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

THOMAS COX et al, on behalf of themselves and all others similarly situated,	:	
	:	Case No. 1:17-cv-5172-WFK-VMS
v.	:	
SPIRIT AIRLINES, INC.	:	

NOTICE OF MOTION FOR PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT

PLEASE TAKE NOTICE, that upon the accompanying memorandum of law, Declaration of Jeffrey A. Klafter, Declaration of Steven Weisbrot. and exhibits attached thereto, the undersigned will move this Court, at a date and time designated by the Court, for an order granting Plaintiffs' Motion for Preliminary Approval of Class Action Settlement that would, *inter alia*, (i) preliminary approve the Settlement, (ii) approve the Parties' proposed forms and method of notice to potential Class members and methods of providing notice to potential Class members, (iii) approve the Angeion Group as Settlement Administrator, and (iv) set a date for a Final Approval Hearing (the "Preliminary Approval Order").

Plaintiffs will also email the Proposed Preliminary Approval Order, which has been agreed to by the Parties, in Word format, to Chambers per the Court's Individual Rules and Practices.

Defendant consents to the relief sought by this Motion.

Dated: August 23, 2023
Rye Brook, New York

Respectfully submitted,

By: /s/ Jeffrey A. Klafter

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 23, 2023, the foregoing was served via ECF on all counsel of record.

/s/ Jeffrey A.Klafter
Jeffrey A. Klafter

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SPIRIT AIRLINES, INC.	:	

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF PRELIMINARY APPROVAL OF CLASS ACTION SETTLEMENT

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INTRODUCTION

Thomas Cox, Shirin Begum, Jill Brua, Julie Feiner, Susan Hott, Susy Koshkakaryan, Yulius Mustafa, Greta Schoeneman, and Michael Wyant (together, "Plaintiffs") submit this memorandum in support of their motion for preliminary approval of the proposed class settlement ("Settlement") set forth in a Settlement Agreement, dated August 23, 2023 ("Settlement Agreement"), reached between Plaintiffs and Spirit Airlines, Inc. ("Defendant" or "Spirit" and, together with Plaintiffs, the "Parties"), and on behalf of a certified Fed. R. Civ. P. 23 class of first-time fliers of Spirit who purchased their Spirit flight through one of the following six on-line travel agents ("OTAs") – Expedia, Travelocity, Kiwi, CheapOair, CheapTickets, and BookIt – during the period of August 31, 2011, through May 3, 2017, and whose claims are governed by U.S. law (*see* ECF No. 152) (approving Plaintiffs' motion for class certification) and ECF No. 166 (denying in substantial part Spirit's motion for reconsideration).[1]

Pursuant to the Settlement, if approved by the Court, Spirit will pay in full and final settlement of the claims of Plaintiffs and the Class an amount not to exceed $8,250,000. This amount will provide Class Members up to 75% of the carry-on bag fee they paid, and is inclusive of all potential costs and fees, including Class Counsel's attorneys' fees, costs, and other expenses, the Class Representatives' Service Awards, and Notice and Administration Costs.

As described in detail below, Plaintiffs submit that the proposed Settlement is fair, reasonable, and adequate, represents a fair compromise of Plaintiffs' and the Class' claims in this action, and warrants preliminary approval by the Court. It is the result, as the Court is aware, of six years of highly contested litigation in this Court and in the Second Circuit Court of Appeals and at a time when a trial commencement date of January 16, 2024 had been set. When the parties went

[1] Spirit consents to the relief sought by Plaintiffs' Motion for Preliminary Approval.

to mediation, they were unquestionably fully and completely versed in the issues in the case and what a trial would have encompassed. The actual settlement was achieved following a ten-hour mediation session conducted before an experienced and nationally recognized mediator, David Geronemus of JAMS, and is the product of arms-length negotiations.

While Plaintiffs have largely prevailed on Spirit's challenges to the remaining breach of contract claim asserted in this action, and believe they would have prevailed on Spirit's arbitration/jurisdiction motion, there is no question that – as both sides recognized in the mediation – that the Class' claims would be vigorously contested at trial, and there was no guarantee the trial would result in a verdict for Plaintiffs and the Class. Moreover, Plaintiffs recognize that even if they prevailed at trial, they would also have to prevail on appeal—both on the merits and as to another effort by Spirit before the Second Circuit to challenge this Court's class certification decision. And even if Plaintiffs were ultimately to prevail, Spirit's actual financial exposure would be subject to claims being submitted that established that the claimant is a member of the Class. Protracted adversarial litigation therefore remained in this case, which exposed each Party to considerable risks, at the time the proposed Settlement was reached. Instead, the Parties, without any admission or concession on the part of the Plaintiffs of the lack of merit of the action whatsoever, or any admission or concession of liability or wrongdoing or the lack of merit of any defense whatsoever by Defendant, have reached the proposed Settlement, which they believe to be a fair resolution of the claims.

Plaintiffs therefore respectfully request that this Court enter the Preliminary Approval Order submitted that, among other things would (i) preliminary approve the Settlement, (ii) approve the Parties' proposed forms and method of notice to potential Class members and methods of providing notice to potential Class members, (iii) approve the Angeion Group as Settlement Administrator, and (iv) set a date for a Final Approval Hearing.

BACKGROUND FACTS AND PROCEDURAL HISTORY

The question at the heart of this litigation, which the jury would be asked to resolve, is, in Plaintiffs' view, fairly simple: by charging its passengers, who had not previously flown on Spirit and who booked their flights through one of the OTAs, additional fees for carry-on bags, did Spirit breach the contract formed between those passengers and Spirit. As the Second Circuit and this Court has held, resolution of this ultimate fact question depends on the meaning of the term "price" in that contract. Plaintiffs contend that the evidence they would submit at trial would establish that a reasonable consumer would believe that the price paid for Spirit to fly them from point A to point B includes the right to bring a carry-on bag on the plane without additional charges. As this Court is aware from the extensive briefing and oral argument on this issue, resolution of this issue at trial will involve contested issues of fact and law.

For purposes of considering to preliminarily approve the Settlement, not only are the risks going forward germane, but also the efforts, over the last six years, that were necessary to get to this point in the case, as they show that the Parties were fully aware of the strengths and weaknesses of their respective positions when the proposed Settlement was reached.

Plaintiff Thomas Cox commenced this action on August 31, 2017; an Amended Complaint and a Second Amended Class Action Complaint ("SAC") were filed on September 15, 2017 and May 10, 2018, respectively (see ECF Nos. 1, 5, and 31). The SAC was refiled (as ECF No. 60) pursuant to the Court's August 1, 2018, Order (ECF No. 59). The SAC charged Defendant with breach of contract, unjust enrichment, and fraud due to Defendant's practice of allegedly selling airfare tickets through on-line travel agents and, after the sale, charging to bring a carry-on bag on the plane.

On November 20, 2018, Judge William F. Kuntz II, who was initially assigned to this case, dismissed this action on the grounds that the Airline Deregulation Act ("ADA"), 49 U.S.C. §

41713(b)(1), preempted all of the claims asserted in the SAC (ECF No. 74). On appeal, Plaintiffs limited their claims to a breach of contract claim only, and on September 10, 2019, the Second Circuit Court of Appeals vacated the District Court's decision insofar as it held that Plaintiffs' breach of contract claims were preempted by the ADA and remanded the case for further proceedings in accordance with the Second Circuit's decision. *Cox v. Spirit Airlines, Inc.*, 786 Fed. Appx. 283, 285 (2d Cir. 2019).

Upon remand, Spirit answered the SAC on November 15, 2019 (ECF No. 86). Substantial discovery followed, including significant document production by the Parties of thousands of pages of documents, and 19 depositions: five Spirit employees and former employees, eleven Plaintiffs, and three representatives of on-line travel agents. Throughout, the Parties had multiple conferrals on discovery disputes, and many impasses were briefed to and resolved by Magistrate Judge Scanlon. *See* ECF Nos. 28, 29, 54, 80, 81, and 92.

After the close of discovery, and per Court order, on April 26, 2021 Plaintiffs filed a comprehensive motion for class certification, drawing upon the discovery it the case and using two experts, while Spirit simultaneously filed its motion for summary judgement, also drawing upon the extensive discovery (ECF Nos. 128-132).[2] Following further briefing on these respective motions (ECF Nos. 133-138) and oral argument on December 10, 2021 (ECF No. 147, 149), as well as supplemental letter submissions by the Parties (ECF Nos. 150-151), by Memorandum and Order

[2] Prior to moving for class certification, the Parties on October 13, 2020 stipulated to the dismissal as parties to this action of Plaintiffs Christine Neptune, Terry Murray, Hayfaa Baroud, Diana Carrillo, Albert and Victoria Eyzagirre, Silva Iahdijian, David Langton, Cynthia Coe, and Maryam Afkarian, without prejudice to their membership in any class that may be certified in this action so long as they are included in the definition of any class certified by this Court, with each party to bear its, his, or her own costs and expenses (ECF No. 106). In addition, by Memorandum and Order dated July 8, 2021, the Court dismissed Heather McGlashen as a party to this action without prejudice to her later participation as a member of the class, in the event she qualifies (ECF No. 143).

dated March 29, 2022, the Court denied Spirit's motion for summary judgment and granted, with certain modifications, Plaintiffs' motion for class certification, certifying the following class:

> first-time fliers of Spirit who purchased their Spirit flight through the six OTAs already at issue – Expedia, Travelocity, Kiwi, CheapOair, CheapTickets, and BookIt – during the period of August 31, 2011 through May 3, 2017, and whose claims are governed by U.S. law.

The Court also dismissed the claim of Plaintiff Amemado as time-barred. *See* ECF No. 152.

Defendant then moved for reconsideration of the Court's summary judgment and class certification decision on April 12, 2022 (ECF No. 153). Defendant filed a petition with the Second Circuit Court of Appeals to appeal the Court's class certification decision pursuant to Fed. R. Civ. Pro. 23(f), and filed a request before the Court for a Pre-Motion Conference to further challenge the Court's class certification decision on the grounds that, according to Spirit, certain Class Members had agreed to arbitrate their claims and that the Court lacked personal jurisdiction over Class Members who lacked a nexus to New York (ECF No. 154). Following briefing (ECF Nos. 156-157), the Court held oral argument on Spirit's motion for reconsideration on May 19, 2022 (ECF No. 159), and directed the submission of supplemental letters (ECF Nos. 160-162). On August 11, 2022, the Second Circuit denied Spirit's 23(f) Petition.

On January 20, 2023, the Court held the Pre-Motion Conference requested by Spirit regarding its requested arbitration/personal jurisdiction motion and set a briefing schedule. The Court also set a schedule for the submission of letters regarding the content of the Class notice, required the Parties to file a joint proposed pretrial order by August 21, 2023; and set jury selection and the trial of this Action to begin on January 16, 2024 at 9:30 a.m. (ECF Nos. 164-165).

On February 14, 2023, the Court ruled on Spirit's motion for reconsideration of the Court's March 29, 2022 Memorandum and Order. ECF No. 166. Aside from certain minor

modifications, including the exclusion of Spirit employees from the class definition, the Court denied Spirit's motion. *Id.*

As ordered at the January 20, 2023 conference, on March 6, 2023 the Parties submitted their respective letters concerning the content of the Class notice (ECF Nos. 167-168) and on April 5, 2023, the Court issued a Memorandum and Order directing the Parties to submit a proposed stipulation and order regarding class notice and a class notice consistent with its Order. ECF No. 172. Also during this time, on April 3, 2023, the Parties' filed their respective briefs concerning Spirit's arbitration/personal jurisdiction motion. ECF Nos. 169-171.

On April 10, 2023, the Parties advised the Court that they had agreed to non-binding mediation before an experienced class action mediator in an effort to resolve the claims of Plaintiffs and the Class. ECF No. 173. That mediation was initially scheduled for May 11, 2023.[3] *Id.* The Parties therefore requested until May 25, 2023, to submit the proposed stipulation and class notice requested by the Court (ECF No. 173), which extension was granted by the Court on April 20, 2023 (order entered on docket; no ECF number).

The Parties met and conferred regarding the content of class notice and filed their proposed stipulation concerning such class notices on May 25, 2023. ECF No. 174. On June 5, 2023, the Court entered an Order approving the Class notices that were submitted and the schedule proposed by the Parties regarding Class notice. ECF No. 175.

On July 5, 2023, the Parties participated in a mediation before David Geronemus of JAMS, and after approximately ten hours of arms-length negotiations, an agreement in principle was reached to settle this class action (subject to approval by Spirit's Board of Directors and the Court) on the terms set forth in Parties' Settlement Agreement. Declaration of Jeffrey A. Klafter

[3] To ensure that Spirit had representatives with authority to enter into a settlement agreement, the mediation was later re-scheduled to July 5, 2023.

("Klafter Dec.") (filed concurrently herewith) at ¶ 2. Spirit's Board of Directors subsequently approved the agreement-in-principle reached as a result of the mediation. *Id.* at ¶ 3. Accordingly, on July 24, 2023, the Parties advised the Court of the agreement in principle, and the Court set August 25, 2023 as the date by which a motion for preliminary approval of the proposed settlement should be filed (order entered on docket; no ECF number). The parties thereafter negotiated the terms of a settlement agreement and all exhibits thereto and executed the Settlement Agreement and Release on August 23, 2023 *(the Settlement Agreement"). *Id.* at ¶ 4. The Settlement Agreement, and all of its exhibits, is attached as Exhibit A to the Klafter Dec.

THE SETTLEMENT AGREEMENT

A. Benefits of the Proposed Settlement

In full and final settlement of the claims of Plaintiffs and the Class, Defendant shall pay an amount that shall not exceed $8,250,000, inclusive of all potential costs and fees, including but not limited to Class Counsel's attorneys' fees, costs, and other expenses, the Class Representatives' Service Awards, and Notice and Administration). *See* Settlement Agreement at 1.31 and Sections A(1)-(3).

The proposed Settlement represents an excellent outcome for the Class, given that it provides a cash refund of up to 75% of the carry-on fee paid to each person who submits a timely signed Claim Form and who establishes that they are a Class Member, with the exact percentage dependent on the amount of carry-on fees paid by all Authorized Claimants and the amount of Settlement funds available for distribution to Authorized Claimants after deducting Court awarded amounts for attorneys' fees and expense and for Service awards to the Class Representatives. Klafter Dec. at ¶ 5; Settlement Agreement at Sections C(6) and J(1)(a)-(f).[4] In light of the risks and

[4] Class Members paid carry-on fees anywhere from $35 to up to $100 per carry-on bag. Klafter Dec. at ¶ 7.

costs of continued litigation, and the defenses available to Spirit with regard to both liability and damages, as further discussed at pp. 13-22 below, this represents a very favorable outcome for the Class. Klafter Dec. at ¶ 6.

B. The Class Notice Plan

The Parties have mutually agreed that Angeion Group will serve as Settlement Administrator and perform all steps described in the Class Notice Plan (*see* Settlement Agreement Section C), including without limitation, dissemination of Court approved forms of summary notice of this proposed Settlement to potential members of Class for dissemination by mail and by email, attached as Exhibits C-1 and C-2, respectively, to the Settlement Agreement; creation of a media campaign, as described in the Declaration of Steven Weisbrot of Angeion, submitted herewith, to reach potential Class Members for whom no direct contact information is obtained by the time notice is to be disseminated; and creation and maintenance of a Class Website that will contain the full notice, attached as Exhibit C-3 to the Settlement Agreement, and allow for potential Class Members to submit Claim Forms and, optionally, banking information to facilitate electronic payment of an Authorized Claimant's share of the Settlement proceeds. The Class Notice Plan also provides for reminder notices to be sent by the Settlement Administrator halfway through the notice period, and distribution of checks.

The Class Notice Plan is designed to be simple. Specifically, following entry of a Preliminary Approval Order by the Court, the Settlement Administrator will run the class list produced by Spirit through appropriate physical mail and email address updating services (including the National Change Of Address ("NCOA") database). *See* Settlement Agreement at Section C(1). To the extent a personal email address is available for a potential Class Member from Spirit's records or from an OTA's production in response to Plaintiffs' subpoenas to the OTAs for such information, Class Notice (as included at Exhibit C to the Settlement Agreement)

and a link to an electronic full Claim Form (as included at Exhibit B to the Settlement Agreement) shall be provided by email to such potential Class Members. *Id.*

For those Class Members for whom an email address is not available from Spirit's records or from an OTA's production (as well as for those for whom attempts at email notice fail (such as due to a bounce back notification stating the email address is invalid)), and a mailing address is available, then Class Notice shall be provided by first-class mail via postcard with a tear-off Claim Form, as set forth in Exhibits B and C to the Settlement Agreement. *Id.* at (C)(3).

To the extent neither a valid email address nor mailing address is available for a potential Class Member, the Settlement Administrator will employ, subject to the Parties' agreement, an appropriate social media campaign designed to reach potential Class Members. *Id.* at (C)(4).

The summary post-card and email notices advise potential Class Members to review the full Class notice available on the website established by the Settlement Administrator, and they all advise potential Class Members that they must, in order to participate in the Settlement, submit a Claim Form attesting (a) that they first flew Spirit during the Class Period and (b) the State or U.S. Territory in which they were at the time they purchased their first Spirit flight through the applicable OTA. *Id.* at Section (E)(2).[5]

Notice according to the Class Notice Plan will be initiated by the Settlement Administrator thirty (30) days after a Preliminary Approval Order is entered. *Id.* at (C)(4).

C. Request for Exclusion and Objections

The notices will also advise potential Class Members of their rights to request exclusion from the Class or to object to the Settlement or any part thereof, and the deadlines and

[5] The Settlement Administrator will only determine a potential Class Member to be an Authorized Claimant if the person submits a signed and timely Claim Form that attests that he or she first flew Spirit during the Class Period and their Spirit flight is within the applicable Statute of Limitation for the State or U.S. Territory they resided in when they purchased their Spirit flight, as indicated on Exhibit F to the Settlement Agreement. *Id.* at (C)(6).

requirements for doing so. Specifically, all Class Members will have the opportunity to opt out of the Class by submitting a letter containing the information specified in the full Class Notice, stating that the Class Member wants to be excluded from the Class. *See* Settlement Agreement at Sections (F)(1)-(5). All requests for exclusion must be in writing, sent to the Settlement Administrator and postmarked no later than thirty (30) days before the Final Approval Hearing. *Id.* In the event of ambiguity as to whether a Class Member has requested to be excluded, Class Counsel shall contact the Class Member who submitted it to resolve the ambiguity, and, if necessary, present the ambiguity to the Court for resolution. *Id.*

All Class Members will also have the opportunity to file objections to the Settlement. Settlement Agreement. at Sections (G)(1)-(2). Objections must be in writing, and filed with the Court and served on counsel for the Parties no later than 30 days prior to the Final Approval Hearing. *Id.*

D. Attorneys' Fees and Costs and Service Payments to Named Plaintiffs

While not relevant for purposes of Preliminary Approval, the Settlement Agreement provides that Class Counsel may make an application to the Court for: (a) an award of attorneys' fees not to exceed $2.75 million in total (a one-third request, which is common and routinely recognized as appropriate); (b) for an award of costs and expenses (including Administrative Costs) incurred and expected to be incurred in litigating the case and effectuating the settlement; and (c) Service Awards to each Class Representative not to exceed $7,500 each. *See* Settlement Agreement at Sections I(1)-(2). Defendant has agreed not to object to the application by Class Counsel for attorneys' fees in an amount not to exceed $2.75 million and reasonable costs and expenses, and Service Awards to each Class Representative not to exceed $7,500 each. *Id.*

As is customary, Class Counsel are making no request for attorneys' fees, expenses, or service payments at this time but will do so, with full briefing and support, following the Settlement

notice period and concurrently with their moving for final approval of the Settlement (should this Court enter the Preliminary Approval Order). *Id.*

E. Releases

The Class Member Release provided in the Settlement Agreement is tailored to the claims at issue in this action. Specifically, should the settlement be approved, then, upon the Effective Date (the last date the entry of a Final Approval Order by this Court is no longer subject to appeal), each Plaintiff and each Class Member who has not submitted a valid and timely request for exclusion shall be conclusively deemed to have fully, finally, and forever settled, released, and discharged all claims asserted in this action or that could have been asserted in this action against the Released Defendant Parties (including Spirit and/or any of its parents, subsidiaries, corporate affiliates, representatives, employees, agents, officers, directors, insurers, or successors and assigns, including JetBlue Airways Corporation ("JetBlue") and any company affiliated with JetBlue, if JetBlue acquires Defendant) that are related to payment of carry-on bag fees to Spirit during the Class Period. *See* Settlement Agreement at Section (K)(1) (emphasis added).

A reciprocal release is also provided. Specifically, each Released Defendant Party shall be conclusively deemed to have fully, finally, and forever settled, released, and discharged each Plaintiff and each Class Member who has not submitted a valid and timely request for exclusion and his or her respective spouses, heirs, executors, administrators, representatives, agents, attorneys, partners, assigns, and all those acting or purporting to act on their behalf, from all claims that are related to payment of carry-on fees to Spirit through the entry of Final Judgment or which relate to the prosecution or settlement on this action. *See* Settlement Agreement at Section (K)(2).

Finally, upon the Effective Date, in consideration of receiving a Service Award, each Plaintiff and his or her respective spouses, heirs, executors, administrators, representatives, agents, attorneys, partners, assigns, and all those acting or purporting to act on their behalf acknowledge

full satisfaction of, and shall be conclusively deemed to have fully, finally, and forever settled, released, and discharged all claims, whether known or unknown against any of the Released Defendant Parties through the entry of the Final Judgment. *See* Settlement Agreement at Section (K)(3).

ARGUMENT

A. The Applicable Legal Standards

In determining whether preliminary approval of a proposed class action settlement is warranted, the primary issue before the Court is whether the proposed settlement is within the range of what might be found fair, reasonable, and adequate so that notice of the proposed settlement should be given to class members, and a hearing scheduled to determine final approval. *See* Manual for Complex Litigation, Fourth, § 13.14, at 172-73 (2004) ("Manual Fourth") (at the preliminary approval stage, "[t]he judge must make a preliminary determination on the fairness, reasonableness, and adequacy of the settlement terms and must direct the preparation of notice of the certification, proposed settlement, and date of the final fairness hearing"). Preliminary approval is therefore the first step in a two-step process required before a class action may be finally settled. *Id.* at § 21.632, at 320-21.

The Second Circuit adheres to a "strong judicial policy in favor of settlements, particularly in the class action context, and a settlement should be approved if it is fair, adequate, and reasonable, and not a product of collusion." *Wal-Mart Stores, Inc., v. Visa U.S.A., Inc.*, 396 F.3d 96, 116 (2d Cir. 2005) (quotations omitted). Moreover, where, as here, a settlement is negotiated at arm's length by capable counsel, the settlement is presumed to be satisfactory. *Wal-Mart Stores,* 396 F.3d at 116.

In *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974), the Second Circuit Court of Appeals set forth the analytical framework for evaluating the substantive fairness of a class action

settlement; the decision has long guided analysis of class action settlements in this Circuit. However, amendments to Fed. R. Civ. P. 23(e) became effective on December 1, 2018. Those amendments were intended to provide district courts with additional guidance in the applicable standard for approving class action settlements. As this Court has noted, and as is expressly stated in the Advisory Committee Notes to the 2018 amendments, the new 23(e) factors were not intended to "displace any factor under the *Grinnell* test." *Zaslavskiy v. Weltman*, 2020 U.S. Dist. LEXIS 194633, *15-16 (E.D.N.Y. Oct. 19, 2020); *see also In re GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (E.D.N.Y. 2019) ("the four new Rule 23 factors were intended to supplement rather than displace the *Grinnell* factors"). Indeed, many of the factors listed in the new Rule 23(e) overlap and subsume standards articulated in *Grinnell*. In a belt-and-suspenders approach, many Courts now review both sets of factors. *See, e.g., D'Angelo v. Hunter Bus. Sch., Inc.*, 2023 U.S. Dist. LEXIS 131029, *12-19 (E.D.N.Y. July 28, 2023) (noting "significant overlap between the two sets of factors). Both sets are factors are discussed below; under either set of factors, the Settlement Agreement is fair and reasonable and warrants preliminary approval.

B. The Grinnell Factors are Satisfied

In *City of Detroit v. Grinnell Corp.*, *supra*, the Court of Appeals set forth the long-standing analytical framework for evaluating the substantive fairness of a class action settlement in the Second Circuit. *Grinnell* guides district courts by setting out the following factors (usually termed the "*Grinnell* factors") for determining whether a proposed settlement should be approved: (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; and (9) the

range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation. 495 F.2d at 463. As demonstrated below, application of these factors is more than sufficient for this Court to make a preliminary determination that the proposed settlement is fair, reasonable, and adequate and meets all of the applicable standards:

1. Litigation Through Trial Would be Complex, Costly, and Long (*Grinnell* Factor 1)

Certainly, this litigation has already been complex, costly, and long. *See* Section II, above; Klafter Dec. at ¶ 8. Virtually every issue in dispute in this litigation has been vigorously contested and extensively briefed, and then briefed again in connection with Spirit's motion for reconsideration of the Court's summary judgement and class certification decision and Rule 23(f) appeal to the Second Circuit Court of Appeals. *Id.* Absent the proposed settlement submitted by the Parties, the Court would also have to decide Spirit's motion to compel a significant portion of the Class to arbitrate their claims individually and seeking a ruling that this Court could not exercise jurisdiction over Class Members with no nexus to New York, which motion was fully briefed when the settlement was reached. *Id.* Trial and resulting appeals promised to be no different. *Id.*

Trial is currently scheduled to commence in January 2024, but Spirit has already indicated that if this Court were to deny its motion to compel arbitration as to a portion of the Class, it has an appeal as of right and would seek to stay this case pending a ruling by the Second Circuit on its arbitration contention. While Plaintiffs would object to any such stay on the grounds that a liability and measure of damages trial could go forward as the issue of class membership would be decided post-trial. Accordingly, whether the case could be tried in January 2024 is uncertain, but whenever it could be tried, and regardless of Plaintiffs' view that the Class' claims will be relatively simple to try, Plaintiffs are also aware that Spirit will vigorously contest every issue this Court has previously

indicated require resolution, and make every effort to highlight differences in OTA disclosures, in an effort to avoid a liability verdict as to all OTAs. The trial would therefore have complexities and would certainly be costly. Further, even if Plaintiffs were successful in obtaining a liability verdict, Spirit has indicated that it intends to present a mitigation defense – that Class members should not be able to recover what they paid if they could have paid a lesser amount in carry-on fee, which defense would also have been vigorously contested. And even if Plaintiffs were successful on all these issues, there would have to be a claims process over which Spirit would have asserted the right to challenge claims, and even after that process, Spirit would have appealed all adverse jury and claim determinations to the Second Circuit and possibly sought certiori to the Supreme Court. This road ahead to any recovery for Plaintiffs and the Class is therefore a long one.

Moreover, in the months ahead, preparing a Pre-Trial Order and for trial, and presenting testimonial and documentary evidence at the trial scheduled to commence on January 16, 2024, would have had to address the many factual issues the Court identified in Summary Judgement and Class Certification Order (ECF No. 152) and Order on Spirit's motion for reconsideration (ECF No. 166) including, among others, whether a reasonable consumer would consider a carry-on to be included in the price of their flight, whether a reasonable consumer would have considered baggage fee links on OTA websites to refer to checked baggage, whether the overwhelming U.S. airline practice of not charging separately for a carry-on was a "custom and usage" so far known to the parties that it must be supposed that the contract at issue was made with reference to it, as well as legal issues such as whether Spirit should be allowed to present the jury speculative claims of subjective knowledge. Klafter Dec. at ¶ 9. These and other pre-trial and trial issues would have consumed tremendous amounts of time and resources, as well as required substantial judicial resources to adjudicate the Parties' trial and pre-trial disputes. The proposed

Settlement, on the other hand, will, if approved by the Court, provide significant relief in a prompt and efficient manner, rather than potentially years from now, if at all. *Id.*

The proposed Settlement, on the other hand, provides significant relief in a prompt and efficient manner, rather than potentially years from now. *Id.* Therefore, the first *Grinnell* factor weighs in favor or preliminary approval.

2. The Court Cannot Assess Reaction of the Class until After Notice Issues (*Grinnell* Factor 2)

Because Class Members have not yet been notified of the Settlement, this factor is not relevant to preliminary approval, but will be to this Court's consideration of final approval of the proposed Settlement after Class Members have had an opportunity to opt-out or object to the proposed Settlement. This factor is therefore neutral and does not preclude the Court from granting preliminary approval.

3. The Parties are Well-Informed to Resolve the Case Responsibly (*Grinnell* Factor 3)

The Parties were exceedingly well-informed in negotiating and reaching this Settlement. Discovery has been extensive. The course of the litigation and the fulsome discovery has already been set out above and needs no repetition here. By the time of mediation in July, 2023, as demonstrated at pp. 3-6 above, the Parties had engaged in extensive discovery and motion practice. The Parties were therefore intimately familiar with the strengths and weaknesses of each side's positions. Furthermore, Spirit produced data regarding the number of potential Class Members and the fees they paid for their carry-on bags, allowing the Parties to arrive at the mediation with settlement demands supported by appropriate facts and evidence.

The essential question this factor poses is "whether counsel had an adequate appreciation of the merits of the case before negotiating." *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 537 (3d Cir. 2004) (citations omitted). Based on the foregoing, the Parties were unquestionably

well-informed when negotiating and agreeing to the proposed Settlement. This factor, therefore, also favors Preliminary Approval.

4. Plaintiffs Would Face Real Risks of Establishing Liability and Damages If the Case Proceeded (*Grinnell* Factors 4 and 5)

"Litigation inherently involves risks." *In re Paine Webber Ltd. P'Ships Litig.*, 171 F.R.D. 104, 126 (S.D.N.Y. 1997). Although Plaintiffs believe their case is strong, they would be foolhardy to not appreciate the risks at trial and on appeal that could result in no recovery at all for Plaintiffs and Class Members. Indeed, if "settlement has any purpose at all, it is to avoid a trial on the merits because of the uncertainty of the outcome." *In re Ira Haupt & Co.*, 304 F. Supp. 917, 934 (S.D.N.Y. 1969). In weighing the risks of establishing liability and damages, the court "must only weigh the likelihood of success by the plaintiff class against the relief offered by the settlement." *In re Austruan & German Bank Holocaust Litig.*, 80 F. Supp. 2d 164, 177 (S.D.N.Y 2000) (internal quotation marks and citation omitted).

Here, as discussed above, Plaintiffs recognize the substantial risks of proceeding with this litigation, including the possibility that after extensive further litigation and a trial, Plaintiffs might not recover any damages at all. Plaintiffs would also have to prevail on appeal, a process which is inherently uncertain and lengthy. But even the possibility that the class "might have received more if the case had been fully litigated is no reason not to approve the settlement." *Granada Invest., Inc. v. DWG Corp.,* 962 F.2d 1203, 1206 (6th Cir. 1992) (quotation omitted). The proposed settlement "provides for relief now, not some wholly speculative payment of a hypothetically larger amount years down the road." *Strougo v. Bassini,* 258 F. Supp. 2d 254, 260 (S.D.N.Y. 2003). This factor therefore supports preliminary approval of the Settlement.

5. Establishing and Maintaining the Class Through Trial Presents Risk (*Grinnell* Factor 6)

The Class has been certified, but Spirit has motions pending, which, if successful, would substantially limit the size and membership of the Class. Plaintiffs are also mindful that Spirit could move to decertify the Class in whole or in part based on the evidence presented at trial. In the face of these risks, it is significant that the proposed Settlement Agreement provides relief for all of the potentially over 800,000 impacted Class Members. This factor therefore supports preliminary approval of the Settlement.

6. Defendants' Ability to Withstand a Greater Judgment is Not Determinative (*Grinnell* Factor 7)

There is no doubt that Defendant is a large corporate entity, and there has been no representation that Defendant would not be able to pay a larger judgment. The Settlement discussions here have not been cabined in any way by the ability to pay on behalf of Defendants. Nevertheless, the Settlement eliminates any risk of collection at a future date by requiring Defendants to pay the full settlement amount shortly after final approval of the settlement. Settlement Agreement, Section J(1)-(2) Accordingly, this factor is neutral.

7. The Settlement is Substantial, Even in Light of the Best Possible Recovery and Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

As discussed above, the Settlement Agreement potentially allows Class Members to recover up to a 75% refund of the carry-on fees they were charged by Spirit. A potential recovery of up to 75% recovery of damages is, Plaintiffs submit, an exceedingly fine class action settlement. Indeed, oft-times class actions settle, and can be approved as fair and reasonable, for even a small percentage of that amount. As the *Grinnell* Court itself observed, "there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *City of Detroit v. Grinnell Corp.*, 495 F.2d at 455, n.2; see also *Strougo*, 258 F. Supp. 2d at 260 (The determination of a 'reasonable' settlement is not susceptible to a mathematical equation yielding a particularized sum."); *Republic Nat'l Life Ins. Co. v.*

Beasley, 73 F.R.D. 658, 668 (S.D.N.Y. 1970) ("In evaluating the proposed settlement, the court is not to compare its terms with a hypothetical or speculative measure of a recovery that might be achieved by prosecution of the litigation to a successful conclusion."). *See also Cagan v. Anchor Sav. Bank FSB*, 1990 U.S. Dist. LEXIS 11450, at *34-35 (E.D.N.Y. May 17, 1990) (approving $2.3 million class settlement over objections that the "best possible recovery would be approximately $121 million"); *Brooks v. Am. Export Indus., Inc.*, 1977 U.S. Dist. LEXIS 17313, at *16-18 (S.D.N.Y. Feb. 17, 1977) (approving settlement of less than 1% of the best possible recovery).

Specifically, while Spirit has identified slightly more than 800,000 potential Class Members, it is not known specifically how many of them flew Spirit before August 31, 2011 (the beginning of the Class Period) and after August 1, 2010, when Spirit first started charging for carry-ons. Klafter Dec. at ¶ 10. Moreover, given that Spirit does not have mailing addresses for approximately 350,000 potential Class Members, it is not known specifically how many of them resided in States that have shorter than New York's six (6) year statute of limitations and whose claims would be barred by such a shorter statute of limitations. Klafter Dec. at ¶ 11.[6] These factors, by Plaintiffs' estimate could reduce the list of approximately 800,000 potential Class Members by at least 10 percent, but that is only an estimate. Klafter Dec. at ¶ 12. The information Spirit provided also indicates that, on average, carry-on fee paid by all potential Class Members was $45.83. Multiplying that average (which does not reflect Spirit's mediation contention) by the above 720,000 Class Member estimate, results in damages of approximately $33 million. Klafter Dec. at ¶ 13. But, there would not have been an aggregate award of damages at trial because the number of Class Members with non-time barred claims is unknown. As a result, a claims process would

[6] Plaintiffs have subpoenaed the OTAs at issue and are hopeful they will obtain mailing and/or email addresses for a material number of the 350,000 from the OTAs.

have to employed post-trial and Spirit would only be liable to pay those persons who establish they are Class Members and only to the extent their claims are not time barred. Klafter Dec. Accordingly, Spirit's actual trial exposure could be more than he amount Spirit has agreed to pay to settle this case, but it could also be less. Klafter Dec. at ¶ 14.

Viewed in this context, the proposed Settlement is substantial in light of the best possible recovery. This conclusion would even be warranted if assessed in comparison to the estimated $33 million damages of all Class Members (regardless of whether they made a claim), which is 25 percent. This factor therefore fully supports preliminary approval of the proposed Settlement.

C. The Rule 23(e)(3) Factors are Satisfied

As mentioned above, in 2018, Fed. R. Civ. P. 23(e)(2) was amended to provide district courts with additional guidance on the applicable standards for approving class action settlements. Specifically, the amended rule directs the court to consider four factors when seeking to approve a class settlement; specifically, those are whether:

> (A) the class representatives and class counsel have adequately represented the class; (B) the proposal was negotiated at arm's length; (C) 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) the proposal treats class members equitably relative to each other.

Fed. R. Civ. P. 23(e)(2)(2018).

A review of the Rule 23(e)(2) factors favor approval of the proposed settlement.

1. The class representatives and class counsel have adequately represented the class

A determination of adequacy typically entails an inquiry as to "whether: (1) plaintiff's interests are antagonistic to the interest of other members of the class and (2) plaintiff's attorneys

are qualified, experienced and able to conduct the litigation." *In GSE Bonds Antitrust Litig.*, 414 F. Supp. 3d 686, 692 (E.D.N.Y. 2019) (*quoting Cordes & Co. Fin. Servs. v. A.G. Edwards & Sons, Inc.,* 502 F.3d 91, 99 (2d Cir. 2007).

Here, Plaintiffs' interests are aligned with other Class Members' interests because they have suffered the same injury – monetary loss from carry on fees. Because of those injuries, Plaintiffs have (and in fact have already demonstrated) an "interest in vigorously pursuing the claims of the class." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). Moreover, Plaintiffs' counsel are qualified, experienced, and have proven themselves able to conduct the litigation and were appointed by the Court as adequate Class counsel. As further described in Plaintiffs' counsels' respective firm resumes, Klafter Lesser LLP and Hermina Law Firm have extensive experience in successfully litigating complex class action litigation. Klafter Dec. at ¶ 15. This factor favors preliminary approval.

2. The proposal was negotiated at arm's length

The Settlement Agreement was the result of an arms-length 10-hour mediation with David Geronemus of JAMS on July 5, 2023. Klafter Dec. at ¶ 2. This factor strongly favors preliminary approval.

3. The relief provided for the class is adequate

This factor overlaps considerably with several *Grinnell* factors. As discussed above in discussing *Grinnell* factor 1 (*supra* at pp. 14-15), the Parties would face significant costs and delay by proceeding to trial. As described in the discussion of *Grinnell* factors 4 and 5 (*supra* at pp. 16-17), Plaintiffs would face significant risks in proving liability and damages at all, not to mention at a level equal to the value offered in this Settlement. As described in the discussion of *Grinnell* factors 8 and 9 (*supra* at pp. 18-19), the Plaintiffs believe the settlement value is significant in comparison to the "best possible recovery," particularly in light of the considerable risk and delay

inherent in proceeding to trial. For the same reasons these factors favor approval under the *Grinnell* analysis, they favor approval here.

Finally, as discussed immediately above when describing the Class Notice Plan (at pp. 8-9), and immediately below in Section D., the plan for informing Class Members of the Settlement, and the process for obtaining relief, is simple. It also offers Class Members multiple ways to learn about the Settlement and how to join, including via a dedicated website. This also favors preliminary approval.

4. The proposal treats class members equitably relative to each other.

The proposed formula for relief is simple: all Class Members who submit valid Claim Forms will be paid a pro-rated amount of money based on the amount of carry-on fee they actually paid. This formula applies equally to all Class Members. As well, all Class Members will agree to the same, identical release (see pp. 11-12, supra), which is narrowly-tailored to the claims in this action.[7] There are no subclasses or any other divisions among Class Members. This factor favors preliminary approval.

In sum, as with the *Grinnell* factors, consideration of the revised Rule 23(e)(2) factors favor preliminary approval of the Settlement Agreement.

D. The Proposed Notice Plan Will Provide Adequate Notice to Members of the Class

[7] The Settlement Agreement provides that Plaintiffs will seek Service Awards for the Named Plaintiffs. In light of that, Named Plaintiffs will sign releases broader in scope than those signed by Class Members. *See* pp. 11-12, s*upra*. The Second Circuit just last week confirmed the propriety of Service Awards in class action settlements. *Maribel Moses v. The New York Times Co.*, No. 21-2556-cv, slip op. at 40-48 (2d Cir. Aug 17, 2023). Plaintiffs will make a full application for the Service Awards consistent with the Second Circuit's approval considerations in connection with their motion for approval of fees and costs and at the time they move for final approval.

Plaintiffs request that the Court approve the Notice Plan provided in the Settlement Agreement which includes: (1) email and mail form notices and Claim Form, attached as Exhibits B and C-1, C-2 and C-3 to the Settlement Agreement for distribution; (2) a settlement website that will contain the Claim Form, Settlement Agreement and other documents pertaining to this action: and (3) a media campaign, which is described in the Declaration of Steve Weisbrot filed herewith, to reach potential Class Members for whom an email or mailing address has not been obtained. This Notice Plan fully complies with due process and Federal Rule of Civil Procedure 23. Pursuant to Rule 23(c)(2)(B), the notice must provide:

> the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> > (i) the nature of the action;
> > (ii) the definition of the class certified;
> > (iii) the class claims, issues, or defenses;
> > (iv) that a class member may enter an appearance through an attorney if the member so desires;
> > (v) that the court will exclude from the class any member who requests exclusion;
> > (vi) the time and manner for requesting exclusion; and
> > (vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

The Notice Plan satisfies each of these requirements. The Notices are written in plain English and is organized and formatted so as to be as clear as possible. Additionally, the Notices describe the terms of the settlement, informs the class about their rights to request exclusion or object and the deadlines for doing so. The Notices either include the Claim Form (as in the case of the mailing version) or provide a link to the Claim Form (as in the case of the email notice) and both mail and email notices encourage the recipients to go to the settlement website created by the Settlement Administrator to read the full notice Each Notice also provides clear instructions on

how and by when potential Class Members need to submit Claim Forms and the full notice informs potential Class Members about how individual class members' recovery will be calculated. The Notices also provide specific information regarding the date, time, and place of the Final Approval Hearing. And, pursuant to Fed. R. Civ. P. 23(h), the full notice sets forth the maximum amount of Attorneys' Fees and Costs and Service Award Payments which may be sought by Class Counsel.

The Settlement Agreement also provides that the Settlement Administrator will provide the Notice to Class Members by email or by U.S. First Class mail within thirty (30) days after entry of the Preliminary Approval Order. As well, reminder notices will also be sent halfway through the notice period to individuals who had not responded by that time. See Settlement Agreement at Sections (C)(1)-(6).

Further, the Claim Form that Class Members need to complete is simple and not burdensome. Class Members need not provide any proof of their flight or how much they paid in carry-on fees as this information is reflected in Spirit's records; they need only affirm that, when they were charged carry-on fees by Spirit, that they were first-time fliers of Spirit, and to identify the state in which they resided when they purchased their Spirit flight. Further, mail recipients of the mail notice have the option of completing a postage pre-paid postcard or going on line to complete it; all others can simply complete a Claim Form on line.

Accordingly, the Notice complies with the standards of fairness, completeness, and neutrality required of a settlement class notice disseminated under authority of the Court. *See, e.g.*, 4 Newberg on Class Actions at §§ 8.21, 8.39; Manual Fourth at §§ 21.311-21.312.

E. A Final Approval Hearing Should be Scheduled

The Court should schedule a Final Approval Hearing to make a final determination that the proposed Settlement meets the requirements for approval and to consider Plaintiffs'

application for attorneys' fees and expenses and for Service Awards to the Class Representatives. The Final Approval Hearing will also provide a forum for any Class Member who wants to be heard regarding the Settlement to state their position.

The setting of a date for the Final Approval Hearing must take into account the following schedule:

Notices disseminated	Thirty (30) days after entry of the Preliminary Approval Order
Deadline for Requests for Exclusion and Objections	Thirty (30) days before the Final Approval Hearing
Motion for Final Approval of the Settlement and for an Award of Attorneys' Fees, Expenses and Service Awards	Ten (10) business days before the Final Approval Hearing

Further, pursuant to the Class Action Fairness Act, 28 U.S.C. § 1715 ("CAFA"), a court may not hold a final approval hearing less than 90 days after the date on which the appropriate Federal official and the appropriate State official, as set forth in CAFA. are served with the notice required by that law. The Settlement Agreement requires Spirit to serve these notices no later than ten (10) days after the filing of this motion. *See* Settlement Agreement, Section D. Plaintiffs, accordingly, request that the Court schedule the Final Approval Hearing as soon as possible after one-hundred (100) days after the filing of this preliminary approval motion.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court enter the Preliminary Approval Order, submitted herewith.

Dated: August 23, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on August 23, 2023, the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system which sends notification of such filing to all counsel of record.

/s/ *Jeffrey A. Klafter*
Jeffrey A. Klafter