

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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In re FEDEX GROUND PACKAGE)	Cause No. 3:05-MD-527-RM
SYSTEM, INC., EMPLOYMENT)	(MDL 1700)
PRACTICES LITIGATION)	
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-----)	
THIS DOCUMENT RELATES TO:)	
)	
<i>Donald E. Carlson, et al. v. FedEx Ground</i>)	
<i>Package System, Inc.,</i>)	
Civil No. 3:05-cv-00664-RLM-CAN (FL))	
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THIRD AMENDED CLASS ACTION COMPLAINT

COME NOW, the Representative Plaintiffs, on their own behalf and on behalf of all others similarly situated, and file this Complaint against the Defendant, FEDEX GROUND PACKAGE SYSTEM, INC. a Delaware corporation authorized do business in the state of Florida, and as grounds in support thereof alleges as follows:

1. Representative Plaintiffs DONALD CARLSON (hereinafter "CARLSON"); SHEREE HARTING (hereinafter "HARTING"); CHARLES HOUSE (hereinafter "HOUSE"); TROY UPMAN (hereinafter "UPMAN"); and DAVID R. MOSHER, (hereinafter "MOSHER") are individuals residing in Pinellas County, Florida.

2. Representative Plaintiff, STEPHEN RENBERG (hereinafter "RENBERG"), is an individual residing in Pasco County, Florida.

3. Representative Plaintiffs, CARLSON; HARTING; HOUSE; RENBERG, UPMAN, and MOSHER are hereinafter referred to as "PLAINTIFFS".

4. Defendant FEDEX GROUND PACKAGE SYSTEM, INC. (“FEG”), and its division, FedEx Home Delivery (“FHD”) (hereinafter together referred to as “Defendant” or “FEDEX GROUND” or “FEG”), is a Delaware corporation doing business as two national companies, affiliated with the Federal Express Corporation.

GENERAL ALLEGATIONS

5. Each Representative Plaintiff and each member of the proposed class responded to advertisements issued by FEDEX GROUND indicating that FEDEX GROUND was currently looking for independent contractors.

6. PLAINTIFFS and each member of the proposed class attended an identical or virtually identical informational meeting where identical or substantially similar informational materials were distributed.

7. In these meetings, PLAINTIFFS were promised the opportunity to run their own business, the opportunity to grow “their” business and a proprietary interest in “their” business.

8. This opportunity was represented to PLAINTIFFS as needing little or no special or commercial grade equipment and as being appropriately operable from a light-duty van.

9. FEDEX GROUND represented that each driver would have an assigned area in which business could be “built” based on quality service.

10. The assigned area was later limited to a single “core zip code”, though even this was later randomly reassigned without consent of the Contractors.

11. FEDEX GROUND represented that as the business in each assigned area grew, the contractors would be able to man additional routes (delivery vans) within their assigned area.

12. FEDEX GROUND represented that as the business in each assigned area grew, the contractors would be able to hire employees of their own.

13. FEDEX GROUND agreed to provide certain support services not unlike a franchise situation. These support services were to have enabled the contractors to function in a uniform and efficient manner.

14. A contract was formed between each Plaintiff or proposed Class Member and Defendant.

15. Representative Plaintiff CARLSON, signed a contract with Defendant in October 2000.

16. Representative Plaintiff HARTING, signed a contract with Defendant in November 2000.

17. Representative Plaintiff HOUSE, signed a contract with Defendant in March 2000.

18. Representative Plaintiff RENBERG, signed a contract with Defendant in March 2000.

19. Representative Plaintiff UPMAN, signed a contract with Defendant in March 2001.

20. Representative Plaintiff MOSHER signed a contract with Defendant in or about February 15, 1999.

21. Each Member of the proposed Class similarly signed a contract with Defendant.

22. Each Contract entered into by Representative Plaintiffs and the Class Members is identical.

23. Plaintiffs have performed on the contract to the best of their ability given the repeated breaches by FEDEX GROUND.

24. FEDEX GROUND has failed to perform the contract.

25. Each Plaintiff has been damaged by FEDEX GROUND's failure to perform under the contract.

26. FEDEX GROUND is obligated to provide accurate maps and routing, but has failed to do so.

27. FEDEX GROUND has unreasonably withheld new routes from the PLAINTIFFS from within their assigned area, in violation of their contract.

28. FEDEX GROUND has caused the existing routes to have more packages and delivery stops than is possible to make with a single vehicle.

29. Because it refused to grant new routes for the overburdened drivers, FEDEX GROUND has not paid the independent contractors their contracted vehicle allowance for the second vehicles the independent contractors were forced to buy and man.

30. FEDEX GROUND has deliberately mislabeled packages and packed them in an order so that it is difficult for contractors to deliver them.

31. FEDEX GROUND has wrongfully required the purchase of second insurance policies.

32. FEDEX GROUND has wrongfully refused to pay vehicle expenses that were required to be paid under the contract.

33. FEDEX GROUND has wrongfully required the purchase of new equipment in violation of the contract and has wrongfully threatened to terminate the contracts of the PLAINTIFFS prematurely, that is, in the middle of the contract term.

34. FEDEX GROUND has designed the routes so that additional equipment is needed which is not compensated, which is in violation of the contract.

35. FEDEX GROUND has wrongfully refused to pay bonus money earned under the contract.

36. FEDEX GROUND has denied the PLAINTIFFS any propriety interest in their core ZIP code.

37. FEDEX GROUND has randomly reassigned core ZIP codes and packages within core ZIP codes, despite the fact that the contract designates proprietary interest in territory and separately and particularly grants proprietary interest in the core ZIP codes.

38. FEDEX GROUND has wrongfully, unreasonably, and in bad faith refused to approve subcontract employees, needed in order to run non-compensated supplemental vans so that the contractors can deliver the packages which they are assigned.

39. On occasion, FEDEX GROUND has deliberately refused to assign core ZIP code packages to the proprietary contractor, as a method of punitive treatment.

40. FEDEX GROUND has required modifications to existing equipment inconsistent with the contract.

41. FEDEX GROUND has wrongfully charged for costs, such as the expense of washing the trucks, which were never received by the contractors.

42. FEDEX GROUND deliberately denied granting additional routes to the proprietary contractors within their area, but rather, creates new routes for new drivers, thus undermining any proprietary interest which the independent contractors have under their contract with FEDEX GROUND.

43. FEDEX GROUND has repeatedly threatened to wrongfully terminate contracts for any complaint regarding FEDEX GROUND's numerous breaches.

44. FEDEX GROUND has deliberately interfered with sales of the Contractors' routes by unreasonably withholding approval of the proposed buyer, by refusing to transfer the route or even the "core ZIP code", by deliberately mis-assigning proposed drivers to different core areas prior to finalization of the contract and by refusing to allow the sale of the FEDEX GROUND trucks with the routes.

45. The overall effect of the numerous breaches by FEDEX GROUND, the gross disparity between representation and reality, the punitive and deliberate breaches rendered as retaliation for any complaint, and the substantial indebtedness which the contractors were required to enter into for non-marketable equipment, was to create a status not unlike that of indentured servitude.

DEFENDANT'S OPERATING AGREEMENT

46. 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.

47. 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.

48. 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.

49. Defendant's right of control over PLAINTIFF CLASS MEMBERS is also retained and/or exercised by Defendant as demonstrated by concealed and/or undisclosed extra-contractual sources such as Company written rules and policies described above and unwritten practices which supplement and fill gaps in the written contract. Defendant employs 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 "Pickup And Delivery Contractor Operating Agreement" that mischaracterizes each driver as an "independent contractor." These operating agreements were designed to conceal the true nature of the relationship between FEG and its drivers: that of employer and employee.

50. Defendant 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 retains 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.

51. 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 the Florida 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 their drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by Florida 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 and fraudulent business practice by Defendant which this court should enjoin.

CLASS REPRESENTATION ALLEGATIONS

52. Counts I through VII of this action are brought by PLAINTIFFS as a class action on their own behalf and on behalf of all others similarly situated under provisions of Fed. R. Civ. P. 23 for injunctive relief and for damages in accordance with Counts I through VII herein.

53. The proposed Class represented by PLAINTIFFS, and as to which each is a member, consists of all those persons who have entered “Independent Contractor” Agreements with FEDEX GROUND, for acquisition of a delivery route in the State of Florida (“Class Members” or the “Class”).

54. Excluded from the proposed Class is Defendant, any entity in which Defendant has a controlling interest, and its legal representatives, heirs, and successors, as well as any members of the judiciary who would preside over this matter.

55. The proposed Class is numerous and geographically dispersed throughout the State of Florida so that joinder of all of its members is impractical.

56. The exact number of the members of the Class is not known as the records establishing that number are in the care custody and control of the Defendant, but is anticipated to number in excess of 100 (one hundred). The Class is so numerous that joinder of the individual members of the Class herein is impractical.

57. There are common questions of law and fact in this action that relate to and affect the rights of each member of the Class that predominate over any individual issues, and the relief sought is common to the members within the Class. The claims of the Class Members arise from the same events or patterns or practices and are based on the same legal theories.

58. The claims advanced by the PLAINTIFFS are typical of the claims of each member of the Class in that the PLAINTIFFS are “Independent Contractors” of Defendant and have paid for FEDEX GROUND’s inadequate and misrepresented delivery routes and further in that Plaintiffs invested time and funds in obtaining their position, but suffer Defendant’s past and continued demands for immediate addendums to the contracts, refusal to recognize proprietary interest, refusal to comply with their contracts, insistence on delineating some routes

with excessive stops, and continued misleading of independent contractors to lure them into maintaining a relationship with FEDEX GROUND, in particular, given the vulnerability of the contractors who have outstanding loans to FEDEX GROUND, as set out above is against public policy and otherwise unfair and inequitable.

59. The PLAINTIFFS will fairly and adequately protect and represent the interest of each member of the Class, seek recovery on their own behalf and on behalf of all the members of the Class, and the PLAINTIFFS agree to act as class representative for the Class. Additionally, PLAINTIFFS are committed to protect vigorously the rights of the Class and will do so fairly and adequately.

60. PLAINTIFFS have no interests which are adverse to the interests of the Class.

61. As to all claims for damages set out herein below under Fed. R. Civ. P. 23(b)(1)(A) or (B), the prosecution of separate actions by individual members of the class would create a risk of inconsistent adjudications with respect to individual members of the class which would establish incompatible standards of conduct for Defendant or would, as a practical matter, be dispositive of the interests of other Class Members not a party to such adjudications or would impede the ability of other Class Members to protect their interests.

62. As to all claims for injunctive relief set out herein below and pursuant to Fed.R.Civ.P. 23(b)(2), Defendant has acted or refused to act on grounds generally applicable to all members of the Class, thereby making final injunctive relief concerning the Class as a whole appropriate, in that a ruling as to PLAINTIFFS will affect all members of the Class.

63. As to all claims for damages set out herein below under Fed.R.Civ.P. 23(b)(3), the questions of law and fact common to the claims of the PLAINTIFFS and the claims of each member of the Class as a whole predominate over any questions of law or fact affecting only

individual members of the Class, and class representation is superior to all other available methods for the fair and efficient adjudication of this controversy.

64. Notice, as and if required, can be provided to Class Members by U.S. Mail or published notice or a combination thereof in the manner commonly used for complex actions of this type.

65. It is desirable to concentrate the litigation of all claims of PLAINTIFFS and the members of the Class in this forum.

66. Absent a class action, PLAINTIFFS and the Class will continue to suffer from and be damaged by the conduct of Defendant.

67. Potential class management difficulties are insignificant weighed against the impossibility of affording adequate relief to the PLAINTIFFS and members of the Class through numerous separate actions.

COUNT I
(Violation of Deceptive and Unfair Trade Practices Acts - Damages)

68. PLAINTIFFS reallege paragraphs 1 through 69 above as if fully set forth herein.

69. This is an action for damages that exceed \$15,000.00.

70. This is an action for damages pursuant to the Deceptive and Unfair Trade Practices Acts of the state of Florida (hereinafter "FDUTPA").

71. This count is brought by PLAINTIFFS individually and on behalf of all others similarly situated.

72. PLAINTIFFS and the Class are "legitimate business enterprises" as defined in FDUTPA. Furthermore, many members of the Class have no prior business experience and are related to FEDEX GROUND as though they were consumers.

73. The providing of the Service constitutes “trade or commerce” under FDUTPA.

74. The actions of FEDEX GROUND in advertising, contracting and soliciting independent contractors and otherwise representing the nature of the independent contract relationship, though knowing, inter alia, that no real proprietary interest would be allowed to exist, that the represented profitability of the enterprise was impossible and grossly unrealistic, that the nature of the relationship would be treated as though it were a master/servant relationship rather than an “arms length” transaction, that additional equipment would be demanded at will, that the loans extended by FEDEX GROUND to the contractors would result in profound vulnerability, that any attempt by PLAINTIFFS to sell their “business” would be subject to onerous approval and restriction and knowing that it would therefore be extremely difficult for said contractors to leave their contracts, is an unconscionable act or practice, and/or an unfair or deceptive act or practice in the conduct of any trade or commerce in violation of FDUTPA.

75. By the misrepresentations and non-disclosure of material facts alleged above, FEDEX GROUND deceived and continues to deceive existing and new FEDEX GROUND Independent Contractors. This conduct constitutes unlawful, unfair, deceptive and fraudulent business practice within the meaning of FDUTPA.

76. As a result of Defendant’s misrepresentations, PLAINTIFFS and the Class have suffered damages.

77. Pursuant to FDUTPA, PLAINTIFFS and the Class are entitled to receive actual damages. Plaintiffs may also be awarded reasonable attorney’s fees and court costs.

78. PLAINTIFFS have incurred attorney’s costs and legal fees in bringing this action.

WHEREFORE, Plaintiffs and the Class pray that the conduct of FEDEX GROUND be declared to be in violation of FDUTPA and that it is likely that Defendant would continue to violate FDUTPA in the future; and that the Court enter judgment for damages, attorney's fees and costs, and for such other and further relief as the Court may deem just and proper.

COUNT II
(Violation of Deceptive and Unfair Trade Practices Acts - Injunction)

79. PLAINTIFFS reallege paragraphs 1 through 69 above as if fully set forth herein.

80. This is an action for damages pursuant to the Deceptive and Unfair Trade Practices Acts of Florida (hereinafter "FDUTPA").

81. This count is brought by PLAINTIFFS individually and on behalf of all others similarly situated.

82. PLAINTIFFS and the Class are "legitimate business enterprises" as defined in FDUTPA. Furthermore, many members of the Class have no prior business experience and are related to FEDEX GROUND as though they were consumers.

83. The providing of the Service constitutes "trade or commerce" under FDUTPA.

84. The actions of FEDEX GROUND in advertising, contracting and soliciting independent contractors and otherwise representing the nature of the independent contract relationship, though knowing, inter alia, that no real proprietary interest would be allowed to exist, that the represented profitability of the enterprise was impossible and grossly unrealistic, that the nature of the relationship would be treated as though it were a master/servant relationship rather than an "arms length" transaction, that additional equipment would be demanded at will, that the loans extended by FEDEX GROUND to the contractors would result in profound vulnerability, and knowing that it would therefore be extremely difficult for said

contractors to leave their contracts, is an unconscionable act or practice, and/or an unfair or deceptive act or practice in the conduct of any trade or commerce in violation of FDUTPA.

85. FEDEX GROUND's past and continued demand for immediate addendums to the contracts, refusal to recognize proprietary interest, refusal to comply with their contracts, insistence on delineating some routes with excessive stops, and continued misleading of independent contractors to lure them into maintaining a relationship with FEDEX GROUND, in particular, given the vulnerability of the contractors who have outstanding loans to FEDEX GROUND, as set out above is against public policy and otherwise unfair and inequitable.

86. FEDEX GROUND continues to contract, misrepresent opportunities; demand accommodations inconsistent with the contracts; refuse to abide by the contracts; deliberately misassign "proprietary" deliveries; mismanage routing and packing as a punitive measure for complaints; demand acceptance of interim addendums and otherwise threaten "independent contractors"; and therefore continues to violate the FDUTPA and is likely to violate the Act in the future.

87. PLAINTIFFS have incurred attorney's costs and legal fees in bringing this action.

WHEREFORE, PLAINTIFFS and the Class pray that the conduct of FEDEX GROUND be declared to be in violation of FDUTPA and that it is likely that DEFENDANT would continue to violate FDUTPA; and that the Court enter judgment: (I) enjoining DEFENDANT from retaliating against the independent contractors who are seeking to enforce their rights in this action; (ii) continuing to market to prospective contractors with misrepresentations regarding income potential; equipment requirements, proprietary interests and independence; (iii) awarding attorney's fees and costs, and (iv) for such other and further relief as the Court may deem just and proper.

COUNT III
(False Information Negligently Supplied)

88. PLAINTIFFS reallege paragraphs 1 through 69 above as if fully set forth herein.

89. This is an action for damages that exceed \$15,000.00.

90. This Count is brought by PLAINTIFFS individually and on behalf of all others similarly situated.

91. In connection with selling and contracting for the Service with PLAINTIFFS and Class Members, FEDEX GROUND and its agents represented falsely that the actions of FEDEX GROUND in advertising, contracting and soliciting independent contractors and otherwise representing the nature of the independent contract relationship, though knowing, inter alia, that no real proprietary interest would be allowed to exist; that the FEDEX GROUND Home Delivery Independent Contractor routes would be vastly different than represented to PLAINTIFFS; that the represented profitability of the enterprise was impossible and grossly unrealistic; that the nature of the relationship would be treated as though it were a master/servant relationship rather than an "arms length" transaction; that additional equipment would be demanded at will; that the loans extended by FEDEX GROUND to the contractors would result in profound vulnerability; that any attempt by PLAINTIFFS to sell their "business would be subject to onerous approval and restriction and knowing that it would therefore be extremely difficult for said contractors to leave their contracts; that additional equipment would be demanded on a periodic basis; that amendments and addendums would be demanded at whim by FEDEX GROUND; that the potential profitability of the situation had been grossly misstated; and that FEDEX GROUND would use arbitrary guidelines as to performance or non-

performance under the contract to enforce compliance and acquiescence with any demanded modification amendment as further breach of the contract.

92. At the time the above false representations were made, FEDEX GROUND knew or should have known that no real proprietary interest would be allowed to exist; that the FEDEX GROUND Contractor routes would be vastly different than represented to PLAINTIFFS; that the represented profitability of the enterprise was impossible and grossly unrealistic; that the nature of the relationship would be treated as though it were a master/servant relationship rather than an “arms length” transaction; that additional equipment would be demanded at will; that the loans extended by FEDEX GROUND to the contractors would result in profound vulnerability; that any attempt by PLAINTIFFS to sell their “business would be subject to onerous approval and restriction and knowing that it would therefore be extremely difficult for said contractors to leave their contracts; that additional equipment would be demanded on a periodic basis; that amendments and addendums would be demanded at whim by FEDEX GROUND; that the potential profitability of the situation had been grossly misstated; and that FEDEX GROUND would use arbitrary guidelines as to performance or non-performance under the contract to enforce compliance and acquiescence with any demanded modification amendment as further breach of the contract.

93. The above false representations were made by FEDEX GROUND negligently and were made for the guidance and inducement of PLAINTIFFS and the Class Members in connection with selling the Service.

94. As a direct and proximate result of FEDEX GROUND’s false representations, PLAINTIFFS and the class have suffered pecuniary loss including lost profit.

95. PLAINTIFFS have incurred attorney’s costs and legal fees in bringing this action.

WHEREFORE, PLAINTIFFS and the Class pray that judgment be entered against Defendant for such amount as the Court may determine, plus prejudgment interest, for attorney's fees, for costs of this action, and for such other and further relief as the Court may deem just in the premises.

COUNT IV
(Breach Of Contract)

96. PLAINTIFFS reallege paragraphs 1 through 69 above as if fully set forth herein.

97. This is an action for damages that exceed \$15,000.00.

98. PLAINTIFFS and the Class and Defendant entered contracts.

99. PLAINTIFFS and the Class honored their obligations under the contracts.

100. Defendant FEDEX GROUND did not honor its obligations under the contracts and has breached the contract uniformly by the conduct stated in paragraphs 1 through 69, above.

101. PLAINTIFFS have been damaged as a result of Defendant's refusal to honor the contract, to wit, PLAINTIFFS have incurred economic damages such as out-of-pocket expenses and have incurred substantial lost profit and have been denied the benefit of their bargain.

102. PLAINTIFFS have incurred attorney's costs and legal fees in bringing this action.

WHEREFORE PLAINTIFFS pray this Honorable Court award damages for Defendant's breach of contract including economic damages, out-of-pocket costs, lost profit and the benefit of their bargain, attorney's fees and legal costs, and any other relief this Court deems equitable.

COUNT V
(Fraud)

103. PLAINTIFFS reallege paragraphs 1 through 69 above as if fully set forth herein.

104. PLAINTIFFS and the class they represent were purportedly hired by DEFENDANT to work as "independent contractors" pursuant to the terms of the OA described

above. In fact, DEFENDANT knew or should have known, at all times, that the “independent contractor” classification in the Operating Agreement was improper and that PLAINTIFFS and all persons similarly situated were “employees” entitled to the benefits and protections of all laws enacted for employees. PLAINTIFFS are informed, believe and on that basis allege, that through the OA DEFENDANT intentionally misled PLAINTIFFS and the class they represent as to their employment status, or made such representations to PLAINTIFFS and PLAINTIFF CLASS MEMBERS recklessly and/or negligently, and deliberately concealed from and/or failed to disclose to the pick-up and delivery drivers the extra contractual sources (including but not limited to the FedEx Ground Manual, Operation Management Handbook and Settlement Manual, other policies and secret driver files described above) that defined the employment relationship between PLAINTIFFS and DEFENDANT, all for the purpose of realizing unjust profits from PLAINTIFFS’ work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

105. At all material times, DEFENDANT either knew, or should have known, that the material representation made to PLAINTIFFS in the OA concerning their employment status, and the concealment and/or non-disclosure of material facts to PLAINTIFFS concerning their employment status and PLAINTIFFS’ corresponding obligation to assume responsibility for all of their “own” employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks were false and fraudulent.

106. At all material times, DEFENDANT intended to and did induce PLAINTIFFS and the class they represent to reasonably and justifiably rely to their detriment on the false and fraudulent representations made to them by DEFENDANT in the OA concerning their employment status and obligation to assume responsibility for all of employment related

expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks and suffered damage as a direct and proximate result.

107. By its aforesaid conduct, DEFENDANT is guilty of oppression, fraud and malice in violating Plaintiff rights and protections guaranteed by Florida state law and other applicable law.

WHEREFORE, PLAINTIFFS and the Class pray that judgment be entered against DEFENDANT for such amount as the Court may determine, plus prejudgment interest, for attorney's fees, for costs of this action, and for such other and further relief as the Court may deem just in the premises.

COUNT VI
(Rescission Of Contract)

108. PLAINTIFFS reallege paragraphs 1 through 69 above as if fully set forth herein.

109. 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.

110. DEFENDANT controls virtually every aspect of the PLAINTIFFS' work and earnings, as set forth in the general allegations hereof at paragraphs 1 through 69.

111.. 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.

112. 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.

113. 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.

114. 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.

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

116. 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.

117. 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.

118. 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.

119. 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.

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 DEFENDANT, along with compensatory damages, punitive damages, 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 VII
(Declaratory Judgment)

120. PLAINTIFFS reallege paragraphs 1 through 69 above as if fully set forth herein.

121. 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; and
- vii. meal, break and rest periods.

b. What amounts PLAINTIFFS and PLAINTIFF CLASS MEMBERS are entitled to receive in compensation and benefits.

c. What amounts PLAINTIFFS and PLAINTIFF CLASS MEMBERS are entitled to receive in interest on unpaid compensation due and owing.

d. What amounts PLAINTIFFS and PLAINTIFF CLASS MEMBERS are entitled to receive from DEFENDANT in statutory penalties and interest.

WHEREFORE, PLAINTIFFS respectfully request that the Court enter judgment in their favor declaring 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 to the PLAINTIFFS and PLAINTIFF CLASS MEMBERS.

DEMAND FOR JURY TRIAL

PLAINTIFFS and the Class herewith demand a trial by jury of all issues so triable.

Dated: December 1, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/ Susan E. Ellingstad

Susan E. Ellingstad
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981

Lynn Rossman Faris
LEONARD CARDER, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612
Tel: (510) 272-0169
Fax: (510) 272-0174

Robert I. Harwood
WECHSLER HARWOOD LLP
488 Madison Avenue, 8th Floor
New York, NY 10022
Tel: (212) 935-7400
Fax: (212) 753-3630

PLAINTIFFS' CO-LEAD COUNSEL

James A. Staack, Esquire (FBN: 296937)
Ginger A. DeGroff, Esquire (FBN: 051550)
STAACK, SIMMS & HERNANDEZ, P.A.
900 Drew Street, Suite 1
Clearwater, Fl 33755
Tel: (727) 441-2635
Fax: (727) 461-4836

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I, Susan E. Ellingstad, hereby certify that on December 1, 2006, 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:

George A Barton	gbarton@birch.net
Evelyn L. Becker	ebecker@omm.com
Kenneth Lee Blalack II	lblalack@omm.com
Darcie R. Brault	dbrault@dibandfagan.com
Laura C. Bremer	lbremer@omm.com
Guy Brenner	gbrenner@omm.com
Thomas J. Brunner Jr	Tom.Brunner@bakerd.com ; Alicia.cummins@bakerd.com ; Melissa.bozzuto@bakerd.com ; amy.ricks@bakerd.com
Michael C. Camunez	mcamunez@omm.com ; cgreenberg@omm.com
David G. Caperton	dcaperton@omm.com
Jerald R. Cureton	jcureton@curetoncaplan.com
Edward J Efkeman	efkeman@fedex.com
Barry S. Fagan	bfagan@dibandfagan.com
Lynn R. Faris	lfaris@leonardcarder.com ; lbadar@leonardcarder.com ; efink@leonardcarder.com ; kzerger@leonardcarder.com
Lee K. Fink	lfink@omm.com
Robert K. Firsten	rfirsten@firstenlaw.com
Wood R. Foster Jr	woodfoster@sbgdf.com ; heidifurlong@sbgdf.com

Alison G. Fox Alison.Fox@bakerd.com; alicia.cummins@bakerd.com;
Melissa.bozzuto@bakerd.com;
amy.ricks@bakerd.com

Philip Stephen Fuoco pfuoco@msn.com

Martin S. Garfinkel garfinkel@sgb-law.com; rwhite@sgb-law.com;
bloch@sgb-law.com

Michael W. Garrison, Jr. mgarrison@omm.com

R. Christopher Gilreath chrisgil@sidgilreath.com

John C. Hamilton jch@hamiltonfirm.com; hamiltonfirm@sbcglobal.net

Robert I. Harwood rharwood@whesq.com

Stacy J. Hauf shauf@omm.com; swickliffe@omm.com

Dmitri Iglitzin iglitzin@workerlaw.com

Dorothy Anne Jarrell dajarrell@omm.com; prowen@omm.com;
jdonovan@omm.com

Tom A. Jerman tjerman@omm.com

Victor H. Jih vjih@omm.com

Thomas P. Jirgal tjirgal@omm.com; jbanks@omm.com

Aparna B. Joshi ajoshi@omm.com; jdonovan@omm.com

Michael W. Kopp mkopp@omm.com

Steve D. Larson slarson@ssbls.com; dcerdas@ssbls.com;
aardley@ssbls.com

Jordan M. Lewis jordanlewis@sbgdf.com

Shannon Liss-Riordan sliss@prle.com; blarmier@prle.com; syoung@prle.com

**Anh-Nguyet Tran
LyJordan** alyjordan@omm.com

Gary F. Lynch glynch@carsonlynch.com

Michael G. McGuinness mmcguinness@omm.com

Matthew J. Merrick mmerrick@omm.com

Jennifer Lee Merzon jmerzon@omm.com

Raquel A. Millman rmillman@omm.com

Daniel O. Myers dmyers@rpwb.com; wking@rpwb.com;
sgiddens@rpwb.com; mbrown@rpwb.com

Peter W. Overs Jr. povers@whesq.com

Richard T. Phillips flip@smithphillips.com; tresaharden@smithphillips.com

D. Lucetta Pope Lucetta.Pope@bakerd.com; Alicia.cummins@bakerd.com;
Melissa.bozzuto@bakerd.com;
amy.ricks@bakerd.com

Nora M Puckett npuckett@omm.com; dmeredith@omm.com

Charles Victor Pyle III victor.pyle@ogletreedeakins.com;
Meredith.smith@ogletreedeakins.com;
ted.speth@ogletreedeakins.com;
Linda.lyday@ogletreedeakins.com

Anne T. Regan atr@zimmreed.com; kmh@zimmreed.com

Robert G. Rikard rrikard@attorneysc.com

J. Gordon Rudd jgr@zimmreed.com

Theodore B. Schroeder tschroeder@omm.com

Robert M. Schwartz rschwartz@omm.com

R. Jay Taylor Jr. jtaylor@scopelitis.com; lnewton@scopelitis.com

Matthew T. Tobin matt@matthewtobinlaw.com

Jeffrey A. Trimarchi jtrimarchi@omm.com

Michael J Watton jdrewicz@Wattongroup.com

I also certify that on December 1, 2006, I mailed by United States Postal Service the foregoing document to the following non CM/ECF participants:

John H. Beisner
O'MELVENY & MYERS, LLP
1625 Eye Street, N.W.
Washington, D.C. 20006-4001

Joree Brownlow
LAW OFFICE OF JOREE G BROWNLOW
1444 Gillham Drive
Suite 200
Bartlett, TN 38134

R Bruce Carlson
CARLSON LYNCH LTD
231 Melville Lane
PO Box 367
Sewickley, PA 15143

Jack D Hilmes
Kevin J Driscoll
FINLEY ALT SMITH SCHARNBERT
CRAIG HILMES & GAFFNEY PC
699 Walnut Street
1900 Hub Tower
Des Moines, IA 50309

Eric E Hobbs
Eric H Rumbaugh
MICHAEL BEST & FRIEDRICH LLP
100 E Wisconsin Ave
Suite 3300
Milwaukee, WI 53202-4108

Donald B Lewis
5 Cynwyd Road
Bala Cynwyd, PA 19004

Robert E McDaniel
THE MCDANIEL LAW OFFICES
4 Bicentennial Square
Concord, NH 03301
(New address:
755 North Main Street
Laconia, NH 03246)

Carla D Macaluso
JACKSON LEWIS LLP
220 Headquarters Plaza
7th Floor East Tower
Morristown, NJ 07960

Paula R Markowitz
MARKOWITZ & RICHMAN
1100 North American Building
121 S Broad St
Philadelphia, PA 19107

Kenneth E Milam
WATKINS & EAGER
PO Box 650
Jackson, MS 39205-0650

James R Mulroy II
William T Fiala
LEWIS FISHER HENDERSON
CLAXTON & MULROY
6410 Poplar Ave
Suite 300
Memphis, TN 38119

Joseph A. Osefchen
LAW FIRM OF PHILIP STEPHEN FUOCO
24 Wilkins Place
Haddonfield, NJ 08033

Alan M Purdie
PURDIE & METZ
P.O. Box 2659
Ridgeland, MS 39158
INCORRECT ADDRESS
402 Legacy
Ridgeland, MS 39157

Aaron Roblan
Karen P Kruse
JACKSON LEWIS LLP
One Union Square
600 University Street, Suite 2900
Seattle, WA 98101

Michael R Reck
BELIN LAMSON MCCORMICK
ZUMBACH FLYNN
666 Walnut Street
Suite 2000
Des Moines, IA 50309-3989

Beth A Ross
LEONARD CARDER LLP
1330 Broadway, Suite 1450
Oakland, CA 94612

Jennifer Rygiel Boyd
OGLETREE DEAKINS NASH
SMOAK & STEWART PC
10 Madison Avenue
Suite 402
Morristown, NJ 07960

Dan S Smith
DAN SOLOMON SMITH LLC
339 Main Street Suite 2D
Orange, NJ 07050

Richard Tanenbaum
1131 McDonald Avenue
Brooklyn, NY 11230

Patricia A Sullivan
EDWARDS ANGELL PALMER
& DODGE LLP
2800 Financial Plaza
Providence, RI 02903

Donald R. Taylor
TAYLOR & DUNHAM
327 Congress Ave #600
Austin, TX 78701
New address:
TAYLOR DUNHAM AND BURGESS LLP
301 Congress Avenue, Suite 1050
Austin, TX 78701

Charles W Whetstone Jr.
Cheryl F Perkins
WHETSTONE MYERS PERKINS
AND YOUNG LLC
PO Box 8086
Columbia, SC 29202

Peter N Wasylyk
LAW OFFICES OF PETER N. WASYLYK
1307 Chalkstone Avenue
Providence, RI 02908

Clayton D. Halunen
Joni M. Thome
HALUNEN & ASSOCIATES
220 South Sixth Street
Suite 2000
Minneapolis, MN 55402

Dated: December 1, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Susan E. Ellingstad

Susan E. Ellingstad
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981