

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

In re FEDEX GROUND PACKAGE)	Case No. 93:05-MD-527 RM
SYSTEM, INC. EMPLOYMENT)	(MDL 1700)
PRACTICES)	
LITIGATION)	CHIEF JUDGE MILLER
_____)	MAGISTRATE NUECHTERLEIN
THIS DOCUMENT RELATES TO)	
ALL ACTIONS)	
_____)	

**PLAINTIFFS' REQUEST FOR JUDICIAL NOTICE
OF FEDEX'S MOST RECENT 10Q REPORT TO THE U.S. SECURITIES &
EXCHANGE COMMISSION REGARDING THE INTERNAL REVENUE SERVICE'S
DETERMINATION THAT FEDEX'S PICKUP AND DELIVERY DRIVERS ARE
MISCLASSIFIED AND THE CITATION OF FEDEX GROUND BY THE
MASSACHUSETTS ATTORNEY GENERAL FOR MISCLASSIFICATION**

Plaintiffs request that this Court take judicial notice, under Rule 201 of the Federal Rules of Evidence, of FedEx Corporation's December 21, 2007 10Q Quarterly Report (Exhibit A) to the United States Securities & Exchange Commission, which includes notice to the public (at page 19) that the Internal Revenue Service has concluded an audit for the year 2002, finding that "FedEx Ground pick-up and delivery owner-operators should be reclassified as employees for federal income tax purposes" and anticipates that FedEx will owe back taxes and penalties of \$319 million plus interest for that tax year alone. In addition, the 10Q report indicates that the IRS has similar audits open for 2004-2006.

This crucial information contained in FedEx's official filing with the SEC is of direct relevance to the pending 38 motions for class certification as well as upcoming motions for the

following reasons:

1) FedEx Ground has offered in evidence the IRS 1995 "letter of assurance" which FedEx has represented as demonstrating that its "independent contractor" model had the approval of the IRS; Plaintiffs have previously informed the court that the IRS was reviewing and reconsidering that letter, as admitted by FedEx Corporation executive responsible for tax matters, Ms. Sallie Ford, at her deposition. The current 10Q report demonstrates that, like its recent SS-8 determinations (which Plaintiffs have offered in evidence), the IRS has now rejected the "letter of assurance" entirely and determined that the pick-up and delivery drivers are in fact legally employees and should be reclassified as such. Equally significant, the IRS has determined that it may impose penalties for FedEx Ground's misclassification of its drivers despite the earlier "letter of assurance." This conclusion 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. The fact that the IRS has flatly reversed its position on the proper classification of the drivers shows that the IRS letter is entitled to no weight in the court's determination of Plaintiffs' class certification motions.

2) The IRS conclusion demonstrates that a categorical determination of employment status, even under the complex 20-factor IRS test, is the norm rather than the exception and this supports Plaintiffs assertion that class certification is both appropriate and proper because of the overwhelming commonality of factual and legal issues in this case.

3) The IRS determination demonstrates that on the merits, Plaintiffs can offer and prove, by common evidence, that the drivers are legally employees not independent contractors.

Plaintiffs also request that this Court take judicial notice of the December 19, 2007

citation of FedEx Ground by the Massachusetts' Attorney General for intentional misclassification of pick-up and delivery drivers as independent contractors. (Exhibit B) The citation assesses FedEx Ground for \$190,000 for the violation and finds that FedEx deprive the drivers of statutory rights due them under Massachusetts Wage and Hour laws. This citation is yet another governmental determination, after full investigation, that the FedEx Ground drivers are misclassified and are legally employees. This citation is clearly relevant to all of the pending class certification motions and of special importance in *Sheehan v. FedEx Ground*, where the Massachusetts state statutory test for employee status has been analyzed by the Attorney General as requiring the reclassification of FedEx's Massachusetts' drivers.

Dated: January 2, 2008

Respectfully submitted,
LEONARD CARDER, LLP

/s/ Lynn Rossman Faris

Lynn Rossman Faris
1330 Broadway, Suite 1450
Oakland, CA 94612
Telephone: (510) 272-0169
Facsimile: (510) 272-0174

Susan E. Ellingstad
LOCKRIDGE GRINDAL NAUEN P.L.L.P.
100 Washington Avenue South, Suite 2200
Minneapolis, MN 55401
Telephone: (612) 339-6900
Facsimile: (612) 339-0981

Robert I. Harwood
HARWOOD FEFFER LLP
488 Madison Avenue, 8th Floor
New York, NY 10022
Telephone: (212) 935-7400
Facsimile: (212) 753-3630

PLAINTIFFS' CO-LEAD COUNSEL

Mr. Peter J. Agostino
ANDERSON, AGOSTINO & KELLER, PC
131 South Taylor Street
South Bend, IN 46601
Telephone: (574) 288-1510
Facsimile: (574) 288-1650

PLAINTIFFS' LIAISON COUNSEL