

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

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In re FEDEX GROUND PACKAGE)	
SYSTEM, INC., EMPLOYMENT)	Cause No. 3:05-MD-527-RM
PRACTICES LITIGATION)	(MDL 1700)
-----)	
THIS DOCUMENT RELATES TO:)	
)	
<i>Kimberly A. Bunger, et al. v. FedEx Ground</i>)	
<i>Package System, Inc.,</i>)	
Civil No. 3:05-cv-00539-RLM-CAN (SD))	
-----)	

SECOND AMENDED CLASS ACTION COMPLAINT

COME NOW the Plaintiffs, Kimberly A. Bunger, Darrell Engbrecht, Jay Heintz, Steve Persing, and Chad Viereck, on behalf of themselves and others similarly situated, by and through their attorneys of record, and for their Complaint against the above-named Defendant, do hereby state and allege as follows:

INTRODUCTION

1. South Dakota law requires employers to reimburse their employees for all expenses necessarily incurred in connection with their employment. *See* SDCL § 60-2-1. Pursuant to South Dakota’s Workers’ Compensation Title, employers are required to provide workers’ compensation insurance for industrially injured or ill employees. *See* SDCL Ch. 62, §§ 62-1-1 *et seq.* Additionally, pursuant to the South Dakota Unemployment Compensation Title, employees are entitled to certain benefits when they are unemployed through no fault of their own. *See* SDCL Ch. 61, §§ 61-1-1 *et seq.* Employers may not avoid these obligations by misclassifying their employees as “independent contractors,” if in fact their workers do not have the right to control the means and manner in which they perform their jobs.

2. Defendant FedEx Ground Package System, Inc. (hereinafter “FedEx Ground” or “FEG” or “Defendant”), is a national company employing thousands of drivers to pick up and deliver packages for their customers throughout the United States, and throughout South Dakota. Upon information and belief, FedEx Ground was formerly known as RPS, Inc. As a condition of employment, FedEx Ground’s drivers are required to sign an Operating Agreement that characterizes each driver as an “independent contractor.” These Operating Agreements conceal the true nature of the relationship between FedEx Ground and its drivers: that of employer and employee.

3. Despite FedEx Ground’s control over virtually all aspects of the employment relationship, and despite the unequivocal command of applicable statutes and case law to the effect that workers such as the Plaintiffs and Class Members are entitled to the protections due employees under South Dakota law, FedEx Ground continues to mischaracterize its drivers 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 and maintaining those vehicles. Additionally, these drivers are deprived of employer-financed workers’ compensation coverage and unemployment insurance benefits.

4. FedEx Ground’s mischaracterization of its drivers as independent contractors, and the attendant requirement that drivers expend their own funds for work related services and equipment is part of an on-going unfair and/or unlawful business practice by FedEx Ground which this court should enjoin. Furthermore, the Defendant’s actions are fraudulent and/or deceitful and have resulted in the Defendant being unjustly enriched.

PARTIES

5. Plaintiff KIMBERLY A. BUNGER, a resident of McCook County, South Dakota, began her employment with Defendant FedEx Ground in 1996 and is currently employed by them. Plaintiff Bunger sues on her own behalf, and as a representative of all drivers in the Class below.

6. Plaintiff DARRELL ENGBRECHT, a resident of McCook County, South Dakota, began his employment with Defendant FedEx Ground in or around August of 2000 and is currently employed by them. Plaintiff Engbrecht sues on his own behalf, and as a representative of all drivers in the Class below.

7. Plaintiff JAY HEINTZ, a resident of Minnehaha County, South Dakota was employed by Defendant FedEx Ground from on or about May 1996 to on or about June 2001, and sues on his own behalf, and as a representative of all drivers in the Class below.

8. Plaintiff STEVE PERSING, a resident of Minnehaha County, South Dakota, was employed by Defendant FedEx Ground from on or about June 1996 until on or about April 2003, and sues on his own behalf, and as a representative of all drivers in the Class below.

9. Plaintiff CHAD VIERECK, a resident of McCook County, South Dakota, began his employment with Defendant FedEx Ground in or around 2001 and is currently employed by them. Plaintiff Viereck sues on his own behalf, and as a representative of all drivers in the Class below.

10. Plaintiffs believe and allege that at all times herein mentioned Defendant FedEx Ground Package System, Inc., and its division, FedEx Home Delivery (“FEH”) (hereinafter collectively referred to as “FedEx Ground” or “FEG” or “Defendant”) is a Delaware corporation doing business as two national companies, affiliated with the Federal Express Corporation.

FedEx Ground is a corporation authorized to do business and doing business in the state of South Dakota at various locations throughout the state, including at least one location in Minnehaha County. Based upon information and belief, FedEx Ground employs hundreds of drivers in the State of South Dakota.

JURISDICTION AND VENUE

11. Jurisdiction and Venue are proper in this Court pursuant to SDCL §§ 15-5-5, 15-5-6, and 15-7-2.

CLASS ACTION ALLEGATIONS

12. Pursuant to SDCL § 15-6-23, Plaintiffs bring this action as a class action on behalf of themselves and all persons who are or, since 1995, have worked for FedEx Ground as package delivery and/or pick-up drivers. Plaintiffs bring this class action on behalf of themselves and other similarly situated members of the Class who have been similarly victimized by FedEx Ground in the manner described below. The Class is specifically defined as follows:

All individuals who worked for Defendant FedEx Ground in South Dakota from in or about 1995 to the time of trial (the Class Period) as package delivery drivers and/or package pick-up drivers, and who were not provided unemployment insurance, worker's compensation insurance, and/or otherwise not reimbursed for their employment expenses which they necessarily spent or incurred in direct consequence of the discharge of their employment duties or in obedience to FedEx Ground's directions.

13. Excluded from the Class are the following categories of persons or entities:
- a. temporary drivers working directly for Defendant and/or its successors, as well as those provided through temporary employee agencies;
 - b. drivers who work or worked directly for a Pick-Up and Delivery Contractor and who have not entered into a Pick-Up and Delivery Contractor Operating Agreement with Defendant and/or its successors; and

- c. line-haul drivers who have performed services for Defendant and/or its successors.

14. During the class period Plaintiffs are informed and believed and on that basis allege that more than 100 persons have worked for FedEx Ground as package delivery and/or package pick-up drivers.

15. This action may be properly maintained as a class action under Fed. R. Civ. P. 23 in that:

- a. The Members of the Class are so numerous that their individual joinder in a single action is impracticable. Plaintiffs do not know the exact number of Class Members because such information is in the exclusive control of Defendant. Although the number of Class Members cannot be properly determined without further discovery, Plaintiffs are informed and believe, and on that basis allege, that the Class has well over 100 Members and that the Members' identities can be ascertained from the Defendant's records;
- b. The central questions of law and fact involved in this action are of a common or general interest to the Class. Common legal and factual issues predominate over any questions affecting only individual Members of the Class. Among the common questions of law and fact are the following:
 - i. Whether Plaintiffs and Class Members have been misclassified as independent contractors pursuant to FedEx Ground's Operating Agreements;
 - ii. Whether FedEx Ground's failure to pay Plaintiffs and Class Members for their expenses violates SDCL § 60-2-1;
 - iii. Whether FedEx Ground unlawfully failed to provide workers' compensation insurance benefits to the Plaintiffs and Class Members in violation of SDCL Ch. 62, §§ 62-1-1 *et seq.*;
 - iv. Whether FedEx Ground unlawfully failed to provide unemployment insurance benefits to the Plaintiffs and Class Members in violation of SDCL Ch. 61, §§ 61-1-1 *et seq.*;
 - v. Whether FedEx Ground's actions constitute Unfair Labor/Trade Practices;
 - vi. Whether FedEx Ground was unjustly enriched;

- vii. Whether FedEx Ground's actions and representations to Plaintiffs and Class Members that they would be "independent contractors" constitute fraud and/or deceit;
 - viii. Whether FedEx Ground made intentional and/or negligent misrepresentations to the Plaintiffs and Class Members; and
 - ix. Whether injunctive and declaratory relief are appropriate under the circumstances.
- c. These and other questions of law or fact are common to the Class and predominate over any question affecting only individual Class Members.
- d. The claims of the named representative Plaintiffs are typical of the claims of the Class. The Plaintiffs and all Members of the Class are parties to a Pick-Up and Delivery Contractor Operating Agreement and are similarly adversely affected by the Defendant's actions. The named Plaintiffs share the same interests as other Members of the Class in this action because, like other Class Members, they have each suffered financial loss of thousands of dollars due to FedEx Ground's insistence on misclassifying them as independent contractors, thereby denying them reimbursement for employment expenses, workers' compensation and unemployment insurance benefits to which they are entitled to under South Dakota law. Given the significance of their losses, they have the incentive, and are committed, to vigorously prosecute this action. Furthermore, Plaintiffs have retained competent counsel who specialize in litigation and who have experience with South Dakota law and class actions to represent themselves and the proposed Class;
- e. The named representative Plaintiffs will fairly and adequately represent and protect the interests of the Class in that each of the named Plaintiffs are/were a driver for Defendant and had a Pick-Up and Delivery Contractor Agreement with Defendant and have no inherent conflicts with any other member of the Class.
- f. Class action treatment is superior to alternatives, if any, for the fair and efficient adjudication of the controversy described herein because it permits a large number of injured drivers to prosecute their common claims in a single forum simultaneously, efficiently and without unnecessary duplication of effort. Class treatment also permits the adjudication of claims by smaller Class Members located throughout the nation who could not otherwise afford to individually litigate their claims against this large corporate Defendant.
- g. It is desirable to concentrate the litigation of these claims in this forum in order to avoid the time and expense of individualized litigation. The cost of individualized litigation, both on the parties and the courts, would

be substantial. Individualized litigation would also present the potential for inconsistent or contradictory judgments and would magnify the expense and delay to all parties and the court system in multiple rounds of discovery and multiple scheduling orders and multiple trials of the issues in this case. By contrast, the conduct of this action as a Class action presents no management difficulties, efficiently conserves the resources of the parties and the court system, and protects the rights of each Class member.

- h. This suit is not against the State of South Dakota for the recovery of a tax imposed by SDCL Chapter 10-39, 10-39A, 10-40, 10-41, 10-43, 10-44, 10-45, 10-46, 10-46A, 10-46B, or 10-52.

FACTS RELEVANT TO ALL CLAIMS

16. FedEx Ground employs more than 100 delivery and pick-up drivers in the State of South Dakota including, either presently or at material times in the past, each of the Plaintiffs and Class Members. FedEx Ground employs these drivers (Plaintiffs and the Class Members) for the purpose of providing its customers with timely and reliable pick-up and delivery of packages.

17. Defendant FedEx Ground Package System, Inc. (“FEG”), is a Delaware corporation doing business as two national companies, affiliated with the Federal Express Corporation. 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 mis-characterizes each driver as an “independent contractor.” These Operating Agreements were designed to conceal the true nature of the relationship between FEG and its drivers: that of employer and employee.

18. FedEx Ground exercises extensive control over the means by which its drivers perform their jobs. Drivers arrive at the FedEx Ground terminals between 5:00 a.m. and 6:30 a.m. to arrange their packages in their vehicles. FedEx Ground employs Terminal Managers,

Pickup and Delivery Managers, and other supervisory personnel, to process the drivers' paperwork, and to give each driver his or her delivery and pick-up schedules. Drivers finish their routes, typically around 4:30 p.m., return to the terminal to complete paperwork and wait for the terminal management to check each driver out.

19. FedEx Ground pays its drivers for the number of stops, deliveries and pick-ups made. If a driver fails to check out with a terminal supervisor, he or she does not get paid for that day's work.

20. Plaintiffs, Class Members, and all FedEx Ground drivers employed by Defendant are active, integral and indispensable instruments of FedEx Ground's business enterprise. By driving vehicles with FedEx Ground's colors and logos, by reliably serving FedEx Ground's customers, by following FedEx Ground's controlled delivery routes and delivery and pick-up methods, by providing FedEx Ground with customer leads, and in other ways, Plaintiffs, Class Members, and other delivery drivers have rendered, and continue to render, valuable personal services to Defendant FedEx Ground.

21. The personal services described immediately above:

- a. confer substantial benefits on FedEx Ground;
- b. are an integral part of the process which enables FedEx Ground to offer its customers timely and reliable pick-up and delivery services; and
- c. do not involve the kind of expertise which requires entrustment to an independent professional, as opposed to an employee.

22. Plaintiffs and Class Members:

- a. do not hire employees of their own in connection with work for FedEx Ground;
- b. do not perform any work for FedEx Ground other than driving a vehicle, picking up and delivering packages and performing services incidental thereto; and

- c. have no control over the prices that FedEx Ground charges its customers for delivery and pick-up services.

23. The drivers do not operate independent businesses, but perform functions that are an essential part of FedEx Ground's normal operations. They do business in the company's name with assistance and guidance from it; they do not ordinarily engage in outside business; they constitute an integral part of the company's business under its substantial control; they have no proprietary interest beyond their investment in their trucks; and they have no significant entrepreneurial opportunity for gain or loss. FedEx Ground simply shifted certain capital costs to the drivers without providing them the independence to engage in entrepreneurial opportunities.

24. The skills required of the Plaintiffs and Class Members in rendering services to FedEx Ground (picking up and delivering packages) are such that said services can be rendered by employees, rather than by specially skilled independent workers.

25. Despite Defendant's control over virtually all material aspects of the employment relationship, and despite the unequivocal command of applicable statutes and case law to the effect that workers such as Plaintiffs are entitled to the protections due employees under South Dakota law, and despite the finding of the Los Angeles Superior Court in Estrada v. FedEx Ground Package Systems, Inc. (Case # BC 210130) that these drivers are employees, Defendant continues to misclassify their drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by the South Dakota law to employees, and they are deprived of employer-financed workers compensation coverage and unemployment insurance benefits. Furthermore, the terms and conditions of their employment contract require these drivers to purchase, operate and maintain expensive trucks for Defendant's exclusive benefit and to work under other unlawful conditions. Defendant's mischaracterization of their

drivers as independent contractors, the concealment and/or non-disclosure of the true nature of the relationship between Defendant and its drivers and the attendant deprivation of substantial rights and benefits of employment are part of an on-going unlawful and fraudulent business practice by Defendant which this court should enjoin.

DEFENDANT’S “OPERATING AGREEMENT”

26. Prior to commencing employment with FedEx Ground, all drivers must sign a “Pick-Up and Delivery Contractor Operating Agreement” (hereafter referred to as “Agreement” or “OA”). As a mandatory condition of employment, FedEx Ground required and continues to require all drivers to sign the Agreement.

27. Plaintiffs are informed and believe and on that basis allege that the OA is similar in all material respects to those Agreements currently in effect between each member of the Plaintiff Class and FedEx Ground.

28. The OA contains the following statement purporting to designate Plaintiffs and Members of the Plaintiff Class as independent contractors:

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 revenues 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 shall have the authority to impose any term or condition on Contractor or on Contractor’s continued operation which is contrary to this understanding.

The term “Contractor” is intended by FedEx Ground to refer to drivers.

29. The Agreement also provides, among other things, that:

- a. Drivers must provide and maintain their own vehicle, paying for all costs and expenses incidental to its operation, including maintenance, gas, oil, repairs, tax, licenses and tolls. Moreover, drivers must adorn the vehicle with specific colors, logos, numbers, marks and insignia identifying it as “part of the FedEx Ground system.” As well, drivers must maintain liability insurance for operation of the vehicle without packages on board in the amount of one million dollars, naming FedEx Ground as an insured;
- b. Drivers must prepare daily driver logs and inspection reports, and such shipping documents “as FedEx Ground may from time to time designate”;
- c. Drivers must deposit \$1,000 in a “Contractor Performance Escrow Account,” to be used to reduce any debt the driver owes FedEx Ground upon termination;
- d. Drivers must wear “a FedEx Ground-approved uniform,” and keep their personal appearance consistent with standards “promulgated from time to time by FedEx Ground”;
- e. FedEx Ground may change a driver’s Primary Service Area, notwithstanding FedEx Ground’s stated understanding that each driver has a proprietary interest in the customers he or she serves. In the event that a Primary Service Area is changed, drivers must pay each other for customers gained or lost thereby according to a set schedule; and
- f. After one year of service, drivers may become eligible to participate in FedEx Ground’s Customer Service Program, by which a specified

monetary bonus can be earned for every four weeks in which the driver has no at-fault accidents and no customer complaints.

30. The Agreement further states that neither it nor its addenda and attachments may be modified, altered, changed or amended in any respect unless in writing and signed by both parties.

31. The Agreement is and at all times mentioned herein has been a contract of adhesion, drafted by FedEx Ground and its legal counsel, printed by FedEx Ground, and distributed by FedEx Ground among drivers for mandatory signature. Plaintiffs are informed and believe, and on that basis allege, that no driver has negotiated with FedEx Ground over the terms or conditions contained in the Agreement, and that FedEx Ground offers its drivers no meaningful choice of terms.

32. The Agreement is, and at all material times has been, unlawful and unconscionable in form and effect.

33. 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.

34. 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.

DEFENDANT’S CONTROL OVER PLAINTIFFS’ AND CLASS MEMBERS’ WORK

35. Although the nature of the work performed by the Plaintiffs and Class Members make detailed control by management unnecessary, FedEx Ground in fact exercises such control over the work of its drivers as is necessary to their operations.

36. Such control is exerted in part through the uniform Agreement described above, which Plaintiffs and Class Members were required to sign as a condition of employment.

37. FedEx Ground’s control over Plaintiffs and Class Members is also exercised by other rules and regulations, written and unwritten, including, but not limited to the following:

- a. FedEx Ground requires Plaintiffs and Class Members to purchase or lease a vehicle manufactured to a design exclusive to FedEx Ground in order to make deliveries and pick-ups;
- b. FedEx Ground requires Plaintiffs and Class Members to pay for the purchase or lease of such vehicle, as well as for its maintenance and upkeep. Other vehicle-related costs required to be paid by Plaintiffs and Class Members include fuel, oil, tires, repairs, taxes, insurance coverage, licenses, vehicle registration renewal fees, base plates and all highway, bridge and ferry tolls;

- c. FedEx Ground requires that Plaintiffs' and Class Members' vehicles meet certain unique specifications, on both the inside and outside. At their own expense, Plaintiffs and Class Members are required to paint the vehicle with FedEx Ground's colors, and put FedEx Ground's logos on the vehicle;
- d. Although Plaintiffs and Class Members could technically use the vehicles for their own commercial and personal purposes, they are not permitted to do so without removing or covering all FedEx Ground identifying logos and marks;
- e. Plaintiffs, Class Members, and other drivers have no control over the prices charged to FedEx Ground's customers for pick-up and delivery service;
- f. Plaintiffs, Class Members, and other drivers do not have authority to reject deliveries or pick-ups. They are required to adhere to FedEx Ground's strict route schedules. FedEx Ground requires Plaintiffs and Class Members to make deliveries in the morning, and pick-ups in the afternoon;
- g. FedEx Ground mandates that Plaintiffs, Class Members, and other drivers wear a FedEx Ground-approved uniform, and follow such other guidelines as FedEx Ground might promulgate regarding their personal appearance;
- h. FedEx Ground instructs and controls drivers as to the appearance of their vehicles requiring that they be clean and presentable and free of body damage and/or any extraneous markings;
- i. All expenses for maintenance of Plaintiffs' and Class Members' uniforms and vehicles are paid by Plaintiffs and Class Members;
- j. FedEx Ground requires that Plaintiffs, Class Members, and other drivers purchase or lease certain electronic communications equipment which complies with FedEx Ground's specifications;
- k. FedEx Ground requires its drivers to prepare daily logs and daily inspection reports, along with fuel receipts, and shipping documents and to file the originals with FedEx Ground upon the conclusion of each business day;
- l. FedEx Ground requires Plaintiffs, Class Members, and its drivers to deposit \$1,000 per driver into an escrow account;
- m. FedEx Ground requires Plaintiffs, Class Members, and its drivers to provide services to FedEx Ground's customers on days and at times which are compatible with the customer's schedules and requirements;

- n. FedEx Ground does not allow Plaintiffs and Class Members to reject any delivery or pick-up assignments;
- o. FedEx Ground assigns Plaintiffs and Class Members to a specific Primary Service Area - the area each driver is to service, the terms of which are non-negotiable;
- p. FedEx Ground determines the volume of deliveries and pick-ups each driver makes;
- q. The volume of deliveries and pick-ups given to each driver prevents them from developing any new business on their own;
- r. FedEx Ground can unilaterally reconfigure Plaintiffs' and Class Members' Primary Service Areas;
- s. FedEx Ground requires Plaintiffs and Class Members to make reasonable efforts to retain and increase FedEx Ground's customer base and the number of packages handled, but does not compensate Plaintiffs and Class Members for any customer leads;
- t. If a package can not be delivered on the day mandated by FedEx Ground, FedEx Ground requires the driver to return the package to FedEx Ground on the same day and to make notations as for the reason for non-delivery;
- u. Plaintiffs and Class Members are not given any sick or vacation leave. If Plaintiffs, Class Members, or other drivers get sick, FedEx Ground requires that they find substitutes. FedEx Ground must first give approval for these substitutes, even though Plaintiffs and Class Members are required to pay such substitutes' wages;
- v. FedEx Ground may terminate drivers at will and without cause;
- w. FedEx Ground requires drivers to give thirty days written notice before terminating their obligations under the Agreement. If drivers fail to do so, Defendant requires drivers to pay it \$1,000 as liquidated damages;
- x. FedEx Ground requires Plaintiffs and Class Members to submit all claims of wrongful termination to arbitration, stating that the arbitrator has no power to award Plaintiffs and Class Members punitive damages;
- y. FedEx Ground prohibits certain acts by Plaintiffs and Class Members, related to driver safety, including, but not limited to:
 - i. Drivers may not refuse to submit to a test of intoxication or impairment requested by a police officer or FedEx Ground;

- ii. Drivers may not carry non-authorized passengers while on FedEx Ground's business;
 - iii. Drivers may not fail to complete or refuse to undergo a thorough physical examination confirming physical fitness to operate a commercial vehicle at least every two years, and following any physical or mental impairment from injury or disease. These examinations must be completed by a qualified physician approved by FedEx Ground.
 - iv. Drivers may not fail to submit to a drug screen administered at whatever time and place and in whatever manner dictated by FedEx Ground; and
 - v. Drivers must cooperate fully with FedEx Ground in the conduct of any legal action, regulatory hearing or other similar process arising from or in any way related to any matter found within the safe driving provisions of the Agreement. Such cooperation includes, without limitation, attendance at hearings, trials, and meetings, the securing of evidence and obtaining the attendance of witnesses; and
- z. FedEx Ground unilaterally determines Plaintiffs' and Class Members' Settlement Enhancement (bonus or raise) at the beginning of every month of June without allowing Plaintiffs and Class Members the ability to negotiate the settlement.

COUNT I

Failure to Reimburse in Violation of SDCL § 60-2-1

38. Plaintiffs hereby reallege paragraphs 1-37 of this Complaint and incorporate them as if fully set forth herein.

39. While acting on the direct instruction of FedEx Ground and discharging their duties for FedEx Ground, Plaintiffs and Class Members incurred expenses for, *inter alia*, the purchase or lease, maintenance, operating costs, and adornment of vehicles; insurance; and uniforms. Plaintiffs and Class Members necessarily incurred these substantial expenses as a direct result of performing their job duties.

40. FedEx Ground has failed to indemnify or reimburse the Plaintiffs and Class Members for these expenditures, and has knowingly inserted illegal contractual provisions as

part of an unconscionable and illegal scheme designed to exculpate it from its legal duty to indemnify its employees. By misclassifying its employees as “independent contractors,” and further by contractually requiring those employees to pay their own expenses, FedEx Ground has violated and continues to violate SDCL § 60-2-1, which requires an employer to reimburse its employees for their necessarily incurred business expenses.

41. As a direct and proximate result of FedEx Ground’s conduct, Plaintiffs and Class Members have suffered substantial losses according to proof, including pre-judgment interest.

COUNT II
Unfair Labor/Trade Practices

42. Plaintiffs hereby reallege paragraphs 1-41 of this Complaint and incorporate them as if fully set forth herein.

43. South Dakota law prohibits employers from engaging in business practices which are unfair and/or unlawful.

44. By failing to indemnify Plaintiffs and Class Members under SDCL § 60-2-1, and by failing and refusing to provide Plaintiffs and Class Members with workers compensation insurance in violation of SDCL Ch. 62, §§ 62-1-1 *et seq.* and unemployment insurance benefits in violation of SDCL Ch. 61, §§ 61-1-1 *et seq.*, and by engaging in the other acts and conduct alleged above, FedEx Ground has committed, and is continuing to commit, ongoing unfair/unlawful business practices.

45. The unfair/unlawful business practices described above have proximately resulted in loss to Plaintiffs and Class Members.

46. Plaintiffs and Class Members are entitled to: (a) restitution of money acquired by Defendant by means of its unfair/unlawful business practices, in amounts not yet determined but to be determined at trial; (b) injunctive relief against Defendant’s continuation of its

unfair/unlawful business practices; and (c) a declaration that Defendant's business practices are unfair/unlawful.

COUNT III
Rescission of Operating Agreement

47. Plaintiffs hereby reallege paragraphs 1-46 of this Complaint and incorporate them as if fully set forth herein.

48. Despite the express terms of the Operating Agreement, Plaintiffs' relationship with FedEx Ground satisfies every aspect of the test for employment, and not for independent contractor status.

49. FedEx Ground controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations hereof.

50. Despite this control and the actual status of the drivers as employees, FedEx Ground 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.

51. The Operating Agreement illegally and unfairly advantages FedEx Ground, by mischaracterizing the status of the Plaintiffs in that FedEx Ground 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.

52. The Operating Agreement between FedEx Ground 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.

53. The Operating Agreement between FedEx Ground and each Plaintiff is an unconscionable contract of adhesion, which is unenforceable as contrary to the public interest, policy and law.

54. The Operating Agreement illegally shifts the burden of certain costs that an employer must pay.

55. While acting on the direct instruction of FedEx Ground and discharging their duties for FedEx Ground, 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.

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

57. As a direct and proximate result of FedEx Ground’s conduct, FedEx Ground 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.

58. Plaintiffs are entitled to compensation for all of the business expenses they were illegally required by FedEx Ground to bear, for all of the employment taxes, unemployment

compensation and workers compensation the FedEx Ground should have but did not pay, and Plaintiffs are entitled to the quantum meruit value of their services as employees.

COUNT IV
Fraud/Deceit

59. Plaintiffs hereby reallege paragraphs 1-58 of this Complaint and incorporate them as if fully set forth herein.

60. 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.

61. At all material times, Defendant either knew, or should have known, that the material representation made to Plaintiffs in the OA concerning their employment status, and the concealment and/or non-disclosure of material facts to Plaintiffs concerning their employment status and Plaintiffs’ corresponding obligation to assume responsibility for all of their “own”

employment-related expenses including but not limited to purchasing or leasing, operating and maintaining expensive trucks were false and fraudulent.

62. 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.

63. Defendant committed fraud as defined by SDCL § 53-4-5 and/or deceit as defined by SDCL § 20-10-2 upon Plaintiffs and Class Members by inducing Plaintiffs and Class Members, through representations that Plaintiffs and Class Members would be “independent contractors,” to enter into the contract or agreement.

64. Plaintiffs and Class Members detrimentally relied on Defendant’s representations that Plaintiffs and Class Members would, in fact be “independent contractors.”

65. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiff rights and protections guaranteed by South Dakota state law and other applicable law.

COUNT VI
Injunctive Relief

66. Plaintiffs hereby reallege paragraphs 1-65 of this Complaint and incorporate them as if fully set forth herein.

67. Defendant, if not enjoined by this Court, will continue to engage in the unfair/unlawful business practices described above in derogation of the rights of Plaintiffs and of Class Members.

68. If an injunction does not issue enjoining Defendant from engaging in the unfair/unlawful business practices described above, Plaintiffs and Class Members will be irreparably injured, the extent, nature and amount of such injury being impossible to ascertain.

69. Plaintiffs and Class Members have no plain, speedy and adequate remedy at law.

70. For these reasons, injunctive relief is appropriate.

COUNT VII
Declaratory Relief

71. Plaintiffs hereby reallege paragraphs 1-70 of this Complaint and incorporate them as if fully set forth herein.

72. An actual and substantial controversy exists between Plaintiffs and Class Members on the one hand, and Defendant FedEx Ground on the other hand, as to the following matters:

- a. Whether FedEx Ground willfully, unlawfully and/or unfairly Classified drivers as independent contractors rather than as employees;
- b. Whether FedEx Ground has failed to reimburse its drivers for their necessarily incurred employment expenses, in violation of SDCL § 60-2-1;
- c. Whether FedEx Ground has unlawfully failed to provide workers compensation and/or unemployment insurance benefits under applicable law;
- d. Whether FedEx Ground's actions constitute Unfair Labor/Trade Practices;
- e. Whether FedEx Ground was unjustly enriched;
- f. Whether FedEx Ground's actions and representations to Plaintiffs and Class Members that they would be "independent contractors" constitute fraud and/or deceit;
- g. Whether FedEx Ground made intentional and/or negligent misrepresentations to the Plaintiffs and Class Members.

73. Plaintiffs and Class Members contend that by Classifying FedEx Ground's employees as independent contractors and by failing and refusing to compensate and reimburse those drivers as alleged herein, Defendant has violated South Dakota law. Defendant FedEx Ground contends the opposite. Declaratory relief is therefore appropriate.

COUNT VIII
For an Accounting

74. Plaintiffs hereby incorporate paragraphs 1-73 of this Complaint and incorporate them as if fully set forth herein.

75. Plaintiffs and Class Members are owed the unreimbursed employment expenses detailed above, as well as statutory interest thereon.

76. Plaintiffs and Class Members do not know the precise amount of compensation due to them and to each member of the Class. Upon information and belief, Defendant FedEx Ground possesses business records from which the amount of compensation due and owing to Plaintiffs and Class Members can be determined.

77. The amount of statutory interest owed to Plaintiffs and Class Members is based on the amount of compensation allegedly owed. This amount can only be determined by an accounting of Defendant FedEx Ground's books and records.

WHEREFORE, Plaintiffs, in their own behalf, and on behalf of each member of the Plaintiff Class, respectfully pray for judgment as follows:

- (1) For an order by the Court certifying this action as a Class action;
- (2) For an award to Plaintiffs and all Members of the Class of compensatory damages in an amount which may be proven at trial, together with prejudgment interest at the maximum rate allowed by law;
- (3) For an order by the Court restoring and/or returning to Plaintiffs and Members of

the Class all of Defendant's unfairly or illegally received profits measured by unreimbursed expenses, workers compensation premiums, and/or unpaid unemployment insurance benefits incurred during the Class period;

- (4) For an order by the Court enjoining Defendant from continuing their unfair and/or unlawful conduct;
- (5) For an order requiring Defendant to rescind the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FEG;
- (6) For a declaration that Defendant's conduct is unfair and/or unlawful;
- (7) For an accounting;
- (8) For Plaintiffs' and Class Members' compensatory, general and special damages in an amount that the jury deems just and proper under the circumstances;
- (9) For reasonable attorney's fees, costs, and disbursements herein;
- (10) For prejudgment and postjudgment interest;
- (11) For an award of punitive damages in an amount to be proven at trial; and
- (12) For such other and further relief as this Court deems just and proper.

Dated: January 9, 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 January 9, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which sent notification of such filing to the following:

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and I hereby certify that I have mailed by United States Postal Service the document to the following non CM/ECF participants::

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Dated: January 9, 2006

Respectfully submitted,

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