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SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF ALAMEDA

AARON ASELTINE and JOHN DUNDON,
on behalf of themselves and all
others similarly situated,
Plaintiffs,
v.
CHIPOTLE MEXICAN GRILL, INC.,
Defendant.

Case No. RG21088118

Assigned for All Purposes to:
Hon. Evelio Grillo

OBJECTION AND NOTICE TO APPEAR AT VIRTUAL FAIRNESS HEARING

INTRODUCTION

I am a Settlement Class member. I submitted a claim. My claim confirmation in the above case is: CDJSXI5M. The claim form is incorporated by reference. This sufficiently establishes my standing.[1] If it does not, I will supplement my submission.

I commend the Court for its extremely thorough Preliminary Approval Order and careful attention to the release and fee award.

As to certifiability and final approval, there is an intra-class conflict which requires the use of subclasses with separate counsel because:

- Some class members have a different type of relationship with Defendant. See, *e.g.*, *In re Photochormic Lens Antitrust Litig.*, 2014 U.S. Dist. LEXIS 46107 (M.D. Fla. Apr. 3, 2014) [some commercial purchasers of product had exclusivity agreements].
- Different classes of customers. See, *e.g.*, *Valley Drug Co. v. Geneva Pharmaceuticals, Inc.*, 350 F.3d 1181, 1194 (11th Cir. 2003) (finding conflict between national and regional wholesalers in antitrust action).

[1] If my objections are overruled, I hereby reserve the right file a motion pursuant to 663 to obtain appellate standing. See, *Hernandez v. Restoration Hardware, Inc.*, 4 Cal. 5th 260.

- Some class members are situated in fundamentally different ways from others. *Gonzales v. City of Albuquerque*, 2010 U.S. Dist. LEXIS 98271 (D.N.M. Aug. 21, 2010).
- The named plaintiffs are seeking a different type of relief for some members of the same class. *Ellis v. Costco Wholesale Corp*., 657 F.3d 970 (9th Cir. 2011); *Wilson v. Conair Corp*., 2016 U.S. Dist. LEXIS 72837 (E.D. Cal. June 3, 2016).

Since different groups of class members are entitled to different relief under the settlement, they had conflicting/different interests in the negotiations. The different groups needed to be in subclasses with separate representatives ***and*** counsel. *Dewey v. Volkswagen AG*, 681 F.3d 170 (3d Cir. 2012); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Liti*g., 2016 U.S. App. LEXIS 12047 (2d Cir. June 30, 2016).

Here the differences are so stark, the Court noted the settlement was "conceptually" two different ones. Given the divergent interests at stake, the need for separate counsel was underscored.[2]

TWO SUBCLASSES WERE REQUIRED ALONG WITH SEPARATE AND INDEPENDENT COUNSEL

In its Preliminary Approval Order, the Court noted:

[2] I would have supported final approval if each Claimant could ***elect*** either a voucher or participation in the cash award on a *pro rata* basis. Therefore, this objection is not meant to be a *spoiler*.

> There are approximately 5.6 million total members of the class. The Settlement Class is defined as all persons in the United States who ordered food delivery online.
>
> There are conceptually two settlements – The Rewards Program Class and the Non-Rewards Program Class. The Rewards Program Class is consumers in the "Rewards Program." Those persons are arguably bound by arbitration agreements. The Rewards Program claims preliminarily settled for up to $3,000,000 in free entrée credits. The settlement agreement states there Chipotle will pay attorneys' fees of $312,000, no costs, a service award of $5,000 for class representative Aseltine. Persons in the Rewards Program submit claims and get a Chipotle entrée. The value of the settlement to the absent class members (up to $3,000,000) will not be known until the claims are made within 180 days. The value per class member is the estimated entrée value of $8.50.
>
> The non-Rewards Program Class is consumers not in the "Rewards Program." The non-Rewards Program claims preliminarily settled for $1,000,000 in cash. The settlement agreement states there will be attorneys' fees of up to $333,333.33 (33%), costs of up to $7,423, a service award of $5,000 for class representative Dundon, and settlement administration costs of up to $130,000. After these expenses of approximately $488,333, the class would get $511,667. Persons in the non-Rewards Program submit claims and get a pro-rata share of the fund. (Agt, p12, Sec IV.D.) The value per class member will vary depending on the number of claims made. If 100 persons make claims then each would get $5,116. If 10,000 persons make claims then each would get $51.16.

I agree with the Court's conceptual description there are two settlements. This highlighted the need for subclasses given the intra-class conflict between reward and non-reward class members. One group is getting cash. The other group is getting a voucher. One group is potentially subject to mandatory arbitration. The other is not.

Each subclass should have also had its own, independent counsel. This is because there is a conflict of interest between the two subclasses based on the relief and potential for mandatory arbitration. Having separate named representatives for each subclass but the same conflicted attorneys representing them makes no sense. In such instance, the subclass mechanism offers merely an illusion of required structural safeguards. Both subclasses have been tainted by the inadequacy of their conflicted counsel. Neither they nor the subclass can offer due process procedural safeguards to absent class members.[3] A class cannot reasonably expect named representatives to make informed and intelligent decisions when they are guided by counsel with irreconcilable conflicts. These conflicts arise from the concurrent representation of clients with highly divergent and disparate interests.

Rule 23(a)(4) requires that the representative party in a class action will "fairly and adequately protect the interests of the class." This requirement encompasses whether: (1) any conflicts of interest exist

[3] In fact, the named representatives are also likely inadequate because they allowed conflicted counsel to represent them and their proposed subclasses. It is unclear whether they were warned of the conflicts by their counsel and whether, in their written retainer agreement, they ever waived these conflicts. Even if they did, such a waiver would not bind the class.

between the class representatives and the class as whole; and (2) whether the representatives will adequately prosecute the action.

In *Amchem Products, Inc. v. Windsor*, the Supreme Court reversed certification of the settlement class because it failed to meet the adequacy and predominance requirements of Rule 23. *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997).

In discussing the deficiency of representation, the Court several times alluded to the lack of subclasses, suggesting that, in the Court's view, Rule 23(c)(4)(B) could have helped the class overcome its divergences to satisfy Rule 23(a)(4). In *Amchem*, class certification was sought to achieve a global settlement for both current and future asbestos-related claims, both for claimants who were currently injured, and those who may face future injuries. The Court noted the divergent interests of the class: those currently injured have the goal of "generous immediate payments," and the exposure-only plaintiffs seek "an ample, inflation-protected fund for the future." The Court noted the significance of these differences, as the settlement included no adjustment for inflation, and only a few claimants per year could opt out. The Court concluded there was "no structural assurance of fair and adequate representation for the diverse groups."

The Supreme Court reaffirmed *Amchem* in *Ortiz v. Fibreboard Corporation*, 527 U.S. 815 (1999). In *Ortiz*, the Court again recognized "that a class divided between holders of present and future claims … requires

division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."

In *In re National Football League Players Concussion Injury Litigation*, 821 F.3d 410 (3d. Cir. 2016), the Third Circuit affirmed the district's court certification of a class of retired football players consisting of two subclasses: (1) those "who have no currently known injuries that would be compensated under the settlement;" and (2) those "who are currently injured and will receive an immediate monetary award under the settlement." In addition, Class Counsel appointed lawyers from the Steering Committee to serve as subClass Counsel. Thus, while the court acknowledged that the divide between present and future injury plaintiffs is a "recurring fundamental conflict," structural protections such as the creation of subclasses with their own separate counsel, can be put in place to "assure that differently situated plaintiffs negotiate for their own unique interests." Therefore, the Third Circuit concluded that the adequacy requirement was satisfied since the subclasses were represented in the settlement negotiations by separate representatives and separate counsel, which was reflected in the terms of the settlement. The same protections are missing here. The subclass was not separately represented at the mediation by their own, independent counsel. The terms of the settlement agreement do not reflect any such safeguards. The motion confirms neither subclass ever had independent counsel.

In *In Re Payment Card Interchange Fee and Merchant Discount Antitrust Litigation*, on June 30, 2016, the Second Circuit Court of Appeals issued an opinion in a case involving twelve million class member merchants who sued Visa, Mastercard and various issuing and acquiring banks, alleging a conspiracy in violation of Section 1 of the Sherman Act (governing unlawful monopolization). The Court overturned the district court's approval of a class settlement on the grounds that the class representatives' counsel was conflicted in that they did not adequately represent the diverging interests of the members of the two settlement classes at issue. The settlement would have provided $7.5 billion to at least some members of the class.

The Plaintiffs' antitrust claims alleged that the defendants adopted rules that allowed the banks issuing credit cards to impose an artificially inflated interchange fee that merchants had little choice but to accept. The settlement divided the plaintiffs into two classes. The first class was certified pursuant to Rule 23(b)(3) and included merchants who accepted Visa or Mastercard from a date in 2004 to a date in 2012 who were entitled to $7.25 billion in monetary relief. The second class was certified pursuant to Rule 23(b)(2) and covered merchants that accepted Visa and Mastercard from the date in 2012 onwards forever, who would receive only injunctive relief in the form of rule changes. Based on the provisions of the rules, members of the first class were permitted to opt out of the settlement, whereas members of

the second class had no opt out rights. In addition, only members of the second class were required to forfeit certain rights to challenge Visa and MasterCard in the future.

The Second Circuit overturned the approval of the settlement based on its conclusion that members of the second class were not adequately represented by counsel, which had acted on behalf of both subclasses. The Court concluded that counsel's conflict violated both Rule 23(b)(4) and the United States Constitution's Due Process Clause. That conclusion was based on analysis of the traditional factors examined under Rule 23(a)(4) to determine the adequacy of representation; *namely*, that the class representative have an interest in vigorously pursuing the claims of the class and have no interests antagonistic to the interests of other class members. The Court reviewed Supreme Court guidance as to adequate representation in the settlement class context. In many circumstances, it is necessary to create subclasses and have different counsel act for each such subclass. In this case, however, the two classes were represented by the same counsel despite the conflicting interests of the class members. Members of the class who sought only monetary relief would want to maximize cash compensation for past harm, while the members who were obtaining only injunctive relief would focus on maximizing the restraints on the network rules to prevent future harm. The Court relied on the Supreme Court's guidance, *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp*.,

527 U.S. 815 (1999), to conclude that such divergent interests require separate counsel in view of the impact on the essential allocation decisions concerning plaintiffs' compensation and defendants' liability, particularly because members of the second class could not opt out. Meanwhile, the Court pointed out that Class Counsel had an enormous incentive to conclude this deal, which represented the largest ever cash settlement in an antitrust class action and which was to net counsel $544.8 million in fees. That incentive suggested that counsel may have been motivated by a desire to consummate the deal, with less concern for the interests of the clients in the second class. This case is similar.

The Eleventh Circuit took a similar approach in *Juris v. Inamed Corporation*, 685 F.3d 1294 (11th Cir. 2012), when faced with similar facts of certifying a class consisting of members with current injuries, as well as potential future injuries. A class member objected to the settlement on the grounds that *Amchem* requires subclasses to address the two diverging interests. The court clarified, however, that *Amchem* and *Ortiz* held that Rule 23(a)(4) calls for some type of adequate structural protection, which includes but does not necessarily require formal subclasses. In fact, plaintiffs with potential future injuries were represented by separate counsel during negotiations. The Eleventh Circuit held that having separate counsel adequately addressed the divergent interests within the class, and "served as the functional equivalents of formally-subclassed groups." Here, there

were not structural protections put in place to protect against divergent interests.

As such, because there are insufficient procedural protections, approval of this proposed settlement would violate due process.

OTHER MISCELLANEOUS OBJECTION REQUIREMENTS

Name and contact information is provided.

My grounds of objection are stated herein.

All papers I have are produced. The claim form is in the possession of the administrator. No copy was provided. However, I received an email confirming claim submission.

On March 10, 2022, I sent an email to class counsel asking questions about the settlement. No response was received.

I intend to appear at the fairness hearing.

As to witnesses to be called at the fairness hearing, if permitted, I shall call both named representatives and their lawyers. I have no need to call any witnesses from Defendant.

As to relevant documents, I request production of the written retainer agreement of the New York based client since California retainer agreements are privileged.

My proof of class membership is my claim form and ID which is already in the possession of the settling parties.

As to the list of objections, I do not keep records of cases in which I object. In some cases, I simply dispatch an objection, sometimes, handwritten or drafted but not saved on a computer. Running my name on Lexis Advance shall reveal cases. It is equally available to the parties. There is simply no genuine need for the list. Based on my recollection and materials in my custody, control, or possession, I recall the following objections:

- Ebarle, et al. v. LifeLock Inc., Case No. 3:15-cv-00258-HSG, in the U.S. District Court for the NDCA
- In re: Google Plus Profile Litigation, Case No. 5:18-cv-06164, in the U.S. District Court for the Northern District of California
- Becker, et al v. Massimo Zanetti Beverage, USA, Inc
- Simmons et al. v. Apple Inc., Case No. 17cv312251
- 3:10 md-02143 Rs Optical Disk Drive Antitrust Litig.
- Chester v. The TJX Companies 15cv01437
- Terri N. White 8:05-cv-1070
- Staley v. Gilead, 3:19-cv-02573-EMC
- Burrage, et al v. LG
- ADP v. Viega
- CHRISTINA GRACE, ET AL. V. APPLE, INC. - CAND Case No.: 5:17-cv-00551
- Mike and Ikes Case [Just Born Candy]
- Nestle USA Case [Candy Case]
- In Re Plaid Inc: Privacy Litigation_Master Docket 4:20-cv-03056
- 21-15022 Indirect Purchaser Plaintiffs, et al v. Panasonic Corporation
- 20-cv-04699 In Re: TikTok, Inc., Consumer Privacy Litigation
- 1:19-cv-20592-JEM Kukorinis v. Walmart, Inc.
- ANASTASHA BARBA VS. OLD NAVY, LLC ET AL, #CGC-19-581937
- Connary et al vs. SC Johnson - RG2006167
- Michael Starke v. Stanley Black & Decker, Inc. - Case No. C-03-CV-21-001091
- 4:13-md-02420-YGR IN RE: LITHIUM ION BATTERIES ANTITRUST LITIGATION
- 3:14-cv-00582-JD Norcia v. Samsung Telecommunications America, LLC

- 3:11-cv-03003-JST Rodman v. Safeway Inc.
- 2020CH07156, MURANSKY DAVID Vs. GODIVA CHOCOLATIER, Inc.
- 4:19-cv-01057-HSG Izor v. Abacus Data Systems Inc.
- 19-cv-22864-MGC COLLINS v. QUINCY BIOSCIENCE
- Hamm v. Sharp, 5:19-CV-00488
- In re: Equifax Inc. Customer Data Security Breach Litigation, Case No. 1:17-md-2800-TWT (N.D. Ga.)
- JC Penney

Respectfully submitted on April 15, 2022

steven helfand

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PROOF OF ELECTRONIC SERVICE

This pleading was distributed electronically to the following relevant persons

Class counsel: sgold@kalielgold.com; jkaliel@kalielpllc.com

Defendants counsel: angela.agrusa@us.dlapiper.com; angela.agrusa@us.dlapiper.com

Additionally, I caused to be mailed, via first class, postage prepaid, a copy of this objection to: Delivery Fee Objections P.O. Box 3037 Portland, OR 97208-3037 on April 15, 2022.

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