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| DISTRICT COURT, COUNTY OF DENVER<br>STATE OF COLORADO<br><br>1437 Bannock Street<br>Denver, CO 80202   |   |
| <b>Plaintiff:</b><br><br>KENNETH RASCON, on behalf of himself and all others<br>similarly situated<br><br>v.<br><br><b>Defendants:</b><br><br>FEDEX GROUND PACKAGE SYSTEM, INC. and<br>FEDEX HOME DELIVERY, a division of FedEx Ground<br>Package System, Inc. | <b>▲ COURT USE ONLY ▲</b><br><br>Case No. 2008cv7626<br><br>Division: 9   |
| Steven M. Kelso, # 29099<br>Jessica G. Simbalenko, # 37287<br>Wheeler Trigg Kennedy LLP<br>1801 California Street, Suite 3600<br>Denver, Colorado 80202<br>(303) 244-1800<br>(303) 244-1879 Facsimile<br>kelso@wtklaw.com<br>simbalenko@wtklaw.com             | <p style="text-align: center;"><b>ANSWER AND ADDITIONAL DEFENSES OF FEDEX GROUND PACKAGE SYSTEM,<br/>         INC. AND FEDEX HOME DELIVERY TO PLAINTIFF’S CLASS ACTION<br/>         COMPLAINT AND JURY DEMAND</b></p> |

Defendant FedEx Ground Package System, Inc. and its division FedEx Home Delivery (collectively referred to as “FedEx Ground”), by and through its attorneys, deny each and every allegation contained in the Class Action Complaint (the “Complaint”) of Plaintiff Kenneth Rascon, except as expressly admitted below:

**INTRODUCTION PARAGRAPH:** FedEx Ground admits that it is engaged in small package information, pickup and delivery operations nationwide, including in the State of Colorado, and that vehicles with a Gross Vehicle Weight Rating (“GVWR”) of under 10,001 pounds are used as a part of those operations, but denies the remaining allegations in the first sentence of the unnumbered “Introduction Paragraph” of the Complaint. FedEx Ground admits

that Plaintiff drove a vehicle with a GVWR under 10,001 pounds and denies the remaining allegations in the second sentence of that Paragraph. FedEx Ground admits that Plaintiff purports to bring a cause of action as described in the third sentence of that Paragraph but denies that Plaintiff's claims have any merit.

1. FedEx Ground admits that this court has jurisdiction.
2. FedEx Ground admits that venue is proper.
3. FedEx Ground lacks knowledge or information sufficient to form a belief as to Mr. Rascon's residency and on that basis denies the same.
4. FedEx Ground admits that it is incorporated in Delaware and further admits that it engages in business in this judicial district.
5. FedEx Ground admits that FedEx Home Delivery is a division of FedEx Ground and that it engages in business in this judicial district.
6. FedEx Ground agrees that it and its contractors are leading providers of small package information, transportations and delivery services throughout the United States, with connecting international service. FedEx Ground admits that it maintains package sorting and/or distribution locations in Colorado, including in Denver, Colorado Springs, Pueblo and Grand Junction. FedEx Ground denies the remaining allegations in Paragraph 6 of the Complaint.
7. FedEx Ground admits that it provides package delivery and pick-up services in Colorado, in part, through individuals and entities who have entered into Operating Agreements. FedEx Ground denies the remaining allegations in Paragraph 7 of the Complaint.
8. FedEx Ground admits that its contractors utilize vehicles to provide delivery and pick-up services that number in excess of 500. Upon information and belief, FedEx Ground admits that some of this number are vehicles that meet Plaintiff's definition of "Light Trucks." FedEx Ground denies the remaining allegations in Paragraph 8 of the Complaint.
9. Paragraph 9 states a legal conclusion and requires no answer. To the extent that an answer is required, FedEx Ground denies each and every allegation in Paragraph 9 of the Complaint.
10. FedEx Ground admits that Plaintiff provided pick-up and delivery services in or near area code 80403 for some portion of the time period from September 27, 2007 until July 19, 2008. FedEx Ground lacks information or knowledge sufficient to form a belief as to whether Plaintiff provided such services in a vehicle meeting Plaintiffs' definition of "Light Truck." FedEx Ground denies the remaining allegations in Paragraph 10 of the Complaint.
11. FedEx Ground admits that Plaintiff executed the "FedEx Home Delivery Standard Contractor Operating Agreement" in Colorado.

12. FedEx Ground denies each and every allegation in Paragraph 12 of the Complaint.

13. FedEx Ground denies each and every allegation in Paragraph 13 of the Complaint.

14. FedEx Ground denies each and every allegation in Paragraph 14 of the Complaint.

15. FedEx Ground denies each and every allegation in Paragraph 15 of the Complaint.

16. FedEx Ground denies each and every allegation in Paragraph 16 of the Complaint.

17. FedEx Ground denies each and every allegation in Paragraph 17 of the Complaint.

18. FedEx Ground denies each and every allegation in Paragraph 18 of the Complaint.

19. FedEx Ground denies each and every allegation in Paragraph 19 of the Complaint.

20. FedEx Ground lacks information or knowledge sufficient to form a belief as to what Plaintiff considered his “primary duties” to be and on that basis denies each and every allegation in Paragraph 20 of the Complaint. FedEx Ground specifically avers that he agreed to undertake efforts to increase the base of shippers and consignees within his Primary Service Area under Paragraph 1.10(b) of his contract.

21. FedEx Ground denies each and every allegation in Paragraph 21 of the Complaint.

22. FedEx Ground admits that Plaintiff had no management responsibilities over FedEx Ground. FedEx Ground lacks information or knowledge sufficient to form a belief as to Plaintiffs’ supervisory duties and on that basis denies the remaining allegations in Paragraph 22 of the Complaint.

23. FedEx Ground denies each and every allegation in Paragraph 23 of the Complaint.

24. FedEx Ground denies each and every allegation in Paragraph 24 of the Complaint.

25. FedEx Ground alleges that the terms of Plaintiff’s compensation are fully set forth in his Operating Agreement and that the terms of that Agreement speak for themselves. To the

extent that an answer is required, FedEx Ground admits that a portion of Plaintiff's compensation was calculated on a "piecework" basis.

26. FedEx Ground denies each and every allegation in Paragraph 26 of the Complaint.

27. FedEx Ground denies each and every allegation in Paragraph 27 of the Complaint.

28. FedEx Ground admits that Plaintiff was not due overtime by FedEx Ground because he was not an employee of FedEx Ground and denies the remaining allegations in Paragraph 28 of the Complaint.

29. FedEx Ground denies each and every allegation in Paragraph 29 of the Complaint.

30. FedEx Ground denies each and every allegation in Paragraph 30 of the Complaint.

31. FedEx Ground denies each and every allegation in Paragraph 31 of the Complaint.

32. FedEx Ground denies each and every allegation in Paragraph 32 of the Complaint.

33. FedEx Ground admits that Plaintiff purports to bring a class action as described in Paragraph 33 of the Complaint and denies the remaining allegations contained in that Paragraph. FedEx Ground specifically denies that this case may be maintained as a class action.

34. FedEx Ground lacks information or knowledge sufficient to form a belief as to the residencies of the members of the putative class and on that basis denies the allegations in Paragraph 34 of the Complaint.

35. FedEx Ground denies each and every allegation in Paragraph 35 of the Complaint.

36. FedEx Ground denies each and every allegation in Paragraph 36 of the Complaint.

37. FedEx Ground denies each and every allegation in Paragraph 37 of the Complaint.

38. FedEx Ground denies each and every allegation in Paragraph 38 of the Complaint.

39. FedEx Ground denies each and every allegation in Paragraph 39 of the Complaint.

40. FedEx Ground admits that the exact number of the class is unknown because the class as described is not ascertainable. FedEx Ground admits that plaintiff believes the class size to be in excess of 200. Upon information and belief, FedEx Ground avers that the class size is in excess of 100. FedEx Ground denies the remaining allegations in Paragraph 40 of the Complaint.

41. FedEx Ground denies each and every allegation in Paragraph 41 of the Complaint.

42. FedEx Ground denies each and every allegation in Paragraph 42 of the Complaint.

43. FedEx Ground denies each and every allegation in Paragraph 43 of the Complaint.

44. FedEx Ground denies each and every allegation in Paragraph 44 of the Complaint.

45. FedEx Ground denies each and every allegation in Paragraph 45 of the Complaint.

46. FedEx Ground repeats its responses to Paragraphs 1 through 45 of the Complaint as if set fully forth herein.

47. FedEx Ground denies each and every allegation in Paragraph 47 of the Complaint.

48. FedEx Ground denies each and every allegation in Paragraph 48 of the Complaint.

49. FedEx Ground denies each and every allegation in Paragraph 49 of the Complaint.

**PRAYER FOR RELIEF:** FedEx Ground admits that Plaintiff seeks the relief described in the PRAYER FOR RELIEF but denies that any and all of it is proper.

**JURY DEMAND:** FedEx Ground admits Plaintiff's demand as stated.

#### **ADDITIONAL DEFENSES**

Defendant denies that Plaintiff or the purported members of the putative class are entitled to any and all of the relief contained in the Complaint, incorporates by reference the additional

defenses set out below, and seeks dismissal of this action with prejudice, with Plaintiff bearing Defendant's costs and fees of this litigation.

Having fully answered Plaintiff's Complaint, FedEx Ground pleads the following defenses and/or affirmative defenses on its own behalf, without waiving any arguments which it may be entitled to assert regarding the burden of proof, legal presumptions, or other legal characterizations.

FIRST ADDITIONAL DEFENSE  
Failure to State Claim

Complaint fails to state a claim upon which relief may be granted.

SECOND ADDITIONAL DEFENSE  
Statute of Limitations

Plaintiff's claims, and the claims of the purported members of the putative class defined in the Complaint, or some of them, are barred in whole or in part by the applicable statutes of limitations.

THIRD ADDITIONAL DEFENSE  
No Class Action or Collective Action

Plaintiff's claims, and each of them, cannot and should not be maintained on a class and/or collective action basis because those claims, and each of them, fail to meet the necessary requirements for certification as a class or collective action, including, *inter alia*, numerosity, commonality, typicality, predominance, superiority, adequacy of the class representatives, and similarity.

FOURTH ADDITIONAL DEFENSE  
Unconstitutional Class Action

Certification of a class action under the circumstances of this case would violate the parties' rights under the United States Constitution.

FIFTH ADDITIONAL DEFENSE  
No Standing

Neither Plaintiff, nor the purported members of the putative class defined in the Complaint, are covered by the statutes, regulations, and legal theories sought to be invoked in the Complaint. Accordingly, for this and other reasons, Plaintiff's claims, or some of them, are barred in whole or in part because Plaintiff lacks standing.

SIXTH ADDITIONAL DEFENSE  
Estoppel

Pending further discovery, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part because Plaintiff and the putative class members are estopped by their own conduct to claim any right to damages or other monetary relief from FedEx Ground.

SEVENTH ADDITIONAL DEFENSE

Laches

Pending further discovery, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part by the doctrine of laches.

EIGHTH ADDITIONAL DEFENSE

Res Judicata/Collateral Estoppel

Pending further discovery, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred, in whole or in part, by the doctrines of res judicata and/or collateral estoppel.

NINTH ADDITIONAL DEFENSE

Accord and Satisfaction: Payment

Pending further discovery, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part by the principles of accord and satisfaction, and payment.

ELEVENTH ADDITIONAL DEFENSE

Release

Pending further discovery, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part because said claims have been released by the individual(s) in question.

TWELFTH ADDITIONAL DEFENSE

Waiver

Pending further discovery, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part because such claims have been waived, discharged, and/or abandoned.

THIRTEENTH ADDITIONAL DEFENSE

Independent Contractor Status

Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, and each of them, are barred because said individuals are/were independent contractors, and not employees of FedEx Ground.

FOURTEENTH ADDITIONAL DEFENSE

Unclean Hands/ In Pari Delicto

Pending further discovery, Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part by the doctrine of unclean hands and in pari delicto.

FIFTEENTH ADDITIONAL DEFENSE

Knowing Submission/Consent

Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, are barred in whole or in part because Plaintiff and said putative class members knowingly submitted to and acquiesced in the actions alleged in the Complaint.

SIXTEENTH ADDITIONAL DEFENSE

Unavailability of Penalties

To the extent Plaintiff or any purported member of the putative class defined in the Complaint seek penalties, punitive damages, or exemplary damages, they fail to state facts sufficient to support such claims, and such claims are precluded by statute, or violate the Due Process rights of FedEx Ground.

SEVENTEENTH ADDITIONAL DEFENSE

Setoff and Recoupment

If any damages have been sustained by Plaintiff, or by any purported member of the putative class defined in the Complaint, although such is not admitted hereby or herein and is specifically denied, FedEx Ground is entitled under the equitable doctrine of setoff and recoupment to offset all obligations of the Plaintiff or putative class members owed to FedEx Ground against any judgment that may be entered against FedEx Ground.

EIGHTEENTH ADDITIONAL DEFENSE

Conduct Reasonable and in Good Faith/not Willful

Assuming, arguendo, that Plaintiff, and the purported members of the putative class defined in the Complaint, or some of them, are/were employees within the meaning of the applicable law, which FedEx Ground specifically denies, and assuming, arguendo, that any such Plaintiff, and any such purported members of the putative class, or some of them, are entitled to relief under applicable law, which FedEx Ground specifically denies, Plaintiff's claims, and the claims of each putative class member, or some of them, are barred, in whole or in part, on the

ground that FedEx Ground acted in good faith, with a good-faith and reasonable belief that FedEx Ground had complied fully with federal and state law, with a bona fide dispute as to the obligation of payment, and/or in conformity with, and in reliance on, written administrative regulations, orders, rulings, guidelines, approvals and/or interpretations of federal and/or State agencies. Furthermore, assuming, *arguendo*, that a violation of applicable law occurred, which FedEx Ground specifically denies, FedEx Ground's conduct was not willful.

NINETEENTH ADDITIONAL DEFENSE  
Unavailability of Equitable Relief

Plaintiff's claims, and the claims of each purported member of the putative class defined in the Complaint, or some of them, for equitable relief, if any, are precluded.

TWENTIETH ADDITIONAL DEFENSE  
Preemption

Plaintiff's claims, and the claims of the purported members of the putative class described in the Complaint, are preempted, in whole or in part, by federal law, and the federal regulation of interstate commerce in general and the transportation industry in particular.

TWENTY-FIRST ADDITIONAL DEFENSE  
Primary Jurisdiction

Pending further discovery, Plaintiff's claims, or some of them, and members of the putative class, or some of them, are subject to the primary jurisdiction of the Colorado state labor authorities.

TWENTY-SECOND ADDITIONAL DEFENSE  
Overtime Exemption

Assuming, *arguendo*, that Plaintiffs or members of the putative class, or some of them, are/were employees within the meaning of the applicable laws, which FedEx Ground specifically denies, Plaintiff's claims are barred in whole or in part because Plaintiffs, or some of them, were at some or all relevant times exempt from the overtime pay and other requirements of those laws.

FedEx Ground reserves the right to assert by supplemental pleading any defenses or counterclaim which matures or is acquired subsequent to the filing of this answer.

**PRAYER**

FedEx Ground specifically denies Plaintiff's entitlement to any and all of the relief requested contained in the Complaint and incorporates by reference the affirmative defenses set out above, and seeks dismissal of this action with prejudice, with Plaintiffs bearing FedEx Ground's costs and fees of this litigation.

**JURY TRIAL DEMAND**

FedEx Ground demands a jury trial on all issues so triable.

Dated: September 26, 2008

s/ Steven M. Kelso

Steven M. Kelso, # 29099

Jessica G. Simbalenko, # 37287

Attorneys for Defendants

FedEx Ground Package System, Inc.

and its division FedEx Home Delivery

**CERTIFICATE OF SERVICE**

I hereby certify that on this 26th day of September, 2008, a true and correct copy of the foregoing was served via method indicated below, addressed to:

Ronald L. Wilcox  
John F. Walsh  
Hill & Robbins, P.C.  
Denver, CO 80202

First Class Mail  
 Hand Delivery  
 Facsimile  
 Overnight Delivery  
 LexisNexis File & Serve  
 E-Mail

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 E-Mail

s/ Steven M. Kelso by Patricia Chavez