

**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:)	
)	
<i>Gregory Cooke v. FedEx Ground Package System, Inc.,</i>)	
Civil No. 3:05-cv-00668-RLM-CAN (SC))	
)	

**ANSWER AND ADDITIONAL DEFENSES OF
FEDEX GROUND PACKAGE SYSTEM, INC. TO PLAINTIFF'S
AMENDED CLASS ACTION COMPLAINT**

Defendant FEDEX GROUND PACKAGE SYSTEM, INC. (“FedEx Ground” or “Defendant”) on behalf of itself alone, and for no other defendant, files this Answer to the Amended Class Action Complaint (the “Amended Complaint”) served by Plaintiff GREGORY COOKE (“Plaintiff”). Except as expressly admitted below, Defendant denies the allegations of Plaintiff’s Amended Complaint.

PARTIES

1. The Plaintiff, Gregory Cooke, is a resident and citizen of the County of Kershaw, State of South Carolina, and was a driver under contract with Defendant, FedEx Ground Package System, Inc. (“FedEx Ground”) from approximately November 2002 through January 2003.

ANSWER: Defendant lacks knowledge or information sufficient to form a belief as to whether Plaintiff Gregory Cooke resides in the County of Kershaw, South Carolina, and therefore denies the same. Defendant denies the remaining allegations contained in Paragraph 1 of the Amended Complaint except Defendant admits that Plaintiff entered

into a contract with Defendant which was in effect from November 18, 2002, through February 7, 2003.

2. 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 South Carolina. At all relevant times, Defendant FedEx Ground served as the sponsor, within the meaning of ERISA §§ 3(16), 29 U.S.C. §§ 1002(16), and administrator of several employee benefit pension and welfare plans established under ERISA, including, but not limited to, Defendants FEDEX Ground Package System, Inc. and Certain Affiliates Wealth Accumulation 401(k) Plan; Group Life and Supplemental Life Plan For Employees Of FedEx Ground Package System, Inc.; Ground Benefits Plus Short-Term Disability Plan; Group Long Term Disability Plan For The Employees of FedEx Ground Package System, Inc.; FedEx Ground Package System, Inc. Medical, Dental And Vision Care Plan; and the Dependent Care Account Of FedEx Ground Package System, Inc. (collectively, the “Defendant Plans”).

ANSWER: Defendant admits that FedEx Ground Package System Inc. is incorporated in Delaware and that its principal place of business is in Moon Township, Pennsylvania, just outside of Pittsburgh. Defendant admits that FedEx Home Delivery is a division of FedEx Ground Package System Inc. Defendant admits that it is a wholly-owned

subsidiary of Federal Express Corporation. Defendant denies the remaining allegations contained in Paragraph 2 of the Amended Complaint.

JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over the ERISA claims stated herein pursuant to 29 U.S.C. §1132(e)(1). This Court has subject matter jurisdiction over all other claims asserted in this action pursuant to 28 U.S.C. § 1367.

ANSWER: Defendant admits that this Court has subject matter jurisdiction over Plaintiff's claims, except Defendant denies that this court has jurisdiction over Plaintiff's ERISA claim because he lacks standing. Defendant denies the remaining allegations contained in Paragraph 3 of the Amended Complaint.

4. Venue is proper in this judicial district and the Columbia division pursuant to Local Rule 3.01 because the Plaintiff resides within this district in the Columbia division.

ANSWER: Defendant lacks sufficient knowledge or information sufficient to form a belief as to the residency of Plaintiff. Defendant alleges that jurisdiction is proper in the Northern District of Indiana pursuant to an order of the Judicial Panel for Multidistrict Litigation and denies the remaining allegations contained in Paragraph 4 of the Amended Complaint.

INTRODUCTION

5. 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, for FedEx, the parent of Defendant FedEx Ground, and for FedEx's largest competitors. This designation is warranted because these shippers have developed a highly regulated set of procedures and protocols to be followed that they could not require of drivers if they were independent contractors.

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

6. Virtually unique in the industry, are the drivers who deliver for Defendant FedEx Ground. Though these drivers are similarly subject to highly-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 6 of the Amended Complaint, except Defendant admits that the independent contractors who have contracted to deliver packages for FedEx Ground are independent contractors and are correctly characterized.

7. True independent contractor status is something that was desired by the named Plaintiff, and probably most of the class of former and current FedEx Ground drivers described below. True independent contractor status would have permitted the named Plaintiff and absent Class Members the freedom 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 admits that independent contractor status is desired by the named Plaintiff and purported members of Plaintiff's putative class and denies the remaining allegations contained in Paragraph 7 of the Amended Complaint.

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

- a declaration that Plaintiff and the class were and are in fact, FedEx Ground employees;

- 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; and
- the full range of ERISA pension and health benefits available to all other FedEx Ground employees.

ANSWER: Paragraph 8 of the Complaint contains Plaintiff's characterization of the case and requires no answer. Defendant specifically denies that Plaintiff or any of the purported members of the putative class described in the Amended Complaint, are entitled to any of the relief requested.

FACTS

9. FedEx Ground was spun off in 2000 from its original parent corporation, FedEx Corporation. FedEx Ground is the second largest, small package ground carrier in North America, with about 35,000 employees and "independent contractors."

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

10. Plaintiff and Class Members are/were drivers for FedEx Ground. FedEx Ground is specifically defined in this Complaint to include all successors, predecessor and subsidiary entities to which these allegations pertain.

ANSWER: Defendant admits that named Plaintiff was an independent contractor who entered into a contract with FedEx Ground and admits that Plaintiff purports to define FedEx Ground as stated in Paragraph 10 of the Amended Complaint. Defendant denies all remaining allegations in Paragraph 10 of the Amended Complaint, and specifically denies that class treatment of this action is appropriate.

11. As a condition of employment, each FEG driver is required to sign a lengthy form contract entitled the "Pickup And Delivery Contractor Operating Agreement" (hereinafter "Operating Agreement," "OA," or "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 11 of the Amended Complaint.

12. 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 South Carolina 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 South Carolina 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 12 of the Amended Complaint.

13. 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 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 13 of the Amended Complaint.

14. 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 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 Plaintiff Class and Defendant is the same in all material respects. The Operating Agreement between Plaintiffs and FEG 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 14 of the Amended Complaint.

15. 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 of Paragraph 15 of the Amended Complaint.

16. 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 16 of the Amended Complaint.

17. 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 17 of the Amended Complaint.

18. Examples of FedEx Ground's control include:

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

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

- *Port-to-port control.* The Plaintiff and Class Members were required to begin their workday at their assigned FedEx Ground terminal.

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

CLASS ALLEGATIONS

19. Plaintiff brings this case on behalf of the following Class:

All current and former single work area pick up and delivery drivers who (1) are or have been dispatched from a South Carolina 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) from six years prior to the commencement of this action through the present date.

The named Plaintiff fits within this description.

ANSWER: Defendant denies each and every allegation contained in Paragraph 19 of the Complaint, except Defendant admits that Plaintiff purports to bring a class action as described in Paragraph 19 and denies that this case may be maintained as a class action.

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 Amended Complaint.

21. The named Plaintiff will fairly and adequately represent the class. The named Plaintiff is a member of the Class, has no interest antagonistic to the members of the Class, and has retained lawyers experienced in class action litigation to prosecute the case.

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

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

ANSWER: Defendant denies each and every allegation contained in Paragraph 22 of the 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 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 Plaintiff and Class Members had the requisite independence and discretion to be classified as independent contractors?
- b. Whether the uniform acts of defendant converted the Plaintiff and the Class, by law, into "employees"?
- c. Whether Plaintiff and the Class are entitled to their overtime, at a rate of time-and-a-half for all hours worked over 40 per week?
- d. Whether Plaintiff and the class are entitled to be reimbursed for business expenses that they covered?
- e. Whether Plaintiff and the class are entitled to their pension and health benefits under the various Defendant Plans because they were and/or are, in fact, employees?
- f. 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 Amended Complaint, including its subparts.

25. The claims of Plaintiff 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 Amended Complaint.

26. Plaintiff is committed to pursuing this action and has retained competent counsel experienced in class action litigation. Plaintiff will fairly and adequately represent the interests of the members of the class.

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

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 Amended Complaint.

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

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

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 Amended Complaint.

CAUSES OF ACTION
FOR A FIRST CAUSE OF ACTION
(Plan Enforcement Under ERISA)

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

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 29 of the Amended Complaint as if set fully forth herein.

31. Plaintiffs' first cause of action is a claim for plan enforcement under 29 U.S.C. § 1132(a)(1)(B) of ERISA.

ANSWER: Defendant admits that Plaintiff purports to bring a claim under 29 U.S.C. Section 1132(a)(1)(B) of ERISA, but denies that the claim has merit.

32. This Court has jurisdiction to hear this claim pursuant to 29 U.S.C. § 1132(e)(1). In conformity with 29 U.S.C. § 1132(h), Plaintiff is contemporaneously serving this complaint, by certified mail, on the Secretaries of Labor and Treasury.

ANSWER: Defendant is without knowledge sufficient to answer on whom Plaintiff served his Amended Complaint, and on that basis denies that allegation. Defendant alleges that Plaintiff lacks standing under ERISA and that, therefore, jurisdiction is improper.

33. Under 29 U.S.C. § 1132(a)(1)(B), Plaintiff is authorized to clarify and to enforce his right and the rights of the Class Members to ERISA benefits in whatever plan for which they were eligible.

ANSWER: Defendant alleges that the terms of 29 U.S.C. Section 1132 speak for themselves, and denies the remaining allegations in Paragraph 33 of the Amended Complaint.

34. Up to now, FedEx Ground has taken the position that Plaintiff and the class are not entitled to any ERISA benefits, based on FedEx Ground's mistaken view that Plaintiff and the class were not employees.

ANSWER: Defendant denies that Plaintiff is entitled to any ERISA benefits, and denies the remaining allegations in Paragraph 34 of the Amended Complaint.

35. Because Plaintiff and the Class, however, are or were employees, they are entitled to employee benefits.

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

36. Accordingly, under 29 U.S.C. § 1132 (a)(1)(B), Plaintiff and the Class are entitled to benefits, declaratory relief, equitable restitution, and injunctive relief. Plaintiff and the Class are further entitled to prejudgment interest, costs, and attorneys fees pursuant to 29 U.S.C. § 1132(g) and the common fund doctrine.

ANSWER: Defendant denies each and every allegation contained in Paragraph 36 of the Complaint. Specifically, Defendant denies that Plaintiff, or the purported members of his putative class, are entitled to any and all relief requested in that paragraph of the Amended Complaint.

FOR A SECOND CAUSE OF ACTION
(Illegal Deductions From Wages Under South Carolina Code Ann. § 41-10-40)

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

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

38. Plaintiffs are “employees” and are not free from the control and direction of the Defendant.

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

39. Defendant unlawfully withheld and diverted 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 South Carolina Code Ann. § 41-10-40 and § 41-10-80. 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 Plaintiff and Plaintiffs Class Members employees’ benefit.

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

40. FedEx Ground 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 40 of the Amended Complaint.

41. 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 in the amount of three times of unpaid wages, civil penalties, pre-judgment interest, costs and reasonable attorney fees.

ANSWER: Defendant denies each and every allegation contained in Paragraph 41 of the

Amended Complaint.

FOR A THIRD CAUSE OF ACTION
(Fraud)

42. Plaintiff realleges and reiterates the above Paragraphs 1 through 32 hereinabove, as if fully repeated herein verbatim.

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 41 of the Amended Complaint as if set fully forth herein.

43. Plaintiff and the Class he represents 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 Plaintiff 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 Plaintiff Class Members as to their employment status, or made such representations to Plaintiff 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 and Settlement Manual, other policies and secret driver files described above) that defined the employment relationship between Plaintiffs and Defendant, all for the purpose of realizing unjust profits from Plaintiffs’ work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

ANSWER: Defendant admits that Plaintiff was an independent contractor pursuant to the terms of an operating agreement. Defendant denies the remaining allegations contained in Paragraph 43 of the Amended Complaint.

44. 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 44 of the Amended Complaint.

45. At all material times, Defendant intended to and did induce Plaintiffs and the Plaintiff Class Members 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 45 of the Amended Complaint.

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

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

FOR A FOURTH CAUSE OF ACTION
Rescission of Operating Agreement

47. Plaintiff realleges and reiterates the above Paragraphs 1 through 32 hereinabove, as if fully repeated herein verbatim.

ANSWER: Defendant repeats and re-alleges its answers to Paragraphs 1 through 32 of the Amended Complaint as if set fully forth herein.

48. Despite the express terms of the Operating Agreement, Plaintiff and Plaintiff Class Members' 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 48 of the Amended Complaint.

49. FEG controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations hereof at paragraphs 10 through 19.

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

50. Despite this control and the actual status of the drivers as employees, FEG mischaracterizes the Plaintiff and Plaintiff Class Members 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 50 of the Amended Complaint.

51. 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 51 of the Amended Complaint.

52. 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 52 of the Amended Complaint.

53. 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 53 of the Amended Complaint.

54. 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 54 of the Amended Complaint.

55. 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 55 of the Amended Complaint.

56. 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 56 of the Amended Complaint.

57. 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 57 of the Amended Complaint.

58. 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 58 of the Amended Complaint.

FOR A FIFTH CAUSE OF ACTION
Declaratory Relief Against Defendant

59. Plaintiff and Plaintiff Class Members 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 58 of the Amended Complaint as if set fully forth herein.

60. 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 FedEx Ground'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 South Carolina law.
- c. What amounts Plaintiff and Plaintiff Class Members are entitled to receive in compensation and benefits.
- d. What amounts Plaintiff and Plaintiff Class Members are entitled to receive in interest on unpaid compensation due and owing.
- e. What amounts Plaintiff 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 60 of the Amended Complaint, including its subparts.

61. Plaintiff 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 Plaintiff Class Members.

ANSWER: Defendant admits that Plaintiff seeks the entry of a declaratory judgment, but denies that the claim has merit.

WHEREFORE, Plaintiff individually, and on behalf of all others similarly situated, prays for the following relief:

- A. An Order permitting them to give notice of this action to all persons who fit within the described class;
- B. An Order certifying the class as described with the named-Plaintiff as class representative;
- C. An award to the Plaintiff and the class in the amount of their unpaid overtime competition;
- D. A declaration that Plaintiff and Class Members are full participants in all ERISA plans otherwise available to FedEx Ground employees;
- E. An order that requiring FedEx Ground to payor otherwise credit Plaintiff and Class Members with all ERISA benefits to which they are retroactively entitled;
- F. An order requiring FedEx Ground to reimburse and/or indemnify Plaintiff and Class Members for the FedEx Ground business expenses that they have covered;
- G. An order requiring FedEx Ground to rescind the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FEG;
- H. An award of attorneys' fees, plus the costs and expenses of this action;
- I. An award of punitive damages in an amount to be proven at trial;

- J. rejudgment interest, as afforded by law;
- K. All other legal and equitable relief to which Plaintiff and the class are entitled.

ANSWER: Defendant denies that Plaintiff is entitled to any of the relief requested in the forgoing paragraph, including its subparts.

ADDITIONAL DEFENSES

Defendant denies that Plaintiff or the purported members of their putative class are entitled to any and all of the relief contained in the 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 Plaintiff's 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

Plaintiff's Complaint fails to state a claim upon which relief may be granted.

SECOND ADDITIONAL DEFENSE

Statute of Limitations

Plaintiff's claims, and the claims of the purported members of the putative class defined in the 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

Plaintiff's 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 Plaintiff, nor the purported members of the putative class defined in the Complaint, are covered by the statutes, regulations and legal theories sought to be invoked in the Complaint. Accordingly, for this and other reasons, Plaintiff's claims, or some of them, and those of the putative class, are barred in whole or in part because Plaintiff lacks standing. Further, Plaintiff, and members of the putative class, 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, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part

because Plaintiff and/or the putative class members are in breach of their agreements with Defendant.

SEVENTH ADDITIONAL DEFENSE

Estoppel

Pending further discovery, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part because Plaintiff 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, Plaintiff's claims, and the claims of each purported member of the putative class defined in the 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, Plaintiff's claims, and the claims of each purported member of the putative class defined in the 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

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

putative class defined in the Complaint, or some of them, are/were employees within the meaning of the applicable law, which Defendant specifically denies, Plaintiff's 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, Plaintiff's claims, and the claims of each purported member of the putative class defined in the 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, Plaintiff's claims, and the claims of each purported member of the putative class defined in the 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

Plaintiff's claims, and the claims of each purported member of the putative class defined in the 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, Plaintiff's claims, and the claims of each purported member of the putative class defined in the 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

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

SIXTEENTH ADDITIONAL DEFENSE

Unavailability of Penalties

To the extent Plaintiff or any purported member of the putative class defined in the 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 Plaintiff, or by any purported member of the putative class defined in the 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 Plaintiff or putative class members owed to Defendant against any judgment that may be entered against Defendant.

EIGHTEENTH ADDITIONAL DEFENSE

Express Contract

Plaintiff's claims, and the claims of each purported member of the putative class defined in the 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

Plaintiff's claims, and the claims of each purported member of the putative class defined in the 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 Plaintiff, and the purported members of the putative class defined in the Complaint, or some of them, are/were employees within the meaning of the applicable law, which Defendant specifically denies, and assuming, *arguendo*, that any such Plaintiff, and any such purported members of the putative class, or some of them, are entitled to relief under applicable law, which Defendant specifically denies, Plaintiff's 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

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

TWENTY-SECOND ADDITIONAL DEFENSE

Preemption

Plaintiff's claims, and the claims of the purported members of the putative class described in the 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 Plaintiff, and the purported members of the putative class defined in the Complaint, or some of them, are/were employees within the meaning of applicable law, which Defendant specifically denies, and assuming, *arguendo*, that any such Plaintiff, and any such purported members of the putative class, or some of them, are entitled to relief, which Defendant specifically denies, Plaintiff's claims, and the claims of each putative class member, or some of them, are barred, in whole or in part, on the ground that Plaintiff and the purported members of the putative class, or some of them, voluntarily authorized the deductions in writing.

TWENTY-FOURTH ADDITIONAL DEFENSE

ERISA Preemption

Plaintiff's 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

Plaintiff 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

Plaintiff's 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

Plaintiff's 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

Plaintiff's 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 South Carolina Department of Labor.

Prayer

Defendant specifically denies Plaintiff's 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 Plaintiff bearing Defendants' costs and fees of this litigation.

Dated: January 27, 2006

Respectfully submitted,

By: s/Thomas J. Brunner

Thomas J. Brunner

John H. Beisner
Robert M. Schwartz
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006-4001

Thomas J. Brunner
Alison G. Fox
BAKER & DANIELS LLP
205 West Jefferson Blvd., Suite 250
South Bend, IN 46601

Defendants' Liaison and Lead Counsel

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of January, 2006, I filed the foregoing *Answer and Additional Defenses to Plaintiff's 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.

Susan E. Ellingstad
sellingstad@locklaw.com

Lynn R Faris
lfaris@leonardcarder.com

Robert I Harwood
rharwood@whesq.com

John C Hamilton
jch@hamiltonfirm.com
hamiltonfirm@sbcglobal.net

Robert G Rikard
rrikard@attorneysc.com

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

Charles W. Whestone, Jr.
Cheryl F. Perkins
WHETSTONE, MYERS, PERKINS AND YOUNG
P. O. Box 8086
Columbus, SC 29202

By: _____ s/Alison G. Fox