

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 )	
)	
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THIS DOCUMENT RELATES TO: )	
)	
<i>Edward Sheehan, et al. v. FedEx Ground</i> )	
<i>Package System, Inc.,</i> )	
Civil No. 3:05-cv-00531-RLM-CAN (MA) )	
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**SECOND AMENDED CLASS ACTION COMPLAINT**

**INTRODUCTION**

1. This is an action brought by current and former delivery drivers of FedEx Ground Package System, Inc. and its division, FedEx Home Delivery (collectively “Defendant” or “FedEx Ground” or “FEG”) for Defendant’s unlawful misclassification of drivers as independent contractors instead of employees. The above-named Plaintiffs bring this action on behalf of a Class of similarly situated persons who have worked as delivery drivers for FedEx Ground in the state of Massachusetts for Defendant’s statutory and common law violations that stem from this misclassification.

**PARTIES**

2. Plaintiff Edward Sheehan is an adult resident of Marstons Mills, Massachusetts. Plaintiff Sheehan worked as a FedEx Ground driver from March 1991 until June 2005.

3. Plaintiff Ronald Perry is an adult resident of North Dartmouth, Massachusetts. Plaintiff Perry worked as a FedEx Home Delivery driver from May 2002 until June 2003.

4. Plaintiff Randy Azzato is an adult resident of East Falmouth, Massachusetts. Plaintiff Azzato worked as a FedEx Ground driver from June 2002 until March 2003.

5. Plaintiff Alan Pacheco is an adult resident of Fall River, Massachusetts. Plaintiff Pacheco worked as a FedEx Home Delivery driver from March 2001 until July 2003.

6. Plaintiff William R. Gardner, Jr., is an adult resident of Lynnfield, Massachusetts. Plaintiff Gardner has worked as a FedEx Home Delivery driver since May 2005.

7. The above-named Plaintiffs bring this action on their own behalf and on behalf of a group of all others similarly situated. That group includes all individuals who worked within the state of Massachusetts for FedEx Ground Package System, Inc. and/or its division, FedEx Home Delivery, as pickup and delivery drivers and who were improperly Classified by Defendant as independent contractors. The Class meets all of the requirements of Rule 23 of the Federal and Massachusetts Rules of Civil Procedure.

8. Defendant FedEx Ground Package System, Inc., together with its division, FedEx Ground Package System, Inc. d/b/a FedEx Home Delivery, is a Delaware corporation with its principal place of business in Pittsburgh, Pennsylvania. At all times relevant, FedEx Ground, an affiliate of FedEx Corporation, engaged in transportation and delivery services in Massachusetts.

#### **JURISDICTION AND VENUE**

9. Jurisdiction in this matter for Counts I – XIII is based upon diversity of citizenship, as Defendant is a resident of the state of Delaware. Plaintiffs are residents of Massachusetts; and the amount in controversy is in excess of the statutory minimum. Therefore, jurisdiction is based upon 28 U.S.C. § 1332.

10. Jurisdiction in this matter for Count XIV is based upon 28 U.S.C. § 1331.

11. Venue lies in the Northern District of Indiana pursuant to the Judicial Panel on Multi-District Litigation by Transfer Order dated August 10, 2005.

### **STATEMENT OF FACTS**

12. FedEx Ground, as an affiliate of FedEx Corporation, employs hundreds of drivers in Massachusetts to pick up and deliver packages to customers of Defendant.

13. As a condition of employment, each FedEx Ground 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 (hereinafter referred to as the "Operating Agreement," the "Agreement" or "OA") were designed to conceal the true nature of the relationship between FedEx Ground and its drivers: that of employer and employee. The Operating Agreement between each member of the Plaintiff Class and Defendant is the same in all material respects. The Operating Agreement between Plaintiffs and FedEx Ground contains all of the same identical material terms with only a few, minor and insubstantial differences.

14. The Operating Agreement contains various statements purporting to Classify Plaintiffs and Plaintiff Class Members 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 pick-up 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.

15. 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. Plaintiffs and Plaintiff Class Members 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.

16. Though the Agreement labels the drivers as independent contractors, the behavioral and financial control manifested over the drivers by Defendant demonstrates that the drivers are employees rather than independent contractors. Such control includes, but is not limited to, the following matters:

- a. Defendant employs supervisors and managers who have supervisory responsibility over the drivers and assign and direct their work. These supervisors and managers work in the terminals where the drivers report to retrieve the packages that they deliver for Defendant’s customers in furtherance of Defendant’s business operations.
- b. The drivers are required to comply with Defendant’s instructions in terms of written and unwritten policies, procedures, and directives appearing in the Agreement and unilaterally promulgated by Defendant from time to time

regarding the completion of the drivers' duties. Drivers suffer financial penalties and/or disciplinary actions for failure to comply with such policies, procedures, and directives.

- c. Upon starting to work for Defendant, the drivers receive training in Defendant's policies and procedures, in the documentation Defendant requires of drivers, and in the technology Defendant mandates the drivers to use in the performance of their work for Defendant.
- d. Though the drivers are required to purchase or lease the vehicles they use in working for Defendant and to purchase the uniforms they wear in performing said work, Defendant requires that the drivers adorn their vehicles and uniforms with Defendant's logo and effectively prohibit the drivers from using their vehicles or uniforms for other business while so adorned. Such requirement prevents the drivers from using their vehicles and uniforms to offer services to the general public.
- e. In addition to paying the drivers for each package picked up and/or delivered, the Agreement provides that Defendant will pay the drivers a set amount for each day that the driver provides services to Defendant as well as a premium for the drivers' time when the drivers' route contains a small amount of package deliveries. Such payments are made to the drivers each week. Thus, their pay basis is not simply by the job, but by the time spent working.
- f. Though the Agreement purports to give the drivers proprietary control over their routes, Defendant changes the drivers' routes from time to time without the drivers' permission and prohibit the drivers from selling their routes or having other individuals perform in their place without the express prior approval of Defendant.
- g. Defendant exerts a high degree of control over the drivers' work. For example, they have begun installing GPS systems in the drivers' vehicles enabling Defendant to track the drivers' whereabouts at all times while working.

17. Though the Agreement labels the drivers as independent contractors, the type of relationship between Defendant and the drivers demonstrates that the drivers are employees rather than independent contractors. Factors showing an employment relationship include, but are not limited to, the following:

- a. The work of the drivers in picking up and delivering packages for Defendant's customers is completely integrated into the business of

Defendant such that Defendant's business depends significantly on the performance of the services that the drivers perform.

- b. Though the drivers are required to purchase or lease the vehicles they use in working for Defendant, and to purchase the uniforms they wear in performing said work, Defendant requires that the drivers adorn their vehicles and uniforms with Defendant's logo and effectively prohibit the drivers from using their vehicles or uniforms for other business while so adorned. Such requirement prevents the drivers from using their vehicles and uniforms to offer services for other, similar businesses.
- c. Though the Agreement purports to give the drivers proprietary control over their routes, Defendant exerts a high degree of control over the drivers' ability to sell their routes or have other individuals perform in their place. Such sales and substitutions require the express prior approval of Defendant, making the services of a type that must be rendered personally by drivers who have effectively been hired by Defendant.
- d. Defendant prevents the drivers from choosing when and how much they care to work for Defendant, instead requiring the drivers to work a minimum number of hours and shifts and prohibiting the drivers from refusing work, such as picking up certain packages.
- e. Many drivers have continued their relationship as drivers for Defendant exclusively over many years.

18. Defendant, per the Agreement, requires the drivers to pay Defendant's operating expenses, including but not limited to:

- a. costs relating to the lease or purchase and operation of vehicles to perform work for Defendant and to maintain and repair such vehicles;
- b. costs relating to the purchase of insurance, including vehicle insurance and work accident insurance;
- c. costs relating to the purchase of uniforms adhering to Defendant's precise specifications;
- d. costs of hiring temporary or replacement drivers when the drivers are unable to perform their work due to injury or illness or when the drivers take vacation or other time off; and
- e. the share of federal employment taxes for which employers are liable; and
- f. other costs normally associated with the operation of a business and included in Defendant's business support package, such as maps, logos and signs, training, modems, and scanners.

19. Defendant also routinely takes other unlawful deductions from the drivers pay as well and/or does not pay the drivers for all work performed or amounts due to them, including not paying them for training time, withholding final pay and/or vacation pay.

20. By retaining behavioral and financial control over the drivers despite the express language to the contrary in the Agreement, Defendant has committed a widespread and systemic breach of the terms of said Agreement.

21. By retaining behavioral and financial control over the drivers despite the express language to the contrary in the Agreement, Defendant has misrepresented to the drivers that they are independent contractors (and thus entrepreneurs with the ability to independently manage and grow their businesses), when in fact they are employees (and thus entitled to a variety of legal benefits that inure from the employment relationship).

22. 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.

23. 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 a FedEx Ground 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.

24. Defendant does not contribute to workers' compensation and unemployment insurance programs and do not allow drivers to apply or qualify for workers' compensation or unemployment benefits.

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 Massachusetts 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 Massachusetts 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.

26. In the matter of FedEx Ground Package System, Inc. and Local 177, Int'l Bhd. of Teamsters, AFL-CIO, the Regional Director for Region 22 of the National Labor Relations Board held that employees working under the Agreement in the Fairfield, New Jersey, terminals are employees and not independent contractors.

27. Under the rules established by the Internal Revenue Service ("IRS") regarding Classification of employees and independent contractors, FedEx Ground drivers are employees. Defendant is in breach of a 1995 agreement reached between their predecessor company, Roadway Package System, Inc. ("RPS"), and the IRS regarding this Classification issue.

**COUNT I**  
**(Declaratory Judgment pursuant to 28 U.S.C. § 2201**  
**and Mass. Gen. L. c. 231A)**

28. Under the relevant laws of the United States and of Massachusetts, Defendant has misclassified the Plaintiffs and Class Members as independent contractors rather than as employees; therefore, pursuant to 28 U.S.C. § 2201 and Mass. Gen. L. c. 231A, this Court should issue a declaratory judgment establishing that the Plaintiffs and Class Members are or were employees of Defendant and that the Plaintiffs and Class Members are or were therefore entitled to all the rights and benefits of employment pursuant to the laws of the United States and of Massachusetts.

**COUNT II**  
**(Violation of Massachusetts Independent Contractor Law)**

29. By misclassifying Plaintiffs and Class Members as independent contractors instead of employees, Defendant has violated Mass. Gen. Laws c. 149 § 148B. This claim is brought pursuant to Mass. Gen. Laws. c. 149 § 150.

**COUNT III**  
**(Violation of Massachusetts Wage Law)**

30. By such conduct in forcing the Plaintiffs and Class Members to bear costs incident to Defendant's business operations, Defendant violated Mass. Gen. Laws. c. 149 §§ 148 and 150 by making unlawful deductions and unlawfully requiring Plaintiffs and Class Members to pay improper set-offs against their wages. Defendant also violated Mass. Gen. Laws. c. 149 §§ 148 and 150 and c. 151 § 1 for not paying Plaintiffs and Class Members for all time worked, including training time, and for withholding other wages owed, such as final paychecks and vacation pay.

**COUNT IV**  
**(Breach of Contract)**

31. Defendant has breached its written contracts with Plaintiffs and Class Members, in which they made express and implied representations concerning the parties' rights and duties which proved untrue, (for example, in changing the drivers' routes without their permission), to Plaintiffs' and Class Members' detriment, in violation of the common law of Massachusetts.

**COUNT V**  
**(Misrepresentation)**

32. Defendant has committed intentional and/or negligent misrepresentation in their representations concerning the parties' rights and duties, in violation of the common law of Massachusetts.

**COUNT VI**  
**(Unfair and Deceptive Business Practices)**

33. Defendant's conduct with respect to the Plaintiffs and Class Members as described above (including changing the drivers' routes without their permission and other breaches of their contracts and misrepresentations) constitutes unfair and deceptive practices in violation of Massachusetts Gen. L. c. 93A.

**COUNT VII**  
**(Plan Enforcement Under ERISA)**

34. This Court has jurisdiction to hear this claim under 29 U.S.C. §1132 (e)(1). In conformity with 29 U.S.C. §1132 (h), Plaintiffs are contemporaneously serving this complaint, by certified mail, on the secretaries of Labor and Treasury.

35. Under 29 U.S.C. §1132 (a)(1)(B), Plaintiffs are authorized to clarify and to enforce their rights to ERISA benefits in whatever plan for which they were eligible.

36. Up to now, Defendant has taken the position that Plaintiffs are not entitled to any ERISA benefits, based on Defendant's mistaken view that Plaintiffs and the Class are not employees.

37. Because Plaintiffs and the Class, however, are employees, they are entitled to employee benefits.

38. Accordingly, under 29 U.S.C. §1132 (a)(1)(B), Plaintiffs are entitled to their benefits, declaratory relief, equitable restitution, and injunctive relief. Plaintiffs are further entitled to prejudgment interest, costs, and attorneys fees pursuant to 29 U.S.C. §1132 (g) and the common fund doctrine.

**COUNT VIII  
(Rescission Of Operating Agreement)**

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

40. Defendant controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the general allegations above.

41. Despite this control and the actual status of the drivers as employees, Defendant 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.

42. The Operating Agreement illegally and unfairly advantages Defendant, by mischaracterizing the status of the Plaintiffs in that Defendant 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.

43. The Operating Agreement between Defendant 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.

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

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

46. While acting on the direct instruction of Defendant and discharging their duties for Defendant, 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.

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

48. As a direct and proximate result of Defendant’s conduct, Defendant 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.

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

**COUNT IX**  
**(Fraud)**

50. 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.

51. 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.

52. 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.

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

**COUNT X  
(Unjust Enrichment)**

54. As a result of Defendant's conduct in misclassifying Plaintiffs and Class Members as independent contractors, Defendant has forced Plaintiffs and Class Members to bear the normal costs and incidents of Defendant's business and have thus unjustly enriched themselves to the detriment of Plaintiffs and Class Members in violation of the common law of Massachusetts.

**COUNT XI  
(Conversion)**

55. By such conduct in forcing the Plaintiffs and Class Members to bear costs incident to Defendant's business operations, Defendant also converted the property of the Plaintiffs and Class Members to Defendant's own use in violation of the common law of Massachusetts.

**COUNT XII  
(Promissory Estoppel)**

56. As a result of the misrepresentation of Defendant that Plaintiffs and Class Members would be independent contractors and other misrepresentations regarding the parties' rights and duties, the Plaintiffs and Class Members were estopped from and forewent other employment and business opportunities in reliance on the promise of entrepreneurship inherent in the independent contractor relationship offered by Defendant, and, as such, Defendant has violated the common law of Massachusetts.

**COUNT XIII  
(Quantum Meruit)**

57. Plaintiffs and Class Members have been deprived by Defendant of the fair value of their services and are thus entitled to recovery in *quantum meruit* pursuant to the common law of Massachusetts.

**COUNT XIV  
(Injunctive Relief)**

58. As Defendant has at all times continued to misclassify Plaintiffs and Class Members as independent contractors despite retaining control over them as employees, the Plaintiffs and Class Members seek permanent injunctive relief enjoining Defendant from practicing the unlawful practices alleged herein.

**JURY DEMAND**

Plaintiffs request a trial by jury on their claims.

WHEREFORE, Plaintiffs request that this Court enter the following relief:

1. Certification of this case as a Massachusetts Class action pursuant to Fed. R. Civ. P. 23 or Mass. R. Civ. P. 23;
2. A declaratory judgment that Plaintiffs and other similarly situated persons are employees, not independent contractors;
3. Disgorgement of profits unjustly retained by Defendant as a result of their unlawful practice of misclassifying Plaintiffs and other similarly situated persons as independent contractors;
4. All damages to which Plaintiffs and Class Members may be entitled;
5. Rescission of the Operating Agreement and awarding restitution compensating for the reasonable value of the benefit provided to Defendant;
6. An award of punitive damages in an amount to be determined at trial; and
7. Any other relief to which Plaintiffs and Class Members may be entitled.

Dated: January 9, 2006

Respectfully submitted,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

s/Susan E. Ellingstad

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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,

LOCKRIDGE GRINDAL NAUEN P.L.L.P.

**s/Susan E. Ellingstad**

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