UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

I. INTRODUCTION

Class Counsel, on behalf of Named Plaintiffs Raymond Tierney, Roland Guillet, Wayne Mills, Alan Ginet, Stephen H. McGuinness, Ricardo Bacani, Donald J. McClafferty, Sammy Farland, and Paul Luongo 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. 2760. 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 Rhode Island 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 Rhode Island case, overwhelmingly favor final approval of the Settlement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action was commenced on May 19, 2005, in the United States District Court for the District of Rhode Island 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 Third Amended Complaint, Plaintiffs asserted common law claims of rescission and unjust enrichment, 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 Rhode Island 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 case was transferred on September 20, 2005. *See In re FedEx Ground Package Sys., Inc., Employment Practices Litig.*, 381 F. Supp.2d 1380 (J.P.M.L. 2005).[1]

[1] 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 Rhode Island 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' claims for rescission, unjust enrichment, and declaratory relief. 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) since May 19, 1999, 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 Rhode Island.

Id. The Court appointed Co-Lead Counsel to serve as Class Counsel and approved the Class Notice in an order entered May 12, 2008. MDL Doc. No. 1288. Notice was promptly mailed to 121 Class members, advising them of their right to opt out of the litigation. One Class member opted out. *See* MDL Doc. No. 2662, ¶ 7.

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. Judgment was entered on December 15, 2010. MDL Doc. No. 2251.

Plaintiffs appealed to the U.S. Court of Appeals for the Seventh Circuit from the judgment entered in favor of FXG on January 5, 2011. MDL Doc. No. 2309. On January 13,

2011, FXG filed a notice of conditional cross-appeal from this Court's March 25, 2008 class certification order, along with any other ruling, order or finding adverse to FXG. MDL Doc. No. 2393. In an order entered April 1, 2011, the Seventh Circuit consolidated the appeal in this action with the appeal in *Craig v. FedEx Ground Package System Inc*.—the *de facto* lead case in the MDL docket; the Seventh Circuit initially requested briefing in *Craig* and suspended all other briefing pending a resolution of the plaintiffs' appeal in that case. *See Craig*, 7th Cir. Doc. No. 26.

In its Opinion and Order entered July 12, 2012 in the *Craig* case, 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 *Tierney*. 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 *Tierney*.

In preparation for the mediation, FXG provided Plaintiffs with substantial electronic data from multiple sources relevant to the damage claims asserted by the Rhode Island 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 common law theories of 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 15, 2016. Co-Lead Counsel and Local Counsel attended the mediation. The Named Plaintiffs were all available by phone during 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. 2662-1. 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. 2760. 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 $1,600,000 to resolve the class claims asserted in Plaintiffs' Third 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.

The $1,600,000 Class Settlement Fund will be allocated and distributed as follows:

- Approximately $919,000 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 $480,000);
- Approximately $50,000 will be paid to Rust Consulting as compensation for settlement administration;
- Up to $15,000 will be distributed to each of the nine Class Representatives who were deposed, in an amount not to exceed $135,000; and
- Approximately $16,000 (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 $29.99 for each workweek

[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.

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 $10.50 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 $7,352, and the range of settlement payments will be approximately $250 to $20,332.24. 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, Rhode Island Legal Services, 56 Pine Street, Fourth Floor, Providence, RI 02903. *See* MDL Doc. No. 2662 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. 2823, 2824, 2825, 2826. 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. 2760. 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 15 persons who fit the Rhode Island 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. 2662-2. 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. 2662-4 (Previously Notified Class Member Notice) and 2662-5 (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. 2662-2 at 7.

On or about September 12, 2016, Rust Consulting sent the Court-approved Notices to all Class members per the preliminary approval order. Declaration of Amanda Myette in Support of Motion for Final Approval of Class Settlement, ¶ 10 ("Myette Decl."), 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 seven Class Notices to be re-

mailed to updated addresses. Joint Declaration of Co-Lead Counsel in Support of Motion for Final Approval of Proposed Rhode Island Class Action Settlement ("Co-Lead Counsel Decl."), ¶ 10, filed herewith.

Rust Consulting also secured a URL and established a website (http://www.tierny-v-fedexground-settlement.com) [sic] 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, 125 notices were mailed[3]; 20 were returned undeliverable; 7 were re-mailed with updated addresses; there were no objections; and there were no exclusions. Myette Decl., ¶¶ 10, 12, 14, 16, 17.

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.

[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.

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 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).

[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*).

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 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").

Plaintiffs' appeal of the ruling holding them to be independent contractors is pending before the Seventh Circuit. To date, the Kansas Supreme Court and the Court of Appeals for the Ninth Circuit[5] have concluded that FXG drivers are employees under Kansas, California and Oregon law. 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.[6] As a result of these rulings, Plaintiffs assess the risk that they would ultimately lose the issue of employment status on appeal and be held independent contractors as a matter of Rhode Island law to be relatively low. However, Plaintiffs recognize the possibility that the Seventh Circuit could rule (as the Eighth and Eleventh Circuits have done) that the issue of employment status cannot be resolved as a matter of law, necessitating a lengthy, complicated, and expensive trial before the transferor court. On balance, Plaintiffs assess their likelihood of prevailing on the issue of employment status as strong but far from certain. Co-Lead Counsel Decl., ¶ 2.

Because Rhode Island had no statutory remedy in place during the time period of this lawsuit, the only class claims certified for the Rhode Island Plaintiffs are rescission and unjust enrichment. Plaintiffs' theory is that the OA should be rescinded on the basis that it was void as against public policy because various of its provisions contravened Rhode Island law, particularly Rhode Island's Payment of Wages Act, R.I. Gen. Law § 28-14-1 *et seq*.[7] Plaintiffs also asserted fraud and mistake as a basis for rescission. *See Bogosian v. Bederman*, 823 A.2d 1117, 1120 (R.I. 2003) ("fraud vitiates all contracts."). Plaintiffs and their damages expert calculated the Plaintiffs' damages as the difference between what Plaintiff drivers received in net

---

[5] *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).

[6] *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).

[7] In 2013, the Rhode Island legislature added a private right of action for illegal deductions. *See* § 28-14-19.2.

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 substantially similar work. Under this model, Plaintiffs calculated their maximum achievable damages for the Plaintiff class as $4,122,000. 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., ¶¶ 3-4.

FXG raised several common law defenses to Plaintiffs' rescission claim, including (1) severability of any offending provisions of the OA, (2) delay in seeking rescission, (3) inability to return the parties to the status quo, and (4) set off of any benefits Plaintiffs received under the OA. Rhode Island law does not set forth exactly what constitutes "reasonable promptness" in seeking rescission. Co-Lead Counsel Decl., ¶ 6. *See LaFazia v. Howe*, 575 A.2d 182, 184 (R.I. 1990). Plaintiffs also had to acknowledge that FXG had succeeded in asserting these common law defenses against rescission/unjust enrichment claims in other states.[8]

As in the other Class Cases, 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

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

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 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., ¶ 6.

As a result, Plaintiffs recognized the risk that their claims for unjust enrichment may not have succeeded. They balanced this likelihood of receiving no part of their calculated damages of $4,122,000 with FXG's offer of $1,600,000 as compensation to the Class. This amount constitutes almost 39% of Plaintiffs' maximum possible damages, higher than the net expected value of further litigation. Co-Lead Counsel Decl., ¶ 8.

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."); *America 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., ¶ 11. Given the size of the Class -- 125 plaintiffs -- 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.

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., ¶ 9.

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 Rhode Island 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. 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 Rhode Island Plaintiffs. As such, the Rhode Island Plaintiffs request the Court to grant final approval to the Class Settlement.

Dated: December 15, 2016

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

Peter N. Wasylyk
LAW OFFICES OF
PETER N. WASYLYK
1307 Chalkstone Avenue
Providence, RI 02098
Tel: (401) 831-7730
Fax: (401) 861-6064
pnwlaw@aol.com

Wm. Christopher Penwell
Brian E. Weisberg
SIEGEL BRILL, P.A.
100 Washington Avenue South, Suite 1300
Minneapolis, MN 55401
Tel: (612) 337-6100
Fax: (612) 339-6591
ChrisPenwell@siegelbrill.com
BrianWeisberg@siegelbrill.com

Plaintiffs' Co-Counsel