

- 4) corporate business records that FXG collects and retains regarding all class members in accordance with FXG policies and procedures;
- 5) corporate communications among and from high-level managers to terminal managers and pickup and delivery drivers regarding the policies, procedures and practices applicable to class members as a whole;
- 6) sworn admissions by FXG's officers, directors, and managers regarding the Operating Agreement, policies, procedures and practices applicable to class members as a whole; and
- 7) expert testimony regarding the OA, policies and procedures and practices applicable to class members as a whole.

That these categories of evidence comprise the type of common proof properly relied upon at summary judgment and trial in class action cases is confirmed by this Court's reference to such types of proof in the March 25 Order, where the court mentioned, inter alia, proof of "common practices and procedures standard to all" plaintiffs (p. 50), "centralized practices and procedures that are systemically applicable to all [] Plaintiffs" (p. 45), "corporate documents" (p. 102) and "centralized practices and procedures that are systematically applicable to all" (p. 149-150).

For their motions for summary adjudication of employment status in all cases where class actions were certified, Plaintiffs do not intent to offer individualized proof of the "experiences of individual drivers" through plaintiff and/or class member declarations or deposition testimony. As the Court indicated, however, such evidence might become necessary to "fight fire with fire" in opposition to FedEx's motion or in rebuttal to FedEx's opposition to Plaintiffs' motions. Plaintiffs believe it is unnecessary for the Court to consider evidence of individual plaintiffs'

subjective belief that they were treated as employees in order to determine their employment classification.

In the event that the employment status issue is not resolved by summary adjudication, at trial, Plaintiffs anticipate that the vast documentary record of FXG OA, policies and procedures and corporate records along with the testimony of its officers, directors and managers will be offered as overwhelming common proof that FXG has reserved to itself the right to control all aspects of the method, manner and means of performance used by pickup and delivery drivers in providing service to FXG's customers. At the same time, without knowing whether these trials will be bench or jury trials, Plaintiffs cannot fully develop or finalize their trial strategy or anticipate all witnesses they will call if the cases proceed to trial.

That Plaintiffs will be able to prove employment status at trial by way of common proof is amply demonstrated by both the trial court and appellate court's determinations in *Estrada v. FedEx Ground*, 154 Cal. App. 4th 1 (2007) expressly rejecting FXG's assertion that Plaintiffs failed to provide common proof of employment status.

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Respectfully submitted,
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