

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK**

IN RE

AIR CARGO SHIPPING SERVICES
ANTITRUST LITIGATION

MDL No. 1775

Master File 06-MD-1775 (JG) (VVP)

THIS DOCUMENT RELATES TO:
All Actions

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS'
MOTION FOR PRELIMINARY APPROVAL OF SETTLEMENT
WITH DEFENDANT ASIANA AIRLINES, INC.**

TABLE OF CONTENTS

	<u>PAGE NO.</u>
INTRODUCTION	1
I. BACKGROUND	1
A. The Litigation.....	1
B. Settlement Negotiations	4
C. The Settlement Agreement	5
1. The Settlement Class	5
2. The Settlement Fund	5
3. The Cooperation Provisions	6
(a) Authentication of Documents	6
(b) Witnesses	6
(c) Meetings with Counsel	6
4. The Release	6
5. Rescission Based on Opt-Outs	8
II. ARGUMENT	9
A. The Settlement of Complex Litigation Is Favored	7
B. The Proposed Settlement Exceeds the Standards for Preliminary Approval.....	8
1. The Proposed Settlement Is the Result of Arm’s Length Negotiations Conducted by Highly Experienced Counsel.....	11
2. The Proposed Settlement Falls Within the Range of Possible Approval.....	13
C. The Proposed Settlement Class Should Be Certified Pursuant to Rule 23	14
1. The Proposed Settlement Class Meets the Requirements of Rule 23(a).....	15

a. The Settlement Class Is So Numerous That It Is Impracticable to Bring All Class Members Before the Court.....15

b. Plaintiffs and the Settlement Class Share Common Legal and Factual Questions. 16

c. Plaintiffs’ Claims Are Typical of the Claims of the Members of the Settlement Class. 18

d. Settlement Class Counsel and Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Class. 19

2. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3). 20

 a. Common Questions of Law and Fact Predominate. 20

 b. A Class Action Is the Superior Method to Adjudicate These Claims. 21

D. Notice to the Class 22

III. PRELIMINARY APPROVAL ORDER 24

IV. CONCLUSION..... 25

TABLE OF AUTHORITIES

PAGE NO.

Cases

<i>Amchem Prods. Inc. v. Windsor</i> , 521 U.S. 591 (1997).....	20, 21
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	2
<i>Bano v. Union Carbide Corp.</i> , 273 F.3d 120 (2d Cir. 2001).....	9
<i>Barone v. Safway Steel Prods., Inc.</i> , No. CV-03-4258, 2005 WL 2009882 (E.D.N.Y. Aug. 23, 2005)	20
<i>Bell Atlantic Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	2
<i>Bourlas v. Davis Law Assocs.</i> , 237 F.R.D. 345 (E.D.N.Y. 2006)	9, 11
<i>Carlough v. Amchem Prods., Inc.</i> , 158 F.R.D. 314 (E.D. Pa. 1993).....	22
<i>City of Detroit v. Grinnell Corp.</i> , 495 F.2d 448 (2d Cir. 1974).....	10
<i>Cont'l Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater N.Y.</i> , 198 F.R.D. 41 (E.D.N.Y. 2000).....	20
<i>D'Alauro v. GC Servs. Ltd. P'ship.</i> , 168 F.R.D. 451 (E.D.N.Y. 1996).....	21
<i>Edge v. C. Tech Collections, Inc.</i> , 203 F.R.D. 85 (E.D.N.Y. 2001).....	15
<i>Fox v. Cheminova, Inc.</i> , 213 F.R.D. 113 (E.D.N.Y. 2003).....	19, 22
<i>Gross v. Wash. Mut. Bank, F.A.</i> , No. 02 CV 4135, 2006 WL 318814 (E.D.N.Y. Feb. 9, 2006)	15
<i>In re Air Cargo Shipping Servs. Antitrust Litig.</i> , 240 F.R.D. 56 (E.D.N.Y. 2006).....	12, 19

<i>In re Air Cargo Shipping Servs. Antitrust Litig.</i> , No. 06-md-1775, 2009 WL 3077396 (E.D.N.Y. Sept. 25, 2009).....	8, 11, 12, 13, 19
<i>In re Air Cargo Shipping Servs. Antitrust Litig.</i> , No. 06-md-01775, 2011 WL 2909162 (E.D.N.Y. July 15, 2011)	8, 9, 11, 12
<i>In re Alcoholic Beverages Litig.</i> , 95 F.R.D. 321 (E.D.N.Y. 1982)	18
<i>In re Buspirone Patent Litig.</i> , 210 F.R.D. 43 (S.D.N.Y. 2002)	21
<i>In re Chambers Dev. Sec. Litig.</i> , 912 F. Supp. 822 (W.D. Pa. 1995)	14
<i>In re Currency Conversion Fee Antitrust Litig.</i> , No. 01 MDL 1409, 2006 WL 3247396 (S.D.N.Y. Nov. 8, 2006)	9
<i>In re Currency Conversion Fee Antitrust Litig.</i> , 263 F.R.D. 110 (S.D.N.Y. 2009), <i>aff'd sub nom Priceline.com, Inc. v. Silberman</i> , 405 F. App'x 532 (2d Cir. 2010)	12
<i>In re Drexel Burnham Lambert Group, Inc.</i> , 960 F.2d 285 (2d Cir. 1992)	19
<i>In re Global Crossing Sec. & ERISA Litig.</i> , 225 F.R.D. 436 (S.D.N.Y. 2004)	8, 9, 13, 14, 16, 18, 19
<i>In re Indep. Energy Holdings PLC Sec. Litig.</i> , 210 F.R.D. 476 (S.D.N.Y. 2002)	15
<i>In re Initial Public Offering Sec. Litig.</i> , 260 F.R.D. 81 (S.D.N.Y. 2009)	13
<i>In re Joint E. & S. Dists. Asbestos Litig.</i> , 878 F. Supp. 473 (E.D.N.Y. 1995)	11
<i>In re Medical X-Ray Film Antitrust Litig.</i> , No. CV-93-5904, 1997 WL 33320580 (E.D.N.Y. Dec. 26, 1997)	10
<i>In re MetLife Demutualization Litig.</i> , 229 F.R.D. 369 (E.D.N.Y. 2005)	19

<i>In re Mut. Funds Inv. Litig.</i> , No. 04-md-15861, 2010 WL 2342413 (D. Md. May 19, 2010)	8
<i>In re NASDAQ Mkt. Makers Antitrust Litig.</i> , 176 F.R.D. 99 (S.D.N.Y. 1997)	1, 9, 10, 13
<i>In re NASDAQ Mkt.-Makers Antitrust Litig.</i> , 187 F.R.D. 465 (S.D.N.Y. 1998)	11, 13
<i>In re Nig. Charter Flights Contract Litig.</i> , 233 F.R.D. 297 (E.D.N.Y. 2006)	21
<i>In re PaineWebber Ltd. P'ships Litig.</i> , 171 F.R.D. 104 (S.D.N.Y. 1997)	11
<i>In re Playmobil Antitrust Litig.</i> , 35 F. Supp. 2d 231 (E.D.N.Y. 1998)	18, 21, 22
<i>In re Sterling Foster & Co. Sec. Litig.</i> , 238 F. Supp. 2d 480 (E.D.N.Y. 2002)	11
<i>In re Twinlab Corp. Sec. Litig.</i> , 187 F. Supp. 2d 80 (E.D.N.Y. 2002)	11
<i>In re Visa Check/MasterMoney Antitrust Litig.</i> , 280 F.3d 124 (2d Cir. 2001)	19
<i>In re WorldCom, Inc. Sec. Litig.</i> , 388 F. Supp. 2d 319 (S.D.N.Y. 2005)	23
<i>Johnston v. HBO Film Mgmt., Inc.</i> , 265 F.3d 178 (3d Cir. 2001)	16
<i>Kapps v. Wing</i> , 283 F. Supp. 2d 866 (E.D.N.Y. 2003) (vacated in part on other grounds, 404 F.3d 105 (2d Cir. 2005)	19
<i>Larsen v. JBC Legal Group, P.C.</i> , 235 F.R.D. 191 (E.D.N.Y. 2006)	20
<i>Medicare Beneficiaries' Defense Fund v. Empire Blue Cross Blue Shield</i> , 938 F. Supp. 1131 (E.D.N.Y. 1996)	14
<i>Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.</i> , 237 F.R.D. 26 (E.D.N.Y. 2006)	16, 18

Robidoux v. Celani,
987 F.2d 931 (2d Cir. 1993)..... 15

Wal-Mart Stores, Inc. v. Dukes,
131 S. Ct. 2541 (2011)..... 16

Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.,
396 F.3d 96 (2d Cir. 2005)..... 9, 23

Weinberger v. Kendrick,
698 F.2d 61 (2d Cir. 1982)..... 14

West Virginia v. Chas. Pfizer & Co.,
440 F.2d 1079 (2d Cir. 1971)..... 24

Statutes

Sherman Act, 15 U.S.C. § 1..... 2, 14, 21

Other Authorities

Manual for Complex Litigation (Third) (1995)..... 10

Manual for Complex Litigation (Fourth) (2004) 9, 23

Newberg on Class Actions §§ 8.04, 8.21 (3d ed. 1992) 22

Rules

Federal Rules of Civil Procedure

23..... 22, 23

23(a) 15, 16, 18, 19, 20

23(a)(1) 15

23(a)(2) 16

23(a)(3) 18

23(a)(4) 19

23(b) 20

23(b)(3) 20, 21

23(c) 24

23(c)(2) 23

23(c)(2)(B) 22

23(c)(3) 23

23(e) 1

INTRODUCTION

Plaintiffs have negotiated a settlement with Asiana Airlines, Inc. (“Asiana”) in the amount of \$55 million. In addition, Asiana will pay an additional \$200,000 to be used for notice and administration costs and provide cooperation in the form of authentication of documents, attorney proffers, depositions, interviews and trial testimony related to plaintiffs’ claims against non-settling Defendants.

Plaintiffs seek preliminary approval of this settlement under Federal Rule of Civil Procedure 23(e), because it is an excellent result for the proposed settlement class (the “Settlement Class”). At the preliminary approval stage, the Court only determines if, on its face, the proposed settlement is “at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard” or, put another way, to make sure that the settlement is within the range of possible approval. *In re NASDAQ Mkt. Makers Antitrust Litig.*, 176 F.R.D. 99, 102 (S.D.N.Y. 1997) (“*NASDAQ I*”).

As detailed below, the settlement provides substantial monetary and non-monetary relief to the Settlement Class, and should be preliminarily approved by this Court under Rule 23(e).

I. BACKGROUND

A. The Litigation

This litigation began in early 2006, when Plaintiffs filed over ninety complaints individually and on behalf of various classes of persons and entities who purchased, either directly or indirectly, Airfreight Shipping Services from Asiana and/or the other airfreight carriers named as Defendants. The First Consolidated Amended Complaint filed in February 2007 named more than two dozen Defendant air carriers. Plaintiffs alleged that Defendants conspired to unlawfully fix prices of Airfreight Shipping Services worldwide, including on cargo shipments to, from and within the United States, by, among other things, concertedly levying

agreed-upon, artificially inflated surcharges thereon, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. Additional Defendants were named in Complaints filed on February 12, 2010 and July 26, 2010. *See* Civil Action No. 10-CV-0639, ECF No. 1; Civil Action No. 10-CV-3398, ECF No. 1.

After extensive motion practice directed at the First Consolidated Amended Complaint, on August 21, 2009, the Court adopted the Report and Recommendation of Magistrate Judge Viktor V. Pohorelsky with respect to the dismissal of indirect purchaser claims, dismissal of claims under European law, and the denial of Defendants' motion to dismiss on the grounds that certain Plaintiffs' claims were barred by the Foreign Trade Antitrust Improvements Act of 1982. The Court also ruled that the direct purchaser plaintiffs' Sherman Act claims satisfied the pleading requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

On November 18, 2009, the Court entered a Scheduling Order that established a schedule for discovery, including the production of documents that Defendants had previously produced to the United States Department of Justice ("DOJ") in connection with its investigation of Airfreight Shipping Services. Under the Scheduling Order, Defendants began, for the most part, to produce documents in December 2009. The parties have proceeded with discovery, including the taking of depositions, of which more than 90 have been taken to date. On October 28, 2011, Plaintiffs filed their Motion and Memorandum of Law in Support of Their Motion for Class Certification and Appointment of Class Counsel, as well as expert and other declarations in support thereof. *See* ECF Nos. 1599 -1605 (filed under seal). After extensive briefing and multiple depositions of experts on October 29-31, 2013 an evidentiary hearing was held on class certification before Magistrate Judge Viktor V. Pohorelsky, which included twenty hours of

testimony from four experts, two for plaintiffs and two for defendants. On November 25, 2013, six hours of closing arguments and arguments on plaintiffs' *Daubert* motions were held before Magistrate Judge Pohorelsky. A report and recommendation on class certification and the *Daubert* motions has not yet been issued.

Thus far, the Court has granted final approval to 18 settlements¹ and has preliminarily approved four settlements: Singapore Airlines Ltd. (\$92.5 million) (ECF No. 1980), Cathay

¹ (1) Deutsche Lufthansa AG, Lufthansa Cargo AG, and Swiss International Air Lines Ltd. (collectively "Lufthansa"): \$85 million, plus the cost of providing notice to the class and substantial cooperation (final approval granted September 25, 2009 (ECF No. 963)) (unlike subsequent settlements, which include payments only to direct purchasers, the Lufthansa settlement included payments both to direct and indirect purchasers); (2) Société Air France ("Air France"), Koninklijke Luchtvaart Maatschappij N.V. ("KLM"), and Martinair Holland N.V. ("Martinair") (collectively "Air France/KLM"): \$87 million, plus notice costs up to \$500,000 and substantial cooperation (final approval granted March 14, 2011 (ECF No. 1414)); (3) JAL: \$12 million, plus substantial cooperation (final approval granted March 14, 2011 (ECF No. 1417)); (4) AMR Corporation and American Airlines, Inc. (collectively, "AA"): \$5 million, plus the cost of providing notice to the class and substantial cooperation (final approval granted March 14, 2011 (ECF No. 1413)); (5) Scandinavian Airlines System and SAS Cargo Group A/S (collectively, "SAS"): \$13.93 million, plus notice costs up to \$500,000 and substantial cooperation (final approval granted effective March 17, 2011 (ECF No. 1416)); (6) All Nippon Airways Co., Ltd. ("ANA"): \$10.4 million, plus substantial cooperation (final approval granted July 15, 2011 (ECF No. 1524)); (7) Cargolux Airlines International S.A. ("Cargolux"): \$35.1 million, plus notice costs of up to \$150,000 and substantial cooperation (final approval granted July 15, 2011 (ECF No. 1524)); (8) Thai Airways International Public Company Limited ("Thai"): \$3.5 million plus substantial cooperation (final approval granted July 15, 2011 (ECF No. 1524)); (9) Qantas Airways Limited ("Qantas"): \$26.5 million, plus notice costs of up to \$250,000 and substantial cooperation (final approval granted August 4, 2011 (ECF No. 1524)); (10) LAN Airlines, S.A., LAN Cargo S.A., and Aerolíneas Brasileiras, S.A. ("LAN/ABSA"): \$66 million, plus notice costs up to \$150,000 and substantial cooperation (final approval granted August 2, 2012 (ECF No. 1732)); (11) British Airways PLC ("BA"): \$89.512 million, plus notice costs up to \$500,000 and substantial cooperation (final approval granted August 2, 2012 (ECF No. 1732)); (12) Malaysia Airlines ("Malaysia"): \$3.2 million, plus \$150,000 toward the cost of notice and settlement administration and cooperation (final approval granted August 2, 2012 (ECF No. 1732)); (13) South African Airways ("SAA"): \$3.29 million plus \$150,000 toward the cost of notice and settlement administration and cooperation (final approval granted August 2, 2012 (ECF No. 1732)); (14) Saudi Arabian Airlines, Ltd. ("Saudia"): \$14 million and cooperation (final approval granted August 2, 2012 (ECF No. 1732)); (15) Emirates: \$7.833 million and cooperation (final approval granted August 2, 2012 (ECF No. 1732)); (16) El Al Israel Airlines Ltd. ("El Al"): \$15.8 million and cooperation (final approval granted August 2, 2012 (ECF No. 1732)); (17) Air Canada and AC Cargo LP ("Air Canada"): \$7.5 million and cooperation (final approval granted August 2, 2012 (ECF No. 1732)); and (18) Salvatore Sanfilippo: cooperation (final approval granted August 2, 2012 (ECF No. 1732)).

Pacific Airways, Ltd. (\$65 million) (ECF No. 1992), (Korean Airlines Co., Ltd. (\$115 million) (ECF No. 1979), and China Airlines, Ltd. (\$90 million) (ECF No. 2017).

B. Settlement Negotiations

Plaintiffs and Asiana began settlement discussions in July 2010. *See* Declaration of Robert N. Kaplan in Support of Plaintiffs’ Motion for Preliminary Approval of Settlement With Defendant Asiana Lines, Inc. Sworn to October 10, 2014 (“Kaplan Decl.” ¶ 2). During the period July 2010 through June 2014, the parties had numerous telephone conversations and two face-to-face meetings. At these meetings, the parties discussed in depth Asiana’s financial condition, and its ability to pay. (Kaplan Decl. ¶3)

These meetings were followed by a two-day mediation on November 18 and 20, 2013 before Kenneth R. Feinberg, a well-known mediator, that was attended by an Asiana executive, Plaintiffs’ and Asiana’s counsel and financial consultants for both parties. Prior to the mediation, Asiana transmitted to Plaintiffs’ Counsel Asiana’s financial consultant’s 135 page detailed analysis regarding its ability to pay and provided copies of its financial statements and other materials. Plaintiffs’ counsel and their financial consultants thoroughly vetted these documents. At the mediation, the parties spent one day discussing Asiana’s financial condition. Asiana’s financial consultant made a detailed presentation and Plaintiffs’ consultant analyzed these issues. Despite these efforts, the parties failed to reach a settlement agreement. (Kaplan Decl. ¶3)

However, Mr. Feinberg continued the discussions and in June 2014, Mr. Feinberg made a mediator’s recommendation which was accepted by both parties. On August 7, 2014, the parties entered into a Memorandum of Understanding regarding a possible settlement agreement. (Kaplan Decl. ¶4).

Following additional negotiations regarding the terms of the settlement agreement, Counsel for Plaintiffs and Asiana signed the Settlement Agreement with an execution date of October 10, 2014. (Kaplan Decl. ¶5).

C. The Settlement Agreement

The Settlement Agreement, attached to the Kaplan Declaration as Exhibit A, includes the following material terms:

1. The Settlement Class

The Settlement Agreement defines the Settlement Class as follows:

All persons or entities (but excluding Defendants, their parents, predecessors, successors, subsidiaries, affiliates, as well as government entities) who purchased Airfreight Shipping Services for shipments to, from or within the United States directly from Settling Defendant, any other Defendant, or from any of their parents, predecessors, successors, subsidiaries, or affiliates, at any time during the period from January 1, 2000, up to and including September 11, 2006.

Settlement Agreement ¶ 25.²

2. The Settlement Fund

Pursuant to the terms of the Settlement Agreement, Asiana will pay the Settlement Amount of \$55 million. Asiana will pay \$37.5 million of the Settlement Amount on or before October 31, 2014 and the remaining balance of \$17.5 million on or before April 30, 2015. *Id.* ¶ 36. Asiana is also paying an additional \$200,000 for Notice and Administration costs. Any amount not used for those purposes, shall be added to the Settlement Fund. ¶ 38.

² As defined in the Settlement Agreement, the term “Defendant” means any party named as a defendant in the First Consolidated Amended Complaint or otherwise named as a defendant in the action up to and including as of the Preliminary Approval Date. *See* Settlement Agreement ¶ 7.

3. The Cooperation Provisions

Asiana has agreed to provide cooperation to the Settlement Class that will aid in the prosecution of antitrust claims against the remaining Defendants. The full extent of this cooperation, set forth in more detail in Paragraphs 48 through 54 of the Settlement Agreement, can be summarized as follows:

(a) Authentication of Documents

Asiana has agreed to produce, through affidavits or declarations, or, if necessary, through deposition or testimony at trial, representatives qualified to authenticate such documents and information, and, to the extent possible, provide confirmation that such documents and information are business records, Settlement Agreement. ¶ 50.

(b) Witnesses

Asiana has agreed to use all reasonable efforts to make available a total of four (4) current or former directors, officers, or employees of Asiana for interviews, deposition and testimony. *Id.* ¶ 52.

(c) Meetings with Counsel

Asiana has agreed to make its counsel available for up to three meetings with Settlement Class Counsel to provide information concerning documents, witnesses, meetings, communications and events not covered by privilege or other protections available under any applicable United States law, relevant to the action. *Id.* ¶ 51.

4. The Release

Asiana will receive a release for all claims related to any conduct prior to the Effective Date concerning the direct purchase from settling Defendant or any other Defendant of Airfreight Shipping Services to, from or within the United States or concerning the pricing, selling, discounting, or marketing of Airfreight Shipping services to, from or within the United

States.³ *Id.* ¶ 33. However, there is no release of any claims (a) made with respect to any indirect purchase of Airfreight Shipping Services; and/or (b) for negligence, breach of contract, bailment, failure to deliver, lost goods, damaged or delayed goods or similar claim between any of the Released Parties and any of the Releasing Parties relating to Airfreight Shipping Services. *Id.*

5. Rescission Based on Opt-Outs

The Settlement Agreement permits Asiana to rescind the agreement based upon the level of opt-outs, but unlike some prior settlements does not provide for any reduction of the Settlement Amount based on opt-outs. Specifically, if the dollar amount of purchases by Class members who elect to opt-out of the Settlement Class exceeds a threshold amount set forth in a separate side letter agreement by the parties, Asiana has the option to rescind the agreement. *Id.* ¶ 45. Within ten (10) business days after the day set by the Court as the date by which Settlement Class members must elect whether to remain in the Settlement Class or opt out, Plaintiffs will provide Asiana with a list of all potential Settlement Class members who have opted out. *Id.* ¶ 45(a). Within ten (10) business days thereafter, Asiana will provide Plaintiffs with Asiana's sales to each Opt-Out Plaintiff (the "Opt-Out Sales"), the total amount of Opt-Out Sales, and a calculation of the percentage of the Opt-Out Plaintiff's purchases in relation to the purchases of the Settlement Class as a whole from Asiana (the "Opt-Out Ratio"). *Id.* ¶ 45(b). If the Opt-Out Ratio equals or exceeds the amount agreed to separately by the parties, then Asiana will have the right and option, within ten (10) business days after the date the Opt-Out Ratio is provided or within ten (10) business days after resolution of any dispute as to the Opt-Out Sales or Opt-Out

³ The full language of the release provisions is found at ¶¶ 33-35 of the Settlement Agreement.

Ratio, to rescind the Settlement Agreement.⁴ Id. ¶ 45(d). Asiana will not be obligated to rescind the Settlement Agreement, but will first be obligated to discuss with Plaintiffs in good faith whether the Settlement Agreement can be re-negotiated rather than rescinded. Id.

II. ARGUMENT

A. The Settlement of Complex Litigation Is Favored

Plaintiffs and Asiana have reached an agreement that maximizes Plaintiffs' recovery and provides cooperation from Asiana in the prosecution of Plaintiffs' claims against the non-settling Defendants. Having negotiated for a cash payment from Asiana that is substantial, as well as significant other benefits, Plaintiffs have avoided the potential risks inherent in complex antitrust class action litigation and secured a favorable settlement for the Settlement Class. Reaching such a positive result at this stage in the litigation only enhances the attractiveness of this settlement. See *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) ("[F]ederal courts favor settlement, especially in complex and large-scale disputes, so as to encourage compromise and conserve judicial and private resources."). While reviewing this proposed settlement, the Court should be mindful of the "general public 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) (approving the Lufthansa settlement); see also *In re*

⁴ The Opt-Out Ratio is reflected in a confidential letter between the parties and can be made available to the Court if requested. See *In re Mut. Funds Inv. Litig.*, No.04-md-15861, 2010 WL 2342413 (D.Md. May 19, 2010) (side letter reflecting terms of opt-out rescission agreement). The percentage amount of purchases represented by Opt-Out Plaintiffs that triggers the right of the parties to rescind the agreement is often referred to as a "blow percentage." The exact blow percentage is not relevant to Class members' decisions as to whether to remain in or exclude themselves from the Settlement Class. Rather, what is relevant is the amount being paid, the cooperation terms, the release terms, and the fact that the sales by Asiana remain in the case. Moreover, this Court has granted both preliminary and final approval to prior settlements that had been accompanied by a confidential side letter reflecting the terms of an opt-out recession agreement by the parties. See e.g., *Cargolux Prel. App. Order* (ECF No. 1362); *Cargolux Final App. Order* (ECF No. 1524); *El Al Prel. App. Order* (ECF No. 1630); *El Al Final App. Order* (ECF No.1732); *Cathay Pacific Prel. App. Order* (ECF No.1992).

Air Cargo Shipping Servs. Antitrust Litig., No. 06-md-1775, 2011 WL 2909162, at *3 (E.D.N.Y. July 15, 2011); Report & Recommendation (ECF No. 625) (the “Lufthansa Prel. App. R&R”), at 14; *Bourlas v. Davis Law Assocs.*, 237 F.R.D. 345, 354-55 (E.D.N.Y. 2006) (noting that class actions are amenable to settlement “because of the difficulties of proof, the uncertainties of the outcome, and the typical length of the litigation”); *Bano v. Union Carbide Corp.*, 273 F.3d 120, 129-30 (2d Cir. 2001).

B. The Proposed Settlement Exceeds the Standards for Preliminary Approval

When parties to a class action seek to settle, they must proceed before the court in two steps – first, they must seek preliminary approval of the proposed settlement as well as certification of the proposed settlement class and then, should such preliminary approval and class certification be granted, they must provide notice to the settlement class and appear at a fairness hearing after which the court may grant final approval to the settlement. *See Manual For Complex Litigation* (Fourth) § 21.63 (2004); *NASDAQ I*, 176 F.R.D. at 102. Because the first step of this process is only “preliminary,” the standards for preliminary approval are less exacting than those applied for final approval. “[A] court must determine whether the terms of the proposed settlement warrant preliminary approval. In other words, the court must make ‘a preliminary evaluation’ as to whether the settlement is fair, reasonable and adequate.” *In re Currency Conversion Fee Antitrust Litig.*, No. 01 MDL 1409, 2006 WL 3247396, at *5 (S.D.N.Y. Nov. 8, 2006) (citation omitted); *see also Wal-Mart Stores, Inc. v. Visa U.S.A. Inc.*, 396 F.3d 96, 116 (2d Cir. 2005). Preliminary approval of a proposed settlement is granted so long as the settlement was arrived at through a fair process and the terms of the settlement are within the “range of possible approval.” *NASDAQ I*, 176 F.R.D. at 102 (emphasis added).

In conducting this inquiry, a court considers both the negotiating process leading up to the settlement and the settlement’s substantive terms. *Global Crossing*, 225 F.R.D. at 455. A

court determines whether the settlement is “at least sufficiently fair, reasonable and adequate to justify notice to those affected and an opportunity to be heard.” *NASDAQ I*, 176 F.R.D. at 102 (citations omitted). Preliminary approval should be granted “if the settlement is the result of serious, informed and non-collusive negotiations and the proposed settlement has no obvious deficiencies, such as giving preferential treatment to class representatives, or granting excessive attorneys’ fees.” *In re Medical X-Ray Film Antitrust Litig.*, No. CV-93-5904, 1997 WL 33320580, at *6 (E.D.N.Y. Dec. 26, 1997) (citing *NASDAQ I*, 176 F.R.D. 99, and *Manual for Complex Litigation* (Third) § 30.14 (1995)). In considering preliminary approval, the sole issue is whether the proposed settlement falls within the range of possible approval. *NASDAQ I*, 176 F.R.D. at 102.

The negotiations here were conducted by experienced counsel on both sides at arm’s length and lasted over one year. The details are set forth above and in the Kaplan Decl.

Plaintiffs’ counsel were well-informed of the material facts and the negotiations were non-collusive. (Kaplan Decl. ¶¶ 5, 6). Furthermore, the cooperation to be provided in addition to the substantial cash payment makes this settlement fall well within the range of possible approval. Based upon these facts, preliminary approval is warranted and, as will be demonstrated in detail at the final fairness hearing, this settlement is a “fair, reasonable, and adequate” settlement of the class claims. *See City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).⁵

⁵ There are nine relevant factors that courts consider in evaluating a settlement’s substantive terms at the time of final approval: (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; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation.” *Grinnell*, 495 F.2d at 463. As the Court has recognized, there is little to be gained by

1. The Proposed Settlement Is the Result of Arm's Length Negotiations Conducted by Highly Experienced Counsel.

The process that led to this proposed settlement was fairly conducted by highly-qualified counsel who sought to obtain the best possible result for their clients and the Settlement Class. When counsel engage in a lengthy arm's-length negotiation that results in a settlement, courts find that the settlement is entitled to a presumption of fairness. *See In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *7 (finding Lufthansa settlement "procedurally fair because it was the product of arm's length negotiations between experienced and capable counsel"); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, 2011 WL 2909162, at *4; *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."); *In re Sterling Foster & Co. Sec. Litig.*, 238 F. Supp. 2d 480, 484 (E.D.N.Y. 2002); *In re Twinlab Corp. Sec. Litig.*, 187 F. Supp. 2d 80, 83 (E.D.N.Y. 2002); *In re Joint E. & S. Dists. Asbestos Litig.*, 878 F. Supp. 473, 567 (E.D.N.Y. 1995). Furthermore, when the settlement that results from such negotiations is being championed by experienced and informed counsel, courts afford counsel's opinion considerable weight because they are closest to the facts and risks associated with the litigation itself. *See In re Joint E.*, 878 F. Supp. at 567 ("A substantial factor in determining the fairness of a settlement is the opinion of counsel involved in the settlement.") (citations omitted); *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997) (stating that "great weight" is accorded to the recommendations of counsel, who are most closely acquainted with the facts of the

applying the *Grinnell* factors at the preliminary approval stage. *See Bourlas*, 237 F.R.D. at 356 n.7 ("[I]t is apparent that several of the *Grinnell* factors themselves were designed for application at a later stage in the class settlement approval process."). As a result, they are discussed herein only when they provide a useful guide to assess the settlement's fairness at this stage.

underlying litigation). The process that led to this settlement confirms that the initial presumption of fairness is correct.

Giving further support, this Settlement was reached only after a lengthy process that involved two formal mediation sessions with Mr. Feinberg, an experienced mediator, and the settlement was the result of a mediator's recommendations. *See In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122 (S.D.N.Y. 2009) (settlement reached after mediation is entitled to a presumption of arms-length dealings and fairness), *aff'd sub nom Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010).

The Court has found that counsel are highly capable and have the requisite qualifications and experience to handle this litigation. *See Lufthansa Prel. App. R&R*, at 8-9; *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. 56, 57 (E.D.N.Y. 2006); *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2011 WL 2909162, at *6; *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *7. In this case, the Settlement was negotiated over a period of more than one year in in-person meetings, telephone conferences, email exchanges, and a two-day mediation session. *See Kaplan Decl.* ¶ 3. The discussions were meaningful and informed as Settlement Class Counsel took steps to ensure that they had all of the necessary information to advocate for a fair settlement that served the best interests of the Settlement Class (*Kaplan Decl.* ¶¶3, 6). Counsel analyzed and evaluated many contested legal and factual issues posed by the litigation so that adequate demands and accurate evaluation of Asiana's position could be made. Asiana's assertions with regard to its financial position were evaluated with the assistance of a financial consultant retained by Settlement Class Counsel. *See id.*; *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *7 (discussing negotiation process arriving at Lufthansa settlement). Thus, Co-Lead Counsel were well-informed of the

facts of the case and the strength of the claims asserted when the terms of the Settlement Agreement were negotiated. *See Global Crossing*, 225 F.R.D. at 458.

2. The Proposed Settlement Falls Within the Range of Possible Approval.

To preliminarily approve this settlement, the court must decide that the proposed settlement falls within the range of settlement that could *possibly* be approved as “fair, adequate and reasonable.” *NASDAQ I*, 176 F.R.D. at 102. The settlement here contains both a cash payment and non-cash benefits that will ultimately enhance Plaintiffs’ chances of recovery from the remaining non-settling Defendants. These benefits have been obtained at a stage in the litigation where the non-monetary benefits will be helpful and have avoided much of the risk that is inherent in litigating complex antitrust cases. *See In re Initial Public Offering Sec. Litig.*, 260 F.R.D. 81, 118 (S.D.N.Y. 2009); *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *9. Under these circumstances and considering these benefits, the proposed settlement not only falls well within the range of possible approval but also represents an excellent result for members of the Settlement Class.

Continuing this litigation against Asiana would entail a lengthy and highly expensive legal battle, involving complex legal and factual issues where motions would be vigorously contested. Evidentiary issues are complicated by the unique issues that attend discovery against foreign parties. And, at trial, Asiana would have asserted defenses making the ultimate outcome uncertain for both parties because it would turn on questions of proof, many of which would be the subject of complicated expert opinions, particularly with regard to damages.⁶ *See NASDAQ II*, 187 F.R.D. at 475-76. Given this uncertainty, “[a] very large bird in the hand in this litigation

⁶ Because Co-Lead Counsel will likely have to litigate against the other Defendants through trial and appeal, their duties to the Class preclude a full discussion of their potential litigation risks.

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). Furthermore, because liability under the Sherman Act is joint and several and Asiana’s sales remain in the case, this settlement in no way prejudices the Class’s ability to recover its full treble damages caused by the alleged conspiracy.

Based upon the foregoing, the Settlement Agreement is well within the possible range of approval as a “fair, reasonable, and adequate” settlement of the Settlement Class’s claims. *See Grinnell*, 495 F.2d at 463.

C. The Proposed Settlement Class Should Be Certified Pursuant to Rule 23

The Second Circuit has long acknowledged the propriety of certifying a class solely for purposes of settlement. *See Lufthansa Prel. App. R&R*, at 2-3; *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982); *Global Crossing*, 225 F.R.D. at 451. A court may grant certification where, as here, the proposed settlement class satisfies the four prerequisites of Rule 23(a) (numerosity, commonality, typicality and adequacy), as well as one of the three subsections of Rule 23(b). *See Lufthansa Prel. App. R&R*, at 3; *see also Weinberger*, 698 F.2d at 73; *Medicare Beneficiaries’ Defense Fund v. Empire Blue Cross Blue Shield*, 938 F. Supp. 1131, 1140 (E.D.N.Y. 1996). Here, Plaintiffs seek certification of the following Settlement Class:

All persons or entities (but excluding Defendants, their parents, predecessors, successors, subsidiaries, affiliates, as well as government entities) who purchased Airfreight Shipping Services for shipments to, from or within the United States directly from Settling Defendant, any other Defendant, or from any of their parents, predecessors, successors, subsidiaries, or affiliates, at any time during the period from January 1, 2000, up to and including September 11, 2006.

Settlement Agreement ¶ 25. This Court previously certified a broader Settlement Class that also included indirect purchasers when it preliminarily and then finally approved the Lufthansa settlement. *See Lufthansa Prel. App. R&R*, at 3-13. Moreover, the Court has granted final

approval of seventeen other airline defendants, all of which have Settlement Classes identical to the Asiana Settlement Class. The factual and legal support for certification of the Lufthansa settlement class and the settlement classes for the other settlements apply equally here, as set forth below.²

1. The Proposed Settlement Class Meets the Requirements of Rule 23(a)

a. The Settlement Class Is So Numerous That It Is Impracticable to Bring All Class Members Before the Court

First, Rule 23(a) requires that the class be so numerous that joinder of all members would be “impracticable.” Fed. R. Civ. P. 23(a)(1); *see also Edge v. C. Tech Collections, Inc.*, 203 F.R.D. 85, 89 (E.D.N.Y. 2001). While no magic number exists for satisfying the numerosity requirement, and Plaintiffs are not required to allege the exact number or identity of class members, “[c]ourts in this circuit generally ‘find a class sufficiently numerous when it comprises forty or more members.’” Lufthansa Prel. App. R&R, at 5 (quoting *In re Indep. Energy Holdings PLC Sec. Litig.*, 210 F.R.D. 476, 479 (S.D.N.Y. 2002)); *see also Gross v. Wash. Mut. Bank, F.A.*, No. 02 CV 4135, 2006 WL 318814, at *2 (E.D.N.Y. Feb. 9, 2006) (citing *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993)).

Here, the proposed Settlement Class consists of persons and entities who directly purchased Airfreight Shipping Services to, from, or within the United States from the Defendants

² See Air France/KLM Prel. App. Order ¶ 3 (ECF No. 1254) (same class certified); JAL Prel. App. Order ¶ 3 (ECF No. 1255) (same); AA Prel. App. Order ¶ 3 (ECF No. 1256) (same); SAS Prel. App. Order ¶ 3 (ECF No. 1291) (same); Cargolux Prel. App. Order ¶ 3 (ECF No. 1362) (same); ANA Prel. App. Order ¶ 3 (ECF No. 1363) (same); Qantas Prel. App. Order, ¶ 3 (ECF No. 1381) (same); Thai Prel. App. Order, ¶ 3 (ECF No. 1418) (same); LAN/ABSA Prel. App. Order, ¶ 3 (ECF No. 1568) (same); BA Prel. App. Order, ¶ 3 (ECF No. 1569) (same); Malaysia Prel. App. Order, ¶ 3 (ECF No. 1570) (same); SAA Prel. App. Order, ¶ 3 (ECF No. 1571) (same); Saudia Prel. App. Order, ¶ 3 (ECF No. 1572) (same); Emirates Prel. App. Order, ¶ 3 (ECF No. 1622) (same); El Al Prel. App. Order, ¶ 3 (ECF No. 1630) (same); Air Canada Prel. App. Order, ¶ 3 (ECF No. 1652); Sanfilippo Prel. App. Order, ¶ 3 (same); Korean Air Prel. App. Order, ¶ 3 (ECF No. 1979) (same); Singapore Prel. App. Order, ¶ 3 (ECF No. 1980) (same); Cathay Prel. App. Order, ¶ 3 (ECF No. 1992) (same); and China Air Prel. App. Order ¶ 3 (ECF No. 2017) (same).

during the period from January 1, 2000 to September 11, 2006. Based on the thousands of persons and entities that fall within the Settlement Class definition and the fact that joinder of these persons is impracticable, the numerosity requirement is satisfied here.⁸

b. Plaintiffs and the Settlement Class Share Common Legal and Factual Questions.

Second, Rule 23(a) requires the existence of questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2); *see also* Lufthansa Prel. App. R&R, at 6; *Reade-Alvarez v. Eltman, Eltman & Cooper, P.C.*, 237 F.R.D. 26, 31 (E.D.N.Y. 2006). Questions are common to the class if class members' claims "depend upon a common contention" that is "of such a nature that it is capable of class wide resolution – which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). The commonality element "may be found when 'injuries derive from a unitary course of conduct by a single system.'" Lufthansa Prel. App. R&R, at 6 (quoting *Reade-Alvarez*, 237 F.R.D. at 32). The commonality element "does not require an identity of claims or facts among class members; instead, [t]he 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." *Global Crossing*, 225 F.R.D. at 451 (quoting *Johnston v. HBO Film Mgmt., Inc.*, 265 F.3d 178, 184 (3d Cir. 2001)).

⁸ *See generally* Lufthansa Prel. App. R&R, at 6; Air France/KLM Prel. App. Order ¶ 4 (same class certified); JAL Prel. App. Order ¶ 4 (same); AA Prel. App. Order ¶ 4 (same); SAS Prel. App. Order ¶ 4 (same); Cargolux Prel. App. Order ¶ 4 (same); ANA Prel. App. Order ¶ 4 (same); Qantas Prel. App. Order ¶ 4 (same); Thai Prel. App. Order, ¶ 4 (same); LAN/ABSA Prel. App. Order, ¶ 4 (same); BA Prel. App. Order, ¶ 4 (same); Malaysia Prel. App. Order, ¶ 4 (same); SAA Prel. App. Order, ¶ 4 (same); Saudia Prel. App. Order, ¶ 4 (same); Emirates Prel. App. Order, ¶ 4 (same); El Al Prel. App. Order, ¶ 4 (same); Air Canada Prel. App. Order, ¶ 4; Sanfilippo Prel. App. Order, ¶ 4 (same); Korean Air Prel. App. Order, ¶ 4 (same); Singapore Prel. App. Order, ¶ 4 (same); Cathay Prel. App. Order, ¶ 4 (same); and China Air Prel. App. Order ¶ 4 (same).

Here, Plaintiffs' allegations raise questions of law and fact common to the proposed Class, including, for example:

- (i) Whether Defendants engaged in a combination or conspiracy to fix, raise, maintain, and/or stabilize prices of Airfreight Shipping Services for shipments to, from, or within the United States;
- (ii) The duration of the conspiracy and the nature and character of the acts performed by Defendants in furtherance of the conspiracy;
- (iii) The effect of Defendants' alleged conspiracy on the price of Airfreight Shipping Services, and whether the alleged conspiracy caused injury to the business or property of Plaintiffs and the other members of the Class; and
- (iv) Whether the alleged conspiracy violated the antitrust laws.

The overarching allegation in the First Consolidated Amended Complaint is that Defendants have engaged in an illegal cartel designed and intended to fix the prices of Airfreight Shipping Services. Proof of this unlawful cartel is common to all members of the Class. *See* Lufthansa Prel. App. R&R, at 6, 7 (finding commonality element met because of allegations regarding massive, global conspiracy to fix prices).²

² *See also* Air France/KLM Prel. App. Order ¶ 4 (commonality satisfied); JAL Prel. App. Order ¶ 4 (same); AA Prel. App. Order ¶ 4 (same); SAS Prel. App. Order ¶ 4 (same); Cargolux Prel. App. Order ¶ 4 (same); ANA Prel. App. Order ¶ 4 (same); Qantas Prel. App. Order ¶ 4 (same); Thai Prel. App. Order, ¶ 4 (same); LAN/ABSA Prel. App. Order, ¶ 4 (same); BA Prel. App. Order, ¶ 4 (same); Malaysia Prel. App. Order, ¶ 4 (same); SAA Prel. App. Order, ¶ 4 (same); Saudia Prel. App. Order, ¶ 4 (same); Emirates Prel. App. Order, ¶ 4 (same); El Al Prel. App. Order, ¶ 4 (same); Air Canada Prel. App. Order, ¶ 4; Sanfilippo Prel. App. Order, ¶ 4 (same); Korean Air Prel. App. Order, ¶ 4 (same); Singapore Prel. App. Order, ¶ 4 (same); Cathay Prel. App. Order, ¶ 4 (same); and China Air Prel. App. Order ¶ 4 (same).

c. *Plaintiffs' Claims Are Typical of the Claims of the Members of the Settlement Class.*

Third, Rule 23(a) requires typicality of the class representatives' claims. *See* Fed. R. Civ. P. 23(a)(3). 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. *See Reade-Alvarez*, 237 F.R.D. at 32; *see also In re Playmobil Antitrust Litig.*, 35 F. Supp. 2d 231, 241 (E.D.N.Y. 1998); *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 plaintiffs 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).

Here, the claims of the representative Plaintiffs are typical when compared to those held by the other members of the Settlement Class. Plaintiffs have alleged that the Defendants created and maintained an illegal cartel in the Airfreight Shipping Services industry, which artificially raised the prices of Airfreight Shipping Services. Such claims of the representative Plaintiffs, like those of the other members of the Settlement Class, arise out of the same alleged illegal anticompetitive conduct by the same Defendants and are based on the same legal theories. *See* Lufthansa Prel. App. R&R, at 8 (finding typicality element met)¹⁰.

¹⁰ *See also* Air France/KLM Prel. App. Order ¶ 4 (finding typicality element satisfied); JAL Prel. App. Order ¶ 4 (same); AA Prel. App. Order ¶ 4 (same); SAS Prel. App. Order ¶ 4 (same); Cargolux Prel. App. Order ¶ 4 (same); ANA Prel. App. Order ¶ 4 (same); Qantas Prel. App. Order ¶ 4 (same); Thai Prel. App. Order, ¶ 4 (same); LAN/ABSA Prel. App. Order, ¶ 4 (same); BA Prel. App. Order, ¶ 4 (same); Malaysia Prel. App. Order, ¶ 4 (same); SAA Prel. App. Order, ¶ 4 (same); Saudia Prel. App. Order, ¶ 4 (same); Emirates Prel. App. Order, ¶ 4 (same); El Al Prel. App. Order, ¶ 4 (same); Air Canada Prel. App. Order, ¶ 4; Sanfilippo Prel. App. Order, ¶ 4 (same); Korean Air Prel. App. Order, ¶ 4 (same); Singapore Prel. App. Order, ¶ 4 (same); Cathay Prel. App. Order, ¶ 4 (same); and China Air Prel. App. Order ¶ 4 (same).

d. Settlement Class Counsel and Representative Plaintiffs Will Fairly and Adequately Protect the Interests of the Class.

Fourth, Rule 23(a) requires that the representative parties fairly and adequately represent the interests of the class. Fed. R. Civ. P. 23(a)(4). As the Second Circuit has stated, “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 Group, Inc.*, 960 F.2d 285, 291 (2d Cir. 1992); *see also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 142 (2d Cir. 2001); *In re MetLife Demutualization Litig.*, 229 F.R.D. 369, 376 (E.D.N.Y. 2005) (citing *Fox v. Cheminova, Inc.*, 213 F.R.D. 113, 130 (E.D.N.Y. 2003)). Both requirements are satisfied here. As this Court has already found, Settlement Class Counsel are qualified, experienced, and thoroughly familiar with antitrust class action litigation. *See Lufthansa Prel. App. R&R*, at 8-9; *see also In re Air Cargo Shipping Servs. Antitrust Litig.*, 240 F.R.D. at 57; *In re Air Cargo Shipping Servs. Antitrust Litig.*, 2009 WL 3077396, at *7. Moreover, in reaching this Settlement Agreement, the interests of the Class members were adequately protected and were not in conflict. *See Kapps v. Wing*, 283 F. Supp. 2d 866, 873 (E.D.N.Y. 2003) (*vacated in part on other grounds*, 404 F.3d 105 (2d Cir. 2005)).

All Settlement Class Members share an overriding interest in obtaining the largest monetary recovery possible from Asiana. *See Lufthansa Prel. App. R&R*, at 9-10 (finding class members not antagonistic when discussing preliminary approval of Lufthansa settlement); *see also Global Crossing*, 225 F.R.D. at 453. The Class members also share a common interest in obtaining Asiana’s cooperation in prosecuting the claims against the non-settling Defendants.¹¹

¹¹ *See Air France/KLM Prel. App. Order* ¶ 4 (adequacy satisfied); *JAL Prel. App. Order* ¶ 4 (same); *AA Prel. App. Order* ¶ 4 (same); *SAS Prel. App. Order* ¶ 4 (same); *Cargolux Prel. App. Order* ¶ 4 (same); *ANA Prel. App. Order* ¶ 4 (same); *Qantas Prel. App. Order* ¶ 4 (same); *Thai Prel. App. Order*, ¶ 4 (same);

2. The Proposed Settlement Class Meets the Requirements of Rule 23(b)(3).

Once the four prerequisites of Rule 23(a) are met, as in this case, Plaintiffs must also show that the proposed Settlement Class satisfies one of the requirements of Rule 23(b), in this case Rule 23(b)(3). *See, e.g., Larsen v. JBC Legal Group, P.C.*, 235 F.R.D. 191, 196 (E.D.N.Y. 2006). Under Rule 23(b)(3), Plaintiffs must first demonstrate that “questions of law or fact common to the class predominate over questions affecting individual members.” *Barone v. Safway Steel Prods., Inc.*, No. CV-03-4258, 2005 WL 2009882 at *15 (E.D.N.Y. Aug. 23, 2005) (quoting Rule 23(b)(3)). Second, Plaintiffs must show that a “class action is superior to other available methods for the fair and efficient adjudication of the controversy.” *Id.* With respect to both requirements, the Court need not inquire whether the “case, if tried, would present intractable management problems, for the proposal is that there be no trial.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997) (citation omitted).

a. Common Questions of Law and Fact Predominate.

“[I]n cases involving allegations of a pure price-fixing conspiracy, common questions of law and fact generally predominate on all issues.” *Lufthansa Prel. App. R&R*, at 11 (quoting *Cont’l Orthopedic Appliances, Inc. v. Health Ins. Plan of Greater N.Y.*, 198 F.R.D. 41, 46 (E.D.N.Y. 2000)). Because Plaintiffs’ claims allege a single global conspiracy from which all Plaintiffs’ injuries arise, issues common to the class members—for example, the existence and scope of the alleged price-fixing conspiracy among Defendants, the impact of Defendants’ conspiracy, and the amount of damage suffered by the class as a result of an alleged violation of

LAN/ABSA Prel. App. Order, ¶ 4 (same); BA Prel. App. Order, ¶ 4 (same); Malaysia Prel. App. Order, ¶ 4 (same); SAA Prel. App. Order, ¶ 4 (same); Saudia Prel. App. Order, ¶ 4 (same); Emirates Prel. App. Order, ¶ 4 (same); El Al Prel. App. Order, ¶ 4 (same); Air Canada Prel. App. Order, ¶ 4.; Sanfilippo Prel. App. Order, ¶ 4 (same); Korean Air Prel. App. Order, ¶ 4 (same); Singapore Prel. App. Order, ¶ 4 (same); Cathay Prel. App. Order, ¶ 4 (same); and China Air Prel. App. Order ¶ 4 (same).

Section 1 of the Sherman Act—predominate over any individual questions, and therefore class treatment of the claims is appropriate for purposes of this settlement. *See 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) (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” (citing *Amchem*, 521 U.S. at 625)). Here, the predominance prong is easily satisfied. *See Lufthansa Prel. App. R&R*, at 12.¹²

b. A Class Action Is the Superior Method to Adjudicate These Claims.

The Court must balance, in terms of fairness and efficiency, the advantages of class action treatment against alternative available methods of adjudication. *In re Nig. Charter Flights Contract Litig.*, 233 F.R.D. 297, 301 (E.D.N.Y. 2006). *See* Fed. R. Civ. P. 23(b)(3) (listing four considerations relevant to this determination). The Court needs to consider “the efficient resolution of the claims or liabilities of many individuals in a single action, as well as the elimination of repetitious litigation and possibly inconsistent adjudications.” *Lufthansa Prel. App. R&R*, at 12 (quoting *D’Alauro v. GC Servs. Ltd. P’ship*, 168 F.R.D. 451, 458 (E.D.N.Y.

¹² *See also* *Air France/KLM Prel. App. Order* ¶ 4 (predominance satisfied); *JAL Prel. App. Order* ¶ 4 (same); *AA Prel. App. Order* ¶ 4 (same); *SAS Prel. App. Order* ¶ 4 (same); *Cargolux Prel. App. Order* ¶ 4 (same); *ANA Prel. App. Order* ¶ 4 (same); *Qantas Prel. App. Order* ¶ 4 (same); *Thai Prel. App. Order*, ¶ 4 (same); *LAN/ABSA Prel. App. Order*, ¶ 4 (same); *BA Prel. App. Order*, ¶ 4 (same); *Malaysia Prel. App. Order*, ¶ 4 (same); *SAA Prel. App. Order*, ¶ 4 (same); *Saudia Prel. App. Order*, ¶ 4 (same); *Emirates Prel. App. Order*, ¶ 4 (same); *El Al Prel. App. Order*, ¶ 4 (same); *Air Canada Prel. App. Order*, ¶ 4; *Sanfilippo Prel. App. Order*, ¶ 4 (same); *Korean Air Prel. App. Order*, ¶ 4 (same); *Singapore Prel. App. Order*, ¶ 4 (same); *Cathay Prel. App. Order*, ¶ 4 (same); and *China Air Prel. App. Order* ¶ 4 (same).

1996). Here, the interests of Class members in individually controlling the prosecution of separate claims are outweighed by the efficiency of the class mechanism. Thousands of persons and entities purchased Airfreight Shipping Services during the Class Period and settling their claims in the context of a class action would conserve both judicial and private resources and would hasten the class members' recovery. *See Fox*, 213 F.R.D. at 130 (stating that "the larger the class, the more judicial resources would be saved by proceeding as a class action"); *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"). The superiority requirement is therefore satisfied. *See Lufthansa Prel. App. R&R*, at 13.¹³

D. Notice to the Class

Rule 23 requires that notice be given in a reasonable manner to all class members who would be bound by a proposed settlement prior to final approval of the settlement. *See Fed. R. Civ. P. 23*. Where, as here, notice of certification of the Settlement Class and notice of a proposed settlement are combined, the more detailed provisions contained in Rule 23(c)(2)(B) apply: "The Court must direct to the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Fed. R. Civ. P. 23(c)(2)(B)*; *see also Carlough v. Amchem Prods., Inc.*, 158 F.R.D. 314, 324-25 (E.D. Pa. 1993) (citing 5 H. Newberg and A. Conte, *Newberg on Class Actions* §§ 8.04, 8.21 (3d

¹³ *See also* Air France/KLM Prel. App. Order ¶ 4 (superiority satisfied); JAL Prel. App. Order ¶ 4 (same); AA Prel. App. Order ¶ 4 (same); SAS Prel. App. Order ¶ 4 (same); Cargolux Prel. App. Order ¶ 4 (same); ANA Prel. App. Order ¶ 4 (same); Qantas Prel. App. Order ¶ 4 (same); Thai Prel. App. Order, ¶ 4 (same); LAN/ABSA Prel. App. Order, ¶ 4 (same); BA Prel. App. Order, ¶ 4 (same); Malaysia Prel. App. Order, ¶ 4 (same); SAA Prel. App. Order, ¶ 4 (same); Saudia Prel. App. Order, ¶ 4 (same); Emirates Prel. App. Order, ¶ 4 (same); El Al Prel. App. Order, ¶ 4 (same); Air Canada Prel. App. Order, ¶ 4; Sanfilippo Prel. App. Order, ¶ 4 (same); Korean Air Prel. App. Order, ¶ 4 (same); Singapore Prel. App. Order, ¶ 4 (same); Cathay Prel. App. Order, ¶ 4 (same); and China Air Prel. App. Order ¶ 4 (same).

ed. 1992)); MANUAL FOR COMPLEX LITIGATION (Fourth) § 21.31 (2004) (when a judge simultaneously certifies a class action and preliminary approves a class-wide settlement, notice is commonly combined). In particular, notice of a proposed settlement:

must concisely and clearly state in plain, easily understood language: the nature of the action, the definition of the class certified, the class claims, issues, or defenses, that a class member may enter an appearance through counsel if the members so desires, that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded, and the binding effect of a class judgment on class members under Rule 23(c)(3).

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

Notice regarding a proposed settlement is adequate under both Rule 23 and due process standards if it “fairly apprise[s] the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in connection with the proceedings,” and it can “be understood by the average class member.” *Wal-Mart Stores, Inc.*, 396 F.3d at 114-15 (internal quotation marks and citation omitted); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 340 (S.D.N.Y. 2005).

Plaintiffs are currently in settlement negotiations with several other defendants and hope to combine the notice of those anticipated settlements with notice of the Asiana settlement. For this reason, Plaintiffs have not submitted a form of notice at this time. At a later date, Plaintiffs will submit a form of notice that will include all of the information required by Rule 23 and due process. The notice plan will provide for individual and publication notice to potential class members within and outside the United States.

The proposed notice plan will conform to the notice plans previously approved by the Court in this matter. (ECF Nos. 1314, 1371, 1661). Specifically, the plan will provide for individual notice, via first-class mail, to each potential Settlement Class member whose address is reasonably ascertainable from the Defendants’ customer lists (Plaintiffs already have an

extensive database of such potential Settlement Class members from notice provided regarding the prior settlements). In addition to individual notice, the program will include publication of a summary notice ("Publication Notice") in the publications previously recommended by the Garden City Group and approved by the Court, unless impracticable. *See West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1079, 1090 (2d Cir. 1971) (Publication is an acceptable means of providing adequate notice for those whose names and addresses cannot be determined through reasonable efforts). The notices also will be published on a website established for the purpose of this settlement. Settlement Class members will also be able to request the Notice by writing to the Settlement Class Administrator or by dialing a toll-free number. Notice materials may be downloaded from a website.

In sum, the notice and notice plan that will be proposed by Plaintiffs will mirror the notice and notice plan previously approved by the Court and will meet the requirements of Rule 23, comport with due process, and fairly apprise potential Settlement Class members of the existence of the Settlement Agreement and their options under it.

III. PRELIMINARY APPROVAL ORDER

Plaintiffs respectfully submit that the proposed Settlement Agreement with Asiana falls well within the range of possible approval and that certification of the Settlement Class is appropriate. Plaintiffs therefore request that the Court:

1. Preliminarily approve the Settlement Agreement and find that its terms are sufficiently fair, reasonable, and adequate for notice to be issued to the settlement class as defined in the Settlement Agreement (the "Settlement Class");
2. Certify the Settlement Class, for purposes of settlement only pursuant to Federal Rule of Civil Procedure 23(c), and authorize Plaintiffs to represent the Settlement Class;

3. Order Settlement Class Counsel to disseminate at a later date notice to the Settlement Class, upon submission of proposed notices and approval by the Court of the form of notice and the notice plan; and

4. Approve The Garden City Group as Administrator of the Settlement, and Citibank as Escrow Agent.

IV. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' Motion for Preliminary Approval and certify the Settlement Class.

Dated: October 14, 2014

Respectfully Submitted,

Robert N. Kaplan
Gregory K. Arenson
Elana Katcher
KAPLAN FOX & KILSHEIMER LLP
850 Third Avenue, 14th Floor
New York, NY 10022
(212) 687-1980

Gary L. Specks (GS-8767)
KAPLAN FOX & KILSHEIMER LLP
423 Sumac Road
Highland Park, IL 60035
(847) 831-1585

By: /s/ Robert N. Kaplan

Hollis L. Salzman
Meegan Hollywood
ROBINS, KAPLAN, MILLER & CIRESI LLP
601 Lexington Avenue, Suite 3400
New York, NY 10022
(212) 980-7400

By: /s/ Hollis L. Salzman

Howard J. Sedran
Austin Cohen
Keith J. Verrier
Levin, Fishbein, Sedran & Berman

Michael D. Hausfeld
Brent W. Landau
Melinda Coolidge
Hausfeld LLP

510 Walnut Street
Philadelphia, PA 19106
(215) 592-1500

By: /s/ Howard J. Sedran

1700 K Street, N.W., Suite 650
Washington, DC 20006
(202) 540-7200

By: /s/ Michael D. Hausfeld