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

10  
11 DAVE VACCARO, individually and on ) Case No. 20STCV28871  
behalf of all others similarly situated, ) [Assigned for All Purposes to the Hon. Elihu  
12 ) M. Berle, Dept. 6]  
13 Plaintiffs, )  
)

14  
15 vs.

16 DELTA DRUGS, II, INC. and DOES 1  
through 10, inclusive,  
17 Defendant.

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

) Date: October 25, 2022  
) Time: 9:00 a.m.  
) Department: 6

18 )  
19 ) **Submitted Under Separate Cover**

- 20 ) • Declaration of Todd Friedman;  
21 ) Declaration of Dave Vaccaro and  
22 ) [Proposed] Order.  
23 )  
24 )  
25 )

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

2  
3  
4 PLEASE TAKE NOTICE that on October 25, 2022, at 9:00 a.m., or as soon thereafter as  
5 counsel may be heard, in Department 6 of the Los Angeles Superior Court, located 312 N.  
6 Spring Street, Los Angeles, California, 90012, Plaintiff DAVID VACCARO (“Plaintiff”), by and  
7 through his attorneys of record (“*Vacarro* Counsel”) will move the Court for an Order Granting  
8 Plaintiff’s Motion for Attorney’s Fees Costs and Incentive Award.

9 This Motion is based on this Notice of Motion, the accompanying Memorandum of  
10 Points and Authorities, the Declarations of Todd M. Friedman, David Marco and Brad Madden,  
11 the complete file in this action and any other documentary and/or oral evidence as may be  
12 presented at the time of the hearing on this Motion.

13  
14 Dated: October 14, 2022

**LAW OFFICES OF TODD M. FRIEDMAN**


15  
16 By:   
17 TODD M. FRIEDMAN, ESQ.  
18 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** .....1

6 **III. THE SETTLEMENT**.....3

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 **a. The number of hours claimed is reasonable** .....5

11 **b. The hourly rates requested are reasonable** .....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**.....8

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>	
	20 Cal. 3d 25 (1977) .....	5, 8
2		
3	<i>Serrano v. Unruh</i>	
	32 Cal. 3d 621 (1982) .....	5, 6
4	<i>Thayer v. Wells Fargo Bank</i>	
	92 Cal. App. 4th 819 (2001) .....	6
5		
6	<i>Vasquez v. Superior Court</i>	
	4 Cal. 3d 800 (1971) .....	4
7	<i>Vasquez v. Superior Court</i> , 4 Cal. 3d 800 (1971) .....	4
8	<i>Wershba v. Apple Computer, Inc.</i>	
	91 Cal. App. 4th 224 (2001) .....	7
9	<b>Statutes</b>	
10	Cal. Penal Code § 630 et seq. ....	1
11	California Invasion of Privacy Act – Cal. Penal Code § 632.7 .....	1
12	Code of Civil Procedure § 1021.5.....	4
13		
14		
15		
16		
17		
18		
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22		
23		
24		
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1 The Parties attended a mediation with the Hon. Andrew J. Guilford, Ret. of JAMS on March 23,  
2 2021. Through his guidance, this Settlement was reached. *See Friedman Decl*, ¶ 8. On July 16,  
3 2021, Plaintiff filed his first Motion for Preliminary Approval, which was heard on August 30,  
4 2021. At said hearing, this Honorable Court expressed concerns with the settlement and Ordered  
5 both parties to make extensive changes to the agreement and notice, including, but not limited to,  
6 changes to the Civil 1542 Waiver and final Judgment. *See Friedman Decl*, ¶ 9.

7 The Court continued the hearing until October 20, 2021, and then subsequently to  
8 November 12, 2021, to allow the parties to make said changes and submit supplemental  
9 declarations and exhibits to the Court. *See Friedman Decl*, ¶ 10. On November 12, 2021, an  
10 additional hearing was held regarding Plaintiff's Motion for Preliminary approval. At the  
11 hearing, the Court indicated additional changes required by the parties to be made to the  
12 settlement, including further changes to the 1542 waiver, Final Judgment and clarification on the  
13 involvement of the Cy Pres recipients. The Court Continued this matter until March 18, 2022, for  
14 the parties to make said changes and submit them to the Court. *See Friedman Decl*, ¶ 11.

15 On March 18, 2022, a third hearing was held on Plaintiff's Motion for Preliminary  
16 Approval of Class Action Settlement. At this hearing, The Court ordered both parties to make a  
17 few more changes to the dates on the class notice and extend the released period in the settlement  
18 agreement, ordering these changes to be submitted to the Court no later than April 18, 2022.  
19 After these changes were submitted, this Honorable Court granted Plaintiff's Motion for  
20 Preliminary Approval of Class Action settlement on May 25, 2022. *See Friedman Decl*, ¶ 12.

21 After, notice was mailed to 8,870 Class Members' last known addresses, fully laying out  
22 the terms of the settlement agreement, the rights of the Class Members to object and the rights of  
23 the Class Members to opt out of the class, less than 3% of which were returned without finding  
24 an updated address. After the Class Members were so informed, **zero objections and zero opt-**  
25 **outs** were lodged. 10.4% of Class Members submitted claims, which is a very good take rate for  
consumer class actions.

Class Counsel is knowledgeable about and has done extensive research with respect to  
the applicable law and potential defenses to the claims of the Settlement Class. Class Counsel  
has diligently pursued an investigation of the Settlement Class Members' claims against  
Defendant. Based on the forgoing data and on their own independent investigation and  
evaluation, Class Counsel is of the opinion that the settlement with the Defendant for the

1 consideration and on the terms set forth in the Settlement Agreement is fair, reasonable, and  
2 adequate and is in the best interest of the Settlement Class Members in light of all known facts  
3 and circumstances, including the risk of significant delay and uncertainty associated with  
4 litigation, various defenses asserted by Defendant, and numerous potential appellate issues.  
5 Although it denies any liability, Defendant has agreed to settle the claims on the terms set forth  
6 in the Settlement Agreement.

### 6 **III. THE SETTLEMENT**

7 Defendants agree to establish a Settlement Fund in the amount of \$300,000 (Agreement §  
8 4.1, p. 7) in order to fund the following:

9 (1) providing notice to Class Members; (2) providing settlement checks to Class Members  
10 entitled to receive a settlement check; (3) creating and maintaining the Settlement Website; (4)  
11 maintaining a toll-free telephone number (total estimated administration costs of under \$50,000);  
12 (5) Litigation expenses of up to \$10,000.00; (6) to pay the proposed \$10,000 Service Award to  
13 the Plaintiff (Agreement § 7, p.8); (7) payment of the proposed Attorneys' Fees of \$100,000.00  
14 (33.33% of the Settlement Fund) (Agreement § 6, p. 7). *See Friedman Decl.*, ¶¶ 20-25. Any  
15 funds remaining after payment of all settlement costs and Payments to the Settlement Class shall  
16 be paid 50% to EPIC and 50% to Public Justice, as cy pres recipients.

15 The amount of the Settlement Fund shall not be reduced as a result of any member(s) of

### 16 **III. ARGUMENT**

#### 17 **A. THIS COURT SHOULD AWARD CLASS COUNSEL FEES AND COSTS**

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

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

28 *Vasquez v. Superior Court*, 4 Cal. 3d 800, 807 (1971); *see also Linder v. Thrifty Oil Co.*, 23 Cal.  
29 4th 429, 434 (2000) ("Courts long have acknowledged the importance of class actions as a means  
30 to prevent a failure of justice in our judicial system.").



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

5 The policy at the very core of the class action mechanism is to overcome the  
6 problem that small recoveries do not provide the incentive for any individual to  
7 bring a solo action prosecuting his or her rights. A class action solves this  
problem by aggregating the relatively paltry potential recoveries into something  
worth someone's (usually an attorney's) labor.

8 *Id.* at 617.

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

18 Contingency fee litigation is always risky. Despite this risk, Class Counsel have  
19 secured an excellent result in this litigation, and Class Counsel respectfully submit that the award  
20 of \$100,000.00 in fees and \$10,000.00 in litigation costs as well as a service payment of \$10,000  
21 to the Class Representative is therefore appropriate. As explained below, the requested fee  
22 reflects a negative lodestar multiplier, after years of work on this litigation, of Class Counsel's  
23 actual fees of \$128,190.00. Plaintiffs are entitled to recover reasonable attorneys' fees, expenses  
24 and costs under Code of Civil Procedure § 1021.5. Moreover, when a party is entitled to  
25 statutory fees, "the fee should ordinarily include compensation for all hours reasonably spent,  
including those relating solely to the fee". *See Serrano v. Unruh*, 32 Cal. 3d 621, 624 (1982)  
("Serrano IV"). California courts, in exercising their broad discretion to determine the  
appropriate fee, may base their calculations on the "lodestar" and "multiplier" method. *See*  
*Press v. Lucky Stores, Inc.*, 34 Cal. 3d 311, 322 (1983); *Serrano v. Priest*, 20 Cal. 3d 25, 48-49  
(1977) ("Serrano III"). That said, it is submitted that the fee award sought herein is reasonable

1 under both the lodestar/multiplier and common fund approaches in determining reasonable  
2 attorney's fees. Class Counsel's costs are also fully documented, necessarily incurred and  
3 otherwise reasonable.

4 The reaction of the Class to the Settlement terms relating to fees and costs must also be  
5 recognized. To date, zero Class Members have opted out and zero Class Members have objected  
6 to the Fee request. Courts have interpreted that response as evidence that the Settlement  
7 warrants final approval. *See, e.g., 7-Eleven Owners for Fair Franchising v. Southland Corp.*, 85  
8 Cal. App. 4th 1135, 1152-53 (2000) (finding response of class members to be "overwhelmingly  
9 positive" where "a mere 80 of the 5,454 absent class members elected to opt out of the  
10 settlement.").

11 **1. The requested attorney's fees are reasonable, fair and appropriate**  
12 **under the lodestar/multiplier approach**

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

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

25 Counsel for prevailing parties are entitled to be compensated "for all time reasonably  
expended in pursuit of the ultimate result achieved in the same manner that an attorney  
traditionally is compensated by a fee-paying client for all time reasonably expended on a  
matter." *Hensley v. Eckerhart*, 461 U.S. 424, 431 (1983) (internal quotes and citation omitted);  
*see also Serrano IV*, 32 Cal. 3d at 633 (parties "should recover for all hours reasonably spent").  
The amount of time Class Counsel spent on this case (163.4 hours), which culminated in the very  
favorable Settlement, is entirely reasonable given the complexity of the issues involved,

1 Defendants' vigorous defense, the length of time the litigation has been pending, and the  
2 exceptional results obtained. Further, all of Class Counsel's time is supported by the  
3 declarations submitted concurrently with this Motion which themselves are based on records that  
4 are maintained contemporaneously in the normal course of Class Counsel's practice. *See, In re*  
5 *Sutter Health Uninsured Pricing Cases*, 171 Cal. App. 4th 495, 511-12 (2009) ("We see no  
6 reason why [the court] could not accept the declarations of counsel attesting to the hours worked,  
7 particularly as he was in the best position to verify those claims by reference to the various  
8 proceedings in the case."); *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th 224, 254-55  
(2001).

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

10 Class Counsel are entitled to be compensated at hourly rates that reflect the reasonable  
11 market value of their legal services, based on their experience and expertise. *See Serrano IV*, 32  
12 Cal. 3d at 640 n.31; *San Bernardino Valley Audubon Soc'y, Inc. v. County of San Bernardino*,  
13 155 Cal. App. 3d 738, 755 (1984). "The reasonable hourly rate is that prevailing in the  
14 community for similar work." *PCLM Group, Inc. v. Drexler*, 22 Cal. 4th 1084, 1095 (2000).  
15 Payment at full market rates is essential to entice well-qualified counsel to undertake difficult  
16 cases such as this one. *See Audubon Soc'y*, 155 Cal. App. 3d at 755. Class Counsel's hourly rates  
17 are fully supported by their experience and reputation in handling complex class action litigation.  
18 *See Friedman Decl.* ¶¶ 42-52. Further, Class Counsel charge rates commensurate with the  
19 prevailing market rates for attorneys of comparable experience and skill handling complex  
20 litigation and Class Counsel made all reasonable attempts to assign tasks to timekeepers at the  
21 appropriate billing rates.

22 **2. The requested attorneys' fees and costs are reasonable, fair and**  
23 **appropriate under the Common Fund Doctrine.**

24 While the lodestar method set forth above weighs in favor of granting this Motion, a  
25 percentage of the common fund calculation supports the requested fee as well. The concept of  
awarding attorneys' fees from a common fund such as at issue here was stated in the following  
manner by the California Supreme Court: "[W]hen a number of persons are entitled in common  
to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in  
the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's  
fees out of the fund." *Serrano III*, 20 Cal. 3d at 34; *see also Lealao*, 82 Cal. App. 4th at 26

1 (observing that “Fee spreading occurs when a settlement or adjudication results in the  
2 establishment of a separate or so-called common fund for the benefit of the class. Because the  
3 fee awarded class counsel comes from this fund, it is said that the expense is borne by the  
4 beneficiaries.”). In addition to spreading the litigation fees among all beneficiaries, awards of  
5 common fund fees are essential to furthering the important societal goal of attracting competent  
6 counsel to handle these often complex contingency cases “who will be more willing to undertake  
7 and diligently prosecute proper litigation for the protection or recovery of the fund if [the  
8 attorneys are] assured that [they] will be promptly and directly compensated should [their]  
9 efforts be successful.” *Melendres v. City of Los Angeles*, 45 Cal. App. 3d 267, 273 (1975)  
10 (quoting *In re Stauffer’s Estate*, 53 Cal. 2d 124, 132 (1959)). In California, trial courts have  
11 inherent equitable power to award attorney’s fees on a common fund basis when counsel’s  
12 efforts “have resulted in the preservation or recovery of a certain or easily calculable sum of  
13 money.” *Serrano III*, 20 Cal. 3d at 35. The traditional method for calculating a common fund fee  
14 is to award a percentage of the total fund. *See, e.g., Lealao*, 82 Cal. App. 4th at 26. Fee awards  
15 from a common fund can “average around one-third of the recovery.” *Consumer Privacy Cases*,  
16 175 Cal. App. 4th 545, 558 n.13 (2009); *see also Chavez v. Netflix, Inc.*, 162 Cal. App. 4th 43, 66  
17 n.11 (2008).

18 The determination of the proper quantum of attorneys’ fees in this case is not a  
19 complicated matter, given the Total Settlement Amount of \$300,000. Thus, the fees sought by  
20 Class Counsel represent a third of that amount, which is well within the realm of fees for such  
21 work on a contingency basis. *Lealao*, 82 Cal. App. 4th at 47 (“As many courts have noted ... the  
22 amount of attorney fees typically negotiated in comparable litigation should be considered in the  
23 assessment of a reasonable fee in representative actions in which a fee agreement is  
24 impossible.”).

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

28 **3. The requested costs are fully documented, necessarily incurred and**  
29 **reasonable.**

30 To date, Class Counsel have documented and verified a total of \$10,809.25. in expenses  
31 and costs incurred through the time of this Motion. *See Friedman Decl.* ¶. The costs and

1 expenses for which counsel seeks reimbursement include filing fees, messenger services, service  
2 of process, electronic filing fees and mediation expenses. *Id.* Plaintiff’s counsel has not billed  
3 for miscellaneous expenses such as legal research expenses, printing expenses and postage. All  
4 of these costs were necessarily incurred in the course of this litigation and should be reimbursed.  
*Id.* Thus, Plaintiff’s request for \$10,000.00<sup>1</sup> in costs is reasonable.

5 **B. THE COURT SHOULD AWARD PLAINTIFF HIS REQUESTED INCENTIVE AWARD**

6 Twelve years ago, in *Cellphone Termination Cases*, 186 Cal. App. 4th 1380, 1396  
7 (2010), the appellate court upheld the trial’s court approval of \$10,000 in incentive awards to  
8 each class representative. The court reasoned, “[T]he rationale for making enhancement or  
9 incentive awards to named plaintiffs is that they should be compensated for the expense or risk  
10 they have incurred in conferring a benefit on other members of the class.” *Id.* at 1394 (quoting  
*Clarke v. American Residential Servs. LLC*, 175 Cal. App. 4th 785, 806 (2009)).

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

20 **II. CONCLUSION**

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

- 22 • \$100,000.00 for Class Counsel’s fees
- 23 • \$10,000.00 for Class Counsel’s costs Capped despite incurring 10,809.25 in  
24 costs);

---

25 <sup>1</sup> Costs were capped at \$10,000 per the Preliminary Approval order so Plaintiff is not requesting  
any excess despite incurring an additional \$809.25 in costs.

- \$58,579 for the cost of Claims Administration; and
- A \$10,000 incentive award to the Plaintiff.

Respectfully submitted,

Dated: October 14, 2022

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 October 14, 2022, I served the foregoing document, described as:

5 **MOTION FOR ATTORNEYS' FEES AND COSTS; DECLARATION OF TODD  
6 M. FRIEDMAN WITH EXHIBITS; PROPOSED ORDER**

7  the original of the document

8  true copies of the document

9 Via Case Anywhere addressed as follows:

10 William C. Fleming, Jr., Esq.  
11 Dustin Huffine, Esq.  
12 Moss Law Group  
13 255 South Marengo Avenue  
Pasadena, CA 91101  
[wffleming@rmosslaw.com](mailto:wffleming@rmosslaw.com)  
[dhuffine@rmosslaw.com](mailto:dhuffine@rmosslaw.com)

14  **BY U.S. MAIL:** I sealed and placed such envelope for collection and mailing to be  
15 deposited on the same day at Los Angeles County, CA. The envelopes were mailed with postage  
16 thereon fully prepaid. I am readily familiar with the Law Offices of Todd M. Friedman's  
17 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.

18  **BY ELECTRONIC MAIL:** I served the above documents in pdf format to the email  
19 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.

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

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

24 Executed this October 14, 2022, at Orange, California.

25 /s Adrian R Bacon