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12 *Co-Lead Counsel for Plaintiffs*

13 **UNITED STATES DISTRICT COURT**
14 **NORTHERN DISTRICT OF CALIFORNIA**
15 **SAN FRANCISCO DIVISION**

16 **IN RE TRANSPACIFIC PASSENGER**
17 **AIR TRANSPORTATION**
18 **ANTITRUST LITIGATION**

Civil Case No. 3:07-cv-05634-CRB

MDL No. 1913

19 **This Document Relates To:**

20 **ALL ACTIONS**

21 **PLAINTIFFS' NOTICE OF MOTION AND**
22 **MOTION FOR FINAL APPROVAL OF**
23 **SETTLEMENT WITH DEFENDANT ALL**
24 **NIPPON AIRWAYS CO., LTD. AND**
25 **MEMORANDUM IN SUPPORT THEREOF**

26 Hearing Date: October 18, 2019
27 Judge: Hon. Charles R. Breyer
28 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 the Honorable Charles R. Breyer will hear this motion at the United States District Court for the Northern District of California, 450 Golden Gate Avenue, Courtroom 6, 17th Floor, San Francisco, California on October 18, 2019 at 10:00 a.m.

Pursuant to Federal Rule of Civil Procedure (“Rule”) 23(e), Plaintiffs seek entry of an order granting final approval of the settlement agreement with Defendant All Nippon Airways Co., Ltd. (“Class Settlement”). The Court should grant the motion because the proposed Class Settlement is fair, reasonable, and adequate.

The motion is supported by: (i) this Notice of Motion and Motion, (ii) the supporting Memorandum of Points and Authorities, (iii) the accompanying Declarations of Christopher L. Lebsock, dated October 4, 2019 (“Lebsock Decl.”), Shannon Wheatman, dated October 3, 2019 (“Wheatman Decl.”), and of Joel Botzet, dated October 3, 2019 (“Botzet Decl.”); (iv) the Class Settlement with ANA (ECF No. 1297-2, Ex. A); (v) the Court’s May 29, 2019 Second Amended Order Granting Preliminary Approval of Settlement with Defendant All Nippon Airways Co., Ltd. and of Notice Program, Notice Forms, and Plan of Allocation (ECF No. 1306); (vi) any further papers filed in support of this motion; (vii) the argument of Co-Lead Counsel for Plaintiffs (“Class Counsel”); and (viii) all matters of record in this litigation (“Action”).

Dated: October 4, 2019

Respectfully Submitted,

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Co-Lead Counsel for Plaintiffs

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STATEMENT OF ISSUE TO BE DECIDED

Whether the Court should grant final approval of the proposed Class Settlement with Defendant All Nippon Airways Co., Ltd. because it is fair, reasonable, and adequate; it satisfies all applicable requirements; no one has submitted an exclusion request opting-out of the settlement; and no objection has been made.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Pursuant to Rule 23(e), Plaintiffs respectfully submit this memorandum in support of final
4 approval of the Class Settlement with Defendant All Nippon Airways Co., Ltd. (“ANA”). This
5 Court should approve the Class Settlement because it is “fair, reasonable, and adequate.” *In re*
6 *Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 944 (9th Cir. 2015). Indeed, the settlement
7 provides an excellent recovery for the Settlement Classes, with a settlement fund of
8 \$58,000,000.00 (“Settlement Fund”), nearly three times the recovery Plaintiffs obtained from any
9 other defendant in this long-running litigation. The ANA Settlement will also end this decade-
10 plus long litigation, with Plaintiffs having obtained \$148,152,000 in total recovery for class
11 members. The Class Settlement, therefore, provides considerable relief for the Settlement Classes,
12 whose members would otherwise face myriad hurdles to achieving a successful result in this
13 Action.

14 As this Court is aware, this case has been heavily litigated. Over the last 12 years, Class
15 Counsel have fought against seriatim motions to dismiss, briefed a plethora of discovery disputes
16 concerning complex issues, took over 60 depositions, made multiple trips to the Ninth Circuit on
17 a broad range of legal issues, including an interlocutory appeal concerning Defendants’ summary
18 judgment motion regarding the filed-rate doctrine, defeated Defendants’ petition for certiorari to
19 the United States Supreme Court, and obtained class certification, amongst many other major
20 litigation events. Indeed, settlement with ANA was reached on the eve of trial and Plaintiffs had
21 already engaged in extensive trial preparations, including producing expert reports and
22 exchanging exhibit and witness lists with ANA. For a full narrative of the litigation events in this
23 Action, please see the Joint Declaration in Support of Plaintiffs’ Motion for Award of Attorneys’
24 Fees and Reimbursement of Expenses (ECF No. 1307-2).

25 In addition to the foregoing, the unanimous, positive reaction of the Settlement Classes
26 further supports final approval of the Class Settlement. Despite the Settlement Classes consisting
27 of thousands—and for some classes, hundreds of thousands—of passengers, along with a
28 thorough and constitutionally sound notice program, no one excluded himself or herself from the

1 Settlement Classes. *See* Botzet Decl. ¶ 18. Nor did anyone object to the Class Settlement or the
2 attorneys' fees and expenses petition Class Counsel filed (ECF No. 1307). *See id.* ¶ 19.

3 After 12 years, the time has come to end this litigation. Finally approving this worthy
4 settlement will accomplish precisely that.

5 II. FACTUAL AND PROCEDURAL HISTORY

6 Class Counsel and counsel for ANA engaged in extensive arm's length negotiations before
7 reaching the Class Settlement. *See* Lebsack Decl. ¶¶ 3-7 (describing negotiation scope and
8 details). The Court preliminarily certified the Settlement Classes and preliminarily approved the
9 settlement on May 29, 2019. *See* ECF No. 1306 (described *infra*). Settlement funds owed pursuant
10 to the Settlement Agreement have been deposited in an escrow account at Citibank, N.A. in a
11 manner and at a time that conforms to the Settlement Agreement. *See* Lebsack Decl. ¶ 8.

12 On May 29, 2019, the Court also approved Class Counsel's proposed notice plan and set
13 deadlines by which Class Members could either opt-out or object. *See* ECF No. 1306. Plaintiffs
14 have complied with the Court's orders, including with respect to the issuance and dissemination
15 of class notice pursuant to Rule 23. *See* Wheatman Decl. ¶¶ 6-32 (describing the extensive, multi-
16 pronged notice program as well as the form and content of notice); Botzet Decl. ¶¶ 5-17
17 (describing the results of claims administration to date). Despite the extensive and thorough notice
18 program, not one person either opted out or objected to the settlement. Botzet Decl. ¶¶ 18-19.

19 III. THE SETTLEMENT AGREEMENT

20 The terms of the proposed settlement are described in detail in Plaintiffs' motions for
21 preliminary approval (ECF Nos. 1297, 1298). Plaintiffs incorporate these terms herein by
22 reference. In short, in exchange for \$58,000,000, the proposed Class Settlement resolves claims
23 against the last remaining Defendant in this Action, ANA, for its participation in an alleged
24 conspiracy to fix, raise, or stabilize prices for air passenger travel, including associated
25 surcharges, for international flights involving at least one flight segment between the United
26 States and Asia/Oceania.

IV. ARGUMENT

A. The Court Should Grant Final Approval of the Settlement

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3 A class action may not be dismissed, compromised, or settled without the approval of the
4 Court. Fed. R. Civ. P. 23(e). The settlement approval procedure includes three steps: (1)
5 certification of a settlement class and preliminary approval of the proposed settlement; (2)
6 dissemination of notice to affected class members; and (3) a formal fairness hearing, or final
7 approval hearing, at which class members may be heard regarding the settlement, and at which
8 counsel may introduce evidence and present argument concerning the fairness, adequacy, and
9 reasonableness of the settlement. *See* Fed. R. Civ. P. 23(e). This procedure safeguards class
10 members' due process rights and enables the Court to fulfill its role as the guardian of class
11 interests. *See* 4 Albert Conte & Herbert Newberg, *Newberg on Class Actions* §§ 11.22, *et seq.*
12 (4th ed. 2002).

13 The Court completed the first step when it granted preliminary approval of the Class
14 Settlement and certified the Settlement Classes. *See, e.g.*, ECF No. 1161. Plaintiffs have since
15 completed the second step of notifying Class Members. Based on the notice plan that Plaintiffs
16 presented, supported by a declaration from class notice experts, the Court approved an extensive
17 and thorough notice program ("Notice Program") (ECF No. 1306). *See Int'l Union v. Gen. Motors*
18 *Corp.*, 497 F.3d 615, 630 (6th Cir. 2007) (abuse of discretion standard for determining
19 reasonableness of notice program). The multi-part Notice Program was designed in conjunction
20 with notice experts to provide the "best notice that [was] practicable under the circumstances."
21 *See* Fed. R. Civ. P. 23(c)(2)(B); *see also* Wheatman Decl. at ¶¶ 5, 36. The Notice Program was a
22 "thorough, multilayered approach" designed to reach Class Members "multiple times" (ECF No.
23 1130 at 5), through direct notice, paid media, earned media, online media, and the establishment
24 of a toll-free number. *See* Wheatman Decl. at ¶¶ 7-32. Direct notice involved postcard notice to
25 individuals that filed claims to previous settlements and email notice to individuals identified as
26 potential Class Members. *Id.* at ¶¶ 7-10. Paid media involved national media, including magazine
27 placements and Internet advertisements, and local ethnic media, such as newspaper placements
28

1 and Internet advertisements. *Id.* at ¶¶ 12-26. Travel agents specializing in ethnically Japanese
2 customers in the United States were also contacted to help inform their clientele of the settlement.
3 *Id.* at ¶ 11. Earned media involved a nationwide press release distributed on PR Newswire’s US1
4 news circuit reaching approximately 5,400 websites, databases, and online services. *Id.* at ¶ 29.
5 The case website (www.airlinesettlement.com) and toll-free phone number were updated to
6 enable potential Class Members to get information on the Class Settlement. *Id.* at ¶¶ 30-31.
7 Potential Class Members could also contact Class Counsel by mail with specific requests or
8 questions via a post office box. *Id.* at ¶ 32.

9 The Notice Program, based on the use of “clear, concise, [and] plain language[.]”
10 succeeded. *Id.* at ¶ 34. Direct notice via postcard reached 95.02 percent of all Class Members who
11 filed a claim for the previous settlements. *Id.* at ¶ 9. Direct notice via email reached potential
12 Class Members with a 97 percent delivery success rate. *Id.* at ¶ 10. Paid media delivery reached
13 an estimated 70.7 percent of U.S. Foreign Travelers an average estimated frequency of 2.2 times.
14 *Id.* at ¶ 27. Through October 2, 2018, there have been approximately 1,146,217 unique visits to
15 the website, 10,641 calls to the toll-free number, and 87 packages have been mailed to potential
16 Class Members with a claim form and the notice after such a request. *See* Botzet Decl. at ¶¶ 6, 8,
17 14. As of October 2, 2019, there have been 82,888 total claim in this Action, with 6,731 claims
18 submitted thus far in connection with the ANA Settlement, although the earliest deadline to
19 submit a Claim Form related to the ANA Settlement is not until February 15, 2020 and Class
20 Members have until 120 days after the Settlement becomes final and effective to file a claim. *See*
21 *id.* at ¶ 20.

22 The Court will complete the third step when it holds the final approval hearing on October
23 18, 2019.

24 **B. The Class Settlement is “Fair, Reasonable and Adequate” and Should**
25 **Be Granted Final Approval.**

26 Rule 23(e) requires the district court to determine whether the proposed settlement is “fair,
27 reasonable, and adequate.” *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 944 (citation
28

1 omitted). To determine whether a settlement agreement meets these standards, a district court
2 must balance a number of factors, including:

3 (1) the strength of the plaintiff’s case; (2) the risk, expense, complexity, and likely
4 duration of further litigation; (3) the risk of maintaining class action status
5 throughout the trial; (4) the amount offered in settlement; (5) the extent of discovery
6 completed and the stage of the proceedings; (6) the experience and views of
7 counsel; (7) the presence of a governmental participant; and (8) the reaction of the
8 class members of the proposed settlement.

9 *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (quoting *Churchill*
10 *Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). These factors militate in favor of
11 granting final approval of the Class Settlement as set forth, *infra*.

12 The law favors compromises and settlements of class action suits. *See, e.g., Churchill*
13 *Village*, 361 F.3d at 576; *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992).
14 “[T]he decision to approve or reject a settlement is committed to the sound discretion of the trial
15 judge because he is ‘exposed to the litigants, and their strategies, positions and proof.’” *Hanlon*
16 *v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988) (quoting *Officers for Justice v. Civil Serv.*
17 *Comm’n*, 688 F.2d 615, 626 (9th Cir. 1982)). “Where, as here, a proposed class settlement has
18 been reached after meaningful discovery, after arm’s length negotiation, conducted by capable
19 counsel, it is presumptively fair.” *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F.
20 Supp. 819, 822 (D. Mass. 1987). The Court should find that the Class Settlement is fair, adequate,
21 and reasonable within the meaning of Rule 23(e).

22 **1. The Class Settlement Reflects the Strength of Plaintiffs’ Case** 23 **at the Time Reached**

24 The Class Settlement reflects the strength of Plaintiffs’ case as well as ANA’s positions
25 at the time the parties entered into the Class Settlement. Courts have noted that legal uncertainty
26 supports approval of a settlement. *See, e.g., Browning v. Yahoo! Inc.*, No. 04-CV-01463-HRL,
27 2007 WL 4105971, at *10 (N.D. Cal. Nov. 16, 2007) (“[L]egal uncertainties at the time of
28 settlement—particularly those which go to fundamental legal issues—favor approval”).

1 Here, Plaintiffs settled with ANA shortly before trial, when the risk to each side of the
2 jury finding in the other party's favor was significant. *See* Lebsack Decl. at ¶¶ 4, 6-7, 9. Indeed,
3 even if the Plaintiffs were confident that they could convincingly demonstrate that ANA had
4 liability, it is never certain that a jury would agree with the Plaintiffs' presentation of the case,
5 particularly given the requirement that Plaintiffs would have had to demonstrate not just ANA's
6 liability, but that ANA's conduct both impacted and damaged members of the certified classes.
7 The Court should find that the judicial policy favoring compromise and settlement of class action
8 suits is applicable here. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

9 2. The Settlement Eliminates Significant Risk to the Classes

10 The risks, expense, complexity, and likely duration of further litigation also support the
11 Court's final approval of the Class Settlement. *Browning v. Yahoo! Inc.*, 2007 WL 4105971, at
12 *10 (finding the fact that "further litigation before this Court would be time consuming, complex
13 and expensive" supports granting final approval). As stated above, at the time of the settlement,
14 the parties were in the final stages of preparation for trial, where risk of losing the case with no
15 guarantee of getting anything for the members of the Settlement Classes was particularly strong.
16 Furthermore, while the Court had granted Plaintiffs' motion for class certification, the Court made
17 clear that the order was subject to being revisited—and the order possibly reversed—as the case
18 progressed, injecting even more risk into the proceedings for Plaintiffs. *See* ECF No. 1224.

19 While Plaintiffs believe their case is strong, the Class Settlement eliminates significant
20 risks if the action were to proceed against ANA. Plaintiffs bear the burden of establishing liability,
21 impact, and damages. *See, e.g., Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 118 (2d
22 Cir. 2005) ("Indeed, the history of antitrust litigation is replete with cases in which antitrust
23 plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at
24 trial, or on appeal" (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476
25 (S.D.N.Y. 1998)); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 282-283 (S.D.N.Y. 1999). The
26 Class Settlement is in the best interest of the Settlement Classes. It eliminates the risks of
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1 continued litigation, while at the same time creating a substantial cash recovery that members of
2 the Settlement Classes can receive free of the risks inherent in any trial.

3 Moreover, if the parties had not reached the Class Settlement, the costs of continuing to
4 prepare for, and ultimately going forward with, a lengthy, costly, and complex trial would have
5 continued to escalate. The risks to both sides are magnified by the fact that the outcome at trial is
6 uncertain. *See In re High-Tech Employee Antitrust Litig.*, No. 11-CV-02509-LHK, 2015 WL
7 5159441, at *2 (N.D. Cal. Sept. 2, 2015). In addition, any trial outcome would be subject to
8 potential appeals, which, at a minimum, will substantially delay any recovery achieved for the
9 Classes. *Id.* Taken together, these circumstances suggest that further litigation would have been
10 costly and uncertain and would have detrimentally delayed any potential relief for the Settlement
11 Classes. By contrast, the Class Settlement provides the Settlement Classes with timely, certain,
12 and meaningful recovery.

13 **3. The Class Settlement Minimized the Risks of Maintaining** 14 **Class Action Status Throughout Trial**

15 As noted above, if Plaintiffs had not settled with ANA, they faced the risk that the Court
16 would de-certify the classes it had previously certified. *See* ECF No. 1224, at 17 (“[T]he Court
17 reserves the right, upon presentation of further evidence and testimony subject to cross-
18 examination, to de-certify either or both classes.”). This consideration favors granting final
19 approval.

20 **4. The Class Settlement Provides Considerable Relief for The** 21 **Classes**

22 The Settlement Fund is substantial and provides considerable relief to the Settlement
23 Classes. The Class Settlement provide for a cash payment of \$58 million, a settlement value that
24 compares favorably to settlements finally approved in other recent price-fixing cases in the Ninth
25 Circuit. *See, e.g., In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 941 (approving \$27.25
26 million settlement); *see also* ECF No. 1009 (this Court’s order approving a previous round of
27 settlements with Defendants totaling \$39.5 million). Furthermore, notable here is that the
28 recovery is nearly three times what Plaintiffs were able to obtain from any other single Defendant

1 in this Action. And when taken together with the other settlements already approved in this Action
2 totaling \$148,152,000, there can be little doubt that the cumulative settlements here provide
3 considerable relief for those harmed by the anticompetitive conduct at the heart of this Action.

4 **5. The Advanced Stage of the Proceedings Support Final**
5 **Approval**

6 The extent of discovery completed and the stage of the proceedings support approval. The
7 factual investigation and legal analysis in the 12-years of this litigation were substantial. Plaintiffs
8 defended and largely prevailed after two extensive rounds of hard-fought motions to dismiss,
9 totaling 18 motions by Defendants with arguments covering such complex regulatory areas as the
10 filed-rate doctrine, the act of state doctrine, the state action doctrine, implied preclusion, federal
11 preemption, and the sufficiency of the conspiracy allegations. Relatedly, Plaintiffs defended and
12 defeated attempts by some of the Defendants to appeal this Court's rulings on the aforementioned
13 motions. Plaintiffs also fought and substantially prevailed on Defendants' motions for summary
14 judgment based on the filed-rate doctrine, an interlocutory appeal of the Court's order related
15 thereto to the Ninth Circuit, which affirmed, and a petition for certiorari, which the Supreme Court
16 denied. Additionally, the settlement was reached after the close of fact discovery. During
17 discovery, Plaintiffs prepared for and took the depositions of 62 fact and 30(b)(6) witnesses of
18 Defendants, as well as three non-party witnesses. Plaintiffs also defended the depositions of 15
19 Class Representatives. Indeed, at the time of settlement, Plaintiffs were preparing for a two-week
20 trial beginning March 4, 2019 against ANA and had already engaged in extensive trial
21 preparations, including exchanging expert reports, depositions of trial expert witnesses, and
22 exchanging exhibit and witness lists with ANA.

23 This progress in the litigation and the exchange of voluminous information confirm that
24 Plaintiffs and ANA each had a good understanding of the strengths and weaknesses of their
25 respective positions to "make an informed decision about settlement." *In re Mego Fin. Corp. Sec.*
26 *Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (quoting *Linney v. Cellular Alaska Partnership*, 151
27 F.3d 1234, 1239 (9th Cir. 1998)). Extensive discovery is also indicative of a lack of collusion, as
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1 the parties have litigated the case in an adversarial manner for a long period. *See* 4 *Newberg on*
2 *Class Actions* § 13:50 (5th ed. 2018).

3 **6. The Settlement Is the Product of Arm’s Length Negotiations**
4 **Between the Parties, and the Recommendation of Experienced**
5 **Counsel Favors Approval**

6 Class Counsel’s views weigh in favor of final approval. The Court appointed competent
7 and experienced counsel who have done extensive work in complex litigation, including antitrust
8 class actions. *See* Order Appointing Class Counsel, ECF No. 130. Class Counsel are therefore
9 able to make informed and highly-sophisticated assessments about the risks and possible
10 recoveries in this Action. Class Counsel endorses the Class Settlement as fair, adequate, and
11 reasonable.

12 Plaintiffs have vigorously litigated this Action through summary judgment, class
13 certification, and to the eve of trial. Plaintiffs have prepared briefs for, and substantially prevailed
14 on, the Defendants’ motions for summary judgment based on the filed rate doctrine, the
15 Defendants’ related appeal to the Ninth Circuit, which affirmed this Court’s decision, and the
16 Defendants’ petition for certiorari, which the Supreme Court denied. Plaintiffs also prevailed
17 against ANA in both a motion for class certification, for which ANA unsuccessfully sought Ninth
18 Circuit review, and in defeating ANA’s summary judgment motion brought in 2018. Additionally,
19 Plaintiffs have also engaged and consulted extensively with experts and economists on issues
20 pertaining to liability, summary judgment, class certification and damages. Discovery in this
21 action has been extensive. Throughout fact discovery, Class Counsel have analyzed over a million
22 documents produced by Defendants and others and obtained cooperation from Defendants who
23 previously settled in this Action, which yielded significant benefits for the Classes. Class Counsel
24 have also conducted an independent investigation of the facts and analyzed Defendants’ sales and
25 pricing data and conducted over 60 depositions. *See* Lebsack Decl. at ¶ 9.

26 The negotiations leading to the Class Settlement were vigorous, informed and thorough;
27 occurred over a span of many months; and involved conversations after the review of industry
28 materials as well as documents and transactional data that ANA and others produced. These

1 negotiations were sharply contested and conducted in the utmost good faith. Settlement
2 discussions took place through a formal two-day mediation with a nationally-renowned mediator,
3 Kenneth R. Feinberg, on December 12 and 13, 2018, as well as multiple telephone
4 communications between counsel and email exchanges between counsel. *Id.* at ¶ 6. While
5 agreement was not reached at the mediation, Mr. Feinberg continued to mediate with the parties
6 by phone and email, and ultimately, he was able to broker the current settlement agreement. *Id.*
7 at ¶ 2. Mr. Feinberg also served as the neutral in determining how best to allocate the \$58 million
8 settlement amongst the Settlement Classes. *See* ECF No. 1297-4, Feinberg Decl. at ¶ 7.

9 Counsel's judgment that the settlement is fair and reasonable is also entitled to "[g]reat
10 weight." *See Nat'l Rural Telcomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 528 (C.D. Cal.
11 2004); *accord Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288–89 (D. Colo. 1997).
12 While Plaintiffs believe they have meritorious claims, ANA asserts that it has strong defenses that
13 would serve to eliminate their liability and/or damage exposure to the Settlement Classes. The
14 parties entered into the Class Settlement to eliminate the burden, expense, and risks of further
15 litigation. For all of these reasons, the cash settlement represents an excellent recovery and is
16 "fair, reasonable and adequate" to the Settlement Classes.

17 **7. There Are No Governmental Participants**

18 There is no government participant in this Action. Pursuant to the Class Action Fairness
19 Act, 28 U.S.C. § 1715, the U.S. Attorney General and Attorneys General of each State in which
20 ANA determined that there are likely to be class members have been notified of the Class
21 Settlement and given an opportunity to raise concerns, but no government official has come
22 forward with any complaints. *See* Lebsack Decl. at ¶ 11. This, too, favors granting final approval.

23 **8. The Positive Reaction of the Class Supports Final Approval**

24 In determining the fairness and adequacy of a proposed settlement, the Court also should
25 consider "the reaction of the class members to the proposed settlement." *Churchill Village*, 361
26 F.3d at 575; *Hanlon*, 150 F.3d at 1026. "It is established that the absence of a large number of
27 objections to a proposed class action settlement raises a strong presumption that the terms of a
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1 proposed class settlement action are favorable to the class members.” *Nat’l Rural Telecomms.*
2 *Coop.*, 221 F.R.D. at 529 (collecting cases); *see also In re Fleet/Norstar Sec. Litig.*, 935 F. Supp.
3 99, 107 (D.R.I. 1996). Following notice through which Class Members were presented with the
4 material financial terms of the proposed Class Settlement and the factors enumerated in Rule 23,
5 not a single person or entity filed an objection or chose to exclude themselves from the settlement.
6 This is extraordinary, given the thousands of passengers that make up the Settlement Classes. The
7 unanimously favorable reaction of members of the Settlement Classes to the Class Settlement
8 strongly militates in favor of approval.

9 **V. THE COURT SHOULD APPOINT THE NAMED PLAINTIFFS AS**
10 **CLASS REPRESENTATIVES**

11 The Court should appoint the named Plaintiffs as Class Representatives. A representative
12 plaintiff is an adequate representative of the class if he or she: (1) does not have any interests
13 antagonistic to or in conflict with the interests of the class; and (2) is represented by qualified
14 counsel who will vigorously prosecute the class’s interests. *Hanlon*, 150 F.3d at 1020. Here, the
15 representative Plaintiffs satisfy both requirements. The interests of named Plaintiffs and Class
16 Members are aligned because (a) all claimed similar injury in the form of higher airline ticket
17 prices for travel from the United States to Asia/Oceania due to Defendants’ alleged conspiracy
18 and (b) seek the same relief. Plaintiffs understand the allegations in this Action and have reviewed
19 pleadings, responded to discovery, and produced the documents requested. *See* Lebsock Decl. at
20 ¶ 10. All representative Plaintiffs have been deposed except one. *Id.* By proving their own claims,
21 representative Plaintiffs will necessarily prove the claims of their fellow Class Members. As such
22 they should be named as Class Representatives for the Settlement Classes.

23 Further, Plaintiffs are represented by highly qualified counsel. Both Cotchett, Pitre &
24 McCarthy, LLP and Hausfeld LLP have successfully prosecuted numerous antitrust class actions
25 throughout the United States, and are committed to vigorously prosecuting this Action on behalf
26 of the Classes. They have undertaken the responsibilities assigned by the Court and have directed
27 the efforts of other Plaintiffs’ counsel. Counsel’s prosecution of this case, and as with earlier
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1 settlements in this case, amply demonstrate their diligence and competence. Therefore, the
2 requirements of Rule 23(a)(4) are satisfied.

3 **VI. THE COURT SHOULD APPOINT CO-LEAD COUNSEL FOR**
4 **PLAINTFFS AS SETTLEMENT CLASS COUNSEL**

5 The Court should appoint Co-Lead Counsel for Plaintiffs as Settlement Class Counsel.
6 “An order that certifies a class action . . . must appoint class counsel under Rule 23(g).” Fed. R.
7 Civ. P. 23(c)(1)(B). Courts must consider (i) counsel’s work in identifying or investigating
8 claims; (ii) counsel’s experience in handling the types of claims asserted; (iii) counsel’s
9 knowledge of applicable law; and (iv) the resources counsel will commit to representing the class.
10 Fed. R. Civ. P. 23(g)(1)(A). After considering competing motions, the Court appointed Cotchett,
11 Pitre & McCarthy and Hausfeld LLP as Interim Co-Lead Counsel for Plaintiffs in 2008 (ECF
12 Nos. 130, 175). “Class counsel’s competency is presumed absent specific proof to the contrary
13 by defendants.” *Farley v. Baird, Patrick & Co., Inc.*, No. 90 CIV. 2168 (MBM), 1992 WL
14 321632, at *5 (S.D.N.Y. Oct. 28, 1992). Cotchett, Pitre & McCarthy, LLP and Hausfeld LLP
15 have demonstrated that they were and are willing and able to vigorously prosecute this action and
16 to devote all necessary resources, as they have shown throughout this arduous journey. The work
17 they have done in the approximately 12 years since their appointment provides substantial bases
18 for the Court’s earlier finding that they satisfy Rule 23(g)’s criteria. Accordingly, Cotchett, Pitre
19 & McCarthy, LLP and Hausfeld LLP should be appointed as Settlement Class Counsel for
20 purposes of the Class Settlement, as they were for the previous rounds of settlements in this
21 Action.

22 **VII. CONCLUSION**

23 Based on the foregoing, Plaintiffs respectfully request that the Court (1) grant final
24 approval of the settlement with ANA; (2) appoint the named Plaintiffs as Class Representatives;
25 and (3) appoint Co-Lead Counsel for Plaintiffs as Settlement Class Counsel.

26 Dated: October 4, 2019

Respectfully submitted,

27 /s/ Adam J. Zapala

/s/ Christopher L. Lebsock

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8 *Co-Lead Counsel for Plaintiffs*
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