settlement;
- 11 6) directing commencement of the compliance monitoring program
12 as agreed in the Settlement;
- 13 7) dismissing Plaintiff's claims with prejudice;
- 14 8) binding class members who did not timely exclude themselves
15 from the Settlement to the release of claims in favor of Defendant as set forth
16 in the Settlement;
- 17 9) barring class members who did not timely object to the
18 Settlement or exclude themselves from the Settlement from prosecuting or
19 pursuing any appeal of the Court's order (to the extent permitted by law);
- 20 10) direct that the clerk of the Court enter the Court's order as a final
21 judgment; and
- 22 11) without affecting the finality of the final judgment, reserve
23 continuing jurisdiction over the parties for the purposes of implementing,
24 enforcing and/or administering the Settlement.
- 25
- 26
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Exhibit 2

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

MARY DUDZIENSKI,)	
)	
Plaintiff,)	
v.)	
)	No. 07 cv 3911
DARDEN RESTAURANTS, INC., a Florida)	
corporation, individually, and d/b/a THE OLIVE)	Hon. Blanche M. Manning
GARDEN and d/b/a THE OLIVE GARDEN)	
ITALIAN RESTAURANT; GMRI, INC.,)	Magistrate Judge Jeffrey Cole
a Florida corporation, individually and d/b/a)	
THE OLIVE GARDEN, and d/b/a THE OLIVE)	
GARDEN ITALIAN RESTAURANT;)	
and DOES 1-10,)	
)	
Defendants.)	

**MEMORANDUM IN SUPPORT OF JOINT MOTION
FOR FINAL APPROVAL OF SETTLEMENT AGREEMENT**

Defendant GMRI, Inc. (“GMRI”) and plaintiff Mary Dudzienski (the “Class Representative” or “Plaintiff”), on behalf of herself and the proposed Class Members¹, by and through their respective counsel, hereby jointly move this Court for final approval of the Class Action Settlement Agreement (“Settlement Agreement”) they have entered into. (See, Settlement Agreement, attached hereto as Exhibit 1).

The Settlement Agreement is the product of extensive arms length negotiations between the parties, and the parties believe it represents a fair, reasonable and adequate settlement of the claims asserted by the Class Representative, individually and purportedly on behalf of the Class Members. Indeed, the terms of the proposed settlement are consistent with other class action settlements of claims throughout the United States which, like the claims asserted by the Class Representative here,

¹ Capitalized terms used, but not otherwise defined, herein shall have the meanings set forth in the Settlement Agreement.

are based on alleged violations of the Fair and Accurate Credit Transactions Act, 15 U.S.C. § 1681c(g)(1) (“FACTA”). Under the circumstances, the parties submit that final approval of the Settlement Agreement is warranted.

Pursuant to the Court’s preliminary approval order, a copy of the Summary Notice of Class Action Settlement was published in the legal section of *USA Today* on two (2) separate days, seven (7) days apart. In addition, the Full Notice of Certified Class Action Settlement was published on a dedicated website created for the purpose of hosting the Full Notice, which had the following internet domain: www.attorneyzim.com. The last day to file objections to the Settlement was June 4, 2009. This was also the last day to request exclusion from the Class. According to the Claims Administrator, 12,806 unique claimant submissions were filed (See, Affidavit of Travis C. Thompson, Claims Administrator, attached hereto as Exhibit 2), while only two (2) class members have requested exclusion from the Settlement Class.

On the record before the Court, the Settlement should be finally approved.

I. BACKGROUND OF THE LITIGATION.

On July 11, 2007, the Class Representative filed her Class Action Complaint in this action alleging that GMRI, which owns and operates the Olive Garden restaurant chain, willfully violated FACTA by displaying more than the last five digits of customer card numbers on receipts issued at GMRI’s Olive Garden restaurants. The Class Representative purports to represent a class consisting of:

All persons who received an electronically-printed receipt at the point of sale or transaction at any Olive Garden Restaurant nationwide, in a transaction occurring between December 4, 2006 and August 10, 2007, which receipt displayed more than the last five digits of the person’s credit or debit card number.

GMRI admits that, for a period of time, Olive Garden's guest receipts¹ displayed more than the last five digits of customer card account numbers. GMRI, however, expressly and vehemently denies that these facts constitute a willful violation of FACTA or give rise to any liability. In addition, GMRI has presented evidence establishing that it corrected Olive Garden's guest receipts so that they do not display more than the last five digits of the customers' account numbers by no later than August 10, 2007, shortly after it received notice of this action. All told, more than 36 million guest receipts were issued displaying more than the last five digits of the customers' account numbers at Olive Garden restaurants throughout the United States.² The parties agree, however, that neither plaintiff nor any putative Class Member has suffered any actual monetary injury as a result of the offending content printed on Olive Garden's guest receipts.

In September 2008, the parties began negotiating a settlement that ultimately became embodied in the Settlement Agreement. While the specific terms of the Settlement Agreement were heavily negotiated, the general terms and structure of the settlement closely track those of virtually all other FACTA class action settlements that have been reached throughout the United States.

II. THE TERMS OF THE SETTLEMENT.

Like the other FACTA class action settlements of which Class Counsel and counsel for GMRI are aware, the Settlement Agreement requires GMRI to provide participating Class Members with vouchers redeemable, without any additional purchase, at Olive Garden restaurants anywhere in the United States. Specifically, the key provisions of the settlement include:

¹ Guest receipts are separate from the credit card slips signed by the customers. Guest receipts include an itemized listing of the customers' orders, as well as other promotional information and content.

² To be clear, the actual Settlement Class was less than 36 million since there were numerous repeat Olive Garden customers who used their credit or debit cards during the eight months between the time FACTA went into effect and the time Olive Garden's guest receipts were corrected.

- GMRI will provide each Participating Claimant with a Claimant Relief Voucher with a face value of \$9.00 that can be used toward the purchase of any appetizer at any Olive Garden restaurant in the United States with no further purchase required (See, proffered Claimant Relief Voucher, attached hereto as Exhibit 3); There were a total of 12,628 valid claims from Participating Claimants, including 12,483 claim forms initially deemed valid and 148 claim forms that were initially deemed invalid but which GMRI subsequently agreed to honor, totaling \$113,652 in monetary relief to the Class;
- GMRI will make a \$5,000 *cy pres* payment to a Court-approved charity;
- GMRI will pay \$2,500 to the Class Representative as compensation and consideration for her efforts on behalf of the Class in lieu of a Claimant Relief Voucher;
- GMRI will pay Class Counsel's Court approved attorneys' fees up to a maximum of \$130,000, and costs up to a maximum of \$5,000; and
- The Class Representative and Class Members will provide GMRI with a full and final release of all Released Claims.

As noted above, both Class Counsel and counsel for GMRI have searched for other FACTA class action settlements throughout the United States. Of the hundreds of FACTA class actions that were filed throughout the United States since FACTA went into effect for most merchants on December 4, 2006, only a relative handful have resulted in class settlements. The FACTA class settlements of which the parties are aware have all resulted in voucher based settlements similar to (and often less favorable to class members than) the Settlement Agreement at issue here. (See, chart summarizing the terms of FACTA class settlements, attached hereto as Exhibit 4).

For the reasons set forth below, the proposed settlement fulfills the requirements for final approval under well-established Seventh Circuit authority.

III. THE PROPOSED SETTLEMENT EXCEEDS THE STANDARDS FOR JUDICIAL APPROVAL.

The Settlement is the product of their extensive investigation, sophisticated economic analysis, and intensive, arm's length settlement negotiations. Under the applicable standards, the Court should approve the Settlement and permit the Class to obtain the benefit of the significant recovery the Settlement represents.

A. Courts Strongly Favor Settlement in Class Actions.

There is an overriding public interest in settling litigation, and this is particularly true in class actions. *See, Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) (“Federal courts naturally favor the settlement of class action litigation”); *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 312 (7th Cir. 1980) (“It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement”), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998). Class action settlements minimize the litigation expenses of the parties and reduce the strain such litigation imposes upon already scarce judicial resources. *See, Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977).

B. The Standard for Approval.

In determining whether to grant final approval, the Court's inquiry “is limited to the consideration of whether the proposed settlement is lawful, fair, reasonable, and adequate.” *Isby*, 75 F.3d at 1196. The Sixth Circuit recently explained:

[The Court's] task is not to decide whether one side is right or even whether one side has the better of these arguments. Otherwise, [the Court] would be compelled to defeat the purpose of a settlement in order to approve a settlement. The question

rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement.

UAW v. Gen. Motors Corp., 497 F.3d 615, 632 (6th Cir. 2007) (approving class action settlements).

Because the very point of compromise is to avoid determining unsettled issues and the waste and expense of litigation, the Court does not “decide the merits of the case or resolve unsettled legal questions.” *Carson v. Am. Brands*, 450 U.S. 79, 88 n.14 (1981). *See also, E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985) (the district court is to “refrain from resolving the merits of the controversy or making a precise determination of the parties’ respective legal rights”), *cert. denied*, 478 U.S. 1004 (1986); *Detroit v. Grinnell Corp.*, 495 F.2d 448, 456 (2d Cir. 1974) (the trial court does not “have the right or the duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute”); 7B Wright & Miller, FED. PRAC. & PROC. at § 1797.5 (“the court may not try disputed issues in the case since the whole purpose behind a compromise is to avoid a trial ... Rather the judge is restricted to determining whether the terms proposed are fair and reasonable.”).

There is not just one settlement that alone is reasonable in a case, but rather there is “a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion.” *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 186 (W.D.N.Y. 2005) (internal quotation marks and citation omitted). “A just result is often no more than an arbitrary point between competing notions of reasonableness.” *In re Corrugated Container Antitrust Litig. (II)*, 659 F.2d 1322, 1325 (5th Cir. 1981). Thus, “[i]t is neither required, nor is it possible for a court to determine that the settlement is the fairest possible resolution of the claims of every individual class member; rather, the settlement, taken as a whole, must be fair, adequate and reasonable.” *Shy v.*

Navistar Int'l Corp., No. C-3-92-333, 1993 U.S. Dist. Lexis 21291, at *11 (S.D. Ohio 1993) (citation omitted). *See also*, 5 MOORE'S FED. PRAC. at § 23.164[2] (“a proposed settlement may be fair and adequate even though it amounts to only a fraction of the potential recovery in a fully litigated case”).

Evaluation and approval of the Settlement is committed to the sound discretion of the Court. The proper focus “is upon ‘the general principles governing approval of class action settlements’ and not upon the ‘substantive law governing the claims asserted in the litigation.’” *Isby*, 75 F.3d at 1197, quoting *Armstrong*, 616 F.2d at 315. The Court has wide latitude in making this determination. There is “no requirement that an evidentiary hearing be conducted as a precondition to approving a settlement in a class action suit.” *Depoister v. Mary M. Holloway Found.*, 36 F.3d 582, 586 (7th Cir. 1994). Therefore, the Court “may limit the fairness hearing to whatever is necessary to aid it in reaching an informed, just and reasoned decision” and should not resort to a full-blown trial on the merits. *UAW*, 497 F.3d at 635 (internal quotation marks and citation omitted).

C. *Armstrong* Considerations.

The Seventh Circuit has established the appropriate standard and considerations for final approval of a class-action settlement. In evaluating whether the proposed settlement is lawful, fair, reasonable, and adequate, the Court should consider: (1) the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement; (2) the defendants’ ability to pay; (3) the complexity, length, and expense of further litigation; (4) the amount of opposition to the settlement; (5) the presence of collusion in reaching the settlement; (6) the reaction of class members to the settlement; (7) the opinion of competent counsel; and (8) the stage of the proceedings and the amount of discovery completed. *Armstrong*, 616 F.2d at 314.

Each of these factors in this case supports approval of the Settlement. In the aggregate, the applicable factors overwhelmingly militate in favor of approval of the Settlement because they demonstrate that the Settlement is lawful, fair, reasonable, and adequate.

1. Strength of the Case for Plaintiffs on the Merits.

a. Plaintiff Faced Considerable Risk In Establishing Liability.

In assessing the fairness, reasonableness and adequacy of the Settlement, the Court should balance the risks of establishing liability against the benefits afforded by the Settlement, and the immediacy and certainty of an adequate recovery against the risks of continuing litigation.

As the court has noted, “no matter how confident one may be of the outcome of litigation, such confidence is often misplaced.” *State of West Virginia v. Chas. Pfizer & Co.*, 314 F.Supp. 710, 743-44 (S.D.N.Y. 1970), *aff’d*, 440 F.2d 1079 (2d Cir.), *cert. denied*, 404 U.S. 871 (1971); *see also*, *Bell Atlantic Corp.*, 2 F.3d at 1313 (“Even if plaintiffs hoped to secure a large damage award, this would have to be drastically discounted by the improbability of their success on the merits”).

That there was unlikely to be any smoking gun evidence of GMRI’s willful noncompliance with FACTA’s truncation requirements. For example, GMRI did not belong to a trade association which disseminated information regarding FACTA’s truncation requirements to its members. Further, there is significant, albeit non-binding authority adverse to class certification in the FACTA context.

Indeed, the Defendant had an outside vendor bring its point of sale systems into compliance with FACTA prior to the compliance deadline. However, the vendor overlooked one component of the system, which continued to print credit card numbers on some of the customer receipts. This fact weighs heavily against the Plaintiff’s burden to prove that the Defendant willfully failed to comply with FACTA.

In the context of this litigation, the risks that Plaintiff faces in establishing liability are manifest, and this factor thus favors approval of the proposed Settlement.

b. Plaintiff Faces Considerable Risk In Establishing A Sustainable Statutory Damage Award.

If Plaintiff succeeded in establishing liability, significant risks would still remain with respect to Plaintiff's ability to prove a *sustainable* class-based damage award. Specifically, statutory damages in this case range from \$100 to \$1,000 per transaction. There are approximately 36 million transactions at issue. If liability were proven in this case, then GMRI would face potentially annihilating class-wide statutory damage exposure.

Plaintiff seriously questions whether damages of this magnitude against GMRI, against the backdrop of the statutory violation at issue, could withstand an almost certain Due Process challenge by GMRI. *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408 (2003).

In addition, Plaintiff's ability to prove a "willful" violation of FACTA is a prerequisite to *any* statutory damage award. As noted above, there are no guarantees that Plaintiff would be able to sustain this burden. *Perry v. FleetBoston*, 299 F.R.D. 105, 115-116 (E.D. Pa. 2005).

This factor favors approval of the proposed Settlement.

2. GMRI's Ability to Pay.

As noted above, statutory damages in this case range from \$100 to \$1,000 per transaction, with approximately 36 million transactions at issue. It does not require a forensic accounting analysis to determine that the potential damage exposure in this case – from \$3.6 billion to \$36 billion – would likely destroy GMRI's business viability. However, GMRI clearly has the resources to satisfy the terms of the proposed Settlement. Therefore, this factor strongly favors the proposed settlement.

3. The Reaction Of The Class To The Settlement Has Been Overwhelmingly Favorable.

After the publication of adequate notice consistent with the Court's directive in the Preliminary Approval Order, there have been **no** objections to the Settlement, with over 12,000 claims. Only two (2) of 36 million potential class members opted-out of the Settlement. Courts recognize that if only a small number of objections are received, that fact can be viewed as indicative of the adequacy of the settlement. *See, In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503, 511 (E.D.N.Y. 2003); *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86-87 (2nd Cir. 2001). This fact plainly recommends final approval of the Settlement.

4. The Settlement was Negotiated at Arm's Length and is Not Collusive.

The requirement that class action settlements be fair is designed to protect against collusion among the parties. *See, In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1383 (D. Md. 1983) (on preliminary approval). When negotiated at arm's length, a proposed settlement is presumptively fair and reasonable. *See, Goldsmith v. Tech Solutions Co.*, No. 92-C-4374, 1995 U.S. Dist. Lexis 15093, at *10 n.2 (N.D. Ill. Oct. 10, 1995) ("it may be presumed that the agreement is fair and adequate where, as here, a proposed settlement is the product of arm's-length negotiations"); 2 NEWBERG ON CLASS ACTIONS, § 11.40 at 451 (2d ed. 1985).

Thus, settlements proposed by experienced counsel as the result of arm's length negotiations are entitled to deference from the court. *See, e.g., Goldsmith*, 1995 U.S. Dist. Lexis 15093, at *10 n.2; *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 640 (E.D. Pa. 2003) ("A presumption of correctness is said to attach to a class settlement reached in arms-length negotiations between experienced, capable counsel after meaningful discovery.") (*quoting Hanrahan v. Britt*, 174 F.R.D. 356, 366 (E.D. Pa. 1997)). The initial presumption in favor of such settlements reflects courts'

understanding that vigorous negotiations between seasoned counsel protect against collusion and advance the fairness concerns of Rule 23(e).

Throughout the negotiations in this case the parties remained adversarial, yet professional. Counsel for both parties are highly experienced litigators who had negotiated numerous class action settlements before the present Settlement was achieved. GMRI's counsel persistently sought to minimize the financial and other burdens and risks to be assumed by their client in the proposed settlement, while Class Counsel equally persistently and forcefully pressed for the greatest achievable advantage for the Class at every turn.

These factors strongly supports approval of the Settlement.

5. The Settlement is Fair in the Opinion of Competent Counsel.

Counsel for the parties have performed extensive research into previously-litigated FACTA cases, and have done thorough evaluations of prior settlements. Counsel was aware of the following:

- That the expiration date had been published on approximately 36 million credit/debit card receipts presented to GMRI's customers at the point of sale during the relevant time period;
- That GMRI's primary liability defense was going to be a lack of willfulness on the part of GMRI under the Fair Credit Reporting Act, as amended by FACTA, in light of Defendant's attempts to comply with FACTA using an outside vendor prior to the compliance deadline;
- That there is significant, albeit non-binding authority adverse to class certification in the FACTA context;
- That there was unlikely to be any smoking gun evidence of GMRI's willful noncompliance with FACTA's truncation requirements. For example, GMRI did not belong to a trade association which disseminated information regarding FACTA's truncation requirements to its members. In some other cases being handled by Class Counsel, such evidence of willfulness is available;

- That without evidence of malice or other indicia of malfeasance, a jury is unlikely to want to impose potentially crippling damages upon a regional business that is generally an upstanding corporate citizen – particularly where there is no evidence that Plaintiff or any Class Member has sustained any actual monetary injury; and
- That if the full measure of statutory damages was actually imposed upon GMRI by a jury, said damages would run a very real risk of violating GMRI’s Due Process rights.

Accordingly, counsel possessed sufficient information to conclude that not only is the proposed Settlement fair, reasonable and adequate, it serves the Congressional purposes reflected in FACTA. At the same time, the proposed Settlement represents a responsible resolution of this litigation in that it does not seek to cripple a business or minimize injury to the Class. As courts have held, the views of the attorneys actively conducting the litigation, while not conclusive, are “entitled to significant weight.” *See, e.g., Fisher Bros. v. Cambridge-Lee Indus., Inc.*, 630 F. Supp. 482, 488 (E.D. Pa. 1985); *see also, Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980)(“the fact that experienced counsel involved in the case approved the settlement after hard-fought negotiations is entitled to “considerable weight.”), *aff’d* 661 F.2d 939 (9th Cir. 1981).

6. Continued Litigation Would Be Long, Complex And Expensive.

The FACTA class action claims at issue are, by definition, complex, and they implicate unsettled areas of applicable law. While Class Counsel would not have asserted the claims if they were not confident that they could make persuasive arguments in favor of both liability and class certification, they acknowledge that if the claims were fully litigated, Plaintiff would have to navigate significant, albeit non-binding, adverse authority.

The most obvious example of this dynamic is in the context of class certification where there has been a growing body of federal district court decisions refusing to certify FACTA class actions

based upon an asserted lack of “superiority” under Fed. R. Civ. P. 23(b). *See, e.g., Najarian v. Charlotte Russe, Inc.*, CV No. 07-501 (C.D.Ca. June 12, 2007)(Klausner, J.); *Spikings v. Cost Plus, Inc.*, 2007 U.S. Dist. LEXIS 44214 (C.D. Ca. May 25, 2007)(Walter, J.); *Soualian v. International Coffee and Tea LLC*, U.S. Dist. LEXIS 44208 (C.D. Ca. June 11, 2007)(Klausner, J.); *Najarian v. Avis Rent-A-Car System*, CV No. 07-588 (C.D. Ca. June 11, 2007)(Klausner, J.); *Lopez v. KB Toys Retail, Inc.*, CV No. 07-144 (C.D. Ca. July 17, 2007)(Walter, J.).

In addition, Plaintiff must demonstrate Defendant’s willful violation of FACTA’s truncation requirements as a prerequisite to statutory damages. The law in this context is evolving, and in a best case scenario, the issue of willfulness would likely be a jury question.

Although substantial discovery was exchanged, more discovery would take place if the case went forward. Expert discovery would be likely, with the potential for extensive motion practice regarding the validity of expert opinions. Undoubtedly, if this case were tried, GMRI would contest the merits of the case on both factual and legal bases, and GMRI would contest the fairness of the underlying judgment amount. The parties would have to brief and argue myriad issues regarding the underlying settlement and the applicable laws and statutes. The Settlement avoids this.

The Settlement permits a prompt resolution of the claims at issue, in a manner that is fair, reasonable and adequate to the Class, while at the same serving the Congressional purpose of causing the truncation of personal consumer credit data on receipts provided to consumers at the point of sale. Standing alone, the relatively expeditious resolution of the claims in dispute benefits the Class, specifically, and consumers, generally.

Courts have consistently held that, unless the proposed settlement is clearly inadequate, its acceptance and approval are preferable to the continuation of lengthy and expensive litigation with

uncertain results. *In re Chambers Development Securities Litigation*, 912 F. Supp. 822, 837 (W.D. Pa. 1995); *see also, TBK Partners, Ltd. v. Western Union Corp.*, 517 F. Supp. 380, 389 (S.D.N.Y. 1981), *aff'd*, 675 F.2d 456 (2d Cir. 1982). Given the prospects for significant discovery, abundant motion practice, a jury trial and probable appeal process, as well as the substantial risks involved, a settlement at this time is beneficial to the Class. *In re First Commodity Corp. of Boston Customer Accounts Litig.*, 119 F.R.D. 301, 314 (D.Mass. 1987).

These factors thus plainly weighs in favor of approval of the proposed Settlement.

For the foregoing reasons, the Court should approve the Settlement as fair, reasonable, and adequate and in the best interests of the settling parties and the Class. The parties' proposed Final Approval Order is attached hereto as Exhibit 5, and the proffered Judgment is attached hereto as Exhibit 6.

Dated: July 9, 2009

Respectfully submitted,

MARY DUDZIENSKI, individually, and on behalf
of all others similarly situated,

By: s/Thomas A. Zimmerman, Jr.
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(847) 480-7800

Counsel for Defendant GMRI, Inc.

Exhibit 3

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

DORIS J. MASTERS, individually and as)
the representative of a class of similarly)
situated persons,)

Plaintiff,)

v.)

LOWE’S HOME CENTERS, INC.,)

Defendant.)

Case No. 09-cv-255-JPG-PMF

SETTLEMENT AGREEMENT

This Settlement Agreement (“Agreement”) is entered into this ___ day of January, 2011, by and among plaintiff Doris J. Masters (“Plaintiff”), on behalf of herself and the Class defined below, and defendant Lowe’s Home Centers, Inc. (“Lowe’s”), by and through their respective counsel. It is hereby agreed between Plaintiff, on behalf of herself and the Class, and Lowe’s, that the class action lawsuit entitled *Masters v. Lowe’s Home Centers, Inc.*, Case No. 09-cv-255, in the United States District Court for the Southern District of Illinois (“the Lawsuit”), and all the matters raised therein or that could have been raised therein, are settled, compromised, and dismissed on the merits and with prejudice on the terms and conditions set forth in this Agreement, including the release set forth herein, subject to the approval of the Court.

WHEREAS, on October 2, 2008, Plaintiff filed a class action complaint (“Complaint”) in the Circuit Court of Madison County, Illinois, Case No. 08 L 910, asserting claims against Lowe’s Companies, Inc., on behalf of a class of persons alleging that Lowe’s willfully violated the Fair and Accurate Credit Transactions Act of 2003 (“FACTA”) and failed to protect Plaintiff

and the putative class against identity theft by failing to comply with FACTA's truncation requirement;

WHEREAS, on March 3, 2009, the Parties stipulated to the dismissal of Lowe's Companies, Inc. and the substituting of Lowe's Home Centers, Inc.;

WHEREAS, on April 2, 2009, Lowe's removed Plaintiff's Complaint to the United States District Court for the Southern District of Illinois (the "Court") under federal question jurisdiction;

WHEREAS, on April 13, 2009, Lowe's filed a motion to stay proceedings and compel individual arbitration;

WHEREAS, on June 11, 2009, this Court denied Lowe's motion to stay proceedings and compel individual arbitration;

WHEREAS, on July 9, 2009, Lowe's filed a notice of appeal regarding this Court's June 11, 2009 Order with the Seventh Circuit Court of Appeals;

WHEREAS, after contentious mediation sessions under the Seventh Circuit's Settlement Conference Program and with a Certified Superior Court Mediator, Benjamin F. Davis, Jr., the Parties have agreed to settle the Lawsuit;

WHEREAS, on December 7, 2010, the Parties filed a Limited Remand Motion with the Seventh Circuit substantially in the form of Exhibit G. The Limited Remand Motion requests that the Court have jurisdiction over this action for the limited purpose of conducting Settlement approval proceedings as contemplated in this Agreement. The Seventh Circuit will retain jurisdiction during the limited remand period;

WHEREAS, Plaintiff and Lowe's have agreed to certification of the following class for Settlement purposes only: "All past and present holders of Lowe's branded GE Money Bank

credit cards, who made a payment on their Lowe's branded GE Money Bank credit card balance at a new Lowe's store between January 1, 2005, and December 3, 2006, or at any Lowe's store between December 4, 2006, and March 24, 2008. A new Lowe's store is a Lowe's store opened after January 1, 2005, and is identified on the list attached to the Agreement as Exhibit A."

WHEREAS, Plaintiff, on behalf of herself and the Class, and Lowe's and its Affiliates (collectively, the "Settling Parties") recognize that the ultimate outcome in the Lawsuit is uncertain and further recognize that achieving a final result through litigation would require substantial additional risk, discovery, time, and expense;

WHEREAS, Plaintiff, on behalf of herself and the Class, and her counsel have conducted an extensive investigation and evaluation of the facts and law relating to the claims asserted in the Lawsuit, the merits of the claims asserted in the Lawsuit, the merits of the defenses raised by Lowe's, and have conducted extensive arm's-length negotiations with Lowe's before entering into this Agreement;

WHEREAS, the Settling Parties desire to compromise and settle all issues and claims that have been or could have been brought in the Lawsuit by or on behalf of Class Members; and

WHEREAS, the Settling Parties desire and intend to seek Court approval of this Agreement, including certification of the class for settlement purposes only, a final order and judgment dismissing with prejudice the Lawsuit and the claims of the Class.

NOW, THEREFORE, IT IS HEREBY STIPULATED AND AGREED, by and among the Settling Parties that, subject to the Court's approval, the Lawsuit and the Released Claims (as defined below) shall be fully and finally compromised, settled, and released, and shall be dismissed with prejudice, subject to and upon the terms and conditions described below.

1. DEFINITIONS

- 1.1 Affiliates: “Affiliates,” “Lowe’s Affiliates,” or “Defendant’s Affiliates” means Lowe’s past and present affiliates (including, but not limited to, Lowe’s HIW, Inc.), parents (including, but not limited to, Lowe’s Companies, Inc.), subsidiaries, general partners, limited partnership partners and partnerships; their respective present and former officers, directors, employees, agents, attorneys, legal counsel, advisors, insurers, accountants, trustees, members, managers, financial advisors, commercial bank lenders, investment bankers, associates, and representatives; and their respective heirs, executors, personal representatives, estates, administrators, successors, and assigns.
- 1.2 Claimant: “Claimant” means a Class Member (as defined below) who submits a timely and valid Claim Form in this Settlement.
- 1.3 Claims Submission Deadline: “Claims Submission Deadline” means the date 120 days after the last mailed notice is sent by the Settlement Administrator.
- 1.4 Class Member: “Class Member” means a person within the definition of the Settlement Class.
- 1.5 Class Counsel: “Class Counsel” means Bock & Hatch, LLC (through attorneys Phillip A. Bock and Richard J. Doherty). Additional class counsel are attorneys from LakinChapman, LLC and Anderson + Wanca.
- 1.6 Effective Date: “Effective Date” means, with respect to the Settlement, the later of: (a) thirty (30) days after the entry of the Final Order and Judgment, if no motion is filed that extends the time for filing a Notice of Appeal and if no Notice of Appeal is timely filed; (b) if a motion is filed that extends the time for filling an appeal, thirty (30) days after final disposition of such motion if no Notice of Appeal is time filed; or (c) if a timely appeal is taken from such Final Order and Judgment, the date upon which all appeals, including

petitions for review, rehearing, or certiorari, and any proceedings resulting therefrom, have been finally disposed of, or the date of the expiration of the time to initiate such petitions or proceedings.

1.7 Internet Notice: “Internet Notice” means the Notice of Proposed Settlement, without material alteration from the form of Exhibit D attached hereto.

1.8 Lowe’s store: “Lowe’s store” means a store owned, operated, or managed by Lowe’s or Lowe’s Affiliates.

1.9 Notice: “Notice” means the Notice Of Proposed Settlement And Right To Opt Out, without material alteration from the form of Exhibit C attached hereto.

1.10 Opt-Out/Objection Deadline: “Opt-Out Objection Deadline” means the date thirty (30) days after the last mailed notice is sent by the Settlement Administrator.

1.11 Released Claims: “Released Claims” means any and all claims or causes of action of any nature whatsoever, including but not limited to any claim for violations of federal, state, or other law (whether in contract, tort, or otherwise, including without limitation statutory, common law, property, and equitable claims), and also including Unknown Claims, that have been or could have been asserted against the Released Parties in the Lawsuit, or in any other complaint, action, or litigation in any other court or forum based upon or in any way relating to the Lawsuit.

1.12 Released Parties: “Released Parties” means Lowe’s and its Affiliates, and their past or present directors, officers, employees, partners, principals, agents, heirs, executors, administrators, successors, reorganized successors, subsidiaries, divisions, parents (including, but not limited to, Lowe’s Companies, Inc.), related or affiliated entities (including, but not limited to, Lowe’s HIW, Inc.), authorized dealers, underwriters, issuers, insurers, co-insurers,

re-insurers, parents, subsidiaries, licensees, divisions, joint ventures, assigns, associates, attorneys, and controlling shareholders and GE Money Bank and its past or present directors, officers, employees, partners, principals, agents, heirs, executors, administrators, successors, reorganized successors, subsidiaries, divisions, parents, related or affiliated entities, authorized dealers, underwriters, issuers, insurers, co-insurers, re-insurers, parents, subsidiaries, licensees, divisions, joint ventures, assigns, associates, attorneys, and controlling shareholders.

1.13 Settlement Administrator: “Settlement Administrator” means an entity retained by Lowe’s with the approval of Class Counsel to arrange for the dissemination of notice to the Class in accordance with the Preliminary Approval Order and to administer this Agreement and the claims process.

1.14 Settlement Class: “Settlement Class” means: “All past and present holders of Lowe’s branded GE Money Bank credit cards, who made a payment on the Lowe’s branded GE Money Bank credit card balance at a new Lowe’s store between January 1, 2005 and December 3, 2006 or at any Lowe’s store between December 4, 2006 and March 24, 2008. A new Lowe’s store is a Lowe’s store opened after January 1, 2005 and is identified on the list attached to the Agreement as Exhibit A.” Excluded from the Class are: (a) all judges or arbitrators who have presided over this case and their spouses and anyone within three degrees of consanguinity from those judges and their spouses; (b) all persons who validly and timely request exclusion from the Class; and (c) all persons who have previously executed and delivered to Lowe’s a release of their claims.

1.15 Termination Date: “Termination Date” shall be defined as set forth in Paragraph 3.15 of this Agreement.

1.16 Unknown Claims: “Unknown Claims” means any and all Released Claims that any Class Member does not know or suspect to exist against any of the Released Parties but which, if known, might have materially altered his or her decision regarding this Agreement.

2. **TERMS OF THE AGREEMENT**

2.1. Certification For Settlement Purposes. Lowe’s does not oppose the certification for settlement purposes only of the Settlement Class. No agreements made by Lowe’s in connection with this Agreement may be used by Plaintiff, any Settlement Class Member, or any other person to establish any of the elements of class certification other than for Settlement purposes. Preliminary certification of the Settlement Class shall not be deemed a concession that certification of a litigation class is appropriate, nor is Lowe’s stopped from challenging class certification in further proceedings in this Lawsuit or any other action if the settlement is not finalized or finally approved. If this Agreement is not approved, the Parties shall be returned to the status quo ante as of March 2, 2010, for all litigation purposes, as if this Agreement had not been negotiated or entered into.

2.2. Plaintiff Believes Settlement Is Fair And Reasonable. Plaintiff believes the Released Claims have merit, but recognizes and acknowledges the expense and length of continued proceedings necessary to prosecute the Released Claims through trial and appeals. Also, Plaintiff has taken into account the uncertain outcome and the risk of the litigation, especially in complex actions such as the Lawsuit, and the difficulties and delays inherent in such litigation. Plaintiff is mindful of the problems of proof under, and possible defenses to, the Released Claims. Plaintiff believes that this Agreement will confer substantial benefit upon the Class. Based upon her evaluation of all of these

factors, Plaintiff has determined that this Agreement is in the best interests of the Class and is fair and reasonable.

2.3. Lowe's Denial Of Liability. Lowe's vigorously denies all claims asserted in the Lawsuit, denies all allegations of wrongdoing and liability, and has denied the material allegations and asserted numerous defenses. Lowe's nevertheless desires to settle all claims that are asserted, or which could have been asserted in the Lawsuit and any other currently pending or later filed actions making these same claims, on the terms and conditions set forth herein, solely for the purpose of avoiding the burden, expense, and uncertainty of continuing litigation and for the purpose of putting to rest the controversies engendered by those actions. Nothing in this Agreement shall be construed as an admission or concession by Lowe's of the allegations raised in this Lawsuit, of any fault, wrongdoing, or liability of any kind.

2.4. Gift Cards. As Consideration for this Agreement, Lowe's agrees to make available Lowe's gift cards in the maximum value of seven million dollars (\$7,000,000) and a minimum value of three million five hundred thousand dollars (\$3,500,000) to pay claims properly and timely submitted by Class Members. The Lowe's gift cards are fully transferable, have no expiration date and charge no fees to the Class Members. Class Counsel's fees and expenses and an incentive award to the Plaintiff will be paid by Lowe's separately.

2.4.1. Benefits Provided To The Class. Each Claimant who submits a valid, timely, and verifiable Claim Form will receive a Lowe's gift card. The value of the gift card shall be \$25 if the Claimant made one payment at a Lowe's store on his/her GE Money Bank Account balance, \$33 if the Claimant made two payments at a Lowe's

store on his/her GE Money Bank Account balance, and \$40 if the Claimant made three or more payments at a Lowe's store on his/her GE Money Bank Account balance. The amount of a Claimant's gift card will be reduced if the total claims made by Claimants exceed seven million dollars (\$7,000,000). In the event that the total claims made by Claimants exceed seven million dollars (\$7,000,000), the Claimants shall share pro rata on the same basis with the order of priority going to providing each Claimant with a \$25 gift card or their pro rata share, then providing each Claimant, who made two or more payments, a \$33 gift card or their pro rata share, and finally providing each Claimant, who made three or more payments, a \$40 gift card or their pro rata share. The specific formula for determining the value of the gift cards is described in Paragraph 2.4.2. To obtain a gift card from Lowe's pursuant to this Agreement, Class Members must complete a Claim Form (to be substantially in the form attached hereto as Exhibit E) by the Claims Submission Deadline. If a Claimant does not receive a Direct Mail Notice or is not on the list of Class Members provided by GE Money Bank to Lowe's, the Claimant must provide documentation in the form of either the actual receipts or their Lowe's branded GE Money Bank Card account statements proving that they are a Class Member. The Settlement Administrator will reject any claim form submitted by a Claimant, who either does not receive a Direct Mail Notice, is not on the list of Class Members provided by GE Money Bank to Lowe's, or does not have the documentation (listed above) proving their membership in the Class. Participating Claimants who fail to use their gift cards, like all Class Members, remain subject to the terms of the Final Order and Judgment.

2.4.2. Calculation Of Gift Card Value For Claimants. To determine the value of the Lowe's gift cards for each Claimant, the Settlement Administrator shall identify the number of Claimants making only one payment at a Lowe's store ("Group One Claimants"), the number of Claimants making only two payments at a Lowe's store ("Group Two Claimants"), and the number of Claimants making three or more payments at a Lowe's store ("Group Three Claimants"). The Settlement Administrator shall classify Claimants as Group One Claimants, Group Two Claimants, and Group Three Claimants based on the data provided by GE Money Bank to Lowe's. If the Claimant does not receive a Direct Mail Notice or is not on the list of Class Members provided by GE Money Bank to Lowe's, the Settlement Administrator shall use the Claimant's documentation (see Paragraph 2.4.1) to confirm the number of payments made and to classify the Claimant as a Group One Claimant, Group Two Claimant, or Group Three Claimant. The value of the gift cards for each of these groups shall be determined by the Settlement Administrator based on the following formula:

- a. Step A. If \$7,000,000 divided by the total number of Claimants is less than or equal to \$25, all Claimants will receive a gift card equal to the the amount obtained by dividing \$7,000,000 by the number of Claimants ("Step A Result"). The Settlement Administrator shall proceed to Step B only if the Step A Result is greater than \$25.
- b. Step B. If the Step A Result is greater than \$25, all the Group One Claimants will receive a \$25 gift card. The Settlement Administrator then will multiply \$25 by the number of Group One Claimants, subtract this product from \$7,000,000, and divide the difference by the number of

Group Two Claimants plus the number of Group Three Claimants (“Step B Result”). If the Step B Result is less than or equal to \$33, all Group Two Claimants and Group Three Claimants will receive a gift card for an amount equal to the Step B Result. The Settlement Administrator shall proceed to Step C only if the Step B Result is greater than \$33.

c. Step C. If the Step B Result is greater than \$33, all Group One Claimants will receive a \$25 gift card and all Group Two Claimants will receive a \$33 gift card. The Settlement Administrator then will multiply \$25 by the number of Group One Claimants and multiply \$33 by the number of Group Two Claimants. The sum of the two products calculated in the previous sentence will be subtracted from \$7,000,000 and the difference will be divided by the number of Group Three Claimants (“Step C Result”). If the Step C Result is less than \$40, all Group Three Claimants will receive a gift card for an amount equal to the Step C Result. If the Step C Result is greater than or equal to \$40, all Group Three Claimants will receive a \$40 gift card. The following chart shows how the formula above operates:

<u>Formula</u>	<u>Gift Card Amount</u>
Step A Result = $\$7,000,000 / (\text{Group One Claimants} + \text{Group Two Claimants} + \text{Group Three Claimants})$.	<p>If Step A Result is less than or equal to \$25, all Claimants receive a gift card with a value of the Step A Result. The formula stops.</p> <p>If Step A Result is greater than \$25, Group One Claimants receive a gift card of \$25, and the formula continues to determine the value of the gift cards for Group Two and Group Three Claimants.</p>
Step B Result = $(\$7,000,000 - (\text{Group One Claimants} \times \$25)) / (\text{Group Two Claimants} + \text{Group Three Claimants})$.	<p>If Step B Result is less than or equal to \$33, all Group Two and Group Three Claimants receive a gift card with a value of the Step B Result. The formula stops.</p> <p>If Step B Result is greater than \$33, Group One Claimants receive a gift card of \$25,</p>

	Group Two Claimants receive a gift card of \$33, and the formula continues to determine the value of the gift card for Group Three Claimants.
Step C Result = $(\$7,000,000 - ((\text{Group One Claimants} \times \$25) + (\text{Group Two Claimants} \times \$33))) / \text{Group Three Claimants}$.	If Step C Result is less than or equal to \$40, all Group Three Claimants receive a gift card with a value of the Step C Result. If Step C Result is greater than \$40, Group One Claimants receive a gift card of \$25, Group Two Claimants receive a gift card of \$33, and Group Three Claimants receive a gift card of \$40.

2.4.3 Cy-Pres Fund. In the event that the amount of claims Lowe’s must pay to Class Members does not reach \$3,500,000, the difference between \$3,500,000 and the amount distributed as gift cards to qualifying Claimants shall be treated as a *cy-pres* fund to be distributed to a Section 501(c)(3) charitable organization. Subject to the Court’s approval, the Parties have selected Habitat for Humanity as the recipient of the *cy-pres*. Habitat for Humanity is a Section 501(c)(3) charitable organization, which “seeks to eliminate poverty housing and homelessness from the world and to make decent shelter a matter of conscience and action.”

2.5 Class Representative Incentive Award. Plaintiff shall seek a Class Representative incentive award of up to, but no more than, Two Thousand Five Hundred Dollars (\$2,500) and Lowe’s will not object to such request. Within ten (10) business days after the Effective Date, and only in the event that the Effective Date occurs and that the Court approves the request for Plaintiff to receive an incentive award, Lowe’s will cause to be forwarded a check payable to Doris Masters, in her personal capacity only and via her counsel of record, in the amount approved by the Court. This payment

shall be compensation and consideration for Masters' efforts as the Class Representative in the Lawsuit.

2.6 Attorneys' Fees And Expenses. After resolving the class relief and with the assistance of the mediator, the parties negotiated attorneys' fees and expenses. Class Counsel may move the Court to recover appropriate attorneys' fees and expenses from Lowe's pursuant to applicable law. Any such petition shall be filed no later than fourteen (14) days prior to the date of the Fairness Hearing and shall include a description of their attorneys' fees, expenses, efforts, or other material justifying such an award. Plaintiff and Class Counsel agree that they shall be responsible for justifying the amount of attorneys' fees and expenses to the Court. Class Counsel may request fees and expenses up to and not exceeding the total amount of One Million Seven Hundred Twenty Four Thousand Dollars (\$1,724,000). Lowe's will not object to a request for this amount of attorneys' fees and expenses. Class Counsel's petition for attorneys' fees and expenses is subject to Court approval. All Parties agree that in no event shall Lowe's be obliged to pay to Plaintiff, any Class Member, Class Counsel, or counsel for any Class Member any amount in excess of the total amount awarded by the Court in connection with this Lawsuit. Plaintiff and Class Counsel acknowledge that any conflict relating to the division of any attorneys' fees is to be decided among Class Counsel as by agreement between the Parties, and Lowe's will have no obligation beyond the lesser of the amount ordered by the Court or One Million Seven Hundred Twenty Four Thousand Dollars (\$1,724,000). Class Counsel represents and warrants that all other legal counsel in the Lawsuit, if any, who are entitled to any part of the attorneys' fees or costs shall be compensated from the amount awarded by the Court

to the Class Counsel. An award of attorneys' fees and expenses in an amount less than requested by Class Counsel shall not be grounds for termination of this Agreement. Lowe's shall have the right to terminate this Agreement if the Court orders an amount of attorneys' fees and expenses greater than One Million Seven Hundred Twenty Four Thousand Dollars (\$1,724,000).

2.7 Payment Of Attorneys' Fees And Expenses. The attorneys' fees and expenses approved by the Court shall be paid to Class Counsel by check or wire transfer ten (10) business days after the Effective Date. Payments made pursuant to Paragraphs 2.5, 2.6, and 2.7 shall constitute full satisfaction of any claim for fees, expenses, and/or costs, and Plaintiff and Class Counsel, on behalf of themselves and all Class Members, agree that they shall not seek nor be entitled to any additional attorneys' fees or costs from Lowe's. Class Counsel shall provide counsel for Lowe's with the pertinent taxpayer identification number and a Form W-9 for reporting purposes. Other than any reporting of this fee payment as required by this Agreement or law Class Counsel, and the Class Representative shall alone be responsible for the reporting of any federal, state, and/or local income or other form of tax on any payment made pursuant to Paragraphs 2.5, 2.6, and 2.7. Except as specifically provided in this Agreement, Lowe's shall not be liable or responsible for any of the attorneys' fees, expenses, or costs of Plaintiff, Class Representative, or any Class Member.

2.8 Notice And Administrative Costs. Lowe's shall bear all costs and expenses in connection with providing notice to the Class and administering the terms of this Agreement, including but not limited to all fees, costs, and expenses of the Settlement

Administrator, which notice and administrative costs shall not impact any amounts payable to the Class. These costs and expenses shall be paid by Lowe's in addition to the funds Lowe's must provide for gift cards to Claimants and the incentive award and attorneys' fees and expenses.

- 2.9 Costs Not Identified In This Agreement. Under no circumstances shall Lowe's be requested and/or required under this Agreement to incur or pay any fees or expenses that Lowe's is not explicitly obligated to incur and/or pay hereunder.

3 SETTLEMENT APPROVAL AND NOTICE PROCESS

3.1 Preliminary Approval Of This Agreement. Within seven (7) days after the complete execution of this Agreement, the Parties shall file the motion for remand with the Seventh Circuit substantially in the form attached hereto as Exhibit G. Within fourteen (14) days after the Seventh Circuit grants the motion to remand, Plaintiff, through her counsel of record in the Lawsuit, shall file this Agreement with the Court and move for preliminary approval of this Agreement. Through this submission and a supporting motion, Plaintiff will request that the Court enter the Preliminary Approval Order substantially in the form attached hereto as Exhibit B, preliminarily approving this Agreement, approving and authorizing the mailing of the Notice, substantially in the form attached hereto as Exhibit C, and posting of the Internet Notice, substantially in the form attached hereto as Exhibit D, and thereby scheduling the Fairness Hearing for the purposes of determining the fairness, adequacy, and reasonableness of this Agreement, granting final approval of this Agreement, granting final approval of this Settlement Agreement, and entering the Final Order and Judgment.

3.2 Notice To Class Members. Within sixty (60) days after the entry of the Preliminary Approval Order, Lowe's shall provide individual notice via mail, substantially in the form attached hereto as Exhibit C (the "Notice"), to each Class Member identified by GE Money Bank's database, who made an in-store payment at a Lowe's store using the addresses contained in that database ("Direct Mail"). For each Class Member, Lowe's in its sole discretion may provide Notice: (a) via a bill stuffer sent by GE Money Bank to Class Members who receive a GE Money Bank bill within two billing cycles of the preliminary approval of Settlement date; or (b) via U.S. post card notice.

Whether the Class Member receives a bill stuffer or U.S. post card notice shall be at Lowe's sole discretion. For the Class Members who are sent the Notice via U.S. post card, at Lowe's sole discretion, it shall either (a) run the entire list of addresses of customers who made an in store payment as identified from GE Money Bank's database through the National Change of Address Link System Database, maintained by the United States Post Office, or a similar service, before service of Notice to Class Members; or (b) run through the National Change of Address Link System Database, maintained by the United States Post Office, or a similar service, any individual notice which is returned to the Settlement Administrator and re-mailed within fifteen (15) days. In no event shall Lowe's be required to run any address from the class list through National Change of Address Link System Database maintained by the United States Post Office, or a similar service, more than one time.

3.3 Website. At the same time that direct mail notice is first sent, the Settlement Administrator shall provide a website that will contain information useful for Class Members. The website address will be included on the Notice, and the website will provide the Internet Notice in substantially the form attached hereto as Exhibit D. The website will also include the claim form, a link to this Agreement, and a link to the Motion For Preliminary Approval. The website will be removed from the Internet after the Claims Submission Deadline. Lowe's shall have the sole right to direct the transfer of the domain name used by the Settlement Administrator. Lowe's may exercise its sole right by requesting that the Settlement Administrator transfer the domain name to Lowe's or Lowe's Affiliates.

3.4 Declaration That Notice Was Provided. No later than fourteen (14) days before the Fairness Hearing, the Settling Parties and/or the Settlement Administrator and/or its or their designees shall file with the Court a declaration verifying that Notice has been provided to the Class by Direct Mail.

3.5 Administration And Distribution Of Benefits. The Settlement Administrator will administer distribution of benefits pursuant to this Agreement. For Class Members to be eligible for the benefits described above, Class Members must present their claims by completing and returning a Claim Form to the Settlement Administrator prior to the Claims Submission Deadline. The Settlement Administrator and Lowe's shall have no obligation to honor claims received after the Claims Submission Deadline even if such claims otherwise would be valid. The Settlement Administrator and Lowe's reserve the right to verify all claims before disbursing the Settlement benefits described in this Agreement. The Settlement Administrator will be the final arbiter of the validity of any claim. The Settlement Administrator shall distribute benefits pursuant to this Agreement within the later of sixty (60) days after the Claims Submission Deadline or the Effective Date, whichever is later, except that the Settlement Administrator shall not distribute any benefits to any Class Member who excluded himself/herself from this Agreement or whose claim was denied by the Settlement Administrator.

3.6 Class Members And Claimant's Queries. Class Counsel and Lowe's will direct all inquiries from Class Members about this Agreement to the Settlement Administrator. In directing any inquiries, Class Counsel and Lowe's will assure any Class Member that Class Counsel has not alleged and has found no evidence that any Class

Member's Lowe's branded GE Money Bank account has been misappropriated or compromised or that any Class Member's identity has been misappropriated or compromised. Further, Class Counsel and Lowe's will state that Lowe's does not believe and is not aware of any Class Member's Lowe's branded GE Money Bank account being misappropriated or compromised or of any Class Members' identity being misappropriated or compromised. Lowe's will further request that GE Money Bank direct all inquiries from Class Members about this Agreement to the Settlement Administrator and provide the same statements regarding the Lowe's branded GE Money Bank account and potential identity theft.

- 3.7 Claimant's Tax Liability. Each Claimant shall remain liable for any individual tax liability, including penalties and interest, arising out of any payment made by Lowe's to that Claimant pursuant to the terms of this Agreement.
- 3.8 Mis-Delivery Of Benefits. Lowe's, Plaintiff, Class Counsel, and the Settlement Administrator shall not be liable for any gift cards mis-delivered or not delivered by the United States Post Office. Lowe's, Plaintiff, Class Counsel, and the Settlement Administrator shall not be liable for the gift cards redeemed by persons other than Claimants. The Releases provided to Lowe's pursuant to this Agreement shall remain effective even as to any Class Members who submit claims and are eligible to participate in the Settlement but who did not receive a gift card or whose gift card is used by a person other than a Class Member.
- 3.9 Confirmatory Discovery. Lowe's will provide reasonable, agreed-upon confirmatory discovery prior to the Fairness Hearing, and Plaintiff shall have the right to withdraw from this Settlement if such discovery fails to confirm the number of potential

claimants discussed during the course of the mediation. The confirmatory discovery shall consist of the following only: (a) Lowe's shall use its best efforts to make available for interview by Plaintiff's Counsel a GE Money Bank representative who is knowledgeable about the Class size and customer identity record-keeping; (b) Lowe's will also use its best efforts to obtain from GE Money Bank a sworn declaration confirming the Class size and customer identity record-keeping; and (c) Lowe's will make available for interview by Plaintiff's counsel a Lowe's representative knowledgeable about Lowe's efforts to comply with FACTA's truncation requirements for the Lowe's branded GE Money Bank credit card and will produce to Plaintiff's counsel a sworn declaration from such Lowe's representative confirming such FACTA compliance efforts. All confirmatory discovery must be completed by no later than forty-five (45) days after the execution of this Agreement. If approval of this Agreement is denied, if Plaintiff withdraws pursuant to this Paragraph 3.9, or if Lowe's withdraws from this Agreement before the Final Fairness Hearing, the Settling Parties agree that all confirmatory discovery provided shall not be admissible for any purpose in this Lawsuit or any other litigation, proceeding, or matter.

3.10 Objection To This Agreement. Any Class Member who wishes to object to the fairness of this Agreement must, by the Opt-Out/Objection Deadline, file any such objection with the Court, and provide copies of the objection to:

For the Class:

Phillip A. Bock
Richard J. Doherty
Bock & Hatch LLC
134 N. La Salle Street, Suite 1000
Chicago, IL 60602

For Lowe's:

Kimball R. Anderson
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601

Settlement Administrator:

[To Be Added]

3.11 Required Information For Objection. Any objection to this Agreement must include

all of the following:

- a. a reference at the beginning to *Masters v. Lowe's Home Centers, Inc.*, Case No. 09-cv-255, in the United States District Court for the Southern District of Illinois;
- b. the objector's full name, address, and telephone number;
- c. the last four digits of the account number for the objector's GE Money Bank account;
- d. a written statement of all grounds for the objection, accompanied by any legal support for such objection;
- e. copies of any papers, briefs, or other documents upon which the objection is based;
- f. a list of all persons who will be called to testify in support of the objection; and
- g. a statement of whether the objector intends to appear at the Fairness Hearing (defined below). If the objector intends to appear at the Fairness Hearing through counsel, the objection must also state the identity of all attorneys representing the objector who will appear at the Fairness Hearing.

3.12 Untimely Or Inadequate Objections. Any Class Member who does not file a timely written objection to this Agreement shall be foreclosed from seeking any adjudication or review of this Agreement by appeal or otherwise, and any Class Member who does

not file a timely notice of his or her intent to appear at the Fairness Hearing shall be foreclosed from speaking at the Fairness Hearing.

3.13 Request For Exclusion. Any Class Member who wishes to be excluded as a Class Member must submit a written exclusion request to the Settlement Administrator, postmarked no later than the Opt-Out/Objection Deadline, with copies of the request for exclusion to Class Counsel, Lowe's Counsel, and the Settlement Administrator, at:

For the Class:

Phillip A. Bock
Richard J. Doherty
Bock & Hatch LLC
134 N. La Salle Street, Suite 1000
Chicago, IL 60602

For Lowe's:

Kimball R. Anderson
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601

Settlement Administrator:

[WHO WILL THIS BE]

To be effective, the exclusion request must: (a) include the Class Member's full name, address, the last four digits of the account number for the Class Member's GE Money Bank account, and the Class Member's telephone number and (b) specifically state the Class Member's desire to be excluded as a Class Member in *Masters v. Lowe's Home Centers, Inc.*

3.14 Failure To Request Exclusion. Any Class Member who does not submit a timely and valid exclusion request shall be subject to and bound by this Agreement, including the Release of Class Members' claims, and every order or judgment entered pursuant to this Agreement.

3.15 Termination Right. Lowe's may, solely at its option, terminate this Agreement in the event that one percent (1%) or more potential Class Members file valid and timely requests for exclusions. If Lowe's so elects, the date Lowe's makes that election shall be the Termination Date. Lowe's may exercise this right within twenty-one (21)

business days after receipt from the Settlement Administrator of a list of persons opting out of this Agreement. In order to invoke this right to nullification, Lowe's must file with this Court and serve on Class Counsel (by facsimile and U.S. Mail) a document expressly entitled Notice of Nullification of Settlement. The Notice of Nullification of Settlement must state the basis for nullification and provide an affidavit with sufficient factual details to establish Lowe's right to nullify. Neither Plaintiff nor any Class Member shall be permitted to seek enforcement of this Agreement or any of its terms against Lowe's should Lowe's elect to nullify this Agreement. If a Party breaches this Agreement, then the other party shall have the right, solely at its option, to terminate this Agreement upon written notice.

3.16 Fairness Hearing. On the date set forth in the Preliminary Approval Order, which shall be set by the Court for approximately sixty (60) days after the Opt-Out/Objection Deadline, a Fairness Hearing will be held, at which the Court will decide (a) whether to approve this Agreement as fair, reasonable, and adequate; and (b) whether to grant the Attorneys' Fees and Expense Request and the application for an incentive award to Plaintiff. At least fourteen (14) days before the Fairness Hearing and consistent with the rules imposed by the Court, Plaintiff shall move the Court for entry of the Order of Final Approval (and the associated entry of Judgment). Also fourteen (14) days before the Fairness Hearing, the Class Counsel shall file a Motion for Fees and Costs, consistent with this Agreement and with Paragraphs 2.5, 2.6, and 2.7 in particular. To the extent possible, the motion seeking entry of the Order of Final Approval shall be noticed for the same day as the Fairness Hearing. The Settling Parties shall take all reasonable efforts to secure entry of the Order of Final Approval. If the Court rejects

in whole or in part this Agreement, fails to enter the Order of Final Approval, or fails to enter the Final Order and Judgment, either party can void this Agreement, and Lowe's shall have no obligations to make any payments under this Agreement.

3.17 Final Order And Judgment. If the Court finally approves this Agreement, a Final Order and Judgment entering judgment as required by Federal Rule of Civil Procedure 58 shall be entered substantially in the form attached hereto as Exhibit F.

3.18 List Of Objectors And Excluded Class Members. Not later than fourteen (14) days after the Opt-Out/Objection Deadline, the Settlement Administrator shall prepare and serve upon Lowe's Counsel and Class Counsel a list of all persons who objected to the Settlement and a list of all persons who have timely excluded themselves from the Class.

3.19 Release Of Class Members' Claims. Upon the Effective Date, Plaintiff and each Class Member who does not timely exclude himself/herself from the Class, including any other person acting on his/her behalf or for his/her benefit, shall be deemed to have, and by operation of the Final Order and Judgment shall have, released, waived, and discharged the Released Parties from the Released Claims as defined above, and expressly waived and relinquished the Released Claims, to the fullest extent permitted by law. Plaintiff or Class Members may hereafter discover facts in addition to or different from those which they now know or believe to be true with respect to the subject matter of the Released Claims, but each Plaintiff and each Class Member, upon the Effective Date of the Settlement, shall be deemed to have, and by operation of the Final Order and Judgment shall have, fully, finally and forever settled, released,

and discharged the Released Parties from any and all Released Claims, including any Unknown Claims.

3.20 Release Of Class Members' Claims Governed By California Civil Code. The release contemplated by this Agreement and the Released Claims shall extend to claims that Plaintiff and the Settlement Class do not know or suspect to exist at the time of the release, which, if known, might have affected Plaintiff's or the Settlement Class' decision to enter into the release. Plaintiff and the Settlement Class shall be deemed to relinquish, to the extent it is applicable, and to the full extent permitted by law, the provisions, rights and benefits of Section 1542 of the California Civil Code, and Plaintiff and the Settlement Class shall be deemed to waive any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542.

4 MISCELLANEOUS PROVISIONS

- 4.1 Headings. The headings in this Agreement are for reference purposes only and have no independent meaning.
- 4.2 Effect of Exhibits. The exhibits to this Agreement are an integral part of this Agreement and are expressly incorporated and made a part of this Agreement.
- 4.3 No Admission. This Agreement is for settlement purposes only. Neither the fact of, nor any provision contained in, this Agreement, nor any action taken hereunder, shall constitute or be construed as any admission of the validity of any claim or any fact alleged in the Lawsuit and or of any wrongdoing, fault, violation of law, or liability of any kind on the part of Lowe's or any admissions by Lowe's of any claim or

allegation made in any action or proceeding against Lowe's. If this Agreement is terminated and becomes null and void for any reason, this Agreement shall have no further force or effect with respect to any party to the Lawsuit and shall not be offered in evidence or used in the Lawsuit or any other proceeding. This Agreement shall not be offered or be admissible in evidence against Lowe's or cited or referred to in any action or proceeding, except in an action or proceeding brought to enforce its terms. Information provided by Lowe's to Plaintiff and Class Counsel in connection with negotiating this Agreement is for settlement purposes only and shall not be used or disclosed for any other purpose whatsoever.

4.4 Entire Agreement. This Agreement represents the entire agreement and understanding among the Settling Parties and supersedes all prior proposals, negotiations, agreements, and understandings relating to the subject matter of this Agreement, and all negotiations, considerations, and representations between the Parties have been incorporated and merged herein and may not be contradicted by evidence of any prior or contemporaneous agreement, arrangement, understanding, representation, or negotiation (whether oral or written). The Settling Parties acknowledge, stipulate, and agree that no covenant, obligation, condition, representation, warranty, inducement, negotiation, or understanding concerning any part or all of the subject matter of this Agreement has been made or relied on except as expressly set forth in this Agreement. No modification or waiver of any provisions of this Agreement shall in any event be effective unless the same shall be in writing and signed by the person against whom enforcement of the Agreement is sought. All of the Parties hereto shall be considered

to be the drafters of this Agreement, and it shall not be interpreted or construed more favorably for any party.

- 4.5 Counterparts. This Agreement may be executed in one or more counterparts, each of which shall be deemed an original as against any party who has signed it, and all of which shall be deemed a single agreement. Signatures transmitted by facsimile shall have the same effect as original ink signatures.
- 4.6 Arm's-Length Negotiations. The Settling Parties have negotiated all of the terms and conditions of this Agreement at arm's length. All terms, conditions, and exhibits in their exact form are material and necessary to this Agreement and have been relied upon by the Settling Parties in entering into this Agreement.
- 4.7 Continuing Jurisdiction. The Court shall retain continuing and exclusive jurisdiction over the Settling Parties to this Agreement, including all Class Members, for the purpose of the administration and enforcement of this Agreement and the Settlement. The Parties hereto and each Class Member who does not timely exclude himself/herself from this Agreement, hereby irrevocably submits to the exclusive jurisdiction and venue of the United States District Court for the Southern District of Illinois for any suit, action, proceeding, or dispute arising out of or relating to this Agreement or the applicability of this Agreement and accompanying exhibits. Without limiting the generality of the foregoing, it is hereby agreed that any dispute concerning the Release as set forth in this Agreement, including, but not limited to, any suit, action, or proceeding by a Class Member in which the provisions of the release are asserted by Lowe's as a defense, constitutes a suit, action, or proceeding arising out of or relating to this Agreement and accompanying exhibits.

4.8 Binding Effect Of Settlement Agreement. This Agreement shall be binding upon and inure to the benefit of the Settling Parties, including the Class Members, and their representatives, heirs, successors, and assigns, and Lowe's, Lowe's Affiliates, and GE Money Bank.

4.9 Extensions of Time. The Settling Parties may agree upon a reasonable extension of time for deadlines and dates reflected in this Agreement without further notice (except that extensions of Court-set deadlines and dates shall be subject to Court approval).

4.10 Service Of Notice. Whenever under the terms of this Agreement, a person is required to provide service or written notice to Lowe's or Class Counsel, such service or notice shall be directed to the individuals and addresses specified below, unless those individuals or their successors give notice to the other Settling Parties in writing:

For the Class:
Phillip A. Bock
Richard J. Doherty
Bock & Hatch LLC
134 N. La Salle Street, Suite 1000
Chicago, IL 60602

For Lowe's:
Kimball R. Anderson
Winston & Strawn LLP
35 West Wacker Drive
Chicago, IL 60601

4.11 Authority To Execute Agreement. Each counsel or other person executing this Agreement or any of its exhibits on behalf of any party hereto warrants that such person has the authority to do so.

4.12 Non-Approval Of Settlement. This Agreement is conditioned upon final approval without material modification by the Court. If this Agreement is not so approved, then: (a) either party may elect to return to the status quo ante as of March 2, 2010, for

all litigation purposes, as if this Agreement had not been negotiated or entered into; and (b) this Agreement, including its exhibits, and any and all negotiations, documents and discussions associated with it, shall not be deemed or construed to be an admission of any kind of evidence: (1) of any violation of any statute, law or regulation; (2) of any liability or wrongdoing by Lowe's; (3) of the truth of any of the claims or allegations made in the Lawsuit; or (4) concerning the value of any claims by Plaintiff or the Class Members. If this Agreement is approved without material modification by the Court, but is later reversed, modified, or vacated on appeal, either party shall have the right to withdraw from this Agreement and return to the status quo ante as of March 2, 2010, for all litigation purposes, as if this Agreement had not been negotiated or entered into. Specifically, the Settling Parties shall be deemed to have preserved all of their rights or defenses as of March 2, 2010, and shall not be deemed to have waived any substantive or procedural rights of any kind that they may have as to each other or to members of the Class. An award of Attorneys' Fees and Expenses in an amount less than requested by Class Counsel shall not be grounds for termination of this Agreement.

4.13 Governing Law. This Agreement shall be construed in accordance with the laws of the state of North Carolina.

4.14 Confidentiality. Any and all drafts of this Agreement and other documents relating to the settlement negotiations between the Settling Parties will remain confidential and will not be disclosed or duplicated except as necessary to obtain preliminary and/or final Court approval. All Confirmatory Discovery conducted under Paragraph 3.9 of this Agreement shall be highly confidential and shall not be disclosed or duplicated

except as necessary to obtain preliminary and/or final court approval, and only with Lowe's express permission. This provision will not prohibit the Settling Parties from submitting this Agreement to the Court in order to obtain preliminary and/or final approval of this Agreement. It is agreed that, within thirty (30) days after the Effective Date, the originals and all copies of all confidential or highly confidential documents and/or information subject to all confidentiality agreements and any Protective Order in the Lawsuit shall be destroyed or returned to the designating party.

4.15 No Solicitation. Plaintiff, Class Counsel, Lowe's, and Lowe's Counsel agree not to encourage, assist, or solicit persons to exclude themselves from the Class or object to this Agreement. Plaintiff, Class Counsel, Lowe's, and Lowe's Counsel further agree that Lowe's may communicate with Class Members regarding the provisions of this Agreement, so long as such communications are not inconsistent with the Notice or other agreed-upon communications concerning this Agreement.

4.16 Dates and Timing. Notwithstanding the terms of this agreement to the contrary, if any date upon which an action is required by this Agreement falls on a Saturday, Sunday, or federal or state holiday, such date shall be advanced to the following Monday or next available business day, as the case may be. Lowe's shall not be liable for any delay or non-performance of its obligations under this Agreement arising from any act of God, governmental act, act of terrorism, war, fire, flood, explosion, or civil commotion.

4.17 Non-Disclosure. Absent prior written approval by Lowe's, there shall be no press release or other public statement by Class Counsel, Plaintiff, or Class Members, regarding this Agreement, other than the Court filings necessary to obtain Preliminary

and Final Approval of this Agreement and the publishing of the Notice by Lowe's. Class Counsel may reference this Lawsuit on their websites using the following form: "Mr. _____ served as class counsel in *Masters v. Lowe's Home Centers, Inc.*, a consumer class action alleging violation of the Fair and Accurate Credit Transactions Act, which was settled for \$7.00 million" and provide links to the Settlement Administrator's website.

IN WITNESS HEREOF, the Settling Parties have caused this Settlement Agreement to be executed as of _____, 2011:

ON BEHALF OF LOWE'S HOME CENTERS, INC.:

By:

ON BEHALF OF PLAINTIFF DORIS J. MASTERS AND THE CLASS:

Phillip A. Bock
Richard J. Doherty
Bock & Hatch, LLC
134 N. La Salle Street, Suite 1000
Chicago, IL 60602

Robert W. Schmieder II
LakinChapman, LLC
300 Evans Drive
P.O. Box 229
Wood River, IL 62095

Brian J. Wanca
Anderson + Wanca
3701 Algonquin Road, Suite 760
Rolling Meadows, IL 60008

Exhibit 4

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

DORIS J. MASTERS, individually and as)	
the representative of a class of similarly)	
situated persons,)	Case No. 09-cv-255-JPG-PMF
)
Plaintiff,)	<u>July 14, 2011 Hearing Date (1:30 p.m.)</u>
)
v.)	Judge J. Phil Gilbert
)
LOWE’S HOME CENTERS, INC.,)	
)
Defendant.)	

ORDER OF FINAL APPROVAL

THIS MATTER is before the Court upon Plaintiff’s Unopposed Motion for Final Approval of Class Action Settlement [Dkt. No. 57]. The Court has carefully reviewed this Motion and the entire court file and is otherwise fully advised in the premises.

Plaintiff Doris J. Masters (“Masters”) has submitted for final approval a proposed settlement of this class action, which is unopposed by Defendant Lowe’s Home Centers, Inc. (“Defendant” or “Lowe’s”). Capitalized terms used in this Order that are not otherwise identified herein have a meaning assigned to them in the Settlement Agreement and the Amendment To Settlement Agreement (collectively the “Settlement Agreement”).

By an Order of Preliminary Approval [Dkt. No. 47] dated January 11, 2011 and a Supplemental Order Of Preliminary Approval [Dkt. No. 51] dated March 11, 2011 (collectively the “Order of Preliminary Approval”), the Court preliminarily approved the proposed Settlement Agreement and Amendment To Settlement Agreement by the Parties based on the terms and conditions of the Unopposed Motion for Preliminary Approval of the Settlement Agreement [Dkt. No. 42] (the “Motion for Preliminary Approval”), the Settlement Agreement [Dkt. No. 46],

the Amendment To Settlement Agreement [Dkt. No. 49, Exhibit 1], and the Agreed Motion To Amend The Settlement Agreement [Dkt. No. 49], subject to further consideration at the Final Settlement and Fairness Hearing conducted on July 14, 2011. In its Order of Preliminary Approval, the Court conditionally certified the cases to proceed as a class action for settlement purposes only and temporarily certified Plaintiff as representative of the following class:

All past and present holders of Lowe's branded GE Money Bank credit cards who made an in-store payment on their Lowe's branded GE Money Bank credit card balance at a new Lowe's store between January 1, 2005 and December 3, 2006 or at any Lowe's store between December 4, 2006 and March 24, 2008, and who received a receipt for their in-store payment showing more than the last five digits of their account. A new Lowe's store is a Lowe's store opened after January 1, 2005 and is identified on the list attached to the Agreement as Exhibit A.

The Court also ordered that the NOTICE OF PROPOSED SETTLEMENT AND RIGHT TO OPT OUT, attached as Exhibit C to the Amendment To Settlement Agreement (the "Notice of Proposed Settlement"), be mailed no later than April 1, 2011.

On July 14, 2011, the Court conducted a Fairness Hearing to determine:

- a. Whether the Court should certify the Settlement Class and whether Plaintiff and her counsel have adequately represented the Class Members;
- b. Whether the Settlement Agreement, on the terms and conditions provided for in the Settlement Agreement, should be finally approved by the Court as fair, reasonable, and adequate;
- c. Whether the Lawsuit should be dismissed on the merits and with prejudice as to Lowe's;
- d. Whether the Court should permanently enjoin the assertion of any claims that arise from or relate to the subject matter of the Lawsuit against Lowe's, Lowe's Affiliates, GE Money Bank, and the Released Parties;

e. Whether the application for attorneys' fees and expenses to be submitted by Class Counsel in connection with the final settlement hearing to which Lowe's does not oppose should be approved; and

f. Whether the application for an incentive award to Plaintiff to be submitted in connection with the final settlement hearing to which Lowe's does not oppose should be approved.

All interested persons were afforded the opportunity to be heard. The Court has duly considered all of the submissions and arguments presented on the proposed Settlement Agreement. After due deliberation and for the reasons set out below, the Court has determined that the Settlement Agreement is fair, reasonable, and adequate and should therefore be approved.

Accordingly, after due consideration, it is

ORDERED AND ADJUDGED that Plaintiff's Unopposed Motion for Final Approval of Class Action Settlement [Dkt. No. 57] be approved and the same is hereby **GRANTED** as follows:

1. On July 14, 2011, the Court held a Fairness Hearing, after due and proper notice, to consider the fairness, reasonableness and adequacy of the proposed Settlement Agreement. In reaching its decision in this case, the Court considered the Parties' Settlement Agreement, the Court file in this case, and the presentations by Class Counsel on behalf of the Plaintiff and the Class and counsel for Lowe's in support of the fairness, reasonableness, and adequacy of the Settlement Agreement.

2. As recognized in the Order of Preliminary Approval [Dkt. Nos. 47 and 51], the Court previously certified a class for settlement purposes only, pursuant to Federal Rules of Civil

Procedure 23(a) and (b)(3).

3. The Court hereby affirms its decision certifying that class and approving the Settlement Agreement. The Court finds that the requirements for approving a settlement class pursuant to Federal Rules of Civil Procedure 23(a) and 23(b)(3) have been met.

4. In the Order of Preliminary Approval, the Court preliminarily approved the Notice and found that the proposed form and content of the Notice Of Proposed Settlement And Right To Opt Out to the Class Members satisfied the requirements of due process. The Court reaffirms that finding and holds that the best practicable notice was given to Class Members under the circumstances and constitutes due and sufficient notice of the Settlement Agreement and Fairness Hearing to all persons affected by and/or entitled to participate in the Settlement Agreement or the Fairness Hearing.

5. Upon reviewing all of the circumstances and evidence including without limitation, the Declaration of Kelley Bethke, the Declaration of Julie Schechter, and the Declaration of Michael Tummillo, the Court has determined that the Settlement Agreement is fair, reasonable, and adequate and should be approved. *Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 652 (7th Cir. 2006). The factors considered are: (1) the strength of the plaintiff's case on the merits compared to the amount of the settlement; (2) the defendant's ability to pay; (3) the likely complexity, length and expense of further litigation; (4) opposition to the settlement from members of the class; (5) evidence of collusion; (6) opinions of counsel; (7) the stage of the proceedings and the amount of discovery completed at the time of settlement; and (8) the public interest. *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996).

The Court has considered the submissions of the Parties, and the confirmatory discovery conducted in this case, along with the Court file, all of which show that there remains substantial

risk and uncertainty in Plaintiff and the Settlement Class ultimately prevailing on their claims. Given the considerable open issues, the benefits available directly to the Class Members represent an excellent result that can be summarized as follows:

The Settlement Agreement requires that a claims procedure be established pursuant to which all Class Members who timely file a valid Proof of Claim by the Claims Submission Deadline shall be entitled to receive a gift card from Lowe's. The value of the Lowe's gift card shall be \$25 if the Claimant made one payment at a Lowe's store on his/her GE Money Bank Account balance, \$33 if the Claimant made two payments at a Lowe's store on his/her GE Money Bank Account balance, and \$40 if the Claimant made three or more payments at a Lowe's store on his/her GE Money Bank Account balance. The amount of a Claimant's gift card will be reduced if the total claims made by Claimants exceed \$7,000,000. In the event that the total claims made by Claimants exceed \$7,000,000, the Claimants shall share *pro rata* on the same basis, with the order of priority going to providing each Claimant with a \$25 gift card or their *pro rata* share, then providing each Claimant, who made two or more payments, a \$33 gift card or their *pro rata* share, and finally providing each Claimant, who made three or more payments, a \$40 gift card or their *pro rata* share. To determine the value of the gift cards for each Claimant, the Settlement Administrator shall identify the number of Claimants making only one payment at a Lowe's store ("Group One Claimants"), the number of Claimants making only two payments at a Lowe's store ("Group Two Claimants"), and the number of Claimants making three or more payments at a Lowe's store ("Group Three Claimants"). The value of the gift cards for each of these groups shall be determined by the Settlement Administrator based on the following formula:

a. Step A. If \$7,000,000 divided by the total number of Claimants is less than or equal to \$25, all Claimants will receive a gift card equal to the amount obtained by dividing \$7,000,000 by the number of Claimants (“Step A Result”). The Settlement Administrator shall proceed to Step B only if the Step A Result is greater than \$25.

b. Step B. If the Step A Result is greater than \$25, all Group One Claimants will receive a \$25 gift card. The Settlement Administrator then will multiply \$25 by the number of Group One Claimants, subtract this product from \$7,000,000, and divide the difference by the number of Group Two Claimants plus the number of Group Three Claimants (“Step B Result”). If the Step B Result is less than or equal to \$33, all Group Two Claimants and Group Three Claimants will receive a gift card for an amount equal to the Step B Result. The Settlement Administrator shall proceed to Step C only if the Step B Result is greater than \$33.

c. Step C. If the Step B Result is greater than \$33, all Group One Claimants will receive a \$25 gift card and all Group Two Claimants will receive a \$33 gift card. The Settlement Administrator then will multiply \$25 by the number of Group One Claimants and multiply \$33 by the number of Group Two Claimants. The sum of the two products calculated in the previous sentence will be subtracted from \$7,000,000 and the difference will be divided by the number of Group Three Claimants (“Step C Result”). If the Step C Result is less than \$40, all Group Three Claimants will receive a gift card for an amount equal to the Step C Result. If the Step C Result is greater than or equal to \$40, all Group Three Claimants will receive a \$40 gift card.

The following chart shows how the formula above operates:

<u>Formula</u>	<u>Gift Card Amount</u>
Step A Result = $\$7,000,000 / (\text{Group One Claimants} + \text{Group Two Claimants} + \text{Group Three Claimants})$.	<p>If Step A Result is less than or equal to \$25, all Claimants receive a gift card with a value of the Step A Result. The formula stops.</p> <p>If Step A Result is greater than \$25, Group One Claimants receive a gift card of \$25, and the formula continues to determine the value of the gift cards for Group Two and Group Three Claimants.</p>
Step B Result = $(\$7,000,000 - (\text{Group One Claimants} \times \$25)) / (\text{Group Two Claimants} + \text{Group Three Claimants})$.	<p>If Step B Result is less than or equal to \$33, all Group Two and Group Three Claimants receive a gift card with a value of the Step B Result. The formula stops.</p> <p>If Step B Result is greater than \$33, Group One Claimants receive a gift card of \$25, Group Two Claimants receive a gift card of \$33, and the formula continues to determine the value of the gift card for Group Three Claimants.</p>
Step C Result = $(\$7,000,000 - ((\text{Group One Claimants} \times \$25) + (\text{Group Two Claimants} \times \$33))) / \text{Group Three Claimants}$.	<p>If Step C Result is less than or equal to \$40, all Group Three Claimants receive a gift card with a value of the Step C Result.</p> <p>If Step C Result is greater than \$40, Group One Claimants receive a gift card of \$25, Group Two Claimants receive a gift card of \$33, and Group Three Claimants receive a gift card of \$40.</p>

Further, the Settlement Agreement provides that Lowe's has assumed financial responsibility for providing notice of the Settlement Agreement to Class Members and administration of the Settlement Agreement.

6. If the case were to proceed without the Settlement Agreement, the possible resulting trial would be complex, lengthy, and very expensive. The Settlement Agreement eliminates a substantial risk that the Class Members would walk away "empty-handed" after the

conclusion of such appeals and/or trial. Absent the Settlement Agreement, because of the resulting motion practice, trial, and appeals, it could be years before Class Members would see any benefit whatsoever, even if they were to prevail on the merits, which might not produce a better recovery than they have achieved in this Settlement Agreement. *S.C. Nat'l Bank v. Stone*, 139 F.R.D. 335, 340 (D.S.C. 1991). The Court is satisfied that the provisions of the Settlement Agreement are of benefit to the Class Members.

7. The Court finds that there were 4 objections filed to the Settlement Agreement and that those objections were without merit.

8. In addition to finding the terms of the proposed Settlement Agreement to be fair, reasonable, and adequate, the Court determines that there was no fraud or collusion between the parties or their counsel in negotiating the Settlement Agreement's terms, and that all negotiations were made at arm's-length. Furthermore, the terms of the Settlement Agreement make it clear that the process by which the Settlement Agreement was achieved was fair. Finally, there is no evidence of unethical behavior, want of skill, or lack of zeal on the part of Class Counsel.

9. This Order shall be binding on all Settlement Class Members. All Settlement Class Members hereby release and discharge Lowe's, Lowe's Affiliates, GE Money Bank, and the Released Parties (as defined in the Settlement Agreement) from all "Released Claims," where "Released Parties" is defined herein and in the Settlement Agreement preliminarily approved by this Court in its Order of Preliminary Approval [Dkt. Nos. 47 and 51] as:

any and all claims or causes of action of any nature whatsoever, including but not limited to any claim for violations of federal, state, or other law (whether in contract, tort, or otherwise, including without limitation statutory, common law, property, and equitable claims), and also including Unknown Claims, that have

been or could have been asserted against the Released Parties in the Lawsuit, or in any other complaint, action, or litigation in any other court or forum based upon or in any way relating to the Lawsuit.

Further, this release and discharge also includes:

any and all claims that Plaintiff and the Settlement Class do not know or suspect to exist at the time of the release, which if known, might have affected Plaintiff's and the Settlement Class' decision to enter into the release, Plaintiff and the Settlement Class shall be deemed to relinquish, to the extent it is applicable, and to the full extent permitted by law, the provisions, rights, and benefits of Section 1542 of the California Civil Code. Plaintiff and the Settlement Class shall be deemed to waive any and all provisions, rights, and benefits conferred by any law of any state or territory of the United States, or principle of common law, which is similar, comparable, or equivalent to California Civil Code Section 1542.

10. All Class Members are hereby barred and permanently enjoined from asserting any of the Released Claims against Lowe's, Lowe's Affiliates, GE Money Bank, and the Released Parties in any court or forum whatsoever, and the Lawsuit is dismissed on the merits, with prejudice and without costs to any party, except as provided herein.

11. The Court finds that the law firms preliminarily approved as Class Counsel in its prior Order of Preliminary Approval [Dkt. Nos. 47 and 51], are competent and experienced attorneys and have adequately and aggressively represented the interests of the Class Members. The Court therefore certifies and appoints the law firms of Bock & Hatch, LLC, LakinChapman, LLC, and Anderson + Wanca to serve as Class Counsel on behalf of the Class.

12. The Court hereby certifies Plaintiff Masters as Class Representative of the Class

defined herein. The terms of the Settlement Agreement provide that Lowe's will pay an incentive award to Plaintiff, and the Court hereby awards the named Class Representative an incentive award of \$2,500.

13. The Court hereby awards Plaintiff's counsel \$1,724,000.00 in attorneys' fees and expenses.

14. The Court finds that there is no just reason to delay the enforcement of or appeal from this Final Approval Order.

15. Without affecting the finality of this Final Approval Order, the Court reserves continuing and exclusive jurisdiction over all matters relating to the administration, implementation, effectuation, and enforcement of the Settlement Agreement.

DONE AND ORDERED in the Southern District of Illinois on July 14, 2011.

s/ J. Phil Gilbert

UNITED STATES DISTRICT JUDGE

Honorable J. Phil Gilbert

Exhibit 5

No. 09-55108

IN THE
United States Court of Appeals for the Ninth Circuit

MICHAEL BATEMAN,

Plaintiff/Appellant,

v.

AMERICAN MULTI-CINEMA, INC.,

Defendant/Appellee.

On Appeal from the United States District Court,
Central District of California
Hon. Florence-Marie Cooper, No. 07-0171

PETITION FOR EN BANC AND/OR PANEL REHEARING

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TABLE OF CONTENTS

	<u>Page</u>
TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
RULE 35 STATEMENT	1
ARGUMENT	4
I. The Panel’s Decision Is Erroneous and Creates an Intra-Circuit Conflict on Whether Courts May Consider the Effects of Aggregating Considerable Statutory Penalties or Damages Across Thousands of Individuals in Applying Rule 23(b)(3)’s “Superiority” Requirement.....	7
II. The Panel’s Decision Also Creates, or Deepens, a Circuit Split on a Legal Question of National Importance.	11
III. Whether District Courts May Consider the Effect of, and Need for, Aggregating Statutory Penalties or Damages Across Thousands of Absent Class Members Is an Important and Recurring Issue of National Significance.	16
CONCLUSION	18

TABLE OF AUTHORITIES

	<u>Page(s)</u>
Cases	
<i>Bateman v. Am. Multi-Cinema, Inc.</i> , 2007 WL 4812282 (C.D. Cal. Oct. 31, 2007)	2
<i>Bateman v. Am. Multi-Cinema, Inc.</i> , 252 F.R.D. 647 (C.D. Cal. 2008)	2
<i>Blair v. Equifax Check Servs., Inc.</i> , 181 F.3d 832 (7th Cir. 1999)	18
<i>Business Guides, Inc. v. Chromatic Commc'ns Enters., Inc.</i> , 498 U.S. 533 (1991)	9
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979)	9, 10, 12
<i>Castano v. Am. Tobacco Co.</i> , 84 F.3d 734 (5th Cir. 1996)	6, 13
<i>Coleman v. Gen. Motors Acceptance Corp.</i> , 296 F.3d 443 (6th Cir. 2002)	13
<i>Flores v. Millennium Interests, Ltd.</i> , 185 S.W.3d 427 (Tex. 2005)	10
<i>Gen. Tel. Co. of the Sw. v. Falcon</i> , 457 U.S. 147 (1982)	10
<i>Giaccio v. Pennsylvania</i> , 382 U.S. 399 (1966)	10
<i>Hart v. Massanari</i> , 266 F.3d 1155 (9th Cir. 2001)	15
<i>Kamm v. Cal. City Dev. Co.</i> , 509 F.2d 205 (9th Cir. 1975)	5
<i>Klay v. Humana, Inc.</i> , 382 F.3d 1241 (11th Cir. 2004)	3, 14
<i>Kline v. Coldwell, Banker & Co.</i> , 508 F.2d 226 (9th Cir. 1974)	2, 3, 5, 6, 8, 9, 12
<i>London v. Wal-Mart Stores, Inc.</i> , 340 F.3d 1246 (11th Cir. 2003)	6, 12, 14
<i>Murray v. GMAC Mortgage Corp.</i> , 434 F.3d 948 (7th Cir. 2006)	3, 14, 15

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
<i>Parker v. Time Warner Entm't Co.</i> , 331 F.3d 13 (2d Cir. 2003).....	3, 5, 6, 13
<i>Ratner v. Chem. Bank N.Y. Trust Co.</i> , 54 F.R.D. 412 (S.D.N.Y. 1972).....	12, 13
<i>Safeco Ins. Co. of Am. v. Burr</i> , 551 U.S. 47 (2007)	2
<i>Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.</i> , 130 S. Ct. 1431 (2010)	10
<i>Shroder v. Suburban Coastal Corp.</i> , 729 F.2d 1371 (11th Cir. 1984).....	14
<i>United States v. Hardesty</i> , 977 F.2d 1347 (9th Cir. 1992).....	11
<i>United States v. Lynch</i> , 437 F.3d 902 (9th Cir. 2006).....	11
<i>Watkins v. Simmons & Clark, Inc.</i> , 618 F.2d 398 (6th Cir. 1980).....	12, 14
<i>Wilcox v. Commerce Bank of Kan. City</i> , 474 F.2d 336 (10th Cir. 1973).....	3, 12, 14
<i>Zinser v. Accufix Research Inst., Inc.</i> , 253 F.3d 1180 (9th Cir. 2001).....	3, 8

Statutes

15 U.S.C. § 1679g(a)	15
15 U.S.C. § 1681c(g)(1).....	2
15 U.S.C. § 1681n(a)	2, 6

Other Authorities

1 JOSEPH M. McLAUGHLIN, <i>McLAUGHLIN ON CLASS ACTIONS</i> (6th ed. 2009).....	4, 7, 18
MARCY HOGAN GREER, <i>A PRACTITIONER’S GUIDE TO CLASS ACTIONS</i> (2010)	16
Sheila B. Scheuerman, <i>Due Process Forgotten: The Problem of Statutory Damages and Class Actions</i> , 74 MO. L. REV. 103 (2009)	18
Stephen G. Grygiel, <i>The Impact of Four Years of Precedent on Litigating Class Actions</i> , in <i>CLASS ACTION LITIGATION 2009: PROSECUTION AND DEFENSE STRATEGIES</i> (2009)	16

TABLE OF AUTHORITIES
(Continued)

	<u>Page</u>
Rules	
9th Cir. R. 35-1	4, 15, 17
Fed. R. App. P. 40(a)(2).....	4
Fed. R. Civ. P. 23(b)(3).....	5

RULE 35 STATEMENT

This Court should grant en banc or panel rehearing because the panel's decision reversing the District Court's denial of class certification in this 'no-harm' class action under the Fair and Accurate Credit Transactions Act ("FACTA"), 15 U.S.C. § 1681c(g), conflicts with this Court's prior precedent, conflicts with the weight of circuit- and district-court authority, and threatens national, systemic consequences for the class adjudication of claims involving statutory penalties or damages. The panel's decision exposes Defendant-Appellee American Multi-Cinema, Inc. ("AMC") to potential monetary penalties of \$290 million for AMC's alleged printing of more than the last five digits of consumers' credit or debit card numbers on movie-ticket receipts between December 2006 and January 2007, even though Plaintiff-Appellant Michael Bateman has never alleged that he or anyone in the putative nationwide class of approximately 290,000 individuals suffered any actual harm therefrom. Slip op. 16362-63.

The District Court exercised its broad discretion under Federal Rule of Civil Procedure 23 to decline certification of Plaintiffs' 'gotcha' class action seeking \$100-\$1,000 in statutory damages under FACTA for each allegedly "willful"

violation, as well as attorneys' fees and costs.¹ The District Court reasoned, in reliance on this Court's decision in *Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir. 1974), and other precedents, that class adjudication was not "superior" to individual actions, as required by Rule 23(b)(3), because, among other reasons, aggregation of the statutory damages provided in FACTA would result in an excessive and disproportionate damages award. *Bateman v. Am. Multi-Cinema, Inc.*, 252 F.R.D. 647, 651 (C.D. Cal. 2008); *Bateman v. Am. Multi-Cinema, Inc.*, 2007 WL 4812282, at *1 (C.D. Cal. Oct. 31, 2007).

The panel² reversed, holding that it was an abuse of discretion to even consider, as part of Rule 23(b)(3)'s superiority analysis, such factors as the prospect of a damages award that, when aggregated across hundreds of thousands of individuals, would be grossly disproportionate, excessive, and unconstitutional, especially in a 'no-harm' class action of this sort. The panel instead held that the

¹ FACTA is an amendment to the Fair Credit Reporting Act ("FCRA") and was enacted "[i]n an effort to combat identity theft." Slip op. 16373. FACTA provides, in relevant part, that vendors who accept credit or debit cards for business transactions shall not "print more than the last 5 digits of the card number . . . upon any receipt provided to the cardholder at the point of the sale or transaction." 15 U.S.C. § 1681c(g)(1). FCRA provides statutory damages for willful violations, *id.* § 1681n(a), which has been interpreted to include "reckless" conduct by a violator. *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58–59 (2007).

² Paez, J., joined by B. Fletcher, J., and Walter, D.J., sitting by designation.

“touchstone” of superiority analysis is “whether denying class certification . . . is consistent with congressional intent.” Slip op. 16374. Finding no indication that Congress intended to preclude aggregation of penalties under FACTA, the panel concluded that the District Court erred in denying certification of the class and reversed.

The panel’s decision conflicts with decisions from this Court and several of its sister Circuits. In *Kline*, this Court reversed a district court’s certification of a class precisely because the aggregation of damages across thousands of class members risked creating a disproportionate penalty that rendered class adjudication not superior to individual actions. 508 F.2d at 235; *see also Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1191 n.7 (9th Cir. 2001). And, as the panel acknowledged, slip op. 16369, multiple other Circuits have similarly held that district courts may consider the proportionality of damages and the likelihood of individual lawsuits as part of the superiority analysis, *e.g., Klay v. Humana, Inc.*, 382 F.3d 1241, 1271 (11th Cir. 2004); *Parker v. Time Warner Entm’t Co.*, 331 F.3d 13, 22 (2d Cir. 2003); *Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336, 346–47 (10th Cir. 1973).

The panel relied instead on the Seventh Circuit’s decision in *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006), but *Murray* nowhere cited or discussed any of the above-cited conflicting precedents, let alone

Rule 23(b)(3)'s superiority requirement. *Murray* therefore does not justify the panel's abrupt departure from this Court's precedent and the decisions of the vast majority of courts to have squarely considered the aggregation/superiority issue presented here. Even if *Murray* did provide direct support for the panel's decision, the panel's reliance on *Murray* would still deepen an important inter- and intra-circuit split, thus warranting en banc and/or panel rehearing in any event.

Absent such rehearing, the panel's decision threatens to make this Circuit even more of a magnet than it already is for 'no-harm,' opportunistic 'gotcha'-type class actions such as this one, particularly given the prevalence of statutory penalties/damages schemes of the sort at issue here. *See, e.g.*, 1 JOSEPH M. McLAUGHLIN, McLAUGHLIN ON CLASS ACTIONS § 2:38 (6th ed. 2009) ("FACTA class actions threaten businesses of every size with devastating classwide liability for what may be harmless statutory violations."). Consequently, the overriding need for uniformity on this legal question of national importance, on which the panel's decision erroneously conflicts with decisions from this Circuit and others, warrants en banc and/or panel rehearing. *See* 9th Cir. R. 35-1; Fed. R. App. P. 40(a)(2).

ARGUMENT

Putative classes may not be certified under Rule 23(b)(3) unless the plaintiff establishes that "a class action is superior to other available methods for fairly and

efficiently adjudicating the controversy.” Fed. R. Civ. P. 23(b)(3). Rule 23 lists a number of factors relevant to this analysis, and this Court, several other Circuits, and the Advisory Committee on Civil Rules have all made clear that district courts must balance these factors when determining whether class adjudication is superior to individual actions or administrative enforcement. *See, e.g., Kamm v. Cal. City Dev. Co.*, 509 F.2d 205, 212 (9th Cir. 1975); Fed. R. Civ. P. 23(b)(3) advisory committee’s note (class should only be certified “without sacrificing procedural fairness or bringing about other undesirable results”).

As part of this required balancing, numerous courts have considered the possibility that aggregating statutory damages for each violation in the class can result in grossly excessive and disproportionate penalty awards. They have recognized that the *in terrorem* threat of such awards often induces post-certification and pretrial settlements, thereby rendering post-trial motions and remittitur an illusory remedy at best. And they have thus held that class actions are not necessarily a “superior” means of adjudication. *See, e.g., Kline*, 508 F.2d at 234–35; *Parker*, 331 F.3d at 22.

This is because aggregation of statutory damages creates a gratuitous “double incentive” for plaintiffs to sue. The class mechanism was devised to eliminate the problem of “negative value” suits that are not worthwhile for a single individual to bring. *E.g., Castano v. Am. Tobacco Co.*, 84 F.3d 734, 748

(5th Cir. 1996). But that same problem can be eliminated through statutory damages and other remedial mechanisms—statutes such as FACTA provide for minimum damages and recovery of attorneys’ fees and costs precisely in order to increase the likelihood that individuals will bring suit, if, as FACTA allows, the FTC and other agencies do not. *See, e.g., Kline*, 508 F.2d at 234 n.5; *Castano*, 84 F.3d at 748. When these damages are aggregated, the result is often “a potentially enormous aggregate recovery for plaintiffs,” *Parker*, 331 F.3d at 22, which may be “completely out of proportion to any harm suffered by the plaintiff,” *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003). In other words, class adjudication is unnecessary and duplicative where, as in this case, statutory damages already give individuals an incentive to sue and deter violations, thus rendering class actions not a “superior” means of adjudication.

All of these concerns clearly exist in the context of FACTA, which allows for attorneys’ fees, costs, minimum statutory damages, and even punitive damages. 15 U.S.C. § 1681n(a). As a result, “[r]ecognizing the economic realities presented by FACTA cases, numerous courts have held that certification was not the superior method of adjudication because it would expose defendant to staggering classwide statutory damages even though plaintiff could not allege that putative class members suffered any actual harm, and significant incentives existed for would-be

class members to bring individual lawsuits.” 1 MCLAUGHLIN, § 2:38 (collecting cases); *see also id.* § 5:61 & n.24.

The panel in this case erroneously rejected any consideration of these factors as part of the superiority analysis, going so far as to hold that the District Court abused its discretion in doing so. The panel held, instead, that the “touchstone” of the superiority requirement is simply “whether denying class certification . . . is consistent with *congressional intent*.” Slip op. 16374 (emphasis added). District courts in this Circuit are thus no longer permitted to consider, as part of the Rule 23(b)(3) “superiority” analysis, the risk of disproportionate damages or the likelihood of individual suits, unless Congress specifically prescribes a damages or other cap on class actions in *the actual statute (e.g., FACTA) giving rise to the underlying substantive cause of action*. *Id.* Because Congress did not satisfy this newly-established *de facto* clear-statement rule in FACTA, the panel reversed the District Court’s decision as an abuse of discretion. *Id.* at 16380.

I. The Panel’s Decision Is Erroneous and Creates an Intra-Circuit Conflict on Whether Courts May Consider the Effects of Aggregating Considerable Statutory Penalties or Damages Across Thousands of Individuals in Applying Rule 23(b)(3)’s “Superiority” Requirement.

The panel’s decision conflicts with this Court’s prior well-established precedent in *Kline v. Coldwell, Banker & Co.* In *Kline*, this Court expressly held that district courts were *required* to consider the likelihood that statutory penalties

(in *Kline*, treble damages under the Sherman and Clayton Acts) and attorneys' fees would be sufficient to induce individuals to sue on their own, as well as the possibility of an excessive and potentially unconstitutional damages award. 508 F.2d at 234. Although "[t]he amount of a recovery in a lawsuit is not ordinarily of concern where a wrong has been inflicted and an injury suffered[,] when 2,000 are joined in an action in which each is jointly and severally liable, the liability is increased in geometric progression." *Id.* As *Kline* concluded, "[i]n . . . light of the problems engendered by the requirement of proof of damages," class adjudication was not "superior to other available methods for the fair and efficient adjudication of the controversy." *Id.* at 235. Similarly, this Court held in *Zinser v. Accufix Research Institute* that the availability of larger damages awards cuts against superiority because such a possibility "suggests that individual claims might economically and reasonably be pursued individually." 253 F.3d at 1191 n.7.

The panel's attempted distinction of *Kline* and its failure to address *Zinser* do not withstand scrutiny. The panel stated that "[t]he basis of *Kline*'s conclusion" was "not simply that potential liability would be disproportional to the harm incurred, but rather that such liability would be inconsistent with congressional intent in enacting the statutory damages provision." Slip op. 16371 (plucking a statement from *Kline* that "[t]he intent of Congress" under the Sherman and Clayton Acts "appears to have been to impose punishment . . . , not to subject [the

defendant] to vicarious liability by the coincidence of a class action for the staggering damages of the multitude” (quoting 508 F.2d at 235)). It also rendered *Kline* (and like decisions) largely a historical artifact by noting that the statute at issue in *Kline* was enacted before the Supreme Court, in *Califano v. Yamasaki*, 442 U.S. 682 (1979), set forth the “presumption that class actions are available unless Congress expressed its contrary intent.” Slip op. 16371.

However, *Kline* did not premise its holding on whether *Congress intended*, in substantive statutes not governing class actions, to allow certification of classes seeking significant statutory damages.³ *Kline* turned on the incentives for individual lawsuits that such penalties created and the likely disproportionality of the damages award that would ensue if such penalties were aggregated across thousands of potential class members. 508 F.2d at 233–34. And the punitive aspect of the treble damages in *Kline* does not differ materially from FACTA damages, which are allowed without any proof of actual harm and thus are clearly “punitive” and deterrent in nature. *Giaccio v. Pennsylvania*, 382 U.S. 399, 402

³ Of course, in addition to enacting statutes, Congress also “participate[s] in the rulemaking process” for the Federal Rules of Civil Procedure by reviewing rules, such as Rule 23, that have been promulgated by the Advisory Committee on Civil Rules and the Supreme Court. *Business Guides, Inc. v. Chromatic Commc’ns Enters., Inc.*, 498 U.S. 533, 552 (1991) (internal quotation marks omitted).

(1966) (statutes are subject to due process review, “whether labeled ‘penal’ or not”); *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 433 (Tex. 2005). This Court’s analysis in *Kline* thus cannot be reconciled with the panel’s decision here.

Nor is there any support in *Califano* for the panel’s decision. *Califano* never considered Rule 23(b)(3)’s superiority requirement, and the “presumption” the Supreme Court articulated in *Califano* is simply that Congress need not affirmatively authorize certification of a cause of action in order for it to be certifiable under Rule 23. 442 U.S. at 700; *see also Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010). *Califano* did not create any sort of background presumption of certifiability of classes seeking aggregated damages against which Congress then legislated. Slip op. 16371–72. If anything, the background presumption Congress legislated against was the wealth of caselaw suggesting that aggregation of damages *could* undermine the superiority of class adjudication. *See infra*, Section II.

Thus, unless Congress specifically precludes certification, district courts should retain their broad discretion under Rule 23 to deny certification of a class, after performing a “rigorous analysis” of whether Rule 23’s superiority and other requirements have been satisfied. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982); *see also Califano*, 442 U.S. at 700 (presumption applicable “where under that Rule certification of a class action *otherwise is permissible*” (emphasis

added)). Otherwise, Congress's failure to preclude aggregation of damages in particular statutes should not affect the outcome of the Rule 23 analysis.

In short, the panel's decision creates irreconcilable conflicts in this Circuit about: (1) whether district courts may consider disproportionality of damages and incentives for individual lawsuits in exercising their discretion with respect to Rule 23(b)(3)'s superiority requirement, and (2) whether the panel's decision can be reconciled with *Kline*. In either case, rehearing is plainly warranted. *See, e.g., United States v. Lynch*, 437 F.3d 902, 905 (9th Cir. 2006) (en banc) (per curiam) (ordering rehearing en banc "to resolve this tension in our law"); *United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc) (per curiam) (when a panel is faced with "irreconcilable conflict" between two decisions, the panel "must call for en banc review" (emphasis in original)).

II. The Panel's Decision Also Creates, or Deepens, a Circuit Split on a Legal Question of National Importance.

The panel's decision also conflicts with decisions from the Second, Sixth, Tenth, and Eleventh Circuits on the important issue of whether district courts may, if not *must*, consider the effects of aggregating statutory penalties across thousands

of potential class members in evaluating whether class adjudication is truly superior to individual (or governmentally initiated) actions.⁴

The rule adhered to and affirmed by the vast majority of courts and rejected by the panel can be traced back to a seminal decision—*Ratner v. Chemical Bank New York Trust Co.*, 54 F.R.D. 412 (S.D.N.Y. 1972)—by one of the principal architects of Rule 23. Judge Frankel presciently explained that aggregation of “\$100 each for some 130,000 class members would be a horrendous, possibly annihilating punishment unrelated to any damage to the purported class or to any benefit to defendant, for what is at most a technical and debatable violation of the Truth in Lending Act.” *Id.* at 416. Such aggregation of penalties thus undermined the “superiority” of class treatment. *Id.*

As the panel here acknowledged, slip op. 16369, this Court soon followed *Ratner* in *Kline*, 508 F.2d at 234, as have several other Circuits, *see, e.g., Watkins v. Simmons & Clark, Inc.*, 618 F.2d 398, 400 n.4 (6th Cir. 1980) (citing *Ratner*); *Wilcox v. Commerce Bank of Kan. City*, 474 F.2d 336, 342 (10th Cir. 1973) (citing *Ratner*); *London v. Wal-Mart Stores, Inc.*, 340 F.3d 1246, 1255 n.5 (11th Cir. 2003) (citing *Kline* and *Ratner*); *Klay v. Humana, Inc.*, 382 F.3d 1241,

⁴ *See also Califano*, 442 U.S. at 700–01 (class actions constitute an “exception to the usual rule that litigation is conducted by . . . individual parties only” (emphasis added)).

1271 (11th Cir. 2004) (citing *Ratner*); see also *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (adopting similar analysis).

Ratner and its progeny have recognized that imposing “minimum statutory damages awards on a per-[litigant] basis” and providing for recovery of attorneys’ fees and costs are meant to “encourage the filing of *individual* lawsuits.” *Id.* at 22 (emphasis added). Accordingly, when Congress enacts a remedial scheme that allows for minimum statutory awards and fees, it does so precisely to make claims worthwhile to bring on a disaggregated basis, which in turn removes “[t]he most compelling rationale for finding superiority in a class action—the existence of a negative value suit.” *Castano*, 84 F.3d at 748; see also, e.g., *Coleman v. Gen. Motors Acceptance Corp.*, 296 F.3d 443, 449 (6th Cir. 2002).

But when the damages meant to incentivize individual lawsuits are aggregated across tens or hundreds of thousands of absent class members, such statutory awards “distort[] the purpose of both statutory damages and class actions” by creating “a potentially enormous aggregate recovery for plaintiffs, and thus an *in terrorem* effect on defendants, which may induce unfair settlements.” *Parker*, 331 F.3d at 22. It is therefore “especially likely” that *actual* harm—not just statutorily defined harm—is “required for superiority” where, as here, “the defendants’ potential liability would be enormous and completely out of proportion

to any harm suffered by the plaintiff.” *London*, 340 F.3d at 1255 n.5; *see also Klay*, 382 F.3d at 1271.

Even in cases where courts have allowed certification of aggregated damages, most, if not all, courts have at least *considered* the troubling possibility these damages present of a disproportionate and excessive damages award—something that the panel’s decision now precludes district courts in this Circuit from doing. *See, e.g., id.*; *Watkins*, 618 F.2d at 404; *Shroder v. Suburban Coastal Corp.*, 729 F.2d 1371, 1378 (11th Cir. 1984); *Wilcox*, 474 F.2d at 347. The panel’s holding thus represents a new and unsupportable break with the precedent of every other Circuit to have squarely addressed this aspect of Rule 23(b)(3)’s superiority requirement.

The panel purported to find support for its unprecedented holding in the Seventh Circuit’s decision in *Murray v. GMAC Mortgage Corp.*, 434 F.3d 948 (7th Cir. 2006). Slip op. 16369–70 (*Murray* “rejected *Ratner*’s reasoning” by “holding that considering a defendant’s potential enormous liability in the Rule 23(b)(3) superiority analysis was improper”). *Murray* cannot, however, bear the weight the panel attributed to it.

Murray did not even cite, let alone directly address or reject the reasoning of, *Ratner*, *Kline*, or their progeny, nor did it hold that district courts were precluded from considering the effect of aggregating statutory penalties across

thousands of class members, or the incentives such penalties already create for individual actions, in deciding whether Rule 23(b)(3)'s "superiority" requirement has been satisfied. *Murray*—decided at the Rule 23(f) petition stage without the benefit of merits briefing or oral argument⁵—held only that a district court may not refuse to enforce statutory damages in a class action, but it nowhere held that the effect of aggregating damages may not be considered by a court in determining whether class adjudication is *superior* to individual (or agency-initiated) actions. 434 F.3d at 954. Indeed, *Murray* never even mentioned Rule 23(b)(3)'s superiority requirement, and obviously, a case is not authority for a proposition the court never considered. *Hart v. Massanari*, 266 F.3d 1155, 1170 (9th Cir. 2001). Not surprisingly then, in the four-plus years since *Murray* was decided, no other Court of Appeals has read it as a decision opining on "superiority" or the validity of *Ratner* or *Kline*—until the panel decision here.

The panel's decision thus places this Court in direct conflict with the decisions of several other Circuits, and therefore warrants panel and/or en banc rehearing. 9th Cir. R. 35-1 (en banc review appropriate "[w]hen the opinion of a

⁵ That may explain why the *Murray* opinion contains a number of errors, such as its mistaken analogy of FACTA to the Credit Repair Organizations Act, which actually provides only for *actual* damages, rather than uncapped statutory damages, as the court assumed. 434 F.3d at 953 (citing 15 U.S.C. § 1679g(a)).

panel directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity”).

III. Whether District Courts May Consider the Effect of, and Need for, Aggregating Statutory Penalties or Damages Across Thousands of Absent Class Members Is an Important and Recurring Issue of National Significance.

Whether the courts of this Circuit may no longer consider the effect of—and need for—aggregating statutory penalties or damages across thousands of absent class members is an important and recurring legal issue of national significance that threatens to turn this Circuit into even more of a magnet for ‘no-harm,’ ‘gotcha’ class actions than it already is, given the prevalence of such penalties and damages in federal and state statutes. *See, e.g.*, MARCY HOGAN GREER, A PRACTITIONER’S GUIDE TO CLASS ACTIONS 503–24 (2010); slip op. 16379–80; Stephen G. Grygiel, *The Impact of Four Years of Precedent on Litigating Class Actions*, in CLASS ACTION LITIGATION 2009: PROSECUTION AND DEFENSE STRATEGIES at 267 (2009) (between 2001 and 2007, the Ninth Circuit led the way among all Courts of Appeals with “a 560% increase” in class action filings, followed by the Second Circuit with “a 200% increase in filings”).

Although the panel purported to address only FACTA, slip op. 16366 n.3, its reasoning obviously extends far beyond that one statute. The panel’s decision effectively renders *Kline* a dead letter, reversing the longstanding presumption and

backdrop against which Congress has been legislating—the majority rule (as the panel itself acknowledged, slip op. 16369) that courts may at least consider the effect of aggregated penalties when determining whether class adjudication is “superior.” The panel’s decision creates out of whole cloth a *de facto* clear-statement rule Congress must satisfy to manifest its “intent” not to impliedly repeal either Rule 23(b)(3)’s superiority requirement or courts’ traditional discretion thereunder to consider the effects of, and need for, aggregation. *Id.*

The split of authority the panel’s decision gives rise to, or at least deepens, *see, e.g., id.* (“consideration of the proportionality between the potential damages and the actual harm . . . has prevailed in the *vast majority* of district courts within this circuit” (emphasis added)), therefore creates “an overriding need for national uniformity” as to “a rule of national application,” practically speaking, that is of significant import to defendants doing business in this Circuit. 9th Cir. R. 35-1.

Given that the panel’s far-reaching decision threatens the *in terrorem* prospect of a nine-figure windfall for plaintiffs who have not alleged any actual harm, this case presents an ideal and compelling vehicle for addressing a significant and difficult problem noted by several courts and commentators—that “once a class is certified, a statutory damages defendant faces a bet-the-company proposition and likely will settle rather than risk shareholder reaction to theoretical billions in exposure even if the company believes the claim lacks merit.” Sheila B.

Scheuerman, *Due Process Forgotten: The Problem of Statutory Damages and Class Actions*, 74 MO. L. REV. 103, 104 (2009); *see also Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (Easterbrook, J.) (“a grant of class status can put considerable pressure on the defendant to settle, even when the plaintiff’s probability of success on the merits is slight”); 1 MCLAUGHLIN, § 2:38.

That is why this Court should reexamine the panel’s suggestion that any gross disproportionality that may ensue can be adequately remedied through post-trial motions and remittitur, particularly given how unrealistic, infeasible, and hypothetical these devices are in the mega-class-action context.

CONCLUSION

This Court should rehear this case en banc, or at least grant panel rehearing, to resolve the split of authority created by the panel’s decision on the important and practically significant questions of law presented herein.

Dated: October 8, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This petition complies with the type-volume limitation of Court Rule 35-4 and 40-1(a) because it contains 4,199 words, excluding the parts of the petition exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This petition complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced font using Microsoft Word 2003 in 14-point Times New Roman type.

Dated: October 8, 2010

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