IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CARLOS TAVERAS, individually and on behalf of all others similarly situated, Plaintiff, v. XPO LAST MILE, INC. Defendant.	C.A. No. 3:15-cv-01550-JAM
XPO LAST MILE, INC. Third-Party Plaintiff, v. EXPEDITED TRANSPORT SERVICES, LLC. Third-Party Defendant.	

PLAINTIFF'S ASSENTED-TO MOTION FOR FINAL APPROVAL OF A CLASS ACTION SETTLEMENT

Plaintiff filed this lawsuit on behalf of himself and a class of similarly situated delivery drivers who performed delivery services for Defendant XPO Last Mile, Inc. in Connecticut pursuant to standard contracts under which they were classified as independent contractors. Plaintiff alleges that XPO's delivery contractors were actually employees, and based on this misclassification, XPO's practice of making deductions from its delivery drivers' pay for such things as damage claims and worker's compensation violates the Connecticut wage payments laws. Conn. Gen. Stat. Sec. 31-71e. The parties have reached a non-reversionary class action settlement for $950,000.

On March 17, 2017, the Court granted preliminary approval of the proposed settlement, certified a class of individuals who performed delivery services for Defendant XPO Last Mile, Inc. in Connecticut pursuant to contracts that class them as independent contractors, and authorized notice to the class. ECF No. 115. Plaintiff now seeks the Court's final approval of the proposed class action settlement at the final settlement approval hearing scheduled for July 7, 2017.

This Court should grant final approval because, as discussed herein, the class action settlement is fair, adequate and reasonable. Indeed, the proposed settlement is similar to class action settlements reached in two prior cases filed against XPO that were approved by federal courts in Massachusetts and Illinois. See Martins v. 3PD, Inc., No. 11-11313-DPW (March 2, 2016 D. Mass.) (ECF No. 209); Brandon v. 3PD, Inc., No. 13-3745 (Jan. 26, 2016 N.D. Ill.) (ECF No. 151).[1]

The settlement satisfies the requirements for class action settlement under Rule 23(e). Of the 103 eligible class members, none filed objections to the settlement, and none sought exclusion from the settlement. Sixty-seven class members have filed claims, for a 65 percent return rate, which is expected to increase after the first round of settlement payments are disbursed. Class claimants will initially receive their minimum share based on a 100-percent claims rate. Forty-five days later, Class Counsel will make a second distribution of the remaining settlement funds, with any class members who file late claims receiving their share, and with the remaining funds being distributed to class members who filed timely claims.

[1] XPO Last Mile, Inc. purchased 3PD, Inc. in 2013 and, even though those cases were filed against 3PD, the plaintiffs actually drove for XPO for much of the relevant time period and XPO ultimately settled the cases.

This is a very high rate of return for an employment class action. This settlement is non-reversionary, thus all available funds will be distributed to the claimants on a pro rata basis. Indeed, each claimant is set to receive substantial compensation, with an average payout of approximately $9,000. If an additional 20 percent of class members file claims, the average payout will be approximately $6,300. Moreover, the class members who filed claims suffered the most in potential damages. So far, the settlement claimants suffered 77 percent of the total deductions made during the class period. See Settlement Distribution Chart (attached as Ex D)

Overall, the settlement provides an excellent result for the class. As discussed below, despite considerable risks to recovery, after payment of fees and incentive payments, Class Counsel will distribute, pursuant to the formula described below, $614,000 to class claimants. The proposed settlement is, therefore, fair and reasonable. Moreover, the recovery for the class is remarkably similar to the settlements with XPO in Massachusetts and Illinois that were both ultimately approved by the courts.[2]

I. BACKGROUND

Plaintiff Carlos Taveras filed his class action complaint on October 26, 2015. ECF No. 1. On January 8, 2016, XPO filed its answer and a third-party complaint against the LLC operated

[2] Based on the data provided by XPO here, its contractors worked approximately 7,436 week from October 2013 to February 2017. A gross settlement of $950,000 would, therefore, provide class members with a gross of $127.50 per week worked. The class in Martins v. 3PD (Massachusetts) included 198 contractors who worked a total of 13,524 week, which meant that the gross settlement of $2,187,500 worked out to an average weekly gross settlement of $161.75 per week worked for the class. In Brandon v. 3PD, Inc. (Illinois), the class included 292 contractors who worked a total of 30,152 weeks. The settlement in Brandon was $2,8000,000, which equated to $92.86 for each week a contractor worked for 3PD/XPO.

As explained below, XPO attempted to compel Plaintiff to arbitrate his claims. While the Court denied XPO's motion to compel arbitration based on delay, this left the possibility that XPO would seek to compel arbitration of claims brought by other class members and enforce its class-action waiver. Arbitration was raised as a defense in either Martins or in Brandon. This made recovery in this case potentially more problematic.

by Taveras, Expedited Transport Services, LLC seeking indemnification pursuant to the Delivery Service Agreement Taveras signed to work for XPO. ECF No. 17-18. XPO amended the third-party complaint to clarify that it was seeking indemnification against Expedited Transport Services, LLC. ECF No. 32.

On February 19, 2016, Plaintiff filed a motion to dismiss the third-party complaint. ECF 39. The Court then required that the motion to dismiss be filed on behalf of Expedited Transport Services, LLC, and not the named Plaintiff. The motion to dismiss was refiled pursuant to the Court's instructions. ECF No. 51. On April 25, 2016, the Court held oral argument and denied Plaintiff's motion to dismiss the third-party complaint. ECF No. 56.

On April 8, 2016, XPO filed a motion to compel arbitration. ECF No. 57. On April 29, 2016, Plaintiff opposed the motion to compel. ECF No. 57. XPO filed its reply brief on May 12, 2016 (ECF No. 65) and Plaintiff filed a sur-reply in opposition to arbitration on May 17, 2016 (ECF No. 69). The Court then requested additional briefing on whether Plaintiff as an individual could be bound by an arbitration agreement entered into by him on behalf of a corporate entity. ECF No. 88. On June 19, 2016, the parties provided their supplemental briefing pursuant the Court's request. ECF Nos. 89, 90.

On June 20, 2016, the Court held oral argument and denied XPO's motion to compel arbitration. The Court held that XPO had waived its right to compel arbitration by litigating the case for six months, which included filing the third-party complaint and engaging in discovery disputes, before filing its motion to compel.

On July 5, 2016, XPO filed a motion to certify the decision to deny its motion to compel for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). ECF No. 95. On September 12, 2016,

the Court denied XPO's motion to certify, holding that its finding of waiver was a factual determination that did not raise a controlling question of law. ECF No. 99.

In addition to motion practice, the parties have engaged in extensive discovery. The parties both issued full sets of interrogatories and requests for production of documents. These, in turn, led to several conferences with the Court dealing with discovery disputes.

On May 4, 2016, XPO filed a motion to stay discovery until its motion to compel arbitration was ruled upon. ECF No. 58. On May 12, 2016, Plaintiff opposed the motion to stay. ECF No. 66. On May 16, 2016, 2016, XPO filed its reply brief in support of stay discovery. ECF No. 67. Also on May 16, 2016, Plaintiff filed a letter requesting that this Court compel XPO to comply with discovery requests for class-wide discovery. ECF No. 68. XPO filed its reply to the discovery letter on May 18, 2016. ECF No. 70. On May 19, 2016, the Court held discovery conference and ruled that some additional discovery be produced. ECF No. 82. Moreover, Plaintiff's counsel deposed two XPO employees over the course of three full days.

Furthermore, the parties engaged in two full-day mediations with a nationally-recognized expert in state and federal law concerning the employment classification of delivery drivers, Carole Katz, Esq., on November 10, 2016 and February 17, 2017. Prior to the mediations, XPO produced voluminous data concerning all deductions it has made from its contractors pay since October 26, 2013.

On March 16, 2017, Plaintiffs filed an assented-to motion for preliminary approval of a class action settlement. ECF No. 114. On March 17, 2017, the Court granted Plaintiffs' motion for preliminary approval and certified a settlement class of:

> All individuals who entered into a Delivery Service Agreement, either in their individual capacities or through their own business entities, with XPO Last Mile, Inc., and personally performed deliveries on a full-time basis within the State of Connecticut at

any time from October 26, 2013 to the date of preliminary approval of the proposed class action settlement

ECF No. 115. In addition, the Court approved Plaintiffs' proposed notice and authorized distribution of the notice and claim forms to the class. Id.

II. DISTRIBUTION OF NOTICE AND CLAIM FORMS AND RESPONSE FROM THE CLASS.

On March 27, 2017, XPO provided Class Counsel with mailing addresses for 103 class members who provided delivery services for XPO in Connecticut. Cleary Decl., ¶ 3 (attached as Ex. A). On the same day, Class Counsel mailed notices to each of the 103 class members by first-class mail. Id. A copy of the notice and claim forms that were approved by the Court and distributed to the class members is attached as Exhibits B and C. Of those initial notices, 20 were returned as undeliverable. Cleary Decl., ¶ 4. Using people-search software purchased by Class Counsel, counsel was able to mail notice and claim forms to 13 of those 20 contractors. Id.

Class Counsel then took several additional steps to ensure that notice had been received and to raise the claim rate. Class Counsel searched for phone numbers based on class members' names and business entities. Cleary Decl. 6. On April 26, 2017 and April 27, 2017, Class Counsel called the 88 remaining claim members to confirm their address. Id. at ¶ 7. As of May 10, 2017, Plaintiffs received 25 claims. Id. at ¶ 8. Class Counsel then resent notice and claim forms to the class members by first-class mail. Id. at ¶ 9. In addition, Class Counsel asked XPO for e-mail addresses for the remaining 78 class members. Id. at ¶ 10. On May 12, 2017, XPO provided email addresses for the remaining 78 class members and Class Counsel e-mailed notice and claims forms to the class. Id. at ¶ 11.

Class Counsel's efforts improved the claims rate. As of the filing of this motion, 67 class members have filed claims representing approximately 77 percent of the total fund and no class

members had submitted objections. Id. at ¶ 14. Further, based on prior experience, once the first round of checks are sent out in August, it is likely that other class members will send in claim forms. Those forms will be accepted and full shares will be paid those claimants in the second round of payments.

Moreover, the range of shares to be awarded to the class demonstrates that the class will receive substantial compensation that is proportional to the amount of damages they suffered. To demonstrate this, Class Counsel have calculated each contractor's share as it stands today and the shares if 20 percent of the remaining class members file claims. See Settlement Distribution Chart. If no one else filed a claim, the average recover for claimants will be approximately $9,160, with a range of $24,600 for a contractor who worked for XPO for over three years to a low share of $218 for a contractor who worked for XPO for two weeks. Id. Moreover, 22 claimants, nearly one-third, will receive shares over $10,000.[3] Id.

Furthermore, the class members with the largest claims have been more likely to file claims. As things currently stand, while 64 percent of the class has filed claims, those claimants account for approximately 77 percent of the potentially recoverable deductions. Thus, claimants with the most in potential damages will be recovering the majority of this settlement.

III. PROPOSED DISTRIBUTION OF SETTLEMENT FUNDS

The total settlement amount is $950,000. The parties propose that, if approved by the Court, the settlement fund will be apportioned as follows:

1. Pay incentive payments to the sole Class Representative Carlos Taveras, who actively participated in this litigation and assisted Class Counsel of $20,000.

[3] Class Counsel expects the additional claimants will come forward after the first round of checks are distributed. Accordingly, if an additional 20 percent of the class (about 18 additional class members) file claims, the average share will be close to $6,200 with a range of approximately $20,000 to $175.

2. Pay to Class Counsel an amount not to exceed $316,000 for attorneys' fees, litigation and mediation expenses and costs of administering the settlement.

3. The remainder, referred to as the Net Settlement Fund, totaling $614,000 to pay the claims of the class members on a non-reversionary basis.

Based on the data provided by XPO, Class Counsel calculated the dates of service and average weekly deductions for each contractor.[4] Each claimant was then given credit for each week they worked for XPO. Additionally, based on the average weekly deductions, Class Counsel divided contractors into three tiers. The top tier, with the contractors with the highest average weekly deductions, received a multiplier of their weeks of 1.4. Contractors in the middle tier of weekly deductions received a multiplier of their weeks of 1.2. Contractors in the bottom tier for average weekly deductions did not receive a multiplier. As a result, each contractor who suffered the most in deductions from their pay, and suffered higher damages as a result, will receive a larger share of the settlement.

Class Counsel then divided the Net Settlement Fund by the total amount of settlement weeks for all class claimants to establish a dollar amount per week. Each class claimant's share shall be calculated by multiplying the claimant's number of weeks by the weekly amount.

The attached spreadsheet lists the class members (with named redacted) who filed claims and the approximate amount that they would receive using this formula if there were no additional claims and how much they would receive if the response rate increases by 20 percent before the final distribution is made. See Settlement Distribution List (attached as Ex. D).

[4] Plaintiff alleged that XPO's practice of making deductions from its contractors weekly pay statements for things such as damage claims, worker's compensation, other insurance, and uniforms, violates the Connecticut wage law. Conn. Gen. Stat. Sec. 31-71e

Approximately 14 days after the Settlement Class Fund is deposited, and after attorney's fees and incentive payments are deducted, class claimants will be mailed shares of the settlement distributions in the amount they would have received if all Settlement Class Members had filed claims.

A second distribution will be made forty-five (45) days later as follows: settlement class members who did not submit claim forms until after the first distribution shall receive the amount they would have been entitled to in the initial distribution. Since this settlement is non-reversionary, the remainder of the settlement fund will be distributed to all the claimants on a pro rata basis. Settlement checks that are not cashed, after claims are made and checks mailed out, will be paid to the *cy pres* beneficiary, Statewide Legal Services of Connecticut.

IV. THE PROPOSED SETTLEMENT IS FAIR, REASONABLE, AND ADEQUATE, AND THEREFORE, SHOULD BE APPROVED.

A. The Legal Standard for Final Settlement Approval.

Rule 23(e) of the Federal Rules of Civil Procedure requires court approval for any settlement of a class action to ensure that class members receive sufficient notice of the settlement, and that the settlement is "fair, reasonable, and adequate." Fed. R. Civ. P. 23(e). When determining whether a class action settlement if fair, "a court 'should give proper deference to the private consensual decision of the parties' and 'keep in mind the unique ability of class and defense counsel to assess the potential risks and rewards of litigation.'" Kemp-DeLisser v. Saint Francis Hosp. & Med. Ctr., 2016 WL 6542707, at *6 (D. Conn. Nov. 3, 2016) (quoting Clark v. Ecolab, Inc., 2009 WL 6615729, at *3 (S.D.N.Y. Nov. 27, 2009)). Courts should be "mindful of the strong judicial policy in favor of settlements, particularly in the class action context" as "[t]he 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) (internal quotation marks omitted). See also Isby v. Bayh, 75 F.3d 1191, 1196 (7th Cir. 1996); Armstrong v. Bd. of Sch. Directors of City of Milwaukee, 616 F.2d 305, 313 (7th Cir. 1980) ("In the class action context in particular, 'there is an overriding public interest in favor of settlement.'"); In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535 (3d Cir. 2004) (noting "an overriding public interest in settling class action litigation" that "should therefore be encouraged").

When deciding whether a class action settlement is fair, adequate, and reasonable, a court's "primary concern is with the substantive terms of the settlement," which involves a "need to compare the terms of the compromise with the likely rewards of litigation." Weinberger v. Kendrick, 698 F.2d 61, 73-74 (2d Cir. 1982). A court must also consider the settlement's procedural fairness by examining "the negotiating process by which the settlement was reached." Id. at 74. "So long as the integrity of the arm's length negotiation process is preserved, however, a strong initial presumption of fairness attaches to the proposed settlement." Kemp-DeLisser, 2016 WL 6542707, at *7 (quoting In re Paine Webber Ltd. Partnerships Litig., 171 F.R.D. 104, 125 (S.D.N.Y.), *aff'd*, 117 F.3d 721 (2d Cir. 1997)). Furthermore, 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).

The Second Circuit has identified nine factors, discussed in City of Detroit v. Grinnell Corp., 495 F.2d 448 (2d Cir. 1974), that a court should consider in determining whether a class action settlement is substantively fair:

> (1) the complexity, expense and likely duration of the litigation; (2) the reaction of the class to the settlement; (3) the stage of the proceedings and the amount of discovery completed; (4) the risks of establishing liability; (5) the risks of establishing damages; (6) the risks of maintaining the class action through the trial; (7) the ability of the defendants

> to withstand a greater judgment; (8) the range of reasonableness of the settlement fund in light of the best possible recovery; (9) the range of reasonableness of the settlement fund to a possible recovery in light of all the attendant risks of litigation[.]

City of Detroit v. Grinnell Corp., 495 F.2d 448, 463 (2d Cir. 1974). For a settlement to be substantively fair, "not every factor must weigh in favor of settlement," rather, "the court should consider the totality of these factors in light of the particular circumstances." Kemp-DeLisser, 2016 WL 6542707, at *7 *(*quoting In re Global Crossing Securities and ERISA Litig., 225 F.R.D. 436, 456 (S.D.N.Y. 2004)).

A review of the Grinell factors shows that the settlement satisfied the requirements of Rule 23(e) and should, therefore, be approved by this Court.

B. The Proposed Settlement Meets the Requirements for Final Approval.

1. The complexity, expense and likely duration of the litigation favors final approval.

This litigation is likely to result in complex, lengthy, and expensive litigation.[5] "Courts have recognized that wage and hour cases involve complex legal issues." Johnson v. Brennan, 2011 WL 4357376, at *17 (S.D.N.Y. Sept. 16, 2011).

The determination of whether a delivery driver is an employee or independent contractor requires complex factual analysis that can lead to conflicting outcomes. See, e.g., In re FedEx Ground Package Sys., Inc., Employment Practices Litig., 758 F. Supp. 2d 638, 700 (N.D. Ind. 2010), rev'd in part sub nom. Carlson v. FedEx Ground Package Sys., Inc., 787 F.3d 1313 (11th Cir. 2015) (finding FedEx drivers to be employees in some states and independent contractors in other states).

[5] This factor "captures the probable costs, in both time and money, of continued litigation." In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 535–36 (3d Cir. 2004).

XPO will likely argue that it did not employ it's the contractors and, even if it did, Plaintiffs claims are preempted by the Federal Aviation Administration Authorization Act of 1994 ("FAAAA"), 49 U.S.C. § 14501(c)(1). The FAAAA preemption issue alone is likely to result in complex, lengthy, and expensive litigation because whoever wins in this Court is likely to file an interlocutory appeal in the Second Circuit. The issue of whether the FAAAA preempts state wage claims has not been addressed by the Second Circuit. But the issue has tied other litigation involving delivery companies in knots. See, e.g., Massachusetts Delivery Ass'n v. Coakley, 769 F.3d 11, 23 (1st Cir. 2014) (First Circuit vacated District Court ruling on FAAAA preemption on interlocutory appeal); Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016) (on interlocutory appeal, holding that FAAAA preempted Prong B of Massachusetts independent contractor test, but not Prongs A or C); Costello v. BeavEx, Inc., 810 F.3d 1045 (7th Cir.2016) (on interlocutory appeal holding that the FAAAA does not preempt the Illinois Wage Payment Act). Indeed, in BeavEx, even though the plaintiffs filed their lawsuit in 2012, won class certification and summary judgment in 2014, and won on both issues in the Seventh Circuit in 2016, the case is currently stayed on BeavEx's petition for certiorari to the United States Supreme Court.[6] See BeavEx v. Costello, Petition No. 15-1305. Thus, an interlocutory appeal of a decision on FAAAA preemption would possibly delay this action for years.

Furthermore, XPO intends to oppose class certification. This issue is further complicated by the possibility that the Court will enforce arbitration clauses signed by absentee class members. While this Court held that XPO waived its right to compel the named Plaintiff to

[6] Additionally, the Third Circuit granted a petition for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) of a New Jersey District Court's holding that the FAAAA did not preempt the New Jersey wage laws. Lupian v. Cory Holdings LLC, No 17-8015 (3d Cir. June 15, 2017).

arbitrate his claims through delay, XPO would likely argue that no class action may proceed because XPO has not waived the arbitration clause as to the absentee class members. The issue of the enforceability of class action waivers has results in substantial litigation in other cases and, in fact, is the subject of three consolidated cases currently pending before the Supreme Court. See Epic Systems Corp. v. Lewis, No. 16-285; Ernst & Young LLP v. Morris, No. 16-300; NLRB v. Murphy Oil USA, Inc., No. 16-307. These cases have been briefed and will likely be the subject of oral argument in Fall 2017.

Moreover, XPO will likely argue that class certification is not warranted under Rule 23 because Prong A (right to control) and Prong C (independently established businesses) require individual inquires. Courts have denied class certification on Prong A's right to control test, finding it would require too many individual inquiries. See, e.g., In re FedEx Ground Package Sys., Inc. Employment Practices Litig., 273 F.R.D. 424, 489 (N.D.In.2008); Schwann v. FedEx Ground Package Sys., Inc., 2013 WL 1292432, at *3 (D.Mass. Apr. 4, 2013) (the first and third prongs of a nearly identical Massachusetts independent contractor statute require individualized factual inquiries); Costello v. BeavEx Inc., 303 F.R.D. 295, 307 (N.D. Ill. 2014), aff'd in part, vacated in part, remanded, 810 F.3d 1045 (7th Cir. 2016). While some courts have found that Prong C can be resolved on common evidence, other courts have disagreed. Schwann, 2013 WL 1292432, at *5; BeavEx Inc., 303 F.R.D. at 307.

Even if Plaintiff survives XPO's arguments on FAAAA preemption and class certification, XPO will argue on summary judgment that its delivery drivers were not employees under the ABC test. As explained below, Recent Connecticut Supreme decisions demonstrate that Plaintiff might lose on each prong. See Standard Oil of Connecticut, Inc. v. Adm'r, Unemployment Comp. Act, 320 Conn. 611, 632 (2016) (holding that installers were free from

control under Prong A where they owned their vehicles and where their contracts stated they not subject to the control of the putative employer and worked outside of putative employer's places of business under Prong B where they provided services only at customers' homes); Sw. Appraisal Grp., LLC v. Adm'r, Unemployment Comp. Act, 324 Conn. 822, 844, 155 A.3d 738, 752 (2017) (to prevail on Prong C, an employer need not show that an employee actually performed services for third parties).

Moreover, even if the class of XPO contractors were found to be employees, and that their claims were not preempted by the FAAAA, there is no certainty that they would be awarded damages for deductions taken by XPO under the Connecticut wage payment law, Conn. Gen. Stat. § 31-71e.

Furthermore, even if Plaintiff and the class members are successful on all of their claims, XPO will argue that it must be indemnified for any of its loses. XPO has a still-pending third-party complaint against Plaintiff pursuant to Plaintiff's independent contractor agreement. XPO will have the same claim against each class member.

Plaintiffs face considerable litigation and delay if they continue to litigate this case. Thus, this factor weighs in favor of approval of this settlement.

2. The reaction of the class to the settlement favors final approval.

This factor favors final approval. There has been no opposition to the settlement. "A lack of objection from any class members after members received notice of the settlement "is an extremely strong indication" that the proposed Settlement is fair." Kemp-DeLisser, 2016 WL 6542707, at *8 (quoting Marsh, 265 F.R.D. at 139). See also In re Mexico Money Transfer Litig., 164 F.Supp.2d 1002, 1021 (N.D. Ill. 2000) (holding that the fact that more than "99.9% of class members have neither opted out nor filed objections . . . is strong circumstantial evidence in

favor of the settlement"), aff'd, 267 F.3d 743 (7th Cir.2001); cf. The Authors Guild, et al. v. Google, Inc., 770 F.Supp.2d 666, 676 (S.D.N.Y.2011) (denying approval of Google's class action, in part because "an extremely high number of class members—some 6,800—opted out" and because "the objections [were] great in number"). A further update regarding any opposition will be provided at the final fairness hearing.

3. The stage of the proceedings and the amount of discovery completed favor final approval.

This factor explores the information that was available to the settling parties to assess whether Class Counsel "have weighed their position based on a full consideration of the possibilities facing them." Global, 225 F.R.D. at 458. This factor also favors approval because Class Counsel entered into settlement negotiations following extensive formal and informal discovery, and with extensive experience litigating class actions on behalf of delivery drivers who worked for XPO in Illinois and Massachusetts.

The parties had ample information to reach an informed settlement in this case. Plaintiff fought for, and obtained, substantial discovery pertaining to the class and the deductions that XPO took from their pay. Plaintiffs conducted three full day depositions of two of Defendant's Rule 30(b)(6) designees. The parties exchanged extensive written discovery in this case. Indeed, XPO produced over 5,000 pages of documents. In addition, XPO produced detailed deductions data, including Excel spreadsheets showing all of the weekly deductions by category of deduction for each of the 103 individual contractors. Plaintiffs also deposed two XPO managers over the course of three days. Plaintiff also obtained further informal discovery in preparation for the two mediations the parties conducted. This discovery permitted Class Counsel to accurately calculate the potential damages for the class. Lazy Oil Co. v. Witco Corp., 166 F.3d 581, 588 (3d Cir.1999) ("Post-discovery settlements are more likely to reflect the true

value of the claim and be fair."); 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).

4. The risks of establishing liability favor final approval.

The fourth Grinnell factor analyzes "the risks of establishing liability." Grinnell, 495 F.2d at 463. As discussed above, Plaintiff faces substantial risks regarding the questions of class certification, federal preemption, independent contractor misclassification, and on liability for deductions.

On class certification, as discussed above, there was no guarantee that this Court would certify Plaintiff's claims. This Court may uphold the absentee class member's arbitration clauses, which include a class action waiver.

Furthermore, XPO will argue that it was not an employer under Connecticut's three-prong independent contractor test. See Conn. General Statutes § 31–222(a)(1)(B)(ii). On Prong A, which looks at the putative employer's right to control, the Connecticut Supreme Court recently issued a ruling that heating and alarm installers were free from control under some similar facts as in this case. Standard Oil of Connecticut, Inc. v. Adm'r, Unemployment Comp. Act, 320 Conn. 611, 632 (2016) (holding that installers were free from control where they owned their vehicles and where their contracts stated they not subject to the control of the putative employer). Furthermore, on Prong B, which would require XPO to show that contractors either worked outside of XPO usual course of business or outside of its places of business, the Connecticut Supreme Court held that the "homes" of the customers are not within the hearting and alarm company's "places of business. Id. at 655-56. Thus, XPO may be able to show that

the deliveries performed at customer's homes were not performed within XPO's places of business and, thus, prevail on Prong B.

Moreover, the Connecticut Supreme Court held that to prevail on Prong C, an employer need not show that an employee actually performed services for third parties. Sw. Appraisal Grp., LLC v. Adm'r, Unemployment Comp. Act, 324 Conn. 822, 844, 155 A.3d 738, 752 (2017). This stands in stark contrast to other states, where employers must not only show that employees were free to work for third parties, but that they actually did so. See, e.g., Philadelphia Newspapers, Inc. v. Bd. of Review, 397 N.J. Super. 309, 323, 937 A.2d 318, 327 (App. Div. 2007) ("[T]he employee must be engaged in such independently established activity at the time of rendering the service involved.") (emphasis added). Thus, Plaintiff's misclassification claims may fail.

Furthermore, as discussed above, even if the Court grants class certification and holds that XPO misclassified its drivers as independent contractors, it may hold, or the Second Circuit may hold, that Plaintiff's claims are preempted by the FAAAA.

Furthermore, XPO will likely argue that the deductions it made from the driver's pay did not violate the Connecticut wage law. XPO will likely argue that the deductions were authorized by Plaintiff and the class members in their independent contractor agreements. While Class Counsel would disagree, there is little caselaw in Connecticut on this issue.

5. The risks of establishing damages favor final approval.

If Plaintiff was successful in establishing that he and the other class members were employees of XPO, it would have been relatively straightforward to ascertain the amounts deducted from the class members' pay. However, it would have presented challenges to establish that all types of deductions were recoverable.

Plaintiff's counsel were provided with detailed deductions data from October 2013 to July 2016, indicating that XPO made the following deductions from its contractor's pay:

AIG	$100,862
Auto Liability Insurance	$797,559
Accident Charges	$18,453
Cargo Insurance	$55,331
General Liability Insurance	$325,142
Umbrella Insurance	$118,988
Worker's Comp. Surcharges	$31,142
Worker's Comp. Insurance	$811,724
Broken Freight	$132,795
Administrative Fee	$55,088
Decal Charges	$2,569
Driver Qual. Fees	$74,669
ESI Registration	$7,025
Truck Lease	$266,166
Gift Cards	$38,075
In Home Damage	$232,358
Occupational Accident	$114,481
Loan Repayment	$11,866
Processing Fee	$27,447
Reserve	$503,661
Strap and Pad Charge	$9,494
Uniforms	$61,280
Zurich Claim	$31,664
TOTAL[7]	**$3,827,840**

Though Plaintiff sought to recover all of these deductions on behalf of the class, there is no Connecticut caselaw holding what types of deductions are actually recoverable. For example, this Court could have rule that deductions for damages claims were recoverable, but deductions for accident liability insurance were not. Furthermore, some deductions were authorized in XPO's independent contractor agreement. The Connecticut Supreme Court held in Weems v.

[7] The total when estimating to the date of the mediation, based on average monthly deductions, came to $4.3 million.

Citigroup, Inc., 289 Conn. 769, 787, 961 A.2d 349, 360 (2008), that wage deductions authorized in writing by employees can be lawful under Conn. Gen. Stat. § 31-71e in some cases if there are for the direct benefit of the employer. Thus, XPO will argue that its contractors authorized all of its deductions.

Moreover, in misclassification cases such as this, it can be onerous to establish damages for each contractor. For example, in Martins v. 3PD, Inc., Judge Douglas Woodlock held XPO's contractors "are only permitted to recover deductions attributable to services they personally performed." 3PD II, 2014 WL 1271761, at *13. As a result, in preparation for a damages trial with a special master, the plaintiffs were required to pour over thousands of daily manifests to determine whether the class members were personally driving their trucks each day. It is plainly possible in this case that Plaintiff would face similar hurdles in showing damages on a class-wide basis. As the class-wide data indicates, while many of XPO's contractors in Connecticut operated only one truck and drove that truck full time, some contractors operated two to three trucks and thus would require substantial investigation to determine what deductions are directly attributable to the services they personally provided.

6. The risks of maintaining the class action through the trial favor final approval.

There has been no ruling on class certification, thus, as discussed above, there is a substantial risk that Plaintiff will not even obtain certification in this case. Even if Plaintiff had obtained class certification, the risk of decertification at a later stage would remain. Global Crossing, 225 F.R.D. at 460. As a result, "this factor also weighs in favor" of final approval. Kemp-DeLisser, 2016 WL 6542707, at *9. See also In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions, 148 F.3d 283, 321 (3d Cir. 1998) ("There will always be a 'risk' or possibility of decertification, and consequently the court can always claim this factor weighs in

favor of settlement.").

Indeed, in Martins v. 3PD, Inc., involving virtually the same facts as present here, the plaintiffs were required to move for class certification twice and XPO moved to decertify the class the court had already certified. 3PD II, 2014 WL 1271761, at *10. Moreover, XPO planned to move to decertify the class again after the hearing on damages.

7. The ability of the defendants to withstand a greater judgment has no impact on final approval.

There is no indication that XPO would have been unable to withstand a judgment greater than the total settlement amount. This factor, however, "standing alone, does not suggest that the settlement is unfair," and where the "other Grinnell factors weigh heavily in favor of settlement," the Court may still approve of the settlement as being fair, reasonable, and adequate. Kemp-DeLisser, 2016 WL 6542707, at *10 (quoting D'Amato v. Deutsche Bank, 236 F.3d 78, 86 (2d Cir. 2001)). "'[A] defendant is not required to empty its coffers before a settlement can be found adequate.'" Id. (quoting Fleisher v. Phoenix Life Ins. Co., 2015 WL 10847814, at *9 (S.D.N.Y. Sept. 9, 2015)). Thus, even XPO "could afford to pay more than the" $950,000 settlement "this does not prevent the Court from approving this Settlement as fair and reasonable." Id.

8. The range of reasonableness of the settlement fund in light of the best possible recovery and attendant risks of litigation favor final approval.

The final two Grinnell factors analyze "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." Grinnell, 495 F.2d at 463. Courts often combine their analysis of these factors. See Kemp-DeLisser, 2016 WL 6542707, at *10; Fleisher, 2015 WL 10847814 at *10; Global Crossing, 225 F.R.D. at 460–61. In analyzing these factors, a court should "consider and weigh 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. Moreover, in evaluating the fairness of a settlement amount, courts "cannot, and should not, use as a benchmark the highest award" possible for the plaintiff or the class. Duhaime v. John Hancock Mut. Life Ins. Co., 177 F.R.D. 54, 68 (D. Mass. 1997). See also In re Celexa & Lexapro Mktg. & Sales Practices Litig., 2014 WL 4446464, at *7 (D. Mass. Sept. 8, 2014) ("A settlement need not reimburse 100% of the estimated damages to class members in order to be fair."); O'Brien v. Brain Research Labs, LLC, 2012 WL 3242365, at *15 (D.N.J. Aug. 9, 2012) ("When evaluating the fairness of settlements, courts have held that full compensation is not a prerequisite for a fair settlement.").

As stated above, assuming Plaintiff is successful on class certification and on liability, Plaintiff's counsel calculated that their best recover for all possible deductions on behalf of the class was approximately $4.3 million.[8] After accounting for attorney's fees and incentive payments, the total recovery for the class is $614,000, or 14 percent of $4.3 million (and the gross settlement of $950,000 is 22 percent of the potential recovery of $4.3 million). However, as discussed above, there is no Connecticut caselaw defining which categories of deductions would have been recoverable, particularly where those deductions arose from work performed by others, and given that the contractors authorized many of the deductions in the independent contractor agreements. Thus, there was no guarantee of any recovery for the contractors.

Moreover, this settlement compares favorably with the two other settlements with XPO that were recently approved by federal courts. Based on the data provided by XPO here, its contractors worked approximately 7,436 weeks from October 2013 to February 2017. A gross

[8] The number would have been subject to doubling if XPO failed to establish that it had a good-faith belief that it was acting in compliance with the law. Conn. Gen. Stat. 31-72.

settlement of $950,000 would, therefore, provide class members with a gross of $127.50 per week worked. The class in Martins v. 3PD (Massachusetts) included 198 contractors who worked a total of 13,524 week, which meant that the gross settlement of $2,187,500 worked out to an average weekly gross settlement of $161.75 per week worked for the class. In Brandon v. 3PD, Inc. (Illinois), the class included 292 contractors who worked a total of 30,152 weeks. The settlement in Brandon was $2,8000,000, which equated to $92.86 for each week a contractor worked for 3PD/XPO. Thus, contractors in Connecticut will more per week than the Illinois contractors and close to the recovery for Massachusetts contractors with nearly identical claims.

Regardless, by any measure the recovery here is substantial and given the potential risks and delays in continuing with the litigation, the settlement falls within the range of reasonableness that is expected in a case of this nature and should be approved. See In re Warner Commc'ns Sec. Litig., 618 F. Supp. 735, 745 (S.D.N.Y. 1985), aff'd, 798 F.2d 35 (2d Cir. 1986) (approving settlement where class members would "recover approximately 12% of a reasonable damage figure"); City of Detroit v. Grinnell Corp., 356 F.Supp. 1380, 1386 (S.D.N.Y.1972) (3.2% to 3.7% of the potential recovery "well within the ball park"); cf. Wilson v. DirectBuy, Inc., 2011 WL 2050537, at *14 (D. Conn. May 16, 2011) (finding proposed settlement was not within the range of reasonableness when valued at between $15 million and $27 million and possible damages were $2 billion, approximately 1% of potential recovery).

9. In addition, the settlement should be approved because it was the product of arms-length litigation.

The Court must also ensure that the settlement is procedurally fair and "not the product of collusion." Kemp-DeLisser, 2016 WL 6542707, at *10 (quoting Global Crossing, 225 F.R.D. at 461). "[C]ourts have demanded that the compromise be the result of arm's-length negotiations and that plaintiffs' counsel have possessed the experience and ability, and have engaged in the

discovery, necessary to effective representation of the class's interests." Id. (quoting Weinberger, 698 F.2d at 73-74. When a settlement was negotiated by such "experienced, fully-informed counsel after extensive arm's-length negotiations," the resulting settlement "is entitled to an initial presumption of fairness and adequacy." Id. (quoting Fleisher, 2015 WL 10847814 at *5).

The procedural background of this matter supports a finding that the settlement agreement was negotiated at arm's length by experience counsel concerning disputes between their clients with respect to liability and damages. The case presented numerous and vigorously contested issues related to the classification of the settlement class members and whether XPO could assert defenses based on FAAAA preemption and arbitration even before the parties could reach the merits.

The parties exchanged extensive discovery, including three days a of deposition and the production of all of the deductions data for the class. The parties further engaged in extensive motion practice regarding discovery and enforceability of XPO's arbitration clause.

Moreover, the parties attended two full-day mediations with a nationally-respected mediator, and former general counsel for FedEx Ground, Carole Katz, Esq.

Furthermore, as discussed in more detail below, counsel for the parties are highly experienced. Indeed, lead counsel for Plaintiffs, Harold Lichten, has successfully litigated dozens of similar class actions. See, e.g., Scovil v. FedEx Ground Package Sys., Inc., 2014 WL 1057079, at *4 (D. Me. Mar. 14, 2014) ("Lead counsel, Harold Lichten, has represented numerous classes alleging misclassification and failure to pay wages and other benefits in individual and class actions across the country [and] the law firm of Lichten & Liss–Riordan

represented classes of [FedEx] drivers in Connecticut, Massachusetts and Vermont….").[9] Moreover, Mr. Lichten gained substantial knowledge of both the law in this area and XPO's operation in particular in litigating and obtaining final approval for class action settlements in two nearly identical cases litigated against XPO, which had recently purchased a company called 3PD, Inc., in Massachusetts and Illinois. See Martins v. 3PD, Inc., No. 11-11313-DPW (March 2, 2016 D.Mass.) (ECF No. 209); Brandon v. 3PD, Inc., No. 13-3745 (Jan. 26, 2016 N.D. Ill.) (ECF No. 151). Those settlement contained very similar terms to the proposed settlement in this case. See above at Footnote 3.

Furthermore, attorney Richard Hayber and attorneys at the Hayber Law Firm also have significant experience representing workers in wage and hour class and collective actions under Connecticut's wage laws and the FLSA. See, e.g., Bozak v. FedEx Ground Package Sys., Inc., 2014 WL 3778211, at *7 (D. Conn. July 31, 2014); Zaniewski v. PRRC Inc., 848 F. Supp. 2d 213, 230 (D. Conn. 2012). As this Court has previously observed, the "Hayber Law Firm, LLC, are experienced employment lawyers with good reputations among the employment law bar. They have prosecuted and favorably settled many employment law class actions, including wage

[9] See also Costello v. BeavEx, Inc., 810 F.3d 1045 (7th Cir. 2016) (representing class of misclassified delivery drivers); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308 (11th Cir.2013) (representing class of misclassified cable installers seeking unpaid wages); Brandon v. 3PD, Inc., C.A. No. 13-cv-03745 (N.D. Ill. 2013) (represented class of misclassified delivery drivers working for company purchased by XPO); Martins v. 3PD, Inc., No. 11–11313–DPW, 2013 WL 1320454 (D. Mass. Mar. 28, 2013) (same); Rodriguez v. Joseph Eletto Transfer, Inc. et al., Index No. 005431/2016 (N.Y. Sup. Ct. 2016); Stull et al. v. Joseph Eletto Transfer, Inc. et al., Civ. Act. No. 1573-CV-00500 (Mass. Sup. Ct. 2015); Anderson v. Homedeliveryamerica.com, Inc., 2013 WL 6860745 (D. Mass. Dec. 30, 2013) (class of delivery drivers were employees under Massachusetts law); Somers v. Converged Access, Inc., 911 N.E.2d 739 (Mass.2009) (landmark decision of the Massachusetts Supreme Judicial Court on independent contractor misclassification); Oliveira v. Advanced Delivery Systems, Inc., C.A. No. 09-1311 (Mass. Super. Ct. 2009); Sherman v. American Eagle Express, Inc., d/b/a AEX Group, C.A. No. 2:09-00575-JS; (E.D. Pa. 2009); Fucci v. Eastern Connection Operating, Inc., C.A. No. 2008-2659 (Mass. Super. Ct. 2008).

and hour class actions." Aros v. United Rentals, Inc., 2012 WL 3060470, at *6 (D. Conn. July 26, 2012). Defendants' counsel likewise has substantial experience in litigating these kinds of cases and negotiating settlements in complex cases like this.

The time and effort spent litigating this case, which includes the experience Class Counsel gained during years of litigating class actions on behalf of XPO contractors in Massachusetts and Illinois, are persuasive indicators that there was no collusion in either the negotiation process nor in the settlement achieved. Moreover, the two full days (one in Boston, Massachusetts and one in Newark, New Jersey) the parties spent with the mediator further demonstrates that the agreement was not reached through collusion. Fleisher, 2015 WL 10847814 at *5 (he "participation of an experienced mediator also reinforces that the Settlement Agreement is non-collusive" and procedurally fair.); Kemp-DeLisser, 2016 WL 6542707, at *10 (same).

Moreover, the proposed Settlement Agreement between Plaintiff and XPO demonstrates that the settlement was negotiated at arm's length by experienced counsel. See Settlement Agreement (attached as Ex. E). Such arm's length negotiations between capable and experienced counsel is entitled to a presumption of fairness, reasonable, and adequacy.

V. THE CLASS RECEIVED THE BEST NOTICE PRACTICABLE UNDER THE CIRCUMSTANCES OF THE PROPOSED SETTLEMENT.

The notice to the class was more than adequate. As described above, class counsel went to considerable effort to ensure that as many class members as possible received notice of the class action settlement. See Cleary Decl. Following this Court's order granting preliminary approval of the settlement, XPO provided Plaintiff with mailing addresses for the 103 class members in this case based on its corporate records. Class Counsel delivered notice the class by regular, telephone, and e-mail. Id. As a result, 67 of the 103 class members have filed claims.

Id. Moreover, the claimants suffered approximately 78 percent of the potential damages in this lawsuit. However, because this a non-reversionary settlement, the entire fund will be distributed to the claimants on a pro rata basis.

In addition, because the settlement will be paid in two distributions -- one approximately 45 days after final approval and the second approximately 45 days after that -- additional class members are expected to come forward after the first distribution is made. Under the agreement if Class Members file claims after the first payments go out, they will still be eligible to receive their share payment in the second distribution. This will further increase the number of claimants. Moreover, since the settlement is non-reversionary, any remaining funds will be redistributed among the class members on a pro rata basis.

Constitutional due process and Federal Rule of Civil Procedure 23(c)(2)(B) require that absent Class Members receive notice that is "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." In re Prudential Sec. Inc. Ltd. Partnerships Litig., 164 F.R.D. 362, 368 (S.D.N.Y.) (quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)), *aff'd*, 107 F.3d 3 (2d Cir. 1996)). Due process requires only "the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." Schulte v. Fifth Third Bank, 805 F. Supp. 2d 560, 595 (N.D. Ill. 2011). Indeed, "[n]otice need not be perfect, but need be only the best notice practicable under the circumstances, and each and every class member need not receive actual notice, so long as class counsel acted reasonably in choosing the means likely to inform potential class members." Serio v. Wachovia Sec., LLC, 2009 WL 900167, at *8 (D.N.J. Mar. 31, 2009) (quoting In re Merrill Lynch TYCO Research Sec. Litig., 249 F.R.D. 124, 133 (S.D.N.Y.2008)).

Class Counsel worked diligently to deliver notice to the class. First, the class was sent notice by first-class mail. Cleary Decl. at ¶¶ 3-4. Notice by first-class mail generally satisfies the notice requirements of both Fed. R. Civ. P. 23 and the due process clause. Zimmer Paper Products, Inc. v. Berger & Montague, P.C., 758 F.2d 86, 90 (3d Cir. 1985) (citing Eisen, 417 U.S. at 173–77; Walsh v. Great Atlantic & Pacific Tea Co., 726 F.2d 956, 962–64 (3d Cir.1983); Cayuga Indian National v. Carey, 89 F.R.D. 627, 632–33 (N.D.N.Y.1981)); 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). Moreover, when issuing notice by mail it is not necessary for every class member to receive actual notice, but only that the method of notice be "'reasonably calculated, under all the circumstances, to apprize interested parties of the pendency of the action and afford them an opportunity to present their objections.'" In re Integra Realty Res., Inc., 354 F.3d 1246, 1260 (10th Cir. 2004) (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950)). See also In re AT & T Mobility Wireless Data Servs. Sales Tax Litig., 789 F. Supp. 2d 935, 968 (N.D. Ill. 2011) ("Due process does not require that every class member receive notice."); Carlough v. Amchem. Prod., Inc., 158 F.R.D. 314, 325 (E.D.Pa.1993) ("Receipt of actual notice by all class members is required by neither Rule 23 nor the Constitution."); In re Nat'l Life Ins. Co., 247 F.Supp.2d 486, 492 (D.Vt.2002) ("An alleged failure to receive notice will not sustain a due process challenge as long as reasonable measures were taken to provide individualized notice to identifiable class members."). In Serio, for example, the court held that sending out notices via direct mail, where class members' notices that came back as undeliverable received follow-up notices if an updated address was found on a United States Postal Service database constituted "the best practicable method for providing notice." 2009 WL 900167, at *8. That is precisely what happened here. Cleary Decl. at ¶ 4.

While 20 of the initial 103 notices came back as undeliverable, and Class Counsel was able to find mailing addresses for 13 of those class members. Id.

Moreover, Class Counsel did not stop at delivering notice once by mail. As of April 14, 2017, only 15 class members had filed claims. Id. at ¶ 5. On April 26 and April 27, 2017, Class Counsel made approximately 88 phone calls to the remaining class members. Id., at ¶ 7. Class Counsel further sent out reminder notices by first-class mail on May 12, 2017. Id. at ¶ 9. Class Counsel then sought updated telephone numbers and e-mail addresses from XPO. Id. at ¶ 10. XPO provided the additional contact information and on May 12, 2017, Class Counsel e-mailed notice of the settlement to the remaining class members. Id. at ¶ 11. As a result of Class Counsel's efforts, the number of claims rose quickly to 47 by May 26, 2017, to 52 claims by June 6, 2017, and 66 claims as of the date this motion was filed. Id. at ¶ 12-13.

Indeed, the high number of claims filed is further proof of the adequacy of the notice issued by Class Counsel. See Schulte v. Fifth Third Bank, 805 F. Supp. 2d 560, 596-97 (N.D. Ill. 2011) (citing In re Agent Orange Product Liability Litigation MDL No. 381, 818 F.2d 145, 169 (2d Cir.1987) (fact that large number of claims were filed by class members "suggest[ed] that no practical problem exist[ed] as to the adequacy of the notice"). Moreover, the low undeliverable rate of 6 percent is well within the range that courts have found acceptable. See In re Integra, 354 F.3d at 1260 (notice held reasonable and adequate even though 1,455 of the 6,423 claim forms were "not actually received"); Grunin v. Int'l House of Pancakes, 513 F.2d 114, 121-22 (8th Cir. 1975) (approving notice where 33 percent of class members not reached by mailing). Moreover, the number of class members who did not receive direct notice was likely much lower than 6 percent, as many of the class members received notice via e-mail and by telephone.

Given Class Counsel's substantial efforts to ensure notice of the class action settlement was actually received by as many class members as possible, and in light of the high rate of claims made and the absence of any objections, the dissemination of the notice here was more than adequate.

VI. THE PROPOSED SETTLEMENT CLASS MEETS THE REQUIREMENTS OF RULE 23.

In the Preliminary Approval Motion, Plaintiffs explained that the proposed settlement class of "All individuals who entered into a Delivery Service Agreement, either in their individual capacities or through their own business entities, with XPO Last Mile, Inc., and personally performed deliveries on a full-time basis within the State of Connecticut at any time from October 26, 2013 to the date of preliminary approval of the proposed class action settlement," satisfied all requirements for certification under Rule 23, including the numerosity, commonality, typicality, adequacy, predominance, and superiority elements. [10] ECF Doc. 114 at 14-19. Indeed, the courts certified classes in all three prior cases brought on behalf of 3PD/XPO's delivery drivers. See Brandon v. 3PD, Inc., No. 13-cv-3745 (N.D. Ill. Oct. 20, 2014); 3PD I, 2013 WL 1320454, *5-9 3PD II, 2014 WL 1271761, *10-13; Phelps v. 3PD, Inc., 261 F.R.D. 548, 554-63 (D. Or. 2009). Moreover, courts have routinely certified classes of delivery drivers who claim they were misclassified as independent contractors under the ABC test pursuant to uniform company policies and subjected to unlawful deductions from their pay.[11]

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[10] Though XPO has assented to Plaintiff's motion, they have specifically reserved their rights to contest class certification in the event that the settlement does not attain final approval and this litigation is to continue.

[11] See Vargas v. Spirit Delivery & Distribution Servs., Inc., 2017 WL 1115163, at *12 (D. Mass. Mar. 24, 2017), reconsideration denied on June 8, 2017 (ECF No. 207) (certifying class of delivery drivers alleging they were misclassified as independent contractors under Massachusetts Prongs A and C); Reynolds v. City Express, Inc., 2014 WL 1758301, at *12 (Mass. Super. Jan. 8, 2014) (certifying claims that delivery drivers were misclassified as independent contractors in

Furthermore, when, as here, the court has not yet entered an order on class certification, the parties may stipulate that the action be maintained as a class action for settlement purposes only. County of Suffolk v. Long Island Lighting, 710 F. Supp. 1422, 1424 (E.D. N.Y. 1989), aff'd in part, rev'd in part on other grounds, 907 F. 2d 1295 (2d Cir. 1990). The parties have done exactly that in this case. See Settlement Agreement at p. 4. Moreover, the Court preliminarily certified the proposed class for the purposes of settlement. ECF No. 115 at ¶ 2.

The Court should now certify the proposed class for final approval of the settlement.

VII. THE PROPOSED INCENTIVE PAYMENTS ARE FAIR AND REAONABLE

The settlement proposes incentive payment of $20,000 to Plaintiff Carlos Taveras. Incentive awards to representative plaintiffs in class action cases "compensate the named plaintiff for any personal risk incurred by the individual or any additional effort expended by the individual for the benefit of the lawsuit." Dornberger v. Metro. Life Ins. Co., 203 F.R.D. 118, 124 (S.D.N.Y. 2001). Such awards are designed to reimburse representative plaintiffs, who "take on a variety of risks and tasks when they commence representative actions, such as complying

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violation of Section 148B and thereby victimized by unfair and deceptive practices of the delivery company's payroll company); Driscoll v. Worcester Telegram & Gazette, C.A. No. 2009-43 (Worcester Super. Ct. Aug. 26, 2013) (Krupp, J.) (certifying newspaper delivery drivers' claims of misclassification under a materially identical three-prong test for employment status); Costello v. BeavEx, Inc., 810 F.3d 1045, 1060 (7th Cir. 2016) (finding that class could be certified under Prongs A or B of identical Illinois ABC test); Spates v. Roadrunner Transportation Sys., Inc., 2016 WL 7426134, at *3 (N.D. Ill. Dec. 23, 2016) (certifying class under all three prongs of Illinois ABC test); Thomas v. Matrix Corp. Servs., Inc., 2012 WL 3581298, at *3 (N.D. Ill. Aug. 17, 2012) (holding class action remains most efficient way to resolve claim of improper deductions); Ladegaard v. Hard Rock Concrete Cutters, Inc., 2001 WL 1403007, at *9 (N.D. Ill. Nov. 9, 2001) (granting class certification to truck drivers under the Illinois wage payment law); Acosta v. Scott Labor LLC, 2006 WL 27118, at *6 (N.D. Ill. Jan. 3, 2006) (granting class certification on claims under the Illinois wage payment law); O'Brien v. Encotech Constr. Servs., Inc., 203 F.R.D. 346, 353 (N.D. Ill. 2001) (same).

with discovery requests and often must appear as witnesses in the action." Marsh, 265 F.R.D. at 150.

The proposed incentive payment is within the range regularly approved in similar wage and hour cases. See, e.g., Brandon v. 3PD, Inc., No. 13-3745 (Jan. 26, 2016 N.D. Ill.) (ECF No. 151) (approving incentive payments of $20,000 for two class representatives and $10,000 for named plaintiff not in the proposed class); Martins v. 3PD, Inc., No. 11-11313 (July 22, 2016) (ECF No. 211) (approving total of $60,000 in incentive payments --$20,000 to each of three named plaintiffs), Willix v. Healthfirst, Inc., 2011 WL 754862, at *7 (E.D.N.Y. Feb. 18, 2011) (approving incentive payments of $30,000, $15,000, and $7,500 in wage and hour class action settlement); In re Janney Montgomery Scott LLC Financial Consultant Litigation, 2009 WL 2137224, *12 (E.D.Pa. July 16, 2009) ($20,000 incentive payments in FLSA and Pennsylvania wage and hour case); Torres v. Gristede's Operating Corp., 2010 WL 5507892, at *8 (S.D.N.Y. Dec.21, 2010) *aff'd*, 519 F. App'x 1 (2d Cir.2013) (finding reasonable service awards of $15,000 to each of 15 named plaintiffs); Badia v. Homedeliverylink, Inc. et al., C.A. No. 12-06920-WJM, ECF No. 99 (Sept. 25, 2015 D.N.J.) (approving incentive payments totaling $97,000. Including $15,000 each to six named plaintiffs). One of the reasons for awarding incentive payments in employment cases, including wage and hour cases, is that workers bringing wage claims face the very real threat of retaliation. As one court 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). See also 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")

Taveras initiated this lawsuit on behalf of his co-workers and it was through his initiative that this recovery was eventually obtained. Taveras provided invaluable assistance to class counsel, including providing hundreds of documents and responding to written discovery. Additionally, Taveras provided detailed information for an affidavit in opposition to XPO's motion to compel arbitration. See ECF No. 57-2. Furthermore, Taveras helped Class Counsel prepare for two mediations. Taveras' regular contributions to this case were invaluable and no objections have been made to the proposed inventive payment.

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

Plaintiff's counsel respectfully request an award of attorneys' fees which will provide them one-third of the gross amount recovered under the settlement, i.e., $316,000. That amount includes costs paid by Plaintiff's counsel in this case, which include costs associated with conducting three depositions and two mediations, which total approximately $16,000. This amount does not include costs or fees for the administrative expenses, staff time, and attorneys' time dedicated to administration of the settlement, and performance of all of this work in-house, as opposed to through a third-party administrator, will save thousands of dollars of the class members' funds. Moreover, the proposed attorney's fees and costs are inclusive of all future expenses and time that Plaintiff's counsel will incur in the next several months administering the settlement fund, calculating settlement shares, taking care of all mailings and filings, responding to inquiries from class members, and issuing checks and necessary tax forms. Plaintiff'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. Additionally, this fee was agreed to by the parties.

To date, Class Counsel have spent approximately 614 hours litigating this case. See Decl. of Harold Lichten at ¶ 7(attached as Ex. F); Decl. of Richard Hayber at ¶ 8 (attached as Ex. G). In addition, Mr. Lichten's firm spent approximately over 2,500 hours litigating Martins v. 3PD in Massachusetts and Brandon v. 3PD in Illinois. See Lichten Decl. at ¶ 9. XPO acquired 3PD in August 2013, thus both Brandon and Martins were largely litigated against XPO and the cases all have nearly identical facts. Mr. Lichten's prior litigation against XPO led to a more efficient litigation in this case.

In addition, counsel has incurred approximately $16,400 in expenses, including fees associated with two full-day mediations. Lichten Decl, at ¶ 8; Hayber Decl. at ¶ 9.

The Second Circuit has endorsed the "percentage-of-the-fund" method for awarding attorney's fees in class action settlements. Goldberger v. Integrated Res., Inc., 209 F.3d 43, 50 (2d Cir. 2000). "Moreover, the trend in this Circuit is toward the percentage method…." Henry v. Little Mint, Inc., 2014 WL 2199427, at *12 (S.D.N.Y. May 23, 2014) (citing Wal–Mart Stores, Inc. v. Visa U.S.A., Inc., 396 F.3d 96, 121 (2d Cir.2005). Indeed, the percentage method "directly aligns the interests of the class and its counsel and provides a powerful incentive for the efficient prosecution and early resolution of litigation." Wal–Mart Stores, 396 F.3d at 121. This potentially contrasts with the lodestar method, which may "create [ ] an unanticipated disincentive to early settlements, tempt[ ] lawyers to run up their hours, and compel[ ] district courts to engage in a gimlet-eyed review of line-item fee audits." Id. Whereas, when using the percentage-of-the-fund method, "a lawyer is still free to be inefficient or to drag her feet in

pursuing settlement options—but, rather than being rewarded for this unproductive behavior, she will likely reduce her own return on hours expended." In re Thirteen Appeals, 56 F.3d at 307. Rather, the percentage-of-the-fund method is preferable because, since it "is result-oriented rather than process-oriented, it better approximates the workings of the marketplace." Id. (quoting In re Continental Ill. Sec. Litig., 962 F.2d 566, 572 (7th Cir.1992) ("We think that Judge Posner captured the essence of this point when he wrote that 'the market in fact pays not for the individual hours but for the ensemble of services rendered in a case of this character.'").

A "request for 33–1/3% of the Settlement Fund is typical in class action settlements in the Second Circuit." Macedonia Church v. Lancaster Hotel, LP, 2011 WL 2360138, at *14 (D. Conn. June 9, 2011) (approving 33-1/3 award of attorney's fees plus additional costs). This Court has routinely approved one-third fees in lawsuits alleging the misclassification of delivery drivers. See, e.g., Bokanoski v. LePage Bakeries Park St., LLC, No. 15-00021, ECF No. 131 (D. Conn. March 13, 2017) Awarding one-third fee to Mr. Lichten and Mr. Hayber); Bozak v. FedEx Ground Package Sys., Inc., 2014 WL 3778211, at *6 (D. Conn. July 31, 2014). Indeed, courts in other districts have routinely approved a one-third fee for counsel in similar cases where delivery drivers allege they were misclassified as independent contractors. See Brandon v. 3PD, Inc., No. 13-03745, ECF No. 151 (N.D. Ill. Jan. 26, 2016) (approving one-third fee for class counsel, including lead counsel Harold Lichten); Martins v. 3PD, Inc., No. 11-11313, ECF No. 209 (D. Mass. March 2, 2016) (same); Scovil v. FedEx Ground Package Sys., Inc., 2014 WL 1057079, at *5 (D. Me. Mar. 14, 2014) (approving one-third fee for attorney's fees and finding that "such a fee is consistent with wage-and-hour settlements"); Gennell v. FedEx Ground Package Sys., Inc., C.A. No. 05-00145-PB (D.N.H. filed Dec. 30, 2014), Docket No. 108 (granting one-third fee for counsel of FedEx delivery drivers bringing claims nearly identical to those here); Badia v.

Homedeliverylink, Inc., C.A. No. 12-6920 (D.N.J. Sept. 25, 2015) (Docket No. 99); Anderson v. Home Delivery America et al., C.A. No. 11-10313 (D. Mass. Dec. 17, 2014) (ECF No. 108) (same for drivers delivering Sears products); Mansingh v. Exel Direct, Inc., C.A. No. 12-11661 (D. Mass. May 7, 2014); Sanchez v. Lasership, Inc., C.A. No. 12-00246 (E.D. Va. April 8, 2014) (ECF No. 176); Sherman v. American Eagle Express, Inc., C.A. No. 09-575 (E.D. Pa. April 24, 2013) (ECF No. 292); Melzard v. ScriptFleet, Inc., Civil Action No. 1200733-B (Norfolk Super. Ct.).

When evaluating whether a proposed attorneys' fees award in the class action settlement context is reasonable, the Court considers the following Goldberger factors: "(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations." Goldberger, 209 F.3d at 50 (internal quotation marks omitted). A brief review of these factors demonstrates that the requested attorneys' fees and costs is reasonable.

1. Time and Labor Expended by Counsel.

As discussed above, Class Counsel spent considerable time and energy litigating this case, a total of approximately 614 hours. Mr. Lichten's law firm spent approximately 376 hours on the case, while Mr. Hayber's firm spent 238 hours. See Lichten Decl. ¶ 7; Hayber Decl. Class Counsel completed a significant amount of formal discovery – including the review of over 5,000 documents produced by XPO and the completion of three days of depositions. Class Counsel reviewed additional information obtained from informal discovery in preparation for two full-day mediations. Furthermore, Class Counsel engaged in substantial motion practice. Moreover, Mr. Lichten's firm logged over 2,500 litigating cases against XPO. Lichten Decl. at ¶ 9. This extensive prior experience with XPO was brought to bear in this lawsuit. Id.

Furthermore, Class Counsel will continue to expend time and resources overseeing the administration of the settlement even after this motion is ruled upon. See also deMunecas v. Bold Food, LLC, 2010 WL 3322580, at *10 (S.D.N.Y. Aug. 23, 2010) ("Class Counsel's fee award will not only compensate them for time and effort already expended, but for time that they will be required to spend administering the settlement going forward.").

Class Counsel's work engaging in both formal and informal discovery and in filing important motions in the case weigh in favor of the request one-third award. Kemp-DeLisser, 2016 WL 6542707, at *15 (holding that 450 hours expended by class counsel supported award of $800,000); In re Prudential Ins., 148 F.3d at 319. (finding that counsel's time spent filing motions, reviewing discovery, and taking depositions supported requested fee award).

2. Magnitude and Complexities of the Litigation.

As discussed above, courts have routinely recognized that wage and hour class actions are complex and generally required lengthy litigation. See, e.g., Johnson v. Brennan, 2011 WL 4357376, at *17 (S.D.N.Y. Sept. 16, 2011). Moreover, Plaintiff faces many complex hurdles if this litigation continues on class certification, liability and damages.

Plaintiff faces several obstacles in seeking summary judgment on the class' status as employees. First, XPO is likely to argue that the class' claims are preempted by the FAAAA, which will require substantial appellate litigation regardless of which party is successful. See Massachusetts Delivery Ass'n v. Coakley, 769 F.3d 11, 23 (1st Cir. 2014) (First Circuit vacated District Court ruling on FAAAA preemption on interlocutory appeal); Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016) (on interlocutory appeal, holding that FAAAA preempted Prong B of Massachusetts independent contractor test, but not Prongs A or C); Costello v. BeavEx, Inc., 810 F.3d 1045 (7th Cir.2016) (on interlocutory appeal holding that

the FAAAA does not preempt the Illinois Wage Payment Act); Lupian v. Cory Holdings LLC, No 17-8015 (3d Cir. June 15, 2017).

Moreover, even if Plaintiff is successful on preemption, there is very little caselaw applying the Connecticut ABC test to delivery drivers. The Connecticut Supreme Court's rulings on the ABC test would appear to support XPO's arguments on all three prongs. See Standard Oil of Connecticut, Inc., 320 Conn. at 632; Sw. Appraisal Grp., LLC, 324 Conn. at 844.

Finally, XPO will argue that individual arbitration clauses are a bar to class certification. The enforceability of such clauses has been the subject of extensive litigation throughout the country and is currently pending before the Supreme Court. See Epic Systems Corp. v. Lewis, No. 16-285; Ernst & Young LLP v. Morris, No. 16-300; NLRB v. Murphy Oil USA, Inc., No. 16-307.

3. Risk of the Litigation.

The Second Circuit recognizes that the risk of success is "perhaps the foremost factor" to be considered in determining a fee award in class actions. Goldberger, 209 F.3d at 54. When weighing this factor, the Court must keep in mind that "despite the most vigorous and competent of efforts, success is never guaranteed." Grinnell, 495 F.2d at 471. Indeed, Class Counsel has litigated this case on a purely contingent basis. Hall v. AT & T Mobility LLC, 2010 WL 4053547, at *20 (D.N.J. Oct. 13, 2010) (finding that the risk of nonpayment in most contingency work "was high"). Counsel advanced all of the costs of this litigation, totaling over $16,000, and bore the sole risk of an unsuccessful litigation. Moreover, as discussed above, the risk of no recovery was significant in this case as the Plaintiff faces significant hurdles on class certification, summary judgment, and calculating damages. Thus, this strongly supports granting fees based on a percentage of the fund. Kemp-DeLisser, 2016 WL 6542707, at *16; Hall, 2010 WL 4053547, at *20

4. Quality of Representation.

As discussed above, Class counsel is highly experienced in issues of worker misclassification, wage and hour class actions, and federal preemption of wage claims of workers in the transportation and delivery industries.[12] Based in large part on this experience, class counsel was able to obtain a result that will give class members an average recovery of over $9,000, covering a statutory period of less than four years. Indeed, based on the data produced by XPO, Class Counsel obtained relief covering approximately 22 percent of the total deductions they could have recovered in this action, and which is remarkably similar to the recoveries in Martins v. 3PD and Brandon v. 3PD, which received final approval from the District Courts in Illinois and Massachusetts.

Mr. Lichten has been lead or co-counsel in some of the most important cases in the United States regarding the misclassification of employees, particularly delivery drivers, as independent contractors. I have argued such cases before the Seventh, Third, Eleventh and First Circuit Courts of Appeal and the Supreme Courts of New Jersey and Massachusetts. See Costello v. BeavEx, Inc., 810 F.3d 1045 (7th Cir. 2016) (affirming denial of defendant's motion for summary judgment and vacating District Court's denial of class certification); Scantland v. Jeffry Knight, Inc., 721 F.3d 1308 (11th Cir.2013) (reversing grant of summary judgment to Defendants); Hargrove v. Sleepy's, LLC, 220 N.J. 289, 106 A.3d 449 (2015) (Landmark decision of the New Jersey Supreme Court declaring that ABC test be used when applying New Jersey wage laws); Schwann v. FedEx Ground Package Sys., Inc., 813 F.3d 429 (1st Cir. 2016) (reversing grant of summary judgment for defendants); Chambers v. RDI Logistics, Inc., 65 N.E.3d 1 (Mass. 2016) (successfully overturning a grant of summary judgment to defendants);

[12] Plaintiffs' counsel's experience and expertise in the employment law are discussed in greater detail in the Affidavits attached hereto as Exhibit 2 and Exhibit 7.

Somers v. Converged Access, Inc., 911 N.E.2d 739 (Mass.2009) (landmark decision of the Massachusetts Supreme Judicial Court on independent contractor misclassification).

In addition, Mr. Lichten also represented Fedex drivers who were classified as independent contractors in several states including Vermont, Connecticut, Massachusetts, Maine, Montana, New York and Pennsylvania. See, e.g., Scovil v. FedEx Ground Package Sys., Inc., 886 F. Supp. 2d 45, 47 (D. Me. 2012); Padovano v. FedEx Ground Package Sys., Inc., 2016 WL 7056574, at *1 (W.D.N.Y. Dec. 5, 2016).

Furthermore, Mr. Lichten recently represented delivery drivers who brought similar claims that they were misclassified as independent contractors under Connecticut. Ahlquist v. Bimbo Foods Bakeries Distribution, Inc., No. 12-1272 (D. Conn); Bokanoski v. LePage Bakeries Park St. LLC, No. 15-00021 (D. Conn). Both cases received final class action settlement approval.

Furthermore, attorney Richard Hayber and attorneys at the Hayber Law Firm also have significant experience representing workers in wage and hour class and collective actions under Connecticut's wage laws and the FLSA. See, e.g., Bozak v. FedEx Ground Package Sys., Inc., 2014 WL 3778211, at *7 (D. Conn. July 31, 2014); Zaniewski v. PRRC Inc., 848 F. Supp. 2d 213, 230 (D. Conn. 2012); Scott v. Aetna Services, Inc., 3:99-CV-46; Gregory v. Home Depot, US.A. Inc., 3:0l-CV-372 (D. Conn.); Neary v. Metropolitan Property and Casualty Company, No. 3:06-CV-0536 (D. Conn.); Lumia v. Hanover Insurance Company, No. 3:07-CV-1094 (D. Conn.); Sancomb v. Motherhood Maternity, No. 3 :05-CV-71 (D. Conn.); Holbrook v. Smith & Hawken, LTD, 3:06-CV-1232 (D. Conn.); Cook v. Family Dollar Stores of Connecticut, Inc., UWY-CV-11-6011946S (D. Conn.), Kiefer v. Moran Foods, Inc., 3:12 cv 00756

(WGY) (D.Conn.); Morrison v. Ocean State Jobbers, Inc., 3:09CV1285 (D. Conn.); Monk v. Elite Limousine Service,Inc., No. 3:13-01880 (D. Conn.); Zouanat v. Serline Transportation, LLC, No. 3: 13-1886 (D. Conn.), Ouellette v. The Fresh Market, Inc., No. 3: 13 CV 1027 (D. Conn.); Lassen v. Hoyt Livery, Inc., 3: 13 CV 01529 (D. Conn.). As this Court has previously observed, the "Hayber Law Firm, LLC, are experienced employment lawyers with good reputations among the employment law bar. They have prosecuted and favorably settled many employment law class actions, including wage and hour class actions." Aros v. United Rentals, Inc., 2012 WL 3060470, at *6 (D. Conn. July 26, 2012).

5. Requested Fee in Relation To Settlement.

The requested one-third fee is reasonable in relation to the settlement. "[T]he percentage used in calculating any given fee award must follow a sliding-scale and must bear an inverse relationship to the amount of the settlement." In re Indep. Energy Holdings PLC, No. 00 CIV. 6689 (SAS), 2003 WL 22244676, at *6 (S.D.N.Y. Sept. 29, 2003). Courts in the Second Circuit have routinely granted requests for one-third of the fund (33 1/3 %) in cases with settlement funds similar to and larger than this case. Johnson, 2011 WL 4357376, at *19 (collecting cases); see also Macedonia Church v. Lancaster Hotel, LP, 2011 WL 2360138, at *14 (D. Conn. June 9, 2011) (approving 33-1/3 award of attorney's fees plus additional costs).

6. Public Policy Considerations.

Public policy considerations also support the proposed fee award. This Court has previously held that public policy favors a common fund attorneys' fee award in class wage and hour lawsuits. Aros v. United Rentals, Inc., 2012 WL 3060470, at *5 (D. Conn. July 26, 2012) (citing Reyes v. Altamarea Grp., LLC, 2011 WL 4599822, at * 7 (S.D.N.Y. Aug. 16, 2011)); Bozak v. FedEx Ground Package Sys., Inc., 2014 WL 3778211, at *6 (D. Conn. July 31, 2014).

Indeed, "[w]here relatively small claims can only be prosecuted through aggregate litigation, and the law relies on prosecution by 'private attorneys general,' attorneys who fill that role must be adequately compensated for their efforts." Id. (quoting Johnson, 2011 WL 4357376, at * 13).

Awarding a "percentage of the fund" fee of one-third recognizes and encourages the vital role that contingency arrangements play in making legal counsel available to individuals who cannot afford hourly fees. Unlike traditional firms that receive hourly fees on a monthly basis, plaintiffs' attorneys who take cases on contingency often spend years litigating cases (typically while incurring significant out-of-pocket expenses for experts, transcripts, document production, and so forth), without ever receiving any ongoing payment for their work. Sometimes fees and expenses are recovered; other times, despite hundreds of hours of work, nothing is recovered. This type of practice is viable only if attorneys, having received nothing for their work on some cases, receive more in other cases than they would if they charged hourly fees. See, e.g., Hensley, 461 U.S. at 448 (noting that "[a]ttorneys who take cases on contingency, thus deferring payment of their fees until the case has ended and taking upon themselves the risk that they will receive no payment at all, generally receive far more in winning cases than they would if they charged an hourly rate"). For that reason, courts have routinely approved one-third fee awards in class settlements, recognizing "the attorneys' fees requested [are] entirely contingent upon success. Proposed Class Counsel risk[s] time and effort and advance[s] costs and expenses, with no ultimate guarantee of compensation." Macedonia Church, 2011 WL 2360138, at *14.

Furthermore, by permitting clients to obtain attorneys without having to pay hourly fees, this system provides critical access to the courts for people who otherwise would not be able to find competent counsel to represent them. That access is particularly important for the effective enforcement of public protection statutes, such as the wage laws at issue in this case. It is well

recognized that "private suits provide a significant supplement to the limited resources available to [government enforcement agencies] for enforcing [public protection] laws and deterring violations." Reiter v. Sonotone Corp., 442 U.S. 330, 344 (1979) (addressing anti-trust laws).

7. Lodestar Cross-Check.

Courts often compare a proposed fee award in a class action to the lodestar, or a "lodestar cross-check" as a final "sanity check to ensure that an otherwise reasonable percentage fee would not lead to a windfall." Colgate-Palmolive, 36 F. Supp. 3d at 353.

In total, Plaintiffs' counsel has dedicated 614 hours to this litigation. This time has been spent conducting discovery, reviewing XPO's substantial document production, taking depositions for three days, drafting a number of briefs and motions, undertaking classwide damages analysis, and preparing for and attending two full-day mediation sessions. Mr. Lichten's firm worked a total of 376 hours on this case, and based on a conservative billing rate of $575 per hour for Mr. Lichten and $350 per hour for his associate, Mr. Lichten's firm has a combined lodestar of $141,805. See Lichten Decl. at ¶ 7.

Mr. Hayber's firm has logged 238.80 hours on this case. Based on a conservative blended rate of $500 for Mr. Hayber and his associates, his firm has a combined lodestar of $80,880. Hayber Decl. ¶ 8.

Courts in the Second Circuit routinely perform a "lodestar crosscheck" to "serve as a rough indicator of the propriety of a fee request." Davis v. J.P. Morgan Chase & Co., 827 F. Supp. 2d 172, 185 (W.D.N.Y. 2011). "The crosscheck is performed by dividing the proposed fee award by the lodestar calculation, resulting in a lodestar multiplier." Id. at 184 (approving multiplier of 5.2 in employment class action). Here, the lodestar multiplier is **1.41**. "Courts regularly award lodestar multipliers from two to six times lodestar." Johnson, 2011 WL

4357376, at *20 (collecting cases); LePage Bakeries, No. 15-0021, ECF No. 131 (D.Conn. March 13, 2017) (approving attorney's fees with multiplier of 1.5); In re Puerto Rican Cabotage Antitrust Litig., 815 F. Supp. 2d at 465 (holding that multiplier of 1.08 was "low" and was "certainly within the reasonable range"); Badia v. Homedeliverylink, C.A. No. 12-6920, ECF No. 99 (granting one-third award of attorney's fees with multiplier of 1.59); In re Relafen, 231 F.R.D. at 82 ("A multiplier of 2.02 is appropriate."); In re Cendant Corp., 243 F.3d at 742 (holding that a lodestar multiplier of three would be reasonable and appropriate). Thus, the multiplier in this case is more favorable than the range approved by courts in the Second Circuit.

VIII. CONCLUSION

Plaintiffs request that the Court enter the Order attached hereto as Exhibit H.

Dated: June 27, 2017.

Respectfully submitted,

Plaintiffs,

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By their Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2017, a copy of this document was served by electronic filing on all counsel of record.

/s/ Harold L. Lichten
Harold L. Lichten

CERTIFICATE OF CONFERENCE

I hereby certify that on June 26, 2017, I conferred with counsel for Defendant XPO Last Mile, Inc. regarding the relief sought in this motion and that counsel assented the motion.

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