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.
Sharon Whiteside, et al. v. FedEx Ground Package Systems, Inc., Case No. 3:07-cv-00538-RLM-MGG (NC)	

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

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I. INTRODUCTION

Class Counsel, on behalf of Named Plaintiffs Sharon Whiteside, John Brown, James D. Coates, Louis Wallace, Darrell Jenkins, and Lawrence Aubrey Wilson 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. 2757. 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 North Carolina Class, described below, no objections to the Settlement have been filed. The Seventh Circuit's criteria for approval of class action

settlements, when applied to the North Carolina case, overwhelmingly favor final approval of the Settlement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action was commenced on May 2, 2007, in the United States District Court for the Western District of North Carolina by the Named Plaintiffs 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.

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 North Carolina 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. This action was subsequently transferred to the MDL on June 26, 2007. *See In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 381 F. Supp.2d 1380 (J.P.M.L. 2005).[1]

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

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

filed in all of the Class cases in five waves during 2007 and 2008. The North Carolina Plaintiffs' class certification motion was filed on October 1, 2007; the motion was granted by the Court on July 27, 2009 with respect to Plaintiffs' statutory claims asserted under the North Carolina Unfair and Deceptive Trade Practice Act ("UDTPA"), and rescission and unjust enrichment. MDL Doc. No. 1770. 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) since May 2, 2003, 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 North Carolina.

Id. The Court appointed Co-Lead Counsel to serve as Class Counsel and approved the Class Notice in an order entered October 14, 2009. MDL Doc. No. 1848. Notice was promptly mailed to 797 Class members, advising them of their right to opt out of the litigation. Twelve Class members opted out. *See* MDL Doc. No. 2690 at ¶ 7.

On September 28, 2009, Named Plaintiffs filed a motion 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 stayed the North Carolina action while it certified two questions in the Kansas case (*Craig*, the *de facto* lead case), to the Supreme Court of Kansas, which accepted the certified questions in January 2013. 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 Kansas 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 in *Craig*, 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 *Whiteside*. 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 *Whiteside*.

In preparation for the mediation, FXG provided Plaintiffs with substantial electronic data from multiple sources relevant to the damage claims asserted by the North Carolina 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 the

UDTPA, rescission and unjust enrichment. 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 January 14, 2016. Co-Lead Counsel and North Carolina Counsel attended the mediation. A settlement in principle was achieved late into the evening and 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. 2690. 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. 2757. 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[2], will provide substantial monetary relief to the Class. FXG will pay the sum of $20,000,000 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 Court-appointed settlement administrator, Rust Consulting. Costs of the Class Settlement notice and administration will be paid from the Settlement Fund.

[2] 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.

The $20,000,000 Class Settlement Fund will be allocated and distributed as follows:

- Approximately $13,656,000 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 $6,000,000);
- Approximately $54,000 will be paid to Rust Consulting as compensation for settlement administration;
- Up to $15,000 will be distributed to each of the six Class Representatives who were deposed, in an amount not to exceed $90,000; and
- Approximately $200,000 (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 $51.90 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 $18.16 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 $19,250 and the range of settlement payments will be approximately $250 to $53,440.47. 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 North Carolina, 224 S. Dawson Street, Raleigh, NC 27601. *See* MDL Doc. No. 2690 at ¶ 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. 2773, 2775, 2777, 2779. Counsel's motion for an award of attorney's fees and costs and Class representative service payments, which will be heard on January 23, 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. 2757. 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 ten persons who fit the North Carolina 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. 2690-2. 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; (d) the estimated amount of each Class 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. 2690-4 (Previously Notified Class Member Notice) and 2690-5 (Un-notified Class Member Notice). Also included with the Class Notice was a "Computation of Estimated Settlement

Share" worksheet informing each Class member of her estimated Settlement share and how it was calculated. MDL Doc. No. 2690-2 at 22.

On or about September 12, 2016, Rust Consulting sent the Court-approved Notices to all Class members per the preliminary approval order. Declaration of Jessica Jenkins in Support of Motion for Final Approval of Class Settlement ("Jenkins Decl."), ¶ 10, filed herewith. 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.* 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 twelve Class Notices to be re-mailed to updated addresses. Joint Declaration of Co-Lead Counsel in Support of Motion for Final Approval of Proposed North Carolina Class Action Settlement ("Co-Lead Counsel Decl."), ¶ 9, filed herewith.

Rust Consulting also secured a URL and established a website (www.whiteside-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.* 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, 707 notices were mailed[3]; 59 were returned undeliverable; 40 were re-mailed with updated addresses; there were no objections; and there were no additional timely exclusions. Jenkins Decl., ¶¶ 10, 13, 15, 17, 18. One previously notified Class member, William Goswick, filed a request for exclusion dated November 10, 2016, which will be discussed at page 19 below.

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 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 School Dist. of City*

[3] 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.

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).[4] 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 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 and 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

[4] *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*).

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 and 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").

Evaluating the strength of Plaintiffs' case on the merits involves an analysis of several factors: the threshold issue of employment status, the strength of the underlying state claims and FXG's defenses, as well as numerous other defenses to class certification, the scope of class membership, the scope of recoverable damages, and other general litigation risks. Here, the principal state claim is UDTPA claim. Other alternative theories are the North Carolina wage statute and state common law claims for rescission of the Operating Agreement and unjust enrichment, the damages to each of which are overlapping.

This action is currently on appeal before the Seventh Circuit on the issue of Plaintiffs' employment status under North Carolina law and the outcome of that appeal is uncertain. While

Plaintiffs will argue that the legal conclusions reached by the Seventh Circuit and the Kansas Supreme Court in *Craig* apply to the employment status factors under North Carolina law, FXG will argue that the holding in *Craig* does not mandate a determination of employment status under North Carolina law. Because North Carolina follows a "right of control" test similar to that found in Kansas, Plaintiffs believe that the finding of independent contractor status will be overturned in North Carolina just as it was in Kansas. *Youngblood v. North State Ford Truck Sales*, 364 S.E.2d 433, 437, *reh'g denied*, 367 S.E.2d 923 (N.C. 1988) ("Where the party for whom the work is being done retains the right to control and direct the manner in which the details of the work are to be executed, however, it is universally held that the relationship of employer and employee is created."); *Pearson v. Peerless Flooring Co.*, 101 S.E.2d 301, 308 (N.C. 1958).

Plaintiffs recognize, however, that even if summary judgment for FXG is overturned, the Seventh Circuit could conclude the issue cannot be resolved as a matter of law and remand the case for trial on the issue of employment status. This is the result reached by the Eleventh Circuit and the Eighth Circuit in remanded cases which recently came before them.[5] While Plaintiffs believe they would ultimately prevail on employment status at trial, a remand would add delay, expense and uncertainty to the outcome of the North Carolina action.

With respect to the underlying legal claims, under their UDTPA claim, N.C. Gen. Stat. § 75-1.1(a), Plaintiffs alleged that drivers were unfairly induced into service contracts based upon the misclassification of drivers as independent contractors. Plaintiffs argued that the business activities of the drivers fit within the general term of "commerce" as used in the statute and that employees could meet the definition of "consumer" under the statute. Plaintiffs cited

[5] *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).

North Carolina precedent holding that employee status was not a bar to a defendant's liability under UDTPA. *See Sara Lee Corp. v. Carter,* 519 S.E. 2d 308, 312-13 (N.C. 1999); *Durling v. King*, 554 S.E. 1, 4 (N.C. Ct. App. 2001). FXG cited contrary legal precedent indicating a presumption against applicability of the UDTPA claim as between employers and employees. *Gress v. Rowboat Co.*, 661 S.E.2d 278, 281-82 (N.C. Ct. App. 2008). Although Plaintiffs believe they could defeat any such presumption, they recognized the risks presented by a somewhat novel theory of recovery in an employment setting. FXG also argued that because more than 80% of the Class renewed their contracts with FXG, they had lost their argument as a matter of law that they were "deceived" for purposes of UDTPA and the value of the claim, including any penalties, would be reduced accordingly. Co-Lead Counsel Decl., ¶ 5.

In addition to the UDTPA claim, Plaintiffs also asserted common law claims for rescission and unjust enrichment. While Plaintiffs believe the common law should provide a remedy for FXG's misclassification of its drivers as independent contractors, they acknowledge the lack of direct favorable precedent relating to Plaintiffs' common law claims in North Carolina. Specifically, Plaintiffs sought to rescind a written agreement arguably relating to a transaction (the Operating Agreement) in order to sue for recovery under an equitable theory of *quantum meruit* or unjust enrichment. FXG asserted a variety of defenses to rescission under the common law. For example, FXG argued that North Carolina limits rescission to transactions involving mistake or fraud/or violation of public policy and has fairly strict requirements that the Parties be able to be returned to the status quo, disgorging all benefits previously received under the contract.[6] Finally, FXG asserted a variety of defenses to a request for rescission, including

[6] 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,

ratification, promptness in requesting rescission, and failure to return of all consideration received under the contract. *Id.* at ¶ 5.

Plaintiffs also examined their potential recovery pursuant to the North Carolina Wage and Hour Act. N.C. Gen. Stat. § 95-25.8. The statute requires written authorization of deductions in advance of the date of deduction along with a specific reason for deduction. Although not certified, Plaintiffs intended to assert this claim upon remand to the North Carolina court under North Carolina's liberal pleading standard allowing for relation back of claims. *Estrada v. Jaques*, 321 S.E.2d 240, 245 (N.C. Ct. App. 1984). Plaintiffs had to consider FXG's strong arguments that the signed addenda to the Operating Agreement constituted sufficient written authorization under North Carolina statutes, and that the damages under the statute were more than subsumed within the broad damages under the UDTPA claim. These deductions damages are also fully subsumed within the unjust enrichment damages calculation and thus would present an alternative theory.

Plaintiffs' expert calculated the damages under the UDTPA for the North Carolina Class as $30,714,643, which represented the actual damages suffered and measured by 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. With trebling, the maximum possible value could be $92,143,929. Of course, this maximum recovery amount assumes Plaintiffs' complete success on their novel theory and the

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

complete failure of all FXG's defenses and arguments, albeit after vigorous, expensive motion practice, expert analysis and discovery, and a trial. These numbers also do not account for FXG's dispute over Plaintiffs' damages calculation, or its argument that 80% of the claim value is lost given Plaintiffs' renewal of their Operating Agreements. Co-Lead Counsel Decl., ¶¶ 3-5.

Plaintiffs' expert measured damages for unjust enrichment as the same as the UDTPA damages, $30,714,643. FXG took issue with Plaintiffs' damage calculations under both theories, and argued damages would be at most about half of Plaintiffs' calculations. Co-Lead Counsel Decl., ¶¶ 3-4. Finally, Plaintiffs' expert computed the total deductions made during the relevant period at $25,577,876 plus interest.[7] Again, these damages were entirely duplicative of and subsumed within the other claims. *Id.* at ¶ 6. Plaintiffs also considered legal fees as a component of damages for their statutory claims, but considered that fees are discretionary under N.C. Gen Stat. § 95-25.22(d).

In addition to the risks addressed above, Plaintiffs considered FXG's other asserted factual and legal defenses, to the class certification decision, the scope of class membership, and the extent of potential recoverable damages. For example, FXG argued that the Class definition of "full-time" was not ascertainable and requires decertification; that Class members who incorporated are not "employees" eligible to recover damages under North Carolina law; and that Class members could not recover for routes driven by others. In sum, Plaintiffs had to consider that FXG had defenses that, if successful, could defeat each of their theories of liability. And additionally, FXG asserted arguments that could limit Plaintiffs' recovery under any of those

[7] Although liquidated damages are available under North Carolina law, a defense remains that a defendant need only establish good faith to avoid imposition of such damages. Plaintiffs had to consider the risk that these elements could not be established in light of the prior rulings upholding FXG's business model.

theories, even if Plaintiffs prevailed on liability, by anywhere from 30-75%. Co-Lead Counsel Decl., ¶ 5.

The Settlement reached for the North Carolina Class members was $20,000,000. This amount represents approximately 65% of the maximum achievable damages exclusive of penalties under the UDTPA, and 22% of that claim assuming complete treble penalties – but without any discount whatsoever for risk. Co-Lead Counsel Decl., ¶ 7. Given the all or nothing nature of that novel claim in North Carolina, the Settlement achieved is an excellent result for the North Carolina Class. The settlement obtained in this case provides Named Plaintiffs and the Class members with concrete, certain benefits in the face of an uncertain final outcome. Further, 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 Named Plaintiffs' claims compared to the litigation risks supports final approval of the Settlement Agreement.

C. The Lack of Opposition to the Settlement (Factor 3)

It is well settled that the absence of objections to a proposed class action settlement raise a strong presumption that the settlement terms are favorable to the class. *Retsky Family Ltd. P'ship v. Price Waterhouse LLP*, No. 97 C 7694, 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., Nos. 07 CV 2898, 09 C 2026, 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.*, No. 3:05-cv-15-DGW, 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: no Class member lodged an objection to either the Settlement or the requested attorney's fees, nor have any of the previously un-notified Class members sought to be excluded from the case. Co-Lead Counsel Decl., ¶ 12. 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.

On or about November 10, 2016, Class Counsel received, via U.S. Mail, an opt-out notice from counsel for Class member William Goswick requesting exclusion from the North Carolina action. Attached as an exhibit to Mr. Goswick's opt-out notice was a copy of the request for exclusion signed by "William Goswick, 179 Retriever Lane, Burke Hill, WV 25413" and dated July 7, 2008. Co-Lead Counsel Decl., Ex. 1. Class Counsel had no record of having received this earlier opt-out request from Mr. Goswick.

Upon investigation, Class Counsel discovered that, although Mr. Goswick was an FXG driver in North Carolina, his time as a driver pre-dates the class period in North Carolina. In addition, his 2008 request for exclusion from the North Carolina class somehow pre-dates the

mailing of the class notices, which were mailed on October 26, 2009. Co-Lead Counsel Decl., ¶ 11.

Class Counsel's investigation also revealed that Mr. Goswick was a driver in Maryland during the class period and that he is a member of the Maryland class. Class Counsel has confirmed that a class action notice in the Maryland action was mailed to Mr. Goswick on or about October 28, 2008. In addition, Class Counsel has confirmed with the settlement administrator that a settlement notice has been mailed to Mr. Goswick in connection with the Maryland settlement and has not been returned as undeliverable. Class Counsel has no record of Mr. Goswick ever filing a request to be excluded from the Maryland class. Co-Lead Counsel Decl., ¶ 11. In any event, since Mr. Goswick claims to have previously opted out of the Class, his request for exclusion should not be considered as opposition to the current 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*, No. 09-CV-5336, 2011 WL 2708399, at *8 (N.D. Ill. July 12, 2011) (approving settlement where "the parties participated in 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. Co-Lead Counsel Decl., ¶ 8.

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 North Carolina Class. *Id.* at ¶ 13. 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. 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 North Carolina Plaintiffs. As such, the North Carolina Plaintiffs request the Court to grant final approval to the Class Settlement.

Dated: December 15, 2016

Respectfully submitted,

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