

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

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In re FEDEX GROUND PACKAGE))	
SYSTEM, INC., EMPLOYMENT))	Case No. 3:05-MD-527 RM
PRACTICES LITIGATION))	(MDL 1700)
)	
-----))	CHIEF JUDGE MILLER
THIS DOCUMENT RELATES TO:))	MAGISTRATE NUECHTERLEIN
)	
<i>Ryan Boudreaux, et al. v. FedEx Ground</i>))	
<i>Package System, Inc.,</i>))	
Civil No. 3:08-cv-00193-RLM-CAN (LA)))	
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AMENDED CLASS ACTION COMPLAINT

Plaintiffs, individually and on behalf of all others similarly situated within the State of Louisiana, by way of Complaint against Defendant, allege as follows:

INTRODUCTION

1. This is a class action suit asserting claims based upon the Defendant’s actions in misclassifying Plaintiffs, and others similarly situated in the State of Louisiana, as independent contractors when, in law and in fact, the drivers are actually employees under Louisiana law.

2. Plaintiffs are Louisiana truck and van drivers engaged in package delivery for the Defendant, Federal Express Ground Package Systems, Inc. (herein “FXG”). FXG fraudulently induced the named Plaintiffs and Class members (collectively, “Plaintiffs”) to purchase a delivery truck, to insure and maintain that truck, to purchase a “business support package” and other items required by FXG, and to deliver packages for FXG, all the while representing to them that they are or would be “independent business owners” and “business partners” with

FXG, and that they had or would have proprietary interests in the delivery routes for which they contracted. These representations were false.

3. In reality, FXG micro-manages (and retains the right to micro-manage) Plaintiffs' activities in such a manner that Plaintiffs are *de facto* employees of FXG and the routes that Class members purchased therefore have no value.

4. FXG has illegally shifted to Plaintiffs the burden of purchasing and maintaining trucks and equipment necessary to operate FXG's business. FXG has avoided all state and federal employment taxes, Workers' Compensation and unemployment compensation obligations and other business expenses by forcing the Class members to pay those obligations themselves. By this suit, the Plaintiffs seek to obtain the benefit of their bargains and compensation for being unlawfully forced to pay for the business expenses of FXG, in the past and in the future, and appropriate injunctive relief.

THE PARTIES

5. All Plaintiffs reside or work in the State of Louisiana and, during the past six years, contracted to be pick-up and delivery drivers at Defendant FXG's Louisiana terminals.

6. Plaintiff Ryan Boudreaux, a resident of Houma, Louisiana is, and at times relevant to this action was, a contract driver for FXG at its St. Rose terminal. Mr. Boudreaux resides in Houma, Louisiana.

7. Plaintiff Timothy Bellow, a resident of Metairie, Louisiana is, and at times relevant to this action was, a contract driver for FXG at its St. Rose terminal, Mr. Bellow resides at Metairie, Louisiana.

8. Defendant, FXG, is a Delaware corporation with its principal office in Moon Township, Allegheny County, P A. FXG operates several terminals in Louisiana that are the focus of this matter.

9. At all times relevant to this action, Defendant has actively and continuously conducted business throughout the State of Louisiana, employing contractor/drivers such as Plaintiffs and all those similarly situated and engaging in a marketing campaign directed to members of the general public to entice members of the public to become contractor/drivers.

JURISDICTION AND VENUE

10. This Honorable Court has jurisdiction over this action pursuant to 28 U.S.C. § 1332.

11. Venue is proper in this District pursuant to 28 U.S.C. § 1391 because the Defendant did or is doing business in this State and judicial district.

FACTS COMMON TO ALL CLAIMS

12. Defendant is a national company employing thousands of drivers to pick up and deliver packages for its customers throughout the United States.

13. FXG operates as one company with two divisions in Louisiana: the Ground division routinely (but not exclusively) picks up and delivers packages to businesses. The Home Delivery division routinely, but not exclusively, delivers packages to residential locations.

14. During the time relevant to this action, FXG retained more than 250 delivery and pick-up drivers in Louisiana, including either presently or at material times in the past, including the Plaintiffs. FXG retains these drivers (the Class members) for the purpose of providing its customers with timely and reliable pick-up and delivery of packages.

THE RECRUITMENT PROCESS AND DEFENDANT'S MISREPRESENTATIONS

15. FXG recruits drivers by placing ads in newspapers and on the Internet, inviting members of the general public to attend meetings where FXG managers and recruiters solicit members of the public who respond to FXG's marketing to become drivers by making, among others, the following misrepresentations:

- a. That persons who enter into the "Operating Agreement" will have their own independent business that will be a "partner" with FXG;
- b. That persons who enter into the "Operating Agreement" can acquire multiple routes as part of their "business;"
- c. That contractor drivers will have the ability to determine their own level of income through their own work and effort;
- d. That contractor drivers' so-called independent businesses will be based on delivery routes that they will own and have an entrepreneurial interest in; and,
- e. That contractor drivers' delivery routes have economic value in excess of the cost of the truck and that they can be sold.

16. FXG misrepresents to the public and to the Plaintiffs, that contract drivers have the right to run their own business; to "be your own boss," to "have the ability to grow your own business;" to "have the chance to partner with the fastest growing transportation company [FXG] in the country."

17. FXG also misrepresents to the Plaintiffs and the public that they "have a proprietary interest as a FedEx Ground [or Home Delivery] contractor."

18. FXG requires its drivers to sign an Operating Agreement ("Agreement") that characterizes each driver as an "independent contractor" representing that the driver will have a proprietary and entrepreneurial interest in the route.

DEFENDANT'S OPERATING AGREEMENT

19. All Class members were required to sign an Operating Agreement. Although not identical, the Agreements for the Ground division and the Home Delivery division are substantially the same in all respects relevant to this action.

20. Both the Ground and Home Delivery Agreements characterize the drivers as independent contractors.

Among other things, the Agreements provide that:

- a. Plaintiffs must provide and maintain their own vehicle, paying for all costs and expenses incidental to its operation, including maintenance, gas, oil, repairs, tax, licenses and tolls. Moreover, Plaintiffs must adorn the vehicle with specific colors, logos and marks, identifying it as “part of the FXG system.” As well, Plaintiffs must maintain liability insurance for operation of the vehicle without packages on board in the amount of one million dollars, naming FXG as an insured; Plaintiffs must prepare daily driver logs and inspection reports, and such shipping documents “as FXG may from time to time designate;” drivers must deposit a “Contractor Performance Escrow Account,” to be used to reduce any debt the driver owes FXG upon termination;
- b. Plaintiffs must wear “an FXG-approved uniform,” and keep his/her personal appearance consistent with standards “promulgated from time to time by FXG;”
- c. FXG may change a driver’s Primary Service Area, notwithstanding FXG’s representation and promise that each driver has a proprietary interest in the customers he or she serves. In the event that a Primary Service Area is changed, drivers must pay each other for customers gained or lost thereby according to a set schedule;
- d. After one year of service, drivers may become eligible to participate in FXG’s Customer Service Program, by which a specified monetary bonus can be earned for every four weeks in which the driver has no at-fault accidents and no customer complaints;
- e. Neither the Agreement nor its addenda and attachments may be modified, altered, changed or amended in any respect unless in writing and signed by both parties;

- f. The purpose of FXG's requiring Class members to operate vehicles that prominently display FXG's logo, conform to FXG's requirements as to appearance, and to wear uniforms and use documents provided by FXG, is to promote the image and brand of FXG.
- g. FXG can terminate the Agreement at will, without good cause or notice.

21. The Agreement is and at all times mentioned herein has been a contract of adhesion, drafted by FXG and its legal counsel, printed by FXG, and distributed by FXG among drivers for mandatory signature. Plaintiffs have no opportunity to negotiate with FXG over the terms or conditions contained in the Agreement, and FXG offers its drivers no meaningful choice of terms.

22. The Agreement is, and at all material times has been, unlawful and unconscionable in form and effect.

23. While the Agreement contains an Arbitration Clause, that Clause applies only in cases of termination, is completely one-sided and allows FXG to not reinstate a terminated Class member, even if ordered to do so by the arbitrator. The Arbitration Clause is unconscionable, illegal and does not preclude Plaintiffs' claims asserted in this Complaint.

24. Despite the Operating Agreement and despite repeated representations by FXG, Plaintiffs are *de facto* employees, for the reasons set forth herein.

DEFENDANT'S CONTROL OF PLAINTIFFS AND OTHER WRONGFUL ACTS

25. FXG exercises extensive control over the means by which Plaintiffs perform their jobs, and retains, through the written form contract, the right to control the methods, manner and means of performing the work.

26. Such control is exerted and retained to the employer in part through the Operating Agreements and provisions described above, which Plaintiffs were required to sign as a condition of employment.

27. FXG's complete control over Plaintiffs is also exercised by other rules and regulations, written and unwritten, including but not limited to the following:

- a. FXG requires Plaintiffs to purchase or lease a vehicle manufactured to a design exclusive to FXG and mandated by FXG to make deliveries and pick-ups;
- b. FXG requires Plaintiffs to pay for the purchase or lease of such vehicle, as well as for its maintenance and upkeep. Other vehicle-related costs required to be paid by Plaintiffs include fuel, oil, tires, repairs, taxes, insurance coverage, licenses, vehicle registration renewal fees, base plates and all highway, bridge and ferry tolls;
- c. FXG requires that Plaintiffs' vehicles meet certain unique specifications, on both the inside and outside. At their own expense, Plaintiffs are required to paint the vehicle with FXG's colors, and put FXG's logos on the vehicle;
- d. Although Plaintiffs could technically use the vehicles for their own commercial and personal purposes, they are not permitted to do so without removing or covering all FXG identifying logos and marks. Additionally, the hours worked by the drivers generally exceed ten hours each day, leaving no time to use the vehicles for any other endeavor;
- e. Plaintiffs and other drivers have no control over the prices charged FXG's customers for pick-up and delivery service;
- f. Plaintiffs and other drivers do not have authority to reject deliveries or pick-ups. They are required to adhere to FXG's strict route schedules and their failure to make a pick up or delivery subjects them to discipline;
- g. FXG mandates that Plaintiffs wear an FXG-approved uniform, and follow such other guidelines as FXG might promulgate regarding their personal appearance;
- h. FXG instructs and controls drivers as to the appearance of their vehicles requiring that they be clean and presentable and free of body damage and/or and extraneous markings;

- i. FXG requires that Plaintiffs perform maintenance on their vehicles according to a schedule set by FXG, at Plaintiffs' expense;
- j. FXG requires that Plaintiffs and other drivers purchase or lease certain electronic communications equipment that complies with FXG's specifications. That equipment includes a "scanner" which contains a global positioning system" capability, which allows FXG to monitor the location of the drivers at all times;
- k. FXG requires its drivers to prepare daily logs and daily inspection reports, along with shipping documents and to file the originals with FXG each business day;
- l. FXG requires Plaintiffs to deposit \$1,000 per Ground driver and \$500 per Home Delivery driver into an escrow account;
- m. FXG requires Plaintiffs to provide services to FXG's customers on days and at times that are compatible with the customer's schedules and requirements as accepted by FXG - the drivers have no choice but to meet the schedules set by FXG and its customer;
- n. FXG assigns Plaintiffs to a specific Primary Service Area the area each driver is to service, the terms of which are nonnegotiable;
- o. FXG determines the volume of deliveries and pick-ups each driver makes;
- p. The volume of deliveries and pick-ups given to each driver prevents them from developing any new business on their own;
- q. FXG can unilaterally reconfigure Plaintiffs' Primary Service Areas;
- r. FXG requires Plaintiffs to make reasonable efforts to retain and increase FXG's customer base and the number of packages handled, but does not compensate Plaintiffs for any customer leads;
- s. If a package can not be delivered on the day mandated by FXG, FXG requires the driver to return the package to FXG on the same day or the next day and to make notations as for the reason for non-delivery, with the drivers being subjected to discipline if they do not or cannot attempt the delivery;
- t. Plaintiffs are not given any sick or vacation leave. If Plaintiffs or other drivers get sick, FXG requires that they find substitutes. FXG must first give approval for these substitutes, even though Plaintiffs are required to pay such substitutes' wages;

- u. FXG may and does terminate drivers at will and without cause;
- v. FXG requires drivers to give thirty (30) days written notice terminating their obligations under the Agreement. If drivers fail to do so, Defendant requires drivers to pay it the escrow as liquidated damages;
- w. FXG requires Plaintiffs to submit all claims of wrongful termination to arbitration, stating that the arbitrator has no power to award plaintiffs their routes or punitive damages. The plaintiffs must pay for their own counsel and their portion of the arbitrators' fees;
- x. FXG offers a group vehicle insurance program to Class members at very low rates. Individual vehicle insurance is so expensive that the result of FXG's termination of insurance is to effectively terminate the Agreement. FXG has terminated the group vehicle insurance for individual Class members as a method of controlling the class.
- y. Plaintiffs must submit to a test of intoxication or impairment requested by FXG;
- z. Plaintiffs may not carry non-authorized passengers while on FXG' business;
- aa. Plaintiffs must complete a thorough physical examination confirming physical fitness to operate a commercial vehicle at least every two years, and following any physical or mental impairment from injury or disease, regardless of whether the driver is subject to DOT requirements. These examinations must be completed by a physician approved by FXG;
- bb. Plaintiffs must submit to a drug screen administered at whatever time and place and in whatever manner dictated by FXG; and
- cc. Drivers must cooperate fully with FXG in the conduct of any legal action, regulatory hearing or other similar process arising from or in any way related to any matter found within the safe driving provisions of the Agreement. Such cooperation includes, without limitation, attendance at hearings, trials, and meetings, the securing of evidence and obtaining the attendance of witnesses.

28. FXG employs Terminal Managers, Pickup and Delivery Managers, Safety Managers and other supervisory personnel to process the drivers' paperwork and to give each driver his or her delivery and pick-up schedules.

29. FXG assigns Plaintiffs to deliver packages outside their geographical “primary service areas” without their consent.

30. FXG’s assignment of packages and unilateral modification of pay structures effectively and efficiently controls Plaintiffs’ earnings and ability to complete their work.

31. Drivers have no say in whether to accept or decline packages assigned by FXG in a given day, even if outside his contracted “primary service area,” FXG disciplines or terminates drivers who fail to deliver packages outside his or her Primary service area that FXG assigns.

32. Drivers typically commence their work day in the early morning and finish their routes around 6 p.m. to 7:00 p.m.

33. FXG pays its drivers on a piece rate system, for the number of stops, deliveries and pick-ups made.

34. Plaintiffs’ delivery of packages is an active, integral and indispensable part of FXG’s business enterprise. By driving vehicles with FXG’s colors and logos, by reliably serving FXG’s customers, by following FXG’s controlled delivery routes and delivery and pick-up methods, by providing FXG with customer leads, and in other ways, Plaintiffs and other delivery drivers have rendered, and continue to render, valuable personal services to Defendant FXG.

35. The personal services described immediately above:

- a. confer substantial benefits on FXG;
- b. are an integral part of the process which enables FXG to offer its customers timely and reliable pick-up and delivery services; and
- c. do not involve the kind of expertise which requires entrustment to an independent professional, as opposed to an employee.

36. The skills required of the Plaintiff Class in rendering services to FXG (picking up and delivering packages) are such that said services can be rendered by employees, rather than

by specially-skilled independent workers. While FXG prefers to employ drivers with at least one year of commercial driving experience, FXG will and does employ drivers with no experience.

CLASS ACTION ALLEGATIONS

37. Plaintiffs bring this class action on behalf of themselves and other similarly situated drivers/contractors.

38. Specifically, Plaintiffs bring this action as a class action on behalf of all persons who worked for Defendant FXG at its Ground Division and/or Home Delivery Division terminals in Louisiana. from February 8, 2002 to the time of trial (the “Class Period”) as package delivery drivers and/or package pick-up drivers, and who were signatory to an operators Agreement with Defendant FXG.

39. For purposes of Plaintiffs’ claim under La. R.S. § 23:631, Plaintiffs bring this action as a class action on behalf of all persons who, at any time after February 8, 2002, entered into a FXG Ground or FXG Home Delivery form Operating Agreement (now known as form OP-149 and form OP-149 RES), drove a vehicle on a full-time basis (meaning exclusive of time off for commonly excused employment absences) to provide package pick-up and delivery services in Louisiana pursuant to that Operating Agreement, and have been discharged or resigned from FXG.

40. Upon information and belief, the number of members of the Plaintiff Class exceeds 300 during the Class Period.

41. The Plaintiff Class is so numerous that their individual joinder into a single action is impracticable. Although the exact number of Class members cannot be properly determined without further discovery, the number and identity of the Class members can easily be ascertained from Defendants’ records.

42. In order to service its customers and to compete with other carriers based upon price, FXG engages and has, at all times relevant, engaged in a systematic marketing, advertising and recruiting campaign within the State of Louisiana, addressed to the general public, to induce members of the public, such as Plaintiffs, to agree to purchase and service one of FXG's delivery routes.

43. Through the above-referenced campaign, FXG induces and has induced individuals, including Plaintiffs, to become drivers for FXG by representing that the drivers will be independent businesses in partnership with FXG, that they will be licensed to use FXG's trade name, trade mark and related characteristics; that they will acquire delivery routes that have intrinsic value, that said routes can grow in value with the delivery business and that said routes can be sold. These representations are false and misleading, as FXG controls the routes and the drivers in such a manner that the routes have virtually no value and the drivers can not grow their business.

44. In its Operating Agreements, as in the marketing materials discussed above, Defendant conceals the true nature of the relationship between FXG and its drivers: that of employer and employee.

45. As a result of Defendant's misrepresentations, the Plaintiffs pay substantial sums of their own money for the purchase or lease of vehicles that meet FXG specifications, as well as all costs of operating and maintaining those vehicles.

46. FXG's drivers who sign the Operating Agreement do not receive workers' compensation coverage or unemployment insurance benefits. FXG does not pay employment taxes on behalf of the Plaintiffs. The drivers are excluded from all of the benefit programs that

FXG affords its other employees, including without limitation vacations, holidays, sick days, personal days, medical insurance and retirement programs.

47. FXG has fraudulently mischaracterized its relationship with its drivers as one of an independent contractor, thereby inducing Plaintiffs to expend tens of thousands of dollars to acquire and maintain vehicles, and expend their own funds for work related services.

48. In fact, and as described above, FXG systemically controls virtually all aspects of the relationship with Plaintiffs in such a manner and extent that the drivers are in fact employees of FXG.

49. FXG has deprived Plaintiffs of the value of their “businesses” by making them employees, despite FXG’s characterization of them as independent contractors and businesspersons.

50. FXG uses the same recruitment and management scheme and script throughout the State of Louisiana, and, upon information and belief, nationwide.

51. The Defendant’s actions have inflicted the same types of harm upon each and every member of the Class.

52. There are questions of law and fact that affect and are common to all Class members. The central questions of law and fact involved in this action are of a common or general interest.

53. Common legal and factual issues predominate over any questions affecting only individual members of the class. Among the common questions of law and fact are the following:

- a. Whether FXG’s drivers are improperly classified as independent contractors instead of employees;

- b. Whether FXG misled Class members into believing they were acquiring an independent business and were independent contractors;
- c. Whether the contractor drivers are actually employees based upon FXG's level of control of their work;
- d. Whether FXG unlawfully forced Plaintiffs to pay for business expenses that rightfully should have been paid for by their employer, FXG;
- e. Whether FXG was unjustly enriched by failing to compensate the Class as employees, to provide employment benefits and emoluments of employees, by evading employment taxes, and by wrongfully benefiting from its requirement that the Class pay for FXG's business expenses;
- f. Whether FXG unlawfully failed to provide workers' compensation insurance benefits to the Class members;
- g. Whether FXG unlawfully failed to provide unemployment insurance benefits to the Plaintiff Class members;
- h. Whether FXG unlawfully failed to pay the employment portion of all employment taxes that would have been due if it accurately classified Plaintiffs as employees instead of independent contractors;
- i. Whether injunctive and declaratory relief are proper;
- j. Whether the agreement permitting FXG to shift the burden of employment expenses, taxes, and insurances is illegal and therefore void; and,
- k. Whether Defendants' actions violate the implied covenant of good faith and fair dealing.

54. The claims of the named representative Plaintiffs are typical of the claims of other members of the Plaintiff Class. The named Plaintiffs share the same interests as other members of the Class in this action because, like other Class members, they have each suffered financial loss of thousands of dollars due to FXG's conduct.

55. The Class Representatives have an incentive and are committed to vigorously prosecute this action because they have actually suffered losses as a result of Defendant's actions.

56. Plaintiffs have retained qualified counsel, experienced in class action practice, to represent them in this matter.

57. A class action is the only realistic method available for the fair and efficient adjudication of this controversy. Because the damages suffered by individual Class members, may be relatively small, in comparison with the expense and burden of individual litigation makes it impracticable for members of the Class to seek redress individually for the wrongful conduct herein alleged. Were each individual member required to bring a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense for the litigants and the court, The prosecution of separate actions would also create the risk of inconsistent rulings, which may be dispositive of the interest of Class members who are not parties to the adjudication and/or may substantially impede Class members' ability to protect their interests, and therefore would be contrary to the interest of justice and equity.

58. This action should proceed as a class action under because the prosecution of separate actions by or against individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendant.

59. This action should also proceed as a class action because the prosecution of separate actions by or against individual members of the Class would create a risk of adjudications with respect to individual members of the Class that would as a practical matter be dispositive of the interests of the other members who are not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

60. This matter should also proceed as a class action because Defendant's acts and/or omissions apply generally to members of the Class warranting a declaratory judgment that

Defendant's actions constitute a scheme, fraud, misrepresentation, and/or unconscionable conduct in violation of applicable Louisiana law and an injunction prohibiting such acts and/or omissions in the future.

COUNT I - CIVIL FRAUD

61. Plaintiffs incorporate by reference the preceding allegations of this Complaint as if fully set forth herein.

62. Defendant's marketing and recruitment materials are offered and presented to members of the general public within the State of Louisiana.

63. In entering into the Operating Agreement, Plaintiffs purchased their routes from FXG. The consideration for that purchase was Plaintiffs' acquiring the delivery truck, purchase of the business support package and an agreement to provide services.

64. Defendant's representations to Plaintiffs and other members of the general public through their advertising, marketing and recruitment process were false and were false statements of intention, when made, and therefore constitute affirmative misstatements of material fact.

65. FXG has engaged in unconscionable commercial practices of deception, fraud, false pretense, false promise, and misrepresentation in recruiting and retaining its drivers, the public at large, and the Class specifically, regarding the status of the Class members as independent business owners as pled in this Complaint.

66. Specifically, Defendant misled Plaintiffs to believe that they were going to be "partners" with FXG, that Plaintiffs would have an independent business, fully marketable and transferable, that Plaintiffs were investing in a business and would have a proprietary interest that would grow, along with their income, that the routes had and would have value, and other

representations designed to convince Plaintiffs and members of the general public to acquire a truck and service Defendant's customers under the terms of a burdensome and nonnegotiable contract.

67. Defendant committed violation of Federal Trade Commission and other regulations with regard to the marketing and sale of purported "franchises" and business opportunities to the Plaintiffs.

68. Defendant knowingly concealed, suppressed or omitted the fact that it intended to micro-manage Plaintiffs' work and income, that Defendant's management and control utterly destroyed or would destroy any perceived value of the routes that FXG had no intention of leaving the means and methods of the work to Plaintiffs, that other jurisdictions have found that driver-contractors were actually employees, not business owners, that Defendant intended to treat Plaintiffs as employees, not entrepreneurs, and other material facts regarding the transaction.

69. Defendant's actions constitute an unconscionable commercial practice, deception, fraud, false pretense, violation of applicable regulations, false promise, misrepresentation, and/or the knowing concealment, suppression or omission of material facts with intent that the Plaintiffs, and those like them, rely upon its concealment, suppression or omission, in connection with the sale of the routes to Plaintiff.

70. Defendant committed affirmative misrepresentations, knowing omissions, and regulation vitiate any consent by Plaintiffs or the members of the Class.

71. As a result of Defendant's conduct, Plaintiffs entered into the Operating Agreement as described above, and made the associated and required investments in the purchase of a truck and other equipment.

72. Plaintiffs therefore pray for rescission of the Operating Agreement and for all damages incurred as a result of the Defendant's fraudulent conduct, and for attorney fees as allowed for by law.

73. As a result of Defendant's control, micro-management, and abuse thereof, Defendant has destroyed the potential financial value of the routes, instead Plaintiffs made great investments in routes that are virtually valueless.

74. Plaintiffs suffered losses as a result of Defendant's actions, including but not limited to, the loss of value of the routes, lost opportunity to sell the routes, lost profits, additional insurance costs, taxes and other expenses that should have been paid by FXG as an employer, and other losses.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for punitive damages, compensatory damages, injunctive and declaratory relief, consequential damages, treble damages, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT II - MISREPRESENTATION

75. Plaintiffs incorporate by reference the preceding allegations of this Complaint as if fully set forth herein.

76. Defendant's knowing misrepresentations and omissions also constitute legal and equitable fraud. Defendant's actions were willful, wanton and taken with reckless disregard to the harm they would cause Plaintiff.

77. Defendant engaged in misrepresentations and omissions described above as part of a systematic corporate policy.

78. Defendant made the representations set forth herein above.

79. Defendant knew, or should have known, or recklessly or negligently disregarded the truth of the representations, which were false when made, or which were promises of future action which Defendant did not intend to comply with at the time when they were made.

80. Defendant made said representations with the intent that Plaintiffs would rely on same.

81. Plaintiffs relied upon Defendant's misrepresentations, actions and intentional omissions in deciding to enter into the Operating agreement.

82. Plaintiffs suffered harm as a result of Defendant's misrepresentations.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for punitive damages, compensatory damages, injunctive and declaratory relief consequential damages, an accounting, exemplary damages, rescission, plus costs, counsel fees, pre- and post -judgment interest, and such further relief as may be just and proper.

COUNT III - RESCISSION OF OPERATING AGREEMENT

83. Plaintiffs incorporate by reference the preceding allegations of this Complaint as if fully set forth herein.

84. Despite the express terms of the Operating Agreement, Plaintiffs' relationship with FXG satisfies every aspect of the test for employment, and not for independent contractor status.

85. FXG controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the preceding allegations.

86. Despite this control and the actual status of the drivers as employees, FXG mischaracterizes the Plaintiffs as independent contractors. As a result, these drivers must pay

substantial sums of their own money for work-related expenses, including but not limited to the purchase or lease of vehicles meeting company specifications, and all costs of operating, insuring and maintaining those vehicles.

87. The Operating Agreement illegally and unfairly advantages FXG, by mischaracterizing the status of the Plaintiffs in that FXG evades employment related obligations, such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, illegally shifting the expense of workers' compensation coverage and other expenses to Plaintiffs.

88. The Operating Agreement between FXG and each Plaintiff and member of the class is void as being illegal and/or against public policy and therefore unenforceable, as failing to recognize the employment status of the Plaintiffs and the Class Members, and therefore denying them the legally cognizable benefits of employment.

89. The Operating Agreement between FXG and each Plaintiff is an unconscionable contract of adhesion, which is unenforceable as contrary to public interest, policy and law.

90. The Operating Agreement illegally shifts upon Plaintiffs the burden of certain costs that an employer must pay.

91. While acting on the direct instruction of FXG and discharging their duties for FXG, Plaintiffs and the Class Members incurred business expenses for, *inter alia*, the purchase or lease, maintenance, operating costs and adornment of vehicles; insurance; and uniforms. Plaintiffs and the Class Members incurred these substantial expenses as a direct result of performing their job duties.

92. By misclassifying its employees as “independent contractors,” and further by contractually requiring those employees to pay FXG’s own expenses, FXG has been unjustly enriched.

93. As a direct and proximate result of FXG’s conduct, FXG has received substantial benefits to which it had no entitlement, at Plaintiffs and the Class Members’ expense, including lost profits, self-employment taxes, premiums for insurance to replace workers compensation and disability benefits, business expenses, compensation of replacement workers, and other expenses.

94. Plaintiffs are entitled to compensation for all of the business expenses they were illegally required by FXG to bear, for all of the employment taxes, unemployment compensation and workers compensation the FXG should have but did not pay, and Plaintiffs are entitled to the quantum meruit value of their services as employees.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant rescinding the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FXG, along with compensatory damages, punitive damages, an accounting, consequential damages, declaratory judgment and injunctive relief, costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT IV - VIOLATION OF La. R.S. 23:631 and La. R.S. 23:634

95. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

96. FXG is an employer of the Plaintiffs, under Louisiana Law.

97. Each Class member is an employee of FXG, under Louisiana law.

98. FXG has paid to the Plaintiffs compensation for their services that are wages.

99. Pursuant to the Operating Agreement and other written policies, Defendant periodically withheld, deducted or took amounts from plaintiffs and plaintiff class members' wages in violation of La. R.S. 23:631.

100. By way of example, FXG has withheld and diverted from the Plaintiffs' wages amounts for workers' compensation, employment taxes, and business expenses such as truck payments, vehicle insurance, vehicle maintenance, the "business support package" and other expenses.

101. Plaintiffs and plaintiff class members are entitled to payment of the unlawfully withheld wages, along with penalty wages and attorney fees and costs pursuant to La. R.S. 23:632.

102. The Operating Agreement as written, applied and interpreted by Defendant is null and void to the extent that it requires the forfeiture of earned wages in violation of La. R.S. 23:634.

103. Each and every provision of the Operating Agreement used, relied on or interpreted by the Defendant to require or allow the Defendant to withhold or retain earned wages of the drivers at termination or resignation is null and void. Plaintiffs and plaintiff class members are entitled to declaratory and/or injunctive relief making such provisions null and void and reimbursing drivers for all wages improperly withheld and enjoining the deduction of future wages.

104. Drivers are also entitled to penalty wages, attorney fees and cost for these violations.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor

and against the Defendant for wrongfully withheld and diverted wages, an accounting, compensatory damages, punitive damages, consequential damages, declaratory judgment holding the Operating Agreement to be null and void, injunctive relief to enjoin the Defendant from entering into new Operating Agreements and from attempting to enforce existing Operating Agreements, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT V -VIOLATION OF La. R.S. 23:635

105. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

106. Drivers are subject to deduction from their earned wages of the value of any package lost or stolen or damaged as reported by the customer and investigated by Defendants. These deductions are taken without a finding of negligence or fault on the part of the driver and despite the driver following all company policies regarding the care and security of packages.

107. The practice of Defendant of deducting these amounts from drivers' earned wages violates La. R.S. 23:635. Plaintiffs and Plaintiff class members are entitled to declaratory and/or injunctive relief declaring this policy to be violative of Louisiana law and enjoining the practice in the future.

108. Additionally, plaintiffs and plaintiff class members are entitled to penalties and all other relief provided for by law for these violations.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for wrongfully withheld and diverted wages. an accounting, compensatory damages, punitive damages. consequential damages. declaratory judgment holding the Operating Agreement to be null and void. injunctive relief to enjoin the Defendant from

entering into new Operating Agreements and from attempting to enforce existing Operating Agreements, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT VI -VIOLATION OF La. R.S. 23:824

109. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

110. Defendant has established and maintained a policy and practice through its terminal managers and other employees of coercion of drivers regarding membership in labor organizations. This coercion includes the fostering of an environment and belief that a driver's contract and employment will be terminated or not renewed if it becomes known that the driver desires to join a labor union or has discussed the idea of joining labor union with other drivers, all in violation of La. R.S. 23:824.

111. Plaintiffs and plaintiff class members are entitled to declaratory and/or injunctive relief ordering that this practice and other similar practices cease immediately and for all other relief provided for by law and for all general and equitable relief.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for wrongfully withheld and diverted wage, an accounting, compensatory damages, punitive damages, consequential damages, declaratory judgment holding the Operating Agreement to be null and void, injunctive relief to enjoin the Defendant from entering into new Operating Agreements and from attempting to enforce existing Operating Agreements, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT VII -VIOLATION OF La. R.S. 963

112. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

113. The Operating Agreement as written, applied and interpreted by Defendant requires drivers to purchase delivery trucks of a specific type, with a specific type of engine, of a specific age, as well as other specifications. Additionally drivers are required to paint the vehicle specific color and place the Defendant's logo and other materials on the delivery truck.

114. Defendant, in furtherance of its policies, coerces its drivers to purchase or lease their delivery trucks from certain vendors and to insure their truck through specific vendors, all in violation of La. R.S. 23:963.

115. Plaintiffs and Plaintiff class members pray that the Defendant be enjoined from this practice and that the Defendant be penalized as provided for by Louisiana law.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for wrongfully withheld and diverted wage, compensatory damages, punitive damages, consequential damages, an accounting, declaratory judgment holding the Operating Agreement to be null and void, injunctive relief to enjoin the Defendant from entering into new Operating Agreements and from attempting to enforce existing Operating Agreements, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT VIII - BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

116. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

117. Under Louisiana law, each Operating Agreement contains a covenant of good faith and fair dealing that FXG owes each Plaintiff and Class member.

118. Defendant has breached that duty, acted in bad faith and has failed and refused to deal with the members of the Class fairly by:

- a. Intentionally misclassifying the Class members as independent contractors when, because of the level of FXG's control, the Class members are actually employees;
- b. Destroying the value of the plaintiffs routes in such a manner as to render them of little or no value, thereby depriving the Plaintiffs of the value of their bargain;
- c. Structuring and restructuring Plaintiffs' routes in such a manner as to require the Plaintiffs to work more and more hours while maintaining or reducing Plaintiffs' incomes;
- d. Unilaterally restructuring routes to FXG's benefit and to the Plaintiffs' detriment, without adequate compensation;
- e. Managing the income of the Plaintiffs in such a manner as to defeat their efforts to increase their earnings, and to maintain all of the Plaintiffs at the same substandard pay rate;
- f. Exercising discretion to terminate driver contracts for failure to "voluntarily" provide services outside assigned routes;
- g. Terminating group vehicle insurance without cause;
- h. Refusing to permit terminated drivers to sell their routes;
- i. Refusing to pay for or create a market for routes once they are terminated;
- j. Subjecting the drivers to an annual renewal process permitting the employer to terminate the agreement without cause, therefore destroying any intrinsic value to the route;
- k. Making unilateral changes to the pay structure for the routes, therefore controlling Plaintiffs' income in order to increase their profits; and
- l. Otherwise depriving Plaintiffs of the benefit of their bargain with FXG.

119. Plaintiffs have suffered losses as a direct and proximate result of the Defendant's breaches, unfair business practices and actions described above.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for compensatory damages, punitive damages, an accounting, consequential damages, declaratory judgment and injunctive relief, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT IX - DECLARATORY RELIEF

120. Plaintiffs incorporate the preceding Paragraphs of this Complaint as if fully set forth herein.

121. An actual and substantial controversy exists between Plaintiffs and members of the Class on the one hand, and Defendant FXG on the other hand, as to the following matters:

- a. Whether FXG willfully and unlawfully classified drivers as independent contractors rather than as employees;
- b. Whether FXG has failed to reimburse its drivers for their necessarily incurred employment expenses; and
- c. Whether FXG has unlawfully refused to provide workers compensation and/or unemployment insurance benefits under applicable law.

122. Plaintiffs contend that by classifying FXG's employees as independent contractors and by failing and refusing to compensate and reimburse those drivers as alleged herein, defendants have violated illegally avoided Louisiana law regarding employment taxes, workers' compensation insurance and business expenses paid by Class members on Defendant's behalf.

123. Defendant contends the opposite of the Plaintiff Class's allegations.

124. Declaratory relief is therefore appropriate, because a controversy exists between the parties.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant and declare that the conduct complained of herein be declared unlawful and the Defendant be enjoined from said conduct in the future.

Plaintiffs pray for trial by jury.

Dated: August 11, 2009

Respectfully submitted,

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