**UNITED STATES DISTRICT COURT**
**DISTRICT OF MASSACHUSETTS**

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| CELSO MARTINS et al.,<br><br>Plaintiffs,<br><br>v.<br><br>3PD, INC.,<br><br>Defendant | Case No. 1:11-cv-11313 (DPW) |
| 3PD, INC.,<br><br>Counterclaim/Third-Party Plaintiff,<br><br>v.<br><br>AAR TRUCKING, INC.,<br><br>Third-Party Defendant | |

**PLAINTIFFS' ASSENTED-TO MOTION FOR PRELIMINARY REVIEW OF CLASS ACTION SETTLEMENT, AUTHORIZATION OF CLASS NOTICE AND SETTING OF FINAL APPROVAL HEARING**

## I. INTRODUCTION

This case was brought on behalf of persons who provided delivery and installation services for 3PD, Inc. ("3PD") between June 1, 2008 and the present within the Commonwealth of Massachusetts. In August 2013, 3PD was acquired by XPO Logistics, Inc. Subsequently, 3PD's name was changed to XPO Last Mile, Inc. d/b/a XPO Logistics ("XPO"). Plaintiffs' primary claim is that they were really employees rather than independent contractors and, as a result, suffered improper deductions from their pay under G.L. c. 149, § 148 (the Massachusetts

Wage Act). Plaintiffs have also brought claims under the Massachusetts common law for unjust enrichment.

The parties have reached a settlement of $2,187,500 that will provide substantial compensation to the class. Plaintiffs seek preliminary review of the proposed class action settlement between the parties pursuant to Fed. R. Civ. P. 23(e).[1] Plaintiffs further request authorization to distribute the attached notice of class settlement and claim form to the class. See Exs. B and C. The notice will inform the class of the settlement and how they may make a claim for a share of the Net Settlement Amount, which is the Settlement Class Fund less Class Counsel fees, expenses, and incentive payments, or opt out of the settlement if they would prefer not to be bound by it.

The class certified by the Court is:

> All individuals who signed Delivery Service Agreements with 3PD [or XPO] (either individually or through a personal business entity) and themselves performed delivery services as drivers for 3PD [or XPO] at any time from June 1, 2008 to the present. The class shall include any such drivers who made deliveries for Home Delivery Group, which 3PD acquired in November 2011.[2]

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[1] The settlement agreement to which the parties have agreed is attached as Exhibit C.

[2] The parties have agreed that the Settlement Class will be limited to the individuals who were part of the class when it was certified in March 2014 and were sent class notice, 26 individuals who signed delivery service agreements and personally provided Massachusetts-based delivery services for XPO following XPO Logistics, Inc.'s acquisition of 3PD in August 2013 on customer accounts that were previously held by 3PD prior to the 2013 acquisition by XPO, and 29 individuals who signed delivery service agreements and personally provided Massachusetts-based delivery services for XPO on its customer account with Staples that was acquired in May 2015. XPO will produce a list of Settlement Class Members to Class Counsel pursuant to this agreement so as to include carriers who have signed delivery service agreements with XPO, subject to the above-mentioned limitation, from June 2014 up to the date of this Court's order authorizing notice of this settlement to the class . XPO has indicated that this will add approximately 55 individuals to the class.

"At the preliminary approval stage, the Court need not make a final determination regarding the fairness, reasonableness and adequateness of a proposed settlement; rather, the Court need only determine whether it falls within the range of possible approval." In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. 125, 140 (D.P.R. 2010) (citations omitted). Indeed, an initial presumption of fairness is established when the Court finds that "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of the class objected." Id. (quoting In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)).

Here, as discussed in more detail below, the proposed settlement meets the standard for preliminary review.

As described herein, this settlement is a fair resolution of the claims the Plaintiffs have raised against XPO. All proceeds of the settlement will be distributed to Settlement Class Members, or for attorneys' fees, expenses, and incentive payments, as described below.

Thus, Plaintiffs respectfully request that this Court 1) certify the proposed class for settlement purposes; 2) designate Plaintiffs Celso Martins, Alexandre Rocha, and Calvin Anderson as class representatives; 3) appoint Lichten & Liss-Riordan, P.C. as Class Counsel; 4)

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Before including the 29 Staples contractors, Class Counsel reviewed deductions data for the short time those contractors provided services for Staples in Massachusetts and, based on the data and considerations that have led to this settlement, agreed to settle their claims for $87,500, from which counsel will not take attorneys' fees.

approve the class notice and claim for distribution; and 5) schedule a final fairness hearing approximately 70 days after this motion has been filed.

## II. RELEVANT PROCEDURAL HISTORY

### A. The Complaint, Plaintiffs' Motion for Class Certification, and the Parties' Motions for Summary Judgment.

Plaintiffs Celso Martins and Alexandre Rocha initially filed this action in Massachusetts Superior Court on June 1, 2011. See Notice of removal (ECF No. 1). On July 22, 2011, XPO removed the case to this Court.[3] Id.

On March 28, 2013, this Court granted Plaintiffs' motion for class certification on Count I (misclassification under G.L. c. 149, § 148B) of the Complaint under Fed. R. Civ. P. 23. ECF No. 70. Additionally, the Court granted the Plaintiffs' motion for summary judgment that they were misclassified as independent contractors by 3PD.

On March 27, 2014, the Court granted class certification as to Count II (Wage Act) on behalf of contractors, but decertified a class of secondary drivers (drivers who worked for XPO through contractors). The Court defined the class as follows: "all individuals who signed Delivery Service Agreements with 3PD (either individually or through a personal business entity) and themselves performed delivery services as drivers for 3PD at any time from June 1, 2008 to the present. The class shall include any such drivers who made deliveries for Home Delivery Group, which 3PD acquired in November 2011." ECF No. 141 at p. 34-35.

At the same time, this Court granted summary judgment in favor of Plaintiffs holding that deductions XPO has made from contractors' pay for in-home damage, broken freight, worker's

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[3] Following some discovery, Plaintiffs successfully moved to amend the complaint to add Calvin Anderson as a plaintiff. ECF No. 70.

compensation, insurance, truck maintenance and lease payments, and administrative fees violated the Massachusetts Wage Act, G.L. c. 149, § 148.[4]

On June 6, 2014, the Court approved class notice and appointed a special master pursuant to Fed. R. Civ. P. 53(b)(1) to hold a hearing on damages. ECF Nos. 159-61. On June 20, 2014, XPO provided the Plaintiffs with a class list and notice was sent to the class members soon after. The hearing on damages was scheduled to take place beginning August 24, 2015.

On September 30, 2014, the First Circuit issued its opinion in Mass. Delivery Ass'n v. Coakley, 769 F.3d 11 (1st Cir. 2014) suggesting that the FAAAA could preempt the application of G.L. c. 149, § 148B, to some types of delivery drivers. On March 24, 2015, XPO filed a motion for reconsideration of this Court's rulings on FAAAA preemption based on the MDA decision. ECF No. 166. XPO also moved to stay the damages hearing pending a ruling on its motion for reconsideration. ECF No. 168. Those motions have been fully briefed and are still pending.

**B. Discovery**

By the time the parties reached an agreement to settle the case, the parties had engaged in substantial discovery. Class Counsel deposed two XPO managers and its Rule 30(b)(6) designee. XPO, meanwhile, deposed each of the three named Plaintiffs and one potential class member. Starting on April 5, 2012 and ending on May 22, 2015, Plaintiffs issued XPO five sets of interrogatories, four sets of requests for production of documents, and one set of requests for admission. This resulted in the production of approximately 25,000 documents which included

[4] In both 2013 and 2014, the Court rejected XPO's argument that Plaintiffs' claims were preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"). See ECF Nos. 70, 141.

settlement statements, delivery manifests, and certificates of insurance. In addition, Class Counsel inspected thousands more delivery manifests at an XPO warehouse in Marietta, Georgia.

Furthermore, XPO provided data showing the deductions made from each contractor's compensation by category during the relevant period. Class Counsel reviewed such data to compile the number of category-specific deductions and number of trucks for each contractor.

### C. Settlement Negotiations

On January 12, 2015, the parties attended a full-day mediation with experienced wage and hour mediator Michael Loeb.[5] The case did not settle at the mediation and the parties continued to prepare for the damages hearing and continued submitting briefs to the Court. However, the parties continued to negotiate with the assistance of Mr. Loeb and have now reached a proposed settlement of this case. The total amount of the proposed settlement is $2,187,500 (the "Settlement Class Fund").

## III. TERMS OF THE FINANCIAL SETTLEMENT

The total settlement amount is $2,187,500. Based upon the data provided by XPO, the Settlement Class has approximately 199 members and Class Counsel believe that the financial settlement will provide reasonable compensation to the Settlement Class Members for the alleged wrongs they have suffered.

The settlement amount will be allocated into two funds. There shall be a Primary Carrier Fund of $2,100,00 which will be distributed to Carriers who personally provided Massachusetts-based delivery services for 3PD, XPO (after it acquired 3PD in 2013 on customer accounts that

[5] Prior to that, in April 2012, the parties attended a full-day mediation with well-respected labor and employment mediator Hunter Hughes.

were previously held by 3PD prior to the 2013 acquisition by XPO), and Carriers who made deliveries for Home Delivery Group, which 3PD acquired in November 2011. Class Counsel's attorney's fees and incentive payments to named Plaintiffs will come out of this fund entirely.

The remaining $87,500 will be allocated to a Staples Carriers Fund that will be distributed to Carriers who personally provided Massachusetts-based delivery services for XPO delivering Staples merchandise since May 2015. No attorney's fees or incentive payments will be deducted from this fund.

The settlement is non-reversionary, meaning that any unclaimed shares will be redistributed to the Settlement Class Members who submit a timely and valid Claim Form ("Class Claimants"). Settlement checks that are not cashed, after claims are made, will be paid to a *cy pres* beneficiary, Greater Boston Legal Services.

The parties propose that, if approved by the Court, the Settlement Class Fund of $2,187,500.00 shall be used to:

1. As described above, allocate $2,100,000 to the Primary Carrier Fund and $87,500 to the Staples Carriers Fund.

2. From the Primary Carriers Fund, pay incentive payments to the three individual Class Representatives who actively participated in the litigation and assisted Class Counsel as follows: $20,000 each to Celso Martins, Alexandre Rocha, and Calvin Anderson, for a total of $60,000.

3. From the Primary Carriers Fund, pay to Class Counsel an amount not to exceed one-third of the Settlement Class Fund for attorney's fees, litigation and mediation expenses and costs of administering the settlement for a total of $700,000.

4. From the Primary Carriers Fund, totaling $1,340,000, pay the claims of the Carriers, except those that have delivered Staples merchandise since May 2015 as described above.

5. From the Staples Carriers Fund, totaling $87,500, pay the claims of the Staples Carriers as described above.

## IV. PROCEDURES AND FORMULA FOR DISTRIBUTION OF THE CLASS FUNDS

If this Court grants this motion, the settlement administration will be conducted by Class Counsel's law firm, Lichten and Liss-Riordan, P.C., which maintains an in-house staff and electronic systems designed for that purpose. This will save thousands of dollars by not utilizing a class action administration firm and will provide more personalized service. A notice will be sent to each Settlement Class Member informing them of the settlement, how they can share in the Net Settlement Amount by signing and submitting a simple claim form, and of their right to participate in the settlement, object to the settlement, or to opt out of the settlement. See Proposed Notice Form (attached as Ex. A). The notice will also inform individuals that this settlement will settle all claims that they may have had against XPO up until the effective date of the proposed Settlement Agreement and Release of Claims ("Settlement Agreement"), which is attached to this motion as Exhibit C.

Settlement Class Members will also receive a Claim Form, which must be signed by the Settlement Class Member to take part in the settlement. See Proposed Claim Form (attached as Ex. B). The notice will request that class members return their Claim Forms within 45 days.

If notices and claim forms come back as undeliverable at the address provided, Class Counsel will, using software they have purchased, attempt to obtain more accurate addresses for those individuals, and will resend the notices. Although the notice will inform individuals that

they must return their claim form within 45 days to be eligible for a share, in fact the parties agree that any individual who files a valid Claim Form up until five days before the Settlement Class Fund is set to be distributed will be eligible to receive a share.

Further, the settlement is non-reversionary – meaning that to the extent that there are unclaimed shares or class members who are not ultimately found, any remaining amounts will be redistributed to those class members making claims. Should there be some unpaid money as a result of checks not being cashed, such remaining funds will go to a *cy pres* beneficiary, Greater Boston Legal Services.

Plaintiffs asserted that, as a result their misclassification, they were forced by XPO to pay back some of their earned pay through improper deductions from their pay. With that in mind, the Net Settlement Amount will be allocated to Class Claimants as follows:

XPO has already provided Plaintiffs' counsel with data listing the deductions made from each contract carrier during the class period. XPO will update this deduction data if necessary. The Net Settlement Amount ($1,427,500) will be distributed to the Class Claimants based on their actual deductions on a pro rata basis.[6]

XPO will deposit the Settlement Class Fund of $2,187,500 with Class Counsel within 14 days of the effective date of the Settlement Agreement. As discussed above, after attorney's fees and incentive payment are allocated, the remaining $1,427,500 will be divided among the Class Claimants and be distributed in two payments.

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[6] In its Order of March 27, 2014, the Court held that contractors could only recover for deductions relating to the trucks they personally drove. ECF No. 141 (Order at p. 23-24). Accordingly, so-called multiple truck contractors will have their total deductions pro-rated to reflect the deductions from the trucks for which they provided services personally in accordance with this Court's order.

Approximately 14 days after the Settlement Class Fund is deposited, and after attorney's fees and incentive payments are deducted, Class Claimants will receive their shares of the settlement distribution in the amount they would have received if all Settlement Class Member had returned Claim Forms prior to the expiration 60 days following the date on which Class Counsel first mails the Class Notice to the Settlement Class Members ("Claims Deadline").

A second distribution will be made 45 days later as follows: Settlement Class Members who did not submit Claim Forms before the Claims Deadline but who have done so after the first distribution and before the Good Cause Shown Deadline or Claim Filing Deficiency Deadline described in the Settlement Agreement shall receive the amount they would have been entitled to in the initial distribution. The residual funds shall be distributed to all participating claimants who have submitted a valid claim form in an amount proportional to the settlement amount each participating claimant already received, regardless of whether the claimant submitted a timely claim form following the first notice.

No Settlement Class Member shall receive a disbursement more than three times their calculated settlement share. Furthermore, any share less than $50 will be distributed to the *cy pres* beneficiaries.

## V. ATTORNEY'S FEES, COSTS, CLASS ACTION ADMINISTRATION AND INCENTIVE PAYMENTS

Class Counsel propose, and XPO agrees not to object to the proposal, that $700,000 of the Settlement Class Fund be set aside for the payment of attorneys' fees, costs, including the costs of mediation, and administration of the class settlement.[7] Class Counsel will administer the settlement in-house, thereby saving the Settlement Class Members thousands of dollars that would be needed if a class action administration firm were used. Class Counsel believes that the requested fee is fair, appropriate, and in line with multiple other similar settlements. In addition, Class Counsel ask the Court to approve incentive payments of $20,000 each for each Class Representative as set forth above. All participated actively throughout this litigation, including providing information leading to the filing of the lawsuit, providing discovery responses, and attending day-long depositions. The case law and reasoning supporting this fee, cost, and incentive payment distribution is provided in sections V.B and VI below.

## VI. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND THEREFORE, SHOULD BE PRELIMINARILY APPROVED

### A. The Legal Standard for Preliminary Review, Authorization of Class Notice, and Setting of Final Approval Hearing.

It is well-established that "the law favors class action settlements." In re Lupron Mktg. & Sales Practices Litig., 228 F.R.D. 75, 88 (D. Mass. 2005) (citation omitted); see also In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004) ("an overriding public interest in settling class action litigation, and it should therefore be encouraged"). Pursuant to Fed. R. Civ. P. 23(e), "[t]he claims, issues, or defenses of a certified class may be settled,

[7] Class Counsel will not seek fees from the settlement amount of $87,500 meant to compensate the Staples contractors.

voluntarily dismissed, or compromised only with the court's approval." The decision of whether to approve a proposed settlement is left to the discretion of this Court. In re Pharm. Indus. Average Wholesale Price Litig., 588 F.3d 24, 32 (1st Cir. 2009). Generally, "when sufficient discovery has been provided and the parties have bargained at arms-length, there is a presumption in favor of the settlement." City P'ship Co. v. Atl. Acquisition Ltd. P'ship, 100 F.3d 1041, 1043 (1st Cir. 1996) (citation omitted); Rowland v. Cellucci, 191 F.R.D. 3, 6 (D. Mass. 2000) ("strong initial presumption" of fairness arises where the parties can show that "the settlement was reached after arms'-length negotiations, that the proponents' counsel have experience in similar cases, that there has been sufficient discovery to enable counsel to act intelligently, and that the number of objectors or their relative interest is small"). Furthermore, "[t]he preliminary approval decision is not a commitment to approve the final settlement; rather, it is a determination that 'there are no obvious deficiencies and the settlement falls within the range of reason.'" Gates v. Rohm & Haas Co., 248 F.R.D. 434, 439 (E.D. Pa. 2008) (citations and quotation marks omitted).

Review of a proposed class settlement involves two steps: preliminary approval and a final "fairness hearing." Manual for Complex Litigation (Fourth) § 13.14. At the preliminary review stage, "the Court need not make a final determination regarding the fairness, reasonableness and adequateness of a proposed settlement; rather, the Court need only determine whether it falls within the range of possible approval." In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. at 140. An initial presumption of fairness is established when the Court finds that "(1) the negotiations occurred at arm's length; (2) there was sufficient discovery; (3) the proponents of the settlement are experienced in similar litigation; and (4) only a small fraction of

the class objected." Id. (quoting In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Products Liab. Litig., 55 F.3d 768, 785 (3d Cir. 1995)).

Once a settlement meets the requirements of preliminary review, the Court authorizes notice of the proposed settlement and the fairness hearing to class members. At the final fairness hearing, class members may formally object to the proposed settlement. In re M3 Power Razor Sys. Mktg. & Sales Practice Litig., 270 F.R.D. 45, 62 (D. Mass. 2010).

**B. The Proposed Settlement Satisfies the Requirements for Preliminary Review.**

Although the Plaintiffs believe that they have strong and meritorious claims, several concerns have led Class Counsel to conclude that a settlement with XPO is preferable to a judgment on the merits. While Plaintiffs believe strongly in their claims for improper wage deductions under G.L. c. 149, § 148, as argued in XPO's motion for reconsideration, the First Circuit's ruling in MDA has at least called into question this Court's ruling that the Plaintiffs' claims of employment under Prong 2 of G.L. c. 149, § 148B, are not preempted by the FAAAA. See also Massachusetts Delivery Ass'n v. Healey, 2015 WL 4111413, at *10 (D. Mass. July 8, 2015) (holding on remand that Prong B of Section 148B was preempted by the FAAAA as applied to same-day delivery service); Remington v. J.B. Hunt Transp., Inc., No. CIV.A. 15-10010-RGS, 2015 WL 501884, at *1 (D. Mass. Feb. 5, 2015) (appeal pending, Appeal No. 15-1252) (finding that, following MDA, all three prongs of Section 148B were preempted by the FAAAA as applied to a delivery company); Schwann v. FedEx Ground Package Sys., Inc., No. CIV.A. 11-11094-RGS, 2015 WL 501512, at *2 (D. Mass. Feb. 5, 2015) (appeal pending, Appeal No. 15-1214) (same). Even if this Court denied the motion for reconsideration, Plaintiffs still faced the possibility of a lengthy and uncertain appeal process.

Based on these considerations, Class Counsel strongly believe that the settlement negotiated here is fair, reasonable, adequate and most importantly, is in the best interest of the class. Moreover, in reaching this conclusion, Class Counsel have spent many hours performing calculations and compiling spreadsheets, both during two rounds of mediations and in preparation for the August 24 damages hearings before the special master. Plaintiffs believe that the total number of contractor class members entitled to a distribution is approximately 199. Thus, the amount of the settlement ($1,427,500) is sufficient to pay shares to the class members who participate in the settlement which will come close to paying them full single damages, net of attorney's fees. It allows Settlement Class Members to obtain compensation immediately, rather than in years.

**C. The Settlement Negotiations Occurred at Arm's Length**

The procedural background of this matter supports a finding that the Settlement Agreement was negotiated at arm's length by experienced counsel concerning *bona fide* disputes between their clients with respect to liability and damages to Settlement Class Members. The case presented numerous and vigorously contested issues related to the classification of the Settlement Class Members and whether certain legal defenses provided XPO with a complete or partial defense to liability. The parties engaged in two full-day mediations with respected mediators which involved extensive informal discovery. The parties conducted extensive formal discovery, including lengthy written discovery and conducting eight depositions. Moreover, the parties have engaged in extensive litigation in this Court since this lawsuit was filed in 2011. Plaintiffs briefed class certification twice (ECF Nos. 40 and 93) and twice moved for summary judgment (ECF Nos. 42 and 118). XPO filed twice for summary judgment (ECF Nos. 34, 37, and 90) and moved to decertify the class (ECF No. 102). Plaintiffs' conducted three depositions

of XPO managers and XPO deposed all three named plaintiffs and one other driver. Over the past three months, both parties were working hard to prepare for the August 24 hearing on damages before the special master. This included Class Counsel's review of thousands of electronic documents disclosed by XPO for the hearing and the on-site inspection of thousands more delivery manifests at an XPO facility in Georgia.

Furthermore, the proposed Settlement Agreement between Plaintiffs and XPO, demonstrates that the settlement was negotiated at arm's length by experienced counsel concerning *bona fide* disputes between their clients with respect to liability and damages. Such arm's length negotiations between capable and experienced counsel is entitled to a presumption of fairness, reasonableness, and adequacy. Rolland v. Cellucci, 191 F.R.D. 3, 6 (D. Mass 2000).

**D. Extensive and Sufficient Discovery Was Performed.**

At this stage, the Court is required to determine "whether sufficient evidence has been obtained through discovery to determine the adequacy of the settlement." Rolland, 191 F.R.D. at 10 (citation omitted). Discovery is sufficient if it allows a court to "intelligently make . . . an appraisal of the Settlement." In re Austrian & German Bank Holocaust Litig., 80 F. Supp. 2d 164, 176 (S.D.N.Y. 2000) (quotation marks omitted).

Here, the parties have conducted extensive discovery on the merits and on damages. There has essentially been three rounds of discovery conducted in this case – discovery prior to the Plaintiffs first motions for class certification and summary judgment, classwide discovery after this Court initially granted class certification in 2013, and then discovery in preparation for the damages hearing after the Court granted summary judgment on damages in 2014. In total, the parties conducted eight depositions, and Class Counsel issued five sets of written discovery requests that produced nearly 25,000 documents and allowed Class Counsel to inspect thousands

more. In doing so, Class Counsel developed a clear picture of who personally provided delivery services for XPO from 2008 to the present and the precise amount of the deductions taken from their pay. This is "sufficient" to determine the fairness and adequacy of settlement at this stage. In re M3 Power Razor, 270 F.R.D. 4563 (D. Mass. 2010) (finding discovery sufficient where defendant produced 100,000 documents and pertinent financial information).

**E. The Proponents of the Settlement Are Highly Experienced in Similar Litigation.**

Plaintiffs are represented by highly experienced and competent counsel who have litigated numerous wage and hour cases aggressively and successfully. Lead counsel, Attorney Harold Lichten, has litigated, tried, and settled numerous class action wage-and-hour cases in Massachusetts and is a recognized expert in labor and employment law in Massachusetts.[8] Furthermore, Mr. Lichten's law firm, Lichten & Liss-Riordan, P.C., are pioneers in the field of worker misclassification and has litigated and settled numerous class action matters filed in the federal courts.[9] Those settlements contained very similar terms to the proposed settlement in this

[8] Among other things, Mr. Lichten successfully argued the landmark case on the Massachusetts Independent Contractor Law, Somers v. Converged Access, Inc., 454 Mass. 582 (2009).

[9] The class cases they have litigated and settled in federal court include: Anderson v. HomeDeliveryAmerica.com, et al., C.A. No. 11-cv-10313 (D. Mass. Dec. 17, 2014) (Doc. #108); Mansingh v. Exel Direct, Inc., C.A. No. 12-11661 (D. Mass. May 7, 2014); Kiely v. TripAdvisor, LLC, C.A. No. 08-11284 (D. Mass. Aug. 8, 2011) (Doc. #52); Apana et al. v. Fairmont Hotels, Inc., C.A. No. 08-cv-00528 (D. Hawaii 2011); Carreiro, et al. v. Huntleigh Corp., et al., C.A. No. 08-10819 (D. Mass.); Elienberg v. RCN, C.A. No. 09-10912 (D. Mass.); Maliniski et al. v. Starwood Hotels, C.A. No. 08-11859 (D. Mass.); Monahan et al. v. WHM LLC d/b/a LXR Luxury Resorts and Boca Resorts, Inc. d/b/a Boca Raton Resort & Club, C.A. No. 09-CV-80198 (S.D. Fla.); Hayes et al. v. Aramark Sports Service LLC, C.A. No. 08-10700 (D. Mass.); Niles et al. v. Ruth's Chris Steak House, C.A. No. 08-07700 (S.D.N.Y.); Mitchell et al. v. PrimeFlight Aviation Services, C.A. No. 08-cv-10629 (D. Mass.); Barreda et al. v. Prospect Airport Svcs., C.A. No. 08-323 (N.D. Ill.); Miller et al. v. SBLI, C.A. No. 08-10267 (D. Mass.).

case, including the same provision for attorneys' fees and the same basic method for notifying class members and distributing the settlement proceeds.

Class Counsel are thus well aware of the law in this area, and their experience has provided the plaintiff class with a high degree of expertise, which contributed to a favorable resolution of their claims. Furthermore, Mr. Lichten's firm is also experienced in the mechanics of class settlement administration. In the more than 60 other cases the firm has settled as class actions, there have been thousands of class members overall requiring active engagement in processing claims from these settlements and distributing settlement proceeds.

The settlement also proposes incentive payments of $20,000 for the Class Representatives. The proposed incentive payment are fair and reasonable, given that the Class Representatives initiated the lawsuit, and it was through their initiative that this recovery was obtained. The Class Representatives provided invaluable assistance to Class Counsel over the course of four years, including providing documents, responding to discovery, and submitting to lengthy depositions.

Courts have widely recognized that incentive payments serve an important function in promoting enforcement of state and federal law by private individuals, while also encouraging class action settlements. See In re Relafen Antitrust Litig., 231 F.R.D. 52, 82 (D. Mass. 2005); In re Compact Disc Minimum Advertised Price Antitrust Litig., 292 F. Supp. 2d 184, 189 (D. Me. 2003); see also Sheppard v. Consol. Edison Co. of N.Y., Inc., 2002 WL 2003206, at *5-6 (E.D.N.Y. 20020 (collecting cases approving incentive payments). As Judge Hornby recognized, awards in employment cases were generally higher than in other types of cases and recent awards averaged around $15,000, but could reach $30,000 and higher. Scovil v. FedEx Ground Package Sys., Inc., 2014 WL 1057079m at *6 (D. Me. Mar. 14, 2014) (citing Theodore

Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303, 1308 (2006); Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir.1998) ($25,000 incentive award approved for one named plaintiff; total settlement was for $14 million plus structural changes to the pension fund)); see also Massiah v. MetroPlus Health Plan, Inc., 2012 WL 5874655, *8 (E.D.N.Y. Nov. 20, 2012) (approving service awards of $5,000 each to two plaintiffs, noting that "[s]uch service awards are common in class action cases and are important to compensate plaintiffs for the time and effort expended in assisting the prosecution of the litigation, the risks incurred by becoming and continuing as a litigant, and any other burdens sustained by plaintiffs"); Toure v. Amerigroup Corp., 2012 WL 3240461, at * 5 (E.D.N.Y. Aug. 6, 2012) (approving service awards of $10,000 and $5,000); Simmons v. Enterprise Holdings, Inc., 2012 WL 2885919, *2 (E.D. Mo. July 13, 2012) (approving "payment of individual incentive awards to the named Plaintiffs in the amount of $6,000.00 as set forth in the Settlement Agreement for their services as class representatives and as consideration for providing a general release"); Sewell v. Bovis Lend Lease, Inc., 2012 WL 1320124, at * 14–15 (S.D.N.Y. Apr. 16, 2012) (finding reasonable and approving service awards of $15,000 and $10,000 in wage and hour action); Reyes v. Altamarea Group, LLC, 2011 WL 4599822, at *9 (S.D.N.Y. Aug. 16, 2011) (approving service awards of $15,000 to three class representatives and $5,000 to fourth class representative in restaurant case challenging tip and minimum wage policies); Willix v. Healthfirst, Inc., 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (approving service awards of $30,000, $15,000, and $7,500); Torres v. Gristede's Operating Corp., 2010 WL 5507892, at *8 (S.D.N.Y. Dec. 21, 2010) (finding reasonable service awards of $15,000 to each of 15 named plaintiffs); Khait v. Whirlpool Corp., 2010 WL 2025106, at *9 (E.D.N.Y. Jan. 20, 2010) (approving service awards of $15,000 and $10,000, respectively, in

wage and hour class action); In re Janney Montgomery Scott LLC Fin. Consultant Litig., 2009 WL 2137224, *12 (E.D.Pa. July 16, 2009) (approving $20,000 payments to three named plaintiffs in complex FLSA)). Moreover, Judge Hornby approved $130,000 in incentive payments ranging from $10,000 to $20,000 for each of nine named plaintiffs who actively participated in the litigation. Id.

One of the reasons for finding higher incentive payment in employment cases, including wage and hour cases, is the issue of retaliation. See, e.g., Overka v. Am. Airlines, Inc., 265 F.R.D. 14, 24 (D. Mass. 2010) (in certifying national class of skycaps challenging $2 per bag curbside check-in charges, court noted with approval skycaps' argument that "class adjudication is superior in the employment context because fear of employer retaliation may have a chilling effect on employees bringing claims on an individual basis" and held that class action "is a superior method for adjudication of the controversy"); Perez v. Safety-Kleen Systems, Inc., 253 F.R.D. 508, 520 (N.D. Cal. 2008) (concluding class action was superior because, *inter alia*, "some class members may fear reprisal"); Guzman v. VLM, Inc., 2008 WL 597186, at *8 (E.D.N.Y. 2008) (noting "valid concern" that "many employees will be reluctant to participate in the action due to fears of retaliation"). This same consideration makes enhancement payments even more crucial in employment class action settlements. As one court has observed: "[Enhancement] awards are particularly appropriate in the employment context. In employment litigation, the plaintiff is often a former or current employee of the defendant, and thus, by lending his name to the litigation, he has, for the benefit of the class as a whole, undertaken the risk of adverse actions by the employer or co-workers." Frank v. Eastman Kodak Co., 228 F.R.D. 174, 187 (W.D.N.Y. 2005).

In light of the arm's-length, hard fought negotiation in this case and Class Counsel's prior experience and expertise in this area of law, the Court should find this proposed settlement to be fair, reasonable, and adequate and should issue preliminary approval. See In re Puerto Rican Cabotage Antitrust Litig., 269 F.R.D. at 140 (settlement agreement need only "falls within the range of possible approval" to be preliminarily approved).

## VII. THE PROPOSED METHOD OF CLASS NOTICE SHOULD BE APPROVED.

Under Rule 23, the threshold for class notice is that "reasonably calculated to reach the class members and inform them of the existence of and opportunity to object to the settlement." Nilsen v. York County, 382 F. Supp. 2d 206, 2010 (D.Me. 2005) (citation omitted). "Rule 23 does not require the parties to exhaust every conceivable method of identifying the individual class members." In re Prudential Ins. Co. of Am. Sales Practices Litig., 177 F.R.D. 216, 232 (D.N.J. 1997) (citing Weinberger v. Kendrick, 698 F.2d 61, 71 (2d Cir.1982) (rejecting the contention that the mailing of individual notice to the last known address of all class members was inadequate), cert. denied, 464 U.S. 818 (1983). Generally, all that is required is that the class be issued the "best notice practicable under the circumstances." In re Volkswagen & Audi Warranty Extension Litig., 273 F.R.D. 349, 355 (D. Mass. 2011). Indeed, it is well-settled that notice by first-class mail satisfies the notice requirement of Rule 23. See Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 173–77 (1974); Zimmer Paper Products, Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985); Parks v. Portnoff Law Associates, 243 F. Supp. 2d 244, 249-50 (E.D. Pa. 2003) (notices mailed to class members' last known address held reasonable and adequate).

The proposed notice form (attached here as Ex. A), satisfies the requirements of Rule 23. The parties have negotiated and drafted a notice that clearly identifies basic information about

the lawsuit and explains how class members can claim a share of the settlement or exercise their right to opt-out or object to the settlement. It will also lists the date, location, and time of the final fairness hearing and include contact information for class counsel if they need further information. See Ex. A. Moreover, the language in the notice mirrors that of the class notice this court approved in June 2014. See ECF No. 160. Thus the notice is sufficient. In re Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 203 (D. Me. 2003) ("The notice must describe fairly, accurately and neutrally the claims and parties in the litigation, the terms of the proposed settlement, and the options available to individuals entitled to participate, including the right to exclude themselves from the class.").

Here, because the class has already been certified, and XPO will be providing the contact information for contractors who recently signed agreements in Massachusetts, Class Counsel expects to be able to contact most, if not all, of the class members through first-class mail. Thus, notice by mail will the "best available method under the circumstances."

## VIII. THE REQUESTED ATTORNEYS' FEES AND COSTS ARE FAIR, REASONABLE, AND SUPPORTED BY APPLICABLE PRECEDENT.

In the motion for final approval, Class Counsel will request an award of attorneys' fees and costs which will provide them with a net of $700,000, approximately one-third of the total settlement. This award would cover all costs incurred to date by Class Counsel, as well as the significant costs Plaintiffs' counsel will incur in the next several months administering the Settlement Class Fund, calculating actual share distributions, taking care of all mailings and filings, etc. To date, Class Counsel have paid for the costs associated with four depositions, half of the mediation fees, and fees related to filing and investigating this case. Class Counsel will incur additional expenses related to mailings and other costs associated with administering the

Settlement Class Fund. Further, the Class Counsel's ability to administer the class settlement without hiring a class action settlement administrator will result in a substantial savings to the settlement fund, which can then be more properly used to pay distribution shares to class members.

The proposed notice of settlement will inform class members that approximately one-third of the settlement proceeds would be used to pay for all attorneys' fees and costs based on the fact that Class Counsel accepted this case on a fully contingent arrangement with no payment of fees or expenses by any client. Further, the named Plaintiffs signed Retainer Agreements providing that counsel would receive one-third of the proceeds received in any judgment or settlement. Courts generally favor awarding fees from a common fund based upon a percentage of the fund. As the Supreme Court has explained:

> This Court has recognized consistently that a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to reasonable attorneys' fee from the fund as a whole . . . jurisdiction over the fund involved in the litigation allows the Court to prevent . . . inequity by assessing attorneys' fees against the entire fund thus spreading fees proportionally among those benefited by the suit.

Belling Company v. Van Gemert, 444 U.S. 472, 478 (1980). Indeed, a one-third attorneys' fee award in a common fund case has been consistently approved as reasonable. See, e.g., Mansingh v. Exel Direct, Inc., C.A. No. 12-11661-DPW (D. Mass. May 7, 2014) (awarding one-third fee in settlement for $1 million); Scovil, 2014 WL 1057079, at *5 (finding one-third fee was reasonable because, among other things, "the plaintiffs' attorneys [Lichten & Liss-Riordan, P.C.] have undertaken all the administrative responsibilities of class action notice and distribution of the settlement proceeds"); Chalverus v. Pegasystems, Inc., Civ. A. No. 97-12570-WGY (D. Mass. 2000) (awarding as an attorneys' fee one-third of a more than $5 million recovery); In re

Copley Pharm., Inc. Sec. Litig., Civ. A. No. 94-11897-WGY (D. Mass. 1996) (awarding one-third of a $6.3 million settlement fund); In re Picturetel Corporation Sec. Litig., Civ. A. No. 97-12135-DPW (D. Mass. Nov. 4, 1999) (approving award of one-third of a $12 million settlement fund); Zeid v. Open Environment Corp., Civ. A. No. 96-12466-EFH (D. Mass. 1999) (awarding a fee of one-third of a $6 million settlement). Given this precedent, approving a one-third recovery for attorneys' fees and costs in this class action case, which includes all costs and expenses, is reasonable.

## IX. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that this Court grant preliminary approval of this proposed settlement, sign the proposed order attached as Exhibit D, and allow Plaintiffs to send class members the proposed Notices and Claim Forms attached hereto as Exhibits A and B.

Respectfully submitted

/s/ Harold L. Lichten
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Dated: November 2, 2015

**CERTIFICATE OF CONFERENCE**

I hereby certify that I have discussed this motion with counsel for Defendants and that the Defendants assent to the filing of this motion and the relief requested.

_/s/ Harold L. Lichten_____
Harold L. Lichten

**CERTIFICATE OF SERVICE**

I hereby certify that on November 2, 2015, I served a copy of this Motion by electronic filing on all counsel of record in this case.

_/s/ Harold L. Lichten_____
Harold L. Lichten