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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CHRISTINE RODRIGUEZ, SANDRA BURGA, KAREN MALAK, JAMES TORTORA, LISA BRUNO, JANEEN CAMERON, KAREN McBRIDE, ANDREW WOOLF, and **BRAD BERKOWITZ**, individually, and for all others similarly situated,

Plaintiffs,

-against-

IT'S JUST LUNCH INTERNATIONAL, IT'S JUST LUNCH, INC., HARRY and SALLY, INC, RIVERSIDE COMPANY, LOREN SCHLACHET, IJL NEW YORK CITY FRANCHISE, IJL ORANGE COUNTY FRANCHISE, IJL CHICAGO FRANCHISE, IJL PALM BEACH FRANCHISE, IJL DENVER FRANCHISE, IJL AUSTIN FRANCHISE, IJL LOS ANGELES-CENTURY CITY FRANCHISE, and **DOES 1-136**,

Defendants.

Index No. 07-CV-9227 (SHS)(SN)

OBJECTION OF MICHAEL JAMES BARTON TO THE PROPOSED CLASS ACTION SETTLEMENT AND ATTORNEYS' FEE REQUEST

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INTRODUCTION

Plaintiffs' proposed settlement fails to correct some of the same deficiencies class member Michael James Barton identified in the initial settlement this Court rejected. *See* Dkt. 304. Although the settlement now offers National class members a cash option, rather than the voucher-only settlement previously negotiated, National class members are still inadequately represented and treated far less favorably than their New York counterparts. With a single settlement fund to compensate them, the interests of New York and National class members are directly at odds. And, still without separate counsel to represent their interests, the National class once again fared poorly in the division of that fund. New York class members are guaranteed $200—twice what the initial settlement promised them. Meanwhile, the National class is guaranteed a mere $14.44 (with only a possibility of more) or a date voucher. This result may not be surprising when one considers that the National class had no separate counsel to advance the strongest arguments on their behalf and ensure their recovery from the settlement fund was fair. Such separate counsel was required as a matter of law. *See In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.,* 827 F.3d 223, 233-234 (2d Cir. 2016) ("*Payment Card*"); *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 252 (2d Cir. 2011) ("*Literary Works*"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). The classes should be decertified and the settlement rejected. *See* Section III.

Class counsel, for their part, continue to seek an excessive fee award. The typical class settlement fee award in this Circuit is 25%, yet class counsel—who had to restart litigation after negotiating an unfair initial settlement and still managing to recover only a small fraction of class members' damages—seek 31% of the $4.75 million fund. Class counsel justify their fee award as less than their lodestar and point to the supposed $77 million value of the vouchers available under the settlement, but neither justifies the excessive $1.5 million they seek. To the extent the Court intends to award fees based on *any* value from the vouchers, that award should be deferred until after the redemption rate is known, as required by the Class Action Fairness Act, regardless of whether the

Court uses the lodestar or percentage analysis. *See In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1175-76 (9th Cir. 2013). Because of the lack of value to class members provided by the settlement's injunctive relief, as underscored by plaintiffs' decision not to rely on that relief in their fee request, it too should be disregarded for purposes of calculating a reasonable fee award under Rule 23(h). *See* Section IV.

Finally, notice to the class is defective because it failed to inform class members of the identity of the *cy pres* recipient eligible to receive remaining funds or of the full amount of attorneys' fees that class counsel may seek due to their reservation of the right to request the remaining funds, and both the notice and settlement fail to provide a way for class members to be notified or object to those future payments. Without this information, class members were deprived of information constitutionally necessary and upon which they may have based a decision to object or opt out. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). *See* Section V.

ARGUMENT

I. Objector Michael James Barton is a member of the class, and intends to appear through counsel at the fairness hearing.

Objector Michael James Barton signed a membership contract with IJL or one of its franchisees and purchased the services of IJL or one of its franchisees in or around March 2009. Declaration of Michael James Barton, ("Barton Decl.") ¶ 3; *see also* Dkt. 304-1 ¶ 3 (Barton declaration filed in support of initial objection). He was a resident of Texas at the time he executed his membership contract with IJL or one of its franchisees. Barton Decl. ¶ 3. He has not received a full refund of the membership fees that he paid to IJL; nor has he signed a release of any claims in favor of IJL and/or a franchisee of IJL. *Id.* Barton therefore is a member of the settlement class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5). Barton's address is 2101 Citywest Blvd. Suite 100, Houston, TX 77042, and his telephone number is (713) 234-6535. Barton Decl. ¶ 2.

Hamilton Lincoln Law Institute's Center for Class Action Fairness ("CCAF"), through attorney Anna St. John, represents Barton *pro bono.* St. John gives notice of her intent to appear at the fairness hearing, where she wishes to discuss matters raised in this Objection. Barton does not intend

to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on to the docket by any settling party or objector. Barton reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval. He joins by reference any substantive objections made by other class members not inconsistent with those made here.

CCAF represents class members *pro bono* in class actions where class counsel employ unfair class action procedures to benefit themselves at the expense of the class. *See, e.g.*, *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014) (CCAF "flagged fatal weaknesses in the proposed settlement" and demonstrated "why objectors play an essential role in judicial review of proposed settlements of class actions"); *In re Dry Max Pampers Litig.* ("*Pampers*"), 724 F.3d 713, 716-17 (6th Cir. 2013) (describing CCAF's client's objections as "numerous, detailed, and substantive") (reversing settlement approval and certification); *Richardson v. L'Oreal USA, Inc.*, 991 F. Supp. 2d 181, 205 (D.D.C. 2013) (describing CCAF's client's objection as "comprehensive and sophisticated" and noting that "[o]ne good objector may be worth many frivolous objectors in ascertaining the fairness of a settlement") (rejecting settlement approval and certification); Adam Liptak, *When Lawyers Cut Their Clients Out of the Deal*, N.Y. Times, Aug. 13, 2013, at A12 (calling founder Theodore H. Frank "[t]he leading critic of abusive class-action settlements"). *See* Declaration of Theodore H. Frank ("Frank Decl."), Dkt. 304-3 ¶ 3.

Since it was founded in 2009,[1] CCAF has "recouped more than $100 million for class members" by driving the settling parties to reach an improved bargain or by reducing outsized fee awards. Andrea Estes, *Critics hit law firms' bills after class-action lawsuits,* Boston Globe (Dec. 17, 2016); *see, e.g., McDonough v. Toys "R" Us,* 80 F. Supp. 3d 626, 661 (E.D. Pa 2015) ("CCAF's time was judiciously spent to increase the value of the settlement to class members." (internal quotation omitted)). Because it has been CCAF's experience that class action attorneys often employ *ad hominem* attacks in attempting to discredit objections, it is perhaps relevant to distinguish CCAF's mission from

[1] In February 2019, CCAF merged with the then-newly formed non-profit public interest law firm Hamilton Lincoln Law Institute. At the time of Barton's previous objection, CCAF was a sub-unit of the non-profit Competitive Enterprise Institute.

the agenda of those who are often styled "professional objectors." A "professional objector" is a specific term referring to for-profit attorneys who attempt or threaten to disrupt a settlement unless plaintiffs' attorneys buy them off with a share of the attorneys' fees. Some courts presume that such objectors' legal arguments are not made in good faith. *See* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal F. 403, 437 n.150 (2003). This is not CCAF's *modus operandi*. *See* Paul Karlsgodt & Raj Chohan, *Class Action Settlement Objectors: Minor Nuisance or Serious Threat to Approval*, BNA: Class Action Litig. Report (Aug. 12, 2011) (distinguishing CCAF from professional objectors). CCAF refuses to engage in *quid pro quo* settlements and does not extort attorneys; and has never withdrawn an objection in exchange for payment. Instead, it is funded entirely through charitable donations and court-awarded attorneys' fees. *See generally* Declaration of Theodore H. Frank, Dkt. 304-3. CCAF's track record—and preemptive response to the most common false *ad hominem* attacks made against it by attorneys defending unfair settlements and fee requests—can be found in the Declaration of Theodore H. Frank. Dkt. 304-3.

To avoid doubt about his motives, and as previously, Barton is willing to stipulate to an injunction prohibiting him from accepting compensation in exchange for the settlement of this objection. Barton Decl. ¶ 7; *see generally* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009) (suggesting inalienability of objections as solution to objector blackmail problem). Barton brings this objection through CCAF in good faith to protect the interests of the class. His objection applies to the entire class, and with respect to his Rule 23(a)(4) objection, also specifically to National class members subject to disfavored treatment.

II. A court owes a fiduciary duty to unnamed class members.

A "district court ha[s] a fiduciary responsibility to the silent class members," *Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 23 (2d Cir. 1987), and must act "with a jealous regard" for the rights and interests of those class members, *Goldberger v. Integrated Resources.*, 209 F.3d 43, 53 (2d Cir. 2000). The court must act "as fiduciary of the class and ultimate decisionmaker on a class-action settlement to substantially alleviate the…concerns about class counsel's incentives." *Fresno County Employees Ret.*

Ass'n v. Isaacson, 925 F.3d 63, 72 (2d Cir. 2019). The court accordingly "must eschew any rubber stamp approval in favor of an independent evaluation" of the settlement. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974), *abrogated on other grounds by Goldberger*, 209 F.3d 43.

The fiduciary role is necessary "because inherent in any class action is the potential for conflicting interests among the class representatives, class counsel, and absent class members." *In re Global Crossing Secs. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004). *See also Plummer v. Chemical Bank*, 668 F.2d 654, 658 (2d Cir. 1982) (through its oversight responsibility, the court assumes a derivative fiduciary obligation to the class).

"[T]he district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class. Instead, the law relies upon the fiduciary obligations of the class representatives and, especially, class counsel, to protect those interests. And that means the courts must carefully scrutinize whether those fiduciary obligations have been met." *Pampers*, 724 F.3d at 718 (internal quotation omitted). *See also Goldberger*, 209 F.3d at 52 ("the adversary system is typically diluted - indeed, suspended - during fee proceedings").

While class counsel and the defendant have an incentive to bargain over the size of the settlement, similar incentives do not govern their critical decisions about how to divvy it up—including the allocation to counsel's own fees. "The concern is not necessarily in isolating instances of major abuse, but rather is "for those situations, short of actual abuse, in which the client's interests are somewhat encroached upon by the attorney's interests." *In re Agent Orange Prods. Liab. Litig.,* 818 F.2d 216, 224 (2d Cir. 1987). "From the selfish standpoint of class counsel and the defendant, … the optimal settlement is one modest in overall amount but heavily tilted toward attorneys' fees." *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014). Therefore, "[i]n reviewing a proposed settlement, a court should not apply any presumption that the settlement is fair and reasonable." American Law Institute, *Principles of the Law of Aggregate Litigation* ("*ALI Principles*") § 3.05(c) (2010). The moving party has the burden of proving the fairness of a settlement allocation. *Id.*

III. The settlement classes cannot be certified due to a conflict between the National class and New York class.

Rule 23(a)(4) makes adequacy of representation a prerequisite to the certification of any class action. Fed. R. Civ. P. 23(a)(4); *see also In re Initial Pub. Offerings Secs. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006). Adequate representation requires "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*, 521 U.S. at 627. To eliminate conflicts, each class or subclass must have "separate representation to eliminate conflicting interests of counsel." *Ortiz*, 527 U.S. at 856.

The revised settlement has not cured the adequacy of representation problem that contributed to the court's denial of approval for the initial settlement. Class members had different interests, as manifested by their division into a New York class and a National class. The interests of these two classes were in conflict because they divided a single fund among them; any increase in the amount recovered by the New York class members resulted in a corresponding decrease in the amount recovered by the National class members, and vice versa. A single class counsel could not simultaneously represent both sets of interests.

The Second Circuit addressed a similar divide in interests in *Literary Works,* 654 F.3d 242. The court applied *Amchem* and *Ortiz* to strike down a settlement on Rule 23(a)(4) grounds where class counsel attempted to negotiate compensation for three separate "categories" of copyright-holding class members in a single settlement. Class counsel and the class representatives had agreed to a settlement that assigned different damages formulas to each subgroup, based on the availability of certain damages for each category's legal claims. If the total claims exceeded a certain amount, then the settlement reduced the compensation for the weakest ("Category C") claims. Each category did not have a separate representative; rather, each class representative had "served generally as a representative for the whole, not for a separate constituency," and some representatives had claims in more than one category. 654 F.3d at 246. The court rejected the settlement due to inadequate representation, observing that such a unitary representative "cannot have had an interest in maximizing compensation for *every* category," where each category had qualitatively different claims.

Id. at 252 (emphasis in original). Class representatives are not adequate when they are "in the position to trade diminution [of one subgroup's] relief for increase of [another's] relief," the Second Circuit reaffirmed in *Payment Card*, 827 F.3d at 234. *Payment Card* recognized the incentives that generally undergird this problem: "(i) the interest of class counsel in fees, and (ii) the interest of defendants in a bundled group of all possible claimants who can be precluded by a single payment." *Id.* at 236.

Amchem also addressed the adequacy problem where conflicts exist between class members competing over a single settlement fund. 521 U.S. 591. There, the proposed class encompassed members who had already manifested asbestos-related injuries, *i.e.*, those with present claims, and those with who had been exposed to asbestos but did not show signs of injury, *i.e.*, those with only potential future claims. The "two subgroups … had competing interests in the distribution of a settlement whose terms reflected 'essential allocation decisions designed to confine compensation and to limit defendants' liability.'" *Literary Works* , 654 F.2d at 250 (quoting *Amchem*, 521 U.S. at 627). As a result, "the adversity among subgroups require[d] that the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroup." *Amchem*, 521 U.S. at 627.

Here, just as in *Literary Works*, *Payment Card*, and *Amchem*, "[a]ny improvement in the compensation of, for example, [New York] claims would result in a commensurate decrease in the recovery available for [the National Class's] claims." *Literary Works*, 654 F.3d at 252. And, just as in *Literary Works*, the settlement payments to the National class will decrease depending on the number of claimants, while the payments to the New York class are set at $200, no matter how many claims are made. When these conflicts exist, "[o]nly 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." *Literary Works,* 654 F.3d at 252 (emphasis added); *accord Payment Card*, 827 F.3d at 233-234; *Ortiz*, 527 U.S. at 857 (groups with conflicting interests should be addressed with "reclassification with separate counsel."). Thus, "'[a]dequacy 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." *Literary Works*, 654 F.3d at 249 (quoting *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006)); *see also* Fed. R. Civ. P. 23(g)(4) ("Class counsel must fairly and adequately represent the interests of the class.").

That New York class members are also National class members does not redress the adequacy problem. "The force of *Amchem* and *Ortiz* does not depend on the mutual[] exclusivity of the classes; it was enough that the classes do not perfectly overlap." *Payment Card*, 827 F.3d at 235; *see also Literary Works*, 654 F.3d at 251 ("Owning Category C claims in addition to other claims does not make named plaintiffs adequate representatives for those who hold only Category C claims."). "[T]he advocacy of an attorney representing each subclass" is the only way "to ensure that the interests of [any] particular subgroup are in fact represented" even when class membership overlaps in more than one subgroup. *Literary Works*, 654 F.3d at 252.

Despite this established and common-sense law, class counsel decided to play kingmaker among their two sets of clients, ultimately favoring the New York class over the National class. While New York class members are guaranteed $214.44 (the $200 New York class payment, plus the minimum $14.44 National class payment), National class members are guaranteed a mere $14.44. In other words, the New York class may recover *fifteen times* more than class members in the National class. *See* Dkt. 445-1, Recitals ¶ D. Yet both classes must agree to the same broad release of claims. *Id.* ¶¶ 1.15, 1.16, 5.02. National class members had no separate counsel to protect their interests when this unfair result was negotiated at the settlement table. This is the "evidence of prejudice to the interests of a subset of plaintiffs" that the Second Circuit has looked to when "assessing the adequacy of representation." *Payment Card*, 827 F.3d at 236 (quoting *Literary Works*, 654 F.3d at 252). The *same* counsel that represented the New York class members and had an overriding interest in reaching a settlement that would pay them hefty fees also represented the National class.

The original settlement that was rejected by this Court had a nearly identical problem, as recognized by the Court at the fairness hearing: "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 *Payment Card*, 827 F.3d at 237). Barton argued the inadequacy of representation in his initial objection. Dkt. 304. Not only did class counsel fail to cure the problem, they exacerbated it by *doubling* the amount the New York class will recover from the $100 guaranteed in the initial settlement. *Compare* Dkt. 445-1 ¶ 2.02 *with* Dkt. 257-2 ¶ 2.02. The availability of vouchers for the National class does not alter the inadequacy. Such vouchers are utterly worthless for the substantial number of class members who have no need for them due to their relationship status or no desire to do business with IJL—a fact that will be demonstrated by the class members' claims. *See* Section IV. Conveniently for the settling parties, they set the claims deadline for the same date as the fairness hearing, such that the final numbers will not be available to the Court then.

Class counsel are likely to argue that the difference in monetary relief is due to the purportedly stronger state-law claims of the New York Class, claiming that the release of those claims justifies greater recovery. Class counsel may point to the Court's denial of its motion to certify a national class for unjust enrichment claims or argue that only the New York claims are pending or argue that New York has unjust enrichment laws fourteen times as favorable to consumers than any other state in the country. Just as in the last proposed settlement, such arguments fail.

First, because the unjust enrichment claims for the National Class could not be certified, they should not be sacrificed by the settlement. "Uncertified issues and claims may be pursued on an individual basis and may *not* be included in any class settlement." *Dugan v. Lloyds Tsb Bank*, No. C 12-02549, 2013 WL 1703375 (N.D. Cal. Apr. 19, 2013) (emphasis in original) (referring to state and international law variation in claims that counsel proposed including for certification). But both classes are releasing *all* of their claims and rights under state and federal law that arise out of or relate "in any way" to the claims asserted in the litigation, "including, without limitation, any claim that IJL's performance under its contracts with members of the Settlement Classes or IJL's conduct in connection with the marketing of its services was unlawful, deceptive, misleading … or breached any federal, state or local consumer fraud or similar laws." Settlement, Dkt. 445-1 ¶ 1.15; *id.* ¶¶ 5.01-5.02.

The release should exclude all of the National class's claims not certified by the Court. These claims may still have litigation value that class members could pursue separately. The releasees should also exclude any person or entity that is not a defendant in the action. This Court has already identified the problem of the broad class release that "purports to insulate IJL and all related entities and individuals for all breach of contract, fraud, and consumer protection claims that could have been brought by current or former clients over a 15-year period." Dkt. 350-1 at 7:17-23. That class counsel are still attempting to release the unjust enrichment and other claims of the National class against such a broad set of releasees without a proper arm-length settlement valuation illustrates the inadequacy of class counsel and the National class representatives. *See, e.g.*, *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 307-08 (3d Cir. 2005) ("question[ing] whether the absent class members' interests were sufficiently pursued by class counsel" where claims that were not pursued by class counsel were released in settlement). It may even "suggest that class counsel subrogated their duty to the class in favor of the enormous class-action fee offered by defendant." *Id. See also Drimmer v. WD-40 Co.*, No. 06-cv-900, 2007 WL 2456003, 2007 U.S. Dist. LEXIS 62582, at *7 (S.D. Cal. Aug. 24, 2007) ("A class representative is not an adequate representative when the class representative abandons particular remedies to the detriment of the class." (internal quotation marks omitted)); *cf. also Fosmire v. Progressive Max Ins. Co.*, 277 F.R.D. 625, 634 (W.D. Wash. 2011) (claim splitting rendered class representative inadequate); *Tasion Comms., Inc. v. Ubiquiti Networks, Inc.*, 308 F.R.D. 630, 642 (N.D. Cal. 2015) (denying certification due to adequacy problem where plaintiffs had abandoned certain damage theories for purposes of making certification more likely).

Second, it might or might not be true that the New York class has claims that command a higher settlement value than the National class. But the National class is also releasing all of their claims under the settlement, and that release is worth something to the defendants. Rule 23 and Circuit and Supreme Court precedent require the proper valuation to have been tested through arms-length negotiation by separate representatives. *See Literary Works*, 654 F.3d at 253 ("We know that Category C claims are worth less than the registered claims, but not by how much. Nor can we know this, in

the absence of independent representation."). Each class requires counsel whose sole duty is to represent and advocate on its behalf. It is only through that process, with counsel "advanc[ing] the strongest arguments" in that favor—that the value of the National class's claims can be determined. *Id.* Instead, the unitary class counsel here was "obligated to advance the collective interests of the class, rather than those of a subset of class members"; entirely absent was "the advocacy of an attorney representing each subclass" or subgroup as required by Rule 23 to "ensure the interests of that particular subgroup are in fact adequately represented." *Literary Works*, 654 F.3d at 252. Ultimately class counsel chose to favor the New York class and their own interest in achieving a settlement for which they could recover fees, rather than split those fees with separate counsel for the National class.

The enormous divergence in recovery here raises "red flags regarding favoritism for some members of the class over others[, including whether] certain groups of class members [are] treated more favorably than others for purposes of future relief." *Staton v. Boeing Co.*, 327 F.3d 938 (9th Cir. 2003); *see also* Fed. R. Civ. P. 23(e)(2)(D) (requiring consideration of whether settlement "treats class members equitably relative to each other"). If it is the case that New York and non-New York claims are of wildly divergent value, that is further reason that the classes cannot be represented by the same counsel. *See Smith v. Sprint Comms. Co. L.P.*, 387 F.3d 612, 614 (7th Cir. 2004) (vacating nationwide settlement class on (a)(4) grounds where state law differed); *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10 (D.C. Cir. 1980) (affirming denial of certification of a class that attempted to consolidate in a single class those with strong and weak claims). Not only is the value of the National class lower, it also is exclusively burdened with a reduction in its recovery based on the number of claims submitted, while the New York class recovers a guaranteed $200. "That only one category was targeted for this penalty without credible justification strongly suggests a lack of adequate representation for those class members who hold claims in this category." *Literary Works*, 654 F.3d at 254.

That the Court previously certified the classes does not alter its authority to reject certification and the proposed settlement now. Rather, a "district court has the affirmative duty of monitoring its class decisions." *Mazzei v. Money Store*, 829 F.3d 260, 266 (2d Cir. 2016). This means that "'courts are

'required to reassess their class rulings as the case develops'" to "ensure continued compliance with Rule 23's requirements." *Amara v. CIGNA Corp.*, 775 F.3d 510, 520 (2d Cir. 2014) (quoting *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999)); *see Burns v. United States* R.R. *Retirement Bd.*, 701 F.2d 189, 191-92 (D.C. Cir. 1983) ("The original definition and certification … may require alteration or amendment as the case unfolds.") (Ruth Bader Ginsburg, J.). While the court previously reassessed the class certifications, it did so upon defendants' challenge to predominance under Rule 23(b)(3), not 23(a)(4), and without the starkly disproportionate terms of the current settlement. *See* Dkt. 402 (amending certified class definitions).

The terms of the settlement agreement, and the way in which the settlement was negotiated, reveal a conflict of interest that prevents the 23(a)(4) adequacy requirement from being met. *See Boucher*, 164 F.3d at 118-19; *see also Amchem*, 521 U.S. at 619-20 (inspection of settlement terms when evaluating adequacy "altogether proper"); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 801 (3d Cir. 1995) (conflicts can sometimes be discerned from "the very terms of the settlement"). Counsel necessarily failed in its duty: the same counsel could not adequately represent the competing interests of the classes to the settlement proceeds.

Moreover, because class representatives are permitting this settlement to go forward, while seeking $12,000 for themselves, they too do not meet the Rule 23(a)(4) standard for adequate representation. *See Gallego v. Northland Group, Inc.*, 814 F.3d 123, 129-30 (2d Cir. 2016); *In re Aqua Dots Prod. Liab. Litig.*, 654 F.3d 748 (7th Cir. 2011). In short, "[c]onflicted representation provides an independent ground for reversing [a] settlement." *Etter v. Thetford Corp.*, No. 8:13-81, Dkt. 221 at 11 (C.D. Cal. Oct. 14, 2014) (quoting *Radcliffe v. Experian Info. Sols.*, 715 F.3d 1157, 1167 (9th Cir. 2013)).

IV. Even if the classes are certifiable, class counsel's fee request is excessive and should be substantially reduced.

Class counsel have requested an excessive 31% of the settlement fund for themselves. This request far exceeds "the increasingly used benchmark of 25%" deemed a reasonable recovery of a fund. *See, e.g.*, *City of Pontiac Gen. Empls. Ret. Sys. v. Lockheed Martin*, 954 F. Supp. 2d 276, 281 (S.D.N.Y.

2013) (25% is "benchmark"); *Ortiz v. Chop't Creative Salad Co. LLC*, 89 F. Supp. 3d 573, 598 (S.D.N.Y. 2015) (awarding 20% of fund). That class counsel is seeking fees on a lodestar basis and requesting and a fractional lodestar do not change the court's responsibility to ensure that an excessive percentage of the settlement fund does not go to the attorneys rather than the class; in no circumstances may fees "exceed what is 'reasonable' under the circumstances." *Goldberger*, 209 F.3d at 47. The fee is not justified "in relation to the settlement," the "quality of representation," the "magnitude and complexities of the litigation," public policy considerations, or any other factors courts may consider. *See id.* at 50. The Court's fiduciary duty ascends a high summit "[i]n setting a fee award, [when] a court is to act as a fiduciary who must serve as a guardian of the rights of absent class members." *Mba v. World Airways*, 369 Fed. Appx. 194, 198 (2d Cir. 2010) (unpublished) (quoting *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 249 (2d Cir. 2007) and *Grinnell Corp.*, 560 F.2d at 1099). In that role, the court must conduct a "'searching assessment' regarding attorneys' fees 'that should properly be performed in each case.'" *McDaniel v. County of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (quoting *Grinnell Corp.*, 560 F.2d at 1099, and *Goldberger*, 209 F.3d at 52)).

In some cases, such as this, the requirement of reasonable fees means that a sub-lodestar award is appropriate. "[A]lthough class counsel's hard work on an action is presumed a necessary condition to obtain attorney's fees, it is never a sufficient condition. Plaintiffs' attorneys don't get paid simply for working; they get paid for obtaining results." *HP Inkjet*, 716 F.3d at 1182. "[H]ours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel." *Redman v. RadioShack*, 768 F.3d 622, 635 (7th Cir. 2014). The reason for that is basic fairness. "Just as the Court would not deprive Class Counsel of all of their potential profit in cases [where their recovery is substantial], it cannot insulate Class Counsel from the risk of pursuing an unprofitable case." *Keirsey v. Ebay, Inc.*, No. 12-cv-01200-JST, 2014 WL 644738, at *3 (N.D. Cal. Feb. 18, 2014). *See, e.g.*, *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 943 (9th Cir. 2011) (reversing even though

lodestar "substantially exceed[ed]" fee award); *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 180 n.14 (3d Cir. 2012) (lodestar multiplier of 0.37 not "outcome determinative").

In assessing the amount of fees that is "reasonable" in any settlement, a "fundamental focus" in awarding fees is on the "result *actually* achieved for class members." Fed. R. Civ. P. 23(h) (emphasis added). Here, that is the cash fund of $4.75 million. At most, a reasonable fee and expense award would be 25% of that fund, or $1,187,500. That class counsel can cite a handful of cases in which courts have awarded a higher percentage does not justify such a result here, where they negotiated an unfair initial settlement and had to reboot the litigation before reaching a second, also problematic settlement that pays the classes a small fraction of their damages.

Class counsel have justified their request by pointing to a purported settlement value of "$77 million exclusive of the injunctive relief." Dkt. 450 at 3. But class counsel have once again relied upon the utterly fictive value of the date vouchers that this Court previously rejected as too indeterminate. Dkt. 350-1 at 3. Any value above the $4.75 million cash fund is pure speculation with no basis in reality. "[T]he actual benefit provided to the class"—not what is *potentially* available—"is an important consideration when determining attorneys' fees." *Baby Prods.*, 708 F.3d at 179 n.13. The burden of proving the quantum of benefit lies with the proponents of the settlement. *See*; *Pampers*, 724 F.3d at 719; *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 195 (5th Cir. 2010) (proponents must show that the settlement "secures some adequate advantage for the class"); *Koby v. ARS Nat'l Servs.*, 846 F.3d 1071, 1079 (9th Cir. 2017) (proponents of settlement bears "burden of demonstrate that class members would benefit" from settlement relief). Plaintiffs cannot carry their burden.

As this Court said at the last fairness hearing, "the valuation of the vouchers is simply too hokey. There is really no way to effectively value that. Similarly with the so-called injunctive relief…." Dkt. 350-1 at 3:1-3. National class members can choose between cash (a minimum of $14.44) and a voucher. Dkt. 445-1 ¶ 2.04. Class counsel say that even if "just 6%," or 10,000 current class-member clients of IJL select and use a voucher rather than the cash offered by the settlement, they are worth

$4.5 million. Dkt. 450 at 2. But by this number is pure speculation—and wildly optimistic given class members' expressed views about the defendant's business practices.

Further, any vouchers elected by the National class cannot be valued at their face value for purposes of justifying the fee award. We know only that class members value them at least $14.44. Once again, the vouchers have onerous restrictions that limit their actual value: (i) the voucher may not be transferred for cash or *any* other consideration; if it is, "the transferor Class Member shall be liable to IJL for liquidated damages of $1,000;" (ii) if "gifted" a voucher, no transferee can use the voucher unless he or she has (or gets) a current IJL membership (the Settlement provides a 25% discount on such membership) and is identified in writing to IJL by the transferor; and (iii) the vouchers must be submitted to IJL within 180 days after issuance. Dkt. 445-1 ¶ 2.04.

Under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1712(a), which applies because the vouchers are coupons, attorneys' fees attributable to the coupons must "be based on the value to class members of the coupons that are redeemed," not just issued.[2] 28 U.S.C. § 1712(a); *see also HP Inkjet*, 716 F.3d at 1175-76 (citing CAFA). Although CAFA allows attorneys' fees to be based on the lodestar method when there is a meaningful non-coupon component of the settlement, the coupon redemption rate is still critical to the court's analysis. "Where the parties have reached a coupon settlement, the actual monetary value of the coupons redeemed by the class is a prime consideration in th[e] assessment [of reasonable attorneys' fees]: it is an indispensable factor in evaluating the reasonableness of the lodestar figure, and it is determinative when calculating an award as a percentage of the recovery." *Fouks v. Red Wing Hotel Corp.*, No. 12-CV-2160, 2013 WL 6169209, 2013 U.S. Dist. LEXIS 165588, at *19 (D. Minn. 2013). "Because redemption rates have a direct and potentially devastating impact on the actual value received by the class, such lack of evidence prevents any

[2] That the settlement refers to "vouchers" rather than "coupons" does not change CAFA's applicability. *E.g.*, *In re Sw. Airlines Voucher Litig.*, 799 F.3d 701, 706 (7th Cir. 2015) (rejecting narrow definition of "coupon"); *In re Excess Value Ins. Coverage Litig.*, 598 F. Supp. 2d 380, 387 (S.D.N.Y. 2005) (applying CAFA to determine fees where settlement gave class "vouchers"); *HP Inkjet*, 716 F.3d at 1177 (discussing "perceived abuse" of "pay[ing] aggrieved class members in coupons or *vouchers*").

reasoned assessment of the settlement's actual value to the class." *Sobel v. Hertz*, No. 3:06-CV-00545, 2011 WL 2559565, 2011 U.S. Dist. LEXIS 68984, at *36 (D. Nev. June 27, 2011); *see also Redman*, 768 F.3d at 635 (employing the lodestar approach "wouldn't make much difference—maybe it wouldn't make any—…because hours can't be given controlling weight in determining what share of the class action settlement pot should go to class counsel.").

Thus, regardless of the approach this Court applies, the Court should not award any fees that are based on the value of the vouchers until after the redemption rate is known.[3] *See HP Inkjet*, 716 F.3d at 1186 n.18 ("Even under the lodestar method, the district court must adjust the amount of any fee award to account for the degree of success class counsel attained. But a court cannot judge counsels' success without first calculating the value of the class relief. And in a coupon class action, the court cannot value the class relief without knowing the redemption value of the coupons." (internal citations and quotation omitted)). Coupon redemption rates are famously low, so without the actual redemption rate, no value can be attributed to the vouchers. *See, e.g.*, 28 U.S.C. § 1711, note § 2(a)(3)(A); *Palamara v. Kings Family Rests.*, No. 07-317, 2008 WL 1818453, at *1-*3 (W.D. Pa. Apr. 22, 2008) ("approximately 165 class members" out of 291,000 "had obtained a voucher" under the settlement); *Moody v. Sears Roebuck & Co.*, 664 S.E.2d 569, 572, 574 (N.C. App. 2008) (317 valid claims filed out of 1,500,000 member class for coupon redemption value of $2,402); James Tharin & Brian Blockovich, *Coupons and the Class Action Fairness Act*, 18 GEO. J. LEGAL ETHICS 1443, 1445 (2005) (citing examples). It may be appropriate for the court to defer or stagger the fee award, to the extent it believes any fees should be awarded based on the value of the vouchers. This is an accepted judicial practice that will

[3] Class counsel may point to *Southwest Airlines Voucher Litig.*, 799 F.3d 701, to argue that the redemption rate is not necessary to a Rule 23(h) award. However, in *Southwest*, the litigation itself involved coupons, specifically drink vouchers that the defendant had stopped honoring, and the settlement, in turn, awarded drink vouchers back to class members. The court emphasized that "the dominant feature of the settlement is that it provides class members with essentially complete relief," *i.e.*, replacement of the drink vouchers at the heart of the case. These unique facts were critical to the court's holding. Because the present litigation involves dating services rather than coupons and does not provide complete relief, the holding of *Southwest* is inapplicable.

ensure a fee award that is more appropriately proportionate to the actual class benefit. *See, e.g.*, Notes of Advisory Committee on 2003 Amendments to Rule 23(h) ("[I]t may be appropriate to defer some portion of the fee award until actual payouts to class members are known.").

Plaintiffs don't rely upon the injunctive relief in the settlement to justify their fee request, and nor could they. They rightly acknowledge that the injunctive relief "is difficult to value, [and] its value is also easily manipulable.'" Dkt. 450 at 10 (quoting *Excess Value Ins.*, 598 F. Supp. 2d at 387). The injunctive relief that plaintiffs refer to is a pledge by IJL to honor client preferences as to age, parental status, and religious status, and a set of commitments by IJL intended to ensure it adheres to that pledge. Dkt. 445-1 ¶ 2.05. But the pledge itself has long been in effect, *see* Dkt. 350-1 at 23, meaning that the only "relief" is the steps IJL agrees to follow to ensure it upholds the pledge.

Just as Barton pointed out in his first objection, a class member will experience *no* benefit from IJL's commitment to match *other people* with dates who have (or do not have) the religious tradition, age, and parental status for which they indicated a preference (or aversion). Just as non-class members will experience this "benefit" only if they become clients of IJL, so, too, will class members experience this benefit only if they also are clients of IJL in the *future*. Class members receive no marginal benefit compared to non-class members and thus have received no consideration for the waiver of their claims from the "pledge." "The fairness of the settlement must be evaluated primarily on how it *compensates class members*—not on whether it provides relief to other people…." *Pampers*, 724 F.3d at 720. "Future purchasers are not members of the class, defined as consumers who have purchased [the service]." *Pearson*, 772 F.3d at 786; *see also Felix v. Northstar Location Servs.*, 290 F.R.D. 397, 410 (W.D.N.Y. 2013) (prospective injunctive relief promise of no value to class members who only dealt with defendant in past transaction). These cases recognize that a class composed of people who have done business with defendants *in the past* is not served by prospective injunctive relief that can at most only benefit those who do business with defendants *in the future*. Even if the injunctive relief somehow imposed significant costs on IJL, "the standard is not how much money a company spends on purported benefits, but the value of those benefits to the class." *Bluetooth*, 654 F.3d at 944 (cleaned up).

It is not just class members for whom the benefit of IJL's pledge is nothing more than an illusion. It is also notable that to the extent IJL's "pledge" has any value, that value will presumably be reflected in the price IJL charges its clients. Any defendant forced to change business practices by prospective injunctive relief can simply make the economically rational decision to pass along the additional costs of such changes to its customers. IJL's commitment to provide better matching services will likely mean additional personnel time and may require additional marketing costs to increase the pool of potential dates to enable preferential matching. It is irrational to assume that those additional marginal costs will not be offset by an increase in price. *See Reed v. Continental Guest Servs. Corp.*, No. 10 Civ. 5642, 2011 WL 1311886, 2011 U.S. Dist. LEXIS 36814, at *9 (S.D.N.Y. Apr. 4, 2011) (finding it "hard to judge the value" of settlement relief because the demand for such items "may be quite limited and [the defendant] can simply raise its prices to offset the revenue lost from any use of the discount codes"). The settlement does not prohibit such an offsetting price increase. As a result, the prospective injunctive relief is inherently illusory to future as well as current clients.

V. Class notice is defective because it fails to disclose to the class the identity of the potential *cy pres* recipient(s) or the full amount of attorneys' fees.

Class counsel similarly have failed to cure a defect with the notice of the initial settlement that Barton pointed out in his previous objection. *See* Dkt. 445-3 at 12. The notice fails to inform class members of the identity of the potential *cy pres* recipient. It tells class members only that any funds remaining after payment to eligible claimants, the representative plaintiffs, class counsel, and claims administrator will be sent to "a 501(c)(3) certified charity as agreed upon by the Parties and with the approval of the Court." Dkt. 445-3 at 12. Though they've had three years to agree upon a proposed recipient, neither the notice nor the settlement reveals the identity of the potential *cy pres* recipient(s) or provides any mechanism for class members to provide input on the selection or to receive notice of the recipients' identities once they are recommended to the Court. And while class members are told that class counsel may seek additional fees from any remaining balance, there is similarly no mechanism for class members to be notified and to object, as required by Rule 23(h). *Id.*

It is "[a]n elementary and fundamental requirement of due process" that "notice [be] reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *see also* 18A Charles Alan Wright *et al., Federal Practice and Procedure* § 1796.6 (3d ed. 2005) ("A proposed notice that is incomplete or erroneous or that fails to apprise the absent class members of their rights will be rejected as it would be ineffective to ensure due process.").

The identity of a *cy pres* recipient is material to a reasonable class member's evaluation of the settlement and determination of whether to object or opt out due to an objectionable recipient of class funds. Class members and the court therefore must be notified of any such recipients. *Dennis v. Kellogg Co.*, 697 F.3d 858 (9th Cir. 2012). A settlement cannot be approved if the parties do not establish that the potential recipient has an appropriate connection to the class and their claims. *Id.* at 867 (rejecting proposed settlement because "by failing to identify the *cy pres* recipients, the parties have restricted our ability to undertake the searching inquiry that our precedent requires"). Even when *cy pres* will only dispose of residual funds, pre-settlement notice and review is still necessary. *Thomas v. Magnachip Semiconductor*, No 14-cv-01160-JST, 2016 WL 1394278, at *8 (N.D. Cal. Apr. 7, 2016); *O'Shea v. Am. Solar Sol., Inc.*, No. 14-cv-00894, 2019 U.S. Dist. LEXIS 98860 (S.D. Cal. Jun. 12, 2019).

The Second Circuit requires any recipient of a *cy pres* award to represent the "*next best* compensation use" of class funds. *Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 436 (2d Cir. 2007) (quotation omitted and emphasis added by Second Circuit); *accord In re Holocaust Victims Assets Litig.*, 424 F.3d 132, 141 n.10 (2d Cir. 2005) ("The unclaimed funds should be distributed for a purpose as near as possible to the legitimate objectives underlying the lawsuit, the interests of class members, and the interests of those similarly situated."). This standard ensures that the settlement remains connected to the class members and their claims and to limit possible misuse of funds. Further, in an opt-out settlement such as this, providing the identity of potential *cy pres* recipients preserves the right of absent class members to distance themselves from causes or institutions that 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 when there is a geographic incongruence between the class and recipient. *Nachshin v. AOL, LLC*, 663 F.3d 1034 (9th Cir. 2011).

Class members did not have sufficient information to determine whether or not to waive their rights to sue and consent to the settlement agreement, as doing so requires them to acquiesce to a potentially inappropriate settlement fund recipient. The proposed settlement therefore should be rejected without this information or, at a minimum, a proposal for notifying class members of the proposed recipient and providing a mechanism to allow them to object to the proposed recipient must be added. Similarly, there should be a mechanism for class members to be informed of any request by class counsel for additional attorneys' fees and to object to that request.

CONCLUSION

For the foregoing reasons, the classes should be decertified and the settlement rejected due to inadequate representation. If the Court does not decertify the classes and approves the settlement, class counsel should recover fees of no more than 25% of the monetary fund. In any event, plaintiffs should provide a mechanism by which class members can be notified of any proposed *cy pres* recipient and additional fee request and can object.

Dated: November 25, 2019

/s/ Anna St. John
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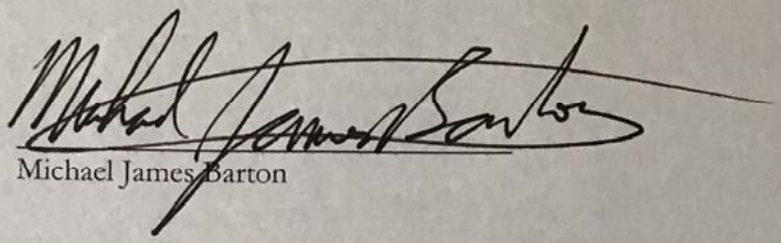
Attorney for Objector Michael James Barton

I, Michael James Barton, am the objector. I sign this written objection drafted by my attorneys as required by the Class Notice § 18.



Michael James Barton

Certificate of Service

The undersigned certifies she electronically filed the foregoing Objection and associated Declaration and Notice of Intent to Appear via the CM/ECF system for the Southern District of New York, thus sending the Objection to the Clerk of the Court and also effecting service on all attorneys registered for electronic filing. Additionally she caused to be served via first class mail a copy of this Objection and associated documents upon the following:

Clerk of Court Daniel Patrick Moynihan United States Courthouse 500 Pearl St. New York, NY 10007-1312	Balestriere Fariello It's Just Lunch Class Action 225 Broadway, 29th Floor New York, NY 10007	Peter Shapiro Lewis Brisbois Bisgaard & Smith LLP 77 Water Street, Suite 2100 New York, NY 10005

Dated: November 25, 2019

/s/ *Anna St. John*
Anna St. John