UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

In re FEDEX GROUND PACKAGE SYSTEM, INC., EMPLOYMENT PRACTICES LITIGATION	Case No. 3:05-MD-00527-RLM-CAN (MDL 1700)
	Judge Robert L. Miller Jr.
THIS DOCUMENT RELATES TO: *Floyd*, Civil No. 3:06-cv-00428 (AL); *Gibson*, Civil No. 3:07-cv-00272 (AZ); *White*, Civil No. 3:07-cv-00411 (GA); *Riewe*, Civil No. 3:05-cv-00390 (IN); *Craig*, Civil No. 3:05-cv-00530 (KS); *Boudreaux*, Civil No. 3:08-cv-00193 (LA); *Westcott*, Civil No. 3:06-cv-00485 (MD); *Lee*, Civil No. 3:05-cv-00533 (MN); *Tofaute*, Civil No. 3:05-cv-00595 (NJ); *Louzau*, Civil No. 3:06-CV-00485 (NY); *Whiteside*, Civil No. 3:07-CV-00326 (NC); *Kelly*, Civil No. 3:08-cv-00336 (OH); *Willis*, Civil No. 3:05-cv-00597 (PA); *Tierney*, Civil No. 3:05-cv-00599 (RI); *Cooke*, Civil No. 3:05-cv-00668 (SC); *Smith*, Civil No. 3:05-cv-00600 (TN); *Humphreys*, Civil No. 3:05-cv-00540 (TX); *Fishler*, Civil No. 3:08-cv-00053 (UT); *Asbury*, Civil No. 3:06-cv-00736 (WV); and *Larson*, Civil No. 3:05-cv-00601 (WI).	

OMNIBUS MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION FOR PRELIMINARY APPROVAL OF PROPOSED CLASS ACTION SETTLEMENT, TO ISSUE NOTICE TO SETTLEMENT CLASS, AND TO SCHEDULE A HEARING ON FINAL SETTLEMENT APPROVAL

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I. INTRODUCTION

Before the Court are motions for preliminary approval of class settlements submitted by Plaintiffs in twenty statewide class actions litigated in this Court in the MDL docket known as *In re FedEx Ground Package System, Inc. Employment Practices Litigation*, 3:05-md-00527-RLM-CAN. These twenty cases – originally filed in as many different states - were transferred to this Court starting in August 2005 for consolidated discovery and coordinated adjudication because they posed similar challenges under their respective state laws to the legality of Defendant's classification of its pickup and delivery drivers as independent contractors. These cases were litigated extensively in this Court between 2005 and 2010, and in the U.S. Court of Appeals for the Seventh Circuit between 2011 and the present.

After six years of hard-fought litigation and five years on appeal—which resulted in decisions that Plaintiff drivers are employees and not independent contractors under the laws of Kansas, California, and Oregon—the parties commenced good faith settlement negotiations in an effort to settle all of the remaining MDL cases, including *Craig v. FedEx Ground Package Sys., Inc.*, and the nineteen other cases pending but stayed in the Seventh Circuit. ("Class Cases").[1]

[1] These include: *Floyd v. FedEx Ground Package Sys., Inc.*, Civil No. 3:06-cv-00428-RLM-CAN (AL); *Gibson, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:07-cv-00272-RLM-CAN (AZ); *White, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:07-cv-00411-RLM-CAN (GA); *Riewe, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00390-RLM-CAN (IN); *Craig, et. al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00530-RLM-CAN (KS); *Boudreaux, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:08-cv-00193-RLM-CAN (LA); *Westcott v. FedEx Ground Package Sys., Inc.*, Civil No. 3:06-cv-00485-RLM-CAN (MD); *Lee, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00533-RLM-CAN (MN); *Tofaute, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00595-RLM-CAN (NJ); *Louzau, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:06-CV-00485-RLM-CAN (NY); *Whiteside, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:07-CV-00326-RLM-CAN (NC); *Kelly, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:08-cv-00336-RLM-CAN (OH); *Willis v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00597-RLM-CAN; *Tierney, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00599-RLM-CAN (RI); *Cooke, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00668-RLM-CAN (SC); *Smith, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00600-RLM-CAN

The parties agreed at the outset of the settlement process that each case would be analyzed, briefed, and negotiated separately, and settled (or not) on its own merits. If the settlements are approved by the Court, the MDL litigation, commenced nearly twelve years ago, will be finally concluded.

The twenty class settlements presented to the Court for preliminary approval are the product of twenty-one days of mediation. Each case was mediated independently, unconditionally, and at arms-length with the assistance of an experienced and skilled mediator. The MDL Co-Lead Counsel prepared for and represented the Class Plaintiffs in negotiating and concluding the twenty class settlements with participation and assistance from the originating counsel and class representatives. Plaintiffs' counsel believe the class settlements obtained the Class Cases are fair, reasonable and adequate, and in the best interests of the class based on the applicable law, the claims and defenses asserted, the potential damages, and the significant risks faced by both sides if the litigation were to continue.

This omnibus brief is submitted by Plaintiffs in support of the motions for preliminary approval filed in each of the Class Cases to address the common legal and factual issues relevant to the Court's analysis. The matters unique to the preliminary approval inquiry in each case, namely the strengths and weaknesses of the claims and defenses specific to each case and the opinion of counsel as to the adequacy of each settlement, are addressed in the concurrently filed case-specific briefs. Based upon all of the supporting memoranda and documents, Plaintiffs request that the Court (1) grant preliminary approval of the proposed class action settlement as

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(TN); *Humphreys, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00540-RLM-CAN (TX); *Fishler, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:08-cv-00053-RLM-CAN (UT); *Asbury, et al. v. FedEx Ground Package Sys., Inc.*, Civil No. 3:06-cv-00736-RLM-CAN (WV); and *Larson, et al., v. FedEx Ground Package Sys., Inc.*, Civil No. 3:05-cv-00601-RLM-CAN (WI).

described in the attached memorandum; (2) approve the form, content, and plan for distribution of the notice filed contemporaneously to enable the parties to send notice of the settlement to all class members; (3) appoint Rust Consulting, Inc. as the Settlement Administrator; and (4) to schedule a hearing regarding final approval of the proposed class action settlement, attorneys' fees and costs and service payments to the Class Representatives.

II. PROCEDURAL HISTORY

Plaintiffs in the Class Cases are current and former pickup and delivery drivers for Defendant FedEx Ground Package System, Inc. ("FXG") who filed state-wide class action lawsuits alleging that FXG misclassified them as independent contractors. The cases were transferred to this Court between 2005 and 2008 by the Judicial Panel of Multi-District Litigation ("JPML") for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407. *See In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 381 F. Supp.2d 1380 (J.P.M.L. 2005).

In its initial case scheduling order entered November 15, 2005, this Court designated Co-Lead Counsel for both sides and bifurcated the proceedings into liability and damages phases with simultaneous class certification and merits discovery. MDL Doc. No. 52. In this order, the Court appointed three firms as Co-Lead Counsel for Plaintiffs,[2] and authorized them to represent Plaintiffs in all aspects of the pretrial proceedings, including mediation proceedings and settlement negotiations. *Id*. at 3-4.

Between 2005 and 2007, the parties engaged in extensive written discovery, document production and review, depositions, expert discovery, and non-dispositive motion practice on behalf of all of the constituent MDL cases. The Court required Plaintiffs to file class

[2] The court appointed Co-Leads are: Susan Ellingstad of Lockridge Grindal Nauen P.L.L.P., Lynn Faris of Leonard Carder, LLP, and Robert Harwood of Harwood Feffer LLP. Beth Ross assumed Ms. Faris' role as Co-Lead Counsel for Leonard Carder after Ms. Faris retired in 2011.

certification motions in five waves after the close of class certification and merits discovery; this briefing took place over the course of about nine months. The Court granted Plaintiffs' motion for class certification in *Craig v. FedEx Ground Package System, Inc.*—the case originating in Kansas and which became the *de facto* lead case—in an order entered October 15, 2007. MDL Doc. No. 906. Thereafter, the Court certified classes in 26 additional cases, including the nineteen other Class Cases now before the Court, in orders entered March 25, 2008 and July 27, 2009. MDL Doc. Nos. 1119 and 1770.

During 2008 and 2009, the parties filed cross-motions for summary adjudication on the issue of the employment status of the Plaintiff Classes in each of the certified class cases. These motions were resolved largely in favor of FXG and against Plaintiffs in orders entered on August 11, 2010 (*Craig*) and December 13, 2010 (remaining cases). *See* MDL Doc. Nos. 2097 and 2239. Plaintiffs appealed from the adverse summary judgment rulings in each of the Class Cases to the U.S. Court of Appeals for the Seventh Circuit.[3]

The Seventh Circuit requested briefing in the lead case, *Craig*, and stayed briefing in all of the other cases pending a decision in *Craig*. In an order entered July 12, 2012, the Seventh Circuit certified two questions addressing Plaintiffs' employment status under Kansas law to the Supreme Court of Kansas, which accepted the certified questions in an order entered January 2013. *Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423 (7th Cir. 2012).

In October 2014, following full briefing, the Kansas Supreme Court issued its opinion on the certified questions, holding that "under the undisputed facts presented, the FedEx delivery

[3] The 20 cases litigated in the MDL docket that were not fully disposed of by this Court's summary judgment rulings were remanded back to their home jurisdictions by the JPML at the suggestion of this Court by for further proceedings. The Class Cases at issue here have been litigated exclusively within the MDL since their transfer by the JPML and remain part of the MDL docket.

drivers are employees for purposes of the KWPA." *Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 92 (Kan. 2014). The Kansas Supreme Court further concluded that an FXG driver does not lose employee status "when the driver acquires one or more other routes for which he or she is not a driver." *Id.* at 93.

On August 27, 2014, just before the Kansas Supreme Court issued its opinion, the Ninth Circuit Court of Appeals reversed summary judgment and entered judgment in favor of Plaintiffs in the California and Oregon cases, which had been remanded from the MDL to their home jurisdictions. *See Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014) (California) and *Slayman/Leighter v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014) (Oregon)). In light of the Kansas Supreme Court and Ninth Circuit decisions, in an order entered October 8, 2014, the Seventh Circuit panel requested briefing from the parties pursuant to Circuit Rule 52(b) setting forth their positions as to how the Court should proceed to resolve the pending appeals. *Criag*, 7th Cir. Doc. No. 77.

On July 8, 2015, the Seventh Circuit issued its Opinion and Order in *Craig*, reversing the summary judgment rulings entered by this Court and remanding the case to this Court with instructions to enter judgment for Plaintiffs that they are employees for purposes of Kansas law, and for further proceedings. *Criag*, 7th Cir. Doc. No. 88. In a separate order entered July 8, 2015, the Seventh Circuit ordered briefing in all of the pending cases with a focus on "whether any of the other applicable states' law differs from the law of California, Florida, Kansas or Oregon." *Criag*, 7th Cir. Doc. No. 90.[4] Mandate issued in the *Craig* case on June 30, 2015.

[4] After the Seventh Circuit's request for a Rule 52(b) statement, the Eleventh Circuit issued a decision in the Florida case, reversing summary judgment in favor of FXG, but concluding that a genuine issue of fact existed as to whether the drivers were employees under Florida law. *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 313 (11th Cir. 2015).

III. THE PARTIES' SETTLEMENT NEGOTIATIONS

In June 2015, a settlement was reached between FXG and the Plaintiff Class in the remanded California case, *Alexander v. FedEx Ground Package Sys., Inc.*, Case 3:05-cv-00038 (N.D. Cal.) (Doc. No. 126-1). With the California case settled and the *Craig* appeal resolved, the parties began exploring settlement in the group of cases pending before the Seventh Circuit, as well as three other cases that, like *Alexander*, had been remanded out of the MDL and were pending in other courts. The Seventh Circuit held a case management conference on July 22, 2015 and issued an order on July 24, 2015 further suspending briefing in all of the pending cases upon the parties' representation that they would be confidentially exploring settlement over the next several months. *Craig*, 7th Cir. Doc. No. 53.

The parties selected Michael Dickstein, a highly respected mediator with special expertise in complex employment matters, to mediate the Class Cases. Mr. Dickstein had successfully mediated the *Alexander* case and was familiar with the factual background, procedural history, nature of the legal claims and defenses, and damages. The *Craig* mediation was scheduled for and took place on October 29, 2015; the other cases were scheduled for and mediated on consecutive business days between January 11 and 22, 2016 in San Francisco, CA, and February 1 and 12, 2016 in Pittsburgh, PA.

In preparation for mediation, FXG produced to Plaintiffs voluminous class-wide damages data from both live and archived files housed in FXG's current and legacy electronic record-keeping systems to enable Plaintiffs to value the class damages in each case. The data produced spanned a fifteen-year period and included, *inter alia*, FXG's scanner and settlement data showing the class members' days and hours of service, mileage, settlement payments, settlement deductions and adjustments, route ownership, vehicle records, and dates of services in each state case. Plaintiffs engaged a forensic accounting expert who spent hundreds of

hours analyzing these records and preparing comprehensive damage exposure models and risk analyses for each of the Class Cases. The parties exchanged comprehensive mediation briefs that included their respective analyses of the strengths and weaknesses of all legal claims and defenses, and the other potential litigation risks facing both sides in the absence of settlement.

Each case was mediated separately based upon separate analyses of the legal theories in each state, the damages models derived from FXG's electronic data, and the length of the class period. The parties successfully resolved all but two of the cases during the four scheduled weeks of mediation; those two cases were resolved shortly afterward through continued negotiation between the parties and facilitated by the mediator. By February 26, 2016, the parties had reached settlements in principle in all twenty cases, now tendered to the Court for preliminary approval.

A. THE STANDARD FOR PRELIMINARY APPROVAL OF THE SETTLEMENT

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval of any settlement of a class action. A district court must scrutinize and evaluate a class action settlement to determine whether it is "fair, reasonable, and adequate." *Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011) (quoting Fed. R. Civ. P. 23(e)(2)); *Anderson v. Torrington Co.*, 755 F. Supp. 834, 838 (N.D. Ind. 1991) (Miller, J.). "Federal courts naturally favor the settlement of class action litigation." *Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996); *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 307 (7th Cir. 1985). "In the class action context in particular, there is an overriding public interest in favor of settlement." *Armstrong v. Bd. of School Dist. of City of Milwaukee*, 616 F.2d 305, 313 (7th Cir. 1980) *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also* Herbert B. Newberg & Alba Conte, Newberg on Class Actions ("Newberg"), § 11.41 (4th ed. 2002) ("The compromise

of complex litigation is encouraged by the courts and favored by public policy."). Settlement of class action litigation "also reduces the strain such litigation imposes upon already scarce judicial resources." *Armstrong*, 616 F.2d at 313.

District court review of a proposed class action settlement "is a two-step process. The first step is a preliminary, pre-notification hearing to determine whether the proposed settlement is within the range of possible approval. This hearing is not a fairness hearing." *Id.* at 314; *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3 (7th Cir. 1982); *see also In re AT&T Mobility Wireless Data Serv. Sales Litig.*, 270 F.R.D. 330, 346 (N.D. Ill. 2010) (same); *In re NCAA Student-Athlete Concussion Injury Litig.*, No. 13 C 9116, 2016 WL 305380, *6 (N.D. Ill. Jan. 26, 2016) ("This is why some courts at this stage perform a summary version of the exhaustive final fairness inquiry.") The purpose of the inquiry, instead, "is to ascertain whether there is any reason to notify the class members of the proposed settlement and to proceed with a fairness hearing." *Gautreaux*, 690 F.2d at 621 n.3; *Armstrong*, 616 F.2d at 314. "Ultimately, preliminary approval requires only that the settlement figure is within a reasonable range." *Am. Int'l Grp, Inc. v. ACE INA Holdings, Inc.*, Nos. 07 C 2898, 09 C 2026, 2011 WL 3290302, *7 (N.D. Ill. July 26, 2011); *Zolkos v. Scriptfleet, Inc.*, No. 12 Civ. 8230, 2014 WL 7011819, at *2 (N.D. Ill. Dec. 12, 2014) (same). If so, the proposed settlement subsequently may be finally approved by the court if it is determined to be lawful, fair, reasonable, and adequate. *Isby*, 75 F.3d at 1196; *E.E.O.C. v. Hiram Walker & Sons, Inc.*, 768 F.2d 884, 889 (7th Cir. 1985).

Five factors aid courts in analyzing preliminary approval:

(1) the strength of plaintiffs' case compared to the terms of the proposed settlement;

(2) the likely complexity, length and expense of continued litigation;

(3) the amount of opposition to settlement among [a]ffected parties;

(4) the opinion of competent counsel; and

(5) the stage of the proceedings and the amount of discovery completed.

Synfuel Techs., Inc. v. DHL Express (USA), Inc., 463 F.3d 646, 653 (7th Cir. 2006); *Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863-64 (7th Cir. 2014); *Anderson*, 755 F. Supp. at 838. These five factors strongly support preliminary approval of each of the tentative class settlements in each of the twenty Class Cases.

B. THE PROPOSED SETTLEMENTS ARE WITHIN THE RANGE OF POSSIBLE APPROVAL AND SHOULD BE PRELIMINARILY APPROVED UNDER FED. R. CIV. P. 23(e).

The first and fourth factors -- the strength of Plaintiffs' case compared to the terms of the proposed settlement, and the opinion of competent counsel regarding the adequacy of the settlement -- will be specifically addressed as to each state's settlement in the state-specific memoranda filed herewith. The remaining three factors are common between all cases and are addressed below.

1. The Likely Complexity, Length and Expense if the Litigation Continues Weigh Heavily in Favor of Preliminary Approval of the Proposed Class Settlements

The complexity, length and expense of continued litigation all weigh heavily in favor of the proposed settlements. If the litigation were to continue in any of the Class Cases, a final resolution would be several years away, and would require significant time and expense to resolve the complex liability and damages issues presented. Pending before the Seventh Circuit in all of the Class Cases except *Craig* are the appeals filed by Plaintiffs from this Court's adverse summary judgment rulings, and FXG's cross-appeal from this Court's class certification orders. Conclusion of the appellate phase of these cases could conceivably be one-to-two years away given the number of cases, and the nature of the issues raised in each.

Moreover, once the appellate proceedings are concluded, substantial additional work will remain to be done before the trial courts in each case before the litigation is over. While the Seventh Circuit could affirm this Court's summary judgment orders in one or more cases, it is equally possible (if not likely) that the summary judgments will be reversed and the cases remanded for damages trials, as in *Craig*, *Alexander* and *Slayman*, or trial on all issues, including employment status, as in *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995 (8th Cir. 2015) (Missouri), and *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 313 (11th Cir. 2015) (Florida). Either way, subsequent trial court proceedings would include substantial rounds of pretrial motion practice regarding class certification, the merits of the Plaintiffs' substantive law claims, as well extensive fact and expert damages discovery and *Daubert* motions, followed by lengthy trials, and the possibility of additional appeals. Among other things, trials on the drivers' employment status would involve a very large body of evidence, with evidence needed to satisfy (or refute) a multi-factor test relating to employment status, and specifically FXG's right of control. So, too, would damage assessments involve disputed and expensive expert testimony regarding the classwide damages. *See Anderson*, 755 F. Supp. at 844 ("As a practical matter, therefore, despite the seductive apparent simplicity of a class action based on a single decision by an employer, proof of discriminatory motive would be a complex matter [and] [p]roof of damages would be even more complex.").

In short, the almost twelve-year length of this litigation is already a factor favoring settlement and, absent settlement, final resolution of all of these cases is still years away. *See Isby*, 75 F.3d at 1199-1200 (settlement approved where "continuation of the litigation would require the resolutions of many difficult and complex issues, would entail considerable additional expense and would likely involve weeks, perhaps months, of trial time,"); *Swift v.*

Direct Buy, Inc., No. 2:11-CV-401, 2013 WL 5770633, at *6 (N.D. Ind. Oct. 24, 2013) ("obtaining any result in this litigation – good or bad – would be years away if the litigation were to continue, which weighs in favor of approving the Settlement Agreement."); *Am. Int'l Grp.*, 2011 WL 3290302, at *7 ("continuing to litigate this case will require vast expense and a great deal of time, on top of that already expended."). This factor strongly supports preliminary approval of the proposed settlements.

2. The Affected Parties Have Not Voiced Opposition to the Proposed Settlements

Generally, "because the parties have not yet sent the notice [of proposed settlement], it is premature to fully assess this factor" at the preliminary approval stage. *AT&T Mobility*, 270 F.R.D. at 349; *Am. Int'l Grp.*, 2011 WL 3290302, at *7 ("insofar as it is proper to consider at preliminary approval the amount of opposition to settlement . . . this third factor weighs in favor of approving the proposed settlement."). Co-Lead Counsel for Plaintiffs solicited and obtained participation of local counsel at the mediations for each of the cases and Named Plaintiffs participated in the mediation process, some in person and others by phone. All of the Named Plaintiffs who so participated indicated approval and satisfaction with the proposed settlement in their cases. Given the substantial participation and approval of both local counsel and Named Plaintiffs to the proposed settlements, this factor also weighs in favor of preliminary approval. *See Am. Int'l Grp.*, 2011 WL 3290302, at *7 ("at this point, the only way to gauge any additional opposition is to solicit it by sending notice of the settlement to the class and inviting its members to voice their opinions.").

3. The Class Cases Have Been Fully Investigated and Heavily Litigated; Formal Merits Discovery Was Completed in 2007 and Comprehensive Informal Damages Discovery Was Conducted During the Mediation Process

This final consideration is "important because it indicates how fully the district court and counsel are able to evaluate the merits of Plaintiffs' claims." *Armstrong*, 616 F.2d at 325; *Swift*, 2013 WL 5770633, at *7 (same); *Am. Int'l Grp*., 2011 WL 3290302, at *8 ("more than sufficient discovery has been undertaken to provide the parties with information about their respective litigation positions."). This factor, too, strongly favors preliminary approval of the proposed settlements.

Formal discovery pertaining to the merits of the claims was extensive and is complete. While formal damage discovery was not conducted given the procedural posture of the case, as noted above, FXG produced all of the data that would have been produced in damages discovery and that was needed by Plaintiffs to evaluate and value the class damage claims in each case during the relevant period. Plaintiffs' damage expert thoroughly analyzed that data and developed comprehensive damage exposure models according to the theories of liability and the available damages under the substantive law in each case (*e.g.*, wage deductions, deceptive trade practices, rescission and unjust enrichment). Similarly, Class Counsel conducted a careful risk analysis in each case in light of the strengths and weaknesses of the various claims and defenses under each state's law.

The parties' investigation, discovery, and thorough analyses of the potential recoveries and risks of further litigation are more than sufficient for Plaintiffs, Class Counsel, and the Court to make informed decisions about the merits of the case and the proposed settlements. *See Am. Int'l Grp*., 2011 WL 3290302, at *8 ("Extensive discovery has undisputedly been completed, and the Court has been presented with volumes of argument, declarations and exhibits. Thus, it is

impossible to say that the court and the parties are unable to evaluate the merits of their case."); *Anderson*, 755 F. Supp. at 847 ("The deadline for completion of discovery has passed . . . little more remains to be learned about the strengths and weaknesses of the parties' cases."). This factor therefore also supports preliminary approval of the settlements.

C. PLAINTIFFS' PROPOSED CLASS NOTICE PROGRAM MEETS THE REQUIREMENTS OF RULE 23(e).

Under Rule 23(e), the Court "must direct notice in a reasonable manner to all class members who would be bound by a proposed settlement." Fed. R. Civ. P. 23(e)(1). The notice provided to members of a class certified under Rule 23(b)(3) must be the "best notice practicable under the circumstances." Fed. R. Civ. P. 23(c)(2)(B). Rule 23(c)(2) enumerates mandatory components of any initial class notice for a Rule 23(b)(3) class:

- The nature of the action;
- The definition of the class certified;
- The class claims, issues or defenses;
- that a class member may enter an appearance through an attorney if the member so desires;
- that the court will exclude from the class any member who requests exclusion, stating when and how members may elect to be excluded; and
- that a class judgment will include all members who do not request exclusion.

Due process also requires a mailed settlement notice to contain a description of class members' rights in the litigation, and notice that class members have an opportunity to be heard and to participate in the litigation, whether in person or through counsel, and an opportunity to present objections to the settlement. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). The Parties' proposed mailed Class and Settlement Notice meets each of the requirements enumerated in Rule 23(c)(2) as well as these additional due process requirements.

The proposed Notices and notice plan satisfy the requirements of Rule 23(e) and due process. The proposed Notices, submitted as **Exhibits 3 and 4** to each of the Class Action

Settlement Agreements, will be sent to the Class Members in each case on or about September 12, 2016. The proposed Notices explain: (1) the nature of the action and the terms of the Settlement including (a) the total Settlement Amount, (b) the attorneys' fees to be requested, (c) how class members' settlement payments will be calculated, (d) the estimated amount of each class members' settlement share and the procedure for challenging the calculation, (e) that the class claims will be released, and (f) how the Class Member may collect his portion of the Settlement, exclude himself from the Settlement, or object to the Settlement. *See Lace v. Fortis Plastics, LLC*, No. 3:12-cv-363, 2015 WL 1383806, at *3 (N.D. Ind. Mar. 24, 2015); *Zolkos*, 2014 WL 7011819, at *6. The Class Notice Package will also include a "Computation of Estimated Settlement Share" worksheet that explains to each class member how the estimated amount of his/her settlement share was calculated. **Ex. 1.**

Prior to mailing the Class Notice Packages, the Settlement Administrator will update the class members addressed supplied by Defendant with both the National Change of Address (NCOA) database and by skip-tracing each address. The Claims Administrator will make further appropriate efforts to locate more current address information for any returned Class Notice Packages and will re-mail those for which an updated address has been found. **Ex. 8.** This is the best notice practicable. *See Lace*, 2015 WL 1383806, at *4 ("class notice shall be mailed by first class mail by Settlement Administrator."); *Oaks v. Moss*, No. 3:15-cv-00196, 2015 WL 5737595, at *2 (N.D. Ind. Sept. 29, 2015) ("The class administrator will confirm and if necessary update the addresses for class members through standard methodology that the class administrator currently uses to update addresses."); *Ohayon v. Hertz Corp.*, No. 5:11-cv-01662 EJD, 2012 WL 4936058, at *5-6 (N.D. Cal. Oct. 16, 2012) (NCOA search and reasonable diligence to obtain

addresses for returned mailings met the Rule 23 notice standards). The Notice Plan more than satisfies the requirements of Rule 23(e) and should be approved.

D. CAFA NOTICE OF THE SETTLEMENT IS REQUIRED

The Class Action Fairness Act ("CAFA") requires that notice be served on "the appropriate Federal official" and the "appropriate State official" within "[n]ot later than 10 days after a proposed settlement of a class action is filed in court." 28 U.S.C. §1715(b). The Settlement Agreements in each case each provide for CAFA notice to be given by the Settlement Administrator after preliminary approval is granted in the form required by the statute. **Ex. 6.**

E. THE PROPOSED SERVICE AWARDS ARE REASONABLE

Class Counsel requests that each of the eighty-eight Named Plaintiffs who were deposed and participated in discovery be awarded $15,000 service awards in recognition of their service to the respective Classes. Service or incentive awards are typical in class-action cases. *Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). As the Seventh Circuit has explained, "[b]ecause a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit." *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *see also In re Synthroid Mktg. Litig.*, 264 F.3d at 722 ("Incentive awards are justified when necessary to induce individuals to become named representatives."). *See* Joint Declarations of Co-Lead Counsel, filed herewith.

Relevant factors in determining whether an incentive award is warranted include 1) actions the plaintiff has taken to protect the interests of the class; 2) the degree to which the class benefited from those actions; and 3) the amount of time and effort the plaintiff expended in pursuing the litigation. *Cook*, 142 F.3d at 1016 (*citing Spicer v. Chicago Bd. Options Exch., Inc.*, 844 F. Supp. 1226, 1267 (N.D. Ill. 1993)).

Courts in the Seventh Circuit have repeatedly found an incentive fee of $15,000 or more to be reasonable. In *In re Southwest Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, *11 (N.D. Ill. Aug. 26, 2013), *aff'd as modified*, 799 F.3d 701 (7th Cir. 2015), for example, the district court awarded $15,000 each to the two named plaintiffs, finding they had been active participants in the litigation, expending significant amounts of their time to benefit the class—including assisting with written discovery, preparing and sitting for depositions, and consulting with class counsel on a regular basis—and that their efforts benefitted the class. *Id.* at *11. Moreover, the court noted that awards of $15,000 for each plaintiff were "well within the ranges that are typically awarded in comparable cases." *Id.*

Likewise here, Plaintiffs' counsel believe a service award of $15,000 each to the eighty-eight Named Plaintiffs who participated in discovery is reasonable in light of the considerable contributions they made to this litigation, which included gathering documents, answering extensive interrogatories, preparing and sitting for depositions, communicating with Counsel and Class Members, staying up-to-date on the progress of the litigation, and not least of all serving as the public face of the Class with the risks inherent in acting as a named plaintiff against a current or former employer. Throughout this multi-year litigation, the Named Plaintiffs stayed abreast of developments in the case and kept other class members informed. The Named Plaintiffs helped Counsel prepare for the mediations and many attended the mediations, providing a valuable perspective to the settlement process. As a result, the Named Plaintiffs have performed a valuable service to the Classes they represent. FXG does not object to the request for these payments. *See generally*, Minnesota Joint Decl., ¶ 31.

Given the achievements for the absent class members and the consistency of this request with service payments awarded in other cases in this circuit, the requested service payments are appropriate here.

IV. THE COURT SHOULD SET A FINAL APPROVAL HEARING

The third requirement for approval of a class action settlement is a fairness hearing "at which [class members] and all interested parties have an opportunity to be heard." *Armstrong*, 616 F.2d at 314; *Kaufman v. Am. Express Travel Related Srvs., Co.*, No. 07-cv-1707, 2016 WL 806546, *6 (N.D. Ill. Mar. 2, 2016) (courts may approve settlement that binds class members only "after proper notice and a public hearing."). The parties have requested, and the Court has scheduled, a multi-day fairness hearing with time slots for each of the Class Cases, so that class members in each case will have a full and fair opportunity to express their views as to whether the settlement reached should be approved by the Court. At the Fairness Hearing, the Court will consider, among other things, whether to grant final approval of the terms of the Agreement, whether to grant Class Counsel's request for attorneys' fees and costs and for service payments to Plaintiffs, as well as any objections to the settlement, Class Counsel's fee request, or the service payments. These provisions of the proposed settlement and Preliminary Approval Order satisfy "[t]he essence of procedural due process . . . that the parties be given notice and opportunity for a hearing." *Jones v. Nuclear Pharm., Inc.*, 741 F.2d 322, 325 (10th Cir. 1984); *Armstrong*, 616 F.2d at 314; *Redman v. RadioShack Corp.*, 768 F.3d 622, 637-38 (7th Cir. 2014) (requiring notice of requested attorney's fees so that informed objections may be made at fairness hearing.)

Plaintiffs request that the Court conduct Final Approval Hearings on January 23 and 24, 2017 as previously scheduled by the Court.

V. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court: (1) grant preliminary approval of the proposed Settlements in the twenty Settled Case; (2) approve the form, content, and method of distribution of the Class Notices and order notice to be issued to the members of each Class; (3) direct that CAFA notice be issued to appropriate state and federal officials; (4) appoint Rust Consulting as Settlement Administrator; and (5) conduct a fairness hearing for final approval of the proposed Settlements.

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Respectfully submitted,

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