

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>Derek Willis v. FedEx Ground</i>)	
<i>Package System, Inc.,</i>)	
Civil No. 3:05-cv-00597-RLM-CAN (PA))	
-----)	

AMENDED CLASS ACTION COMPLAINT

INTRODUCTION

1. This is a class action complaint brought to obtain declaratory, injunctive and monetary relief on behalf of a class of employees of defendant, for violations of, inter alia, the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq.*, the Pennsylvania Minimum Wage Act, 43 P.S. §333.101 *et seq.*, as well as other rights, obligations, privileges and benefits owed to the class by defendant.

2. The class consists of FedEx Ground small package delivery drivers employed in Pennsylvania, whom defendant has improperly misclassified as “independent contractors,” but who are, in actuality, “employees” of defendant under both common and statutory law.

3. This action challenges both the misclassification of these workers and defendant’s denial to plaintiff and the class of the rights, obligations, privileges and benefits owed to them as employees.

VENUE

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

JURISDICTION

5. There is federal jurisdiction over this matter pursuant to 28 U.S.C. § 1332(d)(2), as amended by Public Law 109.2, 119 Stat. 4 (2005), in that this is a class action, the matter in controversy exceeds the sum of \$5 million, exclusive of interest and costs, and members of the class are citizens of a state different from the defendant.

PARTIES

6. Plaintiff Derek D. Willis is an individual residing in Philadelphia, Pennsylvania.

7. Like all members of the class, plaintiff Willis works as a package pick-up and delivery driver for FedEx Ground (“FedEx Ground”) in Pennsylvania and has been misclassified by defendant as an “independent contractor.”

8. Defendant FedEx Ground is a Delaware corporation with a place of business in Moon Township, Pennsylvania. FedEx Ground is engaged in providing small package delivery, transportation and pick-up services in, inter alia, Pennsylvania.

9. FedEx Ground is a subsidiary of FedEx Corporation. FedEx Ground was established in or about 1998, when the FedEx Corporation acquired FedEx Ground’s predecessor, Roadway Package Systems, Inc.

CLASS ACTION ALLEGATIONS

10. Plaintiff brings this action as a class action pursuant to Fed.R.Civ.P. 23, on behalf of a class defined as:

All individuals who worked as FedEx Ground package pick-up and delivery drivers in Pennsylvania who were designated by defendant as “independent contractors.”

11. The class for whose benefit this action is brought is so numerous that joinder of all members is impracticable.

12. Upon information and belief, there are over 1,000 class members, each of whom worked as a FedEx Ground package pick-up and delivery driver under the conditions described herein, each of whom was improperly classified by defendant as an “independent contractor.”

13. The claims in this action arise exclusively from the pre-printed portions of uniform documents, and the uniform policies of defendant as described herein.

14. No violations are a result of any oral communications or individualized interaction between plaintiff and defendant. Rather, all policies and actions challenged herein are uniform policies directed towards and relating to the class as a whole.

15. There are common questions of law and fact affecting the rights of all class members, including, inter alia, the following:

- a. whether plaintiff and the class are employees of defendant;
- b. whether defendant has violated the rights of plaintiff and the class under the Pennsylvania Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq.*;
- c. whether defendant has violated the rights of the class under the Pennsylvania Minimum Wage Act, 43 P.S. §333.101 *et seq.*;
- d. whether the class is entitled to injunctive relief prohibiting defendant from making deductions from the wages of plaintiff and the class which are not authorized by law;
- e. whether plaintiff and the class are entitled to an accounting by defendant of all hours worked on behalf of defendant, all wages paid by defendant, all deductions from wages made by defendant and the basis of all such deductions;
- f. whether the class is entitled to declaratory relief declaring that they are employees of defendant;
- g. whether the class is entitled to injunctive relief requiring defendant to convey to the class the rights, privileges and benefits of employees;
- h. whether defendant has been unjustly enriched at the expense of plaintiff and the class.

16. Plaintiff is a member of the class he seeks to represent and his claims are not only typical of all class members, they are identical, arising from the same factual and legal basis as those of the class.

17. Plaintiff has no interest antagonistic to, or in conflict with, the class. Plaintiff will thoroughly and adequately protect the interests of the class, having retained qualified and competent legal counsel to represent him and the class.

18. All members of the class have been injured by the same actions of defendant in the same manner.

19. Defendant has acted and refused to act on grounds generally applicable to the class, thereby making appropriate injunctive and declaratory relief for the class as a whole.

20. Since defendant continues to misclassify all FedEx Ground package delivery persons in Pennsylvania as “independent contractors,” the prosecution of separate actions by individual class members will create a risk of inconsistent or varying adjudications.

21. A class action is superior to other available methods for the fair and efficient adjudication of the controversy, the common questions will predominate, and there will be no unusual manageability issues.

FACTS GIVING RISE TO THE CAUSES OF ACTION

22. Defendant employs tens of thousands of “FedEx Ground” drivers to pick up and deliver packages for defendant’s customers throughout the United States, including drivers in the State of Pennsylvania.

23. As a condition of employment, each “FedEx Ground” pick-up and delivery driver employed by defendant in Pennsylvania is required to sign a lengthy form contract entitled the “Pickup and Delivery Contractor Operating Agreement” (“PDCOA”) which incorrectly and falsely purports to classify these drivers as “independent contractors” rather than employees of defendant.

24. The PDCOA is a form contract, the terms of which are identical or substantially similar for every class member.

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

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

27. Defendant has created and regularly updated a large number of written policies and procedures outside of the PDCOA that drivers are never given, but nonetheless are required to follow in their work. Defendant's written policies are contained in the FedEx Ground Manual, Operations Management Handbook, Settlement Manual and numerous other written and extra-contractual policies that are actively concealed from drivers and which defendant fails to disclose and/or provide to drivers that govern the relationship between defendant and the drivers. The other written handbooks and manuals and additional extra-contractual sources include, but are not limited, to written rules on "contractor" termination, directives and training provided to terminal managers, written rules on driver appearance (with illustrative poster), written and oral complaint procedures, memorandum and directives to terminal management and other rules concealed from and not provided to the drivers. When drivers do not follow an FEG rule, whether disclosed or undisclosed, known or unknown, they are subject to various types of punishment, some financial and some disciplinary, up to and including contract termination and/or non-renewal. defendant documents such so-called violations of such rules on forms referred to as "Business Discussion Notes" and retains these documents in secret driver files called "DOT" files, along with myriad other documents which are likewise concealed from and not disclosed to the drivers.

28. Despite the PDCOA's mischaracterization of the class members as "independent contractors," defendant is fully aware that plaintiff and the class were and are employees of defendant as a matter of law.

29. Upon information and belief, defendant's use of the misclassification of these workers is part of a scheme by which defendant seeks to deny them the benefits, rights and privileges owed to employees under the law.

30. At all relevant times, defendant was fully aware that the extent of defendant's direction and control over the manner and means by which class members performed their work for defendant was inconsistent with the legal definition of "independent contractors."

31. At all relevant times, defendant was fully aware that the extent of defendant's direction and control over the manner and means by which class members were required to perform their work for defendant created a de facto and de jure employer/employee relationship.

32. In particular, defendant was aware, inter alia, of each of the following facts.

33. Defendant required class members to work out of a terminal owned and operated by defendant, where defendant assigns the packages to the class for delivery and pick up each day.

34. Defendant prohibited class members from leaving defendant's premises without the approval of defendant's managers.

35. Defendant required class members to clock in and out when they enter and leave defendant's terminal, as well as to file daily reports with defendant of their activities.

36. Defendant required class members to purchase and wear FedEx uniforms and insignia bearing FedEx logos and to deliver packages in vehicles adorned with FedEx logos.

37. Defendant employs supervisors and managers at the terminal, who have extensive supervisory control over plaintiff and the class.

38. Defendant regulated the specific times when deliveries and pick-ups would be made by class members.

39. Defendant unilaterally determined how many package pick-ups and deliveries class members would make each day.

40. Defendant unilaterally determined how many hours class members would work each day.

41. Defendant unilaterally determined the amounts charged to customers for delivery of packages.

42. Defendant controls all aspects of the class members' work schedule: determining the times when drivers deliver and pick up packages, how many packages they deliver or pick up in a given period, what packages they pick up and deliver, and how long they work each day.

43. Defendant forbids plaintiff and the class from refusing to accept packages for pick-up or delivery.

44. Plaintiff and the class deliver packages exclusively for defendant and were prohibited by defendant from delivering packages for any other delivery companies.

45. Defendant prohibited class members from using helpers or other workers to assist in the delivery or pick-up of packages, without defendant's express approval of such helpers.

46. Defendant provided training and training materials to plaintiff and the class regarding, inter alia, defendant's policies and procedures, the types of reports required by defendant, and the use of the equipment which defendant required plaintiff and the class to utilize.

47. Defendant promulgated written policies and procedures which class members were required to follow in their work for defendant.

48. Defendant "fined" and otherwise disciplined class members for failing to follow the policies and procedures set by defendant.

49. Defendant required plaintiff and the class to purchase and use “business support” packages from defendant, the contents of which were selected and compiled unilaterally by defendant, and which included maps, signs, training materials, modems and scanners.

50. Defendant required class members to purchase and maintain a delivery vehicle selected unilaterally by defendant, which was built according to defendant’s precise specifications, and adorned with FedEx logos and signage.

51. Defendant maintained and enforced rules for class members as to who was allowed to ride in or drive such vehicles and where such vehicles could be parked.

52. Defendant inspected these vehicles and drivers for compliance with appearance standards promulgated by defendant.

53. Plaintiff and the class are an integral part of defendant’s business, and the services they perform are essential to the conduct of that business.

54. Plaintiff and the class did not exercise any business management in connection with the services they performed for defendant. Moreover, defendant prohibited plaintiff and the class from exercising independent business judgment regarding the services they performed.

55. Defendant also received actual notice from various government entities that the FedEx ground delivery drivers they classified as “independent contractors” were, in fact, employees of defendant and their predecessor.

56. For example, defendant is aware that in the matter of Estrada v. FedEx Ground, Case No. BC 21130 (July 26, 2004), a court of competent jurisdiction in California found that FedEx Ground delivery drivers, working under the same conditions as plaintiff and the class, were not “independent contractors” and were “employees” of defendant.

57. Defendant is also aware that in the matter of Fed Ex Ground Package System v. Int’l Brotherhood of Teamsters, AFL-CIO, Case No. 22 RC-12508 (November 2, 2004), the

Regional Director of the National Labor Relations Board found that FedEx Ground delivery drivers in New Jersey, working under the same conditions as plaintiff and the class, were not “independent contractors” but rather “employees” of defendant.

58. Indeed, on at least three separate prior occasions, the National Labor Relations Board has expressly ruled that package delivery drivers working for FedEx Ground’s predecessor, Roadway Package Systems, were employees and not independent contractors: (“Roadway I”), 288 NLRB 196 (1988), (“Roadway II”), 292 NLRB 376 (1989), enfd., 902 F. 2d 34 (6th Cir. 1990), and most recently, (“Roadway III”), 326 NLRB 842 (1998). Defendant is aware of each of these rulings and of the fact that plaintiff and the class members work under the same conditions found to support employee status in those instances.

59. Defendant is also aware that in 1995, FedEx Ground’s predecessor entered into an agreement with the Internal Revenue Service, agreeing not to misclassify its package pick-up and delivery drivers as independent contractors. Defendant is aware that plaintiff and the class work under conditions that are substantially similar, if not identical, to the conditions that gave rise to that agreement.

60. Defendant is also aware that the New Jersey Department of Labor has issued a finding that a FedEx Ground delivery driver in New Jersey, who worked under the same conditions as plaintiff and the class, was an employee and not an “independent contractor” of defendant.

61. Despite this knowledge, defendant persists in misclassifying plaintiff and the class as “independent contractors,” with full knowledge that they are employees of defendant as a matter of law.

62. Defendant was and is obligated by law to provide certain benefits, rights and privileges to their employees.

63. These include, but are not limited to, the following:
- a. Wages, for all work performed at the direction of defendant;
 - b. Overtime pay for work performed in excess of 40 hours per week;
 - c. Paying employees for terminal waiting time, deadhead time and/or other time during which defendant required plaintiff and the class to be present at defendant's terminal;
 - d. Providing workman's compensation and paying workman's compensation insurance contributions;
 - e. Paying unemployment insurance and unemployment insurance contributions;
 - f. Making Federal Insurance Compensation Act ("FICA") contributions;
 - g. Providing meal, break and rest periods;
 - h. Certain retirement, health and welfare benefits to which plaintiff and the class may be entitled as employees of defendant.

64. A significant amount of work, required for the completion of the tasks assigned by defendant, was performed by plaintiff and the class each day at defendant's terminal for which plaintiff and the class received no compensation.

65. Plaintiff and the class were also required by defendant to spend time waiting at defendant's terminal, for which time defendant paid no compensation.

66. Nor did defendant pay plaintiff and the class for time spent in training required by defendant, or for time spent filling out reports required by defendant.

67. Plaintiff and the class were required to work in excess of 40 hours per week without overtime pay.

68. At no time were plaintiff and the class provided with meal breaks or other rest periods.

69. At no time were plaintiff and the class provided with unemployment compensation or workman's compensation insurance.

70. Nor did defendant make FICA contributions on behalf of plaintiff and the class.

71. Defendant was also prohibited by law from taking unauthorized deductions from the wages of employees, such as plaintiff and the class.

72. Defendant nevertheless made such deductions from the wages of plaintiff and the class, including, but not limited to, deductions for delivery charges when defendant's customers alleged that a delivery was either not made or not made in a timely manner, deductions for defendant's operating expenses and other unauthorized deductions.

73. In addition, plaintiff and the class were required to pay, without reimbursement, many of defendant's operating expenses, all of which were the legal responsibility of defendant.

74. Such expenses included, but were not limited to, the following:

- a. the cost of delivery vehicles;
- b. various forms of insurance, including insurance for the vehicles used for deliveries, work accident insurance, deadhead insurance;
- c. fuel;
- d. the cost of uniforms required by defendant;
- e. the cost of other equipment mandated by defendant, including maps, signs, logos, scanners and modems.

**COUNT I
INJUNCTIVE AND DECLARATORY RELIEF**

75. Plaintiff incorporates all preceding paragraphs as though fully set forth at length herein

76. Plaintiff and the class are entitled to declaratory relief in the form of an order declaring that they are employees of defendant.

77. Plaintiff and the class are entitled to an order for injunctive relief:

- a. prohibiting defendant from misclassifying plaintiff and the class as independent contractors; and

- b. requiring defendant to provide plaintiff and the class with all the rights, benefits and privileges of employees.

78. In addition, plaintiff and the class are entitled to an order directing defendant to make a full accounting of all hours worked by plaintiff and the class on behalf of defendant, all wages that are and were due, and all deductions made from such wages by defendant.

COUNT II
PENNSYLVANIA WAGE PAYMENT AND COLLECTION LAW
43 P.S. § 260.1 et seq.

79. Plaintiff incorporates all preceding paragraphs as though fully set forth at length herein.

80. Defendant is obligated to pay wages to plaintiff and the class based upon the number of hours they work and to make only those deductions and withholdings from wages that are required or authorized by law.

81. Defendant breached its obligations by engaging in the conduct more specifically described in the paragraphs above.

82. Defendant has no justification for their failure and/or refusal to pay such wages and for these unauthorized deductions.

83. Defendant's conduct constitutes violations of the Wage Payment and Collection Law, 43 P.S. § 260.1 *et seq.*

COUNT III
PENNSYLVANIA MINIMUM WAGE ACT
43 P.S. § 333.101 et seq.

84. Plaintiff incorporates all preceding paragraphs as though fully set forth at length herein.

85. Defendant is obligated to pay plaintiff and the class for each hour worked on behalf of defendant, including time spent at defendant's terminal, deadhead time, and performing other tasks required by defendant.

86. Defendant is obligated to pay plaintiff and the class overtime pay for hours worked in excess of 40 hours per week.

87. Defendant breached its obligations by engaging in the conduct more specifically described in the paragraphs above.

88. Defendant's conduct constitutes violations of the Pennsylvania Minimum Wage Act, 43 P.S. § 333.101 *et seq.*

**COUNT IV
FRAUD**

89. Plaintiff incorporates all preceding paragraphs as though fully set forth at length herein.

90. Plaintiff and the class he represents were purportedly hired by defendant to work as "independent contractors" pursuant to the terms of the PDCOA described above. In fact, defendant knew or should have known, at all times, that the "independent contractor" classification in the PDCOA was improper and that plaintiff and all persons similarly situated were "employees" entitled to the benefits and protections of all laws enacted for employees. Plaintiff is informed, believes and on that basis allege, that through the PDCOA defendant intentionally misled plaintiff and the class he represents as to their employment status, or made such representations to plaintiff and 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, Settlement Manual, and other policies and secret driver files described above) that defined the employment relationship between plaintiff and defendant, all for the purpose of realizing unjust profits from plaintiff's work and/or to avoid paying for its operating costs and payroll taxes to increase its competitiveness.

91. At all material times, defendant either knew, or should have known, that the material representation made to plaintiff and the class in the PDCOA concerning their employment status, and the concealment and/or non-disclosure of material facts to plaintiff and the class concerning their employment status and plaintiff's and the class' 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.

92. At all material times, defendant intended to and did induce plaintiff and the class he represents to reasonably and justifiably rely to their detriment on the false and fraudulent representations made to them by defendant in the PDCOA 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.

93. By its aforesaid conduct, defendant is guilty of oppression, fraud and malice in violating plaintiff's rights and protections guaranteed by Pennsylvania state law and other applicable law.

COUNT V
PENNSYLVANIA WORKMAN'S COMPENSATION ACT
77 P.S. 501(a)(d)

94. Plaintiff incorporates all preceding paragraphs as though fully set forth at length herein.

95. As an employer, defendant was required by 77 P.S. § 501(a)(1) to insure payment of compensation to employees through the State Workman's Insurance Fund or an insurance company authorized to insure such liability in Pennsylvania.

96. Defendant did not make workman's compensation contributions or otherwise secure such benefits to plaintiff and the class.

Pursuant to, inter alia, 77 P.S. § 501d), plaintiff and the class are entitled to relief compelling defendant to comply with their obligations under this statute.

COUNT VI
RESCISSION OF OPERATING AGREEMENT/PDCOA

97. Plaintiff incorporates all preceding paragraphs as though fully set forth at length herein.

98. Despite the express terms of the PDCOA, plaintiff's relationship with defendant satisfies every aspect of the test for employment, and not for independent contractor status.

99. Defendant controls virtually every aspect of the plaintiff's work and earnings, as set forth in the general allegations hereof.

100. Despite this control and the actual status of the drivers as employees, defendant mischaracterizes the plaintiff and the class as independent contractors. As a result, these drivers must pay substantial sums of their own money for work-related expenses, including but not limited to the purchase or lease of vehicles meeting company specifications, and all costs of operating, insuring and maintaining those vehicles.

101. The PDCOA illegally and unfairly advantages defendant, by mischaracterizing the status of the plaintiff and the class 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 plaintiff and the class.

102. The PDCOA 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 plaintiff and the class members, and therefore denying them the legally cognizable benefits of employment.

103. The PDCOA between defendant and plaintiff is an unconscionable contract of adhesion, which is unenforceable as contrary to the public interest, policy and law.

104. The PDCOA illegally shifts the burden of certain costs that an employer must pay.

105. 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. Plaintiff and the class members incurred these substantial expenses as a direct result of performing their job duties.

106. 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.

107. As a direct and proximate result of defendant’s conduct, defendant has received substantial benefits to which it had no entitlement, at plaintiff 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.

108. Plaintiff and the class 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 defendant should have but did not pay, and plaintiff and the class are entitled to the *quantum meruit* value of their services as employees.

PRAYER FOR RELIEF

WHEREFORE, plaintiff asks this court to:

- a. Certify this matter as a class action pursuant to Fed.R.Civ.P. 23;
- b. Enter an order for injunctive and declaratory relief as described herein;

- c. Enter an order requiring defendant to rescind the PDCOA, and awarding restitution compensating for the reasonable value of the benefit provided to FedEx Ground;
- d. Enter judgment in favor of each class member for damages suffered as a result of the conduct alleged herein, to include interest and pre-judgment interest;
- e. Award plaintiff reasonable attorneys' fees and costs;
- f. Award plaintiff and the class punitive damages in an amount to be determined at trial; and
- g. Grant such other and further legal and equitable relief as the court deems just and necessary.

JURY DEMAND

Plaintiff hereby demands a trial by jury as to all issues so triable.

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

Philip Stephen Fuoco
LAW FIRM OF PHILIP STEPHEN FUOCO
24 Wilkins Place
Haddonfield, NJ 08033
Tel: (856) 354-1100

Paula R. Markowitz
MARKOWITZ & RICHMAN
1100 North American Building
121 S. Broad Street
Philadelphia, PA 19107
Tel: (215) 875-3100
Fax: (215) 790-0668

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@sgb-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 – glynch@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