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13 Attorneys for Plaintiffs
 14 MARGARET TUMAMPOS,
 15 JONATHAN LAM, and CONNIE LAI on
 16 their behalf and others similarly situated

17 IN THE UNITED STATES DISTRICT COURT FOR THE
 18 NORTHERN DISTRICT OF CALIFORNIA

19 MARGARET TUMAMPOS, JONATHAN
 20 LAM, AND CONNIE LAI ON THEIR
 21 BEHALF AND OTHERS SIMILARLY
 22 SITUATED,

23 Plaintiffs,

24 v.

25 CATHAY PACIFIC AIRWAYS LTD.,

26 Defendant.

CASE NO. 4:16-CV-06208-CW
Assigned for All Purposes:
Honorable Claudia A. Wilken

**DECLARATION OF TIMOTHY B.
 NELSON IN SUPPORT OF PLAINTIFFS’
 MOTION FOR FINAL APPROVAL OF
 CLASS ACTION SETTLEMENT**

Date: September 18, 2018
 Courtroom: TBD
 Time: 2:30 pm

Action Filed: October 26, 2016
 Amended Complaint Filed: January 27, 2017
 Trial: Not Yet Set

1 I, Timothy B. Nelson, declare as follows:

2 1. I am an attorney at law licensed to practice before all courts in the State of California,
3 and the United States District Court for the Northern District of California. I am a partner at Medina
4 McKelvey LLP, counsel of record for the Plaintiffs and the putative class in the above-entitled
5 action. I have personal knowledge of the matters set forth herein, except as to those matters stated
6 on information and belief, and as to those matters, I believe them to be true. If called upon as a
7 witness to testify upon the matters stated herein, I would be competent to do so.

8 **I. CASE BACKGROUND**

9 2. In September 2016, Defendant Cathay Pacific (“Defendant” or “Cathay”) informed
10 its California-based flight attendants in writing that since Cathay was not an American based airline
11 and these flight attendants operated non-American vessels, such employees were not eligible for
12 Social Security (FICA) or California State Disability Insurance (SDI). Accordingly, Cathay stated
13 it would halt withholding FICA and SDI payments from these employees’ wages. (Amended
14 Complaint Attachment A, Dkt. No. 30-1).¹

15 3. Plaintiff Margaret Tumamos commenced this action on October 26, 2016.
16 Plaintiff’s Complaint alleged the following claims: (1) violations of the Fair Labor Standards Act
17 for unlawful deductions from wages and kickbacks; (2) failure to pay all wages due pursuant to
18 California Labor Code sections 221 and 223; (3) unlawful and unauthorized deductions from wages
19 in violation of Labor Code section 221; (4) failure to timely wages during employment in violation
20 of Labor Code section 204; (5) failure to provide accurate, itemized wage statements in violation
21 of Labor Code section 226; (6) failure to pay all wages due at the time of termination in violation
22 of Labor Code sections 201–203; (7) failure to pay contracted wages in violation of Labor Code
23 section 223; (8) conversion; (9) promissory estoppel; (10) failure to provide meal periods; (11)
24 failure to provide rest periods; and (12) unfair business practices. Plaintiff sought relief on her own
25 behalf and on behalf of a class of Defendant’s cabin crew, flight attendant or similar titles who were
26 employed by Defendant in California going back four years. The central allegations in the

27 _____
28 ¹ In Cathay’s answer it admitted it circulated the documents attached to this Attachment A
(Dkt. No. 57 at ¶¶ 44–45).

1 Complaint were that Defendant illegally and unlawfully deducted FICA and SDI taxes from the
2 wages of Cathay’s California-based cabin crew and flight attendants. Plaintiff also alleged that
3 Cathay did not provide Class Members meal and rest breaks pursuant to California law.

4 **A. Defendant Moved to Dismiss and/or Strike the Original Complaint.**

5 4. On January 6, 2017, Defendant filed a Motion to Dismiss the Complaint. Defendant
6 also concurrently filed a Motion to Strike certain allegations in the Complaint. Defendant’s
7 motions made two principal arguments: (1) all Plaintiffs’ claims involving the deduction of FICA
8 and SDI taxes were preempted by federal law and barred under California law; and (2) Plaintiffs’
9 meal and rest break claims failed as a matter of law because California’s meal and rest break laws
10 do not apply extraterritorially, and Plaintiffs and other class members performed most of their
11 duties outside California on international flights to Hong Kong.

12 **B. Plaintiff Filed a First Amended Complaint.**

13 5. After extensive research and revisions, on January 27, 2017, Plaintiff filed her First
14 Amended Complaint, in which she added two additional class representatives, Jonathan Lam and
15 Connie Lai. The First Amended Complaint refined the allegations regarding missed meal and rest
16 breaks and added a claim for civil penalties pursuant to the Private Attorneys General Act (the
17 “PAGA”) as a result of the alleged violations of the California Labor Code. Plaintiffs’ First
18 Amended Complaint (“FAC”) alleged the following claims: (1) unlawful deductions from wages;
19 (2) failure to provide meal periods; (3) failure to provide rest periods; (4) failure to timely pay
20 wages during employment (due to failure to pay premiums for missed meal and rest breaks and
21 unlawful and unauthorized deductions); (5) failure to provide accurate itemized wage statements
22 (due to failure to pay premiums for missed meal and rest breaks and due to unlawful and
23 unauthorized deductions); (6) pay all wages due at the time of termination (due to the failure to pay
24 premiums for missed meal and rest breaks and due to unlawful and unauthorized deductions); (7)
25 breach of contract; and (8) unfair business practices.

26 **C. Defendant Again Moved to Dismiss and/or Strike the First Amended
27 Complaint.**

28 6. On February 10, 2017, Defendant filed a Motion to Dismiss and on February 13,
2017, Defendant filed a Motion to Strike with respect to the First Amended Complaint. These

1 motions relied on the same principal arguments in the initial Motion to Dismiss and Motion to
2 Strike: claims related to unlawful deductions for FICA and SDI taxes were preempted by Federal
3 and state law, and Plaintiffs' meal and rest break claims failed because California's meal and rest
4 break law did not apply extraterritorially. The parties extensively briefed these issues. Defendant's
5 opening briefing amounted to a total of 33 pages. Plaintiffs' opposition briefing amounted to 41
6 total pages. Defendant's reply briefing totaled 22 pages.

7 7. The Court heard Defendant's Motion to Dismiss and Motion to Strike on April 4,
8 2017. Following the hearing, the Court issued a detailed order on April 25, 2017, granting in part
9 and denying in part the Motion to Dismiss. The Court dismissed Plaintiffs' meal and rest break
10 claims with leave to amend. The Court did not dismiss Plaintiffs' remaining Labor Code claims,
11 finding that these claims were not preempted by federal or state law. The Court's order provided
12 a mechanism for Defendant to seek permission to file an early motion for summary judgment as to
13 whether the remaining Labor Code claims could apply extraterritorially.

14 In summary, the Court's April 25, 2017 Order stated the following:

- 15 • Plaintiffs' claim for breach of contract was dismissed with leave to amend;
- 16 • Plaintiffs' meal and rest break claims were dismissed with leave to amend. Plaintiffs were
17 permitted to amend their meal and rest break claims if they could truthfully allege, without
18 contradicting the allegations in the existing complaint, facts to support a finding that they
19 worked principally in California as well as a finding that Defendant was a California
20 employer. In the alternative, Plaintiffs were granted leave to amend these claims if they
21 could truthfully allege, without contradicting the allegations in the existing complaint, that
22 Plaintiffs were entitled to relief for meal and rest period violations based only on the work
23 performed in California.
- 24 • Plaintiffs' eight claim for unfair business practices was dismissed with leave to amend, to
25 the extent the claim was based on the FICA and SDI withholdings.
- 26 • Plaintiffs were permitted to proceed on all their Labor Code claims based on the improper
27 FICA and SDI withholdings.

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1 8. Rather than attempt to amend their pleading once again, Plaintiffs instead chose to
2 move forward with its unlawful deduction claims, as those claims had survived Defendant's
3 preemption argument. Plaintiffs chose not to amend their meal and rest break claims and instead
4 chose to preserve those claims for appeal, if appropriate. When Plaintiffs did not file an amended
5 complaint, Defendant filed an answer to the FAC (as modified by the Court's order) on June 8,
6 2017.

7 **D. Defendant Filed a Motion to Certify the Court's Order Denying the Motion to**
8 **Dismiss for Interlocutory Appeal and to Stay This Action.**

9 9. On May 23, 2017, Defendant filed a motion to certify the April 25, 2017 order for
10 interlocutory appeal and to stay the action. Plaintiffs opposed this motion, and on June 30, 2017,
11 the Court denied Defendant's motion to certify the April 25, 2017 order.

12 **E. The Parties Agreed to Attend Private Mediation with the Honorable Lynn**
13 **Duryee (Ret.) on August 9, 2017 and Conducted Extensive Discovery.**

14 10. On January 18, 2017, the parties filed a notice for need for an ADR telephone
15 conference, because the parties could not agree on an ADR process. An ADR telephone conference
16 was held on January 27, 2017. At that conference, a further ADR phone conference was scheduled
17 for April 18, 2017, due to the fact that the pleadings were not settled. On April 17, 2017, the case
18 was referred to private ADR. The further telephone conference to discuss ADR scheduled for April
19 18, 2017 was taken off calendar, and the case was referred to private mediation. Mediation was to
20 be completed by July 31, 2017. The parties met and conferred regarding a private mediator, and
21 agreed to seek the assistance of the Honorable Judge Lynn Duryee (Ret.) of JAMS to mediate the
22 case. The parties agreed to the Judge Duryee's earliest availability, which was August 9, 2017.
23 The parties requested from the Court an extension on the deadline to complete private mediation to
24 August 31, 2017, and the extension was granted.

25 11. Plaintiffs propounded extensive written discovery in advance of mediation. In
26 addition to initial disclosures, Plaintiffs propounded one set of specially prepared interrogatories
27 on May 5, 2017, and one set of requests for production on May 9, 2017. Plaintiffs served a second
28 set of requests for production of documents on May 31, 2017, and a third set of requests for

1 production of documents on June 7, 2017. In total, Plaintiffs propounded eight interrogatories
2 directed at basic information regarding the composition of the class that Plaintiffs sought to
3 represent and 108 requests for the production of documents related to Plaintiffs' claims. The parties
4 met and conferred extensively regarding discovery, particularly with respect to the production of
5 ESI and agreed upon a rolling production, with the most critical documents relating to liability and
6 Plaintiffs' potential damages being produced first. As a result, Defendant produced, and Plaintiffs
7 reviewed and analyzed, thousands of pages of documents and data, including, Plaintiffs' pay
8 records, wage statements and Defendant's policy and procedure documents. In addition, Plaintiffs'
9 counsel conducted in-depth interviews of a number of putative class members, researched the
10 developing case law concerning the claims asserted in this case and the potential defenses thereto,
11 and conducted an in-depth analysis of potential class-wide damages.

12 12. Once the parties agreed on a mediation date with the Honorable Judge Lynn Duryee,
13 the parties worked cooperatively to prepare for mediation. Plaintiffs agreed not to seek the contact
14 information for class members, in exchange for responses to the remaining interrogatories that
15 Plaintiffs propounded. Plaintiffs also agreed to narrow their document requests to email
16 correspondence regarding the decision to deduct FICA and SDI taxes from Class Members' wages,
17 as well other categories of essential documents (regarding Plaintiffs). These efforts were designed
18 to ensure that the parties had all of the information necessary to prepare for a meaningful and
19 informed mediation with Judge Duryee.

20 **F. The Parties Participated in a Full-Day Mediation with Judge Duryee.**

21 13. On August 9, 2017, the parties attended a full day of mediation with Judge Duryee
22 at the JAMS office in San Francisco. Plaintiffs Margaret Tumamos, Connie Lai, and Jonathan
23 Lam traveled significant distances. to attend the mediation in person. Defendant had two corporate
24 representatives at the mediation, both of whom traveled from Hong Kong. The mediation began at
25 9:30 a.m. Both sides submitted lengthy mediation briefs to Judge Duryee to prepare for the
26 mediation. The mediation lasted all day and did not conclude until approximately 8:30 p.m. The
27 mediation ended when both sides accepted a mediator's proposal for settlement in the amount of
28 \$1,900,000, and the parties executed a brief Memorandum of Understanding.

1 **G. Following Preliminary Approval, the Settlement Administrator Sent Class**
2 **Notice and No Class Members Requested Exclusion or Objected to the**
3 **Settlement.**

4 14. The Court held a hearing on Plaintiff's Motion for Preliminary Approval of the
5 Class Action Settlement on January 9, 2018. Following the hearing, Plaintiffs filed an Addendum
6 to the Settlement Agreement, a revised class notice, and a revised proposed order. (Dkt. Nos. 68-
7 1, 68-2, and 68-3.). The Court signed the order granting preliminary approval of the Settlement on
8 May 2, 2018, which required a further revised class notice be filed. (Dkt. No. 70.). Plaintiffs filed
9 the revised class notice on May 7, 2018 (Dkt. No. 72), the revised class notice was approved by
10 the Court on May 8, 2018. (Dkt. No. 73.)

11 15. Pursuant to the Court's order granting preliminary approval of the Settlement, the
12 Settlement Administrator (ILYM Group) sent the Court-approved notice to the Class Members on
13 May 18, 2018. The class notice was sent to all 445 Class Members. The deadline for Class
14 Members to opt out was July 2, 2018. In addition to mailing the class notice, the Settlement
15 Administrator also posted all relevant settlement documents, including the Settlement Agreement,
16 the Motion for Preliminary Approval, and Plaintiffs' Motion for Attorneys' Fees and Service
17 Awards, to its website. The address for the Settlement Administrator's website was included in
18 the Class Notice that was sent to Class Members.

19 16. Out of 445 class notices that were mailed, six notices were returned. These six
20 notices were skip traced and re-mailed to these six Class Members. After these six notices were
21 re-mailed, only two were returned as undeliverable. Therefore, of the 445 Class Members, 99.6%
22 of these Class Members received the class notice. Finally, none of the Class Members opted out
23 of the settlement, and none of the Class Members provided any objections to the Settlement.
24 Plaintiffs' counsel is not aware of any Class Members reacting negatively to the Settlement. In
25 fact, based on the fact that there were no requests for exclusion and no objections, it appears that
26 the Class Members' reaction to the Settlement is overwhelmingly positive.

27 **II. SETTLEMENT TERMS**

28 17. Under the terms of the Settlement, there are no circumstances under which any
 portion of the Gross Settlement Payment will revert to Cathay.

1 18. Any unclaimed or uncashed Net Settlement Proceeds will be held by the
2 Settlement Administrator and available to be claimed by the payee for 180 days following the
3 initial payment date. Any Net Settlement Proceeds remaining with the Settlement Administrator
4 after 180 days will be paid to two *cy pres* beneficiaries: Legal Services of Northern California (an
5 organization that provides quality legal services to indigent residents of Northern California,
6 including assistance with employment issues such as those at issue in this lawsuit) and the
7 National Center for Youth Law (which works to improve the lives of disadvantaged children and
8 youth). The Gross Settlement Payment is the sole consideration Defendant is paying to
9 Settlement Class Members for the Settlement.

10 **III. CLASS REPRESENTATIVES’ APPLICATION FOR SERVICE AWARDS**

11 19. Plaintiffs have applied to the Court for a service award of Ten Thousand Dollars
12 (\$10,000) for each class representative. (Dkt. No. 74, 74.1–74.6; Settlement Agreement ¶ 3.5.)
13 The class representatives have each submitted declarations supporting such service awards
14 including explaining the many hours devoted by each class representative. (Dkt. Nos. 74-3, 74-4,
15 and 74-5). Any service award approved by the Court will be paid out of the Gross Settlement
16 Payment. Defendant has not opposed the Class Representative’s application for service awards.

17 **IV. MOTION FOR ATTORNEYS’ FEES**

18 20. On June 18, 2018, Class Counsel filed a Motion for Attorneys’ Fees, seeking fees
19 of \$570,000.00. (Dkt. Nos. 74, 74.1–74.6; Settlement Agreement 3.3.) As detailed in the Motion
20 for Attorneys’ Fees, Class Counsel has undertaken representation of the Class on a contingent basis
21 and, to date, has not been compensated for any of their work. Class Counsel has expended over
22 1,300 hours in this action. Accordingly, their request for attorneys’ fees is substantially less than
23 the lodestar amount (hours multiplied by hourly rate) worked by Class Counsel over the course of
24 the case. Indeed, the requested amount is less than 75% of Class Counsel’s lodestar. Class Counsel
25 have also applied for reimbursement of actual expenses incurred in an amount of \$9,699.02. (Dkt.
26 Nos. 74, 74-1, ¶ 23; Settlement Agreement ¶ 3.3.)

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1 21. The requested fees and expenses, if approved by the Court, will be paid out of the
2 Gross Settlement Payment. Defendant has not opposed Plaintiffs' counsel's request for attorneys'
3 fees and expenses.

4 **V. THE PROPOSED SETTLEMENT IS FAIR, ADEQUATE, AND REASONABLE**

5 22. One of the contentious issues in this case is whether California law applies to
6 Plaintiffs' and Class Members' employment. Defendant took the position in its Motion to Dismiss
7 that the protections of the California Labor Code (which all of Plaintiffs' claims are based on) do
8 not apply to Plaintiffs and Class Members because of the amount of time that they spend working
9 on California. Defendant's Motion to Dismiss focused on whether Plaintiffs' meal and rest breaks
10 claims fail because Plaintiffs did not spend a majority of their time working in California. (*See*
11 Defendant's Motion to Dismiss, 14:25–21:16.) Defendant took the position in litigation that it
12 would make the same arguments with respect to Plaintiffs' remaining Labor Code claims, and the
13 Court's April 25 Order permitted Defendant to petition the Court to file an early motion for
14 summary judgment on this issue.

15 23. Defendant also argued that Plaintiffs' claims premised on FICA and SDI deductions
16 were preempted or barred by federal and state law. Defendant argued that these claims are
17 essentially claims for tax refunds (or related to claims for tax refunds) and therefore are preempted
18 by 26 U.S.C. § 7422 and the California Constitution. (*See* Defendant's Motion to Dismiss, 7:14–
19 13:5.) Defendant relied primarily on two similar district court cases in Oregon for the proposition
20 that claims for penalties that derive from deductions for FICA taxes are preempted. Currently,
21 there are no district court cases in California with similar holdings, although this could change at
22 any time. And, as indicated by Defendant's Motion to Certify the Court's April 25 Order for
23 Interlocutory Appeal, Defendant intended to appeal any order permitting these claims to go
24 forward.

25 **VI. THE SETTLEMENT IS IN THE BEST INTEREST OF THE CLASS**

26 24. Class Counsel possess several decades of experience in complex class action
27 litigation, which has allowed is to develop an acute understanding of the strengths and weaknesses
28 of Plaintiffs' claims as well as the strengths and weakness of Cathay's asserted defenses to those

1 claims. Consequently, as Class Counsel, we are well positioned to evaluate the benefits provided
2 by the Settlement Agreement in light of the risks of continued litigation. We firmly believe that
3 the compromise contained in the Settlement Agreement—achieved after extensive negotiations
4 with a retired Judge—represents a beneficial resolution of this highly complex and risky litigation.
5 Accordingly, we strongly recommend that the Court confirm its preliminary approval and finally
6 approve the proposed Settlement Agreement.

7 **VII. THE REACTION OF THE CLASS HAS BEEN OVERWHELMINGLY POSITIVE**

8 25. In accordance with the Court’s Preliminary Approval Order and the terms of the
9 Settlement Agreement, the Settlement Administrator disseminated a comprehensive notice to the
10 445 Class Members. The Settlement Administrator also posted the Notice and relevant settlement
11 documents on its website. As required by the Class Action Fairness Act, Cathay’s counsel also
12 provided notice to the appropriate state official, and the appropriate federal official.

13 26. The response to the Settlement has been overwhelmingly positive. Of the 445 Class
14 Members, none of the Class Members have chosen to exclude themselves and none of the Class
15 Members have objected to the Settlement. Only two of the 445 notices that were mailed to Class
16 Members were returned as undeliverable.

17 **VIII. CONCLUSION**

18 27. Class Counsel have reviewed the terms of the Settlement with Plaintiffs. Plaintiffs
19 have concluded that the Settlement represents a fair, reasonable, and adequate resolution of this
20 case. The Settlement Agreement is comprehensive in its scope, is fair and even-handed in its
21 application, and is of substantial economic benefit to the Class. Class Counsel also believe the
22 Court should approve the Settlement Agreement as fair, adequate and reasonable. No Class
23 Members have objected to the Settlement, and none have requested to be excluded from the
24 Settlement. I have been informed that Defendant does not oppose Plaintiffs’ request for final
25 approval of the Settlement Agreement.

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I declare under penalty of perjury under the laws of the United States of America and the State of California that the forgoing is true and correct and that this declaration was executed on August 14, 2018, in Roseville, California.

/s/ Timothy B. Nelson
Timothy B. Nelson