

**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:)
)
Michael Tofaute, et al. v. FedEx Ground)
Package System, Inc.,)
Civil No. 3:05-cv-00595-RLM-CAN (NJ))
.....)

**ANSWER AND ADDITIONAL DEFENSES OF
FEDEX GROUND PACKAGE SYSTEM, INC. TO PLAINTIFFS’
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 Amended Class Action Complaint (the “Amended Complaint”) served by Plaintiffs MICHAEL TOFAUTE, FRANCIS DENNIS LYNCH, DAVID MCMAHON, THOMAS MIKULSKI, FRANK CUCINOTTI, PATRICK CARRIGAN, and MICHAEL B. KILMARTIN (“Plaintiffs”). Except as expressly admitted below, Defendant denies the allegations of Plaintiffs’ Amended Complaint.

INTRODUCTION

1. This is a class action suit asserting claims for Consumer Fraud, common law fraud and misrepresentation, rescission and recovery for unjust enrichment, violation of the New Jersey Wage Payment Law and breach of the duty of good faith and fair dealing.

ANSWER: Paragraph 1 of the Amended Complaint states Plaintiffs’ description of this action, and therefore requires no answer. Notwithstanding the foregoing, Defendant denies each and every allegation contained in Paragraph 1 of the Amended Complaint,

except Defendant admits that Plaintiffs purport to bring a class action as described in Paragraph 1 and denies that this case may be maintained as a class action.

2. Plaintiffs are New Jersey truck and van drivers engaged in package delivery for the Defendant, Federal Express Ground Package Systems, Inc. (herein “Defendant” or “FEG”). FEG fraudulently induced the named Plaintiffs and Class Members (collectively, “Plaintiffs”) to purchase a delivery truck, to insure and maintain that truck, to purchase a “business support package” and other items required by FEG, and to deliver packages for FEG, all the while representing to them that they are or would be “independent business owners” and “business partners” with FEG, and that they had or would have proprietary interests in the delivery routes for which they contracted. These representations were false. In reality, FEG micro-manages Plaintiffs’ activities in such a manner that Plaintiffs are *de facto* employees of FEG and the routes that Class Members purchased therefore have no value. FEG has illegally shifted to Plaintiffs the burden of purchasing and maintaining trucks and equipment necessary to operate FEG’s business. FEG has avoided all state and federal employment taxes, workers’ compensation and unemployment compensation obligations and other business expenses by forcing the Class Members to pay those obligations themselves. By this suit, the Plaintiffs seek to obtain the benefit of their bargains and compensation for being unlawfully forced to pay for the business expenses of FEG, in the past and in the future, and appropriate injunctive relief.

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

THE PARTIES

3. All Plaintiffs reside or work in the State of New Jersey and, during the past six years, contracted to be pick-up and delivery drivers at Defendant FEG’s New Jersey terminals.

ANSWER: Defendant lacks sufficient knowledge to respond as to the allegations that Plaintiffs reside or work in the State of New Jersey and thus denies the same. Defendant admits that Plaintiffs contracted either with FedEx Ground to provide daily pick-up and delivery service at Defendant's New Jersey terminals, and denies the remaining allegations contained in Paragraph 3 of the Amended Complaint.

4. Plaintiff Michael Tofaute, a resident of Burlington County, New Jersey is, and at times relevant to this action was, a contract driver for FEG at its Barrington, Camden County, New Jersey terminal. Mr. Tofaute resides at 223 Kihade Trail, Medford Lakes, New Jersey.

ANSWER: Defendant admits the identity of the Plaintiff Michael Tofaute. Defendant lacks sufficient knowledge to respond to the allegations concerning Plaintiff Tofaute's residency and on that basis denies the same. Defendant admits that Plaintiff Tofaute is an independent contractor with FedEx Ground operating out of the Barrington, New Jersey Home Delivery Terminal, but denies the remaining allegations contained in Paragraph 4 of the Amended Complaint.

5. Plaintiff Francis Dennis Lynch, a resident of Gloucester County, New Jersey, was at times relevant to this action a contract driver for FEG at its Barrington, Camden County, New Jersey terminal. Mr. Lynch performed this work through a corporate entity he formed known as Deliverite, Inc. Mr. Lynch resides at 101 First Avenue, Pitman, New Jersey.

ANSWER: Defendant admits the identity of the Plaintiff Francis Dennis Lynch and admits that Plaintiff Lynch formed Deliverite, Inc. Defendant lacks sufficient knowledge to respond to the allegations concerning Plaintiff Lynch's residency and on that basis denies the same. Defendant admits that Plaintiff Lynch was an independent contractor with FedEx Ground operating out of the Barrington, New Jersey Home Delivery

Terminal, but denies the remaining allegations contained in Paragraph 5 of the Amended Complaint.

6. Plaintiff David McMahon, a resident of Gloucester County, New Jersey, was at all times relevant to this action, a contract driver for FEG Ground at its West Deptford, Gloucester County, New Jersey terminal. Mr. McMahon resides at 112 Treeline Drive, Deptford, New Jersey.

ANSWER: Defendant admits the identity of the Plaintiff David McMahon. Defendant lacks sufficient knowledge to respond to the allegations concerning Plaintiff McMahon's residency and on that basis denies the same. Defendant admits that Plaintiff McMahon was an independent contractor with FedEx Ground operating out of the West Deptford, New Jersey Ground Terminal, but denies the remaining allegations contained in Paragraph 6 of the Amended Complaint.

7. Plaintiff Thomas Mikulski, a resident of Burlington County, New Jersey, was at all times relevant to this action, a contract driver for FEG Ground at its West Deptford, Gloucester County, New Jersey terminal. Mr. Mikulski resides at 1070 Ashton Avenue, Beverly, New Jersey 08010.

ANSWER: Defendant admits the identity of the Plaintiff Thomas Mikulski. Defendant lacks sufficient knowledge to respond to the allegations concerning Plaintiff Mikulski's residency and on that basis denies the same. Defendant admits that Plaintiff Mikulski was an independent contractor with FedEx Ground operating out of the West Deptford, New Jersey Ground Terminal, but denies the remaining allegations contained in Paragraph 7 of the Amended Complaint.

8. Plaintiff Frank Cucinotti, a resident of Atlantic County, New Jersey, was at all times relevant to this action, a contract driver for FEG Home Delivery at its Barrington, Camden County, New Jersey terminal. Mr. Cucinotti resides at 54 Harbor Drive, Hammonton, New Jersey, 08037.

ANSWER: Defendant admits the identity of the Plaintiff Frank Cucinotti. Defendant lacks sufficient knowledge to respond to the allegations concerning Plaintiff Cucinotti's residency and on that basis denies the same. Defendant admits that Plaintiff Cucinotti was an independent contractor with FedEx Ground operating out of the Barrington, New Jersey Home Delivery Terminal, but denies the remaining allegations contained in Paragraph 8 of the Amended Complaint.

9. Plaintiff, Patrick Carrigan, a resident of Williamstown, New Jersey, was at all times relevant to this action, a contract driver for FEG Ground at its West Deptford, Gloucester County, New Jersey terminal. Mr. Carrigan resides at 478 Winslow Road, Williamstown, NJ 08094.

ANSWER: Defendant admits the identity of the Plaintiff Patrick Carrigan. Defendant lacks sufficient knowledge to respond to the allegations concerning Plaintiff Carrigan's residency and on that basis denies the same. Defendant admits that Plaintiff Carrigan was an independent contractor with FedEx Ground operating out of the West Deptford, New Jersey Ground Terminal, but denies the remaining allegations contained in Paragraph 9 of the Amended Complaint.

10. Plaintiff, Michael B. Kilmartin, a resident of Ventor, New Jersey, was at a home delivery driver at the Cranberry/Dayton facility maintained by the Defendant in the New Jersey terminal until May 2004. Mr. Kilmartin resides at 310 North Harvard Drive, Ventor, NJ 08046.

ANSWER: Defendant admits the identity of the Plaintiff Michael B. Kilmartin.

Defendant lacks sufficient knowledge to respond to the allegations concerning Plaintiff Kilmartin's residency and on that basis denies the same. Defendant admits that Plaintiff Kilmartin was an independent contractor with FedEx Home Ground operating out of the Cranberry/Dayton, New Jersey Home Delivery Terminal, but denies the remaining allegations contained in Paragraph 10 of the Amended Complaint.

11. Defendant, FEG, is a Delaware corporation with its principal office in Moon Township, Allegheny County, PA. FEG operates several terminals in New Jersey that are the focus of this matter.

ANSWER: Defendant admits that it is incorporated in Delaware, and that its principal place of business is located in Moon Township, Pennsylvania. Defendant admits it operates several terminals in New Jersey. Defendant denies the remaining allegations contained in Paragraph 11 of the Amended Complaint.

12. At all times relevant to this action, Defendant has actively and continuously conducted business throughout the State of New Jersey, employing contractor/drivers such as Plaintiffs and all those similarly situated and engaging in a marketing campaign directed to members of the general public to entice members of the public to become contractor/drivers.

ANSWER: Defendant denies each and every allegation contained in Paragraph 12 of the Amended Complaint.

FACTS COMMON TO ALL CAUSES OF ACTION

13. Defendant is a national company employing thousands of drivers to pick up and deliver packages for its customers throughout the United States.

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

Amended Complaint.

14. FEG operates two divisions in New Jersey: the Ground division routinely (but not exclusively) picks up and delivers packages to businesses. The Home Delivery division routinely, but not exclusively, delivers packages to residential locations.

ANSWER: Defendant admits that FedEx Home Delivery is a division of FedEx Ground. Defendant denies each and every remaining allegation contained in Paragraph 14 of the Amended Complaint.

15. During the time relevant to this action, FEG retained more than 300 delivery and pick-up drivers in New Jersey, including either presently or at material times in the past, the Plaintiffs. FEG retains these drivers (the Class Members) for the purpose of providing its customers with timely and reliable pick-up and delivery of packages.

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

THE RECRUITMENT PROCESS AND DEFENDANT'S MISREPRESENTATIONS

16. FEG recruits drivers by placing ads in newspapers and on the Internet, inviting members of the general public to attend meetings where FEG managers and recruiters solicit members of the public who respond to FEG's marketing to become drivers by making, among others, the following misrepresentations:

- a. That persons who enter into the "Operating Agreement" will have their own independent business that will be a "partner" with FEG;
- b. That persons who enter into the "Operating Agreement" can acquire multiple routes as part of their "business;"
- c. That contractor drivers will have the ability to determine their own level of income through their own work and effort;

- d. That contractor drivers' so-called independent businesses will be based on delivery routes that they will own and have an entrepreneurial interest in; and,
- e. That contractor drivers' delivery routes have economic value in excess of the cost of the truck and that they can be sold.

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

17. FEG misrepresents to the public and to the Plaintiffs, that contract drivers have the right to run their own business; to “be your own boss,” to “have the ability to grow your own business;” to “have the chance to partner with the fastest growing transportation company [FEG] in the country.”

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

18. FEG also misrepresents to the Plaintiffs and the public that they “have a proprietary interest as a FedEx Ground [or Home Delivery] contractor.”

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

19. FEG requires its drivers to sign an Operating Agreement (“Agreement”) that characterizes each driver as an “independent contractor” representing that the driver will have a proprietary and entrepreneurial interest in the route.

ANSWER: Defendant alleges that the terms of the Operating Agreements speak for themselves and denies the remaining allegations contained in Paragraph 19 of the Amended Complaint.

DEFENDANT'S OPERATING AGREEMENT

20. All Class Members were required to sign an Operating Agreement. Although not identical, the Agreements for the Ground division and the Home Delivery division are substantially the same in all respects relevant to this action.

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

21. Both the Ground and Home Delivery Agreements characterize the drivers as independent contractors.

Among other things, the Agreements provide that:

- a. Plaintiffs 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, Plaintiffs must adorn the vehicle with specific colors, logos and marks, identifying it as “part of the FEG system.” As well, Plaintiffs must maintain liability insurance for operation of the vehicle without packages on board in the amount of one million dollars, naming FEG as an insured; Plaintiffs must prepare daily driver logs and inspection reports, and such shipping documents “as FEG may from time to time designate;” drivers must deposit a “Contractor Performance Escrow Account,” to be used to reduce any debt the driver owes FEG upon termination;
- b. Plaintiffs must wear “an FEG-approved uniform,” and keep his/her personal appearance consistent with standards “promulgated from time to time by FEG;”
- c. FEG may change a driver’s Primary Service Area, notwithstanding FEG’s representation and promise that each driver has a proprietary interest in the customers he or she serves. In the event that a Primary Service Area is changed, drivers must pay each other for customers gained or lost thereby according to a set schedule;
- d. After one year of service, drivers may become eligible to participate in FEG’s Customer Service Program, by which a specified monetary bonus can be earned for every four weeks in which the driver has no at-fault accidents and no customer complaints;

- e. Neither the Agreement nor its addenda and attachments may be modified, altered, changed or amended in any respect unless in writing and signed by both parties;
- f. The purpose of FEG's requiring Class Members to operate vehicles that prominently display FEG's logo, conform to FEG's requirements as to appearance, and to wear uniforms and use documents provided by FEG, is to promote the image and brand of FEG.
- g. FEG can terminate the Agreement at will, without good cause or notice.

ANSWER: Defendant alleges that the terms of the Operating Agreements speak for themselves, and denies the remaining allegations of Paragraph 21 of the Amended Complaint.

22. The Agreement is and at all times mentioned herein has been a contract of adhesion, drafted by FEG and its legal counsel, printed by FEG, and distributed by FEG among drivers for mandatory signature. Plaintiffs have no opportunity to negotiate with FEG over the terms or conditions contained in the Agreement, and FEG offers its drivers no meaningful choice of terms.

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

23. The Agreement is, and at all material times has been, unlawful and unconscionable in form and effect.

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

24. While the Agreement contains an Arbitration Clause, that Clause applies only in cases of termination, is completely one-sided and allows FEG to not reinstate a terminated Class Member, even if ordered to do so by the arbitrator. The Arbitration Clause is unconscionable, illegal and does not preclude Plaintiffs' claims asserted in this Complaint.

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

25. Despite the Operating Agreement and despite repeated representations by FEG, Plaintiffs are *de facto* employees, for the reasons set forth herein.

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

DEFENDANT'S CONTROL OF PLAINTIFFS AND OTHER WRONGFUL ACTS

26. FEG exercises extensive control over the means by which Plaintiffs perform their jobs.

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

27. Such control is exerted in part through the Operating Agreements and provisions described above, which Plaintiffs were required to sign as a condition of employment.

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

28. FEG's complete control over Plaintiffs is also exercised by other rules and regulations, written and unwritten, including but not limited to the following:

- a. FEG requires Plaintiffs to purchase or lease a vehicle manufactured to a design exclusive to FEG and mandated by FEG to make deliveries and pick-ups;
- b. FEG requires Plaintiffs to pay for the purchase or lease of such vehicle, as well as for its maintenance and upkeep. Other vehicle-related costs required to be paid by Plaintiffs include fuel, oil, tires, repairs, taxes, insurance coverage, licenses, vehicle registration renewal fees, base plates and all highway, bridge and ferry tolls;
- c. FEG requires that Plaintiffs' vehicles meet certain unique specifications, on both the inside and outside. At their own expense, Plaintiffs are

required to paint the vehicle with FEG's colors, and put FEG's logos on the vehicle;

- d. Although Plaintiffs could technically use the vehicles for their own commercial and personal purposes, they are not permitted to do so without removing or covering all FEG identifying logos and marks. Additionally, the hours worked by the drivers generally exceed ten hours each day, leaving no time to use the vehicles for any other endeavor;
- e. Plaintiffs and other drivers have no control over the prices charged FEG's customers for pick-up and delivery service;
- f. Plaintiffs and other drivers do not have authority to reject deliveries or pick-ups. They are required to adhere to FEG's strict route schedules and their failure to make a pick-up or delivery subjects them to discipline;
- g. FEG mandates that Plaintiffs wear an FEG-approved uniform, and follow such other guidelines as FEG might promulgate regarding their personal appearance;
- h. FEG instructs and controls drivers as to the appearance of their vehicles requiring that they be clean and presentable and free of body damage and/or and extraneous markings;
- i. FEG requires that Plaintiffs perform maintenance on their vehicles according to a schedule set by FEG, at Plaintiffs' expense;
- j. FEG requires that Plaintiffs and other drivers purchase or lease certain electronic communications equipment that complies with FEG's specifications. That equipment includes a "scanner" which contains a global positioning system" capability, which allows FEG to monitor the location of the drivers at all times;
- k. FEG requires its drivers to prepare daily logs and daily inspection reports, along with shipping documents and to file the originals with FEG each business day;
- l. FEG requires Plaintiffs to deposit \$1,000 per Ground driver and \$500 per Home Delivery driver into an escrow account;
- m. FEG requires Plaintiffs to provide services to FEG's customers on days and at times that are compatible with the customer's schedules and requirements as accepted by FEG – the drivers have no choice but to meet the schedules set by FEG and its customer;
- n. FEG assigns Plaintiffs to a specific Primary Service Area - the area each driver is to service, the terms of which are non-negotiable;

- o. FEG determines the volume of deliveries and pick-ups each driver makes;
- p. The volume of deliveries and pick-ups given to each driver prevents them from developing any new business on their own;
- q. FEG can unilaterally reconfigure Plaintiffs' Primary Service Areas;
- r. FEG requires Plaintiffs to make reasonable efforts to retain and increase FEG's customer base and the number of packages handled, but does not compensate Plaintiffs for any customer leads;
- s. If a package can not be delivered on the day mandated by FEG, FEG requires the driver to return the package to FEG on the same day or the next day and to make notations as for the reason for non-delivery, with the drivers being subjected to discipline if they do not or cannot attempt the delivery;
- t. Plaintiffs are not given any sick or vacation leave. If Plaintiffs or other drivers get sick, FEG requires that they find substitutes. FEG must first give approval for these substitutes, even though Plaintiffs are required to pay such substitutes' wages;
- u. FEG may and does terminate drivers at will and without cause;
- v. FEG requires drivers to give thirty (30) days written notice before terminating their obligations under the Agreement. If drivers fail to do so, Defendant requires drivers to pay it the escrow as liquidated damages;
- w. FEG requires Plaintiffs to submit all claims of wrongful termination to arbitration, stating that the arbitrator has no power to award plaintiffs their routes or punitive damages. The plaintiffs must pay for their own counsel and their portion of the arbitrators' fees;
- x. FEG offers a group vehicle insurance program to Class Members at very low rates. Individual vehicle insurance is so expensive that the result of FEG's termination of insurance is to effectively terminate the Agreement. FEG has terminated the group vehicle insurance for individual Class Members as a method of controlling the class.
- y. Plaintiffs must submit to a test of intoxication or impairment requested by FEG;
- z. Plaintiffs may not carry non-authorized passengers while on FEG' business;
- aa. Plaintiffs must complete a thorough physical examination confirming physical fitness to operate a commercial vehicle at least every two years, and following any physical or mental impairment from injury or disease,

regardless of whether the driver is subject to DOT requirements. These examinations must be completed by a physician approved by FEG;

- bb. Plaintiffs must submit to a drug screen administered at whatever time and place and in whatever manner dictated by FEG; and
- cc. Drivers must cooperate fully with FEG in the conduct of any legal action, regulatory hearing or other similar process arising from or in any way related to any matter found within the safe driving provisions of the Agreement. Such cooperation includes, without limitation, attendance at hearings, trials, and meetings, the securing of evidence and obtaining the attendance of witnesses.

ANSWER: Defendant denies each and every allegation contained in Paragraph 28 of the Amended Complaint, including its subparts.

29. FEG employs Terminal Managers, Pickup and Delivery Managers, Safety Managers and other supervisory personnel to process the drivers' paperwork and to give each driver his or her delivery and pick-up schedules.

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

30. FEG assigns Plaintiffs to deliver packages outside their geographical "primary service areas" without their consent.

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

31. FEG's assignment of packages and unilateral modification of pay structures effectively and efficiently controls Plaintiffs' earnings and ability to complete their work.

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

32. Drivers have no say in whether to accept or decline packages assigned by FEG in a given day, even if outside his contracted “primary service area,” FEG disciplines or terminates drivers who fail to deliver packages outside his or her Primary service area that FEG assigns.

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

33. Drivers typically commence their work day in the early morning and finish their routes around 6 p.m. to 7:00 p.m.

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

34. FEG pays its drivers on a piece rate system, for the number of stops, deliveries and pick-ups made.

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

35. Plaintiffs’ delivery of packages is an active, integral and indispensable part of FEG’s business enterprise. By driving vehicles with FEG’s colors and logos, by reliably serving FEG’s customers, by following FEG’s controlled delivery routes and delivery and pick-up methods, by providing FEG with customer leads, and in other ways, Plaintiffs and other delivery drivers have rendered, and continue to render, valuable personal services to Defendant FEG.

The personal services described immediately above:

- a. confer substantial benefits on FEG;
- b. are an integral part of the process which enables FEG to offer its customers timely and reliable pick-up and delivery services; and
- c. do not involve the kind of expertise which requires entrustment to an independent professional, as opposed to an employee.

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

Complaint.

36. The skills required of the Plaintiff Class in rendering services to FEG (picking up and delivering packages) are such that said services can be rendered by employees, rather than by specially-skilled independent workers. While FEG prefers to employ drivers with at least one year of commercial driving experience, FEG will and does employ drivers with no experience.

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

CLASS ACTION ALLEGATIONS

37. Plaintiffs bring this class action on behalf of themselves and other similarly situated drivers/contractors.

ANSWER: Paragraph 37 contains Plaintiffs' characterization of their action, and therefore requires no answer. To the extent an answer is required, FedEx Ground specifically denies that Plaintiffs or the purported members of their putative class have been harmed in any way by FedEx Ground and deny that class treatment of their claims is appropriate.

38. Specifically, Plaintiffs bring this action as a class action on behalf of all persons who worked for Defendant FEG at its Ground Division and/or Home Delivery Division terminals in New Jersey, from May 17, 1999 to the time of trial (the "Class Period") as package delivery drivers and/or package pick-up drivers, and who were signatory to an Operating Agreement with Defendant FEG.

ANSWER: Paragraph 38 contains Plaintiffs' definition of their putative class, and therefore requires no answer. To the extent an answer is required, FedEx Ground denies that class treatment is appropriate.

39. Upon information and belief, the number of members of the Plaintiff Class exceeds 300 during the Class Period.

ANSWER: Defendant denies each and every allegation contained in Paragraph 39 of the Amended Complaint and specifically alleges that class treatment is not appropriate.

40. The Plaintiff Class is so numerous that their individual joinder into a single action is impracticable. Although the exact number of Class Members cannot be properly determined without further discovery, the number and identity of the Class Members can easily be ascertained from Defendants' records.

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

41. In order to service its customers and to compete with other carriers based upon price, FEG engages and has, at all times relevant, engaged in a systematic marketing, advertising and recruiting campaign within the State of New Jersey, addressed to the general public, to induce members of the public, such as Plaintiffs, to agree to purchase and service one of FEG's delivery routes.

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

42. Through the above-referenced campaign, FEG induces and has induced individuals, including Plaintiffs, to become drivers for FEG by representing that the drivers will be independent businesses in partnership with FEG, that they will be licensed to use FEG's trade name, trade mark and related characteristics; that they will acquire delivery routes that have intrinsic value, that said routes can grow in value with the delivery business and that said routes can be sold. These representations are false and misleading, as FEG controls the routes and the

drivers in such a manner that the routes have virtually no value and the drivers can not grow their business.

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

43. In its Operating Agreements, as in the marketing materials discussed above, Defendant conceals the true nature of the relationship between FEG and its drivers: that of employer and employee.

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

44. As a result of Defendant's misrepresentations, the Plaintiffs pay substantial sums of their own money for the purchase or lease of vehicles that meet FEG specifications, as well as all costs of operating and maintaining those vehicles.

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

45. FEG's drivers who sign the Operating Agreement do not receive workers' compensation coverage or unemployment insurance benefits. FEG does not pay employment taxes on behalf of the Plaintiffs. The drivers are excluded from all of the benefit programs that FEG affords its other employees, including without limitation vacations, holidays, sick days, personal days, medical insurance and retirement programs.

ANSWER: Defendant denies each and every allegation in Paragraph 45 of the Amended Complaint, except admits that it does not pay employment taxes on behalf of the Plaintiffs.

46. FEG has fraudulently mischaracterized its relationship with its drivers as one of an independent contractor, thereby inducing Plaintiffs to expend tens of thousands of dollars to acquire and maintain vehicles, and expend their own funds for work related services.

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

47. In fact, and as described above, FEG systemically controls virtually all aspects of the relationship with Plaintiffs in such a manner and extent that the drivers are in fact employees of FEG.

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

48. FEG has deprived Plaintiffs of the value of their “businesses” by making them employees, despite FEG’s characterization of them as independent contractors and businesspersons.

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

49. FEG uses the same recruitment and management scheme and script throughout the State of New Jersey, and, upon information and belief, nationwide.

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

50. The Defendant’s actions have inflicted the same types of harm upon each and every member of the Class.

ANSWER: Defendant denies each and every allegation in Paragraph 50 of the Amended Complaint. Defendant specifically denies that it has inflicted any harm on Plaintiffs.

51. There are questions of law and fact that affect and are common to all Class Members. The central questions of law and fact involved in this action are of a common or general interest.

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

52. 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:

- a. Whether FEG violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et. seq., in the marketing/sale of its route to Plaintiffs;
- b. Whether FEG misled Class Members into believing they were acquiring an independent business and were independent contractors;
- c. Whether the contractor drivers are actually employees based upon FEG's level of control of their work;
- d. Whether FEG unlawfully forced Plaintiffs to pay for business expenses that rightfully should have been paid for by their employer, FEG;
- e. Whether FEG was unjustly enriched by failing to compensate the Class as employees, to provide employment benefits and emoluments of employees, by evading employment taxes, and by wrongfully benefiting from its requirement that the Class pay for FEG's business expenses;
- f. Whether FEG unlawfully failed to provide workers' compensation insurance benefits to the Class Members;
- g. Whether FEG unlawfully failed to provide unemployment insurance benefits to the Plaintiff Class Members;
- h. Whether FEG unlawfully failed to pay the employment portion of all employment taxes that would have been due if it accurately classified Plaintiffs as employees instead of independent contractors;
- i. Whether injunctive and declaratory relief are proper;
- j. Whether the agreement permitting FEG to shift the burden of employment expenses, taxes, and insurances is illegal and therefore void; and,

- k. Whether Defendants' actions violate the implied covenant of good faith and fair dealing.

ANSWER: Defendant denies each and every allegation in Paragraph 52 of the Amended Complaint, including its subparts.

53. The claims of the named representative Plaintiffs are typical of the claims of other members of the Plaintiff 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 suffered financial loss of thousands of dollars due to FEG's conduct.

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

54. The Class Representatives have an incentive and are committed to vigorously prosecuting this action because they have actually suffered losses as a result of Defendant's actions.

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

55. Plaintiffs have retained qualified counsel, experienced in class action practice, to represent them in this matter.

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

56. A class action is the only realistic method available for the fair and efficient adjudication of this controversy. Because the damages suffered by individual Class Members, may be relatively small, in comparison with 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. The prosecution of separate actions would also create the risk of inconsistent rulings, which may be dispositive of the interest of Class Members who are not parties to the adjudication and/or may substantially impede Class Members' ability to protect their interests, and therefore would be contrary to the interest of justice and equity.

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

57. This action should proceed as a class action under R.4:32-1(b)(1)(A) because the prosecution of separate actions by or against individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendant.

ANSWER: Defendant denies each and every allegation in Paragraph 57 of the Amended Complaint.

58. This action should also proceed as a class action under R.4:32-1(b)(1)(B) because the prosecution of separate actions by or against individual members of the Class would create a risk of adjudications with respect to individual members of the Class that would as a practical matter be dispositive of the interests of the other members who are not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

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

59. This matter should also proceed as a class action under R.4:32-1(b)(2) because Defendant's acts and/or omissions apply generally to members of the Class warranting a declaratory judgment that Defendant's actions constitute a scheme, fraud, misrepresentation,

and/or unconscionable conduct in violation of applicable New Jersey law and an injunction prohibiting such acts and/or omissions in the future.

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

COUNT I – VIOLATION OF THE CONSUMER FRAUD ACT

60. Plaintiffs incorporate by reference Paragraphs 1 through 59 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 59 of the Amended Complaint as if set fully forth herein.

61. Defendants, through the actions described above, have violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et. seq.

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

62. Defendant's marketing and recruitment materials are offered and presented to members of the general public within the State of New Jersey.

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

63. In entering into the Operating Agreement, Plaintiffs purchased their routes from FEG. The consideration for that purchase was Plaintiffs' acquiring the delivery truck, purchase of the business support package and an agreement to provide services.

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

64. Defendant's representations to Plaintiffs and other members of the general public through their advertising, marketing and recruitment process were false and were false statements of intention, when made, and therefore constitute affirmative misstatements of material fact.

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

65. FEG has engaged in unconscionable commercial practices of deception, fraud, false pretense, false promise, and misrepresentation in recruiting and retaining its drivers, the public at large, and the Class specifically, regarding the status of the Class Members as independent business owners as pled in this Complaint.

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

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

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

67. Defendant committed violations of Federal Trade Commission and other regulations with regard to the marketing and sale of purported “franchises” and business opportunities to the Plaintiffs.

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

68. Defendant knowingly concealed, suppressed or omitted the fact that it intended to micro-manage Plaintiffs’ work and income, that Defendant’s management and control utterly destroyed or would destroy any perceived value of the routes that FEG had no intention of leaving the means and methods of the work to Plaintiffs, that other jurisdictions have found that driver-contractors were actually employees, not business owners, that Defendant intended to treat Plaintiffs as employees, not entrepreneurs, and other material facts regarding the transaction.

ANSWER: Defendant denies each and every allegation contained in Paragraph 68 of the Amended Complaint.

69. Defendant’s actions constitute an unconscionable commercial practice, deception, fraud, false pretense, violation of applicable regulations, false promise, misrepresentation, and/or the knowing concealment, suppression or omission of material facts with intent that the Plaintiffs, and those like them, rely upon its concealment, suppression or omission, in connection with the sale of the routes to Plaintiff.

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

70. Defendant committed affirmative misrepresentations, knowing omissions, and regulation violations of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2, entitling Plaintiff to the remedies under the Act.

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

71. As a result of Defendant's conduct, Plaintiffs entered into the Operating Agreement as described above, and made the associated and required investments in the purchase of a truck and other equipment

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

72. As a result of Defendant's control, micro-management, and abuse thereof, Defendant has destroyed the potential financial value of the routes, instead Plaintiffs made great investments in routes that are virtually valueless.

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

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

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for punitive damages, compensatory damages, injunctive and declaratory relief, consequential damages, treble damages, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

ANSWER: Defendant denies each and every allegation contained in Paragraph 73 of the Amended Complaint and denies that Plaintiffs and the purported members of their putative class are entitled to any and all relief stated in the WHEREFORE clause immediately following Paragraph 73 of the Amended Complaint.

COUNT II - MISREPRESENTATION

74. Plaintiffs incorporate by reference Paragraphs 1 through 73 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 73 of the Amended Complaint as if set fully forth herein.

75. Defendant's knowing misrepresentations and omissions also constitute legal and equitable fraud. Defendant's actions were willful, wanton and taken with reckless disregard to the harm they would cause Plaintiff.

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

76. Defendant engaged in misrepresentations and omissions described above as part of a systematic corporate policy.

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

77. Defendant made the representations set forth herein above.

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

78. Defendant knew, or should have known, or recklessly or negligently disregarded the truth of the representations, which were false when made, or which were promises of future action which Defendant did not intend to comply with at the time when they were made.

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

79. Defendant made said representations with the intent that Plaintiffs would rely on same.

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

80. Plaintiffs relied upon Defendant's misrepresentations, actions and intentional omissions in deciding to enter into the Operating agreement.

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

81. Plaintiffs suffered harm as a result of Defendant's misrepresentations.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for punitive damages, compensatory damages, injunctive and declaratory relief, consequential damages, treble damages, rescission, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

ANSWER: Defendant denies each and every allegation contained in Paragraph 81 of the Amended Complaint and denies that Plaintiffs and the purported members of their putative class are entitled to any and all relief stated in the WHEREFORE clause immediately following Paragraph 81 of the Amended Complaint.

COUNT III– RECISSION OF OPERATING AGREEMENT

82. Plaintiffs hereby incorporate by reference paragraphs 1 through 81 of this Complaint as if fully set forth herein.

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 81 of the Amended Complaint as if set fully forth herein.

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

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

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

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

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

ANSWER: Defendant denies each and every allegation contained in Paragraph 85 of the Amended Complaint.

86. The Operating Agreement illegally and unfairly advantages FEG, by mischaracterizing the status of the Plaintiffs in that FEG evades employment related obligations,

such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, illegally shifting the expense of workers' compensation coverage and other expenses to Plaintiffs.

ANSWER: Defendant denies each and every allegation contained in Paragraph 86 of the Amended Complaint.

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

ANSWER: Defendant denies each and every allegation contained in Paragraph 87 of the Amended Complaint.

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

ANSWER: Defendant denies each and every allegation contained in Paragraph 88 of the Amended Complaint.

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

ANSWER: Defendant denies each and every allegation contained in Paragraph 89 of the Amended Complaint.

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

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

ANSWER: Defendant denies each and every allegation contained in Paragraph 90 of the Amended Complaint.

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

ANSWER: Defendant denies each and every allegation contained in Paragraph 91 of the Amended Complaint.

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

ANSWER: Defendant denies each and every allegation contained in Paragraph 92 of the Amended Complaint.

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

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant rescinding the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FEG, along with compensatory

damages, punitive damages, consequential damages, declaratory judgment and injunctive relief, costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

ANSWER: Defendant denies each and every allegation contained in Paragraph 93 of the Amended Complaint and denies that Plaintiffs and the purported members of their putative class are entitled to any and all relief stated in that paragraph of the Amended Complaint and the WHEREFORE clause immediately following Paragraph 93 of the Amended Complaint.

COUNT IV – VIOLATION OF THE WAGE PAYMENT LAW

94. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 93 of the Amended Complaint as if set fully forth herein.

95. FEG is an employer within the meaning of the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1(a).

ANSWER: Plaintiffs' allegation in Paragraph 95 states a legal conclusion to which no answer is required. To the extent an answer is required, FedEx Ground denies that it employed Plaintiffs or the purported members of their putative class.

96. Each Class Member is an employee within the meaning of N.J.S.A. 34:11-4.1(b).

ANSWER: Defendant denies each and every allegation contained in Paragraph 96 of the Amended Complaint.

97. FEG has paid to the Plaintiffs compensation for their services that are wages within the meaning of N.J.S.A. 34:11-4.1(c).

ANSWER: Defendant denies each and every allegation contained in Paragraph 97 of the Amended Complaint.

98. FEG has withheld and diverted from the Plaintiffs' wages amounts for workers' compensation, employment taxes, and business expenses such as truck payments, vehicle insurance, vehicle maintenance, the "business support package" and other expenses.

ANSWER: Defendant denies each and every allegation contained in Paragraph 98 of the Amended Complaint.

99. FEG withheld and diverted the wages of the Plaintiffs as set forth above in violation of N.J.S.A. 34:11-4.4 et. seq.

ANSWER: Defendant denies each and every allegation contained in Paragraph 99 of the Amended Complaint.

100. The Operating Agreement as described herein violates the Wage Payment Law, and is unlawful, null and void pursuant to N.J.S.A. 34:11-4.7.

ANSWER: Defendant denies each and every allegation contained in Paragraph 100 of the Amended Complaint.

101. Pursuant to N.J.S.A. 34:11-4.7, Plaintiffs have a private right of action against FEG, their employer, for the full amount of wrongfully withheld or diverted wages.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for wrongfully withheld and diverted wage, compensatory damages, punitive damages, consequential damages, declaratory judgment holding the Operating Agreement to be null and void, injunctive relief to enjoin the Defendant from entering into new Operating Agreements and from attempting to enforce existing Operating Agreements, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and

proper.

ANSWER: Defendant denies each and every allegation contained in Paragraph 101 of the Amended Complaint and denies that Plaintiffs and the purported members of their putative class are entitled to any and all relief stated in WHEREFORE clause immediately following Paragraph 101 of the Amended Complaint.

COUNT V – BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

102. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 101 of the Amended Complaint as if set fully forth herein.

103. Under New Jersey law, each Operating Agreement contains a covenant of good faith and fair dealing that FEG owes each Plaintiff and Class Member.

ANSWER: Plaintiffs' allegation in Paragraph 103 states a legal conclusion to which no answer is required.

104. Defendant has breached that duty, acted in bad faith and has failed and refused to deal with the members of the Class fairly by:

- a. intentionally misclassifying the Class Members as independent contractors when, because of the level of FEG's control, the Class Members are actually employees;
- b. destroying the value of the plaintiffs routes in such a manner as to render them of little or no value, thereby depriving the Plaintiffs of the value of their bargain;
- c. structuring and restructuring Plaintiffs' routes in such a manner as to require the Plaintiffs to work more and more hours while maintaining or reducing Plaintiffs' incomes;
- d. unilaterally restructuring routes to FEG's benefit and to the Plaintiffs' detriment, without adequate compensation;

- e. managing the income of the Plaintiffs in such a manner as to defeat their efforts to increase their earnings, and to maintain all of the Plaintiffs at the same substandard pay rate;
- f. exercising discretion to terminate driver contracts for failure to “voluntarily” provide services outside assigned routes;
- g. terminating group vehicle insurance without cause;
- h. refusing to permit terminated drivers to sell their routes;
- i. refusing to pay for or create a market for routes once they are terminated;
- j. subjecting the drivers to an annual renewal process permitting the employer to terminate the agreement without cause, therefore destroying any intrinsic value to the route;
- k. making unilateral changes to the pay structure for the routes, therefore controlling Plaintiffs’ income in order to increase their profits;
- l. otherwise depriving Plaintiffs of the benefit of their bargain with FEG.

ANSWER: Defendant denies each and every allegation contained in Paragraph 104 of the Amended Complaint, including its subparts.

105. Plaintiffs have suffered losses as a direct and proximate result of the Defendant’s breaches, unfair business practices and actions described above.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for compensatory damages, punitive damages, consequential damages, declaratory judgment and injunctive relief, plus costs, counsel fees, pre- and post judgment interest, and such further relief as may be just and proper.

ANSWER: Defendant denies each and every allegation contained in Paragraph 105 of the Amended Complaint and denies that Plaintiffs and the purported members of their putative class are entitled to any and all relief stated in the WHEREFORE clause immediately following Paragraph 105 of the Amended Complaint.

COUNT VI – DECLARATORY RELIEF

106. Plaintiffs incorporate the preceding Paragraphs of this Complaint as if fully set forth herein.

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 105 of the Amended Complaint as if set fully forth herein.

107. An actual and substantial controversy exists between Plaintiffs and members of the Class on the one hand, and Defendant FEG on the other hand, as to the following matters:

- a. Whether FEG willfully and unlawfully classified drivers as independent contractors rather than as employees;
- b. Whether FEG has failed to reimburse its drivers for their necessarily incurred employment expenses; and
- c. Whether FEG has unlawfully refused to provide workers compensation and/or unemployment insurance benefits under applicable law.

ANSWER: Defendant denies each and every allegation contained in Paragraph 107 of the Amended Complaint, including its subparts.

108. Plaintiffs contend that by classifying FEG's employees as independent contractors and by failing and refusing to compensate and reimburse those drivers as alleged herein, defendants have violated illegally avoided New Jersey law regarding employment taxes, workers' compensation insurance and business expenses paid by Class Members on Defendant's behalf.

ANSWER: Defendant admits that Paragraph 108 of the Amended Complaint states Plaintiffs' contents. Defendant denies the remaining allegations contained in Paragraph 108 of the Amended Complaint.

109. Defendant contends the opposite of the Plaintiff Class's allegations.

ANSWER: Defendant admits that it has denied allegations in Paragraph 109 state legal

conclusions to which no answer is required. To the extent that an answer is required, FedEx Ground denies each and every allegation contained in Paragraph 109 of the Amended Complaint and further alleges that FedEx Ground at all times acted lawfully.

110. Declaratory relief is therefore appropriate, because a controversy exists between the parties.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant and declare that the conduct complained of herein be declared unlawful and the Defendant be enjoined from said conduct in the future.

ANSWER: Defendant denies each and every allegation contained in Paragraph 110 of the Amended Complaint and denies that Plaintiffs and the purported members of their putative class are entitled to any and all relief stated in the WHEREFORE clause immediately following Paragraph 110 of the Amended Complaint.

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.

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 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.

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 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.

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 contract 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 the applicable law, which Defendant specifically denies, and assuming, *arguendo*, that any such Plaintiff, and any such purported members of the putative class, or some of them, are entitled to relief under the 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 the 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

Failure to Offer to Return Consideration

Plaintiffs' claims, or some of them, and members of the putative class, or some of 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-FOURTH 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 Jersey Department of Labor.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

Partial Payment

Assuming, arguendo, that Plaintiffs, and the purported members of the putative class described in the Complaint, or some of them, are/were employees within the meaning of the New Jersey law, which Defendant specifically denies, and assuming, arguendo, that Plaintiffs, and any such purported members of the putative class, or some of them, are entitled to economic damages under New Jersey law, which Defendant specifically denies, then the amount of unpaid overtime compensation and other economic damages allegedly owed to Plaintiffs or any putative class member shall reflect the fact that, pursuant to their voluntary agreements with Defendant, Plaintiffs and any and all such putative class members already have been compensated at a straight time rate for all hours "worked" in every work week.

TWENTY-THIRD AFFIRMATIVE DEFENSE

Overtime Exemption

Assuming, arguendo, that Plaintiffs, and the purported members of the putative class described in the Complaint, or some of them, are/were employees within the meaning of New Jersey law, which Defendant specifically deny, Plaintiffs' claims, and the claims of the putative class members, or some of them, are barred in whole or in part because Plaintiffs and the putative class members, or some of them, were at all relevant times exempt from the overtime pay requirements of New Jersey law.

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,

By: s/Thomas J. Brunner

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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' 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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