UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

In re FEDEX GROUND PACKAGE SYSTEM, INC., EMPLOYMENT PRACTICES LITIGATION	Cause No. 3:05-MD-527-RM (MDL 1700)
THIS DOCUMENT RELATES TO:	
Dean Alexander, et al. v. FedEx Ground Package System, Inc., Civil No. 3:05-cv-00528-RLM-CAN (CA)	

CALIFORNIA PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

FedEx Ground Package System, Inc. ("FXG") is not entitled to summary judgment on the employment law claims asserted by the *Alexander* plaintiffs. Although FXG now concedes that whether FXG reserved the "right of control" of the manner and means of the drivers' work is the controlling test of drivers' employment status, it purposefully overlooks specific provisions in the Operating Agreement (OA) that reserve to FXG a far-reaching right to control the drivers. FXG also insists that the Court may not consider the detailed and specific corporate policies and procedures used by FXG to implement to OA's terms, despite the Court's previous contrary ruling. Doc. 1119 at 45, March 25, 2008 Opinion and Order; Doc. 1152.

The motion suffers from other fatal defects as well. FXG claims that the labels and platitudes strategically placed in the adhesive OA by FXG, reciting that the drivers are "independent contractors" and declaring that FXG lacks authority to direct how the drivers perform their work, are dispositive. Under California law, however, it is clearly established that "[the] label placed by the parties on their relationship is not dispositive and subterfuges are not countenanced." *S.G. Borello & Sons, Inc. v. Dep't. of Indus. Relations*, 256 Cal. Rptr. 543, 547 (Cal. 1989).

Equally stunning is FXG's claim that the employment status ruling entered against it in *Estrada v. FedEx Ground Package Systems, Inc.* Case No. BC 210130 (2004), *aff'd*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007), *rev. denied,* (Nov. 28, 2007) is inapposite because the trial court supposedly followed a different "approach" than the Court may follow here and considered "a significantly broader scope of evidence." Doc. 1226 at 29-30. FXG is wrong. *Estrada* determined the employment status of FXG's California drivers who performed service for FXG under the very same contract (during a slightly earlier time period) under the identical legal standard. *Estrada* not only has persuasive value in these MDL cases; it is entitled to preclusive effect under ordinary principles of collateral estoppel and bars FXG from contesting the drivers' employee status here.[1]

[1] Plaintiffs' memorandum of law regarding collateral estoppel, filed April 25, 2008, is Doc. 1194. In addition,

Even if the Court disagrees, examination of the extensive undisputed record evidence precludes a finding that FXG's pickup and delivery drivers are independent contractors, as FXG claims, as a matter of law. In fact, the undisputed evidence is susceptible to only one conclusion: that the drivers are legally employees under California law. The instant motion should be denied, and summary adjudication should be entered in Plaintiffs' favor that the drivers are employees.

II. ARGUMENT

A. FXG's Concession That the Right of Control Is the Conclusive Test of Employment Status Permits Full Reliance on *Estrada*

FXG concedes, as it must, that the drivers' employment status in California will be determined under the "[right of] control of details" test described in *Borello,* 256 Cal. Rptr. at 547. In *Estrada*, the California court determined, after a long trial, that the drivers who signed the OA were employees under California law because FXG retained the right to control the manner and means of their work. FXG cannot legitimately dispute that all drivers signed virtually identical OAs, and have been subject to the same managerial and supervisory policies and procedures. Nor can it dispute that the controlling principles of law are the same. It would be an aberrant result to find differently here, for the reasons discussed in plaintiffs' collateral estoppel brief. Doc. 1194.

Incredibly, FXG argues that the *Estrada* decision is "inapposite" because the Superior Court "took a different approach" to the independent contractor question than that taken by this Court in deciding class certification. FXG cites no authority to support such a novel ground for distinguishing relevant case authority and none exist. The class claims in *Alexander* and *Estrada* present an identical legal issue to be decided under the same material facts. As a federal court sitting in diversity, the Court has a constitutional duty to give the same effect to the *Estrada*

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plaintiffs address virtually every argument asserted by FXG here in Doc. 1153, the memorandum of law filed in support of their cross motion for summary adjudication. The relevant, undisputed material facts pertinent to plaintiffs' motion and FXG's cross motion are catalogued in Plaintiffs' Rule 56.1 Separate Statement of Undisputed Material Facts ("SUF"), Doc. 1197. The supporting evidence is found in Exhibits 1-12, Doc. 1199, to the Declaration of Lynn Faris Doc. 1196) and in Plaintiffs' Request for Judicial Notice (RJN), Doc. 1195, which were manually filed on April 25, 2008.

judgment as would a California court. *U.S. Const. Art. IV §1.* FXG had a full and fair opportunity to litigate the California drivers' employment status and lost. A California court would certainly accord full collateral estoppel effect to *Estrada*'s finding that the drivers are employees to preclude relitigation of that threshold issue here; so must this court. *Durfee v. Duke,* 375 U.S. 106, 109 (1963); *Reinke v. Boden*, 45 F.3d. 166, 169 (7th Cir. 1995).

Nor is there any validity to the distinctions FXG draws to avoid application of the collateral estoppel bar. FXG baldly asserts that differences in the class composition render *Estrada* irrelevant but does not explain why. Doc. 1226 at 29. While the *Estrada* class was limited to Single Work Area ("SWA") drivers, and the *Alexander* class includes Multiple Work Area (MWA) drivers who drive, this distinction has no legal significance for purposes of the "right of control" analysis, as FXG argues. The *Estrada* court expressly found that the MWA drivers are subject to "strict controls" just like the SWAs. (RJN, Exh. B at 17) As this Court has similarly found, it is undisputed that all members of FXG's contractor workforce execute the identical OA and are subject to the same rights of control reserved by FXG over their performance. Doc. 1119 at 45.[2]

FXG's further claim that *Estrada* decided the drivers' status based on a "significantly broader scope of evidence" is equally specious. Doc. 1226 at 29-30. What evidence plaintiffs will be allowed to present to prove their claims *if* the Court rejects plaintiffs' collateral estoppel plea has nothing to with whether the factual allegations and legal issues in the two cases are the same. As discussed at length in plaintiffs' collateral estoppel brief, the core factual allegations and legal issues presented in these cases are virtually identical. Doc. 1194. In any event, this Court has indicated that it will consider the same types of common proof admitted in *Estrada* in addition to the OA (*i.e.* evidence of FXG's generally applicable corporate policies, procedures and practices. Doc. 1119 at 153-154 and Doc.1152).

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[2] While FXG points out that the *Estrada* trial court found that the sole MWA before it was an independent contractor, it deliberately ignores the trial court's express finding that the MWAs are subject to the same strict controls as the SWAs. The trial court's ruling as to the individual claim of the sole MWA before it was premised on an alternate ground. (RJN, Exh. B at 17-18).

FXG's related assertion that the *Estrada* plaintiffs proved their case using "anecdotal" instead of common evidence is false. In its statement of decision, the trial court specifically noted that the analysis of the court would be from the perspective of commonality across the board "*and not localized anecdotes.*" (RJN, Exh. B at 4. The Court of Appeal also observed that the witness testimony characterized by FXG as "anecdotal" was, in fact, "relevant to the class as a whole, not just to the drivers who happened to be the subject of a particular anecdote." *Estrada*, 64 Cal. Rptr. 3d at 338. Thus, while FXG ignores *Estrada*, this court should not.[3]

B. The "Independent Contractor" Label Included in the FXG OA is Not Determinative of Plaintiffs' Employment Status

Boiled to its essence, FXG's main argument in support of summary judgment is that the drivers are independent contractors because the OA says so. Throughout its opening brief FXG refers to §§ 1.15, 1.4 and the Background Statement of the OA, which purport to classify the drivers as "independent contractors" and to deny FXG the authority to "direct" the drivers as to the "manner and means" used to perform their work. FXG contends that these general contractual recitations, incorporated into the adhesive OA drafted by FXG itself, are alone sufficient to demonstrate independent contractor status. FXG's effort to immunize the sham independent contractor arrangement based entirely on contractual terms included in the OA to conceal the true relationship between the parties should be rejected.

California law squarely provides: "[t]he label placed by the parties on their relationship is not dispositive and subterfuges are not countenanced." *Borello*, 256 Cal. Rptr. at 547; *accord Estrada,* 64 Cal. Rptr. 3d at 335-36.[4] In *Antelope Valley Press v. Poizner*, the court held that,

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[3] FXG claim that the decision of the district court in *Narayan v. EGL, Inc.,* No. C-05-04181, 2007 U.S. Dist. LEXIS 50465 (N.D. Cal. 2007) has more persuasive value here than the final published opinion in *Estrada* is nothing short of incredible. (See Doc. 1226 at 11 and 17). The cited *Narayan* order is unpublished, involved different parties, different law and a different contract, and has been appealed to the Ninth Circuit Court of Appeal. (*See* Narayan, Case No. 5:05CV04181, N.D. Cal., Doc. 121, filed 8/2/2007).

[4] *See also Santa Cruz Transp. Inc. v. Unemployment Ins. Appeals Bd.*, 1 Cal. Rptr. 2d 64, 68 (Ct. App. 1991) (agreement "erroneously characterizing" the relationship will be "ignored"); *Toyota Motor Sales USA, Inc v. Superior Court,* 269 Cal. Rptr. 647, 654 (Ct. App. 1990) (". . . attempts to conceal employment by formal documents purporting to create other relationships have led the courts to disregard such terms when the acts and declarations of the parties are inconsistent therewith.")

"although the form contract between AVP and the carriers states that each carrier 'has the right to control the manner and means of delivery' of AVP's publications and 'has the right to determine the equipment and supplies needed to perform delivery services,' there is substantial evidence that is not actually the case." 75 Cal. Rptr. 3d 887, 898-99 (Ct. App. 2008).

Nonetheless, FXG erroneously claims that "[c]ourts applying California law have found similar terms to support a finding of independent contractor status." Doc. 1226 at 5. The only case cited by FXG on this point, *Desimone v. Allstate Ins. Co.,* No. C96-03606 CW, 2000 WL 1811385 (N.D. Cal. Nov. 7, 2000), is readily distinguishable. *Desimone* considered the employment status of a class of insurance sale agents who contracted with Allstate to operate neighborhood sales offices. The plaintiffs enjoyed a high degree of independence in conducting their daily business affairs. They had sole discretion to decide how to market Allstate's products, and were compensated based *entirely* on their sales results. In finding that the agents were true independent contractors, the *Desimone* court did not give blind effect to the contractual recitations of status, as FXG suggests. Rather, the court acknowledged the *Borello* court's admonition that "[t]he label placed by the parties on the relationship is not dispositive and subterfuges are not countenanced" and its mandate to consider the totality of the relationship between Allstate and the agents. *Desimone*, 2000 WL 1811385, at *10. Examining all of the facts, the court found the relationship to be *consistent* with the contractual recitation that plaintiffs were independent contractors. *Desimone*, 2000 WL 1811385, at *11.[5] *Desimone* does

[5] *Desimone* is distinguishable from this case in every other conceivable way as well. The agents determined their own monthly, weekly, and daily sales goals – based on annual goals set by Allstate – and were paid only for what they sold. They had sole discretion to decide where locate their businesses, whether to advertise (or not), and whether to perform other work in their offices. They were free to hire others to accomplish their duties as Allstate sales agents, if they so chose, while they simultaneously engaged in other noncompeting business, *without* Allstate's approval. Allstate did not evaluate the agent's sales techniques, or supervise their daily work activities, but only tracked their sales results. The FXG drivers enjoy no such discretion. Their work is assigned based on daily service goals set unilaterally by FXG's industrial engineers. FXG configures their routes, and reconfigure them at its sole discretion. They have to advertise for FXG with their trucks and uniforms, and they cannot engage in other business activities during the nearly 45- 55 hours a week they work for FXG. They can only hire others to assist with FXG's approval. (SUF 62-63). FXG's global reliance on *Desimone* as support for its position is as misplaced as its refusal to acknowledge the persuasive, if not dispositive, effect of the California appellate court's published opinion in *Estrada.*

not depart from the principal of California law that contractual labels will be *ignored* where the label is a subterfuge, as here.

C. The OA's Merger Clause Does Not Prevent the Court from Considering the FXG Policies that Allow it to Control Plaintiffs' Daily Work Activities

FXG also asserts that the OA is the only evidence of employment status that may be considered by the Court because it "is the only document that governs the relationship between the parties." Doc. 1226 at 4. As support, FXG points to §13 of the OA, a standard merger clause that purports to limit the parties' agreement to the four corners of the contract. Doc. 1226 at 4. This argument is at best a red herring.

The claims in this case do not sound in contract, and the Court's task in this case is *not* to determine whether the OA creates an enforceable independent contractor relationship as a matter of contract law. Rather, as this Court has recognized, plaintiffs assert that they are employees for purposes of the statutory claims presented and do not contend that the OA is ambiguous or in need of the Court's power of contractual interpretation. Doc. 1119 at 15. The OA and FXG's generally applicable corporate policies are relevant and must be considered here as evidence of the relationship between FXG and the drivers. Indeed, it was for this very reason that this Court previously held that such evidence may be considered along with the terms of the OA under the common law agency test. Doc. 1119 at 153; Doc. 1152.

Similarly, in *Estrada,* the Court rejected FXG's claim that the OA is the only relevant evidence of the legal relationship between FXG and its drivers due to the merger clause. 64 Cal. Rptr. 3d at 332-333. The Court of Appeal explained:

> Notwithstanding the merger clause in the Operating Agreement, the drivers' relationship to FedEx is defined by a number of other sources, including the FedEx "Ground Manual" and the "Operations Management Handbook" which set forth the "policies and procedures" in great detail to ensure the uniform operation of FedEx terminals throughout California, as well as by recruiting materials, welcome packets, memoranda, training videos, bulletin board posters, round-table presentations and similar means of communication.

Id. Just as FXG cannot simply draft its way out of employer status by labeling the relationship as something that it is not (as discussed in Section II.B, *supra*), neither can the terms of the OA restrict the sources of evidence the Court may consider to determine employment status. The corporate policies that empower FXG's managers to control the drivers' daily work activities are evidence of FXG's reserved right to control and are highly probative of the ultimate issue: whether the independent contractor classification imposed by FXG on the drivers in the OA is a subterfuge that, under *Borello*, should "not [be] countenanced." *Borello*, 256 Cal. Rptr. at 543.

Recognizing the Court will not disregard FXG's corporate policies, FXG argues in the alternative that one of its policies is dispositive: CRL-007, which was instituted in the March 2005 in response to the *Estrada* decision, and which parrots the general language of OA § 1.15. No different from § 1.5, however, CRL-007 is directly contradicted by voluminous number of FXG policies and procedures, described at length in plaintiffs' SUF, directing FXG's managers to train drivers in FXG work methods, to supervise their work activities, and to discipline those drivers who do not comply through frequent reprimands (known as business discussions), to deduct pay and to terminate the contract or refuse to renew it. (SUF 19-22, 45-54, 70-73, 154-157, 174-179. Thus, CRL-007 is nothing but a label manufactured by FXG in response to the *Estrada* ruling, which is entitled to no more weight here than any other contractual labels.

D. FXG Purposefully Ignores the Substantial Facts Demonstrating FXG's Retention of the Right to Control the Drivers' Work

The fatal flaw in FXG's motion for summary judgment is that it fails to address the numerous *specific* provisions contradicting the general language of OA §1.15 (and related provisions) that compel a finding that FXG has reserved the right to control how the drivers perform their work.[6] FXG also ignores other voluminous evidence found in FXG's policies, procedures and practices confirming FXG's reserved right to control not only the contractual

[6] Robert F. Wood, an expert on independent contractor arrangements, found without hesitation that the FXG OA contains numerous provisions that one would not expect to find in a true independent contractor agreement. He opined: "FXG's plethora of rules for every step, from check-out to check-in, to scanning, to approval of truck and vans, to dress, to shaving, to hours, to hats worn during lunch, are entirely inconsistent with the independence necessary to independent contractor status." (Faris Decl., Exh. 11:16).

result of transporting packages between FXG terminals and customers, but also how FXG expects drivers to achieve that result. These facts, comprehensively addressed in plaintiffs' cross motion for summary judgment Doc. No. 1153, are summarized briefly here.

Under the OA and FXG policy, the drivers are obliged to pickup and deliver every package they are assigned by FXG every day, on days, at times, and using methods prescribed by FXG. (SUF 24-25, 82, 85-89, 91-106). Drivers must do so wearing FXG's approved uniform, and driving trucks that advertise the FXG brand and meet FXG's image standards. (SUF 107, 112-113). Their work hours are circumscribed by the amount of work FXG assigns to them each day, as well as the timetable fixed by FXG for the movement of packages through its nationwide delivery network. (SUF 25, 97-98, 142-145). Drivers must sequence their stops to accommodate the pickup and delivery windows negotiated by FXG sales personnel with FXG's customers. (SUF 97-98, 142).

Drivers are trained in, and required to follow, FXG-devised work rules and methods in performing their duties. (SUF 66-67, 70-73). They are required to transmit a real-time record of their work activities at every stop by scanning and inputting FXG status codes into handheld computers loaded with FXG proprietary software, (SUF 86-90) and must follow a plethora of FXG package handling procedures when performing particular types of deliveries, or servicing particular customers. (SUF 91-94, 96-103). FXG managers are expected to observe and keep records about the drivers' work performance and compliance with FXG rules and procedures using both overt and covert means. (SUF 146-167). FXG managers are empowered and expected to discipline drivers who do not comply with these work methods through mandatory counseling sessions and reprimands as well as loss of pay. (SUF 154-159, 174). The drivers' contracts can be terminated at any time by FXG management for any alleged breach of contract, material or note, including the failure to pickup or deliver a single package on a single occasion. (SUF 210). Their contracts can be non-renewed at any time without any cause. (SUF 56).[7]

[7] FXG's denial that the OA permits such extensive control over these and other aspects of *how* the drivers perform their work was refuted, conclusively by its long-time CEO, Dan Sullivan, who readily admitted that FXG retains the right to exercise all of these controls. See Faris Decl., Exh. 8:817-1004.

On this record, FXG's tautological argument that the OA simply specifies the "results" to be achieved by the drivers rings hollow. The California courts rejected similar arguments in *Borello* and *Antelope Valley*. In *Borello*, the evidence showed that the grower of pickling cucumbers controlled "[a]ll meaningful aspects of the business relationship." 256 Cal. Rptr. at 552. It owned the land, planted and cultivated the crop through most of the growing cycle, and negotiated the sales price with Vlasic. *Id.* Despite these facts, the grower argued that the share-farmers were independent contractors because the work of harvesting the crop required no daily or detailed supervision on its part. *Id.* The California Supreme Court disagreed. Observing that the cucumber harvest involves simple manual labor that can only be performed one way, and involves "no peculiar skill beyond that expected of any employee," the Court explained that "[a] business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one step is performed by the responsible workers." *Borello*, 256 Cal. Rptr. at 552.

In *Antelope Valley*, the California Court of Appeal rejected the argument that work rules mandating the color of bags used by newspaper carriers, and where they could place papers on the customers' property, represented merely the contracted-for results, noting: "The pages of the form contract are filled with manner and means provisions regarding the task of delivering AVP's publications, as well as detailed negative consequences to the carriers if they do not comply with those manner and means directives." 75 Cal. Rptr. 3d at 899. The carriers were thus found to be employees despite the fact that they chose their own route, when to take breaks, and what clothes to wear on the job. *Id.*

FXG's argument is a variation on the same theme. In *Borello* the employer attempted to avoid employee status by narrowly defining the "results" to be achieved. This subterfuge allowed it to deny reserving any right to control the details of the share-farmers' work. Similarly, FXG argues that only results are defined in the OA, and not the means to those results. Just as the *Borello* court rejected the growers' attempt to avoid its statutory obligations through the artifice of carving up its production as a basis for arguing that the share farmers performed

their jobs independently, so too should the Court reject FXG's elaborate effort to avoid a finding of employee status through the artifice of defining the means as the ends. It is *because* the OA requires the drivers to pickup and deliver packages using the means specified in the OA that they are employees. If anything, FXG's admission that the OA does, in fact, reserve to FXG the right to control *how* the drivers perform their work, represents a concession of employee status.

E. FXG Has Failed To Demonstrate That It Has Not Reserved a Right of Control over the Details of the Drivers Work

FXG asserts seven reasons why, in its view, the OA creates a *bona fide* independent contractor relationship. FXG's arguments are without merit for the following reasons.

FXG Has Retained The Right To Terminate The Drivers' Contracts At Will. While FXG acknowledges that under California law "strong evidence in support of an employment relationship is the right to discharge at will, without cause," *Borello*, 256 Cal. Rptr. at 548 (citing *Tieberg v. Unemployment Ins. Appeals Bd.*, 88 Cal. Rptr. 175 (1970)), FXG denies that the OA reserves this right. FXG disregards the relevant facts and the controlling law.

The OA permits FXG to terminate the agreement for *any* perceived breach of the OA, whether material or not, including such minor infractions as the common occurrence of a single customer complaint or missed pickup. (SUF 57, 219). The OA also allows FXG to non-renew the contract of any driver with 30 days notice without any cause at all. (SUF 56, 217; FXG OA § 11.2 and 12 and FHD OA §§ 8.2 and 9.1). There is no requirement that FXG conduct an investigation, or contact a driver facing termination before the fact. (SUF 220). California courts applying the right to control test have held that the right to terminate a worker for poor work performance, or on notice *without* cause is tantamount to termination at will. *See, e.g., Borello*, 256 Cal. Rptr. at 548 (right to discharge without cause is powerful indicia of employee status); *see also Santa Cruz Transp., Inc.*, 1 Cal. Rptr. 2d at 68-69 (taxi-cab lease citing "failure to maintain good public relations as a specific reason for termination" showed "unquestionable control [over the driver's] behavior"); *Yellow Cab Coop. Inc. v W.C.A.B.*, 277 Cal. Rptr. 434, 441 (Ct. App. 1991) (ability to "discharge for disobedience or misconduct is strong evidence of

control"). True to these principles, the *Estrada* court affirmed the trial court's ruling that the termination and non-renewal provisions reserved to FXG the right to terminate at will. *Estrada,* 64 Cal. Rptr. 3d at 336.

FXG attempts to analogize this case to *Mission Insurance Co. v. W.C.A.B.,* 176 Cal. Rptr. 439 (Ct. App. 1981), a decision that pre-dates *Borello* and which is wholly distinguishable. *Mission Insurance* addressed the employment status of a security alarm installer under California's workers' compensation statute. The applicant was licensed by the state to install and service burglar alarms, and subcontracted with an alarm company, Morse, to install and service alarms outside Morse's service area. *Id.* at 441. The applicant operated under a registered fictitious business name, took calls from home and did not work regular hours. *Id.* at 442. Instead, he was on call 24 hours per day and worked when needed. *Id.* He negotiated his own pay rate and was paid based on monthly bills submitted to Morse on a per job basis. *Id.* He worked alone, without supervision, and could hire others to fill in at his sole discretion. *Id.*

The termination provision allowed Morse to terminate the subcontract with 30 days written notice, or without notice if, in its opinion, "the subcontractor's conduct justified immediate termination." *Id.* at 447. The Court of Appeal acknowledged that "[a] right to terminate the agreement at will and without cause does . . . carry with it a certain amount of power to control conduct." *Id.* at 446. It held that Morse's power to terminate without notice was "not really unconditional" because it required a good faith belief that the company would be harmed absent termination and because the right had never been exercised. *Id.* at 446.

The OA is not comparable. Where the subcontract in *Mission Insurance* allowed for termination only for material breach, the OA allows FXG to terminate without notice for any perceived contract violation, no matter what the magnitude. FXG counters that the OA does limit FXG's right to terminate, and points to the fact that § 12.3 of the OA permits drivers to arbitrate claims for wrongful termination. This is pure fiction. The remedies for wrongful termination under OA §12.3 – drafted by FXG – are so limited that FXG has virtually *no* exposure. Most importantly, FXG cannot be compelled to reinstate a terminated driver. Instead,

if wrongful termination is found, it can choose the remedy: reinstatement *or* severance, measured by the net pay the driver would have earned until the contract's renewal date. Because the OA *automatically* renews from year to year after the initial term expires, at most FXG's could be ordered to pay a few months of lost wages to at terminated driver, far less than the value of continued employment to a terminated worker. (OA § 12.3, SUF 58). In truth, the OA does not limit FXG's right to terminate at all; as such, it is terminable at will, just as *Estrada* found.

FXG Has Reserved The Right To Approve Any Additional Drivers And Helpers. FXG next argues that it does not possess the right to control any aspect of the drivers' work because the drivers do not have to perform *any* services for FXG personally, but can hire others to do so. Doc. 1226 at 9. FXG further claims that plaintiffs are mistaken when they retort that drivers' freedom to employ others is illusory, because FXG has retained the right to approve or reject any proposed replacement drivers or non-driving helpers. It is FXG who is mistaken.

In *Estrada*, the court correctly found that "FXG has discretion to reject a driver's helper, temporary replacement or proposed assignee." *Estrada*, 64 Cal. Rptr. 3d at 337. FXG nonetheless insists that it retains only a limited right to require that any substitute drivers meet the federal, state, and municipal safety standards. Doc.1226 at 9. This is simply not true. Section 2.2 of the OA requires that any proposed substitute satisfy all of the qualification standards in the "FedEx Ground Safe Driving Program" addendum to the OA. This addendum lists numerous requirements that have *nothing* to do with safety, such as 1) "[c]ompletion of a *suitable* contractor/driver information sheet", 2) "[a] history of safe commercial driving experience and *satisfactory work history*" and 3) prior experience driving a vehicle *similar* to that used in the FXG fleet, or completion of a FXG-approved training program. OA § 2.2; FXG Safe Driving Program at 3 (emphasis added). FXG has not shown how these qualifications standards are mandated by law because they are not.

FXG further ignores the OA provision requiring any substitute driver to "conform fully to the applicable obligations undertaken by the Contractor pursuant to [the OA]," including the obligation to "[f]oster the professional image and good reputation of FXG." OA § 2.2. FXG's

senior executives have admitted that FXG retains the right to reject or disallow any proposed assistant who does not meet FXG's grooming requirements. (SUF 194).[8] Thus, contrary to FXG's argument, the drivers do not have a "right" to delegate performance of the services under the OA to others; rather, they may only delegate work to assistants with FXG approval.

Finally, FXG claims that independent contractor status is apparent because driving full time is the contractor's choice. Doc. 1226 at 8. This is not so. FXG has the power to compel any "contractor" to drive his own route by denying approval to a proposed replacement driver. In any event, the drivers' limited power to hire assistants does not negate the extensive rights of control over the driver, and is but one factor in determining the drivers' employment status. *See, e.g. NLRB v. Deaton, Inc.* 502 F.2d 1221, 1226-27 (5th Cir. 1974) (where trucking company "had power over the hiring decisions" truckers serving multiple-routes were employees).[9]

FXG Retains The Right To Control The Drivers' Work Schedules. FXG next claims that the clause in Section 1.15 of the OA which states that FXG lacks authority to "prescribe hours or work [and] whether or when the Contractor is to take breaks" proves the drivers are not employees. Doc. 1226 at 10. In fact, the overwhelming and indisputable evidence establishes that FXG expressly retains the right to control when and how long the drivers work. Section 1.10(a) of the OA explicitly mandates the drivers to provide daily pick-up and delivery services "on days and at times which are compatible" with the schedules and requirements of FXG's

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[8] The right to approve replacement drivers' reserved by FXG cannot be compared to the right reserved by Allstate to conduct background and credit checks for employees hired by plaintiffs to sell insurance for and bind the agency in *Desimone, supra*, as FXG argues. Allstate did so to comply with a California law requiring insurers to file a notice of appointment with the Department of Insurance for anyone licensed to sell insurance on its behalf. The *Desimone* court found that this limited approval right did "not indicate that Plaintiffs are controlled as employees, in view of the fact that Plaintiffs have sole discretion over who they hire and the terms." 2000 WL 1811385, at *11.

[9] So, too, have the California Courts have rejected arguments that the ability to hire others is inconsistent with employee status, particularly in cases where there is other compelling evidence to indicate that the "independent contractor" arrangement is a sham. *See, e.g. Borello,* 256 Cal. Rptr. at 552-53 (holding that share-farmers who signed independent contractor agreements as well as family members they employed were *all* employees for grower who retained all necessary control over the work); *Rinaldi v. W.C.A.B.*, 278 Cal. Rptr. 105 (Ct. App. 1991) (grower deemed employer of farm labor contractor as well as the harvesters he hired, paid and supervised to harvest grower's crop; court attached no significance to fact that labor contractor hired and paid others and focused instead on the extensive control exercised by the grower over the harvest operation as a whole). FXG's reliance on *Mission* for the contrary proposition is misplaced, where the subcontract did not restrict his right to hire replacements to cover for him when he wanted time off. *Mission*, 176 Cal. Rptr. at 447-48.

customers. FXG policy, in turn, requires the drivers to provide services five days a week, and expressly retains the sole discretion to change the days service will be provided. (SUF 129-130). The Restatement (Second) of Agency provides an illustration rejecting FXG's mistaken view that the lack of fixed working hours indicates contractor status:

> Certain factory employees normally arrive at eight in the morning and leave at five in the afternoon, but are *not required to work a fixed number of hours* or during specified periods, provided they accomplish a *specified amount of work* during the week, for each unit of which they receive compensation. Such employees are servants.

Id. at § 220, cmt. L, illus. 8 (emphasis added). Applying these principles, courts routinely find employee status where the days and hours the hired party must work are prescribed by the principal, whether directly or by virtue of the role played by the hired party in the business operation as a whole, as here.[10]

The OA and FXG's policies and procedures reserve the right to require drivers to perform the quantity of work assigned and at the times dictated by FXG ("windows"), to satisfy customers, and to avoid disruption of FXG's delivery chain. Obviously, the drivers cannot fulfill their contractual obligation to deliver "every package, every day" unless they remain at the terminal until the morning package sort is complete, all packages are loaded on their vans, and obtain their FXG issued scanners and paperwork during morning "check-out." (SUF 82, 143). So, too, drivers must finish their work and "check-in" with terminal management at the end of the day by a time certain, known as the "cut time", so their pickups can be moved along to their next destination in the network. (SUF 144). Drivers' work hours are thus dependent on the timetable fixed by FXG for the movement of packages through its nationwide network.[11]

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[10] *See, e.g., Rutherford Food Corp. v. McComb,* 331 U.S. 722, 726 (1947) (finding an employment relationship where the defendant "never attempted to control the hours of the boners, but [boners] must 'keep the work current and the hours they work depend in large measure upon the number of cattle slaughtered'"); *Estrada*, 64 Cal. Rptr. 3d at 333 (use of 9.5 -11 hours as benchmark for "full utilization" of vehicle evidenced employee status).

[11] FXG's Chief Operating Officer agreed that the pickup and delivery windows set by FXG circumscribe the drivers' work hours; for example, drivers who have a FedEx/ Kinkos pickup on his or her route cannot end their days until after 6 pm, the pickup hour for that stop. (SUF 142).

Section 1.10(a) of the OA further requires drivers to comply with "pickup and delivery windows" negotiated between FXG sales and marketing with FXG's customers. (SUF 97-98). This clearly affects the drivers' ability to determine or arrange his or her work hours on a given day or at all. (SUF 142). FXG also sets pickup times for its own internal operations, such as its World Service Centers (WSCs) (no pickup before 5 pm) and FedEx/Kinkos (no pickup before 6 pm) and reserves the right to *forbid* drivers to pickup and scan packages at these stops any *earlier*. (SUF 96). Drivers who do not comply with the pickup windows risk contract termination or nonrenewal.[12] FXG's retention of control over the drivers' days and hours of work is beyond dispute, and is a strong indicator of employee status.

FXG Retains The Right To Control How The Drivers Perform Their Pickup And Delivery Duties. For the reasons discussed in Section II.D, *supra,* as well as in plaintiffs' cross motion, the record is replete with undisputed evidence demonstrating that FXG has reserved to itself extensive rights to control how the drivers perform their pickup and delivery duties.

Disregarding this substantial body of evidence, FXG erroneously claims that the OA merely establishes "quality standards" that the drivers are free to satisfy in any way they choose. Doc. 1226 at 13. *Mission Insurance,* the only case cited by FXG for this proposition, does not apply. The service contract there simply required the applicant to ascertain the nature of the trouble or difficulty and to "take all steps necessary to restore the system to proper working order as soon as possible in a diligent and workmanlike manner" in accordance with a "standard of quality service" determined by the company. *Mission*, 176 Cal. Rptr. at 441. The court's opinion does not reveal more about those standards but does say:

> the applicant had complete discretion and control over the manner in which he performed his work, that he worked alone without supervision, that his work was not inspected except where a customer made a specific complaint, and that the time at which and the order in which he visiting various customers was within his own control and discretion.

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[12] *See also* SUF 96 and especially the email transmitting FedEx/Kinkos Early Pickup Stops report and noting: "One early pick up is not acceptable . . . It will not be tolerated and we will take contractual action if a contractor picks up early".

Id. at 447. The OA and FXG policy, by contrast, do not simply require the drivers to perform their duties with diligence or in a "workmanlike" manner. Instead, they must perform their work in a particular way: wearing the FXG uniform, driving a FXG truck, transmitting to FXG real-time electronic records of their work activities throughout the day, following FXG's time table and procedures when performing certain types of pickups and deliveries (i.e. driver release) and providing service to particular customers and so on. (SUF 82-114, 129-131, 133-139).

FXG's is further wrong to claim that provisions of the OA requiring the drivers to complete certain paperwork are legally mandated, and do not indicate employee status for that reason. Doc. 1226 at 14. The paperwork requirements are set forth in §§ 1.7, 1.8, 1.10, 1.11 and 1.13 of the OA, and extend far beyond the federally mandated record-keeping requirements imposed on FXG as a regulated motor carrier. FXG does not explain the relationship between the regulatory provisions it recites and these contractual provisions for good reason: there is none. 49 C.F.R. § 373.101 – cited by FXG – requires a motor carrier to provide receipts or bills of lading to shippers and consignees describing property transported. 49 C.F.R. § 379 App.A specifies the retention period for such documents. Nothing in these regulations requires FXG to track the movement of packages through its network in real-time (OA §§ 1.10(d) and 1.13), to obtain shipper and recipient signatures on FXG shipping forms (OA § 1.8), or to mark and account for undeliverable packages with particular notations, such as the FXG "service cross." (OA § 1.11). The regulations simply require that FXG prepare and maintain records showing what was shipped, where it went, and when.

Nor is there any credence to FXG's further claim that the quarterly "customer service rides" (CSRs) allowed by the OA are used to monitor "results" only. FXG managers are trained and expected to observe and document all aspects of the driver's work performance during the CSRs, including whether the drivers follow "proper entrance and exit methods" as they get in and out of their trucks, or scan and code packages handled according to FXG's detailed procedures, or adhere to FXG rules and procedures for "driver releasing" packages when customers are not home. Managers must also document whether the drivers' shoes are "a dark

color with rubber, nonslip soles" and whether they are wearing "excessive or inappropriate jewelry that might ... detract from a customer's ability to recognize him/her as a FXG contractor." (SUF 20, 148, 150). These requirements go far beyond the mere monitoring of the contracted for result of transporting packages to and from customers. The CSRs, instead, represent direct supervision of method, manner, and means. In similar circumstances, courts have found that the right to observe and document a worker's compliance with customer service standards represents "considerable evidence" of control over the means.[13] See *Antelope Valley Press,* 75 Cal. Rptr. 3d at 899 (use of visual surveys to determine work rule compliance enabled newspaper to "to maintain significant supervision over the carriers.").

Last, recognizing it cannot refute its extensive rights to control the drivers appearance, FXG argues this right pertains to the ends, rather than the means. Doc. 1226 at 15. But telling drivers that they must wear a FXG provided uniform, satisfy FXG grooming standards and wear black socks has nothing to do with the ends of whether packages are successfully delivered to customers. *Estrada,* 64 Cal. Rptr. 3d at 337 n.11 (distinguishing federal cases finding long-haul truckers to be independent contractors, in part, because FXG drivers "must wear uniforms" and "conform their personal appearance to FXG's rules and regulations").[14]

Ignoring recent and relevant authorities, FXG argues the admitted uniform requirement is irrelevant to the "control of details", citing to *Mission Insurance, supra*, and *Mountain Meadows Creameries v. Indus. Accident Comm'n*, 76 P.2d 724 (Cal. Ct. App. 1938). Doc. 1226 at 15. Both cases are easily distinguishable. In *Mission Insurance, supra*, the applicant needed to enter customer's *homes* in responding to alarm emergencies to perform his work. That the applicant

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[13] *See, e.g. Yellow Cab*, 277 Cal. Rptr. at 440-41 (instruction on how to "conduct themselves" and "matters of behavior towards the public" indicia of employment); *NLRB* v. *Maine Caterers, Inc.*, 654 F.2d 131, 133 (1st Cir. 1981) (fact that catering company trained drivers in "exact procedures" and accompanied them on their routes to evaluate compliance and customer relations was "considerable evidence" of right to control).

[14] *See also Friendly Cab Co. v. NLRB,* 512 F.3d 1090, 1101 (9th Cir. 2008) ("Friendly's extensive, mandatory dress code" constitutes additional evidence of control); *NLRB v. O'Hare-Midway Limo. Serv.*, 924 F.2d 692, 694 (7th Cir. 1991) (same); *Sakacsi v. Quicksilver Delivery Sys., Inc.,* No. 8:06-cv-1297, 2007 WL 4218984, at *5 (M.D. Fla. Nov. 28, 2007) (finding uniform and grooming requirements evidenced right of control, rejecting argument that these requirements were only to satisfy customer needs).

was required to wear clothing displaying the Morse insignia was accorded little weight in view of the other strong indicia of contractor status. 176 Cal. Rptr. at 446. The FXG drivers' work is not comparable: it does not involve entering customer residences or responding to emergency calls or performance of security functions. Nor are they required simply to display FXG's "insignia" on their clothing as a credential for access or for their own safety; instead, they must be clad in the FXG uniform down to the color of their shoes and socks to project the FXG image.

Mountain Meadows Creameries concerned the status of a milk truck driver under the workers' compensation law who purchased and transported milk products from a producer for re-sale to end-use consumers. Quite unlike the FXG drivers, the plaintiff had "complete freedom of choice in the performance of [his] contract" including the timing of all deliveries, the route to be followed, how many trucks to use, and who would make the deliveries. *Mountain*, 76 P.2d at 727. He billed customers directly, took the risk of making collections, and absorbed any losses from bad bills. *Id.* Based on these facts, he was found to be an independent contractor. *Id.* at 728. While the court noted that the distributor agreed that he and his employees would make the deliveries wearing "clean white uniforms while on duty," this feature of the contract did not factor into the Court's analysis. *Id.*

FXG Restricts The Right Of Drivers To Engage In "Other Commercial Activity." FXG next argues that the drivers are free to engage in "other commercial activity" since §1.15 of the OA says so. Doc. 1226 at 15. Here, again, FXG disregards the contradictory provisions of the OA and policies that absolutely restrict the drivers from performing "other commercial activity" in several important ways. Section 1.4 explicitly states that while the driver's truck "is in service for [FXG], it shall be used by Contractor exclusively for the carriage of goods for [FXG] and for no other purpose." In turn, FXG reserves the right to make "full utilization" of every truck in its fleet, and engineers the drivers' routes to provide between 9.5 and 11 hours of work each day. When the trucks are not on the road, they are parked at the terminal in assigned parking spots ready to be loaded and unloaded. (SUF 25, 84, 133). Drivers who might wish to use their truck for other purposes must undertake the impossible task of masking the huge,

permanent FXG logos that cover all sides of their trucks, and then remove the masking in time to have their trucks loaded and ready for the next FXG work day. (OA, § 1.5; SUF 24). It is simply not correct for FXG to suggest the drivers can work for others while working for FXG.[15]

FXG Reserves the Right to Control the Sequence of Drivers' Routes. FXG also denies that it has retained the right to control how the drivers sequence their routes, based on the platitudes contained in §1.15 of the OA. This argument, like the last, ignores the contrary provisions of the OA and FXG policy. Section 1.10(a) expressly requires the drivers to comply with "pickup and delivery windows" negotiated by FXG sales and marketing personnel with FXG customers. (SUF 24). The route sequence is plainly determined by these immutable windows. FXG cannot seriously contend otherwise.[16]

***The OA Reserves To FXG – And Not The Drivers – The Right To Control Vehicle Selection And Maintenance*:** FXG admits that the OA vests in it the right to approve any vehicle a driver may wish based on whether FXG deems the truck "suitable" to service the drivers' route, but wrongly claims that this admitted right of approval is consistent with independent contractor status. FXG cites to a single sentence from *Desimone* where the court observed that the insurance agents chose and leased their office locations. Doc. 1226 at 17. The ultimate finding that the insurance agents were self-employed, however, was premised on other powerful indicia of independent contractor status.

FXG also cites *SIDA of Hawaii v. NLRB*, 512 F.2d 354, 357 (9th Cir. 1975), but misstates its holding. In *SIDA,* a myriad of other factors lead the court to find independent contractor status, including that SIDA was a self-governing trade association formed by taxi drivers, which

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[15] FXG's reliance on *Mission Insurance*, *supra*, for this point is misplaced. While the subcontract in that case included an exclusivity provision, the record showed that, unlike the FXG drivers, the benefits applicant was *not* prohibited from engaging in other business or commercial activities. He was on call 24 hours a day, but worked only when he received service calls, leaving time enough to engage in other pursuits. *Id.* at 442.

[16] FXG's claim that it has no right to add or subtract packages from the drivers' routes is utterly *false*. The OA provides FXG with the absolute right to "flex" packages away from the route of any driver on days when the workload is excessive (OA §1.10(a)) and to flex those packages to the routes of the 99% of its workforce who elect the "flex" program. (OA §9, SUF 11, 42-44). At FHD, there is no "flex" program; rather, the FHD OA requires drivers to service packages within their area and "in such other areas as Contractor may from time to time be asked to service." (FHD OA § 1.10(a)).

did not set or collect any fares, allowed the drivers to work whenever and wherever they chose, allowed the drivers to work for other cab companies and make their own arrangements with clients. 512 F.2d at 357-58.[17] More recent and closely analogous NLRA cases establish that a right to control vehicle selection and driver appearance weighs in favor of employee status. *See, e.g., NLRB v. Amber Delivery Serv.,* 651 F.2d 57, 62 (1st Cir. 1981) (fact that "each driver must wear the company insignia and paint his truck with the company colors" indicated employee status); *Friendly Cab Co.,* 512 F.3d at 1099 (reserved discretion over the model of the vehicle assigned to a driver was factor in determining employee status). At best, FXG can rely on *SIDA* for the proposition that the common law agency principles must be applied to the "total factual context of each case." *SIDA*, 512 F.2d at 357. Plaintiffs agree.

F. The Other *Borello* Factors Confirm that the Drivers are Employees

FXG has not even come close to demonstrating that the remaining *Borello* factors support its position that the drivers are independent contractors under California law. Instead, the points made are largely rhetorical, and will be addressed only briefly here.

***Distinct Business and Integration (Borello Factors 2 and 10)*:** The drivers are not engaged in any business that is separate and distinct from that of FXG. Instead, the drivers perform a service that is fully integrated into FXG's core business operation described in the OA as a "small package information, transportation and delivery service." Small package pick-up and delivery is FXG's only enterprise, and the drivers perform the essence of that business, full time and exclusively. (SUF 2-4, 197, 199). Considering these same facts, the *Estrada* court easily concluded that "the work performed by the drivers is wholly integrated into FedEx's operation." 64 Cal. Rptr. 3d at 334.

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[17] FXG misapprehends the facts and holding of SIDA in any event. The Ninth Circuit found that the taxi drivers there, who were *members* of SIDA, agreed to adhere to the associations rules and procedures "in order to promote the SIDA image for the mutual benefit of the Association and its drivers" including "that the drivers be neat and courteous, display the SIDA identification on their dome lights and uniforms, and follow the instructions of the dispatchers." *SIDA* at 358-59. FXG is not a trade association comprised of FXG drivers. It is a large, corporate entity that hires drivers to perform its core business function using methods and means designed to promote the FXG brand to generate profit for its shareholders

FXG admits that the drivers perform work integral to its core business, but contends nonetheless that §5.3 and Addendum 5 to the OA grant the drivers a proprietary interest in their routes, proving that they are self-employed. FXG mistakenly cites to *Desimone* on this point as well. Unlike the FXG drivers, however, the insurance agents had a genuine ownership interest in their Allstate accounts that could not be impaired by Allstate. Even if fired, the agents had a right to sell their accounts to a buyer of their own choosing, or back to Allstate, for valuable consideration. *Desimone*, 2000 WL 1811385, at *16. The FXG drivers own no accounts that can be sold in an open marketplace. The customers belong to FXG and so do the routes. The OA gives drivers only a limited ability to assign their contractual right to provide service for FXG *provided* they are in good standing with FXG at the time of the proposed assignment and *provided* FXG accepts the proposed assignee (SUF 51). Drivers who are terminated or otherwise "in bad standing" simply lose their routes with no recourse. (SUF 59). This is a far cry from the transferable "books of business" which led the *Desimone* court to find the agents were truly in business for themselves. *Id.* at *15.

***Industry Practice (Borello Factor 3)*:** This factor, which examines whether the work is routinely performed "in the locality" by employees or independent contractors, strongly indicates employee status and is not neutral, as FXG claims. Doc. 1226 at 21. The undisputed record shows that the FedEx Express couriers, as well as the vast majority of local pickup and delivery drivers employed by FXG's competitors – UPS, DHL and the USPS – are employees. (SUF 226, 228-231). Indeed, FXG admits that its "independent contractor" business model is unique among the small package delivery giants. (SUF 232).

***Special Skill (Borello Factor 4)*:** FXG's argument that the drivers possess special skills that distinguish them from ordinary employees is refuted by undisputed facts. Where no significant education is required and the requisite skills can be developed on the job with no prior experience or training, employment is indicated. *See Borello*, 256 Cal. Rptr. at 552 ("simple manual labor" could be easily learned: "[w]hile the work requires stamina and patience, it involves no peculiar skill beyond that expected of any employee."); *Estrada*, 64 Cal. Rptr. 3d at

337 (drivers needed no experience; the "only required skill is the ability to drive"); *Air Couriers Int'l v. Empl. Dev. Dep't*, 59 Cal. Rptr. 3d 37, 46 (Ct. App. 2007) ("simplicity of the work (take this package from point A to point B) made detailed supervision . . . unnecessary"); *JKH Enterp., Inc. v. Dep't of Indus. Rel.*, 48 Cal. Rptr. 3d 563, 579 (Ct. App. 2006) (delivery work "did not require a high degree of skill.").[18]

As the *Estrada* court found, the work performed by FXG drivers requires stamina and patience, it does not involve any specialized skills beyond those that are learned in the workplace, nor does it require drivers to exercise any independent initiative. No prior experience or education is required to become a FXG driver. (SUF 201). Thus, the skill and industry practice factor weighs in favor of employment status here as in *Estrada*, *Air Couriers*, and *JKH*.

***Tools and Instrumentalities (Borello Factor 5)*:** FXG argues that this factor indicates contractor status because the drivers supply their own trucks. FXG misunderstands the legal standard. This factor examines the relative investments of the parties, and not just what the hired party contributes. Where the hired party makes a more significant investment in the infrastructure and tools and workplace, employee status will be found. Restatement (Second) of Agency § 220(2), cmt. J and illus. 9 (where worker provides tools, but employing party controls workplace and capital infrastructure, employment status indicated). The FXG drivers' so-called "investment" pales in comparison to FXG's investment in its delivery network. FXG supplies the entire billion-dollar capital infrastructure to support its nationwide operation including a sophisticated computer network, over 500 facilities with sortation equipment and personnel, sales, marketing and customer service personnel, and advertising. (SUF 10, 97, 203-209).

The undisputed evidence also shows that FXG is the source of, and/or controls the instrumentalities needed by the drivers to perform their work, such as their FXG trucks, uniforms, scanners, shipping documentation, and insurance. Indeed, FXG has the vehicles

[18] FXG's reliance on *State Comp Ins. Fund v. Brown*, 38 Cal. Rptr. 2d. 98 (Ct. App. 1995) is misplaced. *Brown* involved the status of long-haul truckers who worked for multiple brokers, and who could accept or reject jobs without reprisal and worked without any supervision. The broker offered assignments and paid the drivers on delivery. *Id.* at 100. *Brown* was distinguished in *Estrada* for these reasons. *Estrada*, 64 Cal. Rptr. 3d at 337 n. 10.

manufactured to meet its specifications for resale to the drivers, and is the source of the fleet. (SUF 115-116). It also provides the drivers with the other tools needed to perform their work, for a daily fee, euphemistically called the "Business Support Package." (SUF 11, OA § 7 and Addendum 3). *See also Estrada*, 64 Cal. Rptr. 3d at 336 (trucks and scanners provided by FXG). These facts create a strong inference of the right to control.

***Permanence of the Working Relationship (Borello Factor 6)*:** The focus of this factor is whether there is a long-term or indefinite relationship in place, not simply whether the contract is for fixed or an indefinite term, as FXG argues. Rest.2d Agency, §220(2) cmts. j and h. FXG cannot seriously dispute that the OA contemplates long service rather than anything short-term or temporary. By its terms, the OA renews *automatically* from year to year after its initial term expires. (SUF 56). It also provides for a seniority based "service bonus" to reward seniority of 20 or more years. (SUF 35, OA Addendum 3). It is no surprise, then, that FXG's records show that thousands of drivers have worked for FXG and its predecessors for five years or more. (SUF 214). The duration factor clearly weighs in favor of the drivers' status as employees. *Borello*, 256 Cal. Rptr. at 552-53 (continuing yearly relationship demonstrated employment); *Air Couriers*, 59 Cal. Rptr. 3d at 47 (exclusive delivery for many years inconsistent with independent contractor status).

***Payment by the Week, Rather Than By the Job (Borello Factor 7)*:** FXG's claim that this factor favors its position is entirely disingenuous. The drivers are paid weekly under a under a complex compensation scheme that combines daily fixed and variable components, as well as monthly, quarterly and annual bonuses keyed to seniority and customer service. (OA §4 and Addendum 3 (amended yearly) (SUF 35)). Their income does not reflect entrepreneurial effort; unlike the commission sales agents discussed in *Desimone*, cited by FXG, the drivers do not generate their own sales, but instead are paid for completing the volume of work assigned by FXG each day, however much or little. FXG's compensation scheme thus bears no resemblance

to "an enterprise resting on the initiative, judgment or foresight of the typical independent contractor." *Schultz v. Cadillac Assocs., Inc.*, 413 F.2d 1215, 1217 (7th Cir. 1969).[19]

***Opportunity for Profit and Loss (Borello Factor 8)*:** FXG's claim that the drivers enjoy true entrepreneurial opportunities was squarely rejected in *Estrada*. In a passage that is fully applicable here, the court explained:

> Although [the drivers] have a nominal opportunity to profit, that opportunity may be lost at the discretion of terminal managers by "flexing" and withheld approvals, and for very slight violations of the rules. Most drivers have worked for FXG for a long time (an average of eight years), and the drivers employed by their competitors (UPS, DHL, and FedEx's sister corporation, FedEx Express) are employees. Based on these facts, we reject FedEx's contention that this is a "true entrepreneurial opportunity depending on how well the drivers perform" and conclude that substantial evidence supports the trial court's finding that they are employees, not independent contractors for purposes of [Labor Code] section 2802.

Estrada, 64 Cal. Rptr. 3d at 336.

***Intent (Borello Factor 9)*:** The "intent" factor is not entitled to great weight under California law. Although the OA states that the drivers "intended" to be independent contractors, it is well-settled that the "label" affixed to the relationship by the principal may be "ignored" when it does not describe the real relationship created by the parties' adhesion contract and practices. *Borello*, 256 Cal. Rptr. at 547. Further, as the Court previously found, "inquisition into the parties' intent at the time of signing would not, after years of litigation preparation provide much guidance in [this] case." March Class Cert Order at 27.

III. CONCLUSION

Based on the foregoing FXG's motion for a finding that the drivers are independent contractors, as a matter of law, should be denied.

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[19] The parties' tax treatment of the drivers also does not indicate independent contractor status in the context of this case, as FXG contends. "[I]f an employer could confer independent contractor status through the absence of payroll deductions there would be *few* employees falling under the protection of the Act." *Huizinga Cartage Co. Inc. v NLRB*, 941 F.2d 616, 620 (7th Cir. 1991) (emphasis added); *see also Yellow Cab*, 277 Cal. Rptr. at 443 ("Where the principal offers no real choice of terms, but imposes a particular characterization of the relationship as a condition of employment, the workers' acquiescence in that characterization does not by itself establish a forfeiture of the [law's] protections.").

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