

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

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In re FEDEX GROUND PACKAGE)	Cause No. 3:05-MD-527-RM
SYSTEM, INC., EMPLOYMENT)	(MDL 1700)
PRACTICES LITIGATION)	
)
-----)	
THIS DOCUMENT RELATES TO:)	
)
<i>Larry Louzau, et al. v. FedEx Ground</i>)	
<i>Package System, Inc.,</i>)	
Civil No. 3:05-cv-00538-RLM-CAN (NY))	
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SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs Larry Louzau, Charles Malkin, Damian Ivanov, Nicholas Conte, George Hammer, and Daniel Santa individually, on behalf of all others similarly situated, and as class representatives, by their attorneys, complain of defendant FedEx Ground Package System, Inc., and its division FedEx Home Delivery (hereinafter, “defendant” or “FedEx Ground”) as follows:

NATURE OF ACTION

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

VENUE

2. Venue herein is proper pursuant to the order of the Judicial Panel for Multidistrict Litigation transferring this action to this Court.

CLASS ALLEGATIONS

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

4. Plaintiffs assert their New York Labor Law claims on behalf of

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

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

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

- a. Whether the Class members have been misclassified as independent contractors by defendant’s operating agreements;
- b. Whether charges and deductions imposed by defendant against the wages of Class members violates Labor Law §193(1); and

- c. Whether payments made by Class members, by separate transaction, which payments were required by defendant or defendant's operations, violate Labor Law §193(2).

7. The claims of the representative plaintiffs are typical of the claims of the Class. The named representative plaintiffs have suffered the same type of financial losses as other Class members in this case. Such losses stem from defendant's policy and practice of misclassifying such Class members as independent contractors in order to facilitate its practice of taking unlawful deductions from their wages in violation of New York law, and requiring them in violation of New York law to make payments that typically constitute an employer's cost of doing business.

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

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

PARTIES

10. Plaintiff Larry Louzau ("Louzau") is a resident of Westchester County, New York, and worked for defendant from in or about September 2002 until in or about January 2006. At the time the instant action was filed, Louzau was working for defendant.

11. Plaintiff Charles Malkin (“Malkin”) is a resident of Orange County, New York, and worked for defendant and its predecessor in interest from in or about July 1997 Until in or about February 2006. At the time the instant action was filed, Malkin was working for defendant.

12. Plaintiff Damian Ivanov (“Ivanov”) is a resident of Kings County, New York, and worked for defendant as a Home Delivery driver from in or about August 2001 to April 2005.

13. Plaintiff Nicholas Conte (“Conte”) is a resident of Westchester County, New York, and worked for defendant from in or about November 2001 to the present.

14. Plaintiff George Hammer (“Hammer”) is a resident of Montgomery, New York, and worked for defendant from in or about March 1998 to the present.

15. Plaintiff Daniel Santa (“Santa”) is a resident of Plattsburgh, New York, and worked for defendant as a Home Delivery driver from in or about February 2003 to September 2006.

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

STATEMENT OF FACTS COMMON TO ALL CAUSES OF ACTION

17. Defendant’s business consists of providing a package transportation and delivery service to its customers throughout the United States. Plaintiffs and Class members were hired by defendant as drivers to deliver and pick up packages for defendant’s customers on behalf of defendant.

18. Plaintiffs and Class members are required to sign either a “Pick-Up and Delivery Contractor Operating Agreement” (hereinafter the “OA”) or “FedEx Home Delivery Standard

Operating Agreement” (hereinafter the “HOA”) (both the OA and HOA are jointly referred to hereinafter as the “Operating Agreements”) with defendant as a condition of employment.

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

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

21. Defendant exercises extensive control over the means by which its drivers perform their jobs. For instance, plaintiffs and drivers have no authority to refuse pick-ups or deliveries. Drivers are not permitted to make deliveries or pick-ups according to their own schedules.

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

23. Defendant requires its drivers to arrive at defendant’s terminal at specified times to arrange and coordinate packages in their vehicles for delivery.

24. Defendant employs Terminal Managers, Pickup and Delivery Managers, and other supervisory personnel, to coordinate and issue drivers’ paperwork, together with delivery and pick-up schedules, to which drivers are strictly required to adhere. Defendant requires its drivers to complete paperwork, including, *inter alia*, daily logs and daily inspection reports.

25. Defendant pays its drivers based upon the number of pick-up and delivery stops made.

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

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

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

29. Such personal services are a fundamental and integral part of defendant's provision of services to its customers. The personal services provided by plaintiffs and other drivers do not involve the level of expertise typically requiring the use of independent professionals with special skills as opposed to employees.

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

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

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

32. The OA, which all drivers are required to sign as a condition of employment, sets forth the following statement, which purports to classify drivers, including the Class members, as independent contractors (the HOA contains virtually identical language):

Background Statement, FedEx Ground Package System, Inc. is a duly licensed motor carrier engaged in providing a small package information, transportation

and delivery service throughout the United States, with connecting international service. The Contractor is an owner-operator of one or more pieces of trucking equipment suitable for use in such a service. Contractor wants to make this equipment available, together with a qualified operator for each piece of equipment, to provide daily pick-up and delivery service on behalf of FedEx Ground. FedEx Ground wants to provide for package pick-up and delivery services through a network of independent contractors, and, subject to the number of packages tendered to FedEx Ground for shipment, will seek to manage its business so that it can provide sufficient volume of packages to Contractor to make full use of Contractor's equipment. Contractor wants the advantage of operating within a system that will provide access to national accounts and the benefits of added revenue associated with shipments picked up and delivered by other contractors throughout the FedEx Ground system. In order to get that advantage, Contractor is willing to commit to provide daily pick-up and delivery service, and to conduct his/her business so that it can be identified as being a part of the FedEx Ground system. Both FedEx Ground and Contractor intend that Contractor will provide these services strictly as an independent contractor, and not as an employee of FedEx Ground for any purpose. Therefore, this Agreement will set forth the mutual business objectives of the two parties intended to be served by this Agreement – which are the results the Contractor agrees to seek to achieve – but the manner and means of reaching these results are within the discretion of the Contractor, and no officer or employee of FedEx Ground will have the authority to impose any term or condition on Contractor or on Contractor's continued operation which is contrary to this understanding.

33. In addition, the Operating Agreements contains specific provisions intended to specifically control the manner and means by which plaintiffs and drivers are expected to achieve defendant's results.

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

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

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

36. The Operating Agreements confirm that they seek to control the means by which plaintiffs and other drivers achieve defendant’s business results by requiring drivers to “prepare daily driver logs and daily inspection reports” and “such shipping documents as FedEx Ground may from time to time designate, and to complete and return these documents to FedEx Ground at the end of each business day.” Indeed, a driver’s failure to submit these daily reports results in nonpayment by defendant to such driver.

37. The OA further requires drivers to deposit with FedEx Ground “at such time and in such manner as FedEx Ground may specify the sum of \$1,000,” which defendant deposits in a so-called “Contractor Performance Escrow Account.” The HOA similarly requires the deposit of such funds, although the amount is \$500.00. Such sum is collected by defendant and used to reduce any “indebtedness” defendant deems a driver may allegedly owe to defendant upon a driver’s termination. The sum is also retained by defendant as liquidated damages if a driver fails to provide defendant with thirty-days written notice of termination of the OA.

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

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

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

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

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

43. Despite defendant’s statement that drivers have a “proprietary interest” in the customers within their Primary Service Area, defendant is permitted to change a driver’s work area at any time. Indeed, plaintiff Ivanov sometimes would be assigned to a completely different

route for a particular day, while the route he supposedly “owned” would be serviced by a temporary driver of defendant’s choosing.

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

45. The Operating Agreements are and at all relevant times have been contracts 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.

46. 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.

47. For instance, although the Operating Agreements purport to limit defendant’s right to terminate drivers only for cause, the practices and extraneous policies used by defendant in interpreting the Operating Agreements and in training its management employees in the supervision of drivers, gives defendant almost absolute unilateral control over contract termination rendering drivers subject to termination at-will. Indeed, plaintiff Ivanov was given

no reason whatsoever for his termination despite multiple requests for such information from defendant.

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

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

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

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

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

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

53. The wages of plaintiffs and Class members were subjected to deductions or charges for, among other things, the purchase or lease, required maintenance, fuel costs and

enhancement of vehicles according to defendant's specifications; equipment required by defendant; insurance; uniforms; and \$1,000 for deposit in defendant's so-called Contractor Performance Escrow Account.

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

Prior Determination of Employee Status

55. In a class action filed in California Superior Court for the County of Los Angeles captioned, *Estrada v. Fed Ex Ground*, No. BC 210130, a class of pick-up and delivery drivers, who performed services for defendant and/or its predecessor in interest in the State of California, were determined to be employees rather than independent contractors, based upon the fact that FedEx Ground had the right to control the manner and means by which the drivers provided services.

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

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

[FedEx Ground] not only has the right to control, but has close to absolute control over the SWAs [defined as single work area pick up and delivery drivers in California] based upon interpretation and obfuscation. . . . A close reading of the OA, which all SWAs must sign in order to be able to work for [FedEx Ground] is comprised of platitudes and guidelines. This, in effect, leaves its interpretation in the sole hands of [FedEx Ground], without any meaningful recourse to the SWAs

but with potential severe penalties and remedies that are intentionally kept uncertain and murky. . . . The description of the workings of the OA, which in effect gives almost absolute control over the SWAs (and even its own employees) is borne out by the testimony of [FedEx Group's] management team. It should be noted in the beginning that the OA is a brilliantly drafted contract creating the constraints of an employment relationship with SWAs in the guise of an independent contractor model.

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

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

59. With respect to defendant's Contractor Relations department, the court in *Estrada* found that it was "nothing more than a mere branch of management" and that "[a]ny decision by Contractor Relations is subject to higher management's approval or veto." According to the court, "Contractor Relations must be seen in a role akin to Human Relations over employees, wherein the highest levels of management have the final say." (*Id.*)

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

FIRST CAUSE OF ACTION

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

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

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

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

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

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

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

SECOND CAUSE OF ACTION

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

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

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

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

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

THIRD CAUSE OF ACTION

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

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

realizing unjust profits from plaintiffs' work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

75. At all material times, defendant either knew, or should have know that the material representation made to plaintiffs in the OA concerning their employment status, and the concealment and/or non-disclosure of material facts to plaintiffs concerning their employment status and plaintiffs' corresponding obligation to assume responsibility for all of their "own" employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks, were false and fraudulent.

76. At all material times, defendant intended to and did induce plaintiffs and the class they represent to reasonably and justifiably rely to their detriment on the false and fraudulent representations made to them by defendant in the OA concerning their employment status and obligation to assume responsibility for all of employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks, and suffered damage as a direct and proximate result.

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

FOURTH CAUSE OF ACTION

78. Despite the express terms of the OA, plaintiffs' relationship with defendant satisfies every aspect of the test for employment, and not for independent contractor status.

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

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

81. The OA illegally and unfairly advantages defendant, by mischaracterizing the status of the plaintiffs in that defendant evades employment related obligations, such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, illegally shifting the expense of workers' compensation coverage, and other expenses to plaintiffs.

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

83. The OA between defendant and each plaintiff is an unconscionable contract of adhesion, which is unenforceable as contrary to the public interest, policy and law.

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

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

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

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

88. Plaintiffs are entitled to compensation for all of the business expenses they were illegally required by defendant to bear, for all of the employment taxes, unemployment compensation and workers’ compensation the defendant should have but did not pay, and Plaintiffs are entitled to the *quantum meruit* value of their services as employees.

FIFTH CAUSE OF ACTION

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

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

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

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

91. 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.

PRAYER FOR RELIEF

WHEREFORE, plaintiffs and Class members demand the following relief:

- (a) Certification of this case as a class action pursuant to Rule 23 of the Federal Rules of Civil Procedure and/or Article 9 of the CPLR ;
- (b) A declaration that plaintiffs and Class members are employees of defendant;
- (c) An award of actual damages in an amount to be determined at trial for amounts deducted from plaintiffs' wages that do not constitute authorized deductions under Labor Law §193;

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

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

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

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

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

Dated: September 22, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

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CERTIFICATE OF SERVICE

I, Susan E. Ellingstad, hereby certify that on September 22, 2006, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which sent notification of such filings to the following:

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