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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE TRANSPACIFIC PASSENGER AIR TRANSPORTATION ANTITRUST LITIGATION

This Document Relates To:

All Actions

Civil Case No. 3:07-CV-05634-CRB
MDL 1913

PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT WITH DEFENDANT ALL NIPPON AIRWAYS CO., LTD AND FOR APPROVAL OF NOTICE PROGAM, NOTICE FORMS, AND PLAN OF ALLOCATION; AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

Hearing Date: May 10, 2019
Judge: Hon. Charles R. Breyer
Time: 10:00 a.m.
Courtroom: 6, 17th Floor

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on May 10, 2019 at 10:00 a.m., before the Honorable Charles R. Breyer, United States District Court for the Northern District of California, 450 Golden Gate Ave., Courtroom 6, 17th Floor, San Francisco, California, Plaintiffs will move the Court, pursuant to Federal Rule of Civil Procedure 23(e), for entry of an Order:

1. Granting preliminary approval of the settlement agreement ("Settlement") Plaintiffs have executed with Defendant All Nippon Airways, Co., Ltd. ("ANA");

2. Certifying the Settlement Classes;

3. Appointing Lead Counsel for Plaintiffs as Settlement Class Counsel and the Class Representatives identified in the ANA Settlement Agreement to serve as class representatives on behalf of the Settlement Classes; and

4. Approving the notice program and plan of allocation described herein.

The motion should be granted because the proposed settlement is within the range of reasonableness and meets the standards for preliminary approval under the Northern District of California's Procedural Guidance for Class Action Settlements. www.cand.uscourts.gov/ClassActionSettlementGuidance. The motion is based on this (i) Notice of Motion and Motion, (ii) the supporting Memorandum of Points and Authorities, (iii) the accompanying Joint Declaration of Counsel for Plaintiffs, (iv) the accompanying declaration of Shannon R. Wheatman and exhibits thereto; (v) the accompanying declaration of Kenneth R. Feinberg and exhibits thereto; (vi) the Settlement Agreement with ANA; (vii) any further papers filed in support of this Motion; (viii) the argument of counsel, and (ix) all pleadings and records on file in this matter.

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STATEMENT OF ISSUES TO BE DECIDED

1. Whether the proposed Settlement Agreement falls within the "range of possible approval" that justifies giving notice because the Court will likely be able to approve the settlement proposal under Rule 23(e)(2), and should, therefore, be preliminarily approved by the Court.

2. Whether the proposed Settlement Classes meet the requirements of Federal Rule of Civil Procedure 23(a) and (b), and should be certified for settlement purposes.

3. Whether Lead Counsel for Plaintiffs ("Class Counsel") should be appointed as Settlement Class Counsel and the Class Representatives identified in the ANA Settlement Agreement be appointed as Class Representatives on behalf of the Settlement Classes.

4. Whether the proposed notice plan and forms fairly apprise potential class members of the existence of the settlements in this action and their rights under them.

5. Whether the proposed notice plan and forms conform to the requirements of Federal Rule of Civil Procedure 23 and due process.

6. Whether Class Counsel's proposed plan of allocation is fair, reasonable, and adequate.

SUMMARY OF ARGUMENT

Pursuant to Federal Rule of Civil Procedure 23, Plaintiffs hereby move this Court for an order preliminarily approving the class action settlement Plaintiffs reached with the sole, remaining Defendant in this action, All Nippon Airways Co., Ltd. ("ANA"). A copy of the Settlement Agreement is attached as Exhibit A to the Joint Declaration of Settlement Class Counsel ("Joint Decl."). The Settlement resolves all claims brought by Plaintiffs against ANA, who will pay $58 million.

The Court should preliminarily approve Plaintiffs' settlement with ANA because it is within the range of possible final approval and justifies giving notice to the proposed Settlement Classes. Further, the Court will be able to finally approve the settlement under Rule 23(e)(2) because the ANA Settlement easily satisfies that standard. The Settlement is the result of informed and hard-fought and arms' length negotiations, and it is fair, reasonable, and adequate. *See Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). The monetary recovery for the class is significant. Indeed, at $58 million, the settlement is nearly three times the recovery Plaintiffs obtained from any other defendant in this long-running litigation. Thus, the Settlement satisfies the requirements for final approval and is thus worthy of preliminary approval.

Applying Rule 23 of the Federal Rules of Civil Procedure, the Court should certify the three proposed Settlement Classes (the "Settlement Classes"),[1] defined as:

> Settlement Class I ("Japan Settlement Class"): All persons and entities that directly purchased tickets for passenger air transportation from JAL or ANA, or any predecessor, subsidiary or affiliate thereof, that originated in the United States and included at least one flight segment from the United States to Japan between the period beginning February 1, 2005 and ending December 31, 2007. Excluded from the class are any tickets that did not include a fuel surcharge. Excluded from the class are any antitrust immunized fares agreed upon at IATA "Tariff Coordinating Conferences." Excluded from the class are tickets exclusively acquired through award or reward travel or any tickets acquired for infant travel

[1] *See* Joint Decl. Ex. A ¶ 3 (ANA Settlement Agreement). Settlement Classes I, II, and III are not mutually exclusive. One can be a member of multiple classes. Settlement Classes I and II are identical to the classes this Court certified for litigation purposes. *See* Order Granting Mot. Class Cert., ECF No. 1224 (certifying Japan and *Satogaeri* Classes).

with a 90% discount. Also excluded from the class are purchases by government entities, Defendants, any parent subsidiary or affiliate thereof, and Defendants' or any other commercial airline's officers, directors, employees, agents, and immediate families.

Settlement Class II ("*Satogaeri* Settlement Class"): All persons and entities that directly purchased *Satogaeri* fares from JAL or ANA or any predecessor, subsidiary or affiliate thereof that originated in the United States and included at least one flight segment to Japan and does not include travel to countries other than the United States and Japan between the period beginning January 1, 2000 and ending April 1, 2006. Excluded from the class are purchases by government entities, Defendants, any parent subsidiary or affiliate thereof, and Defendants' officers, directors, employees and immediate families. Also excluded are purchases of "Satogaeri Special" and maerui satogaeri fares.

Settlement Class III: All persons and entities that purchased passenger air transportation originating in the United States that included at least one flight segment to Asia or Oceania, from or on any of the Defendants, or any predecessor, subsidiary, or affiliate thereof, at any time between January 1, 2000 and December 1, 2016. Excluded from the class are governmental entities, Defendants, former Defendants in the Action, any parent, subsidiary or affiliate thereof, and Defendants' officers, directors, employees and immediate families.

Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy are easily met with respect to the foregoing proposed settlement classes. *See, e.g.*, *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291, 300 (N.D. Cal. 2010), *abrogated on other grounds in In re ATM Fee Antitrust Litig.,* 686 F.3d 741, 755 n. 7 (9th Cir. 2012); *In re Rubber Chemicals Antitrust Litig.*, 232 F.R.D. 346, 350-51 (N.D. Cal. 2005). Likewise, Rule 23(b) is satisfied because common questions predominate and a class action is superior to pursuing numerous individual cases. *See In re Static Random Access Memory (SRAM) Antitrust Litig.*, 264 F.R.D. 603, 615 (N.D. Cal. 2009); *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2006 WL 1530166, at *6 (N.D. Cal. June 5, 2006).

Further, under Rule 23(g), class certification requires that the Court appoint class counsel. Based on their extensive experience and vigorous prosecution of this action, as well as this Court's prior orders with respect to earlier settlements, Cotchett, Pitre & McCarthy and Hausfeld LLP should be appointed as Settlement Class Counsel pursuant to Rule 23(g) for

purposes of this Settlement, and the Class Representatives identified in the ANA Settlement Agreement should be appointed as class representatives for the Settlement Classes.

Pursuant to Federal Rule of Civil Procedure 23(c), Plaintiffs also move the Court for an Order (1) approving the proposed notice program and forms ("Notice Program"), attached to the accompanying Declaration of Dr. Shannon R. Wheatman as exhibits; (2) approving the claim form attached to the accompanying Joint Declaration of Counsel for Plaintiffs; and (3) preliminarily approving Plaintiffs' proposed plan of allocation ("Plan of Allocation"). As with the previously-approved notice programs, this proposed Notice Program sets forth a robust, multifaceted approach to deliver plain and easy-to-understand information regarding the settlement reached between Plaintiffs and ANA (with Plaintiffs, the "Settling Parties").

Plaintiffs have retained a recognized notice expert, Kinsella Media, which has designed a notice program that squarely and comprehensively addresses the specific nature of the settlements and the settlement classes in this action. *See generally* Wheatman Decl.; *see also* Joint Decl. ¶¶ 10-11. Kinsella Media prepared the highly successful notice program approved by this Court in *In re International Air Transportation Surcharge Antitrust Litig*., No. 06-cv-01793-CRB (N.D. Cal.), as well as the notice plans previously approved by the Court with respect to two earlier round of settlements, along with the litigation classes the Court certified in 2018. *See* Wheatman Decl. ¶ 7.

The Notice Program combines the provision of: (1) multiple and targeted publications of the class notice in those domestic and international paid media outlets most likely to inform potential class members about the settlements; (2) press releases (i.e., earned media) that are uniquely targeted towards potential class members; (3) placement of the class notice on internet banner advertisements, including through the social media outlet Facebook; (4) establishment of a website that provides notice of the settlements; (5) specific outreach to travel agents who were likely to have sold *Satogaeri* fares encouraging the travel agents to be in touch with their clients about the claims at issue in this Settlement; and (6) a toll free telephone support line to service class members' inquiries regarding the notice, which in turn will allow them to request a copy of the notice delivered via direct mail.

Plaintiffs' Notice Program will fairly apprise potential class members of the existence of the settlement agreement and their options under it. *See generally* Wheatman Decl. Finally, the proposed Plan of Allocation will fairly compensate class members based on the scope of the release provided by ANA. Joint Decl. ¶ 12. Accordingly, the Court should approve dissemination of class notice and preliminarily approve the allocation of settlement funds and the claim form in the manner and form proposed herein.

In short, the Settlement is within the range of possible approval and in the best interests of all class members. It more than "justifies giving notice." *See* Fed. R. Civ. P. 23(c)(2) (advisory committee notes) (2018). Accordingly, Plaintiffs seek an order preliminarily approving the Settlement Agreement, provisionally certifying the Settlement Class and appointing Co-Lead Counsel for Plaintiffs as Settlement Class Counsel and the Class Representatives identified in the ANA Settlement Agreement as class representatives, approving dissemination of class notice, and preliminarily approving the allocation of settlement funds and the claim form in the manner and form proposed herein.

MEMORANDUM OF POINTS AND AUTHORITIES

I. SETTLEMENT NEGOTIATIONS

Class Counsel and counsel for ANA engaged in extensive arm's length negotiations before reaching the Settlement. *See* Joint Decl. ¶¶ 3-5 (describing negotiation scope and details). Settlement Class Counsel and defense counsel, all experienced and skilled attorneys, vigorously advocated their respective clients' positions. Initial negotiations, beginning more than a year ago, continued into December 2018, and included multiple rounds of negotiation and the use of renowned mediator Kenneth R. Feinberg. *Id.* ¶ 3. Mr. Feinberg also served as a neutral in determining an allocation of the $58 million between the three settlement classes in the ANA Settlement Agreement. *Id.* ¶ 7.

Before the Settlement was reached, Plaintiffs spent significant time investigating the claims against ANA, including through extensive discovery and proffer sessions from previously-settling Defendants. *Id.* ¶ 5. Indeed, Plaintiffs were preparing for a March 4, 2019 trial against ANA and had already engaged in extensive trial preparations, including producing expert reports and exchanging exhibit and witness lists with ANA. *Id.* Class Counsel believe the Settlement—$58 million in recovery allocated between three settlement classes—represents an excellent recovery for the classes and is fair, reasonable, and adequate. This proposed settlement, if finally approved, would bring an end to this long-running, complex antitrust class action.

II. THE SETTLEMENT AGREEMENT

The proposed Settlement Agreement resolves all claims against ANA in the alleged conspiracy to fix or stabilize prices for air passenger travel, including associated surcharges, for international flights involving at least one flight segment between the United States and Asia/Oceania. The Class will receive $58 million. *See* Joint Decl., Ex. 1 at ¶¶ 1.20. The terms of the Agreement are outlined below.

A. Consideration Provided by the Settlement Agreement

ANA has agreed to pay $58 million to resolve all claims against it. Joint Decl., Ex. 1 at

¶ 1.20.[2] The settlement eliminates significant risk to the Classes. While Plaintiffs believe their case is strong, Plaintiffs bear the burden of establishing liability, impact, and damages. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc*., 396 F.3d 96, 118 (2d Cir. 2005). If the parties had not reached Settlement with ANA, they would have had to continue preparing for a lengthy, costly, and complex trial. The risks to both sides are magnified by the fact that the outcome at trial in complex antitrust actions is uncertain. *See In re High-Tech Employee Antitrust Litig*., No. 11-CV-02509-LHK, 2015 WL 5159441, at *2 (N.D. Cal. Sept. 2, 2015). In addition, any trial outcome would be subject to potential appeals, which, at a minimum, would substantially delay any recovery achieved for the Classes. *Id*. Moreover, as expressly recognized by the Court, any trial outcome would have also been subject to a potential decertification order. *See* Order Granting Mot. Class Cert. at 17, ECF No. 1224 ("Class Cert. Order"). Taken together, these circumstances suggest that further litigation would have been costly, uncertain and would have detrimentally delayed any potential relief for the Classes. By contrast, the Settlement provide the Classes with timely, certain, and meaningful recovery.

The allocation of the $58 million total Settlement Amount between the Settlement Classes is as follows: (1) $39,440,752.50 to the Japan Class; (2) $11,059,247.50 to the *Satogaeri* Class; and (3) $7,500,000.00 to Settlement Class III. This allocation is based on the recommendation of Kenneth Feinberg, following his presiding over extensive settlement negotiations between the parties and his discussions with Class Counsel. *See generally* Feinberg Decl. ¶ 7. The allocation takes into account, *inter alia*, the potential each class had to recover at trial, previous settlement agreements in this case, and the amount of ANA's commerce relative to the other Defendant airlines. *See id*. at ¶¶ 9-17.

B. The Scope of the Release

The settlement releases ANA from all claims arising from or relating to the anticompetitive pricing of passenger air transportation between the United States and

[2] Had Plaintiffs fully prevailed on their claims at trial, and their damages estimate accepted by the jury, Plaintiffs could have received approximately $92.4 million for single damages related to the Japan Class and between $22.8 and $29 million for single damages related to the *Satogaeri* Class. Joint Decl. ¶7.

Asia/Oceania with respect to the pricing of fares, fuel surcharges, or any other element or component of pricing that were or could have been alleged in the Second Consolidated Class Action Complaint. Joint Decl., Ex. 1 at ¶¶ 1.17.[3] ANA will provide notice to the state attorneys general pursuant to the Class Action Fairness Act. Joint Decl. ¶ 16.

III. PLAINTIFFS HAVE RETAINED A RENOWNED NOTICE EXPERT SPECIALIZING IN CLASS ACTION NOTIFICATION PROGRAMS

As they did with previous rounds of notice, Plaintiffs have retained Dr. Shannon R. Wheatman, the President of Kinsella Media, LLC ("Kinsella Media"), a firm that specializes in the design and implementation of legal notification programs. Wheatman Decl. ¶ 6. Dr. Wheatman has leveraged their expertise and experience to design a notice program that provides the best notice practicable to members of the Settlement Classes, in light of the class members' demographics and the media channels through which they can best be reached. *Id.* ¶¶ 6-8.

Kinsella Media has created a comprehensive and multifaceted notification program to reach members of the Settlement Classes. The proposed notice program combines publication through paid and earned media, online advertising and social media, and internet notice. Specifically, the program will:

(1) Direct notice to claimants of the prior settlements in this litigation, and other likely claimants. Wheatman Decl. ¶¶ 11-14.

(2) Provide extensive publication notice appearing in national magazines and local ethnic newspapers and websites, including Time, Facebook, and 37 newspapers covering Chinese, Filipino, and Japanese audiences. Notices will also be posted on websites likely to be utilized by class members. Wheatman Decl. ¶¶ 23, 26-28.

(3) A nationwide press release will be distributed on PR Newswire's US1 news circuit reaching approximately 5,400 print and online media outlets and more than 4,000 websites, databases, and online services. Wheatman Decl. ¶ 37.

[3] Because the settlement agreement includes Settlement Class III, the settlement releases claims for that class as well as for the two other classes for which Plaintiffs were preparing for trial against ANA.

(4) Continued use of a dedicated settlement website—www.AirlineSettlement.com—to enable potential Class Members to get information on the settlements. Wheatman Decl. ¶ 38.

(5) A toll-free number will prompt the caller to choose one of the following languages: English, Chinese (Simplified and Traditional), and Japanese. Wheatman Decl. ¶ 39.

(6) A post office box will also be established allowing members of the settlement classes to contact Settlement Class Counsel by mail with specific requests or questions, providing class members additional avenues to obtain pertinent information about their rights. Wheatman Decl. ¶ 40.

(7) A special mailing will be made to travel agents who sold tickets that are part of the *Satogaeri* Class, to help ensure outreach to travel agent's clients and members of that Class. Wheatman Decl. ¶ 15.

Because passenger mailing lists are not available from defendants, this combination of internet and publication notice—coupled with direct mail notice to the claimants from previous settlements—provides appropriate mechanisms to reach the settlement classes. *Id.*, ¶ 9. The "Notice Program meets due process standards and provides the best notice practicable to the Class under the circumstances . . . ." *Id.*, ¶ 10.

IV. THE COURT SHOULD PRELIMINARILY APPROVE THE SETTLEMENT

A. Class Action Settlement Procedure

Proposed class action settlements must be approved by the Court. *See* Fed. R. Civ. P. 23(e). Plaintiffs respectfully request that the Court certify the proposed Settlement Classes, preliminarily approve the Settlement, and appoint Class Counsel as Settlement Class Counsel. *See* A. Conte & H.B. Newberg, *Newberg on Class Actions* § 11:25 (4th ed. 2002) ("*Newberg*") (outlining the steps of preliminary approval and class certification, notice, and a fairness hearing, which are required prior to final approval of a class settlement and are designed to safeguard the rights of absent class members).

B. Standards for Preliminary Settlement Approval

"[T]here is an overriding public interest in settling and quieting litigation . . .

particularly . . . in class action suits." *Van Bronkhorst v. Safeco Corp.*, 529 F.2d 943, 950 (9th Cir. 1976). The district court has substantial discretion in deciding to approve a class action settlement. *See Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004); *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). Preliminary approval requires that the terms of the proposed settlement fall within the "range of possible approval." *See Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. 2009); *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007). Preliminary approval is appropriate when the terms are "sufficient to warrant public notice and a hearing." *See Manual for Complex Litigation* § 13.14 (4th ed. 2004) ("*Manual"*); *see also* Fed. R. Civ. P. 23(c)(2) (advisory committee notes) (2018) (preliminary approval appropriate where settlement "justifies giving notice" to the proposed class).

Preliminary approval should be granted "[w]here the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval." *In re NASDAQ Mkt.-Makers Antitrust Litig*., 176 F.R.D. 99, 102 (S.D.N.Y. 1997). In addition, under amendments to Rule 23 that went into effect in December 2018—amendments that have been characterized as "form over substance," *Swinton v. SquareTrade, Inc.*, 2019 WL 617791, at *5 (S.D. Iowa Feb. 14, 2019)— courts should determine at preliminary approval whether "giving notice is justified by the parties' showing that the court will likely be able to: (i) approve the proposal under Rule 23(e)(2); and (ii) certify the class for purposes of judgment on the proposal." Fed. R. Civ. P. 23(e)(1)(B)(i–ii). Application of these factors here supports preliminary approval of the Settlement. As shown below, the proposed Settlement is fair, reasonable, and adequate—and, as with prior settlements in this action, likely to be approved at final approval. Finally, as the following demonstrates, Plaintiffs have complied with the Northern District's newly-promulgated *Procedural Guidance for Class Action Settlements.* Therefore, the Court should preliminarily approve the settlement and permit notice of the Settlement to be disseminated to the Settlement Classes.

C. The Proposed Settlement is Likely to be Approved at Final Approval

The proposed Settlement will almost certainly be approved after the final fairness hearing because it satisfies the requirements of Rule 23(e)(2). The class representatives and Class Counsel have adequately represented the Classes, obtaining a significant result after negotiating at arm's length, with the assistance of a nationally-renowned mediator, to reach the Settlement. The proposal also treats members of each Settlement Class equitably relative to each other, with a *pro rata* distribution within each class and Mr. Feinberg's recommendation for allocation between the Classes. And the relief is more than adequate, garnering an excellent result for the Classes that will provide immediate compensation without continued risk.

The Settlement is entitled to "an initial presumption of fairness" because it resulted from arm's length negotiations among experienced counsel. *See Newberg* § 11.41. These negotiations occurred over a span of more than one year and collectively involved telephonic and face-to-face meetings; substantial correspondence; and the review of industry materials, documents produced by all of the Defendants, and transactional data produced in this litigation. The negotiations were sharply contested and conducted in good faith. Joint Decl. ¶¶ 3-5. The settlement was only reached after engaging an experienced mediator—Mr. Kenneth Feinberg, weeks after an initially unsuccessful, two-day mediation session, also overseen by Mr. Feinberg. "'Great weight' is accorded to the recommendation of counsel, who are most closely acquainted with the facts of the underlying litigation." *Nat'l Rural Telecomm. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal. 2004). Thus, "the trial judge, absent fraud, collusion, or the like, should be hesitant to substitute its own judgment for that of counsel." *Id.* (internal citation omitted). Class Counsel believe that the Settlement is in the best interests of the Settlement Classes.

Moreover, the total Settlement Amount of $58,000,000 is significant and compares favorably to other antitrust settlements, including previous settlements in this action for which final approval has already been granted. *See* Order Granting Mot. Final Approval, ECF No. 1009 (granting final approval of $39.502 million in settlements for eight defendants); Order Granting Mot. Fees, ECF No. 1252 ("Fees Order"); Order Granting Final Approval

Settlements, ECF No. 1259 (granting final approval of $50.65 million in settlements for four defendants).

V. THE COURT SHOULD CERTIFY THE SETTLEMENT CLASSES

The Court should certify Settlement Class III. As a preliminary matter, the Court has already certified Settlement Classes I and II for litigation purposes, *see* Class Cert. Order, and there is no reason to disturb those findings now. Settlement Class III, which is substantively the same as settlement classes the Court has previously certified for settlement purposes in this action, should be certified as a Settlement Class again here. It is well-established that price-fixing actions like this are appropriate for class certification. *See, e.g.*, *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 267 F.R.D. 291 (N.D. Cal. 2010) ("*LCD*"); *In re Static Random Access (SRAM) Antitrust Litig.*, No. C 07-01819 CW, 2008 WL 4447592 (N.D. Cal. Sept. 29, 2008). Federal Rule of Civil Procedure 23 provides that a court should certify a class action where, as here, Plaintiffs satisfy the prerequisites of Rule 23(a) (numerosity, commonality, typicality, and adequacy) and 23(b) (predominance and superiority).[4] This does not involve a determination of whether Plaintiffs will ultimately prevail on the substantive merits of their claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). The only issue is whether Plaintiffs satisfy the Rule 23 requirements. *Id.* at 178.

A. Settlement Class III Satisfies Rule 23(a)

1. The Class is so numerous that joinder is impracticable.

The first requirement for maintaining a class action is that its members are so numerous that joinder would be impracticable. Fed. R. Civ. P. 23(a)(1). Courts have generally found that the numerosity requirement is satisfied when class members exceed forty. *Newberg* § 18:4; *Or. Laborers-Emp'rs. Health & Welfare Trust Fund v. Philip Morris, Inc.*, 188 F.R.D. 365, 372-73 (D. Or. 1998). Geographic dispersal of plaintiffs may also support a finding that joinder is "impracticable." *Rubber Chems.*, 232 F.R.D. at 350-51; *see also LCD*, 267 F.R.D. at 300 (stating that given the nature of the LCD market, "common sense dictates that joinder would be

[4] Rule 23(b)(3)'s "manageability" requirements need not be satisfied in order to certify a settlement class. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

impracticable."). Here, Settlement Class III consists of hundreds of thousands of members who purchased qualifying airfare involving at least one flight segment originating in the United States. Proposed Settlement Class III satisfies the numerosity requirement.

2. This case involves common questions of law and fact.

The second prerequisite to class certification is the existence of "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). The Ninth Circuit has made clear that the commonality requirement is to be "construed permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). Commonality is satisfied by the existence of a single common issue. *Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir. 1975). "Courts consistently have held that the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist." *Rubber Chems.*, 232 F.R.D. at 351 (internal citation omitted). Here, all class members share common questions of law and fact that revolve around the existence, scope, effectiveness, and implementation of Defendants' alleged conspiracy, and that are central to each class members' claims. Similar questions have satisfied the commonality requirement in antitrust class actions in this District. *LCD*, 267 F.R.D. at 300 (stating "the very nature of a conspiracy antitrust action compels a finding that common questions of law and fact exist") (citing *Rubber Chems.*, 232 F.R.D. at 351; *DRAM*, 2006 WL 1530166, at *3).

3. Representative Plaintiffs' claims are typical of the claims of each Class.

"Under [Rule 23]'s permissive standards, representative claims are 'typical' if they are reasonably co-extensive with those of absent class members; they need not be substantially identical." *Hanlon*, 150 F.3d at 1020. "Generally, the class representatives 'must be part of the class and possess the same interest and suffer the same injury as the class members.'" *LCD*, 267 F.R.D. at 300 (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982)).

Typicality is easily satisfied in horizontal price-fixing cases because "where[] it is alleged that the defendants engaged in a common scheme relative to all members of the class, there is a strong assumption that the claims of the representative parties will be typical of the absent class members." *In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1035 (N.D. Miss. 1993). As such, factual differences among individual transactions or in the amount of damages

do not undermine typicality, so long as the damages suffered by Plaintiffs and the Classes arise from the purchase of products affected by the conspiracy. *See Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001), *abrogated on other grounds by Johnson v. California,* 543 U.S. 499 (2005). Here, Plaintiffs assert the same claims on behalf of themselves and Settlement Class III—that they purchased air passenger tickets from Defendants and were overcharged due to the alleged antitrust conspiracy between the Defendants and their co-conspirators. Therefore, Plaintiffs' claims are typical of the claims of the other class members.

4. Representative Plaintiffs will fairly and adequately represent the interests of the Class and should be appointed as Class Representatives.

A representative plaintiff is an adequate representative of the class if he or she: (1) does not have any interests antagonistic to or in conflict with the interests of the class; and (2) is represented by qualified counsel who will vigorously prosecute the class's interests. *Hanlon*, 150 F.3d at 1020. Here, the Class Representatives satisfy both of these requirements. The interests of Plaintiffs and members of Settlement Class III are aligned because they all claimed similar injury in the form of higher airline ticket prices for travel from the United States to Asia/Oceania due to Defendants' alleged conspiracy, and all seek the same relief. The Class Representatives understand the allegations in this case and have reviewed pleadings and collected or produced documents requested by Defendants. Joint Decl. ¶ 9. By proving their own claims, the Class Representatives will necessarily prove the claims of their fellow class members; as such they should be named as Class Representatives for Settlement Class III.

Further, Plaintiffs are represented by highly qualified counsel. Both Cotchett, Pitre & McCarthy and Hausfeld LLP have successfully prosecuted numerous antitrust class actions and are committed to vigorously prosecuting this action on behalf of all of the Settlement Classes. They have undertaken the responsibilities assigned by the Court and have directed the efforts of other Plaintiffs' counsel. Class Counsel's prosecution of this case amply demonstrates their diligence and competence. Rule 23(a)(4) is satisfied.

B. Settlement Class III Satisfies the Requirements of Rule 23(b)(3)

1. Common questions of law or fact predominate over individual questions.

"Courts have frequently found that whether a price-fixing conspiracy exists is a common question that predominates over other issues because proof of an alleged conspiracy will focus on defendants' conduct and not on the conduct of individual class members." *LCD*, 267 F.R.D. at 310. Courts have held that this issue alone is sufficient to satisfy the predominance requirement. *See, e.g.*, *SRAM*, 264 F.R.D. at 612-14. Therefore, common issues relating to the existence and effect of the alleged conspiracy on air passenger ticket prices for travel from the United States to Asia/Oceania predominate over any questions arguably affecting individual class members. Proof of how Defendants implemented and enforced their conspiracy will also be common to Settlement Class III and predicated on establishing the existence of Defendants' antitrust conspiracy. These overriding issues satisfy the predominance requirement.

2. A class action is superior to other available methods for the fair and efficient adjudication of this case.

"[I]f common questions are found to predominate in an antitrust action, then courts generally have ruled that the superiority prerequisite of Rule 23(b)(3) is satisfied." Wright, Miller & Kane, *Federal Practice and Procedure: Civil Procedure* § 1781 at 254-55 (3d ed. 2004). That is because in price-fixing cases, "the damages of individual indirect purchasers are likely to be too small to justify litigation, but a class action would offer those with small claims the opportunity for meaningful redress." *SRAM*, 264 F.R.D. at 615. Here, a class action is superior to individual litigation because "[n]umerous individual actions would be expensive and time-consuming and would create the danger of conflicting decisions as to persons similarly situated." *Lerwill v. Inflight Motion Pictures, Inc*., 582 F.2d 507, 512 (9th Cir. 1978).

Further, requiring individual cases would deprive many class members of any practical means of redress. Because prosecution of an antitrust conspiracy against economically powerful defendants is difficult and expensive, most class members would be effectively foreclosed from pursuing their claims absent class certification. *See Hanlon*, 150 F.3d at 1023; *see also SRAM*, 264 F.R.D. at 615. Therefore, a class action is the superior method of adjudicating the claims raised in this case.

C. The Court Should Appoint Class Counsel as Settlement Class Counsel.

"An order that certifies a class action . . . must appoint class counsel under Rule 23(g)." Fed. R. Civ. P. 23(c)(1)(B). Courts must consider (i) counsel's work in identifying or investigating claims; (ii) counsel's experience in handling the types of claims asserted; (iii) counsel's knowledge of applicable law; and (iv) the resources counsel will commit to representing the class. Fed. R. Civ. P. 23(g)(1)(A). After considering competing motions, the Court appointed Cotchett, Pitre & McCarthy and Hausfeld LLP as Settlement Class Counsel. *See* Order Interim Class Counsel, ECF. No. 130; Order Granting Mot. Substitution, ECF No. 175. Cotchett, Pitre & McCarthy and Hausfeld LLP are willing and able to vigorously prosecute this action and to devote all necessary resources, as they have demonstrated over the last 12 years. Indeed, the work they have done since their appointment provides substantial basis for the Court's earlier finding that they satisfy Rule 23(g)'s criteria. Accordingly, Cotchett, Pitre & McCarthy and Hausfeld LLP should be appointed as Settlement Class Counsel for purposes of these Settlements, as they were for the previous Settlements in this action.

VI. PLAINTIFFS' PROPOSED NOTICE PROGRAM COMPORTS WITH THE REQUIREMENTS OF RULE 23 AND DUE PROCESS

In Rule 23(b)(3) actions, "the court must direct to class members the best notice that is practicable under the circumstances," and that notice "must clearly and concisely state in plain, easily understood language:" (1) the nature of the action; (2) the definition of the class certified; (3) the class claims, issues, or defenses; (4) that a class member may enter an appearance through an attorney if the member so desires; (5) that the court will exclude from the class any member who requests exclusion; (6) the time and manner for requesting exclusion; and (7) the binding effect of a class judgment on members under Rule 23(c)(3). Fed. R. Civ. P. 23(c)(2)(B).

It is well-settled that notice by publication is appropriate where, as here, "class members' names and addresses cannot be determined with reasonable efforts." *Ross v. Trex Co.*, No. 09-00670-JSW, 2013 WL 79129, at *2 (N.D. Cal. Mar. 4, 2013) (quoting *Juris v. Inamed Corp.*, 685 F.3d 1294, 1321 (11th Cir. 2012)); *see also In re Agent Orange Prod. Liab. Litig.,* 818 F.2d 145, 168–69 (2d Cir.1987) (finding that unidentified absent class members that could not be

located through reasonable efforts did not need to be provided with individual, mailed notice in order to be bound).

The Notice Program proposed by Plaintiffs provides a thorough, multilayered approach to notice by publication designed to reach the members of the settlement classes, and in fact does so multiple times. Wheatman Decl. ¶¶ 9-40; *see also, e.g.*, *Ross*, 2013 WL 791229, at *1 ("[A]ctual notice is not required . . . . Due Process does not entitle a class member to 'actual notice,' but rather to the best notice practicable, reasonably calculated under the circumstances to apprise him of the pendency of the class action and give him a chance to be heard.") (internal quotation omitted). The rigorous Notice Program proposed by Kinsella Media plainly satisfies requirements imposed by Rule 23 and the Due Process clause of the United States Constitution.

Moreover, the contents of the notice satisfactorily inform the members of the settlement classes of their rights under the settlements. *See* Wheatman Decl. Exs. 2-6. The proposed notice form includes: (i) the case caption; (ii) a description of the Settlement Classes; (iii) a description of the settlement agreements, including the monetary consideration provided to the settlement classes; (iv) the names of Settlement Class Counsel; (v) a description of the releases provided by the settlement classes; (vi) the Fairness Hearing date; (vii) information about the Fairness Hearing; (viii) information about the deadline for filing objections to the settlement agreements; (ix) a statement of the deadline for filing requests for exclusion from the settlement classes; (x) the consequences of exclusion or remaining in the settlement classes; (xi) how the Settlement Class Counsel will be compensated and that additional information regarding Settlement Class Counsel's fees and costs will be posted on the website prior to the deadline for objections; and (xii) how to obtain further information about the proposed settlement agreements, including through the website maintained by the claims administrator that will include links to the notice, motions for approval and for attorneys' fees and other important documents in the case. *See id.*; *see also Newberg* § 11:53 at 167 (notice is "adequate if it may be understood by the average class member"); *Lamb v. Bitech, Inc.*, No. 3:11-cv-05583-EDL MED, 2013 WL 4013166, at *4 (N.D. Cal. Aug. 5, 2013). Notice also complies with the Northern District of California's Procedural Guidance for Class Action Settlements (published Nov. 1, 2018; updated Dec. 5,

2018). Accordingly, the Notice Program and accompanying forms are reasonable and adequate and are fairly calculated to apprise class members of their rights under the settlements. *See* Wheatman Decl. ¶¶ 9-10.

Plaintiffs have retained Rust Consulting ("Rust") as the settlement administrator in this action. To that end, Rust works with Kinsella and Settlement Class Counsel to assist with the implementation of the notice program and to address claims administration and distribution. Rust was selected as the claims administrator for this settlement because it has been working with Settlement Class Counsel on this matter for several years.[5] A schedule of estimated costs from Kinsella media is attached as Exhibit C to the Joint Declaration. Approximately $400,000 in remaining costs is needed to pay Rust to administer this settlement and to distribute funds from all settlements in this action. *See* Joint Decl. at ¶14. Given both the size of recovery in this action and the geographic scope of potential class members, the amounts presented are reasonable. *See id*. Payment for settlement administration will be made from the Settlement Amount.

In the first two rounds of settlements, which had total settlement funds of $39.502 million and $50.65 million (*see* Fees Order),[6] Plaintiffs used a similar notice plan to what is proposed here, using paid media, direct notice, postcard, and email. *See* Orders Notice Program, ECF Nos. 968, 974, 1172, 1266. The notice plan provided great results. The claims rate for the first round of settlements, for example, was 7%, based on claims filed representing nearly 7 million tickets. *See* Suppl. Mem. Mot. Notice Program, ECF No. 1160. For the first and second rounds, the combined claims rate was 17.7% representing 17 million tickets. *See* Wheatman Decl. at ¶ 46. Based on the claims received to date, Plaintiffs estimate that each ticket will pay about $5/ticket for members of prior settlement classes in this case, which are similar in scope to Settlement

[5] Prior to the first settlements in this litigation, Class Counsel solicited bids from other claims administrators, and then engaged in substantial further negotiations with those that responded to ensure a cost-competitive retention was secured. Not including this case, Class Counsel have worked with Rust on five separate matters over the last two years. *See* Joint Decl. at ¶ 15 (listing cases for which Rust has been the claims administrator for either Hausfeld or Cotchett).

[6] While the classes in the previous settlement rounds had slightly different definitions, the number of class members for most of the earlier settlement classes is approximately 100 million, the same as in Settlement Class III. *See* Wheatman Decl. ¶ 46.

Class III. A per-ticket allocation for the *Satogaeri* and Japan class is unknown at this time because there is no claims history for either of those Settlement Classes.

VII. THE PROPOSED PLAN OF ALLOCATION IS FAIR AND REASONABLE

"Approval of a plan for the allocation of a class settlement fund is governed by the same legal standards that are applicable to approval of the settlement; the distribution plan must be 'fair, reasonable and adequate.'" *In re Citric Acid Antitrust Litig.*, 145 F. Supp. 2d 1152, 1154 (N.D. Cal. 2001) (internal citations omitted). When allocating funds, "[i]t is reasonable to allocate the settlement funds to class members based on the extent of their injuries or the strength of their claims on the merits." *In re Omnivision Technologies, Inc.*, 559 F. Supp. 2d 1036, 1045-46 (N.D. Cal. 2008) (internal citations omitted) (approving securities class action settlement allocation on a "per-share basis"); *Four in One Co. v. S.K. Foods, L.P.*, 2:08-CV-3017 KJM EFB, 2014 WL 4078232, at *15 (E.D. Cal. Aug. 14, 2014) (approving "plan of allocation providing for a pro rata distribution of the net settlement fund based on verified claimants' volume of qualifying purchases" as "fair, adequate, and reasonable").

The proposed Plan of Allocation—a *pro rata* distribution of settlement funds based on the number of tickets for U.S. originating travel proffered by class members for each class during the claims process—will fairly compensate class members for their injuries. Joint Decl. ¶ 12. Plaintiffs' proposed claim form is not burdensome or does not erect unnecessary barriers to filing a claim, and merely asks class members to identify the number of qualifying purchases they made by airline and to indicate which Settlement Class or Classes to which they belong. The form therefore permits the Claims Administrator to accurately calculate the proper distributions to be made to class members under the settlement agreement. *See* Joint Decl. Ex. B. The allocation among the Settlement Classes is based on the recommendation of Mr. Feinberg, after his review of the case and based on his familiarity with the record. Feinberg Decl. ¶¶ 9-17. This Plan of Allocation is thus "fair, reasonable and adequate" and merits approval by the Court. *See Citric Acid*, 145 F. Supp. at 1154.

VIII. ATTORNEYS' FEES AND EXPENSES

Settlement Class Counsel will submit a motion for attorneys' fees and for reimbursement of expenses at least 35 days before the opt out and objection deadline for members of the Settlement Classes. Settlement Class Counsel will seek up to 33% of the $58 million settlement with ANA, net of any costs and expenses. From the case's inception through March 20, 2019, Plaintiffs' counsel have incurred approximately $45 million in lodestar, representing approximately 108,834 hours of work. *See* Joint Decl. ¶ 17. One-third of the ANA settlement fund, which is more than what Class Counsel will request from the Court because Class Counsel will seek fees based on the net fund, is approximately $19.333 million. When added to the fees the Court has already awarded in this matter, $20,038,071.51 (*see* Fees Order), an award of that amount would bring total fees awarded to approximately $39.371 million, which means the total multiplier in the case would remain a negative multiplier at approximately .87. Settlement Class Counsel will expend additional time finalizing the settlement, including preparing for final approval and working with the claims administrator and notice provider. The lodestar and the negative multiplier will change between now and when Settlement Class Counsel make their final request for fees and expenses prior to final approval.

Settlement Class Counsel will have incurred no more than $1.7 million in unreimbursed litigation expenses by the time they seek final approval of the settlement with ANA. *See* Joint Decl. ¶ 18. In addition to the foregoing, following resolution of a dispute with one of Class Counsel's litigation vendors, Settlement Class Counsel received $1.25 million to resolve this dispute with the vendor, which Settlement Class Counsel will subtract from any requested reimbursement of costs from the Court. *See id*. Because Settlement Class Counsel continue to work on this matter in order to finalize and administer the settlement, the above merely represents a good-faith estimate that is subject to change.

IX. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court grant their motion.

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Respectfully submitted,

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