UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

IN RE NYC BUS TOUR ANTITRUST LITIGATION	Master Case File No. 13-CV-0711 (ALC)(GWG) **RELATED TO ALL CASES** **ECF Case** **JURY TRIAL DEMANDED**

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR FINAL APPROVAL OF SETTLEMENT WITH DEFENDANTS

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Plaintiffs Natasha Bhandari and Tracey L. Nobel ("Class Plaintiffs," or "Plaintiffs"), individually and on behalf of the putative Class of purchasers in this action (the "Settlement Class," or "Class"), have entered into a settlement agreement (the "Settlement") with defendants Twin America, LLC, Coach USA, Inc., International Bus Services, Inc., CitySights LLC and City Sights Twin, LLC ("Defendants").[1] The Court preliminarily approved this Settlement on June 16, 2014 (Dkt. # 107). Plaintiffs now respectfully move the Court for an order finally approving the Settlement.

INTRODUCTION

By any measure, the proposed $19 million Settlement is an outstanding result for the class. Plaintiffs' lawsuit alleged that Defendants violated the antitrust laws in relation to their "hop-on, hop-off" bus tour business from around early 2009 until the present, causing consumers to pay anticompetitive overcharges. Defendants contested these allegations. The class certification briefing provided a preview of the complex and difficult issues that would have dominated a trial on the merits, including questions of market definition, barriers to entry, and the proper economic modeling of any overcharge. The Settlement gives the class an outstanding recovery, sparing them any risk of loss on dispositive motions, trial, or appeal.

The Settlement gives significant relief to class members who could not afford to pursue their individual claims. The $19 million fund will pay treble damages for class members' estimated losses, on a *pro rata* basis according to their ticket purchases and filed claims; if there is any money remaining after distribution to claimants, it will be distributed to the Department of Justice, Antitrust Division, and/or the New York Attorney General's Office, who have a separate

[1] Unless otherwise defined, all Capitalized Terms in this memorandum have the same meaning as set forth in the Settlement Agreement.

pending action in this Court seeking injunctive and other equitable relief. No funds will be returned to Defendants.

The Settlement is the result of an informed recommendation from Class Counsel and protracted, arms-length negotiations with Defendants. Class Counsel recommended this Settlement to the Court only after investing significant effort in this litigation, reviewing more than 500,000 pages of documents and several gigabytes of transaction data, briefing class certification with dueling expert reports, and participating in 29 depositions—including the depositions of current and former senior employees of Defendants. Defendants agreed to this Settlement only after fact discovery was nearly complete, class certification was fully briefed, and the parties had engaged in two separate full-day mediations, facilitated first by Judge Gorenstein and later by Antonio Piazza, an experienced and highly respected mediator. In the views of both Class Counsel and Mr. Piazza, the settlement is fair, reasonable, and adequate, and an excellent result for the class.

The positive response to the Settlement confirms the fairness and adequacy of its terms. Although the deadline set by the Court for Class Members to exclude themselves or object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation have been submitted and only one request for exclusion has been received.

Plaintiffs hired Rust Consulting and Kinsella Media, LLC, whose expertise in class settlement administration and notice is unmatched, to implement the Notice Plan approved by the Court in the Preliminary Approval Order. Dr. Shannon Wheatman, an expert in class notice plans, explains that notice of the Settlement reached approximately 80% of the domestic target audience. In part, this included direct mailings to Class Members whose physical and email addresses were extracted from Defendants' data. The expert further opines that notice satisfied

due process and Federal Rule of Civil Procedure 23 in providing the best notice practicable to Class Members using language that was easily understood by the average Class Member.

For all these reasons, Plaintiffs respectfully request the Court approve the Settlement.

BACKGROUND

A. Litigation and Discovery

On December 11, 2012, the United States of America and State of New York ("Government Entities") filed an antitrust complaint against Defendants in this Court. *See United States v. Twin America, LLC*, No. 12-cv-8989. Since then, individual plaintiffs including Ms. Bhandari and Ms. Nobel have filed five different class action complaints against Defendants. *See Bhandari v. Twin America*, No. 13-cv-0711; *Hanson v. Twin America*, No. 12-cv-9066; *Nobel v. Twin America*, No. 12-cv-9128; *Hinton v. Twin America*, No. 12-cv-9175; and *Mercado v. Twin America*, No. 13-cv-1973.

In its Order of April 5, 2013 (Dkt. # 36), the Court appointed Susman Godfrey LLP to serve as Interim Lead Counsel for the plaintiff Class. In its Order of April 24, 2013 (Dkt. # 38), this Court consolidated the foregoing class actions under Docket No. 13-cv-0711 for all purposes, including trial.

The current consolidated complaint (Dkt. # 83) alleges that Defendants engaged in a *per se* unlawful conspiracy to fix prices above the market rate, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. The complaint also alleges monopolization of the relevant market in violation of Section 2 of the Sherman Act, *id*. § 2, and an illegal merger in violation of Section 7 of the Clayton Act, *id.* § 18. Between May 2013 and February 2014, Plaintiffs served a total of seven sets of document requests and one set of interrogatories on Defendants. Between July 2013 and February 2014, Plaintiffs served a total of 19 third-party subpoenas, calling for both documents and deposition testimony. Plaintiffs received and reviewed over 500,000 documents

and several gigabytes of transactional data. *See* Declaration of William Christopher Carmody In Support of Motion for Final Approval of Settlement ("Carmody Decl."), ¶ 8.

On December 6, 2013, Plaintiffs commenced merits depositions. To date, Plaintiffs have taken or defended 29 depositions, many in cooperation with the United States Department of Justice and the New York Attorney General. These included defenses of Plaintiffs' proposed class representatives, economic expert, and declarant regarding class notice and administration, as well as depositions of Defendants' employees, officers, and corporate designees, and multiple third parties subpoenaed by Plaintiffs, Defendants, and the Government Entities. *Id.*

On November 4, 2013, Plaintiffs filed a motion for class certification, which was supported by an extensive declaration from an economic expert and a declaration on the feasibility of class notice and administration. (Dkt. # 70-77). Defendants opposed that motion on January 10, 2014, including a declaration of their own expert disputing Plaintiffs' conclusions concerning class certification; Plaintiffs filed their reply brief on February 26, 2014. (Dkt. # 97-98). Fact discovery was scheduled to end on April 28, 2014.

B. Settlement Negotiations and Terms

1. Settlement Negotiations

Settlement discussions began last year with several informal discussions between the parties. *See* Carmody Decl. ¶¶ 5-6. On December 12, 2013, Judge Gorenstein held a Settlement Conference. *Id.* ¶ 6; Dkt. # 88. Prior to that conference, the parties submitted letters to the Court outlining their positions on the merits and for settlement. The parties exchanged demands and offers both before and during that conference.

After engaging in further direct discussions, the parties hired a private mediator, Antonio Piazza, to facilitate further discussions. *Id.* ¶ 4. Mr. Piazza is the principal of Mediated Negotiations, and has been involved with the settlement of over 4,000 cases since 1981,

including numerous consumer class actions filed in federal court. *See* Declaration of Antonio Piazza In Support of Motion for Preliminary Approval of Settlement ("Piazza Decl.") ¶ 2 (Dkt. # 106). Mr. Piazza is one of the most highly respected and competent mediators in the country. On March 12, 2014, Mr. Piazza conducted a mediation between the parties in San Francisco. *Id.* ¶ 3. In advance of the mediation, counsel for the parties submitted detailed mediation statements setting forth their positions on the key liability and damages issues. *Id.* ¶ 4. After a spirited, full-day mediation, the parties reached an agreement, which was memorialized in a written term sheet that contained the basic terms of this Settlement. The mediator effectively assisted the parties in coming to a fair and equitable resolution despite the rival positions taken by opposing counsel and their clients. Mr. Piazza believes that the proposed $19 million settlement is fair and reasonable, and is a highly successful result for members of the proposed Class. *Id.* ¶ 10.

2. Settlement Agreement

a. Consideration and Settlement Class

Defendants have agreed to pay $19,000,000 in exchange for dismissals with prejudice and a release of claims. *See* Settlement Agreement, Carmody Decl., Ex. 1. No unclaimed funds will revert to Defendants; instead, any residual funds will be given to the Government Entities. *Id.* ¶ 19.

The Settlement defines the settlement Class as:

> [A]ll persons who, or entities that, purchased Defendants' "hop-on, hop-off" bus tours in New York City from February 1, 2009, until the date of the Preliminary Approval Order (the "Class Period"). Excluded from the Class are Defendants, their present and former parents, subsidiaries, affiliates, and employees.

Id. ¶ 1(e). Under the terms of the Settlement, Defendants stipulate for purposes of settlement only that this Class should be certified under Rule 23(b)(3), and that Susman Godfrey LLP should be appointed as class counsel pursuant to Rule 23(g). *Id.* ¶ 4.

b. Release and Opt-Outs

Upon final approval of the Settlement, Plaintiffs and Class Members will release all claims they have against Defendants that relate to the claims asserted in the lawsuit and "arise out of, are based upon or are related to the allegations, transactions, facts (including allegations of anticompetitive conduct with respect to any acquisition of Defendants' hop-on, hop-off bus tours by Class Members during the Class Period), matters or occurrences, representations or omissions involved, set forth, or referred to in the First Amended Consolidated Class Action Complaint in the Action." *Id.* ¶ (cc). Specifically excluded from the definition of "Class Member" are those who "timely and validly excluded themselves from the Class in accordance with the procedure to be approved by the Court." *Id.* ¶ 1(f).

3. The Distribution Plan

The Distribution Plan, as set forth in the notice papers, will allocate up to $20 as a recovery for each class member's qualifying ticket purchase based on filed claims and reduced on a *pro rata* basis if the submitted claims exceed the Net Settlement Fund. The notice to the class explained the plan and procedure as follows:

> You can get up to $20 per class member ticket if you submit a valid Claim Form. The amount of your payment will depend on the number of claims filed. Payment amounts may be adjusted to ensure that all eligible Class Members receive a payment, as follows: If the total value of all approved claims is greater than the amount of money available to pay claims (after costs and fees have been deducted), eligible Class Members' payments will be reduced proportionally.
>
> The actual amount available for each eligible Class Member will not be determined until after January 19, 2015 and all Claims Forms have been received, and may not be determined until after the Settlement is final.

See Long Form Notice, Wheatman Decl. to Preliminary Approval ("Prelim. App. Wheatman Decl."), Ex. 6, Question 9 (Dkt. # 105).

C. Preliminary Approval, Notice Plan, and Final Approval Hearing

On June 16, 2014, the Court entered an order conditionally certifying a settlement class, naming Lead Counsel as counsel for the settlement class and Lead Plaintiffs as class plaintiffs, and preliminarily approving the settlement with Defendants. (Dkt. # 107). The Court also approved the proposed notice to class members and set a final approval hearing for October 20, 2014. *Id*.

The Court also ordered the following schedule:

- August 26, 2014: Deadline for declaration of mailing from the Claims Administrator.
- September 5, 2014: Deadline for objections, requests for exclusion, and notices for intention to appear at final approval hearing.
- October 13, 2014: Deadline for replies on final approval motion and fee petition.
- October 20, 2014: Final approval hearing.
- January 19, 2015: Deadline to submit Claim Form.

(Dkt. # 107, 109).

ARGUMENT

I. THE PROPOSED SETTLEMENT IS FAIR AND REASONABLE

A. Legal Standard Governing Final Approval

The settlement of complex litigation is strongly favored. The Second Circuit is "mindful of the strong judicial policy in favor of settlements, particularly in the class action context. The compromise of complex litigation is encouraged by the courts and favored by public policy." *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 116-17 (2d Cir. 2005) ("*Wal-Mart*") (internal quotation marks and citation omitted); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 209 (S.D.N.Y. 1995) ("It is well established that there is an overriding public interest in settling and quieting litigation, and this is particularly true in class actions.").

The approval of a proposed class action settlement is a matter of discretion for the trial court. *See Maywalt v. Parker & Parsley Petroleum Co.*, 67 F.3d 1072, 1079 (2d Cir. 1995). "In exercising this discretion, courts should give proper deference to the private consensual decision of the parties." *Clark v. Ecolab, Inc.*, Nos. 07 Civ. 8623, 04 Civ. 4488, 06 Civ. 5672 (PAC), 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009) (internal quotation marks omitted). "In evaluating the settlement, the Court should keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation . . . ." *Id.* (internal quotation marks omitted).

A court may approve a class settlement if it is "fair, adequate, and reasonable, and not a product of collusion." *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775 (JG) (VVP), 2012 WL 3138596, at *4 (E.D.N.Y. Aug. 2, 2012) (quoting *Joel A. v. Giuliani*, 218 F.3d 132, 138 (2d Cir. 2000)); *McReynolds v. Richards-Cantave*, 588 F.3d 790, 803 (2d Cir. 2009); *see also* Fed. R. Civ. P. 23(e)(2). This evaluation requires the court to consider "both the settlement's terms and the negotiating process leading to settlement." *Wal-Mart*, 396 F.3d at 116.

Regarding the negotiating process, "[s]o long as the integrity of the arm's length negotiation process is preserved . . . a strong initial presumption of fairness attaches to the proposed settlement." *In re PaineWebber Ltd. P'ships Litig.*, 171 F.R.D. 104, 125 (S.D.N.Y. 1997), *aff'd*, 117 F.3d 721 (2d Cir. 1997); *see also McReynolds*, 588 F.3d at 803 (same); *Wal-Mart*, 396 F.3d at 116 (same).

Regarding approval of the settlement's terms, recognizing that a settlement represents an exercise of judgment by the negotiating parties, the Second Circuit has cautioned that although a court should not give "rubber stamp approval" to a proposed settlement, it must "stop short of the detailed and thorough investigation that it would undertake if it were actually trying the

case." *Detroit v. Grinnell Corp.*, 495 F.2d 448, 462 (2d Cir. 1974). In assessing a settlement, then, the court should neither substitute its judgment for that of the parties who negotiated the settlement nor conduct a mini-trial on the action's merits. *Weinberger v. Kendrick*, 698 F.2d 61, 74 (2d Cir. 1983); *see also In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 455 (S.D.N.Y. 2004) (court should not substitute its "business judgment for that of counsel, absent evidence of fraud or overreaching"). The factors to be considered by a court in making a Rule 23(e) fairness determination are:

> (1) the complexity, expense and likely duration of the litigation . . . ; (2) the reaction of the class to the settlement . . . ; (3) the stage of the proceedings and the amount of discovery completed . . . ; (4) the risks of establishing liability . . . ; (5) the risks of establishing damages . . . ; (6) the risks of maintaining the class action through the trial . . . ; (7) the ability of the defendants to withstand a greater judgment . . . ; (8) the range of reasonableness of the settlement fund in light of the best possible recovery . . . ; [and] (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation . . . .

Grinnell, 495 F.2d at 463; *see also In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 122-23 (S.D.N.Y. 2009) (*Currency Conversion II*). In applying these factors, "not every factor must weigh in favor of the settlement, but rather the court should consider the totality of these factors in light of the particular circumstances." *In re Telik, Inc. Sec. Litig.*, 576 F. Supp. 2d 570, 575 (S.D.N.Y. 2008) (internal quotation marks omitted); *see also Int'l Union of Electronic, Elec., Salaried Mach. & Furniture Workers, AFL-CIO v. Unisys Corp.*, 858 F. Supp. 1243, 1265 (E.D.N.Y. 1994) (the court need not apply any "single, inflexible test").

B. The Proposed Settlement is Procedurally Fair

The Settlement Agreement is entitled to an initial presumption of fairness and adequacy because it was reached by experienced, fully-informed counsel after extensive arm's-length negotiations.

The negotiations that resulted in the proposed settlement were conducted by highly qualified counsel who endeavored to obtain the best possible result for their clients and the Settlement Class. *See* Carmody Decl. ¶¶ 4-9. The Court previously found that Class Counsel have the requisite qualifications and experience to lead this litigation on behalf the proposed Settlement Class (Dkt. # 36), and the Court appointed Class Counsel for purposes of the settlement in the Preliminary Approval Order (Dkt. # 107). The terms of the Settlement Agreement were negotiated at arm's length through extensive meetings and discussions over the course of several months, and included two full-day mediation sessions—first with Judge Gorenstein and then with Antonio Piazza, a nationally renowned mediator. *See* Carmody Decl., ¶¶ 4-6; Piazza Decl. ¶ 3 (Dkt. # 106).

Beginning last year, there were numerous telephone calls and email exchanges regarding the settlement terms. *See* Carmody Decl. ¶ 6. The discussions were meaningful and informed; they occurred only after the parties had reviewed hundreds of thousands of pages of documents, conducted dozens of depositions, and briefed class certification. Aided by this experience and two rounds of mediation briefing, Class Counsel analyzed all the contested legal and factual issues posed by the litigation to advocate for a fair settlement that serves the best interests of the Settlement Class. *See id*. ¶¶ 7-8. It is the opinion of Class Counsel that this settlement is fair and reasonable. *Id.* ¶ 9.

Where, as here, the settlement is the product of negotiations between experienced and informed counsel, courts give counsel's opinion considerable weight because they are closest to the facts and risks associated with continuing the litigation. *See PaineWebber*, 171 F.R.D. at 125. The weight is especially great where, as here, two experienced mediators assisted the parties with the settlement negotiations and presided over two mediations. *See Clem v. Keybank,*

N.A., No. 13 Civ. 789 (JCF), 2014 WL 1265909, at *2 (S.D.N.Y. Mar. 27, 2014) (citing (*Capsolas v. Pasta Res. Inc.*, No. 10 Civ. 5595, 2012 WL 1656920, at *1 (S.D.N.Y. May 9, 2012)) (the assistance of mediators "reinforces the non-collusive nature of the settlement").

C. The Proposed Settlement Is Substantively Fair: *Grinnell Factors*

Evaluation of this settlement under the *Grinnell* factors supports final approval.

1. Complexity, Expense, and Likely Duration of the Litigation (*Grinnell* Factor 1)

The first factor, which addresses "the complexity, expense and likely duration of the litigation," strongly supports approval. *Grinnell*, 495 F.2d at 463. "Federal antitrust cases are complicated, lengthy, and bitterly fought." *Wal-Mart*, 396 F.3d at 118; *see also In re Linerboard Antitrust Litig.*, 296 F. Supp. 2d 568, 577 (E.D. Pa. 2003) ("An antitrust class action is arguably the most complex action to prosecute. . . . The legal and factual issues involved are always numerous and uncertain in outcome." (citations and internal quotation marks omitted)); *Weseley v. Spear, Leeds & Kellogg*, 711 F. Supp. 713, 719 (E.D.N.Y. 1989) (antitrust class actions "are notoriously complex, protracted, and bitterly fought"); *In re Shopping Carts Antitrust Litig.*, MDL No. 451-CLB, 1983 WL 1950, at *7 (S.D.N.Y. Nov. 18, 1983) ("antitrust price fixing actions are generally complex, expensive and lengthy").

This litigation is no exception. The complaint alleges price-fixing, monopolization, and illegal merger claims in violation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The complex claims were bitterly fought, as Defendants developed defenses to liability, damages and class certification. When the settlement was reached, a fully briefed motion for class certification was pending before this Court and the parties had submitted expert reports and deposed experts in connection with that motion.

Although Plaintiffs were nearing the completion of fact discovery when the Settlement was reached, the costs associated with the completion of discovery, including extensive expert discovery, summary judgment motions, *Daubert* motions, a lengthy and complicated trial and the inevitable post-trial appeals, would have been substantial. As a result, additional years could pass before the class would receive a recovery, if ever. *In re Sony SXRD Rear Projection Television Class Action Litig*., No. 06 Civ. 5173 (RPP), 2008 WL 1956267, at *6 (S.D.N.Y. May 1, 2008) ("the complexity, expense and likely duration of the litigation going forward weigh in favor of approval of the Settlement. . . . Not only would Plaintiffs spend substantial sums in litigating this case through trial and appeals, it could be years before class members saw any recovery, if at all."); *Strougo ex rel. Brazilian Equity Fund, Inc. v. Bassini*, 258 F. Supp. 2d 254, 261 (S.D.N.Y. 2003); *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 362 (S.D.N.Y. 2002). The Settlement allows the parties and the Court system to avoid the significant expenses of continued litigation. *See In re Prudential*, 163 F.R.D. at 210 ("[I]t may be preferable to take the bird in the hand instead of the prospective flock in the bush." (internal quotation marks omitted)).

2. Reaction of the Class to the Settlement (*Grinnell* Factor 2)

The second factor, the "reaction of the class to the settlement," strongly supports approval. *Grinnell*, 495 F.2d at 463; *see, e.g.*, *In re FLAG Telecom Holdings, Ltd. Sec. Litig.*, Bi, 02-cv-3400 (CM) (PED), 2010 WL 4537550, at *16 (S.D.N.Y. Nov. 8, 2010). Although the deadline set by the Court for Class Members to exclude themselves or object to the Settlement has not yet passed, to date, no objections to the Settlement or the Plan of Allocation have been submitted and only one request for exclusion has been received. *Cf. Grant v. Bethlehem Steel Corp.*, 823 F.2d 20, 24 (2d Cir. 1987) (approving class settlement where 45 of the 126 class members, or approximately 36%, expressed opposition to the settlement).

The lack of numerous objections and requests for exclusion is especially notable in light of the widespread notice plan that the Court approved. As set forth in more detail below and in the Declaration of Dr. Shannon R. Wheatman, starting on July 16, 2014, a total of 309,178 E-Mail Notices and 36,086 Postcard Notices were successfully sent to potential Class Members, using data provided by the Defendants. Declaration of Shannon R. Wheatman, Ph.D. in Support of Motion for Final Approval of Settlement with Defendants Re: Adequacy of Notice Program ("Wheatman Decl.") ¶ 8. In addition to these direct mailings, the Claims Administrator implemented a series of paid print media advertisements (including ads in *Parade*, *USA Weekend*, *People*, and *Time*), press releases, and online media (including banner ads on Facebook and other internet sites) that reached an estimated 80% of U.S. residents who fit the demographics of likely class members with an average frequency of 2.5 times per likely class member, and which furnished the best notice practicable to the international target audience. *Id.* ¶¶ 4, 28(A). The Settlement attracted widespread media attention, including articles in the 117 pieces of Media listed in the attached chart. *See id.* ¶ 21. The Claims Administrator also maintains a website that enables potential class members to access important documents, a toll-free hotline that enables Class Members to connect to a live operator, and a case-dedicated email address for questions to the Claims Administrator. Declaration of Daniel Coggeshall Regarding Mailing of the Notice and Receipt of Requests for Exclusion, Objections and Claim Forms to Date ("Coggeshall Decl."), ¶¶ 20-24. Notwithstanding all these notices, not a single objection and only one request for exclusion has been received to date. *Id.* ¶ 25.

The deadline for filing objections is September 5, 2014. (Dkt. # 107). As provided in the Preliminary Approval Order, Plaintiffs will file reply papers no later than October 13, 2014 addressing any objections that may be received.

3. Stage of the Proceedings and Amount of Discovery Completed (*Grinnell* Factor 3)

The third *Grinnell* factor, which addresses "the stage of the proceedings and the amount of discovery completed," also strongly supports approval of the Settlement. *Grinnell*, 495 F.2d at 463. When courts "look [ ] to the stage of the proceedings and the amount of discovery completed" under the third *Grinnell* factor, they "focus[] on whether the plaintiffs obtained sufficient information through discovery to properly evaluate their case and to assess the adequacy of any settlement proposal." *In re Advanced Battery Techs., Inc. Sec. Litig.*, No. 11 Civ. 2279 (CM), 2014 WL 1243799, at *6 (S.D.N.Y. Mar. 24, 2014) (internal quotation marks omitted); *see also Wal-mart*, 396 F.3d at 118. "[F]ull discovery is not a prerequisite for approval as long as the court is assured that the parties had sufficient information about the claims to evaluate intelligently the desirability of settlement." *In re Int'l Murex Techs. Corp. Secs. Litig.*, No. 93 CV 336 (JG), 1996 WL 1088899, at *4 (E.D.N.Y. Dec. 4, 1996); *see also Global Crossing*, 225 F.R.D. at 458.

Here, the settlement was reached shortly before the close of fact discovery, which was extensive: Plaintiffs participated in the depositions of 29 witnesses, issued 19 third-party subpoenas and seven document requests, and received and reviewed over 500,000 documents and several gigabytes of transactional data. Prior to settling, Plaintiffs extensively briefed the central legal issues, and consulted with experts to develop a damages model, in support of their motion for class certification. Plaintiffs also participated in two full-day mediations before Judge Gorenstein and a nationally renowned mediator, supported by additional lengthy briefing, and conducted numerous settlement negotiations with Defendants. All of this gave Plaintiffs' counsel a thorough understanding of the strengths and weaknesses of both sides' positions.

In sum, class counsel had the information needed to make an intelligent, informed appraisal of the strength of the Settlement Class's claims and Defendants' defenses, and the likelihood of obtaining a larger recovery for the Settlement Class if this Action continued. Carmody Decl. ¶¶ 7-9; *see In re Bear Stearns Cos. Secs., Derivative, & ERISA Litig.*, 909 F. Supp. 2d 259, 267 (S.D.N.Y. 2012) (parties had requisite knowledge to "gauge the strengths and weaknesses of their claims and the adequacy of settlement" where they "conducted extensive investigations, obtained and reviewed millions of pages of documents, and briefed and litigated a number of significant legal issues").

4. Risk of Establishing Liability, Damages, and in Maintaining the Class Action Through the Trial (*Grinnell* Factors 4, 5, & 6)

The fourth, fifth and sixth *Grinnell* factors, which address "the risks of establishing liability," "the risks of establishing damages," and "the risks of maintaining the class action through the trial," also strongly support approval of the Settlement. *Grinnell*, 495 F.2d at 463. In assessing *Grinnell* factors 4, 5 and 6, which are often considered together, the Court is not required to decide the merits of the case, resolve unsettled legal questions, or to "foresee with absolute certainty the outcome of the case." *Shapiro v. JPMorgan Chase & Co.*, Nos. 11 Civ. 8331 (CM) (MHD), 11 Civ. 7961 (CM), 2014 WL 1224666, at *10 (S.D.N.Y. Mar. 24, 2014). "[R]ather, the Court need only assess the risks of litigation against the certainty of recovery under the proposed settlement." *Global Crossing*, 225 F.R.D. at 459. In assessing the risks, courts recognize that "the complexity of Plaintiff's claims *ipso facto* creates uncertainty." *Currency Conversion II*, 263 F.R.D. at 123. While Plaintiffs and Lead Counsel believe that they would prevail in their claims asserted against Defendants, they also recognize the risks and uncertainties inherent in pursuing the action through class certification, summary judgment, trial and appeals.

a. Risks to Establishing Liability

Plaintiffs believe their position on liability is strong, but recognize that there are complex issues that pose risk. For example, Plaintiffs allege that Defendants' merger gave them sufficient market power to raise and sustain prices above a competitive level. Defendants, among other things, contested these allegations, disputing that there was an antitrust "market" limited to "hop on, hop off" sightseeing bus tours in New York City and that there were significant barriers to other firms competing in the market. Although Plaintiffs strongly believe in the merit of their arguments, it is not clear how a jury would resolve these issues at trial. *See West Virginia v. Chas. Pfizer & Co.*, 314 F. Supp. 710, 743-44 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir. 1971) ("[N]o matter how confident one may be of the outcome of litigation, such confidence is often misplaced."); *In re Baldwin-United Corp.*, 105 F.R.D. 475, 482 (S.D.N.Y. 1984) (comparing advantages of immediate cash payments with risks involved in long and uncertain litigation).

b. Risks to Establishing Damages

Plaintiffs also faced risks in establishing damages. The parties submitted dueling damages expert reports, and took depositions of each other's damages experts, in connection with the motion for class certification; Plaintiffs expect that the disagreements would only sharpen during further discovery, dispositive motions, and trial. Defendants have vigorously contested the conclusions of Plaintiffs' damages expert in quantifying the alleged overcharge, and argue that the pricing trends of other tourism options in New York demonstrate that the prices of Defendants' hop on, hop off tours were not inflated due to the joint venture. *See*, *e.g.*, Defendants' Opposition to Plaintiffs' Motion for Class Certification, Dkt. # 90-1, at 22-26. Defendants also vigorously attacked Plaintiffs' damages expert's model because it allegedly returned false positives and allegedly had other flaws. *Id.* Although Plaintiffs are confident in

their ability to prove damages, the prospect of a battle at trial between competing economic experts with different econometric models adds substantial risk to Plaintiffs' claims. *See In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 476 (S.D.N.Y. 1998) (observing that "[d]amages at trial would inevitably involve a battle of the experts" and noting that it is "difficult to predict with any certainty which testimony would be credited") (internal quotation marks omitted); *FLAG Telecom*, 2010 WL 4537550, at *18 ("The jury's verdict . . . would . . . depend on its reaction to the complex testimony of experts, a reaction that is inherently uncertain and unpredictable."); *In re Am. Bank Note Holographics, Inc., Sec. Litig.*, 127 F. Supp. 2d 418, 426-27 (S.D.N.Y. 2001).

c. Risks on Appeal.

Even if plaintiffs succeed at trial, defendants are certain to file post-trial motions and, if necessary, an appeal. The appeal of the antitrust issues in this case is likely to be lengthy and expensive, and there is no assurance that plaintiffs would prevail. *See In re Michael Milken & Assocs. Secs. Litig.*, 150 F.R.D. 57, 65 (S.D.N.Y. 1993) (noting that "[i]t must also be recognized that victory even at the trial stage is not a guarantee of ultimate success" and citing a case where a multimillion dollar judgment was reversed).

5. Ability of Defendants to Withstand a Greater Judgment (*Grinnell* Factor 7)

The seventh *Grinnell* factor addresses the defendants' ability to withstand a greater judgment. Even if Defendants could withstand a greater judgment against them, the Second Circuit has made clear that "this factor, standing alone, does not suggest that the settlement is unfair." *D'Amato v. Deutsche Bank*, 236 F.3d 78, 86 (2d Cir. 2001). Indeed, "a defendant is not required to empty its coffers before a settlement can be found adequate." *Sony*, 2008 WL 1956267, at *8 (internal quotation marks omitted). The mere fact that a defendant "is able to pay

more than it offers in settlement does not, standing alone, indicate the settlement is unreasonable or inadequate." *Global Crossing*, 225 F.R.D. at 460. This factor does not, therefore, alter the conclusion that the settlement is fair and reasonable.

6. Range of Reasonableness of the Settlement Funds in Light of the Best Possible Recovery and All the Attendant Risks of Litigation (*Grinnell* Factors 8 and 9)

The final two *Grinnell* factors, "the range of reasonableness of the settlement fund in light of the best possible recovery" and "the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation," also strongly support approval of the Settlement. *Grinnell*, 495 F.2d at 463. Courts typically combine their analysis of the final two *Grinnell* factors. *See Global Crossing*, 225 F.R.D. at 460. In analyzing these two factors, a reviewing court "consider[s] and weigh[s] the nature of the claim, the possible defenses, the situation of the parties, and the exercise of business judgment in determining whether the proposed settlement is reasonable." *Grinnell*, 495 F.2d at 462. "The determination of whether a settlement amount is reasonable does not involve the use of a mathematical equation yielding a particularized sum." *Massiah v. MetroPlus Health Plan, Inc.*, No. 11-cv-05669 (BMC), 2012 WL 5874655, at *5 (E.D.N.Y. Nov. 20, 2012). Rather, "there is a range of reasonableness with respect to a settlement—a range which recognizes the uncertainties of law and fact in any particular case and the concomitant risks and costs necessarily inherent in taking any litigation to completion." *Wal-mart*, 396 F.3d at 119. Moreover, the settlement amount must be judged "not in comparison with the possible recovery in the best of all possible worlds, but rather in light of the strengths and weaknesses of plaintiffs' case." *Shapiro*, 2014 WL 1224666, at *11.

Here, the $19 million payment is a significant recovery in light of the total projected damages and the risks of litigation. Illustrative modeling performed for class certification by Plaintiffs' economic expert, Dr. Hal Singer, estimated pre-trebling damages of approximately

$29 million for a class period ending shortly before the submission of class certification expert reports in the Fall of 2013 (Dkt. # 74, Singer Decl. ¶ 46 & tab. 5).[2] The settlement amount of $19 million thus represents a substantial recovery, certainly well within the permitted range on final approval. *See Grinnell Corp*., 495 F.2d at 455 & n. 2 (in theory, even a recovery of only a fraction of one percent of the overall damages could be a reasonable and fair settlement); *In re Payment Card Interchange Fee & Merch. Disc. Antitrust Litig.*, 986 F. Supp. 2d 207, 229 (E.D.N.Y. 2013) (granting final approval to antitrust class action settlement representing approximately 2.5% of the highest damages estimate as "within the range of reasonableness in light of the best possible recovery and in light of all the attendant risks of litigation"); *In re Air Cargo Shipping Servs. Antitrust Litig.*, No. 06-MD-1775, 2009 WL 3077396, at *9 (E.D.N.Y. Sept. 25, 2009) (approving settlement in price-fixing class action representing approximately 10.5% of the surcharges incurred by class members during the class period); *In re Currency Conversion Fee Antitrust Litig.*, 01 MDL 1409, 2006 WL 3247396, *6 (S.D.N.Y. Nov. 8, 2006) (preliminarily approving antitrust class action settlement representing approximately 10-15% of credit card transaction fees collected by defendants); *Currency Conversion II*, *aff'd sub nom. Priceline.com, Inc. v. Silberman*, 405 F. App'x 532 (2d Cir. 2010) (granting final approval); *In re Med. X-Ray Film Antitrust Litig.*, CV-93-5904, 1998 WL 661515, *5-6 (E.D.N.Y. Aug. 7, 1998) (granting final approval to antitrust class action settlement representing approximately 17% of the estimated best possible recovery).

The Settlement is especially fair in the context of this case: the Government Actions against Defendants are ongoing, and the Government Entities are still pursuing other relief in that case. In addition, any unclaimed funds will be given to the Government Entities, and none will be returned to Defendants.

[2] The class period in the Settlement extends through June 16, 2014, the date of Preliminary Approval.

The Settlement is even more significant given the considerable risks involved in the litigation as set forth above. Plaintiffs and Class Counsel carefully and thoroughly analyzed these risks when negotiating the present Settlement. The proposed Settlement is a favorable result for the Settlement Class in light of the range of possible recoveries and the risks of continued litigation. *Massiah*, 2012 WL 5874655, at *5 ("[W]hen a settlement assures immediate payment of substantial amounts to class members, even if it means sacrificing speculative payment of a hypothetically larger amount years down the road, settlement is reasonable under this factor.") (internal quotation marks omitted).

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In sum, the *Grinnell* factors—including the complexity, expense and delay of further litigation, the well-developed stage of the proceedings and the substantial risks of continued litigation—support a finding that the Settlement is fair, reasonable and adequate.

II. THE NOTICE PROGRAM SATISFIED DUE PROCESS

A. Legal Standard for Notice

Due process and the Federal Rules require that the class receive adequate notice of a class action settlement. *See Wal-Mart*, 396 F.3d at 114. The standard for the adequacy of a settlement notice in a class action "is measured by reasonableness." *Id*. at 113 (citing *Soberal-Perez v. Heckler*, 717 F.2d 36, 43 (2d Cir. 1983); Fed. R. Civ. P. 23(e)). The form of notice is "adequate if it may be understood by the average class member." 6 Herbert & Conte, *Newberg on Class Actions* (4th ed. 2002) ("*Newberg*") § 11.53. As the Second Circuit has held, "[t]here are no rigid rules to determine whether a settlement notice to the class satisfies constitutional or Rule 23(e) requirements; the settlement notice must fairly apprise the prospective members of the class of the terms of the proposed settlement and of the options that are open to them in

connection with the proceedings." *Wal-Mart*, 396 F.3d at 113-14 (internal quotation marks omitted).

The reach of the notice sent to the class must be "the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997). Publication notice is an acceptable method of providing notice where the identity of specific class members is not reasonably available. *See In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1080 (N.D. Cal. 2007) (citing *Manual for Complex Litigation* (4th ed.) § 21.311). Here, the robust notice program more than meets the requirements of due process, Rule 23, and notice standards articulated by the Second Circuit.

B. The Notice Fairly Apprised Class Members About the Settlement

As outlined in the attached declaration of Dr. Shannon Wheatman, who has served as a class notice expert in many state and federal class actions, including consumer class actions with millions of purchasers, the notices prepared in this case effectively communicated the required information to Class Members. Wheatman Decl. ¶¶ 27-34. (Dr. Wheatman was involved in developing illustrative model notices for the Federal Judicial Center, making her particularly well-suited as an expert to develop the notices for use in this matter. Prelim. App. Wheatman Decl. ¶ 8 (Dkt. # 105).) The notices, which were previously approved by the Court, communicate in plain language the essential elements of the Settlement and the options available to Class Members in connection with the settlement. Wheatman Decl. ¶¶ 29-33. The notice describes the litigation, summarizes the Settlement's terms, quotes the releases verbatim, describes the request for attorneys' fees, expenses, and incentive awards for Class Plaintiffs, and explains the deadline and procedure for filing objections to the Settlement as well as opting out of the cash settlement class. *Id.* ¶¶ 29-31. Additionally, the notice prominently notifies class

members how they can obtain more information from Class Counsel or the Class Administrator though a toll-free number, a website, and traditional channels including mail and telephone. Coggeshall Decl. Ex. F. These features of the notice all demonstrate due process and that the federal rules have been satisfied. *See Wal-Mart*, 396 F.3d at 114 (quoting *Newberg* §11.53, at 167) ("Notice is 'adequate if it may be understood by the average class member.'").

C. The Notice Program Was Best Notice Practicable to Reach Class Members

Dr. Wheatman also opines that the notice plan implemented satisfies the requirements of due process and Rule 23 in providing the best notice practicable to Class Members. Wheatman Decl. ¶¶ 5, 34. The notice plan had several elements: (1) direct notice by mail or email to the Class Members who could be identified with reasonable effort (*id.* ¶¶ 7-9); (2) print media publication notice, including publications in *Parade*, *USA Weekend*, *People*, and *Time*, with a combined circulation of over 60 million (*id.* ¶¶ 11-12); (3) internet publication notice with an internet advertising campaign, both domestically and internationally, using several internet ad networks as well as banner ads on Facebook (*id.* ¶¶ 15-16); (4) earned media with a globally distributed press release, translated into foreign languages (*id.* ¶ 22); and (5) a settlement website, toll-free number, and a case-dedicated e-mail address for Class Members to obtain more information (*id.* ¶¶ 23-24; Coggeshall Decl. ¶¶ 20-24). Dr. Wheatman states that the notice plan reached approximately 80% of the domestic target audience that was most likely to contain Class Members, with an average estimated frequency of 2.5 times (Wheatman Decl. ¶ 28(A)), and is the best notice practicable under the circumstances of this case (*id.* ¶ 5).

Class Counsel worked closely with the Claims Administrator to design notices including individual PIN numbers specific to class members' transactions, allowing claimants to submit prepopulated online claim forms and eliminating the need to search for credit card records or other receipts to support their claim. This inventive method has proven to be a great success.

The successful reach of the notice can be judged in part by the reaction of the class. "Where . . . the notice of settlement prompts widespread reaction from class members, it would appear that the notice has served its due process purpose." *Handschu v. Special Servs. Div.*, 787 F.2d 828, 833 (2d Cir. 1986). From June 25, 2014 when the toll-free number was activated, through today, the Class Administrator has received 2,945 calls. Coggeshall Decl. ¶ 24. Similarly, the dedicated website, which went live on June 25, 2014 has received at least 203,072 visits in the past two months. *Id.* ¶ 22. The case-dedicated email address has received and processed 518 inquiries. *Id.* ¶ 23.

Notice plans like these with a mix of direct and publication notice following similar procedures for reaching members of a class located both in the U.S. and abroad have been approved by numerous district courts in this Circuit and elsewhere. *See*, *e.g.*, *In re Vitamin C Antitrust Litig.*, No. 06-MD-1738 (BMC) (JO), 2012 WL 5289514, at *2 (E.D.N.Y. Oct. 23, 2012); *Jermyn v. Best Buy Stores, L.P.*, No. 08 Civ 00214 (CM), 2010 WL 5187746, at *4-5 (S.D.N.Y. Dec. 6, 2010); *In re Vivendi Universal, S.A.*, 242 F.R.D. 76, 107-09 (S.D.N.Y. 2007); *In re Imprelis Herbicide Mktg., Sales Pracs. & Prods. Liab. Litig.*, 296 F.R.D. 351, 363 (E.D. Pa. 2013); *Tableware*, 484 F. Supp. 2d at 1080.

The notice provided to absent class members here was "the best practicable, reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Wheatman Decl. ¶ 5; *Hecht v. United Collection Bureau, Inc.*, 691 F.3d 218, 224 (2d Cir. 2012) (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985)).

III. THE DISTRIBUTION PLAN IS FAIR AND REASONABLE

A distribution plan is fair and reasonable as long as it has a "reasonable, rational basis." *Maley v. Del Global Techs. Corp.*, 186 F. Supp. 2d 358, 367 (S.D.N.Y. 2002); *accord In re Initial Pub. Offerings Secs. Litig.*, 671 F. Supp. 2d 467, 497 (S.D.N.Y. 2009). Because it is impossible in a large class to calculate each member's claim with mathematical precision, courts recognize that "the adequacy of an allocation plan turns on whether counsel has properly apprised itself of the merits of all claims, and whether the proposed apportionment is fair and reasonable in light of that information." *PaineWebber*, 171 F.R.D. at 133. A distribution plan that compensates class members based on the type and extent of their injuries is generally considered reasonable.

Here, the distribution will be $20 for each class member's ticket, on a *pro rata* basis, with no class members being favored over others. *See* Long Form Notice, Prelim. App. Wheatman Decl., Ex. 6, Question 9 (Dkt. # 105). This represents a fair estimation of the damages suffered by each class member, including treble damages. The illustrative econometric modeling prepared by Plaintiffs' expert, Dr. Hal Singer, analyzed the first round of price increases around the time of the joint venture and found an average alleged overcharge of around $5 per ticket. Singer Decl. ¶¶ 18-20, 27 & tab. 1. Dr. Singer noted that defendants implemented a second round of price increases in early 2013, which was approximately the same magnitude of the first (that is, another $5 per ticket increase) (*Id.* ¶ 20 n. 6). Thus, at the merits stage, Plaintiffs would argue that the alleged overcharge was at least $5 to $10 per ticket (or at least $15 to $30 after trebling), particularly given that Plaintiffs would argue that the initial price increase occurred during a recession when prices would have been expected to go down and not up (*Id.* ¶¶ 22 n.8, 23 nn. 9–10). A recovery of $20 per claimant's ticket is therefore a fair result given the range of the estimated average treble actual damages allegedly suffered by each class member.

This type of distribution has frequently been determined to be fair, adequate, and reasonable. *See In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2000 WL 1737867 at *6 (D.D.C. Mar. 31, 2000) ("Settlement distributions, such as this one, that apportions funds according to the relative amount of damages suffered by class members, have repeatedly been deemed fair and reasonable."); *In re Lloyd's Am. Trust Fund Litig.*, No. 96 Civ. 1262 (RWS), 2002 WL 31663577 at *19 (S.D.N.Y. Nov. 26, 2002) ("*prorata* allocations provided in the Stipulation are not only reasonable and rational, but appear to the fairest method of allocating the settlement benefits"); *PaineWebber*, 171 F.R.D. at 135 ("pro rata distribution of the Settlement on the basis of Recognized Loss will provide a straightforward and equitable nexus for allocation and will avoid a costly, speculative and bootless comparison of the merits of the Class Members' claims").

The proposed distribution plan is recommended by Lead Counsel, which finds it to be fair and reasonable, especially in light of counsel's detailed assessments of the strengths and weaknesses of the claims asserted, the applicable damages, and the likelihood of recovery. Carmody Decl. ¶ 11. Lead Counsel's conclusion that the distribution plan is fair and reasonable is entitled to great weight. *See In re Am. Bank Note Holographics, Inc.*, 127 F. Supp. 2d 418, 429-30 (S.D.N.Y. 2001) (approving allocation plan and according the "opinion of experienced and informed counsel . . . considerable weight"). Accordingly, the distribution plan is fair and reasonable, and should be approved.

CONCLUSION

For the foregoing reasons, Class Plaintiffs respectfully request that the Court finally approve the proposed Settlement and the plan of distribution.

DATED: August 15, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

On August 15, 2014, I caused copies of the Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Settlement with Defendants to be served on the following counsel via electronic mail:

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