

**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-527RM
(MDL 1700)**

CHIEF JUDGE MILLER

MAGISTRATE NUECHTERLEIN

EXPERT REPORT OF ROBERT W. WOOD

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I. BACKGROUND

A. QUALIFICATIONS AS EXPERT

I am an attorney licensed to practice law in California, New York, Texas, Washington, Arizona, Wyoming, Montana and the District of Columbia. I am also qualified as a Solicitor in England and Wales. I am Certified as a Specialist in Taxation by the California Board of Legal Specialization. I regularly represent companies in disputes with taxing agencies over the proper characterization of workers as independent contractors or employees. I also regularly render expert testimony on the proper classification of workers as employees or independent contractors.

I am the author of *Legal Guide to Independent Contractor Status* (4th Ed., Tax Institute © 2007), originally published in 1992, now in its Fourth Edition (hereafter "*Legal Guide*"). The *Legal Guide* includes a systematic discussion of the differences between independent contractors and employees, and explores some of the myriad contexts in which such characterization issues arise. Furthermore, the *Legal Guide* examines the various criteria used under different substantive laws and in different jurisdictions for characterizing workers as independent contractors or employees. These subjects include federal and state income and employment taxes, federal and state labor law concerns, pension law liabilities and compliance, and tort and other liabilities to the employer.

The *Legal Guide* includes discussion on the burgeoning contexts in which disputes over the status of workers arise, consideration in drafting agreements with workers, pension and employee benefit considerations, employer tort and other liability considerations, and handling IRS contractor/employee disputes. In addressing planning for worker status and approaches to drafting independent contractor and employment agreements, the *Legal Guide* also includes sample forms and agreements.

My duties as author of the *Legal Guide* include regularly monitoring legal developments relating to independent contractor and employee characterization issues. This includes summarizing case law, as well as statutory and regulatory developments. I have regularly performed these tasks since the publication of the first edition of the *Legal Guide* in 1992, and even before 1992, I followed the area closely as part of preparing the manuscript for the first edition.

In addition to the requisite revisions which led periodically to new editions over the past fifteen years, I have regularly written and published supplements or update material to the *Legal Guide*. I have generally produced published updates as separate paperbound volumes once or twice a year. Thus, my authorship of this treatise has required me to remain current with developments in the law impacting independent contractors, and to regularly follow and comment upon such developments. In addition to the *Legal Guide*, I am the author or editor of 31 books and over 1,000 articles published in legal, accounting and business periodicals.

I attach my educational background and work experience (Exhibit A-1), books, chapters and monographs authored (Exhibit A-2), published articles (Exhibit A-3), speeches and papers presented (Exhibit A-4), and pertinent expert witness roles (Exhibit A-5). In addition to serving as author of the *Legal Guide*, I have consistently maintained an active role as an attorney practicing primarily in the tax arena over the past 28 years. Due to my expertise in worker status matters, I have regularly been called upon to defend companies accused of mischaracterizing workers as independent contractors.

In fact, I have argued far more frequently for independent contractor (rather than employee) status of workers. Most such disputes have involved governmental entities seeking to reclassify as employees workers who were classified as independent contractors. I have handled many such disputes across a wide variety of industries, including the medical and health care fields, consulting and professional services, beauty and personal care, education, construction, publishing, transportation, retailing, food production, processing and delivery, and many other industries.

Furthermore, I have often been retained to advise businesses with respect to such matters, being engaged to help clients establish *bona fide* independent contractor arrangements. In that role I have drafted, edited or assisted in drafting dozens of independent contractor agreements over nearly three decades.

I have served numerous times as an expert witness concerning worker characterization matters (see Exhibit A-5). On most such occasions, I have served as an expert for the parties seeking recognition as employees. I have had expert roles in the insurance, sales, transportation, publishing and food industries. Conversely, on one occasion (involving the health care industry) I served as an expert witness in support of an employer's position that workers seeking reclassification were in fact properly treated as independent contractors.

B. MY OPINIONS IN ESTRADA

I was an expert witness in *Anthony Estrada, et al. v. FedEx Ground Package System, Inc.*¹ I was not asked to (and did not) prepare a written report in *Estrada*, as the applicable state court rules did not require one. On June 29, 2004, I testified before Judge Howard Schwab in Los Angeles Superior Court. A copy of my trial testimony in *Estrada* is attached hereto as Exhibit C. In connection with that testimony and my work in *Estrada*, I comprehensively reviewed the operating agreement,² and policies, training

¹ Superior Court of Los Angeles County, No. BC210130, Statement of Decision (July 2004) (herein referred to as *Estrada*). In *Estrada v. FedEx Ground Package System, Inc.*, 64 Cal.Rptr. 3rd 327 (Cal.Ct. App. 2nd Aug. 13. 2007), the appellate court affirmed the trial court's decision, finding FedEx Ground drivers to be employees, among other rulings (Exhibit B, attached hereto for the Court's convenience, is the *Estrada* appellate opinion of August 13, 2007).

² As used in this report (herein referred to as "Report"), the FedEx Ground Package System, Inc. Pick-Up and Delivery Contractor Operating Agreement (June 2004), described as the "Operating Agreement" in my *Estrada* testimony, is referred to as the "FXG Agreement." See further definitions on p. 15, *infra*.

materials, driver files, Business Discussions, manuals, and videos/DVDs.³ A complete list of the items I reviewed in connection with *Estrada* appears in Exhibit D.

I expressed the following general opinions in *Estrada* concerning FedEx Ground Package System, Inc. (“FXG”), and its practices relating to its pick-up and delivery (“P&D”) drivers:

1. The use of independent contractor terminology and the presence of Section 1.15⁴ of the FXG Agreement does not resolve the independent contractor inquiry.⁵ Rather, Section 1.15 is a sort of savings clause, included in the FXG Agreement as an attempt by FXG to call its P&D drivers independent contractors despite actually treating its P&D drivers as employees.⁶ Section 1.15 is meaningless in light of the other specific and express provisions of the FXG Agreement which reserve rights of control to FXG.⁷

2. Section 1.15 is inconsistent with other provisions of the FXG Agreement.⁸ For example, Section 1.10 (Agreed Standard of Service) states that each P&D driver must provide service “consistent with the competitive standards within the industry,”⁹ “cooperate with FedEx Ground’s employees, customers and other contractors,”¹⁰ “foster the professional image and good reputation of FedEx Ground,”¹¹ and “conduct all business activities with integrity and honesty, in a professional manner, and with proper decorum.”¹² Section 1.10 is contrary to Section 1.15 because these phrases leave open such matters as: 1) who determines the standards; 2) the ramifications for violating the standards; and 3) creates control by terminal managers by virtue of the uncertainty over 1 and 2.¹³

Section 1.12 includes the phrase, “promulgated from time to time” with reference to standards for P&D driver personal appearance.¹⁴ This allows FXG to impose or change unspecified terms and conditions of employment on P&D drivers solely at the discretion of FXG.¹⁵ Moreover, Section 1.12 states that “the equipment shall be maintained in a

³ Videos have been replaced with DVDs.

⁴ Section 1.15 states that each P&D driver “shall be responsible for exercising independent discretion and judgment to achieve the business objectives and results ... 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.” (FXG_GRIFFIN0003320 – 3321).

⁵ See Robert W. Wood Testimony, 12035 – 12036.

⁶ *Id.* at 12036.

⁷ *Id.* at 12047.

⁸ *Id.* at 12041, 12050.

⁹ See Section 1.10(a) (FXG_GRIFFIN0003317).

¹⁰ See Section 1.10(d) (FXG_GRIFFIN0003318).

¹¹ See Section 1.10(e) (FXG_GRIFFIN0003318).

¹² See Section 1.10(h) (FXG_GRIFFIN0003319).

¹³ See Robert W. Wood Testimony, 12064

¹⁴ See Section 1.12 (FXG_GRIFFIN000320).

¹⁵ See Robert W. Wood Testimony, 12041 – 12042.

clean and presentable fashion free of body damage and extraneous markings, in accordance with the standards of the industry.”¹⁶ Section 1.12 is wholly inconsistent with Section 1.15 because it gives terminal managers control over the method, manner, and means of P&D drivers.¹⁷ I would not expect to find such a provision in an independent contractor agreement.¹⁸

Furthermore, FXG’s ability to unilaterally change what it claims is an independent business is inconsistent with independent contractor status. I believe FXG’s unilateral right to reconfigure routes denotes an employment relationship.¹⁹ In addition, in my opinion, the policies and procedures related to Business Discussions²⁰ are of a disciplinary nature, bespeaking employment status, and also inconsistent with Section 1.15.

3. FXG controls the method, manner and means of picking up and delivering packages, not merely the end result.²¹ For example, customer service rides, which allow FXG to supervise its P&D drivers, provide demonstrable evidence of control exerted by FXG over P&D drivers.²² Uniforms,²³ required personal appearance consistent with company standards,²⁴ vague requirements to conduct business activities with proper decorum and in a professional manner,²⁵ are all inconsistent with independent contractor status, because they provide FXG terminal managers the right to control the method, manner and means of its P&D drivers.²⁶ Furthermore, FXG’s right to approve or disapprove replacement drivers, a second van or a helper provide additional evidence that FXG has the right to control the method, manner, and means P&D drivers use to pick up and deliver packages.²⁷

FXG possesses the right to control the method, manner and means by which all packages are delivered, the number of packages delivered each day, and hence the hours to be worked.²⁸ FXG’s Flex Program (in which FXG removes packages from a

¹⁶ See Section 1.12 (FXG_GRIFFIN000320).

¹⁷ See Robert W. Wood Testimony, 12044.

¹⁸ *Id.* at 12043 – 12044.

¹⁹ *Id.* at 12059, 12074 – 12076.

²⁰ In accordance with FXG’s terminology, this Report sometimes abbreviates Business Discussions as “BDs”.

²¹ See Robert W. Wood Testimony, 12048 – 12051.

²² *Id.* at 12045 – 12047.

²³ *Id.* at 12042.

²⁴ *Id.* at 12042 – 12043.

²⁵ *Id.* at 12060.

²⁶ *Id.* at 12062 – 12064.

²⁷ *Id.* at 12049 – 12050.

²⁸ *Id.* at 12072 – 12073.

P&D driver's route and adds packages to the routes of others) is inconsistent with independent contractor status.²⁹

4. The Contractor Assistance Program,³⁰ provides a floor or safety net to ensure that each P&D driver has little if any risk of loss. This is also inconsistent with independent contractor status.³¹

5. Section 12.1(c) – Termination, and Section 11.2 – Renewal Terms, along with vague standards of service in Section 1.10, allow FXG to terminate P&D drivers at will.³² The FXG Agreement allows FXG to terminate drivers for a terribly small infraction, i.e., a torn uniform or a missed pick-up window, or FXG may simply not renew the FXG Agreement with or without reason.³³

6. FXG would be unable to perform its core business of picking up and delivering packages without its P&D drivers. Such integration of the P&D drivers into the heart of FXG's business bespeaks employment.³⁴

C. SUMMARY OF OPINIONS

I have been engaged as an expert in this case. I continue to hold the opinions to which I testified in *Estrada* regarding the employment status of FXG drivers, as well as the import of the operating agreement and policies and procedures. Judge Schwab took specific note of my testimony and relied on it in the Court's Statement of Decision.³⁵

I have been presented with a variety of new FXG business records and depositions as part of this litigation. I have reviewed these new items in developing the opinions I now express. A complete list of the new items with which I have been provided appears as Exhibit E.

I have been asked to examine and evaluate the documents and materials listed in Exhibit D because of:

(a) my practical experience over nearly three decades of legal practice in representing companies defending independent contractor arrangements before taxing and administrative bodies;

²⁹ *Id.* at 12071 – 12072.

³⁰ FXG negotiates for volume discounts for goods and services by drivers to perform their duties, and provides for weekly deductions of small amounts to pay for such goods and services. See Procedure: Contractor Assistance Program, FXG, CRL-371, Revision date: 8/31/05 (FXG000000144 – 151).

³¹ See Robert W. Wood Testimony, 12082 – 12084.

³² *Id.* at 12067 – 12069.

³³ *Id.* at 12067.

³⁴ *Id.* at 12030 – 12033.

³⁵ *Estrada v. FedEx Ground*, Superior Court of Los Angeles County, No. BC210130, Statement of Decision (July 2004), p. 4.

(b) my academic survey and writing in the independent contractor field as a result of my authorship of the *Legal Guide*, published with regular updates and in four editions since 1992;

(c) my drafting and planning experience as an attorney with clients establishing, maintaining and/or modifying contractual independent contractor and/or employee relationships; and

(d) my knowledge of FXG's practices and policies relating to P&D drivers prior to, during, and subsequent to the *Estrada* case.

Based on my review and evaluation of the new documents and materials with which I have been provided, it is my opinion that:

1. FXG's P&D drivers are the cornerstone of its enterprise.³⁶ To a truly extraordinary degree, P&D drivers are integrated within FXG's global system. All drivers wear company prescribed uniforms, all carry company mandated (and company provided) equipment, all drive company procured and prescribed trucks, all perform an extraordinary list of functions the company alone dictates, and all do so in an unequivocally FXG branded manner down to the most banal of details. In my opinion, plainly, unequivocally, and without qualification, the P&D drivers do not (and cannot) constitute *bona fide* independent contractors under any existing test for assessing worker status.

2. Across the panoply of contexts in which worker classification issues arise, the spectrum of federal and state labor law, federal and state tax law, pension laws, tort laws, worker's compensation and unemployment insurance law, one axiom prevails: the employer's right to control, not the employer's actual exercise of that control, defines an employment relationship. Under every test of employment status, the right to control is a key factor, if not the key factor.

3. In a case where the employer's contractual rights manifest the unequivocal right to control the method, manner and means by which the workers go about their daily tasks, it is not necessary to evaluate the extent to which the contractual right to control is actually exercised on a day to day basis to determine the worker's status. Conversely, where a contract does not clearly vest such controlling rights in the employer, it is necessary to evaluate the entire relationship between company and worker to assess the status of the worker. In my opinion, FXG's reserved contractual rights over its P&D drivers obviate reference to FXG's actual patterns of practice.

4. FXG's efforts to "re-engineer" its policies after *Estrada* affected only cosmetic changes, and, in my view, did not materially or substantially change FXG policies and procedures. From the numerous business records I reviewed from June 2004 on, I see no material change in FXG's relationship with P&D drivers. In my opinion, FXG's enforcement of its policies and procedures dictates an extraordinary level of method,

³⁶ See Dan Sullivan Deposition Exhibit 6 (FXG000640682).

manner and means detail in each P&D driver's daily work behavior. In my opinion, both before and after *Estrada*, FXG's firm grip on its P&D drivers evidences employment, under any of the various tests of employment status.³⁷

5. Whether labeled "policies," "procedures," or in any other fashion, enforced step-by-step instructions indicate an employment relationship. FXG's plethora of rules for every step, from check-out to check-in, to scanning, to approval of trucks and vans, to dress, to shaving, to hours, to hats worn during lunch, is entirely inconsistent with the independence normally associated with independent contractor status. The fact that FXG requires its workforce of P&D drivers to follow its directives, and to document that such steps have been completed, provides strong evidence not only of FXG's right to control its P&D drivers, but also of FXG's actual exertion of such control.

6. In my opinion, if this Court determines either that FXG retains the contractual right to control the P&D drivers' method, manner, and means, or if FXG does so in practice, that would require a finding of employment status. Under the facts herein presented, I believe the status of the P&D drivers as employees to be confirmed by both FXG's express contract rights, and by FXG's nationwide and uniform practices, although either one alone would be sufficient.

II. METHODOLOGIES IN ASSESSING WORKER STATUS

A. LEGAL STANDARDS

A number of tests are used to determine whether a worker is truly an independent contractor or employee. Although there is no universal test for determining worker status, there are more similarities than differences in the legal tests, as well as in the results their application produces. As stated in the *Legal Guide*, "[t]he common law right-to-control standard is by far the most important and overarching consideration in determining employee status."³⁸ Furthermore, most tests trace their origins to the common law, assessing worker status based on the employer's right to control the worker, particularly with respect to the details of production rather than merely the end result.³⁹

³⁷ For example, Contractor Relations was "reinvigorated" and expanded in size after *Estrada*. See Robert Ostrov Deposition, 25/7 – 32/19. Contractor Relations began publishing *Independent Times* to communicate more often and directly with its P&D drivers. See, e.g., *Independent Times*, Vol. 1, Sept. 2005 (FXG_000008078 – 8079). However, even with the mass communication and larger Contractor Relations group, in my opinion, since the functions performed by Contractor Relations remained the same except for its expanded size, these changes have not had a material impact on FXG's relationship with its P&D drivers.

³⁸ *Legal Guide*, ¶ 3.02, p. 3-7.

³⁹ *Alexander v. Rush North Shore Med. Center*, 101 F.3d 487, 492 (7th Cir. 1996) quoting *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996) and *Spirides v. Reinhardt*, 198 U.S. App. D.C. 93, 613 F.2d 826, 831-32 (D.C. Cir. 1979); *N.L.R.B. v. Steinberg*, 182 F.2d 850, 857 (5th Cir. 1950), *N.L.R.B. v. Associated Diamond Cabs, Inc.*, 702 F.2d 912 (11th Cir. 1983); *Williams v. United States*, 126

The most prevalent tests used to assess worker classification in labor and employment cases are the *Darden* common law agency test, state unemployment law “ABC” tests, and the economic realities test. The Internal Revenue Service uses a 20 factor test for federal income and employment tax purposes,⁴⁰ yet the criteria are similar. The United States Supreme Court in *Nationwide Mutual Insurance Co. v. Darden*⁴¹ described the common law of agency test applicable to ERISA and similar labor claims.

Although there are various formulations, they all seek a common truth: to identify who is truly an employee, and who is not. Almost without question, the court or agency ruling on the matter must determine the truth by evaluating the governing contract and business records. Where printed contracts and other niceties are not enough to resolve the matter, the court or agency must go beyond them, evaluating what really occurs between the company and the worker in the real world.

Although the tests have differing formulations, in addition to the key factor of the right to control, most all evaluate the degree to which the worker’s function is integrated into the heart of the company’s operations, the degree of special skills held by the worker, the longevity of the relationship between company and worker, and the company’s ability to terminate the relationship. These and other factors are used as earmarks of traditional employment status, to assess the kind of independence, professional stature and entrepreneurial risk that a true independent contractor has, versus the lockstep of direction (whether the direction be exercised or merely held in reserve) which reposes between employer and employee.

As discussed throughout this Report, in my professional opinion, the defendant’s voluminous business records themselves are an overwhelming, incontrovertible and unequivocal testament to the employee status of these P&D drivers under any applicable legal standard. I do not view this as a remotely close case, nor one that can fairly be said to be debatable. The business records and depositions in this case are voluminous, and the defendant’s business practices are complex, yet this is a remarkably simple case.

The essence of the *Estrada* decision is the plainspoken truth that “if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck.”⁴² In practice, the work performed by the driver is wholly dependent upon FXG’s operation. “The drivers look like FedEx employees, act like FedEx employees, are paid like FedEx employees, and receive many employee benefits.”⁴³ The difference between Express drivers, whom FXG admits are employees, and Ground drivers, whom FXG claims are

F.2d 129, 133 (7th Cir. 1942); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522 (1889); *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 350 (1989); *Carpet Remnant Warehouse, Inc. v. N.J. Dep’t of Labor*, 125 N.J. 567, 581 (N.J. 1991).

⁴⁰ *Legal Guide*, ¶ 3.02, p. 3-7 – 3-16.

⁴¹ 503 U.S. 318 (1992).

⁴² See Exhibit B at p. 335.

⁴³ See Exhibit B at p. 334.

not, is negligible.⁴⁴ Such disparate treatment of identically situated workers is rarely countenanced.⁴⁵

In my opinion, the facts presented in this litigation lead inexorably to employee status for the P&D drivers, regardless of which test for examining worker status this Court applies. I find that no difference in result would apply whether this Court applies a common law approach, an economic realities test, a hybrid analysis, or indeed, any other prevailing test.

B. RIGHT TO CONTROL VS. ACTUAL EXERCISE THEREOF

Standards for characterizing workers have received extensive statutory, regulatory, and judicial attention. Judicial examinations of this issue consistently enunciate the principle that the right to control the method, manner and means of a worker's performance is the fundamental common law indicator of an employer-employee relationship.⁴⁶ Across the spectrum of contexts in which worker classification issues arise, from federal and state labor law, federal and state tax law, pension law, tort law, worker's compensation and unemployment insurance law, the axiom is the same.⁴⁷ The employer-employee relationship exists if the employer possesses the right to direct the employee's

⁴⁴ See David Rebholtz Deposition, 80/04 – 81/01, 106/17 – 107/23, 112/17 – 112/22.

⁴⁵ *Legal Guide*, ¶ 5.05, p. 5-47.

⁴⁶ See, e.g., Restatement (Second) of Agency, §220 (1957) (the principal element of the common-law test is the extent of one party's right to direct and control the performance of the other); *Weber v. CIR*, 60 F.3d 1104, 1110 (4th Cir. 1995); *Farrell v. Greater Houston Transp. Co.*, 908 S.W.2d 1(Tex. 1995); *Falls v. Scott*, 815 P.2d 1104 (Kan,1991); *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341 (Ca., 1989); *Carver v. Sparta Elec. System*, 690 S.W.2d 218 (Tenn.,1985); *Sawyer v. Chevron U.S.A., Inc.*, 421 So.2d 1263 (Ala.1982); *Hodges v. Doctors Hospital*, 234 S.E.2d 116 (Ga.App.,1977); *Hickman v. Southern Pac. Transport Co.*, 262 So.2d 385 (La.,1972); *Solmica of Gulf Coast, Inc. v. Braggs*, 232 So.2d 638 (Ala.,1970); *Young v. Warr*, 165 S.E.2d 797 (S.C.,1969); *Van Pelt v. Paull*, 150 N.W.2d 185 (Mich.,1967); *Cooper v. Asheville Citizen-Times Pub. Co.*, 129 S.E.2d 107 (N.C.,1963); *Spencer v. Travelers Ins. Co.*, 133 S.E.2d 735 (W.Va.,1963); *Fardig v. Reynolds*, 348 P.2d 661(Wash.,1960); *Nordling v. Johnston*, 283 P.2d 994 (Or.,1955); *Feller v. New Amsterdam Cas. Co.*, 70 A.2d 299 (Pa.,1950); *Empire Star Mines Co. v. California Employment Commission*, 28 Cal.2d 33 (Ca., 1946); *Moore-Handley Hardware Co. v. Williams*, 189 So. 757 (Ala.,1939); *Caraher v. Sears, Roebuck & Co.*, 200 A. 324 (Conn.,1938); *Professional and Executive Leasing v. CIR*, 862 F.2d 751, 753 (9th Cir. 1988); see also *Air Couriers Int'l et al. v. Employment Dev. Dep't et al* (April 12, 2007),150 Cal. App. 4th 923.; *Legal Guide*, ¶ 1.05, p.1-8.

⁴⁷ See, e.g., *N.L.R.B. v. Steinberg*, 182 F.2d 850, 857 (5th Cir. 1950); *N.L.R.B. v. Associated Diamond Cabs, Inc.*, 702 F.2d 912, 920 (11th Cir. 1983); *Nationwide Mutual Insurance Co. v. Darden*, 503 U.S. 318, 323 (1992); *Zaremba v. Miller*, 169 Cal. Rptr. 688, 689 (Cal. App. Dep't Super. Ct. 1980); *Leone v. United States of America*, 910 F.2d 46 (2d Cir. 1990); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 630 (1st Cir. 1996); *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751 (1989); *Moses v. Diocese of Colorado*, 863 P.2d 310, 324 (Colo. 1993); *Willard Storage Battery Co. v. Caray*, 103 F. Supp. 7, 9 (N.D. Ohio 1942); see also *Legal Guide* at ¶ 1.09; ¶ 5.02, p. 5-9 – 5-11; ¶ 6.02, p. 6-4 – 6-10; ¶ 7.05, p. 7-13 – 7-21.

performance of assigned duties whether or not the employer ever actually exercises that right.

Although various tests can be applied to ascertain the proper legal status of workers, all the tests exhibit certain commonality. A key unifying element is the principal's right to control the worker. An individual is generally classified as an employee "if [his] employer has the right to control and direct the work of [the] individual, not only as to the result to be achieved, but also as to the details by which that result is achieved."⁴⁸ The employer's right to control, not the employer's actual exercise of that control, defines an employment relationship.⁴⁹

In my opinion as expressed throughout this Report, workers constitute employees if the employing company merely reserves the right to control them, even if there is no evidence the employer actually exercises such right, or only exercises that right sporadically. As stated herein, it is my opinion that FXG's contractually reserved rights of control by themselves impart such control, rendering FXG's patterns of practice with its P&D drivers irrelevant. The FXG Agreement, particularly viewed in concert with FXG's other written business records, make unequivocal FXG's significant and pervasive right to control nearly every facet of driver work performance.

However, given that I also find repeated and significant evidence that FXG consistently exercises its rights of control, the voluminous evidence of FXG's actual exercise thereof prove that FXG has retained the right to do so. Since FXG clearly exercises such rights, FXG must, by definition, hold such rights. In my opinion, although it is not necessary to examine FXG's actual practices *viz.* its P&D drivers, such an examination reveals incontrovertible proof of the detailed nature and expansive scope of such retained rights.

As stated in the *Legal Guide*, "[e]ven if the agreement contains all of the terms and conditions one would expect to find in an independent contractor context, the written agreement will not overcome the reality of the situation."⁵⁰

⁴⁸ *Alexander v. Rush North Shore Med. Center*, 101 F.3d 487, 492 (7th Cir. 1996) quoting *Ost v. West Suburban Travelers Limousine, Inc.*, 88 F.3d 435 (7th Cir. 1996) and *Spirides v. Reinhardt*, 198 U.S. App. D.C. 93, 613 F.2d 826, 831-32 (D.C. Cir. 1979); *N.L.R.B. v. Steinberg*, 182 F.2d 850, 857 (5th Cir. 1950), *N.L.R.B. v. Associated Diamond Cabs, Inc.*, 702 F.2d 912 (11th Cir. 1983); *Williams v. United States*, 126 F.2d 129, 133 (7th Cir. 1942); *Singer Mfg. Co. v. Rahn*, 132 U.S. 518, 522 (1889); *S.G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 350 (1989); *Carpet Remnant Warehouse, Inc. v. N.J. Dep't of Labor*, 125 N.J. 567, 581 (N.J. 1991); *Knight v. United Farm Bureau Mut. Ins. Co.*, 950 F.2d 377, 378 (7th Cir. 1991).

⁴⁹ *Legal Guide* at ¶ 5.02, p. 5-9; ¶ 5.06, p. 5-53 – 5-54; ¶ 5.07, p. 5-71.

⁵⁰ *Legal Guide*, ¶ 8.02, p. 8-5.

C. REALITY PREVAILS OVER LABELS

Another feature common to all tests for assessing employment status is that labels are not controlling. The fact that a written agreement denominates a worker as an independent contractor does not actually make the worker an independent contractor. Moreover, even if an agreement contains all of the terms and conditions one would expect to find in an independent contractor context, the written agreement will not overcome the reality of the relationship.

If the worker is subject to the duties and obligations of an employee, the mere fact that a written agreement labels him⁵¹ as an independent contractor, specifies that he is to use his own tools on the job, allows him to work whatever hours he chooses, etc., will not save him from employee status if taxing or labor authorities properly recharacterize him as an employee.⁵² Indeed:

“the contract itself is not the be-all and end-all of the relationship. Many companies have written quite a reasonable contract purporting to establish independent contractor relationships, only to find that their actual practice involves many actions (and many controls over the worker) that simply fly in the face of the contract language. Where this occurs, anyone attempting to characterize the relationship is likely to look beyond the language of the contract and to the actual conduct of the relationship. In fact, it could not be otherwise.”⁵³

The FXG Agreement manifests FXG’s strong and consistent right to control the method, manner and means of P&D drivers. This is so notwithstanding FXG’s elaborate independent-sounding nomenclature, and despite FXG’s numerous references to an intended independent contractor relationship. In rendering his opinion in *Estrada*, Judge Schwab quoted the California Supreme Court’s admonition in *Borello* that “[t]he label by the parties on their relationship is not dispositive, and subterfuges are not countenanced.”⁵⁴

I believe Judge Schwab was correct in *Estrada* that:

“the OA [Operating Agreement] is a brilliantly drafted contract creating the constraints of an employment relationship with SWAs [single work area P&D drivers] in the guise of an independent contractor model.”⁵⁵

⁵¹ As used throughout this Report, the masculine includes the feminine.

⁵² *Legal Guide*, ¶ 8.02, p. 8-5.

⁵³ *Legal Guide*, ¶ 8.01, p. 8-2 – 8-3.

⁵⁴ See *Estrada v. FedEx Ground*, Superior Court of Los Angeles County, No. BC210130, Statement of Decision (July 2004), quoting *S. G. Borello & Sons, Inc. v. Department of Industrial Relations*, 48 Cal.3d 341, 349 (1989).

⁵⁵ See *Estrada v. FedEx Ground*, Superior Court of Los Angeles County, No. BC210130, Statement of Decision (July 2004).

Moreover, Judge Vogel noted in the *Estrada* appellate decision that, “FedEx’s conduct spoke louder than its words.”⁵⁶ Judge Vogel agreed that “the parties’ label is not dispositive and will be ignored if their actual conduct establishes a different relationship.”⁵⁷

III. RIGHT TO CONTROL METHOD, MANNER AND MEANS OF P&D DRIVERS

A. OPERATING AGREEMENT

I have reviewed the 1994 Roadway Package System, Inc. Pick-Up and Delivery Contractor Operating Agreement⁵⁸; the FedEx Ground Package System, Inc. Pick-Up and Delivery Contractor Operating Agreement (June 2004) (“FXG Agreement”)⁵⁹; the FedEx Home Delivery Standard Contractor Operating Agreement (June 2004) (“FHD Agreement”)⁶⁰; and Addenda.⁶¹ In this Report, these agreements are collectively referred to as the “Agreements,” unless otherwise noted.⁶²

These contracts secure FXG/FHD’s unequivocal right to control myriad details of the method, manner, and means carried out by the P&D drivers. This reserved control is so strong that, in my opinion, whether FXG or FHD ever exercises it is unimportant. Because the Agreements contain various internal inconsistencies, it is important to address these inconsistencies, and to explain why, in my opinion, such inconsistencies do not negate FXG’s significant rights of control.

Section 1.15 of the FXG Agreement, a provision entitled “Discretion of Contractor to Determine Method and Means of Meeting Business Objectives,” states that each P&D driver:

“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 or means employed to achieve such objectives and results. For example, no officer, agent or employee of FedEx Ground shall have the authority

⁵⁶ Exhibit B at 336.

⁵⁷ *Id.*

⁵⁸ EST0005712 – 5773

⁵⁹ FXG_GRIFFIN0003307 – 3348.

⁶⁰ FXG_SMITH0001344 – 1375.

⁶¹ See Addenda 1 - 7 to the 2005 FXG Agreement (PWI10002285 – 2299); Addenda 1 - 9 to the 2007 FXG Agreement (PCA0047620 – 679).

⁶² While the substance of the FXG and FHD Agreements remain substantially the same (there are only minor differences between these Agreements, including variations in the Flex Program, location of the arbitration provision in the Agreements, and the HR10 Plan (Prototype Defined Contribution Retirement Plan)), the numbering scheme in the FXG and FHD Agreements are not identical. As a result, throughout this Report, all references to Section are in reference to the FXG Agreement, unless otherwise noted.

to prescribe hours of work, whether or when the Contractor is to take breaks, what route the Contractor is to follow, or other details of performance.”⁶³

Although it states that no officer, agent or employee of FXG shall have the authority to control the method, manner and means of a P&D driver, other provisions reserve FXG’s right to control everything each P&D driver does.⁶⁴

Section 1.15 is completely inconsistent with many other provisions of the Agreements, such as FXG’s:

- Right to control uniform and driver appearance. Section 1.12;
- Right to control truck appearance. Section 1.12;
- Right to control selection of truck. Section 1.1;
- Right to determine suitability of equipment or remove from service. Section 1.2;
- Right to determine color, logos, and markings of truck. Section 1.5;
- Right to determine and interpret all standards of customer service. Section 1.10;
- Right to determine electronic or manual documentation of delivery. Sections 1.11, 1.10(d);
- Right to determine insurance required. Sections 3.1, 3.6;
- Right to determine days of service. Section 1.10(a), Addenda 3;
- Right to determine number of packages delivered each day. Sections 9, 1.10(a);
- Right to control use of truck (full utilization). Background Statement to Agreements;
- Right to determine size of route. Sections 5.2, 5.3;
- Right to control use of other drivers. Sections 2.1, 2.2;
- Right to control assignment of contract rights. Section 18;
- Right to control amount of settlement. Sections 4.1, 6.0, 9.0, Addenda 3, 6;
- Right to control driver work performance by evaluation and training. Section 1.4;

⁶³ See FXG_GRIFFIN0003320 – 3321 (and FXG_SMITH0001356 for FHD).

⁶⁴ The FHD Agreement is to the same effect.

- Right to control daily reporting and delivery method. Sections 1.8, 1.11, 1.13, 1.14, 4.2; and
- Right to control contract termination. Sections 11.2, 3.3, 12.1.

These specific contractual provisions control over the contradictory general provisions.⁶⁵ Hence, FXG's Agreement contains many specific contradictions to Section 1.15's general platitude.

The Agreements include myriad express reservations of FXG's right to control the method, manner, and means of each P&D driver's work.⁶⁶ In my practical experience over the last twenty eight years, taxing and other governmental bodies treat such express reservations of control as indicative of employment. Such control is difficult to defend before such agencies, and impossible to square with the independence needed for independent contractor status.

As I explained in my testimony in *Estrada*, vague and ambiguous terms and phrases appear throughout the Agreements,⁶⁷ providing FXG tremendous latitude in controlling

⁶⁵ See generally, Restatement (Second) of Contracts § 203 (c)(1981); see also, *Baton Rouge Oil and Chemical Workers Union v. Exxon Mobil Corp.*, 289 F.3d 373, 377 (5th Cir. 2002).

⁶⁶ See Section 1.8 ("Contractor agrees to prepare and present for the signature of consignors and consignees such shipping documents as FedEx Ground may from time to time designate") (FXG_GRIFFIN0003315); Section 1.13 ("Contractor shall, at Contractor's expense, purchase or lease the electronic communications equipment necessary to fulfill the obligations specified in Paragraph 1.10(d) above and which complies with specifications promulgated from time to time by FedEx Ground.") (FXG_GRIFFIN0003320); Section 3.3 ("[a]t any time that FedEx Ground discovers that Contractor or an operator engaged by Contractor to drive the Equipment fails to meet FedEx Ground's Safe Driving Standards as published from time to time, all as determined by FedEx Ground in its sole discretion, FedEx Ground may elect to terminate its indemnity for liability ...") (FXG_GRIFFIN0003324); Section 5.2 ("In the event Contractor is not able to provide reasonable means to continue to service the Primary Service Area, FedEx Ground may, in its sole discretion, reconfigure such area.") (FXG_GRIFFIN0003332); Addendum 3 - II.D. to FXG Agreement ("The company reserves the right to name the work days preceding and following any holiday falling on or in conjunction with a weekend") (PWI10002289).

⁶⁷ Section 1.10(a) (A P&D driver must provide service "consistent with the competitive standards within the industry... FedEx Ground may reassign a portion of such packages to another contractor"); Section 1.10(c) ("handle, load, unload, and transport packages using methods that are designed to avoid theft, loss, and damage"); Section 1.10(h) ("conduct all business activities with integrity and honesty, in a professional manner, and with proper decorum"); Section 1.10(d) ("cooperate with FedEx Ground's employees, customers, and other contractors, to achieve the goal of efficient pick-up, delivery, handling, loading, and unloading of packages and equipment, and provide such electronic and/or manual data pertaining to package handling as is reasonably necessary to achieve this goal"); Section 1.10(e) ("foster the professional image and good reputation of FedEx Ground and Contractor with shippers and consignees, including adhering to the vehicle identification and operator appearance standards..."); Section 1.12 ("Contractor acknowledges that the presentation of a consistent image and standard of service to customers throughout the system is essential in order to be competitive with other alternatives available to shippers and consignees and to permit recognition and prompt access to customers' places of business")

the method, manner, and means by which each P&D driver goes about his work. They leave murky:

- who defines these standards;
- how one measures compliance;
- the ramifications of violation; and
- under what circumstances a violation may result in termination.

For example, FXG's terminal managers presumably assess whether P&D drivers are acting with integrity and honesty, with proper decorum, and with professionalism.⁶⁸ Yet, FXG has not even attempted to define such standards, much less to specify who applies them. Such inherent ambiguity imparts significant control in FXG over issues that may be critical to the P&D drivers' work.

It is difficult to read the Agreements in this case without reflecting on the duties of the contractor drafter. As I wrote in the *Legal Guide*, "many attorneys have found themselves trying to draft an agreement that the client hopes will provide for independent contractor treatment of certain workers, and yet that contains inordinate provisions affecting control."⁶⁹ Whatever the respective roles of the company and its advisors in contract drafting, even advisors who are trying to act as mere scribes "may need to inform the client that some provisions in a contract denominated as one for an independent contractor status simply are too employee-like to withstand scrutiny."⁷⁰

In my opinion, that should have occurred here, for both the language and spirit of the Agreements are simply incongruent with all legal tests for assessing independent contractor status. Although some contract drafters have found themselves drafting an agreement as instructed, only to later learn it is being roundly ignored (that is, where the company's controlling practices with its workers are at odds with the contracts nomenclature of independence), that is decidedly not the case here. Here, the Agreements themselves—however FXG may interpret or apply them—unambiguously reflect employment.

Furthermore, these are non-negotiable contracts,⁷¹ and I have seen no evidence even suggesting that the P&D drivers have any power to bargain over or vary any provisions.

and "each person having contact with the public under the provisions of this Agreement will wear a FedEx Ground-approved uniform, maintained in good condition, and will otherwise keep his/her personal appearance consistent with reasonable standards of good order as maintained by competitors and promulgated from time to time by FedEx Ground") (FXG_GRIFFIN0003317 – 3320); Section 5.2 ("FedEx Ground shall give Contractor the opportunity, using means satisfactory to FedEx Ground") (FXG_GRIFFIN0003332).

⁶⁸ See, e.g., Dan Sullivan Deposition, 187 (Terminal managers make sure the P&D drivers are dressed in a proper uniform and properly groomed before going out to service FXG customers.).

⁶⁹ *Legal Guide*, ¶ 8.01, p. 8-2.

⁷⁰ *Id.*

⁷¹ *Estrada*, BC210130, at 4; Exhibit A to *Estrada* at 331.

Some courts have looked to similar facts in finding employment status based on contract language alone.⁷²

In my practice, I would not draft an agreement in the form of the Agreements, for in my opinion it could have no reasonable chance of securing the desired independent contractor status. I make such assessment based on many years of contract drafting, many years of representing companies accused of mischaracterizing workers, and many years of monitoring and writing about this field of law for the *Legal Guide*. As a contractor drafter, I am mindful that the typical (if not universal) desire of the client who engages me to write an independent contractor agreement is to secure independent contractor status.

Understandably, “[e]mployers commonly fear that persons they have retained as independent contractors may be recharacterized as employees by one of the taxing or labor authorities.”⁷³ Appropriately, “the courts generally look to the truth of the relationship.”⁷⁴ An assessment of such recharacterization risk is an inevitable part of the contract drafter’s responsibilities. As a contract drafter, there are times when the drafter “should bear in mind the adage that only very rarely can one have one’s cake and eat it too.”⁷⁵

Section 1.15 of the FXG Agreement contains the broad statements that P&D drivers will not be controlled by any part of FXG management.⁷⁶ Similarly, Contractor Relations Policy-007 states that no FXG management personnel shall control any of its P&D drivers.⁷⁷ Both the FXG Agreement and the policies are replete with many provisions contradicting these broad expressions of non-control.

In my 28 years of practice, I have drafted many savings clauses, and have interpreted or defended many others. I believe there is a fundamental difference between certain types of savings clauses and the type here in question. For example, savings clauses in compensation agreements with employees often state that, in determining the amount of compensation to be paid to a particular corporate officer, any payment that is later judged to be “unreasonable” by the Internal Revenue Service (for purposes of deductibility by the corporation) must be repaid. A savings clause of this type is generally designed to put the parties back in the *status quo ante*, the position in which they would have found themselves were it not for excessive compensation being paid. The case law confirms that such a provision is effective for federal income tax purposes.⁷⁸

⁷² See discussion in *Legal Guide*, ¶ 8.01, p. 8-3.

⁷³ *Legal Guide*, ¶ 8.02, p. 8-6.

⁷⁴ *Id.* at Preface.

⁷⁵ *Id.* at ¶ 4.05[C], p. 4-35.

⁷⁶ See Section 1.15 (FXG_GRIFFIN0003320 – 3321). The same provision appears as Section 1.14 in the FHD Agreement (FXG_SMITH0001356).

⁷⁷ Policy: Contractor Relations, Policy-007, Revision date: 08/21/06 (FXG000714119 – 120).

⁷⁸ See *Pahl v. Commissioner*, 67 T.C. 286 (T.C. 1976) (holding that the taxpayer was allowed a deduction for taxpayer’s return of excessive compensation to his employer due to a provision in his contract limiting his compensation “to such maximum amount” as is not finally disallowed).

In contrast, Section 1.15 of the FXG Agreement requires one to evaluate a prohibition on control. A provision such as Section 1.15 may be included in an independent contractor agreement precisely because the draftsman hopes that, if provisions in the agreement establish control, or if control is manifested in practice, such a clause might help to convince a court that the worker was truly not an employee.

This is a fundamentally different purpose from that intended by the tax savings clauses noted above. Section 1.15 of the FXG Agreement cannot prevent something from occurring. It can only suggest that perhaps FXG did not intend it to occur. In my opinion, control that is reserved (or exercised) cannot be obviated by a savings clause such as Section 1.15 on these facts. The bell cannot be un-rung.

B. POLICIES AND PROCEDURES

1. General Procedures and Policies

FXG has elaborate step-by-step procedures⁷⁹ elucidating precisely how a P&D driver must pick up and must deliver packages. The mere fact of pick-up and delivery may be an end result, but many details FXG prescribes clearly dictate *how* a P&D driver collects and delivers packages, as well as the extraordinary information drivers must collect and remit to FXG. These procedures enunciate the daily steps a P&D driver must follow, commencing with checking out of the terminal in the morning, and terminating with checking in each night.

The following are mere examples of the right to control which FXG reserves to itself:

a. Check-Out, Check-In and Completion Procedures

P&D drivers must conduct a check-out prior to leaving the FXG facility each morning,⁸⁰ and a corollary detailed check-in at day's end.⁸¹ Moreover, P&D drivers are required to complete and submit many different reports and logs to FXG upon check-in.⁸² The reports and forms enable FXG to supervise the method, manner, and means by which each P&D driver picks up and delivers packages. The directives include step-by-step instructions a P&D driver must follow,⁸³ including a detailed pick-up regimen.⁸⁴

⁷⁹ Although I refer to FXG policies and procedures in this Report, FHD policies and procedures generally mirror those of FXG, unless otherwise noted.

⁸⁰ See Procedure: A.M. Check-Out, FXG, CKO-102, Revision date: 11/16/05 (FXG000005673 – 5676); Procedure: A.M. Check-Out, FHD, CKO-151, Revision date: 8/31/05 (FXG000000013 – 16).

⁸¹ See Procedure: Check-In Requirements, FXG, CKI-251, Revision date: 8/31/05 (FXG000000103 – 108); Procedure: Check-In Requirements, FHD, CKI-257, Revision date: 1/31/06 (FXG000006679 – 6685).

⁸² See generally, Procedure: Contractor Check-In for Service Managers, FXG, CKI-802, Revision date: 12/19/2005 (FXG000005677 – 5688); Procedure: Check-In Requirements, FXG, CKI-251, Revision date: 8/31/05 (FXG000000103 – 108).

⁸³ See Procedure: Check-In Requirements, FXG, CKI-251, Revision date: 8/31/05 (FXG000000103 – 108); Procedure: Check-In Requirements, FHD, CKI-257, Revision date: 1/31/06 (FXG000006679 – 6685);

FXG rules literally regulate the length and breadth of the driver's daily activities. Based on my practical experience over many years of drafting contracts, defending independent contractor arrangements, and writing and editing developments in the law for my *Legal Guide*, such extreme regimentation is inconsistent with independent contractor status. Viewed in their totality, FXG's byzantine check-in, check-out and pick-up procedures, its constant micro-management, coupled with the extraordinary documentation requirements P&D drivers must observe, are inconsistent with independent contractor status.

b. Uniform and Vehicle Appearance

FXG retains the right to control its P&D drivers' personal appearance, and that of all trucks.⁸⁵ Uniform requirements include: FedEx uniform knit shirts, FedEx uniform pants or shorts, FedEx uniform jackets, dark shoes and socks, and an approved FedEx ball cap.⁸⁶ This regimentation goes far beyond FXG's interest in branding, and extends to grooming, cleanliness, and decorum.⁸⁷

In addition, each vehicle must bear the FXG brand, marked "with such identifying colors, logos, numbers, marks and insignia as may be required under applicable regulations, ... or to identify the Equipment as part of the FedEx Ground system."⁸⁸ Furthermore, all "equipment shall be maintained in a clean and presentable fashion free of body damage and extraneous markings, in accordance with the standards of the industry."⁸⁹ Beyond that, the vehicles must be free of dents and be "presentable." These strict requirements have little bearing on timely package pick-up and delivery, and instead reflect FXG's larger goals of global branding and image.⁹⁰

DVD: Safe Work Methods, Order # TV-2201, Rev. 4/02 (FXG_M00031); DVD: Suggested Home Delivery Techniques, TV-9914 RES (FXG_M00108); DVD: Customer Service Ride, Order # TV-058, Rev. 4/03 (FXG_M00016); DVD: Instructor Class, QPDL (FXG_M00100).

⁸⁴ Procedures: Pickup Record Completion, FXG, PKP-056, Revision date: 8/31/2005 (The P&D driver must enter the number of packages picked up at the shipper's location, enter the core zone where the shipper is located, enter the time of day the pick-up was made (in military time), enter the 9 digit contractor number, and sign the pick-up record.) (FXG000000719 – 726).

⁸⁵ For example, see Deposition of Dan Sullivan, 187-189 (Terminal managers make sure the P&D drivers have proper uniforms and they are groomed properly. In addition, FXG has the right to require P&D drivers to post FXG's web address and telephone number on the sides of each P&D driver's truck.).

⁸⁶ See Procedure: Uniform Program for Contractors, FXG, PCH-359, Revision date: 7/10/06, (FXG000714239 – 241).

⁸⁷ See PA13102 (driver reprimanded for getting something to eat during the work day while not wearing a FedEx cap and with his shirt untucked); PA13090 (driver told that he needed to shave more consistently, and that it was a "piss or get off the pot" policy).

⁸⁸ Section 1.5 (FXG_GRIFFIN0003314).

⁸⁹ Section 1.12 (FXG_GRIFFIN0003320).

⁹⁰ FedEx Managers Guide - Ground Edition ("FedEx brand—one of the most recognized and admired") (FXG000001684).

In any event, their strictures involve more control than is possible with true independent contractors. Personal appearance, uniform, and even grooming are all addressed by contract provisions. Significantly, FXG can set (and change) undisclosed standards to assess whether any of its P&D drivers—on any particular day—complies with FXG’s uniform and grooming requirements.⁹¹

Regardless of FXG’s reason for mandating spotless appearance (of both driver and truck), these rules can have consequences for the P&D drivers. The documents and materials an FXG manager can use to support a decision to terminate a P&D driver include “equipment appearance notes.”⁹² Going far beyond FXG branding and safety, a dent or a scrape on a fender can result in discipline.⁹³ Poor truck or equipment maintenance is grounds for taking a truck out of service, or contract non-renewal.⁹⁴ The personal and equipment standards are thus mandatory, and represent classic controls over the method, manner and means used by the drivers to perform their work.

c. Customer Service Rides (CSR)

FXG also exercises control over the method, manner, and means used by P&D drivers through routine Customer Service Rides (“CSRs”).⁹⁵ FXG has reserved to itself its right to conduct four CSRs each year for each driver.⁹⁶ FXG claims that its objectives for CSRs are to reduce terminal expenses, improve service dispatch, create safety awareness, raise contractor settlement, reduce contractor operating expenses, and enhance customer relations.⁹⁷

Yet, CSRs provide FXG a venue for making “suggestions” to its P&D drivers. The instructions FXG gives its managers who conduct such ride-alongs makes the extraordinary minutia encompassed by such suggestions clear.⁹⁸ Based on the evidence

⁹¹ See Deposition of Dan Sullivan 186/11 – 188/6.

⁹² See Procedure Reference: Contract Termination Guidelines, RCRL-162, Revision date: 8/17/06 (FXG000707337).

⁹³ See, e.g., PA14490 (FXG manager performed an appearance standard check on all contractor’s vans, and driver was “spoken to” about dent in van. P&D driver was allowed 30 days to fix the dent in order to maintain a professional appearance); PA14478 (P&D driver was given 4 weeks to remove fiberglass from front of van; two weeks to fix scratches; a few days to fix big scratch).

⁹⁴ See Procedure Reference: Contract Termination Guidelines, RCRL-162, Revision date: 8/17/06 (FXG000707348).

⁹⁵ See Procedure: Customer Service Rides, CRL-555, Revision date: 8/28/06 (FXG000707526 – 528).

⁹⁶ See *id.*

⁹⁷ See DVD: Customer Service Ride, Order # TV-058, Rev. 4/03 (FXG_M00016).

⁹⁸ See DVD: Customer Service Ride, Order # TV-058, Rev. 4/03 (FXG_M00016) (In completing a CSR, managers are instructed to record the van’s arrival time when the wheels of the vehicle stop, release their seatbelt, observe the driver for proper exit methods, record the odometer’s mileage when the driver leaves his seat to go to the bulkhead door, turn from the odometer and observe the driver as he selects packages from the cargo area, exit the vehicle before the driver as the driver leaves the cargo area, observe the driver as he exits, follow the driver to the recipient, estimate the walking distance by counting the number of

I have reviewed, I believe some suggestions could legitimately be (and in fact are) interpreted by P&D drivers as mandatory directives.⁹⁹ The fact that FXG managers are trained to make such “suggestions” across such an enormous and detailed array of tasks shows that FXG has the right to control the method, manner, and means of P&D drivers’ daily activities.

FXG managers are trained to comment on how much time a driver should take to execute each segment of a driver’s exit, entry and driving routines, and to record detailed written observations of the examinee’s performance.¹⁰⁰ Moreover, falling short has consequences, as P&D drivers plainly understand. If a service manager believes a P&D driver’s behavior does not comport with FXG’s standards of customer service, FXG provides P&D drivers with “suggestions.”¹⁰¹ Not following one “suggestion” from a manager prompts a Business Discussion.¹⁰² Suggestions not followed can spell termination.¹⁰³ This type of regular and routine evaluation and counseling is typical of employment relationship, and flatly inconsistent with independent contractor status.

steps the driver takes, record the walking distance on the appropriate form, observe the contractor for proper delivery techniques and customer interaction, record the number of packages delivered and stop type, ask driver for address of next stop when walking back to van, observe the driver enter that address in his scanner, observe the driver for proper entrance routine, sit down, shut the passenger door, fasten his seatbelt, and record the departure time as wheels begin to roll).

⁹⁹ “Suggestion” nomenclature will not necessarily be interpreted as permissive in nature. See, e.g., *Armor Bronze & Silver Co. Inc., v. Chittick*, 221 F. Supp. 505 (Sept. 1963) (“In the great majority of instances its [the corporation’s] ‘suggestions’ were treated and followed as orders.” *Id.* at 513. “The company made it plain that it expected compliance by the managers and counselors with the procedures outlined by the company... it set quotas for the addition of new counselors and threatened to discharge managers who did not meet them.” *Id.* at 514).

¹⁰⁰ See Procedure Reference: Completing the Contractor Customer Service Ride Worksheet, FHD, RCRL-555, Revision date: 8/31/05 (FXG000707329 – 331).

¹⁰¹ See Michael Mannion Deposition, 263/8 – 264/13.

¹⁰² PA14229-PA14230 (FXG manager performed a CSR. Manager asked P&D driver how many stops he should assign the P&D driver. P&D driver reprimanded for not doing enough stops each day); PA14258-PA14259 (P&D driver had CSR and FXG manager told him to back into the dock, and to obtain co-signee’s signature before picking up shipment from receiving).

¹⁰³ Many of FXG’s procedures state that the outlined procedures are merely suggestions. However, failing to follow the procedures results in Business Discussions which are used to support termination or nonrenewal. See Procedure Reference: Contract Termination Guidelines, RCRL-162, Revision date: 8/17/06 (FXG000707332 – 353); see, e.g., PA14236 (P&D driver told to follow state laws, avoid backing up, use horn when backing up, install shelves and bulkhead, put packages closer to front. These suggestions would “increase the settlement.” Driver didn’t want Manager to install the bulkhead or shelves); PA14314 (FXG manager suggested that P&D driver rent a bigger van. P&D driver said that the company doesn’t reimburse enough for that. Manager said, “I’ll check into it. We can’t leave boxes behind ... our customers don’t want to hear that.”); PA13848 (FXG manager suggested P&D driver give away some of his area to prevent service problems); and PA14022 (to the same effect).

d. Driver Release Audits

In addition to CSR's, at FHD, they perform "Driver Release Audits," ostensibly designed to assure that packages are driver-released safely, and that packages are out of sight.¹⁰⁴ Unlike a CSR, in which an FHD manager rides in the P&D driver's truck and supervises up-close, a Driver Release Audit involves following the P&D drivers as they perform their delivery duties to determine if the driver is following mandatory driver release procedures. This surveillance-type procedure, which occurs at least four times a year,¹⁰⁵ confirms in FHD an extraordinary degree of control over method, manner and means minutia that, in my opinion, is simply inconsistent with true independent contractor status.

FXG also performs van service audits to ensure that "returned shipments are in compliance with sheeting, reporting, and service cross procedures (reasons why package was not delivered)."¹⁰⁶ FXG performs various other audits to scrutinize driver performance.¹⁰⁷ In my experience, independent contractors are not subject to such strict, routine oversight or surveillance.

e. FXG Must Approve All Drivers

The Agreements allow P&D drivers to engage others to drive for them when ill or absent, but only with FXG's prior approval.¹⁰⁸ If a driver does not have a FXG approved replacement driver, he may not be absent from work. In addition, generally FXG drivers must pay FXG in order to obtain a replacement driver for vacation, or must simply forgo the desired time off.¹⁰⁹

¹⁰⁴ FHD Driver Release Procedures, RDLV-029, Rev. 3/27/06 ("Always... indirect deliver to an alternate address whenever possible, leave a properly completed door tag at the primary entrance of residence. Do ring the doorbell, and driver release to a residential stop when no signature is required, areas out of public sight, areas out of weather (or use a rain bag). Do not driver release to stops with a common entrance (i.e., apartment, condo, or flat), any stop when a signature is required, a business, a mailbox, and areas exposed to weather without a rain bag) (FXG000013724); see also Procedure: Driver Released Packages, FXG, DLV-005, Revision date: 8/31/05 (FXG000000388 – 391), and Procedure: Driver Released Packages, FHD, DLV-006, Revision date: 1/26/06 (FXG000006795 – 6809). See also Michael Mannion Deposition, 258/7 – 258/17.

¹⁰⁵ See Driver Release Audits Participant Manual, 12/03, TM-406 ("One driver release audit MUST be completed every quarter (total of four per year) for each contractor, supplemental, or temporary driver assigned. If a contractor's driver release procedures are not 100% compliant ... [a] follow-up driver release audit must be completed within one week of the failure." Further driver release audit noncompliance results in "de-certification" for a minimum of 30 days.) (FXG000842805).

¹⁰⁶ See Procedure: Van Service Audit, FHD, SVC-375, Revision date: 8/31/05 (FXG00000992).

¹⁰⁷ See Procedure: Security Audit, SEC 130, Revision date: 7/17/06 (FXG000715433 – 437).

¹⁰⁸ Section 2.2 (FXG_GRIFFIN0003321).

¹⁰⁹ See Attachment 7.1 to Addendum 7 to FXG Agreement, Time Off Program (PCA0047662 – 7664).

Also, a worker's unfettered ability to hire helpers is one factor supporting the independence consistent with independent contractor treatment.¹¹⁰ Conversely, when a worker cannot hire helpers, or can do so only with approval from the principal, that control is more consistent with employee status.¹¹¹

Here, FXG controls helper use too,¹¹² and failing to abide by FXG's rules can be serious.¹¹³ For example, one P&D driver was admonished that "unauthorized passenger and an unauthorized driver driving his van [would] not be tolerated," and "could lead to termination of his contract."¹¹⁴ Although the lack of freedom to hire helpers alone does not dictate employment status, it is another in an extraordinary volume of rights reserved to FXG. In my experience and professional opinion, such blatant interference with the worker's method, manner and means of performance does not occur with *bona fide* independent contractors.¹¹⁵ True independent contractors should be able to hire helpers of their own choosing without material interference by a company.¹¹⁶

2. Revisions to Policies and Procedures

FXG's voluminous policies and procedures control the P&D driver's daily activities, and strongly influence the method, manner and means by which P&D drivers go about their daily work.¹¹⁷ I have reviewed a variety of revised procedures and new policies,¹¹⁸ many

¹¹⁰ *Legal Guide*, ¶ 3.02, p. 3-10.

¹¹¹ *Silvcraft, Inc. v. Lambert*, 661 S.W. 2d 403 (Ark. Ct. App. 1983) (The right to control includes the right to hire or control the hiring of helpers.).

¹¹² See Procedure: Authorization Process for Non-driving helper, CRL-566, Revision date: 8/31/05 (FXG000000022 – 23).

¹¹³ See also PA 14247 (FXG personnel took picture of driver's helper driving the truck, which is against policy. Both driver and helper were taken out of service pending termination for violation of the contract).

¹¹⁴ See PA13131; see also Michael Mannion Deposition, 198/4 – 200/25. FXG management often couches violations of FXG's company policies, such as the use of additional drivers or the use of non-driving helpers as potential violations of Department of Transportation ("DOT") regulations. FXG's pervasive control far exceed the DOT regulations. See Expert Report Fritz Kahn, *Estrada* Exhibit 62 (August 23, 2007).

¹¹⁵ In fact, in March 2007, FXG instructed P&D drivers who hire employees or helpers to provide them with workers' compensation insurance. See Dan Sullivan Deposition at 144.

¹¹⁶ *Legal Guide*, ¶ 3.02, p. 3-10.

¹¹⁷ See PA13580 – 13581 (FXG manager reprimanded driver for his delivery method and manager stated, "the contract clearly states that you are to provide daily delivery and pick-up service to the ... shippers on days and times which are compatible with their schedules and requirements within your primary service area.").

¹¹⁸ See Heather D'Alesandro Deposition, page 89/20 – 91/15 (There are approximately 1,300 pages of policies and procedures); 202/5 – 203/1, 205/1 – 205/12 ("A procedure is going to outline how to conduct a specific business process, and it will have a governing policy or policies. So in all instances a policy will supersede a procedure but a procedure's going to provide a how and a framework for executing the business practice.").

of which were “re-engineered”¹¹⁹ or revised by FXG after (and in direct response to) the *Estrada* litigation. In addition, I have reviewed numerous depositions, exhibits, and other documents related to FXG’s policies and procedures.¹²⁰ The policies and procedures address with extraordinary exactitude how FXG managers and personnel should treat P&D drivers. They also prescribe procedures for P&D drivers themselves to follow.¹²¹

In May 2002, FXG redesigned its intranet to help its managers transition from the print version to an online format.¹²² In direct response to *Estrada*,¹²³ FXG embarked on a Document Re-engineering Initiative (“DRI”) in March 2005, completing it in January 2006.¹²⁴ The substance of the re-engineered procedures is not materially different. FXG relabeled its “policies” as “procedures,”¹²⁵ and created “Contractor Relations, Policy-007,”¹²⁶ which mirrors Section 1.15 terminology.

The insertion of Contractor Relations Policy-007 in each procedure has not affected significant changes in the manner in which FXG operates its business, nor in how FXG treats its P&D drivers.¹²⁷ Although an individual driver may not know the number or title

¹¹⁹ See Dan Sullivan Deposition Exhibit 4, which states that FXG must adjust its rules and procedures to improve the P&D driver’s experience, while maintaining fundamentally sound business practices. These “efforts are underway to fortify and promote the independent contractor model” (FXG000586318).

¹²⁰ Although such policies and procedures are now on FXG’s intranet, I have reviewed some of them in hard copy.

¹²¹ See *Estrada v. FedEx Ground*, Superior Court of Los Angeles County, No. BC210130, Statement of Decision (July 2004) (FXG management stated that outside sources defined the relationship between FXG and the P&D drivers, including: verbal information, memorandum from management, internet and website, custom, and under certain circumstances, the Operations Management Handbook and the FXG Manual.).

¹²² See Heather D’Alessandro Deposition, 156/19 – 157/8.

¹²³ See Dan Sullivan Deposition, 123/8 – 123/9, 123/19 – 124/25; Dan Sullivan Deposition Exhibit 4 (“modify policies, procedures, and practices to address concerns/confusion raised by the judge in *Estrada* and elsewhere”) (FXG000586317).

¹²⁴ See Heather D’Alessandro Deposition, 7/18 – 7/23.

¹²⁵ See Heather D’Alessandro Deposition, 235/7 – 235/10.

¹²⁶ FXG Policy: Contractor Relations, Policy-007, Revision date: 08/21/06 (FXG000714119 – 120); Standing as an analog to Section 1.15 of the FXG Agreement, Policy-007 (Contractor Relations) applies to both FXG and FHD, and states that “no 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.” Policy-007 states that FXG personnel who fail to comply with this directive may face disciplinary action, up to and including termination. Yet, in much the same way that Section 1.15 of the FXG Agreement is contradicted by a plethora of specific provisions that reserve FXG’s right to control P&D drivers, Policy-007 is also contradicted by more specific provisions in the “procedures.”

¹²⁷ See Michael Mannion Deposition, 75/3 – 75/9, 89/12 – 89/21 (“I don’t know of anything that’s happened because of [the DRI]”); see also Procedure: Contractor Check-In for Service Managers, FXG, CKI-802, Revision date: 12/19/2005 (FXG000005678); Contractor Check-In, Ch. 8, P.M. Routine, Administrative Management Handbook, Revised March 2002 (FXG000682241). The only substantive difference between these two passages is the inclusion of the word “must,” which is noticeably absent from the 2005 version. The 2002 version states: “The P&D contractors must give the items listed below to the service manager

of a particular policy or procedure, terminal management consistently reminds the driver of the rules and policies required by FXG through the use of constant Business Discussions. FXG managers are expected to access the FXG intranet to follow these policies and procedures.¹²⁸ These FXG managers interface daily with P&D drivers, enforcing and interpreting the rules.¹²⁹ Business Discussions reflect regular threats to P&D drivers that their contract is in “jeopardy” or subject to termination.¹³⁰

FXG’s re-engineered procedures have no impact on the opinions I expressed in *Estrada*, nor on those I render here. The re-engineered policies and procedures may have changed cosmetically, but to the drivers, little has changed.¹³¹ Although FXG’s CEO admits its “re-engineering” was explicitly intended to bolster its contention that P&D drivers are independent contractors,¹³² the policies and procedures evidence the same degree of control at issue in the *Estrada* litigation.

Regardless of labels as “policies” or “procedures,” step-by-step instructions like those described above indicate an employment relationship. FXG’s plethora of rules for every step, from check-out to check-in, to scanning, to approval of trucks and vans, to dress, to shaving, to hours, to hats worn during lunch, are entirely inconsistent with the independence necessary to independent contractor status. The fact that FXG requires its P&D drivers to follow its directives and to document that such steps have been completed provides strong evidence not only of FXG’s right to control its P&D drivers, but also of FXG’s actual exertion thereof.

every evening at the check-in window”. The 2005 version states: “The P&D contractor gives the items listed below to the service manager every evening at the check-in window”. The list that a P&D driver must follow in each year is essentially the same. There are other instances throughout the check-in and check-out procedures reflecting minor verbiage changes. In many places in the 2005 version the “must” verbiage is retained, however.

¹²⁸ See Heather D’Alessandro Deposition. However, the FXG manual remained intact, and could be accessed online by FXG managers. See 50/5 – 52/18, 56/12 – 57/11.

¹²⁹ PA14102 – 101 (FXG manager told P&D driver at FXG, that she operates independently but must follow policies and procedure of the company and her contract.); FXG now allows its P&D drivers to leave the terminal prior to the completion of sorting packages. See Michael Mannion Deposition, 308-312. However, P&D drivers are required to deliver all of their packages, and they must return to the terminal to pickup any packages initially left behind. In reality, P&D drivers continue to wait for all of their packages before leaving the terminal. Accordingly, the procedure may have changed, but the P&D drivers’ practices have not changed materially.

¹³⁰ See e.g., PA14404 (P&D driver reprimanded for not turning in maintenance reports, which are expected every month); PA14448 (P&D driver’s van would be taken out of service if P&D driver did not turn in maintenance reports); PA14518 (P&D driver was reprimanded for unsecured vehicle); and PA14463 (P&D driver told his trash must be dumped out every morning before he will be allowed to dispatch. Manager said she will check driver’s van the next day).

¹³¹ See Michael Mannion Deposition, 75/3 – 75/9, 89/12 – 89/21; also I note settlements are adjusted annually, but this is not a qualitative or relationship change.

¹³² See Dan Sullivan Deposition, 122/14– 124/25.

C. OTHER FXG DOCUMENTS EVINCE CONTROL

FXG utilizes manuals, P&D driver checklists, DVDs, and a driver training course to further exert control over P&D driver tasks. The Court of Appeals for the Seventh Circuit has held that “an individual’s unique work skills may indicate independent contractor status [but that] if the individual requires substantial training and supervision, an employee/employer status is more likely.”¹³³ This reflects the maxim that persons commencing a working relationship with pre-existing training and credentials show one index of independence. In contrast, those receiving training from the particular employer in question are more likely to be employees.

FXG attempts to downplay the weight of its manuals, checklists, DVDs, training, and other paraphernalia as mere “suggestions” to maximize a P&D driver’s profits.¹³⁴ However, my review of these materials and of FXG’s pervasive training and supervision of P&D drivers leads inevitably to employee/employer status. P&D drivers are required to follow FXG procedures, and non-compliance results in a Business Discussion, which may put the P&D driver’s “contract at risk.”¹³⁵

Business Discussions are the equivalent of counseling and discipline, and can lead to termination.¹³⁶ All Business Discussions are documented and maintained in the P&D drivers’ file for future use as a verbatim written record. Business Discussions are used to support termination, and to show that a driver has been warned of possible contract termination.¹³⁷ Unequivocally, this bespeaks employment.

From the voluminous evidence I have reviewed, P&D drivers have no significant latitude in making the vast quantity of business decisions which true independent contractors must inevitably make.¹³⁸ The apparently perpetual record of Business Discussions FXG retains, in the equivalent of an employee’s personnel file, is something I have never previously encountered outside an explicit employment context in my nearly three decades of practice.

¹³³ See, e.g., *Worth v. Tyer*, 276 F.3d 249, 263 (7th Cir. 2001).

¹³⁴ For discussion of the meaning of “suggestions,” see discussion at page 22 - 23, *supra*.

¹³⁵ For example, see PA14252 (P&D driver reprimanded for leaving vehicle unsecured. FXG manager stated that this is a contract violation that could result in immediate termination, and next time it would “go to review”); PA14251 (P&D driver reprimanded for leaving terminal door open); PA13500 (P&D driver reprimanded for not finding a replacement driver and not serving area; put “contract in jeopardy”).

¹³⁶ In FXG’s preferred lexicon, this is “putting your contract at risk”. See Procedure Reference: Contract Termination Guidelines, RCRL-162, Revision date: 8/17/06 (FXG000707332 – 353); see, e.g., PA13325 (where P&D driver was told “this is not an eight-hour job. You are expected to deliver every package every day”).

¹³⁷ See Procedure Reference: Contract Termination Guidelines, RCRL-162, Revision date: 8/17/06 (FXG000707332 – 353).

¹³⁸ Such unfettered and detailed control would in my opinion be difficult (if not impossible) to explain to a taxing or regulatory agency examining the status of workers under such scrutiny.

1. FXG'S Manuals and Flip Charts Show Control

FXG disseminates a Contractor's Companion,¹³⁹ a detailed flip chart designed to assist P&D drivers in the day-to-day administration of their duties.¹⁴⁰ The Contractor's Companion is a small 3" x 5" flip chart fitting neatly in the front shirt pocket of a P&D driver's company uniform, so its prescribed rules are never far away. The Contractor's Companion includes step by step instructions for retail and business pickup and deliveries, how to reconcile a pickup, how to scan packages, what to do when a package is too heavy or poorly packaged, how to account for COD packages, etc.

In addition, the Contractor's Companion includes a list of common customer complaints, and what a P&D driver "should" do to avoid confrontation with a client, including smiling, extending a handshake, never touching the customer, and following customer instructions.¹⁴¹ The Contractor's Companion also covers step by step instructions on what to do when a P&D driver is involved in an accident ("a statement should be given to police, but do NOT admit liability.").¹⁴²

Significantly, the Contractor's Companion was expressly created to ensure that each P&D driver performs his duties in accordance with FXG requirements.¹⁴³ As with so many of its other badges of control, FXG's distribution of its Contractor's Companion evidences the kind of explicit and implicit control one encounters solely in an employment relationship. Extending far beyond end-result functions of timely package pick-up and delivery, FXG prescribes rules that dictate the method, manner and means each P&D driver must follow with virtually military precision.

FXG also provides every FXG manager with a manual entitled "FedEx Managers Guide - Ground Edition" (the "Guide").¹⁴⁴ FXG managers are required to enforce the provisions in the Agreements, as well as the polices and procedures promulgated by FXG.¹⁴⁵ In addition, FXG provides FXG managers with detailed training materials to evaluate P&D drivers on customer service rides,¹⁴⁶ and materials with how to plan and manage pick up

¹³⁹ PWI10000028-PWI10000056; PCA0004619- PCA0004638.

¹⁴⁰ See Deposition of Dan Sullivan, 236/3 – 236/18 (The Contractor Companion are procedures the P&D drivers "need to follow to effect those deliveries correctly.").

¹⁴¹ PWI10000028-PWI10000056; PCA0004619- PCA0004638.

¹⁴² *Id.*

¹⁴³ See Deposition of Dan Sullivan, 236/3 – 236/18 (The Contractor's Companion are procedures the P&D drivers "need to follow to effect those deliveries correctly.").

¹⁴⁴ See FXG000001522 – 1686; Deposition Dan Sullivan 254/8 – 255/2.

¹⁴⁵ See, e.g., FXG Policy: Contractor Relations, Policy-007, Revision date: 08/21/06 (FXG000714120) ("Failure to comply with this policy may result in disciplinary action up to and including termination.").

¹⁴⁶ See Procedure: Customer Service Rides, CRL-555.

and delivery requirements.¹⁴⁷ All manager materials incorporate instructions to terminal management about their important supervisorial oversight of P&D drivers.¹⁴⁸

2. FXG'S Training Shows Control

FXG not only undertakes to prescribe and enforce hygiene, attire, and grooming standards, but even broaches interpersonal demeanor. FXG's "Customers Are Really Everything" ("C.A.R.E.") program¹⁴⁹ instructs drivers how to avoid confrontations with customers, how to please customers, and how drivers should deport themselves in the course of delivering a package.¹⁵⁰ Although C.A.R.E. is nominally voluntary, in practice, it is more disciplinary than extra-curricular. In much the same way that "traffic school" can be attended voluntarily to expunge tickets for motor vehicle violations in many states, a driver may participate in the C.A.R.E. Program to expunge a verified customer complaint from the driver's record. Expunging a complaint is important, as it enables the P&D driver to remain eligible for a CCS reimbursement.¹⁵¹

For example, one P&D driver was charged with a complaint because he scanned a customer's packages twice instead of the requisite three times.¹⁵² Because the P&D driver had taken a C.A.R.E. class, the charge was put in his file, but he did not lose his Contractor Customer Service bonus.¹⁵³ Although one might perhaps debate the degree

¹⁴⁷ See P&D Planning Seminar, Participant Manual (FXG (FXG000938609-FXG000938818) and FHD (FXG000002993-FXG000003145)); see also P&D Planning Seminar Workbook - FHD (FXG000003146-3234)

¹⁴⁸ *Id.*

¹⁴⁹ DVD: WE C.A.R.E.: Customers Are Really Everything, Order # TV-143 RES, Rev. 4/04 (FXG_M00018) ("Remember to: S.M.I.L.E.," which stands for: Say "Good Morning" or "Good afternoon"; Make eye contact; Initiate the Conversation; Look for ways to be helpful; Exit with a "Thank you for using FedEx Home Delivery.").

¹⁵⁰ See Deposition of Dan Sullivan, 235/4 – 235/10; see also DVD: WE C.A.R.E.: Customers Are Really Everything, Order # TV-143 RES, Rev. 4/04 (FXG_M00018) (shows scene of driver delivering package, where "the contractor did three things right here. First, he didn't lose his cool; he apologized for his mistake; then he offered to look in his van for the customer's package. Calling the customer by her name was a nice touch too.").

¹⁵¹ See Procedure: Customers are Really Everything (C.A.R.E.) Program, FXG and FHD, CRL-255, Revision date: 2/02/06 (FXG000013976 – 979).

¹⁵² Procedure: Contractor Customer Service Program, FXG, CRL-366, Revision date: 8/31/05 (FXG000000158 – 164) (all packages must be scanned three times); this scanning requirement is itself another manifestation of control FXG possesses and exercises.

¹⁵³ See PA 13153; FXG has developed the CCS program to encourage and reward P&D drivers for excellence in service, reduced accident frequencies, no missed or early pick-ups and no customer complaints. See Procedure: Contractor Customer Service Program, FXG, CRL-366, Revision date: 8/31/05 (FXG000000158 – 164). The CCS bonus tied to the P&D driver's terminal has been eliminated. See Addendum 6, Pick-Up and Delivery Contractor Operating Agreement - Contractor Customer Service Program (PCA0047655).

to which C.A.R.E. is “voluntary,” it is considered a “behavior modification program”¹⁵⁴ and is used by FXG to further indoctrinate its P&D drivers.

FXG also provides step-by-step instructional DVDs directly to its P&D drivers. The stated purpose of the DVDs is:

“to provide a detailed overview of the pick-up and delivery methods used by successful contractors. The contractors discovered these methods as an efficient means of providing their customers with the best possible service. It guarantees the contractor will get the most out of the work day.”¹⁵⁵

The DVDs provide FXG’s “suggested” practices for pick-up and delivery of packages, with special emphasis on maximizing the time devoted to service.¹⁵⁶ These DVDs contain directions and instructions styled as “suggestions”.¹⁵⁷ One FXG training program called Quality P&D Learning (“QPDL”) is targeted to persons who are not qualified to become P&D drivers because they lack the requisite driving and delivery experience. The QPDL training program affords prospective P&D drivers an opportunity to become FXG P&D

¹⁵⁴ See Michael Byrum, 208/15 - 208/23.

¹⁵⁵ See DVD: Safe Work Methods, Order #TV-2201, Rev. 4/02 (FXG_M00031) (The video tells the P&D driver to pull into a customer’s location; to note the importance of obtaining the customer’s immediate attention (tapping the horn notifies the recipient the FXG P&D driver is there for delivery); to point the front of the van towards the exit path to discourage other vehicles from blocking the van; to reduce walking distance by parking close to the stop and perform a smooth exit; and to avoid backing as much as possible. A proper load will have the following characteristics: Labels facing out so that the P&D driver will not have to handle the packages to view the address; packages should be lip loaded to avoid sliding and potential damage to the customer’s shipment; and the packages should be loaded in stop order. Point of Delivery Techniques: P&D driver should walk immediately to the recipient and attract attention, and indicate number of packages for delivery. Package is scanned, recipient signs scanner, thanks the recipient and leaves the building. Before entering the van, enter the next stop into the scanner and return scanner to its holster. P&D driver should plan ahead and know the best travel path to the next stop.).

¹⁵⁶ See DVD: Time Saving Techniques, Order # TV-204, Rev. 08/02 (FXG_M00027) (Saving just 30 seconds on each stop every day adds up quickly and can save P&D driver much time during the day.).

¹⁵⁷ See note 99, *supra*, e.g., *Armor Bronze & Silver Co. Inc., v. Chittick*, 221 F. Supp. 505 (Sept. 1963) (“In the great majority of instances its [the corporation’s] ‘suggestions’ were treated and followed as orders.” *Id.* at 513.).

drivers,¹⁵⁸ and includes multiple customer service rides after they become drivers to ensure that their training was successful.¹⁵⁹

FXG does not charge a fee to attend its 8 day training course,¹⁶⁰ and any driver lacking a full year of driving a “similar truck” is required to attend.¹⁶¹ As with virtually every other determination, FXG unilaterally decides what is and is not “similar.” Even highly trained and experienced professional drivers can be required to attend QPDL training, if the driver has not been driving a “similar truck” (as determined solely by FXG) for a full year.

Going far beyond safety instruction, FXG expects its QPDL teachings to be re-enacted by drivers in performing everyday functions.¹⁶² The QPDL training, extraordinary in the depth and breadth of its FXG branding and uniformity, includes step-by-step instructions covering virtually everything the P&D driver will do, all in the FXG way. For example, the Vehicle Entrance and Exit Routine scripts step-by-step procedures, covering such minutia as starting the engine, using turn signals, removing seat belts, and even such stylistics as placing keys on the little finger of the driver’s non-writing hand.¹⁶³ This minutia is clearly not only about timely pick-up and delivery, and indeed, seems entirely removed from it.

QPDL training also includes “Knowledge Check,” a test administered at the end of each training day. This test is designed to assess whether the driver has the requisite knowledge FXG requires of its drivers. In the face of such detailed training and

¹⁵⁸ See Deposition of Dan Sullivan, 244/10 – 244/21; *Independent Times*, Vol. 13, Oct. 2006, p. 3 (PCA0047607) (For P&D drivers who want to start their own driver training, newsletter states, “You will have the option to train your own drivers, or operate your own training school, provided you meet the curriculum requirements established by the DOT and FedEx Ground. You will have to submit your proposed curriculum and training plan in writing to the senior manager of the facility you service for approval. The curriculum must comply with all DOT regulations and meet FedEx Ground requirements.”) (emphasis added).

¹⁵⁹ See Deposition of Ivor Wood, Senior Manager P&D Learning, 115/20 – 116/11; Deposition of Ronald Joseph, 47/21 – 48/8.

¹⁶⁰ See Deposition of Ronald Joseph, 47/25– 48/21.

¹⁶¹ See Deposition of Dan Sullivan, 245/15 – 246/12.

¹⁶² See Deposition of Dan Sullivan, 248/1– 248/9.

¹⁶³ Quality P&D Learning Participant Manual (Version 8/03), Day 1, Step Van – Vehicle Entrance and Exit Routines (FXG000396342 – 345); Quality P&D Learning Participant Manual (Version 4/05), Day 1, Suggested Vehicle Entrance/Exit Routine (PCA0021445 – 446). See also DVD: Safe Work Methods, Order # TV-2201, Rev. 4/02 (FXG_M00031) (“as the vehicle approaches the stop, the contractor turns on the flashers and taps the horn to attract attention, shifts into the lowest appropriate gear, engages the emergency break, turns off the ignition, and removes the keys. Next, he unlatches the seatbelt, removes the Star scanner from its cradle and places it in the holster, then proceeds to the bulkhead door. The bulkhead door is opened, and the keys are placed on the little finger of the non-writing hand. Each of these elements has a specific purpose...”).

assessment, broad contract statements or savings clauses about a lack of control cannot contradict the evidence.¹⁶⁴

FXG purports to have no control over its P&D drivers, despite its manuals, flip charts, ride alongs, hygiene and grooming rules, despite its audits, Flex Program, route modifications, uniform signage and grooming mandates, and its host of other minutia. In my opinion, FXG's business records demonstrate that FXG retains the right to control the method, manner and means of daily driver performance.

3. FXG'S Business Discussions and Records Show Control

FXG's Business Discussions (also known as Contract Discussion Notes) demonstrate the right to control, and comprehensive actual control, over its P&D drivers. In fact, FXG admits that its Business Discussions are a "tool" for FXG manager use.¹⁶⁵ In many Business Discussions I have reviewed, the FXG terminal manager concludes that the P&D driver has "put [the] contract in jeopardy."¹⁶⁶ A Business Discussion for even a minor infraction often warns the driver that—in FXG vernacular—he has "put his contract at risk."¹⁶⁷

FXG's right to control and exercise of control is consistently evident in its Business Discussions with its P&D drivers. Failure to follow the procedures "suggested" by FXG not only can result in disciplinary action, it does.¹⁶⁸ In the parlance of employment, this is

¹⁶⁴ "Even if the agreement contains all of the terms and conditions one would expect to find in an independent contractor context, the written agreement will not overcome the reality of the situation." See *Legal Guide* at ¶ 8.02, p. 8-5. If an entire agreement cannot save the relationship from characterization as employment, a mere savings clause cannot do so.

¹⁶⁵ See Procedure Reference: Contract Termination Guidelines, RCRL-162, Revision date: 8/17/06 (FXG000707335).

¹⁶⁶ See PA13088 (because of his dirty uniform, P&D driver was putting his contract in jeopardy); Procedure Reference: Contract Termination Guidelines, RCRL-162, Revision date: 8/17/06 (FXG000707332 – 353) (FXG senior managers and operations managers are instructed to inform the P&D driver in his most recent Business Discussion that he was "in danger of losing his contract... that he had been told his contract was in jeopardy.").

¹⁶⁷ See PA13500 (P&D driver stated: "I'm still sore and can't sit down yet [from surgery] - still draining puss from where they cut me. Can't drive either." P&D driver was reprimanded for not finding a replacement. FXG manager stated this put the contract at risk.); PA13541 (P&D driver vomiting in the morning and he wanted to make deliveries later in the day. FXG manager told the P&D driver that he should have had a back up driver prepared. FXG manager told the P&D driver that it was his choice to deliver or not, but failure to do so was a direct violation of the contract and put the contract at risk. The FXG manager directed the P&D driver to complete all pick-ups, look at his hours, and log all his hours of work. FXG manager also showed P&D driver how to scan packages.).

¹⁶⁸ See, e.g., PA13584 (P&D driver told manager that he was going to do 106 stops. Manager said driver had to do 140. Manager stated, "if you fail to service your area completely, you put your contract in jeopardy of termination." Driver still refused. Manager said, "You have made your own decision. I have no choice but to put your contract up for termination."); PA13695 (P&D driver's employee did not upload the

tantamount to an employee being warned he may be fired. Semantics do not obscure the gravity of these Business Discussions, nor do they lessen their implicit control to obtain desired performance.

For example, if a P&D driver commits any failure or discrepancy in the check-in paperwork, the field manager must engage in a Business Discussion.¹⁶⁹ Furthermore, the field manager must document the content of the Business Discussion in accordance with Contract Discussion Note, OP-147.¹⁷⁰ If a P&D driver fails to remit the monthly vehicle maintenance return, the FXG manager must hold a BD.¹⁷¹ If a P&D driver's vehicle fails to meet FXG's appearance standard, FXG requires a BD.¹⁷²

The same goes for FHD P&D drivers.¹⁷³ If an FHD P&D driver incorrectly marks a package for recycle, it triggers a Contract Discussion.¹⁷⁴ If a customer complains about any P&D driver, FXG conducts a BD.¹⁷⁵ If during a Customer Service Ride, the FXG manager notices a potential breach of the FXG Agreement, it triggers a BD.¹⁷⁶

scanner. Manager told driver that this was a serious issue and was jeopardizing the future of his operating agreement with FHD. Any further occurrences would result in possible termination.); PA13722 – 725 (P&D driver was reprimanded for having multiple missed pick-ups. Manager said, "I would be remiss in my duties as a manager for FXG if I did not bring this matter to an end. I am submitting your contract for termination review. ... I will not allow my customers to be missed in the quantity that you have.").

¹⁶⁹ See Procedure: Check-In Requirements, FHD, CKI-257, Revision date: 1/31/06 (FXG000006679 – 6685) (emphasis added); Procedure: Check-In Requirements, FXG, CKI-251, Revision date: 8/31/05 (FXG000000103 – 108). See also Mark Byrum Deposition, 129/20 – 130/18.

¹⁷⁰ *Id.* See also Procedure: Check-In Requirements, FXG, CKI-251, Revision date: 8/31/05 (FXG000000107) (If a P&D driver refuses to complete a Recipient I.D. Label Installation Record and Problem Report, FXG mandates a Business Discussion. A Business Discussion is required if a P&D driver has no valid reason for not scanning a Recipient I.D. placard. If there is incomplete paperwork, there must be a Business Discussion held with the P&D driver.).

¹⁷¹ See Mark Byrum Deposition, 130/14 – 130/18.

¹⁷² See Mark Byrum Deposition, 131/24 – 132/5.

¹⁷³ See Procedure: Check-In Requirements, FHD, CKI-257, Revision date: 1/31/06 (FXG000006681 – 6682).

¹⁷⁴ See Procedure: A.M. Check-Out, FHD, CKO-151, Revision date: 8/31/05 (FXG000000016).

¹⁷⁵ See Procedure: Contractor Customer Service Program, FXG, CRL-366, Revision date: 8/31/05 (FXG000000161).

¹⁷⁶ See Procedure: Customer Service Rides, CRL-555, Revision date: 8/28/06 (FXG000707526).

The regulation and documentation of such discipline is consistent and extraordinary.¹⁷⁷ FXG can and does employ Business Discussions to threaten P&D drivers with contract termination.¹⁷⁸ “Contractor Business Plans”¹⁷⁹ also serve to document discussions, problems, solutions, and expectations for P&D drivers.¹⁸⁰ Business Plans record what FXG has committed to do, and what the P&D driver has committed to do.¹⁸¹ FXG’s extraordinary focus on driver detail is clearly not limited to annual Business Plans. Business Discussions can occur at any time.¹⁸²

Companies commonly set and monitor objectives for employees and for independent contractors. Furthermore, monitoring such objectives does not necessarily contradict true independent contractor status. However, in addition to FXG’s exacting scrutiny over the minutia of its P&D drivers’ work, FXG’s Business Plans go beyond customary independent contractor standards, and are analogous to employee annual reviews. Like an employee annual review, a Business Plan assesses whether the P&D driver has met the prior year’s service goals, and sets goals for the new year.

¹⁷⁷ See Procedure: Business Discussions, FXG, CRL-560, Revision date: 8/17/06 (FXG000707315); Procedure: Business Discussions, FHD, CRL-572, Revision date: 8/17/06 (FXG000707313) (FXG requires its managers to record notes from each Business Discussion on the Contract Discussion Note form (OP-147). A Business Discussion can be held for any of the following purposes: review of the P&D driver’s overall operations, documentation of agreed predetermined flex(es), positive customer feedback, customer complaints, “problem-solving,” or for discussion of one more aspects of either the driver’s or the facility’s operation. Furthermore, FXG requires that each P&D driver must have at least two Business Discussion’s per year. If a P&D driver refuses to participate in a Business Discussion, FXG directs its managers to contact Contractor Relations. FXG also mandates that each facility maintain a log of all Customer Service Rides and Business Discussions made (Customer Service Rides and Business Discussion Record, OP-214Res).

¹⁷⁸ See Procedure Reference: Contract Termination Guidelines, RCRL-162, Revision date: 8/17/06 (FXG000707337); see also Reaching Higher Ground FXG Kickoff FY07 Presentation (Business Discussions provide “proof” that a P&D driver has breached his Agreement. During such a discussion, FXG directs its managers to: (1) inform the P&D driver of what is expected of him under the contract; (2) identify any problems he/she may have meeting his contractual obligations; (3) seek solutions to those problems; and (4) make very clear what the consequences will be if service objectives are not met.) (FXG000922422–428).

¹⁷⁹ Contractor Business Plans are commonly referred to as “Business Plans” at FXG and in this Report.

¹⁸⁰ See Procedure: Business Discussions, FXG, CRL-560, Revision date: 8/17/06 (FXG000707315).

¹⁸¹ See Procedure: Business Discussions, FXG, CRL-560, Revision date: 8/17/06 (FXG000707316).

¹⁸² Business Discussions are performed by the FXG managers “when a situation arises.” See Michael Mannion Deposition, 276/22 – 277/12.

FXG managers administer Business Discussions¹⁸³ to document failures to follow FXG procedures. FXG's managers and personnel enforce FXG's detailed policies and procedures to ensure that P&D drivers follow FXG protocol.¹⁸⁴ As but one example, one P&D driver was reprimanded for getting something to eat during the workday with his shirt untucked and not wearing his FXG cap.¹⁸⁵ Moreover, the driver was told by the FXG terminal manager that he could only dress and undress at the terminal.¹⁸⁶ Hats feature in other Business Discussions too.¹⁸⁷ In fact, a P&D driver who wants to wear a Santa hat during the holidays (even if his customers love it) cannot do so because "it is a violation of the operating agreement."¹⁸⁸

FXG has reserved its right to control nearly every aspect of a P&D driver's daily work, from whether the P&D driver must shave¹⁸⁹; to the cleanliness of his uniform¹⁹⁰; to the number of hours he is expected to work¹⁹¹; to the hat he must wear¹⁹²; to the time he arrives at FXG's facility each day.¹⁹³ Notwithstanding FXG's interest in protecting its global brand and uniform standards,¹⁹⁴ such control over the minutest of details is antithetical to independent contractor status.

My long experience in representing companies facing recharacterization disputes with taxing and other governmental authorities, my regular summary of legal authorities as the author of the *Legal Guide*, and my extensive contract drafting experience all suggest

¹⁸³ See Procedure: Business Discussions, FXG, CRL-560, Revision date: 8/17/06 (FXG000707315) ("It is imperative for managers to formally communicate with P&D and linehaul contractors... A business discussion with a contractor can be any of the following: review of the contractor's overall operation; documentation of agreed predetermined flex(es); positive customer feedback; customer complaint; problem-solving meeting; discussion of one or more aspects of either the contractor's or the facility's operations.").

¹⁸⁴ See Rodger Marticke Deposition, 90/16 – 90/25.

¹⁸⁵ See PA13102.

¹⁸⁶ See *id.*

¹⁸⁷ See PA13086.

¹⁸⁸ See Dan Sullivan Deposition Exhibit 6 (FXG00640691) (FXG manager "should have a documented Business Discussion with the contractor so he understands that he has a contractual obligation to maintain a professional image that represents the FedEx brand.).

¹⁸⁹ See PA13095.

¹⁹⁰ See PA13088.

¹⁹¹ See PA13260 (P&D driver admonished for not making his first delivery until 10:53 a.m., and for only working a little over 10 hours that day; P&D driver told that "by DOT regulations, you can work up to 14 hours before you have to have an 8 hour break.").

¹⁹² See PA13078 (P&D driver admonished for wearing a University of Michigan baseball hat).

¹⁹³ See PA13302 (P&D driver warned that he is placing his "contract in serious jeopardy" by coming into work at 10 a.m. so he can take care of his baby and not finishing his route after 8 hours).

¹⁹⁴ For example, UPS' global branding of its "brown" image, includes its workers wearing standard brown uniforms. Of course, UPS, the U.S. Postal Service, and DHL all use employees. In fact, even FXG's sister company, Federal Express Corporation ("Express"), utilizes employees as P&D drivers. FXG is the exception to the rule.

that companies with *bona fide* independent contractors are concerned with results, not consumed (as FXG appears to be) with the method, manner and means each P&D driver uses daily to reach those results.

D. FXG'S METHOD OF PAYMENT

FXG issues settlement statements and weekly checks to P&D drivers.¹⁹⁵ FXG styles its driver pay as a “settlement payment” to suggest it is merely paying for an end result, package pick-up and delivery. However, the pay here is a piece rate, not a “by the job” payment.¹⁹⁶ FXG makes payment dependent on P&D drivers’ compliance with method, manner and means details.

P&D drivers must prepare settlement documents and records, daily driver logs, daily inspection reports, shipping documents, and other documents.¹⁹⁷ In order for a P&D driver to receive his weekly settlement statement and check, he must prepare all documents in accordance with FXG rules, or risk not getting paid.¹⁹⁸ Moreover, settlement statements (created by FXG) are conclusive and binding on P&D drivers,¹⁹⁹ unless written objections are submitted to FXG within 30 days.²⁰⁰ Furthermore, the CCS payment is tied to FXG’s discretion.²⁰¹

In a manner befitting payroll checks, FXG allows automatic deposit of weekly settlement checks to P&D drivers’ bank accounts.²⁰² Like an employer withholding deductions for expenses and retirement plan contributions, FXG withholds amounts from a P&D driver’s settlement check for expenses or contributions to various benefit plans. If the P&D driver elects to participate in the HR-10 retirement plan, FXG deducts it from the settlement check and funds the retirement account.²⁰³ If the P&D driver elects to participate in the

¹⁹⁵ Section 4.1; see also Procedure: Settlement Record Completion, FXG, SET-005, Revision date: 8/31/05 (FXG000715663 – 672).

¹⁹⁶ Payment by the hour, week, or month generally points to an employer-employee relationship, provided that this method of payment is not merely a convenient way to pay an agreed lump sum. Payment made upon completion of the job or on straight commission generally indicates that the worker is an independent contractor. See *Legal Guide* at ¶ 5.02, p. 5-9; ¶ 5.03, p. 5-28, 5-29, 5-31; ¶ 5.05, p. 5-43, 5-50; ¶ 5.07, p. 5-68, 5-69, 5-72.

¹⁹⁷ Section 1.7 and 1.8 (FXG_GRIFFIN0003315).

¹⁹⁸ See Procedure: Settlement Record Completion, FXG, SET-005, Revision date: 8/31/05 (FXG000715663 – 672).

¹⁹⁹ Section 4.2 (FXG_GRIFFIN0003330).

²⁰⁰ Section 4.2 (FXG_GRIFFIN0003330).

²⁰¹ Section 6.0 (FXG_GRIFFIN0003335).

²⁰² See Procedure: Contractor Direct Deposit, SET-006, Revision date: 8/31/05 (FXG000000168 – 169), at page 1.

²⁰³ See Procedure: HR-10 Plan for U.S. Only, FXG, SET-002, Revision date: 8/31/05 (FXG000000552 – 553), at page 1.

Service Guarantee Account Program, FXG deducts it from the settlement check to fund the account, and provides matching funds just as employee savings do.²⁰⁴

These payroll procedures extend to operating expenses too. Almost all P&D drivers obtain insurance through Protective Insurance Company using the FXG group sponsored plan; FXG deducts all costs from weekly settlement checks and pays the insurance company.²⁰⁵ The fact that FXG manages this withholding and payment function, instead of the P&D driver himself, constitutes further evidence of control.

E. FXG'S RIGHT TO CONTROL VEHICLES

One of the traditional indices of employee versus independent contractor status is whether the worker provides his own tools and equipment. FXG's entire system of terminals, hubs, its corporate-wide sales and customer service workforce, all operate in an integrated fashion. This vast array of infrastructure, equipment, tools and technology are all provided by FXG, and all constitute the work location and equipment needed by the P&D drivers.²⁰⁶

Moreover, even if one were to disregard facilities and equipment, and argue that the equipment needed by P&D drivers is limited to a truck, scanner, and uniform, these items too are all supplied and regulated by FXG. Although nominally purchased by P&D drivers,²⁰⁷ the trucks are procured in bulk by FXG,²⁰⁸ decorated according to FXG specifications, and then resold to drivers.²⁰⁹ In fact, over and above DOT requirements,

²⁰⁴ Section 8.0 (FXG_GRIFFIN0003336).

²⁰⁵ See Procedure: Financing Requirements, SET-356, Revision date: 8/31/05 (FXG000002509 – 2511), at page 2.

²⁰⁶ DVD: The FedEx Ground Network, Order # TV-009 (FXG_M00048) ("With more than 300 FedEx Ground terminals across the United States and Canada, and nearly 300 FedEx Home delivery facilities, and 27 central distribution hubs, FedEx Ground sorts more than 2 million packages a day, automatically along computerized conveyer routes, through six-sided camera scan tunnels. From these hubs, we transport packages to FedEx Ground and Home Delivery terminals, for their final on-time delivery.").

²⁰⁷ Even if one could conclude that the truck truly "belongs" to the P&D driver, FXG's own documents make it clear that such ownership is highly regulated. PA14255 (P&D driver was reprimanded for unsecured vehicle. He responded, "it is my truck and I am responsible for the packages." Management replied, "that's true, but I also pay to insure those packages. The 1st \$1000 of each claim can be yours; the rest is mine. Also, those packages should be considered mine until they are delivered. The P&D driver stated, "No way, they belong to the shippers." Manager retorted, "Manager is the guardian of those packages."); PA14527c (P&D driver told that he must be approved before getting a van. Driver said, "I'm a contractor, not an employee. When I started I never had to go through this. I went and bought a van and that was it. ... I don't understand why I have to buy a P-550." The manager said the van requirements are set by the company. If this is company policy it must be followed.).

²⁰⁸ See FXG000383648 (FHD team requests approval to purchase 100 white Chevrolet Express XP Cargo Vans for \$1.9 million for April 2000 delivery).

²⁰⁹ See FXG000383565 (FXG purchase of FHD vehicles for resale); FXG000383640 (RPS purchase of vehicles); Stephen Myers Deposition, 62/12-68/9 (FXG charges administrative handling fee on van

FXG has the ultimate (and apparently unfettered) right to approve the sale, disposal, or upgrade of vehicles.²¹⁰ FXG's discretion erects another barrier to any degree of independence by P&D drivers. In addition to FXG's approval of van sales and upgrades, FXG also requires trucks, cargo vans, and package vans to meet detailed specifications regarding size, shelving, color, etc.²¹¹

Even vehicle use is restricted. P&D drivers "may use the Equipment for other commercial or personal purposes when it is not in the service of FedEx Ground," with the understanding that "all such identifying numbers, marks, logos, and insignia will be removed or masked (by paper or plastic overlay) when the Equipment is so used."²¹² As a practical matter, this means P&D drivers cannot use the trucks for any other purpose, and they generally do not do so.²¹³

While selection and replacement of equipment is ostensibly within the discretion of P&D drivers,²¹⁴ FXG reserves the right to approve all equipment,²¹⁵ no matter how minor, and no matter whether it complies with all pertinent governmental laws and regulations.²¹⁶ In fact, FXG controls the minimum size truck each P&D driver can use.²¹⁷

Regardless of FXG's reasons for its tight and multi-tiered approvals and oversight, I would not expect to see this level of control in a truly independent contractor relationship. Such requirements represent badges of control which, in my view, cannot be squared with independent contractor status.

F. FXG'S RIGHT TO CONTROL ROUTES AND ASSIGNMENTS

There is little more fundamental to FXG's asserted independence of its P&D drivers than their routes, denominated as Primary Service Areas. Each P&D driver is responsible for daily pick-up and delivery of packages in his Primary Service Area, as assigned from

purchases).

²¹⁰ Procedure: Vehicle Guidelines and Upgrades, VEH-553, Revision date: 8/31/2005 (FXG000001029 – 1042).

²¹¹ *Id.*

²¹² Section 1.5 (FXG_GRIFFIN0003314).

²¹³ *Estrada v. RPS*, Questionnaire Two Responses (P&D drivers rarely deliver non-RPS packages)(EST0005855-5896).

²¹⁴ Section 1.1 (This is "subject to the determination of FedEx Ground of its suitability for the service called for in this Agreement.") (FXG_GRIFFIN0003312).

²¹⁵ Section 1.1 (FXG_GRIFFIN0003312); Section 2.1 ("No vehicle may be operated pursuant to this Agreement by any operator who is not in compliance with such standards") (FXG_GRIFFIN0003321); Procedure: Vehicle Guidelines and Upgrades, VEH-553, Revision date: 8/31/2005 (FXG000001029 – 1042); DVD: Settlement Enhancements - U.S. P&D Version, June FY02 (FXG_M00097) (Moreover, to even ask for an exception, the P&D driver must provide an explanation why the exception is needed. A P&D driver must submit an explanation for any exceptions to these specifications to FXG's headquarters.).

²¹⁶ See Michael Mannion Deposition, 238/19 – 241/14.

²¹⁷ See Dan Sullivan Deposition, 196/16 – 197/19; see also PA14527c.

time to time by FXG.²¹⁸ Significantly, FXG can unilaterally reconfigure a route, merely by giving the affected P&D driver five-days notice, even when a P&D driver objects.²¹⁹ If a P&D driver is unable to provide reasonable means to service a Primary Service Area, FXG, in its sole discretion, may reconfigure the area.²²⁰

FXG also has control over the routes a driver can acquire.²²¹ FXG reserves the right to refuse to allow a P&D driver a second or third route.²²² FXG also limits the number of routes a driver can acquire by imposing a ceiling.²²³

Moreover, FHD issues daily route and delivery details through its Vehicle Route Planning Enhancements and Facility-entered Delivery instructions.²²⁴ FHD provides drivers with daily route maps, turn-by-turn instructions and a planned sequence of deliveries. FHD makes daily routing changes to improve performance based on routes, stops, packages, start/end locations, and autoflex flex groups.²²⁵ FHD even shuffles stops among the routes to optimize stops the P&D driver makes during the day.²²⁶ FHD also flexes stops from routes with too many stops to routes with too few.²²⁷

Furthermore, a P&D driver may not assign his rights and obligations without the consent of FXG.²²⁸ Even when a P&D driver dies, the replacement must be acceptable to FXG. In my view, FXG's contractual control of driver routes is a crushing blow to any claim of driver independence.

²¹⁸ Section 5.1 (FXG_GRIFFIN0003331).

²¹⁹ Section 5.2 (FXG_GRIFFIN0003331 – 3332); Dan Sullivan Deposition, 192/13 – 193-22.

²²⁰ Section 5.2 (FXG_GRIFFIN0003332).

²²¹ While FXG eliminated the requirement that a driver work a full year before obtaining a second route, FXG still rewards multiple work area drivers with bonuses. See Attachment 3.4 to Addendum 3 to FHD Agreement (PCA0029895).

²²² See Dan Sullivan Deposition, 135/15 – 137/12.

²²³ See Rodger Marticke Deposition, 140/21 – 142/17 (Prior to October 6, 2005, the maximum number of work areas a driver could acquire was five; that was subsequently increased to eight routes.); Dan Sullivan Deposition, 137/4 – 137/23.

²²⁴ See Procedure: Vehicle Route Planning Enhancements, FHD, VRP-159, Revision date: 2/07/06 (FXG000382950 – 968). Each day, by using Vehicle Route Planning 5.02 software (“VRP”), FXG calculates the amount of time it takes to travel and deliver packages for each route. FXG also calculates the time required to travel to and deliver each routed stop. FXG also uses VRP to calculate the minimum and maximum number of stops that each P&D driver can make for each route (FXG000382955).

²²⁵ See Procedure: Vehicle Route Planning Enhancements, FHD, VRP-159, Revision date: 2/07/06 (FXG000382951 – 952).

²²⁶ See Procedure: Vehicle Route Planning Enhancements, FHD, VRP-159, Revision date: 2/07/06 (FXG000382951 – 953).

²²⁷ See Procedure: Vehicle Route Planning Enhancements, FHD, VRP-159, Revision date: 2/07/06 (FXG000382952).

²²⁸ Section 18 (FXG_GRIFFIN0003346).

FHD can even exercise up-to-the-minute control over P&D drivers on the road each day through “facility-entered delivery instructions”.²²⁹ FHD managers input specific delivery instructions for specific routes, stops, or deliveries into FHD’s route planning software, and such “Delivery Instructions” are downloaded to the P&D drivers’ scanners.²³⁰ FXG’s ability to monitor pick-up and delivery of every package clearly evidences its right of control.

G. FXG’S RIGHT TO CONTROL HOURS

An employer’s right to control a worker’s hours is consistent with employee status.²³¹ According to the Agreements and FXG procedures, P&D drivers provide pick-up and deliver service to consignees and shippers on days and at times compatible with customer schedules and requirements.²³² At first blush, such wording might be read to suggest that the hours a P&D driver works are based on consignee and shipper schedules.

However, a careful reading of the Agreements and other business records reveals FXG’s control over driver hours. FXG expects to fully utilize every truck, every day. If there were any doubt that FXG wants its drivers to work a full day every day, and to control every driver’s workload, the Flex Program resolves that doubt. Characterized by FXG as “voluntary”²³³ in reality, Flex is the norm.²³⁴ Any P&D driver in the Flex Program must deliver additional packages even if they are not located on the driver’s route.²³⁵ For

²²⁹ See Procedure: Procedure: Vehicle Route Planning Enhancements, FHD, VRP-159, Revision date: 2/07/06 (FXG000382956 – 968).

²³⁰ See Procedure: Vehicle Route Planning Enhancements, FHD, VRP-159, Revision date: 2/07/06 (FXG000382965). See also Turn by Turn Directions Detail (Instructions to drivers may include: “Frequent customer - leave pkg at back door under porch” and “Do not ring bell - driver release!” These instructions can be given for a particular delivery, for a particular customer address, for one particular day or for future days.) (PCA0009073; PMO0011541; PRI0003383; PTX20000085).

²³¹ *Legal Guide*, ¶ 3.02, p. 3-12.

²³² Section 1.10(a) (FXG_GRIFFIN0003317).

²³³ PA13841 (FXG manager suggested to driver (PA13840) that they create a flex plan. P&D driver didn’t want to, and the manager responded that the bottom line is that every customer must get serviced.); PA13853 (FXG manager was trying to figure out a flex that would be beneficial to two P&D drivers. Neither driver liked the manager’s suggestion. Manager said they would have to make the changes anyway).

²³⁴ *In re FedEx Ground Package System, Inc.*, Employment Practices Litigation, Defendant FedEx Ground Package System, Inc.’s Second Supplemental Objectives and Response to Plaintiff’s First Set of Interrogatories, Interrogatory #63, (Approximately 10,207 P&D drivers participate in the Flex Program, and approximately 94 P&D drivers do not participate.).

²³⁵ See Dan Sullivan Deposition, 202/1 – 202/16; PA13202 (P&D driver was reprimanded for having DNAs but coding them as 16s. P&D driver refused to take flex route. Manager stated, “We assigned those packages to your route, and you refused to take them. From time to time we have to make flexes like that ... We have to make decisions that make sense for all 30 routes and our customers.”); PA13205 (FXG manager (PA13204) told driver that he wasn’t going to change the flex assignment, and driver responded that he wouldn’t deliver the extras. FXG manager said, “That’s your decision to make,” and gave the P&D

“electing” to participate in Flex, P&D drivers receive a daily flex fee for each piece of vehicular equipment in service under the Agreement.²³⁶ In so electing, each P&D driver agrees to accept packages outside his Primary Service Area, up to daily pick-up and delivery capacity (determined by reference to time required, mileage, and van capacity).²³⁷

Because virtually every P&D driver participates in Flex, FXG can unilaterally assign packages from one P&D driver to another.²³⁸ FXG may “flex” packages on any day where the volume of packages available for pick-up and delivery in a P&D driver’s Primary Service Area exceeds the volume a P&D driver can “reasonably be expected to handle.”²³⁹ These determinations are all made by FXG, not by the drivers, and FXG does so under its own criteria.

FXG embraces this package equalization phenomenon across its entire system. FXG thereby has the right to control the number of packages each P&D driver picks up and delivers every day. With the ability to control the number of packages each P&D driver can deliver, FXG can control driver hours and driver pay.²⁴⁰

The injection of non-route specific packages is for FXG’s convenience and efficiency. FXG has unfettered ability to control the creation, size and scope of each driver’s route, and even to make daily exceptions to those routes. FXG can dictate how many packages each driver will deliver, and therefore how many hours each driver will work.

DOT regulations restrict the maximum hours a P&D driver is permitted to operate a vehicle.²⁴¹ FXG assigns packages every day to P&D drivers, so that each P&D driver is expected to work between 9.5 and 11 hours.²⁴² FXG provides each P&D driver with a

driver a resignation form. P&D driver refused to sign. Manager said he would assign another manager to ride with driver to assess how many more stops driver could make.).

²³⁶ Section 9.0 (FXG_GRIFFIN0003338).

²³⁷ Section 9.0 (FXG_GRIFFIN0003338).

²³⁸ Section 1.10(a) (FXG_GRIFFIN0003317).

²³⁹ Section 1.10(a) (FXG_GRIFFIN0003317).

²⁴⁰ P&D drivers’ temporary core zone density payments were based on a seven hour work day. However, the density payment is now based on the number of stops performed by the P&D driver. I see no material change between the two procedures.

²⁴¹ Procedure: Hours of Service, FHD, SAF-085, Revision date: 1/12/06 (No motor carrier shall permit or require any driver, nor shall any driver operate a vehicle: more than 11 hours following 10 consecutive hours off duty; for any period after having been on duty 14 consecutive hours following 10 consecutive hours off duty; for any period after having been on duty, seventy hours in any eight consecutive days.) (FXG000714913).

²⁴² See Customer Service Ride Participant Manual (FXG000006344) (CSR riders, when determining maximum routes, should calculate maximum stops at 11.5 hours); FHD P&D Planning Seminar (FXG000003038) (“When using the Service Flex Range to develop work areas manually or to check how many stops a contractor can do in a typical day, use 9.1 planned hours. ... planned hours for use as a guideline when calculating a contractor’s maximum stop capability is 11.0 hours.”).

daily list of packages to deliver. The number of packages, determined solely by FXG, is expressly calculated so P&D drivers will work from 9.5²⁴³ to 11 hours a day.²⁴⁴

Moonlighting is thus virtually impossible.²⁴⁵ P&D drivers logging between 9.5 and 11 hours a day work substantially full-time for FXG, plainly evidencing exclusivity. Although the Agreements technically permit P&D drivers to work for other companies, FXG rules make working for anyone else impracticable.

Furthermore, FXG uses its rights to deny P&D drivers new routes to control the number of hours they work. FXG managers receive a monthly report detailing the average hours worked per day by each P&D driver.²⁴⁶ FXG uses this information to determine whether a new route should be granted for any particular facility.²⁴⁷ Where a P&D driver averaged only nine hours per day, FXG denied that driver a new route.²⁴⁸ The fact that FXG looks to the number of hours worked (rather than the number of packages delivered) demonstrates FXG's express interest in and control over hours.

FXG changed its "min and max" stop policy to a "delivery stop guideline" to fully utilize a vehicle.²⁴⁹ Prior to FXG's Document Re-engineering Initiative, the calculation of the minimum and maximum number of stops based on a 9.5 to 11 hour day was used to determine whether the vehicle was being fully utilized,²⁵⁰ and included completion of the daily service planning worksheet.²⁵¹ Under the new delivery stop guideline, the form has been revised, and is now called the "daily service worksheet."²⁵²

The delivery stop guideline measures the number of stops a P&D driver makes during the day to fully utilize his vehicle.²⁵³ FXG utilizes a mathematical formula comprised of the number of packages, stops, and miles to calculate vehicle utilization.²⁵⁴ Despite FXG's metamorphosis of its explicit hours rules into its "delivery stop guideline," I see no evidence that FXG's full utilization and hour-conscious policies have changed in any material respects. A change in semantics does not signal any relinquishment of FXG's many prerogatives of control.

²⁴³ See Dennis Oates Deposition, 87/3 – 88/16 (the range was changed from 9.1 to 9.5).

²⁴⁴ See Dennis Oates Deposition, 96/18 – 97/4.

²⁴⁵ *Estrada v. RPS*, Questionnaire Two Responses (P&D drivers rarely deliver non-RPS packages)(EST0005855-5896).

²⁴⁶ See Mark Byrum Deposition, 99/15 – 100/6.

²⁴⁷ See McIntyre Deposition Exhibit 5 (FXG000538264 – 265).

²⁴⁸ See Dennis Oates Deposition Exhibit 13 (FXG000538624- FXG000538625).

²⁴⁹ See Dennis Oates Deposition, 110/12 – 120/14.

²⁵⁰ See Dennis Oates Deposition, 112/13 – 115/1.

²⁵¹ See Dennis Oates Deposition, 97/1 – 97/15.

²⁵² See Dennis Oates Deposition, 99/24 – 108/23.

²⁵³ See Dennis Oates Deposition, 120/9 – 120/14.

²⁵⁴ See Dennis Oates Deposition, 126/12 – 126/17.

Working hourly or daily, rather than to complete prescribed tasks or to achieve a particular result, is more consistent with employee rather than independent contractor status.²⁵⁵ When required hours are long, there is implicit exclusivity,²⁵⁶ another badge of employment. As with other FXG regulations, noncompliance has consequences. A P&D driver who does not deliver all his packages breaches his contract,²⁵⁷ and FXG personnel are instructed to subject the offending P&D driver to a Business Discussion.

By controlling the number of packages a P&D driver must deliver each day, FXG controls the hours each P&D driver works. In some instances, FXG controls driver hours even more blatantly. For example, one P&D driver was reprimanded by a FXG terminal manager for failing to return to the terminal before 7:30 p.m. The FXG terminal manager admonished the P&D driver that if he could not make all his required deliveries before 7:30 pm, he would have to arrive at the terminal at 7:00 a.m., not 8:30 a.m., to begin his deliveries.²⁵⁸ In another instance, a P&D driver told his manager he had over 130 stops and 30 to 40 packages to deliver that day, that this was too much work, and that he could not get it all done. The FXG terminal manager instructed him to do as much as he could in 12 hours.²⁵⁹

Such instances of control are inconsistent with the degree of independence possessed by independent contractors. FXG also reserves the right to name the work days preceding and following any holiday which falls on or in conjunction with a weekend.²⁶⁰ Moreover, FXG maintains a Time-Off Program under which P&D drivers, based on seniority, can sign up for two weeks time-off during each year.²⁶¹

²⁵⁵ *Chuck Bennett & Sons Heating & Air Conditioning v. Cottrell*, 2003 Va. App. LEXIS 697 (Dec. 30, 2003) (holding that a worker hired on an hourly basis was an employee, not an independent contractor).

²⁵⁶ Region 34, NLRB Decision and Direction of Election in *FedEx Home Delivery, A Separate Operating Division of FedEx Ground Package Systems, Inc. v. International Brotherhood of Teamsters, Local Union 671*, dated September 20, 2006 at page 26 (“their ability to use their vehicles for other business purposes when they are not providing service for the Employer is further constrained by the Employer’s requirement that the contract drivers provide delivery services every Tuesday through Sunday between the hours of approximately 6 am to 8 pm...this lack of pursuit of outside business activity appears to be less a reflection of entrepreneurial choice by the ... drivers and more a matter of the obstacles created by their relationship with [the Employer].”).

²⁵⁷ See PA14096 (P&D driver’s service was 87.8%; the required percentage is 99. Driver said “if you want my service at 99%, you need to take Croton and Centerburg off my route.” Manager said he wouldn’t do that, and that driver only worked 8.5 hours. Manager suggested driver work more hours, and do back-tracking if necessary. Manager told driver to rearrange how he does the route.); PA14105 (P&D driver told manager that driver was leaving behind packages for the day. Manager said driver’s contract could be sent up for termination. P&D driver said the routes were set up to meet the terminal’s needs.).

²⁵⁸ See PA13256.

²⁵⁹ See PA13264.

²⁶⁰ Addendum 3 - II.D (PCA0047630).

²⁶¹ Attachment 7.1 to Addendum 7 to FXG Agreement, Time Off Program (Based on seniority, P&D driver selects one week off, and after all the participating P&D drivers have selected their first week, the P&D drivers then select a second week of vacation. Furthermore, Time-Off weeks must be taken in Monday thru

However, FXG requires P&D drivers to take a one-week block off, even if the driver only wants to take 1 or 2 days. Furthermore, vacation must be claimed in Monday to Friday blocks, so a P&D driver apparently cannot take vacation time from Tuesday to Tuesday.²⁶² Even if a P&D driver wants to take vacation during the holidays, the holiday itself evidentially counts toward his 5 days off, despite the fact that other P&D drivers would also have that holiday off.

Furthermore, the Time-Off Program does not allow a P&D driver to take 2 weeks off consecutively. The Time Off Program suggests that its drivers have virtually no latitude over their vacation, lacking control over both the hours they work, and the time they can take off.

IV. RIGHT TO TERMINATE - TERMINATION AT WILL

A. OPERATING AGREEMENT

Real or perceived threats to terminate a worker are often cited as the ultimate condition forcing the worker to submit to the company's control.²⁶³ Several provisions in FXG's Agreements with its P&D drivers speak to this issue. For example, Section 12.1 states that:

"This Agreement may be terminated: (a) At any time; by mutual agreement of Contractor and FedEx Ground; ... (c) by Contractor or FedEx Ground if the other party breaches or fails to perform the contractual obligations imposed by this Agreement."²⁶⁴

Friday increments. Holidays that occur during a P&D driver's Time-Off week are included as part of the P&D driver's Time-Off week. A P&D driver who signs up for the Time-Off Program must remain in the program for the entire year.) (PWI10002295 – 2296).

²⁶² See Attachment 7.1 to Addendum 7 to FXG Agreement, Time Off Program ("Time Off weeks must be taken in Monday thru Friday increments.") (PWI10002295).

²⁶³ *Legal Guide*, ¶ 5.10, p. 5-78; ¶ 5.02, p. 5-7. See also *Brose v. Union-Tribune Publishing Co.*, 183 Cal. App. 3d 1079, 1085 (Cal. App. 4th 1986) ("the power of an employer to terminate the employment at any time 'is a strong circumstance tending to show the subserviency of the employee, since it is incompatible with the full control of the work usually enjoyed by an independent contractor. Perhaps no single circumstance is more conclusive to show the relationship of an employee than the right of the employer to end the service whenever he sees fit to do so.'"); *Cockran v. Rice*, 26 S.D. 393, 397 (1910) ("No single fact is more conclusive as to the effect of the contract of employment, perhaps, than the unrestricted right of the employer to end the particular service whenever he chooses, without regard to the final result of the work itself."); *Messmer v. Bell (& Coggeshall Co.)*, 133 Ky. 19, 25 ("The power to discharge has been regarded as the test by which to determine whether the relation of master and servant exists. While it is not the sole test, it is the best test upon the question of control.").

²⁶⁴ Section 12.1 (FXG_GRIFFIN0003339 – 3340).

If a P&D driver fails to follow FXG procedures for termination, FXG can assess \$1,000 of liquidated damages and withhold it from the P&D driver's final settlement or Performance Escrow Account.

The Agreements include an automatic yearly renewal with a 30 day notice for nonrenewal, with or without any reason.²⁶⁵ Nonrenewal is entirely at FXG's will and discretion. In any case, standards of service in Section 1.10 are so vague that virtually any infraction could be seen by FXG to be a violation, and hence justification for termination under Section 12.1. In my opinion, the Agreements effectively amount to contracts at will, allowing FXG unfettered termination rights for any reason, without material recourse by the affected P&D driver.

"In the trial court's view, FedEx's conduct established that the drivers could be terminated 'at will'".²⁶⁶ "Although the Operating Agreement provides for termination with cause, it also provides for nonrenewal without any cause at all and substantial evidence established that FedEx discharges drivers at will."²⁶⁷

Termination at will is a fundamental basis of control,²⁶⁸ and FXG's right to effect termination at any time without repercussions is difficult to square with a claim of independent contractor status. The Agreements provide that P&D drivers may be terminated for any breach or failure to perform any contractual obligations.²⁶⁹ As FXG's business records reveal, those contractual obligations are extensive, detailed, changeable by FXG, and solely within FXG's control.

B. THREATS OF TERMINATION

Apart from contract rights, the evidence shows that FXG voices an omnipresent threat of termination, a sword of Damocles over each P&D driver. Even a slight infraction, such as wearing a grey T-shirt,²⁷⁰ not shaving,²⁷¹ or failing to wear the required logo cap while eating lunch²⁷² can be enough. If such trivial reasons can trigger threats of termination (in FXG vernacular, "putting one's contract at risk"), then FXG wields a potent weapon to control driver behavior.

²⁶⁵ Section 11.2 (FXG_GRIFFIN0003339).

²⁶⁶ 64 Cal.Rptr. 3rd 327 (Cal.Ct. App. 2nd Aug. 13. 2007) at 334.

²⁶⁷ *Id.* at 336.

²⁶⁸ See, e.g., *Benson v. Scott*, 734 F.2d 1181, 1190 (7th Cir. Ill. 1984), *Taylor v. Lumberman's Mutual Casualty Co.*, 43 Ga. App. 292 (Ga. Ct. App. 1931); *Moore v. Vantil*, 1999 U.S. Dist. LEXIS 964 at 15 (N.D. Ill. 1999); *Barrientos v. Taylor*, 917 F. Supp. 375, 383 (E.D.N.C. 1996).

²⁶⁹ Section 12.1(c) (FXG_GRIFFIN0003340).

²⁷⁰ PA13077 (FXG manager told P&D driver that gray Fed Ex t-shirt he was wearing was not a uniform, and that "this is an image issue and part of the contract. You must always be in uniform.").

²⁷¹ PA13095 (P&D driver told to shave more often to foster a professional image like their competition, UPS).

²⁷² PA13102 (P&D driver reprimanded for getting something to eat during the work day without a FedEx cap and his shirt untucked).

Whether or not termination ultimately results, this scrutiny is likely to have a material impact on the extent to which P&D drivers feel required to follow FXG directions and suggestions. To the common observer, these standards suggests a military regime more than a modern private enterprise. FXG's standards of service are sufficiently vague that drivers can inadvertently breach their contract in myriad ways, allowing FXG to "terminate their contract" at will.

C. TERMINATION UNRELATED TO SERVICE

Discovery in this case uncovered substantial evidence demonstrating that FXG terminates drivers for reasons unrelated to performance. FXG terminal managers perform a "headcount"²⁷³ twice annually (in June and December) to evaluate P&D driver attitudes toward their status as putative independent contractors for FXG.²⁷⁴ Assessing worker attitudes is entirely inconsistent with an independent contractor relationship.

Each terminal manager rates P&D drivers with a plus, a minus, or a question mark to assess whether the P&D driver favors his independent contractor status, would rather be an hourly employee, or it is uncertain how he feels.²⁷⁵ Senior Managers are further directed to explain the reasons for a driver's feelings about being an independent contractor, any desire to be an employee, whether he is a follower or a leader, who he influences, and who influences him. This information is all sent to FXG headquarters.²⁷⁶

A "minus" rating plainly spells trouble for a P&D driver, irrespective of his work performance.²⁷⁷ The minus rates attitude, and not even pleasant demeanor or cheerfulness, but attitude toward FXG and particularly toward its independent contractor model. Not only do the plus/minus criteria have nothing to do with job performance (or the ultimate goal of timely pick-up and delivery), but P&D drivers are evidently unaware they are being rated.

²⁷³ Contractor Relations now performs these headcounts, not FXG terminal management. See Robert Ostrov Deposition, 267/2 – 271/4.

²⁷⁴ FedEx Ground Contractor Relations Plan, Revised 06/05 ("every Senior Manager and Sr. Hub Manager/Sr. Manager - Linehaul is to make an individual assessment, in writing, of how each linehaul and P&D contractor feels about his status as an independent contractor versus being an employee. This written assessment is referred to as a 'headcount' and is prepared by listing the names of all contractors and Temp A's, separate linehaul from P&D. Beside each name, place a plus (+) to indicate that person favors independent contractor status, a minus (-) if he would rather be an hourly employee, and a question mark (?) if the contractor is not known well enough to judge, or if you are unsure how he feels.") (FXG000392964).

²⁷⁵ *Id.*

²⁷⁶ FedEx Ground Contractor Relations Plan, Revised 06/05 (FXG000392965).

²⁷⁷ See Contractor Relations Plan, June 2002 (Support for a union by a P&D driver results in a negative mark).

Ratings occur at and after Roundtable Meetings (“Roundtables”), at which free discussion is encouraged.²⁷⁸ Promoted as morale enhancing sessions where the free exchange of ideas is encouraged, FXG requires a written report of what transpired at each Roundtable,²⁷⁹ identifying by name the P&D drivers who raised particular issues. For each driver rated with a minus or a question mark, FXG managers are instructed to work to increase the driver’s rating to a plus, or to do something more final: find a way to terminate the driver.²⁸⁰

The P&D driver’s work could be proficient, yet he could be fired for having a low opinion (as perceived by FXG) of the FXG’s independent contractor model. This is a criterion on which the driver has no idea he is being rated, and which is wholly irrelevant to driver duties or end results. P&D drivers with poor attitudes about FXG (as subjectively determined solely by FXG) are labeled “rotten apples,”²⁸¹ and subject to termination. To further “clean house,” FXG managers who fail to follow-up on audits, or to deal with driver “misfits,” whose terminals had high levels of P&D complaints, etc.²⁸²

In my opinion, FXG’s power to remove P&D drivers who have not violated their Agreements, but who simply exhibit a bad attitude, unambiguously bespeaks employment. That is especially true where the pivotal “attitude” is subjectively

²⁷⁸ FedEx Ground Contractor Relations Plan, Revised 06/05 (“During roundtables, Regional Managing Directors and Senior Managers are to identify contractors or package handlers whose remarks, questions, or behavior indicate dissatisfaction with their status or with the independent contractor concept. Note inflammatory or confrontational remarks aimed at fostering antagonism and distrust between contractors, package handlers and the FedEx Ground management team.” Managers are to pay close attention to any early warning signs of union activity, and if detected, to gather all facts available the immediately notify the Regional Managing Director and Contractor Relations.) (FXG000392968).

²⁷⁹ See Regional Director Quarterly Roundtable Report (must include information regarding attendance, topics addressed, questions asked and answers given, attitude of contractors present, which contractors asked questions or made comments that indicated their lack of support for the independent contractor model, etc.) (FXG000392979 – 981); see also Tim Edmonds Interoffice Memo (“A Roundtable is not completed or counted until the written Roundtable report is received at Contractor Relations.”) (FXG000739750 – 51).

²⁸⁰ See Michael Mannion Deposition, 340/13 - 345/25. See Email from Tim Edmonds (FXG “needs to be more aggressive on removing rotten [sic] apples”) (FXG000452967).


²⁸¹ See Emails from Tim Edmonds (FXG000760541, FXG000658466).

²⁸² See Email from Tim Edmonds (FXG000658466 – 67); see also See Independent Contractor Research, FedEx Executive Summary, P&D Independent Contractors, January 2004 (FXG even engaged a consulting firm to survey P&D driver morale. The survey measured P&D drivers attitude and morale toward FXG, their commitment to FXG, and their willingness to consistently provide superior consumer service. The survey results reveal that FXG interferes with drivers’ ability to provide superior customer service. In write-in comments, P&D drivers expressed frustration “over control of ways and means of accomplishing work, overscheduled and under-compensated pick-ups, consistent long days, poor inconsistent loading practices, and unreasonable departure times. The survey results conclude that the problems “stem primarily from driver perceptions of lack of control over speed and quality of truck loading, terminal departure time, residential delivery mandates and required time pick-up scheduling.”) (FXG000549789).

determined by FXG based on company surveillance of ostensibly morale-boosting meetings (Roundtables) at which secret ratings are recorded.

Respectfully submitted,

Date: September 7, 2007



Robert W. Wood

Exhibit A-1

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**ROBERT W. WOOD
PROFESSIONAL EXPERIENCE**

Robert Wood has extraordinarily broad experience in corporate, partnership, individual and employment tax matters. Mr. Wood also performs general corporate and transactional work, from start-up companies to the negotiation and documentation of mergers and acquisitions. Mr. Wood's tax controversy and administrative work includes audits, appeals, rulings, protests, appellate conferences, closing agreements, Tax Court and appellate court litigation. He has also regularly been involved in California franchise tax and State Board of Equalization audits, appeals and rulings, and has frequently contested matters involving worker classification (as employee vs. independent contractor).

Mr. Wood regularly represents companies in disputes with taxing agencies over the proper characterization of workers as independent contractors or employees. Moreover, he often consults with companies in advance of such disputes, in structuring, implementing, and amending independent contractor arrangements. He has drafted, edited or assisted in drafting dozens of independent contractor agreements, and he regularly renders expert testimony on the proper treatment of workers as employees or independent contractors. Mr. Wood is the author of *Legal Guide to Independent Contractor Status*, now in its 4th edition.

He also has an international reputation as a consultant on the tax treatment of litigation recoveries. Indeed, in this area he is perhaps the most well-known lawyer in the United States, having recently been labeled the "preeminent authority for tax practitioners" in this area by former Commissioner of Internal Revenue, Lawrence Gibbs. *Tax Notes*, April 18, 2005, p. 393. He has also long maintained a corporate tax practice emphasizing general business planning, negotiation and documentation of corporate distributions, divisive and acquisitive reorganizations, financings, recapitalizations, formations and liquidations. He is listed among "America's Best Lawyers" by Forbes Magazine, is featured in "The Best Lawyers in America," and was named a "Super Lawyer" by publishers of Law & Politics and San Francisco magazines. Rob is a frequent guest on Legal Broadcast Network radio shows, the Sky Radio Network, and is featured on the Legal Talk Network and Ringler Radio.

Unlike many tax lawyers, Rob Wood performs related general corporate and transactional work including the negotiation and documentation of mergers and acquisitions, financing, leases and licenses. His representation in partnership transactions including negotiation and documentation of institutional joint ventures, limited partnership syndications and real estate development projects. He also documents like-kind exchanges. Mr. Wood is also a frequent expert witness on tax matters in civil cases, class actions, tax and accounting malpractice cases, etc.

Mr. Wood has obtained many IRS private letter rulings for clients. He has even been hired to meet with the IRS National Office in Washington by other law or accounting firms when they have failed to obtain a ruling. He also has significant experience with exempt organization work, including formation, qualification, termination, and operation of public charities and private foundations. He has often successfully pursued property tax contests, including appeals and hearings.

He was formerly a partner with Bancroft, Avery & McAlister, San Francisco; and with Steefel, Levitt & Weiss, San Francisco; and formerly associated with McCutchen in San Francisco.

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Sections on Taxation

Qualified Solicitor, Supreme Court of England and Wales

Law Society of England and Wales

Canadian Bar Association

Law Council of Australia

U.S. Supreme Court, U.S. Tax Court, Northern District of California, Ninth Circuit, Third Circuit, District of
Columbia Circuit, Central District of California, Southern District of California, District of Arizona Bars

Certified Tax Specialist, California Board of Legal Specialization

Fellow, American College of Tax Counsel

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Chair, Taxation Law Advisory Commission, California Board of Legal Specialization (member 1989-1992; Chair
1991-1992)

Co-chair, Corporate Tax Committee, California State Bar Tax Section (1991-1992)

Executive Committee, State Bar of California, General and Solo Practice Section (1994-1995)

Vice Chair, Taxation Section, State Bar of California (2002-2003)

Executive Committee, State Bar of California, Taxation Section (2000-2003)

Advisory Council, International Biographical Centre, Cambridge, England

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National Trust for Historic Preservation

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Journal of Corporate Taxation (WG&L) 1985-1989

Taxation for Lawyers (WG&L) 1985-1989

Journal of Real Estate Taxation (WG&L) 1986-

Journal of Bank Taxation (Faulkner & Gray) 1987-1992

BusinessWeek Newsletter for Family-Owned Business (McGraw Hill) 1988-1990

Corporate Taxation (Faulkner & Gray) 1988-1992

S Corporations: The Journal of Tax, Legal and Business Strategies (Executive Enterprises) 1988-1991

The Real Estate Tax Digest (Matthew Bender) 1989-

Taxation of Mergers and Acquisitions (Faulkner & Gray) 1990-1992, Editor-in-Chief

The Journal of New York Taxation (Faulkner & Gray) 1991-1992

Bankruptcy Law Review (Faulkner & Gray) 1992

Consolidated Returns Tax Report (Faulkner & Gray) 1992, Editor-in-Chief

The M&A Tax Report (Tax Institute) 1992-, Editor-in-Chief

The Practical Accountant (Faulkner & Gray) 1993-

Corporate Business Taxation Monthly (CCH) 2003-

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Bohemian Club, Mzuri Safari Club (Past Director and Past President), Mzuri Wildlife Foundation (Past Trustee
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OTHER ACTIVITIES

Adjunct Professor, Golden Gate University School of Law (LL.M. Program) (2004)

Contributor, *Legal Checklists* (West Group 2000)
2000, 2001 and 2002 Delegations, Los Angeles County Bar Association and California Bar Association Tax Section to Washington DC
Contributor, *California Torts* (Matthew Bender 1999)
Planning Committees, 1988, 1989 and 1990 Tax Planning Conferences For Closely Held Corporations (California CPA Society)
Planning Committee, 1994 Tax Disputes Conference (California CPA Society)
Planning Committees, 1990 and 1993 S Corporations Conference (California CPA Society)
Chairman, 1991 S Corporations Conference (California CPA Society)
Consultant, *Wrongful Employment Termination Practice*, 2d Ed. (CEB 1997)
Contributor, *Legal Checklists* (Callaghan)
Contributor, *Modern Trust Forms*
Instructor, University of California, Hastings College of the Law (1981-1982)
Mentor Program, General and Solo Practice Section, State Bar of California

EDUCATION

University of Chicago Law School, J.D. 1979 (Florence James Adams Prize; University of Chicago scholarship)
Humboldt State University, A.B., English 1976 (summa cum laude, President's Scholar)
University of Sheffield, England (1975-1976)
University of the Witwatersrand, South Africa (1977) (independent research)

BOOKS, ARTICLES, CHAPTERS AND SPEECHES

Author of numerous books and articles on taxation in legal, accounting and business publications. Frequent speaker on tax subjects at conferences. **List of books, articles and speeches available on request.**

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V. Judson Klein Award, 2006, California State Bar, Taxation Section.
Named "Best of Class" for tax lawyers by Best of the U.S., a rating service.
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Named by *Forbes Magazine* to America's Best Lawyers.
AV-Rated by Martindale-Hubbell.
Elected to more than a dozen biographical publications, including Who's Who in America, Who's Who in American Law, Who's Who in California, Who's Who in the World, and Who's Who in the West.
Ranked in the top half dozen tax lawyers in the country by United States Lawyer Rankings.
Distinguished Leadership Award, American Biographical Institute.

REFERENCES

Client references and professional references available on request.