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 PRELIMINARILY APPROVE SETTLEMENT WITH DEFENDANT UNITED AIRCARGO CONSOLIDATORS, INC., AND CONDITIONALLY CERTIFY SETTLEMENT CLASS

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I. INTRODUCTION

Plaintiffs and Defendant United Aircargo Consolidators, Inc., ("UAC" or the "Settling Defendant"), which is one of the smallest freight forwarders named as a Defendant in this action, have agreed upon a settlement to the resolve Plaintiffs' Settlement Class' claims against UAC.[1] UAC has agreed to pay a total of **two hundred ninety five thousand two hundred seventy five dollars ($295,275)** to the Settlement Class.[2] Additionally, UAC has agreed to turn over to the Settlement Class **seventy five percent (75%) of the settlement proceeds** it receives as a claimant in *In Re Air Cargo Shipping Services Antitrust Litigation*, No. 06-MD-1775 (JG) (VVP) (E.D.N.Y.) ("*Air Cargo*") ("*Air Cargo* Proceeds Percentage").[3] Also, UAC, while small, did attend certain meetings with other Defendants and has agreed to provide **important cooperation** to Plaintiffs to assist in the prosecution of the case against the remaining Defendants. Finally, the parties negotiated that there is no termination provision whereby UAC could terminate the settlement if more than a specified amount of Settlement Class members opted out of the Settlement Class.

UAC has represented to Class Counsel that UAC's best good faith estimate of its affected revenue from the alleged conspiracies here is relatively small, $334,211. Because UAC is a small freight forwarder, and based upon Plaintiffs other information, this estimate appears reasonable. UAC was not charged with any wrongdoing by the U.S. Department of Justice

[1] *See* Settlement Agreement Between Plaintiffs and Defendant United Aircargo Consolidators, Inc., August 9, 2012, attached as Exhibit A to the Declaration of Benjamin M. Jaccarino In Support Of Plaintiffs' Motion To Preliminarily Approve Settlement With Defendant United Aircargo Consolidators, Inc., And Conditionally Certify Settlement Class, dated August 29, 2012 ("Jaccarino Dec."), submitted herewith ("UAC Settlement Agreement").

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

[3] However, if the cost to Settling Defendant to file proofs of claim in the Air Cargo Litigation exceeds 25% of the proceeds received from the proofs of claim, Settling Defendant may retain a greater percentage of the proceeds received from the proofs of claim to recoup such excess costs. In no event shall the total reimbursement of costs allowed to Settling Defendant for filing proofs of claim exceed $30,000.

("DOJ"). But UAC is paying the same ratio of cash to its affected revenues as the two Japanese Defendants who were charged by the DOJ with criminal price fixing.

UAC denies Plaintiffs' allegations that it entered into any unlawful agreement or conspiracy and has asserted numerous defenses to Plaintiffs' claims.

Plaintiffs now respectfully submit this memorandum and the accompanying Declarations of Benjamin M. Jaccarino ("Jaccarino Dec.") and Christopher Lovell ("Lovell Dec.") in support of their motion pursuant to Fed. R. Civ. P. 23 for an Order preliminarily approving the Settlement, and conditionally certifying the Settlement Class.

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).[4]

Plaintiffs have previously reached settlements with five other Defendant groups:

(1) Deutsche Bahn AG, Schenker AG, Schenker, Inc., Bax Global Inc., and DB Schenker (collectively, "Schenker");

(2) Vantec Corporation, and Vantec World Transport (USA), Inc. (collectively, "Vantec");

(3) EGL, Inc., and EGL Eagle Global Logistics, LP (collectively, "EGL");

(4) Expeditors International Of Washington, Inc. ("Expeditors"); and

(5) Nishi-Nippon Railroad Co. Ltd., ("Nishi-Nippon").

This Court has preliminarily approved each of the foregoing settlements, and has certified the

[4] 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.

same settlement class for each of those preliminarily approved settlements as is proposed here. ECF No. 530, dated September 23, 2011 (Schenker, Vantec, and EGL), ECF No. 587, dated May 7, 2012 (Expeditors), and ECF No. 604, dated July 9, 2012 (Nishi-Nippon).

Plaintiffs filed their First Amended Class Action Complaint ("FACAC") on July 21, 2009 (ECF No. 117). The FACAC added new claims and new Defendants, alleged dozens of dates, times, places, and participants at conspiratorial meetings or on conspiratorial phone calls or e-mails, and plausibly alleged the unlawful 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 DOJ'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) Kuehne + Nagel International AG; and (6) Panalpina Worldwide Transport (Holding) Ltd.

One year later, Plaintiffs advised the Court on September 29, 2011, that six more Defendants agreed to plead guilty to charges by the DOJ of price-fixing under 15 U.S.C. § 1: (7) Kintetsu World Express, Inc.; (8) Hankyu Hanshin Express Co., Ltd.; (9) Nippon Express Co. Ltd.; (10) Nissin Corporation; (11) Nishi-Nippon Railroad Co. Ltd.; and (12) Vantec Corporation. A thirteenth Defendant, MOL Logistics (Japan) Co. Ltd, subsequently agreed to plead guilty to charges of price-fixing under 15 U.S.C. § 1 brought by the DOJ.

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[5] On October 7, 2010, Plaintiffs filed the Second Amended Class Action Complaint (ECF No. 460), 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.

Again, UAC, which is a Japanese freight forwarder, was not charged by the DOJ. 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 UAC, for collusive conduct in fixing and raising freight forwarding surcharges. The amount of the fine to UAC was 11,520,000 yen (approximately $103,318).

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 had informed the Court that they will replead their Complaint if granted leave to do so (*e.g.*, ECF Nos. 483, 488, 492, 495). On August 13, 2012, this Court adopted the Magistrate Judge Pohorelsky's Report and Recommendation in its entirety, and, as a result, the joint motion to dismiss the complaint was granted in part and denied in part and Plaintiffs were granted leave to replead (ECF No. 628). That amended complaint is now due on October 15, 2012.

B. THE UAC SETTLEMENT AGREEMENT

After extensive arm's length negotiations, UAC and the Plaintiff Class Co-Lead Counsel agreed to settle the Settlement Class' claims against UAC. Jaccarino Dec. ¶¶ 2-5, 7. Pursuant to this settlement, Settling Defendant or its designee has agreed to wire transfer **$295,275** to Plaintiffs' Escrow Agent for deposit into the Settlement Fund in four payments.[6] Within ten Japanese business days of the date of execution Settling Defendant shall wire transfer $100,000 (in United States dollars) to the Escrow Agent. Within ten Japanese business days of the Court's

[6] The Escrow Agent and the Settlement Fund are defined and described in the concurrently filed Settlement Agreement at Sections I B 13 and 34, pp. 6 & 9-10, and II D, pp. 21-23.

approval of Class Notice, Settling Defendant shall wire transfer $65,091.67 (in United States dollars) to the Escrow Agent. Within ten Japanese business days of the date of the Court's Fairness Hearing of this Settlement or, if no such hearing is held, within ten Japanese business days of the Court's order granting Final Approval, Settling Defendant shall wire transfer $65,091.67 (in United States dollars) to the Escrow Agent. Within one year of the date of the Court's Fairness Hearing of this Settlement or, if no such hearing is held, within one year of the Court's order granting Final Approval, Settling Defendant shall wire transfer $65,091.66 (in United States dollars) to the Escrow Agent. Within thirty (30) calendar days of Preliminary Approval of this Settlement, Settling Defendant shall transfer to the Settlement Fund the *Air Cargo* Proceeds Percentage it has already received. After Preliminary Approval but before Final Approval, Settling Defendant agrees to transfer to the Settlement Fund any *Air Cargo* Proceeds Percentage it receives within thirty (30) calendar days of receipt. Within thirty (30) calendar days of Final Approval of this Settlement, Settling Defendant shall notify the trustee/administrator for the distribution of *Air Cargo* Litigation funds to wire transfer to this Settlement Fund the *Air Cargo* Proceeds Percentage due to Settling Defendant from that date forward. UAC Settlement Agreement ¶ II.B.1, pp. 10-12.

Again, given the relatively small amounts at stake, Plaintiffs negotiated the settlement with UAC so as to avoid any terms pursuant to which the failure of Settlement Class members to file proofs of claims or the decision by any Settlement Class members to opt out, could cause a reduction in the aggregate amount of the settlement monies paid to the Settlement Class and, therefore, a reversion of such settlement monies to UAC.

In return, Plaintiffs agree to provide a specified release to UAC and its affiliates. The release does not extend to any other Defendants.

UAC also agreed to cooperate with Plaintiffs by producing documents it received from and produced to the Japanese Fair Trade Commission; providing documents produced to the DOJ and any other antitrust regulators in any jurisdiction concerning Freight Forwarding Services within, to, or from the United States, that are reasonably available and in the possession of Settling Defendant on the Effective Date; producing documents showing the amounts of certain surcharges; producing documents identifying the names and addresses of customers, and certain additional electronically stored information. UAC will also authenticate its documents. UAC's counsel further agreed 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. Finally, UAC agreed to provide the opportunity for Co-Lead Counsel to interview two employees with knowledge of the facts underlying the Plaintiffs' allegations, and to provide persons to testify at trial.

III. ARGUMENT

A. THE PROPOSED SETTLEMENT IS 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 the proposed settlement, 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).

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* 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 Settlement here plainly meets the standards for preliminary approval. The Settlement is the result of arm's length negotiations and does not contain any obvious deficiencies or preferential treatment to anyone in the class. The Settlement Agreement was negotiated after ongoing litigation, and involved numerous conversations between Co-Lead Counsel and counsel for UAC after Co-Lead Counsel researched, analyzed, and evaluated a broad array of factual and legal issues. In negotiating with UAC, Co-Lead Counsel also had the benefit of extensive information provided by Schenker, EGL, Vantec, and Nishi-Nippon as well as some information provided belatedly by DHL, the Amnesty Applicant. Thus, Co-Lead Counsel were well-informed as to the facts of the case and the strengths of the claims asserted when the terms of the Agreements were negotiated. *See* Jaccarino Dec ¶7. Moreover, Co-Lead Counsel are experienced antitrust class action lawyers, and they recommend approval of the Settlement.

Critically, there is joint and several liability here, and other non-settling Defendants are subject to liability for three times any damages UAC caused its customers. Nothing in the UAC Settlement alters this fact, but the cooperation provisions tend to make it more likely that Plaintiffs will obtain a judgment from one of the other Defendants that includes treble damages for UAC's alleged overcharges to its customers. Finally, as Plaintiffs will demonstrate in connection with final approval, the Settlement falls 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 Settlement — 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]

Plaintiffs submit that preliminary approval of this proposed Settlement 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 the settlement to be 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]

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[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'").

[8] *In re Prudential Sec. Inc. Ltd. P'ship Litig.*, 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.*

Even a cursory analysis of the *Grinnell* factors shows that this Settlement 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 UAC would entail a lengthy and expensive legal battle. In the absence of settlement, UAC would continue to defend itself 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 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.

In this context, the benefits of this Settlement provide a reasonable result for the members of the Settlement Class. UAC's payment of **$295,275** and the additional transfer or assignment

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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 settlement is "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).

of **75%** of the *Air Cargo* proceeds[9] will provide a recovery for the Settlement Class. UAC's cooperation will benefit the Class.

Class counsel have considered 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, UAC's ability to pay, and UAC's relatively small amount of allegedly conspiratorial revenues. In Class Counsel's judgment, under these and other *Grinnel* factors, UAC's cooperation and its payment, including from its recovery of *Air Cargo* proceeds, easily brings the Settlement within the possible range of approval as a "fair, reasonable and adequate" resolution of the Settlement Class' claims.[10]

Again, because liability in Sherman Act conspiracy cases is joint and several, this settlement in no way prejudices the Settlement Class's ability to recover complete and treble damages attributable to the entire conspiracy, subject to appropriate set-offs, from non-settling Defendants. *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).

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[9] Subject to the potential minor reduction as described in footnote 3 *supra*.

[10] 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.

Given litigation risks and the fact that this partial settlement is a useful step to assist Plaintiffs in administering all of the settlements in this case to date, 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. 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 August 9, 2012.

UAC Settlement Agreement ¶ II.F.1 (the "Settlement Class"). 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 Settlement Agreement. 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) Commonality

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. at 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) ("*Cardizem II*") ("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 this Agreement. All class members share an overriding interest in obtaining the largest possible monetary recovery from this case. *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, 196-97 (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 in 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. 297, 307 (E.D. Mich. 2001) ("*Cardizem I*").

> 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 also must 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. Jaccarino Dec. ¶ 9. 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, for purposes of settlement, the proposed class action is superior to other available methods (if any) for the fair and efficient adjudication of the controversy relating to UAC.

C. PLAINTIFFS WILL PROPOSE A CLASS NOTICE PLAN FOR THE PROPOSED SETTLEMENT

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 have moved for approval of a notice plan which, pursuant to Rule 23(c)(2)(B), will include individual direct mail notice to customers of Defendants who can be identified through reasonable effort. Other material components of Plaintiffs' proposed notice plan (akin to those employed in similar cases) include: (1) publication of a summary notice in one or more appropriate publications; (2) creation of a Freight Forwarders Antitrust Litigation Settlement website that will contain detailed information about the proposed settlements and provide visitors the ability to download or request copies of all relevant notices and forms, and will 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.[11] Upon preliminary approval of this settlement, Plaintiffs will seek to utilize the same notice plan for this Settlement.

IV. CONCLUSION

The proposed Settlement with UAC will provide fair and reasonable benefits to the Settlement Class. The Settlement is well within the range of reasonableness for resolution of the claims against UAC, and the proposed Settlement Class meets Fed. R. Civ. P. 23's criteria for certification of a settlement class. For these reasons, the Court should preliminarily approve the proposed Settlement and conditionally certify the Settlement Class.

[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.

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Respectfully submitted,

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