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 SUPERIOR COURT OF CALIFORNIA
 COUNTY OF LOS ANGELES
 MAY 17 2010
 John A. Clarke, Executive Officer/Clerk
 By H. Helen Balba, Deputy
 HELEN KWON BALBA

5 Attorneys for Plaintiff, THOMAS MOLNAR,
 6 individually and on behalf of all others similarly situated

7
 8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 9 **FOR THE COUNTY OF LOS ANGELES**

10 THOMAS MOLNAR, suing individually and
 11 on behalf of all others similarly situated,

12 Plaintiff,

13 vs.

14
 15 1-800-FLOWERS RETAIL INC., a Delaware
 16 corporation; and defendant DOES 1 through
 100, inclusive,

17 Defendants.

) Case No. BC382828

) [Assigned to the Hon. Zaven V. Sinanian,
) Dept. 23]

) **Class Action**

) **[Proposed] ORDER GRANTING FINAL**
) **APPROVAL OF CLASS ACTION**
) **SETTLEMENT AND ENTRY OF**
) **JUDGMENT**

) **Hearing: May 17,**
) **Date: March 29, 2010**
) **Time: 8:30 a.m.**
) **Dept: 23**

) **Complaint Filed: December 21, 2007**
) **Action Removed: January 28, 2008**
) **Action Remanded: February 23, 2009**

22
 23 Pending before the Court is Plaintiff's Motion For Final Approval of A Class Action
 24 Settlement ("Final Approval Motion"). Having considered the written submissions filed in this
 25 matter, as well as the oral arguments of counsel for the parties and objectors, the Court hereby
 26 finds that the proposed settlement, as reflected in the Settlement Agreement ("Settlement") is fair,
 27 reasonable, and adequate.
 28

1 **I. BACKGROUND**

2 Following a mediation before Judge Edward A. Infante (Ret.), Plaintiff filed a motion with
3 the Court for preliminary approval of the Settlement. On January 8, 2010, following a public
4 hearing and after reading and considering the proposed Settlement, listening to and considering the
5 arguments of counsel for the Parties, and receiving the parties' revised proposed order, this Court
6 preliminarily approved the Settlement Class for purpose of settlement and ordered that notice of
7 the proposed Settlement be directed to the Class.

8 Notice was distributed pursuant to the Court's Preliminary Approval Order of January 8,
9 2010. Six Class Members served and/or filed objections to the proposed Settlement. The Court
10 has reviewed all the objections.

11 By order dated January 8, 2010, the Court set a date for public hearings on the final
12 approval of the Settlement. On March 29, 2010, the Court held a hearing on the final approval of
13 the Settlement ("Final Hearing") to consider: (1) whether the proposed Settlement is just, fair,
14 reasonable, and adequate for the Class and should be granted final approval; (2) whether
15 certification of the Class should be made final; and (3) whether the Court should enter the
16 proposed judgement with prejudice.

17 The Court has carefully reviewed the Settlement Agreement, the written submissions of the
18 Parties, and all objections to the Settlement. The Court concludes that the Settlement is fair,
19 reasonable, and adequate. Accordingly, the Final Approval Motion is granted.

20 Accordingly, the Court hereby makes the following findings of fact:

21 **II. FINDINGS**

22 1. **Definitions.** This Order incorporates by reference the terms and definitions set
23 forth in the Settlement Agreement, and all terms used herein shall have the same meanings as set
24 forth therein;

25 2. **Jurisdiction.** The Court has jurisdiction over the subject matter of the Action, the
26 Class Representative, the Settlement Class Members, and Defendants 1-800-Flowers.com, Inc. and
27 800-Flowers, Inc., ("Defendants" or "1-800-Flowers").

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1 3. **Certification Standards And Findings.** California Code of Civil Procedure
 2 section 382 provides for class certification when there is an ascertainable class and a well-defined
 3 community of interest among class members. The Settlement Class continues to meet this standard
 4 for class certification. Specifically, the Court finds and concludes solely for purposes of effectuating
 5 the Settlement, that:

- 6 a) the Settlement Class is ascertainable;
- 7 b) the Settlement Class is so numerous that joinder of all Settlement Class Members in
 8 the Action is impracticable;
- 9 c) there are questions of law and fact common to the Settlement Class that predominate
 10 over any individual questions, including whether the Settlement is fair, adequate, and
 11 reasonable, and in the best interests of the Settlement Class given the risks and benefits
 12 of proceeding to trial on Class Representative/Plaintiff's claims;
- 13 d) the claims of Class Representative/Plaintiff Thomas Molnar are typical of the claims
 14 of the Settlement Class;
- 15 e) Class Representative/Plaintiff Thomas Molnar and Class Counsel/Plaintiff's Counsel,
 16 Westrup Klick, LLP, have fairly and adequately represented and protected the interests
 17 of the Settlement Class;
- 18 f) a class action is superior to other available methods for the fair and efficient
 19 adjudication of the controversy because, among other reasons, (i) settlement of this
 20 Action is contingent on certification of the Settlement Class; (ii) certification of the
 21 Settlement Class will permit entry of a judgment binding on the Settlement Class; and
 22 (iii) Defendant has agreed to bear the cost of class notice and administration of the
 23 Settlement.

24 The Court makes no findings regarding whether the Settlement Class is manageable or otherwise
 25 properly could be certified in the Action absent the Settlement.

26 4. **Benefits Of Certification.** Certification of the Settlement Class substantially
 27 benefits the Court and the litigants. Certification permits approval of the Settlement, avoiding
 28 potentially time-consuming, expensive, and uncertain litigation. Certification of the Settlement

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1 Class also provides relief to all Settlement Class Members, whom Plaintiff claims are aggrieved by
2 Defendant's actions. Settlement of this case on a class basis permits entry of a judgment binding
3 on Settlement Class Members, thereby avoiding repetitious litigation.

4 5. **Settlement Notice.** The Court previously approved the form of Settlement Notice
5 and the proposed manner of its distribution to Settlement Class Members. (See Order Granting
6 Preliminary Approval to Settlement). The Court again finds that the Settlement Notice reasonably
7 and adequately informed Settlement Class Members of the nature of this Action, the terms of the
8 proposed Settlement, the proposed release of claims, and Settlement Class Members' rights to
9 participate in the Action and Settlement and to exclude themselves or object to the Settlement. In
10 compliance with the Preliminary Approval Order, Settlement Notice was mailed via e-mail to
11 Settlement Class Members and/or mailed to Settlement Class Members where e-mail addresses
12 were either unavailable or notices bounced back. This was the best notice practicable under the
13 circumstances and was reasonably calculated to communicate actual notice of the Settlement to
14 Settlement Class Members.

15 6. **Fairness Of Settlement.** The Settlement is entitled to a presumption of fairness.
16 (See, Dunk v. Ford Motor Co. (1996) 48 Cal.App.4th 1794, 1801-1802)

- 17 a) The Settlement was reached through arm's-length negotiations between the parties
18 and without any collusion between the parties;
- 19 b) Plaintiff's investigation, discovery, and analysis of discovery have been more than
20 sufficient to allow the Court and counsel to decide on the fairness of this Settlement
21 carefully and with deliberation.
- 22 c) Counsel for both parties are experienced in similar class action litigation and have
23 recommended approval of the Settlement.
- 24 d) There were 6 objectors out of 4,682,956 putative class members.

25 7. **Notice and Opt-Out/Objection Deadlines.** There was an adequate interval
26 between Notice and the deadline to permit Settlement Class Members to opt-out or to object and to
27 take the necessary actions to effect their decision.

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1 8. **Final Approval Hearing.** A hearing upon Plaintiff's Motion For Final Approval
2 Of Settlement was set for March 29, 2010. The Court considered the written submissions by the
3 Parties and objectors, the oral argument of all counsel, and carefully scrutinized the objections.

4 9. **Extent Of Litigation Activities.** The action has been vigorously prosecuted and
5 defended, the complaint having been filed December 21, 2007. There was extensive discovery that
6 took place including depositions of 1-800-Flowers representatives regarding their policy,
7 procedures, and practices relating to website, product pricing, actual business costs for delivery and
8 shipping, billing practices, and their ability to identify names and addresses of customers;
9 consultation and expert depositions by both sides; review of documents; and FOIA request to the
10 FTC. The parties also engaged in significant motion practice while this matter was pending in the
11 U.S. District Court, including, but not limited to fully briefing: a motion to dismiss; motion for
12 remand; motion for injunction of the Court proceedings; and partially briefing a motion for class
13 certification and petition for permission to appeal.

14 10. **Additional Settlement Considerations.** In this context the Court assessed the
15 reasonableness of the Settlement in light of two additional compelling factors: (1) there was no
16 certification of the putative class; and (2) there was no adjudication of any non-compliance with
17 any statutory or case law by 1-800-Flowers in its dealings with the members of the putative class.
18 Although a moving certification brief was filed by Plaintiff when the case was pending in the U.S.
19 District Court for the Central District of California, certification would have still required further
20 research and motion drafting and significant expenditure of attorney time in this Court.
21 Adjudication of the merits of the claims of the putative class would have resulted in further
22 expenditure of attorney time, both for further discovery, research, investigation, and drafting of
23 briefs required to prosecute the class claims at trial assuming they were certified. Significantly, it
24 is not even clear that this Court would have been the ultimate forum to adjudicate this matter in
25 light of 1-800-Flowers' Counterclaim and its previous assertions that it would seek to transfer the
26 Action to New York - a right which Plaintiff alleges that, if it existed, had since been waived.
27 These expenditures, of course, would have impacted upon the desirability of the Settlement pre-
28 certification and pre-trial.

1 11. **Objections To The Settlement.** The consideration to be given the Settlement
2 Class under the terms of the Settlement is reasonable considering the strengths and weaknesses of
3 the claims asserted in this Action. One of the principal objections of the objectors is that the form
4 of compensation should have been money instead of \$10 Gift Vouchers for 1-800-Flowers online
5 products. The value thus offered to the Settlement Class must be considered in light of the total
6 individual recovery to each class member of \$12.99 at best - an amount that would not have been
7 realized unless (1) the class were certified, and (2) the class claims were upheld on the merits
8 following trial.

9 12. Thus, the potential recovery must be discounted by both (1) the likelihood of an
10 adverse outcome on either class certification or following trial on the merits, and (2) the
11 individualized nature of proof of each class member's claim.

12 13. **Opt-Out Requests.** Also, the fact that there are 514 opt-outs does not destroy the
13 utility, fairness, or reasonableness of the settlement to past and future customers. That number (of
14 opt-outs) represents some .00011% of the total potential class. And those who opt-out may pursue
15 1-800-Flowers if they believe a better result could and should have been achieved.

16 14. **Benefits To The Settlement Class.** Here, 6,007,946 Gift Vouchers for \$10 off
17 were automatically distributed to the Settlement Class. If all Settlement Class Members were to
18 redeem their Gift Vouchers, the cost to 1-800-Flowers would be in excess of \$60 million. No
19 claim form is required and Class Members do not have to do anything more to receive their award.
20 Moreover, the fungible and gift nature of floral products increases the likelihood that Settlement
21 Class Members would be repeat purchasers and make additional floral product purchases
22 irrespective of this Action. Thus, the Settlement Class derives a real and tangible benefit to the
23 extent they receive a discount off monies they would otherwise spend.

24 15. **Fair, Adequate, And Reasonable Settlement.** Given these factors the Court finds
25 the Settlement to be fair, reasonable, and adequate and provides fair, reasonable, just, and adequate
26 compensation for the dismissal of this action and release of Settlement Class Members' claims in
27 light of the uncertainties and risks of litigation and the delays that would ensue from continued
28 prosecution of this action.

1 16. Accordingly, the Settlement is fair, adequate, reasonable, and in the interests of the
2 the Settlement Class.

3 17. **Adequacy of Representation.** At all times in the prosecution of this action, the
4 negotiation of the Settlement, and its presentation to this Court, the Settlement Class has been
5 adequately represented by Class Representative, Thomas Molner, and by competent Class Counsel,
6 Westrup Klick, LLP. Class Counsel is experienced in consumer class action cases and has
7 exercised skill and experience in representing the Settlement Class and have adequately
8 represented and protected the interests of the Settlement Class in the action and in negotiating the
9 Settlement.

10 18. **Attorneys' Fees.** The Settlement provides for payment of up to \$400,000 to Class
11 Counsel as attorney's fees, costs, and expenses in the Action, subject to the Court's approval.
12 Defendant has agreed to pay fees, costs, and expenses in that amount (separate and apart from the
13 monies being made available to Settlement Class Members).

14 19. Class Counsel has spent or will spend in excess of 1,627 hours working on this
15 case, a reasonable amount of time given the nature of the case and the claims at issue in the action.
16 Class Counsel's normal hourly rates are generally \$450 per hour (except that senior/founding
17 partner, R. Duane Westrup, bills at \$700 per hour). This hourly rate is within the range of hourly
18 fees reasonably and normally charged by attorneys in this area of comparable experience in cases
19 of similar nature and complexity. Class Counsel also paid and will pay litigation costs and
20 expenses in excess of \$38,000.

21 20. In view of the significant costs advanced by Class Counsel in prosecuting the
22 claims, including the hearings, mediation, and discovery proceedings described above, and the
23 possibility of no recovery because of the contingent nature of Class Counsel's recovery, the time
24 records submitted by Class Counsel, as well as the novelty of the questions of law and fact
25 involved in this case, the Court concludes that \$400,000 in attorneys' fees and costs to Class
26 Counsel is reasonable.

27 21. **Incentive Award.** The Settlement provides for payment of \$5,000 as an incentive
28 award to Class Representative/Plaintiff Thomas Molnar subject to the Court's approval. Defendant

1 has agreed to pay that amount (separate and apart from the monies being made available to
2 Settlement Class Members). Class Representative Plaintiff submitted a Declaration setting forth
3 the tasks and time he spent working on the case. Considering the exposure of the Class
4 Representative Plaintiff Thomas Molnar to individualized discovery requests, demands upon him
5 by counsel and the Court, the time he expended on the case, and that a Counterclaim was filed and
6 served against him in response to his filing of this Action, an incentive award in the amount of
7 \$5,000 to Class Representative Plaintiff Thomas Molnar is reasonable and does not unduly favor
8 the Class Representative Plaintiff.

9 **III. IT IS HEREBY ORDERED, ADJUDGED, AND DECREED**

10 22. For purposes of the Action, the Court has subject matter and personal jurisdiction
11 over the parties, including all Settlement Class Members.

12 23. Pursuant to Code of Civil Procedure section 382 and California Rule of Court Rule
13 3.769, the Court certifies, solely for purposes of effectuating the Settlement, the Settlement Class
14 which consists of the following class:

15 Persons residing in the United States who purchased products through
16 Defendants' website, which website noted a "shipping charge" and
17 which products were delivered by local florists, during the period from
18 March 1, 2006 through February 5, 2008.

18 Excluded from the Settlement Class are those persons who timely excluded themselves.

19 24. The Court acknowledges that 1-800-Flowers would not have entered into the
20 Settlement without adequate assurance that it would not be precluded from contesting class
21 certification in the event the Settlement is not consummated. Accordingly, in the event that the
22 approval of the Settlement is reversed on appeal or the Effective Date is not reached for any reason,
23 1-800-Flowers shall not be estopped or otherwise precluded from opposing a motion for class
24 certification in the Action.

25 25. The Court grants final approval of the Settlement and finds that said Settlement and
26 the releases therein have been entered and given in good faith and are, in all respects, fair reasonable,
27 and adequate.

28 26. This Action is hereby dismissed with prejudice as to the Class Representative

1 Plaintiff and all Settlement Class Members who did not properly and timely request exclusion from
2 the Settlement Class.

3 27. Upon the Effective Date, the Plaintiff Thomas Molnar and all Settlement Class
4 Members shall be forever barred from bringing or prosecuting, in any capacity, any action or
5 proceeding that involves or asserted any of the Released Claims against any Released Party and
6 shall conclusively be deemed to have released and forever discharged the Released Parties from all
7 Released Claims.

8 28. For purposes of the preceding paragraph, "Released Claims" means and includes
9 any and all claims, liabilities, demands, debts, accounts, obligations, actions, and causes of action,
10 known or unknown, suspected or unsuspected, at law or in equity, of any kind or nature whatsoever
11 that were alleged or that could have arisen out of the facts alleged in the Second Amended
12 Complaint and all predecessor complaints thereto.

13 29. As of the Effective Date, Plaintiff Thomas Molnar and each member of the
14 Settlement Class Members shall, conclusively be deemed to have acknowledged that the Released
15 Claims may include claims, rights, demands, causes of action, liabilities, or suits that are not
16 known or suspected to exist as of the Effective Date and shall have released all Released Claims
17 against the Released Parties. Further, as of the Effective Date, Plaintiff Thomas Molnar and each
18 member of the Settlement Class shall be deemed to have waived any and all protections, rights and
19 benefits of California Civil Code section 1542 and any comparable statutory or common law
20 provision of any other jurisdiction.

21 30. The Settlement and this Order are not an admission of liability or fault by
22 Defendants or the Released Parties, or a finding of the validity of any claims in the Action or of
23 any wrongdoing or violation of the law by Defendants or the Released Parties. Neither the
24 Settlement nor this Order, nor any act performed or document executed pursuant thereto: a) is or
25 may be deemed to be used as an admission of, or evidence of, the validity of any Released Claim,
26 or of any wrongdoing or liability of the Defendants; and b) is or may be deemed to be or may be
27 used as an admission of, or evidence of, any fault or omission of the Defendants in any civil,
28 criminal, or administrative proceeding in any court, administrative agency, or other tribunal.

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1 31. Reasonable attorneys' fees, costs, and expenses are awarded to Class Counsel/
2 Plaintiff's Counsel, Westrup Klick, LLP, in the amount of \$400,000.

3 32. A service award or enhancement is awarded to Class Representative and named
4 Plaintiff Thomas Molnar in the amount of \$5,000.

5 33. In all other respects, each party is to bear its own fees and costs.

6 34. Each payment shall be made in the time specified in the Settlement.

7 35. Without affecting the finality of this Order and related Judgment in any way, the
8 Court hereby retains exclusive and continuing jurisdiction over the Action, the Class
9 Representative, the Settlement Class Members, and Defendants for the purposes of supervising the
10 implementation, enforcement, construction, and interpretation of the Settlement, the Court's Order
11 granting Preliminary Approval dated January 8, 2010, this Order and the related Judgment.

12 36. In the event that the Settlement is not effectuated in accordance with the terms of
13 the Settlement, then the Judgment entered in this Action shall be rendered null and void to the
14 extent provided by and in accordance with Settlement and shall be vacated and, in such event, all
15 orders entered and releases delivered in connection with this Judgment shall be null and void to the
16 extent provided by and in accordance with the Settlement.

17 37. Notwithstanding the reservation of jurisdiction in Paragraph 35, this is a final
18 and appealable judgment that ends the litigation of all claims alleged in this Action. The Court
19 directs that a judgment shall be entered in accordance with this Order.

20 **IT IS SO ORDERED.**

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22 Dated: MAY 17 2010



HON. ZAVEN V. SINANIAN
Superior Court Judge, Los Angeles County, California

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