

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: )  
)  
*Edward Slayman, v. FedEx Ground* )  
*Package System, Inc.,* )  
Civil No. 3:05-cv-00596-RLM-CAN (OR) )  
\_\_\_\_\_ )

**ANSWER AND ADDITIONAL DEFENSES OF FEDEX GROUND PACKAGE SYSTEM,  
INC. TO PLAINTIFFS' THIRD AMENDED 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' Third Amended Complaint (the "Third Amended Complaint") served by Plaintiffs EDWARD SLAYMAN, DENNIS MCHENRY and JEREMY BRINKER ("Plaintiffs"). Except as expressly admitted below, Defendant denies the allegations of Plaintiffs' Third Amended Complaint.

**INTRODUCTION**

1. Throughout most of the upper-tier parcel shipping industry, the drivers who actually pick up and deliver packages are the *employees* of the companies for which they drive. This is true, for example, of FedEx, the parent of defendant FedEx Ground Package System, Inc. and of FedEx's largest competitors. This designation makes sense: these shippers have developed a highly regulated set of procedures and protocols that they could not require of drivers if they were independent contractors.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 1 of the Third Amended Complaint.

2. Almost unique in the industry, however, are the drivers who deliver for defendant FedEx Ground Package System, Inc. Though these drivers are similarly subject to tightly regulated control by FedEx Ground, they are nevertheless called independent contractors by FedEx Ground. True independent contractor status would permit Plaintiffs certain freedoms to operate their business as they see fit, and to run the risks and rewards of owning a business. But there is nothing “independent” about the actual job requirements imposed on drivers by FedEx Ground.

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

3. Accordingly, if FedEx Ground is going to treat Plaintiffs and Class Members as employees, then it must compensate them as *employees*, as well. Thus, this lawsuit, on behalf of the named Plaintiffs and the Class described below, seeks:

- a declaration that Plaintiffs and the Class are in fact, FedEx Ground employees; and
- 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 the FEG should have but did not pay, and Plaintiffs are entitled to the quantum meruit value of their services as employees.

**ANSWER:** Paragraph 3 of the Third Amended Complaint describes the type of relief Plaintiffs and the purported members of his putative class seek and does not require an answer. Notwithstanding this, Defendant denies each and every allegation contained in Paragraph 3 of the Third Amended Complaint.

Specifically, Defendant denies that Plaintiffs or any purported member of his putative class is entitled to the relief sought.

#### **JURISDICTION AND VENUE**

4. This Court has subject matter jurisdiction over all other claims asserted in this action via 28 U.S.C. §1367.

**ANSWER:** Defendant admits that this Court has jurisdiction over the remaining claims.

5. 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.

#### **PARTIES**

6. Edward Slayman was, during the relevant period, a driver for FedEx Ground.

**ANSWER:** Defendant admits that Plaintiff Edward Slayman was an independent contractor with a contract with Defendant. Defendant denies any implication that Plaintiff Slayman was an employee of Defendant.

7. Dennis McHenry was, during the relevant period, a driver for FedEx Home Delivery.

**ANSWER:** Defendant admits that Plaintiff Dennis McHenry was an independent contractor with a contract with Defendant. Defendant denies any implication that Plaintiff McHenry was an employee of Defendant.

8. Jeremy Brinker was, during the relevant period, a driver for FedEx Home Delivery.

**ANSWER:** Defendant admits that Plaintiff Brinker was an independent contractor with a contract with Defendant. Defendant denies any implication that Plaintiff Brinker was an employee of Defendant.

9. Defendant FedEx Ground Package System, Inc. and FedEx Ground Package System, Inc. d/b/a FedEx Home Delivery, Inc. (hereafter collectively referred to as “Defendant” or “FEG” or “FedEx Ground”) is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania. FEG is a part of the “family” of corporations controlled by Federal Express Corporation. At all relevant times, and within six years of the filing of this Complaint, FEG was engaged in providing small package information, transportation and delivery services in the United States, including in the State of Oregon.

**ANSWER:** Defendant admits that it is a Delaware corporation and that part of its business includes providing small package information, transportation and delivery services in the United States, including in the State of Oregon. Defendant further admits that it is a wholly-owned subsidiary of Federal Express Corporation. Defendant denies the remaining allegations contained in Paragraph 9 of the Third Amended Complaint.

10. FedEx Ground is specifically defined in this complaint to include all successor, predecessor, and subsidiary entities to which these allegations pertain.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 10 of the Third Amended Complaint.

#### **COMMON FACTS**

11. Defendant employs thousands of drivers to pick up and deliver packages for its customers throughout the United States. As a condition of employment, each FEG and FHD

driver (referred to by Defendant as a “P&D contractor”) must sign a “Pick-Up and Delivery Contractor Operating Agreement” and Addenda thereto (referred to hereinafter as combined as “OA” or the “Operating Agreement” or the “Agreement”) as a mandatory condition of employment. These Operating Agreements were designed to conceal the true nature of the relationship between FEG and its drivers: that of employer and employee. The date, time and place of execution of each driver’s Operating Agreement is within the knowledge of Defendant as each Agreement is maintained in the driver files described above, in the regular course of business. The Operating Agreement between each member of the Plaintiffs Class and Defendant is the same in all material respects. The Operating Agreement between Plaintiffs and FEG and between Plaintiffs and FHD contain all of the same identical material terms with only a few, minor and insubstantial differences.

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

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

determines that any provision of the contract has been “violated” amounting to the right to terminate at will, the right to require the use of communication equipment and the wearing of company uniforms, the right to take a vehicle out of service, the right to review and evaluate “customer service” and to set and change standards of such service, the right to require drivers to perform service at “times” requested by customers and determined by Defendant, the right to withhold pay for certain specified expenses, the right to require purchase of specified insurance and numerous other purchases by drivers, the right to require completion of specified paperwork, and other rights reserved to Defendant.

**ANSWER:** Defendant alleges that the terms of the Operating Agreements speak for themselves and further admits that both Defendant and Contractors intend that the Contractors will provide services strictly as independent contractors, and not as employees of Defendant for any purpose. Defendant denies the remaining allegations contained in Paragraph 12 of the Third Amended Complaint.

13. 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 Plaintiffs Class Members are required to sign the Agreement 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 13 of the Third Amended Complaint.

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

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

15. Defendant's right of control over Plaintiffs 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 Agreement.

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

16. Examples of FedEx Ground control include:

- *Minimum daily hours.* Plaintiffs and Class Members must spend at least seven hours daily on the road, even if they have completed all their assigned deliveries and pickups. Plaintiffs and Class Members are docked if they leave the road early, even if their deliveries are completed.
- *Required insurance.* FedEx Ground requires a certain level of auto, liability and workers' compensation insurance, and further requires that Plaintiffs and Class Members buy their insurance from FedEx Ground.
- *No substitute drivers.* Plaintiffs and Class Members are not permitted to allow drivers who are not pre-approved by FedEx Ground to assume their job duties even temporarily.
- *Uniforms.* Plaintiffs and Class Members are required to wear FedEx Ground uniforms, without any variance. Their uniform may only be purchased from FedEx Ground.
- *Truck decals.* Plaintiffs and Class Members are required to decorate their trucks with the same standard-issue FedEx Ground decals, which is only available from FedEx Ground.
- *Punching the clock.* Plaintiffs and Class Members are required to carry an electronic scanner. Plaintiffs and Class Members are required to electronically "punch in" at the start of their workday, and "punch out" at the conclusion. The scanner transmits throughout the day, and records the whereabouts of the Plaintiffs and the Class Members.
- *Controlled departures.* Plaintiffs and Class Members are not permitted to depart from their terminal until after the entire package sort is complete, even where Plaintiffs and Class Members have loaded and readied all of their packages that they are required to deliver. They are required to wait until FedEx Ground completes its paperwork.
- *Bonus tied to FedEx Ground performance.* Plaintiffs' and Class Members' bonuses are tied to the performance of FedEx Ground.
- *Authority over workdays.* FedEx Ground has the right to order the Plaintiffs and Class Members to work holidays and days after holidays (such as the Friday after Thanksgiving). Failure to show up to work on these required days can result in termination.

- *Authority over work assignments.* FedEx Ground assumes complete authority over which geographical area is to be serviced by Plaintiffs and Class Members. Plaintiffs and Class Members are not permitted to exchange those assigned geographical areas among themselves.
- *Authority over work load.* FedEx Ground exercises total control over the workload of Plaintiffs and Class Members.
- *Authority over drop-offs and pickups.* FedEx Ground assumes complete control over the daily drop-off and pickups assignments of Plaintiffs and Class Members. Plaintiffs and Class Members are not permitted to informally exchange work assignments among themselves.
- *Authority over the selling of routes.* Plaintiffs and Class Members cannot buy and sell their FedEx Ground assigned routes without prior approval by FedEx Ground.
- *No potential for entrepreneurial risks and rewards.* Plaintiffs and Class Members are compensated on a highly structured system that gives them no ability to exercise entrepreneurship or otherwise engage in the risks and rewards associated with owning a business. Accordingly, Plaintiffs and Class Members are paid a daily stipend, based on their geographical area assigned by FedEx Ground, and are paid a set amount for each FedEx assigned stop, and separately for each FedEx-assigned delivered package.
- *No opportunity to sell FedEx Ground services.* Plaintiffs and Class Members cannot take orders from customers for FedEx Ground services.
- *No opportunity to compete.* Plaintiffs and Class Members cannot separately offer pickup and/or delivery services independent from FedEx Ground.
- *“Company store.”* Plaintiffs and Class Members receive weekly paychecks from FedEx Ground. From their total owed (assigned route stipend plus assigned stops plus completed deliveries), FedEx Ground deducts various compulsory expenses. These business expenses are for services (such as the leasing of equipment) that Plaintiffs and Class Members cannot shop around to other vendors to seek a better deal.
- *Approval requirements.* FedEx Ground requires that all Plaintiffs and Class Members (and those substitute drivers who Plaintiffs and Class Members want to occasionally assume their job duties) take and pass a FedEx Ground institutional course.
- *Port-to-port control.* Plaintiffs and Class Members are required to begin their workday at their assigned FedEx Ground terminal.

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

17. Despite Defendant's control over virtually all material aspects of the employment relationship, and despite the unequivocal command of applicable statutes and case law to the effect that workers such as Plaintiffs are entitled to the protections due employees under Oregon law, and despite the finding of the Los Angeles Superior Court in Estrada v. FedEx Ground Package Systems, Inc. (Case # BC 210130) that these drivers are employees, Defendant continues to mis-classify their drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by Oregon state law to employees, and they are deprived of employer-financed workers compensation coverage and unemployment insurance benefits. Furthermore, the terms and conditions of their employment contract require these drivers to purchase, operate and maintain expensive trucks for Defendant's exclusive benefit and to work under other unlawful conditions. Defendant's mis-characterization of their drivers as independent contractors, the concealment and/or non-disclosure of the true nature of the relationship between Defendant and its drivers and the attendant deprivation of substantial rights and benefits of employment are part of an on-going unlawful and fraudulent business practice by Defendant which this court should enjoin.

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

### **CLASS ALLEGATIONS**

18. Plaintiffs brings this case on behalf of the following Class:

All single work area pick-up and delivery drivers who (1) are dispatched from a Oregon-based terminal, and (2) performed services for FedEx Ground driving full-time (exclusive of time off for vacation and/or illness) pursuant to the terms of the standardized operating agreements.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 18 of the Third Amended Complaint, except Defendant admits that Plaintiffs purport to bring a class action as described in Paragraph 18. Defendant specifically denies that this case may be maintained as a class action.

19. The named Plaintiffs fit within this description.

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

20. All Class Members share an interest in ascertaining whether they should be treated as employees, or as independent contractors.

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

21. The named Plaintiffs will fairly and adequately represent the Class. The named Plaintiffs have no interest antagonistic to the members of the Class, and have retained lawyers experienced in Class action litigation to prosecute their case.

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

22. The Class is large, numbering into the hundreds. Accordingly, joinder is impracticable.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 22 of the Third Amended Complaint, except Defendant admits that the aggregate number of putative class members who would meet Plaintiffs' proposed class definition exceeds 100.

23. Nevertheless, the Class is not large enough to render Class treatment unmanageable. Nearly all relevant information, e.g., the identity of those Class Members, can be found in written and electronic records of FedEx Ground.

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

24. Pursuant to Fed. R. Civ. P. 23(a)(2) and (a)(3), there are questions of law or fact common to the Class, including, but not limited to:

- a. Whether Plaintiffs and Class Members have the requisite independence and discretion of independent contractors.
- b. Whether the uniform acts of defendant convert the Plaintiffs and the Class, by law, into “employees.”
- c. Whether Plaintiffs and the Class are entitled to be reimbursed for defendant’s business expenses that they covered.
- d. Whether Plaintiffs and the Class are entitled to their pension and health benefits plans because they are, in fact, employees.
- e. Whether the actions of FedEx Ground are applicable to the Class as a whole, entitling Class Members to injunctive relief.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 24 of the Third Amended Complaint, including its subparts.

25. The claims of Plaintiffs are typical of the claims of each member of the Class as a whole and are based on and arise out of identical conduct by FedEx Ground.

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

26. Plaintiffs are committed to pursuing this action and have retained competent counsel experienced in class action litigation. Plaintiffs will fairly and adequately represent the interests of the members of the Class.

**ANSWER:** To the extent that Paragraph 26 contains an assertion as to Plaintiffs' present intentions, it does not require an answer. Defendant denies the remaining allegations contained in that paragraph. Defendant specifically denies that Plaintiffs would be fair and adequate representatives of any putative class.

27. The prosecution of separate actions by individual members of the Class would create a risk of establishing incompatible standards of conduct for defendant.

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

28. Defendant's actions are generally applicable to the Class as a whole, and Plaintiffs seek remedies with respect to the Class as a whole.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 28 of the Third Amended Complaint except that it admits that Plaintiffs purports to seek remedies with respect to a putative class. Specifically, Defendant denies that Plaintiffs or any purported member of the putative class they seek to represent are entitled to any such remedies.

29. The common questions of law and fact enumerated above predominate over questions affecting only individual members of the Class, and a class action is the superior method for fair and efficient adjudication of the controversy.

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

**First Claim For Relief  
(Illegal Deductions From Wages Under Oregon Rev. Stat. §652.610)**

30. Plaintiffs re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

**ANSWER:** Defendant repeats and realleges its answers to Paragraphs 1 through 29 of the Third Amended Complaint as if set fully forth herein.

31. Plaintiffs and the Class are “employees” as defined in Oregon Rev. Stat. § 652.310 and are not free from the control and direction of Defendant.

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

32. Defendant unlawfully withheld monies from the compensation earned by Plaintiffs and Plaintiff Class Members for business expenses of Defendant, including but not limited to vehicle expenses, cargo claims and insurance claims in violation of Oregon Rev. Stat. § 652.610. Plaintiffs and Plaintiff Class Members have not expressly and freely given written consent to such deductions, and these deductions are not made in response to a valid wage assignment or deduction order. Such deductions were not for the Plaintiffs and Plaintiff Class Members employees’ benefit.

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

33. Defendant has withheld said funds unlawfully without providing Plaintiffs and Plaintiff Class Members with advance notice of such amounts, reasons or documentation to justify such deductions, and absent any lawfully sufficient reason for such conduct.

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

34. As a direct and proximate result of Defendant’s conduct, Plaintiffs and Plaintiff Class Members suffered substantial losses and have been deprived of compensation to which

they were entitled, including monetary damages, civil penalties, pre-judgment interest, costs and reasonable attorney fees.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 34 of the Third Amended Complaint. Specifically, Defendant denies that Plaintiffs or any purported member of the putative class he seeks to represent are entitled to any and all of the relief described in that paragraph.

**Second Claim for Relief  
(Fraud)**

35. Plaintiffs restate and reallege the above paragraphs as if fully set forth.

**ANSWER:** Defendant repeats and realleges its answers to Paragraphs 1 through 34 of the Third Amended Complaint as if set fully forth herein.

36. 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 Operating Agreement was improper and that Plaintiffs and all persons similarly situated were “employees” entitled to the benefits and protections of all laws enacted for employees. Plaintiffs are informed, believes and on that basis alleges, that through the OA Defendant intentionally misled Plaintiffs and the Class he represents as to their employment status, or made such representations to Plaintiffs and Plaintiffs 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 alleges that the terms of the Operating Agreements speak for themselves, and further admits that both Defendant and Contractors intend that the Contractors will provide services strictly as independent contractors, and not as employees of Defendant for any purpose. Defendant denies the remaining allegations contained in Paragraph 36 of the Third Amended Complaint.

37. At all material times, Defendant either knew, or should have known, that the material representation made to Plaintiffs and the Class in the OA concerning their employment status, and the concealment and/or non-disclosure of material facts to Plaintiffs and the Class 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 37 of the Third Amended Complaint.

38. At all material times, Defendant intended to and did induce Plaintiffs and the Class 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 38 of the Third Amended Complaint.

39. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiffs' rights and protections guaranteed by Oregon state law and other applicable law.

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

**Third Claim for Relief**  
**(Rescission of Operating Agreement)**

40. Plaintiffs restate and reallege the above paragraphs as if fully set forth.

**ANSWER:** Defendant repeats and realleges its answers to Paragraphs 1 through 39 of the Third Amended Complaint as if set fully forth herein.

41. 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 41 of the Third Amended Complaint.

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

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

43. Despite this control and the actual status of the drivers as employees, FEG mischaracterizes the Plaintiffs and the Class 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 43 of the Third Amended Complaint.

44. 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 44 of the Third Amended Complaint.

45. The Operating Agreement between FEG and Plaintiffs and members 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 45 of the Third Amended Complaint.

**Fourth Claim for Relief**  
**(Declaratory Relief Against Defendant)**

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

**ANSWER:** Defendant repeats and realleges its answers to Paragraphs 1 through 45 of the Third Amended Complaint as if set fully forth herein.

47. 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 Oregon 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

47 of the Third Amended Complaint, including its subparts.

48. 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 Plaintiff and Plaintiffs Class Members.

**ANSWER:** Defendant admits that Plaintiffs and the putative class they purport to represent seek entry of a declaratory judgment, but denies each and every allegation contained in Paragraph 48 of the Third Amended Complaint. Specifically, Defendant denies that Plaintiffs or any purported member of the putative class they seeks to represent are entitled to any of the remedies set forth in Paragraph 48 of the Third Amended Complaint.

**JURY DEMAND**

Plaintiffs hereby demand a trial by jury for all issues so triable.

**ANSWER:** Defendant admits that Plaintiffs request a jury trial for all issues so triable.

**PRAYER FOR RELIEF**

**WHEREFORE**, Plaintiffs individually, and on behalf of all other similarly situated, prays for the following relief:

- A. An order certifying the Class as described with the named Plaintiffs as Class representative.
- B. An award to the Plaintiffs and the Class in the amount of their unpaid overtime compensation.
- C. An order that requires FedEx Ground to rescind the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FedEx Ground.
- D. An order requiring FedEx Ground to reimburse and/or indemnify Plaintiffs and Class Members for the FedEx Ground business expenses that they have covered.
- E. An award of attorneys' fees, plus the costs and expenses of this action.
- F. An award of punitive damages in an amount to be determined at trial.
- G. Prejudgment interest, as afforded by law.
- H. All such other legal and equitable relief to which Plaintiffs and Class are entitled.

**ANSWER:** Defendant denies that Plaintiffs or any purported member of the putative class they seeks to represent are entitled to any of the relief requested in the foregoing paragraph, including its subparts.

### **ADDITIONAL DEFENSES**

Defendant denies that Plaintiffs or the purported members of the putative class are entitled to any and all of the relief contained in the Third 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' Third 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' Third 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 Third Amended Complaint, or some of them, are barred in whole or in part by the applicable statutes of limitations.

THIRD ADDITIONAL DEFENSE

No Class Action

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

FOURTH ADDITIONAL DEFENSE

Unconstitutional Class Action

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

FIFTH ADDITIONAL DEFENSE

No Standing

Neither Plaintiffs, nor the purported members of the putative class defined in the Third Amended Complaint, are covered by the statutes, regulations and legal theories sought to be invoked in the Third Amended Complaint. Accordingly, for this and other reasons, Plaintiffs' claims, or some of them, are barred in whole or in part because Plaintiffs lack standing. Further, Plaintiffs, 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 a former, and not current employee.

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 Third 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 Third 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 Third 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 Third 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 Third 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 Third Amended Complaint, or some of them, are/were employees within the meaning of applicable law, which Defendant specifically denies, Plaintiffs' claims, or some of them, are barred in whole or in part by the receipt of 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 Third 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 Third 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 Third 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 Third 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 Third 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 Third Amended Complaint.

SIXTEENTH ADDITIONAL DEFENSE

Unavailability of Penalties

To the extent Plaintiffs or any purported member of the putative class defined in the Third 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 Third 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 Third Amended Complaint, or some of them, are barred in whole or in part because they entered into an express contact with Defendant.

NINETEENTH ADDITIONAL DEFENSE

Arbitration

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Third 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 Third Amended Complaint, or some of them, are/were employees within the meaning of applicable law, which Defendant specifically denies, and assuming, arguendo, that any such Plaintiffs, and any such purported members of the putative class, or some of them, are entitled to relief under applicable law, which Defendant specifically denies, Plaintiffs' claims, and the claims of each putative class member, or some of them, are barred, in whole or in part, on the ground that Defendant acted in good faith, with a good-faith and reasonable belief that Defendant had complied fully with federal and state law, with a bona fide dispute as to the

obligation of payment, and/or in conformity with, and in reliance on, written administrative regulations, orders, rulings, guidelines, approvals and/or interpretations of federal and/or State agencies. Furthermore, assuming, arguendo, that a violation of applicable law occurred, which Defendant specifically denies, Defendant's conduct was not willful.

TWENTY-FIRST ADDITIONAL DEFENSE

Unavailability of Equitable Relief

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Third 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 Third 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 Third Amended Complaint, or some of them, are/were employees within the meaning of applicable law, which Defendant specifically denies, and assuming, arguendo, that any such Plaintiffs, and any such purported members of the putative class, or some of them, are entitled to relief, which Defendant specifically denies, Plaintiffs' claims, and the claims of each putative class member, or some of them, are barred, in whole or in part, on the ground that

Plaintiffs and the purported members of the putative class, or some of them, voluntarily authorized the deductions in writing.

TWENTY-FOURTH ADDITIONAL DEFENSE

ERISA Preemption

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

TWENTY-FIFTH ADDITIONAL DEFENSE

Ineligibility

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

TWENTY-SIXTH ADDITIONAL DEFENSE

Failure to Exhaust Remedy

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

TWENTY-SEVENTH ADDITIONAL DEFENSE

Failure to Offer to Return Consideration

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

TWENTY-EIGHTH ADDITIONAL DEFENSE

Primary Jurisdiction

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

TWENTY-NINTH ADDITIONAL DEFENSE

Willful Violation of Contract

Assuming, arguendo, that Plaintiffs, and the purported members of the putative class defined in the Third Amended Complaint, or some of them, are/were employees within the meaning of Oregon law, which Defendant specifically denies, and assuming, arguendo, that any such Plaintiffs, and any such purported members of the putative class, or some of them, are entitled to relief, which Defendant specifically denies, Plaintiffs and the purported members of the putative class, or some of them, willfully violated the terms of employment and/or their respective employment contracts and are therefore not entitled to attorney fees and costs pursuant to ORS 652.200.

THIRTIETH ADDITIONAL DEFENSE

Bona Fide Belief

Assuming, arguendo, that Plaintiffs, and the purported members of the putative class defined in the Third Amended Complaint, or some of them, are/were employees within the meaning of Oregon law, which Defendant specifically denies, and assuming, arguendo, that any such Plaintiffs, and any such purported members of the putative class, or some of them, are entitled to relief, which Defendant specifically denies, Plaintiffs and the purported members of the putative class, or some of them, are not entitled to penalty wages or attorney fees on any of

their claims because Defendant had a bona fide belief that it did not owe wages beyond those already paid.

THIRTY-FIRST AFFIRMATIVE DEFENSE

Fraud Allegations Insufficient

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

THIRTY-SECOND AFFIRMATIVE DEFENSE

Lack of Reasonable Reliance

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

THIRTY-THIRD AFFIRMATIVE DEFENSE

Statute of Frauds

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

THIRTY-FOURTH ADDITIONAL DEFENSE

Failure to Mitigate

Assuming, *arguendo*, while vigorously denying, that Plaintiffs and members of the putative class have suffered any economic damages as a result of defendant's actions, Plaintiffs

and putative class members have a duty to mitigate damages and, upon information and belief have failed to do so.

THIRTY-FIFTH ADDITIONAL DEFENSE

Failure to Plead With Specificity

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

THIRTY-SIXTH AFFIRMATIVE DEFENSE

Judicial Deference

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

**Prayer**

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

Dated: December 18, 2006

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 18th day of December, 2006, I filed the foregoing *Answer And Additional Defenses Of Fedex Ground Package System, Inc. To Plaintiffs' Third Amended Complaint* with the Clerk of the Court using the CM/ECF system. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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and I further certify that I have mailed the foregoing document by United States Postal Service to the following non CM/ECF participants:

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By: \_\_\_\_\_ s/Thomas J. Brunner