

**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: )  
\_\_\_\_\_ )

*Robert Gennell, Jr., et al. v. FedEx Ground* )  
*Package System, Inc.,* )  
Civil No. 3:05-cv-00534-RLM-CAN (NH) )  
\_\_\_\_\_ )

**ANSWER AND ADDITIONAL DEFENSES OF FEDEX GROUND PACKAGE SYSTEM,  
INC. TO PLAINTIFFS’ THIRD AMENDED COMPLAINT  
(CLASS ACTION)**

Defendant FEDEX GROUND PACKAGE SYSTEM, INC. (“FedEx Ground” or “Defendant”) files this Answer to Plaintiffs’ Third Amended Complaint (Class Action) (the “Amended Complaint”) served by Plaintiffs ROBERT GENNELL, JR., et al. Except as expressly admitted below, Defendant denies the allegations of Plaintiffs’ Amended Complaint.

**PARTIES**

1. The Plaintiffs, Robert Gennell, Jr., Kimball P. Rice, Donald Swazey, Gery Terrio, Lance Tucker, and Shane Tucker, on behalf of themselves and a class of similarly situated individuals, seek relief for the causes of action complained of herein which arise out of the same series of transactions and involve common questions of law and fact.

**ANSWER:** Defendant admits that Plaintiffs purport to bring a class action but deny that class treatment is appropriate. Defendant denies each and every remaining allegation contained in Paragraph 1 of the Amended Complaint.

2. Plaintiffs are, or have been employed by the Defendant and have, as a result of the acts of Defendant complained of herein, been economically damaged by Defendant.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 2 of the Amended Complaint.

3. Defendant FedEx Ground Package System, Inc. (“FEG”), and its division, FedEx Home Delivery (“FHD”) (hereinafter together referred to as “Defendant” or “Defendant” (*sic.*)), is a Delaware corporation doing business as two national companies, affiliated with the Federal Express Corporation. At all relevant times, Defendant was engaged in providing small package information, transportation and delivery services in the United States, including in the State of New Hampshire.

**ANSWER:** Defendant admits that FedEx Ground Package System, Inc., including its division FedEx Home Delivery, is a Delaware corporation and a wholly-owned subsidiary of Federal Express Corporation. Defendant admits that it is engaged in providing small package information, transportation and delivery services in the State of New Hampshire. Defendant denies the remaining allegations contained in Paragraph 3 of the Amended Complaint.

4. Defendant is qualified to, and does, transact business in the State of New Hampshire.

**ANSWER:** Defendant admits that it is engaged in small package information, transportation and delivery services in the State of New Hampshire.

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

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 5 of the Amended Complaint.

### **JURISDICTION AND VENUE**

6. Jurisdiction in this matter is based upon diversity of citizenship, as Defendant is a resident of the State of Delaware, and all Plaintiffs are residents of the State of New Hampshire, the amount in controversy is in excess of the statutory minimum, thus jurisdiction is based upon 28 U.S.C. 1332.

**ANSWER:** Defendant admits that jurisdiction is proper pursuant to 28 U.S.C. § 1332, but denies that Plaintiffs are entitled to any relief.

7. Venue herein is proper pursuant to an order by the Judicial Panel for Multidistrict Litigation transferring this action to this Court.

**ANSWER:** Defendant admits that venue is proper in the Northern District of Indiana pursuant to an order of the Judicial Panel on Multidistrict Litigation transferring this case to MDL 1700 for coordinated pretrial proceedings.

### **INTRODUCTION**

8. The United States of America, and several States, have enacted laws and promulgated regulations intended to protect workers, employees and other persons from predatory, abusive and unfair business practices to which they may be exposed by their employers. Among these laws is the New Hampshire Workers Compensation Act, RSA §§281-A:1 et seq., which requires that employers provide workers compensation insurance (or that employers be permitted to self insure) for industrially-injured or ill employees. Additionally, the New Hampshire Unemployment Insurance Act, RSA §§282-A: et seq., provides certain safety net benefits for “persons unemployed through no fault of their own.” Other laws, regulations

and practices regulate the payment of wages and compensation, and the re-imbusement of business expenses by employees.

**ANSWER:** Paragraph 8 contains Plaintiffs' characterization of United States and New Hampshire law and, therefore, requires no answer. Notwithstanding the foregoing, Defendant alleges that the terms of the laws invoked in this paragraph of the Amended Complaint speak for themselves, and Defendant denies the remaining allegations in Paragraph 8 of the Amended Complaint.

9. Employers may not avoid these obligations by pretending that their employees are "independent contractors," and misclassifying them as such when, in fact, their workers are not independent contractors because they do not have the right to control the means and manner in which they perform their so-called "independent" contract, but, rather, are directed by their employer, in this case, the Defendant.

**ANSWER:** Defendant alleges that the terms of any laws referenced in Paragraph 9 speak for themselves, and Defendant denies each and every allegation contained in Paragraph 9 of the Amended Complaint.

### **CLASS ACTION ALLEGATIONS**

10. This action is brought on behalf of a Class of persons currently and formerly employed by Defendant as employees within the definition of "employee" in the common and statutory law, but who, similar to the named Plaintiffs, are or were erroneously Classified as "contractors" or "independent contractors." Occupations or jobs in which Class Members worked or work include route delivery for FED and FHD. The Class includes all such persons employed by Defendant within the six-year statute of limitations. The Class is specifically defined as follows:

All individuals who worked for Defendant FedEx Ground System, Inc. and/or its subsidiary FedEx Home Delivery, Inc. in New Hampshire from March 21, 1999 to March 21, 2005 (the Class Period), as package pick-up and delivery drivers, and who were Classified as “independent contractors” and thereby deprived of various protections under New Hampshire law.

**ANSWER:** Defendant admits that Plaintiffs seek to bring a class action on behalf of the individuals referenced in Paragraph 10 of the Amended Complaint, but denies that class treatment is appropriate. Defendant denies the remaining allegations contained in that Paragraph.

11. FEG and FHD employ 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 “Pick-up and Delivery Contractor Operating Agreement” that mischaracterizes each driver as an “independent contractor.” These Operating Agreements conceal the true nature of the relationship between Defendant and its drivers: that of employer and employee.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 11 of the Amended Complaint.

12. Plaintiffs, and Plaintiff Class Members, were denied the accoutrements of employment, including, but not limited to:

- a. wages;
- b. overtime pay;
- c. holiday pay;
- d. workers’ compensation;
- e. unemployment insurance;
- f. contributions to Defendant’s retirement plan;
- g. participation in Defendant’s Employee Stock Purchase Plan;

- h. income tax withholding; and,
- i. meal, break and rest periods.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 12 of the Amended Complaint, including its subparts. To the extent Plaintiffs seek relief under Defendant's retirement plan and stock purchase plan, such relief is preempted by the Employee Retirement Security Act of 1974 ("ERISA"). For reasons discussed at length in Defendant's accompanying Motion to Dismiss Plaintiffs' Claims for Relief Under ERISA, Plaintiffs' claims based on these plans should be dismissed.

13. Plaintiffs, and Plaintiff Class Members, were required to pay Defendant's operating expenses, all of which should have been paid by Defendant, including, but not limited to:

- a. delivery vehicle purchase;
- b. various insurances, including vehicle insurance and work accident insurance;
- c. delivery vehicle maintenance and repairs;
- d. purchase and maintenance of logos and uniforms;
- e. fuel;
- f. cargo claims; and,
- g. "business support," including maps, signs, logos, training and scanners.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 13 of the Amended Complaint, including its subparts.

14. Despite Defendant's control over virtually all material aspects of the employment relationship, and despite the unequivocal command of applicable statutes and case law to the effect that workers such as Plaintiffs are entitled to the protections due employees under New Hampshire law, and despite the finding of the Los Angeles Superior Court in Estrada v. FedEx

Ground Package Systems, Inc. (Case # BC 210130) that these drivers are employees, Defendant continues to misclassify its drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by New Hampshire law to employees, and they are deprived of employer-financed workers compensation coverage and unemployment insurance benefits. Furthermore, the terms and conditions of their employment contract require these drivers to purchase, operate and maintain expensive trucks for Defendant's exclusive benefit and to work under other unlawful conditions. Defendant's mischaracterization of their drivers as independent contractors, the concealment and/or non-disclosure of the true nature of the relationship between Defendant and its drivers and the attendant deprivation of substantial rights and benefits of employment are part of an on-going unlawful and fraudulent business practice by Defendant which this court should enjoin.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 14 of the Amended Complaint.

15. The named Plaintiffs are adequate representatives of the Class because they were treated in the same manner as other Class Members by their exclusion from employee compensation programs, plans and agreements and employee benefit plans and rights.

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

16. There are common questions of law and fact applicable to the entire Class including, but not limited to, the question whether Plaintiffs and Plaintiff Class members are entitled to certain types of employee compensation and benefits because they are employees of Defendant as defined by common and statutory law, even though Defendant has misrepresented to Plaintiffs and plaintiff Class members their true employment status.

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

17. This case should be certified as a Class action pursuant to Rule 23 of the Federal Rules of Civil Procedure because the common questions of law and fact concerning Defendant's liability predominate over any individual question over the amount of damages to each person and that:

- a. The members of the Class are so numerous that their individual joinder in a single action is impossible and/or impracticable;
- b. The central question 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 misclassified as independent contractors pursuant to Defendant's operating agreements;
  - ii. Whether the Defendant has violated their legal obligations under various provisions of New Hampshire Law;
  - iii. Whether Defendant unlawfully failed to provide workers compensation insurance benefits to the Class Members in violation of New Hampshire Law;
  - iv. Whether Defendant intentionally and/or negligently misrepresented to Plaintiffs and the Class they seek to represent their true employment status and thereby induced them to incur substantial expenses in reliance on such representations and;
  - v. Whether injunctive and declaratory relief and an equitable accounting are proper.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 17 of the Amended Complaint, including its subparts.

18. The claims of the named Plaintiffs are identical to the claims of other members of the Class. 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 misclassified and suffered

financial loss of thousands of dollars due to Defendant's wrongful misclassification. Given the significance of their losses, they have the incentive, and are committed, to vigorously prosecuting this action. They have retained competent and experienced counsel who specialize in Class action and employment litigation to represent them and the proposed Class. 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 individual member required to bring a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense for the litigations and the Court and create the risk of inconsistent rulings which would be contrary to the interest of justice and equality.

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

**FACTS COMMON TO ALL CAUSES OF ACTION**

19. Defendant is a national corporation whose businesses consists of offering package delivery and pick-up service to its customers using a single integrated nationwide network of transportation, sorting and communication facilities and integrating Plaintiff into those existing network operations. Defendant hired Plaintiffs to timely deliver and pick up packages based at times, locations and for amounts determined solely by Defendant.

**ANSWER:** Defendant admits that it is a national corporation and that its business includes providing a small package information, transportation and delivery service. Defendant denies the remaining allegations contained in Paragraph 19 of the Amended Complaint.

20. Each pick-up and delivery driver (referred to by Defendant as a “P&D contractor”) must sign a “Pick-Up and Delivery Contractor Operating Agreement” and Addenda thereto (referred to hereinafter as “OA” or the “Operating Agreement” or the “Agreement”) as a mandatory condition of employment. The date, time and place of execution of each driver’s Operating Agreement is within the knowledge of Defendant as each Agreement is maintained in the driver files described above, in the regular course of business. The Operating Agreement between each Plaintiff and Defendant 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 20 of the Amended Complaint.

21. The Operating Agreement contains various statements purporting to classify Plaintiffs as independent contractors. At the same time, the Operating Agreement retains to the company, *inter alia*, the right to approve or disapprove any vehicle used to provide service, the right to approve or disapprove any driver or helper who provides service, the right to approve or disapprove the purchase or sale of any vehicle, the right to assign pickup and delivery stops to each driver, the right to temporarily or permanently transfer portions of any route to another with or without compensation, the right to determine when a driver has “too few” or “too many” packages to deliver on a given day, the right to inspect vehicles and drivers for compliance with Company-promulgated appearance standards, the right to terminate the contract upon thirty days notice or whenever the company unilaterally determines that any provision of the contract has been “violated” amounting to the right to terminate at will, the right to require the use of communication equipment and the wearing of Company uniforms, the right to take a vehicle out

of service, the right to review and evaluate “customer service” and to set and change standards of such service, the right to require drivers to perform service at “times” requested by customers and determined by Defendant, the right to withhold pay for certain specified expenses, the right to require purchase of specified insurance and numerous other purchases by drivers, the right to require completion of specified paperwork, and other rights reserved to Defendant.

**ANSWER:** Defendant alleges that the terms of the Operating Agreements 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 21 of the Amended Complaint.

22. The Operating Agreement is and at all relevant times has been a contract of adhesion, drafted exclusively by Defendant and/or its legal counsel, with no negotiation with drivers, who are required to sign the Agreement as a condition of employment. Plaintiffs 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 22 of the Amended Complaint.

23. Defendant’s right of control over Plaintiffs is also retained and/or exercised by Defendant as demonstrated by concealed and/or undisclosed extra- contractual sources such as Company written rules and policies described above and unwritten practices which supplement and fill gaps in the written contract.

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

24. Defendant has created and regularly updated a large number of written policies and procedures outside of the Operating Agreement that drivers are never given, but nonetheless are required to follow in their work. Defendant's written policies are contained in the FedEx Ground Manual, Operations Management Handbook, Settlement Manual and numerous other written and extra-contractual policies that are actively concealed from drivers and which Defendant fails to disclose and/or provide to drivers that govern the relationship between Defendant and the drivers. The other written handbooks and manuals and additional extra-contractual sources include, but are not limited, to written rules on "contractor" termination, directives and training provided to terminal managers, written rules on driver appearance (with illustrative poster), written and oral complaint procedures, memorandum and directives to terminal management and other rules concealed from and not provided to the drivers. When drivers do not follow an FEG or FHD rule, whether disclosed or undisclosed, known or unknown, they are subject to various types of punishment, some financial and some disciplinary, up to and including contract termination and/or non-renewal. Defendant documents such so-called violations of such rules on forms referred to as "Business Discussion Notes" and retains these documents in secret driver files called "DOT" files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 24 of the Amended Complaint.

25. Defendant retains the right to control the manner and means by which Plaintiffs perform their jobs. Drivers work from a terminal, where they are assigned packages for delivery

and locations for pickups each day. Defendant employs a variety of managers at its terminals who have supervisory responsibility over the drivers, their daily assignments and paperwork. Drivers also interact with other personnel of Defendant on a daily basis.

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

26. Defendant unilaterally sets the compensation to be paid to the drivers. Defendant pays drivers for the number of stops, deliveries and pickups made, as well as daily compensation for making themselves available for pickup and delivery work in a geographic areas solely determined by Defendant. Defendant pays its drivers for the number of stops, deliveries and pick-ups made. If a driver fails to check out with a terminal supervisor, he or she does not get paid for that day's work.

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

27. Defendant unilaterally sets the prices charged to its customers for the services rendered by Plaintiffs. Defendant has a wide array of written and unwritten policies and procedures that drivers are trained in and required to follow in their work. When drivers do not follow Defendant's rules, they suffer various types of punishment, some financial, and some disciplinary including loss of their route.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 27 of the Amended Complaint.

28. Plaintiffs provide service which is an integral part of Defendant's business enterprise and they have no separate or distinct occupation or business. By providing vehicles with required Defendant colors, logos and advertising, by reliably serving Defendant's

customers, by following Defendant's controlled delivery routes and delivery and pick up methods, by providing Defendant with customer leads, by using Defendant's scanners which enable Defendant's customers to track their packages, and in other material ways, Plaintiffs have rendered and continue to render services to Defendant which are integral to the Defendant's nationwide package delivery system.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 28 of the Amended Complaint.

29. Defendant through the representations contained in the Agreement and other documents given to Plaintiffs, induced Plaintiffs to enter into the Agreements in the belief that each Plaintiff would own his own business as an independent contractor. In reliance on those representations Plaintiff incurred substantial debt to purchase trucks and made to spend large sums of money for uniforms, insurance and expenses of owning, operating and maintaining their trucks. Defendant's representations to Plaintiffs in the Agreement were and are fraudulent and intended to mislead Plaintiffs into believing that Plaintiffs were independent businessman when the reality was that the Defendant retained such control over the Plaintiffs' work that they own virtually nothing except the obligation to continue to incur expenses for which they receive no reimbursement.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 29 of the Amended Complaint.

**FIRST CAUSE OF ACTION**  
**Failure To Pay Overtime And To Provide Meal Breaks**

Plaintiffs incorporate by reference Paragraphs 1 through 29 of this complaint 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 29 of the Amended Complaint as if set fully forth herein.

30. Plaintiffs operate vehicles with a gross vehicle weight rating of less than 10,001 pounds, including but not limited to P350 and P400 package van. 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 NH RSA 279:29VIII.

**ANSWER:** Defendant alleges that the terms of the Federal and New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves and therefore denies the allegations contained in Paragraph 30 of the Complaint, except that Defendant admits that certain Plaintiffs drove vehicles with a gross vehicle weight rating of less than 10,001 pounds..

31. Defendant required Plaintiffs to work without any thirty minute unpaid meal period for every 5 hours worked as required by NH RSA 275:30a.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 31 of the Amended Complaint and alleges that the terms of the New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves.

32. Defendant has not paid Plaintiffs at the rate of time and a half for hours worked by Plaintiffs in excess of 40 hours per week as required by NH RSA 279:21VIII. The failure by Defendant to make such payments to Plaintiffs is also a violation of the employer's obligation under NH RSA 275:43, to pay employees on a weekly basis.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 32 of the Amended Complaint and alleges that the terms of the New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves.

33. As a direct and proximate result of Defendant's conduct as alleged, Plaintiffs have suffered substantial monetary losses, according to proof, plus interest, costs and reasonable attorney fees as provided for under NH RSA 279:29.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 33 of the Amended Complaint and alleges that the terms of the New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves. Specifically, Defendant denies that Plaintiffs are entitled to any and all relief requested in that paragraph of the Amended Complaint.

**SECOND CAUSE OF ACTION**  
**Conversion;**  
**Unauthorized Deductions from Compensation**

Plaintiffs incorporate by reference Paragraphs 1 through 33 of this complaint as if fully set forth, and for a cause of action, allege as follows:

**ANSWER:** Defendant repeats and realleges its answers to Paragraphs 1 through 33 of the Amended Complaint as if set fully forth herein.

34. Defendant has unlawfully withheld monies from the compensation earned by Plaintiffs for business expenses of Defendant, including but not limited to cargo claims and insurance claims in violation of NH RSA 275:48.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 34 of the Amended Complaint and alleges that the terms of the New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves.

35. Defendant has withheld said funds unlawfully without even providing Plaintiffs with advance notice of the amounts, reasons or documentation of any justification for such deductions and absent any lawfully sufficient reason for such conduct in violation of NH RSA 275:49.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 35 of the Amended Complaint and alleges that the terms of the New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves.

36. As a direct and proximate result of Defendant's conduct as alleged, Plaintiffs have suffered substantial monetary losses, according to proof, plus interest, costs and reasonable attorney fees as provided for under NH RSA 275:53.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 36 of the Amended Complaint and alleges that the terms of the New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves. Specifically, Defendant denies that Plaintiffs are entitled to any and all relief requested in that Paragraph of the Amended Complaint.

**THIRD CAUSE OF ACTION**  
**Fraud**

Plaintiffs incorporate by reference Paragraphs 1 through 36 of this complaint as if fully set forth, and for a cause of action, allege as follows:

**ANSWER:** Defendant repeats and realleges its answers to Paragraphs 1 through 36 of the Amended Complaint as if set fully forth herein.

37. Plaintiffs were purportedly hired by Defendant to work as "independent contractors" pursuant to the terms of the OA described above. In fact, Defendant knew or should have known, at all times, that the "independent contractor" classification in the Operating

Agreement was improper and that Plaintiffs and all persons similarly situated were “employees” entitled to the benefits and protections of all laws enacted for employees. Plaintiffs are informed, believe and on that basis allege, that through the OA Defendant intentionally misled Plaintiffs as to their employment status, or made such representations to Plaintiffs recklessly and/or negligently, and deliberately concealed from and/or failed to disclose to the pick-up and delivery drivers the extra contractual sources (including but not limited to the FedEx Ground Manual, Operation Management Handbook and Settlement Manual, other policies and secret driver files described above) that defined the employment relationship between Plaintiffs and Defendant, all for the purpose of realizing unjust profits from Plaintiffs’ work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

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

38. At all material times, Defendant either knew, or should have known, that the material representation made to Plaintiffs in the OA concerning their employment status, and the concealment and/or non-disclosure of material facts to Plaintiffs concerning their employment status and Plaintiffs’ corresponding obligation to assume responsibility for all of their “own” employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks were false and fraudulent.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 38 of the Amended Complaint.

39. At all material times, Defendant intended to and did induce Plaintiffs to reasonably and justifiably rely to their detriment on the false and fraudulent representations made to them by Defendant in the OA concerning their employment status and obligation to assume

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

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 39 of the Amended Complaint.

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

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 40 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs are entitled to any and all relief requested.

**FOURTH CAUSE OF ACTION**  
**Unfair Business Practices**  
**in Violation of New Hampshire RSA §§358-A, et. seq.**

Plaintiffs incorporate by reference Paragraphs 1 through 40 of this complaint 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 40 of the Amended Complaint as if set fully forth herein.

41. The New Hampshire Consumer Protection Act RSA §358-A *et. seq.*, prohibits any legal entity, including corporations and natural persons from using “any unfair method of competition or any unfair or deceptive act or practice in the conduct of any trade or commerce within” New Hampshire. By failing and refusing to provide Plaintiffs with workers compensation insurance in violation of RSA §§281-A:1 *et seq.* and unemployment insurance benefits in violation of RSA §§282-A:1 *et seq.*, and by engaging in the other acts and conduct

alleged above, Defendant has committed, and are continuing to commit, ongoing unfair business practices within the meaning of RSA 358A:2.

**ANSWER:** Defendant alleges that the terms of the New Hampshire laws referenced in Paragraph 41 of the Amended Complaint speak for themselves, and Defendant denies the remaining allegations contained in that Paragraph of the Amended Complaint.

42. The unfair business practices described above have proximately resulted in damages to Plaintiffs.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 42 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs are entitled to any and all relief requested.

43. Pursuant to RSA 358-A:10, Plaintiffs, are entitled to: (a) damages in amounts not yet ascertained but to be ascertained at trial; and equitable relief including: (i) injunctive relief against Defendant's continuation of their unfair business practices, and (ii) a declaration that Defendant's business practices are unfair within the meaning of the statute.

**ANSWER:** Defendant alleges that the terms of the New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves, and Defendant denies that Plaintiffs are entitled to any and all relief requested in Paragraph 43 of the Amended Complaint.

**FIFTH CAUSE OF ACTION**  
**Rescission Of Contract**

Plaintiffs hereby incorporate by reference paragraphs 1 through 43 of this complaint as if 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 43 of the Amended Complaint as if set fully forth herein.

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

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

45. Defendant controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations hereof at paragraphs 1 through 21.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 45 of the Amended Complaint.

46. Despite this control and the actual status of the drivers as employees, Defendant mischaracterizes the Plaintiffs as independent contractors. As a result, these drivers must pay substantial sums of their own money for work-related expenses, including but not limited to the purchase or lease of vehicles meeting company specifications, and all costs of operating, insuring and maintaining those vehicles.

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

47. The Operating Agreement illegally and unfairly advantages Defendant, by mischaracterizing the status of the Plaintiffs in that Defendant evades employment related obligations, such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, illegally shifting the expense of workers' compensation coverage and other expenses to Plaintiffs.

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

48. The Operating Agreement between Defendant and each Plaintiff is void as against public policy and therefore unenforceable, as failing to recognize the employment status of the Plaintiffs, and therefore denying them the legally cognizable benefits of employment.

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

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

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

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

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 50 of the Amended Complaint.

51. While acting on the direct instruction of Defendant and discharging their duties for Defendant, Plaintiffs incurred expenses for, *inter alia*, the purchase or lease, maintenance, operating costs and adornment of vehicles; insurance; and uniforms. Plaintiffs incurred these substantial expenses as a direct result of performing their job duties.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 51 of the Amended Complaint.

52. By misclassifying its employees as “independent contractors,” and further by contractually requiring those employees to pay Defendant’s own expenses, Defendant has been unjustly enriched.

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

53. As a direct and proximate result of Defendant’s conduct, Defendant has received substantial benefits to which it had no entitlement, at Plaintiffs’ expense, including lost profits, self-employment taxes, premiums for insurance to replace workers compensation and disability benefits, business expenses, compensation of replacement workers, and other expenses.

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

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

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 54 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs are entitled to any and all relief requested in that paragraph of the Amended Complaint.

**SIXTH CAUSE OF ACTION**  
**For an Accounting**

Plaintiffs incorporate Paragraphs 1 through 54 of this complaint as though fully set forth herein, and for a cause of action, allege as follows:

**ANSWER:** Defendant repeats and realleges its answer to Paragraphs 1 through 54 of the Amended Complaint as if set fully forth herein.

55. Plaintiffs are owed unpaid overtime compensation and unauthorized deductions from their compensation as detailed above.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 55 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs are entitled to any and all relief requested in that paragraph of the Amended Complaint.

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

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 56 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs are entitled to any and all relief requested in that paragraph of the Amended Complaint.

**SEVENTH CAUSE OF ACTION**  
**Declaratory Judgment**

Plaintiffs incorporate Paragraphs 1 through 56 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 56 of the Amended Complaint as if set fully forth herein.

57. An actual controversy has arisen between the Plaintiffs, on the one hand, and Defendant, on the other hand, relating to the following matters:

- a. Whether Defendant has unlawfully misclassified Plaintiffs as independent contractors, and have thus denied Plaintiffs of the common benefits of employee status, such as
  - i. wages;
  - ii. holiday pay;
  - iii. workers' compensation;

- iv. unemployment insurance;
  - v. contributions to the Defendant's retirement plan;
  - vi. income tax withholding; and
  - vii. meal, break and rest periods.
- b. What amounts Plaintiffs are entitled to receive in compensation and benefits.
  - c. What amounts Plaintiffs are entitled to receive in interest on unpaid compensation due and owing.
  - d. What amounts Plaintiffs are entitled to receive from Defendant in statutory penalties and interest.

**ANSWER:** Defendant denies each and every allegation contains in Paragraph 57 of the Amended Complaint, including its subparts. To the extent Plaintiffs seek relief under Defendant's retirement plan, such relief is preempted by ERISA.

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

**ANSWER:** Paragraph 58 describes Plaintiffs' request for declaratory relief, to which no answer is required. Notwithstanding the foregoing, Defendant denies that Plaintiffs are entitled to any and all relief required in that paragraph of the Amended Complaint.

**EIGHTH CAUSE OF ACTION**  
**Failure to Reimburse Employee Expenses Under New Hampshire Rev. Stat.**  
**§ 275:57**

Plaintiffs incorporate Paragraphs 1 through 58 of this complaint as though fully set forth herein, and for a cause of action, allege as follows:

**ANSWER:** Defendant repeats and realleges its answers to Paragraphs 1 through 58 of the Amended Complaint as if set fully forth herein.

59. Plaintiffs are “employees” as defined in New Hampshire Rev. Stat. § 275:42 and are not free from the control and direction of Defendant.

**ANSWER:** Defendant alleges that the terms of the New Hampshire laws invoked in this Paragraph of the Amended Complaint speak for themselves and denies each and every allegation contained in Paragraph 59 of the Amended Complaint.

60. Defendant unlawfully has failed to reimburse Plaintiffs for expenses incurred at the request of Defendant, and which were not expenses normally borne as a precondition for employment.

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

61. Defendant has willfully violated New Hampshire Rev. State § 275:57.

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

62. As a direct and proximate result of Defendant’s conduct, Plaintiffs suffered substantial losses and have been deprived of compensation to which they were entitled, including monetary damages, civil penalties, pre-judgment interest, costs and reasonable attorney fees.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 62 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs are entitled to any and all of the relief requested in Paragraph 54.

### **PRAYER FOR RELIEF**

Plaintiffs, jointly and severally pray for judgment as follows:

- A. For an order certifying the class as described with the named Plaintiffs as class representatives;

- B. For an order by the Court restoring and/or returning to Plaintiffs all of the Defendant's unfairly or illegally gotten profits measured by un-reimbursed expenses, workers compensation premiums, and/or unpaid unemployment insurance benefits incurred, together with interest thereon, as well as any other monetary damages caused by Defendant;
- C. For an order by the Court enjoining Defendant from continuing its unfair and/or unlawful conduct;
- D. For a declaration that Defendant's conduct is unfair and/or unlawful;
- E. For and order by the Court rescinding the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to Defendant;
- F. For punitive damages in an amount to be determined at trial;
- G. For an accounting;
- H. For an award to Plaintiffs of their costs and expenses incurred in this action, including reasonable attorneys' and experts' fees pursuant to applicable New Hampshire law; and,
- I. 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 foregoing paragraph, including its subparts.

## **ADDITIONAL DEFENSES**

Defendant denies that Plaintiffs or the purported members of the 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, and the claims of the purported members of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part by the applicable statutes of limitations.

### **THIRD ADDITIONAL DEFENSE**

#### **No Class Action**

Plaintiffs' claims, and each of them, cannot and should not be maintained on a class 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.

#### FOURTH 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.

#### FIFTH 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 rescission, declaratory and injunctive relief because they allege to be former, and not current employees.

#### SIXTH ADDITIONAL DEFENSE

##### Breach of Contract

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part because Plaintiffs and/or the putative class members are in breach of their agreements with Defendant.

SEVENTH ADDITIONAL DEFENSE

Estoppel

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part because Plaintiffs and the putative class members are estopped by their own conduct to claim any right to damages or other monetary relief from Defendant.

EIGHTH ADDITIONAL DEFENSE

Laches

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part by the doctrine of laches.

NINTH ADDITIONAL DEFENSE

Res Judicata/Collateral Estoppel

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred, in whole or in part, by the doctrines of res judicata and/or collateral estoppel.

TENTH ADDITIONAL DEFENSE

Accord and Satisfaction: Payment

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part by the principles of accord and satisfaction, and payment. Assuming, arguendo, that Plaintiffs, and the purported members of the putative class defined in the Amended Complaint, or some of them, are/were

employees within the meaning of applicable law, which Defendant specifically denies, Plaintiffs' claims, or some of them, are barred in whole or in part by the receipt of balancing time off.

ELEVENTH ADDITIONAL DEFENSE

Release

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part because said claims have been released by the individual(s) in question.

TWELFTH ADDITIONAL DEFENSE

Waiver

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part because such claims have been waived, discharged and/or abandoned.

THIRTEENTH ADDITIONAL DEFENSE

Independent Contractor Status

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, and each of them, are barred because said individuals are/were independent contractors, and not employees of Defendant.

FOURTEENTH ADDITIONAL DEFENSE

Unclean Hands/ In Pari Delicto

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part by the doctrine of unclean hands and in pari delicto.

FIFTEENTH ADDITIONAL DEFENSE

Knowing Submission/Consent

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part because Plaintiffs and said putative class members knowingly submitted to and acquiesced in the actions alleged in the Amended Complaint.

SIXTEENTH ADDITIONAL DEFENSE

Unavailability of Penalties

To the extent Plaintiffs or any purported member of the putative class defined in the Amended Complaint 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.

SEVENTEENTH ADDITIONAL DEFENSE

Setoff and Recoupment

If any damages have been sustained by Plaintiffs, or by any purported member of the putative class defined in the Amended Complaint, 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 or putative class members owed to Defendant against any judgment that may be entered against Defendant.

EIGHTEENTH ADDITIONAL DEFENSE

Express Contract

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part because they entered into an express contact with Defendant.

NINETEENTH ADDITIONAL DEFENSE

Arbitration

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, 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.

TWENTIETH ADDITIONAL DEFENSE

Conduct Reasonable and in Good Faith/not Willful

Assuming, arguendo, that Plaintiffs, and the purported members of the putative class defined in the Amended Complaint, or some of them, are/were employees within the meaning of applicable law, which Defendant specifically denies, and assuming, arguendo, that any such Plaintiffs, and any such purported members of the putative class, or some of them, are entitled to relief under applicable law, which Defendant specifically denies, Plaintiffs' claims, and the claims of each putative class member, 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 applicable law occurred, which Defendant specifically denies, Defendant's conduct was not willful.

TWENTY-FIRST ADDITIONAL DEFENSE

Unavailability of Equitable Relief

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, for equitable relief are precluded.

TWENTY-SECOND ADDITIONAL DEFENSE

Preemption

Plaintiffs' claims, and the claims of the purported members of the putative class described in the Amended Complaint, 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-THIRD ADDITIONAL DEFENSE

Deduction Authorization

Assuming, arguendo, that Plaintiffs, and the purported members of the putative class defined in the Amended Complaint, or some of them, are/were employees within the meaning of applicable law, which Defendant specifically denies, and assuming, arguendo, that any such Plaintiffs, and any such purported members of the putative class, or some of them, are entitled to relief, which Defendant specifically denies, Plaintiffs' claims, and the claims of each putative class member, or some of them, are barred, in whole or in part, on the ground that Plaintiffs and the purported members of the putative class, or some of them, voluntarily authorized the deductions in writing prior to accrual of the debts in issue, and/or that authorization was not required by state law under the facts alleged.

TWENTY-FOURTH ADDITIONAL DEFENSE

ERISA Preemption

Plaintiffs' claims, and the claims of the purported members of the putative class described in the Complaint, are preempted by ERISA.

TWENTY-FIFTH ADDITIONAL DEFENSE

Ineligibility

Plaintiffs and the members of the putative class are not entitled to benefits under the terms of the employee benefit plans at issue.

TWENTY-SIXTH ADDITIONAL DEFENSE

Failure to Exhaust Remedy

Plaintiffs' claims, or some of them, and members of the putative class, or some of them, are barred because they have failed to exhaust administrative remedies under the employee benefit plans at issue and/or under applicable administrative rules.

TWENTY-SEVENTH ADDITIONAL DEFENSE

Failure to Offer to Return Consideration

Plaintiffs' claims, or some of them, and members of the putative class, or some of the them, are precluded from seeking rescission because they have failed to offer to return the consideration they have received under the contracts they seek to rescind.

TWENTY-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 New Hampshire Department of Labor.

TWENTY-NINTH ADDITIONAL DEFENSE

Failure to Plead With Specificity

Plaintiffs' claims and those of the members of the putative class for fraud are barred because Plaintiffs have failed to plead fraud with sufficient particularity.

THIRTIETH AFFIRMATIVE DEFENSE

Judicial Deference

The interpretations of the governing plan documents and the decision by Defendant to deny benefits to Plaintiffs and the purported members of the putative class described in the Complaint, or some of them, were within Defendant's reasonable discretionary authority and may not be overturned.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Fraud Allegations Insufficient

To the extent that the Plaintiffs are attempting to allege fraud against the Defendant, such claims do not satisfy Rule 9 (b) and (c) of the Federal Rules of Civil Procedure.

THIRTY-SECOND AFFIRMATIVE DEFENSE

Lack of Reasonable Reliance

To the extent Plaintiffs are attempting to allege fraud against the Defendant, such claims are barred because to the extent alleged misrepresentations were made by Defendant, which Defendant specifically denies, Plaintiffs did not reasonably rely on the alleged misrepresentations as a matter of law.

THIRTY-THIRD AFFIRMATIVE DEFENSE

Statute of Frauds

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part by the doctrine of the statute of frauds. Defendant reserves the right to assert by supplemental pleading any affirmative defenses or counterclaim which matures, or is acquired by any of them, subsequent to the filing of this Answer.

THIRTY-FOURTH ADDITIONAL DEFENSE

Failure to Mitigate

Assuming, *arguendo*, while vigorously denying, that Plaintiffs and members of the putative class have suffered any economic damages as a result of defendant's actions, Plaintiffs and putative class members have a duty to mitigate damages and, upon information and belief have failed to do so.

TWENTY-FIFTH ADDITIONAL DEFENSE

Worker's Compensation Exclusivity

Plaintiffs' claims and those of the members of the putative class for fraud are barred because Plaintiffs have failed to plead fraud with sufficient particularity.

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 Defendants' costs and fees of this litigation.

Dated: December 18, 2006

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of December, 2006, I filed the foregoing ***ANSWER AND ADDITIONAL DEFENSES OF FEDEX GROUND PACKAGE SYSTEM, INC. TO PLAINTIFFS' THIRD AMENDED 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 18th day of December, 2006, I mailed the foregoing document by U.S. Mail on the following party of record:

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By:           s/Thomas J. Brunner