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Superior Court of California
County of Los Angeles

JUL 31 2015

Sherri R. Carter, Executive Officer/Clerk
By  Deputy
Shaunya Bolden

9 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES**

11 RACHELLE ERRATCHU, individually, and
12 on behalf of other members of the general
13 public similarly situated,

14 Plaintiffs,

15 vs.

16 FTD.COM INC., a Delaware corporation; and
17 DOES 1 through 10, inclusive,

18 Defendants.

Case Number: **BC 589687**

[Assigned for all purposes to the Hon.
TBD]

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
PLAINTIFF'S MOTION FOR AN
ORDER: (1) PRELIMINARILY
APPROVING CLASS ACTION
SETTLEMENT;
(2) CONDITIONALLY CERTIFYING
CLASS; (3) APPROVING FORM AND
METHODS OF CLASS NOTICE;
AND (4) SCHEDULING FINAL
APPROVAL OF SETTLEMENT**

[Notice of Motion and Motion;
Declaration of Shawn C. Westrick filed
concurrently herewith; [Proposed] Order
lodged concurrently herewith]

Date: August 25, 2015
Time: 8:30 a.m.
Dept.: TBD

Complaint Filed: July 31, 2015

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1 Plaintiff Rachele Erratchu ("Plaintiff") respectfully submits this Memorandum Of Points
2 And Authorities In Support Of Plaintiff's Motion For An Order: (1) Preliminarily Approving
3 Class Action Settlement; (2) Conditionally Certifying Class; (3) Approving Form And Methods
4 Of Class Notice; And (4) Scheduling Final Approval Of Settlement. The settlement agreement
5 ("Settlement Agreement") to which the parties have agreed is filed concurrently herewith.¹

6 **I. INTRODUCTION**

7 Plaintiff seeks preliminary review of the proposed California settlement of this class action
8 against Defendant FTD.COM Inc. ("Defendant" or "FTD"), and authorization to distribute the
9 Class Notice to Class Members in the manner described herein. The Settlement meets Plaintiff's
10 goals in this litigation: it provides (1) monetary relief to the Class Members, and (2) an agreement
11 for FTD to make certain changes to its disclosures regarding the potential for substitution on its
12 website, as outlined in the Settlement Agreement. The Settlement is thus an excellent result for
13 the Class.

14 Plaintiff's central allegations in this action are that FTD falsely advertised its floral
15 arrangements with pictures and hides its substitution policy to attract consumers based on the
16 reasonable assumption that the floral arrangements they purchase will look like the arrangements
17 pictured on www.ftd.com when in fact, the arrangement sent to the recipient may contain different
18 colors and types of flowers and/or a different container than the picture selected by the purchaser.
19 The Complaint asserts causes of action on behalf of Plaintiff and a putative class for: (1) Unjust
20 Enrichment; (2) Negligent Misrepresentation; (3) Violation of California Business & Professions
21 Code § 17200, et seq.; (4) Violation of California Business & Professions Code § 17500, et seq.;
22 and (5) Violation of California Civil Code § 1770, et seq.

23 The parties have now reached a class-wide settlement that will benefit the Class Members,
24 the terms of which are set forth in the Settlement Agreement. The settlement: (1) provides
25 monetary relief to Class Members who submit claims by giving them the choice between a coupon
26 or a check; and (2) requires FTD to enhance its disclosures of the potential for substitutions.

27
28 ¹ All capitalized terms herein are used as defined in the Settlement Agreement.

1 By this motion, Plaintiff seeks an order that: (1) preliminarily approves the class
2 settlement; (2) certifies a conditional settlement class; (3) approves the form and plan for
3 dissemination of Class Notice; and (4) schedules a Fairness Hearing for final approval of the
4 Settlement.

5 **II. BACKGROUND**

6 The complaint arises out of FTD's failure to adequately disclose its substitution policy on
7 its e-commerce website, www.ftd.com, which contradicts the representation that FTD will ship the
8 floral arrangement in the picture specifically selected by the customer. Consumers take great care
9 in selecting a floral arrangement based on the holiday, event or person for which the arrangement
10 is purchased and the special meaning the colors and types of flowers in the arrangement convey.
11 FTD acknowledges this by displaying pictures of each of its floral arrangements on www.ftd.com
12 and by allowing consumers to search for arrangements by occasion and type of flower. However,
13 some orders placed through FTD's website contain substitutions, which often go undetected.
14 Since the vast majority of these purchases are sent directly to the recipient, who is usually
15 different from the purchaser, the purchaser will not learn that the recipient received a floral
16 arrangement different from the one the purchaser specifically selected on FTD's website. By the
17 same token, the recipient will not know what the purchaser selected and whether the purchaser
18 purchased flowers different from those he or she received.

19 In early 2014, Plaintiff's Counsel began investigating allegations that FTD used a
20 concealed disclaimer, which it relied upon to ship products significantly different from those
21 selected by the purchaser. The investigation included an extensive search and review of
22 complaints made regarding FTD's substitution policy online. (Declaration of Shawn C. Westrick
23 ["Westrick Decl."], at ¶¶ 8-9.) The investigation also included gathering numerous articles
24 regarding customer satisfaction with floral arrangements purchased from FTD as well as articles
25 regarding the business model of national floral networks like FTD. (*Id.* at ¶ 9.) The investigation
26 further included interviews of current and former FTD network florists. (*Id.*) Based on this
27 information, Plaintiff's Counsel was able to draft, on behalf of Plaintiff and other California
28 consumers, a notice letter pursuant to the Consumer Legal Remedies Act ("CLRA") claiming that

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1 FTD misled Plaintiff and other California consumers by not sufficiently disclosing the potential
2 for substitutions on www.ftd.com. (*Id.* at ¶ 10.)

3 The parties then began discussing a mediation. (*Id.* at ¶ 11.) Thereafter, the parties
4 informally exchanged critical written discovery, including information and charts demonstrating,
5 *inter alia*, the: (1) number of orders and revenue from orders placed by California consumers for
6 2010 through 2014; (2) number of orders and revenue from orders potentially involving
7 substitutions in 2013; and (3) the content of FTD's substitution policy from 2010 through 2014.
8 (*Id.* at ¶ 12.) The parties participated in a mediation session on July 22, 2014, before former Los
9 Angeles Superior Court Judge Carl J. West (Ret.) of JAMS, during which the parties came close to
10 agreeing upon the major deal points of a settlement. (*Id.* at ¶¶ 13-16.) After the mediation, the
11 parties engaged in substantial additional arm's-length negotiations over the course of a year with
12 the assistance of Judge West, including the amount of monetary and coupon relief available to the
13 class members as well as the nature of the changes to FTD's disclosure of its substitution policy
14 on its website. (*Id.* at ¶ 17.) Additionally, the parties extensively negotiated the claims
15 administration process as well as the form of the Class Notice, Claim Form, proposed order
16 granting preliminary approval, and proposed final order and judgment. (*Id.*) This ultimately
17 resulted in the settlement reflected in the Settlement Agreement.

18 **III. THE PROPOSED SETTLEMENT**

19 The proposed settlement is the result of intensive arm's-length negotiations. The parties
20 believe the proposed settlement is fair and reasonable and in the best interest of all the parties, as it
21 allows Defendant to avoid the ongoing cost of litigation and also provides a substantial benefit to
22 the Class Members, especially in light of the difficulties and uncertainties of litigation. A
23 summary of the key terms of the Settlement Agreement, submitted herewith, is as follows.

24 **A. Settlement Class**

25 The Settlement Agreement provides for certification of a Class of all persons identified by
26 reference to FTD's records who, between April 1, 2011 and March 31, 2015: (1) ordered and paid
27 for a floral arrangement from FTD; (2) provided a California billing address; (3) whose purchase
28 is believed to have involved a substitution; and (4) who did not receive any refund, whether partial

1 or whole, on their purchase. (Settlement Agreement § I.) The parties believe that the total number
2 of Class Members is approximately 34,000. (*Id.*)

3 **B. Benefits to the Settlement Class Members**

4 As part of the Settlement, FTD has agreed to pay \$8.50 via a check or to give a \$20.00
5 coupon to be used on a future purchase on www.ftd.com to each Class Member, at each Class
6 Member's election. (Settlement Agreement § III-B.) Given that the Settlement Class is
7 approximately 34,000 consumers, the maximum monetary benefit to the Settlement Class is
8 \$289,000 if all Class Members choose a cash payment and \$680,000 if all of the Class Members
9 elect to receive coupons. All of the Class Members were identified because they took steps to
10 either notify FTD that there were substitutions in their orders or were notified of substitutions by
11 FTD. Moreover, if a minimum of 13,200 Class Member do not submit claims, FTD will email a
12 FTD Coupon to a sufficient number of Class Members to make up the difference between the
13 13,200 minimum number of claims and the actual number of claims submitted. (*Id.* § III-C.)
14 Thus, the minimum rate of Class Members receiving a benefit from the Settlement is
15 approximately 38.8%, and the minimum benefit to the Settlement Class in coupons is \$264,000.
16 No attorney's fees or costs will be subtracted from the amount to be paid by FTD to the Class
17 Members.

18 Defendant has also agreed to enhance its disclosures for the potential for substitution on
19 www.ftd.com. First, Defendant has agreed to put a "Delivery/Substitution Policy" tab in close
20 proximity to the button where customers begin the order process, and clicking on the tab will
21 include the statement that "substitutions may be necessary" with a conspicuous hyperlink
22 containing FTD's full substitution policy. (*Id.* § III-D(1).) Second, FTD has agreed to include a
23 hyperlink titled "Substitution Policy" linking to the policy on the secondary page a consumer is
24 taken to when he or she adds an item to his or her shopping cart. (*Id.* § III-D(2).) Third, on the
25 final billing and review page visited by customers prior to finalizing and placing their orders, FTD
26 has agreed to expressly note that by placing an order, the customer agrees to FTD's "Terms of
27 Use," and the customer will be able to click on a hyperlink to read those terms, which will include
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1 a disclosure about the potential for substitutions. (*Id.* § III-D(3).)²

2 **C. Notice to Settlement Class Members**

3 The parties extensively negotiated the claims administration process and form of the Class
4 Notice and Claim Form. The parties believe that the plan for distributing the Notice to the Class
5 Members described below provides Class Members with the “best practicable notice.” FTD can
6 ascertain from its business records the identities of all Class Members. Accordingly, within seven
7 days of entry of the Preliminary Approval order, FTD shall provide Class Notice to the putative
8 Class Members. (*Id.* § IV-B.) The Class Notice will be provided via email³ to the email address
9 used by each putative Class Member at the time he or she made the purchase at issue. (*Id.*)
10 Within fourteen days after completion of service of the notice on all Class Members, FTD will
11 provide affidavits to the Court, with a copy to Plaintiff’s counsel, attesting to the measures
12 undertaken to provide the Notice. (*Id.* § IV-C.)

13 The Class Notice complies with the requirements of California Rule of Court 3.766(d) and
14 advises Class Members of, *inter alia*, a brief explanation of the case, the terms of the Settlement,
15 the Class Members’ right to object to the Settlement or to opt-out of the Settlement, and how and
16 by when they need to act. (*Id.*, Ex. D.) The Class Members will have 60 days from the date of the
17 Notice to submit a request for exclusion from the Proposed Settlement, or objections to or
18 comments on the proposed Settlement, which is a reasonable amount of time in which to do so. (*Id.*)
19 The Class Notice will also include the amount of recovery for Class Members. (*Id.*) Class
20 Members will be informed that to receive any money or benefits, they must simply submit a Claim
21 Form, which will be available on a website created and maintained by the Claims Administrator,
22 by a certain date. (*Id.*) The website will allow Class Members to submit Claims Forms online or
23 print Claims Forms and mail them to the Claims Administrator. (*Id.* § V-C.)⁴

24 FTD has also agreed to provide the Claims Administrator with documentation identifying
25 the putative Class Members. (*Id.* § V-D.) FTD has agreed to pay the full cost of the Claims

26
27 ² As of the date the Settlement Agreement was executed, FTD has already implemented the changes identified
in § III-D(1), (2). (Settlement Agreement § D.)

28 ³ For some Class Members where an email is not available, FTD will send the Class Notice via regular mail.

⁴ The Claim Form is attached to the Settlement Agreement as Exhibit E.

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1 Administrator, which will not come out of the settlement proceeds made available to the Class
2 Members. (*Id.* § IV-D.) In order to properly complete the Claim Form, each class member must
3 provide: (1) their contact information; (2) the approximate date he or she purchased a floral
4 arrangement from FTD; (3) whether they elect to receive a check for \$8.50 or a coupon for \$20;
5 (4) a copy of a government issued identification card; and sign the Claim Form under penalty of
6 perjury. (*Id.* Ex. E.) The use of a Claim Form is necessary so that the Class Members can prove
7 their identities and also choose whether they would prefer to receive a check versus a coupon.
8 Any Class Member who timely submits a completed Claim Form online or mails in a Claim Form
9 by the postmark date will receive the Settlement Payment of their choosing within thirty days of
10 the date on which the Settlement and Final Order have become final. (*Id.* § V-C, D.) Although
11 Claim Forms that fail to accurately provide the requested information will be rejected, the Claims
12 Administrator will notify the parties of rejected claims, and Plaintiff's Counsel may contact
13 claimants whose claims were rejected solely to inform them how to cure their Claim Forms. (*Id.* §
14 V-F.)

15 **D. Scope of the Release**

16 Pursuant to the Settlement Agreement, Plaintiff and the Class Members agree to release
17 known and unknown claims, arising from or related to Plaintiff's Complaint alleging that FTD
18 failed to sufficiently disclose substitutions or the potential for substitutions for FTD orders. (*Id.*
19 §§ I, VII-A.) The Settlement Agreement also includes waiver of the protections afforded by
20 California Civil Code Section 1542. (*Id.*) The scope of the release was extensively negotiated by
21 the parties, and Defendant would not have agreed to provide the significant relief provided for
22 under the Settlement Agreement in the absence of a Section 1542 waiver. (Westrick Decl. at ¶
23 18.) However, the Section 1542 is reasonable in scope since it is tied to the Released Claims
24 which is limited to those claims arising out of or related to the allegations in Plaintiff's Complaint.

25 **E. Payment of Attorneys' Fees and Costs to Class Counsel**

26 After the parties had agreed to the material terms of the Settlement, including the relief
27 available to the Class Members and the changes to FTD's disclosures, the parties separately
28 negotiated the amount of attorney's fees and costs Plaintiff's counsel could petition the Court for.

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1 (Westrick Decl. at ¶ 19.) Class Counsel intends to file a petition for attorneys' fees and costs.
2 Defendants agree not to oppose Class Counsel's petition for attorneys' fees in an amount up to
3 \$150,000 and costs in an amount up to \$5,000. (Settlement Agreement § X-A.) A description of
4 Plaintiff's Counsel's lodestar is set forth in the Declaration of Shawn C. Westrick at ¶¶ 38-43.

5 **F. Enhancement Payments to Plaintiff**

6 The Settlement Agreement provides that Plaintiff Rachelle Erratchu is to receive two
7 thousand five hundred dollars (\$2,500) for her services, efforts and risks taken on behalf of the
8 Class. (Settlement Agreement § III-E.) Plaintiff participated in significant consultation with Class
9 Counsel necessary to the effective prosecution of the case. (Westrick Decl. at ¶ 24.) Specifically,
10 Plaintiff provided evidence of her orders placed with FTD, emails and complaints in connection
11 with those orders, and photographs of the floral arrangements delivered to the recipients. (*Id.* at ¶
12 25.) Plaintiff was also available by telephone during the mediation, and regularly spoke with her
13 counsel throughout the course of the parties' negotiations. (*Id.* at ¶ 26.) In addition, Plaintiff
14 reviewed correspondence and filings prepared in connection with the case, including the CLRA
15 Notice Letter, the Complaint, and the Settlement Agreement. (*Id.* at ¶ 27)

16 **G. Costs of Administration**

17 The Claims Administrator will be selected and paid for by FTD to administer and respond
18 to claims submissions. (*Id.* §§ IV-D, V-A.)

19 **IV. THE PROPOSED SETTLEMENT IS FAIR AND REASONABLE AND SHOULD**
20 **BE GRANTED PRELIMINARILY**

21 To grant preliminary approval of a class action settlement, the Court need only find that
22 the settlement falls "within the range of possible approval." *In re Prudential Sec. Inc. Ltd.*
23 *P'ship Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) (quoting *Manual for Complex Litigation*,
24 *Third* §30.41 at 237 (1995); 4 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*
25 § 11:25 (4th ed. 2002). There is usually an initial presumption of fairness when a proposed class
26 settlement, which was negotiated at arm's-length for the class, is presented for court approval.
27 *Dunk v. Ford Motor Co.*, 48 Cal. App. 4th 1794, 1801 (1996). Although the trial court has broad
28 powers to determine whether a proposed settlement of a class action is fair, reasonable, and

1 adequate, the court should give due regard:

2 to what is otherwise a private consensual agreement between the
3 parties. The inquiry “must be limited to the extent necessary to
4 reach a reasoned judgment that the agreement is not the product of
5 fraud or overreaching by, or collusion between, the negotiating
6 parties, and that the settlement, taken as a whole, is fair, reasonable
7 and adequate to all concerned. . . Ultimately the [trial] court’s
8 determination is nothing more than ‘an amalgam of delicate
9 balancing, gross approximations and rough justice.’”

10 *Id.* at 1801 (quoting *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615, 625 (9th Cir.
11 1982)(internal quotation omitted)); *see also 7-Eleven Owners for Fair Franchising v. Southland*
12 *Corp.*, 85 Cal. App. 4th 1135, 1145 (2000). In considering a potential settlement, the trial court
13 should not “reach any ultimate conclusions on the contested issues of fact and law which underlie
14 the merits of the dispute, for it is the very uncertainty of outcome in litigation and avoidance of
15 wasteful and expensive litigation that induce consensual settlements.” *7-Eleven*, 85 Cal. App. 4th
16 at 1145 (internal quotations omitted).

17 California courts have adopted the procedures and standards developed by federal courts
18 for preliminary approval of class action settlements. *See generally Daar v. Yellow Cab Co.*,
19 67 Cal. 2d 695 (1967). Courts have articulated a number of factors to be considered in
20 determining whether a settlement should be preliminarily approved. Relevant factors are
21 discussed below.

22 **A. The Settlement Is the Product of Serious, Informed, and Arm’s-Length**
23 **Negotiations**

24 California courts recognize that “a presumption of fairness exists where . . . [a] settlement
25 is reached through arm’s-length bargaining.” *Wershba v. Apple Computer, Inc.*, 91 Cal. App. 4th
26 224, 245 (2001) (internal quotations omitted). This settlement is the result of preliminary arm’s-
27 length negotiations with the Honorable Carl J. West (Ret.) of JAMS during a mediation and
28 extensive arm’s length negotiations with the assistance of Judge West over the course of the year
following the mediation.

In preparation to the mediation, Class Counsel conducted extensive examination,
investigation and evaluation of the relevant law, facts and allegations to assess the merits of the

1 claims and potential claims and the strength of both defenses and liability sought in the Action.
2 (Westrick Decl. at ¶ 8.) Plaintiff's counsel also spoke with current and former FTD network
3 florists regarding the frequency of substitutions and FTD's policies and procedures. (*Id.* at ¶ 9.)

4 Prior to the mediation, the parties informally exchanged critical written discovery,
5 including information and charts demonstrating, *inter alia*, the: (1) number of orders and revenue
6 from orders placed by California consumers for 2010 through 2014; (2) number of orders and
7 revenue from orders potentially involving substitutions in 2013; and (3) the content of FTD's
8 substitution policy from 2010 through 2014. (*Id.* at ¶ 12.) The parties prepared extensive
9 mediation briefs. (*Id.* at ¶ 14.) Attached to Plaintiff's mediation brief was numerous exhibits
10 including, *inter alia*, examples of online consumer complaints regarding FTD's substitution
11 policies, articles regarding consumer satisfaction with FTD's orders in which substitutions were a
12 factor, and articles regarding the business model of national floral networks like FTD. (*Id.* at ¶
13 15.)

14 The parties participated in a mediation session on July 22, 2014, before former Los
15 Angeles Superior Court Judge Carl J. West (Ret.) of JAMS, during which the parties came close to
16 agreeing upon the major deal points of a settlement. (*Id.* at ¶¶ 13-16.) After the mediation, the
17 parties engaged in substantial additional arm's-length negotiations over the course of a year with
18 the assistance of Judge West, including the amount of monetary and coupon relief available to the
19 class member as well as the nature of the changes to FTD's disclosure of its substitution policy on
20 its website. (*Id.* at ¶ 17.) Additionally, the parties extensively negotiated the claims
21 administration process as well as the form of the Class Notice, Claim Form, proposed order
22 granting preliminary approval, and proposed final order and judgment. (*Id.*) This ultimately
23 resulted in the settlement reflected in the Settlement Agreement.

24 One of the key issues in reaching a settlement was that Plaintiff did not believe that FTD's
25 network florists kept records of when substitutions occurred. (*Id.* at ¶ 21.) Additionally, since the
26 recipients of most floral arrangements are different from the purchaser, substitutions are likely to
27 go undetected by consumers, and the only records available are customer complaints made to
28 FTD. (*Id.*) Plaintiff thus believes this settlement fairly balances achieving the highest settlement

1 value available while acknowledging that the issue regarding the ascertainability of the Class
2 Members posed a great risk. (*Id.*) Moreover, the Settlement is the result of informed, arm's-
3 length negotiations.

4 **B. The Complexity, Expense, and Likely Duration of the Litigation**

5 Courts additionally consider the complexity, expense, and likely duration of the litigation
6 when evaluating a proposed settlement. *Wershba*, 91 Cal. App. 4th at 245. The preparation for,
7 and trial of, this action would be complex and expensive. Only informal discovery has taken
8 place, including documents and charts demonstrating, *inter alia*: (1) number of orders and
9 revenue from orders placed by California consumers for 2010 through 2014; (2) number of orders
10 and revenue from orders potentially involving substitutions in 2013; and (3) the content of FTD's
11 substitution policy from 2010 through 2014. (Westrick Decl. at ¶ 12.) Plaintiff's Counsel also
12 spoke with current and former FTD network florists regarding the frequency of substitutions and
13 FTD's policies and procedures. (*Id.* at ¶ 9.)

14 In the event approval of the settlement was not granted, the parties will likely require
15 significant additional discovery on the merits. For example, Plaintiff would require discovery
16 regarding the identities and contact information for the identities of the Class Members as well as
17 recipients of the floral arrangements, which will likely result in a lengthy discovery battle
18 including the filing of motions to compel. Plaintiff would also subpoena documents from FTD's
19 network florists and take their depositions regarding their policies and procedures regarding
20 substitutions. Plaintiff also intended to have a survey conducted to determine the rate and
21 frequency of substitutions in FTD's floral arrangements.

22 The parties would also likely employ experts to opine regarding whether FTD's business
23 model encourages substitutions as well as consumer experts to opine regarding the adequacy of
24 FTD's disclosures of its substitution policy. This expert testimony would be instrumental in
25 preparing for trial, and no discovery has taken place as to such experts. The parties further
26 anticipate that several contested substantive motions will be brought, including, *inter alia*, motions
27 for class certification and for summary judgment, which would further add to the expense of
28 litigating this case. There can be little doubt that this case is complex.

1 **C. The Risks of Establishing Liability, Restitution, and Damages**

2 In assessing the reasonableness of a settlement, courts ordinarily compare the settlement to
3 the likelihood of liability being imposed on defendants and the probable range of damages. *See*
4 *Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by*
5 *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000). “In appraising the possibilit[y]
6 and probabilit[y] of recovery and the possible range of damages for the purposes of submitting or
7 approving the settlement proposal, the judge should carefully avoid expression of any opinion that
8 constitutes a prejudgment of the outcome of the litigation or a final judgment on the merits.” *In*
9 *re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1384 (D. Md. 1983) (quoting *Manual*
10 *on Complex Litigation, Third* §1.46 at 64-65).

11 1. *Defendant’s Liability*

12 Plaintiff believes that if every factor broke in her favor, the range of damages would be
13 approximately \$2,329,000. (Westrick Decl. at ¶ 34.) Based on the data provided by Defendants to
14 Class Counsel, the average cost of a floral arrangement from the period from 2010 through 2013
15 was approximately \$68.50. (*Id.* at ¶ 35.) Given that Defendant identified 34,000 Class Members
16 from its records during the relevant time period between April 1, 2011 and March 31, 2015,
17 Defendant’s revenue from orders placed by the Class Members was approximately \$2,329,000.
18 (*Id.* at ¶ 36.)

19 However, Plaintiff does not believe that an entire refund would be an appropriate remedy
20 even if Plaintiff established that Defendant did not adequately disclose its substitution policy. Due
21 to the fact that consumers still received floral arrangements from Defendants’ business, even
22 though they were different from the arrangements selected, Plaintiff’s Counsel believes it cannot
23 assume contract recession remedy would be provided on a class-wide basis. Therefore, in
24 preparation for mediation, Plaintiff estimated that a refund of 10% to 40% would be the most
25 likely outcome and Defendant’s totally liability in this matter ranged from \$232,900 and
26 \$931,600. (*Id.* at ¶ 37.) However, these numbers only represent Plaintiff’s best chance at
27 damages and do not take into account other factors such as the likelihood of certification or
28 actually winning a judgment on the merits.

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1 2. *Factors That Demonstrate the Reasonableness of the Settlement*

2 Class action settlements are not settled in a vacuum. Rather, a number of issues must be
3 considered during the mediation process including, but not limited to, the likelihood of
4 certification (and consequently surviving the inevitable decertification motion), if the matter is
5 certified on some or all of the causes of action, the likelihood of prevailing at trial, the time value
6 of money as any verdict in Plaintiff's favor would likely lead to an appeal by Defendant and
7 finally, the ability of Defendant to fund a settlement (including the risk that Defendant might go
8 bankrupt).

9 a. Certification Odds

10 While there are few definitive pieces of evidence of class certification rates in California,
11 Plaintiff believes that the odds of certifying a class action is typically less than 10%. In 2010, the
12 Administrative Office of the Courts (Office of Court Research) produced a report on Class
13 Certification in California. The report noted a certification rate of 5% in class action cases. (See
14 <http://www.courts.ca.gov/documents/classaction-certification.pdf> [last viewed on July 29, 2015] at
15 p. 15, Table 9.) Few would argue that certification has become easier since 2010; however,
16 consumer class actions were not specifically addressed by the report. Therefore, Plaintiff
17 estimates she had at best a 10% chance of certifying this matter.

18 b. Liability Odds

19 During the mediation process and thereafter, the parties presented their respective views of
20 the strengths and weaknesses of the case; the likelihood of restitution and damages being assessed;
21 the risk, expense, complexity, and likely duration of further litigation; Plaintiff's Counsel's
22 experience and recommendation; the benefits of the settlement to the Class; and the value of the
23 proposed settlement. The Honorable Carl J. West (Ret.) presided over much of the parties'
24 settlement discussions, including those that yielded most of the substantive terms of the
25 settlement.

26 In agreeing to resolve this case, Plaintiff and Defendant recognize that Plaintiff's claims
27 have certain strengths and weaknesses. Although Plaintiff believes her claims to be meritorious,
28 she also recognizes that liability is not a foregone conclusion. Defendant maintained from the

1 outset of the litigation that: (1) FTD adequately disclosed its substitution policy; (2) consumers
2 regularly recognize that substitutions are likely to occur due to the nature of flowers being
3 seasonal and perishable; (3) that Plaintiff may have difficulty demonstrating that the class is
4 ascertainable because there are no records of when substitutions occur; and (4) Plaintiff may have
5 difficulty demonstrating damages resulting from substitutions because recipients still received a
6 floral arrangement that may have been of the same or greater value than what the purchaser
7 ordered. (Westrick Decl. at ¶ 22.)

8 In assessing the merits of the litigation, Class Counsel carefully considered the factual and
9 legal questions at issue. In light of those issues and the relief ultimately obtained, Class Counsel
10 believes they obtained a very good settlement for the class. (*Id.* at ¶ 23). Whether Defendant is
11 liable for violations of the UCL, FAL, California's laws regulating unjust enrichment, or negligent
12 misrepresentation, are complex questions that would have to be resolved by the trier of fact. (*Id.*)
13 Defendant, who is represented by highly experienced counsel, asserted that it possessed strong
14 defenses to Plaintiff's claims. (*Id.*) Plaintiff has taken into account the uncertain outcome and the
15 risk of any litigation, particularly complex actions such as this one, which involves the UCL and
16 FAL, as well as the difficulties and delays inherent in any complex case. (*Id.*) Plaintiff is mindful
17 of the inherent problems of proof under, and possible defenses to, her claims. (*Id.*)

18 While Class Counsel believes that Plaintiff has a strong case, they recognize that a finding
19 of liability is never assured. Plaintiff faced risks with respect to her claims, as Defendant
20 consistently maintained and as detailed above. In sum, it is unclear how each of these complicated
21 issues would have been resolved, either pre-trial by the Court, or at trial by the trier of fact.

22 Even if they established liability, Plaintiff also faced the risk that she would not be able to
23 prove restitution or damages. The amount of monetary relief recoverable would have been subject
24 to vigorous attack by Defendant, especially given that Class Members were provided with floral
25 arrangements from FTD, regardless of whether the arrangement was substantially similar to the
26 arrangement selected by the purchaser. Such a determination likely would involve conflicting
27 expert opinions, including opinions on the value of the particular flowers and arrangements, and
28 the value represented by a floral arrangement's ability to reflect a particular emotion or occasion.

1 The typical “battle of experts” would have occurred in which the magnitude and even the
2 existence of injury would have been hotly disputed.

3 Plaintiff also faced the further risk of appeal of any judgment or verdict in her favor. A
4 victory at trial is no guarantee that the judgment would ultimately be sustained on appeal. For
5 example, in *In re Apple Computer Securities Litigation*, No. C-84-20148(A)-JW, 1991 U.S. Dist.
6 LEXIS 15608 (N.D. Cal. Sep. 6, 1991), a securities class action which had been pending for eight
7 years, the jury rendered a verdict for the plaintiffs after an extended trial. Based upon the jury’s
8 findings, recoverable damages could have exceeded \$100 million. Weeks later, however, the
9 Court overturned the verdict and entered judgment n.o.v. for the individual defendants, and
10 ordered a new trial with respect to the corporate defendant. *Id.*

11 Were this settlement not achieved, Class Members and Defendant would have faced
12 additional costly litigation, with the ultimate success for the Class uncertain. Instead, Plaintiff’s
13 Counsel successfully negotiated a favorable settlement for the benefit of the Class commensurate
14 with the damages at stake. Class Members will thus receive the benefits from the successful
15 resolution of the litigation more promptly and without the years of delay and uncertainty that often
16 occur in these cases. Based on their own assessment and the discussions with Judge West, the
17 parties recognize that the risk, expense, and complexity of further litigation is not justified in light
18 of the benefits that could be conferred on the Class by resolving the case at this stage of the
19 proceedings.

20 Under these circumstances, the compromise reached by the parties, consisting of monetary
21 relief in the form of check payments or coupons at the Class Member’s election, and the
22 significant changes made regarding the disclosure of FTD’s substitution policy on its website, is
23 within the range of settlements that are fair, reasonable, and adequate.

24 Taking both Plaintiff’s odds at securing a certification of 10% and assuming a coin flip’s
25 chance at liability, the expected value of this case is approximately 5% of the total potential
26 liability. Given the high-end of Plaintiff’s damages model of \$931,600, the approximated value of
27 this matter is \$50,000. The current settlement value therefore is very fair and reasonable to class
28 members.

1 **D. Judgment of Experienced Counsel**

2 The question whether a proposed settlement is fair, reasonable, and adequate necessarily
3 requires a judgment evaluation by the attorneys for the parties based upon a comparison of “the
4 terms of the compromise with the likely rewards of litigation.” *Weinberger v. Kendrick*, 698 F.2d
5 61, 73 (2d Cir. 1982) (internal quotations omitted). Courts recognize that the opinion of
6 experienced counsel supporting the settlement is entitled to considerable weight. *Lyons v.*
7 *Marrud, Inc.*, No. 66 Civ. 415, 1972 U.S. Dist. LEXIS 13401, at *5 (S.D.N.Y. June 6, 1972)
8 (“Experienced and competent counsel have assessed these problems and the probability of success
9 on the merits. They have concluded that compromise is well-advised and necessary. The parties’
10 decision regarding the respective merits of their positions has an important bearing on this case.”).

11 Here, Plaintiff’s counsel is experienced in class action and consumer litigation. (Westrick
12 Decl. at ¶¶ 29-33.) Counsel for Defendant engaged in lengthy and extensive negotiations
13 supervised by Judge West and the parties believe that this settlement is fair, reasonable, and
14 adequate. (*Id.* at ¶ 30.) This conclusion should be afforded considerable weight by the Court.

15 **V. PROVISIONAL CERTIFICATION OF THE SETTLEMENT CLASS IS**
16 **APPROPRIATE**

17 Under California Code of Civil Procedure § 382, certification is proper “when the question
18 is one of a common or general interest, of many persons, or when the parties are numerous, and it
19 is impracticable to bring them all before the court, one or more may sue or defend for the benefit
20 of all.” Cal. Civ. Proc. Code § 382; *see also* Cal. R. Ct. 3.769(d) (“The court may make an order
21 approving . . . certification of a provisional settlement class after the preliminary settlement
22 hearing.”). Courts have interpreted Section 382 as imposing two requirements that must be met in
23 order for a class to be certified: (1) “there must be an ascertainable class” and (2) “there must be a
24 well defined community of interest in the questions of law and fact involved affecting the parties
25 to be represented.” *Daar*, 67 Cal. 2d at 704 (internal citations omitted). “The community of
26 interest requirement embodies three factors: (1) predominant common questions of law or fact;
27 (2) class representatives with claims or defenses typical of the class; and (3) class representatives
28 who can adequately represent the class.” *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 470

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1 (1981). Finally, in making a class certification decision, the Court must determine whether “the
2 class action proceeding is superior to alternate means for a fair and efficient adjudication of the
3 litigation.” *Sav-On Drug Stores, Inc. v. Super. Ct.*, 34 Cal. 4th 319, 332 (2004) (internal quotation
4 omitted). Provisional certification of the settlement class is appropriate here because each of these
5 criteria is satisfied.

6 **A. An Ascertainable Class Exists**

7 The proposed Class is ascertainable, as it encompasses all persons identified by reference
8 to FTD’s records who, between April 1, 2011 and March 31, 2015: (1) ordered and paid for a
9 floral arrangement from FTD; (2) provided a California billing address; (3) whose purchase is
10 believed to have involved a substitution; and (4) who did not receive any refund, whether partial
11 or whole, on their purchase. *See generally Wilner v. Sunset Life Ins. Co.*, 78 Cal. App. 4th 952,
12 959-60 (2000) (class membership defined in terms of those who purchased policies as a result of
13 deceptive or fraudulent sales practices is sufficiently described to make the class ascertainable).
14 Defendant maintains detailed business records, including contact information, billing address
15 where the payment originated from, whether the customer complained about substitutions in their
16 order, and whether the customer was assessed any refund of their purchase, and can thus readily
17 identify the Class Members.

18 **B. Joinder of All Members of the Settlement Class Is Impracticable**

19 As discussed above, Defendant maintains detailed business records, including contact
20 information, billing address where the payment originated from, whether the customer complained
21 about substitutions in their order, and whether the customer was assessed any refund of their
22 purchase. From a review of these records, Defendant estimates that there are approximately
23 34,000 Class Members. (Settlement Agreement § I.) These numbers are without question large
24 enough to meet the numerosity requirement. *See generally* 1 Alba Conte & Herbert B. Newberg,
25 *Newberg on Class Actions* § 3:5 (4th ed. 2002) (“[T]he difficulty inherent in joining as few as
26 40 class members should raise a presumption that joinder is impracticable.”); *see also Chance v.*
27 *Super. Ct.*, 58 Cal. 2d 275, 291 (1962) (“It is also apparent that it is impracticable to bring all of
28 the over 2,000 investors before the court other than by a class action.”).

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1 **C. The Central Issues That Are Common to All Class Members Predominate**
2 **Over Any Individual Issues**

3 The test for predominance is whether the issues that are common to all class members
4 “would be the principal issues in any individual action, both in terms of time to be expended in
5 their proof and of their importance, and that if a class suit were not permitted, a multiplicity of
6 legal actions dealing with identical basic issues would be required in order to permit recovery by
7 each [individual member of the class].” *Vasquez v. Super. Ct.*, 4 Cal. 3d 800, 810 (1971).
8 “Indeed, issues affecting the merits of a case may be enmeshed with class action requirements,
9 such as whether substantially similar questions are common to the class and predominate over
10 individual questions or whether the claims or defenses of the representative plaintiffs are typical of
11 class claims or defenses.” *Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 443 (2000) (citations
12 omitted).

13 In this settlement context, the factual and legal issues that are common to all members of
14 the Settlement Class (*e.g.*, whether Defendants uniformly used pictures on FTD’s website to
15 depict the floral arrangements marketed and sold by FTD in California and whether the
16 pictures/descriptions used to depict the flowers and floral arrangements are a material part of the
17 advertisements) predominate over individual issues, particularly when the issue of manageability
18 at trial can be set aside.

19 **D. The Claims of the Named Plaintiffs Are Typical of the Claims of the Class**

20 To satisfy the typicality requirement, California law requires that the named plaintiff be
21 “similarly situated” to the other members of the proposed class. *Classen v. Weller*, 145 Cal.
22 App. 3d 27, 46 (1983) (emphasis in original). Where, as here, the same underlying conduct affects
23 the named plaintiff and the class sought to be represented, the typicality requirement is met
24 irrespective of any differences that may underlie individual claims. *Rosack v. Volvo of Am. Corp.*,
25 131 Cal. App. 3d 741, 763 (1982). Here, Plaintiff is “similarly situated” to the other member of
26 the Class because she purchased floral arrangements from FTD with a credit card with a California
27 billing address and the arrangements shipped to the recipients contained substitutions. Further,
28 she was affected in the same way by FTD’s conduct because, as a result of the pictures and hidden

1 substitution policy on FTD's website, she was enticed into considering FTD as a florist, which led
2 to sales based on the reasonable assumption that the floral arrangements she purchased would look
3 like the arrangements pictured on www.ftd.com.

4 **E. The Named Plaintiffs and Their Counsel Adequately Represent the Class**

5 Adequacy of representation consists of two components: (1) no disabling conflict of
6 interest between the class representative and the class, and (2) the named representative must be
7 represented by counsel competent and experienced in the kind of litigation to be undertaken.
8 *McGhee v. Bank of Am.*, 60 Cal. App. 3d 442, 450-51 (1976).

9 Here, the named Plaintiff has interests that are co-extensive with those of the Class, as the
10 named Plaintiff alleges she was subjected to the same wrongs as each Class Member: she
11 purchased floral arrangements from FTD with a credit card with a California billing address and
12 the arrangements shipped to the recipients contained substitutions. (Westrick Decl. at ¶¶ 3, 28.)
13 In addition, she has standing and is typical of the class. (*Id.* at ¶ 28.) Furthermore, Plaintiff has
14 retained competent counsel that is experienced in complex consumer class action litigation and
15 who have negotiated a favorable settlement for the Settlement Class in this action. (*Id.* at ¶¶ 29-
16 33.) This is sufficient to establish adequacy of representation.

17 **F. A Settlement Class Is Superior to a Multiplicity of Litigation**

18 In cases such as this one, where consumers have modest economic claims against
19 defendants, a class settlement is a superior method for addressing the claims of a multitude of
20 individuals. *See generally Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 446 (2000) ("class actions
21 are appropriate when numerous parties suffer injury of insufficient size to warrant individual
22 action . . .") (internal quotations omitted). Here, the amount that most individuals could
23 potentially recover is low, and any injuries are of insufficient size to warrant individual actions.
24 On an individual basis, such damages would be insufficient to warrant separate suits by each Class
25 Member, even if such damages could be shown.

26 **VI. THE PROPOSED CLASS NOTICE PROGRAM IS APPROPRIATE**

27 **A. The Notice Satisfies Due Process**

28 California statutory and case law vests the Court with broad discretion in fashioning an

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1 appropriate notice program. Cal. Civ. Code § 1781; *Cartt v. Super. Ct.*, 50 Cal. App. 3d 960, 973-
2 74 (1975). There is no statutory or due process requirement that all class members receive actual
3 notice of the settlement; rather “[t]he notice given should have a reasonable chance of reaching a
4 substantial percentage of the class members” *Cartt*, 50 Cal. App. 3d at 974. What
5 constitutes adequate notice will depend on the circumstances of each case, and such efforts and
6 their cost must be proportional to the magnitude of the claims. *See generally id.* at 967-68.

7 The proposed notice plan here satisfies all due process requirements as well as the
8 requirements of California Rule of Court 3.766(e). FTD shall provide Class Notice to the putative
9 Class Members via email to the email address used by each putative Class Member at the time he
10 or she made the purchase at issue, which is readily ascertainable from FTD’s business records.
11 (Settlement Agreement § IV-B.) FTD will also provide affidavits to the Court, with a copy to
12 Plaintiff’s Counsel, attesting to the measures undertaken to provide the Notice. (*Id.* § IV-C.) FTD
13 has agreed to provide the Claims Administrator with documentation identifying the putative Class
14 Members. (*Id.* § V-D.) Further, the Claims Administrator will notify the parties of rejected
15 claims, and Plaintiff’s Counsel may contact claimants whose claims were rejected solely to inform
16 them how to cure their Claim Forms. (*Id.* § V-F.)

17 As set forth above, Defendant’s floral arrangements were purchased directly from
18 Defendant, so Defendant has the last email addresses provided by the Class Members. Therefore,
19 the parties believe that providing notice via email is the most efficient and reasonable manner of
20 providing Class Members notice of the Settlement Agreement and the opportunity to participate.

21 **B. The Proposed Notice Is Accurate and Informative**

22 The California Rules of Court provide that class notice “must contain an explanation of the
23 proposed settlement and procedures for class members to follow in filing written objections to it
24 and in arranging to appear at the settlement hearing and state any objections to the proposed
25 settlement.” Cal. R. Ct. 3.769(f).⁵ The Class Notice is simple and easy to understand, and meets

26 _____
27 ⁵ The Manual for Complex Litigation further identifies the information that should be included in class notice
28 (which are fully satisfied here): (1) a definition of the class, (2) a description of the options open to class members and
the deadlines for taking action, (3) a description of the essential terms of the proposed settlement, (4) disclosure of any
special benefits provided to the class representatives, (5) information regarding attorneys’ fees, (6) the time and place

1 all of these substantive requirements. (Settlement Agreement, Ex. D.)

2 **VII. A FAIRNESS HEARING SHOULD BE SET**

3 The parties request that, should the Court grant this motion for preliminary approval, the
4 Court also set a date for a Fairness Hearing at which time the Court can determine whether the
5 Settlement Agreement is fair, adequate, and reasonable. The parties propose the following
6 schedule for the Final Approval Hearing and other relevant dates if the Court grants the motion for
7 preliminary approval at the August 25, 2015 hearing:

8	9	Direct emailing of Notice completed by FTD/Class Administrator.	Within 7 days after entry of Preliminary Approval Order
10	11	Last day for Class Members to submit a request for exclusion from the Proposed Settlement.	Within 60 days after Notice is provided
12	13	Last day for Class Members to submit objections to or comments on the proposed Settlement.	
14	15	Postmark deadline for Class Members to Submit Claims Form.	
16	17	Last day for filing and service of papers in support of final Settlement approval and requests for attorneys' fees and expenses.	Within 7 days after the end of the claim period
18	19	Final Fairness Hearing	16 court days after filing

20 **VIII. CONCLUSION**

21 For the reasons set forth above, the parties respectfully request that the Court conditionally
22 certify a class for settlement purposes, preliminarily approve the proposed settlement as within the
23 range of settlements that are fair, reasonable, and adequate, set a date for a fairness hearing, and
24 approve the plan and form of notice to the class.

25
26 of the final approval hearing, (7) a description of the method for objecting to or opting out of the settlement, (8) an
27 explanation of the procedures for distribution of settlement funds, (9) an explanation of the basis for valuation of
28 nonmonetary benefits if the settlement includes them, (10) information that will enable class members to calculate or
at least estimate their individual recoveries, and (11) the address and phone number of class counsel and how to make
inquiries. *See Manual for Complex Litigation, Fourth* § 21.312 (4th ed.).

08/03/2015

1 Dated: July 31, 2015

Respectfully Submitted,

2
3 By: 

SHAWN WESTRICK

KAWAHITO SHRAGA & WESTRICK LLP

Attorneys for Plaintiffs/Class Members

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1 **PROOF OF SERVICE**

2 I am employed in the **County of Los Angeles, State of California**. I am over the age of
3 18 and not a party to this action; my current business address is **1990 S. Bundy Dr., Ste. 280**
4 **Los Angeles, CA 90025**

4 On **July 31, 2015**, I served the foregoing document(s) described as:

5 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**
6 **PLAINTIFF'S MOTION FOR AN ORDER: (1) PRELIMINARILY APPROVING**
7 **CLASS ACTION SETTLEMENT; (2) CONDITIONALLY CERTIFYING CLASS;**
8 **(3) APPROVING FORM AND METHODS OF CLASS NOTICE; AND**
9 **(4) SCHEDULING FINAL APPROVAL OF SETTLEMENT**

8 on the interested parties in this action as follows:

9 X BY THE FOLLOWING MEANS:

10 I placed an original enclosed in sealed envelope(s) addressed as follows:

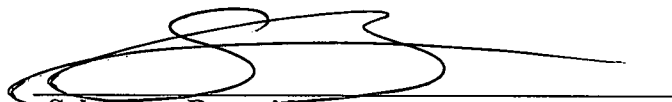
11 Jason C. Wright, Esq.
12 JONES DAY
13 555 S. Flower St., 50th Floor
14 Los Angeles, CA 90071

15 x BY HAND DELIVERY: I engaged Elite Attorney & Messenger Service to deliver the
16 above referenced document(s) **by hand** to the above listed addressee(s).

17 x Executed on **July 31, 2015**, at **Los Angeles, California**.

18 x I declare under penalty of perjury under the laws of the State of California that
19 the above is true and correct.

20 x I declare that I am employed in the office of a member of the bar of this court at
21 whose direction the service was made.

22 
23 **Sebastian Burnside**

51027 2015