

ORIGINAL

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

CV 13

6399

DPWN HOLDINGS (USA), INC.
1200 South Pine Island Road, Suite 600,
Plantation, FL 33324,

Plaintiff,

v.

AIR CANADA; AC CARGO LP

Defendants.

Civil Action No. _____

COMPLAINT

JURY TRIAL DEMANDED

JOHNSON

U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

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FILED
CLERK

POHORELSKY, M.J.

1. Plaintiff DPWN Holdings (USA), Inc., on behalf of itself and as the assignee of all relevant claims of its affiliated entities (collectively "DHL"), brings this action to protect its interest in competition in the market for U.S. Airfreight Shipping Services, to deter future antitrust violations, and for damages it suffered as a result of violations of the federal antitrust laws by Air Canada and AC Cargo LP (collectively, "Air Canada" or "Defendant") relating to U.S. commerce. DHL alleges upon information and belief as follows:

INTRODUCTION

2. Air Canada and its competitor airlines ("Airfreight Carriers") engaged in and actively concealed a secret and unlawful conspiracy (the "Cartel") from at least February 1, 2000 through at least February 14, 2006 (the "Cartel Period"), to fix, raise, maintain and/or stabilize the prices for air cargo shipments ("Airfreight Shipping Services"), including the prices for air cargo shipments to, from and within the United States ("U.S. Airfreight Shipping Services").

3. To date, pursuant to an on-going U.S. government investigation, twenty Airfreight Carriers have pled guilty to felony antitrust violations in the United States for their involvement

in the price-fixing conspiracy and have paid criminal fines totaling almost \$1.75 billion. In addition, thirteen Airfreight Carrier executives have been charged in the government's investigation and six have pled guilty, paid criminal fines and been sentenced to serve varying jail terms for their roles in the conspiracy. Although Air Canada has not pled guilty, it has reached a civil settlement with a class of direct purchasers of U.S. Airfreight Shipping Services for \$7,500,000. DHL opted out of that class settlement. DHL is one of Air Canada's largest, if not its largest, air-cargo customer.

4. During the Cartel Period, Air Canada and its co-conspirator Airfreight Carriers discussed and implemented agreements to fix (1) base-freight rates and (2) Fuel and Security Surcharges imposed on top of base-freight rates. DHL paid at least \$5.1 million in Surcharges to Air Canada for U.S. Airfreight Shipping Services during the Cartel Period—all of which constituted illegal overcharges given the following: (i) at the time the surcharges were imposed base freight rates were already at supracompetitive levels as a result of collusion among the Airfreight Carriers; (ii) the Airfreight Carriers continued to fix base freight rates throughout the Cartel Period; and (iii) at all relevant times the Fuel and Security Surcharges over-recovered for any increase in the actual costs of fuel and security. DHL also paid at least \$2.2 million in base-freight rate overcharges to Air Canada during the Cartel Period.

5. As a participant in the Cartel and a supplier of U.S. Airfreight Shipping Services to DHL during the Cartel Period, Defendant Air Canada is jointly and severally liable for three times the Cartel's overcharges to DHL—which consist of overcharges for both Surcharges and base-freight rates. Defendant's total liability for overcharges to DHL is at least \$2 billion, plus DHL's attorneys' fees.

6. Air Canada is liable for overcharges from the beginning to the end of the Cartel notwithstanding the fact that it was in bankruptcy for part of that time.

- a. First, Air Canada is liable for the amount it overcharged DHL prior to the date of the filing of the bankruptcy on April 1, 2003, as well as such overcharges incurred prior to the confirmation of the bankruptcy plan on September 30, 2004. The confirmation of a bankruptcy plan does not discharge claims that were unknown by the claim holder and actively concealed by the debtor. That was the case here. Prior to and during the bankruptcy case, Air Canada concealed its involvement in the price fixing conspiracy. Air Canada failed to provide any notice to DHL prior to or during the bankruptcy that DHL may have had a claim against Air Canada relating to Air Canada's coordination of air shipping charges and surcharges. Because of the efforts of Air Canada and the other cartel members to conceal their participation in the conspiracy, DHL did not and could not reasonably have uncovered Air Canada's participation in the Cartel prior to July 2010 (when it obtained documents pursuant to a settlement with another Airfreight Carrier). Although Air Canada's Fuel Surcharges increased in a roughly parallel manner to other Airfreight Carriers, DHL had no reason to believe that Air Canada and its fellow Airfreight Carriers were engaging in a price-fixing conspiracy. Rather, as staged by Air Canada and the other Airfreight Carriers, the price increases appeared to be price adjustments in response to a common stimulus—higher fuel costs. Indeed, as noted in paragraphs 52, 55, 61, 66, 71, 75, 81, 82, 84, 86, 87, 90, 92-95, 99, 101, 105, 108, 111, 113, 114, 117, 154 and 155, Air Canada affirmatively concealed its participation in the cartel by staggering the dates of its

price increases relative to other participants in the cartel. Not only were the dates of announcement and effective dates staggered, but the leaders changed. Given those concealment efforts, DHL did not know, and could not have discovered its claim prior to July 2010.

- b. In any event, Air Canada is liable for the overcharges that DHL incurred after the bankruptcy plan was confirmed on September 30, 2004. After that date, Air Canada continued to participate in the Cartel, engaged in overt acts in furtherance of the Cartel, and charged DHL inflated prices through at least February 14, 2006, due to its price-fixing efforts. Indeed, subsequent to September 30, 2004, Air Canada engaged in overt acts in furtherance of the Cartel, including collusively increasing the Fuel Surcharge. Each of Air Canada's overcharges of DHL after Air Canada emerged from bankruptcy protections constituted an affirmative, overt act in furtherance of the conspiracy. Air Canada overcharged DHL at least \$3.3 million in Fuel and Security Surcharges for U.S. Airfreight Shipping Services between the time it exited bankruptcy on September 30, 2004, and the dawn raids on February 14, 2006. Moreover, because of that continued participation, Air Canada remains jointly and severally liable for the overcharges of its co-conspirators for the entire Cartel Period.

JURISDICTION AND VENUE

7. This action is brought pursuant to Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26, to obtain injunctive relief and to recover damages and costs of suit, including reasonable attorneys' fees and costs, for the injuries sustained by DHL as a result of Defendant's violations of Section 1 of the Sherman Act, 15 U.S.C. § 1, as alleged herein.

8. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1337, and Sections 4 and 16 of the Clayton Act, 15 U.S.C. §§ 15 and 26.

9. Defendant's violations occurred in and directly and substantially affected United States commerce, including United States import commerce. These violations give rise to DHL's claims in this action under Section 1 of the Sherman Act.

10. Venue is proper in this District under Sections 4, 12 and 16 of the Clayton Act, 15 U.S.C. §§ 15, 22 and 26, and 28 U.S.C. § 1391(b), (c) and (d), because during all times relevant to this action, Defendant resided, transacted business, maintained offices, maintained agents or were found in this District, and because a substantial part of the events giving rise to DHL's claims, and a substantial portion of the affected interstate trade and commerce as described below, occurred and was carried out, in this District. Defendant also inserted products or services in the stream of commerce that were intended to and did reach this District.

PARTIES

11. Plaintiff DPWN Holdings (USA), Inc. ("DPWN") is a corporation organized under the laws of Ohio, with its principal place of business located at 1200 South Pine Island Road, Suite 600, Plantation, Florida 33324. DPWN is the holding company of all DHL operating companies in the United States, including but not limited to DHL Express (USA), Inc., Exel, Inc. and Danzas—which, together with DPWN, are collectively referred to herein as "DHL." DPWN is the assignee of the legal right to prosecute and recover damages in this action by all of its commonly-owned companies that purchased U.S. Airfreight Shipping Services from the Air Canada during the Cartel Period. DHL is engaged in the business of providing, among other things, logistics and freight-forwarding services to manufacturers and other businesses that require the transportation of goods within, to and from the United States. DHL is one of the

largest (if not the largest) purchasers of U.S. Airfreight Shipping Services. At all relevant times, DHL directly purchased U.S. Airfreight Shipping Services from Defendant.

12. Defendant Air Canada is a foreign company with its headquarters located at 5100 de Maisonneuve Boulevard West, Montreal, Quebec H4A 3T2, Canada. Air Canada conducts Airfreight Shipping Services throughout the world, including in the United States and this district.

13. Defendant AC Cargo LP is a foreign company with its headquarters located at 5100 de Maisonneuve Boulevard West, Montreal, Quebec H4A 3T2, Canada. AC Cargo conducts Airfreight Shipping Services throughout the world, including in the United States and this district. At all relevant times, Air Canada owned and controlled the businesses of AC Cargo.

14. Canadian Airlines International ("Canadian Airlines") was a Canadian airline that operated from 1987 until 2001. Air Canada acquired Canadian Airlines in 2000.¹ As a result, Air Canada is liable for the Cartel conduct in which Canadian Airlines engaged during the Cartel Period.

15. Unless otherwise specified, this Complaint refers to Air Canada, AC Cargo LP and Canadian Airlines collectively as "Air Canada" or "Defendant."

16. Defendant provides a wide range of freight and mail services to shippers throughout their system. During the Cartel Period, Air Canada, either directly or through their predecessors, successors and/or affiliates, marketed and/or sold U.S. Airfreight Shipping Services. In particular, Defendant and other Airfreight Carriers, at all times relevant to this action, sold U.S. Airfreight Shipping Services to DHL and made shipments of goods on behalf of DHL in United States commerce, including United States import commerce.

¹ Star Alliance, Member Airlines, Air Canada, *available at* <http://perma.cc/0mjRTTABEDf>.

INTERSTATE COMMERCE

17. At all times relevant to this action, Defendant engaged in a continuous and uninterrupted flow of transactions in U.S. Airfreight Shipping Services that occurred in and involved interstate commerce, including United States import commerce. The conduct of Defendant and its co-conspirators affected the flow of such commerce to customers of U.S. Airfreight Shipping Services, such as DHL, and was intended to, and did, have a direct, substantial and reasonably foreseeable effect upon United States interstate commerce, including United States import commerce.

FACTS

I. Overview of the Airfreight Shipping Services Cartel

18. Beginning at least as early as February 1, 2000, and continuing until at least February 14, 2006 (the “Cartel Period”), Air Canada engaged in a secret conspiracy with other Airfreight Carriers, including but not limited to those that already have pled guilty to price fixing, that fixed the price of Airfreight Shipping Services, including U.S. Airfreight Shipping Services. As the direct result of the Cartel in which Air Canada participated, DHL was overcharged by at least \$655.5 million for U.S. Airfreight Shipping Services.

19. Airfreight Carriers, including Air Canada, charge their customers, including DHL, two separate pricing components for U.S. Airfreight Shipping Services: (1) a base-freight rate, and (2) various surcharges in addition to the base-freight rate. The Cartel in which Air Canada participated involved secret agreements to fix both components of price—the base-freight rate and the Fuel and Security Surcharges imposed on top of the base-freight rate. As a result, the Airfreight Carriers, including Air Canada, significantly overcharged DHL.

20. Air Canada and its co-conspirators agreed to impose and did impose at least the following surcharges on top of the base-freight rate:

- (a) Fuel Surcharge: Beginning as early as October 1996, Air Canada began discussing Fuel Surcharges with competing Airfreight Carriers. Starting on February 1, 2000, after discussions with other Airfreight Carriers and pursuant to the Cartel agreement, Air Canada began imposing a per-kilogram Fuel Surcharge on a worldwide basis, regardless of distance shipped. Defendant continued to charge—and, in fact, increased—such Fuel Surcharges through at least the end of 2006.
- (b) Security Surcharge: From September 2001 through at least February 2006, the Airfreight Carriers, including Air Canada, agreed to impose and did impose a per-kilogram Security Surcharge on a worldwide basis, regardless of distance shipped.

21. The Airfreight Carriers' stated justification for imposing these Surcharges was the recovery of increased costs. However, that was a pretext intended to conceal the existence of the Cartel. In reality, none of the Surcharges was necessary to recover any increase in fuel- or security-related costs. The Fuel Surcharges were not necessary to recover any increased cost of fuel because the Air Canada and its co-conspirators already had secretly fixed base-freight rates at supracompetitive levels prior to their imposition of the first Fuel Surcharge in February 2000, and the Fuel Surcharges over-recovered for subsequent fuel cost increases. During the Cartel Period, the Fuel Surcharges that Air Canada charged exceeded Air Canada's any incremental increase in fuel cost net of hedging and fuel-saving efficiency enhancements.

22. The Fuel Surcharge mechanism, to which Air Canada and its co-conspirators agreed and subsequently implemented, fixed prices at supracompetitive levels. The mechanism was originally embodied in International Air Transport Association ("IATA") Resolution 116ss, which provided for Fuel Surcharges on all routes based on weight and regardless of distance shipped. Air Canada implemented Resolution 116ss and began charging supracompetitive Fuel Surcharges in concert with other Cartel members with which they competed before receiving and

without waiting for approval from the United States Department of Transportation (“DOT”) and, thus, without antitrust immunity and in violation of U.S. antitrust law. The DOT found the Fuel Surcharge mechanism contained in Resolution 116ss to be “fundamentally flawed and unfair to shippers and other users of cargo air transportation” and would result in “unjustified and unwarranted rate increases,” concluding that the resolution “to be adverse to the public interest and in violation of [section 41309 of Title 49 of the United States] Code.”²

23. Following the DOT’s refusal to grant immunity to Resolution 116ss and after IATA ceased publication of its Fuel Price Index (“FPI”)—the mechanism by which the Airfreight Carriers were to increase and decrease the Fuel Surcharge under Resolution 116ss—, Air Canada secretly agreed with other Cartel members to continue imposing Fuel Surcharges according to a FPI published by Lufthansa Cargo, which was a slightly modified version of the IATA FPI. By covertly and collusively continuing to impose Fuel Surcharges (using the Lufthansa Cargo FPI rather than the IATA FPI), Air Canada and its co-conspirators continued to violate U.S. antitrust law and prevented DHL from detecting the existence of the Cartel.

24. The Security Surcharges, to which Air Canada and the other conspiring Airfreight Carriers agreed, were not calculated based on actual security-related costs. Instead, for ease of implementation and monitoring, they were based merely on weight.

25. Air Canada further secretly agreed with other Airfreight Carriers not to reduce base-freight rates so as to offset the Surcharges.

26. In addition, throughout the Cartel Period, Air Canada routinely engaged in private communications about Surcharges and base-freight rates with other Cartel members that subsequently pled guilty to criminal price-fixing and paid criminal fines to the United States

² Order, U.S. Dep’t of Transportation, Docket OST-2000-6837-2, at 2 (Mar. 17, 2000), *available at* <http://perma.cc/08YkrDUHXpg>.

Department of Justice (“DOJ”). These private communications served to monitor the Cartel and to implement changes to the Surcharges pursuant to the Cartel agreement.

27. The Cartel was coordinated by a core group of Airfreight Carriers that included Air France, KLM and Lufthansa Cargo, among others. Geographically-oriented groups of Airfreight Carriers, including Air Canada, helped coordinate and monitor the Cartel on a local or regional basis. Indeed, in implementing the Cartel on flights to and from Canada, Lufthansa Cargo’s “practise [sic] [was] to follow the Air Canada published Fuel Surcharge methodology on their website.”³ As the Lufthansa Cargo regional manager for Canada stated, “for market consistency sake . . . it is best to be in line with the national carrier.”⁴

28. As a result of the Airfreight Carriers’ price fixing, the Surcharges imposed by the Cartel members, including Air Canada, moved in substantially parallel fashion during the Cartel Period. However, the Airfreight Carriers intentionally staggered changes in the Fuel Surcharge to avoid detection of the Cartel by giving customers the false impression that the Cartel members were acting unilaterally instead of collusively.

II. Structural Characteristics of the Airfreight Shipping Services Industry that Facilitated the Cartel

A. Structure of the Airfreight Shipping Services Industry

29. The Airfreight Shipping Services industry has high fixed costs relative to marginal costs. Moreover, the Airfreight Carriers lawfully had agreed on prices when they were subject to government price regulation.

30. Prior to the Cartel Period, competition was putting downward pressure on the price of Airfreight Shipping Services, and Airfreight Carriers were concerned that prices would

³ E-mail between Lufthansa Cargo employees (Dec. 16, 2005) [LH_CIV_0112747].

⁴ E-mail between Lufthansa Cargo employees (Dec. 16, 2005) [LH_CIV_0112747].

fall even though fuel costs were increasing. Among other things, Airfreight Carriers tracked each other's capacity and discussed among themselves the elimination of "unprofitable routes."⁵ In addition, several Airfreight Carriers attempted to impose Fuel Surcharges prior to the Cartel Period on an apparently unilateral basis, but those Airfreight Carriers were forced to withdraw them because of competition from other Airfreight Carriers.

B. Trade Associations

31. Prior to and throughout the Cartel Period, Air Canada and its co-conspirators participated in various trade associations during which they had the opportunity to, and actually did, collude. The trade associations in which Air Canada participated included International Air Transport Association ("IATA"), the Air Cargo Representative Board of Indonesia ("ACRB"), the Airline Cargo Business Association of Thailand ("ACBA"), the Airline Cargo Council of Switzerland ("ACCS"), the Air Cargo Agents Association of India ("ACAA"), the Board of Airline Representatives of India ("BAR India"); the Global Cargo Council, Inc. ("GCCCI"),⁶ the Hong Kong Board of Airlines Representatives ("Hong Kong BAR"), the Korea Board of Airline Representatives ("Korea BAR") and the Singapore Board of Airline Representatives ("Singapore BAR). The Airfreight Carriers used these meetings to monitor the Cartel.

32. Agreements reached at these trade association meetings were not immune from U.S. antitrust law. Agreements reached at IATA meetings, for example, are only immune from U.S. antitrust laws if the DOT approves those agreements—which DOT did not do with respect to any of the Cartel agreements that are the subject of this Complaint.

⁵ Minutes of the Meeting, Global Cargo Council, Inc. (Feb. 27, 1998) [LH_CIV_0240851] ("Unprofitable routes will be eliminated."). See also Airline Cargo Benchmark 2004/5 [LH_CIV_0003200] (describing a program through which the Airfreight Carriers shared information on revenue, costs, capacity, and other competitively sensitive topics); E-mail between Lufthansa Cargo employees (Aug. 17, 2004) [LH_CIV_0008167] (noting excess capacity).

⁶ This group is also known as the Global Carriers Council, Inc. and Global Cargo Carriers, Inc.

C. Airline Marketing Alliances

33. In addition to trade associations, Airfreight Carriers frequently participate in alliances. Air Canada was and is a member of the Star Alliance. Star Alliance members, including Air Canada, frequently engaged in communications with other Star Alliance members and with non-Star Alliance Airfreight Carriers to covertly fix base-freight rates and Surcharges for U.S. Airfreight Shipping Services in furtherance of the Cartel. Indeed, a number of members of the Star Alliance, including All Nippon Airways, Asiana Airlines, Lufthansa, and Scandinavian Airlines System ("SAS"), have acknowledged participation in the Cartel and admitted liability.

34. Absent an express grant of antitrust immunity by the DOT, the antitrust laws apply to all such alliances.⁷

III. The Fuel Surcharge Conspiracy

A. Background

35. In late 1996, the price of aviation fuel increased. In response, Air Canada and other Airfreight Carriers discussed whether a fuel surcharge should be adopted.⁸

36. In October 1996, several Airfreight Carriers, including Air Canada,⁹ announced that they would implement fuel surcharges on what appeared to DHL and any reasonable observer to be on a unilateral basis.¹⁰ However, because not all Airfreight Carriers followed,

⁷ Only certain bilateral and multilateral agreements were approved by the U.S. DOT. However, none of them provided immunity for collusive activity. The DOT-approved agreements included only one involving Air Canada: United Airlines. See U.S. DOT, *Airline Alliances Operating with Antitrust Immunity*, at 8-9, available at <http://perma.cc/0WSvTJTD> (discussing the United - Air Canada alliance, Docket No. OST-1996-1434). The limited antitrust immunity for certain agreements with United Airlines did not give Air Canada immunity to conspire with United and dozens of other Airfreight Carriers to overcharge customers.

⁸ See, e.g., Minutes, Emergency ACCS Meeting (Nov. 13, 1996) [SIA_CIV_0030231].

⁹ Facsimile between Qantas Airways employees (Nov. 5, 1996) [QAL-01-193978].

¹⁰ See, e.g., Facsimile, Air France Cargo, *Air France Cargo Implements a Fuel Surcharge from Nov 4 until Further Notice* (Oct. 30, 1996) [LH_CIV_0143510]; Letter from British Airways World Cargo Sales to Customer (Oct. 31, 1996) [QAL-01-193978]; Letter from KLM Cargo to Cargo Customer (Oct. 29, 1996) [LH_CIV_0103095]; Press

almost all of these Airfreight Carriers that had announced fuel surcharges withdrew them, and they were not implemented. Thus, the Airfreight Carriers learned that “concerted and coordinated industry action” was necessary to impose sustainable fuel surcharges.¹¹

37. On December 5, 1996, Bob Thompson of Air Canada met with a representative of Lufthansa Cargo to discuss, among other things, fuel surcharges.¹² Mr. Thompson noted that Lufthansa Cargo was a “market leader” with respect to the fuel surcharge.¹³ Mr. Thompson also informed his Lufthansa Cargo counterpart that Air Canada already had implemented a fuel surcharge outside of Canada and planned to implement a Fuel Surcharge in Canada on January 1, 1997.¹⁴ In addition, Mr. Thompson and the Lufthansa Cargo representative discussed base-freight rates, including base-freight rates for U.S. Airfreight Shipping Services.¹⁵ Mr. Thompson and the Lufthansa Cargo representative scheduled another meeting for mid-January 1997.¹⁶

B. Agreement to Fix Fuel Surcharges

38. The IATA Cargo Steering Group of the IATA Composite Fuel Conference held a Special Meeting on December 9, 1996, “to determine what further action was to be taken” with respect to the increasing price of aviation fuel.¹⁷ The attending Airfreight Carriers recognized that “events of the recent past [i.e., unsuccessful unilateral attempts to impose fuel surcharges]

Release, Lufthansa Cargo, *Lufthansa Cargo Applies a Fuel Surcharge* (Oct. 25, 1996) [QAL-01-193945]; Facsimile from Lufthansa Cargo to Schenker Int'l (Australia) (Oct. 28, 1996) [QAL-01-193949]; Letter from Qantas Airways Limited to Customer (Nov. 1, 1996) [QAL-01-193978]; Customer Notice, Qantas Airways (Nov. 1, 1996) [QAL-01-193960]; Letter from Khaw Host Eng, Manager Cargo Marketing, Singapore Airlines, to All SIA Cargo Agents, Singapore (Nov. 6, 1996) [QAL-01-193986]; Facsimile from Ulf Barnard, General Manager, Schenker Int'l (Australia) to Ken Cavanagh, Siemens Ltd. (Oct. 31, 1996) [QAL-01-193958]; Facsimile between Qantas Airways employees (Nov. 5, 1996) [QAL-01-193977].

¹¹ Minutes, Special Meeting, Cargo Tariff Conferences Steering Group, at 4 (Dec. 9, 1996) [SIA_CIV_0030544].

¹² Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

¹³ Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

¹⁴ Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

¹⁵ Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

¹⁶ Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

¹⁷ Agenda, IATA Cargo Committee, 9th Meeting, at 24 (Mar. 3, 1997) [QAL-01-194074]. *See also* Minutes, Special Meeting, Cargo Tariff Conferences Steering Group, at 4 (Dec. 9, 1996) [SIA_CIV_0030544].

and the resultant market confusion, underlined the need for carriers, in future, to develop *concerted and co-ordinated industry action* under the auspices of an IATA conference.”¹⁸

39. On January 13, 1997, the IATA Cargo Steering Group met to further discuss joint strategies in light of the increasing price of aviation fuel.¹⁹ At the subsequent Special Composite Meeting of Cargo Tariff Coordinating Conferences held in Geneva, Switzerland from January 14 to 16, 1997, the IATA Cargo Steering Group presented its recommendation that the Conference “attempt to adopt surcharge Resolutions for all routes.”²⁰ However, several Airfreight Carriers initially opposed the resolution.²¹ Five Airfreight Carriers believed that a surcharge was unnecessary because any increase in fuel costs already had been recouped through increased passenger fares or through base-freight rates.²² Four Airfreight Carriers opposed a flat per kilogram surcharge because the proposed surcharge did not differentiate between area and route.²³ Another Airfreight Carrier wanted a percentage surcharge, rather than the proposed cents per kilogram surcharge.²⁴ Other Airfreight Carriers proposed increases in base-freight rates, rather than a surcharge.²⁵

¹⁸ Minutes, Special Meeting, Cargo Tariff Conferences Steering Group, at 4 (Dec. 9, 1996) [SIA_CIV_0030544] (emphasis added).

¹⁹ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 2-3 (Jan. 14-16, 1997) [QAL-01-194051].

²⁰ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 3 (Jan. 14-16, 1997) [QAL-01-194051].

²¹ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 3-4 (Jan. 14-16, 1997) [QAL-01-194051].

²² Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 4 (Jan. 14-16, 1997) [QAL-01-194051].

²³ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 4 (Jan. 14-16, 1997) [QAL-01-194051].

²⁴ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 4 (Jan. 14-16, 1997) [QAL-01-194051].

²⁵ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 4 (Jan. 14-16, 1997) [QAL-01-194051].

40. Members of the IATA Cargo Tariff Coordinating Conferences, including Air Canada, were aware of the antitrust risks of their conduct. The director of the IATA Legal Department, Andrew Charlton, addressed the Special Composite Meeting as follows:

Antitrust laws prohibit competitors reaching any form of agreement, understanding or arrangement which is likely to have an impact on price. As a general rule, competitors cannot discuss in any way the price they intend charging consumers. There are very few exceptions to this. The relevant exception is where immunity has been granted by the relevant authority for rates reached pursuant to a particular procedure and within the strict confines of the terms of the approval itself. IATA has such an approval for this conference. These immunities are very rare.

Without an immunity, authorities regard with great suspicion any situation where competitors charge the same rate. In the event that there is any evidence whatsoever that competitors have had an opportunity to communicate in any way, and charge the same rate, there is a very strong assumption that they do so having colluded.

Until the particular approval is granted for any rate agreed at this conference, that situation would apply. In other words, *in my opinion, any airline which moves to charge the rate which is agreed at this conference before government approval, and therefore antitrust immunity, is obtained, would face a very strong evidential presumption that the rate being charged had been agreed between competitors and without antitrust immunity.* The question is one of evidence.²⁶

41. Notwithstanding the antitrust risk and recognizing that concerted action was necessary for fuel surcharges to be imposed successfully, the attendees pursued the Steering Group's recommendation to charge a fuel surcharge on a global basis, including for U.S. Airfreight Shipping Services (the "Fuel Surcharge"). The attendees developed Resolution 116ss, which contained the mechanism by which the Airfreight Carriers would impose the Fuel Surcharge.²⁷ Specifically, the Fuel Surcharge would be tied to percentage changes in the spot

²⁶ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 5-6 (Jan. 14-16, 1997) [QAL-01-194051] (emphasis added).

²⁷ Agenda, IATA Cargo Committee, 9th Meeting, at 25 (Mar. 3, 1997) [QAL-01-194074].

price of aviation fuel as tracked by the IATA FPI, which IATA benchmarked against the June 1996 average spot price of aviation fuel in five markets around the world (i.e., IATA set its FPI at 100 to represent the average spot price of aviation fuel in June 1996).²⁸ The initial Fuel Surcharge would be USD 0.10 (or the equivalent amount in local currency) per kilogram, regardless of the distance shipped.²⁹ The Airfreight Carriers agreed that all IATA members would implement this Fuel Surcharge by March 1, 1997, provided the FPI remained above 110 (i.e., spot prices remained ten percent above the June 1996 spot price).³⁰ Thereafter, the Fuel Surcharge would remain in effect until the FPI fell below 110.³¹ If the FPI continued to increase and reached 150, the Airfreight Carriers agreed they would convene an IATA meeting to discuss further increasing the Fuel Surcharge.³²

42. Twenty Airfreight Carriers voted in favor of approving Resolution 116ss, while five abstained and two opposed it—Lufthansa Cargo and Swissair.³³ Lufthansa Cargo initially opposed the resolution because Lufthansa Cargo preferred an approach to Fuel Surcharges that appeared to be one of unilateral decision-making. Because there was not unanimous support for

Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 8 (Jan. 14-16, 1997) [QAL-01-194051].

²⁸ As of October 1996, the FPI exceeded 140 (i.e., according to IATA, the spot price of aviation fuel had increased by forty percent from June to October 1996). Agenda, IATA Cargo Committee, 9th Meeting, at 24 (Mar. 3, 1997) [QAL-01-194074]. In reality, the increase in fuel costs faced by Airfreight Carriers was significantly less than forty percent. See Order, U.S. Dep't of Transportation, Docket OST-2000-6837-2, at 2 (Mar. 17, 2000), available at <http://perma.cc/08YkrDUHXpg> (noting that "the actual average fuel prices, as reported to the [U.S.] Department [of Transportation by IATA] . . . measured between June 1996 and November 1999, increased about six percent, while IATA's index, based on spot market prices, showed a 34 percent increase over the same period.").

²⁹ Agenda, IATA Cargo Committee, 9th Meeting, at 25 (Mar. 3, 1997) [QAL-01-194074]. Under this version of Resolution 116ss, the Fuel Surcharge would not apply in some countries. *Id.* The Fuel Surcharge imposed in 2000 had no such limitation. See Section III.C., *infra*.

³⁰ Agenda, IATA Cargo Committee, 9th Meeting, at 25 (Mar. 3, 1997) [QAL-01-194074].

³¹ Agenda, IATA Cargo Committee, 9th Meeting, at 25 (Mar. 3, 1997) [QAL-01-194074].

³² Agenda, IATA Cargo Committee, 9th Meeting, at 25 (Mar. 3, 1997) [QAL-01-194074].

³³ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 10 (Jan. 14-16, 1997) [QAL-01-194051]. Swissair was previously the national airline of Switzerland, but filed for bankruptcy in March 2002. Swiss International Air Lines ("Swiss") is the successor Airfreight Carrier to Swissair. Swiss WorldCargo is the cargo subsidiary of Swiss.

the resolution, it was defeated pursuant to IATA rules.³⁴ However, that was not the end of the resolution.

43. On May 16, 1997, several representatives from Lufthansa Cargo met with Desmond Vertannes, Air Canada's General Manager of Cargo for Europe, Africa and the Middle East, and Konrad Bossdorf, Air Canada's Cargo Manager for Germany and Northern Europe, to discuss, among other things, Air Canada's sales policy for flights originating in Canada, including Fuel Surcharges and base-freight rates.³⁵ There was also a meeting on August 26, 1997, between John Fox, Air Canada's General Manager of Cargo Sales for Canada, and a representative from Lufthansa Cargo to discuss, among other things, the Fuel Surcharge and base-freight rates.³⁶

44. Later in 1997, apparently recognizing the importance of concerted action to making the Fuel Surcharge effective, Lufthansa Cargo withdrew its objection to the IATA Fuel Surcharge resolution and suggested that IATA adopt it by mail vote.³⁷ Thereafter, the Airfreight Carriers adopted a revised version of Resolution 116ss by Mail Vote 875 on August 7, 1997, with an intended effective date of October 1, 1997.³⁸

45. Resolution 116ss, as passed, was the same as the initial resolution in key respects. The revised Resolution 116ss still used the IATA FPI benchmarked to the June 1996 spot price of fuel as the mechanism for implementing the Fuel Surcharge.³⁹ But the triggering amount was changed. If the FPI equaled or exceeded 130 on or after October 1, 1997, the Airfreight Carriers

³⁴ Minutes, Special Composite Meeting of Cargo Tariff Coordinating Conferences, at 12 (Jan. 14-16, 1997) [QAL-01-194051]; Agenda, IATA Cargo Committee, 9th Meeting, at 26 (Mar. 3, 1997) [QAL-01-194074].

³⁵ Lufthansa Cargo, Summary of Air Canada Meeting (May 16, 1997) [LH_CIV_0101711].

³⁶ Minutes of Meeting between Air Canada and Lufthansa Cargo (Aug. 26, 1997) [LH_CIV_0101704].

³⁷ Agenda, IATA Cargo Committee, 10th Meeting, at 41 (Sept. 10, 1997) [QAL-01-194239].

³⁸ Agenda, IATA Cargo Committee, 10th Meeting, at 41 (Sept. 10, 1997) [QAL-01-194239]; Memorandum from Director, Tariff Affairs and Conferences, IATA, to Members Participating in Tariff Coordinating Conferences (Aug. 12, 1997) [QAL-01-194217].

³⁹ Memorandum from Director, Tariff Affairs and Conferences, IATA, to Members Participating in Tariff Coordinating Conferences, at 4 (Aug. 12, 1997) [QAL-01-194217].

would implement a Fuel Surcharge not to exceed USD 0.10 per kilogram except on “minimum charge” shipments.⁴⁰ As with the original resolution, if at any time the FPI exceeded 150 for two consecutive weeks, IATA would convene a meeting of the Cargo Tariff Coordinating Conferences to consider further increasing the Fuel Surcharge.⁴¹ Similarly consistent with the original resolution, the revised resolution provided that, if the FPI fell below 110 for two consecutive weeks, IATA would suspend the Fuel Surcharge.⁴²

46. Pursuant to the Cartel agreement, the “lead carrier” in each country monitored the Cartel and coordinated the Fuel Surcharges for flights departing that country. Sometimes this coordination was performed on a route-by-route basis. The “lead carrier” in a particular country or on a particular route was generally the Airfreight Carrier that conducted the most business in that country or on that route. Air Canada was the “lead carrier” in Canada. In fact, even the Cartel ringleaders, like Lufthansa Cargo, followed Air Canada’s lead on imposing Fuel Surcharges on shipments departing from Canadian airports.⁴³

⁴⁰ Memorandum from Director, Tariff Affairs and Conferences, IATA, to Members Participating in Tariff Coordinating Conferences, at 4, 6 (Aug. 12, 1997) [QAL-01-194217]; Agenda, IATA Cargo Committee, 10th Meeting, at 41 (Sept. 10, 1997) [QAL-01-194239].

⁴¹ Memorandum from Director, Tariff Affairs and Conferences, IATA, to Members Participating in Tariff Coordinating Conferences, at 4 (Aug. 12, 1997) [QAL-01-194217].

⁴² Memorandum from Director, Tariff Affairs and Conferences, IATA, to Members Participating in Tariff Coordinating Conferences, at 4 (Aug. 12, 1997) [QAL-01-194217].

⁴³ See, e.g., E-mail between Lufthansa Cargo employees (Aug. 22, 2005) [LH_CIV_0044547] (“Effective Sep. 5, 2005, [Lufthansa Cargo’s] FSC level ex Canada will be CAD 0.62 which matches the [Air Canada] Cargo published level.”); E-mail between Lufthansa Cargo employees (Oct. 13, 2005) [LH_CIV_0030488] (“For the Canadian [Fuel Surcharge], we went with the next surcharge level of CAD0.73 as published on the [Air Canada] website.”); E-mail between Lufthansa Cargo employees (Nov. 7, 2005) [LH_CIV_0043265] (“For the Canadian [Fuel Surcharge], we went with the next surcharge level of CAD0.67 as published on the [Air Canada] website.”); E-mail between Lufthansa Cargo employees (Nov. 14, 2005) [LH_CIV_0030202] (“For the Canadian [Fuel Surcharge], we went with the next surcharge level of CAD0.61 as published on the [Air Canada] website.”); E-mail between Lufthansa Cargo employees (Nov. 21, 2005) [LH_CIV_0043236] (“For the Canadian [Fuel Surcharge], we went with the next surcharge level of CAD0.56 as published on the [Air Canada] website.”); E-mail between Lufthansa Cargo employees (Dec. 16, 2005) [LH_CIV_0112747] (“[W]e [Lufthansa Cargo] have made the practise [sic] to follow the Air Canada published Fuel Surcharge methodology on their website. They are the only carriers ‘publishing’ CAD levels – and I believe for market consistency sake that it is best to be in line with the national carrier. I spoke with [Air Canada] on this point a few weeks ago”); E-mail between Lufthansa Cargo employees (Feb. 6, 2006) [LH_CIV_0043214] (“For the Canadian [Fuel Surcharge], we went with the next surcharge level of CAD0.48 as published on the [Air Canada] website.”).

47. Although the Airfreight Carriers adopted the resolution in 1997, IATA did not submit Resolution 116ss to the DOT until early 2000.⁴⁴ The Airfreight Carriers knew that they could not lawfully implement Resolution 116ss prior to receiving approval from the DOT. Indeed, at the May 1998 IATA Composite Meeting of Cargo Tariff Coordinating Conferences in Geneva, Switzerland, the Airfreight Carriers noted that Resolution 116ss “could not be declared effective because of the outstanding approval of Argentina, India and USA (‘required governments’).”⁴⁵ In particular, IATA noted that

As with all traffic conference meetings, these [IATA] meetings had immunity from US anti-trust laws, *on the condition that all agreements were submitted for specific approval by the US authorities*. IATA would submit the agreements to the DOT in accordance with this condition. In addition, IATA’s Board of Governors had determined that any agreement reached at this meeting must not be put into effect prior to its declaration of effectiveness. This ruling was contained in the Provisions for the Conduct of the IATA Traffic Conferences and must be complied with to ensure continued immunity.⁴⁶

Moreover, the Airfreight Carriers knew that the “US DoT [] advised that they would not accept filing of this Resolution for approval unless accompanied by economic justification based on current prices which the US carriers were unable to provide.”⁴⁷ D. Singh of Canadian Airlines attended the meeting.⁴⁸

48. In June 1999, Konrad Bossdorf of Air Canada met to engage in a “Competition Analysis” with representatives from Air France, British Airways, Cargolux, Cathay Pacific,

⁴⁴ IATA, Application for Approval of Agreements by the Int’l Air Transport Ass’n to the U.S. Dep’t of Transp., Docket OST-2000-6837-1 (Jan. 28, 2000) [QAL-01-194611].

⁴⁵ Memorandum from Director, Tariff Services, IATA, to Members Participating in Tariff Coordinating Conferences, at 28 (May 29, 1998) [QAL-01-194306].

⁴⁶ Memorandum from Director, Tariff Services, IATA, to Members Participating in Tariff Coordinating Conferences, at 10 (May 29, 1998) [QAL-01-194306] (emphasis added).

⁴⁷ Memorandum from Director, Tariff Services, IATA, to Members Participating in Tariff Coordinating Conferences, at 28 (May 29, 1998) [QAL-01-194306].

⁴⁸ Memorandum from Director, Tariff Services, IATA, to Members Participating in Tariff Coordinating Conferences, at 61 (May 29, 1998) [QAL-01-194306].

Emirates, EVA Airways, Japan Airlines, KLM, Korean Air, Lufthansa Cargo, Martinair, Singapore Air, South African Airways, SAS, Swissair, Thai Airways, United Airlines and VARIG.⁴⁹ The analysis included discussions about the competitive situation in the United States, which Air Canada attended.⁵⁰ In addition, the attendees discussed the Fuel Surcharge.

C. Implementation of the Initial Illegal Fuel Surcharges and Adherence to the Cartel Agreement

49. In December 1999, e-mails were exchanged between representatives of Air Canada, Lufthansa Cargo, SAS, United Airlines and VARIG regarding the Fuel Surcharge. On December 13, 1999, a SAS representative asked the group “whether [they] would be considering adding a fuel surcharge to [their] prices now that the IATA index has passed the magic limit of 130?”⁵¹ As discussed below, all of the recipients of the e-mail, including Air Canada, soon added a Fuel Surcharge to their prices.

50. On December 28, 1999, Lufthansa Cargo announced it would impose a USD 0.10 per kilogram Fuel Surcharge effective February 1, 2000, worldwide.⁵²

51. On January 11, 2000, Konrad Bossdorf of Air Canada, as well as representatives from Air France, Cargolux, KLM, Korean Air, Lufthansa Cargo, Martinair, Nippon Cargo, SAS,

⁴⁹ E-mail from Sales Manager, Asia & Australia, Lufthansa Cargo (June 23, 1999) [LH_CIV_0002173].

⁵⁰ E-mail from Sales Manager, Asia & Australia, Lufthansa Cargo (June 23, 1999) [LH_CIV_0002173].

⁵¹ E-mail from Robert Skoog, SAS, to representatives of United Airlines, Air Canada, Lufthansa Cargo and VARIG (Dec. 13, 1999) [LH_CIV_0110116].

⁵² Lufthansa Cargo News, *Lufthansa Cargo introducing fuel surcharge Effective from February 2000 for the entire route network* (Dec. 28, 1999) [LH_CIV_0031101]; Letter from Regional Manager Sales, Arabian Peninsula and Iran, Lufthansa Cargo, to Customer (Dec. 29, 1999) [QAL-01-194436]; Press Release, Lufthansa Cargo, *Lufthansa Cargo Announces Fuel Surcharge Increase* (Dec. 28, 1999) [LH_CIV_0001158]. See also Memorandum from Wolfgang Schmitz, Lufthansa Cargo (Jan. 7, 2000) [LH_CIV_0001151]; Minutes, Lufthansa Cargo Executive Board Meeting (Dec. 21, 1999) [LH_CIV_0001153].

Singapore Air, South African Airways, Thai Airways, United Airlines and VARIG, attended a "Market Analysis" meeting, where they discussed the Fuel Surcharge.⁵³

52. On the same day, January 11, 2000, Air Canada informed its competitors that it would impose a Fuel Surcharge starting on February 15, 2000.⁵⁴ Air Canada's announced implementation date was two weeks after the implementation date announced by Lufthansa Cargo and other Airfreight Carriers, giving its customers, including DHL, the misleading impression that Air Canada's Fuel Surcharge was unilaterally set.

53. On January 27, 2000, a group called "Global Cargo Council, Inc." ("GCCCI")⁵⁵ held a meeting at "Benissimo Restaurant" to discuss the implementation of the Fuel Surcharge even though IATA had not submitted Resolution 116ss to the DOT.⁵⁶ Cesar Rillo of Canadian Airlines (which became a part of Air Canada in January 2001) attended the meeting, along with representatives of Air France, Asiana Airlines, Cargolux, China Airlines, Japan Airlines, KLM, Korean Air, Lufthansa Cargo, Nippon Cargo Airlines, Northwest Airlines, Singapore Airlines, Thai Airways and United Airlines, among others.⁵⁷ Although GCCCI claimed that "[t]he concentration of the meetings does not focus on the pricing/rates of each airline but to discuss what is happening to the group and the industry," one of the key functions of GCCCI was in fact to coordinate implementation of the Fuel Surcharge.⁵⁸ Indeed, the purpose of the meeting on January 27 was to discuss how to implement the Fuel Surcharge.⁵⁹

⁵³ E-mail from Sales Manager Asia & Australia, Lufthansa Cargo, to representatives of Air Canada, Air France, Cargolux, KLM, Korean Air, Lufthansa Cargo, Martinair, Nippon Cargo, SAS, Singapore Air, South African Airways, Thai Airways, United Airlines and VARIG (Jan. 11, 2000) [LH_CIV_0002255].

⁵⁴ Chart, Lufthansa Cargo, *Treibstoffzuschlag / Fuel Surcharge ab 01.02.2000* (Feb. 1, 2000) [LH_CIV_0002265].

⁵⁵ This group is also known as the Global Carriers Council, Inc. and Global Cargo Carriers, Inc.

⁵⁶ Minutes of Monthly Meeting, Global Cargo Council, Inc. (Jan. 27, 2000) [LH_CIV_0240820].

⁵⁷ Minutes of Monthly Meeting, Global Cargo Council, Inc., at 1 (Jan. 27, 2000) [LH_CIV_0240820] (noting that, in addition to attending the meeting, Cesar Rillo of Canadian Airlines was a "Head Member" of "GCCCI.COM").

⁵⁸ Minutes of Monthly Meeting, Global Cargo Council, Inc., at 1-2 (Jan. 27, 2000) [LH_CIV_0240820].

⁵⁹ Minutes of Monthly Meeting, Global Cargo Council, Inc., at 2 (Jan. 27, 2000) [LH_CIV_0240820].

54. IATA submitted its application for approval of Resolution 116ss to the DOT on January 28, 2000.⁶⁰

55. Without waiting for a response from the DOT, and in accordance with the joint discussions set forth above, Air Canada, Canadian Airlines and a number of other Airfreight Carriers started charging DHL and other customers a Fuel Surcharge of USD 0.10 per kilogram in February 2000, pursuant to the terms of Resolution 116ss.⁶¹ The other Airfreight Carriers included, but were not limited to, Air France, Asiana Airlines, Cargolux, Cathay Pacific, Japan Airlines, KLM, Korean Air, Lufthansa Cargo, Qantas Airways, SAS, South African Airways, Swissair and United Airlines.⁶² The Airfreight Carriers intentionally staggered the implementation of the Fuel Surcharge to prevent detection of the Cartel by giving the impression to DHL and other customers that they were acting unilaterally. For example, Lufthansa Cargo's Fuel Surcharge went into effect on February 1,⁶³ Asiana's on February 7,⁶⁴ and Air Canada's and Canadian Airlines' on February 15, 2000.⁶⁵ Because they did not have approval from the DOT, Air Canada, Canadian Airlines and the other Airfreight Carriers did not have immunity from the U.S. antitrust laws when they implemented this Fuel Surcharge (or at any time thereafter). DHL thus started paying the Fuel Surcharge to the Cartel members, including Air Canada and Canadian Airlines, in February 2000.

⁶⁰ IATA, Application for Approval of Agreements by the Int'l Air Transport Ass'n to the U.S. Dep't of Transp., Docket OST-2000-6837-1 (Jan. 28, 2000) [QAL-01-194611].

⁶¹ Chart, Lufthansa Cargo, *Treibstoffzuschlag / Fuel Surcharge ab 01.02.2000* (Feb. 1, 2000) [LH_CIV_0002265]; Chart, GCCI, *Fuel Surcharge Update* (Mar. 3, 2000) [LH_CIV_0240824]; Chart, GCCI, *Fuel Surcharge Update* (Mar. 10, 2000) [LH_CIV_0240823]. See also Press Release, Air France, *Air France Cargo Implements Fuel Surcharge as from 1st February 2000* (Dec. 20, 1999) [LH_CIV_0104424]; Press Release, Lufthansa Cargo, *Lufthansa Cargo Announces Fuel Surcharge Increase* (Dec. 28, 1999) [LH_CIV_0001158]; Chart, American Airlines, *West Texas Intermediate Crude: Historical Prices* [QAL-01-168138].

⁶² See, e.g., *ibid.*

⁶³ Lufthansa Cargo News, *Lufthansa Cargo introducing fuel surcharge Effective from February 2000 for the entire route network* (Dec. 28, 1999) [LH_CIV_0031101].

⁶⁴ Chart, GCCI, *Fuel Surcharge Update* (Mar. 10, 2000) [LH_CIV_0240823].

⁶⁵ Chart, Lufthansa Cargo, *Treibstoffzuschlag / Fuel Surcharge ab 01.02.2000* (Feb. 1, 2000) [LH_CIV_0002265].

56. On February 24, 2000, GCCI held another meeting, this time at “Dekkers Lounge.”⁶⁶ Cesar Rillo of Canadian Airlines attended the meeting, along with representatives from Air France, British Airways, Cargolux, Cathay Pacific, China Airlines, Japan Airlines, Korean Airlines, Nippon Cargo Airlines, Northwest Airlines, Saudi Arabian Airlines, Thai Airways and United Airlines, among others.⁶⁷ The first item discussed was the Fuel Surcharge.⁶⁸ The Airfreight Carriers also discussed other competitively sensitive issues, such as capacity and flight frequency.⁶⁹ The next GCCI meeting was scheduled for March 16, 2000, and the group planned to meet on the third Thursday of each month thereafter.⁷⁰

57. On March 14, 2000, the DOT rejected IATA’s application for approval of Resolution 116ss, stating that the resolution was anticompetitive and was not necessary to cover increased fuel costs:

We are not inclined to accept this continuing, IATA-agreed worldwide industry mechanism that automatically triggers rate increases when certain criteria are met as a method to offset increased fuel costs. . . . We have [] decided to disapprove Resolution 116ss.

The uniform, industry-wide index mechanism proposed here appears *fundamentally flawed and unfair* to shippers and other users of cargo air transportation. If the price of fuel spikes long enough to trigger a rate increase and then declines, but not enough to trigger its suspension, then shippers and users could be subjected, through this mechanism, to unjustified and unwarranted rate increases. . . .

Moreover, IATA’s proposed index mechanism, which reflects the volatile nature of the spot market, is at best an imperfect measure of the impact of fuel price increases on carriers. Most carriers employ fuel hedging programs which they use to limit the effects

⁶⁶ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 1 (Feb. 24, 2000) [LH_CIV_0240825]; Agenda, GCCI Monthly Meeting (Feb. 24, 2000) [LH_CIV_0240819].

⁶⁷ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 1 (Feb. 24, 2000) [LH_CIV_0240825].

⁶⁸ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 1 (Feb. 24, 2000) [LH_CIV_0240825]; Agenda, GCCI Monthly Meeting (Feb. 24, 2000) [LH_CIV_0240819].

⁶⁹ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 2 (Feb. 24, 2000) [LH_CIV_0240825].

⁷⁰ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 2 (Feb. 24, 2000) [LH_CIV_0240825].

of jet fuel price volatility and thus discipline their costs. Indeed, under these programs, many prudent carriers manage to hedge between 70-80 percent of their total fuel needs. To illustrate, . . . the difference between the average actual fuel prices, as reported to the Department [by IATA], measured between June 1996 and November 1999, increased about six percent, while IATA's index, based on spot market prices, showed a 34 percent increase over the same period. In these circumstances, the proposed mechanism cannot receive our approval.

We find the [] resolution . . . to be *adverse to the public interest and in violation of the [section 41309 of Title 49 of the United States] Code*.⁷¹

58. IATA subsequently sent a memorandum to its members, including Air Canada, informing them that the DOT disapproved of Resolution 116ss, attaching the DOT's order, and stating that "as a result Mail Vote 875 will not come into effect."⁷² However, the Airfreight Carriers, including Air Canada and Canadian Airlines, were already charging (and they continued to charge) DHL a Fuel Surcharge.

59. On April 6, 2000, IATA announced that it would no longer publish the FPI.⁷³ IATA also privately sent the members of the IATA Cargo Committee, including Air Canada, a letter on April 14, 2000, regarding the potential liability for following the FPI as described in Resolution 116ss:

The Index has now become tainted by the DoT order finding Resolution 116ss, to which the Index was linked, to be adverse to the public interest and in violation of law. If the carriers were to coordinate pricing by reference to the Index, whether pursuant to this disapproved Resolution or simply through de facto parallel pricing actions, that could be regarded as an illegal conspiracy in violation of applicable Competition laws, whether the Index is published by IATA, PLATTS, or indeed, simply calculated by each of the carriers independently. Against that background,

⁷¹ Order, U.S. Dep't of Transportation, Docket OST-2000-6837-2, at 2-3 (Mar. 17, 2000) (emphasis added), available at <http://perma.cc/08YkrDUHXpg>.

⁷² Memorandum from Director, Tariff Services, IATA, to Members Participating in Tariff Coordinating Conferences (Mar. 21, 2000) [QAL-01-194653].

⁷³ Memorandum from Senior Director, Tariff Services, IATA, to Members Participating in Cargo Tariff Coordinating Conferences (Apr. 7, 2000) [QAL-01-194707].

IATA has no choice but to discontinue all activity associated with the disapproved Resolution, including calculation and dissemination of the Fuel Price Index, and it has done so. Because any further pricing actions linked to the now tainted Index could expose the carriers engaging in such pricing actions to serious antitrust liability, we must advise that carriers not engage in any pricing actions tied to the Index. As there is no further legitimate or lawful use to be made of the Index, we also recommend that carriers refrain from approaching any third party requesting them to calculate and publish the Index.⁷⁴

60. The DOT's rejection of Resolution 116ss formalized the Airfreight Carriers' *lack* of immunity for charging the Fuel Surcharges. Nevertheless, Air Canada, Canadian Airlines and the other Cartel members—including, but not limited to, Air France, Cargolux, KLM, Korean Air, Lufthansa Cargo and United Airlines—continued charging DHL the Fuel Surcharge. However, to disguise the unlawful Cartel agreement, the Airfreight Carriers no longer used the IATA FPI. Instead, Lufthansa Cargo started publishing on its website its own FPI, which was substantially the same as the IATA FPI, although it took different numerical values to prevent detection of the Cartel agreement. Other Airfreight Carriers either followed the Lufthansa Cargo FPI or published what purported to be their own FPIs but were substantially the same as the IATA and Lufthansa Cargo FPIs. Air Canada, for example, published its own FPI that took different numerical values than Lufthansa Cargo's FPI to hide the existence of the Cartel.⁷⁵

61. In practice, all of the published FPIs resulted in coordinated increases of Fuel Surcharges, although the precise dates of increases were staggered to avoid exactly parallel conduct and, thus, further hide the Cartel. Indeed, Air Canada sometimes delayed changes to its Fuel Surcharge by a number of months, as was the case in the summer and fall of 2000.⁷⁶

⁷⁴ Memorandum from Managing Director, Distribution Services, IATA, to Members, IATA Cargo Committee (Apr. 14, 2000) [QAL-01-194725].

⁷⁵ See Lufthansa Cargo, Minutes of Meeting with Air Canada, at 2 (Feb. 13, 2003) [LH_CIV_0244945] (noting that Air Canada was publishing a FPI in 2001); E-mail between American Airlines Employees (Aug. 15, 2005) [AAC046855] (linking to the FPIs of various Airfreight Carriers, including Air Canada).

⁷⁶ See E-mail between Lufthansa Cargo employees (Sept. 7, 2000) [LH_CIV_0112002].

62. To monitor adherence to the Cartel agreement, the Airfreight Carriers, including Air Canada, met frequently and discussed their experience and plans with respect to implementing the Cartel agreement. For example, Air Canada, attended a series of secret meetings of the JFK Airport Air Cargo Association in New York, New York.⁷⁷ Other attendees included Air France, Alitalia, China Airlines, Cargolux, Cathay Pacific, EVA Airways, JAL, Lufthansa Cargo, Nippon Cargo Airlines, Singapore Air and Thai Airways.⁷⁸ During these meetings, the Airfreight Carriers discussed and coordinated their plans to charge Fuel Surcharges in accordance with the Lufthansa Cargo Fuel Surcharge methodology.⁷⁹

63. On April 4, 2000, the IATA Cargo Committee met in Vancouver, British Columbia, Canada.⁸⁰ C. Morin, Air Canada's Vice President of Cargo, and B. Remple of Canadian Airlines attended the meeting.⁸¹ During the meeting, IATA provided an update on the FPI and Resolution 116ss.⁸² IATA again noted that the DOT rejected Resolution 116ss and that, as a result, "IATA's legal advisors [] recommended that the publication of the index should be suspended."⁸³ Nonetheless, the Airfreight Carriers, including Air Canada and Canadian Airlines, continued to charge Fuel Surcharges pursuant to the Lufthansa Cargo FPI, which was substantially the same as the IATA FPI contained in Resolution 116ss.

⁷⁷ See Class Action Complaint, *Benchmark Export Services et al. v. China Airlines Ltd. et al.*, at 32, 10-CV-639 (JG)(VVP) (Feb. 12, 2010).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ Agenda & Documentation, IATA Cargo Committee, 14th Meeting (Apr. 4, 2000) [QAL-01-194664]; Summary of Action, IATA Cargo Committee 14th Meeting (Apr. 4, 2000) [QAL-01-194692].

⁸¹ Summary of Action, IATA Cargo Committee 14th Meeting, at 8-9 (Apr. 4, 2000) [QAL-01-194692].

⁸² Summary of Action, IATA Cargo Committee, 14th Meeting, at 10 (Apr. 4, 2000) [QAL-01-194692].

⁸³ Summary of Action, IATA Cargo Committee, 14th Meeting, at 10 (Apr. 4, 2000) [QAL-01-194692].

64. In September 2000, Gerry Simpson, Air Canada's Manager of Cargo Marketing and Sales Support, corresponded with Lufthansa Cargo regarding the Fuel Surcharge for flights originating in Canada, including flights from Canada to the United States.⁸⁴

65. On January 17, 2001, the Airline Cargo Council of Switzerland ("ACCS") met at the Unique Centre Airport in Zurich, Switzerland.⁸⁵ Representatives from Air Canada attended the meeting, as did representatives from Air France, British Airways, Cathay Pacific, El Al Israel Airlines, KLM, Korean Air, Lufthansa Cargo, Martinair, Singapore Air, South African Airways, Swissair, Thai Airways and United Airlines, among others.⁸⁶ One of the topics discussed was whether to decrease the Fuel Surcharge in accordance with Lufthansa Cargo's FPI in light of a decline in fuel prices.⁸⁷

D. The Agreement to Modify the Fuel Surcharge Mechanism and to Adhere to the Modified Mechanism

66. In late 2001, the FPI fell to a level that, under Resolution 116ss, required that the Fuel Surcharge be suspended. Accordingly, Air Canada and several other Airfreight Carriers either reduced or suspended the Fuel Surcharge on or about December 1, 2001.⁸⁸ The Airfreight Carriers agreed to suspend the Fuel Surcharge in a staggered manner to give customers, including DHL, the impression that the Airfreight Carriers were acting unilaterally. For example, Air Canada suspended its Fuel Surcharge effective December 1,⁸⁹ while Lufthansa Cargo's suspension was effective December 20.⁹⁰

⁸⁴ See E-mail between Lufthansa Cargo employees (Sept. 7, 2000) [LH_CIV_0112002].

⁸⁵ Minutes, 27th ACCS Meeting (Jan. 17, 2001) [LH_CIV_0007440].

⁸⁶ Minutes, 27th ACCS Meeting, at 1 (Jan. 17, 2001) [LH_CIV_0007440].

⁸⁷ Minutes, 27th ACCS Meeting, at 3 (Jan. 17, 2001) [LH_CIV_0007440].

⁸⁸ All Cargo News, *Air Canada<AC.TO> to end cargo fuel surcharge, Dec 1* (Nov. 29, 2001) [LH_CIV_0104455]; E-mail between Lufthansa Cargo employees (Nov. 27, 2001) [LH_CIV_0050892].

⁸⁹ All Cargo News, *Air Canada<AC.TO> to end cargo fuel surcharge, Dec 1* (Nov. 29, 2001) [LH_CIV_0104455].

⁹⁰ Lufthansa Cargo News, *Lufthansa Cargo lifts fuel surcharge* (Dec. 6, 2001) [LH_CIV_0031099].

67. Unwilling to give up the supracompetitive profits generated by the Fuel Surcharges, the Airfreight Carriers soon agreed to a new methodology and reinstated Fuel Surcharges. In January 2002, Lufthansa Cargo and other Cartel members secretly developed a modified FPI mechanism.⁹¹ Like Resolution 116ss and the follow-on Lufthansa Cargo FPI, the revised methodology was benchmarked to the average spot price of aviation fuel in June 1996,⁹² but the new methodology had different thresholds for increases and decreases in the Fuel Surcharge. It worked as follows:⁹³

- FPI **exceeds 115** for 2 consecutive weeks: Fuel Surcharge implemented at \$0.05/kg
- FPI **exceeds 135** for 2 consecutive weeks: Fuel Surcharge adjusted to \$0.10/kg
- FPI **exceeds 165** for 2 consecutive weeks: Fuel Surcharge adjusted to \$0.15/kg
- FPI **exceeds 190** for 2 consecutive weeks: Fuel Surcharge adjusted to \$0.20/kg
- FPI **below 170** for 2 consecutive weeks: Fuel Surcharge reduced to \$0.15/kg
- FPI **below 145** for 2 consecutive weeks: Fuel Surcharge reduced to \$0.10/kg
- FPI **below 120** for 2 consecutive weeks: Fuel Surcharge reduced to \$0.05/kg
- FPI **below 100** for 2 consecutive weeks: Fuel Surcharge suspended

68. Lufthansa Cargo publicly announced the new methodology—pursuant to which it and other Airfreight Carriers, including Air Canada, had agreed to impose Fuel Surcharges—on January 23, 2002.⁹⁴ In its press releases announcing the new FPI, Lufthansa Cargo misleadingly claimed that the new FPI was “much more closely linked to the actual developments of fuel prices than the previous [Fuel Surcharge]” and the new FPI “still leaves Lufthansa Cargo

⁹¹ See, e.g., E-mail from General Manager for Pricing, Lufthansa Cargo, to Senior Vice President of Marketing, Lufthansa Cargo (Jan. 25, 2002) [LH_CIV_0001655].

⁹² E-mail from General Manager for Pricing, Lufthansa Cargo, to a Lufthansa Cargo employee (Jan 15, 2002) [LH_CIV_0000015]; E-mail from General Manager for Pricing, Lufthansa Cargo, to a Lufthansa Cargo employee (Jan 15, 2002) [LH_CIV_0000021]; E-mail from General Manager for Pricing, Lufthansa Cargo, to several Lufthansa Cargo employees (Jan. 16, 2002) [LH_CIV_0000315].

⁹³ E-mail from General Manager for Pricing, Lufthansa Cargo, to a Lufthansa Cargo employee (Jan 15, 2002) [LH_CIV_0000015].

⁹⁴ Lufthansa Cargo News, *Lufthansa Cargo introduces new fuel surcharge calculation method More closely linked to kerosene price / Risk remains with the airline* (Jan 23, 2002) [LH_CIV_0000321].

exposed to high financial risks arising from strongly fluctuating fuel prices.⁹⁵ In reality, the Fuel Surcharges imposed according to the new FPI were not “linked” to fuel costs and the Airfreight Carriers were not “exposed to high financial risks” because the Fuel Surcharges over-recovered for any increases in fuel costs.

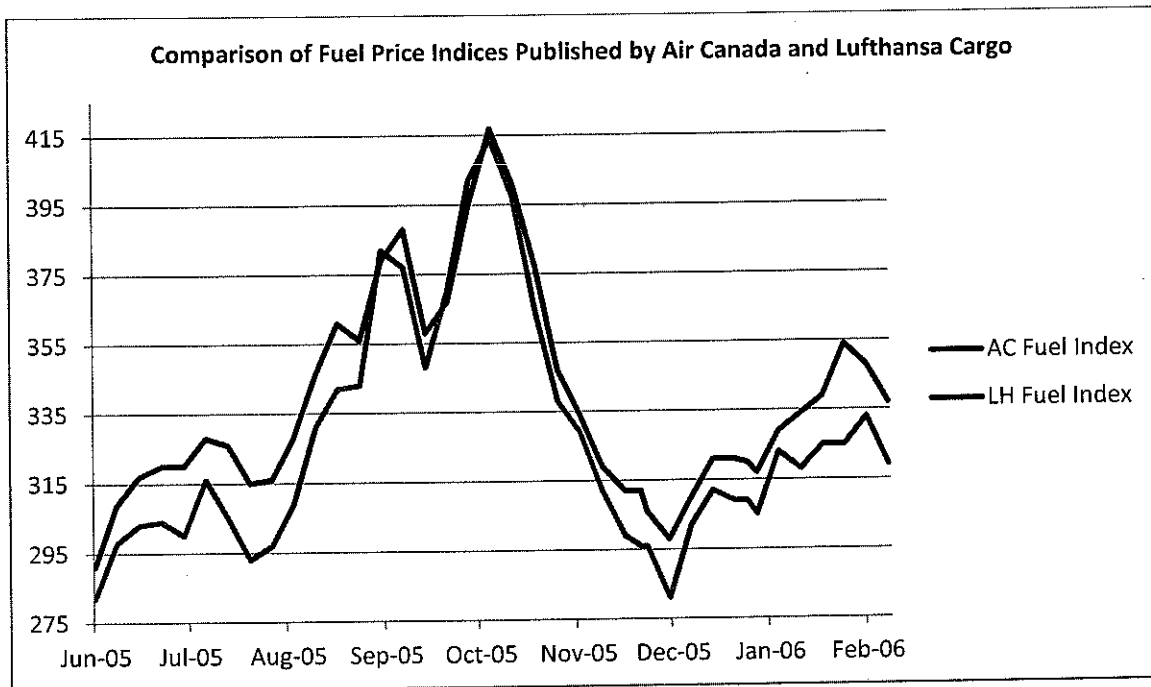
69. Other Airfreight Carriers, such as Air Canada, Air France, British Airways, Emirates, Japan Airlines, KLM, LAN Cargo, Northwest Airlines, SAS, Swissair and United Airlines, published FPIs according to the new methodology during portions of the Cartel Period.⁹⁶ Like the previous Lufthansa Cargo FPI, the new indices used slightly different numbers than the new Lufthansa Cargo FPI in order to give the false impression of unilateral action. For example, Air Canada published on its website its own FPI during portions of the Cartel Period, giving DHL the misimpression that Air Canada was imposing its Fuel Surcharge unilaterally.⁹⁷ The following graph compares the FPI that Air Canada published with the FPI published by Lufthansa Cargo:⁹⁸

⁹⁵ Lufthansa Cargo News, *Lufthansa Cargo introduces new fuel surcharge calculation method More closely linked to kerosene price / Risk remains with the airline* (Jan 23, 2002) [LH_CIV_0000321]; E-mail between Lufthansa Cargo employees (Jan. 21, 2002) [LH_CIV_0029983] (pasting an announcement of Lufthansa Cargo’s new FPI).

⁹⁶ See, e.g., E-mail between American Airlines employees (Aug. 15, 2005) [AAC046855].

⁹⁷ See, e.g., Lufthansa Cargo, Minutes of Meeting with Air Canada, at 2 (Feb. 13, 2003) [LH_CIV_0244945] (noting that Air Canada was publishing a FPI in 2002); E-mail between American Airlines Employees (Aug. 15, 2005) [AAC046855] (linking to the FPIs of various Airfreight Carriers, including Air Canada).

⁹⁸ See Chart of Lufthansa Cargo FPI (May 24, 2006) [QAL-01-168190]; E-mail between American Airlines Employees (Aug. 15, 2005) [AAC046855] (linking to the FPIs of various Airfreight Carriers, including Air Canada); Snapshots of Air Canada’s Fuel Index Website, *available at* <http://perma.cc/0qsTrMZuAi1> (as of Feb. 13, 2006); <http://perma.cc/0ufMqyJeUtP> (as of Dec. 15, 2005); <http://perma.cc/03eMUfEgxYi> (as of Dec. 1, 2005); <http://perma.cc/0nuXXu7BdDT> (as of Nov. 5, 2005).



70. In practice, all of the published FPIs resulted in near-simultaneous (but staggered) increases of equivalent amounts by all of the Airfreight Carriers, including Air Canada.

71. Lufthansa Cargo began charging a Fuel Surcharge pursuant to its new methodology on April 25, 2002, when the modified FPI first exceeded 115 for two consecutive weeks.⁹⁹ Other Airfreight Carriers, including Air Canada, also began charging customers, including DHL, a Fuel Surcharge of USD 0.05 per kilogram pursuant to the new methodology.¹⁰⁰ As had been suggested by Lufthansa Cargo, Air Canada and its co-conspirators staggered their implementation dates to conceal their participation in the Cartel. For example, British Airways

⁹⁹ Lufthansa Cargo News, *Lufthansa Cargo to introduce Fuel Surcharge of 0.05 euros* (Mar. 28, 2002) [LH_CIV_0042858]; Letter from Senior Vice President of Sales, Lufthansa Cargo, to Partners and Customers [LH_CIV_0030639].

¹⁰⁰ Press Release, Air Canada, *Air Canada Cargo Fuel Surcharge* (Apr. 11, 2002) [SIA_CIV_0037929]. See also Press Release, Air France Cargo, *Air France Cargo Introduced Fuel Surcharge Sliding Scale* (Mar. 26, 2002) [LH_CIV_0045746]; Press Release, Air France Cargo, *Air France Cargo Announces Fuel Surcharge* (Apr. 5, 2002) [SIA_CIV_0027992]; Customer Newsletter, KLM Cargo (Apr. 3, 2002) [LH_CIV_0192106].

and Emirates implemented the Fuel Surcharge effective April 22,¹⁰¹ Lufthansa Cargo effective April 25,¹⁰² and KLM effective May 1.¹⁰³

72. In early September 2002, the new FPI exceeded the relevant threshold for an increase in the Fuel Surcharge. In response, there were communications among the Airfreight Carriers confirming that they would increase the Fuel Surcharge. For example, on September 5, 2002, Steve Gibbs, Air Canada's Senior Director of Corporate Sales for The Americas and South Pacific, and Gerry Simpson, Air Canada's Manager of Cargo Marketing and Sales Support, met privately with Lufthansa Cargo's Vice President of Sales for The Americas and Lufthansa Cargo's Manager of Strategic Alliances and Networks for the Americas in Atlanta, Georgia.¹⁰⁴ During the meeting, Lufthansa Cargo confirmed that it would "levy a fuel surcharge of USD 0.10/kg (CAD 0.16/kg) on actual weight effective SEPT 23rd, 2002."¹⁰⁵ Air Canada responded that its "fuel index ha[d] also risen above the threshold of 135 for two consecutive weeks, and [Air Canada] expect[ed] an increase shortly."¹⁰⁶ The meeting closed with an agreement between the two Airfreight Carriers to "investigate areas of cooperation in the Americas."¹⁰⁷ In a subsequent e-mail from Lufthansa Cargo to Mr. Gibbs and Mr. Simpson of Air Canada, Lufthansa Cargo summarized the meeting as "a very open and good discussion [] about possible further steps to cooperate more closely together."¹⁰⁸ Mr. Simpson and Lufthansa Cargo held

¹⁰¹ Newsflash, British Airways World Cargo, *British Airways World Cargo to Implement Fuel Surcharge* (Apr. 9, 2002) [QAL-01-209152]; E-mail from Jassim Saif, Emirates (Apr. 9, 20002) [LH_CIV_0148256].

¹⁰² Lufthansa Cargo News, *Lufthansa Cargo to introduce Fuel Surcharge of 0.05 euros* (Mar. 28, 2002) [LH_CIV_0042858]; Letter from Senior Vice President of Sales, Lufthansa Cargo, to Partners and Customers (Apr. 9, 2002) [LH_CIV_0030639].

¹⁰³ Letter from KLM Cargo Management to Customer (Apr. 3, 2002) [LH_CIV_0192106].

¹⁰⁴ Minutes, Air Canada/LCAG Meeting, at 1 (Sept. 5, 2002) [LH_CIV_0001237].

¹⁰⁵ Minutes, Air Canada/LCAG Meeting, at 2 (Sept. 5, 2002) [LH_CIV_0001237].

¹⁰⁶ Minutes, Air Canada/LCAG Meeting, at 2 (Sept. 5, 2002) [LH_CIV_0001237].

¹⁰⁷ Minutes, Air Canada/LCAG Meeting, at 3 (Sept. 5, 2002) [LH_CIV_0001237].

¹⁰⁸ E-mail from Manager, Strategic Alliances & Networks, the Americas, Lufthansa Cargo, to Steven Gibbs, Senior Director, Corporate Sales, The Americas and South Pacific, Air Canada, and Gerry Simpson, Manager, Cargo Marketing and Sales Support, Air Canada (Sept. 5, 2002) [LH_CIV_0001237].

another meeting on September 30, 2002, “to follow up on Sep.5 meeting in [Atlanta] between [Air Canada] and [Lufthansa Cargo].”¹⁰⁹

73. On September 19, 2002, the Air Cargo Agents Association of India held a meeting in the Air India conference room “to discuss an increase in [the] Fuel Surcharge in view of [an increase in the] fuel price index There was an almost unanimous decision that the [Fuel Surcharge] would be increased” effective October 1, 2002.¹¹⁰ M. Sane of Air Canada attended the meeting.¹¹¹ Other attendees included Air France, Air India, Alitalia, British Airways, Cathay Pacific, El Al Israel Airlines, Emirates, EVA Airways, KLM, Korean Air, Malaysian Airlines System, Saudi Arabian Airlines, Singapore Air, South African Airways, Swiss WorldCargo and Thai Airways, among others.¹¹²

74. On September 25, 2002, Lufthansa Cargo’s Vice President of Sales for the Americas wrote to Claude Morin of Air Canada (copying Steven Gibbs and Gerald Simpson of Air Canada, who had attended the meeting with Lufthansa Cargo on September 5, 2002) to discuss “possibilities of a closer cooperation.”¹¹³ The Lufthansa Cargo representative noted that the cooperation does “not stop in Canada.”¹¹⁴ The end of the e-mail noted that Lufthansa Cargo wanted to meet to further discuss “a possible closer cooperation which may benefit our two companies.”¹¹⁵

¹⁰⁹ Lufthansa Cargo, Air Canada/LCAG Minutes (Sept. 30, 2002), attached to E-mail between Lufthansa Cargo employees (Oct. 7, 2002) [LH_CIV_0112254].

¹¹⁰ Minutes of the Air Cargo Agents Association of India Meeting, at 2 (Sept. 19, 2002) [SIA_CIV_0027253].

¹¹¹ Minutes of the Air Cargo Agents Association of India Meeting, at 3 (Sept. 19, 2002) [SIA_CIV_0027253].

¹¹² Minutes of the Air Cargo Agents Association of India Meeting, at 3 (Sept. 19, 2002) [SIA_CIV_0027245].

¹¹³ E-mail from Vice President, Sales, The Americans, Lufthansa Cargo, to Claude Morin, Steven Gibbs and Gerald Simpson, Air Canada (Sept. 25, 2002) [LH_CIV_0054776].

¹¹⁴ E-mail from Vice President, Sales, The Americans, Lufthansa Cargo, to Claude Morin, Steven Gibbs and Gerald Simpson, Air Canada (Sept. 25, 2002) [LH_CIV_0054776].

¹¹⁵ E-mail from Vice President, Sales, The Americans, Lufthansa Cargo, to Claude Morin, Steven Gibbs and Gerald Simpson, Air Canada (Sept. 25, 2002) [LH_CIV_0054776].

75. In mid-September 2002, in accordance with the new methodology and the subsequent communications confirming the revised Cartel agreement, the Airfreight Carriers, including Air Canada, announced an increase in the Fuel Surcharge by USD 0.05 per kilogram to USD 0.10 per kilogram to be effective in late September or early October 2002.¹¹⁶ The Airfreight Carriers staggered the implementation of this Fuel Surcharge increase to give the fraudulent impression that they were acting unilaterally. For example, British Airways and Lufthansa Cargo increased their Fuel Surcharge to USD 0.10 per kilogram effective September 23,¹¹⁷ while increases by Air Canada and KLM were effective October 1.¹¹⁸ Rolf Holderegger of Air Canada coordinated the increase to USD 0.10 per kilogram by sending the date and amount of Air Canada's planned Fuel Surcharge increase to ACCS members on September 12, 2002.¹¹⁹

76. On September 20, 2002, Rolf Holderegger of Air Canada met privately with representatives from other Airfreight Carriers at a restaurant named "Frohsinn in Kloten."¹²⁰ Other attendees included Air France, British Airways, Cathay Pacific, Emirates, Iberia,

¹¹⁶ E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Sept. 12, 2002) [LH_CIV_0005426]. See also Press Release, KLM, *KLM Cargo Introduces Fuel Surcharge and Security Surcharge Based on Actual Weight Per October 1st* (Sept. 16, 2002) [QAL-01-214167]; Press Release, British Airways World Cargo, *British Airways World Cargo to Increase Fuel Surcharge* (Sept. 6, 2002) [QAL-01-176977]; Lufthansa Cargo News, *Lufthansa Cargo to introduce Fuel Surcharge of 0.10 euros per kilo of actual freight weight on September 23, 2002* (Sept. 5, 2002) [LH_CIV_0031089].

¹¹⁷ Newsflash, *British Airways World Cargo To Increase Fuel Surcharge* (Sept. 6, 2002) [QAL-01-176977]; Lufthansa Cargo News, *Lufthansa Cargo to introduce Fuel Surcharge of 0.10 euros per kilo of actual freight weight on September 23, 2002* (Sept. 5, 2002) [LH_CIV_0031089].

¹¹⁸ E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Sept. 12, 2002) [LH_CIV_0005426]; Newsletter, *KLM Cargo introduces fuel surcharge and security surcharge based on actual weight per October 1st* (Sept. 16, 2002) [QAL-01-214167].

¹¹⁹ E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Sept. 12, 2002) [LH_CIV_0005426].

¹²⁰ E-mail from Angelo Lassandro, IATA, to representatives from Air France, Air Canada, British Airways, Cathay Pacific, Emirates, Iberia, Lufthansa Cargo, Singapore Air, Swiss WorldCargo and Thai Airways (Sept. 6, 2002) [SIA_CIV_0031218].

Lufthansa Cargo, Singapore Air, Swiss WorldCargo and Thai Airways.¹²¹ One of the primary discussion topics discussed was the Fuel Surcharge.¹²²

77. On February 13, 2003, Air Canada met privately with Lufthansa Cargo at the Montreal International Airport to discuss, among other things, the FPI and the Fuel Surcharge.¹²³ The Air Canada representatives in attendance were Claude Morin, Vice President of Cargo; Gerry Simpson, Manager of Cargo Marketing and Sales Support; and Steven Gibbs, Senior Director of Corporate Cargo Sales for The Americans and South Pacific.¹²⁴ The attendees discussed the fact that both Air Canada's and Lufthansa Cargo's FPIs had "exceeded the target threshold for an increase within two weeks notice."¹²⁵ It was also noted that Air Canada's "various surcharges accounted for 11% of [Air Canada] Cargo revenue in 2002."¹²⁶

78. Lufthansa Cargo announced on February 17, 2003 that it would increase its Fuel Surcharge by USD 0.05 per kilogram to USD 0.15 per kilogram effective March 3, 2003.¹²⁷ On the day of Lufthansa Cargo's announcement, a Lufthansa Cargo representative sent an e-mail to Gerry Simpson, Air Canada's Manager of Cargo Marketing and Sales Support, to inform Air Canada that Lufthansa Cargo would be increasing its Fuel Surcharge.¹²⁸ Mr. Simpson responded

¹²¹ E-mail from Angelo Lassandro, IATA, to representatives from Air France, Air Canada, British Airways, Cathay Pacific, Emirates, Iberia, Lufthansa Cargo, Singapore Air, Swiss WorldCargo and Thai Airways (Sept. 6, 2002) [SIA_CIV_0031218].

¹²² E-mail from Angelo Lassandro, IATA, to representatives from Air France, Air Canada, British Airways, Cathay Pacific, Emirates, Iberia, Lufthansa Cargo, Singapore Air, Swiss WorldCargo and Thai Airways (Sept. 6, 2002) [SIA_CIV_0031218].

¹²³ Lufthansa Cargo, Minutes of Meeting with Air Canada (Feb. 13, 2003) [LH_CIV_0244945].

¹²⁴ Lufthansa Cargo, Minutes of Meeting with Air Canada, at 1 (Feb. 13, 2003) [LH_CIV_0244945].

¹²⁵ Lufthansa Cargo, Minutes of Meeting with Air Canada, at 2 (Feb. 13, 2003) [LH_CIV_0244945].

¹²⁶ Lufthansa Cargo, Minutes of Meeting with Air Canada, at 2 (Feb. 13, 2003) [LH_CIV_0244945].

¹²⁷ Lufthansa Cargo News, *Lufthansa Cargo to introduce fuel surcharge of 0.15 euros per kilo of actual weight on 3 March 2003* (Feb. 17, 2003) [LH_CIV_0030115].

¹²⁸ E-mail from a Lufthansa Cargo representative to Gerry Simpson, Manager, Cargo Marketing and Sales Support, Air Canada (Feb. 17, 2003) [LH_CIV_0001240].

by informing the Lufthansa Cargo representative that Air Canada also would be increasing its Fuel Surcharge by the same amount.¹²⁹

79. The announcement and implementation of the increase to USD 0.15 per kilogram was also coordinated by e-mails between and among at least the following Airfreight Carriers: Air Canada, Air China, Air France, Air New Zealand, Alitalia, American Airlines, British Airways, Cargolux, Cathay Pacific, Emirates, Iberia, Japan Airlines, KLM, Korean Air, LAN Cargo, Lufthansa Cargo, Martinair, SAS, Saudi Arabian Airlines, Singapore Air, South African Airways, Swiss WorldCargo, Thai Airways, United Airlines and VARIG.¹³⁰ In addition, the president of ACCS thanked the ACCS members, including Air Canada, “for the active part in agreeing on the same amount” for the Fuel Surcharge increase.¹³¹

80. The modified Fuel Surcharge mechanism did not envision the Fuel Surcharge exceeding USD 0.20 per kilogram. Therefore, to continue the Cartel, the Airfreight Carriers needed additional tiers for changes in the Fuel Surcharge after the increase to USD 0.20 per kilogram was announced. (The Airfreight Carriers referred to “tiers,” “thresholds” and “triggers” interchangeably.) Accordingly, Lufthansa Cargo persuaded the Airfreight Carriers to adopt two new tiers that would result in increases of the Fuel Surcharge to USD 0.25 per

¹²⁹ E-mail from Gerry Simpson, Manager, Cargo Marketing and Sales Support, Air Canada, to a Lufthansa Cargo representative (Feb. 24, 2003) [LH_CIV_0001240]. Mr. Simpson noted that for shipments departing from Canada, the Fuel Surcharge would be CAD 0.24 per kilogram, which was higher than the Cartel level of CAD 0.23 per kilogram. *Id.*

¹³⁰ *See, e.g.*, E-mail from Regional Sales Director for Germany, Lufthansa Cargo, to representatives of Air Canada, Air China, Air France, Air New Zealand, Cargolux, Cathay Pacific, Japan Airlines, KLM, LAN Cargo, SAS, Singapore Air, South African Airways, Thai Airways, United Airlines and VARIG (Feb. 17, 2003) [LH_CIV_0160688]; E-mail from Andre Berger, President, ACCS, to Air Canada, Air France, Alitalia, American Airlines, British Airways, Cathay Pacific, Federal Express, El Al Israel Airlines, Emirates, Iberia, Japan Airlines, KLM, Korean Air, Kuwait Airways, Lufthansa Cargo, Martinair, Saudi Arabian Airlines, Singapore Air, Swiss WorldCargo, TAP, Thai Airways and United Airlines (Feb. 18, 2003) [SIA_CIV_0000144]. *See also* Minutes, India BAR Cargo Meeting (Oct. 8, 2003) [SIA_CIV_0027226]; Chart, Lufthansa Cargo, *Carrierzuschläge* (undated) [LH_CIV_0031564]. *See also* Press Release, KLM Cargo, *KLM Cargo increases fuel surcharge to 0.20 cents, effective March 24, 2003* (Mar. 11, 2003) [LH_CIV_0051398].

¹³¹ Minutes, Confidential ACCS Meeting, at 1 (Apr. 2, 2003) [LH_CIV_0007454].

kilogram and USD 0.30 per kilogram if the FPI exceeded certain thresholds.¹³² Similarly, if the FPI fell below certain thresholds, the Fuel Surcharge would return to USD 0.25 per kilogram or USD 0.20 per kilogram.¹³³ The Airfreight Carriers referred to these new tiers as triggers 5 and 6 (with triggers 1 through 4 already defined in the existing mechanism to which the Cartel members agreed in late 2001 and early 2002). At the same time, the Airfreight Carriers also added a lower tier to protect against the elimination of the Fuel Surcharge if the price of aviation fuel were ever to drop. As long as the FPI remained above 100, a Fuel Surcharge of at least USD 0.02 per kilogram would be imposed.¹³⁴ The only way the Fuel Surcharge would be eliminated is if the FPI fell below 100 (i.e., the average price of aviation fuel was below the 1996 average price of aviation fuel) for two consecutive weeks, a highly unlikely scenario.¹³⁵ Subsequently, each time the then-highest tier was announced, the Airfreight Carriers would simultaneously announced two additional tiers.¹³⁶

81. Lufthansa Cargo announced that it would increase its Fuel Surcharge by USD 0.05 per kilogram to USD 0.20 per kilogram effective March 24, 2003.¹³⁷ Following the announcement of its Fuel Surcharge increase, but before its effective date, Lufthansa Cargo also sent its Fuel Surcharge press release in an e-mail jointly addressed to M. Sauer of Air Canada and representatives of other Cartel members, including Air China, Air France, Air New Zealand, Cargolux, Cathay Pacific, Japan Airlines, KLM, Korean Air, LAN Cargo, Martinair, South

¹³² E-mail from General Manager of Pricing, Lufthansa Cargo, to Senior Vice President of Marketing, Lufthansa Cargo (Mar. 11, 2003) (attachment) [LH_CIV_0000039].

¹³³ E-mail from General Manager of Pricing, Lufthansa Cargo, to Senior Vice President of Marketing, Lufthansa Cargo (Mar. 11, 2003) (attachment) [LH_CIV_0000039].

¹³⁴ E-mail from General Manager of Pricing, Lufthansa Cargo, to Senior Vice President of Marketing, Lufthansa Cargo (Mar. 11, 2003) (attachment) [LH_CIV_0000039].

¹³⁵ E-mail from General Manager of Pricing, Lufthansa Cargo, to Senior Vice President of Marketing, Lufthansa Cargo (Mar. 11, 2003) (attachment) [LH_CIV_0000039].

¹³⁶ See, e.g., Letter from Tom Wong, Chairman, Cargo Sub-Committee, Hong Kong Board of Airline Representatives, to Stephen Kwok, Assistant Director-General (Air Services), Civil Aviation Department, Hong Kong (Apr. 7, 2005) [QAL-01-195594] (announcing triggers 9 and 10).

¹³⁷ Lufthansa Cargo News, *Continuing Rise in Crude Oil Prices Leads to New Increase in Fuel Surcharge* (Mar. 10, 2003) [LH_CIV_0030098].

African Airways, SAS, Singapore Air, Thai Airways, United Airlines and VARIG.¹³⁸ Air Canada and the other Cartel members announced the same increase to their Fuel Surcharge to be effective at approximately the same time, but not exactly the same time, thus conveying the impression to DHL that the Airfreight Carriers were acting unilaterally.¹³⁹

82. On April 1, 2003, when the price of aviation fuel was dropping, ten Airfreight Carriers (Air Canada, Air France, British Airways, Cathay Pacific, EVA Airways, Federal Express, Japan Airlines, KLM, Korean Air and Lufthansa Cargo) met and discussed adjusting the Fuel Surcharge downward pursuant to the Lufthansa Cargo FPI.¹⁴⁰ In furtherance of the discussions at the April 1 meeting and according to the Fuel Surcharge triggers previously adopted—and to minimize cheating—the Airfreight Carriers, including Air Canada, agreed to and did reduce their Fuel Surcharges—in a coordinated and largely parallel manner—by USD 0.05 per kilogram to USD 0.15 per kilogram effective in April 2003.¹⁴¹ Again, the Airfreight Carriers staggered their implementation dates to prevent detection of the Cartel.¹⁴²

83. Effective shortly thereafter in early May 2003, the Airfreight Carriers, including Air Canada, again in a coordinated and largely parallel fashion (with staggered effective dates)

¹³⁸ E-mail from Regional Sales Director for Germany, Lufthansa Cargo, to representatives of Air Canada, Air China, Air France, Air New Zealand, Cargolux, Cathay Pacific, Japan Airlines, KLM, Korean Air, LAN Cargo, Martinair, South African Airways, SAS, Singapore Air, Thai Airways, United Airlines and VARIG (Mar. 10, 2003) [LH_CIV_0147783].

¹³⁹ See, e.g., Customer Newsletter, KLM Cargo, *KLM Cargo Increases Fuel Surcharge, Effective March 24* (Mar. 11, 2003) [QAL-01-168247]; Lufthansa Cargo News, *Continuing Rise in Crude Oil Prices Leads to New Increase in Fuel Surcharge* (Mar. 10, 2003) [LH_CIV_0030098]; Customer Newsletter, KLM Cargo, *KLM Cargo Increases Fuel Surcharge, Effective March 24* (Mar. 11, 2003) [QAL-01-168247]; Press Release, British Airways World Cargo, *British Airways World Cargo Increases Fuel Surcharge* (Mar. 13, 2003) [LH_CIV_0001173]; Letter from John Cooper, General Manager Freight Sales & Marketing, Qantas Airways, to Customers (Mar. 18, 2003) [QAL-01-168180]; Press Release, British Airways World Cargo, *British Airways World Cargo Increases Fuel Surcharge* (Mar. 13, 2003) [LH_CIV_0001173].

¹⁴⁰ E-mail between Lufthansa Cargo employees (Apr. 2, 2003) [LH_CIV_0001242].

¹⁴¹ See, e.g., Customer Newsletter, KLM Cargo, *KLM Cargo reduces fuel surcharge from Euro 0.20 to Euro 0.15, effective April 7, 2003* (Apr. 2, 2003) [LH_CIV_0031547]; Press Release, Lufthansa Cargo, *Reduce Fuel Surcharge* (Apr. 8, 2003) [QAL-01-195302]; Press Release, British Airways, *British Airways World Cargo Decreases Fuel Surcharge* (Apr. 10, 2003) [LH_CIV_0001176].

¹⁴² See E-mail between Qantas Airways employees (Apr. 8, 2003) [QAL-01-195310].

pursuant to the Cartel agreement, reduced the Fuel Surcharge by another USD 0.05 per kilogram to USD 0.10 per kilogram.¹⁴³

84. In early December 2003, the FPI was rising, and it exceeded the relevant threshold for a Fuel Surcharge increase.¹⁴⁴ Pursuant to their agreement, the Airfreight Carriers, including Air Canada, increased the Fuel Surcharge by USD 0.05 per kilogram to USD 0.15 per kilogram effective in late December 2003 or early January 2004.¹⁴⁵ Once again, the effective dates of the increase were staggered. For example, Lufthansa Cargo, Japan Airlines, and Singapore Air implemented the increase to USD 0.15 per kilogram effective December 18,¹⁴⁶ Martinair December 19,¹⁴⁷ KLM January 1,¹⁴⁸ Air France January 15,¹⁴⁹ and Air Canada on January 19.¹⁵⁰

85. In April 2004, the FPI exceeded the next threshold, triggering another Fuel Surcharge increase. This trigger led to another round of communications between and among the Cartel members, including at least the following Airfreight Carriers: Air Canada, Air China, Air France, Air New Zealand, Cargolux, Cathay Pacific, EVA Airways, Japan Airlines, KLM,

¹⁴³ See, e.g., Lufthansa Cargo News, *Lufthansa Cargo to reduce fuel surcharge to 0.10 euros from May 6 2003* (Apr. 22, 2003) [LH_CIV_0030082]; Press Release, KLM Cargo, *KLM Cargo reduces fuel surcharge and adjusts Middle East network* (Apr. 25, 2003) [SIA_CIV_0037969]; Press Release, Martinair Cargo, *Martinair Reduces Fuel Surcharge* (Apr. 29, 2003) [SIA_CIV_0037977]; Press Release, Air France Cargo, *Fuel Surcharge* (May 1, 2003) [SIA_CIV_0037979]; E-mail between Swiss WorldCargo employees (Apr. 24, 2003) [SIA_CIV_0004274] (pasting British Airways press release)..

¹⁴⁴ E-mail from Senior Vice President of Marketing, Lufthansa Cargo, to several Lufthansa Cargo employees (Dec. 4, 2003) [LH_CIV_0000042].

¹⁴⁵ E-mail between Lufthansa Cargo employees (Jan. 12, 2004) [LH_CIV_0050736]. See also Customer Newsletter, KLM Cargo, *KLM Cargo increases fuel surcharge to Euro 0.15* (Dec. 16, 2003) [LH_CIV_0159207]; Press Release, Martinair Cargo, *Martinair Cargo Increases Fuel Surcharge* (Dec. 8, 2003) [SIA_CIV_0038106]; Press Release, American Airlines Cargo, *American Airlines Cargo Division Announces Increase in Fuel Surcharge* (Dec. 3, 2003) [LH_CIV_0005544].

¹⁴⁶ E-mail between Qantas Airways employees (Dec. 5, 2003) [QAL-01-195434].

¹⁴⁷ Press Release, *Martinair Cargo Increases Fuel Surcharge* (Dec. 8, 2003) [SIA_CIV_0038106].

¹⁴⁸ Press Release, *KLM Cargo increases fuel surcharge to Euro 0.15* (Dec. 16, 2003) [LH_CIV_0159207].

¹⁴⁹ E-mail between Swiss WorldCargo employees (Dec. 23, 2003) [LH_CIV_0005622].

¹⁵⁰ E-mail between Lufthansa Cargo employees (Jan. 12, 2004) [LH_CIV_0050736].

Korean Air, LAN Cargo, Lufthansa Cargo, Martinair, SAS, Singapore Air, South African Airways, Thai Airways, United Airlines and VARIG.¹⁵¹

86. Pursuant to the Cartel agreement and the communications between Cartel members in April 2004, the Airfreight Carriers, including Air Canada, announced—in a coordinated and largely parallel fashion—an increase to USD 0.20 per kilogram to be effective in May 2004.¹⁵² The Airfreight Carriers' effective dates were once again staggered to prevent detection of the secret Cartel agreement.¹⁵³

87. Shortly after the Cartel members announced the increase to USD 0.20 per kilogram, the FPI moved above the next threshold. Pursuant to the Cartel agreement, the Airfreight Carriers, including Air Canada, increased—in a coordinated and mostly parallel fashion—the Fuel Surcharge to USD 0.25 per kilogram in effective in early June 2004.¹⁵⁴ These increases were staggered by the Cartel members thereby concealing from customers, such as DHL, the coordinated nature of the increases.¹⁵⁵

88. By mid-June 2004, the FPI was increasing so quickly that it exceeded another threshold, indicating that the Fuel Surcharge should be increased to USD 0.30 per kilogram.

¹⁵¹ See, e.g., E-mail from a Lufthansa Cargo employee to representatives of Air Canada, Air China, Air France, Air New Zealand, Cargolux, Cathay Pacific, EVA Air, Japan Airlines, KLM, Korean Air, LAN Cargo, Martinair, SAS, Singapore Air, South African Airways, Thai Airways, UA and VARIG (Apr. 27, 2004) [LH_CIV_0110022].

¹⁵² See, e.g., Press Release, KLM Cargo, *KLM Cargo increases fuel surcharge to GBP 0.13* (Apr. 29, 2004) [SIA_CIV_0037986]; Press Release, Martinair Cargo, *Martinair Cargo increases its Fuel Surcharge* (Apr. 29, 2004) [SIA_CIV_0037983].

¹⁵³ See Lufthansa Cargo News, *Lufthansa Cargo increases fuel surcharge* (Apr. 26, 2004) [LH_CIV_0043016]; Press Release, KLM Cargo, *KLM Cargo increases fuel surcharge to GBP 0.13* (Apr. 29, 2004) [SIA_CIV_0037986]; Press Release, Martinair Cargo, *Martinair Cargo increases its Fuel Surcharge* (Apr. 29, 2004) [SIA_CIV_0037983]; Press Release, *Saudi Arabian Airlines Fuel Surcharge Increase* (Apr. 29, 2004) [SIA_CIV_0037987]; E-mail from Matthew Kemp, British Airways (Apr. 28, 2004) [QAL-01-209412].

¹⁵⁴ E-mail between Lufthansa Cargo employees (June 7, 2004) [LH_CIV_0031917]. See also Lufthansa Cargo, *Fuel Surcharge Competitor Overview*, at 2 (June 28, 2004) [LH_CIV_0000492].

¹⁵⁵ Lufthansa Cargo News, *Lufthansa Cargo increases fuel surcharge* (May 24, 2004) [LH_CIV_0043009]; Press Release, *Martinair increases Fuel Surcharge* (June 1, 2004) [SIA_CIV_0038013]; E-mail from Matthew Kemp, British Airways, to Debbie Sykes, Qantas Airways (May 26, 2004) [QAL-01-209436]; Press Release, Air France Cargo, *FSC Anpassung* (July 26, 2004) [LH_CIV_0029935]; Customer Newsletter, *KLM Cargo increases fuel surcharge to Euro 0.25* (July 23, 2004) [LH_CIV_0029049].

Concerned that the Cartel increasing the Fuel Surcharge too often and too quickly may reveal the existence of the Cartel, the Airfreight Carriers, after discussions among themselves, agreed to keep the Fuel Surcharge at USD 0.25 per kilogram.¹⁵⁶ Although members of the Cargo Subcommittee of the Singapore Board of Airline Representatives (“Singapore BAR CSC”), which included Air Canada, had already announced an increase, Tom Wong of Cathay Pacific and leader of the Singapore BAR, sent an e-mail on July 21, 2004, to all members of the Singapore BAR, stating that “due to the different interpretation of the LH [Lufthansa] Cargo Fuel Surcharge mechanism by various stakeholders, the previously-announced fuel surcharge increase will be withdrawn with immediate effect.”¹⁵⁷ This statement was intended to and did have the effect of concealing the Cartel agreement.

89. The FPI rose again in late August 2004, and the Airfreight Carriers again discussed whether they should increase the Fuel Surcharge. KLM suggested to various Airfreight Carriers that they should jointly increase the Fuel Surcharge from USD 0.25 per kilogram to USD 0.30 per kilogram.¹⁵⁸ After additional private communications between Cartel members, including Air Canada, the Airfreight Carriers decided to leave the Fuel Surcharge USD 0.25 per kilogram and delay an increase.¹⁵⁹

90. By mid-September 2004, after further communications, the Airfreight Carriers, including Air Canada, decided to increase the Fuel Surcharge to USD 0.30 per kilogram and did

¹⁵⁶ See, e.g., E-mail from a Lufthansa Cargo employee to General Manager for Pricing, Lufthansa Cargo (June 21, 2004) [LH_CIV_0001180]; Press Release, KLM Cargo, *Fuel surcharge remains 0.20 Euro—KLM Cargo adapts fuel surcharge mechanism* (June 25, 2004) [LH_CIV_0000057].

¹⁵⁷ E-mail from Maria Ng, Cathay Pacific, to Hong Kong BAR members (July 21, 2004) [QAL-01-209463].

¹⁵⁸ See, e.g., E-mail between Qantas Airways employees (Aug. 25, 2004) [QAL-01-209484].

¹⁵⁹ See, e.g., E-mail between Qantas Airways employees (Aug. 25, 2004) [QAL-01-209484]; E-mail between Lufthansa Cargo employees (Aug. 31, 2004) [LH_CIV_0001940] (“AF [a]nd KL[M] today have not yet reached a decision about what they will do. [They] want to give me an update about the decision tomorrow (Tue). We [Lufthansa Cargo] have signaled, however, that we would follow. . . . We should definitely try to convince AF/KLM to be the first mover. [Lufthansa Cargo] will follow up once again tomorrow [on that].”); E-mail from Senior Manager of Pricing, Lufthansa Cargo, General Manager for Pricing, Lufthansa Cargo (June 21, 2004) [LH_CIV_0001180].

so effective between late September and early October 2004.¹⁶⁰ Like the increases before it, this Fuel Surcharge increase was staggered to give the misleading impression that the Cartel members' conduct was unilateral. For example, Air France and KLM's increase to USD 0.30 per kilogram was effective on September 29,¹⁶¹ Singapore Air and Swiss WorldCargo on October 4,¹⁶² British Airways on October 7,¹⁶³ and Air Canada on October 8.¹⁶⁴ Air Canada also affirmatively coordinated this increase with other Airfreight Carriers, including Swiss WorldCargo.¹⁶⁵

91. At the same time that they announced the Fuel Surcharge increase to USD 0.30 per kilogram, the Airfreight Carriers announced two new tiers in preparation for increases in the Fuel Surcharge to USD 0.35 per kilogram and USD 0.40 per kilogram.¹⁶⁶ The Airfreight Carriers referred to these tiers as the seventh and eighth trigger points.

92. Pursuant to the seventh trigger point announced in September 2004, in mid-October 2004, the Cartel, including Air Canada, announced—in a coordinated and parallel (although staggered) fashion—another increase in the Fuel Surcharge of USD 0.05 per kilogram to USD 0.35 per kilogram to take effect on or about October 25, 2004.¹⁶⁷ Like other Fuel

¹⁶⁰ Press Release, Air Canada, *Air Canada Fuel Surcharge ab 08.10.2004* (Sept. 27, 2004) [SIA_CIV_0014322]. See also Press Release, KLM Cargo, *KLM Cargo Increases Fuel Surcharge to Euro 0.30 Effective September 29th* (Sept. 15, 2004) [LH_CIV_0029858]; Press Release, Air France Cargo, *Air France Cargo erhöht Fuel Surcharge* (Sept. 21, 2004) [LH_CIV_0158260]; Press Release, Martinair Cargo, *Martinair Cargo Increases Fuel Surcharge* (Sept. 21, 2004) [SIA_CIV_0038047].

¹⁶¹ Press Release, *Air France Cargo erhöht Fuel Surcharge* (Sept. 21, 2004) [LH_CIV_0158260]; Press Release, *KLM Cargo increases fuel surcharge to Euro 0.30 effective September 29th* (Sept. 15, 2004) [LH_CIV_0029858].

¹⁶² E-mail from Walter Burri, Singapore Air, to ACCS members (Sept. 24, 2004) [LH_CIV_0005822].

¹⁶³ Press Release, *British Airways World Cargo to Increase Fuel Surcharge* (Sept. 24, 2004) [SIA_CIV_0038050].

¹⁶⁴ Press Release, *Air Canada Fuel Surcharge ab 08.10.2004* (Sept. 27, 2004) [SIA_CIV_0014322].

¹⁶⁵ See, e.g., E-mail between Swiss WorldCargo employees (Sept. 23, 2004) [SIA_CIV_0033819].

¹⁶⁶ See, e.g., Press Release, KLM Cargo, *KLM Cargo Adapts Fuel Surcharge Mechanism and Increases Fuel Surcharge to Euro 0.35* (Oct. 12, 2004) [LH_CIV_0029856]; Press Release, British Airways World Cargo, *British Airways World Cargo to Increase Fuel Surcharge* (Sept. 24, 2004) [SIA_CIV_0038050].

¹⁶⁷ Press Release, Air Canada, *Air Canada Fuel Surcharge Ab 25.10.2004* (Oct. 15, 2004) [LH_CIV_0029039]. See also Press Release, Air France Cargo, *Air France Cargo Increases Fuel Surcharge on Oct 28, 2004* (Oct. 13, 2004) [LH_CIV_0029934]; Press Release, Martinair Cargo, *Martinair Cargo Increases Fuel Surcharge* (Oct. 13, 2004) [LH_CIV_0043810].

Surcharge increases, the increase to USD 0.35 per kilogram was staggered, giving DHL the impression that the Cartel members were acting unilaterally. For example, Air Canada's increase was effective on October 25,¹⁶⁸ Martinair's on October 26,¹⁶⁹ and Air France's and British Airways' on October 28.¹⁷⁰

93. Effective in January 2005, the Airfreight Carriers, including Air Canada, decreased the Fuel Surcharge to USD 0.30 per kilogram.¹⁷¹ This decrease was staggered. For example, Air France implemented its decrease to USD 0.30 per kilogram on January 1,¹⁷² Lufthansa Cargo on January 3,¹⁷³ British Airways on January 6,¹⁷⁴ and Air Canada on January 10.¹⁷⁵ Air Canada coordinated this decrease by, among other things, informing the members of ACCS about the intended effective date and amount of its Fuel Surcharge decrease.¹⁷⁶

94. Effective in March 2005, the Airfreight Carriers, including Air Canada, increased the Fuel Surcharge back to USD 0.35 per kilogram.¹⁷⁷ The Airfreight Carriers again staggered the implementation of this increase to maintain the illusion of unilateral conduct.¹⁷⁸ In connection with this increase, Lufthansa Cargo's General Manager for Pricing sent an e-mail jointly addressed to Kevin Cincurak of Air Canada and representatives of Air China, Air New

¹⁶⁸ Press Release, *Air Canada Fuel Surcharge Ab 25.10.2004* (Oct. 15, 2004) [LH_CIV_0029039].

¹⁶⁹ Press Release, *Martinair Cargo Increases Fuel Surcharge* (Oct. 13, 2004) [LH_CIV_0043810].

¹⁷⁰ Press Release, *Air France Cargo erhöht Fuel Surcharge* (Oct. 13, 2004) [LH_CIV_0029934]; Press Release, *British Airways World Cargo to Increase Fuel Surcharge* (Oct. 14, 2004) [SIA_CIV_0038065].

¹⁷¹ Press Release, Air Canada, *Air Canada Cargo FSC* (Jan. 4, 2005) [LH_CIV_0126034]; E-mail from Rolf Holderegger, Air Canada, to ACCS members (Jan. 3, 2005) [LH_CIV_0005971]. See also Press Release, Air France Cargo, *Fuel Surcharge decrease from 01/01/2005* (Dec. 17, 2004) [SIA_CIV_0038082]; Press Release, KLM Cargo, *KLM Cargo decreases fuel surcharge from GBP 0,24 to GBP 0,21 effective January 1, 2005* (Dec. 17, 2004) [SIA_CIV_0038083]; Press Release, Martinair Cargo, *Martinair Cargo Reduces Fuel Surcharge* (Dec. 20, 2004) [SIA_CIV_0038084].

¹⁷² Press Release, Air France, *Fuel surcharge decrease from 01/01/2005* (Dec. 17, 2004) [SIA_CIV_0038082].

¹⁷³ Lufthansa Cargo News, *Lufthansa Cargo lowers fuel surcharge* (Dec. 20, 2004) [LH_CIV_0042836].

¹⁷⁴ Press Release, *British Airways World Cargo to Decrease Fuel Surcharge* (Dec. 30, 2004) [SIA_CIV_0038094].

¹⁷⁵ Press Release, *Air Canada Cargo Fuel Surcharge* (Jan. 4, 2005) [LH_CIV_0126035].

¹⁷⁶ E-mail from Rolf Holderegger, Air Canada, to ACCS members (Jan. 3, 2005) [LH_CIV_0005971].

¹⁷⁷ Chart, Lufthansa Cargo, *Fuel Surcharge Competitor Overview* [LH_CIV_0050585]. See also Press Release, Air France Cargo, *Fuel Surcharge Increase from 22nd March 2005* (Mar. 9, 2005) [SIA_CIV_0038129]; Press Release, KLM Cargo, *KLM Cargo to increase fuel surcharge March 22* (Mar. 10, 2005) [SIA_CIV_0038132]; Press Release, Martinair Cargo, *Martinair Cargo Increases Fuel Surcharge* (Mar. 9, 2005) [SIA_CIV_0038131].

¹⁷⁸ See *ibid.*

Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways to inform those Airfreight Carriers that Lufthansa Cargo planned to increase its Fuel Surcharge to USD 0.35 per kilogram effective March 21, 2005—the same day that Air Canada ultimately increased its Fuel Surcharge by the same amount.¹⁷⁹ In that same e-mail, Lufthansa Cargo's General Manager for pricing also directed the addressees to the Lufthansa Cargo website, where Lufthansa Cargo published its FPI.¹⁸⁰

95. Effective in April 2005, the Airfreight Carriers, including Air Canada, increased in the Fuel Surcharge—in a coordinated manner—to USD 0.40 per kilogram.¹⁸¹ Pursuant to the Cartel agreement, the Airfreight Carriers once again staggered the implementation of this increase to hide the existence of the Cartel from DHL and other customers. For example, Lufthansa Cargo increased its Fuel Surcharge effective on April 4,¹⁸² Air France and KLM on April 5,¹⁸³ and Air Canada and British Airways on April 7.¹⁸⁴

96. The Fuel Surcharge increase to USD 0.40 per kilogram was again preceded by an e-mail from Lufthansa Cargo's pricing department that was jointly addressed to Kevin Cincurak of Air Canada and representatives of Air China, Air New Zealand, Cathay Pacific, EVA

¹⁷⁹ E-mail from General Manager for Pricing, Lufthansa Cargo, to representatives of Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Mar. 7, 2005) [LH_CIV_0135462].

¹⁸⁰ E-mail from General Manager for Pricing, Lufthansa Cargo, to representatives of Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Mar. 7, 2005) [LH_CIV_0135462].

¹⁸¹ Press Release, *Air Canada Cargo Fuel Surcharge Increase* (Mar. 29, 2005) [LH_CIV_0044564]; Air Canada, *Surcharges—Canada*, attached to E-mail between Lufthansa Cargo employees (June 20, 2005) [LH_CIV_0028424]. See also Press Release, *Air France Cargo—Fuel Surcharge Increase from 5 April 2005* (Mar. 24, 2005) [SIA_CIV_0038151]; Press Release, *KLM Cargo—Fuel Surcharge Increase* (Mar. 24, 2005) [SIA_CIV_0038149]; Press Release, *Martinair Cargo, Martinair Cargo to increase fuel surcharge April 5th* (Mar. 22, 2005) [SIA_CIV_0038145]; Press Release, *Cargolux, Cargolux Adapts Its Fuel Surcharge* (Mar. 22, 2005) [QAL-01-168149].

¹⁸² Lufthansa Cargo News, *Record crude oil prices trigger rise in fuel surcharge* (Mar. 21, 2005) [LH_CIV_0042954].

¹⁸³ Press Release, *Air France Cargo—Fuel Surcharge Increase from 5 April 2005* (Mar. 24, 2005) [SIA_CIV_0038151]; Press Release, *KLM Cargo—Fuel Surcharge Increase* (Mar. 24, 2005) [SIA_CIV_0038149].

¹⁸⁴ Press Release, *Air Canada Cargo Fuel Surcharge Increase* (Mar. 29, 2005) [LH_CIV_0044564]; Press Release, *British Airways World Cargo fuel surcharge increase April 7* (Mar. 24, 2005) [SIA_CIV_0038147].

Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways informing the addressees that Lufthansa Cargo planned to increase the Fuel Surcharge to USD 0.40 per kilogram effective April 4, 2005—just four days prior to the date on which Air Canada increased its Fuel Surcharge by the same amount.¹⁸⁵

97. When the Airfreight Carriers announced the increase to USD 0.40 per kilogram, they simultaneously announced two additional trigger points for Fuel Surcharge increases to USD 0.45 per kilogram and USD 0.50 per kilogram.¹⁸⁶ The Airfreight Carriers referred to these tiers as the ninth and tenth trigger points.¹⁸⁷

98. On June 17, 2005, Chris Yang, Korean Air's Manager of Cargo Route and Fleet Management, sent Korean Air's FPI methodology and the corresponding Fuel Surcharge amounts for flights departing from Korea in an e-mail jointly addressed to representatives of Air Canada and Swiss WorldCargo, among other Airfreight Carriers.¹⁸⁸

99. Effective in July 2005, the Airfreight Carriers, including Air Canada, increased the Fuel Surcharge to USD 0.45 per kilogram in a coordinated and largely parallel manner.¹⁸⁹ As with other Fuel Surcharge increases, the Airfreight Carriers staggered their implementation dates to disguise their collusive conduct as unilateral decision-making. For example, Air France and

¹⁸⁵ E-mail from Senior Manager for Pricing, Lufthansa Cargo, to representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Mar. 21, 2005) [LH_CIV_0135463].

¹⁸⁶ Press Release, British Airways World Cargo, *British Airways World Cargo to Increase Fuel Surcharge* (Mar. 24, 2005) [SIA_CIV_0038147]. See also Letter from Tom Wong, Chairman, Cargo Sub-Committee, Hong Kong Board of Airline Representatives, to Stephen Kwok, Assistant Director-General (Air Services), Civil Aviation Department, Hong Kong (Apr. 7, 2005) [QAL-01-195594].

¹⁸⁷ See, e.g., Letter from Tom Wong, Chairman, Cargo Sub-Committee, Hong Kong Board of Airline Representatives, to Stephen Kwok, Assistant Director-General (Air Services), Civil Aviation Department, Hong Kong (Apr. 7, 2005) [QAL-01-195594].

¹⁸⁸ E-mail from Chris Yang, Manager, Cargo Route & Fleet Management, Korean Air (June 17, 2005) [SIA_CIV_0031014].

¹⁸⁹ Press Release, Air Canada, *Fuel Surcharge Air Canada Cargo* (June 30, 2005) [SIA_CIV_0014861]; E-mail from Rolf Holderegger, Air Canada, to ACCS members (June 30, 2005) [LH_CIV_0000838]. See also Press Release, KLM Cargo, *KLM Cargo Increases Fuel Surcharge to Euro 0.45 Effective July 7, 2005* (June 23, 2005) [QAL-01-209646]; Letter from Bruce McCaffrey, Vice President Freight, The Americas, Qantas Freight, to Customer (June 28, 2005) [QAL-01-168181].

KLM increased their Fuel Surcharge effective on July 7,¹⁹⁰ Air Canada on July 11,¹⁹¹ and British Airways on July 14.¹⁹²

100. The Fuel Surcharge increase to USD 0.45 per kilogram again was preceded by an e-mail from Lufthansa Cargo's General Manager for Pricing that was jointly addressed to Kevin Cincurak of Air Canada and representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways informing the addressees that Lufthansa Cargo planned to increase the Fuel Surcharge to USD 0.45 per kilogram effective July 11, 2005—again on the same day that Air Canada increased its Fuel Surcharge by the same amount.¹⁹³ Rolf Holderegger of Air Canada also coordinated the increase to USD 0.45 per kilogram by sending the date and amount of its planned Fuel Surcharge increase to ACCS members on June 30, 2005,¹⁹⁴ which was in response to the ACCS president's exhortation that "[i]t is time again to exchange information."¹⁹⁵ Air Canada also secretly coordinated the implementation of this increase through multilateral correspondence in Brazil.¹⁹⁶

101. Effective in September 2005, the Airfreight Carriers, including Air Canada, increased the Fuel Surcharge to USD 0.50 per kilogram in a coordinated and parallel fashion.¹⁹⁷

¹⁹⁰ E-mail from Basil Baramki, Air France, to ACCS members (July 1, 2005) [LH_CIV_0003413].

¹⁹¹ Press Release, *Fuel Surcharge Air Canada Cargo* (June 30, 2005) [SIA_CIV_0014861].

¹⁹² E-mail from Marek Vraný, British Airways, to ACCS members (June 30, 2005) [SIA_CIV_0001444].

¹⁹³ E-mail from Senior Manager for Pricing, Lufthansa Cargo, to representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (June 27, 2005) [LH_CIV_0000638]. *See also* E-mail from General Manager for Pricing, Lufthansa Cargo, to representatives of Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (July 11, 2005) [LH_CIV_0135464].

¹⁹⁴ E-mail from Rolf Holderegger, Air Canada, to ACCS members (June 30, 2005) [LH_CIV_0000838].

¹⁹⁵ E-mail from Walter Burri, Singapore Air, to ACCS members (June 30, 2005) [LH_CIV_0000838].

¹⁹⁶ *See* E-mail from Alfredo Rodriguez, President, JURCAIB (Aug. 1, 2005) [LH_CIV_0004129].

¹⁹⁷ E-mail from Rolf Holderegger, Air Canada, to ACCS members (Aug. 24, 2005) [LH_CIV_0000853]. *See also* Press Release, KLM Cargo, *KLM Cargo Increases Fuel Surcharge to Euro 0.50 Effective September 5, 2005* (Aug. 22, 2005) [QAL-01-209702]; Letter from Air France Cargo to Customer (Aug. 23, 2005) [LH_CIV_0063813]; Press Release, Air France Cargo, *Modification Fuel Surcharge AF* (Sept. 16, 2005) [LH_CIV_0040481]; Letter from

The Airfreight Carriers continued to conceal the existence of the Cartel by staggering the implementation of this increase. For example, Air Canada's increase went into effect on September 5,¹⁹⁸ British Airways' on September 8,¹⁹⁹ and Asiana on September 30.²⁰⁰

102. The increase to USD 0.50 per kilogram was preceded by an e-mail from Lufthansa Cargo's General Manager for Pricing that was jointly addressed to Kevin Cincurak of Air Canada and representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways informing the addressees that Lufthansa Cargo planned to increase the Fuel Surcharge to USD 0.50 per kilogram effective September 5, 2005—again on the same day that Air Canada increased its Fuel Surcharge by the same amount.²⁰¹ In addition, Rolf Holderegger of Air Canada again coordinated the increase by sending the date and amount of Air Canada's planned Fuel Surcharge increase to ACCS members on August 24, 2005.²⁰²

103. Shortly after the increase to USD 0.50 per kilogram, the FPI exceeded the next threshold, indicating that the Fuel Surcharge should be increased to USD 0.55 per kilogram.²⁰³ However, Lufthansa Cargo sent an e-mail jointly addressed to Kevin Cincurak of Air Canada, as well as representatives Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways, stating that

Bruce McCaffrey, Vice President Freight, The Americas, Qantas Freight, to Customer (Aug. 22, 2005) [QAL-01-168182].

¹⁹⁸ E-mail from Rolf Holderegger, Air Canada, to ACCS members (Aug. 24, 2005) [LH_CIV_0000853].

¹⁹⁹ Press Release, *British Airways World Cargo to Increase Fuel Surcharge* (Aug. 25, 2005) [SIA_CIV_0031047].

²⁰⁰ Rate Sheet, Asiana Airlines [LH_CIV_0146620].

²⁰¹ E-mail from Senior Manager for Pricing, Lufthansa Cargo, to representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Aug. 22, 2005) [LH_CIV_0135465].

²⁰² E-mail from Rolf Holderegger, Air Canada, to ACCS members (Aug. 24, 2005) [LH_CIV_0000853].

²⁰³ E-mail from Lufthansa Cargo to Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Sept. 12, 2005) [LH_CIV_0135466].

Lufthansa Cargo intended to suspend the increase.²⁰⁴ Air Canada and the other Cartel members likewise suspended the increase until Lufthansa Cargo decided to increase its Fuel Surcharge.

104. On October 5, 2005, Lufthansa Cargo informed its competitors, including Air Canada, that it was prepared to lift the suspension and increase the Fuel Surcharge to USD 0.55 per kilogram effective October 17, 2005.²⁰⁵ Lufthansa Cargo's General Manager for Pricing communicated this decision in an e-mail jointly addressed to Kevin Cincurak of Air Canada and representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways.²⁰⁶

105. Air Canada and the other Cartel members then implemented the increase to USD 0.55 per kilogram.²⁰⁷ Air Canada's increase was effective on the same day as the one announced and communicated to competitors by Lufthansa Cargo (October 17, 2005),²⁰⁸ which was part of a staggered implementation with other Airfreight Carriers. For example, Emirates' increase went into effect on October 18,²⁰⁹ and British Airways' on October 20.²¹⁰

106. Rolf Holderegger of Air Canada coordinated the increase to USD 0.55 per kilogram by informing the members of ACCS of the date and amount of Air Canada's increase

²⁰⁴ E-mail from Lufthansa Cargo to Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Sept. 12, 2005) [LH_CIV_0135466].

²⁰⁵ E-mail from General Manager for Pricing, Lufthansa Cargo, to representatives of Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Oct. 5, 2005) [LH_CIV_0135467].

²⁰⁶ E-mail from General Manager for Pricing, Lufthansa Cargo, to representatives of Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Oct. 5, 2005) [LH_CIV_0135467].

²⁰⁷ E-mail from Rolf Holderegger, Air Canada to ACCS Members (Oct. 7, 2005) [LH_CIV_0006186]. *See also* Press Release, KLM Cargo, *KLM Cargo Increases Fuel Surcharge to Euro 0.55 Effective October 17, 2005* (Oct. 5, 2005) [QAL-01-197523]; Press Release, Air France Cargo, *Air France Increases Fuel Surcharges* (Oct. 6, 2005) [LH_CIV_0041854].

²⁰⁸ E-mail from Rolf Holderegger, Air Canada to ACCS Members (Oct. 7, 2005) [LH_CIV_0006186].

²⁰⁹ Press Release, *Fuel surcharge increase on Emirates SkyCargo* (Oct. 10, 2005) [LH_CIV_0063764].

²¹⁰ Press Release, *British Airways World Cargo fuel surcharge increase effective 20th October 2005* (Oct. 6, 2005) [LH_CIV_0030940].

on October 7, 2005.²¹¹ Air Canada also communicated bilaterally with other Airfreight Carriers, including Qantas Airways, to coordinate the increase to USD 0.55 per kilogram.²¹²

107. On October 21, 2005, Chris Yang, Korean Air's Manager of Cargo Route and Fleet Management, sent an updated and revised version of Korean Air's FPI methodology and the corresponding Fuel Surcharge amounts for flights departing from Korea in an e-mail jointly addressed to representatives of Air Canada, Air France and Lufthansa Cargo, among other Airfreight Carriers.²¹³

108. Effective in late October and early November 2005, the Airfreight Carriers, including Air Canada, increased the Fuel Surcharge to USD 0.60 per kilogram in a coordinated and parallel (although staggered) fashion.²¹⁴

109. The increase to USD 0.60 per kilogram was again preceded by an e-mail from Lufthansa Cargo's General Manager for Pricing that was jointly addressed to Kevin Cincurak of Air Canada and representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways informing the addressees that Lufthansa Cargo planned to increase the Fuel Surcharge to USD 0.60 per kilogram effective October 24, 2005.²¹⁵ Rolf Holderegger of Air Canada further

²¹¹ E-mail from Rolf Holderegger, Air Canada to ACCS Members (Oct. 7, 2005) [LH_CIV_0006186].

²¹² See, e.g., E-mail from Qantas Airways to Porter Enterprises (Oct. 6, 2005) [QAL-01-197510].

²¹³ E-mail from Chris Yang, Manager, Cargo Route & Fleet Management (Oct. 21, 2005) [LH_CIV_0239238].

²¹⁴ Press Release, Air Canada, *New Air Canada Fuel Surcharge* (Oct. 19, 2005) [LH_CIV_00063681]; E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Oct. 19, 2005) [LH_CIV_0006245]. See also Press Release, Air France-KLM, *Air France Cargo-KLM Cargo increase fuel surcharge to Euro 0.60 effective October 28th, 2005* (Oct. 17, 2005) [LH_CIV_0045855]; Press Release, Martinair Cargo, *Martinair Cargo Increases Fuel Surcharges* (Oct. 19, 2005) [LH_CIV_0063693]; Letter from Bruce McCaffrey, Vice President Freight, The Americas, Qantas Freight, to Customer (Oct. 21, 2005) [QAL-01-168186]; Lufthansa Cargo News, *Lufthansa Cargo raises fuel surcharge to 0.60 Euro/kg* (Oct. 13, 2005) [LH_CIV_0042922]; Press Release, *British Airways World Cargo to increase Fuel Surcharge* (Oct. 21, 2005) [LH_CIV_0063661].

²¹⁵ E-mail from General Manager for Pricing, Lufthansa Cargo, to representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Oct. 14, 2005) [LH_CIV_0135468].

coordinated the increase to USD 0.60 per kilogram by informing the members of ACCS of the date and amount of Air Canada's increase on October 19, 2005.²¹⁶

110. In early November 2005, Lufthansa Cargo noted that the Air Canada's Fuel Surcharge was slightly different than the one applied by the Cartel. In response, Lufthansa Cargo and Swiss WorldCargo privately discussed the situation with Air Canada, which admitted that it was using the wrong currency conversion factor.²¹⁷ Air Canada Cargo gave Lufthansa Cargo "confirmation" that, although Air Canada Cargo would "stick to their [Fuel Surcharge] methodology until the end of the year," it would "make any necessary corrections by 01JAN so we should all be on the same page by then."²¹⁸

111. In November 2005, as the FPI declined, the Airfreight Carriers, including Air Canada, in accordance with the Cartel agreement and in a coordinated and parallel fashion, reduced the Fuel Surcharge by USD 0.05 per kilogram to USD 0.55 per kilogram in late November 2005.²¹⁹ Once again, the Cartel members staggered their implementation dates. For example, Air France-KLM²²⁰ implemented the decrease effective on November 16,²²¹ Martinair on November 18,²²² Air Canada on November 21,²²³ and British Airways on November 24.²²⁴

²¹⁶ E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Oct. 19, 2005) [LH_CIV_0006245].

²¹⁷ E-mail between Swiss WorldCargo employees (Nov. 18, 2005) [LH_CIV_0006431].

²¹⁸ E-mail between Lufthansa Cargo employees (Nov. 7, 2005) [LH_CIV_0004348]; E-mail between Swiss WorldCargo employees (Nov. 18, 2005) [LH_CIV_0006431].

²¹⁹ Press Release, Air Canada, *Air Canada Cargo Fuel Decrease* (Nov. 11, 2005) [LH_CIV_0063580]; E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Nov. 11, 2005) [LH_CIV_0006280]. See also Press Release, Air France-KLM, *Air France Cargo—KLM Cargo Decreases Fuel Surcharge to Euro 0.55 Effective November 16, 2005* (Nov. 2, 2005) [LH_CIV_0029409]; Press Release, Martinair, *Martinair Cargo Reduces Fuel Surcharge* (Nov. 8, 2005) [LH_CIV_0063610]; IATA Information Service, *Fuel Surcharge by Carrier* (Nov. 1-11, 2005) [SIA_CIV_0000853].

²²⁰ Air France and KLM merged in May 2004. Since that time, Air France and KLM have been owned by a holding company known as Air France-KLM, but the two carriers have remained separate subsidiaries of Air France-KLM and each carrier has retained its own independent brand.

²²¹ Press Release, *AF: Fuel Surcharge Decrease 16NOV05* (Nov. 3, 2005) [LH_CIV_0029409].

²²² Press Release, *Martinair Cargo Reduces Fuel Surcharge* (Nov. 8, 2005) [LH_CIV_0063610].

²²³ Press Release, *Air Canada Cargo FSC decrease* (Nov. 11, 2005) [LH_CIV_0063580].

²²⁴ Press Release, *British Airways World Cargo to decrease Fuel Surcharge* (Nov. 10, 2005) [LH_CIV_0063583].

112. The decrease to USD 0.55 per kilogram was preceded by an e-mail from Lufthansa Cargo's General Manager for Pricing that was jointly addressed to Kevin Cincurak of Air Canada and representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways informing the addressees that Lufthansa Cargo planned to decrease the Fuel Surcharge to USD 0.55 per kilogram effective November 21, 2005.²²⁵ Rolf Holderegger of Air Canada further coordinated the decrease to USD 0.55 per kilogram by informing the members of ACCS of the date and amount of Air Canada's decrease on November 11, 2005.²²⁶ Air Canada also coordinated the decrease with Lufthansa Cargo.²²⁷

113. In accordance with the Cartel agreement and in a coordinated manner, the Cartel members, including Air Canada, decreased the Fuel Surcharge to USD 0.50 per kilogram in late November and early December 2005.²²⁸ Pursuant to the Cartel agreement, the Airfreight Carriers once again staggered the implementation of this decrease to prevent DHL and other customers from detecting the Cartel. For example, Air France-KLM decreased their Fuel Surcharge effective November 28,²²⁹ and Air Canada on December 1.²³⁰

²²⁵ E-mail from General Manager for Pricing, Lufthansa Cargo, to representatives of Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Nov. 8, 2005) [LH_CIV_0135470].

²²⁶ E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Nov. 11, 2005) [LH_CIV_0006280].

²²⁷ See, e.g., E-mail between Lufthansa Cargo employees (Nov. 4, 2005) [LH_CIV_0001243].

²²⁸ Press Release, Air Canada, *Air Canada Cargo FSC Decrease* (Nov. 21, 2005) [LH_CIV_0029434]; E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Nov. 22, 2005) [LH_CIV_0006311]. See also Press Release, Air France-KLM, *Air France Cargo—KLM Cargo reduces fuel surcharge to Euro 0.50 effective November 28, 2005* (Nov. 15, 2005) [LH_CIV_0030856]; Press Release, Martinair Cargo, *Martinair Cargo Reduces Fuel Surcharge* (Nov. 16, 2005) [LH_CIV_0029479]; Press Release, American Airlines Cargo, *American Airlines Cargo Decrease Fuelsurcharge* (Nov. 18, 2005) [LH_CIV_0063523]; Press Release, Lufthansa Cargo, *Lufthansa Cargo Lowers Fuel Surcharge to 0.45 Euro/kg* (Nov. 22, 2005) [LH_CIV_0029405].

²²⁹ Press Release, *Air France Cargo – KLM Cargo reduces fuel surcharge to Euro 0.50 effective November 28, 2005* (Nov. 15, 2005) [LH_CIV_0030856].

²³⁰ Press Release, *Air Canada Cargo FSC Decrease* (Nov. 21, 2005) [LH_CIV_0029434].

114. As the FPI continued to decrease, the Airfreight Carriers, including Air Canada, decreased the Fuel Surcharge to USD 0.45 per kilogram in early December 2005.²³¹ This decrease was also staggered to give the false impression of unilateral action. For example, Air France-KLM implemented the decrease effective on December 1,²³² Lufthansa Cargo on December 5,²³³ Martinair on December 6,²³⁴ Air Canada on December 8,²³⁵ and Emirates on December 9.²³⁶

115. The decreases to both USD 0.50 per kilogram and USD 0.45 per kilogram, like the previous changes in the Fuel Surcharge, were preceded by e-mails from Lufthansa Cargo's General Manager for Pricing that were jointly addressed to Kevin Cincurak of Air Canada and representatives of Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways informing the addressees of the date and amount of Lufthansa Cargo's planned Fuel Surcharge decrease.²³⁷ Rolf Holderegger of Air Canada also once again coordinated both of these decreases by informing the members of ACCS of the date and amount of Air Canada's decreases.²³⁸

116. In late November or early December 2005, Lufthansa Cargo, while monitoring the Cartel, noticed that the Fuel Surcharge that Air Canada was charging for flights originating in

²³¹ Press Release, Air Canada, *Air Canada Cargo FSC Reduction* (Dec. 1, 2005) [LH_CIV_0029432]. See also Customer News Letter, Air France-KLM, *Air France Cargo—KLM Cargo reduces fuel surcharge to Euro 0.45 effective December 1, 2005* (Nov. 22, 2005) [LH_CIV_0063484]; Letter from Martinair Cargo to Customers (Nov. 23, 2005) [LH_CIV_0063467] Press Release, American Airlines Cargo, *American Airlines Cargo Decrease Fuelsurcharge* (Dec. 2, 2005) [LH_CIV_0063393].

²³² Press Release, *Air France Cargo – KLM Cargo reduces fuel surcharge 01 December* (Nov. 22, 2005) [LH_CIV_0063484].

²³³ Lufthansa Cargo News, *Lufthansa Cargo lowers fuel surcharge to 0.45 Euro/kg* (Nov. 21, 2005) [LH_CIV_0042879].

²³⁴ Press Release, *Martinair Cargo to Reduce Fuel Surcharge* (Nov. 23, 2005) [LH_CIV_0063467].

²³⁵ Press Release, *Air Canada Cargo FSC Reduction* (Dec. 1, 2005) [LH_CIV_0029432].

²³⁶ Press Release, *Emirates SkyCargo Fuel surcharge decrease 09 December* (Dec. 2, 2005) [LH_CIV_0063395].

²³⁷ See, e.g., E-mail from General Manager for Pricing, Lufthansa Cargo, to representatives of Air Canada, Air China, Air New Zealand, Cathay Pacific, EVA Airways, Japan Airlines, Korean Air, LAN Cargo, SAS, Singapore Air and South African Airways (Nov. 15, 2005) [LH_CIV_0135471].

²³⁸ See, e.g., E-mail from Rolf Holderegger, Air Canada, to ACCS Members (Nov. 22, 2005) [LH_CIV_0006311].

Canada did not match the Cartel level because of the exchange rate between U.S. dollars (“USD”) and Canadian dollars (“CAD”). Lufthansa Cargo raised the issue of the discrepancy between Air Canada’s published Fuel Surcharge and the agreed upon Cartel level.²³⁹ In response, Air Canada “advised” Lufthansa Cargo that Air Canada would “overhaul their published methodology in January 2006 to take into account current exchange rates between USD and CAD.”²⁴⁰

117. In late January 2006, the FPI exceeded the relevant threshold, indicating that the Fuel Surcharge should be increased.²⁴¹ In response, the Cartel members, including Air Canada, increased the Fuel Surcharge—in a coordinated and parallel fashion—to USD 0.50 per kilogram effective in mid-February 2006.²⁴² Air Canada coordinated the increase with Lufthansa Cargo.²⁴³ Once again, the Airfreight Carriers staggered their implementation of this increase to give the fraudulent appearance of unilateral conduct. For example, Air France-KLM increased its Fuel Surcharge to USD 0.50 per kilogram effective on February 14,²⁴⁴ Martinair on February 15,²⁴⁵ British Airways on February 16,²⁴⁶ and Air Canada on February 20.²⁴⁷

118. Regarding each of the aforementioned Fuel Surcharges described in this section, DHL was subject to and paid these Fuel Surcharges to Air Canada and its co-conspirators for U.S. Airfreight Shipping Services.

²³⁹ E-mail between Lufthansa Cargo employees (Dec. 16, 2005) [LH_CIV_0112747].

²⁴⁰ E-mail between Lufthansa Cargo employees (Dec. 16, 2005) [LH_CIV_0112747].

²⁴¹ E-mail from Walter Burri, Singapore Air, to representatives of British Airways, KLM, Lufthansa Cargo and Swiss WorldCargo (Feb. 2, 2006) [LH_CIV_0000869].

²⁴² Press Release, Air Canada, *Air Canada Cargo Fuel Increase* (Feb. 10, 2006) [LH_CIV_0063321]. See also E-mail between Lufthansa Cargo employees (Feb. 3, 2006) [LH_CIV_0004350]; Press Release, Air France-KLM, *Air France Cargo—KLM Cargo increases fuel surcharge to Euro 0.50 effective February 14, 2006* (Feb. 1, 2006) [LH_CIV_0030190]; Letter from Martinair Cargo to Customers (Feb. 2, 2006) [LH_CIV_0063369].

²⁴³ E-mail between Lufthansa Cargo employees (Feb. 3, 2006) [LH_CIV_0004350].

²⁴⁴ Press Release, *AF-KL Fuel Surcharge Increase 14FEB06* (Feb. 1, 2006) [LH_CIV_0030190].

²⁴⁵ Press Release, *Martinair Cargo Increases Fuel Surcharge* (Feb. 2, 2006) [LH_CIV_0063369].

²⁴⁶ Press Release, *British Airways World Cargo to Increase Fuel Surcharge* (Feb. 2, 2006) [LH_CIV_0030192].

²⁴⁷ Press Release, *Air Canada Cargo Fuel Increase* (Feb. 10, 2006) [LH_CIV_0063321].

IV. The Conspiracy Included Security Surcharges

119. Following the terrorist attacks of September 11, 2001, the Airfreight Carriers, including Air Canada, secretly and jointly agreed to charge a new surcharge for the purported purpose of recouping increased security-related costs. However, the amount of the new surcharge was not calculated based on the Airfreight Carriers' actual additional security-related costs, as evidenced by the fact that the Cartel members initially referred to the surcharge using different names, such as an "insurance surcharge" or a "security surcharge."²⁴⁸ Indeed, Air Canada discussed with Lufthansa Cargo what the surcharge should be called.²⁴⁹ Eventually, the Cartel members adopted the standard nomenclature of "Security Surcharge."²⁵⁰

120. The Airfreight Carriers used the Fuel Surcharge as a model for the Security Surcharge so that the Security Surcharge could be easily implemented and monitored without having to make any complex calculations. Like the Fuel Surcharge, the dollar amount of the Security Surcharge was not based on any measure of actual costs, but merely on weight. As one Airfreight Carrier executive noted:

The calculation on the basis of AW [actual weight] has already been applied in the calculation of the fuel surcharge and is therefore easier to communicate internally and externally. This has been particularly important in the current situation since a fast and successful implementation was important. In addition, the billing procedure is already known from the fuel surcharge and implemented.²⁵¹

121. On September 26, 2001, representatives from 33 Airfreight Carriers, including Lufthansa Cargo, Cathay Pacific, China Airlines, EVA Airways, Qantas Airways and Singapore

²⁴⁸ See, e.g., E-mail from Rodney Ee, Singapore Airlines, to Lufthansa Cargo and SAS (Sept. 30, 2001) [LH_CIV_0001316]; Minutes of the Extra Ordinary Meeting, Cargo Sub Committee, Air Cargo Agents Association of India, at 3 (Oct. 6, 2001) [LH_CIV_0147927].

²⁴⁹ E-mail between Lufthansa Cargo employees (Sept. 28, 2001) [LH_CIV_0001596].

²⁵⁰ See, e.g., E-mail between Lufthansa Cargo employees (Oct. 2, 2001) [LH_CIV_0001249]; Minutes of the Extra Ordinary Meeting, Cargo Sub Committee, Air Cargo Agents Association of India, at 3 (Oct. 6, 2001) [LH_CIV_0147927].

²⁵¹ E-mail between Lufthansa Cargo employees (Oct. 1, 2001) [LH_CIV_0000066].

Airlines met in Hong Kong and discussed the Security Surcharge.²⁵² Although the e-mail summary does not list all of the 33 Airfreight Carriers that attended this meeting,²⁵³ Air Canada operated in Hong Kong and thus likely attended the meeting. At the meeting, the attendees discussed the amount of the Security Surcharge, and the majority of Airfreight Carriers “indicated between 0.10 and 0.15 USD per kg.” which is what was agreed to.²⁵⁴ Air Canada subsequently implemented the Security Surcharge, and, as with the other Airfreight Carriers, the surcharge applied to shipments worldwide, not just to or from Hong Kong.

122. In early October 2001, Gerry Simpson, Manager of Cargo Marketing and Sales Support for Air Canada, corresponded with Lufthansa Cargo’s Regional Manager of Sales for Canada about the Security Surcharge.²⁵⁵ On October 1, 2001, Lufthansa Cargo’s Regional Manager wrote to Mr. Simpson to inform him that Lufthansa Cargo planned to impose a Security Surcharge for flights originating in Canada and the United States starting on October 8, 2001.²⁵⁶ Mr. Simpson responded the following day, stating that Air Canada would be “doing the same thing, except we [Air Canada] have (for the moment) a \$15 minimum fee ex Canada and \$10 USD ex USA, no maximum.”²⁵⁷

123. The Airfreight Carriers, including Air Canada, implemented Security Surcharge effective in October 2001, at which time Air Canada and its co-conspirators began charging and DHL began paying a EUR 0.15 per kilogram Security Surcharge on shipments worldwide,

²⁵² E-mail between Lufthansa Cargo employees (Sept. 26, 2001) [LH_CIV_0001820].

²⁵³ See E-mail between Lufthansa Cargo employees (Sept. 26, 2001) [LH_CIV_0001820].

²⁵⁴ E-mail between Lufthansa Cargo employees (Sept. 26, 2001) [LH_CIV_0001820].

²⁵⁵ E-mail exchange between Gerry Simpson, Manager, Cargo Marketing & Sales Support, Air Canada, and Regional Manager, Sales, Canada, Lufthansa Cargo (Oct. 2001) [LH_CIV_0183932].

²⁵⁶ E-mail from Regional Manager, Sales, Canada, Lufthansa Cargo, to Gerry Simpson, Manager, Cargo Marketing & Sales Support, Air Canada (Oct. 1, 2001) [LH_CIV_0183932].

²⁵⁷ E-mail from Gerry Simpson, Manager, Cargo Marketing & Sales Support, Air Canada, to Regional Manager, Sales, Canada, Lufthansa Cargo (Oct. 2, 2001) [LH_CIV_0183932].

including on U.S. Airfreight Shipping Services.²⁵⁸ As with the Fuel Surcharge, the Airfreight Carriers secretly agreed to stagger the implementation of the Security Surcharge to give DHL and other customers the false impression that the Cartel members were acting unilaterally. For example, Air France's Security Surcharge went into effect on October 8,²⁵⁹ Air Canada's and KLM's on October 15,²⁶⁰ and Asiana Airlines' on October 16.²⁶¹

124. The Airfreight Carriers, including Air Canada, continued to charge—and DHL continued to pay—a Security Surcharge through at least February 2006.

125. Air Canada also imposed Security Surcharges on passenger tickets beginning on September 28, 2001.²⁶²

126. DHL was subject to and paid the Security Surcharge described in this section to Air Canada and its co-conspirators for U.S. Airfreight Shipping Services.

V. The Conspiracy Encompassed Base-Freight Rates

127. The conspiracy was not limited to Surcharges. It also encompassed base-freight rates. Indeed, the Airfreight Carriers, including Air Canada, had fixed base-freight rates prior to the time they instituted Fuel and Security Surcharges. Accordingly, base-freight rates were already at supracompetitive levels at the time the Fuel Surcharge was implemented in February 2000. DHL was subject to and paid the supracompetitive base-freight rates described in this section to Air Canada and its co-conspirators for U.S. Airfreight Shipping Services.

²⁵⁸ See, e.g., Newsletter, KLM Cargo, *Security Surcharge on KLM Cargo Shipments Effective October 15, 2001* (Oct. 1, 2001) [LH_CIV_0001249]; E-mail between Lufthansa Cargo employees (Oct. 4, 2001) [LH_CIV_0135600]; Chart, Lufthansa Cargo, *War Risk/Security Surcharge Update* (Oct. 12, 2001) [LH_CIV_0240802].

²⁵⁹ E-mail between Lufthansa Cargo employees (Oct. 4, 2001) [LH_CIV_0135600].

²⁶⁰ Chart, Lufthansa Cargo, *War Risk/Security Surcharge Update* (Oct. 12, 2001) [LH_CIV_0240802]; Newsletter, *Security Surcharge on KLM Cargo Shipments Effective October 15, 2001* (Oct. 1, 2001) [LH_CIV_0001249].

²⁶¹ Chart, Lufthansa Cargo, *War Risk/Security Surcharge Update* (Oct. 12, 2001) [LH_CIV_0240802].

²⁶² News Article (Sept. 27, 2001) [SIA_CIV_0003747].

A. Base-Freight Rates, Including for Routes To and From the United States, Were Fixed Prior to Introduction of the Fuel Surcharge

128. Even before imposing the Fuel Surcharge in February 2000, Air Canada had covertly coordinated base-freight rates with other Airfreight Carriers. For example, in September 1994, John Fox and Guy Menard of Air Canada, as well as Karola Oates of Canadian Airlines, attended a secret meeting at the Hilton Airport Dorval in Montreal, Canada, with representatives from Air France, Alitalia, British Airways, Iberia Airlines, KLM, Lufthansa Cargo and Swissair.²⁶³ According to Air Canada's Karola Oates,

The basis of today's meeting is to share and process information of mutual interest and concern. Enable us the opportunity to discuss general commonalities, such as rates, capacity, market trends, etc... The objective of the meeting is to establish guidelines and leave with a general consensus in mind. No one will benefit from commitments that are unachievable.²⁶⁴

Consistent with the meeting's purpose, both Air Canada and Canadian Airlines voluntarily shared their capacity and base-freight rate information with their competitors.²⁶⁵ Air Canada stated that "space is a premium, yields have increased and ADD-HOC [sic] rates have been eliminated."²⁶⁶ Canadian Airlines shared the following information: *"Flights are presently full to all areas, therefore an increase in rates November 1st is essential. Canadian's primary concern is the deteriorating yields to the North Pacific and would like to see an immediate increase. Canadian will contact appropriate carriers not present to discuss in detail."*²⁶⁷ All Airfreight Carriers present at the meeting, including Canadian Airlines and Air Canada, *"[c]onceded to increase market rates November 1st [and a]greed meetings should be held*

²⁶³ Minutes of Carriers Meeting, Canadian Airlines [LH_CIV_0102883].

²⁶⁴ Minutes of Carriers Meeting, Canadian Airlines, at 1 [LH_CIV_0102883].

²⁶⁵ Minutes of Carriers Meeting, Canadian Airlines, at 1, 3 [LH_CIV_0102883].

²⁶⁶ Minutes of Carriers Meeting, Canadian Airlines, at 1 [LH_CIV_0102883].

²⁶⁷ Minutes of Carriers Meeting, Canadian Airlines, at 3 [LH_CIV_0102883] (emphasis in original).

regularly to maintain communication flow.”²⁶⁸ Accordingly, the group’s next meeting was scheduled for November 30, 1994, in Air Canada’s conference room.²⁶⁹

129. On December 5, 1996, Bob Thompson of Air Canada met with a representative of Lufthansa Cargo to discuss, among other things, base-freight rates.²⁷⁰ Mr. Thompson stated that Air Canada had a “[r]ate increase planned for UK first Q97 (5%), German no, USA will watch us-competition and LHCargo, Canada effective 01JAN97 to selected destinations. No further increases planned for 1997, contracts will be valid for one year=DEC97.”²⁷¹ The two men also discussed fuel surcharges.²⁷² Mr. Thompson and the Lufthansa Cargo representative planned to meet again in mid-January 1997.²⁷³

130. On August 26, 1997, John Fox, Air Canada’s General Manager of Cargo Sales for Canada, met secretly with a representative from Lufthansa Cargo.²⁷⁴ Mr. Fox informed his Lufthansa Cargo colleague that Air Canada would increase rates to all destinations by two to three percent effective on either October 1 or 15, 1997.²⁷⁵ In addition, the two men discussed Air Canada’s plan to install a new pricing scheme on January 1, 1998, that would “consist of 5 incentive levels, giving the most revenue producer the highest incentive”²⁷⁶ Mr. Fox and the Lufthansa Cargo representative also discussed the difference between Air Canada’s and Lufthansa Cargo’s rates—on average Lufthansa Cargo’s rates were 20 percent higher than Air Canada’s rates.²⁷⁷ Air Canada’s fuel surcharge was also discussed.²⁷⁸ Mr. Fox and the

²⁶⁸ Minutes of Carriers Meeting, Canadian Airlines, at 3 [LH_CIV_0102883] (emphasis in original).

²⁶⁹ Minutes of Carriers Meeting, Canadian Airlines, at 3 [LH_CIV_0102883].

²⁷⁰ Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

²⁷¹ Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

²⁷² Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

²⁷³ Memo, Lufthansa Cargo (Dec. 5, 1996) [LH_CIV_0101713].

²⁷⁴ Minutes of Meeting between Air Canada and Lufthansa Cargo (Aug. 26, 1997) [LH_CIV_0101704].

²⁷⁵ Minutes of Meeting between Air Canada and Lufthansa Cargo (Aug. 26, 1997) [LH_CIV_0101704].

²⁷⁶ Minutes of Meeting between Air Canada and Lufthansa Cargo (Aug. 26, 1997) [LH_CIV_0101704].

²⁷⁷ Minutes of Meeting between Air Canada and Lufthansa Cargo (Aug. 26, 1997) [LH_CIV_0101704].

²⁷⁸ Minutes of Meeting between Air Canada and Lufthansa Cargo (Aug. 26, 1997) [LH_CIV_0101704].

Lufthansa Cargo representative also discussed how Air Canada and Lufthansa Cargo were focusing on the same customers and agreed that, going forward, the two Airfreight Carriers would “focus on shippers of [other Airfreight Carriers] which are currently not our common customers.”²⁷⁹ Mr. Fox and the same Lufthansa Cargo representative planned to meet again in September 1997 to further exchange information, and a “kickoff meeting of sales persons” was also scheduled for that month.²⁸⁰

131. On October 31, 1997, Des Vertannes, Air Canada’s General Manager of Cargo for Europe, met secretly with representatives of Lufthansa Cargo, SAS, Thai Airways, United Airlines and VARIG under the guise of the Star Alliance.²⁸¹ Lufthansa Cargo called the meeting because even though “[a] number of meetings have already taken place at various levels with UA/SK [United Airlines/SAS] and AC [Air Canada],” Lufthansa Cargo believed that it was time to “explore options as a group.”²⁸² The attendees discussed competitively sensitive issues, such as capacity, pricing and marketing.²⁸³ Further, the attending Airfreight Carriers agreed to a “Regular Information Exchange” and “Further expansions of the group.”²⁸⁴ Lufthansa Cargo believed that these information exchanges would “be a major step towards strengthening [the group’s] competitive position in the market.”²⁸⁵

132. On February 11, 1998, Claude Morin, Air Canada’s Managing Director of Cargo, met secretly with a representative from Lufthansa Cargo to, among other things, reaffirm their

²⁷⁹ Minutes of Meeting between Air Canada and Lufthansa Cargo (Aug. 26, 1997) [LH_CIV_0101704].

²⁸⁰ Minutes of Meeting between Air Canada and Lufthansa Cargo (Aug. 26, 1997) [LH_CIV_0101704].

²⁸¹ Letter from Regional Director, UK & Ireland, Lufthansa Cargo, to representatives of Air Canada, SAS, Thai Airways, United Airlines and VARIG (Aug. 7, 1997) [LH_CIV_0143895].

²⁸² Letter from Regional Director, UK & Ireland, Lufthansa Cargo, to representatives of Air Canada, SAS, Thai Airways, United Airlines and VARIG (Aug. 7, 1997) [LH_CIV_0143895].

²⁸³ Letter from Regional Director, UK & Ireland, Lufthansa Cargo, to representatives of Air Canada, SAS, Thai Airways, United Airlines and VARIG (Aug. 7, 1997) [LH_CIV_0143895].

²⁸⁴ Letter from Regional Director, UK & Ireland, Lufthansa Cargo, to representatives of Air Canada, SAS, Thai Airways, United Airlines and VARIG (Aug. 7, 1997) [LH_CIV_0143895].

²⁸⁵ Letter from Regional Director, UK & Ireland, Lufthansa Cargo, to representatives of Air Canada, SAS, Thai Airways, United Airlines and VARIG (Aug. 7, 1997) [LH_CIV_0143895].

“Code of Conduct,” under which the two Airfreight Carriers would “focus on shippers of OAL [other airlines] which are currently not [their] common customers” rather than competing with each other.²⁸⁶

133. In late 1998, Lufthansa Cargo communicated directly and privately with Air Canada, Air France, Cargolux, Cathay Pacific, Japan Airlines, KLM, Korean Air, Singapore Air, Swissair and United Airlines to discuss rates and to exchange information on prices. For example, on December 16, 1998, Lufthansa Cargo’s Sales Manager for Germany sent an e-mail jointly addressed to representatives of those ten Airfreight Carriers, including Konrad Bossdorf of Air Canada, stating the following:

the euro is coming and nothing is going to change that. as [sic] a result it would be useful—as previously discussed with some of you already—for all of us to meet soon. it [sic] is certainly in our interest, as well as in the interest of our partners and customers, that we ensure a somewhat uniform transition from the dm to the euro. some [sic] of you are already publishing your rate sheets for 01 January 1999 in euros. others, [sic] such as Lufthansa cargo, will be doing this on 01 April 1999. In addition there are various options for rounding up and down with the framework of the conversation. there [sic] are bound to be other topics, which we should discuss. so [sic] I am inviting you all to have an opportunity to exchange information

on: 08 January 1999
from: 9AM to 12 Noon (possible 1 PM)
at: Gasaurant restaurant

on [sic] behalf of Lufthansa. I would very much appreciate it if each airline would send a representative.²⁸⁷

Prior to the private meeting on January 8, 1999, Konrad Bossdorf of Air Canada separately and secretly met with representatives of Lufthansa Cargo for a “Christmas visit.”²⁸⁸

²⁸⁶ Lufthansa Cargo, Minutes of Meeting, at 2 (Feb. 11, 1998) [LH_CIV_0143687]. Although the two men did not discuss the Code of Conduct, it was on the agenda. *Id.*

²⁸⁷ E-mail from Sales Manager for Germany, Lufthansa Cargo, to representatives of United Airlines, Air China, Air France, Cargolux, Cathay Pacific, Japan Airlines, KLM, Korean Air, Lufthansa Cargo, Singapore Air, South African Airways, Swissair and VARIG (Dec. 16, 1998) [LH_CIV_0002164].

134. On May 5, 1999, a representative of Lufthansa Cargo wrote directly to Gerry Simpson, Air Canada's Manager of Cargo Marketing and Sales Support, about increasing base-freight rates in light of the expected high demand surrounding Y2K:

Dear Gerry,

hopefully [sic] you are well

according [sic] our expectations the airline industry will face a boom effective mid/end of this year because many producers want to have their goods shipped to their customers before 2000 as the problems of Y2 may influence the production.

Do you also think so? Do you plan to increase your rates because of the expected increasing demand? We intend to increase our rates eff. September 01, 99.

Thank you for a short info about your plans and expectations; if you are not the right person to contact, please pass my request to the responsible one.²⁸⁹

Mr. Simpson responded directly to the Lufthansa Cargo representative the next day, in relevant part, as follows:

So right now, no we do not plan an increase. I will raise this item at our next management meeting and will also forward this note to our Managing Director for his information and review.²⁹⁰

135. On June 18, 1999, Lufthansa Cargo sent a private e-mail jointly addressed to Gerry Simpson, Air Canada's Manager of Cargo Marketing and Sales Support, and representatives from SAS, Singapore Air, Thai Airways, United Airlines and VARIG.²⁹¹ Lufthansa Cargo inquired as to when those Airfreight Carriers "plan to introduce pricing and

²⁸⁸ E-mail between Lufthansa Cargo employees (Dec. 21, 1998) [LH_CIV_0002163].

²⁸⁹ E-mail from Lufthansa Cargo to Gerry Simpson, Manager, Cargo Marketing and Sales Support, Air Canada (May 5, 1999) [LH_CIV_0102466].

²⁹⁰ E-mail from Gerry Simpson, Manager, Cargo Marketing and Sales Support, Air Canada, to Lufthansa Cargo (May 6, 1999) [LH_CIV_0102466].

²⁹¹ E-mail from Lufthansa Cargo to Air Canada, SAS, Singapore Air, Thai Airways, United Airlines and VARIG (June 18, 1999) [LH_CIV_0102474].

rating in EURO”²⁹² Mr. Simpson responded by informing Lufthansa Cargo that Air Canada “is selling and billing in Euros on the Continent and in Ireland. In the UK we [Air Canada] are still selling and billing in [British Pounds Sterling]. There are no plans to make any change to move to Euros in the UK.”²⁹³

136. On July 8, 1999, GCCI—the same organization that helped facilitate the Fuel Surcharge conspiracy—held a secret meeting at “Pan Pacific.”²⁹⁴ Cesar Rillo from Canadian Airlines attended, as did representatives from Alitalia, Asiana Airlines, Cargolux, EVA Airways, Japan Airlines, Korean Airlines, Lufthansa Cargo, Malaysian Airlines System, Martinair, Singapore Air, Thai Airways and United Airlines, among others.²⁹⁵ Each attendee participated in an “AIRLINE UPDATE,” during which capacity and base-freight rate information was exchanged.²⁹⁶ Mr. Rillo told the group that Canadian Airlines had “restructured” its rates.²⁹⁷

137. On August 30, 1999, GCCI secretly met again, this time at the “Miascor Lounge.”²⁹⁸ Cesar Rillo of Canadian Airlines attended, along with representatives from Asiana Airlines, Cargolux, Emirates, EVA Airways, Japan Airlines, Korean Air, KLM, Lufthansa Cargo, Malaysian Airlines System, Northwest Airlines, Thai Airways and United Airlines, among others.²⁹⁹ The Airfreight Carriers discussed competitively sensitive issues, including flight frequency and capacity.³⁰⁰ In particular, Mr. Rillo informed the attendees that Canadian Airlines had “increased rates effect[ive] Aug 16.”³⁰¹

²⁹² E-mail from Lufthansa Cargo to Air Canada, SAS, Singapore Air, Thai Airways, United Airlines and VARIG (June 18, 1999) [LH_CIV_0102474].

²⁹³ E-mail from Lufthansa Cargo to PricewaterhouseCoopers LLP (June 21, 1999) [LH_CIV_0102474].

²⁹⁴ Minutes of Monthly Meeting, Global Cargo Carriers, Inc. (July 8, 1999) [LH_CIV_0240835].

²⁹⁵ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 1 (July 8, 1999) [LH_CIV_0240835].

²⁹⁶ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 2 (July 8, 1999) [LH_CIV_0240835].

²⁹⁷ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 2 (July 8, 1999) [LH_CIV_0240835].

²⁹⁸ Minutes of Monthly Meeting, Global Cargo Carriers, Inc. (Aug. 30, 1999) [LH_CIV_0240830].

²⁹⁹ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 1 (Aug. 30, 1999) [LH_CIV_0240830].

³⁰⁰ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 2 (Aug. 30, 1999) [LH_CIV_0240830].

³⁰¹ Minutes of Monthly Meeting, Global Cargo Carriers, Inc., at 2 (Aug. 30, 1999) [LH_CIV_0240830].

B. Base-Freight Rates Were Fixed During the Cartel Period

138. The coordination of base-freight rates between and among Airfreight Carriers, including Air Canada, continued during and after the initial implementation of the Fuel Surcharge in February 2000. Because the base-freight rates were fixed prior to the implementation of the Fuel Surcharge, the entire Fuel Surcharge that the Airfreight Carriers implemented in February 2000 was an overcharge, as was a portion of the base-freight rates. Moreover, because the base-freight rate continued to be fixed, the subsequent Fuel Surcharges were overcharges in their entirety.

139. On February 11, 2003, Lufthansa Cargo's Regional Sales Director for Germany sent Lufthansa Cargo's planned pricing measures (in the form of a draft press release) for the upcoming summer season in an e-mail jointly addressed to M. Sauer of Air Canada and representatives of Air China, Air France, Air New Zealand, Cargolux, Cathay Pacific, Japan Airlines, KLM, Korean Air, LAN Cargo, United Airlines and VARIG.³⁰²

140. In October 2003, Air Canada shared its rates from Boston, Massachusetts, to various European destinations directly with Swiss WorldCargo.³⁰³

141. In mid-2004, representatives from Air Canada attended the Air Cargo Club of New England summer BBQ, along with representatives of Air France, Alitalia, American Airlines, British Airways, Continental Airlines, Northwest, US Airways and Virgin Atlantic.³⁰⁴ A Lufthansa Cargo summary of the meeting states that "[t]he subject of conversation was [Lufthansa Cargo] and their \$.20 rate @1000kg."³⁰⁵

³⁰² E-mail from Regional Sales Director for Germany, Lufthansa Cargo, to representatives of Air Canada, Air China, Air France, Air New Zealand, Cargolux, Cathay Pacific, Japan Airlines, KLM, Korean Air, LAN Cargo, United Airlines and VARIG (Feb 11, 2003) [LH_CIV_0147653].

³⁰³ SMART Boston, Week 42 (Oct. 2003) [SIA_CIV_0026725].

³⁰⁴ Note, Lufthansa Cargo, *SMART Boston* (undated) [SIA_CIV_0023986].

³⁰⁵ Note, Lufthansa Cargo, *SMART Boston* (undated) [SIA_CIV_0023986].

142. On May 25, 2005, Martin Bittner of Air Canada secretly met with representatives of Lufthansa Cargo and Aviainform, an entity that facilitated price fixing among Airfreight Carriers, as described in more detail below.³⁰⁶ The purpose of the meeting was to discuss how to “hold out together” against certain pricing activity.³⁰⁷

143. Following their secret meeting on May 25, 2005, Martin Bittner of Air Canada and the representatives of Lufthansa Cargo and Aviainform began planning a larger meeting.³⁰⁸ On June 9, 2005, Dirk Steiger of Aviainform sent invitations to the meeting in an e-mail jointly addressed to Mr. Bittner and representatives of Air New Zealand, Cargolux, Lufthansa Cargo, Martinair, Singapore Air and South African Airways.³⁰⁹ Mr. Bittner accepted the invitation,³¹⁰ as did representatives from Air New Zealand, Cargolux, Lufthansa Cargo, Martinair, Singapore Air, South African Airways and Swiss WorldCargo.³¹¹

144. On June 27 and 28, 2005, “Aviainform” hosted a secret meeting at the Hotel Alte Amtsgericht in Braunfels, Germany, which was attended by Martin Bittner of Air Canada and representatives of Air New Zealand, Cargolux, Lufthansa Cargo, Martinair, Singapore Air, South African Airways and Swiss WorldCargo.³¹² The attendees discussed “Recent Issues on Volume

³⁰⁶ E-mail exchange between Martin Bittner, Air Canada; Dirk Steiger, Aviainform; and a representative of Lufthansa Cargo (April-May 2005) [LH_CIV_0000564].

³⁰⁷ E-mail from Dirk Steiger, Aviainform, to Martin Bittner, Air Canada, and a representative of Lufthansa Cargo (Apr. 22, 2005) [LH_CIV_0000564].

³⁰⁸ See, e.g., E-mail from Dirk Steiger, Aviainform, to representatives of Air Canada, Air New Zealand, Lufthansa Cargo and Singapore Air (June 3, 2005) [LH_CIV_0000578]; E-mail from Lufthansa Cargo to representatives of Air Canada, Air New Zealand, Aviainform and Singapore Air (June 3, 2005) [LH_CIV_0000581].

³⁰⁹ E-mail from Dirk Steiger, Aviainform, to representatives of Air Canada, Air New Zealand, Cargolux, Lufthansa Cargo, Martinair, Singapore Air and South African Airways (June 9, 2005) [LH_CIV_0000597].

³¹⁰ See E-mail from Martin Bittner, Air Canada, to Lo Gaumer, Aviainform, and representatives of Air New Zealand, Cargolux, Lufthansa Cargo, Martinair, Singapore Air, South African Airways and Swiss WorldCargo (June 22, 2005) [LH_CIV_0000199] (“I’m also playing golf while I’m there!”).

³¹¹ See E-mail from Lo Gaumer, Aviainform, to representatives of Air Canada, Air New Zealand, Cargolux, Lufthansa Cargo, Martinair, Singapore Air, South African Airways and Swiss WorldCargo (June 22, 2005) [LH_CIV_0000626].

³¹² E-mail from Rob Veltman, Regional Director Central Europe, Martinair, to representatives of Air Canada, Air New Zealand, Aviainform, Cargolux, LAN Cargo, Lufthansa Cargo, South African Airways, Singapore Air and Swiss WorldCargo (June 30, 2005) [LH_CIV_0000213]; E-mail from Dirk Steiger, Aviainform, to representatives from Cargolux, Air Canada, Lufthansa Cargo, Air New Zealand, Singapore Air, South African Airways, and

and Prices,” including “Pricing Models with selected Freight Forwarders segments.”³¹³ The Airfreight Carriers also exchanged competitively-sensitive information, such as prices, volumes, capacities, yields, Fuel Surcharges and fuel prices.³¹⁴ In addition to the written information exchanged, one of the purposes of the Aviainform meetings was to set ad hoc rates, which are the base-freight rates for any Airfreight Shipping Services purchased outside the context of a contract. The routes upon which the attendees agreed to fix ad hoc rates included routes to and from the United States. The same Airfreight Carriers met again for the same purposes in August 2005 and February 2006.³¹⁵

VI. The Airfreight Carriers Engaged in Frequent Communications to Monitor Adherence to the Cartel

145. In addition to agreeing on Surcharges and base-freight rates, the Cartel members engaged in frequent private communications to make sure the Cartel was functioning properly. The private communications included in-person meetings, e-mails, faxes and other communications during the Cartel Period in which they discussed competitively sensitive information, including prices, capacity and Surcharges.

Martinair (June 9, 2005) [LH_CIV_0000608]; E-mail from Lo Gaumer, Aviainform, to representatives of Lufthansa Cargo, Cargolux, Air New Zealand, Air Canada, Singapore Air, Swiss WorldCargo, South African Airways and Martinair (June 22, 2005) [LH_CIV_0000626].

³¹³ Presentation, Aviainform, *2005 Pricing Strategy Workshop Germany*, at 2 (June 27-28, 2005) [LH_CIV_0135433].

³¹⁴ Presentation, Aviainform, *2005 Pricing Strategy Workshop Germany* (June 27-28, 2005) [LH_CIV_0135433].

³¹⁵ E-mail from Dirk Steiger, Aviainform (Nov. 29, 2005) [LH_CIV_0001782]; E-mail from Dirk Steiger, Principal & Managing Director, Aviainform, to representatives of Air Canada, Air Canada, Air New Zealand, Cargolux, LAN Cargo, Lufthansa Cargo, Martinair, Singapore Air, South African Airways and Swiss WorldCargo (June 30, 2005) [LH_CIV_0000643]; E-mail from Nicole Dommermuth, Aviainform, to representatives of Air Canada, Air New Zealand, Cargolux, LAN Cargo, Lufthansa Cargo, Martinair, Singapore Air, South African Airways and Swiss WorldCargo (Aug. 17, 2005) [LH_CIV_0000702]; E-mail from Lo Gaumer, Aviainform, to representatives of Air Canada, Air New Zealand, Cargolux, LAN Cargo, Lufthansa Cargo, Martinair, South African Airways and Swiss WorldCargo (Aug. 11, 2005) [SIA_CIV_0037807]; E-mail from Martin Bittner, Air Canada, to representatives of Air Canada, Air Canada, Air New Zealand, Aviainform, Cargolux, LAN Cargo, Lufthansa Cargo, Martinair, Singapore Air, South African Airways and Swiss WorldCargo (June 30, 2005) [LH_CIV_0000649].

146. In furtherance of the Cartel, a series of secret meetings, known as “coffee rounds,” took place throughout the Cartel Period. Air Canada, Air France, KLM and Lufthansa Cargo, among other Airfreight Carriers, routinely attended such meetings.³¹⁶ The purpose of the “coffee round” meetings was to exchange competitively sensitive information to monitor the Cartel and prevent cheating on the Cartel.³¹⁷

147. In October or November 2003, Gerry Simpson, Air Canada’s Manager of Cargo Marketing and Sales Support, and Vito Cerone, Air Canada’s General Manager of Postal Affairs Network and Yield, secretly met with Lufthansa Cargo’s Regional Manager of Sales for Canada “to explor[e] potential areas of cooperation between Lufthansa Cargo AG and Air Canada Cargo.”³¹⁸ And on October 8, 2003, Claude Morin of Air Canada met with Lufthansa Cargo’s Vice President of Sales for the Americas in Toronto, Canada.³¹⁹

148. In August 2005, Walter Burri of Singapore Air sent an e-mail jointly addressed to Rolf Holderegger of Air Canada and representatives of Cathay Pacific, Emirates, KLM, Lufthansa Cargo and Swiss WorldCargo, among others, to set up a meeting “at 10:00/Aug. 29, 2005/conference room 619, 2nd floor, bldg. F3” at Cargologic.³²⁰

³¹⁶ See, e.g., Lufthansa Cargo, Meeting Summary, at 3 (May 24, 2002) [LH_CIV_0056943] (showing that Lufthansa Cargo planned to “reanimate” the coffee rounds with “OALs” (other airlines), including Air Canada).

³¹⁷ E-mail from Sales Manager for Germany, Lufthansa Cargo, to Otto Meyer, Air France, Bernd von Seelen, KLM Cargo, and representatives of British Airways and Swissair (Apr. 20, 2000) [LH_CIV_0004304]. See also E-mail from a Swissair employee to Sales Manager for Germany, Lufthansa Cargo (Apr. 24, 2000) [LH_CIV_0004304].

³¹⁸ E-mail exchange between Gerry Simpson, Manager, Cargo Marketing and Sales Support, Air Canada; Vito Cerone, General Manager, Postal Affairs Network & Yield, Air Canada; and Regional Manager of Sales, Canada, Lufthansa Cargo (Oct. 2003) [LH_CIV_0244971].

³¹⁹ See E-mail from District Sales Manager, Eastern Canada & New England, Lufthansa Cargo, to Vito Cerone, Air Canada (Sept. 29, 2003) [LH_CIV_0003753].

³²⁰ E-mail from Walter Burri, Singapore Air, to representatives of Air Canada, Airpass, Cathay Pacific, Emirates, KLM, Lufthansa Cargo, Sirius Air and Swiss WorldCargo (Aug. 25, 2005) [LH_CIV_0007229].

149. On January 19, 2006, Martin Bittner of Air Canada had a private lunch with the representatives from Air New Zealand, Lufthansa Cargo and South African Airways that had also attended the Aviainform price fixing meetings described in the previous section.³²¹

VII. Lufthansa's Leniency Application

150. In or around December 2005, Lufthansa entered the corporate leniency program with the DOJ. According to the DOJ, "Lufthansa was conditionally accepted [into the leniency program] after it disclosed its role in the international cargo conspiracy"³²² Lufthansa also obtained conditional leniency from the European Commission and competition authorities in other countries.³²³ Lufthansa, in communication with the DOJ, continued to participate in the conspiracy at least through February 2006 so that the DOJ could obtain more information about the Cartel.

151. Pursuant to the Justice Department's corporate leniency policy, Lufthansa could only have been afforded conditional leniency if it confessed its wrongdoing and "report[ed] the wrongdoing with candor and completeness"³²⁴

152. In 2006, Lufthansa agreed to pay \$85 million to settle certain of its liability exposure to a class of direct purchaser plaintiffs in a United States class action pending in the United States District Court for the Eastern District of New York, *In re Air Cargo Shipping Services Antitrust Litigation* (MDL No. 1775).

³²¹ E-mail exchange between Air Canada, Air New Zealand, Lufthansa Cargo and South African Airways (Jan. 2006) [LH_CIV_0002933].

³²² Press Release, U.S. Department of Justice (Aug. 1, 2007), available at <http://perma.cc/09H5HoX3yEV>.

³²³ See Lufthansa, Annual Report 2006, at 71, available at <http://perma.cc/0mCbJzejR6p>.

³²⁴ See DOJ, Corporate Leniency Policy available at <http://perma.cc/0mprZRMVEZN>.

VIII. The Dawn Raids and Subsequent Price Increases

153. On February 14, 2006, competition authorities around the world raided the headquarters of some Airfreight Carriers.³²⁵ The headquarters of Air Canada was not raided.

154. Notwithstanding the dawn raids, Lufthansa Cargo continued to publish the FPI (with the undisclosed consent of the U.S. Antitrust Division) on its website and Air Canada continued to adhere to the Cartel agreement and to charge Fuel Surcharges accordingly. Indeed, despite the dawn raids, Air Canada and the other Cartel members increased the Fuel Surcharge to USD 0.50 per kilogram in February 2006 pursuant to the Cartel agreement, which included an agreement to stagger implementation dates.³²⁶

155. Air Canada and its co-conspirator continued to adhere to the Cartel agreement when they increased the Fuel Surcharge to USD 0.55 per kilogram pursuant to the Lufthansa Cargo FPI in May 2006.³²⁷ Pursuant to the Cartel FPI, Air Canada and its co-conspirators further increased the Fuel Surcharge to USD 0.60 per kilogram effective later in May 2006.³²⁸ The Airfreight Carriers were careful to stagger the implementation dates of their Fuel Surcharge increases. For example, Air France-KLM increased the Fuel Surcharge to USD 0.60 per kilogram effective May 17,³²⁹ British Airways effective May 18,³³⁰ and Air Canada effective May 25.³³¹

³²⁵ See, e.g., Antitrust & Trade Regulation Daily, *EC Announces Raids of Air Cargo Firms Suspected of Price-Fixing on Fuel Charges* (Feb. 16, 2006).

³²⁶ See *supra* notes 242, 244, 245, 246 and 247.

³²⁷ Press Release, *Air Canada Cargo increases FSC eff 16. May 06* (Apr. 28, 2006) [LH_CIV_0029430]. See also Press Release, *Air France-KLM, AF-KL Fuel Surcharge Increase 03MAY06* (Apr. 20, 2006) [LH_CIV_0029392]; Letter from Martinair Cargo to Customers (Apr. 26, 2006) [LH_CIV_0063251].

³²⁸ Press Release, *Air Canada Cargo Fuel Increase* (May 17, 2006) [LH_CIV_0063109]. See also Lufthansa Cargo News, *Lufthansa Cargo raises fuel surcharge to 0.60 Euro/kg* (May 2, 2006) [LH_CIV_0031175]; Press Release, *AF-KL Fuel Surcharge Increase 17MAY06* (May 3, 2006) [LH_CIV_0063200]; Press Release, *British Airways World Cargo – Fuel Surcharge Newsflash* (May 8, 2006) [LH_CIV_0029436].

³²⁹ Press Release, *AF-KL Fuel Surcharge Increase 17MAY06* (May 3, 2006) [LH_CIV_0063200].

³³⁰ Press Release, *British Airways World Cargo – Fuel Surcharge Newsflash* (May 8, 2006) [LH_CIV_0029436].

³³¹ Press Release, *Air Canada Cargo Fuel Increase* (May 17, 2006) [LH_CIV_0063109].

156. Lufthansa Cargo continued to publish—and Air Canada and the other Cartel members continued to adhere to—the Cartel FPI until at least September 2006.³³²

157. DHL was subject to and paid the Fuel Surcharges described in this section to Air Canada and its co-conspirators for U.S. Airfreight Shipping Services.

IX. The Other Airfreight Carriers' Guilty Pleas and Criminal Fines

158. To date, twenty Airfreight Carriers and six executives have pled guilty and paid criminal fines in connection with the DOJ's investigation of the price-fixing Cartel described in this Complaint. The following chart provides a summary of the guilty pleas entered and the fines paid by the Airfreight Carriers and their executives:

Carrier	Date	Details
Aerolinhas Brasileiras S.A.	2/19/2009	Carrier pled guilty and paid a joint fine (with LAN Cargo) of \$109 million
Air France-KLM	7/22/2008	Carrier pled guilty and paid a fine of \$350 million
	4/26/2011	An indictment was returned against Marc Boudier, former Executive Vice President of Air France's Cargo Division, and Jean Charles Foucault, former Vice President of Sales & Marketing in Air France's Cargo Division—the charges are still pending
All Nippon Airways Co. Ltd.	12/6/2010	Carrier pled guilty and paid a fine of \$73 million (for price fixing in both the air cargo and air passenger industries)
Asiana Airlines Inc.	5/5/2009	Carrier pled guilty and paid a \$50 million fine (for price fixing in both the air cargo and air passenger industries)

³³² E-mail from Chuck Cocci, UPS, to Head of Area Management for The Americas, Lufthansa Cargo (Sept. 5, 2006) [LH_CIV_0063886] (inquiring why Lufthansa Cargo had removed the FPI from the Lufthansa Cargo website). *See also* E-mail from Lufthansa Cargo to Christine Liu, Cathay Pacific (Sept. 15, 2006) [LH_CIV_0246498] (“[D]ue to the antitrust regulations in other jurisdiction [sic] Lufthansa Cargo is unfortunately not in the position [sic] to provide [the Hong Kong] BAR CSC with details concerning the changes in Lufthansa [sic] Cargo’s fuelsurcharge [sic] methodology or with examples [sic] illustrating the difference between the former index and our new index. In addition, I would like to bring to your attention that Lufthansa Cargo will not continue or update the former fuelprice-index [sic].”)

Carrier	Date	Details
British Airways Plc.	8/23/2007	Carrier pled guilty and paid a \$300 million fine—\$100 million for passenger and \$200 million for cargo
	11/10/2008	Keith Packer, a British citizen and former Commercial General Manager for British Airways World Cargo, pled guilty and agreed to an eight-month prison sentence and a \$20,000 fine
Cargolux Airlines International S.A.	5/12/2009	Carrier pled guilty and paid a \$119 million fine
	12/8/2011	Ulrich Ogiermann, former President and CEO of Cargolux, and Robert Van de Weg, former Senior Vice President of Sales and Marketing for Cargolux, each pled guilty and agreed to serve 13 months in prison
Cathay Pacific Airways Ltd.	7/22/2008	Carrier pled guilty and paid a \$60 million fine
China Airlines Ltd.	11/3/2010	Carrier pled guilty and paid a \$40 million fine
El Al Israel Airlines Ltd.	2/4/2009	Carrier pled guilty and paid a \$15.7 million fine
EVA Airways Corporation	6/24/2011	Carrier pled guilty and paid a \$13.2 million fine
Japan Airlines International Co. Ltd.	5/7/2008	Carrier pled guilty and paid a \$110 million fine
	11/16/2010	Takao Fukuchi, former president of JAL Cargo Sales, was indicted—the charges are still pending
Korean Air Lines Co. Ltd.	8/24/2007	Carrier pled guilty and paid a \$300 million fine (for price fixing in both the cargo and passenger industries)
LAN Cargo S.A.	2/19/2009	Carrier pled guilty and paid a joint fine (with Aerolinhas Brasileiras) of \$109 million
Martinair Holland N.V.	7/22/2008	Carrier pled guilty and paid a \$42 million fine
	6/26/2009	Franciscus Johannes de Jong, former Vice President of Cargo Sales in Europe for Martinair, pled guilty and agreed to a \$20,000 fine and an eight-month prison sentence
	9/21/2010	An indictment was returned for Maria Christina “Meta” Ullings, the former Senior Vice President of Cargo Sales and Marketing for Martinair Cargo—the charges are still pending
Nippon Cargo Airlines Co. Ltd.	5/8/2009	Carrier pled guilty and paid a \$45 million fine
	11/16/2010	Indictments were returned against Yoshio Kunugi and Naoshige Makino, both former senior executives at Nippon Cargo—the charges are still pending Mr. Kunugi also worked at All Nippon Airways after leaving Nippon Cargo in August 2005

Carrier	Date	Details
Northwest Airlines LLC	8/27/2010	Carrier pled guilty and paid a \$38 million fine
Polar Air Cargo LLC	10/15/2010	Carrier pled guilty and paid a \$17.4 million fine
Qantas Airways Ltd.	1/14/2008	Carrier pled guilty and paid a \$61 million fine
	5/15/2008	Bruch McCaffrey, former Vice President of Freight for the Americans at Qantas, pled guilty and agreed to serve eight months in jail and to pay a \$20,000 fine.
SAS Cargo Group A/S	7/21/2008	Carrier pled guilty and paid a \$52 million fine
	8/29/2008	Timothy Pfeil, SAS's former highest-ranking U.S. cargo executive, pled guilty and agreed to a \$20,000 fine and a six-month prison sentence
	8/12/2009	Jan Lillieborg, SAS's former vice president of global sales, was indicted—the charges are still pending
Singapore Airlines	2/8/2011	Carrier pled guilty and paid a \$48 million fine

159. The size of these fines—totaling almost \$1.75 billion in cargo-specific fines—reflects considerable consumer overcharges, for which each conspirator, including Air Canada, is jointly and severally liable.

X. Air Canada's Bankruptcy

160. Air Canada filed for protection under the Companies' Creditors Arrangement Act (the Canadian equivalent to Chapter 11 bankruptcy petition) on April 1, 2003, and emerged from bankruptcy protection 17 months later on September 30, 2004.

161. During the bankruptcy, Air Canada's management remained in place and continued to implement the unlawful Cartel.

162. During the bankruptcy, Air Canada engaged in overt acts that concealed its involvement in the Cartel, such as making the effective dates of its Fuel Surcharge increases slightly different from those of its co-conspirators and publishing what purported to be its own

FPI. Notwithstanding notice requirements of the applicable bankruptcy code, Air Canada never gave DHL notice that it had an antitrust claim against Air Canada.

163. At no time during its bankruptcy did Air Canada disclose to DHL or anyone else that Air Canada had engaged in discussions about and reached agreements on prices with its competitors. Nor did Air Canada participate in purely parallel conduct with any other Airfreight Carrier, as evidenced by the staggered implementation dates of changes in the Fuel Surcharge.

164. After Air Canada emerged from bankruptcy protection on September 30, 2004, Air Canada remained a participant in the Cartel, engaged in affirmative overt acts in furtherance of the conspiracy, and charged DHL at least \$3.3 million in illegal Fuel and Security Surcharges.

165. DHL did not and could not have discovered the injuries it sustained as a result of Air Canada's illegal activity until after July 2010, when DHL first gained access to documents revealing Air Canada's participation in the Cartel.

COUNT ONE

VIOLATION OF SECTION 1 OF THE SHERMAN ACT

166. DHL restates and incorporates by reference each and every allegation contained in the preceding paragraphs.

167. During the Cartel Period, Air Canada participated in a global Cartel that fixed the base-freight rates and Surcharges for U.S. Airfreight Shipping Services that DHL paid.

168. Air Canada, through its officers and employees, including high-level personnel of Defendant's cargo divisions, participated in a conspiracy with one or more providers of Airfreight Shipping Services, a primary purpose of which was to suppress and eliminate competition by fixing one or more components of the prices charged to customers for U.S. Airfreight Shipping Services.

169. In furtherance of the conspiracy, Air Canada, through its officers and employees, engaged in discussions and attended meetings with representatives of one or more providers of Airfreight Shipping Services. During these discussions and meetings, agreements were reached to fix one or more components of the prices to be charged to purchasers of certain Airfreight Shipping Services.

170. Air Canada participated in numerous overt acts in furtherance of the Cartel, as itemized in detail in the prior sections of this Complaint, including engaging in communications regarding and reaching agreements as to the prices to be charged for U.S. Airfreight Shipping Services.

171. At no time during the Cartel Period did Air Canada withdraw from the Cartel.

172. Air Canada's anticompetitive conduct, as described above, constitutes a per se unreasonable restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1.

173. Air Canada's unlawful conduct had a direct and substantial adverse effect on U.S. commerce, harming U.S. consumers, including DHL, by increasing their costs and thereby reducing the output of U.S. commerce.

174. As a direct and proximate result of Air Canada's unlawful conduct and the unlawful conspiracy alleged herein, DHL has suffered injury and damage to its business and property. DHL's injuries flow directly from the anticompetitive effects of the unlawful price-fixing agreements between Defendant and its co-conspirators on U.S. commerce. Defendant alone overcharged DHL by approximately \$7.3 million on shipments to and from the United States. The Cartel members that have pled guilty in the United States overcharged DHL by at least \$655.5 million, as set forth below. Defendant is jointly and severally liable for the Cartel overcharges.

DHL'S DAMAGES

175. DHL restates and incorporates by reference each and every allegation contained in the preceding paragraphs.

176. Defendant is jointly and severally liable for treble the damages that DHL suffered as a result of the Cartel.

177. During the Cartel Period (February 1, 2000 through at least February 14, 2006), DHL purchased at least \$3.7 billion in U.S. Airfreight Shipping Services from Airfreight Carriers that have pled guilty in the United States.

178. DHL was overcharged on its purchases from the Cartel members that have pled guilty in the United States by at least \$655.5 million. These overcharges include at least \$314.2 million in Fuel Surcharges, and at least \$38.7 million in Security Surcharges that DHL paid to Cartel members that have pled guilty in the United States. The base-freight rates that DHL paid to the Cartel members that pled guilty also included approximately \$302.5 million in overcharges.

179. Prior to the Cartel, Airfreight Carriers that had attempted to unilaterally impose Surcharges were unable to sustain those surcharges given the pressures of competition that were driving prices toward marginal cost. Indeed, the Cartel was intended to overcome such competitive pressures. But for the Cartel, the prices of U.S. Airfreight Shipping Services would have been significantly lower than they actually were during the Cartel Period.

180. The Airfreight Carriers were unable to justify to the DOT any need for a Fuel Surcharge. According to the DOT, the Fuel Surcharge mechanism was "fundamentally flawed and unfair to shippers and other users of cargo air transportation" and would resulted in

“unjustified and unwarranted rate increases.”³³³ The DOT reasoned, in relevant part, that the “proposed index mechanism, which reflects the volatile nature of the spot market, is at best an imperfect measure of the impact of fuel price increases on carriers.”³³⁴ Moreover, the DOT noted that “[m]ost carriers employ fuel hedging programs which they use to limit the effects of jet fuel price volatility and thus discipline their costs” and “many prudent carriers manage to hedge between 70-80 percent of their total fuel needs.”³³⁵ The Airfreight Carriers were unable to present any information to persuade the DOT to change its mind.

181. Moreover, much of the U.S. Airfreight Shipping Services that DHL purchased from the Cartel members, including Defendant, was for shipments in the belly of passenger planes, for which passenger fares, including at various times passenger fuel and security surcharges, covered all fuel costs.

182. None of the Surcharges imposed by Defendant on DHL was calculated based on an Airfreight Carrier’s actual costs. Air Canada did not set the amount of its Surcharges according to any ex-ante internal calculation of its actual costs.

183. Air Canada is jointly and severally liable for three times the Cartel-imposed overcharges plus DHL’s attorneys’ fees.

CLASS SETTLEMENT AND DHL OPT OUT

184. On February 7, 2012, Air Canada entered into a Settlement Agreement with a class of direct purchasers that bought Airfreight Shipping Services to, from or within the United States from January 1, 2000, through September 11, 2006. The Settlement Agreement

³³³ Order, U.S. Dep’t of Transportation, Docket OST-2000-6837-2, at 2 (Mar. 17, 2000), *available at* <http://perma.cc/08YkrDUHXpg>.

³³⁴ Order, U.S. Dep’t of Transportation, Docket OST-2000-6837-2, at 2 (Mar. 17, 2000), *available at* <http://perma.cc/08YkrDUHXpg>.

³³⁵ Order, U.S. Dep’t of Transportation, Docket OST-2000-6837-2, at 2 (Mar. 17, 2000), *available at* <http://perma.cc/08YkrDUHXpg>.

subsequently received preliminary approval from this Court, which retains exclusive jurisdiction over the Settlement Agreement.

185. Pursuant to the Settlement Agreement, Air Canada agreed to pay the class \$7.5 million.

186. The Settlement Agreement expressly provides that members of the class, such as DHL, can opt-out of the class settlement and pursue their claims against Air Canada independently. DHL timely opted out of the Settlement Agreement in April 2012

FRAUDULENT CONCEALMENT

187. DHL restates and incorporates by reference each and every allegation contained in the preceding paragraphs.

188. Air Canada and its co-conspirators engaged in a successful price-fixing Cartel that by its nature was inherently self-concealing. In addition, Air Canada and its fellow Cartel members agreed among themselves not to discuss publicly or otherwise reveal the nature and substance of the acts and communications in furtherance of their illegal conspiracy.

189. Air Canada and its co-conspirators affirmatively and fraudulently concealed their unlawful conduct from DHL, including by, among other things, engaging in secret communications, giving false and pre-textual reasons for the various Surcharges, staggering their implementation of changes in the Fuel and Security Surcharges, and instructing recipients of e-mails concerning the Cartel to keep them "strictly CONFIDENTIAL especially for anti-trust reasons" and to delete them.³³⁶ The Cartel members also explicitly agreed to maintain the

³³⁶ See, e.g., E-mail between Lufthansa Cargo employees (May, 19, 2004) [LH_CIV_0000047] ("please delete!"); E-mail between Swiss WorldCargo employees (May 19, 2005) [LH_CIV_0006520] (asking the recipients to keep the contents of the e-mail "[s]trictly CONFIDENTIAL especially for anti-trust reasons").

“confidentiality” of meetings.³³⁷ Indeed, one e-mail written by a Cartel member stated, “IT GOES WITHOUT SAYING THAT CARRIERS MEETINGS HAVE TO BE TREATED IN A VERY CONFIDENTIAL WAY.”³³⁸

190. Each of the Cartel members’ Surcharge announcements during the Cartel Period constituted implicit statements that the Surcharges in question were legitimate and the result of legitimate competitive market forces. Surcharges for U.S. Airfreight Shipping Services before the Cartel Period had occurred and were publicly reported in press releases, news wire services, trade publications, and newspapers. As a result, DHL thought that the similarity between Air Canada’s Surcharges and those of other Airfreight Carriers was due to the fact that each Airfreight Carrier was responding to a common stimulus—higher fuel costs.

191. DHL was unable to detect the Cartel by examining the Fuel Surcharges, spot market fuel prices, or the FPIs because none of those numbers reflects any Airfreight Carrier’s actual fuel costs net of hedging and after allocating fuel costs between passenger and cargo on planes that carry both passengers and cargo.

192. Air Canada and its co-conspirators consistently ascribed the Surcharges to normal market forces, including increases in costs. For example, Air Canada publicly attributed the changes in its Fuel Surcharge solely to changes in the cost of jet fuel and did not disclose that they were set collusively.³³⁹ Other Cartel members did so, as well.³⁴⁰ And when the Cartel

³³⁷ See, e.g., E-mail between Lufthansa Cargo employees (Nov. 22, 2004) [LH_CIV_0061034] (“[W]e agreed [to] confidentiality of meetings/group existence [sic]”).

³³⁸ E-mail between Swiss WorldCargo employees (May 19, 2005) [LH_CIV_0006520] (emphasis in original).

³³⁹ See, e.g., Press Release, *Air Canada Cargo Fuel Surcharge* (Apr. 11, 2002) [SIA_CIV_0037929] (“The cost of jet fuel has risen significantly over the past few weeks.”); Press Release, *Fuel Surcharge Air Canada Cargo* (June 30, 2005) [SIA_CIV_0014861] (“Based on the recent increase in the price of fuel, *Air Canada Cargo* must increase our existing fuel surcharge”) (emphasis in original); Press Release, *Air Canada Cargo Fuel Increase* (Feb. 10, 2006) [LH_CIV_0063321] (“Based on the recent increase in the price of fuel, *Air Canada Cargo* must increase our existing fuel surcharge”) (emphasis in original).

³⁴⁰ See, e.g., Lufthansa Cargo News, *Lufthansa Cargo introducing fuel surcharge* (Dec. 28, 1999) [LH_CIV_0031101] (“Owing to the dramatic price and currency-related increase in fuel costs in recent months,

revised its FPI methodology in 2002, it falsely claimed that the new FPI was “much more closely linked to the actual development of fuel prices”³⁴¹ Even outside the context of announcements, the Cartel members publicly and fraudulently stated that they were imposing Surcharges instead of increasing base-freight rates because of increased costs.³⁴² At least one

Lufthansa Cargo is introducing a surcharge on airfreight shipments Lufthansa Cargo is having to take this step because of the enormous rise in the fuel price on the world market.”); Press Release, *Air France Cargo Implements Fuel Surcharge as from 1st February 2000* (Dec. 20, 1999) [LH_CIV_0104424] (“Due to the rising fuel cost, Air France Cargo will be adding a fuel surcharge throughout its network”); Letter from British Airways to Valued Customers (Dec. 11, 2000) [QAL-01-221800] (“British Airways World Cargo has taken the decision to raise the fuel surcharge that is currently in place as a result of continued increases in the price of fuel.”); Letter from Swiss WorldCargo to Client (Apr. 10, 2003) [SIA_CIV_0023943] (“Following the drop in crude oil prices, . . . Swiss WorldCargo will [reduce its] fuel surcharge.”); Customer Newsletter, *KLM Cargo increases fuel surcharge, effective March 24* (Mar. 11, 2003) [QAL-01-168247] (“Oil prices have spiraled in recent months, sparking a sharp increase in the price of jet fuel. In light of these developments, KLM Cargo today announced that it will increase its fuel surcharge worldwide”); Press Release, *Martinair Cargo increases its Fuel Surcharge* (Apr. 29, 2004) [SIA_CIV_0037983] (“This [increase] is based on the actual developments of the fuel price.”); Press Release, *British Airways World Cargo to Decrease Fuel Surcharge* (Dec. 30, 2004) [SIA_CIV_0038094] (“The decrease to the fuel surcharge has been caused by the recent fall in fuel prices”); Lufthansa Cargo News, *Lufthansa Cargo raises fuel surcharge* (Mar. 7, 2005) [LH_CIV_0042956] (“In face [sic] of rising kerosene prices, Lufthansa Cargo is raising its fuel surcharge”); Press Release, *KLM Cargo to increase fuel surcharge March 22* (Mar. 10, 2005) [SIA_CIV_0038132] (“Due to the development of jet fuel prices in the last two weeks, KLM Cargo decided to increase the current fuel surcharge”); Press Release, *Fuel surcharge increase on Emirates SkyCargo* (Oct. 10, 2005) [LH_CIV_0063764] (“Due to the development of jet fuel prices in the last two weeks Emirate SkyCargo decided to increase the current fuel surcharge”); Press Release, *Fuel surcharge increase Asiana Airlines* (Oct. 7, 2005) [LH_CIV_0063789] (“Please be advised that due to the continued increases in the cost of aviation fuel, Asiana Airlines Cargo will Increase the Fuel Surcharge”); Press Release, *AF-KL Fuel Surcharge Increase 14FEB06* (Feb 1, 2006) [LH_CIV_0030190] (“Due to the development of the jet fuel prices during the last two weeks, Air France-KLM Cargo has decided t increase the fuel surcharge”); Press Release, *British Airways World Cargo to increase Fuel Surcharge* (Feb. 2, 2006) [LH_CIV_0030192] (“The increase to the fuel surcharge has been caused by the continued rise in fuel prices”).

³⁴¹ Letter from Senior Vice President of Sales, Lufthansa Cargo, to Partners and Customers [LH_CIV_0030639]. See also Lufthansa Cargo News, *Lufthansa Cargo introduces new fuel surcharge calculating method* (Jan. 23, 2002) [LH_CIV_0031094] (“By adding additional incremental steps in the process, the logistics company in the Lufthansa Group is responding to customer wishes that fuel price fluctuations be more immediately reflected in the surcharge and that it be more closely linked with the actual jet fuel price.”).

³⁴² Lufthansa Cargo, *Rate vs. Surcharge* (Oct. 5, 2005) [LH_CIV_0030611] (“The reason for the [Fuel Surcharge] being a sucharge [sic] is simple: rates are highly cyclical, subject to constantly changing market and competitive condition, while fuel is a major fixed cost component of an air cargo carriers’ scheduled services. Charging the Fuel Surcharge seperately [sic] is the most transparent way to pass increasing fuel costs onto customers. . . . Even slight increases in jet kerosene can result in dramatically higher costs for flight operations. Rate adaptations, however, only take place twice a year. If the extra cost were incorporated into the rates, it meant that customers would not participate in the quickly changing fuel price changes. However, air cargo carriers offering scheduled services and a huge network need some assurance that, even during periods of depressed rates, major operating cost components such as fuel will be recovered.”).

Cartel member affirmatively and fraudulently claimed that it “carries substantial financial risks [from] sharp fluctuations in kerosene prices” despite the Fuel Surcharge.³⁴³

193. DHL did not have and could not have had contemporaneous access to sufficient information regarding Air Canada’s and its co-conspirators’ costs and thus had to rely on the truthfulness of Cartel members’ purported cost justifications.

194. Air Canada and the other Cartel Members staggered the dates when they each increased their prices pursuant to the Cartel. This had the effect of misleading DHL and other customers to believe that each Cartel member was reacting unilaterally to a common stimulus—higher fuel costs.

195. DHL did not discover and could not have discovered through the exercise of reasonable diligence the existence of the price-fixing conspiracy until in or around February 2006, when the DOJ and other antitrust agencies around the world made public their investigations of the Cartel.

196. During the Cartel Period, DHL inquired about the Fuel Surcharges to various Airfreight Carriers, but was told that the Surcharges were based on costs. Such inquiries proved futile because without access to the Cartel members’ actual fuel costs (which were often subject to long-term contracts), hedging strategies, and allocation practices when air cargo was carried in the bellies of passenger flights, it was impossible for DHL to evaluate whether the Airfreight Carriers’ claimed justifications for the Surcharges were valid. Moreover, while in retrospect, the Fuel Surcharges follow a parallel pattern, at the time that pattern was not clear in large part because of the changes in the Surcharges were intentionally staggered.

³⁴³ See, e.g., Lufthansa Cargo News, *Lufthansa Cargo to introduce Fuel Surcharge of 0.05 euros per kilo of actual freight weight on April 15, 2002* (Mar. 28, 2002) [LH_CIV_0042858].

197. In addition, DHL could not have discovered the conspiracy prior to the dawn raids by the exercise of reasonable diligence because of the affirmative, deceptive acts of secrecy employed by Air Canada and its co-conspirators.

198. Because the alleged conspiracy was both self-concealing and affirmatively concealed by Air Canada and its co-conspirators until February of 2006, DHL had no knowledge of the alleged conspiracy or of any facts or information which would have caused a reasonably diligent person to investigate whether a conspiracy existed.

199. As a result of the fraudulent concealment of the Cartel, the running of any applicable statute of limitations has been tolled with respect to the claims made in this Complaint.

200. Assuming, arguendo, that any statute of limitations started to run following the DOJ's dawn raids on February 14, 2006, the statute of limitations was tolled as to DHL due to the pending class action lawsuit in *In re Air Cargo Shipping Services Antitrust Litigation*, MDL No. 1775 (E.D.N.Y.), and the still ongoing federal criminal investigation into the Airfreight Shipping Services industry.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests the Court to:

- a. Declare that the contract, combination and conspiracy alleged herein is an unreasonable and unlawful restraint of trade in violation of Section 1 of the Sherman Act;
- b. Declare that United States antitrust law governs the calculation of damages relating to shipments to and from the United States;
- c. Order that judgment be entered against Air Canada, and in favor of DHL, for three times the overcharges it suffered as a result of the Cartel;

d. Order that each of Air Canada's successors, assigns, parents, subsidiaries, affiliates and transferees, and their officers, directors, agents and employees, and other persons acting or claiming to act on behalf of Defendant or in concert with it, be permanently enjoined and restrained from, in any manner, directly or indirectly, continuing, maintaining or renewing any contracts, combinations, conspiracies, agreements, understanding or concert of action, or adopting any practice, plan, program or design having a similar purpose or effect of restraining competition;

e. Award DHL its attorneys' fees and reasonable costs, and pre-judgment and post-judgment interest, to the fullest extent permitted by law; and

f. Award such other and further relief as the Court deems just and proper.

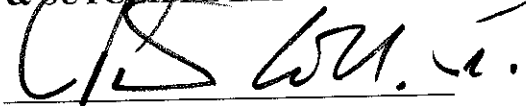
JURY TRIAL DEMAND

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiff demands a trial by jury of all claims asserted in this Complaint so triable.

Dated: November 19, 2013

Respectfully submitted,

**ORRICK, HERRINGTON
& SUTCLIFFE LLP**



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Attorneys for Plaintiff DHL

CIVIL COVER SHEET

ORIGINAL
CV 13
6399

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

I. (a) PLAINTIFFS

DPWN Holdings (USA), Inc.

1200 South Pine Island Rd., Suite 600

Plantation, FL 33324

(b) County of Residence of First Listed Plaintiff Broward County, FL

(EXCEPT IN U.S. PLAINTIFF CASES)

DEFENDANTS

Air Canada; AC Cargo LP

5100 de Maisonneuve Boulevard West

Montreal, Quebec H4A 3T2, Canada

County of Residence of First Listed Defendant

(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys (Firm Name, Address, and Telephone Number)

J. Peter Coll, Jr.

Orrick Herrington & Sutcliffe LLP

51 W. 52d St.

New York, NY 10019 - 212-506-5000

Attorneys (If Known)

Sandy Litvack

Hogan Lovells US LLP

875 Third Avenue

New York, NY 10022

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- ☐ 1 U.S. Government Plaintiff
- ☒ 3 Federal Question (U.S. Government Not a Party)
- ☐ 2 U.S. Government Defendant
- ☐ 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | PTF | DEF | | PTF | DEF |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | ☐ 1 | ☐ 1 | Incorporated or Principal Place of Business In This State | ☐ 4 | ☐ 4 |
| Citizen of Another State | ☐ 2 | ☐ 2 | Incorporated and Principal Place of Business In Another State | ☐ 5 | ☐ 5 |
| Citizen or Subject of a Foreign Country | ☐ 3 | ☐ 3 | Foreign Nation | ☐ 6 | ☐ 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
☐ 110 Insurance ☐ 120 Marine ☐ 130 Miller Act ☐ 140 Negotiable Instrument ☐ 150 Recovery of Overpayment & Enforcement of Judgment ☐ 151 Medicare Act ☐ 152 Recovery of Defaulted Student Loans (Excludes Veterans) ☐ 153 Recovery of Overpayment of Veteran's Benefits ☐ 160 Stockholders' Suits ☐ 190 Other Contract ☐ 195 Contract Product Liability ☐ 196 Franchise	PERSONAL INJURY ☐ 310 Airplane ☐ 315 Airplane Product Liability ☐ 320 Assault, Libel & Slander ☐ 330 Federal Employers' Liability ☐ 340 Marine ☐ 345 Marine Product Liability ☐ 350 Motor Vehicle ☐ 355 Motor Vehicle Product Liability ☐ 360 Other Personal Injury ☐ 362 Personal Injury - Medical Malpractice	PERSONAL INJURY ☐ 365 Personal Injury - Product Liability ☐ 367 Health Care/Pharmaceutical Personal Injury Product Liability ☐ 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY ☐ 370 Other Fraud ☐ 371 Truth in Lending ☐ 380 Other Personal Property Damage ☐ 385 Property Damage Product Liability	☐ 625 Drug Related Seizure of Property 21 USC 881 ☐ 690 Other LABOR ☐ 710 Fair Labor Standards Act ☐ 720 Labor/Management Relations ☐ 740 Railway Labor Act ☐ 751 Family and Medical Leave Act ☐ 790 Other Labor Litigation ☐ 791 Employee Retirement Income Security Act IMMIGRATION ☐ 462 Naturalization Application ☐ 465 Other Immigration Actions	☐ 422 Appeal 28 USC 159 ☐ 423 Withdrawal 28 USC 157 PROPERTY RIGHTS ☐ 820 Copyrights ☐ 830 Patent ☐ 840 Trademark SOCIAL SECURITY ☐ 861 HIA (1395ff) ☐ 862 Black Lung (923) ☐ 863 DIWC/DIWW (405(g)) ☐ 864 SSID Title XVI ☐ 865 RSI (405(g)) FEDERAL TAX SUITS ☐ 870 Taxes (U.S. Plaintiff or Defendant) ☐ 871 IRS—Third Party 26 USC 7609	☐ 375 False Claims Act ☐ 400 State Reapportionment ☒ 410 Antitrust ☐ 430 Banks and Banking ☐ 450 Commerce ☐ 460 Deportation ☐ 470 Racketeer Influenced and Corrupt Organizations ☐ 480 Consumer Credit ☐ 490 Cable/Sat TV ☐ 850 Securities/Commodities/Exchange ☐ 890 Other Statutory Actions ☐ 891 Agricultural Acts ☐ 893 Environmental Matters ☐ 895 Freedom of Information Act ☐ 896 Arbitration ☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision ☐ 950 Constitutionality of State Statutes
REAL PROPERTY ☐ 210 Land Condemnation ☐ 220 Foreclosure ☐ 230 Rent Lease & Ejectment ☐ 240 Torts to Land ☐ 245 Tort Product Liability ☐ 290 All Other Real Property	CIVIL RIGHTS ☐ 440 Other Civil Rights ☐ 441 Voting ☐ 442 Employment ☐ 443 Housing/Accommodations ☐ 445 Amer. w/Disabilities - Employment ☐ 446 Amer. w/Disabilities - Other ☐ 448 Education	PRISONER PETITIONS Habeas Corpus: ☐ 463 Alien Detainee ☐ 510 Motions to Vacate Sentence ☐ 530 General ☐ 535 Death Penalty Other: ☐ 540 Mandamus & Other ☐ 550 Civil Rights ☐ 555 Prison Condition ☐ 560 Civil Detainee - Conditions of Confinement			

V. ORIGIN (Place an "X" in One Box Only)

- ☒ 1 Original Proceeding
- ☐ 2 Removed from State Court
- ☐ 3 Remanded from Appellate Court
- ☐ 4 Reinstated or Reopened
- ☐ 5 Transferred from Another District (specify)
- ☐ 6 Multidistrict Litigation

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):

15 U.S.C. § 1 et seq.

Brief description of cause:

Antitrust claim for price fixing

VII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A CLASS ACTION UNDER RULE 23, F.R.Cv.P.

DEMAND \$

655,500,000.00

CHECK YES only if demanded in complaint:

JURY DEMAND:

☒ Yes ☐ No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE Gleeson

DOCKET NUMBER 06-MD-1775 (JG)(VVP)

DATE SIGNATURE OF ATTORNEY OF RECORD

11/19/2013

FOR OFFICE USE ONLY

RECEIPT #

AMOUNT

APPLYING IFP

JUDGE

MAG. JUDGE

4653066922

55

VVP

6399

Local Arbitration Rule 83.10 provides that with certain exceptions, actions seeking money damages only in an amount not in excess of \$150,000, exclusive of interest and costs, are eligible for compulsory arbitration. The amount of damages is presumed to be below the threshold amount unless a certification to the contrary is filed.

I, J. Peter Coll, Jr., counsel for Plaintiffs DPWN Holdings (USA), Inc., do hereby certify that the above captioned civil action is ineligible for compulsory arbitration for the following reason(s):

- ☒ monetary damages sought are in excess of \$150,000, exclusive of interest and costs,
- ☒ the complaint seeks injunctive relief,
- ☐ the matter is otherwise ineligible for the following reason

DISCLOSURE STATEMENT - FEDERAL RULES CIVIL PROCEDURE 7.1

Identify any parent corporation and any publicly held corporation that owns 10% or more of its stocks:

DPWN Holdings (USA), Inc. is a wholly-owned subsidiary of Deutsche Post Beteiligungen Holding GmbH, which is, in turn, a wholly-owned subsidiary of Deutsche Post, A.G. ("DPAG"). DPAG is a company publicly traded in Germany on the Frankfurt Stock Exchange.

RELATED CASE STATEMENT (Section VIII on the Front of this Form)

Please list all cases that are arguably related pursuant to Division of Business Rule 50.3.1 in Section VIII on the front of this form. Rule 50.3.1 (a) provides that "A civil case is "related" to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge." Rule 50.3.1 (b) provides that "A civil case shall not be deemed "related" to another civil case merely because the civil case: (A) involves identical legal issues, or (B) involves the same parties." Rule 50.3.1 (c) further provides that "Presumptively, and subject to the power of a judge to determine otherwise pursuant to paragraph (d), civil cases shall not be deemed to be "related" unless both cases are still pending before the court."

NY-E DIVISION OF BUSINESS RULE 50.1(d)(2)

- 1.) Is the civil action being filed in the Eastern District removed from a New York State Court located in Nassau or Suffolk County? No
- 2.) If you answered "no" above:
 - a) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in Nassau or Suffolk County? No
 - b) Did the events or omissions giving rise to the claim or claims, or a substantial part thereof, occur in the Eastern District? Yes

If your answer to question 2 (b) is "No," does the defendant (or a majority of the defendants, if there is more than one) reside in Nassau or Suffolk County, or, in an interpleader action, does the claimant (or a majority of the claimants, if there is more than one) reside in Nassau or Suffolk County?

(Note: A corporation shall be considered a resident of the County in which it has the most significant contacts).

BAR ADMISSION

I am currently admitted in the Eastern District of New York and currently a member in good standing of the bar of this court.

☒ Yes ☐ No

Are you currently the subject of any disciplinary action (s) in this or any other state or federal court?

☐ Yes (If yes, please explain) ☒ No

I certify the accuracy of all information provided above.

Signature:

