

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:

*John Humphreys, et al. v. FedEx Ground  
Package System, Inc.*  
Civil No. 3:05-cv-00540-RLM-CAN (TX)

**ANSWER AND ADDITIONAL DEFENSES OF  
FEDEX GROUND PACKAGE SYSTEM, INC. TO PLAINTIFFS’  
FOURTH 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 Plaintiffs’ Fourth Amended Class Action Complaint (the “Amended Complaint”) served by Plaintiffs JOHN HUMPHREYS, DAVID MEREDITH, JEFFREY QUEBE, TIM MERSHON, and CHARLES CAMPBELL (“Plaintiffs”). Except as expressly admitted below, Defendant denies the allegations of Plaintiffs' Amended Complaint.

**PARTIES**

1. Plaintiff JOHN HUMPHREYS is a resident of Travis County, Texas and was, at all relevant times complained of, employed by Defendant in Travis County, Texas.

**ANSWER:** Defendant denies the allegation contained in Paragraph 1 that John Humphreys is or was employed by Defendants during the specified time period. Defendant lacks knowledge sufficient to form a belief as to the remaining allegations in this paragraph, and, on that basis, denies the same.

2. Plaintiff DAVID MEREDITH, is a resident of Hays County, Texas and was at all relevant times complained of, employed by Defendant in Travis County, Texas.

**ANSWER:** Defendant denies the allegation contained in Paragraph 2 that David Meredith is or was employed by Defendants during the specified time period. Defendants lack knowledge sufficient to form a belief as to the remaining allegations in this paragraph, and, on that basis, denies the same.

3. Plaintiff JEFFREY QUEBE, is a resident of Travis County, Texas and was at all relevant times complained of, employed by Defendant in Travis County, Texas.

**ANSWER:** Defendant denies the allegation contained in Paragraph 3 that Jeffrey Quebe is or was employed by Defendants during the specified time period. Defendants lack knowledge sufficient to form a belief as to the remaining allegations in this paragraph, and, on that basis, denies the same.

4. Plaintiff TIM MERSHON, is a resident of Hays County, Texas and was at all relevant times complained of, employed by Defendant in Travis County, Texas.

**ANSWER:** Defendants denies the allegation contained in Paragraph 4 that Tim Mershon is or was employed by Defendants during the specified time period. Defendants lack knowledge sufficient to form a belief as to the remaining allegations in this paragraph, and, on that basis, denies the same.

5. Plaintiff CHARLES CAMPBELL, is a resident of Grayson County, Texas and was at all relevant times complained of, employed by Defendant in Grayson County, Texas.

**ANSWER:** Defendant denies the allegation contained in Paragraph 5 that Charles Campbell is or was employed by Defendants during the specified time period.

Defendants lack knowledge sufficient to form a belief as to the remaining allegations in this paragraph, and, on that basis, denies the same.

6. At all relevant times herein, and within four years of the filing of this Third Amended Complaint and Jury Demand, Plaintiffs were local package delivery drivers employed by Defendant in the State of Texas.

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

7. Defendant FedEx Ground Package System, Inc. (hereinafter “Defendant” or “FEG”) is a Delaware corporation, affiliated with the Federal Express Corporation.

**ANSWER:** Defendant admits that it is a Delaware Corporation and alleges that it is a subsidiary of Federal Express Corporation.

8. Defendant is qualified to, and does, transact business in the State of Texas.

**ANSWER:** Defendant admits that it does business in the State of Texas and denies the remaining allegation in Paragraph 8 of the Amended Complaint.

9. Defendant employs, and has employed in the State of Texas within the past four years, on a full time basis, numerous local package delivery drivers, including the Plaintiffs and members of the proposed Class.

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

10. Defendant employs local package delivery drivers, all of whom, at FEG’s direction and control, perform package delivery to local businesses and residences.

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

11. Defendant classifies FEG package delivery drivers, including Plaintiffs and members of the Class, as “independent contractors,” requiring them to work pursuant to a sham independent contractor arrangement.

**ANSWER:** Defendants admits that persons performing package delivery services are in an independent contractor relationship with Defendants and denies each remaining allegation contained in Paragraph 11 of the Amended Complaint.

### **JURISDICTION AND VENUE**

12. This is an action alleging violations of the Motor Carrier Act and asserting causes of action for unjust enrichment, deceptive trade practices, negligent misrepresentation, fraud and promissory estoppel. Jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1332(a) as Plaintiffs are all domiciled in Texas while Defendant is located in states other than Texas.

**ANSWER:** Defendant admits that Paragraph 12 of the Amended Complaint contains Plaintiffs' characterization of their claims. Defendant also admits that this Court has jurisdiction over this action.

13. Proper venue lies with this Court as the unlawful actions complained of took place within this district and throughout the State of Texas.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 13 of the Amended Complaint.

### **CLASS ACTION ALLEGATIONS**

14. Plaintiffs bring this action pursuant to Fed. R. Civ. P. 23 on behalf of themselves and a Class consisting of all persons who were employed by Defendant in the State of Texas as “independent contractor” local package delivery drivers for FEG for any portion of time during the four year period immediately preceding the filing of this Complaint, as well as those local

package delivery drivers employed by Defendant in the State of Texas who continue to be employed as such from the date of the filing of this Complaint. (the “Class”)

**ANSWER:** Defendant denies each and every allegation contained in that paragraph of the Amended Complaint, except Defendant admits that Plaintiffs purport to bring this action “pursuant to Fed. R. Civ. P. 23.” Defendant also specifically denies that this case can be maintained as a class action.

15. Plaintiffs and the Class were subject to Defendant’s direction and control over the manner and means in which their work was performed.

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

16. Plaintiffs and the Class were the denied the accoutrements of their employment, including but not limited to:

- a. Wages;
- b. Overtime pay;
- c. Holiday pay;
- d. Waiting time pay;
- e. Worker’s compensation;
- f. Unemployment insurance;
- g. Income tax withholding;
- h. Meal, break and rest periods; and
- i. FICA contributions.

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

17. The Class is so numerous that it is impracticable to join all members of the Class before the Court. The exact number of Class members is unknown to Plaintiffs, but is believed to consist of more than 400 members, past and present, part-time and full-time, local package delivery drivers within the State of Texas.

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

18. There are questions of law and fact common to the Class, and the claims of the Plaintiffs are typical of the claims of the members of the Class.

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

19. Plaintiffs will fairly and adequately protect the interests of the Class and there are no apparent conflicts between the Plaintiffs and the Class.

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

20. Plaintiffs have retained competent counsel who have significant experience in prosecuting class action litigation and who will vigorously pursue the claims of the Class throughout the course of this litigation.

**ANSWER:** Defendant is without sufficient information to form a belief as to the allegations contained in Paragraph 20, and, on that basis, denies the same. To the extent this paragraph states Plaintiffs' legal position, it requires no answer.

21. The prosecution of separate actions by individual members of the Class would create a risk of inconsistent adjudications with respect to individual members of the Class and incompatible standards of conduct for the Defendant.

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

22. The questions of law and fact common to the members of the Class predominate over any questions affecting only individual members of the Class.

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

23. A class action is superior to other available methods for the fair and efficient adjudication of this controversy.

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

24. Plaintiffs anticipate no difficulty in the management of this litigation. Defendant's records will permit identification of and notice to the members of the Class.

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

### **STATEMENT OF RELEVANT FACTS**

25. 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 driver is required to sign a lengthy form contract entitled the "Pickup And Delivery Contractor Operating Agreement" that mischaracterizes 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 25 of the Amended Complaint.

26. 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 extra-contractual 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 retain these documents in secret driver files called "DOT" files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

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

27. 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 27 of the Amended Complaint.

28. 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 therefore require no answer. Defendant denies the remaining allegations contained in Paragraph 28 of the Amended Complaint.

29. 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 29 of the Amended Complaint.

30. 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 30 of the Amended Complaint.

31. For the past four years, in whole or in part, Plaintiffs and the Class have been employed by Defendant in the State of Texas as local package delivery drivers. In fact, recent

judicial and administrative decisions issued by the Superior Court of California, the Montana Department of Labor and Industry and the National Labor Relations Board have found that individuals similarly situated to Plaintiffs and the Class in the states of California, New Jersey and Montana are employees, notwithstanding Defendant's classification of those individuals as "independent contractors." Consequently, Defendant should be estopped from denying that Plaintiffs and the Class are anything other than employees.

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

32. Plaintiffs and the Class' job duties were performed at the complete direction, control and supervision of Defendant.

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

33. Plaintiffs and the Class delivered packages exclusively to Defendant's customers.

**ANSWER:** Defendant lacks knowledge or information sufficient for form a belief as to the allegations contained in Paragraph 33 of the Amended Complaint, and on that basis denies the same.

34. Plaintiffs and the Class were required to work in excess of sixty (60) and/or seventy (70) hours per week.

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

35. Plaintiffs and the Class were and are essential to Defendant's business and integral to Defendant's operations.

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

36. Plaintiffs and the Class were and are economically dependent upon Defendant for their livelihood, and bore few risks of loss or opportunity for gain.

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

37. Neither Plaintiffs nor the Class have any delivery business independent from that of the Defendant.

**ANSWER:** Defendant lacks knowledge or information sufficient to form a belief as to the allegations contained in Paragraph 37 of the Amended Complaint, and on that basis denies the same.

38. Neither Plaintiffs nor the Class exercised any business management with regard to their employment with Defendant;

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

39. Neither Plaintiffs nor the Class have or had any input into the prices charged for the delivery services.

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

40. As a condition of their employment, Plaintiffs and the Class were and continue to be controlled by Defendant. For example, but without limitation, Plaintiffs and the Class were and are:

- a. Required to perform unpaid work outside their job classification;

- b. Prohibited from working for other delivery companies while working for Defendant;
- c. Required to purchase, wear and maintain Defendant's signage, logos and uniforms;
- d. Required to purchase and maintain a vehicle selected by Defendant, built to Defendant's specifications and identified by Defendant's logo and signage;
- e. Required to insure the vehicles at Defendant's direction and control;
- f. Assigned to and required to work a minimum number of hours per shift, often exceeding twelve (12) and even fourteen (14) hours per day;
- g. Prohibited from leaving the work premises without management approval;
- h. Required to identify themselves and their vehicles as part of the Defendant's operations, with FedEx logos and signage;
- i. Required to clock in and out and file daily reports with Defendant;
- j. Prohibited from hiring helpers without Defendant's approval;
- k. Prohibited from refusing to deliver packages;
- l. Required to purchase from Defendant its "business support" package including maps, signs, training, modems and scanners;
- m. Told how to conduct themselves and subjected to discipline in the event they fail to comply with such requirements;
- n. Prohibited from choosing when and how much they wish to work; and
- o. Prohibited from exercising any control over the customer service areas, the number of packages allotted to each driver and the number of stops allotted to them.

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

41. Defendant required Plaintiffs and the Class to purchase and adorn themselves and their vehicles with FedEx logos.

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

42. Defendant maintained rules concerning the make and model of trucks which Defendant required Plaintiffs and the Class to purchase.

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

43. Defendant maintained and maintains control over who is allowed to ride or drive Plaintiffs' and the Class' vehicles, as well as where those vehicles may be parked and how and when they may be accessed.

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

44. Plaintiffs and the Class' vehicles, as selected and controlled by Defendant, cannot practicably be used for any purpose other than the delivery of Defendant's packages.

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

45. Neither Plaintiffs nor the Class are permitted to reject deliveries or route schedules. Nor are they permitted to restrict the volume of packages they are willing to deliver.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 45 of the Amended Complaint.

46. Defendant completely controls the rights to service areas, and Plaintiffs and the Class have no proprietary rights with regard to same.

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

47. Defendant paid Plaintiffs and the Class a below market value “van availability” fee which was not negotiable by Plaintiffs or the Class.

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

48. Plaintiffs and the Class were subject to discipline by, among other methods, termination without notice and “fines” in the form of reduced “bonuses” for failure to follow employment rules enacted by Defendant.

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

49. The position of local package delivery driver did not require any special skills.

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

50. At no time during the past four years were Plaintiffs or the Class paid hourly wages by Defendant.

**ANSWER:** Defendant denies that the consideration paid Plaintiffs is properly characterized as wages, and denies all remaining allegations contained in Paragraph 50. Plaintiffs received consideration under the terms of their contracts with FedEx Ground or FedEx Home Delivery.

51. Plaintiffs and the Class’ compensation was non-negotiable and under the complete control of Defendant.

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

52. Plaintiffs and the Class regularly under-reported the hours they worked at the instruction of Defendant.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 52 of the Amended Complaint.

53. At no time during the past four years were Plaintiffs or the Class compensated for waiting time in their respective terminals.

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

54. At no time during the past four years were Plaintiffs or the Class paid overtime wages for work in excess of eight hours per day, or forty hours per week.

**ANSWER:** Defendant denies that the consideration paid Plaintiffs is properly characterized as wages, and denies all remaining allegations contained in that paragraph of the Amended Complaint. Plaintiffs received consideration under the terms of their contracts with FedEx Ground or FedEx Home Delivery.

55. At no time during the past four years were Plaintiffs or the Class provided with meal, break and/or rest periods.

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

56. At no time during the past four years were Plaintiffs or the Class provided Unemployment Compensation or Workers' Compensation Insurance.

**ANSWER:** Defendant denies that the consideration paid Plaintiffs is properly characterized as Unemployment Compensation or Workers' Compensation Insurance, and denies all remaining allegations contained in Paragraph 56. Plaintiffs received

consideration under the terms of their contracts with FedEx Ground or FedEx Home Delivery.

57. The damages sought by the Plaintiffs and the Class exceed \$75,000.00 and are otherwise in excess of the minimum jurisdiction of this Court.

**ANSWER:** Defendant admits that the damages sought by Plaintiffs exceed \$75,000 and denies all remaining allegations contained in Paragraph 57 of the Amended Complaint.

58. All foregoing facts are incorporated in the causes of action set forth below. Such causes of action are pled alternatively in the event one or more conflict. All conditions precedent for the institution of this suit have been satisfied.

**ANSWER:** The first two sentences of Paragraph 58 of the Amended Complaint state Plaintiffs' characterizations of their allegations and claims, and therefore require no answer. Defendant denies the allegations made in the third and final sentence of Paragraph 58.

### **CAUSES OF ACTION ON BEHALF OF CLASS**

#### **FIRST CAUSE OF ACTION DAMAGES CAUSED BY VIOLATIONS OF MOTOR CARRIER ACT**

59. Pursuant to 49 U.S.C. § 14704(a)(2), an interstate motor carrier, broker and/or freight forwarder providing transportation or services subject to the Federal Motor Carrier Act is liable for damages sustained by a person as a result of an act or omission by that interstate motor carrier, broker and/or freight forwarder in violation of such Federal Rules and Regulations.

**ANSWER:** Paragraph 59 of the Amended Complaint contains legal conclusions to which no response is required. Defendant alleges that the terms of 49 U.S.C. § 14704(a)(2) speak for themselves.

60. 49 C.F.R. § 395.3 regulates the maximum hours of service that Plaintiffs and the Class were and are permitted to work and drive. Defendant routinely and continually forced Plaintiffs and the Class to work and drive in excess of the amount of hours permitted under such regulation. In addition, Defendant routinely and continually required Plaintiffs and the Class to falsify their daily driving records to conceal such violations. Defendant also routinely and continually modified Plaintiffs and the Class' daily driving records unilaterally to conceal such violations. As a result of Defendant's unlawful conduct described herein, Plaintiffs and the Class have been damaged.

**ANSWER:** Defendant alleges that the terms of 49 C.F.R. § 395.3 speak for themselves and denies the remaining allegations contained in Paragraph 60 of the Amended Complaint.

61. Plaintiffs and each member of the Class therefore pray for an award of unpaid wages in the amounts to be proven at trial.

**ANSWER:** Defendant denies Plaintiffs' entitlement to any and all of the relief requested contained in Paragraph 61 of the Amended Complaint.

## **SECOND CAUSE OF ACTION FRAUD**

62. Plaintiffs hereby incorporate all of the preceding of this Complaint as if fully set forth herein.

**ANSWER:** Defendant repeats and re-alleges its answers to Paragraphs 1 through 61 of the Amended Complaint as if set fully forth herein.

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

64. At all material times, Defendant either knew, or should have known, that the material representations 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 64 of the Amended Complaint.

65. 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 to assume responsibility for all of employment related expenses, including but not limited to purchasing or leasing, operating and maintaining expensive trucks, Plaintiffs and the Class suffered damage as a direct and proximate result.

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

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

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

### **THIRD CAUSE OF ACTION RESCISSION OF OPERATING AGREEMENT**

67. Plaintiffs hereby incorporate all of the preceding of this Complaint as if fully set forth herein.

**ANSWER:** Defendant repeats and re-alleges its answers to Paragraphs 1 through 66 of the Amended Complaint as if set fully forth herein.

68. 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 68 of the Amended Complaint.

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

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

70. 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 70 of the Amended Complaint.

71. 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 71 of the Amended Complaint.

72. 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 72 of the Amended Complaint.

73. 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 73 of the Amended Complaint.

74. 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 74 of the Amended Complaint.

75. 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 75 of the Amended Complaint.

76. By misclassifying Plaintiffs and the Class Members 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 76 of the Amended Complaint.

77. 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 77 of the Amended Complaint.

78. 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 78 of the Amended Complaint.

**FOURTH CAUSE OF ACTION  
DECLARATORY RELIEF**

79. 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 78 of the Amended Amended Complaint as if set fully forth herein.

80. 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:

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

81. Whether Defendant have 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

- a. wages;

- b. holiday pay;
- c. workers' compensation;
- d. unemployment insurance;
- e. contributions to FEG's retirement plan;
- f. income tax withholding; and
- g. meal, break and rest periods.

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

82. 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 Texas law.

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

83. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive in compensation and benefits.

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

84. What amounts Plaintiffs and Plaintiff Class Members are entitled to receive in interest on unpaid compensation due and owing.

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

85. 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 85 of the Amended Complaint.

86. 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:** Paragraph 86 of the Amended Complaint contains Plaintiffs' characterization of the relief sought and does not require an answer. Notwithstanding this, Defendant denies that Plaintiffs are entitled to any or all of the relief requested in that paragraph.

**WHEREFORE,** Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant rescinding the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FEG, along with compensatory damages, punitive damages, consequential damages, declaratory judgment and injunctive relief, costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

**ANSWER:** The WHEREFORE Paragraph of the Amended Complaint contains Plaintiffs' characterization of the relief sought and does not require an answer. Notwithstanding this, Defendant denies that Plaintiffs are entitled to any or all of the relief requested in that paragraph.

#### **INDIVIDUAL CAUSES OF ACTION**

87. Plaintiffs hereby assert the following individual causes of action:

**ANSWER:** Paragraph 87 consists of Plaintiffs' characterizations of their claims, and therefore requires no answer. Notwithstanding the foregoing, Defendant denies that Plaintiffs are entitled to any relief for the claims alleged.

**FIRST CAUSE OF ACTION  
DECEPTIVE TRADE PRACTICES**

88. Defendant's conduct described hereinabove constitutes a violation of § 17.41 et seq., of the Texas Deceptive Trade Practices Act (DTPA). Plaintiffs are consumers, as described in Section 17.50 of the DTPA, who purchased or sought to purchase goods or services. Defendant employed false, misleading and/or deceptive acts or practices as specifically enumerated under the DTPA, including, but not limited to the following, which were relied on by Plaintiffs to their detriment:

- a. Defendant caused confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services; for example, that Plaintiffs would have a proprietary right to a service area and could later sell their "business." TEX. BUS. & COM. CODE ANN. § 17.46(b)(2).
- b. Defendant represented that their goods and services had sponsorship, approval, characteristics, uses or benefits they did not have and the representatives had sponsorship, approval, status, affiliation, and/or connection that they did not have. TEX. BUS. & COM. CODE ANN. § 17.46(b)(5).
- c. Defendant falsely represented that their services are of a particular standard, quality, or grade. TEX. BUS. & COM. CODE ANN. § 17.46(b)(7).
- d. Defendant performed unconscionable acts and/or took an unconscionable course of action against Plaintiffs, which to Plaintiffs' detriment, took advantage of their lack of knowledge, ability, experience or capacity to a grossly unfair degree. TEX. BUS. & COM. CODE ANN. § 17.50(a)(3).

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 88 of the Amended Complaint, including its subparts.

**SECOND CAUSE OF ACTION  
PROMISSORY ESTOPPEL**

89. Defendant made promises to Plaintiffs which they knew Plaintiffs would rely upon. Plaintiffs did substantially and detrimentally rely on such promises and were damaged as a result.

**ANSWER:** Defendant denies each and every allegation contained in Paragraph 89 of the Amended Complaint, including its subparts.

**PUNITIVE DAMAGES**

90. Defendant has acted fraudulently and/or with malice, as defined by the Texas Civil Practice and Remedies Code and the common law, and should be assessed punitive damages.

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

**DAMAGES**

91. Plaintiffs seek the recovery of:
- a. all their general, actual, special and consequential damages;
  - b. costs of court;
  - c. attorney's fees as provided by law;
  - d. pre- and post-judgment interest as allowed by law;
  - e. treble damages as permitted under the DTPA; and
  - f. punitive damages as may be determined by the finder of fact.

**ANSWER:** Defendant specifically denies Plaintiffs' entitlement to any and all of the relief requested contained in Paragraph 91, including its subparts.

**REQUEST FOR A JURY TRIAL**

92. In accordance with Fed. R. Civ. P. 38, Plaintiffs request a trial by jury on all issues.

**ANSWER:** Defendants admit Plaintiffs' request as stated.

**PRAYER**

WHEREFORE, PREMISES CONSIDERED, Plaintiffs, individually and on behalf of each member of the Class, respectfully request that judgment be entered on their behalf following trial herein and that Plaintiffs recover such other and further relief to which they may show themselves to be justly entitled to receive.

**ANSWER:** Defendant specifically denies Plaintiffs' entitlement to any and all of the relief requested contained in the above paragraph, including its subparts, and incorporates by reference the affirmative defenses set out below, and seeks dismissal of this action with prejudice, with Plaintiffs bearing Defendants' costs and fees of this litigation.

**ADDITIONAL DEFENSES**

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

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

FIRST ADDITIONAL DEFENSE

Failure to State a Claim

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

SECOND ADDITIONAL DEFENSE

Statute of Limitations

Plaintiffs' claims, and the claims of the purported members of the putative class defined in the Amended Complaint, or some of them, are barred in whole or in part by the applicable statutes of limitations.

THIRD ADDITIONAL DEFENSE

No Class Action or Collective Action

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

FOURTH ADDITIONAL DEFENSE

Unconstitutional Class Action

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

FIFTH ADDITIONAL DEFENSE

No Standing

Neither Plaintiffs, nor the purported members of the putative class defined in the Amended Complaint, are covered by the statutes, regulations and legal theories sought to be invoked in the Amended Complaint. Accordingly, for this and other reasons, Plaintiffs' claims, or some of them, and those of the putative class, or some of them, are barred in whole or in part because Plaintiffs lack standing. Further, 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 Plaintiff, and any such purported members of the putative class, or some of them, are entitled to relief under the applicable law, which Defendant specifically denies, Plaintiffs' claims, and the claims of each putative class member, or some of them, are barred, in whole or in part, on the ground that Defendant acted in good faith, with a good-faith and reasonable belief that Defendant had complied fully with federal and state law, with a bona fide dispute as to the obligation of payment, and/or in conformity with, and in reliance on, written administrative regulations, orders, rulings, guidelines, approvals and/or interpretations of federal and/or State

agencies. Furthermore, assuming, arguendo, that a violation of the applicable law occurred, which Defendant specifically denies, Defendant's conduct was not willful.

TWENTY-FIRST ADDITIONAL DEFENSE

Unavailability of Equitable Relief

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

TWENTY-SECOND ADDITIONAL DEFENSE

Preemption

Plaintiffs' claims, and the claims of the purported members of the putative class described in the Amended Complaint, are preempted, in whole or in part, by federal law, and the federal regulation of interstate commerce in general and the transportation industry in particular.

TWENTY-THIRD ADDITIONAL DEFENSE

Deduction Authorization

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

TWENTY-FOURTH ADDITIONAL DEFENSE

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-FIFTH 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 Texas Department of Labor.

TWENTY-SIXTH ADDITIONAL DEFENSE

Limitation on Exemplary Damages

Defendant is entitled to the statutory cap on exemplary damages as set out in Chapter 41 of the Texas Civil Practice and Remedies Code.

TWENTY-SEVENTH ADDITIONAL DEFENSE

Procedural Rights for Exemplary Damages

Defendant is entitled to a bifurcated trial as to exemplary damages as set out in Chapter 41 of the Texas Civil Practice and Remedies Code.

TWENTY-EIGHTH ADDITIONAL DEFENSE

Comparative Responsibility

Plaintiffs were a contributing cause of their alleged injuries and damages and Defendant is entitled a finding by the jury of Plaintiffs proportionate responsibility under Chapter 33 of the Texas Civil Practice and Remedies Code.

TWENTY-NINTH ADDITIONAL DEFENSE

Failure to Plead With Specificity

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

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

Fraud Allegations Insufficient

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

THIRTY-SECOND AFFIRMATIVE DEFENSE

Lack of Reasonable Reliance

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

THIRTY-THIRD AFFIRMATIVE DEFENSE

Statute of Frauds

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

THIRTY-FOURTH ADDITIONAL DEFENSE

Failure to Mitigate

Assuming, *arguendo*, while vigorously denying, that Plaintiffs and members of the putative class have suffered any economic damages as a result of defendant's actions, Plaintiffs and putative class members have a duty to mitigate damages and, upon information and belief have failed to do so.

THIRTY-SIXTH 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.

THIRTY-SEVENTH 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.

THIRTY-EIGHTH 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 and/or under applicable administrative rules.

**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' Fourth 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:

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By: s/Thomas J. Brunner