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PRELIMINARY STATEMENT

By their application for a TRO, the named plaintiffs in the *Alexander* case, the overwhelming majority of whom (14 of 18) long ago ended their relationship with defendant FedEx Ground Package System, Inc. (“FXG” or the “Company”), seek to enjoin the Company from taking lawful steps—endorsed by the California judiciary—to reduce its exposure to legal claims and substantial financial liabilities in California stemming from the use of Single Work Area (“SWA”) independent contractors. The Company’s business goal is to transition to an all Multiple-Work Area (“MWA”) independent contractor network in the state—and plaintiffs’ request that the Court interfere with implementation of that goal should be summarily rejected.

The Company’s steps, explained below, are a response to recent changes in the legal and regulatory environment in California. On August 13, the state’s Court of Appeal held that the 207 SWAs at issue in that case should be treated as employees (retrospectively only) for purposes of an expense reimbursement statute. *See Estrada v. FXG Package System, Inc.*, 154 Cal. App. 4th 1 (2007) (“*Estrada III*”). A few weeks later, based on *Estrada III*, the California Unemployment Insurance Appeals Board made a similar finding for its purposes.

Notably, the *Estrada* trial court expressly found that using an independent contractor-based business model was a “legitimate and acceptable” method of doing business, that FXG’s MWAs were “true independent contractors,” and that FXG was entitled to the benefit of that “bright line” distinction (between MWAs and SWAs) in running its business. The trial court specifically noted that FXG has the right to revise its California independent contractor model or to move to an employee-based model, but that the decision is FXG’s to make—not the Court’s and certainly not plaintiffs’. Those conclusions were neither challenged nor revisited on appeal. Although FXG has asked the California Supreme Court to review *Estrada III*, there is significant

uncertainty over use of SWA contractors in that state. Any prudent business would take steps to reduce its liability exposure under such circumstances. That is all FXG has done.

Plaintiffs' TRO application attacks FXG's "California Transition" plan and its nationwide "Enhanced Primary Plus" plan, which were announced on September 20. On that day, FXG stated that, starting with contracts that expire on their own terms on October 26, the Company will exercise its express right not to renew any more California SWA contracts. Additional incentives are being offered on a voluntary basis to assist California contractors in moving from SWA to MWA status, or in exiting from their SWA businesses, or in otherwise restructuring them. The consideration for those incentives is a narrow release limited to claims arising from the non-renewal of SWA contracts and their transition decision. The release does not include other claims a contractor may have against the Company, such as the claims asserted in any of these MDL actions or *Estrada*.

The same day, the Company also announced the Enhanced Primary Plus program as further incentive to MWAs to expand their businesses. There too, no participating contractor is asked to waive any claims involved in this litigation. FXG made all of this clear in its information packets and separately reaffirmed it to plaintiffs' counsel three days before they sought their TRO.

Plaintiffs' application seeks to force FXG to continue to do business under a model that their complaint asserts is unlawful and harmful to them. They assert that FXG is prohibited from moving to an all-MWA model in California, even though the *Estrada* court expressly said that the independent contractor model is a "legitimate and acceptable mode of commerce" and that MWAs are "true independent contractors." Plaintiffs say that the Company's California Transition and Enhanced Primary Plus programs are an act of "retaliation" against the putative

Alexander class or the *Estrada* plaintiffs for asserting their rights, and that the programs are intended to “chill” the participation by putative class members in the other MDL proceedings. None of these assertions is based on any facts. Plaintiffs’ showing is based entirely on innuendo and speculation, buttressed only with adjective-laden accusations. As explained below, plaintiffs are not entitled to any of the relief they seek:

First, there is no need for immediate relief or for any injunctive relief. The first non-renewals will not occur until late October and, as plaintiffs’ papers acknowledge, this Court could set aside the parties’ settlements or award damages and reinstatement if it were to determine later that they were improperly obtained.

Second, plaintiffs are not entitled to injunctive relief on behalf of putative class members prior to obtaining certification of their class. Plaintiffs have not even filed a motion to certify a retaliation class, and no discovery or other briefing has occurred.

Third, plaintiffs have not shown that they are likely to succeed on the merits of their retaliation claim. There is no evidence to support it, and in the face of evidence that FXG is making these changes for legitimate business reasons in response to legal and regulatory developments in a manner explicitly approved by the *Estrada* trial court, plaintiffs have not and can not show that those reasons are pretextual.

Fourth, the balance of hardships weighs entirely against the TRO because of the irreparable disruption to the Company’s business and other harm it would inflict on FXG, on non-party independent contractors who want to grow their businesses or move on (nearly fifty percent of whom have already signed paperwork to participate), and on the millions of customers around the country who rely on the FXG network to ship their packages. These plaintiffs could

not possibly make whole those substantial injuries, should any relief ultimately be determined to have been granted in error.

For these reasons, and those explained below, the Court should deny plaintiffs' request for a TRO and for any further preliminary injunctive proceedings.

STATEMENT OF FACTS

On September 20, 2007, FXG announced that it was moving to an all-MWA business model in California. (Declaration of Michael Mannion ¶ 10.) To make that transition, FXG notified all existing SWA contractors in the state that, beginning October 26, 2007, it would exercise its right not to renew their Operating Agreements. (*Id.* ¶¶ 10-13.) FXG did not terminate any existing contracts, which remain in effect. (*Id.* ¶ 13.) This decision applies equally to all California SWA contractors, regardless of whether they have been a party to any litigation. (*Id.* ¶ 12.)

Along with the non-renewal announcement, FXG announced the availability of voluntary transition incentives for SWA contractors in the state. The incentives—which are described fully in the accompanying Mannion Declaration at paragraphs 14-17 and in the materials that were distributed by FXG with its announcement of the California Transition—provide financial and other assistance to any SWA contractor wishing to become an MWA and, alternatively, to assist any SWA contractors who may wish to leave the business and pursue other opportunities. (*Id.* ¶ 13, Exh. B.) The incentives range from \$25,000 to just over \$81,000, depending on a SWA contractor's annual revenues from the route. (*Id.* ¶ 15.) A California SWA contractor wishing to receive such payments must sign a Contractor Conversion and Release Agreement (“Release Agreement”). (*Id.* ¶ 18.) The Release Agreement on its face (quoted *infra* p. 17) is limited to claims related to the California Transition, *e.g.*, claims pertaining to the non-renewal of the Operating Agreement. (*Id.* ¶ 18, Exh. C at 2.)

To be clear, no contractor is under any obligation to accept any of the transition incentives offered by FXG or to sign any release that is part of the California Transition. (*Id.* ¶ 20.) Any California contractor is free to reject the incentives and to choose instead to continue operating under the existing terms of his or her Operating Agreement. (*Id.*) FXG has extensively communicated the voluntary nature of the program and confirmed the limited extent of the Release Agreement. As the materials distributed to contractors emphasize: “No contractor is required to sign the release of claims documents. Whatever a contractor chooses, nothing in today’s announcement affects any current contract with FedEx Ground, which remains in effect. . . . In exchange for the transition incentives, FedEx Ground is asking California SWAs for a release of certain potential claims related to this transition. The release is not intended to settle all claims you may have against FedEx Ground, and is limited to potential claims concerning FedEx Ground’s announcement of this transition incentive; the termination, non-renewal or assignment of the Contractor’s Operating Agreement; and any sale assignment, loss or other disposition of the Contractor’s primary service area.” (*Id.* ¶ 13, Exh. B at 4. (emphasis added).)

On the same day, FXG announced a nationwide improvement to its existing Primary Plus program (“Enhanced Primary Plus”), which provides increased financial payments to contractors operating multiple routes. (*Id.* ¶ 13, Exh. B at 2.) These increased payments make more attractive the prospect of being an MWA. (*Id.*) To receive Enhanced Primary Plus payments, however, a contractor needs to execute a “Compliance-Disclosure Addendum.” (*Id.* ¶ 23.) Although FXG has always required its contractors to comply with applicable laws and regulations, the Addendum clarifies that an MWA contractor must validate his or her compliance by providing documentation to the Company. (*Id.* ¶ 23, Exh. D.) The indemnification provision

(quoted *infra* p. 18) is limited to claims arising from the contractors’ relationships with *their* employees – nowhere does it contain a release of claims that the contractors themselves may have against the Company. Moreover, the indemnification provision is nothing new to the contractors—they had already committed to that obligation in Section 3.5 of the current Operating Agreement. (*Id.* ¶ 3, Exh. A at 11-13.)

Existing MWA contractors in California and elsewhere are not required to accept the Enhanced Primary Plus payments or to sign the Compliance-Disclosure Addendum and may continue to work—without any penalty—under their existing contracts. The materials distributed to contractors emphasize that “Enhanced Primary Plus is a voluntary program for existing Multiple Work Area contractors, not an automatic one.” (*Id.* ¶ 13, Exh. B at 11 (emphasis added).) FXG does, however, require that new MWA contractors in California entering into new contracts with FXG sign the Compliance-Disclosure Addendum. (*Id.*)

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO DEMONSTRATE THE NEED FOR AN *EX PARTE* TEMPORARY RESTRAINING ORDER

Because an *ex parte* TRO requires the Court to take action on an extremely truncated record with limited opposition, it is an “extraordinary and drastic” remedy that should not issue except in “extremely limited” circumstances. *See Am. Can Co. v. Mansukhani*, 742 F.2d 314, 321 (7th Cir. 1984); *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). As the Supreme Court has cautioned, “our entire jurisprudence runs counter to the notion of court action taken before reasonable notice and an opportunity to be heard has been granted to both sides of a dispute.” *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 438-39 (1974). Plaintiffs’ request is particularly troubling because it asks the Court to derail a state-wide business transition that has been going on for two weeks. Having spent the last few weeks

preparing their papers and gathering declarations, plaintiffs ask the Court to act immediately, without affording FXG a full opportunity to respond. Plaintiffs' delay suggests the lack of any true emergency and basic fairness requires that judicial action of the magnitude plaintiffs seek not be taken precipitously or on an incomplete record. *See Montano v. Eagle III Diversified*, No. EDCV 010848, 2002 WL 1352080 (C.D. Cal. Jan. 10, 2002) (denial based on delay).

There is no reason why plaintiffs need a Temporary Restraining Order. Nothing is going to happen in the next three weeks that requires intervening judicial action. The first contract affected by FXG's non-renewal announcement does not expire until October 26, 2007. (Mannion Decl. ¶ 10.) And even if plaintiffs are right (they are not) that contractors are signing "unlawful" releases and indemnification agreements, plaintiffs admit this Court has the authority to void the releases should plaintiffs later prevail. (Pls.' Br. at 19-21.) *See Mansukhani*, 742 F.2d at 321-22 (no *ex parte* relief unless "there is no reasonable alternative"). As for plaintiffs' argument that contractors will be "chilled" from participating in the MDL lawsuits (Pls.' Br. 3), nothing is happening in the MDL right now that requires action by any contractor. This is nothing like *Segar v. Civiletti*, 516 F. Supp. 314 (D.D.C. 1981), where a class had been certified, class members were required to come forward with proof of individual damages, and the failure to do so because of any "chilling" effect would lead to an irreparable loss of claims. *Id.* at 320.

II. PLAINTIFFS CANNOT PREVAIL ON THEIR WIDE-RANGING REQUEST FOR RELIEF

Even though FXG has not had a chance to develop a record in opposition to plaintiffs' request for a preliminary injunction, it is clear—based on this record alone—that plaintiffs are not entitled to any injunction. The standards for a TRO are the same as the standard for a preliminary injunction. A motion for entry of a preliminary injunction asks the Court to conduct a four-part analysis. *Mil-Mar Show Co. Inc. v. Shonac Corp.*, 75 F.3d 1153, 1156 (7th Cir. 1996).

“The district court begins by considering whether the moving party has demonstrated: 1) a reasonable likelihood of success on the merits, and 2) no adequate remedy at law and irreparable harm if the relief is denied.” *Id.* “If the moving party clears these hurdles, the court must then consider: 3) the irreparable harm the non-moving party will suffer if the injunction is granted balanced against the irreparable harm the moving party will suffer if the injunction is denied, and 4) the public interest, i.e., the effect granting or denying the injunction will have on non-parties.” *Id.* In the Seventh Circuit, courts are encouraged to follow a sliding scale in applying these factors. Where, as here, the less a movant shows a likelihood of success on the merits, the more he will have to show in the way of irreparable harm. *Vencor, Inc. v. Webb*, 33 F.3d 840, 845 (7th Cir. 1994).

A. There Is No Authority For The Class-Wide Injunction Plaintiffs Seek—Especially When No Class Has Been Certified.

Since the September 20, 2007 announcement (that is, as of October 5, 2007), approximately 48% of the SWA contractors in California (357 of the 739 SWAs) have signed the Release Agreement and have begun the process of transitioning their businesses by either acquiring additional routes, selling their businesses, or restructuring their operations. Nationally, 681 MWA contractors have signed the Compliance-Disclosure Addendum in return for the Enhanced Primary Plus payments. None of these contractors is a party to this lawsuit. (Mannion Decl. ¶ 26.) Yet, plaintiffs seek to undo FXG’s agreements with these non-parties and to block the thousands of other contractors now deciding whether to accept FXG’s offer to improve their agreements.

“[W]ithout a properly certified class, a court cannot grant relief on a class-wide basis.” *Zepeda v. U.S. INS*, 753 F.2d 719, 728 n.1 (9th Cir. 1983); *Wagner v. Coler*, 700 F. Supp. 935, 947-48 (N.D. Ill. 1988); *Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir. 1974). This is true even

when the injunction is being sought for the benefit of putative class members. *See Saleh v. Titan Corp.*, 353 F. Supp. 2d 1087, 1091 (S.D. Cal. 2004). The reason for this prohibition is obvious. Unless the Court is satisfied that plaintiffs' counsel can speak for every contractor in California and throughout the nation, and that each contractor's circumstances and interests are sufficiently aligned that it makes sense to interfere in the contractors' business decisions and relations without notice or a chance to object, injunctive relief on a class-wide basis is improper. *See Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). As one Seventh Circuit panel put it bluntly, "Why else bother with class actions?" *McKenzie v. City of Chicago*, 118 F.3d 552, 555 (7th Cir. 1997) (denying injunction prior to class certification).¹

The injunction plaintiffs seek is doubly problematic because they ask the Court to force FXG and contractors to remain in agreements that are either due to expire or that they have

¹ Plaintiffs cite not a single case in which a court granted a preliminary injunction or temporary restraining order affecting the substantive rights of putative members of an uncertified class. In *In re Int'l. House of Pancakes Franchise Litig.*, MDL Docket No. 77, 972 WL 519 (W.D. Mo. Jan. 4, 1972), which plaintiffs cite as "particularly instructive," the district court had certified a class before plaintiffs moved for a preliminary injunction. *Id.* at *1. Although plaintiffs seek injunctive relief pursuant to Rule 65, they argue that their request is "strengthened" due to the Court's "supervisory role" under Rule 23(d). (Pls.' Br. 19-21.) Rule 23(d), however, is limited to regulating communications about the litigation. *Gulf Oil Co. v. Bernard*, 425 U.S. 89, 100 (1981); *Williams v. Chartwell Fin. Servs.*, 204 F.3d 748, 759 (7th Cir. 2000). Rule 23(d) authorizes federal courts to limit a defendant's communications with putative class members only if there is a "clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties." *Gulf Oil Co.*, 425 U.S. at 101. It does not extend to the substantive rights of putative class members, their business dealings, or to communications not concerning the litigation. Even if the Court recast plaintiffs' motion as one seeking a Rule 23(d) protective order, there is no record of any abuse. In fact, in its September 20 communications to California contractors, FXG reminded them of the pending litigation and provided lead counsel's contact information. Absent a clear record of actual abuse, which does not exist here, a defendant's contact with putative class members cannot be limited. *See Jenifer v. Del. Solid Waste Authority*, 1999 WL 117762 (D. Del. Feb. 25, 1999); *Wiginton v. Ellis*, 2003 WL 22232907 (N.D. Ill. Sept. 16, 2003) (plaintiffs' assertions are "too speculative" to justify restrictions on communications).

already agreed to amend or terminate. This goes far beyond the typical prohibitory injunction, but mandates that FXG and non-party contractors abide by agreements that the two parties no longer both agree to. Plaintiffs cannot, in the guise of “preserving the status quo,” require FXG to extend contracts beyond their terms “for the duration of the litigation.” *House of Materials, Inc. v. Simplicity Pattern Co., Inc.*, 298 F.2d 867, 871-72 (2d Cir. 1962). Mandatory injunctions are “cautiously viewed and sparingly issued,” *Jordan v. Wolke*, 593 F.2d 772, 774 (7th Cir. 1978), and “interlocutory mandatory injunctions are even more rarely issued,” *W.A. Mack, Inc. v. General Motors Corp.*, 260 F.2d 886, 890 (7th Cir. 1958).

B. Plaintiffs Cannot Demonstrate a Likelihood of Success on the Merits.

1. FXG’s Decision Not to Renew California SWA Contracts, and Transition to an MWA Work Force, is Not Retaliatory.

The decision to move to an exclusively MWA contractor work force in California was a practical business decision reflecting FXG’s legitimate desire to preserve and strengthen its independent contractor model in the state. (Mannion Decl. ¶¶ 10-13.) Recent changes in the legal and regulatory environment in California—including the California Court of Appeal’s *Estrada III* decision and a recent decision issued by the California Unemployment Insurance Appeals Board (which relied on *Estrada III*)—have created significant uncertainty and risk associated with the continued use of an SWA model in that state. (*Id.* ¶ 8.)

In the face of this uncertainty, FXG decided, as matter of its business judgment, to pursue an all-MWA contractor work force in California. (*Id.* ¶ 10-13.) The Company’s decision was largely informed by the findings of the trial court in the underlying *Estrada* case. (Declaration of Robert M. Schwartz ¶ 2, Exh. A (attaching *Estrada v. FXG Package Sys., Inc.*, No. BC 210130, slip op. 3:20-22 (Cal. Super. Ct. July 26, 2004), *aff’d in relevant part, remanded in part*, 154 Cal. App. 4th 1 (2007) (hereinafter, “*Estrada I*”). While the trial court found that the SWAs within

the class were employees, it also found that MWAs were “true independent contractors” because of their “opportunity to hire drivers and slowly but surely create a little financial empire.” (*Id.*, Exh. A at 17-18.) Rejecting plaintiffs’ arguments that some MWAs could be considered employees, the *Estrada I* trial court held that the Company “needs a ‘bright line’ in order to conduct its business as to the status of its workers.” (*Id.*, Exh. A at 18:11-12.)

In his Statement of Decision, the *Estrada I* trial judge also stated: “The court makes no value judgment as to whether independent contractor or employee status is a better business model or more beneficial for society. The court agrees ... that independent contractor status is a legitimate and acceptable mode of commerce.” (*Id.*, Exh. A at 3:18-22.) Even when the trial court ordered injunctive relief against FXG’s use of SWA contractors (which the Court of Appeal later reversed), the trial judge made clear that he was not ordering FXG to convert to employees and that the Company could also comply by changing its business model: “What I am pretty much saying, you know, is you can keep your employment model but they will be employees. You can change it. I am not about to run FedEx. That is FedEx’s decision. I am giving you the freedom, which you definitely have the right to have, to modify that employment model.” (*Id.* ¶ 3, Exh. B (attaching October 7, 2005 Hearing Transcript).) Now that the *Estrada I* decision has been affirmed by the Court of Appeal, FXG is exercising that freedom and pursuing the trial court’s “bright line” of using only MWA contractors in California.

Plaintiffs pay lip-service to FXG’s right “to run its own business, including modifying its business model” (Pls.’ Br. 1), but argue that FXG’s actions in California are retaliatory and therefore unlawful. Retaliation under the FMLA or California law requires proof of an employee, who engages in protected activity, and who suffers an adverse employment action because of the protected activity. *See, e.g., Buie v. Quad/Graphics, Inc.*, 366 F.3d 496, 503 (7th Cir. 2004).

Moreover, in the face of a “legitimate, nondiscriminatory reason” for the action, plaintiffs must further demonstrate that retaliation was the true reason and that any other reason is a pretext. *See Texas Dep’t of Comty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). Plaintiffs cannot prevail on the merits of such a claim.

First, any retaliation claim requires the Court to first decide the ultimate issue in this case—whether all contractors can be deemed, on a class-wide basis, to be employees. (Pls.’ Br. 11-12.) *See Sistare-Meyer v. Young Men’s Christian Ass’n*, 58 Cal. App. 4th 10, 17-18 (1997) (plaintiff could not assert claim for wrongful termination in violation of public policy because he was an independent contractor and not an employee); 29 USC § 2611(2)(a) (defining persons covered by the FMLA as “eligible employees”). As the Court knows, the employment question is a multi-faceted decision and not a pure legal question. Whether employment classification can be determined on any class-wide basis is a contested issue that the Court has yet to decide. For the TRO and the preliminary injunction, though, plaintiffs do not even attempt to address the certification issue or the merits but simply invoke principles of collateral estoppel, claiming that the court’s decision in *Estrada III* is binding here. (Pls.’ Br. 11.)

Likelihood of success cannot, however, be demonstrated merely by citing the *Estrada III* decision. The *Estrada* case concerned the classification under the California Labor Code of 207 SWA contractors who drove for FXG from 1996 to 2001, most of whom are not even working with FXG anymore. For purposes of collateral estoppel, the *Estrada III* decision cannot be simply adopted wholesale as the answer to issues that involve different contractors, different laws, a different time period, and different circumstances. *See Lucido v. Superior Court of Mendocino County*, 51 Cal. 3d 335, 341-42 (Cal. 1990).

- There is no preclusive effect because the *Estrada III* decision is not final. Under California law, a judicial decision is not final until the final resolution of any appeal or the expiration of the time for an appeal.² FXG has filed a petition for review by the California Supreme Court, which remains pending. (Mannion Decl. ¶ 8.) *See People ex rel. Gow v. Mitchell Bros.’ Santa Ana Theater*, 101 Cal. App. 3d 296, 306 (1980); *Western Mut. Ins. Co. v. Yamamoto*, 29 Cal. App. 4th 1474, 1483 (1994) (decision is final after time for petition for review in the Supreme Court has passed).
- Further, there cannot be collateral estoppel when different—even if similar—legal standards apply. *See American Cont’l Co. v. American Cas. Co.*, 86 Cal. App. 4th 929, 943 (Cal. Ct. App. 2001). The fact that certain SWA contractors were once deemed to be “employees” for purposes of expense reimbursement under California Labor Code Section 2802 does not mean that they *or others* are “employees” for purposes of the FMLA, which is governed by a different “economic realities” test. *See In re FXG Package System*, 2006 WL 3755311 at *3 (N.D. Ind. Dec. 14, 2006); *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1058-59 (2d Cir. 1988).
- Further still, collateral estoppel cannot be applied when circumstances have changed, as they have here. *See Hodgson v. Royal Crown Bottling Co.*, 465 F.2d 473, 475 n.1 (5th Cir. 1972) (policies and practices had changed); *California Employment Stabilization Commission v. Matcovich*, 74 Cal. App. 2d 398, 404 (1946) (different time period). Since the *Estrada* trial in 2004, FXG has made numerous changes in California. FXG has significantly revised its manuals, policies, and procedures to

² The preclusive effect of a California state-law judgment is a matter of California law. *See Migra v. Warren City School Dist. Bd. of Education*, 465 U.S. 75 (1984).

prevent managerial interference with contractors' businesses, changed its training of managers in interacting with contractors, and eliminated many of the procedures and programs that the *Estrada* court found problematic. (Mannion Decl. ¶ 9.)

Without any showing—other than the erroneous invocation of collateral estoppel—to establish that the named plaintiffs and the putative class members are “employees” for purposes of the FMLA or California law, plaintiffs cannot prevail on any retaliation claim.

Second, other than plaintiffs' purple prose, there is nothing before the Court—certainly no evidence—that FXG's California Transition plans were implemented to punish anyone for any protected activity. Putative class members, of course, have not engaged in any protected activity. With respect to the named plaintiffs, the timing of FXG's actions refutes any inference of retaliation. FXG's transition plans were announced on September 20, 2007—nearly three years after the *Alexander* case was filed (November 17, 2004), over eight years after the *Estrada* case was filed (May 11, 1999), and over three years after the *Estrada* case was tried (April 16, 2004). To “support an inference of retaliatory motive,” however, the adverse action must occur “fairly soon” after the protected activity. *Paluck v. Gooding Rubber Co.*, 221 F.3d 1003, 1009-10 (7th Cir. 2000). “Fairly soon” is “limited to days, not weeks or months.” *Chapman v. Essex Group*, No. 1:06-CV-84 (TS), 2007 WL 1891813 at *11 (N.D. Ind. 2007); *see Hughes v. Derwinski*, 967 F.2d 1168, 1174-75 (7th Cir. 1992) (four month interval is too long to demonstrate a causal link).

Furthermore, the California Transition applies to all SWA contractors in the state—whether or not they participated in *Estrada* or are litigants in *Alexander*, whether or not they support the litigation, and whether or not they have ever asserted claims against FXG. The

evidence shows that FXG was not acting in response to particular contractors, but in response to the developing legal and regulatory environment in California. (Mannion Decl. ¶¶ 10-13.)

FXG has the unassailable right to change its business model in reaction to changes in the legal landscape without those changes constituting retaliation. Thus, in *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), a newspaper terminated its independent distributorship agreements and moved to an employee-based system after the distributors brought an antitrust action. The Ninth Circuit found that there was no evidence of retaliation, because all distributors were terminated, not merely the plaintiffs in the antitrust action. *Id.* at 805, n.11 (newspaper was free to make the “choice of an alternative form of distribution”). A blanket rule preventing the termination or non-renewal of FXG’s contracts would improperly impair its ability to make business decisions. *See Naify v. McClatchy Newspapers*, No. C-76-117-SW, 1977 WL 1389 *2, n.1 (N.D. Cal. 1977); *House of Materials*, 298 F.2d at 871-72 (the non-renewal of distribution contracts was not retaliatory and a preliminary injunction cannot issue to mandate the renewal of such contracts).³

³ In the communication materials, FXG directed contractors to Lynn Rossman Faris of the law firm Leonard Carter, LLP, if they were interested in obtaining information about the pending lawsuits. (Mannion Decl. ¶ 21, Exh. B at 12.) There is simply no basis for Plaintiffs’ accusation that inclusion of this information is evidence of “retaliatory motives” or a desire “to wreak havoc on this MDL proceeding,” and nothing in FXG’s communications gives “the false impression the termination program was known about and even approved by co-lead MDL counsel.” (Pls.’ Br. 14.) The contact information—for plaintiffs’ co-lead counsel—is a matter of record in this case, and is widely advertised by counsel on her website and press releases. Since certain SWAs are plaintiffs in the *Estrada* decision, in which Ms. Faris is also lead counsel, FXG provided this information to make sure any decision by contractors would be fully informed and, in an abundance of caution, to ensure compliance with any arguable notice requirements. *See Ralph Oldsmobile, Inc. v. General Motors, Corp.*, 2001 WL 1035132, at *5 (S.D.N.Y. Sept. 7, 2001) (advising that communications include information about opposing counsel); Manual for Complex Litigation (4th ed.) § 21.12.

2. **FXG Is Not Acting Coercively, Improperly, or Unlawfully With Respect to Any Release or Indemnification Agreements.**

The California Transition incentives and the national Enhanced Primary Plus program are not, as plaintiffs contend, part of a “stealth campaign to coerce class members into executing unlawful releases of their legal claims.” (Pls.’ Br. 18.) Neither the Release Agreement (which is given in exchange for the transition incentives) nor the Compliance-Disclosure Addendum (which is given in exchange for the Enhanced Primary Plus payments) requires contractors to give up their MDL claims, nor do they “threaten to bar [them] from being able to recover against FXG in these proceedings.” (Id. 18.)

No California contractor is asked or required to give up his or her MDL claims as a condition of receiving the transition payments. Section 3(a) of the Contractor Conversion and Release Agreement states that it is a limited release tied to the September 20, 2007 non-renewal announcement:

Contractor ... releases and discharge[s] ... any and all claims ... arising out of or in any way connected with (i) [FXG]’s announcement(s) that it is modifying its relationship with contractors in California, and (ii) any and all actions related to [FXG]’s modification of its relationship with California contractors, including, without limitation, any contemplated or actual termination, non-renewal or assignment of [Contractor’s] Operating Agreement, and any contemplated or actual sale, assignment, or other disposition of a primary service area

(Mannion Decl. ¶ 19, Exh. C at 2.) Plaintiffs point to section 3(b), which waives the statutory protections of Section 1542 of the California Civil Code, to argue that the release is “contradictory” and “indecipherable.” While Paragraph 3(b) of the Release Agreement does reference Section 1542 (which concerns the scope of a General Release), that paragraph is expressly limited by its unambiguous terms to the claims defined in paragraph 3(a). (Mannion Decl. ¶ 19, Exh. C at 2-3.) Moreover, inclusion of a Section 1542 waiver in a limited release is commonplace because it is required for the release to be valid as to any unknown claims, and

does not transform a limited release into a general one. *See Butler v. The Vons Cos.*, 140 Cal. App. 4th 943, 948 (2006).

FXG understands that contractors are not lawyers. (Pls.’ Br. 6.) Accordingly, FXG prominently stated in its communications that it was not seeking a general release and it encouraged contractors to “read all documents very carefully, and consult your own legal counsel.” (Mannion Decl. ¶ 13, Exh. B at 12.) There is no basis for plaintiffs to claim that “FXG intends to leave the door wide to claim—if it so chooses—that the SWAs who sign have waived their right to participate as class members in this MDL action.” (Pls.’ Br. 6.) To the extent there is any genuine question about that, FXG hereby makes a judicially binding admission that the Release Agreement is not a general release and is limited to potential claims related to the non-renewal announcement and the transition from SWA status—which is what it has been saying all along.

The concerns about the Compliance-Disclosure Addendum are equally unfounded. The Addendum is designed to ensure that contractors certify through documentation that they are properly complying with state and federal laws with respect to their own employees—an obligation they already committed to in the Operating Agreement. (Mannion Decl. ¶ 3, Exh. A at 9.) In section 2.2(f) of the Addendum, a contractor re-confirms his already existing obligation to indemnify FXG for “any liability and claims by Contractor or any third party ... arising from Contractor’s use or employment of any other person(s) in the performance of Contractor’s obligations.” (Mannion Decl. ¶ 23, Exh. D at 2 (emphasis added).) This indemnity provision is limited to claims made by a contractor, his employee, or a third party that specifically pertain to the contractor’s use of an employee, and not, as plaintiffs allege, to the contractor’s own purported employment claims against FXG. (Pls.’ Br. 10, 14.) Nothing in the document requires

a contractor to “waive his or her employment law claims against FXG connected to their MWA status.” (*Id.* at 10 (emphasis added).) Again, to the extent there is any genuine confusion about this, FXG hereby makes a judicially binding admission that the Addendum does not release any claims a contractor may have concerning his or her own status.

Of course, there is nothing unlawful about obtaining a release or an indemnification agreement. *See Faris v. Williams WPC-I, Inc.*, 332 F.3d 316, 319 (5th Cir. 2003) (releases); *Lemat Corp. v. American Basketball Assn.*, 51 Cal. App. 3d 267, 278 (1975) (indemnification agreements).⁴ According to plaintiffs, though, some contractors may feel “compelled” by “economic necessity” to accept the financial payments FXG is offering and sign the Release Agreement or the indemnification agreement as a result of “coercion” by FXG. (Pls.’ Br. 19.) This is not coercion. As the Seventh Circuit held in *Fabert Motors, Inc. v. Ford Motor Co.*, 355 F.2d 888, 891 (7th Cir. 1966), “[e]conomic coercion is not established by showing that the release was given under pressure of financial circumstances under threat of [the Defendant] having recourse to an action [Defendant] was legally entitled to take.” Thus, simply because some contractors may be facing the “pressure of financial circumstances” does not make FXG’s programs coercive. And even if a contractor feels financial pressure because of FXG’s decision not to renew SWA contracts in California (Pls.’ Br. 18), there still is no economic coercion because FXG has the right not to renew its contracts. (Mannion Decl. ¶ 3, Exh. A at 22.) “It is

⁴ The cases plaintiffs cite concern releases from liability for future wrongdoing, *see, e.g., Baker Pacific Corp. v. Suttles*, 220 Cal. App. 3d 1148 (1990), or waivers of statutory rights under the FMLA, *see, e.g., Hendricks v. Compass Group, USA, Inc.*, 2007 WL 2230161 (7th Cir. Aug. 6, 2007). (Pls.’ Br. 14-16.) FXG is not seeking these types of releases or waivers. More importantly, FXG has the right to communicate with its contractors, “including discussing settlement before certification.” Manual for Complex Litigation (4th ed.) § 21.12; *see also In re General Motors Corp. Engine Interchange Litig.*, 594 F.2d 1106, 1138-39 (7th Cir. 1979).

not duress to do, or to threaten to do, what one has a right to do.” *See, e.g., Gustin v. FDIC*, 835 F. Supp. 503, 508 (W.D. Mo. 1993) (economic duress requires “wrongful conduct” that deprives a person “of free will”).

C. **The Balance of Hardships And Public Interest Weigh Heavily Against an Injunction.**

Even if plaintiffs had established some violation of law, the Court would “not [be] mechanically obligated to grant an injunction.” *Amoco Prod. Co. v. Village of Gambell, Alaska*, 480 U.S. 531, 542 (1987). The Court must carefully “balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief.” *Id.* The balance of hardships tips strongly against granting injunctive relief.

The only harm plaintiffs could potentially suffer is a loss of income—a monetary harm that could be remedied through back pay and reinstatement. As plaintiffs’ own authorities note, a person who is wrongfully terminated suffers “no injury that could not subsequently be remedied.” *Segar*, 516 F. Supp. at 320 (“Neither the inconvenience caused by the transfer nor the injury to his reputation caused by the demotion would be irreversible.”); *see also Shegog v. Board of Education of the City of Chicago*, 194 F.3d 836, 839 (7th Cir. 1999) (“a temporary deprivation of employment does not inflict irreparable injury”).

Plaintiffs’ claim that other contractors might be harmed because they will be chilled from participating in the litigation is only speculative, especially because FXG’s business decisions apply even-handedly to all contractors whether they participate in this litigation or not. The mere “possibility” of a chilling effect “is too remote and speculative an injury on which to base a TRO or preliminary injunction.” *Soler v. G&U, Inc.*, 1982 WL 2159 at *4 (S.D.N.Y. Jan. 15, 1982). Any potential chilling effect alleged by plaintiffs must be demonstrated by actual evidence and

must be carefully weighed against plaintiffs' likelihood of success (or failure) on the merits. *See Holt v. Continental Group, Inc.*, 708 F.2d 87, 91 (2d Cir. 1983).

The real threat of irreparable harm here is to FXG, the hundreds of contractors who are not parties to the pending lawsuits, and to their mutual customers. As set forth in the Mannion Declaration at paragraphs 26 to 30, an injunction prohibiting or reversing the California Transition and the national Enhanced Primary Plus program threatens irreparable harm. It would, at a minimum, create mass confusion among contractors and the Company's management about which contractors will be remaining as part of the workforce and which ones will not. An injunction would also lead to uncertainty over what contract terms—old or new—will be operative.

This confusion and uncertainty interferes with the ability of both contractors and FXG to plan effectively for ongoing and future business activities. (Mannion Decl. ¶ 27.) Some contractors have already announced to managers that they will be leaving FXG. (*Id.*) In order to ensure the quality and continuity of service provided to its customers, FXG must know how many open work areas will actually exist and how those open work areas can be filled. Any uncertainty in this regard could lead to significant service disruptions. (*Id.*) Service could be disrupted by the confusion that could arise following the issuance of an injunction from the fact that contractors who have purchased and sold their routes through the transition may be unsure if they have continuing obligations to service those routes. (*Id.* ¶ 28.) Because California accounts for approximately ten percent of the overall traffic in the FXG network, any such California-based service disruptions would affect the entire FXG network. (*Id.*) In addition, halting the California Transition is likely to lead to a loss of confidence in the Company by FXG's contractors because they may well have heard all about the transition plans but now could be told

that whatever the Company has said cannot be relied upon. That loss of confidence and goodwill from FXG's contractors will not only be difficult to restore, but impossible to value. (*Id.*)

The uncertainty that plaintiffs' requested injunctive relief would create regarding whether or not FXG is moving to an all-MWA workforce in California would also have a negative impact on the Company's reputation and competitive position in the package delivery industry.

(Mannion Decl. ¶ 29.) The industry is highly competitive, and with the fast pace of national and international commerce, shippers expect a high degree of assurance that the network that is picking up and delivering their packages will operate reliably. (*Id.*) If the California Transition is brought to a halt, FXG's customers may very well interpret the resulting confusion regarding the Company's business model in California as a basis for doubting its ability to ship their packages in a timely and professional manner. (*Id.*) This will be especially true if the ensuing confusion results in significant service disruptions and delays, as described above. Shippers will be especially risk-averse in this regard during the "peak" year-end shipping season, which is already underway, and may well decide to use one of FXG's competitors. In short, altering the course of FXG's California Transition mid-stream could result in harm to the Company's hard-earned reputation for predictable, on-time service that would be difficult to restore and impossible to calculate in terms of damages, and a loss of business that would be extremely difficult to regain. (*Id.*)

Finally, an injunction issued at this time will have the practical result of forcing FXG to maintain a business model that is under attack in California and that may continue to expose the Company to ongoing damages, liability, and risks that are not presently knowable. (Mannion Decl. ¶ 30.) While FXG continues to believe strongly that its SWAs are, in fact, independent contractors—and while it has prevailed on that argument multiple times in the past—the *Estrada*

III decision, as well as other recent administrative decisions in California, have substantially increased the risk with respect to FXG's SWA contractor model in California. Injunctive relief requiring FXG to cease its transition to an all-MWA model would harm FXG by exposing it to the risk of continued attack on its contractor model. The inability of plaintiffs to repay these damages if FXG is forced by a TRO or mandatory injunction to continue operating an SWA model in California, but later prevails at trial, makes that harm irreparable. *See R. J. Corr Naturals, Inc. v. Coca-Cola Co.*, No. 97-1059, 1997 WL 223058 (N.D. Ill. Apr. 25, 1997) (denying plaintiffs' application to enjoin Coke in part because "[t]he financial harm to Coke would be considerable if it is later determined that a preliminary injunction was issued in error" and "would undoubtedly exceed the ability of [the plaintiff] to pay"); *American Hospital Supply Corp. v. Hospital Prods., Ltd.*, 780 F.2d 589, 596 (7th Cir. 1986) (noting that a loss may be irreparable if the party's inability to pay is apparent); Fed. R. Civ. P. 65(c) (injunctive relief cannot be granted unless plaintiff first posts security "in such sum as the court deems proper for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined"); *Mead Johnson & Co. v. Abbot Labs.*, 201 F.3d 883, 888 (7th Cir. 2000) ("When setting the amount of security, district courts should err on the high side. . . . An error in setting the bond too high thus is not serious. . . . Unfortunately, an error in the other direction produces irreparable injury, because the damages for an erroneous preliminary injunction cannot exceed the amount of the bond.").

Finally, the public interest also strongly favors denial of a TRO because of the potential disruption of service to customers who rely on FXG for timely service. *See, e.g., In re QWEST Commc'n Int'l Sec. Litig.*, 243 F. Supp. 2d 1179, 1187-88 (D. Colo. 2003) (refusing to issue an injunction because of a potential disruption of the defendant's business operations that would be

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of October, 2007, I filed the foregoing ***FEDEX GROUND PACKAGE SYSTEM, INC.'S MEMORANDUM OF LAW IN OPPOSITION TO ALEXANDER (CALIFORNIA) PLAINTIFFS' APPLICATION FOR TEMPORARY RESTRAINING ORDER AND OSC RE PRELIMINARY INJUNCTION*** with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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