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8
9 **SUPERIOR COURT OF CALIFORNIA**
COUNTY OF LOS ANGELES

10 TERRY FABRICANT, individually and on)
behalf of all others similarly situated,)

11 Plaintiff,)
12)

13 vs.)

14 TOP FLITE FINANCIAL, INC.; DOES 1)
-100, and each of them,)

15 Defendants)
16)

Case No. 20STCV13837

) [Assigned for All Purposes to the Hon.
Lawrence Riff, Dept. 7]

) **PLAINTIFF’S NOTICE OF MOTION**
) **AND MOTION FOR ATTORNEYS’**
) **FEES, COSTS AND INCENTIVE**
) **AWARDS**

) Date: August 24, 2023
) Time: 10:00 a.m.
) Department: SS7

18) **Submitted Under Separate Cover**

- 19) • Declaration of Adrian Bacon; Declaration
20) of Terry Fabricant
21)
22)
23)
24)
25)

1 **ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:**

2 PLEASE TAKE NOTICE that on August 24, 2023, at 10:00 a.m., or as soon thereafter as
3 counsel may be heard, in Department 7 of the Los Angeles Superior Court, located 312 N.
4 Spring Street, Los Angeles, California, 90012, Plaintiff TERRY FABRICAT (“Plaintiff”), by
5 and through his attorneys of record (“Class Counsel”) will move the Court for an Order Granting
6 Plaintiff’s Motion for Attorney’s Fees Costs and Incentive Award.
7

8 This Motion is based on this Notice of Motion, the accompanying Memorandum of
9 Points and Authorities, the Declarations of Adrian R. Bacon and Terry Fabricant, the complete
10 file in this action and any other documentary and/or oral evidence as may be presented at the
11 time of the hearing on this Motion.

12
13 Dated: June 22, 2023.

LAW OFFICES OF TODD M. FRIEDMAN

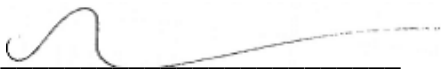
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15 By: 
16 TODD M. FRIEDMAN, ESQ.
17 ATTORNEY FOR PLAINTIFF
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TABLE OF CONTENTS

1		
2	MEMORANDUM OF POINTS AND AUTHORITIES	1
3	I. INTRODUCTION	1
4	II. FACTUAL BACKGROUND	1
5	A. PROCEEDINGS TO DATE	2
6	III. THE SETTLEMENT	2
7	A. THIS COURT SHOULD AWARD CLASS COUNSEL FEES AND COSTS	3
8	1. The requested attorney’s fees are reasonable, fair and	
9	appropriate under the lodestar/multiplier approach	5
10	<i>a. The number of hours claimed is reasonable</i>	5
11	<i>b. The hourly rates requested are reasonable</i>	6
12	2. The requested attorneys’ fees and costs are reasonable, fair	
13	and appropriate under the Common Fund Doctrine.	6
14	3. The requested costs are fully documented, necessarily incurred	
15	and reasonable.	7
16	B. THE COURT SHOULD AWARD PLAINTIFF HIS REQUESTED INCENTIVE	
17	AWARD	7
18	II. CONCLUSION	8
19		
20		
21		
22		
23		
24		
25		

TABLE OF AUTHORITIES

Cases

7-Eleven Owners for Fair Franchising v. Southland Corp.
85 Cal. App. 4th 1135 (2000) 5

Amchem Prods. Co. v. Windsor
521 U.S. 591 (1997) 4

Audubon Soc’y, 155 Cal. App. 3d at 755 7

Cellphone Termination Cases
186 Cal. App. 4th 1380 (2010) 9

Chavez v. Netflix, Inc.
162 Cal. App. 4th 43 (2008) 8

Clarke v. American Residential Servs. LLC
175 Cal. App. 4th 785 (2009) 9, 10

Consumer Privacy Cases
175 Cal. App. 4th 545 (2009) 8

Hensley v. Eckerhart
461 U.S. 424 (1983) 6

In re Stauffer’s Estate
53 Cal. 2d 124 (1959) 8

In re Sutter Health Uninsured Pricing Cases
171 Cal. App. 4th 495 (2009) 6

Lealao v. Beneficial California, Inc.
82 Cal. App. 4th 19 (2000) 6, 8, 9

Linder v. Thrifty Oil Co.
23 Cal. 4th 429 (2000) 4

Melendres v. City of Los Angeles
45 Cal. App. 3d 267 (1975) 8

Mills v. Electric Auto-Lite Co.
396 U.S. 375 (1970) 4

PCLM Group, Inc. v. Drexler
22 Cal. 4th 1084 (2000) 7

Press v. Lucky Stores, Inc.
34 Cal. 3d 311 (1983) 5

San Bernardino Valley Audubon Soc’y, Inc. v. County of San Bernardino
155 Cal. App. 3d 738 (1984) 7

1	<i>Serrano v. Priest</i>	
2	20 Cal. 3d 25 (1977)	5, 8
3	<i>Serrano v. Unruh</i>	
4	32 Cal. 3d 621 (1982)	5, 6
5	<i>Thayer v. Wells Fargo Bank</i>	
6	92 Cal. App. 4th 819 (2001)	6
7	<i>Vasquez v. Superior Court</i>	
8	4 Cal. 3d 800 (1971)	4
9	<i>Vasquez v. Superior Court, 4 Cal. 3d 800 (1971)</i>	4
10	<i>Wershba v. Apple Computer, Inc.</i>	
11	91 Cal. App. 4th 224 (2001)	7
12	Statutes	
13	Cal. Penal Code § 630 et seq.	1
14	California Invasion of Privacy Act – Cal. Penal Code § 632.7	1
15	Code of Civil Procedure § 1021.5.....	4
16		
17		
18		
19		
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21		
22		
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Through this Motion, Plaintiff Terry Fabricant (“Plaintiff”) seeks attorneys’ fees, costs
4 and an incentive award as a result of the final approval of the proposed class action settlement
5 with TOP FLITE FINANCIAL, INC. (“Defendant”) who do not oppose this Motion. In the
6 proposed settlement, Defendant has agreed to pay \$275,000 (“Settlement Fund”) to the
7 members of the settlement class. The Settlement resolves the Invasion of Privacy (“IPA”) claims brought against Defendant in this action.

8 The Settlement is the result of the hard work performed by Class Counsel, over the period
9 this case has been pending, including researching Defendant; interviewing Plaintiff, reviewing
10 and analyzing the records during the Class Period, and negotiating and administering the
11 settlement. As such, Plaintiff should be awarded his fees and costs, the Claims Administrator
12 should be paid for providing its services, and the Class Representative should receive an
13 incentive award for expending considerable time and effort actively pursuing this matter to
14 resolution. There have been zero opt outs and zero objections. Moreover, the current claims rate
15 is 10.42%, which shows the Class Members are interested in and participating in this Settlement
16 at a higher rate.¹

17 Specifically, The Law Offices of Todd M. Friedman, PC (“Class Counsel”) bring this
18 instant Motion for Attorneys’ Fees, Costs and Incentive Awards based upon the share of the
19 Settlement Fund calculated to compensate Settlement Class Members with claims factually
20 similar to Plaintiff which accounts for \$91,666 in fees plus \$8,229.60 in costs from the total
21 \$275,000.00 in the Settlement Fund.

22 **II. FACTUAL BACKGROUND**

23 Plaintiff’s operative Complaint alleges that Delta Defendant The California Invasion of
24 Privacy Act, Cal. Penal Code § 630 et seq. (“IPA”) during every call, by recording consumers’
25 communications without telling them they are doing so at the outset of the conversation.
Plaintiff contends he and the Class are entitled to statutory damages pursuant to the IPA.
Defendant has vigorously denied and continue to deny that it violated the IPA, and denies all
charges of wrongdoing or liability asserted against it in the Action.

///

¹ This information will be updated in Plaintiff’s final approval papers in advance of the hearing.

1 **A. Proceedings to Date**

2 Plaintiff’s Complaint was filed on April 8, 2020, alleging violations of the IPA.
3 Plaintiff amended the complaint to name Defendant on September 8, 2020. Thereafter, on
4 December 2, 2020, the Parties stipulated and the Court entered a stay of this action pending the
5 Supreme Court’s decision in Jeremiah Smith v. LoanMe, Inc., Supreme Court Case No.
6 S260391. On May 12, 2021, Plaintiff advised the Court that the stay could be lifted, and the
7 Court did so. The Parties agreed to attend mediation. Plaintiff requested and Defendant
8 provided the call detail records concerning the Settlement Class as well as other documents
9 and information requested by Plaintiff. At mediation, the Parties reached a settlement. Plaintiff
10 moved for preliminary approval of the settlement which, after revisions with the guidance of
11 the Court, was granted on April 4, 2023.

12 After, notice was mailed to 9,022 Class Members’ last known addresses, fully laying out
13 the terms of the settlement agreement, the rights of the Class Members to object and the rights of
14 the Class Members to opt out of the class, only 3% of which were returned without finding an
15 updated address. After the Class Members were so informed, *zero objections and zero opt-outs*
16 were lodged. 10.42% of Class Members submitted claims to date, with two more weeks on the
17 claims period left to go. This is a very good take rate for consumer class actions.

18 Class Counsel is knowledgeable about and has done extensive research with respect to
19 the applicable law and potential defenses to the claims of the Settlement Class. Class Counsel
20 has diligently pursued an investigation of the Settlement Class Members’ claims against
21 Defendant. Based on the forgoing data and on their own independent investigation and
22 evaluation, Class Counsel is of the opinion that the settlement with the Defendant for the
23 consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and
24 adequate and is in the best interest of the Settlement Class Members in light of all known facts
25 and circumstances, including the risk of significant delay and uncertainty associated with
litigation, various defenses asserted by Defendant, and numerous potential appellate issues.
Although it denies any liability, Defendant has agreed to settle the claims on the terms set forth
in the Settlement Agreement.

24 **III. THE SETTLEMENT**

25 Defendants agree to establish a Settlement Fund in the amount of \$275,000 (Agreement §
4.1) in order to fund the following: in order to fund the following: (1) providing notice to

1 Settlement Class Members; (2) paying a pro rata share to Settlement Class Members who submit
2 a Valid Claim Form; (3) creating and maintaining the Settlement Website; (4) all other claims
3 administration steps, including a toll-free telephone number, with estimated administration costs
4 of approximately \$60,000; (5) litigation expenses of up to \$10,000.00; (6) paying the proposed
5 \$5,000 Service Award to the Plaintiff; (7) payment of the proposed Attorneys' Fees of \$91,666.
6 (33.33% of the Settlement Fund) (Agreement § 5-8). After the expiration of the validity of
7 checks sent pursuant to Sections 14.3 through 14.4, any remaining funds from uncashed
8 settlement checks, including settlement checks to Settlement Class Members who submitted
9 Valid Claim Forms but whose current Valid Address could not ultimately be determined, shall be
10 delivered to the State Controller's Office for Unclaimed Property in the name of the Settlement
11 Class Members who made a claim and did not cash their checks. (*Id.* § 14.5).

12 III. ARGUMENT

13 A. THIS COURT SHOULD AWARD CLASS COUNSEL FEES AND COSTS

14 Both the United States Supreme Court and the California Supreme Court have long
15 recognized the need for class actions in consumer cases where recoveries are too small to
16 warrant individual prosecution. Over a quarter of a century ago, the California Supreme Court
17 explained:

18 Modern society seems increasingly to expose men to ... group injuries for which
19 individually they are in a poor position to seek legal redress, either because they
20 do not know enough or because such redress is disproportionately expensive. If
21 each is left to assert his rights alone if and when he can, there will at best be a
22 random and fragmentary enforcement, if there is any at all. This result is not only
23 unfortunate in the particular case, but it will operate seriously to impair the
24 deterrent effect of the sanctions which underlie much contemporary law.

25 *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807 (1971); *see also Linder v. Thrifty Oil Co.*, 23 Cal.
4th 429, 434 (2000) ("Courts long have acknowledged the importance of class actions as a means
to prevent a failure of justice in our judicial system.").

The concerns articulated by the Court in *Vasquez* apply precisely to this action.
Individual Class Members could, or would, not have undertaken the burden of investigation and
litigation necessary to prosecute individual claims against it. A class action was necessary to
vindicate their rights. As the United States Supreme Court explained in *Amchem Prods. Co. v.*
Windsor, 521 U.S. 591 (1997):

The policy at the very core of the class action mechanism is to overcome the
problem that small recoveries do not provide the incentive for any individual to
bring a solo action prosecuting his or her rights. A class action solves this

1 problem by aggregating the relatively paltry potential recoveries into something
2 worth someone's (usually an attorney's) labor.

3 *Id.* at 617.

4 The reality is that appropriate awards of attorneys' fees are absolutely necessary in order
5 to ensure that consumer and employee rights are protected and vindicated. One of the
6 fundamental axioms of class action law is that a plaintiff who obtains a settlement on behalf of
7 absentee class members is allowed to recover reasonable attorneys' fees and costs incurred in the
8 litigation. *See, e.g., Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 391-92 (1970) (recognizing the
9 right of class action plaintiffs who have obtained a settlement to recover attorneys' fees and costs
10 because, "[t]o allow the others to obtain full benefit from the plaintiff's efforts without
11 contributing equally to the litigation expenses would be to enrich the others unjustly at the
12 plaintiff's expense.").

13 Contingency fee litigation is always risky. Despite this risk, Class Counsel have
14 secured an excellent result in this litigation, and Class Counsel respectfully submit that the award
15 of \$91,666 in fees and \$8,229.60 in litigation costs as well as a service payment of \$5,000 to the
16 Class Representative is therefore appropriate. As explained below, the requested fee reflects a
17 slight negative lodestar multiplier, after years of work on this litigation, of Class Counsel's actual
18 fees of \$94,895. Plaintiff is entitled to recover reasonable attorneys' fees, expenses and costs
19 under Code of Civil Procedure § 1021.5. Moreover, when a party is entitled to statutory fees,
20 "the fee should ordinarily include compensation for all hours reasonably spent, including those
21 relating solely to the fee". *See Serrano v. Unruh*, 32 Cal. 3d 621, 624 (1982) ("*Serrano IV*").
22 California courts, in exercising their broad discretion to determine the appropriate fee, may base
23 their calculations on the "lodestar" and "multiplier" method. *See Press v. Lucky Stores, Inc.*, 34
24 Cal. 3d 311, 322 (1983); *Serrano v. Priest*, 20 Cal. 3d 25, 48-49 (1977) ("*Serrano III*"). That
25 said, it is submitted that the fee award sought herein is reasonable under both the
lodestar/multiplier and common fund approaches in determining reasonable attorney's fees.
Class Counsel's costs are also fully documented, necessarily incurred and otherwise reasonable.

The reaction of the Class to the Settlement terms relating to fees and costs must also be
recognized. To date, zero Class Members have opted out and zero Class Members have objected
to the Fee request. Courts have interpreted that response as evidence that the Settlement
warrants final approval. *See, e.g., 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85
Cal. App. 4th 1135, 1152-53 (2000) (finding response of class members to be "overwhelmingly

1 positive” where “a mere 80 of the 5,454 absent class members elected to opt out of the
2 settlement.”).

3 **1. The requested attorney’s fees are reasonable, fair and appropriate**
4 **under the lodestar/multiplier approach**

5 Under the lodestar/multiplier approach, the court computes the “lodestar” amount by
6 multiplying the number of hours reasonably expended by each attorney or legal staff member by
7 their reasonable hourly rates. *See Serrano III*, 20 Cal. 3d at 48. However, “the lodestar formula
8 does not limit consideration to hours expended and hourly rate, though that is the foundation of
9 the calculation.” *Lealao v. Beneficial California, Inc.*, 82 Cal. App. 4th 19, 40 (2000). The court
10 then enhances this lodestar figure by a “multiplier” to account for a range of factors, such as the
11 novelty and difficulty of the case, its contingent nature, and the degree of success achieved. *See*
12 *Serrano III*, 20 Cal. 3d at 49; *see also Lealao*, 82 Cal. App. 4th at 26; *Thayer v. Wells Fargo*
13 *Bank*, 92 Cal. App. 4th 819, 834 (2001) (“[t]here is no hard-and-fast rule limiting the factors that
14 may justify an exercise of judicial discretion to increase or decrease a lodestar calculation”).
15 Class Counsels’ fee demand is justified based upon the lodestar method of calculating fees.

16 **a. *The number of hours claimed is reasonable***

17 Counsel for prevailing parties are entitled to be compensated “for all time reasonably
18 expended in pursuit of the ultimate result achieved in the same manner that an attorney
19 traditionally is compensated by a fee-paying client for all time reasonably expended on a
20 matter.” *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983) (internal quotes and citation omitted);
21 *see also Serrano IV*, 32 Cal. 3d at 633 (parties “should recover for all hours reasonably spent”).
22 The amount of time Class Counsel spent on this case (157.4 hours), which culminated in the very
23 favorable Settlement, is entirely reasonable given the complexity of the issues involved,
24 Defendant’s vigorous defense, the length of time the litigation has been pending, and the
25 exceptional results obtained. Further, all of Class Counsel’s time is supported by the declaration
submitted concurrently with this Motion which themselves are based on records that are
maintained contemporaneously in the normal course of Class Counsel’s practice. *See, In re*
Sutter Health Uninsured Pricing Cases, 171 Cal. App. 4th 495, 511-12 (2009) (“We see no
reason why [the court] could not accept the declarations of counsel attesting to the hours worked,
particularly as he was in the best position to verify those claims by reference to the various
proceedings in the case.”); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254-55

1 (2001).

2 **b. *The hourly rates requested are reasonable***

3 Class Counsel are entitled to be compensated at hourly rates that reflect the reasonable
4 market value of their legal services, based on their experience and expertise. *See Serrano IV*, 32
5 Cal. 3d at 640 n.31; *San Bernardino Valley Audubon Soc’y, Inc. v. County of San Bernardino*,
6 155 Cal. App. 3d 738, 755 (1984). “The reasonable hourly rate is that prevailing in the
7 community for similar work.” *PCLM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000).
8 Payment at full market rates is essential to entice well-qualified counsel to undertake difficult
9 cases such as this one. *See Audubon Soc’y*, 155 Cal. App. 3d at 755. Class Counsel’s hourly rates
10 are fully supported by their experience and reputation in handling complex class action litigation.
11 *See Declaration of Adrian R. Bacon ¶¶ 20-31.* Further, Class Counsel charge rates
12 commensurate with the prevailing market rates for attorneys of comparable experience and skill
13 handling complex litigation and Class Counsel made all reasonable attempts to assign tasks to
14 timekeepers at the appropriate billing rates.

15 **2. The requested attorneys’ fees and costs are reasonable, fair and**
16 **appropriate under the Common Fund Doctrine.**

17 While the lodestar method set forth above weighs in favor of granting this Motion, a
18 percentage of the common fund calculation supports the requested fee as well. The concept of
19 awarding attorneys’ fees from a common fund such as at issue here was stated in the following
20 manner by the California Supreme Court: “[W]hen a number of persons are entitled in common
21 to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in
22 the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney’s
23 fees out of the fund.” *Serrano III*, 20 Cal. 3d at 34; *see also Lealao*, 82 Cal. App. 4th at 26
24 (observing that “Fee spreading occurs when a settlement or adjudication results in the
25 establishment of a separate or so-called common fund for the benefit of the class. Because the
fee awarded class counsel comes from this fund, it is said that the expense is borne by the
beneficiaries.”). In addition to spreading the litigation fees among all beneficiaries, awards of
common fund fees are essential to furthering the important societal goal of attracting competent
counsel to handle these often complex contingency cases “who will be more willing to undertake
and diligently prosecute proper litigation for the protection or recovery of the fund if [the
attorneys are] assured that [they] will be promptly and directly compensated should [their]

1 efforts be successful.” *Melendres v. City of Los Angeles*, 45 Cal. App. 3d 267, 273 (1975)
2 (quoting *In re Stauffer’s Estate*, 53 Cal. 2d 124, 132 (1959)). In California, trial courts have
3 inherent equitable power to award attorney’s fees on a common fund basis when counsel’s
4 efforts “have resulted in the preservation or recovery of a certain or easily calculable sum of
5 money.” *Serrano III*, 20 Cal. 3d at 35. The traditional method for calculating a common fund fee
6 is to award a percentage of the total fund. *See, e.g., Lealao*, 82 Cal. App. 4th at 26. Fee awards
7 from a common fund can “average around one-third of the recovery.” *Consumer Privacy Cases*,
8 175 Cal. App. 4th 545, 558 n.13 (2009); *see also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66
9 n.11 (2008).

10 The determination of the proper quantum of attorneys’ fees in this case is not a
11 complicated matter, given the Total Settlement Amount of \$275,000. Thus, the fees sought by
12 Class Counsel represent a third of that amount, which is well within the realm of fees for such
13 work on a contingency basis. *Lealao*, 82 Cal. App. 4th at 47 (“As many courts have noted ... the
14 amount of attorney fees typically negotiated in comparable litigation should be considered in the
15 assessment of a reasonable fee in representative actions in which a fee agreement is
16 impossible.”).

17 In sum, the fees requested herein are more than reasonable due to the result achieved, the
18 reaction of the Class to the Settlement, as well as the entirely contingent nature of the work
19 undertaken by Class Counsel, for which they have yet to be paid one cent for their work.

20 **3. The requested costs are fully documented, necessarily incurred and**
21 **reasonable.**

22 To date, Class Counsel have documented and verified a total of \$8,105.10 in expenses
23 and costs incurred through the time of this Motion and anticipate incurring \$124.50 more in the
24 filing of this and final approval. *See Bacon Decl.* ¶ 19. The costs and expenses for which
25 counsel seeks reimbursement include filing fees, messenger services, service of process,
electronic filing fees, and mediation expenses. *Id.* Plaintiff’s counsel has not billed for
miscellaneous expenses such as legal research expenses, printing expenses and postage. All of
these costs were necessarily incurred in the course of this litigation and should be reimbursed.
Id. Thus, Plaintiff’s request for \$8,229.60 in costs is reasonable.

B. THE COURT SHOULD AWARD PLAINTIFF HIS REQUESTED INCENTIVE AWARD

Twelve years ago, in *Cellphone Termination Cases*, 186 Cal. App. 4th 1380, 1396

1 (2010), the appellate court upheld the trial’s court approval of \$10,000 in incentive awards to
2 each class representative. The court reasoned, “[T]he rationale for making enhancement or
3 incentive awards to named plaintiffs is that they should be compensated for the expense or risk
4 they have incurred in conferring a benefit on other members of the class.” *Id.* at 1394 (quoting
5 *Clarke v. American Residential Servs. LLC*, 175 Cal. App. 4th 785, 806 (2009)).

6 Here, the Settlement Agreement calls for Plaintiff to receive a \$5,000 incentive award.
7 This incentive award is well deserved and justified by the fact that Plaintiff took action on behalf
8 of almost 9,300 class members and expended considerable effort to achieve the results.
9 Declaration of Terry Fabricant ¶¶ 7-10. Plaintiff participated in a mediation and several
10 discussions after. *Id.* Moreover, Plaintiff faced substantial financial risk by bringing this claim
11 because he had to give up his rights to pursue Defendant on any other basis. *Id.* By bringing this
12 action, Plaintiff furthered the public policy goals of consumer privacy. Therefore, this time and
13 effort made resolution of this case possible for the members of the Class. Furthermore, Plaintiff
14 has served as model class representative since the inception of this case. By bringing this action,
15 Plaintiff also furthered the well-established public policy goals of protecting consumers from
16 alleged and severe invasion of privacy practices.

17 **II. CONCLUSION**

18 For the reasons stated above, Plaintiff respectfully submits that this Motion should be
19 granted in its entirety. Specifically, Plaintiff seeks:

- 20 • \$91,666.00 for Class Counsel’s fees
- 21 • \$8,229.60 for Class Counsel’s costs;
- 22 • Up to \$60,000 for the cost of Claims Administration, to be addressed in the final
23 approval motion; and
- 24 • A \$5,000 incentive award to the Plaintiff.

25 Respectfully submitted,

Dated: June 22, 2023

LAW OFFICES OF TODD M. FRIEDMAN, P.C.

By: 

Adrian R. Bacon
Attorneys for Plaintiff Dave Vaccaro and the Class

1 **PROOF OF SERVICE**

2 I am employed in Orange County, California. I am over the age of 18 and not a party to
3 this action. My business address is 21031 Ventura Blvd Suite 340, Woodland Hills, CA 91364.

4 On June 22, 2023, I served the foregoing document, described as:

5 **MOTION FOR ATTORNEYS’ FEES AND COSTS; DECLARATION OF**
6 **ADRIAN R. BACON; DECLARATION OF TERRY FABRICANT**

7 the original of the document

8 true copies of the document

9 Via Case Anywhere addressed as follows:

10 **WOOD, SMITH, HENNING & BERMAN, LLP**
11 Frances O’Meara, Esq. (SBN 140600)
12 Mindy S. Bae, Esq. (SBN 301769)
10960 Wilshire Blvd., 18th Floor,
Los Angeles, California 90024
E-mail: fomeara@wshblaw.com
mbae@wshblaw.com

13 **BY U.S. MAIL:** I sealed and placed such envelope for collection and mailing to be
14 deposited on the same day at Los Angeles County, CA. The envelopes were mailed with postage
15 thereon fully prepaid. I am readily familiar with the Law Offices of Todd M. Friedman’s
16 practice of collection and processing correspondence for mailing. Under this practice,
documents are deposited with the U.S. Postal Service on the same day that is stated in the proof
of service, with postage fully prepaid at Los Angeles County, CA, in the ordinary course of
business.

17 **BY ELECTRONIC MAIL:** I served the above documents in pdf format to the email
18 listed in the service caption above via Case Anywhere. A true and correct copy of transmittal
will be produced if requested by any party or the Court.

19 **STATE:** I declare under penalty of perjury under the laws of the state of California that
20 the above is true and correct.

21 **FEDERAL:** I declare that I am employed in the office of a member of the bar of this court
22 at whose direction the service was made.

23 Executed this June 22, 2023, at Orange, California.

24 /s Adrian R Bacon