

No. 15-16280

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DONALD WORTMAN, et al.,

Plaintiffs-Appellees,

AMY YANG

Objector-Appellant,

v.

SOCIETE AIR FRANCE; MALAYSIAN AIRLINE SYSTEM BERHAD;
SIGNAPORE AIRLINES LIMITED; VIETNAM AIRLINES COMPANY
LIMITED; and JAPAN AIRLINES COMPANY, LTD.,

Defendants-Appellees.

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

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

COTCHETT, PITRE & MCCARTHY, LLP
Steven N. Williams
Adam J. Zapala
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000
Facsimile: 650-697-0577
swilliams@cpmlegal.com
azapala@cpmlegal.com

HAUSFELD LLP
Michael P. Lehmann
Christopher L. Lebsock
600 Montgomery Street, Suite 3200
San Francisco, CA 94111
Telephone: 415-633-1908
Facsimile: 415-358-4980
mlehmann@hausfeld.com
clebsock@hausfeld.com

Attorneys for Plaintiffs-Appellees

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Corporate Disclosure Statement

Pursuant to Rules 26.1 and 29(c) of the Federal Rules of Appellate Procedure, Appellees state that they are all natural persons, and thus that no further disclosure is necessary.

Statement of Subject Matter and Appellate Jurisdiction

The district court had federal question jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1337 because Plaintiffs’ claims arose under Section 1 of the Sherman Act (15 U.S.C. § 1). This Court has appellate jurisdiction over Objector Amy Yang’s (“Yang”) objections concerning Federal Rule of Civil Procedure¹ 23(a)(4). Yang lacks standing—and thus this Court lacks subject matter jurisdiction—over Yang’s objections concerning Rules 23(c)(2)(B), 23(e)(1), and 23(e)(5), as a decision by this Court “cannot result in redressing any injury” as to Yang. *See Glasser v. Volkswagen of Am., Inc.*, 645 F.3d 1084, 1088 (9th Cir. 2011) (“*Glasser*”).

¹ The Federal Rules of Civil Procedure are cited as “Rule” or “Rules.”

Statement of the Issues

1. Does a finding of adequacy of representation under Rule 23(a)(4) require that each member of a settlement class have a valid claim with exactly equal litigation value? And, is it reversible error for a district court to approve a *pro rata* plan of distribution of settlement funds where some settlement class members might face unique, but yet-unproven and speculative defenses, the merits of which were contingent upon future developments at the time of settlement?
2. Does a class action objector who asserts that a class definition violates Rules 23(c)(2)(B), 23(e)(1), and 23(e)(5)'s notice, opt-out, and objection requirements have standing under Article III of the United States Constitution to object to the alleged violations if she: (a) received notice in advance of the deadlines to opt-out or object, (b) decided to remain in the class, and (c) timely lodged an objection?
3. If such an objector has Article III standing, then is it reversible error for a district court to adopt a class definition that—by virtue of being tethered to the date that the settlement becomes final and effective—encompasses some “future” members who will join the class after conclusion of the notice program, provided that the notice program (the sufficiency of which is unchallenged on appeal) targeted and reached both current and potential future class members?

Standard of Review

Appellate review of class action settlement approval is “extremely limited,” *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000) (“*Mego*”), and focuses on “the fairness of a settlement as a whole, rather than assessing its individual components,” *Lane v. Facebook, Inc.*, 696 F.3d 811, 818-19 (9th Cir. 2012) (“*Lane*”); accord *Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 306-07, 326 (3d Cir. 2011) (“*Sullivan*”) (*en banc*) (“[An] objector’s focus on the legal strengths and weaknesses of [individual] class members’ claims misconstrues the requirements of Rule 23.”). Settlement approval under Rule 23(e) is left to the “sound discretion of the trial judge because he is exposed to the litigants, and their strategies, positions, and proof.” *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998) (“*Hanlon*”) (citation omitted). The Ninth Circuit will affirm approval of a class settlement “if the district court judge applies the proper legal standard and his findings of fact are not clearly erroneous.” *Mego*, 213 F.3d at 458.

As a practical matter [the Ninth Circuit] rarely overturn[s] an approval of a class action consent decree on appellate review for substantive reasons[, such as the planned distribution of any relief,] unless the terms of the agreement contain convincing indications that the incentives favoring pursuit of self-interest rather than the class’s interests in fact influenced the outcome of the negotiations and that the district court was wrong in concluding otherwise.

Staton v. Boeing Co., 327 F.3d 938, 960 (9th Cir. 2003) (“*Staton*”). The inquiry is not, therefore, “whether the final product could be prettier, smarter or snazzier, but

whether it is fair, adequate and free from collusion.” *Hanlon*, 150 F.3d at 1027.

Statutes and Rules

Yang has identified the statutes and rules relevant to the issues on appeal; Plaintiffs concur with her statement.

Statement of the Case

A. Plaintiffs Recover Substantial Monetary Relief in Vigorously Contested Litigation

This case was filed in 2007. Dkt. 1. Plaintiffs' complaint alleged that, beginning in 2000, at least thirteen airlines participated in a long-running conspiracy to fix the price of international air passenger travel and fuel surcharges. Dkt. 200 ¶¶ 2, 4-5. Through airline alliances, *id.* ¶¶ 54-66, and trade associations, *id.* ¶¶ 67-78, the Defendants raised their fares and fuel surcharges in lock-step pursuant to a collusive and anticompetitive scheme, *e.g.*, *id.* ¶¶ 79-81, 106-08, 111-74, 181-89, 192-204. Plaintiffs' complaint alleged just one cause of action, an illegal price-fixing conspiracy in violation of Section 1 of the Sherman Act (15 U.S.C. §1), redressable under Sections 4 and 16 of the Clayton Act (15 U.S.C. §§1, 26). *Id.* ¶¶ 315-21.²

The action has been, and continues to be, vigorously contested. *See, e.g.*, ER 50-51, 53-54. Plaintiffs prevailed, in substantial part, against numerous motions to dismiss. ER 244-290. They oversaw sprawling discovery, including 65 depositions (some of which were taken abroad), and the review of over seven million documents (many in foreign languages). ER 50-51, 53-54. Plaintiffs also prevailed, in substantial part, against multiple summary judgment motions predicated on the

² "Dkt." refers to the district court docket. "ER" refers to the appellant's Excerpts of Record. "SER" refers to appellees' Supplemental Excerpts of Record.

filed-rate doctrine. Dkt. 944, 945. As the Honorable Charles R. Breyer observed:

The fact is, as counsel has represented to the Court, this case was heavily litigated. It involved complicated issues. It went on for a long period of time. It involved certain risks of litigation that the plaintiffs were able to incur; that is, they took these chances.

ER 54.

Plaintiffs have thus far settled their price-fixing claims against eight of the thirteen defendants in this case, resulting in an aggregate recovery of \$39.5 million. SER 9. Only five settlements are the subject of this appeal as the appellant has conceded that she lacks standing with respect to the remaining three . Dkt. 1001; CCAF Opening Br. at 11.

The terms of the settlements are substantially uniform, save for Plaintiffs' settlement with Japanese Airlines ("JAL"). The JAL settlement, which was reached before the district court ruled on defendants' Foreign Trade Antitrust Improvement Act, 15 U.S.C. § 6a ("FTAIA") motions, included a release of claims for both domestic and foreign-originating transpacific air travel. ER 35, 64-66. Subsequently, the district court dismissed damages claims against the non-settling defendants arising from foreign-originating travel under the FTAIA, leaving only domestic-originating transpacific travel as a source of antitrust injury. ER 248-55.

In light of the district court's ruling, the classes in the subsequent settlements only released claims arising from domestic-originating transpacific air travel. ER 89-92, 114-17, 138-41, 163-66. Consequently, those settlement agreement's terms

do not bar damages claims arising from foreign-originating transpacific air travel against the settling defendants (except JAL) in foreign jurisdictions like Japan. *E.g., In re Cathode Ray Tube (CRT) Antitrust Litig.*, MDL No. 1917, 2014 WL 1047207, at *4 (N.D. Cal. Mar. 13, 2014) (finding Japan an adequate alternative forum to resolve antitrust claims); Simon Vande Walle, *Private Enforcement of Antitrust Law in Japan: An Empirical Analysis*, THE COMPETITION LAW REVIEW, Vol. 8, Issue 1 (Dec. 2011) (discussing the availability and growing use of private antitrust remedies in Japan).

Because JAL settlement class members gave up valuable releases for foreign-originating travel claims (including appeal rights of the district court's decision), JAL settlement class members are set to be compensated *pro rata* for both domestic and foreign-originating travel claims. Dkt. 948 at 9; Dkt. 968; ER 64-66. The remaining settlements classes are also scheduled to be compensated *pro rata*, but only for domestic-originating travel claims. *Id.*; *see also* ER 89-92, 114-17, 138-41, 163-66.

Although the Center for Class Action Fairness (“CCAF”) asserts that those with foreign-originating travel claims are being compensated the same as those with domestic-originating travel claims, CCAF Opening Br. at 6, that assertion reflects a fundamental misunderstanding of how the settlements function overall. Foreign-originating travel claims are only compensated in the \$10 million JAL

settlement. ER 64-66. Because only JAL settlement funds may be distributed to those with foreign-originating travel claims, such claims, while compensated *pro rata*, are compensated from a substantially smaller pool of funds than that available to class members with domestic-originating travel claims. In other words, those with domestic-originating travel claims will be compensated significantly more on a per claim basis than those with foreign-originating travel claims.

B. Both Current and Potential Future Class Members Receive Notice

Though CCAF suggests that class notice in this case was “questionable,” CCAF Opening Br. at 41, it ignores the breadth and scope of the notice program—the propriety of which it does not actually challenge on appeal.

Notice of all settlements was disseminated through a comprehensive publication program. It included paid media in the United States and 14 other countries. Dkt. 948-4 ¶ 17. It was designed to reach large categories of potential class members, including, *inter alia*, international “business travelers.” *Id.* ¶ 38. *See generally id.*; *see also id.* at Ex. 1, 11 (targeting frequent “leisure travelers,” those with “family” abroad, and frequent “business travelers”); *id.* at 17 (more target audience demographics). It included advertising in *National Geographic*, *People*, and *Time*, among numerous other publications. *Id.* It successfully reached “80.3% of the potential class members in the United States an average of 2.6 times and ‘at least 70%’ of the Settlement Classes living in Japan.” ER 36. The

publication program was thus designed to target current class members as equally as those likely to become class members in the near future, such as frequent business travelers or those with family abroad.

C. The Settlements Receive a Lone, Unsuccessful Objection

Unable to find a class member who actually objected to the settlement, Ted Frank (“Frank”)—a well-known class action opponent and head of the CCAF³—

³ CCAF’s objections have often been criticized, *inter alia*, for being “long on ideology and short on law.” *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 785 (N.D. Ohio 2010) (overruling CCAF objection as “there [was] substantial case law indicating that [CCAF’s requested relief] is neither necessary nor appropriate”); *City of Livonia Employees’ Ret. Sys. v. Wyeth*, No. 07 CIV. 10329 RJS, 2013 WL 4399015, at *5 (S.D.N.Y. Aug. 7, 2013) (Frank’s client’s “objection on this count does not seem grounded in the facts of this case, but in her and her attorney’s objection to class actions generally”); *In re Online DVD-Rental Antitrust Litig.*, 779 F.3d 934, 953 (9th Cir. 2015) (“Online DVD”) (rejecting CCAF objections); *Blessing v. Sirius XM Radio Inc.*, 507 F. App’x 1, 5 (2d Cir. 2012) (CCAF’s objections “are without merit”); *Jackson v. Wells Fargo Bank, N.A.*, No. 2:12CV1262, 2015 WL 5732090, at *16 & n. 16 (W.D. Pa. Sept. 30, 2015) (rejecting “wide of the mark” CCAF objection unsupported by “any controlling authority”); *Dennis v. Kellogg Co.*, No. 09-CV-1786-L WMC, 2013 WL 6055326, at *5 (S.D. Cal. Nov. 14, 2013) (overruling CCAF’s objections and denying CCAF’s “unwarranted” fee request); *In re Citigroup Inc. Sec. Litig.*, 965 F. Supp. 2d 369, 394-95 (S.D.N.Y. 2013) (“Neither [of Frank’s] argument[s] prevail[.]”); *Trombley v. Nat’l City Bank*, 826 F. Supp. 2d 179, 206 (D.D.C. 2011) (rejecting CCAF’s objections).

See also, Maxwell S. Kennerly, *Ted Frank and the Real Risk of Class Actions*, LITIGATION & TRIAL (June 23, 2015), www.litigationandtrial.com/2015/06/articles/attorney/contingent-fee/ted-frank (observing that the “bulk” of Frank’s objections “focused on reducing the attorney’s fees claimed by the class counsel” rather than concerns with the proposed settlement agreements’ terms); Joe Patrice, *Non-Sequiturs: 11.05.14*, ABOVE THE LAW (Nov. 5, 2014), <http://abovethelaw.com/2014/11/non-sequiturs-11-05-14> (“CCAF is hiring. Good pay, flexible hours. Sounds like a great gig if you hate plaintiffs’ firms.”).

recruited Yang, the wife of CCAF lawyer Adam Schulman, to serve as a conduit for CCAF's own objections. SER 28 (Yang did not even read the settlement agreements she objected to); SER 29 ("A. So I don't know what I'm objecting to."). Like many before, Judge Breyer found CCAF's objections unpersuasive.

In a carefully considered final approval order, Judge Breyer observed that the presence of one, lone objector out of a class of hundreds of thousands itself "suggest[ed] that the settlements are fair." ER 34 (citation omitted). He then considered and rejected each of CCAF's objections on the merits. ER 34-37.

As to the objections raised on appeal—CCAF's (a) identification of speculative conflicts, the validity of which were (at least at the time of settlement) contingent on future events and (b) the purportedly "unbounded" class definition—Judge Breyer correctly overruled them, relying on this Court's precedents:

Yang states that the settlements inappropriately treat all class members the same despite differences in the value of their claims. Specifically, Yang believes that purchasers of US-originating flights and foreign-originating flights should be treated differently, and that direct and indirect purchasers should be treated differently. . . .

Ultimately the Court does not believe that its role is to "differentiat[e] within a class based on the strength or weakness of the theories of recovery." *See Sullivan v. DB Investments, Inc.*, 667 F.3d 273, 328 (3d Cir. 2011). The Ninth Circuit explained in *Lane v. Facebook* that while some class members' claims might have been more valuable than others at trial, "that does not cast doubt on the district court's conclusion as to the fairness and adequacy of the overall settlement amount to the class as a whole." 696 F.3d 811, 824 (9th Cir. 2012) (emphasis in original). The court explained that class actions "necessarily reflect[] the parties' pre-trial assessment as to the

potential recovery of the entire class, with all of its class members' varying claims." *Id.* So too here, while there might be differences in the values of individual class members' claims at trial (or following appeal), the Court finds that the settlement as a whole is substantial, and fair. The Court therefore rejects Yang's argument that there is a conflict between the class members necessitating either a different valuation of claims or subclasses.

ER 34-35 (docket citations omitted).

As for the class definition, Judge Breyer noted that CCAF "is incorrect" that the class lacks temporal boundaries, as "the end date is defined in the settlement agreements and in the notice." ER 37. All current **and** potential future class members received that notice in advance of the Rule 23(c)(2)(B), 23(e)(1), and 23(e)(5) deadlines, which is "adequate." ER 37.⁴

⁴ CCAF did block a tardy request for an award of some costs inadvertently omitted from class counsel's initial fee and cost reimbursement application. Dkt. 1062 at 3. Judge Breyer found nothing improper about the substance of the request itself, simply its timing. Judge Breyer awarded CCAF some fees in connection with this particular reduction; but as it has done before, CCAF overstates the significance of its role below. *Compare* CCAF Opening Br. at 14 (suggesting that CCAF was responsible for reducing class counsel's Rule 23(h) request by \$5.1 million) *with* Dkt. 1062 at 2 n.1 ("[t]he Court did not rely on Yang's argument" for a reduction in the attorneys' fees request, but rather applied its longstanding view that fees should be awarded out of the net, not gross, settlement fund); *cf., e.g., Fraley v. Facebook, Inc.*, No. C 11-1726 RS, 2014 WL 806072, at *1 (N.D. Cal. Feb. 27, 2014) (rejecting CCAF's characterization of its contribution: "the arguments [CCAF's client] presented did not materially contribute to the [court's] analysis"); *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 842 F. Supp. 2d 346, 351 (D. Me. 2012) ("the significance of [Frank's] efforts is sharply reduced" given the court had previously "signaled [its] concern with" the settlements "several times").

Summary of the Argument

CCAF seeks to unwind the labors of the parties and the district court on the basis that some class members *might* face varied defenses that, if resolved on the merits against them, *could* create intra-class conflicts defeating adequacy under Rule 23(a)(4). CCAF also contends that a class definition that encompasses some future class members is impermissible even where potential future members receive notice. Each objections fails in multiple material respects.

First, CCAF's manufactured conflicts are speculative. At the time of entering into the settlements, the asserted defenses were (or still are) contingent on future events. It has never been a requirement for certification of a settlement class that class members state viable claims of exactly the same litigation value. Only presently manifest, objective, and concrete conflicts, not at issue here, warrant the relief requested by CCAF.

Second, even if it were proper to consider CCAF's purported conflicts, they are illusory. CCAF's FTAIA conflict, which applies only to the JAL settlement, ignores that those settlement class members gave up valuable releases of their rights to appeal the FTAIA dismissal as well as their rights to sue in foreign nations such as Japan. These valuable releases merit compensation. It is not for this Court to substitute its judgment for that of the district court or the parties as to the litigation values of these releases.

CCAF's purported indirect purchaser conflict is similarly flawed. Even if it were appropriate to impute the indirect purchaser rule into the settlement agreements—which are contractual arrangements guided by contract principles, not claims litigated on the merits in a court of law—this Court has held that where title first passes to the consumer and not to an intermediary, as is the case in the air travel context, the consumers are properly considered direct purchasers. CCAF has not identified one instance, here or below, where an intermediary travel agent first takes title to the ticket in its own name and then transfers its title to a consumer such that the consumer is an “indirect” purchaser.

Third, CCAF takes issue with the class definition, which provides for the inclusion of some “future” class members. However, there is nothing unusual or objectionable about the inclusion of future class members provided those potential class members receive notice. Here, the comprehensive publication notice program sufficiently reached current and potential future class members, sufficient for them to evaluate their potential rights under the settlement in advance of the relevant Rule 23 deadlines. And in any event, because this is an injury suffered, in CCAF's own words, by “late purchasing” class members, CCAF Opening Br. at 41, it is not a redressable injury as to Yang—who is not a late purchasing class member, received notice, decided to stay in the class, and timely lodged an objection—and thus she lacks Article III standing to raise this objection.

The district court's order finally approving the settlements should be affirmed.

Argument

I. The District Court Correctly Concluded that CCAF's Rule 23(a)(4) Arguments Lack Merit

A. There is No Heightened Standard Applicable to the Particular Objections CCAF Raises

CCAF suggests that this Court's precedents require strict scrutiny of the class settlements above and beyond the eight-factor *Churchill Village* test, CCAF Opening Br. at 19, but CCAF fails to discuss, let alone substantiate the presence of, any of the indicia of collusion necessary to trigger such scrutiny.

This Court has held that heightened scrutiny is appropriate when one or more of the following three factors are present: (1) "when counsel receive a disproportionate distribution of the settlement, or when the class receives no monetary distribution but class counsel are amply rewarded"; (2) "when the parties negotiate a 'clear sailing' arrangement providing for the payment of attorneys' fees separate and apart from class funds"; and (3) when the parties arrange for fees not awarded to revert to defendants rather than be added to the class fund. *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947 (9th Cir. 2011) ("*Bluetooth*") (citations omitted). None of these factors are present.

In an attempt to manufacture an indicia of collusion, CCAF posits that class counsel have compromised the interests of the class to avoid splitting the court awarded fees with separate class counsel. CCAF Opening Br. at 18. This is not a relevant factor under *Bluetooth*, 654 F.3d at 947. But even if it were, CCAF's undivided fee argument is unmeritorious. If CCAF is correct that the "uncertified subclasses" have no valid claims at all, then the only recovery that would be had would be by the direct purchaser class that lead counsel (settlement class counsel here) has been appointed to represent—none of the settlement funds recovered to date, and thus none of the fees, would be split with any indirect purchaser class or separate class counsel. If Plaintiffs are correct that all settlement class members are direct purchasers who gave up valuable releases, then the status quo would remain undisturbed. Either result leads to the **same** fee award; there is thus no disproportionate distribution of settlement funds, no inappropriate conflict of interest or collusive behavior, and no heightened standard of review.

B. Only Concrete, Objective, and Presently Manifest Conflicts Defeat a Finding of Adequacy Under Rule 23(a)(4)

CCAF's brief is replete with half-truths and distortions regarding the Supreme Court's holdings in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) ("*Ortiz*") and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) ("*Amchem*"). Those cases concerned sprawling classes spanning decades-long class periods, with truly limitless temporal boundaries for future claimants, and a varied host of

present and future substantive claims. CCAF quotes this passage from *Ortiz*: “[i]t is obvious after *Amchem* that a class divided . . . requires division into homogeneous subclasses . . . , with separate representation to eliminate conflicting interests of counsel.” CCAF Opening Br. at 18-19 (quoting *Ortiz*, 527 U.S. at 856). It disingenuously utilizes a strategic ellipsis to omit important language. The full text of the relevant passage is as follows:

First, it is obvious after *Amchem* that a class divided **between holders of present and future claims (some of the latter involving no physical injury and attributable to claimants not yet born)** requires division into homogeneous subclasses under Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel.

Ortiz, 527 U.S. at 856 (emphasis added) (citing *Amchem* 521 U.S. at 626-27).⁵

In *Ortiz* class counsel had “negotiated the separate settlement of 45,000 pending claims, the full payment of which was contingent on a successful global settlement” of the class claims. 527 U.S. at 819. And because of a lack of insurance coverage for claims arising after 1959, pre-1959 claimants had objectively more

⁵ *Ortiz* was a “limited fund” class settlement under Rule 23(b)(1)(B). 527 U.S. at 815. “A proposed settlement of a mandatory ‘limited fund’ class under Rule 23(b)(1)(B) must meet *the exacting standards* articulated by the Supreme Court in *Ortiz v. Fibreboard Corp.* Because limited-fund classes do not permit out-outs, certification for settlement imposes “*particularly stringent standards.*” MANUEL FOR COMPLEX LITIGATION § 21.132 (4th ed.) (emphasis added). Though there are no cognizable conflicts here under any standard of review, the present case is **not** a limited fund class settlement and it is not subject to the “exacting” standards applicable to limited fund cases.

valuable claims than post-1959 claimants as there were insufficient funds to satisfy the uninsured claims. *Id.* These were manifest, concrete, and objective conflicts, rendered all the more troubling because the mandatory class precluded member opt outs. *Id.* at 823.⁶ *Ortiz* simply does not stand for CCAF’s broad proposition that any theorized division among proposed class members, regardless of how concrete or speculative it may be, requires subclasses and appointment of separate counsel.

To the contrary, this Court has consistently held that the law does “not ‘favor denial of class certification on the basis of speculative conflicts.’” *Online DVD*, 779 F.3d at 953 (citation omitted). “Only conflicts that are fundamental to the suit and that go to the heart of the litigation prevent a plaintiff from meeting the Rule 23(a)(4) adequacy requirement.” *Id.* (quoting William B. Rubenstein, et al., *NEWBERG ON CLASS ACTIONS* § 3.58 (5th ed. 2011)). This is particularly true on appeal, where the district court’s decision is reviewed for an abuse of discretion and the appellate court has “no business ‘substitut[ing] [its] notions of fairness for those of the district judge.’” *Bluetooth*, 654 F.3d at 950 (alteration in original, citation omitted); accord *Allen v. Bedolla*, 787 F.3d 1218, 1225 (9th Cir. 2015) (“*Allen*”) (same). As a leading class action treatise explains:

⁶ *Amchem*’s holding is similarly limited. *Amchem* also involved a single sprawling class for both present injuries and exposure-only claimants; but exposure-only plaintiffs, whose injuries may not manifest for decades, had a concrete, presently manifest interest in “ensuring an ample, inflation-protected fund” for injuries that might not manifest until far into the future. 521 U.S. at 827.

Like a lawyer in any litigation, a class action attorney may not simultaneously represent two clients if those clients' interests are directly adverse or if there is significant risk that the dual representation will materially limit the lawyer's representation of one client. Such attorney conflicts, like those of the class representative, are material to the question of whether the proposed class counsel can adequately represent the class: but as with class representatives, only client conflicts that are material and presently manifest—**rather than** merely trivial, **speculative, or contingent on the occurrence of a future event**—will affect the adequacy of class counsel. . . . In general, class counsel may represent multiple sets of litigants—whether in the same action or in a related proceeding—so long as the litigants' interests are not inherently opposed.

Rubenstein, NEWBERG ON CLASS ACTIONS § 3.75 (emphasis added); *see also* *Sandoval v. Ali*, 34 F. Supp. 3d 1031, 1046-47 (N.D. Cal. 2014) (“*Ali*”).

CCAF raises only two grounds substantiating its claim of inadequacy: with respect to the JAL settlement class only, an argument that the FTAIA precludes foreign-originating travel from being compensated at the same rate as domestic-originating travel; and, the purported presence of indirect purchasers in the class that, in CCAF's view, have no claim. These arguments fail because at the time the respective settlements were agreed to, the asserted conflicts were based on yet unproven defenses. *See* Rubenstein, NEWBERG ON CLASS ACTIONS, § 3.75 (speculative conflicts that do not defeat Rule 23(a)(3) adequacy are those that are “contingent on the outcome of a future event”); *see also Ali*, 34 F. Supp. 3d at 1046-47.

In the class settlement context, these considerations are inappropriate. To hold otherwise would permit defendants (and objectors) to defeat class certification on the basis of speculative, hypothesized individual defenses that either have no merit or may never materialize. That is not the law. *See Sullivan*, 667 F.3d at 315, 327-28 (finding “no support” for differentiating within a class based on the strength or weakness of the theories of recovery, rather, what matters is that “regardless of the [claim] and the time period . . . all of the class members shared a unified interest in establishing the . . . Defendants’ liability for engaging in anticompetitive conduct”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 955 (9th Cir. 2009) (federal courts are “not obligated” to weigh potential recovery at trial with the amount of settlement proceeds, particularly where settlement recovery is “substantial”); *Gascho v. Glob. Fitness Holdings, Inc.*, 2:11-CV-436, 2014 WL 1350509, at *21-22 (S.D. Ohio Apr. 4, 2014), *report and recommendation adopted*, 2014 WL 3543819 (S.D. Ohio, July 16, 2014), *appeal pending*, No. 14-3798 (6th Cir.) (“*Gascho*”) (overruling CCAF’s client’s objections that class action settlement (a) must “account for differences in class members’ claims and damages” or (b) that “it is unfair to combine the differing claims in the same subclass and to be settled for the same amount,” because Rule 23(a)(4) is satisfied where both groups of claimants alleged “a common injury, *i.e.*, [that] each was improperly charged, pursuant to a common policy or practice of defendant”).

Sullivan is particularly instructive. There, the Third Circuit, sitting *en banc*, reversed a district court's rejection of a nationwide indirect purchaser class settlement, even though it is indisputable that many states do not provide *Illinois Brick* repealer statutes providing for such a recovery. *Sullivan*, 667 F.3d at 285-86, 289, 291. The Court in *Sullivan* rejected the objectors' contention that all class members must assert uniform and legally cognizable claims. *Id.* at 295.⁷

Rule 23(b)(3) does not, as urged by the objectors and the dissent, require individual class members to individually state a valid claim for relief. . . . [Nor have we ever] required the presence of identical or uniform issues or claims as a prerequisite to certification of a class. . . . The correct outcome is even clearer for certification of a settlement class because the concern for manageability that is a central tenet of a litigation class is removed from the equation[,] . . . [s]ince a settlement would eliminate the principal burden of establishing the elements of liability under disparate laws. . . . To adopt the position of the dissent and the objectors is to introduce a Rule 12(b)(6) inquiry as to every claim in the class before a class may be certified. But Rule 23 makes clear that a district court has limited authority to examine the merits when conducting the certification inquiry. . . . [T]he Rule 23 inquiry does not, and should not, involve a Rule 12(b)(6) inquiry.

Id. at 297, 301-03, 305, 308; *see also Hassine v. Jeffes*, 846 F.2d 169, 178 (3d Cir. 1988) (“*Hassine*”) (“The ability of a named plaintiff to succeed on his or her individual claims has never been a prerequisite to certification of the class.”);

⁷ *Accord In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 522-25, 529-31 (3d Cir. 2004) (approving certification of unitary class settlement despite inconsistencies in state antitrust and consumer protection laws and eligibility for punitive or treble damages).

Allen, 787 F.3d at 1223 (citing *Sullivan* with approval).

This Court reached a similar conclusion in *Lane*:

Both the district court and this court must evaluate the fairness of a settlement as a whole, rather than assessing its individual components. As our precedents have made clear, the question whether a settlement is fundamentally fair within the meaning of Rule 23(e) is different from the question whether the settlement is perfect in the estimation of the reviewing court. . . .

As an initial matter, we reject Objectors’ argument insofar as it stands for the proposition that the district court was required to find a specific monetary value corresponding to each of the plaintiff class’s [] claims and compare the value of those claims to the proffered settlement award Not only would such a requirement be onerous, it would often be impossible—statutory or liquidated damages aside, the amount of damages a given plaintiff (or class of plaintiffs) has suffered is a question of fact that must be proved at trial . . . **thus making any prediction about that recovery speculative and contingent**. . . .

The district court acted properly in evaluating the strength of the plaintiffs’ *case* in its entirety rather than on a claim-by-claim basis. . . .

696 F.3d at 818-19, 823-24 (citations omitted, emphasis added); *see also Jenkins v. Pech*, No. 8:14CV41, 2015 WL 6738624, at *2 (D. Neb. Nov. 4, 2015) (“*Jenkins*”) (“The court’s role in reviewing a negotiated class settlement is to ensure that the agreement is not the product of fraud or collusion and that, ***taken as a whole***, it is fair, adequate, and reasonable to all concerned.” (emphasis added)).

CCAF’s attempts to distinguish *Lane* and *Sullivan* on the (incorrect) basis that they were decided in the context of Rule 23(b)(3), not Rule 23(a)(4). CCAF

Opening Br. at 34. Both cases, however, considered the objections not only in the context of Rule 23(b)(3), but also in the context of the overall fairness and adequacy of the settlement under Rule 23(e), which was amended in 2003 specifically to “strengthen the process of reviewing proposed class action settlements” to “assure adequate representation of class members who have not participated in shaping the settlement.” Fed. R. Civ. P. 23(e) advisory committee’s notes (2003); *see also Lane*, 696 F.3d at 816, 818 (“The question presented is whether the district court abused its discretion in approving the parties’ \$9.5 million settlement agreement as ‘fair, reasonable, and adequate’ under Rule 23(e).”); *Sullivan*, 667 F.3d at 319 (objectors also “quarrel[ed] with the District Court’s approval of the settlement as a whole under Federal Rule of Civil Procedure 23(e)’s requirement that the settlement be ‘fair, reasonable, and adequate’” because of purported “intra-class conflict of interest” rendering class counsel and representatives inadequate).⁸

At its core, the reviewing court’s function is to interpret a private contract between the parties, not wrestle with the likely outcomes of settled claims on the merits. *Sullivan*, 667 F.3d at 312-13 (“It is well established that ‘settlement

⁸ *Hesse v. Sprint Corp.*, 598 F.3d 581, 589 (9th Cir. 2010), cited by CCAF, is not to the contrary. There, the named representative attempted to represent a class bringing claims under Washington’s “B & O Tax Surcharge” laws, but the named plaintiff “never paid the Washington B & O Tax Surcharge.” *Id.* Here, all class members bought qualifying air travel affected by the conspiratorial conduct.

agreements are creatures of private contract law.’” (quotation omitted)); *Jenkins*, 2015 WL 6738624, at *2 (“The court’s ‘guiding principle’ is that ‘a class action settlement is a private contract negotiated between the parties.’” (citations omitted)); accord *In re Int’l Air Transp. Surcharge Antitrust Litig.*, 577 F. App’x 711, 715 (9th Cir. 2014) (“*Air Transp. Surcharge*”); *Jeff D. v. Andrus*, 899 F.2d 753, 759 (9th Cir. 1989) (“*Andrus*”). The challenged settlements provide contractual releases of alleged claims for valuable consideration, and the district court did not abuse its discretion by concluding that CCAF’s speculative and contingent conflicts were insufficient to compel unequal treatment of those releases. And even if this Court might have come to a different conclusion if presented with the issue initially, as a court sitting in review, it is not this Court’s function to substitute its own judgment for that of the district court or the parties. *Bluetooth*, 654 F.3d at 950; *Allen*, 787 F.3d at 1225.

What CCAF is truly asking this Court to do is rewrite Rule 23 to incorporate Rule 12(b)(6) or Rule 56 requirements; something this Court has consistently and correctly declined to do. See *Lane*, 696 F.3d at 818-19, 823-24; cf. *Sullivan*, 667 F.3d at 297, 301-03, 305, 308.

C. Even if it Were Appropriate to Value Settled Claims By Weighting Yet-Unresolved Defenses, the Conflicts CCAF Highlights Are Either Meritless or Illusory

In spite of the authorities *supra*, all of which were fully briefed below,

CCAF maintains that its two conflicts mandate division of the settlement classes and unequal treatment of the JAL settlement class members. CCAF Opening Br. at 35-36. Though this Court need not even reach CCAF's contentions because they are speculative conflicts, each contention also fails in its own right.

As to CCAF's FTAIA conflict, CCAF makes much of the fact that after the settlement was reached, the district court dismissed foreign-originating travel claims. CCAF Opening Br. at 20-23. But "the Court's analysis of the fairness of the settlement considers what was known to the settling parties at the time the agreement was reached." *Trombley*, 826 F. Supp. 2d at 203 (rejecting CCAF objection and observing that "settlement fairness analysis must consider the risks at the time the settlement was reached, not the risks or absence of risks that arose after the settlement" (citation omitted)).

Litigants are not required to see into the future to determine the appropriateness of claim releases and the consideration received in return. As a consequence, the FTAIA conflict is evaluated as of the date the parties agreed to settle. *Cf. Lane*, 696 F.3d at 824 ("[A] class-action settlement necessarily reflects the parties' pre-trial assessment as to the potential recovery of the entire class, with all of its class members' varying claims."); *Sullivan*, 667 F.3d at 303-04 ("we are not as concerned with formulating some predication as to how [variances in claims] would play out at trial, for the proposal is that there be no trial" (alteration

in original, citations omitted)); *see also* Rubenstein, NEWBERG ON CLASS ACTIONS § 3.75; *Ali*, 34 F. Supp. 3d at 1046-47; *Gascho*, 2014 WL 1350509, at *21-22 (Rule 23(a)(4) is satisfied where both groups of claimants alleged “a common injury, i.e., [that] each was improperly charged, pursuant to a common policy or practice of defendant”).

More importantly though, the conflict is built on the fallacy that class members releasing foreign injury claims gave up valueless releases; they did not. Foreign injury claimants gave up valuable releases in at least two material and significant respects: forfeiture of their rights to appeal the FTAIA dismissal,⁹ and

⁹ CCAF contends that these appellate releases are valueless. CCAF Opening Br. at 20-23. While, as discussed above, the Court need not weigh the relative validity of the JAL settlement class members’ claims, Plaintiffs note that they presented colorable arguments to the district court on a close question of law: the application of the FTAIA to international air travel. *See In re Transpacific Passenger Air Transp. Antitrust Litig.*, No. C 07-05634-CRB, 2011 WL 1753738, at *5-7 (N.D. Cal. May 9, 2011). The Ninth Circuit has not had occasion to consider the application of the FTAIA through the unique lens of international air travel, and the affirmance of the district court’s order on appeal is not even remotely as foregone a conclusion as CCAF posits. CCAF’s arguments regarding the FTAIA appear to assume that litigants are omniscient and can perfectly predict how district courts and ultimately appellate courts will rule on complex issues such as the FTAIA. This is far from true, particularly in the context of the FTAIA, the application of which has been in flux for a number of years. CCAF’s own brief mistakenly states that the FTAIA concerns a court’s subject matter jurisdiction. *See* CCAF Opening Br. at 20. But as this Court recently made clear in *United States v. Hui Hsiung*, 778 F.3d 738, 751-752 (9th Cir. 2015), the FTAIA is not jurisdictional but constitutes the substantive elements of a plaintiff’s antitrust claim on the merits. This Court’s holding corrected the longstanding but mistaken belief by several districts courts that the FTAIA imposed jurisdictional limitations. This Court’s holding in *Hui Hsiung* also casts doubt on whether the Ninth Circuit would

forfeiture of their rights to sue JAL for foreign-originating travel claims under the antitrust laws of nations like Japan. ER 64-66. Members of the other settlement classes gave up no such releases. ER 89-92, 114-17, 138-41, 163-66. The JAL settlement class members deserve compensation for these releases, which arise from the same antitrust conspiracy, and are rooted in the same overcharge damages, as the domestic-originating travel releases. CCAF has not cited any authority mandating unequal valuation of the domestic and foreign releases, nor proposed a method for doing so that amounts to anything other than its own guesswork. Indeed, a class member might have a valid objection if the JAL settlement released foreign originating travel claims but failed to compensate those class members.

That Yang's counsel is displeased with the result is of no moment. *See Allen*, 787 F.3d at 1223 (“[I]t is the nature of a settlement, as a highly negotiated compromise . . . that ‘[i]t may be unavoidable that some class members will always be happier with a given result than others.’” (quotation omitted)). If Yang truly believed her claim was being diluted, she could after all have excluded herself from the settlement class and preserved her right to sue JAL on her own, as another

actually find that foreign-originating travel is barred by the FTAIA. This is all to say that it is entirely appropriate for parties to settle claims because they cannot perfectly predict how courts (or juries) will resolve highly complex and disputed issues. Indeed, this is the very point of settlement and what drives it.

class member elected to do. SER 9. What she cannot do, however, is rewrite the JAL settlement agreement to conform to her personal preferences. *Jackson*, 2015 WL 5732090, at * 16 (rejecting CCAF objection because “the choice here ‘is not between the settlement that the parties have proposed and [the objector’s] dream settlement but between the proposed settlement and none at all”).

Simply put, CCAF’s displeasure with the JAL settlement is a far cry from the objective and presently manifest conflicts present in *Ortiz* and *Amchem*, and the district court did not abuse its discretion by finding the FTAIA conflict insufficient to compel unequal treatment of JAL settlement class members, division into subclasses, or appointment of separate representatives or counsel.

CCAF’s indirect purchaser conflict fares no better. It is also built on a fallacy: the existence of indirect purchasers within the settlement classes. There are none. What CCAF characterizes as indirect purchasers are those who employed travel agents and similar entities, such as priceline.com, but who first took title to the tickets in their own name. *See, e.g.*, ER 183 (sample form describing agency relationship between International Air Transportation Association travel agents and ticket purchasers).¹⁰ Where the consumer first takes title to the ticket, an agency-

¹⁰ CCAF highlights Priceline.com as a supposed example of an exception to plaintiffs’ agency theory, but it incorrectly assumes that Priceline is a direct buyer of airline tickets for its own account. CCAF Opening Br. at 24. In reality, Priceline.com is a ticketing agent like any other travel agent, not a buyer of airline

principal relationship is formed and the consumer, not the agent, is properly considered the direct purchaser. *E.g.*, *Burkhalter Travel Agency v. MacFarms Int'l, Inc.*, 141 F.R.D. 144, 149-50 (N.D. Cal. 1991) (travel agent not a direct purchaser under *Illinois Brick* given “agency-principal relationship”). This Court recently upheld a similar conclusion, finding that:

Airlines give up the property—here, the coupon for the long-haul flight—to the passenger, not the [travel agent]. The property is transferred to the passenger at the time of booking, and it is this action that prompts the obligation to remit payment. [The agent] facilitates this exchange between the Airlines and its customers, but it is not the party to whom the ticket is sold.

Air Transp. Surcharge, 577 F. App'x at 715-16. Besides speculation, CCAF has not identified any instance where a ticket is first issued in the name of the agent, and then title is subsequently transferred from the agent to the consumer such that the consumer can properly be considered an “indirect” purchaser.

CCAF counters that *Air Transp. Surcharge* is inapposite because it involved contract and class definition interpretation, and no analysis of the strengths and

tickets in its own name. *See* Priceline, 2014 Annual Report (Form 10-K), at 1 (Feb. 19, 2015) (accessible at: <http://files.shareholder.com/downloads/PCLN/1286578044x0xS1075531-15-7/1075531/filing.pdf>) (Priceline.com facilitates the sale of airline tickets to consumers through its “online travel agent (OTA) services” by “connect[ing] consumers wishing to make travel reservations with providers of travel services”).

weaknesses of the class members’ respective claims. ***But that is precisely the point.*** The reviewing court’s job is to interpret a contract—the settlement agreements and their releases. *Sullivan*, 667 F.3d at 312-13; *Air Transp. Surcharge*, 577 F. App’x at 715; *Andrus*, 899 F.2d at 759; *Jenkins*, 2015 WL 6738624, at *2. A reviewing court’s job is not to engage in speculative weighing of the litigation values of alleged variances in class members’ claims’. Thus the district court did not abuse its discretion when it declined to “incorporate the indirect purchaser rule” into the settlement agreements. *Air Transp. Surcharge*, 577 F. App’x at 716 (whether “the customers were ‘indirect purchasers’” is an “issue [the reviewing court] need not decide”).

II. Yang Lacks Standing to Raise CCAF’s Rules 23(c)(2)(B), 23(e)(1), and 23(e)(5) Concerns, and in Any Event, They Are Unfounded

Lastly, CCAF posits that, by virtue of being tethered to the exhaustion of appellate rights, the boundaries of the class definition run afoul of Rule 23’s notice, opt-out, and objection requirements as to certain, late-purchasing class members. Though CCAF’s position lacks merit, as to Yang, this Court lacks jurisdiction to even entertain the complaint.

“To establish Article III standing on appeal, ‘an appellant must establish that she has suffered an injury, caused by the appellee, that is redressable.’” *Glasser*, 645 F.3d at 1088 (quotation omitted). “In the class action context, simply being a member of the class does not automatically confer standing to challenge” a

component of a settlement—“the objecting class member must be ‘aggrieved’ by the” component. *Id.*; see also *Friends of the Earth, Inc. v. Laidlaw Env'tl. Servs. (TOC), Inc.*, 528 U.S. 167, 185 (2000) (one “must demonstrate standing separately for each form of relief sought”).

CCAF’s complaint, that “[t]hose who purchase qualifying air travel after the completion of the notice program will be deprived of their rightful notice,” while wrong on the law, simply does not apply to Yang; she purchased before the notice program was instituted, and opted to remain in and object to the settlements. CCAF Opening Br. at 43; see also *id.* at 16 (arguing that “late-purchasing class members”—not Yang herself—will be deprived of “Rule 23 rights to notice”).

In *Laguna v. Coverall N. Am., Inc.*, 753 F.3d 918, 926 (9th Cir. 2014), *vacated after settlement*, 772 F.3d 608 (9th Cir. 2014), this Court considered a similar objection in which CCAF served as *amicus curiae*. There, the objector claimed that the settlement violated the Class Action Fairness Act’s notice requirements. *Id.* But “[r]ather than asking to be exempt from the settlement agreement” because of the allegedly improper notice, the objector urged “rejection of the entire settlement agreement.” *Id.* Because the requested relief would not remedy the objector’s alleged harm (as he had received notice), the objector could not “‘show that a favorable decision w[ould] provide redress,’ and thus lack[ed] standing on th[e] claim.” *Id.* (quotation omitted). The same is true of Yang.

Recognizing this fatal deficiency, CCAF asserts—without citing any authority—that “class members like Ms. Yang [do not] escape unharmed from this overbroad class definition” because as future class members join the class, it dilutes their “*pro rata* share” of the settlement funds. CCAF Opening Br. at 43. This argument ignores that “[t]he inclusion of future class members in a class is not itself unusual or objectionable.” *Rodriguez v. Hayes*, 591 F.3d 1105, 1118 (9th Cir. 2010) (“*Rodriguez*”). CCAF’s claimed “dilution” is nothing more than the payment of claims submitted by members of an objectively defined class. CCAF cannot back-door the standing inquiry by coupling a meritless dilution objection with a notice objection for which Yang lacks standing.¹¹

Article III notwithstanding, CCAF’s concerns with the ostensibly “unbounded” class period lack merit. The class period is not unbounded, but was expressly defined in the publication notice to conclude upon final approval of the settlements and resolution of any appeals. ER 36-37. When these criteria are met, Plaintiffs will post the exact effective date on the settlement website. *Id.* CCAF’s true concern is that a *de minimis* portion of the settlement classes will suffer future

¹¹ Although Plaintiffs did not make this argument below, it is properly considered both because this Court has “an ongoing obligation to be sure that jurisdiction exists,” *Matheson v. Progressive Specialty Ins. Co.*, 319 F.3d 1089, 1090 (9th Cir. 2003), and independently because it is a question of law and does not depend on development of the record, *e.g.*, *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir. 2012) (citation omitted); *Hesse*, 598 F.3d at 590.

injury (in large part because CCAF’s appeal has delayed final resolution). But there is nothing wrong with the inclusion of future injury class members. *E.g.*, *Rodriguez*, 591 F.3d at 1118; *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 603 (3d Cir. 2009) (“nothing in [our class action jurisprudence] should be read to preclude an open-ended class period”); *George v. Uponor Corp.*, No. CIV. 12-249 ADM/JJK, 2015 WL 5255280, at *2 (D. Minn. Sept. 9, 2015) (certifying class for “past and future property damage claims” with same damages metrics applicable to present and future members); *Hooks v. Landmark Indus., Inc.*, No. CIV.A. H-12-173, 2013 WL 3937029, at *7 (S.D. Tex. July 30, 2013) (certifying class with “open-ended” class period where class members can be identified by “objective means”); *Wike v. Vertrue, Inc.*, No. 3:06-cv-0024, 2010 WL 3719524, at *11 (M.D. Tenn. Sept. 15, 2010) (certifying open-ended class period defined to end at “an appropriate end date”).

Here, the publication notice program was directed at broad categories of transpacific air travelers (including leisure travelers, business travelers and foreign nationals); it did not merely reach presently existing class members, but potential future class members as well. *See supra*. The notice program allowed those who might become class members in the future to assess the settlements and, if they anticipated becoming members, object or opt out if they were unsatisfied with the terms. Judge Breyer commended the program’s success in reaching over seven

hundred thousand class members as of the date of final approval, and new claims, including very large corporate claims, continue to be filed every week. ER 48. Notably, CCAF does not challenge the efficacy of the notice program on appeal, which only underscores the casual disconnect between her alleged injury (insufficient notice) and the alleged defect in the class settlements (the boundaries of the class definition). The district court was thus well within its discretion when it found the class definitions and the notice to be “adequate.” ER 34-37.

Conclusion

In sum, the district court applied the correct standard of law and its findings of fact were not clearly erroneous. This Court should not substitute its own business judgment for that of the district court or the parties, and CCAF’s speculative conflicts of interest do not compel or warrant rejection of the settlement; nor was the class definition improperly bounded or notice improvidently provided.

The district court should be affirmed in its totality.

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Respectfully submitted,

/s/ Christopher L. Lebsack

Christopher L. Lebsack

Michael P. Lehmann

HAUSFELD LLP

600 Montgomery Street, Suite 3200

San Francisco, CA 94111

Telephone: (415) 633-1908

Facsimile: (415) 358-4980

clebsock@hausfeld.com
mlehmann@hausfeld.com

Steven N. Williams
Adam J. Zapala
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000
Facsimile: 650-697-0577
swilliams@cpmlegal.com
azapala@cpmlegal.com

Attorneys for Plaintiffs-Appellees

**CERTIFICATE OF COMPLIANCE WITH FEDERAL RULE OF
APPELLATE PROCEDURE 32(A)(7) AND CIRCUIT RULE 32-1**

This brief complies with the type-volume limitation of Fed. R. App. Proc. 32(a)(7)(B) because this brief contains fewer than 9,546 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Executed on January 4, 2016.

/s/ Christopher L. Lebsack

Christopher L. Lebsack
HAUSFELD LLP

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system on January 4, 2016.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 4, 2016.

/s/ Candice P. Elder

Candice P. Elder