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1 Jeffrey D. Kaliel (SBN 238293)
jkaliel@kalielpllc.com
2 **KALIELGOLD PLLC**
1100 15th Street NW, 4th Floor
3 Washington, D.C. 20005
Tel: (202) 350-4783

4 Sophia Goren Gold (SBN 307971)
sgold@kalielgold.com
5 **KALIELGOLD PLLC**
6 950 Gilman Street, Suite 200
Berkeley, CA 94710
7 Tel: (202) 350-4783

8 *Attorneys for Plaintiffs and the Proposed Class*

FILED
Superior Court of California
County of Los Angeles
12/06/2022
Sherri R. Carter, Executive Officer / Clerk of Court
By: T. Bivins Deputy

9
10 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **FOR THE COUNTY OF LOS ANGELES - STANLEY MOSK COURTHOUSE**
12

13 JEFF ROSS, ROXANNE OLIVEIRA, and
14 NATASHA SCOTT on behalf of themselves
and all others similarly situated,

15
16 Plaintiffs,

17 v.

18 PANDA RESTAURANT GROUP, INC., and
19 DOES 1- 50, inclusive,

20 Defendant.
21

Case No. 21STCV03662
(Assigned to Hon. Lawrence P. Riff, Dept. 7)

SECOND AMENDED CLASS ACTION COMPLAINT

[DEMAND FOR JURY TRIAL]

Date Action Filed: January 29, 2021
Trial Date: None

1 Plaintiffs JEFF ROSS, ROXANNE OLIVEIRA, and NATASHA SCOTT, on behalf of themselves
2 and all others similarly situated, complain and allege upon information and belief based, among other
3 things, upon the investigation made by Plaintiffs and through their attorneys as follows:

4 **NATURE OF ACTION**

5 1. This is a proposed class action seeking monetary damages, restitution, and injunctive and
6 declaratory relief from Defendant Panda Restaurant Group, Inc. (“Defendant” or “Panda Express”), arising
7 from its deceptive and untruthful promises to provide a flat \$2.95 delivery fee on food deliveries ordered
8 through its App and website.

9 2. Since the beginning of the COVID-19 pandemic, Panda Express has moved aggressively
10 into the food delivery business, exploiting an opportunity presented by Americans’ reduced willingness to
11 leave their homes. To appeal to consumers in a crowded food delivery marketplace, Panda Express has
12 promised its customers low-price delivery in its mobile application and on its website, usually in the
13 amount of \$2.95.

14 3. These representations, however, are false, because that is not the true cost of having food
15 delivered by Panda Express. In fact, Panda Express imposes hidden delivery charges on its customers in
16 addition to the low “delivery charge” represented in its app and on its website.

17 4. On delivery orders only, Panda Express assesses an additional charge on food orders that it
18 calls a “service charge.” This additional charge amounts to 10% more for the same food received by non-
19 delivery customers. Because this fee is exclusively charged to delivery customers, and not to customers
20 who order in-store or who order online and pick up their food in store, the “service fee” is by definition a
21 delivery fee. Panda Express obscures the true nature of the fee by naming it a “service fee.”

22 5. Even more insidiously, Panda Express hides its “service fee” in a deceptive line item called
23 “Taxes and Fees”—further obscuring its hidden delivery charge from consumers during the ordering
24 process.

25 6. This hidden delivery upcharge makes Panda Express’s promise of low-cost, \$2.95 delivery
26 patently false. The true delivery costs are obscured, as described above, and far exceed its express
27 representation that its delivery fee is \$2.95.

28 ///

1 7. By falsely marketing a quantified, low-cost delivery charge, Panda Express deceives
2 consumers into making online food purchases they otherwise would not make.

3 8. Panda Express misrepresents the nature of the delivery charges assessed on the Panda
4 Express mobile application and the website, by issuing in-app and online marketing materials that fail to
5 correct reasonable understandings of its low-cost delivery promises, and that misrepresent the actual costs
6 of the delivery service.

7 9. Specifically, Panda Express omits and conceals material facts about the Panda Express
8 delivery service, never once informing consumers in any disclosure, at any time, that the so-called “service
9 fee” is assessed exclusively on delivery customers and is therefore by definition a delivery charge.

10 10. Hundreds of thousands of Panda Express customers like Plaintiffs have been assessed
11 hidden delivery charges they did not bargain for.

12 11. Consumers like Plaintiffs reasonably understand Panda Express’ express “Delivery Fee”
13 representation to disclose the total additional cost they will pay as a result of having their food delivered,
14 as opposed to ordering online and picking up food in person, or ordering and picking up food in person.

15 12. By unfairly obscuring its true delivery costs, Panda Express deceives consumers and gains
16 an unfair upper hand on competitors that fairly disclose their true delivery charges. For example, Panda
17 Express competitors Del Taco and El Pollo Loco both offer delivery services through their app and website.
18 But unlike Panda Express, Del Taco and El Pollo Loco fairly and prominently represent their true delivery
19 charges.

20 13. Plaintiffs seek damages and, among other remedies, injunctive relief that fairly allows
21 consumers to decide whether they will pay Panda Express’s delivery mark-ups.

22 **PARTIES**

23 14. Plaintiff Jeff Ross is a citizen of the State of California who resides in Los Angeles,
24 California.

25 15. Plaintiff Roxanne Oliveira is a citizen of the State of California who resides in Bakersfield,
26 California.

27 16. Plaintiff Natasha Scott is a citizen of the State of Michigan who resides in Wyandotte,
28 Michigan.

1 17. Defendant, Panda Restaurant Group, Inc., is incorporated in California and maintains its
2 principal business offices in the city of Rosemead, County of Los Angeles.

3 **JURISDICTION AND VENUE**

4 18. This Court has jurisdiction over Defendant and the claims set forth below pursuant to Code
5 of Civil Procedure § 410.10 and the California Constitution, Article VI § 10, because this case is a cause
6 not given by statute to the other trial courts.

7 19. Plaintiffs are informed and believe that the State of California has personal jurisdiction over
8 the Defendant named in the action because Defendant is a corporation authorized to conduct and does
9 conduct business in this State. Defendant is incorporated in California, maintains its corporate headquarters
10 in California, is registered with the California Secretary of State to do sufficient business with sufficient
11 minimum contacts in California, and/or otherwise intentionally avails itself of the California market
12 through the ownership and operation of over 500 store locations throughout California, including in the
13 County of Los Angeles, which has caused both obligations and liability of Defendant to arise in the County
14 of Los Angeles.

15 20. The amount in controversy exceeds the jurisdictional minimum of this Court.

16 **COMMON FACTUAL ALLEGATIONS**

17 **A. Food Delivery Services Increase in Popularity, and then Explode in Popularity**
18 **During the Pandemic**

19 21. In 2018, the online food delivery industry was an astounding \$82 billion in gross revenue
20 and projected to exceed \$200 billion by 2025.¹

21 22. US Foods reports that the average American consumer has two food delivery apps installed
22 on their mobile phone and uses those apps three times per month.²

23 23. The online food delivery industry predominately influences the country's most financially
24 vulnerable populations. A nationwide research study conducted by Zion & Zion reveals that the largest

25 _____
26 ¹ See Frost & Sullivan, *\$9.6 Billion in Investments Spurring Aggressive Expansion of Food Delivery*
27 *Companies*, October 25, 2019, accessible at [https://ww2.frost.com/news/press-releases/9-6-billion-in-](https://ww2.frost.com/news/press-releases/9-6-billion-in-investments-spurring-aggressive-expansion-of-food-delivery-companies/)
28 [investments-spurring-aggressive-expansion-of-food-delivery-companies/](https://ww2.frost.com/news/press-releases/9-6-billion-in-investments-spurring-aggressive-expansion-of-food-delivery-companies/), last accessed January 19, 2021.

² See US Foods, *New Study Shows What Consumers Crave in a Food Delivery Service*, 2019,
accessible at <https://www.usfoods.com/our-services/business-trends/2019-food-delivery-statistics.html>,
last accessed January 19, 2021.

1 user markets for online delivery food services are the young and the poor.³ During a 90-day timeframe,
2 63% of consumers between the ages of 18 and 29 used a multi-restaurant delivery website or app service,
3 followed by 51% of consumers between the ages of 30 to 44.⁴ The study also demonstrated that the "less
4 income a consumer earns, the more likely the consumer is to take advantage of restaurant delivery
5 services," as those earning less than \$10,000 per year ordered online delivery the most (51.6%).⁵

6 24. Put plainly, the allure for online food delivery services has historically been based upon
7 pure convenience. A 2019 Gallup study of third-party delivery services companies like GrubHub,
8 DoorDash, and Uber Eats reported 72% of customers order online food delivery because they don't want
9 to leave their house; 50% so that they can continue with their ongoing activities; and 41% to avoid bad
10 weather.⁶

11 25. According to data compiled by Yelp, food delivery orders have *doubled* since the COVID-
12 19 outbreak began.⁷

13 26. The arrival of the unprecedented COVID-19 pandemic escalated the value of online food
14 delivery services from one of pure convenience to that of a comforting necessity for many consumers who
15 are sick, in a high-risk population group for COVID-19, or simply do not feel safe to leave their homes
16 and venture out into the public to purchase food during quarantine.

17 27. In its 2019 Economic Report conducted by research firm Technomic, DoorDash reported
18 that 86% of customers agreed that DoorDash played an important role in helping them access food during
19 the pandemic and 77% of consumers increased their use of third-party delivery services during this time.⁸

21 ³ See Aric Zion and Thomas Hollman, Zion & Zion Research Study, *Usage and Demographics of
22 Food Delivery Apps*, accessible at [https://www.zionandzion.com/research/food-delivery-apps-usage-and-
23 demographics-winners-losers-and-laggards/](https://www.zionandzion.com/research/food-delivery-apps-usage-and-demographics-winners-losers-and-laggards/), last accessed January 19, 2021.

24 ⁴ *Id.*

25 ⁵ *Id.*

26 ⁶ See Sean Kashanchi, Gallup, *Third-Party Delivery Will Grow; Is Your Restaurant Ready?*, May
27 6, 2019, accessible at [https://www.gallup.com/workplace/248069/third-party-delivery-grow-restaurant-
28 ready.aspx](https://www.gallup.com/workplace/248069/third-party-delivery-grow-restaurant-ready.aspx), last accessed January 19, 2021.

⁷ See Tal Axelrod, The Hill, *Yelp: Delivery and take-out twice as popular as usual amid
coronavirus*, March 20, 2020, available at [https://thehill.com/policy/technology/488749-yelp-delivery-
and-take-out-twice-as-popular-as-usual-amid-coronavirus](https://thehill.com/policy/technology/488749-yelp-delivery-and-take-out-twice-as-popular-as-usual-amid-coronavirus), last accessed January 19, 2021.

⁸ See Technomic and DoorDash, 2019 Economic Impact Report, *The Impact of DoorDash on
Economic Activity and Restaurant Resilience*, available at [https://doordashimpact.com/media/2019-
Economic-Impact-Report.pdf](https://doordashimpact.com/media/2019-Economic-Impact-Report.pdf), last accessed January 19, 2021.

1 Indeed, amidst the uncertainty of the novel virus, 68% of consumers now view ordering food online for
2 delivery as the safer option.⁹

3 28. The era of COVID-19 undoubtedly caused a significant revenue boom for third party
4 delivery services. SEC filings indicate that the top four U.S. food-delivery apps (DoorDash, Uber Eats,
5 GrubHub, and Postmates) collectively experienced a *\$3 billion increase* in revenue in just two quarters,
6 April through September, following the enactment of shelter-in-place restrictions throughout the nation.¹⁰

7 29. The ramp up in utilization of food delivery services also had a massive positive impact on
8 restaurant owners who were quickly on the brink of facing permanent closures during lockdown: 67% of
9 restaurant operators said DoorDash was crucial to their business during COVID-19 and 65% say they were
10 actually able to *increase* profits during this time because of DoorDash.

11 30. In the wake of the food delivery surge, Consumer Reports highlighted the need for fee
12 transparency for consumers who use these apps and services.¹¹ A research team investigated food delivery
13 companies and the report measured their compliance with new rules regarding fees enacted in seven US
14 cities aimed at protecting consumers and businesses during the pandemic. It found that these companies
15 continued to not comply with the new ordinances and continued to “employ design practices that obfuscate
16 fees.” They concluded that “[c]onsumers deserve to have informed choices to understand what they are
17 being charged for *and* how their dollars spent impacts the restaurants they support and patronize in their
18 communities.”

19 **B. Panda Express’s App and Website Fails to Bind Users to Any Terms of Service**

20 31. When a consumer downloads the Panda Express app, or uses the Panda Express website, he
21 may create an account in order to place an order for delivery or pickup.

22 32. In order to do so, a user enters in a name and contact information.

23
24 ⁹ *Id.*

25 ¹⁰ See Levi Sumagaysay, Market Watch, *The pandemic has more than doubled food-delivery apps’*
26 *business. Now what?*, last updated November 27, 2020, available at
<https://www.marketwatch.com/story/the-pandemic-has-more-than-doubled-americans-use-of-food-delivery-apps-but-that-doesnt-mean-the-companies-are-making-money-11606340169>, last accessed
27 January 19, 2021.

28 ¹¹ See Consumer Reports, *Collecting Receipts: Food Delivery Apps & Fee Transparency*,
September 29, 2020, accessible at https://digital-lab-wp.consumerreports.org/wp-content/uploads/2020/09/Food-delivery_-Report.pdf, last accessed January 19, 2021.

1 **C. Panda Express Prominently and Plainly Represents a Flat \$2.95 “Delivery Fee” on its**
2 **App and Website**

3 33. Beginning in early 2020, Panda Express began prominently featuring low-cost delivery
4 promises on its mobile application and on its website.

5 34. Such representations often are made on the home screen of the app or website, and were
6 always made on the check-out screen of the app and website, prior to the finalization of an order. On that
7 screen, Panda Express promised a flat “Delivery Fee,” usually in the amount of \$2.95.

8 35. Specifically, for supposed “\$2.95 Delivery Fee” orders, the order finalization screen states:

9 Subtotal: [representing the cost of the food selected]

10 Delivery Fee: \$2.95

11 Tip: [a prepopulated amount, suggested by the app or website]

12 Taxes & Fees: [representing sales taxes and additional fees]

13 ORDER TOTAL: [adding up the above]

14 36. In short, there was no way for Plaintiffs or other users of the Panda Express mobile
15 application or website to *avoid* seeing Panda Express’s promises of a flat fee, \$2.95 delivery charge.

16 **D. Panda Express Omits and Conceals Material Facts About the Costs of the Panda**
17 **Express Delivery Service**

18 37. But those disclosures were false and misleading, and the delivery charge was not, in fact,
19 \$2.95.

20 38. That is because Panda Express applies a “Service Fee” exclusively to delivery orders, hides
21 that “Service Fee” from users behind a hyperlink, and misrepresents what the “Service Fee” is actually for:
22 a hidden delivery charge.

23 39. On ordering screen, and for the first time in the ordering process, Panda Express presents a
24 line item called “Taxes and Fees.” The ordering screen does not explain what “Taxes and Fees” are
25 comprised of.

26 40. Only if a user clicks on “Taxes and Fees” do two further line items appear: “Tax” and
27 “Service Fee.” “Tax” adds the locally applicable sales tax rate. “Service Fee” adds a further charge of 10%

1 of the total food cost. This “Service Fee” is exclusively applied by Panda Express to delivery orders, and
2 is therefore by definition an additional hidden delivery charge.

3 41. In fact, Panda Express does not apply this “Service Fee” to orders made on its app and
4 website when those orders are for in-store pickup.

5 42. In short, the disclosed “Delivery Fee” is not actually \$2.95. The *actual* “delivery fee”—the
6 extra charge for having food delivered as opposed to picking it up—is the listed “Delivery Fee” *plus* the
7 hidden “Service Charge” markup applied exclusively to delivery orders.

8 43. If that were not enough, Panda Express misrepresents the true nature of the “Service Fee.”

9 44. If a user clicks a further link next to “Service Fee,” a disclosure appears stating that the fee
10 “Helps maintain and improve your digital experience.”

11 45. This disclaimer is false. The “Service Fee” is not for “digital experience,” it is a hidden
12 delivery fee. This is necessarily true because the “Service Fee” is only assessed on delivery orders. It is
13 not assessed on orders placed through the mobile app or website that are for pickup—even though the same
14 so-called “digital experience” is used by a consumer for such an order.

15 46. Panda Express does not inform consumers the true costs of its delivery service and it
16 misrepresents its Delivery Fee as \$2.95, when in fact those costs are actually much higher.

17 **E. Other Restaurant Industry Actors and Panda Express Competitors Disclose Delivery**
18 **Fees Fairly and Expressly**

19 47. By unfairly obscuring its true delivery costs, Panda Express deceives consumers and gains
20 an unfair upper hand on competitors that fairly disclose their true delivery charges. For example, Panda
21 Express competitors Del Taco and El Pollo Loco both offer delivery services through their app and website.
22 But unlike Panda Express, Del Taco and El Pollo Loco fairly and prominently represent their true delivery
23 charges.

24 48. For example, Del Taco does not mark-up food charges for delivery orders through its app,
25 nor does it add an additional “service charge” to delivery orders. Instead, for delivery orders its ordering
26 screen presents the following:

27 Subtotal:

28 Tax:

1 Delivery Charge:

2 Tip:

3 49. All line-item amounts are **identical** for delivery and pick-up orders, except for the plainly
4 and fairly disclosed delivery charge—allowing consumers to understand the true cost of the delivery
5 service.

6 50. Similarly, Panda Express competitor El Pollo Loco does not mark-up food charges for
7 delivery orders through its app, nor does it add an additional “service charge” to delivery orders. Instead,
8 for delivery orders its ordering screen presents the following:

9 Subtotal:

10 Delivery Charge:

11 Tax:

12 51. All line-item amounts are **identical** for delivery and pick-up orders, except for the plainly
13 and fairly disclosed delivery charge—allowing consumers to understand the true cost of the delivery
14 service.

15 **F. Plaintiff Ross’s Experience**

16 52. Plaintiff Ross used the Panda Express app to make a purchase of food on December 25,
17 2020, in the total amount of \$29.78.

18 53. When using the app, and prior to placing his order, the Panda Express app stated that the
19 Delivery Fee was \$2.95.

20 54. However, Plaintiff’s purchase included a hidden “Service Fee” that in fact represented an
21 additional delivery fee. Panda Express charged Plaintiff a \$1.88 service fee on his order.

22 55. Upon information and belief, this same service fee is assessed only on delivery orders like
23 the one made by Plaintiff and would not have been assessed to Plaintiff had he picked up his order in
24 person from the Panda Express location.

25 56. Plaintiff would not have made the purchase if he had known the Panda Express delivery fee
26 was not in fact \$2.95.

27 57. If he had known the true delivery fee, he would have chosen another method for receiving
28 food from Panda Express or ordered food from another provider.

1 **G. Plaintiff Oliveira’s Experience**

2 58. Plaintiff Oliveira used the Panda Express app to make a purchase of food on January 27,
3 2021, in the total amount of \$31.89.

4 59. When using the app, and prior to placing her order, the Panda Express app stated that the
5 Delivery Fee was \$2.95.

6 60. However, Plaintiff’s purchase included a hidden “Service Fee” that in fact represented an
7 additional delivery fee. Panda Express charged Plaintiff a \$2.41 service fee on her order.

8 61. Upon information and belief, this same service fee is assessed only on delivery orders like
9 the one made by Plaintiff and would not have been assessed to Plaintiff had she picked up her order in
10 person from the Panda Express location.

11 62. Plaintiff would not have made the purchase had she known the Panda Express delivery fee
12 was not in fact \$2.95.

13 **H. Plaintiff Scott’s Experience**

14 63. Plaintiff Scott used the Panda Express website to make a purchase of food on May 1, 2021,
15 in the total amount of \$36.94.

16 64. Prior to placing her order, the Panda Express website stated that the Delivery Fee was \$2.95.

17 65. However, Plaintiff Scott’s purchase included a hidden “Service Fee” that in fact represented
18 an additional delivery fee. Panda Express charged Plaintiff a \$2.90 service fee on her order.

19 66. Upon information and belief, this same service fee is assessed only on delivery orders like
20 the one made by Plaintiff Scott and would not have been assessed to Plaintiff Scott had she picked up her
21 order in person from the Panda Express location.

22 67. Plaintiff Scott would not have made the purchase if she had known the Panda Express
23 delivery fee was not in fact \$2.95.

24 68. If she had known the true delivery fee, she would have chosen another method for receiving
25 food from Panda Express or ordered food from another provider.

26
27 **CLASS ALLEGATIONS**

28 69. Pursuant to California Code of Civil Procedure § 382, Plaintiffs bring this action on behalf

1 of themselves and a Class of similarly situated persons defined as follows:

2 All persons within the United States who at any time between July 17, 2020, and
3 February 16, 2022 placed an order for delivery through Defendant's website or
4 mobile application where a Service Fee was charged in connection with that
5 delivery order

6 70. Excluded from the Class are Defendants, any entities in which they have a controlling
7 interest, any of their parents, subsidiaries, affiliates, officers, directors, employees and members of such
8 persons' immediate families, and the presiding judge(s) in this case, and their staff. Plaintiffs reserve the
9 right to expand, limit, modify, or amend this class definition, including the addition of one or more
10 subclasses, in connection with his motion for class certification, or at any other time, based upon, *inter*
11 *alia*, changing circumstances and/or new facts obtained during discovery.

12 71. **Numerosity:** At this time, Plaintiffs do not know the exact size of the Class; however, due
13 to the nature of the trade and commerce involved, Plaintiffs believe that the Class members are well into
14 the thousands, and thus are so numerous that joinder of all members is impractical. The number and
15 identities of Class members is administratively feasible and can be determined through appropriate
16 discovery in the possession of the Defendant.

17 72. **Commonality:** There are questions of law or fact common to the Class, which include, but
18 are not limited to the following:

- 19 a. Whether during the class period, Defendant deceptively represented Delivery Fees
20 on food deliveries ordered through the Panda Express website and mobile app;
- 21 b. Whether Defendant's alleged misconduct misled or had the tendency to mislead
22 consumers;
- 23 c. Whether Defendant engaged in unfair, unlawful, and/or fraudulent business
24 practices under the laws asserted;
- 25 d. Whether Defendant's alleged conduct constitutes violations of the laws asserted;
- 26 e. Whether Plaintiffs and members of the Class were harmed by Defendant's
27 misrepresentations;
- 28 f. Whether Plaintiffs and the Class have been damaged, and if so, the proper measure
of damages; and

1 g. Whether an injunction is necessary to prevent Defendant from continuing to
2 deceptively represent the amount of the delivery fee on food deliveries ordered
3 through the Panda Express website and mobile app.

4 73. **Typicality:** Like Plaintiffs, many other consumers ordered food for delivery from Panda
5 Express's website or mobile app, believing delivery to be the flat fee represented based on Defendant's
6 representations. Plaintiffs' claims are typical of the claims of the Class because Plaintiffs and each Class
7 member was injured by Defendant's false representations about the true nature of the delivery fee. Plaintiffs
8 and the Class have suffered the same or similar injury as a result of Defendant's false, deceptive and
9 misleading representations. Plaintiffs' claims and the claims of members of the Class emanate from the
10 same legal theory, Plaintiffs' claims are typical of the claims of the Class, and, therefore, class treatment
11 is appropriate.

12 74. **Adequacy of Representation:** Plaintiffs are committed to pursuing this action and have
13 retained counsel competent and experienced in prosecuting and resolving consumer class actions.
14 Plaintiffs will fairly and adequately represent the interests of the Class and does not have any interests
15 adverse to those of the Class.

16 75. **The Proposed Class and Satisfies the Rule 23(b)(2) Prerequisites for Injunctive Relief.**
17 Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making
18 appropriate final injunctive and equitable relief with respect to the Class as a whole. Plaintiffs remain
19 interested in ordering food for delivery through Panda Express's website and mobile app; there is no way
20 for them to know when or if Defendant will cease deceptively misrepresenting the cost of delivery.

21 76. Specifically, Defendant should be ordered to cease from representing their delivery service
22 as a flat fee and to disclose the true nature of their mark-ups.

23 77. Defendant's ongoing and systematic practices make declaratory relief with respect to the
24 Class appropriate.

25 78. **The Proposed Class Satisfies the Rule 23(b)(3) Prerequisites for Damages.** The
26 common questions of law and fact enumerated above predominate over questions affecting only individual
27 members of the Class, and a class action is the superior method for fair and efficient adjudication of the
28 controversy. The likelihood that individual members of the Class will prosecute separate actions is remote

1 due to the extensive time and considerable expense necessary to conduct such litigation, especially when
2 compared to the relatively modest amount of monetary, injunctive, and equitable relief at issue for each
3 individual Class member.

4 **CAUSES OF ACTION**

5 **FIRST CLAIM FOR RELIEF**

6 **Violation of California’s Unfair Competition Law (“UCL”)**
7 **Cal. Bus. & Prof. Code § 17200, *et seq.***

8 79. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

9 80. California Business & Professions Code § 17200 prohibits acts of “unfair competition,”
10 including any “unlawful, unfair or fraudulent business act or practice.” Panda Express’s conduct related to
11 deceptively representing that it provides a flat Delivery Fee of \$2.95 on food deliveries ordered through its
12 website and mobile app violates each of the statute’s “unfair,” “unlawful,” and “fraudulent” prongs.

13 81. The UCL imposes strict liability. Plaintiffs need not prove that Panda Express intentionally
14 or negligently engaged in unlawful, unfair, or fraudulent business practices—but only that such practices
15 occurred.

16 82. A business act or practice is “unfair” under the UCL if it offends an established public
17 policy or is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers, and that
18 unfairness is determined by weighing the reasons, justifications, and motives of the practice against the
19 gravity of the harm to the alleged victims.

20 83. A business act or practice is “fraudulent” under the UCL if it is likely to deceive members
21 of the public.

22 84. A business act or practice is “unlawful” under the UCL if it violates any other law or
23 regulation.

24 85. Panda Express committed unfair and fraudulent business acts and practices in violation of
25 Cal. Bus. & Prof. Code § 17200, *et seq.*, by affirmatively and knowingly misrepresenting on its website
26 and mobile app that it provides a flat \$2.95 Delivery Fee for food orders, when, in reality, it hides delivery
27 charges through the assessment of an elusive “service fee” exclusively charged to delivery customers.

1 86. Defendant’s acts and practices offend an established public policy of fee transparency in
2 the marketplace, and constitute immoral, unethical, oppressive, and unscrupulous activities that are
3 substantially injurious to consumers.

4 87. The harm to Plaintiffs and the Class outweighs the utility of Defendant’s practices. There
5 were reasonably available alternatives to further Defendant’s legitimate business interests, other than the
6 misleading and deceptive conduct described herein.

7 88. Defendant’s conduct also constitutes an “unlawful” act under the UCL because, as detailed
8 in Plaintiffs’ Second Claim for Relief below, it also constitutes a violation of sections 1770(a)(5) and (a)(9)
9 of the California Consumer Legal Remedies Act (“CLRA”), Cal. Civ. Code § 1750, *et seq., infra*, in that
10 Panda Express deceptively represents that it provides a flat fee for delivery for food orders made on its
11 website or mobile app; in reality, however, this marketing message is false because Panda Express’s so-
12 called “service fee” is assessed exclusively on delivery customers and is therefore by definition a delivery
13 charge.

14 89. Panda Express’s business practices have misled Plaintiffs and the proposed Class and will
15 continue to mislead them in the future.

16 90. Plaintiffs relied on Defendant’s misrepresentations about the falsely advertised cost of
17 delivery in choosing to utilize the Panda Express food delivery service in ordering food from Defendant’s
18 website or mobile app.

19 91. By falsely marketing the true costs of food delivery, Panda Express deceived Plaintiffs and
20 Class members into making online food purchases they otherwise would not make.

21 92. Had Plaintiffs known the truth of the delivery service fee, *i.e.*, that Panda Express’s “Service
22 Fees” were in all reality “delivery fees,” they would have chosen another method for receiving food from
23 Panda Express or ordered food from another provider.

24 93. As a direct and proximate result of Panda Express’s unfair, fraudulent, and unlawful
25 practices, Plaintiffs and Class members suffered and will continue to suffer actual damages. Defendant’s
26 fraudulent conduct is ongoing and present a continuing threat to Class members that they will be deceived
27 into ordering food for delivery under the false belief that delivery was \$2.95.
28

1 94. As a result of its unfair, fraudulent, and unlawful conduct, Panda Express has been unjustly
2 enriched and should be required to disgorge its unjust profits and make restitution to Plaintiffs and Class
3 members pursuant to Cal. Bus. & Prof. Code § 17203 and 17204.

4 **SECOND CLAIM FOR RELIEF**
5 **Violation of California’s Consumer Legal Remedies Act (“CLRA”)**
6 **Cal. Civ. Code § 1750, *et seq.***

7 95. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

8 96. This cause of action is brought pursuant to the Consumers Legal Remedies Act (CLRA),
9 California Civil Code § 1750, *et seq.* Plaintiffs and each member of the proposed Class are “consumers”
10 as defined by California Civil Code § 1761(d). Defendant’s sale of food products to consumers for delivery
11 ordered through its website and mobile app were “transactions” within the meaning of California Civil
12 Code § 1761(e). Defendant’s online delivery service utilized by Plaintiffs and the Class is a “service”
13 within the meaning of California Civil Code § 1761(b). The food products purchased by Plaintiffs and the
14 Class are “goods” within the meaning of California Civil Code § 1761(a).

15 97. Defendant violated and continues to violate the CLRA by engaging in the following
16 practices proscribed by California Civil Code § 1770(a) in transactions with Plaintiffs and the Class which
17 were intended to result in, and did result in, the sale of Panda Express food orders for delivery:

- 18 a. “Representing that goods or services have . . . characteristics . . . that they do not
19 have” (a)(5); and
20 b. “Advertising goods or services with intent not to sell them as advertised” (a)(9).

21 98. Specifically, Panda Express advertises to customers that use of its delivery service is a flat
22 fee of \$2.95, but this is false because Defendant imposes hidden delivery charges to consumers by covertly
23 applying a “Service Fee” exclusively to delivery orders and misrepresenting that it is actually a delivery
24 charge.

25 99. At no time does Panda Express disclose the true nature of its delivery fee to consumers;
26 instead, it repeatedly conceals and misrepresents this material information at several steps of the transaction
27 process.

28 100. Pursuant to § 1782(a) of the CLRA, Plaintiffs’ counsel notified Defendant in writing by

1 certified mail of the particular violations of §1770 of the CLRA and demanded that it rectify the problems
2 associated with the actions detailed above and give notice to all affected consumers of Defendant’s intent
3 to act. If Defendant fails to respond to Plaintiffs’ letter or agree to rectify the problems associated with the
4 actions detailed above and give notice to all affected consumers within 30 days of the date of written notice,
5 as proscribed by §1782, Plaintiffs will move to amend his Complaint to pursue claims for actual, punitive
6 and statutory damages, as appropriate against Defendant. As to this cause of action, at this time, Plaintiffs
7 seek only injunctive relief.

8 **THIRD CLAIM FOR RELIEF**
9 **Violation of Michigan Consumer Protection Act (“MCPA”)**
10 **M.C.L. §§ 445.903, *et seq.***

11 101. Plaintiffs incorporate the preceding allegations by reference as if fully set forth herein.

12 102. This cause of action is brought pursuant to Michigan’s Consumer Protection Act, M.C.L.
13 §§ 445.903, *et seq.* Defendant’s sale of food products to consumers for delivery ordered through its website
14 and mobile app were “transactions” within the meaning of the MCPA.

15 103. Defendant violated and continues to violate the MCPA by engaging in the following
16 practices proscribed by the MCPA in transactions with Plaintiff Scott and the Class which were intended
17 to result in, and did result in, the sale of Panda Express food orders for delivery:

- 18 a. “Representing that goods or services . . . have . . . characteristics . . . that they do not
19 have” (1)(c);
- 20 b. “Advertising or representing . . . services with intent not to dispose of those . . .
21 services as advertised or represented” (1)(g); and
- 22 c. “Failing to reveal a material fact, the omission of which tends to mislead or deceive
23 the consumer, and which fact could not reasonably be known by the consumer”
24 (1)(s).

25 104. Specifically, Panda Express advertises to customers that use of its delivery service is a flat
26 fee of \$2.95, but this is false because Defendant imposes hidden delivery charges to consumers by covertly
27 applying a “Service Fee” exclusively to delivery orders and misrepresenting that it is actually a delivery
28 charge.

1 105. Plaintiff Scott reasonably relied on Defendant's material misrepresentations about the
2 falsely advertised cost of delivery in choosing to utilize the Panda Express food delivery service in ordering
3 food from Defendant's website or mobile app. Had Plaintiff Scott known the truth of the delivery service
4 fee, *i.e.*, that Panda Express's "Service Fees" were in all reality "delivery fees," she would have chosen
5 another method for receiving food from Panda Express or ordered food from another provider.

6 106. At no time does Panda Express disclose the true nature of its delivery fee to consumers;
7 instead, it repeatedly conceals and misrepresents this material information at several steps of the transaction
8 process.

9
10 **FOURTH CLAIM FOR RELIEF**

11 **Breach of Contract**
12 **(On behalf of the Class)**

13 107. Plaintiffs repeat and re-allege the above allegations as if fully set forth herein.

14 108. Plaintiffs and Panda Express have contracted for food delivery services, as embodied in the
15 representations made in the Panda app and website.

16 109. No contract provision authorizes Panda Express be able to impose hidden delivery charges
17 on its customers in addition to the "delivery charge" represented in its app and on its website.

18 110. Panda Express breached the terms of its contract with consumers by charging an additional
19 10% more for "delivery" than the contracted-for "delivery charge."

20 111. Plaintiffs and members of the Class have performed all, or substantially all, of the
21 obligations imposed on them under the contract.

22 112. Plaintiffs and members of the Class have sustained damages as a result of Panda Express'
23 breach of the contract and breach of the implied covenant of good faith and fair dealing.

24 **PRAYER FOR RELIEF**

25 **WHEREFORE**, Plaintiffs on behalf of themselves and the Class seeks judgment in an amount to
26 be determined at trial, as follows:

- 27 (a) For an order enjoining Defendant from continuing the unlawful practices set forth
28 above;

- 1 (b) For declaratory and injunctive relief as set forth above;
- 2 (c) For an order requiring Defendant to disgorge and make restitution of all monies it acquired
- 3 by means of the unlawful practices set forth above;
- 4 (d) For compensatory damages according to proof;
- 5 (e) For punitive damages according to proof;
- 6 (f) For reasonable attorneys' fees and costs of suit;
- 7 (g) For pre-judgment interest; and
- 8 (h) Awarding such other and further relief as this Court deems just, proper and equitable.

9 **JURY DEMAND**

10 Plaintiffs hereby demand a jury trial on all claims so triable.

11

12 Dated: December 5, 2022

KALIELGOLD PLLC

13 

14 By: _____

15 Jeffrey D. Kalief
16 Sophia G. Gold

17 *Attorneys for Plaintiffs and the Proposed Class*

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1 **PROOF OF SERVICE**

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

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

5 On **December 6, 2022**, I served the document(s) described as:

6 **SECOND AMENDED CLASS ACTION COMPLAINT**

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

9 **SEE ATTACHED SERVICE LIST**

10 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the persons
11 at the addresses listed in the Service List and placed the envelope for collection and mailing,
12 following our ordinary business practices. I am readily familiar with KalielGold PLLC's practice
13 for collecting and processing correspondence for mailing. On the same day that the correspondence
14 is placed for collection and mailing, it is deposited in the ordinary course of business with the
15 United States Postal Service, in a sealed envelope with postage fully prepaid.

16 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused a copy of the document(s) to be
17 sent from e-mail address ngarcia@kalielgold.com to the persons at the e-mail addresses listed in
18 the Service List. I did not receive, within a reasonable time after the transmission, any electronic
19 message or other indication that the transmission was unsuccessful.

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

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

26 Executed this **December 6, 2022**, at Los Angeles, California.

27 NEVA R. GARCIA
28 Type or Print Name



Signature

1 **SERVICE LIST**

2
3
4 Adil M. Khan
khanad@gtlaw.com

Attorneys for Defendant
PANDA RESTAURANT GROUP, INC.

5 Mark D. Kemple
kemplem@gtlaw.com

6 Blakeley Oranburg
oranburgb@gtlaw.com

7 **GREENBERG TRAUIG, LLP**
8 1840 Century Park East, Suite 1900
9 Los Angeles, California 90067-2121
10 Tel: (310) 586-3882
11 Fax: (310) 586-0582

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