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Via ECF

Hon. Sarah Netburn
Thurgood Marshall Courthouse
40 Foley Square, Room 430
New York, NY 10007

Re: *Rodriguez, et al. v. It's Just Lunch International, et al.*,
Index No. 07-CV-9227 (SHS)(SN)

Dear Judge Netburn:

We write on behalf of class member Michael James Barton in response to Class Counsel's letter of May 10, 2019, submitting the parties' proposed settlement agreement. Dkt. 435. Mr. Barton objected to the initial proposed settlement and writes to express concern that the revised settlement fails to correct certain legal defects both he and the Court identified with the initial settlement. *See* Dkt. 304.

Class Counsel has not presented a motion for preliminary approval, proposal for class notice, or motion for attorneys' fees at this time. Additional problems with the revised settlement may come to light in connection with those filings and as we continue our review. Accordingly, Mr. Barton limits his initial comments to the renewal of certain substantive issues that have not been remedied in the revised settlement. He reserves the right to supplement these arguments and present additional arguments in an objection or other pleading if the revised settlement is presented for preliminary and/or final approval.

First, the revised proposed settlement again reveals that class members were inadequately represented in violation of Federal Rule of Civil Procedure 23(a)(4). Class members in the New York class recover a guaranteed $200, ensuring they recover at least twice (and up to sixteen times) the monetary compensation of class members solely in the National class, who recover a minimum of $13 and a maximum of $200. Dkt. 435 ¶¶ 2.03, 2.04(a). Yet both classes must agree to the same broad release of claims against IJL. *Id.* ¶ 5.02. This difference in recovery exhibits a conflict between the two diverse classes. The Court noted this problem at the hearing on March 10, 2017: "When one category of class members is … targeted for worse treatment without credible justification, it strongly suggests a lack of adequate representation for those class members who hold only claims in that category."

Dkt. 355 at 20 (quoting *In re Payment Card Interchange Fee & Merchant Discount Antitrust Litig.*, 827 F.3d 223, 237 (2d Cir. 2016)).

Due to this conflict, the classes were required to have "separate representation to eliminate conflicting interests of counsel." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999). "Only the creation of subclasses, *and the advocacy of an attorney representing each subclass*, can ensure that the interests of that particular subgroup are in fact adequately represented." *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F. 3d 242, 252 (2d Cir. 2011) (emphasis added). "Adequacy is twofold: the proposed class representative [and counsel] must have an interest in vigorously pursuing the claims of the class, and must have no interests antagonistic to the interests of other class members." *Id.* at 249 (internal quotation marks omitted).

Here, however, the same Class Counsel represented the two subgroups with conflicting interests. The New York class members have separate claims that may ultimately warrant additional compensation. But the National class members may also have separate state law claims that Class Counsel simply failed to pursue, and the release of their claims may be worth additional compensation than that allocated to them. Without separate counsel zealously advocating on behalf of each class, the National class appears to have lost out. Given the zero-sum nature of the allocation, Class Counsel necessarily reduced the National class's recovery by agreeing to increase the New York class's recovery.

Second, Class Counsel intend to seek an excessive $1.75 million in the attorneys' fees, equal to nearly 37% of the $4.75 million settlement fund, and they reserve the right to seek any remaining balance from the monetary fund. *See* Dkt. 435 ¶ 2.06(a). Any reduction in fees will be distributed to an unnamed third-party *cy pres* organization, and will not be eligible for further distribution to the class. Dkt. 435 ¶ 2.02. In fact, the class payments are capped at $200 for the National class and an additional $200 for the New York class. Dkt. 435 ¶ 2.04(a). As Barton discussed in his objection to the initial settlement, this structure presents the specter of a lawyer-driven settlement and has a "strong presumption of … invalidity" because the class will not benefit from any reduction in fees. *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014). Even if this structure survives the Court's fairness inquiry, the settlement is unfair if Class Counsel receive a disproportionate distribution of the settlement compared to what class members actually receive. *See* Dkt. 355 (rejecting initial settlement where attorneys recovered bulk of $4.75 million monetary fund); *Dennis v. Kellogg Co.*, 697 F.3d 858, 868 (9th Cir. 2012) (38.9% fee is "clearly excessive"); *Brown v. Sega Amusements, U.S.A., Inc.*, No. 13 Civ. 7558, 2015 U.S. Dist. LEXIS 28442 (S.D.N.Y. Mar. 9, 2015) (rejecting settlement where class counsel sought 56% of proceeds).

On its own, the fee request of $1.75 million request is well above the 25% benchmark followed by courts of this Circuit. Any claim to the contrary almost certainly depends on Class Counsel placing an unreasonable value on the injunctive relief and/or basing their request on the anticipated value of vouchers distributed rather than the value of the vouchers actually redeemed, as required by the Class Action Fairness Act of 2005, 28 U.S.C. § 1712. *See In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1175-76 (9th Cir. 2013). As Barton explained in his objection, the fee analysis focuses on the "result *actually* achieved for class members." Notes of Advisory Committee on 2003 Amendments to Rule 23(h) (emphasis added). Dkt. 304 at 19-22.

Just as the Court found the relief in the initial settlement provided class members "little to no benefit," Dkt. 355 at 9, the injunctive relief in the revised settlement remains utterly valueless to the class and therefore cannot be used to support either settlement fairness or an award of attorneys' fees.

Class members receive nothing as a result of IJL's change in business practices unless they happen also to be future clients of ILJ. *See* Dkt. 435 ¶ 2.05 (describing forward-looking injunctive relief). Even then, a class member will experience no marginal benefit compared to anyone else who is a future client of IJL and thus subject to IJL's general pledge regarding its future business practices. "The fairness of the settlement must be evaluated primarily based on how it *compensates class members*—not on whether it provides relief to other people." *In re Dry Max Pampers Litig.*, 724 F.3d 713, 720 (6th Cir. 2013) (emphasis in original) (internal quotation marks omitted).

Third, while the parties have not presented the proposed class notice, Barton suspects that it will fail to disclose the identity of the *cy pres* recipients to whom any remaining funds will be distributed or to set forth any mechanism for class members to provide input on the selection of recipients or to receive notice of the recipients' identities once they are recommended to the Court. *See* Dkt. 304 (arguing initial class notice is defective for this reason). Any class notice approved by the Court should disclose this information to the class to preserve the right of absent class members to distance themselves from causes or institutions they would rather not support or to make a valid objection if there is an abuse of the *cy pres* mechanism, such as where the proposed recipient is related to Class Counsel or a defendant or there is a geographic incongruence between the class and recipient. *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011); *see also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (due process requires notice "to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections").

Respectfully submitted,

/s/ Anna St. John
Anna St. John

Counsel for Class Member Michael James Barton

cc: Counsel of Record (via CM/ECF)