

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

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

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

_____))
THIS DOCUMENT RELATES TO:)
_____))
ALL ACTIONS)
_____))

Chief Judge Miller
Magistrate Judge Nuechterlein

**FEDEX GROUND PACKAGE SYSTEM, INC.'S MEMORANDUM OF LAW
IN OPPOSITION TO PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE**

Plaintiffs' request that this Court take judicial notice of FedEx Corporation's December 21, 2007 10-Q Quarterly Report and a December 19, 2007 press release referencing citations issued by the Massachusetts Attorney General mischaracterizes the relevant facts and their applicability to the class certification matters currently under consideration by the Court. For these reasons, FedEx Ground respectfully requests that plaintiffs' request for judicial notice be denied.

Judicial notice of an adjudicative fact is properly taken when that fact is "not subject to reasonable dispute in that it is either: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). Therefore, while the Court may take judicial notice of documents within the public record, it cannot take judicial notice of disputed facts or inferences from any such documents. *Holmes v. Nigro*, No. 97-c-4360. 1998 U.S. Dist. LEXIS 18718, at *8-9 (N.D. Ill. Nov. 25, 1998); *see also United States v. So. Cal.*

Edison, Co., 300 F. Supp. 2d 964, 977 (E.D. Cal. 2004) (citing *California ex rel. RoNo, LLC v. Altus Fin. S.A.*, 344 F.3d 920, 931 (9th Cir. 2003)). Under this rule, plaintiffs' request might have been appropriate had they limited their request for judicial notice merely to the fact that FedEx Corp. issued a 10-Q report in which it disclosed that the IRS has tentatively indicated that it may issue an assessment against FedEx Ground at some time in the future. However, as amply demonstrated by plaintiffs' request, they ask the Court to take judicial notice of the 10-Q report and a press release regarding citations issued by the Massachusetts Attorney General for the purposes of making arguments based upon the assumed facts and preliminary findings that *underlie* these regulatory activities. Judicial notice of facts and interpretations that are reasonably in dispute is not appropriate. Fed. R. Evid. 201(b); *Hennessey v. Penril Datacomm Networks*, 69 F.3d 1344, 1354 (7th Cir. 1995). This is why the Seventh Circuit in *Hennessey* announced that SEC filings are generally inappropriate for judicial notice and found that the district court rightly refused to take notice of a company's SEC filing because, "given that there was considerable argument over the significance of the 10-K form, the judge properly found that its contents were subject to dispute." *Id.*

Like in *Hennessey*, plaintiffs here ask this Court to take judicial notice of their characterization of the import of FedEx Ground's 10-Q filing, as well as the citations preliminarily issued by the Massachusetts Attorney General.

First, contrary to plaintiffs' characterizations (*see* Pls.' Req. at 2), the IRS has not issued a dispositive determination that FedEx Ground contractors are employees under federal tax law, or any determination at all. FedEx Ground objects to plaintiffs' characterization of these in-progress proceedings. In a routine SEC filing, FedEx Ground's parent advised that IRS auditors indicated a tentative conclusion that for 2002 certain contractors might be reclassified as

employees. Additional discussions with the auditors, however, are planned and the audit remains ongoing. And, significantly, that tentative conclusion conflicts with a prior IRS audit and may be inconsistent with IRS audits of contractors. Additional review will occur before any IRS determination is made, which will be subject to court review. This matter remains preliminary and does not invalidate the IRS 1994 Letter of Assurance that FedEx Ground's contractors *are* contractors. As such, judicial notice of FedEx Ground's parent 10-Q is not merited.

Second, the IRS applies its own unique 20-factor test for determining independent contractor status – a test that is not at issue in the vast majority of jurisdictions in which motions for class certification are currently pending.¹ Even were the IRS test applicable to other jurisdictions, the mere fact that an IRS field-level audit team has tentatively concluded an audit for 2002 and that it could conclude that contractors in that year should be classified as employees for federal tax purposes might pertain to merits issues but it says nothing about whether the plaintiffs' proposed classes meet the requirements of commonality, typicality and manageability under Rule 23. If anything, a tentative IRS finding that FedEx Ground's contractors should be classified as con employees for federal tax purposes in 2002 can only *undermine* plaintiffs' theory for class certification, as such a finding may conflict with IRS findings relating to other time periods and would indicate that the relevant facts have changed critically over the relevant class periods. Further, since plaintiffs claim that the Operating Agreement has not materially

¹ See, e.g., *Home Ins. Co. v. Indus. Comm'n*, 599 P.2d 801, 803 (Ariz. 1979) (applying “totality of circumstances” test in Arizona); *Bourgeois v. Cacciapuoti*, 84 A.2d 122, 123 (Conn. 1951) (applying “right of general control” test in Connecticut); *Hayes v. Bd. of Trs.*, 29 S.E.2d 137, 140 (N.C. 1944) (applying eight-factor test in North Carolina); *Stamp v. Dep't of Consumer & Bus. Servs.*, 9 P.3d 729, 731 (Or. Ct. App. 2000) (en banc) (applying four-factor “right to control” test in Oregon); *Am. Fam. Life Assur. Co. v. Welch*, 170 S.E.2d 703, 707 (Ga. Ct. App. 1969) (Georgia courts presume parties' characterization of the relationship is correct).

changed over the relevant class periods, any IRS assessment also would demonstrate that the classification question requires looking beyond the Agreement, to individualized evidence.

Plaintiffs' assertion that the tentative IRS conclusion disclosed in FedEx Ground's parent SEC filing "must rest on a finding that FedEx does not have a reasonable, good faith belief that its drivers are lawfully classified and therefore does not qualify for the protection of the safe harbor provisions of Section 530 of the Internal Revenue Code" (Pl. Req. at 2) exemplifies the great liberties in plaintiffs' logic, and, why this matter is inappropriate for judicial notice. First, the SEC disclosure merely advises that there is a *possibility* of a liability in this matter, not that there *is* a liability. Second, the IRS itself has made no decisions. The IRS *audit team* has merely indicated *its* tentative conclusions and, as disclosed, invited further discussions with respect to that tentative conclusion. Third, plaintiffs are attempting to draw an unsupported legal conclusion with respect to the reasonableness of FedEx Ground's classifications. In this untested assertion, plaintiffs speculate as to the facts, logic and law related to a tentative audit conclusion that may – or may not – be found to be consistent with IRS and judicial standards related to the good faith presumption of FedEx Ground's classification, and the classifications themselves under the law. The 10-Q disclosure is just the sort of "non-fact" that should not be judicially noticed. *Hennessy*, 69 F.3d at 1355. (As a point of clarification, Section 530 of the Internal Revenue Code relates to Coverdell education savings accounts. FedEx Ground believes plaintiffs' reference to Section 530 was meant to reference Section 530 of the Revenue Act of 1978.)

Plaintiffs' request that the Court take judicial notice of a press release regarding thirteen *individual* citations issued by the Massachusetts Attorney General is also inappropriate and rests on mischaracterizations of the facts. Plaintiffs' assertion that these citations reflect a generalized

finding that “FedEx Ground drivers are misclassified and are legally employees” (Pls.’ Req. at 3) is patently false. In fact, the Massachusetts citations apply only to thirteen *individual* contractors and thus reflect the appropriateness and necessity of individual, case-by-case adjudication of contractor status. Just as important, FedEx Ground has the right to object to the citations and to seek adjudication through administrative and judicial means. The company has already exercised this right and intends to vindicate its position. Further undermining the consistency needed for class treatment, the former Massachusetts Attorney General previously investigated this issue and issued no citation. Other Massachusetts agencies have also repeatedly found for FXG regarding contractor status. This more recent historical anomaly under Massachusetts law demonstrates that determinations may vary according to time and individualized circumstances. A one-size fits all, multi-year class action is not consistent with such outcomes.

For the foregoing reasons, FedEx Ground respectfully requests that this court reject plaintiffs’ request to take judicial notice in its entirety.

Dated: January 8, 2008.

Respectfully submitted,

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