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Interim Co-Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE TRANSPACIFIC PASSENGER AIR TRANSPORTATION ANTITRUST LITIGATION	Civil Case No. 3:07-cv-05634-CRB MDL No. 1913
This Document Relates To: **ALL ACTIONS**	**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR FINAL APPROVAL OF SETTLEMENTS WITH DEFENDANTS PHILIPPINE AIRLINES, INC., AIR NEW ZEALAND LIMITED, CHINA AIRLINES, LTD., AND EVA AIRWAYS CORPORATION AND MEMORANDUM IN SUPPORT THEREOF** Hearing Date: September 14, 2018 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 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 September 14, 2018 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 agreements with Defendants Philippine Airlines, Inc. ("PAL"), Air New Zealand Limited ("ANZ"), China Airlines, Ltd. ("CAL"), and EVA Airways Corporation ("EVA") (collectively, "Class Settlements"). The Court should grant the motion because the proposed Class Settlements are 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 Adam J. Zapala, dated August 31, 2018 ("Zapala Decl."), Shannon Wheatman, dated August 30, 2018 ("Wheatman Decl."), and of Joel Botzet, dated August 29, 2018 ("Botzet Decl."); (iv) the Class Settlements with PAL, ANZ, CAL, and EVA (collectively, "Settling Defendants") (ECF Nos. 1112-2, 1112-3, 1112-4, 1129-2); (v) the Court's May 16, 2018 Order Granting Motions for Preliminary Approval of Settlements (ECF No. 1161) and the Court's June 1, 2018 Order Granting Plaintiffs' Motion For Approval of Notice Program, Notice Forms, and Plan of Allocation (ECF No. 1172); (v) any further papers filed in support of this motion; (vi) the argument of Interim Co-Lead Counsel for Plaintiffs ("Class Counsel"); and (vii) all matters of record in this litigation ("Action").

Dated: August 31, 2018

Respectfully Submitted,

/s/ Adam J. Zapala
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STATEMENT OF ISSUE TO BE DECIDED

Whether the Court should grant final approval of the proposed Class Settlements because they are fair, reasonable, and adequate; they satisfy all applicable requirements; only one individual has submitted an exclusion request opting-out of the settlements; and no legitimate objection has been made.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to Rule 23(e), Plaintiffs respectfully submit this memorandum in support of final approval of the Class Settlements with the Settling Defendants. This Court should approve the Class Settlements because they are "fair, reasonable and adequate." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 945 (9th Cir. 2015).

The settlements provide an excellent recovery for the class, with a cumulative settlement fund of $50,650,000.00 ("Settlement Fund"). The Class Settlements also provide for continuing cooperation from the Settling Defendants regarding the existence, scope, and implementation of conspiratorial conduct. The Class Settlements, therefore, provide considerable relief for the Settlement Classes, whose members would otherwise face myriad hurdles to achieving a successful result in this action. Indeed, as this Court is well aware, this case has been heavily litigated. Over the last 11 years, Class Counsel have fought against seriatim motions to dismiss, briefed a plethora of discovery disputes concerning complex issues, took over 60 depositions, made multiple trips to the Ninth Circuit on a broad range of legal issues, including an interlocutory appeal concerning Defendants' summary judgment motion regarding the filed rate doctrine, and defeated Defendants' petition for certiorari to the United States Supreme Court, amongst many other major litigation events.

In addition to the foregoing, the virtually unanimous, positive reaction of the class further supports final approval of the settlements. Despite the Settlement Classes consisting of hundreds of thousands of passengers, along with a thorough and constitutionally sound notice program, only one individual excluded herself from the Settlement Classes. Elaine Gano filed an exclusion request by mail on July 26, 2018. *See* Botzet Decl. ¶ 12. And only one, *pro-per* individual objected to the settlements, Bruce Wheatley of Pembroke Pines, Florida ("Wheatley Objection"). *See* Botzet Decl. ¶ 12. The Wheatley Objection lacks merit. The Wheatley Objection misunderstands the nature of an antitrust action, arguing the Action is a "sham" and an "imaginary class action controversy" because Class Members had the option of purchasing passenger air transportation from multiple airlines and voluntarily purchased passenger air transportation from specific

airlines based on specific dates and destinations (ECF No. 1203). Mr. Wheatley's objection is irrelevant because the affirmative decision by Class Members to purchase airfare from Defendants does not negate the fact that Plaintiffs paid supra-competitive rates for those fares as compared to the "but-for world." Moreover, the Settling Defendants have agreed that it was in their best interests to settle and that the settlements provide very substantial benefits to the classes at issue. Further undermining Mr. Wheatley's objection is the fact that claims administration records indicate that he submitted a claim for payment from the previous round of settlements. *See* Botzet Decl. ¶ 12. Those Round 1 Settlements, in structure and in substance, are no different from this round of settlements. Mr. Wheatley also refers to "multi-million dollar legal fees that may be an integral part of the proposed settlement" (ECF No. 1203). The fees Class Counsel seek are both appropriate under prevailing Ninth Circuit law and warranted based on the risks and difficulty of this complex litigation. *See e.g.,* ECF No. 1227 (Plaintiffs' Motion for Award of Attorneys' Fees for Round 2 Settlements). The Court should overrule Mr. Wheatley's objection in its entirety.

II. FACTUAL AND PROCEDURAL HISTORY

Class Counsel and counsel for each Settling Defendant engaged in extensive arm's length negotiations before reaching these Class Settlements. *See* Zapala Decl. ¶¶ 2-14, 16 (describing negotiation scope and details). The Court preliminarily certified the Settlement Classes on April 27, 2018 (ECF No. 1146) (described i*nfra*) and preliminarily approved the settlements on May 16, 2018 (ECF No. 1161). Settlement funds owed pursuant to the Settlement Agreements have been deposited in an escrow account at Citibank, N.A. in a manner and at a time that conforms to the Settlement Agreements. Zapala Decl. ¶ 18.

The Court also approved Class Counsel's proposed notice plan on June 1, 2018 and set deadlines by which Class Members could either opt-out or object (ECF No. 1172). Plaintiffs have complied with the Court's orders, including with respect to the issuance and dissemination of class notice pursuant to Rule 23. *See* Wheatman Decl. ¶¶ 5-35 (describing the extensive, multi-pronged notice program as well as the form and content of notice); Botzet Decl. ¶¶ 5-12 (describing the results of claims administration to date). Despite the extensive and thorough notice program, only one individual opted-out of the Settlement Classes and only one person submitted

a non-meritorious objection to the settlements (ECF No. 1203).

III. THE SETTLEMENT AGREEMENTS

The terms of the proposed settlements are each described in detail in Plaintiffs' motions for preliminary approval of the settlements (ECF Nos. 1112, 1129). Plaintiffs incorporate these terms herein by reference. In short, in exchange for $50,650,000 and other valuable consideration in the form of extensive cooperation, the proposed Class Settlements resolve claims against Settling Defendants for their participation in an alleged conspiracy to fix, raise, 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. In preliminarily approving the Settlement Agreements (ECF No. 1161), the Court approved the Settlement Classes (*see* Hr'g Tr. at 4:2-3 (Apr. 27, 2018) ("The Court hereby certifies the classes as indicated in the moving papers").

IV. ARGUMENT

A. The Court Should Grant Final Approval of the Settlements

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

The Court completed the first step when it granted preliminary approval of the Class Settlements and certified the Settlement Classes. *See, e.g.,* ECF No. 1161

Plaintiffs have since completed the second step of notifying Class Members. Based on the notice plan that Plaintiffs presented, supported by a declaration from class notice experts, the

Court approved an extensive and thorough notice program ("Notice Program") (ECF No. 1172). *See Int'l Union v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007) (abuse of discretion standard for determining reasonableness of notice program). The multi-part Notice Program was designed in conjunction with notice experts to provide the "best notice that [was] practicable under the circumstances." *See* Fed. R. Civ. P. 23(c)(2)(B); *see also* Wheatman Decl. at ¶ 5. The Notice Program was a "thorough, multilayered approach" designed to reach Class Members "multiple times" (ECF No. 1130 at 5), through direct notice, paid media, earned media, online media, and the establishment of a toll-free number. Wheatman Decl. at ¶¶ 12-28. Direct notice involved postcard notice to individuals that filed claims to previous settlements and email notice to individuals identified as potential Class Members. *Id.* at ¶¶ 8-11. Paid media involved national media, including magazine placements and Internet advertisements, and local ethnic media, such as newspaper placements and Internet advertisements. *Id.* at ¶¶ 19-23. Earned media involved a nationwide press release distributed on PR Newswire's US1 news circuit reaching approximately 15,000 print and online media outlets and more than 5,400 websites, databases, and online services. *Id.* at ¶ 28. The case website (www.airlinesettlement.com) and toll-free phone number were updated to enable potential Class Members to get information on the Class Settlements. *Id.* at ¶¶ 29-30. Potential Class Members could also contact Class Counsel by mail with specific requests or questions via a post office box. *Id.* at ¶ 31.

The Notice Program, based on the use of "clear, concise, and plain language[,]" succeeded. *Id.* at 33. Direct notice via postcard reached 97.65 percent of all Class Members who filed a claim for the previous settlements. *Id.* at ¶¶ 8-10. Direct notice via email reached potential Class Members with a 95.8 percent delivery success rate. *Id.* at ¶ 11. Paid media delivery reached an estimated 70 percent of U.S. Foreign Travelers an average estimated frequency of 2.3 times. *Id.* at ¶ 25. Through August 18, 2018, there have been approximately 966,451 unique visits to the website, 9,585 calls to the toll-free number, and 1,593 packages have been mailed to potential Class Members with a claim form and the notice after such a request. Botzet Decl. at ¶¶ 6, 8, 9.

The Court will complete the third step when it holds the final approval hearing on September 14, 2018.

B. The Class Settlements Are "Fair, Reasonable and Adequate" and Should Be Granted Final Approval.

Rule 23(e) requires the district court to determine whether the proposed settlements are "fair, reasonable and adequate." *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 944 (citation omitted). To determine whether a settlement agreement meets these standards, a district court must balance a number of factors, including:

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

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

The law favors compromises and settlements of class action suits. *See, e.g.*, *Churchill Vill. L.L.C. v. Gen. Elec.*, 361 F.3d 566, 576; *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). "[T]he decision to approve or reject a settlement is committed to the sound discretion of the trial judge because he is 'exposed to the litigants and their strategies, positions and proof.'" *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1988) (quoting *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 628 (9th Cir. 1982)). "Where, as here, a proposed class settlement has been reached after meaningful discovery, after arm's length negotiation, conducted by capable counsel, it is presumptively fair." *M. Berenson Co. v. Faneuil Hall Marketplace, Inc.*, 671 F. Supp. 819, 822 (D. Mass. 1987). The Court should find that the Class Settlements are fair, adequate, and reasonable within the meaning of Rule 23(e).

1. The Class Settlements Reflect the Strength of Plaintiffs' Case At the Time Reached

The Class Settlements reflect the strength of Plaintiffs' case as well as Defendants' positions at the time the parties entered into the settlements. Courts have noted that legal uncertainty supports approval of a settlement. *See, e.g.*, *Browning v. Yahoo! Inc.*, No. 04-CV-

01463-HRL, 2007 WL 4105971, at *10 (N.D. Cal. Nov. 16, 2007) ("[L]egal uncertainties at the time of settlement—particularly those which go to fundamental legal issues—favor approval").

Here, Plaintiffs settled with PAL and ANZ during the pendency of Defendants' appeal of the Court's decision on the filed rate doctrine. Zapala Decl. at ¶¶ 2, 5. Similarly, Plaintiffs settled with CAL and EVA after Plaintiffs prevailed on Defendants' appeal of the filed rate doctrine decision in the Ninth Circuit but prior to the Supreme Court's denial of Defendants' petition for certiorari. *Id.* at ¶¶ 8, 11. The Court should find that the judicial policy favoring compromise and settlement of class action suits is applicable here. *See In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

2. The Settlements Eliminate Significant Risk to the Classes

The risks, expense, complexity, and likely duration of further litigation also support the Court's final approval of the Class Settlements. As stated above, at the time of the PAL and ANZ settlements, Defendants' appeal of this Court's filed rate doctrine decision remained pending before the Ninth Circuit and, at the time of the CAL and EVA settlements, Defendants' petition for certiorari of the Ninth Circuit's filed rate doctrine decision remained pending. Furthermore, the parties had not yet reached the class certification stage. Class certification and related *Daubert* motions are typically complicated and, although the Court subsequently granted class certification related to two classes involving travel from the United States to Japan, the settlements with PAL, ANZ, CAL, and EVA simplified the proceedings, allowing Plaintiffs to present focused, narrowed classes for certification related to the remaining Defendant, All Nippon Airways Co., Ltd.

While Plaintiffs believe their case is strong, the Class Settlements eliminate significant risks if the action were to proceed against the Settling Defendants. 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) ("Indeed, the history of antitrust litigation is replete with cases in which antitrust plaintiffs succeeded at trial on liability, but recovered no damages, or only negligible damages, at trial, or on appeal" (quoting *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 475 (S.D.N.Y. 1998)); *In re Sumitomo Copper Litig.*, 189 F.R.D. 274, 282-283 (S.D.N.Y. 1999). The Class Settlements are in the best interest of the Settlement Classes. They

eliminate the risks of continued litigation, while at the same time creating a substantial cash recovery and requiring the Settling Defendant to cooperate with Plaintiffs during the pendency of the litigation.

Moreover, if the parties had not reached the Class Settlements, they would have had to prepare for a lengthy, costly, and complex trial. The risks to both sides are magnified by the fact that the outcome at trial 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, will substantially delay any recovery achieved for the Classes. *Id.* Taken together, these circumstances suggest that further litigation would have been costly and uncertain and would have detrimentally delayed any potential relief for the Classes. By contrast, the Class Settlements provide the Classes with timely, certain, and meaningful recovery.

3. The Class Settlements Minimized the Risks of Maintaining Class Action Status Throughout Trial

If Plaintiffs had not settled with these Defendants, Plaintiffs likely would have sought certification of different classes, and Plaintiffs had no guarantee that the Court would certify said classes. These considerations favor granting final approval.

4. The Class Settlements Provide Considerable Relief For The Classes

The cumulative Settlement Fund is substantial and provides considerable relief to the Settlement Classes. The Class Settlements provide for a cash payment of over $50 million, a settlement value that compares favorably to settlements finally approved in other recent price-fixing cases in the Ninth Circuit. *See, e.g.*, *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d at 941 (approving $27.25 million settlement); *see also* ECF No. 1009 (this Court's order approving a previous round of settlements with Defendants totaling $39.5 million).

Further, the Class Settlements call for the Settling Defendants to provide substantial cooperation. This is a valuable benefit because it will save time, reduce costs, and provide access to information, witnesses and documents regarding the conspiracy that might otherwise not be

available to Plaintiffs. *See In re Mid-Atlantic Toyota Antitrust Litig.*, 564 F. Supp. 1379, 1386 (D. Md. 1983) (finding such agreements "an appropriate factor for a court to consider in approving a settlement"). The provision of cooperation is a substantial benefit to the classes and strongly militates toward approval of a settlement agreement. *In re Linerboard Antitrust Litig.*, 292 F. Supp. 2d 631, 643 (E.D. Pa. 2003). In addition, "[i]n complex litigation with a plaintiff class, 'partial settlements often play a vital role in resolving class actions.'" *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992) (*quoting* Manual for Complex Litigation, Second, § 30.46 (1986)).

5. The Advanced Stage of the Proceedings Support Final Approval

The extent of discovery completed and the stage of the proceedings support approval. The factual investigation and legal analysis in the 11-years of this litigation were substantial. Plaintiffs defended and largely prevailed after two extensive rounds of hard-fought motions to dismiss, totaling 18 motions by Defendants with arguments covering such complex regulatory areas as the filed-rate doctrine, the act of state doctrine, the state action doctrine, implied preclusion, federal preemption, and the sufficiency of the conspiracy allegations. Relatedly, Plaintiffs defended and defeated attempts by some of the Defendants to appeal this Court's rulings on the aforementioned motions. Plaintiffs also fought and substantially prevailed on Defendants' motions for summary judgment based on the filed rate doctrine, an interlocutory appeal of the Court's order related thereto to the Ninth Circuit, which affirmed, and a petition for certiorari, which the Supreme Court denied. Additionally, all of the Round 2 settlements were reached after the close of fact discovery. During discovery, Plaintiffs prepared for and took the depositions of 62 fact and 30(b)(6) witnesses of Defendants, as well as three non-party witnesses. Plaintiffs also defended the depositions of 15 Class Representatives. This progress in the litigation and the exchange of voluminous information confirm that Plaintiffs and Defendants had a good sense of the strength and weaknesses of their respective cases to "make an informed decision about settlement." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (quoting *Linney*, 151 F.3d at 1239). Extensive discovery is also indicative of a lack of collusion, as the parties have litigated the case

in an adversarial manner for a long period. *See* 4 Newberg on Class Actions § 13:50 (5th ed. 2018).

6. The Settlements Are the Product of Arm's Length Negotiations Between the Parties, and the Recommendation of Experienced Counsel Favors Approval

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

Plaintiffs have vigorously litigated this class action through summary judgment and now class certification. Plaintiffs have prepared briefs for, and substantially prevailed on, the Defendants' motions for summary judgment based on the filed rate doctrine, the Defendants' related appeal to the Ninth Circuit, which affirmed this Court's decision, and the Defendants' petition for certiorari, which the Supreme Court denied. Additionally, Plaintiffs have also engaged and consulted extensively with experts and economists on issues pertaining to liability, summary judgment, class certification and damages. Discovery in this action has been extensive. Throughout fact discovery, Class Counsel have analyzed millions of documents produced by Defendants and others and obtained cooperation from Settling Defendants, which has already yielded significant results. Class Counsel have also conducted an independent investigation of the facts and analyzed Defendants' sales and pricing data and conducted over 60 depositions. *See* Zapala Decl. at ¶ 19.

The negotiations leading to the Class Settlements were vigorous, informed and thorough; occurred over a span of many months for each settlement; and involved conversations after the review of industry materials as well as documents and transactional data that Settling Defendants and others produced. These negotiations were sharply contested and conducted in the utmost good faith. Settlement discussions took place in one or more of the following ways: through formal

mediation (as to CAL and EVA) with highly-respected mediators, in-person meetings of counsel, telephone communications between counsel, and/or email exchanges between counsel. *Id*.

Counsel's judgment that the settlements are fair and reasonable is also entitled to "great weight." *See Nat'l Rural Telcomms. Coop.*, 221 F.R.D. at 528; *accord Wilkerson v. Martin Marietta Corp.*, 171 F.R.D. 273, 288–89 (D. Colo. 1997). While Plaintiffs believe they have meritorious claims, the Settling Defendants all assert that they have strong defenses that would serve to eliminate their liability and/or damage exposure to the Settlement Classes. The parties entered into the Class Settlements to eliminate the burden, expense and risks of further litigation. For all of these reasons, the cash settlements in conjunction with cooperation represent an excellent recovery and are "fair, reasonable and adequate" to the Settlement Classes.

7. There Are No Governmental Participants

There is no government participant in this Action. Pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715, the U.S. Attorney General and Attorneys General of each State have been notified of the Class Settlements and given an opportunity to raise concerns, but no government official has come forward with any complaints. Zapala Decl. at ¶ 20. This, too, favors granting final approval.

8. The Positive Reaction of the Class Supports Final Approval

In determining the fairness and adequacy of a proposed settlement, the Court also should consider "the reaction of the class members to the proposed settlement." *Churchill Village*, 361 F.3d at 575; *Hanlon*, 150 F.3d at 1026. "It is established that the absence of a large number of objections to a proposed class action settlement raises a strong presumption that the terms of a proposed class action settlement are favorable to the class members." *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 529 (C.D. Cal. 2004) (collecting cases); *see also In re Fleet/Norstar Sec. Litig.*, 935 F. Supp. 99, 107 (D.R.I. 1996). Following notice through which Class Members were presented with the material financial terms of the proposed Class Settlements and the factors enumerated in Rule 23, only one individual, Ms. Elaine Gano, filed a

notice of exclusion and opted-out of the settlements[1], and only one individual, Mr. Wheatley, submitted a one-page objection to the settlements. Botzet Decl. ¶ 12. This is extraordinary, given the hundreds of thousands of passengers that make up the settlement classes. The almost-unanimously favorable reaction of the class to the Class Settlements strongly militates in favor of approval.

As a procedural matter, Mr. Wheatley's objection failed to comply with the requirements set forth in the long form notice provided on the website established by Kinsella Media (www.airlinesettlement.com). The long form notice provides that objections must include, among other things, "[p]roof of membership in the Settlement classes[.]"[2] The Court explicitly stated in its June 1, 2018 order approving the notice program that objections must comply with the long form notice requirements (ECF No. 1172). Here, Mr. Wheatley's July 3, 2018 objection asserts that "[b]etween 2009 and 2017, [he] traveled via Philippine Airlines, between Los Angeles California and Manila, Philippines" and that he made "15 round trip flights" (ECF No. 1203). His objection did not attach any documents concerning his purchases of transpacific passenger air transportation that would constitute proof of membership in the Settlement Classes. Mr. Wheatley's objection therefore fails to comply with the long form notice's objection requirements on procedural grounds.

Notwithstanding the procedural failures of the Wheatley Objection, the Court should nevertheless find that his objection is substantively meritless. Mr. Wheatley argues that the Court should reject the Class Settlements because, in summary, Class Members "had the right and ability to decline the ticket at the price quoted" and that the "overwhelming majority" of Class Members lacks "any actual good conscious claims about the price they willingly paid for their ticket" (ECF No. 1203). The foregoing simply misses the point of an antitrust action, and the

[1] Ms. Gano filed a claim by mail three years ago on April 8, 2015 in connection with the previous round of settlements. As the exclusion deadline for that round of settlements (*i.e.*, September 19, 2015) has passed, Ms. Gano's exclusion request only applies to this round of settlements.

[2] *See* Long Form Notice (*available at* https://airlinesettlement.com/eng/Portals/0/Documents/4422_Transpacific_English_Long%20Form%20Notice.pdf).

theory upon which injured parties recover in such cases. Most, if not all, purchasers of price-fixed goods or services purchase them voluntarily, and surely had the option to purchase products not manufactured or provided by the defendant. But that is not the issue in an antitrust action. The issue is whether the Defendants' collusive conduct restrained the normal operation of supply and demand factors, thereby artificially raising the price of the good or service. It is immaterial whether the customer "had the right and ability," as Mr. Wheatley states, to purchase an airfare from some other entity. Thus, Mr. Wheatley's assertions that Class Members had the option of purchasing airfare from different airlines and could have accepted or declined airfare at the price quoted by an airline is wholly irrelevant. As Plaintiffs' expert analyses shows, Defendants did, in fact, fix, raise, maintain, and stabilize the prices of base passenger fares and fuel surcharges on international flights that Class Members paid. A Class Member's affirmative decision to purchase from a certain airline at a certain price set by the airline does not preclude his or her antitrust claims or immunize the airline from such claims.

Further, Mr. Wheatley contends that "there is no controversy here" and "this case might easily be declared a sham pleading" (ECF No. 1203). Mr. Wheatley's assertions fly in the face of 11-years of litigation during which Plaintiffs fought and prevailed after two extensive rounds of motions to dismiss; fought and substantially prevailed on Defendants' motions for summary judgment based on the filed rate doctrine; and prepared for and took the depositions of over 60 fact and 30(b)(6) witnesses of Defendants. A "sham pleading" would not have survived motions to dismiss, much less summary judgment—as the action here has. Mr. Wheatley's objection ignores that Plaintiffs and Settling Defendants decided it was in their best interests to settle; that very experienced and knowledgeable counsel negotiated each of the Class Settlements in good faith; and that Class Settlements provide very substantial benefits to the classes at issue and are not tainted with the slightest hint of collusion. Indeed, the Settling Defendants would have paid the substantial sums that they did had the case been a "sham pleading." This Court is familiar with the liability evidence in the case, and it is strong.

Finally, Mr. Wheatley's objection suggests—though it is unclear whether he is lodging a formal objection in this regard—that the attorneys' fees sought are inappropriate, stating this case

was "specifically designed and tailored to create an imaginary class action controversy that in reality may not exist except for the alleged multi-million dollar legal fees that may be an integral part of the proposed settlement" (ECF No. 1203). As Plaintiffs' motion for award of attorneys' fees made clear, Class Counsel seeks an award of attorneys' fees in the amount of 30 percent of the Net Settlement Fund. The requested percentage is fair and reasonable and certainly not excessive under controlling law. *See* Plaintiffs' Motion for Award of Attorneys' Fees (ECF No. 1227 at 10-14) (reciting factors that warrant the 30 percent of fees Class Counsel seeks, including the amount of recovery for the class, the high skill level and quality of work required from counsel to prosecute the action, the risks counsel faced, and contingent nature of the fee). Moreover, the lodestar cross-check demonstrates that the fee sought is roughly 45 percent of the lodestar counsel has actually accrued in prosecuting this action, confirming the reasonableness of the fee request beyond doubt. *Id.* at 14. The fees Class Counsel seek are both appropriate based on the challenges incumbent to this 11-year-old Action and under the prevailing law in this Circuit. Mr. Wheatley's objection does not warrant rejection of the PAL Settlement or any of the Class Settlements. Indeed, this Court previously approved attorneys' fees net of costs at 30%, further undermining the Wheatley Objection. *See* Order Approving Attorneys' Fees for Round 1 Settlements, ECF No. 1009.

V. THE COURT SHOULD APPOINT THE NAMED PLAINTIFFS AS CLASS REPRESENTATIVES

The Court should appoint the named Plaintiffs 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 1011, 1020 (9th Cir. 1998). Here, the representative Plaintiffs satisfy both requirements. The interests of named Plaintiffs and Class Members are aligned because (a) 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 (b) seek the same relief. Plaintiffs understand the allegations in this Action and have reviewed pleadings, responded to discovery, and produced the documents requested.

Zapala Decl. at ¶ 20. All representative Plaintiffs have been deposed except one. *Id.* By proving their own claims, representative Plaintiffs will necessarily prove the claims of their fellow Class Members. As such they should be named as Class Representatives for the Settlement Classes.

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

VI. THE COURT SHOULD APPOINT INTERIM CO-LEAD COUNSEL FOR PLAINTIFFS AS SETTLEMENT CLASS COUNSEL

The Court should appoint Interim Co-Lead Counsel for Plaintiffs 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 Interim Co-Lead Counsel for Plaintiffs in 2008 (ECF Nos. 130, 175). "Class counsel's competency is presumed absent specific proof to the contrary by defendants." *Farley v. Baird, Patrick & Co., Inc.*, No. 90 CIV. 2168 (MBM), 1992 WL 321632, at *5 (S.D.N.Y. Oct. 28, 1992). Cotchett, Pitre & McCarthy, LLP and Hausfeld LLP are willing and able to vigorously prosecute this action and to devote all necessary resources, as they have shown throughout this arduous journey. The work they have done in the approximately 11-years since their appointment provides substantial bases for the Court's earlier finding that they satisfy Rule 23(g)'s criteria. Accordingly, Cotchett, Pitre & McCarthy, LLP and

Hausfeld LLP should be appointed as Settlement Class Counsel for purposes of these Settlements as they were for the previous round of settlements in this Action.

VII. CONCLUSION

Based on the foregoing, Plaintiffs respectfully request that the Court (1) grant final approval of the settlements with PAL, ANZ, CAL, and EVA; (2) appoint the named Plaintiffs as Class Representatives; and (3) appoint Interim Co-Lead Counsel for Plaintiffs as Settlement Class Counsel.

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Respectfully submitted,

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