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: *Lawrence Asbury, et al. v. FedEx Ground Package Systems, Inc.*, Case No. 3:05-cv-00826-RLM-MGG (WV)	

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

STATUTES

I. INTRODUCTION

Class Counsel, on behalf of Named Plaintiffs Lawrence Asbury and Roger Davis, 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. 2746. 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 strength 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 West Virginia 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 West Virginia case, overwhelmingly favor final approval of the Settlement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action was commenced on September 25, 2006, in the United States District Court for the Southern District of West Virginia by Plaintiff Asbury on behalf of a putative class against FXG.[1] 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 Complaint, Plaintiffs asserted claims under West Virginia law that included: 1) violation of W. Va. Code § 21-5 ("West Virginia Wage Payment and Collection Act"); 2) violation of W. Va. § 46-6 ("West Virginia Consumer Credit Protection Act"); and 3) rescission and unjust enrichment claims, 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 West Virginia 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]

---

[1] Plaintiff Roger Davis was added as a party by subsequent amendment. Plaintiffs and FXG are collectively referred to as "Parties."

[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 West Virginia 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' statutory claims asserted under the West Virginia Wage Payment and Collection Act, the West Virginia Consumer Credit Protection Act, and their common law unjust enrichment and rescission 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 September 25, 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 West Virginia.

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 123 Class members, advising them of their right to opt out of the litigation. Three Class members opted out. *See* MDL Doc. No. 2682, ¶ 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. 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, 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 *Asbury*. 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 *Asbury*.

In preparation for the mediation, FXG provided Plaintiffs with substantial electronic data from multiple sources relevant to the damage claims asserted by the West Virginia 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 West Virginia Wage Payment and Collection Act, the West Virginia Consumer Credit Act, and 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 February 10, 2016. A settlement in principle was achieved that day 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. 2682. 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. 2746. 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 $3,575,000 to resolve the class claims asserted in Plaintiffs' 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

[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.

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 $3,575,000 Class Settlement Fund will be allocated and distributed as follows:

- Approximately $2,396,750 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 $1,072,500);
- Approximately $40,000 will be paid to Rust Consulting as compensation for settlement administration;
- Up to $15,000 will be distributed to each of the two Class Representatives who were deposed, in an amount not to exceed $30,000; and
- Approximately $35,750 (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 $69.52 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 $24.33 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 $22,306 and the range of

settlement payments will be approximately $250 to $76,456.48. 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 West Virginia, 922 Quarrier Street, 4th Floor, Charleston, WV 25301. *See* MDL Doc. No. 2682 at ¶¶ 17, 28, 29. 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 of 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. 2835, 2836, 2837, and 2838. 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. 2746. 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 any 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. 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 their 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. 2682-5 (Class 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. 2682-2, 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 Melissa Padal in Support of Motion for Final Approval of West Virginia Class Action Settlement ("Padal Decl."), at ¶ 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.* 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 six Class Notices to be re-mailed to updated addresses. Joint Declaration of Co-Lead Counsel in Support of Motion for Final Approval of Proposed West Virginia Class Action Settlement ("Co-Lead Counsel Decl."), ¶ 10, filed herewith.

Rust Consulting also secured a URL and established a website (www.asbury-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 ¶ 6. 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, 107 notices were mailed[4]; 11 were returned undeliverable; 19 were remailed with updated addresses; there were no objections; and there were no exclusions. Padal Decl., ¶¶ 10, 13, 15, 17, 18.

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. 1972)). Settlement is particularly advantageous in complex class actions. *Id*.; *Armstrong v. Bd. of School Dist*, 616 F.2d 305, 312-13 (7th Cir. 1980) ("It is axiomatic that the federal courts look with great favor

[4] 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.

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).[5] 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 & 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*

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

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.*, 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.").

This action is currently on appeal before the Seventh Circuit on the issue of the Named Plaintiffs' employment status under West Virginia law and the outcome of that appeal is entirely uncertain. While Named Plaintiffs will argue that the legal conclusions reached by the Seventh Circuit and the Kansas Supreme Court in *Craig* apply equally to the employment status factors under West Virginia law and compel the same result, FXG will argue that the holding in *Craig* is completely irrelevant to any determination of employment status under West Virginia law. But Plaintiffs recognize that even if summary judgment for FXG is denied, there is a significant likelihood that the Seventh Circuit may 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, and

there exists West Virginia precedent that the determination of employee status is not necessarily one that will be determined as a matter of law. *Zirkle v. Winkl*er, 585 S.E.2d 19, 24 (W. Va. 2003) ("In a case involving the relationship of independent contractor, although the facts may be undisputed, the issue should be submitted to the jury and not decided by the court as a matter of law, unless the facts are such as would justify but one reasonable inference.")[6]

Likewise, whether or not it is a question of law or fact, Named Plaintiffs will have to demonstrate that they meet the West Virginia definition of employment using a four-factor test: 1) selection and engagement of the servant; 2) the payment of compensation; 3) the right to fire; and 4) the power of control. *Burless v. W. Va. Univ. Hosps., Inc.*, 601 S.E.2d 85, 91 (W. Va. 2004). Plaintiffs believe that the record overwhelmingly supports their view that employment status can be found based on these four factors. Nonetheless, FXG is likely to argue and Plaintiffs would face risk to a showing of employment status, and indeed the continuance of class action status, if a West Virginia court interprets the "power of control" factor to be shown by actual exercise of such power as argued by FXG. *See Timberline Four Seasons Resort Mgmt. Co. v. Herlan*, 679 S.E.2d 329, 334-35 (W. Va. 2009). If actual control is the operative test, then each plaintiff would have to show, based upon his or her individual experience, that FXG exercised control and the commonality and typicality factors of the West Virginia class would be subject to direct attack.

If the drivers are ultimately held to be employees either as a matter of law or after trial, Plaintiffs will be required to prove their wage deduction claim under W. Va. Code § 21-5-10. FXG will assert numerous factual and legal defenses, as it did in mediation. These defenses include: (1) whether the Class definition of "full-time" is ascertainable or requires

[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).

decertification; (2) whether Class members who incorporated are "employees" eligible to recover damages under the Wage Payment Collection Act; and (3) whether settlement deductions from multi-route Class members that related to those other routes were "wages" under the Wage Payment Collection Act recoverable to Plaintiffs. While Named Plaintiffs will argue that the West Virginia statute specifies exact categories of allowable deductions, there remains some doubt as to whether the parties may contract among themselves to expand such categories of deductions. W. Va. Code § 21-5-3(e). Likewise, FXG disputed several categories of deductions sought by Named Plaintiffs as being unrecoverable under the West Virginia statute. Co-Lead Counsel Decl., ¶ 7.

Additionally, FXG will argue that Named Plaintiffs' wage deduction claim may be limited by applicability of a five-year statute of limitations under the Wage Collection Act, which would create a rolling accrual of deductions which would have to be applied on a person-by-person basis. *Id.* W. Va. Code Ann. § 55-2-6; *Ingram v. City of Princeton*, 540 S.E.2d 569, 573 (W. Va. 2000). Named Plaintiffs argue that this section is inapplicable, but recognize the litigation risks still to be faced if the case did not settle, including risks that could substantially impact the damages recoverable under their legal theories.

As for Named Plaintiffs' second theory, application of the West Virginia Consumer Credit Protection Act was a novel theory asserted here by Plaintiffs despite a lack of precedent for this claim in the employment context. West Virginia law arguably limits consumer fraud claims to "consumers" and requires that the action be based upon a "consumer transaction." West Virginia courts that have analyzed whether persons beyond "consumers" may bring an action have rejected a broader interpretation. *See Cather v. Seneca-Upshur Petroleum, Inc.*, 2010 U.S. Dist. LEXIS 85077, at **19-22 (N.D. W. Va. Aug. 18, 2010). Thus, the Named

Plaintiffs face uncertainty as to whether drivers were "consumers" under the particular definition in the statute. As a result, Named Plaintiffs placed a very low expectation that they could prevail on the Credit Protection Act claim.

In addition to the statutory claims, Named Plaintiffs also asserted common law claims for rescission and unjust enrichment. While Named Plaintiffs believe the common law should provide a remedy for FXG's misclassification of its drivers as independent contractors, FXG is likely to argue that there is a lack of direct favorable precedent relating to Plaintiffs' common law claims in West Virginia. Specifically, Named 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 West Virginia 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.[7] *See Gaston v. Wolfe*, 53 S.E.2d 632, 636 (W. Va. 1949). Finally, the common law of West Virginia accords a variety of defenses to a request for rescission, including ratification, promptness in requesting rescission, and failure to return of all consideration received under the terms of the contract.

Based on the certified legal claims, Named Plaintiffs' expert calculated the damages for the West Virginia Class as follows: The total deductions Named Plaintiffs claimed were made

[7] 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.*, 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.*, 2012 WL 2396873 (E.D. Va. May 9, 2012).

during the relevant period in violation of the West Virginia Wage Payment Collection Act totaled approximately $2,963,052 plus interest in the amount of $2,531,622 for a total of $5,494,674. Co-Lead Counsel Decl., ¶ 3. Although liquidated damages are generally available under the Wage Payment Collection Act, such damages are recoverable only where an employee is already "separated" from an employer. W. Va. Code Ann. § 21-5-4. Approximately 25% of the West Virginia class continues to work for FXG, thus any recoverable liquidated damages had to be reduced by that amount. Named Plaintiffs also considered legal fees as a component of damages for this claim. Even with liquidated damages, the maximum Wage Payment Collection Act damages are $14,383,831. FXG disputed many of Named Plaintiffs' assumptions and argued Plaintiffs would not recover even one-third of their valuation of the Wage Payment Collection Act claim. Co-Lead Counsel Decl., ¶ 3.

Plaintiffs' expert also calculated damages for unjust enrichment in the amount of approximately $3,449,261, but FXG took issue with Plaintiffs' unjust enrichment calculations based on comparable pay to employee drivers and valued those damages at an insignificant fraction of that amount. Co-Lead Counsel Decl., ¶¶ 5-6. Named Plaintiffs face the very high risk that the damages comprising an unjust enrichment theory could be subsumed completely within the statutory damages. In determining a fair settlement value for the West Virginia rescission/unjust enrichment case, Plaintiffs' Counsel ascribed a minimal risk of loss on the issue of employment status and a very substantial risk of loss to recovery under the common law theory of rescission/unjust enrichment given the defenses available in West Virginia to these claims such as ratification and a failure to return tendered consideration.

Named Plaintiffs felt they were most likely to succeed on the Wage Payment Collection Act claims, given that the statute does not provide a fully exhaustive list of wage deductions

similar to those taken from the West Virginia drivers and that, under West Virginia law, deductions generally associated with employer/employee relationships are recoverable. *Clendenin Lumber & Supply Co. v. Carpenter*, 305 S.E.2d 332, 337 (W. Va. 1983). Named Plaintiffs believe that their maximum achievable damages were $14,383,831. However, if FXG prevailed in its argument to exclude from recovery all Plaintiffs who incorporated their business, or to exclude amounts expended on routes Plaintiffs did not drive, the deductions recoverable could have been substantially reduced. A potential recovery under the West Virginia Wage Payment Collection Act, therefore, even assuming full recovery of the categories of deductions sought by Plaintiffs, could have been under $5,178,179 if damages and interest are reduced based on FXG's arguments to narrow the class for incorporated and MWA drivers. This is before the risk of further reduction of the class membership, or decertification altogether, based on the argument that the definition of full time cannot be ascertained. Co-Lead Counsel Decl., ¶ 8.

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 $3,575,000 settlement reached for the certified West Virginia Class represents approximately 25% 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., ¶ 8. 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. 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*, 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.*, 2012 WL 651727, at *6 (N.D. Ill. Feb. 28, 2012) ("[O]ut 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: 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 -- 107 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. The West Virginia 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 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. Class Counsel Decl., ¶¶ 2-9.

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 West Virginia 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. 2682 at ¶ 27. 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 West Virginia Plaintiffs. As such, the West Virginia 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

Damon L. Ellis, Esq.
MANI ELLIS & LAYNE, P.L.L.C.
405 Capitol Street
P.O. Box 1266
Charleston, WV 25325-1266
Tel: (304) 720-1000
dellis@mle-law.com

Plaintiffs' Co-Counsel