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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – STANLEY MOSK COURTHOUSE

JEFF ROSS, ROXANNE OLIVEIRA, and
NATASHA SCOTT, on behalf of
themselves and all others similarly situated,

Plaintiffs,

v.

PANDA RESTAURANT GROUP, INC.,
and DOES 1-50, inclusive,

Defendant.

Case No. 21STCV03662
(Assigned to Hon. Lawrence P. Riff, Dept. 7)

CLASS ACTION

**PLAINTIFFS’ MEMORANDUM OF
POINTS AND AUTHORITIES IN
SUPPORT OF UNOPPOSED MOTION
FOR PRELIMINARY APPROVAL OF
CLASS ACTION SETTLEMENT AND
CERTIFICATION OF THE CLASS FOR
SETTLEMENT PURPOSES**

**[Notice of Unopposed Motion for Preliminary
Approval of Class Action Settlement; Joint
Stip of Class Action Settlement; Declaration
of Jeffrey D. Kaliel; [Proposed] Order filed
concurrently herewith]**

Hearing Date: March 30, 2023
Time: 10:00 a.m.
Department: 7

Action filed: January 29, 2021
SAC Filed: December 5, 2022
Trial date: None

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	7
II. SUMMARY OF THE LITIGATION	9
A. Plaintiffs' Allegations	9
B. Panda's Defenses	9
C. Procedural History	10
III. SUMMARY OF SETTLEMENT	11
A. Settlement Negotiations	11
B. The Proposed Settlement	11
1. Class Certification	12
2. Class Benefits	12
a. Settlement Funds	12
b. Claims Process	13
c. Change to Business	14
d. Settlement Releases	14
e. Settlement Class Notice	14
f. Service Awards for Class Representatives and Class Counsel's Fees and Costs	15
C. Settlement Administration, Opt-Outs, Objections, and Rescission	15
IV. ARGUMENT IN FAVOR OF PRELIMINARY SETTLEMENT APPROVAL	16
A. The Settlement Should be Preliminarily Approved	16
1. A Presumption of Fairness Applies to this Settlement Because It Is the Result of Arms-Length Negotiation, There Has Been Sufficient Investigation and Discovery, Counsel Are Experienced in Similar Litigation	19
2. There Are No Grounds to Doubt the Fairness of the Settlement Because There Are No Obvious Deficiencies, The Settlement Does Not Improperly Grant Preferential Treatment to Plaintiffs, And Class Counsel Will Not be Excessively Compensated	20

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2
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4
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14
15
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19
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21
22
23
24
25
26
27
28

3.	The Settlement Falls Within the Range of Possible Approval	21
4.	The Strength of Plaintiffs' Case Balanced Against the Amount Offered in The Settlement Also Supports Granting Plaintiffs' Approval	22
5.	Claims-Made Settlements Are Routinely Approved	23
B.	The Settlement Class Should be Preliminarily Certified	25
1.	The Class is Ascertainable	26
2.	The Class is Sufficiently Numerous	27
3.	Common Questions of Law and Fact Predominate	27
4.	Plaintiffs' Claims are Typical of Those of the Class	28
5.	Plaintiffs and Class Counsel Will Vigorously Protect the Class's Interests	28
6.	A Class Settlement is a Superior Method of Adjudication	29
C.	The Proposed Notices Are Adequate	31
V.	PROPOSED SCHEDULE OF EVENTS	33
VI.	CONCLUSION	33

TABLE OF AUTHORITIES

Page(s)

Cases

Adtrader, Inc. v. Google LLC
(N.D. Cal. Nov. 1, 2022) No. 17-cv-07082-BLF, 2022 WL 1657932425

Alvarez v. Sirius XM Radio Inc.
(C.D. Cal. July 15, 2020) No. CV 18-8605 JVS (SSx), 2020 U.S. Dist. LEXIS 23504327, 29

Amchem Prod., Inc. v. Windsor
(1997) 521 U.S. 59131

Astiana v. Kashi Co.
(S.D. Cal. 2013) 291 F.R.D. 49331

Berger v. Home Depot USA, Inc.
(9th Cir. 2014) 741 F.3d 106120

Brinker Restaurant Corp. v. Superior Court
(2012) 53 Cal. 4th 1004, 102129

Browning v. Yahoo! Inc.
(N.D. Cal. Nov. 16, 2007) No. C04-01463, 2007 WL 4105971.....34

Bush v. Superior Court
(1992) 10 Cal. App. 4th 137418

C.f. 7-Eleven Owners for Fair Franchising v. Southland Corp.
(2000) 85 Cal. App. 4th 113519

Carlotti v. Asus Computer Int'l
(N.D. Cal. Nov. 19, 2019) No. 18-cv-03369-DMR.....26

Cellphone Termination Fee Cases
(2010) 186 Cal. App. 4th 138034

Chavez v. Netflix, Inc.
(2008) 162 Cal. App. 4th 4315, 23, 33, 34

City of San Jose v. Superior Court
(1974) 12 Cal. 3d 44732

Classen v. Weller
(1983) 145 Cal. App. 3d 2730

1 *Cohen v. DIRECTV, Inc.*
 (2009) 178 Cal. App. 4th 96619

2

3 *Collins v. Rocha*
 (1972) 7 Cal. 3d 23228

4

5 *Cundiff v. Verizon California, Inc.*
 (2008) 167 Cal. App. 4th 71826

6

7 *Daar v. Yellow Cab Co.*
 (1967) 67 Cal. 2d 69526, 31

8

9 *Dean Witter Reynolds, Inc. v. Superior Court*
 (1989) 211 Cal.App.3d 75826, 32

10 *Dunk v. Ford Motor Co.*
 (1996) 48 Cal. App. 4th 1794, 180714, 17, 18, 20, 32

11 *Ehret v. Uber Technologies, Inc.*
 (N.D. Cal. 2014) 68 F.Supp.3d 112123, 27, 31

12

13 *Estrada v. FedEx Ground Package Sys., Inc.,*
 (2007) 154 Cal. App. 4th 127

14

15 *Fireside Bank v. Superior Court*
 (2007) 40 Cal. 5th 106929

16

17 *Ghazaryan v. Diva Limousine, Ltd.*
 (2008) 169 Cal. App. 4th 152427

18

19 *Gonzales v. San Gabriel Transit, Inc.*
 (2019) 40 Cal. App. 5th 113129

20

21 *Hanlon v. Chrysler Corp.*
 (9th Cir. 1998) 150 F.3d 101128

22

23 *Henderson v. Ready to Roll Transportation, Inc.*
 (2014) 228 Cal. App. 4th 121328

24

25 *Hernandez v. Vitamin Shoppe Indus., Inc.*
 (2009) 174 Cal. App. 4th 144126

26

27 *In re Microsoft I-V Cases*
 (2006) 135 Cal. App. 4th 70614

28 *In re OnStar Contract Litig.*
 (E.D. Mich. 2011) 278 F.R.D. 35219

1 *In re Sutter Health Uninsured Pricing Cases*
(2009) 171 Cal. App. 4th 49522

2 *In re Vioxx Class Cases*
3 (2009)180 Cal. App. 4th 11619

4 *Johnson v. Wal-Mart Stores, Inc.*
5 (9th Cir. 2013) 544 Fed. Appx. 696.....23

6 *Kullar v. Foot Locker Retail, Inc.*
7 (2008) 168 Cal. App. 4th 11617, 20, 22, 23

8 *Kumar v. Salov North America Corp.*
9 (N.D. Cal. July 7, 2017) No. 4:14-cv-02411-YGR.....25

10 *Kumar v. Safeway, Inc.*
(Super. Ct. of Cal., Cnty. of Alameda, Oct. 27, 2017) No. RG 14-72670724

11 *La Sala v. Am. Sav. & Loan Ass'n*
12 (1971) 5 Cal. 3d 86417, 30

13 *Laffitte v. Robert Half Int'l Inc.*
14 (2016) 1 Cal. 5th 48022

15 *Lemus v. H&R Block Enters. LLC*
(N.D. Cal. Aug. 22, 2012) No. C 09-3179 SI, 2012 WL 363855025

16 *Linder v. Thrifty Oil Co.*
17 (2000) 23 Cal. 4th 42926

18 *Machlan v. Procter & Gamble Co. et al.*
19 (Super. Ct. of Cal., Cnty. of San Francisco, Dec. 9, 2016) No. GCG 14-53816824

20 *Mazza v. Am. Honda Motor Co.*
(9th Cir. 2012) 666 F.3d 58119

21 *McGhee v. Bank of Am.*
22 (1976) 60 Cal. App. 3d 44230

23 *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles*
24 (2010) 186 Cal. App. 4th 39922

25 *National Solar Equipment Owners' Assn. v. Grumman Corp.*
(1991) 235 Cal. App. 3d 127330

26 *Richmond v. Dart Indus., Inc.*
27 (1981) 29 Cal. 3d 46231

28

1 *Saccoccio v. JP Morgan Chase Bank, N.A.*
 (S.D. Fla. 2014) 297 F.R.D. 68325

2

3 *Searle v. Wyndham International, Inc.*
 (2002) 102 Cal. App. 4th 132718

4

5 *Shames v. Hertz Corp.*
 (S.D. Cal. 2012) No. 07-CV-2174-MMA (WMC) 2012 WL 539215925

6

7 *Spann v. J.C. Penney Corp.*
 (C.D. Cal. Jan. 25, 2016) 314 F.R.D. 312.....33

8

9 *Vasquez v. Superior Court*
 (1971) 4 Cal. 3d 800, 82017, 26, 28

10 *Vianu v. AT&T Mobility LLC*
 (N.D. Cal. Nov. 8, 2022) No. 19-cv-03602-LB, 2022 U.S. Dist. LEXIS 20352027, 29

11 *Wershba v. Apple Computer, Inc.*
 (2001) 91 Cal. App. 4th 22414, 17, 29, 32, 33

12 **Statutes**

13

14 Cal. Code Civ. Pro. § 38426

15 Cal. Code Civ. Pro. § 38228, 30

16 **Other Authorities**

17 *Manual for Complex Litigation* (3d ed. 1995) § 30.4122

18 *Manual for Complex Litigation*, (2nd ed. 1985) § 30.4417

19

20 Rubenstein, *Newberg on Class Actions* (5th ed. 2014) § 13:724

21 **Rules**

22 Cal. R. Ct. 3.769(a)17

23 Cal. R. Ct. 3.776(d)(e).....32

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1 **I. INTRODUCTION**

2 Plaintiffs Jeff Ross, Roxanne Oliveira, and Natasha Scott¹ (“Plaintiffs”) move for
3 preliminary approval of a proposed nationwide class action settlement with Defendant Panda
4 Restaurant Group, Inc. (“Panda”), the terms and conditions of which are set forth in the Joint
5 Stipulation of Class Action Settlement (the “Agreement”), attached hereto as *Exhibit 1*². Plaintiffs
6 allege that Panda deceptively marketed “\$2.95” delivery on food deliveries ordered through its
7 mobile application and website, when in reality, Panda imposes a hidden delivery charge on its
8 customers by assessing an additional “Service Fee” amounting to 10% more for the same food
9 received by non-delivery customers. Panda denies Plaintiffs’ allegations and contends that it
10 accurately disclosed what customers would be charged. Given the risks, uncertainties, and burdens
11 of litigation, the Parties have agreed to settle according to the terms of the Agreement.

12 The Settlement is an excellent result in this novel action with significant merits risks and the
13 uncertain odds of a contested class certification motion—indeed, this is the one of the first lawsuits
14 in the nation challenging “delivery fees” that, allegedly, are not actually the flat, low cost
15 represented. The most important benefit of the proposed settlement is one that will benefit all
16 Participating Class Members and indeed all current and future users of Panda’s delivery services
17 nationwide: Panda has stopped charging its “Service Fee” entirely and agrees that it will not charge
18 a Service Fee on delivery orders for four (4) years from the Effective Date of the Agreement.
19 Plaintiffs estimate that this results in a saving of at least \$12,000,000 to consumers nationwide and
20 a more fair and free marketplace, both for consumers of Panda and Panda’s competitors nationwide.
21 Kaniel Decl., ¶ 5. But that is not all. The Settlement also secures a substantial monetary benefit for
22 the Settlement Class. As detailed below, the Settlement provides: (a) a cash fund of **\$900,000.00**,
23 and (b) an additional fund of **\$500,000.00** in free medium entrée Vouchers at Panda Express, up to
24 2 per Class Member, which can be used without any further purchase. By submitting a timely and
25 valid claim, Participating Class Members will have the option to participate in either the Voucher

26 ¹ Plaintiff Scott is being added to this Action pursuant to the concurrently filed Amended
27 Complaint.

28 ² The capitalized terms used herein are defined and have the same meaning as used in the
Agreement unless otherwise stated.

1 or cash portion of the Settlement.

2 The Parties have agreed to a robust direct Email Notice and Publication Notice plan designed
3 to afford all members of the Settlement Class due process and advise them of the rights under the
4 Agreement. Moreover, the claims process for both classes is seamless, simple, and efficient, as it
5 allows Participating Class Members to submit electronic claims via a direct, easy to use link from
6 their Email Notices. No proof of purchase or submission of any documentary support is necessary.
7 Panda will also make major contributions to the notice and administration of the Settlement, in order
8 to ensure costs of notice and administration are kept to a minimum. Specifically, Panda will 1)
9 provide customer email addresses to the Settlement Administrator for purposes of notice, obviating
10 the need for mailed notice; and 2) facilitate the issuance and redemption of codes for entrée credits
11 that can be used through the technology of its website and mobile app for the benefit of Settlement
12 Class Members, obviating the need to print and mail credit vouchers to class members. Declaration
13 of Jeffrey Kaliel, at ¶ 6. In addition, the Parties have agreed to provide notice through social media
14 to satisfy the CLRA's notice requirements and reach potential class members who might not receive
15 notice by email.

16 Subject to the Court's approval, the \$900,000 cash portion of the Gross Settlement will also
17 be used to pay Settlement Administration Costs; court-approved Class Representative Service
18 Awards to each named Plaintiff to compensate them for the time they spent, the risks they incurred,
19 and the benefits they obtained for the Settlement Class by serving as class representatives
20 (maximum of \$5,000 each); Class Counsel's attorneys' fees of no more than 33% of the \$1,400,000
21 Gross Settlement (\$462,000); Class Counsel's costs in prosecuting the action (not to exceed
22 \$16,500); and the costs of notice and settlement administration (not to exceed \$105,000).

23 For the reasons set forth below, the Agreement meets all requirements for preliminary
24 approval. Therefore, Plaintiffs respectfully request that the Court preliminarily approve this
25 settlement, appoint Plaintiffs the class representatives for the Settlement Class and the undersigned
26 counsel as Class Counsel; order that the proposed notices be disseminated, and schedule the Final
27
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1 Approval Hearing Date.³

2 **II. SUMMARY OF THE LITIGATION**

3 **A. Plaintiffs' Allegations**

4 Plaintiffs' class action claims arise out of allegations that Panda unfairly obscures its true
5 delivery charges by falsely marketing a flat, low cost delivery fee of \$2.95 to consumers for food
6 purchases placed on its App and website. On delivery orders only, Panda assesses an additional
7 charge it calls a "Service Fee" which amounts to 10% more for the same food received by non-
8 delivery customers. Kaniel Decl., ¶ 7. Plaintiffs contend that because this Fee is exclusively charged
9 to delivery customers, and not to customers who order online and pick up their food in store, the
10 "Service Fee"—which is included in a line item called "Taxes and Fees"—is in all actuality a hidden
11 delivery upcharge, rendering the \$2.95 delivery fee representation false and misleading. *Id.* ¶ 8.
12 Plaintiffs allege that by omitting, concealing, and misrepresenting material facts about Panda's
13 delivery service, Panda deceives consumers into making online food purchases they otherwise
14 would not make. *Id.* ¶9.

15 In the Second Amended Complaint, Plaintiffs allege consumer protection claims under
16 California and Michigan law and for breach of contract seeking monetary damages, restitution,
17 injunctive relief, declaratory relief, and attorneys' fees on behalf of a nationwide class of consumers
18 who made a food delivery order through Panda's App or website during the Class Period. *Id.* ¶ 10.

19 **B. Panda's Defenses**

20 Panda denies that its fees for delivery were not adequately disclosed to consumers and is
21 confident in its defense. As Panda argued in its demurrer, Panda contends that Plaintiffs cannot
22 prove any misrepresentation because Panda's "Service Fee" is clearly disclosed during the checkout
23 process and is accurately described as a charge that "[h]elps maintain and improve your digital
24 experience." Given these multiple disclosures before checkout, Panda maintains that no reasonable
25 customer was misled. Relatedly, Panda asserts that Plaintiffs' claims are barred by the voluntary
26

27 ³ Of course, Panda denies Plaintiffs' allegations, disputes the merits of Plaintiffs' claims,
28 and contends that these claims are not suitable for class certification outside the settlement context.

1 payment doctrine because all costs were disclosed prior to Plaintiffs finalizing and completing their
2 orders. (*See* Section IV.A., below.)

3 Turning to class certification, Panda asserts that (i) what each customer saw during their
4 personal purchasing experience; (ii) how each customer interpreted what they saw during their
5 purchasing experience; (iii) whether customers relied on the representations alleged by Plaintiffs;
6 and (iv) whether customers were actually confused about the Service Fee in light of the multiple
7 disclosures provided to them, are all highly individualized inquiries that are not amenable to class
8 treatment.

9 Finally, Panda has pointed out that one of the named plaintiffs made at least five delivery
10 orders *after* filing the Complaint in this action. In Panda’s view, those post-lawsuit purchases help
11 disprove the central elements of deception, materiality, causation, and injury, and they would
12 undermine a contested bid for class certification if this settlement is not approved.

13 **C. Procedural History**

14 Plaintiff Jeff Ross and Roxanne Oliveira filed their complaint on January 29, 2021 in the
15 Superior Court of California, County of Los Angeles on behalf of all California consumers who
16 purchased food for delivery from Panda Express’s App or website alleging violations of California’s
17 Unfair Competition Law (the “UCL”) and California’s Consumer Legal Remedies Act (the
18 “CLRA”). (*See Ross, et al. v. Panda Restaurant Group, Inc.*, Case No. 21STCV03662) (the “*Ross*
19 *Action.*”). Plaintiff Natasha Scott filed her complaint on July 1, 2021 in the United States District
20 Court, Central District of California on behalf of a similar class alleging violations of the UCL,
21 CLRA, and Michigan’s Consumer Protection Act (the “MCPA”). (*See Scott v. Panda Restaurant*
22 *Group, Inc.*, Case No. 2:21-cv-05368-MCS-GJS) (the “*Scott Action*”).

23 Panda filed a demurrer in the *Ross Action*, which was overruled on November 3, 2021.
24 Panda filed a motion to dismiss in the *Scott Action*, which was fully briefed and pending before the
25 Court at the time the Parties agreed to stay each case pending the conclusion of mediation.

26 On February 9, 2022, the Parties attended a full-day mediation before Judge Andrew
27 Guilford (Ret.), who previously served as U.S. District Court Judge in the Central District of
28

1 California. Kaliel Decl., ¶ 11. In preparation for mediation and for several months throughout the
2 settlement negotiations, the Parties engaged in informal discovery. Plaintiff requested, and Panda
3 provided, voluminous information regarding Panda’s policies, practices, and procedures related to
4 the marketing and pricing of delivery orders during the Class Period. *Id.* ¶ 12. Panda also provided
5 detailed sales data and data analysis regarding delivery orders, users, and fees. *Id.*, ¶ 13. The matter
6 did not settle at the mediation, but the Parties continued lengthy negotiations and ultimately agreed
7 to the material terms of settlement, resulting in the Agreement now before the Court. *Id.* ¶ 14. The
8 Parties subsequently engaged in confirmatory discovery on class membership and damages. *Id.*, ¶
9 15.

10 **III. SUMMARY OF SETTLEMENT**

11 **A. Settlement Negotiations**

12 As noted above, the settlement was aggressively negotiated with the assistance of Andrew
13 Guilford (Ret.), a well-respected mediator who presided over an arm’s-length mediation between
14 capable and experienced class action counsel on both sides. Kaliel Decl., ¶ 16. The Parties engaged
15 in a significant amount of informal and confirmatory discovery in order to assist Class Counsel in
16 vetting and assessing the claims of Settlement Class Members and Panda’s defenses to those claims
17 prior to reaching this Agreement. *Id.* ¶ 17. The information provided included, but was not limited
18 to, the nature, timing, geographic scope and implementation of Panda’s advertisements, marketing
19 materials, and disclosures on its website and App regarding delivery fees and service fees; each
20 Plaintiffs’ purchasing history with Panda; the number of customers who purchased food for delivery
21 on Panda’s website and App; and the approximate fees and prices charged to customers who
22 purchased food for delivery on Panda’s website and App. *Id.* ¶ 18. Importantly, the Parties did not
23 discuss attorneys’ fees and costs, nor any potential service awards, until they first agreed on the
24 material terms of the settlement, including the definition of the Class, notice, class benefits, and
25 scope of the release. *Id.* ¶ 18.

26 **B. The Proposed Settlement**

27 The Parties have entered into the Agreement, which completely resolves this Action and the
28

1 Scott Action, both of which the Parties have agreed will be stayed while approval of this proposed
2 Settlement is pending. Kaliel Decl., ¶ 20. The Agreement includes the following material terms:

3 **1. Class Certification**

4 For settlement purposes, the Parties have agreed to certify the Class defined as:

5 **Settlement Class** means persons within the United States who at any time between
6 July 17, 2020, and February 16, 2022 placed an order for delivery through Panda's
7 website or mobile application where a Service Fee was charged in connection with that
8 delivery order.

8 See Agreement at ¶ 9.⁴

9 **2. Class Benefits**

10 Class Counsel believes that the contemplated benefits addressed below adequately
11 compensate the Settlement Class for the harm they suffered and, in light of the risks of litigation,
12 represent an excellent result for the Settlement Class. Kaliel Decl., ¶ 21. According to Panda's
13 records, approximately 1,385,236 distinct email addresses were used in connection with purchases
14 during the Class Period where a Service Fee was charged. *Id.* ¶ 22.

15 **a. Settlement Funds**

16 Within 10 business days of the Effective Date of the Settlement, Panda will deposit the
17 \$900,000.00 cash portion into a Qualified Settlement Fund ("QSF") to be established by the
18 Settlement Administrator. Agreement, ¶ 41. The QSF will be used to pay (1) the cash component of
19 the Participating Class Members Individual Settlement Recoveries; (2) Class Counsel's Fees; (3)
20 Class Counsel's Costs; (4) Class Representatives' Service Awards; and (5) the Settlement
21 Administrator's Costs. *Id.* ¶¶ 38(a). The amount of cash of the Individual Settlement Recoveries is
22 to be determined on a pro rata basis shared equally amongst those Participating Class Members after
23 deduction for the Class Representatives' Service Awards, Class Counsel's Fees and Costs, and
24 Settlement Administrator costs. *Id.*

25 Additionally, Panda will make \$500,000.00 in Vouchers available to Participating Class
26 Members (currently estimated at a maximum retail value of \$11.75) for a free medium entrée

27 _____
28 ⁴ The Parties agreed to a February 16, 2022 cut-off because that is when Panda updated its
business practice and stopped charging the Service Fee.

1 through Panda’s mobile App or website. *Id.* ¶¶ 35, 38(b). Participating Class Members may receive
2 up to two Vouchers. *Id.* ¶ 38(b). The Vouchers provide a real benefit to the Settlement Class in that
3 they are able to receive up to two free entrees from Panda at no charge *and do not have to spend*
4 *any of their own money in order to retain this benefit.* (*See Chavez v. Netflix, Inc.* (2008) 162 Cal.
5 App. 4th 43, 53-55 [finding settlement benefit of providing free DVD rentals worth \$6 to current
6 subscribers was fair and reasonable because class members were “being offered an opportunity to
7 obtain a limited number of rentals at *no charge.*”] [emphasis in original].) Such settlements have
8 been routinely embraced in California courts as being fair and reasonable. (*See e.g., In re Microsoft*
9 *I-V Cases* (2006) 135 Cal. App. 4th 706, 711-13 [affirming approval of class action settlement that
10 provided computer software vouchers to class]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.
11 App. 4th 224, 247 [affirming finding that \$50 coupons for redemption at Apple’s online store were
12 reasonable]; *Dunk v. Ford Motor Co.*, (1996) 48 Cal. App. 4th 1794, 1804-05.)

13 **b. Claims Process**

14 Given that Plaintiffs’ allegations exclusively regard consumers’ very recent use of Panda’s
15 App and website in order to place food orders for delivery (only since early 2020)—and that a valid
16 email address is a requirement of placing such an order— Panda maintains electronic customer
17 contact information. Panda has agreed to provide this information to the Settlement Administrator,
18 who will give direct e-mail notice to the Settlement Class Members. And for those Class Members
19 who might not receive or read the Notice sent by email, the Publication Notice will provide
20 supplemental notice that permits the Class Member to contact the Settlement Administrator to
21 determine if they are eligible to receive a Settlement Notice and benefit. Agreement, ¶ 25. (To the
22 extent the CLRA has additional notice requirements, the Publication Notice will satisfy those goals
23 too.)

24 In order to receive an Individual Settlement Recovery, Participating Class Members must
25 submit a valid and timely Claim Form to the Settlement Administrator via web form during the
26 Claim Period. *Id.*, ¶ 39. Participating Class Members will have the option to receive either a cash
27 payment or up to two Vouchers, and those who successfully submit a valid Claim will receive their
28

1 elected Settlement benefit within 14 calendars of the funding of the Settlement. *Id.* ¶ 42. If a
2 Participating Class Member fails to choose between a cash payment and a Voucher, or erroneously
3 chooses both a cash payment and a Voucher, the Settlement Administrator will designate that
4 Participating Class Member to have chosen the cash option. *Id.* ¶ 38(b).

5 The Claim Forms are accessible via one click in the Email Notice and through the settlement
6 website. *Id.* ¶ 39. The Claim Forms do not require that the Settlement Class Member submit any
7 proof of purchase or other supporting documentation. *See* Claim Form, attached as Agreement, Ex.
8 B. The Claim Forms only require the Participating Class Member to verify their name, email
9 address, phone number, unique ID Code (provided by email), and certify that they are eligible class
10 members seeking to participate in the settlement—all of which can be performed on any mobile
11 device or personal computer with ease.

12 **c. Change to Business Practice**

13 Beginning on or around February 16, 2022, Panda stopped the exact business practice that
14 Plaintiffs’ lawsuit challenged by ceasing its assessment of a Service Fee on delivery orders placed
15 through Panda’s mobile App and website. Agreement, ¶ 38(c). Panda further agrees that it will not
16 charge a Service Fee on delivery orders for a period of 4 years from the Effective Date of the
17 Agreement. *Id.*

18 **d. Settlement Releases**

19 The Agreement includes a narrow release by Participating Class Members of Released
20 Claims that arose during the Class Period and that reasonably arise out of or relate to the claims
21 alleged in the Action. Agreement, ¶¶ 27-28, 58.

22 The Agreement also includes a General Release and waiver of California Civil Code Section
23 1542 as to the named Plaintiffs only. *Id.* ¶ 59.

24 **e. Settlement Class Notice**

25 The Settlement Administrator will provide direct Email Notice via the e-mail addresses
26 identified in the Class List and contained in Panda’s business records, as well as Publication Notice
27 published on Facebook to reach Class Members who might not receive or read the Email Notice.
28

1 *Id.* ¶¶ 25, 47. Panda’s business records will be used to identify Settlement Class Members and their
2 contact information.

3 The Settlement Administrator will also establish and maintain the settlement Website, which
4 will include key information about the Settlement, including, but not limited to the Notice, the Claim
5 Form, a copy of the Agreement, the Preliminary Approval Order, the date of the Fairness Hearing,
6 and how to submit Claim Forms online. *Id.* The Notice will include a summary of the case; a
7 summary of Settlement Class Members’ legal rights and options; answers to frequently asked
8 questions; a description of the Agreement and the settlement benefits; contact information for
9 Counsel; instructions on how to opt out of or object to the Settlement; a description of the attorneys’
10 fees that Class Counsel intends to apply for and the service awards to be sought for Plaintiffs; and
11 information about the Final Approval Hearing. *See* Agreement at *Exhibit A*.

12 **f. Service Awards for Class Representatives and Class Counsel’s**
13 **Fees and Costs**

14 Subject to Court approval, Plaintiffs will later request Service Awards of up to \$5,000 each
15 to be paid from the cash portion of the Gross Settlement; Class Counsel’s Fees of up to 33% of the
16 Gross Settlement (\$462,000); and reimbursement of reasonable costs and expenses in this litigation
17 (approximately \$16,500). Agreement at ¶¶ 7, 38, 44.

18 **C. Settlement Administration, Opt-Outs, Objections, and Rescission**

19 Plaintiffs and Class Counsel, in conjunction with Panda, request the Court’s approval of
20 Epiq Class Action & Claims Solutions, Inc. as the Settlement Administrator, which will provide
21 notice and other administrative handling of the Agreement. Agreement at ¶ 33. Those costs are
22 currently estimated at approximately \$105,000. *Id.*, ¶ 34.

23 The Agreement provides a procedure for members of the Class to exclude themselves from
24 the Settlement by submitting a written statement by the Response Deadline. *Id.*, ¶ 49. Requests for
25 exclusion must include: (1) the Settlement Class Member’s name, address, phone number, and email
26 address used to place the order, and (2) a statement that the Member wishes to be excluded. *Id.*

27 The Agreement also provides the procedures for Settlement Class Members to object to the
28 Agreement by the Response Deadline. *Id.*, ¶ 52. Written objections must be signed by the

1 Participating Class Member, delivered to the Settlement Administrator, and include: (1) the
2 Settlement Class Member's name, address, phone number, email address used to place the order,
3 and (2) the reason including any legal grounds for the Participating Class Member's objection. *Id.*

4 Panda may rescind the Agreement if 10,000 or more of the Class Members opt out of the
5 Settlement. *Id.*, ¶ 50.

6 **IV. ARGUMENT IN FAVOR OF PRELIMINARY SETTLEMENT APPROVAL**

7 **A. The Settlement Should be Preliminarily Approved**

8 The law favors settlements. (*Bush v. Superior Court* (1992) 10 Cal. App. 4th 1374, 1382.)
9 This is particularly true in class actions where substantial resources can be conserved by avoiding
10 the time, cost, and rigors of formal litigation. However, a class action may not be dismissed,
11 compromised, or settled without the Court's approval. (Cal. R. Ct. 3.769(a).) California courts
12 frequently look to Federal Rule of Civil Procedure 23 and to federal cases for guidance on issues
13 related to review and approval of class action settlements. (*See e.g., Vasquez v. Superior Court*
14 (1971) 4 Cal. 3d 800, 820; *La Sala v. Am. Sav. & Loan Ass'n* (1971) 5 Cal. 3d 864, 872.)

15 The decision to approve or reject a proposed Settlement Agreement lies within the Court's
16 sound discretion. (*See Wershba v. Apple Computer, Inc.* (2001) 91 Cal. App. 4th 224, 239-40.) The
17 preliminary approval assessment does not require the trial court to answer any ultimate question on
18 the issues of fact and law that underlie the parties' dispute. (*Id.*; *Dunk v. Ford Motor Co.* (1996) 48
19 Cal. App. 4th 1794, 1807.) However, "the court must at least satisfy itself that the class settlement
20 is within the ballpark of reasonableness." (*Kullar v. Foot Locker Retail, Inc.* (2008) 168 Cal. App.
21 4th 116, 133 [internal citations omitted].) A settlement satisfies that standard so long as "the
22 proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has
23 no obvious deficiencies, does not improperly grant preferential treatment to class representatives or
24 segments of the class, and falls within the range of possible approval" (*Manual for Complex*
25 *Litigation* (2d ed. 1985) § 30.44.)

26 While conducting this analysis, the Court should give "[d]ue regard to what is otherwise a
27 private consensual agreement between the parties." (*Dunk, supra*, 48 Cal. App. 4th at p. 1801.) The
28

1 inquiry “must be limited to the extent necessary to reach a reasoned judgment that the agreement is
2 not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the
3 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.” (*Id.* [citations and
4 internal quotation marks omitted].)

5 Importantly, preliminary approval does not require the Court to make a *final* determination
6 that the settlement is fair, adequate, and reasonable—although the Settlement in this case embodies
7 all three. Rather, that decision is made only after notice has been given to the Class Members and
8 that they have had an opportunity to voice their views of the settlement or exclude themselves from
9 it. (*C.f. 7-Eleven Owners for Fair Franchising v. Southland Corp.* (2000) 85 Cal. App. 4th 1135,
10 1145 [“Neither the trial court nor [the court of appeal] is to reach any ultimate conclusions on the
11 contested issues of fact and law which underlie the merits of the dispute, for it is the very uncertainty
12 of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual
13 settlements.”]; *see also Dunk, supra*, 48 Cal. App. 4th at p. 1801.)

14 Plaintiffs and the Settlement Class faced significant legal risks in this case. For instance, the
15 theory of liability here was novel, and indeed this is one of the first cases in the country challenging
16 the veracity of low cost delivery promises where additional delivery-only “service fees” were
17 included in order totals. Panda argued that Plaintiffs voluntarily paid the total cost of their delivery
18 orders, including additional service fees, and could not possibly have been deceived. While
19 Plaintiffs prevailed on the demurrer, both the demurrer and the motion to dismiss pending in the
20 *Scott* Action nevertheless posed a threshold litigation risk. Indeed, Panda argued on demurrer that
21 California courts have repeatedly rejected attempts to recover payment of fees that were disclosed,
22 even where a customer/guest alleges the description of the fees was inaccurate or deceptive. *See,*
23 *e.g., Searle v. Wyndham International, Inc.* (2002) 102 Cal. App. 4th 1327, 1330 (voluntary payment
24 doctrine barred plaintiff’s claims regarding hotel’s service fee which was disclosed and avoidable
25 because “[w]hat a hotel does with the revenue it earns—either from the mini-bar, in home movies
26 or its room service charges—is of no direct concern to hotel guests”). Since Plaintiffs’ claims and
27 theory of liability were novel, there was a great deal of uncertainty on these claims. There were
28

1 also genuine risks that Plaintiffs might not prevail at class certification, at trial, or on appeal. Kalliel
2 Decl. ¶ 23. Given these risks, a settlement that provides members of the Settlement Class with a
3 critical change to Panda’s allegedly deceptive practice as well a substantial monetary benefit falls
4 within the range of possible approval. *Id.* There are no grounds to doubt the Agreement’s fairness.
5 *Id.*

6 In addition, Panda maintains that it has always disclosed service fees for food delivery. In
7 early 2020 and during the heart of the pandemic, Panda began charging a 10% service fee associated
8 with delivery to help offset the increased costs caused by the dramatic shift to online delivery orders.
9 If required to defend the merits of the case, Panda would have argued that it never represented that
10 it would not assess additional service fees, and that it was not false to advertise a flat, low cost \$2.95
11 delivery fee. Panda also argued that these fees were not a shrouded way to increase profit, but were
12 needed to cover costs associated with delivery services during the pandemic. Each of these factors
13 were litigation risks faced by the Plaintiffs and the proposed Class.

14 Moreover, Panda asserts that Plaintiffs would not be able to certify a class in this case due
15 to the individualized inquiries inherent in their claims. Initially, different guests had different
16 ordering experiences depending on their individual choices. Such claims cannot be certified.⁵ As
17 an additional hurdle, Plaintiffs’ CLRA and MCPA claims require Plaintiffs to prove materiality and
18 injury caused by the alleged deception.⁶ Where such a showing would require an individualized
19 inquiry, a class cannot be certified. *See, e.g., In re Vioxx*, 180 Cal. App. 4th at 129 (“if the issue of
20

21 ⁵ *See, e.g., Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 596 (vacating class
22 certification order on UCL and CLRA claims because class members did not all view the same
23 allegedly deceptive statements); *Berger v. Home Depot USA, Inc.* (9th Cir. 2014) 741 F.3d 1061,
24 1069 (affirming denial of certification of UCL and CLRA claims; “[W]hen the class action is based
25 on alleged misrepresentations, a class certification denial will be upheld when individual evidence
26 will be required to determine whether the representations at issue were actually made to each
27 member of the class.”); *Cohen v. DIRECTV, Inc.* (2009) 178 Cal. App. 4th 966, 980 (denying
28 certification of UCL and CLRA claims; “In short, common issues of fact do not predominate over
[plaintiff’s] proposed class because the members of the class stand in a myriad of different positions
insofar as the essential allegation in the complaint is concerned.”)

⁶ *In re Vioxx Class Cases* (2009) 180 Cal. App. 4th 116, 129 (explaining that CLRA claims
are limited to instances in which someone suffers damage “as a result” of the unlawful practice); *In
re OnStar Contract Litig.* (E.D. Mich. 2011) 278 F.R.D. 352, 377 (causation is a necessary showing
under MCPA).

1 materiality is a matter that would vary from consumer to consumer, the issue is not subject to
2 common proof, and the action is properly not certified as a class action.”)

3 **1. A Presumption of Fairness Applies to this Settlement Because It Is the**
4 **Result of Arms-Length Negotiations, There Has Been Sufficient**
5 **Investigation and Discovery, Counsel Are Experienced in Similar**
6 **Litigation**

7 There is a presumption that a proposed settlement is fair and reasonable when it is the result
8 of arms’ length negotiations, there has been sufficient investigation and discovery to permit counsel
9 and the Court to act intelligently, counsel are experienced in similar litigation, and the percentage
10 of objectors is small⁷. (See *Kullar*, 168 Cal. App. 4th at p. 128, quoting *Dunk*, 48 Cal. App. 4th at
11 p. 1803.)

12 This settlement is the product of a successful mediation using the services of Judge Andrew
13 Guilford (Ret.), a highly experienced mediator who is well-versed in complex disputes, including
14 class action claims regarding false advertising of consumer products. Kaliel Decl., ¶ 24. The
15 settlement negotiations were vigorous and non-collusive. *Id.*, ¶ 25. In addition, prior to any
16 settlement discussions Plaintiffs sought and obtained a significant amount of information about the
17 number of customers who purchased food for delivery on Panda’s website and App and the
18 approximate fees and prices charged customers who purchased food for delivery on Panda’s website
19 and App, such that Plaintiffs could estimate the available damages in the case and will allow the
20 Court to “independently and objectively analyze the evidence and circumstances before it in order
21 to determine whether the settlement is in the best interests of those whose claims will be
22 extinguished.” (*Kullar*, 168 Cal. App. 4th at p. 130.) See also Kaliel Decl., ¶ 26.

23 Finally, Plaintiffs are represented by experienced Class Counsel. Class Counsel has years of
24 experience in consumer class action litigation and has successfully handled national, regional, and
25 statewide class actions throughout the United States, in both state and federal courts. See *id.* ¶ 27
26 and Ex. A thereto.

27 ⁷ Notice has not yet been disseminated to the Settlement Class. Thus, there are no objections
28 to the Settlement at this juncture.

1 2. **There are No Grounds to Doubt the Fairness of the Settlement Because**
2 **There Are No Obvious Deficiencies, The Settlement Does Not Improperly**
3 **Grant Preferential Treatment to Plaintiffs, and Class Counsel Will Not**
4 **Be Excessively Compensated**

5 No grounds exist to doubt the fairness of the Settlement, much less at this preliminary
6 approval stage. Considering the costs and risks of continued litigation, Class Counsel believes the
7 Settlement to be in the Class Members’ best interests. Kaliel Decl. ¶ 28. First, the benefit of Panda’s
8 removal of the “Service Fee” is a major accomplishment for Plaintiffs. *Id.*, ¶ 29. Class Counsel
9 also believes that Panda’s agreement to not charge a Service Fee on delivery orders for a period of
10 4 years from the Effective Date of the Agreement will aid in price transparency for consumers in
11 making their purchasing decision. Further, Panda’s addition of a notice on its order finalization
12 screen that “Additional Charge on Delivery Orders” will allow its customers to make better-
13 informed decisions about the costs of delivery services. *Id.* In addition, some of Panda’s competitors
14 have followed Panda’s example and made better disclosures regarding delivery fees. *Id.*, ¶ 30. In
15 short, this critical practice change will inure to the benefit of the Settlement Class and future delivery
16 consumers. The monetary benefits are also robust, as described above.

17 Moreover, all Settlement Class members will receive the same opportunity to participate in
18 the settlement, submit a claim, and receive a benefit. Although the Settlement provides for a \$5,000
19 service award to each of the named Plaintiffs from the Gross Settlement, which is subject to the
20 Court’s approval, those payments are designed to separately compensate Plaintiffs for (1) granting
21 a release of *all* their claims, (2) having incurred substantial risks in undertaking this litigation,
22 including the potential liability for costs of suit, (3) having expended resources in prosecuting this
23 case by providing information and documents to Class Counsel to assist in their investigation of
24 their claims, reviewing and approving the Complaint, considering and accepting the settlement
25 proposal, and supervising Class Counsel; and (4) having obtained—through their bringing this
26 suit—a substantial recovery for the thousands of absent Settlement Class Members who will receive
27 the benefits of the Settlement without having to spend any of their own time or resources litigating
28 their claims. Kaliel Decl., ¶ 31.

 The Agreement also provides for an award of up to 33% of the Gross Settlement for

1 attorneys' fees and reimbursement of costs to be paid from the Net Settlement, subject to the Court's
2 approval. Plaintiffs' forthcoming motion for an award of attorneys' fees and expenses will explain
3 in detail why the award is justified, but the requested amount is on its face less than common
4 amounts awarded in class action litigation. (*See Chavez*, 162 Cal. App. 4th at p. 66 fn. 11
5 ["Empirical studies show that, regardless whether the percentage method or the lodestar method is
6 used, fee awards in class actions average around one-third of the recovery."] [internal citations
7 omitted]; *see also Laffitte v. Robert Half Int'l Inc.* (2016) 1 Cal. 5th 480.) The fees and expenses
8 were negotiated only after the Parties agreed to all other terms. Kaliel Decl., ¶ 32.

9 **3. The Settlement Falls Within the Range of Possible Approval**

10 "A trial court should *not* evaluate a proposed settlement against a hypothetical or
11 speculative measure of what might have been achieved had plaintiffs prevailed at trial." (*In re*
12 *Sutter Health Uninsured Pricing Cases* (2009) 171 Cal. App. 4th 495, 511.) Instead, at
13 preliminary approval, the question is whether the proposed settlement is "within the range of
14 possible approval." (*Manual for Complex Litigation* (3d ed. 1995) § 30.41.) To evaluate
15 whether a proposed settlement falls within this reasonable range of approval, courts will
16 examine if "the consideration being received for the release of the class members' claims is
17 reasonable in light of the strengths and weaknesses of the claims and the risks of the particular
18 litigation." (*Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th
19 399, 408, citing *Kullar*, 168 Cal. App. 4th at 129.)

20 The proposed Agreement recognizes the inherent risks, costs, and delay associated with the
21 prosecution of complex cases. Indeed, Panda could have prevailed on its demurrer and motion to
22 dismiss in the *Scott* Action, requiring Plaintiffs to forfeit their claims at the pleading stage. Further,
23 Panda could have succeeded in opposing class certification, obtaining summary judgment or a
24 favorable verdict at trial, or succeeding on appeal. Moreover, even if a judgment were obtained
25 against Panda at trial, the recovery might be of no greater value to the Settlement Class Members
26 and could be substantially less valuable. In contrast, the Settlement benefits provide a guaranteed
27 and meaningful benefit to Settlement Class Members of greater value, for instance, a cash recovery
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1 or two free Panda entrées worth around \$11.75 each.

2 Additionally, the only certainty is that if this case proceeds in litigation, the Settlement Class
3 Members will have to wait longer for any recovery, and both Parties will incur significant additional
4 fees and costs.

5 **4. The Strength of Plaintiffs’ Case Balanced Against the Amount Offered in**
6 **The Settlement Also Supports Granting Preliminary Approval**

7 Even after establishing a presumption of fairness, as Plaintiffs have here, the Court may also
8 evaluate the settlement in terms of the strength of Plaintiffs’ case on the merits, weighed against the
9 amount offered in settlement, which is often the factor given the greatest weight. (*Kullar*, 168 Cal.
10 App. 4th at p. 130 [stating the initial presumption of fairness must “then withstand the test of the
11 plaintiffs’ likelihood of success.”].)

12 The strength of Plaintiffs’ claims are demonstrated by the numerous courts that have
13 repeatedly upheld claims similar to these—claims premised on a misrepresentation about the
14 amount of, or reasons for, a “fee.” For example, *Ehret v. Uber Technologies, Inc.* (N.D. Cal. 2014)
15 68 F. Supp. 3d 1121, makes clear that even if a *total* price is disclosed accurately, line-item
16 representations about the *components* of that total price can nonetheless be deceptive and thus
17 actionable. In *Ehret*, the plaintiff challenged Uber’s practice of charging a 20% fee above the
18 metered fare for each ride and misrepresenting that fee as a “gratuity” that is automatically added
19 for the driver, when it actually retained the fee as an additional revenue source. (*Id.* at p. 1127.)
20 There was no dispute that the total price of the Uber ride was disclosed to plaintiffs; what was in
21 dispute was whether one component of that total price—the “metered fare”—was actually the true
22 cost of the ride before tips. The court found these allegations were sufficient to state a claim under
23 the UCL and CLRA. (*Id.* at 1137.) Like Uber’s “metered fare,” Plaintiffs here alleged that Panda’s
24 “delivery fee” was actually much higher than represented. The court in *Uber* held that “Plaintiff has
25 adequately alleged an economic injury” since Plaintiff has alleged that but for Uber’s
26 misrepresentations, she would not “have agreed to or paid Uber the full amount that Uber charged
27 her and that she paid to Uber.” (*Id.* at p. 1134.) Again, line-item components of a price can be
28 deceptive even if the total price is accurately disclosed. (*See also Johnson v. Wal-Mart Stores, Inc.*

1 (9th Cir. 2013) 544 Fed. Appx. 696, 697 [Wal-Mart’s \$9 recycling fee disclosed but was nonetheless
2 an actionable misrepresentation because Wal-Mart implicitly advertised the fee as mandatory under
3 California law when it was not.]

4 Although Plaintiffs feel strongly about the strength of merits of their claims in light of the
5 decisions above, this case faced potential obstacles at all levels that could have resulted in no
6 recovery at all for the Class, including losing the demurrer and motion to dismiss in the *Scott* Action;
7 losing class certification; losing summary judgment; losing at trial; losing on appeal at either class
8 certification or after a successful trial. Any one of these risks would have been devastating to the
9 potential recovery, and even if the case had survived to a final collected judgment, that would only
10 be obtained after years of delay and increased costs of litigation that would reduce the benefit
11 obtained.

12 At an estimated total monetary value of \$1,400,000.00 in Settlement benefits, plus a practice
13 change that was at the crux of Plaintiffs’ Complaint, the Settlement constitutes an exceptional
14 recovery. Thus, the strength of Plaintiffs’ claims weighed against the guaranteed and immediate
15 monetary benefit also lends to a finding that the Settlement is fair, reasonable, and adequate, and
16 supports a grant of preliminary approval.

17 **5. Claims-Made Settlements Are Routinely Approved**

18 “Claims-made” settlements are commonplace in consumer class actions. Like the Settlement
19 here, “[a] ‘claims-made’ settlement is a settlement that does not have a fixed settlement fund, but
20 rather provides that the defendant will pay claims of class members who file them, usually up to
21 some fixed ceiling” and the defendant’s liability will not exceed the exact amount of class claims
22 submitted. (*See* Rubenstein, *Newberg on Class Actions* (5th ed. 2014) § 13:7.)

23 Claims-made consumer class action settlements have been routinely approved by various
24 courts throughout California and the country. (*See e.g. Kumar v. Safeway, Inc.* (Super. Ct. of Cal.,
25 Cnty. of Alameda, Oct. 27, 2017) No. RG 14-726707 [approving claims-made settlement in false
26 advertising class action where benefits to be claimed were \$.50 in cash or \$1.50 in vouchers per
27 bottle of olive oil purchased]; *Machlan v. Procter & Gamble Co. et al.* (Super. Ct. of Cal., Cnty. of
28

1 San Francisco, Dec. 9, 2016) No. GCG 14-538168 [approving claims-made settlement in false
2 advertising class action where benefits to be claimed were \$1 per package of flushable wipes
3 purchased]; *Adtrader, Inc. v. Google LLC* (N.D. Cal. Nov. 1, 2022) No. 17-cv-07082-BLF, 2022
4 WL 16579324 [approving claims-made settlement in false advertising and unfair business practice
5 class action of a non-reversionary \$7 million settlement fund]; *Carlotti v. Asus Computer Int'l* (N.D.
6 Cal. Nov. 19, 2019) No. 18-cv-03369-DMR [approving nationwide consumer class action claims-
7 made settlement involving defect laptops where consumers could submit claims for either a cash
8 payment or credit from defendants and which provided that defendants would retain whatever
9 money is not claimed from the class fund]; *Kumar v. Salov North America Corp.* (N.D. Cal. July 7,
10 2017) No. 4:14-cv-02411-YGR [approving nationwide claims-made settlement in false advertising
11 consumer products class action]; *Saccoccio v. JP Morgan Chase Bank, N.A.* (S.D. Fla. 2014) 297
12 F.R.D. 683, 696 [rejecting objection to claims-made settlement and noting that the court need not
13 wait until claims are filed to approve the settlement, as settlements with low claiming rates have
14 often been approved]; *Shames v. Hertz Corp.* (S.D. Cal. 2012) No. 07-CV-2174-MMA (WMC)
15 2012 WL 5392159, *9 [rejecting objections and approving claims-made settlement because “there
16 is nothing inherently objectionable with a claims-submission process, as class action settlements
17 often include this process, and courts routinely approve claimsmade [sic] settlements.”]; *Lemus v.*
18 *H&R Block Enters. LLC* (N.D. Cal. Aug. 22, 2012) No. C 09-3179 SI, 2012 WL 3638550
19 [approving claims-made settlement where unclaimed funds revereted to the defendants].)

20 Here, the claims process will ensure that only eligible customers participate in the settlement.
21 The class is defined as “persons within the United States who at any time between July 17, 2020
22 and February 16, 2022 placed an order for delivery through Panda’s website or mobile application
23 where a Service Fee was charged in connection with that delivery order.” Agreement, ¶ 9. But the
24 person who placed an order could be different from the individual(s) who were exposed to Panda’s
25 marketing, who paid for the order, or whose email address was used for that order, so the claim form
26 will ensure proper participation. And if anyone has questions about eligibility, they may ask the
27 class administrator, and the Parties will confer in good faith to resolve individual issues that may
28

1 arise. *E.g., id.* ¶ 25.

2 Further, the Settlement provides that no amount of the \$900,000.00 cash portion of the Gross
3 Settlement shall revert to Panda, and the entire cash pool will be distributed *pro rata* to Settlement
4 Class Members who choose the cash option. Agreement, ¶ 38(a). Nevertheless, in the absence of a
5 provision in the Agreement providing for the distribution of unclaimed funds, California requires
6 that such funds will be distributed to a cy pres recipient and will not revert to Panda. (*See Cal. Code*
7 *Civ. Pro.* § 384 [“It is the policy of the State of California to ensure that the unpaid cash residue
8 and unclaimed or abandoned funds in class action litigation are distributed, to the fullest extent
9 possible, in a manner designated either to further the purposes of the underlying class action or
10 causes of action, or to promote justice for all Californians.”]; *see also Cundiff v. Verizon California,*
11 *Inc.* (2008) 167 Cal. App. 4th 718, 721-22 [applying § 384 to a claims-made settlement on the basis
12 that the term “unpaid residue” accurately described the uncashed and returned settlement checks.])

13 **B. The Settlement Class Should be Preliminarily Certified.**

14 Class actions are historically favored in California as an important tool for protecting
15 consumer rights. (*See Linder v. Thrifty Oil Co.* (2000) 23 Cal. 4th 429, 434 [“Courts have long
16 acknowledged the importance of class actions as a means to prevent a failure of justice in our judicial
17 system.”].) Courts frequently certify a class for the purpose of approving a settlement. (*See e.g.,*
18 *Hernandez v. Vitamin Shoppe Indus., Inc.* (2009) 174 Cal. App. 4th 1441, 1457.) In California, there
19 are two prerequisites to certification: (1) the existence of an ascertainable class, and (2) “a well-
20 defined community of interest in the questions of law and fact involved affecting the parties to be
21 represented.” (*Daar v. Yellow Cab Co.* (1967) 67 Cal.2d 695, 704 [citation omitted].) Whether there
22 is an ascertainable class depends upon (1) the class definition, (2) the size of the class, and (3) the
23 means available for identifying the Class Members. (*Vasquez*, 4 Cal. 3d at pp. 821-822.) California
24 courts also utilize the procedures prescribed by the Federal Rules of Civil Procedure for class
25 actions. (*See Dean Witter Reynolds, Inc. v. Superior Court* (1989) 211 Cal. App. 3d 758, 773.)

26 Class certification in other consumer cases involving false advertising and deceptive
27 misrepresentations about the amount of, or reasons for, a “fee” like the instant matter has been
28

1 achieved. *See, e.g. Vianu v. AT&T Mobility LLC* (N.D. Cal. Nov. 8, 2022) No. 19-cv-03602-LB, 2022 U.S.
2 Dist. LEXIS 203520, at *2 (certifying class for settlement purposes and granting final approval of settlement
3 in case with allegations that AT&T advertised a flat monthly fee for wireless service but mislead customers
4 by charging additional fees); *Alvarez v. Sirius XM Radio Inc.* (C.D. Cal. July 15, 2020) No. CV 18-8605 JVS
5 (SSx), 2020 U.S. Dist. LEXIS 235043, at *2 (certifying class for settlement purposes in case with allegations
6 that the consumers paid a flat fee for a lifetime subscription, but were thereafter charged additional fees);
7 *Ehret v. Uber Techs., Inc.* (N.D. Cal. Feb. 16, 2017) No. 3:14-cv-113-EMC, 2017 U.S. Dist. LEXIS 22586,
8 at *2 (granting final approval of class settlement in case with allegations that 20% gratuity fee was
9 misleading) And Panda does not dispute that these requirements may be satisfied in this case for
10 purposes of settlement only because the notice and claim process resolve issues that would be
11 disputed in a contested motion for class certification. Therefore, the Court may conditionally certify
12 the following Settlement Class: all persons within the United States who at any time between July
13 17, 2020 and February 16, 2022 placed an order for delivery through Panda’s website or mobile
14 application where a Service Fee was charged in connection with that delivery order.

15 **1. The Class is Ascertainable**

16 A class is ascertainable “if it identifies a group of unnamed plaintiffs by describing a set of
17 common characteristics sufficient to allow a member of that group to identify himself as having a
18 right to recover based on the description.” (*Ghazaryan v. Diva Limousine, Ltd.* (2008) 169 Cal.
19 App. 4th 1524 at p. 1533, quoting *Estrada v. FedEx Ground Package Sys., Inc.* (2007) 154 Cal.
20 App. 4th 1, 14.) The proposed class here is ascertainable. The Settlement Class definition identifies
21 the class members in simple and objective terms, such that Class members can readily identify
22 themselves from the description of the Class. These individuals are also ascertainable because they
23 can be generally identified and determined through an examination of Panda’s business records.
24 Those records will facilitate direct e-mail notice to class members, and they will be used to verify
25 questions and potential claims received by the administrator (e.g., from those who have email
26 problems or receive notice by publication). Thus, Panda’s records will help confirm the identities
27 of its customers who fit the settlement class definition.

1 **2. The Class is Sufficiently Numerous**

2 Code of Civil Procedure § 382 requires that the class be “numerous” in size such that “it is
3 impracticable to bring them all before the court.” (*See Henderson v. Ready to Roll Transportation,*
4 *Inc.* (2014) 228 Cal. App.4th 1213, 1222.) Panda’s records indicate that the Class includes over 1.3
5 million distinct email addresses. *See* Kaliel Decl. ¶ 33. Therefore, the Class is sufficiently numerous
6 such that joinder is impractical.

7 **3. Common Questions of Law and Fact Predominate**

8 “The ultimate question the element of predominance presents is whether the issues which
9 may be jointly tried, when compared with those requiring separate adjudication, are so numerous or
10 substantial that the maintenance of a class action would be advantageous to the judicial process and
11 to the litigants.” (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal. 4th 1004, 1021
12 [citations and quotation marks omitted].) Common issues predominate when they would be “the
13 principal issues in any individual action, both in terms of time to be expended in their proof and of
14 their importance.” (*Vasquez*, 4 Cal. 3d at p. 810.) The “predominance” requirement does not mean
15 that all questions of law or fact must be common to every Settlement Class Member; rather, the
16 “existence of shared legal issues with divergent factual predicates is sufficient, as is a common core
17 of salient facts coupled with disparate legal remedies within the class.” (*Hanlon v. Chrysler Corp.*
18 (9th Cir. 1998) 150 F.3d 1011, 1019; *see also* *Collins v. Rocha* (1972) 7 Cal. 3d 232, 238.)

19 Merely alleging a common legal theory is enough to establish commonality, (*Morgan v.*
20 *Labs. Pension Trust Fund* (N.D. Cal. 1979) 81 F.R.D. 669, 676), but both common facts and
21 common legal issues are present here. The Settlement Class Members’ claims arise from a common
22 nucleus of facts because all of them ordered delivery through Panda’s website or App and were
23 charged a “Service Fee” that Plaintiffs contend was a “hidden” delivery charge. Plaintiffs contend
24 that common legal issues also unite the Settlement Class. They include: (1) the elements of
25 Plaintiffs’ claims and Panda’s defenses; (2) whether Panda violated the UCL, CLRA, and breached
26 its contract with consumers when it represented on its Website and App that the Delivery Fee for
27 orders would be \$2.95 and also assessed a “Service Fee” applied exclusively to delivery orders; (3)
28

1 whether Panda’s misrepresentations were material and would likely deceive a reasonable consumer;
2 (4) whether Plaintiffs and the Settlement Class Members have sustained damages as a result of
3 Panda’s business practices; and (5) the measure of damages or restitution owed to Plaintiffs and
4 Settlement Class Members. And although the Parties disagree about the predominance analysis for
5 a contested motion to certify a class, the settlement structure avoids those complications because
6 issues like exposure, materiality, and reliance are not at issue. Thus, there are no issues of law that
7 affect only individual Settlement Class Members. Accordingly, a finding of commonality and
8 predominance is merited in the context of this settlement. *See, e.g. Vianu*, 2022 U.S. Dist. LEXIS
9 203520, at *11 (commonality and predominance requirements met for the purpose of settlement); *Alvarez*,
10 2020 U.S. Dist. LEXIS 235043, at *20-24 (same).

11 **4. Plaintiffs’ Claims are Typical of Those of the Class**

12 Typicality requires that the named Plaintiffs’ interests in the action be similar to those of
13 other Class Members. (*See Fireside Bank v. Superior Court* (2007) 40 Cal. 5th 1069, 1090.)
14 “Typicality does *not* require that the representative plaintiff’s claims and those of the class members
15 be identical or perfectly aligned.” (*Gonzales v. San Gabriel Transit, Inc.* (2019) 40 Cal. App. 5th
16 1131, 1161 [emphasis added], citing *Wershba*, 91 Cal. App. 4th at p. 228.) Rather, “[i]t is enough
17 that both the named plaintiff’s claims and class members’ claims arise from similar conduct and
18 implicate the same legal theories so that the plaintiff has a motive to litigate on behalf of all class
19 members.” (*Id.*, citing *Classen v. Weller* (1983) 145 Cal. App. 3d 27, 45.) Here, Plaintiffs’ claims
20 are based on the same facts and underlying legal theories as those of the Settlement Class. Like
21 other class members, they were charged a “Service Fee” on delivery orders placed thorough Panda’s
22 website or mobile app. Because the claim form and transaction records would suffice for Plaintiffs’
23 claims as it would for absent Class Members, Plaintiffs’ claims are typical of those of the putative
24 Class they seek to represent. Again, Panda does not dispute the Court’s finding of typicality for
25 purposes of settlement only.

26 **5. Plaintiffs and Class Counsel Will Vigorously Protect the Class’s Interests**

27 The representative plaintiff must adequately protect the interests of the class. (Code Civ.
28

1 Proc. § 382; *National Solar Equipment Owners' Assn. v. Grumman Corp.* (1991) 235 Cal. App. 3d
2 1273, 1284.) Indeed, “[w]hen a plaintiff sues on a behalf of a class, he assumes a fiduciary obligation
3 to the members of the class, surrendering any right to compromise the group action in return for
4 individual gain.” (*La Sala*, 5 Cal.3d at p. 871.) To satisfy the “adequacy” prong, a plaintiff must
5 demonstrate that (1) there be no disabling conflicts of interest between the class representative and
6 the class, and (2) that class counsel be competent and experienced. (*See McGhee v. Bank of Am.*
7 (1976) 60 Cal. App. 3d 442, 450.)

8 Plaintiffs understand that their role as class representatives is to remain informed regarding
9 the lawsuit and assist class counsel in the interest of the class. Kaniel Decl. ¶ 34. Plaintiffs
10 understand that they cannot, and do not, have any legal conflicts with the Class. *Id.* And Plaintiffs
11 have already demonstrated their willingness to serve the Class’s interest by filing this lawsuit to
12 vindicate the interests of the Class, and they have actively participated in the prosecution of this
13 case on behalf of the Class since its inception. *Id.* ¶ 35. They effectively communicate with counsel,
14 have provided documents to counsel, have participated in discovery throughout this litigation and
15 are willing to sit for deposition if noticed by Panda. *Id.* Moreover, Plaintiffs do not have any claims
16 antagonistic to or in conflict with those of other members of the Class. As discussed above, they are
17 pursuing the same legal theory as the rest of the Class relating to the same course of Panda’s conduct.
18 Plaintiffs and other class members’ claims turn on the same alleged misrepresentations and
19 omissions. In addition, Plaintiffs seek remedies equally applicable and beneficial to themselves and
20 all other members of the Class.

21 Plaintiffs have also selected experienced and competent counsel to represent the Class. Class
22 Counsel has extensive background in litigating complex litigation and consumer class actions, have
23 been appointed class counsel in prior and similar cases, and have the resources necessary to
24 prosecute this action to its conclusion. *See* Kaniel Decl. ¶ 36. They have recovered hundreds of
25 millions of dollars for classes they represented. Class Counsel are qualified to represent the Class
26 and will, along with Plaintiffs, vigorously protect the interests of the Class.

27 **6. A Class Settlement is a Superior Method of Adjudication**

1 A class settlement is a superior method of adjudicating this case. A class action is superior
2 when it “both eliminates the possibility of repetitious litigation and provides small claimants with a
3 method of obtaining redress for claims which would otherwise be too small to warrant individual
4 litigation.” (*Richmond v. Dart Indus., Inc.* (1981) 29 Cal. 3d 462, 469.) Resolving Plaintiffs’ claims
5 as a class settlement will satisfy both these objectives. Because issues like exposure, reliance, and
6 materiality are irrelevant under the proposed settlement structure, the notice, claim form, and
7 transaction records will enable a classwide settlement that avoids repetitive and needless litigation
8 of the same issue and instead, will permit all claims to be resolved only once, with binding effect.
9 The alternative is to proceed with a contested motion to certify a class or for each class member to
10 file a separate case; but here, it would be impracticable to bring each class member’s claim
11 individually and such small claims would not be economically feasible or practical. Indeed, the
12 potential damages for each Settlement Class Member are “relatively small.” (*Daar*, 67 Cal. 2d at
13 p. 715 [where “defendant will retain the benefits from its alleged wrongs” without a class action
14 “[a] procedure that would permit the allegedly injured parties to recover . . . is to be preferred over
15 the foregoing alternative.”].) This is particularly true in consumer protection lawsuits, “[w]here a
16 case involves multiple claims for relatively small individual sums, some plaintiffs may not be able
17 to proceed as individuals because of the disparity between their litigation costs and what they hope
18 to recover.” (*Astiana v. Kashi Co.* (S.D. Cal. 2013) 291 F.R.D. 493, 507 [finding a class action the
19 superior method in litigating a consumer food products case]; *see also Ehret*, 148 F. Supp. 3d at p.
20 903 (“Given the very low recovery likely at issue, it seems unlikely that class members will have
21 an interest in individually controlling the prosecution of separate actions.”].) Thus, absent
22 certification for settlement, most members of the Class would never seek redress on their own or
23 face the risk of the Court denying a contested motion for class certification. That would be unjust.
24 “The class action is a product of the court of equity. It . . . [was] adopted to prevent a failure of
25 justice.” (*City of San Jose v. Superior Court* (1974) 12 Cal. 3d 447, 458.) Class certification is the
26 best way to “achieve economies of time, effort and expense, and promote uniformity of decision as
27 to persons similarly situated, without sacrificing procedural fairness.” (*Amchem Prod., Inc. v.*
28

1 Windsor (1997) 521 U.S. 591, 615.)

2 In sum, the proposed class settlement meets all certification criteria and should be certified
3 for purposes of effectuating the settlement. (*Dean Witter Reynolds, Inc.*, 211 Cal. App. 3d at p. 765
4 [holding if the necessary factors are found, “a trial court is under a duty to certify the class and is
5 vested with no discretion to deny certification based upon other considerations”]; *see also Dunk*, 48
6 Cal. App. 4th at p. 1807 n.19 [stating a lesser standard of scrutiny applies when evaluating the
7 criteria for settlement purposes and a court should take the settlement into account when evaluating
8 class certification].)

9 **C. The Proposed Notices Are Adequate**

10 A trial court has broad discretion as to how notice is given to class members. (*Chavez*, 162
11 Cal. App. 4th at p. 57.) The standard is whether the notice has a reasonable chance of reaching a
12 substantial percentage of the class members.” (*Wershba*, 91 Cal. App. 4th at p. 251 [internal
13 quotations and citations omitted].) The content of the notice “must fairly apprise the class members
14 of the terms of the proposed compromise and of the options open to dissenting class members.”
15 (*Id.*) The California Rules of Court 3.776(d) and (e) mandate that the Notice contain among other
16 things, a brief explanation of the case, including the parties’ basic contentions; a statement that the
17 court will exclude the member from the class if the member so requests by a specified date; the
18 procedures for class members to follow in requesting exclusion from the class; and a statement that
19 the judgment will bind all members who do not request exclusion. The purpose of a class notice is
20 to give members “sufficient information to allow each class member to decide whether to accept
21 the benefit he or she would receive under the settlement, or to opt out and pursue his or her own
22 claim . . . No more than that [is] required.” (*Chavez, supra*, 162 Cal. App. 4th at p. 56.)

23 The Email Notice is accurate, informative, neutral, and readable by the average person. *See*
24 Agreement at Exhibit A. It is written in plain, simple language, and provides key information about
25 the Agreement so that members of the Class can choose what to do, including: the settlement
26 benefits; how to submit a claim; the fact that Class Members will be bound by the judgment; the
27 right to opt out or object and the method for doing so; and the time, date, and place of the final
28

1 approval hearing. Moreover, the Notice will be directly delivered via e-mail, and as a supplement,
2 the Settlement Administrator will publish the Publication Notice on Facebook in order to reach
3 Class Members who might not receive or read the Notice sent via email. Agreement, ¶¶ 20, 25, 47.
4 The Settlement Administrator will also create and maintain a website which includes all relevant
5 documents pertaining to the Settlement, such as the Notices, Claim Form, a copy of the Agreement,
6 Preliminary Approval Order, date of the Fairness Hearing, and how to submit Claim Forms online.
7 Thus, the parties are confident that these methods cumulatively provide a strong chance of effecting
8 notice of the Settlement to a substantial number of Class Members. (See, e.g., *Wershba*, 91 Cal.
9 App. 4th at p. 251 [approving method where website posted notice for over thirty days and notice
10 was mailed or e-mailed directly to class members]; *Chavez*, 162 Cal. App. 4th at p. 58 [approving
11 method where notice was given by e-mail to current and former Netflix users and such notice
12 included a hyperlink to the settlement website with more detailed information about the settlement];
13 *Spann v. J.C. Penney Corp.* (C.D. Cal. Jan. 25, 2016) 314 F.R.D. 312, 331-332 [approving a
14 combination of e-mail notice, postcard notice, and publication notice on Facebook in consumer class
15 action settlement]; *Browning v. Yahoo! Inc.* (N.D. Cal. Nov. 16, 2007) No. C04-01463, 2007 WL
16 4105971 *4, *11-12 [approving e-mail notice and long-form notice posted on the settlement website
17 and finding internet notice “particularly suitable” where claims involved “visits to Defendants’
18 internet websites.”].)

19 Given that Plaintiffs’ allegations regard consumers’ use of Panda’s mobile app and website
20 in order to place food orders for delivery, Panda maintains a substantial amount of customer contact
21 information. In light of the amount of Settlement Class Member contact information within Panda’s
22 control, this constitutes the best notice practicable under the circumstances. Similarly, the content
23 of the Notices sets forth substantial detail regarding the nature of the action and claims, the structure
24 of the Settlement and class benefits, and apprises each Class Member of his or her rights and
25 obligations, as such, the Court should approve the proposed Class Notice. (See e.g. *Cellphone
26 Termination Fee Cases* (2010) 186 Cal. App. 4th 1380, 1393 [finding class notices that identified
27 the total amount of the common fund and the formula for determining how the fund would be
28

1 allocated among qualified claimants fairly apprised the prospective members the terms of the
2 Settlement and “[n]othing more specific is needed.”.)

3 **V. PROPOSED SCHEDULE OF EVENTS**

4 Entry of the Preliminary Approval Order would, among other things, (1) conditionally
5 certify the action as a class action for purposes of settlement; (2) preliminarily approve the proposed
6 Settlement Agreement; (3) direct notice of the settlement to all members of the Settlement Class;
7 and (4) schedule a hearing to consider whether the settlement should be finally approved as being
8 fair, reasonable, and adequate. The Parties respectfully request the following key deadlines:

- 9 • **Deadline to complete sending Notice:** Up to 37 days after Preliminary Approval.
10 Agreement ¶ 8 (class list due 30 days after preliminary approval), 47 (email Notice to be
11 sent 7 days after receipt of class list).
- 12 • **Objection/Exclusion Deadline:** 60 days after the Settlement Administrator distributes
13 notice. Agreement ¶ 30.
- 14 • **Deadline to file Motion for Attorneys’ Fees and Incentive Awards:** 67 days after
15 Preliminary Approval.
- 16 • **Deadline to file Motion for Final Approval:** 127 days after Preliminary Approval.
- 17 • **Deadline to File Claims:** 60 days after the Settlement Administrator distributes notice.
18 Agreement ¶ 30.
- 19 • **Fairness Hearing Date:** Approximately one hundred and fifty (150) days after
20 Preliminary Approval (or such other date ordered by the Court).

21 **VI. CONCLUSION**

22 Plaintiffs respectfully request that the Court grant preliminary approval of the Agreement
23 and enter the proposed Preliminary Approval Order filed concurrently herewith.

24 Dated: December 6, 2022

KALIELGOLD PLLC

25 
26 By: _____

27 Jeffrey D. Kaliel
28 Sophia G. Gold

Attorneys for Plaintiffs and the Classes