UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.	8:20-cv-00885-SVW-MRW	Date	February 13, 2022
Title	*Karla Maree v. Deutsche Lufthansa AG*		

Present: The Honorable	STEPHEN V. WILSON, U.S. DISTRICT JUDGE
Paul M. Cruz	N/A
Deputy Clerk	Court Reporter / Recorder
Attorneys Present for Plaintiffs:	Attorneys Present for Defendants:
N/A	N/A

Proceedings: ORDER GRANTING RECONSIDERATION OF PRELIMINARY SETTLEMENT APPROVAL [168, 169]

I. Introduction

Before the Court are motions for reconsideration of the Court's prior denial of preliminary approval of a class action settlement filed by Plaintiffs Karlee Maree and Mourad Guerdad (collectively the "Maree Plaintiffs") and Defendant Deutsche Lufthansa AG. ECF Nos. 168, 169. For the foregoing reasons, the Court GRANTS the motion and preliminary approval.

II. Background

a. Factual and Procedural Background

The parties are familiar with the factual and procedural background. Thus, the Court will briefly recount the relevant facts. The present action arises from the cancellation of flights by Defendant during the COVID-19 pandemic. The Maree Plaintiffs were two customers of Lufthansa who purchased flights that were cancelled. ECF No. 93. Plaintiff Maree purchased her flight ticket from a third-party vendor, while Plaintiff Guerdad, who was added almost a year after the action commended, purchased his ticket directly from Lufthansa. *Id.* The Maree Plaintiffs bring a breach of contract claim seeking refunds as well as consequential and incidental damages as a result of the flight cancellations and filed the instant

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class action. *Id.* Around the same time Plaintiff Maree filed her action, Plaintiffs Anthony Castanares and Kristin Sullivan (collectively the "Castanares Plaintiffs") also filed their own class action suit proceeding on behalf of purchasers who bought their tickets directly from Lufthansa. *See Anthony Castanares et al v. Deutsche Lufthansa AG*, No. 8:20-cv-00885-SVW-MRW at ECF No. 1; ECF No. 1.

There was some variation in how the indirect purchasers proceeded in the instant case as opposed to the direct purchasers: the Maree Plaintiffs were apparently subject to a mandatory arbitration clause contained in the third-party ticket vendors' terms of service. As a result, on August 14, 2020, Lufthansa filed a motion to compel the Maree Plaintiffs into arbitration on the basis of a mandatory arbitration clause contained in the third-party vendor's terms of service. ECF No. 44. The Court denied the motion and Lufthansa filed a notice of appeal. ECF Nos. 53, 57. In the interim, the Court stayed the Maree Plaintiffs' case, but permitted the Castanares Plaintiffs to engage in limited discovery. ECF No. 82. A week later, the Maree Plaintiffs and Lufthansa entered into mediation and signed a binding term sheet on June 28, 2021. Krivoshey Decl. ¶ 8; Sims Decl. ¶ 5. On August 12, 2021, the Maree Plaintiffs amended their complaint, with Lufthansa's permission, to add Plaintiff Geurdad, and four days later filed a motion for approval of the preliminary settlement agreement. ECF Nos. 93, 95.

The Castanares Plaintiffs opposed preliminary approval. The Court deferred ruling on preliminary approval, until the Castanares Plaintiffs finished discovery. ECF No. 101. On September 30, 2022, the Court denied preliminary approval. ECF No. 161. The Maree Plaintiffs and Lufthansa, then filed the instant motions for reconsideration. ECF Nos. 168, 169.

b. Terms of the Settlement

Class Definition:

The Settlement defines the class as "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." Settlement at 11, Section I(BB).

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. *Id.*

Monetary Relief:

The Settlement will provide monetary relief in two classes. The first class consists of Class Members who received refunds from Lufthansa for Qualified Flight. *Id* at 13, Section III(A). These Class Members will have the option to submit a Claim Form allowing them to elect between a $10 cash option per person, or a voucher for future travel in the amount of $45. *Id.* Payout for this class will be capped at $3,500,000. *Id* at Section III(C). This Settlement cap includes attorneys' fees, expenses, and costs, service awards, and Claims Administration Expenses. *Id.* If the total value of Valid Claims is greater than the $3,500,000 settlement cap, the awards will be reduced on a pro rata basis up to the net claim amount. *Id.* at 14, Section III(D).

The second class consists of Class Members who have not received a full refund for their ticket price. *Id.* at 13, Section III(B). These class members will have the ability to submit a claim form to receive a full refund of their ticket price, plus an additional one percent interest of the refund due. *Id.* Payout for this class is not subject to any caps or deductions. *Id.*

Release:

The Settlement will release Defendant and Defendant's related and affiliated entities from all claims arising out of the canceled flight during the class period. *Id.* at 10, Section I(X). The Settlement though does not extinguish any right that a settlement class member may have to receive a refund of the amount of their booking for cancelled flight and does not release any claims for personal injury. *Id.*

Incentive Awards, Attorneys' Fees, and Settlement Administration Costs:

Subject to Court approval, named Plaintiffs may make an application for service awards for their work and contributions in this case up to $2,000. *Id.* at 21, Section IX(F).

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Class Counsel may make an application for an award of attorneys' fees, costs, and expenses valued in the aggregate at no more than 25% of the $3.5 million settlement cap ($875,000). *Id.* at 20, Section IX(A). Defendant may challenge the amount of attorneys' fees, but not the attorneys' right to receive attorney's fees under the settlement. *Id.*

The Settlement will be administered by RG2 Claims Administration LLC. *Id.* at 15, Section V(A). The costs of settlement administration will go towards the $3.5 million Settlement Cap. *Id.* at 13, Section III(C).

III. Grounds for Reconsideration

Under this district's Local Rules, the Court cannot reconsider a previous ruling unless the party requesting reconsideration meets the following standard:

> A motion for reconsideration of an Order on any motion or application may be made only on the grounds of (a) a material difference in fact or law from that presented to the Court that, in the exercise of reasonable diligence, could not have been known to the party moving for reconsideration at the time the Order was entered, or (b) the emergence of new material facts or a change of law occurring after the Order was entered, or (c) a manifest showing of a failure to consider material facts presented to the Court before the Order was entered. No motion for reconsideration may in any manner repeat any oral or written argument made in support of, or in opposition to, the original motion....

C.D. Cal. Local Rule 7-18; *see also Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (motion for reconsideration is not a vehicle to reargue the motion, present arguments which could reasonably have been raised earlier, or present evidence which should have been raised before). "Motions for reconsideration are disfavored, however, and are not the place for parties to make new arguments not raised in their original briefs. Nor is reconsideration to be used to ask the Court to rethink what it has already thought." *Motorola, Inc. v. J.B. Rodgers Mech. Contractors*, 215 F.R.D. 581, 582 (D. Ariz. 2003) (citation omitted).

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Determination of a party's motion for reconsideration rests within the Court's discretion. *See United States v. Brobst*, 558 F.3d 982, 994 (9th Cir. 2009); *see also United States v. Hobbs*, 31 F.3d 918, 923 (9th Cir. 1994). "A district court … has inherent discretionary power to revisit previously issued orders and to reopen any part of a case still pending before the court." *White v. Experian Info. Sols. Inc.*, 2010 WL 11515655, at *2 (C.D. Cal. Dec. 14, 2010).

The Court's denial of preliminary approval was based on the combination of three factors: 1) the fact that the settlement was reached without being informed by the Castanares Plaintiffs' formal discovery; 2) the seemingly clandestine manner the settlement was reached in conjunction with the relatively last-minute addition of Plaintiff Guerdad; and 3) the lack of information as to what Maree's counsel believed the proper range of recovery would be. *Maree v. Deutsche Lufthansa AG*, No. 820CV00885SVWMRW, 2022 WL 5052582, at *5 (C.D. Cal. Sept. 30, 2022). Maree and Lufthansa point out that the Court failed to consider Maree's reply brief in its prior order, which contained Maree's estimate as to what the proper range of recovery. The failure to consider this brief constitutes the failure to consider material facts, warranting reconsideration, which the Court now grants.

IV. Preliminary Certification and Approval

Under Rule 23(e), a class action may not be settled without the court's approval. Fed. R. Civ. P. 23(e). Court approval of a settlement typically involves two steps: (1) whether a proposed class action settlement should receive preliminary approval, and (2) review of the fairness of the settlement at a final fairness hearing. *See Salazar v. Midwest Servicing Grp., Inc.*, No. 17-CV-0137-PSG-KS, 2018 WL 3031503, at *4 (C.D. Cal. June 4, 2018).

a. Preliminary Settlement Approval

i. Legal Standard

Federal Rule of Civil Procedure 23(a) requires plaintiffs to demonstrate that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). In addition, Federal Rule of Civil Procedure 23(b)(3) requires the Court to find that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. Fed. R. Civ. P. 23(b)(3).

"The criteria for class certification are applied differently in litigation classes and settlement classes," *Espinosa v. Ahearn (In re Hyundai & Kia Fuel Econ. Litig.)*, 926 F.3d 539, 558 (9th Cir. 2019), and the Court must apply "undiluted, even heightened, attention" to the specifications of Rule 23 when considering whether to certify a settlement class. *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 630 (1997).

ii. Discussion

a) Numerosity

A proposed class meets Rule 23(a)'s numerosity requirement where the class is so numerous that joinder of all members individually is "impracticable." Fed.R.Civ.P. 23(a)(1). No exact numerical cut-off is required; rather, the specific facts of each case must be considered. *In re Cooper Cos. Sec. Litig.*, 254 F.R.D. 628, 634 (C.D.Cal. 2009) (citing *General Tel. Co. of Northwest, Inc. v. E.E.O.C.*, 446 U.S. 318, 330 (1980)). However, numerosity is presumed where the plaintiff class contains forty or more members. *Id.* (citing *Consolidated Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995)).

Here, the proposed class has met the numerosity requirement. There are approximately 166,360 Class Members, which plainly satisfies the numerosity requirement.

b) Commonality

The commonality requirement is met if "there are questions of law or fact common to the class." Fed. R. Civ.P. 23(a)(2). The commonality requirement is construed "permissively." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). All questions of fact and law need not be common; rather, "[t]he existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Id.* Commonality requires that the claims of a named plaintiff and all putative class members "depend upon a common contention

... of such a nature that it is capable of class-wide resolution—which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal–Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541, 2551 (2011).

The present class action asserts a single cause of action for a breach of the same contract – Lufthansa's Condition of Carriage. The common questions raised include: (1) whether the defendant breached its Conditions of Carriage, (2) whether Defendant failed to refund passengers within reasonable time, (3) the amount of damages stemming from the breach, and (4) whether Lufthansa's conduct was intentional or grossly negligent. These questions are sufficient to satisfy the commonality requirement.

c) Typicality

Typicality requires that "the claims or defenses of the representative parties [be] typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). Representative claims are "typical" if they are "reasonably co-extensive with those of absent class members"; they "need not be substantially identical." *Hanlon*, 150 F.3d at 1020. However, class representatives "must be able to pursue [their] claims under the same legal or remedial theories as the unrepresented class members." *In re Paxil Litigation*, 212 F.R.D. 539, 549 (C.D.Cal. 2003). The Ninth Circuit has established that the "purpose of the typicality requirement is to assure that the interest of the named representative aligns with the interests of the class." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992). Thus, "class certification should not be granted if there is a danger that absent class members will suffer if their representative is preoccupied with defenses unique to it.'" *Id.* at 508 (quoting *Gary Plastic Packaging Corp. v. Merrill Lynch*, 903 F.2d 176, 180 (2d. Cir. 1990)).

Here, Plaintiffs Maree and Guerdad are sufficiently representative of the class. Plaintiff Maree was an indirect purchaser of the flight, while Plaintiff Guerdad purchased directly from Lufthansa, making them "typical of the class," because the other class members also used these two methods of obtaining a ticket. Both Plaintiffs had their flights cancelled, alleged that they were initially denied refunds, and allege that the time it took for Lufthansa to provide the refunds was not reasonable. Neither Castanares, nor Lufthansa allege anything "unique" about Plaintiffs Maree and Guerdad that would make them atypical of the class. Accordingly, this requirement is met.

d) Adequacy

Rule 23(a) also requires that the representative parties be able to "fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). Representation is adequate if the named plaintiffs (1) "do not have conflicts of interest with the proposed class" and (2) are "represented by qualified and competent counsel." *Dukes*, 509 F.3d at 1185. Indicia of adequacy include, "among other factors, an absence of antagonism between representatives and absentees, and a sharing of interest between representatives and absentees." *Ellis*, 657 F.3d at 985 (citations omitted).

As an initial matter, the Castanares Plaintiffs do not dispute that the Maree Plaintiffs are represented by qualified and competent counsel. *See* Krivoshey Decl. Ex. 2 (firm resume of Bursor & Fisher, P.A.). Rather, the Castanares Plaintiffs contend that Plaintiff Maree and her counsel do not adequately represent direct purchasers, because her case was stayed pending appeal of the denial of a mandatory arbitration agreement.

Here, the Castanares Plaintiffs question Plaintiff Maree's adequacy to represent direct purchasers. Specifically, the Castanares Plaintiffs point out that Plaintiff Maree was potentially subject to a mandatory arbitration clause, which made the indirect purchasers' prospects for recovery weaker than the direct purchasers. In response, Maree contends that her claims were not weakened by the pending appeal, because other courts had held that airlines could not enforce mandatory arbitration clauses. These arguments raise a close question as to the adequacy of Plaintiff Maree for direct purchasers. While the Court's denial of the mandatory arbitration clause placed Plaintiff Maree and other indirect purchasers on the same legal footing as direct purchasers, the Court must take note of the fact that Plaintiff Maree's case was stayed pending the appeal.

Ultimately, the Court need not decide whether Plaintiff Maree is an adequate representative for direct purchasers, because the Maree Plaintiffs amended their complaint to add Plaintiff Guerdad, who was a direct purchaser. Although Plaintiff Guerdad was added late to the case, Plaintiff Guerdad's declaration persuades the Court that he is an adequate representative of direct purchasers. *See* Geurdad Decl. Absent any evidence to the contrary, the Court finds this requirement is met.

e) Predominance and Superiority

Rule 23(b)(3) requires the Court to find that: (1) "the questions of law or fact common to class members predominate over any questions affecting only individual members," and (2) "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

The predominance inquiry tests "whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Hanlon*, 150 F.3d at 1022. This analysis requires more than proof of common issues of law or fact. *Id.* Rather, the common questions must "present a significant aspect of the case [that] they can be resolved for all members of the class in a single adjudication." *Id.* The superiority inquiry requires determination of "whether objectives of the particular class action procedure will be achieved in the particular case." *Id.* at 1023.

"For certification of a settlement-only class, a district court need not inquire whether the case, if tried, would present intractable management problems; instead, the focus is on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Perez v. Core & Main LP*, No. 5:20-CV-01821-MCS-KK, 2021 WL 8820866, at *2 (C.D. Cal. Nov. 15, 2021) (quotations and citations omitted) (cleaned up). "That some individualized issues might need to be addressed does not in and of itself defeat predominance[;] The predominance inquiry is mainly concerned with the balance between individual and common issues." *In re Hyundai & Kia Fuel Econ. Litig.*, 926 F.3d 539, 560 (9th Cir. 2019) (citations and quotations omitted).

Here, the Court is satisfied that common questions predominate over the class. As discussed above in the commonality analysis, Class members were all subject to the same contract and allege the same cause of action. The common questions that are raised include: 1) whether Lufthansa breached its conditions of carriage; 2) whether Lufthansa failed to refund passengers within a "reasonable time"; 3) the amount of damages stemming from the breach; and 4) whether Lufthansa's conduct was "intentional or grossly negligent. These common facts and questions sufficiently predominate over the class. *See e.g. Ellsworth v. U.S. Bank, N.A.*, No. C 12-02506 LB, 2014 WL 2734953, at *27 (N.D. Cal. June 13, 2014) (finding predominance met because "[t]he form mortgage contracts are identical, and Plaintiffs allege uniform policies and practices surrounding FPI"').

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As for superiority, the class action method is superior if "classwide litigation of common issues will reduce litigation costs and promote greater efficiency." *Valentino v. Carter–Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (citation omitted). Here, Class members are limited to indirect and consequential damages, which are too small for each individual class members to litigate. Moreover, the price of full refunds may also be too small for Class Members to choose to litigate. The average amount refunded for those whose bookings that were cancelled and refunded was €2,348.48 or $2,764.63. Declaration of Eric Mangusi Regarding Maree Settlement Class, at ¶3–6. Accordingly, superiority is also met.

b. Preliminary Approval

i. Legal Standard

Courts are required to approve class settlements to protect absent class members from the "inherent risk ... that class counsel may collude with the defendants, 'tacitly reducing the overall settlement in return for a higher attorney's fee.'" *In re Bluetooth Headset Prods. Liability Litig.*, 654 F.3d 935, 946 (9th Cir. 2011) (citations omitted). Thus, under Rule 23(e)(2), a settlement binding absent class members may only be approved if the Court finds that it is "fair, reasonable, and adequate" after considering:

(A) whether class representatives and counsel provided adequate representation,
(B) whether the proposal was negotiated at arm's length,
(C) 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 attorney's fees, including timing of payment; and
  (iv) any agreement required to be identified under Rule 23(e)(3); and
(D) whether the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2).[1]

At the preliminary approval stage, the Court must determine if it is sufficiently likely to grant final approval of the settlement to justify directing notice to class members. Fed. R. Civ. P. 23(e)(1)(B). Because some factors cannot be fully assessed at the preliminary approval stage, "a full fairness analysis is unnecessary." *Rivera v. Western Express, Inc.*, 2020 WL 5167715, at *7 (C.D. Cal. 2020).

Courts have instead performed a more abbreviated fairness analysis, examining whether "the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class, and falls within the range of possible approval." *Chen v. Chase Bank USA, N.A.*, 2020 WL 264332, at *6 (N.D. Cal. 2020) (citation omitted). "In determining whether the proposed settlement falls within the range of reasonableness, perhaps the most important factor to consider is plaintiffs' expected recovery balanced against the value of the settlement offer." *Cotter v. Lyft, Inc.*, 176 F. Supp. 3d 930, 935 (N.D. Cal. 2016).

"Prior to formal class certification, there is an even greater potential for a breach of fiduciary duty owed the class during settlement." *In re Bluetooth*, 654 F.3d at 946. Approval of a settlement before certification therefore "requires a higher standard of fairness" and "a more probing inquiry than may normally be required under Rule 23(e)." *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019) (citation omitted). A court "must be particularly vigilant not only for explicit collusion, but also for more subtle signs that class counsel have allowed pursuit of their own self-interests and that of certain class members to infect the negotiations." *In re Bluetooth*, 654 F.3d at 947 (citations omitted).

ii. Discussion

1. Serious, informed, non-collusive negotiations

In evaluating this factor, courts consider whether the settlement is a product of collusion and whether sufficient discovery has been taken or investigation completed to enable counsel and the court

[1] The Ninth Circuit has also enumerated its own set of factors that substantively track the factors discussed in Rule 23(e)(2). *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1048 (9th Cir. 2019).

to act intelligently." *Barbosa v. Cargill Meat Solutions Corp.*, 297 F.R.D. 431, 447 (E.D. Cal. 2013) (internal quotation marks omitted). This more "exacting review" is warranted "to ensure that class representatives and their counsel do not secure a disproportionate benefit at the expense of the unnamed plaintiffs who class counsel had a duty to represent. *Roes*, 944 F.3d at 1049 (citations and quotations omitted).

In terms of collusion, in its prior order, the Court noted its concern with the method which the settlement was reached. At the time of the negotiations, the Maree action was stayed pending appeal of the Court's denial of Lufthansa's motion to compel arbitration, while the Castanares action case was permitted to move forward on limited discovery. One week after the Castanares action was permitted to move forward, Plaintiff Maree entered into mediation with Lufthansa on behalf of direct and indirect purchasers and signed a binding terms sheet. Several months later, Plaintiff Maree filed an amended complaint adding Plaintiff Guerdad, a direct purchaser, and then moved for preliminary approval of the settlement.

As recognized by Judge Fitzgerald at the hearing held on June 1, 2022, the procedure of how the settlement was reached undermined the Court's faith in the settlement as being best possible settlement. Transcript, ECF No. 149 at 4:21-4:25. One of the issues identified was "the risk of a reverse auction by Lufthansa choosing those counsel whom it found most amenable." *Id.* at 4:25-5:2. Sharing these concerns, the Court noted that the "seemingly clandestine nature of the negotiations, combined with the weaker negotiating position that Maree was in, and the inclusion of a new named plaintiff – who would subsume the *Castanares* action – after the settlement was reached undermine[d] the Court's confidence in the fairness of the proceeding." *Maree*, No. 820CV00885SVWMRW, 2022 WL 5052582, at *4.

In response, the Maree Plaintiffs contend that the Court "overlooked" the fact that the Maree Plaintiffs had repeatedly offered to work with the Castanares Plaintiffs and offered Castanares' counsel an opportunity to partake in the settlement, *after* the term sheet was signed. But these gestures do not change the fact that the settlement was negotiated without the knowledge of Castanares' counsel.

Nonetheless, the Court finds that these events do not weigh against preliminary approval. Despite the Court's concern regarding the procedure of the settlement negotiations, the record before the Court does not permit the Court to conclude that Maree and Lufthansa engaged in collusion that

prejudiced the interests of class members.

Indeed, in its prior order, the Court noted several factors that support preliminary approval. First, the settlement was reached through a neutral mediator, which supports the propriety of the negotiations. *See La Fleur v. Med. Mgmt. Int'l, Inc.*, No. EDCV 13-00398-VAP, 2014 WL 2967475, at *4 (C.D. Cal. June 25, 2014) ("Settlements reached with the help of a mediator are likely non-collusive.").

Second and more importantly, the Court stated that it did not find the traditional subtle signs of implicit collusion, such as: 1) whether counsel will receive a disproportionate distribution of the settlement, 2) whether the parties negotiate a clear sailing' arrangement; and 3) whether the parties agree to a reverter that returns unclaimed funds to the defendant. *Roes*, 944 F.3d at 1049.

The fees provided to Maree's counsel align with the Ninth Circuits' 25% benchmark. *In re Bluetooth Headset Prod. Liab. Litig.*, 654 F.3d 935, 942 (9th Cir. 2011) ("courts typically calculate 25% of the fund as the "benchmark" for a reasonable fee award"). The agreement also does not contain a "clear sailing" arrangement, since Lufthansa may still challenge the amount of attorney's fees that Maree's counsel may receive. *Messineo v. Ocwen Loan Servicing, LLC*, No. 15-CV-02076-BLF, 2017 WL 733219, at *8 (N.D. Cal. Feb. 24, 2017) (holding that a settlement that stated that the defendant reserved "the right to oppose any petition by Class Counsel for Attorneys' Fees and Expenses that [the defendant] deems to be unreasonable in nature or amount" did not contain a clear sailing provision.).

The Court's closer examination of the record does reveal a troubling aspect of the settlement, a claims-made agreement: the presence of a reversion, whereby unclaimed funds will remain with Lufthansa. *Norton v. LVNV Funding, LLC*, No. 18-CV-05051-DMR, 2021 WL 3129568, at *9 (N.D. Cal. July 23, 2021) ("A claims-made settlement raises the same concerns as a reversionary agreement and so the third *Bluetooth* factor is present here."). *See* 4 Newberg on Class Actions § 13:7 (5th ed.) (explaining that a claims-made settlement is "the functional equivalent of a common fund settlement where the unclaimed funds revert to the defendant").

Such reversions are generally disfavored in the Ninth Circuit. *Roes*, 1-2, 944 F.3d at 1058. But courts routinely provide preliminary approval for claims-made settlements that contain a reversion. *See*

Nur v. Tatitlek Support Servs., Inc., No. 15CV00094SVWJPRX, 2016 WL 3039573, at *3 (C.D. Cal. Apr. 25, 2016) (collecting cases). The Court's concern about a potential windfall to Lufthansa may be mitigated by the amount of class members that submit a claim. *See Minor v. FedEx Office & Print Servs., Inc.*, No. C09-1375 TEH, 2013 WL 503268, at *4 (N.D. Cal. Feb. 8, 2013) (finding reversion clause not "inherently inadequate" for purposes of preliminary approval where there was a minimum distribution floor of 45%, a contention that reversion was essential for defendant to agree to settlement, and parties anticipated a relatively high claim rate); *In re Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prod. Liab. Litig.*, 895 F.3d 597, 612 (9th Cir. 2018) (noting that, among other factors, the actual trend in class member participation indicate that the reversion clause did not, in design or in effect, allow VW to recoup a large fraction of the funding pool.).

Accordingly, despite the presence of a reversion, the Court nevertheless grants preliminary approval. The Court, however, cautions the parties that the Court will cast more exacting scrutiny on the parties' final approval motion, including counsel's fees in relation to the to the settlement. "[W]ith final proposed numbers in hand the parties must be prepared to more fully develop their justifications for the court's permitting defendant to retain unclaimed funds, providing clear information on the total amount of any windfall and any other information to place any windfall in a context demonstrating its fairness or unfairness." *Wilson v. Metals USA, Inc.*, No. 2:12-CV-00568-KJM-DB, 2019 WL 1129117, at *7 (E.D. Cal. Mar. 12, 2019).

Finally, in reviewing the substance of the agreement, the Court finds that the potential reasonableness of the settlement helps alleviate the Court's concerns regarding collusion. As will be discussed below, the Court finds that the amount offered to the class is well within the range of possible approval. In sum, while the Court found that Maree and Lufthansa's actions gives the Court pause, this does not preclude the Court, at this stage, from granting preliminary approval.

Turning to discovery, the Court's prior order weighed the need for formal discovery too heavily, and while formal discovery is an important factor, it is not necessary to properly grant preliminary approval. What is required at this stage is that "sufficient discovery has been taken or investigation completed to enable counsel and the Court to act intelligently." Herbert B. Newberg, Newberg on Class Actions § 11.41 (4th ed. 2013).

Prior to settlement, Maree's counsel engaged in a variety of informal discovery; served, responded, and conferred regarding interrogatories and production of documents; and litigated two motions to dismiss and motion to compel arbitration. Krivoshey Decl. ¶¶ 2-4. This procedural history sufficiently demonstrates that Maree's counsel was adequately informed of the merits of the case before engaging in negotiations. *Lyter v. Cambridge Sierra Holdings, LLC*, No. CV173435MWFAGRX, 2019 WL 13153197, at *5 (C.D. Cal. June 18, 2019) (finding that the parties were sufficiently informed where they engaged in significant informal discovery and engaged in adversarial motion practice.); *In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1174 (S.D. Cal. 2007) ("Plaintiffs indicate that lead counsel has conducted "significant informal discovery and investigation on the matters alleged, even though formal discovery was stayed pursuant to the [PSLRA] while the Parties litigated Defendants' motions to dismiss.").

Moreover, though the Maree Plaintiffs did not benefit from the full discovery provided by the Castanares Plaintiffs, measured against the substance of the settlement, this lesser amount of discovery does not weigh against preliminary approval. As the Maree Plaintiffs and Lufthansa point out, the Castanares Plaintiffs' discovery presented mixed results. While limited discovery provided evidence demonstrating that Lufthansa may have taken steps to delay refunds, the limited discovery also demonstrated that the potential class was smaller by [redacted] Stark Decl. ¶ 32.i, and that the average times for refunds were between 40 and 140 days. Baggett Decl. ¶ 25. In other words, while the Castanares Plaintiffs may have uncovered facts that could strengthen their case in terms of establishing liability, other uncovered facts revealed that damages may have been much lower than what the parties anticipated. These facts support the fairness and adequacy of the substance of the settlement, somewhat alleviating the Court's concerns as to whether the Maree's counsel was sufficiently informed at the bargaining table. Thus, the Court finds that these factors do not weigh against preliminary approval.

2. Range of Possible Approval

"To evaluate the range of possible approval criterion, which focuses on substantive fairness and adequacy, courts primarily consider plaintiffs' expected recovery balanced against the value of the settlement offer." *Vasquez v. Coast Valley Roofing, Inc.*, 670 F. Supp. 2d 1114, 1125 (E.D. Cal. Nov. 17, 2009).

a. Strength of the Plaintiff's Case

First, the Court considers the strength of the plaintiff's case and risk, expense, complexity, and duration of further litigation. "Settlement eliminates the risks inherent in certifying a class, prevailing at trial, and withstanding any subsequent appeals, and it may provide the last opportunity for class members to obtain relief." *Scott v. HSS Inc.*, 2017 WL 10378568, at *8 (C.D. Cal. Apr. 11, 2017). Given the potential risks of further litigation, this factor therefore weighs in favor of granting preliminary approval. *See Nat'l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 526 (C.D. Cal. 2004) ("In most situations, unless the settlement is clearly inadequate, its acceptance and approval are preferable to lengthy and expensive litigation with uncertain results." (citation omitted).

The Maree Plaintiffs and Lufthansa point out that Class Members would face significant hurdles receiving recovery, specifically in demonstrating that Class Members are entitled to receive interest. Plaintiffs would need to "show that the timing of Lufthansa's performance (the refund) was unreasonable." *Maree v. Deutsche Lufthansa AG*, 2020 WL 6018806, at *5 (C.D. Cal. Oct. 7, 2020). The average time that Lufthansa provided refunds were 45 days between the months of August 2020 and June 2021, except for one month. *See* Baggett Decl. ¶ 25. For flights cancelled between March 2020 and June 2020, Lufthansa provided refunds between 40-140 days thereafter. *Id.* The Maree Plaintiffs and Lufthansa contend, and the Court agrees, that given the backdrop of COVID-19 and the prospect of Lufthansa going bankrupt, there is a serious question as to whether an average refund period of 40, 45, or even 140 days was a reasonable time provide refunds.

Maree and Lufthansa further contend that class members face significant hurdles for class certification on the merits. Maree and Lufthansa point to three issues that may undermine the ability for the purported Class to satisfy the predominance inquiry. First, the determination of what a reasonable time to issue is a highly individualized factual determination. Second, the determination of whether which class members were injured would be an individualized determination because Lufthansa does not automatically keep track of when a customer requested or received a refund. Finally, the existence of condition precedents may raise individual determinations as to whether each class member provided sufficient proof to be entitled to a refund.

In response, the Castanares Plaintiffs contends that the purported class could nonetheless be

certified, because the claims arise from the same contract and limited discovery provided evidence of a uniform policy in handling refunds. From these facts, the Castanares Plaintiffs contend that common question as to whether the Conditions of Carriage contain a condition precedent and whether Lufthansa hindered, delayed, or prevented refund.

Without making an ultimate determination at this stage of the proceedings, the Court recognizes that the issues raised by the Maree Plaintiffs and Lufthansa present hurdles for class certification on the merits that could jeopardize ability of the class to recover. At a minimum, the briefs demonstrate that class certification would be hotly contested, weighing in favor of settlement. *See e.g. In re Packaged Seafood Prod. Antitrust Litig.*, No. 315MD02670DMSMDD, 2022 WL 228823, at *5 (S.D. Cal. Jan. 26, 2022) (noting that "[c]lass certification was and remains hotly contested" and that this fact weighed in favor of preliminary approval). In light of these litigation hazards, the Court agrees that Class Members would face a long, contentious, and uncertain road to recovery, which weighs in favor of settlement.

b. Range of Recovery and Amount Offered

Second, "[i]n determining whether the amount offered in settlement is fair, a court compares the settlement amount to the parties' estimates of the maximum amount of damages recoverable in a successful litigation." *Sigma Beta Xi, Inc. v. Cnty. of Riverside*, No. EDCV181399JGBJEMX, 2019 WL 5151970, at *6 (C.D. Cal. Aug. 26, 2019). "When considering whether the amount offered in settlement is fair and adequate, it is the complete package taken as a whole, rather than the individual component parts, that must be examined for overall fairness." *Cottle v. Plaid Inc.*, 340 F.R.D. 356, 374 (N.D. Cal. 2021) (cleaned up and citations omitted).

The Court begins with the amount offered in the settlement. The Maree Plaintiffs and Lufthansa contend that the Court improperly failed to consider the value of the full refunds that Class members with "open tickets" would receive. According to the Maree Plaintiffs, the Court's calculation of maximum recovery should have included this amount, totaling approximately, $56 million, because the settlement provides a mechanism for class members to submit a form to receive a full refund plus 1% interest.

The notice to class members and refund value provides some value to the class. But the Court

declines to apply the full value of the $56 million to the value of the settlement. Not all members of the class benefit from the notice and provision of full refunds. As the settlement agreement itself recognizes, Class Members consist of those who have already received their refunds and those who have not. The $56.6 million in full refunds is therefore meaningless to class members who have already received their refund.

Rather, the primary relief offered to all class members is the value of consequential damages – interest – that Lufthansa allegedly owes them. *See Maree*, No. SACV20885MWFMRWX, 2020 WL 6018806, at *5 ("Although Plaintiff already received a refund, she may allege other damages, so long as those damages are recoverable under the express terms of the Conditions of Carriage. […] Plaintiff will also need to allege sufficient facts showing that she would be able to plausibly obtain consequential damages under the contract."); M.Dkt 95, at 20 ("these Class Members [(Class Members who have not received their refund)] are limited to a theory of damages based on interest."). Thus, while the Court agrees that the full refunds present a significant benefit to Class Members who have not received their refund, this benefit alone is not sufficient to justify the adequacy of the settlement.

Turning now to the value of the interest that the settlement offers to Class Members, the Maree Plaintiffs and Lufthansa contend that the Court improperly calculated the amount offered in the settlement by subtracting the attorneys' fees and costs and considering the claims rate of the settlement. The Court agrees. In considering the amount offered to the class, the Court must also consider attorney's fees, incentive awards, and administrative costs. *Lopez v. Youngblood*, 2011 WL 10483569, at *12 (E.D. Cal. Sept. 2, 2011) ("Fees and class administration costs are included in determining the size of the fund."). Additionally, while the Court echoes its concerns regarding the claims rate, these concerns are better addressed after notice to Class Members has been given. Time, in other words, will tell whether the Maree Plaintiffs' claims that "there will likely be a higher claims rate than usual" comes to pass. ECF No. 124. at 23. Accordingly, again, the Court reserves full consideration of the actual recovery to the class for final approval. Thus, the Court values the interest offered by the settlement at $9.1 million.[2]

[2] This figure was arrived at by adding the settlement cap to the maximum interest recovery for open ticket members. $3.5 million + $5.6 million = $9.1 million.

Comparing this sum to the ranges of recovery that each party has presented and the aforementioned litigation hazards, the settlement amount is within the range of potential approval. The Court previously believed it was unable to properly assess the range of recovery because Maree did not provide an estimate as to what they expected to recover at trial. But the Court overlooked Maree's reply brief, which did include their estimate. Accordingly, the Court can properly assess the range of potential recovery for plaintiff.

Evaluating potential recovery in this case presents several challenges as their two variables that significantly impact the amount of recovery: the interest rate and when interest begins to accrue. Each interested party presented their own figures and calculations as to what the maximum recovery and range of recovery would look like. These figures are outlined below:

Party	Minimum Valuation	Maximum Valuation
Maree	$341,753	$13.77 million
Lufthansa	$159,730	$6.12 million
Castanares	$1.96 million	$19.6 million

See ECF No. 168, at 15.

As noted in the Court's previous order, the Court agrees with the Maree Plaintiffs and Lufthansa that the Castanares Plaintiffs' estimates are too high. Among the many errors highlighted by Lufthansa's expert, the most significant is Castanares' Plaintiff's expert's, Baggett's, assumption of 10% interest rate and that interest would accrue the earlier of 7 days after cancellation or a request for a refund. Based on these assumptions Bagget provided an excessively optimistic estimate of what Class Members could recover.

Nonetheless, comparing the maximum recovery of $9.1 million for all class members against the Castanares Plaintiffs' figure, the Court finds that this is within the range of recovery. Courts have routinely approved settlements that amount to fractions of maximum of recovery. *See Couser v. Comenity Bank*, 125 F. Supp. 3d 1034, 1043 (S.D. Cal. 2015) ("it is well-settled law that a proposed settlement may be acceptable even though it amounts to only a fraction of the potential recovery that

might be available to the class members at trial.") (citations and alterations omitted). Thus, this factor also weighs in favor of preliminary approval.

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For the foregoing reasons, the settlement has satisfied the requirements for preliminary approval.[3] The procedure of negotiating the settlement does raise serious and concerning questions as to its fairness. But in reviewing the substance of the agreement, the maximum recovery is well within the range of approval. And though the Court still has concerns regarding the amount of actual recovery by class members, the Court will revisit these considerations in determining whether final approval is appropriate, after Class Members have been notified.

V. Conclusion

For the aforementioned reasons, the Court grants preliminary approval of the settlement and of the notification procedures as detailed in the parties' proposed order, ECF No. 95-8, subject to the following changes:

- Mailing of the Notice and Proof of Claim to potential class members ("the Notice Date") shall begin within 30 days of the issuance of this Order;
- The final approval hearing shall be set for May 1, 2023, at 1:30pm.

IT IS SO ORDERED.

[3] The Court also finds that there are no obvious deficiencies in the settlement agreement nor does the Court find that the settlement provides preferential treatment to class representatives or segments of the class.

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