UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC., et al., on behalf of themselves and all others similarly situated, Plaintiffs, *vs.* PANALPINA WORLD TRANSPORT (HOLDING) LTD., et al., Defendants.	Case No.: 08-CV-00042 (JG) (PK)

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR (1) PRELIMINARY APPROVAL OF PROPOSED SETTLEMENT WITH THE DHL DEFENDANTS; AND (2) CONDITIONAL CERTIFICATION OF SETTLEMENT CLASS

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I. INTRODUCTION

Plaintiffs seek the Court's preliminary approval of a proposed settlement agreement with the DHL Defendants.[1] This proposed settlement provides a prompt payment of $53 million to the settlement fund -- an excellent result for the Settlement Class Members -- and would resolve Plaintiffs' remaining claims against DHL.[2]

Plaintiffs present this proposed settlement to the Court with full knowledge of the strengths and weaknesses of each side's position. Since 2008, the parties have litigated Plaintiffs' allegations that DHL and other freight forwarders fixed prices and otherwise inflated rates and surcharges in the freight forwarding or third-party logistics industry. Extensive motion practice, the production of over five million documents, and 50 depositions on three continents have led to 21 other settlements.

This proposed settlement with DHL certainly is within the range of possible final approval, and all of the requirements are met for certifying a settlement class. Therefore, Plaintiffs respectfully request that the Court preliminarily approve the settlement and conditionally certify the Settlement Class.

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[1] Plaintiffs are Precision Associates, Inc.; JCK Industries, Inc.; RBX Industries, Inc.; Mary Elle Fashions, Inc.; Zeta Pharmaceuticals, LLC.; Kraft Chemical Company; Printing Technology, Inc.; David Howell Product Design Inc.; Innovation 714 Inc.; Mika Overseas Corporation; and NORMA Pennsylvania Inc. (collectively, "Plaintiffs"). The DHL Defendants (also referred to herein as the Settling Defendants) are Deutsche Post AG; Danzas Corporation (d/b/a DHL Global Forwarding); DHL Express (USA) Inc.; DHL Global Forwarding Japan K.K.; DHL Japan Inc.; Exel Global Logistics, Inc.; Air Express International USA, Inc.; and their subsidiaries, affiliates and predecessors.

[2] Plaintiffs previously settled certain so-called "Japanese" or "Severed" claims with DHL, related to shipping routes from Japan. That settlement has been finally approved by this Court. Memorandum and Order, November 10, 2015 (ECF No. 1330). The remaining claims, or the so-called "Non-Severed Claims" which would be settled by the agreement now presented to the Court, are the 2001 Security Surcharge Agreement (1st Claim); 2002 New Export System Fee Agreement (3rd Claim); 2005 Currency Adjustment Factor Agreement (5th Claim); Peak Season Rate Increase Agreements (6th Claim); 2004 U.S. Customs Air "AMS" Charge Agreement (8th Claim); U.S. Customs Ocean "AMS" Agreement (9th Claim); and the Global Agreement (10th Claim).

II. PROCEDURAL HISTORY

A. THE PARTIES HAVE LITIGATED THIS CASE EXTENSIVELY.

In January 2008, Plaintiffs brought this class action alleging that several global freight forwarders conspired to fix prices of U.S. freight forwarding services in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. *See* Class Action Complaint (ECF No. 1). On June 2, 2009, the Court appointed the undersigned as Interim Co-Lead Counsel ("Co-Lead Counsel"). ECF No. 115. Shortly thereafter, Plaintiffs filed their First Amended Class Action Complaint ("FACAC") on July 21, 2009. ECF No. 117. The FACAC added new claims and new defendants, alleged dozens of dates, times, places, and participants in conspiratorial meetings, phone calls, or emails, and described unlawful agreements reached at those meetings.[3]

In response, the defendants filed extensive and voluminous motions to dismiss the FACAC.[4] Plaintiffs filed seventeen briefs opposing those motions. On September 15, 2010, Magistrate Judge Pohorelsky heard arguments on those motions, and on January 4, 2011, issued a Report and Recommendation (ECF No. 468) denying in part and granting in part defendants' motions and recommending that Plaintiffs have leave to re-plead the dismissed claims. This Court adopted Magistrate Judge Pohorelsky's Report and Recommendation in its entirety. *See* ECF No. 628.

On November 15, 2012, Plaintiffs moved to add more plaintiffs, and concurrently filed the Third Amended Class Action Complaint under seal. ECF Nos. 676 and 677. The Court granted Plaintiffs leave on February 27, 2013 to file a Corrected Third Amended Class Action

[3] Plaintiff's Second Amended Class Action Complaint (ECF No. 460) made ministerial changes to the FACAC needed to serve certain foreign defendants as required by their local foreign government authorities.

[4] *See* ECF Nos. 120, 220, 233-235, 239, 242, 247, 297, 384, 386-387, 390-392, 396-397, 406, and 445.

Complaint ("CTAC") to make certain corrections and add new parties. ECF No. 726. Plaintiffs filed the CTAC under seal on March 27, 2013. ECF No. 746.

Plaintiffs' CTAC alleged eleven separate Sherman Act § 1 violations by overlapping groups of defendants, added substantial details about dates, times, places, and participants in conspiratorial meetings, and identified phone calls and emails that detailed the unlawful agreements the defendants reached in those meetings and communications. The CTAC detailed unlawful anticompetitive agreements, including the 2001 Security Surcharge Agreement, the 2002 New Export System Fee Agreement, the 2005 Chinese Currency Adjustment Factor Surcharges Agreement, the Peak Season Rate Increase Agreement, the 2004 U.S. Customs Air "AMS" Charge Agreement, the U.S. Customs Ocean "AMS" Charge Agreement, and the Global Agreement.

On February 27, 2013, the remaining defendants moved to dismiss all claims in the CTAC. ECF No. 727-728. After another extensive round of briefing,[5] the Court heard oral argument on June 13, 2013. On September 20, 2013, Magistrate Judge Pohorelsky issued a Report and Recommendation granting in part and denying in part defendants' motions to dismiss. ECF No. 878. Magistrate Judge Pohorelsky recommended denying defendants' motions, except for the following: (1) dismissing the global conspiracy claim against Dachser, UPS, Bax Global, and Geodis; (2) dismissing the CTAC as to Toll Global Forwarding (USA), Inc.; (3) dismissing "Agility Logistics Corporation," replacing it in the Complaint with "Agility Holdings, Inc.," and permitting Plaintiffs to serve an amended summons; (4) limiting the Japanese Claims only to freight forwarding services on shipments originating in Japan; and (5) granting the Japanese Defendants' motion to sever the four Japanese Claims. *See* ECF No. 878.

[5] *See* ECF Nos. 779, 781-83, 786, 787, 789, 792-93, 799, 803-04, 806, 809-10, 816-29, 780, 784- 85, 788, 790-91, 794-95, 802, 805, 807, and 811-12.

Defendants objected to the Report and Recommendation. ECF Nos. 904-913. This Court adopted the Report and Recommendation in its entirety. ECF No. 992.

The case then proceeded to discovery. In discovery, Plaintiffs prepared and served 16 sets of discovery requests, resulting in 5.1 million documents from defendants. Plaintiffs used advanced analytical search techniques and keyword searches to identify and review 1,062,552 defendant documents, including translating and reviewing several documents in Japanese, German, and Italian. Plaintiffs interviewed 43 witnesses produced by DHL and other settling defendants. Plaintiffs conducted 50 depositions in four countries spread across three continents. The details of this litigation were cataloged in detail in the Joint Declaration Of Co-Lead Counsel In Support Of Co-Lead Counsel's Petition For A Second Interim Award Of Attorney's Fees And Reimbursement Of Expenses, at 8–10 (ECF No. 1282), and will not be repeated here.

Recent motion practice narrowed the claim period against DHL to end as of October 11, 2007, the day after government agencies conducted "dawn raid" searches and seizures of various industry participants. *See* ECF 1269. Accordingly, Plaintiffs filed the current Fourth Amended Class Action Complaint. (ECF No. 1311) (redacted - public version).

The extensive motion practice and discovery in this case led to this proposed settlement. By the time Plaintiffs and DHL agreed in principle to settle this matter, fact discovery had closed, and the parties were about to embark on expert discovery and class certification. Thus, the record had been fully developed.

B. <u>THE COURT HAS APPROVED NUMEROUS SETTLEMENTS IN THIS CASE.</u>

The Court has finally approved 21 other settlements in this case, involving Plaintiffs, DHL (for the Japanese Claims), and 20 other defendants. The Court approved these prior settlements in two rounds.

The first set of settlements was with 10 groups of settling defendants: (1) Schenker Deutsche Bahn AG, Schenker AG, Schenker Inc., Bax Global Inc. and DB Schenker (collectively "Schenker"); (2) Vantec Corporation and Vantec World Transport (USA), Inc. (collectively "Vantec"); (3) EGL, Inc. and EGL Eagle Global Logistics, LP, Inc., (collectively "EGL"); (4) Expeditors International of Washington, Inc. ("Expeditors"); (5) Nishi-Nippon Railroad Co., Ltd. ("Nishi-Nippon"); (6) United Aircargo Consolidators, Inc. ("UAC"); (7) Kuehne + Nagel International and Kuehne + Nagel, Inc. (collectively "Kuehne + Nagel"); (8) Morrison Express Logistics Pte. Ltd. (Singapore) and Morrison Express Corporation (U.S.A.) (collectively "Morrison"); (9) UTi Worldwide, Inc. ("UTi"); and (10) ABX Logistics Worldwide NV/SA ("ABX"). The Court finally approved this first set of settlements on August 27, 2013.[6]

The second set of settlements was with 11 settling defendants, or defendant groups: (1) SDV Logistique Internationale ("SDV"); (2) Panalpina World Transport (Holding) Ltd. and Panalpina, Inc. (collectively "Panalpina"); (3) Geodis S.A. and Geodis Wilson USA, Inc. (collectively "Geodis"); (4) DSV A/S, DSV Solutions Holding A/S, and DSV Air & Sea Ltd. (collectively "DSV"); (5) Jet Speed Logistics, Ltd., also known as Jet Speed Air Cargo Forwarders (HK), Ltd, Jet Speed Logistics (USA), LLC, and Jet-Speed Air Cargo Forwarders, Inc. (USA) (collectively "Jet Speed"); (6) Toll Global Forwarding (USA), Inc., and Baltrans Logistics, Inc. (collectively "Toll"); (7) Agility Holdings, Inc., Agility Logistics Corp, Geologistics Corp., and Geologistics International Management (Bermuda) Limited (collectively "Agility"); (8) United Parcel Service, Inc. and UPS Supply Chain Solutions, Inc. (collectively "UPS"); (9) Dachser GmbH & Co., KG, doing business as Dachser Intelligent Logistics, and Dachser Transport of America, Inc. (collectively "Dachser"); (10) Hankyu Hanshin Express

[6] *See* ECF No. 866 at 20 & 34, and ECF Nos. 879-888.

Holding Corporation, Hankyu Hanshin Express Co. Ltd., Hanshin Air Cargo USA, Inc., Japan Aircargo Forwarders Association, Kintetsu World Express, Inc., Kintetsu World Express (U.S.A.) Inc., "K" Line Logistics, Ltd., "K" Line Logistics (U.S.A.), Inc., MOL Logistics (Japan) Co., Ltd., MOL Logistics (U.S.A.) Inc., Nippon Express Co., Ltd., Nippon Express USA, Inc., Nissin Corporation, Nissin International Transport U.S.A., Inc., Yamato Global Logistics Japan Co., Ltd., Yamato Transport U.S.A. Inc., Yusen Air & Sea Service Co., Ltd., and Yusen Air & Sea Service (U.S.A.), Inc. (collectively "the Japanese Defendants"); and (11) Deutsche Post AG, Danzas Corporation, doing business as DHL Global Forwarding, DHL Express (USA) Inc., DHL Global Forwarding Japan K.K., DHL Japan Inc., Exel Global Logistics, Inc., Air Express International USA, Inc. (collectively "DHL") for the Japanese Severed Claims only settlement (the "DHL Japanese Agreement"). The Court finally approved the second set of settlements on November 10, 2015. ECF No. 1330.

In addition, Plaintiffs have an agreement in principle with the Hellmann Defendants to settle claims against those defendants, and have so advised the Court. ECF No. 1338. Plaintiffs and Hellmann presently are working to finalize that agreement, and the Court has stayed proceedings with Hellmann except for the settlement process. ECF Notice (Dec. 9, 2015).

C. PLAINTIFFS AND DHL NOW HAVE REACHED A PROPOSED SETTLEMENT.

After extensive arm's length negotiations, including two mediations with two prominent mediators and consultations with both sides' economists, Plaintiffs have agreed to settle all claims against DHL in return for DHL's payment of $53 million in cash for the benefit of the Settlement Class. Bruckner Decl. at 5.[7] In addition, DHL has agreed to provide its best efforts

[7] Declaration Of W. Joseph Bruckner In Support of Motion For (1) Preliminary Approval Of Settlement With The DHL Defendants; And (2) Conditional Certification Of Settlement Class (hereinafter "Bruckner Decl.").

to cooperate with Plaintiffs in pursuing their claims against other defendants.[8] DHL has agreed to provide declarations or affidavits, authenticate exhibits, and provide witnesses for trial. DHL has provided transactional data to Plaintiffs, but will supplement that data with any transactional data that should have been produced, and will answer reasonable questions about the transactional data. DHL has also produced many documents to Plaintiffs pursuant to requests based on the Antitrust Criminal Penalty Enhancement Reform Act of 2004 ("ACPERA").[9]

In return, Plaintiffs agreed to release specified claims against DHL and its affiliated co-defendants. The release does not extend to other defendants. DHL may rescind the settlement agreement in accordance with the terms of a separate supplemental agreement in the event a certain threshold of Settlement Class Members exclude themselves from the Settlement Class.

III. ARGUMENT

A. THE PROPOSED DHL SETTLEMENT IS WITHIN THE RANGE OF POSSIBLE APPROVAL.

Proposed class-wide settlements are subject to the court's approval. Fed. R. Civ. P. 23(e); *see generally* 4 William B. Rubenstein, Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 13:1, at 274 (5th ed. 2014). "Compromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (noting "strong judicial policy in favor of settlements, particularly in the class action context"); *In re World Trade Center Lower Manhattan Disaster Site Litig.*, No. 21 MC 102, 2015 WL 3606032 at *2 (S.D.N.Y. June 9, 2015) (strong public policy favors settling "complex litigation"). Courts should review proposed settlements in light

[8] However, if this proposed agreement with DHL and Plaintiffs' tentative agreement with Hellmann both ultimately are finally approved, these settlements will resolve this litigation in its entirety, making further cooperation unnecessary.

[9] Pub. L. No. 108-237, § 213, et seq., 118 Stat. 661, 666 (2004), as amended by Pub. L. 111-190, 124 Stat. 1275, codified as amended at 15 U.S.C. § 1 note.

of this "general policy favoring settlement." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-md-1775, 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009).

Preliminary approval is akin to "a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n E. R.R.s.*, 627 F.2d 631, 634 (2d Cir. 1980). The court considers both the negotiating process leading up to the settlement and the settlement's terms when deciding whether a settlement is "at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ II*") (internal quotations omitted).

Preliminary approval should be granted when a proposed settlement: (1) is the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not grant preferential treatment to a class representative or segments of the class, and (2) falls within the range of what possibly may be later found to be fair and reasonable. *NASDAQ II*, 176 F.R.D. at 102; *see also* Manual For Complex Litigation (Fourth) § 21.632 at 321 (2004) (preliminary determination settlement agreement is fair reasonable, and adequate). "So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement." *In re NASDAQ Mkt.- Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) ("*NASDAQ III*"). The opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997); *NASDAQ III*, 187 F.R.D. at 474.

The proposed settlement with DHL clearly meets preliminary approval standards. The settlement resulted from arm's length negotiations amidst lengthy litigation. It does not have any obvious deficiencies or preferential treatment for particular class segments. As described in

detail in the Bruckner Declaration, Plaintiffs and DHL have discussed settlement since 2010. They first mediated with mediator Anthony Piazza on December 16, 2013, but ended far from agreement. After the mediation, the parties continued discussing settlement, but without progress. They scheduled a mediation with Mr. Piazza a year later, for December 4, 2014, but cancelled it due to lack of progress. Plaintiffs and DHL mediated again on July 2, 2015 with mediator Kenneth Feinberg, but again did not agree. Finally, the parties signed a memorandum of understanding on October 14, 2015.

The parties have litigated this case since 2008, and by the time this agreement was reached, fact discovery had closed and the parties were embarking on expert discovery and class certification. Consequently, Co-Lead Counsel approached these settlement discussions with the benefit of extensive document discovery and review, witness interviews and depositions, and review of DHL's revenue and other data, which thoroughly informed Co-Lead Counsel as to the case's facts, strengths, and weaknesses. *See* Bruckner Decl. at 4–5. Based on that knowledge, Co-Lead Counsel, experienced antitrust class action lawyers, recommend approval of this settlement agreement as a significant recovery for the Class. In light of the case's factual and legal complexities, this settlement is well within the range that ultimately may be approved as fair, reasonable, and adequate.

Second Circuit courts analyze class settlement final approval based on the *Grinnell* settlement factors,[10] including: (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;

[10] *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000).

(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 compared to a possible recovery in light of all the attendant risks of litigation.[11] Based on the extensive discovery in this case, Co-Lead Counsel believe this proposed settlement will fare well at final approval. However, for preliminary approval, the Court may find this settlement within the range of what may later be found reasonable without a full-scale *Grinnell* analysis:

> [T]he Court will be in a position to fully evaluate the *Grinnell* factors at the fairness hearing, where it can consider the submissions by proponents and potential opponents of the settlements and the reaction of the Class Members. At this stage of the proceeding, the Court need only find that the proposed settlement fits 'within the range of possible approval,' *Armstrong*, 616 F.2d at 314, a test that the settlement here easily satisfies.[12]

Briefly reviewing the *Grinnell* factors supports preliminarily approving this settlement. Antitrust class actions are "notoriously complex, protracted, and bitterly fought," *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989), and continuing this litigation against DHL would entail a lengthy and expensive legal battle. Absent a settlement, DHL's

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[11] *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 117 (2d Cir. 2005) ("In this Circuit, courts examine the fairness, adequacy, and reasonableness of a class settlement according to the '*Grinnell* factors.') (discussing *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974), *abrogated on other grounds by Goldberger v. Integrated Res., Inc.*, 209 F.3d 43 (2d Cir. 2000)); *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 138 (S.D.N.Y. 2010) ("It is well-established that courts in this Circuit examine the fairness, adequacy and reasonableness of a class action settlement according to the '*Grinnell* factors'[.]") (listing factors).

[12] *In re Prudential Sec. Inc. Ltd. P'ship Litig.*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) (citing *Armstrong v. Bd. of Sch. Dir. of Milwaukee*, 616 F.2d 305 (7th Cir. 1980), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998)); *see also Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) ("The first step in district court review of a class action settlement is a preliminary, pre-notification hearing to determine whether the proposed settlement is 'within the range of possible approval.'") (citation omitted); *In re AT&T Mobility Wireless Data Serv. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010) (quoting *Armstrong*, 616 F.2d 305, with approval); *In re State Street Bank & Trust Co. ERISA Litig.*, No. 07-Civ-8488, 2009 WL 3458705, at *1 (S.D.N.Y. Oct. 28, 2009) (stating preliminary approval question is whether settlement is in range of possible approval).

vigorous defense would continue. A jury trial would require complex proof, much from expert testimony, especially as to damages, making trial outcome uncertain. *See NASDAQ III*, 187 F.R.D. at 475 ("Antitrust litigation in general, and class action litigation in particular, is unpredictable."). Lengthy appeals would follow. *See In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993) (noting a trial victory "is not a guarantee of ultimate success" and citing a case where a multi-million dollar judgment was reversed). Given this uncertainty, "[a] very large bird in the hand in this litigation is surely worth more than whatever birds are lurking in the bushes." *In re Chambers Dev. Sec. Litig.*, 912 F. Supp. 822, 838 (W.D. Pa. 1995); *see also In re IPO Sec. Litig.*, 260 F.R.D. 81, 118–19 (S.D.N.Y. 2009); *Air Cargo*, 2009 WL 3077396, at *8.

Based on full discovery, and compared to the risks of certifying a class or classes, proving liability and damages, and weighing the expense and delay of continued litigation and appeals, this $53 million cash settlement provides a substantial benefit to the Settlement Class. DHL's prompt and substantial payment, and potential cooperation, bring this settlement well within the possible range of approval as a "fair, reasonable and adequate" resolution of the Class's case against DHL.

B. THE COURT SHOULD PRELIMINARILY CERTIFY THE SETTLEMENT CLASS.

The Court should certify the proposed Settlement Class to implement the settlement on a collective basis. Class actions may be certified for settlement purposes only pursuant to Fed. R. Civ. P. 23. *See, e.g., Amchem Prods, Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *see Plummer v. Chem. Bank*, 668 F.2d 654, 658 (2d Cir. 1982). A settlement class must satisfy each Rule 23(a) requirement, and at least one of Rule 23(b)'s provisions. *See Amchem*, 521 U.S. at 613-14; *see also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 299 (3d Cir. 2005) ("[C]ertification of classes for

settlement purposes only [is] consistent with Fed. R. Civ. P. 23, provided that the district court engages in a Rule 23(a) and (b) inquiry[.]").

Plaintiffs seek certification of a Settlement Class defined as:

> All persons (excluding governmental entities, Defendants, their respective parents, subsidiaries and affiliates) who directly purchased U.S. Freight Forwarding Services
>
> (a) for shipments within, to, or from the United States, or
>
> (b) purchased or sold in the United States regardless of the location of shipment;
>
> from any of the Defendants or any subsidiary or affiliate thereof, at any time during the period from January 1, 2001 to January 4, 2011.

See Bruckner Decl., Exh. A at § II(E)(2) (settlement agreement, class definition). This Court has already certified essentially identical Settlement Classes in earlier settlements approved in this case. *See* ECF Nos. 530, 587, 604, 643, 649, 667, 692, 715, 894, 1102, 1103, 1124, 1147 (preliminary approval orders); and ECF Nos. 866, 879 – 888 and 1330 (final approval orders). Just as in those instances, this proposed class meets Rule 23's requirements.

1. The Settlement Satisfies Rule 23(a)'s Requirements.

a) The Class Is Numerous.

Fed. R. Civ. P. 23(a)(1) requires that the class be so numerous as to make joinder of its members "impracticable." No magic number satisfies the numerosity requirement, and plaintiffs need not allege the class members' precise number or identity at this preliminary approval stage. *Gross v. Wash. Mut. Bank*, No. 02 Civ. 4135 (RML), 2006 WL 318814, at *2 (E.D.N.Y. Feb. 9, 2006). Courts generally consider the estimated number and geographic dispersion of parties in the proposed class, the expediency of joinder, and the practicality and judicial economy of avoiding multiple lawsuits when determining whether the numerosity requirement is met. *See Mascol v. E & L Transp., Inc.*, No. 03 Civ. 3343, 2005 WL 1541045, at *3–4 (E.D.N.Y. June

29, 2005); *Weil v. Long Island Sav. Bank*, 200 F.R.D. 164, 168–69 (E.D.N.Y. 2001). Here, the proposed Settlement Class consists of persons and entities that purchased freight forwarding services from the defendants during the period from January 1, 2001 to January 4, 2011. Many thousands of persons and entities fall within the Settlement Class definition. Thus, joinder would be impracticable and Rule 23 (a)(1) is easily satisfied.

b) There Are Many Common Questions Of Law And Fact.

Fed. R. Civ. P. 23(a)(2) requires questions of law or fact common to the class. Commonality "does not require an identity of claims or facts among class members; instead, [t]he commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 451 (S.D.N.Y. 2004) (quotation omitted); *see also Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997) ("The commonality requirement is met if plaintiffs' grievances share a common question of law or of fact."); *Weil*, 200 F.R.D. at 169 ("A single common issue of law will satisfy the commonality requirement."). Because it requires only one common question, Rule 23(a)(2) is generally considered a "'low hurdle' easily surmounted." *In re Prudential Sec. Inc. Ltd. P'ships. Litig.*, 163 F.R.D. at 206 n.8 (citation omitted). "It is well established that class actions are particularly appropriate for antitrust litigation concerning price-fixing schemes because price-fixing presumably subjects purchasers in the market to common harm." *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 240 (E.D.N.Y. 1998) ("*Playmobil*").

A central allegation in Plaintiffs' complaint is that defendants engaged in an illegal cartel to fix charges and surcharges for freight forwarding services. Proof of this allegation will be common to all class members. *See D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 456 (E.D.N.Y. 1996) (where question of law involves "standardized conduct of the defendant . . . a

common nucleus of operative fact is typically presented and the commonality requirement . . . is usually met") (citation omitted). In addition to that overarching question, this case is replete with other questions of law and fact common to the Settlement Class including:

- the role of each defendant in the cartel;
- whether defendants' conduct violated Section 1 of the Sherman Act;
- whether defendants affirmatively concealed their agreements;
- whether defendants' conspiratorial conduct caused the prices of U.S. freight forwarding services to be inflated;
- the appropriate measure of monetary relief, including the appropriate measure of damages; and
- whether Plaintiffs and class members are entitled to declaratory and/or injunctive relief.

Accordingly, the Settlement Class satisfies Rule 23(a)(2).

c) The Class Representatives' Claims Are Typical.

Fed. R. Civ. P. 23(a)(3) requires that the class representatives' claims be typical of class members' claims. The typicality requirement is satisfied where, as here, the claims of the representative Plaintiffs arise from the same course of conduct that gives rise to the claims of the other class members, and the claims are based on the same legal theories. *Playmobil*, 35 F. Supp. 2d at 241; *In re Alcoholic Beverages Litig.*, 95 F.R.D. 321, 324 (E.D.N.Y. 1982). "Indeed, when 'the same [alleged] unlawful conduct was directed at or affected both the named plaintiff and the class sought to be represented, the typicality requirement is usually met irrespective of minor variations in the fact patterns underlying individual claims.'" *Global Crossing*, 225 F.R.D. at 452 (citation omitted) (alternation in original); *see also In re Indus. Diamonds Antitrust Litig.*, 167 F.R.D. 374, 379 (S.D.N.Y. 1996) ("The typicality requirement of Rule 23(a)(3) is satisfied when

the claims of the representative plaintiffs and the absent class members are based on the same legal or remedial theory and there are no antagonistic interests between the two.").

Courts generally find typicality in cases alleging a price-fixing conspiracy. *See, e.g.*, *In re Mercedes-Benz Antitrust Litig.*, 213 F.R.D. 180, 185 (D.N.J. 2003) (finding that plaintiffs met the typicality requirement based on the fact that plaintiffs' main claim — that they were harmed by an illegal price-fixing conspiracy — was the same for all class members); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 335 (E.D. Mich. 2001) ("*Cardizem II*") ("Here, as in other antitrust price-fixing cases, Plaintiffs' claims and the claims of the absent class members arise from the same events, involve the same legal theory, and the same elements of proof. Therefore, the interests of the class representatives and the absent class members are sufficiently aligned."); *In re Potash Antitrust Litig.*, 159 F.R.D. 682, 691 (D. Minn. 1995) (representatives' claims are typical in that they must prove "'a conspiracy, its effectuation, and damages therefrom — precisely what the absentees must prove to recover'") (citation omitted).

Here, Plaintiffs allege a conspiracy to fix, inflate, and maintain the price of U.S. freight forwarding services. Plaintiffs will have to prove the same elements that absent Settlement Class Members would have to prove, *i.e.*, the existence and effect of the conspiracies. Because the representative Plaintiffs' claims arise out of the same alleged illegal anticompetitive conduct and are based on the same alleged theories and will require the same types of evidence to prove those theories, the typicality requirement of Rule 23(a)(3) is satisfied.

d) The Class Representatives Are Adequate.

For a case to proceed as a class action, Fed. R. Civ. P. 23(a)(4) requires the court to find that "the representative parties will fairly and adequately protect the interests of the class." Adequacy of representation is measured by two standards. "First, class counsel must be

'qualified, experienced and generally able' to conduct the litigation. Second, the class members must not have interests that are 'antagonistic' to one another." *In re Drexel Burnham Lambert Grp., Inc*., 960 F.2d 285, 291 (2d Cir. 1992).

Both requirements are satisfied here. Co-Lead Counsel are qualified, experienced, and thoroughly familiar with antitrust class action litigation. *See* June 2, 2009 Order appointing Interim Counsel (ECF No. 115). Co-Lead Counsel have successfully prosecuted many significant antitrust actions, including this one, and will continue to prosecute this case vigorously.

Moreover, the interests of the Settlement Class Members are adequately protected by representative Plaintiffs and were not in conflict while reaching this settlement agreement. All class members share an overriding interest in obtaining the largest possible monetary recovery from this case. *See Global Crossing*, 225 F.R.D. at 453 (certifying settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."); *In re Corrugated Container Antitrust Litig*., 643 F.2d 195, 208 (5th Cir. 1981) (certifying settlement class and holding that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes."). Under the settlement agreements, named Plaintiffs are not afforded any special compensation and all class members similarly share a common interest in obtaining a monetary recover from defendants and cooperation from DHL in prosecuting any remaining claims.

Co-Lead Counsel have diligently represented the interests of the Class in this litigation and will continue to do so. Accordingly, this case satisfies Rule 23(a)(4)'s requirements.

2. The Proposed Class Satisfies Rule 23(b)(3).

Once Rule 23(a)'s four prerequisites are met, a proponent must show that a proposed settlement class satisfies Rule 23(b)(3). *See, e.g.*, *Larsen v. JBC Legal Grp., P.C.*, 235 F.R.D. 191, 196–97 (E.D.N.Y. 2006). Rule 23(b)(3) requires that common questions of law or fact predominate over any questions affecting only individual members, and that a class action be superior to other available methods to fairly and efficiently adjudicate the matter. *Barone v. Safway Steel Prods., Inc.*, No. 03 Civ. 4258, 2005 WL 2009882, at *2 (E.D.N.Y. Aug. 23, 2005).

To satisfy the predominance requirement a plaintiff must show "that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) (quoting *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107–08 (2d Cir. 2007) (ellipsis in original, internal quotation marks omitted)). "[A] claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individualized position." *In re Potash Antitrust Litig.*, 159 F.R.D. at 693. Class-wide issues predominate if class members can resolve more substantial genuine factual or legal issues through generalized proof than the issues subject only to individualized proof. *Moore v. Painewebber, Inc.*, 306 F.3d 1247, 1252 (2d Cir. 2002). Predominance is met "unless it is clear that individual issues will overwhelm the common questions and render the class action valueless." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996) ("*NASDAQ I*").

In antitrust conspiracy cases such as this, courts consistently find that common issues as to the existence and scope of the conspiracy predominate over individual issues. *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 408 (S.D. Ohio 2007); *see also In re Catfish Antitrust*

Litig., 826 F. Supp. 1019, 1039 (N.D. Miss. 1993) ("As a rule of thumb, a price fixing antitrust conspiracy model is generally regarded as well suited for class treatment."). This follows from the central nature of a conspiracy in such cases: "Clearly, the existence of a conspiracy is the common issue in this case. That issue predominates over issues affecting only individual sellers." *Hughes v. Baird & Warner, Inc.*, No. 76 C 3929, 1980 WL 1894, at *3 (N.D. Ill. Aug. 20, 1980); *see also Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."); *Playmobil*, 35 F. Supp. 2d at 247 (finding predominance where case involved allegations of "pricing structure to regulate prices . . . to maintain prices at artificially high levels and to hinder price competition"); *In re Buspirone Patent Litig.*, 210 F.R.D. 43, 58 (S.D.N.Y. 2002) (citing *Amchem*, 521 U.S. at 625) (finding predominance requirement satisfied where "[p]roof of the allegedly monopolistic and anticompetitive conduct at the core of the alleged liability is common to the claims of all the plaintiffs").

Plaintiffs also must show that a class action is superior to individual actions, which is evaluated by four considerations:

> (A) the class members' interests in individually controlling the prosecution or defense of separate actions;
>
> (B) the extent and nature of any litigation concerning the controversy already begun by or against class members;
>
> (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and
>
> (D) the likely difficulties in managing a class action.

Fed. R. Civ. P. 23(b)(3).

Here, no class member has expressed an interest in individually controlling the prosecution of separate claims.[13] Even if they had, such an interest likely would be outweighed by the efficiency of the class mechanism. Many thousands of entities purchased U.S. freight forwarding services during the Class Period; settling these claims as a class action will conserve both judicial and private resources and will hasten class members' recovery. *See Playmobil*, 35 F. Supp. 2d at 249 (certifying a class because "proceeding forward as a class action for liability is superior and would avoid duplication, unnecessary costs and a wasting of judicial resources."); *Hughes*, 1980 WL 1894, at *3 (class action superior "due to the relatively small recovery each seller would receive compared to the cost of individually litigating a claim."). Finally, while Plaintiffs see no management difficulties in this case, this final consideration does not affect approving a settlement class, since if it is approved there will be no trial.[14] Accordingly, for this settlement, the proposed class action is superior to other available methods (if any) for the fair and efficient adjudication of the controversy relating to Defendants.

The proposed Settlement Class qualifies for certification. The numerous class members face common legal and factual questions, and their proposed class representatives are adequate and hold claims typical of the class. The common issues predominate, and a class settlement is the superior method to adjudicate their claims. Accordingly, Plaintiffs respectfully request the Settlement Class' conditional certification.

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[13] To the best of Class Counsel's knowledge, no individual actions have been filed regarding an agreement during the Class Period to fix prices for U.S. freight forwarding services, and thus no class member has expressed an interest in individually controlling the prosecution of separate claims. Bruckner Decl. at 6.

[14] *See Amchem*, 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

C. PLAINTIFFS WILL PROPOSE A CLASS NOTICE PLAN SUBSTANTIALLY SIMILAR TO THE CLASS NOTICE PLAN APPROVED AND IMPLEMENTED FOR PREVIOUS SETTLEMENTS.

Rule 23(e) requires that prior to final approval, notice of a proposed settlement be given in a reasonable manner to all class members who would be bound by such a settlement. For a class proposed under Rule 23(b)(3), whether litigated or by virtue of a settlement, Rule 23(c)(2)(B) requires sufficient notice:

> [T]he court must direct to class members 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).

Since Plaintiffs and the Hellmann Defendants are still finalizing their settlement agreement for presentation to the Court, Plaintiffs respectfully propose that they defer presenting a class notice program for the DHL settlement until a Hellmann agreement is presented for preliminary approval, which Plaintiffs expect to be in the near future. At that time, Plaintiffs anticipate proposing a class notice program for both the DHL and Hellmann proposed

settlements, which will be substantially similar to the class notice program previously approved by the Court and implemented for the second set of settlements finally approved in this case.

IV. CONCLUSION

Plaintiffs' proposed settlement with DHL will deliver substantial benefits to the Settlement Class. The settlement is well within the range of reasonableness for resolution of the claims against DHL, and the proposed Settlement Class meets Fed. R. Civ. P. 23's criteria for certification. For these reasons, the Court should preliminarily approve the settlement with DHL and conditionally certify the proposed Settlement Class.

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Respectfully submitted,

s/W. Joseph Bruckner

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