

**UNITED STATES DISTRICT COURT
DISTRICT OF COLORADO**

Civil Action No. _____

HORACIO FLORES, et al.

Plaintiffs,

v.

FEDEX GROUND PACKAGE SYSTEM, INC.,

Defendant.

CLASS ACTION COMPLAINT

Plaintiffs, on behalf of themselves and a Class of persons similarly situated, for their Complaint against Defendant, state and allege as follows:

PARTIES

1. Plaintiffs are Horacio Flores and Mark Niles. Plaintiff Horacio Flores worked for Defendant and was classified as an independent contract until his contract was terminated on August 17, 2007. Plaintiff Mark Niles currently works for Defendant and is classified as an independent contractor.

2. Defendant FedEx Ground Package System, Inc. (“FEG”), and its division, FedEx Home Delivery (“FHD”) (hereinafter together referred to as “Defendant” or “Defendants”), is a Delaware corporation doing business as two national companies, affiliated with the Federal Express Corporation. At all relevant times, and within six years of the filing of this Complaint, Defendant was engaged in providing small package information, transportation and delivery

services in the United States, including in the State of Colorado.

3. Defendant is qualified to, and does, transact business in the State of Colorado, including El Paso County.

4. Defendant employs local package delivery drivers for FEG and FHD, all of whom, at FEG's and FHD's direction and control, perform package delivery to local businesses and residences.

JURISDICTION AND VENUE

5. This is an action alleging illegal deduction from wages, violation of the Colorado Consumer Protection Act, and rescission, and requesting declaratory and injunctive relief.

6. Venue herein is proper because Defendant transacts business in this district.

CLASS ACTION ALLEGATIONS

7. This action is brought on behalf of a Class of persons currently and formerly employed by Defendant as employees within the definition of "employee" in the common and statutory law, but who, similar to the named Plaintiffs, are or were erroneously classified as "contractors" or "independent contractors." Occupations or jobs in which Class Members worked or work include route delivery drivers for FEG and FHD. The Class includes all such persons employed by Defendant within the statutes of limitations. The Class is specifically defined as follows:

All persons who: 1) entered or will enter into a FXG Ground or FXG Home Delivery form Operating Agreement (now known as form OP-149 and form OP-149 RES); 2) drove or will drive a vehicle on a full-time basis (meaning exclusive of time off for commonly excused employment absences) since August 1, 2004, to provide package pick-up and delivery services pursuant to the Operating Agreement; and 3) were dispatched out of a terminal in the state of Colorado.

8. Plaintiffs believe that the Class as defined above includes over 200 members.

9. FEG and FHD employ thousands of drivers to pick up and deliver packages for its customers throughout the United States. As a condition of employment, each FEG and FHD driver is required to sign a lengthy form contract entitled the "Pick-up and Delivery Contractor Operating Agreement" that mischaracterizes each driver as an "independent contractor." These Operating Agreements conceal the true nature of the relationship between Defendant and its drivers: that of employer and employee.

10. Plaintiffs, and Plaintiff Class Members, were denied the accoutrements of employment, including, but not limited to:

- a. wages;
- b. overtime pay;
- c. holiday pay;
- d. workers' compensation;
- e. unemployment insurance;
- f. contributions to Defendant's retirement plan;
- g. participation in Defendant's Employee Stock Purchase Plan;
- h. income tax withholding; and,
- i. meal, break and rest periods.

11. Plaintiffs, and Plaintiff Class Members, were required to pay Defendant's operating expenses, all of which should have been paid by Defendant, including, but not limited to:

- a. delivery vehicle purchase;

- b. various insurances, including vehicle insurance and work accident insurance;
- c. delivery vehicle maintenance and repairs;
- d. purchase and maintenance of logos and uniforms;
- e. fuel;
- f. cargo claims; and,
- g. “business support,” including maps, signs, logos, training and scanners.

12. Despite Defendant’s control over virtually all material aspects of the employment relationship, and despite the unequivocal command of applicable statutes and case law to the effect that workers such as Plaintiffs are entitled to the protections due employees under Colorado law, and despite the finding of the Los Angeles Superior Court in Estrada v. FedEx Ground Package Systems, Inc. (Case # BC 210130) that these drivers are employees, Defendant continues to misclassify its drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by Colorado law to employees, and they are deprived of employer-financed workers compensation coverage and unemployment insurance benefits. Furthermore, the terms and conditions of their employment contract require these drivers to purchase, operate and maintain expensive trucks for Defendant’s exclusive benefit and to work under other unlawful conditions. Defendant’s mischaracterization of its drivers as independent contractors, the concealment and/or non-disclosure of the true nature of the relationship between Defendant and its drivers and the attendant deprivation of substantial rights and benefits of employment are part of an on-going unlawful business practice by Defendant which this court should enjoin.

13. The named Plaintiffs are adequate representatives of the Class because they were

treated in the same manner as other Class Members by the Defendant and they have been damaged by this treatment in the same manner as other Class Members by their exclusion from employee compensation programs, plans and agreements and employee benefit plans and rights.

14. There are common questions of law and fact applicable to the entire Class including, but not limited to, the question whether Plaintiffs and Plaintiff Class Members are entitled to certain types of employee compensation and benefits because they are employees of Defendant as defined by common and statutory law, even though Defendant has misrepresented to Plaintiffs and Plaintiff Class Members their true employment status.

15. This case should be certified as a Class action pursuant to Rule 23 of the Federal Rules of Civil Procedure because the common questions of law and fact concerning Defendant's liability predominate over any individual question over the amount of damages to each person and that:

- a. The members of the Class are so numerous that their individual joinder in a single action is impossible and/or impracticable;
- b. The central questions of law and fact involved in this action are of a common or general interest and those 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:
 - i. Whether Class Members have been misclassified as independent contractors pursuant to Defendant's operating agreements;
 - ii. Whether the Defendant has violated their legal obligations under various provisions of Colorado law;
 - iii. Whether Defendant unlawfully failed to provide workers compensation insurance benefits and unemployment insurance benefits to the Class Members in violation of Colorado Law;
 - iv. Whether Defendant intentionally and/or negligently misrepresented to Plaintiffs and the Class they seek to represent their true employment status and thereby induced

them to incur substantial expenses in reliance on such representations and;

- v. Whether injunctive and declaratory relief and an equitable accounting are proper.

16. The claims of the named Plaintiffs are identical to the claims of other members of the 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 been misclassified and suffered financial loss of thousands of dollars due to Defendant's wrongful misclassification. Given the significance of their losses, they have the incentive, and are committed, to vigorously prosecuting this action. They have retained competent and experienced counsel who specialize in Class action and employment litigation to represent them and the proposed Class.

17. A Class action is the only realistic method available for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation makes it impracticable for members of the Class to seek redress individually for the wrongful conduct alleged herein. 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 and create the risk of inconsistent rulings which would be contrary to the interest of justice and equity.

FACTS COMMON TO ALL CAUSES OF ACTION

18. Defendant is a corporation whose business consists of package delivery and pick-up service to customers, using a single integrated nationwide network of transportation, communication and sorting facilities and integrating Class Members into that existing network of operations. Defendant hired Plaintiffs to deliver and pick up packages based on times, locations and for amounts determined solely by Defendant.

19. Defendant employs or employed during the Class period more than 200 delivery and pick-up drivers in the State of Colorado including, either currently or at material times in the past, each of the Plaintiffs.

20. Each pick-up and delivery driver (referred to by Defendant as a “P&D contractor”) must sign a “Pick-Up and Delivery Contractor Operating Agreement” and Addenda thereto (referred to hereinafter as combined as “OA” or the “Operating Agreement”) as a mandatory condition of employment. The date, time and place of execution of each driver’s Operating Agreement is within the knowledge of Defendant as each Agreement is maintained in the driver files described above, in the regular course of business. The Operating Agreement between each member of the Plaintiff Class and Defendant is the same in all material respects. The Operating Agreement between Plaintiffs and FEG and between Plaintiffs and FHD contain all of the same identical material terms with only a few, minor and insubstantial differences.

21. The Operating Agreement contains various statements purporting to classify Plaintiffs and Plaintiff Class Members as independent contractors. At the same time, the Operating Agreement retains to the company, *inter alia*, the right to approve or disapprove any vehicle used to provide service, the right to approve or disapprove any driver or helper who provides service, the right to approve or disapprove the purchase or sale of any vehicle, the right to assign pickup and delivery stops to each driver, the right to temporarily or permanently transfer portions of any route to another with or without compensation, the right to determine when a driver has “too few” or “too many” packages to deliver on a given day, the right to inspect vehicles and drivers for compliance with Company-promulgated appearance standards, the right to terminate the contract upon thirty days notice or whenever the company unilaterally

determines that any provision of the contract has been “violated” amounting to the right to terminate at will, the right to require the use of communication equipment and the wearing of Company uniforms, the right to take a vehicle out of service, the right to review and evaluate “customer service” and to set and change standards of such service, the right to require drivers to perform service at “times” requested by customers and determined by Defendant, the right to withhold pay for certain specified expenses, the right to require purchase of specified insurance and numerous other purchases by drivers, the right to require completion of specified paperwork, and other rights reserved to Defendant.

22. The Operating Agreement is and at all relevant times has been a contract of adhesion, drafted exclusively by Defendant and/or its legal counsel, with no negotiation with drivers, who are required to sign the Agreement as a condition of employment. Plaintiffs and Plaintiff Class Members are required to sign the form contract as is, without any changes made to the terms contained therein. Each year, drivers are required to sign additional Addenda which are likewise not subject to negotiation and are unilaterally drafted adhesion contract provisions. The Agreement is, and at all material times has been unlawful, unconscionable and fraudulent in form and effect.

23. Defendant also has created and regularly updated a large number of written policies and procedures outside of the Operating Agreement that drivers are never given, but nonetheless are required to follow in their work. Defendant’s written policies are contained in the FedEx Ground Manual, Operations Management Handbook, Settlement Manual and numerous other written and extra-contractual policies that are actively concealed from drivers and which Defendant fails to disclose and/or provide to drivers that govern the relationship

between Defendant and the drivers. The other written handbooks and manuals and additional extra-contractual sources include, but are not limited, to written rules on “contractor” termination, directives and training provided to terminal managers, written rules on driver appearance (with illustrative poster), written and oral complaint procedures, memorandum and directives to terminal management and other rules concealed from and not provided to the drivers. When drivers do not follow an FEG or FHD rule, whether disclosed or undisclosed, known or unknown, they are subject to various types of punishment, some financial and some disciplinary, up to and including contract termination and/or non-renewal. Defendant documents such so-called violations of such rules on forms referred to as “Business Discussion Notes” and retain these documents in secret driver files called “DOT” files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

24. Defendant maintains compensation and benefit plans, agreements and programs available to persons who are “employees” of Defendant. The benefit plans include: Health Benefit Plan, Life Insurance Plan, Short-term and Long-term Disability Plans, Accidental Death & Dismemberment and Survivor Income Plan, Employee Stock Purchase Plan, Business Travel Accident Plan, and Retirement and 401 (K) Savings Plans. In addition, employees of Defendant receive additional compensation programs, plans, rights, and benefits, including vacation, holidays, sick leave, other types of paid leave, and stock purchase rights.

25. Plaintiffs and Plaintiff Class Members have been excluded from the foregoing compensation plans and programs and benefit plans for all or a portion of their employment at FedEx due to their misclassification as non employees.

26. Plaintiffs and Plaintiff Class Members have incurred expenses for equipment, insurance and other expenses that Defendant requires them to purchase under the contract.

FIRST CAUSE OF ACTION: ILLEGAL DEDUCTIONS FROM WAGES IN VIOLATION OF COLO. REV. STAT SECTION 8-4-101

27. Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

28. Defendant has unlawfully withheld monies from the compensation earned by Plaintiffs and Plaintiff Class Members for business expenses of Defendant, including but not limited to vehicle expenses, cargo claims and insurance claims in violation of Colorado Statute Section 8-4-105. Plaintiffs and Plaintiff Class Members have not expressly and freely given written consent to such deductions, and these deductions are not made in response to a valid deduction order. Such deductions were not for the Plaintiffs and Plaintiff Class Members employees' benefit.

29. Defendant has withheld said funds unlawfully without providing Plaintiffs and Plaintiff Class Members with advance notice of amounts, reasons or documentation to justify such deductions, and absent any lawfully sufficient reason for such conduct.

30. As a direct and proximate result of Defendant's conduct, Plaintiffs and Plaintiff Class Members have suffered substantial losses and been deprived of compensation to which they were entitled, including monetary damages as provided in the statute, pre-judgment interest, costs and reasonable attorney fees.

SECOND CAUSE OF ACTION: VIOLATION OF THE COLORADO CONSUMER PROTECTION ACT, COLO. REV. STAT. SECTION 6-1-105 ET SEQ.

31. Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

32. Defendant, through the actions described above, has violated the Colorado Consumer Protection Act, Colo. Rev. Stat. § 6-1-105 et seq.

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

34. In entering into the Operating Agreement, Plaintiffs purchased their routes from Defendant. The consideration for that purchase was Plaintiffs' acquisition of the delivery truck, purchase of the business support package, or an agreement to provide services.

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

36. Defendant has engaged in unconscionable commercial practices of deception, fraud, false pretense, false promise, misrepresentations and omissions in recruiting and retaining its drivers, the public at large, and the Plaintiffs and Plaintiff Class Members specifically, regarding the status of the Plaintiffs and Plaintiff Class Members as independent business owners as pled in this complaint.

37. Specifically, Defendant misled Plaintiffs to believe that they were going to be "partners" with Defendant, 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.

38. Defendant knowingly concealed, suppressed or omitted the fact that it intended to manage Plaintiffs' work and income, that Defendant's management and control destroyed or would destroy any perceived value of the routes, that Defendant had no intention of leaving the means and methods of 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.

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

40. Defendant committed affirmative misrepresentations, knowing omissions, and violations of the Colorado Consumer Protection Act, entitling Plaintiffs and Plaintiff Class Members to the remedies under the Act.

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

42. As a result of Defendant's control and management, Defendant has destroyed the potential financial value of the routes.

43. Plaintiffs suffered ascertainable losses as a result of Defendant's actions, including but not limited to the loss of value in the routes, lost opportunity to sell the routes, lost profits, additional insurance costs, taxes, and other expenses that should have been paid by Defendant as an employer. Defendant's conduct is injurious to the public and Plaintiffs have suffered injury and losses as a result thereof.

44. A causal nexus exists between Defendant's actions and Plaintiffs' losses. Defendant is liable to Plaintiffs and Plaintiff Class Members for compensatory damages, consequential damages, civil penalties, punitive damages, injunctive and declaratory relief, plus costs, disbursements, and attorney fees, plus pre- and post-judgment interest.

THIRD CAUSE OF ACTION: RESCISSION

45. Plaintiffs hereby incorporate by reference all preceding paragraphs as if fully set forth herein and further allege:

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

47. Defendant controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations hereof at paragraphs 18 through 26.

48. Despite this control and the actual status of the drivers as employees, Defendant 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.

49. The Operating Agreement illegally and unfairly advantages Defendant, by mischaracterizing the status of the Plaintiffs in that Defendant 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.

50. The Operating Agreement between Defendant and each Plaintiff and member of the Class is void as 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.

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

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

53. While acting on the direct instruction of Defendant and discharging their duties for Defendant, Plaintiffs and the Class Members incurred 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.

54. By misclassifying its employees as "independent contractors," and further by contractually requiring those employees to pay Defendant's own expenses, Defendant has been unjustly enriched.

55. As a direct and proximate result of Defendant's conduct, Defendant 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.

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

FOURTH CAUSE OF ACTION: DECLARATORY RELIEF

57. Plaintiffs hereby incorporate by reference all preceding paragraphs as if fully set forth herein, and further allege:

58. An actual controversy has arisen between the Plaintiffs and Plaintiff Class Members, on the one hand, and Defendant, on the other hand, relating to the following matters:

- a. Whether Defendant has unlawfully misclassified Plaintiffs and Plaintiff Class Members as independent contractors, and have thus denied Plaintiffs and Plaintiff Class Members of the common benefits of employee status, such as
 - i. wages;
 - ii. holiday pay;
 - iii. workers' compensation;
 - iv. unemployment insurance;
 - v. contributions to Defendant's retirement plan;
 - vi. income tax withholding;
 - vii. meal, break and rest periods.

- b. Whether Defendant has unlawfully failed to pay benefits and compensation owing in a timely manner to Plaintiffs and Plaintiff Class Members whose employment with Defendant ended, as required by Colorado law.
- c. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive in compensation and benefits.
- d. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive in interest on unpaid compensation due and owing.
- e. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive from Defendant in statutory penalties and interest.

59. Plaintiffs and Plaintiff Class Members further seek entry of a declaratory judgment in their favor which declares Defendant's practices as heretofore alleged to be unlawful and which provides for recovery of all sums determined by this Court to be owed by Defendant, and each of them, to the Plaintiffs and Plaintiff Class Members.

FIFTH CAUSE OF ACTION: REQUEST FOR INJUNCTIVE RELIEF

60. Plaintiffs hereby incorporate by reference all preceding paragraphs as if fully set forth herein, and further allege:

61. Defendant will continue to misclassify Plaintiffs and Plaintiff Class Members as independent contractors and unlawfully deny them the common benefits of employee status;

62. Plaintiffs and Plaintiff Class Members have been injured and damaged, and are threatened with injury and damage, by Defendant's continued misclassification and unlawful refusal to pay all compensation and benefits as heretofore alleged, and Plaintiffs and Plaintiff Class Members have no adequate remedy at law.

63. Defendant has acted, and threatened to act, on grounds generally applicable to the individual members of the Class, thereby making appropriate preliminary and permanent injunctive relief enjoining Defendant and their agents from practicing the unlawful practices

heretofore alleged.

WHEREFORE, Plaintiffs request that judgment be entered against Defendant for the following:

1. Declaring that the Defendant's acts described in this Complaint constitute violations of Colorado common and statutory law;
2. An award of damages and treble damages for all expenses incurred by Plaintiffs and Plaintiff Class Members necessary to perform their jobs for Defendant described above with an appropriate award of interest, and an award of civil penalties;
3. Rescinding the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to Defendant;
4. Attorney fees and costs as provided by law; and,
5. Such other further relief as the Court may deem just and equitable.

Dated: August 27, 2007

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Susan E. Ellingstad

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CERTIFICATE OF SERVICE

I, Susan E. Ellingstad, hereby certify that on August 27, 2007, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which sent notification of such filings to the following:

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I also certify that on August 27, 2007, I mailed by United States Postal Service the foregoing document to the following non CM/ECF participants:

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