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)
THIS DOCUMENT RELATES TO: *Dean Alexander, et. al v. FedEx Ground Package System, Inc.* Civil No. 3:05-cv-00528-RLM-CAN (CA)	CHIEF JUDGE MILLER

MEMORANDUM OF LAW
OF DEFENDANT FEDEX GROUND PACKAGE SYSTEM, INC.
IN SUPPORT OF ITS *ALEXANDER* (CALIFORNIA)
MOTION FOR SUMMARY JUDGMENT

INDEPENDENT CONTRACTOR VS. EMPLOYEE STATUS
MOTION & MEMORANDUM NO. 8 OF 13

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INTRODUCTION

This Court certified a statewide California class because the "right of control" is the critical inquiry in determining whether the class members are independent contractors and that question can be resolved on a classwide basis "[g]iven the ubiquity of the Operating Agreement." March 25 Order [Doc. No. 1119] at 65. California distinguishes between control over "the result of the work," which is permitted in an independent contractor relationship, and control over the "means by which [the work] is accomplished." *Tieberg v. Unemployment Ins. Appeals Bd.*, 471 P.2d 975, 977 (Cal. 1970). Here, the Operating Agreement ("OA") governing the relationship between the parties provides for certain standards of service—the results to be accomplished—but it leaves to the contractor the right to determine how the work is accomplished.

Under the OA, the contractor commits to providing package pick-up and delivery services to the customers in a primary service area. But the contractor does not commit to personally perform the services. And even if the contractor chooses to do the work (as the class members have), the contractor remains free—indeed, is contractually obligated—to use his own discretion, judgment, and initiative to determine the best way to provide the pick-up and delivery services. The contractor is free to determine when to work, what route to take, and who should help. These facts point to an independent contractor relationship under California law. Accordingly, FedEx Ground is entitled to a judgment that the California class members are independent contractors, and not employees.

ARGUMENT

Summary judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). California courts have held that summary judgment is appropriate on the independent contractor question when the uncontroverted evidence supports only one conclusion. *See, e.g.*, *State Comp. Ins. Fund v. Brown*, 38 Cal. Rptr. 2d 98, 102, 105 (Ct. App. 1995) (affirming summary judgment where uncontroverted evidence established that trucker owner-operators were independent contractors as a matter of law). Here, based on the unambiguous terms of the Operating Agreement, summary judgment against the California class is appropriate.

I. THE CLASS MEMBERS ARE INDEPENDENT CONTRACTORS.

Plaintiffs' statutory and common law claims both require application of the California common law test for determining whether an individual is properly classified as an independent contractor or employee. *See Reynolds v. Bement*, 116 P.3d 1162, 1169 (Cal. 2005) (where a statute refers to employees without defining the term, "courts have generally applied the common law test of employment"). That test, described by the California Supreme Court in *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 769 P.2d 399 (Cal. 1989), includes a non-exhaustive list of factors derived from the *Restatement (Second) of Agency* § 220 as well as other related indicia of employment status. Specifically, California courts have considered the following factors in resolving questions of independent contractor status:

(1) whether the principal has the right to control the "manner and means" or "details" of performance, not just the "result" of the work;

(2) whether the service provider is engaged in or holds himself out to be a "distinct occupation or business";

(3) whether the occupation is usually performed under the direction of the principal or by a specialist without supervision;

(4) the skill required in the particular occupation;

(5) whether the service provider makes a substantial investment in the instrumentalities or tools to perform the work;

(6) the length of time for which services are to be performed;

(7) whether the service provider is paid by the hour or by the job;

(8) whether the service provider has an opportunity for profit or loss depending on management skill;

(9) whether the parties believe they are creating an independent contractor or employment relationship; and

(10) whether the service provider is an integral part of the regular business of the principal.

See Borello, 769 P.2d at 404, 407. While no single factor is dispositive, the right to control is the "most important" or "most significant" consideration. *Id*. at 404.

FedEx Ground reads the Court's Order as focusing the evidence relevant to the determination of the class members' employment status on the OA, which determines the rights of the parties. March 25 Order at 65. As the Court said, "[g]iven the ubiquity of the Operating Agreement, FedEx Ground's right to control its drivers is a common question that predominates over all other questions with respect to the California claims." *Id*. FedEx Ground recognizes, however, that later in its Order, where the Court discussed plaintiffs' evidence generally, the Court also referenced "generally applicable FedEx

policies." *Id*. at 153.

Plaintiffs have not definitively identified which policies, if any, they believe demonstrate FedEx Ground's "right to control" under California law. To the extent the plaintiffs attempts to invoke FedEx Ground's policies or procedures, however, they cannot change the result. That is because the OA is the only document that governs the relationship between the parties. The OA does not, in any way, generally incorporate the policies and procedures. Rather, paragraph 13 is a merger provision stating that the OA and its addenda "constitute the entire agreement and understanding between the parties" and "shall not be modified, altered, changed, or amended in any respect unless in writing and signed by both parties." (Statement of Material Facts ¶ 12 (OA ¶ 13) ("Facts").) Further, the policies and procedures do not reserve to FedEx Ground any rights in conflict with the OA. Policy-007 provides that the OA and its addenda "set forth the mutual obligations and objectives of FedEx Ground and the independent contractor owner-operators and must be adhered to by all officers, managers, agents and employees of FedEx Ground." (Facts ¶ 18.a.i. (Policy-007, Contractor Relations).) Specifically, "***[n]o officer, agent or employee of FedEx Ground has the authority to direct the contractor as to the manner or means employed to achieve such objectives and results.***" (*Id.* ¶ 18.a.ii. (Policy-007, Contractor Relations) (emphasis in original).)

Based on the undisputed terms of the OA, most factors considered under the *Borello* test—most importantly, the factor considering FedEx Ground's right to control—favor independent contractor status.

A. The Principal *Borello* Factor Indicates Independent Contractor Status.

"The principal test of an employment relationship is whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired…." *Borello*, 769 P.2d at 404 (quoting *Tieberg*, 471 P.2d at 977). By contrast, when "control may be exercised only as to the result of the work and not the means by which it is accomplished, an independent contractor relationship is established." *Tieberg*, 471 P.2d at 977. The OA speaks directly to this issue by denying FedEx Ground the right to control the details of performance as follows:

- Paragraph 1.15 of the OA states: "It is specifically understood and agreed by both parties that Contractor shall be responsible for exercising independent discretion and judgment to achieve the business objectives and results specified above, and ***no officer, agent or employee of FedEx Ground shall have the authority to direct Contractor as to the manner and means employed*** to achieve such objectives and results." (Facts ¶ 4.q. (OA ¶ 1.15) (emphasis added).)

- Paragraph 1.4 of the OA states: "Contractor agrees to direct the operation of the Equipment and to determine the methods, manner and means of performing the obligations specified in this Agreement." (*Id.* ¶ 4.e. (OA ¶ 1.4).)

Courts applying California law have found similar terms to support a finding of independent contractor status. In *Desimone v. Allstate Insurance Co.*, No. C 96-03606 & C 99-02074, 2000 U.S. Dist. LEXIS 18097 (N.D. Cal. Nov. 7, 2000), the court found that insurance agents "retain[ed] sufficient control to weigh in favor of independent contractor status," *id.* at *31, in part based on the governing "Exclusive Agency Agreement," which reserved to the agents "the right to exercise independent judgment as to the time, place, and manner of performing your duties under this Agreement." *Id.* at *13 (granting summary judgment that insurance agents were independent contractors).

The OA not only directly denies FedEx Ground the right to control the manner of performance, but specifically denies it the right to terminate the contractor without cause—an important feature of the right to control analysis under California law—and further denies FedEx Ground the right to control the other major aspects of performance.

***First,* the OA denies FedEx Ground the right to terminate a contractor at will.** The right to discharge without cause is "[s]trong evidence" of the right of control. *Borello*, 769 P.2d at 404; *see also Toyota Motor Sales U.S.A., Inc. v. Superior Court*, 269 Cal. Rptr. 647, 653 (Ct. App. 1990) ("[T]he unlimited right to discharge at will and without cause has been stressed by a number of cases as a strong factor demonstrating employment." (citations omitted).)

In *Mission Insurance Co. v. Workers' Compensation Appeals Board*, 176 Cal. Rptr. 439 (Ct. App. 1981), the agreement provided that it "may be terminated by [the principal] upon the giving of 30 day's written notice to Subcontractor. This 30-day requirement is waived if in the opinion of [the principal] the Subcontractor's conduct justifies immediate termination." *Id*. at 442. The court found that the principal lacked the right to terminate at will because "the power to terminate without notice was not really unconditional; the agreement imposed upon [the principal] a duty to exercise that power only upon a good faith belief that its interests required such action, based on applicant's conduct." *Id.* at 446 (annulling Board's decision finding employment status); *see Desimone*, 2000 U.S. Dist. LEXIS 18097, at *44 (finding that a "mutual termination provision" that allowed either party to terminate the contract without cause upon ninety

days written notice was "consistent either with an employment-at-will relationship or parties in a continuing contractual relationship") (quoting *Brown*, 38 Cal. Rptr.2d at 105).

Here, the OA explicitly prohibits either party from terminating their contractual relationship except in limited circumstances—the antithesis of termination at will. Specifically, the OA expressly provides for termination prior to the end of the contract term in only four circumstances: (1) by mutual agreement with the contractor; (2) as a result of "intentional misconduct" or "reckless or willful[] negligen[ce]" in operating the contractor's equipment (or knowledge of or reason to anticipate such behavior, if the equipment is operated by another individual); (3) upon a showing that one party "breache[d] or fail[ed] to perform the contractual obligations imposed by [the] Agreement"; and (4) in the event FedEx Ground ceases to do business or reduces operations, because of a decline in business. (Facts ¶ 11.a.i.-iv. (OA ¶ 12.1).) Indeed, the termination provision in *Mission Insurance* was far more permissive than the termination provision here. Unlike the OA, it imposed no conditions on termination where notice was provided, and notice was waived entirely where the principal had a "good faith" basis for immediate termination. And unlike the *Mission Insurance* provision, in this case the ***contractors*** are the only party who can, without condition, terminate the OA on 30 day's written notice. (*Id.* ¶ 11.a.v. (OA ¶ 12.1(e)).) These greater limitations make all the more compelling the conclusion that the OA does not reserve to FedEx Ground the right to terminate the contractors at will.

In addition, the OA provides contractors the right to arbitrate termination issues. (*Id.* ¶ 11.b. (OA ¶ 12.3).) As the Eighth Circuit has found in the context of an

employment dispute, "the use of the arbitration procedure as a means of settling employment-related disputes … necessarily alters the employment relationship from at-will to something else—some standard of discernable cause is inherently required in this context where an arbitration panel is called on to interpret the employment relationship." *Painewebber, Inc. v. Agron*, 49 F.3d 347, 352 (8th Cir. 1995).

***Second*, contractors are free to hire others to perform any or all of the work specified in the OA.** The right to hire others to perform the work is consistent with a finding of right to control by the contractor. The court in *Mission Insurance* held that a relationship to install and service security alarm systems governed by a "[S]ubcontractor [A]greement" was an independent contractor relationship, as a matter of law, because the principal did not have the right to control the manner in which the work was to be performed. 176 Cal. Rptr. at 441, 444-47. Had there been "any question" about the right to control, however, the court stated that "it would be answered conclusively by the fact that the contract did not even require that the services be performed by applicant personally. He could and did on several occasions have employees of his own perform the work, and he, not [the principal], supervised those employees." *Id.* at 447; *see also Desimone*, 2000 U.S. Dist. LEXIS 18097, at *32 ("Consistent with [Plaintiffs' right to control their performance], Plaintiffs may hire employees to perform their duties, and are solely responsible for compensating those employees, and for the terms and conditions of their employment. Each agent has sole discretion to determine whether to perform a task personally or to assign it to one of her employees.") (internal citations omitted).

Paragraph 2.2 of the OA provides that a "Contractor may employ or provide person(s) to assist Contractor in performing the obligations specified by this Agreement." (Facts ¶ 5.a. (OA ¶ 2.2).) Pursuant to this term, contractors may elect not to perform any work at all. Paragraph 2.2 confirms that FedEx Ground's interest under the OA lies not in what the contractors personally do or how they do it, as long as someone provides the service promised in the OA. And although plaintiffs have limited the class to full-time drivers, the OA makes clear that ***all*** contractors are entitled at any time to exercise their right to hire someone else to perform their obligations under the OA.

Plaintiffs deny that contractors are free to hire employees because the OA grants FedEx Ground a right to "approve" supplemental drivers or helpers (3d Am. Compl. ¶ 31 ("Compl.")), but they are mistaken. The OA contains no such provision. Paragraph 2.2 provides only that assistants "shall be qualified pursuant to all applicable federal, state and municipal safety standards and the FedEx Ground Safe Driving Standards." (Facts ¶ 5.b. (OA ¶ 2.2).) The safe driving standards in turn impose minimum experience, age, licensure, driving record, criminal record, and drug and alcohol abuse requirements, as well as require compliance with basic safety and maintenance requirements. (*Id.* ¶ 16. (OA Safe Driving Program 1-3).) The contract does not grant FedEx Ground a right of "approval" or "disapproval," but instead requires contractors to ensure that their assistants satisfy those minimum conditions.

Moreover, "where the method of performing a task is dictated by health and safety regulations imposed by the government, the principal is not exercising the manner and means of control as an employer." *Sw. Research Inst. v. Unemployment Ins. Appeals Bd.*,

96 Cal. Rptr. 2d 769, 771 (Ct. App. 2000). In *Desimone*, the court concluded that background and credit checks conducted on agents' potential hires did not suggest control by Allstate because the checks were "reasonably related" to Allstate's compliance with California Department of Insurance oversight. 2000 U.S. Dist. LEXIS 18097, at *32-33. The court concluded that "this requirement does not indicate that Plaintiffs are controlled as employees, in view of the fact that, in all other respects, Plaintiffs have sole discretion over who they hire and on what terms." *Id.* at *33; *see also Empire Star Mines Co. v. Cal. Employment Comm'n*, 168 P.2d 686, 691 (Cal. 1946), *partially overruled on other grounds by People v. Sims*, 32 Cal. 3d 468 (1982) (affirming a finding of independent contactor status as a matter of law where contract provisions did not confer a right to control, but were intended, at least in part, "to insure compliance with mine safety orders of the California Industrial Accident Commission"). Thus, the provisions in the OA that ensure compliance with U.S. Department of Transportation regulations on safety and truck leasing—including the requirement that drivers be properly licensed and qualified, 49 C.F.R. § 391.11—are irrelevant to the right to control analysis.

***Third,* the OA denies FedEx Ground the right to set a contractor's work schedule.** The contractor's right to control his or her schedule also indicates independent contractor status. In *Mission Insurance*, evidence that the service provider worked "at the time of his choosing, except perhaps for emergency service" was found to support independent contractor status. 176 Cal. Rptr. at 447; *see also Briggs v. Cal. Employment Comm'n*, 168 P.2d 696, 698 (Cal. 1946) (affirming finding of independent contractor status based on undisputed evidence that, among other things, a bottled water distributor

serviced his route when he chose and without having to report to the principal's plant at any particular time). Here, paragraph 1.15 of the OA expressly denies FedEx Ground "the authority to prescribe hours of work [and] whether or when the Contractor is to take breaks." (Facts ¶ 4.r. (OA ¶ 1.15).) This right of contractors to control their schedules supports a finding of independent contractor status.

While contractors are obligated to "[p]rovide daily pick-up and delivery service to shippers and recipients on days and at times which are compatible with their schedules and requirements" (*Id.* ¶ 4.m.i. (OA ¶ 1.10(a))), it is the customer, not FedEx Ground, who influences contractors' schedules. The need to satisfy customer demands is not anathema to an independent contractor relationship. In *Narayan v. EGL, Inc.*, No. C-05-04181, 2007 U.S. Dist. LEXIS 50465 (N.D. Cal. July 10, 2007), the court granted summary judgment that truck driver owner-operators were independent contractors where, among other things, the pickup and delivery services "may include customer time and delivery specific requirements." *Id.* at *26. Though decided under Texas law, "[t]he result would be no different if California law governed." *Id.* at *31 n.12.[1]

[1] The issue in *Narayan* was the relationship between EGL, a transportation logistics company offering "local pickup and delivery service" and truck owner-operators who EGL contracted with to perform such service. *Id.* at *3. As here, the drivers alleged claims under the California labor codes and unfair competition law premised on status as employees. *Id.* at *2. And, as here, the court was confronted with a motion for summary judgment based on the drivers' independent contractor status. The parties disputed what independent contractor test applied where the drivers operated in California but signed service agreements containing a Texas choice-of-law provision. *Id.* at *5-6, *12. The court determined that "the same test applies under both Texas and California law" and therefore honored the choice of law provision, *id.* at *22, but noted, on finding that drivers were independent contractors as a matter of law, that the "[t]he result would be no different if California law governed," *id.* at *31 n.12. *Narayan* is probative of the issue

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The right to control their own schedules is one of several fundamental points of distinction between the contractors and the delivery drivers in *Air Couriers International v. Employment Development Department*, 59 Cal. Rptr. 3d 37 (Ct. App. 2007). In *Air Couriers*, the trial court determined that drivers, who performed services for customers of Air Couriers (formerly doing business as Sonic Couriers) without a contract, were Sonic's employees. *Id.* at 41. The trial court found on the basis of drivers' testimony that "they worked a regular schedule…consistent with employee status and reflect[ing] employer control." *Id.* at 46-47. Sonic's drivers, unlike this case, did not have the express contractual right to determine the manner and means of their performance, including work schedule, or to hire employees to perform services on their behalf. There was nothing preventing Sonic from terminating a driver without cause. *See id.* at 40. Also, Sonic drivers exercised little, if any, discretion—in contrast to the facts here, they did not have a proprietary interest in their routes, they could not manage or expand their operations, they did not invest in equipment, they could not perform services for anyone but Sonic, and they were not responsible for safety compliance or meeting business objectives. Sonic drivers drove—that's all they did. *See id.* at 46 (describing the work of Sonic drivers as "take this package from point A to point B"). Thus, the finding that Sonic drivers were employees is inapposite.

***Fourth*, the OA gives the contractor the right to control how pickup and delivery is accomplished.** Quality standards are consistent with the contractor's control

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before this Court given the factual similarities between the two cases and the application of the

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over manner and means. As explained in *Mission Insurance*, "an employer who controls the manner in which the work is done has little need of establishing quality standards for completed work; such standards are indicative that [the principal's] primary interest was in the quality of the result rather than the manner in which the work was done and constitutes evidence that [service provider] was an independent contractor." 176 Cal. Rptr. at 447. The contract in *Mission Insurance* stated that "Subcontractor shall take all steps necessary to restore the system to proper working order as soon as possible in a diligent and workmanlike manner," and further that the principal "shall determine the standards of quality for service and installation and Subcontractor shall install and service by these standards." *Id.* at 441.

The OA adopts a similar approach. Paragraph 1.15 provides that "no officer, agent or employee of FedEx Ground shall have the authority to prescribe … [the] details of performance." (Facts ¶ 4.r. (OA ¶ 1.15).) Contractors agree to certain "standards of service" such as to "[h]andle, load, unload and transport packages using methods that are designed to avoid theft, loss and damage" (*id.* ¶ 4.m.ii. (OA ¶ 1.10(c))), but, using this example, the OA does not give FedEx Ground the right to determine how contractors handle packages or otherwise carry out pickup and delivery services to avoid theft, loss or damage. Even more so than in *Mission Insurance*, the "standards of service" applicable to contractors are consistent with independent contractor status because they are laid out in the OA and thus not subject to change by FedEx Ground.

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same substantive principles of law.

For the same reasons that quality standards are not indicative of control over the contractor's performance, plaintiffs are incorrect in asserting that the "require[d] completion of specified paperwork" weighs in favor of employment status. Compl. ¶¶ 31, 32(d).[2] Such requirements are part of the results sought under the OA. And, as mentioned in paragraph 1.7, federal regulations require FedEx Ground, as a licensed motor carrier, to collect and preserve logs and reports including certain shipping information. *See* 49 C.F.R. pt. 379 App. A (schedule of records and periods of retention for motor carriers); *see also* 49 C.F.R. § 373.101 (requires the motor carrier issue a receipt or bill of lading containing specified shipping information). Compliance with these regulations does not constitute control by FedEx Ground. *See supra* 9-10.

Plaintiffs are also incorrect that FedEx Ground's right to "review and evaluate customer service" indicates employment status. Compl. ¶ 31. Under paragraph 1.14, FedEx Ground has only the right to "visit customer locations with Contractor ***four times annually*** to verify that Contractor is meeting the standards of customer service provided in this Agreement." (Facts ¶ 4.p. (OA ¶ 1.14) (emphasis added).) This limitation cuts against employment status because, for all but four days a year, FedEx Ground has no right to monitor a contractor, as an employer would. The OA states that FedEx Ground's right to visit customer locations is designed "to verify that Contractor is meeting the

[2] Paragraph 1.7 states: "Contractor agrees to prepare daily driver logs and daily inspections reports … and other documents as required by law or regulation. (Facts ¶ 4.j. (OA ¶ 1.7).) Paragraph 1.8 obligates drivers to "prepare and present for the signature of shippers and recipients such shipping documents as FedEx Ground may from time to time designate." (*Id.* ¶ 4.k. (OA ¶ 1.8).)

standards of customer service"—*i.e.*, the results of contractors' performance. (*Id.* ¶ 4.p. (OA ¶ 1.14).) Efforts to "monitor, evaluate, and improve the results of [the service provider's] work without supervision over the means by and manner in which he does his work, indicates that the worker is an independent contractor." *Desimone*, 2000 U.S. Dist. LEXIS 18097, at *37 (quoting *C.C. E., Inc. v. NLRB*, 60 F.3d 855, 858 (D.C. Cir. 1995)).

Finally, plaintiffs are incorrect that the OA's uniform and appearance requirements constitute control over the manner and means of contractors' performance.[3] Compl. ¶¶ 31, 32(e). To the contrary, the court in *Mission Insurance* explained that the requirement to wear a uniform is "all but irrelevant to the right to control the means by which the result, service of [the] customers, was to be achieved." 176 Cal. Rptr. at 445. And in *Mountain Meadow Creameries v. Industrial Accident Commission*, 25 Cal. App. 2d 123 (Ct. App. 1938), the court annulled the Commission's determination of employment status notwithstanding that milk distributors "were required to keep neat and clean and to wear clean white uniforms while on duty." *Id.* at 126.

***Fifth*, the OA grants the contractor the right to engage in other commercial activity.** The court in *Mission Insurance* considered "significant" the fact that the contractor "was not prohibited from engaging in any other kind of business or commercial activity." 176 Cal. Rptr. at 447. The OA does not restrict contractors from engaging in other employment (Facts ¶ 4.h. (OA ¶ 1.5)), and their ability to hire others to

[3] Paragraph 1.12 requires that "each person having contact with the public under the provisions of this Agreement will wear a FedEx Ground-approved uniform" and further requires that "the Equipment shall be maintained in a clean and presentable fashion." (Facts ¶ 4.n. (OA ¶ 1.12).)

perform their work under the OA gives them flexibility to do just that. Paragraph 1.5 also states that the "Contractor may use the Equipment for other commercial or personal purposes when it is not in the service of FedEx Ground." (*Id.*)

***Sixth*, the OA reserves to the contractor the right to determine what routes are taken.** The ability to choose "the route to be followed in making deliveries" supports independent contractor status. *See Mountain Meadows*, 25 Cal. App. 2d at 129; *see also Mission Ins.*, 176 Cal. Rptr.3d at 224 (control over performance demonstrated in part by evidence that "the order in which [the service provider] visited various customers was within his own control and discretion"). Paragraph 1.15 expressly denies FedEx Ground "the authority to prescribe … what route the Contractor is to follow." (Facts ¶ 4.r. (OA ¶ 1.15).) This provision supports that contractors retain the right to control how they service their work areas.

Plaintiffs contend that FedEx Ground has "the right to assign pickup and delivery stops" and "the right to determine when a driver has 'too few' or 'too many' packages to deliver on a given day." Compl. ¶¶ 31, 32(h). That is not correct. In signing the OA, contractors acquire "a proprietary interest … in the customer accounts in his/her Primary Service Area," as defined in the contract. (Facts ¶ 8.c.i. (OA ¶ 5.3).) And contractors bear "responsib[ility] for the daily pick-up and delivery of packages" to those customers. (*Id.* ¶ 8.a. (OA ¶ 5.1).) FedEx Ground has no right to interfere with this responsibility—by either adding or subtracting packages—so long as the contractors are successfully providing service. Contractors, however, may elect to participate in the FedEx Ground Flex Program and "agree[] to accept packages from outside Contractor's Primary Service

Area for pick-up and delivery." (*Id.* ¶ 9.a. (OA ¶ 9).) Participation in the Flex Program is decided by contractors—not FedEx Ground.

***Seventh*, the OA reserves to the contractor the right to select the vehicle and how it is maintained.** Independent contractor status is supported by the fact that "[service providers] own, operate, and maintain the vehicles used for the [principal's] delivery jobs." *Narayan*, 2007 U.S. Dist. LEXIS 50465, at *25 (applying Texas law but noting that its outcome is consistent with California law). Paragraph 1.1 says that "the selection and replacement of the equipment is within the discretion of the Contractor." (Facts ¶ 4.b. (OA ¶ 1.1).) Paragraph 1.2 states that the contractor controls the maintenance of the vehicles by "agree[ing], at Contractor's expense, to maintain the Equipment in accordance with the safety and equipment standards specified in applicable federal, state and municipal laws." (*Id.* ¶ 4.c. (OA ¶ 1.2).)

Plaintiffs note that the OA reserves to FedEx Ground a right to "approve" a contractor's vehicle based on its "suitability for the service called for in this Agreement" (Facts ¶ 4.b (OA ¶ 1.1); *see* Compl. ¶¶ 31, 32(a)), but this is not inconsistent with an independent contractor relationship. This suitability requirement merely ensures that the contractor can complete the work specified in the contract. In *Desimone*, the requirement to maintain an office "suitable for conducting Allstate business" did not prevent the court from finding that "Plaintiffs choose their office location" and that "Plaintiffs retain sufficient control to weigh in favor of independent contractor status." 2000 U.S. Dist. LEXIS 18097, at *19-20, *31-33. The Ninth Circuit's decision in *SIDA of Hawaii, Inc. v. NLRB*, 512 F.2d 354 (9th Cir. 1975), although not decided under California law, is also

instructive. There, independent taxicab owner-operators who wished to become independent contractors of a taxicab company required the approval of the company's general manager. Among other things, approval decisions were based on "ownership of a suitable vehicle." *Id.* at 357. Despite the vehicle "suitability" requirement, the Ninth Circuit concluded that the owner-operators were independent contractors and denied enforcement of a NLRB order. *Id.*

Plaintiffs also note that contractors "must adorn the[ir] vehicle[s] with specific colors, logos and marks, identifying it as part of the [FedEx Ground] or [FedEx Home Delivery] system at their own expense." Compl. ¶ 33(a). But vehicle branding requirements do not negate independent contractor status. For example, in *Briggs*, the court affirmed independent contractor status though trucks were "painted to conform to a general plan of color and advertising signs." 168 P.2d at 697-98. Similarly, in *Mountain Meadow*, the court found independent contractor status notwithstanding the requirement that distributors paint their trucks "with appropriate lettering." 25 Cal. App. 2d at 126.

B. The Other *Borello* Factors Confirm Independent Contractor Status.

1. The second *Borello* factor, whether plaintiffs are engaged in a distinct business, favors independent contractor status.

Contractors are engaged in independent businesses. First, they have a proprietary interest in their routes. In *Desimone*, that plaintiffs had a "transferable economic interest in their … books of business" was a factor in finding independent contractor status. 2000 U.S. Dist. LEXIS 18097, at *47; *see also Mountain Meadow*, 25 Cal. App. 2d at 128 (finding that "a property right in the milk route" was "inconsistent with the relationship

of employer and employee" in discussing termination provision). In paragraph 5.3 and Addendum 5 of the OA, FedEx Ground recognizes that Contractor has a "proprietary interest" in the customer accounts in Contractor's "Primary Service Area." (Facts ¶¶ 8.c.i., 15.d. (OA ¶ 5.3 and Add. 5).) FedEx Ground cannot take away or reduce a contractor's primary service area without paying consideration to the contractor under paragraph 5.3.[4] A contractor also has the discretion to sell, purchase, or transfer his proprietary interest to anyone "qualified to provide the services of Contractor under this Agreement." (*Id.* ¶ 13. (OA ¶ 18).)

Second, under California law "[o]ther employment suggests the existence of an independent contractor relationship." *Sw. Research*, 96 Cal. Rptr. 2d at 771; *see Desimone*, 2000 U.S. Dist. LEXIS 18097, at *42 ("Unlike employees, Plaintiffs may employ others to accomplish their duties as sales agents while engaging in other non-competing business, without Defendant's approval. This fact suggests that Plaintiffs are independent contractors."). As mentioned, contractors may hire employees to fulfill contractors' obligations to FedEx Ground, and perform services for parties other than

[4] Plaintiffs contend that FedEx Ground can "temporarily or permanently transfer portions of any route to another with or without compensation." Compl. ¶ 31. This misstates the relationship between the parties. Under the OA, FedEx Ground has a limited right to reconfigure service areas "to take account of customer service requirements"—that is, to achieve the contracted for results—but it must provide a contractor with "five work days of prior written notice" before doing so, with the express purpose of giving the contractor an opportunity to meet the customer service requirements (again, the results). (Facts ¶ 8.b. (OA ¶ 5.2).) Even then, the OA constrains FedEx Ground's right in two ways. Under paragraph 5.2, FedEx Ground may reconfigure the service area only when the contractor has breached his/her service obligations under the contract—*i.e.*, "[i]n the event Contractor is not able to provide reasonable means to continue to service" the service area. (*Id.*) Further, as noted, contractors are entitled to

(footnote continued on the next page)

FedEx Ground—even competing pickup and delivery services. (*See supra* at 8-11, 16.) As in *Southwest Research* and *Desimone*, these rights reserved to the contractors weigh in favor of independent contractor status.

Third, contractors have to pay their own business expenses and taxes (as opposed to having taxes withheld). The responsibility to pay business expenses and taxes is indicative of distinct business operations. *See Brown*, 38 Cal. Rptr. 2d at 101 (affirming that truck drivers were independent contractors as a matter of law where, among other things, they "were in business for themselves, and assumed all the costs of their own operations, including fuel, maintenance, insurance, and payroll taxes"). Under paragraphs 1.3 and 3.6 of the OA, "Contractor agrees to bear all costs and expenses incidental to the operation of the Equipment," and "agrees to obtain and keep in force … work accident and/or workers compensation insurance insuring Contractor and all of Contractor's employees." (Facts ¶ 4.d., 6.f. (OA ¶ 1.3).) As well, paragraph 4.2 makes clear that FedEx Ground assumes "no responsibility to make deductions for, or to pay wages, benefits, health, welfare and pension costs, withholding for income taxes, unemployment insurance premiums, payroll taxes, disability insurance premiums, social security taxes, or any other similar charges with respect to Contractor or Contractor's employees." (Facts ¶ 7.b. (OA ¶ 4.2).)

Fourth, contractors may operate their businesses through their own corporations or other business entities and, in this manner, cement their separateness from FedEx

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compensation based on an agreed-upon formula described under paragraph 5.3. (*Id.* ¶ 8.c.i-ii.

(footnote continued on the next page)

Ground. *See Mission Ins.*, 176 Cal. Rptr. at 442 (dismissing the argument that an independent contractor agreement was a subterfuge in light of evidence including that the service provider "registered the fictitious business name Electronic Detection Company and operated his business under that name"). Contractors' use of corporations also accentuates their status as independent contractors since corporations cannot be employees—only individuals can be employees.

2. The third *Borello* factor is neutral, since the local practice cannot be evaluated absent individualized evidence.

This factor requires looking to whether, in the locality, the pickup and delivery services performed by plaintiffs are typically done by employees or independent contractors. *Borello*, 769 P.2d at 404. The OA is silent on this issue. Case law addressing the independent contractor status question with respect to truckers/drivers in California differ in their outcomes. *Compare Brown*, 38 Cal. Rptr. 2d at 105 (finding independent contractor status); *with Air Couriers*, 59 Cal. Rptr. 3d at 47 (finding employment status). On balance, this factor does not weigh in either direction.

3. The fourth *Borello* factor points to independent contractor status since pickup and delivery services require special skill.

California recognizes that "truck driving—while perhaps not a skilled craft—requires abilities beyond those possessed by a general laborer." *Brown*, 38 Cal. Rptr. 2d at 105. The amount of skill called upon by particular work is relevant to the status of the worker because, as the California Supreme Court explained in *Borello*, it indicates

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(OA ¶ 5.3).)

whether the worker can exercise discretion and control over his performance. In *Borello*, the Court stated that cucumber harvesting "involves simple manual labor which can be performed in only one correct way … It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision and discipline unnecessary." 769 P.2d at 408. The court in *Brown*, by contrast, affirmed that trucker owner-operators were independent contractors as a matter of law, in part, because "the manner in which [truck driving] services are provided require a greater exercise of the driver's discretion than the near ministerial tasks of watering, weeding, and picking." 38 Cal. Rptr. 2d at 105.

The OA also calls for extensive management skills, including: providing and maintaining a vehicle (Facts ¶ 4.a-c. (OA ¶¶ 1.1, 1.2)); managing business expenses and costs (*id.* ¶ 4.d. (OA ¶ 1.3)); determining the "methods, manner and means of performing the obligations specified in this Agreement" (*id.* ¶ 4.e. (OA ¶ 1.4)); understanding and complying with any local licensing obligations (*id.* ¶ 4.i. (OA ¶ 1.6)); determining the best way to achieve the "business objectives." (*id.* ¶ 4.m.i-v. (OA ¶ 1.10)); training and managing any driver that is hired to perform the contracted-for service (*id.* ¶ 4.p. (OA ¶ 1.14)); and exercising "independent discretion and judgment" to achieve the goal of efficient pick-up, delivery, handling, loading and unloading of packages (*id.* ¶ 4.q. (OA ¶ 1.15)). These responsibilities require businesspersons with management skills, an understanding of delivery methods, transportation and vehicle know-how, and the ability to decide on the need to hire, train and manage employees.

4. The fifth *Borello* factor indicates independent contractor status because plaintiffs must furnish the vehicles.

The fact that contractors, not FedEx Ground, provide all their own equipment is a significant factor weighing in favor of independent contractor status. "The question of the ownership of instrumentalities or tools … is significant 'especially if the tools are of substantial value.'" *Tieberg*, 471 P.2d at 982 (quoting *Restatement (Second) of Agency* § 220(2), cmt. k (1958)) (alteration omitted). Here, the contractors are required under paragraph 1.1 of the OA to "provide and utilize the vehicular equipment" suitable for service. (Facts ¶ 4.a. (OA ¶ 1.1).) This requires a substantial investment.

Contractors' investments are substantial not only because vehicles in general are expensive, but also because the vehicles suitable to perform service under the OA bear little resemblance to the average vehicle in someone's driveway. "The investment in a truck is far greater than an investment in a car, pick up or van that frequently serves also as a family all-purpose vehicle." *Gonzalez v. Workers' Comp. Appeals Bd.*, 54 Cal. Rptr. 2d 308, 313 (Ct. App. 1996) (contrasting the investment by the trucker owner-operators in *Brown* with a newspaper deliverer, which the court found to be an employee as a matter of law). The facts at issue thus differ from cases involving the use of personal vehicles by employees delivering newspapers, *id.*, or pizzas, *Toyota*, 269 Cal. Rptr. at 653. *See also Air Couriers*, 59 Cal. Rptr. 3d at 47 (that "no driver purchased or leased any special vehicle to make Sonic deliveries" supported employment status).

5. The sixth *Borello* factor indicates independent contractor status because the contract is for a fixed term.

An indefinite (rather than fixed) contract term is indicative of an employment relationship. *See Brown*, 38 Cal. Rptr. 2d at 105 ("The contracts are indefinite, which

gives the relationship the permanence associated with employment."); *see also Desimone*, 2000 U.S. Dist. LEXIS 18097, at *44 ("The fact that Plaintiffs are engaged in an ongoing and indefinite working relationship weighs in favor of their employment status."). Here, the contracts are for definite terms of one to three years. (*See* Facts ¶ 10.a. (OA ¶ 11.1).)

At the end of a contractor's initial term, the OA "shall automatically renew for successive terms of one year after expiration of the initial term unless Contractor or FedEx Ground provides the other party notice of non-renewal." (*Id.* ¶ 10.b. (OA ¶ 11.2).) The potential for renewal at the parties' discretion does not change that the term is for a fixed period. In *Briggs*, distributors, determined to be independent contractors, contracted with a bottled water company to supply customers in a specified territory for an initial term of three years subject to renewal by mutual consent. *See* 168 P.2d at 697. The court in *Briggs* treated the relationship as for a definitive period—so not terminable at will—even though the parties could renew their relationship at the end of the contract term. *See id.* at 699.

6. The seventh *Borello* factor supports independent contractor status because plaintiffs are paid based on their performance without withholding or employment benefits.

The fact that contractors "are not paid by the hour or on salary" points to an independent contractor relationship. *Desimone*, 2000 U.S. Dist LEXIS 18097, at *41. Paragraph 4.1 of the OA indicates that payment under the contract shall be based on five components: (1) a "Package Pick-Up and Delivery Settlement" based on the "stops made and packages handled;" (2) a "Contractor and Van Availability Settlement" for each day the contractor furnishes his or her vehicle for service to a FedEx Ground service area; (3)

a "Temporary Core Zone Density Settlement" amount for areas where "customer density and package volume" is still developing; (4) a daily "Flex Fee" if the contractor chooses to pick-up and deliver packages outside of the contractor's primary service area; and (5) a "Quarterly Performance Settlement" based on a percentage of a contractor's previous gross settlement and paid on a quarterly basis after one year of service. (Facts ¶ 7.a.i-v. (OA ¶ 4.1).) In other words, contractors' pay varies according to the results achieved (number of stops made and packages handled), the services provided (van availability), the distance traveled (core zone payments for low density routes), and the nature of the work promised (the additional flex fee), with an additional payment made available to certain contractors on a quarterly basis (the quarterly performance settlement).

The fact that FedEx Ground periodically sets the rates of compensation—subject to contractor approval—does not change the nature of the compensation. *See Desimone*, 2000 U.S. Dist LEXIS 18097, at *41 ("[t]he fact that Defendant may change Plaintiffs' commission rates on ninety days notice does not change this fact" that Plaintiffs' payment by commission favors independent contractor status). Contractors are paid like independent contractors based on the work performed, rather than by the hour.

Finally, contractors are responsible for paying their own taxes and retirement benefits. (Facts ¶ 7.b. (OA ¶ 4.2).) This too supports independent contractor status. *See Desimone*, 2000 U.S. Dist LEXIS 18097, at *45 (the facts that service providers paid all their own taxes and established their own retirement plans were determined to "weigh in favor of treating [the service providers] as independent contractors").

7. The eighth *Borello* factor points to independent contractor status because plaintiffs have the opportunity for profit or loss.

The *Borello* factor considering the opportunity for profit or loss turns on whether contracting with FedEx Ground present a "true entrepreneurial opportunity." *Compare Brown,* 38 Cal. Rptr. 2d at 105 ("There is true entrepreneurial opportunity depending on how well the independents perform their transportation services; this is not mere 'piece work.'"); *with Borello*, 769 P.2d at 409 ("[Cucumber harvesters] incur no opportunity for 'profit' or 'loss'; like employees hired on a piecework basis, they are simply paid by the size and grade of the cucumbers they pick."). The OA demonstrates that the opportunity for profit or loss exists for contractors.

On the profit side, contractors are paid based on their performance. *See supra* at 24-25. They can also hire employees (Facts ¶ 5.a. (OA ¶ 2.2)), expand their coverage into areas acquired either from FedEx Ground or other contractors (*id.* ¶¶ 8.c., 13. (OA ¶¶ 5.3, 18)), and take on other business (*id.* ¶ 4.h. (OA ¶ 1.5)). These facts support independent contractor status. *See Desimone*, 2000 U.S. Dist LEXIS 18097, at *41 (payment on commission, ability to employ others, and ability to conduct other business demonstrated the ability to achieve profit); *see also C.C. E., Inc.*, 60 F.3d at 860 (drivers' contractual rights to hire employees to assist in the performance of work and to haul for other parties (generally on weekends or evenings) considered "substantial entrepreneurial opportunities tend[ing] to support their being independent contractors" even for those who did not take advantage).

And on the expense side of the ledger, contractors bear responsibility and are in

control of their own expenses. They acquire and maintain their own vehicles. (Facts ¶ 4.a-c. (OA ¶¶ 1.1, 1.2).) They affect their expenses by how they operate their vehicles to achieve the results under the OA. (*Id.* ¶ 4.e. (OA ¶ 1.4).) They select all their own vendors and service providers and bear those costs directly. (*Id.* ¶ 4.d. (OA ¶ 1.3).) They also make their own employment decisions, determine what to pay them, as well as how to use them. (*Id.* ¶ 5.a-b. (OA ¶ 2.2).) Finally, contractors must carry, at minimum, specified levels of coverage and name FedEx Ground as an additional insured. (*See id.* ¶¶ 6.a-d., f. (OA ¶¶ 3.1-3.4, 3.6).) As the court in *Desimone* explained, "[t]he requirement that Plaintiffs obtain certain insurance policies and name defendant as an additional insured reflects the reality, that Plaintiffs are responsible for their profits and losses, by protecting the Defendant in the event Plaintiffs incur substantial losses." 2000 U.S. Dist. LEXIS 18097, at *43. Contractors are capable of considerable gains and losses, and both at their own doing.

8. The ninth *Borello* factor points to independent contractor status given the parties' mutual intent.

A written agreement between the parties establishing an independent contractor relationship is a "significant factor" for consideration. *Tieberg*, 471 P.2d at 981 (finding employment status where relevant agreements entitled a producer "to direct the writers in making modifications or revisions," entitled the writers to participate in a pension plan, and referred to the writers as employees). As stated in *Mission Insurance*, "The conduct of business and commerce requires that persons be able to act on their reasonable expectations … Thus, a lawful agreement between the parties expressly stating that the

relationship created is that of an independent contractor should not be lightly disregarded …." 176 Cal. Rptr. at 448-49. There is no dispute that the parties here intended to create such a relationship:

> Both FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contractor, not as an employee for any purpose …. [T]he manner and means of reaching [the contracted-for objectives] are within the discretion of the Contractor, and no officer or employee of FedEx Ground shall have the authority to impose any term or condition on Contractor or on Contractor's continued operation which is contrary to this understanding.

(Facts ¶ 3.a. (OA Background Statement).)

9. The tenth *Borello* factor is insufficient to alter an independent contractor conclusion or to prevent summary judgment.

The last *Borello* factor considers whether contractors' work is part of the regular business of FedEx Ground. Even if this factor could be resolved on the face of the OA, it would be insufficient to undermine an independent contractor conclusion or to prevent summary judgment for FedEx Ground. In *Southwest Research*, the court found the undisputed facts and their reasonable inferences compelled the conclusion that a service provider who obtained gasoline samples for a principal in precisely the same business was nonetheless an independent contractor. *See* 96 Cal. Rptr. 2d at 772. In the court's view, the contractor's work being part of the principal's regular business, "when balanced against all the other factors is too weak to support a finding of an employment relationship." *Id.* Similarly, the court granted summary judgment that the insurance agents in *Desimone* were Allstate's independent contractors despite being integral to its

insurance business because this finding was "insufficient to overcome the strong indicia" pointing in the competing direction. 2000 U.S. Dist. LEXIS 18097, at *48.

II. *ESTRADA* DOES NOT CHANGE THE APPROPRIATENESS OF FINDING INDEPENDENT CONTRACTOR STATUS AS A MATTER OF LAW.

As the preceding arguments demonstrate, plaintiffs are independent contractors as a matter of California law. *Estrada v. FedEx Ground Package System, Inc.*, 64 Cal. Rptr. 3d 327 (Ct. App. 2007), finding that single work-area contractors ("SWAs") were employees, does not alter this conclusion. Although the parties are separately providing the Court with a more detailed discussion of the *Estrada* collateral estoppel question in the MDL cases, FedEx Ground raises two primary points here:

First, the Superior Court in *Estrada* took a different approach to the independent contractor question than the approach the Court used here to decide class certification. Here, the court did not distinguish between SWAs and multiple work-area contractors ("MWAs") in certifying a class that included both groups of contractors. In *Estrada*, however, MWAs were excluded from the class. Statement of Decision, *Estrada v. FedEx Ground*, BC210130, at 2 (Cal. Sup. Ct. July 26, 2004) (attached as Ex. 1). Indeed, the trial court later found that MWAs—unlike SWAs—were independent contractors. (*Id.* at 3.) Specifically, the *Estrada* court found that MWAs had "the opportunity to hire drivers and slowly but surely create a little financial empire under the aegis of [FedEx Ground]." (*Id.* at 18.) Only the claims of the SWAs were allowed to go forward to a class trial.

Second, the Superior Court in *Estrada* decided the independent contractor status question on the basis of a significantly broader scope of evidence than the Court

contemplated here in its class certification decision. The Court of Appeal in *Estrada* recounted that "[a]lthough FedEx [Ground] claimed at trial that the Operating Agreement (and ***only*** the Operating Agreement) determined the drivers status as independent contractors, both sides presented anecdotal and other evidence through the testimony of numerous drivers, FedEx [Ground] managers, and experts." 64 Cal. Rptr. 3d at 332. This is the basis for FedEx Ground's concern, described in the Court's class certification order, that "once classes are certified, the plaintiffs will turn their focus from the Operating Agreement to anecdotal evidence and the experiences of individual drivers." March 25 Order at 153. Here, the Court has focused the evidence on the Operating Agreement and generally applicable FedEx Ground policies. The outcome in *Estrada* is a reflection of a different approach, one this Court rejected, and therefore is inapposite.

CONCLUSION

For the foregoing reasons, FedEx Ground respectfully requests that this Court grant FedEx Ground's motion for summary judgment against the class.

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Respectfully submitted,

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