**BURSOR & FISHER, P.A.**
L. Timothy Fisher (CA Bar No. 191626)
Yeremey Krivoshey (CA Bar No. 295032)
1990 North California Blvd., Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-mail: ltfisher@bursor.com
ykrivoshey@bursor.com

*Attorneys for Plaintiffs*

**UNITED STATES DISTRICT COURT**

**CENTRAL DISTRICT OF CALIFORNIA**

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

Plaintiffs,

v.

DEUTSCHE LUFTHANSA AG,

Defendant.

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

**PLAINTIFFS' NOTICE OF MOTION AND MOTION FOR PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT, PROVISIONAL CERTIFICATION OF NATIONWIDE SETTLEMENT CLASSES, AND APPROVAL OF PROCEDURE FOR AND FORM OF NOTICE**

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

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

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

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

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

Dated: August 16, 2021

Respectfully submitted,

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

By: */s/ Yeremey O. Krivoshey*
Yeremey O. Krivoshey

L. Timothy Fisher (CA Bar No. 191626)
Yeremey O. Krivoshey (CA Bar No. 295032)
1990 North California Blvd., Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-mail: ltfisher@bursor.com
ykrivoshey@bursor.com

*Attorneys for Plaintiffs*

# TABLE OF CONTENTS

**PAGE(S)**

# TABLE OF AUTHORITIES

**PAGE(S)**

**CASES**

**RULES**



**OTHER AUTHORITIES**

## I. INTRODUCTION

Plaintiffs Karla Maree and Mourad Guerdad ("Plaintiffs"), by and through Class Counsel,[1] respectfully submit this memorandum in support of Plaintiffs' Motion for Preliminary Approval of Class Action Settlement. The Settlement Agreement ("Settlement") and its exhibits are attached as Exhibit 1 to the Declaration of Yeremey O. Krivoshey ("Krivoshey Decl."), filed herewith.

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

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

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

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

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

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

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

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

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

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

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

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

> **General**
> 10.1 We will refund any unused ticket or unused portion of a ticket in accordance with the following paragraphs of this article and the relevant fare conditions:
>
> **Refund Recipient**
> 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.*
>
> 10.1.2 If the ticket has been paid for by a person other than the passenger 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 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.

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

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

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

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

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

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

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

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

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

## II. SETTLEMENT NEGOTIATIONS AND DISCOVERY

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

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

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

Judge Andersen has provided a declaration in support of the Settlement, opining that the 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." Andersen Decl. ¶ 6. Judge Andersen "presided over the Mediation, spoke to the Parties' 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. *Id*. ¶ 7. Judge Andersen "believe[s] the settlement reached at the Mediation is not collusive and was not the result of a collusive process." *Id*. ¶ 8. Further, Judge Andersen notes that "[t]he 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*. ¶ 10.

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

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

## III. TERMS OF THE PROPOSED SETTLEMENT

### A. Class Definition

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

### B. Monetary Relief

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

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

**C. Release**

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

**D. Incentive Awards**

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

**E. Attorneys' Fees, Expenses, and Costs**

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

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

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

## IV. LEGAL STANDARD

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

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

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

every instance, of course, is the need to compare the terms of the compromise with the likely rewards of litigation." *Protective Committee for Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 424-25 (1968). That said, "the court's intrusion upon what is otherwise a private consensual agreement negotiated between the parties to a lawsuit must be limited 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." *Officers for Justice*, 688 F.2d at 625.

## V. ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### B. The Court Should Preliminarily Approve The Settlement Because It Is Fair, Adequate, And Reasonable

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

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

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

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

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

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

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

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

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

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

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

*ii. The Amount Offered In The Settlement*

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

*iii. The Stage Of The Proceedings*

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

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

*iv. The Experience And Views Of Counsel*

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

**2. <u>The Settlement Class Meets All Of The Rule 23(e)(2) Factors</u>**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### C. The Proposed Notice Program Constitutes Adequate Notice And Should Be Approved

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

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

## VI. CONCLUSION

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

[4] https://www.fjc.gov/sites/default/files/2012/NotCheck.pdf (last accessed August 13, 2021

Dated: August 16, 2021

Respectfully submitted,

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

By: */s/ Yeremey O. Krivoshey*
Yeremey O. Krivoshey

L. Timothy Fisher (CA Bar No. 191626)
Yeremey O. Krivoshey (CA Bar No. 295032)
1990 North California Blvd., Suite 940
Walnut Creek, CA 94596
Telephone: (925) 300-4455
Facsimile: (925) 407-2700
E-mail: ltfisher@bursor.com
ykrivoshey@bursor.com

*Attorneys for Plaintiffs*