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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

In re TRANSPACIFIC PASSENGER AIR TRANSPORTATION ANTITRUST LITIGATION AMY YANG, Objector.	Case No. 3:07-cv-05634-CRB **OBJECTION OF AMY YANG** Date: May 22, 2015 Time: 10:00 a.m. Courtroom: 6 Judge: Hon. Charles R. Breyer

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SUMMARY OF ARGUMENT

Eight of the thirteen defendants in this class action entered into settlements in which they agree to contribute varying amounts for distribution to the putative class, in exchange for a broad release of claims related to the purchase of air travel between the United States and Asia or Oceania by the hundreds of thousands of putative class members. Amy Yang objects to the eight settlements in which she is a class member because, for the reasons detailed below, the settlements are not fair, adequate, and reasonable as required by Rule 23.

First, and fatal to class certification as discussed by Section III below, the settlements create unitary settlement classes with untenable intraclass conflicts. All class members are represented by the same counsel and, regardless of the strength of the claims they are releasing, will receive the same *pro rata* distribution from the settlement funds. When, as here, subgroups within a class have competing interests, Rule 23(a)(4) and constitutional due process require proper subclassing and separate representation; these settlement classes cannot be certified. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 627 (1997).

As Section III.A discusses below, for the Japan Airlines International Company ("JAL") settlement class, class members who purchased flights originating in Asia or Oceania ("foreign-originating flights") are entitled to the same *pro rata* distribution of the $10 million settlement fund as class members who purchased U.S.-originating flights, even though the former have no claim under the law of this case. Mem. & Order Granting in Part & Denying in Part Motions to Dismiss ("Dismissal Order") (Dkt. 467) at 12. Within the subset of JAL class members who purchased foreign-originating flights, there is a further conflict between U.S. and foreign residents because U.S. residents generally have a stronger claim for damages than foreign residents under the "domestic effects" exception in the Foreign Trade Antitrust Improvements Act ("FTAIA"). *See infra* § III.A. These are qualitatively different claims competing against one another for the rights to a limited settlement fund, and they cannot be conglomerated into a single settlement class without separate representation.

In addition, a deep intraclass conflict exists between direct and indirect purchasers within all eight of the settlement classes. *See infra* § III.B. The settlement classes are defined to include members who purchased passenger air transportation "from" Defendants or their co-conspirators, but they do not require such purchase to have been *directly* from Defendants or their co-conspirators. Nothing in the claim form (Dkt. 948-2) or notice (Dkt. 948-4 at 146) distinguishes such class members. The settlement classes thus encompass not only direct purchasers but also indirect purchasers who purchased travel from Defendants through an intermediate vendor such as a travel agent or consolidator. But such indirect purchasers have no federal cause of action, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and any state cause of action is preempted by the Airline Deregulation Act of 1978 ("ADA"), 49 U.S.C. § 41713, *see Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992); *In re Korean Air Lines Co.*, 642 F.3d 685, 695-97 (9th Cir. 2011). Again, class members such as Yang with stronger claims are having their claims diluted by claimants putatively in the same class with unquestionably qualitatively weaker claims; again Rule 23(a)(4) requires subclassing and separate representation to cure the intraclass conflict.

Even if the Court were to certify the settlement classes, the Rule 23(h) request is excessive and further compromises class members' interests, as Section IV discusses. In contravention of the Ninth Circuit's 25 percent of recovery benchmark, class counsel seeks a fee that amounts to over 40 percent of the recovery, and an undocumented $3 million to spend, unsupervised, on "future litigation." In accord with this Court's preferred methodology, the fee award should be reduced to 25 percent of the recovery for the class, after administrative and other expenses have been deducted. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942, 945 (9th Cir. 2011). And the "future litigation fund" should be rejected in its entirety. *See, e.g.*, *7-Eleven, Inc. v. Etwa Enter.*, 2013 U.S. Dist. LEXIS 83961, at *14 (D. Md. Jun. 12, 2013). Class members should not have to bear the risk of class counsel's further litigation against non-settling defendants.

Yang also objects on behalf of the class to the lack of direct notice. *See* Section V below. Notice that is "reasonably calculated, under all circumstances, to apprise interested parties of the pendency

of the action and afford them an opportunity to present their objections" is constitutionally necessary in the class action context. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 175 (1974). But the parties do not intend to provide direct notice to any putative class members, despite admitting that Defendants have contact information for at least a subset of the class. Moreover, the content of the publication notice is itself defective under binding Ninth Circuit precedent because it does not identify the potential *cy pres* recipient(s)—information material to a class member's decision to remain in the class or opt-out or object. *Dennis v. Kellogg Co.*, 697 F.3d 858, 865 (9th Cir. 2012). *See* § VI below.

Finally, the definition of "settlement class" set forth in the settlement agreements is deficient in two key respects even aside from the intraclass conflicts. First, the definition fails to set a definitive end date for class membership. This failure deprives class members of their Rule 23 rights, namely those who enter the class after the notice program ends and the deadlines for excluding oneself or objecting to the settlement have passed. *Amchem*, 521 U.S. at 628; *see* § VII below. Second, by failing to exclude judges who may preside over an appeal of this matter, the settlement creates the risk that the parties effectively will be denied their right of appeal, given the statutory recusal requirements and the likelihood that presiding appellate judges are settlement class members. *See Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1029 (5th Cir. 1998). *See* § VIII below.

For these reasons, it would be reversible error to certify the classes and approve the settlements. And if the Court were to approve the settlements, it should not agree to the excessive Rule 23(h) request.

ARGUMENT

I. The Objector Is a Member of the Class.

Objector Amy Yang is a U.S. resident who purchased passenger air transportation that included at least one segment between the United States and Asia from Defendants or their alleged co-conspirators and for which she was not reimbursed by someone else between January 1, 2000 and the present. *See* Declaration of Amy Yang ("Yang Decl.") ¶¶ 3-4. Yang therefore is a member of the settlement class with standing to object to the settlement. Fed. R. Civ. P. 23(e)(5). Yang's purchases were directly from American Airlines and for travel originating in the United States. Yang Decl. ¶ 3.

Yang's address is 6005 Ridge View Drive, Alexandria, VA; her phone number is 410-207-8745; and her email address is amy_x_yang@yahoo.com. Yang Decl. ¶ 2.

The Center for Class Action Fairness, through attorneys Theodore H. Frank and Anna St. John, represent Yang *pro bono*. St. John, who has been admitted to practice in this matter *pro hac vice*, gives notice of her intent to appear at the fairness hearing in this case, where she wishes to discuss matters raised in this Objection. Yang does not intend to call any witnesses at the fairness hearing, but reserves the right to make use of all documents entered on to the docket by any settling party or objector. Yang reserves the right to cross-examine any witnesses who testify at the hearing in support of final approval. Yang joins the objections of any other objectors to the extent those objections are not inconsistent with this one.

II. The Court Has a Fiduciary Duty to the Unnamed Members of this Class.

A district court must act as a "fiduciary for the class," "with a jealous regard" for the rights and interests of absent class members. *In re Mercury Interactive Corp.*, 618 F.3d 988, 994–95 (9th Cir. 2010) (internal quotation and citation omitted). This fiduciary role is necessary because "the relationship between plaintiffs and their attorneys turns adversarial at the fee-setting stage," when counsel's "interest in getting paid the most for its work representing the class [is] at odds with the class' interest in securing the largest possible recovery for its members." *Id.* at 994 (internal quotation

and citation omitted); *see also Amchem,* 521 U.S. at 623 ("Rule 23(e) … protects unnamed class members 'from unjust or unfair settlements.'").

There is thus no presumption in favor of settlement approval: "[t]he proponents of a settlement bear the burden of proving its fairness." *True v. American Honda Motor Co.*, 749 F. Supp. 2d 1052, 1080 (C.D. Cal. 2010). Where the Court confronts a pre-certification settlement, consideration of the eight *Churchill* factors "alone is not enough to survive appellate review." *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (citing *Churchill Vill., L.L.C. v. Gen. Elec.*, 361 F.3d 566, 575 (9th Cir. 2004)). It is insufficient that the settlement was at "arm's length" and without express collusion between the parties. Because of the danger of conflicts of interest endemic to class actions, pre-certification settlement approval requires a "higher level of scrutiny." *Id.* at 946-48. "'[C]ourts must be particularly vigilant'" not only for explicit collusion, but also for "'subtle signs that class counsel have allowed pursuit of their own self-interests … to infect the negotiations.'" *In re Dry Max Pampers Litig.*, 724 F.3d 713, 718 (6th Cir. 2013) (quoting *Dennis*, 697 F.3d at 864).

III. The Settlements Inappropriately Treat All Class Members the Same Despite Sharp Differences in the Value of Their Claims, Creating Intraclass Conflicts that Preclude a Finding of Adequate Representation under Rule 23(a)(4).

"[J]udges have the responsibility of ensuring fairness to all members of the class presented for certification" under Rule 23. *Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003). The most important factor in determining the fairness of the settlement is the "strength of the plaintiffs' case." *Churchill Vill.*, 361 F.3d at 576. Where class members have claims whose qualitative value is materially different, the court's evaluation must weigh not only the total constructive common fund against the value of the class claims in toto, but the compensation for each of the individual types of claims. *Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 786 (7th Cir. 2004). Judicial supervision requires the court also to weigh the value of claims of differently-situated class members against one another to determine whether the certification and intraclass allocation are fair and reasonable. "[I]ntraclass equity" is a "requirement." *Ortiz*, 527 U.S. at 863. Here, class members with claims of vastly different litigation value all receive the same *pro* rata distribution of settlement funds, forcing class members with

legitimate claims to unfairly compromise and dilute their claims for damages so that class members with more speculative and even no claims can participate in a single settlement class.

A. The JAL Settlement Inappropriately Treats Purchasers of U.S.-Originating Travel and Foreign-Originating Travel Equally.

The JAL settlement differs from the other settlements by providing the same *pro rata* recovery from the JAL settlement fund to purchasers of both U.S.- and foreign-originating travel. Wheaton Decl., Ex. F (Dkt. 948-4) ("Notice") at 148, 151; JAL Settlement Agmt. (Dkt. 921-3) ¶¶ 2, 10.11.[1] The other settlements provide for recovery *only* by purchasers of U.S.-originating travel. This difference is significant.

Purchasers of foreign-originating travel have no claim at all under the law of this case. By order dated May 9, 2011, this Court dismissed from the case with prejudice Plaintiffs' claims against Defendants that arose out of "foreign injury," i.e., "the overcharges associated with flights originating in Asia," because such claims were barred by the FTAIA. Dismissal Order (Dkt. 467) at 5, 12. At the time the Court issued this decision, JAL had "apparently settled and [was] out of the case." *Id.* at 2 n.2. While this Court had not yet ruled on the "foreign injury" issue when the settlement occurred, it does not change that the value of claims against JAL based on foreign-originating travel are worth materially less than those based on U.S.-originating travel simply as a practical matter. The foreign-originating-travel claims were subject to (an ultimately successful) affirmative defense that the U.S.-originating-travel claims were not.

Now just because those claims have been dismissed here does not necessarily mean they are worth zero; there is some small chance that Plaintiffs could win the issue on a future appeal, meaning they might have some litigation value. But this fact just highlights yet another intraclass conflict within

[1] The Notice misleadingly states that the JAL settlement class includes only those persons and entities that purchased qualifying air transportation from *Defendants*, which the Notice defines more narrowly than the JAL settlement agreement. The JAL settlement agreement defines the class to include purchasers from all Defendants and the alleged co-conspirators. JAL Settlement Agmt. (Dkt. 921-3) ¶¶ 1.7, 2. Misleading notice is inadequate notice. *Chavez v. PVH Corp.*, No.: 13-CV-01797-LHK, 2015 U.S. Dist. LEXIS 17511, at *19-*22 (N.D. Cal. Feb. 11, 2015).

the single JAL settlement class. Although this court dismissed the claims of both U.S. and foreign residents who purchased foreign-originating travel, the position of U.S. residents is significantly stronger on appeal. The Court held that the FTAIA bars "foreign-injury claims" because those claims neither involved "import trade or import commerce," nor fell within the statute's "domestic effects" exception, which applies where conduct involving foreign trade "has a direct, substantial, and reasonably foreseeable effect … on trade or commerce which is not trade or commerce with foreign nations," 15 U.S.C. § 6a. Dismissal Order (Dkt. 467). While the scope of this exception remains subject to debate, there exist cases where U.S. residents have succeeded on both prongs of the inquiry, while foreign residents' claims of injury generally have been outright rejected. *See id.* at 8 (holding that U.S. residents had met the first prong and rejecting damage to foreign travelers as "unpersuasive" and "entirely indirect"); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 785 F. Supp. 2d 835, 842-44 (N.D. Cal. 2011) (finding that allegations fell within "domestic effects" exception where global prices were negotiated, in part, in the U.S. and noting that the company "is not a foreign company alleging injury based wholly on foreign transactions and conduct"); *In re SRAM Antitrust Litig.*, 2010 WL 5477313, at *6-*7 (N.D. Cal. Dec. 31, 2010) (finding that U.S. purchasers of a product had met the second prong).

The single JAL settlement class thus kludges together three subgroups of class members with qualitatively different claims: purchasers of U.S.-originating travel have stronger claims than U.S. purchasers of foreign-originating travel, who in turn have stronger claims than foreign purchasers of foreign-originating travel. Because these three groups are competing for the same set of settlement funds, it creates an untenable intraclass conflict of interest to merge them into the same class. *See Hesse v. Sprint Corp.* 598 F.3d 581, 589 (9th Cir. 2010) (rejecting representation as inadequate where "one group within a larger class possesses a claim that is neither typical of the rest of the class nor shared by the class representative."); *Melong v. Micronesian Claims Comm'n*, 643 F.2d 10 (D.C. Cir. 1980) (affirming denial of certification of a class that attempted to consolidate in a single class those with strong and weak claims). Here, class counsel has put their self-interest in obtaining a single undivided fee ahead of the interests of the uncertified subgroup of the class with the strongest claims, choosing to dilute those claims with the fiction that uncertified subgroups of the class with weaker claims are

entitled to the same settlement relief. If purchasers of U.S.-originating travel had separate representation from the other two subgroups, as Rule 23(a)(4) requires, this inequity never would have occurred. The settlement class cannot be certified and must be rejected.

B. All Eight Settlements Improperly Treat Direct and Indirect Purchasers Equally.

Similarly, class members with direct purchases such as Ms. Yang have qualitatively different claims than those who purchased indirectly. While indirect purchasers may pay higher prices if their reseller passes on overcharges from the price-fixing conspiracy, these purchasers have no cause of action under federal law, *Illinois Brick Co.*, 431 U.S. 720, or state law, as federal law preempts any state cause of action that may be available to class members, *Morales*, 504 U.S. 374 (federal ADA preempts state consumer protection claims against air carriers); *In re Korean Air Lines Co.*, 642 F.3d 685 (federal ADA preempts state antitrust claims against air carriers). By failing to exclude indirect purchasers from this worldwide settlement, the settlement compromises direct purchasers so that other class members with no cause of action may recover equally from the funds. This, again, presents an intraclass conflict, and, under Rule 23(a)(4), necessitates subclassing to ensure adequate representation for all class members so that class members with stronger claims do not have their settlement relief unfairly diluted by payments to class members with weaker claims.

C. Subclassing is Necessary to Provide Adequate Representation to Class Members.

The unitary relief awarded to class members with claims of significantly divergent value presents not only a fairness problem, but a Rule 23(a)(4) problem of adequate representation. "An absence of material conflicts of interest between the named plaintiffs and their counsel with other class members is central to adequacy" under Rule 23(a)(4). *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 959 (9th Cir. 2009). When individuals with claims of different legal value are intermingled within a single class, Rule 23(a)(4) and the requirement of interclass equity are violated. *Ortiz*, 527 U.S. at 857-58. Adequate representation requires "structural assurance of fair and adequate representation for the diverse groups and individuals affected." *Amchem*, 521 U.S. at 627.

To eliminate intraclass conflicts, subclassing is required, with each subclass having "separate representation to eliminate conflicting interests of counsel." *Ortiz*, 527 U.S. at 856. *See also In re Literary Works in Elec. Databases Copyright Litig.,* 654 F.3d 242, 252 (2d Cir. 2011) ("Only the creation of subclasses, *and the advocacy of an attorney representing each subclass*, can ensure that the interests of that particular subgroup are in fact adequately represented.") (emphasis added); Federal Judicial Center, MANUAL ON COMPLEX LITIGATION § 21.27 (4th ed. 2004) ("If the certification decision includes the creation of subclasses reflecting divergent interests among class members, each subclass must have separate counsel to represent its interests.").

The settling parties may point to *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011), where a divided *en banc* opinion affirmed approval of an indirect-purchaser settlement with a single uniform fifty-state class, though many states preclude recovery from indirect purchasers. But *Sullivan*'s majority opinion focused on Rule 23(a) commonality and Rule 23(b) predominance, and did not address the issue of Rule 23(a)(4) intraclass conflicts and adequacy because the appellants in that case did not raise that objection. *Ortiz*, *Amchem*, and *Hesse* preclude that result, even if *Sullivan* were correct. "The problem here 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*." *Sullivan*, 667 F.3d at 353 n. 22 (Jordan, J., dissenting).[2]

IV. The 42% Fee Request and $3 Million Future Litigation Fund Are Improper under Ninth Circuit Law; Appropriate Reduction Will Augment Class Recovery.

A. Counsel's Fee Request is Excessive and Should Be Reduced.

The settlements create a sum fund of $39,502,000. The amount of the fund that class members even potentially will recover is immediately reduced to $37.1 million as a result of the $2.4 million paid

[2] And *Sullivan* is wrong even on its narrower Rule 23(b)(3) analysis, contradicting Supreme Court and Ninth Circuit precedent. *Cf. Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 589–94 (9th Cir. 2012).

to a third party "for costs associated with sending notice and administering the Settlements." Mot. for Approval of Notice Program (Dkt. 948) at 9; Am. Order Granting Mot. for Approval of Notice Program (Dkt. 968) ¶ 9. The fund is reduced further by class counsel's request for reimbursement of $2,807,699.73 in expenses, plus another $3 million "for future expenses." In addition, counsel requests fees of $13,154,166. Mot. for Award of Attorneys' Fees (Dkt. 986). This fee request equals 42 percent of the $31.29 million net settlement fund—"clearly excessive" in relation to the Ninth Circuit's 25 percent benchmark. *Dennis*, 697 F.3d at 868.

The Ninth Circuit established 25 percent of the fund as the "benchmark" award that should be given in common fund cases. *Bluetooth*, 654 F.3d at 942. The percentage-of-recovery benchmark is the prevailing Ninth Circuit methodology because it aligns the incentives of class counsel and the class far better than the competing lodestar method. *In re Apple IPhone/IPod Warranty Litig.*, 2014 U.S. Dist. LEXIS 52050, at *8-*9 (N.D. Cal. Apr. 14, 2014). "[A]pplying the lodestar to common fund cases does not achieve the stated purposes of proportionality, predictability and protection of the class. It encourages abuses such as unjustified work and protracting the litigation. It adds to the work load of already overworked district courts. In short, it does not encourage efficiency, but rather, it adds inefficiency to the process." *Id.* (internal quotation and ellipsis omitted). With the percent of recovery approach, in contrast, "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." *Redman v. RadioShack Corp.*, 768 F.3d 622, 633 (7th Cir. 2014).

While the Ninth Circuit gives courts the discretion to calculate the percentage-of-recovery on the gross fund, the better rule is to calculate percentage-of-recovery *after* expenses have been deducted from the settlement. *Id.* at 630 ("the roughly $2.2 million in administrative costs should not have been included in calculating the division of the spoils between class counsel and class members"); *Myles v. AlliedBarton Sec. Servs.*, 2014 U.S. Dist. LEXIS 159790, at *16 (N.D. Cal. Nov. 12, 2014) ("the fees paid to the settlement administrator—do[] not constitute a benefit to the class members"); *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.");

see also Bluetooth, 654 F.3d at 945 (remanding where fee award was far greater than 25 percent of the fund when notice costs were excluded). The post-expense calculation thus follows this Court's precedents, as well as the intent of the 2003 amendments to Rule 23. *See* Notes of Advisory Committee on 2003 Amendments to Rule 23 ("fundamental focus is the result *actually achieved* for class members" (emphasis added)); *id.* (*citing* 15 U.S.C. §§ 77z-1(a)(6); 78u-4(a)(6) (fee award should not exceed a "reasonable percentage of the amount of any damages and prejudgment interest *actually paid* to the class" (emphasis added))).

Even if the Court includes the administrative costs and expenses in the denominator when calculating reasonable attorneys' fees, there are no "'special circumstances' justifying a departure" from the 25 percent benchmark. *Bluetooth*, 654 F.3d at 942. The "foremost" consideration in the reasonableness of a fee award is the benefit obtained for the class. *Id.* And even where class counsel achieves an exemplary settlement, which counsel has failed to show that counsel achieved here for the hundreds of thousands of class members, district courts of this Circuit have hewed closely to the benchmark. *See, e.g.*, *Hopkins v. Stryker Sales Corp.*, 2013 U.S. Dist. LEXIS 16939 (N.D. Cal. Feb. 6, 2013) (reducing request for 33.3% fee where each class member recovered 85-100% of maximum recovery without even having to file a claim form); *Monterrubio v. Best Buy Stores*, 291 F.R.D. 443 (E.D. Cal. 2013). That the lodestar claimed by class counsel is higher than the benchmark does not alter this analysis. *See, e.g.*, *Clayton v. Knight Transp.*, 2013 U.S. Dist. LEXIS 156647 (E.D. Cal. Oct. 30, 2013) (reducing fees to 25% even where plaintiff's lodestar was greater than the 33.3% fee requested); *Keirsey v. Ebay, Inc.*, 2014 U.S. Dist. LEXIS 21371 (N.D. Cal. Feb. 18, 2014) (refusing to deviate above 25% even though requested amount was only a .23 multiplier on counsel's lodestar).

B. The $3 Million "Future Litigation Fund" Is Improper and Should Be Denied.

The $3 million "future litigation fund" is separately improper. Despite telling the Court that their "litigation fund request will be fully explained in the proposed notice program," Am. Mot. for Prelim. App. (Dkt. 921) at 13, class counsel's only "explanation" is the fact of the request: "Class Counsel has requested that the Court set aside $3 million of the settlement fund to cover future litigation expenses," Notice (Dkt. 948-4) at 153. How counsel intends to spend the funds is unknown,

and, in fact, class counsel has made inconsistent statements about the purpose and use of the $3 million on the record.[3]

Courts routinely reject such unsupported fund requests for "future" use. *See 7-Eleven, Inc. v. Etwa Enter.*, 2013 U.S. Dist. LEXIS 83961, at *14 (D. Md. Jun. 12, 2013); *St. Hilaire v. Indus. Roofing Co.*, 346 F. Supp. 2d 212, 215 (D. Me. 2004) ("[T]he Court is not prepared to accept Plaintiff's bald projection of reasonable future fees without corroborating support in the record."). Expenses can only be granted upon a showing of clear and demonstrable benefit, accompanied by proper documentation. *Dyer v. Wells Fargo Bank, N.A.*, 303 F.R.D. 326, 334 (N.D. Cal. 2014) (expenses require documentation); *Wolph v. Acer Am. Corp.*, 2013 U.S. Dist. LEXIS 151180, at *18 (N.D. Cal. Oct. 21, 2013) (expenses must be "clear"); *Davis v. Cole Haan, Inc.*, 2013 U.S. Dist. LEXIS 151813, at *10 (N.D. Cal. Oct. 21, 2013) (expenses must be sufficiently described).

The only authorities cited by class counsel in support of the request involve funds with safeguards against improper expenditures. The funds (1) were suggested by a court-appointed mediator and required court approval for any expenditure, *Newby v. Enron Corp.*, 394 F.3d 296, 302 (5th Cir. 2004), or (2) required court approval for payments and were overseen by sophisticated, "institutional investor[]" plaintiffs and counsel who, "in striking contrast to the common circumstance of attorneys choosing their clients in class actions," had been actively selected by the plaintiffs and requested fees amounting to only 10 percent of the recovery, *In re Cal. Micro Devices Secs. Litig.*, 965 F. Supp. 1327, 1330, 1332, 1337 (N.D. Cal. 1997).

No such safeguards are present here. Instead, class counsel seeks complete authority over the fund, in contravention of Rule 23(h). If counsel continues to pursue the litigation against the remaining defendants, they can seek additional expenses and fees when and if they are successful.

[3] *Compare* Notice (Dkt. 948-4) at 153 (fund will "cover future litigation expenses") *with* Am. Mot. for Prelim. App. (Dkt. 921) at 13 (fund will be used "for the reimbursement of out-of-pocket expenses incurred to date, and for payment of current and future out-of-pocket expenses").

V. The Notice Plan Is Inadequate Because It Does Not Include Direct Notice for Any Class Members Despite Defendants Having Reasonable Access to Such Information.

Direct notice is obligatory as a matter of due process for those class members for whom Defendants have contact information—even if Defendants do not have such information for the entire class. *Eisen*, 417 U.S. at 175. As an industry-wide practice, airlines require customers to provide an email address or, in times past, a physical address for delivery of a confirmation code or ticket. Airlines also require an email address and/or physical address from enrollees in their frequent flyer programs. Yet the notice plan here is publication-only.

The parties' proposed notice plan does not include *any* notification by direct mail, email, or other individualized means. The absence of individualized notice is explained only by the statement of a single Defendant in its settlement agreement that "the email or physical addresses or other contact information for Settlement Class Members are not reasonably available" to that particular Defendant. Quantas Settlement Agmt. (Dkt. 942-2) ¶ 5.1. This assertion is conspicuously absent from the other settlement agreements. And the third-party consultant responsible for the notice program has made only conclusory comments about "mailing" addresses. Wheaton Decl. (Dkt. 948-4) ¶¶ 15, 22 ("Because passenger mailing lists are not available from the Defendants…." and "Where individual addresses for purposes of direct mail are not available, as is the case here….").

The *Mullane* constitutional imperative is that the settlement notice be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314. "Where the names and post-office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318. In *Eisen*, the Supreme Court further held that "individual notice to identifiable class members is not a discretionary consideration to be waived in a particular case…. [E]ach class member who can be identified through reasonable effort must be notified." 417 U.S. at 176.

Following these decisions, the Ninth Circuit holds that "[t]o comply with the spirit of [Rule 23 notice provisions], it is necessary that the notice be given in a form and manner that does not

systematically leave an identifiable group without notice." *Mandujano v. Basic Vegetable Prods., Inc.*, 541 F.2d 832, 835 (9th Cir. 1976). Putative class members for whom Defendants have contact information are just such an identifiable group. Even where only a limited percentage of the class can be reached through direct notice, direct notice is still mandatory for those class members. *Eisen*, 417 U.S. at 175-76; *Smith v. Levine Leichtman Capital*, 2012 U.S. Dist. LEXIS 163672, at *7-*8 (N.D. Cal. Nov. 15, 2012) ("[n]otice to class…must be 'the best…practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort'" (quoting *Amchem*)); *Fraser v. Asus Computer Int'l*, 2012 U.S. Dist. LEXIS 181315, at *10-*12 (N.D. Cal. Dec. 21, 2012) (postal notice is required even when it only would reach 30% of class).

Defendants acknowledge that "Federal Rule of Civil Procedure 23 and due process [require] individual notice [to be] given to Settlement Class Members for whom Defendants have email or physical addresses." Defs.' Settlement Agmts. (Dkt. Nos. 942-2, ¶ 5.1; 921-3, ¶ 4.1; 921-4, ¶ 5.1; 921-5, ¶ 5.1; 921-7, ¶ 5.1; and 942-3, ¶ 5.1). And at least one Defendant acknowledges that Defendants have access to contact information for class members, noting that direct notice may be "based upon contact information to be provided by [the] defendants, including but not limited to through frequent flyer program information concerning such class members." JAL Settlement Agmt. (Dkt. 921-3) ¶ 4.1. At the very least, then, the notice program must provide for direct notice to putative class members who are enrolled in Defendants' frequent flyer programs.

The authorities cited by Defendants are not to the contrary. Those cases involved notice plans in which a significant number of class members did receive individual notice. *E.g.*, *In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 167-68 (2d Cir. 1987) (notice letters sent to over 100,000 individuals). The citation to *Ross v. Trex. Co., Inc.*, 2013 WL 791129 (N.D. Cal. Mar. 4, 2013) is even more self-defeating, because in a subsequent order, Judge White required the parties to address the feasibility of obtaining class member contact information through affiliates of the defendants, 2013 U.S. Dist. LEXIS 74720 (N.D. Cal. May 28, 2013), and, ultimately, the parties' notice plan included direct notice to more than 66,000 class members, 2013 U.S. Dist. LEXIS 177718, at *12 (N.D. Cal. Dec. 16, 2013).

There should be no dispute that the publication-only notice here is unacceptable when Defendants' records house class members' contact information. As *Mullane* held, "the fact that the [defendant] has been able to give mailed notice to known beneficiaries" at the time the relationship "was established is persuasive that postal notification at the time of accounting would not seriously burden the plan." *Mullane*, 339 U.S. at 319. Thus, Defendants' ability to send settlement class members reservations by email or traditional mail establishes their ability to contact such individuals with notice of the settlement. And they certainly maintain contact information for a significant number of class members through their frequent flyer programs. Any objection by Defendants that such an effort would be expensive and time-consuming should be rejected, as their "pocketbooks are not a factor—the mandatory notice requirement may not be relaxed based on the high cost of providing notice." *In re Motor Fuel Temperature Sales Practices Litig.*, 279 F.R.D. 598 (D. Kan. 2012).

VI. Notice Is Defective Because the Identity of Potential *Cy Pres* Recipient(s) Is Material to the Fairness of the Settlement, But Is Not Disclosed to the Class.

The notice here is constitutionally deficient under *Mullane* for an additional reason: It fails to provide the "required information" that is material to a reasonable class member's evaluation of the settlement, in determining whether to submit to the proposed settlement. *Mullane*, 339 U.S. at 314. *See In re Veritas Software Corp. Secs. Litig.*, 496 F.3d 962, 969 (9th Cir. 2007) ("It is clear that the purpose of the notice requirement is to allow class members to evaluate a proposed settlement."). That standard is not met where the identity of a *cy pres* beneficiary is not disclosed.

Here, after costs and attorneys' fees have been paid from the settlement funds, remaining funds shall be paid pro-rata to the settlement classes "or, in Settlement Class Counsel's reasonable judgment, be made the subject of an application to the Court by Plaintiffs for *cy pres* distribution." *E.g.*, Quantas Settlement Agmt. (Dkt. No. 942-2) ¶ 11.9. The only information provided to class members about the potential *cy pres* distribution is that "[i]t is possible that any money left after paying members of the classes will be donated to charities approved by the Court." Notice (Dkt. 948-4) at 151. Neither the notice nor the settlement reveal the identity of the potential recipients. Nor does the settlement

provide any mechanism for class members to provide input on the selection of *cy pres* recipients or to receive notice of the identities of the potential recipients once they are recommended to the Court.

"To ensure that the settlement retains some connection to the plaintiff class and the underlying claims … a *cy pres* award must qualify as the next best distribution to giving the funds directly to class members." *Dennis*, 697 F.3d at 865. Where the parties do not establish that the potential recipient has an appropriate nexus to the putative class and their claims, the settlement will not be approved. *Custom LED v. eBay, Inc.*, 2013 U.S. Dist. LEXIS 122022, at *19-*20 (N.D. Cal. Aug. 27, 2013). *See also Dennis*, 697 F.3d at 867 (rejected proposed settlement because, "by failing to identify the *cy pres* recipients, the parties have restricted our ability to undertake the searching inquiry that our precedent requires").

In an opt-out settlement, providing the identity of potential *cy pres* recipients preserves the right of absent class members to distance themselves from causes or institutions that they would rather not support. The information can underpin a valid objection if there is an abuse of the *cy pres* mechanism if, for example, the intended recipient is related to class counsel or a defendant, or when there is a geographic incongruence between the class and the recipient. *See Nachshin v. AOL*, 663 F.3d 1034 (9th Cir. 2011). Class members have a right to know to whom their money is going and how it will be utilized. *In re VeriFone Holdings, Inc. Secs. Litig.*, 2013 U.S. Dist. LEXIS 126988, at *6 (N.D. Cal. Sept. 5, 2013) (what will happen to funds remaining after initial distribution must be specified).

VII. A Lawful Class Definition Requires an End Date.

This Court preliminarily certified for settlement purposes a class for each of the settling Defendants. Each class comprises persons who purchased qualifying air travel from Defendants or their co-conspirators, "at any time between January 1, 2000 and the Effective Date." Prelim. App. Order I (Dkt. 924) ¶ 2; Prelim. App. Order II (Dkt. 951) ¶ 2. The settlements define "Effective Date" as "the date all of the following conditions have been met: (a) the Court has entered Judgment…; and (b) the time for appeal … has expired…, or, if appealed, the Judgment has been affirmed [and is] no longer subject to further appeal." *E.g.*, Quantas Settlement Agmt. (Dkt. 942-2) ¶ 8. The class definition is flawed, because it does not establish a firm end-date for class membership.

"An implied prerequisite to certification is that the class must be sufficiently definite." *Whiteway v. FedEx Kinko's Office & Print Servs., Inc.*, 2006 U.S. Dist. LEXIS 69193, at *10 (N.D. Cal. Sept. 13, 2006). This means that, at the very least, every class definition should include: (1) a specification of a particular group at a particular time frame and location who were harmed in a particular way; and (2) a method of definition that allows the court to ascertain its membership. *Rowe v. E.I. Dupont De Nemours & Co.*, 262 F.R.D. 451, 455 (D.N.J. 2009). These principles are violated by a class definition that has no definite end date and is only bounded *de facto* by the issuance of a final approval order at an indeterminate future date.

This Court repeatedly has held that proposed classes with no fixed end date must be denied certification.[4] The Supreme Court itself has "recognize[d] the gravity of the question whether class action notice sufficient under the Constitution and Rule 23 could ever be given to legions so unselfconscious and amorphous." *Amchem*, 521 U.S. at 628. Other courts analyzing proposed classes with no fixed end date have reached the same conclusion.[5]

There are sound reasons for requiring a definite temporal boundary. First, as discussed above, Rule 23's notice requirement allows class members a sound platform for assessing the merits and demerits of the settlement in deciding whether to object or opt-out. Those who purchase qualifying air travel after the completion of the notice program will be deprived of their rightful notice. Second, even if the late-purchasing class members were somehow to learn of the settlement, the objection and opt-out deadline may have passed by that time. These class members would be deprived of their Rule 23(e)(5) right of objection and Rule 23(c)(2)(B) right to exclude themselves.

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[4] *See In re Wal-Mart Stores, Inc. Wage & Hour Litig.*, 2008 U.S. Dist. LEXIS 109446, at *15-*16 (N.D. Cal. May 2, 2008); *Cruz v. Dollar Tree Stores*, 2009 U.S. Dist. LEXIS 62817, at *3-*5 (N.D. Cal. July 2, 2009); *Zeisel v. Diamond Foods*, 2011 U.S. Dist. LEXIS 113550, at *5 (N.D. Cal. Oct. 3, 2011).

[5] *See Mueller v. CBS*, 200 F.R.D. 227, 236 (W.D. Pa. 2001); *Saur v. Snappy Apple Farms*, 203 F.R.D. 281, 285-86 (W.D. Mich. 2001); *Vickers v. GMC*, 204 F.R.D. 476, 478 (D. Kan. 2001); *Wike v. Vertrue*, No. 3:06-00204, 2010 U.S. Dist. LEXIS 96700 (M.D. Tenn. Sept. 15, 2010).

VIII. By Failing to Exclude Potential Appellate Judges, the Class Definition Is Defective.

Under at least two statutory provisions, a judge must recuse himself when he or a family member is a putative class member. First, a judge "shall" disqualify himself where "[h]e knows that he … or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy." 28 U.S.C. § 455(b)(4). "Financial interest" is defined as "ownership of a legal or equitable interest, however small." Under this standard, "where a judge or an immediate family member is a member of a class seeking monetary relief, § 455(b)(4) requires recusal because of the judge's financial interest in the case." *Tramonte v. Chrysler Corp.*, 136 F.3d 1025, 1029 (5th Cir. 1998). *See also In re Aetna UCR Litig.*, 2013 U.S. Dist. LEXIS 54864 (D.N.J. Apr. 15, 2013) (class-member judge recused himself due to disqualifying financial interest). Second, a judge must disqualify himself from "any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a).

Here, the settlement classes include millions of American travelers, and almost certainly include a number of judges who subsequently may hear an appeal of this matter and would be forced to recuse themselves. In the Supreme Court, there is no provision to replace recused judges, potentially depriving litigants of a quorum. 28 U.S.C. § 1; *e.g., American Isuzu Motors, Inc. v. Ntsebeza*, 553 U.S. 1028 (2008). To avoid a situation in which only judges with a financial interest in the litigation are available to hear an appeal, potentially denying class members their full appellate rights, the settlement class definitions should be amended to exclude judges of the U.S. Court of Appeals for the Ninth Circuit and U.S. Supreme Court Justices.

CONCLUSION

For the forgoing reasons, the settlement cannot be approved. It favors putative class members with weak claims at the expense of those with stronger claims, without providing adequate representation. The settlement does not afford effective notice to the class and denies late-entering class members their rights to object or opt out. If the Court decides to approve the settlement anyhow, it should drastically pare down the requested fee.

Dated: April 17, 2015

Respectfully submitted,

/s/ Anna St. John
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CERTIFICATE OF SERVICE

I, Anna St. John, declare that I am over the age of eighteen and not a party to the entitled action. I am an attorney with the Center for Class Action Fairness, and my office address is 1718 M Street NW, No. 236, Washington, DC 20036.

On April 17, 2015, I caused to be served a true and correct copy of the following:

1) **OBJECTION OF AMY YANG**

2) **DECLARATION OF AMY YANG**

3) **[PROPOSED] ORDER DENYING FINAL APPROVAL OF SETTLEMENTS**

4) **CERTIFICATE OF SERVICE**

with the Clerk of the Court using the Official Court Electronic Document Filing System which served copies on all interested parties registered for electronic filing and, in accordance with the class notice, via first class mail to the following addresses listed below:

Clerk's Office U.S. District Court for the District of Northern California 450 Golden Gate Avenue San Francisco, CA 94102	Transpacific Air Settlement Objections P.O. Box 2209 Faribault, MN 55021-1609

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Executed on April 17, 2015, in Washington, DC.

/s/ Anna St. John

Anna St. John