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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

KARLA MAREE and MOURAD GUERDAD, on behalf of themselves and all others similarly situated,

Plaintiff,

v.

DEUTSCHE LUFTHANSA AG, a German public limited company,

Defendant.

CASE NO. 8:20-cv-885-MWF-MRW

MEMORANDUM OF DEUTSCHE LUFTHANSA AG IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL OF CLASS SETTLEMENT

Date: September 13, 2021
Time: 10:00 a.m.
Crtrm: 5A
Judge: Hon. Michael W. Fitzgerald

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I. INTRODUCTION

The very nature of a settlement is compromise in the interest of reaching an expeditious and cost-effective conclusion of litigation. "[I]t is the very uncertainty of outcome in litigation and avoidance of wasteful and expensive litigation that induce consensual settlements." *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1291 (9th Cir. 1992). While the plaintiffs' Motion for Preliminary Approval demonstrates the fairness of the Proposed Settlement ("Proposed Settlement"), Defendant Deutsche Lufthansa AG ("Lufthansa") respectfully writes separately to emphasize the risks to the settlement class from continued litigation, including class certification and potential trial, which further demonstrates the fairness of the settlement reached.

As the Court is aware, the unprecedented Covid-19 pandemic upended international air travel. Countries shut their borders and their businesses. Government restrictions and health concerns forced all airlines, including Lufthansa, to cancel flights in numbers never before seen. And other customers cancelled their flights proactively because they were concerned about closures or their health. Obvious challenges in processing the attendant number of requests for refunds for cancelled flights—during a pandemic that forced employees to pivot to working from home—resulted.

Amidst this chaos, two sets of plaintiffs—in *Castanares et al. v. Deutsche Lufthansa AG* ("*Castanares*") and *Maree v. Deutsche Lufthansa AG* ("*Maree*")—filed overlapping putative class actions that originally demanded Lufthansa refund them the money they paid for flights that Covid-19 forced Lufthansa to cancel. When the plaintiffs were forced to admit that Lufthansa had actually given them their money back, the plaintiffs morphed their claims into assertions that, although Lufthansa refunded them within two months after the flight cancellations (amidst a global pandemic that disrupted air travel in unprecedented numbers and crippled the airline industry), the refund was not fast enough. The named plaintiffs in both actions are

seeking as damages interest for their purportedly delayed refunds over a "reasonable time" during this global crisis.

Castanares also now claims that Lufthansa was supposed to provide "automatic" refunds upon a flight's cancellation—which is contrary to the language of the applicable contract, Lufthansa's General Conditions of Carriage ("GCC"), past practice, and common sense, as passengers whose flights are cancelled are given a choice: rebook on another flight, request a refund, or, during certain periods of time, obtain a voucher for future travel. Once the passenger makes his or her election, Lufthansa provides the requested relief. That makes sense. In contrast, the contention that Lufthansa must automatically just issue refunds (and not provide an option to rebook) when flights are canceled is not only contrary to the plain language of the GCC, but is nonsensical and would lead to absurd results. In such a situation, Lufthansa would be required automatically to refund all passengers every time a flight was canceled—notwithstanding that many members of the traveling public often would rather elect to be rebooked on the next available flight. And, during the pandemic, Lufthansa introduced a new voucher option by which passengers could elect to receive not only all of their money back, but also an additional 50-euro discount on rebookings made with the voucher. (*Maree* Dkt. 44-10.) Under the plaintiffs' scenario, Lufthansa and passengers could not chose that option. It is this faulty premise upon which *Castanares* will likely object (again) to the Proposed Settlement.

In sum, "[s]ettlement is the offspring of compromise; the question [to] address is not whether the final product could be prettier, smarter or snazzier, but whether it is fair, adequate and free from collusion." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1027 (9th Cir. 1998) (overruled on other grounds). Lufthansa denies any wrongdoing and is confident that, should the case proceed, it will establish that its actions were reasonable, within the boundaries of its contracts, and that a litigation class could not be certified here. And as demonstrated below, the Proposed Settlement is well within

the range of reasonableness given the significant economic consideration made available and the substantial risks the plaintiffs face from continued litigation.

II. BACKGROUND

A. The Negotiations Leading to the Proposed Settlement

The Proposed Settlement is the product of arm's-length negotiations that took place over a year. Counsel for *Maree* first raised the idea of a potential class settlement in June of 2020, but those discussions were not fruitful. (*Castanares* Dkt. 93-2 ¶ 2.) Then, during the Ninth Circuit mediation process, to avoid the distraction and cost of litigation, Lufthansa agreed to explore once again whether a negotiated resolution was possible. (*Id.*) After calls with the Ninth Circuit mediator, the parties agreed to private mediation in April 2021. (*Id.*) The mediation was conducted by Judge Wayne R. Andersen (Ret.) of JAMS, who served nearly twenty years as a U.S. District Judge for the Northern District of Illinois and presided over dozens of class actions, and who has mediated more than one hundred class actions. (Decl. of Wayne R. Andersen ("Andersen Decl.") ¶¶ 3, 5.)

In advance of the mediation, Lufthansa provided certain discovery, including information about the size and potential exposure, which was covered by the mediation privilege, to *Maree*'s counsel ("Class Counsel"). (Decl. of Colleen Gulliver ("Gulliver Decl.") ¶ 3.) On June 28, 2021, after an all-day mediation during which the settlement terms were intensely negotiated, Lufthansa and plaintiffs reached an agreement in principle to settle the *Maree* putative class action. Both counsel for the proposed settlement class and Lufthansa believe that the Proposed Settlement is fair, reasonable, and adequate, in the best interests of the Proposed Settlement Class, and is not collusive in any respect. *See* Decl. of Yeremey Krivoshey ("Krivoshey Decl."), *Castanares* Dkt. 93-2 ¶ 4; Decl. of Christopher M. Young ("Young Decl."), *Castanares* Dkt. 93-1 ¶ 5.

In addition, Judge Andersen submitted a declaration in support of Class Counsel's motion for preliminary approval of the settlement, in which he states that

the Proposed Settlement is "not collusive and was not the result of a collusive process." (Andersen Decl. ¶ 8.) Judge Andersen further confirmed that the "proposed Maree settlement was the product of extensive, arm's-length settlement negotiations conducted over the course of a full, day-long mediation that [he] conducted virtually on Zoom on June 28, 2021." (*Id.* ¶ 6.) Judge Andersen "spoke to the Parties' counsel separately and together, relayed offers and counter-offers, and facilitated the discussions where counsel for plaintiff and defendants negotiated the terms of the final settlement" and during the mediation "Parties did not discuss the attorneys' fees to be paid to the plaintiff's counsel until after the Parties had agreed upon the terms of the settlement." (*Id.* ¶¶ 7, 10.) In addition, Judge Andersen was "aware of the existence of a second and related class action also before this Court, *Castanares* [. . .] which has a putative class that was subsumed by the *Maree* putative class." (*Id.* ¶ 9.)

This process bears the hallmarks of a non-collusive, adversarial settlement.

B. Key Terms of the Proposed Settlement

The Proposed Settlement provides the Settlement Class with significant economic consideration, and more than they would likely receive if they litigated this case through trial.

Settlement Class Members who have received a refund from Lufthansa have the option to submit a claim form electing either: (1) the "Cash Option" of $10; or (2) the "Voucher Option" of a voucher for future travel on Lufthansa or its sister airlines in the amount of $45.

Settlement Class Members who have not requested a refund, but are entitled to one, will be reminded through the Notice Plan that they are eligible to receive a refund and provided the option to request a refund on the claim form. Upon submission of a valid claim, Lufthansa will pay them: (1) the full amount of their refund, and (2) an additional payment of one percent (1%) of the refund due (the "Interest Payment"). Notably, Settlement Class Members who have not requested or received a refund from

Lufthansa and do not fill out a claim form in a timely fashion, will **not release their claim for a refund** under the Proposed Settlement. Rather, they may still later request a refund from Lufthansa, but without interest; whether that refund will be paid will depend on the circumstances of the flight, its fare rules, and the time that has passed since the flight was cancelled—as detailed in the GCC.

Lufthansa has agreed to pay the value of all valid claims made for Cash Options, Voucher Options, and Interest Payments up to a maximum capped dollar amount of $3,500,000, minus attorneys' fees and costs to be awarded, any service awards, and any claims administration expenses (the "Net Claim Amount"). If, however, the claims submitted for the Cash Option, Voucher Option, and Interest Payments exceed the Net Claim Amount, these payments will be reduced *pro rata*. The refunds provided to those Settlement Class Members who request a refund and submit a claim form **do not** count against the maximum capped dollar amount and shall be paid in full separately by Lufthansa.

III. ARGUMENT

A. Legal Standard

The Ninth Circuit has adopted a "strong judicial policy that favors settlements" in complex class actions. *Class Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992); *see also In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008) ("strong judicial policy . . . favors settlements"); *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982). As explained in *Officers for Justice*, the trial court should scrutinize the settlement only "to the extent necessary to reach a reasoned judgment that the agreement is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned." *Id.*

"Approval of a class action settlement requires a two-step process—a preliminary approval followed by a later final approval. The standard of review differs at each stage." *Behfarin v. Pruco Life Ins. Co.*, 2019 WL 7188575, at *5 (C.D. Cal.

Nov. 26, 2019) (Fitzgerald, J.) (granting preliminary approval) (internal citation omitted). "At the preliminary approval stage, the Court need only 'evaluate the terms of the settlement to determine whether they are within a range of possible judicial approval.'" *Id.* "[P]reliminary approval of a settlement has both a procedural and a substantive component." *Id.*

As to procedure, "the Ninth Circuit emphasizes that the parties should have engaged in an adversarial process to arrive at the settlement." *Id.* "Substantively, the Court should look to 'whether the proposed settlement discloses grounds to doubt its fairness or other obvious deficiencies such as unduly preferential treatment of class representatives or segments of the class, or excessive compensation of attorneys.'" *Id.*; *accord Cody v. SoulCycle Inc.*, 2017 WL 11628587, at *5 (C.D. Cal. June 22, 2017) (Fitzgerald, J.) (granting preliminary approval) (internal citation omitted). Both the procedural and substantive circumstances of the Proposal Settlement warrant preliminary approval here.

B. <u>The Proposed Settlement Is The Result of an Adversarial Process</u>.

1. Non-Collusive Negotiations and Mediation.

The Proposed Settlement should be approved because the parties have aggressively litigated this action and the Proposed Settlement is the result of a non-collusive, adversarial process. "Given the parties' vigorous and often contentious litigation of this case . . . the settlement is 'the product of an arms-length, non-collusive, negotiated resolution.'" *Behfarin*, 2019 WL 7188575, at *5 (internal citation omitted). Lufthansa briefed two motions to dismiss in *Maree* and *Castanares* each, appealed the Court's decision denying Lufthansa's motion to compel arbitration in *Maree*, and subsequently filed a motion to stay both actions pending the appeal. Similarly, counsel for *Maree* researched and prepared three complaints and responded to Lufthansa's motions to dismiss and motion to stay. *See, e.g., In re OSI Sys., Inc. Derivative Litig.*, 2017 WL 5634607, at *2 (C.D. Cal. Jan. 24, 2017) (Fitzgerald, J.) (granting preliminary approval of settlement where "[c]ounsel reviewed OSI's public

documents; researched applicable law; prepared multiple complaints; investigated damages; participated in several negotiation discussions and mediation sessions with Defendant; and negotiated the final settlement.").

In addition, "[t]he fact that the parties utilized an experienced mediator to reach the settlement agreement supports the notion that it was the product of an arms-length negotiation." *Behfarin*, 2019 WL 7188575, at *6. Courts recognize that "[s]ettlements reached with the help of a mediator are likely non-collusive." *La Fleur v. Med. Mgmt. Int'l, Inc.*, 2014 WL 2967475, at *4 (C.D. Cal. June 25, 2014); *see also In re OSI*, 2017 WL 5634607, at *3 (finding that negotiations were fair where parties negotiated settlement before a retired judge experienced in the subject matter); *Eisen v. Porsche Cars N. Am., Inc.*, 2014 WL 439006, at *5 (C.D. Cal. Jan. 30, 2014) ("Where the services of a private mediator are engaged, this fact tends to support a finding that the settlement valuation by the parties was not collusive.") (citing cases). So too here. As explained above, the Proposed Settlement was reached after extensive negotiations and a formal day-long mediation before a retired federal judge, with significant experience mediating class actions. *See* Andersen Decl.; Krivoshey Decl.; *Castanares* Dkt. 93-2 ¶¶ 3-4.

2. The Extent of Discovery.

It is true that extensive formal discovery has not been completed. "However, in the context of class action settlements, 'formal discovery is not a necessary ticket to the bargaining table' where the parties have sufficient information to make an informed decision about settlement." *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000); *accord Kemp v. Low Cost Interlock, Inc.*, 2021 WL 1181195, at *5 (C.D. Cal. Mar. 19, 2021) ("That this case was settled pre-discovery is no secret. The Court acknowledges that 'because Plaintiff claims that the lease agreement violates the law on its face, it is possible that only limited discovery was needed,' however, the early stage at which this case is, at best, a factor neutral for approval.") (appeal docketed); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174

(S.D. Cal. 2007) (settlement approved where informal discovery gave the parties "a clear view of the strengths and weaknesses of their cases"). Moreover, early settlement is encouraged as a matter of public policy. *Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results."). Therefore, there is no basis to disturb the agreed-upon resolution based on a purported lack of "formal discovery."

Here, Class Counsel conducted extensive investigation, research, and informal discovery in this case. Class Counsel outlined a detailed request for information needed to evaluate fully the merits and exposure of the class claims asserted. (Gulliver Decl. ¶ 3.) In response, Lufthansa provided aggregate data regarding involuntarily cancelled flights, including the number of bookings for involuntarily cancelled flights, the value of such cancellations, the amount of refunds paid to date, and the amount of unpaid refunds to date. (*Id.*) Both parties used their data to prepare and analyze accrued interest damages models. (*Id.*) This data and analysis formed much of the basis for the settlement negotiations. (*Id.* ¶ 4.) Lufthansa respectfully submits that the Proposed Settlement is in no way collusive. *Castanares*' speculation that the Proposed Settlement is collusive simply because they were not involved is both self-serving and untrue.

C. The Substantive Terms of the Proposed Settlement Fall Within the Range of Possible Approval.

The Proposed Settlement is within the range of possible approval because substantial benefits will be conferred on the Settlement Class Members, which reflects a significant outcome given the serious risks plaintiffs faced—both to certify a litigation class and at trial and on appeal. As noted below, courts have held that plaintiffs are not entitled to "automatic" refunds from airlines under virtually identical terms of carriage and there is significant risk that plaintiffs could not certify a

litigation class and, even if they could, they would not recover interest damages or that any such recovery would be minimal.

1. The Significant Risks in Continued Litigation Favor Preliminary Approval Here.

The plaintiffs are unlikely to obtain any award in the event of continued litigation for the reasons outlined below. They face numerous obstacles, including potentially dispositive defenses and adverse factual findings. Failure to overcome any one of these obstacles would reduce or eliminate the plaintiffs' claims against Lufthansa and, thus, inform the Proposed Settlement's fairness. *See In re OSI*, 2017 WL 5634607, at *2 ("Plaintiffs' counsel has taken into account the possibility that Plaintiffs' claims may be defeated by several available defenses, such as an inability to establish demand futility. The settlement avoids the possibility of no recovery for Plaintiffs after years of litigation.").

a. Customers are not Entitled to "Automatic" Refunds Under the GCC.

In *Castanares*' skewed view, the Proposed Settlement unfairly resolves "potentially over $100 million in claims of direct purchasers" (*Castanares* Dkt. 94 [Opp. to Stay Pending Settlement] at 3) and "would likely permit Lufthansa to keep more than $100 million in customer money that it did not earn." (*Castanares* Dkt. 86, Ex. A [Opp. to Jt. Stip.] at 3].)[1] This is untrue. Specifically, *Castanares* has argued that Lufthansa was required to issue refunds "automatically" upon flight cancellation "without any refund request from Plaintiffs" based on GCC Section 10.2. (*Castanares* Dkt. 92 [SAC] ¶¶ 9, 17; *accord* Maree Dkt. 43 [SAC] ¶¶ 12-13, 16-17, 40-42.) GCC

[1] *Castanares* has no factual basis for the speculation that $100 million in US refunds have not been paid. In fact, that amount is significantly less: approximately $56 million for the Maree Settlement Class. (Decl. of Eric Mangusi ("Mangusi Decl."), *Maree* Dkt. 95-5, at ¶ 6.)

Section 10.2., titled "Involuntary Refunds," states:

> 10.2.1. We will give you a refund as set out below if we cancel a flight, fail to operate a flight according to the timetable, fail to stop at your destination or stopping places, or cause you to miss a connecting flight for which you hold a reservation:
> 10.2.1.1. If you have not used any portion of the ticket, an amount equal to the airfare paid,
> 10.2.1.2. If you have already used a portion of the ticket, not less than the difference between the fare paid and the fare applicable to the segments you have already flown

(*Id.*)

Castanares reads words into Section 10.2. that do not exist. There is no express term, which requires the payment of a refund without the plaintiff's request—let alone automatic refunds. And, their reading ignores other express terms in Section 10 ("Refunds"), which explicitly require an affirmative request by the customer. First, Section 10.1.1. states that "[t]he refund will be made **either** to the passenger named on the ticket or to the person who paid for the ticket **upon presentation of satisfactory proof that the payment has been made**..." (*Castanares* Dkt. 33-1 [GCC] § 10.1.1) (emphasis added). Thus, a customer must inform Lufthansa to whom the refund should be paid and the phrase "upon presentation of satisfactory proof" imposes a condition precedent to provide proof of payment before the issuance of a refund. Only after this request is made, is Lufthansa obligated to issue the refund.

Second, Section 10.5.1. states that Lufthansa "may **refuse a refund** when the respective **application is made** later than six months after the expiry of the validity of the ticket." (*Id.* § 10.5.1) (emphasis added). This provision also expressly contemplates an affirmative customer request before a refund will be issued. (*Id.*)

Third, Section 10.1.3. states that "[e]xcept in the case of a lost ticket, we will **only** provide the refund **once you have given us the ticket and any unused flight coupons**." (*Id.* § 10.1.3) (emphasis added). This provision imposes another condition precedent to a refund such that it is not owed automatically.

Courts have recently and repeatedly rejected *Castanares*' argument that an airline has an automatic refund obligation. In *Bugarin v. All Nippon Airways Co.*, 513 F. Supp. 3d 1172 (N.D. Cal. 2021), for example, a customer brought a breach of contract claim against All Nippon Airways ("ANA") alleging the failure to issue refunds automatically for cancelled flights during the Covid-19 pandemic. Among other things, the purchaser argued that "no request for refund [wa]s required" under the conditions of carriage. *Id.* at 1192. The Court disagreed and granted ANA's motion to dismiss. The Court held that "the plain language of the COC that a request for refund, supported by evidence sufficient to prove entitlement to a refund, is a condition precedent to obtaining a refund." *Id*. The Court assessed analogous language in ANA's conditions of carriage, which stated "ANA will make a refund to the person named in a Ticket or, to the person who purchased the Ticket **upon presentation to ANA of satisfactory evidence** to prove that he/she is entitled by these Conditions of Carriage to such refund." *Id.* (emphasis added).

Similarly, in *Melnyk v. Polskie Linie Lotnicze Lot S.A.*, 2021 WL 3417949 (D.N.J. May 26, 2021), the plaintiff brought a putative class action against the airline Polish Lot alleging a breach of contract claim for failure to refund during Covid-19. The plaintiff also argued that the operative conditions of carriage required the airline to issue a refund without any offer of proof from the plaintiff. *Id*. at *3. The applicable conditions of carriage stated that "the carrier shall make a refund either to the person named in the ticket or to the person who paid for the ticket **upon presentation of a satisfactory proof of payment** made to the carrier." *Id.* at *5 (emphasis added). The Court agreed with the airline that "upon presentation of a satisfactory proof of payment" imposed a condition precedent to a refund. *Id.*

And, in *Herrera v. Cathay Pac. Airways Ltd.*, 2021 WL 673448 (N.D. Cal. Feb. 21, 2021), the Court expressly held that "refunds are **not automatic**." *Id.* at *15 (emphasis added). To reach its holding, the Court explained that "Article 11.1.3 [of the conditions of carriage] require[d] **affirmative conduct** on the part of the

passenger to obtain a refund, providing that '**[e]xcept in the case of lost Tickets, refunds will only be made on surrender to us of the Ticket and all unused Flight Coupons**.'" *Id.* (emphasis added).

So too here. Lufthansa's GCC provided that either the ticketed passenger or the purchaser could obtain a refund, and that refund would issue "upon presentation of satisfactory proof"—a condition precedent that precludes any alleged obligation to refund tickets automatically. (*Castanares* Dkt. 33-1 [GCC] § 10.1.1.) Lest there be any doubt, the GCC's Section 10.1.3 provides that Lufthansa "will only provide the refund once you have given us the ticket and any unused flight coupons" (*Castanares* Dkt. 33-1 [GCC] § 10.1.3)—and this **identical** contractual term in *Herrera* "ma[de] clear that refunds are not automatic." 2021 WL 673448, at *15. These conditions precedent eliminate the prospect of an unconditional automatic refund upon flight cancellation.

In any event, the plaintiffs' reading defies common sense. Under the plaintiffs' view, Lufthansa would be required automatically to refund a passenger without first determining if that customer would prefer to be rebooked on the next available flight. But when an airline cancels a flight, a customer routinely decides whether they would like to be rebooked or to obtain a refund. For example, Lufthansa notifies customers whose flight is cancelled by Lufthansa that they can choose to rebook, obtain a refund, or during some of the relevant times, obtain a voucher. *See* Gulliver Decl. Ex. 1 (Lufthansa "Refunds webpage, dated Jan. 23, 2021). Many passengers would prefer to simply get on the next flight rather than cancel their trip entirely (particularly in a non-pandemic situation).

In summary, there are material risks in the viability of *Castanares*' automatic refund theory. The Proposed Settlement fairly accounts for these risks by (1) reminding purchasers that refunds are available through the Notice Plan so that if they want a refund, they can get one; (2) issuing full refunds plus 1% of the refund amount to purchasers submitting timely and valid claims; and (3) providing that purchasers

who have not requested or received a refund from Lufthansa and do not fill out a claim form in a timely fashion, will **not** release their claims for a refund. They may still later request a refund from Lufthansa, but without interest. And whether that refund will be paid will depend on the circumstances of the flight, its fare rules, and the time that has passed since the flight was cancelled.[2]

b. The GCC Does Not Provide for the Payment of Interest on Refunds.

In moving to dismiss the SAC, Lufthansa argued that it did not voluntarily undertake an obligation to pay interest under the GCC, and as such, the Airline Deregulation Act of 1978, 49 U.S.C. § 41713 (b)(1) ("ADA"), pre-empted plaintiffs' request for interest. (*Maree* Dkt. 44-1 at 21.) While the Court found accrued interest damages were not pre-empted by the ADA in all circumstances (*Maree* Dkt. 53 [MTD SAC Order] at 12), an appellate court could reverse that ruling on appeal—which Lufthansa would pursue if litigation continued through trial.

Lufthansa would also appeal the Court's finding that Lufthansa "voluntarily undertook the obligation to refund a customer's cancelled flight within a reasonable period of time," which was based "[u]nder general principles of contract law, where . . . no time is specified . . . a reasonable time is supplied." (*Maree* Dkt. 42 [MTD FAC Order] at 9.) Courts have held that a plaintiff "fails to plausibly allege a breach of contract" against an airline where "the terms of the operative contract . . . the General Conditions of Carriage . . . entitle Plaintiff to a refund for canceled flights, but do not specify a timetable for the refund." *Daversa-Evdyriadis v. Norwegian Air Shuttle*

[2] There is nothing preventing these customers from contacting Lufthansa today and asking for a refund, and had they wanted one, they also could have done so throughout the class period of January 2020 to the present—nearly eighteen months. But under the Proposed Settlement, purchasers who have not received a refund will be reminded of this opportunity under the Notice Plan and may receive a refund upon request. These refunds will not count against the $3.5 million claims-made cap.

ASA, 2020 WL 5625740, at *2 (C.D. Cal. Sept. 17, 2020).

c. Any Interest Award Would Likely Be *De Minimis*.

Because customers are not entitled to automatic refunds and those customers who requested a refund have already received it, the best the plaintiffs can hope to achieve at trial is obtain accrued interest damages—and only if they can demonstrate that the length of time it took for them to receive their refund exceeded a reasonable length of time during a global pandemic.

As an initial matter, contrary to the plaintiffs' argument, California's ten percent prejudgment interest statute is not applicable here because it is pre-empted. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84 (1992) (the ADA has an "expansive sweep" and expresses "a broad pre-emptive purpose"); *accord Daversa-Evdyriadis*, 2020 WL 5625740, at *6 (finding the ADA preempts attempts to add a term to the agreement). The Court previously "determine[d] that the ADA preempts [California Civil Code] section 1657's application to the Conditions of Carriage," which purportedly would have required an immediate refund, as that would "impermissibly 'enlarge[] or enhance[]' the parties' agreement." (*Maree* Dkt. 42 at 9.) Therefore, the plaintiffs' attempt to assert Cal. Civil Code § 3289 will fail for the same reason. *See Castanares* Dkt. 27 [Opp. to MTD], at 21; *Castanares* Dkt. 37 [Opp. to MTD FAC], at 14.

Thus, to prevail, the plaintiffs must establish the actual amount of interest that was owed as "the amount of the damage documented" under the GCC § 14.1.7. But interest rates were nowhere near ten percent and plummeted further during the pandemic. For example, the annual applicable federal interest rate ("AFR") was 1.5% in March 2020—when the Castanares' flight was cancelled, less than 1% in April 2020—when the *Maree* plaintiffs claim to have lost the value of their money, and 0.25% in May 2020—when Mr. Guerdad requested his refund. *See* https://www.irs.gov/pub/irs-drop/rr-20-09.pdf, https://www.irs.gov/pub/irs-drop/rr-20-06.pdf, https://www.irs.gov/pub/irs-drop/rr-20-11.pdf. And, Lufthansa would

have probed in discovery the actual interest rate the plaintiffs were eligible to receive on their bank accounts during that time period, as it may have been even lower.

As to the length of time any potential settlement class member waited to receive their refund, the named plaintiffs' experiences in *Maree* and *Castanares* serve as a guide for assessing the fairness of the settlement compensation. Lufthansa refunded the *Castanares* plaintiffs 49 days after their request, plaintiff Maree in 49 days, and plaintiff Guerdad in 89 days.[3] And Lufthansa announced on August 21, 2020 that it had processed "92 percent of all refund applications from the first half-year." (Decl. of Marina Marquardt ("Marquardt Decl."), *Maree* Dkt. 95-4, at ¶ 6.) Thus, for settlement purposes only, Lufthansa has assumed the named plaintiffs' experiences are representative of the Settlement Class.

Citing guidance from the Department of Transportation ("DOT"), the plaintiffs contend a "reasonable" refund processing time is 7 days for credit card purchases, and 20 days for cash or check purchases. (*Maree* Dkt. 43 ¶ 4; *Castanares* Dkt. 92 ¶ 20.) It is unlikely that the plaintiffs will be successful in demonstrating that seven days was the appropriate time to refund during a global pandemic since the DOT has "recognize[d] that, given the significant volume of refund requests resulting from the COVID-19 public health emergency, processing refunds **may take longer than normal**." (*Maree* Dkt. 44-6 [DOT FAQ] at 3) (emphasis added). It is more likely that a few months was reasonable, but certainly at least 30 days.

The Castanares plaintiffs received a refund of $2,942.30. Thus, if they were to be successful in certifying a litigation class and then prevailed at trial, they potentially could achieve somewhere between $1.53 (*i.e.*, 1% interest with 30 days as the reasonable time period to refund) to a maximum recovery of $33.86 (in the unlikely scenario that the plaintiffs were to prevail on **all** of their arguments, *i.e.*, only a 7-day

[3] For the purposes of this brief only, Lufthansa will assume the facts alleged in the Third Amended Complaint are true.

reasonable time period and 10% California statutory interest). Plaintiff Maree purchased $1,109.05 in tickets and was refunded. Her potential recovery at trial ranges between $0.58 and $12.76 (assuming she contacted Lufthansa to request a refund on April 4, 2020). Finally, plaintiff Guerdad's potential recovery at trial ranges between $1.29 and $17.94.

Castanares Interest

[$2,942.30 principal, actual refund time 49 days]

Interest Rate	Reasonable Time to Refund	Accrual Period	**Accrued Interest**
1%	30 days	19 days	**$1.53**
1%	7 days	42 days	**$3.39**
10%	30 days	19 days	**$15.32**
10%	7 days	42 days	**$33.86**

Maree Interest

[$1,109.05 principal, actual refund time 49 days]

Interest Rate	Reasonable Time to Refund	Accrual Period	**Accrued Interest**
1%	30 days	19 days	**$0.58**
1%	7 days	42 days	**$1.28**
10%	30 days	19 days	**$5.77**
10%	7 days	42 days	**$12.76**

Guerdad Interest

[$798.43 principal, actual refund time 89 days]

Interest Rate	Reasonable Time to Refund	Accrual Period	**Accrued Interest**
1%	30 days	59 days	**$1.29**
1%	7 days	82 days	**$1.79**
10%	30 days	59 days	**$12.91**
10%	7 days	82 days	**$17.94**

Thus, the Proposed Settlement's consideration of a $10 cash refund per person far exceeds the likely potential recovery at trial using a reasonable interest rate of 1%. And Settlement Class Members that alternatively elect a $45 Voucher receive more

value by settling than their best-case (and entirely unrealistic) potential recovery at trial.

By the same token, the $3.5 million cap under the Proposed Settlement is reasonable and adequate. The Settlement Class consists of approximately 166,360 bookings[4] for a total of $378,345,418.81 in refunds for the period from January 1, 2020 through July 31, 2021. (Marquardt Decl. ¶ 2; Mangusi Decl. ¶ 4.) A 1% interest rate yields $435,356.37 in accrued interest damages, assuming an actual refund time of 49 days (the time it took to refund Castanares), a reasonable time to refund of 7 days, and an interest accrual period of 42 days. A 10% interest rate yields $4,353,563.72 in accrued interest damages. Assuming, instead, that 30 days was a reasonable refund time, a 1% interest rate yields $196,946.93 in accrued interest damages and a 10% interest rate yields $1,969,469.30.

As to Open Tickets, there are 31,190 bookings in the amount of approximately $56,653,767.83. (Mangusi Decl. ¶ 6.) These Settlement Class Members could seek to claim up to $566,537.68 in additional interest.

When compared against the potential recovery at trial, the Proposed Settlement adequately compensates the class and is in their best interests. A 1% interest rate yields under $1 million in accrued interest damages. Accrued interest damages remain under $3 million even at a 5% interest rate. As such, the $10 cash refund and $45 Voucher compensate settlement class members significantly more than their likely potential recovery at trial. *Behfarin,* 2019 WL 7188575, at *7 ("The Court determines that the proposed settlement provides a reasonable level of compensation to those affected by Defendants' challenged practices").[5]

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[4] Lufthansa has not completed its analysis yet of the bookings. It is possible that certain Settlement Class Members have multiple bookings.

[5] *See also Custom LED, LLC v. eBay, Inc*, 2014 WL 2916871, at *4 (N.D. Cal. June 24, 2014) ("courts have held that a recovery of only 3% of the maximum potential

d. Lufthansa Timely Provided Refunds During an Unprecedented Global Pandemic.

The Court previously held that the "reasonableness [of time to refund] is a question of fact not proper for resolution on a motion to dismiss" (*Maree* Dkt. 53 at 12)—not that Lufthansa's alleged delay in issuing refunds upon request was unreasonable at a matter of law. The risk here to plaintiffs is significant. If litigation proceeds, the undisputed facts will show that: (1) Lufthansa was forced to cancel an unprecedented number of flights due to the coronavirus travel restrictions; (2) the DOT has "recognize[d] that, given the significant volume of refund requests resulting from the COVID-19 public health emergency, processing refunds may take longer than normal" (*Maree* Dkt. 44-6 [DOT FAQ] at 3); and (3) Lufthansa's refund timing was reasonable considering what has been universally recognized as a devastating public health emergency with an "unprecedented impact" on airlines (*id.*). *See also Sheehan v. Atlanta Int'l Ins. Co.*, 812 F.2d 465, 470 (9th Cir. 1987) (holding at summary judgment that a twenty-two-day delay in paying a settlement agreement was reasonable as a matter of law).

The Proposed Settlement accounts for this risk by providing settlement class members with the choice of the $10 Cash Option or $45 Voucher Option and does not require any class member to prove that their refund was unreasonably delayed.

2. The Plaintiffs Would Not Be Able to Certify A Litigation Class.

Even if the plaintiffs could prove liability and damages here (which they cannot), they also face significant risks at class certification. This certification risk

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recovery is fair and reasonable"); *In re Endosurgical Prod. Direct Purchaser Antitrust Litig.*, 2008 WL 11504857, at *6 (C.D. Cal. Dec. 31, 2008) (approving "settlement [] worth approximately 1.7% of relevant sales"); *McCabe v. Six Continents Hotels, Inc.*, 2015 WL 3990915, at *10 (N.D. Cal. June 30, 2015) (preliminary approval of settlement representing between 0.3% and 2% of potential recovery).

weighs in favor of approval of the settlement. *E.g.*, *Behfarin*, 2019 WL 7188575, at *6 (granting preliminary approval and noting "risk that the class would not be certified for lack of uniformity"); *Downey Surgical Clinic, Inc. v. Optuminsight, Inc.*, 2016 WL 5938722, at *6 (C.D. Cal. May 16, 2016) (finding "uncertainty of both obtaining and maintaining class action status . . . weighs in favor of final approval"); *Aarons v. BMW of N. Am., LLC*, 2014 WL 4090564, at *11 (C.D. Cal. Apr. 29, 2014) ("Plaintiffs recognize that they would face significant risks in attempting to certify a litigation class for trial, and would bear the risk of defending certification through trial. Among other things, BMW's argument [regarding] individualized reasons could pose a continuing threat to certification. . . . Accordingly, the Court finds that this factor weighs in favor of approval of the settlement."); *Castillo v. ADT, LLC*, 2017 WL 363108, at *4-5 (E.D. Cal. Jan. 25, 2017) ("If the parties had not settled, defendant would have opposed plaintiff's request for class certification, contested the merits of his claims . . . [and i]n doing so, defendant would have asserted some twenty-three defenses against plaintiff's claims . . .").

The very nature of the plaintiffs' contract claims based on the "reasonable time" for processing and issuing refunds yields individualized issues that overwhelm common ones. For example, in *Herskowitz v. Apple, Inc.*, 301 F.R.D. 460 (N.D. Cal. 2014), the Court denied certification of breach of contract claims based on temporal reasonableness:

> Whether or not any given time lag between a purchase and the appearance of the purchased product in a customer's iTunes library is reasonable, however, may depend on a host of individualized factors, such as the quality of the customer's internet connection, the age and capacity of the downloading device, and the other activities in which the downloading device may be engaged at the time of the download. The need to examine the circumstances of any given transaction to determine whether the time it took a product to appear in the customer's library—or, alternatively, the amount of time the customer waited before downloading the product a second time—was reasonable or

> unreasonable introduces numerous individual questions into the breach of contract analysis.

Id. at 478.

Here, similarly, whether Lufthansa's alleged delay in issuing refunds is reasonable depends on "a host of individualized factors." *Id.* When a Lufthansa flight is cancelled, consumers can elect to rebook, receive a refund, and after a certain point, obtain a voucher. (Gulliver Decl. Ex. 1.) The customer needs to make that choice and inform Lufthansa. Lufthansa then responds. Accordingly, the reasonableness of the response time depends on (and varies) according to when in the Covid-19 cycle the refund was requested. Was it March 2020, when flights were cancelled in massive numbers? Or several months later, when the chaos had somewhat subsided? Or during the second Covid wave in Europe, which necessitated a new wave of lock downs and travel restrictions?

The method of purchase and refund can also affect processing time, which affects the reasonableness analysis. For example, if the flight was purchased through a third-party, then the third-party is responsible for processing the refund. Refunds for cash purchases also typically take longer to process relative to credit card purchases, and involve different processes. And there may be unique reasons for a given delay—for example, Lufthansa may have issued a timely refund to a credit card that was later closed after being used to purchase the flight. And, there were certain processing issues with third party payment processors that were outside of Lufthansa's control.

Finally, even complete success at trial would likely leave class members outside California uncompensated. While the plaintiffs would seek certification of a nationwide class, it is far from certain that the claims of the nationwide Settlement Class could ever be adjudicated in a single forum and trial. *See, e.g.*, *Mazza v. Am. Honda Motor Co., Inc.*, 666 F.3d 581, 589-94 (9th Cir. 2012) (material variations in state laws make nationwide class treatment inappropriate); *Gustafson v. BAC Home Loans Servicing, LP*, 294 F.R.D. 529, 544 (C.D. Cal. 2013) ("The Court finds that the

differences among states' breach of contract laws are material in this instance as they could greatly affect how the relevant provisions of the agreements are interpreted and ultimately whether there was a breach of those provisions."); *Warner v. Toyota Motor Sales, U.S.A., Inc.*, 2016 WL 8578913, at *12 (C.D. Cal. Dec. 2, 2016) ("Nationwide class certification under the laws of multiple states can be very difficult for plaintiffs' counsel.") (citing *Mazza*). The alternative would be repeat litigation in multiple forums across the country, and such litigation would be exceedingly costly, inherently risky, and continue for years. By contrast, these constraints do not apply in the context of settlement. "For purposes of a settlement class, differences in state law do not necessarily, or even often, make a class unmanageable. . . . it generally is not legal error to forego a choice-of-law analysis in a settlement-class predominance inquiry." *Jabbari v. Farmer*, 965 F.3d 1001, 1007 (9th Cir. 2020).

In sum, whether a refund was issued within a reasonable time requires examining the circumstances of each individual transaction. This key question cannot be answered with common evidence, let alone on a nationwide basis.

3. The Expense, Complexity, and Likely Duration of Further Litigation Support Preliminary Approval.

The Proposed Settlement benefits are even more impressive given the inherent uncertainties of continued litigation and the inevitable expense and delay that would accompany it. Compromise of potential recovery in exchange for certain and timely provision of the benefits under the Proposed Settlement is a reasonable and fair outcome. *Nobles v. MBNA Corp*., 2009 WL 1854965 at *2 (N.D. Cal. June 29, 2009) ("The risks and certainty of recovery in continued litigation are factors for the Court to balance in determining whether the Settlement is fair."); *Kim v. Space Pencil, Inc*., 2012 WL 5948951, at *5 (N.D. Cal. Nov. 28, 2012) ("The substantial and immediate relief provided to the Class under the Settlement weighs heavily in favor of its approval compared to the inherent risk of continued litigation, trial, and appeal . . ."). Given the likelihood that Lufthansa would prevail in defeating plaintiffs' claims for

delayed refunds and automatic refunds and in opposing a litigation class here, the risks of continued litigation to plaintiffs and absent class members are particularly substantial.

These risks are compounded by the breadth and complexity of issues presented in this litigation, which would require both sides to expend substantial fees and resources to litigate the case through judgment and likely appeal. Among other things, Lufthansa and plaintiffs would put forward competing evidence of a reasonable refund processing time during the Covid-19 pandemic and damages models, which would likely require expert testimony and *Daubert* motions—at significant expense. *Herrera v. Fed. Express Corp.*, 2019 WL 12042059, at *4 (C.D. Cal. July 9, 2019) (Fitzgerald, J.) (granting preliminary approval; "As Plaintiffs contend, at trial, there exists the regular risk that the Trier of Fact will find against Plaintiff . . . Further, even if there was a decision favoring the class, Defendant would have the right to appeal. As the Plaintiff notes, this process places ultimate relief several years away and immediate and substantial recovery now, which is **a significant factor to be considered**.") (emphasis added and internal quotations omitted); *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009) (length and expense of continued litigation favored settlement where parties still had to contend with a number of "serious hurdles" such as *Daubert* motions, an anticipated motion for summary judgment, a motion to bifurcate, and appeals); *In re OSI*, 2017 WL 5634607, at *3 ("The Court agrees with counsel that both sides were fairly apprised of the risks of continuing the litigation."); *Nat'l Rural Telecomms.*, 221 F.R.D. at 526 ("The Court shall consider the vagaries of litigation and compare the significance of immediate recovery by way of the compromise to the mere possibility of relief in the future, after protracted and expensive litigation.") (citation omitted).

Continued litigation would also mean that members of the Settlement Class would not see any relief, if at all, for likely a year or more. The substantial delays that would result from protracted litigation of this case provide further grounds for

preliminary approval here. *Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 629 (9th Cir. 1982) (approving settlement in class action where "many years may be consumed by trial(s) and appeal(s) before the dust finally settles" because "any benefits above those provided by the [proposed settlement] would likely be substantially diluted by the delay inherent in acquiring them").

IV. CONCLUSION

Lufthansa respectfully asks this Court to grant plaintiffs' Motion for Preliminary Approval because the Proposed Settlement falls within the range for possible approval.

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