**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) (VVP)**

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

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## I. INTRODUCTION

Plaintiffs move for final approval of two Proposed Settlements, totaling $53,550,000, with the Settling Defendants[1] in this Action. This Court should finally approve the Settlements because they are fair, reasonable and adequate under Fed. R. Civ. P. 23(e) and represent an extraordinary recovery for the Class. As described below, the Class unanimously supports the Proposed Settlements. Out of a putative Class of hundreds of thousands of customers, not a single putative Class Member has objected and Class Counsel has received only one opt-out request. 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.[2] These companies, along with small businesses and individuals that utilized 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. The DHL corporate family agreed to pay $53 million to resolve all claims, while the Hellmann corporate family agreed to pay $550,000 to resolve all claims. Each of these settlements is commensurate with the size of the Defendant, the price-fixed surcharges recouped from their customers (*i.e.,* "the affected revenue"), and litigation developments.

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[1] "Settling Defendants" are: (1) the DHL corporate family, which includes 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.; and Air Express International USA, Inc. (collectively, "DHL"); and (2) the Hellman Corporate family, which includes Hellmann Worldwide Logistics GmbH & Co. KG; Hellmann Worldwide Logistics Ltd. Hong Kong; and Hellmann Worldwide Logistics, Inc. (collectively, "Hellmann").

[2] "Freight Forwarding Services" includes services relating to the organization of transportation of items via air and ship. Freight forwarders, who provide this package of services, are sometimes referred to as "third party logistics providers."

With these proposed settlements, Plaintiffs now have settled with all 29 Defendant groups named in Plaintiffs' Complaint, fully resolving all of Plaintiffs' eleven claims after nearly nine years of litigation. The total settlement amount of approximately $406.1 million will grow as many settling Defendants make additional payments due under their settlement agreements.

Throughout this litigation, Plaintiffs 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 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).

The two proposed settlements were only reached after substantial motion practice and extensive 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 has been received from various Defendants; (b) the extensive documentary evidence obtained during the litigation; (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 nationally-renowned mediators; and (i) such other information that became available during the course of this extensive litigation. This Court should grant final approval to the two settlements.

## II. STATEMENT OF FACTS

### A. Litigation History[3]

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. *See* 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"), ¶ 19, ECF No. 1282.

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

[3] Plaintiffs will not repeat here the entire history of the litigation. A comprehensive litigation history may be found in 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 ("Joint Declaration"), ¶ 19, ECF No. 1282. This declaration provides a litigation history and the efforts of Class Counsel from the inception of the case until August 15, 2015. *See id.*, ECF No. 1282. The Declaration of W. Joseph Bruckner in Support of Co-Lead Counsel's Petition for a Third Award of Attorneys' Fees and Reimbursement of Expenses ("Bruckner Decl."), ECF No. 1370, provides a litigation history and the efforts of Class Counsel for the time period of August 16, 2015 through July 31, 2016.

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.[4]

In response, Defendants filed extensive and voluminous motions to dismiss the FACAC.[5] 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, Judge John Gleeson 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.

[4] 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.

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

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 2002 Fuel Surcharge 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, the 2006 Security and Explosives Examination Surcharge Agreement, the Global Agreement and the Japanese Regional 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[6], 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. Defendants objected to

[6] *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.

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 formal discovery.[7] 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—the Department of Justice leniency applicant—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 have since been updated in the Bruckner Declaration (ECF No. 1370). 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.

The extensive motion practice and discovery in this case led to these proposed settlements. By the time Plaintiffs and the settling Defendants 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 factual record had been fully developed.

[7] Throughout this period, Plaintiffs continued to engage in, and spend substantial resources on, informal discovery provided under ACPERA or pursuant to settlements reached with early, settling Defendants.

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**;
- 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;
- 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. Since August of 2015, Plaintiffs have additionally engaged in the tasks, amongst others:

- Researched case evidence, documents, and depositions for Plaintiffs' supplemental discovery responses and responses to contention interrogatories;
- Drafted and served Plaintiffs' supplemental discovery responses;
- Reviewed and prepared Plaintiffs' documents for supplemental productions;
- Researched, drafted, and served contention interrogatories to Defendants;
- Reviewed and Negotiated with Defendants regarding Defendants' privilege log deficiencies;

- Reviewed Defendant DHL documents produced for inspection in Seattle, Washington;
- Drafted and served requests for admissions on Defendants;
- Researched and drafted responsive briefing on Defendant Hellmann's motion to compel responses to requests for admissions and motion for protective order;
- Researched documents regarding fraudulent concealment issues;
- Researched documents regarding built-in surcharge issues;
- Negotiated and drafted stipulation regarding the amended complaint;
- Attended Court status conferences;
- Reviewed issues and strategized with co-counsel regarding settlement issues with remaining Defendants;
- Negotiated settlement terms with the remaining two Defendants, DHL and Hellmann;
- Drafted a Memorandum of Understanding regarding the proposed settlement with the DHL Defendants;
- Drafted and finalized the settlement agreements and escrow agreements with the DHL Defendants and with the Hellmann Defendants;
- Drafted motions for preliminary approval of settlements with the DHL Defendants and with the Hellmann Defendants;
- Drafted motions for final approval of Second Round settlements;
- Prepared for and attended the hearing before Judge Gleeson regarding final approval for the Second Round settlements;
- Researched and drafted a third notice plan to class members regarding the Third Round settlements with DHL and Hellmann;
- Conferred frequently and extensively with many class members, third-party claim filers, and the claims administrator on questions regarding claim filing and issues regarding claims administration;
- Analyzed and researched issues regarding claims administration, including deficient claims and late-filed claims;
- Monitored filed claims and worked with claims administrator to verify claims;
- Monitored whether entities opted out of the proposed settlement classes;
- Researched Defendants' revenues which were affected by the conspiracies alleged in
  Plaintiffs' complaint; analyzed, calculated, and drafted settlement allocation matrix consistent with Plan of Allocation in preparation for distribution;
- Held multiple conferences with defense counsel regarding the status and timing of subsequent settlement payments; and
- Corresponded with named Plaintiffs regarding case issues, status and progress.

Bruckner Decl., ¶ 3, ECF No. 1370.

**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, the 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 due to the Class's receipt of additional

proceeds from the *Air Cargo* litigation. Joint Declaration ¶¶ 5, 6.

**D. Second Round of Settlements**

On November 10, 2015, this Court finally approved settlements and certified settlement classes with eleven Defendant groups. ECF No. 1330. Those Defendant groups included: (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. (together, "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 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 (the "DHL Japanese agreement").

The settlement fund created by these eleven, second-round settlements constituted $197,623,497.87. That amount has subsequently increased due to the Class's receipt of additional proceeds from the *Air Cargo* litigation.

**E. Third Round of Settlements**

After sending notice of the first and second rounds of settlements and engaging in substantial litigation and discovery, the Class subsequently reached settlements with DHL and Hellmann, the two remaining Defendant families. This Court has preliminarily approved each of these Third Round Settlements.[8] The Settlements create a Settlement Fund of $53,550,000 for the benefit of the Class.

**1. The DHL Settlement**

After extensive arm's length negotiations, including two mediations with two prominent mediators and consultations with both sides' economists, Plaintiffs agreed to settle all claims against DHL in return for a payment of $53 million in cash for the benefit of the Settlement Class. ECF No. 1340. At the time, given that Hellmann was the sole remaining Defendant, DHL also agreed to provide cooperation, including declarations or affidavits, authentication of exhibits, and an agreement to provide witnesses at trial. *Id.* Furthermore, DHL agreed to supplement the transactional data they already provided to Plaintiffs with any additional data required by Plaintiffs' economists. *Id.* DHL also produced substantial documentary evidence pursuant to requests based on the Antitrust Criminal Penalty Enhancement Reform Act of 2004 ("ACPERA").[9]

[8] *See* ECF No. 1343 (DHL); ECF No. 1358 (Hellmann).
[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.

### 2. The Hellmann Settlement

After extensive arm's length negotiations, including with the assistance of a nationally prominent mediator, Plaintiffs agreed to settle their claims against Hellmann in return for a payment of $550,000 in cash for the benefit of Settlement Class. ECF No. 1355. Hellmann has also agreed to use reasonable efforts to authenticate documents it produced during the course of this litigation. *Id.*[10] Hellmann's settlement payment is based on its small size, the small amount of affected revenue[11] and the fact that it played a lesser role in the alleged conspiracy than the other, larger Defendants. For example, unlike many of the Defendants, Hellmann ultimately did not plead guilty to DOJ criminal charges.

## 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

[10] Because Hellmann is the last remaining defendant and Plaintiffs had previously obtained discovery from Hellmann during the course of this litigation, little cooperation is necessary at this point.

[11] As discussed *infra*, relative to other Defendants, Hellmann did not collect nearly as much revenue as a result of the price-fixed surcharges or rate increases.

both "the settlement's terms and the negotiating process leading to settlement." *Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 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).

Here, each preliminary approval brief was supported by declarations attesting to the settlement's procedural fairness. *See* ECF Nos. 1341, 1356. As attested, the Settlements were entered into in good faith, after extensive arms' length negotiations between experienced and informed counsel on both sides. *Id*.

Moreover, the proposed settlement with DHL was clearly reached with "procedural integrity." The settlement resulted from arm's length negotiations amidst lengthy litigation with

the assistance of two nationally-renowned mediators. The settlement does not have any obvious deficiencies or preferential treatment for particular class segments. As described detail in the W. Joseph Bruckner Declaration, submitted in support of preliminary approval of the DHL settlement, Plaintiffs and DHL have discussed settlement since 2010. *See* ECF No. 1341 at 4. They first mediated with mediator Anthony Piazza on December 16, 2013, but ended far from agreement. *Id.* at 5. After the mediation, the parties continued discussing settlement, but without progress. *Id.* at 6. The parties scheduled a mediation with Mr. Piazza a year later, for December 4, 2014, but cancelled it due to lack of progress on specific settlement numbers. *Id.* at 7. Plaintiffs and DHL mediated again on July 2, 2015 with mediator Kenneth Feinberg, but again could not reach agreement. *Id.* at 8. After vigorous negotiations, the parties finally reached agreement and signed a memorandum of understanding on October 14, 2015. *Id.* at 9.

The proposed settlement with Hellmann also clearly meets the "procedural integrity" standard. The settlement resulted from arm's length negotiations during lengthy litigation. It does not have any obvious deficiencies or preferential treatment for particular segments of the class. Plaintiffs and Hellmann engaged in extensive, hard-fought, and contentious settlement negotiations over the course of several years. *See* ECF No. 1356 at 3–7. Settlement discussions began in February 2013 and included a mediation session in April 2014 with Mr. Piazza, a nationally prominent mediator who by that time had mediated multiple settlements in this case. Between Mr. Piazza's efforts and many informal conferences directly between counsel for Hellmann and Plaintiffs, the parties finally reached agreement in December 2015. *Id.* at 3, 6. The parties then negotiated in earnest over the final terms of the settlement agreement, which was executed on February 18, 2016. *Id.* at 12.

In reaching both settlements, 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 for eight years, received substantial cooperation from previously-settled Defendants, reviewed millions of pages of documentary evidence, had taken extensive witness interviews and depositions, reviewed hundreds of pages of written discovery responses, engaged in and resolved 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 two 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, both Settling Defendants are represented by attorneys who vigorously and 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 *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. In making the determination, the settlement agreement must be considered as a whole. *Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995) ("*Maywalt*") (emphasis added).

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 "antitrust impact" and 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. *See In re Visa Check/MasterMoney Antitrust Litig.*, 297 F.Supp.2d at 510 (approving settlement where action "would have 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—over $50 million—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. *See 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. 1361-1364. After receiving extensive notice regarding this litigation, the Class unanimously and overwhelmingly support the Settlements. **Not a single Class Member—in a Class with hundreds of thousands putative members—objected to *either* of the Settlements**. The opt-out ratio has been similarly outstanding. Only one putative Class Member has specifically opted out of these third-round settlements. *See* ECF No. 1387. [12] This overwhelming support for the Settlements by the Class strongly supports final approval.

### 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

[12] Several putative Class Members opted-out of the Schenker agreement, which was part of the first round of settlements, and which by the terms of the Schenker agreement 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 two 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"). ECF No. 1276; *see also* Text Only Order Approving Yamaha's Request, September 18, 2015.

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 and discovery 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 P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997). Indeed, Plaintiffs had taken over 50 depositions in this case prior to reaching settlements with DHL and Hellmann.

**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 e.g.*, *Wal-Mart Stores, Inc. v. Dukes*, 131

S. Ct. 2541 (2011) (*"Dukes"*); *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013) ("*Comcast*"). 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 over a lengthy class period.

*Second*, Plaintiffs faced substantial risk, not to mention discovery costs, in establishing liability, antitrust impact and damages against the Settling Defendants 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 through the distribution chain. Throughout this litigation, 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 by third-parties and thus would have been passed on to customers even absent a conspiracy. 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. Thus, at trial the question in this case would have been how quickly and effectively that pass-on would have occurred. 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 here ultimately sped up the ability of the cartel to pass along these surcharges to the Class at a higher amount and thus allowed the cartel 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.

Thus, the Class faced 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 minimal or no 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.

*Third*, even assuming Plaintiffs were able to establish liability and prove damages, their ability to collect a judgment in excess of the previous settlement amounts is uncertain as to the 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 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. In this case, the Settlements provide immediate concrete cash benefits to Class members in the aggregate of $53,550,000. The DHL settlement of $53 million constitutes the single largest monetary settlement obtained in this litigation. And the Hellmann settlement, as noted, reflects Hellmann's small size[13], the small amount of its affected revenue[14], litigation developments and the lesser role that Hellmann played in the alleged conspiracy. 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.

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[13] *See, e.g.,* Plaintiffs' Fourth Amended Complaint (ECF No. 1311), ¶¶ 203 (listing the market share information for Defendants, and finding Hellmann ranked 16th, behind Defendants DHL, Panalpina, Kuehne + Nagel, Schenker, Agility, Expeditors, UTi, Nippon Express, and EGL, among others).

[14] Relative to other Defendants in this litigation, Hellmann did not collect substantial revenue from the price-fixed surcharges or rate increases.

Although neither of these two proposed settlements involved a subsequently guilty-pleading Defendant, Class Counsel does have a record of obtaining settlements from several Defendants in this action that did plead guilty. And each of those Settlements far outperformed 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 will receive additional funds based on Agility's *Air Cargo* recoveries. 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 was $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. If history is any guide, had DHL or Hellmann pled guilty to DOJ charges, the two, proposed settlements most likely would have outperformed those fines too. The settlements are fair, reasonable and adequate.

**C. The Requirements of Class Certification Have Been Met**

The Court previously preliminarily approved each proposed settlement class as meeting the requirements of Fed. R. Civ. Proc. 23. *See* ECF No. 1343 (DHL); ECF No. 1358 (Hellmann). No objections have been made. The same showings that were made for preliminary approval apply now. Accordingly, as provided in the two proposed orders and judgments of final approval,

annexed to the Notice of Motion, this Court should finally approve each settlement class. Judge Gleeson has also already certified an essentially identical Settlement Class in each of the settlements he has finally approved to date. *See* ECF Nos. 866, 879 – 888, 1312 (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 manageability issues 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 10, 2016, this Court approved Plaintiffs' Class Notice Program. ECF No. 1367. 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. 1362-1364. The accompanying declarations of Julie Redell and Katherine Kinsella attest to the fact that the Notice Program was implemented in accordance with this Court's order. *See* Redell Decl.; *see also* Kinsella Decl., submitted herewith.

### E. The Plan of Allocation is Fair and Reasonable

Plaintiffs' Plan of Allocation is the same as for the first two rounds of settlements. *See* Exhibit 3. This Court previously approved Plaintiffs' Plan of Allocation and, as the last two times, 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). The Court's previous orders 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, both of the Proposed Settlements are 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 7, 2016

Respectfully Submitted,

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