UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC.; ANYTHING GOES LLC d/b/a MAIL BOXES ETC., and JCK INDUSTRIES, INC., 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) (VVP)

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO FINALLY APPROVE THE SECOND ROUND OF SETTLEMENTS AND THE PLAN OF ALLOCATION

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I. INTRODUCTION

Plaintiffs move for final approval of eleven Proposed Settlements, totaling $197,623,497.87[1] with the Settling Defendants[2] in this Action. This Court should finally

[1] This Settlement Fund will increase as a result of assignments the Class received from Settling Defendants' receipt of settlement money from the litigation, *In re Air Cargo Shipping Services Antitrust Litigation*, No. 06-MD-1775 (JG) (VVP) (E.D.N.Y.) ("*Air Cargo*"). The cumulative Settlement Fund of $197,623,497.87 includes amounts received in cash payments from the Settling Defendants, guaranteed future cash payments, and *Air Cargo* money actually received and deposited to date. The Settlement Fund of $197,623,497.87 does not reflect *Air Cargo* money assigned but not yet received and deposited into the Class's escrow accounts, with the exception of the UPS settlement which Plaintiffs previously represented is projected to reach the cap of $25,000,000. *See* ECF No. 1120. These future *Air Cargo* payments will be significant. Since the last *Air Cargo* distribution, the *Air Cargo* class has reached additional settlements totaling approximately $552.85 million. The case continues against four defendant families.

[2] "Settling Defendants" are: Agility Holdings, Inc.; Agility Logistics Corp.; Geologistics Corp.; and Geologistics International Management (Bermuda) Limited (collectively, "Agility"); Dachser GmbH & Co., KG, doing business as Dachser Intelligent Logistics and Dachser Transport of America, Inc. (collectively, "Dachser"); Deutsche Post AG; Danzas Corporation, doing business as DHL Global Forwarding; DHL Express (USA) Inc.; DHL Forwarding Japan K.K.; DHL Japan Inc.; Exel Global Logistics, Inc.; Air Express International USA, Inc. (collectively, "DHL") for the Japanese, severed-claims only; DSV A/S; DSV Solutions Holding A/S; and DSV Air & Sea Ltd. formerly known as DFDS Transport (HK) Ltd. (together, "DSV"); Geodis S.A. and Geodis Wilson USA, Inc. (collectively, "Geodis"); Hankyu Hanshin Express Holding Corporation formerly known as Hankyu Express International Co., Ltd and its subsidiary, Hankyu Hanshin Express Co., Ltd, and its U.S. subsidiary, Hanshin Air Cargo USA, Inc. (collectively, "Hankyu Hanshin"); Japan Aircargo Forwarders Association ("JAFA"); Kintetsu World Express, Inc. and its U.S. subsidiary, Kintetsu World Express (U.S.A.), Inc. (collectively, "Kintetsu"); "K" Line Logistics, Ltd., and its U.S. subsidiary "K" Line Logistics (U.S.A.), Inc. (collectively, "KLL Ltd."); MOL Logistics (Japan) Co., Ltd., and its U.S. subsidiary, MOL Logistics (USA) Inc. (collectively, "MOL Logistics"); Nippon Express Co., Ltd. and its U.S. subsidiary, Nippon Express USA, Inc. (collectively, "Nippon Express"); Nissin Corporation and its U.S. subsidiary, Nissin International Transport U.S.A., Inc. (collectively, "Nissin"); Yamato Global Logistics Japan Co., Ltd., and its U.S. affiliate, Yamato Transport U.S.A. Inc. (collectively, "Yamato"); Yusen Air & Sea Service Co., Ltd. and its U.S. subsidiary, Yusen Air & Sea Service (U.S.A.) Inc. (collectively, "Yusen"); 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"); Panalpina World Transport (Holding) Ltd. and Panalpina, Inc. (collectively, "Panalpina"); SDV Logistique Internationale ("SDV"); Toll Global Forwarding (USA), Inc.; Baltrans Logistics, Inc.; and Toll Holdings, Ltd. (collectively, "Toll"); United Parcel Service, Inc. and UPS Supply Chain Solutions, Inc. (collectively, "UPS").

approve the Settlements because they are fair, reasonable and adequate under Fed. R. Civ. P. 23(e) and combined with their robust cooperation provisions, they represent an extraordinary recovery for the Class. As described below, the Class unanimously supports the Proposed Settlements. Not a single putative Class Member has objected and Class Counsel has received only six opt-out requests out of a putative Class of hundreds of thousands of customers. This is significant. This Class is composed of, in part, sophisticated, large businesses like Intel, Apple, Motorola, Nike and other multinational companies that rely on Freight Forwarding Services.[3] These companies, along with small businesses and individuals that utilize Freight Forwarding Services, have determined that the Settlements provide real value to the Class.

The reasonableness of the Proposed Settlements, moreover, is demonstrated by the substantial financial commitments made by the Settling Defendants. In each case where a Settling Defendant subsequently pled guilty to charges brought by the Department of Justice ("DOJ") after the filing of Plaintiffs' complaint, that Settling Defendant paid substantially more to the Class by way of settlement than it did in connection with a government sanction imposed by DOJ. In some cases, the financial consideration provided to the Class is many multiples of what those Defendants paid in U.S. fines.

Plaintiffs have vigorously litigated this case for close to eight-years. All along the way, they have faced substantial risk and uncertainty, both as a result of the complexity of the price-fixing conspiracies involved and because of the changing legal landscape with respect to class actions. Plaintiffs' operative complaint—the Fourth Amended Class Action Complaint ("4th CAC")—alleges eleven price-fixing conspiracies that span the globe and took place over an

[3] "Freight Forwarding Services" includes services relating to the organization of transportation of items via air and ship and can include related activities such as customs clearance, warehousing and ground services. The providers of this package of services are sometimes referred to as "third party logistics providers."

eleven-year period. As this Court has recognized, "[f]rom the outset, the potential for this complex litigation to consume considerable time and resources has been great. Complex legal and factual issues abound." *Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-cv-42 (JG)(VVP), 2013 WL 4515323, at *7 (E.D.N.Y. Aug. 27, 2013).

These settlements were only reached after substantial motion practice and extensive formal and informal discovery into the bases of the various claims. Class Counsel are experienced complex antitrust litigators who strongly support the Proposed Settlements. Class Counsel's judgment is based on: (a) the voluminous cooperation and informal discovery that had been received from various Defendants; (b) the extensive documentary evidence obtained during the litigation from Settling Defendants and Non-Settling Defendants alike; (c) assertions by each of the Defendants of their defenses; (d) Class Counsel's extensive briefing and legal research on issues germane to the case during prolonged pleadings challenges and motion practice; (e) Class Counsel's review of Defendants' transactional data, detailing the amount of commerce at stake and the various surcharges that were alleged to be fixed; (f) Class Counsel's engagement of leading econometric consulting firms, which provided economic, econometric, damages and strategic advice about both the litigation and proposed settlement scenarios; (g) Class Counsel's vigorous negotiation with the Settling Defendants to get the best deal possible for the Class; (h) extensive arms' length negotiations often with the assistance of a nationally-renowned mediator; and (i) such other information that became available during the course of this extensive litigation.

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II. STATEMENT OF FACTS

A. Litigation History[4]

Class Counsel developed this case long before the filing of any government complaints. Plaintiffs' first complaint was filed on January 3, 2008, following many months of preparation, investigation, and research by Class Counsel into the freight forwarding industry. ECF No. 1. No criminal or other enforcement proceedings had begun when Class Counsel commenced the investigation and filed the first complaint. The Japan Fair Trade Commission did not begin levying fines until 2009, and the first criminal charges by the DOJ were not announced until September 2010. Joint Declaration ¶ 19.[5]

Plaintiffs brought this class action alleging that Defendants and others 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 to serve as Interim Co-Lead Counsel ("Class 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 of conspiratorial meetings, phone calls, or e-mails, and described the unlawful agreements reached at those meetings.[6]

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[4] Plaintiffs will not repeat here the entire history of the litigation. A comprehensive litigation history may be found in Plaintiffs' Joint Declaration of Co-Lead Counsel in Support of Co-Lead Counsel's Petition for a Second Interim Award of Attorneys' Fees and Reimbursement of Expenses ("Joint Declaration"). *See* ECF No. 1282.

[5] References to the "Joint Declaration" or "Joint Decl." are to the Joint Declaration of Co-Lead Counsel in Support of Co-Lead Counsel's Petition for a Second Interim Award of Attorneys' Fees and Reimbursement of Expenses, filed at ECF No. 1282.

[6] On October 7, 2010, Plaintiffs filed the Second Amended Class Action Complaint (ECF No. 460), which made only ministerial changes to the FACAC necessary to allow Plaintiffs to serve certain foreign Defendants, in conformity with requirements of certain foreign government authorities.

In response, Defendants filed extensive, voluminous and multiple motions to dismiss the FACAC.[7] Plaintiffs filed seventeen briefs in opposition to those motions. On September 15, 2010, Magistrate Judge Pohorelsky heard arguments on those motions, and on January 4, 2011, issued a Report and Recommendation ("R&R") (ECF No. 468) granting in part and denying in part Defendants' motions. In his R&R, Magistrate Judge Pohorelsky recommended that this Court permit Plaintiffs to re-plead any dismissed claims. On August 13, 2012, this Court adopted Magistrate Judge Pohorelsky's R&R in its entirety. *See* ECF No. 628.

On November 15, 2012, Plaintiffs filed a Motion to Add Proposed Plaintiffs to the Third Amended Complaint (ECF No. 676), and concurrently filed the Third Amended Class Action Complaint under seal. ECF No. 677. On February 27, 2013, the Court granted Plaintiffs leave to file a Corrected Third Amended Class Action Complaint ("CTAC") in order to make certain corrections and to add new parties. ECF No. 726. Plaintiffs filed the CTAC under seal on March 27, 2013. ECF No. 746.

The CTAC alleged eleven separate violations of Section 1 of the Sherman Act against overlapping groups of Defendants, added significant details regarding the dates, times, places, and participants of conspiratorial meetings, and identified phone calls or e-mails that described the unlawful agreements reached at those meetings. As part of the CTAC, Plaintiffs alleged that Defendants engaged in unlawful agreements and wrongful conduct related to the 2001 Security Surcharge Agreement, 2002 Fuel Surcharge Agreement, 2002 New Export System Fee Agreement, 2004 U.S. Customs Air "AMS" Agreement (Japanese), 2005 Chinese Currency Adjustment Factor Surcharges Agreement, the Peak Season Rate Increase Agreement, 2006 Security & Explosives Examination Surcharges Agreement, the 2004 U.S. Customs Air "AMS"

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

Charge Agreement (non-severed), U.S. Customs Ocean "AMS" Charge Agreement, the Global Agreement (including the non-severed claims) and the Japanese Regional Conspiracy claims.

On February 27, 2013, the remaining Defendants moved to dismiss all claims in the CTAC. ECF Nos. 727 – 728. After another round of extensive briefing,[8] oral argument was held on June 13, 2013. On September 20, 2013, Magistrate Judge Pohorelsky issued a Report and Recommendation ("CTAC R&R") granting in part and denying in part Defendants' motions to dismiss. ECF No. 878. In the CTAC R&R, Magistrate Judge Pohorelsky recommended that the Defendants' motions be denied with the exception of 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" from the complaint and replacing that entity with "Agility Holdings, Inc.," and permitting Plaintiffs to serve an amended summons; (4) dismissing the Japanese conspiracy claims only to the extent they sought relief from freight forwarding services on shipments originating outside of Japan; and (5) granting the Japanese Defendants' motion to sever four of Plaintiffs' eleven claims. *See* ECF No. 878. Defendants filed objections to Magistrate Judge Pohorelsky's CTAC R&R. ECF Nos. 904 – 913, 915. On January 28, 2014, this Court adopted Magistrate Judge Pohorelsky's CTAC R&R in its entirety. ECF No. 992. The case proceeded to discovery (which is now largely complete) and to further motion practice.

Plaintiffs (and Defendants) have vigorously litigated this case. As detailed in Plaintiffs' Motion for Attorneys' Fees, Plaintiffs:

- **Interviewed 43 witnesses** and prepared for and **participated in approximately 18 attorney proffers**;

[8] *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, 811-12.

- Utilized advanced analytical search tools, as well as keyword searches, to identify the most relevant documents of the more than 5.1 million documents produced by Defendants and ultimately reviewed 1,062,552 million Defendant documents;
- Filed 22 non-ministerial motions (including 12 motions to compel) and 2 objections to reports and recommendations;
- Made 14 appearances before Magistrate Judge Pohorelsky and 4 appearances before Judge Gleeson;
- Participated in Rule 26(f) conferences, negotiating multiple disputed provisions;
- In addition to the motions described above, responded to a total of 3 pre-motion briefs and submitted briefing in response to 4 motions;
- Obtained Settling and Non-Settling Defendants' transactional data, worked extensively with economists to understand Defendants' data, and engaged in innumerable meetings and conferences with Defendants in order to fully comprehend the transactional data;
- Prepared witness and Defendant factual summaries to assist in depositions, discovery responses, work by experts engaged by Plaintiffs, and trial;
- Prepared for and conducted **50 depositions in 4 countries** spread across three continents;
- Prepared and served 16 sets of discovery requests and engaged in lengthy meet and confers with Defendants about the requests;
- Prepared for and engaged in arms' length settlement negotiations and several mediations that led to the eleven Second Round Settlements;
- Conducted legal research and factual research regarding pertinent issues; and
- Worked with industry and economic consultants and experts to develop pleadings, evaluate transactional data, guide discovery, formulate settlement strategies, assess damages, and prepare for Plaintiffs' class certification motion.

See Joint Declaration ¶ 15.

B. Defendants' Guilty Pleas

To date, sixteen Defendants have pled guilty to charges under 15 U.S.C. § 1, and have paid criminal fines for some of the conduct alleged in this civil case. Those Defendants include: (1) Schenker AG; (2) BAX Global, Inc. (a Schenker affiliate); (3) EGL, Inc.; (4) Geologistics International Management (Bermuda) Limited; (5) Kuehne + Nagel International AG; (6) Panalpina Worldwide Transport (Holding) Ltd.; (7) Kintetsu World Express, Inc.; (8) Hankyu Hanshin Express Co., Ltd.; (9) Nippon Express Co., Ltd.; (10) Nissin Corporation; (11) Nishi-Nippon Railroad Co. Ltd.; (12) Vantec Corporation; (13) Yusen Logistics Co., Ltd. (successor to

Defendant Yusen Air & Sea, Co. Ltd); (14) "K" Line Logistics, Ltd.; (15) MOL Logistics (Japan) Co. Ltd., and (16) Yamato Global Logistics Japan Co., Ltd.

C. First Round of Settlements

On August 27, 2013, this Court finally approved settlements and certified settlement classes with ten Defendant groups. ECF No. 866, 879-888. Those Defendant groups included: (1) 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 (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 AG and Kuehne + Nagel, Inc. (collectively, "K+N"); (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 settlement fund created by these ten, first-round settlements constituted $112,356,911.58. That amount has subsequently increased by $21,092,361.98 due to the Class's receipt of additional proceeds from the *Air Cargo* litigation. Joint Declaration ¶¶ 5, 6.

D. Summary of Second Round of Settlements

After sending notice of the first round of settlements and engaging in substantial litigation and discovery, the Class subsequently reached settlements with nineteen additional

Defendant families. This Court has preliminarily approved each of these Second Round Settlements.[9]

The Settlements create a Settlement Fund of $197,623,497.87 for the benefit of the Class. That amount will likely grow based on the continued receipt of proceeds from the *Air Cargo* litigation that were negotiated as part of the settlement agreements with several of the settling Defendant families.[10]

1. The SDV Settlement

After extensive arm's length negotiations, SDV agreed to wire transfer $350,000 to Plaintiffs' Escrow Agent for deposit into the Settlement Fund. *See* ECF No. 871. SDV also paid 75% of all proceeds it already received or may receive in the future resulting from *Air Cargo*, which included $905,993.00. SDV also agreed to provide substantial cooperation. Thus far, Plaintiffs have received $1,955,573.19 from the SDV settlement, and the amount is likely to grow as the Class will receive 75% of future payments from SDV's continued receipt of *Air Cargo* proceeds. *See* Ex. 3, Joint Declaration ¶ 279.

2. The Panalpina Settlement

After extensive arm's length negotiations conducted with the assistance of a neutral third-party mediator, Panalpina agreed to pay $35,000,000. The settlement also includes 100% of all proceeds Panalpina or any of its predecessors, successors, affiliates, parents, subsidiaries or assigns receive in the future from *Air Cargo*. Panalpina also agreed to extensive cooperation provisions. ECF Nos. 1082, 1083. Thus far, Plaintiffs have received $39,158,324.45 from the

[9] *See* ECF No. 894 (SDV); ECF No. 1102 (Panalpina, Geodis, DSV, Jet-Speed); ECF No. 1103 (Toll); ECF No. 1124 (Agility, UPS); ECF No. 1147 (Dachser), ECF No. 1189 (DHL and Japanese Defendants).

[10] For a full chart of the second round of settlements, including guaranteed money and future *Air Cargo* payments, *see* Exhibit 1.

Panalpina agreement, and the amount is likely to grow as the Class will obtain 100% of Panalpina's continued receipt of future *Air Cargo* proceeds. *See* Ex. 4, Joint Declaration ¶ 282.

3. The Geodis Settlement

After extensive arm's length negotiations conducted with the assistance of a neutral third-party mediator, Geodis agreed to settle Plaintiffs' claims for payments totaling $3,000,000. Geodis has also agreed to provide cooperation. *See* Ex. 5, *see also* ECF No. 1084 (Bruckner Decl. in Support of Motion for Preliminary Approval).

4. DSV Settlement

After extensive arm's length negotiations, DSV agreed to pay $1,500,000 to the Settlement Class. The settlement also includes 100% of all proceeds DSV receives in the future from *Air Cargo*. The agreement provides for cooperation. *See* Ex. 6, *see also* ECF No. 1085 (Hedlund Decl. in Support of Motion for Preliminary Approval).

5. The Jet-Speed Settlement

After extensive arm's length negotiations conducted with the assistance of a neutral third-party mediator, Jet-Speed agreed to pay $750,000 to the Settlement Class. The settlement also includes 100% of all proceeds Jet-Speed receives in the future from *Air Cargo*. Jet-Speed has also agreed to cooperate with Plaintiffs. *See* Ex. 7, *see also* ECF No. 1084 (Bruckner Decl. in Support of Preliminary Approval).

6. The Toll Settlement

After extensive arm's length negotiations, including multiple conferences among counsel, as well as with assistance from a neutral third-party mediator, Toll agreed to pay $900,000 to the Settlement Class. Toll will also pay 100% of its future proceeds from *Air Cargo*. Toll has similarly agreed to cooperation provisions. *See* Ex. 8, *see also* ECF No. 1098 (Hedlund Decl. in Support of Preliminary Approval).

7. The Agility Settlement

After extensive arm's length negotiations conducted with the assistance of a neutral third party mediator, Agility agreed to pay $16,000,000, plus 100% of all proceeds it received in the past or will receive in the future from *Air Cargo*, for a total certain amount of $17,859,499.23. *See* Joint Declaration ¶ 297, ECF No. 1282. Agility has also agreed to extensive cooperation provisions. *See* ECF No. 1121 (Bruckner Decl. in Support of Motion for Preliminary Approval). Thus far, Plaintiffs have received $17,859,499.23 from the Agility settlement, and the amount is likely to grow as the Class continues to receive settlement amounts from Agility's receipt of future *Air Cargo* proceeds. *See* Ex. 9, *see also* Joint Decl. ¶ 297.

8. The UPS Agreement

After extensive arm's length negotiations conducted with the assistance of a neutral third party mediator, UPS agreed to pay the Class 100% of *Air Cargo* proceeds received from June 18, 2014 forward in an amount not to exceed $25 million. In the event that such *Air Cargo* proceeds total less than $25 million, UPS has agreed to pay the difference, provided that it will not have to pay a difference totaling more than $7 million. Based on its prior recoveries in the *Air Cargo* action, Class Counsel estimates that UPS will receive an additional $18,725,877 from that litigation. Class Counsel, therefore, projects that the Class will receive the full $25 million from the settlement with UPS. *See* Ex. 10; *see also* Joint Declaration ¶ 300.

9. The Dachser Agreement

After extensive arm's length negotiations conducted with the assistance of a neutral third-party mediator, Dachser agreed to settle Plaintiffs' claims for a payment of $2,500,000. Additionally, Dachser has agreed to assign 100% of its rights to *Air Cargo* proceeds. Dachser also agreed to cooperation provisions. *See* Ex. 11; *see also* ECF No. 1142 (Zapala Decl. in Support of Motion for Preliminary Approval).

10. The Japanese Agreement

After extensive arm's length negotiations conducted with the assistance of a neutral third party mediator over the course of a two-day mediation and including consultations with both sides' economists, the Japanese Defendants agreed to settle all claims on a collective basis for a payment of $100 million. *See* ECF No. 1177 (Williams Decl. in Support of Motion for Preliminary Approval).

The Settlement Agreement also provides for a "Pro-Rata Opt-Out Reduction." The settlement payment of $100 million may be reduced on a pro-rata basis, based on the total dollar amount of qualifying surcharges paid for by an Opt-Out Class Member to the Japanese Defendants in the time period of October 16, 2002 through November 12, 2007. As an example, if the total dollar amount of qualifying surcharges paid for by an Opt-Out Class Member during the relevant period equals 5% of the total dollar of amount of qualifying surcharges paid for by all Opt-Out Class Members and Class Members during the relevant time period, the total settlement payment would be reduced by 5% overall, or $5 million. *Id.* In no event, however, shall the provision reduce the settlement by more than $10 million. *Id.* Class Members that opted out of the Schenker settlement do not count toward the pro-rata opt-out reduction. Based on the extremely low level of opt-outs (6 in all), Plaintiffs anticipate that the ratchet down provision will hardly be affected. As called for under the Settlement Agreement, Plaintiffs are awaiting the amount of the ratchet down calculation from the Japanese Defendants and will provide that figure at the final approval hearing but expect it will be *de minimis*.

Additionally, as detailed in Plaintiffs' Motion for Attorneys' Fees, if the settlements with the Japanese Defendants are given final approval by the Court, they will implicate the Most Favored Nations ("MFN") clauses in the settlement agreements with settling Defendants Vantec and Nishi-Nippon. ECF Nos. 527 (Vantec Settlement Agreement), 590 (Nishi-Nippon Settlement

Agreement). The settlement agreements with Vantec and Nishi-Nippon, including their MFN provisions, were finally approved by this Court on September 24, 2013. ECF Nos. 879, 883. The MFN provisions in those agreements require a partial repayment in the event that subsequently reached settlements with guilty-pleading Japanese Defendants produce a settlement ratio—defined as the settlement payment divided by affected revenue—that is less than the ratios provided for in the Vantec and Nishi-Nippon agreements. Final approval of the Japanese Settlement Agreement will result in a $14,729,135.52 total, collective repayment to Nishi-Nippon and Vantec. *See* Ex. 12, *see also* Joint Decl., ¶ 12

11. The DHL Japanese Agreement

After extensive arm's length negotiations conducted with the assistance of a neutral third-party mediator over two days, DHL agreed to settle the severed claims affecting the Japanese-only routes in return for a payment of $5,000,000. Joint Declaration ¶ 307. The Class has only released the severed claims as against DHL and continues to proceed against DHL on the non-severed claims. *See* Ex. 13, *see also* Joint Decl., ¶ 307.

III. LEGAL STANDARD

Federal Rule of Civil Procedure 23 requires court approval of all class action settlements. Fed. R. Civ. P. 23(e). Under Rule 23, a class action settlement should be approved if it is "fair, adequate and reasonable, and not a product of collusion." *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F. Supp. 2d 503, 509 (E.D.N.Y. 2003) (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)).

In making this examination, "[i]t is not the court's function 'to reopen and enter into negotiations with the litigants in the hope of improving the terms of the settlement' or to 'substitute its business judgment for that of the parties who worked out the settlement.'" *In re Cuisinart Food Processor Antitrust Litig.*, MDL No. 447, 1983 WL 153, at *3 (D. Conn. Oct. 24,

1983) (citations omitted). Rather, in determining whether the settlement meets these criteria, courts often consider both "the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc.*, 396 F.3d at 116 (2d Cir. 2005); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06– MDL–1775, 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009) (Gleeson, J). As discussed below in more detail, each settlement is fair, reasonable and adequate for the Class and should be granted final approval.

IV. ARGUMENT

A. The Proposed Settlements are Procedurally Fair and Reasonable

Courts begin their review of class actions settlements by considering the "procedural integrity" of the settlement. Whether the agreements are procedurally fair "must be examined in light of the experience of counsel, the vigor with which the case was prosecuted, and the coercion or collusion that may have marred the negotiations themselves." *Malchman v. Davis*, 706 F.2d 426, 433 (2d Cir. 1983). Courts also consider the negotiation process and the opinion of competent counsel in assessing the procedural fairness of a proposed settlement. *See Weinberger v. Kendrick*, 698 F.2d 61, 74 (2nd Cir. 1982) ("*Weinberger*"). If this threshold criteria is met, the "proposed class settlement enjoys a strong presumption that it is fair, reasonable and adequate." *Teachers' Retirement Sys. Of La. v. A.C.L.N., Ltd.*, No. 011-CV-11814, 2004 WL 1087261, at *1 (S.D.N.Y. May 14, 2004). Each preliminary approval brief and the supporting declarations for the eleven Settlements, which encompass nineteen Defendant-families, were supported by declarations attesting to their procedural fairness. *See* ECF Nos. 872, 1083, 1084, 1085, 1098, 1121, 1142, 1177. As attested, the Settlements were entered into in good faith, after extensive arms' length negotiations between experienced and informed counsel on both sides. *Id*.

The Panalpina, Geodis, Jet-Speed, Toll, Agility, UPS, Dachser, DHL and Japanese settlements were all entered into with the assistance of a nationally recognized mediator—with the Japanese and DHL settlement negotiations taking place over two days. In many cases, Defendants and Plaintiffs presented expert opinion and were advised by econometricians as to the extent of damages. The fact that nine of the eleven settlements were reached with the assistance of an experienced mediator lends credence to their procedural fairness.

Class Counsel, who have decades of experience in antitrust class action litigation, zealously represented the interests of the Class during all settlement negotiations. At the time of entering the settlements, Class Counsel had litigated the case over a number of years, received substantial cooperation from previously-settled Defendants, reviewed millions of pages of documentary evidence, taken extensive witness interviews and depositions, reviewed hundreds of pages of written discovery responses, engaged in a number of discovery disputes, obtained and analyzed the Settling Defendants' voluminous transactional data, consulted with and retained experienced econometricians, and carefully considered a variety of settlement scenarios and strategies prior to entering the eleven settlements which are the subject of this motion. Thus, Class Counsel were well informed as to the facts of the case and the strengths of the claims asserted when the terms of the Settlement Agreements were negotiated

Moreover, with respect to all settlements, Settling Defendants are represented by nationally renowned law firms whose attorneys skillfully negotiated on behalf of their clients. The intense, arms' length bargaining, the integrity of the negotiation process, the length of the case and amount of discovery, and Class Counsel's extensive knowledge of the facts and legal theories of this case, shows that the Settlements are procedurally fair.

B. The Proposed Settlements Are Substantively Fair and Reasonable

In the Second Circuit, whether a settlement is fair, reasonable and adequate is analyzed under the so-called *Grinnell* factors, which include: (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. *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d. Cir. 1976). Of significance to a determination of whether a settlement is fair, reasonable and adequate "'is the need to compare the terms of the compromise with the *likely* rewards of litigation.'" *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) ("*Maywalt*") (emphasis added). In making the determination, the settlement agreement must be considered as a whole. *Id.* at 1079.

The decision to approve a class action settlement lies within the court's broad discretion. *Joel A.*, 218 F.3d at 139. "The Court must eschew any rubber stamp approval in favor of an independent evaluation, yet, at the same time, it must stop short of the detailed and thorough investigation that it would undertake if it were actually trying the case." *Grinnell*, 495 F.2d at 462. In this regard, courts have consistently concluded that the function of a judge reviewing a settlement is not to rewrite the settlement agreement reached by the parties or to try the case by resolving issues intentionally left unresolved. *Carson v. Am. Brands, Inc.*, 450 U.S. 79, 88 (1981). Rather, its function is to determine whether the settlement is fair, reasonable and adequate. *Joel A.*, 218 F.2d at 138. The settlements here plainly meet that standard.

1. The Complexity, Expense and Likely Duration of the Litigation Support Final Approval

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); *accord Wal-Mart Stores, Inc.*, 396 F.3d at 122 ("antitrust cases, by their nature, are highly complex."); *In re Shopping Carts Antitrust Litig.*, MDL No. 451, 1983 WL 1950, at *6 (S.D.N.Y. Nov. 18, 1983) ("[A]ntitrust price fixing actions are generally complex, expensive and lengthy."). This Court recognized the difficulty of this litigation when it stated "[f]rom the outset, the potential for this complex litigation to consume considerable time and resources has been great. Complex legal and factual issues abound." *Precision Assocs., Inc.*, 2013 WL 4515323, at *7.

In the absence of settlement, Settling Defendants would continue to defend themselves vigorously. Any jury trial would turn on risky questions of proof, many of which would be subject to complicated expert testimony, particularly with regard to damages, making the outcome of such a trial uncertain. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D. N.Y. 1998) ("Antitrust litigation in general, and class action litigation in particular, is unpredictable."). Even assuming Plaintiffs were able to recover a favorable judgment at trial, Defendants almost certainly would appeal, which would further delay any benefit to the Class. *In re Visa Check/MasterMoney Antitrust Litig.*, 297 F.Supp.2d at 510 (approving settlement where action "would be taken many more years to finally resolve, taking into account the time necessary to exhaust all avenues of review"); *Strougo v. Bassini*, 258 F.Supp.2d 254, 261 (S.D.N.Y. 2003) ("[V]ictory – even at the trial stage – is not a guarantee of ultimate success."); *In re Michael Milken & Assocs. Sec. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993) (noting that "[i]t must also be recognized that victory even at the trial stage 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).

Thus, "'[t]he potential for this litigation to result in great expense and to continue for a long time suggest that settlement is in the best interests of the Class.'" *Strougo*, 258 F.Supp.2d at 258 (quoting *Slomovics v. All for a Dollar, Inc.*, 906 F. Supp. 146, 149 (E.D.N.Y. 1995)). The Settlements secure an extraordinary benefit to the Class—close to $200 million and continuing to rise with additional, future receipt of *Air Cargo* proceeds—without the significant expense, prolonged delay and inevitable risk of continued litigation. This factor "weighs heavily in favor" of final approval of the settlements. *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Cir. 6689, 2003 WL 22244676, at *3 (S.D.N.Y. Sept. 29, 2003).

2. The Class Unanimously Supports the Settlements

The reaction of class members to a settlement is an important factor in determining its fairness. *McBean v. City of New York*, 233 F.R.D. 377, 386 (S.D.N.Y. 2006). Some courts have held that that the reaction of the class "***is perhaps the most significant factor to be weighed in considering its adequacy.***" *Maley v. Del Global Techs. Corp.*, 186 F.Supp.2d 358, 362 (S.D.N.Y. 2002) (emphasis added). Class Counsel designed an extensive and far reaching class notice program. *See* ECF No. 1202. After receiving this extensive notice, the reaction of the Class has unanimously and overwhelmingly been supportive of the Settlements. **Not a single Class Member—in a Class with hundreds of thousands putative members—objected to *any* of the Settlements**. The opt-out ratio has been similarly outstanding. Only six putative Class

Members have specifically opted out of these second-round settlements.[11] This overwhelming support of the Settlements by the Class strongly supports final approval of all eleven Settlements.

3. The Stage of the Proceedings and the Amount of Discovery Support Final Approval of the Settlements

In determining whether a class action settlement is fair, courts also consider the stage of the proceedings, including the amount of discovery completed. *See Weinberger*, 698 F.2d at 74; *Grinnell*, 495 F.2d at 463. This factor ensures that plaintiffs had access to sufficient material to evaluate their case and to assess the adequacy of any settlement proposal. *See Chatelain v. Prudential-Bache Sec., Inc.,* 805 F. Supp. 209, 213-214 (S.D.N.Y. 1992) ("*Chatelain*"). As noted elsewhere in this brief, Class Counsel has engaged in extensive litigation in this case. *See supra* at Section II A.

In light of the substantial work Class Counsel has completed in this long and vigorous litigation, it is clear that these Settlements were reached through a fully informed and non-coercive process. This factor weighs strongly in favor of approval of the Settlements. *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 62 (S.D.N.Y. 2003); *In re PaineWebber Pshps. Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997).

[11] Several putative Class Members opted-out of the Schenker agreement, which was part of the first round of settlements, and which caused those putative Class Members to be excluded from the rest of the litigation. The above figure, therefore, does not reflect Schenker opt-outs. A list of opt-outs are attached as Exhibits 1 and 2 to each proposed order and judgment finally approving the eleven Settlements. In addition, the following entities, which had initially opted-out of the Schenker agreement have since re-joined the class: Yamaha Motor Co., Ltd., Yamaha Motor Corporation U.S.A., Yamaha Motor Manufacturing Corporation of America, Yamaha Jet Boat Manufacturing, U.S.A. (a.k.a. Tennessee Watercraft Inc.), Yamaha Motor Powered Products Co., Ltd., Yamaha Motor Engineering Co., Ltd., I-Pulse Co., Ltd., Sunward International Inc., and Yamaha Motor Distribution Latin America Inc. (collectively "Yamaha").

4. Plaintiffs Faced Substantial Risks of Maintaining the Class Action, Trying the Case, and Establishing and Collecting Damages

In assessing substantive fairness, courts must balance a settlement's benefits to the class—especially the immediacy and certainty of a substantial recovery for the Class—against the continuing risks of litigation. *See Grinnell*, 495 F.2d at 463. This includes balancing the likelihood of ultimate success against the relief offered by the proposed Settlements. In making such determination the court "has no duty and no right to make any ultimate conclusions on the issues of fact and law underlying the merits of the dispute, it is required to 'consider the strength of the case presented by the class members in order to determine whether . . . the settlement was grossly unfair and inadequate.'" *In re Shopping Carts*, MDL No. 451, 1983 WL 1950, at *7 (quoting *Grinnell*, 495 F.2d at 456).

First, Plaintiffs faced substantial risk in obtaining class certification. No one can reasonably dispute that *during the pendency of this case* the Supreme Court has significantly tightened the standards for certifying class actions. *See Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013). And although *Dukes* and *Comcast* involved complex issues, those cases did not involve—as here—eleven price-fixing conspiracies, spanning the globe on a variety of trade routes.

Second, Plaintiffs faced substantial risk, not to mention discovery costs, in establishing liability and damages against every Settling Defendant (nineteen separate corporate families) for each of the claims in which they were named. Unlike in the *Air Cargo* litigation, where the carriers were the originators of the allegedly priced-fixed charges, Freight Forwarders are middle-men who are under much more pressure to pass along surcharges down the distribution chain. Throughout this litigation, Settling Defendants have consistently and strenuously insisted that all or most of the charges and surcharges at issue in this case were based on cost increases or

other exogenous charges imposed on them and thus were necessary. As a result, Defendants would argue that Plaintiffs could not demonstrate "*but for*" damages. And, as a matter of economic theory, many economists would agree that such charges—even in a competitive environment—are ultimately passed along. The question in this case is how quickly and effectively. Plaintiffs contend not only that Defendants' agreements allowed them to mark-up their exogenous costs (thus turning passed-on costs into profit centers), but also that the price-fixing conduct ultimately sped up the ability of the cartel to pass along these surcharges to the Class at a higher amount and thus provided the cartel with the ability to charge supracompetitive prices. But, as is often the case in complex antitrust actions, this theory of damages—unlike in the *Air Cargo* case—is not without risk.

Third, even if Plaintiffs established liability, the Class continued to face substantial risk that a neutral fact finder (or the Court at class certification) would find no or limited "antitrust impact" or damages for the Class. To establish a price-fixing violation, a plaintiff must demonstrate not only that a conspiracy existed, but also that the conspiracy caused antitrust impact and damages, which is measured by reference to prices that would have existed but for the conspiracy. In addition to the foregoing, history is replete with cases in which plaintiffs succeeded at trial on liability, but recovered no damages, or only disappointing damages, at trial or on appeal. *See, e.g., TVT Records v. Island Def Jam Music Group*, 412 F.3d 82 (2d Cir. 2004) (reversing and setting aside $54 million judgment); *U.S. Football League v. Nat'l Football League*, 644 F. Supp. 1040, 1042 (S.D.N.Y. 1986) ("[T]he jury chose to award plaintiffs only nominal damages, concluding that the USFL had suffered only $1.00 in damages."), *aff'd*, 842 F.2d 1335, 1377 (2d Cir. 1988). Damages at trial would inevitably involve a "battle of the

experts," and it is "difficult to predict with any certainty which testimony would be credited." *In re NASDAQ Market-Makers Antitrust Litig*., 187 F.R.D. at 476.

Fourth, even assuming Plaintiffs were able to establish liability and prove damages, their ability to collect a judgment in excess of the Settlement amounts is uncertain as to foreign Defendants. Moreover, the transportation industry generally and the freight forwarding industry specifically have been known to experience "boom-bust" cycles. While the Settling Defendants are able to pay these substantial settlements now, there is no guarantee that their financial picture will look the same several years down the road after a lengthy class certification and trial process, especially in light of the nature of the logistics industry. These factors strongly support approval of the eleven Settlements.

5. The Financial Level of the Settlements Easily Falls Within the Range of Reasonableness

The determination of a reasonable settlement is not susceptible to a simple mathematical equation yielding a particular sum. Rather, "in any case there is a range of reasonableness with respect to a settlement – a range which recognizes the uncertainties of law and fact in any particular case and concomitant risks and costs necessarily inherent in taking any litigation to completion." *Newman v. Stein*, 464 F.2d 689, 693 (2d Cir. 1972). Further, the intricacies of what can and cannot be proved based on the facts known today are pertinent to both the "likely" recovery standard under *Maywalt,* 67 F.3d at 1079, and the "best possible" recovery standard under *Grinnell*.

And yet, by almost any measure (and certainly by the range of reasonableness measure), each of these Settlements represents a substantial recovery for the Class. To the extent that any of these Defendants subsequently pled guilty to DOJ charges after the filing of the initial complaint in this action, the Settlements far outperform any fines obtained by DOJ. For

example, after the filing of Plaintiffs' complaint, Agility (then named Geologistics) pled guilty only to fixing the prices of the Air AMS fee and paid a fine of $687,960. The settlement with the Class, by contrast, included a payment of $16 million and 100% of all past and future *Air Cargo* proceeds. Thus far, the Class has received a total of $17,859,499.23 from Agility and projects additional, future *Air Cargo* money. Panalpina pled guilty to fixing prices on the Air AMS fee, the CAF surcharge and the Peak Season Surcharge and paid a fine of $11.9 million. By contrast, Panalpina's settlement with the Class included a payment of $35 million and all future *Air Cargo* proceeds. Plaintiffs have thus far received $39,158,425.45 and also project substantial additional money from future payouts in *Air Cargo*. The Japanese Defendants all eventually pled guilty after the filing of Plaintiffs' complaint and collectively paid $61,823,489 in U.S. fines, whereas their collective payment to the Class is $100,000,000. As can be seen from the foregoing, Plaintiffs' Settlements with the Defendants far exceed the DOJ fines—in many cases, by several multiples. A complete chart can be found at Exhibit 2.

In this case, the Settlements provide immediate concrete cash benefits to Class members in an aggregate of $197,623,497.87. Additional cash payments will be made from pending distributions in *Air Cargo* as well as from future settlements in *Air Cargo* and there is no reversion to the Settling Defendants included in any of the Proposed Settlement Agreements. Under any method of evaluating the Proposed Settlements—including the fact that the Class included large, sophisticated businesses that have not objected and are filing claims for the benefits of the Settlements—the Proposed Settlements are fair, reasonable and adequate and should be approved.

C. The Requirements of Class Certification Have Been Met

This Court previously preliminarily approved each proposed settlement class as meeting the requirements of Fed. R. Civ. Proc. 23. *See* ECF No. 894 (SDV); ECF No. 1102 (Panalpina, Geodis, DSV, Jet-Speed); ECF No. 1103 (Toll); ECF No. 1124 (Agility, UPS); ECF No. 1147 (Dachser), ECF No. 1189 (DHL and Japanese Defendants). No objections have been made. The same showings that were made for preliminary approval apply now. Accordingly, as provided in the eleven proposed orders and judgments of final approval, annexed to the Notice of Motion, this Court should finally approve each settlement class. This Court has also already certified an essentially identical Settlement Class in each of the settlements it has finally approved to date. *See* ECF Nos. 866, 879 – 888 (final approval orders). Just as in those instances, these proposed classes meet the requirements of Rule 23(a), as well as the requirements of Rule 23(b)(3). Finally, while Plaintiffs see no management difficulties in this case, manageability is not pertinent to approving a settlement class. *See Amchem Products v. Windsor*, 521 U.S. 591, 620 (1997) ("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."). Accordingly, for purposes of 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.

D. The Class Notice Program Complied with this Court's Order and Far Exceeded the Requirements of Rule 23

On May 29, 2015, this Court approved Plaintiffs' Class Notice Program. ECF No. 1216. Plaintiffs developed the Notice Program with the assistance of experts with extensive experience in global notice programs. The Notice Program was a robust, multi-faceted approach, which delivered clear and understandable information to potential Class Members about this case and

the proposed settlements. In Class Counsel's experience, the Notice Program and its implementation included many elements that far surpassed any basic due process requirements imposed by the case law and Rule 23. *See* ECF Nos. 1202-1204. The accompanying declarations of Julie Redell and Katherine Kinsella attest to the fact that the Notice Program was implemented in accord with this Court's order.

E. The Plan of Allocation is Fair and Reasonable

Plaintiffs' Plan of Allocation is the same as for the first round of settlements. *See* Ex. 14. This Court previously approved Plaintiffs' Plan of Allocation and, as last time, there are no objections. Approval of a plan of allocation in a class action is made under the same standards applicable to approval of the settlements as a whole: the plan must be fair, reasonable and adequate. *In re Computron Software, Inc. Sec. Litig.*, 6 F. Supp. 2d 313, 321 (D. N.J. 1998); *In re Oracle Sec. Litig.*, No. C-90-0931-VRW, 1994 WL 502054, at *1 (N.D. Cal. June 18, 1994) (observing that a "plan of allocation that reimburses class members based on the extent of their injuries is generally reasonable"). A plan of allocation "need only have a reasonable, rational basis, particularly if recommended by 'experienced and competent' class counsel." *In re Am. Bank Note Holographics*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001). This Court's previous order approving the Plan of Allocation and the Class's unanimously favorable reaction to the Settlements demonstrates that the Plan of Allocation should be approved.

V. CONCLUSION

For the foregoing reasons, each of the Proposed Settlements is fair, adequate and reasonable under Fed. R. Civ. P. 23 and the Second Circuit's case law governing final approval of class action settlements. Each of the Proposed Settlements, therefore, should be finally approved and the forms of judgement should be entered.

Dated: October 5, 2015

Respectfully Submitted,

/s/ *Steven N. Williams*

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