

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

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

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

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THIS DOCUMENT RELATES TO: )  
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*Larry Louzau, et al. v. FedEx Ground* )  
*Package System, Inc.,* )  
Civil No. 3:05-cv-00538-RLM-CAN (NY) )  
\_\_\_\_\_ )

**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 Plaintiffs’ Amended Class Action Complaint (the “Amended Complaint”) served by Plaintiffs LARRY LOUZAU and CHARLES MALKIN (“Plaintiffs”). Except as expressly admitted below, Defendant denies the allegations of Plaintiffs’ Amended Complaint.

**NATURE OF ACTION**

1. Plaintiffs allege on behalf of themselves, and other similarly situated current and former single work area pick-up and delivery drivers who worked or are working for defendant in New York State, that they are entitled to, *inter alia*, (i) the return of sums unlawfully deducted from their wages in violation of New York State Labor Law § 193(1); (ii) the return or reimbursement of funds which plaintiffs were required to pay “by separate transaction” in violation of New York State Labor Law § 193(2); and (iii) all damages authorized by New York State Labor Law § 198, except for liquidated damages.

**ANSWER:** Defendant denies the allegations contained in the “Nature of Action” Paragraph of the Amended Complaint. While defendant admits that the Amended Complaint filed by Plaintiffs on behalf of themselves and on behalf of putative class members purports to bring claims as described in the Amended Complaint, Defendant denies specifically the inference that Defendant violated the following statutes: (i) New York State Labor Law § 193(1); (ii) New York State Labor Law § 193(2); and (iii) New York State Labor Law § 198.

### **VENUE**

2. Venue herein is proper pursuant to the order of 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.

### **CLASS ALLEGATIONS**

3. Plaintiffs sue on their own behalf and on behalf of a class of persons pursuant to Rule 23 of the Federal Rules of Civil Procedure and Article 9 of the CPLR.

**ANSWER:** Paragraph 3 is not directed at Defendant and, therefore, requires no answer. Notwithstanding the foregoing, Defendant denies that Plaintiffs may maintain this suit either on behalf of themselves or on behalf of any putative class of persons.

4. Plaintiffs assert their New York Labor Law claims on behalf of all persons who worked for defendant and/or its predecessor in interest, RPS, Inc., in New York State at any time from October 27, 1998 until the entry of judgment in this case (the “Class Period”), as a Pick Up and Delivery Contractor driving full-time (exclusive of time off for vacation and/or illnesses) in a single work area dispatched from a New York State based terminal pursuant to the terms of defendant’s “Pick Up and Delivery Contractor Operating Agreement.” (the “Class”)

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 4 of the Amended Complaint, except that Defendant admits that Plaintiffs attempt to assert New York Labor Law claims on behalf of a class of persons.

5. The persons in the Class are so numerous that joinder of all members is impracticable. Although the precise number of such Class members is not currently known, and facts concerning such precise number are within the sole control of defendant, upon information and belief, there are more than 500 members of the Class during the Class Period.

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

6. There are questions of law or fact common to the Class which predominate over any questions affecting only individual members. Questions of law and fact common to the Class which predominate over questions solely affecting individual members of the Class include the following:

- a. Whether the Class members have been misclassified as independent contractors by defendant's operating agreements;
- b. Whether charges and deductions imposed by defendant against the wages of Class members violates Labor Law §193(1); and
- c. Whether payments made by Class members, by separate transaction, which payments were required by defendant or defendant's operations, violate Labor Law §193(2).

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 6 of the Amended Complaint, including its subparts.

7. The claims of the representative plaintiffs are typical of the claims of the Class. The named representative plaintiffs have suffered the same type of financial losses as other Class members in this case. Such losses stem from defendant's policy and practice of misclassifying such Class members as independent contractors in order to facilitate its practice of taking

unlawful deductions from their wages in violation of New York law, and requiring them in violation of New York law to make payments that typically constitute an employer's cost of doing business.

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

8. The representative parties will fairly and adequately protect the interests of the Class.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 8 of the Amended Complaint.

9. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, particularly in the context of wage litigation in which individual plaintiffs lack the financial resources to prosecute such claims effectively against a corporate defendant. The expense and burden of protracted litigation make it impracticable for Class members to seek redress individually for defendant's unlawful conduct. Moreover, if individuals were required to institute separate actions concerning the same issues raised by this action, the Court would be unduly burdened and the risk of inconsistent rulings, which might be dispositive of legal issues affecting nonparties, would be contrary to justice.

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

### **PARTIES**

10. Plaintiff Larry Louzau ("Louzau") is a resident of Westchester County, New York, and worked for defendant from in or about September 2002 to the present.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief as to the residency of Mr. Louzau and denies the remaining allegations contained in Paragraph 10 of the Amended Complaint.

11. Plaintiff Charles Malkin (“Malkin”) is a resident of Orange County, New York, and worked for defendant and its predecessor in interest from in or about July 1997 to the present.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief as to the residency of Mr. Malkin and denies the remaining allegations contained in Paragraph 11 of the Amended Complaint.

12. Upon information and belief, defendant FedEx Ground is a Delaware corporation doing business nationally, including in New York State.

**ANSWER:** Defendant denies each and every allegation in Paragraph 12 of the Amended Complaint, except that Defendant admits that FedEx Ground is incorporated under the laws of the State of Delaware and admits that it does business in New York State.

**STATEMENT OF FACTS COMMON TO ALL CAUSES OF ACTION**

13. Defendant’s business consists of providing a package transportation and delivery service to its customers throughout the United States.

**ANSWER:** Defendant alleges that it is a licensed motor carrier engaged in providing a small package information, transportation and delivery service throughout the United States and denies the remaining allegations contained in Paragraph 13 of the Amended Complaint.

14. Plaintiffs and Class members were hired by defendant as drivers to deliver and pick up packages for defendant’s customers on behalf of defendant.

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

15. Plaintiffs and Class members are required to sign a “Pick-Up and Delivery Contractor Operating Agreement” (hereinafter the “OA”) with defendant as a condition of employment.

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

16. Upon information and belief, during the Class Period, more than 500 delivery and pick-up drivers in New York State fall within the Class. Such drivers include each of the plaintiffs named herein.

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

17. Defendant uses drivers, including plaintiffs, for the purpose of providing its customers with the core service defendant promotes as its business.

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

18. Defendant exercises extensive control over the means by which its drivers perform their jobs. For instance, plaintiffs and drivers have no authority to refuse pick-ups or deliveries. Drivers are not permitted to make deliveries or pick-ups according to their own schedules. Indeed, defendant requires drivers, including plaintiffs, to make daily deliveries in the morning and pick-ups in the afternoon.

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

19. Moreover, plaintiffs and Class members are required to provide deliveries and pick-ups which are compatible with defendant's customer's schedules and requirements, which are contracted by defendant's sales employees. In addition, defendant can and often does require its drivers to pick up and/or deliver packages outside of their assigned work areas.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 19 of the Amended Complaint.

20. The vehicles used by drivers in the performance of their duties for defendant are kept at defendant's terminal unless they are being used by drivers for defendant's assigned deliveries or pick-up. Defendant requires its drivers to arrive at defendant's terminal between 5:00 a.m. and 6:30 a.m. to arrange and coordinate packages in their vehicles for delivery. Prior to drivers' arrival at the terminal, the vehicles are loaded by defendant's employees with packages to be delivered to the respective assigned work area of each driver.

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

21. Defendant employs Terminal Managers, Pickup and Delivery Managers, and other supervisory personnel, to coordinate and issue drivers' paperwork, together with delivery and pick-up schedules, to which drivers are strictly required to adhere. Drivers generally return to their assigned terminal at or around 4:30 p.m., in order to complete paperwork required by defendant, including, *inter alia*, daily logs and daily inspection reports, and to await management's check of each driver before such drivers are permitted to leave for the day.

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

22. Defendant pays its drivers based upon the number of pick-up and delivery stops made. A driver who at the end of the day fails to check out with his supervisor, who is an employee of defendant, is not paid wages for that day despite having worked.

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

23. Plaintiffs and all drivers employed by defendant are subject to the direction and control of defendant in that their services constitute an integral part of and are indispensable to defendant's business operations and core business purpose.

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

24. The success or continuation of defendant's business depends upon the personal services performed by plaintiffs and Class members.

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

25. Plaintiffs and Class members render a personal and necessary service to defendant by driving vehicles displaying defendant's colors, marks and logos, by adhering to defendant's strictly controlled and assigned delivery routes, by following defendant's delivery and pick-up methods on which they are extensively trained by defendant, and in other ways.

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

26. Such personal services are a fundamental and integral part of defendant's provision of services to its customers. The personal services provided by plaintiffs and other

drivers do not involve the level of expertise typically requiring the use of independent professionals with special skills as opposed to employees.

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

27. Indeed, the norm in defendant's industry is that such drivers are, in fact, employees of the companies for which they deliver and pick up packages.

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

28. Furthermore, the services provided by plaintiffs and other drivers are personal in that plaintiffs do not hire their own employees to perform the services for defendant.

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

**The Pick-Up and Delivery Contractor Operating Agreement (OA), Defendant's Policies, Practices and Procedures, and Management Discretion Ensure Strict Control Over Drivers**

29. The OA, which all drivers are required to sign as a condition of employment, sets forth the following statement, which purports to classify drivers, including the Class members, as independent contractors:

**Background Statement,** FedEx Ground Package System, Inc. is a duly licensed motor carrier engaged in providing a small package information, transportation and delivery service throughout the United States, with connecting international service. The Contractor is an owner-operator of one or more pieces of trucking equipment suitable for use in such a service. Contractor wants to make this equipment available, together with a qualified operator for each piece of equipment, to provide daily pick-up and delivery service on behalf of FedEx Ground. FedEx Ground wants to provide for package pick-up and delivery services through a network of independent contractors, and, subject to the number of packages tendered to FedEx Ground for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment. Contractor wants the advantage of operating within a system that will provide

access to national accounts and the benefits of added revenue associated with shipments picked up and delivered by other contractors throughout the FedEx Ground system. In order to get that advantage, Contractor is willing to commit to provide daily pick-up and delivery service, and to conduct his/her business so that it can be identified as being a part of the FedEx Ground system. Both FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee of FedEx Ground for any purpose. Therefore, this Agreement will set forth the mutual business objectives of the two parties intended to be served by this Agreement – which are the results the Contractor agrees to seek to achieve – but the manner and means of reaching these results are within the discretion of the Contractor, and no officer or employee of FedEx Ground will have the authority to impose any term or condition on Contractor or on Contractor’s continued operation which is contrary to this understanding.

**ANSWER:** Defendant alleges that 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 29 of the Amended Complaint.

30. In addition, the OA contains specific provisions intended to specifically control the manner and means by which plaintiffs and drivers are expected to achieve defendant’s results.

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

31. Among other things, plaintiffs and Class members are required to purchase or lease vehicles that meet defendant’s specific specifications, and which bear a “FedEx Ground Unit Number.” At all times, defendant retains control over the selection of vehicles used by plaintiffs for defendant’s intended use. Such vehicles are manufactured to a design exclusive to defendant. In addition, plaintiffs and drivers are required, at their sole cost and expense, to maintain the vehicles in accordance with defendant’s standards and to submit to defendant proof of timely maintenance and inspection of such vehicles. Defendant also requires that plaintiffs

and drivers maintain liability insurance, naming defendant as an insured, in the amount of one million dollars.

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

32. Defendant requires that the vehicles driven by plaintiffs and other drivers be marked “with such identifying colors, logos, numbers, mark and insignia . . . or to identify the [vehicle] as a part of the FedEx Ground system.” Although defendant purports to permit plaintiffs and Class members to use the vehicle for other purposes, when it is not being used for defendant, defendant requires that “all such identifying numbers, marks, logos and insignia will be removed or masked . . . when the [vehicle] is so used,” thus rendering any such use impractical.

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

33. The OA confirms that it seeks to control the means by which plaintiffs and other drivers achieve defendant’s business results by requiring drivers to prepare daily driver logs and daily inspection reports” and “such shipping documents as FedEx Ground may from time to time designate, and to complete and return these documents to FedEx Ground at the end of each business day.”

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

34. The OA further requires drivers to deposit with FedEx Ground “at such time and in such manner as FedEx Ground may specify the sum of \$1,000,” which defendant deposits in a so-called “Contractor Performance Escrow Account.” Such sum is collected by defendant and

used to reduce any “indebtedness” defendant deems a driver may allegedly owe to defendant upon a driver’s termination. The sum is also retained by defendant as liquidated damages if a driver fails to provide defendant with thirty-days written notice of termination of the OA.

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

35. Defendant expressly dictates in the OA that drivers “wear a FedEx Ground approved uniform” and “keep his/her personal appearance consistent with reasonable standards of good order as maintained by [defendant’s] competitors and promulgated from time to time by FedEx Ground.” Thus, in addition to the OA, defendant incorporates other obligations and requirements which are set forth in its other written and unwritten policies, procedures, and practices.

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

36. Defendant requires that drivers maintain the vehicles “in a clean and presentable fashion free of body damage and extraneous markings.”

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

37. Defendant requires that drivers adhere to its strict guidelines concerning driver safety. Among other things, defendant prohibits drivers from refusing to submit to intoxication and drug tests; carrying passengers in their vehicles while working for defendant, unless authorized or required by defendant; failing to complete or undergo, at least every two years, physical examinations by a physician approved by defendant, confirming fitness to operate their vehicles.

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

38. The OA directs that drivers purchase or lease electronic communications equipment so that they are able “to cooperate” with defendant’s employees in connection with the “pick-up, delivery, handling, loading and unloading of packages and equipment . . . .” Such equipment is required to comply with defendant’s specifications.

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

39. The OA further provides that delivery routes, referred to as a driver’s “Primary Service Area,” are assigned by defendant and non-negotiable.

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

40. Despite defendant’s statement that drivers have a “proprietary interest” in the customers within their Primary Service Area, defendant is permitted to change a driver’s work area at any time.

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

41. The OA further provides for performance-based bonuses referred to as “Contractor Customer Service” payments after one year of service. Such payments are based upon a driver’s avoidance of “at-fault” accidents and not receiving customer complaints.

**ANSWER:** Defendant alleges that the Operating Agreements speak for themselves and denies each and every allegation contained in Paragraph 41 of the Amended Complaint.

42. The Operating Agreement is and at all relevant times has been a contract of adhesion, drafted exclusively by Defendant and/or its legal counsel, with no negotiation with drivers, who are required to sign the Agreement as a condition of employment. Plaintiffs and plaintiff class members are required to sign the form contract as is, without any changes made to the terms contained therein. Each year, drivers are required to sign additional Addenda which are likewise not subject to negotiation and are unilaterally drafted adhesion contract provisions. The Agreement is, and at all material times has been unlawful, unconscionable and fraudulent in form and effect.

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

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

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

44. For instance, although the OA purports to limit defendant's right to terminate drivers only for cause, the practices and extraneous policies used by defendant in interpreting the OA and in training its management employees in the supervision of drivers, gives defendant almost absolute unilateral control over contract termination rendering drivers subject to termination at-will.

**ANSWER:** Defendant alleges that the Operating Agreements speak for themselves and denies each and every allegation contained in Paragraph 44 of the Amended Complaint.

45. Furthermore, the OA states that “This Agreement, the Addenda and Attachments shall not be modified, altered, changed or amended in any respect unless in writing and signed by both parties.” In reality, however, defendant has taken the position that drivers who sign the OA prior to the inclusion of an addendum are still bound by such addendum whether or not the addendum is signed by both parties.

**ANSWER:** Defendant alleges that the Operating Agreements speak for themselves and denies each and every allegation contained in Paragraph 45 of the Amended Complaint.

**Effect of Defendant’s Misclassification  
of Plaintiffs and Class Members as Independent Contractors**

46. Defendant misclassifies plaintiffs and Class members for a variety of reasons involving avoidance of obligations arising under state and federal tax laws, social security, state unemployment insurance laws, workers’ compensation laws, and other employment laws.

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

47. In addition, defendant saves money in avoiding the expenses associated with its core business, *i.e.*, the delivery and pick-up of packages, by deducting sums for such expenses from plaintiffs’ compensation, which defendant characterizes as a “weekly settlement.”

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

48. With respect to other amounts not deducted directly from the wages of plaintiffs and Class members, defendant requires that plaintiffs and Class members make such payment by separate transaction.

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

49. The sums either deducted by defendant directly from plaintiffs' and Class members' wages or paid by plaintiffs and Class members by separate transaction are not for the benefit of plaintiffs and Class members, but, rather, are for the benefit of defendant and its business.

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

50. The wages of plaintiffs and Class members were subjected to deductions or charges for, among other things, the purchase or lease, required maintenance, fuel costs and enhancement of vehicles according to defendant's specifications; equipment required by defendant; insurance; uniforms; and \$1,000 for deposit in defendant's so-called Contractor Performance Escrow Account.

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

51. In addition, the wages of plaintiffs and Class members were subjected to deductions for errors, omissions, and/or work defendant or its customers deemed improperly performed.

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

### **Prior Determination of Employee Status**

52. In a class action filed in California Superior Court for the County of Los Angeles captioned, *Estrada v. Fed Ex Ground*, No. BC 210130, a class of pick-up and delivery drivers,

who performed services for defendant and/or its predecessor in interest in the State of California, were determined to be employees rather than independent contractors, based upon the fact that FedEx Ground had the right to control the manner and means by which the drivers provided services.

**ANSWER:** Defendant alleges that the *Estrada* court's Statement of Decision speaks for itself and further denies each and every allegation contained in Paragraph 52 of the Amended Complaint.

53. The class members in *Estrada* performed the same duties and were subject to the same control, material terms, and conditions as plaintiffs and Class members herein. In addition, the drivers in *Estrada* were required to sign an operating agreement that was similar in all material respects to the OA at issue in this case.

**ANSWER:** Defendant alleges that the *Estrada* court's Statement of Decision speaks for itself and further denies each and every allegation contained in Paragraph 53 of the Amended Complaint.

54. In concluding that the drivers in *Estrada* were, in fact, common law employees and not independent contractors despite FedEx Ground's classification of them as such, the court stated, among other things, that

[FedEx Ground] not only has the right to control, but has close to absolute control over the SWAs [defined as single work area pick up and delivery drivers in California] based upon interpretation and obfuscation. . . . A close reading of the OA, which all SWAs must sign in order to be able to work for [FedEx Ground] is comprised of platitudes and guidelines. This, in effect, leaves its interpretation in the sole hands of [FedEx Ground], without any meaningful recourse to the SWAs but with potential severe penalties and remedies that are intentionally kept uncertain and murky. . . . The description of the workings of the OA, which in effect gives almost absolute control over the SWAs (and even its own employees) is borne out by the testimony of [FedEx Group's] management team. It should be noted in the beginning that the OA is a brilliantly drafted contract creating the

constraints of an employment relationship with SWAs in the guise of an independent contractor model.

(*Estrada, et al. v. Fed Ex Ground*, No. BC210130, Statement of Decision, filed and dated July 26, 2004)(Superior Court of the State of California, Los Angeles County).

**ANSWER:** Defendant alleges that the *Estrada* court's Statement of Decision speaks for itself and further denies each and every allegation contained in Paragraph 54 of the Amended Complaint.

55. Furthermore, the *Estrada* court found, based upon the testimony of defendant's head of Contractor Relations as well as the testimony of defendant's San Diego and Anaheim terminal managers that the "OA was in effect a contract that relied upon a myriad of outside sources beyond the document itself in order to be implemented." (*Id.*) Defendant's head of Contractor Relations testified that such outside sources include, but are not limited to, the following: verbal information; posters on bulletin boards, welcome packets sent to new drivers; information given to new drivers as to customer expectations and company procedures; memoranda from management; audiotapes; News Network and the "Scanner"; Round Table Presentations; Information from Contractor Relations personnel as they traveled to the various facilities; Internet and Website; Custom; and under certain circumstances, the Operations Management Handbook and FedEx Ground Manual.

**ANSWER:** Defendant alleges that the *Estrada* court's Statement of Decision speaks for itself and further denies each and every allegation contained in Paragraph 55 of the Amended Complaint.

56. With respect to defendant's Contractor Relations department, the court in *Estrada* found that it was "nothing more than a mere branch of management" and that "[a]ny decision by

Contractor Relations is subject to higher management's approval or veto." According to the court, "Contractor Relations must be seen in a role akin to Human Relations over employees, wherein the highest levels of management have the final say." (*Id.*)

**ANSWER:** Defendant alleges that the *Estrada* court's Statement of Decision speaks for itself and further denies each and every allegation contained in Paragraph 56 of the Amended Complaint.

57. Plaintiffs are also aware of multiple decisions of the National Labor Relations Board holding FedEx Ground drivers to be employees.

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

#### **FIRST CAUSE OF ACTION**

58. Plaintiffs incorporate by reference all of the preceding paragraphs.

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

59. At all times material hereto, the compensation paid by defendant to plaintiffs and Class members constituted "wages" within the meaning of Labor Law §§190(1) and 193.

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

60. Other than deductions required by law, government rules or regulations (e.g., payroll taxes, child support orders, or wage garnishments), section 193 of the Labor Law prohibits an employer from making any deduction from an employee's wages, except those which the employee expressly authorizes in writing and are for that employee's benefit.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 60 of the Amended Complaint and refers to § 193 of New York Labor Law for its true and correct content.

61. Section 193 of the Labor Law expressly limits such “authorized deductions” to amounts for “insurance premiums, pension or health and welfare benefits, contributions to charitable organizations, payments for United States bonds, payments for dues or assessments to a labor organization, and similar payments for the benefit of the employee.” (Labor Law §193(1)(b)).

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 61 of the Amended Complaint and refers to § 193 of New York Labor Law for its true and correct content.

62. Defendant deducted amounts directly from the wages of plaintiffs and Class members, which do not fall within the categories of authorized deductions.

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

63. Defendant’s ongoing deduction of amounts not constituting authorized deductions from the wages of plaintiffs and Class members constitutes a violation of Labor Law §193(1).

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

64. As a proximate result of the foregoing, plaintiffs and Class members have been deprived of such amounts deducted from their wages and have incurred damages thereby.

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

## SECOND CAUSE OF ACTION

65. Plaintiffs incorporate by reference all of the preceding paragraphs.

**ANSWER:** Defendant repeats and re-alleges its answers to Paragraphs 1 through 64 of the Amended Complaint as if set fully forth herein.

66. Section 193(2) of the Labor Law prohibits employers from requiring an “employee to make any payment by separate transaction unless such charge or payment is permitted as a deduction of wages under [Labor Law §193(1)].”

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 66 of the Amended Complaint and refers to § 193 of New York Labor Law for its true and correct content.

67. Defendant required plaintiffs and Class members to make payments by separate transaction to defendant and/or third parties on behalf of defendant in connection with charges that would not have constituted authorized deductions pursuant to Labor Law §193.

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

68. Defendant’s requirement that plaintiffs and Class members make such payments constitutes a violation of Labor Law §193(2).

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

69. As a proximate result of the foregoing, plaintiffs and Class members have been deprived of such amounts deducted from their wages and have incurred damages thereby.

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

### **THIRD CAUSE OF ACTION**

70. Plaintiffs incorporate by reference all of the preceding paragraphs.

**ANSWER:** Defendant repeats and re-alleges its answers to Paragraphs 1 through 69 of the Amended Complaint as if set fully forth herein.

71. Plaintiffs and the class they represent were purportedly hired by defendant to work as “independent contractors” pursuant to the terms of the OA described above. In fact, defendant knew or should have known, at all times, that the “independent contractor” classification in the OA was improper and that plaintiffs and all persons similarly situated were “employees” entitled to the benefits and protections of all laws enacted for employees. Plaintiffs are informed, believe and on that basis allege, that through the OA Defendant intentionally misled plaintiffs and the class they represent as to their employment status, or made such representations to plaintiffs and class members recklessly and/or negligently, and deliberately concealed from and/or failed to disclose to the pick-up and delivery drivers the extra contractual sources (including but not limited to the FedEx Ground Manual, Operation Management Handbook, Settlement Manual, and 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 admits that both Defendant and Contractor intended 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 71 of the Amended Complaint.

72. At all material times, defendant either knew, or should have know 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 72 of the Amended Complaint.

73. At all material times, defendant intended to and did induce plaintiffs and the class they represent to reasonably and justifiably rely to their detriment on the false and fraudulent representations made to them by defendant in the OA concerning their employment status and 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 73 of the Amended Complaint.

74. By its aforesaid conduct, defendant is guilty of oppression, fraud, and malice in violating plaintiffs' rights and protections guaranteed by New York state law and other applicable law.

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

#### **FOURTH CAUSE OF ACTION**

75. Despite the express terms of the OA, 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 75 of the Amended Complaint.

76. Defendant controls virtually every aspect of the plaintiffs' work and earnings, as set forth in the general allegations hereof at paragraphs 14 through 52.

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

77. 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 77 of the Amended Complaint.

78. The OA 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 78 of the Amended Complaint.

79. The OA between defendant and each plaintiff and member of the class is void as against public policy and therefore unenforceable, as failing to recognize the employment status of the plaintiffs and the class members, and therefore denying them the legally cognizable benefits of employment.

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

80. The OA 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 80 of the Amended Complaint.

81. The OA illegally shifts the burden of certain costs that an employer must pay.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 81 of the Amended Complaint.

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

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 82 of the Amended Complaint.

83. 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 83 of the Amended Complaint.

84. As a direct and proximate result of defendant’s conduct, defendant 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 84 of the Amended Complaint.

85. 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 85 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs are entitled to any and all of the relief requested in that paragraph of the Amended Complaint.

#### **FIFTH CAUSE OF ACTION**

86. Plaintiffs hereby incorporate by reference all preceding paragraphs as if fully set forth herein, and further allege:

**ANSWER:** Defendant repeats and re-alleges its answers to Paragraphs 1 through 85 of the Amended Complaint as if set fully forth herein.

87. An actual controversy has arisen between the plaintiffs and plaintiff class members, on the one hand, and defendant, on the other hand, relating to the following matters:

- a. Whether defendant has unlawfully misclassified plaintiffs and plaintiff class members as independent contractors, and have thus denied plaintiffs and plaintiff class members of the common benefits of employee status, such as
  - i. wages;
  - ii. holiday pay;

- iii. workers' compensation;
  - iv. unemployment insurance;
  - v. contributions to the defendant's retirement plan;
  - vi. income tax withholding;
  - vii. meal, break and rest periods.
- b. Whether defendant has unlawfully failed to pay benefits and compensation owing in a timely manner to plaintiffs and plaintiff class members whose employment with defendant ended, as required by New York law.
  - c. What amounts plaintiffs and plaintiff class members are entitled to receive in compensation and benefits.
  - d. What amounts plaintiffs and plaintiff class members are entitled to receive in interest on unpaid compensation due and owing.
  - e. What amounts plaintiffs and plaintiff class members are entitled to receive from defendant in statutory penalties and interest.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 87 of the Amended Complaint, including its subparts.

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

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 88 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs and/or members of Plaintiffs' putative class are entitled to any and all of the relief requested in this Paragraph.

### **PRAYER FOR RELIEF**

**WHEREFORE**, plaintiffs and Class members demand the following relief:

(a) Certification of this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and/or Article 9 of the CPLR ;

(b) A declaration that plaintiffs and Class members are employees of defendant;

(c) An award of actual damages in an amount to be determined at trial for amounts deducted from plaintiffs' wages that do not constitute authorized deductions under Labor Law §193;

(d) An award of actual damages in an amount to be determined at trial for payments plaintiffs and Class members were required to make by separate transaction that did not qualify as authorized or permitted charges under Labor Law §193.

(e) An order requiring defendant to rescind the OA, and awarding restitution compensating for the reasonable value of the benefit provided to defendant.

(f) An award of plaintiffs' costs, pre- and post-judgment interest, expert witness fees, and reasonable attorneys' fees pursuant to Labor Law §198 and CPLR R. 909 and/or the Federal Rules of Civil Procedure;

(g) An award of punitive damages in an amount to be proven at trial; and

(h) Any other relief this Court deems to be just and proper.

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

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

#### FIRST ADDITIONAL DEFENSE

##### Failure to State a Claim

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

#### SECOND ADDITIONAL DEFENSE

##### Statute of Limitations

Plaintiffs' claims, 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, members of the putative class, or some of them, lack standing with respect to their claim for declaratory relief because they allege to be former, and not current employees. Upon information and belief, some purported members of the putative class lack standing because they were not signatories to any agreement with Defendant.

#### 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

#### 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 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, 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.

### 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 York Department of Labor.

### TWENTY-FIFTH 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.

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

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