NO. 15-16280

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

In re: TRANSPACIFIC PASSENGER AIR TRANSPORTATION ANTITRUST LITIGATION,
DONALD WORTMAN, individually and on behalf of all others similarly situated,
Plaintiff-Appellee,

AMY YANG,
Objector-Appellant,

v.

SOCIETE AIR FRANCE; MALAYSIAN AIRLINE SYSTEM BERHAD; SINGAPORE AIRLINES LIMITED; VIETNAM AIRLINES COMPANY LIMITED; JAPAN AIRLINES COMPANY, LTD.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California, No. 3:07-cv-05634 CRB

Petition for Rehearing and Rehearing *En Banc* of Appellant Amy Yang

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Table of Contents

Table of Authorities

Cases

Rules and Statutes

Other Authorities

FRAP 35(b)(1)(A) Statement

As recognized by Judge Rawlinson's dissent, the panel decision conflicts with the Supreme Court decisions *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999), and "ignore[s] the requirements of Rule 23." Dissent 1.[1] The decision, by disregarding Yang's Rule 23(e) fairness objection, also conflicts with this Court's decision in *Churchill Village, LLC v. Gen. Elec.*, 361 F.3d 566 (9th Cir. 2004). Consideration by the full court is therefore necessary to secure and maintain uniformity of the Court's decisions.

The panel decision also is premised on the misapprehensions of fact and law that any conflicts between class members over differing affirmative defenses were "speculative" because "at the time of settlement, Defendants-Appellees had not raised the[] affirmative defenses, and the district court had not ruled on them." Majority 3. This is incorrect as a matter of fact: the affirmative defenses had been raised in a motion in 2009 and/or in answers in 2011 well before the 2014 settlements. And it is incorrect as a matter of law: a district court need not rule on an affirmative defense to recognize that the affirmative defense's existence creates a material risk reducing the litigation value of a subgroup's claims such that their claims are not homogenous with those of another subgroup within the class. The panel further misapprehended *Lane v. Facebook*, 696 F.3d 811 (9th Cir. 2012) as requiring affirmance on the class-certification issue that *Lane* did not reach. *Compare id.* at 824 n.5 *with* Majority 2.

[1] "Majority" and "Dissent" refer to the attached slip opinions. "ER" and "Dkt." refer to Yang's Excerpts of Record and the district court docket in this case.

Introduction

Imagine a $40 million class-action settlement in the hypothetical case of *Coyote v. Acme*. After the attorneys take their $15 million cut, 250,000 American purchasers of unreasonably dangerous rocket-powered roller skates[2] make *pro rata* claims on the remaining $25 million to settle their consumer-fraud claims against Acme; about $100 each. But for some reason, the settlement class definition is expanded to also include European purchasers who have little chance of a successful class action and would have nothing beyond nuisance settlement value if they litigated as a separate class. Because of the expanded class definition, 350,000 European purchasers also make claims on the settlement fund. Now the American purchasers get the same $41.67 as the European purchasers, though they had a much stronger case. The American class members with a colorable cause of action have a grievance that their settlement value is being diluted by settlement-class claimants without a cause of action.

The class-certification requirements of Rule 23(a) prohibit yoking together two disparate groups into a single class like this. And a settlement that does this is inherently unfair under Rule 23(e) as well, because it treats those with colorable claims on equal footing with those that have no claim whatsoever. But a defendant has no incentive to fix the problem: it's looking for the broadest release possible at the cheapest cost to itself, without caring how the money it's paying is distributed amongst class members and the attorneys. And class counsel gets paid by total settlement size without regard to who in the class gets the money. Indeed, if class counsel splits up the classes as Rule 23

[2] *Cf. Beep! Beep!* (Warner Bros. 1952).

requires, it might have to share fees with a second set of attorneys, so its perverse incentive is to avoid the niceties of class-certification requirements. It is up to the courts enforcing the requirements of Rule 23 to protect absent class members; thus, due process and Rule 23(e) require a fairness hearing rather than just treating class settlement as a private matter.

The hypothetical isn't so hypothetical here: this petition challenges a split decision of this Court that fails to follow Supreme Court precedent or protect the unnamed class members in this scenario.

Amy Yang appeals from a district-court approval of several settlements of price-fixing claims on behalf of a class of purchasers of airline tickets for travel across the Pacific. But under federal antitrust law, only consumers who directly purchase products from alleged price-fixing conspirators have a cause of action. An "indirect purchaser," one who purchases indirectly through intermediaries (like a travel agent or Priceline or Expedia, say), however, is not permitted to sue under federal antitrust law. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); Dissent 2-3. *Illinois Brick* is certainly controversial (dozens of states have rejected *Illinois Brick* for purposes of state antitrust law), but there is no question that it limits the scope of recovery under federal law.

Yet the direct purchasers and the indirect purchasers are in a single class and are treated identically by the settlement. Because indirect purchasers make up a majority of the class,[3] over half of the $22.1 million settlement fund will be claimed by class

[3] The class period began January 1, 2000, and will end on an uncertain date in the future. *E.g.,* ER71. In that time, 2013 is the first year that more Americans booked travel directly with airlines than indirectly with online travel agents, "officially ending"

members who have no cause of action whatsoever (or, at a minimum, a materially riskier and less valuable cause of action) at the expense of the subgroup who, like Yang, are direct purchasers who do not face the *Illinois Brick* affirmative defense raised by every defendant.

Rule 23(a)(4) and Supreme Court precedent forbid this: where there are significant differences among subgroups within a class "the members of each subgroup cannot be bound to a settlement except by consents given by those who understand that their role is to represent solely the members of their respective subgroups." *Amchem*, 521 U.S. at 627. "[I]t is obvious after *Amchem* that a class divided … requires division into homogeneous subclasses…, with separate representation to eliminate conflicting interests of counsel." *Ortiz*, 527 U.S. at 856 (1999). "Conflicts of interest may arise when one group within a larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative." *Hesse v. Sprint Corp.,* 598 F.3d 581, 589 (9th Cir. 2010) (citing *Amchem*). Whether a district court might think the settlement fair to the class as a whole is irrelevant to the due process and Rule 23(a)(4) requirement of separate representation for distinct subgroups with differing interests. *Amchem*, 521 U.S. at 621; *In re Literary Works in Elec. Databases*, 654 F.3d 242 (2d Cir. 2011).

The majority panel decision sidestepped this requirement by holding that the district court did not have to consider the *Illinois Brick* defense (or similarly preclusive

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online travel agents' "decade-long dominance in leisure air bookings." Stephanie Rosenbloom, *Booking Flights and Hotels: Online Agents or Direct?*, N.Y. TIMES, Feb. 25, 2015.

FTAIA defense) because "Defendants-Appellees had not raised these affirmative defenses, and the district court had not ruled on them." Majority 3. But that premise is factually false. *Every* defendant not subject to a bankruptcy stay had raised the *Illinois Brick* defense in 2011 before the settlements were signed in 2014. And that the district court had not ruled on the issues is legally irrelevant: the district court had not dispositively resolved the legal issues in *Amchem*, *Ortiz*, or *Literary Works*, either; under the majority opinion's standard, all of those cases were wrongly decided.

The majority mistakenly relied upon *Lane v. Facebook* to support its class-certification analysis, even though *Lane* expressly stated that its reasoning might have been different if it were to consider "significant variation" "among class members" and class-certification and definitional issues that appellants there had not raised. 696 F.3d at 824 n.5.

Furthermore, Yang protested on appeal that this Circuit's test for settlement fairness under Rule 23(e) requires a district court to do what it did not do here: analyze "the strength of the plaintiffs' case." *Churchill Village,* 361 F.3d at 575. The panel failed to apply this precedent, providing an independent reason for rehearing.

Rehearing is necessary so that the panel decision is not based on misapprehensions of fact and law; in the alternative, rehearing *en banc* is necessary to reconcile the panel's opinion with the precedents of the Supreme Court and this Court.

Statement of the Case

The underlying class action alleged a conspiracy of numerous international air carrier defendants to fix prices in violation of the Sherman Act and sought recovery for

passengers who had purchased transpacific air travel from the defendants and their alleged co-conspirators. This appeal relates to the district court's approval of settlements with eight of the defendants, each of which creates a single class of purchasers permitted to recover the same *pro rata* share of funds.[4] Although indirect purchasers had no right to recover any damages under *Illinois Brick,* nor under state law due to preemption of any state-law claim by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713, both they and direct purchasers, who do have a right to recover damages, were represented by the same counsel and named plaintiffs and will recover the same *pro rata* amount under the challenged settlements. *See* ER65-ER66, ER91-ER92, ER116-ER117, ER141, ER166. Similarly, the settlement with Japan Airlines International Company ("JAL") allowed purchasers of foreign- and U.S.-originating travel to recover the same *pro rata* amount, without providing them with separate representation, despite foreign-originating-travel purchasers having no right to damages under the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6A ("FTAIA"). ER64. The district court had re-affirmed this long-standing rule of law in a 2011 ruling in the case, holding that the FTAIA barred the court from exercising subject-matter

[4] Eight of the thirteen defendants had settled at the time of appeal, and the district court issued a single final approval order for those eight settlements. While all eight settlements suffer the same defect, class definitions reflecting the scope of the alleged conspiracy differed slightly. Yang has standing to appeal with respect to only the five settlements where she is a class member, though a decision to vacate the legally erroneous ruling below and remand for further proceedings will affect all eight settlements.

jurisdiction over claims arising from overcharges associated with flights originating in Asia. ER255.

Yang is a class member in the settlements with JAL, Air France, Malaysian Airline System Berhad, Singapore Airlines Limited, and Vietnam Airlines Company Limited. Represented *pro bono* by non-profit counsel, she objected to these settlements, arguing, *inter alia*, that the settlements violated Rule 23(a)(4) because, by treating all class members the same despite sharp differences in the value of their claims, the settlements created intra-class conflicts that precluded a finding of adequate representation; and they were similarly unfair under Rule 23(e) because they treated materially differently situated class members identically. In particular, she objected that the JAL settlement unfairly diluted the claims of purchasers of U.S.-originating travel, who had stronger claims than purchasers of foreign-originating travel, who had no claim under FTAIA, and that all of the settlements unfairly diluted the claims of direct purchasers, who had stronger claims than indirect purchasers, who had no right to recovery under federal or state law. ER199-ER203; ER44-ER45. Because the unitary class structure forced class members with superior claims to unfairly compromise and dilute their claims for recovery so that class members who have no claim (or, at best, longshot claims that face at a minimum substantial additional hurdles) could join a single settlement class, the settlements violated the requirements of Rule 23(a)(4) under *Amchem* and *Ortiz* and Rule 23(e).

The district court nevertheless approved the settlements, "declin[ing] the opportunity to wade into the *Illinois Brick* issue at this time" and stating its belief that its role is not to differentiate within a settlement class based on the strength or weakness

of the members' claims. Instead, relying on *Lane*, 696 F.3d at 824, the court held that "while there might be differences in the values of individual class members' claims at trial (or following appeal), … the settlement as a whole is substantial, and fair." ER34-ER35.

Yang appealed, arguing that the district court decision contradicted *Amchem* and *Ortiz* and failed to apply the *Churchill Village* test. A split panel affirmed, approving the district court's reliance on *Lane* without mentioning *Churchill Village*. The panel opinion rejected Yang's appeal because, "at the time of settlement, Defendants-Appellees had not raised these affirmative defenses, and the district court had not ruled on them," and "Subclasses may not be created 'on the basis of speculative' conflicts of interest." Majority 3 (quoting *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015)).

Judge Rawlinson, writing in dissent, would have reversed and remanded to create the subclasses *Amchem* and *Ortiz* require because "With such an apparent conflict within the class, it is virtually impossible for the class representatives to adequate represent a class that includes members who may be entitled to absolutely no recovery." Dissent 1-2.

Argument

I. The majority opinion errs in both fact and law in holding that conflicts between class members were too "speculative" to be considered because such conflicts were based on affirmative defenses that had not been raised by the appellees or ruled on by the district court.

A. Rehearing is appropriate because the panel misapprehends the facts.

The majority opinion stated that "at the time of settlement, Defendants-Appellees had not raised the[] affirmative defenses [of *Illinois Brick* and FTAIA], and the district court had not ruled on them." As a result, the majority concluded, "[s]ubclasses may not be created 'on the basis of speculative' conflicts of interests." Majority 3 (quoting *Online DVD*). But the panel's premise—that defendants had not raised those two affirmative defenses—is wrong.

First, several defendants raised FTAIA in a motion to dismiss in 2009. Dkt. 290. This is well before JAL and the plaintiffs entered into a settlement agreement in 2010. Dkt. 402; ER361. The district court issued an order holding that FTAIA barred foreign injury claims in 2011. ER255. This all occurred three years before plaintiffs moved for preliminary approval of the later-amended JAL settlement agreement in 2014. Dkt. 900; ER397.

Second, all of the remaining defendants-appellees raised (or adopted and incorporated) *Illinois Brick* and/or indirect-purchaser status as an affirmative defense in their answers filed in 2011. *See* Dkt. 586 at 42; Dkt. 592 at 5; Dkt. 594 at 53; Dkt. 595 at 55-56. Again, this happened years before these four defendants-appellees entered into settlement agreements. *See* ER86; ER132; ER135; ER161.

The panel's claim that the defense was "speculative" because no one thought to raise it before the settlement thus badly misapprehends the facts and requires rehearing.

B. Rehearing or rehearing *en banc* is appropriate because the panel majority misapprehends the law and contradicts Supreme Court precedent by dismissing intra-class conflicts as "speculative" where a court has not yet ruled on issues underlying an intra-class conflict.

To require a court to have ruled on an issue before that issue can create a conflict requiring separate representation under Rule 23(a)(4) is an error of law that, if left uncorrected, would undermine the Rule; it also directly contradicts *Amchem* and *Ortiz*.

As an initial matter, the panel pulled its "speculative" test from *Online DVD*. But the 23(a)(4) conflict alleged there—whether "fairly typical" requests for incentive payments of $5,000 to class representatives made the representatives "inadequate"—has nothing to do with the actual "intra-class structural conflict" existing here. In fact, *Online DVD* acknowledged such a structural conflict would be grounds for decertification. 779 F.3d at 942-43 (*citing Amchem* and *Dewey v. Volkswagen AG*, 681 F.3d 170, 187-89 (3d Cir. 2012)[5]). While the district court had not ruled on the *Illinois Brick* defense at the time plaintiffs sought approval of the settlements, the majority opinion misapprehends the law by thinking this relevant. The panel's extension of the "speculative" exception to such scenarios conflicts with *Amchem* and *Ortiz*.

By the majority opinion's lights, *Amchem*'s intra-class conflict between plaintiffs with fully-manifested asbestos injuries and those with latent undiagnosed claims was

[5] *Dewey*'s settlement impermissibly treated similarly-situated class members differently, the inverse of the problem here.

entirely "speculative." The *Amchem* district court in fact found that no conflict would arise, finding that defendants' assets sufficed to pay all claims and that future claimants would not be unfairly prejudiced. 521 U.S. at 626. No matter: a "global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected" cannot be approved. *Id.* at 627. This is so even if one, as the Supreme Court did, is only speculating about the future effect of the *Amchem* settlement's lack of an inflation adjustment. *Id.* at 627.

Similarly, in *Ortiz*, the fatal 23(a)(4) violation came about because the settlement failed to account for the legally relevant date that defendant's insurance lapsed. The settlement in *Ortiz* assumed the defendant's litigation against its insurer would succeed and proposed to pay all class members equally, even though claims arising before 1959 would likely be covered by insurance, while post-1959 claims might only recover from an insolvent company. 527 U.S. at 857. But the conflict in *Ortiz* was "speculative" by this panel's reasoning because the district court had not had the opportunity to rule dispositively on collateral insurance litigation pending in other courts, whereas *Ortiz* in fact required separate representation.

The existence of these material affirmative defenses in this case is not speculative; it should not be surprising that parties raised these two affirmative defenses early in the litigation. The indirect-purchaser rule is not an obscure aspect of antitrust, but is known to the most novice antitrust practitioner, and regularly arises in price-fixing litigation—and almost always results in separate putative classes, *including in litigation over airline-ticket purchases. E.g., In re Korean Air Antitrust Litig.*, 642 F.3d 685 (9th Cir. 2011) (discussing appropriate management of MDL involving direct and indirect purchasers; affirming

dismissal of indirect purchasers' state-law claims represented by separate counsel); *Somers v. Apple, Inc.,* 729 F. 3d 953 (9th Cir. 2013) (plaintiff sought certification of two separate classes of direct and indirect purchasers); *In re Fresh & Process Potatoes Antitrust Litig.*, No. 4:10-md-2186, Dkt. 902 and 904 (D. Idaho Dec. 14, 2015) (separate orders approving separate settlements for separately represented direct and indirect purchasers); *In re Korean Ramen Antitrust Litig.*, No. 3:13-cv-04115-WHO, Dkt. 210 (N.D. Cal. Sept. 29, 2015) (discussing separate settlements for separately represented direct-purchaser plaintiffs and indirect-purchaser plaintiffs); *In re Cathode Ray Tube Antitrust Litig.*, 3:07-cv-5944, Dkt. 2517 (N.D. Cal. Apr. 1, 2014) (same). Of note: the indirect purchasers in each of these cases and settlements had no right of recovery if they did not have a cause of action under state antitrust law as an indirect purchaser, and the indirect-purchaser settlements created subclasses based upon the fact that purchasers from states with permissive indirect-purchaser rules created different rights of recovery than purchasers from states that followed *Illinois Brick*.

The status of class members based on the existing and immutable facts of their ticket purchases were at the heart of the litigation. If a conflict is "speculative" in these circumstances, it is unclear what, if any, conflict will ever be sufficient to require separate representation of class members, and raises questions about the validity of *Amchem* and *Ortiz* in this Circuit. This misapprehension of law requires rehearing; in the alternative, rehearing *en banc* is required to maintain uniformity of the Court's decisions with Supreme Court precedent.

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The legal and factual grounds on which the majority opinion concluded that the conflict between class members was "speculative" or unknown to the settling parties were thus faulty. All that is necessary to reject class certification here is to recognize that one subgroup is facing material affirmative defenses that substantially reduce the litigation value of its claims relative to the subgroup not facing those affirmative defenses. Once a court recognizes that truism, it is not "speculative" that the affirmative defenses mean the class is not homogenous and that there is an intra-class conflict that makes certifying a single class improper. The court need not rule on the issue, or even just guess whether the likelihood of success of these affirmative defenses is a 50% coin flip, or 80%, or (as is almost certainly the case) effectively 100%; it merely needs to find that the difference is not trivial or immaterial. That uncertainty is exactly why separate representation is required to ensure that each subgroup is being negotiated for at arm's length, and that a single conflicted class counsel isn't taking a self-serving shortcut that compromises one subgroup's rights for the benefit of another's.

As the dissent recognized, these "disparate claims prevent adequate representation of the class" under Supreme Court precedent. Dissent 3. The record shows that the settling parties understood or should have understood that a good number of class members had weak or non-existent claims as a result of these defenses, based on facts that existed *at the time of settlement*, and this information would have factored into any rational party's settlement calculation. Yet every class member received the same *pro rata* distribution of settlement funds. As a result, class members with the superior claims, *i.e.*, purchasers of U.S.-originating travel under the JAL settlement and direct purchasers under all five settlements—were forced to unfairly

compromise and dilute their claims for damages so that class members who have no claim can participate in a single settlement class. Just as the class members eligible for insurance payment were not adequately represented in *Ortiz*, the direct purchasers like Yang are not adequately represented here.

II. Rehearing or rehearing *en banc* is independently appropriate because the majority's reliance on *Lane* for class-certification issues misapprehends the law and contradicts *Amchem*.

The majority cited *Lane* for the proposition that Rule "23(a) does not require a district court to weigh the prospective value of each class member's claims or conduct a claim-by-claim review when certifying a settlement class." But *Lane* holds no such thing.

Lane addressed an objector's argument that the $9.5 million settlement recovery was too low *as a whole* because the district court failed to consider the value of certain class members' Video Privacy Protection Act ("VPPA") claims that sought statutory damages of $2500 per violation. 696 F.3d at 822-23. The *Lane* appellants did "not challenge the district court's class certification or its decision to include individuals with VPPA claims in the settlement class," and the court "express[ed] no opinion" on the "relevant" question of "significant variation in claimed damages among class members." *Id.* at 824 n.5. But the panel ignored and contradicted *Lane*'s distinction.

Similarly, the district court, relying on *Lane,* suggested that because it found that "the settlement as a whole" is fair, it need not resolve the Rule 23(a)(4) issue Yang raised. ER34-35. This by itself is reversible legal error under *Amchem*. Rule 23(e) "was designed to function as an additional requirement, not a superseding direction, for the

class action to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." *Amchem*, 521 U.S. at 621 (cleaned up); *Online DVD*, 779 F.3d at 942.

The district court's reliance on *Lane* to support class certification was reversible legal error, and the panel opinion misapprehends *Lane* and *Amchem* in repeating the error.

III. Rehearing *en banc* is independently appropriate because the majority opinion conflicts with this Court's decision in *Churchill Village*.

An "agreement that gives the same monetary remedy to all members of the class, despite significant differences in the nature of their claims or injuries, may not be fair and reasonable." AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.05, *comment b*. On appeal, Yang raised the Rule 23(e) unfairness of having her claim diluted and the refusal of the district court to apply the *Churchill Village* test to the claims of the subgroups.

The panel affirmed without mentioning the fairness issue or *Churchill Village*. It correctly recognized that this Court does not require district courts "to attribute a specific monetary value to each of the class members' asserted claims." Majority 2 (citing *Lane*), and perhaps it thought this resolved the issue. But Yang did not ask the district court to calculate a specific monetary value of the subgroups' claims.

What Yang asked for, and what the district court failed to do, is precisely what this Court already required in *Churchill Village*: use the fairness hearing to evaluate "the strength of the plaintiffs' case" relative to the "amount of the settlement." 361 F.3d at 575-76. That doesn't require the district court to calculate an exact *ex ante* probability of success of the affirmative defenses, much less actually adjudicate them (though the

court had already decided the FTAIA issue). All it requires is a factual finding whether an affirmative defense creates a materially different likelihood of success between subgroups. Given that every appropriately-litigated price-fixing case in this Circuit has accounted for the indirect-purchaser affirmative defense that every litigating defendant here raised, the inescapable factual conclusion is that materially differently situated class members are unfairly being treated the same, and the district court erred as a matter of law in approving the settlements under Rule 23(e). Rehearing or rehearing *en banc* is necessary to maintain uniformity of this Court's decisions.

Conclusion

The Court should grant panel rehearing or rehearing *en banc*.

Dated: July 10, 2017

Respectfully submitted,

/s/ Theodore H. Frank

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Certificate of Compliance
Pursuant to Rules 35-4 and 40-1 for Case Number 15-16280

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing and for rehearing *en banc*:

Contains 4,199 words (petitions and answers must not exceed 4,200 words), and is prepared in a format, type face, and type style that complies with Fed. R. App. P. 32(a)(4)-(6).

Executed on July 10, 2017.

/s/ Theodore H. Frank
Theodore H. Frank

Proof of Service

I hereby certify that on July 10, 2017, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

/s/ Theodore H. Frank
Theodore H. Frank