

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BECKLEY

LAWRENCE ASBURY

Plaintiff,

v.

CIVIL ACTION 5:06-cv-0736
HONORABLE: _____

FEDEX GROUND PACKAGE
SYSTEM, INC.

Defendant.

#19217

PLAINTIFF'S ORIGINAL CLASS ACTION COMPLAINT

Plaintiff, on behalf of himself and a Class of persons similarly situated, for his Complaint against the Defendant, states and alleges as follows:

PARTIES

1. Plaintiff Lawrence Asbury is a resident of Raleigh County, West Virginia. Plaintiff worked for Defendant corporation, was hired at a West Virginia terminal, and was classified as an independent contractor.

2. Defendant FedEx Ground Package System, Inc. and its division, FedEx Home Delivery, (hereafter collectively referred to as "Defendant" or "FEG") is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania. FEG is a part of the "family" of corporations controlled by Federal Express Corporation. At all relevant times material to this lawsuit, FEG was engaged in providing small package information, transportation, and delivery services in the United States, including in Raleigh County, State of West Virginia. Defendant may be served with the summons and a copy of the complaint by serving Defendant's registered agent, The Corporation Trust Company, at its registered

address, Corporation Trust Center, 1209 Orange Street, Wilmington, Delaware 19801 or by serving any officer or other authorized person.

JURISDICTION AND VENUE

3. This is an action for damages that exceed the jurisdictional minimum of this Court.

4. The events complained of arose in Raleigh County and throughout the State of West Virginia, and both parties reside in, do business in, and have a substantial presence in Raleigh County and in the Southern District of West Virginia.

FACTS COMMON TO ALL CAUSES OF ACTION

5. 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 ("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.

6. FEG knows that Los Angeles County Superior Court has determined that FEG employees working under the alleged independent contractor agreement are, in fact, employees entitled to all of the rights and privileges of employee status. Despite this, FEG continues to deny these rights and privileges to its similarly situated West Virginia employees.

7. FEG employs or employed during the Class period hundreds of pick-up drivers in the State of West Virginia including the Plaintiff.

8. FEG retains the right to control the manner and means by which Plaintiff and Plaintiff Class Members perform or performed their jobs. Drivers work from an FEG terminal,

where they are assigned packages for delivery and locations for pickups each day. FEG employs a variety of managers at their terminals who have supervisory responsibility over the drivers, their daily assignments, and paperwork. Drivers also interact with other FEG personnel on a daily basis.

9. FEG unilaterally sets the compensation to be paid to the drivers. Drivers are paid for the number of stops, deliveries, and pick-ups made, as well as daily compensation for making themselves available for pickup and delivery work in geographic areas determined by FEG.

10. FEG unilaterally sets the prices charged to their customers for the services rendered by Plaintiff and Plaintiff Class Members.

11. Plaintiff and Plaintiff Class Members provide services which are an integral part of FEG's business enterprise and are formally identified as a part of the system. Plaintiff and Plaintiff Class Members did not have and do not have any business independent from that of FEG.

12. As a condition of employment, Plaintiff and Plaintiff Class Members are, or were controlled by FEG in numerous ways, including the following:

- a. required to work a minimum number of hours in a shift, often eight hours or longer;
- b. prohibited from leaving the work premises without management approval;
- c. required to identify themselves and their vehicles as a part of the FEG system, with FedEx logos and signage;
- d. required to purchase, wear, and maintain FedEx uniforms, logos, and signage;
- e. required to purchase and maintain a vehicle selected by FEG, built to FEG's precise specifications, and identified by FEG logo and signage;

- f. required to insure the vehicles at FEG's direction and control;
- g. required to clock in and out and file daily reports with FEG;
- h. required to purchase from FEG their "business support package," including maps, signs, training, modems, and scanners;
- i. required to conduct themselves according to FEG guidelines and were subject to discipline for any failures to comply with those requirements;
- j. prevented from choosing when and how much they wanted to work.

13. The Operating Agreement contains various statements purporting to classify Plaintiff and Plaintiff Class Members as "independent contractors" and yet the Agreement also contains policies, procedures and management discretion that ensure specific control over the manner and means by which Plaintiff and Plaintiff Class Members are expected to achieve FEG's desired results. More specifically, the Operating Agreement also gives FEG the right to:

- a. approve or disapprove any vehicle used to provide service;
- b. approve or disapprove any driver or helper who provides service;
- c. approve or disapprove the purchase or sale of any vehicle;
- d. assign deliveries to each driver;
- e. temporarily or permanently transfer portions of any route to another with or without compensation;
- f. determine when a driver has "too few" or "too many" packages to deliver;
- g. inspect vehicles and drivers for compliance with Company promulgated appearance standards;
- h. terminate the contract whenever the company unilaterally determines that any provision of the contract has been "violated" amounting to the right to terminate at will;
- i. require the use of communication equipment and the wearing of Company uniforms;

- j. take a vehicle out of service;
- k. review and evaluate "customer service" and to set standards of such service;
- l. require driver to perform service at "times" requested by customers and determined by FEG;
- m. withhold pay for certain specified expenses;
- n. require purchase of specified insurance and numerous other purchases by drivers;
- o. require completion of specified paperwork, amid rights reserved to FEG;

14. The Operating Agreement also provides, among other things, that:

- a. Subject to company approval of any vehicle used, drivers must provide and maintain their own vehicle paying for all costs and expenses incidental to its operation, including maintenance, gas, oil, repairs, tax, licenses and tolls. Moreover, drivers must adorn the vehicle with specific colors, logos, and marks, identifying it as part of FEG system at their own expense;
- b. Drivers must maintain liability and worker's compensation insurance (sometimes referred to as "work accident insurance") for the benefit of FEG;
- c. Drivers must use communications equipment, i.e., a scanner, which uses FEG and/or FHD's customized and/or proprietary tracking software and drivers must pay to rent such equipment from the Company;
- d. Drivers must prepare and submit daily reports and such shipping documents Defendant may from time to time designate;
- e. Drivers must wear an approved uniform, and keep their personal appearance and demeanor consistent with standards unilaterally "promulgated from time to time" by FEG;
- f. FEG retains the right to change a driver's work area on a daily basis or permanently, at its discretion, notwithstanding statements in the Agreement regarding an alleged "proprietary interest" in the customers the driver serves;

- g. FEG issues "Settlement Statements" and settlement checks to Drivers on a weekly basis, except when the Agreement is terminated, in which case FEG determines that a final settlement check will be issued 45 days after termination. The Settlement Statement computes the total earnings the Contractor is entitled to receive and itemizes all deductions from the Driver's settlement. Deductions may include, but are not limited to, the expenses FEG has retained the right to pay, such as the cost of vehicle licenses, taxes, and fees as well as any expenses FEG has incurred in connection with their payment;
- h. After one month of service, drivers become eligible to participate in FEG's Customer Service Program, by which a monetary bonus can be earned for every period in which the driver has no customer complaints and no missed pickups and during which the entire terminal's performance meets company assigned standards of service;
- i. FEG retains the right to control the volume of packages to be delivered and/or picked up, the locations of such deliveries and pickups, and the delivery and/or pickup times (referred to as "windows," thus controlling the drivers' work hours;
- j. All performance expectations and goals for drivers are set forth by Terminal managers and discipline is imposed for violations of company policies.

15. The Operating Agreement is and at all times mentioned herein has been a contract of adhesion, drafted exclusively by FEG and/or its legal counsel. Plaintiff and Plaintiff Class Members had no bargaining power, and were not allowed to negotiate the terms of the Operating Agreement, which they are required to sign as a condition of employment. The Operating Agreement is, and at all material times has been, unlawful and unconscionable in form and effect.

16. Although the nature of the work performed by Plaintiff and Plaintiff Class Members makes detailed control by management unnecessary, FEG in fact retains the right to control and exercise intensive control over the work of the drivers, as is necessary to fulfill FEG's commitments to their customers.

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

18. Plaintiff and Plaintiff Class Members have been excluded from the foregoing compensation plans and programs and benefits plans for all or a portion of their employment at FEG due to their misclassification as non-employees.

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

20. FEG has acted, continues to act, refuses to act, and continues to refuse to act on grounds generally applicable to the Plaintiff and the Plaintiff Class Members, making appropriate temporary and permanent injunctive relief with respect to the Plaintiff Class as a whole.

COUNT ONE:
VIOLATIONS OF THE WEST VIRGINIA
CONSUMER CREDIT AND PROTECTION ACT

21. Plaintiff hereby re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs.

22. Defendant, through the actions described above, has violated the West Virginia Consumer Credit and Protection Act, V. Va. Code §§ 46A-6-101, et seq. ("the Act").

23. The Plaintiff and Plaintiff Class Members are "consumers" as defined by the Act.

24. Defendant's marketing and recruitment materials are offered and presented to members of the general public within the State of West Virginia.

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

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

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

28. Specifically, Defendant misled Plaintiff to believe that he was going to be a "partner" with Defendant, that Plaintiff would have an independent business, fully marketable and transferable, that Plaintiff was investing in a business and would have a proprietary interest that would grow, along with his income, that the routes had and would have value, and other representations designed to convince Plaintiff and members of the general public to acquire a truck and service Defendant's customers under the terms of a burdensome and nonnegotiable contract.

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

leaving the means and methods of work to Plaintiff, that other jurisdictions have found that driver-contractors were actually employees, not business owners, that Defendant intended to treat Plaintiff as an employee, not an entrepreneur, and other material facts regarding the transaction.

30. Defendant's actions are unfair and deceptive, and constitute deception, fraud, false pretense, false promise, misrepresentation, omission, or knowing concealment, suppression, or omission of material facts with the intent that the Plaintiff, Plaintiff Class Members, and the general public rely upon such concealment, suppression, or omission of material facts in connection with the sale of routes to Plaintiff and Plaintiff Class Members.

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

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

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

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

COUNT TWO:
FRAUD

35. Plaintiff hereby re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs and further alleges:

36. Plaintiff and the Class he represents were purportedly hired by Defendant to work as "independent contractors" pursuant to the terms of the Operating Agreement 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 Plaintiff and all persons similarly situated were "employees" entitled to the benefits and protections of all laws enacted for employees. Plaintiff is informed, believes, and on that basis alleges, that through the Operating Agreement Defendant intentionally misled Plaintiff and the Class he represents as to their employment status, or made such representations to Plaintiff and the 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 Ground Manual, Operation Management Handbook and Settlement Manual, other policies and secret driver files) that defined the employment relationship between Plaintiff and Defendant, all for the purpose of realizing unjust profits from Plaintiff's work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

37. At all material times, Defendant either knew, or should have known, that the material representations made to Plaintiff and Plaintiff Class members in the Operating Agreement concerning their employment status, and the concealment and/or non-disclosure of material facts to Plaintiff and Plaintiff Class Members concerning their employment status and Plaintiff and the Class's 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.

38. At all material times, Defendant intended to and did induce Plaintiff and the Class to reasonably and justifiably rely to their detriment on the false and fraudulent representations made to them by Defendant in the Operating Agreement concerning their employment status and obligation to assume responsibility for all employment related expenses including, but not limited to, purchasing or leasing, operating, and maintaining expensive trucks and suffered damages as a direct and proximate result.

39. By its aforesaid conduct, Defendant is guilty of oppression, fraud, and malice in violating Plaintiff and the Class's rights and protections guaranteed by West Virginia law and other applicable law, thereby entitling Plaintiff and Plaintiff Class Members to punitive damages.

**COUNT THREE:
UNJUST ENRICHMENT**

40. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges:

41. Defendant has failed to indemnify or reimburse Plaintiff and Plaintiff Class Members for the expenditures they incurred while acting on the direct instruction of FEG and while discharging their duties for FEG, such as, among other things, the purchase of delivery vehicles, the purchase of various policies of insurance, delivery vehicle maintenance and repairs, the purchase and maintenance of logos and uniforms, the purchase of fuel, and the purchase of business support, while at the same time denying Plaintiff and Plaintiff Class Members wages, holiday pay, overtime pay, worker's compensation, unemployment insurance, and contributions to FEG's retirement plans. Plaintiff and Plaintiff Class

Members necessarily incurred these substantial expenses as a direct result of performing their job duties. Under the facts of this case, Plaintiff and Plaintiff Class Members are entitled to recover damages under the equitable doctrine of unjust enrichment on the basis that Defendant was not entitled to the payments and benefits it received from Plaintiff and Plaintiff Class Members as a result of their classification as independent contractors rather than as employees.

42. By its aforesaid conduct, Defendant is guilty of willful, malicious, and intentional conduct in violating Plaintiff and the Class's rights and protections guaranteed by West Virginia law and other applicable law, thereby entitling Plaintiff and Plaintiff Class Members to punitive damages.

COUNT FOUR:
ILLEGAL DEDUCTIONS FROM WAGES
IN VIOLATION OF W. VA. CODE § 21-5-1, ET SEQ.

43. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges:

44. Plaintiff and Plaintiff Class Members are "employees" as defined in W. Va. Code § 21-5-1, *et seq.* and are not free from the control and direction of Defendant.

45. Defendant has unlawfully withheld monies from the compensation earned by Plaintiff and Plaintiff Class Members for business expenses of FEG, including but not limited to vehicle expenses, cargo claims, and insurance claims in violation of W. Va. Code § 21-5-1, *et seq.* and other applicable laws. Plaintiff and Plaintiff Class Members have not expressly and freely given written consent to such deductions, and these deductions are not made in response to a valid wage assignment or deduction order.

46. As a direct and proximate result of Defendant's conduct, Plaintiff and Plaintiff Class Members suffered substantial losses and have been deprived of compensation to which they were entitled, including damages, reasonable attorney's fees, and costs.

COUNT FIVE:
FOR AN ACCOUNTING AGAINST DEFENDANT

47. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges:

48. Plaintiff and Plaintiff Class Members are owed wages which equal the sum of overtime compensation not paid by Defendant to Plaintiff and Plaintiff Class Members, statutory interest on all such compensation and benefits, and waiting time penalties owed to Plaintiff and Plaintiff Class Members whose employment terminated.

49. Plaintiff does not know the precise amount of compensation due to each Plaintiff and Plaintiff Class Member. Upon information and belief, Defendant possesses books and records from which the amount of compensation due and owing to each Plaintiff and Plaintiff Class Member can be determined.

50. The amount of statutory interest and penalties owed to each Plaintiff and Plaintiff Class Member is based on the amount of compensation owed to Plaintiff and Plaintiff Class Members.

COUNT SIX:
RESCISSION OF OPERATING AGREEMENT

51. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges:

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

53. FEG controls virtually every aspect of the Plaintiff's work and earnings, as set forth in the general allegations hereof.

54. Despite this control and the actual status of the drivers as employees, FEG mischaracterizes the Plaintiff and Plaintiff Class Members 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.

55. The Operating Agreement illegally and unfairly favors FEG by mischaracterizing the status of the Plaintiff 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 and other expenses to Plaintiff.

56. The Operating Agreement between FEG and Plaintiff and each member of the Class is void as against public policy and is therefore unenforceable as failing to recognize the employment status of the Plaintiff and the Class Members, and therefore denying them the legally cognizable benefits of employment.

57. 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.

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

59. While acting on the direct instruction of FEG and discharging their duties for FEG, Plaintiff and the Class Members incurred expenses for, inter alia, the purchase or lease, maintenance, operating costs, and adornment of vehicles, insurance, and uniforms.

Plaintiff and Class Members incurred these substantial expenses as a direct result of performing their job duties.

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

61. As a direct and proximate result of FEG's conduct, FEG has received substantial benefits to which it had no entitlement, at Plaintiff and Class Members' expense, including lost profits, self-employment taxes, premiums for insurance to replace worker's compensation and disability benefits, business expenses, compensation of replacement workers, and other expenses.

62. Plaintiff is entitled to compensation for all of his business expenses he was illegally required by FEG to bear, for all of the employment taxes, unemployment compensation and workers' compensation FEG should have but did not pay, and Plaintiff is entitled to the quantum meruit value of his service as an employee.

COUNT SEVEN:
DECLARATORY RELIEF AGAINST DEFENDANT

63. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges:

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

- a. Whether Defendant has unlawfully misclassified Plaintiff and Plaintiff Class Members as independent contractors, and have thus denied Plaintiff and Plaintiff Class Members of the common benefits of employee status, such as:
 - i. wages;
 - ii. overtime pay;

- iii. holiday pay;
 - iv. worker's compensation;
 - v. unemployment insurance;
 - vi. contributions to Defendant's retirement plan;
 - vii. income tax withholding; and
 - viii. meal, break, and rest periods.
- b. Whether Defendant has unlawfully failed to pay benefits and compensation owing in a timely manner to Plaintiff and Plaintiff Class Members whose employment ended with Defendant as required by West Virginia law.
- c. What amounts Plaintiff and Plaintiff Class Members are entitled to receive in compensation and benefits.
- d. What amounts Plaintiff and Plaintiff Class Members are entitled to receive in interest on unpaid compensation due and owing.
- e. What amounts Plaintiff and Plaintiff Class Members are entitled to receive from Defendant in waiting time penalties.

58. Plaintiff 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 Plaintiff and Plaintiff Class Members.

COUNT EIGHT:
REQUEST FOR INJUNCTIVE RELIEF

59. Plaintiff hereby incorporates by reference all preceding paragraphs as if fully set forth herein and further alleges:

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

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

62. Plaintiff has reasonable fear that Defendant, upon receiving notice of this lawsuit, will take such action or inaction resulting in the termination, harassment, demotion, reassignment, or reduction in currently paid compensation or benefits against Plaintiff Class Members, to their detriment, in retaliation for attempting to enforce their rights under West Virginia common and statutory law.

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

CLASS ACTION ALLEGATIONS

64. Plaintiff hereby re-alleges and incorporates by reference each and every allegation set forth in the preceding paragraphs and further alleges:

65. This action is brought by the Plaintiff on behalf of a Class of persons currently and formerly employed by FEG as employees within the definition of "employee" in the common and statutory law, but who, similar to the named Plaintiff, are or were erroneously classified as "contractors" or "independent contractors." Occupations or jobs in which Class Members worked or work include delivery drivers for FEG and its division, FedEx Home Delivery. The Class is specifically defined as follows:

All individuals who worked for Defendant FedEx Ground Package System, Inc. and or its division FedEx Home Delivery in West Virginia from September 14, 2002 until the present (the

Class Period) as package pick-up and delivery drivers, and who were classified as "independent contractors."

Plaintiff believes that the Class as defined above includes hundreds of drivers.

66. Plaintiff is a member of the Class he purports to represent, and has interests typical and/or identical to the other members of the Plaintiff Class.

67. The named Plaintiff is an adequate representative of the Class because he was treated in the same manner as other Class Members by Defendant and he has been damaged by this treatment in the same manner as other Class Members by his exclusion from employee wages, compensation programs, plans and agreement, and employee benefit plans and rights.

68. There are common questions of law and fact applicable to the entire Class including, but not limited to:

- a. Whether the Class Members have been misclassified as independent contractors pursuant to the Defendant's operating agreements;
- b. Whether Defendant has violated their legal obligations under West Virginia wage and hour law;
- c. Whether Defendant unlawfully failed to provide workers compensation insurance benefits and unemployment insurance benefits to the Class Members in violation of West Virginia law;
- d. Whether Defendant intentionally and/or negligently misrepresented to Plaintiff and the Class he seeks to represent their true employment status and thereby induced them to incur substantial expenses in reliance on such representations;
- e. Whether the Plaintiff and Plaintiff Class Members are entitled to injunctive and declaratory relief and an equitable accounting;
- f. Whether Plaintiff and Plaintiff Class Members are entitled to certain additional types of employee compensation and benefits because they are employees of the Defendant as defined by common and statutory law;

- g. Whether Plaintiff and Plaintiff Class Members are entitled to certain additional amounts of employee compensation and benefits above and beyond the types and amounts they already earn;
- h. Whether Defendant has misrepresented to Plaintiff and Plaintiff Class Members their true employment status;
- i. Whether Defendant has unjustly enriched themselves as the expense of the Plaintiff and Plaintiff Class Members;
- j. Whether Defendant has engaged in conduct towards the Plaintiff and Plaintiff Class Members in violation of the West Virginia Consumer Credit and Protection Act; and
- k. Whether Defendant has engaged in conduct against the Plaintiff and Plaintiff Class Members which should be enjoined, whether on a temporary or permanent basis.

69. These and other questions of law and fact are central to this case, and common to all members of the Class and predominate over any question(s) affecting only individual members of the Class.

70. The claims of the named Plaintiff are identical to the claims of other members of the Class. The named Plaintiff shares the same interests as other members of the Class in this action because, like other Class Members, they have each been misclassified and suffered financial loss of thousands of dollars due to Defendant's wrongful misclassification. Given the significance of his losses, he has the incentive, and is committed, to vigorously prosecute this action. Plaintiff has retained competent and experienced counsel who specializes in Class action and employment litigation to represent him and the proposed Class.

71. A Class action is the only realistic method available for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation makes it impracticable for members of the Class to seek redress individually for the wrongful conduct alleged herein. Were each individual member required to bring a separate lawsuit, the

resulting multiplicity of proceedings would cause undue hardship and expense for the litigants and the Court and create the risk of inconsistent rulings, which would be contrary to the interest of justice and equity.

72. Class certification is appropriate pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure because prosecution of separate actions would create a risk of:

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

73. Class certification is appropriate under Rule 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

74. Plaintiff seeks injunctive relief in the form of an order declaring the challenged policy exclusion null and void as contrary to West Virginia law and/or public policy. Plaintiff further seeks injunctive relief to prevent Defendant from retaliating against Plaintiff or Plaintiff Class Members for filing this case, in the form of termination, demotion, reassignment, or reduction in pay or benefits.

75. Class certification of the Plaintiff Class is appropriate under Rule 23(b)(3) because common issues of law and fact relative to Defendant's conduct predominate over individual issues.

76. A Class action is superior to individual litigation because thousands of separate lawsuits would magnify the delay and expense for the parties and the courts. By

contrast, the Class action device presents far fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision in a single court of law.

77. Class certification is appropriate under Rule 23(b)(3) because a Class action is the superior procedural vehicle for the fair and efficient adjudication of these claims, given that:

- a. Common questions of law and fact overwhelmingly predominate over any individual questions that may arise and consequently, there would be enormous economies to the courts and to the parties in litigating the common issues on a Class-wide basis instead of on a repetitive individual basis;
- b. This lawsuit seeks to establish liability on a Class-wide basis; and
- c. No unusual difficulties are likely to be encountered in the management of this Class action in that all questions of law or fact related to liability are common to the Class.

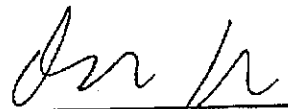
PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the Plaintiff Class Members, requests that judgment be entered against the Defendant for the following:

1. Certification of the proposed Class and appropriate subclasses, if needed;
2. Declaration that the Defendant's acts described in this Complaint constitute violations of West Virginia statutory and common law;
3. An award of benefits due them under the programs, agreements, and plans described above with an appropriate award of interest;
4. An award of damages for their erroneous exclusion from the programs, agreements and plans described above with an appropriate award of interest;
5. Clarification and enforcement of their rights under these programs, agreements, and plans;

6. An award of damages for all out-of-pocket expenses incurred by Plaintiff and Plaintiff Class Members necessary to perform their jobs for Defendant described above with an appropriate award of interest;
7. An order requiring Defendant to rescind the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FEG;
8. Compensatory damages;
9. Statutory damages;
10. Punitive damages;
11. Statutory interest;
12. Temporary and/or permanent injunctive relief commanding Defendant cease and desist their unlawful and inequitable conduct;
13. Attorney's fees;
14. Pre- and post-judgment interest as permitted by law;
15. Any other relief the Court deems just and proper.

PLAINTIFFS DEMAND A TRIAL BY JURY.



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