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: *Larry Louzau, et al. v. FedEx Ground Package Systems, Inc.*, Civil No. 3:05-cv-00530-RLM-MGG (NY)	

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

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I. INTRODUCTION

Class Counsel, on behalf of Named Plaintiffs Larry Louzau, Charles Malkin, Damian Ivanov, Nicholas Conte, George Hammer, and Daniel Santa, 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. 2743. 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 given to more than 1,500 New York Class members, two class members have raised an objection to the Settlement as described below. The Seventh Circuit's

criteria for approval of class action settlements, when applied to the New York case, overwhelmingly favor final approval of the Settlement.

II. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

This action was commenced on October 27, 2004, in the Supreme Court of the State of New York for the County of Westchester by the Named Plaintiffs individually 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 Complaint, Plaintiffs asserted claims under New York law that include 1) illegal deductions in violation of New York Labor Law § 193; 2) illegal payments in violation of New York Labor Law § 193(2); 3) fraud; 4) rescission and unjust enrichment; and 5) declaratory relief, 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 New York 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).[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 New York Plaintiffs' class certification motion was filed on March 12, 2007; the motion was granted by the Court on March 25, 2008 with respect to Plaintiffs' statutory claims 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 October 27, 1998 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 New York.

Id. The Court appointed Co-Lead Counsel to serve as Class Counsel and approved the Class Notice in an order entered April 4, 2008. MDL Doc. No. 1131. Notice was promptly mailed to 1,780 potential Class members, advising them of their right to opt out of the litigation. Fourteen Class members opted out. *See* MDL Doc. No. 2650, ¶ 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 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 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 *Louzau*. 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 *Louzau*.

In preparation for the mediation, FXG provided Plaintiffs with substantial electronic data from multiple sources relevant to the damage claims asserted by the New York 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 New York statutory law 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 January 11, 2016. Co-Lead Counsel attended the mediation. Although no settlement was reached at the mediation, the parties continued to negotiate over the next several weeks. On February 3, 2016, a settlement-in-principle was achieved 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. 2650-1. 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. 2743. 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 $42,900,000 to resolve the class claims asserted in Plaintiffs' Complaint. FXG has also agreed to pay all costs of administration and notice. 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

[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.

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 $42,900,000 Class Settlement Fund will be allocated and distributed as follows:

- Approximately $29,511,000 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 $12,870,000);
- 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 $429,000 (1% of the Settlement) will be held in a Reserve Fund for payments to self-identified Class members, if any.

No part of the Class Settlement Fund will be used to reimburse the cost of settlement administration. Rather, FXG will pay such costs separately, up to $100,000. Nor will any part of the Class Settlement Fund revert to FXG—all funds will be distributed to the drivers.

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 $43.34 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 $15.70 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 $250.00.

The average per Class member recovery, net of settlement administration expenses, attorney's fees and costs and service awards, will be approximately $18,421 and the range of

settlement payments will be approximately $250 to $68,880. 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, MFY Legal Services, 299 Broadway, 4th Floor, New York, NY 10007. *See* MDL Doc. No. 2650 at ¶¶ 17, 29, 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 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. 2790, 2791, 2793 and 2795 (New York Fee Motion). 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 by FXG and there have been no objections to the requested fees.

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. 2743. 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 sixty-six persons who fit the New York 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. 2650-2, at 40-41. 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. 2650-4 (Previously Notified Class Member Notice) and 2650-3 (Un-notified Class Member Notice). Also included with the Class Notice was a "Computation of Estimated Settlement Share" worksheet informing each Class member of their estimated settlement share and how it was calculated. MDL Doc. No. 2650-2, at 42.

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 New York Class Settlement ("Myette 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.* 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 44 Class Notices to be re-mailed to Class members whose Notices were previously returned as undeliverable. *Id.* at ¶ 13; Joint Declaration of Co-Lead Counsel in Support of Plaintiffs' Unopposed Motion for Final Approval of the New York Class Action Settlement ("Co-Lead Counsel Decl."), ¶ 14, filed herewith.

Rust Consulting also secured a URL and established a website (www.louzau-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, 1,602 notices were mailed[3]; 168 were returned undeliverable; 118 were remailed with updated addresses; and Rust directly received no objections or exclusions. Myette Decl., ¶¶ 10, 13, 15, 17, and 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

[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.

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 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

[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*).

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

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

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

In making an informed judgment about the fairness, reasonableness, and adequacy of a settlement, a court should assess the likelihood and value to the class of the case's possible outcomes, referred to as the net expected value of the litigation. *See Wong*, 773 F.3d at 863; *see also Williams v. Rohm & Haas Pension Plan*, 658 F.3d 629, 634 (7th Cir. 2011) (citing *Synfuel Techs., Inc.*, 463 F.3d at 653); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 284-85 (7th Cir. 2002); *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 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 Plaintiffs' employment status under New York law and the outcome of that appeal is uncertain. Plaintiffs and FXG held strongly differing views whether employment status could be established under New York law. Plaintiffs relied upon case law that looked to whether an employer had reserved

a *right of control* over an employee and argued that the legal conclusions reached by the Kansas Supreme Court in *Craig* apply equally to the employment status factors under New York law. *See Chaiken v. VV Publishing Corp.*, 119 F.3d 1018, 1034 (2d Cir. 1997) (employment relationship exists if an employer controls *or has right to control* the result and the manner and means of bringing about result). FXG argued that New York law requires a showing of *actual* control to establish employment status and maintained that the holding in *Craig* is completely irrelevant to any determination of employment status under New York law. *See Bynog v. Cipriani Group, Inc.*, 802 N.E.2d 1090, 1092-93 (N.Y. 2003). The success of the Named Plaintiffs' entire case rests upon whether control can be established as a reserved right or actual exercised control. For this reason alone, if FXG's argument were adopted, the Named Plaintiffs would face substantial risk in maintaining the action and succeeding at trial. *See* Co-Lead Counsel Decl., ¶ 4.

The issue of whether New York follows a reserved right of control test or an actual control test is of particular significance because it directly impacted the underlying basis of the class certification of New York claims. FXG argued that it would seek decertification of the New York class if the Seventh Circuit reversed the finding of independent contractor status. FXG argued that, if actual control is the dominant test in New York, then there will necessarily be different factual predicates for each of the New York class members. Named Plaintiffs, however, argued that even if "actual control" was the test, it did not mean that decertification was likely or required. Named Plaintiffs cited to recent Seventh Circuit precedent wherein class certification was maintained even though an "in fact" evaluation of employment status was necessary on an individual basis. *See Costello v. Beavex, Inc.*, 810 F.3d 1045, 1060 (7th Cir. 2016). While Named Plaintiffs ultimately believed that New York class certification could be

maintained, they nonetheless recognized potential risk given FXG's arguments to maintaining class certification of New York claims. Co-Lead Counsel Decl., ¶ 4.

Named Plaintiffs also acknowledged that, if FXG succeeds and actual control is found to be the predominant test, the ultimate determination of employment status may be made only after remand of the action to a New York District Court. If there are fact–finding issues concerning actual control and the Seventh Circuit concludes the issue cannot be resolved as a matter of law, it is likely that it will remand the case for trial on the issue of employment status. *See Browning v. CEVA Freight, LLC*, 885 F. Supp. 2d 590 (E.D.N.Y. 2012). This was the result reached by the Eleventh Circuit and the Eighth Circuit in remanded cases which recently came before them. Named Plaintiffs therefore faced additional risk about whether they faced further litigation (and its related delay) before trial and final resolution.

With respect to the underlying claims, Named Plaintiffs asserted two claims pursuant to New York Labor Law. The first claim was for reimbursement of wrongful deductions taken from the drivers' compensation pursuant to NYLL § 193(1). The second claim was for reimbursement of business expenses incurred by the drivers in violation of NYLL § 193(2).

Named Plaintiffs believe they have a strong claim for reimbursement of deductions taken from their compensation based upon the statutory language of NYLL § 193(1). The statute bars any deductions from the wages of an employee other than the fourteen specifically enumerated exceptions in the statute. The statute further provided that any deduction must be expressly authorized by the employee and for the benefit of the employee. NYLL § 193(1)(b). Rather than challenge the statutory provision head on, FXG argued that even if deductions were

recoverable they may only be obtained by a person – not a business entity.[5] Co-Lead Counsel Decl., ¶ 7. In an attempt to limit the possible damages, FXG asserted that once a person incorporated his or her business, the business was no longer an employee under New York law. *Id.*; *Fin. Techs., Int'l, Inc. v. Smith*, 247 F. Supp. 2d 397, 413 (S.D.N.Y. 2002). Named Plaintiffs responded that the issue was largely untested and that FXG could not benefit from such a provision as it was FXG that forced the drivers to incorporate in the first place. No matter how strong the deduction claim may be, it only holds value for Class members who are entitled to claim such a deduction under New York law.

Named Plaintiffs' claim for expense reimbursement under NYLL § 193(2) was less certain. While there is no separate expense reimbursement statute in New York, Named Plaintiffs relied upon NYLL § 193(2) that reads: "No employer shall make any charge against wages or require an employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction from wages under the provisions of subdivision one of this section." NYLL § 193(2). Named Plaintiffs broadly interpreted this provision to include any payment of business expenses to any third parties. FXG took a contrary view that Section 193(2) only prevented payment by separate transaction to the purported employer. There exists contrary legal precedent interpreting how to apply Section 193(2). FXG offered a 2008 advisory opinion from the New York Department of Labor that suggested that the separate payment was meant to be a payment only to the employer or a third party in which an employer has an interest. While Plaintiffs relied upon a 1992 advisory opinion to support their view, they recognized that expense reimbursement claim to third parties was relatively novel and required a broad reading

[5] FXG did dispute several categories of deductions sought as not being recoverable under NYLL 193(1), such as deductions for vehicle insurance.

of the applicable statutory language.[6] Recognizing that it is their burden to prove at trial, Plaintiffs had to consider the real risk that if FXG succeeded on this argument, there could be no recovery under this claim. Co-Lead Counsel Decl., ¶ 11.

If the New York drivers are ultimately held to be employees either as a matter of law or after trial, FXG will assert numerous factual and legal defenses, as it did in mediation, to the class certification decision, the scope of class membership, and the extent of potential recoverable damages. These defenses include: (1) whether the Class definition of "full-time" is ascertainable or requires decertification; (2) whether Class members who incorporated are "employees" eligible to recover damages under the New York wage statutes; and (3) whether settlement deductions from multi-route Class members that related to those other routes were "wages" under the New York wage statutes recoverable to Plaintiffs. Co-Lead Counsel Decl., ¶ 7.

In addition to the statutory claims, Named 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 New York. 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 New York limits rescission to transactions involving mistake or fraud/or violation of public policy and has fairly strict requirements that the Parties be

[6] Plaintiffs cited *Hart v. Rick's NY Cabaret Int'l, Inc.*, 967 F. Supp. 2d 901, 953 (S.D.N.Y. 2013), in support for repayment of business expenses. However, FXG distinguished the case by arguing that the business expenses in question were ultimately paid to the club itself by a separate payment – not to a reimbursement of an expense paid to a third party.

able to be returned to the status quo, disgorging all benefits previously received under the contract.[7] Finally, the common law of New York 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, Plaintiffs' expert calculated the damages for the New York Class as follows: The deductions that Named Plaintiffs claimed were made during the relevant period in violation of the New York wage statute totaled approximately $61,492,755 plus statutory interest in the amount of $49,031,326 for a total of $110,524,081.[8] Named Plaintiffs also considered legal fees as a component of damages for this claim. FXG calculated deductions as being $54,943,702 or $6,549,053 less than Plaintiffs' calculation. Co-Lead Counsel Decl., ¶ 6.

Plaintiffs' expert separately calculated damages for unjust enrichment and interest thereon in the amount of $66,336,335 (excluding interest, which FXG argued would be unavailable as not based in a sum certain). FXG also took issue with Plaintiffs' unjust enrichment calculations (in addition to liability at all) based on comparable pay to employee drivers and argued that Plaintiffs could not even recover half of their claimed damages. Named Plaintiffs face the possibility that most of the damages comprising an unjust enrichment theory

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[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).

[8] Although liquidated damages are available under the New York wage statute, such penalties are not mandatory and FXG argued that any denial of wages was in good faith. FXG argued it was highly unlikely that Plaintiffs could establish a lack of good faith based upon rulings in the case and prior rulings upholding FXG's business model.

would be completely subsumed within the statutory damages. In determining a fair settlement value for the New York rescission/unjust enrichment case, Plaintiffs' Counsel had to consider FXG's success in obtaining dismissal of such common law rescission/unjust enrichment claims, given the defenses available in New York to these claims. Co-Lead Counsel Decl., ¶¶ 9-10.

Named Plaintiffs felt far more confident about the valuation of the New York wage deduction claim, given the language of the New York statute limiting the categories of allowable deductions and the requirements that an expressly written authorization be given for deduction that were of benefit to the employee. NYLL § 193(1). However, FXG argued that Named Plaintiffs faced a strong risk of failing to be found to be employees under the New York wage statute and also faced a motion for decertification. Further, if FXG prevailed in its argument to exclude from recovery all Plaintiffs who incorporated their businesses, or to exclude amounts expended on routes Plaintiffs did not drive, the deductions recoverable could have been substantially reduced. A potential recovery under the New York wage statute, therefore, even assuming full recovery of the categories of deductions sought by Plaintiffs, could have been under $27,852,068 if damages and interest are reduced by FXG's arguments to narrow the class for incorporated and MWA drivers. Co-Lead Counsel Decl., ¶ 12.

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 $42,900,000 settlement reached for the certified New York Class represents approximately 39% 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., ¶ 12. 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. Minimal Opposition To The Settlement (Factor 3)

The response of the Class to the Settlement Agreement has been overwhelmingly positive. Although there were more than 1,600 Notices sent to New York Class members, there have been only two objections to the Settlement filed by Richard Vinson ("Vinson Objection"), annexed to the Co-Lead Counsel New York Declaration as Exhibit 1 and by George Ponzoni ("Ponzoni Objection"), annexed to the Co-Lead Counsel New York Declaration as Exhibit 2. No Class member lodged an objection to 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., ¶ 15. Such a high acceptance "is strong circumstantial evidence in favor of the settlement." *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."); *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"); *see also Gehrich v. Chase Bank USA, N.A.*, 316 F.R.D. 215, 230 (N.D. Ill. 2016) (18 objectors and 22 opt-outs from a class of 32 million); *Kolinek v. Walgreen Co.*, 311 F.R.D. 483, 495 (N.D. Ill. 2015) (20 objectors and 151 opt-outs from class of 9 million). Two objectors in a class of over 1,500 drivers must be considered "scant opposition" since a level of "opposition" cannot get smaller than a single objector. *See In re Capital One Telephone Consumer Protection Act Litig.*, 80 F. Supp. 3d 781, 792 (N.D. Ill. 2015).

If an objection is to affect the issue of final approval of a proposed settlement, it must "cast doubt upon the settlement's fairness, reasonableness, or adequacy." *Am. Int'l Grp., Inc.*, 2012 WL 651727, at *11. The objections filed here do not meet this burden and should be overruled. Objectors Vinson and Ponzoni urge the Court to reject the Settlement because Class members are not receiving enough money for the claims asserted: Vinson asserts that the settlement is "wholly inadequate in compensating individuals like myself" (Ex. 1 at 1) and Ponzoni states that "My main complaint is that the compensation figures are too low." Ex. 2 at 1. These objections are inadequate for several reasons as set forth below. Class Counsel are aware that the Settlement does not recover 100% of the possible damages. "But a settlement is a compromise, and courts need not – and indeed should not – reject a settlement solely because it does not produce a complete victory to plaintiffs." *In re Capital One*, 80 F. Supp. at 790

(quoting *AT&T Mobility Wireless Data Srvs. Sales Litig*., 270 F.R.D. 330, 347 (N.D. Ill. 2010)); *Isby*, 75 F.3d at 1200; *Gehrich*, 316 F.R.D. at 228.

Given that the Settlement is a "solution somewhere between the two extremes" of "total-win versus total-loss," *Armstrong*, 616 F.2d at 315, the Vinson and Ponzoni Objections make no attempt to explain how Class Counsel's evaluation of the risks of continuing litigation is erroneous or flawed. The objections make no attempt to examine the relevant state statutes and authority, not to mention the defenses asserted by FXG to the claims asserted.[9] The objections simply assert that they should get more money. Similarly, Vinson and Ponzoni make no reference to the litigation risks identified by Class Counsel, taking for granted (for example) that a favorable result on employment status will be obtained. This is inadequate to call into question Class Counsel's considered evaluations of the "risks and costs that accompany continuation of the litigation." *Donovan v. Estate of Fitzsimmons*, 778 F.2d 298, 309 (7th Cir. 1985); *Am. Int'l Grp., Inc.*, 2012 WL 651727, at *3 ("the court's role is to ensure that the settlement proponents' analysis is a reasonable one").

The Settlement is an all-cash recovery with no reversionary right to FXG, a settlement structure which courts view as particularly favorable to class members. *See Gehrich*, 316 F.R.D. at 227 (the "recovery per claimant is paid in cash," and thus the "benefits of the settlement have

[9] The Seventh Circuit has frequently held that "perfunctory and undeveloped arguments, and arguments that are unsupported by pertinent authority, are waived." *U.S. v. Useni*, 516 F.3d 634, 658 (7th Cir. 2008); *Davis v. Carter*, 452 F.3d 686, 691-92 (7th Cir. 2006); *Estate of Moreland v. Dieter*, 395 F.3d 747, 759 (7th Cir. 2005). This rule has been held applicable to objectors to proposed class settlements, s*ee Butler v. Am. Cable and Tel., LLC*, 2011 WL 4729789, at *15 n.2 (N.D. Ill. Oct. 6, 2011), and it has been applied to pro-se litigants as well as attorneys. *See Mathis v. New York Life Ins. Co.*, 133 F.3d 546, 548 (7th Cir. 1998) ("Even pro se litigants . . . must expect to file a legal argument and some supporting authority."). The Notice of Preliminary Approval invited objections which included "any legal or factual support you wish to bring to the Court's attention," but the objections cite no authority whatsoever.

been traced with some accuracy"); *Redman v. RadioShack Corp*., 768 F.3d 622, 634 (7th Cir. 2014) (questioning coupon-based settlement).

The Vinson and Ponzoni Objections also fail to account for the evaluation of the adequacy of the Settlement made by Plaintiffs' expert Professor Brian Fitzpatrick. Specifically, in examining the Settlement obtained by Class Counsel, Professor Fitzpatrick stated that "the excellent risk-recovery analyses that class counsel undertook in their settlement approval papers . . . are some of the most thoughtful and thorough I have ever seen . . . despite the challenges, they recovered outstanding amounts for the classes … the recovery rates here are outstanding." MDL Doc. No. 2796, at ¶ 19. He concludes that "[a]lthough I am not aware of any studies of recovery percentages in labor and employment class actions, the studies of recovery percentages in other class actions—securities fraud and antitrust—show that classes do not usually recover anywhere near what many of the classes are recovering in these cases." *Id.* Again, Vinson and Ponzoni do not indicate how Professor Fitzpatrick is mistaken in his analysis of the adequacy of recovery obtained here. As a result, Vinson and Ponzoni have not carried the burden of demonstrating that the Settlement is unfair or unreasonable, and thus their objections should be overruled.

The Vinson and Ponzoni Objections next assert that the Settlement is inadequate because it does not recover overtime pay. Co-Lead Counsel Decl., Exs. 1 and 2. Payment of overtime for the trucking industry is principally regulated under the Federal Motor Carrier Safety Act exemption to the Fair Labor Standards Act ("FLSA"). Under the FLSA exemption, employees who drove vehicles weighing more than 10,000 pounds could not assert a claim for overtime compensation. When the New York action was originally filed in 2004, there was no actionable claim for overtime under the FLSA. Shortly after the JPML ordered the consolidation of these

cases into the MDL proceeding, the exemption under the federal Motor Carrier Safety Act was eliminated for drivers of vehicles weighing less than 10,001 pounds. *See* MDL Doc. No. 874. Accordingly, Plaintiffs filed two cases in the MDL to pursue claims for overtime on behalf of a national class as well as a multi-state class of drivers of trucks weighing less than 10,000 pounds. *See* MDL Doc. Nos. 873, 874, 1076. The Court denied class certification, holding the employment status test applicable to the FLSA was not subject to class treatment. MDL Doc. No. 1770 at 40.

Vinson and Ponzoni also objects to the proposed Settlement because it does not include payment for health and retirement benefits provided by FXG to its full-time employees. Co-Lead Counsel Decl., Exs. 1 and 2. As a threshold matter, Plaintiffs asserted a national claim for ERISA benefits under Section 502(a)(1) in the *Craig* action and obtained class certification of the claim. *See* MDL Doc. No. 906. The ERISA claim was subsequently dismissed with leave to re-file the claim after the MDL Court determined that the representative ERISA plaintiffs had failed to exhaust their administrative remedies. *See* MDL Doc. No. 2078. Following dismissal of the claim, the representative plaintiffs undertook to seek administrative review of their ERISA claims by the claims administrators named under the various plans. The administrative review was completed as of February 2011 at which time the remainder of the *Craig* action was on appeal before the Seventh Circuit. Following remand of the *Craig* action to the MDL Court, the parties stayed the proceeding to explore settlement. Although the ERISA claim remains dismissed, it is dismissed without prejudice and subject to reinstatement and is not released by the New York Settlement Agreement. Vinson and Ponzoni's objections to the Settlement of the Pennsylvania action is thus without merit.

In objecting to the Settlement being too low, the Vinson Objection contends that the Settlement does not account for the difference in compensation received by the misclassified independent contractors as compared to the employee drivers in FXG's sister company, FedEx Express. Co-Lead Counsel Decl., Ex. 1 at 1. Vinson suggests that his settlement amount should be the difference between what he was paid by FXG and the weekly earnings of a full-time Express driver, including benefits and truck-related costs. *Id.* at 2. In calculating the net expected value of the New York drivers' case, Plaintiffs applied two damages models. One damages model included all of the impermissible deductions taken from the drivers' compensation in violation of NYLL Section 193(1). The second damages model sought to value business expenses, which Plaintiffs measured by taking the difference between what Plaintiffs earned *after* all of the business costs FXG had shifted to Plaintiffs, and what employee drivers would have earned. To calculate these damages, Plaintiffs' forensic accounting expert used the rates paid to FedEx Express drivers in Missouri and adjusted those rates using Bureau of Labor Statistics data for the region of the country in which the drivers worked. Co-Lead Counsel Decl., ¶ 9. Accordingly, Plaintiffs computed damages exactly as Vinson contends they should be computed. This model of damages (i.e., the "unjust enrichment" analysis comparing Plaintiffs' net compensation to that of employee drivers) substantially overlapped with the damages based on illegal wage deductions. In arriving at the Settlement, Plaintiffs considered all of the various damages calculations and then accounted for the attendant defenses and risks to both the damages recoverable and the underlying legal theories, as described more fully above. Because Plaintiffs appropriately considered the costs incurred by the New York Plaintiffs, as well as the compensation paid to FedEx Express drivers and arrived at a Settlement which is fair, reasonable and adequate, the Vinson Objection should be overruled.

The Ponzoni Objection takes issue with the interest rate applied to his settlement amount. Ponzoni states that the damages should be calculated at "today's present value," which he contends is "the country's inflation rate." Mr. Ponzoni attaches tables to reflect his settlement numbers with an inflation rate. Co-Lead Counsel Decl., Ex. 2 at 2-3. In calculating the net expected value of the New York case, Plaintiffs included an amount for prejudgment interest on the damages. Co-Lead Counsel Decl., ¶ 5. In New York, the prejudgment interest rate is governed by the New York Civil Practice Law and Rules (NY CPLR) Section 5001 *et seq*. Prejudgment interest is the mechanism to compensate a prevailing party for the loss of use of his money from the time damages were incurred. Accordingly, to the extent Ponzoni objects on the basis that the settlement amount should have been adjusted for inflation to reflect "current value," his objection fails because, pursuant to New York law, Class Counsel appropriately included prejudgment interest in their settlement calculations.

The Ponzoni Objection also asserts that "punitive damages should be assessed to make sure FedEx stops this unfair practice" and characterizes the Settlement as "a slap on the wrist for a company like FedEx and does little to ensure this isn't happening in the future." Co-Lead Counsel Decl., Ex. 2 at 2. Punitive damages could only be awarded as part of a trial on the merits, of course, and Class Counsel have addressed this in their risk assessment analysis. Put simply, there exist several obstacles which would have to be successfully overcome before a favorable result in a trial on the merits could occur, and a failure on any number of them would mean there would never be a trial. Further, under New York law, punitive damages could only be assessed if FXG was unable to demonstrate that they acted in good faith. CPLR §198; *Hart*, 967 F. Supp. 2d at 901, 937 ("[U]nder the FLSA and under the NYLL after November 24, 2009, a finding of good faith is an affirmative defense to liquidated damages."). Class Counsel's

analysis did account for the risks inherent in prevailing on punitive damages but concluded such a claim against FXG was limited by prior rulings that assisted FXG in demonstrating the good faith of its actions, such as findings that employment status was indeed a jury question and an NLRB decision that found drivers to be independent contractors. In light of such arguments supporting a demonstration of good faith, the likelihood of obtaining punitive damages was considered but discounted. The Ponzoni Objection should therefore be overruled.

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. MDL Doc. No. 2650 at ¶ 39.

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 New York 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. 2650, at ¶ 28. 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 New York Plaintiffs. As such, the New York Plaintiffs request the Court to grant final approval to the Class Settlement.

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Respectfully submitted,

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