IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

RUSSELL DOVER, HENRY HORSEY, CODY RANK, and SUZETTE PERRY, on behalf of themselves and all others similarly situated, Plaintiffs -vs.- BRITISH AIRWAYS, PLC (UK), Defendant.	Case No. 1:12-cv-05567 (RJD) (CLP) Judge: Raymond J. Dearie Magistrate Judge: Cheryl L. Pollak

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY APPROVAL

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I. INTRODUCTION

Plaintiffs respectfully ask this Court to grant preliminary approval of the proposed Settlement Agreement ("Settlement") between Plaintiffs and British Airways Plc ("BA"). *See* Ex. 1. The Settlement fully resolves this hard-fought, long-running litigation and is an excellent outcome for Class Members. It includes up to $42.0 million in cash that compares favorably to what Plaintiffs could have achieved at trial and also makes billions of Avios (BA's frequent flyer points) *automatically* available to current Executive Club Members who prefer them to cash. The vast majority of Class Members, moreover, will receive Avios even if they take no affirmative action at all.

The Settlement satisfies all of the criteria for preliminary approval. Negotiations leading to this Settlement were highly adversarial and at arm's length: the parties ultimately were only able to resolve this dispute with considerable guidance from Judge Cheryl L. Pollak over the course of two separate mediation sessions. Indeed, the parties previously had attempted to resolve the dispute with assistance from two well-regarded private mediators, but they were unsuccessful. There should be, moreover, no question that the Settlement meets this Circuit's standards for approval because it compares very favorably to the range of possible outcomes at trial. At oral argument on summary judgment, for example, this Court specifically indicated that—even if Plaintiffs prevailed on liability at trial—a jury might well award damages far lower than the $161-140 million Plaintiffs' sought.

The proposed settlement is not merely reasonable: it is an exceptional outcome for the Class.

II. APPLICABLE LEGAL STANDARDS

A. Courts apply a three-step process prior to approving a class action settlement.

A court must take three distinct steps before it approves a class action settlement:

1. Consider a written motion for preliminary approval;

2. Disseminate notice of the settlement to Class Members; and

3. Conduct a final approval hearing where, among other things, Class Members have an opportunity to present their views regarding the settlement.

See Fed. R. Civ. P. 23(e); *see also* Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* ("*Newberg*") §§11.22 *et seq.* (5th ed. 2011); *Reyes v. Buddha-Bar NYC*, No. 08-02494, 2009 WL 5841177, at *1-2 (S.D.N.Y. May 28, 2009). Courts use this three-step process to act as an independent guardian of class interests and safeguard Class Members' procedural due process rights. *See, e.g., Charron v. Wiener*, 731 F.3d 241, 249 (2d Cir. 2013) ("The district court did not simply rubber-stamp the settlement on the basis of boilerplate findings, but wrote a long and careful opinion after engaging in a serious process to air and examine the objections to the settlement.").

B. To evaluate the instant motion, the Court will determine whether there is "probable cause" to submit the Settlement to Class Members.

On preliminary approval, a court conducts an "initial evaluation" of the fairness of the proposed settlement. *Newberg* § 11.25. It will grant preliminary approval if there is "probable cause to submit [the settlement] to the class members and to hold a fairness hearing." *Zeller v. PDC Corp.*, No. 13-cv-05035, 2016 WL 748894, at *2 (E.D.N.Y. Jan. 28, 2016) (citing *D'Amato v. Deutsche Bank*, 236 F.3d 78, 85–86 (2d Cir. 2001)); *see Newberg* §11.25 (explaining that "[i]f the preliminary evaluation of the proposed settlement does not disclose grounds to doubt its fairness . . . and appears to fall within the range of possible approval," the court should

permit notice of the settlement to be sent to Class Members); *see also Danieli v. IBM*, No. 08 Civ. 3688, 2009 WL 6583144, at *4 (S.D.N.Y. Nov. 16, 2009).

To determine whether there is probable cause to submit the settlement to Class Members, courts review both "the negotiating process that led" to the agreement and "the terms of the settlement agreement . . . ." *Frank v. Eastman Kodak Co.*, 228 F.R.D. 174, 184 (W.D.N.Y. 2005). First, the court determines whether the negotiating process was "reached in arm's-length negotiations." *Wal-Mart Stores*, 396 F.3d at 116 ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." (internal quotation marks omitted)). Second, the court examines whether there is sufficient initial evidence that the substantive terms of the settlement will pass muster under what are known as the "*Grinnell* Factors." *See, e.g.*, *Ortiz v. Chop't Creative Salad Co. LLC*, No. 13 CIV. 2541 KNF, 2014 WL 1378922, at *12 (S.D.N.Y. Mar. 25, 2014) (citing *City of Detroit v. Grinnell Corporation*, 495 F.2d 448, 463 (2d Cir. 1974)).[1]

The preliminary approval process allows notice to issue to the Class and for Class Members to object, comment on, or opt out of the settlement. After the notice period, a court then evaluates the settlement fully with the benefit of Class Members' input.

[1] The *Grinnell* factors are: (1) the complexity, expense, and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. *Grinnell*, 495 F.2d at 463.

III. RELEVANT FACTUAL BACKGROUND

This is a breach of contract case about whether the fuel surcharge that British Airways' imposed on its customers until early 2013 was reasonably related to the price or cost of fuel. This Court articulated the relevant facts and legal disputes in its opinions on Plaintiffs' motion for class certification, the parties' cross-motions for summary judgment, and the parties' cross-motions to exclude each other's experts. *See* Dkt. 249 at 1-4; Dkt. 271 at 1-4; *see generally* Dkt. 256.

A. The parties reached the Settlement after arm's-length mediation over more than three years.

Plaintiffs respectfully submit to the Court that few settlements involve more careful, adversarial, and arm's-length negotiation than the one proposed here. The parties first tried to resolve this dispute through mediation in April 2016 (after discovery concluded, but before the Court ruled on class certification, *Daubert* challenges, and summary judgment). To do so, they retained Judge Layn Philips, one of the country's best-known and most successful mediators. Despite the parties' good-faith efforts, however, they were unable to resolve the dispute, even after substantial in-person and telephonic efforts.

The parties again tried to resolve their dispute in 2017. This time, they retained Mr. Larry Pollack, who has successfully resolved a number of class action cases. The parties again devoted their best efforts to the mediation—including another full day of in-person mediation and extensive follow-up via teleconference—but could not resolve the dispute.

Judge Cheryl L. Pollak ultimately ordered the parties to mediate before her in early 2018. *See e.g.*, Dkt. 286. She helped both parties reexamine the strengths and weaknesses of their arguments enough to close the distance between their respective positions, although they remained far apart on the economics of the deal. Because the parties had made progress,

however, they agreed to appear before her one final time. There, the parties finally reached the Settlement.

B. The Settlement provides exceptional benefits to Class Members.

Under the Settlement, BA will provide significant economic consideration to the Class. In particular, BA made $42,000,000 in cash available and is automatically providing up to 2,288,677,500 Avios to Class Members who do not choose to claim cash relief.

First, all Class Members may elect cash. A Class Member who submits a claim for the "Cash Option" will receive a cash payment worth 16.9% of all redemption ticket fuel surcharges he or she paid during the Class Period (assuming the Court awards Class Counsels' application for attorneys' fees and costs in full; the percentage would increase slightly if the Court were to reduce Class Counsel's fee or expense award). For example, a Class Member who spent $1,000 in fuel surcharges during the Class Period would receive $169 in cash if he elected the Cash Option.[2]

Second, the vast majority of Class Members who do not elect cash will automatically receive Avios based on the number of times they redeemed Avios during the Class Period. More than 77% of Class Members still have an active Executive Club account with British Airways. If those Class Members do absolutely nothing, their Avios Settlement compensation will be deposited automatically in their Executive Club accounts, up to 2,288,677,500 Avios total. By way of comparison, if Class Members were to purchase this amount of Avios in bulk, it would cost them more than $63 million. In particular, Class Members will automatically receive:

- 12,500 Avios: for one redemption during the Class Period;
- 20,000 Avios: for between two and five redemptions during the Class Period; or

[2] Class members paid average fuel surcharges of $955, which means the average Cash Option amount is $161.40.

- 35,000 Avios: for six or more redemptions during the Class Period.

Avios will be even more valuable to many Class Members than the cash relief (e.g., a plane ticket from the west coast to Hawaii is 12,500 Avios), although any Class Member who prefers cash may choose it.

Third, under the Settlement, Class Counsel is entitled to ask the Court for an award of reasonable attorneys' fees, expenses, and costs not to exceed approximately twenty-nine percent of the $42,000,000 settlement amount for the cash component plus attorneys' fees and expenses. Class Counsel intends to seek an amount not to exceed $3,750,000 in expenses and $11,095,000 in fees. Class Counsel also will apply for service awards of $10,000 each for the three Class Representatives to compensate them for their efforts and commitment on behalf of the Class for more than five years.

IV. THE SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE

As explained above, courts grant motions for preliminary approval when there is probable cause to submit a proposed settlement to the class for consideration. Plaintiffs respectfully submit that this is not a close call. First, there is no question that the Settlement was negotiated at arm's-length. *See Wal-Mart Stores*, 396 F.3d at 116 ("A presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery." (internal quotation marks omitted)). Second, and as explained more fully below, the Settlement passes muster under the *Grinnell* factors.

A. Trial would be extremely costly, and it is unlikely that the litigation would have resolved prior to 2020.

The first *Grinnell* factor considers the complexity, expense, and likely duration of the litigation. *Grinnell*, 495 F.2d at 463. And there is no real question that continued litigation

would involve considerable expense. Indeed, sitting by designation in the Second Circuit, Judge Brian Cogan specifically cautioned Plaintiffs that proceeding to trial would cost "another six to ten million dollars." Ex. A (6/13/17 Tr.) at 10:23-11:4.

This litigation, moreover, was filed over five years ago, and it is extremely unlikely that it would have finally resolved after trial. British Airways has repeatedly stressed that it intended to appeal class certification, the *Daubert* rulings, and any adverse verdict.

Thus, Plaintiffs' options thus were not between settlement today and final resolution before a jury tomorrow, but between settlement today and final resolution in two to five years after spending "another six to ten million dollars," which would have reduced the amount of any recovery. By reaching a favorable settlement prior to trial, Plaintiffs ensure a risk-free recovery for the Class.

B. The Class Representatives support the Settlement.

The second *Grinnell* factor considers the Class Members' responses to the settlement. *Grinnell*, 495 F.2d at 463. While it is not possible to weigh this factor prior to final approval because Class Members have not yet had a chance to react to the Settlement, Plaintiffs respectfully note that the Class Representatives, who are sophisticated travelers and are highly familiar with the strengths and weaknesses of this case, support the Settlement.

C. The parties fully completed discovery and major pretrial motions practice.

Under the third *Grinnell* factor, courts ask "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (internal quotation marks omitted). This factor unambiguously supports settlement. The parties have completed all major pretrial motion practice and all pretrial discovery, including dozens of depositions. The parties were well-equipped to evaluate the

strengths and weaknesses of the case; indeed, trial was the sole remaining event that would have been expected to provide the parties with significant additional information.

D. All trials carry considerable risk on liability.

The fourth *Grinnell* factor considers how likely Plaintiffs were to establish liability. *Grinnell*, 495 F.2d at 463; *cf. Velez v. Majik Cleaning Serv., Inc.*, No. 03 Civ. 8698, 2007 U.S. Dist. LEXIS 46223, at *19 (S.D.N.Y. June 25, 2007) ("The proposed settlement benefits each plaintiff in that he or she will recover a monetary award immediately, without having to risk that an outcome unfavorable to the plaintiffs will emerge from a trial."). Plaintiffs believe their liability case was strong for the reasons detailed in their motion for summary judgment. *See generally* Dkt. 299. BA disagrees. And while Plaintiffs liked their chances, every trial is risky, and the appellate process adds to that jeopardy. If Plaintiffs had lost at trial or on appeal, Class Members would have received nothing.

One final point. Notwithstanding BA's attack on Plaintiffs' experts that BA will apparently reiterate in its filing today—attacks that are incorrect, rebutted in numerous submissions by Plaintiffs, and unseemly—Plaintiffs stand behind that testimony and the fulsome record in this case.

E. There was a significant chance that a jury would have awarded less than Plaintiffs' $161-$140 million maximum damages amount.

Damages also posed a risk to Plaintiffs at trial. Plaintiffs sought $161-140 million in damages. While it was possible that a jury would have awarded the full amount, it is equally possible that the jury would have awarded a compromise number instead. For example, the jury could have decided that "rough justice" compelled BA to return half of the fuel surcharges that it collected, awarding Class Members only $70-80 million. And this Court specifically alluded to the possibility that a jury would find that BA only needed to adjust its fuel surcharges once per

year, which could have led to an even lower damages number depending on the way that the jury implemented such a finding. *See* Ex. B (6/28/16 Tr.) at 68:11-69:4. Considering the risks to Plaintiffs both on damages and liability, the Settlement is fair, adequate, and reasonable.

F. There was not a significant risk of maintaining class certification through trial and appeal.

For the reasons articulated in this Court's opinion granting class certification, *see* Dkt. 249, there was not a significant chance that Plaintiffs would be unable to maintain class certification through trial and appeal, although some risk always exists of an adverse change in the law. Plaintiffs respectfully submit that the settlement value appropriately reflects this risk.

G. The range of reasonableness in light of the best possible recovery.

The best possible result for Plaintiffs would have been $161 million, minus the additional "six to ten million" in costs that Plaintiffs would expend to get such a result (i.e., no greater than $155 million). The cash value of the settlement alone (ignoring the significant amount of Avios) is more than 25% of this number. This also weighs strongly in favor of settlement. Indeed, the Second Circuit has noted that "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Grinnell*, 495 F.2d at 455 n.2; *see also Cagan v. Anchor Sav. Bank FSB*, No. 88 Civ. 3024, 1990 U.S. Dist. LEXIS 11450, at *34-35 (E.D.N.Y. May 22, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million").

H. The range of reasonableness in light of "all the attendant risks of litigation."

The final *Grinnell* factor considers the range of reasonable settlements in light of "all attendant risks of litigation." *Grinnell*, 495 F.2d at 463. There should be no question that the Settlement is not merely reasonable, but exceptional when viewed against the backdrop of

litigation risk, as described above. And the settlement provides guaranteed value to Class Members today rather than after several years.

* * *

In sum, there is probable cause to submit the Settlement for consideration to Class Members so that the Court may fully weigh the *Grinnell* factors based on Class Members' input.

V. THE ATTACHED FORM OF NOTICE AND THE NOTICE PROGRAM ARE REASONABLE AND APPROPRIATE.

If the Court preliminarily approves the Settlement, it must separately consider whether the proposed notice is appropriate. *See* Fed. R. Civ. P. 23(e)(1) (explaining that the Court "must direct notice in a reasonable manner to all class members who would be bound by the proposal"). First, "[a] notice program must provide the 'best notice practicable under the circumstances' including individual notice to all members who can be identified through reasonable effort." *In re Advanced Battery Techs., Inc. Sec. Litig*, 298 F.R.D. 171, 182 (S.D.N.Y. 2014). Second, "[i]f the average class member understands 'the terms of the proposed settlement and of the options that are open to them in connection with [the] proceedings,' then the notice is adequate." *Vaccaro v. New Source Energy Partners L.P.*, No. 15 CV 8954 (KMW), 2017 WL 6398636, at *3 (S.D.N.Y. Dec. 14, 2017) (quoting *Weinberger v. Kendrick*, 698 F.2d 61, 70 (2d Cir. 1982).

The proposed notice meets these requirements. *See* Ex. C. (Keough Decl.). The Parties will e-mail plain language notice (the "Notice") of the Settlement to all Class Members for whom BA has an active e-mail address (over 99% of the proposed class). And a plain language postcard notice will be sent via US Mail to those few Class Members for whom BA does not have a current e-mail address. To ensure a complete and accurate mailing, BA will provide the Settlement Administrator with names and either e-mail or mailing information of Class Members following preliminary approval, and that mailing addresses will be updated with any information

available through the National Change of Address system. The Settlement Administrator will trace all returned undeliverable notices and will re-send to the most recent addresses available.

The Notice to the Class will contain information about how to exclude oneself, object to the settlement or fee application, or file a claim for the Cash Option. Class members will have sixty (60) days from the date of original mailing/emailing to submit opt-out requests or to comment on or object to the Settlement. This is sufficient time to give Class Members a fair opportunity to respond. *Cf. Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1375 (9th Cir. 1993) (approving notice sent 31 days before the deadline for objections).

CONCLUSION

For the above reasons, Plaintiffs respectfully ask the Court to grant their motion for preliminary approval.

Dated: April 11, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2018, service of this document was accomplished via ECF and that British Airways consented to such service.

Jason L. Lichtman