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9 RON DAVIS and the CLASS

10 **UNITED STATES DISTRICT COURT**

11 **NORTHERN DISTRICT OF CALIFORNIA**

12 RON DAVIS, an individual, on behalf of
13 himself and all others similarly situated,

14 Plaintiff,

15 vs.

16 VISA, INC., a Delaware corporation,

17 Defendant.

18 Case No. 3:13-cv-5125-CRB

19 **NOTICE OF MOTION AND MOTION
20 FOR AWARD OF ATTORNEY'S FEES
21 AND COSTS AND FOR SERVICE
22 AWARD TO NAMED PLAINTIFF;
23 MEMORANDUM OF POINTS AND
24 AUTHORITIES**

25 Hearing Date: March 20, 2015

26 Hearing Time: 10:00 a.m.

27 Judge: Hon. Charles R. Bryer

28 Trial Date: None Set

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

2 **PLEASE TAKE NOTICE THAT** on March 20, 2015, at 10:00 a.m., or as soon thereafter
3 as this matter may be heard in Courtroom 6,17th Floor, 450 Golden Gate Avenue, San Francisco,
4 California, Class Counsel will, and hereby does, move for an Order awarding \$57,520 in fees and
5 expenses and \$2,000 for a service award to named Plaintiff Ron Davis, as defined in the proposed
6 Class Action Settlement Agreement filed November 7, 2014 [Dkt. No. 54.1] (the "Settlement").
7

8 As discussed in the accompanying memorandum, this motion is made on the grounds that
9 the awards are fair, reasonable and justified under applicable law.

10 This motion is based upon this notice, the attached memorandum of points and authorities,
11 the accompanying declaration of Charles D. Marshall, as well as the Declaration of Charles D.
12 Marshall in Support of Preliminary Approval of Class Action Settlement Agreement filed on
13 November 7, 2014 [Dkt. No. 54], other papers filed in support of preliminary approval of the
14 Settlement, any oral argument that is held regarding this motion, the complete record in this
15 litigation and such other matters as the Court may consider.
16

17
18 DATED: February 11, 2015

19 **MARSHALL LAW FIRM**

20
21 By: /s/ Charles D. Marshall

22 Charles D. Marshall
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28 Attorney for Plaintiff RON DAVIS
and the CLASS

MOT. FOR AWARD OF ATTY'S FEES AND
COSTS AND SERVICE AWARD; MPA
Case No. 3:13-cv5125-CRB

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1 Class Counsel respectfully submits this application for an award of attorneys' fees and
2 reimbursement of expenses totaling \$57,520 and a service award of \$2,000 for the representative
3 plaintiff Ron Davis.

4 **I. INTRODUCTION**

5 Class Counsel has achieved an excellent result by securing the agreement of VISA, Inc. to
6 (a) pay each Class Member 100% of the Collision Damage Waiver benefit ("CDW Benefit")
7 previously denied—that is an amount up to \$500 or \$750 for each Class Member, which are the
8 maximum losses a Class Member could have suffered, depending on when they made their claim
9 against the VISA CDW Benefit, and (b) prospectively allow VISA cardholders to make claims
10 against the CDW Benefit for Zipcar rentals through at least April 1, 2015. After April 1, 2105,
11 VISA will either on continue to allow such claims under the benefit, or expressly exclude them by
12 either amending the benefit agreement or otherwise providing clear notice of such a policy change
13 to cardholders.

14 Pursuant to the terms of the Class Action Settlement Agreement ("Settlement
15 Agreement"), VISA also agreed to pay to Class Counsel, subject to court approval, fees and costs
16 in the amount of \$57,520. VISA agreed to pay this attorneys fee award in recognition of the
17 substantial benefits achieved in this litigation as well as the contingent nature of the litigation, the
18 skill with which Class Counsel litigated the action, and the fees typically awarded by courts across
19 the country in similar litigation. Class Counsel and VISA negotiated the fees and expenses *only*
20 *after reaching agreement on the other principal terms of the Settlement. See Declaration of*
21 *Charles D. Marshall In Support Class Counsel's Motion For Award Of Attorney's Fees And*
22 *Costs; And Award Of Service Award To Named Plaintiff ("Marshall Decl.") at ¶ 7.*

23 This negotiated fee is eminently fair and reasonable, particularly in light of the fact that it
24 is an amount lower than the actual fees actually incurred by Class Counsel in the prosecution of
25 this action. Marshall Decl. at ¶ 8, 9. As explained below, in light of the excellent result obtained,
26 the requested fee award and reimbursement of expenses are reasonable and should be approved.

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II. PROCEDURAL HISTORY

For a detailed discussion of the nature of this action, the procedural history, the extensive actual and legal research performed by counsel and the settlement negotiations, the Court is respectfully referred to the Marshall Declaration, and Motion for Preliminary Approval Of Class Action Settlement Agreement filed on November 7, 2014 [Dkt. No. 53].

III. ARGUMENT

A. Plaintiffs’ Fee Application Is Governed By California Law.

At the conclusion of a successful class action, class counsel may apply to the Court for an award of reasonable attorneys’ fees. *See* Fed. R. Civ. P. 23(h). The first issue in assessing any fee application is to identify the governing law. Here, the Court’s jurisdiction arises under the Class Action Fairness Act (“CAFA”), 28 U.S.C. § 1332(d), which means the Court is sitting in diversity. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 571 (2005) (“CAFA confers federal diversity jurisdiction over class actions...”). Pursuant to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), the Court therefore applies California state law in assessing Plaintiffs’ fee application, as both the availability of a fee award and the method of calculating that award are considered substantive issues reflecting important state policy. *See, e.g., Mangold v. Cal. Pub. Utils. Comm’n*, 67 F.3d 1470, 1478 (9th Cir. 1995) (“The method of calculating a fee is an inherent part of the substantive right to the fee itself, and a state right to an attorneys’ fee reflects a substantial policy of the state.”); *Gezalyan v. BMW of North America, LLC*, 2010 WL 1133427, *1 (C.D. Cal. 2010) (“In diversity actions, federal courts look to state law in determining whether a party has a right to attorneys’ fees and how to calculate those fees.”).

1 **B. California Law Entitles Plaintiff To A Fee Award Under California's Private**
2 **Attorney General Statute.**

3 Plaintiff is entitled to a fee award under California's private attorney general statute, Cal.
4 Code Civ. Proc. § 1021.5. Under this statute, the court may award attorney's fees to a "successful
5 party" in any action that "has resulted in the enforcement of an important right affecting the public
6 interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the
7 general public or a large class of persons, (b) the necessity and financial burden of private
8 enforcement are such as to make the award appropriate, and (c) such fees should not in the interest
9 of justice be paid out of the recovery, if any." The fundamental objective of the statute is "to
10 encourage suits enforcing public policies by providing substantial attorney fees to successful
11 litigants in such cases." *Graham v. DaimlerChrysler Corp.*, 34 Cal. 4th 553, 565 (2004).

12
13 In the context of California's private attorney general statute, the term "successful party" is
14 synonymous with the term "prevailing party" as used in California's Consumers Legal Remedies
15 Act, Cal. Civ. Code. § 1750 *et seq.* and other statutes, and requires only that the plaintiff achieve
16 its litigation objectives, whether by judgment, settlement, or other means. *Id.* at 576-77.
17 "[P]laintiffs may be considered 'prevailing parties' for attorney's fees purposes if they succeed on
18 any significant issue in litigation which achieves some of the benefits of the parties sought in
19 bringing suit." *Lyons v. Chinese Hosp.*, 136 Cal. App. 4th 1331, 1346 (2006) (quoting *Maria P. v.*
20 *Riles*, 43 Cal. 3d 1281, 1292 (1987); *see also Graciano v. Robinson Ford Sales, Inc.*, 144 Cal.
21 App. 4th 140, 153 (2006) (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). Plaintiff
22 brought this action to recover out-of-pocket expenses he paid when VISA denied his CDW
23 Benefit claim, as well as to change VISA's policy regarding how it treated Zipcars under the
24 CDW Benefit. (See Second Am. Compl. [Dkt. No. 22], ¶ 6). Under the settlement, class members
25 who incurred out-of-pocket expenses as a result of VISA's denial of the CDW Benefit incurred
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1 flywheel system repair will receive 100% of the amount of their benefit claim, and VISA's has
2 agreed to accept Zipcar claims for a period of time, and then either continue to do so, or amend its
3 policy to make clear whether Zipcars are covered or not. This pragmatic assessment of whether
4 plaintiffs realized their litigation objectives confirms that Plaintiff is entitled to a fee award under
5 the Cal. Code Civ. Proc. § 1021.5 as prevailing plaintiff.

6 Plaintiff also satisfies the other delineated criteria for a fee-shifting award under the private
7 attorney general statute. The action conferred a significant benefit on a large class of persons by
8 providing relief to several hundred VISA cardholders. The action also conferred a significant
9 benefit on the public by enforcing important consumer protection rights and discouraging similar
10 unfair and deceptive treatment of consumers. *See Graham*, 34 Cal. 4th at 578 (“It is well settled
11 that attorney fees under section 1021.5 may be awarded for consumer class action suits benefiting
12 a large number of people.”). The necessity and financial burden of private enforcement make an
13 award appropriate. Without the incentive of an attorneys’ fees award, Plaintiff could not have
14 afforded to hire counsel to pursue this case; his loss, while certainly not trivial, was only \$721.70.
15 *See Ryan v. Cal. Interscholastic Fed’n*, 94 Cal. App. 4th 1033, 1044 (2001) (“As to the necessity
16 and financial burden of private enforcement, an award is appropriate where the cost of the legal
17 victory transcends the claimant’s personal interest; in other words, where the burden of pursuing
18 the litigation is out of proportion to the plaintiff's individual stake in the matter.”).

19 Finally, this is not a case where fees should in the interest of justice be paid out of class
20 members’ recovery. The incentive of a Court-awarded fee was necessary in this case because there
21 is no fund from which Class Counsel could be awarded those costs nor was there ever a reasonable
22 expectation that a common fund would be generated by this litigation. While it is known how
23 many cardholders had CDW Benefits declined due to a Zipcar rental, it is not known how many of
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1 them, if any, were able to have the loss covered by another form of insurance. As a result, class
2 members would have to come forward (through a claims process) to individually establish their
3 membership in the class and amount of benefit left unpaid. *See Sav-On Drug Stores, Inc. v.*
4 *Superior Court*, 34 Cal. 4th 319, 334 (2004) (recognizing the need in certain class case for each
5 class member to come forward and individually establish eligibility and damages); *Kamar v.*
6 *Radio Shack Corp.*, 254 F.R.D. 387, 399 (C.D. Cal. 2008) (citing *Sav-On*).

7
8 **C. California Law Prescribes A Lodestar/Multiplier Method Of Calculating A**
9 **Reasonable Fee**

10 In cases that involve fee-shifting, in which the responsibility to pay attorney's fees is
11 statutorily or otherwise transferred from the prevailing plaintiff to the defendant, the primary
12 method for establishing the amount of 'reasonable' attorney fees is the lodestar/multiplier method.
13 *In re Consumer Privacy Cases*, 175 Cal. App. 4th 545, 556-57 (2009); *see also Ketchum v. Moses*,
14 24 Cal. 4th 1122, 1137 (2001) (“[T]he lodestar adjustment method, including discretion to award
15 fee enhancements, is well established under California law.”). California's lodestar/multiplier
16 method is a two-step process of fee calculation under which the Court first determines a lodestar
17 value for the fees by multiplying the time reasonably spent by Plaintiff's counsel on the case by a
18 reasonable hourly rate. *In re Consumer Privacy Cases*, 175 Cal. App. 4th at 556-57. The Court
19 may then enhance or reduce the lodestar by applying a multiplier to take into account the
20 contingent nature and risk associated with the action, as well as other factors such as the degree of
21 skill required and the ultimate success achieved. *Id.*; *Ketchum*, 24 Cal. 4th at 1130, 1137 (holding
22 that Court of Appeal erred when it followed *City of Burlington v. Dague*, 505 U.S. 557 (1992) and
23 concluded that it lacked authority to enhance a prevailing party's lodestar). Plaintiff's counsel
24 here does not request a multiplier, so this brief will not discuss that aspect of the Lodestar method.
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1 **D. The Requested Fee Is Reasonable Under Governing Standards**

2 Class Counsel’s hourly rate of \$450 per hour is a competitive market hourly rate in the
3 local legal community for this sort of case – complex class action consumer litigation—for an
4 attorney with Mr. Marshall’s experience. Indeed, Class Counsel’s rate was previously approved in
5 2012 by the U.S. District Court for the Northern District of California in *In re: Chase Bank, USA,*
6 *N.A. “Check Loan” Contract Litigation*, Case No. 3:09-md-2032 MMC (JSC). Marshall Decl. ¶
7 11. Mr. Marshall also charges, and has charged, the same \$450 rate to clients in cases where is
8 retained on an hourly basis. *Id.*

9 Class Counsel devoted a total of 143.40 hours to this case as of February 11, 2015.
10 Marshall Decl. ¶ 8. The rate times hours results in a lodestar of \$64,395.00. *Ketchum*, 24 Cal. 4th
11 at 1130, 1137. Class Counsel exercised reasonable billing judgment and reduced this amount by
12 7.1 hours, or \$3,195.00 in lodestar, bringing the total lodestar down to \$61,200. Marshall Decl. ¶
13 8. During negotiation of the fee and costs, Class Counsel agreed to cap his fee request at \$57,520,
14 which is the request counsel now makes in this motion. *Id.* The hours spent on the case are
15 reasonable and reflect the ability and efficiency of Plaintiff’s counsel, as well as a reduction of
16 fees. *Id.* The amount of time spent by Class Counsel in this action was devoted to, among other
17 things: (1) initial investigation of the factual and legal basis for Plaintiff’s claims, (2) drafting and
18 filing complaints; (3) motion practice, (4) analyzing and further investigation into discovery
19 produced by VISA relating to the claims and settlement proposals, (5) communicating with class
20 member regarding their experience with the VISA CDW benefit, (6) research via independent
21 resources regarding VISA’s claims about class size and CDW utilization, (7) and extensive
22 settlement negotiations. Marshall Decl. ¶¶ 3-7. Class Counsel anticipates spending more time in
23 this matter even after final approval, should it be granted, to communicate with class members and
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1 answer any questions about the claims process. Marshall Decl. ¶ 8..

2 As stated by the Ninth Circuit, “[t]he Supreme Court has repeatedly emphasized that the
3 lodestar should be presumed reasonable unless some exceptional circumstance justifies deviation.”
4 *Quesada v. Thomason*, 850 F.2d 537, 539 (9th Cir. 1988) (citing *Pennsylvania v. Del. Valley*
5 *Citizens’ Council for Clean Air*, 483 U.S. 711, 728 (1987)). As shown above, the agreement to pay
6 class counsel \$57,520 in fees and costs for the work and result achieved for the class is fair and
7 eminently reasonable.

8
9 **E. The Fee-And-Expense Amount Was Agreed Upon By Sophisticated
Parties After Arm’s-Length Negotiations**

10 The United States Supreme Court has encouraged consensual resolution of attorney’s fees
11 as the ideal toward which litigants should strive. In *Hensley v. Eckerhart*, 461 U.S. 424 (1983), the
12 United States Supreme Court said, “[a] request for attorney’s fees should not result in a second
13 major litigation. Ideally, of course, litigants will settle the amount of a fee.” *Hensley*, 461 U.S. at
14 437 (market factors, best known by the negotiating parties themselves, should determine the
15 quantum of attorneys’ fees).¹ In representative cases, it is widely recognized that fee agreements
16 between plaintiffs and defendants are urged. *Johnson v. Ga. Highway Express, Inc.*, 488 F.2d 714,
17 720 (5th Cir. 1974) (“In cases of this kind, we encourage counsel on both sides to utilize their best
18 efforts to understandingly, sympathetically, and professionally arrive at a settlement as to
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22 ¹ The present action submitted California state law claims. While fee awards are subject to judicial
23 scrutiny, California courts also defer to the fees agreements between parties if the agreement is
24 otherwise valid. *Cazares v. Saenz*, 208 Cal. App. 3d 279, 287 (1989) (“where the bargaining
25 process is a fair one, courts traditionally defer to the parties’ agreement as the best measure of the
26 value of the contract performance”); *Melendres v. Los Angeles*, 45 Cal. App. 3d 267, 282-83
(1975); *Lealao v. Beneficial Lealao v. Beneficial Cal., Inc.*, 82 Cal. App. 4th 19, 47-48 (2000) (“In
the class action context, that would mean attempting to award the fee that informed private
bargaining, if it were truly possible, might have reached”).

1 attorney's fees.”). Of course, even where the parties have agreed as to the appropriate amount of
2 the fee, the Court must still review and approve the fee.

3 In the absence of any evidence of collusion, however, a negotiated fee that does not
4 diminish the amount of recovery by the class is entitled to substantial weight. *In re First Capital*
5 *Holdings Corp. Fin. Prods. Sec. Litig.* MDL No 901, 1992 U.S. Dist. LEXIS 14337, at *12-13
6 (C.D. Cal. June 10, 1992) (stating that Court should be reluctant to disturb award where class
7 counsel negotiated fee with sophisticated defense counsel, who were familiar with case, risks,
8 amount and value of class counsel's time, and nature of result obtained for class), appeal dismissed
9 for class member's lack of standing, 33 F.3d 29 (9th Cir. 1994), superseding *Wolford v. Gaekle (In*
10 *re First Capital Holdings Corp. Fin. Prods. Sec. Litig.)*, 19 F.3d 470 (9th Cir. 1994).

12 Consistent with the foregoing precedents, the parties negotiated the amount of fees and
13 expenses defendant VISA will pay to Class Counsel for the work that Class Counsel did on behalf
14 of the Class. The result is an amount reflecting a compromise reached through arm's-length
15 bargaining by informed parties. Moreover, it was only after the parties negotiated the other terms
16 and provisions of the Settlement that the parties addressed the issue of attorney's fees. Marshall
17 Decl. ¶ 7. Thus, the provisions regarding attorney's fees and expenses do not reduce the benefits to
18 the class in any way. *See DeHoyos v. Allstate Corp.*, 240 F.R.D. 269 (W.D. Tex. 2007), not to
19 mention that the monetary relief obtained for the Class is 100% of each class member's monetary
20 loss. Moreover, VISA's counsel have an interest in protecting their client who has a direct
21 financial interest in the amount of fees and expenses to be paid. Defendant is represented by
22 highly skilled lawyers, and does not need, nor has it sought, protection from the Court regarding
23 the amount of fees and expenses to be paid. Rather, as part of the settlement, VISA agreed to pay,
24 subject to Court approval, \$57,520 to Class Counsel for both attorney's fees and expenses.
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1 **F. Named Plaintiff Merits A Modest Service Award**

2 The named plaintiff in this case—Ron Davis—came forward to prosecute this litigation for
3 the benefit of the class as a whole. Plaintiff, through his counsel, sought successfully to remedy a
4 widespread wrong and conferred valuable benefits upon his fellow class members. Plaintiff Davis
5 provided a valuable service to the class by: (a) overseeing the prosecution of the litigation; (b)
6 consulting with counsel; and (c) offering advice and direction at critical junctures, including the
7 Settlement of the litigation. See Marshall Decl., ¶¶ 13, 14. Not only has Plaintiff Davis devoted
8 time and energy in working with counsel in prosecuting this matter, but he was the only class
9 member who sought to bring the issue to light and pursue a determination through Court that he
10 and others had been wronged. *Id.* In recognition of this service, Class Counsel and VISA’s counsel
11 negotiated that VISA pay Plaintiff Davis \$2,000 as a modest service award.

12
13 Courts have recognized that the allowance of service payments to plaintiffs in class actions
14 advances the goals of federal statutes, and have found it appropriate to reward named plaintiffs for
15 the benefit they conferred. *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958 (9th Cir. 2009)
16 (service awards “are fairly typical in class action cases.”); *Van Vranken v. Atl. Richfield Co.*, 901
17 F. Supp. 294, 299 (N.D. Cal. 1995) (approving service award of \$50,000 to class representative in
18 consumer class action); *Romero v. Producers Dairy Foods, Inc.*, No. 1:05cv0484 DLB, 2007 U.S.
19 Dist. LEXIS 86270 (E.D. Cal. Nov. 13, 2007) (approving aggregate service award of \$14,400 to
20 class representatives in wage and hour action).² Such awards are “intended to compensate class
21 representatives for work done on behalf of the class [and] make up for financial or reputational
22 _____

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25 ² Since this is a consumer action, not a securities action brought under the PSLRA, service awards
26 are not limited to “reasonable costs and expenses” under 15 U.S.C. § 78u-4(a)(4). *See In re ESS
27 Tech., Inc. SEC Litig.*, No. 02-04497, 2007 U.S. Dist. LEXIS 84756 (N.D. Cal. Oct. 30, 2007).

1 risk undertaken in bringing the action.” *Rodriguez*, 563 F.3d at 958; *Van Vranken*, 901 F. Supp. At
2 299. The service awards requested are well justified here.

3 In addition, as with the negotiated fee-and-expense fund, the service award that VISA
4 agreed to pay is separate from the fund payable to class members. It was not deducted from the
5 Class’s award, and if not awarded it will not revert to the Class. Furthermore, the parties
6 negotiated this payment only *after* all substantive relief to the Class was agreed to in its principal
7 form. Marshall Decl. ¶ 14. Given that the service award will not decrease the benefit conferred
8 upon the Class in the Settlement, and given the responsibilities undertaken by named Plaintiff
9 Davis in bringing this action, Class Counsel respectfully requests that the service award be
10 granted.
11

12 **V. CONCLUSION**

13 Class Counsel was able to obtain a Settlement that represents an excellent result for the
14 Class. This Settlement is the culmination of the determined and skilled work of Class Counsel. For
15 those efforts, Class Counsel requests the Court award him fees and expenses in the amount of
16 \$57,520. In addition, it is requested that the Court award \$2,000 to named Plaintiff Ron Davis for
17 the services he provided for the benefit of the class.
18

19 DATED: February 11, 2015

20 **MARSHALL LAW FIRM**

21 By: /s/ Charles D. Marshall .

22 Charles D. Marshall
23 **MARSHALL LAW FIRM**
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28 Attorney for Plaintiff and the Class

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the email addresses denoted in the Electronic Mail Notice List.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: February 11, 2015

MARSHALL LAW FIRM

By: /s/ Charles D. Marshall .
Charles D. Marshall

Attorney for Plaintiff RON DAVIS and the CLASS