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: *John Humphreys, et. al. v. FedEx Ground Package Systems, Inc.*, Civil No. 3:05-cv-00540-RLM-MGG (TX)	

MEMORANDUM OF LAW IN SUPPORT
OF TEXAS PLAINTIFFS' UNOPPOSED MOTION FOR FINAL APPROVAL
OF PROPOSED TEXAS CLASS ACTION SETTLEMENT

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I. INTRODUCTION

Class Counsel, on behalf of Named Plaintiffs John Humphreys, David Meredith, Jeffrey Quebe, Tim Mershon, Charles Campbell, and the certified Class (collectively "Plaintiffs" or "the Class"), submit this memorandum pursuant to Rule 23(e) of the Federal Rules of Civil Procedure in support of their motion for final approval of the proposed class action settlement (the "Settlement") preliminarily approved by the Court in its Order entered August 17, 2016. MDL Doc. No. 2749. Plaintiffs respectfully ask the Court to grant final approval of the Settlement on the basis that it is fair, reasonable, adequate, and in the best interest of the Class.

The Settlement is the product of arm's-length negotiations after more than a decade of hard fought litigation, and the amount to be paid by Defendant appropriately reflects both the strengths of Plaintiffs' case and the risks and costs of continuing to litigate this complex suit through trial and appeals. Class Counsel's judgment that the Settlement is a fair, reasonable, and adequate result for the Class is based on: a thorough analysis of the legal and factual issues presented; the evidence and expert testimony; the risks, expense and delay were this litigation to proceed through trial and further appeals; Class Counsel's past experience in complex class action litigation; and the hotly contested issues concerning both the merits and damages, many of which had not yet been litigated. The Settlement was reached after the close of fact and expert discovery, extensive motion practice, numerous rulings by the Court, Plaintiffs' successful appeal from a final judgment entered in favor of FedEx Ground Package System, Inc. ("FXG"), and mediation facilitated by a well-respected mediator who has mediated hundreds of Class Cases. Following Notice to the Texas Class, described below, no objections to the Settlement

have been filed.[1] The Seventh Circuit's criteria for approval of class action settlements, when applied to the Texas case, overwhelmingly favor final approval of the Settlement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action was commenced on March 4, 2005, in the United States District Court for the Western District of Texas by the Named Plaintiffs individually and on behalf of a putative class against FXG. FXG employs thousands of drivers to pick up and deliver packages nationwide. As a condition of employment, each FXG driver is required to execute a contract with FXG, known as the FedEx Ground Pickup and Delivery Contractor Operating Agreement ("OA"). The OA classifies the drivers as independent contractors, but grants FXG substantial rights to control the manner and means of their work. It requires that drivers provide daily package pick-up and delivery service to FXG customers on assigned routes, wearing FXG uniforms, driving FXG-branded trucks, using FXG scanners, and following FXG work methods.

In their Fourth Amended Complaint, Plaintiffs asserted claims under Texas common law claims of rescission, unjust enrichment, and declaratory judgment, all premised on the allegation that FXG improperly classified its pick-up and delivery drivers as independent contractors rather than employees. On August 10, 2005, the Judicial Panel on Multidistrict Litigation found that a number of putative class actions challenging FXG drivers' independent contractor status (including the Texas action) involved common questions, consolidated them into a multidistrict litigation ("MDL") docket, and transferred them 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).[2]

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[1] As noted below at page 18, one individual filed an untimely opt-out from the proposed Settlement.

[2] All of these transferred cases are referred to collectively as the "Class Cases."

Following transfer, this Court designated Co-Lead Counsel for Plaintiffs in all of the Class Cases for purposes of all pretrial proceedings. MDL Doc. No. 52. Following extensive written discovery, depositions and expert work, class certification motions were prepared and filed in all of the Class Cases in five waves during 2007 and 2008. The Texas Plaintiffs' class certification motion was filed on April 23, 2007; the motion was granted by the Court on March 25, 2008 with respect to Plaintiffs' common law unjust enrichment, rescission, and declaratory judgment claims. MDL Doc. No. 1119. The certified Class was defined as:

> All persons who: 1) entered or will enter into a FXG Ground or FXG Home Delivery form Operating Agreement (now known as form OP-149 and form OP-149 RES); 2) drove or will drive a vehicle on a full-time basis (meaning exclusive of time off for commonly excused employment absences) between March 4, 2001 and October 15, 2007 to provide package pick-up and delivery services pursuant to the Operating Agreement; and 3) were dispatched out of a terminal in the state of Texas.

Id. The Court appointed Co-Lead Counsel to serve as Class Counsel and approved the Class Notice in an order entered April 4, 2008. MDL Doc. No. 1131. Notice was promptly mailed to 1,740 potential Class members, advising them of their right to opt out of the litigation. Nineteen Class members opted out. *See* MDL Doc. No. 2674-2 at 43.

On April 25, 2008, the parties filed cross-motions for summary judgment on the question of whether the Class members had been properly classified as independent contractors. In its order entered December 13, 2010, this Court found Plaintiffs and the Class were independent contractors as a matter of law for purposes of their certified claims, resulting in the dismissal of those claims. MDL Doc. No. 2239. Plaintiffs filed a timely appeal in the U.S. Court of Appeals for the Seventh Circuit from the judgment entered in favor of FXG.

The Seventh Circuit initially requested briefing in the lead case, *Craig v. FedEx Ground Package Sys., Inc.* (Kansas) and stayed briefing in all of the other cases pending a decision in

Craig. In its Opinion and Order entered July 12, 2012 in *Craig*, the Seventh Circuit found the issues before it presented questions of state law, and certified them to the Kansas Supreme Court to aid in resolving the appeal. In October 2014, that Court unanimously held the Plaintiff drivers were employees for purposes of the KWPA and their common law claims. *Craig, et al. v. FedEx Ground Package Sys., Inc.*, 335 P.3d 66 (Kan. 2014). A few months earlier, the Ninth Circuit Court of Appeals entered orders reversing the summary judgments entered for FXG in the related California and Oregon cases and directed that summary adjudication be entered for the Plaintiff drivers, finding them employees under the laws of those states. *Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981 (9th Cir. 2014) (California); *Slayman v. FedEx Ground Package Sys., Inc.*, 765 F.3d 1033 (9th Cir. 2014) (Oregon).

In its Opinion and Order dated July 8, 2015, the Seventh Circuit reversed the orders granting summary judgment in favor of FXG and denying summary adjudication to the Kansas Plaintiffs, and remanded the *Craig* case to this Court with instructions to enter summary adjudication for Plaintiffs that they are employees under Kansas law. *In re FedEx Ground Package Sys., Inc. Employment Practices Litig.*, 792 F.3d 818, 821 (7th Cir. 2015). During this time, the parties began settlement discussions pertaining to all of the Class Cases, including *Humphreys*. The parties agreed to retain Michael Dickstein, a well-respected mediator who successfully mediated the remanded California case in June 2015, *Alexander v. FedEx Ground Package Sys. Inc*., Case No. 05-cv-0038 EMC (N.D. Cal.), to mediate all of the remaining MDL cases including *Humphreys*.

In preparation for the mediation, FXG provided Plaintiffs with substantial electronic data from multiple sources relevant to the damage claims asserted by the Texas Class during the class period. Class Counsel retained a forensic accounting expert to analyze the data and prepare a

comprehensive damage model consistent with the damage claims asserted under Texas common law. FXG similarly engaged an expert labor economist to analyze the same data and prepare an alternate damage model. The parties exchanged detailed mediation statements outlining their perspectives on the strength and weaknesses of the legal claims, their competing damage analyses, and the scope of the potential recovery.

The mediation took place on February 11, 2016. Co-Lead Counsel and Texas Counsel (by telephone) participated in the mediation. Although the Texas action did not resolve at the mediation, the parties continued to negotiate and reached a settlement in principle several weeks later, which is summarized in a written Deal Point Memorandum. On June 14, 2016, the parties executed a comprehensive written Class Action Settlement Agreement (the "Agreement"). *See* MDL Doc. No. 2674-1. In an order entered August 17, 2016, the Court preliminarily approved the proposed Settlement and directed that notice be provided to the Class. MDL Doc. No. 2749. The matter is now before the Court for final approval.

III. THE PROPOSED SETTLEMENT TERMS

The Proposed Class Settlement, preliminarily approved by this Court in an order entered August 17, 2016,[3] will provide substantial monetary relief to the Class. FXG will pay the sum of $8,900,000 to resolve the class claims asserted in Plaintiffs' Fourth Amended Complaint. The complete amount of the Net Settlement Fund (the total settlement amount after payment of attorney's fees and litigation costs, service payments to Named Plaintiffs who participated in the litigation, and settlement administration expenses) will be distributed to the Class with no reversion to FXG. Settlement checks will be issued to all Class members without a claim form. The funds will be distributed through a qualified settlement fund ("QSF") administered by the

[3] On November 9, 2016, the Court granted Plaintiffs' motion to correct an administrative error in the August 17, 2016 orders granting preliminary approval. MDL Doc. No. 2850.

Court-appointed settlement administrator, Rust Consulting. Costs of the Class Settlement notice and administration will be paid from the Settlement Fund.

The $8,900,000 Class Settlement Fund will be allocated and distributed as follows:

- Approximately $6,001,000 of the Fund will be distributed to the Class (the Net Settlement Fund);
- Up to 30% of the Fund will be distributed to Class Counsel for attorney's fees and costs in an amount to be determined by the Court (a maximum of $2,670,000);
- Approximately $65,000 will be paid to Rust Consulting as compensation for settlement administration;
- Up to $15,000 will be distributed to each of the five Class Representatives who were deposed, in an amount not to exceed $75,000; and
- Approximately $89,000 (1% of the Settlement) will be held in a Reserve Fund for payments to self-identified Class members, if any.

The Net Settlement Fund will be distributed among the Class members who meet the Class definition of a full-time driver, based on their *pro rata* weeks worked within the class period. All Class members will receive a settlement payment of $12.91 for each workweek during which it appears, from FXG records, that they personally drove one of their FXG routes 35 or more hours, and a lower payment of $4.52 for workweeks in which they drove between 16 and 35 hours per week. Class members who, according to FXG records, did not personally drive more than 16 hours in *any* workweek during the recovery period will receive a flat minimum payment of $250.

The average per Class member recovery, net of settlement administration expenses, attorney's fees and costs and service awards, will be approximately $3,938 and the range of settlement payments will be approximately $250 to $13,880.19. After final approval, checks will be mailed to the notified Class members; they will not be required to submit claim forms or any additional paperwork in order to receive their settlement shares. Removing the barrier to

payment that a claim process can create will maximize the number of eligible Class members who will receive their settlement shares, and, at the same time, the costs of administering the Settlement will be minimized. Any unclaimed funds following the first distribution will be redistributed to the Class members who cashed checks sent in the first distribution on a *pro rata* basis based on their weeks worked within the class period. After the second round distribution, any uncashed checks will be distributed to the *cy pres* recipient agreed upon by the parties, Legal Aid of Northwest Texas, 1515 Main Street, Dallas, TX 75201. *See* MDL Doc. No. 2674 at ¶¶ 17, 28, 30. The automatic payment and redistribution structure is a significant benefit to the Class and should result in the distribution of all of the Net Settlement Fund to Class members, with negligible amounts, if any, going to the *cy pres* fund.

In return for the above consideration, FXG will receive a general release of claims from each the Named Plaintiffs, and a release on behalf of the Class of all claims that were brought, or which could have been brought, in this action arising out of or relating to allegations of misclassification as independent contractors set forth in the operative Complaint (the "Released Claims"). Upon entry of the Final Approval Order, this action shall be dismissed with prejudice and all Released Claims shall be conclusively settled as to Plaintiffs and the Class members.

Finally, on September 12, 2016, Class Counsel moved the Court for an award of attorney's fees and litigation costs of 30% of the settlement amount, and have applied to the Court for service payments to the Named Plaintiffs who participated in the litigation of $15,000 each. *See* MDL Doc. Nos. 2813, 2814, 2815, 2844. Counsel's motion for an award of attorney's fees and costs and Class representative service payments, which will be heard on January 23-24, 2017 with the instant final approval motion, is unopposed and no objections have been filed.

IV. THE NOTICE PLAN

In its preliminary approval order, the Court approved Plaintiffs' Notice Plan, and scheduled a final approval hearing for January 23 and 24, 2017. MDL Doc. No. 2749. The Court directed that notice of the Settlement be given to members of the certified Class on about September 12, 2016; that all Class members be afforded an opportunity to object to the Settlement by November 14, 2016; and that previously un-notified Class members be provided the opportunity to be excluded from the lawsuit by the same date. *Id*.

As permitted by Federal Rule of Civil Procedure 23(e)(4), the Court's preliminary approval order provided that Class members who previously received notice of the pendency of the case and an opportunity to opt-out of the Class would receive notice of the Settlement terms and be afforded the opportunity to object to the Settlement terms, but would not have a second opportunity for exclusion. During the settlement process, FXG identified approximately forty-two (42) persons who fit the Texas Class definition but were not previously provided notice of the pendency of this case and, therefore, the opportunity to opt-out of the case. MDL Doc. No. 2674-2 at 44. Under the approved Notice Plan, the previously un-notified Class members were mailed a combined Notice of the pendency of the lawsuit and the Settlement informing them of their right to be excluded from the case or to remain in the Class and object to the Settlement terms.

The Class Notices explained the nature of the action and the terms of the Settlement, including: (a) the total Settlement amount; (b) the attorney's fees to be requested; (c) how Class members' settlement payments will be calculated;[4] (d) the estimated amount of each Class

[4] In five states, including Texas, the Settlement Notice contained an error in the weekly payment rate included in the allocation formula set forth in Box #10 of the Notice. This error did not affect the estimated Settlement amount provided to Plaintiffs, which was correct in the original Notice. On September 29, 2016, Rust Consulting provided a corrective letter to the Texas

members' settlement share and the procedure for challenging the calculation; (e) that the Class claims will be released; and (f) how the Class member may collect his portion of the Settlement, object to the Settlement and, in the case of Class members not previously notified of the pendency of the case, how they could exclude themselves from the litigation. *See* MDL Doc. Nos. 2674-5 (Previously Notified Class Member Notice) and 2674-4 (Un-notified Class Member Notice). Also included with the Class Notice was a "Computation of Estimated Settlement Share" worksheet informing each Class member of their estimated Settlement share and how it was calculated. MDL Doc. No. 2674-2 at 45.

On or about September 12, 2016, Rust Consulting sent the Court-approved Notices to all Class members per the preliminary approval order. Myette Decl., ¶ 10. In advance of this mailing, Rust Consulting updated the Class member addresses supplied by FXG both by running the address list against the National Change of Address (NCOA) database and also by skip-tracing each address using a variety of commercially available public records databases. *Id.* at ¶ 8. After Rust Consulting had exhausted its efforts to locate Class members whose Notices were returned as undeliverable, Class Counsel made further efforts, including placing phone calls to the missing Class members' last-known telephone numbers, conducting internet research and searching social media platforms, and have caused Class Notices to be re-mailed to 34 Class members whose Notices were previously returned as undeliverable. Joint Declaration of Co-Lead Counsel in Support of Texas Plaintiffs' Motion for Final Approval of Class Action Settlement ("Co-Lead Counsel Decl."), ¶ 11; Myette Decl., ¶ 14.

Plaintiffs with the proper weekly payment rate. *See* Exhibit B to Declaration of Amanda Myette in Support of Motion for Final Approval of Texas Class Action Settlement ("Myette Decl."), filed herewith.

Rust Consulting also secured a URL and established a website (www.humphreys-v-fedexground-settlement.com) where it posted comprehensive information about the lawsuit and Settlement including, *inter alia*, key dates and deadlines, the Settlement Agreement and preliminary approval order, the Class Notices, and answers to commonly asked questions. *Id.* at ¶ 4. Rust Consulting further established a live call center with a toll-free number and trained attendants to answer Class member questions. Media publicity following the public filing of the Settlement also generated phone calls from eligible Class members. *Id.* As a result of these efforts, 1,515 notices were mailed;[5] 89 were returned undeliverable; 44 were remailed with updated addresses; there were no objections; and there were no exclusions. Myette Decl., ¶¶ 10, 14, 16, 18, 19.

The Court-approved Notice Plan is the best practicable under the circumstances and was reasonably calculated to reach substantially all Class members. The Claims Administrator has complied fully with the Court-approved procedures. The Notice Plan executed in this case satisfies the requirements of Federal Rule of Civil Procedure 23(e), the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1715, and due process for the reasons set forth by Plaintiffs and accepted by the Court in its preliminary approval order.

V. THE PROPOSED SETTLEMENT WARRANTS FINAL APPROVAL

A. Standard for Final Approval of Settlement

Rule 23(e) of the Federal Rules of Civil Procedure provides that a class action may not be settled without approval of the Court. "In general, courts look upon the settlement of lawsuits with favor because it promotes the interests of litigants by saving them the expense and

[5] The original Class list from which class notices were mailed contained a number of duplicative names and addresses. The parties, through their experts, worked to cross-reference individuals and entities with their contractor identification numbers and arrived at a more accurate list for purposes of the Settlement notices.

uncertainties of trial, as well as the interests of the judicial system by making it unnecessary to devote public resources to disputes that the parties themselves can resolve with a mutually agreeable outcome." *Hispanics United of DuPage Cnty. v. Village of Addison, Ill.*, 988 F. Supp. 1130, 1149 (N.D. Ill. 1997) (*citing Newman v. Stein*, 464 F.2d 689 (2d Cir. 1971)). Settlement is particularly advantageous in complex class actions. *Id*.; *Armstrong v. Bd. of Sch. Dist. of City of Milwaukee*, 616 F.2d 305, 312-13 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor upon the voluntary resolution of litigation through settlement . . . Settlement of the complex disputes often involved in class actions minimizes the litigation expenses of both parties and also reduces the strain such litigation imposes upon already scarce judicial resources."), *overruled on other grounds by Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *see also Isby v. Bayh*, 75 F.3d 1191, 1196 (7th Cir. 1996) ("Federal courts naturally favor the settlement of class action litigation.") (citations omitted).

When reviewing a proposed settlement of a class action, the court must determine whether the settlement is "fair, reasonable, and adequate." *Armstrong*, 616 F.2d at 313; *see also EEOC v. Hiram Walker & Sons, Inc*., 768 F.2d 884, 889 (7th Cir. 1985) ("The district court may not deny approval of a consent decree unless it is unfair, unreasonable, or inadequate."). This inquiry is a "limited" one in that "[j]udges should not substitute their judgment as to optimal settlement terms for the judgment of the litigants and their counsel" and should stop short of the thorough investigation that they would undertake if they were actually trying the case and refrain from reaching conclusions upon issues that have not been fully litigated. *Armstrong*, 616 F.2d at 314-15. Further, in determining whether a settlement is fair, reasonable, and adequate, the court should view the settlement as a whole, rather than separately analyzing individual components of the settlement. *Id*. at 315 (citations omitted); *Isby*, 75 F.3d at 1199 (citations omitted).

The Seventh Circuit has identified several relevant (and potentially) interrelated substantive factors that courts should consider in deciding whether to grant final approval of a proposed class action settlement, including: (1) the strength of plaintiffs' case compared to the terms of the proposed settlement; (2) the complexity, length, and expense of the litigation; (3) the opposition to settlement among affected parties; (4) the opinion of competent counsel; and (5) the stage of proceedings and discovery completed at the time of settlement. *See Synfuel Techs., Inc. v. DHL Express (USA), Inc.*, 463 F.3d 646, 653 (7th Cir. 2006) (citing *Isby*, 75 F.3d at 1199); *accord Wong v. Accretive Health, Inc.*, 773 F.3d 859, 863-64 (7th Cir. 2014); *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 (7th Cir. 1997); *Anderson v. Torrington Co.*, 755 F. Supp. 834, 838 (N.D. Ind. 1991).[6] A court need not consider or find every factor satisfied in order to approve the settlement since not every factor will be relevant to every settlement. This Court's inquiry into the reasonableness of the proposed settlement is necessarily case-specific and individualized. *See e.g., Hiram Walker & Sons, Inc.*, 768 F.2d at 890 (describing the court's reasonableness inquiry as "equitable and subjective" in nature); *In re Global Crossing Sec. & ERISA Litig.*, 225 F.R.D. 436, 456 (S.D.N.Y. 2004) (not all factors need weigh in favor of settlement; instead, the court should look at the totality of the factors in light of the specific circumstances involved) (citation omitted).

While the district court must clearly set forth in the record its reasons for approving the settlement, "the court's reasoning need not be so specific as to amount to a judgment on the merits." *Armstrong*, 616 F.2d at 315 (citing *Dawson v. Pastrick*, 600 F.2d 70, 75-76 (7th Cir. 1979); *Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799, 804 (3d Cir. 1974)). For the reasons

[6] *See also Armstrong*, 616 F.2d at 314 (listing eight factors); *Hispanics United of DuPage Cnty.*, 988 F. Supp. at 1150 (identifying nine factors, citing *Armstrong*).

discussed below, each of the factors relevant to this case strongly favor final approval of the parties' proposed Settlement.

B. The Amount of the Settlement Appropriately Reflects Both the Strength of Plaintiffs' Case and the Costs and Risks of Further Litigation (Factors 1 & 2)

The first factor, the amount of the settlement in light of the strength of the plaintiffs' case, is the most important criterion in determining whether a settlement is fair, reasonable, and adequate. *Synfuel Techs., Inc.*, 463 F.3d at 653 (citing *In re Gen. Motors Corp. Engine Interchange Litig*., 594 F.2d 1106, 1132 (7th Cir. 1979)); *Isby*, 75 F.3d at 1199; *Armstrong*, 616 F.2d at 314, 322 (citations omitted). The second factor, the complexity, length, and expense of further litigation, is closely related to the first. *See Armstrong*, 616 F.2d at 322. Together, these factors require the court to weigh the benefits of settlement, including the avoidance of further risk, against the range of outcomes for plaintiffs after litigating the suit to completion.

In making an informed judgment about the fairness, reasonableness, and adequacy of a settlement, a court should assess the likelihood and value to the class of the case's possible outcomes, referred to as the net expected value of the litigation. *See Wong*, 773 F.3d at 863; *see also Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011) (citing *Synfuel Techs., Inc.*, 463 F.3d at 653); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002); *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co. of Chi.*, 834 F.2d 677, 682 (7th Cir. 1987) ("A settlement is fair to the plaintiffs in a substantive sense ... if it gives them the expected value of their claim if it went to trial, net of the costs of trial").

Plaintiffs' appeal of the ruling holding them to be independent contractors is pending before the Seventh Circuit and the outcome of that appeal is not certain. To date, the Kansas

Supreme Court and the Court of Appeals for the Ninth Circuit[7] have concluded that FXG drivers are employees as a matter of law under the common law employment tests in Kansas, California and Oregon. The Eleventh and Eighth Circuits have held that, under Florida and Missouri law, FXG drivers' employment status cannot be determined as a matter of law and must be resolved at trial.[8] Unlike the law in many states, Texas law indicates that the contractual recitations of independent contractor status give rise to a presumption of independent contractor status and may even be determinative of the question. *See Durbin v. Culberson County*, 132 S.W.3d 650, 659 (Tex. App. 2004) (citing *Newspapers, Inc. v. Love*, 380 S.W.2d 582 (Tex. 1964) (holding that "an agreement providing that a person shall be an independent contractor and providing no right of control is controlling in determining the relationship between the parties.")). While Plaintiffs believe FXG's reservation of control could overcome this label, Plaintiffs recognize a comparatively increased risk relating to the issue of employment status under Texas law as opposed to the law in the majority of jurisdictions. Co-Lead Counsel Decl., ¶ 5.

While Plaintiffs believe there is some likelihood they would prevail in overturning the adverse summary judgment under Texas law, it is also possible that the judgment could be affirmed on appeal. And, in any event, under Texas precedent, Plaintiffs would ultimately need to try the threshold employment status issue to a jury and overcome the presumption of independent contractor status that the Court could apply in their case.

Because of the lack of a statutory remedy in Texas, the only claims certified for the Texas Plaintiffs were rescission and unjust enrichment. Plaintiffs' theory is that the OA should be rescinded on the basis that it is void as against public policy because its various provisions

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[7] *See Alexander v. FedEx Ground Package Sys. Inc.*, 765 F.3d 981 (9th Cir. 2014) (California law); *Slayman v. FedEx Ground Package Sys. Inc.*, 765 F.3d 1033 (9th Cir. 2014) (Oregon).

[8] *See Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313 (11th Cir. 2015) (Florida law); *Gray v. FedEx Ground Package Sys., Inc.*, 799 F.3d 995 (8th Cir. 2015) (Missouri law).

contravened Texas law, particularly the Texas Workers' Compensation Act.[9] Plaintiffs and their damages expert calculated the maximum achievable recovery to be $33,340,000 (exclusive of interest which FXG strenuously argued at mediation is not available due to the lack of a sum certain under this theory), representing the difference between what Plaintiff drivers received in net compensation (after all deductions had been taken by FXG pursuant to the OA) and the compensation paid by FXG's sister company, FedEx Express, to its employee drivers during the same time period for performing substantially similar work. Of course, this maximum assumes the ultimate failure of all FXG's defenses and arguments, albeit after vigorous, expensive motion practice, expert analysis and discovery, and a trial. Co-Lead Counsel Decl., ¶ 6.

FXG raised a variety of common law defenses to these claims, including (1) severability of any offending provisions of the OA; (2) delay in seeking rescission or avoidance; (3) inability to return the parties to the status quo; and (4) set-off of any benefits Plaintiffs received under the OA. While Texas law is not fully developed on the question of what constitutes a reasonable time within which to seek rescission, it (unlike some other states) does require a defendant asserting unreasonable delay to show some prejudice resulting from the delay. *See Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 344 (Tex. 2011). Nevertheless, Plaintiffs had to acknowledge that FXG had succeeded in asserting these common law defenses against rescission/unjust enrichment claims in other states.[10] As a result, Plaintiffs

[9] Like most jurisdictions, Texas law holds that "when a valid express contract covers the subject matter of the parties' dispute, there can be no recovery under a quasi-contract theory," such as unjust enrichment. *Fortune Prod. Co. v. Conoco*, 52 S.W.3d 671, 684 (Tex. 2000).

[10] FXG succeeded in dismissing Plaintiffs' common law rescission/unjust enrichment claims in four similar cases that were either remanded out of the MDL or filed after the MDL docket concluded. *See Slayman v. FedEx Ground Package Sys., Inc.*, Nos. 3:05-cv-1127, 3:07-cv-818, 2012 WL 1902601 (D. Or. May 25, 2012) (dismissing claim for rescission under Oregon law and summarizing dismissals of rescission claims in Maine, Massachusetts and Michigan actions). Plaintiffs in the Virginia action did obtain an initial denial of FXG's motion to dismiss this

considered the risk that their claims for rescission and unjust enrichment could be dismissed upon continued litigation. Co-Lead Counsel Decl., ¶ 7.

In addition, Plaintiffs considered the prospect that even if they prevail on their common law claims they could well recover less than the maximum damages. First, FXG disputed several of the core assumptions underlying Plaintiffs' damages computation, and offered expert testimony to show that – even if FXG lost on all its affirmative defenses and Plaintiffs succeeded on their claims - the maximum Plaintiffs could recover was no more than 15% of their computed damages. Plaintiffs disagreed with this analysis but had to consider the risk that that the court or a jury could find otherwise, putting at risk more than 80% of their claimed damages. Co-Lead Counsel Decl., ¶ 7.

Finally, FXG intended to bring a motion to decertify the Class for the first five years of the Class period on the ground that there are no accessible records to show which putative Class members met the full time driving requirement during this time frame. Plaintiffs believe that a defendant is not permitted to use its own lack of record keeping as a basis to decertify a class, and that FXG had the ability to make this argument prior to certification and waived it. However, the lack of evidence is a risk to class cohesiveness through trial, counseling in favor of this settlement. FXG also intended to file motions to cut off the liability period at December 2010 on the basis that it made substantial changes to its business model, and to exclude from the class persons who assigned their contracts to incorporated entities after the class was initially certified on the basis that the incorporated entities do not meet the class definition. If FXG were to succeed on any one of these defenses its liability to the class could be reduced by 40-50%; it

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claim. *Gregory v. FedEx Ground Package Sys., Inc.*, No. 2:10-cv-630, 2012 WL 2396873 (E.D. Va. May 9, 2012).

were to succeed on more than one of these defenses, its liability to the class could be reduced by 60% or more. Co-Lead Counsel Decl., ¶ 7.

Balanced against these risks, the expenditure of further time and resources by the parties and the Court on additional litigation would not guarantee greater returns for the Class members and could risk a reduction of the Class' recovery below the Settlement amount. Avoiding the expense and time that would be involved in further litigation through a damages trial and subsequent appeals manifestly benefits the parties and also serves the public's interest in judicial efficiency, conservation of resources and voluntary dispute resolution. *See, e.g., Isby*, 75 F.3d at 1199; *Armstrong*, 616 F.2d at 312-13; *Hispanics United of DuPage Cnty.*, 988 F. Supp. at 1149-50, 1166.

The $8,900,000 settlement reached for the certified Texas Class represents approximately 27% of the maximum achievable damages calculated by Plaintiffs' expert, which damages would only be recoverable if all of FXG's defenses and arguments were to fail at the conclusion of further litigation. Co-Lead Counsel Decl., ¶ 9. The proposed Class Settlement provides Plaintiffs and the Class members concrete, certain benefits in the face of an uncertain final outcome. Furthermore, in addition to the litigation risks that this and every case involves, there is a substantial benefit to obtaining relief now. *Air Lines Stewards & Stewardesses Ass'n v. Am. Airlines, Inc.*, 455 F.2d 101, 109 (7th Cir. 1972) ("[T]he public interest may indeed be served by a voluntary settlement in which each side gives ground in the interest of avoiding litigation"). The strength of Plaintiffs' claims compared to the litigation risks manifestly supports final approval of the Class Settlement which provides an excellent result for the Class.

C. <u>The Lack of Opposition to the Settlement (Factor 3)</u>

It is well settled that the absence of objections to a proposed class action settlement raises a strong presumption that the settlement terms are favorable to the class. *Retsky Family Ltd.*

P'ship v. Price Waterhouse LLP, 2001 WL 1568856, at * 3 (N.D. Ill. Dec. 10, 2001) ("The absence of objection to a proposed class settlement is evidence that the settlement is fair, reasonable and adequate") (citations omitted); *see also In re Mexico Money Transfer Litig.*, 164 F. Supp. 2d 1002, 1020-21 (N.D. Ill. 2000) *aff'd*, 267 F.3d 743 (7th Cir. 2001) ("99.9% of class members have neither opted out nor filed objections. This acceptance rate is strong circumstantial evidence in favor of the settlement."); *Am. Int'l Grp., Inc. v. ACE INA Holdings, Inc.*, 2012 WL 651727, at *6 (N.D. Ill. Feb. 28, 2012) ("out of a class of over thirteen hundred class members, only three have objected, and just one has excluded itself from the class. Thus, using the number of class members as a metric, there has been almost no opposition to the settlement."); *Meyenburg v. Exxon Mobil Corp.*, 2006 WL 5062697, at *6 (S.D. Ill. June 5, 2006) (less than fifty opt-outs and nine objections in class "which potentially has thousands of members.")

Here, the reaction of the Class to the proposed Settlement has been uniformly positive. The November 14, 2016 deadline for lodging objections to the Settlement passed without a single filing except the untimely opt-out discussed below. Except to the extent this purported opt out gave "reason for opting-out," no Class member lodged an objection to either the Settlement or the requested attorney's fees, nor have any others of the previously un-notified Class members sought to be excluded from the case. Co-Lead Counsel Decl., ¶ 12. Given the size of the Class – 1,515 drivers -- the lack of opposition supports this Court's preliminary determination that the Settlement is fair, reasonable, and adequate, entitling it to final approval by the Court. *See Retsky Family Ltd. P'ship*, 2001 WL 1568856, at * 3.

Class Counsel did receive one request to opt-out of the proposed Settlement from Derick Allen Jordan. A copy of the opt-out request is attached as Exhibit 1 to the Co-Lead Counsel

Texas Declaration. Mr. Jordan was provided notice of the pendency of the *Humphrey*s action in 2008, advised of his rights to participate, and did not elect to opt-out at that time. Mr. Jordan's opt-out request is dated November 14, 2016, which is well after the close of the applicable opt-out period in 2008. As a result Mr. Jordan was and continues to be listed as a member of the Texas Class.[11] Although Mr. Jordan may not exclude himself from the Texas class, he is entitled to eschew any benefit from the Settlement if he chooses to do so. Co-Lead Counsel Decl., ¶ 13.[12]

The Texas Class uniformly favors final approval of the proposed Settlement.

D. The Opinions of Competent Counsel Favor Final Approval (Factor 4)

"While the court, of course, should not abdicate its responsibility to review a class action settlement merely because counsel support it, the court is entitled to rely heavily on the opinion of competent counsel." *Armstrong*, 616 F.2d at 325 (citations omitted). In finding counsel "competent," the court may rely on its own observations of the quality of representation provided by counsel as well as any affidavits highlighting the qualifications and accomplishments of counsel. *Isby*, 75 F.3d at 1200 (citations omitted); *Butler v. Am. Cable & Tel., LLC*, 2011 WL 2708399, at *8 (N.D. Ill. July 12, 2011) (approving settlement where "the parties participated in

[11] Generally, "the standard for determining whether a class member should be allowed to opt out of a class action after the applicable exclusion deadline has passed is whether the class member's failure to meet the deadline is the result of 'excusable neglect."' *In re Charles Schwab Corp. Sec. Litig.*, No. C08-01510-WHA, 2011 WL 855817 at *1 (N.D. Cal. Mar. 9, 2011); *In re VMS Sec. Litig.*, 145 F.R.D. 458, 462-63 (N.D. Ill. 1992) (same). Mr. Jordan has provided no facts upon which it could be concluded his failure to comply with the applicable deadline is a result of "excusable neglect."

[12] Nor do Mr. Jordan's "reasons for opting out" of the Settlement have any merit. His argument that the recovery does not pay the "total damages suffered" and does not recover various ERISA benefits has been addressed by Class Counsel in a number of the Class Cases such as the New York and Pennsylvania actions. Mr. Jordan's argument that the Settlement does not require FXG to "pay damages past 2011" is incorrect. The recovery period for the Texas Class extends through April 30, 2016 and FXG agreed to pay damages on the asserted Class claims until April 30, 2016, thus "past 2011." Co-Lead Counsel Decl., ¶ 4.

arm's length negotiations with the assistance of the Court"); *McKinnie v. JP Morgan Chase Bank,* 678 F. Supp. 2d 806, 812 (E.D. Wis. 2009) (noting that arm's-length negotiations facilitated by a neutral mediator is one factor, among others, that supports a finding that the settlement is fair).

Both parties in this case are represented by experienced class action counsel, and all have endorsed the proposed Settlement. The Settlement was the product of extended arm's-length negotiations facilitated by a highly experienced and respected mediator. The parties reached the Agreement after significant investigation and discovery, as well as mediation briefing, that enabled Class Counsel to evaluate on an informed basis the claims and defenses in this case. In formulating their settlement position and ultimate decision to accept the Settlement, Class Counsel carefully considered the likelihood of success on certain issues and the risk of loss on other issues. Counsel considered the risk of decertification, the issues that would likely be tried, the effect FXG's defenses could have on the Class size and the potential narrowing of recoverable damages. Counsel also considered the length of time in which the litigation could proceed to a final judgment or verdict compared to the value to the Class of receiving the settlement funds now, particularly in light of the length of time that this case already has been pending. MDL Doc. No. 2674 at 37; Co-Lead Counsel Decl., ¶ 10.

All Counsel agreed the Settlement obtained was in the best interests of the Class and represents, in terms of the percentage of the total possible damages, an excellent result for the Texas Class. The Court is entitled to rely heavily on the considered judgment of counsel for the parties that this Settlement represents a fair, reasonable, and adequate resolution of Plaintiffs' claims. *Hispanics United of DuPage Cnty.*, 988 F. Supp. at 1170 ("This Court reiterates its belief that counsel for all parties are extremely competent. Their unanimously strong

endorsement of the Decree is entitled to significant weight."). Because the Settlement, in the opinion of Class Counsel, was fair, adequate, and reasonable, it should be approved.

E. The Settlement Was Reached After Ample Discovery and Litigation Sufficient to Test the Strength of Plaintiffs' Claims (Factor 5)

"The stage of the proceedings at which settlement is reached is important because it indicates how fully the district court and counsel are able to evaluate the merits of plaintiffs' claims." *Armstrong*, 616 F.2d at 325. As described above, the proposed Settlement was reached after more than eleven years of hard-fought litigation, including substantial fact and expert discovery and motion practice, class certification and dispositive motions, the entry of final judgment against Plaintiffs, and a successful Seventh Circuit appeal, and only after substantive settlement negotiations. MDL Doc. No. 2674 at ¶ 26. Class Counsel had a full understanding of the strengths and weaknesses of the claims, as well as the potential difficulties Plaintiffs could face in obtaining a favorable verdict at trial and surviving another round of appeals. *See, e.g.*, *In re Mexico Money Transfer Litig*., 164 F. Supp. 2d at 1021-22 (noting that at the time of settlement, plaintiffs' counsel had analyzed the strengths and weaknesses of available claims and "had ample opportunity to reach an informed judgment concerning the merits of the proposed settlements"). There can be no dispute that the advanced stage of the current proceedings weighs heavily in favor of approving the settlement. *Hispanics United of DuPage Cnty.*, 988 F. Supp. at 1170-71 (approving proposed consent decree entered into after the completion of massive discovery, the entry of numerous pretrial rulings and on the eve of summary judgment).

VI. CONCLUSION

For all of the foregoing reasons, the Settlement is a fair, reasonable, and adequate result for the Texas Plaintiffs. As such, the Texas Plaintiffs request the Court to grant final approval to the Class Settlement.

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Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Susan E. Ellingstad
Susan E. Ellingstad
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981
seellingstad@locklaw.com

Beth A. Ross
LEONARD CARDER, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612
Tel: (510) 272-0169
Fax: (510) 272-0174
bross@leonardcarder.com

Robert I. Harwood
Matthew M. Houston
HARWOOD FEFFER LLP
488 Madison Avenue, 8th Floor
New York, NY 10022
Tel: (212) 935-7400
Fax: (212) 753-3630
rharwood@hfesq.com
mhouston@hfesq.com

Plaintiffs' Co-Lead Counsel

Donald R. Taylor
Jennifer Tatum Lee
TAYLOR DUNHAM, LLP
301 Congress Avenue, Suite 1050
Austin, TX 78701
Tel: (512) 473-2257
Fax: (512) 478-4409
dtaylor@taylordunham.com
jtatumlee@taylordunham.com

Plaintiffs' Co-Counsel