

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>Bradley D. Gregory, et al. v. FedEx Ground</i>)	
<i>Package System, Inc., et al.</i>)	
Civil No. 3:05-CV-00541-RLM-CAN (VA))	
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THIRD AMENDED CLASS ACTION COMPLAINT

PLAINTIFF, BRADLEY D. GREGORY (“Plaintiff”), individually and on behalf of all others similarly situated, complains against Defendant, FEDEX GROUND PACKAGE SYSTEM, INC. (“hereinafter “Defendant” or “FEG”), as follows:

THE PARTIES

1. Plaintiff BRADLEY D. GREGORY resides and is employed by Defendant in the City of Chesapeake and the Commonwealth of Virginia.
2. At all times relevant herein, and within three years of the filing of Plaintiff’s original complaint (July 3, 2003), Plaintiff was a local package delivery driver employed by Defendant in the Commonwealth of Virginia.
3. Defendant FedEx Ground Package System, Inc., and its division, FedEx Home Delivery (“FHD”) (collectively, “FEG,” “FedEx Ground,” or Defendant) is a corporation incorporated under the laws of Delaware, with its principal place of business in the State of

Pennsylvania. At all relevant times, Defendant FedEx Ground served as the sponsor, within the meaning of ERISA §§ 3(16), 29 U.S.C. §§ 1002(16), and administrator of several employee benefit pension and welfare plans established under ERISA, including, but not limited to, Defendants FedEx Ground Package System, Inc. and Certain Affiliates Wealth Accumulation 401(k) Plan; Group Life and Supplemental Life Plan For Employees Of FedEx Ground Package System, Inc.; Ground Benefits Plus Short-Term Disability Plan; Group Long Term Disability Plan For The Employees of FedEx Ground Package System, Inc.; FedEx Ground Package System, Inc. Medical, Dental And Vision Care Plan; and the Dependent Care Account Of FedEx Ground Package System, Inc. (collectively, the “Plan Defendants”).

4. FEG (formerly Roadway Package Systems, Inc.), is engaged in providing a small package information, transportation and delivery service in Chesapeake, the Commonwealth of Virginia.

5. FEG is part of a “family” of corporations controlled by FedEx Corporation.

6. Defendant is qualified to and does transact business in the Commonwealth of Virginia and regularly conducts business in Chesapeake, Virginia,

7. Defendant employs, and has employed in the Commonwealth of Virginia, within the past six years, on a full time basis, numerous local package delivery drivers, including the Plaintiff and members of the Class.

8. During the relevant period, Defendant classified FEG package delivery drivers, including Plaintiff and all members of the Class, as “independent contractors”, requiring them to work pursuant to a sham independent contractor arrangement.

JURISDICTION AND VENUE

9. This action for declaratory, injunctive, and monetary relief is brought pursuant to Section 502 of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1132, and common law.

10. Defendant is engaged in interstate commerce within the meaning of 29 USC §203(b), and has gross sales in excess of \$500,000.

11. Plaintiff does not drive “interstate”, as his assignments to deliver packages concern only local package delivery.

12. Proper venue is in this Court as the illegal actions alleged herein occurred within this district and throughout the Commonwealth of Virginia.

CLASS ACTION ALLEGATIONS

13. Plaintiff brings this action pursuant to Rule 23 of the Federal Rules of Civil Procedure (“FRCP”) on behalf of himself and a Class (the “Class”) consisting of all persons who were employed by Defendant in the Commonwealth of Virginia as “independent contractor” local package delivery drivers for FEG for the six year period immediately proceeding the filing of Plaintiff’s original complaint, as well as Commonwealth of Virginia local package delivery drivers who continue to be employed as “independent contractors” by the Defendant from the date of the filing of this complaint forward, and into the future.

14. Plaintiff, and all members of the Class, were misclassified as independent contractors of FEG, despite Defendant’s knowledge that they were “employees” and despite Defendant’s classifying similarly situated Federal Express Corporation package delivery drivers as “employees.”

15. Plaintiff, and all members of the Class, were subject to Defendant's direction and control of the manner and means in which their work was performed.

16. Plaintiff, and all members of the Class, were denied the accouterments of employment, including but not limited to:

- a. wages
- b. overtime and waiting time pay
- c. holiday pay
- d. worker's compensation
- e. unemployment insurance
- f. federal insurance compensation act contributions
- g. income tax withholding
- h. contributions to Defendant's retirement plan
- i. meal, break and rest periods

17. Plaintiff, and all members of the Class, were required to pay Defendant's operating expenses, all of which should have been paid by Defendant, including but not limited to:

- a. delivery vehicle purchase
- b. various insurances, including vehicle insurance, work accident insurance, physical damage/deadhead insurance
- c. delivery vehicle maintenance and repairs
- d. purchase and maintenance of logos and uniforms
- e. fuel
- f. cargo claims
- g. "business support" including maps, signs, logos, training, scanners and modems.

18. The Class is so numerous that it is impracticable to join all members of the Class before the Court. The exact number of Class members is unknown to Plaintiff, but is believed to be far in excess of a total of 1,000 past and present, part-time and full-time, local package delivery drivers.

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

20. Plaintiff will fairly and adequately protect the interests of the Class; there are no conflicts between the Plaintiff and members of the Class.

21. Plaintiff has retained competent counsel experienced in Class action litigation and the classification of workers. Plaintiff and counsel will vigorously pursue the claims of the members of the Class throughout this litigation.

22. Individual members of the Class have an insufficient interest in controlling the prosecution of separate actions as their claims are too small to warrant the expense of prosecuting litigation of this complexity.

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

24. Defendant has acted and refused to act on grounds applicable to the Class, making injunctive and declaratory relief appropriate as to the Class as a whole.

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

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

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

FACTUAL ALLEGATIONS

28. Defendant FEG employs thousands of drivers to pick up and deliver packages for its customers throughout the United States. As a condition of employment, each FEG driver is required to sign a lengthy form contract entitled the "Pickup And Delivery Contractor Operating Agreement" that mischaracterizes each driver as an "independent contractor." These operating agreements were designed to conceal the true nature of the relationship between FEG and its drivers: that of employer and employee.

29. 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 Virginia 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 its drivers as independent contractors. As a result, these drivers are deprived of the rights and protections guaranteed by Virginia 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 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.

30. 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 retains 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.

31. Each pick-up and delivery driver (referred to by Defendant as a "P&D contractor") must sign a "Pick-Up and Delivery Contractor Operating Agreement" and Addenda thereto (referred to hereinafter as combined as "OA" or the "Operating Agreement") as a mandatory condition of employment. The date, time and place of execution of each driver's

Operating Agreement is within the knowledge of Defendant as each Agreement is maintained in the driver files described above, in the regular course of business. The Operating Agreement between each member of the Plaintiff Class and Defendant is the same in all material respects. The Operating Agreement between each member of the Plaintiff Class and Defendant contains all of the same identical material terms with only a few, minor and insubstantial differences.

32. The Operating Agreement contains various statements purporting to classify Plaintiff and each member of the Plaintiff Class as independent contractors. At the same time, the Operating Agreement retains to the company, *inter alia*, the right to approve or disapprove any vehicle used to provide service, the right to approve or disapprove any driver or helper who provides service, the right to approve or disapprove the purchase or sale of any vehicle, the right to assign pickup and delivery stops to each driver, the right to temporarily or permanently transfer portions of any route to another with or without compensation, the right to determine when a driver has “too few” or “too many” packages to deliver on a given day, the right to inspect vehicles and drivers for compliance with Company-promulgated appearance standards, the right to terminate the contract upon thirty days notice or whenever the company unilaterally determines that any provision of the contract has been “violated” amounting to the right to terminate at will, the right to require the use of communication equipment and the wearing of Company uniforms, the right to take a vehicle out of service, the right to review and evaluate “customer service” and to set and change standards of such service, the right to require drivers to perform service at “times” requested by customers and determined by Defendant, the right to withhold pay for certain specified expenses, the right to require purchase of specified insurance and numerous other purchases by drivers, the right to require completion of specified paperwork, and other rights reserved to Defendant.

33. The Operating Agreement is and at all relevant times has been a contract of adhesion, drafted exclusively by Defendant and/or its legal counsel, with no negotiation with drivers, who are required to sign the Agreement as a condition of employment. Plaintiff and each member of the Class 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.

34. Defendant's right of control over Plaintiff and each member of the Class 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.

35. As a condition of employment, Plaintiff, and all members of the Class were controlled by Defendant, among other ways, as follows:

- a. assigned to and required to work a minimum of number of hours in a shift, often eight hours or longer;
- b. prohibited from leaving the work premises without management approval;
- c. required to identify themselves and their vehicles as part of the Defendant's system, with Fed Ex logos and signage;
- d. required to purchase, wear and maintain Defendant's signage, logos and uniforms;
- e. required to purchase and maintain a vehicle selected by Defendant, built to Defendant's precise specifications, and identified by Defendant's logo and signage;
- f. required to insure the vehicles at Defendant's direction and control;
- g. required to clock in and out and file daily reports with Defendant;

- h. required to purchase from Defendant their “business support” package including maps, signs, training, modems and scanners;
- i. prohibited from refusing packages;
- j. prevented from working for other delivery businesses while working for Defendant;
- k. prohibited from hiring helpers without Defendant’s approval;
- l. required to perform unpaid work outside their job Classification;
- m. told how to conduct themselves and subject to discipline for any failures to comply with the Defendant’s requirements;
- n. prevented from choosing when and how much they wanted to work;
- o. Defendant controlled the customer service areas, number of packages and number of stops;

36. Defendant required Plaintiff and all members of the Class to purchase and adorn themselves and their vehicles with Defendant’s logos;

37. Plaintiff and all members of the Class were required to pay operating expenses which should have been paid by Defendant, including, among other expenses, vehicle purchase, vehicle, accident, deadhead and other types of insurance, fuel, maintenance and repair of the vehicle, “Business Support System”, and uniforms.

38. Defendant paid these operating expenses on behalf of FedEx Corporation drivers, but failed to do so on behalf of FEG drivers.

39. Requiring Plaintiff and all members of the Class to pay Defendant’s operating expenses conferred a benefit upon the Defendant for which Defendant did not pay;

40. Defendant paid Plaintiff, and all members of the Class, a below market value “van availability” for their vehicles, which amount was not negotiable by Plaintiff or members of the Class;

41. Requiring Plaintiff and all members of the Class to accept a below market value “van availability” conferred a benefit upon Defendant for which Defendant did not pay;

42. Defendant had knowledge that the Plaintiff, and members of the Class, were conferring benefits on Defendant under circumstances that made it inequitable for Defendant to retain the benefits without paying for their value;

43. Plaintiff, and all members of the Class, were subject to discipline by, among other methods, termination without notice for failure to follow employment rules and regulations set forth by Defendant;

44. Plaintiff was not, nor was any member of the Class, required by Defendant to have any experience for the position, but were provided training by Defendant;

45. At no time during the past three years was Plaintiff, or any Class member, paid wages by the Defendant.

46. Defendant instructed Plaintiff, and other members of the Class, to under-report their total hours worked.

47. At no time during the past three years was Plaintiff, or any Class member, paid for terminal waiting time, while FedEx Corporation drivers were so paid.

48. At no time during the past three years was Plaintiff, or any member of the Class, paid overtime wages for work in excess of eight hours in a day, or forty hours in a week, while FedEx Corporation drivers were so paid.

49. At no time during the past three years was Plaintiff, or any member of the Class, provided with meal, break and/or rest periods, while FedEx Corporation drivers were.

50. At no time during the past three years was Plaintiff, or any member of the Class, provided Unemployment Compensation or Workers' Compensation Insurance, while FedEx Corporation drivers were.

51. At no time during the past three years did Defendant make FICA contributions on behalf of Plaintiff or any member of the Class, as required by 26 USC §3101 et. seq., while Defendant did so on behalf of FedEx Corporation drivers.

52. On information and belief, Defendant, or through a plan administrator, maintains a 26 U.S.C. §401(k) and/or retirement plan, both of which are governed by ERISA.

53. Defendant was required, under 29 U.S.C. §423, to make such plans available to all employees.

54. Defendant did not make such plans available to the Plaintiff or other members of the Class despite knowledge that they were "employees," making such plans available only to its acknowledged "employees," including identically situated FedEx Corporation local package delivery drivers.

55. Defendant misclassified Plaintiff and other members of the Class with the specific intent of interfering with their attainment of 401k contributions, matched contributions or retirement benefit rights, making no contributions for Plaintiff, or other members of the Class, to either the 401k or retirement plan in violation of 29 U.S.C. §1140.

56. Unless Defendant is restrained from violating the law, the Plaintiff and other members of the Class will continue to suffer irreparable damages.

57. The damages sought by the Plaintiff and each member of the Class exceed \$50,000 and in excess of the jurisdiction of this court.

CAUSES OF ACTION

FIRST CAUSE OF ACTION
VIOLATIONS OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

58. Plaintiff and the Class incorporate by reference herein all preceding allegations of this complaint.

59. Under the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. §1132(a)(1)(B), Plaintiffs are entitled to clarify and enforce their rights and those rights held by absent Class members pertaining to all benefits owed under the Plans.

60. Plaintiff and the Class have either attempted to exhaust administrative remedies but were prevented by Defendant from exhausting such remedies, or exhaustion would be futile wherein Defendant has adjudged Plaintiff and the Class to be independent contractors rather than employees.

61. By wrongfully classifying Plaintiff and the Class as ineligible under the Plans, Defendants have violated, and continue to violate, the terms of the Plans and the Class and Plaintiff’s rights thereunder.

62. Plaintiff and the Class are correctly classified as employees and have the right to payment of benefits pursuant to the Defendant’s ERISA benefit plans. Accordingly under 29 U.S.C. §1132(a)(1)(B), Plaintiff and the Class are entitled to declaratory relief and to pension, health, disability, group insurance, dependent care, and/or other benefits that were not paid as a result of their improper classification.

SECOND CAUSE OF ACTION

FRAUD

63. Plaintiff and the Class incorporate by reference herein all preceding allegations of this complaint.

64. Plaintiff and the Class 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 Plaintiff and all persons similarly situated were “employees” entitled to the benefits and protections of all laws enacted for employees. Plaintiff is informed, believes and on that basis alleges, that through the OA Defendant intentionally misled Plaintiff and the Class as to their employment status, or made such representations to Plaintiff and the Class 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 Plaintiff and Defendant and between each member of the Class and Defendant, all for the purpose of realizing unjust profits from Plaintiff’s and each Class member’s work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

65. At all material times, Defendant either knew, or should have known, that the material representation made to Plaintiff and the Class in the OA concerning their employment status, and the concealment and/or non-disclosure of material facts to Plaintiff and the Class concerning their employment status and Plaintiff’s and each Class member’s 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.

66. At all material times, Defendant intended to and did induce Plaintiff and the Class 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.

67. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiff's and each Class member's rights and protections guaranteed by Virginia law and other applicable law.

THIRD CAUSE OF ACTION
RESCISSION OF OPERATING AGREEMENT

68. Plaintiff and the Class incorporate by reference herein all preceding allegations of this complaint.

69. Despite the express terms of the Operating Agreement, Plaintiff's and each Class member's relationship with FEG satisfies every aspect of the test for employment, and not for independent contractor status.

70. FEG controls virtually every aspect of the Plaintiff's and each Class member's work and earnings, as set forth in the general allegations hereof at paragraphs 29 through 58.

71. Despite this control and the actual status of the drivers as employees, FEG mischaracterizes the Plaintiff and the Class 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.

72. The Operating Agreement illegally and unfairly advantages FEG, by mischaracterizing the status of the Plaintiff and the Class in that FEG evades employment related obligations, such as social security contributions, workers' compensation coverage, and state disability and unemployment compensation, illegally shifting the expense of workers' compensation coverage and other expenses to Plaintiff and the Class.

73. The Operating Agreement between FEG and the Plaintiff and each member of the Class is void as against public policy and therefore unenforceable, as failing to recognize the employment status of the Plaintiff and the Class, and therefore denying them the legally cognizable benefits of employment.

74. The Operating Agreement between FEG and the Plaintiff and each Class member is an unconscionable contract of adhesion, which is unenforceable as contrary to the public interest, policy and law.

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

76. While acting on the direct instruction of FEG and discharging their duties for FEG, Plaintiff and each member of the Class incurred expenses for, *inter alia*, the purchase or lease, maintenance, operating costs and adornment of vehicles; insurance; and uniforms. Plaintiff and each member of the Class incurred these substantial expenses as a direct result of performing their job duties.

77. By misclassifying its employees as "independent contractors," and further by contractually requiring those employees to pay FEG's own expenses, FEG has been unjustly enriched.

78. As a direct and proximate result of FEG's conduct, FEG has received substantial benefits to which it had no entitlement, at Plaintiff and each Class member's 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.

79. Plaintiff and each member of the Class are entitled to compensation for all of the business expenses they were illegally required by FEG to bear, for all of the employment taxes, unemployment compensation and workers compensation the FEG should have but did not pay, and Plaintiff and each member of the Class are entitled to the quantum meruit value of their services as employees.

FOURTH CAUSE OF ACTION
DECLARATORY RELIEF AGAINST DEFENDANT

80. Plaintiff and the Class incorporate by reference herein all preceding allegations of this complaint and further allege:

81. An actual controversy has arisen between the Plaintiff and the Class, on the one hand, and Defendant, on the other hand, relating to the following matters:

a. Whether Defendant has unlawfully misclassified Plaintiff and the Class as independent contractors, and have thus denied Plaintiff and the Class 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 Plaintiff and the Class whose employment with Defendant ended, as required by Virginia law.
- c. What amounts Plaintiff and the Class are entitled to receive in compensation and benefits.
- d. What amounts Plaintiff and the Class are entitled to receive in interest on unpaid compensation due and owing.
- e. What amounts Plaintiff and the Class are entitled to receive from Defendant in statutory penalties and interest.

82. Plaintiff and the Class 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 Plaintiff and the Class.

RELIEF REQUESTED

WHEREFORE, Plaintiff, individually and on behalf of each member of the Class, requests the following relief:

- a. An order certifying the Class as described with the named Plaintiff as Class representative;
- b. An award to the Plaintiff and the Class in the amount of their unpaid overtime compensation
- c. A declaration that Plaintiff and the Class are full participants in all ERISA plans otherwise available to FedEx Ground employees.
- d. An order that requires FedEx Ground to pay or otherwise credit Plaintiff and the Class for all ERISA benefits to which they are retroactively entitled.
 - i. That this Court determine that Plaintiff and his counsel are adequate representatives of the Class;

- ii. An order that requires FedEx Ground to rescind the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FedEx Ground.
- iii. An order requiring FedEx Ground to reimburse and/or indemnify Plaintiff and the Class for the FedEx Ground business expenses that they have covered.
- iv. An award of attorneys' fees, plus the costs and expenses of this action.
- v. An award of punitive damages in an amount to be proven at trial;
- vi. Prejudgment interest, as afforded by law.
- vii. All such other legal and equitable relief to which Plaintiff and the Class are entitled.

Dated: January 9, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Susan E. Ellingstad

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ATTORNEYS FOR PLAINTIFF

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,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

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