UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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

**MEMORANDUM IN SUPPORT OF**
**CO-LEAD COUNSEL'S PETITION FOR A SECOND INTERIM**
**AWARD OF ATTORNEYS' FEES AND REIMBURSEMENT OF EXPENSES**

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## I. INTRODUCTION

Co-Lead Counsel and other Class Counsel (collectively "Class Counsel") submit this memorandum in support of their Petition For A Second Interim Award Of Attorneys' Fees And Reimbursement Of Expenses. Settling Defendants have made (or soon will make) payments pursuant to their settlement agreements yielding a Total Available Settlement Fund of $168,986,724.33, from which no attorneys' fees or litigation expenses have been awarded. Class Counsel now respectfully request the Court to award from those funds a second interim fee award of 25% of that amount, for a total second interim fee award of $42,246,681.08, and further seek an award of unreimbursed litigation expenses totaling $4,046,323.05.

In the more than seven years this case has been pending, Class Counsel have worked tirelessly on behalf of the Class to litigate these complex international claims. As summarized below and described in more detail in the Joint Declaration,[1] Class Counsel:

- Have reached favorable and complete settlements with 27 of the 29 Defendant groups named in the Corrected Third Amended Class Action Complaint ("CTAC");
- Have reached a partial settlement with DHL, one of the two remaining Defendants; and
- Have completely resolved four of Plaintiffs' 11 claims.

The settlements reached to date cumulatively have resulted in a recovery by the Class of approximately $317.6 million. That amount likely will grow as settling Defendants make additional payments due under their settlement agreements. The settlements also have afforded Plaintiffs valuable cooperation that will assist them in prosecuting their claims against the two

[1] References to the "Joint Decl." or "Joint Declaration" are to the Joint Declaration Of Co-Lead Counsel In Support Of Co-Lead Counsel's Petition For A Second Interim Award of Attorneys' Fees And Reimbursement of Expenses, filed herewith.

remaining Defendant families, DHL and Hellmann.

As the Court previously recognized in this case, "[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 Court's observation two years ago remains undoubtedly correct. The Joint Declaration briefly summarizes the motion practice, discovery, depositions, interviews, appearances, conferences, negotiations, settlements, stipulations, and other work Class Counsel have done thus far in this case and for which no fees have yet been recovered. The Joint Declaration's description of those seven-plus years of litigation comprises more than 100 pages. Class Counsel's zealous and extensive work directly resulted in the settlement funds from which Class Counsel now seek this second interim award.

## II. FEES AND EXPENSES REQUESTED

### A. Background Regarding First Interim Fee Award

On December 27, 2013, the Court ordered a first interim award of attorneys' fees, and awarded Class Counsel 15% of the recoveries they had then obtained under settlement agreements with 10 groups of settling Defendants ("First Round Settlements").[2] *See* Electronic Order dated Oct. 3, 2013 (awarding fees and expenses); ECF No. 984 (granting Plaintiffs'

[2] First Round Settlements were reached with Deutsche Bahn AG, Schenker AG, Schenker, Inc., Bax Global Inc. and DB Schenker (collectively, "**Schenker**"); EGL, Inc. and EGL Eagle Global Logistics, LP, Inc. (collectively, "**EGL**"); Vantec Corporation and Vantec World Transport (USA), Inc. (collectively, "**Vantec**"); Expeditors International of Washington, Inc. (**"Expeditors**"); Nishi-Nippon Railroad Co., Ltd. (**"Nishi-Nippon**"); United Aircargo Consolidators, Inc. ("**UAC**"); Kuehne + Nagel International and Kuehne + Nagel, Inc. (collectively, "**Kuehne + Nagel**"); Morrison Express Logistics Pte. Ltd (Singapore) and Morrison Express Corporation (U.S.A.) (collectively, "**Morrison Express**"); UTi Worldwide, Inc. ("**UTi**"); and ABX Logistics Worldwide NV/SA ("**ABX**"). The Court entered final approval as to each. ECF Nos. 879-88.

motion for reconsideration of October 3 order regarding fees and increasing Class Counsel's first interim fee award to 15%). That first interim award used as a lodestar cross-check only those attorneys' fees and expenses accrued directly in obtaining the First Round Settlements; the Court specifically directed Class Counsel not to submit any attorney lodestar or expenses that did not directly relate to the First Round Settlements. The first interim fee award also did not cover any work performed after January 28, 2013.

### B. Additional Payments Made And Refunds Due Under The First Round Settlements

Most of the First Round Settlements required settling Defendants to pay for the benefit of the Class some or all future proceeds they were then and are yet to recover in *In re: Air Cargo Shipping Services Antitrust Litigation*, MDL No. 1775 (E.D.N.Y.) ("*Air Cargo*"). Thus, in addition to the First Round Settlement recoveries on which the Court calculated the first interim fee award, some of those First Round Settlement Defendants now also have received supplemental payments from the second *Air Cargo* distribution, and also have received a third round of *Air Cargo* distributions. Those additional funds, totaling $21,092,361.98 have now been deposited into the First Round Settlement escrow accounts.[3]

In addition, Vantec and Nishi-Nippon will receive refunds totaling $14,729,135.52 from their respective escrowed settlement funds due to the "most favored nation" clauses in their settlement agreements. *See* Joint Decl. ¶ 7 n.1.

### C. Second Round Settlements

Since the First Round Settlements, Plaintiffs have reached, and the Court has preliminarily approved, 11 settlements covering 19 additional corporate families of Defendants[4]

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[3] As this Court is aware, the *Air Cargo* litigation is ongoing.

[4] These settling Defendants are: SDV Logistique Internationale ("**SDV**"); Panalpina World Transport (Holding) Ltd. and Panalpina, Inc. (collectively "**Panalpina**"); Geodis S.A. and

(the "Second Round Settlements"). Those Second Round Settlements provide for cash payments totaling a minimum of $179,623,497.87, nearly all of which has been received and deposited in interest-bearing escrow accounts. *See generally* Joint Decl. ¶ 8. The amount ultimately recovered under the Second Round Settlements will likely exceed that amount as a result of certain settling Defendants' agreement to pay to the Class in this case the proceeds the settling Defendants will receive in *Air Cargo*. Each settlement agreement in the Second Round Settlements includes specified funds reserved to pay the cost of notice to the Class of these

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Geodis Wilson USA, Inc. (collectively "**Geodis**"); 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**"); DSV A/S; DSV Solutions Holding A/S; and DSV Air & Sea Ltd. formerly known as DFDS Transport (HK) Ltd. (collectively "**DSV**"); Toll Global Forwarding (USA), Inc.; Baltrans Logistics, Inc.; and Toll Holdings, Ltd. (collectively "**Toll**"); Agility Holdings, Inc.; Agility Logistics Corp.; Geologistics Corp.; and Geologistics International Management (Bermuda) Limited (collectively "**Agility**"); United Parcel Service, Inc. and UPS Supply Chain Solutions, Inc. (collectively "**UPS**"); Dachser GmbH & Co., KG, doing business as Dachser Intelligent Logistics and Dachser Transport of America, Inc. (collectively "**Dachser**"); Hankyu Hanshin Express Holding Corporation, formerly known as Hankyu Express International Co., Ltd.; its subsidiary, Hankyu Hanshin Express Co., Ltd.; and its U.S. subsidiary, Hanshin Air Cargo USA, Inc. (collectively "**Hankyu Hanshin**"); Japan Aircargo Forwarders Association ("**JAFA**"); Kintetsu World Express, Inc. and its U.S. subsidiary, Kintetsu World Express (U.S.A.), Inc. (collectively "**Kintetsu**"); "K" Line Logistics, Ltd., and its U.S. subsidiary "K" Line Logistics (U.S.A.), Inc. (collectively "**'K Line'**"); MOL Logistics (Japan) Co., Ltd., and its U.S. subsidiary, MOL Logistics (USA) Inc. (collectively "**MOL Logistics**"); Nippon Express Co., Ltd. and its U.S. subsidiary, Nippon Express USA, Inc. (collectively "**Nippon Express**"); Nissin Corporation and its U.S. subsidiary, Nissin International Transport U.S.A., Inc. (collectively "**Nissin**"); Yamato Global Logistics Japan Co., Ltd., and its U.S. affiliate, Yamato Transport U.S.A. Inc. (collectively "**Yamato**"); Yusen Air & Sea Service Co., Ltd. and its U.S. subsidiary, Yusen Air & Sea Service (U.S.A.) Inc. (collectively "**Yusen**"), and with Hankyu Hanshin, JAFA, Kintetsu, "K" Line, MOL Logistics, Nippon Express, Nissin, and Yamato, the "**Japanese Defendants**"); and, for the severed Japanese Claims only, Deutsche Post AG; Danzas Corporation (doing business as DHL Global Forwarding); DHL Express (USA) Inc.; DHL Forwarding Japan K.K.; DHL Japan Inc.; Exel Global Logistics, Inc.; Air Express International USA, Inc. (collectively "**DHL**"). The Court has preliminarily approved each of those settlements. ECF Nos. 894, 1102, 1103, 1124, 1147, and 1189.

The Second Round Settlements are individually summarized in paragraphs 279 through 312 of the Joint Declaration, in Plaintiffs' preliminary approval briefs filed at ECF Nos. 870, 1081, 1096, 1119, 1120, 1140, and 1175, and in the forthcoming final approval brief.

proposed settlements and for other related expenses, and most settlement agreements require the settling Defendant to provide substantial cooperation that will continue to assist Plaintiffs in prosecuting their claims against DHL and Hellmann, the two remaining Defendant groups.

Class Counsel specifically exclude two portions of the Second Round Settlements' $179.6 million guaranteed minimum recovery from this fee petition, and instead reserve the right to seek fees on those portions at an appropriate future time:[5]

First, the settlement agreement with the nine Defendant families named in the Japanese Claims (the "Japanese Defendants") contains a ratchet-down provision providing that, under certain circumstances, up to $10 million of the total $100 payment may be returned to the Japanese Defendants based on any opt-outs from that settlement. Because the opt-outs are not yet known, it cannot currently be determined whether and how much of that $10 million must be refunded to the Japanese Defendants. Accordingly, Class Counsel seek fees based only on the $90 million not subject to refund. At an appropriate time after any ratchet-down has materialized, Class Counsel will seek the Court's award of fees on whatever portion of the $10 million ultimately is not refunded to the Japanese Defendants.

Second, UPS's settlement agreement provides that it will pay 100% of all future *Air Cargo* recoveries, with a minimum payment of $7 million and a cap of $25 million. Because UPS's total payment is for an amount and date not yet certain, and because to date UPS has not

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[5] Although three settling Defendants (Geodis, Jet Speed, and Agility) have not yet deposited all of the funds due under their respective settlement agreements, those three Defendants' remaining payments are for an amount certain and, under the deadlines set by their settlements agreements, will be made before any distributions from the Second Round Settlements can be made to qualified Class members. *See generally* Joint Decl. ¶ 9 and notes 2-4. For those reasons, Class Counsel now seek fees on the full amounts due under the Geodis, Jet Speed, and Agility settlements. If the Court grants Class Counsel's fee petition, Class Counsel will not deduct any fees from either of those Defendants' final payments until such funds are actually paid, in the escrow account, and available for distribution to qualified class member claimants.

paid (and has not been required to pay) anything to the Class under its settlement agreement, at this time Class Counsel are not seeking the Court's award of fees on any amounts to be received in the future under the UPS settlement. Rather, Class Counsel intend to do so at an appropriate time after those funds are deposited in the escrow account.[6]

### D. Calculation Of Total Available Settlement Fund And Requested Fees And Expenses

At this time, Class Counsel request that the Court order a fee award of 25% of the Total Available Settlement Fund, calculated as follows:

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|---|---|
| $21,092,361.98 | New *Air Cargo* proceeds from First Round Settlements |
| - $14,729,135.52 | MFN refund due to Vantec and Nishi-Nippon |
| + $179,623,497.87 | Second Round Settlements' guaranteed payments and *Air Cargo* proceeds received from Second Round Settlements |
| -$7,000,000.00 | UPS guaranteed minimum payment not yet due |
| -$10,000,000.00 | Maximum refund to Japanese Defendants under ratchet-down |
| = $168,986,724.33 | Total Available Settlement Fund |
| x 25% | Fee award percentage requested by Class Counsel |
| = $42,246,681.08 | Total second interim fee award requested |

The Court previously ordered a first interim fee award of 15% of the then-available settlement funds, or $16,853,536.74. Joint Decl. ¶ 5; ECF No. 984. If the Court now awards the second interim fee request of $42,246,681.08, then the aggregate fees awarded thus far in this case of $59,100,217.82 will represent not a multiplier, but a deflator with respect to the value of Class Counsel's time spent from the inception of the case through August 15, 2015. Joint Decl. ¶ 325. Class Counsel will continue to vigorously litigate the case against the two remaining

[6] Although the UPS settlement does not directly affect the amount sought in this fee petition, Class Counsel describe the settlement here to provide the Court with a full and accurate picture of the work performed on behalf of, and the benefit obtained for, the Class.

Defendants to a resolution, through trial, if necessary. If additional settlements are reached or a judgment obtained after trial, the Court can consider then what future fee award to Class Counsel is appropriate, including any overall multiplier for the results achieved.

In addition, Class Counsel request unreimbursed expenses incurred from the inception of the case through August 15, 2015.[7] (To the extent that expenses were incurred in connection with the First Round Settlements, and thus were reimbursed in the first interim award, those expenses are not included in this fee petition.) The unreimbursed expenses for this period total $4,046,323.05 and are set forth in the Joint Declaration at ¶¶ 327-31 and in each of the law firm declarations (Exhibits A-N) and the summaries of unreimbursed expenses (Exhibits P and Q) filed therewith.

## III. ARGUMENT

### A. **The Court Should Award Attorneys' Fees And Expenses Under The Common Fund Doctrine.**

The equitable fund doctrine provides that plaintiffs' attorneys in a class action may petition the court for compensation from any benefits to the class that resulted from counsel's efforts. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The Second Circuit permits either the "percentage of the fund" approach or the lodestar approach when calculating fees in a common fund case. *See, e.g.*, *McDaniel v. Cnty. of Schenectady*, 595 F.3d 411, 419 (2d Cir. 2010) (holding that a district court may, in its discretion, chose either approach). But the "trend in this Circuit is toward the percentage method, which directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir.

[7] As described more fully in the Joint Declaration at ¶ 333 and note 42, expenses paid from the Litigation Fund are described through August 27, 2015. Co-Lead Counsel's contributions to the Litigation Fund therefore are also described, and reimbursement for such contributions is also sought, through that date.

2005) (citation omitted); *accord In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 128 (S.D.N.Y. 2009).

The use of the percentage method dispenses with the "cumbersome, enervating, and often surrealistic process of lodestar computation." *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 50 (2d Cir. 2000) (quotation marks and citations omitted). However, the Court of Appeals recommends considering the hours submitted by counsel as a "cross-check" on the reasonableness of the requested percentage. *Id.* Accordingly, Class Counsel's lodestar in this case and the cross-check it provides are discussed in Sections III.B. and III.D. below.

Regardless of which method of calculation a court uses, the key consideration in awarding fees is what is reasonable under the circumstances. *Goldberger*, 209 F.3d at 47; *see also* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees . . . ."). In addition, the fee award should be based on the entire settlement fund, not a portion of the fund. *See Masters v. Wilhelmina Model Agency, Inc.*, 473 F.3d 423, 437 (2d Cir. 2007) ("The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not.").

An interim award of attorneys' fees and expenses is warranted at this time, even though the litigation continues. Since the Court's first interim award, Class Counsel have continued their tireless litigation efforts. This Court has implicitly recognized the appropriateness of an interim fee based on the settlements achieved up to that point. *See Precision Assocs., Inc. v. Panalpina World Transport (Holding) Ltd.*, No. 08-cv-42 (JG)(VVP), 2013 WL 4525323, at *13-17 (ordering first interim award); *In re Air Cargo Shipping Serv. Litig.*, No. 06-MD-1775 (JG)(VVP), 2011 WL 2909162, at *5-7 (E.D.N.Y. July 15, 2011) ("*Air Cargo 2*"); *In re Air*

*Cargo Shipping Serv. Litig.*, No. 06-MD-1775 (JG)(VVP), 2012 WL 3138596, at *1 (E.D.N.Y. Aug. 2, 2012) ("*Air Cargo* 3"). Now that Class Counsel's continued work has resulted in even greater recoveries for the Class, consideration of another interim fee award is appropriate.

### B. **<u>Co-Lead Counsel Seek A Reasonable Percentage Of The Total Available Settlement Fund.</u>**

In calculating the lodestar cross-check to assess the reasonableness of Class Counsel's current fee request, Class Counsel respectfully submit that the Court should compare the total of all fees awarded in the first petition and fees requested in this second petition, to the lodestar reflecting all work done in this case from inception until August 15, 2015, including work that related to the First Round Settlements and which was covered by the first interim fee award. The Joint Declaration describes the work Class Counsel have performed since the inception of this case through August 15, 2015, because the reasonableness of Class Counsel's current fee request is most appropriately measured over the life of the entire case thus far. All of this work is directly related to Class Counsel's efforts to prove participation by all Defendants in the conspiracies at issue, and to prosecute the claims of a proposed class consisting of purchasers from all settling and non-settling Defendants.

For instance, discovery from one Defendant directly bears on the participation of other Defendants in the same conspiracy. Thus, the documents reviewed, witnesses interviewed, and depositions taken of settling Defendants were all directed toward the goals of negotiating incrementally more favorable settlements with Defendants and proving the liability of non-settling Defendants. *See, e.g., In re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 681 F. Supp. 2d 141, 160-61 (D. Conn. 2009) (evidence found in competitor's files was considered important evidence against another defendant); *In re High Fructose Corn Syrup Antitrust Litig.*, 295 F.3d 651, 662-63 (7th Cir. 2002) (evidence of statements from competitor

employees' documents used to defeat ADM's motion for summary judgment). Indeed, it is for this reason that nearly every settlement agreement in this case to date has required the settling Defendant to provide substantial cooperation to Plaintiffs through discovery and trial.

The work Class Counsel have performed from inception also has been necessary for upcoming class certification proceedings, dispositive motions, and trial. The work performed to date also has cumulatively enabled Co-Lead Counsel to negotiate in an informed manner with any Defendant who was willing to discuss settlement.

For these reasons, it is appropriate for the Court to consider the lodestar amount for all work performed in the case from inception through August 15, 2015 in assessing the reasonableness of the requested fee. *See Air Cargo 2*, 2011 WL 2909162, at *6-7 (awarding 25% and applying a lodestar cross-check based on counsel's "tireless work over the course of four years," *i.e.,* since co-lead counsel was first appointed).

Class Counsel are mindful of this Court's fee decisions in *In re Visa Check/Mastermoney Antitrust Litigation*, 297 F. Supp. 2d 503, 520 (E.D.N.Y. 2003), *aff'd sub nom. Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96 (2d Cir. 2005), in which the Court not only considered the appropriate percentage that should be applied in a "mega-case" such as *Visa Check*, but also scrutinized the multiplier that would result if plaintiffs' counsel's request was granted. *See Visa Check*, 297 F. Supp. 2d at 424-25 & n.33. This Court concluded that a multiplier of almost 10 was not warranted, but a multiplier of 3.5 was reasonable. *See id.* at 522, 524.

The nature of this litigation — a case with relatively small government fines for many Defendants and no fines for others, 68 Defendants from 29 Defendant families, and eleven distinct international conspiracies alleged — make it easily distinguishable from a typical monolithic two-defendant mega-conspiracy such as in *Visa Check*. Unlike *Visa Check*, where

class counsel obtained a $3,383,400,000 settlement (a large fund by any measure) against two defendants for domestic conduct, in this case there are 68 Defendants from 29 Defendant families alleged to have engaged in widespread international conduct, with Class Counsel achieving full or partial settlements as to 28 different corporate families so far. Although the large number of settling Defendants magnifies the total amount of the settlements here, each of the individual settlement agreements is well below megafund amounts. In this case, as discussed in more detail below, the lodestar crosscheck shows that Class Counsel's request for 25% of the Total Available Settlement Fund — which results in a deflator — is very reasonable given the risks, complexities and work involved to prosecute these multiple international conspiracies against many Defendants.

Class Counsel respectfully suggest that, depending on the outcome of this case through future settlements or a favorable judgment at trial, a multiplier could be appropriate. However, that determination should be made after the extent of additional recoveries is quantified and the amount and quality of work is assessed taking into consideration all of the relevant factors. At the present time, it is well within the Court's discretion to award the request of 25%. *See, e. g., Air Cargo 3,* 2012 WL 3138596, at *5 (E.D.N.Y. Aug. 2, 2012) ("*Air Cargo 3*") (granting class counsel's requested interim fee of 25% of the gross amount of the settlement fund when such a request represented a modest 1.11 multiplier); *In re Checking Account Overdraft Litig.*, Case No. 09-MD-02036-JLK, 2011 WL 5873389 at *28 (S.D. Fla. Nov. 22, 2011) (approving fee award of 30% of $410 million settlement fund); *In re Linerboard Antitrust Litig.*, No. MDL 1261, Civ. A. 98-5055, Civ. A. 99-1000, Civ. A. 99-1341, 2004 WL 1221350, at *17 (E.D. Pa. June 2, 2004) (approving fee award of 30% of $202,572,489 fund); *In re Vitamins Antitrust Litig.*, No. Misc. 99-197 (TFH), MDL No. 1285, 2001 WL 34312839, at *10 (D.D.C. July 16, 2001)

(approving fee award of 34.6% of $365 million fund); *see also Visa Check*, 297 F. Supp. 2d at 525 & n.33 (distinguishing large size of $3 billion fund in that case and the size of the multiplier; and stating that if the fund was not as large, "a larger percentage might be appropriate").

**C. Class Counsel's Request Is Consistent With The *Goldberger* Factors.**

"Generally, the factor given the greatest emphasis [when awarding a percentage of a fund] is the size of the fund created, because 'a common fund is itself the measure of success. . . [and] represents the benchmark from which a reasonable fee will be awarded.'" *Manual for Complex Litigation (Fourth)* § 14.121 (2004) (quoting Alba Conte & Herbert B. Newberg, 4 *Newberg on Class Actions* § 14.6, at 547, 550 (4th ed. 2002)). Courts in this Circuit have repeatedly held that "a fee award should be assessed based on scrutiny of the unique circumstances of each case . . . [with] a jealous regard to the rights of those who are interested in the fund." *Goldberger*, 209 F.3d at 53; *see McDaniel*, 595 F.3d at 426. In determining the reasonableness of a fee request, the Court should consider: (1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations. *Goldberger*, 209 F.3d at 50 (citation omitted); *Precision Assocs.*, 2103 WL 4525323, at *14 (applying *Goldberger*). Application of the *Goldberger* factors shows that Class Counsel's request for 25% of the Total Available Settlement Fund is reasonable.

1. The Time And Labor Expended By Counsel Supports The Requested Fee.

The large international scale of this litigation, the sheer number of Defendants, the enormous amount of discovery, and the contentious motion practice have required an intensive effort by Class Counsel. Since the inception of this case, Class Counsel have spent a total of 153,782.18 hours prosecuting the litigation, and to date have received no compensation for 120,722.14 of that time, either because it was performed in service of the litigation as a whole

(and not specifically in connection with the First Round Settlements) and thus was specifically excluded from the Court's first interim award, or because it was performed after January 28, 2013. *See* Joint Decl. ¶ 325.

The Joint Declaration describes the uncompensated work Class Counsel have performed since the case's inception, which is briefly summarized as follows:

- Prepared a First Amended Class Action Complaint consisting of 326 numbered paragraphs containing specific and detailed allegations against Defendants, including names, dates, places and subject matters of conspiratorial meetings and other communications;
- Responded to 18 motions to dismiss the First Amended Complaint and 11 objections on Magistrate Judge Pohorelsky's resulting Report & Recommendation;
- Prepared a Corrected Third Amended Class Action Complaint, comprising 593 numbered paragraphs and additional detailed and specific allegations;
- Responded to 15 motions to dismiss the Corrected Third Amended Complaint (including the 13 initial motions and two later-filed motions by Hellmann and JAFA, respectively), one motion to sever certain claims, and 11 objections on Magistrate Judge Pohorelsky's resulting Report & Recommendation;
- Filed 22 non-ministerial motions (including 12 motions to compel) and 2 objections;
- Made 14 appearances before Magistrate Judge Pohorelsky and 4 appearances before Judge Gleeson;
- Attempted to negotiate a confidentiality order with Defendants concerning confidential material to be produced in discovery and, when Defendants refused to agree, successfully moved the Court for a confidentiality order;
- Participated in lengthy briefing and motion practice to obtain customer lists from non-settling Defendants to assist in providing Class notice;
- Participated in Rule 26(f) conferences, negotiating multiple disputed provisions;
- In addition to the motions described above, responded to a total of 3 pre-motions and submitted briefing in response to 4 motions;

- Reviewed 84,842 Plaintiff documents, and ultimately produced 46,064 of those documents, to Defendants;
- 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;
- Ultimately reviewed 1,062,552 million Defendant documents (including translating and reviewing several documents in Japanese, German, and Italian);
- Engaged in innumerable meetings and conferences with Defendants to obtain and understand Defendants' 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;
- Responded to 20 sets of document requests propounded by Defendants;
- Interviewed 43 witnesses and prepared for and participated in approximately 18 attorney proffers;
- Prepared for and engaged in arms-length settlement negotiations and several mediations that led to the 10 First Round Settlements and the 11 Second Round Settlements;
- Prepared and supervised an extensive program to provide notice to potential claimants of the First Round Settlements and engaged in extensive communications with Class Members relating to the claims-administration process;
- Prepared and supervised an extensive program to provide notice to potential claimants of the Second Round Settlements and engaged in extensive communications with Class Members relating to the claims-administration process;
- Conducted legal research and factual research regarding pertinent issues; and
- Worked with industry and economic consultants and experts to develop pleadings, evaluate transactional data, guide discovery, formulate

settlement strategies, assess damages, and prepare for Plaintiffs' class certification motion.

*See* Joint Decl. generally and ¶ 15 specifically.

2. The Magnitude And Complexities Of The Litigation Support The Requested Fee.

Antitrust class actions "are notoriously complex, protracted, and bitterly fought." *Wesely v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989); *see In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 129 ("antitrust cases are typically complex"). Indeed, as this Court has recognized, this litigation is "irrefutably complex." *Precision Assoc.*, 2013 WL 4525323, at *15. It involves international conspiratorial conduct across the globe with 68 different Defendants, 28 Defendant families, and 11 conspiracies.

Because of the large number of Defendants, the complexity of the legal issues, and the extensive motion practice, this litigation is over seven years old. Indeed, Plaintiffs filed the first complaint in this case in January 2008, but formal discovery in the case was stayed for nearly five years from its initial filing,[8] and the various motions to dismiss were not, for the most part, finally resolved until January 28, 2014.

The Joint Declaration also describes the manner in which the time reported by Class Counsel was scrutinized to eliminate time entries that did not comply with the guidelines set by Co-Lead Counsel. Joint Decl. ¶¶ 319-20.

3. The Risk Of Litigation Supports The Requested Fee.

The risk of litigation is "perhaps the foremost factor to be considered in determining whether to award an enhancement." *Goldberger*, 209 F.3d at 54 (quotation omitted); *accord In*

[8] During the discovery stay, Plaintiffs continued to gather information and evidence that would help them prosecute their claims, including by conducting additional research, monitoring the status of government investigations around the world, and through cooperation received from settling Defendants.

*re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. at 129. The litigation risk "must be measured as of when the case is filed." *Goldberger*, 209 F.3d at 55 (citing *DiFilippo v. Morizio*, 759 F.2d 231, 234 (2d Cir. 1985)). Courts in this Circuit have repeatedly recognized that the risk associated with a case undertaken on a contingent basis is an important factor in determining an appropriate fee award. *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 148 (S.D.N.Y. 2010); *In re NASDAQ Mkt. Makers Antitrust Litig.*, 187 F.R.D. 465, 489 (S.D.N.Y. 1998). And this Court has acknowledged that this action "is obviously risky." *Precision Assoc.*, 2013 WL 4525323, at *15.

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, measurable by reference to prices that would have existed but for the conspiracy. Here, even if Plaintiffs prevail through class certification and other pre-trial proceedings and obtain a judgment of liability, such a judgment could be overturned on appeal. *See, e.g., Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1218-19 (10th Cir. 1996) (overturning plaintiffs' verdict obtained after two decades of litigation); *Backman v. Polaroid Corp.*, 910 F.2d 10, 12 (1st Cir. 1990) (en banc) (reversing plaintiffs' verdict and ordering entry of judgment for defendants).

Moreover, risk must be measured at the outset of the litigation. When Plaintiffs filed their original complaint in January 2008, no government complaints had been filed, and no guilty pleas had been entered. The first fines related to government investigations did not occur until the JFTC issued fines in March 2009, over a year after the inception of the case. And the DOJ did not announce any guilty pleas until 2010 — more than two and one-half years after Plaintiffs' case began. The EC did not impose fines until 2012. As such, the case faced significant initial risks with respect to showing liability. Plaintiffs have also vigorously pursued

claims and alleged conspirators where no DOJ guilty pleas or EC fines exist, all of which have been sustained under Fed. R. Civ. P. 12 (*i.e.*, Count 1: Security Surcharge; Count 9: Ocean AMS; Count 10: Global Agreement).

Plaintiffs have faced, and will continue to face, other risks. All Defendants sought dismissal under one or more provisions of Fed. R. Civ. P. 12, each making multiple of arguments, and often in multiple motions. Plaintiffs have already defeated a total of 33 motions to dismiss under Rules 12(b)(1) and (6).[9]

Even if Plaintiffs succeed on liability at trial and through appeal, remaining Defendant DHL has made clear that, as the amnesty applicant to the Department of Justice, it will seek an order that it is not subject to treble damages or joint and several liability pursuant to the Antitrust Criminal Penalty Enhancement and Reform Act of 2004 ("ACPERA"), Pub. L. No. 108-237, § 213(a)-(b), 118 Stat. 661, 666-668 (June 22, 2004). Plaintiffs will vigorously contest any such motion and argue that DHL's limited cooperation has not earned it ACPERA's benefit, but the question ultimately is for the Court to decide, and a ruling in DHL's favor would significantly reduce Plaintiffs' potential recovery.

Due to the significant international dimension of the case, Plaintiffs have encountered difficulties obtaining necessary discovery, and the collection of any judgments against foreign Defendants would be frustrated.

In addition, Defendants have made clear they intend to argue that Plaintiffs lack standing, that no class can be certified, and that no damages exist because the surcharges and rates at issue would have been passed through to Plaintiffs even absent any conspiracy. Plaintiffs will

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[9] The fact that the remaining Defendants DHL and Hellmann have recently prevailed on much narrower motions, *see* ECF Nos. 1236, 1269, does not detract from Plaintiffs' nearly total success in sustaining their complaint against an onslaught of challenges by these and the other Defendants .

vigorously contest such challenges, as they have each challenge to date, and believe they will prevail on each of those issues, but those arguments also pose risks to any eventual recovery by the Class.

In this instance, the risks Class Counsel undertook in advancing this litigation justify the requested fee. In the seven-and-a-half years Class Counsel have spent litigating this case, they have committed 153,782.18 hours of their time — amounting to over $69.8 million in lodestar — and incurred $4,659,708.89 in expenses, all of which were and are at risk of never being recovered. Joint Decl. ¶¶ 13, 325; Electronic Order dated Oct. 3, 2013 (making first interim expense award of $613,385.84).

4. The Quality Of Counsel's Representation Supports The Requested Fee Award.

As the Court has recognized, Class Counsel in this case "are highly experienced practitioners in complex litigation generally and antitrust litigation specifically." *Precision Assoc.*, 2013 WL 4525323, at *16. Notwithstanding Defendants' ongoing efforts to defeat this case, Co-Lead Counsel has managed to obtain eleven new and substantial settlements — for a total of 21 settlement agreements to date — which in nearly every applicable instance exceeded the fines paid by settling Defendants in the United States,[10] and in many other instances involved settlements with Defendants who were never criminally charged in the United States.[11] Such a recovery is consistent with Co-Lead Counsel's extensive experience successfully litigating antitrust class actions, and supports the fee request. *See* ECF No. 101 (outlining Co-Lead

[10] The only settlement that did not exceed the fines paid to the Department of Justice was the "ice-breaker" settlement with Schenker, which in addition to cash provided extensive and early cooperation. That cooperation enabled Plaintiffs and the Class to survive Defendants' first barrage of motions to dismiss and facilitated future settlements that in many instances far exceeded the settling Defendants' fines paid to the Department of Justice.

[11] The following settling Defendant groups were never charged in the United States: Expeditors, UAC, Morrison Express, UTi, ABX, SDV, DSV, Geodis, Jet Speed, Toll, Dachser, and UPS.

Counsel's extensive experience and success in the class action field).

Similarly, in addition to the collective wealth represented by Defendants themselves, they are represented by top antitrust legal practitioners; the law firms representing Defendants are some of the largest and most skilled law firms in the world. *See* Joint Decl. ¶ 18. Throughout this litigation, Defendants' counsel have worked tirelessly to protect their clients' interests, and Co-Lead Counsel's ability to obtain these significant settlements at this stage of the litigation further underscores the adequacy of the requested fee award. *See In re Merrill Lynch & Co., Inc. Research Reports Sec. Litig.*, 246 F.R.D. 156, 174 (S.D.N.Y. 2007) ("The quality of opposing counsel is also important in evaluating the quality of Class Counsels' work."); *In re NASDAQ Market Makers Antitrust Litig.*, 187 F.R.D. 465, 488 (S.D.N.Y. 1998).

5. The Requested Fee Is Supported By The Size And The Scope Of The Settlement.

The requested fee represents 25% of the Total Available Settlement Fund, which represents a deflator. Class Counsel respectfully suggest the requested award is fair given the extensive effort that was required to achieve these excellent results.

The fee requested is consistent with fee awards in other class action litigations with settlements of this size. *See, e.g., Air Cargo 2*, 2011 WL 2909162, at *6-7 (awarding 25% fee recovery in related antitrust case); *In re Initial Public Offering Sec. Litig.*, 671 F. Supp. 2d 467, 516 (S.D.N.Y. 2009) (awarding one-third fee in a securities fraud case)*; In re Priceline.com, Inc. Sec. Litig.*, 2007 WL 2115592, at *4 (awarding 30% of $80 million settlement); *see also In re Prudential Sec., Inc. Ltd. P'ships Litig.*, 912 F. Supp. 97, 103 (S.D.N.Y. 1996) ("Many courts have approved and awarded fees in class actions of one-third of the settlement fund in recognition of the substantial services performed by counsel and the risks undertaken.").

6. Public Policy Considerations Support the Award of the Requested Fee.

The award of the percentage of fee requested by Class Counsel will encourage the private enforcement of antitrust laws and support attorneys who decide to take such cases on a contingent fee basis. The Supreme Court has held repeatedly that private enforcement of U.S. antitrust laws is essential to effective antitrust enforcement, *e.g., Blue Shield of Va. v. McCready*, 457 U.S. 465, 472 (1982); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969), and a market-rate fee award such as is requested here incentivizes competent, experienced counsel to undertake such high-risk, complex class action litigation. This Circuit has noted that "[i]n the absence of adequate attorneys' fee awards, many antitrust actions would not be commenced, since the claims of individual litigants, when taken separately, often hardly justify the expense of litigation." *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1050 (2d Cir. 1973). In determining whether public policy supports the requested fee request, the court should balance providing lawyers with a "sufficient incentive to bring common fund cases" against preventing an "unwarranted windfall" to counsel. *Air Cargo 2*, 2011 WL 2909162, at *6 (E.D.N.Y. July 15, 2011). In light of the time and effort Co-Lead Counsel have dedicated to this litigation, the requested fee of 25% fairly compensates Co-Lead Counsel, helps to perpetuate the availability of skilled counsel in future antitrust class actions, and does not result in a windfall to counsel.

**D. Co-Lead Counsel's Request For Attorneys' Fees Is Reasonable Under A Lodestar Crosscheck.**

The use of the lodestar crosscheck on the reasonableness of a percentage fee award is encouraged. *Farinella v. Paypal, Inc.*, 611 F. Supp. 2d 250, 269 (E.D.N.Y. 2009). Courts may award fees higher than the lodestar by applying a multiplier based on factors such as the riskiness of litigation. *See In re Nortel Networks Corp. Secs. Litig.*, 539 F.3d at 132 n.4. Courts

commonly award multipliers from two to six times the lodestar. *See Monserrate v. Tequipment, Inc.*, No. 11 CV 6090, 2012 WL 5830557, at *3 (E.D.N.Y. Nov. 16, 2012) (collecting cases).

The total lodestar in this case, from inception, is $69,869,851.59. Joint Decl. ¶ 325. This Court has implicitly recognized that, in long-lasting, hard-fought litigation such as this, it is appropriate to calculate the lodestar cross-check over the duration of the entire case, rather than piecemeal, from interim fee award to interim fee award. *See Air Cargo 2*, 2011 WL 2909162, at *6-7 (making a second interim award of 25% of settlement proceeds and applying a lodestar cross-check period from the appointment of co-lead counsel through the conclusion of counsel's requested cross-check period). A lodestar cross-check against the award Class Counsel seek in this petition yields a deflator, which this Court has deemed reasonable under analogous circumstances. *Air Cargo 2,* 2011 WL 2909162, at *6 (granting an interim attorneys' fee request of 25% where the requested fee was less than the lodestar and thus represented a deflator).

The lodestar in this case is based on rates currently charged by counsel, Joint Decl. ¶ 325, an approach which courts have considered reasonable. *Velez v. Novartis Pharm. Corp.*, 04 CIV 09194 CM, 2010 WL 4877852, at *23 (S.D.N.Y. Nov. 30, 2010) ("The use of current rates to calculate the lodestar figure has been repeatedly endorsed by courts as a means of accounting for the delay in payment inherent in class actions and for inflation. . . .") (citation omitted). These rates are well within the normal range for counsel litigating similar antitrust class actions.

**E. <u>Class Counsel's Request For An Award Of Expenses Incurred Is Reasonable.</u>**

Class Counsel's request for an award of $4,046,323.05 for payment of expenses is reasonable. "Attorneys may be compensated for reasonable out-of-pocket expenses incurred and customarily charged to their clients." *Miltland Raleigh-Durham v. Myers*, 840 F. Supp. 235, 239 (S.D.N.Y. 1993). Within the Second Circuit, courts "normally grant expense requests in common fund cases as a matter of course." *In re Vitamin C Antitrust Litig.*, 2012 WL 5289514,

at *11 (E.D.N.Y. Oct. 23, 2012); *In re Arakis Energy Corp. Sec. Litig.*, No. 95CV3421, 2001 WL 1590512, at *17 n.12 (E.D.N.Y. Oct. 31, 2001). Co-Lead Counsel seek reimbursement of reasonable litigation expenses including economic and industry experts, deposition transcription, class notice and claims administration, data hosting, online legal research, travel expenses, document imaging and copying, and an online document repository. *See* Joint Decl. ¶¶ 327-31. The expenses incurred by Class Counsel were reasonably necessary to advance the interests of the Class and to obtain an excellent result on their behalf. Due to the risk that they might never be recovered, Class Counsel endeavored to keep expenses to a minimum. Accordingly, Class Counsel respectfully request reimbursement of expenses in the amount of $4,046,323.05.[12]

### F. In The Future, Co-Lead Counsel Will Make Subsequent Applications For The Court's Consideration For Fees and Expenses Related To Claims Settlement, Administration, And Processing.

The processing and administration of Class Members' claims for the Second Round Settlements will begin in earnest following the March 31, 2016 deadline to submit claims. The Claims Administrator has mailed direct notice to potential Class members in accordance with the Court-approved notice plan. Class Members have been submitting claims and will continue to do so through the March 31, 2016 deadline. Before payment of such claims can be

[12] In addition to the expenses described here and in greater detail in the Joint Declaration, payments totaling $5,142,299.00 have been made from the settlement escrow accounts for class notice as directed by the Court, related expenses regarding preliminary or final approval, and related bank fees. In addition, invoices related to notice totaling $494,000.00 are outstanding and in the process of review. To the extent appropriate, they will be paid from the settlement escrow accounts. These payments were, or will be, made pursuant to language in each of the Settling Defendant's Settlement Agreements reserving a specific amount of such Settling Defendant's payment that may be used for payment of notice and related costs (and which would be non-refundable to the settling Defendant in the event the settlement was not finally approved), and have already been authorized by the Court. While these payments are not included in the requested reimbursement in this petition, and have already been paid or have been authorized by the Court to be paid from those escrow accounts, we describe those expenditures here to fully describe all litigation-related expenses incurred in this case.

recommended to the Court for its approval, each claim will have to be verified and in some cases audited, to ensure that the Class Member is qualified and that its claimed purchases are allowable.

Expenditures for escrow fees, taxes on the escrowed funds, and preparation of those tax forms, also will be necessary in the foreseeable future. In addition, as described in the long-form Class Notice, *see* ECF No. 1204-6 at 12, at the end of the litigation Co-Lead Counsel intend to ask the Court to allow service awards to the Plaintiffs who have served as Class Representatives.

Accordingly, in the future and as appropriate Co-Lead Counsel will apply to the Court for approval to pay expenses related to the escrow accounts, claims administration and processing, and Class Representative service awards. These items may be considered by the Court in due course before any such expense payments are made.

### G. Class Members Have Received Notice and Will Have an Opportunity to Object.

The Class Notice approved by this Court informed potential Class members that Class Counsel would seek a fee award of up to 33% of the settlement fund, and would also seek reimbursement for expenses. ECF No. 1204-6 at 12. That Notice has been distributed to potential Class members in accordance with the Court's order approving notice. Joint Decl. ¶ 314. Likewise, this fee petition and all papers filed in connection with it will be posted to the settlement website within 24 hours of filing, as directed by the Court. ECF No. 1229. Any objections from Class Members, if any, are to be filed by September 18, 2015. If there are any such objections, Class Counsel will respond before the November 2, 2015 final approval hearing.

## IV. CONCLUSION

For all of the reasons set forth above, Co-Lead Counsel respectfully requests that the Court enter an Order awarding a second interim award of attorneys' fees and expenses as

follows:

(1) Class Counsel is awarded 25% of the Total Available Settlement Fund of $168,986,724.33 as interim attorneys' fees, for a total second interim fee award of $42,246,681.08, to be paid as follows:

a. $40,684,181.08, to be paid immediately from funds currently paid into the Settlement Fund;

b. $250,000.00, to be paid upon Final Approval of the Geodis settlement from the final portion of the settlement proceeds ($1,000,000.00) scheduled to be paid into the Settlement Fund by Geodis at that time;

c. $1,250,000.00, to be paid fifteen days after Final Approval of the Agility settlement, or on January 4, 2016, whichever is later, from the final portion of the settlement proceeds ($5,000,000.00) scheduled to be paid into the Settlement Fund by Agility at that time; and

d. $62,500.00, to be paid on May 8, 2016, from the final portion of the settlement proceeds ($250,000) scheduled to be paid into the Settlement Fund by Jet Speed at that time; and

(2) Class Counsel is awarded $4,046,323.05 as reimbursement for interim litigation expenses.

Dated: September 3, 2015

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