No. _-_____

In The Supreme Court of the United States

AMY YANG,

Petitioner,

v.

DONALD WORTMAN, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Ortiz v. Fibreboard Corp.*, the Court held that class members whose legal claims have materially different settlement values than those of other class members may not be joined in a unitary settlement class unless each subclass has separate representation. 527 U.S. 815, 857-58 (1999). The *Ortiz* class members had competing interests because most of the settlement fund came from insurance that covered injuries arising up to, but not after, 1959. In accord with its decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), the Court held that Rule 23(a)(4), which requires that class representatives "fairly and adequately" protect the class's interests, was a "structural protection" of the absent class members' interests; the district court's certification of a single class whose members had competing interests negated that protection. 527 U.S. at 855-57.

Below, a divided panel of the Ninth Circuit Court of Appeals affirmed the certification of a unitary settlement class that paid the same *pro rata* amount both to class members with no colorable claim under black letter federal antitrust law and to class members with a viable claim for damages.

Are class members "adequately represented" under Federal Rule of Civil Procedure 23(a)(4) when a single representative negotiated a single settlement with uniform relief for a single class that includes both class members with viable claims and class members whose claims are subject to dispositive defenses?

PARTIES TO THE PROCEEDING

Petitioner Amy Yang was an objector in the district court and appellant in No. 15-16280 below.

Respondents Donald Wortman, Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, Dickson Leung, Brendan Maloof, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow, James Kawaguchi, and David Kuo were named plaintiffs in the district court and appellees in No. 15-16280 below.

Respondents Japan Airlines Company, Ltd., Malaysia Airline System Berhad, Singapore Airlines Ltd., Société Air France, and Vietnam Airlines Company Ltd. were defendants in the district court and appellees in No. 15-16280 below.

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INTRODUCTION

This Court has repeatedly held that Rule 23(a)'s class certification requirements, which are "designed to protect absentees by blocking unwarranted or overbroad class definitions[,] demand undiluted, even heightened attention in the settlement context." *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *accord Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). This Court has also repeatedly held that these interests in structural protection are paramount, even when a class action settlement might be objectively fair notwithstanding the failure to satisfy Rule 23(a)(4)'s adequacy of representation requirement. After all, the fairness inquiry under Rule 23(e) is "an additional requirement, not a superseding direction." *Amchem*, 521 U.S. at 621. Following *Amchem*, *Ortiz* rejected certification of a settlement class containing members with claims of materially different value. If class members have competing interests in a limited fund, the "settlement must seek equity by … treating such differently situated claimants with fairness as among themselves." 527 U.S. at 855-56.

The Ninth Circuit's misapplication of these opinions in this case deepens a divide among the circuit courts regarding the adequacy of representation required under Rule 23(a)(4). In the nearly 20 years since *Ortiz*, circuit courts have split on the protections necessary to ensure adequate representation. The Ninth Circuit's decision below places it in a camp that, notwithstanding the strong direction from this Court, focuses on the Rule 23(e) fairness inquiry rather than the adequacy of efforts to eliminate intraclass conflicts arising from the underlying legal claims. The Ninth

Circuit went so far as to hold that conflicts are "speculative," and thus not worthy of separate representation, unless the defendants have raised the affirmative defenses that would create those conflicts. App. 3a. That reasoning would place the class members' rights at the mercy of a party whose incentive is to ignore them. *Amchem* and *Ortiz* demand separate representation of subgroups with conflicting claims on a single recovery, and it conflicts with holdings from the Second and Seventh Circuits. Consistent with *Amchem* and *Ortiz*, they recognize that separate counsel is necessary when a settlement affects "the 'essential allocation decisions' of plaintiffs' compensation and defendants' liability." *In re Payment Card Interchange Fee & Merchant Disc. Antitrust Litig.*, 827 F.3d 223, 233-34 (2d Cir. 2016) (quoting *Amchem*, 512 U.S. at 627); *see also In re Literary Works in Electronic Databases Copyright Litigation*, 654 F.3d 242, 257 (2d Cir. 2011); *Smith v. Sprint Communications*, 387 F.3d 612, 614 (7th Cir. 2004).

In the Second or Seventh Circuits, the certification in this case would have been reversed. Each of these settlements entitle all class members, whether they purchased tickets directly or indirectly, to the same *pro rata* payment. But indirect purchasers, who make up a majority of the class, have no claim for damages under longstanding, black-letter federal antitrust law. One settlement groups class members whose trips originated abroad with members whose trips originated in the United States, even though claims for damages are not available for foreign-origination travel. As a result, class members with strong, legitimate claims were in direct competition with, and had their recovery diluted by, class members who had no claim for damages. "The very decision to treat [these

class members] all the same is itself an allocation decision with results almost certainly different from the results" they would have chosen. *Ortiz*, 527 U.S. at 857. Other circuits and this Court's precedent would require separate representation. The Ninth Circuit did not.

The intra-class conflict here is worse than the one in *Literary Works*, where at least class counsel made a good faith effort to try to allocate a common settlement fund amongst class members with differing quality claims. Here, as was held impermissible in *Ortiz*, every class member's claim is treated identically, though over half the class is facing a dispositive affirmative defense. Class counsel engaged in and the district court and Ninth Circuit acceded to improper procedural shortcuts that unfairly diluted the claims of class members by millions of dollars.

Plaintiffs' lawyers filing a complaint have their choice of forum nationwide. Without uniformity in the application of Federal Rule of Civil Procedure 23, forum shopping can permit class action abuse by these attorneys. At the settlement stage, plaintiffs' attorneys are in direct competition with their putative clients: any dollar awarded in fees to the lawyers is a dollar that will not be distributed to the class. Defendants likewise are incentivized to settle quickly, seeking a broad release covering as many potential claims as possible, and they are indifferent to how their settlement payment is allocated among the class members or between the class members and their attorneys. Without proper judicial oversight, these incentives can result in settlements with overbroad class definitions (to increase the number of releases for defendants and fees for plaintiffs' attorneys) and unfair

allocation of the settlement fund. The result might be good for the defendants and plaintiffs' attorneys, but not for the harmed class members. These absent class members, who did not choose their attorney and often are unaware their rights are at stake in the litigation, are dependent upon rigorous judicial scrutiny to ensure the structural and procedural safeguards of Rule 23.

This Court's intervention is required to provide guidance to courts seeking to ensure proper protections to the millions of absent class members whose rights are at stake in the ever-increasing number of class actions on their dockets.

PETITION FOR WRIT OF CERTIORARI

Petitioner Amy Yang petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The Ninth Circuit's opinion affirming the district court is available at --- Fed. Appx. ---, 2017 WL 2772177, and is reproduced at App. 1a-7a.

The order of the District Court for the Northern District of California approving the class settlements is available at 2015 WL 3396829 and is reproduced at App. 8a-17a.

The Ninth Circuit's unreported order denying rehearing and rehearing *en banc* is reproduced at App. 18a-19a.

JURISDICTION

The Ninth Circuit issued its opinion and order affirming the district court on June 26, 2017. It denied Petitioner's timely petition for rehearing and rehearing *en banc* on August 2, 2017. The Court has jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

The applicable portion of Federal Rule of Civil Procedure 23 states:

* * *

> (a) Prerequisites. One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> * * *
>
> (4) the representatives will fairly and adequately protect the interests of the class.

STATEMENT OF THE CASE

I. Factual and procedural background.

A. Claims, defenses, and settlements.

The plaintiffs sued several international air carriers under the Sherman Act. They alleged a conspiracy to fix prices for trans-Pacific air travel and sought recovery for a class of passengers who had purchased that travel from the defendants and their alleged co-conspirators between January 1, 2000, and the end of the appeals process. *In re Transpacific Passenger Air Transp. Antirust Litig.* ("*Transpacific*"), No. 3:07-cv-05634, Dkt. 467 (N.D. Cal. May 9, 2011). This petition relates to the district court's approval of settlements with five of the defendants. App. 8a.

The airlines raised several defenses. One of these was the *Illinois Brick* doctrine. Under that doctrine, antitrust recoveries are limited to direct purchasers, that is, purchasers who participated directly in the markets whose prices were fixed. Indirect purchasers have no claim for damages. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728-29 (1977). Because these are claims about air travel, the doctrine also prevents indirect purchasers from seeking relief under state antitrust laws; they are preempted by the Airline Deregulation Act of 1978, 49 U.S.C. § 41713. Another defense was the Foreign Trade Antitrust Improvements Act ("FTAIA"), 15 U.S.C. § 6a, which generally excepts activities occurring abroad from the scope of federal antitrust laws. The district court in 2011 dismissed claims arising from travel that originated in Asia as barred by the FTAIA. *Transpacific*, No. 3:07-cv-05634, Dkt. 467 (N.D. Cal. May 9, 2011).

In 2014, the plaintiffs sought approval of eight settlements, including the five settlements at issue here. In each settlement, the settling airline agreed to contribute an amount ranging from $555,000 to $10 million to a settlement fund to be distributed to eligible members of that settlement class. Each class included both passengers who purchased air travel directly from an alleged price fixer and passengers who purchased their travel indirectly, such as through an online vendor or travel agent, *see* App. 6a. Each class included passengers who purchased travel that originated in the United States. The class of Japan Airlines Company Ltd. ("JAL") travelers also included passengers who purchased travel that originated in Asia. But each settlement created a unitary settlement class—a single class of purchasers, each entitled to recover the same *pro rata* share of funds.

B. Yang's objections to the settlement.

Petitioner Amy Yang purchased transpacific air travel directly from an alleged co-conspirator during the class period and is a member of the JAL, Air France, Malaysian Airlines, Singapore Airlines, and Vietnam Airlines settlement classes. *Transpacific*, No. 3:07-cv-05634, Dkt. 993 (N.D. Cal. Apr. 17, 2015). She objected to the certification and the settlements. *Id.* One basis for her objection was that the settlements violated Rule 23(a)(4).

Yang argued that the interests of those who had bought travel directly from a conspirator had been inadequately represented. Rule 23(a)(4) required the district court to certify subclasses with separate representation for a subclass of direct purchasers, to whom the *Illinois Brick* doctrine did not apply, and a

subclass of indirect purchasers, to whom it did. Because their claims were not barred by the *Illinois Brick* doctrine, direct purchasers had stronger claims than did indirect purchasers. The settlements, however, entitled all purchasers to the same *pro rata* recovery, diluting the value of direct-purchase claims by mixing them with weaker, indirect-purchase claims. This dilution put the two subgroups of claimants into conflict—the members of one subgroup were entitled to larger slices of the pie than were the others—that precluded a finding that a single representative could furnish adequate representation. She further objected to the JAL settlement on the same basis due to the difference between the strength of the claims of those whose travel originated in the U.S. and the weakness of the claims of those whose travel originated abroad, whose claims the FTAIA barred.

In each case, both subgroups of purchasers were represented by the same counsel and named plaintiffs in the litigation and settlement negotiations. Indirect purchasers make up a majority of each class.[1] Thus, more than half of the settlement funds will be claimed by class members who have no (or at least a much riskier and less valuable) cause of action. Their recovery comes at the expense of the subgroup of class members who, like petitioner Yang, do not face the *Illinois Brick* or FTAIA defenses.

In response, plaintiffs argued, *inter alia*, that none of the settlements created improper conflicts because

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[1] During the class period, most Americans booked travel with online travel agents. Stephanie Rosenbloom, *Booking Flights and Hotels: Online Agents or Direct?*, N.Y. TIMES, Feb. 25, 2015.

all class members shared an interest in establishing defendants' liability, contract principles permitted parties to bind themselves as they see fit, and all class members here are direct purchasers. *Transpacific*, No. 3:07-cv-05634, Dkt. 999 (N.D. Cal. May 8, 2015). The only evidence plaintiffs cited in support of the latter argument was a blank form agreement from a travel agent trade group. *Transpacific*, No. 3:07-cv-05634, Dkt. No. 999-10 (N.D. Cal. May 8, 2015). Plaintiffs further responded that the JAL settlement had been negotiated before the district court's dismissal of the foreign-injury claims and, in any event, settlement value should be measured by the benefit provided to the class, not "on the vagaries of what might happen" later in the case.

The non-settling defendants stated their intent to argue, "in the appropriate posture and with the necessary evidentiary record, that the *Illinois Brick* doctrine bars the claims of some of the putative class members who purchased from intermediaries such as consolidators and travel agents." *Transpacific*, No. 3:07-cv-05634, Dkt. No. 1005 (N.D. Cal. May 15, 2015).

II. The district court approves the settlement.

Following a fairness hearing, the district court overruled Yang's objections and approved the settlements. It "decline[d] the opportunity to wade into the *Illinois Brick* issue" and stated that its role was not to differentiate among class members based on the strength or weakness of their claims. App. 13a-14a. Relying on *Lane v. Facebook*, 696 F.3d 811, 824 (9th Cir. 2012), it held that, "while there might be differences in the val-

ues of individual class members' claims at trial (or following appeal), … the settlement as a whole is substantial, and fair." App. 14a.

The district court issued final judgments under Rule 54(b) for the eight settling defendants, including the five at issue here. Yang's timely appeal followed.

III. The divided decision below.

Over a dissent from Judge Rawlinson, the Ninth Circuit affirmed. App. 1a. The panel majority sidestepped the Rule 23(a)(4) and due-process requirement that distinct subgroups with differing interests have separate representation, holding that subclasses are not required because Rule 23(a) does not require a district court certifying a settlement class to "weigh the prospective value of each class member's claims or conduct a claim-by-claim review…." App. 2a. Like the district court, the majority relied on *Lane* to support this analysis; like the district court, it did not consider *Lane*'s statement that its reasoning might have been different if appellants had raised the "significant variation" among class members' claims. 696 F.3d at 824 n.5.

The panel majority further held that the district court did not have to consider the *Illinois Brick* or FTAIA defenses because, it found, the defendants had not raised and the district court had not ruled on them. App. 2a-3a. Based on this finding, the panel majority concluded that the intra-class conflicts were speculative. App 3a.

Judge Rawlinson dissented. She 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 adequately represent a class that includes members who may be entitled to absolutely no recovery." App. 5a. She concluded that

> the district court abused its discretion by lumping together disparate claimants, failing to comply with Rule 23 and our governing precedent. … [It] took the easy way out rather than sorting through the various claims and claimants. *See Ortiz*, 527 U.S. at 856 (requiring "division into homogenous subclasses" when there are conflicting claims within the class).

App. 6a-7a.

The Ninth Circuit denied Yang's petition for rehearing and rehearing *en banc* on August 2, 2017. App. 18a. Judge Rawlinson would have granted rehearing and rehearing *en banc*. *Id.*

REASONS TO GRANT THE WRIT

The Court has addressed class action issues in each recent term. *E.g.*, *Microsoft Corp. v. Baker*, 137 S. Ct. 1702 (2017); *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036 (2016); *Dart Cherokee Basin Operating Co., LLC v. Owens*, 135 S. Ct. 547 (2014); *Haliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014). But though certified class actions "invariably"[2] end in settlement, the Court has directly confronted class settlements only twice, in *Amchem* and *Ortiz*. In the eighteen years since *Ortiz*, the lower courts have split over the protections necessary to ensure adequate representation of absent class members, reaching sharply different conclusions about how to treat those class members with sharply competing interests. This petition presents the Court with the opportunity to resolve that split and bring certainty to an issue that affects federal courts across the nation.

I. The persistent incentive problems of representative litigation.

Federal Rule of Civil Procedure 23 sets forth a number of protections to address the conflicts of interest inherent to representative litigation such as class actions. These protections are necessary to satisfy due process because

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[2] *Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014); *see also* J. Maria Glover, *The Federal Rules of Civil Settlement*, 87 N.Y.U. L. Rev. 1713, 1723 n.36 (2012);

> [c]lass action settlements are different from other settlements. The parties to an ordinary settlement bargain away only their own rights—which is why ordinary settlements do not require court approval. In contrast, class-action settlements affect … the interests of unnamed class members who by definition are not present during the negotiations. And thus there is always the danger that the parties and counsel will bargain away the interests of unnamed class members in order to maximize their own.

In re Dry Max Pampers Litig., 724 F.3d 713, 715 (6th Cir. 2013) ("*Pampers*"). *See also Evans v. Jeff D.*, 475 U.S. 717, 733 (1986) (acknowledging "the possibility of a tradeoff between merits relief and attorney's fees" in settlement negotiations).

The protection of absentee class members is particularly important where they have antagonistic interests. Rule 23(a)(4) specifically furnishes this protection, permitting a court to certify a class "only if … the representative parties will fairly and adequately protect the interests of the class." This protects absent class members "by blocking unwarranted or overbroad class definitions[.]" *Amchem*, 521 U.S. at 620. Because class-action settlements surrender the legal rights of persons not actually party to the suit, the adequate-representation requirements demand "undiluted, even heightened, attention in the settlement context." *Id.* One of those requirements is "intraclass equity." *Ortiz*, 527 U.S. at 863.

The intraclass-equity requirement mitigates the incentive to sacrifice some class members' interests to

benefit others. Defendants care only about maximizing the number of releases from potential claimants while minimizing their payments; they are indifferent to the allocation of the payments. *Pampers,* 724 F.3d at 718; *In re Bluetooth Headset Litig.*, 654 F.3d 935, 948-949 (9th Cir. 2011); *Redman v. RadioShack*, 768 F.3d 622, 629 (7th Cir. 2014); *Pearson v. NBTY, Inc.,* 772 F.3d 778, 786-87 (7th Cir. 2014). Class counsel's fees, meanwhile, are usually based on the size of the common fund created by the overall settlement value—what counsel has recovered for the class. *See Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). Class counsel have no incentive to ensure a fair allocation among class members. Jonathan R. Macey & Geoffrey P. Miller, *Judicial Review of Class Action Settlements*, 1 J. OF LEGAL ANALYSIS 167, 188 (2009). Their interest is in maximizing their fee, which will be the same for a common fund no matter who partakes of it. This is a disincentive for class counsel to ask to certify separately represented subclasses: Dividing members into subclasses also divides one master common fund into several smaller funds, thus dividing the fees attributable to each fund, and requiring sharing fees with additional separate counsel.

The defendant and class counsel will negotiate on the only issue that interests them: the size of the pie. But the size of the slices is an intra-class negotiation. Without vigorous enforcement of the adequate-representation protection, there is no advocate for claimants within the class to receive a pie slice of the size they deserve. It is thus no surprise that intra-class conflicts were an "endemic problem[.]" That problem was compounded by the extra-legality of "intra-class tradeoffs" made by "even the well-meaning plaintiffs' attorney," whose role had gradually shifted away from

that "of an advocate and adviser for clients" to one "of a philosopher king, dispensing largess among his client subjects." John C. Coffee Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1443 (1995).

Certain courts, notably the Second and Seventh Circuits, have applied *Amchem* and *Ortiz* rigorously. When class members have competing interests, those courts refuse to approve certifications that do not create separate subclasses with their own counsel and representative. Other courts, notably the Ninth Circuit below and the Third Circuit, have been more reluctant to intercede when called upon to enforce the "specifications" of Rule 23 "designed to protect absentees from unwarranted or overbroad class definitions." *Amchem*, 521 U.S. at 620.

This inter-circuit fissure presents a recurring and important issue. Without a uniform interpretation of Rule 23, less scrupulous counsel will forum-shop class settlements into circuits that are lax in enforcing class members' rights to adequate representation. In cases like this, that means the defendant's peace and class counsel's fee come at the expense of class members with legitimate claims—class members whose share of the recovery is diluted by individuals whose own claims would entitle them to zero recovery.

II. The Court's enforcement of Rule 23's protections.

Two of the Court's opinions, *Amchem* and *Ortiz*, create the roadmap lower courts must use to enforce the protections of Rule 23. Both arose from the mass of asbestos cases burdening courts in the 1980s and 1990s.

The parties in *Amchem* proposed to certify a settlement-class before litigation had occurred. The district

court certified the class based on class members' common interest "in receiving prompt and fair compensation for their claims" (*i.e.*, an interest in settlement). 521 U.S. at 607. The Third Circuit reversed, holding that the district court had lowered the bar for settlement-only certifications when each of Rule 23's "requirements must be satisfied without taking into account the settlement, and as if the action were going to be litigated." *Georgine v. Amchem Prods.*, 83 F.3d 610, 626 (3d Cir. 1996).

The Court, speaking through Justice Ginsburg, unequivocally affirmed. A settlement class disposed of Rule 23(b)(3)(D) trial-manageability issues, but the other "specifications of the rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context." 521 U.S. at 620. These safeguards "are not impractical impediments—checks shorn of utility—in the settlement class context," nor are they superseded by Rule 23(e)'s requirement that the district court approve class-action settlements. *Id.* at 621. The settlement-approval requirement supports, not supplants, these protections, "for the 'class action' to which Rule 23(e) refers is one qualified for certification under Rule 23(a) and (b)." *Id.* In sum, even a settlement that is "fair, reasonable, and adequate" under Rule 23(e) cannot be approved if the class being certified does not satisfy the protections of Rule 23(a) and (b).

Dealing specifically with Rule 23(a)(4)'s adequacy-of-representation protection, *Amchem* held that each representative "be part of the class and possess the same interest and suffer the same injury as the class members." *Id.* at 625-26 (internal quotation omitted).

If a class's subgroups have significant differences, "the members of each subgroup cannot be bound to a settlement except by consents given by" representatives devoted specifically to that subgroup. *Id.* at 627 (quoting *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 742-743 (2d Cir. 1992)). The *Amchem* class was not cohesive enough to settle as a single class because the class members' injuries were so varied, some class members in fact manifesting no harm at the time of the settlement. *Id.* The interest of those potential "future-injury claimants" was to ensure their ability to recover in the future and to receive medical monitoring; that interest conflicted with the interest of "current-injury plaintiffs" in recovering damages immediately. These disparities meant that the settlement was making "essential allocation decisions" about who would be paid and how "with no structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Id.* at 627.

The Court's second decision was *Ortiz*. 527 U.S. 815. The *Ortiz* class split along two fissures: it included claimants exposed to asbestos both before and after the defendant's insurance policy had lapsed, and it included claimants with both present and potential injuries. *Id.* at 857. Because the pre-expiration claimants had access to insurance proceeds, their claims were inherently more valuable (just as petitioner's claims here are inherently more valuable than those of indirect purchasers or purchasers of foreign-origination travel). *Id.* And just as in *Amchem*, the present-injury claimants' interests in being paid now conflicted with the potential-injury claimants interest in maintaining a fund that could pay later. *Id.* at 856-857. These legally distinct subgroups were competing for the same set of settlement funds; merging them into

the same class with the same representation created an untenable conflict. *Id.*

Echoing *Amchem*, *Ortiz* held that a request to certify a settlement class requires "'heightened attention'" to the justifications for binding the class members and that a fairness hearing "is no substitute for rigorous adherence to those provisions of the Rule 'designed to protect absentees." *Id.* at 848-849. It reaffirmed that intraclass equity, or "the fairness of distributions to those within" the class, is one of Rule 23(a)(4)'s requirements. *Id.* at 854, 863. For *Amchem* made it obvious "that a class divided" among claimants with distinct injuries "requires division into homogenous subclasses…, with separate representation to eliminate conflicting interests of counsel." *Id.* at 856.

The Court rejected the notion that the settlement eliminated any conflict by treating the claims equally. *Id.* at 857. That, indeed, was part of the problem: "The very decision to treat them all the same is itself an allocation decision with results almost certainly different from the results that" present-injury and pre-1959-injury plaintiffs would have chosen. *Id.*

III. The decision below disregards *Amchem* and *Ortiz* and eviscerates the safeguards for absent class members.

The Ninth Circuit panel majority below failed to apply *Amchem* and *Ortiz*, although there is no basis to distinguish this case from them. Similarly, the Third Circuit opinion that the panel majority relied upon in reaching its decision ignores these decisions. The result is an evisceration of class members' adequate-representation protections.

A. An objector's rights are not hostage to a defendant's desire to settle.

The Ninth Circuit panel majority held that the two intraclass conflicts that petitioner raised did not warrant subclasses because the airlines "had not raised these affirmative defenses, and the district court had not ruled on them." App. 3a. This is factually incorrect, *supra* at 7-8; but even assuming the premise *arguendo* (as this Court does not engage in factual error correction), the rule of law proposed is wholly inconsistent with *Amchem* and *Ortiz*, both of which involved settlements reached *before* a suit was filed. *Amchem*, 521 U.S. at 601-605; *Ortiz*, 527 U.S. at 825-827. The defendants there raised no objections; their first action before a court was to capitulate. If the Ninth Circuit's rule applied, *Amchem* and *Ortiz* would have come out the other way, and the Court never would have endorsed the objectors' arguments.

B. Courts are obliged to determine whether class members have antagonistic interests.

Similarly, the panel majority affirmed the district court's citation to *Lane*, 696 F.3d at 823, to support its explicit disavowal of a "role to differentiate within a class based on the strength or weakness of the theories of recovery." App. 14a, 2a. First, the issue here is not the issue in *Lane*, where the objector claimed that the court could not assess the propriety of certification unless it determined the amount of statutory damages each potential class member was eligible to receive. *Id.* But more substantively, if those strengths and weaknesses create an actual conflict among the class members, *Amchem* and *Ortiz* command just that. Indeed, *Ortiz* recognized that the refusal to assess the different claims and defenses available to different groups

of claimants was exactly the problem: "The very decision to treat [every claimant] the same is itself an allocation decision with results almost certainly different from" what would have happened had each discrete group been empowered to negotiate for itself. 527 U.S. at 857.

Further, courts have a continuing duty throughout the case to ensure that class certification remains proper. *See, e.g., In re Target Corp. Data Breach Litig.*, 847 F.3d 608, 612 (8th Cir. 2017); *Mazzei v. The Money Store*, 829 F.3d 260, 266 (2d Cir. 2016); *In re Gen. Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1124 (7th Cir. 1979). The Manual for Complex Litigation notes that conflicts "not anticipated" by the named parties might emerge between certification of the class and a request to approve a settlement. In that case, "the court may decide to certify subclasses, appoint attorneys to represent the subclasses, and send the parties back to the negotiating table." MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.612.

C. The risk of no settlement does not supersede absent claimants' due-process rights.

Both the district court and the panel majority cited the Third Circuit's opinion in *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011) (*en banc*) to support their conclusions. App. 3a. *Sullivan* involved a settlement of antitrust claims brought on behalf of a nationwide class of diamond purchasers. The objectors there argued that certification was improper because of an intraclass conflict between residents of states that prohibit indirect-purchaser actions and residents of states that allow them. *See id.* at 293-94 (describing the *Illinois Brick* issue). Over a dissent from Judges

Jordan and Smith, the majority rejected both challenges.

The court's majority held that Rule 23 does not require that a court assess intraclass conflicts in the governing law before certifying a settlement class. *Id.* at 302-07.[3] Rather, a settlement-only certification "marginalizes" the need for a rigorous analysis. *Id.* at 302-03. It also held that a settlement's allocation plan need not account for "the strength or weakness of the theories of recovery" amongst class members. *Id.* at 328. This is in part because prohibiting classes that mix those with and those without colorable claims would hamper the ability of parties to reach global settlements. *Id.* at 308-09. *Sullivan*'s majority did not cite *Ortiz* and cited *Amchem* only to note that trial manageability is no concern when certifying a settlement class and for background on class actions. 667 F.3d at 303, 296, 312.

This focus on *some* settlement rather than a settlement accounting for all competing interests continues. The Third Circuit recently permitted a settlement on behalf of former NFL players asserting long-term personal injuries for damage sustained from concussions during their playing days. In doing so, it affirmed the district court's decision to refuse to create additional subclasses because doing so "risked slowing or even

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[3] The majority in *Sullivan* focused on Rule 23(a) commonality and Rule 23(b) predominance because the appellants did not couch the issue in terms of Rule 23(a)(4).

halting the settlement negotiations." *In re Nat'l Football League Players Concussion Injury Litig.*, 821 F.3d 410, 432 n.9 (2016).

The upshot of the *Sullivan* and panel majority opinions is an overriding preference for settlement that cannot be squared with Rule 23(a) or *Amchem* or *Ortiz*. Both *Amchem* and *Ortiz* reversed certifications of global settlements. (Indeed, *Ortiz* made a point of noting the "elephantine mass of asbestos cases" at issue. 527 U.S. at 821.) Both of them did so because the settlements treated unequal claims as if they were equal. Both of them did so based on objections not raised by the defendants.

Judge Jordan's dissent recognized the majority's error: "a defendant's willingness to waive an argument is not a reason to ignore it. It is rather the very reason that collusive settlements are a problem." *Sullivan*, 667 F.3d at 354 (Jordan, J., dissenting).

It was an inherent conflict for class counsel to agree to a settlement that sacrificed recovery by class members with strong claims for the benefit of class members with no claims. As Judge Rawlinson noted in dissent below, "it is virtually impossible for the class representatives to adequately represent a class that includes members who may be entitled to absolutely no recovery." App. 5a (citing *Amchem*, 521 U.S. at 627; *Ortiz*, 527 U.S. at 856). One reason is that "Rule 23 is designed to efficiently handle claims recognized by law, not to create new claims." *Sullivan*, 667 F.2d at 343 (Jordan, J. dissenting). The problem here just as in *Sullivan* "is not that some absent class members who deserve compensation are left out by the settlement. The problem is that some class members who deserve nothing are included in the settlement and

hence are diluting the recovery of those who are entitled to make claims. That harm is real, and the cause of it, the overbreadth of the class, is akin to the problem in *Amchem*." *Id.* at 353 n.22 (Jordan, J., dissenting).

IV. The decision below conflicts with holdings of the Second and Seventh Circuits.

In contrast to the Third and Ninth Circuits, the Second and Seventh Circuits have been vigorous in applying *Amchem* to root out overbroad and conflicted settlement classes resulting from the "imperatives of the settlement process." *Payment Card*, 827 F.3d at 235. Recognizing that the conflicts inherent to the settlement process "can influence the definition of the classes and the allocation of relief," these courts have policed settlements to ensure that safeguards were in place before the deal was inked—especially when "[c]lass counsel stood to gain enormously if they got the deal done." *Id.* at 234, 236.

For example, the class counsel in *Literary Works in Electronic Databases Copyright Litigation* attempted to negotiate compensation from Google for three separate "categories" of class members in a single settlement. 654 F.3d 242, 246 (2d Cir. 2011). As in this case and in *Ortiz*, each category had legally distinct claims of varying strength. *Id.* Yet each class representative "served generally as a representative for the whole, not for a separate constituency." *Id.* at 251 (quoting *Amchem*, 521 U.S. at 627). The court found that the representation was inadequate and rejected the certification because the class representatives "cannot have had an interest in maximizing compensation for *every* category." *Id.* at 252 (emphasis in original). The

fact that "Category A and B claims [were] 'more valuable' than Category C claims produc[ed] 'disparate interests' within the class." *Id.* at 251 (quoting *Ortiz*). This structural error alone was sufficient to warrant reversal and remand; the court did not address whether the compensation negotiated for any given category was unfair or inadequate.

Literary Works is not an outlier. The Second Circuit has repeatedly required subclassing with separate counsel when presented with claims of disparate legal value. *Payment Card*, 827 F.3d at 232-36; *Cent. States Se. & Sw. Areas of Health & Welfare Fund v. Merck–Medco Managed Care, L.L.C.*, 504 F.3d 229, 246 (2d Cir. 2007); *Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 742-43 (quoted with approval by *Amchem*). Just last year, the Second Circuit rejected unitary representation as inadequate when the representatives "were in the position to trade diminution [of one subgroup's] relief for increase of [another subgroup's] relief." *Payment Card*, 827 F.3d at 234. "Essential allocation decisions" of this sort demand separate representation. *Id.* at 233-34 (quoting *Amchem*).

The Second Circuit's enforcement of the adequate-representation protection is so robust that it allowed a collateral attack on a global settlement in the Agent Orange litigation. It held there that the plaintiffs were not bound by a release because "their class representative negotiated a settlement and release that extinguished their claims without affording them any recovery." *Id.* at 237 (discussing *Stephenson v. Dow Chem. Co.*, 273 F.3d 249, 260-61 (2d Cir. 2001)). Even though Rule 23 did not apply (because it was not a direct appeal), the court held that enforcing the settlement's release would violate due process. *Id.*

The Seventh Circuit has also diligently applied Rule 23(a)(4)'s representation requirements. In *Smith v. Sprint Communications*, it vacated certification of a nationwide settlement class where differences in state law meant that class members had claims of materially different value. 387 F.3d 612 (2004). Even though "the settlement agreement provided that adjustments [would] be made to the amount of recovery available to landowners in a given state, based on an analysis of that state's law by independent property-law experts," that still did "not provide the 'structural assurance of fair and adequate representation' prior to the settlement" required by Rule 23. *Id.* at 614 (quoting *Amchem*, 521 U.S. at 627)). "Rule 23 demands" protection "prior to the settlement itself." *Id.* Landowning class members in Tennessee and Kansas had fundamentally superior legal claims to other class members in other states and, as such, they required separate representation. *Id.*

In other cases, the Seventh Circuit has recognized that "the Federal Rules of Civil procedure encourage rather specific and limited classes." *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 341 (1997) (cited by *Amchem*, 521 U.S. at 617). And in contrast to the holding below that a conflict is "speculative" if not previously raised or ruled upon, the Seventh Circuit follows the rule that the existence of even "an arguable defense peculiar to the named plaintiff or a small subset of the plaintiff class" can undermine class representation. *CE Design Ltd. v. King Architectural Metals, Inc.*, 637 F.3d 721, 726 (7th Cir. 2011) (internal quotation omitted).

V. Class members' rights depend on uniform application of Rule 23(a)(4). This circuit split matters, and the Court should resolve it.

"The benefits of litigation peace do not outweigh class members' due process right to adequate representation." *Payment Card*, 827 F.3d at 240. *See also Amchem*, 521 U.S. at 627 (criticizing "global compromise with no structural assurance of fair and adequate representation for the diverse groups and individuals affected"). The defendants here bought peace at the expense of class members with legitimate claims, but absent adequate representation for class members with discrete interests like petitioner, that peace was not class counsel's to sell.

The decisions below invite class counsel to slide back onto the philosopher king's throne. Coffee, *Class Wars*, *supra* at 16. But class members are not subjects; they are entitled to a zealous advocate for their discrete interests in how settlement funds are allocated. *Amchem* and *Ortiz* underscore that handing this role to a single representative is unacceptable. The adequate-representation protection is a constitutional necessity that cannot be sacrificed for expediency. The Ninth Circuit burned that sacrifice below. Rule 23(a)(4) did not bend to permit a unitary resolution of disparate claims, even to relieve the "elephantine mass of asbestos cases" that had such a "massive impact…on the federal courts." *Ortiz*, 527 U.S. at 821; *id.* at 865 (Rehnquist, J., concurring). *A fortiori*, the Ninth Circuit should not have bent it here, and other courts should not be allowed to bend it in the future.

A. The decision below creates incentives to avoid raising absent class members' rights.

Amchem and *Ortiz* recognize a truth that the panel did not. If the law permits courts to acknowledge intraclass conflicts only after a defendant raises the underlying affirmative defense, then the law effectively cedes class members' rights to the defendant. But the certification requirements "are intended to protect absent class members;' they "are not the defendant's to waive[.]" Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L. REV. 1494, 1506 (2013). There are problems enough with "the misalignment of interests between class counsel and class members in the settlement context. A practice of allowing the defendant to waive Rule 23 requirements only when its settlement terms are met will likely exacerbate these problems." *Id.* (footnotes omitted).

Defendants cannot and should not be relied on to assert the rights of absent class members. Indeed, there are strategic reasons a defendant would *prefer* an inadequate representative. As one example, it is easier to negotiate cheap settlements if the class representative is lax. *See, e.g., Foley v. Buckley's Great Steaks, Inc.*, No. 14-cv-063-LM, 2015 WL 1578881 (D.N.H. Apr. 9, 2015). As another, a defendant can leverage a named plaintiff's special vulnerability into a settlement of general effect. Jessica Erickson, *The New Professional Plaintiffs in Shareholder Litigation*, 65 Fla. L. Rev. 1089, 1126 (2013). Hence the rule that neither of the "proponents of the settlement" may "rewrite Rule 23." *Ortiz*, 527 U.S. at 858-59.

The Ninth Circuit's reasoning would "take the law back before *Amchem*," *Ortiz*, 527 U.S. at 864. Named litigants would have the power to circumvent Rule 23

and dispense with the rights of absent class members for their own profit. It is no answer to say that the panel majority's opinion is unpublished and thus non-binding. Courts in the Ninth Circuit are already citing it to support single-fund settlements for consumers with disparate interests. *See In re Lithium Ion Batteries Antitrust Litig.*, No. 4:13-md-2420-YGR, Dkt. 2003, at 4:13-20 (N.D. Cal. Oct. 27, 2017). The Ninth Circuit's attempt to shield its defiance of the Court's rulings in *Amchem* and *Ortiz* is "yet another disturbing aspect of the [decision], and yet another reason to grant review." *Plumley v. Austin*, 135 S. Ct. 828, 831 (2015) (Thomas and Scalia, JJ., dissenting from the denial of certiorari). The Court should take this opportunity to ensure that the protection of Rule 23(a)(4), given heft through *Amchem* and *Ortiz*, is not rubbished.

B. This circuit split creates incentives to shop for forums that will not protect absent class members.

Amchem and *Ortiz* were emphatic that claims of widely divergent value and quality do not belong in the same class. The lower courts cannot agree on the rigor with which *Amchem* and *Ortiz* should be applied. The decision below, as the Third Circuit's decision in *Sullivan*, yields some class members' rights to adequate representation in favor of the interest in other class members receiving some, or an immediate, recovery. This preference for global settlements disobeys the Court's commands in *Amchem* and *Ortiz* on the need to enforce the protections of Rule 23(a)(4).

If this litigation had proceeded in the Second or Seventh Circuits, there is little doubt it would have come out differently. The Court should not tolerate such a

fundamental disagreement, particularly among the circuits that most routinely handle complex nationwide class action settlements. Even more than most areas of law, class-action procedure demands uniformity. Suits alleging a nationwide class of victims can establish jurisdiction and venue almost anywhere. *See* 28 U.S.C. §§ 1332(d) (federal jurisdiction over class-action claims), 1391(b)(2) (venue proper in any district where a "substantial part" of events underlying claim occurred). Defendants who want to fight class-action allegations can take advantage of the Court's recent clarification of the personal-jurisdiction standards in class-action cases. *Bristol-Myers Squibb Co. v. Superior Ct. of Cal., San Francisco Cnty.*, 137 S. Ct. 1773, 1781-1782 (2017). But defendants who want to buy peace can always consent to jurisdiction; there is little to stop settling parties from relocating a suit from Houston or Chicago or New York to Los Angeles or San Francisco or Philadelphia to take advantage of the latter set's more lenient stance on absent class members' due-process rights.

CONCLUSION

Due process for absent class members demands that they have adequate representation. *E.g., Ortiz*, 527 U.S. at 846. Allowing conflicts to persist among the circuits encourages counsel to shop for forums where those questions will be thumbed through rather than delved into—to the detriment of absent class members' interests. *See Lusby v. Gamestop Inc.*, 297 F.R.D. 400, 416 (N.D. Cal. 2013) (suggesting that settling parties dismissed and refiled their case to avoid a particular district judge's scrutiny); *see gener-*

ally Marcel Kahan & Linda Silberman, *The Inadequate Search for "Adequacy" in Class Actions: A Critique of Epstein v. MCA, Inc.*, 73 N.Y.U. L. REV. 765, 775 (1998) (discussing the "more sinister" form of forum shopping that occurs with class action settlements).

Rule 23(a)(4) is in place to protect absent class members' due-process rights. The Court held in *Amchem* and *Ortiz* that those due-process rights are not subject to the expediencies sought by those who want to buy peace. Conditioning those due-process rights on defendants' assertion of them, as the Third and Ninth Circuits have done, is unacceptable. Constitutional rights of absent class members should not depend on which Circuit the parties choose to proceed. The Court should grant certiorari to make the due-process protections for absent class members uniform across the nation.

The Court should grant the writ for certiorari and, after granting the writ, reverse the Ninth Circuit's judgment and remand for recertification under the proper standards.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

NOT FOR PUBLICATION

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,

v.

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.

No. 15-16280

Filed June 26, 2017

MEMORANDUM*

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court for the Northern District of California

Charles R. Breyer, District Judge, Presiding

Argued and Submitted April 21, 2017 San Francisco, California

Before: SCHROEDER and RAWLINSON, Circuit Judges, and LOGAN,** District Judge.

Appellant Amy Yang ("Yang") appeals the grant of Donald Wortman's motion for final approval of eight class action settlement agreements with Defendants-Appellees. We review for abuse of discretion. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 940 (9th Cir. 2011). We affirm.

1. The district court properly certified the settlement class and was not obligated to create subclasses for purchasers of U.S.-originating travel and direct purchasers of airfare. Federal Rule of Civil Procedure 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. *See Lane v. Facebook, Inc.*, 696 F.3d 811, 823 (9th Cir. 2012) (reasoning that it would be "onerous" and "impossible" to attribute a

** The Honorable Steven Paul Logan, United States District Judge for the District of Arizona, sitting by designation.

specific monetary value to each of the class members' asserted claims).

Yang argues that purchasers of foreign-originating travel and indirect purchasers of airfare should not be entitled to an equal *pro rata* share of the settlement funds, in light of *Illinois Brick* and the Foreign Trade Antitrust Improvements Act. *See* 15 U.S.C. § 6a (barring claims arising out of foreign injury); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 728–29 (1977) (providing that only customers who purchase directly from defendants may recover under federal antitrust law). But, at the time of settlement, Defendants-Appellees had not raised these affirmative defenses, and the district court had not ruled on them. Subclasses may not be created "on the basis of speculative" conflicts of interests. *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 942 (9th Cir. 2015) (internal citation and quotation marks omitted); *see also Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 305 (3d Cir. 2011) (establishing that "a district court has limited authority to examine the merits when conducting the [class] certification inquiry").

2. The settlements provided sufficient notice to class members under Rule 23. *See* Fed. R. Civ. P. 23(c)(2)(B), 23(e)(1), & 23(e)(5). Potential class members were notified of the opportunity to opt out or object to the settlements no later than thirty-five days before the fairness hearing. While the class membership period has remained open for the duration of this appeal, "the class as a whole" was given sufficient notice to "flush out whatever

objections might reasonably be raised to the settlement[s]." *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993). Indeed, Defendants-Appellees implemented a comprehensive notice program that has reached approximately eighty-percent of potential class members in the United States, and at least seventy-percent in Japan.

AFFIRMED.

DISSENT

Rawlinson, Circuit Judge, dissenting:

I respectfully dissent. In my view, the district court abused its discretion when it certified a settlement class containing members with divergent interests.

Rule 23 of the Federal Rules of Civil Procedure provides in pertinent part:

One or more members of a class may sue or be sued as representative parties on behalf of all members *only if … the representative parties will*

fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a)(4) (emphasis added).

The settlement class certified by the district court ignored the requirements of Rule 23 by lumping together class members with fundamentally different interests. The Japan Airlines Company, Ltd. (JAL) settlement lumps together purchasers of domestic travel and purchasers of foreign travel for the same *pro rata* distribution of settlement proceeds, despite the fact that the Foreign Trade Antitrust Improvements Act (FTAIA) precludes federal courts from exercising jurisdiction over claims of overcharges associated with foreign travel. *See* 15 U.S.C. 6a (providing that the prohibitions against monopolies and restraint of trade do not apply to "trade or commerce ... with foreign nations"). With such an apparent conflict within the class, it is virtually impossible for the class representatives to adequately represent a class that includes members who may be entitled to absolutely no recovery. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) ("[T]he adversity among subgroups requires that 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.") (citation omitted) (emphasis added); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 856 (1999) ("[I]t is obvious after *Amchem* that a [divided] class requires ... homogenous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of

counsel. *See Amchem*, 521 U.S. at 627, 117 S. Ct. 2231 (class settlements must provide 'structural assurance of fair and adequate representation for the diverse groups and individuals affected. ...' ") (citations omitted).

In a similar vein, the settlement agreement lumped together passengers who purchased tickets directly from the airlines and passengers who purchased tickets through an intermediary, such as a travel agent or ticket broker. We have explicitly recognized that the "indirect purchaser rule" articulated by the United States Supreme Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746-47 (1977) "bars suits for antitrust damages by customers who do not buy directly from a defendant." *Somers v. Apple, Inc.*, 729 F.3d 953, 961 (9th Cir. 2013). And we have defined "indirect purchasers of airline tickets" as individuals who "did not purchase tickets directly from [the airlines] but instead bought them from direct purchasers such as travel agents and consolidators." *In re Korean Air Lines Co., Ltd. Antitrust Litig.*, 642 F.3d 685, 689 (9th Cir. 2011). Yet again, these disparate claims prevent adequate representation of the class. *See Amchem Prods.*, 521 U.S. at 627; *see also Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010) (concluding that representation of class was inadequate and conflicting when "one group within a larger class possesse[d] a claim that is neither typical of the rest of the class nor shared by the class representative") (citing *Amchem*, 521 U.S. at 625-27).

In sum, the district court abused its discretion by lumping together disparate claimants, failing to

comply with Rule 23 and our governing precedent. *See Zonowick v. Baxter Healthcare Corp.*, 850 F.3d 1090, 1093 (9th Cir. 2017) (noting that the district court abuses its discretion when it commits an error of law). Unfortunately, the district court took the easy way out rather than sorting through the various claims and claimants. *See Ortiz*, 527 U.S. at 856 (requiring "division into homogenous subclasses" when there are conflicting claims within the class).

Rather than affirming, I would reverse and remand for the district court to create the necessary subgroups to ensure adequate representation of all claimants. *See Amchem*, 521 U.S. at 627.

Because I would reverse on the class certification issue, I would not address the notice issue. However, as my colleagues in the majority have included that issue in their discussion, I simply note that it is patently unreasonable to end the notice period before all prospective class members are identified, thereby completely depriving those class members of any notice. *See* Fed. R. Civ. P. 23(c)(2)(B), (e)(1) (requiring reasonable notice to prospective class members).

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Transpacific Passenger Air Transportation Antitrust Litgation

This Document Relates to: All Actions

No. C 07-05634 CRB

Signed May 26, 2015

ORDER GRANTING MOTION FOR FINAL APPROVAL AND GRANTING MOTION FOR FEES

CHARLES R. BREYER, UNITED STATES DISTRICT JUDGE

Now pending are (1) the Motion for Final Approval (dkt. 999) of the settlements between Plaintiffs and the "Settling Defendants" (Societe Air France, Cathay Pacific Airways Limited, Japan Airlines International Company, Ltd., Malaysian Airline System Berhad, Qantas Airways Limited, Singapore Airlines Limited, Thai Airways International Public Co., Ltd., and Vietnam Airlines Corporation),[1] and (2) Plaintiffs' Fees Motion (dkt. 986), filed in connection with the

[1] Not all Defendants in the case have settled; in fact, the non-settling Defendants, Philippine Airlines, Inc., Air New Zealand Ltd., China Airlines Ltd., All Nippon Airways Co., Ltd., and EVA Airways Corporation, wrote separately "to clarify that they are not party to the present settlement proceedings, and accordingly are not bound by any resolution of certain merits issues that have been raised in those proceedings." *See* Letter (dkt. 1005).

settlements. The Court preliminarily approved these settlements in two rounds—first in August 2014 and then in October 2014. *See* Orders Granting Prelim. Approval (dkts. 924, 951). At the motion hearing held Friday, May 22, 2015, the Court found the settlement fair, reasonable, and adequate under Federal Rule of Civil Procedure 23(e)(2). The Court issues this Order to explain in greater detail its rulings on two particular issues: first, the amount of fees, and second, the objections.

1. Fees

The Settling Defendants created a Settlement Fund of $39,502,000. Mot. for Final Approval at 1. Out of that Fund, Plaintiffs seek:

- $13,154,166 in attorneys' fees, Fees Mot. at 13;

- $3,829,582.01 in expenses, Supp. Williams Decl. (dkt. 1003) at 1;

- $3,000,000 "for future expenses to be used in ongoing litigation against the non-Settling Defendants," Fees Mot. at 1;

- and $7,500 for each of the fifteen Class Representatives (a total of $112,500), *see* Williams Decl. (dkt. 987) ¶¶ 82–84.[2]

- Plaintiffs would also deduct "approximately $2.4 million" from the Settlement Fund, "for costs associated with sending notice and administering the

[2] Plaintiffs informed the Court at the motion hearing that there are 15 representative class members.

Settlements." *See* Mot. for Approval of Notice Program (dkt. 968) (granted December of 2014 (dkt. 968)).

At the motion hearing, the Court awarded Plaintiffs $9,000,000 in fees. The Court's reasoning is as follows.

While it is not an abuse of discretion to calculate fees based on the gross fund, *see In re Online DVD–Rental Antitrust Litig.,* 779 F.3d 934, 953 (9th Cir.2015); *see also Powers v. Eichen,* 229 F.3d 1249, 1258 (9th Cir. 2000) (no particular approach to determining fees mandated; "choice of whether to base an attorneys' fee award on either net or gross recovery should not make a difference so long as the end result is reasonable"), Plaintiffs cite to no authority *requiring* the Court to use the gross. This Court has had a longstanding preference for using the net, and is not alone in that preference. *See, e.g., Redman v. Radioshack Corp.,* 768 F.3d 622, 633 (7th Cir. 2014) ("the central consideration is what class counsel achieved for the members of the class rather than how much effort class counsel invested in the litigation"); *In re Wells Fargo Secs. Litig.,* 157 F.R.D. 467, 471 (N.D.Cal.1994) ("If an attorney risks losing some portion of his fee award for each additional dollar in expenses he incurs, the attorney is sure to minimize expenses"); *Miles v. AlliedBarton Security Svcs., LLC,* No. 12–5761 JD, 2014 WL 6065602, at *5 (N.D.Cal. Nov. 12, 2014) ("the fees paid to the settlement administrator—does not constitute a benefit to the class members").

The Court therefore subtracts the various expenses from the gross Settlement Fund. The Court subtracts $2,807,699.73 in expenses,[3] $3,000,000 "for future expenses," $2,400,000 in notice costs, and $112,500 in individual awards to the Representative Plaintiffs—a total of $8,320,199.73—from $39,502,000, leaving a *net Settlement Fund of $31,181,800.27.* Plaintiffs' proposed fee award of $13,154,166 is not 33.3% of the Fund, as they assert, *see* Fees Mot. at 1, but *42% of the net Fund.* That $13,154,166 is reportedly less than 35% of Plaintiffs' lodestar of $38,685,058.25, Fees Mot. at 13, is cold comfort.

In the Ninth Circuit, the benchmark is of course twenty-five percent. *See Powers v. Eichen,* 229 F.3d 1249, 1256 (9th Cir.2000) ("We have also established

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[3] The Fees Motion, filed April 7, 2015, sought expenses of $2,807,699.73. Fees Mot. at 1. Plaintiffs then filed a supplemental declaration on May 15, 2015, requesting a total of $3,829,582.01 in expenses, Supp. Williams Decl. at 1 (explaining that the earlier amount "did not reflect two additional invoices that Class Counsel have incurred."). The Court notes that the far larger of the two additional invoices was dated February 27, 2015, and there is no apparent reason why Plaintiffs could not have included it in their earlier request. *See id.* Ex. A (2/27/15 invoice from Nathan Associates Inc. for $914,938.09). Moreover, as Objector Amy Yang noted at the motion hearing, class members were not able to assess the settlement in light of the additional one million dollars in expenses before they were required to either object or opt-out, and this is plainly improper under *In re Mercury Interactive Corp. Sec. Litig.,* 618 F.3d 988, 993–95 (9th Cir.2010) ("obligation of the district court to ensure that the class has an adequate opportunity to review and object to its counsel's fee motion"). Accordingly, the Court finds that the appropriate remedy is to award $2,807,699.73, rather than $3,829,582.01, in expenses.

twenty-five percent of the recovery as a 'benchmark' for attorneys' fees calculations under the percentage-of-recovery approach."). In some cases, however, the twenty-five percent benchmark is "inappropriate." *See Vizcaino v. Microsoft Corp.,* 290 F.3d 1043, 1048 (9th Cir.2002). Courts must not arbitrarily apply a percentage but show why that percentage and the award is appropriate based on the facts of the case. *Id.* Courts may consider "the extent to which class counsel achieved exceptional results for the class, whether the case was risky for class counsel, whether counsel's performance generated benefits beyond the cash settlement fund," etc. *See In re Online DVD–Rental Antitrust Litig.,* 779 F.3d at 954–55. This case involved two rounds of motions to dismiss, filed by numerous defendants (one round prompting a 47–page Order from the Court), a grueling discovery process (involving 65 depositions and almost 7 million pages in documents), and summary judgment (requiring a 60–page omnibus Opposition brief and resulting in an Order keeping the majority of claims in the case). Fees Mot. at 3–8. The settlement process, which began in late 2008, yielded a substantial recovery for the class and demanded of Plaintiffs' counsel risky, challenging, and as-yet uncompensated work. *Id.* at 8–9; 11–13. Plaintiffs note a study from 2008 showing that awards of thirty percent were given in 11 of 16 antitrust cases with recoveries of less than $100 million. *Id.* at 11 (citing Robert H. Lamde & Joshua P. Davis, *Benefits from Private Antitrust Enforcement: An Analysis of Forty Cases,* 42 U.S.F. L.Rev. 879, 911 tbl. 7A (2008)). As the Court stated at the motion hearing, this was not a run-of-the-mill class action that settled relatively early; it was a heavily litigated,

complicated case that was filed in 2007. Plaintiffs are therefore entitled to $9,000,000 in fees, which is roughly thirty percent of $31,181,800.27.

2. Objections

As for objections, there is just one, despite a class of hundreds of thousands. Mot. for Final Approval at 1. This alone suggests that the settlements are fair. *See Nat'l Rural Telecomms. Coop v. DIRECTV, Inc.,* 221 F.R.D. 523, 529 (C.D.Cal.2004) ("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."). Objector Amy Yang, the wife of an attorney at the Center for Class Action Fairness, *see* Mot. for Final Approval at 1, raises a number of objections to the settlements. The Court held at the motion hearing that it was overruling Yang's objections, aside from her objection to the requested attorneys' fees, *see* Objection (dkt. 993) at 6–8, addressed above. The Court's reasoning is as follows.

First, Yang states that the settlements inappropriately treat all class members the same despite differences in the value of their claims. Objection at 2. Specifically, Yang believes that purchasers of US-originating flights and foreign-originating flights should be treated differently, and that direct and indirect purchasers should be treated differently. *Id.* at 3–5. The Court declines the opportunity to wade into the *Illinois Brick* issue at this time. *See* Letter at 1 ("This motion is not the

proper vehicle for this Court to adjudicate whether certain class members are indirect purchasers subject to an *Illinois Brick* defense"). Although the Court's 2011 Order on one of the rounds of motions to dismiss held that the FTAIA barred recovery for flights originating in Asia/Oceania, *see generally* Order on MTD (dkt. 467), Plaintiffs represent that the Japan Airlines settlement took place before that ruling, *see* Mot. for Final Approval at 9, and they noted at the motion hearing that they could still appeal that ruling. Ultimately the Court does not believe that its role is to "differentiat[e] within a class based on the strength or weakness of the theories of recovery." *See Sullivan v. DB Investments, Inc.,* 667 F.3d 273, 328 (3d Cir.2011). The Ninth Circuit explained in *Lane v. Facebook* that while some class members' claims might have been more valuable than others at trial, "that does not cast doubt on the district court's conclusion as to the fairness and adequacy of the overall settlement amount to the class *as a whole*." 696 F.3d 811, 824 (9th Cir.2012) (emphasis in original). The court explained that class actions "necessarily reflect[ ] the parties' pre-trial assessment as to the potential recovery of the entire class, with all of its class members' varying claims." *Id.* So too here, while there might be differences in the values of individual class members' claims at trial (or following appeal), the Court finds that the settlement as a whole is substantial, and fair. The Court therefore rejects Yang's argument that there is a conflict between the class members necessitating either a different valuation of claims or subclasses.

Second, Yang argues that the $3 million "future litigation fund" is improper and should be denied.

Objection at 8–9. The Court disagrees. *See* Alba Conte, 1 Attorney Fee Awards § 2:20 (3d ed. 2004) (courts have "permitted class plaintiffs who have settled with fewer than all defendants to expend class-settlement monies, or a portion thereof, for litigation expenses to prosecute the action against remaining, non-settling defendants") (collecting cases); *In re TFT–LCD (Flat Panel) Antitrust Litig.,* No. 07–1827 SI, Order Granting Direct Purchaser Class Plaintiffs' Motion for the Advancement of Litigation Expenses From Settlement Funds (dkt. 2474) (N.D.Cal. Feb. 17, 2011) (granting $3 million in future litigation expenses, holding: "The advanced litigation funds will benefit direct purchaser class members by assisting Class Counsel to prosecute this case effectively."). The Court has no reason to believe that Plaintiffs would misuse the funds.

Third, Yang complains that notice was inadequate because it did not include direct notice to individual class members. Objection at 10–12. But due process does not mandate individual notice—what it mandates is the "best notice that is practicable under the circumstances" and "through reasonable effort." Fed.R.Civ.P. 23(c)(2)(B); *Silber v. Mabon,* 18 F.3d 1449, 1453–54 (9th Cir.1994). Plaintiffs have presented evidence that individual notice to all class members here was not possible. *See* Mot. For Final Approval at 5 (Qantas, Japan Airlines). Moreover, the notice program, which the Court already approved, reached 80.3% of the potential class members in the United States an average of 2.6 times and "at least 70%" of members of the Settlement Classes living in Japan. *See* Mot. for Final Approval at 4; Wheatman

Decl. ¶¶ 8, 18. The notice also included paid media in 13 other countries. *Id.*; ¶ 25. There were 700,961 unique visits to the website, toll-free numbers in 15 countries received over 2,693 calls, and 1,015 packages were mailed to potential class members. *Id.* ¶¶ 6, 9, 10. It was therefore adequate. *See In re Google Referrer Header Privacy Litig.,* No. 10–4809 EJD, 2015 WL 1520475, at *3 (N.D.Cal. March 31, 2015) ("individual notice is not always practical. When that is the case, publication or some similar mechanism can be sufficient to provide notice.").

Fourth, Yang contends that the Notice was inadequate because it did not include the identity of the potential *cy pres* recipient. Objection at 12–13. Again, the Court has already approved notice here. Moreover, in this case, payment to a Court-approved *cy-pres* would only take place for a "tiny fraction of funds if money remains after paying Class members." Mot. for Final Approval at 6; Objection at 12. Judge Illston recently approved a similar provision. *See In re TFT–LCD (Flat Panel) Antitrust Litig.,* No. 07–1827 SI, 2013 WL 1365900, at *5 (N.D.Cal. Apr. 3, 2013) (granting final approval, notwithstanding *Dennis v. Kellogg Co.,* 697 F.3d 858 (9th Cir.2012), where only provision in plan involving *cy pres* was provision for residual funds to be distributed in court's discretion). The Court is not troubled by the lack of a named *cy-pres* in this case.

Fifth, Yang asserts that the class definition lacks an end date. Objection at 13–14. She is incorrect: the end date is defined in the settlement agreements and in the notice as the date "(a) the Court has entered

Judgment; and (b) the time for appeal has expired, or if an appeal occurs, the Judgment has been affirmed and no further appeals are possible." Mot. for Final Approval at 13–14; Long Form Notice on website. Moreover, Plaintiffs assert that they will post the exact effective date on the website when the criteria are met. Mot. for Final Approval at 14. This is adequate.

Finally, Yang maintains that the class definition should exclude potential appellate judges. Objection at 15. This objection is meritless; appellate judges may always recuse themselves if they are conflicted.

Accordingly, finding the settlements fair, reasonable, and adequate, and rejecting the objections, the Court GRANTS both final approval and fees in the amount explained above.

IT IS SO ORDERED.

APPENDIX C

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,

v.

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.

No. 15-16280

Filed August 2, 2017

ORDER

Before: SCHROEDER AND RAWLINSON, Circuit Judges, and LOGAN,* District Judge.

A majority of the panel votes to deny the petition for rehearing. Judge Rawlinson votes to grant the petition for rehearing and the petition for rehearing en banc. Judge Schroeder and Judge Logan vote to deny the petition for rehearing and recommend denying the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. *See* Fed. R. App. P. 35.

The petition for rehearing is DENIED and the petition for rehearing en banc is DENIED.

No further petitions for rehearing and for rehearing en banc will be entertained.

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* The Honorable Steven Paul Logan, United States District Judge for the District of Arizona, sitting by designation.

APPENDIX D

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Transpacific Passenger Air Transportation Antitrust Litgation

This Document Relates to: All Actions

No. C 07-05634 CRB

Signed June 11, 2015

Filed June 15, 2015

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE AS TO DEFENDANT MALAYSIAN AIRLINE SYSTEM BERHAD

This matter has come before the Court to determine whether there is any just reason for delay of the entry of this final judgment with respect to the class action settlement with Defendant Malaysian Airline System Berhad (sometimes referred to herein as "Defendant" or "MAS"). The Court, having reviewed the Motion for Final Approval of certain settlements (*see* ECF No. 999) and Plaintiffs' Fees Motion (*see* ECF No. 986), and having held argument on the motion on May 22, 2015 and having issued an Order Granting Motion For Final Approval And Granting Motion For Fees (*see* ECF No. 1009), and finding no just reason for delay hereby directs entry of Judgment which shall constitute a final adjudication of this case on the merits as to members

of the MAS Settlement Class and Defendant Malaysian Airline System Berhad pursuant to the Settlement Agreement Between Plaintiffs and Malaysian Airline System Berhad (the "Settlement Agreement") (*see* ECF No. 999-6):

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Court has jurisdiction over the subject matter of this litigation, and all actions within this litigation (collectively, the "Action") and over the parties to the Settlement Agreement, including all members of the Settlement Class and Defendant.

2. The following class is certified for settlement purposes only, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

MALAYSIA AIRLINES SETTLEMENT CLASS: All persons and entities that purchased passenger air transportation that included at least one flight segment between the United States and Asia/Oceania from Defendants or their co-conspirators, or any predecessor, subsidiary or affiliate thereof, at any time between January 1, 2000 and the Effective Date. Excluded from the class are purchases of passenger air transportation between the United States and the Republic of South Korea purchased from Korean Air Lines, Ltd and/or Asiana Airlines, Inc. Also excluded from the class are governmental entities, Defendants, former defendants in the Actions, any parent, subsidiary or affiliate thereof, and Defendants' officers, directors, employees or immediate families.

3. This settlement class shall be referred to herein as the Settlement Class.

4. For purposes of this order, the terms "Defendants," "Effective Date," "Released Claims," and "Released Parties" shall be defined as set forth in the Settlement Agreement. The term co-conspirators means: American Airlines; Asiana Airlines, Inc.; British Airways; Continental Airlines; Delta Airlines; Korean Air Lines, Ltd.; KLM Royal Dutch Airlines; Lufthansa; Northwest Airlines; Scandinavian Airlines System; Swiss International; United Airlines; and Virgin Atlantic Airways.

5. The Court finds the prerequistes to a class action under Federal Rule of Civil Procedure 23(a) have been satisfied for settlement purposes by each of the Settlement Classes in that:

a. there are hundreds of thousands of putative members of the Settlement Class, making joinder of all class members impracticable;

b. there are questions of fact and law that are common to all members of the Settlement Class;

c. the claims of the Class Representatives are typical of those of the absent members of the Settlement Class; and

d. Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi (the "Class Representatives") have

and will fairly and adequately protect the interests of the absent members of the Settlement Class and have retained counsel experienced in complex antitrust class action litigation who have and will continue to adequately advance the interests of the Settlement Class.

6. The Court finds that this Action may be maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) for settlement because: (i) questions of fact and law common to the members of the Settlement Class predominate over any questions affecting only the claims of individual members; and (ii) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

7. Pursuant to Fed. R. Civ. P. 23(g), the Court hereby confirms that Cotchett, Pitre & McCarthy, LLP and Hausfeld LLP are appointed as Settlement Class Counsel, and that Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi are appointed to serve as Class Representatives on behalf of the Settlement Class.

8. The person identified on Exhibit B to the Declaration of Joel Botzet in support of Plaintiffs' motion for final approval of the Class Settlements (*see* ECF No. 999-19) has timely and validly requested exclusion from the Settlement Class and, therefore, is

excluded. Such person is not included in or bound by this final judgment.

9. Upon the Effective Date, all Releasing Parties shall be permanently barred and enjoined from instituting, commencing, prosecuting or asserting any Released Claim against any of the Released Parties.

10. The Court has finally approved a total of eight settlements between the Class Representatives and Japan Airlines Company, Ltd., Societe Air France, Vietnam Airlines Company Limited, Thai Airways International Public Co., Ltd. ("Thai Airways"), Malaysian Airline System Berhad, Qantas Airways Limited ("Qantas"), Cathay Pacific Airways, Ltd. ("Cathay Pacific"), and Singapore Airlines Limited (collectively the "Settlement Agreements") in the total amount of $39,502,000.00, approved an award of attorneys' fees in the amount of $9,000,000.00, approved reimbursement to Class Counsel of expenses in the amount of $2,807,699.73, approved a litigation fund of $3,000,000.00, and approved an award of $7,500.00 for each of the Class Representatives (collectively the "Approved Fees and Costs") (*see* ECF No. 1009).

11. The Approves Fees and Costs shall be allocated pro-rata to each of the Settlement Agreements.

12. This Court hereby dismisses on the merits and with prejudice the Action against Defendant, with each party to bear its own costs and attorneys' fees.

13. Without affecting the finality of this final judgment in any way, this Court hereby retains

continuing jurisdiction over: (a) implementation of the terms of the Settlement Agreement and any distribution to members of the Settlement Class pursuant to further orders of this Court; (b) hearing and ruling on any matters relating to the plan of allocation of the settlement proceeds; and (c) all parties to the Action and Releasing Parties, for the purpose of enforcing and administering the Settlement Agreement and the mutual releases and other documents contemplated by, or executed in connection with the Settlement Agremeent.

IT IS SO ORDERED.

APPENDIX E

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Transpacific Passenger Air Transportation Antitrust Litgation

This Document Relates to: All Actions

No. C 07-05634 CRB

Signed June 11, 2015

Filed June 15, 2015

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE AS TO DEFENDANT SINGAPORE AIRLINES LIMITED

This matter has come before the Court to determine whether there is any just reason for delay of the entry of this final judgment with respect to the class action settlement with Defendant Singapore Airlines Limited (sometimes referred to herein as "Defendant" or "SQ"). The Court, having reviewed the Motion for Final Approval of certain settlements (*see* ECF No. 999) and Plaintiffs' Fees Motion (*see* ECF No. 986), and having held argument on the motion on May 22, 2015 and having issued an Order Granting Motion For Final Approval And Granting Motion For Fees (*see* ECF No. 1009), and finding no just reason for delay hereby directs entry of Judgment which shall constitute a final adjudication of this case on the merits as to members of the SQ Settlement Class and

Defendant Singapore Airlines Limited, pursuant to the Settlement Agreement Between Plaintiffs and Singapore Airlines Limited (the "Settlement Agreement") (*see* ECF No. 999-9):

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Court has jurisdiction over the subject matter of this litigation, and all actions within this litigation (collectively, the "Action") and over the parties to the Settlement Agreement, including all members of the Settlement Class and Defendant.

2. The following class is certified for settlement purposes only, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

SINGAPORE AIRLINES SETTLEMENT CLASS: All persons and entities that purchased passenger air transportation that included at least one flight segment between the United States and Asia or Oceania from Defendants or their co-conspirators, or any predecessor, subsidiary or affiliate thereof, at any time between January 1, 2000 and the Effective Date. Excluded from the class are purchases of passenger air transportation between the United States and the Republic of South Korea purchased from Korean Air Lines, Ltd and/or Asiana Airlines, Inc. Also excluded from the class are governmental entities, Defendants, former defendants in the Actions, any parent, subsidiary or affiliate thereof, and Defendants' officers, directors, employees or immediate families.

3. This settlement class shall be referred to herein as the Settlement Class.

4. For purposes of this order, the terms "Defendants," "Effective Date," "Released Claims," and "Released Parties" shall be defined as set forth in the Settlement Agreement. The term co-conspirators means: American Airlines; Asiana Airlines, Inc.; British Airways; Continental Airlines; Delta Airlines; Korean Air Lines, Ltd.; KLM Royal Dutch Airlines; Lufthansa; Northwest Airlines; Scandinavian Airlines System; Swiss International; United Airlines; and Virgin Atlantic Airways.

5. The Court finds the prerequistes to a class action under Federal Rule of Civil Procedure 23(a) have been satisfied for settlement purposes by the Settlement Class in that:

a. there are hundreds of thousands of putative members of the Settlement Class, making joinder of all class members impracticable;

b. there are questions of fact and law that are common to all members of the Settlement Class;

c. the claims of the Class Representatives are typical of those of the absent members of the Settlement Class; and

d. Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi (the "Class Representatives") have

and will fairly and adequately protect the interests of the absent members of the Settlement Class and have retained counsel experienced in complex antitrust class action litigation who have and will continue to adequately advance the interests of the Settlement Class.

6. The Court finds that this Action may be maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) for settlement because: (i) questions of fact and law common to the members of the Settlement Class predominate over any questions affecting only the claims of individual members; and (ii) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

7. Pursuant to Fed. R. Civ. P. 23(g), the Court hereby confirms that Cotchett, Pitre & McCarthy, LLP and Hausfeld LLP are appointed as Settlement Class Counsel, and that Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi are appointed to serve as Class Representatives on behalf of the Settlement Class.

8. The person identified on Exhibit B to the Declaration of Joel Botzet in support of Plaintiffs' motion for final approval of the Class Settlements (*see* ECF No. 999-19) has timely and validly requested exclusion from the Settlement Class and, therefore, is

excluded. Such person is not included in or bound by this final judgment.

9. Upon the Effective Date, all Releasing Parties shall be permanently barred and enjoined from instituting, commencing, prosecuting or asserting any Released Claim against any of the Released Parties.

10. The Court has finally approved a total of eight settlements between the Class Representatives and Japan Airlines Company, Ltd., Societe Air France, Vietnam Airlines Company Limited, Thai Airways International Public Co., Ltd. ("Thai Airways"), Malaysian Airline System Berhad, Qantas Airways Limited ("Qantas"), Cathay Pacific Airways, Ltd. ("Cathay Pacific"), and Singapore Airlines Limited (collectively the "Settlement Agreements") in the total amount of $39,502,000.00, approved an award of attorneys' fees in the amount of $9,000,000.00, approved reimbursement to Class Counsel of expenses in the amount of $2,807,699.73, approved a litigation fund of $3,000,000.00, and approved an award of $7,500.00 for each of the Class Representatives (collectively the "Approved Fees and Costs") (*see* ECF No. 1009).

11. The Approves Fees and Costs shall be allocated pro-rata to each of the Settlement Agreements.

12. This Court hereby dismisses on the merits and with prejudice the Action against Defendant, with each party to bear its own costs and attorneys' fees.

13. Without affecting the finality of this final judgment in any way, this Court hereby retains

continuing jurisdiction over: (a) implementation of the terms of the Settlement Agreement and any distribution to members of the Settlement Class pursuant to further orders of this Court; (b) hearing and ruling on any matters relating to the plan of allocation of the settlement proceeds; and (c) all parties to the Action and Releasing Parties, for the purpose of enforcing and administering the Settlement Agreement and the mutual releases and other documents contemplated by, or executed in connection with the Settlement Agremeent.

IT IS SO ORDERED.

APPENDIX F

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Transpacific Passenger Air Transportation Antitrust Litgation

This Document Relates to: All Actions

No. C 07-05634 CRB

Signed June 11, 2015

Filed June 15, 2015

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE AS TO DEFENDANT SOCIETE AIR FRANCE

This matter has come before the Court to determine whether there is any just reason for delay of the entry of this final judgment with respect to the class action settlement with Defendant Societe Air France (sometimes referred to herein as "Defendant" or "AF"). The Court, having reviewed the Motion for Final Approval of certain settlements (*see* ECF No. 999) and Plaintiffs' Fees Motion (*see* ECF No. 986), and having held argument on the motion on May 22, 2015 and having issued an Order Granting Motion For Final Approval And Granting Motion For Fees (*see* ECF No. 1009), and finding no just reason for delay hereby directs entry of Judgment which shall constitute a final adjudication of this case on the merits as to members of the AF Settlement Class and

Societe Air France, pursuant to the Settlement Agreement Between Plaintiffs and Societe Air France (the "Settlement Agreement") (*see* ECF No. 999-3):

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Court has jurisdiction over the subject matter of this litigation, and all actions within this litigation (collectively, the "Action") and over the parties to the Settlement Agreement, including all members of the Settlement Class and Defendant.

2. The following class is certified for settlement purposes only, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

SOCIETE AIR FRANCE SETTLEMENT CLASS: All persons and entities that purchased passenger air transportation that included at least one flight segment between the United States and Asia or Oceania from Defendants or their co-conspirators, or any predecessor, subsidiary or affiliate thereof, at any time between January 1, 2000 and the Effective Date. Excluded from the class are purchases of passenger air transportation between the United States and the Republic of South Korea purchased from Korean Air Lines, Ltd and/or Asiana Airlines, Inc. Also excluded from the class are governmental entities, Defendants, former defendants in the Actions, any parent, subsidiary or affiliate thereof, and Defendants' officers, directors, employees or immediate families.

3. This settlement class shall be referred to herein as the Settlement Class.

4. For purposes of this order, the terms "Defendants," "Effective Date," "Released Claims," and "Released Parties" shall be defined as set forth in the Settlement Agreement. The term co-conspirators means: American Airlines; Asiana Airlines, Inc.; British Airways; Continental Airlines; Delta Airlines; Korean Air Lines, Ltd.; KLM Royal Dutch Airlines; Lufthansa; Northwest Airlines; Scandinavian Airlines System; Swiss International; United Airlines; and Virgin Atlantic Airways.

5. The Court finds the prerequistes to a class action under Federal Rule of Civil Procedure 23(a) have been satisfied for settlement purposes by the Settlement Class in that:

a. there are hundreds of thousands of putative members of the Settlement Class, making joinder of all class members impracticable;

b. there are questions of fact and law that are common to all members of the Settlement Class;

c. the claims of the Class Representatives are typical of those of the absent members of the Settlement Class; and

d. Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi (the "Class Representatives") have and will fairly and adequately protect the interests of the absent members of the Settlement Class and have

retained counsel experienced in complex antitrust class action litigation who have and will continue to adequately advance the interests of the Settlement Class.

6. The Court finds that this Action may be maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) for settlement because: (i) questions of fact and law common to the members of the Settlement Class predominate over any questions affecting only the claims of individual members; and (ii) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

7. Pursuant to Fed. R. Civ. P. 23(g), the Court hereby confirms that Cotchett, Pitre & McCarthy, LLP and Hausfeld LLP are appointed as Settlement Class Counsel, and that Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi are appointed to serve as Class Representatives on behalf of the Settlement Class.

8. The person identified on Exhibit B to the Declaration of Joel Botzet in support of Plaintiffs' motion for final approval of the Class Settlements (*see* ECF No. 999-19) has timely and validly requested exclusion from the Settlement Class and, therefore, is excluded. Such person is not included in or bound by this final judgment.

9. Upon the Effective Date, all Releasing Parties shall be permanently barred and enjoined from instituting, commencing, prosecuting or asserting any Released Claim against any of the Released Parties.

10. The Court has finally approved a total of eight settlements between the Class Representatives and Japan Airlines Company, Ltd., Societe Air France, Vietnam Airlines Company Limited, Thai Airways International Public Co., Ltd. ("Thai Airways"), Malaysian Airline System Berhad, Qantas Airways Limited ("Qantas"), Cathay Pacific Airways, Ltd. ("Cathay Pacific"), and Singapore Airlines Limited (collectively the "Settlement Agreements") in the total amount of $39,502,000.00, approved an award of attorneys' fees in the amount of $9,000,000.00, approved reimbursement to Class Counsel of expenses in the amount of $2,807,699.73, approved a litigation fund of $3,000,000.00, and approved an award of $7,500.00 for each of the Class Representatives (collectively the "Approved Fees and Costs") (*see* ECF No. 1009).

11. The Approves Fees and Costs shall be allocated pro-rata to each of the Settlement Agreements.

12. This Court hereby dismisses on the merits and with prejudice the Action against Defendant, with each party to bear its own costs and attorneys' fees.

13. Without affecting the finality of this final judgment in any way, this Court hereby retains continuing jurisdiction over: (a) implementation of the terms of the Settlement Agreement and any distribution to members of the Settlement Class

pursuant to further orders of this Court; (b) hearing and ruling on any matters relating to the plan of allocation of the settlement proceeds; and (c) all parties to the Action and Releasing Parties, for the purpose of enforcing and administering the Settlement Agreement and the mutual releases and other documents contemplated by, or executed in connection with the Settlement Agremeent.

IT IS SO ORDERED.

APPENDIX G

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Transpacific Passenger Air Transportation Antitrust Litgation

This Document Relates to: All Actions

No. C 07-05634 CRB

Signed June 11, 2015

Filed June 15, 2015

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE AS TO DEFENDANT VIETNAM AIRLINES CORPORATION

This matter has come before the Court to determine whether there is any just reason for delay of the entry of this final judgment with respect to the class action settlement with Defendant Vietnam Airlines Company Limited (sometimes referred to herein as "Defendant" or "VN"). The Court, having reviewed the Motion for Final Approval of certain settlements (*see* ECF No. 999) and Plaintiffs' Fees Motion (*see* ECF No. 986), and having held argument on the motion on May 22, 2015 and having issued an Order Granting Motion For Final Approval And Granting Motion For Fees (*see* ECF No. 1009), and finding no just reason for delay hereby directs entry of Judgment which shall constitute a final adjudication of this case on the merits as to members

of the VN Settlement Class and Defendant Vietnam Airlines Company Limited, pursuant to the Settlement Agreement Between Plaintiffs and Vietnam Airlines Company Limited (the "Settlement Agreement") (*see* ECF No. 999-4):

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Court has jurisdiction over the subject matter of this litigation, and all actions within this litigation (collectively, the "Action") and over the parties to the Settlement Agreement, including all members of the Settlement Class and Defendant.

2. The following class is certified for settlement purposes only, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

VIETNAM AIRLINES SETTLEMENT CLASS: All persons and entities that purchased passenger air transportation that included at least one flight segment between the United States and Asia or Oceania from Defendants or their co-conspirators, or any predecessor, subsidiary or affiliate thereof, at any time between January 1, 2000 and the Effective Date. Excluded from the class are purchases of passenger air transportation between the United States and the Republic of South Korea purchased from Korean Air Lines, Ltd and/or Asiana Airlines, Inc. Also excluded from the class are governmental entities, Defendants, former defendants in the Actions, any parent, subsidiary or affiliate thereof, and Defendants' officers, directors, employees or immediate families.

3. This settlement class shall be referred to herein as the Settlement Class.

4. For purposes of this order, the terms "Defendants," "Effective Date," "Released Claims," and "Released Parties" shall be defined as set forth in the Settlement Agreement. The term co-conspirators means: American Airlines; Asiana Airlines, Inc.; British Airways; Continental Airlines; Delta Airlines; Korean Air Lines, Ltd.; KLM Royal Dutch Airlines; Lufthansa; Northwest Airlines; Scandinavian Airlines System; Swiss International; United Airlines; and Virgin Atlantic Airways.

5. The Court finds the prerequistes to a class action under Federal Rule of Civil Procedure 23(a) have been satisfied for settlement purposes by each of the Settlement Classes in that:

a. there are hundreds of thousands of putative members of the Settlement Class, making joinder of all class members impracticable;

b. there are questions of fact and law that are common to all members of the Settlement Class;

c. the claims of the Class Representatives are typical of those of the absent members of the Settlement Class; and

d. Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi (the "Class Representatives") have

and will fairly and adequately protect the interests of the absent members of the Settlement Class and have retained counsel experienced in complex antitrust class action litigation who have and will continue to adequately advance the interests of the Settlement Class.

6. The Court finds that this Action may be maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) for settlement because: (i) questions of fact and law common to the members of the Settlement Class predominate over any questions affecting only the claims of individual members; and (ii) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

7. Pursuant to Fed. R. Civ. P. 23(g), the Court hereby confirms that Cotchett, Pitre & McCarthy, LLP and Hausfeld LLP are appointed as Settlement Class Counsel, and that Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi are appointed to serve as Class Representatives on behalf of the Settlement Class.

8. The person identified on Exhibit B to the Declaration of Joel Botzet in support of Plaintiffs' motion for final approval of the Class Settlements (*see* ECF No. 999-19) has timely and validly requested exclusion from the Settlement Class and, therefore, is

excluded. Such person is not included in or bound by this final judgment.

9. Upon the Effective Date, all Releasing Parties shall be permanently barred and enjoined from instituting, commencing, prosecuting or asserting any Released Claim against any of the Released Parties.

10. The Court has finally approved a total of eight settlements between the Class Representatives and Japan Airlines Company, Ltd., Societe Air France, Vietnam Airlines Company Limited, Thai Airways International Public Co., Ltd. ("Thai Airways"), Malaysian Airline System Berhad, Qantas Airways Limited ("Qantas"), Cathay Pacific Airways, Ltd. ("Cathay Pacific"), and Singapore Airlines Limited (collectively the "Settlement Agreements") in the total amount of $39,502,000.00, approved an award of attorneys' fees in the amount of $9,000,000.00, approved reimbursement to Class Counsel of expenses in the amount of $2,807,699.73, approved a litigation fund of $3,000,000.00, and approved an award of $7,500.00 for each of the Class Representatives (collectively the "Approved Fees and Costs") (*see* ECF No. 1009).

11. The Approves Fees and Costs shall be allocated pro-rata to each of the Settlement Agreements.

12. This Court hereby dismisses on the merits and with prejudice the Action against Defendant, with each party to bear its own costs and attorneys' fees.

13. Without affecting the finality of this final judgment in any way, this Court hereby retains

continuing jurisdiction over: (a) implementation of the terms of the Settlement Agreement and any distribution to members of the Settlement Class pursuant to further orders of this Court; (b) hearing and ruling on any matters relating to the plan of allocation of the settlement proceeds; and (c) all parties to the Action and Releasing Parties, for the purpose of enforcing and administering the Settlement Agreement and the mutual releases and other documents contemplated by, or executed in connection with the Settlement Agremeent.

IT IS SO ORDERED.

APPENDIX H

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

In re Transpacific Passenger Air Transportation Antitrust Litgation

This Document Relates to: All Actions

No. C 07-05634 CRB

Signed June 11, 2015

Filed June 15, 2015

FINAL JUDGMENT OF DISMISSAL WITH PREJUDICE AS TO DEFENDANT JAPAN AIRLINES COMPANY, LTD.

This matter has come before the Court to determine whether there is any just reason for delay of the entry of this final judgment with respect to the class action settlement with Defendant Japan Airlines Company, Ltd. (sometimes referred to herein as "Defendant" or "JAL"). The Court, having reviewed the Motion for Final Approval of certain settlements (*see* ECF No. 999) and Plaintiffs' Fees Motion (*see* ECF No. 986), and having held argument on the motion on May 22, 2015 and having issued an Order Granting Motion For Final Approval And Granting Motion For Fees (*see* ECF No. 1009), and finding no just reason for delay hereby directs entry of Judgment which shall constitute a final adjudication of this case on the merits as to members of the JAL Settlement

Class and Defendant Japan Airlines Company, Ltd. pursuant to the Settlement Agreement Between Plaintiffs and Japan Airlines Company, Ltd. (the "Settlement Agreement") (*see* ECF No. 999-2):

IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

1. The Court has jurisdiction over the subject matter of this litigation, and all actions within this litigation (collectively, the "Action") and over the parties to the Settlement Agreement, including all members of the Settlement Class and Defendant.

2. The following class is certified for settlement purposes only, pursuant to Rule 23 of the Federal Rules of Civil Procedure:

JAL SETTLEMENT CLASS: All persons and entities that purchased passenger air transportation that included at least one flight segment between the United States and Asia or Oceania from Defendants or their co-conspirators, or any predecessor, subsidiary or affiliate thereof, at any time between January 1, 2000 and the Effective Date. Excluded from the class are purchases of passenger air transportation between the United States and the Republic of South Korea purchased from Korean Air Lines, Ltd and/or Asiana Airlines, Inc. Also excluded from the class are governmental entities, Defendants, former defendants in the Actions, any parent, subsidiary or affiliate thereof, and Defendants' officers, directors, employees or immediate families.

3. This settlement class shall be referred to herein as the Settlement Class.

4. For purposes of this order, the terms "Defendants," "Effective Date," "Released Claims," and "Released Parties" shall be defined as set forth in the Settlement Agreement. The term co-conspirators means: American Airlines; Asiana Airlines, Inc.; British Airways; Continental Airlines; Delta Airlines; Korean Air Lines, Ltd.; KLM Royal Dutch Airlines; Lufthansa; Northwest Airlines; Scandinavian Airlines System; Swiss International; United Airlines; and Virgin Atlantic Airways.

5. The Court finds the prerequistes to a class action under Federal Rule of Civil Procedure 23(a) have been satisfied for settlement purposes by each of the Settlement Classes in that:

a. there are hundreds of thousands of putative members of the Settlement Class, making joinder of all class members impracticable;

b. there are questions of fact and law that are common to all members of the Settlement Class;

c. the claims of the Class Representatives are typical of those of the absent members of the Settlement Class; and

d. Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi (the "Class Representatives") have

and will fairly and adequately protect the interests of the absent members of the Settlement Class and have retained counsel experienced in complex antitrust class action litigation who have and will continue to adequately advance the interests of the Settlement Class.

6. The Court finds that this Action may be maintained as a class action under Federal Rule of Civil Procedure 23(b)(3) for settlement because: (i) questions of fact and law common to the members of the Settlement Class predominate over any questions affecting only the claims of individual members; and (ii) a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

7. Pursuant to Fed. R. Civ. P. 23(g), the Court hereby confirms that Cotchett, Pitre & McCarthy, LLP and Hausfeld LLP are appointed as Settlement Class Counsel, and that Plaintiffs Meor Adlin, Franklin Ajaye, Andrew Barton, Rachel Diller, Scott Fredrick, David Kuo, Dickson Leung, Brendan Maloof, Donald Wortman, Harley Oda, Roy Onomura, Shinsuke Kobayashi, Patricia Lee, Nancy Kajiyama, Della Ewing Chow and James Kawaguchi are appointed to serve as Class Representatives on behalf of the Settlement Class.

8. The person identified on Exhibit B to the Declaration of Joel Botzet in support of Plaintiffs' motion for final approval of the Class Settlements (*see* ECF No. 999-19) has timely and validly requested exclusion from the Settlement Class and, therefore, is

excluded. Such person is not included in or bound by this final judgment.

9. Upon the Effective Date, all Releasing Parties shall be permanently barred and enjoined from instituting, commencing, prosecuting or asserting any Released Claim against any of the Released Parties.

10. The Court has finally approved a total of eight settlements between the Class Representatives and Japan Airlines Company, Ltd., Societe Air France, Vietnam Airlines Company Limited, Thai Airways International Public Co., Ltd. ("Thai Airways"), Malaysian Airline System Berhad, Qantas Airways Limited ("Qantas"), Cathay Pacific Airways, Ltd. ("Cathay Pacific"), and Singapore Airlines Limited (collectively the "Settlement Agreements") in the total amount of $39,502,000.00, approved an award of attorneys' fees in the amount of $9,000,000.00, approved reimbursement to Class Counsel of expenses in the amount of $2,807,699.73, approved a litigation fund of $3,000,000.00, and approved an award of $7,500.00 for each of the Class Representatives (collectively the "Approved Fees and Costs") (*see* ECF No. 1009).

11. The Approves Fees and Costs shall be allocated pro-rata to each of the Settlement Agreements.

12. This Court hereby dismisses on the merits and with prejudice the Action against Defendant, with each party to bear its own costs and attorneys' fees.

13. Without affecting the finality of this final judgment in any way, this Court hereby retains

continuing jurisdiction over: (a) implementation of the terms of the Settlement Agreement and any distribution to members of the Settlement Class pursuant to further orders of this Court; (b) hearing and ruling on any matters relating to the plan of allocation of the settlement proceeds; and (c) all parties to the Action and Releasing Parties, for the purpose of enforcing and administering the Settlement Agreement and the mutual releases and other documents contemplated by, or executed in connection with the Settlement Agremeent.

IT IS SO ORDERED.