UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

In re FEDEX GROUND PACKAGE SYSTEM, INC., EMPLOYMENT PRACTICES LITIGATION	Case No. 3:05-MD-527-RM (MDL 1700) Judge Robert L. Miller Jr.
THIS DOCUMENT RELATES TO: *Raymond Tierney, et al. v. FedEx Ground Package System, Inc.*, Civil No. 3:05-cv-00599-RLM-CAN (RI)	

MEMORANDUM OF LAW IN SUPPORT OF RHODE ISLAND PLAINTIFFS' MOTION FOR ATTORNEY'S FEES AND COSTS AND APPROVAL OF SERVICE AWARDS TO NAMED PLAINTIFFS

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INTRODUCTION

After eleven years of vigorous litigation, Plaintiffs' Counsel has obtained an excellent result for the class in this case: a $1,600,000 non-reversionary common fund settlement on behalf of approximately 120 current and former drivers for FedEx Ground Package System, Inc., and its division FedEx Home Delivery (collectively "FXG"). The settlement was achieved in the face of a staunch defense mounted by a motivated Defendant and real litigation risks, including a loss on summary judgment that Plaintiffs hoped to reverse on appeal and, if successful, numerous other challenges if the litigation continued to trial. To compensate them for the remarkable result achieved, Plaintiffs' Counsel seek an award of attorney's fees and costs in the amount of $480,000, representing thirty percent (30%) of the common fund.

The requested fee and expense award is well supported by Seventh Circuit precedent, under which class action counsel are generally awarded at least 30% of the common fund they helped to create to reimburse them for their efforts. The Circuit's preference for awarding a percentage-of-the-fund fee in common fund cases is grounded in the view that it is likely to yield the closest approximation of the market rate for counsel's fees by aligning the interests of class counsel and their clients to obtain the largest potential recovery for each in the shortest amount of time. *See In re Synthroid Mktg. Litig*., 325 F.3d 974, 979-80 (7th Cir. 2003) ("*Synthroid II*"); *Matter of Continental Ill. Secs. Litig*., 962 F.2d 566, 572 (7th Cir. 1992). The requested fee and expense award in this case truly represents what a willing buyer and seller in the market would pay for the services provided in this complex litigation case, as shown not only in the retainer agreements executed between plaintiffs and their counsel, but also in fee awards approved by courts in the Seventh Circuit in complex employment and other class action cases. An award of 30% of the common fund also represents appropriate market compensation to counsel in light of the significant risks presented at the outset of the case and throughout the litigation - any one of

which could have precluded any recovery to the class and a corresponding fee – as well as the quality and amount of work performed over eleven years on a pure contingency with no guarantee of payment.

Equally important, the settlement accomplished by Plaintiffs' Counsel is excellent given the substantial risks faced when the case was first filed and the many obstacles Plaintiffs have had to overcome thereafter. The settlement sum represents almost 39% of the maximum achievable recovery to the class *if* they were to overturn the adverse judgment and prevail at trial; it is *non-reversionary*; and class members will not have to file claim forms or overcome any other barriers to receive their settlement payments. The settlement was reached while Plaintiffs' appeal from final judgment entered against them on all claims was pending before the Seventh Circuit Court of Appeals. Plaintiffs' Counsel positioned this case for settlement by, *inter alia*, successfully overturning the case-ending summary judgment entered in favor of FXG in the related and lead MDL case, *Craig v. FedEx Ground Package System, Inc.*, and prevailing in both the Seventh and Ninth Circuit Courts, who directed that summary judgment be entered in favor of Plaintiffs on the most important issue in the case—the Plaintiff drivers' employment status—based on the undisputed factual record developed by Plaintiffs' Counsel during the MDL trial court proceedings.

Having created this common fund through tenacious litigation efforts and a strategic approach to settlement negotiations, Plaintiffs' Counsel respectfully request the Court to enter an order awarding them 30% of the common fund they created (in the amount of $480,000) and also to approve $15,000 in incentive awards to each of the class representatives for their extraordinary service to the class. Each participated fully in the case over the many years it has been pending. Without their efforts there would be no case and no recovery for the class.

SUMMARY OF THE LITIGATION AND RESULT ACHIEVED

I. PLAINTIFFS' COUNSEL DEDICATED ENORMOUS RESOURCES DURING ELEVEN YEARS OF LITIGATION TO BRING THIS CASE TO A SUCCESSFUL CONCLUSION

The history of this litigation is well-known to the Court and described in detail in Plaintiffs' motion for preliminary approval of the class settlement. *See* MDL Doc. Nos. 2692 and 2693. In brief, the *Tierney* complaint was filed on May 19, 2005 on behalf of a statewide class of FXG pickup and delivery drivers. Declaration of Co-Lead Counsel ("Co-Lead Counsel Decl.") ¶ 5. It asserted novel common law claims for rescission and unjust enrichment, and injunctive relief. These claims were all premised on the allegation that FXG had unlawfully classified Plaintiffs and the class as independent contractors rather than employees, unjustly enriching FXG. *Id.* On August 28, 2005, over Plaintiffs' objections, the Judicial Panel on Multidistrict Litigation granted FXG's second motion to consolidate this action – and a number of others – into an MDL docket and transferred it pursuant to 28 U.S.C. §1407 to this Court for coordinated pretrial proceedings. *See In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 381 F. Supp. 2d 1380 (J.P.M.L. 2005); Co-Lead Counsel Decl., ¶ 6.

Plaintiffs' Counsel have prosecuted these cases for more than eleven years. During the proceedings, Plaintiffs' Counsel from many law firms—under the direction of the Court-appointed Co-Lead Counsel—collectively devoted more than 149,000 attorney hours through the present (representing a collective lodestar fee of $74,540,000) and risked more than $7,713,000 million dollars in litigation expenses. *See* Co-Lead Counsel Decl. ¶¶ 20-22 and Exs. 5-6.[1] The focus of the pretrial work in the MDL – from start to finish – was the employment status of the

[1] The Co-Lead Counsel's time through the present has been self-audited and reduced by approximately 10% after the exercise of billing judgment to eliminate time that could not have been charged to a fee paying client. Co-Lead Counsel Decl., ¶ 26. A complete audit of time records of all counsel will be performed as part of the fee allocation process to follow final approval of the settlements and related fee and expense motions. *Id.*

drivers under the law of each state. Consequently, the vast majority of work was common, necessary, and of equal benefit to each of the consolidated cases as FXG's liability to the class in each case turned on the common threshold factual issue of the drivers' employment status under that state's law.

Plaintiffs' Counsel engaged in extensive and intensive fact and expert discovery pertaining to class certification and merits issues; they briefed and filed dozens of routine administrative, discovery and other non-dispositive motions; FXG produced more than 3.5 million documents responsive to hundreds of document requests; Plaintiffs deposed more than 100 FXG executive, corporate, managerial, and operational personnel (including managerial employees covering the region and district which included Rhode Island terminals); named plaintiffs in every case were required to respond to comprehensive document requests, requests for admissions, and written interrogatories, and all were deposed; and the parties collectively designated ten principal class certification and merits experts, each of whom produced multiple reports and were deposed, some more than once. Co-Lead Counsel Decl., ¶ 8.

Plaintiffs' Counsel marshaled the facts from this massive discovery to develop a comprehensive record which formed the basis of omnibus factual and legal presentations proffered to support motion for class certification and summary judgment in each case, including this one. Plaintiffs' Counsel submitted additional briefing on class certification and summary judgment dealing with Rhode Island-specific facts, claims and defenses. Co-Lead Counsel Decl., ¶ 9. Plaintiffs' Counsel succeeded in certifying a broad class of Rhode Island FXG drivers (after multiple rounds of briefing) and putative class members were provided notice of the action and the opportunity opt-out of the case. Following class certification, the parties filed cross motions for summary judgment focusing on the threshold issue of the class members'

employment status. The Court granted FXG's summary judgment motion in this case and denied the Plaintiffs' motion for summary adjudication, concluding that the Rhode Island drivers were independent contractors under Rhode Island's employment status test. Final judgment was entered in FXG's favor on April 6, 2011. MDL Doc. No. 2542.

The Rhode Island Plaintiffs appealed from the adverse judgments entered for FXG and against them to the Seventh Circuit Court of Appeals. FXG noticed a conditional cross-appeal seeking reversal of the class certification. The Seventh Circuit requested briefing in the *de facto* lead case, *Craig v. FedEx Ground Package System, Inc.*, U.S. Court of Appeals for the Seventh Circuit, Case No. 10-3115, and stayed briefing in all of the other cases pending a ruling in *Craig*. Co-Lead Counsel Decl., ¶ 12. Class Counsel devoted significant additional time and resources to bringing the *Craig* appeal to a successful conclusion. Perhaps most important, they made the strategic decision to seek appellate rulings reversing both the district court's order granting summary judgment to FXG *and* its order denying summary adjudication to Plaintiffs on the employment status issue based on the record of undisputed facts they developed in the MDL. *Id.*

Following full briefing and oral argument, the Seventh Circuit panel referred the *Craig* case to the Kansas Supreme Court to decide the employment status issue on certified questions. *See Craig v. FedEx Ground Package Sys., Inc.*, 686 F.3d 423 (7th Cir. 2012); Co-Lead Counsel Decl., ¶ 13. Relying on the comprehensive factual record developed by Plaintiffs' Counsel in support of their affirmative motion for summary adjudication, the Kansas Supreme Court unanimously agreed with Plaintiffs that the Kansas drivers were employees as a matter of law. *See Craig v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66, 92 (Kan. 2014). The Seventh Circuit issued its final Opinion and Order in the *Craig* case on July 8, 2015, reversing the summary judgment rulings entered by this Court and remanding the case with instructions to

enter judgment for Plaintiffs that they were employees as matter of Kansas law. 7th Cir. Doc. No. 88. The mandate issued on July 30, 2015. 7th Cir. Doc. No. 92.

By July 2015, when the parties entered into the negotiations that led to the settlement of the Rhode Island case, the appeal had been stayed for more than four years but was far from complete, with a final resolution years away: even if Plaintiffs were 100% successful on appeal, the case would be remanded for further proceedings – including additional discovery and motion practice and eventually a trial on the remaining complex and untested liability and damage issues. Co-Lead Counsel Decl., ¶ 14.

II. THE CLASS SETTLEMENT IS THE PRODUCT OF AN INTENSIVE MEDIATION EFFORT AND PROVIDES AN EXCELLENT RECOVERY TO THE CLASS

In July 2015, more than ten years after the case was filed, the parties first explored settlement of the remaining cases pending before the Seventh Circuit, including Rhode Island. As part of the mediation process, FXG produced voluminous and comprehensive class-wide damages data spanning the entire liability period including, *inter alia*, FXG's scanner and settlement data relevant to every aspect of the damage claims asserted. Co-Lead Counsel Decl., ¶ 15. Plaintiffs engaged a well-qualified forensic accounting expert who spent hundreds of hours analyzing these records on a state-by-state basis and preparing comprehensive damage exposure models and risk analyses to guide the negotiations. *Id.* The parties exchanged substantive mediation briefs addressing Rhode Island's liability standards, damages regimes, and the yet-unaddressed defenses FXG intended to assert regarding the continued viability of the class certification, Plaintiffs' claims on the merits, and the scope and amount of damages, in addition to other potential litigation risks facing both sides in the absence of settlement.[2] *Id.* ¶¶ 15-16.

[2] *See* Rhode Island Plaintiffs' Memorandum of Law in Support of Unopposed Motion for Preliminary Approval of Proposed Rhode Island Class Action Settlement. MDL Doc. No. 2661

The parties mediated the Rhode Island action on January 15, 2016, separately from all other actions in the MDL. *Id.* ¶ 17. Counsel vigorously debated the issues of employment classification and the scope of damages in the context of the mediated negotiation. Ultimately, the parties were able to agree upon terms to resolve this action. *Id.*

The $1,600,000 settlement provides substantial and meaningful relief to members of the Rhode Island class and represents nearly 39% of the maximum achievable recovery at trial. *See* MDL Doc. No. 2661 at 10. Assuming the instant request for attorney's fees and costs, and class representative incentive awards is granted, class members will receive settlement payments from a net settlement fund of $919,000, ranging between $250 and $20,332 and an average award of $7,352. Co-Lead Counsel Decl., ¶ 18. Given the procedural posture of the case, and continued risks facing the class if the litigation were to continue, this is an excellent resolution of the Rhode Island class action.

III. COUNSEL UNDERTOOK THE SUBSTANTIAL RISK OF REPRESENTING THE PLAINTIFF CLASS WITH THE EXPECTATION THAT, IF SUCCESSFUL, THEY WOULD BE COMPENSATED A PERCENTAGE OF THE COMMON FUND IN THIS CONTINGENT FEE LITIGATION

Plaintiffs' Counsel undertook representation of the *Tierney* Plaintiffs on a wholly-contingent basis recognizing that the litigation would be well-lawyered and well-funded, hard fought, expensive and time-consuming, and that success was far from certain with any resolution of the case likely years away. From the outset, the high risks of filing and prosecuting the Rhode Island action demanded highly skilled counsel who expected to be fairly compensated if they achieved results for the Rhode Island drivers. Co-Lead Counsel Decl., ¶¶ 39-40.

The *Tierney* action, like others in the MDL docket, was conceived by Plaintiffs' Counsel *sui generis* without the benefit of a well-developed body of law challenging conduct that often

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at 7-10 (providing additional risk factors based on new legal analyses of damages and defenses, and on new expert opinion).

(and predictably) results in class settlements in other types of class action cases. Co-Lead Counsel Decl., ¶ 41. The notions of a certified class of misclassified delivery drivers and recovery of damages under untested and novel common law damages theories under Rhode Island law presented high risk propositions for Plaintiffs' Counsel. *Id.* The threshold and most important issue, *i.e.* the Plaintiff drivers' employment status, threatened the continued viability of FXG's core business model. Success depended on the ability of Plaintiffs' Counsel to certify a statewide class including drivers who delivered packages for FXG on a single route on their own as well as drivers who operated multiple routes and engaged secondary drivers and helpers, as well as persons who had signed FXG contracts as individuals, and those who had signed on in the name of corporate entities. Inclusion of both single and multiple route drivers in a single class presented important challenges under Rule 23. *Id.* Plaintiffs' common law theories for rescission of the contract and unjust enrichment were unprecedented: to succeed, Plaintiffs would need to establish that FXG's classification of its delivery drivers as "independent contractors" is improper under Rhode Island law and that the Plaintiff drivers would have been paid more as employees than what FXG paid them as independent contractors. *Id.*

Wage and hour cases like this one, which present a wholesale challenge to a defendant's core business model, are viewed in the Plaintiffs' bar as "undesirable." Co-Lead Counsel Decl., ¶ 40. Regardless of the size of the potential recovery, settlement before trial is very difficult to achieve and the plaintiffs, who are working people, are unable to afford the costs of litigation. *Id.* Plaintiffs' Counsel anticipated—correctly—that FXG would insist on taking this case to a final judgment on the merits, and that it would be unlikely to engage in meaningful settlement dialogue until then. Co-Lead Counsel Decl., ¶ 41.

Nonetheless, and despite the risk of a long delay in payment or no payment at all for their

efforts, the Co-Lead and PSC firms actively sought to be appointed by the Court to represent the Plaintiff classes knowing that a leadership role in these cases would require a substantial financial outlay for expenses, in addition to a significant expenditure of time devoted to this contingent case rather than performing other work during that time. Co-Lead Counsel Decl., ¶ 42. Numerous of the originating counsel also volunteered to and did invest significant time, money and other resources to prosecuting the Plaintiffs claims. *Id.* All Plaintiffs' Counsel undertook representation of the Plaintiffs in the constituent MDL cases with the reasonable expectation that if a settlement was reached, they would be compensated for their work as a percentage of the common fund created by their efforts in proportion to the results achieved which is the prevailing market rate for complex contingent fee litigation of this kind. *Id.* ¶ 43.

ARGUMENT

I. PLAINTIFFS' COUNSEL'S FEE REQUEST OF THIRTY PERCENT OF THE COMMON FUND IS REASONABLE AND APPROPRIATE UNDER FACTS AND CIRCUMSTANCES OF THIS ACTION

The Supreme Court has recognized that under the common fund doctrine, a reasonable fee may be based "on a percentage of the fund bestowed on the class." *Blum v. Stenson*, 465 U.S. 886, 900 n.16 (1984). As the Seventh Circuit has explained: "a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *see also Florin v. Nationsbank of Georgia, N.A.*, 34 F.3d 560, 563 (7th Cir. 1994). The common fund doctrine is based on the notion that all "those who have benefited from litigation should share its costs." *Skelton v. General Motors Corp.*, 860 F.2d 250, 252 (7th Cir. 1988); *see also Synthroid II*, 325 F.3d at 977 (each class member "must bear their portion of the legal expense").

A. The Percentage-Of-The-Fund Approach Is The Preferred Method For Awarding Fees From A Common Fund Recovery In Class Action Cases In The Seventh Circuit.

In common fund cases, unlike fee-shifting cases, courts have discretion to use one of two methods in awarding attorney's fees and costs to counsel from a common fund: (1) percentage of the fund; or (2) lodestar plus a risk multiplier. *See, e.g., Americana Art China Co., Inc. v. Foxfire Printing & Packaging, Inc.*, 743 F.3d 243, 247 (7th Cir. 2014). But "[t]he approach favored in the Seventh Circuit is to compute attorney's fees as a percentage of the benefit conferred upon the class," *see In re Ky. Grilled Chicken Coupon Mktg. & Sales Practices Litig.*, 280 F.R.D. 364, 379 (N.D. Ill. 2011), both because it is "more likely to yield an accurate approximation of the market rate," *In re Capital One TCPA Litig.*, 80 F. Supp. 3d 781, 795 (N.D. Ill. 2015), and because of "its relative simplicity of administration." *Florin*, 34 F.3d at 566. *See also Beesley v. Int'l Paper Co.*, No. 06-cv-703, 2014 WL 375432, at *2 (S.D. Ill. Jan. 31, 2014) ("When determining a reasonable fee, the Seventh Circuit Court of Appeals uses the percentage basis rather than a lodestar or other basis.") (citation omitted).

There is no question that the percentage method should be used here to set counsel's fee in this contingent fee litigation: this is because a percentage of the common fund, by any measure, accurately mirrors the private marketplace for the amount of a negotiated contingent fee arrangement in this case. As the Seventh Circuit has put it, "[w]hen the 'prevailing' method of compensating lawyers for 'similar services' is the contingent fee, then the contingent fee *is* the market rate." *Kirchoff v. Flynn*, 786 F.2d 320, 324 (7th Cir. 1986) (original emphasis); *see also Swedish Hosp. Corp. v. Shalala*, 1 F.3d 1261, 1269 (D.C. Cir. 1993) ("[A] percentage-of-the-fund approach more accurately reflects the economics of litigation practice.").

B. A Fee Award Of 30% Of The Common Fund Represents A Lesser Fee Than Many Representative Plaintiffs And Their Counsel Actually Bargained For In Contingency Compensation.

Under the Seventh Circuit's market approach, "[t]he first benchmark is actual agreements." *In re Synthroid Mktg. Litig.*, 264 F.3d 712, 719 (7th Cir. 2001) ("*Synthroid I*"); *see also Pavlik v. FDIC*, No. 10 C 816, 2011 WL 5184445, at *11 (N.D. Ill. Nov. 1, 2011) ("Based on the actual contingency fee agreements Plaintiffs' Counsel signed with the two named plaintiffs, as well as the market data for fees in cases of this size, the Court finds that Plaintiffs' Counsel are entitled to attorney's fees in the amount of 33 1/3% of the common fund."); *Teamsters Local Union No. 604 v. Inter-Rail Transport, Inc.*, No. 02-cv-1109, 2004 WL 768658, at *2 (S.D. Ill. Mar. 19, 2004) (acknowledging that the "first" benchmark "is the actual agreements negotiated by the named Plaintiffs and the Class Counsel prior to commencement of the litigation" and awarding 33 1/3% of the common fund). Here, Plaintiffs' actual *ex ante* agreements provide for compensation as a percentage of any recovery in an amount to be determined by the Court. Because Plaintiffs chose to leave the percentage of the common fund attorney's fee up to the court, the contracts are silent as to the market rate. Thus, the best evidence as to the market rate is the fee negotiated by the plaintiffs in the parallel cases against FXG. Those agreements are uniformly between 33% and 40% of the common fund and thus reflect the market rate for this litigation. Co-Lead Counsel Decl., ¶ 39. *See also* Declaration of Brian Fitzpatrick in Support of Plaintiffs' Motion for Attorneys' Fees and Costs ("Fitzpatrick Decl.") ¶ 15.

C. A Fee Award Of 30% Of The Common Fund Also Reflects The Private Market Rate For Similar Contingency Fee Litigation.

This Circuit has recognized that because fees in class actions are usually determined after the fact, there is often no precise *ex ante* "market" comparison, but "a court can learn about *similar* bargains." *Synthroid I*, 264 F.3d at 719 (original emphasis). Thus, another way to measure of the market value of counsel's service to the class is to examine fee awards in similar

cases. *Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005). And, numerous courts in the Seventh Circuit have observed: "Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, 'the normal rate of compensation in the market' is '33.33% of the common fund recovered.'" *Will v. Gen. Dynamics Corp.*, Civ. No. 06-0698-GPM, 2010 WL 4818174, at *2 (S.D. Ill. Nov. 22, 2010); *see also Kirchoff, supra*, 786 F.2d at 324. This is true in labor and employment cases, *see e.g. Burkholder v. City of Ft. Wayne*, 750 F. Supp. 2d 990, 997 (N.D. Ind. 2010) (collecting employment cases and approving award of 33.3% of common fund),[3] as well as other types of complex class actions. *City of Greenville v. Syngenta Crop Protection, Inc.*, 904 F. Supp. 2d 902, 909 (S.D. Ill. 2012) (noting that "a one-third contingency fee is standard" and collecting cases and awarding one-third of $30 million class recovery).[4]

[3] *See Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 636 (7th Cir. 2011) (noting evidence that "the market rate for ERISA class action attorney's fees is a contingency fee between 25% and 33%"); *McCue v. MB Fin., Inc.*, No. 15 cv 988, 2015 WL 4522564, *3 (N.D. Ill. July 23, 2015) (one-third of common fund, *plus* expenses, awarded to class counsel in labor and employment settlement). *See also Mansfield, et al. v. Air Line Pilots Ass'n In'tl, et al.*, No. 1:06-cv-06869, slip op. at 7 (N.D. Ill. Dec. 14, 2009) (awarding 35% of $44 million settlement fund for class of senior pilots alleging union discriminated in favor of junior pilots) Ex. 9 to Co-Lead Counsel Decl.; *Smith, et al. v. Nike Retail Servs., Inc.*, No. 1:03-cv-09110, slip op. at 3 (N.D. Ill. Oct. 2, 2007) (granting Class Counsel's Petition for Attorneys' Fees, Oct. 1, 2007, ECF No. 184 (attached as Ex. 10 to Co-Lead Counsel Decl.) and awarding 32.37% of $7.6 million settlement fund in race discrimination class action)).

[4] *See also Gaskill v. Gordon*, 160 F.3d 361, 363 (7th Cir. 1998) (affirming 38% of class common fund as attorney fee award where "[t]he typical contingent fee [contract] is between 33 and 40 percent..."); *Kirchoff*, 786 F.3d at 323 ("40% is the customary fee in tort litigation"); *Heekin v. Anthem, Inc.*, No. 05-cv-1908, 2012 WL 5878032, at *5 (S.D. Ind. Nov. 20, 2012) (awarding 33.3% percent of $90 million fund); *Will*, 2010 WL 4818174, at *2 ("Where the market for legal services in a class action is only for contingency fee agreements, and there is a substantial risk of nonpayment for the attorneys, the normal rate of compensation in the market is 33.33% of the common fund recovered."); *Schulte v. Fifth Third Bank*, 805 F. Supp. 2d 560, 598-99 (N.D. Ill. 2011) (33.3% award of fees from settlement fund is within reasonable range); *see also, e.g.*, *Taubenfeld*, 415 F.3d at 598-600 (considering a list of Northern District of Illinois cases awarding 30-39%); *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694,

The contingency fee contracts large-stakes plaintiffs sign in similar litigation support the request here. The most famous study of contingency cases, by Professor Herbert M. Kritzer, includes labor and employment cases and reached the same conclusion as all other contingency studies: i.e. that the most common fee percentage is 33%, but many agreements call for more than that depending on how far along the case is when it is resolved. Fitzpatrick Decl., ¶ 16 (citing study finding over 60% of contingency agreements set fees at a flat 33.3% and another third or so set fees at variable rates, usually escalating up to as high as 50% as the case went on).

Over forty percent of the district courts in the Seventh Circuit have concluded that the market rate is at or above 30% for contingent fee cases. Fitzpatrick Decl., ¶ 17. The average and median fee percentages in labor and employment cases in the Seventh Circuit were 34.3% and 33.3%, respectively. *Id.* These percentages are exclusive of expenses that class counsel sought separately – unlike the request by Plaintiffs' Counsel here. *Id.*

Plaintiffs' request for a 30% award of fees and costs from the class recovery is below the one-third benchmark standard for contingency fee litigation across the spectrum of complex class cases, and there is no unusual feature of this case that would take it outside the norm. As discussed *supra*, Plaintiffs' Counsel undertook representation of the Plaintiff Class and prosecuted the case on a pure contingency, assuming the substantial risk that they would recover nothing for their efforts. Co-Lead Counsel Decl., ¶ 39. They did so to the exclusion of other fee generating work. *Id.* ¶ 44. The successful prosecution of this case necessarily required Plaintiffs to overcome significant legal and factual obstacles *both* with respect to the threshold issue of employment classification, novel liability and damages issues, and was far riskier than an

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2001 WL 1568856, at *4 (N.D. Ill. Dec. 10, 2001) (awarding one-third of a $14 million settlement fund).

ordinary commercial dispute, in which damages are usually known and there is no class certification threshold to surmount. Where compensation at or above the 33% benchmark would be more than justified in this case, Plaintiffs' Counsel respectfully submit that the requested award of 30% of the common fund is reasonable, appropriate and entitled to Court approval.

D. A 30% Common Fund Fee Represents The Hypothetical *Ex Ante* Fee A Paying Client Would Have Agreed To At The Outset Under The *Synthroid* Factors.

Recognizing that, in reality, "it is impossible to know *ex post* exactly what terms would have resulted from arm's-length bargaining *ex ante*," the Seventh Circuit has instructed the lower courts to "do their best to recreate the market by considering factors such as actual fee contracts that were privately negotiated for similar litigation, information from other cases, and data from class-counsel auctions." *Taubenfeld*, 415 F.3d at 599. In *Synthroid I*, *supra*, the Circuit identified four factors to be considered in recreating the market, including "the quality of its performance, in part on the amount of work necessary to resolve the litigation, and in part on the stakes of the case.'" *Sutton v. Bernard*, 504 F.3d 688, 693 (7th Cir. 2007) (quoting *Synthroid I*, 264 F.3d at 721). These factors all favor the instant fee request.

1. Class Counsel Assumed Significant Risks In Bringing This Case With No Guarantee Of Payment

Courts have placed significant emphasis on the importance of risk as a factor in determining market rates. In *Silverman v. Motorola Solutions, Inc.*, the Seventh Circuit reasoned that because "[c]ontingent fees compensate lawyers for the risk of nonpayment," the probability of success at the outset of the litigation is of great importance in setting counsel's compensation. 739 F.3d 956, 958 (7th Cir. 2013). Thus, the "greater the risk of walking away empty-handed, the higher the award must be to attract competent and energetic counsel." *Id.* (citing *Kirchoff*, 786 F.2d at 320).

As noted above, the high risks undertaken by counsel in pursuing this case were real and meaningful. Counsel accepted representation of the Rhode Island class in this matter solely on a contingent basis, with no guarantee of payment unless the litigation was successfully resolved by settlement or judgment. From the outset, Counsel appreciated the significant risks in front of them, not only because the case posed a head-on challenge to the legality of FXG's fundamental business model to operate its package delivery business using independent contractor drivers instead of employees, but also because the liability and damage theories advanced were novel. Plaintiffs' Counsel also knew they faced a highly motivated and well-funded opponent in FXG, and that the case would be hard-fought by the highest quality counsel. Counsel expected the litigation to be protracted, including a trial and appeals, as had been the case in the California *Estrada* class action; that expectation was met.

Counsel also understood that because the threshold employment status question turned on a fact-intensive, multi-factor test, they would be required to conduct comprehensive discovery into every aspect of FXG's business in order to develop the common evidence necessary to support both class certification and a class-wide merits determination. As noted above, this risk generally presented by independent contractor litigation generally was magnified in this case by Plaintiffs' Counsel's strategic choice to seek certification of the broadest possible class of drivers comprised of both single work-area (SWA) and multiple work-area (MWA) drivers, and also to include within the class drivers who signed the FXG independent contractor agreement both as individuals and as incorporated entities. Co-Lead Counsel Decl., ¶ 41. In the predecessor *Estrada* case, the certified class of California drivers found to be employees was limited to SWA drivers; MWA drivers were excluded from the certified class by the Court, and the lone MWA driver in the case was found by the trial judge to be a *bona fide* independent contractor. *Id.*

Plaintiffs also faced risks in seeking a favorable ruling on the drivers' employment status.

Plaintiffs' Counsel also recognized the risks of the legal theories they were advancing. Plaintiffs' Counsel advanced a common law theory of rescission/unjust enrichment, to which FXG had strong defenses that could have eliminated recovery under that theory altogether. Co-Lead Counsel Decl., ¶ 41.

The known risks undertaken by counsel at the start of the case were amplified when, over Plaintiffs' vigorous objections, the JPML granted FXG's motion to transfer *Tierney* to an MDL docket. The transfer to the MDL docket substantially increased the risk of a longer than usual delay in the final resolution of each one of the constituent cases. While this Court adopted an aggressive case management plan, the key deadlines were predictably extended both because discovery disputes arose and because new cases continued to be "tagged along" into the MDL docket. Moreover, while the cases were consolidated for discovery and other pretrial purposes, each case retained its separate identity. As a consequence, while all the cases presented a common fact question, the threshold employment status issue had to be analyzed and decided separately under the law of each state. It took the Court a full year to resolve the initial class certification motions, and more than two years to rule on the parties' cross-motions for summary judgment. That these cases have taken nearly four times as long as the average length to settlement in class action cases of three years was predictable given the stakes in this case and would have been considered *ex ante* to demand a higher contingency fee than in the typical class action. Fitzpatrick Decl., ¶ 19.

The fact that FXG's business model operated at a top-down, national level, increased the workload and the litigation risks exponentially. FXG's nationwide, centralized business practices required expanded discovery beyond FXG's statewide operations in Rhode Island.

Counsel thus focused their discovery efforts on FXG's corporate decision-makers and decision-making at the highest levels, while also developing evidence at the lower levels of management covering each state case in the constituent actions, including Rhode Island. *See* Co-Lead Counsel Decl., ¶ 8.

Counsel deployed enormous effort and a high degree of skill to develop a comprehensive omnibus record of undisputed facts, derived entirely from the testimony of FXG witnesses and documents and without any reliance on anecdotal evidence or plaintiff testimony, and then to marshal those facts into a concise record to support the dozens of class certification and summary judgment filings. While Plaintiffs' affirmative summary judgment strategy failed in the trial court, it won the day in both the Seventh Circuit (in its adoption of the Kansas Supreme Court's answers to the certified questions) and the Ninth Circuit, whose opinions overturning the district court's summary judgment orders were grounded entirely in the omnibus undisputed factual record developed by Plaintiffs' Counsel.

Finally, the risks presented in the case were not academic but were fully realized: at the conclusion of five years of bruising trial court proceedings, Plaintiffs *lost* the case before ever reaching the merits of the underlying claims. Counsel persevered and overcame this potentially case-ending obstacle by successfully appealing the adverse judgments entered for FXG in the related MDL cases which ultimately brought FXG to the settlement table even though the judgment entered in its favor remained intact.

2. Plaintiffs' Counsel Provided Quality Legal Services To Produce An Excellent Result For The Class

The risks undertaken by counsel have gone hand in glove with the quality of legal services rendered by counsel and the amount of work and resources involved. As discussed above, the factual issues were voluminous and complicated, the legal issues were novel and

untested, and the litigation has been ongoing for more than eleven years. Plaintiffs' Counsel applied their skill and experience to developing the factual record to support their contention that FXG misclassified its delivery drivers as independent contractors, depriving them of the benefits and protections accorded to employees under Rhode Island law, and unjustly enriching FXG. Plaintiffs' Counsel have prosecuted all phases of the case thoroughly and tenaciously, including pursuing a risky summary judgment strategy which ultimately positioned them to negotiate an excellent class-wide settlement *even though* Plaintiffs' appeal from the adverse judgment was stayed and could conceivably have been lost. That FXG was willing to pay $1,600,000 to resolve the class claim under these circumstances is a testament to Plaintiffs' Counsel's extraordinary dedication, skill and experience.

3. Plaintiffs' Counsel Devoted Vast Time And Resources To The Case

As the court is aware from overseeing the case, Plaintiffs' Counsel, worked extremely hard and intensively during all phases of the litigation. At the outset, Plaintiffs' Counsel expected that considerable time and resources would be necessary to prosecute this case to a successful conclusion, and this expectation was borne out: to date, Plaintiffs' Counsel have devoted more than 149,000 attorney and professional hours to the successful prosecution of the case. Co-Lead Counsel Decl., ¶ 20. Plaintiffs' Counsel rose to every challenge presented by FXG in its staunch defense of the claims.

Moreover, Plaintiffs' Counsel will continue to invest future time and effort managing this settlement, for no additional compensation. The future time and effort to finish the litigation, all of which is without cost to the Class, will include monitoring the administration of the Settlement Fund, maintaining and updating the class website, communicating with Class members to answer and resolve questions, representing Class member interests in the event of unforeseen circumstances that require Court resolution and/or approval and defending the class

settlement in the event of an appeal.

The time and resources invested by counsel these last eleven years fully support requested fee: it is simply unlikely that any class member would have bargained to pay a fee of *less* than 30% of their recovery to compensate counsel to represent them in this class action case which was expected to and did require enormous skill, effort, and financial resources to reach a successful conclusion.

4. The Stakes In The Case Were Extremely High

The stakes in this case were enormous. While FXG is a large and wealthy company, the claims and the prospect of a trial presented it with the significant risk of a multimillion dollar liability and, more importantly, posed a direct and dangerous threat to the continued viability of its profitable and preferred nationwide business model. FXG was strongly motivated to resist this litigation, and it did so. Likewise, the stakes for Plaintiffs were also very high. Each member of the class was deprived of the full measure of their earned wages, and other important benefits and legal protections enjoyed by employees under law.

Counsel also had a great deal at stake. By taking this case, Plaintiffs' Counsel took on the significant risk of non-payment, the burden of advancing litigation expenses, and the substantial "opportunity cost" of having to turn down other potentially lucrative work. Co-Lead Counsel Decl., ¶¶ 42-44. These large risks strongly motivated Plaintiffs' Counsel to perform work of the highest quality and in appropriate quantity, in order to fulfill their fiduciary commitment to the class. Defense counsel also had a great deal at stake because a high-profile loss would affect their business. This compelled Defense counsel to litigate vigorously, which in turn increased the time and energy required by Plaintiffs' Counsel to prosecute the case to a successful conclusion.

Class-action cases such as this one are high-stakes propositions for each interested party: the defendants, the class members, and the lawyers. In this case, the high stakes justify the award

of a 30% fee to properly reflect the degree of difficulty presented. *See* Fitzpatrick Decl., ¶ 20 ("Indeed, not only were the *ex ante* risks in these cases very substantial—as evidenced by the fact that class counsel *lost* all these cases on summary judgment on the independent contractor-employee question before reversing those rulings on appeal—but, even now, there are *still* substantial risks in *every* case. In my opinion, these cases were and continue to be much riskier than the typical class action.").

E. A Lodestar Cross-Check – While Unnecessary – Supports Counsel's Requested Fee Of 30% Of The Common Fund.

As noted above, the Seventh Circuit has stated that attorney's fees in this type of class case are to be awarded as a percentage of the gross recovery. The Court may properly end its analysis at this point and is not even required to consider lodestar. *Williams*, 658 F.3d at 636 ("consideration of a lodestar check is not an issue of required methodology"); *Cook v. Niedert*, 142 F.3d 1004, 1013 (7th Cir. 1998) ("[W]e have never ordered the district judge to ensure that the lodestar result mimics that of the percentage approach"); *Skelton*, 860 F.2d at 252-53 (citing with approval *Report of the Third Circuit Task Force, Court Awarded Attorney fees*, 108 F.R.D. 237, 258 (1986), which characterized lodestar approach as "cumbersome, enervating, and often surrealist"); *George v. Kraft Foods Global, Inc.*, No. 08-3799, slip op. at 5 (N.D. Ill. June 26, 2012) ("The use of a lodestar cross-check has fallen into disfavor.") Ex. 11; *See also Third Circuit Task Force on the Selection of Class Counsel*, 208 F.R.D. 340, 370 (2002) (criticizing lodestar cross-check process as illusory and wasteful).

Indeed, numerous district courts, applying Seventh Circuit precedent, have similarly characterized the lodestar cross-check as "irrelevant," "unnecessary, arbitrary and potentially counterproductive," and "truly unjustified" because it runs counter to how parties in the market would contract. *See, e.g., Schulte*, 805 F. Supp. 2d at 598, n. 27 (recognizing irrelevance of

lodestar crosscheck); *Will*, 2010 WL 4818174, at *3 ("The use of a lodestar cross-check in a common fund case is unnecessary, arbitrary, and potentially counterproductive."); *In re Comdisco Sec. Litig.*, 150 F. Supp. 2d 943, 948 n. 10 (N.D. Ill. 2001) ("To view the matter through the lens of free market principles, [lodestar analysis] (with or without a multiplier) is truly unjustified as a matter of logical analysis."); *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d at 573 (noting it is easier to establish market based contingency fee percentages than to "hassle over every item or category of hours.)

Even so, Counsel's request for an award of 30% of the common fund in this case easily passes a lodestar cross-check test. The "lodestar" fee is derived by multiplying the attorney and professional hours devoted to a case by the timekeepers' individual billing rates. The lodestar should be calculated using hourly rates that are "the prevailing market rates in the relevant community, " *Blum*, 465 U.S. at 895, and courts typically apply each attorney's *current* rates for all hours of work in order to account for the delay in payment resulting from the years it took to litigate the case. *See Missouri v. Jenkins*, 491 U.S. 274, 282-84 (1989) (court should account for delay in payment by applying current rather than historic hourly rates); *In re Washington Public Power Supply System Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994). For purposes of the "cross-check" the lodestar is then adjusted by applying a risk multiplier to account for the result achieved, the quality of representation, the complexity and magnitude of the litigation, and the risk plaintiff's counsel assumes in recovering nothing. *Florin*, 34 F.3d at 562; *Cook*, 142 F.3d at 1015; *Skelton*, 860 F.2d at 255; *Harman v. Lyphomed, Inc.*, 945 F.2d 969, 975-76 (7th Cir. 1991) (trial court committed legal error by failing to award a risk multiplier).

Here, as noted above, Plaintiffs' Counsel have so far devoted more than 149,000 attorney and professional hours to this litigation, representing an unadjusted collective lodestar fee of

$74,540,000. Co-Lead Counsel Decl., ¶ 20. They have also advanced more than $7,713,000 in litigation expenses. *Id.* ¶ 21. The vast majority of counsel's time was devoted to litigating the issue common to all of the constituent cases, i.e. drivers' employment status, and would have been necessary to prosecute the employment law claims here asserted even if those claims had been litigated in a stand-alone statewide class action. Assuming the Court approves the common fund fee requests made by counsel in each one of the twenty proposed class settlements, the total fee recovery will represent no multiplier of the remaining MDL lodestar fee and will not result in any double recovery to Plaintiffs' Counsel. See Co-Lead Counsel Decl., ¶ 23[5] and Ex. 7.[6] In *Blum v. Stenson*, *supra*, the Supreme Court aptly observed: "Lawyers operating in the marketplace can be expected to charge a higher hourly rate when their compensation is contingent on success than when they will be promptly paid, irrespective of whether they win or lose." *Blum*, 465 U.S. at 903. Thus, a 30% common fund recovery leaves *no* room for doubt that the instant request should be approved; there can be no question that it mimics the low end of the market for the services provided and the excellent result for achieved during the eleven-year litigation.

II. SERVICE AWARDS TO THE CLASS REPRESENTATIVES SHOULD BE APPROVED

[5] To date, approximately $6.3 million has been returned to the MDL litigation fund from settlements achieved in remanded cases to offset the approximately $74.5 million in attorneys' fees and $7,713,000 in costs incurred by Plaintiffs' Counsel through August 2016. It is entirely uncertain whether any additional funds will be returned from the remaining remanded cases, for example, the California settlement and fee award is currently on appeal in the Ninth Circuit. However, even assuming, *arguendo*, that another $20 million is eventually returned to the fund from the class settlements achieved in the remaining remanded cases, the requested fee recoveries in the constituent cases would represent a lodestar risk multiplier of approximately 1.3. Co-Lead Counsel Decl., ¶ 23.

[6] By separate motion, Co-Lead Counsel will propose an allocation process, similar to what has been set forth in the settlement agreements and prior submissions to the Court, to occur following the Court's decision on this fee petition.

Service awards compensating named plaintiffs for work done on behalf of the class are routinely awarded. Such awards encourage individual plaintiffs to undertake the responsibility of representative lawsuits. *See Cook*, 142 F.3d at 1016 (recognizing that "because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit"); *Synthroid I*, 264 F.3d at 722 ("Incentive awards are justified when necessary to induce individuals to become named representatives."); *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, No. 07 C 2898, 2012 WL 651727, at *17 (N.D. Ill. Feb. 28, 2012) (awarding seven plaintiffs $25,000 each).

The requested service awards of $15,000 for each Class Representative are reasonable. The Class Representatives contributed substantially to this litigation, including gathering documents, answering extensive interrogatories, preparing and sitting for depositions, communicating with Plaintiffs' Counsel and Class Members, staying up to date on the progress of the litigation, and serving as the public face of the Class with the risks inherent in acting as a named plaintiff against a current or former employer. Throughout this multi-year litigation, the Named Plaintiffs stayed abreast of developments in the case and kept other class members informed. The Named Plaintiffs helped Counsel prepare for the mediations, and were available by phone during the mediation, providing a valuable perspective to the settlement process. Co-Lead Counsel Decl., ¶ 48. Moreover, the modest amount requested here, $15,000 for each Class Representative (totaling $135,000) is in line with or less than awards approved by federal courts in the Seventh Circuit and elsewhere. *See, e.g., Cook*, 142 F.3d at 1016 (affirming $25,000 incentive award to plaintiff); *In re Southwest Airlines Voucher Litig.*, No. 11 C 8176, 2013 WL 4510197, *11 (N.D. Ill., Aug. 26, 2013) (awarding $15,000 each to two named plaintiffs); *Heekin*, 2012 WL 5878032, at *1 (approving $25,000 incentive award to lead class plaintiff over

objection); *Will*, 2010 WL 4818174, at *4 (awarding $25,000 each to three named plaintiffs).

CONCLUSION

The task of the Court in setting an award of attorney's fees in a class action common fund case is to emulate the market for contingent fee. Plaintiffs' Counsel respectfully request the Court to enter an order awarding them 30% in attorney's fees and expenses from the common fund of $1,600,000 created for the Rhode Island Class. The 30% fee requested here is well within the range of fees that likely would have been negotiated in the marketplace, and is appropriate considering the scope and complexity of this particular suit and the exceptional result achieved. In addition, Plaintiffs' Counsel request service payments of $15,000 for each of the nine Named Plaintiffs who actively represented the Class during this case.

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Respectfully submitted,

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