

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

-----)	
In re FEDEX GROUND PACKAGE)	
SYSTEM, INC., EMPLOYMENT)	Cause No. 3:05-MD-527-RM
PRACTICES LITIGATION)	(MDL 1700)
-----)	
THIS DOCUMENT RELATES TO:)	
<i>Arthur Smith, et al. v. FedEx Ground</i>)	
<i>Package System, Inc.,</i>)	
Civil No. 3:05-cv-00600-RLM-CAN (TN))	
-----)	

SECOND AMENDED CLASS ACTION COMPLAINT

Plaintiffs, on behalf of themselves and a Class of persons similarly situated, for their Complaint against the Defendant, state and allege as follows:

PARTIES

1. Plaintiffs Arthur Smith, Rachele Westbrook, and Buddy D. Johnson are residents of Shelby County, Tennessee. Plaintiffs Robert Erbentraut is a resident of Tipton County, Tennessee. Plaintiff Herbert Humphrey is a resident of Fayette County, Tennessee. Plaintiffs Debbie Lindsey and John Lindsey are residents of DeSoto County, Mississippi. Plaintiffs have all worked or are still working for Defendant corporations, were hired by Defendant at a Tennessee terminal and are or were Classified as independent contractors.

2. Defendant FedEx Ground Package System, Inc. and FedEx Ground Package System, Inc. d/b/a FedEx Home Delivery, Inc. (hereafter collectively referred to as “Defendant” or “FEG” or “FedEx Ground”) is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania. FEG is a part of the “family” of corporations controlled by Federal Express Corporation. At all relevant times, and within six years of the filing of this Complaint,

FEG was engaged in providing small package information, transportation and delivery services in the United States, including in the State of Tennessee.

JURISDICTION AND VENUE

3. Jurisdiction is proper in this case pursuant to diversity, as defined by the Class action Fairness Act of 2005, Public Law 109-2, 119 Stat. 9, 28 U.S.C. § 1332(d).

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

FACTS COMMON TO ALL CAUSES OF ACTION

5. 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 “Pick-up 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.

6. FEG knows that Los Angeles County Superior Court has determined that FEG employees working under the alleged independent contractor agreement are, in fact, employees entitled to all of the rights and privileges of employee status. Despite this FEG continues to deny these rights and privileges to its similarly situated Tennessee employees.

7. FEG employs or employed during the Class period more than 1,000 deliver and pick-up drivers in the State of Tennessee including, either currently or at material times in the past, each of the Plaintiffs.

8. FEG retains the right to control the manner and means by which Plaintiffs and Plaintiff Class Members perform their jobs. Drivers work from an FEG terminal, where they are

assigned packages for delivery and locations for pickups each day. FEG employs a variety of managers at their terminals who have supervisory responsibility over the drivers, their daily assignments and paperwork. Drivers also interact with other FEG personnel on a daily basis.

9. FEG unilaterally sets the compensation to be paid to the drivers. Drivers are paid for the number of stops, deliveries and pick-ups made, as well as daily compensation for making themselves available for pickup and delivery work in geographic areas determined by FEG.

10. FEG unilaterally sets the prices charged to their customers for the services rendered by Plaintiffs and Plaintiff Class Members.

11. Plaintiffs and Plaintiff Class Members provide services which are an integral part of FEG's business enterprise and are formally identified as a part of system. Plaintiffs and Plaintiff Class Members did not and do not have any business independent from that of FEG.

12. As a condition of employment, Plaintiffs and Plaintiff Class Members are, or were controlled by FEG in numerous ways, including the following:

- a. required to work a minimum 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 a part of FEG system, with FedEx logos and signage;
- d. required to purchase, wear and maintain FedEx uniforms, logos and signage;
- e. required to purchase and maintain a vehicle selected by FEG, built to FEG's precise specifications, and identified by FEG logo and signage;
- f. required to insure the vehicles at FEG's direction and control;
- g. required to clock in and out and file daily reports with FEG;
- h. required to purchase from FEG their "business support package": including maps, signs, training, modems and scanners;

- i. required to conduct themselves according to FEG guidelines and were subject to discipline for any failures to comply with those requirements
- j. prevented from choosing when and how much they wanted to work;

13. The Agreement contains various statements purporting to classify Plaintiffs and Plaintiff Class Members as “independent contractors” and yet the agreement also contains policies, procedures and management discretion that ensure specific control over the manner and means by which Plaintiffs and Plaintiff Class Members are expected to achieve FEG’s desired results. For example, the Operating Agreement (also referred to as “Agreement” or “OA”) signed by Plaintiffs and Plaintiff Class Members contains a Background Statement that states, in part:

Both FedEx Ground and Contractor intent that Contractor will provide these services strictly as an independent contractor, 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.

14. Contrary to the language contained in the statement above, the Agreement also gives FEG the right to:

- a. approve or disapprove any vehicle used to provide service;
- b. approve or disapprove any driver or helper who provides service;
- c. approve or disapprove the purchase or sale of any vehicle;
- d. assign deliveries to each driver;
- e. temporarily or permanently transfer portions of any route to another with or without compensation;
- f. determine when a driver has “too few” or “too many” packages to deliver;

- g. inspect vehicles and drivers for compliance with Company promulgated appearance standards;
 - h. 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;
 - i. require the use of communication equipment and the wearing of Company uniforms;
 - j. take a vehicle out of service;
 - k. review and evaluate "customer service" and to set standards of such service;
 - l. require driver to perform service at "times" requested by customers and determined by FEG;
 - m. withhold pay for certain specified expenses;
 - n. require purchase of specified insurance and numerous other purchases by drivers;
 - o. require completion of specified paperwork, amid other rights reserved to FEG;
15. The Agreement also provides, among other things, that:
- a. Subject to company approval of any vehicle used, 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 and marks, identifying it as part of FEG system at their own expense;
 - b. Drivers must maintain liability and workers compensation insurance (sometimes referred to as "work accident insurance") for the benefit of FEG;
 - c. Drivers must use communications equipment, i.e., a scanner, which uses FEG and/or FHD's customized and/or proprietary tracking software and drivers must pay to rent such equipment from the Company;
 - d. Drivers must prepare and submit daily reports and such shipping documents "as FEC, FEG and FHD may from time to time designate;"

- e. Drivers must wear an approved uniform, and keep their personal appearance and demeanor consistent with standards unilaterally “promulgated from time to time” by FEG;
- f. FEG retains the right to change a driver’s work area on a daily basis or permanently, at its discretion, notwithstanding statements in the Agreement regarding an alleged “proprietary interest” in the customers the driver serves;
- g. FEG issues “Settlement Statements” and settlement checks to Drivers on a weekly basis, except when the Agreement is terminated, in which case FEG determines that a final settlement check will be issued 45 days after termination. The Settlement Statement computes the total earning the Contractor is entitled to receive and itemizes all deductions from the Driver’s settlement. Deductions may include, but are not limited to, the expenses FEG has retained the right to pay, such as the cost of vehicle licenses, taxes, and fees as well as any expenses FEG has incurred in connection with their payment;
- h. After one month of service, drivers become eligible to participate in FEG’s Customer Service Program, by which a monetary bonus can be earned for every period in which the driver has no at-fault accidents, no customer complaints and no missed-pickups and during which the entire terminal’s performance meets company assigned standards of service;
- i. FEG retains the right to control the volume of packages to be delivered and/or picked up, the locations of such deliveries and pickups, and the delivery and/or pickup times (referred to as “windows”, thus controlling the drivers’ work hours.
- j. All performance expectations and goals for drivers are set forth by Terminal managers and discipline is imposed for violations of company policies.

16. The Operating Agreement is and at all time mentioned herein has been a contract of adhesion, drafted exclusively by FEG and/or its legal counsel. Plaintiffs and Plaintiff Class Members had no bargaining power, and were not allowed to negotiate the terms of the Agreement, which they are required to sign as a condition of employment. The Agreement is, and at all material times has been, unlawful and unconscionable in form and effect.

17. Although the nature of the work performed by Plaintiffs and Plaintiff Class Members makes detailed control by management unnecessary, FEG in fact retain the right to

control and exercise intensive control over the work of the drivers, as is necessary to fulfill FEG's commitments to their customers.

18. FEG maintains compensation and benefit plans, agreements and programs available to persons who are "employees" of FEG. The benefit plans include: Health Benefit Plan, Life Insurance Plan, Short-term and Long-term Disability Plans, Accidental Death & Dismemberment and Survivor Income Plan, Employee Stock Purchase Plan, Business Travel Accident Plan, and Retirement and Savings Plans. In addition, employees of FEG receive additional compensation programs, plans, rights, and benefits, including vacation, holidays, sick leave, other types of paid leave, and stock purchase rights.

19. Plaintiffs and Plaintiff Class Members have been excluded from the foregoing compensation plans and programs and benefits plans for all or a portion of their employment at FEG due to their misclassification as non-employees

20. Plaintiffs and Plaintiff Class Members have incurred expenses for equipment, insurance and other expenses that FEG requires them to purchase under the contract.

21. FEG has acted, continues to act, refuses to act, and continues to refuse to act on grounds generally applicable to the Plaintiffs and the Plaintiff Class Members, making appropriate temporary and permanent injunctive relief with respect to the Plaintiff Class as a whole.

CLASS ACTION ALLEGATIONS

22. Plaintiffs hereby re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

23. This action is brought by the Plaintiffs on behalf of a Class of persons currently and formerly employed by FEG as employees within the definition of "employee" in the

common and statutory law, but who, similar to the named Plaintiffs, are or were erroneously Classified as “contractors” or “independent contractors.” Occupations or jobs in which Class Members worked or work include delivery drivers for FEG and its division, FedEx Home Delivery, Inc. The Class is specifically defined as follows:

All individuals who worked for Defendant FedEx Ground Package System, Inc. and or its division FedEx Home Delivery, Inc. in Tennessee from June 15, 1999 until June 15, 2005 (the Class Period) as package pick-up and delivery drivers, and who were classified as “independent contractors.”

Plaintiffs believe that the Class as defined above includes over 1,000 members.

24. Plaintiffs are members of the Class they purport to represent, and have interests typical and/or identical to the other members of the Plaintiff Class.

25. The named Plaintiffs are adequate representatives of the Class because they were treated in the same manner as other Class Members by defendant and they have been damaged by this treatment in the same manner as other Class Members by their exclusion from employee wages, compensation programs, plans and agreements and employee benefit plans and rights.

26. There are common questions of law and fact applicable to the entire Class including, but not limited to:

- a. Whether Class Members have been misclassified as independent contractors pursuant to the Defendant’s operating agreements;
- b. Whether Defendant has violated their legal obligations under Tennessee wage and hour law;
- c. Whether Defendant unlawfully failed to provide workers compensation insurance benefits and unemployment insurance benefits to the Class Members in violation of Tennessee law;
- d. Whether Defendant intentionally and/or negligently misrepresented to Plaintiffs and the Class they seek to represent their true employment status and thereby induced them to incur substantial expenses in reliance on such representations;

- e. Whether the Plaintiffs and Plaintiff Class Members are entitled to injunctive and declaratory relief and an equitable accounting;
- f. Whether Plaintiffs and Plaintiff Class Members are entitled to certain additional types of employee compensation and benefits because they are employees of the Defendant as defined by common and statutory law;
- g. Whether Plaintiffs and Plaintiff Class Members are entitled to certain additional amounts of employee compensation and benefits above and beyond the types and amounts they already earn;
- h. Whether Defendant has misrepresented to Plaintiffs and Plaintiff Class Members their true employment status;
- i. Whether Defendant has unjustly enriched themselves at the expense of the Plaintiffs and Plaintiff Class Members;
- j. Whether Defendant has engaged in conduct towards the Plaintiff and Plaintiff Class Members in violation of the Tennessee Consumer Protection Act; and
- k. Whether Defendant has engaged in conduct against the Plaintiffs and Plaintiff Class Members which should be enjoined, whether on a temporary or permanent basis.

27. These and other questions of law and fact are central to this case, and common to all members of the Class and predominate over any question(s) affecting only individual members of the Class.

28. The claims of the named Plaintiffs are identical to the claims of other members of the Class. The named Plaintiffs share the same interests as other members of the Class in this action because, like other Class Members, they have each been misclassified and suffered financial loss of thousands of dollars due to Defendant's wrongful misclassification. Given the significance of their losses, they have the incentive, and are committed, to vigorously prosecuting this action. They have retained competent and experienced counsel who specialize in Class action and employment litigation to represent them and the proposed Class.

29. A Class action is the only realistic method available for the fair and efficient adjudication of this controversy. The expense and burden of individual litigation makes it impracticable for members of the Class to seek redress individually for the wrongful conduct alleged herein. Were each individual member required to bring a separate lawsuit, the resulting multiplicity of proceeding would cause undue hardship and expense for the litigants and the Court and create the risk of inconsistent rulings, which would be contrary to the interest of justice and equity.

30. Class certification is appropriate pursuant to Rule 23(b)(1) of the Federal Rules of Civil Procedure because prosecution of separate actions would create a risk of:

- a. inconsistent or varying adjudications with respect to individual members of the Classes that would establish incompatible standards of conduct for Defendant; and
- b. adjudications with respect to individual members of the Classes which may, as a practical matter, be dispositive of the interests of other members not parties to the adjudication or which may substantially impair or impede their ability to protect their interests.

31. Class certification is appropriate under Rule 23(b)(2) because Defendant has acted or refused to act on grounds generally applicable to the Classes, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Classes as a whole.

32. Plaintiff seeks injunctive relief in the form of an order declaring the challenged policy exclusion null and void as contrary to Tennessee law and/or public policy. Plaintiff further seeks injunctive relief to prevent Defendant from retaliating against Plaintiffs or Plaintiff Class Members for filing this case, in the form of termination, demotion, reassignment, or reduction in pay or benefits.

33. Class certification of the Plaintiff Class is appropriate under Rule 23(b) (3) because common issues of law and fact relative to Defendant's conduct predominate over individual issues.

34. A Class action is superior to individual litigation because thousands of separate lawsuits to challenge the validity of the policy exclusion would magnify the delay and expense for the parties and the courts. By contrast the Class action device presents far fewer management difficulties and provides the benefits of unitary adjudication, economies of scale, and comprehensive supervision in a single court of law.

35. Class certification is appropriate under Rule 23(b) (3) because a Class action is the superior procedural vehicle for the fair and efficient adjudication of these claims, given that:

- a. Common questions of law and fact overwhelmingly predominate over any individual questions that may arise and consequently, there would be enormous economies to the courts and to the parties in litigating the common issues on a Class wide basis instead of on a repetitive individual basis;
- b. This lawsuit seeks to establish liability on a Class wide basis; and
- c. No unusual difficulties are likely to be encountered in the management of this Class action in that all questions of law or fact related to liability are common to the Class.

FIRST CAUSE OF ACTION:
VIOLATIONS OF THE TENNESSEE CONSUMER
PROTECTION ACT OF 1977

36. Plaintiffs hereby re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

37. Defendant, through the actions described above, have violated the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101 et seq.

38. The Plaintiffs and Plaintiff Class Members are "consumers" as defined by the Tennessee Consumer Protection Act, T.C.A. §§ 47-18-101 et seq.

39. Defendant's marketing and recruitment materials are offered and presented to members of the general public within the State of Tennessee.

40. In entering into the Operating Agreement, Plaintiffs purchased their routes from Defendant. The consideration for that purchase was Plaintiffs' acquisition of the delivery truck, purchase of the business support package, or an agreement to provide services.

41. Defendant's representations to Plaintiffs and other members of the general public through their advertising, marketing and recruitment process were false and were false statements of intention when made, and therefore constitute misstatements of material fact.

42. Defendant has engaged in unconscionable commercial practices of deception, fraud, false pretense, false promise, misrepresentations and omissions in recruiting and retaining its drivers, the public at large, and the Plaintiffs and Plaintiff Class Members specifically, regarding the status of the Plaintiffs and Plaintiff Class Members as independent business owners as pled in this Complaint.

43. Specifically, Defendant misled the Plaintiffs to believe that they were going to be "partners" with Defendant, that Plaintiffs would have an independent business, fully marketable and transferable, that Plaintiffs were investing in a business and would have a proprietary interest that would grow, along with their income, that the routes had and would have value, and other representations designed to convince Plaintiffs and members of the general public to acquire a truck and service Defendant's customers under the terms of a burdensome and nonnegotiable contract.

44. Defendant knowingly concealed, suppressed or omitted the fact that it intended to manage Plaintiffs' work and income, that Defendant's management and control destroyed or would destroy any perceived value of the routes, that FXG had no intention of leaving the means

and methods of work to Plaintiffs, that other jurisdictions have found that driver-contractors were actually employees, not business owners, that Defendant intended to treat Plaintiffs as employees, not entrepreneurs, and other material facts regarding the transaction.

45. Defendant's actions are unfair and deceptive, and constitute deception, fraud, false pretense, false promise, misrepresentation, omission, or knowing concealment, suppression or omission of material facts with the intent that the Plaintiffs, Plaintiff Class Members, and the general public, rely upon concealment, suppression, or omission of facts in connection with the sale of routes to Plaintiffs and those like them.

46. Defendant committed affirmative misrepresentations, knowing omissions, and violations of the Illinois Consumer Fraud and Deceptive Trade Practices Act, entitling Plaintiffs and Plaintiff Class Members to the remedies under the Act.

47. As a result of Defendant's conduct, Plaintiffs entered into the Operating Agreement as described in the foregoing allegations, and made the associated and required investments, including the purchase of a truck and other equipment.

48. As a result of Defendant's control and management, Defendant has destroyed the potential financial value of the routes.

49. Plaintiffs suffered ascertainable losses as a result of Defendant's actions, including but not limited to the loss of value in the routes, lost opportunity to sell the routes, lost profits, additional insurance costs, taxes, and other expenses that should have been paid by Defendant as an employer.

50. A causal nexus exists between Defendant's actions and Plaintiffs' losses. Defendant is liable to Plaintiffs and Plaintiff Class Members for compensatory damages,

consequential damages, punitive damages, injunctive and declaratory relief, costs, disbursements, and attorney fees, plus pre- and post-judgment interest.

SECOND CAUSE OF ACTION:
FRAUD

51. Plaintiffs hereby re-allege and incorporate by reference each and every allegation set forth in the preceding paragraphs.

52. 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 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.

53. 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.

54. 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.

55. By its aforesaid conduct, Defendant is guilty of oppression, fraud and malice in violating Plaintiffs' rights and protections guaranteed by Tennessee law and other applicable law.

THIRD CAUSE OF ACTION:
FOR AN ACCOUNTING AGAINST DEFENDANT

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

57. Plaintiffs and Plaintiff Class Members are owed wages which equal the sum of overtime compensation not paid by Defendant to Plaintiffs and Plaintiff Class Members, statutory interest on all such compensation and benefits, and each of them, and waiting time penalties owed to Plaintiffs and Plaintiff Class Members whose employment terminated.

58. Plaintiffs do not know the precise amount of compensation due to each Plaintiff and Plaintiff Class Member. Upon information and belief, Defendant possesses books and records from which the amount of compensation due and owing to each Plaintiff and Plaintiff Class Member herein can be determined.

59. The amount of statutory interest and penalties owed to each Plaintiff and Plaintiff Class Member is based on the amount of compensation owed to Plaintiffs and Plaintiff Class Members.

FOURTH CAUSE OF ACTION:
RESCISSION OF OPERATING AGREEMENT

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

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

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

63. Despite this control and the actual status of the drivers as employees, FEG 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.

64. The Operating Agreement illegally and unfairly advantages FEG, by mischaracterizing the status of the Plaintiffs 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 Plaintiffs.

65. The Operating Agreement between FEG 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.

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

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

68. While acting on the direct instruction of FEG and discharging their duties for FEG, 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.

69. 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.

70. As a direct and proximate result of FEG’s conduct, FEG 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.

71. Plaintiffs 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 FEG should have but did not pay, and Plaintiffs are entitled to the *quantum meruit* value of their services as employees.

FIFTH CAUSE OF ACTION:
DECLARATORY RELIEF AGAINST DEFENDANT

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

73. An actual controversy has arisen between the Plaintiffs and Plaintiff Class Members, on one hand, and Defendant, 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. overtime pay;
 - iii. holiday pay;
 - iv. worker's compensation;
 - v. unemployment insurance;
 - vi. contributions to Defendant's retirement plan;
 - vii. income tax withholding; and
 - viii. 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 Tennessee Code Annotated § 50-2-103 or other Tennessee 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 waiting time penalties.

74. 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 Plaintiff and Plaintiff Class Members.

SIXTH CAUSE OF ACTION:
REQUEST FOR INJUNCTIVE RELIEF

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

76. Defendant will continue to misclassify Plaintiff and Plaintiff Class Members as independent contractors and unlawfully deny them the common benefits of employee status;

77. Plaintiffs and Plaintiff Class Members have been injured and damaged, and are threatened with injury and damage, by Defendant's continued misclassification and unlawful refusal to pay all compensation and benefits as heretofore alleged, and Plaintiff's and Plaintiff Class Members have no adequate remedy at law.

78. Plaintiffs have reasonable fear that Defendant, upon receiving notice of this lawsuit, will take such action or inaction resulting in the termination, harassment, demotion, reassignment, or cut in currently paid compensation or benefits against Plaintiffs or Plaintiff Class Members, to their detriment, in retaliation for attempting to enforce their rights under Tennessee common and statutory law.

79. Defendant has acted, and threatened to act, on grounds generally applicable to the individual members of the Class, thereby making appropriate preliminary and permanent injunctive relief enjoining Defendant and their agents from practicing the unlawful practices heretofore alleged.

WHEREFORE, Plaintiffs request that judgment be entered against the Defendant for the following:

1. Declaring that the Defendant's acts described in this Complaint constitute violations of the Tennessee State Law for payments of employment in private employments and common law;
2. An award of benefits due them under the programs, agreements and plans described above with an appropriate award of interest;
3. An award of damages for their erroneous exclusion from the programs, agreements and plans described above with an appropriate award of interest;
4. Clarification and enforcement of their rights under these programs, agreements and plans;
5. Temporary and/or permanent injunctive relief commanding that Defendant cease and desist their unlawful and inequitable conduct;
6. An award of damages for all out-of-pocket expenses incurred by Plaintiffs and Plaintiff Class Members necessary to perform their jobs for Defendant described above with an appropriate award of interest;
7. An order requiring Defendant to rescind the Operating Agreement, and awarding restitution compensating for the reasonable value of the benefit provided to FEG
8. Actual damages, treble damages, and attorneys' fees, as set forth by the Tennessee Consumer Protection Act;
9. Punitive damages in an amount to be determined at trial;
10. Pre- and post-judgment interest as permitted by law;
11. Discretionary and court costs as provided by law; and
12. Such other further relief as the Court may deem just and equitable.

Dated: January 9, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Susan E. Ellingstad

Susan E. Ellingstad
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981

Lynn Rossman Faris
LEONARD CARDER, LLP
1330 Broadway, Suite 1450
Oakland, CA 94612
Tel: (510) 272-0169
Fax: (510) 272-0174

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

PLAINTIFFS' CO-LEAD COUNSEL

R. Christopher Gilreath
GILREATH & ASSOCIATES
The Mosby Bennett House
6256 Poplar Avenue
Memphis, TN 38119
Tel: (901) 680-9777
Fax: (901) 680-0580

Joree G. Brownlow
LAW OFFICE OF JOREE G. BROWNLOW
1444 Gillham Drive
Suite 200
Bartlett, TN 38134
Tel: (901) 266-9902
Fax: (901) 266-5985

J. Gordon Rudd
Anne T. Regan
ZIMMERMAN REED
651 Nicollet Mall
Suite 501
Minneapolis, MN 55401
Tel: (612) 341-0400
Fax: (612) 341-0844

Clayton D. Halunen
Joni M. Thome
HALUNEN & ASSOCIATES
220 South Sixth Street
Suite 2000
Minneapolis, MN 55402
Tel: (612) 605-4098
Fax: (612) 605-4099

ATTORNEYS FOR PLAINTIFFS

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:

George A Barton – gbarton@birch.net

Evelyn L Becker – ebecker@omm.com

Thomas J Brunner Jr – Tom.Brunner@bakerd.com

Jerald R Cureton – jcureton@curetoncaplan.com

Edward J Efke – eefkeman@fedex.com

Lynn R Faris – lfaris@leonardcarder.com

Wood R Foster Jr – woodfoster@sbgdf.com

Alison G Fox – Alison.Fox@bakerd.com

Philip Stephen Fuoco – pfuoco@msn.com

Martin S Garfinkel – garfinkel@sbg-law.com

Clayton D Halunen – Halunen@youhaverights.info

John C Hamilton – jch@hamiltonfirm.com hamiltonfirm@sbcglobal.net

Robert I Harwood – rharwood@whesq.com

Tom A Jerman – tjerman@omm.com

Jordan M Lewis – jordanlewis@sbgdf.com

Shannon Liss-Riordan – sliss@prle.com

Gary F Lynch – glynych@carlsonlynch.com

Daniel O Myers – dmyers@rpwb.com

Richard T Phillips – flip@smithphillips.com

C Victor Pyle III – victor.pyle@ogletreedeakins.com

Anne T Regan – atr@zimmreed.com

Robert G Rikard – rrikard@attorneyssc.com

J Gordon Rudd – jgr@zimmreed.com

Robert M Schwartz – rschwartz@omm.com

Edith A Thomas – edithomas1@aol.com

Joni M Thome – Thome@youhaverights.info

Matthew T Tobin – matt@jhmmj.com

Michael J Watton – jdrewicz@Wattongroup.com

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

John H. Beisner
O'Melveny & Myers, LLP
1625 Eye Street, N.W.
Washington, D.C. 20006-4001

Dated: January 9, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Susan E. Ellingstad

Susan E. Ellingstad
100 Washington Avenue South
Suite 2200
Minneapolis, MN 55401
Tel: (612) 339-6900
Fax: (612) 339-0981