



AlaFile E-Notice

69-CV-2022-900008.00

Judge: HON. BURT SMITHART

To: R BRENT IRBY
brent@irbylaw.net

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA

LAKESHA CLIATT V. HIBBETT RETAIL, INC. ET AL
69-CV-2022-900008.00

The following matter was FILED on 12/12/2022 5:05:01 PM

C001 CLIATT LAKESHA

MOTION FOR AWARD OF ATTORNEYS' FEES AND EXPENSES RELATED TO CLASS SETTLEMENT

[Filer: IRBY ROBERT BRENT]

Notice Date: 12/12/2022 5:05:01 PM

PAIGE SMITH
CIRCUIT COURT CLERK
BARBOUR COUNTY, ALABAMA
405 EAST BARBOUR STREET
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STATE OF ALABAMA

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Unified Judicial System

69-BARBOUR

 District Court
 Circuit Court

CV21

CIVIL MOTION COVER SHEET

LAKESHA CLIATT V. HIBBETT RETAIL, INC. ET AL

Name of Filing Party: C001 - CLIATT LAKESHA

Name, Address, and Telephone No. of Attorney or Party. If Not Represented.

R BRENT IRBY
2201 Arlington Avenue South
Birmingham, AL 35216
Attorney Bar No.: IRB006

 Oral Arguments Requested
TYPE OF MOTION**Motions Requiring Fee**

- Default Judgment (\$50.00)
Joinder in Other Party's Dispositive Motion
(i.e. Summary Judgment, Judgment on the Pleadings,
or other Dispositive Motion not pursuant to Rule 12(b))
(\$50.00)
- Judgment on the Pleadings (\$50.00)
- Motion to Dismiss, or in the Alternative
Summary Judgment (\$50.00)
- Renewed Dispositive Motion (Summary
Judgment, Judgment on the Pleadings, or other
Dispositive Motion not pursuant to Rule 12(b)) (\$50.00)
- Summary Judgment pursuant to Rule 56 (\$50.00)
- Motion to Intervene (\$297.00)
- Other _____
pursuant to Rule _____ (\$50.00)

*Motion fees are enumerated in §12-19-71(a). Fees
pursuant to Local Act are not included. Please contact the
Clerk of the Court regarding applicable local fees.

Local Court Costs \$ 0 _____

Motions Not Requiring Fee

- Add Party
- Amend
- Change of Venue/Transfer
- Compel
- Consolidation
- Continue
- Deposition
- Designate a Mediator
- Judgment as a Matter of Law (during Trial)
- Disburse Funds
- Extension of Time
- In Limine
- Joinder
- More Definite Statement
- Motion to Dismiss pursuant to Rule 12(b)
- New Trial
- Objection of Exemptions Claimed
- Pendente Lite
- Plaintiff's Motion to Dismiss
- Preliminary Injunction
- Protective Order
- Quash
- Release from Stay of Execution
- Sanctions
- Sever
- Special Practice in Alabama
- Stay
- Strike
- Supplement to Pending Motion
- Vacate or Modify
- Withdraw
- Other Motion for Award of Attorneys' Fees and
Expenses Related to Class Settlement
pursuant to Rule NA _____ (Subject to Filing Fee)

Check here if you have filed or are filing contemporaneously
with this motion an Affidavit of Substantial Hardship or if you
are filing on behalf of an agency or department of the State,
county, or municipal government. (Pursuant to §6-5-1 Code
of Alabama (1975), governmental entities are exempt from
prepayment of filing fees)

Date:
12/12/2022 4:58:13 PM

Signature of Attorney or Party
/s/ R BRENT IRBY

**Motions titled 'Motion to Dismiss' that are not pursuant to Rule 12(b) and are in fact Motions for Summary Judgments are subject to filing fee.



IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA

LAKESHA CLIATT and MARKETHA)	
HILL, individually and on behalf of all)	
others similarly situated,)	CASE NO.: CV-2022-90008
)	
Plaintiffs,)	
)	
v.)	
)	
HIBBETT RETAIL, INC. and CITY)	
GEAR, LLC,)	
)	
Defendants.)	

MOTION FOR AWARD OF ATTORNEYS’ FEES AND EXPENSES RELATED TO CLASS SETTLEMENT

Class Counsel petitions this Honorable Court to determine and award a reasonable attorneys’ fee of \$1,722,241 and reimbursement of litigation expenses of \$202,759. As grounds therefore and as outlined in more detail in the accompanying Memorandum Brief, Class Counsel respectfully states as follows:

1. The Nature of the Employment and the Issues Presented.

Class litigation was initially commenced by Lakesha Cliatt against Defendants Hibbett Retail, Inc. and City Gear, LLC on February 25, 2022, seeking damages in connection with the alleged improper printing of credit card information on receipts in violation of the Fair and Accurate Credit Transactions Act (“FACTA”) amendment to the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.*, as amended (the “FCRA”). The complaint was amended on April 22, 2022 to add Marketha Hill as a Class Representative. Plaintiffs’ claims are set forth in more detail in the amended complaint filed in this action. Class Counsel recognized at the outset that this case would involve complex and time-consuming litigation involving extensive investigation, discovery and review of substantial records and files. Throughout the course of this litigation, Plaintiffs’ claims have been vigorously pursued by Class Counsel and vigorously resisted and

contested by Defendants and their able counsel. Eventually, the parties successfully reached a settlement only after mediating this matter on four separate occasions spanning approximately six months.

2. The Measure of Success Achieved and the Value of the Employment.

The settlement recovery represents a monetary recovery to the Class of \$6,000,000 as well as additional value in the form of enhanced security protocols and oversight designed to prevent a similar situation from occurring in the future. (Affidavit of R. Brent Irby “Irby Aff.”, ¶¶ 13-14; attached hereto as Exhibit 1). Court approved notice of the settlement setting forth the nature of the attorneys’ fees and expense request by Class Counsel was sent to the members of the Settlement Class beginning on November 14, 2022. (*Id.* at ¶ 12). The Settlement avoids the uncertainty of continued protracted litigation and the possibility of future appeals which could postpone any recovery and extend this litigation over a period of years.

3. The Weight of the Responsibility Assumed as a Result of the Employment.

The weight of the responsibility assumed by Class Counsel is significant. Irby Law, LLC, along with its co-counsel, have been primarily responsible for litigating this matter. Since litigation was initially commenced, our activities have included review and analysis of data and documents produced in this litigation, preparation and filing of pleadings, including amending the Complaint; discussions and meetings with Plaintiffs; numerous meetings and discussions with co-counsel to plan strategy; extensive negotiations and mediation sessions surrounding the settlement and preparation, review and edification of settlement documentation.

Irby Law, LLC and its co-counsel are small law firms. A significant portion of our practices over the last year have been devoted to this litigation, which in turn has resulted in our firms being unable to devote resources and efforts to other matters during this time. Further, we

handled this case on a contingency basis and placed at risk a substantial amount of attorney time, resources and expenses if a successful recovery had not been achieved.

Class Counsel's fee request is also well below the acceptable percentage of fees that could be awarded in a class action settlement in Alabama. Therefore, an attorneys' fee award of \$1,722,241 constitutes a fair and reasonable attorneys' fee, particularly in view of the time expended and results achieved. Finally, absent the efforts of Class Counsel in this matter, it is unlikely that there would have ever been any recovery achieved on behalf of the Class Members for the claims brought in this litigation. It would not have been economically feasible or possible for numerous Class Members to individually assert and litigate these claims.

4. Fee Customarily Charged in the Locality for Similar Legal Services.

In Alabama and in the Eleventh Circuit,¹ "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." *Camden I Condo. Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991); *see also Edelman & Combs v. Law*, 663 So.2d 957, 959 (Ala. 1995) ("in a class action where the plaintiff class prevails and the lawyer's efforts result in a recovery of a fund, by way of settlement or trial, a reasonable attorney fee should be determined as a percentage of the amount agreed upon in settlement or recovered at trial."). The Settlement Fund in this case is \$6,000,000 and was obtained through the efforts of Class Counsel in this litigation. *See* (Irby Aff. at ¶ 13).

¹ Because Ala. R. Civ. P. 23 is substantially similar to Fed. R. Civ. P. 23, "Federal cases construing the Federal Rules of Civil Procedure are persuasive authority in construing the Alabama Rules of Civil Procedure, which were patterned after the Federal Rules of Civil Procedure." *Ex parte Novartis Pharms. Corp.*, 975 So.2d 297, 300 n. 2 (Ala. 2007).

5. The Learning, Professional Experience and Reputation of the Attorneys and the Skill and Labor Requisite to the Proper Discharge of the Employment Undertaken.

Class Counsel respectfully leaves to this Honorable Court the determination as to the learning, experience and skill employed by Class Counsel in discharging their duties to the Class in connection with this case. Class Counsel routinely handles complex litigation, including numerous class actions in federal and state courts throughout the United States, and has been appointed to serve as Class Counsel in numerous nationwide and statewide class actions representing plaintiff classes in consumer, commercial and/or insurance sales practices cases and other complex commercial litigation in state and federal courts throughout the United States. (Irby Aff. at ¶ 4).

6. Time Consumed, Reasonable Expenses and Fee Arrangement with the Clients.

The fee arrangement of Class Counsel was solely and exclusively contingent upon the outcome of this case. Because this case proceeded as a class action, any fee must first be determined and awarded by this Honorable Court. The litigation has been prosecuted for over one (1) year during which time Class Counsel has received no compensation. Class Counsel assumed all of the risks associated with a full contingent fee arrangement and would not be entitled to any fees if the litigation resulted in no recovery or a final judgment in favor of the Defendants. Additionally, Class Counsel expended more than a thousand hours litigating this case and have incurred or will incur \$202,759 in expenses related to this litigation. (Irby Aff. at ¶¶ 15, 17). Reimbursement of these expenses was also contingent on a successful recovery in this case.

7. The Nature and Length of a Professional Relationship, the Likelihood that a Particular Employment May Preclude Other Employment, and the Time Limitations Imposed by the Client or by the Circumstances.

This case has required the devotion of substantial time and money by Class Counsel. The time and expense devoted to this case by Class Counsel necessarily precluded employment and attention to other matters and has, from time to time, required Class Counsel to turn down offers of other employment.

8. Conclusion.

In conclusion, Class Counsel respectfully request that this Honorable Court award an attorneys' fee of \$1,722,241. Class Counsel respectfully submits that this is an appropriate and reasonable fee award commensurate with the guidelines established by the Alabama Supreme Court. Class Counsel also requests reimbursement of \$202,759 in expenses incurred during the course of the litigation.

Dated: December 12, 2022

Respectfully submitted,

/s/ Brent Irby

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was filed on December 12, 2022 using the Alafile system which will electronically deliver a copy of this pleading upon all counsel of record in this matter:

Thomas J. Butler
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
Birmingham, AL 35203

/s/ Brent Irby

_____ **OF COUNSEL**



IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA

LAKESHA CLIATT and MARKETHA HILL, individually and on behalf of all others similarly situated,)	
)	
Plaintiffs,)	CASE NO.: CV-2022-90008
)	
v.)	
)	
HIBBETT RETAIL, INC. and CITY GEAR, LLC,)	
)	
Defendants.)	

MEMORANDUM BRIEF IN SUPPORT OF MOTION FOR AWARD OF ATTORNEYS’ FEES AND EXPENSES RELATED TO CLASS SETTLEMENT

COMES NOW Class Counsel and respectfully submits the following Memorandum Brief in support of the Motion for Award of Attorneys’ Fees and Expenses Related to Class Settlement.

INTRODUCTION

After one year of contentious and hotly contested litigation, Plaintiffs and Class Counsel were able to produce a fair and reasonable settlement for the benefit of the Settlement Class. This settlement provides a substantial monetary benefit to class members and constitutes a successful resolution to a complex and difficult case. As demonstrated herein, Class Counsel’s request for an award of attorneys’ fees and expenses is fair and reasonable in light of the benefit created by the settlement.

ARGUMENT

I. THE REQUESTED AWARD OF FEES AND EXPENSES IS REASONABLE AND WARRANTED

Through skillful and focused litigation, Class Counsel achieved a settlement that provides \$6,000,000 in monetary relief to the Settlement Class. (Affidavit of R. Brent Irby, “Irby Aff.”; attached as Exhibit “1” to Motion for Award of Attorneys’ Fees and Expenses). Class Counsel

respectfully petitions this Honorable Court to determine and award a reasonable attorneys' fee of \$1,722,241 and award expenses of \$202,759. Importantly, the fee negotiations between Class Counsel and Defendants were conducted at arm's-length, during a mediation session conducted by Lee Copeland and **only after** all material terms of the Settlement had been agreed upon. *See* (Irby Aff. at ¶¶ 3, 11). In addition to compensating Class Counsel for work performed up until this date, the requested attorneys' fee also includes compensation for all future services to be performed by Class Counsel. Based upon first-hand experience, these services will require a continuing commitment of time, effort and resources.

As shown in greater detail below, Class Counsel's request is entirely reasonable and should be approved by the Court as part of the overall Settlement of the Class claims because:

- the Settlement provides valuable monetary benefits to the Class;
- Class Counsel expended over one thousand hours prosecuting this litigation;
- substantial work remains to be done in the monitoring and implementation of the Settlement, for which Class Counsel will receive no further compensation;
- Class Counsel undertook the litigation of this matter on a completely contingent basis, advancing all expenses and accepting all risk that they could work for years and receive no compensation or reimbursement whatsoever; and
- Class Counsel's fee request here is based upon a percentage of the common fund created by the settlement and is well within the range adopted by the Alabama Supreme Court.

It was only through the efforts of Class Counsel and Plaintiffs – taken at their own risk – that \$6,000,000 in benefits were obtained for the Class. *Cf. In re Rio Hair Naturalizer Prods. Liab. Litig.*, No. MDL 1055, 1996 WL 780512, at *17 (E.D. Mich. Dec. 20, 1996) (“Absent Petitioners’ efforts, there would be no fund[s] whatsoever for distribution to class members.”).

A. Courts Have Regularly Approved Negotiated Fee Arrangements As Part Of Class Action Settlements.

Fee agreements between plaintiffs and defendants in class actions of this nature are encouraged where, as here, the fees are negotiated separately from and after all material terms of the settlement on behalf of the class have been agreed to by the parties. “In cases of this kind, we encourage counsel on both sides to utilize their best efforts to understandingly, sympathetically, and professionally arrive at a settlement as to attorney’s fees.” *Johnson v. Georgia Highway Exp., Inc.*, 488 F.2d 714, 720 (5th Cir. 1974); *rev’d on other grounds*; *see also Williams v. MGM-Pathé Communications Co.*, 129 F. 3d 1026, 1027 (9th Cir. 1997) (“parties to a class action properly may negotiate not only the settlement of the action itself, but also the payment of attorneys’ fees”). The fee agreement here was negotiated only *after* all of the substantive provisions of the Settlement were determined. *See* (Irby Aff. at ¶¶ 3, 11).

In *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983), for example, the United States Supreme Court held that negotiated, agreed-upon attorneys’ fee provisions, such as the one here, are the “ideal” toward which the parties should strive: “A request for attorney’s fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount for a fee.” *Accord In re Continental Illinois Sec. Litig.*, 962 F.2d 566, 568-70 (7th Cir. 1992) (market factors, best known by the negotiating parties themselves, should determine the quantum of attorneys’ fee); *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 829 (D. Mass. 1987) (“The authorities encourage parties situated as those herein to agree as to the amount of the counsel fees to be paid. Whether a defendant is required by statute or agrees as part of the settlement of a class action to pay the plaintiffs’ attorneys’ fees, ideally the parties will settle the amount of the fee between themselves.”).

The parties followed the recommended procedure here: Class Counsel and Defendants’

Counsel separated the issues of settlement and fees, negotiating all substantive terms of the Settlement first and deferring discussion of attorneys' fees and expenses until after all substantive terms were in place. *See* (Irby Aff. at ¶¶ 3, 11). The fee was negotiated under market conditions: Class Counsel wished to maximize their fees to compensate, as courts encourage, for their risk, contingency, innovation and creativity; Defendants' Counsel had a direct interest in negotiating the lowest amount their clients would be willing to pay. The result is an arm's-length, negotiated, reasonable fee that was set by market forces. Because the fee was negotiated after all of the other material aspects of the Settlement were resolved and because the fee does not directly or indirectly reduce the monetary benefits available to the Class Members, there is no concern that the Class Members were prejudiced.

B. Class Counsel Are Entitled To Be Compensated For Creating A Common Benefit For the Class

Attorneys who create a common fund or benefit for a group of persons are entitled to have their fees and costs based on the common benefit achieved. *Edelman & Combs v. Law*, 663 So.2d 957, 959 (Ala. 1995) (“in a class action where the plaintiff class prevails and the lawyer’s efforts result in a recovery of a fund, by way of settlement or trial, a reasonable attorney fee should be determined as a percentage of the amount agreed upon in settlement or recovered at trial.”); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[A] lawyer who recovers a common fund for the benefit of persons other than . . . his client is entitled to a reasonable attorneys’ fee from the fund as a whole. . .”). Until Plaintiffs initiated this action, Defendants did not intend to compensate Class Members for the FACTA violations alleged by Plaintiffs in their amended complaint. It was only through the efforts of Plaintiffs and their attorneys that \$6,000,000 in monetary benefits were obtained for the Class.

1. Under The Common Benefit Doctrine, The Preferred Method of Calculating Attorneys' Fees Is As A Percentage Of the Overall Class Benefit

The preferred approach to calculating the amount of attorneys' fees in common benefit cases is to award a percentage of the class benefit. *Camden I Condominium Ass'n v. Dunkle*, 946 F.2d 768, 774 (11th Cir. 1991). Compensating counsel in common benefit and common fund cases on a percentage basis makes eminently good sense. First, it is consistent with the practice in the private marketplace where contingent fee attorneys are customarily compensated on a percentage-of-the-recovery method. *In re Public Service Co. of New Mexico*, 1992 WL 278452, *7 (S.D. Cal. July 28, 1992) ("If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30% to 40% of the recovery").

Second, it provides plaintiffs' counsel with a strong incentive to effectuate the maximum possible recovery in the shortest amount of time necessary under the circumstances, which is precisely what occurred here. *Duhaime v. John Hancock Mut. Life Ins. Co.*, 989 F. Supp. 375, 377 (D. Mass. 1997) (the advantage of the percentage method is that it focuses on result, rather than process, which better approximates the workings of the marketplace). Third, use of the percentage method decreases the burden imposed upon the Court by the "lodestar" method and assures that Class Members do not experience undue delay in receiving their share of the settlement. *See In re Activision Sec. Litig.*, 723 F. Supp. 1373 (N.D. Cal. 1989).

2. A Twenty-Eight Percent (28%) Fee Award is Clearly Reasonable And Warranted.

Here, Class Counsel's request for fees and reimbursement of expenses is twenty-eight percent (28%) of the total settlement valued at \$6,000,000. This fee request is well within the range of those historically awarded in class actions and within the guidelines adopted by the Alabama Supreme Court. *See Edelman & Combs*, 663 So.2d at 960 (Ala. 1995) (finding that

attorneys' fee awards ranging from 20% to 50% of a common fund may be reasonable). Courts have traditionally looked at several factors in considering a fee and expense award. These factors include: (1) the results obtained; (2) the economics involved in the prosecution of the case; (3) the professional skill and standing of counsel; (4) the customary fee in similar cases; (5) the time and labor involved and (6) the reaction of the class. In *Hensley*, the United States Supreme Court held that the "most critical factor is the degree of success obtained." 461 U.S. at 436. Considering the substantial benefit that the class will receive, the degree of success is remarkable and is well within the customary norms in class action settlements. Accordingly, this factor warrants the fee and expense award requested by Class Counsel.

Second, Class Counsel undertook this litigation on a purely contingent basis, thereby bearing the full risk of non-recovery. *Cf. In re Rio Hair*, 1996 WL 780512, at * 18 (recognizing risk entailed in a major investment of attorney time and financial resources over a period of nearly two years). Lost time and effort was not the only risk; Class Counsel advanced significant litigation expenses. Third, Class Counsel consists of experienced class action counsel. The Settlement is the fruit of Class Counsel's experience, reputation and ability in these types of cases. Additionally, Defendants were represented by experienced and highly skilled Counsel who vigorously defended this action on every front. Obviously, Defense Counsel presented formidable opposition, and Plaintiffs rightly anticipated a superior caliber of legal work performed by Defense Counsel. Additionally, the magnitude and complexity of the class action litigation cannot be overstated.

3. Class Counsel's Fee Request is Reasonable and Properly Supported

Class Counsel's request for fees and reimbursement of expenses is fair and reasonable. In considering an attorneys' fee request, the Eleventh Circuit held that district courts should evaluate

the twelve “*Johnson* factors”. *Johnson v. Georgia Highway Expr., Inc.*, 488 F.2d 714 (5th Cir.1974). These twelve factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the “undesirability of the case”; (11) the nature and the length of the professional relationship with the client, and (12) awards in similar cases. *Johnson*, 946 F.2d at 772, n. 3. In addition to the *Johnson* factors, the Eleventh Circuit held that “other pertinent factors are the time required to reach a settlement, whether there are any substantial objections by class members or other parties to the settlement terms or the fees required by counsel, any non-monetary benefits conferred upon the class by the settlement, and the economics involved in prosecuting a class action.” *Id.* at 775.

First, Class Counsel expended over one thousand hours litigating this case. This action was filed ten months ago and was litigated continuously during that time. Plaintiffs reviewed information and documents provided by Defendants and the case was hotly contested. Class Counsel respectfully submits that these efforts satisfy the first *Johnson* factor.

Second, this action was a complex, class action that involved numerous difficult questions and issues related to alleged FACTA violations and specific defenses raised by Defendants. Moreover, it is clear that Defendants hired experienced and capable counsel who thoroughly litigated this matter leaving “no stone unturned.” This second *Johnson* factor is also satisfied.

Class Counsel respectfully submits that the third and fourth *Johnson* factors are met. Prosecution of class actions requires a particular skill and experience level that is not required in

some other types of cases. Class Counsel has significant experience prosecuting these types of cases and respectfully submits that their experience and skill produced the results obtained in this case. Furthermore, Class Counsel had to forego other less risky employment opportunities to pursue this litigation to conclusion.

The fifth, sixth and twelfth *Johnson* factors focus on customary fees awarded in similar cases or circumstances. Typical, “non-class” cases are handled on a contingency fee basis. Class Counsel undertook this litigation on a purely contingent basis, thereby bearing the full risk of non-recovery. *Cf. In re Rio Hair*, 1996 WL 780512, at * 18 (recognizing risk entailed in a major investment of attorney time and financial resources over a period of nearly two years). Lost time and effort was not the only risk; Class Counsel also advanced \$202,759 in litigation expenses. Class Counsel’s fee request is within the range of customary fee awards in complex class actions.

The seventh *Johnson* factor examines the time limitations of the particular litigation. The time limitations and deadlines imposed in this case were similar to time constraints in other complex, class action cases. The eighth factor examines the results obtained by Class Counsel. Class Counsel respectfully submits that this factor supports approval of the requested attorneys’ fee. Class Counsel’s efforts in this case were successful and resulted in the creation of \$6,000,000 in monetary and other valuable benefits for class members.

Class Counsel will leave a finding of the next *Johnson* factor regarding their experience, reputation and expertise to the Court. The tenth and eleventh *Johnson* factors are largely inapplicable to this case. While this litigation was complex and difficult, there is no evidence that it was particularly undesirable. Also, this is the first time that Class Counsel has represented Plaintiffs and this representation has lasted approximately one year. Finally, the magnitude and complexity of this class action undertaken by Class Counsel cannot be overstated. At this time, it

is not possible to judge the reaction of the Class to the Settlement because the objection deadline has not expired. After the expiration of the objection deadline and prior to the Fairness Hearing, Class Counsel intends to file a Memorandum Brief in Support of Final Approval which will address the reaction of the Class to the Settlement.

WHEREFORE, PREMISES CONSIDERED, Class Counsel respectfully requests that the Court grant the Motion for Award of Attorneys' Fees and Expenses Related to Class Settlement.

Dated: December 12, 2022

Respectfully submitted,

/s/ Brent Irby

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Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing pleading was filed on December 12, 2022 using the Alafire system which will electronically deliver a copy of this pleading upon all counsel of record in this matter:

Thomas J. Butler
Maynard, Cooper & Gale, P.C.
1901 Sixth Avenue North
Birmingham, AL 35203

/s/ Brent Irby _____

OF COUNSEL



IN THE CIRCUIT COURT OF BARBOUR COUNTY, ALABAMA

LAKESHA CLIATT and MARKETHA HILL, individually and on behalf of all others similarly situated,)	
)	
Plaintiffs,)	CASE NO.: CV-2022-90008
)	
v.)	
)	
HIBBETT RETAIL, INC. and CITY GEAR, LLC,)	
)	
Defendants.)	

DECLARATION OF R. BRENT IRBY

I, R. Brent Irby, am over the age of twenty-one, am competent to testify and have personal knowledge of the information contained herein, declare as follows:

1. I am the principal and founding member of the law firm Irby Law, LLC, counsel of record for Plaintiffs in this matter. I am a member in good standing of the bars of the States of Alabama, Georgia, and Tennessee. Along with my co-counsel, I serve as counsel for Plaintiffs Lakesha Cliatt and Marketha Hill. This affidavit is submitted in support of Plaintiffs’ motion for an award of attorneys’ fees and expenses requested for work performed by the team of lawyers representing Plaintiffs in connection with this litigation. I have personal knowledge of the facts below and, if called upon to do so, could and would testify competently thereto.

2. This firm is Class Counsel for Plaintiffs. Class Counsel undertook the representation of Plaintiffs on a purely contingent basis and this litigation was hard-fought and adversarial.

3. Negotiations on attorneys’ fees and expenses between Class Counsel and Defendants were conducted at arm’s-length and were presided over by Lee Copeland, and only

after all material terms of the Settlement had been agreed upon by the parties.

I. Qualifications of Class Counsel

4. My firm handles a large amount of complex litigation, including numerous class actions in federal and state courts throughout the United States. I have been appointed lead counsel or co-lead counsel in several class actions and in many nationwide class actions. Cases in which I have served as Class Counsel and in which I played a lead role include:

Mike Allen, et al. v. Dolgencorp, LLC and Dollar General Corp., Case No. SUCV2020000385; Superior Court of White County, State of Georgia.

Warren Burch and James Bodley v. Whirlpool Corporation, Case No.: 1:17-CV-18-PLM; United States District Court, Western District of Michigan (Southern Division);

Wendy and Nicholas Grasso v. Electrolux Home Products, Inc., Case No.: 8:16-cv-00911-CEH-TGW; United States District Court, Middle District of Florida (Tampa Division);

Robert Brown v. Electrolux Home Products, Inc. d/b/a Frigidaire, Case No.: 1:08-cv-00030-LGW-BKE; United States District Court, Southern District of Georgia (Augusta Division);

Timmy L. Murphy v. Walgreen Co., d/b/a Walgreens, Case No.: 2015-CV-63251; In the Superior Court of Bibb County, State of Georgia;

Golden Eaton, Jr., et al. v. Vaughan Regional Medical Center, LLC, et al., Case No.: 27-CV-2014-900317.00; In the Circuit Court of Dallas County, Alabama;

Scott A. Chambers, et al. v. Merrill Lynch & Co., Inc., et al.; Case No.: 10-cv-07109-NRB; United States District Court, Southern District of New York;

O'Shaughnessey Wallace v. Greene Finance Company, Inc., et al.; Case No.: 2007-cv-052; In the Superior Court of Quitman County, State of Georgia;

Amber Osborne v. Rite Aid Corporation, Case No.: 2011-cv-0685-MM; In the Superior Court of White County, State of Georgia;

Washer & Refrigeration Supply Co., Inc., et al. v. PRA Government Services, LLC d/b/a "Revenue Discovery Systems" and/or "RDS" and/or "Alatax," et al.; Case No.: CV-2010-903417.00; In the Circuit Court of Jefferson County, Alabama (Birmingham Division);

Joretta Rhodes Smith, individually and on behalf of a class of Alabama citizens in Alabama Similarly situated v. CVS Pharmacy, Inc.; CVS/Caremark Corporation; Case No.: CV-2008-900054; Circuit Court of Bullock County, Alabama;

Eufaula Family Medicine, P.C. v. Stericycle, Inc.; Case No. CV-2008-900066; Circuit Court of Barbour County, Alabama (Eufaula Division);

Jimmy S. Calton, Sr. and Jim S. Calton, Jr., d/b/a Calton & Calton v. Shred-It USA, Inc.; Case No. CV-2008-900006; Circuit Court of Barbour County, Alabama (Eufaula Division);

Earl R. Cates, et al. v. Cooper Tire and Rubber Company, Case No. 3:06-cv-940; United States District Court for the Northern District of Ohio (Western Division).

Margaret Franklin v. Acceptance Insurance Agency, Inc., et al.; Civil Action No. CV-06-000065; Circuit Court of Bullock County, Alabama;

Annette Rush v. Village Auto Insurance Company, Inc.; 2005-CV-107983; In the Superior Court of Fulton County State of Georgia;

Shelly Jones and Dennis Hill v. Southland National Insurance Corporation; Civil Action No. CV-05-0200; Circuit Court of Barbour County, Alabama (Eufaula Division);

In Re Textile Rental Services Litigation; Civil Action No. CV-05-019; Circuit Court of Barbour County, Alabama (Clayton Division);

Fred Phillips, et al. v. Columbiana Bancshares, Inc., et al.; Civil Action No. CV-03-1405; Circuit Court of Shelby County, Alabama;

Ann Harbin, individually and d/b/a Harbin Research Services, et al. v. Pitney Bowes, Inc.; Pitney Bowes Credit Corporation; Case No. 2002-769; Circuit Court of Montgomery County, Alabama;

In Re Allstate Insurance Company Underwriting and Rating Practices Litigation; MDL Docket No. 3:02-md-1457 – All Cases;

United States District Court Middle District of Tennessee (Nashville Division).

5. I am a member of a team of lawyers that initiated this class action case on behalf of the Class Representatives. Along with myself, Wm. Eric Colley and Christy D. Crow serve as my co-counsel and have been involved in the litigation and settlement of these claims on behalf of the Settlement Class Members.

6. Class Counsel are not aware of any conflicts of interest that exist between them and any members of the Settlement Class and are not aware of any conflicts of interest that exist between the Class Representatives and any members of the Settlement Class.

II. Preliminary Investigation and Filing of the Lawsuit

7. Prior to filing this action, counsel for Plaintiffs thoroughly investigated the facts and claims at issue, including: research and due diligence into other potentially affected consumers; due diligence and analysis into potential fraudulent activity, identity theft, and fraudulent charges on Plaintiffs' card accounts; research on Defendant Hibbett Retail, Inc. and its related corporate entities; research on other similar FACTA litigation, as well as the FACTA statute itself, amendments thereto, and case law involving FACTA claims; research and analysis on issues surrounding potential recovery and damages for the claims asserted; and research and analysis on issues surrounding standing that have been addressed in recent consumer litigation. In addition, counsel conducted extensive legal research regarding available state law claims, remedies, and class certification.

8. Following their pre-filing due diligence, counsel for Plaintiffs drafted a Class Action Complaint and Plaintiff Lakesha Cliatt filed this action on January 25, 2022. A First Amended Complaint was filed on April 22, 2022, which added Marketha Hill as an additional Class Representative.

III. Negotiation of the Settlement

9. In the spring of 2022, the parties began discussing the possibility of exploring settlement. These discussions were prompted by the parties' desire to avoid the expense, uncertainties, and burden of protracted litigation. To further facilitate settlement negotiations and to structure appropriate relief, Defendants shared with Plaintiffs' counsel relevant information relating to the size and scope of the class as well as Defendants' defenses to Plaintiffs' claims. Information and informal discovery was provided by Defendants before, during, and after the settlement was reached. Relevant information pertaining to the alleged FACTA violations and related class issues was provided throughout the settlement process and mediation sessions, including: information surrounding the nature, extent, and scope of the alleged violations; information pertaining to the time period during which the alleged violations occurred; information surrounding the issue of willfulness of the alleged FACTA violations, including Defendants' awareness, knowledge, due diligence, and remedial efforts surrounding the alleged FACTA issues; information surrounding Defendants' internal investigation of the alleged FACTA violations and pertinent issues; information on customer data that Defendants have and maintain regarding affected transactions or consumers; and information on the number of transactions at issue and the number of individual consumers within the appropriate class period.

10. After careful consideration, the parties chose former Alabama State Bar President Lee Copeland of Copeland, Franco, Screws & Gill as the mediator in this matter. The parties conducted no less than four (4) in-person mediation sessions with Lee Copeland, with sessions on April 25, May 16, June 14, and June 29, 2022. Each of these in-person mediations were full-day sessions that were intense and extremely hard fought, with each aspect of the settlement being vigorously negotiated. In addition to these in-person mediation sessions, the parties also conducted

dozens of telephone conferences with Lee Copeland in furtherance of their efforts to mediate and resolve this matter. Lee Copeland continued to assist and provide ongoing oversight in all aspects of the settlement negotiations. During these negotiations, Defendants continued to provide Plaintiffs' counsel with information pertaining to the scope, number, and remedial efforts surrounding the alleged FACTA violations. Virtually every term of the Settlement was hotly contested. Ultimately, the parties confronted these issues and reached agreement when it appeared on several occasions that a settlement could not be reached. The Class Representatives were consulted by Class Counsel and agreed that the settlement was fair and reasonable.

11. After the parties ultimately reached an agreement in principle on all material terms of substantive relief for the settlement class, they began negotiating, with the input, assistance, and oversight of Lee Copeland, the amount of attorneys' fees and costs that Defendant would pay to Class Counsel (subject to Court approval) and the amount of service awards Defendants would pay to the Class Representatives (also subject to Court approval). At all times, the issue of attorneys' fees, costs, and class representative service awards was negotiated separately from the settlement relief to class members. Like the other negotiations, these negotiations were conducted at arm's length and with the assistance and oversight of Mr. Copeland.

12. Following negotiations, the parties ultimately reached an agreement in principle on all issues related to the settlement, and executed a written term sheet memorializing those terms on or about August 29, 2022. For approximately two months, the parties negotiated the terms of the written settlement agreement. Ultimately, the Settlement Agreement (the "Agreement") was drafted, finalized and executed by the Parties on October 28, 2022. In accordance with this Court's Order granting preliminary approval of the settlement, notice was emailed or mailed to the member of the Settlement Class beginning on November 14, 2022. Class Counsel also worked with the

Notice Administrator to develop and implement a plan to reach class members through publication notice.

Following the execution of the term sheet, the parties began drafting, exchanging, and editing the detailed Settlement Agreement, including its accompanying exhibits, notices, and claim form. On October 28, 2022, the parties executed the final version of the Settlement Agreement and its accompanying exhibits. The Settlement Agreement resulted from hard fought and adversarial negotiations over a five-month period with the assistance, input, and oversight of Lee Copeland. The time and effort spent by all parties to this litigation - - - under the auspices of Mr. Copeland - - - demonstrate the rigor, intensity, and thoroughness of the mediation efforts, as well as the parties' commitment to working constructively toward a resolution. The proposed settlement addresses the reasonable objectives of the litigation. The exchange of information throughout the settlement process allowed the parties to sufficiently understand the relative strengths and weaknesses of their positions when fashioning the proposed settlement.

IV. The Relief Afforded to the Class by the Litigation and Settlement

13. The Settlement provides that Defendants shall create a Settlement Fund totaling \$6,000,000.00. Payments to the Settlement Class, as well as any award for attorneys' fees, reimbursement of litigation expenses or class representative incentive awards, will be paid from this Settlement Fund. In order to receive a settlement payment, members of the Settlement Class only need to complete a simple claim form. Members of the Settlement Class are eligible to receive up to twenty dollars (\$20.00) in cash or Hibbett Rewards credit unless the total value of all claims exceeds the amount of the net settlement fund. If this occurs, each member of the Settlement Class will receive its pro-rata share of the net settlement fund.

14. Moreover, it is reasonable to conclude that the prosecution of this litigation resulted in meaningful and valuable relief to the Settlement Class as Defendants will reform their security practices in an apparent response to Plaintiffs' allegations. This valuable injunctive relief was only made by Defendants in settlement of the claims alleged by Plaintiffs and this injunctive relief provides a direct, quantifiable benefit to the Settlement Class.

V. Application for an Award of Attorneys' Fees and Reimbursement of Expenses

15. Class Counsel expended over one thousand hours litigating the case that produced this settlement. Class Counsel performed extensive work investigating, filing and litigating this class action. Class Counsel investigated the factual claims of Plaintiffs and evaluated various federal and state laws in order to file this action. Class Counsel developed a discovery plan and reviewed information and documents produced by Defendants; participated in meetings and strategy sessions with Plaintiffs and co-counsel; attended formal and informal mediation sessions and spent substantial time negotiating and drafting the Settlement Agreement and the attendant pleadings required to obtain approval of this Settlement. All of these efforts directly contributed to the Settlement that provides valuable relief to members of the Settlement Class. The negotiations between the parties regarding an award of attorneys' fees were conducted at arm's-length and only occurred after all material aspects of the class relief were agreed upon.

16. Class Counsel agreed to represent Plaintiffs on a contingency fee basis and have not been paid any fees or expenses in this litigation from Plaintiffs.

17. Through the date of the Fairness Hearing, Class Counsel and the law firms working with Class Counsel have incurred and/or will incur \$202,759 in expenses litigating this action. Class Counsel's expenses primarily encompass filing fees, legal research, postage and copying charges, mileage, mediation fees and notice and settlement administration expenses. These

expenses are maintained in the books and records of Class Counsel and the law firms working with Class Counsel on behalf of Plaintiffs.

Executed on the 12th day of December, 2022.

/s/ R. Brent Irby
R. Brent Irby