

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS**

MAX BAZERMAN, individually and on
behalf of others similarly situated,

Plaintiff,

vs.

AMERICAN AIRLINES, INC., a
Delaware Corporation,

Defendant.

Case No.: 1:17-CV-11297-WGY

**DECLARATION OF BENJAMIN EDELMAN IN SUPPORT OF PLAINTIFF'S
MOTION FOR AN AWARD OF REASONABLE ATTORNEYS' FEES, COSTS,
AND EXPENSES**

I, Benjamin Edelman, declare as follows:

1. I am co-counsel for Plaintiff and the Class with Goldstein, Borgen, Dardarian & Ho ("GBDH"), and I have been appointed Class Counsel in this action. (ECF No. 65 ¶ 6.) I am providing this declaration in support of Plaintiff's Motion for an Award of Reasonable Attorneys' Fees, Costs, and Expenses. I have personal knowledge of the facts set forth in this declaration and could and would testify competently to them.

BACKGROUND AND EXPERIENCE

2. I am an attorney licensed in good standing to practice law in the state of Massachusetts. A copy of my resume is attached hereto as Exhibit A.

3. I have been actively engaged in the practice of law since 2008. I have served as an attorney in a variety of class litigation. Selected cases in which I served as co-counsel:

a. *In re: Yahoo Litigation*, No. 06-2737-CAS (C.D. Cal) - challenging Yahoo placing advertisers' advertisements in low-quality locations such as adware, popups, and typosquatting, while charging advertisers high prices predicated on search advertising.

b. *Vulcan Golf, LLC, et al., v. Google, Inc., et al.*, No. 07 C 3371 (N.D. Ill.) - challenging Google and its partners using domain names that are typographic variants of trademarks in order to show advertising.

c. *In Re In-App Purchase Litigation*, Case No. 5:11-CV-01758-EJD (N.D. Cal.) – challenging Apple charging users for purchases made by kids, refusing refunds to such users, and allowing purchases (and charging users' credit cards) without users reentering their passwords to authorize the purchases.

d. *Bohannon v. Facebook, Inc.*, Case No. 5:12-cv-01894 (N.D. Cal) – challenging Facebook claiming that kids' purchases are final and refusing refunds to kids and their parents and guardians.

4. In general, my litigation efforts embody novel cases in the sense that I examine fact patterns that have not previously been the subject of litigation by others. In each of the cases listed above, I identified and developed the operative facts and appropriate legal theories.

5. In addition to my litigation experience, I have other relevant experience and expertise. During the majority of the pendency of this case, my primary employment was as a faculty member at the Harvard Business School. My work as an instructor and scholar is intrinsically linked with my work as an attorney. For example, my academic research often leads me to notable practices that give rise to potential litigation claims. Similarly, in the course of preparing teaching materials and teaching plans, I sometimes uncover practices that give rise to litigation claims. Some of my academic publications are published in legal journals including

(as indicated in my CV) the Stanford Technology Law Review, the Journal of Competition Law & Economics, the Journal of Law, and ABA Business Law Today. Ultimately, the mix of skills necessary for modern business education is complementary to the mix of skills that led me to identify and develop the operative facts of this case and to successfully bring suit.

6. A second set of relevant expertise comes from my consulting experience. Beginning in 1999, I have operated a consulting practice focusing on malfunctions, errors, and other disputes in IT. In a representative engagement for the ACLU, I documented thousands of instances of Internet filters – designed to block pornographic images and other objectionable materials – that in fact blocked access to unobjectionable materials. In a project for the National Football League and others, I examined an access control mechanism that was intended to allow certain video content to be viewed only by users located in Canada, but in fact allowed access by users worldwide. These projects built my capabilities in assessing IT problems including testing systems I cannot directly access, identifying patterns in errors, developing and testing hypotheses about the causes of errors, and devising methods to prevent errors.

7. My IT experience includes substantial software programming expertise. I have 25 years of experience writing software, and have sold software prototypes to multiple large technology companies. My software development expertise strengthens my skills in testing and error-checking software written by others. For one, I can examine and understand their software code (when available). Furthermore, my experience writing software helps me anticipate and diagnose errors that others may have made.

8. My interdisciplinary expertise was crucial both to identification of the claims and to their successful pursuit. In particular, my familiarity with law, business, and software led me

to the operative facts in this case—a breach of contract embodied in deficient business practices, information technology systems, and software defects.

**REASONABLE TIME SPENT ON THIS MATTER AND NATURE OF ITS
REPRESENTATION OF THE CLASS**

9. I have been involved in all aspects of this case since its inception. I have been co-counsel with GBDH. Throughout this case, GBDH and I have coordinated the work to maximize expertise and avoid unnecessary duplication of work. I coordinated settlement and litigation strategy with GBDH.

10. As co-counsel, I took a lead role in certain aspects of the case, including the initial factual and legal research identifying and developing the bases of the claim, assessing the general legal theories, and drafting substantial sections of the Complaint.

11. Prior to the filing of the Complaint, I initiated the factual investigation of this case during summer 2016 when I observed that certain Defendant web pages, kiosks, emails, and other documents made promises about baggage benefits, and that Defendant failed to honor these promises in a range of instances. When my investigation concluded that problems were widespread and substantial, my co-counsel at GBDH became involved in the investigation and litigation of this case.

12. As the investigation continued, we searched and reviewed numerous online sources for public statements from American passengers about potentially improper checked bag fees. Based on our review of more than 3,000 public statements on Twitter, Facebook, and online discussion boards, such as Flyer Talk, Plaintiff's counsel mapped out American's alleged systematic contract breaches with respect to checked bag fees.

13. We also spoke with numerous passengers about their checked bag fee experiences with American, and reviewed many travel-related documents from passengers on American flights.

14. We filed a Freedom of Information Act Request with the United States Department of Transportation (“DOT”), which led to the gathering of many additional passenger complaints. We also gathered publicly available American filings with the DOT, which provided key insights with respect to American’s records, certain databases, and other American practices.

15. After the complaint was drafted, I was part of the team that compiled the significant amount of initial disclosures and drafted the discovery requests to Defendant. Because I had a distinctive knowledge of likely documents and terminology, my efforts included identifying the type of documents and data likely to be available to prove the case, drafting language that would most likely cover the documents and data we were seeking, assessing the general legal theories, and drafting portions of the Complaint.

16. In light of my familiarity with Defendant’s institutions and practices, I participated in substantially all calls with Defense counsel as well as Defendant’s data-processing vendor, including leading most meet-and-confer calls on the subjects of business practices, business records, software, information technology systems, errors, promises, data, and data processing. For the same reasons, I led review of Defendant’s document production.

17. Much of my work in this case was technical, pertaining to the software Defendant uses to store its business records and the means by which those records can be searched. I reviewed software code and sample data from Defendant’s data consultants. On numerous occasions I spoke with Defendant attorneys and Defendant’s data consultants about the data I

knew to be available and the methods of search and analysis I knew to be feasible. I gave instructions on data searches that I knew were possible based on my knowledge of Defendant's systems and of databases more generally. To the best of my knowledge, some of the methods used in Defendant's searches followed the procedures I proposed.

18. When settlement discussions became a possibility, I identified the critical data we would need to estimate damages, the documents we would need to further evaluate liability and the likelihood of success at trial, and the systems where this data and documents were located. As we prepared for mediation, I reviewed and analyzed the data, including evaluating the number of passengers that appeared to be affected, the scope of the problems, and the quality of proof we would be able to assemble.

19. My representation of Plaintiff and the Class was on a wholly contingent basis. I devoted substantial resources to this matter, and I have received no payment for any of the more than 537 hours of services performed toward the investigation, litigation, negotiation, and resolution of this case. I did this work, with no guarantee of repayment, because of the importance of this case and the benefits it would bring to hundreds of thousands of passengers. As result of the demands of this litigation, my time was allocated to this matter to the exclusion of other cases and other activities.

20. I maintain contemporaneous time records reflecting the time spent on this and other matters. In all instances, I indicate the date and amount of time spent on a task to one-tenth of an hour; describe the work that was performed during the indicated time period; and identify the case to which the time should be charged. I have kept contemporaneous records documenting in detail all time spent on this matter, including the tasks I performed on each day, in increments of 0.1 of an hour. I have provided a true and correct copy of my detailed time

records in this case (excluding those entries eliminated in the exercise of billing judgment) to my co-counsel, Linda Dardarian, for submission to the Court. These records are based on my contemporaneous entries into the computerized record-keeping system which I operate in the ordinary course of business.

21. I made every effort to litigate this matter efficiently by coordinating the work with GBDH's attorneys and paralegals, minimizing duplication. I also exercised billing judgment to account for any excess, redundant, or unreasonably duplicative time.

22. Class Counsel worked efficiently and cost-effectively. Class Counsel avoided duplication of labor by using modern software to store documents and drafts, to review each others' revisions, and to assign and manage tasks.

23. The hours I billed were properly and necessarily spent on my assigned tasks and projects. The detailed time records for the hours I spent and billed to this case, from inception of the investigation through January 15, 2019, amount to a total of 537.2 hours.

24. This figure does not include time that I will continue to incur to see this case over the next three months through the final approval of the class action settlement, and the review and analysis of defendant's claim verification process. I estimate that I will spend an additional 90 hours on these remaining tasks.

SPECIAL EFFORTS DURING CLAIM VERIFICATION PROCESS

25. After class members filed claims, AA and its data processing vendor used software to assess which claims should yield refunds, in which amounts, and which should be denied for what reasons. Class Counsel worked extensively to achieve the most comprehensive possible refunds for class members. I led this process by reviewing the software code, logic, and assumptions used by AA and its data processing vendor; by holding multiple meet-and-confer calls to discuss the code, logic, and assumptions; and by pushing for broader inclusions and

narrower exclusions. In my review, I found multiple instances in which AA mistakenly planned to discount the refunds of some bags, preparing to refund them only in part when they were supposed to be refunded in full. After I brought this to AA's attention, AA corrected the error and agreed to refund these bags in full. In my review, I also found bags that were being refunded at incorrect rates, and here too AA corrected the error.

26. In addition, Class Counsel vigorously opposed some of the reasons for which AA planned to reject certain claims. For example, AA planned to reject certain claims based on a discrepancy between the passenger name on the ticket versus the name on the claim form. In response, we pointed out the many reasons why names can properly vary, such as legal change of name, alternative spellings, names not originally in Roman letters, varying treatment of multi-word family names, and more. AA planned to reject other claims based on certain of its records indicating that a claimant did not check a bag, because the bag was purportedly checked by another member of the traveling party. We pointed out the unreliability of this portion of AA's business records, including indicia of unreliability within AA's business records as well as the underlying operational factors that led to unreliability. The parties continue to meet and confer on these subjects. AA has, however, already agreed to accept the majority of claims that it had originally planned to reject on these reasons.

27. Class Counsel's work during claim verification served to increase the refunds provided to class members and to increase the likelihood that all improper charges were indeed refunded as provided by the settlement.

SIZE OF RECOVERY FOR CLASS MEMBERS

28. Defense Counsel recently advised Class Counsel that AA has verified \$6,535,270 of claims by class members. Those claims will be paid and are not in dispute.

29. Available information suggests that the recovery for class members will be somewhat larger for the following reasons:

a. Some class members forgot to sign their claim forms or forgot to answer the question confirming their US residence. The Settlement Administrator is contacting them and giving them an opportunity to do so. If they do so, they will be included in the recovery. The Settlement Administrator previously advised us that 15,444 claims were invalid on their face due to missing signature and/or no answer as to US residence. If these class members all correct the invalidities, if their claim forms are verified at the same rate as other claims, and if these claimants have claims for multiple check-ins at the same rate as other claimants, that would increase the number of verified claim customer/PNR slices by 6.5%. If these claims have the same dollar value as other claims, the dollar recovery would increase in the same proportion.

b. Class Counsel dispute certain of AA's denials of certain categories of class member claims, namely AA's use of certain manifest data which Class Counsel contend is unreliable or imposes additional restrictions not present in the Settlement Agreement. AA has tentatively denied refunds for 15,597 customer/PNR slices for disputed reasons. If this dispute is resolved in the class's favor, and if these claimants have claims for multiple check-ins at the same rate as other claimants, these claims would increase the number of verified claim customer/PNR slices by 6.7%. If these claims have the same dollar value as other claims, the dollar recovery would increase in the same proportion.

c. Class Counsel understand that three bulk claims, from a claims agent on behalf of three companies that paid for travel and bag fees for their employees or other travelers, were timely submitted to the Settlement Administrator. Class Counsel understand that these claims are not included in claims data verified by AA. These claims cover 52,951 passengers

who, the claims agent indicates, all traveled on AA in the relevant period on company business. If 5% of these passengers were overcharged for bag fees for the reasons considered in this settlement, if these claimants have claims for multiple check-ins at the same rate as other claimants, that bulk claim would increase the number of verified claim customer/PNR slices by 1.3%. If these claims have the same dollar value as other claims, the dollar recovery would increase in the same proportion.

d. Additional notice will be sent, and additional claims received, due to the Court's order of January 11, 2019, which allows affected class members to file claims through and including February 20, 2019.

30. If all of these events occur in full, the recovery for class members would increase by more than 14% to an estimated recovery of \$7,450,207.

REASONABLE HOURLY RATES

31. Based on my knowledge and experience, the rates charged by me in this matter are the same as, or less than, I charge for non-contingent services, and are within the range of rates normally and customarily charged in the Boston area by attorneys of similar qualifications and experience.

32. I have charged rates well above the requested rate to clients seeking my time on a non-contingent basis. For example, beginning in 2009, I instituted a standard rate of \$600/hour for certain investigations of online advertising overcharges. Beginning in 2014, I instituted a standard rate of \$1200/hour for discussions with investors and others about allegations of errors, overcharges, and other misconduct by certain online advertising services. I have contemporaneous invoices that demonstrate clients in fact paying these rates. Those records are available for the Court to review should the Court wish to, and I will provide them to the Court for inspection if requested.

33. The reasonableness of my requested rate is supported by past fee awards in similarly complex class action cases. In *Bohannon v. Facebook, Inc.*, Case no. 5:12-cv-01894 (N.D. Cal.), I was awarded an hourly rate of \$650 per hour in 2016. Three years earlier, in 2013, I was awarded an hourly rate of \$550 per hour in *In re Apple In-App Purchase Litigation*, Case No. 5:11-CV-01758-EJD (N.D. Cal.). My requested rate of \$600 in this case balances both my increase in experience and qualifications since 2016 and the lower prevailing market rates in the Boston area.

34. In my judgment and based on my experience, the number of hours expended and the services performed by me were reasonable, and benefited the plaintiffs in this litigation.

I declare under penalty of perjury that the foregoing facts are true and correct and that this declaration was executed this 18th day of January, 2019 in Bellevue, Washington.

DocuSigned by:

Ben Edelman

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Benjamin Edelman

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (“NEF”) and paper copies will be sent to those indicated on the NEF as non-registered participants on January 18, 2019

/s/ Benjamin Edelman

Benjamin Edelman