NO. 15-16280

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

AMY YANG,
Objector-Appellant,

v.

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

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

Reply Brief of Appellant Amy Yang

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Introduction

According to plaintiffs, it is "***precisely the point***" of their argument for affirmance that a district court should not analyze "the strengths and weaknesses of the class members' respective claims" and the district court did not err by failing to do so. PB29-30 (emphasis in original).[1] If that's the hill plaintiffs want to defend, this is an extraordinarily easy case for this Court. The ***very first factor*** a court should consider in evaluating whether to approve a settlement is "the strength of the plaintiffs' case." *Churchill Village v. General Electric Co.*, 361 F.3d 566, 575 (9th Cir. 2004); OB27; *see also* OB20 (citing cases). At a minimum, remand is necessary for the district court to correct this legal error in its certification decision. But this Court can go further, answer the purely legal question itself, and hold certification improper as a matter of law.

Admitting that controlling Supreme Court precedent requires subclassing and separate counsel where a settlement class includes members with conflicting interests, Plaintiffs nevertheless give scant attention to the Rule 23(a)(4) standard set in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). Relying instead on cases analyzing different Rule 23 requirements, as well as revisionist legal analysis, they attempt to characterize the sharp intraclass conflicts present in the settlement classes at issue as "illusory," "speculative," and "contingent

[1] OB and PB refer to the opening and plaintiffs' appellate briefs respectively; ER, SER, and RSER refer to the excerpts of record, plaintiffs' supplemental excerpts of record, and the reply supplemental excerpts of record respectively.

on future events." PB13. This attempt is futile, however, as Plaintiffs fail to distinguish the conflicts on any principled basis from those in *Ortiz* and *Amchem*.

Plaintiffs use erroneous *post hoc* reasoning to justify the *pro rata* allocation in the Japan Airlines International Company ("JAL") settlement. The Foreign Trade Antitrust Improvement Act ("FTAIA") has barred foreign-injury claims under the Sherman Act for decades, and no disagreement in reasoning among courts can infuse new life into foreign-originating-travel claims. Moreover, the fact that JAL class members all gave up worthless releases for their claims in foreign jurisdictions is irrelevant to the analysis. PB8; *see* ER64. And, contrary to Plaintiffs' assertion, the fundamental conflict in the JAL settlement agreement cannot be mitigated by looking at "how the settlements function overall." PB8. This appeal challenges the district court's approval of five separate and independent settlement agreements with five different defendants. That a member of the JAL settlement class also fits within the class definition in the Air France settlement and recovers from Air France says nothing about the fairness of the JAL settlement.

With respect to the *Illinois Brick* conflict, Plaintiffs assert that the affirmative defense has no applicability here. While the correctness of Plaintiffs' argument is *necessary* for them to defeat Yang's objection, it is not *sufficient*. If, for example, Plaintiffs had a 70% chance of prevailing on their unprecedented application of *Illinois Brick* to this market, that would mean the subclass of those who were second and third in the purchasing chain have a claim that is worth only 70% of the subclass of those who were first in the purchasing chain. Only if the *Illinois Brick* defense were essentially riskless to the plaintiffs and without colorable merit would avoiding

subclassing be appropriate. Class counsel is incorrect when it asserts that Yang is asking for the district court to resolve a Rule 56 motion. Nothing in Yang's argument requires a district court to value claims with precision or the settling parties to perfectly anticipate what would happen in a fully litigated case; a rough estimate of the range compared to the settlement is plenty sufficient: does a claim have about a 10-30% chance of success? 70-90% chance of success? Is it a slam-dunk? But a district court cannot entirely ignore whether affirmative defenses add material risk to the case for uncertified subclasses when evaluating the *Churchill Village* factors. *Cf. Mirfasihi v. Fleet Mortg. Corp.*, 356 F.3d 781, 782-83 (7th Cir. 2004) (Posner, J.). Here, the district court assumed, without any attempt to value the "strength of plaintiffs' case," that an alleged indirect purchaser's claim was worth 100% of the value of the direct purchaser's claim. The district court failed to apply the correct methodology for evaluating a settlement. It also independently reached the wrong result, because plaintiffs' *Illinois Brick* argument is not only not a slam dunk or close to it (as they must demonstrate to win on appeal here), plaintiffs' *Illinois Brick* argument is almost certainly much closer to a 0% chance of success than a 100% chance of success.

Simply put, plaintiffs don't even demonstrate that they get over the initial hurdle of proving that *Illinois Brick* doesn't apply. Plaintiffs claim—without record support and in the face of *Illinois Brick*'s "bright line rule" barring claims by purchasers who are second and third in the purchasing chain—that no indirect purchasers exist and, therefore, there is no conflict between direct and indirect purchasers in the five settlements at issue. No court would accept such *ipse dixit* reasoning. As a practical matter, class members who purchased their air travel through an intermediary

consolidator and/or travel agent faced a significant legal hurdle to their claim that class members who purchased their air travel directly from an airline did not.

Plaintiffs' opposition proves the very point Yang made in her opening brief: The litigation risk inherent in claims arising from foreign-originating travel and indirect purchases makes those claims less certain than the claims of U.S.-originating-travel claimants and direct purchasers. While Yang believes Plaintiffs are wrong on the merits of their FTAIA and indirect-purchaser arguments, even if the court ultimately agrees with them, it is undeniably the case that one uncertified subclass has a materially different chance of success than another. As such, the uncertified subclasses are in conflict with each other and, under Rule 23(a)(4), the settlements cannot be approved without separate representation for each subclass.

Plaintiffs also challenge, for the first time, Yang's standing to raise the impropriety of the settlements' failure to fix an end date for class membership, perhaps recognizing they cannot win the issue on the merits. As a class member who objected to the legality of settlements that bind her, she has standing to raise any issues within that broad zone of interests, including an overbroad class definition that denied class members their Rule 23 rights to notice and to object and opt out. *Devlin v. Scardelletti*, 536 U.S. 1 (2002). Even apart from the broad standing afforded objecting class members, Yang was "aggrieved" through dilution of her *pro rata* interest, and is entitled to the remedy of reversal that would cure the overbroad class certification that injures her interests.

Argument

I. The settlements inappropriately treat class members identically despite facing materially different affirmative defenses, creating intraclass conflicts that preclude a finding under Rule 23(a)(4) because of the lack of separate representation.

As Plaintiffs expressly acknowledge, the adequacy requirement of Rule 23(a)(4) is not met where a unitary settlement class includes members with conflicts that are "fundamental to the suit." PB18. The disagreement between Plaintiffs and Yang appears to center on whether the conflicts in the settlement classes at issue are, as Plaintiffs claim, too "speculative" to require separate representation under *Ortiz* and *Amchem*. *Id.*

The conflicts here go to the very heart of the antitrust claims. They arise not from speculative factual assertions about class member variance, but from fundamental, black-letter law known among even the most novice antitrust practitioners. Indirect purchasers have not had a claim under federal law for nearly 40 years, *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), while foreign-injury-based antitrust claims have been controversial, at best, since the Foreign Trade Antitrust Improvements Act was enacted in 1982 to limit the extraterritorial application of the Sherman Act, and claims specifically for foreign-originating travel and services have been barred for years, *see, e.g.*, *Turicentro, S.A. v. Am. Airlines, Inc.*, 303 F.3d 293, 303 (3d Cir. 2002).

It is telling that Plaintiffs devote a mere page and a half to *Amchem* and *Ortiz*, the Supreme Court cases that will decide this appeal. If Plaintiffs were correct that a 23(a)(4) conflict cannot be "based on yet unproven defenses" (PB19), then *Ortiz*

would not have found a 23(a)(4) violation based on a settlement that failed to account for the legally relevant date that defendant's insurance lapsed. But it did. 527 U.S. at 857. Even in their short discussion of these cases, Plaintiffs primarily focus not on the merits but on attacking an attempt at brevity by Yang that excised language specific to the asbestos claims in *Ortiz* that does nothing to change the universally applicable principle for which Yang quoted the passage. PB16-18. As Yang predicted in her opening brief, Plaintiffs direct their attention instead to cases that were not analyzed under Rule 23(a)(4) and therefore are not decisive to the adequacy of representation question presented here. *See* PB20-23.

A. This Court should apply a higher standard of review to the settlements.

In arguing that there is no heightened standard applicable to class-action settlements, Plaintiffs misstate the holding of *In re Bluetooth Headset Products Liability*, 654 F.3d 935 (9th Cir. 2011). In *Bluetooth*, this Court addressed the long-recognized fact that "'settlement class actions present unique due process concerns for absent class members,'" with "an even greater potential for breach of fiduciary duty owed the class" where settlement is reached "[p]rior to formal class certification." 654 F.3d at 946 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998)). As a result, a determination that the settlement agreement is "fair" requires "an even higher level of scrutiny" where, as here, settlement occurs before class certification. *Id.* at 946-47. *Bluetooth* made no attempt to exhaustively delineate every warning sign of settlement unfairness. 654 F.3d at 947 ("A few such signs are:…").

Plaintiffs' erroneous reading of *Bluetooth* would undermine its holding. It makes little sense to require a court to find signs of collusion *before* the court scrutinizes the settlement for signs of collusion or other unfairness. Indeed, a key element of the heightened scrutiny required for a pre-certification settlement is that courts "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *Id.* at 947. Yang is not alleging explicit collusion; she alleges that class counsel improperly swept Rule 23(a)(4) concerns under the rug so as not to have to share fees with attorneys with a separately-represented subclass—exactly the sort of "pursuit of … self-interest[]" *Bluetooth* was concerned about, even if there were no constitutional requirement that class members be adequately represented.

Moreover, although Plaintiffs claim that this Court's "function" is restricted to "interpret[ing] a private contract between the parties," PB23, this description is far too limited in the class-action context. While it is true that class-action settlements partake of private contracts, they are

> different from other [contracts]. 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 not only the interests of the parties and counsel who negotiate them, but also 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). The requirement of judicial approval demonstrates that class settlements are more than merely private contracts. *See* Fed. R. Civ. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval."); *see also Amchem*, 521 U.S. at 619-20 (lower court properly "homed in on settlement terms in explaining why it found the absentees' interests inadequately represented"). The parties have a private contract, but they cannot contract around the Rule 23(a) requirements.

B. Plaintiffs' claim that there are no indirect purchasers in the settlement classes is facially disingenuous, lacks record support, and contradicts *Illinois Brick*.

Plaintiffs do not dispute that indirect purchasers of air passenger travel do not have a claim under federal or state law. Nor do Plaintiffs dispute that the settlement classes fail to carve out indirect purchasers from the class definitions. They stake their opposition instead on their unsupported claim that there are *no* indirect purchasers in the passenger air travel sector.

According to Plaintiffs, "[w]here the consumer first takes title to the ticket, an agency-principal relationship is formed and the consumer, not the agent, is properly considered the direct purchaser." PB28-29. The only cases Plaintiffs cite for this allegedly settled principle of law is *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 149-50 (N.D. Cal. 1991), and *In re Int'l Air Transp. Surcharge Antitrust Litig.*, 577 F. Appx 711, 715-16 (9th Cir. 2014). PB29. Neither remotely supports Plaintiffs' position. Yang detailed the inapplicability of these two cases in her opening brief.

OB24. *Burkhalter* involved a contract-specific analysis of the one-time purchase of macadamia nuts by a travel agent who took no profit on the sale. *See* 144 F.R.D. at 150. The case therefore cannot stand for the proposition that a purchaser of air travel from a consolidator or travel agent is always a direct purchaser. *International Air Transportation Surcharge* likewise cannot stand for such a broad proposition. That case involved the interpretation of a class definition in the settlement agreements at issue, with the court carefully limiting its decision to that specific agreement, rather than making a broad pronouncement of the applicability of *Illinois Brick* in the travel sector. (In fact, the court did not cite *Illinois Brick* even once.)[2]

Illinois Brick created a "sensible and straightforward bright line rule" that only direct purchasers have standing. *Warren Gen. Hosp. v. Amgen Inc.*, 643 F.3d 77, 95 (3d Cir. 2011) (internal quotation marks omitted). Several concerns underlie the *Illinois Brick* decision. First, allowing indirect purchasers to recover "would transform treble-damages actions into massive efforts to apportion the recovery among all potential plaintiffs that could have absorbed part of the overcharge—from direct purchasers to middlemen to ultimate consumers." *Illinois Brick*, 431 U.S. at 737. Moreover, if indirect purchasers were allowed to prove that the overcharge was passed on to them, the direct purchasers' damages would be greatly reduced and no party would have a

[2] Plaintiffs also cite *International Air Transportation Surcharge* for the court's comment that it need not decide whether certain customers were indirect purchasers. However, Plaintiffs fail to note the reason for the court's comment. The settlement at issue encompassed both Sherman Act violations and violations of U.K. law, which has "not adopted the strict 'indirect purchaser' rule applicable in U.S. antitrust cases" but instead allows claims by indirect purchasers. 577 Fed. Appx. at 716.

sufficient stake to bring an action. *Id.* at 745. At the same time, there would be the potential for multiple recoveries against a defendant for the same conduct. *Id.*

With this reasoning as background, the Supreme Court has rejected "exceptions" to the indirect-purchaser rule for any particular market or industry. *Id.* at 744-45. The only two exceptions enumerated by the Supreme Court allow indirect-purchaser standing where there is a preexisting cost-plus contract or the direct purchaser is owned or controlled by its customer. *Id.* at 736 & n.16; *Glynn-Brunswick Hosp. Auth. v. Becton, Dickinson & Co.*, No. CV 215-091, 2016 U.S. Dist. LEXIS 10925, at *21 (S.D. Ga. Jan. 29, 2016).

Plaintiffs apparently have taken this latter exception—where the direct purchaser is owned or controlled by its customer—and contorted it into a theory that any agent-principal relationship bestows direct purchaser status on a purchaser down the distribution chain. This is not the law. *See Howard Hess Dental Labs. v. Dentsply Intern.*, 424 F.3d 363, 372 (3d Cir. 2005) ("control exception" to *Illinois Brick* limited to parent-subsidiary relationship or "'relationships involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale'" (quoting *Jewish Hosp. Ass'n v. Stewart Mech. Enter.*, 628 F.2d 971, 975 (6th Cir. 1980))).

Plaintiffs do not deny the existence of travel agents and consolidators whose characterization as "indirect purchasers" has been accepted by this Court. *See Korean Air Lines Co. Antitrust Litig.*, 642 F.3d 685, 689 (9th Cir. 2011) (characterizing without analysis those who purchased tickets through travel agents or consolidators rather than directly from airlines as "indirect purchasers"). Nor do Plaintiffs deny that

international air travel passengers purchased tickets from consolidators and travel agents during the class period. PB28-29. It is common knowledge that, typically, airline consolidators operate by negotiating with the airlines and buying tickets in bulk at a discount and reselling those tickets to travel agents who, in turn, add a markup for their services and sell the tickets to consumers. *See, e.g.*, Global Netfares, "Our History," *available at* https://www.globalnetfares.com/History.aspx.

Plaintiffs ask this Court to accept, without legal or factual support, that (1) one cannot be an indirect purchaser of passenger air travel unless he or she bought the ticket from another person or entity who first had purchased the ticket and "taken title," and (2) no one in the classes encompassing hundreds of thousands of travelers purchased tickets in this manner. PB28. This proposed approach defies *Illinois Brick* and ignores the many cases in which courts have adhered to the "bright line rule" preventing purchasers second and third in the distribution system from bringing an antitrust claim. *See, e.g.*, *Glynn-Brunswick Hosp. Auth.*, 2016 U.S. Dist. LEXIS 10925, at *21 (plaintiffs are not direct purchasers where they purchase defendants' products from distributors, make payment to the distributor, the distributor sets the price for the product, and the distributor sends them the product); *Howard Hess Dental Labs.*, 424 F.3d at 373 (whether "the dealers [took] physical possession" of the product is irrelevant to indirect purchaser analysis).

Even if Plaintiffs' view of the law were correct, they provide no evidence of the relationships between airline defendants, intermediate vendors, and consumers here, and non-settling defendants' letter to the district court makes clear that the issue was strongly disputed. ER58. *Cf. In re Morales Travel Agency*, 667 F.2d 1069, 1072-73 (1st

Cir. 1981) (noting that different travel agents had different contracts with different airlines). Plaintiffs had the burden to do so. *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 979-980 (9th Cir. 2011) (burden of demonstrating compliance with the 23(a) and (b) prerequisites resides with the proponents of class certification); *Mayfield v. Dalton*, 109 F.3d 1423, 1427 (9th Cir. 1997) (same).

More importantly, Yang's Rule 23(a)(4) argument does not depend upon the intricacies of the relationships between the airline defendants, plaintiffs, and various travel consolidators and agents that sold their tickets during the class period. The very fact that those purchasers who obtained tickets through an intermediary have a higher hurdle to overcome makes their claims materially less valuable than those of class members such as Yang who purchased directly from the defendant airlines. It was legal error for the district court to approve the settlements without creating subclasses and designating counsel to represent each subclass.

C. The conflict between JAL class members who purchased U.S.-originating air travel and foreign-originating air travel is fundamental and concrete.

Plaintiffs admit that class members in the JAL settlement class "are set to be compensated *pro rata* for both domestic- and foreign-originating travel claims," PB8, despite purchasers of foreign-originating flights having no claim under the FTAIA, PB7. Plaintiffs brush aside the JAL settlement conflict on the grounds that the district court's order dismissing foreign-originating-travel claims was issued after settlement was reached, and a court's fairness analysis should consider only "'what was known to the settling parties at the time the agreement was reached.'" PB25 (quoting *Trombley v.*

Nat'l City Bank, 826 F. Supp. 2d 179, 203 (D.D.C. 2011)). But nothing in Yang's argument is demanding perfect foresight from settling parties; she merely notes that there was definitive risk of a successful FTAIA defense, and that Plaintiffs thought so little of an appeal of the FTAIA issue that they did not even seek nuisance settlement value from the post-ruling settling defendants.

To hold, as Plaintiffs suggest, that there can never be an intraclass conflict requiring separate representation unless the district court has previously ruled on the affirmative defense that creates the conflict before settlement would directly conflict with *Amchem* in addition to *Ortiz*. *Amchem* did not require the district court to find that the claims of potential future-injury class members were non-justiciable before they were entitled to separate representation. *See* 521 U.S. at 624, 626. If it had, the claims would have been dismissed, removing the need for subclasses and separate representation. Instead it found that the class certification issues were "logically antecedent." 521 U.S. at 612.

To the extent Plaintiffs argue that the merits of the FTAIA defense were unknown at the time of settlement, they are engaging in revisionist legal analysis. Since its inception in 1982, the FTAIA has barred such foreign-injury claims. *See* 15 U.S.C. § 6a. That courts have disagreed as to whether the basis for such prohibition is jurisdictional or merits-based does not change the fact that, as a matter of black-letter law, the foreign-injury Sherman Act claims have only nuisance settlement value. *E.g.*, *Turicentro*, 303 F.3d at 303. Putative foreign-injury plaintiffs would not have more valuable claims if dismissal was on the merits rather than due to a lack of jurisdiction, or *vice versa*. As Yang acknowledged in her opening brief, foreign-injury claims may

have retained some minimal value based on the small chance of success in a future appeal, OB21 n.3; but the settlement value of such claims is indisputably lower than U.S.-originating-travel claims that do not face such a hurdle.[3]

Plaintiffs' additional argument that *pro rata* compensation is fair because JAL class members gave up a purportedly "valuable" release precluding them from bringing their claims in a foreign jurisdiction is puzzling. PB13. *All* JAL class members released their right to sue in a foreign forum. ER65, 71-72. If Plaintiffs are trying to argue that the release is more valuable for foreign-originating than U.S.-originating travel and therefore balances the scale, they are wrong. Only a limited remedy is available to any private litigant in many foreign jurisdictions. Indeed, with respect to Plaintiffs' specific suggestion of Japan, private enforcement of antitrust violations by consumers in Japan historically has resulted in recovery of "virtually nothing." Simon Vande Walle, *Private Enforcement of Antitrust Law in Japan: An Empirical Analysis*, THE COMPETITION LAW REVIEW Vol, 8, Issue 1 at 8-9 (Dec. 2011), *available at* http://www.clasf.org/CompLRev/Issues/Vol8Issue1Art1Walle.pdf; *see also* Remarks by Stuart M. Chemtob, "Antitrust Deterrence in the United States and Japan," June 23, 2000, *available at* http://www.justice.gov/atr/speech/antittrust-deterrence-united-states-and-japan ("just a handful" of successful private suits in

[3] Plaintiffs understandably prefer to frame the issue as though Yang sought to "compel unequal treatment" of the class members with weaker claims. PB24. But it is not unequal to treat similarly-situated individuals the same, and differentially-situated individuals differently. As *Ortiz* said, "It is no answer to say…that…conflicts may be ignored because the settlement makes no disparate allocation of resources as between the conflicting classes." 527 U.S at 857.

Japan). In these circumstances, the possibility of a Japanese claim unlikely to result in recovery can hardly be considered roughly as valuable as an American claim.

Finally, Plaintiffs oddly suggest that the JAL conflict is mitigated because class members with U.S.-originating travel claims are eligible to recover under *different* settlement agreements that define their class membership to include them. PB8-9. How other defendants may agree to settle claims is simply not relevant to whether the JAL settlement class can be certified, or whether the settlement meets Rule 23(e)(2).

D. Class members with material differences in the quality and value of their claims must be separately represented.

Perhaps recognizing that *Ortiz* and *Amchem* would require subclassing and separate representation under Rule 23(a)(4), Plaintiffs chose to focus their argument on *Sullivan v. DB Investments, Inc.*, 667 F.3d 273 (3d Cir. 2011), and *Lane v. Facebook, Inc.*, 696 F.3d 811 (9th Cir. 2012)—neither of which involved a Rule 23(a)(4) challenge or addressed Rule 23(a)(4) in the majority opinion. Plaintiffs' limited effort to challenge the applicability of *Ortiz* and *Amchem* largely consisted of their exaggerated claim that Yang's brief "is replete with half-truths and distortions" about *Ortiz* and *Amchem*. PB16. In support, they claim that one of our many quotations from the cases "disingenuously" omitted certain language from *Ortiz*. PB17. However, Yang discussed the holding of *Ortiz* extensively in her opening brief and used ellipses in the quoted passage to focus on a universally applicable standard that does not depend on the facts specific to the case—not in any kind of "disingenuous attempt" to hide the holding of the case. OB18-19.

Plaintiffs make overblown claims that the "concrete" and "manifest" intraclass conflicts of *Ortiz* and *Amchem*, are a stark contrast to the conflicts in the settlements here. However, they do not adequately explain how the conflicts here are different in principle from the conflicts between holders of present and future injury claims in *Amchem* and the claims that could draw upon an established insurance fund and those that could not in *Ortiz*. In all instances, holders of one type of claim have a clear, present right to recover under existing facts and law, while holders of another type have a less certain right to recover. To be sure, the law or facts may change in the future or on appeal such that those with weaker claims end up having a strong claim. And perhaps holders of those claims should receive some limited compensation for releasing their claims. Even if ultimately vindicated, however, under the circumstances present at the time of settlement, they had claims whose merits were far less clear than those held by another uncertified subclass. They therefore are not entitled to the same valuation of their claims, absent separate representation advocating for the conflicting subclasses.

As Yang predicted in her opening brief, Plaintiffs pin their position on the holdings of *Lane* and *Sullivan*. Plaintiffs argue that the cases involved Rule 23(b)(3) *and* Rule 23(e), but this fact is meaningless to the 23(a)(4) adequacy requirement. As in *Ortiz*, Plaintiffs' argument "ignores the fact that Rule 23 requires protections under subdivisions (a) and (b) against inequity and potential inequity at the precertification stage, quite independently of the required determination at postcertification fairness review under subdivision (e) that any settlement is fair in an overriding sense." *Ortiz*, 527 U.S. at 858. As "instructive" as Plaintiffs might consider the Third Circuit's Rule

23(b)(3) predominance analysis in *Sullivan*, PB21, it is irrelevant to the (a)(4) standard set by the Supreme Court in *Amchem* and *Ortiz*.

The other cases Plaintiffs rely on likewise miss the mark. Plaintiffs cite *Rodriguez v. West Publishing Corp.*, 563 F.3d 948 (9th Cir. 2009), for the proposition that federal courts are "not obligated" to weigh the potential recovery at trial with the amount achieved through settlement. PB20; *see also* PB22; PB27. But neither Yang nor her counsel has complained that the aggregate settlements should be for a higher dollar value; the problem here is one of allocation among class members. *See Pampers*, 724 F.3d at 717 (the "economic reality" is that a defendant merely cares about its total liability, and not the fair allocation of damages and relief); *Ortiz*, 527 U.S. at 857 ("The very decision to treat [all claims] the same is itself an allocation decision with results almost certainly different from the results that those with immediate injuries or claims of indemnified liability would have chosen.").

Plaintiffs also rely on *Gascho v. Global Fitness Holdings, LLC*, No. 2:11-cv-436, 2014 U.S. Dist. LEXIS 46846 (S.D. Ohio Apr. 4, 2014). But there, the magistrate's (a)(4) analysis depended on the fact that different statutory claims contemplated the same potential remedy and "there [wa]s no case law interpreting or applying either of these statutory provisions" that would suggest lopsided outcomes after counsel devoted time to proving the claims. *Id.* at *68-*69.[4] In other words, *Gascho* performed precisely the analysis—weighing the litigation value of the allegedly differing claims—that the district court erroneously omitted here. *Cf. also In re Warfarin Sodium Antitrust*

[4] Plaintiffs incorrectly assert that CCAF's client made this objection, but he did not; a co-objector did.

Litigation, 391 F.3d 516, 532-33 (3d Cir. 2004) (finding of adequate representation depended on all class members having opportunity to recover all of their recognized loss, regardless of the number of people in the class, such that recovery was not diluted by class members with weaker claims, and two groups with potential conflicts had separate representation).

Ultimately, Plaintiffs offer nothing to undercut the applicability of *Ortiz* and *Amchem* that, as discussed in Yang's opening brief, require subclassing, with each subclass having "separate representation to eliminate conflicting interests of counsel" before there can be certification of a class with the material conflicts present here. *Ortiz*, 527 U.S. at 856; *Amchem*, 521 U.S. at 627 (Rule 23(a)(4) requires "structural assurance of fair and adequate representation for the diverse groups and individuals affected").

E. The ability to opt-out of a settlement does not cure the unfair prejudice to class members with superior claims.

Plaintiffs are simply wrong as a matter of law that the ability of Yang or any other class member to "exclude[] herself from the settlement class and preserve[] her right to sue JAL on her own," PB27, is relevant to the fairness of the settlements. The ability to "opt out" does not alter a court's Rule 23 analysis of a class-action settlement. *See Epstein v. MCA, Inc.*, 50 F.3d 644, 667 (9th Cir. 1995), *rev'd on other grounds sub nom. Matsushita Elec. Indus. Co. v. Epstein*, 516 U.S. 367 (1996) ("Regardless of whether class members are given opt-out rights, the court is still required to ensure that representation is adequate and that the settlement is fair to class members."); *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173, 1179 (9th Cir. 1977)

(Kennedy, J., concurring) ("I do not believe that a provision for opting out of the class provides an entirely satisfactory answer to the claim that a lead attorney failed to discharge that duty of representation. Particularly where the settlement could be easily modified to resolve the class conflicts, the dissident members should not be required to take the settlement or leave it."); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 388 (C.D. Cal. 2007) (opt-out mechanism did not cure deficiencies in settlement because "common sense and empirical study admonish that any belief that a significant number of class members would do so is ill-founded").

A class member's failure to object or opt-out, particularly in a large-scale consumer class action that did not provide individualized notice, cannot be interpreted as agreement with the settlement terms or provide any indication of the settlement's fairness. *See Redman v. Radioshack Corp.*, 768 F.3d 622, 628 (7th Cir. 2014) (describing it as "naïve" to infer assent from silence); Theodore Eisenberg & Geoffrey Miller, *Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1561 (2004) ("Common sense indicates that apathy, not decision, is the basis for inaction."); *cf. also Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2071 (2013) (Alito, J., concurring) (inaction in response to an opt out form is not consent).

II. Yang has standing to appeal approval of the settlements; her appeal of the unbounded class definition is meritorious.

For the first time, Plaintiffs argue in their opposition brief that Yang lacks standing to challenge the lack of a definitive end date in the class definitions. Even if

it were proper for the Court to consider this untimely argument, Plaintiffs are wrong on the merits.

As a class member who objected to settlement approval below, Yang has standing to appeal final approval of the settlements, and this Court has jurisdiction to rule on her appeal. *Devlin*, 536 U.S. 1. Under Rule 23(e)(5), "any class member" may object to a class action settlement. There is no separate requirement that the class member demonstrate injury from the settlement beyond being bound by the judgment. *Devlin*, 536 U.S. at 6-7 (ability of objecting class member to appeal settlement approval "does not implicate the jurisdiction of the courts under Article III of the Constitution"). Indeed, "nonnamed class members are parties to the proceedings in the sense of being bound by the settlement. It is this feature of class action litigation that requires that class members be allowed to appeal the approval of a settlement when they have objected at the fairness hearing." *Id.* at 10.[5] Simply put, "[t]he person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992).

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[5] *See also Union Asset Mgmt. v. Dell, Inc.*, 669 F.3d 632, 638 (5th Cir. 2012) (no requirement that appellants demonstrate they have an individual claim because "[a]ny class member has standing to object to a class settlement"); *Cobell v. Salazar*, 679 F.3d 909, 919 (D.C. Cir. 2012) ("Any other conclusion would prove a bitter irony for those who have lost their [chose in action]"); *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1183 & n.1 (10th Cir. 2002) (objectors who have objected to entire settlement are entitled to raise all issues relating to settlement fairness with respect to entire class).

Accordingly, courts broadly recognize an objector's standing to challenge class definition and certification on appeal. *See, e.g.*, *Larson v. AT&T Mobility LLC*, 687 F.3d 109, 131 n.34 (3d Cir. 2012) (recognizing right to challenge adequacy, despite the fact that issue complained of did not harm objectors; they "had constitutional standing to make such an objection because they were class members who had asserted that objection to the District Court") (citing *Devlin*); *Benjamin v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938 (3d Cir. 2012) (recognizing right to challenge class certification); *Officers For Justice v. Civil Serv. Comm. of the City and Cty of San Francisco*, 688 F.2d 615, 624 (9th Cir. 1982) (class "notice must indicate that a dissident can object to the settlement and to the definition of the class").

As it has done in the Federal Rules here, Congress can abrogate limitations on prudential standing. *Warth v. Seldin*, 422 U.S. 490, 501 (1975). Indeed, in 2003, after *Devlin* was decided, the Federal Rules of Civil Procedure were amended. If Congress wished to limit the power of class members to object to settlements, it had the opportunity to do so, but it instead reasserted that right in clearer language: "Subdivision (e)(4) [now (e)(5)] confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C) [now (e)(2)]." Advisory Committee Notes to 2003 Amendments to Rule 23. Under binding Supreme Court precedent, this broad language—"any"—definitively settles that the "zone of interests" extends to ***any*** class member. *Compare Bennett v. Spear*, 520 U.S. 154, 163-66 (1997) (statute permitting "any person [to] commence a civil suit" is authorization of "remarkable breadth" to the

"full extent permitted under Article III") *with American Immig. Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1358 (D.C. Cir. 2000) (IIRIRA includes no language like "any" that would override prudential standing).

Plaintiffs unconvincingly argue that Yang's argument that those "who purchase qualifying air travel after completion of the notice program will be deprived of their rightful notice," does not apply to her because she purchased before the notice program was instituted and opted to remain in and object to the settlement. PB31. Plaintiffs rely on *Glasser v. Volkswagen of America, Inc.*, 645 F.3d 1084 (9th Cir. 2011); this reliance is misguided. *Glasser* is limited to situations where the appellant objector does not challenge the fairness of the underlying settlement, but merely challenges the fee award on its own, but has no stake in the size of the fee award. *Bluetooth*, 635 F.3d at 949 n.9. Yang has maintained her objection to the settlement. Even by plaintiffs' misstatement of the *Glasser* standard, Yang is "aggrieved": her objection to the class definition, if upheld, would benefit Yang by reducing dilution of the settlement fund. Improper certification of a class definition without a definitive end date is an invitation for more claimants to recover from a finite settlement fund, diluting each claimant's *pro rata* share. A class member's right to challenge an overbroad class definition thus can be analogized to a class member's unquestionable standing to appeal a fee award from a common fund. *See, e.g.*, *Knisley v. Network Associates, Inc.*, 312 F.3d 1123, 1226 (9th Cir. 2002).

The other cases relied upon by Plaintiffs are also inapposite. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000), is not a case relating to class actions, where the standing requirements for objecting class members are relaxed

and construed broadly. Plaintiffs also attempt to draw a comparison between *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918 (9th Cir. 2014), *vacated after settlement*, 772 F.3d 608 (9th Cir. 2014).[6] PB31. *Laguna*, however, involved an objector's argument that improper notice to state and federal authorities under the Class Action Fairness Act ("CAFA") should result in rejection of the settlement agreement. For a number of reasons, improper statutory notice to non-class members under CAFA is not analogous. Class members have a due-process right to notice of a settlement that will bind them, and, as discussed above, a right to challenge terms of an agreement that bind them. Moreover, the improper inclusion of late-purchasing class members diminished the claim value for class members properly included.

Not only does Yang have standing to raise Rule 23(c)(2)(B), 23(e)(1), and 23(e)(5) concerns, but such concerns are warranted. As explained in Yang's opening brief, a class definition without a definite end date, bounded *de facto* by the issuance of an affirmance at an indeterminate future end date, violates the principles of definiteness that are required for Rule 23 certification. *See* OB40-43. Cases plaintiffs cite are not to the contrary. *See, e.g.*, *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 603 (3d Cir. 2009) (district court abused its discretion in certifying "an open-ended class period"); *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2009) (inclusion of future class members did not raise ripeness issues).[7]

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[6] "A decision that has been vacated has no precedential authority whatsoever." *Durning v. Citibank, N.A.*, 950 F.2d 1419, 1424 n.2 (9th Cir. 1991).

[7] Finally, interspersed throughout Plaintiffs' opposition are abusively false *ad hominem* attacks on Yang and her counsel that have no relationship to the substantive legal issues, improperly attempt to distract the Court, and contradict the record. We

Conclusion

At a minimum, this Court should remand to allow the district court to consider *Amchem* and apply the correct standard of law. But this Court can go farther: these unitary settlement classes encompassing class members' claims of wildly disparate quality cannot and should not be certified, and this Court should vacate and reverse the settlement approval and the class certification.

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trust that this Court will disregard these irrelevant attacks. Plaintiffs made many of the same misstatements and out-of-context misrepresentations of the deposition record to the district court, which rejected these attacks and stated that it thought Yang's objection was brought in good faith. ER55. Plaintiffs mischaracterize Yang's knowledge of her objection, and, in any event, no court has ever required a client to be able to describe technical legal arguments with precision before permitting her attorney to make those legal arguments on her behalf; that is precisely why attorneys represent clients in court to begin with. *See* RSER6-8 (summarizing deposition transcript (Dkt. 999-12) and correcting similar misrepresentations made below). Plaintiffs' discussion of CCAF's litigation history (PB10 n.3) is sanctionably misleading. *E.g.*, *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 807, 813-17 (N.D. Ohio 2010) ("the Court is convinced that Mr. Frank's goals are policy-oriented as opposed to economic and self-serving"; awarding CCAF about $40,000 in attorneys' fees for increasing class benefit by $2 million); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369 (S.D.N.Y. 2013) (relying on many of CCAF's arguments to reduce attorneys' fees by over $26 million). For example, this Court expressly adopted the CCAF policy argument against abusive kicker clauses that *Lonardo* called "long on ideology and short on law." *Bluetooth*, 654 F.3d at 947-49. Plaintiffs cite a case where the Ninth Circuit once "reject[ed] CCAF objections." PB10 n.3. If the Court agrees with plaintiffs that CCAF's Ninth Circuit track record has relevance to the merits in this case, then please take judicial notice that CCAF has won reversal or remand in five out of six CCAF appeals decided by this Court.

Dated: February 17, 2016

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains 6,901 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Executed on February 17, 2016.

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Proof of Service

I hereby certify that on February 17, 2016, I electronically filed the foregoing with the Clerk of the United States Court of Appeals for the Ninth Circuit using the CM/ECF system, which will provide notification of such filing to all who are ECF-registered filers.

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