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, v. BRITISH AIRWAYS, PLC (UK), Defendant.	Case No. 1:12-cv-05567-RJD-CLP

MEMORANDUM OF BRITISH AIRWAYS PLC IN SUPPORT OF PLAINTIFFS' UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT

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I. INTRODUCTION

Defendant British Airways Plc ("BA") respectfully submits this memorandum of law in support of the plaintiffs' Motion for Preliminary Approval ("Plaintiffs' Motion") of the proposed settlement ("Proposed Settlement") reached between the parties. While the Plaintiffs' Motion demonstrates the fairness of the Proposed Settlement, BA writes separately to emphasize the risks to the settlement class from a liability and class certification perspective had the case proceeded to trial, which further emphasizes the fairness of the settlement reached.

The Proposed Settlement provides significant economic consideration to Settlement Class Members.[1] Specifically, Executive Club Members with active accounts ("Active Executive Club Members") *automatically* will receive between 12,500 and 35,000 Avios (depending on the number of redemptions they had during the Class Period) and they have the option instead to receive a cash benefit (the "Cash Option") in lieu of the Avios. If all Active Executive Club Members receive Avios in the Settlement, they will receive 2,288,677,500 Avios in total, *which equates to a valuation of more than $63 million*. Executive Club Members who no longer have accounts ("Former Executive Club Members") cannot automatically receive Avios because their accounts are closed. Those Former Executive Club Members can file a claim for the Cash Option. The Cash Option is a cash payment of 16.9% of all redemption ticket fuel surcharges a Settlement Class Member paid during the Class Period,[2] with a minimum $5.00 payment, which in aggregate equates to $27.125 million.[3]

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[1] Unless otherwise noted, capitalized terms have the same meaning as in the proposed Settlement Agreement ("Settlement Agreement".)

[2] This percentage assumes 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. (Settlement Agreement at X(11).)

[3] As explained further below, the actual amount received will depend on the number of Settlement Class Members who file Valid Claims for the Cash Option.

The Proposed Settlement followed the close of more than five years of hard fought litigation, which included both fact and expert discovery, extensive motions practice and an interlocutory appeal, with only trial remaining. It resulted from arm's-length negotiations and is the culmination of three different mediations supervised by seasoned mediators – including Magistrate Judge Cheryl Pollak –spanning almost two years.

The Proposed Settlement is well within the range of reasonableness given the significant economic consideration provided to Settlement Class Members, especially in light of the substantial risks the plaintiffs would have faced if they had tried the case and through the inevitable appeals. Preliminary approval of the Proposed Settlement is appropriate and BA respectfully joins the plaintiffs' request for it to be granted here.

II. THE NEGOTIATIONS THAT LEAD TO THE PROPOSED SETTLEMENT

The Proposed Settlement is the product of lengthy and intense arm's-length negotiations that involved three separate mediators and took almost two years. (*See* Declaration of Colleen Carey Gulliver ("Gulliver Decl."), dated April 10, 2018 at ¶ 2.) Before reaching the Proposed Settlement, the parties conducted two prior unsuccessful mediation attempts. First, in April 2016, the parties worked with former U.S. District Judge Layn Phillips to try to resolve the dispute while the motion for class certification, the parties' cross motions for summary judgment, and the parties' *Daubert* motions were pending before the Court. (*Id.* at ¶ 3.) The parties traveled to California and participated in a full-day mediation. (*Id.*) By the end of the day, the parties remained very far apart, but agreed to continue to work with Judge Phillips to see if they could reach a resolution. (*Id.*) These discussions occurred periodically until November 2017. (*Id.*)

After the Court issued summary judgment ruling in November 2017, the parties decided to pursue a second mediation with a different mediator to see if a different approach could help

them reach a resolution. (*Id.* at ¶ 4.) Another full-day mediation took place, on December 4, 2017, before Larry Pollack. (*Id.*) But, by the end of the day, it was clear that the parties remained far apart. (*Id.*)

Finally, Magistrate Judge Pollak ordered the parties to participate in a court-ordered mediation. (*Id.* at ¶ 5.) On January 22, 2018, the parties met for a third time to try to resolve the dispute. (*Id.*) By the end of the evening, progress had been made for the first time. (*Id.*) As such, the parties agreed to continue the settlement conference later that week. (*Id.*) On January 25, 2018, the parties finally reached an agreement before Judge Pollak on the Proposed Settlement. (*Id.*)

III. THE PROPOSED SETTLEMENT SHOULD BE PRELIMINARILY APPROVED.

The Courts have a "'strong judicial policy in favor of settlements, particularly in the class action context.'" (Ex. A,[4] *Marshall et al. v. Deutsche Post DHL, et al.*, 1:13-cv-01471, ECF No. 104, Mem. & Order, at 7 (E.D.N.Y. Sept. 21, 2015) (Dearie, J.) (quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F.3d 132, 138 (2d Cir. 1998)); *see also Karic v. The Major Auto. Cos.*, 2015 WL 9433847, at *7 (Pollak, J.) (E.D.N.Y. Dec. 22, 2015) ("Judicial policy favors the settlement and compromise of class actions"); *Yim v. Carey Limousine NY, Inc.*, 2016 WL 1389598, at *3 (E.D.N.Y. Apr. 7, 2016) ("Courts favor the settlement of complex class action litigation.").) "There is a 'presumption of fairness, reasonableness, and adequacy as to the settlement where a class settlement is reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" (Ex. A, *Marshall*, 1:13-cv-01471, ECF No. 104, Mem. & Order,

[4] Exhibits referred to as "SJ Ex." are references to the exhibits incorporated in BA's Reply to Plaintiffs' Response to BA's Statement Pursuant to Local Rule 56.1 of Material Facts as to Which There Is No Genuine Issue, which BA submitted to the Court in support of its motion for summary judgment on February 25, 2016 (ECF No. 233) ("Reply 56.1"). BA's Reply 56.1 summarizes BA's evidence in support of its motion for summary judgment.

This submission also refers to lettered exhibits, which refer to documents that were not exhibits to BA's Reply 56.1 and, as such, were not previously submitted to the Court. These exhibits are attached as Exs. A-D.

at 7 (Dearie, J.) (quoting *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005)).) "'Indeed, the trial judge . . . should be hesitant to substitute its own judgment for that of counsel.'" *In re Sumitomo Cooper Litig.*, 189 F.R.D. 274, 280 (S.D.N.Y. 1999) (quoting *Cotton v. Hinton*, 559 F.2d 1326, 1330 (5th Cir. 1977)).

A. Legal Standard.

"'In the context of a motion for preliminary approval of a class action settlement, the standards are not so stringent as those applied when the parties seek final approval.'" *Carey Limousine*, 2016 WL 1389598, at *3 (quoting *Karvaly v. eBay, Inc.*, 245 F.R.D. 71, 86 (E.D.N.Y. 2007)). When the Court ultimately rules on final approval, the court considers the following factors:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of 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 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.

City of Detroit v. Grinnell Corp., 495 F. 2d 448, 463-64 (2d Cir. 1974) (internal citations omitted). While a full analysis of these factors is not required at the preliminary approval stage, they "are instructive in determining whether to grant preliminary approval of the settlement." *Parker v. City of N.Y.*, 2017 WL 6375736, at *5 (Pollak, J.) (E.D.N.Y. Dec. 11, 2017).

On preliminary approval, the Court must "only find that the proposed settlement fits 'within the range of possible approval' to proceed." *Carey Limosine*, 2016 WL 1389598 at *3; *see also Karic v. Major Auto. Cos.*, 2015 WL 9433847, at *8 (E.D.N.Y. Dec. 22, 2015) ("[T]he court need only find that there is 'probable cause' to submit the settlement to class members and hold a fairness hearing.").

B. The Settlement Was Not Collusive: It Was Reached After Years of Arm's-Length Negotiations and During A Court-Ordered Mediation.

The lengthy and extensive arm's-length settlement negotiations between the parties demonstrate the procedural fairness of the settlement. For two years, the parties unsuccessfully explored whether they could negotiate a settlement and two previous mediation attempts with experienced and accomplished mediators failed. (*See* Gulliver Decl. at ¶ 2.) It was only during the third mediation, with the assistance of Judge Pollak, that the parties were able to reach the Proposed Settlement. (*Id.* at ¶ 5.)

Courts hold that a settlement achieved through mediation is procedurally fair. *See, e.g.*, *Stinson v. City of N.Y.*, 256 F. Supp. 3d 283, 289 (S.D.N.Y. 2017) ("Settlement was only reached . . . after multiple arm's-length mediation sessions with Judge Martin, all of which further supports finding procedural fairness in the process."); *Bodon v. Domino's Pizza, LLC*, 2015 WL 588656, at *4 (E.D.N.Y. Jan. 16, 2015) (The fact that the "magistrate judge presided over settlement conferences that led to settlement weighed in favor of procedural fairness.") (citing *Yahraes v. Rest. Assocs. Events Corp.*, 2013 WL 139730, at *1 (E.D.N.Y. Jan. 10, 2013)).

C. The Substantive Terms of the Proposed Settlement Fall Within the Range of Possible Approval.

The Proposed Settlement should be approved as fair, reasonable, and adequate. Not only are the benefits that will be conferred on the Settlement Class Members substantial, but they also reflect a significant outcome given the serious risks plaintiffs faced – both at trial and to maintain class certification through trial and appeal. Moreover, the complexity, expense, and duration of the Litigation has been considerable; and the Litigation is at an advanced stage. As such, preliminary approval respectfully should be granted here.

1. Settlement Class Members Are Promptly Receiving Substantial Relief.

The Proposed Settlement provides Active Executive Club Members *automatically* with between 12,500 and 35,000 Avios or the option to receive a cash benefit in lieu of the Avios. (Settlement Agreement at IV(A)(1-2).) If all Active Executive Club Members receive Avios, that equates to a valuation of more than *$63 million for the Avios*. (*Id.* at IV(A)(1).) All Settlement Class Members can file for the cash benefit, up to an aggregate of $27.125 million. (*See, e.g.*, *id*. at IV(A)(5).)

2. The Significant Risks Inherent in Continued Litigation Favor Preliminary Approval Here.

The plaintiffs faced three substantial and distinct risks in continuing the Litigation: (a) liability risk; (b) damages risk; and (c) risk of decertification or reversal of the class certification order on appeal. The Proposed Settlement's substantial recovery is reasonable in light of these significant risks. Each risk is discussed in detail below.

(a) Liability Risk

If the case were tried, the plaintiffs would lose. It is undisputed that the applicable contracts explicitly permit BA to impose a fuel surcharge and that, in entering those contracts, the plaintiffs agreed to pay one. (*See* SJ Ex. 7, at § 13.14; SJ Ex. 8, at § 4a5.) The Court has defined a "fuel surcharge" as:

> a supplemental charge that is reasonably related to or based upon the cost or price of fuel. This understanding comports with conventional usage. Most—if not all—commercial airplane passengers are aware that the price of jet fuel rises and falls. Against this backdrop, the typical consumer would consider a fuel surcharge to be an added charge imposed by an airline in order to defray rising fuel costs.

(ECF No. 52, Mem. & Order on Mot. to Dismiss, at 9, Nov. 7, 2013.) As a result, at trial, the plaintiffs would have to prove, by a preponderance of the evidence, that:

(1) the purpose of the fuel surcharge was not "to defray rising fuel costs"; and

(2) the fuel surcharge they agreed to pay was not a "supplemental charge that [was] reasonably related to or based upon the cost or price of fuel." (*See id.*)

As explained below, the evidence proves otherwise.

(i) The Purpose of the Fuel Surcharge Was to Offset Rising Fuel Costs.

From 2003 through the end of the Class Period, the price of jet fuel tripled from "$1 per gallon in 2003 to over $3 per gallon in 2013" and became BA's largest single cost. (SJ Ex. 17, at 3.) The contemporaneous record evidence demonstrates that BA introduced a fuel surcharge in May 2004 as "a result of the continuing rise in oil prices;" it decided to impose a fuel surcharge instead of increasing its fares because it "allow[ed] greater flexibility in response to changing oil prices and provide[d] greater transparency to [BA's] customers." (BA Reply 56.1 ¶ 26 (quoting SJ Ex. 22).) At that time, BA projected that its fuel costs would increase by £150 million over the next year; in response, BA imposed a £2.50 per sector fuel surcharge that was expected to recover only £50 million of that £150 million increase. (*Id.* ¶ 27 (citing SJ Ex. 20; SJ Ex. 19).) BA selected £2.50 because "[i]t was a number which was acceptably small for everyone to have agreed to get the concept into the marketplace, and nowhere near the number it needed to be." (*Id.* (citing Crawley, 23:9-20).)

Projections are estimations; future fuel costs are unknowable. Within a few months of BA's introduction of the fuel surcharge, it realized that its fuel costs were rising faster than expected – BA revised its projected fuel costs for the coming year to be £225 million more than the prior year (versus £150 million). (*See id.* ¶ 32 (citing SJ Ex. 20).) As a result, in August of 2004, BA raised the fuel surcharge to £6 per sector. (*Id.* ¶ 33 (citing SJ Ex. 20).) Yet, BA expected this higher fuel surcharge to offset only £70 million of that £225 million increase. (*Id.*)

Every witness who has personal knowledge of the purpose of the fuel surcharge testified that BA imposed a fuel surcharge in an effort to defray rising fuel costs; for example:

- Andrew Crawley, the former Chief Commercial Officer, testified that the fuel surcharge was "a recovery device for recovering . . . the incremental costs of our fuel," and intended "to recover the cost of fuel which was going through the roof and which we have never managed to recover the full costs of." (*Id.* ¶ 40 (quoting Crawley, 23:3-6; 84:15-16));

- Jerry Foran, the Head of Product Delivery for Revenue Management, testified that the fuel surcharge was introduced "as a result of an unexpected rise in [BA's] fuel costs which we attempted to partially recover," that because BA "had a spike in the cost of fuel . . . we needed to attempt to recover that increase in our costs," and its purpose was "to recover the additional cost of fuel that we had incurred." (*Id.* ¶ 40 (quoting Foran, 17:17-18, 19:16-21, 173:9-17); *see also* SJ Ex. 18 ¶ 4);

- Jo Boswell, the former Head of Revenue and Customer Analysis, testified that the "fuel surcharge [helped] to offset the massive increase in cost." (BA Reply 56.1 ¶ 103 (quoting Boswell, 120:2-13)); and

- Ian Howick, the former Head of Treasury, testified that the fuel surcharge was "to try and offset what we could" of the fuel price. (*Id.* ¶ 103 (quoting Howick, 86:2-8)).

There is no record evidence to the contrary.

(ii) BA's Fuel Surcharge Never Over Recovered its Fuel Costs.

At trial, the evidence would have shown that BA's fuel surcharge never recovered more than its fuel costs or even its incremental increase in fuel costs:

- Over the class period, BA collected **only 46 percent** of its aggregate fuel costs net of hedging through the passenger fuel surcharge. (BA Reply 56.1 ¶ 156 (citing SJ Ex. 32 ¶ 71, Chart 9));

- BA never collected in fuel surcharges its full incremental fuel costs, and in general only recovered approximately 70 percent of them (measured from the inception of the fuel surcharge). (*Id.* ¶ 157 (citing SJ Ex. 32 ¶ 71, Chart 10)); and

- On the named plaintiffs' flights, BA did not collect more in fuel surcharge than its fuel costs or the incremental increase in fuel costs. (*Id.* ¶ 158 (citing SJ Ex. 17 ¶ 156).)

(iii) Every Global Fuel Surcharge Change Was Reasonably Related to or Based Upon the Price or Cost of Fuel.

The Class Period spans over six years and encompasses more than 168,000 class members who bought 605,920 tickets on 38,771 routes. (SJ Ex. 79, Fig. 10; SJ Ex. 32, Ex. 5.) During those 2,351 days, BA made dozens of decisions to increase, decrease, or hold steady the fuel surcharge. Each decision reflected the fuel prices, hedging positions, currency exchange rates, future forecasts, and trends at that moment in time. (*See* BA Reply 56.1 ¶¶ 64-146.) BA had a fuel surcharge committee ("FSC"), which considered its fuel costs and attempted to defray a portion of those costs through the fuel surcharge. (*See id*; SJ Ex. 26; SJ Ex. 40.)

During the Class Period, the FSC met 47 times; it changed the global fuel surcharge 15 times, increasing it on 12 occasions and reducing it on three. (BA Reply 56.1 ¶¶ 60-61; SJ Ex. 26; SJ Ex. 40.) At every FSC meeting, Treasury led a discussion regarding the outlook for fuel, including analysts' price projections, Treasury's internal view, and projected variances in BA's fuel bill versus previous targets or budgets. (*See id*. ¶¶ 54-55.) At or before the meetings, Treasury distributed a chart mapping the historical trend of jet fuel prices against BA's prior fuel surcharge changes ("FSC Price v. Surcharge Charts") and Treasury described how BA's fuel price moved over time as well as its expectations for the future. (SJ Ex. 18 ¶¶ 33-34; *see also* BA Reply 56.1 ¶ 56; SJ Ex. 147.)

Armed with this information, the FSC considered factors that were directly related to or affected the cost of fuel, including spot fuel prices, historical trends, future projections, hedging, and currency exchange. (BA Reply 56.1 ¶ 41.) Hedging affected what BA actually paid for fuel, which was routinely higher or lower that the spot price on a particular day. (*Id*. ¶¶ 41, 45, 46, 49.) Because BA bought fuel in U.S. dollars, but kept its books in Pounds Sterling, the rate of exchange directly impacted BA's cost of fuel as well. (*Id.* ¶ 49.)

While the impact of any one factor at a given period of time may have differed, at its core, the question was: is the current fuel surcharge sufficient to cover the projected increase in future fuel costs. (*See id.* ¶ 34.) Of course, at any particular moment in time, BA did not know what would happen in the future, but the FSC members considered whether there was a "significant increase or decrease in the market price for jet fuel," "an indication that BA's fuel costs would be significantly higher than what was budgeted for in BA's business plan," "fuel price trends, hedging, and currency exchanges" and "how the current fuel price and expectations for the future price of fuel, in light of BA's hedged positions, would be expected to affect BA's fuel costs as modeled in its business plan." (*Id.* ¶ 42 (quoting SJ Ex. 18 at ¶¶ 28, 35).)

"For example, if current fuel prices and anticipated future fuel prices were expected to result in BA paying $200 million more for fuel than had previously been budgeted for the year," the FSC could "seek to recover some portion of those increased costs through" a fuel surcharge change. (SJ Ex. 18 ¶ 36.) This happened in early 2011, for instance, when BA projected increased fuel costs of £200-250 million more than it had anticipated in its 2011 financial plan. (BA Reply 56.1 ¶ 55 (citing SJ Ex. 28).)

BA would prove this up at trial. At trial, BA's executives would systematically walk through the FSC meetings, the fuel price at the time, the Treasury fuel briefings (including the FSC Price v. Surcharge Charts), the press releases and Q&As for each global fuel surcharge change, BA's financial plans, budgets, and year-end annual reports, all of which demonstrate that each of BA's global fuel surcharge changes was reasonably related to or based upon the price or cost of fuel. As a result, the jury would be likely to return a verdict in BA's favor.

(iv) BA Set the Fuel Surcharge Prospectively, Not Looking Backward to 2003/4.

BA set the fuel surcharge looking at, among other things, expectations of fuel cost increases above the prior year or prior estimates for the future – *i.e.*, prospectively. For example:

- In March 2008, BA estimated its fuel bill for the 2008/2009 fiscal year would increase by **£450 million** to **£2.5 billion** (SJ Ex. 34 at BA00003312);
- The FSC met on April 25, 2008 to discuss changing the fuel surcharge "given the current price of oil." (BA Reply 56.1 ¶ 93 (citing SJ Ex. 132) and ¶ 96 (quoting SJ Ex. 134));
- In the weeks preceding that meeting, jet fuel prices had increased rapidly and reached record highs. (*Id.* ¶ 95 (citing SJ Ex. 103) and ¶ 94 (citing SJ Ex. 133));
- After the meeting, BA increased the fuel surcharge on all longhaul and shorthaul flights, effective May 2, 2008. (*Id.* ¶ 97 (citing SJ Ex. 50));
- Contemporaneous documents explained that BA raised the surcharge because it then projected that its fuel bill would increase by **£800 million** in fiscal year 2008/2009 to **£2.9 billion—£400 million** higher than its estimate the month before. (*See* Ex. B, BA00075672); and
- An external press release announcing the surcharge explained that "the decision reflects continuing high oil prices." (BA Reply 56.1 ¶ 97 (quoting SJ Ex. 50).)

This evidence unequivocally demonstrates that this global fuel surcharge change was not only reasonably related to the cost or price of fuel, but also done prospectively. Similar documentation exists for every other global fuel surcharge change.

Significantly, at his deposition, the plaintiffs' damages expert, Dr. Arnold, conceded that the manner in which BA set its fuel surcharge fits well within his conception of a fuel surcharge:

> Q. So if BA were to look at its fuel costs and say we thought our fuel costs were going to be 100 million pounds and something happened and we now think it is going to be more like 200 million pounds, is it appropriate as a matter of economics for BA to put a fuel surcharge in to attempt to recoup some part of that increased 100 million pounds?
>
> [Objection made]

> A. I think that would be a – that would fit my conception of what a fuel surcharge is as long as it is applied in a consistent basis across routes and customers.

(Arnold, 151:24-152:13.)

While BA set the fuel surcharge prospectively, it used a baseline of 2003/2004 – the fiscal year prior to when it implemented the fuel surcharge – as a retrospective check to ensure that BA did not over-recover its incremental fuel costs. (BA Reply 56.1 ¶¶ 34-35 (citing SJ Ex. 34, at BA00003293).) Utilizing a baseline in this fashion is perfectly consistent with setting the fuel surcharge based on forward-looking factors.

(v) The Jury Would Be Unlikely to Credit the Plaintiffs' Experts.

The jury would be unlikely to credit the testimony of Robert Kokonis, the plaintiffs' purported aviation expert, and their damages expert, Dr. Arnold, for a myriad of reasons, including the five reasons discussed below.

First, the plaintiffs' experts are not persuasive. Dr. Arnold's testimony is not likely to be credited because, among other things, he:

- Is not an expert in airline fuel surcharges (having never worked on a case involving fuel surcharges) and has never worked for an airline (Arnold, 244:20-245:9);
- Did not review fuel surcharge, economic, or aviation literature and failed to cite any economic authority in support of his opinions (*Id.*, 13:7-14:6); and
- Was found by a federal court to have filed a frivolous claim. (*Arnold v. Villarreal*, 2010 WL 3893828, at *4 (N.D. Ill. Sept. 29, 2010).)

Mr. Kokonis is equally unlikely to be persuasive to the jury, as, among other things, he:

- Never worked at an airline when it was imposing a fuel surcharge (Kokonis, 145:4-21);
- Never worked in revenue management or loyalty at an airline (*Id.*, 61:11-19);
- Never obtained certification as an expert in litigation and sought out plaintiffs' counsel here and asked to work on this case (*Id.*, 71:12-16; 71:23-72:4);

- Refused to discuss the only work he previously did supposedly analyzing fuel surcharges (*Id.*, 53:3-15); and
- Lied under oath at his deposition. (*Id.*, 181:6-18.)

Second, Mr. Kokonis and Dr. Arnold admitted that their opinions are sheer speculation, unsupported by analysis. For example, Mr. Kokonis opines that "BA changed and discussed its YQ[5] charges for reasons that did not relate to the cost of fuel." (SJ Ex. 205 ¶ 2.) At his deposition, it became clear that he had done no analysis to support this supposition:

> Q. Are you offering that as an opinion as to every YQ charge from the period 2003 to 2013?
>
> A. No, I'm not.
>
> Q. So there are changes to the YQ charge over that period that may have related to the cost of fuel?
>
> A. Possibly.
>
> Q. How many . . . changes to the charge in your view do not relate to the cost of fuel?
>
> A. We didn't count. ***I have no idea***.

(Kokonis, 114:4-17 (emphasis added).) Likewise, Dr. Arnold proclaims in his report that BA considered "many factors other than changes in the price of oil or cost of fuel" when setting the fuel surcharge. (SJ Ex. 79, at p. 6.) But, at his deposition, Dr. Arnold testified that he had not done any analysis of the reason for any particular fuel surcharge change and that he had no evidence to disprove contemporaneous documentation establishing that a particular increase was in fact done as a result of trends in the cost of fuel. (Arnold, 192:22-193:11.)

Third, what Dr. Arnold and Mr. Kokonis contend BA should have done in this case is unprecedented in the airline industry. For example, Dr. Arnold claims BA should have reset all

[5] "YQ" is a technical code that BA, and other airlines, use to refer to a fuel surcharge. The plaintiffs' experts use that code to pretend that the fuel surcharge is not, in fact, a fuel surcharge.

of its fares and fuel surcharges quarterly, but admitted at his deposition that no airline does this. (*Id.*, 146:6-13; 171:23-172:5; 173:2-6; 183:25-184:5.) Similarly, Mr. Kokonis opines that BA should have automated its fuel surcharge, but he testified that he did not know of a single airline that does so. (*Id*., 229:17-230:21.) And, he opines that it was improper for BA to impose a point of sale differential, but testified that he did not know of a single airline that does not vary its fuel surcharge based upon point of sale. (*Id.*, 222:3-224:17.)

Fourth, both experts cherry pick data that renders their conclusions unreliable. For example, Dr. Arnold proclaims that BA's ratio of fuel surcharge to fare (the "Ratio") is too high, thus rendering the fuel surcharge not a fuel surcharge. To get to his desired results (high Ratios), Dr. Arnold used fare data for a small number of low-priced, non-refundable, shoulder-season fares – which is not representative data because no one in the class purchased such fares (since they all bought fully refundable redemption tickets). (SJ Ex. 79, Figs. 5-6; Arnold, 74:20-75:5; 86:13-19.) Had Dr. Arnold analyzed the named plaintiffs' tickets, or even comparable tickets, his results would have been dramatically lower: the named plaintiffs' redemption tickets had ratios between four and 15 percent. (*Compare* SJ Ex. 32, Chart 7, *with* SJ Ex. 79, Fig. 5.)

Mr. Kokonis' analyses similarly rely on non-representative, cherry-picked data that a jury is unlikely to credit as reliable. For example, even though Mr. Kokonis declared that "individual routes do not matter" (SJ Ex. 205 ¶ 19), he then proceeded to identify 13 routes (out of 240 routes BA flies) where he claims BA allegedly over-recovered its fuel costs *versus his projected costs from the 2003/2004 fiscal year*. (SJ Ex. 81, at p. 31.) This analysis is irrelevant because BA set the fuel surcharge on a global, not route-by-route, basis. (BA Reply 56.1 ¶ 63.) In any event, none of the 13 routes Mr. Kokonis cherry picked were flown by the named plaintiffs, none were to or from the United States, and none were even among the top 25 routes allegedly

traveled by members of the class. (*Id.* ¶ 29; SJ Ex. 79, Fig. 10.) And, after initially lying about it under oath, Mr. Kokonis admitted that he had analyzed at least one United States-U.K. route but then excluded it because he only included routes that purportedly over-recovered. (Kokonis, 181:11-18; SJ Ex. 17 ¶ 89.) Amusingly, Mr. Kokonis' analysis ultimately shows that 239 of BA's 240 routes (over 99 percent) did not over-recover BA's aggregate fuel costs. (SJ Ex. 81, at p. 31; SJ Ex. 32, at Ex. 5.)

Fifth, Dr. Arnold's opinions lack foundation and were not predicated on economic theories or economic authority. First, he opined that BA's fuel surcharge was not a genuine fuel surcharge "as a matter of economics." (SJ Ex. 79 ¶ 9.) Amazingly, however, when asked at his deposition if there was a common generally accepted definition of the term fuel surcharge in economics, he responded that, "I don't know that I researched that particular question. I don't know that it is particularly relevant . . . ." (Arnold, 8:3-6.) In addition, when asked whether "there was any particular economic principle" to support his opinion that BA's fuel surcharges are not fuel surcharges, he responded that he could not identify one; instead, he invoked "the tools of economics." (*Id.*, 17:2-16.) When asked to identify those "tools," he could not do so. (*Id.*, 18:5-8.)

As a result of the above, the plaintiffs face substantial liability risk as they would have been unsuccessful in proving their case at trial.

(b) Damages Risk

Even if a jury were to find in favor of the plaintiffs (which it would not have) no jury would award anywhere near the plaintiffs' asserted damages of $160.7 million – which represents *every single penny* paid in fuel surcharge – for several reasons.

First, it is undisputed that the contracts *expressly permitted BA to assess a fuel surcharge*. (SJ Ex. 7, at § 13.14; SJ Ex. 8, at § 4a.) Therefore, the notion that BA could not charge a single

cent in fuel surcharge – in the face of tripling fuel costs and when its competitors were charging one as well – is nonsensical. Second, the named plaintiffs undisputably obtained value for the fuel surcharge paid. Mr. Horsey and Mr. Dover, for example, flew in BA's first-class cabin, with use of BA's fist class lounges and spa services and other amenities. While they each paid a fuel surcharge, the value of the flights dwarfed the fuel surcharge amount: Mr. Horsey paid $1,325 for flights that would have cost $28,583-$33,265 and Mr. Dover paid $1,746 for flights that would have cost $20,692. (SJ Ex. 32, Chart 7.)

Third, a $160 million judgment cannot be supported under English law, which requires the jury "to step into the shoes of [BA], and taking into account the relevant economic and other considerations which would have influenced the method of performance, 'decide on the level'" of fuel surcharge that BA would have assessed consistent with the EC Contract. (SJ Ex. 36 ¶ 23 (internal citation omitted).) In that analysis, BA is expected to keep its own "*commercial interests 'very much in mind'*." (SJ Ex. 1 ¶ 86 (emphasis added).)

The plaintiffs' $160 million in damages request violates this rule, as it is premised on the counter-factual (and absurd) assumption that BA would have done *the exact opposite* of what the parties agree it was legally entitled to do: assess a fuel surcharge. Stated otherwise, to obtain $160 million, the plaintiffs would have to convince the jury that even though BA wrote two contracts authorizing a fuel surcharge, faced skyrocketing fuel costs, and created infrastructure around the fuel surcharge, it would instead have decided not to impose any fuel surcharge at all.

Fourth, the undisputed evidence demonstrates that, if BA decided to stop charging the fuel surcharge, it would have taken alternative actions to mitigate the lost revenue, which would need to be factored into any damages analysis. (SJ Ex. 33 ¶ 33, Ex. 76.) Yet, the plaintiffs' expert admits he failed to consider any mitigating factors. (Arnold, 129:17-22; 130:17-131:7.)

Finally, the plaintiffs' damages figures are improperly inflated because they include individuals who do not meet the class definition. Specifically, the plaintiffs seek damages for individuals that: (a) paid with cash; (b) had a flight segment without a redemption; (c) redeemed using BA's Reward Flight Saver product and did not pay a fuel surcharge; (d) redeemed for an upgrade; (e) redeemed for the Part Avios and Part Cash product; (f) redeemed prior to the start of the class period; (g) did not provide a valid U.S. address at the time of booking; or (h) previously released their claims against BA in a prior settlement. (SJ Ex. 32 ¶¶ 93-105.) Removing these individuals reduces the maximum potential damages award significantly.

(c) Decertification Risk

Even if the plaintiffs could prove liability *and* damages (which they could not), they could not do so using generalized proof common to the class rather than individual to its members. The Court's class certification order stated that,

> Plaintiffs *plan to use generalized proof* to show that: (1) at all times, British Airways relied on an irrelevant and impermissible factor – British Airways' total cost of fuel in 2003-2004 – in setting its YQ charges, (2) through the class period, British Airways' YQ charges were not, as a matter of economics, genuine fuel surcharges because they do not bear a 'close relationship' to the cost or price of fuel, and (3) as a result, British Airways breached the Contract (4) causing damage to the class of $142 to $161 million.

(ECF No. 249, Mem. & Order (Class Certification), at 13 (emphasis added).)

If the case proceeded to trial, it would become evident that the evidence on which the plaintiffs' experts were relying in an attempt to prove up their case is not generalized proof, but rather varies by individual, and thus would expose the plaintiffs to a decertification motion. District courts are under a continuing duty to monitor the prerequisites of class certification and may "decertify a class if it appears that the requirements of Rule 23 are [no longer] in fact met." *Mazzei v. Money Store*, 308 F.R.D. 92, 106 (S.D.N.Y. 2015), *aff'd* 829 F.3d 260 (2d Cir. 2016). BA can move to decertify the class at the close of plaintiffs' evidence or even after a jury verdict.

See, e.g., *Mazzei*, 829 F.3d at 266-267 (affirming decertification); *Taylor v. The Hous. Auth. of New Haven*, 267 F.R.D. 36, 62, 66 (D. Conn. 2010) (vacating certification order because "test[ing] [plaintiffs' theory] on the merits" at trial defeated commonality and typicality); *Reed v. Town of Babylon*, 914 F. Supp. 843, 849 (E.D.N.Y. 1996) (post-trial *sua sponte* decertification).

Here, trial would demonstrate that the questions that the plaintiffs and the Court have posed are not capable of "generating common answers apt to drive the resolution of the litigation." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011). While "representative evidence can be used to prove an individual issue on a classwide basis," one can only do so "if each class member, in an individual action, could rely on that evidence to prove his individual claim." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1057 (2016) (Thomas, J., dissenting).

The Court cited exclusively to Dr. Arnold's report in support of plaintiffs' claim that they possess "generalized proof." (ECF No. 249, Mem. & Order (Class Certification) at 13 (citing SJ Ex. 79, pgs. 31-45, 66-67).) A trial would reveal that the analysis on which Dr. Arnold relies, however, is: (1) not capable of proving the claims of the named plaintiffs, (2) not common to the entire class, and (3) not equally applicable to each fuel surcharge change. (Arnold, 193:2-11.)

For example, Dr. Arnold claimed that, as a "matter of economics," the Ratio was unduly high, which renders the fuel surcharge improper. (SJ Ex. 79 ¶¶ 37-40.) Even if probative (which it is not), this analysis does not generate generalized proof common to the class, but instead is individual to its members: the class booked 605,920 tickets, on 38,771 route combinations, over a more than six year period, during which BA had millions of fares. (SJ Ex. 79, Fig. 10; SJ Ex. 32, Ex. 5; SJ Ex. 18 ¶ 5.) As a result, there will be thousands (or more) of resulting Ratios requiring highly individualized fact-finding. Indeed, the failure of this metric to generate

answers common to the class as a whole is demonstrated by the fact the named plaintiffs cannot rely upon it to prove their individual claims: the Ratios for their refundable redemption flights ranged from ***four percent to 15 percent***, which does not establish that the fuel surcharge was improper. (SJ Ex. 32, Chart 7.) As such, individualized issues would predominate at trial, which would risk decertification of the class. These management problems presented by a litigated class, however, are absent from a settlement class. *See, e.g.*, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997) ("Confronted with a request for a settlement-only class certification, a district court need not inquire whether the case if tried, would present intractable management problems . . . for the proposal is that there be no trial."); *In re Am. Int'l Grp. Inc. Sec. Litig.*, 689 F.3d 229, 239 (2d Cir. 2012) (same).

3. The Complexity, Expense, and Duration of the Litigation Favor Preliminary Approval.

In addition to the substantial risks and uncertainty that the parties would face if the Litigation were to continue, the parties face *certainty* that further litigation would be expensive, complex, and time-consuming. "[S]ettlement is favored where 'trial of th[e] class action would be a long, arduous process requiring great expenditures of time and money on behalf of both the parties and the court.'" *In re Giant Interactive Grp., Inc.*, 279 F.R.D. 151, 160 (S.D.N.Y. 2011) (approving settlement). As BA previously informed the Court, trial of this matter will be lengthy, complicated, and expensive. The plaintiffs estimated that they would call at least six to eight witnesses and BA estimated that it would call between seven and 15 witnesses. (ECF No. 275, Oct. 13, 2017 Joint Letter, at 2.) Conservatively, BA estimated that a trial would take two weeks. (*See id.* at 2-3.)

In addition, trial here would involve a battle of the experts. (*See* SJ Order, ECF No. 271, at 11 ("[E]xpert witnesses for both parties have provided competing analyses of the relationship

between the YQ charge and fuel prices or costs, as well as the amount, if any, of damages.").) "A trial consisting of a 'battle of the experts' … would be complex and lengthy." *In re Sinus Buster Prods. Consumer Litig.*, 2014 WL 5819921, at *8 (E.D.N.Y. Nov. 10, 2014) (approving settlement).

Moreover, in the unlikely event that the plaintiffs prevailed at trial with a class intact, BA would have appealed, and avoidance of that lengthy process favors approval of the Proposed Settlement. "Not only would Plaintiffs spend substantial sums in litigating this case through trial and appeals, it could be years before class members saw any recovery, if at all." *In re Sony SXRD Projection Television Class Action Litig.*, 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) (approving settlement); *see also In re Marsh And McLennan Companies Inc. Secs. Litig.*, 2009 WL 5178546, at *5 (S.D.N.Y. Dec. 23, 2009) ("There would have been significant additional resources and costs expended to litigate the case through trial and through the inevitable appeals of any judgment that might have been entered.").

4. The Advanced Stage of the Proceedings Favors Preliminary Approval.

"If all discovery has been completed and the case is ready to go to trial, the court obviously has sufficient evidence to determine the adequacy of settlement." *Wal-Mart Stores*, 396 F.3d at 118. Similarly, if the parties are "in the advanced stage of pointing or preparing for trial," as the parties are here, they have sufficient information to assess a settlement. *See In re Sumitomo Copper Litig.*, 189 F.R.D. at 282 (approving settlement). Here, the only remaining step in this case, had it not settled, would be trial. As a result, the parties and the Court are fully capable of assessing the benefits of the Proposed Settlement, which weighs in favor of preliminary approval of the Proposed Settlement.

5. Comparable Settlement Terms Have Been Readily Approved.

The Proposed Settlement is comparable to numerous other settlements that have been approved. For example, in *Careathers v. Red Bull North Am. Inc.*, the Southern District of New York approved a settlement where class members could choose to receive either free Red Bull products or cash. (Ex. C, 1:13-cv-00369, ECF No. 101, Final J. and Order, at 13-14 (S.D.N.Y. May 12, 2015).) Similarly, in *Parker v. Time Warner Entm't Co.*, the Southern District of New York approved a settlement of a consumer class action, which provided class members with either a free month of cable service or a $5 check. 631 F. Supp. 2d 242, 250 (E.D.N.Y. 2009). Also, in *Carter v. Forjas Taurus S.A.*, the Court approved a settlement providing class members with an enhanced warranty or a cash payment. 2016 WL 3982489, at *3 (S.D. Fla. July 22, 2016), *aff'd*, 701 F. App'x 759 (11th Cir. 2017). Finally, in *Rachel Cody, et al. v. SoulCycle Inc.*, the Court approved a settlement where class members would receive "reinstatement of up to two expired classes or cash reimbursement." (Ex. D, 15-cv-6457, ECF No. 254, Order Granting Pls.' Mot. For Final Approval of Class Action Settlement, at 3 (C.D. Cal. Oct. 3, 2017).)

IV. CONCLUSION

BA respectfully asks this Court to grant Plaintiffs' Motion because the Proposed Settlement falls within the range for possible 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 the plaintiffs consented to such service.

Daniel Harkins