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23 **UNITED STATES DISTRICT COURT**  
24 **CENTRAL DISTRICT OF CALIFORNIA**  
25 **WESTERN DIVISION**

IN RE KOREAN AIR LINES CO., LTD.  
ANTITRUST LITIGATION

MDL No. 07-01891

Master File No. CV 07-05107 SJO  
(AGRx)

This Document Relates To:

ALL ACTIONS

**PLAINTIFFS' MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF PLAINTIFFS'  
MOTION FOR AN AWARD OF  
ATTORNEYS' FEES AND  
REIMBURSEMENT OF EXPENSES**

**Date: December 2, 2013**  
**Time: 10:00 a.m.**  
**Place: Courtroom No. 1**  
**Judge: Hon. S. James Otero**

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1 Having secured settlements totaling \$50 million in cash and \$36 million in  
2 coupons on behalf of the Class, Co-Lead Class Counsel respectfully request that  
3 the Court approve an award of fees of (a) 25 percent of the cash portion of the  
4 combined Settlement Fund and (b) 25 percent of the \$36 million in air travel  
5 coupons, as described more particularly below, and expense reimbursement to  
6 plaintiffs’ counsel in an amount not to exceed \$600,000.

7 **I. INTRODUCTION<sup>1</sup>**

8 In this complex antitrust action, the efforts of Plaintiffs and Co-Lead Class  
9 Counsel and their colleagues spanning six years achieved settlements with  
10 defendants Asiana Airlines (“Asiana”) and Korean Air Lines Co., Ltd., (“Korean  
11 Air”) (collectively “Defendants”) providing a combined recover of \$86 million  
12 dollars in cash and coupons. The combined Settlement Fund consists of \$50  
13 million cash and \$36 million in coupons redeemable toward the purchase of  
14 passenger air transportation services on Asiana and Korean Air. Co-Lead Class  
15 Counsel secured the settlements in the face of significant litigation risks and  
16 challenges, including the precarious financial condition of Asiana and Korean Air  
17 and the continued uncertainty of obtaining class certification and proving liability  
18 and damages on a class-wide basis. Jt. Decl. at ¶30.

19 A fee award of \$12.5 million of the \$50 million cash portion of the Fund and  
20 one-fourth of the coupons of the \$36 million in travel coupons plus reimbursement  
21 of up to \$600,000 in expenses reasonably compensates Co-Lead Counsel for “the  
22 value of the class recovery.” *In re HP Inkjet Printer Litig.*, 716 F.3d 1173, 1178  
23 (9th Cir. 2013) (citations omitted). The requested fee and expense award is  
24 reasonable and appropriate because the recovery obtained for the Class resulted

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25 <sup>1</sup> For a detailed chronology of the litigation, Plaintiffs refer the Court to the  
Joint Declaration of Susan G. Kupfer, Marc M. Seltzer and Jeff S. Westerman (“Jt.  
Decl.”).

1 from Co-Lead Class Counsel’s vigorous prosecution of the litigation, and was  
2 achieved only after: a thorough investigation; extensive motion practice, including  
3 responding to several motions to dismiss; substantial discovery, in which  
4 thousands of Korean language documents were translated and reviewed; and an  
5 arm’s-length mediation with the assistance of a nationally-prominent mediator,  
6 with additional negotiations following the face-to-face mediation. Jt. Decl. at  
7 ¶¶16-17.

8 The request for a fee award will also satisfy the requirements of the Class  
9 Action Fairness Act, 28 U.S.C. § 1712(e), for awards relating to coupon  
10 settlements. Under *HP Inkjet*’s analysis of CAFA section 3, the Court must base  
11 the part of the fee award “attributable to” the \$36 million in coupons on “the  
12 redemption value of the coupons” to the class. *HP Inkjet*, 716 F.3d 1187 (quoting  
13 28 U.S.C. § 1712(e)).

14 Co-Lead Class Counsel propose three alternatives to the Court for awarding  
15 attorneys’ fees based on the amount of the coupons. Counsel believe that each  
16 alternative, described below, complies with CAFA and *HP Inkjet* and ask the Court  
17 to express its preferred alternative award and find that the proposal is fair and  
18 reasonable to Counsel and to the Class.

19 (1) The first alternative is that counsel be awarded 25% of the coupons  
20 themselves when they are distributed to the Class. Co-Lead Class Counsel will  
21 then participate, as the Class does, in transfer and redemption of their share of the  
22 coupons during the three year redemption period. To insure that the redemption of  
23 the travel coupons to be distributed is as efficient and valuable as possible,  
24 Plaintiffs have engaged, and the Court has appointed, Chicago Clearing  
25 Corporation (“CCC”) as Coupon Claims Administrator. CCC will establish a  
market mechanism to assist in the transfer and redemption of the coupons through  
an online marketplace where class members can transfer coupons to others or offer  
coupons for sale. CCC had previously established markets for redemption of



1 coupons to class members in the *In re Auction Houses Antitrust Litg.*, No. 00 CV.  
2 0648 (LAK) (S.D.N.Y.) and *In re Linen Antitrust Litigation*, No. 03 Civ. 7823  
3 (RWS) (S.D.N.Y.) cases, among others.

4 (2) The second alternative would be to have counsel awarded a percentage  
5 of the coupons based on the actual redemption of the coupons by the Class.  
6 Counsel would make periodic application to the Court for release of coupons for a  
7 fee award when data becomes available on redemptions by the Class through the  
8 transfer mechanism or through the airlines. Counsel believe this alternative is not  
9 mandated by CAFA but is certainly permitted.

10 (3) The third alternative would be to reserve up to 25% of the face value of  
11 the coupons out of the cash portion of the Settlement Fund for future attorneys'  
12 fees, to be paid once the Court determines redemption rates and other relevant  
13 factors. This alternative, while also permissible under both CAFA and *HP Inkjet*,  
14 has the downside of limiting the initial cash distribution to the Class by requiring  
15 the reserve.

16 Counsel have listed these alternatives for the Court to consider in the  
17 preferred order. Distribution of the coupons, not cash, to counsel as a fee award, is  
18 the preferred alternative. As the Court was advised at the hearing on preliminary  
19 approval of the Korean Air settlement, the first alternative does not require a cash  
20 reserve and places counsel in the same position as the Class in participating in the  
21 redemption of the coupons. Counsel will share equally with the Class whatever the  
22 ultimate redemption value of the coupons.

23 Pursuant to the Court's July 31, 2013 Order (the "Preliminary Approval  
24 Order"), the Claims Administrator mailed over 1,500,000 notices to potential  
25 Settlement Class Members, Jt. Decl. ¶¶6 and 25. The Notice specifically advised  
potential Settlement Class Members that Co-Lead Counsel intended to apply to the  
Court for an award of attorneys' fees representing up to 25% of the Settlement

1 Fund and that Co-Lead Counsel would seek reimbursement of out-of-pocket  
2 expenses. *Id.*

3 The deadline to request to be excluded from the Class and the deadline to  
4 file objections to the Settlement is October 25, 2013. Jt. Decl. at ¶24. To date, no  
5 objections have been filed with respect to any aspect of the Settlement, including  
6 the request for fees and reimbursement of expenses. Jt. Decl. at ¶7.

7 The fairness and reasonableness of Co-Lead Class Counsels' fee and  
8 expense request are confirmed when cross-checked with Co-Lead Counsels'  
9 lodestar. Co-Lead Counsel performed 23,384 hours of work during this litigation,  
10 accumulating a lodestar of \$11,175,134. Thus, the requested cash fee award  
11 amounts to a modest multiplier of 1.1 on Co-Lead Counsels' time. However, other  
12 law firms assisted the Co-Lead Class Counsel in the prosecution of this litigation.  
13 Based on the time reported to Co-Lead Counsel by plaintiffs' counsel performing  
14 work during the litigation, plaintiffs' counsel expended over 12,635 hours of  
15 professional time and accumulated a lodestar totaling approximately \$6,158,220 in  
16 prosecuting the Action. Jt. Decl. at ¶51 and attached Exhibits A-D of Co-Lead  
17 Counsel. The requested fee based on the cash portion of the Fund therefore  
18 represents a "negative" lodestar multiplier of 0.72 to compensate all Plaintiffs'  
19 Counsel for this time and labor, as well as the substantial risks associated with  
20 litigating this case on a fully contingent basis.

21 For the reasons set forth more fully below, the requested attorneys' fees and  
22 expenses are fair and reasonable under applicable legal standards. Therefore, Co-  
23 Lead Counsel respectfully request that the Court grant this motion.

## 24 **II. FACTUAL BACKGROUND**

25 This case is an antitrust class action brought against two defendants, Asiana  
and Korean Air. On August 23, 2007, Korean Air pled guilty to participating in  
conspiracies to fix prices for certain U.S./trans-Pacific air cargo services and

1 certain air passenger flights from the United States to Korea and agreed to pay a  
2 fine of \$300 million. On May 6, 2009, Asiana also pled guilty to participating in  
3 conspiracies to fix prices for certain U.S./trans-Pacific air cargo services and  
4 certain air passenger flights from the United States to Korea. Asiana agreed to  
5 pay a fine of \$50 million.

6 Plaintiffs filed the operative complaint—the Second Amended Complaint  
7 (“SAC”)—on February 29, 2008, alleging that Korean Air and Asiana conspired  
8 to fix air fares and fuel surcharges for passenger air transportation on flights  
9 between the United States and Korea in violation of Section 1 of the Sherman Act,  
10 15 U.S.C. § 1. The case involves highly-complex issues of fact and law relating to  
11 the pricing and distribution of tickets for passenger air travel, the effect of the  
12 alleged conspiracy on the price of passenger air travel between the United States  
13 and Korea, and the damages allegedly caused by the price fixing conspiracy. The  
14 litigation has been hard fought over the course of six years.

15 Defendants each filed a motion to dismiss on April 4, 2008. The Court  
16 granted defendants’ motions in part, dismissing plaintiffs’ “pass through” claims—  
17 *i.e.*, claims that were based on an itinerary that includes a U.S.-Korea flight  
18 segment but where the original point of departure or ultimate destination was not in  
19 Korea or the U.S. The Court denied defendants’ motions as to all other of  
20 plaintiffs’ claims.

21 On August 12, 2009, defendants jointly filed a second motion to dismiss the  
22 claims of purchasers of Korea-origin travel pursuant to the Foreign Trade  
23 Antitrust Improvement Act (“FTAIA”). On December 22, 2009, the Court struck  
24 the parties’ briefing on the motion to dismiss and ordered further discovery. On  
25 February 26, 2010, defendants again filed a joint motion to dismiss the claims of  
purchasers of Korea-origin travel. On August 2, 2010, the Court granted

1 defendants' motion and dismissed claims based on purchases of tickets for air  
2 passenger travel made in Korea.

3 The parties have also engaged in time-consuming discovery, including  
4 motion practice pertaining to discovery matters. Plaintiffs have expended  
5 significant effort and resources toward proof of liability and damages. Although  
6 the matter of class certification has not been litigated, Plaintiffs prepared through  
7 discovery and economic expert analysis to bring a motion for class certification  
8 before the settlement with defendant Asiana was reached in 2010.

9 In July 2010, following months of arm's-length negotiations—including  
10 numerous conference calls and face-to-face discussions among counsel—plaintiffs  
11 and Asiana agreed to a settlement of the claims in this lawsuit as against Asiana.  
12 That settlement received final approval from the Court in June 2011 and Asiana  
13 began to provide cooperation in connection with the ongoing litigation against  
14 Korean Air as part of the terms of that settlement.

15 The settlement reached with defendant Korean Air in June 2013, and  
16 preliminarily approved by this Court, is also the result of arm's-length negotiation  
17 that took place over the course of many months, including substantial mediation  
18 with the assistance of the Hon. Layn Phillips (Ret.).

19 The Stipulation of Settlement Between Class Plaintiffs and Defendant  
20 Korean Air Lines Co. Ltd. (the "Settlement Agreement"), dated as of June 30,  
21 2013, provides that (1) Korean will pay \$39,000,000 in cash in three installment  
22 payments, \$13,000,000 of which has already been deposited in an interest-bearing  
23 escrow account established by Co-Lead Counsel and (2) Korean will make  
24 available \$26,000,000 in fully transferrable travel coupons redeemable for  
25 passenger air travel on Korean Air. *See generally* Jt. Decl., .

As explained in detail in the Joint Declaration of Co-Lead Class Counsel

1 (at ¶36), the work performed by plaintiffs' counsel throughout the litigation  
2 included:

- 3 • Reviewing and analyzing the factual background underlying the  
4 complaint and airline industry characteristics;
- 5 • Collecting and reviewing a comprehensive compilation of analyst  
6 reports and major news service reports on Asiana and Korean Air;
- 7 • Reviewing and analyzing the allegations of price-fixing and market  
8 allocation relating to Asiana and Korean Air;
- 9 • Locating and interviewing witnesses and third parties;
- 10 • Translating and analyzing thousands of documents produced by  
11 defendants;
- 12 • Reviewing named class plaintiffs' qualifications to serve as class  
13 representatives and defending discovery and depositions;
- 14 • Researching and analyzing publicly-available presentations, journals,  
15 industry publications, and other materials, specifically related to  
16 defendants' conduct;
- 17 • Drafting the initial complaints and the First and Second Consolidated  
18 Class Action Complaint setting forth the violations of the federal  
19 antitrust laws;
- 20 • Researching and drafting memoranda opposing Defendants' Motions  
21 to Dismiss;
- 22 • Preparing for and appearing at oral argument on Defendants' Motions  
23 to Dismiss;
- 24 • Preparing Initial Disclosures and assisting in the production of  
25 documents by plaintiffs;
- Serving narrowly-tailored and specific Requests for Admissions, and  
Requests for Production of Documents on Defendants;

- 1 • Negotiating a confidentiality stipulation (and proposed Order) with  
2 defendants;
- 3 • Engaging in multiple efforts to meet and confer concerning discovery  
4 disputes and prosecution of a motion to compel before the Magistrate  
5 Judge;
- 6 • Spending substantial amounts of time reviewing written discovery  
7 responses, as well as reviewing thousands of pages of documentary  
8 evidence received in response to Plaintiffs' discovery requests;
- 9 • Taking the early 30(b)(6) deposition of Korean Air and several  
10 30(b)(6) depositions of defendants' revenue management team in  
11 connection with the motions to dismiss;
- 12 • Consulting with economic experts in the areas of revenue  
13 management, class certification and damages;
- 14 • Engaging expert economists to conduct studies and prepare analyses  
15 with respect to the issues of class certification and damages;
- 16 • Preparing for and participating in a mediation process with a  
17 nationally regarded third-party neutral, former Judge Phillips,  
18 including drafting opening and reply mediation statements, and  
19 participating in continued negotiation efforts over the weeks following  
20 the mediation to achieve and finalize the Settlement;
- 21 • Drafting the settlement papers, related motion papers and other  
22 documents necessary to provide notice of the Settlement to Class  
23 Members and to obtain preliminary and final approval of the  
24 Settlement;
- 25 • Securing the appointment of a coupon claims administrator, and  
working with all parties to implement the process, to establish a  
market in the travel coupons and enable claimants to easily transfer  
and redeem the coupons.

1 Counsels’ successful efforts to resolve this action have been without  
2 compensation of any kind to date, and payment of attorneys’ fees was and always  
3 has been wholly contingent upon the result achieved. As compensation for these  
4 efforts, Co-Lead Counsel respectfully requests this Court to award attorneys’ fees  
5 and reimbursement of expenses sought by this motion.

6 **III. A REASONABLE PERCENTAGE OF THE COMMON FUND**  
7 **RECOVERED IS AN APPROPRIATE APPROACH TO AWARDING**  
8 **ATTORNEYS’ FEES**

9 **A. The Common Fund Doctrine**

10 It has long been recognized that “a private plaintiff, or his attorney, whose  
11 efforts create, discover, increase or preserve a fund to which others also have a  
12 claim is entitled to recover from the fund the costs of his litigation, including  
13 attorneys’ fees.” *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 769 (9th Cir.  
14 1977). In *Paul, Johnson, Alston & Hunt v. Grauldy*, 886 F.2d 268 (9th Cir. 1989),  
15 the Ninth Circuit explained the equitable principle underlying such fee awards:

16 Since the Supreme Court’s 1885 decision in *Central Railroad &*  
17 *Banking Co. of Ga. v. Pettus*, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915  
18 (1885), it is well settled that the lawyer who creates a common fund is  
19 allowed an *extra* reward, beyond that which he has arranged with his  
20 client, so that he might share the wealth of those upon whom he has  
21 conferred a benefit.

22 \* \* \*

23 The amount of such a reward is that which is deemed “reasonable”  
24 under the circumstances.

25 *Id.* at 271 (Emphasis in original; citations omitted). The purpose of the “common  
fund” doctrine is to avoid unjust enrichment, requiring “those who benefit from the  
creation of the fund [to] share the wealth with the lawyers whose skill and effort  
helped create it.” *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d  
1291, 1300 (9th Cir. 1994) (“WPPSS”).

1 Courts also have recognized that, in addition to providing just compensation,  
2 awards of attorneys' fees from a common fund also serve to encourage skilled  
3 counsel to represent those who seek redress for damages inflicted on entire classes  
4 of persons and to discourage future similar misconduct. Indeed, the Supreme  
5 Court has emphasized that private actions, such as the instant action, provide an  
6 effective weapon in the enforcement of the antitrust laws.

7 **B. The Percentage-of-Fund Approach**

8 In *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984), the Supreme Court  
9 recognized that under the common fund doctrine, a "reasonable" fee may be based  
10 "on a percentage of the fund bestowed on the class." In *Paul, Johnson*, 886 F.2d at  
11 268, *Six (6) Mexican Workers v. Arizona Citrus Growers*, 904 F.2d 1301, 1311  
12 (9th Cir. 1990), and *Torrise v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1376 (9th Cir.  
13 1993), the Ninth Circuit expressly approved the use of the percentage-of-recovery  
14 method in common fund cases.

15 Following the Ninth Circuit's decisions in *Paul, Johnson* and its progeny,  
16 district courts have almost uniformly shifted to the percentage-of-fund method in  
17 awarding fees in representative actions. Indeed, use of the percentage-of-fund  
18 method "appears to be dominant." *In re OmniVision Techs., Inc.*, 559 F. Supp. 2d  
19 1036, 1046 (N.D. Cal. 2008). There are compelling reasons why so many courts  
20 have opted for the percentage approach in common fund cases. First, it is  
21 consistent with the practice in the private marketplace where contingent fee  
22 attorneys are customarily compensated by a percentage of the recovery.<sup>2</sup> Second,  
23 it more closely aligns the lawyers' interest in being paid a fair fee with the interest  
24 of the class in achieving the maximum possible recovery in the shortest amount of  
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<sup>2</sup> See *Matter of Cont'l Illinois Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992)  
("The class counsel are entitled to the fee they would have received had they  
handled a similar suit on a contingent fee basis, with a similar outcome, for a  
paying client.").



1 time required under the circumstances.<sup>3</sup> Third, use of the percentage-of-recovery  
2 method decreases the burden imposed on the court (by avoiding a detailed and  
3 time-consuming lodestar analysis), and assures that class members do not  
4 experience undue delay in receiving their share of the settlement.<sup>4</sup>

5 **C. The Ninth Circuit Considers 25% of the Common Fund to be a**  
6 **Reasonable Fee**

7 “Attorney fees awarded under the percentage method are often between 25%  
8 and 30% of the fund.” MANUAL FOR COMPLEX LITIGATION § 14.121 (4th ed.  
9 2004). In *Paul, Johnson*, 886 F.2d at 273, the Ninth Circuit originally established  
10 25% of the fund recovered as the “benchmark” which may be adjusted depending  
11 on the circumstances of the particular case. *See also Powers v. Eichen*, 229 F.3d  
12 1249, 1256 (9th Cir. 2000) (“We have also established twenty-five percent of the  
13 recovery as a ‘benchmark’ for attorneys’ fees calculations under the percentage-of-  
14 recovery approach”) (citation omitted).<sup>5</sup>

15 “The district court may adjust the benchmark when special circumstances  
16 indicate a higher or lower percentage would be appropriate.” *In re Pac. Enters.*  
17 *Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995). Courts in this Circuit consider the  
18 following factors: (i) the results achieved;<sup>6</sup> (ii) the risks of litigation;<sup>7</sup> (iii) the

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19 <sup>3</sup> *See Kirchoff v. Flynn*, 786 F.2d 320, 325-26 (7th Cir. 1986) (“The lawyer  
20 gains only to the extent his client gains[,]...ensur[ing] a reasonable proportion  
21 between the recovery and the fees . . . reward[ing] exceptional success . . .  
22 penaliz[ing] failure . . . [and] automatically handl[ing] compensation for the  
23 uncertainty of litigation.”) (Easterbrook, J.).

24 <sup>4</sup> *See In re Activision Securities Litigation*, 723 F. Supp. 1373, 1378-79  
25 (N.D. Cal. 1989).

<sup>5</sup> *But see In re Activision Securities Litigation*, 723 F. Supp. 1373, 1378-79  
(N.D. Cal. 1989) (endorsing a 30% award as the “better practice”: “This court’s  
review of recent reported cases discloses that nearly all common fund awards  
range around 30% even after thorough application of either the lodestar or twelve-  
factor method.”).

<sup>6</sup> *Six Mexican Workers*, 904 F.2d at 1311; *Vizcaino*, 290 F.3d at 1050

1 complexity of the case;<sup>8</sup> (iv) the skill required and quality of work performed by  
2 counsel;<sup>9</sup> (v) the length the case has transpired;<sup>10</sup> (vi) the contingent nature of the  
3 fee and financial burden carried by Plaintiffs;<sup>11</sup> (vii) awards made in similar  
4 cases;<sup>12</sup> (viii) percentages in standard contingency-fee agreements in similar  
5 individual cases;<sup>13</sup> (ix) the non-monetary benefits obtained;<sup>14</sup> (x) the reaction of the  
6 class to the proposed fee and expense requests;<sup>15</sup> and (xi) a lodestar cross-check.<sup>16</sup>

7 As discussed below, applying these factors here confirms that the requested fee is  
8 reasonable and justified. The requested fee award of 25% of the Settlement Fund  
9 in this case is on par with fees awarded by this Court, as well as by numerous other  
10 courts within the Ninth Circuit, and is also in line with fee awards on settlement  
amounts that are similar to the Settlement achieved in this Action.

#### 11 **IV. ALL RELEVANT FACTORS CONSIDERED, AN AWARD OF 25% 12 OF THE SETTLEMENT FUND IS REASONABLE**

##### 13 **A. Counsel Achieved an Excellent Result for the Class, Supporting 14 the Requested Award**

15 Courts have consistently recognized that the result achieved is an important  
16 factor to be considered in making a fee award. *Hensley v. Eckerhart*, 461 U.S.  
17 424, 436 (1983) (“the most critical factor is the degree of success obtained”);  
*Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (“[e]xceptional

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18 <sup>7</sup> *In re Pacific Enters. Litig.*, 47 F.3d at 379; *Vizcaino*, 290 F.3d at 1048-49.

19 <sup>8</sup> *Six Mexican Workers*, 904 F.2d at 1311; *In re Pacific Enters. Litig.*, 47  
20 F.3d at 379.

21 <sup>9</sup> *Vizcaino*, 290 F.3d at 1048.

22 <sup>10</sup> *Six Mexican Workers*, 904 F.2d at 1311; *Vizcaino*, 290 F.3d at 1050.

23 <sup>11</sup> *Vizcaino*, 290 F.3d at 1050.

24 <sup>12</sup> *Id.*

25 <sup>13</sup> *Id.* at 1049.

<sup>14</sup> *In re Pacific Enters. Secs. Litig.*, 47 F.3d at 379; *Staton v. Boeing Co.*, 327  
F.3d 938, 946 (9th Cir. 2003).

<sup>15</sup> *Omnivision*, 559 F. Supp. 2d at 1048.

<sup>16</sup> *Vizcaino*, 290 F.3d at 1050-51.

1 results are a relevant circumstance”); *In re King Res. Co. Sec. Litig.*, 420 F. Supp.  
2 610, 630 (D. Colo. 1976) (“...the amount of the recovery, and end result achieved  
3 are of primary importance, for these are the true benefit to the client”).

4 The total Settlement Fund created here is \$86,000,000, consisting of \$50  
5 million in cash and \$36 million in coupons redeemable for travel on the airlines of  
6 defendants. Asiana paid \$11 million in cash and will make available \$10 million  
7 in coupons. The Asiana settlement received final approval by this Court in 2011.  
8 The current settlement with Korean Air, consists of \$39 million in cash and \$26  
9 million in coupons. This amount is an excellent recovery for the Class. *See* Jt.  
10 Decl.; *In re Cendant Corp. Sec. Litig.*, 109 F. Supp. 2d 235, 245 (D.N.J. 2000)  
(citing cases which settled for 1.6-10% of claimed damages).

11 The settlements provide Class Members with a solid recovery especially  
12 considering defendants’ precarious financial condition at the time of each of these  
13 settlements. Defendants’ ability to fund potential judgments has been called into  
14 question given their submissions to the Court monitoring their payment of criminal  
15 fines following their guilty pleas to antitrust violations in parallel criminal  
16 litigation. The results achieved by Co-Lead Counsel in a legally and factually-  
17 complex case justify the requested fee award.

18 **B. The Substantial Risks and Complexity of the Litigation Support  
19 the Requested Award**

20 Numerous cases have recognized that the risks of litigation are important  
21 factors in determining a fee award. *See, e.g., WPPSS*, 19 F.3d at 1299-1300;  
22 *Detroit v. Grinnell Corp.*, 495 F.2d 448, 470 (2d Cir. 1974), *abrogated by*  
23 *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000); *Lindy Bros.*  
24 *Builders, Inc. v. Am. Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d  
25 Cir. 1976). As endorsed by the Ninth Circuit, the risk of litigation is an important,  
if not the foremost, factor in adjusting the attorneys’ benchmark percentage

1 upward. *See Vizcaino*, 290 F.3d at 1048 (“Risk is a relevant circumstance”).<sup>17</sup>  
2 Although plaintiffs believe that their claims have merit, Co-Lead Class Counsel  
3 acknowledge the significant risks and expenses necessary to prosecute plaintiffs’  
4 claims through trial and subsequent appeals, as well as inherent difficulties and  
5 delays complex litigation like this entails.

6 Notably, the action settled for a substantial recovery *before* the class was  
7 certified, obviating the risk of denial of class certification. Although both Korean  
8 Air and Asiana pled guilty to criminal antitrust violations and paid fines, the  
9 prosecution of this litigation involved extensive effort to determine the contours  
10 and effects of the conspiracy on passenger air fares and fuel surcharges, and the  
11 resulting damages, all of which would be subject to conflicting evidence at trial. In  
12 sum, the obstacles to recovery faced by the Class in this antitrust class action were,  
13 to say the least, very significant.

14 **C. The Skill Required and the Quality and Efficiency of Work  
15 Performed by Counsel Support the Requested Award**

16 The “prosecution and management of a complex national class action  
17 requires unique legal skills and abilities.” *Knight v. Red Door Salons, Inc.*, No. 08-  
18 01520 SC, 2009 WL 248367, at \*6 (N.D. Cal. Feb. 2, 2009). Here, the quality of  
19 Co-Lead Counsel’s work on this case is reflected in the significant recovery  
20 obtained. *See Behrens v. Wometco Enters., Inc.*, 118 F.R.D. 534, 547-48 (S.D. Fla.  
21 1988).

22 The reputation and prior experience of Co-Lead Counsel are also relevant in  
23 determining fair compensation. *See, e.g., Detroit*, 495 F.2d at 470; *Eltman v.*  
24 *Grandma Lee’s, Inc.*, No. 82 Civ. 1912, 1986 WL 53400, at \*9 (E.D.N.Y. May 28,  
25 1986). Co-Lead Counsel have extensive and significant experience in the highly-

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<sup>17</sup> The risks of further litigation are analyzed in connection with approval of the Settlement itself and will not be discussed here. The Court is also respectfully referred to paragraphs ¶¶40-43 of the Jt. Declaration.

1 specialized field of antitrust class action litigation. Given the complexity of the  
2 issues presented in this Action, only skilled counsel who applied themselves  
3 diligently could have obtained such a favorable recovery. Jt. Decl. ¶¶37-38.  
4 Specifically, Co-Lead Counsel were required to analyze the intricacies of this  
5 antitrust conspiracy and the damages stemming from defendants' conduct, analysis  
6 which required extensive work and substantial experience. It is important to  
7 reward skilled counsel for pursuing difficult cases because "the stated goal in  
8 percentage fee-award cases [is] of 'ensuring that competent counsel continue to be  
9 willing to undertake risky, complex, and novel litigation.'" *Gunter v. Ridgewood*  
*Energy Corp.*, 223 F.3d 190, 198 (3d Cir. 2000).

10 The quality of opposing counsel is also important in evaluating the quality of  
11 the work done by Co-Lead Counsel. *See, e.g., In re Equity Funding Corp. of Am.*  
12 *Sec. Litig.*, 438 F. Supp. 1303, 1337 (C.D. Cal. 1977); *King Res.*, 420 F. Supp. at  
13 634. Here, Plaintiffs were vigorously opposed at every stage of the litigation by  
14 O'Melveny & Meyers, Morgan Lewis & Bockius, and lately Paul Hastings,  
15 prominent national law firms with tremendous resources that frequently represent  
16 defendants in complex antitrust class actions. Jt. Decl. ¶39. That Co-Lead  
17 Counsel achieved the settlements for the Class in the face of formidable legal  
18 opposition further evidences the quality of their work.

19 In sum, Co-Lead Counsel were required to perform with a high level of skill,  
20 efficiency, and professionalism to assemble a case that was strong enough to  
21 encourage defendants to compensate Class Members. Co-Lead Counsel evaluated  
22 the merits and risks presented, negotiated a very favorable payment to the Class,  
23 and settled the Action on excellent terms for the Class. Counsel's efforts,  
24 efficiency and dedication should be rewarded.

24 **D. The Contingent Nature of the Fee and the Financial Burden**  
25 **Carried By Co-Lead Counsel Support the Requested Award**

The Ninth Circuit recognizes that the determination of a fair fee must

1 include consideration of the contingent nature of the fee and the difficulties which  
2 were overcome in obtaining the settlement: “[i]t is an established practice in the  
3 private legal market to reward attorneys for taking the risk of non-payment by  
4 paying them a premium over their normal hourly rates for winning contingency  
5 cases.” *WPPSS*, 19 F.3d at 1299 (citing Richard A. Posner, *Economic Analysis of*  
6 *Law*, § 21.9, at 534-35 (3d ed.1986)). In fact, contingent fees that may far exceed  
7 the market value of the services if rendered on a non-contingent basis are accepted  
8 in the legal profession as a legitimate way of assuring competent representation for  
9 plaintiffs who could not afford to pay on an hourly basis regardless of whether they  
10 win or lose. *Id.*

11 Co-Lead Counsel received no compensation over the six years of this  
12 litigation and invested more than \$11,175,134 in lodestar and incurred  
13 unreimbursed litigation expenses of \$521,823 to obtain the Settlement for the  
14 benefit of the Class. Additionally, lawyers working on the case have foregone  
15 business opportunity to devote time to other cases. *See Vizcaino*, 290 F.3d at 1050.

16 Any fee award or expense reimbursement to Co-Lead Counsel has always  
17 been at risk and completely contingent on the result achieved, and on this Court’s  
18 exercise of its discretion in making any award. Thus, this factor militates in favor  
19 of the Court granting Co-Lead Counsel’s request for attorneys’ fees and expenses.

20 **E. The Length the Case Has Transpired Supports the Requested Fee  
21 Award**

22 This six years that this case has been litigated for significantly longer than the  
23 typical class action at the time the Settlement was reached. This factor counsels in  
24 favor of meeting or exceeding the 25 percent benchmark.

25 **F. The Customary Fee in Similar Individual Cases Support the  
Requested Award**

If this were not a class action, the customary fee arrangement would be  
contingent, on a percentage basis, and in the range of 30% to 40% of the recovery.

1 *E.g., Blum*, 465 U.S. at 903 (“In tort suits, an attorney might receive one-third of  
2 whatever amount the plaintiff recovers. In those cases, therefore, the fee is directly  
3 proportional to the recovery.”); *In re M.D.C. Holdings Sec. Litig.*, No. CV89-0090  
4 E (M), 1990 WL 454747, at \*7 (S.D. Cal. Aug. 30, 1990) (“In private contingent  
5 litigation, fee contracts have traditionally ranged between 30% and 40% of the  
6 total recovery”); *Kirchoff v. Flynn*, 786 F.2d 320, 323 (7th Cir. 1986) (40%  
7 contractual award if case had gone to trial).<sup>18</sup> Thus, as the customary contingent  
8 fee in the private marketplace – 30% to 40% of the fund recovered – is greater than  
9 the 25% percentage-of-recovery fee requested in this case, Co-Lead Counsel’s  
request is reasonable.

10 Additionally, when determining the market rate by looking at fees awarded  
11 in similar cases, the lodestar rates billed by Co-Lead Counsel are comparable to  
12 peer plaintiff and defense firms litigating matters of similar magnitude and  
13 complexity, including Defendants’ counsel in this case.

14 Under these circumstances, a fee award of a reasonable percentage fee of  
15 25% of the Settlement Fund (plus expenses), reflects the benefit conferred and a  
discount to the customary, privately-contracted contingent fee rate.

16 **G. A Lodestar Cross-Check Confirms the Requested Fee’s**  
17 **Reasonableness**

18 As a “cross-check” on the reasonableness of a requested fee award, courts  
19 often compare counsel’s lodestar with the fee request made under the percentage-

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21 <sup>18</sup> See also Lester Brickman, *ABA Regulation of Contingency Fees: Money*  
22 *Talks, Ethics Walks*, 65 FORDHAM L. REV. 247, 248 (1996) (noting that  
23 “standard contingency fees” are “usually thirty-three percent to forty percent of  
24 gross recoveries” (emphasis omitted)); Herbert M. Kritzer, *The Wages of Risk: The*  
25 *Returns of Contingency Fee Legal Practice*, 47 DEPAUL L. REV. 267, 286 (1998)  
(reporting the results of a survey of Wisconsin lawyers, which found that “[o]f the  
cases with a [fee calculated as a] fixed percentage [of the recovery], a contingency  
fee of 33% was by far the most common, accounting for 92% of those cases”).

1 of-the-fund method. *See, e.g., Vizcaino*, 290 F.3d at 1050; *Fischel v. Equitable*  
2 *Life Assurance Soc'y of U.S.*, 307 F.3d 997, 1007 (9th Cir. 2002). “[T]he lodestar  
3 calculation can be helpful in suggesting a higher percentage when litigation has  
4 been protracted... [and] may provide a useful perspective on the reasonableness of  
5 a given percentage award.” *Vizcaino*, 290 F.3d at 1050.

6 Significantly, in class actions, it is common for lodestar amounts to be  
7 adjusted upward by a multiplier to reflect a variety of factors, including the  
8 complexity of the case and the risks assumed by counsel. For example, the court in  
9 *Vizcaino* approved a fee representing a multiple of 3.65 times counsel’s lodestar.  
10 *Id.* at 1051-52 (the *Vizcaino* court listed twenty-three shareholder settlements and  
11 the multipliers for each, in which the average multiplier is 3.28); *see also* Jt. Decl.  
12 Ex. 4-1, attaching *Ramsey, supra*, (citing *Vizcaino* for the proposition that “courts  
13 routinely enhance ‘the lodestar to reflect the risk of non-payment in common fund  
14 cases[,]”” stating that “[t]ypically, a lodestar is multiplied up to four times to yield  
15 an enhanced award[,]” and applying a lodestar multiplier of approximately 2.15 in  
16 awarding a fee based on 25% of the common fund).

17 Here, the lodestar cross-check confirms that the fee requested by Co-Lead  
18 Counsel on behalf of Plaintiffs’ Counsel, which represents a negative multiplier on  
19 the worked time, is fair and reasonable.<sup>19</sup> Additionally, Co-Lead Counsel’s  
20 lodestar does not include time and effort that they will continue to devote to the  
21 case.<sup>20</sup> Indeed, the negative multiplier in this case is more than reasonable when

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21 <sup>19</sup> The total cash value of the Settlement is approximately \$50,000,000,  
22 making the 25% cash fee requested equal to \$12,500,000. As set forth in the Jt.  
23 Declaration, the total lodestar reported to Co-Lead Counsel by all plaintiffs’  
24 counsel, based on hourly rates, is approximately \$17,333,000, yielding a negative  
25 multiplier on the reported lodestar. *Id.*

<sup>20</sup> In addition to the time expended to date, Co-Lead Counsel will expend  
additional time directing the claims administration process and final distribution.



1 compared to both the 3.65 multiplier approved in *Vizcaino* and the 1-4 range of  
2 frequently awarded multipliers discussed in *Vizcaino*.

### 3 **H. The Reaction of the Class Supports the Requested Award**

4 Over 1,500,000 Notice Packets have been disseminated by mail and email to  
5 potential Settlement Class Members. Jt. Decl. ¶¶6, 25. Additionally, the  
6 Summary Notice was published in a selection of newspapers, Korean language  
7 outlets, and national media as directed by Kinsella Media and set forth in the  
8 Declaration of Katharine Kinsella, filed with the Court at Preliminary Approval.  
9 Jt. Decl. ¶26. Settlement Class Members were informed in the Notice and the  
10 Summary Notice that Co-Lead Counsel could apply for attorneys' fees of up to  
11 25% of the Settlement Fund (plus accrued interest), plus reimbursement of  
12 litigation costs and expenses, and were advised of their right to object to Co-Lead  
13 Counsel's fee and expense request. To date, no objections to the fee request or any  
14 aspect of the Settlement have been filed with the Court, nor has any objection been  
15 received by the Claims Administrator, Co-Lead Counsel or Defendants' Counsel.  
16 The deadline for Objections and Requests for Exclusion is October 25, 2013 and  
17 Counsel have filed this Motion so that the Class may have the opportunity to  
18 consider the request for fees and expenses.

### 19 **V. CO-LEAD COUNSEL'S EXPENSES ARE REASONABLE AND** 20 **WERE NECESSARY TO ACHIEVE THE BENEFIT OBTAINED**

21 The Court should approve the request for reimbursement of Co-Lead  
22 Counsel's expenses.<sup>21</sup> Courts have found that counsel for the Class are entitled to  
23 reimbursement for certain types of out-of-pocket expenses that an attorney would  
24 normally expect the client to pay. *Harris v. Marhoefer*, 24 F.3d 16, 19 (9th Cir.

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25 <sup>21</sup> At final approval of the settlement with Asiana, the Court awarded Co-  
Lead Counsel expenses to reimburse Co-Leads for expenses incurred to that time.  
The request now is for unreimbursed expenses for Co-Leads since 2011, and for  
other plaintiffs' counsel from the inception of the litigation.

1 1994) (“Harris may recover as part of the award of attorney’s fees those out-of-  
2 pocket expenses that `would normally be charged to a fee paying client.””) (citation  
3 omitted); *see also In re Immune Response Sec. Litig.*, 497 F. Supp. 2d 1166, 1177  
4 (S.D. Cal. 2007).

5 To prosecute this action and achieve the Settlement, Co-Lead Counsel and  
6 other plaintiffs’ counsel incurred reasonable and necessary costs and expenses of  
7 \$600,000. These expenses were incurred largely in conjunction with the  
8 engagement of expert economists, document review expenses and expenses  
9 relating to the engagement of the mediator. Co-Lead Counsel seek reimbursement  
10 of these costs and expenses related to the prosecution of this Action on behalf of  
11 the Class. *Jt. Decl.* ¶54. Additionally, because the expenses at issue are the types  
12 typically reimbursed by individual clients in the marketplace, they should be  
reimbursed from the common fund.

13 Because the expenses were incurred with no guarantee of recovery, Co-Lead  
14 Counsel had a strong incentive to keep them as low as reasonably possible – and  
15 did so. Moreover, the fact that no Settlement Class members objected thus far to  
16 the reimbursement of Co-Lead Counsel’s estimated expenses further evidences  
their reasonableness.

17 Because the expenses were relatively small compared to the recovery  
18 obtained, and were incurred on an ongoing basis for such items as expert fees,  
19 mediation, legal research, copying and other expenses necessarily incurred and  
20 directly related to the prosecution of the case, the total amount of expenses is  
21 reasonable and should be reimbursed in full from the common fund following  
22 payment of attorneys’ fees.

## 23 **VI. CONCLUSION**

24 Class actions are complex and laden with risk. Co-Lead Counsel undertook  
25 this risk and expended thousands of hours vigorously litigating this Action despite

1 the very real possibility that if they did not achieve a favorable result for the Class  
2 they could receive no compensation whatsoever. As demonstrated in the papers  
3 submitted, the Action has been hard-fought at every turn. From the beginning,  
4 Plaintiffs were faced with determined adversaries represented by experienced and  
5 equally-determined defense counsel. Without any assurance of victory, Co-Lead  
6 Counsel pursued this Action to a successful conclusion.

7 In light of all of the foregoing considerations, the Settlement represents an  
8 excellent recovery on behalf of the Settlement Class and reflects the skill and  
9 dedication of Co-Lead Counsel. Thus, it is respectfully requested that the Court  
10 approve the fee and expense application and enter an Order awarding Lead  
11 Counsel 25% of the Settlement Fund plus reimbursement of \$600,000 for  
12 expenses; and interest earned thereon at the same rate and for the same period as  
that earned on the Settlement Fund until paid in full.

13 Dated: October 4, 2013

Respectfully submitted,

14 By: s/ Susan G. Kupfer

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**PROOF OF SERVICE VIA ELECTRONIC POSTING PURSUANT TO  
CENTRAL DISTRICT OF CALIFORNIA LOCAL RULES  
AND ECF GENERAL ORDER NO. 10-07**

I, the undersigned, say:

I am a citizen of the United States and am employed in the office of a member of the Bar of this Court. I am over the age of 18 and not a party to the within action. My business address is One Embarcadero Center, Suite 760, San Francisco, California 94111.

On October 4, 2013, I caused to be served the following document by posting such document electronically to the ECF website of the United States District Court for the Central District of California:

**PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF PLAINTIFFS' MOTION FOR AN AWARD OF  
ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

to all ECF registered parties as listed on the attached Court's Service List.

And on any non-ECF registered party:

**By Mail:** By placing true and correct copies thereof in individual sealed envelopes, with postage thereon fully prepaid, which I deposited with my employer for collection and mailing by the United States Postal Service. I am readily familiar with my employer's practice for the collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, this correspondence would be deposited by my employer with the United States Postal Service that same day.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on October 4, 2013, at San Francisco, California.

s/ Susan G. Kupfer  
Susan G. Kupfer

**Mailing Information for a Case 2:07-cv-05107-SJO-AGR****Electronic Mail Notice List**

The following are those who are currently on the list to receive e-mail notices for this case.

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