

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>Michael Tofaute, et al. v. FedEx Ground</i>)	
<i>Package System, Inc.,</i>)	
Civil No. 3:05-cv-00595-RLM-CAN (NJ))	
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AMENDED CLASS ACTION COMPLAINT

Plaintiffs, individually and on behalf of all others similarly situated within the State of New Jersey, by way of Complaint against Defendant, allege as follows:

INTRODUCTION

1. This is a class action suit asserting claims for Consumer Fraud, common law fraud and misrepresentation, rescission and recovery for unjust enrichment, violation of the New Jersey Wage Payment Law and breach of the duty of good faith and fair dealing.

2. Plaintiffs are New Jersey truck and van drivers engaged in package delivery for the Defendant, Federal Express Ground Package Systems, Inc. (herein “Defendant” or “FEG”). FEG fraudulently induced the named Plaintiffs and Class Members (collectively, “Plaintiffs”) to purchase a delivery truck, to insure and maintain that truck, to purchase a “business support package” and other items required by FEG, and to deliver packages for FEG, all the while representing to them that they are or would be “independent business owners” and “business partners” with FEG, and that they had or would have proprietary interests in the delivery routes for which they contracted. These representations were false. In reality, FEG micro-manages

Plaintiffs' activities in such a manner that Plaintiffs are *de facto* employees of FEG and the routes that Class Members purchased therefore have no value. FEG has illegally shifted to Plaintiffs the burden of purchasing and maintaining trucks and equipment necessary to operate FEG's business. FEG has avoided all state and federal employment taxes, workers' compensation and unemployment compensation obligations and other business expenses by forcing the Class Members to pay those obligations themselves. By this suit, the Plaintiffs seek to obtain the benefit of their bargains and compensation for being unlawfully forced to pay for the business expenses of FEG, in the past and in the future, and appropriate injunctive relief.

THE PARTIES

3. All Plaintiffs reside or work in the State of New Jersey and, during the past six years, contracted to be pick-up and delivery drivers at Defendant FEG's New Jersey terminals.

4. Plaintiff Michael Tofaute, a resident of Burlington County, New Jersey is, and at times relevant to this action was, a contract driver for FEG at its Barrington, Camden County, New Jersey terminal. Mr. Tofaute resides at 223 Kihade Trail, Medford Lakes, New Jersey.

5. Plaintiff Francis Dennis Lynch, a resident of Gloucester County, New Jersey, was at times relevant to this action a contract driver for FEG at its Barrington, Camden County, New Jersey terminal. Mr. Lynch performed this work through a corporate entity he formed known as Deliverite, Inc. Mr. Lynch resides at 101 First Avenue, Pitman, New Jersey.

6. Plaintiff David McMahan, a resident of Gloucester County, New Jersey, was at all times relevant to this action, a contract driver for FEG Ground at its West Deptford, Gloucester County, New Jersey terminal. Mr. McMahan resides at 112 Treeline Drive, Deptford, New Jersey.

7. Plaintiff Thomas Mikulski, a resident of Burlington County, New Jersey, was at all times relevant to this action, a contract driver for FEG Ground at its West Deptford,

Gloucester County, New Jersey terminal. Mr. Mikulski resides at 1070 Ashton Avenue, Beverly, New Jersey 08010.

8. Plaintiff Frank Cucinotti, a resident of Atlantic County, New Jersey, was at all times relevant to this action, a contract driver for FEG Home Delivery at its Barrington, Camden County, New Jersey terminal. Mr. Cucinotti resides at 54 Harbor Drive, Hammonton, New Jersey, 08037.

9. Plaintiff, Patrick Carrigan, a resident of Williamstown, New Jersey, was at all times relevant to this action, a contract driver for FEG Ground at its West Deptford, Gloucester County, New Jersey terminal. Mr. Carrigan resides at 478 Winslow Road, Williamstown, NJ 08094.

10. Plaintiff, Michael B. Kilmartin, a resident of Ventor, New Jersey, was at a home delivery driver at the Cranberry/Dayton facility maintained by the Defendant in the New Jersey terminal until May 2004. Mr. Kilmartin resides at 310 North Harvard Drive, Ventor, NJ 08046.

11. Defendant, FEG, is a Delaware corporation with its principal office in Moon Township, Allegheny County, PA. FEG operates several terminals in New Jersey that are the focus of this matter.

12. At all times relevant to this action, Defendant has actively and continuously conducted business throughout the State of New Jersey, employing contractor/drivers such as Plaintiffs and all those similarly situated and engaging in a marketing campaign directed to members of the general public to entice members of the public to become contractor/drivers.

FACTS COMMON TO ALL CAUSES OF ACTION

13. Defendant is a national company employing thousands of drivers to pick up and deliver packages for its customers throughout the United States.

14. FEG operates two divisions in New Jersey: the Ground division routinely (but not exclusively) picks up and delivers packages to businesses. The Home Delivery division routinely, but not exclusively, delivers packages to residential locations.

15. During the time relevant to this action, FEG retained more than 300 delivery and pick-up drivers in New Jersey, including either presently or at material times in the past, the Plaintiffs. FEG retains these drivers (the Class Members) for the purpose of providing its customers with timely and reliable pick-up and delivery of packages.

THE RECRUITMENT PROCESS AND DEFENDANT'S MISREPRESENTATIONS

16. FEG recruits drivers by placing ads in newspapers and on the Internet, inviting members of the general public to attend meetings where FEG managers and recruiters solicit members of the public who respond to FEG's marketing to become drivers by making, among others, the following misrepresentations:

- a. That persons who enter into the "Operating Agreement" will have their own independent business that will be a "partner" with FEG;
- b. That persons who enter into the "Operating Agreement" can acquire multiple routes as part of their "business;"
- c. That contractor drivers will have the ability to determine their own level of income through their own work and effort;
- d. That contractor drivers' so-called independent businesses will be based on delivery routes that they will own and have an entrepreneurial interest in; and,
- e. That contractor drivers' delivery routes have economic value in excess of the cost of the truck and that they can be sold.

16. FEG misrepresents to the public and to the Plaintiffs, that contract drivers have the right to run their own business; to "be your own boss," to "have the ability to grow your own business;" to "have the chance to partner with the fastest growing transportation company [FEG] in the country."

17. FEG also misrepresents to the Plaintiffs and the public that they “have a proprietary interest as a FedEx Ground [or Home Delivery] contractor.”

18. FEG requires its drivers to sign an Operating Agreement (“Agreement”) that characterizes each driver as an “independent contractor” representing that the driver will have a proprietary and entrepreneurial interest in the route.

DEFENDANT’S OPERATING AGREEMENT

19. All Class Members were required to sign an Operating Agreement. Although not identical, the Agreements for the Ground division and the Home Delivery division are substantially the same in all respects relevant to this action.

20. Both the Ground and Home Delivery Agreements characterize the drivers as independent contractors.

Among other things, the Agreements provide that:

- a. Plaintiffs 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, Plaintiffs must adorn the vehicle with specific colors, logos and marks, identifying it as “part of the FEG system.” As well, Plaintiffs must maintain liability insurance for operation of the vehicle without packages on board in the amount of one million dollars, naming FEG as an insured; Plaintiffs must prepare daily driver logs and inspection reports, and such shipping documents “as FEG may from time to time designate;” drivers must deposit a “Contractor Performance Escrow Account,” to be used to reduce any debt the driver owes FEG upon termination;
- b. Plaintiffs must wear “an FEG-approved uniform,” and keep his/her personal appearance consistent with standards “promulgated from time to time by FEG;”
- c. FEG may change a driver’s Primary Service Area, notwithstanding FEG’s representation and promise that each driver has a proprietary interest in the customers he or she serves. In the event that a Primary Service Area is changed, drivers must pay each other for customers gained or lost thereby according to a set schedule;

- d. After one year of service, drivers may become eligible to participate in FEG's Customer Service Program, by which a specified monetary bonus can be earned for every four weeks in which the driver has no at-fault accidents and no customer complaints;
- e. Neither the Agreement nor its addenda and attachments may be modified, altered, changed or amended in any respect unless in writing and signed by both parties;
- f. The purpose of FEG's requiring Class Members to operate vehicles that prominently display FEG's logo, conform to FEG's requirements as to appearance, and to wear uniforms and use documents provided by FEG, is to promote the image and brand of FEG.
- g. FEG can terminate the Agreement at will, without good cause or notice.

21. The Agreement is and at all times mentioned herein has been a contract of adhesion, drafted by FEG and its legal counsel, printed by FEG, and distributed by FEG among drivers for mandatory signature. Plaintiffs have no opportunity to negotiate with FEG over the terms or conditions contained in the Agreement, and FEG offers its drivers no meaningful choice of terms.

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

23. While the Agreement contains an Arbitration Clause, that Clause applies only in cases of termination, is completely one-sided and allows FEG to not reinstate a terminated Class Member, even if ordered to do so by the arbitrator. The Arbitration Clause is unconscionable, illegal and does not preclude Plaintiffs' claims asserted in this Complaint.

24. Despite the Operating Agreement and despite repeated representations by FEG, Plaintiffs are *de facto* employees, for the reasons set forth herein.

DEFENDANT'S CONTROL OF PLAINTIFFS AND OTHER WRONGFUL ACTS

25. FEG exercises extensive control over the means by which Plaintiffs perform their jobs.

26. Such control is exerted in part through the Operating Agreements and provisions described above, which Plaintiffs were required to sign as a condition of employment.

27. FEG's complete control over Plaintiffs is also exercised by other rules and regulations, written and unwritten, including but not limited to the following:

- a. FEG requires Plaintiffs to purchase or lease a vehicle manufactured to a design exclusive to FEG and mandated by FEG to make deliveries and pick-ups;
- b. FEG requires Plaintiffs to pay for the purchase or lease of such vehicle, as well as for its maintenance and upkeep. Other vehicle-related costs required to be paid by Plaintiffs include fuel, oil, tires, repairs, taxes, insurance coverage, licenses, vehicle registration renewal fees, base plates and all highway, bridge and ferry tolls;
- c. FEG requires that Plaintiffs' vehicles meet certain unique specifications, on both the inside and outside. At their own expense, Plaintiffs are required to paint the vehicle with FEG's colors, and put FEG's logos on the vehicle;
- d. Although Plaintiffs could technically use the vehicles for their own commercial and personal purposes, they are not permitted to do so without removing or covering all FEG identifying logos and marks. Additionally, the hours worked by the drivers generally exceed ten hours each day, leaving no time to use the vehicles for any other endeavor;
- e. Plaintiffs and other drivers have no control over the prices charged FEG's customers for pick-up and delivery service;
- f. Plaintiffs and other drivers do not have authority to reject deliveries or pick-ups. They are required to adhere to FEG's strict route schedules and their failure to make a pick up or delivery subjects them to discipline;
- g. FEG mandates that Plaintiffs wear an FEG-approved uniform, and follow such other guidelines as FEG might promulgate regarding their personal appearance;

- h. FEG instructs and controls drivers as to the appearance of their vehicles requiring that they be clean and presentable and free of body damage and/or and extraneous markings;
- i. FEG requires that Plaintiffs perform maintenance on their vehicles according to a schedule set by FEG, at Plaintiffs' expense;
- j. FEG requires that Plaintiffs and other drivers purchase or lease certain electronic communications equipment that complies with FEG's specifications. That equipment includes a "scanner" which contains a global positioning system" capability, which allows FEG to monitor the location of the drivers at all times;
- k. FEG requires its drivers to prepare daily logs and daily inspection reports, along with shipping documents and to file the originals with FEG each business day;
- l. FEG requires Plaintiffs to deposit \$1,000 per Ground driver and \$500 per Home Delivery driver into an escrow account;
- m. FEG requires Plaintiffs to provide services to FEG's customers on days and at times that are compatible with the customer's schedules and requirements as accepted by FEG – the drivers have no choice but to meet the schedules set by FEG and its customer;
- n. FEG assigns Plaintiffs to a specific Primary Service Area - the area each driver is to service, the terms of which are non-negotiable;
- o. FEG determines the volume of deliveries and pick-ups each driver makes;
- p. The volume of deliveries and pick-ups given to each driver prevents them from developing any new business on their own;
- q. FEG can unilaterally reconfigure Plaintiffs' Primary Service Areas;
- r. FEG requires Plaintiffs to make reasonable efforts to retain and increase FEG's customer base and the number of packages handled, but does not compensate Plaintiffs for any customer leads;
- s. If a package can not be delivered on the day mandated by FEG, FEG requires the driver to return the package to FEG on the same day or the next day and to make notations as for the reason for non-delivery, with the drivers being subjected to discipline if they do not or cannot attempt the delivery;
- t. Plaintiffs are not given any sick or vacation leave. If Plaintiffs or other drivers get sick, FEG requires that they find substitutes. FEG must first

give approval for these substitutes, even though Plaintiffs are required to pay such substitutes' wages;

- u. FEG may and does terminate drivers at will and without cause;
- v. FEG requires drivers to give thirty (30) days written notice before terminating their obligations under the Agreement. If drivers fail to do so, Defendant requires drivers to pay it the escrow as liquidated damages;
- w. FEG requires Plaintiffs to submit all claims of wrongful termination to arbitration, stating that the arbitrator has no power to award plaintiffs their routes or punitive damages. The plaintiffs must pay for their own counsel and their portion of the arbitrators' fees;
- x. FEG offers a group vehicle insurance program to Class Members at very low rates. Individual vehicle insurance is so expensive that the result of FEG's termination of insurance is to effectively terminate the Agreement. FEG has terminated the group vehicle insurance for individual Class Members as a method of controlling the class.
- y. Plaintiffs must submit to a test of intoxication or impairment requested by FEG;
- z. Plaintiffs may not carry non-authorized passengers while on FEG' business;
- aa. Plaintiffs must complete a thorough physical examination confirming physical fitness to operate a commercial vehicle at least every two years, and following any physical or mental impairment from injury or disease, regardless of whether the driver is subject to DOT requirements.. These examinations must be completed by a physician approved by FEG;
- bb. Plaintiffs must submit to a drug screen administered at whatever time and place and in whatever manner dictated by FEG; and
- cc. Drivers must cooperate fully with FEG in the conduct of any legal action, regulatory hearing or other similar process arising from or in any way related to any matter found within the safe driving provisions of the Agreement. Such cooperation includes, without limitation, attendance at hearings, trials, and meetings, the securing of evidence and obtaining the attendance of witnesses.

28. FEG employs Terminal Managers, Pickup and Delivery Managers, Safety Managers and other supervisory personnel to process the drivers' paperwork and to give each driver his or her delivery and pick-up schedules.

29. FEG assigns Plaintiffs to deliver packages outside their geographical “primary service areas” without their consent.

30. FEG’s assignment of packages and unilateral modification of pay structures effectively and efficiently controls Plaintiffs’ earnings and ability to complete their work.

31. Drivers have no say in whether to accept or decline packages assigned by FEG in a given day, even if outside his contracted “primary service area,” FEG disciplines or terminates drivers who fail to deliver packages outside his or her Primary service area that FEG assigns.

32. Drivers typically commence their work day in the early morning and finish their routes around 6 p.m. to 7:00 p.m.

33. FEG pays its drivers on a piece rate system, for the number of stops, deliveries and pick-ups made.

34. Plaintiffs’ delivery of packages is an active, integral and indispensable part of FEG’s business enterprise. By driving vehicles with FEG’s colors and logos, by reliably serving FEG’s customers, by following FEG’s controlled delivery routes and delivery and pick-up methods, by providing FEG with customer leads, and in other ways, Plaintiffs and other delivery drivers have rendered, and continue to render, valuable personal services to Defendant FEG.

The personal services described immediately above:

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

35. The skills required of the Plaintiff Class in rendering services to FEG (picking up and delivering packages) are such that said services can be rendered by employees, rather than

by specially-skilled independent workers. While FEG prefers to employ drivers with at least one year of commercial driving experience, FEG will and does employ drivers with no experience.

CLASS ACTION ALLEGATIONS

36. Plaintiffs bring this class action on behalf of themselves and other similarly situated drivers/contractors.

37. Specifically, Plaintiffs bring this action as a class action on behalf of all persons who worked for Defendant FEG at its Ground Division and/or Home Delivery Division terminals in New Jersey, from May 17, 1999 to the time of trial (the "Class Period") as package delivery drivers and/or package pick-up drivers, and who were signatory to an Operating Agreement with Defendant FEG.

38. Upon information and belief, the number of members of the Plaintiff Class exceeds 300 during the Class Period.

39. The Plaintiff Class is so numerous that their individual joinder into a single action is impracticable. Although the exact number of Class Members cannot be properly determined without further discovery, the number and identity of the Class Members can easily be ascertained from Defendants' records.

40. In order to service its customers and to compete with other carriers based upon price, FEG engages and has, at all times relevant, engaged in a systematic marketing, advertising and recruiting campaign within the State of New Jersey, addressed to the general public, to induce members of the public, such as Plaintiffs, to agree to purchase and service one of FEG's delivery routes.

41. Through the above-referenced campaign, FEG induces and has induced individuals, including Plaintiffs, to become drivers for FEG by representing that the drivers will be independent businesses in partnership with FEG, that they will be licensed to use FEG's trade

name, trade mark and related characteristics; that they will acquire delivery routes that have intrinsic value, that said routes can grow in value with the delivery business and that said routes can be sold. These representations are false and misleading, as FEG controls the routes and the drivers in such a manner that the routes have virtually no value and the drivers can not grow their business.

42. In its Operating Agreements, as in the marketing materials discussed above, Defendant conceals the true nature of the relationship between FEG and its drivers: that of employer and employee.

43. As a result of Defendant's misrepresentations, the Plaintiffs pay substantial sums of their own money for the purchase or lease of vehicles that meet FEG specifications, as well as all costs of operating and maintaining those vehicles.

44. FEG's drivers who sign the Operating Agreement do not receive workers' compensation coverage or unemployment insurance benefits. FEG does not pay employment taxes on behalf of the Plaintiffs. The drivers are excluded from all of the benefit programs that FEG affords its other employees, including without limitation vacations, holidays, sick days, personal days, medical insurance and retirement programs.

45. FEG has fraudulently mischaracterized its relationship with its drivers as one of an independent contractor, thereby inducing Plaintiffs to expend tens of thousands of dollars to acquire and maintain vehicles, and expend their own funds for work related services.

46. In fact, and as described above, FEG systemically controls virtually all aspects of the relationship with Plaintiffs in such a manner and extent that the drivers are in fact employees of FEG.

47. FEG has deprived Plaintiffs of the value of their “businesses” by making them employees, despite FEG’s characterization of them as independent contractors and businesspersons.

48. FEG uses the same recruitment and management scheme and script throughout the State of New Jersey, and, upon information and belief, nationwide.

49. The Defendant’s actions have inflicted the same types of harm upon each and every member of the Class.

50. There are questions of law and fact that affect and are common to all Class Members. The central questions of law and fact involved in this action are of a common or general interest.

51. Common legal and factual issues predominate over any questions affecting only individual members of the Class. Among the common questions of law and fact are the following:

- a. Whether FEG violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1, et. seq., in the marketing/sale of its route to Plaintiffs;
- b. Whether FEG misled Class Members into believing they were acquiring an independent business and were independent contractors;
- c. Whether the contractor drivers are actually employees based upon FEG’s level of control of their work;
- d. Whether FEG unlawfully forced Plaintiffs to pay for business expenses that rightfully should have been paid for by their employer, FEG;
- e. Whether FEG was unjustly enriched by failing to compensate the Class as employees, to provide employment benefits and emoluments of employees, by evading employment taxes, and by wrongfully benefiting from its requirement that the Class pay for FEG’s business expenses;
- f. Whether FEG unlawfully failed to provide workers’ compensation insurance benefits to the Class Members;

- g. Whether FEG unlawfully failed to provide unemployment insurance benefits to the Plaintiff Class Members;
- h. Whether FEG unlawfully failed to pay the employment portion of all employment taxes that would have been due if it accurately classified Plaintiffs as employees instead of independent contractors;
- i. Whether injunctive and declaratory relief are proper;
- j. Whether the agreement permitting FEG to shift the burden of employment expenses, taxes, and insurances is illegal and therefore void; and,
- k. Whether Defendants' actions violate the implied covenant of good faith and fair dealing.

52. The claims of the named representative Plaintiffs are typical of the claims of other members of the Plaintiff 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 suffered financial loss of thousands of dollars due to FEG's conduct.

53. The Class Representatives have an incentive and are committed to vigorously prosecuting this action because they have actually suffered losses as a result of Defendant's actions.

54. Plaintiffs have retained qualified counsel, experienced in class action practice, to represent them in this matter.

55. A class action is the only realistic method available for the fair and efficient adjudication of this controversy. Because the damages suffered by individual Class Members, may be relatively small, in comparison with the expense and burden of individual litigation makes it impracticable for members of the Class to seek redress individually for the wrongful conduct herein alleged. Were each individual member required to bring a separate lawsuit, the resulting multiplicity of proceedings would cause undue hardship and expense for the litigants and the court. The prosecution of separate actions would also create the risk of inconsistent

rulings, which may be dispositive of the interest of Class Members who are not parties to the adjudication and/or may substantially impede Class Members' ability to protect their interests, and therefore would be contrary to the interest of justice and equity.

56. This action should proceed as a class action under R.4:32-1(b)(1)(A) because the prosecution of separate actions by or against individual members of the Class would create a risk of inconsistent or varying adjudications with respect to individual members of the Class that would establish incompatible standards of conduct for Defendant.

57. This action should also proceed as a class action under R.4:32-1(b)(1)(B) because the prosecution of separate actions by or against individual members of the Class would create a risk of adjudications with respect to individual members of the Class that would as a practical matter be dispositive of the interests of the other members who are not parties to the adjudications or would substantially impair or impede their ability to protect their interests.

58. This matter should also proceed as a class action under R.4:32-1(b)(2) because Defendant's acts and/or omissions apply generally to members of the Class warranting a declaratory judgment that Defendant's actions constitute a scheme, fraud, misrepresentation, and/or unconscionable conduct in violation of applicable New Jersey law and an injunction prohibiting such acts and/or omissions in the future.

COUNT I – VIOLATION OF THE CONSUMER FRAUD ACT

59. Plaintiffs incorporate by reference Paragraphs 1 through 58 of this Complaint as if fully set forth, and for a cause of action, allege as follows:

60. Defendants, through the actions described above, have violated the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 *et. seq.*

61. Defendant's marketing and recruitment materials are offered and presented to members of the general public within the State of New Jersey.

62. In entering into the Operating Agreement, Plaintiffs purchased their routes from FEG. The consideration for that purchase was Plaintiffs' acquiring the delivery truck, purchase of the business support package and an agreement to provide services.

63. 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 affirmative misstatements of material fact.

64. FEG has engaged in unconscionable commercial practices of deception, fraud, false pretense, false promise, and misrepresentation in recruiting and retaining its drivers, the public at large, and the Class specifically, regarding the status of the Class Members as independent business owners as pled in this Complaint.

65. Specifically, Defendant misled Plaintiffs to believe that they were going to be "partners" with FEG, 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.

66. Defendant committed violations of Federal Trade Commission and other regulations with regard to the marketing and sale of purported "franchises" and business opportunities to the Plaintiffs.

67. Defendant knowingly concealed, suppressed or omitted the fact that it intended to micro-manage Plaintiffs' work and income, that Defendant's management and control utterly

destroyed or would destroy any perceived value of the routes that FEG had no intention of leaving the means and methods of the 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.

68. Defendant's actions constitute an unconscionable commercial practice, deception, fraud, false pretense, violation of applicable regulations, false promise, misrepresentation, and/or the knowing concealment, suppression or omission of material facts with intent that the Plaintiffs, and those like them, rely upon its concealment, suppression or omission, in connection with the sale of the routes to Plaintiff.

69. Defendant committed affirmative misrepresentations, knowing omissions, and regulation violations of the New Jersey Consumer Fraud Act, N.J.S.A. § 56:8-2, entitling Plaintiff to the remedies under the Act.

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

71. As a result of Defendant's control, micro-management, and abuse thereof, Defendant has destroyed the potential financial value of the routes, instead Plaintiffs made great investments in routes that are virtually valueless.

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

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for punitive damages, compensatory damages, injunctive and declaratory relief, consequential damages, treble damages, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT II - MISREPRESENTATION

73. Plaintiffs incorporate by reference Paragraphs 1 through 72 of this Complaint as if fully set forth herein, and for a cause of action, allege as follows:

74. Defendant's knowing misrepresentations and omissions also constitute legal and equitable fraud. Defendant's actions were willful, wanton and taken with reckless disregard to the harm they would cause Plaintiff.

75. Defendant engaged in misrepresentations and omissions described above as part of a systematic corporate policy.

76. Defendant made the representations set forth herein above.

77. Defendant knew, or should have known, or recklessly or negligently disregarded the truth of the representations, which were false when made, or which were promises of future action which Defendant did not intend to comply with at the time when they were made.

78. Defendant made said representations with the intent that Plaintiffs would rely on same.

79. Plaintiffs relied upon Defendant's misrepresentations, actions and intentional omissions in deciding to enter into the Operating agreement.

80. Plaintiffs suffered harm as a result of Defendant's misrepresentations.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for punitive damages, compensatory damages, injunctive and

declaratory relief, consequential damages, treble damages, rescission, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT III– RECISSION OF OPERATING AGREEMENT

81. Plaintiffs hereby incorporate by reference paragraphs 1 through 80 of this Complaint as if fully set forth herein.

82. 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.

83. FEG controls virtually every aspect of the Plaintiffs' work and earnings, as set forth in the preceding allegations.

84. 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.

85. 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.

86. The Operating Agreement between FEG and each Plaintiff and member of the class is void as being illegal and/or 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.

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

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

89. While acting on the direct instruction of FEG and discharging their duties for FEG, Plaintiffs and the Class Members incurred business 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.

90. 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.

91. 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.

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

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant rescinding the Operating Agreement, and awarding restitution

compensating for the reasonable value of the benefit provided to FEG, along with compensatory damages, punitive damages, consequential damages, declaratory judgment and injunctive relief, costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT IV – VIOLATION OF THE WAGE PAYMENT LAW

93. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

94. FEG is an employer within the meaning of the New Jersey Wage Payment Law, N.J.S.A. 34:11-4.1(a).

95. Each Class Member is an employee within the meaning of N.J.S.A. 34:11-4.1(b).

96. FEG has paid to the Plaintiffs compensation for their services that are wages within the meaning of N.J.S.A. 34:11-4.1(c).

97. FEG has withheld and diverted from the Plaintiffs' wages amounts for workers' compensation, employment taxes, and business expenses such as truck payments, vehicle insurance, vehicle maintenance, the "business support package" and other expenses.

98. FEG withheld and diverted the wages of the Plaintiffs as set forth above in violation of N.J.S.A. 34:11-4.4 *et. seq.*

99. The Operating Agreement as described herein violates the Wage Payment Law, and is unlawful, null and void pursuant to N.J.S.A. 34:11-4.7.

100. Pursuant to N.J.S.A. 34:11-4.7, Plaintiffs have a private right of action against FEG, their employer, for the full amount of wrongfully withheld or diverted wages.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for wrongfully withheld and diverted wage, compensatory damages, punitive damages, consequential damages, declaratory judgment holding the Operating

Agreement to be null and void, injunctive relief to enjoin the Defendant from entering into new Operating Agreements and from attempting to enforce existing Operating Agreements, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT V – BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

102. Plaintiffs incorporate by reference the preceding Paragraphs of this Complaint as if fully set forth herein.

103. Under New Jersey law, each Operating Agreement contains a covenant of good faith and fair dealing that FEG owes each Plaintiff and Class Member.

104. Defendant has breached that duty, acted in bad faith and has failed and refused to deal with the members of the Class fairly by:

- a) intentionally misclassifying the Class Members as independent contractors when, because of the level of FEG's control, the Class Members are actually employees;
- b) destroying the value of the plaintiffs routes in such a manner as to render them of little or no value, thereby depriving the Plaintiffs of the value of their bargain;
- c) structuring and restructuring Plaintiffs' routes in such a manner as to require the Plaintiffs to work more and more hours while maintaining or reducing Plaintiffs' incomes;
- d) unilaterally restructuring routes to FEG's benefit and to the Plaintiffs' detriment, without adequate compensation;
- e) managing the income of the Plaintiffs in such a manner as to defeat their efforts to increase their earnings, and to maintain all of the Plaintiffs at the same substandard pay rate;
- f) exercising discretion to terminate driver contracts for failure to "voluntarily" provide services outside assigned routes;
- g) terminating group vehicle insurance without cause;

- h) refusing to permit terminated drivers to sell their routes;
- i) refusing to pay for or create a market for routes once they are terminated;
- j) subjecting the drivers to an annual renewal process permitting the employer to terminate the agreement without cause, therefore destroying any intrinsic value to the route;
- k) making unilateral changes to the pay structure for the routes, therefore controlling Plaintiffs' income in order to increase their profits;
- l) otherwise depriving Plaintiffs of the benefit of their bargain with FEG.

105. Plaintiffs have suffered losses as a direct and proximate result of the Defendant's breaches, unfair business practices and actions described above.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant for compensatory damages, punitive damages, consequential damages, declaratory judgment and injunctive relief, plus costs, counsel fees, pre- and post-judgment interest, and such further relief as may be just and proper.

COUNT VI – DECLARATORY RELIEF

106. Plaintiffs incorporate the preceding Paragraphs of this Complaint as if fully set forth herein.

107. An actual and substantial controversy exists between Plaintiffs and members of the Class on the one hand, and Defendant FEG on the other hand, as to the following matters:

- a) Whether FEG willfully and unlawfully classified drivers as independent contractors rather than as employees;
- b) Whether FEG has failed to reimburse its drivers for their necessarily incurred employment expenses; and
- c) Whether FEG has unlawfully refused to provide workers compensation and/or unemployment insurance benefits under applicable law.

108. Plaintiffs contend that by classifying FEG's employees as independent contractors and by failing and refusing to compensate and reimburse those drivers as alleged herein, defendants have violated illegally avoided New Jersey law regarding employment taxes, workers' compensation insurance and business expenses paid by Class Members on Defendant's behalf.

109. Defendant contends the opposite of the Plaintiff Class's allegations.

110. Declaratory relief is therefore appropriate, because a controversy exists between the parties.

WHEREFORE, Plaintiffs respectfully request that the Court enter judgment in their favor and against the Defendant and declare that the conduct complained of herein be declared unlawful and the Defendant be enjoined from said conduct in the future.

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

Jerald R. Cureton
Karen M. Murray
Anthony Marchetti Jr.
CURETON CAPLAN
950B Chester Avenue
Delran, NJ 08075
Tel: (856) 824-1001
Fax: (856) 824-1008

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:

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