

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION

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

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

THIS DOCUMENT RELATES TO:

*Raymond Tierney, et al. v. FedEx Ground  
Package System, Inc.,*  
Civil No. 3:05-cv-00599-RLM-CAN (RI)

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

Defendant FEDEX GROUND PACKAGE SYSTEM, INC. (“FedEx Ground” or “Defendant”) on behalf of itself alone, and for no other defendant, and files this Answer to Plaintiffs’ Third Amended Class Action Complaint (the “Amended Complaint”) served by Plaintiffs RAYMOND TIERNEY, ROLAND GUILLET, WAYNE MILLS, ALAN GINET, STEPHEN H. MCGUINNESS, RICARDO BACANI, DONALD J. MCCLAFFERTY, SAMMY FARLAND, and PAUL LUONGO (“Plaintiffs”). Except as expressly admitted below, Defendant denies the allegations of Plaintiffs’ 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 among most of defendant FedEx Ground Package System, Inc.’s drivers, as well as its much larger corporate parent, and its 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 Amended Complaint.

2. Almost unique in the industry, however, are the drivers who deliver for FedEx Ground Package System, Inc. (“FedEx Ground” or “FEG”) and its division, FedEx Home Delivery (“FEH”). Though these drivers are similarly subject to tightly-regulated control by FedEx Ground, they are nevertheless treated by FedEx Ground as independent contractors.

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

3. True independent contractor status is something desired by most of the named Plaintiffs, and probably most of the Class described below. 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 by FedEx Ground.

**ANSWER:** Defendant lacks information or knowledge sufficient to form a belief pertaining to the desires of the Plaintiffs or those of the purported putative class. Defendant alleges that the independent contractors are properly classified as such and denies the remaining allegations contained in Paragraph 3 of the Amended Complaint.

4. 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:** Defendant denies each and every allegation contained in Paragraph 4 of the Amended Complaint, including its subparts, except Defendant admits that Plaintiffs state the relief they seek in that paragraph of the Amended Complaint. Defendant specifically denies that Plaintiffs are entitled to any or all relief requested.

### **JURISDICTION AND VENUE**

5. 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 subject matter jurisdiction over Plaintiffs' claims.

6. 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 for Multidistrict Litigation transferring this action to this Court.

### **PARTIES**

7. Roland Guillet, of Cranston, RI, has been a driver for FedEx Ground for the last 3 years.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff was an independent contractor pursuant to the terms of a contract with FedEx Ground from June 8, 2002 through June 8, 2006. Defendant denies each and every remaining allegation contained in Paragraph 7.

8. Wayne Mills, of Cranston, RI, has been a driver for FedEx Ground for the last six months.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff was an independent contractor pursuant to the terms of a contract with FedEx Ground from November 26, 2004 through May 12, 2005. Defendant denies each and every remaining allegation contained in Paragraph 8.

9. Alan Ginet, of Rumford, RI, has been a driver for FedEx Ground for the last 10 months.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff has been an independent contractor pursuant to the terms of a contract with FedEx Ground from October 5, 2004 through the present. Defendant denies each and every remaining allegation contained in Paragraph 9.

10. Stephen H. McGuinness of Warwick, RI, has been a driver for FedEx Ground for the last three and one-half years.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff was an independent contractor pursuant to the terms of a contract with FedEx Ground from November 13, 2001 through April 17, 2005. Defendant denies each and every remaining allegation contained in Paragraph 10.

11. Ricardo Bacani of Warwick, RI, has been a driver for FedEx Ground for the last year.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff has been an independent contractor pursuant to the terms of a contract with FedEx Ground from May 18, 2004 through the present. Defendant denies each and every remaining allegation contained in Paragraph 11.

12. Donald J. McClafferty of Norwich, CT, has been a driver for FedEx Ground for the last one and one-half years.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff was an independent contractor pursuant to the terms of a contract with FedEx Ground from September 23, 2003 through July 17, 2005. Defendant denies each and every remaining allegation contained in Paragraph 12.

13. Sammy Farland of North Providence, RI, has been a driver for FedEx Ground for the last six months.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff was an independent contractor pursuant to the terms of a contract with FedEx Ground from November 26, 2004 through July 3, 2005. Defendant denies each and every remaining allegation contained in Paragraph 13.

14. Paul Luongo, of Smithfield, RI, has been a driver for FedEx Ground for the last two years.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff was an

independent contractor pursuant to the terms of a contract with FedEx Ground from April 22, 2003 through April 27, 2005. Defendant denies each and every remaining allegation contained in Paragraph 14.

15. Ray Tierney of North Providence, RI, has been a driver for FedEx Ground for the last two years.

**ANSWER:** Defendant lacks sufficient information to form a belief as to Plaintiff's residency, and on that basis denies the same. Defendant admits that Plaintiff was an independent contractor pursuant to the terms of a contract with FedEx Ground from June 3, 2003 through May 11, 2005. Defendant denies each and every remaining allegation contained in Paragraph 15.

16. 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 Rhode Island. In March 2000, FedEx Ground launched a new service, FedEx Home Delivery. FedEx Home Delivery is intended to serve business-to-consumer shipping demands. All Plaintiffs and Class Members are drivers for FedEx Home Delivery. 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 16 of the Amended Complaint, except that Defendant admits that it is incorporated under the

laws of the State of Delaware, Defendant admits that its business includes providing small package information, transportation and delivery services in the United States, including in the State of Rhode Island, and Defendant admits that it maintains certain benefit and welfare plans.

### **FACTS**

17. 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 is required to sign a lengthy form contract entitled the “Pick-up And Delivery Contractor Operating Agreement” that mis-characterizes each driver as an “independent contractor.” These Operating Agreements were designed to conceal the true nature of the relationship between FEG and its drivers: that of employer and employee.

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

18. 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 Rhode Island 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 Rhode Island 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 alleges that the terms of the Los Angeles Superior Court finding speaks for itself and denies each and every allegation contained in Paragraph 18 of the Amended Complaint.

19. 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, memoranda and directives to terminal management and other rules concealed from and not provided to the drivers. When drivers do not follow an FEG or FHD rule, whether disclosed or undisclosed, known or unknown, they are subject to various types of punishment, some financial and some disciplinary, up to and including contract termination and/or non-renewal. Defendant documents such so-called violations of such rules on forms referred to as "Business Discussion Notes" and retains these

documents in secret driver files called “DOT” files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

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

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

21. The Operating Agreement contains various statements purporting to classify Plaintiffs and Plaintiff Class Members as independent contractors. At the same time, the Operating Agreement retains to the company, *inter alia*, the right to approve or disapprove any vehicle used to provide service, the right to approve or disapprove any driver or helper who provides service, the right to approve or disapprove the purchase or sale of any vehicle, the right to assign pickup and delivery stops to each driver, the right to temporarily or permanently transfer portions of any route to another with or without compensation, the right to determine when a driver has “too few” or “too many” packages to deliver on a given day, the right to

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

**ANSWER:** Defendant alleges that the terms of the Operating Agreements speak for themselves and further admits that both Defendant and Contractor intend that the Contractor will provide services strictly as an independent contractor, and not as an employee of Defendant for any purpose. Defendant denies the remaining allegations.

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

the Amended Complaint.

23. 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 23 of the Amended Complaint.

24. 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.* All 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.* All 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.* All 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 24 of the Amended Complaint, including its subparts.

### CLASS ALLEGATIONS

25. Plaintiffs bring this case on behalf of the following Class:

All single work area pick up and delivery drivers who (1) are dispatched from a Rhode Island - 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 Standard Contractor Operating Agreement (or, where applicable, its predecessor and/or successor).

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 25 of the Amended Complaint, except Defendant admits that Plaintiffs purport to bring a class action as described in Paragraph 25. Defendant denies that this case may be maintained as a class action.

26. 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 26 of the Amended Complaint.

27. The named Plaintiffs will fairly and adequately represent the Class. The named Plaintiffs are members of the Class, 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 27 of the Amended Complaint.

28. The Class is large, numbering into the hundreds, at least. Accordingly, joinder is impracticable.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 28 of the Amended Complaint, except Defendant admits that the aggregate number of putative class members who would meet Plaintiffs' proposed class definition exceeds 100.

29. 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 29 of the Amended Complaint.

30. 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 are 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 copy expenses that they covered.
- d. Whether Plaintiffs and the Class are entitled to their pension and Amended 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 30 of the Amended Complaint, including its subparts.

31. 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 31 of the Amended Complaint.

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

33. 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 33 of the Amended Complaint.

34. 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 34 of the Amended Complaint.

35. 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 35 of the Amended Complaint.

**LEGAL CLAIMS  
COUNT I  
FRAUD**

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

**ANSWER:** Defendant repeats and re-alleges its answers to Paragraphs 1 through 35 of the Amended Complaint as if set fully forth herein.

37. 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, 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 Plaintiff Class Members recklessly and/or negligently, and deliberately concealed from and/or failed to disclose to the pick-up and delivery drivers the extra contractual sources (including but not limited to the FedEx Ground Manual, 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 independent contractors are properly characterized as such and denies the remaining allegations contained in Paragraph 37 of the Amended Complaint.

38. At all material times, Defendant either knew, or should have known, that the material representation made to Plaintiffs in the OA concerning their employment status, and the

concealment and/or non-disclosure of material facts to Plaintiffs concerning their employment status and Plaintiffs' corresponding obligation to assume responsibility for all of their "own" employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks were false and fraudulent.

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

39. At all material times, Defendant intended to and did induce Plaintiffs 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 39 of the Amended Complaint.

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

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

**COUNT II  
RESCISSION OF OPERATING AGREEMENT**

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

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

42. 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 42 of the Amended Complaint.

43. 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 43 of the Amended Complaint.

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

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

45. 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 45 of the Amended Complaint.

46. The Operating Agreement between FEG 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 46 of the Amended Complaint.

47. The Operating Agreement between FEG 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 47 of the Amended Complaint.

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

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

49. While acting on the direct instruction of FEG and discharging their duties for FEG, 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 49 of the Amended Complaint.

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

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

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

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

52. Plaintiffs are entitled to compensation for all of the business expenses they were illegally required by FEG to bear, for all of the employment taxes, unemployment compensation and workers compensation the FEG 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 52 of the Amended Complaint. Specifically, Defendant denies that Plaintiffs or any purported members of the putative class they seek to represent are entitled to any or all of the relief described in that paragraph.

**COUNT III  
DECLARATORY RELIEF AGAINST DEFENDANT**

53. 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 52 of the Amended Complaint as if set fully forth herein.

54. 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 Defendants' 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 Rhode Island 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 54 of the Amended Complaint, including its subparts.

55. 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 admits that Paragraph 55 of the Amended Complaint describes Plaintiffs' request for declaratory relief, to which no answer is required. Notwithstanding the foregoing, Defendant denies that Plaintiffs or the putative members of the purported class they seek to represent are entitled to any and all relief requested in that paragraph.

### **JURY DEMAND**

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

**ANSWER:** Defendant admits Plaintiffs' demand as stated.

### **PRAYER FOR RELIEF**

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

- A. An order certifying the Class as described with the named Plaintiffs as Class representatives.
- B. An award to the Plaintiffs and the Class in the amount of their unpaid overtime compensation.
- C. An order requiring FedEx Ground to reimburse and/or indemnify Plaintiffs and Class Members for the FedEx Ground business expenses that they have covered.
- D. An order requiring FedEx Ground to rescind the Operating Agreement, and award restitution compensating for the reasonable value of the benefit provided to FEG.
- E. An award of punitive damages in an amount to be proven at trial.
- F. An award of attorneys' fees, plus the costs and expenses of this action.
- 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 his 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, Plaintiffs, or some of them, and members of the putative class, or some of them, lack standing with respect to their claims for rescission, declaratory and injunctive relief because they allege to be former, and not current employees.

SIXTH ADDITIONAL DEFENSE

Breach of Contract

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of

the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part because Plaintiffs and/or the putative class members are in breach of their agreements with Defendant.

SEVENTH ADDITIONAL DEFENSE

Estoppel

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

EIGHTH ADDITIONAL DEFENSE

Laches

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

NINTH ADDITIONAL DEFENSE

Res Judicata/Collateral Estoppel

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

TENTH ADDITIONAL DEFENSE

Accord and Satisfaction: Payment

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part by the principles of

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

ELEVENTH ADDITIONAL DEFENSE

Release

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

TWELFTH ADDITIONAL DEFENSE

Waiver

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

THIRTEENTH ADDITIONAL DEFENSE

Independent Contractor Status

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

FOURTEENTH ADDITIONAL DEFENSE

Unclean Hands/ In Pari Delicto

Pending further discovery, Plaintiffs' claims, and the claims of each purported member of

the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part by the doctrine of unclean hands and in pari delicto.

FIFTEENTH ADDITIONAL DEFENSE

Knowing Submission/Consent

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

SIXTEENTH ADDITIONAL DEFENSE

Unavailability of Penalties

To the extent Plaintiffs or any purported member of the putative class defined in the Amended Complaint seek penalties, punitive damages, or exemplary damages, they fail to state facts sufficient to support such claims, and such claims are precluded by statute, or violate the Due Process rights of Defendant.

SEVENTEENTH ADDITIONAL DEFENSE

Setoff and Recoupment

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

EIGHTEENTH ADDITIONAL DEFENSE

Express Contract

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

NINETEENTH ADDITIONAL DEFENSE

Arbitration

Plaintiffs' claims, and the claims of each purported member of the putative class defined in the Amended Complaint, or some of them, may not be litigated in court because some or all of said individuals' claims may be subject to individual mandatory, final, and binding arbitration.

TWENTIETH ADDITIONAL DEFENSE

Conduct Reasonable and in Good Faith/not Willful

Assuming, arguendo, that Plaintiffs, and the purported members of the putative class defined in the Amended Complaint, or some of them, are/were employees within the meaning of the 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 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 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 Amended 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 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 Rhode Island Department of Labor.

TWENTY-NINTH ADDITIONAL DEFENSE

No Private Right of Action

Plaintiffs' claims pursuant to which they seek relief under state law do not provide for a

private right of action.

THIRTIETH AFFIRMATIVE DEFENSE

Judicial Deference

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

THIRTY-FIRST AFFIRMATIVE DEFENSE

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-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 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 or Rhode Island Civil Rules of Procedure.

**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: December 18, 2006

Respectfully submitted,

By: s/Thomas J. Brunner

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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 to Plaintiffs' Third 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 18th day of December, 2006, I mailed the foregoing document by U.S. Mail on the following party of record:

Peter N. Wasylyk  
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Providence, RI 02908

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