UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

PRECISION ASSOCIATES, INC.; *et al.*, Plaintiffs, vs. PANALPINA WORLD TRANSPORT (HOLDING) LTD., *et al.*, Defendants.	Case No.: 08-CV-00042 (JG) (VVP)

PLAINTIFFS' REPLY TO NON-SETTLING JAPANESE DEFENDANTS' OPPOSITION TO MOTION FOR FINAL APPROVAL OF VANTEC AND NISHI-NIPPON SETTLEMENTS

The Vantec and Nishi-Nippon settlements together provide $30,697,159 in actual payments to date, plus future anticipated *Air Cargo*[1] proceeds. The Non-Settling Japanese Defendants' objections[2] to these settlements should be rejected for three reasons.

First, the Non-Settling Defendants' criticisms of the Most-Favored Nations provisions ("MFNs") in the Vantec and Nishi settlements are wholly speculative. Second, the Non-Settling Defendants have no standing to object and have failed to show any "plain legal prejudice" to themselves as a result of these settlements. Finally, each settlement, including its MFN, is fair, reasonable, and adequate *to the Class*, and the Non-Settling Defendants cannot show otherwise.

I. NON-SETTLING DEFENDANTS' CRITICISMS ARE SPECULATIVE.

Non-Settling Defendants' criticisms are wholly speculative, and therefore the Court is presented with no justiciable issue. By contrast, in *Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198, 1201-02 (6th Cir. 1996), *In re Chicken Antitrust Litig.*, 560 F. Supp.

[1] *See In Re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (E.D.N.Y.) ("*Air Cargo*"), from which defendants have received recoveries from various settlement.
[2] ECF Nos. 841, 860.

943, 944-45 (N.D. Ga. 1979), and *Fisher Bros. v. Phelps Dodge Indus., Inc.*, 614 F. Supp. 377, 379-80 (E.D. Pa. 1985), all cited by Defendants, later-settling defendants had reached definite settlement agreements with plaintiffs, which allowed the courts in those cases to make fact- and evidence-based determinations as to whether, *e.g.*, the "materially changed circumstances" provision (*Cintech* and *Fisher Bros.*) or the "financial ability" provision (*In re Chicken Antitrust*) in the MFNs contained in earlier settlements had been satisfied.

By contrast, Non-Settling Defendants essentially do nothing more than complain that, when and if they reach a settlement with the Class, they should have the option to pay proportionately less than Vantec or Nishi. Putting aside their lack of merit, the Non-Settling Japanese Defendants' arguments are speculative. They have no settlement agreements for the Court to compare to Vantec's and Nishi's agreements to pay more than $30 million plus cooperation for the immediate benefit of the Class, and they present no circumstances showing why these two existing settlements should not be approved. Their objections should be overruled for this reason alone.

In the one case Non-Settling Defendants cite that is procedurally similar to this one, *i.e.*, a non-settling defendant objected to another defendant's settlement, *In re Ampicillin Antitrust Litig.*, the court first found that the non-settling defendant had no standing to object, and then proceeded to reject those objections on their merits. *In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654-55 (D.D.C. 1979) ("It should be noted that Bristol has no standing to object to this settlement between Beecham and the CCS plaintiffs. . . . Furthermore, it seems unlikely that its general objections are raised from any legitimate concern to protect the classes."). As discussed below, Non-Settling Defendants' objections here should be rejected for the same reasons.

II. NON-SETTLING DEFENDANTS LACK STANDING TO OBJECT.

The Non-Settling Defendants lack standing to object because the Vantec and Nishi settlements do not deprive them of any substantive rights. "Plain legal prejudice," required for such standing, applies only where a settlement interferes with contract or indemnity rights or "strips the party of a legal claim or cause of action, such as a cross-claim or the right to present relevant evidence at trial." *Agretti v. ANR Freight Sys., Inc.*, 982 F.2d 242, 247 (7th Cir. 1992). "[C]ourts have repeatedly held that a settlement which does not prevent the later assertion of a non-settling party's claims, although it may force a second lawsuit against the dismissed parties, does not cause plain legal prejudice to the non-settling party." *Id*. Consequently, non-settling defendants "cannot object to clauses precluding settlement with such defendants on terms more favorable to the settling defendants." *In re Med. X-Ray Film Antitrust Litig.*, No. 93-5904, 1997 WL 33320580, at *6 (E.D.N.Y. Dec. 26, 1997). Accordingly, *Zupnick v. Fogel*, 989 F.2d 93, 98, 100 (2d Cir. 1993), relied on by the Non-Settling Defendants, held that non-settling defendants lacked standing because their rights were not affected. The Non-Settling Defendants here do not and cannot show how they would be prejudiced in their claims, defenses or trial presentations.

III. THE MFNs ARE SUFFICIENTLY LIMITED AND FLEXIBLE TO PROTECT THE CLASS' INTERESTS.

A. The MFNs Account For Defendants' Demonstrable Culpability, Defendants' Solvency, And Class Certification.

Contrary to Non-Settling Defendants' bald statement that the MFNs do not allow for materially changed circumstances (ECF No. 860 at 1), the MFNs specifically address the most important and material circumstances that could change settlement prospects -- Defendants' culpability, ability to pay, and class certification.

First, the MFNs take into account the remaining Defendants' culpability and likely liability. The MFNs only apply to subsequently settling Japanese Defendants that have pled

guilty (or for the Vantec MFN, have pled guilty or been indicted) to U.S. charges of price-fixing or agreement to restrain trade related to Plaintiffs' claims.[3] The Non-Settling Japanese Defendants cannot deny that their guilty pleas have a substantial practical impact on Plaintiffs' civil claims.[4] But the MFNs also provide a second outlet for culpability considerations: the MFNs do not apply in the unlikely event that summary judgment is granted.[5]

Second, the MFNs do not apply to a subsequently settling Japanese Defendant that is "insolvent or bankrupt, or has an inability to pay the amount that would be required by the application" of the MFN ratio.[6] If the MFNs do apply, repayments would be limited to amounts needed to reduce the settlement ratios to equivalency.[7] Again demonstrating the wholly speculative nature of their complaints, the Non-Settling Japanese Defendants are substantial enterprises that have neither claimed nor demonstrated any financial difficulties.[8]

Third, the MFNs do not apply in the unlikely situation that class certification is denied.[9] The MFNs therefore take into account the material considerations that could affect subsequent settlements in a case of this nature.

In addition, the Non-Settling Defendants cannot answer why Nishi-Nippon could settle with Plaintiffs, notwithstanding Vantec's MFN. ECF No. 604. No one claims that Nishi agreed to pay "economically irrational" consideration, which Non-Settling Defendants suggest the MFN settlement ratios require. This practical fact negates Defendants' workability arguments.

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[3] Vantec Agreement ¶ II(D)(1); Nishi-Nippon Agreement ¶ II(D)(1).
[4] *See, e.g.*, 15 U.S.C. § 16(a) (effect of prior antitrust criminal judgment).
[5] Vantec Agreement ¶ II(D)(7); Nishi-Nippon Agreement ¶ II(D)(7).
[6] Vantec Agreement ¶ II(D)(6); Nishi Nippon Agreement ¶ II(D)(6).
[7] Vantec Agreement ¶ II(D)(4); Nishi Nippon Agreement ¶ II(D)(4).
[8] *See also* Nishi-Nippon letter to Court at 4 (filed July 23, 2013) (ECF No. 847) ("because many of the key Japanese defendants are substantially larger than Nishi-Nippon, the MFN refund would be dwarfed by the settlement amounts that the plaintiff class would receive from the similarly situated Non-Settling Japanese Defendants"). This contrasts with the situation in *In re Chicken Antitrust*, in which the court declined to approve a settlement with an MFN involved financially weak non-settling defendants in circumstances "strongly suggestive of predatory intent" by the earlier settling defendant that could have driven smaller defendants from the market. *In re Chicken Antitrust Litig.*, 560 F. Supp. at 947-48.
[9] Vantec Agreement ¶ II(D)(7); Nishi-Nippon Agreement ¶ II(D)(7).

B. The Global Conspiracy Ruling Is Not A Material Change.

It makes no sense to suggest, as Non-Settling Defendants do, that dismissal of much of the global conspiracy claim is a material change in the litigation since the Vantec and Nishi settlements. Magistrate Judge Pohorelski recommended dismissal of that claim on January 4, 2011 (ECF No. 468). *After* the Plaintiffs declined to object to that recommendation, the parties entered the Vantec Settlement on April 26, 2011 (ECF No. 527-4), and the Nishi Settlement on May 9, 2012 (ECF No. 590-2). All parties knew full well of the recommendation at the time of the settlements, and it is illogical to suggest that this constituted a material change.

IV. THE VANTEC AND NISHI SETTLEMENTS ARE FAIR, REASONABLE AND ADEQUATE.

A. Vantec And Nishi Agreed To Pay Substantial Consideration And Provide Cooperation.

Vantec and Nishi have agreed to provide concrete and valuable consideration for their settlements. Vantec agreed to pay $9,900,000 and 100% of its *Air Cargo* proceeds. Vantec's cash and *Air Cargo* proceeds currently come to $10,614,263.21. In addition, Vantec, the first Japanese Defendant to settle, provided cooperation that included 206 documents used in the Japan Fair Trade Commission proceedings, as well as witness interviews and trial testimony. Nishi agreed to pay $20,082,896, plus up to $500,000 in *Air Cargo* proceeds. Nishi also agreed to provide cooperation in the form of information, documents, witness interviews and testimony. These combined payments, now exceeding $30,000,000, plus cooperation and anticipated *Air Cargo* proceeds, make the settlements fair, reasonable, and adequate for the Class.

By contrast, the Non-Settling Japanese Defendants have not offered to settle on *any* terms, but instead posit only speculative scenarios and complain that when and if the time comes, they should have the option to settle for proportionately less than Vantec and Nishi. Since Fed. R. Civ. P. 23(e) contemplates settlements that are "fair, reasonable, and adequate" *to the Class*,

Non-Settling Defendants' argument to pay *lower* settlements is entitled to no weight.[10] Similarly, since they've offered nothing to date, Non-Settling Defendants' complaint about the absence of a sunset provision in the MFNs is entirely hypothetical.

V. NON-SETTLING DEFENDANTS' CITED CASES DO NOT SUPPORT OVERTURNING THESE SETTLEMENTS.

The cases cited by Non-Settling Defendants do not require rejection of the Vantec or Nishi settlements. For example, the settling parties voluntarily added limitations to the MFN after a non-settling defendant objected in *Hyland v. Homeservices of Am., Inc*., No. 3:05-CV-612, 2012 WL 1575310, at *4 (W.D. Ky. May 3, 2012) (granting final approval) ("After they [non-settling defendants] filed a motion to strike the MFN provision, Plaintiffs and counsel for the Reology Defendants amended the clause"). Although noting reservations, "the Court did not find its inclusion to be a barrier to preliminary approval." *Id*. Then, "[a]fter hearing from the parties at the fairness hearing, the Court [found] that the inclusion of the MFN Clause is not reason to deny approval of the proposed settlements." *Id*. at *5; *see also Hyland v. Homeservices of Am., Inc*., No. 3:05-CV-612, 2012 WL 122608, at *6 (W.D. Ky. Jan. 17, 2012) (granting preliminary approval) ("For this reason, the Court does not find the inclusion of this MFN Clause to be a barrier to preliminary approval at this time."). Similarly, other cases cited by Non-Settling Defendants approved settlements with MFN provisions.[11] By confusing courts'

[10] Non-Settling Japanese Defendants' comparison of these settlement ratios to those in *Air Cargo* is inapposite. For example, the Lufthansa settlement's MFN ratio is based on defendants' sales, and the MFN ratios in this case are based on affected revenues. *See* Settlement Agreement Between Air Cargo Plaintiffs And Defendants Deutsche Lufthansa AG, Lufthansa Cargo AG, And Swiss International Air Lines Ltd. ¶ 66(d), *In Re Air Cargo Shipping Servs. Antitrust Litig*. (filed May 7, 2007) (ECF No. 419-3).

[11] *E.g*., *In re Bisphenol–A (BPA) Polycarbonate Plastic Prod. Liab. Litig*., No. 08-1967, 2011 WL 1790603, at *4 (W.D. Mo. May 10, 2011) ("The Court simply does not discern any unfairness to the class members."); *Med. X-Ray Film*, 1997 WL 33320580, at *6 (finding "[t]he proposed settlements have no obvious deficiencies" and concluding, "[a]ccordingly, Kodak's objections on this ground cannot preclude preliminary approval of the proposed settlements"); *In re Ampicillin Antitrust Litig*., 82 F.R.D. 652, 655 (D.D.C. 1979) ("Rather, the classes may benefit from any additional incentive it may create for favorable settlement terms."); *Air Cargo* at 3 (E.D.N.Y. Mar. 14, 2011) (ECF No. 1414) (finding Air France settlement fair, reasonable, and adequate for the class); *id*., at 2 (ECF No. 1416) (same, SAS settlement); *id*. at 2 (E.D.N.Y. Oct. 6, 2009) (ECF No. 974) (same, Lufthansa settlement).

descriptions of such features while approving them with requirements for MFNs, Non-Settling Defendants attempt to use *obiter dicta* to turn the holdings of those cases on their heads. Regardless, the cited cases have approved settlements with MFNs, rather than limiting them.

CONCLUSION

The Vantec and Nishi settlements are fair, reasonable, and adequate *for the Class*. They advance the Class' interest by promising $$30,697,159 in cash payments, plus additional amounts in *Air Cargo* proceeds. The MFNs contain suitable limits and flexibility to advance the Settlement Class' interests, and account for materially changed circumstances most likely to affect future settlement prospects. The Non-Settling Defendants lack standing to object and have failed to show any "plain legal prejudice" resulting from the settlements, and their arguments are speculative and unfounded.

Accordingly, Plaintiffs respectfully request that the Court grant final approval to the Vantec and Nishi settlements, along with the other proposed settlements now before the Court.

Dated: August 7, 2013

Respectfully submitted,

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Contrary to the Non-Settling Japanese Defendants' suggestion, the lack of class members' objections to the MFN provision in *In re Packaged Ice Antitrust Litig*., No. 08-MD-01952, 2011 WL 717519, at *4, 14 (E.D. Mich. Feb. 22, 2011) is all the more reason that case supports approval of settlements with MFN provisions.

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