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Electronically FILED by
Superior Court of California,
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10/06/2023 6:01 PM
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By K. Valenzuela, Deputy Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES – SPRING STREET 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’ NOTICE OF MOTION AND
MOTION FOR FINAL APPROVAL OF
CLASS ACTION SETTLEMENT;
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT**

**[Declaration of Jeffrey D. Kaliel; [Proposed]
Order filed concurrently herewith]**

Hearing Date: November 8, 2023
Time: 10:00 a.m.
Department: 7

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

1 **TO THE COURT, TO ALL PARTIES, AND THEIR ATTORNEYS OF RECORD:**

2 PLEASE TAKE NOTICE that on November 8, , 2023 at 10:00 a.m., or as soon thereafter
3 as counsel may be heard by this Court in Department 7, located at the Spring Street Courthouse,
4 312 Spring Street, Los Angeles, California 90012, Plaintiffs Jeff Ross, Roxanne Oliveira, and
5 Natasha Scott will and hereby do move for an order:

6 1. Certifying the Settlement Class, defined to mean all persons within the United
7 States who at any time between July 17, 2020, and February 16, 2022 placed an order for
8 delivery through Panda Restaurant Group’s website or mobile application where a Service Fee
9 was charged in connection with that delivery order;

10 2. Appointing Plaintiffs Jeff Ross, Roxanne Oliveira, and Natasha Scott as the Class
11 Representatives; and

12 3. Granting final approval of the terms set forth in the Settlement and finding that
13 the Settlement is, in all respects, fair, adequate, and reasonable, and directing the parties to
14 effectuate the Settlement according to its terms.

15 This Motion is based on this Notice of Motion; the Memorandum of Points and
16 Authorities; the Declaration of Jeffrey D. Kaliei; the papers and pleadings on file with the Court;
17 and on other such evidence, information, or material as may be presented to the Court.

18 Dated: October 6, 2023

Respectfully submitted,

KALIELGOLD PLLC



21 By: _____

Jeffrey D. Kaliei

Sophia G. Gold

Attorneys for Plaintiffs and the Settlement Class

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1 **I. INTRODUCTION**

2 Plaintiffs Jeff Ross, Roxanne Oliveira, and Natasha Scott (“Plaintiffs”) attained preliminary
3 approval of a nationwide class action settlement with Defendant Panda Restaurant Group, Inc.
4 (“Defendant” or “Panda”), the terms and conditions of which are set forth in the Amended Joint
5 Stipulation of Class Action Settlement (the “Agreement”) submitted in conjunction with Plaintiffs’
6 Supplemental Brief in Support of Preliminary Approval of Class Action Settlement filed on May
7 12, 2023. The Court granted Preliminary Approval on June 7, 2023, ordering the Parties to
8 disseminate notice to the Settlement Class.

9 The Notice program has now been completed, with direct email notice having been sent to
10 Settlement Class Members as well as supplemental publication notice through Facebook as
11 instructed by the Court’s Preliminary Approval Order. (Declaration of Settlement Administrator
12 Regarding Notice and Settlement Administration (“Admin. Decl.”), ¶ 21). The deadline to file an
13 objection or request for exclusion has now passed and only three (3) Settlement Class Members
14 have opted out and zero (0) objections have been filed. (*Id.*, ¶ 19).

15 This case was the result of a significant investigation into delivery fee practices
16 industrywide, well before the complaint was ever filed. Subsequently, Class Counsel drafted and
17 filed two complaints in two different jurisdictions, then engaged in formal discovery, informal
18 discovery, and extensive settlement negotiations overseen by a well-respected neutral, former U.S.
19 District Court Judge Andrew Guilford (Ret.). The Settlement is an excellent result in this novel
20 action with merits, risks, and uncertain odds of a contested class certification motion—indeed, this
21 is one of the first lawsuits in the nation challenging “delivery fees” that, allegedly, are not actually
22 the flat, low cost as represented. The most important benefit of the proposed Settlement is one that
23 will benefit all Settlement Class Members and all current and future users of Panda’s delivery
24 services nationwide: Panda has stopped charging its “Service Fee” entirely and agrees that it will
25 not charge a Service Fee on delivery orders for four (4) years from the Effective Date of the
26 Agreement. Plaintiffs estimate that this results in a saving of at least \$12,000,000 to consumers
27 nationwide. (Declaration of Jeffrey D. Kaliel (“Kaliel Decl.”), ¶ 17.) But that is not all. The
28

1 Settlement also secures a substantial monetary benefit for Settlement Class Members. As detailed
2 below, the Settlement provides: (a) a cash fund of **\$900,000.00**, and (b) an additional fund of
3 **\$500,000.00** in free medium entrée Vouchers at Panda Express, up to two (2) Vouchers per Class
4 Member, which can be used without any additional purchase. By submitting a timely and valid
5 claim, Settlement Class Members will have the option to participate in either the cash or Voucher
6 portion of the Settlement.

7 To date, the Settlement Administrator has received 2,374 claims for free entrée Vouchers (a
8 total value of at least \$55,789) and 11,588 claims for cash payments. (Admin. Decl., ¶ 21). Plaintiffs
9 will further update this figure prior to the Final Fairness Hearing, after the claims deadline passes
10 on January 10, 2024.

11 Accordingly, Plaintiffs now submit that final approval of the Settlement is warranted under
12 California law.

13 **II. SUMMARY OF THE LITIGATION**

14 **A. Plaintiffs' Allegations**

15 Plaintiffs' class action claims arise out of allegations that Panda unfairly obscured its true
16 delivery charges by falsely marketing a flat, low cost delivery fee of \$2.95 to consumers for food
17 purchases placed on its App and website. On delivery orders only, Panda assessed an additional
18 charge it called a "Service Fee" which amounted to 10% more for the same food received by non-
19 delivery customers. (Kaliel Decl., ¶ 2.) Plaintiffs contend that because this Fee was exclusively
20 charged to delivery customers, and not to customers who ordered online and picked up their food in
21 store, the "Service Fee"—which was included in a line item called "Taxes and Fees"—was in all
22 actuality a hidden delivery upcharge, rendering the \$2.95 delivery fee representation false and
23 misleading. (*Id.*, ¶ 3.) Plaintiffs allege that by omitting, concealing, and misrepresenting material
24 facts about Panda's delivery service, Panda deceived consumers into making online food purchases
25 they otherwise would not make. (*Id.*, ¶ 4.)

26 In the Second Amended Complaint, Plaintiffs allege consumer protection claims under
27 California and Michigan law and for breach of contract seeking monetary damages, restitution,
28

1 injunctive relief, declaratory relief, and attorneys’ fees on behalf of a nationwide class of consumers
2 who made a food delivery order through Panda’s App or website during the Class Period. (*Id.*, ¶ 5.)

3 **B. Panda’s Defenses**

4 Panda asserts that all fees were fully disclosed to consumers. As Panda argued in its
5 demurrer, Panda contends that Plaintiffs cannot prove any misrepresentation because Panda’s
6 “Service Fee” was clearly disclosed during the checkout process and was accurately described as a
7 charge that “[h]elps maintain and improve your digital experience.” Given these multiple
8 disclosures before checkout, Panda maintains that no reasonable customer was misled. Relatedly,
9 Panda asserts that Plaintiffs’ claims are barred by the voluntary payment doctrine because all costs
10 were disclosed prior to Plaintiffs finalizing and completing their orders. *See, e.g., Searle v.*
11 *Wyndham International, Inc.* (2002) 102 Cal. App. 4th 1327, 1330 (voluntary payment doctrine
12 barred plaintiff’s claims regarding hotel’s service fee which was disclosed and avoidable because
13 “[w]hat a hotel does with the revenue it earns—either from the mini-bar, in home movies or its room
14 service charges—is of no direct concern to hotel guests”).

15 Turning to class certification, Panda asserts that (i) what each customer saw during their
16 personal purchasing experience; (ii) how each customer interpreted what they saw during their
17 purchasing experience; (iii) whether customers relied on the representations alleged by Plaintiffs;
18 and (iv) whether customers were actually confused about the Service Fee in light of the multiple
19 disclosures provided to them, are all highly individualized inquiries that are not amenable to class
20 treatment. *See, e.g., Mazza v. Am. Honda Motor Co.* (9th Cir. 2012) 666 F.3d 581, 596 (vacating
21 class certification order on California’s Unfair Competition Law (“UCL”) and California’s
22 Consumer Legal Remedies Act (“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

1 certification of UCL and CLRA claims; “In short, common issues of fact do not predominate over
2 [plaintiff’s] proposed class because the members of the class stand in a myriad of different positions
3 insofar as the essential allegation in the complaint is concerned.”)

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

8 **C. Procedural History**

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

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

20 On February 9, 2022, the Parties attended a full-day mediation before Judge Andrew
21 Guilford (Ret.), who previously served as U.S. District Court Judge in the Central District of
22 California. (Kaliel Decl., ¶ 6.) In preparation for mediation and for several months throughout the
23 settlement negotiations, the Parties engaged in informal discovery. Plaintiffs requested, and Panda
24 provided, voluminous information regarding Panda’s policies, practices, and procedures related to
25 the marketing and pricing of delivery orders during the Class Period. (*Id.*, ¶ 7.) Panda also provided
26 detailed sales data and data analysis regarding delivery orders, users, and fees. (*Id.*, ¶ 8.) The matter
27 did not settle at the mediation, but the Parties continued lengthy negotiations and ultimately agreed
28

1 to the material terms of settlement, resulting in the Agreement now before the Court. (*Id.*, ¶ 9.) The
2 Parties subsequently engaged in confirmatory discovery on class membership and damages. (*Id.*, ¶
3 10.)

4 The Parties' rigorous efforts in securing the Settlement continued through the preliminary
5 approval stage. The Court carefully scrutinized the terms of the Settlement and required
6 supplemental briefing to address outstanding concerns and to clarify specific provisions in the
7 Agreement and the Notices, including but not limited to, the scope of Panda's potential damages
8 exposure, justification for the claims process and how counsel will encourage claim submissions,
9 and the agreed-upon procedures for any undeliverable email notices. (*Id.*, ¶ 11.) Additionally, the
10 Parties amended the Agreement to address some of the Court's concerns. Thus, they submitted an
11 Amended Joint Stipulation of Class Action Settlement that designates the State Bar of California's
12 Justice Gap Fund as a *cy pres* recipient in the very unlikely event there is an undistributed remainder
13 of the cash portion of the Net Settlement Amount. (*Id.*, ¶ 12.)

14 On June 7, 2023, after the Court thoroughly examined the Settlement, the Amended Joint
15 Stipulation, and supplemental briefing to ensure the Settlement was provisionally fair, adequate,
16 and reasonable, the Court entered its Preliminary Approval Order, conditionally approving the
17 Settlement and certifying the Class for settlement purposes only.

18 **III. SUMMARY OF SETTLEMENT**

19 **A. Settlement Negotiations**

20 As noted above, the settlement was aggressively negotiated with the assistance of Judge
21 Andrew Guilford (Ret.), a well-respected mediator who presided over an arm's-length mediation
22 between capable and experienced class action counsel on both sides. (Kaliel Decl., ¶ 13.) The Parties
23 engaged in a significant amount of informal and confirmatory discovery in order to assist Class
24 Counsel in vetting and assessing the claims of Settlement Class Members and Panda's defenses to
25 those claims prior to reaching this Agreement. (*Id.*, ¶ 14.) The information provided included, but
26 was not limited to, the nature, timing, geographic scope and implementation of Panda's
27 advertisements, marketing materials, and disclosures on its website and App regarding delivery fees
28

1 and service fees; each Plaintiffs’ purchasing history with Panda; the number of customers who
2 purchased food for delivery on Panda’s website and App; and the approximate fees and prices
3 charged to customers who purchased food for delivery on Panda’s website and App. (*Id.*, ¶ 15.)
4 Importantly, the Parties did not discuss attorneys’ fees and costs, nor any potential service awards,
5 until they first agreed on the material terms of the settlement, including the definition of the Class,
6 notice, class benefits, and scope of the releases. (*Id.*, ¶ 16.)

7 **B. The Proposed Settlement**

8 The Parties have entered into the Agreement, which completely resolves the *Ross* Action
9 and the *Scott* Action—both of which the Parties have agreed will be stayed while approval of this
10 proposed Settlement is pending. (Kaliel Decl., ¶ 18.) The Agreement includes the following material
11 terms:

12 **1. Class Certification**

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

14 **Settlement Class** means persons within the United States who at any time between July
15 17, 2020, and February 16, 2022 placed an order for delivery through Panda’s website or
16 mobile application where a Service Fee was charged in connection with that delivery
order.

17 (*See* Agreement at ¶ 9.¹)

18 **2. Class Benefits**

19 Class Counsel believes that the contemplated benefits addressed below adequately
20 compensate the Settlement Class for the harm they allegedly suffered and, in light of the risks of
21 litigation, represent an excellent result for the Settlement Class. (Kaliel Decl., ¶ 19.) According to
22 Panda’s records, approximately 1,385,236 distinct email addresses were used in connection with
23 purchases during the Class Period where a Service Fee was charged. (Admin. Decl., ¶ 7.)

24 **a. Settlement Funds**

25 Within 10 business days of the Effective Date of the Settlement, Panda will deposit the
26 \$900,000.00 cash portion into a Qualified Settlement Fund (“QSF”) to be established by the

27 _____
28 ¹ 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 elected Settlement benefit within 14 calendar days 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 four (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 **IV. NOTICE HAS BEEN SUCCESSFULLY DELIVERED AS ORDERED BY THE**
25 **COURT**

26 Prior to distributing notice to the Class Members, the Settlement Administrator established
27 a website, www.deliveryservicefeesettlement.com. Declaration of Settlement Administrator
28 Regarding Notice and Settlement Administration filed contemporaneously herewith (“Admin

1 Decl.”) at ¶ 15.

2 On July 6, 2023, Epiq began sending Email Notices to all Settlement Class Members
3 identified in Panda's business records, using the email addresses and names that Settlement Class
4 Members themselves used when ordering from, or signing up for an account with, Panda. Each
5 email contained a unique ID Number along with a description of how to use that unique ID Number
6 to submit a claim on the Settlement Website. *Id.*, 8. The Email Notice included an embedded link to
7 the Settlement Website. By clicking the link, recipients were taken to the Settlement Website, where
8 they were then able to easily file an online Settlement Claim Form using the unique ID number that
9 was included with their Email Notice. *Id.*, 10. The Settlement Website also allowed Settlement Class
10 Members to make updates to their email addresses, spelling of names, or last names (as, for example,
11 would be necessary for a recently married person who changed their last name). *Id.*, ¶ 15.

12 Upon completion of the Email Notice campaign on July 10, 2023, the Settlement
13 Administrator had emailed the Court-approved notice of the Settlement to 1,372,411 Class Members.
14 In total, Email Notice was delivered, without return, to 936,613 unique Settlement Class Members.
15 *Id.*, ¶ 9.

16 Separately, and as a measure to supplement the direct Email Notice and satisfy any
17 additional notice obligations under the CLRA, commencing on July 10, 2023, and continuing for
18 30 days, the Settlement Administrator ran online banner advertisements (the “Banner Notices”) on
19 the social media site, Facebook, which appeared on newsfeeds and as right-hand-side notices. [*Id.*
20 ¶¶ 10-11.] The Banner Notices were distributed to a variety of target audiences, including those
21 relevant to individuals’ demonstrated interests and/or likes. All Banner Notices appeared on
22 desktop, mobile, and tablet devices, and were distributed to selected targeted audiences nationwide.
23 Banner Notices were also targeted (remarketed) to people who clicked on a Banner Notice. [*Id.* ¶
24 12.] These Banner Notices generated approximately 10.3 million impressions. [*Id.* ¶ 13.]

25 In response to the notice, to date no Settlement Class Member has objected to the Settlement.
26 Admin. Decl., ¶ 20. Three Settlement Class Members have elected to opt-out of the Settlement. *Id.*,
27 ¶ 19.

1 Settlement Class Members who wish to be considered for payment under the Settlement are
2 required to submit a Claim Form to Epiq through the Settlement Website no later than January 10,
3 2024. As of September 8, 2023, Epiq has received 13,891 Claim Forms. 11,531 Settlement Class
4 Members have elected to participate in the Cash Portion of the Net Settlement Amount and 2,360
5 Settlement Class Members have elected to receive Vouchers.

6 The Settlement Administrator has received only three (3) opt-outs in this case, and zero (0)
7 Settlement Class Members have filed an objection to the Settlement. (*Id.*, ¶ 19).

8 **V. ARGUMENT**

9 **A. The Settlement Should Be Finally Approved**

10 The proposed Settlement meets all the standards set forth under California law for final
11 approval of a class action settlement. The trial court has “broad discretion” to determine whether a
12 class action settlement is “fair and reasonable.” (*Wershba v. Apple Computer, Inc.* (2001) 91 Cal.
13 App. 4th 224, 234-35.) In reviewing a class action settlement, “due regard should be given to what
14 is otherwise a private consensual agreement between the parties . . . The inquiry must be limited to
15 the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or
16 overreaching by, or collusion between the negotiating parties, and that the settlement taken as a
17 whole is fair, reasonable and adequate to all concerned.” (*7-Eleven Owners for Fair Franchising*
18 *Inc. v. Southland Corp.* (2000) 85 Cal.App.4th 1135, 1145.)² The relevant factors in assessing a
19 settlement include:

20 the strength of [the] plaintiffs’ case, the risk, expense, complexity and likely duration of
21 further litigation, the risk of maintaining class action status through trial, the amount
22 offered in settlement, the extent of discovery completed and the stage of the proceedings,
the experience and views of counsel, the presence of a governmental participant, and the
reaction of the class members to the proposed settlement.

23 (*Id.* at p. 1146.)

24 There is a presumption of fairness where, as here, 1) the settlement was reached through
25 arm’s-length negotiation, 2) investigation and discovery are sufficient to allow counsel and the
26 Court to act intelligently, 3) counsel is experienced in similar litigation, and 4) the number of

27 _____
28 ² Unless otherwise stated, all internal citations, quotation marks, and alterations are omitted
herein.

1 objectors is small. (*Dunk v. Ford Motor Co.* (1996) 48 Cal. App. 4th 1794, 1801.)

2 As set forth above, the *Dunk* presumption in favor of approval applies as the Settlement was
3 reached through arm’s-length negotiation with the assistance of an experienced mediator (Kaliel
4 Decl., ¶ 20); robust investigation and informal discovery was conducted and more than sufficient to
5 allow informed decisions regarding settlement (*id.*, ¶ 21); Class Counsel is experienced in similar
6 litigation (*id.*, ¶ 22); and the number of objectors is not only small, but in fact, there has been zero
7 (0) objections filed with the Settlement Administrator, and also just three (3) Settlement Class
8 Members have elected to opt out of this proposed Settlement. (Admin. Decl., ¶ 19).

9 The following analysis evaluates the proposed Settlement under required California law.

10 **1. Evaluation of the Settlement**

11 Class Counsel believes the Settlement is an excellent one for the Settlement Class. (Kaliel
12 Decl., ¶ 23). On the merits, Plaintiffs believe their claims are strong: they allege that Panda’s
13 practice of assessing an additional charge it calls a “Service Fee” which amounts to 10% more for
14 the same food received by non-delivery customers misleads consumers about the true cost of
15 delivery. Indeed, the strength of Plaintiffs’ claims are demonstrated by the numerous courts that
16 have repeatedly upheld claims similar to these—claims premised on a misrepresentation about the
17 amount of, or reasons for, a “fee.” (*See e.g., Ehret v. Uber Technologies, Inc.* (N.D. Cal. 2014) 68
18 F. Supp. 3d 1121, 1127, 1134-37 [plaintiffs stated a claim under the UCL and CLRA where they
19 alleged that Uber’s practice of charging a 20% fee above the metered fare for each ride represented
20 as a “gratuity” for the driver, but was actually retained as an additional revenue source for Uber,
21 was deceptive even though the total price was disclosed to consumers]; *Johnson v. Wal-Mart Stores,*
22 *Inc.* (9th Cir. 2013) 544 Fed. Appx. 696, 697 [Wal-Mart’s \$9 recycling fee disclosed but was
23 nonetheless an actionable misrepresentation because Wal-Mart implicitly advertised the fee as
24 mandatory under California law when it was not].)

25 Nevertheless, Plaintiffs and the Settlement Class faced significant legal risks in this case. For
26 instance, the theory of liability here was novel, and indeed, this is one of the first cases in the country
27 challenging the veracity of low-cost delivery promises where additional delivery-only “service fees”
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1 were included in order totals. While Plaintiffs prevailed on the demurrer in the *Ross* Action, both
2 the demurrer and the motion to dismiss pending in the *Scott* Action still posed a threshold litigation
3 risk, as Panda asserted several colorable defenses on the merits and also as to class certification. For
4 example, Panda argued that Plaintiffs voluntarily paid for the total cost of their delivery orders,
5 including the challenged Service Fees, and that no reasonable consumer would be deceived by
6 Panda’s checkout process where California courts repeatedly reject attempts to recover payment of
7 fees that were disclosed, even where a customer/guest alleges the description of the fees was
8 inaccurate or deceptive. (*See, e.g., Searle v. Wyndham International, Inc.* (2002) 102 Cal.App.4th
9 1327, 1330 [voluntary payment doctrine barred plaintiff’s claims regarding hotel’s service fee which
10 was disclosed and avoidable because “[w]hat a hotel does with the revenue it earns—either from
11 the mini-bar, in home movies or its room service charges—is of no direct concern to hotel guests”].)
12 Panda additionally argued that it never advertised or represented a “flat” delivery fee as Plaintiffs
13 allege; that the Service Fee was not a shrouded way to increase profit as alleged, but was reasonably
14 necessary to pay the significant costs associated with online delivery services; and that Plaintiffs
15 were unlikely to prevail at class certification due to the individualized inquiries needed to assess
16 materiality, injury, and other elements of Plaintiffs’ claims, given Class Members’ different ordering
17 experiences. Considering the novelty of Plaintiffs’ claims and Panda’s viable defenses, the
18 resolution of Plaintiffs’ claims against Panda would likely involve lengthy and uncertain appeals.
19 (*See Uppal v. CVS Pharmacy, Inc.* (N.D. Cal. Sept. 11, 2015) No. 3:14-cv-02626-VC, 2015 WL
20 10890652, at *1 [settlement would avoid “substantial costs, delay and risks that would be presented
21 by the further prosecution of the litigation”].)

22 In light of these risks and uncertainty, Plaintiffs were ultimately able to obtain a settlement
23 with a value of over \$1.4 million—consisting of \$900,000 cash and \$500,000 in entrée Vouchers
24 plus, most critically, an important and prominent disclosure from one of the largest restaurant chains
25 in the country. Given the real substantive and procedural uncertainties of protracted litigation risks
26 discussed here, a settlement that provides members of the Settlement Class with a critical change to
27 Panda’s allegedly deceptive practice, as well a substantial monetary benefit, undoubtedly supports
28

1 granting final approval. (Kaliel Decl., ¶ 24.)

2 Indeed, the monetary benefits are also robust. The \$900,000 cash portion of the Settlement
3 Fund—which is to be distributed equally amongst those Participating Class Members who submit
4 a valid claim and who opt to receive a cash benefit in Individual Settlement Recovery amounts to
5 be determined on a pro rata basis—plus the \$500,000 Voucher portion—which provides Settlement
6 Class Members with the ability to receive up to two (2) Vouchers for one free medium entrée
7 through Panda’s mobile App or website (each Voucher estimated at a maximum retail value of
8 \$11.75) without the need for any additional purchase—collectively represents approximately 19.4%
9 of Class Counsel’s estimate of Plaintiffs’ best-case damages at trial, if Plaintiffs were to prevail.
10 (Kaliel Decl., ¶ 25).

11 Currently, 2,374 Settlement Class Members have already validly claimed the Voucher benefit
12 portion of the Settlement, amounting to at least \$55,789 worth of the \$500,000 fund in available
13 Vouchers. The Vouchers provide a real benefit to the Settlement Class in that they are able to receive
14 up to two (2) free medium entrees from Panda at no charge *and do not have to spend any of their*
15 *own money in order to retain this benefit.* (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.App.4th 43,
16 53-55 [finding settlement benefit of providing free DVD rentals worth \$6 to current subscribers was
17 fair and reasonable because class members were “being offered an opportunity to obtain a limited
18 number of rentals at *no charge.*”] [emphasis in original].) Such settlements have been routinely
19 embraced in California courts as being fair and reasonable. (See *e.g., Aaron Aseltine, et al. v.*
20 *Chipotle Mexican Grill, Inc.* (Sept. 14, 2022) No. RG21088118, Super. Ct. California, Alameda
21 County [granting final approval in similar delivery fee class action settlement that provided class
22 members with the opportunity to claim a voucher for one free entrée worth \$8.50]; *In re Microsoft*
23 *I-V Cases* (2006) 135 Cal.App.4th 706, 711-13 [affirming approval of class action settlement that
24 provided computer software vouchers to class]; *Wershba, supra*, 91 Cal.App.4th at p. 247 [affirming
25 finding that \$50 coupons for redemption at Apple’s online store were reasonable]; *Dunk, supra*, 48
26 Cal.App.4th at pp. 1804-05.)

27 Adding the value of the Vouchers to the \$900,000 non-reversionary cash component, and
28

1 even *excluding* the value of Panda’s change in business practices—brings the value of the
2 Settlement to almost \$1,000,000 at this stage of the claims process. Settlement Class Members still
3 have over three (3) months remaining to submit claims, and that number is likely to increase
4 significantly.

5 All in all, this is an excellent recovery in the context of a settlement, where “it is well-settled
6 law that a proposed settlement may be acceptable even though it amounts to only a fraction of the
7 potential recovery that might be available to the class members at trial.” (*Nat’l Rural Telecomms.*
8 *Corp. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527; *see also Behrens v. Wometco*
9 *Enters., Inc.* (S.D. Fla. 1998) 118 F.R.D. 534, 542 (King, J.), *aff’d* (11th Cir. 1990) 899 F.2d 21
10 [“[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not
11 mean the settlement is unfair or inadequate”].) Indeed, “[a] settlement can be satisfying even if it
12 amounts to a hundredth or even a thousandth of a single percent of the potential recovery.” (*Id.*; *see*
13 *e.g., Schneider v. Chipotle Mexican Grill, Inc.* (N.D. Cal. 2020) 336 F.R.D. 588, 597 [granting final
14 approval of a claims made settlement in a nationwide class action concerning alleged
15 misrepresentations to consumers where the settlement amount represented 7.4% of estimated
16 damages]; *Dashnaw v. New Balance Ath., Inc.* (S.D. Cal. July 29, 2019) No. 17cv159-L(JLB), 2019
17 WL 3413444 at *10 [granting final approval of claims made settlement relating to claims of false
18 advertising and consumer misrepresentation for 14% of estimated damages]; *City of Detroit v.*
19 *Grinnell Corp.* (S.D.N.Y. 1972) 356 F.Supp. 1380, 1386 [a recovery of 3.2% to 3.7% of the amount
20 sought is “well within the ball park”], *aff’d in part, rev’d on other grounds*, (2d Cir. 1974) 495 F.2d
21 448; *Martel v. Valderamma* (C.D. Cal. 2015) 2015 U.S. Dist. LEXIS 49830 * 17 [approving a
22 settlement of \$75,000 where potential damages were \$1.2 million]; *In re Toys R Us FACTA Litig.*
23 (C.D. Cal. 2014) 295 F.R.D. 438, 453 [approving settlement with **vouchers** (not cash) **potentially**
24 worth a maximum of three percent (3%) if all possible claims were actually made, or \$391.5 million
25 aggregate voucher potential where the class could have recovered \$13.05 billion].)

26 Lastly, the positive reaction of the Settlement Class supports a finding that the Settlement is
27 fair, reasonable, and adequate to grant final approval. After providing Notice of the Settlement to
28

1 the Settlement Class, and after giving Class Members sufficient opportunity to review the Court’s
2 file and all of the components of the Agreement, not a single Class Member has objected to the
3 fairness of the Settlement. (Admin. Decl., ¶ 20.) Additionally, the response of absent Class Members
4 to the Settlement was “overwhelmingly positive” because only three (3) Class Members elected to
5 opt out. (*See 7-Eleven, supra*, 85 Cal.App.4th at p. 1153 [nonetheless finding a positive reaction to
6 the proposed settlement where 80 of the 5,454 national class members elected to opt out and 9
7 members objected].) This nearly uniform response on behalf of absent Class Members indicates the
8 Settlement Class’s acceptance of the Settlement and further supports that their interests have been
9 adequately protected by the Settlement. (*See Natural Gas Anti-Trust Cases I, II, III & IV* (Cal. Super
10 Ct. San Diego Cnty, Dec. 11, 2006) Case Nos. 4221, 4228, 4224, 4226, 2006 WL 5377849, at *2
11 [“When relatively few class members object to or exclude themselves from a class action settlement,
12 courts interpret that response as evidence that the settlement warrants final approval”].)

13 In sum, the strength of Plaintiffs’ novel claims weighed against the risks involved, the
14 substantial monetary benefit and valuable equitable relief offered, and the positive reaction of absent
15 Class Members, confirm that the Settlement is strong and warrants final approval.

16 **2. The Court Should Finally Certify the Settlement Class**

17 For the reasons explained in Plaintiffs’ motion for preliminary approval, and for the reasons
18 stated in the Court’s Preliminary Approval Order, the Settlement Class should be finally certified
19 for settlement purposes and the Court should grant the class action Settlement in this matter.

20 **VI. CONCLUSION**

21 Based on the foregoing, it is requested that Plaintiffs’ motion for final approval should be
22 granted in full, as set forth herein.

23 Dated: October 6, 2023

KALIELGOLD PLLC

24 By: 
25 _____
26 Jeffrey D. Kalief
27 Sophia G. Gold

Attorneys for Plaintiffs and the Settlement Class

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the District of Columbia. I am over the age of 18 and not a party to the
4 within action. My business address is 1100 15th Street NW, 4th Floor, Washington, DC 20005.

5 On **October 6, 2023**, I served the document(s) described as:

6 **PLAINTIFFS’ UNOPPOSED MOTION FOR FINAL APPROVAL OF CLASS**
7 **ACTION SETTLEMENT; MEMORANDUM OF POINTS AND AUTHORITIES**
8 **IN SUPPORT THEREOF**

9 on the interested parties in this action by sending [] the original [or] [✓] a true copy thereof
[✓] to interested parties as follows [or] [] as stated on the attached service list:

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18 **[X] BY NOTICE OF ELECTRONIC FILING:** I electronically served the document(s) with
19 the by using the CaseAnywhere system. Participants in the case who are registered
20 CaseAnywhere users will be served by the CaseAnywhere system. Participants in the case
21 who are not registered CaseAnywhere users will be served by mail or by other means
22 permitted by the court rules.

23 I declare under penalty of perjury under the laws of the State of California that the foregoing
24 is true and correct.

25 Executed this **October 6, 2023**, at Los Angeles, California.

26 NEVA R. GARCIA
27 Type or Print Name



28 _____
Signature