

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW JERSEY**

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RICHARD LUCEY, FRANCIS	:	Hon. Renee Marie Bumb, U.S.D.J.
DENNIS LYNCH, DAVID MC	:	Case No. 06-3738
MAHON, MICHAEL MC KENZIE,	:	
FRANK CUCINOTTI AND JAMES	:	<i>Civil Action</i>
HOUGH,	:	
	:	
	:	
Plaintiffs,	:	Return Date: June 1, 2007
	:	
v.	:	
	:	
FEDEX GROUND PACKAGE	:	
SYSTEMS, INC.,	:	
	:	
Defendant.	:	
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**DEFENDANT FEDEX GROUND PACKAGE SYSTEM, INC.'S  
MEMORANDUM OF LAW IN REPLY TO PLAINTIFFS' OPPOSITION  
AND IN FURTHER SUPPORT OF ITS MOTION TO COMPEL  
ARBITRATION AND TO DISMISS MCMAHON'S CLAIMS**

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On the Brief: Jennifer Rygiel-Boyd, Esq.

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## **STATEMENT OF FACTS**

Defendant FedEx Ground Package System, Inc. (“FedEx Ground”) relies upon the “Statement of Pertinent Facts and Procedural History” contained in its opening brief, as well as the Certifications of Michael Cline, Jr. (“Cline Cert.”), and Michael J. Murphy, Esq. (“Murphy Cert.”) that are submitted concurrently.

## **LEGAL ARGUMENT**

### **I. McMAHON’S ARBITRATION AWARD MUST BE CONFIRMED AND HIS CLAIMS DISMISSED.**

It is undisputed the arbitrator issued an award on June 9, 2006 dismissing McMahan’s claims. It is also undisputed that McMahan never filed a motion to vacate the arbitration award. Thus, no matter what law is applied (Federal Arbitration Act (“FAA”), as the plaintiffs suggest, or Pennsylvania arbitration law, as FedEx Ground maintains), it is clear that based on these facts McMahan’s arbitration award must be confirmed and his claims dismissed.

Under the FAA, McMahan had three months to serve his notice of motion to vacate the June 9, 2006 award. *See* 9 U.S.C. §12. McMahan failed to file any such notice. Thus, McMahan waived his right to oppose the confirmation of his arbitration award. *See Jeereddi A. Prasas, M.D., Inc. Retirement Plan Trust Profit Sharing v. Investors Associates, Inc.*, 82 F. Supp. 2d 365, 367 (D.N.J. 2000).

Alternatively, if Pennsylvania arbitration law applies, McMahan’s arbitration award must still be confirmed and his claims dismissed. Under

Pennsylvania law, McMahon had 30 days from the receipt of this award to file a motion to vacate or modify the arbitration award. *See Snyder v. Cress*, 791 A.2d 1198, 1201 (2002); *Miller v. Allstate Ins. Co.*, 763 A.2d 401, 405 (Pa. Super. 2000). Because McMahon failed to file such a motion, the trial court is required to confirm the award. *See Sage v. Greenspan*, 765 A.2d 1139, 1143 (Pa. Super. 2000); *Miller*, 763 A.2d at 404-05. Additionally, McMahon also has waived his right to challenge the arbitration award in response to FedEx Ground's motion to confirm (as he is now attempting to do). *See Lowther v. Roxborough Memorial Hospital*, 738 A.2d 480, 486 (Pa. Super. 1999) (citations omitted). Nor is McMahon permitted to challenge the arbitration award by filing a declaratory judgment action challenging the underlying arbitration agreement (as he did in the Complaint). *Id.* at 495-86. Accordingly, McMahon's arbitration award must be confirmed and his claims must be dismissed.

Contrary to plaintiffs' contention, this matter is not similar to *McHenry v. FedEx Home Delivery*, Case No. 16-06-22287, Oregon State Court, Lane County (April 9, 2007). In *McHenry*, an arbitration award was never issued. As such, the plaintiff was not required to file a timely motion to vacate as McMahon was required to do.

Plaintiffs' reliance on *Bergquist Co. v. Sunroc Co.*, 777 F. Supp. 1236 (E.D. Pa. 1991) and *Kaplan v. First Options of Chicago, Inc.*, 19 F.3d 1503 (3d Cir.

1994) is equally misplaced. In both of those cases, unlike here, the parties timely filed their motion to vacate the arbitration award and in those motions challenged the validity of the arbitration award and the underlying arbitration agreement.

Finally, plaintiffs would have this Court believe that “after filing his demand, McMahon's participation in the arbitration was limited to objecting to it,” (Opposition, p. 26) — an argument that should have been raised in a timely motion to vacate, which McMahon failed to do. Even if McMahon raised this argument timely, it fails as the record evidence shows otherwise. Indeed, several months after McMahon demanded arbitration before the American Arbitration Association (“AAA”), McMahon, through counsel, willingly participated in a preliminary hearing conference with the appointed arbitrator on April 24, 2006 in which the parties agreed upon a detailed motions practice and an arbitration hearing schedule of July 18 and 19, 2006. Murphy Cert., ¶ 6. At no time, during this preliminary hearing did McMahon, through counsel, object to arbitrating his claims. *Id.* Moreover, as the record shows, once McMahon later refused to continue with the arbitration, the AAA made it very clear to McMahon that it would not stay the proceeding absent a court order and that the AAA would administer the case in accordance with the parties previously agreed upon scheduling order. Murphy Cert., ¶¶ 8-10 and Exh. H attached thereto. McMahon never obtained a court-ordered stay and, moreover, knowingly elected not to

respond to FedEx Ground's Motion to Dismiss even after the AAA reminded him of the deadline for doing so and forwarded the Motion to the arbitrator for consideration. Murphy Cert., ¶¶ 8-13. Thus, it is disingenuous for McMahon now to feign surprise at the fact that the AAA continued to process the case and the arbitrator rendered a decision.

In sum, because McMahon failed to file a timely motion to vacate under either Pennsylvania law or the FAA after the arbitrator issued her opinion on June 9, 2006, McMahon now cannot challenge the arbitration award or the arbitration provision contained in his Operating Agreement. Accordingly, the Court must confirm McMahon's arbitration award and dismiss his claims.

**II. FEDEX GROUND'S ARBITRATION AGREEMENT WITH THE PLAINTIFFS IS NOT UNCONSCIONABLE AND, THUS, SHOULD BE ENFORCED.**

The arbitration agreement contained in the Operating Agreements between the plaintiffs and FedEx Ground is not unconscionable under Pennsylvania state substantive law. Indeed, plaintiffs have not challenged the choice of law provision contained in their Operating Agreements and, thus, waived their right to do so. Therefore, even if the Court evaluates the arbitration agreement under the FAA, as the plaintiffs wish, the Court is required to analyze the validity of the arbitration agreement under Pennsylvania state substantive law.

Section 2 of the FAA provides that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds that exists at law or in equity

for the revocation of any contract.” 9 U.S.C. § 2. In determining the validity of an agreement to arbitrate, federal courts “should apply ordinary state-law principles that govern the formation of contracts.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Therefore, in deciding whether the arbitration agreement contained in the Operating Agreements between FedEx Ground and the plaintiffs is valid and not unconscionable, the Court must apply Pennsylvania state law pursuant to the choice of law provision in the Operating Agreement.<sup>1</sup>

Under Pennsylvania law, “a contractual provision is unconscionable if: (1) one of the parties had no meaningful choice with respect to the provision, and (2) the provision unreasonably favors the other party.” *Lytle v. CitiFinancial Services, Inc.*, 810 A.2d 643, 659 (Pa. Super. 2002) (citations omitted). Whether an arbitration agreement is valid and not unconscionable is an issue of law for the Court, not the arbitrator, to decide. *See Ostroff v. Alterra Healthcare Corp.*, 433 F.

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<sup>1</sup> The cases cited by plaintiffs in their opposition, specifically *Parilla v. IAP Worldwide Services VI, Inc.*, 368 F.3d 269 (3d Cir. 2004), *Alexander v. Anthony International, L.P.*, 341 F.3d 256 (3d Cir. 2003), *Johnson v. FedEx Ground Package System, Inc.*, and *McHenry v. FedEx Home Delivery*, to support their position that the arbitration provision is unconscionable should be disregarded as those cases do not rely upon Pennsylvania state law. *Parilla* and *Alexander* rely upon Virgin Islands law, *Johnson* relies upon California state law and *McHenry* relies upon Oregon state law; none of which are applicable here.

Supp.2d 538 (E.D. Pa 2006); *Metzgar v. Star Pontiac, Inc.*, 2005 WL 3947961 (Pa. Com. Pl. 2005)<sup>2</sup>.

Here, plaintiffs have not met their burden in proving that the arbitration provision is unconscionable. *See Bullick v. Sterling, Inc.*, 2004 WL 2381544, \*6 (E.D. Pa. 2004)(“The burden of proof lies with the party who alleges unconscionability”).<sup>3</sup> Thus, the arbitration provision must be upheld and plaintiffs Lucey’s, Lynch’s, Cucinotti’s and Hough’s claims must be compelled to arbitration before the AAA.<sup>4</sup>

**A. The Arbitration Agreement is Not Procedurally Unconscionable.**

Incorrectly, plaintiffs argue that the arbitration provision contained in each of their Operating Agreements with FedEx Ground is procedurally unconscionable because it is a contract of adhesion.<sup>5</sup> The Pennsylvania courts, however, already

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<sup>2</sup> A copy of this opinion is attached as Exhibit I to the Reply Certification of Jennifer Rygiel-Boyd (“Rygiel-Boyd Reply Cert.”), which was submitted concurrently.

<sup>3</sup> A copy of this opinion is attached as Exhibit F to Rygiel-Boyd Reply Cert.

<sup>4</sup> FedEx Ground brought the motion to compel arbitration against plaintiff McKenzie in the event that McKenzie’s claims are not dismissed in accordance with the Suggestion on Record of Party’s Death Pursuant to Rule 25(a) of the Federal Rules of Civil Procedure, which was filed by Richard Haws, Esq. of Cureton Caplan, PC, attorney for plaintiffs, on March 13, 2007.

<sup>5</sup> Plaintiffs improperly ask this Court simply to adopt the findings of the Court in *Johnson, McHenry, and Wieber v. FedEx Ground Package System, Inc.* without analyzing the facts of this case under Pennsylvania state law. The determination of

addressed this issue, and found that an agreement offered on a take-it or leave-it basis is not an unenforceable contract of adhesion. *See e.g., Seus v. John Nuveen & Co., Inc.*, 1997 WL 325792 (E.D. Pa. 1997)<sup>6</sup>, *aff'd*, 146 F.3d 175 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999); *Stebok v. American General Life and Accident Insur. Co.*, 715 F. Supp. 711 (W.D. Pa. 1989), *aff'd*, 888 F.2d 1382 (3d Cir. 1989); *Worman v. FedEx Ground Package System, Inc.*, 76 Pa. D&C4th 292 (Pa. Com. Pl. 2005)<sup>7,8</sup>.

Courts have found that an arbitration agreement is not rendered invalid simply because plaintiffs contend that they lacked any bargaining power. Indeed, the Pennsylvania Supreme Court held that mere inequality in bargaining power is not sufficient to hold a contract unenforceable. *See Witmer v. Exxon Corp.*, 434 A.2d 1222, 1228 (1981); *see also Seus*, 146 F.3d at 184; *Stebok*, 715 F. Supp. at 714.

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procedural unconscionability (or simply put whether an individual had a meaningful choice in accepting the agreement) requires a fact sensitive analysis of each case. It would be imprudent for the Court to simply adopt the rulings in another case without conducting this analysis.

<sup>6</sup> A copy of this opinion is attached as Exhibit J to Rygiel-Boyd Reply Cert.

<sup>7</sup> A copy of this opinion is attached as Exhibit K to Rygiel-Boyd Reply Cert.

<sup>8</sup> While plaintiffs were independent contractors of FedEx Ground and *not* employees, the cited cases are instructive as to the general principles under which Pennsylvania law enforces arbitration agreements.

Courts also have found that an arbitration agreement is not rendered invalid simply because plaintiffs assert that they would not have entered into the contract if their financial circumstances were more secure. *See Stebok*, 715 F. Supp. at 711; *Worman*, 76 Pa D&C4th at 313.

Here, plaintiffs did not lack a meaningful choice in accepting the arbitration provision. They attended informational meetings in which FedEx Ground explained the opportunity and the contract to them. Exh A at 44:18-57:4 attached to Rygiel-Boyd Reply Cert.; Cline Cert., ¶ 8. Additionally, they were given subsequent opportunities to meet with the management of FedEx Ground and ask questions. Exh A at 60:20-63 attached to Rygiel-Boyd Reply Cert.; Cline Cert., ¶¶ 9-14. In fact, McMahon admitted that he had numerous discussions with the management at FedEx Ground for four months prior to executing his Operating Agreement. Exh. B attached to Rygiel-Boyd Reply Cert. As such, each of the plaintiffs had a meaningful choice in accepting the contract with FedEx or to pursue other opportunities. Cline Cert., ¶ 12; *see Worman*, 76 Pa D&C4th at 312-14. FedEx Ground did not, and could not have, forced plaintiffs into accepting the Operating Agreement.

Moreover, plaintiffs have not proffered any evidence that they lacked any meaningful choice about whether to accept the Operating Agreement.<sup>9</sup> Accordingly, the arbitration agreement is not procedurally unconscionable and should be enforced.

**B. The Arbitration Agreement is Not Substantively Unconscionable.**

Plaintiffs also argue that the arbitration provision is unconscionable because its terms purportedly unreasonably favor FedEx Ground. As demonstrated below, this is untrue. The various terms of the arbitration agreement do not unreasonably favor FedEx Ground. Indeed, several of the terms have been already upheld under Pennsylvania law.

Assuming, however, that plaintiffs are able to prove that certain terms are unconscionable (which they cannot do), the proper remedy is not to invalidate the arbitration agreement. Rather, the Court should sever the offending term and compel arbitration. *See Spinetti v. Service Corp. Int'l*, 240 F. Supp.2d 350, 357 (W.D. Pa. 2001), *aff'd*, 324 F.3d 212, 214 (3d Cir. 2003); *Zumpano v. Omnipoint*

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<sup>9</sup> Plaintiffs maintain that they obligated themselves to delivery vehicles prior to receiving the Operating Agreements and, as such, had no choice but to accept the Agreement. However, plaintiffs fail to proffer any evidence that they were not given opportunities to learn about the business opportunity and the Operating Agreement before acquiring vehicles and executing the contract.

*Communications*, 2001 WL 43781, \*12 (E.D.Pa. 2001)<sup>10</sup>; *Giordano v. Pep Boys-Manny, Moe & Jack, Inc.*, 2001 WL 484360 (E.D.Pa. 2001)<sup>11</sup>.

**1. The limitation on damages is not unconscionable.**

Plaintiffs argue that the fact that damages are limited to the term of the contract makes the agreement unconscionable. However, it is black-letter contract law that any claim under a breach of contract theory limit damages to the length of the contract term. Parties may always contract for liquidated damages where necessary to fully compensate either party for a breach but absent liquidated damages in the contract (as in this case) the non breaching party will be limited to his/her expectation under the contract. *See Trosky v. Civil Service Com'n, City of Pittsburgh*, 652 A.2d 813, 817 (Pa. 1995) (*citing* Restatement (Second) of Contracts §344).

Plaintiffs Lucey, Lynch, Cucinotti and Hough assert claims for breach of contract. Therefore, regardless of where their claims are adjudicated (in arbitration or in court), they will be limited to damages available under contract law. Under the arbitration agreement, the measure of damages includes the settlement that would have been earned during the remainder of the contract term. Plaintiffs will not be entitled to recover punitive damages. Nor will they be able to recover other

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<sup>10</sup> A copy of this opinion is attached as Exhibit L to Rygiel-Boyd Reply Cert.

<sup>11</sup> A copy of this opinion is attached as Exhibit G to Rygiel-Boyd Reply Cert.

compensatory damages. Therefore, the damages limitation contained in the arbitration agreement is appropriate for plaintiffs' breach of contract claims. *See Worman*, 76 Pa. D&C4th at 311. Plaintiffs are not prohibited from recovering damages in arbitration that would otherwise be available to them on a breach of contract claim in court. Thus, this term is not unconscionable.

Moreover, the Operating Agreements also limit FedEx Ground's damages. FedEx Ground could seek arbitration in the event an independent contractor terminated his contract without 30 days written notice. However, its damages are limited to either \$500 or \$1,000 depending if the individual operated under a FedEx Home Delivery Operating Agreement or a FedEx Ground Operating Agreement. *See* Lynch Operating Agreement, ¶ 9.1(e); Hough Operating Agreement, ¶ 9.1(e); Cucinotti Operating Agreement, ¶ 9.1(e); McMahon Operating Agreement, § 12.1(e).<sup>12</sup> Clearly, the damages limitation does not unreasonably favor FedEx Ground.

Accordingly, this term is not unconscionable and arbitration should be compelled.

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<sup>12</sup> Plaintiffs' Operating Agreements are attached to the Certification of Jennifer Rygiel-Boyd, Esq. submitted on March 26, 2007 as Exhibits A, B, C, D, E, and F respectively.

**2. The contractual statute of limitations is not unconscionable.**

Courts have found that the 90-day statute of limitations for filing a demand for arbitration with the AAA contained in FedEx Ground's arbitration provision not to be unreasonable. *See Worman, supra.; Letourneau v. FedEx Ground Package System, Inc.*, 2004 WL 758231 (D.N.H. 2004)<sup>13</sup>. As recognized by the Court in *Letourneau*, Pennsylvania does not prohibit "parties from entering into agreements to shorten the period in which claims may be raised as long as such agreements are reasonable under the circumstances." *Letourneau*, 2004 WL 758231 at \*1 (*citing McElhiney v. Allstate Ins. Co.*, 33 F. Supp.2d 405 (E.D. Pa. 1999)). 90 days is reasonable as it

is sufficient time for a potential plaintiff to determine whether he intends to bring a claim for wrongful termination. In addition, there would be no continuing violation as his contact with [FedEx Ground] presumably would have ended at the time of the termination of his [contract].

*Worman*, 76 Pa D&C4th at 307. Further, reinstatement is a possible remedy under the arbitration agreement and, thus, the parties have an interest in resolving the claim expeditiously.

Plaintiffs have not provided any evidence demonstrating that the 90-day limitation is unreasonable. The speculative and unsupported allegations of counsel are not enough to prove that the 90-day time limitation was unconscionable.

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<sup>13</sup> A copy of this opinion is attached as Exhibit H to Rygiel-Boyd Reply Cert.

Additionally, plaintiffs failed to cite to any Pennsylvania case law supporting their position. Accordingly, the Court must find that the 90-day statute of limitations for filing a demand for arbitration with the AAA contained in FedEx Ground's arbitration provision to be reasonable and not unconscionable.

**3. The expenses associated with arbitration are not prohibitive or unconscionable.**

Plaintiffs claim that requiring them to pay their own attorney fees and their portion of the arbitrator's fees renders the arbitration agreement unconscionable. Dividing the arbitrator's fees and requiring the parties to each pay for their own attorneys does not necessarily render the agreement unconscionable. Moreover, pursuant to the arbitration agreement, the arbitrator uses his/her own discretion in dividing AAA fees and AAA assessed expenses when rendering an award. An arbitrator may not necessarily require plaintiffs to pay for 50% of these fees and expenses.

Cases in which agreements have been struck down as unconscionable based on a fee provision have mostly centered on cases in which the costs of conducting the hearing and paying the arbitrator's fees far exceeds the amount of money the plaintiff was seeking. *See e.g., McNulty v. H&R Block Inc.*, 843 A.2d 1267 (Pa.Super. 2004)(finding fee provision unconscionable where it did not allow for class action when each plaintiff was only seeking approximately \$30 and the fees for arbitration were at least \$50). This is not the case here. In fact, when filing for

arbitration with the AAA, Lynch demanded \$130,000 in damages, McMahon demanded \$200,000 in damages, and McKenzie demanded \$124,000 in damages, for example. Exhs. C-E to Rygiel-Boyd Reply Cert.

Clearly, plaintiffs are not seeking minimal damages that would make it economically foolish or unsound for them to avail themselves of arbitration. As in the *Worman* case, plaintiffs here failed to provide any evidence that the cost of arbitration would in some way be oppressive and prohibitive in order to succeed.<sup>14</sup> *See Worman*, 76 Pa D&C4th at 304-05. Nor did they provide any evidence that the cost of arbitration would outweigh their potential recovery. *Id.* Thus, this term is not unconscionable and arbitration should be compelled.

**4. The discovery limitation does not render the arbitration agreement unconscionable.**

Plaintiffs also claim that the agreement is unconscionable based on the fact that there is no formal discovery under the agreement. This discovery limitation is consistent with the Pennsylvania law and AAA rules for Commercial Arbitration, which does not require any form of extensive discovery be available to the parties. *See* 42 Pa.C.S.A. § 7342; AAA Rules for Commercial Arbitration Rule 21. Additionally, under the AAA rules, the parties are required to exchange documents, witness lists, and a copy of all exhibits to be used at the hearing. *Id.*

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<sup>14</sup> Plaintiffs provided a chart of their maximum damages in arbitration. (Opposition, p.19 n.57). However, it is unclear what those calculations are based on or how they derived those amounts.

**5. It is not unconscionable to not require the arbitrator to issue a written opinion.**

To be substantively unconscionable, the contractual terms must unreasonably favor the party with the greater bargaining power. *See Witmer*, 434 A.2d at 1228. As the Court in *Worman* noted, the lack of a written opinion “affects both parties equally and therefore does not favor either side.” *Worman*, 76 Pa D&C4th at 312. Thus, this term cannot be unconscionable. Moreover, this term is consistent with Pennsylvania law which does not require an arbitrator to issue a written opinion. *See* 42 Pa.C.S.A. § 7342.

In sum for all of the foregoing reasons, as well as the reasons previously set forth in its opening brief, the arbitration agreement between plaintiffs and FedEx Ground Package System, Inc. is not unconscionable.

**CONCLUSION**

Accordingly, FedEx Ground respectfully requests that claims on behalf of Lucey, Lynch, Cucinotti, and Hough be compelled to arbitration, and that McMahon’s arbitration award be confirmed and his claims dismissed with prejudice.

Respectfully submitted,

OGLETREE, DEAKINS, NASH,  
SMOAK & STEWART, P.C.

Date: May 25, 2007

By: s/ Jennifer Rygiel-Boyd (JR 5676)