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)

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION TO: (1) PRELIMINARILY APPROVE SETTLEMENTS OF THEIR CLAIMS AGAINST DEFENDANTS DEUTSCHE BAHN AG, SCHENKER AG, SCHENKER, INC., BAX GLOBAL, INC. DB SCHENKER, VANTEC CORPORATION, VANTEC WORLD TRANSPORT (USA), INC., EGL, INC., AND EGL EAGLE GLOBAL LOGISTICS, LP; AND (2) CONDITIONALLY CERTIFY THE SETTLEMENT CLASS

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I. INTRODUCTION

Plaintiffs Precision Associates, Inc, Anything Goes LLC d/b/a Mail Boxes Etc., and JCK Industries, Inc. ("Plaintiffs") have reached settlements with three groups of Defendants: (1) Deutsche Bahn AG, Schenker AG, Schenker, Inc., Bax Global Inc. and DB Schenker (collectively, "Schenker"); (2) EGL, Inc. and EGL Eagle Global Logistics, LP, Inc. (collectively, "EGL"); and (3) Vantec Corporation and Vantec World Transport (USA), Inc. (collectively, "Vantec") (collectively overall, "Settling Defendants").[1]

Settling Defendants have agreed to pay a total of at least $28,950,000 to the Settlement Class.[2] Vantec and EGL have also agreed to turn over to the Settlement Class additional amounts equivalent to all (or in the case of EGL, the first $10 million) of the proceeds they receive as claimants in *In Re Air Cargo Shipping Services Antitrust Litigation*, No. 06-MD-1775 (JG) (VVP) (E.D.N.Y.) ("*Air Cargo*"), and each Settling Defendant has agreed to provide significant cooperation to Plaintiffs to assist the prosecution of the case against the remaining Defendants.

Plaintiffs now move pursuant to Fed. R. Civ. P. 23 for an Order preliminarily approving the Settlements, and conditionally certifying the Settlement Class.

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[1] *See* Settlement Agreement Between Plaintiffs and Defendant Schenker, Inc., attached as Exhibit A to the Declaration of W. Joseph Bruckner, dated September 20, 2011 ("Bruckner Dec.") and submitted herewith ("Schenker Settlement Agreement"); Settlement Agreement Between Plaintiffs and Defendants EGL, Inc. and EGL Eagle Global Logistics, LP, Inc., attached as Exhibit B ("EGL Settlement Agreement"); and Settlement Agreement Between Plaintiffs and Vantec Corporation and Vantec World Transport (USA), Inc., attached as Exhibit C ("Vantec Settlement Agreement").

[2] The Settlement Class is defined in Section III B at p. 12 of this Memorandum.

II. PROCEDURAL HISTORY

A. BACKGROUND

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 as Interim Co-Lead Counsel ("Co-Lead Counsel") (ECF No. 115).[3]

Aware that the Department of Justice had granted conditional amnesty from criminal prosecution to one of the Defendants in this case, Co-Lead Counsel then advised all Defendants that Plaintiffs sought cooperation from the Amnesty Applicant under the Antitrust Criminal Penalty Enhancement and Reform Act of 2004, P.L. 108-237 ("ACPERA"). Because they received no response to their request for ACPERA cooperation, Co-Lead Counsel negotiated with other Defendants who indicated that they would cooperate as part of an early settlement.

After protracted negotiations, Plaintiffs reached a settlement with Defendant Schenker in July 2009. Based in part on information Schenker provided under the settlement, Plaintiffs filed their First Amended Class Action Complaint ("FACAC") on July 21, 2009 (ECF No. 117).[4] The FACAC added seven new claims and twenty-nine new Defendants and, consistent with Plaintiffs' investigation up to the date of that filing, provided specific and additional details of

[3] This appointment should satisfy Rule 23(g)'s requirement that the Court appoint class counsel when certifying a class. If not, Plaintiffs' counsel respectfully requests that the Court re-appoint them.

[4] Shortly after Plaintiffs filed their FACAC on July 21, 2009, Defendant DHL finally came forward and disclosed that its parent company, Deutsche Post AG, and its affiliates (collectively "DHL Defendants") are the Amnesty Applicants in the criminal investigation and prosecutions. Thereafter, the DHL Defendants began providing limited cooperation pursuant to ACPERA.

conspiratorial meetings. Those details included dates, times, places, and participants of meetings, as well as agreements reached at those meetings.[5]

Most Defendants then filed numerous motions to dismiss the FACAC. Plaintiffs filed seventeen briefs in opposition to those motions, and on September 15, 2010, Magistrate Judge Pohorelsky heard arguments on those motions for a full afternoon. While those motions were pending, Plaintiffs advised the Court on October 1, 2010, that six Defendant groups agreed to plead guilty to the federal government's charges against them under 15 U.S.C. § 1 and to pay criminal fines: (1) Schenker AG; (2) BAX Global, Inc. (a Schenker affiliate); (3) EGL, Inc.; (4) Geologistics International Management (Bermuda) Limited; (5) Kühne + Nagel International AG; and (6) Panalpina Worldwide Transport (Holding) Ltd.

On January 4, 2011, Magistrate Judge Pohorelsky issued a Report and Recommendation (ECF No. 468) granting in part and denying in part Defendants' motions to dismiss the FACAC. Magistrate Judge Pohorelsky recommended that Plaintiffs be allowed to replead any dismissed claims. Several Defendants and Plaintiffs timely filed objections to the Report and Recommendation. Plaintiffs have informed the Court that they fully intend to replead their Complaint if granted leave to do so (*e.g.,* ECF Nos. 483, 488, 492, 495). Judge Gleeson's decision on the objections to the Report and Recommendation is pending.

B. THE SETTLEMENT AGREEMENTS

1. The Schenker Settlement Agreement

After extensive arm's length negotiations, Co-Lead Counsel agreed to settle with Schenker for an $8,750,000 payment to the Settlement Class, and for significant cooperation

[5] On October 7, 2010, Plaintiffs filed the Second Amended Class Action Complaint which made only ministerial changes to the First Amended Class Action Complaint necessary to allow Plaintiffs to serve certain foreign Defendants, in conformity with requirements of certain foreign government authorities.

with Plaintiffs in their ongoing prosecution of the case. *See* Bruckner Dec. Ex. A, and C. Lovell Declaration, September 20, 2011, submitted herewith. In return, Plaintiffs agreed to give a general release to the Schenker Defendants. The release does not extend to any other Defendants. Schenker may rescind the settlement in accordance with a separate Supplemental Agreement if a certain threshold of class members exclude themselves from the settlement class. Schenker's cooperation includes its counsel meeting with Co-Lead Counsel for the purpose of providing a detailed proffer of the principal facts previously provided by Schenker to the DOJ. Numerous such discussions have already occurred between Schenker's counsel and Co-Lead Counsel which provided critical information used in drafting the FACAC. Schenker has agreed to produce price announcements, documents or summaries that show revenues of Freight Forwarding Services, and documents produced to the DOJ. Schenker also has agreed to produce any other documents responsive to reasonable requests by Co-Lead Counsel regarding any other issue relevant to the Claims in this case, and to authenticate its documents.

2. The Vantec Settlement Agreement

After hard-fought negotiations, Vantec agreed on April 26, 2011 to pay the Settlement Class $9,900,000 and additional proceeds equivalent to the amounts it receives in *Air Cargo*. *See* Bruckner Dec. and Ex. C thereto. If Vantec's proceeds from the *Air Cargo* settlement are less than $300,000 as of December 31, 2012, Vantec will pay to the Settlement Class $300,000 less the total *Air Cargo* settlement proceeds paid by Vantec at that point. In return, Plaintiffs agreed to give a general release to the Vantec Defendants. The release does not extend to any other Defendants.

Vantec also agreed to cooperate with Plaintiffs by producing documents received from and produced to the Japanese Fair Trade Commission,[6] documents related to price announcements for Freight Forwarding Services, documents showing the amounts of certain surcharges, documents identifying the names and addresses of customers, certain additional electronically stored information, and copies of documents produced to any antitrust regulators in any jurisdiction. Vantec will also authenticate its documents. Vantec's counsel agrees to meet with Co-Lead Counsel to provide information with respect to the documents and the communications or meetings of Defendants relevant to Plaintiffs' claims. Vantec also agreed to provide the opportunity for Co-Lead Counsel to interview up to five employees with knowledge of the facts underlying the Plaintiffs' allegations, and to provide persons to testify at trial.

3. The EGL Settlement Agreement

After extensive negotiations spanning several months, EGL agreed on May 12, 2011 to pay $10 million to the Settlement Class. Additional funds may be paid to the Settlement Class up to a maximum of $10 million, contingent on EGL's recovery of proceeds in connection with its claims in *Air Cargo*. Bruckner Dec. Ex. B, and D. Hedlund Declaration, September 20, 2011, submitted herewith. EGL also agreed to provide substantial cooperation to Plaintiffs, including a detailed description of the principal facts previously provided to the DOJ (by counsel), and by making its employees available for interviews and deposition regarding both the conspiracy and general industry information. EGL has also agreed to provide and authenticate documents, including copies of all documents that EGL produced to the DOJ, price announcements, documents to show EGL's revenues of Freight Forwarding Services, copies of documents produced to the European Commission or any other antitrust or competition regulators, and

[6] As alleged in the FACAC (ECF No. 117) at ¶ 141-56, in March 2009 the Japanese Fair Trade Commission levied $94.7 million in fines against several international Freight Forwarders, including Vantec, for collusive conduct in fixing and raising freight forwarding surcharges.

copies of any other documents responsive to reasonable requests made by Co-Lead Counsel. EGL has further agreed to provide employees for testimony at trial, if necessary. In return, Plaintiffs agreed to give a general release to the EGL Defendants. The release does not extend to any other Defendants. EGL may rescind the settlement in accordance with a separate Supplemental Agreement if a certain threshold of class members exclude themselves from the settlement class.

III. ARGUMENT

A. THE PROPOSED SETTLEMENTS ARE WITHIN THE RANGE OF POSSIBLE APPROVAL

"Compromises of disputed claims are favored by the courts." *Williams v. First Nat'l Bank*, 216 U.S. 582, 595 (1910); *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009) (stating there is a "strong judicial policy in favor of settlements, particularly in the class action context"). In reviewing these proposed settlements, the Court should recognize the "general policy favoring settlement." *In re Air Cargo Shipping Servs. Antitrust Litig.,* No. 06-md-1775, 2009 WL 3077396, at *6 (E.D.N.Y. Sept. 25, 2009) ("*Air Cargo*").

Proposed class-wide settlements must be approved by the court. Fed. R. Civ. P. 23(e) (compromise of class action must be preceded by notice of proposed dismissal or compromise in manner directed by court and by judicial approval). *See generally* 4 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 11.41, at 89 (4th ed. 2002).

Preliminary approval is akin to "a determination that there is what might be termed 'probable cause' to submit the proposal to class members and hold a full-scale hearing as to its fairness." *In re Traffic Exec. Ass'n. E. R.R.s.*, 627 F.2d 631, 634 (2d Cir. 1980). The Court considers both the negotiating process leading up to the settlement and the settlement's terms when deciding whether a settlement is "at least sufficiently fair, reasonable and adequate to

justify notice to those affected and an opportunity to be heard." *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) ("*NASDAQ*").

Preliminary approval should be granted when a proposed settlement: (1) is not illegal, is the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to a class representative or segments of the class, and (2) falls within the range of what possibly may be later found to be fair and reasonable. *NASDAQ*, 176 F.R.D. at 102; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632 ("MANUAL"). Requiring class action settlements to be fair and reasonable protects against collusion by the parties. *See Air Cargo*, 2009 WL 3077396, at *7 (finding Lufthansa settlement "procedurally fair because it was the product of arm's length negotiations between experienced and able counsel"); *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 465, 474 (S.D.N.Y. 1998) ("*NASDAQ II*") ("So long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement"). The opinion of experienced and informed counsel supporting settlement is entitled to considerable weight. *See In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (stating "great weight" is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the underlying litigation).

The proposed Settlements here plainly meet the standards for preliminary approval. The Settlements are the result of arm's length negotiations and do not contain any obvious deficiencies or preferential treatment to anyone in the class. The Settlement Agreements were negotiated over extensive periods, involving numerous conversations and meetings between Co-Lead Counsel and each Settling Defendant after Co-Lead Counsel researched, analyzed, and evaluated a broad array of factual and legal issues. In negotiating with EGL and Vantec, Co-

Lead Counsel also had the benefit of the extensive information provided by Schenker, as well as information provided by DHL, the Amnesty Applicant. Thus, Co-Lead Counsel was well-informed as to the facts of the case and the strengths of the claims asserted when the terms of the Agreements were negotiated. Moreover, Co-Lead Counsel are experienced antitrust class action lawyers, and they strongly recommend approval of the settlements.

In addition to the non-collusive aspects of the Settlements, the Settlements represent a significant recovery for the Class and will substantially aid the prosecution of claims against the remaining Defendants. As Plaintiffs will demonstrate in connection with final approval, the Settlements fall squarely within the range of what can be approved as fair, reasonable, and adequate in light of the case's legal and factual complexities.

In this Circuit, whether a settlement is fair, reasonable and adequate under Rule 23 — the determination the Court will make in deciding *final* approval of the proposed Settlements — 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.[7]

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

Plaintiffs submit that preliminary approval of these proposed Settlements is proper based on their extensive experience, their knowledge of the strengths and weaknesses of this case, their analyses of the likely recovery at trial and after appeals, the risks of litigation, and the *Grinnell* factors. At this preliminary approval stage, however, a full-blown *Grinnell* analysis is not necessary to find these settlements within the range of what may later be found to be reasonable:

> [T]he Court will be in a position to fully evaluate the *Grinnell* factors at the fairness hearing, where it can consider the submissions by proponents and potential opponents of the settlements and the reaction of the Class Members. At this stage of the proceeding, the Court need only find that the proposed settlement fits "within the range of possible approval," *Armstrong*, 616 F.2d at 314, a test that the settlement here easily satisfies. [8]

Even a cursory analysis of the *Grinnell* factors shows that these Settlements should be approved. Antitrust class actions are "notoriously complex, protracted, and bitterly fought," *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989), and continuing this litigation against Settling Defendants would entail a lengthy and expensive legal battle. Settling Defendants would defend themselves vigorously. A jury trial might turn on close questions of proof, many of which would be subject to complicated expert testimony, particularly with regard to damages, making the outcome of such trial uncertain. *See NASDAQ II*, 187 F.R.D. at 475-76 ("Antitrust litigation in general, and class action litigation in particular, is unpredictable."). Even

[8] *In re Prudential Sec. Inc. Ltd. P'ship*, 163 F.R.D. 200, 210 (S.D.N.Y. 1995) (citing *Armstrong v. Bd of Sch. Dir. of Milwaukee*, 616 F.2d 305 (7th Cir. 1980) (*overruled on other grounds, Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998)));*see also Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982) ("The first step in district court review of a class action settlement is a preliminary, pre-notification hearing to determine whether the proposed settlement is 'within the range of possible approval."); *In re AT&T Mobility Wireless Data Serv. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010) (quoting *Armstrong* with approval); *In re State Street Bank & Trust Co. ERISA Litig.*, No. 07-Civ-8488, 2009 WL 3458705, at *1 (S.D.N.Y. Oct. 28, 2009) (stating preliminary approval question is whether settlement is in range of possible approval). The proposed settlements are "at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard." *In re Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984).

after trial concluded, there likely would be lengthy appeals. *See 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); *see also In re IPO Sec. Litig.*, 260 F.R.D. 81, 118-19 (S.D.N.Y. 2009); *Air Cargo*, 2009 WL 3077396, at *9.

Against this background, the substantial benefits afforded here plainly represent a reasonable result for the members of the Settlement Class. Considering the "complexity, expense and likely duration of the litigation," the "risks of establishing liability . . . [and] damages," and the "reasonableness of the settlement fund" in light of all the attendant risks of litigation, Settling Defendants' $28,950,000 million total guaranteed payment, EGL and Vantec's additional Air Cargo settlement proceeds, and the ongoing cooperation, easily bring the Settlement Agreements within the possible range of approval as a "fair, reasonable and adequate" of the Settlement Class' claims.[9]

Moreover, because liability in Sherman Act conspiracy cases is joint and several, these early settlements in no way prejudice the Settlement Class' ability to recover full treble damages

[9] Although a court must also find that the plan for distributing the settlement fund is reasonable, it is appropriate to defer the submission of such a plan until after a court has approved the adequacy of the overall settlement. *See In re Agent Orange Prod. Liab. Litig.*, 818 F.2d 145, 170 (2d Cir. 1987) ("The prime function of the district court in holding a hearing on the fairness of the settlement is to determine that the amount paid is commensurate with the value of the case. This can be done before a distribution scheme has been adopted so long as the distribution scheme does not affect the obligations of the defendants under the settlement agreement. The formulation of the plan in a case such as this is a difficult, time-consuming process."); *NASDAQ II*, 187 F.R.D. at 480 (noting that "it is appropriate, and often prudent, in massive class actions" to defer consideration of the plan of distribution); NEWBERG § 12:35 at 342. Plaintiffs are not proposing a class distribution of the proceeds of these Settlements at this time.

attributable to the entire conspiracy, subject to appropriate set-offs. *Burlington Indus., Inc. v Milliken & Co.*, 690 F.2d 380, 391 (4th Cir. 1982); *see also Zenith Radio Corp v. Hazeltine Research, Inc.*, 401 U.S. 321, 348 (1971) (stating rule requiring appropriate set-offs to prevent double recovery). In addition to not affecting the overall damages, the settlements should hasten and improve the Class's recovery by providing Plaintiffs access to information that might otherwise be obtainable only through protracted discovery. *See In re Ampicillin Antitrust Litig.*, 82 F.R.D. 652, 654 (D.D.C. 1979) (approving settlement where class will "relinquish no part of its potential recovery" due to joint and several liability and where settling defendant's "assistance in the case against [a non-settling defendant] will prove invaluable to plaintiffs").

Settling Defendants' agreement to cooperate represents significant consideration meriting the Settlements' approval. Courts have repeatedly recognized the value of cooperation:

> [F]rom a pragmatic standpoint, the value of . . . willing allies in litigation, as opposed to the specter of hundreds of uncooperative opponents, is significant. The [settling defendants] know far better than the plaintiff classes precisely what occurred in the [relevant] period . . . and their willingness to open their files and aid plaintiffs in amassing evidence against [non-settling defendants] may ease the plaintiffs' discovery burden enormously.

In re IPO Sec. Litig., 226 F.R.D. 186, 198-99 (S.D.N.Y. 2005) (footnote omitted). Settlement consideration requiring cooperation in continuing litigation against non-settling defendants is very valuable. This cooperation here is even more valuable in joint and several liability claims.

Given these risks and the fact that these early, partial settlements are a judicially well-recognized strategic step to assist Plaintiffs in the case against the non-Settling Defendants, the standards for preliminary approval are met in this case.

B. THE COURT SHOULD PRELIMINARILY CERTIFY THE SETTLEMENT CLASS

The Court must determine whether the proposed Settlement Class should be certified for settlement purposes. Under Rule 23, class actions may be certified for settlement purposes only.

See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997); *Plummer v. Chem. Nat'l Bank*, 668 F.2d 654, 658 (2d Cir. 1982). Certification of a settlement class must satisfy each requirement set forth in Rule 23(a), as well as at least one of the separate provisions of Rule 23(b). *Amchem*, 521 U.S. at 613-14; *see also In re Cmty. Bank of N. Va.*, 418 F.3d 277, 299 (3d Cir. 2005) ("[C]ertification of classes for settlement purposes only [is] consistent with Fed. R. Civ. P. 23, provided that the district court engages in a Rule 23(a) and (b) inquiry[.]").

> Plaintiffs seek certification of a Settlement Class consisting of:
>
> All persons (excluding governmental entities, Defendants, their respective parents, subsidiaries and affiliates) who directly purchased Freight Forwarding Services
>
> (a) for shipments within, to, or from the United States, or
>
> (b) purchased or sold in the United States regardless of the location of shipment;
>
> from any of the Defendants or any subsidiary or affiliate thereof, at any time during the period from January 1, 2001 to the date on which a motion for preliminary approval of the Settlements are filed.

This class meets the requirements of Rule 23(a) as well as the requirements of Rule 23(b)(3).

1. The Requirements of Rule 23(a) are Satisfied

a) Numerosity

Fed. R. Civ. P. 23(a)(1) requires that the class be so numerous as to make joinder of its members "impracticable." No magic number satisfies the numerosity requirement, and plaintiffs do not have to allege the precise number or identity of the class members at this stage. *Gross v. Wash. Mut. Bank*, 02 Civ. 4135, 2006 WL 318814, at *2 (E.D.N.Y. Feb. 9, 2006). Courts generally consider the estimated number of parties in the proposed class, the expediency of joinder, and the practicality of multiple lawsuits when determining whether the numerosity requirement is met. *See Mascol v. E&L Transp., Inc.*, 03 Civ. 3343, 2005 WL 1541045, at *3-4 (E.D.N.Y. June 29, 2005). The proposed Settlement Class consists of persons and entities that

purchased Freight Forwarding Services from the Defendants during the period from January 1, 2001 to the Effective Date of the Agreements. There are at least thousands of persons and entities that fall within the Settlement Class definition. Thus, joinder would be impracticable and Rule 23 (a)(1) is satisfied.

b) Common Questions of Law and Fact

Fed. R. Civ. P. 23(a)(2) requires that there be questions of law or fact common to the class. Commonality "does not require an identity of claims or facts among class members; instead, the commonality requirement will be satisfied if the named plaintiffs share at least one question of fact or law with the grievances of the prospective class." *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 451 (S.D.N.Y. 2004) (quoting *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001)); *see also Marisol A. by Forbes v. Giuliani*, 126 F.3d 372, 376 (2d Cir. 1997); *Weil v. Long Island Sav. Bank*, 200 F.R.D. 164, 169 (E.D.N.Y. 2001) ("A single common issue of law will satisfy the commonality requirement."). Because it requires only one common question, Rule 23(a)(2) is generally considered a "'low hurdle' easily surmounted." *In re Prudential Sec. Inc. Ltd. P'ships. Litig.*, 163 F.R.D. 200, 206 n.8. "It is well established that class actions are particularly appropriate for antitrust litigation concerning price-fixing schemes because price-fixing presumably subjects purchasers in the market to common harm." *In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 240 (E.D.N.Y. 1998) ("*Playmobil"*).

A central allegation in the FACAC is that Defendants have engaged in an illegal cartel to fix charges and surcharges for Freight Forwarding Services. Proof of this allegation will be common to all Class members. *See D'Alauro v. GC Servs. Ltd. P'ship*, 168 F.R.D. 451, 456 (E.D.N.Y. 1996) (where question of law involves "standardized conduct of the defendant . . . a common nucleus of operative fact is typically presented and the commonality requirement . . . is

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

- the role of each Defendant in the cartel;
- whether Defendants' conduct violated Section 1 of the Sherman Act;
- whether Defendants affirmatively concealed their agreements;
- whether Defendants' conspiratorial conduct caused the prices of U.S. Freight Forwarding Services to be inflated;
- the appropriate measure of monetary relief, including the appropriate measure of damages; and
- whether Plaintiffs and Class members are entitled to declaratory and/or injunctive relief.

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

c) Typicality

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

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

Plaintiffs here allege a conspiracy to fix, maintain and inflate the price of Freight Forwarding Services for shipments within, to, or from the United States. Plaintiffs will have to prove the same elements that absent Settlement Class members would have to prove, *i.e.*, the existence and effect of such conspiracy. Because the representative Plaintiffs' claims arise out of the same alleged illegal anticompetitive conduct and are based on the same alleged theories and will require the same types of evidence to prove those theories, the typicality requirement of Rule 23(a)(3) is satisfied.

d) Adequacy

Fed. R. Civ. P. 23(a)(4) requires that, in order for a case to proceed as a class action, the court must find that "the representative parties will fairly and adequately protect the interests of the class." Adequacy of representation is measured by two standards. "First, class counsel must be 'qualified, experienced and generally able' to conduct the litigation. Second, the class

members must not have interests that are 'antagonistic' to one another." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992).

Both requirements are satisfied here. Co-Lead Counsel are qualified, experienced, and thoroughly familiar with antitrust class action litigation. *See* June 3, 2009 Order appointing Interim Counsel (ECF No. 115). Co-Lead Counsel have successfully litigated many significant antitrust actions and have prosecuted and will continue to vigorously prosecute this lawsuit.

Moreover, the interests of the settling Class members are adequately protected by representative Plaintiffs and were not in conflict while reaching these Agreements. All Class members share an overriding interest in obtaining the largest possible monetary recovery and as fulsome cooperation as possible. *See Global Crossing*, 225 F.R.D. at 453 (certifying settlement class and finding that "[t]here is no conflict between the class representatives and the other class members. All share the common goal of maximizing recovery."); *In re Corrugated Container Antitrust Litig.*, 643 F.2d 195, 208 (5th Cir. 1981) (certifying settlement class and holding that "so long as all class members are united in asserting a common right, such as achieving the maximum possible recovery for the class, the class interests are not antagonistic for representation purposes."). Representative Plaintiffs are not afforded any special compensation and all Class members similarly share a common interest in obtaining Settling Defendants' early and substantial cooperation in prosecuting the claims against the non-Settling Defendants.

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

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

Once Rule 23(a)'s four prerequisites are met, Plaintiffs must show the proposed Settlement Class satisfies Rule 23(b)(3). *See, e.g.*, *Larsen v. JBC Legal Grp., P.C.*, 235 F.R.D. 191, 196 (E.D.N.Y. 2006). Rule 23(b)(3) requires that common questions of law or fact

predominate over any questions affecting only individual members, and that a class action be superior to other available methods to fairly and efficiently adjudicate the matter. *Barone v. Safway Steel Prods., Inc.*, No. 03 Civ. 4258, 2005 WL 2009882, at *2 (E.D.N.Y. Aug. 23, 2005).

To satisfy the predominance requirement a plaintiff must show "that the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Brown v. Kelly*, 609 F.3d 467, 483 (2d Cir. 2010) (quoting *Cordes & Co. Fin. Servs., Inc. v. A.G. Edwards & Sons, Inc.*, 502 F.3d 91, 107-08 (2d Cir. 2007) (ellipsis original, internal quotation marks omitted)). "[A] claim will meet the predominance requirement when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individualized position." *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. at 307.

> Class-wide issues predominate if resolution of some of the legal or factual questions that qualify each class member's case as a genuine controversy can be achieved through generalized proof, and if these particular issues are more substantial than the issues subject only to individualized proof.

Moore v. Painewebber, Inc., 306 F.3d 1247, 1252 (2d Cir. 2002). Predominance is met "unless it is clear that individual issues will overwhelm the common questions and render the class action valueless". *In re NASDAQ Market-Makers Antitrust Litig.*, 169 F.R.D. 493, 517 (S.D.N.Y. 1996).

In antitrust conspiracy cases such as this one, courts consistently find that common issues of the existence and scope of the conspiracy predominate over individual issues. *In re Foundry Resins Antitrust Litig.*, 242 F.R.D. 393, 408 (S.D. Ohio 2007); *see also In re Catfish Antitrust Litig.*, 826 F. Supp. 1019, 1039 (N.D. Miss. 1993) ("As a rule of thumb, a price fixing antitrust

conspiracy model is generally regarded as well suited for class treatment."). This follows from the central nature of a conspiracy in such cases.

> Clearly, the existence of a conspiracy is the common issue in this case. That issue predominates over issues affecting only individual sellers. Also, a class action is superior to other methods of settling this controversy, due to the relatively small recovery each seller would receive compared to the cost of individually litigating a claim.

Hughes v. Baird & Warner, Inc., No. 76 C 3929, 1980 WL 1894, at *3 (N.D. Ill. Aug. 20, 1980); *see also Amchem*, 521 U.S. at 625 ("Predominance is a test readily met in certain cases alleging consumer or securities fraud or violations of the antitrust laws."); *Playmobil*, 35 F. Supp. 2d at 247 (finding predominance where case involved allegations of "pricing structure to regulate prices . . . to maintain prices at artificially high levels and to hinder price competition"); *In re Buspirone Patent Litig.*, 210 F.R.D. 43, 58 (S.D.N.Y. 2002) (citing *Amchem*) (finding predominance requirement satisfied where "[p]roof of the allegedly monopolistic and anti-competitive conduct at the core of the alleged liability is common to the claims of all the plaintiffs").

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

> (A) the interest of the members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of the class action.

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

Here, any Class member's interest in individually controlling the prosecution of separate claims is outweighed by the efficiency of the class mechanism. Many thousands of entities purchased Freight Forwarding Services during the class period; settling these claims in the

context of a class action would conserve both judicial and private resources and would hasten Class members' recovery. *See Playmobil*, 35 F. Supp. 2d at 249 (certifying a class because "proceeding forward as a class action for liability is superior and would avoid duplication, unnecessary costs and a wasting of judicial resources."). To the best of Interim Counsel's knowledge, no individual actions have been filed regarding an agreement during the Class Period to fix prices for Freight Forwarding Services. Bruckner Dec. ¶ 13. Finally, while Plaintiffs see no management difficulties in this case, this final consideration is not pertinent to approving a settlement class. *See Amchem,* 521 U.S. at 620 ("Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.").

Accordingly, the proposed class action is superior to other available methods (if any) for the fair and efficient adjudication of the controversy relating to Schenker, EGL, and Vantec.

C. UPON THE COURT'S RESOLUTION OF PLAINTIFFS' PENDING MOTION TO OBTAIN NON-SETTLING DEFENDANTS' CUSTOMER CONTACT DATA , PLAINTIFFS WILL PROPOSE A CLASS NOTICE PLAN FOR THE PROPOSED SETTLEMENTS

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

> [T]he court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:
>
> (i) the nature of the action;
>
> (ii) the definition of the class certified;
>
> (iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

Fed. R. Civ. P. 23(c)(2)(B).

Plaintiffs intend to propose a plan of notice which, pursuant to Rule 23(c)(2)(B), will have as a keystone individual direct mail notice to all customers of Defendants – Settling and Non-Settling Defendants alike -- who can be identified through reasonable effort. However, to date none of the Non-Settling Defendants have agreed voluntarily to Plaintiffs' request that they produce customer contact data for class notice purposes. Accordingly, Plaintiffs separately have moved this Court to direct Non-Settling Defendants to provide Plaintiffs' Interim Lead Counsel with their customer contact data, so that notice to the Class of these proposed settlements may proceed.[10]

Use of defendants' customer lists for individual notice is commonplace in antitrust cases. *In re Air Cargo Shipping Serv. Antitrust Litig.*, No. 06-MD-01775 at 1 (E.D.N.Y. Oct. 31, 2007) (ECF No. 646) (order) (requiring production absent undue burden); *see also Air Cargo* at 19-20 (Oct. 16, 2007) (ECF No. 625) (Report And Recommendation) (preliminarily approving settlement and ordering conference regarding non-settling defendants' customer information); *Visa Check/MasterMoney*, No. 96-5238, 2002 WL 31528478 at *2-3 (E.D.N.Y. June 21, 2002) ("For purposes of providing notice, the best way to identify individual merchant class members

[10] Plaintiffs' letter motion to Magistrate Judge Pohorelsky to direct Non-Settling Defendants to produce customer contact data, filed on September 16, 2011 (ECF No. 525)

is . . . through merchant contact information . . . ."); *In re Aftermarket Auto. Lighting Prod. Antitrust Litig.*, No. 09-ML-2007 (C.D. Cal. Aug. 29, 2011) (ECF No. 315-3) (Finegan declaration) (defendants produced class member records); *In re Urethane Antitrust Litig.*, No. 04-MD-01616 at 3 (D. Kan. Apr. 6, 2006) (notice based on defendants' records) (ECF No. 291); *Lazy Oil Co. v. Witco Corp.*, 95 F.Supp.2d 290, 297 (W.D. Pa. 1997) (mailed notice based on defendants' customer lists); *In re Citric Acid Antitrust Litig.*, No. 1092, C-95-2963, 1997 WL 446239, *1 (N.D. Cal. July 24, 1997).

In addition to individual direct mail notice, other material components of Plaintiffs' proposed notice plan (akin to those employed in similar cases) will include: (1) publication of a summary notice in one or more appropriate publications; (2) creation of a Freight Forwarders Antitrust Litigation settlement website which will contain detailed information of the proposed settlements and provide visitors the ability to download or request copies of all relevant notices and forms, and inform visitors how to obtain more information; and (3) creation of an international toll-free telephone number which will inform callers how to obtain more information on the proposed settlements.

These other forms of notice act as a supplement to individual direct mail notice. Therefore, once Plaintiffs' motion that Non-Settling Defendants be directed to provide customer contact data is resolved, and once Plaintiffs can analyze and determine the scope of Defendants' customer contact data, Interim Lead Counsel will craft an appropriate plan of notice and move the Court for its approval.[11]

[11] Plaintiffs also will move the Court to schedule a final fairness hearing at a time that provides class members a reasonable period after receiving notice to consider the proposed settlements. *See* MANUAL § 21.634. At that time, the Court can consider the reasonableness, adequacy, and fairness of the proposed Settlements, and decide whether they should be finally approved by the Court.

IV. CONCLUSION

For these reasons, the Court should preliminarily approve the proposed Settlements and preliminarily certify the Settlement Class.

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Respectfully submitted,

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