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9 *Attorneys for Plaintiffs and the Class*

10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF ALAMEDA**

12 AARON ASELTINE and JOHN DUNDON,
13 on behalf of themselves and all others
14 similarly situated,

15 Plaintiffs,

16 v.

17 CHIPOTLE MEXICAN GRILL, INC.,

18 Defendant.

Case No. RG21088118
Assigned for All Purposes to:
Hon. Evelio Grillo

19 **CLASS ACTION**

20 **PLAINTIFF'S NOTICE OF MOTION AND**
21 **MOTION FOR FINAL APPROVAL OF**
22 **CLASS ACTION SETTLEMENT;**
23 **MEMORANDUM OF POINTS AND**
24 **AUTHORITIES IN SUPPORT**

25 **[Notice of Unopposed Motion for Final**
26 **Approval; Declaration of Jeffrey Kaliel;**
27 **Supplemental Declaration of Cameron R.**
28 **Azari; [Proposed] Order filed concurrently**
herewith]

Hearing Date: July 12, 2022
Time: 10:00 a.m.
Department: 21
Reservation No. 277454712648

Action filed: February 4, 2021
Trial date: None

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

PLEASE TAKE NOTICE that on July 12, 2022, at 10:00 a.m. or as soon thereafter as counsel may be heard by this Court in Department 21, located at the Rene Davidson Courthouse, 1225 Fallon Street, Oakland, California 94612, Plaintiffs Aaron Aseltine and John Dundon will and hereby do move for an order:

- 1. Certifying the Settlement Class, defined to mean all persons who made a food delivery order through Chipotle’s App or Website during the Class Period, including persons who are part of the Non-Rewards Member Settlement Subclass and the Rewards Member Settlement Subclass.
- 2. Appointing Named Plaintiffs Aaron Aseltine and John Dundon as the Class Representatives.
- 3. Granting final approval of the terms set forth in the Settlement and finds that the Settlement is, in all respects, fair, adequate, and reasonable, and directs the parties to effectuate the Settlement according to its terms.

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

Dated: May 13, 2022

Respectfully submitted,

KALIELGOLD PLLC



By: _____
Jeffrey D. Kaliei
Sophia G. Gold

Attorneys for Plaintiffs and the Classes

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Statutes

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1 **I. INTRODUCTION**

2 Plaintiffs Aaron Aseltine and John Dundon (“Plaintiffs”) moved previously for preliminary
3 approval of a proposed nationwide class action settlement with Defendant Chipotle Mexican Grill,
4 Inc. (“Defendant” or “Chipotle”), the terms and conditions of which are set forth in the Amended
5 Settlement Agreement and Release (the “Agreement”) attached to the Memorandum of Points and
6 Authorities In Support of Plaintiffs’ Unopposed Motion for Preliminary Approval of Class Action
7 Settlement and Certification of the Class for Settlement Purposes filed on November 8, 2021. The
8 Court granted Preliminary Approval on January 19, 2022, ordering the Parties to disseminate notice
9 to the Class.

10 The Notice program has now been completed, with direct email notice having been sent to
11 Settlement Class Members as instructed by the Court’s Preliminary Approval Order. Declaration of
12 Cameron R. Azari, Esq. (“Notice Decl.”). To date, just four Settlement Class Members have opted-
13 out and one objection has been filed. *Id.*, ¶ 13.

14 This case was the result of a significant investigation into delivery fee practices
15 industrywide, well before the complaint was ever filed. Subsequently, Class Counsel drafted and
16 filed two complaints in two different jurisdictions, then engaged in informal discovery and extensive
17 settlement negotiations overseen by a well-respected neutral, Bruce Friedman of JAMS Los
18 Angeles. The Settlement is an excellent result in this novel action with significant arbitration and
19 merits risks—indeed, this is the first lawsuit in the nation challenging “delivery fees” that, allegedly,
20 are not actually “free” or very low cost. The most important benefit of the proposed settlement is
21 one that will benefit all Settlement Class Members and indeed all current and future users of
22 Chipotle’s delivery services nationwide: Chipotle now says prominently on its delivery ordering
23 screen: **“Higher menu prices and additional service fees apply for delivery”**—and it will keep
24 this disclosure in place as long as these charges are applicable to delivery orders. This results in a
25 more free and fair marketplace for consumers of Chipotle nationwide. But that is not all. The
26 settlement also secures a substantial monetary benefit for Settlement Class Members. As detailed
27 below, the Settlement provides: a) a cash fund of **\$1,000,000.00** to be shared by Chipotle customers
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1 who did not join Chipotle’s Rewards Program (and whose claims were thus not subject to
2 arbitration); and b) an additional fund of up to **\$3,000,000.00** in free entrée credits for Chipotle
3 customers who did join Chipotle’s Rewards Program (and whose claims were likely subject to
4 arbitration). For the former group, upon submitting a valid claim, a Settlement Class Member will
5 receive a cash payment via electronic transfer or card. Agreement, E.2. For the latter group, upon
6 submitting a valid claim, a Settlement Class Member will receive a redemption code for a free
7 regularly priced entrée from the Chipotle menu—direct, meaningful, and easy to use on their
8 Chipotle app. *Id.* ¶ E.1. To date, the Settlement Administrator has received 83,702 claims for a free
9 entrée voucher from members of the Rewards Member Subclass (a total value of at least \$763,000)
10 and 7,407 claims from members of the Non-Rewards Member Subclass. Notice Decl., ¶ 14.
11 Plaintiffs will further update this figure prior to the Final Fairness Hearing, after the claims deadline
12 passes.

13 Plaintiffs now present the matter for final approval, which is warranted by California law.

14 **II. SUMMARY OF THE LITIGATION**

15 **A. Plaintiffs’ Allegations**

16 Plaintiffs’ class action claims arise out of allegations that Chipotle unfairly obscures its true
17 delivery costs by falsely marketing “free” or “\$1” delivery to consumers for food purchases placed
18 on its App and Website in two ways. First, in May 2020, Chipotle began assessing an additional
19 charge on delivery food orders called a “service charge” that amounts to 10% more for the same
20 food received by non-delivery customers. Kaliel Decl., ¶ 2. Second, beginning in August 2020,
21 Chipotle began charging higher menu prices for online delivery, ranging from 7% to 13% and,
22 depending on the time period and the store from which the purchase was made, at times 10.5% or
23 17%. *Id.* ¶ 3. To illustrate, Plaintiff Dundon alleges that he placed an order on the Chipotle App that
24 was advertised as having a \$1.00 delivery fee, but was actually much higher than represented
25 because his purchase included a “Service Charge” of \$2.86 and the prices of the items he ordered
26 were 12-15% higher, each increased cost allegedly representing a hidden delivery fee markup. *Id.* ¶
27 4. Plaintiffs allege that by omitting, concealing, and misrepresenting material facts about Chipotle’s
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1 delivery service, Defendant deceives consumers into making online food purchases they otherwise
2 would not make. *Id.* ¶ 5.

3 In the Amended Complaint, Plaintiffs allege consumer protection claims under New York
4 and California law and a common law claim for unjust enrichment seeking monetary damages,
5 restitution, injunctive relief, declaratory relief, and attorneys' fees on behalf of a nationwide class
6 of consumers—both Non-Rewards Members and Rewards Members—who made a food delivery
7 order through Chipotle's App or Website during the Class Period. *Id.* ¶ 6.

8 **B. Chipotle's Defenses**

9 Chipotle denies that its fees for delivery were not adequately disclosed to consumers. When
10 the COVID-19 pandemic hit, restaurants including Chipotle were shuttered and forced to shift from
11 in-store to online and delivery purchases. About two months into the pandemic, in May 2020,
12 Chipotle began charging service fees for online and App-based delivery orders to help offset the
13 increased costs caused by the dramatic shift to online delivery orders. Chipotle contends that these
14 increased costs were associated with, among other things, implementing safety policies and
15 procedures, increasing employee pay and benefits, enhancing its digital platform, and increased
16 costs from its third-party delivery partner. When Chipotle began charging those service fees, it
17 maintains that it expressly disclosed the service fee in multiple places and manners before customers
18 made their purchases. Given these multiple disclosures before checkout, Chipotle maintains that no
19 customer was misled that they would be charged a service fee for delivery purchases.

20 After nearly 5 months into the pandemic, in August 2020, Chipotle maintains that it made
21 the business decision to charge higher menu prices for online delivery orders to offset costs and
22 continue to meet customer needs. When Chipotle increased the menu prices for delivery orders, it
23 maintains that it set out those prices in clear, accessible fashion on the delivery menu, and it also
24 always disclosed the total amount of the purchase prior to checkout.

25 In addition, Defendant maintains that Chipotle's Terms of Use and Chipotle Rewards Terms
26 & Conditions, require all Rewards members to pursue any claims against Chipotle in arbitration.

27 **C. Procedural History**

1 Plaintiff John Aaron Aseltine, who is not a member of Chipotle’s Rewards Program, filed
2 his complaint on January 29, 2021 in the Superior Court of California, County of Alameda on behalf
3 of all California consumers who purchased food delivery from Chipotle beginning on or about May
4 2020, and alleging violations of California’s Unfair Competition Law (the “UCL”) and California’s
5 Consumer Legal Remedies Act (the “CLRA”). (*See Aaron Aseltine et. al. v. Chipotle Mexican Grill,*
6 *Inc.*, Case No. RG21088118.) Plaintiff John Dundon, a member of Chipotle’s Rewards Program,
7 filed his complaint on March 1, 2021, in the United States District Court, Northern District of New
8 York on behalf of all consumers nationwide and a subclass of New York consumers who purchased
9 food for delivery from Chipotle beginning on or about May 2020 and alleging claims for relief for
10 violation of New York’s General Business Law (the “GBL”) and fraud in the inducement. (*See*
11 *Dundon v. Chipotle Mexican Grill, Inc.*, Case. No. 3:21-cv-00236-MAD-ATB) (the “New York
12 Action”). The Parties agreed to stay each case pending the conclusion of mediation.

13 On June 4, 2021, the Parties attended a full-day mediation before Bruce A. Friedman of
14 JAMS. Kaliel Decl., ¶ 7. In preparation for mediation and for several months throughout the
15 settlement negotiations, the Parties engaged in informal discovery. Plaintiff requested, and
16 Defendant provided, voluminous information regarding Chipotle’s policies, practices, and
17 procedures related to the marketing and pricing of delivery orders during the Class Period. *Id.* ¶ 8.
18 Chipotle also provided detailed data analysis regarding delivery orders, users, and fees. *Id.*, ¶ 9.
19 After reviewing the documents and data, the Parties continued lengthy negotiations and ultimately
20 agreed to the material terms of settlement, resulting in the Agreement now before the Court. *Id.* ¶
21 10. The Parties subsequently engaged in confirmatory discovery on class membership and damages.
22 *Id.*, ¶ 11.

23 **III. SUMMARY OF SETTLEMENT**

24 **A. Settlement Negotiations**

25 As noted above, the settlement was aggressively negotiated with the assistance of Bruce A.
26 Friedman, a well-respected mediator who presided over an arm’s-length mediation between capable
27 and experienced class action counsel on both sides. Kaliel Decl., ¶ 12. The Parties engaged in a
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1 significant amount of informal and confirmatory discovery in order to assist Class Counsel in vetting
2 and assessing the claims of Settlement Class Members and Chipotle's defenses to those claims prior
3 to reaching this Agreement. *Id.* ¶ 13. The information provided included, but was not limited to, the
4 nature, timing, geographic scope and implementation of Defendant's advertisements, marketing
5 materials, and disclosures on its Website and App regarding delivery fees, service fees, and menu
6 prices; Plaintiff Dundon's participation in Chipotle's Rewards Program and both Plaintiffs'
7 purchasing history with Chipotle; Chipotle's Terms of Use for its Website and App and Chipotle
8 Rewards Terms & Conditions; the number of customers who purchased food for delivery on
9 Defendant's Website and App, broken down by Rewards members and non-Rewards members; and
10 the approximate fees and prices charged customers who purchased food for delivery on Defendant's
11 Website and App. *Id.* ¶ 14. Importantly, the Parties did not discuss attorneys' fees and costs, nor
12 any potential service awards, until they first agreed on the material terms of the settlement, including
13 the definition of the Class, notice, class benefits, and scope of the release. *Id.* ¶ 15.

14 **B. The Proposed Settlement**

15 The Parties have entered into the Agreement, which completely resolves this action and the
16 New York Action, which the Parties and the New York court have agreed will be stayed while
17 approval of this proposed settlement is pending. Kaniel Decl., ¶ 16. The Agreement includes the
18 following material terms:

19 **1. Class Certification**

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

21 **Settlement Class** means all persons who made a food delivery order through
22 Chipotle's App or Website during the Class Period, including persons who are part of
23 the Non-Rewards Member Settlement Subclass and the Rewards Member Settlement
24 Subclass.

24 *See* Agreement at § II, Z.

25 The Settlement Class is comprised of the Non-Rewards Member Settlement Subclass (those
26 persons who were not members of Chipotle's Rewards Program and ordered food delivery through
27 Defendant's App or Website during the Class Period and were charged a service fee and/or increased
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1 menu prices pursuant to disclosures Plaintiffs allege were deficient) and the Rewards Member
2 Settlement Subclass (those who similarly were subjected to the alleged wrongs addressed above,
3 but who were members of Chipotle’s Rewards Program during the Class Period). *Id.* § II, V-W.

4 **2. Class Benefits**

5 Class Counsel believes that the contemplated benefits addressed below adequately
6 compensate Settlement Class Members for the harm they suffered and, in light of the risks of
7 litigation, represent an excellent result for Settlement Class Members. Kalliel Decl., ¶ 17.

8 **a. Settlement Funds**

9 Compensation for the Settlement Class will be allocated to each Member according to their
10 status as a Non-Rewards Member or a Rewards Member.

11 Within 30 days after the Effective Date, Defendant shall establish a Non-Rewards Settlement
12 Fund of \$1,000,000 in cash, less the administrative costs previously deposited into the escrow
13 account established by the Class Action Settlement Administrator. Agreement, § IV, D. This Fund,
14 which settles the claims of Plaintiff Aseltine and the Non-Rewards Settlement Subclass, will be
15 used to pay both Settlement Costs (which includes a portion of the attorneys’ fees and costs, the
16 incentive awards for Plaintiff Aseltine, and costs of notice and administration) and the Settlement
17 Awards to Non-Rewards Subclass Members to be shared equally amongst those Members who
18 make a valid claim. *Id.*

19 As for settling the claims of Mr. Dundon and the Rewards Member Settlement Subclass,
20 Defendant will provide to Settlement Class Members who make a valid claim vouchers (average
21 retail value \$8.50 each) for one free entrée from the Chipotle menu from a voucher fund in the total
22 amount of \$3,000,000. *Id.*, § IV, E. The vouchers provide a real benefit to Settlement Class Members
23 in that they are able to receive one free entrée from Chipotle at no charge *and do not have to spend*
24 *any of their own money in order to retain this benefit.* (See *Chavez v. Netflix, Inc.* (2008) 162 Cal.
25 App. 4th 43, 53-55 [finding settlement benefit of providing free DVD rentals worth \$6 to current
26 subscribers was fair and reasonable because class members were “being offered an opportunity to
27 obtain a limited number of rentals at *no charge.*”] [emphasis in original].) Such settlements have
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1 been routinely embraced in California courts as being fair and reasonable. (*See e.g., In re Microsoft*
2 *I-V Cases* (2006) 135 Cal. App. 4th 706, 711-13 [affirming approval of class action settlement that
3 provided computer software vouchers to class]; *Wershba v. Apple Computer, Inc.* (2001) 91 Cal.
4 App. 4th 224, 247 [affirming finding that \$50 coupons for redemption at Apple’s online store were
5 reasonable]; *Dunk v. Ford Motor Co.*, (1996) 48 Cal. App. 4th 1794, 1804-05.)

6 **b. Claims Process**

7 Given that Plaintiffs’ allegations exclusively regard consumers’ very recent use of
8 Chipotle’s App and Website in order to place food orders for delivery (only since May, 2020)—and
9 that a valid email address is a requirement of placing such an order—Defendant maintains robust
10 electronic customer contact information. Defendant provided this information to the Settlement
11 Administrator, who gave direct e-mail notice to the Settlement Class Members.

12 In order to receive a Settlement Award, Non-Rewards Subclass Members must submit a
13 valid Claim Form to the Settlement Administrator via mail or web form located on the Settlement
14 Website. *Id.* Those Non-Rewards Subclass Members who successfully submit a valid Claim will
15 receive an electronic payment via PayPal, Venmo, or other service, at the Class Members’ election,
16 within one hundred and eighty (180) days of the Effective Date. *Id.* The Net Settlement Fund will
17 be divided equally among the Non-Rewards Subclass Members who submit a valid claim. Rewards
18 Member Settlement Subclass Members who similarly submit a valid Claim Form to the Class
19 Administrator via web form on the Settlement Website will receive a redemption code via e-mail
20 for a free regularly priced entrée from the Chipotle menu within one hundred and eighty (180) days
21 of the Effective Date, up to a total value of \$3,000,000. *Id.*

22 The Claim Forms are accessible via one click in the email notice. It does not require that
23 the Settlement Class Member submit any proof of purchase or other supporting documentation. *See*
24 Claim Form, attached as Agreement, Ex. 1. The Claim Forms only require the Settlement Class
25 Member to verify their name, address, and affix an electronic signature—all of which can be
26 performed on any mobile device or personal computer with ease.

27 **c. Remediation**

1 As a direct result of this litigation, Defendant revised the disclosures on its App and Website
2 to state (a) expressly that menu prices may be higher for delivery orders; and (b) that service charges
3 are separate from and in addition to delivery fees, including, without limitation, the statement
4 presented to consumers on both Chipotle’s Website and App during the online ordering process, but
5 prior to purchasing food delivery: “Menu price for delivery is higher and fees apply”; the statement
6 presented to consumers on both Chipotle’s Website and App at checkout, but prior to purchasing
7 food for delivery: “Delivery includes higher menu prices and additional fees to help offset the costs
8 of delivery”; and the Offer Terms included with advertsing of promotional pricing offers for
9 delivery orders. Agreement, § IV, G. Defendant agrees to keep these or substantially similar
10 remediation measures in place as long as they are applicable to delivery orders. *Id.*

11 **d. Settlement Releases**

12 The Agreement includes a release from Named Plaintiffs and Settlement Class Members of
13 claims that arose during the Class Period and arise from and/or relate to Chipotle’s marketing and
14 charges for delivery orders through Defendant’s App or Website, and the claims alleged in the
15 operative complaint in the Action. *Id.*, § IV, C.1. Defendant agrees to release Named Plaintiffs,
16 Settlement Class Members, and Class Counsel from all claims that arise out of and/or relate to the
17 prosecution of the Action. *Id.* § IV, C.2. The Agreement also includes a waiver of California Civil
18 Code Section 1542 as to Named Plaintiffs, the Settlement Class Members, and Defendant. *Id.* § IV,
19 C.1-2.

20 **IV. NOTICE HAS BEEN SUCCESSFULLY DELIVERED AS ORDERED BY THE**
21 **COURT**

22 As this Court held when granting Preliminary Approval, the direct email notice provided to
23 Settlement Class Members is the best notice practicable under the circumstances. After the Court
24 granted Preliminary Approval, the Settlement Administrator provided direct Electronic Mail Notice
25 to all Settlement Class Members via the e-mail addresses contained in Chipotle’s business records
26 that were used by Settlement Class Members to place the online delivery orders at issue in this
27 lawsuit. Of the 7,433,989 total email notices that were sent, just 310,091 emails were returned as
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1 undeliverable. Notice Decl., ¶ 9. This results in a successful deliverable rate of approximately 96%.
2 *Id.*

3 Notice has also been effectuated via the Settlement Website. The Settlement Administrator
4 established the Settlement Website, included key information about the Settlement, including, but
5 not limited to the Long Form Notice, the Claim Form, a copy of the Agreement, the Preliminary
6 Approval Order, the date of the Fairness Hearing, and how to submit Claim Forms online. *Id.*

7 To date, the Settlement Administrator has received 83,702 claims for a free entrée voucher
8 from members of the Rewards Member Subclass (a total value of at least \$763,000) and 7,407 claims
9 from members of the Non-Rewards Member Subclass. *Id.*, ¶ 14. Plaintiffs will further update this
10 figure prior to the Final Fairness Hearing, after the claims deadline passes.

11 The Settlement Administrator has received just four opt-outs in this case, and one Settlement
12 Class Member has filed an objection. *Id.*, ¶ 13. Plaintiffs will address the objection, and any other
13 timely-filed objection, in a separate filing with the Court after the May 25, 2022 deadline to object
14 passes.

15 **V. ARGUMENT**

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

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

26 “the strength of [the] plaintiffs’ case, the risk, expense, complexity and likely duration
27 of further litigation, the risk of maintaining class action status through trial, the
28 amount 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

1 participant, and the reaction of the class members to the proposed settlement.”
2 (*Id.*)

3 There is a presumption of fairness when, as here, 1) the settlement was reached through arm’s-
4 length negotiation, 2) investigation and discovery are sufficient to allow counsel and the Court to
5 act intelligently, 3) counsel is experienced in similar litigation, and 4) the number of objectors is
6 small. (*Dunk v. Ford Motor Co.* (1996) 48 Cal.App.4th 1794, 1801.)

7 As set forth above, the *Dunk* presumption in favor of approval applies as the settlement was
8 reached through arm’s-length negotiation with the assistance of an experienced mediator (Decl. ¶
9 ___); robust investigation and informal discovery were conducted and more than sufficient to allow
10 informed decisions regarding settlement (Kaliel Decl. ¶ 18); Class Counsel is experienced in similar
11 litigation (Kaliel Decl. ¶ 19); and, the number of objectors not only is small, but to date, there has
12 been only one objection filed with the Settlement Administrator, and also, just four Settlement Class
13 Members have elected to opt out of this proposed settlement. (Notice Decl. ¶ 13.)

14 The following analyzes this proposed settlement through the required California case law.

15 **1. Evaluation of the Settlement**

16 Class counsel believes the settlement is an excellent one for the class. Kaliel Decl., ¶ 20. On
17 the merits, Plaintiffs believe their claims are strong: they allege that Chipotle’s practice of menu
18 price inflation on delivery-only orders acted as a hidden delivery fee in contravention of “FREE” or
19 low-cost delivery promises. Nonetheless, Chipotle could raise several colorable defenses. And
20 given the novelty the claims against Chipotle, the resolution of Plaintiffs’ claims would likely
21 involve lengthy and uncertain appeals. *See Uppal v. CVS Pharmacy, Inc.* (N.D. Cal., Sept. 11, 2015,
22 No. 3:14-cv-02626-VC) 2015 WL 10890652, at *1 (settlement would avoid “substantial costs,
23 delay and risks that would be presented by the further prosecution of the litigation”).

24 Plaintiffs and the Class faced significant legal risks in this case. For instance, Plaintiffs’
25 theory of liability here was novel, and indeed this is the first case in the country challenging the
26 veracity of “free” or low cost delivery promises where additional delivery-only “service fees” were
27 included in order totals. Defendant would have argued that Plaintiffs voluntarily paid the total cost
28 of their delivery orders, including additional service fees, and could not possibly have been

1 deceived. While Plaintiffs were optimistic they would prevail, this posed a threshold litigation risk.
2 As another example, Defendant maintains that at all material times, in order to receive the benefits
3 afforded members of Chipotle’s Rewards Program, program members were required to agree to
4 Chipotle’s Rewards Terms & Conditions and Terms of Use, each of which contains an arbitration
5 and class action waiver clause. Thus, Defendant’s contemplated motion to compel arbitration as to
6 Plaintiff Dundon and the Rewards Program Members presented an uncertain obstacle that could
7 have fully extinguished the ability of Rewards Program Members to pursue class action relief.

8 While Plaintiffs were hopeful they would prevail on Chipotle’s motion to compel arbitration,
9 the risks were significant that the Rewards Program Subclass would have received nothing. Indeed,
10 recent California law could have supported Defendant’s argument. (*See e.g., Nathan v. Symantec*
11 *Corporation* (Super. Ct. of Cal., Cnty. of Santa Clara, May 11, 2018) No. 17CV319332 [compelling
12 plaintiff’s claims to arbitration in sign-in wrap agreement where each time plaintiff made an online
13 purchase, the webpage button stated that clicking the button equated to assent with the license
14 agreement and terms of sale]; *Peter v. DoorDash, Inc.* (N.D. Cal. 2020) 445 F. Supp. 3d 580
15 [applying California law and granting motion to compel arbitration in sign-in wrap agreement].) If
16 the case did evade arbitration and continued through litigation, Plaintiffs and both Subclasses would
17 similarly face a substantial hurdle in overcoming any demurrer or motion to dismiss in the action.
18 As discussed above, Plaintiffs’ claims were novel, and Defendant would have argued that California
19 courts have repeatedly rejected attempts to recover payment of fees that were disclosed, even where
20 a customer/guest alleges the description of the fees was inaccurate or deceptive. *See, e.g., Searle v.*
21 *Wyndham International, Inc.* (2002) 102 Cal. App. 4th 1327, 1330 (voluntary payment doctrine
22 barred plaintiff’s claims regarding hotel’s service fee which was disclosed and avoidable because
23 “[w]hat a hotel does with the revenue it earns—either from the mini-bar, in home movies or its room
24 service charges—is of no direct concern to hotel guests”). While Plaintiffs would have strongly
25 opposed a demurrer, there was a great deal of uncertainty on these novel claims. There were also
26 genuine risks that Plaintiffs might not prevail at class certification, at trial, or on appeal. Kaliel
27 Decl. ¶ 21. Given these risks, a settlement that provides members of the Settlement Class with a
28

1 major change to Defendant’s allegedly deceptive practice as well a substantial monetary benefit
2 falls within the range of possible approval. *Id.* There are no grounds to doubt the Agreement’s
3 fairness. *Id.*

4 In addition, Defendant maintains that it has always disclosed service fees for food delivery.
5 About two months into the Pandemic, on May 11, 2020, Chipotle began charging a \$1 delivery fee
6 and 10% service fee (or, in some test markets a, flat \$2 service fee) associated with delivery to help
7 offset the increased costs caused by the dramatic shift to online delivery orders. Defendant would
8 have argued that it never represented that it would not assess additional service fees, and that it was
9 not false to advertise “\$1 delivery fee,” “\$0 delivery fee,” or, at times, “free delivery fee.”
10 Defendant would also have argued that these fees were not a shrouded way to increase profit, but
11 were needed to cover costs associated with delivery services during the pandemic.

12 In light of these risks and uncertainty, Plaintiffs was able to obtain a settlement with value
13 of over \$4.3 million, consisting of \$1,000,000 for Non-Rewards Sublcass Members (whose claims
14 were not subject to arbitration) and up to \$3,000,000 in entrée vouchers for the benefit of Rewards
15 Subclass Members (whose claims were subject to arbitration), and the separate payment of some
16 attorneys’ fees. Most importantly, Plaintiffs won an important and prominent disclosure
17 improvement from one of the largest restaurant chains in the country.

18 Given the real substantive and procedural uncertainties of continued litigation, the
19 Settlement merits final approval because it provides appropriate—and certain—relief to the
20 Settlement Class. In the face of those uncertainties, the amount offered in the Settlement is
21 considerable.

22 The monetary benefits are also robust. The \$1 million cash Settlement Fund to be distributed
23 equally to Non-Rewards Subclass Members who submit a valid claim represents approximately
24 43% of Class Counsel’s estimate of the most likely damages at trial, were Plaintiffs to prevail. *Id.*,
25 ¶ 22. The vouchers for Rewards Subclass Members is an excellent recovery, providing up to 350,000
26 claimants with a full price entrée, without the need for any additional purchase. *Id.* ¶ 23.

1 Even if the Court were to look only at the value of the the entrée vouchers *already claimed*,
2 as opposed to the \$3 million in vouchers the could be claimed in total, Rewards Subclass Members
3 have already claimed at least \$750,000 worth of the vouchers. The vouchers provide a real benefit
4 to Settlement Class Members in that they are able to receive one free entrée from Chipotle at no
5 charge *and do not have to spend any of their own money in order to retain this benefit.* (See *Chavez*
6 *v. Netflix, Inc.* (2008) 162 Cal. App. 4th 43, 53-55 [finding settlement benefit of providing free DVD
7 rentals worth \$6 to current subscribers was fair and reasonable because class members were “being
8 offered an opportunity to obtain a limited number of rentals at *no charge*.”] [emphasis in original].)
9 Such settlements have been routinely embraced in California courts as being fair and reasonable.
10 (See *e.g., In re Microsoft I-V Cases* (2006) 135 Cal. App. 4th 706, 711-13 [affirming approval of
11 class action settlement that provided computer software vouchers to class]; *Wershba v. Apple*
12 *Computer, Inc.* (2001) 91 Cal. App. 4th 224, 247 [affirming finding that \$50 coupons for redemption
13 at Apple’s online store were reasonable]; *Dunk v. Ford Motor Co.*, (1996) 48 Cal. App. 4th 1794,
14 1804-05.)

15 Adding the value of the vouchers to the \$1,000,000 cash component and the agreed-upon
16 separate payment of attorneys’ fees and a service award attributable to the Rewards Subclass, the
17 value of the Settlement excluding attorneys’ fees paid separately by Chipotle—and not including
18 the valuable prospective relief won—is at the very least \$1,763,000 at this stage of the claims
19 process. Rewards Subclass Members still have almost 2 months remaining to submit claims, and
20 that number is likely to increase significantly. Of course, this also does not account for the
21 significant value of the prospective relief the Settlement provides—relief that likely dwarfs the
22 monetary recovery for the Settlement Class.

23 All in all, this is an excellent recovery in the context of a settlement, where “it is well-settled
24 law that a proposed settlement may be acceptable even though it amounts to only a fraction of the
25 potential recovery that might be available to the class members at trial.” (*Nat’l Rural Telecomms.*
26 *Coop. v. DIRECTV, Inc.* (C.D. Cal. 2004) 221 F.R.D. 523, 527; *see also Behrens v. Wometco*
27 *Enters., Inc.* (S.D. Fla. 1998) 118 F.R.D. 534, 542 (King, J.), *aff’d*, (11th Cir. 1990) 899 F.2d 21
28

1 (“[T]he fact that a proposed settlement amounts to only a fraction of the potential recovery does not
2 mean the settlement is unfair or inadequate”).) Indeed, “[a] settlement can be satisfying even if it
3 amounts to a hundredth or even - a thousandth of a single percent of the potential recovery.” (*Id.*;
4 *see also City of Detroit v. Grinnell Corp.* (S.D.N.Y. 1972) 356 F. Supp. 1380, 1386 (a recovery of
5 3.2 % to 3.7 % of the amount sought is “well within the ball park”), *aff’d in part, rev’d on other*
6 *grounds*, (2d Cir. 1974) 495 F.2d 448; *Martel v. Valderamma* (C.D. Cal. 2015) 2015 U.S. Dist.
7 LEXIS 49830 * 17 (approving a settlement of \$75,000 when potential damages were \$1.2 million);
8 *In re Toys R US FACTA Litig.*(C.D. Cal. 2014) 295 F.R.D. 438, 453 (approving settlement with
9 **vouchers** (not cash) **potentially** worth a maximum of three percent (3%) if all possible claims were
10 actually made, or \$391.5 million aggregate voucher potential where the class could have recovered
11 \$13.05 billion.)

12 Here, in light of the risks involved, the Settlement offer is very strong.

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

14 For the reasons explained in Plaintiffs’ motion for final approval, and for the reasons stated
15 in the Court’s Preliminary Approval Order, the Settlement Class should be finally certified for
16 settlement purposes and the Court should grant the Class Action settlement in this matter.

17 **VI. CONCLUSION**

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

20 Dated: May 13, 2022

KALIELGOLD PLLC

21
22 By:  _____

Jeffrey D. Kalief
Sophia G. Gold

23
24 *Attorneys for Plaintiffs and the Classes*



Court Reservation Receipt

Reservation

Reservation ID:
277454712648

Status:
RESERVED

Reservation Type:
Motion for Determination of Good Faith Settlement
(CCP 877.6)

Number of Motions:
1

Case Number:
RG21088118

Case Title:
Aseltine VS Chipotle Mexican Grill, Inc

Filing Party:
Aaron Aseltine (Plaintiff)

Location:
Rene C. Davidson Courthouse - Department 21

Date/Time:
July 12th 2022, 10:00AM

Confirmation Code:
CR-X77NDFJJ2FZHPCPIA

Fees

Description	Fee	Qty	Amount
Reschedule Fee	1.00	1	1.00
TOTAL			\$1.00

Payment

Amount:
\$1.00

Type:
Visa

Account Number:
XXXX4183

Authorization:
06809G

Payment Date:
2022-05-16

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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

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 May 16, 2022, I served the document(s) described as:

6 **PLAINTIFFS’ MEMORANDUM OF POINTS AND AUTHORITIES IN**
7 **SUPPORT OF UNOPPOSED MOTION FOR ATTORNEYS’ FEES, EXPENSES**
8 **AND CLASS REPRESENTATIVE SERVICE AWARDS**

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

11 **DLA PIPER LLP (US)**
12 ANGELA C. AGRUSA (SBN 131337)
13 *angela.agrusa@us.dlapiper.com*
14 SHANNON E. DUDIC (SBN 261135)
15 *shannon.dudic@us.dlapiper.com*
2000 Avenue of the Stars
Suite 400 North Tower
Los Angeles, California 90067-4704

Attorneys for Defendant,
**CHIPOLTE MEXICAN
GRILL, INC.**

16 [] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s)
17 for mailing in the ordinary course of business at Los Angeles, California. I am “readily
18 familiar” with this firm’s practice of collection and processing correspondence for
mailing. Under that practice, sealed envelopes are deposited with the U.S. Postal
Service that same day in the ordinary course of business with postage thereon fully
prepaid at Los Angeles, California.

19 [X] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles,
20 California, by e-mail delivery on the parties listed herein at their most recent known e-
mail address or e-mail of record in this action.

21 [] **BY FAX:** I hereby certify that this document was served from Los Angeles, California,
22 by facsimile delivery on the parties listed herein at their most recent fax number of
record in this action.

23 [] **BY PERSONAL SERVICE:** I delivered the document, enclosed in a sealed envelope,
24 by hand to the offices of the addressee(s) named herein.

25 I declare under penalty of perjury under the laws of the State of California that the
26 foregoing is true and correct. Executed this **May 16, 2022**, at Los Angeles, California.

27 NEVA R. GARCIA


28 _____
Signature