

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION**

_____))
In re FEDEX GROUND PACKAGE SYSTEM,)
INC., EMPLOYMENT PRACTICES)
LITIGATION)
_____)

Cause No. 3:05-MD-527-RM
(MDL 1700)

THIS DOCUMENT RELATES TO:)
)
Dean Alexander, et al. v. FedEx Ground)
Package System, Inc.,)
Civil No. 3:05-cv-00528-RLM-CAN (CA))
.....)

**ANSWER AND ADDITIONAL DEFENSES OF
FEDEX GROUND PACKAGE SYSTEM, INC. TO PLAINTIFFS'
FIRST AMENDED CLASS ACTION COMPLAINT**

Defendant FEDEX GROUND PACKAGE SYSTEM, INC. (“FedEx Ground” or “Defendant”) on behalf of itself alone, and for no other defendant, files this Answer to the Plaintiffs’ First Amended Class Action Complaint (the “Amended Complaint”) served by Plaintiffs DEAN ALEXANDER, PETER ALLEN, SUZANNE ANDRADE, JARRETT HENDERSON, ELY INES, JORGE ISLA, PAUL INFANTINO, ERIC JEPSON, BERNARD MANCUSO, JESSE PADILLA, JOEY RODRIGUEZ, ALLAN ROSS and DEAN WILEY (“Plaintiffs”). Except as expressly admitted below, Defendant denies the allegations of Plaintiffs’ Amended Complaint.

INTRODUCTION

1. The Family and Medical Leave Act of 1993 (“FMLA”) entitles eligible employees to take up to 12 work weeks of unpaid leave annually for certain specified reasons listed in the Act including, for example, serious illness of an employee or specified family member. The FMLA is prescriptive in nature, proscribing certain conduct by employers, and creating statutory rights for employees. Likewise, the California Labor Code provides legal

rights to employees and requires employers to meet various legal obligations to their employees, such as the duty to reimburse their employees for all expenses necessarily incurred in connection with their employment (Lab. Code §2802), the duty to pay overtime premium pay for hours worked which exceed eight in any workday or forty in any workweek (Lab. Code §1194), the duty to provide workers compensation coverage (Lab. Code §§3200 *et seq.*), the duty to provide meal and rest breaks (Lab. Code §510, 226.7), the duty to avoid coercion in purchase of necessary equipment and materials (Lab. Code §450) and other legal obligations. Under settled law, employers may not avoid these legal obligations or interfere with the exercise of these rights by mis-classifying their employees as “independent contractors” if the employers treat workers as employees.

ANSWER: Defendant alleges that terms of the law referenced in Paragraph 1 of the Amended Complaint speak for themselves and therefore requires no answer, and denies the remaining allegations contained in that paragraph.

2. In 1999, a statewide class action entitled Estrada et al. v. Roadway Package Systems, BC 210130, was filed in Los Angeles Superior Court. (The case name was later changed to Estrada v. FedEx Ground by order of the court.) A class was certified on August 2, 2001 and the case proceeded to trial in phases beginning with Phase I, tried in the court from April 16 to June 30, 2004 before the Honorable Howard J. Schwab in Department F-48. At the end of Phase I, Judge Schwab issued a Statement of Decision on July 26, 2004, finding that pickup and delivery drivers with one route were employees, not independent contractors, and finding that FedEx Ground had not reimbursed its drivers for their work-related expenses. (A true and correct copy of that Statement of Decision is attached hereto as Exhibit A.) Final judgment in that case was entered on December 19, 2005 finding that those drivers were

employees and enjoining further mis-classification by FedEx Ground. The class definition in Estrada v. FedEx Ground included those who were drivers at the time of the certification order on August 2, 2001 but did not include drivers operating under contracts signed thereafter and also did not include those pickup and delivery drivers operating for the FedEx Ground division doing business as FedEx Home Delivery. The instant lawsuit follows the earlier Estrada case, covering those not included in that class and seeking relief for all pickup and delivery drivers operating under contract with FedEx Ground and FedEx Home Delivery.

ANSWER: Defendant alleges that terms of the Order of the Superior Court referenced in Paragraph 2 of the Amended Complaint speak for themselves and therefore requires no answer, and denies the remaining allegations contained in that paragraph.

3. Defendant FedEx Ground Package System, Inc. (“FEG”), and its division, FedEx Home Delivery (“FHD”) (hereinafter together referred to as Defendant), is a Delaware corporation doing business as two national companies, affiliated with the Federal Express Corporation. FEG (including FHD) employs thousands of drivers to pick up and deliver packages for its customers throughout the United States. As a condition of employment, each FEG and FHD driver is required to sign a lengthy form contract entitled the “Pickup And Delivery Contractor Operating Agreement” that mis-characterizes 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.

ANSWER: Defendant admits that FedEx Ground is a Delaware Corporation, that FedEx Ground is a subsidiary of Federal Express Corporation, and that FedEx Home Delivery is a division of FedEx Ground. Defendant denies the remaining allegations contained in Paragraph 3 of the Amended Complaint.

4. Despite FEG and FHD's control over virtually all material aspects of the employment relationship, and despite the unequivocal command of applicable statutes and case law to the effect that workers such as plaintiffs are entitled to the protections due employees under the Family Medical Leave Act and California law, and despite the finding of the Los Angeles Superior Court in the Estrada case that these drivers are employees, FEG and FHD continue to mis-classify their drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by the Family and Medical Leave Act and California law to employees, and they are deprived of employer-financed workers compensation coverage and unemployment insurance benefits. Furthermore, the terms and conditions of their employment contract require these drivers to purchase, operate and maintain expensive trucks for FEG and FHD's exclusive benefit and to work under other unlawful conditions. FEG and FHD's mis-characterization of their drivers as independent contractors, the concealment and/or nondisclosure of the true nature of the relationship between FEG and FHD and its drivers and the attendant deprivation of substantial rights and benefits of employment are part of an on-going unfair, and/or unlawful and/or fraudulent business practice by FEG and FHD which this court should enjoin.

ANSWER: Defendant denies each and every allegation contained in Paragraph 4 of the Amended Complaint.

PARTIES

5. Plaintiffs Dean Alexander, Peter Allen, Suzanne Andrade, Jarrett Henderson, Ely Ines, Jorge Isla, Paul Infantino, Eric Jepson, Bernard Mancuso, Jesse Padilla, Joey Rodriguez, Allan Ross and Dean Wiley are residents of Alameda, Sacramento, Orange, Butte and San Diego counties in the State of California. Paul Infantino, Joey Rodriguez and Dean Wiley were and/or

are employed by FEG for all relevant times as pick-up and delivery drivers. Dean Alexander, Peter Allen, Suzanne Andrade, Jarrett Henderson, Ely Ines, Jorge Isla, Bernard Mancuso, Jesse Padilla and Allan Ross were and/or are employed by FHD for all relevant times as pick-up and delivery drivers. Together, they sue on behalf of themselves, as representatives of all similarly situated pickup and delivery drivers in the classes defined below, on behalf of the public and as private attorney generals pursuant to the Unfair Business Practices Act (“UBPA”), Cal. Bus. & Prof. Code §17200, et seq. and Cal. Labor Code § 2699.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief as the residence of the Named Plaintiffs and on that basis denies the same. Defendant admits that Plaintiffs purport to bring a class action but deny that class treatment is appropriate. Defendant denies the remaining allegations contained in Paragraph 5 of the Amended Complaint.

6. Plaintiffs Allen, Andrade, Infantino, and Jepson are “eligible employees” within the meaning of the FMLA, in that they were and/or are employed by FEG and/or FHD as a pickup and delivery driver at its California terminals for at least 12 months, and they worked more than 1,250 hours in a 12 month period during the relevant time period covered herein.

ANSWER: Defendant denies each and every allegation contained in Paragraph 6 of the Amended Complaint.

7. Plaintiffs Andrade, Infantino, and Jepson qualified for family medical leave for their own or their parent’s serious health conditions during the relevant time period covered herein. Defendant interfered with, restrained and/or denied the exercise of these Plaintiffs’ FMLA rights. Plaintiffs Andrade, Infantino, and Jepson either constructively quit or were terminated for exercising or attempting to exercise their FMLA rights.

ANSWER: Defendant denies each and every allegation contained in Paragraph 7 of the Amended Complaint.

8. Plaintiffs are informed and believe and on that basis allege that at all times herein defendant FEG (including its division FHD) has been and is a Delaware corporation authorized to do business and doing business in all fifty states including the state of California at various locations throughout the United States with its principal corporate headquarters in Pittsburgh, Pennsylvania. Plaintiffs are informed and believe and on that basis allege that at all times relevant herein defendant FEG and its division FHD operate a network of approximately 500 distribution hubs and local pick-up and delivery terminals throughout the United States with at least fifty employees within a 75-mile radius of each other. At all times relevant herein, defendant FEG and its division FHD have been and are employers of Plaintiffs within the meaning of the FMLA and California law.

ANSWER: Defendant admits that FedEx Ground is a Delaware corporation doing business throughout the United States. Defendant alleges that its principal place of business is Moon Township, PA. Defendant denies the remaining allegations contained in Paragraph 8 of the Amended Complaint.

9. The true names and capacities, whether individual, corporate, association or otherwise of defendants named herein as DOES 1 THROUGH 20, inclusive, are unknown to Plaintiffs and therefore Plaintiffs sue such DOES by fictitious names. Plaintiffs are informed, believe, and on that basis allege that these DOE defendants are California residents or corporations or entities doing business in the State of California, and that each is the agent of the other Defendants and that each is responsible for some or all of the acts and omissions alleged

herein. Plaintiffs will amend this complaint to show the true names and capacities of these DOE defendants when they have been determined.

ANSWER: Defendant denies each and every allegation contained in Paragraph 9 of the Amended Complaint.

JURISDICTION AND VENUE

10. This court has jurisdiction over the subject matter and the parties pursuant to 28 U.S.C. §§ 1331, 2201, and 2202. This court has supplemental jurisdiction over the related state law claims pursuant to 28 U.S.C. § 1367(a). Plaintiff's state law claims are related, as all of plaintiff's claims share common operative facts. Resolving all state and federal claims in a single action serves the interests of judicial economy, convenience and fairness to the parties as determined by the Judicial Panel on Multi-District Litigation by Transfer Order on August 10, 2005. Venue is proper in the Northern District of Indiana pursuant to the same order.

ANSWER: Defendant admits that jurisdiction and venue are proper and denies the remaining allegations contained in Paragraph 10 of the Amended Complaint.

CLASS ACTION ALLEGATIONS

11. Plaintiffs bring this national class action on behalf of themselves and all former and current pick-up and delivery drivers who currently work or worked during the relevant time period covered herein for FEG and/or FHD in the United States and who are "eligible employees" within the meaning of FMLA and who have been similarly deprived of their rights under FMLA by FEG and FHD in the manner described in this Complaint. For purposes of Plaintiffs' First Cause of action, as set forth below, Plaintiffs seek to certify a national class comprised of

All individuals who performed pick-up and delivery services for Defendant FEG and/or its division FHD in the United States pursuant to written contracts, referred to as

“Operating Agreements,” signed on or after January 9, 2003 under which Defendant misclassified them as “independent contractors” and thereby deprived them of their rights under the FMLA and who were “eligible employees” under the FMLA.

Plaintiffs are informed and believe and on that basis allege that FEG and its division FHD employ approximately 14,000 pickup and delivery drivers nation-wide and a substantial majority of these drivers fall within the defined national class whose identities may be ascertained from Defendant’s records.

ANSWER: Defendant admits that Plaintiffs purport to bring a class action but denies that class treatment is appropriate. Defendant denies the remaining allegations contained in Paragraph 11 of the Amended Complaint.

12. Plaintiffs also bring a statewide class action on behalf of all persons who are now working or have worked for FEG and/or FHD as pick-up and delivery drivers within the State of California during the time period covered herein. Plaintiffs bring this class action on behalf of themselves and other similarly situated members of the class who have been similarly deprived of rights under California law by FEG and FHD in the manner described in this Complaint. For purposes of Plaintiffs’ Second, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh and Twelfth Causes of Action, as set forth below, Plaintiffs seek to certify a class comprised of

All individuals who performed pick-up and delivery services for Defendant FEG and/or its division FHD in California pursuant to written contracts, referred to as “Operating Agreements” under which Defendant mis-classified them as “independent contractors” and thereby deprived them of their rights under California law.

Plaintiffs intend to include as members of the California statewide class (a) all FHD pickup and delivery drivers who executed contracts to provide service to FHD between November 12, 2000 and the time of trial, (b) all FEG California pick-up and delivery drivers who began providing services to FEG after August 2, 2001 and were therefore never included in the Estrada class on that basis for any time between August 2, 2001 and the time of trial, (c) any

former or putative Estrada class members whose claims were dismissed by the Los Angeles Superior Court without prejudice or who were excluded from the Estrada class during the pendency of that action for lack of jurisdiction for the period May 11, 1995 through the time of trial.

ANSWER: Defendant admits that Plaintiffs purport to bring a class action but denies that class treatment is appropriate. Defendant denies the remaining allegations contained in Paragraph 12 of the Amended Complaint.

13. During the class period, Plaintiffs are informed and believe and on that basis allege that more than 1000 persons have worked for FEG and/or FHD as package pickup and delivery drivers in California and who fall within this class and whose identities may be ascertained from Defendant's records.

ANSWER: Defendant denies each and every allegation contained in Paragraph 13 of the Amended Complaint.

14. For purposes of Plaintiffs' Third Cause of Action, as set forth below, Plaintiffs seek to certify a sub-class of those identified in Paragraph 12 above comprised of :

All individuals who performed pick-up and delivery services for Defendant FEG and/or its division FHD in California pursuant to written contracts, referred to as "Operating Agreements," under which Defendant mis-classified them as "independent contractors" and thereby deprived them of various protections of California law and who at any time during the class period operated vehicles with a gross vehicle weight rating of less than 10,001 pounds.

ANSWER: Defendant admits that Plaintiffs purport to bring a class action but denies that class treatment is appropriate. Defendant denies the remaining allegations contained in Paragraph 14 of the Amended Complaint.

15. During the class period Plaintiffs are informed and believe and on that basis allege that more than 300 persons have worked for FEG and/or FHD as pick-up and delivery

drivers in California and who fall within the subclass identified in paragraph 14 and whose identities may be ascertained from Defendant's records.

ANSWER: Defendant denies each and every allegation contained in Paragraph 15 of the Amended Complaint.

16. This action may be properly maintained as a class action under Federal Rule of Civil Procedure 23 and/or California Code of Civil Procedure Section 382 in that:

(A) The members of each subclass are so numerous that their individual joinder in a single action is impossible and/or impracticable;

(B) The central questions of law and fact involved in this action are of a common or general interest and those common legal and factual issues predominate over any questions affecting only individual members of the class. Among the common questions of law and fact are the following:

- i. Whether class members have been mis-classified as independent contractors pursuant to FEG and/or FHD's operating agreements;
- ii. Whether class members are entitled to the protections of the FMLA and various provisions of the California Labor Code as detailed below;
- iii. Whether FEG and/or FHD have violated their legal obligations under the FMLA and various provisions of the California Labor Code as detailed below;
- iv. Whether FEG and/or FHD unlawfully failed to provide workers compensation insurance benefits and unemployment insurance benefits to the class members in violation of Cal. Labor Code §§3200 *et seq.* and Cal. Unempl. Ins. Code §§100 *et seq.* respectively;

- v. Whether FEG and/or FHD's actions constitute violations of the Unfair Business Practices Act, California Business & Professions Code ;
- vi. Whether FEG and/or FHD intentionally and/or negligently misrepresented, concealed and/or failed to disclose to Plaintiffs and the class they seek to represent their true employment status and thereby obtained unjust profits and induced the drivers to incur substantial expenses in reliance on such representations;
- vii. Whether Plaintiffs are entitled to injunctive and declaratory relief and an equitable accounting; and
- viii. Whether the imposition of civil penalties pursuant to California Labor Code Section 2699 is proper.

ANSWER: Defendant denies each and every allegation contained in Paragraph 16 of the Amended Complaint.

17. The claims of the named representative plaintiffs are typical of the claims of the members of the national class and the California subclasses. The named plaintiffs share the same interests as other members of the class in this action because, like other class members, they have each been mis-classified, have been deprived of their federal and state legal rights, have been subjected to FEG and/or FHD's unlawful policies and procedures and suffered financial loss of thousands of dollars due to FEG and/or FHD's wrongful mis-classification. Given the significance of the deprivation of their rights, they have the incentive, and are committed, to vigorously prosecute this action. They have retained competent and experienced counsel who specialize in class action and employment litigation to represent themselves and the proposed class.

ANSWER: Defendant denies each and every allegation contained in Paragraph 17 of the Amended Complaint.

18. 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 herein alleged. 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.

ANSWER: Defendant denies each and every allegation contained in Paragraph 18 of the Amended Complaint.

FACTS COMMON TO ALL CAUSES OF ACTION

19. FEG is a national corporation, and FHD is a division thereof, whose business consists of package delivery and pick-up service to customers, using a single integrated nationwide network of transportation, sortation and communication facilities and integrating class members into those existing network of operations. Defendant FEG and/or its division FHD hired plaintiffs to timely deliver and pick up packages at times, locations and for amounts determined solely by FEG and/or FHD.

ANSWER: Defendant admits that FedEx Home Delivery is a division of FedEx Ground and that FedEx Ground is engaged in providing a small package information, transportation and delivery service throughout the United States. Defendant denies the remaining allegations contained in Paragraph 19 of the Amended Complaint.

20. FEG and its division FHD employ or employed during the national class period more than 14,000 pick-up and delivery drivers in the United States including, either presently or at material times in the past, each of the plaintiffs and members of the plaintiff class. FEG and FHD employ or employed during the statewide class period more than 1,000 pick-up and delivery drivers in the State of California including, either presently or at material times in the past, each of the plaintiffs and members of the plaintiff class.

ANSWER: Defendant denies each and every allegation contained in Paragraph 20 of the Amended Complaint.

21. FEG and FHD retain the right to control the manner and means by which Plaintiffs and class members perform their jobs. Pick-up and delivery drivers work from a FEG or FHD terminal, where they are assigned packages for delivery and locations for pickups each day. FEG and FHD employ a variety of managerial and supervisory employees at their terminals who have supervisory responsibility over the drivers, their daily assignments and paperwork. Drivers also interact with other FEG and/or FHD personnel on a daily basis.

ANSWER: Defendant denies each and every allegation contained in Paragraph 21 of the Amended Complaint.

22. FEG and FHD unilaterally set the compensation to be paid to the pick-up and delivery drivers. Defendant pays drivers 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 and FHD.

ANSWER: Defendant denies each and every allegation contained in Paragraph 22 of the Amended Complaint.

23. FEG and FHD unilaterally set the prices charged to their customers for the services rendered by Plaintiffs and plaintiff class members.

ANSWER: Defendant denies each and every allegation contained in Paragraph 23 of the Amended Complaint.

24. FEG and FHD have created and regularly updated a large number of written policies and procedures outside of the Operating Agreement that drivers are never given, but nonetheless govern the terms and conditions of their employment and compensation. FEG and FHD'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/or which FEG and FHD fail to disclose and/or provide to drivers that govern the relationship between FEG, FHD and the drivers. The other written handbooks and manuals and additional extra-contractual sources include, but are not limited, to written rules on "contractor" termination, directives and training provided to terminal managers, written rules on driver appearance (with illustrative poster), written and oral complaint procedures, memorandum and directives to terminal management and other rules concealed from and not provided to the drivers. When drivers do not follow an FEG or FHD rule or procedure, 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. FEG and FHD document 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.

ANSWER: Defendant denies each and every allegation contained in Paragraph 24 of the

Amended Complaint.

25. Plaintiffs and Plaintiff class members provide services which are an integral part of FEG and FHD's business enterprise and they have no separate or distinct occupation or business. By providing vehicles with required FEG and FHD's colors, logos and advertising, by at least daily reporting to FEG and FHD terminal facilities, by interacting daily with FEG and FHD terminal managers and other employees, by reliably serving FEG and FHD's customers, by following FEG and FHD's controlled delivery routes and delivery and pick-up methods and schedules, by providing FEG and FHD sales personnel with customer leads, by using FEG and FHD scanners which enable Defendant's customers to track their packages, and in other material ways, Plaintiffs and Plaintiff class members have rendered, and continue to render, services to Defendant which are integral to the Defendant's package delivery system.

ANSWER: Defendant denies each and every allegation contained in Paragraph 25 of the Amended Complaint.

26. Each pick-up and delivery driver (referred to by FEG and FHD 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 FEG and FHD 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 FEG or FHD is the same in all material respects. The Operating Agreement between Plaintiffs and FEG and between Plaintiffs and FHD contain all of the same identical material terms with only a few, minor and insubstantial differences.

ANSWER: Defendant denies each and every allegation contained in Paragraph 26 of the Amended Complaint.

27. 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 or pick-up 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 FEG and FHD, 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 FEG and FHD.

ANSWER: Defendant alleges that the terms of the Operating Agreement speak for themselves, and further admits that both Defendant and contractor intend that the contractor will provide services strictly as an independent contractor, and not as an

employee of Defendant for any purpose. Defendant denies the remaining allegations contained in Paragraph 27 of the Amended Complaint.

28. 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 the FEG or FHD system at their own expense;
- (B) Drivers must maintain liability and workers compensation insurance (sometimes referred to as “work accident insurance” for the benefit of Defendant;
- (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 “as FEG may from time to time designate;”
- (E) Drivers must wear an approved uniform, and keep their personal appearance consistent with standards unilaterally “promulgated from time to time” by Defendant;
- (F) Defendant 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) After one month of service, drivers become eligible to participate in FEG’s “Contractor Customer” program (“CCS”), by which a monetary bonus can be

earned for every period in which the driver has no at-fault accidents, no customer complaints and no missed-pickups and during which the entire terminal's performance meets company-assigned standards of service; and

- (H) Defendant retains the right to control the volume of packages to be delivered and/or picked up each day, the locations of such deliveries and pickups, and the delivery and/or pickup times (referred to as "windows"), and thus controlling the drivers' work hours;
- (I) Defendant retains the right to control when drivers may leave the terminal with the packages for delivery each day and retains control over the release of scanners each day and thus further controls the drivers' work hours.

ANSWER: Defendant alleges that terms of the Operating Agreements speak for themselves and denies the remaining allegations contained in Paragraph 28 of the Amended Complaint.

29. The Operating Agreement sets forth an initial term ranging from one to **three** years and is automatically renewed for successive terms of one year after the expiration of the initial term. The Agreement can be terminated either by mutual agreement or unilaterally by Defendant for alleged contract violations. Because FEG and FHD retain absolute unilateral control over contract interpretation and termination, the Agreement is an at-will employment relationship of indefinite duration.

ANSWER: Defendant alleges that terms of the Operating Agreements speak for themselves and denies the remaining allegations contained in Paragraph 29 of the Amended Complaint.

30. The Operating Agreement is, and at all times mentioned herein, 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.

ANSWER: Defendant denies each and every allegation contained in Paragraph 30 of the Amended Complaint.

31. Although the nature of the work performed by the plaintiff class makes detailed control by management unnecessary, Defendant in fact retains the right to control and exercise extensive control over the work of the drivers to fulfill Defendant's commitments to its customers.

ANSWER: Defendant denies each and every allegation contained in Paragraph 31 of the Amended Complaint.

32. Defendant's right of control over plaintiff class members is also retained and/or exercised by FEG and FHD as demonstrated by concealed and/or undisclosed extra- contractual sources such as Company written rules and policies and unwritten practices which supplement and fill gaps in the written contract.

ANSWER: Defendant denies each and every allegation contained in Paragraph 32 of the Amended Complaint.

33. FEG and FHD maintain bulletin boards in “contractor check-in areas” at each of its terminals and distribution hubs to post selected policies, notices and posters. Defendant has failed to post any notices of FMLA provisions and procedures for filing complaints under the FMLA on its “contractor check in” bulletin boards at each of its terminals.

ANSWER: Defendant denies each and every allegation contained in Paragraph 33 of the Amended Complaint.

34. Defendant also provides a standardized “Welcome Packet” to all new pickup and delivery drivers which include various documents. The “Welcome Packet” does not contain any information about FMLA rights and responsibilities or Defendant’s policies regarding FMLA.

ANSWER: Defendant denies each and every allegation contained in Paragraph 34 of the Amended Complaint.

35. Defendant periodically distributes memoranda and/or videotapes from management to all pickup and delivery drivers covering various topics including pick-up and delivery procedures, changes in selected company rules, procedures or programs, news regarding company growth or new customers with particular requirements and similar information. Nonetheless, Defendant has never distributed any memoranda to its pickup and delivery drivers explaining FMLA provisions, workers compensation procedures or notices or any other notification to employees required by law.

ANSWER: Defendant denies each and every allegation contained in Paragraph 35 of the Amended Complaint.

36. On a quarterly basis, Defendant holds “Round Table” Meetings for each of its terminal facilities for pickup and delivery drivers, conducted by personnel from corporate headquarters, regional headquarters and the terminal. Drivers are given notice of these meetings

and strongly encouraged, if not required, to attend. These presentations cover various topics such as operations, improvement of pick-up and delivery procedures, company programs and the like. Defendant has never provided information about FMLA rights and/or responsibilities at these “Round Table” meetings.

ANSWER: Defendant denies each and every allegation contained in Paragraph 36 of the Amended Complaint.

37. Defendant fails to provide pickup and delivery drivers with information about the availability of FMLA leave when drivers provide sufficient notice to FEG and FHD of facts supporting the need for FMLA leave. To the contrary, Defendant instead informs any pickup and delivery driver in need of such a leave of his or her obligation to provide continuous, uninterrupted service to the company despite illness or family emergency covered by the FMLA. Pursuant to company policy, Defendant routinely threatens contract termination of any driver requesting time off for an illness or injury to himself or covered family member. Further, Defendant requires pickup and delivery drivers who seek a leave that would be covered by the FMLA to hire pre-approved temporary replacement drivers at the driver’s own expense, thus, interfering, restraining and/or burdening the right to take an FMLA leave. Defendant retains the absolute right to approve or disapprove any proposed temporary replacement drivers and requires that any such driver have an approved driver “DOT” file; moreover, to have such a file, the proposed replacement driver must be processed the same as any driver applicant, meet extensive minimum requirements, be fully trained and go through a background check before any such replacement driver is permitted to replace an ill or injured driver for even one day. If the driver does not have an already-approved replacement driver to service his or her route, he or she may not take a leave at all.

ANSWER: Defendant denies each and every allegation contained in Paragraph 37 of the Amended Complaint.

38. In order to take a limited amount of pre-scheduled time off without having to hire a temporary replacement driver, pickup and delivery drivers at FEG can pay Defendant \$756 per year (\$3 per day of work) to participate in its so-called “Time Off Program” which allows participating drivers to take two non-consecutive weeks off without hiring replacement drivers. During such pre-scheduled time off, Defendant provides replacement drivers to cover the driver’s route for the scheduled week off. Defendant must approve the time off period far in advance; drivers sign up for weeks of “Time-off” under this program by seniority, once per year for the following year during a sign-up period. Such time off is not permitted to be used on an emergency basis or without advance scheduling.

ANSWER: Defendant alleges that terms of the Operating Agreements speak for themselves and denies the remaining allegations contained in Paragraph 38 of the Amended Complaint.

39. Defendant has manipulated Plaintiffs’ and plaintiff class’ eligibility under the FMLA and other employment laws by mis-classifying them as independent contractors to avoid legal duties under the FMLA and other state and federal laws. In addition, Defendant does not inform pick-up and delivery drivers of FMLA rights and responsibilities and denies approval of temporary replacement drivers, threatens contract termination as well as terminate contracts of drivers on leave, harasses drivers who are on leave regarding service issues that arise with their replacement drivers or the company’s replacement drivers, and/or forces drivers to return from leave prematurely.

ANSWER: Defendant denies each and every allegation contained in Paragraph 39 of the

Amended Complaint.

40. Plaintiffs and plaintiff class were denied their FMLA rights, were penalized for exercising or attempting to exercise their FMLA rights and/or were otherwise prejudiced by Defendant's willful and intentional violation of the FMLA.

ANSWER: Defendant denies each and every allegation contained in Paragraph 40 of the Amended Complaint.

FIRST CAUSE OF ACTION

[Interfering, Restraining or Denying the Exercise of Rights Under the Family Medical Leave Act in violation 29 U.S.C. §2617(a)(1)(B)]

Plaintiffs hereby incorporate by reference paragraphs 1 through 40 above as if fully set forth herein, and, for a cause of action by all members of the national plaintiff class, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 40 of the Amended Complaint as if set fully forth herein.

41. Defendant willfully mis-classified pick-up and delivery drivers as independent contractors, in part, to evade its responsibilities under the FMLA, interfered with and restrained and discouraged the exercise of FMLA rights by, inter alia, denying that drivers have rights under the FMLA and by requiring drivers to hire replacement drivers in order to take statutorily protected leave and/or participate in the "Time Off" Program and failed to notify and advise drivers of their FMLA rights as required by law.

ANSWER: Defendant denies each and every allegation contained in Paragraph 41 of the Amended Complaint.

42. Plaintiffs and plaintiff class members are entitled to a declaration of their rights under the FMLA, 29 U.S.C. §2617(a)(1)(B). An actual and substantial controversy exists between plaintiffs and Defendant, as to the following matters:

a. Whether FEG and its division FHD has mis-classified drivers as independent contractors when they were in fact employees; and

b. Whether FEG and its division FHD has interfered with, restrained and/or denied the exercise of (or attempt to exercise) the plaintiffs' and plaintiff class members' rights under the FMLA.

ANSWER: Defendant denies each and every allegation contained in Paragraph 42 of the Amended Complaint.

43. In addition, Plaintiffs and plaintiff class members are entitled to an injunction under the FMLA, 29 U.S.C. §2617(a)(1)(B). Defendant, if not enjoined by this Court, will continue to engage in the unlawful conduct described above in derogation of the rights of plaintiffs and of class members under the FMLA.

ANSWER: Defendant denies each and every allegation contained in Paragraph 43 of the Amended Complaint.

44. If an injunction does not issue enjoining Defendant from engaging in the unlawful practices described above, plaintiffs and members of the class will be irreparably injured, the extent, nature and amount of such injury being impossible to ascertain.

ANSWER: Defendant denies each and every allegation contained in Paragraph 44 of the Amended Complaint.

45. Plaintiffs have no plain, speedy and adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in Paragraph 45 of the

Amended Complaint.

46. For these reasons, equitable relief is appropriate under the FMLA, 29 U.S.C. §2617(a)(1)(B).

ANSWER: Defendant denies each and every allegation contained in Paragraph 46 of the Amended Complaint.

WHEREFORE plaintiffs and plaintiff class are entitled to relief as more fully set forth below.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

SECOND CAUSE OF ACTION

(Failure to Reimburse in Violation of Labor Code §2802)

Plaintiffs hereby incorporate by reference paragraphs 1 through 46 above as if fully set forth herein, and, for a cause of action by all members of the plaintiff class, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 46 of the Amended Complaint as if set fully forth herein.

47. While acting on the direct instruction of FEG and/or FHD and discharging their duties for FEG and/or FHD, Plaintiffs and plaintiff class members incurred work-related expenses including but not limited to the purchase or lease, maintenance, operating costs, and adornment of vehicles, insurance, communications equipment, “escrow accounts,” and uniforms. Plaintiffs and class members necessarily incurred these substantial expenses as a direct result of performing their job duties for Defendant.

ANSWER: Defendant denies each and every allegation contained in Paragraph 47 of the Amended Complaint.

48. FEG and FHD have failed to indemnify or in any manner reimburse the plaintiff class members for these expenditures, and have knowingly inserted illegal contractual provisions as part of an unconscionable and illegal scheme designed to avoid its legal duty to indemnify its employees. By mis-classifying its employees as “independent contractors,” and further by contractually requiring those employees to pay expenses which they incurred in direct consequence of the discharge of their duties for FEG/FHD and/or in obedience to the direction of FEG/FHD, FEG and FHD have violated and continue to violate Cal. Labor Code § 2802.

ANSWER: Defendant denies each and every allegation contained in Paragraph 48 of the Amended Complaint.

49. As a direct and proximate result of FEG and FHD’s conduct, Plaintiffs and Plaintiff class members have suffered substantial losses according to proof, as well as prejudgment interest, costs and attorney fees for the prosecution of this action.

ANSWER: Defendant denies each and every allegation contained in Paragraph 49 of the Amended Complaint.

WHEREFORE, Plaintiffs and the plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

THIRD CAUSE OF ACTION

(Failure to pay overtime compensation in Violation of California Labor Code §§510 and 1194 et seq. and For Late Payment of Wages In Violation of California Labor §201 et seq.)

Plaintiffs hereby incorporate by reference paragraphs 1 through 49 above as if fully set forth herein, and, for a cause of action by the identified subclass of the plaintiff class, allege as

follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 49 of the Amended Complaint as if set fully forth herein.

50. Various Plaintiffs and Plaintiff class members operate vehicles with a gross vehicle weight rating of less than 10,001 pounds, including but not limited to P350, P400 and other small step package vans. Persons who operate such vehicles are not subject to the maximum hours regulations promulgated pursuant to the Federal Motor Carrier Safety Act and are therefore not exempt from the overtime requirements established by the California Labor Code and the California Industrial Welfare Commission (“IWC”) Wage Order 9.

ANSWER: Defendant alleges that terms of the laws referenced in Paragraph 50 of the Amended Complaint speak for themselves and therefore requires no answer, and denies the remaining allegations contained in that paragraph.

51. Plaintiffs and plaintiff class members who during the class period have operated vehicles with a gross vehicle weight rating of less than 10,001 pounds for Defendant FEG and/or FHD and are therefore are legally entitled to overtime compensation for all hours worked in excess of eight hours per day and all hours worked in excess of forty per work week under the California Labor Code and the California Industrial Welfare Commission (“IWC”) Wage Order 9.

ANSWER: Defendant admits that some Plaintiffs operated vehicles weighing less than 10,001 pounds. Defendant denies the remaining allegations contained in Paragraph 51 of the Amended Complaint.

52. Plaintiffs and plaintiff class members who operate vehicles with a gross vehicle weight rating of less than 10,001 pounds have not been paid at the rate of time and one-half their

regular rate of pay for all hours of overtime worked, in violation of California Labor Code §§510 and 1194 et seq. and IWC Wage Order 9.

ANSWER: Defendant denies each and every allegation contained in Paragraph 52 of the Amended Complaint.

53. As a direct and proximate result of the unlawful conduct of FEG and FHD, such Plaintiffs and such plaintiff class members have suffered substantial monetary losses, according to proof, and are further entitled to pre-judgment interest, recovery costs of suit and reasonable attorney fees as a result of their prosecution of this lawsuit.

ANSWER: Defendant denies each and every allegation contained in Paragraph 53 of the Amended Complaint.

54. As a further direct and proximate result of the unlawful failure to pay overtime compensation, such Plaintiffs and such plaintiff class members who were deprived of their overtime compensation and who have resigned or been terminated from their employment, are entitled to recover thirty additional days of pay pursuant to California Labor code §201 et seq. by virtue of FEG and FHD's failure to timely pay all wages due and owing upon resignation or termination.

ANSWER: Defendant denies each and every allegation contained in Paragraph 54 of the Amended Complaint.

WHEREFORE, Plaintiffs and the Plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

FOURTH CAUSE OF ACTION

(Failure to Provide Meal and Break Periods In Violation of California Labor Codes §§510, 226.7 and IWC 9)

Plaintiffs hereby incorporate by reference paragraphs 1 through 54 above as if fully set forth herein, and, for a cause of action by all members of the plaintiff class, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 54 of the Amended Complaint as if set fully forth herein.

55. FEG and FHD required Plaintiffs and plaintiff class members to work without any thirty minute unpaid meal period and/or either of two break periods as required by California Labor Codes §§510, 226.7 and California Industrial Welfare Commission Wage Order 9, which is applicable to Plaintiffs and the plaintiff class.

ANSWER: Defendant denies each and every allegation contained in Paragraph 55 of the Amended Complaint.

56. By virtue of being deprived of such meal and rest periods, Plaintiffs and plaintiff class members are entitled to recover up to two additional hours of pay at the regular rate of pay for each work day that such meal and/or rest periods were not provided. FEG and FHD have failed and refused to pay such additional compensation in violation of the aforesaid provisions of the Labor Code and IWC Wage Order 9.

ANSWER: Defendant denies each and every allegation contained in Paragraph 56 of the Amended Complaint.

57. As a direct and proximate result of FEG and FHD's conduct as alleged, Plaintiffs and plaintiff class members have suffered substantial monetary losses, according to proof, plus pre-judgment interest, costs and reasonable attorney fees.

ANSWER: Defendant denies each and every allegation contained in Paragraph 57 of the

Amended Complaint.

WHEREFORE, Plaintiffs and the Plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

FIFTH CAUSE OF ACTION

(Illegal Deductions From Wages In Violation Of California Labor Code §221 & 223)

Plaintiffs hereby incorporate by reference paragraphs 1 through 57 above as if fully set forth herein, and, for a cause of action by all members of the plaintiff class, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 57 of the Amended Complaint as if set fully forth herein.

58. FEG and FHD have unlawfully withheld monies from the compensation earned by Plaintiffs and plaintiff class members for certain ordinary business expenses of FEG and FHD, including but not limited to “cargo claims” for the value of lost or damaged cargo and insurance claims in violation of California Labor Code §§ 221 and 223.

ANSWER: Defendant denies each and every allegation contained in Paragraph 58 of the Amended Complaint.

59. FEG and FHD have withheld said funds unlawfully without providing Plaintiffs and plaintiff class members with advance notice of the amounts, reasons or documentation of any justification for such deductions and absent any lawfully sufficient reason for such conduct.

ANSWER: Defendant denies each and every allegation contained in Paragraph 59 of the Amended Complaint.

60. As a direct and proximate result of FEG and FHD's conduct, Plaintiffs and plaintiff class members have suffered substantial losses and been deprived of compensation to which they were entitled, including monetary damages, pre-judgment interest, costs and reasonable attorney fees.

ANSWER: Defendant denies each and every allegation contained in Paragraph 60 of the Amended Complaint.

61. As a direct and proximate result of FEG and FHD's conduct, Plaintiffs and plaintiff class members who resigned or were terminated without being paid their full compensation, by virtue of such illegal deductions, are also entitled to thirty additional days of pay pursuant to California Labor Code §201-203.

ANSWER: Defendant denies each and every allegation contained in Paragraph 61 of the Amended Complaint.

WHEREFORE, plaintiffs and the plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

SIXTH CAUSE OF ACTION

(For Unlawful Coercion In Violation of California Labor Code 450 et seq.)

Plaintiffs hereby incorporate by reference paragraphs 1 through 61 above as if fully set forth herein, and, for a cause of action by all members of the plaintiff class, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 61 of the Amended Complaint as if set fully forth herein.

62. FEG and FHD have compelled and/or coerced Plaintiffs and plaintiff class members to patronize FEG and/or FHD by requiring Plaintiffs and plaintiff class members to rent or purchase uniforms, scanners, van washing services, DOT inspections, and other equipment, services and material directly from FEG and FHD in violation of California Labor Code §450.

ANSWER: Defendant denies each and every allegation contained in Paragraph 62 of the Amended Complaint.

63. FEG and FHD have also compelled and/or coerced Plaintiffs and plaintiff class members to patronize preferred vendors of FEG/FHD for purchase or lease of vehicles and/or work accident and physical damage insurance in violation of California Labor Code §450. As a direct and proximate result of FEG and FHD's coercion, Plaintiffs and plaintiff class members have suffered substantial monetary damage, according to proof.

ANSWER: Defendant denies each and every allegation contained in Paragraph 63 of the Amended Complaint.

WHEREFORE, plaintiffs and the plaintiff class are entitled to damages in an amount to be ascertained at the trial of the matter according to proof.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

SEVENTH CAUSE OF ACTION

(Fraud)

Plaintiffs hereby incorporate by reference paragraphs 1 through 63 above as if fully set forth herein, and, for a cause of action by all members of the plaintiff class, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 63 of

the Amended Complaint as if set fully forth herein.

64. Plaintiffs and the class they represent were hired by FEG and FHD 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 and is improper and that, in fact, plaintiffs and all persons similarly situated were and are “employees” entitled to the benefits and protections of all laws enacted for employees. Plaintiffs are informed, believe and on that basis allege, that 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, Operations Management Handbook and Settlement Manual, other policies and secret driver files and other materials 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.

ANSWER: Defendant denies each and every allegation contained in Paragraph 64 of the Amended Complaint.

65. At all material times, FEG and FHD either knew, or should have known, that the material representation made to plaintiffs 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.

ANSWER: Defendant denies each and every allegation contained in Paragraph 65 of the Amended Complaint.

66. 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 concerning their employment status and obligation to assume responsibility for all of employment related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks and suffered damage as a direct and proximate result.

ANSWER: Defendant denies each and every allegation contained in Paragraph 66 of the Amended Complaint.

67. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiff rights and protections guaranteed by the California Labor Code and other applicable law.

ANSWER: Defendant denies each and every allegation contained in Paragraph 67 of the Amended Complaint.

WHEREFORE, Plaintiffs, on behalf of themselves, all others similarly situated, pray for relief as stated hereinafter.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

EIGHTH CAUSE OF ACTION

(Unfair Business Practices in Violation of California Business and Professions Code §§17200 et. seq.)

Plaintiffs incorporate by reference Paragraphs 1 through 67 above as if fully set forth, and for a cause of action on behalf of all members of plaintiff class, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 67 of the Amended Complaint as if set fully forth herein.

68. The California Unfair Business Practices Act (UBPA), Cal. Bus. & Prof. Code § 17200 *et. seq.* prohibits business and/or individuals from engaging in, *inter alia*, business practices which are unlawful, unfair or fraudulent.

ANSWER: Defendant alleges that terms of the UBPA speak for themselves and denies the remaining allegations contained in Paragraph 68 of the Amended Complaint.

69. By all of the foregoing alleged conduct of failing to indemnify Plaintiffs and class members for work-related expenses, by failing to notify Plaintiffs and class members of their rights under the FMLA, by interfering with, restraining or denying FMLA rights to plaintiffs and class members, by failing and refusing to provide plaintiffs and class members with workers compensation insurance and unemployment insurance benefits, by failing to pay overtime compensation to Plaintiffs and plaintiff class members who operate trucks with a gross vehicle weight rating of less than 10,001pounds, by failing and refusing to provide meal and/or rest periods, by unlawfully deducting money from wages and coercing Plaintiffs and plaintiff class members to patronize Defendant and allied companies, by intentionally, reckless and/or negligently misrepresenting to Plaintiffs and plaintiff class members the true nature of their employment status, and by engaging in the other acts and conduct alleged above, FEG and FHD have committed, and are continuing to commit, ongoing unlawful, unfair and fraudulent business practices within the meaning of Cal. Bus. & Professions Code §17200 *et seq.*

ANSWER: Defendant denies each and every allegation contained in Paragraph 69 of the Amended Complaint.

70. As a direct and proximate result of the unfair business practices described above, Plaintiffs, members of the plaintiff class and the general public have all suffered significant losses and Defendant has been unjustly enriched.

ANSWER: Defendant denies each and every allegation contained in Paragraph 70 of the Amended Complaint.

71. Pursuant to Cal. Bus. & Prof. Code §17203, Plaintiffs, members of the plaintiff class, and the general public are entitled to: (a) restitution of money acquired by Defendant by means of their unfair business practices, in amounts not yet ascertained but to be ascertained at trial; (b) injunctive relief against Defendant's continuation of their unfair business practices, and (c) a declaration that Defendant's business practices are unfair within the meaning of the statute.

ANSWER: Defendant denies each and every allegation contained in Paragraph 71 of the Amended Complaint.

WHEREFORE, plaintiffs and the plaintiff class are entitled to relief as more fully set forth below.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

NINTH CAUSE OF ACTION

(Injunctive Relief -- Cal. Bus. & Prof. Code §17203)

Plaintiffs incorporate Paragraphs 1 through 71 of this Complaint as though fully set forth, and for a cause of action on behalf of themselves and all persons similarly situated, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 71 of the Amended Complaint as if set fully forth herein.

72. By failing to indemnify Plaintiffs and class members for work-related expenses, by failing and refusing to provide plaintiffs and class members with workers compensation insurance and unemployment insurance benefits, by failing to pay overtime compensation to Plaintiffs and plaintiff class members who operate trucks weighting less than 10,000 pounds, by failing and refusing to provide meal and/or rest periods, by unlawfully deducting money from wages and coercing Plaintiffs and plaintiff class members to patronize Defendant and allied companies, and by engaging in the other acts and conduct alleged above, FEG has committed, and is continuing to commit, ongoing unlawful, unfair and fraudulent business practices within the meaning of Cal. Bus. & Professions Code §17200 et seq. Defendant, if not enjoined by this Court, will continue to engage in the said unlawful, unfair and fraudulent business practices in derogation of the rights of Plaintiffs, of class members and of the general public to be free from such improper and anti-competitive conduct.

ANSWER: Defendant denies each and every allegation contained in Paragraph 72 of the Amended Complaint.

73. Absent injunctive relief enjoining Defendant from engaging in the unlawful, unfair and fraudulent business practices described above, Plaintiffs, members of the class and the general public will be irreparably injured, the extent, nature and amount of such injury being impossible to ascertain.

ANSWER: Defendant denies each and every allegation contained in Paragraph 73 of the Amended Complaint.

74. Plaintiffs have no plain, speedy and adequate remedy at law.

ANSWER: Defendant denies each and every allegation contained in Paragraph 74 of the Amended Complaint.

75. For these reasons, preliminary and permanent injunctive relief is appropriate.

ANSWER: Defendant denies each and every allegation contained in Paragraph 75 of the Amended Complaint.

WHEREFORE, plaintiffs and plaintiff class are entitled to injunctive relief as more fully set forth below.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

TENTH CAUSE OF ACTION

**(Declaratory Relief -- Declaratory Judgment Act, 28 U.S.C. §2201;
Cal. Code of Civil Procedure §1060)**

Plaintiffs incorporate Paragraphs 1 through 75 above as if fully set forth, and, for a cause of action, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 75 of the Amended Complaint as if set fully forth herein.

76. An actual and substantial controversy exists between Plaintiffs and members of the Plaintiff class on the one hand, and Defendant on the other hand, as to the following matters:

- (A) Whether FEG and FHD mis-classified drivers as independent contractors when they were and are in fact employees within the meaning of the FMLA and California law;
- (B) Whether FEG and FHD failed to reimburse pickup and delivery drivers for their necessarily incurred employment expenses, in violation of Labor Code §2802;
- (C) Whether FEG and FHD have unlawfully refused to provide workers compensation and /or unemployment insurance benefits under applicable law;

- (D) Whether FEG and FHD have unlawfully failed to pay overtime compensation required by California law;
- (E) Whether FEG and FHD have unlawfully prohibited Plaintiffs and plaintiff class members from taking meal and/or rest periods as required by law;
- (F) Whether FEG and FHD have made unlawful deductions from the compensation paid to Plaintiffs and plaintiff class members in violation of California law;
- (G) Whether FEG and FHD have coerced or compelled Plaintiffs and plaintiff class members to patronize FEG, FHD and/or other companies in the purchase or lease of vehicles, uniforms, scanners, insurance and other equipment and materials in violation of California law; and
- (H) Whether FEG and FHD have engaged in unlawful, unfair or fraudulent business practices in violation of California law.

ANSWER: Defendant denies each and every allegation contained in Paragraph 76 of the Amended Complaint.

77. Plaintiffs contend that in various ways, as alleged above, Defendant has violated federal and California law. Defendant contends the opposite. Declaratory relief is therefore appropriate.

ANSWER: Defendant denies each and every allegation contained in Paragraph 77 of the Amended Complaint.

WHEREFORE, plaintiffs pray for relief as more fully set forth below.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

ELEVENTH CAUSE OF ACTION

(For an Accounting)

Plaintiffs incorporate Paragraphs 1 through 77 of this complaint as though fully set forth herein, and for a cause of action, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 77 of the Amended Complaint as if set fully forth herein.

78. Plaintiffs and members of the plaintiff class are owed the un-reimbursed employment expenses as well as other amounts due, and statutory interest thereon.

ANSWER: Defendant denies each and every allegation contained in Paragraph 78 of the Amended Complaint.

79. Plaintiffs do not know the precise amount of compensation due to them and to each member of the class. Upon information and belief, Defendant possesses business records from which the amount of compensation due and owing to plaintiffs and members of the class can be determined.

ANSWER: Defendant denies each and every allegation contained in Paragraph 79 of the Amended Complaint.

80. The amount of statutory interest owed to plaintiffs and to each member of the class is based on the amount of compensation allegedly owed. This amount can only be determined by an accounting of Defendant FEG's books and records.

ANSWER: Defendant denies each and every allegation contained in Paragraph 80 of the Amended Complaint.

WHEREFORE, plaintiffs and plaintiff class pray for relief as more fully set forth below.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in

the Wherefore Paragraph.

TWELFTH CAUSE OF ACTION

(Civil Penalties - Labor Code Section 2699)

Plaintiffs incorporate Paragraphs 1 through 80 of this complaint as though fully set forth herein, and for a cause of action, allege as follows:

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 80 of the Amended Complaint as if set fully forth herein.

81. California Civil Code Section 2699 provides for the imposition of civil penalties for violations of the California Labor Code where there is no statute which specifically provides for the imposition of civil penalties in specified amounts to punish the alleged statutory violation;

ANSWER: Defendant alleges that terms of the California Labor Code speak for themselves and denies the remaining allegations contained in Paragraph 81 of the Amended Complaint.

82. By and through the conduct described above, including failing to indemnify plaintiffs and class members for their work-related expenses, by failing and refusing to provide plaintiffs and class members with workers compensation insurance and unemployment insurance benefits, by failing to pay overtime compensation to Plaintiffs and plaintiff class members who operate trucks with a gross vehicle weight rating of less than 10,001pounds, by failing and refusing to provide meal and/or rest periods, by unlawfully deducting money from wages and coercing Plaintiffs and plaintiff class members to patronize Defendant and allied companies, Defendant has violated numerous provisions of the California Labor Code, including but not limited to Sections 221, 223, 226.7, 450, 510, 1194, and 2802 as detailed above.

ANSWER: Defendant denies each and every allegation contained in Paragraph 82 of the

Amended Complaint.

83. Pursuant to California Labor Code Section 2699, Defendant is liable for civil penalties of \$100 per aggrieved employee per pay period for each initial statutory violation described above, and \$200 per aggrieved employee per pay period for each subsequent violation payable to the California General Fund, the Labor and Workforce Development Agency, and Plaintiffs and members of the Plaintiff class for each pay period commencing November 12, 2000 and for each subsequent pay period to the date of trial.

ANSWER: Defendant denies each and every allegation contained in Paragraph 83 of the Amended Complaint.

84. Plaintiffs have satisfied all of the prerequisites required for maintaining a civil suit to recover such penalties provided for in California Labor Code Section 2699.3. Plaintiffs, by and through their counsel, provided written notice by certified mail to the California Labor and Workforce Development Agency and Defendant of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation. Thereafter, in a letter dated December 23, 2004, the California Labor and Workforce Development Agency notified both Defendant and Plaintiffs' counsel that it does not intend to investigate the alleged violation. A true and correct copy of this letter is attached here as Exhibit B.

ANSWER: Defendant denies each and every allegation contained in Paragraph 84 of the Amended Complaint.

WHEREFORE plaintiffs and the plaintiff class pray for relief as more fully set forth below.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Wherefore Paragraph.

PRAYER FOR RELIEF

Plaintiffs, on their own behalf, on behalf of each member of the plaintiff class, and as private attorneys general on behalf of the public, pray for judgment as follows:

1. For an order by the Court certifying the First Cause of Action as a national class action claim pursuant to Federal Rule of Civil Procedure 23;

2. For an order by the Court certifying the Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth and Eleventh causes of action as a statewide class action claims pursuant to Federal Rule of Civil Procedure 23 and/or California Code of Civil Procedure §382;

3. As to the First Cause of action, for equitable relief including a declaration that Plaintiffs and the plaintiff class are employees under FMLA, that Defendant's conduct violated FMLA and a permanent injunction prohibiting Defendant from interfering with, restraining or denying or attempting to deny to Plaintiffs all legal rights provided for by the FMLA;

4. As to the Second, Third, Fourth, Fifth, Sixth and Seventh Causes of Action, for an award to plaintiffs and all members of the class of compensatory and punitive damages and other penalties in an amount which may be proven at trial, together with prejudgment interest at the maximum rate allowed by law, costs and reasonable attorney fees;

5. As to the Seventh Cause of Action for Fraud, for an award of punitive damages in an amount to be proven at trial;

6. As to the Eighth Cause of Action, for an order by the Court restoring and/or returning to plaintiffs and members of the class all of defendant's unfairly or illegally gotten profits measured by un-reimbursed expenses incurred, insurance premiums including for work accident and physical damage (deadhead) insurance, unpaid unemployment insurance benefits, monies unlawfully withheld from wages, unpaid overtime, a portion of self-employment tax paid

by Plaintiffs and plaintiff class members which should have been paid by Defendant and other money due as part of a full restitutionary remedy;

7. As to the Ninth Cause of Action, for an order by the Court preliminarily and permanently enjoining Defendant from continuing their unfair, unlawful and/or fraudulent business practices;

8. As to the Tenth Cause of Action, for a declaration that that Plaintiffs and the plaintiff class are employees under the FMLA and California law, that Plaintiffs and the plaintiff class are covered by the FMLA and California law and that Defendant's conduct violates the FMLA and California law;

9. As to the Eleventh Cause of Action, for an accounting of all damages and/or restitution, and/or pre-judgment interest;

10. As to the Twelfth Cause of Action, for civil penalties as provided for in California Labor Code Section 2699;

11. For an award to plaintiffs of all of their costs and expenses incurred in this action, including reasonable attorneys' pursuant to the FMLA, 29 U.S.C. §2617(a)(3), and applicable California law, including but not limited to Cal. Code of Civil Procedure §1021.5 and California Labor Code §§1194, 2802, 2699(f) and other laws; and

12. For such other and further relief as this Court deems just and proper.

ANSWER: Defendant denies that Plaintiffs are entitled to any of the relief requested in the Prayer for Relief.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury of all claims as to which they are entitled to jury trial.

ANSWER: Defendant admits Plaintiffs' request as stated but denies that they are

entitled to any and all relief requested therein.

ADDITIONAL DEFENSES

Defendant denies that Plaintiffs or the purported members of their putative class are entitled to any and all of the relief contained in the Amended Complaint, incorporates by reference the additional defenses set out below, and seeks dismissal of this action with prejudice, with Plaintiffs bearing Defendant's costs and fees of this litigation.

Having fully answered Plaintiffs' Amended Complaint, Defendant pleads the following defenses and/or affirmative defenses on its own behalf, without waiving any arguments which it may be entitled to assert regarding the burden of proof, legal presumptions or other legal characterizations.

FIRST ADDITIONAL DEFENSE

Failure to State a Claim

Plaintiffs' Amended Complaint fails to state a claim upon which relief may be granted as to any Defendant.

SECOND ADDITIONAL DEFENSE

Statute of Limitations

Plaintiffs' claims, or some of them, are barred in whole or in part by the applicable statutes of limitations.

THIRD ADDITIONAL DEFENSE

No Standing

Neither Plaintiffs, nor the purported members of the putative class defined in the Amended Complaint, are covered by the statutes, regulations and legal theories sought to be invoked in the Amended Complaint. Accordingly, for this and other reasons, Plaintiffs' claims, or some of

them, and those of the putative class, or some of them, are barred in whole or in part because Plaintiffs lack standing. Further, Plaintiffs, or some of them, and members of the putative class, or some of them, lack standing with respect to their claims for declaratory and injunctive relief because they allege to be former, and not current employees.

FOURTH ADDITIONAL DEFENSE

Breach of Contract

Pending further discovery, Plaintiffs' claims, or some of them, are barred in whole or in part because Plaintiffs are in breach of their agreements with Defendant.

FIFTH ADDITIONAL DEFENSE

Estoppel

Pending further discovery, Plaintiffs' claims, or some of them, are barred in whole or in part because Plaintiffs are estopped by their own conduct to claim any right to damages or other monetary relief from Defendant.

SIXTH ADDITIONAL DEFENSE

Laches

Pending further discovery, Plaintiffs' claims, or some of them, are barred in whole or in part by the doctrine of laches.

SEVENTH ADDITIONAL DEFENSE

Res Judicata/Collateral Estoppel

Pending further discovery, Plaintiffs' claims, or some of them, are barred, in whole or in part, by the doctrines of res judicata and/or collateral estoppel.

NINTH ADDITIONAL DEFENSE

Accord and Satisfaction: Payment

Plaintiffs' claims, or some of them, are barred in whole or in part by the principles of accord and satisfaction, and payment. Assuming, arguendo, that Plaintiffs are/were employees within the meaning of the applicable law, which Defendant specifically denies, Plaintiffs' claims, or some of them, are barred in whole or in part by the receipt of compensatory time off.

TENTH ADDITIONAL DEFENSE

Release

Pending further discovery, Plaintiffs' claims, or some of them, are barred in whole or in part because said claims have been released by the individual(s) in question.

ELEVENTH ADDITIONAL DEFENSE

Waiver

Pending further discovery, Plaintiffs' claims, or some of them, are barred in whole or in part because such claims have been waived, discharged and/or abandoned.

TWELFTH ADDITIONAL DEFENSE

Independent Contractor Status

Plaintiffs' claims are barred because said individuals are/were independent contractors, and not employees of Defendant.

THIRTEENTH ADDITIONAL DEFENSE

Unclean Hands/ In Pari Delicto

Pending further discovery, Plaintiffs' claims, or some of them, are barred in whole or in part by the doctrine of unclean hands and in pari delicto.

FOURTEENTH ADDITIONAL DEFENSE

Knowing Submission/Consent

Plaintiffs' claims, or some of them, are barred in whole or in part because Plaintiffs knowingly submitted to and acquiesced in the actions alleged in the Amended Complaint.

FIFTEENTH ADDITIONAL DEFENSE

Unavailability of Penalties

To the extent Plaintiffs seek penalties, punitive damages, or exemplary damages, they fail to state facts sufficient to support such claims, and such claims are precluded by statute, or violate the Due Process rights of Defendant.

SIXTEENTH ADDITIONAL DEFENSE

Setoff and Recoupment

If any damages have been sustained by the Plaintiffs, although such is not admitted hereby or herein and is specifically denied, Defendant is entitled under the equitable doctrine of setoff and recoupment to offset all obligations of the Plaintiffs owed to Defendant against any judgment that may be entered against Defendant.

SEVENTEENTH ADDITIONAL DEFENSE

Express Contract

Plaintiffs' claims, or some of them, are barred in whole or in part because they entered into an express contract with Defendant.

EIGHTEENTH ADDITIONAL DEFENSE

Arbitration

Plaintiffs' claims, or some of them, may not be litigated in court because some or all of said individuals' claims may be subject to individual mandatory, final, and binding arbitration.

NINETEENTH ADDITIONAL DEFENSE

Conduct Reasonable and in Good Faith/not Willful

Assuming, arguendo, that Plaintiffs, or some of them, are/were employees within the meaning of the applicable law, which Defendant specifically denies, and assuming, arguendo, that any such Plaintiff is entitled to relief under the applicable law, which Defendant specifically denies, Plaintiffs' claims, or some of them, are barred, in whole or in part, on the ground that Defendant acted in good faith, with a good-faith and reasonable belief that Defendant had complied fully with federal and state law, with a bona fide dispute as to the obligation of payment, and/or in conformity with, and in reliance on, written administrative regulations, orders, rulings, guidelines, approvals and/or interpretations of federal and/or State agencies. Furthermore, assuming, arguendo, that a violation of the applicable law occurred, which Defendant specifically denies, Defendant's conduct was not willful.

TWENTIETH ADDITIONAL DEFENSE

Unavailability of Equitable Relief

Plaintiffs' claims, or some of them, for equitable relief are precluded.

TWENTY-FIRST ADDITIONAL DEFENSE

Preemption

Plaintiffs' claims are preempted, in whole or in part, by federal law, and the federal regulation of interstate commerce in general and the transportation industry in particular.

TWENTY-SECOND ADDITIONAL DEFENSE

Deduction Authorization

Assuming, arguendo, that Plaintiffs are/were employees within the meaning of the applicable law, which Defendant specifically denies, and assuming, arguendo, that any such Plaintiff, is

entitled to relief, which Defendant specifically denies, Plaintiffs' claims are barred, in whole or in part, on the ground that Plaintiffs voluntarily authorized the deductions in writing.

TWENTY-THIRD ADDITIONAL DEFENSE

Not Disabled

Plaintiffs are not individuals with disabilities under the prevailing law.

TWENTY-FOURTH ADDITIONAL DEFENSE

Failure To Seek Reasonable Accommodation or Fully Engage in an Interactive Process to Identify Reasonable Accommodations

Plaintiffs either failed entirely to request reasonable accommodations, or did not fully engage in the interactive process necessary to determine whether Plaintiffs' alleged disability or disabilities could be accommodated reasonably and without causing undue hardship.

TWENTY-FIFTH ADDITIONAL DEFENSE

Undue Hardship

Defendant is not required to provide an accommodation to Plaintiffs because to do so would pose an undue hardship on the operation of Defendant's business.

TWENTY-SIXTH ADDITIONAL DEFENSE

Direct Threat

Plaintiffs pose a direct threat to the health and safety of themselves and/or others.

TWENTY-SEVENTH ADDITIONAL DEFENSE

Failure to Mitigate

Plaintiffs have failed to mitigate their damages.

TWENTY-EIGHTH ADDITIONAL DEFENSE

Mixed-Motive Defense

Plaintiffs are not entitled to relief because Defendant would have taken the same alleged action regardless of any alleged improper or illegal motive.

TWENTY-NINTH ADDITIONAL DEFENSE

Failure to Exhaust Administrative Remedies

Plaintiffs' claims are barred and they are not entitled to relief because they failed to exhaust their administrative remedies.

THIRTIETH ADDITIONAL DEFENSE

Unreasonable Accommodation

Any accommodation for Plaintiffs was and is, in fact, unreasonable.

THIRTY-FIRST ADDITIONAL DEFENSE

Qualification Standards

Plaintiffs' cause of action for disability discrimination is barred because the employer maintained a reasonable qualification standard consistent with business necessity, which, with or without reasonable accommodation, Plaintiffs could not meet.

THIRTY-SECOND ADDITIONAL DEFENSE

Insufficient Time In Service

Plaintiffs do not have the required time-in-service to recover under the FMLA.

THIRTY-THIRD ADDITIONAL DEFENSE

Ineligible Under FMLA

Plaintiffs are not eligible for recovery under the FMLA.

THIRTY-FOURTH ADDITIONAL DEFENSE

Insufficient Notice

Plaintiffs failed to meet the requirements for the provision of proper notice under the FMLA.

THIRTY-FIFTH ADDITIONAL DEFENSE

Not Entitled To Leave

Plaintiffs were not entitled to leave under the FMLA.

THIRTY-SIXTH ADDITIONAL DEFENSE

No Class Action or Collective Action

Plaintiffs' claims, and each of them, cannot and should not be maintained on a class-and/or collective action basis because those claims, and each of them, fail to meet the necessary requirements for certification as a class or collective action, including, inter alia, numerosity, commonality, typicality, predominance, superiority, adequacy of the class representatives, and similarity.

THIRTY-SEVENTH ADDITIONAL DEFENSE

Unconstitutional Class Action

Certification of a class action under the circumstances of this case would violate the parties' rights under the United States Constitution.

THIRTY-EIGHTH ADDITIONAL DEFENSE

Primary Jurisdiction

Plaintiffs' claims, or some of them, and members of the putative class, or some of them, are subject to the primary jurisdiction of the U.S. Department of Labor, the U.S. Department of Transportation, and the California Department of Labor.

PRAYER

Defendant specifically denies Plaintiffs' entitlement to any and all of the relief requested contained in the Amended Complaint and incorporates by reference the affirmative defenses set out above, and seeks dismissal of this action with prejudice, with Plaintiffs bearing Defendant's costs and fees of this litigation.

Dated: January 27, 2006

Respectfully submitted,

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Defendants' Liaison and Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of January, 2006, I filed the foregoing *Answer and Additional Defenses to Plaintiffs' First Amended Class Action Complaint* with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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I further certify that on the 27th day of January, 2006, I mailed the foregoing document by U.S. Mail on the following party of record:

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By: s/Alison G. Fox