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**SUPERIOR COURT OF WASHINGTON FOR KING COUNTY**

JACOB DANIEL TUMULTY, an individual, and TAJ KARL UHDE, an individual,

*Plaintiffs,*

v.

FEDEX GROUND PACKAGE SYSTEM, INC., et al.,

*Defendants.*

NO. 03-2-40355-5 SEA

*Plaintiffs' Reply Brief in Support of Motion to Amend Complaint (re-noted for Tues. May 18, 2004 – no oral argument)*

**Introduction**

Plaintiffs originally noted this motion for 4/22/04, but in keeping with their practice of granting extensions to the Defendants at every stage of this litigation, they agreed to re-note it and give Defendants an additional 3 weeks to respond. This accommodation has resulted in roughly 40 pages (plus voluminous attachments) of collective opposition from Defendants FedEx Ground and Royong, leaving Plaintiffs one court day to respond.

Notwithstanding the barrage of challenges, FedEx Ground and Royong fail to explain why this Court should abandon the liberal application of CR 15 and prevent Plaintiffs from amending their complaint at this early stage of the litigation. They raise premature challenges to the merits of the amended claims and the propriety of a class,

Plaintiffs' Reply Brief in Support of Motion to Amend - 1

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*Original*

1 matters which instead belong under a CR 56 heading/certification opposition when the  
2 parties have had adequate time to conduct discovery. This is especially true in light of the  
3 attachments to FedEx Ground's opposition, which have yet to be produced in response to  
4 Plaintiffs' 11/03 Requests for Production (we are seeing them for the first time), and will  
5 likely be produced once this motion has been resolved.

6 Had Plaintiffs initiated this case as a class action, Defendants would have had no  
7 basis to block access to the clerk's office and prevent it from being filed. By the same  
8 token, it makes no sense for Plaintiffs to be prevented from filing an amended complaint at  
9 this early stage of the litigation, especially when it raises identical factual allegations and  
10 analogous federal claims as in the original complaint. In sum, leave should be "freely  
11 given" to allow Plaintiffs to amend their complaint, and granting such relief will not  
12 prevent any Defendant from seeking dismissal on the merits or opposing class  
13 certification. Finally, because FedEx Ground has attempted to turn this motion into a  
14 certification hearing before the complaint has even been amended, Plaintiffs seek leave to  
15 file an over-length brief.

17 **Comment on FedEx Ground Facts**

18 This case remains in its infancy, with no discovery having been initiated by  
19 Defendants Royong, Fairley Sparks or FedEx Ground and no depositions having been  
20 taken by any party. The disturbing defense advanced by the parties is that no one is the  
21 "employer" of any Plaintiff or class member, leading to the harm revealed in this case, in  
22

23 Plaintiffs' Reply Brief in Support of Motion to Amend - 2

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1 which overtime laws were not followed, payroll taxes were not withheld (harming FICA,  
2 Medicare, and L&I trust funds), and labor laws were disregarded.

3 FedEx Ground injects into the record a Contractor Agreement which it has yet to  
4 produce in discovery and which purport to place the onus of complying with wage laws on  
5 its Contractors, giving the latter full control over how Drivers do their jobs. The evidence  
6 in this case, and Royong's cross claim, reveal just the opposite — i.e. FedEx Ground  
7 controls virtually every aspect of how the Driver's does his job. Interestingly, it  
8 undercuts its own defense by citing case law illustrating why these documents are  
9 irrelevant and why it is liable to all Drivers as a "joint employer." Torrez-Lopez, 111 F.3d  
10 633 (9<sup>th</sup> Cir. 1997) (tab 8 of its appendix) (ruling as a matter of law that defendant was a  
11 "joint employer" under the FLSA and related farm law to workers supplied and paid by  
12 independent contractor, where defendant exerted control over workers).  
13

#### 14 Discussion

##### 15 A. CR 15 Generally

16 CR 15 allows a party to amend its pleading by leave of court, which "shall be  
17 freely given when justice so requires." "Amendments should be freely given unless the  
18 opposing party would be prejudiced." See Orland and Tegland, 3A Washington Practice  
19 (Rules of Practice), CR 15, p. 367;. →

20 → Foman v. Davis, 371 U.S. 178, 182182 ("[T]he amendment would have done no  
21 more than state an alternative theory for recovery . . . . If the underlying facts or  
22 circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to  
23

Plaintiffs' Reply Brief in Support of Motion to Amend - 3

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1 be afforded an opportunity to test his claim on the merits."). Courts routinely allow  
 2 motions to amend, even in situations not present in this case, such as when they are made  
 3 well after filing the original complaint, or when new claims are asserted.<sup>1</sup>

4 The touchstone of the CR 15 inquiry is prejudice to the defendants, which is  
 5 often shown by undue delay and unfair surprise. Caruso, at 349-51. The fact that  
 6 material in the amended pleading could have been included in the original pleading is  
 7 generally not dispositive, absent prejudice to the nonmoving party. *Id.* The cases in  
 8 which such motions have been denied generally arise when they come so late in the  
 9 proceedings that the non-moving party would be prejudiced. See Dewey v. Tacoma

11 \_\_\_\_\_  
 12 <sup>1</sup>When a motion to amend is filed at a late stage in the proceedings, the liberal application  
 13 of CR 15 often allows such an amendment, albeit with the potential for a continuance if  
 14 the Defendants need additional time to respond. Kirkham v. Smith, 106 Wn.App. 177  
 15 (2001) (adding new claim 3 weeks before trial ok since the same proof was involved);  
 16 Caruso v. Local Union No. 690, 100 Wn.2d 343, 350-51 (1983) (allowing amended  
 17 complaint 6 years after original and noting "petitioner had notice of a possible issue of  
 18 defamation at the time of the original complaint", and thus was not prejudiced in  
 19 preparing his defense, contacting witnesses, and otherwise securing evidence); Tagliani  
 20 v. Colwell, 10 Wn.App. 227, 233-234 (1973) (reversing trial court's refusal to amend after  
 21 plaintiffs' case dismissed orally on summary judgment, but before order entered, since  
 22 there was no "undue prejudice, dilatory practice, undue delay," or any other reason to deny  
 23 motion); Raffensperger v. Towne, 59 Wn.2d 731 (1962) (amendment proper, but  
 continuance only allowed if defendants establish prejudice by amendment). Amendments  
 are proper even when a complaint changes the theory of a case. Gregory v. Fidelity &  
Casualty Co. of New York, 7 Wn.2d 645 (1941). Moreover, even when new claims are  
 added, courts will still allow the amended complaint. In re Campbell, 19 Wn.2d 300  
 (1943); Kirkham, *supra* (adding new claim 3 weeks before trial ok since the same proof  
 was involved); Zachman v. Whirlpool Acceptance Corp., 120 Wn.2d 304 (1992)  
 (amendment was proper as it involved similar claims already briefed by parties).

1 School Dist. No.10, 95 Wn.App. 18 (1999) (amendment made at last possible minute was  
2 too late); Wilson v. Horsley, 137 Wn.2d 500 (1999) (proper denial where motion to  
3 amend made after mandatory arbitration and on eve of trial).

4 FedEx Ground cites Herron v. Tribune Publishing Co., 108 Wn.2d 162 (1987), for  
5 the proposition that leave to amend is not warranted in this case. In Herron, a prosecutor  
6 sued a paper for defamation concerning articles written about him. More than 10 months  
7 after filing his initial complaint, and after extensive discovery/summary judgment motions  
8 had been filed, the plaintiff sought to amend his complaint and add new claims regarding  
9 different articles. The trial court denied the motion on the grounds that the suit had "been  
10 pending for a substantial period of time" and such an amendment would require  
11 defendants "to contact an entire new set of witnesses and begun new efforts to secure  
12 evidence." *Id.* at 168. The Supreme Court affirmed, but noted that had the amended  
13 complaint alleged claims based on similar facts as in the original, the motion would have  
14 been proper. It noted that such motions would be permissible in keeping with the "judicial  
15 preference for those amendments based on the underlying circumstances set forth in the  
16 original complaint – as compared with amendments raising new claims based on new  
17 factual issues...." *Id.* at 167. It stated:

18  
19 [w]hen an amended complaint pertains to the same facts alleged in the original  
20 pleading, denying leave to amend may hamper a decision on the merits.  
21 Moreover, the defendant in the latter case is more likely to suffer prejudice  
22 because he has not been provided with notice of the circumstances giving rise to  
23 the new claim and may have to renew discovery.

*Id.*

Plaintiffs' Reply Brief in Support of Motion to Amend - 5

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1 FedEx Ground also cites Shelton v. Azar, Inc., 90 Wn.App. 923 (1998) for the  
2 proposition that amended pleadings which seek to add "futile" claims should be  
3 disallowed. In Azar, the amended pleading on its face was defective, as it sought to  
4 circumvent the Industrial Insurance laws by bringing a claim by an injured co-worker  
5 against his fellow worker, while the latter was acting within the scope of his  
6 employment. Azar is inapposite, as nothing on the face of our amended complaint  
7 reveals a futile claim; to the contrary, the amended complaint alleges FLSA violations  
8 and seeks class status, both of which involve viable legal theories. To the extent FedEx  
9 Ground seeks to delve beyond the pleadings and address the facts supporting these  
10 claims, it should do post-discovery, under CR 56 or certification opposition.

11  
12 **B. CR 15 as applied to this case.**

13 In the instant case, the Plaintiffs' motion to amend should be granted because the  
14 amended complaint is timely, raises identical factual allegations as the original, and asserts  
15 related claims. Claims of overtime, missed breaks, and retaliatory discharge are contained  
16 in both the original and amended complaint. The amended claims (under the FLSA)  
17 mirror those under state law, and state courts routinely look to the FLSA when interpreting  
18 Washington law. Chelan County Deputy Sheriffs' Ass'n v. Chelan County, 109 Wn.2d  
19 282, 291 (1987). There is no Herron or Azar concern, as no discovery by Defendants  
20 have taken place, no CR 56 motions have been filed, and the claims are viable.

21 *Defendants have the burden of showing prejudice and have failed to do so. They*  
22 *wisely do not advance the most common CR 15 challenge (timeliness), since the motion*  
23 *Plaintiffs' Reply Brief in Support of Motion to Amend - 6*

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1 to amend was filed just a month after the Defendants' 3/04 Answers. Defendants can  
2 hardly claim undue delay, as they have benefited from numerous extensions by Plaintiffs  
3 (3 extra months to file answers/respond to discovery and 3 extra weeks to oppose this  
4 motion). Moreover, our trial is roughly 1 year away.

5 Defendants also fail to explain how they are in any different position than they  
6 would have been had the Plaintiffs filed a class action on 11/5/03. To the contrary, they  
7 have benefited from the delay, as they have had ample time to investigate the allegations  
8 in the case and are being presented with the amended complaint before they have sent a  
9 single interrogatory or notice of deposition. If there is any prejudice in the delay, it rests  
10 with the FLSA class members, whose federal limitations period may run until they "opt-  
11 in" via notice to the court. Delay, therefore, is Defendants' best friend.

12 Plaintiffs have continued to investigate this claim and waited to amend their  
13 complaint until they verified that their claims are widespread (as evidenced by public  
14 disclosure requests and FedEx Grounds' own admission that it claims to not "employ" any  
15 Drivers). Oddly, Defendants' opposition to the amended complaint encourages class  
16 actions to be filed at the outset, and discourages the kind of responsible investigation  
17 followed by Plaintiffs in this case. Fortunately, CR 15 allows subsequent amendments.

18 Defendants' only challenge to the motion to amend is that it is "futile" — i.e. the  
19 amended claims are so devoid of merit that they should not even be allowed to be asserted.

20 They claim Plaintiffs have failed to join indispensable parties, cannot meet the  
21 requirements of CR 23, and have failed to plead sufficient details of each claim. The

22 Plaintiffs' Reply Brief in Support of Motion to Amend - 7

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1 challenge is akin to a motion to dismiss under CR 12(b)(6), the latter of which this Court  
2 has already once denied (per Royong's motion to dismiss individually), is disfavored, and  
3 routinely fails when there is even the remote possibility that such claims may succeed.  
4 Neigel v. Harrell, 82 Wn.App. 782, 784 (1996) (motion to dismiss improper unless court  
5 can say "beyond a reasonable doubt" that such claims will fail).

6 Defendants will have every chance to raise these issues at a more appropriate time.  
7 They may seek dismissal under CR 56 and challenge the class action at the certification  
8 stage. Such a challenge will be appropriate after the parties have engaged in discovery,  
9 and after Plaintiffs have been able to inspect the kind of documents filed by FedEx  
10 Ground in its opposition. While the Plaintiffs will address the premature arguments raised  
11 below, they emphasize that it is unfair and beyond the scope of CR 15 to consider them.  
12

13 **C. Defendants' challenges to the merits of the amended complaint must fail.**

14 **1. A Primer on the FLSA and MWA**

15 The FLSA and the Washington State Minimum Wage Act (MWA) require  
16 that an employee who works more than 40 hours a week be paid at least time and a  
17 half for each hour in excess of 40 per week. See 29 U.S.C. 207, RCW 49.46.130(1).  
18 Washington state law also requires that employees be provided 2 paid breaks (of at  
19 least 10 minutes each) for each 8 hour shift. See WAC 296-126-092(4); Wingert v.  
20 Yellow Freight Sys., Inc., 146 Wn.2d 841 (2002) (class action on missed breaks).  
21 The employee must also be allowed an unpaid 30 minute lunch. See WAC 296-126-  
22 092. State and federal law make it illegal for an employer to retaliate against an  
23

1 employee who complains about overtime violations. See RCW 49.46.100(2)  
2 (misdemeanor to discharge after employee complains to employer); 29 U.S.C.  
3 215(a)(3); Lambert v. Ackerley, 180 F.3d 997, 1001 (1999).

4 Whether a party is an "employer" or "joint employer" under the FLSA is a  
5 question of law. Bonnette v. California Health and Welfare Agency, 704 F.2d 1465,  
6 1469 (9<sup>th</sup> Cir. 1983); Karr v. Strong Detective Agency, Inc., 787 F.2d 1205, 1206 (7<sup>th</sup>  
7 Cir. 1985). The FLSA defines "employer" as "any person acting directly or  
8 indirectly in the interest of the employer in relation to an employee ...." See 29  
9 U.S.C. 203(d). An "employee" is "any individual employed by an employer." 29  
10 U.S.C. 203(e)(1). The term "employ" means "to permit to work." See 29 U.S.C.  
11 203(g). Washington law, which parallels the FLSA, contains similar definitions.  
12 RCW 49.46.010. The definition of employee is "the broadest definition that has ever  
13 been included in any one act." United States v. Rosenwasser, 323 U.S. 360, 363 n. 3  
14 (1945); Real v. Driscoll Strawberry Assocs., Inc., 603 F.2d 748, 754 (9<sup>th</sup> Cir. 1979)  
15 (noting in a joint employment case that "[c]ourts have adopted an expansive  
16 interpretation of the definitions of "employer" and "employee" under the FLSA, in  
17 order to effectuate the broad remedial purposes of the Act"). These definitions are  
18 the product of legislative intent to cast a wide net over persons fitting within the  
19 definition of "employee." See Nationwide Mut. Ins. Co., v. Darden, 503 U.S. 318,  
20 326 (1992) (FLSA "defines the verb employ expansively" with "striking breadth"  
21 and in such a way as to "stretch[] the meaning of "employee" to cover some parties

23 Plaintiffs' Reply Brief in Support of Motion to Amend - 9

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1 who might not qualify as such under a strict application of traditional agency law  
2 principles.”).

3 An employee may have more than one employer, triggering the “joint  
4 employer doctrine” which is liberally applied to render all entities exerting sufficient  
5 control over the worker to be deemed his “joint employer.” See 29 C.F.R. 791.2.  
6 Torres-Lopez v. May, 111 F.3d 633 (9<sup>th</sup> Cir. 1997) (tab 8 of FedEx Ground  
7 appendix). When determining whether a joint employment relationship exists, courts  
8 look to a number of facts including whether the alleged employer had the power to  
9 hire and fire employees and control the manner in which the job was performed. *Id.*  
10 “The FLSA contemplates there being several simultaneous employers who may be  
11 responsible for compliance with the FLSA.” Dole v. Elliot Travel & Tours, Inc., 942  
12 F.2d 962, 965 (6<sup>th</sup> Cir. 1991). State law parallels federal law vis a vis determining  
13 who is an “employer.” Dewater v. State, 921 P.2d 1059 (Wash. 1996) (court looks  
14 to degree of control in determining if employer)  
15

16 Section 29 USC 216(b) allows a plaintiff in a wage case to bring a class action  
17 in state or federal court. *Id.* This section provides:

18 An action to recover the liability prescribed in either of the preceding  
19 sentences may be maintained against any employer (including a public  
20 agency) in any Federal or State court of competent jurisdiction by any one or  
21 more employees for and in behalf of himself or themselves and other  
22 employees similarly situated. No employee shall be a party plaintiff to any  
23 such action unless he gives his consent in writing to become such a party and  
such consent is filed in the court in which such action is brought.

1 Id. (emphasis added). As set forth below, the import of this section is twofold: First,  
2 the analysis under Rule 23 does not apply; second, a FLSA class member must send a  
3 written request to "opt-in" to the class before he becomes a member and his limitations  
4 period is tolled. Contrast this with a class action involving state claims (i.e. the MWA,  
5 missed breaks, etc.). Under a state class, the elements of CR 23 are considered and  
6 class members must opt out or they are deemed part of the class.

7  
8 With regard to the first matter, the Rule 23 elements (numerosity, typicality,  
9 etc.) do not apply. "[I]t is clear that the requirements for pursuing a section 216 class  
10 action are independent of, and unrelated to, the requirements for class action under Rule  
11 23 ..." Grayson, 79 F.3d at 1096 (attached as Appendix 3 to FedEx brief). Instead the  
12 inquiry is far easier for the plaintiff to meet - i.e. he must show a "reasonable basis"  
13 that he is "similarly situated" to other class members. Id. at 1097. The class  
14 representatives need only show that "their positions are similar, not identical, to the  
15 putative class members." Id. at 1096. This burden is "not a heavy one" and is met by  
16 showing substantial allegations of class wide violations. Id. at 1097.

17 FedEx Ground previews two of its defenses in this case, both of which will fail.  
18 First, it contends that the agreements it entered into with its Contractors required the  
19 latter to follow the wage laws, thereby exempting FedEx Ground from complying with  
20 the same. It further argues that some Contractors in turn entered into agreements with  
21 Drivers, which purport to exempt the Contractors from being "employers" of the  
22 Drivers. The argument was raised and rejected by the 9<sup>th</sup> Circuit in the recent  
23 Plaintiffs' Reply Brief in Support of Motion to Amend - 11

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1 Microsoft line of cases. See Vizcaino v. Microsoft Corp., 120 F.3d 1006, 1013-15 (9th  
2 Cir. 1997)(en banc) (Microsoft II) (workers provided by temp agencies were still  
3 "employees" of Microsoft notwithstanding "independent contractor" agreements the  
4 workers signed conceding that they were not Microsoft "employees."); Vizcaino v.  
5 Microsoft Corp., 173 F.3d 713, 723 (9th Cir. 1999) (Microsoft III) (temp. workers fit  
6 within the class of Microsoft employees: "Even if for some purposes a worker is  
7 considered an employee of the agency, that would not preclude his status of common  
8 law employee of Microsoft. The two are not mutually exclusive.").

9  
10 FedEx Ground next claims that a class action is not proper in this case because  
11 it would be too confusing since one class would require class members to "opt-in"  
12 while the other would require them to "opt-out." Even though this issue is premature,  
13

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16  
17 Torres-Lopez (tab 8 of FedEx Ground appendix) illustrates that federal and class  
18 wage claims may be logically joined. Id. (FLSA joined with Oregon wage claims).

19  
20 **2. The specific challenges**

21 Having addressed the basic components of federal and state wage law, Plaintiffs  
22 now address the particular challenges on the merits of the amended complaint by FedEx  
23 Ground and Royong.

1           a.     **Failure to join indispensable parties.**

2           FedEx Ground claims that Plaintiffs have failed to join indispensable parties in the  
3 proposed class action - i.e. all other Contractors (i.e. the peers of Royong/Sparks). FedEx  
4 Ground claims that these non-parties are indispensable because FedEx Ground and its  
5 Contractors entered into agreements in which the latter purportedly agreed to make all  
6 decisions regarding the Drivers (our evidence and Royong's cross-claim against FedEx  
7 Ground reveal just the opposite). As set forth above, FedEx Ground's defense that it can  
8 "contract away" the broad reach of the FLSA/MWA despite its extensive control over the  
9 Drivers is dubious. Moreover, it does not render the other Contractors "indispensable."

10           CR 19 triggers a two-part inquiry. First, under CR 19(a), the court must determine  
11 whether the absent party is "necessary." This involves an inquiry into whether complete  
12 relief can be obtained in the parties' absence, whether his absence would impair the absent  
13 parties' own rights, or whether his absence would subject any existing party to unfair  
14 liability. If this burden is met and the party is deemed "necessary," the court may require  
15 him to be joined. *Id.* Only if the party cannot be joined, do we finish the remainder of the  
16 CR 19 inquiry under section (b). This latter section requires the court to consider whether  
17 "in equity and good conscience" the action may progress or it should be dismissed. *Id.* at  
18 CR 19(b). Under this latter inquiry, the court considers a number of factors, including the  
19 prejudice the non-party would suffer if not joined; to what extent protective provisions in  
20 the judgment can avoid harm; whether a judgment rendered in the person's absence will  
21 be adequate; and whether the plaintiff will have an adequate remedy if the action is

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23 *Plaintiffs' Reply Brief in Support of Motion to Amend - 13*

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1 dismissed. *Id.*; see also Orwick v. Fox, 65 Wn.App. 71, 79-80 (1992) (police chief not an  
2 indispensable party in police brutality suit against 6 officers).

3 FedEx Ground cannot meet the requirements of CR 19(a) so as to even approach  
4 the CR 19(b) inquiry, illustrating its "indispensable party" claim must fail. Pursuant to CR  
5 19(a), the Plaintiff class in our case may obtain complete relief against the existing parties  
6 - as FedEx Ground is liable under the "joint employer" doctrine for overtime, breaks, and  
7 other violations of the wage laws. See Torres-Lopez, supra (FedEx Appendix, tab 8).  
8 While the Plaintiffs are free to sue as many Contractors as they deem fit (they are the  
9 masters of their own pleadings), they are not required to do so and the decision to sue only  
10 one jointly liable party (i.e. FedEx Ground) as opposed to the other jointly liable party (i.e.  
11 a Contractor), does not render the latter "indispensable." See Washington Practice, CR  
12 19, p. 468 ("Joinder of joint tortfeasors is not generally required, since the liability is joint  
13 and several, and the plaintiff can proceed against one."). Orwick, 65 Wn.App. at 71  
14 (joinder of police chief not required under CR 19 in suit against officers for excessive  
15 force).<sup>2</sup> Moreover, the absent Contractor's rights are not being harmed, as there is no  
16  
17

18  
19 <sup>2</sup> Other courts agree that a Plaintiff may decide whether to sue one or more jointly  
20 liable parties, and the latter's absence is not a CR 19 defect. Goldberg v. Wharf  
21 Constructors, 209 F.Supp. 499 (N.D.Ala. 1962) (member of joint venture or  
22 partnership defendant was not indispensable party); Bedel v. Thompson, 103 F.R.D.  
23 78 (S.D. Ohio 1984) ("a plaintiff is under no requirement to join all parties who  
might be jointly and severally liable.") (interpreting frcp 19); Yates v. Applied  
Performance Technologies, Inc., 209 F.R.D. 143 (2002) (rejecting motion to dismiss  
for failure to join corporate officer in overtime suit, since corporation was already a  
party and plaintiffs could get complete relief against existing parties); Miele v.

1 "right" of theirs which is being enforced in this case. Finally, FedEx Ground faces no  
2 unfair liability in some Contractor's absence, as a joint employer faces complete liability  
3 under the FLSA, regardless of who else may be a party, and therefore the presence or  
4 absence of jointly liable contractors will not increase its own liability. See Torres-Lopez  
5 (tab 8 of FedEx Ground appendix) (joint employer sued, but Contractor was not). To the  
6 extent FedEx Ground seeks to shift its liability as a joint employer in this case to its  
7 Contractors pursuant to its dubious "Contractor Agreements," FedEx Ground is free to  
8 add them as third-party defendants or seek contribution/indemnity from them in a different  
9 proceeding. Interestingly, it has not chosen to assert a cross claim against Sparks in this  
10 action, indicating that it has no such intention of pursuing these Contractors.

11  
12 Finally, it is not unfair for Plaintiffs to sue some Contractors but not others.  
13 Royong and Sparks are only responsible for their own Drivers. They could be sued under  
14 the class action provisions of the FLSA regardless of the number of drivers, since  
15 "numerosity" is irrelevant. Their participation in this action does not expose them to any  
16 greater liability. In sum, the premature CR 19 defense of FedEx Ground fails.

17  
18  
19 Greyling, 892 F.Supp. 107 (S.D.N.Y. 1995) (failure to join CEO in securities fraud  
20 suit naming other officers did not warrant dismissal under indispensable party rule,  
21 since a plaintiff may sue whichever parties it desires when they are jointly and  
22 severally liable; fact that non-joined party has information which makes defense  
23 helpful is irrelevant); Benvenuto v. Taubman, 690 F.Supp. 149 (E.D.N.Y. 1988)  
(nonparty partner is not indispensable party, since partners are jointly and severally  
liable)

1           **b. Inability to meet the CR 23 elements**

2           FedEx Ground and Royong claim that the Plaintiffs cannot meet the elements of  
3 CR 23 and therefore the complaint should not be amended so as to assert a class. This  
4 argument is nothing more than a premature brief in opposition to certification, something  
5 that the local rules do not envision happening until well after the Defendants have filed  
6 their Answers to the amended complaint and discovery has taken place. Moreover, it  
7 ignores the relevant inquiry and reaches the wrong conclusion as to class viability.

8                           **(1) The FLSA class**

9           As set forth above, the FLSA class claims do not trigger a Rule 23 analysis and  
10 FedEx Ground/Royong do not even address the FLSA class inquiry. Tumulty and Uhde's  
11 amended complaint asserts the pithy requirements of 29 U.S.C. 216 by contending that  
12 they are "similarly situated" to others who were denied overtime and were retaliated  
13 against for complaining about the same. See Amended Complaint, para. 3.1, 3.5. This  
14 burden can be met in this case by looking to FedEx Ground's own interrogatory  
15 answers, in which it admits that it relies exclusively on Contractors and Staffing  
16 Agencies to provide it drivers. Tumulty and Uhde are "similarly situated" to this class,  
17 and therefore certification will be warranted. Moreover, Tumulty is similarly situated  
18 to other Drivers who were fired when they challenged the FedEx Ground system.

19                           **(2) The state class**

20           Defendants FedEx Ground and Royong question whether Plaintiffs meet the  
21 requirements of CR 23 as it pertains to the MWA violations (state overtime, missed  
22 Plaintiffs' Reply Brief in Support of Motion to Amend - 16

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1 breaks, retaliation). Relying on cases addressing the certification stage (as opposed to a  
2 single case addressing this detailed inquiry at the motion to amend/dismiss stage), they  
3 contend that Plaintiffs cannot meet the CR 23 requirements (commonality, typicality,  
4 numerosity, etc.). Despite the prevalence of wage class actions, they claim that a class in  
5 this case is inappropriate because each Driver's claim is too fact specific.

6 The arguments fail for many reasons. While virtually every class action  
7 involves some individual inquiries (i.e. hours worked, breaks missed, etc.), they are  
8 particularly appropriate in wage cases such as this one. See Wingert v. Yellow Freight  
9 Sys., Inc., 146 Wn.2d 841 (2002) (class action for missed breaks). The early  
10 discovery in this case reveals the same general fact pattern -- Drivers are not paid  
11 overtime and no one claims to "employ" them. Turnulty and Uhde worked for 3  
12 different Contractors and one Staffing Agency, yet the manner in which they performed  
13 their jobs was identical -- pick-up and deliver FedEx Ground packages under the eagle  
14 eye of FedEx Ground. Moreover, the Department of L&I's investigation of overtime  
15 complaints against FedEx Ground Contractor Bertram and Sons in 2000 reveals that the  
16 evasion of the overtime laws has been happening for years, and remarkably continues to  
17 the present time, while FedEx Ground turns a blind eye on to the system it created.  
18 Common threads bind this class. See Brown v. Brown, 6 Wn.App. 249 (1971)  
19 (reversing denial of class of utility customers whose service cut off due to bogus  
20 bills, court notes while differences, same basic problems alleged rendering class  
21 proper); Blackie v. Barrack, 524 F.2d 891, 902 (9<sup>th</sup> Cir. 1976) (not all questions of  
22

1 law and fact need be same, and court takes a common sense approach and if class is  
2 united in determining whether defendants' actions is actionable, this element is met).

3 Royong also questions whether Plaintiffs can meet the numerosity requirement  
4 as to his drivers. Citing the UW gender discrimination case of Oda v. State, 111  
5 Wn.App. 79-80 (2002), Royong claims it employed only 10 drivers and there are no  
6 facts indicating a larger number of drivers with common overtime claims. Oda once  
7 again illustrates the premature nature of Defendants' opposition. The Oda court  
8 addressed the CR 23 elements in connection with a motion for certification after  
9 discovery had been completed, not a motion to file an amended complaint. *Id.*  
10 Moreover, Oda did not involve a FLSA claim, in which the numerosity element is  
11 *irrelevant*. Finally, the numerosity element turns on the circumstances of each case.  
12 Classes as small as 4 and 18 members have been held to be sufficient. See 3A Orland  
13 and Tegland, Washington Practice, Rules of Procedure (4<sup>th</sup> Ed.), p. 538, rule 23  
14 (citing Cypress v. Newport News General & Nonsectarian Hosp. Ass'n, 375 F.2d  
15 648 (4<sup>th</sup> Cir. 1967), and Wm. D. Perkins & Co. v. Diking Dist. No. 3, 162 Wn. 227  
16 (1931)). Because an FLSA class will be appropriate with regard to Royong given  
17 Tumulty's ability to represent other "similarly situated" Royong drivers, the state  
18 class claims will likewise be proper.

19 FedEx Ground next questions at what date the applicable limitations period should  
20 be tolled so as to define the length of the class - i.e. from the date of the complaint  
21 (11/5/03), or the date of our motion to amend (4/04), or some other date. This may be the  
22 most premature objection yet and has no bearing on whether a class is proper, but at most

23 Plaintiffs' Reply Brief in Support of Motion to Amend - 18

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1 pertains to how far back the class will stretch. Plaintiffs will merely reference the relation  
2 back doctrine of CR 15 and suggest this issue be addressed at a later date.

3 FedEx Ground next claims that state and federal class claims are unworkable  
4 because of the opt-in and opt-out disparities under the FLSA and the MWA.

5  
6 Because federal law does not mandate paid breaks, yet state law does, it would be unfair to  
7 prevent plaintiffs from having to pick and choose which rights they can enforce.

8  
9 FedEx Ground next claims that the wrongful termination claims for the class fail  
10 because they are not specific and do not establish that they violate state public policy. To  
11 the contrary, the amended complaint provides fact-specific illustrations of Turnulty's  
12 termination after complaining about the overtime violations, and alleges others  
13 experienced the same fate. Such pleading meets the requirements of CR 8(a) and CR 23,  
14 as well as KCLR 23(a)(2)(B). To the extent FedEx Ground seriously questions whether  
15 such terminations violate Washington public policy, it may seek dismissal of the same at  
16 the CR 56 stage.

17  
18 FedEx Ground raises a similar challenge to Plaintiffs' claims for employee  
19 benefits, arguing that Plaintiffs have failed to state the obvious - i.e. that they were entitled  
20 to benefits in the first place. The entitlement to such benefits may be inferred from the  
21 fact that Plaintiffs are seeking to recover them; requiring such additional language would  
22 amount to overkill and encourage 100 page complaints. When FedEx Ground produces

1 the material sought in discovery, the parties will be able to determine what if any benefits  
2 Plaintiffs are entitled to recover.

3 **Conclusion**

4 Had Plaintiffs filed this action as a class action would FedEx Ground and Royong  
5 have been able to block access to the clerk's office on the grounds that the claims  
6 contained therein were not viable? Why then should they be able to prevent the Plaintiffs  
7 from amending their complaint, when such an amendment is made in a timely manner, is  
8 based on identical facts and claims in the original complaint, and illustrates a disturbing  
9 pattern across this state? CR 15's liberal practice of allowing amended complaints should  
10 prevail, as Defendants have failed to show prejudice. Their premature attack on the merits  
11 may be addressed in due course and should not thwart an amendment before discovery has  
12 progressed. For these reasons, Plaintiffs' motion should be granted.

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15 By: 

16 PHIL BRENNAN,\* WSBA #25711

17 Attorney for Plaintiffs; Date: 5/17/04

18 **Declaration of Phil Brennan/Certificate of Service**

19 Phil Brennan declares under penalty of perjury under Washington law that  
20 today I delivered this document as follows: By email and then first class, postage paid  
21 mail to: Rick Cordes at 2625 B Parkmont Lane SW Olympia, Wa 98502 and Sandra  
22 Bates Gay at 10500 NE Eighth St, Ste 1900, Bellevue, Wa 98004; by hand delivery  
23 to: Karen Kruse at One Union Square, 600 University St, Ste 2900, Seattle, Wa  
98101-4063; Tahl Tyson at 1501 Fourth Ave #2600, Seattle, Wa 98101-1688.