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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

VICTOR CATALA, individually and on
behalf of all others similarly situated,

Plaintiffs,

v.

RESURGENT CAPITAL SERVICES L.P.
and PLAINS COMMERCE BANK,

Defendants.

Civil No.08cv2401 NLS

ORDER:

(1) GRANTING MOTION FOR FINAL APPROVAL OF CLASS ACTION SETTLEMENT AND FOR APPROVAL OF INCENTIVE PAYMENTS TO PLAINTIFF [Doc. No. 35];

(2) GRANTING MOTION FOR AWARD OF ATTORNEY’S FEES AND COSTS [Doc. No. 36]; and

(3) DIRECTING ENTRY OF FINAL JUDGMENT AND DISMISSAL WITH PREJUDICE.

Plaintiff Victor Catala, individually and on behalf of all others similarly situated (Catala or Plaintiff), filed two motions seeking (1) final approval of a class action settlement and approval of incentive payments to Plaintiff; and (2) and an award of attorney’s fees and costs. Defendants Resurgent Capital Services L.P. (Resurgent) and Plains Commerce Bank (Plains) (collectively, Defendants) do not oppose the motions. This court has already granted preliminary approval of the settlement.

With no objections having been filed, pursuant to Civil Local Rule 7.1.d.1 the court decides these motions on the papers and without oral argument. This court has reviewed all papers filed in support of the motions and for the reasons set forth below, **GRANTS** the motion for final approval of

1 settlement and approval of incentive payments and **GRANTS** the motion for attorney's fees and costs.

2 **RELEVANT FACTS**

3 Catala is a consumer allegedly delinquent and owing consumer debts. Resurgent is a limited
4 partnership that attempted to collect debts from Catala. Catala alleges that in attempting to collect debts
5 from him, Resurgent sent an envelope and/or collection letter that said "you are pre-approved for a new
6 visa credit card" and that "arrangements have been made for you to obtain a pre-approved visa credit
7 card issued through Plains Commerce Bank." Plains is allegedly the bank that underwrote new
8 extensions for credit for any Resurgent accounts.

9 Catala filed a complaint against Resurgent and Plains on December 24, 2008, alleging that this
10 mailing violated the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et seq. (FDCPA) and the
11 California Fair Debt Collection Practices Act, California Civil Code § 1788 et seq. (Rosenthal Act).
12 Resurgent and Plains deny the allegations and argue that if any violation occurred, it resulted from an
13 unintentional and bona fide error, notwithstanding the maintenance of procedures formulated to avoid
14 the violation. Plains also argues that it is not a debt collector under the FDCPA or Rosenthal Act.

15 The court held a telephonic conference and then issued the Scheduling Order in this matter on
16 May 18, 2009. As of July 22, 2009, the parties were engaged in settlement negotiations and requested to
17 continue the class certification motion and expert designation deadlines. On September 21, 2009, the
18 parties notified the court that they had agreed to settle the case.

19 On October 19, 2009 Catala and Resurgent filed a joint motion for preliminary approval of class
20 action settlement. The court denied the joint motion without prejudice. The parties later filed a renewed
21 joint motion, and on January 29, 2010, the court granted it and certified the class for settlement purposes
22 only, preliminarily approved the settlement, class counsel and the class representative, and ordered that
23 the notice be made to the class members.

24 The parties settled the case pursuant to these terms:

- 25 A. Defendant shall pay to San Diego County Legal Aid Society, through
26 Plaintiff's counsel, as a *cy pres* distribution on behalf of the Class the total
27 sum of \$35,000, which is \$10,000 more than 1% of Resurgent's net worth,
28 the maximum amount of damages allowed in an FDCPA class action
under 15 U.S.C. §1692K(a)(2)(B).
- B. Defendant will pay Plaintiff as an incentive payment \$2,500, subject to
Court approval, for his efforts in litigating this action.

1 C. Defendants shall be responsible for, and shall bear the costs of, class
2 notice by publication. Defendants shall also pay up to \$5,000 to Gilardi &
3 Company LLC, a third-party administrator, for settlement administration
services performed by Gilardi pursuant to its separate agreement with
Class Counsel.

4 D. Subject to approval of the Court, Defendant has agreed to pay to Class
5 Counsel attorneys' fees and expenses not to exceed \$35,000.

6 The conditional class covered by the settlement includes:

7 All individuals in the State of California, during the Class Period, who
8 were sent an envelope by Resurgent Capital Services, L.P. that was light
9 blue in color, bearing white clouds as a design, a stamp that indicated it
10 was "PRESORTED FIRST CLASS MAIL," and/or the words
11 "IMMEDIATE REPLY REQUESTED," and/or were sent a collection
letter from Resurgent Capital Services, L.P. bearing the representations
"YOU ARE PRE-APPROVED* FOR A NEW VISA® CREDIT CARD"
and "Arrangements have been made for you to obtain a Pre-Approved*
Visa credit card issued through Plains Commerce Bank."

12 The class period is from December 4, 2007 to December 24, 2008. The class includes 195,561 potential
13 class members.

14 On March 15, 2010, Gilardi & Company (Gilardi), the settlement administrator, caused the
15 court-approved notice to be published in the San Francisco and Los Angeles Print Market editions of the
16 USA Today newspaper. Vasquez Decl. ¶ 2, Ex. A [Dkt. No. 34].

17 DISCUSSION

18 A. Approval of Class Action Settlement.

19 Settlement of a class action lawsuit requires court approval. *See* Fed.R.Civ.P. 23(3). The court
20 must find that the proposed settlement is fundamentally fair, adequate, and reasonable. *Staton v. Boeing*
21 *Co.*, 327 F.3d 938, 959 (9th Cir. 2003) (citing *Hanlon v. Chrysler Corp.* 150 F.3d 1011, 1026 (9th Cir.
22 1998)). In making that determination the court can consider:

- 23 [1] the strength of plaintiffs' case;
- 24 [2] the risk, expense, complexity and likely duration of further litigation;
- 25 [3] the risk of maintaining class action status throughout the trial;
- 26 [4] the amount offered in settlement;
- 27 [5] the extent of discovery completed, and the stage of the proceedings;
- 28 [6] the experience and views of counsel . . .; and
- [7] the reaction of the class members to the proposed settlement.

27 *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) (citation omitted). This is
28 not an exclusive list and some factors may predominate over others, depending on the relevant facts.

1 *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir. 1993).

2 The court must be particularly vigilant where, as in this case, the parties agree to settle prior to
3 class certification. *Hanlon*, 150 F.3d at 1026. The court, however, must likewise take into account the
4 Ninth Circuit's policy favoring settlement, particularly in class action cases. *See Officers*, 688 F.2d at
5 625. While balancing these factors, the court is to satisfy itself that the settlement is not a product of
6 collusion between the parties. *Id.* In evaluating the settlement, the court is not to reach the merits of the
7 case or to form conclusions about the underlying questions of law or fact. *See id.*

8 **1. The Strength of Plaintiff's Case.**

9 "Regardless of the strength of case counsel might present at trial, victory in litigation is never
10 guaranteed." *In re AremisSoft Corp. Sec. Litig.*, 210 F.R.D. 109, 125 (D. N.J. 2002). Here, in the
11 settlement the Plaintiff class will have obtained more than all it could obtain had the case gone to trial,
12 which is 1% of Resurgent's net worth. In light of the asserted defenses and the uncertainties Plaintiff
13 would have faced to establish liability and a full recovery, the court finds that the strength of Plaintiff's
14 case weighs in favor of resolution of this action by settlement.

15 **2. The Risk of Continued Litigation.**

16 The risk, cost, complexity, and possible duration of litigation play into determining the
17 reasonableness of a settlement. *Torrise*, 8 F.3d at 1376. "In most situations, unless the settlement is
18 clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with
19 uncertain results." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal.
20 2004) (internal quotations omitted).

21 Plaintiff faced substantial risks in establishing liability, causation, and damages. If litigation
22 continued, the parties would have continued with discovery. Discovery could have caused additional
23 delays and complexities due to the possibility of disputes and obtaining discovery from class members,
24 Defendants and experts. Litigation would have also included a possible summary judgment motion, trial
25 preparation, trial and post-trial motions, and appeals. The litigation would have significantly delayed
26 any recovery to the settlement class. Against these uncertainties and delays, an immediate and certain
27 award for 100% of the potential recovery favors settlement of this action.

28 ///

1 **3. Risk of Maintaining Class Action Status Through Trial.**

2 The court approved class action status for only settlement purposes. If the case had not settled,
3 Defendants would have opposed Plaintiff’s motion for class certification. Even if the class had been
4 certified, courts may re-evaluate the appropriateness of class certification at any time. Fed. R. Civ.
5 P.23(c)(1)(c). However, “the possible risk of decertification does not prevent the Court from granting
6 final approval to the Settlement.” *In re Heritage Bond Litig.*, 2005 U.S. Dist. LEXIS 13555, *36 (C.D.
7 Cal. 2005). The avoidance of risk of maintaining class action certification throughout trial favors
8 settlement of this action.

9 **4. Amount of the Settlement.**

10 The adequacy of a settlement must be judged in the context of “a yielding of absolutes and an
11 abandoning of highest hopes.” *Officers*, 688 F.2d at 624. The settlement agreement embodies a
12 compromise, where one party gives up something they might have won through a trial in exchange for
13 saving cost and eliminating risk. *Id.*

14 Under the FDCPA, at most Plaintiff could recover 1% of Resurgent’s net worth, or \$28,850.
15 Under the Settlement Agreement, the parties agree that Defendants shall pay to San Diego County Legal
16 Aid Society a *cy pres* distribution of \$35,000 on behalf of the Class. Here, Plaintiff obtained
17 approximately 1% of Resurgent’s net worth, plus an additional \$10,000 on behalf of Plains. Therefore,
18 Plaintiff could not have achieved a more favorable result. While both sides may have asserted
19 compelling arguments at trial, by way of this settlement, the class can avoid the cost and risk of
20 litigation while recovering all of their potential damages.

21 The court recognizes that the settlement will not result in payment of any money to individual
22 class members, other than to lead Plaintiff. Under the FDCPA, the amount a class can recover cannot
23 exceed the lesser of \$500,000 or 1 percent of the net worth of the debt collector. 15 U.S.C. §
24 1692k(a)(2)(B). Given that the class size is 195,561 persons, and Resurgent’s net worth of \$2,585,000,
25 the most an individual class member could recover from Resurgent would be approximately 13 cents.¹

26 *Cy pres* distribution is acceptable where notice is provided to each class member and individual
27

28 ¹\$2,585,000 x 1% = \$28,850. \$28,850 - \$2,500 (for Lead Plaintiff) = \$26,350. \$26,350 / 195,561
Class Members = 13.47 cents.

1 damages are calculated. *Six Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1305 (9th Cir.
2 1990). Plaintiffs cannot use *cy pres* “recovery to avoid the difficulty of proving each class members’
3 specific injury.” *Id.*; see *In re Hotel Telephone Charges*, 500 F.2d 86, 89-90 (9th Cir. 1974). Further,
4 *cy pres* distribution is appropriate where distribution to individual class members is impracticable:

5 When a class action involves a large number of class members but only a
6 small individual recovery, the cost of separately proving and distributing
7 each class member's damages may so outweigh the potential recovery that
8 the class action becomes unfeasible. Fluid recovery or "cy pres"
9 distribution avoids these difficulties by permitting aggregate calculation of
10 damages, the use of summary claim procedures, and distribution of
11 unclaimed funds to indirectly benefit the entire class. Federal courts have
12 frequently approved this remedy in the settlement of class actions where
13 the proof of individual claims would be burdensome or distribution of
14 damages costly.

15 *Six Mexican Workers*, 904 F.2d at 1305(internal citations omitted).

16 Here, the de minimus recovery of approximately 13 cents per class member would make
17 distribution to class members impracticable because of the burden and expense of distribution. This
18 court finds the proposed amount of settlement is fair and reasonable, and is a factor that weighs in favor
19 of settlement.

20 **5. Extent of Discovery.**

21 “[I]n the context of class action settlements, formal discovery is not a necessary ticket to the
22 bargaining table where the parties have sufficient information to make an informed decision about
23 settlement.” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (quotations omitted).

24 Plaintiff conducted written discovery of both Defendants concerning class allegations and merits.
25 Through this discovery Plaintiff learned that Resurgent was a debt collector as defined under both acts
26 and that Plains was not. Plaintiff also learned that no financial or account information was shared
27 between the Defendants in this process, as Plains underwrote the available credit cards without first
28 having each consumer’s financial information disclosed. Through discovery, the parties also determined
29 that as of May 31, 2009, Resurgent had a net worth of \$2,585,000. The court is satisfied that class
30 counsel sufficiently familiarized themselves with the facts and merits of this case such that they could
31 make an informed decision regarding the merits of settlement, and this factor weighs in favor of
32 settlement.

1 **6. Experience of Counsel.**

2 “Great weight is accorded to the recommendation of counsel, who are most closely acquainted
3 with the facts of the underlying litigation.” *Nat’l Rural Telecomms.*, 221 F.R.D. at 528.

4 The court finds that both counsel have substantial experience in working on class actions. *See*
5 *Swigart Decl.* In an effort to avoid further litigation and to resolve the matter amicably, counsel for both
6 sides engaged in settlement discussions and negotiated an agreement. Counsel have weighed the
7 strengths and weaknesses of their respective positions and they endorse this settlement. Their
8 recommendation is entitled to significant weight, and weighs in favor of settlement.

9 **7. Reaction of the Plaintiff Class.**

10 The absence of a large number of objections to a proposed class action settlement raises a strong
11 presumption that the terms of the settlement are favorable to the class members. *Omnivision Tech.*, 559
12 F.Supp. 2d at 1043 (quoting *Nat’l Rural Telecomms.*, 221 F.R.D. at 529); *see Hughes v. Microsoft*
13 *Corp.*, 2001 U.S. Dist. LEXIS 5976, *24 (W.D. Wash. 2001) (finding approval of class supported a
14 finding of fairness where with 37,000 notices sent out less than 1% of class opted out and only 9
15 potential claimants objected).

16 Here, notice was published on March 15, 2010 in the San Francisco and Los Angeles Print
17 Market editions of the USA Today newspaper. The deadline for objecting to the settlement was May
18 18, 2010, and to date, no class members have objected or opted out. Further, notice was given to the
19 California Attorney General, and to date, the Attorney General has not objected to the settlement. The
20 lack of opt-outs and objections favor approving the settlement.

21 **8. Absence of Fraud or Collusion.**

22 The court finds that the proposed settlement did not result from collusion by the parties’ counsel,
23 but from an investigation and consideration of strengths and weaknesses in the case, and arms-length
24 negotiations between counsel. It will provide substantially more than the maximum amount of damages
25 that could be recovered from Resurgent, even if the Plaintiff class prevailed at trial on its claims against
26 Resurgent. Regarding recovery against Plains, Plains argues that it is not a “debt collector” and thus not
27 subject to liability in this action. The settlement amount that exceeds Resurgent’s maximum exposure
28 reflects the de minimus exposure of Plains in this case. The manner in which counsel approached

1 settlement and arms-length negotiations favor approval of the settlement.

2 **B. Incentive Payments to Plaintiff.**

3 Whether to award a class representative for his efforts is within a court's discretion. *Van*
4 *Vranken v. Atl. Richfield Co.*, 901 F. Supp. 294, 299 (N.D. Cal. 1995). Courts may consider the
5 following criteria when determining whether to award an incentive payment: (1) the risk to the class
6 representative in commencing suit, both financial and otherwise; (2) the notoriety and personal
7 difficulties encountered by the class representative; (3) the amount of time and effort spent by the class
8 representative; (4) the duration of the litigation; and (5) the personal benefit, or lack thereof, enjoyed by
9 the class representative as a result of the litigation. *Id.*

10 Class counsel requests an award of \$2,500.00 to lead Plaintiff Catala to reimburse him for
11 activities related to his representation of the settlement class during the prosecution and settlement of
12 this action. As part of his duties as class representative, Catala provided counsel with details of the facts
13 of this case at the inception of litigation, reviewed the complaint and discussed it with counsel before its
14 filing in December 2008. Catala also prepared to attend the Early Neutral Evaluation conference² and
15 was ready to proceed with whatever discovery was necessary. He will receive no other compensation
16 from this settlement due to the nature of the *cy pres* recovery. Defendant has agreed to pay the
17 \$2,500.00 incentive payment. Considering the relevant criteria, the court finds the request for the
18 incentive payment to be reasonable and grants the request.

19 **C. Attorney's Fees and Costs.**

20 The FDCPA and the Rosenthal Act contain fee shifting provisions that award payment of
21 attorney's fees to the prevailing party. In their settlement, the parties agreed that Defendant would pay
22 Plaintiff's counsel's attorney's fees and costs in the amount of \$35,000. Plaintiff's counsel have
23 incurred actual fees and costs in the amount of \$38,208.43, but seek formal court approval for only the
24 \$35,000 (including \$1,540.43 in costs). Swigart Fee Decl. ¶ 25, Ex. A.

25 Courts have discretion to apply either the lodestar method or the percentage-of-the-fund method
26 to determine attorneys' fees in a common fund case. *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 19
27

28 ²After initially requiring the parties to personally attend the Early Neutral Evaluation (ENE), the court continued the ENE to a telephonic conference with counsel only.

1 F.3d 1291, 1295 (9th Cir. 1994) (*WPPSSS*). Whether the “fees come from a common fund *or are*
2 *otherwise paid*,” the court must assure the amount of fees paid are fair and proper. *Staton v. Boeing Co.*,
3 327 F.3d 938, 964 (9th Cir. 2003) (emphasis in original). Where there is a fee-shifting statute, courts
4 must calculate the fee using the lodestar method. *Id.* at 965. To do so, the court engages in the
5 following analysis:

6 This [lodestar] method requires a court to multiply “the number of hours
7 the prevailing party reasonably expended on the litigation by a reasonable
8 hourly rate.” The lodestar figure is presumptively reasonable. Adjustments
9 to the lodestar amount are allowed only “if circumstances warrant,” and
10 are reserved for “rare” or “exceptional” cases. Adjustments must be
11 carefully tailored, drawing from a finite pool of factors relevant to the
12 reasonableness determination and only to the extent a factor has not been
13 subsumed within the lodestar calculation. Those factors include the
14 preclusion of other employment by the attorney due to acceptance of the
15 case; time limitations imposed by the client or the circumstances; the
16 amount involved and the results obtained; the “undesirability” of the case;
17 the nature and length of the professional relationship with the client; and
18 awards in similar cases. Costs are not among the factors a court may
19 consider in adjusting the lodestar amount.

20 *Rouse v. Law Offices of Rory Clark*, 603 F.3d 699, *11 (9th Cir. 2010) (citations omitted).

21 The calculation of a reasonable fee award is a two-step process. *See Lytle v. Carl*, 382 F.3d 978,
22 988 (9th Cir. 2004). First, the court must calculate the “lodestar figure” by taking the number of hours
23 reasonably expended on the litigation and multiplying it by a reasonable hourly rate. *Id.* Taken into
24 account in either the reasonable hours component or the reasonable rate component of the lodestar
25 calculation are: “(1) the novelty and complexity of the issue; (2) the special skill and experience of
26 counsel; (3) the quality of the representation; (4) the results obtained; and (5) the contingent nature of
27 the fee agreement.” During the second step the court, in its equitable discretion, adjusts this amount “on
28 the basis of other considerations.” *Id.* The district court has great deal of discretion in determining the
reasonableness of the fee.” *Gates v. Deukmejian*, 987 F.2d 1392, 1398 (9th Cir. 1992). Adjustments
under fee-shifting statutes, however, are rare. *See id.* at 1310-11.

29 **1. Reasonable Hourly Rate.**

30 A reasonable hourly rate is calculated according to the prevailing market rates in the relevant
31 community. *Sorenson v. Mink*, 239 F.3d 1140, 1145 (9th Cir. 2001). The community where the court
32 sits is the relevant market for determining reasonable fees. *Gates*, 987 F.2d at 1405.

1 Plaintiff's firm Hyde & Swigart has an almost-exclusive practice in debt collection abuse
2 litigation. Swigart Fee Decl. ¶ 6. It has litigated over 700 such cases in the past seven years and has
3 been involved in over 25 published decisions, including appeals. *Id.* The hourly rates sought in this
4 case are \$355 for partners, \$225-\$275 for associates, and \$95-\$125 for support staff. These rates have
5 recently been approved in these cases: *Dillon v. United Processing, Inc.*, Case No. 08cv1235 JM (NLS)
6 (S.D. Cal. July 7, 2009) (*see* Ex. A) and *Basinger-Lopez v. Tracy Paul & Associates*, Case No. 08-5192
7 SBA (N.D. Cal. July 6, 2009) (*see* Ex. B). Swigart Fee Decl. ¶ 11. Other firms in this area have higher
8 median billing rates than the rates requested here. Swigart Fee Decl. ¶ 22, Ex. F.³

9 The court has reviewed the Fee Declaration by Joshua Swigart and considered the skill and
10 experience of all counsel involved from Plaintiff's firm. Their skill and experience, combined with the
11 favorable result obtained for the Plaintiff class and the work they put in to negotiate this result, leads this
12 court to find that the hourly rates Plaintiff's counsel billed are reasonable.

13 **2. Hours Reasonably Expended.**

14 Plaintiff provided the fee declaration of Joshua Swigart, as well as detailed time records for all
15 the attorneys, as evidence of the hours reasonably expended on this case. Counsel has reduced their fee
16 request from the lodestar amount of \$38,208.43 to \$35,000. They also say they have already eliminated
17 any attorney and staff time that might be duplicative of work done by others.

18 The court has reviewed the time records, and finds that Plaintiff's counsel has made "a good
19 faith effort to exclude excessive, redundant, or otherwise unnecessary hours from [their] fee request."
20 *See Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983). Along with the self-reduction of the amount of
21 fees, the experience of counsel and the non-duplicative work, this court finds that the number of hours
22 Plaintiff's counsel worked on this case is reasonable.

23 **3. Costs.**

24 Of the \$35,000 claimed in fees, \$1540.43 is to go toward the amount of costs. The court has
25 reviewed the costs requested, and finds they are reasonable.

26 The court, therefore, **GRANTS** Plaintiff's motion for fees and costs for \$35,000.

27
28 ³*See, e.g.,* Luce. Forward, Hamilton & Scripps (San Diego), median billing rates for 2007 according to a survey by the National Law Journal: Partners--\$475 and Associates--\$280.

1 **FINAL ORDER AND JUDGMENT**

2 1. On January 29, 2010, this Court preliminarily approved the Class Action Settlement
3 Agreement ("Settlement Agreement") reached between Plaintiffs and Defendants Resurgent Capital
4 Services, LP ("Resurgent") and Plains Commerce Bank ("Plains"). At the Preliminary Approval
5 hearing, the Court approved a form of notice for publishing to the class. Defendants, through counsel,
6 have filed the Declaration of Alan Vasquez Re: Publication of Summary Notice with the Court stating
7 the Notice of Class Action Settlement (the "Settlement Notice") was published as ordered by the Court
8 in the Preliminary Approval Order. The Court is informed through that declaration that published notice
9 occurred as follows: The Summary Notice was published on March 15, 2010 in the San Francisco and
10 Los Angeles Print Market editions of USA Today Newspaper.

11 2. As set forth in the declaration of Class Counsel, no class member requested exclusion and
12 no objections were filed or received.

13 3. Pursuant to the Notice of Filing of Notification Required by 28 U.S.C. §1715, filed by
14 Defendants in this matter, notice of the class settlement was sent with accompanying exhibits on
15 October 28, 2009 to the appropriate state and federal officials.

16 4. Solely for the purpose of settlement and pursuant to Fed. R. Civ. P. 23(a) and (b)(3), this
17 court certifies the Settlement Class that it approved in the Preliminary Approval Order, as follows:

18 All individuals in the State of California, during the Class Period, who
19 were sent an envelope by Resurgent Capital Services, L.P. that was light
20 blue in color, bearing white clouds as a design, a stamp that indicated it
21 was "PRESORTED FIRST CLASS MAIL," and/or the words
22 "IMMEDIATE REPLY REQUESTED," and/or were sent a collection
letter from Resurgent Capital Services, L.P. bearing the representations
"YOU ARE PRE-APPROVED* FOR A NEW VISA® CREDIT CARD"
and "Arrangements have been made for you to obtain a Pre-Approved*
Visa credit card issued through Plains Commerce Bank."

23 The Class Period is the period from December 24, 2007 to December 24, 2008.

24 If for any reason the events in paragraph 16 of this Order occur, then (a) this final approval of the
25 Settlement Class shall be null and void, and shall not be used or referred to for any purpose in this
26 Litigation or any other action or proceedings, and (b) all status quo ante rights of the parties, including
27 (i) Plaintiffs' right to seek certification of this action as a class action and Defendants' right to oppose
28 certification, and (ii) the parties' rights to assert all other defenses, rights, and positions, shall in all

1 respects be unaffected and preserved.

2 5. On June 22, 2010, the Court held a Final Approval Hearing to which class members,
3 including any with objections, were invited. No class members, or their counsel, appeared in person at
4 the Final Approval Hearing to offer argument about the settlement. No appropriate state or federal
5 officials, as those terms are defined in 28 U.S.C. §1715, appeared at the Final Approval Hearing. No
6 objections having been filed, the Court took the motions under submission and did not hold oral
7 argument.

8 6. The Court finds that the provisions for notice to the class satisfy the requirements of Fed.
9 R. Civ. P. 23 and due process. The Court has determined that, as to the Settlement Class, the Litigation
10 meets all the prerequisites of Rule 23(a) of the Federal Rules of Civil Procedure, and that Plaintiffs and
11 Plaintiffs' Counsel are adequate representatives of the Settlement Class.

12 7. Resurgent verified to the satisfaction of Class Counsel that 1% of its net worth, as of May
13 31, 2009, is \$25,850. One percent (1%) of Resurgent's net worth is the maximum amount of damages
14 allowed in an FDCPA class action under 15 U.S.C. § 1692k(a)(2)(B).

15 8. The definitions and terms set forth in the Settlement Agreement filed as Exhibit A in
16 support of the Joint Motion for Preliminary Approval are hereby incorporated in this Final Order and
17 Judgment.

18 9. Because there have been no objections filed and no requests for exclusions submitted, it
19 is not necessary for the Court to rule on any such objections nor exclude any person requesting to be
20 excluded from the Settlement. The Court grants the parties' request for final approval of the Settlement
21 Agreement. In addition to the other factors stated herein, the Court finds the Settlement Agreement to be
22 fair, adequate and reasonable in light of the risk of establishing liability and damages, and the expense
23 of further litigation.

24 10. In certifying this action as a class action for purposes of this settlement, the Court found
25 and finds that: (1) the members of the Class are so numerous that joinder of all class members in this
26 action is impracticable; (2) there are questions of law and fact common to the members of the Class; (3)
27 the claims or defenses of the representative parties are typical of the claims or defenses of the Class; (4)
28 the representative parties and their counsel have fairly and adequately protected the interests of the

1 Class; (5) the questions of law and fact common to the members of the Class predominate over any
2 questions affecting only individual members of the Class; (6) a class action was and is superior to other
3 available methods for the fair and efficient adjudication of the controversy, considering, inter alia, (a)
4 the interest of members of the Class in individually controlling the prosecution or defense of separate
5 actions, (b) the extent and nature of any litigation concerning the controversy already commenced by or
6 against members of the Class, (c) the desirability or undesirability of prosecuting the litigation of these
7 claims in this particular forum, and (d) the difficulties likely to be encountered in the management of the
8 class action.

9 11. The Court finds that the settlement is fair and reasonable to all parties, including the
10 Plaintiffs and all members of the Settlement Class, and hereby approves the Settlement Agreement
11 submitted by the parties, including the release, and orders:

- 12 A. Defendants shall pay to San Diego County Legal Aid Society, through Plaintiff's
13 counsel, as a *cy pres* distribution on behalf of the Class the total sum of \$35,000,
14 which is \$10,000 more than 1% of Resurgent's net worth, the maximum amount
15 of damages allowed in an FDCPA class action under 15 U.S.C. §1692K(a)(2)(B).
- 16 B. Defendants will pay Plaintiff as an incentive payment \$2,500, subject to Court
17 approval, for his efforts in litigating this action. Defendants shall make those
18 payments in the time period as set forth within the Settlement Agreement.
- 19 C. After review and consideration of the moving papers in support of the Plaintiffs'
20 counsel's request for confirmation of the agreement between the parties for
21 payment of attorneys' fees and costs, the Court hereby approves an award of such
22 agreed-upon amount of \$35,000 to Plaintiffs' counsel jointly as attorneys' fees and
23 costs for their efforts in litigating this case. Defendants shall pay those attorneys'
24 fees and costs in the time period as set forth within the Settlement Agreement.

25 12. Plaintiffs and the members of the Class grant Defendants (as defined in the Settlement
26 Agreement) the following release, which is also set forth in the Settlement Agreement:

- 27 A. Each Class Member, including the Plaintiffs, on behalf of such Class Member and of any
28 person claiming by or through such Class Member as heir, administrator, devisee,

1 predecessor, successor, representative of any kind, or assignee, shall be deemed to release
2 and forever discharge Defendants (as that term is defined in the Settlement Agreement)
3 from any and all of the Released Claims.

4 B. "Released Claims" means:

5 For the named Plaintiffs, all claims, actions, causes of action, demands, rights,
6 damages, costs, attorneys' fees, expenses, and compensation whatsoever arising from the
7 envelopes, mailers and other facts alleged in the Litigation, that they or their heirs,
8 executors, administrators, successors, assigns, and attorneys may have against
9 Defendants for violation of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692 et
10 seq., or the California Fair Debt Collection Practices Act (or "Rosenthal Fair Debt
11 Collection Practices Act"), California Civil Code §§ 1788-1788.32, as of the date of this
12 Agreement, it being the intent of Victor Catala (all of the named Plaintiffs) to release all
13 claims against Defendants under those Acts that were alleged, or could have been
14 alleged, in the Litigation.

15 For the Class, any and all claims, actions, causes of action, demands, rights,
16 damages, costs, attorneys' fees, expenses, and compensation whatsoever arising from the
17 envelopes, mailers and other facts alleged in the Litigation that the Class Members or the
18 Class Members' respective heirs, executors, administrators, successors, assigns, and
19 attorneys have and/or could assert against Defendants for violation of the Fair Debt
20 Collection Practices Act, 15 U.S.C. § 1692 et seq. or the California Fair Debt Collection
21 Practices Act (or "Rosenthal Fair Debt Collection Practices Act") California Civil Code
22 §§ 1788-1788.32. This Agreement and the settlement embodied herein shall not release
23 any debts owed by Plaintiffs or the Class, nor shall this settlement operate as an accord
24 and satisfaction of such debts. Each Class Member is permanently enjoined and barred
25 from instituting or maintaining any action for the Released Claims against Defendants,
26 whether by complaint, counterclaim, defense or otherwise, in any state or federal court,
27 or in any agency or other authority or forum wherever located.

28 13. The Court finds the Settlement Agreement is fair and made in good faith.

1 14. The Court dismisses the claims of Plaintiffs and the Class Members against Defendants
2 with prejudice and without costs (other than what has been provided for in the Settlement Agreement
3 and in this Final Order and Judgment) and this dismissal shall, to the maximum extent permitted by law,
4 operate as res judicata and collateral estoppel so as to bar any future suits under those provisions so long
5 as they arise from or are related to the subject matter of this lawsuit during the Class Period.

6 15. The parties sent notice required by 28 U.S.C. §1715(b) to the appropriate state and
7 federal officials, as defined by 28 U.S.C. §1715(a). This Court is entering this Final Judgment more than
8 ninety days after such officials were served, as is required by 28 U.S.C. §1715(d).

9 16. In the event that (i) the Settlement Agreement is terminated pursuant to its terms, or (ii)
10 the Settlement Agreement, Preliminary Approval Order and Final Order and Judgment are reversed,
11 vacated or modified in any material respect by this or any other court, then (a) all orders entered
12 pursuant to the Settlement Agreement shall be vacated, including this Order; (b) the Litigation shall
13 proceed as though a Settlement Agreement had never been reached; (c) no reference to the prior
14 Settlement Agreement, or any documents related thereto, shall be made for any purpose; (d) nothing in
15 this Order shall be construed or used as an admission, concession or declaration by or against Resurgent,
16 or any fault, wrongdoing, breach or liability; (e) this Order shall not be construed by or against the
17 Plaintiffs or Class Members that their claims lack merit or that the relief requested in this Litigation is
18 inappropriate, improper or unavailable, or as a waiver by any party of any defenses it may have; (f) this
19 Order shall not be construed or used to show that certification of one or more classes would or would
20 not be appropriate if this Litigation was to be litigated rather than settled; provided, however, that if the
21 parties to the Settlement Agreement agree to appeal jointly an adverse ruling and the Settlement
22 Agreement and Final Order and Judgment are upheld on appeal in all material respects, then the
23 Settlement Agreement and Final Order and Judgment shall be given full force and effect. In the event of
24 (i) or (ii) in this paragraph, all parties reserve all of their rights existing prior to the execution of the
25 Settlement Agreement, and the doctrines of res judicata and collateral estoppel shall not be applied.

26 17. Neither the Settlement Agreement, this Final Order and Judgment, nor any of their
27 provisions, nor any of the documents (including but not limited to drafts of the Settlement Agreement,
28 the Preliminary Approval Order or the Final Order and Judgment), negotiations, or proceedings relating

1 in any way to the Settlement, shall be construed as or deemed to be evidence of an admission or
2 concession of any kind or any person, and shall not be offered or received in evidence, or subject to
3 discovery, in this or any other action or proceeding except in an action brought to enforce its terms or
4 except as may be required by law or court order.

5 18. The Court retains jurisdiction over all parties to this action for purposes of the
6 interpretation, enforcement and implementation of the Settlement Agreement and this Final Order and
7 Judgment.

8 19. **The Clerk of Court is hereby expressly directed** to enter Judgment in accordance with
9 the terms of this Order and close the file on this case.

10 **IT IS SO ORDERED.**

11 DATED: June 22, 2010



Hon. Nita L. Stormes
U.S. Magistrate Judge
United States District Court