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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ALAMEDA

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

Plaintiffs,

v.

CHIPOTLE MEXICAN GRILL, INC.,

Defendant.

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

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR ATTORNEYS' FEES, EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARDS

[*Ex Parte* Application to File Memorandum to Exceed Page Limit; [Proposed] Order; Notice of Unopposed Motion Attorneys' Fees, Expenses and Class Representative Service Award; Declaration of Jeffrey D. Kaliel; Declaration of Cameron R. Azari; and [Proposed] Order filed concurrently herewith]

Hearing Date: July 21, 2022
Time: 10:00 a.m.
Department: 21

Action filed: February 4, 2021
Trial date: None

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. INTRODUCTION

Plaintiffs Aaron Aseltine and John Dundon ("Plaintiffs") moved previously for preliminary approval of a proposed nationwide class action settlement with Defendant Chipotle Mexican Grill, Inc. ("Defendant" or "Chipotle"), the terms and conditions of which are set forth in the Amended Settlement Agreement and Release (the "Agreement") attached to the Memorandum of Points and Authorities In Suppot of Plaintiffs' Unopposed Motion for Preliminary Approval of Class Action Settlement and Certification of the Class for Settlement Purposes filed on November 8, 2021.

The Notice program has now been completed, with emails having been sent to Settlement Class Members as instructed by the Court's Preliminary Approval Order. Declaration of Adam Brown ("Notice Decl."). Plaintiffs will move for final approval of the Settlement on June 24, 2022, after the deadline for Settlement Class Members to object to or opt-out of the Settlement runs on May 25, 2022. In order to ensure Settlement Class Members have a chance to review fully Class Counsel's request for attorneys' fees, expenses and Class Representative service awards, Class Counsel is filing this Motion now. This Motion will also be posted on the Settlement website for review by Settlement Class Members.

This case was the result of a significant investigation into delivery fee practices industrywide, well before the complaint was ever filed. Subsequently, Class Counsel drafted and filed two complaints in two different jurisdictions, then engaged in informal discovery and extensive settlement negotiations overseen by a well-respected neutral, Bruce Friedman of JAMS Los Angeles. The Settlement is an excellent result in this novel action with significant arbitration and merits risks—indeed, this is the first lawsuit in the nation challenging "delivery fees" that, allegedly, are not actually "free" or very low cost. The most important benefit of the proposed settlement is one that will benefit all Settlement Class Members and indeed all current and future users of Chipotle's delivery services nationwide: Chipotle now says prominently on its delivery ordering screen: **"Higher menu prices and additional service fees apply for delivery**"—and it will keep this disclosure in place as long as these charges are applicable to delivery orders. This results in a more free and fair marketplace, both for consumers of Chipotle and Chipotle's competitors,

nationwide. But that is not all. The settlement also secures a substantial monetary benefit for Settlement Class Members. As detailed below, the Settlement provides: a) a cash fund of **$1,000,000.00** to be shared by Chipotle users who did not join Chipotle's Rewards Program (and whose claims were thus not subject to arbitration); and b) an additional fund of up to **$3,000,000.00** in free entrée credits for Chipotle users who did join Chipotle's Rewards Program (and whose claims were likely subject to arbitration). For the former group, upon submitting a valid claim, a Settlement Class Member will receive a cash payment via electronic transfer or card. Agreement, E.2. For the latter group, upon submitting a valid claim, a Settlement Class Member will receive a redemption code for a free regularly priced entrée from the Chipotle menu—direct, meaningful, and easy use on their Chipotle app. *Id.* ¶ E.1.

Subject to the Court's approval, the $1,000,000 cash Settlement Fund will also be used to pay Settlement Costs, including, a court-approved incentive award to Plaintiff Aseltine to compensate him for the time he spent, the risks he incurred, and the benefits he obtained for the Settlement Class by serving as a class representative; Class Counsel's attorneys' fees of no more than 33.3% of the $1,000,000 cash Settlement Fund; Class Counsel's costs in prosecuting the action; and the costs of notice and settlement administration. Chipotle has agreed to separately pay an additional $312,000 in attorneys fees attributed to the Rewards Member Settlement and a $5,000 incentive award to Plaintiff Dundon.

Class Counsel are entitled to seek fees and costs for their efforts and success. As such, pursuant to the Settlement Agreement and as the Notice informed class members, and without objection from Defendant, Plaintiffs bring this Motion seeking an order awarding attorneys' fees in the amount of $645,333, of which $333,333 or 1/3 is requested from the Settlement Fund provided for Non-Rewards Members Sublcass and $312,000 is to be paid separately by Chipotle attributable to the Rewards Members Subclass, and service awards in the amount of $5,000 each for the two Class Representatives.

Class Counsel obtained the above benefits for the Settlement Class with hard work and creativity, investing hundreds of hours of time in this matter—including a significant amount of

innovative investigation. When this case was filed, Plaintiffs were unaware of any other case in the country challenging the assessment of hidden delivery fees. With no precedent upon which to rely, and a formidable arbitration clause and class action waiver covering a large portion of the class, Class Counsel faced significant risks in filing this Action. Without their hard work, and that of the Class Representatives, Chipotle's alleged practices would have remained shrouded in darkness, without challenge or notice to the Class.

Accordingly, Plaintiffs' unopposed request for attorneys' fees, costs, and service awards should be granted.

II. SUMMARY OF THE LITIGATION

A. Plaintiffs' Allegations

Plaintiffs' class action claims arise out of allegations that Chipotle unfairly obscures its true delivery costs by falsely marketing "free" or "$1" delivery to consumers for food purchases placed on its App and Website in two ways. First, in May 2020, Chipotle began assessing an additional charge on delivery food orders called a "service charge" that amounts to 10% more for the same food received by non-delivery customers. Kaliel Decl., ¶ 3. Second, beginning in August 2020, Chipotle began charging higher menu prices for online delivery, ranging from 7% to 13% and, depending on the time period and the store from which the purchase was made, at times 10.5% or 17%. *Id.* ¶ 4. To illustrate, Plaintiff Dundon alleges that he placed an order on the Chipotle App that was advertised as having a $1.00 delivery fee, but was actually much higher than represented because his purchase included a "Service Charge" of $2.86 and the prices of the items he ordered were 12-15% higher, each increased cost representing a hidden delivery fee markup. *Id.* ¶ 5. Plaintiffs allege that by omitting, concealing, and misrepresenting material facts about Chipotle's delivery service, Defendant deceives consumers into making online food purchases they otherwise would not make. *Id.* ¶ 6.

In the Amended Complaint, Plaintiffs allege consumer protection claims under New York and California law and a common law claim for unjust enrichment seeking monetary damages, restitution, injunctive relief, declaratory relief, and attorneys' fees on behalf of a nationwide class

of consumers—both Non-Rewards Members and Rewards Members—who made a food delivery order through Chipotle's App or Website during the Class Period. *Id.* ¶ 7.

B. Chipotle's Defenses

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

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

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

C. Procedural History

Plaintiff John Aaron Aseltine, who is not a member of Chipotle's Rewards Program, filed his complaint on January 29, 2021 in the Superior Court of California, County of Alameda on behalf of all California consumers who purchased food delivery from Chipotle beginning on or about May 2020 and alleging violations of California's Unfair Competition Law (the "UCL") and California's Consumer Legal Remedies Act (the "CLRA"). (*See Aaron Aseltine et. al. v. Chipotle Mexican Grill,*

Inc., Case No. RG21088118.) Plaintiff John Dundon, a member of Chipotle's Rewards Program, filed his complaint on March 1, 2021 in the United States District Court, Northern District of New York on behalf of all consumers nationwide and a subclass of New York consumers who purchased food for delivery from Chipotle beginning on or about May 2020 and alleging claims for relief for violation of New York's General Business Law (the "GBL") and fraud in the inducement. (*See Dundon v. Chipotle Mexican Grill, Inc.,* Case. No. 3:21-cv-00236-MAD-ATB) (the "New York Action"). The Parties agreed to stay each case pending the conclusion of mediation.

On June 4, 2021, the Parties attended a full-day mediation before Bruce A. Friedman of JAMS. Kaliel Decl., ¶ 8. In preparation for mediation and for several months throughout the settlement negotiations, the Parties engaged in informal discovery. Plaintiff requested, and Defendant provided, voluminous information regarding Chipotle's policies, practices, and procedures related to the marketing and pricing of delivery orders during the Class Period. *Id.* ¶ 9. Chipotle also provided detailed data analysis regarding delivery orders, users, and fees. *Id*., ¶ 10. After reviewing the documents and data, the Parties continued lengthy negotiations and ultimately agreed to the material terms of settlement, resulting in the Agreement now before the Court. *Id.* ¶ 11. The Parties subsequently engaged in confirmatory discovery on class membership and damages. *Id*., ¶ 12.

III. SUMMARY OF SETTLEMENT

A. Settlement Negotiations

As noted above, the settlement was aggressively negotiated with the assistance of Bruce A. Friedman, a well-respected mediator who presided over an arm's-length mediation between capable and experienced class action counsel on both sides. Kaliel Decl., ¶ 13. The Parties engaged in a significant amount of informal and confirmatory discovery in order to assist Class Counsel in vetting and assessing the claims of Settlement Class Members and Chipotle's defenses to those claims prior to reaching this Agreement. *Id.* ¶ 14. The information provided included, but was not limited to, the nature, timing, geographic scope and implementation of Defendant's advertisements, marketing materials, and disclosures on its Website and App regarding delivery fees, service fees, and menu

prices; Plaintiff Dundon's participation in Chipotle's Rewards Program and both Plaintiffs' purchasing history with Chipotle; Chipotle's Terms of Use for its Website and App and Chipotle Rewards Terms & Conditions; the number of customers who purchased food for delivery on Defendant's Website and App, broken down by Rewards members and non-Rewards members; and the approximate fees and prices charged customers who purchased food for delivery on Defendant's Website and App. *Id.* ¶ 15. Importantly, the Parties did not discuss attorneys' fees and costs, nor any potential service awards, until they first agreed on the material terms of the settlement, including the definition of the Class, notice, class benefits, and scope of the release. *Id.* ¶ 16.

B. The Proposed Settlement

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

1. Class Certification

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

> **Settlement Class** means 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 Sublcass and the Rewards Member Settlement Subclass.

See Agreement at § II, Z.

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

2. Class Benefits

Class Counsel believes that the contemplated benefits addressed below adequately

compensate Settlement Class Members for the harm they suffered and, in light of the risks of litigation, represent an excellent result for Settlement Class Members. Kaliel Decl., ¶ 18.

a. Settlement Funds

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

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

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

b. Claims Process

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

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

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

c. Remediation

As a direct result of this litigation, Defendant revised the disclosures on its App and Website to state (a) expressly that menu prices may be higher for delivery orders; and (b) that service charges are separate from and in addition to delivery fees, including, without limitation, the statement presented to consumers on both Chipotle's Website and App during the online ordering process, but prior to purchasing food delivery: "Menu price for delivery is higher and fees apply"; the statement

presented to consumers on both Chipotle's Website and App at checkout, but prior to purchasing food for delivery: "Delivery includes higher menu prices and additional fees to help offset the costs of delivery"; and the Offer Terms included with advertsing of promotional pricing offers for delivery orders. Agreement, § IV, G. Defendant agrees to keep these or substantially similar remediation measures in place as long as they are applicable to delivery orders. *Id.*

d. Settlement Releases

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

C. Settlement Administration, Opt-Outs, Objections, and Termination

The Settlement Administror has provided direct Electronic Mail Notice to all Settlement Class Members via the e-mail addresses contained in Chipotle's business records. Of the 7,754,133 total email notices that were sent, just 310,091 emails were returned as undeliverable. Notice Decl., ¶ 15. This results in a successful deliverable rate of approximately 96%. *Id.*, at ¶ 16.

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

To date, the Settlement Administrator has received 83,082 claims for a free entrée voucher members of the Rewards Member Subclass (a total value of at least $757,000) and 7,335 claims from members of the Non-Rewards Member Subclass. *Id.*, ¶ 23. Plaintiffs will update this figure prior to the Final Fairness Hearing, after the claims deadline passes.

The Settlement Administrator has received just two opt-outs in this case, and one Settlement Class Member has filed an objection on grounds unrelated to the request for attorneys' fees, expenses, and service awards. *Id.*, 22.

IV. ARGUMENT

A. The Court Should Grant the Requested Attorneys' Fees, Whether Based on a Lodestar Evaluation, Percentage of the Recovery Calculation, or Both

Class Counsel's total request for attorneys' fees amounts to $645,333, of which $333,333 or 1/3 is requested from the Settlement Fund provided for Non-Rewards Members Sublcass and $312,000 is to be paid separately by Chipotle attributable to the Rewards Members Subclass.

A plaintiff who obtains a settlement on behalf of absentee class members is allowed to recover reasonable attorneys' fees and costs incurred in the litigation. *See, e.g., Mills v. Electric Auto-Lite Co*. (1970) 396 U.S. 375, 391-92 (recognizing the right of class action plaintiffs who have obtained a settlement to recover attorneys' fees and costs because, "[t]o allow the others to obtain full benefit from the plaintiff's efforts without contributing equally to the litigation expenses would be to enrich the others unjustly at the plaintiff's expense."). Contingency fee litigation such as this is risky and costly, with no guarantee of success. Despite this risk, Class Counsel have secured an excellent result in this litigation, and submit that a total award of $645,333 in attorneys' fees is therefore appropriate. As explained below, the requested fee reflects a reasonable 1.94 lodestar multiplier.

Regardless of whether attorneys' fees are determined using the lodestar method or awarded based on a "percentage-of-the-benefit" analysis under the common fund doctrine, "'[t]he ultimate goal ... is the award of a "reasonable" fee to compensate counsel for their efforts, irrespective of the method of calculation.' [Citations.]" (*Apple Computer, Inc. v. Superior Court, supra,* 126 Cal.App.4th at p. 1270, 24 Cal.Rptr.3d 818.) It is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace. (*Chavez v. Netflix, Inc., supra,* 162 Cal.App.4th at pp. 65-66, 75 Cal.Rptr.3d 413.) *In re Consumer Privacy Cases* (2009) 175 Cal.App.4th 545, 557-558.

Respectfully, the fee award sought herein is reasonable under both the lodestar/multiplier approach in determining reasonable attorney's fees and the common benefit approach. Further, the reaction of the Settlement Class to the Settlement terms relating to fees and costs must also be recognized. To date, just two Settlement Class Members have opted out and none have objected to the Fee request. Notice Decl. at ¶ 22.

1. The Requested Fee Is Reasonable Under the Lodestar Method

The requested attorney's fees are reasonable, fair and appropriate under the lodestar/multiplier approach. Under the lodestar/multiplier approach, the court computes the "lodestar" amount by multiplying the number of hours reasonably expended by each attorney or legal staff member by their reasonable hourly rates. *See Serrano v. Priest* (1977) 20 Cal. 3d 25, 48 ("*Serrano II*"). However, "the lodestar formula does not limit consideration to hours expended and hourly rate, though that is the foundation of the calculation." *Lealao v. Beneficial California, Inc.* (2000) 82 Cal. App. 4th 19, 40. The court then enhances this lodestar figure by a "multiplier" to account for a range of factors, such as the novelty and difficulty of the case, its contingent nature, and the degree of success achieved. *See Serrano II*, 20 Cal. 2d at 49; *see also Lealao*, 82 Cal. App. 4th at 26; *Thayer v. Wells Fargo Bank* (2001) 92 Cal. App. 4th 819, 834 ("[t]here is no hard-and-fast rule limiting the factors that may justify an exercise of judicial discretion to increase or decrease a lodestar calculation"). Class Counsel's fee demand is more than justified based upon the lodestar method of calculating fees.

a. <u>The number of hours claimed is reasonable</u>

Counsel for prevailing parties are entitled to be compensated "for all time reasonably expended in pursuit of the ultimate result achieved in the same manner that an attorney traditionally is compensated by a fee-paying client for all time reasonably expended on a matter." *Hensley v. Eckerhart* (1983) 461 U.S. 424, 431 (internal quotes and citation omitted); *see also Serrano IV*, 32 Cal. 3d at 633 (parties "should recover for all hours reasonably spent"). Class Counsel spent a significant amount of time on this first-of-its-kind case, including an extensive and sophisticated initial investigation that culminated in the Class Action Complaint. Given the complexity of the

issues involved, the exceptional results obtained, an extended settlement negotiation, and the execution of a large notice program, the 548.7 hours expended on the case have been necessary and reasonable. Class Counsel's time is detailed by the Declaration submitted concurrently with this Motion. *See* Kaliel Decl., ¶ 19.

The lodestar method looks to the number of hours reasonably expended multiplied by the reasonable hourly rate. *PLCM Grp. v. Drexler* (2000) 22 Cal. 4th 1084, 1095. Trial courts that conduct lodestar cross-checks "have generally not been required to closely scrutinize each claimed attorney-hour, but have instead used information on attorney time spent to focus on the general question of whether the fee award appropriately reflects the degree of time and effort expended by the attorneys." *Laffitte*, 1 Cal.5th 4 at 505 (internal citations and quotation marks omitted].) Here, the time and effort expended supports Plaintiffs' fee award request.

Plaintiffs' counsel has spent approximately 548.7 hours performing necessary work on behalf of the Class, from investigating and gathering evidence in support of the claims resolved by the Settlement; drafting the original complaints, then the Amended Complaint; conferring with the class representatives; regularly researching critical legal issues; preparing for mediation including by researching and drafting a comprehensive mediation statement; attending mediation; negotiating and drafting the Agreement with Defendant's counsel that provides substantial benefits to the Settlement Class, moving for and obtaining preliminary approval, including modifying aspects of the Settlement as required by the Court; overseeing the Settlement Administrator's efforts to provide notice to the Classes; and preparing the Motion for Final Approval.

In addition to the extensive work already performed, Counsel will need to continue to work on the case after final approval is granted, including working with the Settlement Administrator to ensure that all individual payments are made. Class Counsel's 548.7 reasonable hours worked multiplied by Plaintiff's Counsel's reasonable rates amount to a lodestar of $381,637.50. After application of a reasonable multiplier of 1.94, the lodestar crosscheck demonstrates the reasonableness of the requested percentage fee.

b. <u>The hourly rates requested are reasonable</u>

Class Counsel are entitled to be compensated at hourly rates that reflect the reasonable market value of their legal services, based on their experience and expertise. *See Serrano IV*, 32 Cal. 3d at 640 n.31; *San Bernardino Valley Audubon Soc'y, Inc. v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 755. "The reasonable hourly rate is that prevailing in the community for similar work." *PCLM Group, Inc. v. Drexler* (2000) 22 Cal. 4th 1084, 1095. Payment at full market rates is essential to entice well-qualified counsel to undertake difficult cases such as this one. *See Audubon Soc'y,* 155 Cal. App. 3d at 755.

Mr. Kaliel's hourly rate of $764 per hour is derived from the Laffey Matrix, which is published by the D.C. Circuit Court, and which measure prevailing market rates based on seniority in the D.C. area. Courts have acknowledged that the "[t]he Laffey Matrix is used as a guideline for reasonable attorneys' fees in the Washington/Baltimore area." *In re Neustar, Inc. Sec. Litig.*, (E.D. Va. Dec. 8, 2015) No. 1:14cv885 (JCC/TRJ), 2015 WL 8484438, at *10 n.6 (internal quotation and citation omitted); *see also Salazar ex rel. Salazar v. D.C.*, (D.C. Cir. 2015) 809 F.3d 58, 64 (confirming that the use of the Adjusted Laffey Matrix for attorneys in Washington, D.C. is appropriate).

Ms. Gold, a partner, has a rate is $650 and Ms. Casola, an associate, has an hourly rate of $475. These hourly rates are in line with market rates in San Francisco for attorneys with Class Counsel's backgrounds and levels of experience. *See Polee v. Central Contra Costa Transit Authority*, (N.D. Cal. Jan. 29, 2021) No. 18-cv-05405-SI, 2021 WL 308608, at *4 (finding $850/hour rate is "within the prevailing market rates for the San Francisco Bay Area"); *O'Bannon v. Nat'l Collegiate Athletic Ass'n*, (N.D. Cal. 2015) 114 F. Supp. 3d 819, (approving rates of up to $985 for partners, $430 for associates, $320 for professional staff) objections sustained in part and overruled in part, (N.D. Cal. Mar. 31, 2016) No. 4:09-cv-03329-CW, 2016 WL 1255454, aff'd, 739 F. App'x 890 (9th Cir. 2018) (same).

In sum, Plaintiffs' Counsel calculated their hourly rates by the reasonable market value of Counsel's services on an hourly basis. As such, they are reasonable under California law. *Ketchum* (2001) 24 Cal. 4th at 1134; *Blum v. Stenson* (1984) 465 U.S. 886, 895 n. 11; *PLCM Group, Inc*., 22

Cal.4th at 1094; *Camacho v. Bridgeport Fin., Inc*. (9th Cir. 2008) 523 F.3d 973, 979; *see also Robertson v. Fleetwood Travel Trailers of Cal., Inc.* (2006) 144 Cal.App.4th 785, 818; *Blanchard v. Bergeron* (1989) 489 U.S. 87, 96 (assessing reasonable market value for attorneys working on a contingent fee basis). Moreover, these fees are particularly appropriate given the deferred and contingent nature of Counsel's compensation. C.f. *Ketchum*, 24 Cal.4th at 1132-33 ("A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal services he renders but for the loan of those services.").

Accordingly, their rates should be approved in calculating the lodestar.

c. The requested fee is reasonable

If the requested fee is awarded, Class Counsel will be receiving a reasonable multiplier on the above lodestar. To date, Class Counsel have expended 548.7 hours of work in this litigation and accumulated a total lodestar of approximately $381,637.50. Kaliel Decl. at ¶ 20. This results in a multiplier of 1.94.

Trial courts have substantial discretion in adjusting the lodestar to account for various factors. *See Lealao*, 82 Cal. App. 4th at 26, 39-45; *see also Serrano III*, 20 Cal. 3d at 49. In addition, it has been held that "[m]ultipliers can range from 2 to 4 or even higher." *See Wershba*, 91 Cal. App. 4th at 255. Once the court has fixed the lodestar, it may increase or decrease that amount by applying a positive or negative 'multiplier' to take into account a variety of other factors, including the quality of the representation, the novelty and complexity of the issues, the results obtained, and the contingent risk presented." *Lealao, supra*, 82 Cal.App.4th 19, 26. California courts often use "the amount at stake, and the result obtained by counsel" as relevant factors justifying enhancement of a lodestar fee through use of a multiplier. *Id*. at 45. The court also considers "additional factors [such] as the . . . importance of the suit, and the public nature of plaintiffs' position." *Coal. for L. Cty. Plan. etc. Int. v. Bd. of Supervisors* (1977) 76 Cal. App. 3d 241, 251; *see also Thayer*, 92 Cal.App.4th at 833. When looking at the timing of the settlement, "the promptness of settlement cannot be used to justify the refusal to apply a multiplier to reflect the size of the class recovery without exacerbating

the disincentive to settle promptly inherent in the lodestar methodology." *Lealao,* 82 Cal.App.4th at 52-53. The "[California] Supreme Court has placed an extraordinarily high value on settlement (*see, e.g., Neary v. Regents of University of California* (1992) 3 Cal.4th 273, 277-280 [10 Cal.Rptr.2d 859, 834 P.2d 119], *citing, inter alia, McClure v. McClure* (1893) 100 Cal. 339, 343 [34 P. 822].

The lodestar multiplier requested here of 1.94 is well within the range of reasonable—indeed, it is below that range. *See Wershba v Apple Computer, Inc*. (2001) 91 Cal. App. 4th 224, 255, disapproved on another ground in *Hernandez v. Restoration Hardware, Inc*. (2018) 4 Cal.5th 260 ("Multipliers can range from 2 to 4 or even higher"); *see also Lloyd v. Navy Fed. Credit Union*, (S.D. Cal. May 28, 2019) No. 17-CV-1280-BAS-RBB, 2019 WL 2269958, at *13, reconsideration denied in part, No. 17-CV-1280-BAS-RBB, 2019 WL 2602516 (S.D. Cal. June 25, 2019 (approving attorneys' fee award in overdraft fee case which resulted in 10.96 multiplier); *Steiner v. American Broadcasting Co*., (9th Cir. 2007) 248 Fed. Appx. 780, 783 (affirming fee award where the lodestar multiplier was 6.85).

The above factors weigh in favor of the positive multiplier requested by Plaintiffs. Plaintiffs was able to obtain a settlement with value of over $4.3 million, consisting of $1,000,0000 for Non-Rewards Sublcass Members (whose claims were not subject to arbitration) and up to $3,000,000 in entrée vouchers for the benefit of Rewards Subclass Members (whose claims were subject to arbitration), and the separate payment of some attorneys' fees. Most importantly, Plaintiffs won an important and prominent disclosure improvement from one of the largest restaurant chains in the country.Plaintiffs and the Class faced significant legal risks in this case. For instance, the theory of liability here Plaintiffs was novel, and indeed this is the first case in the country challenging the veracity of "free" or low cost delivery promises where additional delivery-only "service fees" were included in order totals. Defendant would have argued that Plaintiffs voluntarily paid the total cost of their delivery orders, including additional service fees, and could not possibly have been deceived. While Plaintiffs were optimistic they would prevail, this posed a threshold litigation risk. As another example, Defendant maintains that at all material times, in order to receive the benefits

afforded members of Chipotle's Rewards Program, program members were required to agree to Chipotle's Rewards Terms & Conditions and Terms of Use, each of which contains an arbitration and class action waiver clause. Thus, Defendant's contemplated motion to compel arbitration as to Plaintiff Dundon and the Rewards Program Members presented an uncertain obstacle that could have fully extinguished the ability of Rewards Program Members to pursue class action relief.

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

falls within the range of possible approval. *Id.* There are no grounds to doubt the Agreement's fairness. *Id*.

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

Additionally, Plaintiffs' counsel took this matter on a full contingency, for which they would have recovered nothing if they had not prevailed in this matter. Counsel have litigated this case for a substantial length of time and have received no payment of their fees to date. The risks inherent to such practice, especially when undertaken in the public interest, justify a lodestar multiplier.

Based on the above factors, Class Counsel are seeking a reasonable multiplier of 1.94 times their actual fees incurred. The reasonableness of the amount of the multiplier in combination with the factors justifying it weigh in favor of this Motion being granted.

2. A Percentage of the Recovery Analysis Supports the Fee Request as Well

The total settlement benefit to the class is $4,317,000 and a $645,333 fee request amounts to less than **15%** of that total. Even if the Court were to look only at the value of the the entrée vouchers *already claimed,* as opposed to the $3 million in vouchers the could be claimed in total, Rewards Subclass Members have already claimed at least $757,000 worth of the vouchers. Adding that ot the $1,000,000 cash component and the agreed-upon separate payment of attorneys' fees and a service award attributable to the Rewards Subclass, the value of the Settlement excluding attorneys' fees paid separately by Chipotle—and not including the valuable prospective relief won—is at the very least $1,757,000 at this early stage of the claims process. Rewards Subclass Members still have another 2 months to submit requests, and that number is likely to increase

significantly. In any event, even looking at today's value of the free entrée rewards that will be issued to Rewards Subclass Members, the total attorneys' fee request amounts to only 37% of the claimed value of the Settlement to date. Plaintiffs will update this figure prior to the Final Fairness Hearing, after the claims deadline passes.

Defendant does not object to this request and it has been included in the terms of the Settlement preliminarily approved by the Court. The Class Notice advises the Settlement Class that Class Counsel would seek these fees. Thus, in light of the value created by the Settlement, from which all of the eligible Settlement Class members will automatically share unless they opt out, the requested fee award is appropriate.

a. Under The Common Benefit Doctrine, The Requested Attorneys' Fees Should Be Awarded

The California Supreme Court confirmed that in common fund cases, a trial court may award class counsel a fee out of that fund by choosing an appropriate percentage of the fund. *Laffitte v. Robert Half Int'l,* (2016) 1 Cal.5th 480, 503. While recognizing that some courts have employed a benchmark percentage, the Court chose not to adopt one and in that case affirmed a one-third fee request. *Id*. at 495.

Here, as in other common-benefit cases, Class Counsel should be rewarded for creating substantial recoveries for the Class in the most efficient method possible. California encourages attorneys to undertake the often enormous risks of time and money necessary to vindicate consumers' and employees' rights and the public interest, and to protect the public policies underlying our laws. To enable and encourage such actions to be tackled by well qualified counsel, California law intentionally provides that attorney fee awards should be equivalent to fees paid in the legal marketplace. *See Lealao v. Beneficial Cal., Inc*. (2000) 82 Cal.App.4th 19, 47. Here, Plaintiff's counsel's request for attorneys' fee that represents between 15% and 37% of the common benefit (depending on whether the benefit is calculated on the total amount possible for redemption by class members, or only the amount redeemed as of today) provided by the Settlement is certainly

consistent with decades of contingency fee awards in California's legal marketplace—in fact, it is lower.

If this were a non-representative litigation, the customary fee arrangement would be contingent, on a percentage basis, and in the range of 30%-40% of the recovery. *Blum v. Stenson* (1984) 465 U.S. 886, 903 ("In tort suits, an attorney might receive one-third of whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly proportional to the recovery."); *In re M.D.C. Holdings Securities Litigation* (S.D. Cal. 1990) 1990 WL 454747, at *22 ("in private contingent litigation, fee contracts have traditionally ranged between 30% and 40% of the total recovery."). Thus, the customary contingent fee in the private marketplace – 30% to 40% of the fund recovered – further supports that the requested 33% fee is reasonable and fair. As *Lealao* also recognizes, fee awards that are too small will "chill the private enforcement essential to the vindication of many legal rights and obstruct the representative actions that often relieve the courts of the need to separately adjudicate numerous claims." *Lealao*, 82 Cal.App.4th at 53.

The goal in a case such as this is to set a fee that approximates the probable terms of a contingent fee contract negotiated between an attorney and client in comparable litigation. *Lealao*, 82 Cal.App.4th at 48. *In re Warner Communications Sec. Lit*. (S.D.N.Y. 1985) 618 F. Supp. 735, *Newberg on Class Actions*, and other authorities in various jurisdictions all support the conclusion that fees from 30% up to even 40% of a common fund have normally been awarded in class litigation for many years. See *Williams v. MGM-Pathe Communic'ns Co.* (9th Cir. 1997) 129 F.3d 1026, 1027 (awarding 33% of total fund amount); *Paul, Johnson, Alston & Hunt v. Graulty* (9th Cir. 1989) 886 F.2d 268, 272 (an award of attorneys' fees up to 33 1/3% of the fund can be reasonable); *Barbosa v. Cargill Meat Solutions Corp.* (E.D. Cal. 2013) 297 F.R.D. 431, 451 (wage-and-hour class action where the court approved a fee request of 33% of the fund where settlement was reached 1.5 years after case was filed and before class certification.)

Newberg on Class Actions Fourth Edition, vol. 4, p. 560, § 14.6 discusses the concept of a market place analysis and why it is so valuable in determining a percentage award:

> [Goodrich and Silver[1]] ... suggest that fee awards should be consistent with contingent fee arrangements negotiated in non-class litigation:
>
> > The percentage method is consistent with and is intended to mirror practice in the private marketplace where contingent fee attorneys typically negotiate percentage fee arrangements with their clients. As Judge Posner emphasized in In re Continental Illinois Securities Litigations, "[t]he object in awarding a reasonable attorney's fee...is to simulate the market...**The Class Counsel are entitled to the fee they would have received had they handled a similar suit on a contingent fee basis, with a similar outcome, for a paying client."**

Ibid; emphasis added.

Here, the results achieved justify awarding a fee that is the equivalent of the standard market fee. Class Counsels' experience, reputation and ability to obtain a substantial result for the Class as expeditiously as possible should be rewarded.

Kaliel Gold, PLLC is a respected and experienced class action firm, with substantial experience in not only in class actions generally, but more particularly in consumer litigation. As demonstrated throughout the Declaration, it is unquestionable that the firm has regularly achieved exceptional results. Kaliel Gold has been appointed Class Counsel in dozens of cases across the country, most recently achieving a groundbreaking $75,000,000 settlement for class members in a case in which they were lead counsel.

In short, Class Counsel in this matter were qualified to pursue the claims now before this Court. It is respectfully submitted that their experience and ongoing quality of representation, coupled with a demonstrated willingness to bring these cases to certification and then on to trial, was instrumental in enabling the Class to obtain a very favorable result, under the circumstances presented by this case. Class Counsel's representation of the Plaintiffs and Class has been wholly contingent. The combined efforts have resulted in a substantial settlement for the benefit of the Class..

B. Class Counsel is Entitled to its Requested Costs

As set forth in their declarations, Class Counsel has expended a total $7,687.50. in costs and expenses on behalf of the Class, including filing fees, mediation, and court fees, all compensable

[1] Goodrich, Frank and Silver, Reagan, *Common Fund and Common Fund Problems: Fee Objections and Class Counsel's Response*, 17 Rev. Litig. 525 (Summer 1995).

pursuant to C.C.P. § 1033.5(a) and (c)(4), and were reasonably expended in the duration of the case. Moreover, reimbursement for reasonable costs and expenses in prosecution of the claims and obtaining a settlement is typical for a plaintiff's counsel. In *Serrano III*, 20 Cal. 3d at 35, the Supreme Court advised that reimbursement of costs in a common fund is "grounded in the historic power of equity to permit the trustee of a fund or property, or a party preserving or recovering a fund for the benefit of others in addition to himself, to recover his costs, including his attorneys' fees, from the fund or property.'" *Id*., *citing Alyeska Pipeline Co. v. Wilderness Society* (1995) 421 U.S. 240, 257. The requested reimbursement for costs and expenses is relatively low for class litigation and inherently reasonable given the complexity of the litigation. The costs and expenses were necessary and were an important factor in bringing this matter to a successful conclusion, and consist mainly of filing fees and costs to engage an experienced and well-respected mediator. Kaliel Decl., 22.

C. Plaintiffs' Incentive Awards are Reasonable and Should be Approved

The Court should also approve a $5,000.00 service award to each of the Class Representatives. Defendant does not oppose such an award.

In deciding whether to approve a service award, a court should consider: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation; and 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation. *Cellphone Termination Fee Cases* (2010) 186 Cal.App.4th 1380, 1394-95. Courts routinely grant service awards in similar amounts or higher. See e.g. *id*. at 1395 (finding no abuse of discretion in a $10,000 service award); *Munoz v. BCI Coca-Cola Bottling Co. of Los Angeles* (2010) 186 Cal. App. 4th 399, 412 (finding a $5,000 service award reasonable); *Dennis v. Kellogg Co*. (S.D. Cal. Nov. 14, 2013) No. 09CV1786-L (WMc), 2013 WL 6055326, at *9 (noting that a request for a $5,000 service payment in consumer class action settlement "is well within if not below the range awarded in similar cases.").

Here, the Plaintiffs, who have taken every necessary action to protect the interests of the Class and provided substantial, tangible benefits to all the Class members, were essential to the success of the litigation and to securing a favorable settlement. Mr. Aseltine and Mr. Dundon assisted in every way possible throughout the case, including assistance in investigation of the case, and working with Counsel to prepare for mediation. Moreover, by filing suit against Chipotle for alleged violations of consumer protection laws, Plaintiffs sought to protect the interests of the Class over their own interests. As such, Plaintiffs are entitled to a service award for their work.

V. CONCLUSION

Based on the foregoing, it is requested that Plaintiffs' motion for attorneys' fees, costs and service award should be granted in full, as set forth herein.

Dated: April 25, 2022

KALIELGOLD PLLC

By:_____
Jeffrey D. Kaliel
Sophia G. Gold

Attorneys for Plaintiffs and the Classes

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

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

On **April 25, 2022**, I served the document(s) described as:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED MOTION FOR ATTORNEYS' FEES, EXPENSES AND CLASS REPRESENTATIVE SERVICE AWARDS

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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Attorneys for Defendant,
CHIPOLTE MEXICAN GRILL, INC.

[ ] **BY MAIL (ENCLOSED IN A SEALED ENVELOPE):** I deposited the envelope(s) for mailing in the ordinary course of business at Los Angeles, California. I am "readily 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.

[X] **BY E-MAIL:** I hereby certify that this document was served from Los Angeles, 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.

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

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

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

NEVA R. GARCIA

Signature