IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

JAN MAYHEU, on behalf of herself and all others similarly Situated,

Plaintiff,

v.

CHICK-FIL-A INC.,

Defendant.

CASE NO. 2022CV365400

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF THEIR UNOPPOSED MOTION FOR FINAL APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT AND APPLICATION FOR ATTORNEYS' FEES, COSTS AND SERVICE AWARDS

SHAMIS & GENTILE, P.A.
Andrew J. Shamis
(GA Bar No. 49496)
Edwin E. Elliott
14 NE 1st Ave., Suite 705
Miami, FL 33132
Tel: 305-479-2299
ashamis@shamisgentile.com
edwine@shamisgentile.com

KALIELGOLD PLLC
Jeffrey Kaliel
Sophia Goren Gold
1100 15th St., NW, 4th Floor
Washington, DC 20005
Telephone: (202) 280-4783
jkaliel@kalielpllc.com
sgold@kalielgoldpllc.com

EDELSBERG LAW, P.A.
Scott Edelsberg
20900 NE 30th Ave.
Aventura, FL 33180
Tel: 305-975-3320
scott@edelsberglaw.com

Attorneys for Plaintiffs and the Settlement Class

Dated: January 30, 2024

I. INTRODUCTION

Plaintiffs Jan Mayheu, Aneisha Pittman, Susan Ukpere, Ron Goldstein, and Ronald Ortega ("Plaintiffs") moved previously for preliminary approval of a proposed multi-state class action settlement with Defendant Chick-fil-A Inc. ("Chick-fil-A" or "Defendant"), the terms and conditions of which are set forth in the Class Action Settlement Agreement (the "Agreement"), attached to the Memorandum of Law in Support of their Unopposed Motion for Preliminary Approval of Proposed Class Action Settlement filed on September 26, 2023. Through the Agreement, the parties have completely resolved the claims asserted in *Mayheu v. Chick-fil-A, Inc.*, No. 2022CV365400, Superior Court of Fulton County, Georgia (the "*Mayheu* Action"), which consolidates the claims asserted in *Pittman and Ukpere v. Chick-fil-A, Inc.*, No. 1:21-cv-8041, United States District Court for the Southern District of New York (appealed to the Second Circuit as Case No. 22-1862) (the *"Pittman* Action"), *Ukpere v. Chick-fil-A, Inc.*, No. 2:22-cv-5397, United States District Court for the District of New Jersey (the "*Ukpere* Action"), *Goldstein v. Chick-fil-A, Inc.*, No. 1:22-cv-21897, United States District Court for the Southern District of Florida (the "*Goldstein* Action"), and *Ortega v. Chick-fil-A, Inc.*, No. 2:21-cv-845, United States District Court for the Eastern District of California (the "*Ortega* Action") (collectively, the "Action").

The Class Notice plan has now been completed, with emails having been sent to Settlement Class Members as instructed by the Court's Preliminary Approval Order. Declaration of Class Action Settlement Administrator ("Admin Decl."). The deadline has passed, and zero Settlement Class Members have opted-out and zero objection(s) have been filed. *Id.*, ¶ 15.

Following a preliminary review of Chick-fil-A's delivery fee practices, Class Counsel drafted and filed five complaints in five different jurisdictions, and then engaged in contested

motion practice, a substantial amount of both formal and informal discovery, and extensive settlement negotiations overseen by a well-respected neutral, Judge David Garcia (Ret.) that continued for weeks after the mediation. The Settlement is a fair result in this novel case with merits risks. The Settlement secures a substantial monetary benefit for the Settlement Class. As detailed below, the Settlement provides: (a) a Cash Settlement Fund of **$1,450,000.00**, and (b) a Gift Card Settlement Fund worth a total redemption value of **$2,950,000.00** from which Settlement Class Members can elect to receive an electronic gift card, which they can use with no additional purchase other than a sales tax charge. By submitting a timely and valid claim, Settlement Class Members have the option to receive either a cash payment or an electronic gift card. To date, the Class Action Settlement Administrator has received 4,574 claims for a Cash Settlement Award up to $29.25 and 1,924 claims for a Gift Card Settlement Award for an electronic gift card with a balance up to $29.25. Admin Decl., ¶ 16. Plaintiffs will further update this figure prior to the Fairness Hearing for Final Approval, after the Claim Period ends. In addition, Chick-fil-A has revised the disclosures on its Chick-fil-A mobile application (the "Chick-fil-A App") and website to state expressly that menu prices may be higher for delivery orders, and agrees to keep these (or similar) disclosures in place as long as they are applicable to delivery orders.

Class Counsel are entitled to seek fees and costs for their efforts and success in achieving the Settlement. As such, pursuant to the Agreement and as the Class Notice informed Settlement Class Members, and without objection from Defendant, Plaintiffs also bring this Motion seeking the Court's approval of the distribution of the $1,450,000.00 Cash Settlement Fund, which will also be used to pay Administration Costs to the Class Action Settlement Administrator for the costs of notice and settlement administration; court-approved Service Awards to each Class Representative to compensate them for the time they spent, the risks they incurred, and the benefits

they obtained for the Settlement Class by serving as class representatives ($5,000 each); Class Counsel's attorneys' fees not to exceed $880,000.00 (representing 20% of the total monetary value of the Settlement made available to the Settlement Class); and reimbursement of Class Counsel's reasonable litigation costs incurred in prosecuting the Action in the amount of $15,579.32.

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. With no precedent upon which to rely for these novel claims, Class Counsel faced significant risks in filing the Action.

Accordingly, Plaintiffs' unopposed request for final approval of the Settlement and 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 Chick-fil-A unfairly obscures its true delivery charges by falsely marketing a flat, low-cost delivery fee in varying amounts (e.g., $2.99, $3.99) to consumers for Chick-fil-A delivery purchases placed on the Chick-fil-A App and website. Plaintiffs allege that on delivery orders only, Chick-fil-A secretly marks up food prices by a hefty 25-30%, meaning that consumers end up paying more for a delivery order than if they purchased the same menu items for pickup or in-store. Declaration of Jeffrey Kaliel ("Kaliel Decl."), ¶ 2. Plaintiffs contend that because this markup is applied exclusively to delivery orders, it amounts to a hidden delivery upcharge and makes Chick-fil-A's promise of a low-cost delivery charge patently false, deceptive, and misleading. *Id.*, ¶ 3. Plaintiffs allege that by omitting, concealing, and misrepresenting material facts about Chick-fil-A's delivery service, Chick-fil-A deceives consumers into making online food purchases they otherwise would not make. *Id.*, ¶ 4.

Plaintiffs allege negligent misrepresentation claims and consumer protection claims under their respective states' statutes, seeking monetary damages, restitution, injunctive relief, and declaratory relief on behalf of subclasses of consumers in Georgia, Florida, New York, New Jersey, and California who made a Chick-fil-A delivery order through the Chick-fil-A App or website from a Chick-fil-A location in these respective states between November 1, 2019 and April 30, 2021. *Id.*, ¶ 5.

B. Chick-fil-A's Defenses

Chick-fil-A has vehemently denied liability at every stage of the litigation and remains confident in its defense.

Through the course of the Action, Plaintiffs were forced to abandon claims for breach of contract and unjust enrichment, as well as claims on behalf of a nationwide class. Indeed, in both the *Ortega* and *Pittman* Actions, two separate federal district courts dismissed Plaintiffs' claims for breach of contract and unjust enrichment. With respect to the breach of contract claim, Chick-fil-A asserted that Plaintiffs cannot prevail on a breach of contract claim without identifying the specific contractual provision that Chick-fil-A allegedly breached and that Plaintiffs affirmatively assented to be bound by the Terms & Conditions on CFA's website and the Chick-fil-A App, which allegedly disclosed the total cost of delivery. Chick-fil-A also argued that Plaintiffs' unjust enrichment claim fails where Plaintiffs received the benefit of the bargain because they received the food as ordered. Chick-fil-A further contended that Plaintiffs could not be deceived because they got what they paid for, and that the term "Delivery Fee" was not deceptive because it does not explicitly indicate to a reasonable consumer that it excludes other costs that may be associated with delivery orders. As a result of these rulings, Plaintiffs no longer assert claims for breach of contract and unjust enrichment.

Likewise, in both the *Ortega* and *Pittman* Actions, Chick-fil-A also challenged Plaintiffs' ability to obtain nationwide class certification by moving to strike Plaintiffs' nationwide class allegations. In both cases, Chick-fil-A argued that material differences in relevant state consumer protection statutes, unjust enrichment, and breach of contract claims would defeat predominance and create an unmanageable class. These arguments were mooted by the *Ortega* and *Pittman* Courts' granting Chick-fil-A's motions to dismiss; however, Plaintiffs no longer seek certification on behalf of a nationwide class of consumers.

In the operative Consolidated Complaint, Plaintiffs allege claims for negligent misrepresentation and violation of five states' consumer protection statutes (California, Florida, Georgia, New Jersey, and New York). Chick-fil-A contends that these claims all fail because there were no misrepresentations regarding its delivery services or delivery food pricing. Chick-fil-A contends that Plaintiffs have failed to allege any representation that delivery pricing would be the same across all delivery channels. Moreover, Chick-fil-A contends that Plaintiffs are not justified in relying on any such alleged misrepresentation because it is evident from the allegations in the Consolidated Complaint that Plaintiffs had the ability to compare prices across delivery channels. Chick-fil-A further contends that Plaintiffs cannot establish that they would have made a different choice without the so-called misrepresentations. For these reasons, and many others that Chick-fil-A indicated they would argue if the Action were to proceed, Chick-fil-A contends that its practices were not deceptive or misleading as a matter of law.

C. Procedural History

Plaintiff Ronald Ortega filed his complaint in California state court on March 11, 2021, and then his Second Amended Complaint on August 12, 2022 in the Eastern District of California following removal by Chick-fil-A, on behalf of all California consumers who made Chick-fil-A

delivery orders on the Chick-fil-A App or website from a Chick-fil-A location in the State of California during the applicable statute of limitations period, alleging violations of California's Unfair Competition Law, California's Consumer Legal Remedies Act, California's False Advertising Law, and Negligent Misrepresentation.

Plaintiffs Aneisha Pittman and Susan Ukpere filed their action in the Southern District of New York on September 28, 2021, on behalf of all New York and New Jersey consumers who made Chick-fil-A delivery orders on the Chick-fil-A App or website from a Chick-fil-A location in the States of New York and New Jersey during the applicable statute of limitations period, alleging violations of NY Gen. Bus. Law § 349, New Jersey Consumer Fraud Act, Breach of Contract, and Unjust Enrichment. Plaintiff Susan Ukpere's claims were dismissed for lack of personal jurisdiction. Plaintiff Aneisha Pittman's remaining claims were also dismissed. Plaintiff Aneisha Pittman then filed an appeal to the United States Court of Appeals for the Second Circuit, which is presently pending, but stayed to allow consideration of the proposed class-wide settlement by this Court.

Plaintiff Susan Ukpere then filed a state court action in New Jersey on August 1, 2022, which was subsequently removed by Defendant to the District of New Jersey, on behalf of all New Jersey consumers who made Chick-fil-A delivery orders on the Chick-fil-A App or website from a Chick-fil-A location in the State of New Jersey during the applicable statute of limitations period, alleging violations of the New Jersey Consumer Fraud Act, Breach of Contract, and Unjust Enrichment.

Plaintiff Ron Goldstein filed his complaint in Florida state court on May 19, 2022, and then his Amended Complaint on August 11, 2022 in the Southern District of Florida following removal by Chick-fil-A, on behalf of all Florida consumers who made Chick-fil-A delivery orders on the

Chick-fil-A App or website from a Chick-fil-A location in the State of Florida during the applicable statute of limitations period, alleging violations of the Florida Deceptive and Unfair Trade Practices Act and Negligent Misrepresentation.

Plaintiff Jan Mayheu filed her complaint in Georgia state court on May 24, 2022, and then her Amended Complaint on August 5, 2022, on behalf of all Georgia consumers who purchased food for delivery from CFA on the Chick-fil-A® One App or Website, alleging violations of Georgia's Unfair Business Practices Act and Negligent Misrepresentation.

On January 6, 2023, the parties attended a full-day mediation before Judge David Garcia (Ret.). Kaliel Decl., ¶ 6. In preparation for mediation and for several months throughout the settlement negotiations, the Parties engaged in formal discovery in the *Ortega* Action and informal discovery in the other actions, wherein Defendant provided voluminous information regarding Chick-fil-A's policies, practices, and procedures related to the marketing and pricing of delivery orders during the Class Period. *Id.*, ¶ 7. Chick-fil-A also provided information related to the nature, timing, and implementation of Defendant's advertisements, marketing materials, and disclosures on its website and Chick-fil-A App regarding delivery fees, service fees, and menu prices; Chick-fil-A's Terms of Use for its website and Chick-fil-A App and Chick-fil-A's Terms & Conditions; the approximate number of customers who purchased food for delivery on its website and Chick-fil-A App, as well as the approximate fees and prices charged those customers, in the five states at issue in the Action. *Id.*, ¶ 8. Based on the documents and data produced, coupled with the lengthy negotiation period, Class Counsel was able to thoroughly review, vet, and assess the claims of the Settlement Class Members and Chick-fil-A's defenses before ultimately agreeing to the material terms of the Settlement and the Agreement now pending final approval before the Court. *Id.*, ¶ 9.

On September 29, 2023, Plaintiffs collectively filed a Consolidated Complaint that adds all

of the Class Representatives as plaintiffs to the *Mayheu* Action, redefines the class definition to be consistent with the Settlement Class described herein, and adds the respective claims on behalf of each of the Settlement Subclasses.

On October 2, 2023, after the Court thoroughly examined the Settlement in its entirety to ensure it was provisionally fair, adequate, and reasonable, the Court entered its Preliminary Approval Order, preliminarily approving the Settlement and conditionally certifying the Settlement Class for purposes of notice and settlement only.

III. SUMMARY OF SETTLEMENT

A. Settlement Negotiations

As noted above, the Settlement was heavily negotiated with the assistance of Judge David Garcia (Ret.), a well-respected mediator who presided over an arm's-length mediation between capable and experienced class action counsel on both sides and then continued for many months thereafter. Kaliel Decl., ¶ 10. The Parties engaged in a significant amount of informal and formal discovery, as outlined in greater detail above, in order to assist Class Counsel in vetting and assessing the claims of Settlement Class Members and Chick-fil-A's defenses to those claims prior to reaching this Agreement. *Id.*, ¶ 11. 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. *Id.*, ¶ 12.

B. The Proposed Settlement

The Parties have entered into the Agreement, which completely resolves claims asserted in the Action. The *Goldstein* Action, *Ortega* Action, *Pittman* Action, and *Ukpere* Action have been stayed by the respective courts pending this Court's consideration of the settlement and will be dismissed with prejudice should this Court grant final approval. *Id.*, ¶ 13. The Agreement includes

the following material terms:

1. Settlement Class Certification

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

> **Settlement Class** means all persons who made a Chick-fil-A delivery order through the Chick-fil-A App or website between November 1, 2019 and April 30, 2021, from a Chick-fil-A location in the states of Georgia, Florida, New York, New Jersey, and California.
>
> The **Georgia Settlement Subclass** refers to all members of the Settlement Class who made a Chick-fil-A delivery order through the Chick-fil-A App or website between November 1, 2019 and April 30, 2021, from a Chick-fil-A location in the State of Georgia.
>
> The **Florida Settlement Subclass** refers to all members of the Settlement Class who made a Chick-fil-A delivery order through the Chick-fil-A App or website between November 1, 2019 and April 30, 2021, from a Chick-fil-A location in the State of Florida.
>
> The **New York Settlement Subclass** refers to all members of the Settlement Class who made a Chick-fil-A delivery order through the Chick-fil-A App or website between November 1, 2019 and April 30, 2021, from a Chick-fil-A location in the State of New York.
>
> The **New Jersey Settlement Subclass** refers to all members of the Settlement Class who made a Chick-fil-A delivery order through the Chick-fil-A App or website between November 1, 2019 and April 30, 2021, from a Chick-fil-A location in the State of New Jersey.
>
> The **California Settlement Subclass** refers to all members of the Settlement Class who made a Chick-fil-A delivery order through the Chick-fil-A App or website between November 1, 2019 and April 30, 2021, from a Chick-fil-A location in the State of California.

See Agreement at § II.Y. The Class Period is the period from November 1, 2019, through April 30, 2021. *Id.* at § II.F.

2. Class Benefits

Class Counsel believe that the contemplated benefits addressed below adequately compensate the Settlement Class for the harm Plaintiffs allege they suffered and, in light of the risks of continued litigation, represent an excellent result for the Settlement Class. Kaliel Decl., ¶

14. According to Chick-fil-A's records, approximately 400,000 distinct email addresses associated with Settlement Class Members who made Chick-fil-A delivery orders through the Chick-fil-A App or website during the Class Period. *Id.*, ¶ 15.

a. Settlement Funds

Chick-fil-A has agreed to establish a Cash Settlement Fund of $1,450,000.00. Agreement, § IV.E.1. Within 14 calendar days of Preliminary Approval, Defendant deposited the Initial Administration Payment into the Cash Settlement Fund, maintained as an Escrow Account established by the Class Action Settlement Administrator. *Id.*, § IV.E.1.a. Within 30 calendar days of the Effective Date, Defendant shall deposit the Remaining Fund Payment. *Id.* at § IV.E.1.b. The Remaining Fund Payment shall be used to pay (a) the remaining Administration Costs; (b) all other Settlement Costs (including any attorneys' fees and costs awarded to Class Counsel); (c) all Service Awards; and (d) all Cash Settlement Awards to Settlement Class Members who elect to receive a Cash Settlement Award as opposed to a Gift Card Settlement Award. *Id.* Settlement Class Members who elect to receive a Cash Settlement Award will receive a cash payment up to $29.25. *Id.*, § IV.D. In the event there are not sufficient funds in the Net Cash Settlement Fund to award each Settlement Class Member $29.25, the Net Cash Settlement Fund will be distributed on a *pro rata* basis to those Settlement Class Members electing to receive a Cash Settlement Award. *Id.* Though the Claims Period has not yet closed, it appears that each Settlement Class Member electing to receive a Cash Settlement Award will receive a payment of $29.25. Kaliel Decl., ¶ 16.

Additionally, Chick-fil-A has agreed to make Gift Card Settlement Awards (an electronic gift card with a balance up to $29.25) available to Settlement Class Members in the total redemption amount up to and not exceeding of $2,950,000.00 for those Settlement Class Members who elect to receive a Gift Card Settlement Award. Agreement, § IV.F. The Gift Card Settlement

Awards provide a real benefit to the Settlement Class in that, with the exception of being charged sales tax, Settlement Class Members are able to redeem the electronic gift card without having to make any additional purchases. Though the Claims Period has not yet closed, it appears that each Settlement Class Member electing to receive a Gift Card Settlement Award will receive an electronic gift card in the amount of $29.25. The recovery provided by the Cash Settlement Fund and Gift Card Settlement Awards represents approximately 40% of the Settlement Class Members' most likely best recoverable damages should they completely prevail at trial. Kaliel Decl., ¶ 17.

b. Claims Process

Given that Plaintiffs' allegations exclusively regard the Settlement Class Members' relatively recent use (late 2019) of the Chick-fil-A App and website in order to place Chick-fil-A orders, and that a valid email address is a requirement of placing such an order, Chick-fil-A maintains email addresses for Settlement Class Members with active accounts who have not otherwise requested that their account information be deleted. Chick-fil-A provided these email addresses to the Class Action Settlement Administrator, who gave direct Electronic Mail Notice to the Settlement Class Members. Agreement, § V.A. And for those Settlement Class Members who might not receive or read the Electronic Mail Notice, the Long Form Notice posted on the Settlement Website provided supplemental notice that permits the Settlement Class Members to contact the Class Action Settlement Administrator to determine if they are eligible to receive a Settlement Notice and benefit. *Id.*, § V.B.

In order to receive either a Cash Settlement Award or Gift Card Settlement Award, Settlement Class Members were to submit a valid and timely Claim Form to the Class Action Settlement Administrator via mail or web form during the Claim Period. *Id.*, § IV.D. Settlement Class Members were provided the option to receive either a cash payment or an electronic gift

card. *Id.* If a Settlement Class Member fails to choose between a Cash Settlement Award and a Gift Card Settlement Award, or erroneously chooses both a Cash Settlement Award and a Gift Card Settlement Award, the Class Action Settlement Administrator is to designate that claimant to have selected a Cash Settlement Award. *Id.*, § IV.F.1.

The Claim Forms are accessible via one click in the Electronic Mail Notice and through the Settlement Website. *Id.*, § IV.A-B. The Claim Forms do not require that Settlement Class Members submit any proof of purchase or other supporting documentation. *See* Claim Form. The Claim Forms only require that Settlement Class Members verify their name, email address, phone number, and certify that they are an eligible class member seeking to participate in the Settlement—all of which can be performed on any mobile device or personal computer with ease. Kaliel Decl., ¶ 18.

Within seven calendar days after the close of the Claims Period, the Class Action Settlement Administrator shall provide the Parties with the final number of valid and timely Claims received, and the apportionment between Settlement Class Members who requested Cash Settlement Awards and those who requested Gift Card Settlement Awards. Agreement, § IV.G.

c. Distribution of Settlement Class Member Payments

Within 60 days of the Effective Date, the Class Action Settlement Administrator will distribute the Cash Settlement Awards and Gift Card Settlement Awards to Settlement Class Members. Agreement, § IV.D.

d. Disposition of Residual Funds

At the expiration of the Claims Period, if there is cash remaining in the Net Cash Settlement Fund, the excess funds will be distributed to either Feeding America or Hunger Initiative as a *cy pres* award, subject to the Court's approval. Agreement, § IV.E.2.

e. Remediation

Chick-fil-A revised the disclosures made on its Chick-fil-A App and website on or around April and October 2021 respectively—which are presented to consumers *prior* to placing a delivery order—to state expressly that menu prices may be higher for delivery orders and added the following language: "Menu prices for delivery are higher than at restaurant. Delivery fee, order minimums or small order fees, and additional fees apply." Agreement, § IV.H. Chick-fil-A additionally added a similar disclosure that is presented at checkout. *Id.* Chick-fil-A agrees to keep these or substantially similar disclosures in place if applicable to delivery orders and reserves the right to amend these as necessary. *Id.*

f. Releases

The Agreement includes releases from the Plaintiffs and the Settlement Class Members to release the Released Parties from the Released Claims (as defined in the Agreement) that arise from or relate in any way to Chick-fil-A's advertising, marketing, or promotion related to Chick-fil-A's delivery and fees, charges and costs for or associated with delivery orders through the Chick-fil-A App or website during the Class Period, including the claims alleged in each complaint filed in the Action. Agreement, § IV.B.1.

The Agreement also includes a General Release and waiver of California Civil Code Section 1542 by Plaintiffs and Settlement Class Members. *Id.*

Any Settlement Class Member who fails to timely and validly request exclusion from the Settlement Class but fails to submit a Claim Form will be bound by the terms of the Agreement, including the Releases. *Id.*

Chick-fil-A agrees to fully release and discharge Class Representatives, Settlement Class Members, and Class Counsel from all claims that Defendant has against those individuals concerning the institution or prosecution of the Action. *Id.*, § IV.B.2.

g. Settlement Class Notice

The Class Action Settlement Administrator provided direct Electronic Mail Notice via the email addresses provided by Defendant, as well as Website Notice via the Settlement Website. Agreement, § V. Chick-fil-A's business records were used to identify Settlement Class Members and their contact information.

The Class Action Settlement Administrator has established and maintains the Settlement Website, which includes 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.* § V.B. The Long Form Notice includes a summary of the case; a summary of Settlement Class Members' legal rights and options; answers to frequently asked questions; a description of the Agreement and the Settlement benefits; contact information for Counsel; instructions on how to opt out of or object to the Settlement; a description of the attorneys' fees that Class Counsel intends to apply for and the Service Awards to be sought for Plaintiffs; and information about the Fairness Hearing. *See* Agreement.

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

The Court approved the Class Action Settlement Administrator who provided notice to Settlement Class Members and is handling administration of the Settlement. Agreement, § II.I.; V.

The Agreement provided a procedure for Settlement Class Members to exclude themselves from the Settlement by submitting a written statement by the Objection/Exclusion Deadline. *Id.*, § VI.B. The Agreement also provided the procedure for Settlement Class Members to object to the Agreement by the Objection/Exclusion Deadline. *Id.*, § VI.A. The Objection/Exclusion Deadline has passed, and there were no objections and no requests for exclusion.

i. Service Awards for Class Representatives

Class Counsel seeks a Service Award of $5,000.00 for each Plaintiff. Agreement, § IV.I.2. The Service Awards will be paid solely from the Cash Settlement Fund and will be in addition to the Settlement Class Member Payments the Plaintiffs will be entitled to receive under the Agreement. *Id.* The Service Awards will compensate Plaintiffs for their time and effort and for the risks they assumed in prosecuting the Action, including potential liability for costs of suit. Kaliel Decl., ¶ 19. Specifically, Plaintiffs provided assistance that enabled Class Counsel to successfully defend the Action and reach the Settlement, including: (1) submitting to interviews with Class Counsel and approving the Complaints; (2) locating and forwarding documents and information to Class Counsel both informally and in response to requests for production; (3) participating in conferences with Class Counsel; (4) reviewing the settlement documentation, and (5) supervising Class Counsel. *Id.* In so doing, the Plaintiffs were integral to the case. Defendant does not to oppose the request for these Service Awards. Agreement, § IV.I.2.

j. Attorneys' Fees and Costs.

Class Counsel has not been paid for their efforts or reimbursed for litigation costs. Kaliel Decl., ¶ 20. Class Counsel requests, and Defendant does not oppose, attorneys' fees of up to $880,000.00, as well as reimbursement of litigation costs incurred in connection with the Action, to be paid from the Cash Settlement Fund. Agreement, § IV.I.1. The Parties negotiated and reached agreement regarding attorneys' fees and costs only after agreeing to all material terms of the Settlement. Kaliel Decl., ¶ 21. Such award is subject to this Court's approval and will serve to compensate for the time, risk, and expense Class Counsel incurred pursing claims for the Settlement Class.

IV. CLASS NOTICE WAS PROVIDED AS ORDERED BY THE COURT

As this Court held when granting Preliminary Approval, the direct Email Notice provided

to Settlement Class Members is the best notice practicable under the circumstances. After the Court granted Preliminary Approval, the Class Action Settlement Administrator provided direct Email Notice to all Settlement Class Members via the e-mail addresses contained in Chick-fil-A's business records associated with the Settlement Class Members who placed the delivery orders at issue in the Action. Of the 407,648 total Email Notices that were sent, just 78,712 emails were returned as undeliverable. Admin Decl., ¶ 9. This results in a successful deliverable rate of approximately 80.7%. *Id*. Class Notice has also been effectuated via the Settlement Website. The Class Action Settlement Administrator established the Settlement Website, which 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.*, ¶ 4.

To date, the Class Action Settlement Administrator has received 4,574 valid claims for a Cash Settlement Award (a cash payment up to $29.25) and 1,924 valid claims for a Gift Card Settlement Award (an electronic gift card with a balance up to $29.25). *Id.*, ¶ 16.

The Class Action Settlement Administrator has received zero opt-outs in this Settlement, and zero objections. *Id.*, ¶ 15.

V. CLASS CERTIFICATION OF THE SETTLEMENT CLASS IS PROPER

For the reasons explained in Plaintiffs' Motion for Preliminary Approval, and for the reasons stated in the Court's Preliminary Approval Order, the Settlement Class and Settlement Subclasses should be finally certified for settlement purposes only.

VI. ARGUMENT IN FAVOR OF FINAL SETTLEMENT APPROVAL

A. The Settlement Should Be Finally Approved as Fair, Reasonable, and Adequate.

As a matter of public policy and under Georgia law, settlement is strongly favored to

resolve litigation, especially complex class actions. *See e.g.*, *Triple Eagle Assocs. v. PBK, Inc.*, 307 Ga. App. 17, 17 (2010) ("settlement agreements…are highly favored under the law and will be upheld whenever possible as a means of resolving uncertainties and preventing lawsuits"); *Atlanta Journal & Atlanta Const. v. Long*, 258 Ga. 410, 415 (1988) ("promoting private settlements of litigation is in the public interest"). Indeed, "settlements of class actions are 'highly favored in the law and will be upheld whenever possible because they are means of amicably resolving doubts and preventing lawsuits.'" *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 312-13 (N.D. Ga. 1993) (quoting *Bennett v. Behring*, 96 F.R.D. 343, 348 (S.D. Fla. 1982), *aff'd*, 737 F.2d 982 (11th Cir. 1984)).[1]

The settlement of a class action requires court approval. O.C.G.A. § 9-11-23(e). It is well-established that a settlement should be approved if it is fair, adequate, reasonable, and free of fraud or collusion. *See In re Motorsports Merch. Antitrust Litig.*, 112 F. Supp. 2d. 1329, 1333 (N.D. Ga. 2000)*; Ingram v. Coca Cola Co.*, 200 F.R.D. 685, 688 (N.D. Ga. 2001); *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977). The proposed Settlement enjoys a presumption that it is fair and reasonable because it is the product of extensive arm's-length negotiations conducted by capable counsel who are well-experienced. *In re Motorsports*, 112 F. Supp. 2d at 1333. In considering a proposed settlement, courts have recognized that the object of settlement is to avoid determination of contested issues. Thus, "the court must not turn the settlement hearing 'into a trial or a rehearsal of the trial.'" *Newman v. Stein*, 464 F.2d 689, 692 (2d Cir. 1972) (citations omitted). Rather, in determining the adequacy of a proposed settlement, the Court should ultimately ascertain whether

[1] "Many provisions of OCGA § 9-11-23 were borrowed from Federal Rule of Civil Procedure 23, and for this reason, when Georgia courts interpret and apply OCGA § 9-11-23, they commonly look to decisions of the federal courts interpreting and applying Rule 23." *Bickerstaff v. SunTrust Bank*, 299 Ga. 459, 462 (2016).

the Settlement is within a range that responsible and experienced attorneys could accept, considering all relevant risks. *See In re Motorsports*, 112 F. Supp. 2d at 1334. That range "recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion . . . ." *In re Domestic Air Transp.*, 148 F.R.D. at 323 (citing *Newman,* 464 F.2d at 693).

Analyzing a proposed settlement involves an examination of the six factors set forth by the Eleventh Circuit in *Bennett*: "(1) the likelihood of success at trial; (2) the range of possible recoveries; (3) the point on or below the range of possible recoveries at which a settlement is fair, adequate and reasonable; (4) the complexity, expense and duration of litigation; (5) the substance and degree of opposition to the settlement; and (6) the stage of the proceedings at which the settlement was achieved." *In re Motorsports,* 112 F. Supp. 2d. at 1333 (citing *Bennett*, 737 F.2d at 986). Evaluating these factors, the Court is entitled to rely on the judgment of the parties' experienced counsel. "[T]he trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id*. (quoting *Cotton,* 559 F.2d at 1330).

Here, the balancing analysis weighs heavily in favor of approval of the Settlement. Plaintiffs and Class Counsel have examined the facts and applicable law relating to Plaintiffs' claims, considered the arguments that Defendant advanced (and could advance) in defending against the claims, and weighed the material benefits secured by the Settlement against the risks, delay, and cost of further litigation and possible appeals. Kaliel Decl., ¶ 22. Plaintiffs submit that the Settlement is fair and in the best interests of the Settlement Class.

1. The Likelihood of Success at Trial

The first factor weighs the likelihood of success on the merits of Plaintiffs' claims against the amount of relief provided for under the settlement. *Carr v. Ocwen Loan Servicing, LLC,* 2014 WL 12860083 at *9 (N.D. Ga. Apr. 25, 2014) (citing *Carson v. Am. Brands, Inc.,* 450 U.S. 79, 88

n.13 (1981)).

Plaintiffs and the Settlement Class faced significant legal risks in this case. For instance, the theory of liability here was novel, and indeed, this was one of the first cases in the country challenging the veracity of low-cost delivery promises where additional charges were included in order totals for delivery orders only. Chick-fil-A consistently argued for dismissal because Plaintiffs received the benefit of the bargain in that they received exactly what they ordered and paid for. *See e.g., Waldrup v. Countrywide Fin. Corp.,* 2014 WL 3715131, at *7 (C.D. Cal. July 23, 2014) (dismissing unjust enrichment claim because plaintiff "disclaimed any allegation that the appraisals which she received were inflated or otherwise inaccurate," and thus conceded that she received precisely what she paid for). Chick-fil-A also argued that Plaintiffs could not have been deceived because the term "Delivery Fee" did not include qualifying words that would lead a reasonable consumer to believe that other delivery costs would not be included in the product total, such that they could not have been deceived or mislead. *See e.g., Twohig v. Shop-Rite Supermarkets, Inc.,* 519 F. Supp. 3d 154, 162 (S.D.N.Y. 2021) (dismissing NY GBL § 349 claim where a reasonable consumer would not construe a challenged statement as implying additional information not stated on the product). Indeed, these defenses created a significant litigation risk, as the courts in both the *Ortega* and *Pittman* Actions accepted Chick-fil-A's arguments and granted the motions to dismiss. Since Plaintiffs' claims and theory of liability were novel, there was a great deal of uncertainty on these claims. There were also genuine risks that Plaintiffs might not prevail at class certification, at trial, or on appeal. Kaliel Decl., ¶ 23. Additionally, given the novelty of these claims, none of these cases asserting such claims have proceeded to trial. This means that there is no model for Plaintiffs' case and therefore, unforeseen pitfalls could easily derail the Settlement Class's claims should they proceed through the rigors of litigation. Given these risks,

a settlement that provides members of the Settlement Class with a substantial monetary benefit falls within the range of possible approval. *Id.* There are no grounds to doubt the Agreement's fairness. *Id.*

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

2. The Range of Possible Recovery and Point On or Below the Range of Possible Recovery at Which the Settlement is Fair, Adequate, and Reasonable

The second and third factors related to recovery are "easily combined and normally considered in concert." *Phillips v. Hobby Lobby Stores, Inc.,* 2021 WL 3710134, at *4 (N.D. Ala. Aug. 20, 2021). The focus on this consideration examines the possible amount plaintiffs would have recovered at trial combined with the likelihood of success at trial. *In re Motorsports,* 112 F. Supp. 2d at 1334 (citing *In re Domestic Air Transp.,* 148 F.R.D. at 319). "If this amount is reasonable in light of the costs and risk hindering a Plaintiff's recovery, then it is likely fair, adequate, and reasonable." *Id.* "The Court's role is not to engage in a claim-by-claim, dollar-by-dollar evaluation, but to evaluate the proposed settlement in its totality." *Lipuma v. Am. Express Co.,* 406 F. Supp. 2d 1298, 1323 (S.D. Fla. 2005) (citations omitted). Even a minimal settlement can be approved. *See In re Motorsports,* 112 F. Supp. 2d at 1335 ("That the proposed settlement amounts to a fraction of potential recovery does not render the proposed settlement inadequate and unfair"); *Behrens v. Wometco Enters., Inc.,* 118 F.R.D. 534, 542 (S.D. Fla. 1988), *aff'd,* 899 F.2d 21 (11th Cir. 1990) ("A settlement can be satisfying even if it amounts to a hundredth or even a thousandth of a single percent of the potential recovery.").

Here, the Settlement provides significant relief to Settlement Class Members. The

$4,400,000.00 total monetary value of the Settlement (the $1,450,000.00 Cash Settlement Fund plus the $2,950,000.00 Gift Card Settlement Award fund) represents 40% of Class Counsel's estimate of the most likely best recovery to the Class were Plaintiffs to prevail at trial. Kaliel Decl., ¶ 24. Settlement Class Members have the option to select either a Cash Settlement Award or Gift Card Settlement Award in the amount of up to $29.25. *Id.* The Gift Card Settlement Awards constitute a fair recovery, providing electing Settlement Class Members to receive an electronic gift card with a balance up to $29.25 to purchase food items at Chick-fil-A without having to spend any of their own money (other than sales tax) in order to retain this benefit. *Id.*; *see e.g., Phillips,* 2021 WL 3710134 at *4 (approving settlement where class members will receive a cash payment and gift card, "which functions essentially as cash at a Hobby Lobby store"). Of course, this total value does not account for the significant value of the prospective relief the Settlement provides—relief that likely dwarfs the monetary recovery for the Settlement Class.

Plaintiffs believe that the benefits under the Settlement are as good as, if not better, than the likely results at trial. Plaintiffs' best-case scenario would be full reimbursement of the difference in price customers paid for delivery food items as compared to in-store or pickup prices for the same food items. Kaliel Decl., ¶ 25. However, Defendant disputes that there were any misrepresentations regarding its delivery pricing or that customers would be justified in relying on any so-called misrepresentations given their ability to conduct a price comparison across delivery channels. *Id.* In this context, the amount of the Cash Settlement Fund and Gift Card Settlement Award Fund to be distributed to Settlement Class Members is a fair recovery. The added benefit of Chick-fil-A's revised disclosures further illustrates the Agreement's fairness. *Id.* Further, a settlement representing 40% of Class Counsel's estimate of Class Members' most likely best damages is within the accepted range of other approved class action settlements in this Circuit. *See*

e.g., In re NetBank, Inc. Sec. Litig., 2011 WL 13353222, at *2 (N.D. Ga. Nov. 9, 2011) (approving settlement representing approximately 35% of maximum estimated damages in securities class action); *Phillips,* 2021 WL 3710134 at *4 (approving settlement where class members will receive 39% of the value of a successful claim in a deceptive trade practices consumer class action); *Montoya v. PNC Bank, N.A.,* 2016 WL 1529902 (S.D. Fla. Apr. 13, 2016) (approving claims-made settlement in force-placed insurance class action with 12.5% recovery for class members and collecting cases where the "Eleventh Circuit has affirmed claims-made settlements affording far less relief to class members") (collecting cases); *Parsons v. Brighthouse Networks, LLC,* 2015 WL 13629647, at *3 (N.D. Ala. Feb. 5, 2015) (approving 13% and 20% recoveries for cable subscribers in antitrust case and collecting cases in general that have approved recoveries as low as 5.5%); *McWhorter v. Ocwen Loan Servicing, LLC,* 2019 WL 9171207, at *10-11 (N.D. Ala. Aug. 1, 2019) (approving 30% recovery of total convenience fees assessed when class members made mortgage loan payments); *In re Checking Account Overdraft Litigation,* 830 F. Supp. 2d 1330, 1350 (S.D. Fla. 2011) (approving settlement representing "between 45 percent and 9 percent of [class members'] anticipated total recovery").

As such, the significant relief afforded Settlement Class Members in light of the possible amount they would have recovered at trial supports granting final approval.

3. The Complexity, Expense, and Duration of Litigation

A settlement such as this one reached by the Parties will alleviate the need for judicial determination of these novel claims, reduce litigation costs, and eliminate the significant risk that individual claimants might recover nothing. *Ingram,* 200 F.R.D. at 691. "With the uncertainties inherent in pursuing a trial and appeal of this case, the benefits of a resolution by way of settlement are apparent." *Lipuma,* 406 F. Supp. 2d at 1324.

As discussed above, the Settlement is particularly favorable given the risks of continued

litigation and the uncertainties of prevailing at trial on Plaintiffs' novel legal issues; therefore, this factor also supports final approval of the Settlement. To illustrate, Chick-fil-A already prevailed on its motion to dismiss in both the *Ortega* Action and the *Pittman* Action, requiring Plaintiff Ukpere to re-file her claims in New Jersey and Plaintiff Pittman to appeal the ruling to the United States Court of Appeals for the Second Circuit. Further, in any of the other Stayed Actions, Chick-fil-A could have succeeded in opposing class certification, obtaining summary judgment or a favorable verdict at trial, or succeeding on appeal. Moreover, even if a judgment were obtained against Chick-fil-A at trial, the recovery might be of no greater value to the Settlement Class and could be substantially less valuable. In contrast, the Settlement benefits here provide a guaranteed and meaningful benefit to the Settlement Class Members of greater value, for instance, a cash recovery or an electronic gift card up to $29.25 in value. The only certainty is that if this Action proceeds in litigation, the Settlement Class Members will have to wait longer for any recovery, and both Parties will incur significant additional fees and costs.

Indeed, it is reasonable to infer that in the absence of settlement, resolution would have taken years given the complex issues and proposed classes in five separate actions, including further discovery and expert participation. Protracted litigation would only create the risk of encountering unforeseen obstacles and extinguish the Settlement Class's claims and ultimately, would delay the Settlement Class's potential recovery and reduce the value of such recovery. Thus, because this Settlement provides a significant and certain recovery, this factor also weighs in favor of final approval. *See Carr,* 2014 WL 12860083 at *10 (finding "additional expenses associated with class certification and summary judgment proceedings," "significant trial expenses, and possible appellate litigation costs" in the absence of settlement weighed in favor of granting final approval).

4. No Class Members Objected to or Opted-Out of the Proposed

Settlement

Whether there are any substantial objections by class members or other parties to the settlement terms or the fees requested by counsel are also factors to consider when approving a settlement. *In re Domestic Air Transp.,* 148 F.R.D. at 350. A class action settlement may be presumed fair when there are only a small percentage of objectors. *Meyer v. Citizens & S. Nat'l Bank,* 677 F. Supp. 1196, 1210 (M.D. Ga. 1988) (finding that only 10 objections out of over 8,000 class members supported approval of settlement); *see also Lipuma,* 406 F. Supp. 2d at 1324 (finding the "small number" of 1,159 opt-outs and 41 objections given the large number of 830,976 claims filed "militates in favor of approval"). Nevertheless, a settlement can be fair even where (unlike here) there is a large number of objectors. *See Bennett,* 737 F.2d at 988.

After providing notice of the proposed Settlement to the Class, and after giving Settlement Class Members sufficient opportunity to review the Court's file and all of the components of the Agreement, no Settlement Class Members have objected to the fairness of the Settlement and no Settlement Class Members have elected to opt-out of the Settlement to date. Admin Decl., ¶ 15. Thus, the response of absent Class Members to the proposed Settlement is overwhelmingly positive. This uniform result on behalf of Settlement Class Members indicates the Class's acceptance of the Settlement and further supports that their interests have been adequately protected by the Settlement. Indeed, Settlement Class Members have had adequate time to object to or opt out of the Settlement if they wished to do so, and the deadline to opt-out or object was January 2, 2024. *Id*.

Accordingly, the reaction of the Settlement Class supports granting final approval of the Settlement.

5. The Stage of the Proceedings

Lastly, the stage of the proceedings at which a settlement is achieved is evaluated to ensure

Plaintiffs had access to sufficient information to adequately evaluate the merits of the case and weigh the benefits of the settlement against further litigation. *In re Southern Co. Shareholder Derivative Litig.,* 2022 WL 4545614 at *7 (N.D. Ga. June 9, 2022); *see also Lipuma,* 406 F. Supp. 2d at 1324 (noting that "vast formal discovery need not be taken" and encouraging the utilization of informal discovery so as to decrease the financial burden of litigation).

Here, the Parties engaged in both formal and informal discovery prior to agreeing to the terms of the Settlement, which included Defendant's production of information about the number of customers who made Chick-fil-A purchases on Chick-fil-A's website and Chick-fil-A App and the approximate fees and prices charged to those customers, such that Plaintiffs could estimate the available damages in the case and allow them to determine the appropriate contours of a settlement. Kaliel Decl., ¶ 26. Plaintiff Ortega first filed his lawsuit in March 2021 (which has now been consolidated in the Action) and the Parties finalized the Agreement over two years later in July 2023. From March 2021 through February 2023, the Parties aggressively litigated the cases through contentious motion practice, settlement negotiations driven by the exchange of discovery, and a full-day mediation. Thus, the Parties undoubtedly had sufficient information to adequately assess the merits of the case and to weigh the benefits of settlement prior to entering into the Agreement. *See In re Southern Co.,* 2022 WL 454614 at *7 ("Class Counsel's decision to settle was well-informed" where they "had a strong understanding of the potential risks and rewards of pursuing further litigation" coupled with "their decades of experience litigating and settling dozens" of similar actions).

In sum, all of the factors weigh in favor of finding that the proposed Settlement is fair, adequate, and reasonable, and therefore, a grant of final approval of the Settlement is warranted.

VII. THE REQUESTED ATTORNEYS' FEE AWARD IS REASONABLE AND FAIR

In conjunction with Final Approval, Class Counsel respectfully requests that the Court award the following Settlement Costs from the Cash Settlement Fund: (1) attorneys' fees of $880,000.00 (representing 20% of the total monetary benefits of the Settlement); (2) reasonable litigation costs of $15,579.32; (3) Service Awards for each Class Representative in the total amount of $25,000.00.

Courts have long recognized that attorneys who obtain a recovery for a class in the form of a common fund are entitled to an award of fees and expenses from that fund. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Camden I Condo. Ass'n, Inc. v. Dunkle ("Camden I"),* 946 F.2d 768, 774 (11th Cir. 1991) ("Attorneys in a class action in which a common fund is created are entitled to compensation for their services from the common fund, but the amount is subject to court approval"); *Barnes v. City of Atlanta*, 281 Ga. 256, 260, 637 S.E.2d 4, 7 (2006) ("With respect to attorney's fees, Georgia adheres to the common-fund doctrine"). When awarding attorneys' fees out of a common fund, in Georgia "the percentage of the fund approach [is] the most equitable, sensible, and fair," *Friedrich v. Fid. Nat'l Bank*, 247 Ga. App. 704, 707, 545 S.E.2d 107, 109-110 (2001) (finding the "percentage of the fund" method to be "the preferred method of determining these fees" in class action settlements and finding "persuasive the criticisms of the lodestar method").

Applying *Friedrich*'s directive that (absent special circumstances) Georgia courts must award fees based on the percentage method, courts of this state typically award fees in a range from "25 to 33 percent" in class action cases. *Teachers Ret. Sys. v. Plymel*, 296 Ga. App. 839, 846-47 (2009) (citing 25% to 33% range in affirming 30% fee); *Camden I,* 946 F.2d at 774-75 (noting that "an upper limit of 50% of the fund may be stated as a general rule, although even larger percentages have been awarded"). *See also In re NetBank,* 2011 WL 13353222, at *3 (awarding

34% fee); *Waters v. Int'l Precious Metals Corp.*, 190 F.3d 1291, 1300 (11th Cir. 1999) (citing 30% as the "benchmark" for percentage fee awards in the 11th Circuit, and approving modest upward adjustment to affirm 33⅓ % fee); *Columbus Drywall & Insulation v. 17 Masco Corp*., 2012 WL 12540344, at *8 (N.D. Ga. Oct. 26, 2012) (awarding 33⅓ % fee); *In re Arby's Restaurant Group, Inc. Data Security Litig.*, 2019 WL 2720818 at *4 (N.D. Ga. June 6, 2019) (awarding fee representing 29.6% of the total potential benefit to the class). Given the exceptional results achieved for the Settlement Class, Class Counsel respectfully submits that their work fully merits a fee award of 20% of the value of the Settlement.

"In this circuit, common-fund fee awards are properly calculated as a percentage of benefits ***made available*** to the class, ***regardless*** of whether each class member redeems the benefits made available to class members, or even whether unclaimed benefits revert to the defendant." *Phillips,* 2021 WL 3710134 at *6 (emphasis added) (citing *Waters,* 190 F.3d 1291, 1294-95) (upholding attorney fee award based on the entire settlement fund, even though a portion reverted to the defendant); *Masters v. Wilhelmina Model Agency, Inc.,* 473 F.3d 423, 200 (2d Cir. 2007) (holding that in determining counsel fees, trial court erred in calculating percentage of the fund on the basis of claims made against the fund rather than on the entire fund created by efforts of counsel). Here, Class Counsel seeks an attorneys' fee award of $880,000.00, representing 20% of the total monetary benefits made available to the Settlement Class of $4,400,000.00—which is comprised of the $1,450,000.00 Cash Settlement Fund and the $2,950,000.00 Gift Card Settlement Fund. This request is consistent with the amount that was identified in the Class Notice sent to all Settlement Class Members, and to which no Settlement Class Member has objected. Having reached a settlement in this Action that creates a Cash Settlement Fund and Gift Card Settlement Fund that together equals approximately 40% of the most likely best total damages that could be

awarded at trial, from which all eligible Settlement Class Members will obtain a share, as well as the value of Defendant's agreement to maintain disclosures (if applicable) on the Chick-fil-A App and website, which will benefit all current and future users of Chick-fil-A's delivery services nationwide, Class Counsel are fully entitled to the requested fee award.

Class Counsel's request for attorneys' fees in the amount of 20% of the value of the Settlement is reasonable and is within the range of fees routinely awarded in claims-made settlements in Georgia and the Eleventh Circuit. *See e.g., Waters,* 190 F.3d at 1295-96 (affirming fee award of 33.33% of total amount made available to the class, and determining that attorney's fees must be determined based on total fund, not just actual payout to class); *Alghadeer Bakery & Market, Inc. v. Worldpay US, Inc.,* 2020 WL 10935986 at *4 (N.D. Ga. June 3, 2020) (approving one-third fee of $15 million cash fund in claims-made settlement as "reasonable and consistent with awards in similar cases" in the Eleventh Circuit); *In re Equifax Inc. Customer Data Security Breach Litig.,* 2020 WL 256132, at *31 (N.D. Ga. Mar. 17, 2020), *rev'd on other grounds in* 999 F.3d 1247 (11th Cir. 2021) (awarding 20.36% of $380.5 million settlement fund in claims-made settlement in consumer data breach class action and noting "[t]ypically, awards range from 20% to 30%, and 25% is considered the 'benchmark' percentage") (citing *Camden I,* 946 F.2d at 775); *Montoya v. PNC Bank, N.A.,* 2016 WL 1529902 (S.D. Fla. Apr. 13, 2016) (approving fee of 14.7% of the value of monetary relief made available to the class); *Phillips,* 2021 WL 3710134 at *7 (awarding fee representing approximately 15% of total fund as being "well below the benchmark range").

A. The *Johnson* Factors Support a Finding That the Requested Fee is Fair and Reasonable

To determine whether a requested percentage fee is reasonable, courts in Georgia must also "articulate specific reasons for selecting the percentage upon which the . . . award is based."

Friedrich, 247 Ga. App. at 707. Although the relevant factors "may vary from cases to case," *Friedrich* noted that in evaluating a fee request it continues to be "appropriate" to use the twelve factors enumerated in *Johnson v. Ga. Hwy. Express*, 488 F.2d 714 (5th Cir. 1974). The non-exclusive list of *Johnson* factors to be considered are:

> (1) the time and labor required; (2) the novelty and the difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to the acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

Johnson, 488 F.2d at 717-20. Additional factors may include (13) the time required to reach a settlement; (14) the reaction of the Class (including the extent of objections or opt-outs); (15) any non-monetary benefits provided; and (16) the economics involved in prosecuting a class action. *Friedrich*, 247 Ga. App. at 707. Weighing the relevant *Johnson* factors here confirms that Class Counsel's request for an award amounting to 20% of the value of the Settlement is a reasonable percentage of the amount of the Settlement.[2] For the Court's convenience, Class Counsel submits that these somewhat overlapping factors can be efficiently grouped here into seven categories: (1) quality of results achieved, including non-monetary benefits; (2) complexity, risk, and desirability of the case; (3) the contingent nature of the fee and the economics involved; (4) customary attorneys' fees in similar cases; (5) counsel's experience, ability, and reputation; (6) the reaction of the Settlement Class; and (7) the amount of time and labor expended. All of these factors strongly support the requested fee.

[2] Not all of the *Johnson* factors are necessarily relevant under the percentage fee approach in every context. *See In re Arby's,* 2019 WL 2720818 at *3 n.2.

1. The Quality of the Results Achieved

In *Camden I,* cited by *Friedrich,* the Eleventh Circuit identified the result obtained by Class Counsel as the pre-eminent consideration: "in this context, monetary results achieved predominate over all other criteria." *Camden I,* 946 F.2d at 774; *see also Gunthert v. Bankers Standard Ins. Co.,* 2019 WL 1103408 at *5 (M.D. Ga. Mar. 8, 2019) ("The 'most important factor' in determining the appropriate fee award in a common fund case is generally considered to be 'the results obtained' for the class") (quoting *Allapattah Servs., Inc. v. Exxon Corp.,* 454 F. Supp. 2d 1185, 1204-05 (S.D. Fla. 2006)). For all of the reasons previously discussed above, the value of the Settlement constituting $4,400,000.00 in total monetary benefits for the Settlement Class is a fair recovery and provides Settlement Class Members with a guaranteed benefit representing approximately 40% of their estimated best total damages. Class Counsel's requested fee of 20% of the value of the Settlement—not including the value of the prospective relief provided—is well within the range routinely awarded in Georgia and the Eleventh Circuit in class action settlements.

Class Counsel obtained the above benefits for the Settlement Class with hard work and creativity, investing hundreds of hours of time in the matter. Before this Action was filed, to Class Counsel's knowledge, no enforcement agency, no consumer protection group, and no other court in Georgia had addressed allegations of inflated delivery fees assessed in the form of menu item markups. As a result of the Settlement, Defendant is making substantial monetary relief available to consumers. In addition, Chick-fil-A has revised its pricing disclosures on the Chick-fil-A App and website to state expressly that menu prices may be higher for delivery orders and agrees to keep these (or similar) disclosures in place indefinitely as long as they are applicable to delivery orders. This factor supports the requested fee and is further justified by the fact that no class member has objected to the Settlement or Class Counsel's fee request.

2. Complexity, Risk, and Desirability of the Case

Second, "[a]ttorneys should be appropriately compensated for accepting complex and difficult cases. It is common knowledge that class action suits have a well-deserved reputation as being most complex." *Gunthert,* 2019 WL 1103408 at *6 (citations omitted). Class Counsel's expertise allowed it to build a novel case that has not been litigated in Georgia before. Kaliel Decl., ¶ 27. Indeed, as discussed at length above, the theory of liability here was novel as this was one of the first cases in the country challenging the veracity of low-cost delivery promises. *See Johnson,* 488 F.2d at 718 ("Cases of first impression generally require more time and effort on the attorneys' part."). Because Class Counsel has litigated many complex class action cases involving consumer protection and false advertising claims, they were able to successfully litigate and settle this matter. Employing this experience and skill, Class Counsel aggressively and swiftly worked to litigate and resolve this case in an efficient manner.

3. The Contingent Nature of the Fee and the Economics Involved

The third factor acknowledges that Class Counsel agreed to take this complex class action on a contingency fee basis. Kaliel Decl., ¶ 28; *see Gunthert,* 2019 WL 1103408 at *7 ("[t]he contingent nature of the fee and the fact that the risks of failure and nonpayment in a class action are high are significant for purposes of determining if a fee award is appropriate."); *Equifax,* 2020 WL 256132 at *33 (higher contingency fee awards are "justified because if the case is lost a lawyer realizes no return for investing time and money in the case"). As a result, Class Counsel assumed a significant risk of non-payment. Thus, this commitment to prosecute the Action notwithstanding the financial risk presented to Class Counsel warrants enhanced compensation. *See Behrens,* 118 F.R.D. at 548 (noting that "[a] contingency fee arrangement often justifies an increase in the award of attorneys' fees" and "[i]f this 'bonus' methodology did not exist, very few lawyers could take

on the representation of a class client given the investment of substantial time, effort, and money, especially in light of the risks of recovering nothing").

The risk of protracted litigation also presented "economic" considerations for Settlement Class Members and the Court. Further expensive litigation could well have eroded the value of any recovery at a later date, even if a settlement at the same level could have been obtained later. And the Georgia judicial system would also incur significant costs and draw of state court jurisdiction. Class Counsel respectfully submits that their taking such novel action further evidences their diligence throughout in protecting the Settlement Class's interests and further supports the requested fee.

4. Customary Attorneys' Fee Awards

The "customary fee" in a class action lawsuit of this nature is a contingency fee because few if any class members possess a sufficiently large stake in the litigation to justify paying attorneys on an hourly basis. *See Norman v. Hous. Auth. of City of Montgomery,* 836 F.2d 1292, 1299 (11th Cir. 1988). As addressed above, the requested 20% fee "falls at the low end" of the customary contingent fee range in the prevailing market rate throughout Georgia and the Eleventh Circuit. *See Gunthert,* 2019 WL 1103408 at *6 (approving a fee request of 20% of $2.25 million settlement fund as "fair and reasonable" in consumer class action settlement); *see e.g., Plymel,* 296 Ga. App. at 846-47 (typical fee range is 25-33%); *In re Flowers Foods, Inc. Sec. Litig.,* 2019 WL 6771749 at *1 (M.D. Ga. Dec. 11, 2019) (awarding 33.33% fee); *Cabot E. Broward 2 LLC v. Cabot,* 2018 WL 5905415, at *7 (S.D. Fla. Nov. 9, 2018) (noting that attorneys' fees of 33% or more are frequently approved).

Moreover, Class Counsel's 20% fee request falls within the range of approved fees it has been awarded in similar delivery fee class action settlements across the country. *See e.g., Jeff Ross,*

et al. v. Panda Restaurant Group, Inc., Case No. 21STCV03662 (Super. Ct. Cal., Los Angeles County) (awarding fees amounting to one-third of $1.4 million gross settlement amount); *Aaron Aseltine, et al. v. Chipotle Mexican Grill, Inc.,* Case No. RG21088118 (Super. Ct. California, Alameda County) (awarding fees representing 15-37% of the common benefit).

As demonstrated above, the requested fee award in this case is on par with the fee awards approved in similar consumer class actions, as well as other class actions in general in Georgia and the Eleventh Circuit.

5. Class Counsel's Experience, Ability, and Reputation

Next, "[t]he appropriate fee should also reflect the degree of experience, competence, and effort required by the litigation." *Gunthert,* 2019 WL 1103408 at *6 (quoting *Columbus Drywall,* 2012 WL 12540344 at *4). Class Counsel's experience, reputation, and ability to obtain a substantial result for the Settlement Class as expeditiously as possible should be rewarded. Indeed, Class Counsel are respected and experienced class action firms, with substantial experience not only in class actions generally, but more particularly in consumer protection litigation. As demonstrated throughout the Kaliel Declaration, it is unquestionable that Class Counsel has regularly achieved exceptional results. KalielGold 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. Kaliel Decl., ¶ 29.

Further, the quality of the work performed by Class Counsel in attaining the Settlement should be evaluated in light of the quality of opposing counsel. *See Columbus Drywall,* 2012 WL 12540344 at *4. Here, Chick-fil-A was represented by Troutman Pepper, a preeminent national defense firm specializing in several practice areas including high-stakes commercial class action litigation. Class Counsel's ability to obtain a favorable Settlement for the Settlement Class despite

this formidable legal opposition confirms the quality of the representation provided here.

Thus, this factor also supports the requested fee award.

6. The Reaction of the Class

As set forth above, the reaction of the Settlement Class was overwhelmingly positive, as no Settlement Class Member has opted-out of, nor objected to the Settlement or Class Counsel's requested fee award. "The lack of objection is a strong indicator that both the settlement agreement and [fee application] are reasonable and fair." *In re Arby's,* 2019 WL 2720818 at *1; *Gunthert,* 2019 WL 1103408 at *7. Thus, this factor also supports the requested fee.

7. Time and Labor Required

The final factor examines the time and labor expended by Class Counsel in litigating this matter. "Although the hours claimed or spent on a case should not be the sole basis for determining a fee . . . they are a necessary ingredient to be considered." *Johnson,* 488 F.2d at 717.

Over the course of two years of litigation in the Action, including several months of an independent review prior to filing the Action, Class Counsel has spent approximately 1,247 hours performing the necessary work on behalf of the Settlement Class, from investigating and gathering evidence in support of the claims resolved by the Settlement; preparing written discovery requests; producing and reviewing documents and data; engaging in several meet and confer conferences; researching, drafting, and filing the oppositions to motions to dismiss in the *Ortega* and *Pittman* Actions; preparing for mediation by researching and drafting a comprehensive mediation statement; engaging an expert to assess the potential damages; 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; overseeing the Class Action Settlement Administrator's efforts to effectuate notice to the Settlement Class; and preparing the

motions for final approval and attorneys' fees and costs. Kaliel Decl., ¶ 30. More work will be required of Class Counsel after final approval is granted, including working with the Class Action Settlement Administrator to ensure that all payments are made, and if residual funds exist, obtaining approval to issue the residual funds to the *cy pres* recipient, or if not feasible, then to oversee a second distribution to the Settlement Class Members who elected to receive a Cash Settlement Award.

Accordingly, Class Counsel's considerable dedication of time and effort in litigating the Action supports the requested fee. *See Gunthert,* 2019 WL 1103408 at *6 (finding Class Counsel's efforts "including investigating the claims against [defendant]; drafting the complaint; engaging in written discovery;" "reviewing documents produced by [defendant];" "conducting informal discovery;" and "devoting significant time to negotiating the settlement as well as the" approval process "readily justify the requested fee").

VIII. CLASS COUNSEL'S REQUEST FOR REIMBURSEMENT OF REASONABLE COSTS INCURRED SHOULD BE APPROVED

Class Counsel respectfully requests that, in addition to attorneys' fees, the Court also reimburses their reasonable out-of-pocket litigation expenses. *Lunsford v. Woodforest Nat'l Bank,* 2014 WL 12740375 at *16 (N.D. Ga. May 19, 2014) (approving class counsels' request for reimbursement of "certain actual out-of-pocket costs and expenses" incurred in the action including expert fees, mediator's fees, travel expenses, and filing fees); *George v. Academy Mortgage Corporation (UT),* 369 F. Supp.3d 1356, 1386 (N.D. Ga. 2019) ("Because Class Counsel has lost the use of this money for nearly three years, the expenses required are reasonable and necessary") (citations omitted). Class Counsel has expended a total of $15,579.32 in costs and expenses on behalf of the Settlement Class, including filing fees, mediation, expert fees, out-of-town travel cost, and court fees. Kaliel Decl., ¶ 31. These costs were reasonably expended in the

duration of the cases. Indeed, Class Counsel had an incentive to only incur expenses that were reasonable and necessary for the prosecution of the Action because Class Counsel was not guaranteed to recover these expenses because their repayment was contingent on the successful resolution of the case. *Id.*, ¶ 32. The requested reimbursement for costs and expenses is relatively low for class litigation and inherently reasonable given the complexity of the litigation. *Id.*, ¶ 33.

Additionally, the Court should approve the payment of the Administration Costs to the Class Action Settlement Administrator for its fees and costs associated with disseminating the Class Notice and administering the Settlement and Settlement Fund. "Settlement administrators are typically entitled to 'reimbursement for fees, costs, and expenses incurred in connection with the administration of the settlement fund." *County of Monmouth, New Jersey v. Florida Cancer Specialists,* No. 2:18-cv-201-SDM-KCD, 2022 WL 18716679 at *4 (M.D. Fla. Oct. 21, 2022); *see e.g., George,* 369 F. Supp.3d at 1383 (approving settlement administrator's fees in multi-state class action settlement).

IX. PLAINTIFFS' REQUEST FOR SERVICE AWARDS FOR THEIR WORK ON BEHALF OF THE SETTLEMENT CLASS SHOULD BE APPROVED

Finally, Plaintiffs request Service Awards of $5,000 for each Plaintiff (a total of $25,000.00 total for all Plaintiffs) for the time and effort they expended in connection with litigating this Action on behalf of the Settlement Class. Georgia courts have approved service awards to compensate class representatives in much higher amounts than that requested here. *See e.g., Old Town Trolley Tours of Savannah, Inc. v. The Mayor and Aldermen of The City of Savannah,* No. SPCV20-00767-MO (Chatham Super. Ct., Feb. 23, 2021) (Morse, J.) (awarding $55,000 service award). Here, the Plaintiffs, who have taken every necessary action to protect the interests of the Settlement Class and provided substantial, tangible benefits to all the Settlement Class Members, were essential to the success of the litigation and to securing a favorable settlement. Each Plaintiff

assisted in every way possible throughout the Action, including assistance in investigation of the cases, reviewing pleadings, participating in formal discovery in the *Ortega* Action, and working with Class Counsel to prepare for mediation. Without their active participation (including their willingness to be deposed), there would be no recovery at all for the Settlement Class. As such, Plaintiffs are entitled to service awards for their work.

X. CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that the Court grant final approval to the proposed Settlement as being fair, reasonable, and adequate, and that the requested attorneys' fee award of $880,000.00, plus the $15,579.32 in litigation costs incurred in the prosecution of the Action, and $25,000.00 in Service Awards to the Class Representatives is also fair and reasonable. Accordingly, Plaintiffs respectfully request that the Court approve the proposed Settlement by entering the proposed Final Approval Order submitted by Plaintiffs and the requested allowance of attorneys' fees, costs, and service awards.

Dated: January 30 ,2024

/s/ Andrew J. Shamis
SHAMIS & GENTILE, P.A.
Andrew J. Shamis
(GA Bar No. 49496)
Edwin E. Elliott
14 NE 1st Ave., Suite 705
Miami, Florida 33132
Tel: 305-479-2299
ashamis@shamisgentile.com
edwine@shamisgentile.com

/s/ Jeffrey Kaliel
KALIELGOLD PLLC
Jeffrey Kaliel
Sophia Goren Gold
1100 15th St., NW, 4th Floor
Washington, DC 20005
Telephone: (202) 280-4783
jkaliel@kalielpllc.com
sgold@kalielgoldpllc.com

/s/ Scott Edelsberg
EDELSBERG LAW, P.A.
Scott Edelsberg
20900 NE 30th Ave.
Aventura, FL 33180
Tel: 305-975-3320
scott@edelsberglaw.com

Attorneys for Plaintiffs and the Settlement Class