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

16 HARLEY SEEGERT, individually; on behalf of
16 himself and all others similarly situated,

17 Plaintiff,

18 v.

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

21 Defendant.

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

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S UNOPPOSED MOTION
FOR FINAL APPROVAL OF CLASS
ACTION SETTLEMENT**

Date: July 12, 2019
Time: 1:30 p.m.
Judge: Hon. Katherine Bacal
Dept.: C-69

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1 **I. INTRODUCTION**

2 This is a class action brought by Plaintiff Harley Seegert (“Plaintiff”), on behalf of himself and all
3 persons who engaged in a credit card transaction with Defendant P.F. Chang’s (“Defendant”) in California
4 from May 3, 2016 to February 22, 2019, for which Defendant utilized a credit card transaction form that
5 contained preprinted spaces designated for filling in the telephone number and/or email address of the
6 cardholder. Plaintiff alleges that Defendant’s practice of utilizing a preprinted credit card transaction form
7 that solicits cardholders’ personal identification information violates the Song-Beverly Credit Card Act
8 (California Civil Code section 1747.08) (“Song-Beverly”). Song-Beverly specifically prohibits retailers
9 from utilizing preprinted credit card transaction forms that solicit cardholders’ personal identification
10 information in conjunction with credit card transactions. The statute’s purpose is to guard consumer
11 privacy and prevent, *inter alia*, identity theft, spam marketing, and abuse of consumers’ personal
12 information.

13 On February 22, 2019, this Court granted preliminary approval of the parties’ Settlement
14 Agreement and Release (the “Agreement”), certified a provisional Class for settlement purposes, and
15 authorized the parties’ proposed form and method of giving notice to class members of this action and the
16 proposed settlement. The Settlement has been well-received. Over 290,000 Class Members received
17 notice via email, and others received notice through online media publication. (Declaration of Todd D.
18 Carpenter (“Carpenter Decl.”) at ¶ 9.) No Class Member objected, and only one (1) person opted-out of
19 the Class. (*Id.* at ¶ 11.)

20 Having provided notice as authorized in the Court’s preliminary approval order and contemplated
21 by the Settlement Agreement, the parties now seek final approval of the Settlement Agreement. As set
22 forth in more detail below, the settlement terms are fair, adequate, and reasonable, and the response by
23 class members to the settlement supports final approval. No Class member has objected to the settlement,
24 and one class member requested to be excluded. Accordingly, Plaintiffs hereby request that the Court
25 grant final approval of the Settlement Agreement, and enter judgment as set forth in the concurrently filed
26 proposed order granting final approval of the class action settlement and proposed judgment.

27 ///

28 ///

1 **II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

2 **A. The Complaint’s Allegations Regarding Defendant’s Practices and Violations of Song-**
3 **Beverly, and Defendant’s Denial of Wrongdoing**

4 Defendant owns and operates P.F. Chang’s China Bistro restaurant locations in the State of
5 California. This action arises from Plaintiff’s allegation that Defendant’s practice of utilizing a credit card
6 transaction form with preprinted spaces soliciting customers’ personal identification information violates
7 the Song-Beverly Credit Card Act. Defendant does not dispute that it utilized a credit card transaction
8 form¹ containing pre-printed spaces for customer personal identification information but claims it is
9 insulated from liability based upon several affirmative defenses, including but not limited to the Special
10 Purpose Exception. To that end, Defendant denies any wrongdoing.

11 **B. The Parties’ Investigation and Mediation of the Claims**

12 The parties expended significant effort and expense investigating the merits of the claims and
13 defenses in the action and negotiating a settlement. Specifically, the parties exchanged informal discovery
14 related to Plaintiff’s claims and Defendant’s practices and conducted extensive arms-length negotiations,
15 including a full day of mediation with the Honorable Edward A. Infante (Ret.). At the close of the
16 mediation, the parties reached a settlement in principle and over the course of approximately six months,
17 worked to finalize the settlement consistent with the terms agreed upon in mediation. The parties
18 collectively desired to settle the class action and the claims asserted in the class action on the terms and
19 conditions in the Settlement Agreement to avoid the burden, expense, and uncertainty of continuing
20 litigation, and to put to rest the controversies advanced by the litigation. Should this case not resolve
21 through these proceedings, the parties believe there are legitimate factual and legal issues in dispute that
22 will undoubtedly be vigorously contested in any future legal proceeding. (Carpenter Decl. at ¶6.)

23 **III. THE PARTIES LEGAL CONTENTIONS**

24 **A. Plaintiff’s Legal Contentions**

25 Section 1747.08 of the Song-Beverly Credit Card Act prohibits retailers from utilizing credit card
26 transaction forms that contain preprinted spaces specifically designed for filling in the cardholders’

27
28 ¹ Defendant often utilizes the term “receipt” in lieu of Credit Card Transaction Form.

1 personal identification information:

2
3 (a) Except as provided in subdivision (c), no person, firm, partnership, association, or corporation
4 which accepts credit cards for the transaction of business shall do any of the following:

5 (3) Utilize, in any credit card transaction, a credit card form which contains preprinted spaces
6 specifically designated for filling in any personal identification information of the cardholder.

7 Cal. Civ. Code section 1747.08(a)(3) (emphasis added). However, Song-Beverly does permit businesses
8 to collect personal identification information if that information is required for a special purpose incidental
9 but related to the individual credit card transaction such as for shipping, delivery, servicing, installation,
10 or for special orders. *Id.* At section 1747.08(c) (hereinafter referred to as the “Special Purpose Exception”).
11 Song-Beverly’s protections cannot be waived by consumers. Cal. Civ. Code section 1747.04 (“[a]ny
12 waiver of the provisions of [Song-Beverly] is contrary to public policy, and is void and unenforceable.”).

13 Plaintiff contends that Defendant’s practice violates Section 1747.08(a)(3). Section 1747.08(e)
14 imposes a civil penalty of *up to* \$250 for the first violation and \$1,000 for each subsequent violation.
15 Although a violator of the statute is subject to a mandatory civil penalty, the amount of the civil penalty
16 to be imposed against a defendant is within the discretion of the trial court. *See The TJX Companies, Inc.*
17 *v. Superior Court*, 163 Cal. App. 4th 80, 86-87 (2008). “Presumably this could span between a penny (or
18 even the proverbial peppercorn) to the maximum amounts authorized by the statute.” *Id.*

19 **B. Defendant’s Legal Contentions**

20 During informal discovery, briefing and hearings before this Court, Defendant has consistently
21 denied any wrongdoing. Defendant argues it is not liable, and contends, among other things, that it is
22 insulated from liability pursuant to the Special Purpose Exception. Despite Defendant’s belief it has a
23 strong defense to the merits and potential penalties, Defendant desires to settle this class action and the
24 class asserted in the class action complaint on the terms and conditions set forth in the Settlement
25 Agreement.

26 Should this case not resolve, the parties believe there are legitimate factual and legal issues in
27 dispute that will undoubtedly be vigorously contested in future legal proceedings.
28

1 The settlement was reached after arms-length negotiations by experienced counsel on both sides.
2 (Carpenter Decl., ¶ 5.) The settlement terms are fair, reasonable, and adequate and were achieved with the
3 assistance of Hon. Edward A. Infante (Ret.), a mediator experienced in class action. (*Id.*)

4 **IV. THE PRELIMINARILY-APPROVED SETTLEMENT AGREEMENT**

5 The parties and their counsel agree and believe that the settlement preliminarily approved on
6 February 22, 2019, and now at bench for final approval, is fair, adequate, and reasonable and should be
7 given final approval by this Court. The Settlement Agreement and the Court’s order granting preliminary
8 approval of settlement are summarized below for the Court’s convenience.

9 **A. Certification of the Settlement Class**

10 For purposes of settlement only, the parties agreed that this action meets the requirements of a
11 class action under California Code of Civil Procedure § 382 and well-established California case law².

12 The Court agreed and conditionally certified the Class on February 22, 2019, defined as:

13 **All persons who engaged in a credit card transaction at a California P.F. Chang’s**
14 **Restaurant during the Class Period, during which Defendant provided a Credit Card**
15 **Transaction Form that contained a space that allowed the credit cardholder to fill in**
16 **his or her personal identification information.**

17 The term “Class Period” means May 3, 2016 until entry of the preliminary approval order, or February
18 22, 2019. The term “California P.F. Chang’s Restaurant” means any P.F. Chang’s branded restaurant
19 located in the State of California. Excluded from the Class are Defendant, its officers, directors,
20 employees, and attorneys, and the judge presiding over the Action.

21 **B. Corrective Measure**

22 Defendant, as a result of this litigation, agrees to comply with California Civil Code section
23 1747.08 with respect to its usage of credit card transaction forms in its California locations.

24 ///

25 ///

26 _____
27 ² Defendant agrees to class certification and this class definition for settlement purposes. Defendant
28 reserves its rights to deny/oppose certification of the class if this matter were to proceed to formal
litigation. To that end, Defendant reserves its right to challenge class certification in the event the
settlement agreement is not approved or does not become final.

1 **C. Compensation to the Settlement Class**

2 Defendant has agreed to establish, with no reversion, a Maximum Settlement Fund of
3 \$1,000,000.00 from which Authorized Claimants (*i.e.*, those who do not properly request exclusion and
4 submit a valid claim) shall receive a cash settlement check of a pro rata share of the Net Settlement Fund,
5 up to a maximum of \$1,000.00 each. The actual amount of the cash settlement check will be determined
6 by the number of Authorized Claimants and will be limited to one cash settlement check per Authorized
7 Claimant. As of June 6, 2019, there were 11,254 total claims made. (Carpenter Decl. ¶ 11.)

8 **D. Notice Was Properly Provided to the Class**

9 The parties complied with the notice requirements in the Settlement Agreement and Preliminary
10 Approval Order.

11 Pursuant to 1.28 of the Settlement Agreement, Defendant retained an independent claims
12 administrator, JND Legal Administration, to provide notice of the proposed settlement to Class members.
13 Under the Court’s February 22, 2019 preliminary approval order and section 4.2 of the parties’ Settlement
14 Agreement, beginning on April 4, 2019, Defendant caused notice to be provided via the following
15 methods:

16 (1) **Email Notice.** On April 8, 2019, the Settlement Administrator caused the email notice to be
17 emailed to each class member it had an email address for. As of June 6, 2019, the Settlement
18 Administrator emailed 353,369 email notices to Class Members for whom Defendant has an
19 email address. (Carpenter Decl., ¶ 9.) 60,271 of the email notices were undeliverable, but
20 293,098 emails were deemed successful. (*Id.*) Of the successful emails delivered, 1,636 emails
21 were responded to. (*Id.*)

22 (2) **Settlement Website.** On April 4, 2019, the Settlement Administrator established an internet-
23 based website and posted the Full Class Notice on the Settlement Website
24 “www.SeegertVPFChangSettlement.com.” (Carpenter Decl. at ¶ 10.) Visitors to the website
25 were able to file a claim and download copies of the Long-Form notice of Class Action
26 Settlement. (*Id.*) The notices also provided a postal mailing address through which Class
27 Members could contact the Settlement Administrator with inquiries regarding the Settlement
28 and claims process. (*Id.*)

1 (3) **Banner Ad.** On April 8, 2019, the Settlement Administrator implemented an online banner ad
2 on the Google Display Network, placed up to 4 million impressions geographically targeted to
3 California adults, and directed Class Members to visit the Settlement Website. (*Id.* at ¶ 9.)

4 The deadline to opt-out and/or object has passed—there were zero (0) objections and only one (1)
5 person opted-out. (*Id.* at ¶ 11) There have been a total of 11,254 claims submitted as of June 7, 2019. (*Id.*)

6 Providing notice via email, website and banner ad as set forth in the Settlement Agreement met
7 the standard set forth in California Rule of Court, Rule 3.766(f) and discussed in *Cartt v. Superior Court*
8 50 Cal. App. 3d 960, 974 (1975) (“[T]he notice given should have a reasonable chance of reaching a
9 substantial percentage of class members.”). In terms of substance, California Rule of Court, Rule 3.769(f)
10 provides that class notice “must contain an explanation of the proposed settlement and procedures for
11 class members to follow in filing written objections to it and arrange to appear at the settlement hearing
12 and state any objections to the proposed settlement.” The Class Notice preliminarily approved by the Court
13 in its February 22, 2019 order and issued to Class members as set forth hereinabove, meets these
14 requirements.

15 **E. Implementation Costs**

16 Defendant agreed to bear all settlement implementation costs, including the costs of providing
17 Class Notice. Settlement Agreement, section 2.5.

18 **F. Incentive Award to Class Representative**

19 When a settlement is given final approval at the fairness hearing, a class representative may apply
20 for an incentive award in recognition of the risk taken in commencing the action and the representative’s
21 work in prosecuting the action.

22 As detailed in the pending Unopposed Motion for Fees, Costs, and Incentive Award, and consistent
23 with the Agreement, Class Counsel is requesting an incentive award of \$5,000.00 for Plaintiff Harley
24 Seegert as class representative. Plaintiff Seegert has been an active participant in the litigation over the
25 course of the last two years, and the requested award is in line with incentive awards commonly provided
26 to class representatives.

27 Additionally, Plaintiff Harley Seegert bore the full risk of an adverse judgement should this case
28 prove unsuccessful, thereby risking his own assets and credit. Plaintiff knew the risk he faced if he lost,

1 including potentially having to pay Defendant's costs, which would undoubtedly be have been significant,
2 and the risk of negative publicity and exposure as a result of his participation as a plaintiff in a class action,
3 public lawsuit. The incentive award is particularly appropriate given that the class relief achieve provides
4 substantial benefits to Class members. Plaintiff routinely met with counsel, maintained and provided to
5 Class Counsel relevant documents, sent inquiries to Class Counsel about the case's status, communicated
6 with and assisted Class Counsel in preparing for mediation, and was available to discuss discovery and
7 any pending offers. Plaintiff Harley Seegert also reviewed the Settlement Agreement. The incentive award
8 will result in the issuance of Form 1099 to the Class representative, who shall assume full responsibility
9 and liability for the payment of taxes due on such award. The justifications for the incentive award are
10 further detailed in Plaintiff's separately filed motion for attorneys' fees and costs.

11 Accordingly, the incentive award agreed to be paid to Plaintiff is fair, adequate, and reasonable,
12 and should be granted final approval.

13 **G. Attorneys' Fees and Costs to Class Counsel**

14 As detailed in the pending Unopposed Motion for Fees, Costs, and Incentive Award, and consistent
15 with the Agreement, Defendant has agreed to pay Class Counsel an award of attorneys' fees and costs in
16 the amount of \$358,000.00 and not to oppose Class Counsel's application for a fee and cost award up to
17 this amount. See Settlement Agreement, section 2.4. The requested fees and costs are based on: (a) the
18 418.2 hours spent litigating the case to date (which includes the time spent preparing this motion), plus
19 the estimated time to prepare for and attend the Final Approval Hearing, which at the respective hourly
20 rates set forth in the attorney declarations totals \$220,330 in fees; plus (b) costs of \$9,789.21 (Carpenter
21 Decl., ¶ 12.) Although this totals \$230,119.21, Class Counsel believes a multiplier of 1.55 is warranted
22 here, as thoroughly explained in Plaintiff's Unopposed Motion for Fees, Costs, and Incentive Award.

23 This attorneys' fees and costs figure was reached after arms-length negotiations between the
24 parties' counsel through the third party neutral mediator. Class Counsel believes the award is appropriate
25 based on the amount and quality of the work performed, the significant scope of this case, the results
26 achieved by Plaintiff's counsel for Plaintiff and the Class, and the risk involved to Plaintiff, Plaintiff's
27 counsel, and the alleged class in further litigation of this action. Defendant agreed not to contest Plaintiff's
28 fee and cost application for an award in this amount. The figure was reached only after the parties first

1 negotiated the terms of the relief to Plaintiff and the Class. The agreed upon fee represents a fair and
2 commensurate amount in view of the nature of the action, and is appropriate as an award under California
3 Civil Procedure Code Section 1021.5. The legal and factual basis for this award is set forth in detailed in
4 Plaintiff's separately filed motion for attorneys' fees and costs, filed on June 19, 2019.

5 **V. THE SETTLEMENT REMAINS FAIR, REASONABLE, AND ADEQUATE**

6 In evaluating a proposed settlement, “[d]ue regard, should be given to what is otherwise a private
7 consensual agreement between the parties. The inquiry ‘must be limited to the extent necessary to reach a
8 reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between,
9 the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all
10 concerned.’ [Citation.]” *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996); *see also, 7-Eleven*
11 *Owners for Fair Franchising v. Southland Corp.*, 85 Cal. App. 4th 1135, 1145 (2000) (“for it is the very
12 uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce
13 consensual settlements”) (*citing Officers for Justice v. Civil Service Comm’n, etc.*, 688 F.2d 615, 625 (9th
14 Cir. 1982)).

15 In granting preliminary approval, this Court has already determined the Settlement to be within
16 the range of fair, reasonable, and adequate. The Court’s previous finding was supported by ample case
17 law identifying the factors necessary for a presumption of fairness: (1) the settlement was reached through
18 arm’s-length bargaining; (2) investigation and discovery allowed counsel and the Court to act intelligently;
19 (3) counsel is experienced in similar litigation; and (4) the percentage of objectors is small (indeed, there
20 are no objectors). *See Wershba*, 91 Cal. App. 4th at 245.

21 Here, the Court should not deviate from its February 22, 2019 order.

22 **A. The Settlement Was The Result of Arm’s-Length Bargaining**

23 The parties negotiated each term that eventually established the Agreement through arm’s-length
24 bargaining. Each party believed its position was meritorious and should prevail at trial, while each party
25 also recognized the uncertainty of litigation. Class Counsel recognized that, even if a judgment was
26 obtained against Defendant, the recovery to the Class might be of no greater value, and could be less
27 valuable to the class than the award provided through this Settlement. Although Defendant disputed
28 Plaintiff’s allegations and denied any wrongdoing or liability, it also recognized the significant exposure

1 to the company if it failed to prevail. With these considerations in mind, the Parties engaged in arm's-
2 length negotiations with the assistance of skilled mediator Hon. Edward A. Infante (Ret.) after enough
3 information was obtained to assess the benefits and risks to each party. These negotiations resulted in a
4 preliminarily-approved Settlement Agreement that received no objections from the Class. (Carpenter
5 Decl. ¶ 5.)

6 **B. The Extent of Discovery Completed and the Stage of the Proceedings Also Support the**
7 **Settlement**

8 Another factor in determining whether a class settlement is fair, adequate, and reasonable is
9 whether class counsel performed sufficient investigation and discovery to warrant the proposed settlement.
10 *Wershba*, 91 Cal. App. 4th at 244-45. Class counsel has done so here, by conducting significant informal
11 discovery, discussions, correspondence with defense counsel and evaluations of the factual strengths and
12 weaknesses of the case before reaching settlement. (Carpenter Decl. ¶ 7.) Class Counsel's work included,
13 but is not limited to: fact investigation prior to filing; extensive legal research and evaluation of the law
14 regarding the claim asserted and the defense raised by Defendant; comprehensive analysis of potential
15 class-wide penalties and equitable relief available; and informal pre-mediation settlement discussions. (*Id.*
16 at ¶ 7.) The parties' shared information learned through their investigations and research as part of their
17 mutual interest in reaching a satisfactory resolution of this action, and, as a result, are sufficiently informed
18 of the nature of the claims and defenses such that they are in a good position to evaluate the settlement for
19 its fairness, adequacy, and reasonableness.

20 Class Counsel is convinced that this settlement is in the best interest of the Class based on the
21 negotiations and a detailed knowledge of the issues present. (*Id.* at ¶¶ 18-20.) Class Counsel balanced the
22 terms of the proposed settlement, including the proposed settlement amount, against the probable outcome
23 of liability and the range of recovery. The length and risks of trial and other normal perils of litigation,
24 and specific defenses regarding class claims, were all weighed in reaching the proposed settlement. (*Id.*)

25 The settlement before the Court came only after the case was fully investigated by counsel. This
26 litigation, therefore, has reached the stage where "the Parties certainly have a clear view of the strengths
27 and weaknesses of their cases" to support the settlement. *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 617
28 (N.D. Cal. 1979).

1 **C. Counsel for Each Party Is Experienced in Similar Litigation and Support the Settlement**

2 Fairness is presumed to exist for a class settlement where class counsel is experienced in similar
3 litigation. *Wershba*, 91 Cal.App.4th at 245; *Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1784, 1802;
4 see also *Boyd v. Bechtel Corp.*, 485 F. Supp. 610, 616–17 (N.D. Cal. 1979) [finding that the view of the
5 attorneys actively conducting the litigation “is entitled to significant weight” in deciding whether to
6 approve the settlement...].) Class Counsel is very experienced in consumer class actions and in class
7 actions for violations of California Civil Code section 1747.08. (Carpenter Decl. ¶ 13.) Defendant’s
8 counsel is also very experienced in complex civil litigation. Each counsel is well qualified to evaluate the
9 class claims and to evaluate settlement versus trial on a fully-informed basis. Counsel on both sides share
10 the view that this is a fair and reasonable settlement in light of the complexities of the case, the state of
11 the law and uncertainties of class certification, and an excellent rules for the Class. Accordingly,
12 experienced counsel, operating at arm’s-length, weighed the strengths and weaknesses of the case,
13 examined all of the issues and risks of litigation, and endorse the proposed Settlement. (Carpenter Decl.
14 ¶¶ 18-20.) Based upon these representations, Class Counsel requests that this Court find the settlement to
15 be fair, adequate, and reasonable and in the best interest of the Class.

16 **D. Not A Single Class Member Objected To The Proposed Settlement**

17 A class action settlement may be presumed fair when there are only a small percentage of
18 objectors. *Wershba*, 91 Cal. App. 4th at 245 (quoting *Dunk*, 48 Cal. App. 4th at 1802). Here, the Class
19 overwhelmingly supports the settlement.

20 Defendant provided notice to Class members starting on April 4, 2019. The deadline to file an
21 objection or exclusion request was June 7, 2019. After providing notice of the proposed Settlement to the
22 Class, and giving Class Members sufficient opportunity to review the Court’s file and the Settlement
23 Agreement in its entirety, not a single Class Member has objected to the fairness of the Settlement, and
24 only one class member requested to be excluded. (Carpenter Decl., ¶ 11.) The overwhelming support of
25 the settlement by Class members demonstrates its fairness and reasonableness.

26 The *Wershba* presumption of fairness standard is met in this case. There is no reason in fact or law
27 to alter the parties’ arms-length agreement, and it should, therefore, be granted final approval.

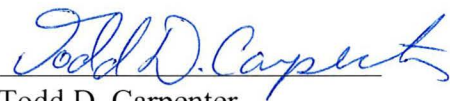
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1 **VI. CONCLUSION**

2 The Settlement reached in this consumer class action is highly beneficial to the Class and will
3 efficiently, economically, and favorably resolve what would otherwise have been protracted and
4 expensive litigation. Plaintiff and the Class request the settlement be given final approval, and that the
5 Court award the requested attorneys' fees and costs to Class Counsel and the requested incentive award
6 to Plaintiff as Class Representative.

7
8 Date: June 19, 2019

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