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

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

13 Plaintiffs

14  
15 v.

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

17 Defendants.  
18  
19

) Case No. CV 07-00171 JHN-AJWx

) **CLASS ACTION**

) **REPLY MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF MOTION FOR  
AWARD OF ATTORNEY'S FEES,  
COSTS AND ENHANCEMENT  
PAYMENT**

) Date: September 26, 2011  
Time: 10:00 a.m.  
Ctrm: 790 (Roybal)

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1 **INTRODUCTION**

2 Despite the fact that counsel for plaintiff Michael Bateman ("Plaintiff"), after  
3 litigating this case for more than four years, obtained a precedent setting decision  
4 from the Ninth Circuit that reversed an erroneous denial of certification, and  
5 ultimately achieved a settlement that provides approximately \$6.5 million worth of  
6 vouchers to hundreds of thousands of consumers (the "Settlement"), defendant  
7 American Multi-Cinema, Inc. ("AMC") urges this Court to award Plaintiff attorney's  
8 fees of no more than \$150,000 to \$200,000. None of the reasons offered by AMC for  
9 awarding Plaintiff so little in fees has merit. The Settlement is not a "coupon  
10 settlement" under CAFA because, as AMC concedes, class members do not have to  
11 buy a movie ticket to use any of the vouchers received as settlement benefits. Nor  
12 does this Court lack discretion either to calculate fees based on the percentage of the  
13 fund method or, should it choose instead the lodestar approach, to apply a reasonable  
14 multiplier to the lodestar. In light of the exceptional result achieved in this complex  
15 and incredibly risky case, the amount of fees requested by Plaintiff is reasonable  
16 under either the percentage of the fund or lodestar method.

17 Although AMC otherwise quibbles that Plaintiff spent \$7,500 to publicize the  
18 Settlement, AMC has no basis for disputing that the amount spent by Plaintiff's to  
19 publicize the Settlement was a reasonable litigation expense incurred for the benefit  
20 of class members. Thus, Plaintiff should be awarded the full amount of costs  
21 requested in accordance with AMC's agreement to pay "reasonable" costs. Since  
22 AMC does not oppose Plaintiff's request for an enhancement award, the Court should  
23 also award Plaintiff the full amount of the enhancement requested.

24 Finally, the Court should overrule the objection of the one class member who  
25 objected to Plaintiff's fee request because no class member has standing to object to  
26 an award of fees in this case. The amount of attorney's fees awarded to Plaintiff will  
27 not have any effect on settlement benefits to be received by class members. No class  
28 member can possibly suffer any injury or be aggrieved by an award of fees.

ARGUMENT

**I. NEITHER CAFA NOR ANY CASE LAW PROHIBITS THE COURT FROM CALCULATING ATTORNEY'S FEES IN THIS CASE BASED ON A PERCENTAGE OF THE FUND OR VALUE OF VOUCHERS**

AMC contends that the Court may not calculate fees on the basis of the percentage of the fund approach because 1) the vouchers to be distributed under the Settlement constitute "coupons" under CAFA; and 2) this is a "fee shifting" case. AMC is wrong on both counts. The vouchers are not "coupons" because class members do not need to purchase a movie ticket to use them and, if the vouchers were "coupons," Plaintiff's counsel would never get paid any fees for this case because there is no time limit for redeeming the vouchers. This case is not a "fee shifting" case because Plaintiff's fee request is not based on the FCRA but on the contractual agreement of AMC to pay reasonable attorney's fees.

In short, neither CAFA nor any case law remotely prohibits the Court from awarding fees based on the value of the vouchers (which, contrary to AMC's unfounded accusations, Plaintiff has not inflated) under the percentage of the fund method. The Court should award Plaintiff the full amount of fees requested at the reasonable, far below benchmark rate, of 21.3% of the present value of the vouchers.

**A. A COUPON REQUIRES A CLASS MEMBER TO SPEND MONEY IN ORDER TO USE THE COUPON**

Contrary to what AMC apparently would like this Court to believe, *Browning v. Yahoo! Inc.* (N.D. Cal. 2007) 2007 WL 4105971 is not the only case recognizing that "the distinguishing feature of a coupon is that it 'require[s] class members to spend money in order to realize the settlement benefit.'" (Opposition p. 10, quoting, *Browning*, 2007 WL 4105971, at \*5). In each of the following cases, neither of which AMC bothers to mention, the settlement benefit was likewise not deemed a "coupon" under CAFA because class members were not required to expend money on their own in order to realize benefits from the settlement: *In re Bisphenol-A (BPA)*

1 *Polycarbonate Plastic Products Liability Litigation* (W.D. Mo. 2011) 2011 WL  
2 1790603, at \*3 (vouchers); *Ribestein v. Rite Aid Corp.* (E.D. Pa. 2011) 761  
3 F.Supp.2d 241, 256 (gift cards). *Browning* does not represent a minority or narrow  
4 view. Along with *In re Bisphenol-A* and *Ribestein*, *Browning* comports with all the  
5 cases cited by AMC recognizing that the principal characteristic of a "coupon" is that  
6 a "coupon," unlike a voucher, provides a "discount on another product or service  
7 offered by the defendant." *Fleury v. Richemont North Am., Inc.* (N.D. Cal. 2008) 2008  
8 WL 3287154, at \*2 (emphasis in original). A coupon that only provides a discount,  
9 and thereby requires a consumer to pay some amount of money to take advantage of  
10 the discount, differs substantially from a voucher whose use does not require any  
11 purchase or expenditure of money.

12 **B. VOUCHERS CAN BE USED BY CLASS MEMBERS WITHOUT**  
13 **HAVING TO PURCHASE A MOVIE TICKET**

14 AMC concedes that class members do not actually have to purchase a movie  
15 ticket in order to use a voucher. At page 13 of its Opposition, AMC acknowledges  
16 that "class members are certainly entitled to enter any AMC theatre on any future date  
17 simply to obtain four free popcorns." The concession by AMC that vouchers can be  
18 used by class members without purchasing a movie ticket in and of itself suffices to  
19 refute AMC's arguments that the vouchers constitute "coupons" under CAFA.

20 In addition, AMC ignores the common situation of a spouse, date or friend  
21 attending a movie without having to spend money on a movie ticket because their  
22 companion pays for both of their tickets. All recipients of vouchers who attend a  
23 movie as the non-paying guest of someone else who paid for their ticket can use  
24 vouchers without having to pay any money themselves.

25 Finally, AMC overlooks that, because the vouchers are freely transferable and  
26 never expire, they do not suffer from any of the typical limitations or disadvantages  
27 frequently associated with "coupons" under CAFA. Vouchers can not only be sold or  
28 traded freely without any restriction but, as the price of popcorn increases, the value

1 of vouchers will also rise. While AMC suggests without any empirical evidence that  
2 the "market value" of a sold or traded voucher is less than its face value for  
3 redemption purposes, AMC simply cannot dispute that class members can derive  
4 significant benefits from vouchers without having to spend any money to use them.  
5 The vouchers in this case do not remotely resemble "coupons" under CAFA.

6 **C. 99.7% OF VOUCHER PACKETS WILL BE DISTRIBUTED TO**  
7 **PERSONS WHO ALREADY PURCHASED A TICKET**

8 For the reasons set forth above, the vouchers to be mailed to the class members  
9 who submitted claims do not constitute "coupons" under FACTA. Yet an additional  
10 reason compels the conclusion that the remaining vouchers to be distributed to  
11 consumers at AMC theaters, which comprise more than 99.7% of the vouchers, are  
12 not "coupons." All of those vouchers will be distributed to consumers after they have  
13 already purchased a movie ticket. No person who receives vouchers as a result of  
14 purchasing a ticket (which will in many cases come as a surprise to the person who  
15 bought the ticket) will have to purchase a single ticket to use the vouchers.

16 Plaintiff agrees with AMC that, in all likelihood, most consumers who receive  
17 a Voucher Packet are not likely to use all four vouchers in one visit to an AMC  
18 theater. However, the consumers who receive Voucher Packets are movie patrons  
19 who are likely to visit AMC theaters in the future, not just so they can use a voucher,  
20 but because they like to go to the movies. That is the concept underlying the  
21 principal mechanism the parties agreed on, and the Court approved, for distributing  
22 settlement benefits. Voucher Packets will be distributed to consumers who, because  
23 they are AMC patrons, were likely AMC patrons in the past whose rights under  
24 FACTA were violated. These same patrons are likely to keep going to movies in the  
25 future and when they do, having already decided to see a movie, they can use their  
26 vouchers for free popcorn without having to pay anything extra to use the vouchers.

27 AMC acknowledges that, because the price of a movie ticket exceeds the price  
28 of popcorn, it would not make any sense, and there is no reason to believe, that any

1 class member would purchase a movie ticket just to get a free popcorn. (Opposition  
2 p. 11). A voucher that does not induce a class member to buy a particular product  
3 (i.e. a movie ticket in this case) through the offer of a discount, but merely entitles a  
4 class member who would buy that product anyways to receive something else for free  
5 (i.e. popcorn in this case), does not constitute a "coupon" under CAFA.

6 **D. IF THE VOUCHERS WERE "COUPONS" UNDER CAFA,**  
7 **PLAINTIFF'S COUNSEL WOULD NEVER GET PAID ANY FEES**

8 All of AMC's arguments about the inability of the Court to fashion a fee award  
9 until a redemption rate is known have no merit because the limitations on fee awards  
10 under CAFA only apply to "coupon settlements" providing for an award or recovery  
11 of "coupons" by class members. For all the reasons discussed above, the vouchers in  
12 this case do not constitute "coupons" and the Settlement is not a "coupon settlement."  
13 Thus, CAFA does not preclude this Court from basing a fee award on the value of the  
14 vouchers prior to their redemption.

15 The conclusion that the vouchers do not constitute "coupons" under CAFA is  
16 further compelled by the fact that, if the vouchers were "coupons," Plaintiff's counsel  
17 would never get paid any fees in this case. 28 U.S.C. Section 1712(a) provides that,  
18 with respect to fees awarded in coupon settlements that are attributable to the award  
19 of coupons, the amount of fees shall be based on "the value to class members of the  
20 coupons that are redeemed." In this case, the vouchers never expire and there is no  
21 agreed upon method (if any possible method at all) for tracking the redemption of  
22 vouchers. Indeed, although AMC suggests that a redemption rate can be estimated  
23 after four to five months, AMC concedes that "the redemption rate will never be  
24 known with certainty." (Opposition p. 13).

25 The requirement that coupons be redeemed prior to basing an award of fees on  
26 their value cannot have been intended by Congress to apply to a voucher that, unlike  
27 a coupon, is freely transferable and has an unlimited redemption period. CAFA  
28 restricts attorney's fees in "coupon settlements" to prevent attorneys from enriching

1 themselves unfairly at the expense of class members who would not actually get any  
2 real benefit from an undesirable coupon. It would turn 28 U.S.C. Section 1712(a) on  
3 its head to deprive Plaintiff's counsel of any fees just because the vouchers in this  
4 case, due to the absence of any limits on their transferability or a redemption period,  
5 are far more desirable and beneficial to class members than coupons.

6 **E. PLAINTIFF HAS NOT GROSSLY INFLATED THE VALUE OF**  
7 **THE VOUCHERS**

8 AMC has not provided a shred of evidence to substantiate its assertion that  
9 Plaintiff has "grossly inflated" the value of the Settlement. AMC's reliance on *Young*  
10 *v. Polo Retail, LLC* (N.D. Cal. 2006) 2006 WL 3050861 is misplaced because there  
11 the court was presented with evidence of the "secondary market for gift cards." AMC  
12 has not presented any such evidence to this Court. Moreover, since the court  
13 concluded that the real value of the gift cards in that case was a significant portion  
14 (80% - 85%) of their face value, *Young* does not remotely support the accusation that  
15 Plaintiff has "grossly" inflated the value of the Settlement.

16 AMC also fails to consider that, unlike the gift cards for a fixed amount in  
17 *Young*, the vouchers in this case will increase in value as the price of popcorn rises.  
18 Indeed, the value of the vouchers has already increased by more than \$280,000 since  
19 the parties first reached agreement on the material terms of settlement. Since the  
20 vouchers never expire, they will be worth far more in the future than they are now.

21 Finally, AMC contends that it is not likely that all the vouchers will be  
22 redeemed. But for the purposes of calculating fees based on the percentage of a  
23 common fund, it does not matter what amount of settlement benefits are actually  
24 claimed or used by class members. What matters is the total amount of the fund. *Six*  
25 *Mexican Workers v. Arizona Citrus Growers* (9th Cir. 1990) 904 F.2d 1301, 1311.  
26 "The Supreme Court has stated that attorneys' fees sought under a common fund  
27 theory should be assessed against every class members' share, not just the claiming  
28 members." *Six Mexican Workers*, 904 F.3d at 1311 [citing *Boeing Co. v. Van Gemert*

1 (1980) 444 U.S. 472, 480]. Here, the Settlement provides that 282,314 Voucher  
2 Packets will be distributed without any reversion of benefits to AMC. Since each  
3 Voucher Packet has a current redemption value of \$23, the current value of the  
4 Settlement is \$6,493,222. Plaintiff's assessment that the value of the Settlement,  
5 based on the current price of popcorn, is approximately \$6.5 million, is not inflated.

6 **F. THE COURT IS NOT REQUIRED TO USE THE LODESTAR**  
7 **METHOD FOR CALCULATING FEES**

8 AMC contends that, even if the Court concludes that the vouchers are not  
9 "coupons," the Court is nevertheless prohibited from awarding fees based on the  
10 percentage of the fund approach because this is a fee shifting case. (Opposition p.  
11 24). AMC is wrong because this is not a fee shifting case. Plaintiff does not seek  
12 fees as a prevailing party under the FCRA. Pursuant to Rule 23(h) of the Federal  
13 Rules of Civil Procedure, which allows a court to award fees "that are authorized by  
14 law or by the parties agreement" (emphasis added), Plaintiff seeks fees authorized by  
15 AMC's agreement, set forth in the Settlement, to "pay the reasonable attorneys' fees  
16 and costs of Class Counsel in an amount to be determined by the Court." Amended  
17 Stipulated Settlement Agreement and Release ¶ 23.

18 Plaintiff's fee request thus relies on a contractual agreement just like the fee  
19 request of the plaintiff in *Wing v. Asarco, Inc.* (9th Cir. 1997) 114 F.3d 986. In *Wing*,  
20 the Ninth Circuit held that, in light of the parties' agreement, the district court was not  
21 prohibited from calculating fees by using the percentage of the fund approach. The  
22 Ninth Circuit explained that "[u]nder the Settlement Agreement, the only constraint  
23 on the district court's discretion was the requirement that the fee be 'reasonable.'" *Wing*,  
24 114 F.3d at 988.

25 Similarly, in *Fleury v. Richemont North Am., Inc.* (N.D. Cal. 2008) 2008 WL  
26 3287154, the settlement included a provision whereby the defendant agreed to pay up  
27 to a certain amount of fees "as awarded by the court." Following *Wing*, the court  
28 stated that "the main question for the Court is what constitutes a reasonable attorney's

1 fee" and went on to explain that, under *Hanlon v. Chrysler Corp.* (9th Cir. 1998) 150  
2 F.3d 1011, it had the discretion to make that determination by using the percentage of  
3 the fund approach. *Fleury*, 2008 WL 3287154, at \*1. In light of AMC's contractual  
4 agreement to pay "reasonable attorney's fees," this Court too may decide what  
5 constitutes a "reasonable" fee under the percentage of the fund approach.

6 **G. AMC DOES NOT DISPUTE ANY OF THE REASONS THAT**  
7 **WARRANT A PERCENTAGE HIGHER THAN BENCHMARK**

8 In his moving papers, Plaintiff discusses four factors that warrant an adjustment  
9 upwards from the benchmark rate of 25% established by the Ninth Circuit for  
10 calculating fees using the percentage of the fund approach: 1) quality of  
11 representation; 2) benefits obtained for the class; 3) complexity and novelty of the  
12 issues; and 4) risk of non-payment. Although AMC in a footnote quibbles that  
13 Plaintiff cited the wrong Ninth Circuit case as authority for adjusting the percentage  
14 rate, and makes the irrelevant assertion that these factors cannot be considered for the  
15 purpose of lodestar calculation, AMC does not, because it cannot, dispute that case  
16 law amply supports each of these factors as a reason for making an adjustment to the  
17 benchmark rate. *See, e.g., In re Pacific Enterprises Security Litigation* (9th Cir.  
18 1995) 47 F.3d 373, 379 (33.3% rate justified by "complexity of the issues and the  
19 risks"); *Vizcaino v. Microsoft Corp.* (9th Cir. 2002) 290 F.3d 1043, 1048 (28% rate  
20 justified because plaintiff achieved "exceptional results" and case was "extremely  
21 risky for class counsel"); *Vasquez v. Coast Valley Roofing, Inc.* (E.D. Cal. 2010) 266  
22 F.R.D. 482, 492 (33.3% rate justified by "good result achieved for Plaintiffs, the risk  
23 counsel took pursuing the matter, and the skill they exhibited prosecuting the case").

24 Relying on the incorrect assertion that this Court may not base a fee award on  
25 the percentage of the fund method at all, AMC does not dispute any of the reasons  
26 supporting an award in this case based on a percentage higher than the benchmark  
27 rate of 25%. Plaintiff's request for fees based on 21.3% of the value of the vouchers,  
28 far below what Plaintiff could have sought, is eminently reasonable.

1 **II. PLAINTIFF MAY BE AWARDED THE AMOUNT OF FEES**  
2 **REQUESTED IN THIS CASE BASED ON A LODESTAR AMOUNT**  
3 **WITH AN APPROPRIATE MULTIPLIER**

4 As discussed above, AMC's contention that this Court is required to use the  
5 lodestar method to determine a reasonable attorney's fee in this case is wrong. AMC's  
6 arguments about what a reasonable fee would be based on a lodestar calculation are  
7 also wrong. As set forth below, the amount of Plaintiff's lodestar is not excessive,  
8 this Court is not prohibited from applying a lodestar multiplier, and a multiplier of 4.6  
9 would be reasonable in light of the exceptional results achieved by Plaintiff in this  
10 incredibly risky case. Although the law is clear that a lodestar cross-check is not  
11 required, a lodestar calculation, should this Court choose to do one, confirms that the  
12 amount of fees requested by Plaintiff is reasonable.

13 **A. PLAINTIFF'S LODESTAR IS NOT EXCESSIVE**

14 AMC contends that Plaintiff's initial lodestar of \$297,920<sup>1</sup> is excessive and  
15 urges the Court to reduce Plaintiff's lodestar to between \$150,000 and \$200,000.  
16 AMC thus asks this Court to reduce Plaintiff's lodestar enormously, by approximately  
17 33.3% to 50%! Neither of the two principal reasons for reducing Plaintiff's lodestar  
18 proffered by AMC in its opposition brief<sup>2</sup> - inadequate documentation and  
19 comparison with other FACTA settlements - remotely justify any reduction of  
20 Plaintiff's lodestar, let alone the incredibly substantial reduction suggested by AMC.  
21 Plaintiff's lodestar is not excessive and should not be reduced by any amount.

---

23 <sup>1</sup> The current value of Plaintiff's lodestar to date is \$301,630. (Supp. Karasik  
24 Decl. ¶ 2).

25 <sup>2</sup> To the extent the declaration of AMC's expert Kenneth Moscaret contains  
26 citations to cases or makes other legal arguments, it must be disregarded. Legal  
27 argument does not constitute "opinion" testimony admissible under Rule 702 of the  
28 Federal Rules of Evidence and AMC may not evade the page limits of Local Rule  
11-6 by making arguments under the guise of expert opinion. In light of AMC's 25  
page opposition brief, that is what AMC has impermissibly tried to do.

1           Inadequate Documentation

2           AMC requests the Court to reduce Plaintiff's initial lodestar by \$20,720  
3 because the time records of Plaintiff's counsel reflecting 29.6 hours engaged in "legal  
4 research" do not specify the topic researched.<sup>3</sup> None of the cases cited by AMC,  
5 however, support reduction of Plaintiff's lodestar for this reason. In fact, they  
6 actually undermine AMC's argument. In *Cunningham v. County of Los Angeles* (9th  
7 Cir. 1988) 879 F.2d 481, 487 the Ninth Circuit ruled that district courts may not  
8 consider inadequate documentation as a basis for reducing a lodestar because "[t]he  
9 Supreme Court held in *Hensley [v. Eckerhart* (1983) 461 U.S. 424] that the first  
10 rationale, inadequate documentation, is subsumed in the lodestar determination."  
11 *Cunningham* went on to hold that the district court therefore abused its discretion by  
12 relying on inadequate documentation to reduce the lodestar in that case. Neither  
13 *Cunningham* nor *Hensley*, the only authorities relied on by AMC in connection with  
14 its arguments about inadequate documentation, support AMC in any way.

15           While AMC's expert contends that the time entries for "legal research" are  
16 "impermissibly vague," AMC does not dispute that Plaintiff's counsel spent any of the  
17 reported time engaged in legal research or contend that the amount of time engaged in  
18 legal research (or any other task) was excessive. Albeit unnecessary in light of  
19 *Cunningham* and *Hensley*, the supplemental declaration of Plaintiff's counsel  
20 explains the various topics researched to ameliorate any concerns the Court may have  
21 about the sufficiency of his time records. (Supp. Karasik Decl. ¶ 3).

---

22  
23           <sup>3</sup> Because AMC in its opposition brief does not challenge the reasonableness  
24 of the hourly rate of Plaintiff's counsel, all the opinions of AMC's expert Kenneth  
25 Moscaret regarding hourly rates are irrelevant. To the extent Moscaret takes issue  
26 with the Laffey Matrix, his opinion is also contrary to the many cases that not only  
27 confirm the propriety of the Laffey Matrix in general, but note that the reasonable  
28 hourly rates for lawyers in Los Angeles are higher than the rates listed on the Laffey  
Matrix. *See, e.g., Collins v. Cargill Meat Solutions Corporation* (E.D. Cal. 2011)  
2011 WL 2580321, at \*11; *Fernandex v. Victoria Secret Stores* (C.D. Cal. 2008)  
2008 WL 8150816, at \*14-15.

1           Other FACTA Settlements

2           AMC urges this Court to reduce Plaintiff's lodestar on the grounds that the  
3 amount of fees requested by Plaintiff is significantly higher than the amounts of fees  
4 awarded in other FACTA cases. AMC, however, has failed to provide the Court with  
5 sufficient information about the circumstances of those cases that this Court would  
6 need to make a meaningful comparison. Most glaringly, AMC does not say anything  
7 about the value of the settlement benefits distributed to the class members in any of  
8 those cases. The failure of AMC to discuss the actual results of each case fatally  
9 undermines its comparative arguments, especially in light of its reliance on *Hensley*.  
10 The Supreme Court there ruled that the most critical factor for determining the  
11 reasonableness of a fee request is "the results obtained." *Hensley*, 461 U.S. at 434.

12           To illustrate the fallacy of AMC's arguments, Plaintiff compares below the  
13 results obtained by Plaintiff in this case with the results obtained by the plaintiffs in  
14 *Soualian* and *Dudzienski*, the two FACTA cases AMC contends are most analogous  
15 to this one. The comparisons demonstrate that, based on what Plaintiff achieved in  
16 this case, the amounts of fees awarded in those two cases do not militate in favor of  
17 reducing Plaintiff's lodestar but actually support Plaintiff's request for fees.

18           In *Soualian*, the settlement resulted in distribution of 48,000 vouchers for a  
19 beverage that, according to the defendant, were cumulatively worth \$310,000. (Supp.  
20 Karasik Decl. ¶ 4, Ex. 1, p. 6). The fee award in *Soualian*, in an amount not opposed  
21 by the defendant, was thus equal to 30% of the value of the benefits to be distributed  
22 to class members. As attested to by counsel for *Soualian*, one of the reasons for  
23 agreeing to a fee award less than lodestar was the expectation that Judge Klausner  
24 would not approve a fee request that amounted to more than 30% of the value of class  
25 member benefits. (Moore Decl. ¶ 4). As further explained by *Soualian* counsel,  
26 distinct procedural and substantive issues in that case, not present here, also  
27 contributed to counsel's agreement to accept a fee award less than lodestar. (Moore  
28 Decl. ¶ 2-3). *Soualian* does not remotely compare with this case.

1 In *Dudzienski*, the settlement provided class members who submitted claims  
2 with a voucher for an appetizer with a face value of \$9.00. Although the plaintiff  
3 contended that the defendant violated FACTA more than 36 million times, only  
4 12,628 valid claims were submitted such that the value of settlement benefits actually  
5 distributed to class members was only \$113,652. (Supp. Karasik Decl. ¶ 5, Ex. 2, p.  
6 4). Here, in contrast, the Settlement provides for distribution of 282,314 Voucher  
7 Packets -- one for each of AMC's violations of FACTA -- currently worth \$23 each.  
8 The present value of the Settlement in this case is more than 57 times the value of the  
9 settlement reached in *Dudzienski*, which only held the defendant accountable for a  
10 minute fraction of its violations of FACTA. The results achieved by Plaintiff in this  
11 case far surpass the results achieved by the plaintiff in *Dudzienski*.

12 In terms of results, there are only two cases that can be compared meaningfully  
13 to this one. In *Lowes v. Home Centers, Inc.*, Case No. 09-cv-255, United States  
14 District Court, Southern District of Illinois, the parties reached a settlement requiring  
15 Lowes to provide class members who submitted claims between \$3.5 million and \$7.0  
16 million worth of gift cards. (Supp. Karasik Decl. ¶ 6, Ex. 3, p. 8). On July 14, 2011,  
17 the court awarded plaintiff's counsel attorney's fees and costs in the amount of  
18 \$1,724,000, which reflects approximately 25% of the value of the maximum  
19 settlement benefits potentially available to class members in that case. (Supp.  
20 Karasik Decl. ¶ 7, Ex. 4). Here, Plaintiff has requested an even lower percentage,  
21 21.3%, of the value of the settlement benefits that will be actually distributed.

22 In *McGee v. Ross Stores, Inc.*, Case No. 06-7496, United States District Court,  
23 Northern District of California, plaintiff's counsel was awarded a fee of \$400,000  
24 based on a common fund of \$1,250,000. (Moore Decl. ¶ 6). The percentage of the  
25 fund requested by Plaintiff in this case, 21.3%, is far lower than the percentage of the  
26 fund awarded in fees in *McGee*, which was 32%.

27 The conclusion is inescapable. Comparison with fee awards in FACTA cases  
28 with comparable results strongly supports Plaintiff's request for fees.

1           **B. THE COURT CAN APPLY A LODESTAR MULTIPLIER**

2           AMC contends erroneously that the Court cannot apply a multiplier because  
3 "fees are sought under a fee-shifting statute." (Opposition p. 19). As explained  
4 above, Plaintiff does not seek fees under the fee-shifting provisions of the FCRA but  
5 seeks fees based on the agreement of AMC to pay "reasonable attorney's fees."

6           AMC also contends that this Court cannot apply a multiplier because the  
7 vouchers, not being cash, do not constitute a "common fund." AMC does not cite any  
8 authority, however, supporting the notion that a multiplier cannot be applied in cases  
9 where a class action settlement provides benefits other than cash. *Zucker v.*  
10 *Occidental Petroleum Corp.* (9th Cir. 1999) 192 F.2d 1323 is inapposite because  
11 there the Ninth Circuit only held that a class member who objected to the district  
12 court's initial fee award had standing to challenge the award.<sup>4</sup> *Yeagley v. Wells Fargo*  
13 *& Co.* (9th Cir. 2010) 365 Fed.Appx. 838 is likewise inapposite because there the  
14 Ninth Circuit merely ruled that the district court should have used the lodestar  
15 approach instead of the common fund approach to determine a reasonable attorney's  
16 fee. Neither *Zucker* nor *Yeagley* says anything about multipliers or remotely  
17 precludes application of a multiplier by a district court that chooses to determine what  
18 amount of attorney's fees is reasonable by using a lodestar approach.

19           The Ninth Circuit has not only endorsed lodestar multipliers, but has held that a  
20 district court commits an abuse of discretion by failing to apply a risk multiplier when  
21 1) attorneys take a case with the expectation that they will receive a risk enhancement  
22 if they prevail; 2) their hourly rate does not reflect that risk; and 3) there is evidence  
23 the case is risky. *Fischel v. Equitable Life Assur. Society of U.S.* (9th Cir. 2002) 307  
24 F.3d 997, 1008. Since all three of these circumstances are present here (Supp.  
25 Karasik Decl. ¶ 8), application at the very least of a risk multiplier is warranted.

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28           <sup>4</sup> *Zucker* has been implicitly overruled by *Glasser v. Volkswagen of America, Inc.* (9th Cir. 2011) \_\_ F.3d \_\_, 2011 WL 1844088.

1           **C. THE EXCEPTIONAL RESULT ACHIEVED AT EXTREME RISK**  
2           **OF NON-PAYMENT WARRANTS A MULTIPLIER OF 4.6**

3           As discussed above, AMC's arguments to the effect that the Court cannot apply  
4 a multiplier in this case are contrary to the law. So too are AMC's arguments that  
5 multipliers cannot be based on factors subsumed within lodestar analysis. None of  
6 the cases cited by AMC actually support this proposition because none of them  
7 involve class actions or discuss multipliers. Moreover, all the cases relied on by  
8 AMC are inapposite fee shifting cases. Adjustment of lodestar in a single plaintiff fee  
9 shifting case simply has nothing to do with applying a multiplier in a common fund  
10 class action where the defendant, like AMC here, agreed to pay whatever amount of  
11 attorney's fees the district court decided was "reasonable."

12           Despite AMC's efforts to downplay the results achieved by Plaintiff, it is  
13 obvious that the result in this case was exceptional. Unlike any other FACTA  
14 plaintiff within the Ninth Circuit, Plaintiff obtained a significant decision from the  
15 Ninth Circuit repudiating the legal analysis adopted by numerous district courts to  
16 wrongfully deny class certification in numerous FACTA cases. Although AMC now  
17 tries to minimize the import of the Ninth Circuit's decision, AMC took quite the  
18 opposite view when it sought rehearing by the Ninth Circuit en banc. In its petition  
19 for rehearing, AMC argued that the Ninth Circuit's opinion "threatens national,  
20 systemic consequences for the class adjudication of claims involving statutory  
21 penalties or damages" and that the Ninth Circuit erred on a "legal question of national  
22 importance" (Supp. Karasik Decl. ¶ 9, Ex. 5, pp. 1, 4). Those characterizations belie  
23 AMC's self-serving revisionist arguments now.

24           AMC also fails to appreciate -- or perhaps deliberately ignores -- the other  
25 principal reason why a multiplier is appropriate in this case. As set forth in Plaintiff's  
26 moving papers, this case presented Plaintiff's counsel with an extremely high risk of  
27 non-payment. In light of the poor results in most other FACTA cases, AMC simply  
28 cannot dispute the extreme risk of non-payment in this case.

1 Finally, AMC contends that the numerous cases cited by Plaintiff where courts  
2 awarded multipliers higher than 4.6 are inapposite because they all involved lodestar  
3 cross-checks on fees calculated under the percentage of the fund method. This  
4 argument has no merit because, as discussed above, this Court can award fees based  
5 on the percentage of the fund method. As set forth in Plaintiff's moving papers, all of  
6 these cases support Plaintiff's argument that, should this Court decide in its discretion  
7 to perform a lodestar cross-check in this case (even though not required), a resulting  
8 multiplier of 4.6 confirms the reasonableness of Plaintiff's fee request.

9 **III. THE \$7,500 COST OF PUBLICIZING THE SETTLEMENT WAS A**  
10 **REASONABLE EXPENSE INCURRED ON BEHALF OF THE CLASS**

11 AMC objects to \$7,500 in costs incurred by Plaintiff's counsel publicizing the  
12 Settlement on the grounds that "AMC never agreed to such costs." (Opposition p.  
13 25). This argument has no merit because AMC did not agree to pay any specific costs  
14 or limit its agreement to pay costs to certain kinds of costs. AMC agreed to "pay the  
15 reasonable attorneys' fees and costs of Class Counsel in an amount to be determined  
16 by the Court." Amended Stipulated Settlement Agreement and Release ¶ 23. The  
17 only question is whether the \$7,500 spent to publicize the Settlement is "reasonable."

18 Clearly, this expense was reasonable. AMC does not dispute that Plaintiff  
19 incurred this expense or that this expense was incurred to benefit class members.  
20 While AMC contends that the notice provided in the Settlement was adequate, those  
21 notice provisions were agreed upon before the parties modified the Settlement, as  
22 suggested by the Court, to include a preliminary claims process. It was eminently  
23 reasonable for Plaintiff's counsel to promote claims by class members by providing  
24 additional notice of the Settlement even though not required by due process. Indeed,  
25 in the opinion of Plaintiff's counsel, this supplemental notice resulted in a much  
26 higher claims rate than would have resulted without it. (Supp. Karasik Decl. ¶ 10).  
27 Especially since Plaintiff's counsel has a fiduciary obligation to class members, the  
28 expense of additional notice for their benefit was undoubtedly reasonable.

1 **IV. THE OBJECTION OF CLASS MEMBER HAMPE MUST BE**  
2 **OVERRULED BECAUSE SHE HAS NO STANDING TO OBJECT TO**  
3 **THE AMOUNT OF ATTORNEY'S FEES**

4 Class member Cassie Grimes Hampe objects on the grounds that the amount of  
5 attorney's fees sought by Plaintiff is excessive. This objection must be overruled  
6 because Hampe has no standing to make it. Recently, the Ninth Circuit unequivocally  
7 established that a class member does not have standing to object to a request for  
8 attorney's fees when the award of fees will not reduce or dilute the amount of  
9 settlement benefits payable to class members. *Glasser v. Volkswagen of America,*  
10 *Inc.* (9th Cir. 2011) \_\_ F.3d \_\_, 2011 WL 1844088.

11 In the class action context, simply being a member of the class does not  
12 automatically confer standing to challenge a fee award to class counsel -  
13 - the objecting class members must be "aggrieved" by the fee award.  
14 [citation]. If modifying the fee award would not "actually benefit the  
15 objecting class member," the class member lacks standing because his  
16 challenge to the fee award cannot result in redressing any injury.  
17 [citation].

18 *Glasser*, 2011 WL 1844088, at \*3.

19 Precisely so here, whatever amount of fees may be awarded to Plaintiff's  
20 counsel will have absolutely no effect on the settlement benefits available to class  
21 members under the Settlement. The number of vouchers to be distributed will remain  
22 the same regardless of the fee award. Awarding Plaintiff an amount of fees less than  
23 requested would not result in any actual benefit to any class member.

24 *Glasser* dictates that Hampe's objection to the amount of fees requested by  
25 Plaintiff's counsel must be overruled for lack of standing. Not having anything to  
26 lose regardless of what amount of fees this Court decides to award, Hampe cannot be  
27 injured or aggrieved by any award of fees. Under *Glasser*, she has no standing to  
28 assert any kind of objection to an award of attorney's fees in this case.

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**CONCLUSION**

Plaintiff respectfully requests that his motion for fees, costs and an enhancement award be granted in its entirety.

Dated: July 15, 2011

SPIRO MOSS LLP

By: /s/ Gregory N. Karasik  
Gregory N. Karasik

Attorneys for Plaintiff