

**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>Jessie Capers, et al. v. FedEx Ground</i>)	
<i>Package System, Inc., et al.</i>)	
Civ. No. 3:05-cv-00535-RLM-CAN (NJ))	
-----)	

SECOND AMENDED COMPLAINT

Plaintiffs, Jessie Capers, Patrick Ngei, Tariq Baskerville, and Gitonga Waiguchu allege as follows:

FIRST COUNT

1. Plaintiff Capers is a resident of the City of New York and presently resides at 214 West 136.
2. Plaintiff Ngei is a resident of the City of Elizabeth, County of Union, State of New Jersey, and presently resides at 648 Jefferson Avenue, Apartment E-11.
3. Plaintiff Baskerville is a resident of the City of Irvington, County of Essex, State of New Jersey, and presently resides at 41 Montrose Terrace, 1st Floor.
4. Plaintiff Waiguchu is a resident of the City of Paterson, County of Passaic, and presently resides at 5 Granite Avenue.

5. Plaintiffs have been classified by Defendant as independent contractors who own and operate one or more pieces of trucking equipment suitable for daily pick-up and delivery services on behalf of FedEx.

6. From the beginning of their employment with FedEx, Plaintiffs' position was that of package and delivery drivers, which included picking up packages from FedEx, inspection of, tracking of and numerical recordings of packages for efficient delivery to customers.

7. Throughout their employment with FedEx, Plaintiffs' performance was acceptable, except insofar as the hostile and intimidating work environment described hereinafter impaired it.

8. At all times hereinafter mentioned, Defendant FedEx Ground (hereinafter "FedEx") is a corporation, with operations in the State of New Jersey, including Middlesex County, New Jersey.

9. Defendant FedEx is a duly licensed motor carrier engaged in providing a small package information, transportation and delivery service throughout the United States, with connecting international service.

10. FedEx provides for package pick-up and delivery services through a network of independent contractors.

11. FedEx's pick-up and delivery contractor operating agreement stipulates that both FedEx "and Contractor intend to that Contractor will provide these services strictly as an independent contractor, and not as an employee" of FedEx "for any purpose."

12. At all times hereinafter mentioned, Defendants Tyrone Gaskins, Albeit Rettinger, Jim Gelhausen, Joe Collins, Tom DiMaio, are or were officers, principals, and/or employed by FedEx.

13. Defendant FedEx is an employer as defined by N.J.S.A. 34:19-2(a).
14. Plaintiffs are an employee as defined by N.J.S.A. 34:19-2(b).
15. Plaintiffs are black persons and are employees of the Defendant FedEx..
16. Defendants, in their official capacities, have aided, abetted, incited, compelled or coerced discrimination against Plaintiffs based solely on their race.
17. Plaintiffs have been denied equal employment opportunity for job assignments, promotions, wages, and other terms and conditions of employment by the Defendants solely because of the Plaintiffs' classifications of race, creed, color, national origin, and nationality.
18. Defendants refuse to hire qualified applicants for managerial positions though the positions remain open for similarly qualified applicants.
19. Defendants deny qualified independent contractors, including Plaintiffs, promotions though others with similar or lesser qualifications achieved the positions.
20. Defendants follow a policy and practice of discrimination in employment against blacks on account of their race by showing favoritism towards white employees since only white employees were given entrance codes to the business office and given better routes.
21. Defendants maintain jobs, and classifications that are segregated on the basis of race, so that when employees are hired, assigned, promoted or demoted, they are placed in a job that is either a "white job" or a "black job".
22. Defendants discriminate against Plaintiffs in pay, terms, conditions, or privileges of employment on the basis of the classifications of race, creed, color, national origin, and nationality.
23. Defendants assign white employees to "white jobs" and black employees to "black jobs" and pay black employees the lowest possible wages under the circumstances.

24. Defendants exclude all, or substantially all, blacks, including named Plaintiffs, from supervisory, managerial, or professional jobs on the basis of their race.

25. Defendants assign black employees to the lowest paid and least desirable jobs, these jobs being generally the jobs demanding the most strenuous and continuous physical exertion, and involve duties hazardous to health or physical safety.

26. Plaintiffs are employed by the Defendants as so-called independent contractors and are denied equal pay and job opportunities solely because of Plaintiffs' race and color.

27. Defendants failed to make bona fide inquiries to Plaintiffs regarding job postings and statements expressing promotions in connection with Plaintiffs with Defendants based solely on Plaintiffs' race, creed, color, national origin, and nationality.

28. Plaintiffs sought to be promoted or transferred to a better job position, but were denied such promotion and transfer solely because of Plaintiffs' race and color.

29. Plaintiffs attempted as far back as 1992 and, as late as April 2002 to be assigned to open routes, including, but not limited to, Highland Park, Route 1 N in Piscataway but Defendants refused to permit Plaintiffs to advance and, instead, assigned the position to white employees with less seniority.

30. Despite Plaintiffs' efforts to obtain better job positions and pay, Defendants have continued to assign white employees, with less seniority than Plaintiffs, to do the better job positions. Bulk stops consisting of the delivery of 10 pieces were given to white employees to enhance their earning capabilities.

WHEREFORE, in consideration of the above, Plaintiffs requests judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorneys fees and any other and further relief as the court may deem proper.

SECOND COUNT

31. Plaintiffs repeat the allegations contained in the First Count of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

32. As early as 1986 Defendants and Plaintiffs entered into a contract of employment.

33. At all times relevant to this action, defendant has represented to Plaintiffs in various writings, including but not limited to, personnel policies and procedure manuals and employment guidelines, that their employment relationship with Defendants would be based upon good faith, that Plaintiffs would be treated fairly and equitably, that Plaintiffs would be judged on the basis of individual merit and ability, and that Plaintiffs would receive just compensation for their services rendered to Defendants. These provisions and representations form part of Plaintiffs' express employment contract with Defendants.

34. From and after the date of the contract mentioned above and until September 2002, Defendants remained an employer of Plaintiffs, serving as officers, supervisors and managers for Plaintiffs and engaging on behalf of Plaintiffs in the business of providing small package information, transportation and delivery service throughout the United States, with connecting international service.

35. The contents of the contract stipulate that the "Contractor may employ or provide person(s) to assist Contractor in performing the obligations specified by this Agreement."

36. Defendants' retention of the right to supervise and inspect the work of the Plaintiffs as it progressed was nothing more than a general supervisory power to ensure that the work was properly completed according to the project's plans and specifications. At all times throughout the course of the work, Plaintiffs had sole and absolute discretion over how the work was to be done and had the right to do the work by whatever method Plaintiffs chose. At no time

during the course of the work did Defendants have the right to control, or actually attempt to control, the manner in which the work was to be carried out.

37. As independent contractors Plaintiffs should have been in complete control of the manner by which the work was to be accomplished, furnished all the necessary labor and had complete control over their purchased routes as the Plaintiffs saw fit.

38. Plaintiffs were ready at all times to perform all Plaintiffs' obligations under the contract and performed all conditions, covenants, promises, duties, and responsibilities required of them to be performed in accordance and in conformity with their employment contract.

39. Defendants failed to perform on Defendants' part of the contract in that they hired temporary workers to take over routes of the independent contractors.

40. While in Plaintiffs' employ, Defendants conducted business activities on Defendants' own accounting involving hiring temporary worker to handle Plaintiffs' routes, paying the temporary workers less and pocketing the difference. Defendants took further advantage of business opportunities which rightly belonged to Plaintiffs in express violation of Defendants' employment agreement with Plaintiffs and in violation of Defendants' duties to Plaintiffs.

41. Defendants employ a substantial number of independent contractors and circulate a manual that provides certain benefits incident to employment.

42. Defendants' breach of contract for violating the terms of the manual caused Plaintiffs lost earnings, lost promotions and other lost opportunities deemed appropriate during the scope of Plaintiffs' employment.

43. Defendants breached Plaintiffs' contract and wrongfully failed to judge Plaintiffs on the basis of merit and ability and such deliberate actions caused Plaintiffs' working conditions to become intolerable.

44. As a result of the activities mentioned above on the part of the Defendants, Plaintiffs have lost substantial sums representing the profits it would have realized on the business Defendants engaged in and appropriated to Defendants' own account. Plaintiffs are unable to determine such amount without an accounting of the business of Defendants on Defendants' own account and in competition with business of Plaintiffs during Plaintiffs' period of employment with Defendants. Plaintiffs demand such an accounting of Defendants.

WHEREFORE, Plaintiffs requests judgment as follows:

45. This court order an accounting of the business activities and profits obtained by Defendants on Defendants' own account and in competition with the business of Plaintiffs while in the employ of Plaintiff.

46. An award of damages for all profits revealed by such accounting; and

47. Costs expended in this action, attorney's fees, and any and all other relief to which Plaintiffs may appear entitled.

THIRD COUNT

48. Plaintiffs repeat the allegations contained in the First through Second Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

49. Defendants made clear and definite promises to Plaintiffs when they were hired as independent contractors that as such they would be in exclusive control of their routes, vacation times, sick time, lunch breaks, and/or other details of performance.

50. Defendants failed to maintain express and implied promises based on the fact that they treated Plaintiffs as employees as opposed to independent contractors.

51. Defendants maintained control over Plaintiffs' routes, vacation time, sick time, lunch breaks and other details of performance.

52. Defendants' promises were made with the expectation that Plaintiffs would rely on the promises.

53. Plaintiffs did in fact rely on the Defendants' promises.

54. Plaintiffs incurred a detriment of definite and substantial nature in reliance on those promises.

WHEREFORE, in consideration of the above, Plaintiffs requests judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

FOURTH COUNT

55. Plaintiffs repeat the allegations contained in the First through Third Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

56. Defendants used false performance evaluations to justify their failure in promoting Plaintiffs.

57. Where Defendants attempted to appraise Plaintiffs' performance they were under a duty of care to exercise some degree of care and skill in carrying out the appraisals.

58. Defendants falsely accused Plaintiffs of theft without investigating the alleged theft by intentionally opening boxes and taking out goods, taking pictures of the open boxes to submit as evidence of the incompetence of Plaintiffs.

59. Defendants allegedly received complaints from customers and falsely blames Plaintiffs for misconduct to placate the customer.

60. Defendants' statements are susceptible of defamatory meaning in that statements made tended to harm the reputation of the Plaintiffs as to lower them in the estimation of the community or to deter third persons from associating or dealing with them. Additionally, Defendants' statements tended to injure reputation, to diminish the esteem, respect, good-will or confidence in which the Plaintiffs are held, or to excite, adverse, derogatory or unpleasant feelings or opinions against them.

61. Defendants' entire statements are defamatory based on its verifiability and its context according to the fair and natural meaning which will be given it by reasonable persons of ordinary intelligence hearing or reading it.

62. Defendants' whole statements are susceptible of one meaning only and that meaning is defamatory making the statements libelous as a matter of law.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

FIFTH COUNT

63. Plaintiffs repeat the allegations contained in the First through Fourth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

64. Defendants created a hostile work environment and that harassment would not have occurred but for the employees' race and/or national origin.

65. Defendants' hostile work environment was severe or pervasive enough to make a reasonable person believe that the conditions of employment were altered and the working environment was hostile or abusive.

66. Defendants knew or should have known of the harassment and failed to take prompt and effective remedial action or was otherwise negligent in allowing the harassing atmosphere to exist.

67. Defendants' failure to take prompt and effective remedial action and allowance of the harassing atmosphere to exist caused Plaintiffs' emotional distress.

68. Defendants created a hostile work environment by giving entrance codes into the business office to only white employees, by altering their routes to white employees, by damaging their trucks while the truck were under the surveillance of 400 security cameras and a security officer, by inaccurately scanning the number of deliveries made, by opening boxes and taking merchandise out of the boxes so that the independent contractors seemed untrustworthy and incompetent, by showing favoritism to white employees, by ignoring Plaintiffs' concerns regarding their unfair treatment and by violating their own policies and procedures as set forth in the contractor's operating manual.

WHEREFORE, in consideration of the above, Plaintiffs requests judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

SIXTH COUNT

69. Plaintiffs repeat the allegations contained in the First through Fifth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

70. Defendants negligently hired the managers and supervisors of FedEx.

71. Defendants are liable because their negligence in hiring and/or retaining employers exposes members of the public to dangerous or unfit company and its employers.

72. Defendants intended the acts of tampering with the Plaintiffs' delivery trucks by taking necessary parts off the engines, by opening packages and taking goods from those packages in an attempt to accuse Plaintiffs of stealing, by failing to accurately inspect the Plaintiffs' work, by incorrectly loading hazardous materials onto the delivery trucks, placing Plaintiffs and their customers' safety at risk and by failing to address Plaintiffs' concerns regarding these acts.

73. Defendants knew or had reason to know of the particular unfitness, incompetence, or dangerous attributes of their employers and could have reasonably foreseen that such qualities created a risk of harm to other persons.

74. The Defendants' acts were reckless and failed to exercise reasonable care.

75. The Defendants' acts were contrary to the non-delegable duty of the employer to protect Plaintiffs and members of the public or adjoining landowners from inherently dangerous activities.

76. The Defendants' conduct purportedly on behalf of the employer was clothed with the appearance of authority and there was a reasonable reliance upon the apparent authority and the Defendants helped complete the wrong.

77. Defendants retained control of the manner and means of the doing of the work which is contrary to the contract.

78. Defendants' conduct is especially egregious and the Defendants actually participated in the conduct or demonstrated willful indifference.

79. Through the negligence of the Defendants in hiring their employees, the latter's incompetence; unfitness or dangerous characteristics proximately caused Plaintiffs' injuries.

80. Defendant DiMaio, at all times mentioned was a racist person and known to be so by Defendants who, regardless of that knowledge, hired Defendant DiMaio.

81. At all times mentioned, Plaintiffs were independent contractors of Defendant DiMaio.

82. Approximately on April 2002, Plaintiffs attempted to transact business with Defendant DiMaio when Defendant DiMaio, inflicted injuries on Plaintiffs by refusing to discuss important and relevant issues related to the business and by Defendant DiMaio's favoritism towards white employees and by failing to follow the rules and regulations set forth in the operating manual.

83. Defendant DiMaio's unfair management practices placed Plaintiffs at a disadvantage in that Plaintiffs were not allowed to purchase additional trucks to expand their routes and volume of deliveries causing Plaintiffs to suffer financially and emotionally.

84. Plaintiffs' injuries and damages were a direct and proximate result of the negligence of Defendant DiMaio in the following particulars, without which negligence the injuries would not have occurred.

85. In hiring Defendant DiMaio when Defendant knew or should have known that Defendant DiMaio was a racist person based on his previous employment with UPS. In fact, Defendant DiMaio was terminated from UPS because of his racist views and practices.

86. Defendants should not have permitted Defendant DiMaio to transact business with others or work alongside others, when Defendants knew or should have known that the likely result would be injury to Plaintiffs.

87. In continuing Defendant DiMaio in its employ after having notice of Defendant DiMaio as being racist.

88. Defendants' failure to perform an adequate background check of Defendant DiMaio exposed Defendants to negligent hiring and/or negligent retention.

WHEREFORE, in consideration of the above, Plaintiffs requests judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and farther relief as the court may deem proper.

SEVENTH COUNT

89. Plaintiffs repeat the allegations contained in the First through Sixth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein.

90. Plaintiffs entered into Defendants' employ under the agreement, and performed all the terms and conditions of the agreement on Plaintiffs' part to be performed. Plaintiffs have ever since been, and still are, ready and willing to continue in such service.

91. Defendants negligently supervised the supervisors in that Defendants allowed supervisors to abuse their contractual agreements and professional relationship with the Plaintiffs in a manner that caused injury to the Plaintiffs.

92. Defendants' failure to remain independent of the Plaintiffs' right to perform the details of their performance is a refusal to permit Plaintiffs to continue work as agreed, although Plaintiffs have offered to continue in the employ of the Defendants and perform the agreement on Plaintiffs' part.

93. Defendants negligently loaded hazardous materials inappropriately onto the trucks with an expectation that Plaintiffs would incur the risk of delivery and that the customers would incur the risk of accepting the hazardous materials as delivered.

94. Plaintiffs informed Defendants of the dangerous condition of the trucks housing the unacceptably hazardous materials and requested that Defendants package these materials as required by federal and state safety regulations but Defendants assured Plaintiffs of the safety of Plaintiffs' trucks and directed Plaintiffs to continue working and delivering these materials to customers.

95. It was Defendants' duty to provide Plaintiff a safe and secure place in which to work. Defendants, disregarding such duty, negligently and carelessly permitted the workplace to become hazardous, as mentioned above. Defendants also negligently and carelessly permitted and required Plaintiffs to work in such hazardous environment.

WHEREFORE, Plaintiffs' request judgment against Defendants for damages, together with attorney's fees, costs of suit, and such other and further relief, as the court deems proper.

EIGHTH COUNT

96. Plaintiffs repeat the allegations contained in the First through Seventh Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

97. Since 1992 Plaintiffs refused to participate in the unfair, discriminatory practices of Defendants, which Plaintiffs reasonably believed was in violation of law, or a rule or regulation promulgated pursuant to law or fraudulent or criminal or incompatible with a clear mandate of public policy concerning public health, safety, or welfare, in that Defendants incorrectly and inappropriately loaded hazardous materials on trucks for delivery to customers.

98. Defendants retaliated against or penalized Plaintiffs for seeking information about their deliveries and scanning procedures resulting in sabotage of their trucks, placing opened packages on trucks with missing items for delivery to customers, incorrect scanning of actual packages delivered to customers, falsifying delivery/pick-up records, maintenance and

attendance records, altered Plaintiffs' routes to other independent contractors without conferring or acquiescence of Plaintiffs, refused Plaintiffs the right to sell routes as agreed by the contract yet white employees were not refused the right to sell and by refusing to address these concerns with Plaintiffs.

99. Defendants intimidated, harassed or otherwise discouraged Plaintiffs, from requesting necessary information regarding the incorrectness of the scanning logs, damages incurred to trucks while in the security gate and under the supervision of security.

100. Plaintiffs objected, disclosed or threatened to disclose Defendants' involvement with kickbacks, sabotage, discriminatory practices, breach of contract, breach of fiduciary duties, intentional infliction of emotional distress, defamation of character, hostile work environment, negligent supervision, CEPA violations, unfair business practices, age discrimination, Civil Rights Act of 1964 violations, Title VII violations, disparate treatment, disparate impact, EEOC violations, negligent misrepresentation, fraud, good faith and fair dealings misrepresentation, tortious interference, and invasion of privacy violations.

101. Plaintiffs believed these acts to be unlawful, fraudulent, criminal, or against a clear mandate of public policy.

WHEREFORE, Plaintiffs' requests:

102. Reinstatement of Plaintiffs to the same position held before Defendants' retaliatory action against Plaintiffs, or to an equivalent position;

103. Reinstatement of full fringe benefits and seniority rights to Plaintiffs;

104. Compensation to Plaintiffs for lost wages, benefits and other remunerations;

105. Punitive damages deemed appropriate by the Court;

106. Assessment against Defendants for reasonable costs and attorney's, fees of this action; and

107. Such further relief as the court deems proper.

NINTH COUNT

108. Plaintiffs repeat the allegations contained in the First through Eighth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

109. Defendants succeeded at, attempted to, or conspired to restrain Plaintiffs' trade or commerce, such as through price fixing, refusing to deal and tying agreements.

110. Defendants succeeded at, attempted to, or conspired to substantially lessen competition between Plaintiffs and other independent contractors through acquisition and altering of routes which negatively impacted Plaintiffs' income.

111. Defendants made material representations, or omissions in the face of an obligation to disclose, of a presently existing or past fact.

112. Defendants knew or should have known of its falsity and intended that Plaintiffs rely upon the material representations or omissions.

113. Defendants knew or had reason to know that Plaintiffs, as an identifiable class of persons, would likely suffer economic harm as a result of Defendants' conduct.

114. Defendants are liable to Plaintiffs for rescission of a fraudulent contract upon the return of any consideration received.

115. Plaintiffs seek to enjoin Defendants from such conduct and require them to pay the costs and reasonable attorney's fees.

116. Defendants are liable for Plaintiffs' economic damages and injuries in their business as a proximate result of such conduct.

117. Defendants are liable to Plaintiffs for treble the damage-sustained costs, and reasonable attorney's fees.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

TENTH COUNT

118. Plaintiffs repeat the allegations contained in the First through Ninth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth.

119. Defendants fail to post positions so that all employees receive equal opportunity to apply for qualified positions.

120. Defendants promote white employees without giving qualified minority employees an opportunity to apply.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

ELEVENTH COUNT

121. Plaintiffs repeat the allegations contained in the First through Tenth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

122. Plaintiffs are black independent contractors.

123. This action is brought pursuant to §10:5-12, which prohibits unlawful employment practice or unlawful discrimination against employees based on age in compensation or in terms, conditions or privileges of employment.

124. At all relevant times, in accordance with §10:5-12 Defendants regularly employed five or more persons, bringing Defendants within, the provisions of §10:5-12 prohibiting Defendant from discriminating against Plaintiffs on the basis of age.

125. Defendants discriminated against Plaintiffs because of Plaintiffs' age in that Plaintiffs were denied employment advancement.

126. Plaintiffs believe and allege that Plaintiffs' age was a substantial and a determining factor in Defendants' failure to promote Plaintiffs to supervisory and managerial positions.

127. Defendants' conduct as alleged in this Complaint constitutes an unlawful employment practice in violation of §10:5-12.

128. As a direct, foreseeable, and proximate result of Defendants' discriminatory acts, Plaintiffs has suffered and continues to suffer substantial losses in earnings and job benefits, and has suffered and continues to suffer humiliation, embarrassment, mental and emotional distress, and discomfort, as to Plaintiffs' damages.

129. Defendants committed the acts described in this Complaint oppressively, willfully, and maliciously, entitling Plaintiff to an award of punitive damages against Defendants.

WHEREFORE, Plaintiffs request judgment against Defendants as follows:

130. For compensatory damages including total wages and benefits, and emotional distress damages;

131. For punitive damages;

132. For attorney fees and costs of suit;

133. For prejudgment interest on all amount claimed; and

134. For such other and further relief as the court deems proper.

TWELFTH COUNT

135. Plaintiffs repeat the allegations contained in the First through Eleventh Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

136. Defendants have discriminated against Plaintiffs because of their race, color, gender, age and national origin with respect to the terms and conditions of their employment by refusing to promote Plaintiffs, by refusing to post open positions so that all eligible employees can apply, and by refusing to grant Plaintiffs a meaningful remedy for violations of their rights and have thereby intentionally engaged in unlawful practices prohibited by 42 U.S.C. §2000-2(a).

137. Plaintiffs are entitled to such affirmative action and other equitable relief as this court deems appropriate under 42 U.S.C. §2000-5(g).

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

THIRTEENTH COUNT

138. Plaintiffs repeat the allegations contained in the First through Twelfth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

139. Plaintiffs are members of a protected class by the anti-discrimination law.

140. Plaintiffs were qualified for the positions or rank sought.

141. Plaintiffs were denied promotions; reappointment and others with similar I or lesser qualifications achieved the positions.

WHEREFORE, in consideration of the above, Plaintiffs' Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

FOURTEENTH COUNT

142. Plaintiffs repeat the allegations contained in the First through Thirteenth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

143. Defendants uses the employment practice of transferring routes, inaccurate scanning, failing to offer promotions, sabotaging trucks, racial discrimination, economic deprivation and any other employment opportunities that caused disparate impact based on the Plaintiffs' race, color, religion, sex, or national origin.

144. Defendants' actions limited, segregated and classified Plaintiffs in a way that deprived them of employment opportunities and otherwise adversely affected their status as independent contractors because of Plaintiffs' race, color, religion, sex, or national origin.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

FIFTEENTH COUNT

145. Plaintiffs repeat the allegations contained in the First through Fourteenth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

146. Defendants, in committing the above-described acts, intended to and did inflict severe emotional distress upon Plaintiffs. Defendants acted with a reckless disregard of the probability of causing Plaintiffs' emotional distress.

147. As a direct result of the outrageous acts and omissions, conduct, and discrimination, Plaintiffs suffered severe emotional distress.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

SIXTEENTH COUNT

148. Plaintiffs repeat the allegations contained in the First through Fifteenth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

149. This civil action is brought by the Plaintiffs for a scheme to defraud and to steal in connection with the operation of the Defendants' company. The relief sought includes treble damages; compensatory, treble, and punitive damages under state law, the imposition of a constructive trust with tracing, costs of investigation and suit; interest, and attorney fees.

150. This Court has jurisdiction of this action under the Organized Crime Control Act of 1970, 18 U.S.C. §1964 (a) and (c) (Racketeer Influenced and Corrupt Organizations); 28 U.S.C. §§ 1331 (federal question) 1332 (diversity); 1337 (commerce); and under the principles of supplemental jurisdiction under 28 U.S.C. §1367.

151. Personal jurisdiction and venue in this action are predicated on 18 U.S.C. §1965 and on 28 U.S.C. §1391 (b), since certain Defendants are residents of, are found within, have agents within, or transact their affairs in the State of New Jersey, and certain activities of the Defendants giving rise to this action took place in the State of New Jersey.

152. Without the knowledge or consent of Plaintiffs, Defendants agreed, combined, and conspired among themselves and with others unknown to Plaintiffs to devise, intend to devise, and participate in and did devise, intend to devise and participate in a scheme and

artifice to defraud and to steal, and for obtaining property and to conceal the thefts by false and fraudulent pretenses, representations, false declarations, obstruction of justice and perjury.

153. It was part of the scheme to defraud and to steal that Defendants, through operation and control of Plaintiffs, doing business and independent contractors, and the position of ostensible trust and responsibility they occupied with respect to the affairs of that business which placed them in a unique position to identify individuals known to transfer Plaintiffs' routes to temporary employees for the purpose of paying them less and pocketing the difference.

154. Defendants' would solicit and receive information concerning habits, practices, itineraries, and customs of Plaintiffs for the purpose of using such information to steal routes and the money subsequently earned from those routes.

155. It was further part of the scheme to defraud and to steal that Defendants would utilize maps and other pertinent information to facilitate the theft of Plaintiffs' routes thereby stealing business and economic opportunities from Plaintiffs.

156. It was further a part of the scheme to defraud and to steal that Defendants communicated information gathered by Defendant DiMaio.

157. It was further part of the scheme to defraud and to steal that Defendants would and did make false statements regarding their activities in order to conceal the aforesaid scheme and the activities of the participants therein.

158. It was further a part of the scheme to defraud and to steal that Defendants would consult with other participants in the unlawful scheme to plan concealment of the scheme from law enforcement authorities through the making of false statements, false declarations, obstructions of justice, and perjury.

159. It was further a part of the scheme to defraud and to steal that Defendants would obstruct justice by advising other persons and/or participants in the unlawful scheme to falsely respond to questions regarding thefts perpetrated pursuant to the aforesaid scheme.

160. It was further a part of the scheme to defraud and to steal that Defendants would conceal property obtained pursuant to the scheme.

161. This is a civil action brought by the Plaintiffs under the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, 18 U.S.C. §1961 (c).

162. The Plaintiffs are persons within the meaning of 18 U.S.C. §§1961 (3) and 1962 (c).

163. Each Defendant is a “person” within the meaning of 18 U.S.C. §§ 1961 (3) AND 1962 (c) and (d).

164. Each Defendant conducted or participated, directly or indirectly, in the conduct of the company’s affairs, and conspired so to do, through a pattern of racketeering activity within the meaning of 18 U.S.C. §1961 (5), that is,

- a. Theft from an interstate shipment in violation of 18 U. S.C. §659,
- b. Transportation in interstate shipment in violation of 18 U.S.C. §2314,

165. The Plaintiffs were injured by the Defendants in their business and property in an undetermined amount by reason of violations of 18 U.S.C. §§ 1962(c) and (d) committed by the aforesaid Defendants within the meaning of 18 U.S.C. §1964(c).

166. The activities of the Defendants constitute the statutory tort of interference with property rights.

167. The Plaintiffs have sustained and will continue to sustain substantial damage as a result of the aforesaid statutory tort in an amount that is presently undetermined.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

SEVENTEENTH COUNT

168. Plaintiffs repeat the allegations contained in the First through Sixteenth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein, at length.

EIGHTEENTH COUNT

169. Plaintiffs repeat the allegations contained in the First through Seventeenth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

170. Defendants made material misrepresentations of the fact that Plaintiffs be judged upon the basis of merit and ability, and that Plaintiffs would be given an opportunity to interview and be evaluated for all the positions.

171. Defendants concealed facts from Plaintiffs which Defendants had an affirmative duty to disclose to the effect that Defendants would not provide Plaintiffs with an opportunity to be evaluated on a nondiscriminatory basis for transfer or promotion.

172. Defendants held themselves out as being situated so that Plaintiffs would reasonably rely upon Defendants. Defendants made the material misrepresentations and concealed facts with the knowledge of the falsity of the representations made, with the intent to induce Plaintiffs to rely upon such representations. As a consequence, Plaintiffs reasonably relied upon the fraudulent and material misrepresentations.

173. As a result of Defendants' fraud, deceit, and misrepresentations as set forth above, Plaintiffs have suffered and will suffer damages in excess of the jurisdictional requirements of this court. Plaintiffs request leave to amend this complaint on learning the extent of the damages.

174. Defendants' fraudulent actions towards Plaintiffs were willful and intentional, and were made with the intent to vex, annoy, oppress, and injure Plaintiffs, and therefore Plaintiffs are entitled to punitive damages in the sum deemed appropriate by the court .

WHEREFORE, Plaintiffs request actual damages against Defendants with interest thereon, general and compensatory damages and punitive damages, costs of suit, reasonable attorney's fees, and for such further relief as the court deems just and equitable.

NINETEENTH COUNT

175. Plaintiffs repeat the allegations contained in the First through Eighteenth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

176. The employment agreement has implied in law a covenant of good faith and fair dealing by which Defendants promised to give full cooperation to Plaintiffs in their performance under the employment agreement and to refrain from any act that would prevent or impede Plaintiffs from performing all of the conditions of the agreement.

177. Beginning approximately soon after Plaintiffs' temporary periods were over, Defendants' breached its implied covenant of good faith and fair dealing with regard to Plaintiffs by (a) discriminatorily refusing to judge Plaintiffs on the basis of their ability and merit, (b) refusing and failing to make available to their equal opportunity for promotion and advancement; (c) failing and refusing to reconsider Plaintiffs' merit and ability for promotion or transfer; (d) failing to give any consideration to Plaintiffs' long- term record of employment service; (e) violating company procedures regarding job interviews for openings and transfers, including but not limited to, interviews of qualified candidates who have expressed a desire to be considered; and (f) failing to consider fairly Plaintiff for either supervisory or managerial positions despite Plaintiffs' abundant qualifications and the impending elimination of Plaintiffs' present position

by Defendants, all with the object of denying Plaintiffs the opportunity to advance as independent contractors, forcing Plaintiffs' salary to be reduced.

178. As a proximate cause of Defendants' breach of the covenant of good faith and fair dealing, Plaintiffs have suffered and continue to suffer substantial losses in earnings, retirement benefits, and other employee benefits that they would have received had Defendants not breached the agreement. Plaintiffs request leave to amend this complaint upon learning the extent of the damages.

179. As a further proximate result of the above-mentioned acts, Plaintiffs have suffered humiliation, mental pain and anguish, all to Plaintiffs' damage in a sum yet to be determined.

180. The above-mentioned acts of Defendants were willful, wanton, and malicious, and justify the awarding of punitive damages in a sum deemed appropriate by the Court.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

TWENTIETH COUNT

181. Plaintiffs repeat the allegations, contained in the First through Nineteenth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth.

182. Defendants and as such were authorized to operate delivery trucks and it was Plaintiffs' duty in the performance of Plaintiffs' work to drive the trucks to and from various delivery sites.

183. During all times mentioned, Defendants employed a security guard and paid for the 400 surveillance cameras to protect the delivery trucks after business hours. It was the duty of the employed security guard to ensure that the trucks are not stolen or damaged.

184. It was Defendants' duty to provide Plaintiffs safe, secure, and appropriate delivery trucks with which to work and maintain the safety of such machinery, to properly and suitably provide the machinery preparatory to Plaintiffs' exercise of duties, and to provide Plaintiffs a safe and secure place to perform such duties. Defendants disregarding such duties, negligently and carelessly permitted the trucks to be tampered with allowing the delivery trucks operate with improper and dangerous adjustments, negligently and carelessly failed to fulfill its duty to ensure the delivery trucks' safety and ability to operate safely, and negligently and carelessly permitted and required Plaintiffs to operate the machinery with improper adjustments.

185. Plaintiffs would return to their delivery trucks to find parts missing from the engines and other signs of sabotage that jeopardized their safety as well as the safety of the public.

186. In consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

TWENTY-FIRST COUNT

187. Plaintiffs repeat the allegations contained in the First through Twentieth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

188. Plaintiffs are informed and believe, and based on that information and belief allege, that each of the Defendants are negligently or otherwise legally responsible for the events and happenings referred to in this complaint, and negligently or otherwise unlawfully caused the injuries and damages to plaintiff alleged in this complaint.

189. Plaintiffs are informed and believe, and based on that information and belief allege, that at all times mentioned in this complaint, Defendants were the agents and employees

of their co-defendants, and in doing the things alleged in this complaint were acting within the course and scope of their agency and employment.

190. Plaintiffs were independent contractors of Defendants' company.

191. Plaintiffs are licensed CDL delivery drivers.

192. Defendants knew or should have known of the relationship between Plaintiffs' and Defendants' intentional conspiracy with each other to restrain competition and deprive Plaintiffs of their employment privileges to benefit competing members of the conspiracy by transferring routes purchased by Plaintiffs to other employees, by failing to allow Plaintiffs an opportunity to purchase additional delivery trucks to handle the volume of additional deliveries, by intentionally failing to scan the deliveries accurately, by opening packages and taking merchandise from those packages and re-taping the packages so that they would be delivered to customers that caused customers to complain, by sabotaging the delivery trucks to prevent Plaintiffs from performing their duties as prescribed by the contract and by denigrating Plaintiffs' professional qualifications and performance.

193. As a direct and proximate result of defendants' actions, Plaintiffs have lost economic opportunities, suffered embarrassment and substantial harm to their physical safety.

194. Defendants' interference with the employment contractual relationship with the company has resulted in damage to Plaintiffs.

WHEREFORE, Plaintiffs demands judgment against Defendants for compensatory damages, punitive damages, attorney's fees and costs of suits; and any other and further relief that the court considers proper.

TWENTY-SECOND COUNT

195. Plaintiffs repeat the allegations contained in the First through Twenty-First Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

196. Defendants exposed Plaintiffs' payroll checks prior to delivery to Plaintiffs by failing to put the checks in a secured envelope in an attempt to discover and display the net income of Plaintiffs. Defendants failed to have a legitimate interest in this material disclosure.

197. Defendants used private payroll information to retaliate against Plaintiffs by implementing measures to prevent Plaintiffs from rising above a certain income level.

198. Defendants caused damage to trucks while under the surveillance of 400 video cameras and security, opened boxes in an attempt to hide the boxes on the trucks of unsuspecting drivers to create the illusion of theft and incompetence on the part of Plaintiffs that causing customers to subsequently complain and Plaintiffs' alleged incompetence and untrustworthiness.

199. In consideration of the above, Plaintiffs request judgment against Defendants for damages, together with attorney's fees, and costs of suit, and any other further relief as the court may deem proper.

TWENTY-THIRD COUNT

200. Plaintiffs repeat the allegations contained in the First through Twenty-Second Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

201. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1343 and 42 U.S.C. §2000e-5, this being a suit in equity authorized and instituted pursuant to Title VII of the

Civil Rights Act of 1964, 42 U.S.C. §2000 et seq., providing for injunctive and other relief against racial discrimination in employment.

202. Plaintiffs bring this action on their own behalf of themselves and others similarly situated pursuant to Rule 23 (a) and (b) of the Federal Rules of Civil Procedure. There are common questions of law and fact affecting the rights of others seeking equal employment opportunities without discrimination on the basis of race and color who are so numerous as to make it impracticable to bring them all individually before the Court; the claims and defenses of the Plaintiffs are typical of the claims and defenses of the class; and the Plaintiffs will fairly and adequately protect the interests of the class. The Defendants have adopted rules and policies and have refused to eliminate same, which have deprived and will continue to deprive the Plaintiffs and others of their class of rights to equal employment opportunities without regard to their race or color as secured to them by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq.

203. This is a proceeding for a permanent injunction to restrain the Defendants from maintaining any policy, practice, custom or usage of withholding, denying, attempting to withhold or deny, and depriving or attempting to deprive or otherwise interfering with or limiting the rights of Plaintiffs and other of their class to equal employment opportunities at the company of Defendants without discrimination on the ground of race or color.

204. Plaintiffs are Black citizens of the United States and New Jersey. Plaintiffs are and have been employed at the company for years.

205. Defendant Fed Ex's is authorized to do business in New Jersey, with power to sue and be sued in its corporate name. Defendant Fed Ex operates a delivery service in New Jersey, delivering packages to customers. Defendant Fed Ex employs independent contractors which affects interstate commerce and employees more than 100 employees.

206. Fed Ex has followed and presently follows a practice and policy of limiting and classifying the independent contractors on the basis of race or color.

207. Defendants have limited the employment opportunities of Plaintiffs and other Black employees, and discriminated against Plaintiffs and other Black employees in the compensation, terms, conditions and privileges of employment because of their race and color.

208. Defendants' discrimination against Plaintiffs and others of their class with respect to terms, conditions and privileges of employment and classification of Plaintiffs and others of their class in employment were intended to deny and have had the effect of denying the Plaintiffs and others of their class equal employment opportunities and to otherwise adversely affect their status as independent contractors solely because of their race and color in violation of their rights secured to them by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq.

209. Plaintiffs have no plain, adequate or complete remedy at law to redress the wrongs alleged herein and this suit for a permanent injunction is their only means of securing adequate relief. Plaintiffs and the class they represent are now suffering and will continue to suffer irreparable injury from Defendants' policy, practice, custom and usage as set forth herein unless and until enjoined by this Court.

WHEREFORE, Plaintiffs respectfully pray this Court advance this cause on the docket, order a speedy hearing at the earliest practicable date, cause this case to be in every way expedited, and upon such hearing to:

210. Grant Plaintiffs and the class they represent a permanent injunction enjoining Defendants, their agents, successors, employees, independent contractors, attorney's and those acting in concert and participation with them and at their direction from continuing or maintaining any policy, practice, custom, or usage of denying, abridging, withholding,

conditioning, limiting or otherwise interfering with the rights of the Plaintiffs and others of the class to equal employment opportunities including equal rights to employment, equal terms, conditions and privileges of employment as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000 et seq.

211. Allow Plaintiffs their costs herein, including reasonable attorney fees and such other additional relief as may appear to the Court to be equitable and just.

TWENTY-FOURTH COUNT

212. Plaintiffs repeat the allegations contained in the First through Twenty Third Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

213. Defendants reduced Plaintiffs' core zone rates while allowing the same rates to stay the same for white employees.

214. As of December 30, 2002, Plaintiff Ngei was terminated by Defendants in violation of pervasive company policy.

215. Plaintiffs reasonably expected that the policy would be enforced uniformly and fairly.

216. Defendants terminated Plaintiff because he disclosed Defendants' unlawful business practices, provided information to corporate headquarters for the investigation of Defendants' and because he objected to Defendants' activities that were reasonably believed to be unlawful, fraudulent, criminal, or against a clear mandate of public policy.

WHEREFORE, Plaintiffs request judgment as follows:

217. This court order reinstatement of Plaintiff Ngei's employment;

218. An award of compensatory damages and attorney's fees; and

219. Lost wages and;

220. Punitive damages in the event of actual participation by upper management or willful indifference and any and all other relief to which Plaintiffs may appear entitled.

TWENTY-FIFTH COUNT

221. Plaintiffs repeat the allegations contained in the First through Twenty-Fourth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

222. Plaintiff Capers continues to experience sabotage by Defendants in that his work truck's oil plate was tampered, his tire were flattened and opened boxes continue to be placed on his truck since the original complaint was filed.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

TWENTY-SIXTH COUNT

223. Plaintiffs repeat the allegations contained in the First through Twenty-Fifth Counts of the Complaint and incorporate and re-allege them herein as if fully set forth herein at length.

224. Defendants continue to harass Plaintiff Waiguchu.

225. Defendants' conduct towards Plaintiffs is extreme and outrageous.

WHEREFORE, in consideration of the above, Plaintiffs request judgment against Defendants for punitive and compensatory damages, together with costs of suit, attorney's fees, and any other and further relief as the court may deem proper.

DESIGNATION OF TRIAL COUNSEL

Pursuant to Rule 4:25-4, Dan S. Smith, is designated as trial counsel for the Plaintiff, Jesse Capers et al., in the above matter.

CERTIFICATION OF NO OTHER ACTIONS

It is stated that the matter in controversy is not the subject of any other action pending in any other court or of a pending arbitration proceeding to the best of our knowledge or belief. Also, to the best of our belief, no other action or arbitration proceeding is contemplated. Further, other than the parties set forth in this pleading, we know of no other parties that should be joined in the above action. In addition, we recognize the continuing obligation of each party to file and serve on all parties and the Court an amended certification if there is a change in the facts stated in this original certification.

JURY DEMAND

The Plaintiffs demand trial by a jury on all of the triable issues of this complaint.

DEMAND FOR DISCOVERY OF INSURANCE COVERAGE

Demand is made that defendant disclose to Plaintiffs' attorney whether or not there are any insurance agreements or policies under which any person or firm carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in this action or indemnify or reimburse for payments made to satisfy the judgment and provide the Plaintiffs' attorney with true copies of those insurance agreements or policies, including, but not limited to, any and all declaration sheets. This demand shall include and cover not only primary coverage, but also any and all excess, catastrophe and umbrella policies.

Dated: March 2, 2007

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Susan E. Ellingstad, hereby certify that on March 2, 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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Dated: March 2, 2007

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