

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)	
)	
-----)	
THIS DOCUMENT RELATES TO:)	
)	
<i>Carlene M. Craig, et al. v. FedEx</i>)	
<i>Ground Package System, Inc., et al.</i>)	
Civil No. 3:05-cv-00530-RLM-CAN (KS))	
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FOURTH AMENDED CLASS ACTION COMPLAINT

Plaintiffs, by and through their attorneys, for their fourth amended class action complaint against the Defendant FedEx Ground Package System, Inc., allege:

PARTIES

1. Defendant FedEx Ground Package System, Inc., and its division, FedEx Home Delivery (“FHD”) (collectively, “FedEx Ground,” or “Defendant” or “FEG”) is a corporation incorporated under the laws of Delaware, with its principal place of business in the State of Pennsylvania. At all relevant times, Defendant FedEx Ground served as the sponsor, within the meaning of ERISA §§ 3(16), 29 U.S.C. §§ 1002(16), and administrator of several employee benefit pension and welfare plans established under ERISA, including, but not limited to, Defendants FEDEX Ground Package System, Inc. and Certain Affiliates Wealth Accumulation 401(k) Plan; Group Life and Supplemental Life Plan For Employees Of FedEx Ground Package System, Inc.; Ground Benefits Plus Short-Term Disability Plan; Group Long Term Disability Plan For The Employees of FedEx Ground Package System, Inc.; FedEx Ground Package

System, Inc. Medical, Dental And Vision Care Plan; and the Dependent Care Account Of FedEx Ground Package System, Inc. (collectively, the “Plan Defendants”).

2. Plaintiff Leo Rittenhouse is a citizen and resident of the State of Kansas, residing at 23333 S. Croco Rd., Vassar, KS 66543. During the period 1994-1999, Plaintiff Rittenhouse was an employee or former employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

3. Plaintiff Jeff Bramlage is a citizen and resident of the state of Kansas, residing at 7330 SW 61st, Topeka, KS 66610. During the period October 1996-1999, Plaintiff Bramlage was an employee or former employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

4. Plaintiff Lawrence Liable is a citizen and resident of the State of Kansas, residing at 2038 Old Highway 50, Waverly, KS 66871. During the period of 2003, Plaintiff Liable was an employee or former employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

5. Plaintiff Kent Whistler is a citizen and resident of the State of Kansas, residing at 1616 S.W. Clay, Topeka, KS 66604. During the period November 1998-December 2001, Plaintiff Whistler was an employee or former employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

6. Plaintiff Mike Moore is a citizen and resident of the State of Kansas, residing at 1924 Ohio, Lawrence, KS 66046. During the period of 2003, Plaintiff Moore was an employee or former employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

7. Plaintiff Keith Berry is a citizen and resident of the State of Kansas, residing at 2112 SE Colorado, Topeka, KS 66605. During the period January 2002-2004 with FedEx Ground and September 2001 through present with FedEx Home Delivery, Plaintiff Berry was an employee or former employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

8. Plaintiff Mathew Cook is a citizen and resident of the State of Kansas, residing at 1403 Mundell Drive, Mulvane, KS 67110. During the period May 2000 through present, Plaintiff Cook was an employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

9. Plaintiff Heidi Law is a citizen and resident of the State of Kansas, residing at 4960 S. Synaca, Lot 43, Wichita, KS 67217. During the period September 2003 through present, Plaintiff Law was an employee of Defendant FedEx Home Delivery and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

10. Plaintiff Sylvia O'Brien is a citizen and resident of the State of Kansas, residing at 2146 N. Keith, Wichita, KS 67212. During the period October 2004 through present, Plaintiff O'Brien was an employee of Defendant FedEx Home Delivery and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

11. Plaintiff Neal Bergkamp is a citizen and resident of the State of Kansas, residing at 8416 South Ridge Road, Clearwater, KS 67026. During the period November 1992 through present, Plaintiff Bergkamp was an employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans.

12. Plaintiff Dominic R. Lupo is a resident of Racine, Wisconsin and is currently a driver for FedEx Ground. Plaintiff Lupo is an employee of Defendant FedEx Ground and a

participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans. Plaintiff Lupo joins this Complaint for purposes of Count V.

13. Plaintiff Ronald Perry is a resident of North Dartmouth, Massachusetts. Plaintiff Perry worked as a FedEx Home Delivery driver from May 2002 until June 2003. Plaintiff Perry an employee or former employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans. Plaintiff Perry joins this Complaint for purposes of Count V.

14. Plaintiff Alan Pacheco is a resident of Fall River, Massachusetts. Plaintiff Pacheco worked as a FedEx Home Delivery driver from March 2001 until July 2003. Plaintiff Pacheco an employee or former employee of Defendant FedEx Ground and a participant, within the meaning of ERISA § 3(7), 29 U.S.C. § 1002(7), in the Plans. Plaintiff Pacheco joins this Complaint for purposes of Count V.

JURISDICTION AND VENUE

15. This action for declaratory, injunctive, and monetary relief is brought pursuant to Section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132, the Declaratory Judgment Act, 28 U.S.C. § 2201, and Kansas law. This Court has subject matter jurisdiction over Plaintiffs' federal claims pursuant to 28 U.S.C. § 1331, and supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367(a). Venue lies in the Northern District of Indiana pursuant to the Judicial Panel on Multi-District Litigation by Transfer Order of August 10, 2005.

FACTUAL BACKGROUND

16. Plaintiffs and the members of the Classes defined herein were at all times relevant to the allegations of this complaint the employees, in fact, of FedEx Ground.

17. This action arises from FedEx Ground's violation of the statutory requirements of K.S.A. 44-314, 315, 316 and 319 of the Kansas Wage Payment Act (KWPA) and Kansas common law by requiring the Plaintiffs and other persons similarly situated to pay for various employment-related expenses, including but not limited to the following:

- a) purchase or rent of their vehicle to perform pick-up and delivery service;
- b) operating expenses for that vehicle such as fuel, oil, tires, business, taxes, cleaning, insurance, and registration;
- c) maintenance of that vehicle,
- d) marking of the vehicle with logos, colors, numbers, marks, and insignia;
- e) payments to the Contractor Performance Escrow Account;
- f) licensing of that vehicle;
- g) purchase, rent or cleaning of uniforms;
- h) purchase or other payments for use of communications equipment such as scanners;
- i) liability insurance premiums and payments; and
- j) workers compensation premiums and payments.

18. FedEx Ground has also violated the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1002(6), because the Plaintiffs and other persons similarly situated were denied any pension, health, disability, group insurance, dependent care and/or other benefits due to FedEx Ground wrongfully classifying them as independent contractors rather than as employees.

19. The court has subject matter jurisdiction under ERISA because the Class Members are participants of a plan. 29 U.S.C. § 1132 (a)(1). A participant is "any employee or former employee of an employer who is or may become eligible to receive a benefit of any type from an employee benefit plan." 29 U.S.C. § 1002(7).

20. Although FedEx Ground has purported to characterize the Plaintiffs and other persons similarly situated as independent contractors, Plaintiffs and other persons similarly situated have been, or continue to be in fact employees of FedEx Ground.

21. The status of Plaintiffs and those similarly situated as current or former employees of FedEx Ground is demonstrated by a variety of requirements which FedEx Ground has consistently imposed on the Plaintiffs and other persons similarly situated, all of which demonstrate that FedEx Ground has exercised substantial and continuing control over the method and manner of performance of labor and services by Plaintiffs and others similarly situated for the work that they have done for FedEx Ground. FedEx Ground's imposition of control of the Plaintiffs and others similarly situated is illustrated by, but not limited to, the following, in that FedEx Ground required Plaintiffs and other persons similarly situated in their performance of their duties to:

- a) wear only clothes which are approved by FedEx Ground;
- b) wear only clothes that bear FedEx Ground's colors and logos;
- c) have FedEx Ground logo on their personal trucks;
- d) adhere to FedEx Ground's rules, regulations, policies and procedures;
- e) lease vans that had to meet FedEx Ground's required specifications;
- f) complete forms prepared by FedEx Ground;
- g) pick-up and deliver FedEx Ground's customers packages at certain times;
- h) have their delivery routes re-configured by FedEx Ground at anytime;
- i) work only for FedEx Ground during their regular working hours, and not to work for other delivery companies;
- j) not allowed to reject packages which FedEx Ground asked them to deliver;
- k) let FedEx Ground employees accompany the drivers on their routes in order to offer suggestions for improving customer service; and

- l) report to work at a certain time if they wished to have FedEx Ground's package handlers load their vehicles for their daily deliveries.

22. The drivers here do not operate independent businesses, but perform functions that are an essential part of FedEx Ground's normal operations. They do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no substantial proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. They simply shifted certain capital costs to the drivers without providing them the independence to engage in entrepreneurial opportunities.

23. Throughout the time that Plaintiffs and other persons similarly situated were employed by FedEx Ground, FedEx Ground consistently had the right to control, and in fact did exercise substantial control over the manner in which Plaintiffs and others similarly situated performed their labor and services for FedEx Ground. FedEx Ground was therefore legally required to adhere to the relevant statutory provisions of the Kansas Wage Payment Act and the Employee Retirement Income Security Act.

24. Although FedEx Ground was legally required to adhere to the relevant statutory provisions of the Kansas Wage Payment Act and the Employee Retirement Income Security Act, FedEx Ground repeatedly violated the provisions of those statutory provisions, by:

- (a) requiring Plaintiffs and others similarly situated to pay for various costs and expenses which were employment related, in which, pursuant to the Kansas Wage Payment Act, Plaintiffs and others similarly situated should not have been required to pay; and,
- (b) failing to provide other employment related benefits to these Plaintiffs, and others similarly situated, that were legally required by Fed Ex Ground to pay to these Plaintiffs and other similarly situated because their status in fact was that of employees of FedEx Ground.

25. Under the Kansas Wage Payment Act, Plaintiffs and others similarly situated are entitled to reimbursement of the total amount of costs and expenses, which they were improperly required to pay by FedEx Ground, in which FedEx Ground should have instead paid for them, because they were employees in fact of FedEx Ground.

26. In addition, Plaintiffs and others similarly situated are entitled to payment of penalties and interests as provided by KSA 44-314 (b) and K.S.A. 44-315 (b), and interest pursuant to K.S.A. 16-210.

27. Plaintiffs and all others similarly situated are entitled to damages equivalent to any pension, employment, or vacation benefits they should have received under the Employee Retirement Income Security Act from FedEx Ground, due to FedEx Ground wrongfully classifying them as independent contractors rather than as employees.

28. As a condition of employment, each FedEx Ground 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” or the “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 FedEx Ground and between Plaintiffs and FHD contain all of the same identical material terms with only a few, minor and insubstantial differences. These operating agreements were designed to conceal the true nature of the relationship between FedEx Ground and its drivers: that of employer and employee.

29. 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.

30. 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.

31. 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.

32. 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.

33. 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 Kansas 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 Kansas 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 their 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 ACTION ALLEGATIONS

34. Plaintiffs and the Classes defined below incorporate by reference herein the allegations of paragraphs 1 through 31 of this complaint.

35. For purposes of Plaintiffs' First, Second, Third and Fourth Causes of Action, as set forth below, Plaintiffs, individually and on behalf of the Class defined in paragraph 34 below

(the “State Class”), bring this Class action lawsuit under the KWPA and common law, pursuant to Rule 23 of the Federal Rules of Civil Procedure.

36. The Plaintiff State Class in this action is defined as:

- a) Each Pick Up and Delivery Contractor who at any time between February 10, 1997 and February 11, 2003 performed services for FedEx Ground and/or its successors in the State of Kansas as a Pick-up and Delivery Contractor driving full-time (meaning exclusive of time off for vacation and/or illness) in an area dispatched from a Kansas- based terminal pursuant to the terms of the Pick Up and Delivery Contractor Operating Agreement;
- b) Excluded from the Class are the following categories of persons or entities:
 1. temporary drivers working directly for Defendant and/or its successors, as well as those provided through temporary employee agencies;
 2. drivers who work or worked directly for a Pick-Up and Delivery Contractor and who have not entered into a Pick-Up and Delivery Contractor Operating Agreement with Defendant and /or its successors; and
 3. line-haul drivers who have performed service for Defendant and/or its successors.

37. Maintenance of this case as a class action under Rule 23 of the Federal Rules of Civil Procedure is appropriate given the simplicity and commonality of the pertinent issues.

38. FedEx Ground’s liability can be established with proof of a set of facts common to all of the Class Members. The issues are “common” to all Class Members because FedEx Ground’s policies are uniformly applied to all Kansas stores in the FedEx Ground System.

39. All Class Members have sustained economic damages resulting from FedEx Ground’s violations of the Kansas Wage Payment Act and Kansas common law.

40. The questions of law and or fact common to the members of the Class predominate over any questions affecting only individual Class Members, therefore a class

action and collective action are superior to other available methods for the fair and efficient adjudication of this controversy.

41. The representative Plaintiffs will fairly and adequately protect the interests of the Class because the claims of the representative Plaintiffs are typical of the claims of the Class Members, and because the representative Plaintiffs are represented by legal counsel who are experienced at class action litigation.

42. Upon information and belief, the Plaintiffs estimate the total number of Class Members is in excess of 300 persons, thus satisfying the “numerosity” requirement. Joinder of all Class Members is impracticable.

43. In addition, the prosecution of separate actions by or against the individual members of the Class would create a risk of:

- a) inconsistent or varying adjudication with respect to individual members of the Class, which would establish incompatible standards of conduct for FedEx Ground and other similarly situated companies; and
- b) adjudications with respect to individual members of the Class would as a practical matter be dispositive of the interests of the other members not parties to the adjudication, or substantially impair or impede their ability to protect their interests.

44. The members of the defined Class have not shown any interests as of yet in individually pursuing the prosecution of the defense in separate actions.

45. There is no other lawsuit pending in the state of Kansas apparent to the knowledge of Plaintiffs, relating to the claims at issue, by any other Class Member.

46. It is clearly desirable to concentrate the litigation and the claims of these named Plaintiffs and the members of the Class in one forum, so that the claims can be adjudicated efficiently in one action.

47. Class certification is proper under Rule 23 of the Federal Rules of Civil Procedure for the KWPA and Kansas common law because a Class action is superior to other available methods for the fair and efficient adjudication of this action.

48. There are no significant difficulties likely to be encountered in the management of this Class action by this Court.

49. For purposes of Plaintiffs' Fifth Cause of Action, as set forth below, Plaintiffs seek to certify a national Class of all drivers, who absent their mischaracterization as independent contractors, were eligible for but did not receive benefits from ERISA benefit plans maintained by Defendant and Plan Defendants (the "ERISA Class").

50. The members of the ERISA Class are so numerous that joinder of all members is impracticable. While the exact number of ERISA Class Members is unknown to Plaintiffs at this time and can only be ascertained through appropriate discovery, Plaintiffs believe there are, at a minimum, thousands of members of the ERISA Class throughout the United States, based upon the number of drivers who were improperly Classified as independent contractors.

51. Common questions of law and fact exist as to all members of the ERISA Class and predominate over any questions affecting solely individual members of the ERISA Class. Among the questions of law and fact common to the Class are whether:

52. ERISA Class Members were improperly Classified as independent contractors;

53. ERISA Class Members are entitled to their pension, health, disability, group insurance, and dependent care plan benefits because they were, in fact, employees; and

54. ERISA Class Members are entitled to damages and declaratory relief.

55. Plaintiffs' claims are typical of the claims of the members of the ERISA Class, as Plaintiffs and members of the ERISA Class sustained injury arising out of Defendants' violation of ERISA as complained of herein.

56. Plaintiffs will fairly and adequately protect the interests of the members of the ERISA Class. Plaintiffs have retained competent counsel. Plaintiffs have no interests antagonistic to or in conflict with those of the ERISA Class.

57. Prosecution of separate actions by members of the ERISA Class would create a risk of inconsistent adjudications with respect to individual members of the Class which would establish incompatible standards of conduct for Defendants, or adjudications with respect to individual members of the Class would, as a practical matter, be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

58. A class action is superior to other available methods for the fair and efficient adjudication of the controversy since joinder of all members of the ERISA Class is impracticable. Furthermore, because the injury suffered by the individual ERISA Class Members may be relatively small, the expense and burden of individual litigation makes it impracticable for the ERISA Class Members individually to redress the wrongs done to them. There will be no difficulty in the management of this action as a class action.

COUNT I
VIOLATIONS OF KANSAS WAGE PAYMENT ACT (KWPA)

59. Plaintiffs and the Class incorporate by reference herein all preceding allegations of this Complaint.

60. Plaintiffs and the Class were wrongfully classified by FedEx Ground as independent contractors, rather than employees, under the Kansas Wage payment Act (KWPA).

61. Under the KWPA, as employees Plaintiffs and the Class are entitled to the repayment of the total of all costs and expenses they paid during which time they were employees of FedEx Ground and payment of overtime wages for the relevant period of time for which they may lawfully recover.

COUNT II
RESCISSION OF OPERATING AGREEMENT

62. Plaintiffs and the Class incorporate by reference herein all preceding allegations of this complaint.

63. 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.

64. Defendant controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations hereof.

65. 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.

66. 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.

67. 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.

68. 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.

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

70. 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.

71. 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.

72. 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.

73. 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.

COUNT III
FRAUD

74. Plaintiffs and the Class incorporate by reference herein all preceding allegations of this complaint.

75. 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, Settlement Manual, and 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.

76. 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.

77. 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.

78. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiff rights and protections guaranteed by Kansas and other applicable law.

COUNT IV
DECLARATORY JUDGMENT

79. Plaintiffs and the Class incorporate by reference herein all preceding allegations of this complaint Plaintiffs hereby incorporate by reference all preceding paragraphs as if fully set forth herein, and further allege:

80. 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 Defendants' retirement plan;

vi. income tax withholding;
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.

81. 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 to the Plaintiffs and Plaintiff Class Members.

COUNT V
VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

82. Plaintiffs and the Class incorporate by reference herein all preceding allegations of this complaint.

83. Under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1132(a)(1)(B), Plaintiffs are entitled to clarify and enforce their rights and those rights held by absent Class Members pertaining to all benefits owed under the Plans.

84. Plaintiffs have either attempted to exhaust administrative remedies but were prevented by Defendants from exhausting such remedies, or exhaustion would be futile wherein Defendants have adjudged Plaintiffs and the ERISA Class Members to be independent contractors rather than employees.

85. By wrongfully classifying Plaintiffs and the ERISA Class Members as ineligible under the Plans, Defendants have violated, and continue to violate, the terms of the Plans and Plaintiffs' rights thereunder.

86. Plaintiffs and the ERISA Class Members are correctly classified as employees and have the right to payment of benefits pursuant to the Defendants' ERISA benefit plans. Accordingly under 29 U.S.C. §1132(a)(1)(B), Plaintiffs and the ERISA Class Members are entitled to declaratory relief and to pension, health, disability, group insurance, dependent care, and/or other benefits that were not paid as a result of their improper classification.

RELIEF REQUESTED

WHEREFORE, Plaintiffs pray for judgment against Defendant FedEx Ground as follows:

- a. For an order by the Court certifying the First, Second Third and Fourth Causes of Action as a statewide Class action pursuant to Fed. R. Civ. Proc. 23;
- b. For an order by the Court certifying the Fifth Cause of Action as a national Class action pursuant to Fed. R. Civ. Proc. 23;
- c. As to the Fifth Cause of Action, for a declaration that Plaintiffs and all members of the ERISA Class were participants and entitled to benefits under the ERISA plans maintained by the Defendants.
- d. As to the Fifth Cause of Action, for an order that requires Defendants to pay or otherwise credit Plaintiffs and the ERISA Class Members for all ERISA benefits to which they are entitled.
- e. For an award Plaintiffs prejudgment interest, reasonable attorneys' fees and costs of suit incurred herein as allowed by ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1) and other applicable law.
- f. Injunctive relief enjoining the Defendant from requiring payment and requiring repayment of any costs and expenses paid by Plaintiff and other persons similarly situated;
- g. Actual damages to Plaintiffs and the Class to the full extent;
- h. A judgment in favor of Plaintiffs and the Class for all penalties and liquidated damages allowed by law;
- i. Award of prejudgment interest to Plaintiffs and the Class;

- j. Rescinding the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to Defendant;
- k. Declaring that the Defendant's acts described in this Complaint constitute violations of the Kansas Wage Payment Act and Kansas common law;
- l. Award of punitive damages in an amount to be determined at trial;
- m. Attorney fees and costs as provided by law; and,
- n. Such other further relief as the Court may deem just and equitable.

DEMAND FOR TRIAL BY JURY

Plaintiffs, for themselves and the Class, demand a jury trial on all issues so triable.

Dated: December 1, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/ Susan E. Ellingstad

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