

**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>John Humphreys, et al. v. FedEx Ground</i>)	
<i>Package System, Inc.</i>)	
Civil No. 3:05-cv-00540-RLM-CAN (TX))	
-----)	

FOURTH AMENDED CLASS ACTION COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Plaintiffs JOHN HUMPHREYS, DAVID MEREDITH, JEFFREY QUEBE, TIM MERSHON and CHARLES CAMPBELL (“Plaintiffs”), individually and on behalf of all others similarly situated, and file this their Third Amended Complaint and Jury Demand against Defendant FEDEX GROUND PACKAGE SYSTEM, INC. and its division FEDEX HOME DELIVERY, INC. and in support thereof would respectfully show the Court as follows:

PARTIES

1. Plaintiff JOHN HUMPHREYS is a resident of Travis County, Texas and was, at all relevant times complained of, employed by Defendant in Travis County, Texas.
2. Plaintiff DAVID MEREDITH, is a resident of Hays County, Texas and was at all relevant times complained of, employed by Defendant in Travis County, Texas.
3. Plaintiff JEFFREY QUEBE, is a resident of Travis County, Texas and was at all relevant times complained of, employed by Defendant in Travis County, Texas.

4. Plaintiff TIM MERSHON, is a resident of Hays County, Texas and was at all relevant times complained of, employed by Defendant in Travis County, Texas.

5. Plaintiff CHARLES CAMPBELL, is a resident of Grayson County, Texas and was at all relevant times complained of, employed by Defendant in Grayson County, Texas.

6. At all relevant times herein, and within four years of the filing of this Third Amended Complaint and Jury Demand, Plaintiffs were local package delivery drivers employed by Defendant in the State of Texas.

7. Defendant FedEx Ground Package System, Inc. (hereinafter “Defendant” or “FEG”) is a Delaware corporation, affiliated with the Federal Express Corporation.

8. Defendant is qualified to, and does, transact business in the State of Texas.

9. Defendant employs, and has employed in the State of Texas within the past four years, on a full time basis, numerous local package delivery drivers, including the Plaintiffs and members of the proposed Class.

10. Defendant employs local package delivery drivers, all of whom, at FEG’s direction and control, perform package delivery to local businesses and residences.

11. Defendant classifies FEG package delivery drivers, including Plaintiffs and members of the Class, as “independent contractors,” requiring them to work pursuant to a sham independent contractor arrangement.

JURISDICTION AND VENUE

12. This is an action alleging violations of the Motor Carrier Act and asserting causes of action for unjust enrichment, deceptive trade practices, negligent misrepresentation, fraud and promissory estoppel. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1332(a) as Plaintiffs are all domiciled in Texas while Defendant is located in states other than Texas.

13. Proper venue lies with this Court as the unlawful actions complained of took place within this district and throughout the State of Texas.

CLASS ACTION ALLEGATIONS

14. Plaintiffs bring this action pursuant to Fed. R. Civ. P. 23 on behalf of themselves and a Class consisting of all persons who were employed by Defendant in the State of Texas as “independent contractor” local package delivery drivers for FEG for any portion of time during the four year period immediately preceding the filing of this Complaint, as well as those local package delivery drivers employed by Defendant in the State of Texas who continue to be employed as such from the date of the filing of this Complaint. (the “Class”)

15. Plaintiffs and the Class were subject to Defendant’s direction and control over the manner and means in which their work was performed.

16. Plaintiffs and the Class were the denied the accoutrements of their employment, including but not limited to:

- a. Wages;
- b. Overtime pay;
- c. Holiday pay;
- d. Waiting time pay;
- e. Worker’s compensation;

- f. Unemployment insurance;
- g. Income tax withholding;
- h. Meal, break and rest periods; and
- i. FICA contributions.

17. The Class is so numerous that it is impracticable to join all members of the Class before the Court. The exact number of Class members is unknown to Plaintiffs, but is believed to consist of more than 400 members, past and present, part-time and full-time, local package delivery drivers within the State of Texas.

18. There are questions of law and fact common to the Class, and the claims of the Plaintiffs are typical of the claims of the members of the Class.

19. Plaintiffs will fairly and adequately protect the interests of the Class and there are no apparent conflicts between the Plaintiffs and the Class.

20. Plaintiffs have retained competent counsel who have significant experience in prosecuting class action litigation and who will vigorously pursue the claims of the Class throughout the course of this litigation.

21. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent adjudications with respect to individual members of the Class and incompatible standards of conduct for the Defendant.

22. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members of the Class.

23. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

24. Plaintiffs anticipate no difficulty in the management of this litigation. Defendant's records will permit identification of and notice to the members of the Class.

STATEMENT OF RELEVANT FACTS

25. Defendant employs thousands of drivers to pick up and deliver packages for its customers throughout the United States. As a condition of employment, each FEG driver is required to sign a lengthy form contract entitled the "Pickup And Delivery Contractor Operating Agreement" that mischaracterizes each driver as an "independent contractor." These operating agreements were designed to conceal the true nature of the relationship between FEG and its drivers: that of employer and employee.

26. 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 rule, whether disclosed or undisclosed, known or unknown, they are subject to various types of punishment, some financial and some disciplinary, up to and including contract termination and/or non-renewal. Defendant documents such so-called violations of such rules on forms referred to

as “Business Discussion Notes” and retain these documents in secret driver files called “DOT” files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

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

28. 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.

29. 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.

30. 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.

31. For the past four years, in whole or in part, Plaintiffs and the Class have been employed by Defendant in the State of Texas as local package delivery drivers. In fact, recent judicial and administrative decisions issued by the Superior Court of California, the Montana Department of Labor and Industry and the National Labor Relations Board have found that

individuals similarly situated to Plaintiffs and the Class in the states of California, New Jersey and Montana are employees, notwithstanding Defendant's classification of those individuals as "independent contractors." Consequently, Defendant should be estopped from denying that Plaintiffs and the Class are anything other than employees.

32. Plaintiffs and the Class' job duties were performed at the complete direction, control and supervision of Defendant.

33. Plaintiffs and the Class delivered packages exclusively to Defendant's customers.

34. Plaintiffs and the Class were required to work in excess of sixty (60) and/or seventy (70) hours per week.

35. Plaintiffs and the Class were and are essential to Defendant's business and integral to Defendant's operations.

36. Plaintiffs and the Class were and are economically dependent upon Defendant for their livelihood, and bore few risks of loss or opportunity for gain.

37. Neither Plaintiffs nor the Class have any delivery business independent from that of the Defendant.

38. Neither Plaintiffs nor the Class exercised any business management with regard to their employment with Defendant;

39. Neither Plaintiffs nor the Class have or had any input into the prices charged for the delivery services.

40. As a condition of their employment, Plaintiffs and the Class were and continue to be controlled by Defendant. For example, but without limitation, Plaintiffs and the Class were and are:

- a. Required to perform unpaid work outside their job classification;

- b. Prohibited from working for other delivery companies while working for Defendant;
- c. Required to purchase, wear and maintain Defendant's signage, logos and uniforms;
- d. Required to purchase and maintain a vehicle selected by Defendant, built to Defendant's specifications and identified by Defendant's logo and signage;
- e. Required to insure the vehicles at Defendant's direction and control;
- f. Assigned to and required to work a minimum number of hours per shift, often exceeding twelve (12) and even fourteen (14) hours per day;
- g. Prohibited from leaving the work premises without management approval;
- h. Required to identify themselves and their vehicles as part of the Defendant's operations, with FedEx logos and signage;
- i. Required to clock in and out and file daily reports with Defendant;
- j. Prohibited from hiring helpers without Defendant's approval;
- k. Prohibited from refusing to deliver packages;
- l. Required to purchase from Defendant its "business support" package including maps, signs, training, modems and scanners;
- m. Told how to conduct themselves and subjected to discipline in the event they fail to comply with such requirements;
- n. Prohibited from choosing when and how much they wish to work; and
- o. Prohibited from exercising any control over the customer service areas, the number of packages allotted to each driver and the number of stops allotted to them.

41. Defendant required Plaintiffs and the Class to purchase and adorn themselves and their vehicles with FedEx logos.

42. Defendant maintained rules concerning the make and model of trucks which Defendant required Plaintiffs and the Class to purchase.

43. Defendant maintained and maintains control over who is allowed to ride or drive Plaintiffs' and the Class' vehicles, as well as where those vehicles may be parked and how and when they may be accessed.

44. Plaintiffs and the Class' vehicles, as selected and controlled by Defendant, cannot practicably be used for any purpose other than the delivery of Defendant's packages.

45. Neither Plaintiffs nor the Class are permitted to reject deliveries or route schedules. Nor are they permitted to restrict the volume of packages they are willing to deliver.

46. Defendant completely controls the rights to service areas, and Plaintiffs and the Class have no proprietary rights with regard to same.

47. Defendant paid Plaintiffs and the Class a below market value "van availability" fee which was not negotiable by Plaintiffs or the Class.

48. Plaintiffs and the Class were subject to discipline by, among other methods, termination without notice and "fines" in the form of reduced "bonuses" for failure to follow employment rules enacted by Defendant.

49. The position of local package delivery driver did not require any special skills.

50. At no time during the past four years were Plaintiffs or the Class paid hourly wages by Defendant.

51. Plaintiffs and the Class' compensation was non-negotiable and under the complete control of Defendant.

52. Plaintiffs and the Class regularly under-reported the hours they worked at the instruction of Defendant.

53. At no time during the past four years were Plaintiffs or the Class compensated for waiting time in their respective terminals.

54. At no time during the past four years were Plaintiffs or the Class paid overtime wages for work in excess of eight hours per day, or forty hours per week.

55. At no time during the past four years were Plaintiffs or the Class provided with meal, break and/or rest periods.

56. At no time during the past four years were Plaintiffs or the Class provided Unemployment Compensation or Workers' Compensation Insurance.

57. The damages sought by the Plaintiffs and the Class exceed \$75,000.00 and are otherwise in excess of the minimum jurisdiction of this Court.

58. All foregoing facts are incorporated in the causes of action set forth below. Such causes of action are pled alternatively in the event one or more conflict. All conditions precedent for the institution of this suit have been satisfied.

CAUSES OF ACTION ON BEHALF OF CLASS

FIRST CAUSE OF ACTION DAMAGES CAUSED BY VIOLATIONS OF MOTOR CARRIER ACT

59. Pursuant to 49 U.S.C. § 14704(a)(2), an interstate motor carrier, broker and/or freight forwarder providing transportation or services subject to the Federal Motor Carrier Act is liable for damages sustained by a person as a result of an act or omission by that interstate motor carrier, broker and/or freight forwarder in violation of such Federal Rules and Regulations.

60. 49 C.F.R. § 395.3 regulates the maximum hours of service that Plaintiffs and the Class were and are permitted to work and drive. Defendant routinely and continually forced Plaintiffs and the Class to work and drive in excess of the amount of hours permitted under such regulation. In addition, Defendant routinely and continually required Plaintiffs and the Class to falsify their daily driving records to conceal such violations. Defendant also routinely and

continually modified Plaintiffs and the Class' daily driving records unilaterally to conceal such violations. As a result of Defendant's unlawful conduct described herein, Plaintiffs and the Class have been damaged.

61. Plaintiffs and each member of the Class therefore pray for an award of unpaid wages in the amounts to be proven at trial.

**SECOND CAUSE OF ACTION
FRAUD**

62. Plaintiffs hereby incorporate all of the preceding of this Complaint as if fully set forth herein.

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

64. At all material times, Defendant either knew, or should have known, that the material representations 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.

65. 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 to assume responsibility for all of employment related expenses, including but not limited to purchasing or leasing, operating and maintaining expensive trucks, Plaintiffs and the Class suffered damage as a direct and proximate result.

66. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiffs' rights and protections guaranteed by Texas law and other applicable law.

**THIRD CAUSE OF ACTION
RESCISSION OF OPERATING AGREEMENT**

67. Plaintiffs hereby incorporate all of the preceding of this Complaint as if fully set forth herein.

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

69. FEG controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations.

70. Despite this control and the actual status of the drivers as employees, FEG 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.

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

72. The Operating Agreement between FEG 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.

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

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

75. While acting on the direct instruction of FEG and discharging their duties for FEG, 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.

76. By misclassifying Plaintiffs and the Class Members as “independent contractors,” and further by contractually requiring those employees to pay FEG’s own expenses, FEG has been unjustly enriched.

77. As a direct and proximate result of FEG’s conduct, FEG 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.

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

**FOURTH CAUSE OF ACTION
DECLARATORY RELIEF**

79. 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:

81. Whether Defendant have 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

- a. wages;
- b. holiday pay;
- c. workers’ compensation;
- d. unemployment insurance;

- e. contributions to FEG's retirement plan;
- f. income tax withholding; and
- g. meal, break and rest periods.

82. Whether Defendant has unlawfully failed to pay benefits and compensation owing in a timely manner to Plaintiffs and Plaintiff Class Members whose employment with Defendant ended, as required by Texas law.

83. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive in compensation and benefits.

84. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive in interest on unpaid compensation due and owing.

85. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive from Defendant in statutory penalties and interest.

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

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

INDIVIDUAL CAUSES OF ACTION

87. Plaintiffs hereby assert the following individual causes of action:

**FIRST CAUSE OF ACTION
DECEPTIVE TRADE PRACTICES**

88. Defendant's conduct described hereinabove constitutes a violation of § 17.41 et seq., of the Texas Deceptive Trade Practices Act (DTPA). Plaintiffs are consumers, as described in Section 17.50 of the DTPA, who purchased or sought to purchase goods or services. Defendant employed false, misleading and/or deceptive acts or practices as specifically enumerated under the DTPA, including, but not limited to the following, which were relied on by Plaintiffs to their detriment:

- a. Defendant caused confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services; for example, that Plaintiffs would have a proprietary right to a service area and could later sell their "business." TEX. BUS. & COM. CODE ANN. § 17.46(b)(2).
- b. Defendant represented that their goods and services had sponsorship, approval, characteristics, uses or benefits they did not have and the representatives had sponsorship, approval, status, affiliation, and/or connection that they did not have. TEX. BUS. & COM. CODE ANN. § 17.46(b)(5).
- c. Defendant falsely represented that their services are of a particular standard, quality, or grade. TEX. BUS. & COM. CODE ANN. § 17.46(b)(7).
- d. Defendant performed unconscionable acts and/or took an unconscionable course of action against Plaintiffs, which to Plaintiffs' detriment, took advantage of their lack of knowledge, ability, experience or capacity to a grossly unfair degree. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3).

**SECOND CAUSE OF ACTION
PROMISSORY ESTOPPEL**

89. Defendant made promises to Plaintiffs which they knew Plaintiffs would rely upon. Plaintiffs did substantially and detrimentally rely on such promises and were damaged as a result.

PUNITIVE DAMAGES

90. Defendant has acted fraudulently and/or with malice, as defined by the Texas Civil Practice and Remedies Code and the common law, and should be assessed punitive damages.

DAMAGES

91. Plaintiffs seek the recovery of:
- a. all their general, actual, special and consequential damages;
 - b. costs of court;
 - c. attorney's fees as provided by law;
 - d. pre- and post-judgment interest as allowed by law;
 - e. treble damages as permitted under the DTPA; and
 - f. punitive damages as may be determined by the finder of fact.

REQUEST FOR A JURY TRIAL

92. In accordance with Fed. R. Civ. P. 38, Plaintiffs request a trial by jury on all issues.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, individually and on behalf of each member of the Class, respectfully request that judgment be entered on their behalf following trial herein and that Plaintiffs recover such other and further relief to which they may show themselves to be justly entitled to receive.

Dated: December 1, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/ Susan E. Ellingstad

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CERTIFICATE OF SERVICE

I, Susan E. Ellingstad, hereby certify that on December 1, 2006, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which sent notification of such filings to the following:

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

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