IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
PADUCAH DIVISION

GALE CARTER, *et al.* Plaintiffs, v. PASCHALL TRUCK LINES, INC., *et al.* Defendants.	Civ. A. No. 5:18-cv-00041-TBR

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT ELEMENT TRANSPORTATION'S MOTION FOR SUMMARY JUDGMENT ON THE ISSUE OF SUCCESSOR LIABILITY

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I. INTRODUCTION

Defendant Element Transportation has asked this Court to resolve a controversy of its and its parent corporation's own making—who it is, what is its purpose, and whether it and (indirectly) its parent corporation should be able to be held responsible for forced-labor violations committed by a sister-corporation on behalf of the same parent corporation, which sold all the assets and liabilities related to those forced-labor violations to Element Transportation, before being spun-off to another company, allowing Element Transportation to continue the forced-labor business on behalf of parent, allowing it and the parent to continue benefiting from what Plaintiffs contend is an scheme to receive coerced unpaid labor.

Defendant Element Transportation has argued that it should not be held liable for forced labor violations, because it was not the entity who received the direct benefit of the Named Plaintiffs' forced labor, that liability should remain with the former subsidiary of its parent which sold it this forced-labor business, in an attempt by their mutual parent to divide itself into a fleet management business and a commercial finance business.

Defendant Element Transportation's motion should be rejected because by its parent corporation's own agreements effectuating this reorganization, the parent made clear that the transactions at issue here—the leasing of commercial trucks to individual commercial drivers—was to be consolidated within the fleet management business, and claims arising from those transactions, whether known or unknown, would be assumed by the subsidiary the parent had chosen to continue this business—Defendant Element Transportation. And in the transactions attending the birth of this corporation, Defendant Element Transportation purchased the truck assets of the other subsidiary and agreed to assume all liabilities related to those trucks, both known and unknown.

Accordingly, the Court should find that Defendant Element Transportation is a successor to Defendant EFC and can be liable for violations of the Federal Forced Labor Statute previously committed by Defendant EFC and deny Element Transportation's motion for summary judgment.

Plaintiffs Gale Carter and Forbes Hays ("Plaintiffs") worked for Paschall Truck Lines ("PTL") from October 20, 2016 through December 2015, and March 18, 2016 through June 2016, respectively, and leased trucks from a Delaware-corporation named Element Financial Corp. ("EFC"), to work for PTL. Plaintiffs alleged that once they began working, they found that themselves coerced to work for PTL and EFC without pay, incurring debt rather than earnings, for fear of the contracts they had signed with PTL and EFC. *See* Amended Complaint at ¶¶ 133-143, Docket No. 103. Plaintiffs allege that this scheme—one in which they were coerced to work without pay—violates the Federal Forced Labor Statute, and both the motor carrier and the truck leaser are proper defendants under that statute.

The instant motion is not meant to be a merits determination of whether PTL and/or EFC, and/or any successors to EFC's obligations and liabilities concerning these leases, violated the Federal Forced Labor Statute with respect to Plaintiffs. Rather, Defendant Element Transportation has moved for summary judgment solely on the basis that it is not a successor-in-interest to Defendant EFC under the FFLS. For the reasons that follow, Defendant Element Transportation's motion should be denied.

The following facts are essentially undisputed: (1) Defendant Element Transportation is a wholly-owned subsidiary of Defendant Element Fleet Management Corp. (formerly known as Element Financial Corporation (Ontario)); (2) Prior to September 19, 2016, the truck leasing business in which Plaintiffs participated was operated by Defendant EFC, another wholly owned subsidiary of what is now Defendant Element Fleet Management Corp.; (3) On September 19,

2016, Defendant EFC transferred the truck assets leased to individuals to Defendant Element Transportation, as part of a rearrangement and reorganization of assets whereby Defendant Element Fleet Management Corp. concentrated fleet-management-related assets and liabilities in itself and its subsidiaries, and concentrating commercial-finance-related assets and liabilities in a separate subsidiary in anticipation of the spin-off of a new corporation to be known as ECN Capital Corp.; (4) On October 3, 2016, the Reorganization took place, and on or before that date, Defendant EFC was divested from Defendant Element Fleet Management Corp. and transferred or sold to Defendant ECN Capital Corp.; (4) Defendant Element Transportation continued Defendant EFC's previous business of leasing trucks to individual drivers to work as contractors for diverse motor carriers until December 30, 2016; (5) After December 30, 2016, Defendant Element Transportation indirectly continued in the individual truck leasing business by receiving as its sole source of revenue interest income from promissory note from a joint-venture with Celadon known as 19th Street Capital, set-up to operate the individual truck leasing business going forward.

The significance of these facts is that prior to September 19, 2016, Parent Element operated a fleet leasing business through one of its subsidiaries, Defendant EFC, the entity which leased Plaintiffs their commercial vehicles. After September 19, 2016, through the transactions discussed below, Parent Element continued operating the identical fleet leasing business through a different subsidiary, Defendant Element Transportation. Defendant EFC was divested of this business, and transferred to another corporation, ECN Capital Corp., without any further connection to that business.

The entire point of labor-law successor doctrine is to look past the various methods of corporation reorganization and identify when there is a continuity of business operations such to

make it equitable to assign labor law liability to a successor entity. The instant matter is an easier case than others in which the transactions at issue may simply be the transfer of some assets in an arms-length deal between two wholly separate entities; here, the transactions were between closely related entities, two wholly owned subsidiaries of a single parent organization attempting to reorganize itself and consolidate assets and liabilities in two separate entities based on their respective business lines to make both entities more attractive investment options for the public capital markets. The gist of the reorganization was to separate commercial finance from fleet operations. Because EFC was ultimately going to be transferred to the commercial finance company, but Parent Element wanted to retain the individual truck leasing business in the fleet operations company, the individual truck lease business had to be transferred from one subsidiary of Parent Element to another **prior** to the Reorganization. In so doing, Element Transportation agreed to assume all liabilities, known or unknown, related to the individual truck leasing assets.

The touchstone for finding successorship in federal labor law contexts is whether there was a continuity of business operations such that it would be equitable to allow liability to run against the successor corporation. Here, the continuity in operations was overwhelming, the intention of the Element entities was to concentrate all fleet management operations, including liabilities, into the fleet management corporation and its subsidiaries, and that intention should be respected to find that Defendant Element Transportation is a proper defendant and its summary judgment motion should be denied.

II. FACTUAL BACKGROUND

Plaintiff's Counterstatement of Facts and Opposition to Defendants' Statement of Facts, filed with this Memorandum of Law, are incorporated herein by reference. The most important facts to highlight for the Court are set forth below.

A. Parent Element's individual commercial truck leasing business began in 2011 with a purchase of trucks and truck leasing agreements from Celadon.

Prior to October 3, 2016, Element Fleet Management Corporation ("Element Fleet") was called Element Fleet Management Corporation (Ontario) ("Parent Element"). Parent Element was a fleet management and equipment financing company. *See* Plaintiff's Counterstatement of Facts ("PCOF") at ¶ 1. Defendant Element Fleet Management Co. (Delaware) ("EFC") was the wholly owned subsidiary within same. *Id.* at ¶ 10. Defendant EFC acquired a portfolio of commercial Class A trucks from Celadon Group ("Celadon"). *Id.* At the time of the acquisition, most trucks acquired were already under lease agreements with individual drivers, in leaseback agreements with different motor carriers but functionally identical to the leaseback agreements complained of here. *Id.* at ¶¶ 12; 13; 21; 34.

As part of this acquisition from Celadon, Defendant EFC acquired the right to receive the lease payments made by individuals upon the leased assets. *Id.* at ¶¶ 13; 14. Pursuant to the acquisition, though Defendant EFC was the owner of the trucks, and held the beneficiary interest in the leases associated with same, Celadon, through its subsidiary Quality Companies ("Quality"), remained responsible for servicing trucks, and for matching the trucks with lessors. *Id.* Thus, to the extent Defendant EFC's acquired vehicles were re-leased to new individuals after the acquisition, the new leases reflected that EFC owned the trucks and would receive the benefit of the truck lease payments from the individuals. *Id.* Through Quality, EFC leased its vehicles to individuals signing agreements to transport freight for multiple carriers, including PTL. Regardless of which carrier an individual was seeking to work for, all lease agreements offered by EFC to individual drivers were identical. *Id.* at ¶¶ 12; 13.

On October 20, 2015, and March 8, 2016, respectively, Plaintiff Gale Carter and Plaintiff Forbes Hays entered into agreements to lease trucks from EFC to work for PTL ("Lease Agreements"). PCOF at ¶¶ 15; 16. Each Lease Agreement identified EFC as the Lessor. *Id.* at ¶ 14. Following Plaintiffs' return of those trucks leased from EFC, Quality continued to lease the trucks to new drivers on behalf of EFC's successors, Defendant Element Transport and then 19th Capital, under substantially identical terms. *Id.* at ¶¶ 21; 34.

B. Parent Element changes its name to Element Fleet Management Corporation and Reorganizes its operations.

On February 16, 2016, Parent Element announced it would reorganize into two separate companies. The Reorganization announcement identified that Parent Element would spin-off a part of its business into ECN Capital Corp., and Parent Element would thereafter change its name to Element Fleet Management Corporation ("Element Fleet"). Element Fleet was to continue the North American fleet leasing business of Parent Element. *Id.* at ¶ 20. After the Reorganization was completed on October 3, 2016, *id.* at ¶ 5, Element Fleet continued this business out of the office that was previously held by Parent Element. The officers of the new Element Fleet were previous officers of Parent Element. *Id.* at ¶¶ 6;7. Element Fleet continued to utilize the generic "Element" logo previously used by Parent Element. *Id.* at ¶ 8. Following the completion of the Reorganization on October 3, 2016, Element Fleet did not engage in any business transactions with ECN Capital Corp. *Id.* at ¶ 26.

C. EFC becomes ECN Financial, LLC

On October 3, 2016, the same day of the Reorganization transaction, EFC (then operating as Element Financial, LLC) changed its name ECN Financial, LLC. ("ECN Financial"). PCOF at

¶ 24. As part of the Reorganization, EFC (now ECN Financial) was spun-off from Parent Element and became a wholly owned subsidiary of ECN Capital Corp. *Id.* at ¶¶ 25; 26.

D. Defendant Element Transportation is created to conduct EFC's previous individual truck leasing business after the Reorganization.

In anticipation of the Reorganization, on June 22, 2016, Parent Element created Defendant Element Transportation. PCOF at ¶ 18. Prior to the consummation of the Reorganization on October 3, 2016, on September 19, 2016, while both EFC and Element Transportation were still wholly-owned subsidiaries of Parent Element, EFC transferred its line of business and its portfolio of commercial Class A trucks to Defendant Element Transportation. *Id.* at ¶ 22. In all, approximately 8000-9000 trucks were transferred, 60% of which were leased at that time to individual drivers. Included in this transfer were those trucks previously leased to Plaintiffs. *Id.* at ¶ 30. Following the Reorganization, Defendant Element Transportation was the only subsidiary of either Element Fleet or ECN Capital Corp. operating the individual leasing business previously conducted by Defendant EFC. *Id.* at ¶ 28.

On December 6, 2016, Defendant Element Transportation re-leased Plaintiff Forbes Hays' truck to another over-the-road truck driver, working for a different motor carrier. *Id.* at ¶ 34. The lease terms between Defendant Element Transportation and the lessor were identical to the lease terms Plaintiffs entered with EFC. *Id.* at ¶. The trucks were re-leased through Quality, through the servicing agreement with Celadon that EFC had previously entered. *Id.* at ¶ 33. Defendant Element Transportation's leasing agreement used the same generic "Element" logo that EFC previously utilized on the lease covers. *Id.* at ¶ 37.

E. Defendant Element Transportation Benefitted from its Receipt of EFC's Assets

From September 19, 2016 until December 30, 2016, Defendant Element Transportation received $28.4 million in revenue from the individual truck leasing business previously operated by Defendant EFC. PCOF at ¶ 38. On December 30, 2016, Defendant Element Transportation transferred the truck assets, and beneficiary interest in those truck leases, to 19th Capital. 19th Capital constitutes a joint venture between Defendant Element Transportation and Celadon. *Id.* at ¶¶ 39; 40. Defendant Element Transportation holds an equity interest in this joint venture and was also given a loan receivable from 19th Capital. *Id.* at ¶ 41. In 2017, Defendant Element Transportation received $34.5 million representing interest payments on the loan receivable to 19th Capital. *Id.* at ¶ 43.

Following the transfer of assets to 19th Capital, 19th Capital continued the servicing agreement with Quality to lease the trucks to carriers, including PTL. Through 19th Capital, trucks were leased to drivers for PTL. The lease terms offered by 19th Capital were identical to the terms of the leases from EFC and Defendant Element Transportation.

On October 1, 2018, Element Fleet announced it would wind down the 19th Capital joint venture and re-acquire the assets transferred to 19th Capital and purchase the outstanding equity in same. *Id.* at ¶ 47.

III. STANDARD OF REVIEW

A court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). "When evaluating a summary judgment motion, the reviewing court must construe the facts in the light most favorable to the non-movant." *Gillis v. Miller*, 845 F.3d 677, 683 (6th Cir. 2017).

A "genuine issue of material fact exists when there is sufficient evidence for a trier of fact to find for the non-moving party." *Brown v. Battle Creek Police Dep't*, 844 F.3d 556, 565 (6th Cir. 2016).

IV. LEGAL ARGUMENT

Under common law principles, a new business that purchases another's assets is not liable for the actions of its predecessor. The exception to this rule is the doctrine of successor liability, where in certain circumstances, based upon equitable principles, the new business may in fact become liable for the actions of its predecessors. This is particularly true when the new business continues the business of its predecessor and benefits from the previous unfair practices of same.

In the instant matter, the forced-labor scheme perpetuated by EFC (now ECN Financial) prior to September 19, 2016, was continued after September 19, 2016, by Defendant Element Transportation, and then after December 30, 2016, by 19th Capital. Defendant EFC and Defendant Element Transportation were **both** wholly-owned subsidiaries of Element Fleet Management Corp. at the time they perpetuated the forced-labor scheme. Each entity that engaged in the business of individual truck leases used Quality Companies as their servicer and used identical lease terms with the individual lessees. Each entity that perpetuated the scheme was an entity that was specifically created by Parent Element to manage and run this business line. Indeed, it appears that Element Transportation was created ***to*** continue running this business for Parent Element after the Reorganization so that Parent Element could transfer EFC (now ECN Financial) to the spin-off company without EFC retaining any part of the individual truck leasing business.

Thus, Plaintiffs seek to hold Defendant Element Transportation liable for the Forced Labor Statute violations committed by its predecessor, Defendant EFC, because the facts and the actions attendant upon the transfer of assets between EFC and Element Transportation demonstrates that their mutual parent, Element Fleet Management Corp., sought to make Defendant Element

Transportation the successor to Defendant EFC with respect to both Defendant EFC's assets **and** liabilities. *See* Exhibit 1-R at P000918, P000920, and P000922. Accordingly, the Court should find that Defendant Element Transportation is Defendant EFC's successor-in-interest based on the transfer of the truck assets to Defendant Element Transportation and Defendant Element Transportation's assumption of Element Fleet Management's individual truck leasing business, and Defendant EFC's exit from that business on September 19, 2016, and sale/divestment to ECN Capital Corp. on or after October 3, 2016.

A. The Federal Common Law doctrine of successor liability should be applied to Federal Forced Labor claims

In the modern era, courts have expanded successor liability in labor law claims beyond the traditional common law view of when a merger or transfer of assets does or does not result in the transfer of liability. The doctrine of labor-law successorship was initially developed in the context of duties to arbitrate and unfair labor practices under the NLRA. *See John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 549 (1965); *Golden State Bottling v. NLRB,* 414 U.S. 168, 182 fn. 5 (1973) (identifying the history of the application of the doctrine of successorship in NLRA claims). At its core, labor-law successorship absolves courts of distinguishing between mergers, consolidations, and purchases of assets, and looks instead to whether there is a "continuity" in the employing industry; if so, "the public policies underlying the doctrine will be served by its broad application." *Golden State Bottling,* 414 at 182, fn. 5.

Since these cases, the successor doctrine has been expanded beyond the NLRA to other federal labor and civil-rights statutes. *See e.g. EEOC v. MacMillan Bloedel Containers, Inc*., 503 F.2d 1086, 1090 (6th Cir. 1974) (Title VII); *Leib v. Georgia–Pac. Corp*., 925 F.2d 240, 245–46 (8th Cir.1991) (Vietnam Veteran's Readjustment Assistance Act); *Steinback v. Hubbard*, 51 F.3d

843, 845 (9th Cir. 1995) (FLSA); *Teed v. Thomas & Betts Power Sols., L.L.C.*, 711 F.3d 763, 766 (7th Cir. 2013) (FLSA); *Einhorn v. M.L. Ruberton Const. Co.*, 632 F.3d 89, 96 (3d Cir. 2011) (ERISA); *see also* 29 C.F.R. § 825.107 (codifying doctrine in FMLA's implementing regulations.

The Federal Forced Labor Statute was passed in 2000 to prevent entities from obtaining labor by means of force, threats of serious harm or schemes intended to cause persons to believe that if they did not perform ongoing labor, they would suffer serious harm. 18 U.S. Code § 1589. The statute makes it illegal for anyone who knowingly benefits, financially or by receiving anything of value, from participation in a venture which has engaged in obtaining forced labor, with knowledge or reckless disregard that the labor was unlawfully obtained, is subject to civil suit for said violations. 18 U.S. Code § 1589(b) and § 1595(a).

The Supreme Court, in defending the principle of broad labor-law successorship doctrine, stated the following:

> Employees . . . ordinarily do not take part in the negotiations leading to a change in corporate ownership. The negotiations will ordinarily not concern the wellbeing of the employees, whose advantage or disadvantage, potentially great, will inevitably be incidental to the main considerations. The objectives of national labor policy . . . require that the rightful prerogatives of owners independently to rearrange their businesses and even eliminate themselves as employers be balanced by some protection to the employees from a sudden change in the employment relationship.

John Wiley & Sons, 376 U.S. at 549.

In *EEOC v. MacMillan*, the Sixth Circuit applied the labor-law successorship doctrine to a claim of racial and sex discrimination brought by the EEOC under Title VII against a corporation's successor. 503 F.2d at 1092. However, liability of a "successor is not automatic, but must be determined on a case-by-case basis." *Id.* "We hold only that Title VII per se does not prohibit the application of the successor doctrine, but rather mandates its application." *Id.* In that case, the Sixth

Circuit held that the "equities of the matter favor successor liability because it is the successor who has benefited from the discriminatory employment practices of its predecessor." *Id.* at 1092.

Like the broad remedial purpose of other labor laws to which the doctrine of successorship has been applied, its application in the Forced Labor context is warranted in the instant matter as well.

B. Analysis of the labor-law successor liability factors indicates that Defendant Element Transportation may be held liable for violations of the Federal Forced Labor Statute under the doctrine of successor liability

The Sixth Circuit has "adopted the federal common law of successor liability in employment law cases." *Clark v. Shop24 Glob., LLC*, 77 F. Supp. 3d 660, 691 (S.D. Ohio 2015) *quoting Thompson v. Bruister & Associates, Inc*., No. 3:07–00412, 2013 WL 1099796, at *4–5 (M.D.Tenn. Mar. 15, 2013). Under this doctrine, an entity may be held liable for the wrongdoings of its predecessor where (1) the purchaser expressly or impliedly agrees to assume the obligations; (2) the purchaser is merely a continuation of the selling corporation; or (3) the transaction is entered into to escape liability. *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 182, 94 S. Ct. 414, 424, 38 L. Ed. 2d 388 (1973) (holding a purchasing employer liable for unfair labor practices of predecessor). Because successor liability is an equitable doctrine, strict corporate definitions of successorship cannot be used to restrict its application. *Id*., *see Comer v. Directv, LLC*, No. 2:14-CV-1986, 2016 WL 853027, at *5 (S.D. Ohio Mar. 4, 2016); *Sullivan v. Dollar Tree Stores, Inc.*, 623 F.3d 770, 781-782 (9th Cir. Sept. 27, 2010) ("The inquiry is not merely whether the new employer is a 'successor' in the strict corporate-law sense of the term. The successorship inquiry in the labor-law context is much broader").

In determining whether the doctrine of successorship is applicable, courts must balance (1) the interests of the defendant; (2) the interests of the plaintiff; and "(3) the goals of federal policy,

in light of the particular facts of a case and the particular legal obligation at issue." *Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 554 (6th Cir. 2006). In applying the three -pronged balancing approach, courts in the Sixth Circuit have commonly looked to the nine-factor test set forward in *Cobb v. Contract Transp., Inc.*, 452 F. 3d 543, 554 (6th Cir. 2006) *citing Equal Employment Opportunity Comm'n v. MacMillan Bloedel Containers, Inc.*, 503 F.2d 1086, 1094 (6th Cir. 1974). These factors include:

> (1) whether the successor company has notice of the charge; (2) the ability of the predecessor to provide relief; (3) whether the new employer uses the same plant; (4) whether there has been substantial continuity of business operations; (5) whether the new employer uses the same or substantially same workforce; (6) whether the new employer uses the same or substantially same supervisory personnel; (7) whether the same jobs exist under substantially the same working conditions; (8) whether [the defendant] uses the same machinery, equipment and methods of production; and (9) whether [the defendant] produces the same product.

Cobb., 452 F.3d at 554 *citing MacMillan*, 503 F.2d. 1094.

Successorship liability "must be answered on a case by case basis" and a "new employer . . . may be a successor for some purposes and not for others." *See* June 20, 2018 Memorandum Opinion & Order, Docket No. 80 at 8. Thus, the *Cobb* factors are not the sole test for successor liability, and factors that are inapplicable need not be applied. Nonetheless, courts in this jurisdiction, as well as others, have consistently looked to the *Cobb* factors when determining the imposition of successor liability in the employment law context. *See e.g. Comer v. Directv, LLC,* No. 2:14-CV-1986, 2016 WL 853027, at *5 (S.D. Ohio Mar. 4, 2016); *Thompson v. Bruister & Assocs., Inc*., No. 3:07-00412, 2013 WL 1099796, at *6 (M.D. Tenn. Mar. 15, 2013). As noted by the Sixth Circuit Court, the nine-factors set forth in *Cobb* "are factors in an overarching three-part test considering the equities of imposing a particular legal obligation upon a successor." *Grace v. USCAR*, 521 F.3d 655, 672 (6th Cir. 2008).

Defendant Element Transportation does not re-argue that the nine *Cobb* factors support its position in the instant motion, instead focusing on (a) whether Defendant Element Transportation had notice of Plaintiffs' claims; (b) whether Defendant EFC (now ECN Financial) is able to provide the requested relief; and (c) whether holding Defendant Element Transportation potentially liable as a successor to Defendant EFC would advance the policies of the FFLS. A review of both the *Cobb* factors and the three factors Defendant focused on its opening brief demonstrate that a finding of successorship is warranted here, and the Court should deny Defendant's motion for summary judgment.

1. Whether Defendant Element Transportation had notice of Plaintiffs' claims prior to the acquisition is not dispositive to issue of successor liability.

Because the application of the successorship doctrine is an equitable one, and not dependent on any one factor, a lack of notice is not dispositive to a finding of successor liability. *See e.g., Clark v. Shop24 Glob., LLC*, 77 F. Supp. 3d 660, 692, 693 fn. 14 (S.D. Ohio 2015) (holding that the successor employer could be liable for the FLSA violations of its predecessor even if it did not have notice of the plaintiff's claims at the time it acquired its predecessor's business, where the claims were not filed until after the acquisition). Indeed, in *Clark,* the court noted that it was **impossible** for either the successor employer or the predecessor employer to have had notice of the claims at issue, because they had not been brought at the time of the acquisition.

Here, the transaction at issue occurred on September 19, 2016. *See* PCOF at ¶ 22. The initial complaint in this matter was not filed until October 12, 2017. *See* ECF Doc. No. 1. Thus, neither EFC nor Element Transportation had notice of Plaintiffs' claims at the time of the transaction.

Many of the cases involving the application of the notice factor to the successorship analysis involve cases in which the litigation was initiated prior to the corporate transaction, and the party seeks to continue the action against the alleged successor-corporation. There, lack of notice of the charge would support a finding that the selling corporation hid litigation or potential litigation (i.e., an EEOC charge) from the purchasing corporation, and, therefore, the selling corporation should be liable, not the purchasing corporation. But where the claims are still unknown, a better factor to consider than notice of the charge is notice of the ***potential claims—i.e., the facts underlying the claims.*** *See Clark*, 77 F.Supp.3d at 693, fn. 14. Here, the relevant facts are Plaintiffs' regularly working for PTL without pay—a fact that EFC was or should have been aware of, and a fact that Element Transportation was or should have been aware of at the time it took over EFC's business.

2. Defendant Element Transportation Had Constructive Notice of Plaintiffs' Claims.

The notice factor was developed so that the successor has some time to negotiate a change in the purchase agreement to reflect the potential liability of a lawsuit. *Musikiwamba v. ESSI, Inc*., 760 F.2d 740, 752 (7th Cir. 1985). Thus, it is there to protect the innocent purchaser from becoming liable for the wrongs of its predecessor that it is unaware of. Thus, a successor who engages in due diligence to uncover evidence of a potential claim, and does not find any, should potentially be relieved of liability for its predecessor's actions. *Id,; see also EEOC v. Phase 2 Investments Inc*., Civ. A. No. 17-2463 (D. Md. April 17, 2018) ("Courts look to notice in [the successor liability] context to protect innocent purchasers that were themselves blindsided"). Thus, as set forth above, the relevant issue is not whether a lawsuit or administrative charge has been filed at the time of the

acquisition, but rather whether the successor has access to sufficient information to understand that potential claims may exist based on the business it is buying and continuing.

In determining the existence of notice, Courts may broadly construe facts and circumstances for finding same. Notice of potential claims need not be actual. *See Id*. (noting notice may be actual or constructive); *EEOC v. 786 South LLC*, 693 F.Supp.2d 792, 795 (W.D.Tenn.2010) (holding that "constructive notice may suffice under the successor liability doctrine"). "Constructive notice is information or knowledge of a fact imputed by law to a person ... because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it." *Id.* 693 F.Supp.2d at 795, *quoting Kirby v. Macon County*, 892 S.W.2d 403, 409 (Tenn.1994).

Based upon the above, Courts have broadly construed the circumstances that constitute notice in the determination of successorship. For example, the Supreme Court held in *Golden State* that the presence at negotiations between the two companies of an individual who was the predecessor's manager and became the successor's general manager supported a finding of notice of the successor to the **potential** for a claim. *Golden State*, 414 U.S. at 173. Similarly, in *Harlan Coal*, for example, the Sixth Circuit took note of the proximity of the predecessor and successor's business operations and the extensive news coverage of the circumstances in finding that the successor had knowledge of the unfair labor practice. *Harlan Coal*, 844 F.2d at 386.

Based upon the principles of *Harlan* and *Golden State*, Courts have held that when a successor's officer was a director in the predecessor's company, such facts give rise to a determination of notice for a successor company of its predecessor's unfair labor practices. *See Laborers' Pension Fund v. Lay–Corn, Inc.*, 455 F.Supp.2d 773 (N.D.Ill.2006) (holding notice existed where the successor's officer was also an officer or director in the predecessor company);

see also Sullivan v. Alpine Irr. Co., No. 09 C 2329, 2011 WL 1575617, at *6 (N.D. Ill. Apr. 25, 2011) (same).

In the instant matter, Defendant Element Transportation cannot assert that it was unaware of ECN Financial's actions while operating as EFC. The officers of Element Financial, LLC, which previously conducted business as EFC, were the same as the officers of Defendant Element Transportation. In fact, Michael Beland signed the Asset Purchase Agreement between Defendant Element Transportation and Element Financial, LLC on behalf of both entities. PCOF at ¶ 24. Defendant Element Transportation cannot assert that it was unaware of the unfair labor practices of its predecessor. Furthermore, as evidenced by its use of identical lease terms, Defendant Element Transportation continued the unfair labor practices of its predecessors, presumably because of the benefits its predecessors derived from same. *See, e.g.*, Exhibit 1-E at P0001442-1453. Like the holdings in *Golden State* and *Harlan Coal*, notice of the unfair labor practices ECN Financial engaged in, as EFC, can be imputed upon Defendant Element Transportation based on the continuity of officers, business practices, and lease terms both before and after the transaction.

i. Defendant Element Transportation rely on contract language to demonstrate it lacked notice.

Defendant has suggested that it could not have had notice of the potential claims under the FFLS because of a provision in one of the transaction documents in which EFC stated it was not aware of any claims or threatened claims. *See* Defendants' Brief, ECF Doc. 98-1, at 7.

However, because the doctrine of successor liability is an equitable one, in making a determination of notice, entities may not rely upon contractual disclaimers to demonstrate an absence of notice. *See e.g. Shop24 Glob*, 77 F. Supp. 3d at 692 (noting that provisions in an asset transfer agreement "do not control when the federal standard for successor liability is at issue");

see also Finnerty v. Wireless Retail, Inc., No. CIV A 04-40247, 2008 WL 5773652, at *7 (E.D. Mich. Aug. 26, 2008), *report and recommendation rejected*, 624 F. Supp. 2d 642 (E.D. Mich. 2009), *aff'd sub nom. Finnerty v. RadioShack Corp.*, 390 F. App'x 520 (6th Cir. 2010) (noting a defendant "cannot avoid successor liability by merely putting a disclaimer of liability in the Asset Purchase agreement").

Defendant Element Transportation incorrectly argues that this Court cannot impose successor liability because the servicing agreement entered into between Defendant Element Transportation, and ECN Financial, as Element Financial, LLC, holds that the seller is "unaware of any claims." As an initial matter, this contract term cannot control whether Defendant Element Transportation is liable claims related to the assets it purchased, as Defendant Element Transportation **expressly agreed to assume all liabilities of the seller, known or unknown**, as set forth in Section 2.2 of the Asset Purchase Agreement, entered into on the same date as the servicing agreement. *See* Exhibit 1-K, § 2.2, at ET000067. That provision states that the Buyer, i.e., Element Transportation, is assuming the following liabilities:

> All debts, liabilities and obligations of Seller in respect of or relating to the Transferred Assets that arise, accrue or are to be performed as a result of, on or after the date hereof, whether primary or secondary, direct or indirect, **known or unknown**, fixed or contingent, including, without limitation, any transfer taxes not required to be charged or collected by Seller;

Id.

The Asset Purchase Agreement further provided that the Seller, i.e., EFC, was not making any representations or warranties other than those contained in the Asset Purchase Agreement, and any other representations and warranties were expressly disclaimed. *Id.* at ET000068.

Thus, the Asset Purchase Agreement makes clear that Defendant Element Transportation is on notice for the potential of unknown claims to arise, and, accordingly, would have factored

that potential into the price that was paid for EFC's assets. That Defendant EFC also represented in the SUBI that it was not aware that litigation would be filed related to these assets a year later is accordingly simply an uncontroversial statement of fact lacking legal significance, since Defendant Element Transportation had already agreed it would assume liability for future claims arising from these assets. This assumption of future liability for unknown claims satisfies the notice factor and makes it abundantly equitable to hold Defendant Element Transportation responsible as a successor for the instant claims.

3. The Ability of the Predecessor to Pay Relief is Not Established and is Irrelevant to the Instant Analysis.

Defendant Element Transportation asserts because EFC remains a going concern and is not defunct, Element Transportation should not be deemed a successor-in-interest to Defendant EFC. First, that ECN Financial LLC exists and may have the ability to pay a judgment against it on Plaintiffs' claims does not preclude a finding of liability against Defendant Element Transportation based on Defendant Element Transportation's assumption of ECN Financial LLC's relevant assets and business. *See e.g. Wheeler v. Snyder Buick, Inc*., 794 F.2d 1228 (7th Cir. 1986) (holding the successor liable for the unfair labor practices of its predecessor, even when the predecessor had ability to provide relief, on the basis that the successor could seek indemnification from the successor).

ECN Financial LLC does not retain the assets of its predecessor which gave rise to the damages Plaintiffs incurred. Rather, the leasehold assets and the beneficiary interest in the leases associated with same were specifically transferred to Defendant Element Transportation via the Asset Purchase Agreement. *See* Ex. 1-K. This was done for maintaining both the assets and the

vehicle leasing business with a subsidiary of the renamed Parent Element, i.e., Element Fleet, after the Reorganization. *See* PCOF at ¶ 9.

It should also be noted that per the Second Amended Complaint, and Defendant Element Transportation's arguments, Plaintiff has sought to impose liability on ECN Financial, LLC in addition to or in the alternative to Defendant Element Transportation, as the entity which owned Plaintiffs' trucks and received payments from Plaintiffs during Plaintiffs' employment and forced labor.

But that Element Financial LLC may be jointly and severally liable in-whole or in-part with Element Transportation for violations of the Forced Labor Statute does not absolve Element Transportation from liability for the same violations. Rather, courts in this circuit have specifically found that more than one entity can be held liable for the predecessor's bad acts under the doctrine of successor liability. *See e.g. Kelly v. Thomas Solvent Co*., 725 F.Supp. 1446, 1458 (W.D. Mich. 1998).

In the matter of *Kelly v. Thomas Solvent Co*., the plaintiffs sought to impose liability against Thomas Solvent Company, and four of Thomas Solvent Company's spin-off corporations, for environmental waste violations committed by Thomas Solvent Company prior to the creation of the spin-off corporations. In granting summary judgment for the plaintiffs, the Western District of Michigan Court held that the each of the four spin-off corporations were also liable to plaintiffs under the theory of successor liability because, even though Thomas Solvent continued to operate, the spin-offs had benefitted from the practices of their predecessor, and because they continued the business of their predecessor. The Court further held that the broad application of the doctrine of successorship was desirable because it not only incentivized better practices by all corporations,

but further because "it encourages defendants to locate and implead other responsible parties." *Kelley*, 725 F. Supp. at 1458.

Like the facts in *Kelly*, in the instant matter, Plaintiffs assert that both Element Financial, LLC (now doing business as ECN Financial, LLC) and Defendant Element Transportation represent corporations that continued the business of EFC following the Reorganization of Parent Element. If Defendant Element Transportation believes that its predecessor misrepresented the value of the assets Defendant Element Transportation "purchased" pursuant to the Asset Purchase Agreement, it is within its rights to seek remedies for same directly from ECN Financial, LLC. Of course, such an argument ignores the reality that the Reorganization did not involve arms-length transactions in which it was possible for ECN Financial LLC to "dupe" Element Transportation as to the legal significance of the transfer of assets. Rather, the entire Reorganization was managed and directed by officers and employees of Parent Element.

Accordingly, the existence of more than one potential successor with ability to provide relief does not preclude a finding of liability against Defendant Element Transportation. Accordingly, this factor weighs in favor of a finding of successorship.

4. Defendant Element Transportation Utilized the Same "Plant."

The Lease Agreements utilized by EFC and Defendant Element Transportation each identify the entity's principles place of business as 655 Business Center Drive, Horsham, PA. *See* PCOF at ¶ 11, 16, 17, and 37, Ex. 1-B, 1-C, 1-E. Furthermore, both entities relied upon Quality Companies, LLC to provide the servicing of the Class A vehicles under the leases it held. *See* PCOF at ¶ 14, 34. Accordingly, this factor also weighs in favor of a finding of successorship.

5. Defendant Element Transportation continued the business of EFC.

The fourth factor in the Court's successorship analysis is whether an entity substantially continued the business operations of its predecessor. Moreover, "factors five through nine are essentially sub-factors of factor four." *Cormer* at *6. In the instant matter, it is undisputed that Defendant Element received the leasehold assets held by EFC, PCOF at ¶ 23, and continued the business of providing truck leases to individuals. PCOF at ¶ 33. It did so under the exact lease terms used by its predecessors and used the same generic "Element" logo as its predecessor. PCOF at ¶ 36. It did so as the subsidiary of its parent corporation, Element Fleet, which was Parent Element under a new name. PCOF at ¶ 2. Element Fleet operated its business from the same headquarters it had used when it was Parent Element. PCOF at ¶ 6. Within the subsidiaries of Element Fleet, Defendant Element Transportation was the entity that continued the business of EFC. PCOF at ¶ 29. Thus, factors four through nine all weigh heavily in favor of a finding of successorship.

C. <u>A Finding of Successorship would further the goals of the Federal Forced Labor Statute's Policy</u>

While the *Cobb* factors are merely factors for a Court to consider in making a determination of successor liability, "the ultimate inquiry always remains whether the imposition of the particular legal obligation at issue would be equitable and in keeping with federal policy." Order dated June 20, 2018, ECF Docket No. 80, at 8, *quoting Cobb v. Contract Transp., Inc.*, 452 F.3d 543, 554 (6th Cir. 2006).

In this matter, Defendant Element Transportation continued the business of EFC, including the unfair leasing practices giving rise to Plaintiffs' Forced Labor Statute claims, and benefitted from same, earning $28.4 million dollars in the short period of time in which it engaged in the

leasing of trucks to individual owner-operators, and more than $30 million dollars in loan interest through its ability to sell this business. PCOF at ¶¶ 39, 42-44. Given same, it would be equitable to hold Defendant Element Transportation liable for its predecessors' violations of the Federal Forced Labor Statute.

Though the Federal Forced Labor Statute has been most commonly applied to those who hold undocumented immigrants for peonage or domestic service and those who hold individuals for the sex trade, this Court has specifically rejected the limitation of its application to such narrow circumstances. June 20, 2018 Order, ECF Doc. No. 80, at 21-22 ; *See also United States v. Callahan*, 801 F.3d 606, 617 (6th Cir. 2015) ("The statute's express terms do not limit its application to immigrant victims or sex workers"). In fact, in the development of the law, Congress specifically identified that criminal laws penalizing only servitude through physical threats or legal coercion were insufficient to punish conduct "that can have the same purpose and effect," and thus identified the law as a means of expanding the courts' ability to hold individuals and entities accountable for imposing "significant violations of labor, public health, and human rights standards worldwide." HR. Conf. Rep. 106-939 at 102. Through this statute, Congress sought to hold accountable "whoever knowingly benefits, financially or by receiving anything of value, from participation in a venture" that results in a violation of the statute.

It is uncontested that Defendant Element Transportation benefitted from the individual leasing business it received from ECN Financial. It earned profits in the short time it directly operated the program. *See* PCOF at ¶ 39. Then, because of the program's profitability, it was able to sell same for an equity share in a joint venture, and a loan receivable upon which it continues to earn significant interest in the tens of millions of dollars. PCOF at ¶ 40-44. Thus, if this scheme is a forced-labor racket, it would **frustrate** the purposes of the statute to shield Element

Transportation from liability, especially since Element Transportation's parent, Element Fleet, divested itself of EFC after it had stripped EFC of this line of business and transferred it to Element Transportation. ECN Capital Corp. is a wholly separate company from Element Fleet, which is the new name of Parent Element, which operated as one of its line of businesses the forced-labor scheme complained of in this lawsuit. It may be appropriate to hold the subsidiary operating the forced-labor scheme accountable instead of the parent, but it is not appropriate for let the parent direct one subsidiary to transfer the forced-labor business to a second subsidiary, then sell the now-empty first subsidiary to a third-party, and then have the second subsidiary disclaim liability under the act.

Furthermore, Defendant Element Transportation cannot nakedly assert that the labor arrangement complained of herein was not coercive or did not involve forced labor. The coercive and exploitative labor conditions of truck-driving labor operated on a leased-driver model have been documented by recent journalist investigations, describing the coercive nature of these arrangements.

For instance, on June 16, 2017, prior to the filing of this lawsuit, USA Today published an investigative report showing that truckers in lease contracts suffer conditions reminiscent of indentured servitude. In publishing the story, the newspaper described the life of a lease to own operator who worked 16-hour days and earned as little as 67 cents per week.[1] The conditions

[1] *See* USA Today "Rigged. Forced into Dept. Worked Past Exhaustion. Left with Nothing." June 16, 2017, available at https://www.usatoday.com/pages/interactives/news/rigged-forced-into-debt-worked-past-exhaustion-left-with-nothing/. *See also See also Transcript* PBS Newshour "Labor Violations Force Truckers Into Life of Servitude." June 17, 2017, available at https://www.pbs.org/newshour/show/labor-violations-force-truckers-life-servitude ("We are looking at guys doing 100 hours a week, 120 hours a week. And even if the pay is so bad they're taking home pennies on the hour, they have no choice but to say yes, because — so, if they fall

described in this piece are the exact conditions asserted by Plaintiffs in support of their claims of violations of the Federal Forced Labor Statute.

Defendant Element Transportation's assertion that Plaintiffs have not properly plead conditions of "modern day slaves" is incorrect and has already been rejected by this Court. Furthermore, the assertion that the remedial purpose of the Forced Labor Statute would not be advanced by holding Defendant Element Transportation liable as a successor is also incorrect. Defendant Element Transportation benefitted from the scheme of its predecessor by inheriting the leases associated with the trucks leased by Plaintiffs. It earned significant sums in 2016 when it continued to perpetrate the scheme that its predecessor EFC had engaged in. Furthermore, even when it ceased engaging in the individual leasing business, it only did so because it created a joint venture that continued to perpetrate the scheme, while Defendant Element Transportation earned a continual benefit, in the form of loan interest, from same.

It is again important to note that Plaintiffs assertion that Defendant Element Transportation be liable for violations of the Federal Forced Labor Statute is not based upon its mere purchase of EFC's assets. Rather, in the instant matter, Defendant Element Transportation was created from the reorganization of EFC's parent company, and thereafter continued the business that EFC previously engaged in. Based on its continuity of the business operation that underlies the violations of the Forced Labor Statute, and the benefits Defendant Element Transportation has

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behind, for instance, on a week, the debt carries over to the next week. And they can actually owe their boss money come Friday.")

received from same, it would be equitable to hold Defendant Element Transportation responsible for same.

D. Defendant Element Transportation Constitutes a Defendant Within the Plain Meaning of the Forced Labor Statute

Unlike other employment statutes, the Forced Labor Statute broadly identifies who could constitute a defendant under this claim. In fact, the statute specifically imposes liability upon "whoever knowingly benefits" from a scheme in violation of its prohibitions with, at a minimum, reckless disregard as to whether the labor at issue was secured through impermissible coercive means. 18 U.S.C. § 1589(b). Defendant Element Transportation received the financial benefit of the scheme EFC had participated in and set-up, PCOF at ¶ 39, assumed vehicle leases from EFC in mid-contract at the time of the asset purchase, PCOF at ¶ 31, and was aware of and used the same lease payments and acceleration terms contained in the individual vehicle leases that constitute at least part of the coercive means by which the Plaintiffs' labor was coerced. PCOF at ¶ 36.

When a "statute is clear and unambiguous, then the plain meaning of the statute is generally conclusive, and we give effect to the unambiguously expressed intent of Congress." *Indian Harbor Ins. Co. v. United States*, 704 F.3d 949, 954 (2013). Thus, even if this Court finds that Defendant Element Transportation is not a successor-in-interest to the business of EFC, it is still a properly named defendant, subject to liability for Plaintiff's alleged Forced Labor Statute violations, as a beneficiary of the unlawful venture.

E. Pennsylvania Common Law also supports a finding of successorship as to Plaintiff's Unjust Enrichment Claims

Similar to the federal common law doctrine of successorship, Pennsylvania common law also recognizes the imposition of successor liability in circumstances where "1) the purchaser

expressly or impliedly agreed to assume the obligations; 2) the transaction amounted to a consolidation or merger; 3) the purchasing corporation was merely a continuation of the selling corporation; 4) the transaction was fraudulently entered into to escape liability; and 5) the transfer was without adequate consideration and no provisions were made for creditors of the selling corporation." *Hill v. Trailmobile, Inc.*, 412 Pa. Super. 320, 326, 603 A.2d 602, 605 (1992), *quoting Husak v. Berkel, 234 Pa.Super*. 452, 457, 341 A.2d 174, 176-77 (1975), *abrogated* by *Schmidt v. Boardman Co.*, 608 Pa. 327, 11 A.3d 924 (2011) on other grounds.

Pursuant to Section 2.2 of the Asset Purchase Agreement, Defendant Element Transportation explicitly agreed to assume the obligations of its predecessor, known or unknown. *See* Exhibit 1-K, § 2.2, at ET000067. Further, during the period it continued the individual truck leasing business, Defendant Element Transportation represented a mere continuation of the individual fleet leasing business ECN Financial ran as EFC. Accordingly, successor liability is applicable as to Plaintiffs' common law claims as well.

V. CONCLUSION

The issue before this Court is not whether Plaintiffs will be able to prove violations of the Forced Labor Statute occurred (in fact, the parties have not engaged in discovery related to these claims). Rather, the issue before the Court is which entity or entities are liable for the violations Plaintiffs assert were committed by EFC, given that EFC is no longer operates an individual vehicle lease business.

Plaintiffs assert Defendant Element Transportation, as the continuation of EFC's business, must bear this liability, either by itself or with others. In support, Plaintiffs assert Defendant Element Transportation is the entity that continued the business of EFC, and the scheme perpetrated between EFC and PTL when Parent Element reorganized itself. Based upon the same,

Plaintiffs respectfully request that this Court find Defendant Element Transportation constitutes a successor in interest to EFC and deny Defendant Element Transportation's motion for summary judgment.

Respectfully submitted,

/s Joshua S. Boyette
Joshua S. Boyette, Esq.
Manali S. Arora, Esq.
Travis B. Martindale-Jarvis, Esq.
SWARTZ SWIDLER, LLC
1101 Kings Hwy N, Ste. 402
Cherry Hill, NJ 08034
Tel.: (856) 685-7420
Fax: (856) 685-7417
jboyette@swartz-legal.com

Attorneys for Plaintiffs

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