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**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SAN DIEGO**

HARLEY SEEGER, individually, on behalf of  
himself and all others similarly situated,  
Plaintiff,

v.

P.F. CHANG'S CHINA BISTRO, INC., a  
Delaware Corporation; and DOES 1 through 20,  
inclusive,  
Defendant.

Case No: 37-2017-00016131-CU-MC-CTL

**[E-FILE]**

**CLASS ACTION**

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S UNOPPOSED MOTION FOR  
ATTORNEYS' FEES, COSTS, AND  
INCENTIVE AWARD**

Date: July 12, 2019

Time: 1:30 p.m.

Dept.: C-69

Judge: Hon. Katherine Bacal

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff Harley Seegert brings the instant motion to seek recovery of reasonable attorneys' fees  
4 and expenses incurred in the prosecution of this class action, which successfully safeguarded the privacy  
5 rights of thousands of California citizens and provided them with a significant financial benefit. The  
6 California Supreme Court has declared that the right of privacy found in California the Constitution, Art.  
7 I, § I "prevents government and business interests from collecting and stockpiling information about us."  
8 *Hill v. National Collegiate Athletic Assn.*, 7 Cal. 4th 1, 17 (1974). The California Legislature enacted the  
9 Song-Beverly Credit Card Act, Civil Code § 1747.08 *et seq.* ("Song-Beverly") — the statutory scheme at  
10 the heart of this action — to protect this privacy right for all California consumers who use credit cards to  
11 transact business. *See Florez v. Linens 'N Things*, 108 Cal. App. 4th 447, 452 (2003); *see generally Pineda*  
12 *v. Williams-Sonoma Stores, Inc.*, 51 Cal. 4th 524 (2011).

13 The instant class action enforced this right to privacy for thousands of California consumers who  
14 are members of the Class. Specifically, Plaintiff pursued this class action on behalf of himself and all  
15 persons similarly situated against Defendant P.F. Chang's China Bistro Inc. ("Defendant" or "P.F.  
16 Chang's"), who engaged in a credit card transaction with Defendant in California from May 3, 2016 to  
17 February 22, 2019 for which Defendant utilized a credit card transaction form that contained preprinted  
18 spaces designated for filling in the telephone number and/or email address of the cardholder. Plaintiff  
19 alleges that Defendant's uniform practice of using this type of credit card transaction form at its P.F.  
20 Chang's locations violated Song-Beverly.

21 After litigating the case for two years, the parties — with the assistance of an experienced mediator  
22 — reached an agreement to settle the matter on a class-wide basis. Defendant agreed to establish, with no  
23 reversion, a Maximum Settlement Fund of \$1,000,000.00 from which Authorized Claimants (*i.e.*, those  
24 who did not properly request exclusion and submitted a valid claim) shall receive a cash settlement check  
25 of a pro rata share of the Net Settlement Fund, up to a maximum of \$1,000.00 each. The actual amount of  
26 the cash settlement check will be determined by the number of Authorized Claimants and will be limited  
27 to one cash settlement check per Authorized Claimant. Further, Defendant agreed to revise its California  
28



1 credit card transaction form so that it does not contain spaces for customers to write down their email  
2 address or telephone number. This Settlement provides not only a significant financial benefit for the  
3 Class, but also confers a benefit upon the public at large by deterring other businesses from engaging in  
4 this illegal conduct. Moreover, this Settlement enforces an important public policy affecting an important  
5 public interest: protecting the privacy of consumers who use credit cards.

6 In prosecuting this action, Plaintiff expended his time and effort and took significant financial and  
7 reputational risks for the benefit of the Class as a whole, thus, imposing a financial burden on Plaintiff out  
8 of proportion to his individual stake in the matter.

9 Awarding fair compensation to Class Counsel for bringing this action to enforce an important  
10 public policy is warranted and signals to industry watchers that corporate credit card practices and  
11 procedures need to consider the constitutionally protected right to privacy guaranteed to all California  
12 consumers. Given the risks undertaken as well as the benefits achieved for California consumers, Class  
13 Counsel is entitled, and deserves, to be appropriately compensated, and Defendant has agreed not to  
14 impose the amounts sought by this motion.

15 The California Supreme Court requires market rate compensation for attorneys who undertake the  
16 risk of contingent, public interest litigation. After arms-length negotiations through a well-respected  
17 Mediator in the field of consumer class actions, Plaintiff and the Class Counsel agreed that attorneys' fees'  
18 and costs in the amount of \$358,000 is fair and reasonable, and Defendant agreed not to oppose a request  
19 by Plaintiff for this amount. The fees and costs now sought were plainly disclosed in the Class Notice  
20 approved by this Court in its February 22, 2019 preliminary approval order. No class member submitted  
21 any objections to the attorneys' fees and cost request to date. Plaintiff respectfully requests that the Court  
22 therefore grant the instant motion for attorneys' fees and costs and award Plaintiff the incentive award set  
23 forth in the Settlement Agreement.

24 ///

25 ///

26 ///

1 **II. CLASS COUNSEL IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEYS'**  
2 **FEES PURSUANT TO THE PRIVATE ATTORNEY GENERAL DOCTRINE (C.C.P. §**  
3 **1021.5)**

4 Under the private attorney general doctrine, codified at California Code of Civil Procedure section  
5 1021.5, attorneys' fees are awarded in cases that enforce rights affecting public policies:

6 The fundamental objective of section 1021.5 is to encourage suits  
7 effectuating a strong public policy by awarding substantial attorney's fees  
8 to those who successfully bring such suits. The statute is based on the  
9 recognition that privately initiated lawsuits are often essential to the  
10 effectuation of the fundamental public policies embodied in constitutional  
11 or statutory provisions.

12 *California Common Cause v. Duffy*, 200 Cal. App. 3d 730, 741 (1987).

13 Successful litigants are entitled to fees under California Code of Civil Procedure section 1021.5  
14 when the litigants' efforts: (1) have enforced an important right affecting the public interest; (2) have  
15 conferred a significant benefit on the general public or a large class of persons; and (3) have imposed a  
16 financial burden on the plaintiff out of proportion to his individual stake in the matter. *Baggett v. Gates*,  
17 32 Cal. 3d 128, 142 (1982).

18 While trial courts do have discretion to determine appropriate fee awards, they are also urged to  
19 recognize that: (1) class action settlements should be approved in the absence of evidence of collusion  
20 between the class representative and defendant; and (2) attorneys' fees are an integral part of a class action  
21 settlement. *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 33 (2000) ("The award to the class  
22 and the agreement on attorney fees represent a package deal. Even if the fees are paid directly to the  
23 attorneys, those fees are still best viewed as an aspect of the class' recovery.").

24 Here, Plaintiff contends this case meets the criteria for such an award.

25 **A. Plaintiff is the Successful Party**

26 Plaintiff is the successful party under Code Civil Procedure § 1021.5. "A plaintiff will be considered  
27 a successful party where an important right is vindicated by activating defendants to modify their  
28 behavior." *Westside Community for Independent Living v. Obledo*, 33 Cal. 3d 348, 353 (1983). "[T]o be  
a 'successful party,' a plaintiff need not achieve a favorable final judgment." *Urbaniak v. Newton*, 19 Cal.  
App. 4th 1837, 1842 (1993). Thus, fees are awarded where a plaintiff obtains relief through corrective

1 action by the defendants caused by litigation. *Folsom v. Butte County Assn. of Governments*, 32 Cal. 3d  
2 668, 685-686 (1982) (“The critical fact is the impact of the action, not the manner of its resolution.”);  
3 *Northington v. Davis*, 23 Cal. 3d 955, 960, n.2 (1979) (“voluntary” corrective action, induced by litigation,  
4 is a benefit of the litigation).

5 This action resulted in corrective action insofar as Defendant agreed to revise its credit card  
6 transaction forms to be in compliance with Song-Beverly and the action resulted in significant financial  
7 relief for the class. Neither result would have occurred without Plaintiff’s and Class Counsels’ efforts in  
8 this Action.

9 **B. The Litigation Enforced Important Right Affecting the Public Interest**

10 In examining the “important right” criterion of Section 1021.5, courts assess the “strength” and  
11 “societal importance” of the right by its relationship to the achievement of fundamental legislative goals.  
12 *Woodland Hills II*, 23 Cal. 3d at 938. This examination will test whether the “subject matter of the action  
13 implicated the public interest.” *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1418 (1991),  
14 disapproved on other grounds in *Olson v. Auto Club of S. Cal.*, 42 Cal. 4th 1142, 1153 n6 (2008).  
15 Consumer protection litigation has “long been judicially recognized to be vital to the public interest.” *Id.*  
16 at 1418, citing *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808 (1971); *see also Colgan v. Leatherman Tool*  
17 *Group, Inc.*, 135 Cal. App. 4th 663, 703 (2006) (acknowledging the enforcement of California consumer  
18 protection laws as an important right affecting the public interest). The *Florez* court recognized that  
19 Section 1747.08 was designed to protect the personal privacy of consumers who use credit cards. *Florez*,  
20 104 Cal. App. 4th at 452; *see also Pineda*, 51 Cal. 4th at 534. The Legislature recognized that protecting  
21 consumers’ privacy rights was not just an abstract ideal. Rather, the collection of private personal  
22 information posed a real danger to consumers. For instance, the Legislature specifically considered that  
23 store clerks who obtained customers’ phone numbers and addresses were committing acts of harassment  
24 and violence. *Florez*, 104 Cal. App. 4th at 452. Moreover, merchants were able to profit from collecting  
25 and selling customers’ personal identification information. *Id.*

26 In addition to the dangers recognized by the *Florez* court, the unnecessary collection and mass  
27 storage of consumer information places consumers at risk of identity theft, which can be financially  
28

1 devastating and expensive and time-consuming to redress. It also poses the risk of large-scale data breach,  
2 which places an enormous burden on society. With advances in computer technology, the concerns the  
3 Legislature recognized nearly twenty years ago are even more pronounced today. As evidenced by the  
4 rash of retailer database security breaches and the rise in identity theft cases nationwide, identity theft is  
5 one of the most important crime issues facing consumers today.

6 Finally, a statute is presumed to affect important public rights when it includes a civil penalty. *City*  
7 *and County of San Francisco v. Sainez*, 77 Cal. App. 4th 1302, 1315 (2000). Song-Beverly contains such  
8 a penalty provision. *See* Cal. Civ. Code § 1747.08, subd. (e).

9 Thus, the Settlement is tethered to the enforcement of an important right affecting the public  
10 interest.

### 11 **C. This Action Conferred Benefits on a Large Class**

12 A significant benefit is conferred if the litigation has beneficially impacted the public as a whole.  
13 *Beasley*, 235 Cal. App. 3d at 1417. “[T]he ‘significant benefit’ that will justify an attorney fee award  
14 [under section 1021.5] need not represent a ‘tangible’ asset or a ‘concrete’ gain but, in some cases, may  
15 be recognized simply from the effectuation of a fundamental . . . statutory policy.” *Keep Our Mountains*  
16 *Quiet v. Cnty. of Santa Clara*, 236 Cal. App. 4th 714, 737 (2015), citing *Woodland Hills II*, 23 Cal.3d at  
17 939.

18 The benefits this action conferred on a sizable class are beyond dispute. The Settlement here  
19 provides that P.F. Chang’s will establish, with no reversion, a Maximum Settlement Fund of  
20 \$1,000,000.00 from which Authorized Claimants (*i.e.*, those who do not properly request exclusion and  
21 submit a valid claim) shall receive a cash settlement check of a pro rata share of the Net Settlement Fund,  
22 up to a maximum of \$1,000.00 each. (Settlement Agreement § 2.2.) The actual amount of the cash  
23 settlement check will be determined by the number of Authorized Claimants and will be limited to one  
24 cash settlement check per Authorized Claimant. (*Id.*) This constitutes a significant cash benefit for the  
25 Class. Further, Defendant has agreed to revise its California credit card transaction form so that it does  
26 not contain spaces for customers to write down their email address or telephone number. (*Id.* § 2.1.)  
27  
28

Moreover, the financial benefits of this action go far beyond the Class's compensation. The total penalty amount of approximately \$1,000,000.00 sufficiently deters Defendant and other businesses from engaging in the collection of customer's personal identification information in violation of the statute, which confers a substantial benefit to the general public.

In sum, the Settlement confers a significant financial and equitable benefit upon both the Class and the public.

**D. The Necessity and Financial Burden of Private Enforcement Makes the Award Appropriate**

The necessity and financial burden of privately litigating this action justify the requested fee award. The "necessity and financial burden" requirement for private attorney general fees examines "whether private enforcement was necessary and whether the financial burden of private enforcement warrants subsidizing the successful party's attorneys." *Wilson v. San Luis Obispo County Democratic Cent. Com.*, 192 Cal. App. 4th 918, 926 (2011) (citation omitted.) The theoretical possibility that a governmental agency could have sued does not foreclose a fee award; fees are appropriate when the government has failed to act to protect the plaintiff or the public. *Daniels v. McKinney*, 146 Cal. App. 3d 42, 52 (1983); *see also Committee to Defend Reproductive Rights v. A Free Pregnancy Center*, 229 Cal. App. 3d 633, 641 (1991) (plaintiff need not obtain approval from the district attorney to be eligible for Section 1021.5 fees). In fact, to Class Counsels' knowledge, since the Legislature first enacted the statute decades ago, no lawsuits under Civil Code § 1747.08 have been brought by a public prosecutor. Therefore, our state relies on private enforcement, and without it the statute would not be enforced.

The "financial burden" criterion of California Code of Civil Procedure section 1021.5 is met when "the cost of the claimant's legal victory transcends his or her personal interest, that is, when the necessity of pursuing the lawsuit placed a burden on the plaintiff out of proportion to his or her individual stake in the matter." *Woodland Hills Residents Assn., Inc. v. City Council*, 23 Cal. 3d 917, 941 (1979); *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors*, 79 Cal. App. 4th 505, 519 (2000) ("The issue, in short, is whether the cost of litigation is out of proportion to the litigant's stake in the litigation."); *Notrica v. State Compensation Ins. Fund*, 70 Cal. App. 4th 911, 955 (1999).

1 Here, Plaintiff had little financial incentive to pursue his lawsuit. Plaintiff alleges one transaction in  
2 which Defendant violated Section 1747.08(a). Under Section 1747.08(e), the most Plaintiff could have  
3 recovered is \$1,000. Such a meager award would be wholly out of proportion to the attorneys' fees and  
4 costs they would have had to spend to pursue this matter. Thus, claims are efficiently brought on a class-  
5 wide basis, and the financial burden of taking on a class-wide claim, along with the benefit gained for the  
6 entire class, justifies an award of attorneys' fees pursuant to the private attorney general doctrine.

7 Accordingly, each of the factors for a fee award under section 1021.5 is satisfied here and the  
8 Court should grant Plaintiff's motion for attorneys' fees and costs.

9 **III. CLASS COUNSEL SEEKS REASONABLE ATTORNEYS' FEES AND COSTS**

10 The amount of \$358,000 in attorneys' fees and costs is fair and reasonable in light of Class  
11 Counsels' efforts in this case. The parties negotiated the agreed-upon attorneys' fees and costs only *after*  
12 negotiating and agreeing to all other material terms of the settlement, including all class compensation.  
13 This approach is expressly endorsed by the *Manual for Complex Litigation*. See *Manual For Complex*  
14 *Litigation* ¶ 21.7 (4th ed. 2004) ("Separate negotiation of the class settlement before an agreement on fees  
15 is generally preferable."). The interests of the Settlement Class are promoted by a fee that is negotiated  
16 after all class compensation. By deferring the fee negotiation until that time, Class Counsel aligned their  
17 interests with the interests of the Class. Once the material terms of the settlement were agreed to,  
18 Defendant had every incentive to negotiate as low a fee as possible to decrease its overall costs.

19 The resulting agreed-upon attorneys' fees and costs proposed by Hon. Edward Infante (Ret.) are  
20 the product of a non-collusive adversarial negotiation considering Class Counsels' prior and future efforts,  
21 and the excellent results achieved. In agreeing to pay \$358,000 in the aggregate for attorneys' fees and  
22 costs, Defendant also considered the possibility that Class Counsel might apply for and receive a much  
23 larger award, especially in the event of any objection or appeal of the settlement, which would necessarily  
24 lead to additional protracted litigation and efforts by Class Counsel to defend the settlement. Rather than  
25 take these risks, Defendant agreed to pay the amount of \$358,000 for fees and costs, subject to Court  
26 approval. The requested fees and costs are fair and reasonable and should be granted final approval by the  
27 Court.

1 Throughout the fee negotiations, Class Counsel remained ready to litigate the attorneys' fees issue  
2 if the parties did not reach an agreement. The negotiated fee reflects an arm's-length compromise where  
3 Defendant recognized that if it litigated the fee, it might do worse and Class Counsel also realized that if  
4 the fee was litigated, the Court could award more or less than the agreed amount.

5 To accomplish the objective set forth in *Woodland Hills Residents Ass'n, Inc.*, courts are in  
6 agreement that the fee award must be large enough "to entice competent counsel to undertake difficult  
7 public interest cases." *San Bernardino Valley Audubon Society v. County of San Bernardino*, 155 Cal.  
8 App. 3d 738, 755 (1984). In light of the risks and delays involved in contingent class action litigation,  
9 California courts "recognize two methods for calculating attorneys' fees in civil class actions: the  
10 lodestar/multiplier method and the percentage of the recovery method." *Wershba*, 91 Cal. App. 4th at 254;  
11 *see also Lealao*, 82 Cal. App. 4th at 49-50. The method to be used depends on whether the case involves  
12 "fee shifting" or "fee spreading." Fee shifting cases are those in which the obligation to pay attorneys'  
13 fees is statutorily or otherwise transferred from the plaintiff or class to the defendant and is paid separate  
14 from the class recovery. In fee spreading cases, a separate or "common fund" is established for the benefit  
15 of the class; attorneys' fees are paid out of the common fund and are calculated as a percentage of the class  
16 recovery. *Lealao*, 82 Cal. App. 4th at 26-27. It is well established under California law that the lodestar-  
17 multiplier method is the appropriate method for calculating attorneys' fees in civil class actions similar to  
18 this case. *See Ketchum v. Moses*, 24 Cal. 4th 1122, 1137 (2001); *Consumer Privacy Cases*, 175 Cal. App.  
19 4th 545, 556-57 (affirming that the lodestar approach was properly used to calculate attorneys' fees in  
20 consumer privacy cases); *Robertson v. Fleetwood Travel Trailers of California, Inc.*, 144 Cal. App. 4th  
21 785, 818-19 (2006) (holding that the lodestar method, as the prevailing rule for calculation of statutory  
22 attorneys' fees, apply to cases under the Song-Beverly Consumer Warranty Act); *Wershba*, 91 Cal. App.  
23 4th at 254. Under the lodestar-multiplier method, the lodestar is calculated by multiplying the reasonable hours  
24 expended by a reasonable hourly rate, which is then enhanced by an appropriate multiplier. *Id.*

25 **A. The Requested Attorneys' Fees and Costs Amount is Appropriate Under a Lodestar-**  
26 **Multiplier Analysis**

27 The predominance of the lodestar method for calculating attorneys' fees in private attorney general  
28 cases was first established in 1977 in *Serrano v. Priest*, 20 Cal. 3d 25 (1977). In *Serrano*, the California

1 Supreme Court held that the starting point for determining the amount of attorneys' fees under the private  
2 attorney general doctrine begins by determining the "lodestar" amount. The "lodestar" is calculated by  
3 multiplying the time spent by the reasonable hourly compensation for the attorney involved in the  
4 presentation of the case. *Serrano III*, 20 Cal. 3d at 48, n.23; *see also Maria P. v. Riles*, 43 Cal. 3d 1281,  
5 1294 (1987); *Vo v. Las Virgenes Muncipal Water District*, 79 Cal. App. 4th 440, 445 (2000). The  
6 "lodestar" should normally include out-of-pocket expenses of the type normally billed by an attorney to a  
7 fee-paying client. *Bussey v. Affleck*, 225 Cal. App. 3d 1162, 1166 (1990); *Guinn v. Dotson*, 23 Cal. App.  
8 4th 262, 271 (1994); *Beasley v. Wells Fargo Bank*, 235 Cal. App. 3d 1407, 1419-1422 (1991). The  
9 "lodestar" should also include time spent on the fee application itself. *Serrano v. Unruh*, 32 Cal. 3d 621,  
10 632-638 (1982).

11 Pursuant to the contemporaneous time records maintained by Class Counsel, the law firms  
12 representing the Class have expended a total of 418.2 hours and \$9,789.21 in costs to date on the  
13 investigation and prosecution of this action, and expect to spend another 30 hours through the conclusion  
14 of the action. *See* Declaration of Gene J. Stonebarger ("Stonebarger Decl.") at ¶6; Declaration of Todd  
15 Carpenter ("Carpenter Decl.") at ¶4.

16 Gene Stonebarger, the founder of Stonebarger Law, APC, has expended a total of 31 hours on the  
17 case to date. Stonebarger Decl., ¶6. Mr. Stonebarger's hourly rate for complex class action litigation is  
18 \$795. *Id.* Crystal L. Matter, an attorney of Stonebarger Law, APC, expended a total of 92.1 hours, at the  
19 rate of \$495 per hour, on the case to date. *Id.* Todd Carpenter, a shareholder in the law firm of Carlson  
20 Lynch LLP, has expended a total of 110.6 hours on the case to date. Carpenter Decl. at ¶4. Mr. Carpenter's  
21 hourly rate for complex class action litigation is \$750. *Id.* Brittany Casola is an associate with Carlson  
22 Lynch LLP, has expended a total of 148.3 hours on the case to date. Casola Decl. at ¶3. Ms. Casola's  
23 hourly rate for complex class action litigation is \$395. *Id.* The hourly rates for each attorney are reasonable  
24 for consumer class action attorneys with similar experience litigating consumer class actions and have  
25 been approved by various California State and Federal Courts. *See* Stonebarger Decl., ¶8.

26 Based upon Class Counsel's hourly rates and the number of hours expended on this matter to date,  
27 Class Counsels' current fee lodestar is \$220,330.00. An additional \$9,789.21 was spent on litigation costs  
28



1 and expenses. Accordingly, total fees and costs incurred to date are \$230,119.21. This lodestar number  
2 will continue to increase through the conclusion of this case.

3 **B. Class Counsels' Hours are Reasonable**

4 Class Counsel must demonstrate that the hours they sought were reasonable and necessary to the  
5 litigation. *Concepcion*, 223 Cal. App. 4th at 1320 (internal citations omitted). Hours are reasonable if they  
6 were "reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney  
7 traditionally is compensated by a fee-paying client for all time reasonably expended on a matter. *Hensley*  
8 *v. Eckerhart*, 461 U.S. 424, 431 (1983). In addition to time spent during litigation, reasonable hours  
9 include the time spent before the action was filed, including time spent interviewing clients, investigating  
10 the facts and the law, and preparing the initial pleadings. *Webb v. Board of Educ.*, 471 U.S. 234 (1985).  
11 The fee award should also include time spent to prepare and litigate the attorneys' fee claim. *Serrano IV*,  
12 32 Cal. 3d at 639.

13 Class Counsel spent approximately 418.2 hours litigating this case to date. (Carpenter Decl., ¶ 4;  
14 Casola Decl., ¶ 3; Stonebarger Decl. ¶ 3.) Class Counsels' declarations outline the work they performed  
15 to date, which included the following: fact investigation; drafting the complaint; amending the complaint;  
16 meeting and conferring on initial case management issues and topics; drafting written discovery;  
17 conducting research; preparing an opposition to a demurrer; preparing for, attending, and arguing at the  
18 demurrer hearing; preparing for and attending mediation; meeting and conferring on settlement terms;  
19 drafting and finalizing a settlement agreement, claim forms, and notices; enlisting the services of a claims  
20 administration company; and drafting a motion for preliminary approval, among other things. (Carpenter  
21 Decl., ¶¶ 5; Casola Decl., ¶ 4; Stonebarger Decl. ¶ 3.)

22 **C. The Multiplier Confirms the Reasonableness of the Requested Fee**

23 Once the lodestar is calculated, it may be enhanced with a multiplier. *Wershba*, 91 Cal. App. 4th  
24 at 254. The objective of any multiplier is to provide lawyers involved in public interest litigation with a  
25 financial incentive. *Ketchum*, 24 Cal. 4th at 1123; *see also Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 322  
26 (1983) (Purpose of multiplier is to "reflect the broad impact of the results obtained and to compensate for  
27 the high quality of work performed and the contingencies involved in undertaking this litigation."). "If  
28

1 this ‘bonus’ methodology did not exist, very few lawyers could take on the representation of a class client  
2 given the investment of substantial time, effort, and money, especially in light of the risks of recovering  
3 nothing.” *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1300 (9th Cir.1994).  
4 Only when courts properly compensate experienced and able counsel for successful results, such as the  
5 settlement obtained here, can they assure the continuing effectiveness of the remedies available through  
6 class actions. To accomplish this objective, the fee award must be large enough “to entice counsel to  
7 undertake difficult public interest cases.” *San Bernardino Valley Audubon Society v. County of San*  
8 *Bernardino*, 155 Cal. App. 3d 738, 755 (1984). A positive multiplier is applied to the lodestar to account  
9 for other factors, including (1) the novelty and difficulty of the questions involved; (2) the skill displayed  
10 and the results achieved; and (3) the contingent nature of the fee award. *Ketchum*, 24 Cal. 4th at 1132.

11 When determining the lodestar multiplier, trial courts should consider all factors relevant to a given  
12 case. *Serrano III*, 20 Cal. 3d at 49. Plaintiff’s action supports the public interest outlined in Song-Beverly  
13 of curbing the collection and storage of unnecessary personal identification information. The Settlement  
14 effectively provides a significant financial benefit to Class Members and creates a real deterrence against  
15 future violations. This result justifies the requested multiplier.

16 In addition to enforcement of a public interest, the court also considers additional factors when  
17 awarding a multiplier, such as (1) the novelty and difficulty of the questions involved; (2) the skills  
18 displayed by Class Counsel and the exceptional results obtained; and (3) the contingent nature of the fee  
19 award. *Ketchum*, 24 Cal. 4th at 1132. The requested fee amount represents a multiplier of approximately  
20 1.55—an amount well within the accepted range for class action cases. *See e.g., Chavez v. Netflix, Inc.*,  
21 162 Cal. App. 4th 43, 60 (2008) (multiplier of 2.5); *Consumer Privacy Cases*, 175 Cal. App. 4th 545, 558  
22 (2009) (multiplier of 1.75); *Sutter Health Insured Pricing Cases*, 171 Cal. App.4th 495, 512 (2009)  
23 (multiplier of 2.52).

### 24 1. The Novelty and Difficulty of the Questions Involved

25 This action presented novel and difficult questions regarding liability under Song-Beverly.  
26 Plaintiff alleges that at each of its P.F. Chang’s locations in California, Defendant routinely used credit  
27 card transaction forms with pre-printed spaces specifically designated for filling in the personal  
28

1 identification information of the cardholder, namely, the cardholder's telephone number and email  
2 address. Plaintiff alleges that Defendant collected Class Members' personal identification information to  
3 advance its own prospective business purposes, including but not limited to targeted marketing campaigns.

4 On the other hand, Defendant disagrees that its practices violated the Act because it contends that  
5 its credit card form was insulated from liability under the Special Purpose Exception pursuant to Section  
6 1747.08(c)(4) because it requested cardholder's personal identification information for its loyalty rewards  
7 program. Defendant filed a demurrer on these grounds, but the Court rejected this defense at the pleading  
8 stage, stating that it could not rule as a matter of law that P.F. Chang's only used the collected personal  
9 identification information for its rewards program. Courts have recognized the "special purpose  
10 exception" as a viable defense in different factual scenarios. *See e.g., Lewis v. Safeway*, 235 Cal. App. 4th  
11 385 (2015); *Lewis v. Jinon Corp.*, 232 Cal. App. 4th 1369 (2015)); *Flores v. Chevron U.S.A. Inc.*, 217  
12 Cal. App. 4th 337 (2013). Although both sides continue to believe their respective positions are correct,  
13 these cases demonstrate that the questions involved in the instant litigation are novel and difficult.

## 14 **2. The Skills Displayed by Class Counsel and the Exceptional Results** 15 **Obtained**

16 Class Counsel specializes in complex class actions, regularly litigate cases in California federal  
17 and state courts, and have substantial experience prosecuting Song-Beverly actions in particular. (*See*  
18 *generally* Carpenter Decl. and Stonebarger Decl.) Historically, Class Counsel have achieved excellent  
19 results for cumulatively hundreds of thousands of consumers in contested Song-Beverly actions.  
20 Importantly, the amount of fees and costs to be paid in this case is separate and apart from the Class  
21 benefits, and does not diminish the Class benefits received by Class Members in any way.

22 Equipped with a significant background in successful consumer class litigation, Class Counsel was  
23 able to work efficiently and effectively at all times in working toward resolution of the action. Class  
24 Counsel sufficiently investigated the case so as to accurately assess its value, and weigh it against the  
25 risks, expenses, and uncertainties arising from the potential of protracted litigation. Upon filing the case,  
26 Class Counsel engaged in informal discovery and motion practice such that they were adequately informed  
27 of the nature of the special purpose exception and its application to Defendant's rewards program. Class  
28

1 Counsel often encouraged settlement discussions and eventually took part in a mediation with a highly-  
2 regarded mediator, Hon. Edward A. Infante (Ret.). In the months following a productive and successful  
3 arm's-length mediation, the parties were able to agree upon the terms and execute a final Settlement  
4 Agreement and class notice plan after hosting several lengthy meet and confer discussions. The Maximum  
5 Settlement Fund of \$1,000,000.00 is an exceptional result and gives each Class Member a cash settlement  
6 check in an amount up to \$1,000. Importantly, the fees and costs paid in this case are separate from the  
7 Class benefits, and do not in any way diminish the Class benefits received by Class Members.

### 8 **3. The Contingent Nature of the Fee Award Warrants an Enhanced** 9 **Multiplier**

10 "The risk that an attorney takes in the underlying public interest litigation has two components:  
11 the risk of not being a 'successful party,' i.e. not prevailing on the merits, and the risk of not establishing  
12 eligibility for an attorney fee award." *Graham*, 34 Cal. 4th at 583. "[A] contingent fee contract, since it  
13 involves a gamble on the result, may properly provide for a larger compensation than would otherwise be  
14 reasonable." *Rader v. Thrasher*, 57 Cal. 2d 244, 253 (1962) (citations omitted).)

15 Class Counsel agreed to represent Plaintiff and the putative Class on a contingency fee basis.  
16 (Carpenter Decl., ¶ 7.) Accordingly, Class Counsel bore all of the risk, not only for the time spent  
17 investigating and litigating this matter, but also the costs incurred. Given that there was no guarantee of  
18 success, the contingent nature of this action lends favor to the application of a positive multiplier to Class  
19 Counsel's lodestar.

20 The California Supreme Court has explicitly recognized that the contingent nature of a case  
21 justifies a multiplier:

22 Under our precedents, the unadorned lodestar reflects the general local hourly rate for a  
23 *fee-bearing case*; it does *not* include any compensation for contingent risk . . . . The  
24 adjustment to the lodestar figure, e.g., to provide a fee enhancement reflecting the risk that  
25 the attorney will not receive payment if the suit does not succeed, constitutes earned  
compensation; unlike a windfall, it is neither unexpected nor fortuitous. Rather, it is  
intended to approximate market-level compensation for such services, which typically  
includes premium for the risk of nonpayment or delay in payment of attorneys fees.

26 *Ketchum*, 24 Cal. 4th at 1138 (emphasis in original). *See also* Posner, *Economic Analysis*  
27 *of Law* (4th ed. 1992) at 534, 567) ("A contingent fee must be higher than a fee for the  
28 same legal services paid as they are performed. The contingent fee compensates the  
lawyer not only for the legal services he renders but for the loan of those services from

1 the time counsel began investigating and litigating the claims until Counsel actually gets  
2 paid. This “loan for services” is properly rewarded with a positive multiplier. The  
3 implicit interest rate on such a loan is higher because the risk of default (the loss of the  
4 case, which cancels the debt of the client to the lawyer) is much higher than that of  
5 conventional loans.”). The contingent fee compensates the lawyer not only for the legal  
6 services he renders but also for the loan of those services. The implicit interest rate on  
7 such a loan is higher because the risk of default (the loss of the case, which cancels the  
8 debt of the client to the lawyer) is much higher than that of conventional loans.

9 *Id.* at 1132-33; *see also* *Serrano*, 20 Cal. 3d at 49; *Downey Cares v. Downey Community Dev. Comm’n.*,  
10 196 Cal. App. 3d 983, 997 (1987) (Enhanced fees in contingent fee cases recognize the delay in receipt of  
11 full payment of fees.).

12 Class Counsel assumed substantial risk in agreeing to litigate Plaintiff Seegert’s case on a pure  
13 contingency fee basis. Thus, the multiplier, and the resulting unopposed \$358,000.00 fee and cost request,  
14 should be granted.

#### 15 **4. Additional Factors Justify Applying a Positive Multiplier**

16 Class Counsel secured a settlement of this action instead of engaging in additional years of  
17 protracted litigation through trial and certain appeal. Accordingly, a positive multiplier is warranted.  
18 “Considering that our Supreme Court has placed an extraordinarily high value on settlement, it would  
19 seem counsel should be rewarded, not punished, for helping to achieve that goal.” *Lealao*, 82 Cal. App.  
20 4th at 52 (*citing Merola v. Atlantic Richfield Company*, 515 F.2d 165, 168 (3d Cir. 1975) (Courts should  
21 reward attorney who secures a substantial benefit for his clients with a minimum of time invested);  
22 *Bowling v. Pfizer, Inc.*, 922 F. Supp. 1261, 1282-1283 (S.D. Ohio 1996) (Courts should reward attorney  
23 in case settled “in swift and efficient fashion”); *Arenson v. Board of Trade of City of Chicago*, 372 F.  
24 Supp. 1349, 1358 (N.D. Ill. 1974) [awarding a fee four times the normal hourly rate on ground that, if the  
25 case had not settled and gone to verdict, “there is no doubt that the number of hours of lawyer’s time  
26 expended would be more than quadruple the number of hours expended to date.”).

27 Class Counsel has litigated this matter diligently for two years and took an enormous risk that they  
28 would never be compensated for their time or reimbursed for the costs they incurred. Class Counsel further  
advanced substantial costs to pay for an all-day mediation. Based on this work, Class Counsel achieved  
an excellent result for the Class.

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1       **D. The Value of the Settlement Itself does not Provide a Cap on the Award of Fee**

2       California law “does not mandate... that attorney fees bear a percentage relationship to the ultimate  
3 recovery of damages...” *Harman v. City and County of San Francisco*, 158 Cal. App. 4th 407, 419 (2007);  
4 *see also Concepcion v. Amscan Holdings, Inc.*, 223 Cal. App. 4th 1309, 1321 (2014) (“the attorney fee  
5 award need not bear any specific relationship to the dollar amount of the recovery.”). Likewise, the U.S.  
6 Supreme Court has rejected the proposition that awards of attorneys' fees should necessarily be  
7 proportionate to the amount of damages a plaintiff actually recovers. *Riverside v. Rivera*, 477 U.S. 561,  
8 574 (1986). In fact, the California Court of Appeal held that “strict proportionality” is *not* a critical factor  
9 in assessing the proper amount of attorneys' fees, and that “a rule of proportionality... is inconsistent with  
10 the flexible approach to lodestar calculations that takes into account all considerations relevant to the  
11 reasonableness of time spent. *Harman*, 158 Cal. App. 4th at 419, 421. An award of “attorney's fee is to be  
12 based upon actual time expended rather than being tied to any percentage of the recovery. This requirement  
13 is designed to make the pursuit of consumer rights involving inexpensive consumer products economically  
14 feasible. *Robertson v. Fleetwood Travel Trailers of California, Inc.*, 144 Cal. App. 4th 785, 820 (2006)  
15 (citing Sen. Rep. No. 93-151, 1st Sess., pp. 23-24 (1973)); *see also Drouin v. Fleetwood Enterprises*, 163  
16 Cal. App. 3d 486, 493 (1985). The U.S. Supreme Court, Ninth Circuit Courts of Appeal and California  
17 Courts of Appeal considering fee awards have consistently “rejected the notion that attorney's fees... should  
18 be proportionate to the amount of damages a plaintiff recovers.” *Riverside*, 477 U.S. at 574; *Fair Hous. v.*  
19 *Combs*, 285 F.3d 899, 908 (9th Cir. 2002); *Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1508 (1987); *see*  
20 *also Quesada v. Thomason*, 850 F.2d 537, 540 (9th Cir. 1988) (“the district court should not have reduced  
21 the attorney's fees simply because the damage award was small”); *Flannery v. Prentice*, 26 Cal. 4th 572,  
22 576 (2001) (approved an attorneys' fees award of \$971,684 to after entering a damages award of \$250,000  
23 to plaintiff); *Acree v. General Motors Acceptance Corp.*, 92 Cal. App. 4th 385, 404 (2001) (damages verdict  
24 of \$1,863,187 for the class and an attorneys' fees award of \$3,629,275 “does not shock our conscience”;  
25 *Nightingale v. Hyundai Motor America*, 31 Cal. App. 4th 99, 105 (1994) (affirmed an award of \$75,648 in  
26 attorneys' fees after entering a compensatory damages award of \$6,264); *Reveles v. Toyota By The Bay*, 57  
27 Cal. App. 4th 1139, 1153 (1997) (affirmed an award of \$19,000 in attorneys' fees following a \$9,300  
28

1 settlement); *Stokus v. Marsh*, 217 Cal. App. 3d 647, 651 (1990) (affirmed an award of \$75,000 in attorneys'  
2 fees following a \$6,126 damages award to plaintiff); *Boyd v. Oscar Fisher Co.*, 210 Cal. App. 3d 368, 380-  
3 81 (1989) (affirmed an award of \$38,730 in attorneys' fees following a judgment of \$21,699 to plaintiff).

4 **E. The Requested Fees and Costs Amount is Unopposed by both Defendant and All Class**  
5 **Members**

6 Also of importance is the fact that the amount of fees and costs is uncontested. Defendant has  
7 agreed not to oppose an award of up to \$358,000 in fees and costs. The Class members were provided  
8 notice of the proposed settlement, including the proposed attorneys' fees and costs. To date, no Class  
9 member has objected to the requested fees and costs. In addition, the requested fees and costs resulted  
10 from an arms-length negotiation through the mediator who proposed the amounts sought and agreed that  
11 these fees and costs are reasonable in this matter.

12 **IV. PLAINTIFF IS ENTITLED TO A REASONABLE CLASS REPRESENTATIVE**  
13 **SERVICE AWARD**

14 Class Counsel requests a reasonable service award for Plaintiff Seegert in the amount of \$5,000.00.  
15 “[I]ncentive awards are fairly typical in class action cases” and are “designed” to compensate class  
16 representatives for work done on behalf of the class, to make up for financial or reputational risk  
17 undertaken in bringing the action, and sometimes, to recognize their willingness to act as a private attorney  
18 general.” *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009); *see also Munoz v.*  
19 *BCI Coca-Cola Bottling Co. of L.A.*, 186 Cal. App. 4th 399, 412 (2010) (“[I]t is established that named  
20 plaintiffs are eligible for reasonable incentive payments to compensate them for the expense or risk that  
21 they have incurred in conferring a benefit on other members to the class.”). In addition to the risk and  
22 expenses incurred, courts may also consider the notoriety and personal difficulties encountered, as well as  
23 the personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation. *See*  
24 *Van Vranken v. Atl. Richfield*, 901 F. Supp. 294, 299 (N.D. Cal. 1995).

25 Plaintiff maintained continued involvement in the litigation, including reviewing initial pleadings  
26 and communicating with Class Counsel on the status of the action. (Declaration of Plaintiff Harley Seegert  
27 (“Seegert Decl.”, ¶ 2.) In agreeing to serve as a class representative, Plaintiff undertook a substantial risk  
28 by placing his reputation in the public domain and thrusting himself into active litigation to enforce an

1 important public policy for the benefit of the general public. (*Id.*, ¶ 5.) Moreover, Plaintiff risked potential  
2 judgment against him if this case had been unsuccessful. (*Id.*, ¶ 4.) In class action losses, class  
3 representatives are deemed the losing party that is liable for the prevailing party's costs. *Earley v. Superior*  
4 *Court*, 79 Cal. App. 4th 1420, 1433–1434 (2000). Few individuals are willing to undertake that risk,  
5 particularly since courts have entered judgments against class representatives. *See In re Tobacco Cases*  
6 *II*, 240 Cal. App. 4th 779, 805–07 (2015) (upholding cost award in favor of defendant against class  
7 representative in her personal capacity in the amount of \$764,552.73); *see also Whiteway v. Fedex Kinkos*  
8 *Office & Print Servs.*, 2009 WL 725152 (N.D. Cal. 2007) (imposing costs of \$56,788.68 against class  
9 representative in unsuccessful class action), *reversed on other grounds.*)

10 Lastly, courts in this district have found class representative service awards in similar amounts to  
11 that requested by Plaintiff Seegert to be within the acceptable range of approval. *See e.g., Morey*, 2014  
12 WL 109194 (approving \$5,000 incentive award in Song-Beverly settlement); *Williams v. Costco*  
13 *Wholesale Corp.*, 2010 WL 2721452, at \*7 (S.D. Cal. Jul. 7, 2010) (approving a \$5,000 incentive award  
14 in antitrust case settling for \$440,000); *Carr*, 51 F.Supp.3d at 986 (granting \$1,500 incentive award in  
15 consumer class action); and *Dennis v. Kellogg Co.*, No. 09CV1786-L (WMc), 2013 WL 6055326, at \*9  
16 (S.D. Cal. Nov. 14, 2013) (noting that a request for a \$5,000 incentive payment “is well within if not  
17 below the range awarded in similar cases.”).

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## V. CONCLUSION

In light of the foregoing reasons, the parties request the Court grant Plaintiff's unopposed motion for reasonable attorneys' fees and costs in the amount of \$358,000.00, and an incentive award to Plaintiff Harley Seegert in the amount of \$5,000.00.

Date: June 19, 2019

Respectfully submitted,

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