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11 **UNITED STATES DISTRICT COURT**
 12 **CENTRAL DISTRICT OF CALIFORNIA**

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

16 Plaintiffs,

17 v.

18 DEUTSCHE LUFTHANSA AG,

19 Defendant.

20 Case No. 8:20-cv-00885-MWF-MRW

21 **PLAINTIFFS’ NOTICE OF**
 22 **MOTION AND MOTION FOR**
 23 **PRELIMINARY APPROVAL OF**
 24 **CLASS ACTION SETTLEMENT,**
 25 **PROVISIONAL CERTIFICATION**
 26 **OF NATIONWIDE SETTLEMENT**
 27 **CLASSES, AND APPROVAL OF**
 28 **PROCEDURE FOR AND FORM**
OF NOTICE

Date September 13, 2021

Time: 10:00 a.m.

Courtroom: 5A

Judge: Hon. Michael W. Fitzgerald

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE THAT** on September 13, 2021 at 10:00 a.m. or as
3 soon thereafter as counsel may be heard by the above-captioned Court, located at the
4 First Street Courthouse, 350 West First Street, Courtroom 5A, Los Angeles,
5 California 90012 in the courtroom of the Honorable Michael W. Fitzgerald, Plaintiffs
6 Karla Maree and Mourad Guerdad (“Plaintiffs”), by and through their undersigned
7 counsel of record, will move, pursuant to Fed. R. Civ. P. 23(e), for the Court to: (i)
8 grant preliminary approval of the proposed Stipulation of Class Action Settlement
9 (“Settlement Agreement”), (ii) provisionally certify the Class for the purposes of
10 preliminary approval, designate Plaintiffs as the Class Representatives, and appoint
11 Bursor & Fisher, P.A. as Class Counsel, (iii) establish procedures for giving notice to
12 members of the Class, (iv) approve forms of notice to Class Members, (v) mandate
13 procedures and deadlines for exclusion requests and objections, and (vi) set a date,
14 time and place for a final approval hearing.

15 This motion is made on the grounds that preliminary approval of the proposed
16 class action settlement is proper, given that each requirement of Rule 23(e) has been
17 met.

18 This motion is based on Plaintiffs’ Memorandum of Points and Authorities in
19 Support of Motion for Preliminary Approval of Class Action Settlement, Provisional
20 Certification of Nationwide Settlement Class, and Approval of Procedure for and
21 Form of Notice, the accompanying Declaration of Yeremey O. Krivoshey, the
22 Declaration of Karla Maree, the Declaration of Mourad Guerdad, the Declaration of
23 the Honorable Wayne R. Andersen (Ret.), the Declaration of Marine Marquardt, the
24 Declaration of Eric Mangusi, the Declaration of William Wickersham, the
25 Settlement Agreement, the pleadings and papers on file herein, and any other written
26 and oral arguments that may be presented to the Court.
27
28

1 Dated: August 16, 2021

Respectfully submitted,

2 **BURSOR & FISHER, P.A.**

3 By: /s/ Yeremey O. Krivoshey
4 Yeremey O. Krivoshey

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1 **I. INTRODUCTION**

2 Plaintiffs Karla Maree and Mourad Guerdad (“Plaintiffs”), by and through
3 Class Counsel,¹ respectfully submit this memorandum in support of Plaintiffs’
4 Motion for Preliminary Approval of Class Action Settlement. The Settlement
5 Agreement (“Settlement”) and its exhibits are attached as Exhibit 1 to the
6 Declaration of Yeremey O. Krivoshey (“Krivoshey Decl.”), filed herewith.

7 The Settlement provides tremendous relief to Settlement Class Members.
8 Class Members that have already received a refund for their flights may elect to
9 receive \$10 in cash or a \$45 voucher that can be used on any Lufthansa (or sister
10 airline) flight. Settlement at 13, § III(A). The \$10 cash payments, \$45 vouchers, and
11 interest payments are capped at \$3,500,000, net of any attorney’s fees awarded by
12 the Court, expenses and costs, service awards, and notice and claim administration
13 expenses. *Id.* § III(C). The Settlement allows Class Members who have not to date
14 received a refund from Lufthansa to submit claims for a *full* refund, *plus* one percent
15 interest of their ticket prices. *Id.* § III(B). There are 31,190 class members that
16 qualify to receive full refunds, for a total of \$56.6 million in refunds, plus interest.
17 *See* Mangusi Decl. ¶ 6. The availability of the full refunds is not capped in the
18 Settlement, or in any way affected by the award of attorney’s fees, costs and
19 expenses, service awards, or notice and claim administration expenses, meaning that
20 the full \$56.6 million is available to Class Members. Settlement at 14, § III(C).

21 Class Counsel believe that they have achieved a feat no other plaintiffs’
22 counsel has, to date, been able to accomplish since the flood of flight-refund lawsuits
23 were filed nationwide in the wake of COVID-19: they have secured a class
24 settlement that actually puts significant money in the hands of class members.
25 Krivoshey Decl. ¶ 12.

26
27 ¹ All capitalized terms not otherwise defined herein shall have the same definitions
28 as set out in the settlement agreement. *See* Krivoshey Decl., Ex. 1.

1 When governments around the world began instituting lockdowns and travel
2 restrictions in March and April 2020, the airline industry came to a halt. Many
3 airlines faced the brink of bankruptcy, and pleaded for government bailouts to
4 survive the unprecedented shutdown of the airline industry. And, perhaps
5 unsurprisingly, many airlines struggled to, or simply failed to, refund their customers
6 money owed for the cancelled flights – or, to the extent they provided refunds, the
7 refunds came months later (or not at all). *Id.*

8 Almost immediately, virtually every domestic and international airline was
9 sued in district and state courts throughout the country. In June 2020, a motion was
10 even filed before the Judicial Panel on Multidistrict Litigation seeking to consolidate
11 all the flight-refund cases for all the various airlines before one court. *See gen.* MDL
12 No. 2957. Class actions were filed against both domestic (*e.g.* – cases filed against
13 Spirit, Hawaiian, Frontier, Allegiant, Southwest, United, Delta, American, JetBlue)
14 and international airlines (*e.g.* – Lufthansa, Air Canada, Volaris, All Nippon,
15 Norwegian, LOT, China Eastern, Turkish, Emirates, and many others). All alleged
16 virtually the same claim: that the airline industry failed to provide customers with
17 refunds for cancelled flights, or failed to do so in a reasonable or timely manner. *Id.*

18 The majority of the cases have since come to a screeching halt, and none, to
19 Class Counsel’s knowledge, have resulted in a class action settlement or money in
20 class members’ pockets. An initial wave of cases did not survive the pleading stage.
21 *Id.* ¶ 13; *See, e.g., Bugarin v. All Nippon Airways Co., Ltd.*, 513 F. Supp. 3d 1172
22 (N.D. Cal. 2021) (MTD granted with narrow leave to amend); *Herrera v. Cathay*
23 *Pac. Airways Ltd.*, 2021 WL 673448, at *15 (N.D. Cal. Feb. 21, 2021) (“*Cathay P*”)
24 (MTD granted with narrow leave to amend); *Daversa-Evdyriadis v. Norwegian Air*
25 *Shuttle ASA*, 2020 WL 5625740, at *6 (C.D. Cal. Sep. 17, 2020) (MTD granted
26 without leave to amend); *Subramanyam v. KLM Royal Dutch Airlines*, 2021 WL
27 1592664, at *1-9 (E.D. Mich. Apr. 23, 2021) (MTD granted without leave to
28

1 amend); *Melnyk v. Polskie Linie Lotnicze Lot S.A.*, 2021 WL 3417949, at *5 (D.N.J.
2 May 26, 2021) (“*LOT*”) (MTD granted with leave to amend); *Capua v. Air Europa*
3 *Lineas Aereas S.A. Inc.*, 2021 WL 965500, at *8-9 (S.D. Fla. Mar. 15, 2021) (Motion
4 to compel arbitration granted). Many others were voluntarily dismissed without a
5 ruling on the pleadings. Krivoshey Decl. ¶ 13. *See, e.g., Hill v. Spirit Airlines, Inc.*,
6 Case No. 20-60746, Dkt. No. 59 (S.D. Fla. Sep. 24, 2020) (dismissing case pursuant
7 to stipulation).

8 Notably, some airline refund cases did survive the pleadings, including this
9 case on Plaintiff’s second attempt. *See, e.g., Maree v. Deutsche Lufthansa AG*, 2021
10 WL 267853 (C.D. Cal. Jan 26, 2021) (denying MTD as to amended complaint after
11 having granted the MTD with leave to amend as to the initial complaint); *Ward v.*
12 *Am. Airlines, Inc.*, 498 F. Supp. 3d 909, 928 (N.D. Tex. 2020) (MTD granted in part
13 and denied in part); *Bombin v. Southwest Airlines Co.*, 2021 WL 1174561 (E.D.
14 Penn. Mar. 29, 2021) (MTD denied); *Ide v. British Airways PLC*, 2021 WL 1164307
15 (S.D.N.Y. Mar 26, 2021) (MTD granted in part and denied in part); *Levey v.*
16 *Concesionaria Vuela Compania de Aviacion, S.A.P.I de C.V.*, 2021 WL 1172702, at
17 *7 (N.D. Ill. Mar 29, 2021) (“*Volaris*”) (MTD granted in part and denied in part);
18 *Herrera v. Cathay Pac. Airways Ltd.*, 2021 WL 2186214, at *7 (N.D. Cal. May 28,
19 2021) (“*Cathay IP*”) (MTD denied after initial dismissal with leave to amend).

20 Even the limited cases that survived the pleadings have had a fairly bleak
21 record of success to date. For instance, despite surviving the motion to dismiss and
22 being represented by one of the most reputable class action firms in the country
23 (Hagens Berman), the plaintiffs in the *American Airlines* case (*Ward*) voluntarily
24 dismissed their case about a month after the ruling on the motion to dismiss. *See*
25 *Ward*, Case No. 4:20-cv-00371-O, Dkt. No. 74 (N.D. Tex. Dec. 11, 2020) (notice of
26 dismissal). None of the other cases appear to have proposed class settlements
27
28

1 pending approval, and there is no indication that any payments have been made to
2 class members as a result of the lawsuits. Krivoshey Decl. ¶ 13.

3 Perhaps, the landmark settlement here will provide a roadmap for counsel and
4 litigants in the still-pending airline cases to follow, and the tide will turn.
5 Nonetheless, despite the Settlement providing Class Members with full refunds plus
6 interest, and providing money and benefits even for those class members that have
7 already received a refund, counsel for plaintiffs in the related *Castanares* action
8 believe the settlement does not go far enough. Most of their arguments against the
9 settlement are, however, either completely without foundation or go against recent
10 decisions directly on point.

11 Castanares' main objection to the Settlement is that it does not provide
12 *automatic* refunds, but rather requires a claims process. *See Castanares* Plaintiffs
13 Opposition to the Maree Plaintiff and Lufthansa's Joint Status Report Re:
14 Settlement, Dkt. 90, at 3 (Castanares complaining that the Settlement does not
15 provide automatic refunds); *id.* at 8 ("The issue in dispute is whether Lufthansa is
16 contractually obligated to automatically issue the refund"). But this exact argument,
17 based on word-for-word identical language in other airlines' conditions of carriage,
18 has been repeatedly rejected by district courts. Lufthansa's Conditions of Carriage
19 ("COC") state:

20 **General**

21 10.1 We will refund any unused ticket or unused portion of a ticket in
22 accordance with the following paragraphs of this article and the relevant fare
conditions:

23 **Refund Recipient**

24 10.1.1 The 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, except otherwise specified.

25 10.1.2 If the ticket has been paid for by a person other than the passenger
26 named on the ticket and if the ticket indicates that there is a refund restriction,
we will offer the refund only to the person who paid for the ticket or in
27 accordance with their instructions.

10.1.3 *Except 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.*

...

Involuntary Refunds

10.2

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 of 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

...

Refusal of Refunds

10.5

10.5.1 We may refuse a refund when the respective application is made later than six months after the expiry of the validity of the ticket.

Second Amended Complaint, Dkt. 43, Ex. 1, at 22-23 (Lufthansa COC) (italics added). In *Bugarin*, Judge Freeman of the Northern District of California, held that the following terms in All Nippon Airways’ (a Japanese airline) conditions of carriage require a passenger to affirmatively first present the airline with “satisfactory evidence of entitlement to a refund,” meaning that the refund was not due automatically:

(B) Person to whom Refund will be made

(1) Unless otherwise provided in this Paragraph, ANA will make a refund to the person named in a Ticket or, to the person who purchase the Ticket *upon presentation to ANA of satisfactory evidence to prove that he/she is entitled by these Conditions of Carriage to such a refund.*

(2)(a) If a person other than the Passenger named in a Ticket pays for the Ticket and designates a person to whom refund shall be made, ANA will indicate on the Ticket that there is a restriction on a person to whom refund shall be made and make a refund only to the designated person.

Bugarin, 513 F. Supp. 3d 1172 (emphasis in original).² In *Cathay I*, Judge Spero of the Northern District of California likewise held that refunds due under the conditions of carriage in that case were not due to be paid automatically, as

² The case is not paginated on Westlaw, and Plaintiff is unfortunately unable to provide a page citation. The discussion appears in section C(2)(b) of the decision.

1 passengers were given a choice between a refund or being rescheduled or rerouted at
2 their option, and the presence of language suggesting that refunds would be due only
3 if passengers surrendered their ticket and all unused flight coupons. *Cathay I*, 2021
4 WL 673448, at *15. Virtually identical language appears in Lufthansa’s COC. *See*
5 SAC, Ex. 1 § 10.1.3 (“Except in the case of a lost ticket, we will only provide the
6 refund once you have given us the ticket and any unused flight coupons.”). And
7 again in *Melnyk*, Judge Arleo of the District of New Jersey held that refunds for
8 cancelled flights were not due to be paid automatically where the conditions of
9 carriage allowed the carrier to refuse a refund “unless the passenger or the person
10 who has paid for the ticket submits a satisfactory proof of payment to the carrier.”
11 *Melnyk*, 2021 WL 3417949, at *5. As discussed above, that language is virtually
12 word for word identical to the language in Lufthansa’s COC. Notably, the
13 undersigned counsel was counsel for the plaintiffs in both *Melnyk* and *Bugarin*.
14 Krivoshey Decl. ¶ 14. Though we may disagree with those decisions, the decisions
15 are uniform and all come to the same conclusions. Class Counsel does not believe
16 that it is reasonable to veto this Settlement due to the off chance that this Court
17 would depart from the reasoning in *Melnyk*, *Cathay I*, and *Bugarin*, especially when
18 the Court has already held that “Lufthansa did not agree to issue refunds
19 ‘immediately.’” Dkt. No. 42, at 9. Further, Class Counsel believes that doing so is
20 reckless and not in the best interests of Class Members. Krivoshey Decl. ¶ 14.

21 Amazingly, Castanares’ counsel also contends that the Settlement leaves Class
22 Members “*worse off*” because Lufthansa already acknowledges that it owes
23 customers full refunds upon request. *See Castanares* Plaintiffs’ Opposition to
24 Defendant’s Motion to Stay *Castanares* Action Pending Approval of Proposed
25 Settlement in *Maree*, Case No. 2:20-cv-4261, Dkt. No. 94 (in *Castanares*), at 10
26 (emphasis added). According to Castanares’ counsel, Class Members who did not
27 submit a claim in the Settlement would be worse off because they would no longer
28

1 (due to the release) be entitled to receive a refund that Lufthansa has already agreed
2 to provide. *See id.* Castanares is completely wrong. The Settlement explicitly does
3 not release the rights of Class Members to request and receive refunds from
4 Lufthansa, even if they never submit a claim as part of the Settlement and never opt
5 out. Settlement at 10, § I(X).

6 Further, providing Class Members with full refunds (plus interest) as part of a
7 claims process is a great benefit to class members – and certainly not “illusory.” The
8 cancellations at issue occurred in March and April of 2020, nearly 17-18 months ago.
9 And yet, \$56.6 million has never been refunded to Class Members. *See Mangusi*
10 *Decl.* ¶ 6. According to Lufthansa, the money has not been refunded because these
11 Class Members never affirmatively requested a refund, as it had paid virtually all
12 refunds due to Class Members that had requested them. *See Marquardt Decl.* ¶ 6. A
13 failure by Class Members to request \$56.6 million worth of refunds suggests that
14 they likely have either (a) forgotten about these funds, (b) decided to elect to keep
15 their ticket value (Ticket on Hold) for future travel, allowing them to rebook to any
16 new travel date or travel destination at a later date, or, and much more likely, that (c)
17 they forgot that they *can* ask for a refund or do not know *how*. This Settlement will
18 provide each of these Class Members with notice instructing them that they can still
19 receive full refunds – plus interest – and give them an opportunity to do so simply by
20 filling out a very straight-forward claim form. As another benefit, the claims will be
21 received and verified by the claims administrator – *not* Lufthansa – meaning that the
22 claims processing will be done by a neutral third party, subject to audit and
23 supervision. And even if these Class Members still fail to claim full refunds plus
24 interest as part of the Settlement, they can still receive a refund for these flights from
25 Lufthansa in the future directly.

26 Castanares is also misguided in their critiques of the claims process. *See, e.g.,*
27 *Nur v. Tatitlek Support Services, Inc.*, 2016 WL 3039573, at *3 (C.D. Cal. Apr. 25,

1 2016) (“claims-made settlements ... are routinely approved by the Ninth Circuit and
2 Courts in California”). Castanares claims that, “[a]t a minimum customers who did
3 not submit a claim should automatically receive either the \$10 payment or the \$45
4 voucher as a default to avoid the claims process from being impermissibly used
5 simply as a ‘choke’ on the relief provided.” *Castanares* Plaintiffs’ Opposition to
6 Defendant’s Motion to Stay *Castanares* Action Pending Approval of Proposed
7 Settlement in *Maree*, Case No. 2:20-cv-4261, Dkt. No. 94 (in *Castanares*), at 11.
8 Without a claim form allowing the individual to elect one or the other, it is unclear
9 what exactly Castanares thinks should happen “automatically.” But, of course, \$10
10 payments and \$45 vouchers would never have been possible (because Lufthansa
11 would never have agreed to them) if they were required to be paid automatically.
12 Krivoshey Decl. ¶ 15. Rather, Settlement Class Counsel was able to negotiate these
13 relatively high payoffs (considering that these are available for Class Members that
14 have already been refunded) because of the claims-made structure. *Id.* If, as
15 Castanares insists, Settlement Class Counsel demanded automatic refunds, there
16 would likely either be no settlement at all – and Class Members would receive
17 *nothing* short of prevailing at trial and appeal – or, in the alternative, the payouts
18 would have been drastically lower – *i.e.*, \$1 cash or \$5 voucher per Class Member.
19 *Id.* Settlement negotiations are a balancing act. Class Counsel strongly believes it is
20 far better to provide Class Members the ability to submit claims for meaningful
21 consideration now than provide automatic refunds that would, effectively, be *de*
22 *minimis* after accounting for settlement claims administration expenses. *Id.*

23 Castanares’ counsel also puts forth foundationless, and speculative arguments
24 concerning Lufthansa’s purported intent to “negotiate away the claims of direct
25 purchasers with a weakened opponent (*Maree*) whose case was just stayed for over a
26 year and whose interests are not aligned with direct purchasers.” *Id.* at 7-8. As
27 discussed at length by Lufthansa at a recent hearing before Judge Wilner, the
28

1 perfectly innocuous reason Lufthansa negotiated with Class Counsel and not
2 Castanares is because it wanted total peace, and not the partial relief that could be
3 available due to Castanares' self-imposed narrow class limited to direct purchasers
4 (as opposed to the *Maree* class definition, which includes both direct and indirect
5 purchasers). In any case, Class Counsel has been retained by a direct purchaser (Mr.
6 Guerdad) who has been added as a class representative in the Third Amended Class
7 Action Complaint. Dkt. No. 93. Plaintiff Guerdad is a signatory to the Settlement,
8 and believes that it is fair, reasonable, and adequate, and in the best interest of Class
9 Members. Guerdad Decl. ¶ 6. As a direct purchaser, his claims are not subject to
10 any stay. Nor is he even colorably "weakened."

11 As discussed in more detail below, the Settlement is fair, adequate, and
12 reasonable and should be approved. It was reached after a full-day mediation before
13 Hon. Wayne R. Andersen (Ret.) of JAMS, who has submitted a declaration stating that
14 the negotiations were conducted in good faith, at arms-length, and were not collusive
15 whatsoever. Andersen Decl. ¶¶ 6-8. The Court should find that the Settlement falls
16 within the range of possible approval. Accordingly, Plaintiffs respectfully request that
17 the Court enter an order in the form of the Proposed Preliminary Approval Order,
18 which is attached to the Settlement as Exhibit E.

19 II. SETTLEMENT NEGOTIATIONS AND DISCOVERY

20 The parties in the *Maree* case have been discussing the potential resolution on
21 a classwide basis from the very inception of the case, in May 2020. Krivoshey Decl.
22 ¶ 5. In June 2020, Class Counsel drafted and circulated a term sheet to settle the case
23 on a classwide basis. *Id.* However, those discussions eventually stalled. *Id.*

24 In April 2021, the parties resumed resolution discussions during calls with the
25 Ninth Circuit mediator in connection with Lufthansa's appeal of the Court's Order
26 Re: Defendant's Motion to Compel Arbitration and Dismiss Case, Dkt. 53. *Id.* ¶ 6.
27 In late April 2021, Class Counsel proposed that the parties consider retaining the
28

1 Honorable Wayne R. Andersen (Ret.) of JAMS for a mediation. *Id.* In early May
2 2021, the parties scheduled a mediation for June 28, 2021. *Id.* ¶ 7. The parties had
3 multiple settlement discussions in the weeks and months leading up to the mediation.
4 *Id.* On June 28, 2021, the parties executed a term sheet for a nationwide putative
5 class settlement. *Id.* ¶ 8. The proposed settlement was reached after a full-day
6 mediation before Judge Andersen. *Id.*

7 Judge Andersen has provided a declaration in support of the Settlement,
8 opining that the Settlement “was the product of extensive, arm’s length settlement
9 negotiations conducted over the course of a full, day-long mediation that [he]
10 conducted virtually on Zoom.” Andersen Decl. ¶ 6. Judge Andersen “presided over
11 the Mediation, spoke to the Parties’ separately and together, relayed offers and
12 counter-offers, and facilitated the discussions where counsel for plaintiff and
13 defendants negotiated the terms of the final settlement. *Id.* ¶ 7. Judge Andersen
14 “believe[s] the settlement reached at the Mediation is not collusive and was not the
15 result of a collusive process.” *Id.* ¶ 8. Further, Judge Andersen notes that “[t]he
16 Parties did not discuss the attorneys’ fees to be paid to the plaintiff’s counsel until
17 after the Parties had agreed upon the terms of the settlement.” *Id.* ¶ 10.

18 Further, Class Counsel negotiated the Settlement with sufficient information
19 and discovery to adequately apprise themselves of the strengths, merits, risks,
20 potential damages, and complexities of the case should it have proceeded in
21 litigation, and to allow them to objectively analyze the fairness, reasonableness, and
22 adequacy of the Settlement. Krivoshey Decl. ¶ 3. The parties exchanged and met
23 and conferred concerning a number of discovery requests, including interrogatories
24 and requests for production. *Id.* ¶ 2. Lufthansa produced critical information
25 concerning the merits of the case, including information concerning the number of
26 Class Members, the amount of flights at issue that had been cancelled within the
27 Class Period, the amount of money that had been refunded, the amount of money
28

1 that had not yet been refunded, the amount of vouchers claimed by U.S. customers,
2 and information concerning processes available for contacting Class Members. *Id.*

3 **III. TERMS OF THE PROPOSED SETTLEMENT**

4 **A. Class Definition**

5 Plaintiff seeks to provisionally certify the following Settlement Class: all
6 United States residents who purchased tickets for travel on a Lufthansa flight
7 scheduled to operate to or from the United States during the Class Period whose
8 flights were cancelled by Lufthansa. Excluded from the Settlement Class are all
9 persons who validly opt out of the Settlement in a timely manner; governmental
10 entities; counsel of record (and their respective law firms) for the Parties; Lufthansa
11 and any of its affiliates, subsidiaries, and all of its respective employees, officers, and
12 directors; the presiding judge in the Litigation or judicial officer presiding over the
13 matter, and all of their immediate families and judicial staff; and any natural person
14 or entity that entered into a release with Lufthansa prior to the Effective Date
15 concerning the Released Claims in the Litigation.

16 **B. Monetary Relief**

17 For those Class Members who have received refunds from Lufthansa for
18 Qualified Flights, they shall have the option to submit a Claim Form electing: (1) the
19 Cash Option of \$10 per person, or (2) the Voucher Option of a voucher for future
20 travel in the amount of \$45. Settlement at 13, § III(A). Settlement Class Members
21 who have not received a refund can submit a Claim Form to receive a full refund of
22 their ticket price, plus an additional one percent interest of the refund due. *Id.* §
23 III(B). Lufthansa shall pay the value of all Valid Claims, Cash Options, Interest
24 Payments, and Voucher Options up to a maximum dollar amount yielded by
25 deducting attorneys' fees, expenses, and costs, service awards, and Claims
26 Administration Expenses from \$3,500,000 (the Settlement Cap). *Id.* § III(C). The
27 full refunds available to Class Members that have not yet been refunded are not
28

1 subject to any cap. *Id.* If the total value of Valid Claims is greater than the Net
2 Claim Amount (\$3.5 million net of fees, expenses, costs, service awards, and Claims
3 Administration Expenses), the awards will be reduced on a *pro rata* basis up to the
4 Net Claim Amount. *Id.* § III(D).

5 **C. Release**

6 In exchange for the relief described above, Defendant and each of its related
7 and affiliated entities as well as all “Released Persons” as defined in Settlement
8 I(Y) will receive a release of all claims arising out of the cancelled flights during the
9 Class Period. *Id.* ¶ 10. However, the Settlement explicitly does not extinguish any
10 right that a Settlement Class Member may have to receive a refund of the amount of
11 their booking for a cancelled flight (to the extent one is owed) and does not release
12 any claims for personal injury. *Id.* § I(X).

13 **D. Incentive Awards**

14 Subject to the Court’s approval, the Settlement permits Plaintiffs to make an
15 application for service awards for their work and contributions in this case up to
16 \$2,000. Settlement § IX(F). The amount of the awards here are certainly
17 reasonable. *See gen.* Declarations of Karla Maree (the “Maree Decl.”) and Mourad
18 Geurdad. *See also Rodriguez v. Marshalls of CA, LLC*, 2020 WL 7753300, at *11
19 (C.D. Cal. July 31, 2020) (Fitzgerald, J.) (“In this district, a \$5,000 payment is
20 presumptively reasonable, and incentive awards typically range from \$2,000 to
21 \$10,000.”) (internal quotations omitted).

22 **E. Attorneys’ Fees, Expenses, and Costs**

23 The Settlement permits Class Counsel to make an application for an award of
24 attorneys’ fees, costs, and expenses valued in the aggregate at no more than 25
25 percent of the \$3.5 million Settlement Cap, or \$875,000. *See* § IX(A), *infra.*
26 Defendant has the right to challenge the amount of Plaintiffs’ fees, costs and
27 expenses – there is no clear sailing agreement. *Id.*
28

1 **F. Payment of Notice and Administrative Fees**

2 The parties propose that RG2 Claims Administration LLC act as the
3 Settlement Administrator. Settlement § I(AA). Notice expenses will be paid for by
4 Defendant, and count against the \$3.5 million Settlement Cap.

5 **IV. LEGAL STANDARD**

6 Approval of class action settlements involves a two-step process. First, the
7 Court must make a preliminary determination whether the proposed settlement
8 appears to be fair and is “within the range of possible approval.” *In re Syncor ERISA*
9 *Litig.*, 516 F.3d 1095, 1100 (9th Cir. 2008) (“*In re Syncor*”). If so, notice can be sent
10 to class members and the Court can schedule a final approval hearing where a more
11 in-depth review of the settlement terms will take place. *See* MANUAL FOR COMPLEX
12 LITIGATION § 21.312 at 293-96 (4th ed. 2004).

13 While preliminary approval does not require an answer to the ultimate
14 question of whether the proposed settlement is fair and adequate, a review of the
15 standards applied at final approval is helpful to the determination of preliminary
16 approval. One such standard is the strong judicial policy of encouraging
17 compromises, particularly in class actions. *See In re Syncor*, 516 F.3d at 1101
18 (citing *Officers for Justice v. Civil Serv. Comm’n*, 688 F.2d 615 (9th Cir. 1982)); *see*
19 *also Millan v. Cascade Water Servs., Inc.*, 310 F.R.D. 593, 602 (E.D. Cal. 2015)
20 (“The Ninth Circuit has declared that a strong judicial policy favors settlement of
21 class actions.”). When a settlement is negotiated at arm’s-length by experienced
22 counsel, there is a presumption that it is fair and reasonable. *See In re Pac. Enters.*
23 *Sec. Litig.*, 47 F.3d 373, 378 (9th Cir. 1995). Ultimately, the Court’s role is to ensure
24 that the settlement is fundamentally fair, reasonable and adequate. *See In re Syncor*,
25 516 F.3d at 1100.

26 Beyond the public policy favoring settlements, the principal consideration in
27 evaluating the fairness and adequacy of a proposed settlement is the likelihood of
28 recovery balanced against the benefits of settlement. “[B]asic to this process in

1 every instance, of course, is the need to compare the terms of the compromise with
 2 the likely rewards of litigation.” *Protective Committee for Independent Stockholders*
 3 *of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). That said,
 4 “the court’s intrusion upon what is otherwise a private consensual agreement
 5 negotiated between the parties to a lawsuit must be limited to the extent necessary to
 6 reach a reasoned judgment that the agreement is not the product of fraud or
 7 overreaching by, or collusion between, the negotiating parties, and that the
 8 settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”
 9 *Officers for Justice*, 688 F.2d at 625.

10 V. ARGUMENT

11 A. The Settlement Class Meets All Requirements Of Fed. 12 R. Civ. P. 23(a) And 23(b)(3)

13 “Before the court may evaluate a class action settlement under Rule 23(e) of
 14 the Federal Rules of Civil Procedure, the settlement class must meet the
 15 requirements of Rules 23(a)”: (1) numerosity, (2) commonality, (3) typicality, and
 16 (4) adequacy of representation.” *Millan*, 310 F.R.D. at 603. “Once subsection (a) is
 17 satisfied, the putative class must then fulfill the requirements of Rule 23(b)(3).” *Id.*
 18 The Settlement Class meets all of these requirements.

19 1. Fed. R. Civ. P. 23(a)(1) – Numerosity

20 There are approximately 166,360 of Class Members. Marquardt Decl. ¶ 2.
 21 These numbers plainly satisfy the numerosity requirement for preliminary approval.

22 2. Fed. R. Civ. P. 23(a)(2) – Commonality

23 Commonality is easily satisfied for breach of contract actions. Plaintiffs assert
 24 one cause of action, alleging that Defendant breached the same contract – the
 25 Conditions of Carriage – in substantially identical manner with respect to all
 26 passengers. Such allegations satisfy the commonality requirement. *In re Nigeria*
 27 *Charter Flights Contract Litig.*, 233 F.R.D. 297, 300 (E.D.N.Y. 2006) (“*In re*
 28 *Nigeria*”) (“Plaintiffs allege that the relevant terms and conditions of the tickets of

1 prospective class members and plaintiffs are identical, as are the issues relating to
 2 World’s alleged failure to abide by its obligations. These allegations satisfy Rule
 3 23(a)(2)’s commonality requirement.”); *In re Medical Capital Sec. Litig.*, 2011 WL
 4 5067208, at *3 (“Defendants acknowledge that Plaintiffs’ breach of contract claim
 5 involves alleged violations of standardized contracts (the NISAs), which existed in
 6 substantially identical form across all MedCap SPCs.”); *In re AXA Equitable Life*
 7 *Ins. Co. COI Litig.*, 2020 WL 4694172, at *7 (S.D.N.Y. Aug. 13, 2020) (certifying
 8 nationwide breach of contract case where class members’ “contracts with AXA are
 9 identical in all material respects”).

10 **3. Fed. R. Civ. P. 23(a)(3) – Typicality**

11 Plaintiff Maree was an “indirect” purchaser of a Lufthansa flight, while
 12 Plaintiff Guerdad purchased directly through Lufthansa’s website, making them
 13 typical of Class Members that purchased tickets through third-party websites and
 14 directly through Lufthansa. TAC ¶¶ 23-25. Both had their flights cancelled, and
 15 allege that they were initially denied refunds, and allege that the time it took for
 16 Lufthansa to provide the refunds was not reasonable. *Id.* Accordingly, typicality is
 17 satisfied. *See In re Nigeria*, 233 F.R.D. at 302 (typicality satisfied where “each
 18 plaintiff purchased tickets from Ritetime for travel on World’s flights and each
 19 plaintiff had a portion of their travel cancelled without notice”).

20 **4. Fed. R. Civ. P. 23(a)(4) – Adequacy**

21 The final requirement of Rule 23(a) is that “the representative parties will
 22 fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a)(4).
 23 Adequacy is presumed where a fair settlement was negotiated at arm’s-length.
 24 NEWBERG ON CLASS ACTIONS §11.28, at 11-59. Plaintiffs and Class Counsel have no
 25 conflicts with absent Class Members, and have vigorously and competently pursued
 26 the Class Members’ claims. *See Maree Decl.* ¶¶ 2-8; *Guerdad Decl.* ¶¶ 2-8. Class
 27 Counsel has engaged in significant, arm’s-length negotiations over the course of
 28

1 many months, including with the assistance of a reputable mediator. Krivoshey
2 Decl. ¶¶ 3-8; Andersen Decl. ¶¶ 6-10. Class Counsel has also defeated a motion to
3 dismiss and a motion to compel arbitration. Further, Class Counsel has extensive
4 experience and expertise in prosecuting complex class actions, taking class actions to
5 trial (and winning six of six times they have done so), and obtaining class settlement
6 with tremendous benefits to class members. *See* Krivoshey Decl. Ex. 2 (firm resume
7 of Bursor & Fisher, P.A.). Rule 23(a)(4) is easily satisfied.

8 **5. Fed. R. Civ. P. 23(b)(3) – Predominance And Superiority**

9 Certification under Rule 23(b)(3) is appropriate and encouraged “whenever the
10 actual interests of the parties can be served best by settling their differences in a single
11 action.” *Hanlon*, 150 F.3d at 1022. As the Supreme Court has explained,
12 “[c]onfronted with a request for settlement-only class certification, a district court
13 need not inquire whether the case, if tried, would present intractable management
14 problems. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

15 Here, predominance is met because “common questions ... present a
16 significant aspect of the case and [] can be resolved for all members of the class in a
17 single adjudication.” *Murillo*, 266 F.R.D. at 476. These common questions include,
18 but are not limited to: (i) whether Defendant breached its Conditions of Carriage; (ii)
19 whether Defendant failed to refund passengers within a “reasonable time”; (iii) the
20 amount of damages stemming from the breach; and (iv) whether Lufthansa’s conduct
21 was “intentional or grossly negligent.” *See Ellsworth*, 2014 WL 2734953, at *27
22 (predominance met because “[t]he form mortgage contracts are identical, and
23 Plaintiffs allege uniform policies and practices surrounding FPI”); *In re Nigeria*, 233
24 F.R.D. at 304 (predominance met where “plaintiffs’ claims do not rely on
25 individualized representations, but rather on a uniform deceptive course of conduct
26 by World Airways ... that was directed at all ticket purchasers”).

1 As for superiority, the indirect and consequential damages (interest) stemming
2 from Lufthansa’s alleged breach are small. *See* Dkt. 53, at 13 (limiting damages in
3 this case to indirect and consequential damages). Even damages for *full refunds* are
4 too small for consumers to litigate their claims against a well-funded opponent on an
5 individual basis. Thus, “the prohibitive cost of proceeding individually against
6 [Lufthansa] and the likely unavailability of contingency-fee counsel far outweigh
7 any interest the plaintiffs have in proceeding individually.” *In re Nigeria*, 233
8 F.R.D. at 306. Accordingly, superiority is satisfied.

9 **B. The Court Should Preliminarily Approve The**
10 **Settlement Because It Is Fair, Adequate, And**
11 **Reasonable**

12 Fed. R. Civ. P. 23(e)(2) provides that “the court may approve [a proposed
13 class action settlement] only after a hearing and on finding that it is fair, reasonable,
14 and adequate.” When making this determination, the Ninth Circuit has instructed
15 district courts to balance several factors: (1) the strength of Plaintiff’s case; (2) the
16 risk, expense, complexity, and likely duration of further litigation; (3) the risk of
17 maintaining class action status throughout the trial; (4) the amount offered in
18 settlement; (5) the extent of discovery completed and the stage of the proceedings;
19 and (6) the experience and views of counsel. *Hanlon*, 150 F.3d at 1026 (the “*Hanlon*
20 *Factors*”).³ “These factors substantively track those provided in 2018 amendments to
21 Rule 23(e)(2), under which the court may approve a settlement only after considering
22 whether: (A) the class representatives and class counsel have adequately represented
23 the class; (B) the proposal was negotiated at arm’s length; (C) the relief provided for
24 the class is adequate, taking into account: (i) the costs, risks, and delay of trial and
25 appeal; (ii) the effectiveness of any proposed method of distributing relief to the

26 ³ In *Hanlon*, the Ninth Circuit also instructed district courts to consider “the reaction
27 of the class members to the proposed settlement.” *Hanlon*, 150 F.3d at 1026. This
28 consideration is more germane to final approval (after class members receive notice
and have an opportunity to file claims, opt-out, and object).

1 class, including the method of processing class-member claims; (iii) the terms of any
 2 proposed award of attorneys' fees, including timing of payment; and (iv) any
 3 agreement required to be identified under Rule 23(e)(3); and (D) the proposal treats
 4 class members equitably relative to each other." *Greer v. Dick's Sporting Goods,*
 5 *Inc.*, 2020 WL 5535399, at *2 (E.D. Cal. Sept. 15, 2020). The new Rule 23(e)
 6 factors are "not intended to 'displace' any factors developed over the years in the
 7 circuit courts." *Smith v. Kaiser Foundation Hospitals*, 2020 WL 5064282, at *9
 8 (S.D. Cal. Aug. 26, 2020) (citing Fed. R. Civ. P. 23(e) advisory committee's note to
 9 2018 amendment).

10 Here, the Settlement Class meets both the *Hanlon* Factors and Rule 23(e)(2).

11 **1. The Settlement Meets All Of The *Hanlon* Factors**

12 *i. The Strength Of Plaintiff's Case, the Risk, Complexity, and*
 13 *Duration of Further Litigation, and the Risk of Maintaining*
 14 *Class Action Status Throughout the Trial*

15 In determining the likelihood of a plaintiff's success on the merits of a class
 16 action, "the district court's determination is nothing more than an amalgam of
 17 delicate balancing, gross approximations and rough justice." *Officers for Justice*,
 18 688 F.2d at 625 (internal quotations omitted). The court may "presume that through
 19 negotiation, the Parties, counsel, and mediator arrived at a reasonable range of
 20 settlement by considering Plaintiff's likelihood of recovery." *Garner v. State Farm.*
 21 *Mut. Auto. Ins. Co.*, 2010 WL 1687832, at *9 (N.D. Cal. Apr. 22, 2010) (citing
 22 *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009)).

23 Here, as set forth in the Krivoshey Decl., Class Counsel engaged in arms-
 24 length negotiations with Defendant's counsel and with the assistance of a neutral
 25 mediator, and Class Counsel was thoroughly familiar with the applicable facts, legal
 26 theories, and defenses on both sides. Krivoshey Decl. ¶¶ 2-8. Although Plaintiff and
 27 Class Counsel had confidence in their claims, a favorable outcome was not assured.
 28 *Id.* ¶ 19. As discussed in the Introduction, flight refund class actions have had very

1 minimal success to date in district courts throughout the country. The Court’s
2 motion to dismiss orders limited damages to interest, and even then only if Plaintiffs
3 could prove that Lufthansa’s conduct was intentional or grossly negligent. *See* Dkt.
4 No. 53, at 13; Dkt. No. 42, at 10. The Court also expressed reservations about
5 whether Plaintiff Maree (and the *Castanares* plaintiffs) could prove that Lufthansa’s
6 48-day delay in processing the refund was sufficiently “unreasonable” to impose
7 liability, initially granting Lufthansa’s motion to dismiss in a tentative ruling on this
8 basis but later deferring the issue for summary judgment in its entered order. *See*
9 Dkt. 53, at 12-13. Further, class certification on the merits would be daunting in this
10 case, as Lufthansa insists that its “booking database does not contain the date a
11 refund was requested for a particular booking[,] ... does not contain the date a refund
12 was issued ... [, that] there is no automated way to compile the refund time for any
13 individual booking within the Settlement Class ... [and that to] determine the refund
14 processing time for a given booking in the Settlement Class, Lufthansa would have
15 to manually review Lufthansa’s information ... to establish the date that the refund
16 was requested and the date the refund was processed.” *See* Marquardt Decl. ¶¶ 5-7.
17 In a case that relies on the theory that Lufthansa took unreasonably long to issue
18 refunds, the potential requirement of having to go through each Class Member’s
19 individual booking records to determine the time it took to process the refund would
20 spell serious trouble for prospects of class certification. And even if Plaintiffs were
21 able to obtain class certification, the class could still be decertified at any time. *See*
22 *In re Netflix Privacy Litig.*, 2013 WL 1120801, at *6 (N.D. Cal. Mar. 18, 2013)
23 (“The notion that a district court could decertify a class at any time is one that
24 weighs in favor of settlement.”) (internal citations omitted).

25 In light of the risks posed at class certification, summary judgment, and trial,
26 the proposed Settlement provides the Class with an outstanding recovery. *Id.* The
27 Settlement also abrogates the risks that might prevent them from obtaining any relief.
28

1 *Id.*; see also *Curtis-Bauer v. Morgan Stanley & Co., Inc.*, 2008 WL 4667090, at *4
2 (N.D. Cal. Oct. 22, 2008) (“Settlement avoids the complexity, delay, risk and
3 expense of continuing with the litigation and will produce a prompt, certain, and
4 substantial recovery for the Plaintiff class.”). Accordingly, these factors are met.

5 *ii. The Amount Offered In The Settlement*

6 The Settlement here offers meaningful relief for the Class. Indeed, it is quite
7 possible that Class Members would not have recovered any more even if Plaintiffs
8 had prevailed at trial. Class Members that have not yet received a refund can submit
9 a claim for a full refund, plus 1% interest. There is roughly \$56.6 million in further
10 refunds that could be processed for these Class Members. Mangusi Decl. ¶ 6. Class
11 Members that have already received a refund can receive \$10 in cash or a \$45
12 voucher, up to \$3.5 million (net of fees, expenses, and costs). Because these Class
13 Members are limited to a theory of damages based on interest, a recovery of .92% of
14 the total refund amount (\$378 million has been refunded to date) is outstanding at
15 this juncture. See Mangusi Decl. ¶ 4. Notably, the cancellations at issue here
16 occurred in late March and April 2020. By August 21, 2020, however, Lufthansa
17 had processed “92 percent of all refund applications from the first half-year.”
18 Marquardt Decl. ¶ 6. Interest would only accumulate here from the date at which it
19 was unreasonable for Lufthansa to not process the refund until the date that it was
20 paid. So, even assuming that it was unreasonable for Lufthansa to not refund past 7
21 days (as required by DOT regulations), Class Members’ interest would have
22 accumulated for about two to three months. That means Class Members are
23 recovering between 3.7 to 4.6% in interest on a *monthly* basis under the Settlement.
24 The outstanding recovery here clearly supports preliminary approval.

25 *iii. The Stage Of The Proceedings*

26 Under this factor, courts evaluate whether class counsel had sufficient
27 information to make an informed decision about the merits of the case. See *In re*

1 *Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000). Plaintiffs, through
 2 their counsel, have conducted extensive research, discovery, and investigation during
 3 the prosecution of the Action. Krivoshey Decl. ¶¶ 2-4. Plaintiffs obtained
 4 information regarding the size of the class, amount of refunds issued and outstanding,
 5 the timing of refunds, and had sufficient information to determine the size of potential
 6 damages at trial. The parties also held numerous telephonic and written discussions
 7 regarding Plaintiffs' allegations, discovery, and settlement as well a mediation with
 8 Hon. Wayne R. Andersen (Ret.) of JAMS. *Id.* ¶¶ 2-8. The Settlement is the result of
 9 fully-informed negotiations. *Vega v. Weatherford U.S., Limited Partnership*, 2016
 10 WL 7116731, at *9 (E.D. Cal. Dec. 7, 2016) (factor weighed in favor of settlement
 11 where "[g]iven the discovery completed by the parties, it appears that the parties made
 12 informed decisions, which lead to resolution of the matter with a mediator").

13 *iv. The Experience And Views Of Counsel*

14 "The recommendations of plaintiffs' counsel should be given a presumption of
 15 reasonableness." *In re Omnivision Techs., Inc.*, 559 F. Supp. 2d 1036, 1043 (N.D.
 16 Cal. 2008). Deference to Class Counsel's evaluation of the Settlement is appropriate
 17 because "[p]arties represented by competent counsel are better positioned than courts
 18 to produce a settlement that fairly reflects each party's expected outcome in
 19 litigation." *Rodriguez*, 563 F.3d at 967. Here, the Settlement was negotiated by
 20 counsel with extensive experience in consumer class action litigation. *See* Krivoshey
 21 Decl. Ex. 2 (firm resume of Bursor & Fisher, P.A.). Based on their experience, Class
 22 Counsel concluded that the Settlement provides exceptional results for the Class
 23 while sparing the Class from the uncertainties of continued litigation.

24 **2. The Settlement Class Meets All Of The Rule 23(e)(2) Factors**

25 *i. Rule 23(e)(2)(A) – Plaintiff And Class Counsel Have Adequately
 26 Represented The Class*

27 "The Ninth Circuit has explained that 'adequacy of representation ... requires
 28 that two questions be addressed: (a) do the named plaintiffs and their counsel have

1 any conflicts of interest with other class members and (b) will the named plaintiffs
 2 and their counsel prosecute the action vigorously on behalf of the class?” *Hefler v.*
 3 *Wells Fargo & Co.*, 2018 WL 6619983, at *6 (N.D. Cal. Dec. 18, 2018) (quoting *In*
 4 *re Mego Financial Corp. Sec. Litig.*, 213 F.3d at 462). Here, this prong is met for
 5 the same reasons as Plaintiffs and Class Counsel met the adequacy prong under Fed.
 6 R. Civ. P. 23(a)(4). See Argument § V.A.4, *supra*; see also *Hilsley v. Ocean Spray*
 7 *Cranberries, Inc.*, 2020 WL 520616, at *5 (S.D. Cal. Jan. 31, 2020) (“Because the
 8 Court found that adequacy under Rule 23(a)(4) has been satisfied above, due to the
 9 similarity, the adequacy factor under Rule 23(e)(2)(A) is also met.”).

10 *ii. Rule 23(e)(2)(B) – Arms’ Length Negotiations Occurred*

11 A court may “presume that through negotiation, the Parties, counsel, and
 12 mediator arrived at a reasonable range of settlement by considering Plaintiff’s
 13 likelihood of recovery.” *Garner*, 2010 WL 1687832, at *9 (citing *Rodriguez*, 563
 14 F.3d at 965). “[T]he Settlement [here] was reached as a result of informed and non-
 15 collusive arms-length negotiations [over a number of months] facilitated by a neutral
 16 mediator.” *Kramer v. XPO Logistics, Inc.*, 2020 WL 1643712, at *1 (N.D. Cal. Apr.
 17 2, 2020); *G. F. v. Contra Costa County*, 2015 WL 4606078, at *13 (N.D. Cal. July
 18 30, 2015) (“[T]he assistance of an experienced mediator in the settlement process
 19 confirms that the settlement is non-collusive.”) (internal quotations omitted);
 20 Krivoshey Decl. ¶¶ 2-8; Andersen Decl. ¶¶ 6-10.

21 *iii. Rule 23(e)(2)(C) – The Relief Provided Is Adequate*

22 Fed. R. Civ. P. 23(e)(2)(C) requires that the Court consider whether “the relief
 23 provided for the class is adequate, taking into account: (i) the costs, risks, and delay
 24 of trial and appeal; (ii) the effectiveness of any proposed method of distributing relief
 25 to the class, including the method of processing class-member claims; (iii) the terms
 26 of any proposed award of attorneys’ fees, including timing of payment; and (iv) any
 27 agreement required to be identified under Rule 23(e)(3).” “The amount offered in
 28

1 the proposed settlement agreement is generally considered to be the most important
2 consideration of any class settlement.” *Hilsley*, 2020 WL 520616, at *6.

3 **“The Costs, Risks, And Delay Of Trial And Appeal”**: Plaintiffs have
4 discussed these factors extensively above. *See* § V(B)(I), *supra*.

5 **“The Effectiveness Of Any Proposed Method Of Distributing Relief”**: As
6 described *infra*, the proposed notice plan and claims procedure is straightforward and
7 comports with due process. *See gen.* Wickersham Decl. The plan was proposed by
8 experienced and competent counsel and ensures “the equitable and timely
9 distribution of a settlement fund without burdening the process in a way that will
10 unduly waste the fund.” *In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 695
11 (S.D.N.Y. 2019) (internal quotations omitted).

12 **“The Terms Of Any Proposed Award Of Attorneys’ fees”**: Class Counsel
13 will petition this Court for an award of up to \$875,000 in attorneys’ fees, inclusive of
14 any costs and expenses, to be paid only if the Court otherwise grants final approval.
15 Settlement § IX(A). Under Ninth Circuit standards, a District Court may award
16 attorneys’ fees under either the “percentage-of-the-benefit” method or the “lodestar”
17 method. *Fischel v. Equitable Life Assur. Soc’y of U.S.*, 307 F.3d 997, 1006 (9th Cir.
18 2002). “Courts in the Ninth Circuit prefer to use the percentage-of-recovery method,
19 but to cross-check the final figure with a lodestar calculation.” *In re Transpacific*
20 *Passenger Air Transportation Antitrust Litig.*, 2019 WL 6327363, at *1 (N.D. Cal.
21 Nov. 26, 2019). To calculate attorneys’ fees based on the percentage of the benefit,
22 Ninth Circuit precedent requires courts to award class counsel fees based on the total
23 benefits being made available rather than the amount actually paid out. *Young v.*
24 *Polo Retail, LLC*, 2007 WL 951821, at *8 (N.D. Cal. Mar. 28, 2007) (“The Ninth
25 Circuit ... bars consideration of the class’s actual recovery in assessing the fee
26 award”); *Williams v. MGM-Pathe Commc’ns Co.*, 129 F.3d 1026, 1027 (9th Cir.
27 1997) (ruling that a district court abused its discretion in basing attorney fee award
28

1 on actual distribution to class instead of amount being made available). The Court
2 must also include the value of the benefits conferred to the Class, including any
3 attorneys' fees, expenses, and notice and claims administration payments to be made.
4 *Hartless v. Clorox Co.*, 273 F.R.D. 630, 645 (S.D. Cal. 2011), *aff'd*, 473 F. App'x.
5 716 (9th Cir. 2012). Stated otherwise, California courts include the requested
6 attorneys' fees when calculating the total value of the settlement fund. *Lealao v.*
7 *Beneficial California, Inc*, 82 Cal. App. 4th 19, 33 (2000).

8 Here, the Settlement allows Class Members that have not yet received a refund
9 to claim approximately \$56.6 million, plus one percent interest. And Class Counsel
10 made a \$3.5 million cap available to pay cash and voucher claims, interest, fees,
11 expenses, costs, and settlement administration expenses, for a total benefit of roughly
12 \$60.1 million. Thus, Class Counsel's fee request of \$875,000 represents about 1.45
13 percent of the total value of the Settlement. Krivoshey Decl. ¶ 16. Even under
14 Castanares' contention that the \$56.6 million provides the Class with *no* value
15 (because Class Members can get refunds through Lufthansa directly), Class
16 Counsel's fee still accounts for less than the 25% benchmark in the Ninth Circuit (as
17 it is inclusive of expenses and costs). *See Hanlon*, 150 F.3d at 1029.

18 **“Any Agreement Required To Be Identified By Rule 23(e)(3)”**: This prong
19 asks whether there was “any agreement made in connection with the proposal.” *In re*
20 *GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d at 696. Here, no such agreement exists.

21 *iv. Rule 23(e)(2)(D) – The Proposal Treats Class*
22 *Members Equitably Relative To Each Other*

23 Under this factor, courts consider whether the Settlement “improperly grant[s]
24 preferential treatment to class representatives or segments of the class.” *Hefler*, 2018
25 WL 6619983, at *8. Here, the Settlement equitably and reasonably allocates relief
26 based on whether Class Members received a refund. Class Members that have not
27 are entitled to a full refund, plus interest (based on the cost of the booking). Class
28

1 Members that have received a refund can elect \$10 or a \$45 voucher, which, as
2 discussed above, are potentially more than they could have even received at trial.

3 **C. The Proposed Notice Program Constitutes Adequate
4 Notice And Should Be Approved**

5 The proposed notice plan here provides the best notice that can be provided
6 under the circumstances. *See gen.* Settlement §§ V, VI. All Class Members for
7 whom Lufthansa has either email or home address information will receive direct
8 notice. Wickersham Decl. ¶¶ 16-21. For the small fraction of Class Members for
9 whom Lufthansa does not have address or emails, they will be subjected to focused
10 digital advertising. *Id.* ¶¶ 14, 22-23. The Settlement Notice Administrator will set
11 up a dedicated case website, a toll-free phone number, and issue a press release. *Id.*
12 ¶¶ 24-29. The Settlement also provides for CAFA notice. Settlement § V(B)(8). In
13 all, the notice will have far more than 90 percent reach. *See Wickersham Decl.* ¶¶ 6,
14 9-16. *See* Judges' Class Action Notice and Claims Process Checklist and Plain
15 Language Guide (2010), Federal Judicial Center, at 1 (describing a notice reach
16 "between 70-95%" as a "high percentage").⁴

17 The notice documents themselves are more than adequate. They inform Class
18 Members of the subject matter of the litigation, are easy to understand, and explain
19 to Class Members the benefits and terms of the Settlement, their rights and
20 obligations, procedures and deadlines to opt out and object, the date of the final
21 approval hearing, and provide other pertinent case information and deadlines.

22 **VI. CONCLUSION**

23 For the foregoing reasons, Plaintiffs and Class Counsel respectfully request
24 that the Court grant preliminary approval to the Settlement, provisionally certify the
25 Class, approve the proposed notice plan, and enter the Proposed Preliminary
26 Approval Order in the form submitted herewith.

27 ⁴ <https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf> (last accessed August 13,
28 2021)

1 Dated: August 16, 2021

Respectfully submitted,

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3
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