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

GALE CARTER, *et al.* Plaintiffs, v. PASCHALL TRUCK LINES, INC., *et al.* Defendants.	No. 18-0041

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT PTL'S MOTION FOR SUMMARY JUDGMENT

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I. INTRODUCTION

Defendant has moved for summary judgment as to the Plaintiff Gale Carter's Truth-in-Leasing Act ("TILA") and Forced Labor claims and Plaintiff Carter now responds.[1] Defendant has filed this motion prior to even the start of full-blown merits discovery, premised only on the pre-certification discovery. Accordingly, their arguments are extremely narrow, and turn on two issues it believes it uncovered in the depositions of Carter and Hays and the small number of pre-certification depositions Plaintiffs' took of Defendant's management.

First, Defendant believes that Plaintiffs cannot show any actual damages stemming from an alleged TILA violation, and therefore, Defendant is entitled to judgment as to this claim as a matter of law. Setting aside whether such any of Defendant's legal or procedural premises are correct, Defendant is not entitled to judgment as to Carter's TILA claim because Carter can show actual damages due to Defendant's TILA disclosure violations. Most egregious was PTL's promise that it would **disclose** and **pay** accessorial charges to Lease Operators which PTL received in connection with the freight the Lease Operators' delivered. PTL did not make these payments, and got away with this breach of contract because they failed to disclose the existence of these payments. This failure violates TILA and has resulted in Carter suffering actual damages. As outlined below, Carter has other theories of TILA damages, but because Defendant has narrowly tailored its summary judgment to a single factual predicate, and because Defendant is wrong about that factual predicate, the Court should deny Defendant's motion.

Second, with respect to Carter's Federal Forced Labor Statute ("FFLS") claim, Defendant claims: (1) it did not threaten Carter; (2) if it did, the threat was not of sufficiently serious gravity;

[1] Hays has directed undersigned counsel to seek Defendants' consent for his voluntary dismissal of his claims with prejudice. The parties are finalizing the terms of this dismissal with prejudice, but because he is withdrawing, Plaintiffs position is that Defendant's motion with respect to Hays is or will soon be moot.

(3) the threat did not force Carter to work against his will; and (4) Plaintiff cannot prove intent. The Court should reject this argument because it is undisputed Defendant included a financial threat of a hefty penalty should Carter cease working for Defendant prior to the expiration of a nine-month lock-in period (and this was not the only threat of financial harm which attended to the forced-labor scheme); Carter testified that this threat coupled with the generally low wages he was receiving made him feel "locked-in" to the working arrangement, and, finally, Defendant's corporate "intention" for imposing the "early termination fee" is, at minimum, an issue of disputed fact. Accordingly, the Court should deny Defendant's motion as to the FFLS claim as well.

II. RESPONSE TO DEFENDANT'S STATEMENT OF FACTS

Defendant did not number the statement of facts contained in its Brief at pages 7-12. Set forth below, Plaintiff responds, pursuant to Fed. R. Civ. P. 56(c), to the facts which (1) Defendant did not support sufficiently pursuant to Rule 56; and/or (2) Plaintiff disputes.

FACT #1

> Under the Service Agreement, Plaintiffs could reject loads, work for other motor carriers, hire their own drivers, and broker their own loads. Id.; Hays Dep., Dep. Ex. 3, § I; Deposition of Anthony Waller ("Waller Dep.") (attached as Exhibit C) at 109:20-23.

Def. Br., ECF Doc. No. 177-1, at 7, § II.A.1, ¶ 1.

RESPONSE #1: Denied in part and admitted in part. Admitted that Plaintiffs could reject loads and could theoretically hire their own drivers under the Service Agreements. Denied that Plaintiffs could work for other motor carriers or broker their own loads while working under the Service Agreements. With respect to driving for other motor carriers while working for PTL, after PTL's Orientation, PTL directed the Drivers to travel to Quality Companies in Indianapolis, Indiana, and to sign Lease Agreements to lease a truck from Element Financial Corporation ("Element") to drive for PTL, which they then did. Hays Declaration, Ex. A at ¶ 10; Carter

Declaration, Ex. B at ¶ 10; Harris Declaration, Ex. C at ¶ 10; Carter Deposition Transcript, Ex. D at 77:13-14. Per the Lease Agreements, the Drivers were required to haul freight exclusively for PTL. Hays Lease, Ex. E at ¶ 3, 6; Carter Lease, Ex. F at ¶ 3, 6; Harris Declaration, Ex. C at ¶ 18. Moreover, at all relevant times, Carter was aware of the provisions within the Lease Agreement requiring to work exclusively for PTL. Ex. D at 80:4-8. With respect to brokering other loads, PTL did not let drivers broker their own loads. Hays' driver manager informed him that "drivers can't book loads for themselves. I'm sorry." Hays Qualcomm Messages, Ex. G at PTL000553. When Hays persisted and forwarded a load to PTL for approval, the driver manager attempted to appease him by stating "I can send it over to the booking area and have them contact [the broker], but I can't promise they will get it booked. [PTL has] certain criteria and time frames they look at when booking leads for our drivers." *Id.* PTL then did not approve the load, instead assigning Hays to a load which PTL chose. *Id.* PTL did not explain what criteria or time frames it used to prohibit Hays from taking the load he found.

FACT #2

> With respect to compensation, the Service Agreements provided PTL would pay Carter and Hays 70% of "all revenue (including fuel surcharge) actually received from the shippers, brokers, forwarders, consignees, or other carriers related to the services performed by [Carter or Hays] specific to the actual movement of freight . . . from the point of origin to destination reduced by: (a) the amount paid to any third party by PTL in relation to the movement of the load . . . ." *Carter Dep.*, Dep. Ex. 3, Appendix ("App.") A, § 1.01; *Hays Dep.*, Dep. Ex. 3, App. A, § 1.01.

Def. Br., ECF Doc. No. 177-1, at 7, § II.A.1, ¶ 2.

RESPONSE #2: Denied. In addition to providing that PTL would pay "a percentage of received linehaul and fuel surcharge revenue of 70% as base linehaul rate," defined as Defendant sets forth above in Fact No. 5, PTL also agreed that PTL and Contractor could agree on time-to-time alternative compensation arrangements for any shipment "for which it is not practical to establish a specific compensation base because of the variability of time and expense associated

with such assignments," *see* Carter Dep. Excerpts, ECF Doc. No. 177-2, App. A, § 1.02, and specified Defendant would pay Plaintiffs Accessorial and Other Charges/Credits as follow: (1) all other charges for items such as multiple stop-offs, loading and unloading, lumper loading and unloading; detention/layover; reconsignment; redelivery; or authorized deadhead; etc.; *Id.*, § 1.03(a). *See also* Owens Declaration, ECF Doc. No. 177-7, at ¶ 7-8.

FACT #3

> This provision understated the amount that PTL expends to attract and contract with contractors. In 2017, PTL spent between $1,000-$1,200 to contract with each independent contractor and between $16,000 and $18,000 monthly on recruiting. *Declaration of Marlin Bates* ("Bates Decl.") (attached as Exhibit D).

Def. Br., ECF Doc. No. 177-1, at 8, § II.A.1, ¶ 4.

RESPONSE #3: Denied. The information attested to by Marlin Bates is inadmissible because it is based on company records which Defendant has not produced, and therefore constitutes hearsay for which the predicate of admissibility has not been established (including disclosure pursuant to Fed. R. Civ. P. 26). Second, it is unclear whether the $1000-$1200 attested to by Bates is included within the recruiting cost or subsumed by it.

FACT #4

Prior to this litigation, PTL did not have copies of the Element Leases. *Owen Decl.* ¶ 12.

Def. Br., ECF Doc. No. 177-1, at 8, § II.A.2, ¶ 1.

RESPONSE #4: Denied. Owen attested that PTL "did not have" copies of Carter or Hay's Element Lease Agreements before the litigation, but Owen did not testify or attest that no managers or officers of PTL was unaware of the form provisions in those Lease Agreements. PTL signed a master Vehicle Lease Program Agreement with Quality Equipment Leasing ("Quality") in March 2014, *see* Ex. H (to be filed under seal), in which PTL was required to assist Quality in the planning, structuring and implementation of the lease of the vehicles, agreed to promote Quality

as a recognized and credible source of lease financing for [PTL's Lease Drivers], and to offer [Quality] the right to provide lease financing to [Lease Drivers] on a transaction by transaction basis, and to offer Quality the right of first refusal for any individuals who wanted to become a Lease Driver for PTL.

FACT #5

> [PTL] had no input regarding the equipment lease terms offered to Carter and Hays. *Deposition of Charles Wilson* (attached as Exhibit E) at 94:23-95:7.

Def. Br., ECF Doc. No. 177-1, at 8, § II.A.2, ¶ 1.

RESPONSE #5: Denied. PTL signed a master Vehicle Lease Program Agreement with Quality Equipment Leasing ("Quality") in March 2014, *see* Ex. H (to be filed under seal), in which PTL was required to assist Quality in the planning, structuring and implementation of the lease of the vehicles, agreed to promote Quality as a recognized and credible source of lease financing for [PTL's Lease Drivers], and to offer [Quality] the right to provide lease financing to [Lease Drivers] on a transaction by transaction basis, and to offer Quality the right of first refusal for any individuals who wanted to become a Lease Driver for PTL. The terms of the master Vehicle Lease Program Agreement and the high-level nature of Mr. Wilson's position raises an actual or potential dispute of material fact as to what involvement PTL had with respect to the equipment lease terms and Quality, and discovery is not yet completed.

FACT #6

> The fact drivers like Carter and Hays sometimes wait after rejecting a load is a function of the trucking industry itself and not the result of any nefarious action by PTL, as PTL's policies allow Contractors to reject loads without penalty. *Owen Decl.*, ¶ 5; *Hays Dep.*, Dep. Ex. 3, §§ I & 2.04; *Waller Dep.* at 109:20-23.

Def. Br., ECF Doc. No. 177-1, at 10-11, § II.B.2, ¶ 1, fn. 1.

RESPONSE #6: Denied. By way of example only, Defendant prohibits Plaintiffs from accessing a private load board or communicating with private brokers to secure their own loads, leaving them dependent on PTL. *See* Hays Qualcomm Messages, Ex. G at PTL000553. Moreover, it is PTL's practice to only offer Lease Operators one load at a time. *See, id.*, Carter Qualcomm Messages, Ex. I, at PTL695.

FACT #7

> [Carter] always received revenue and a fuel surcharge, when applicable, in association with the loads that he hauled in accordance with the proportion of the load that he completed. *See Declaration of Jeremy Owen* ("Owen Decl.") (attached as Exhibit F).

Def. Br., ECF Doc. No. 177-1, at 9, § II.B.1, ¶ 3.

RESPONSE #7: Denied. Admitted that while he worked for PTL, he was allotted a percentage of gross freight revenue and the fuel surcharge fee (if any) paid by PTL's customers. Carter Declaration, Ex. B at ¶ 21. Despite this, after PTL's charges and expenses were deducted, Plaintiff Carter received $0 settlements twice and received weekly paychecks of $127.24 and $112.71. Carter Settlements, Ex. J. Total, during the October 2015 through December 2016 extent of his employment, Carter grossed only $3275.33 in compensation. *Id.* Moreover, on several occasions PTL received accessorial fees for loads Carter delivered, but failed to pay these fees to Carter or notify Carter that PTL had received these fees, in violation of § 1.03(a) of the Compensation Addendum. *See* Carter Dep., ECF Doc. No. 177-2, App. A, § 1.03(a). Specifically, Defendants failed to pay Carter the following accessorial fees, or notify him of their existence and/or receipt:

Order No.	Check Date	Fee	Type	Record
3324487	11/4/2015	$234	Lumper	Carter Settlement, Ex. J, at 1; Carter BOL, Ex. K at PTL1049; Carter Messages, Ex. I at PTL695

3326189	11/11/2015	$181	Lumper	Ex. J, at 2; Ex. K at PTL1052; Ex. I at PTL696-697
3321798	11/18/2015	$750	Detention	Ex. J, at 3; Ex. K at PTL1047; Ex. I at PTL700-701
3339173	12/02/2015	$100	Stopoff/Split P/U Charge	Ex. J, at 5; Ex. K at PTL1081; Ex. I at PTL771-7773
3349513	1/06/2016	$325	Detention	Ex. J, at 8; Ex. K at PTL1116; Ex. I at PTL832

FACT #8

> [Carter] expressly denied staying at PTL because of the $5,000 early termination fee in his Service Agreement. *Id.* at 95:5-96:15.

Def. Br., ECF Doc. No. 177-1, at 9, § II.B.1, ¶ 4.

RESPONSE #8: Denied. Carter testified that the $5000 early termination did not "make him not leave" before eight or nine months; however, this was simply confirming that despite the existence of the $5000 early termination fee, Carter did indeed leave PTL prior to the expiration of the lock-in period. Carter testified that while the $5000 fee did not act as a perpetual restraint against him leaving, his desire to "do better for [his] family" meant that he could not dismiss it, and he heard stories and assurances from Defendant's driver managers that his revenue would increase. But the fact that a coercive working relationship also included promises that things would "change" and "get better" does not undermine that Carter was coerced into continuing to work due to the serious financial harm which would occur if and when he stopped. In other words, the suggestion of the possibility of a carrot cannot eliminate the undeniable reality of a stick when assessing why individuals remain trapped in coercive working relationships prohibited by the Forced Labor Statute even in the absence of physical restraint.

Carter testified that when he first learned about the early termination fee, he believed PTL "would offer me the revenue to be able to pay for the truck, take care of my household and actually build up some for maintenance." Carter Deposition, Ex. D at 83:22-1. However, shortly after

beginning his work with Defendant, Carter contacted his recruiter to advise him that the revenue he was receiving was not commensurate with the typical amounts that the recruiter had advised Carter would make. *Id.* at p. 45:20-21. PTL was consistently assigning/offering Carter low-paying loads. *Id.* at 91:4-1. He accepted these loads not because he believed they were acceptable but because PTL was not providing any alternatives, and the only other option was not to make any money at all. *Id.* at 209:25-210:03. Nevertheless, Carter always requested longer loads, higher paying loads, and loads in area where he believed he would be more likely to get a follow-up load and not sit and wait for work. *Id*; see at 92:13-24. Carter spoke with other drivers and learned they were also struggling to earn enough revenue to stay afloat. *Id.* at 80:3-23. The lack of quality work being offered further caused Carter to incur debts and miss bill payments. *Id.* at 93:15-18; 24-25. Carter testified that his concern about adding the early termination fee on top of these other debts and lack of pay kept him "locked into PTL" so that he "couldn't leave." *Id*. at 194:14-18; 199:20-200:2; *Id*. at 203:23-25; *Id.* at 258: 15-20.

FACT #9

> And [Carter] admitted no one from PTL threatened him about pursuing the termination fee if he decided to leave. *Id.* at 276:18-277:15.

Def. Br., ECF Doc. No. 177-1, at 9-10, § II.B.1, ¶ 4.

RESPONSE #9: Plaintiff's counsel objected to the question propounded by Defendant's counsel to which this answer is allegedly responsive because the term "threat" is a legal term of art for purposes of the FFLS. Moreover, because Defendant's counsel asked a confusing, compound, and disjointed question ("They never threatened you that you would-" referring to Carter's driver managers, and "PTL never threat- threatened that they would sue you if you left"), Plaintiff's answer is unclear and cannot constitute an admission of anything. Still, even in the light most favorable to Defendant, Defendant's question asked only if PTL ever threatened to "sue him"

not whether PTL ever threatened to pursue the termination fee. Finally, Carter responded that he understood from the contract that if he left, he could be penalized. *Id.* at 276:19-277:01.

FACT #10

> Instead, just as he had done several times before at other motor carriers, he left PTL "as soon" as he decided that he would not be able to generate the type of revenue that he had hoped. *Id.* at 95:5-96:15.

Def. Br., ECF Doc. No. 177-1, at 10, § II.B.1, ¶ 4.

RESPONSE #10: Denied. As set forth above, early on, Carter was aware that he was not making the type of revenue that Defendant had promised. Ex. D at p. 45:20-21. Carter testified that during this time, the combination of his low-paying loads and incurred debts coupled with the early termination fee kept him "locked into PTL" so that he "couldn't leave." *Id.* at 194:14-18; 199:20-200:2; *Id.* at 203:23-25; *Id.* at 258:15-20. Eventually, however, Carter determined that he would not make more revenue, and after he made that final determination, he decided to leave despite the existence of the early termination fee. *Id.* at 93:01-96:06.

FACT #11

> While under contract with PTL, for each load he hauled, Hays always received his contractual share of the revenue and fuel surcharge associated with the load. *Owen Decl.* ¶ 20.

Def. Br., ECF Doc. No. 177-1, at 11, § II.B.2, ¶ 2.

RESPONSE #11: Denied. As with Carter, Hays was allotted a percentage of gross freight revenue and the fuel surcharge fee (if any) paid by PTL's customers. Hays Declaration, Ex. A at ¶ 20. Despite this, after PTL's charges and expenses were deducted, of the nine settlement sheets Hays received, six of them said that he was paid $0. He also received weekly pay amounts of $11.37, $284.54, and $625.31 after deductions but before taxes. Hays Settlements, Ex. L. Total, during the March 2016 through June 2016 period in which he worked for PTL, Hays only grossed

$917.22 in compensation. *Id.* Moreover, on several occasions, PTL received accessorial fees for loads Hays delivered, but failed to pay these fees to Hays or notify Hays that PTL had received the fees, in violation of § 1.03(a) of the Compensation Addendum. Hays Dep., ECF Doc. No. 177-3, App. A, § 1.03(a). Specifically, PTL failed to pay Hays the following accessorial fees, or notify him of their existence and/or receipt:

Order No.	Check Date	Fee	Type	Record
3414690	04/20/2016	$39	Misc.	Hays Settlements, Ex. L, at 4; Hays BOL, Ex. M at PTL1152; Hays Messages, Ex. G at PTL577
3414522	04/27/2016	$60	Lumper Unloading	Ex. L, at 4; Ex. M at PTL1148; Ex. G at PTL574-575
3415256	04/27/2016	$113.75	Detention	Ex. L, at 4; Ex. M at PTL1155; Ex. G at PTL579
3421033	05/11/2016	$45	Detention	Ex. L, at 6; Ex. M at PTL1167; Ex. G at PTL606-607
3438433	06/15/2016	$117.50	Detention	Ex. L, at 9; Ex. M at PTL1207; Ex. G at PTL665-667

III. FACTUAL SUMMARY AND SUPPLEMENTAL STATEMENT OF FACTS

Plaintiff's response to Defendant's Statement of Facts details that Carter and other Lease Operators did not have the freedom to work for other carriers or broker their own loads, and were required by the interlocking requirements of the Service Agreement and the Lease Agreement to work exclusively for PTL, *see* Response to Defendants' Statement of Facts ("RDSOF") at #1. As part of the Service Agreement, Carter (and other Lease Operators) were promised accessorial payments from customers in addition to a percentage of linehaul revenue pay. PTL never paid Carter these payments, in violation of the Service Agreement and TILA, and never disclosed its receipt of such payments from the customers, also in violation of TILA. *See* RDSOF at #2. PTL also violated TILA by improperly disclosing how the escrow would be funded, failing to pay

interest on the escrow account, and by causing Carter to sign the Service Agreement before he had secured his truck to lease. *See infra.*

The Service Agreement states that Carter was to be an independent contractor with the potential and expectation of profit. *See* Carter Dep., Ex. 3, ECF Doc. No. 177-2 at 90. Plaintiff has alleged—and advanced evidence—that he was not. By being economically dependent on Defendant, Plaintiff could not work to the maximum extent of his abilities and use his initiative to make the income he expected. Plaintiff detailed during his deposition the difference in what he had been promised and what he received. *See* RDSOF at ¶ 8; Carter Deposition, Ex. D at 83:22-1 (Carter expected to be able to make an income that could support his family); *Id.* at 91:4-1; *Id.* at 209:25-210:03; 92:13-24 (Carter was being assigned low-paying loads and was not able to get any of the types of loads he was requesting, or which Defendant had advertised). Indeed, had Carter **been** an employee of PTL, he would have made a minimum of $0.38 cents a mile. *See* Employee Driver Compensation, Ex. N.

Carter—and other Lease Operators—were coerced to continue working for PTL by a combination of factors, but the major one which PTL independently instituted was the $5000 early termination fee which PTL would assess to Lease Operators who left prior to the end of a nine-month lock-in period. Once Carter learned that he was making far less than he anticipated, he felt the early termination fee to be a severe and serious threat of financial harm that left him locked in to PTL and unable to leave. Eventually, Carter determined that the situation at PTL was not ever going to get better, and despite the threat, left. In response, PTL sent Carter to collections and sent Carter a collection letter demanding payment of more than $7000.

IV. STANDARD OF REVIEW

Summary judgment is proper where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In ruling on such motions, Courts must view the facts contained in the record and all inferences that can be drawn from those facts in the light most favorable to the non-moving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Nat'l Satellite Sports, Inc. v. Eliadis, Inc.,* 253 F.3d 900, 907 (6th Cir. 2001). The Court cannot weigh the evidence, judge the credibility of witnesses, or determine the truth of any matter in dispute. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986).

V. LEGAL ARGUMENT

A. DEFENDANT IS NOT ENTITLED TO JUDGMENT AS TO PLAINTIFF'S TILA CLAIM BECAUSE PLAINTIFF CAN SHOW ACTUAL DAMAGES STEMMING FROM DEFENDANT'S VIOLATIONS

The Court should deny Defendant's motion as to Carter's TILA claims because Plaintiff can show he suffered "actual" damages—and the alleged absence of such damages is the sole argument Defendant makes for judgment at this juncture.

1. TILA protects independent operators from one-sided contracts which fail to adequately disclose the terms and condition of contract and work arrangement.

The TILA regulations require interstate motor carriers who use leased vehicles and leased driver-labor to enter written leases that specify, among other things, the compensation to be paid to and the charges to be deducted from the driver. 49 U.S.C. § 14102(a); 49 C.F.R. § 376.12. The regulations were enacted in 1973 by Congress and the Interstate Commerce Commission ("ICC") after independent truck drivers "went on strike" during what has been referred to as the "winter of discontent" in 1973. *In re Arctic Exp. Inc.*, 636 F.3d 781, 796 (6th Cir. 2011) (citing *Global Van Lines, Inc. v. ICC,* 627 F.2d 546, 548 (D.C. Cir. 1980)). The regulations were enacted because

drivers "were found to be caught in a continuing cost crunch, faced with rising costs, inflexible income, difficulties in obtaining long-term financing and questionable industry practices." *Id.* "Congress's substantive purpose in authorizing the Truth-in-Leasing regulations was to protect owner-operators." *Id.* (quoting *OOIDA v. Swift Transp. Co., Inc.*, 367 F.3d 1108, 1115 (9th Cir.2004)).

These regulations "espouse a goal of ensuring that owner-operators such as [plaintiff] are informed of all potential costs and liabilities that they may incur as a result of entering into an equipment lease." *Jones Express, Inc. v. Watson*, 871 F. Supp. 2d 719, 730 (M.D. Tenn. May 15, 2012); *see also Lease and Interchange of Vehicles*, 47 FR 51136-02 (1982). The TILA regulations further carry a standard of "strict" or "literal" compliance. *OOIDA, Inc. v. C.R. England, Inc.*, 508 F.Supp.2d 972, 975 (D. Utah June 20, 2007) (*C.R. England II*); *Port Drivers Federation 18, Inc. v. All Saints Exp., Inc.*, 757 F.Supp.2d 443, 451 (D. N.J. Oct. 18, 2010). Where payments to or drivers are withheld in violation of TILA's requirements or the actual disclosures in the contracts (which are required TILA), a successful plaintiff is entitled to recoupment of this money. *In re Arctic Exp. Inc.*, 636 F.3d 781, 787 (6th Cir. 2011). Likewise, if a carrier charges drivers amounts which drivers were not required to pay the carrier, the plaintiff can recover these charges as well as his actual damages.

Outlined below, Plaintiff identifies specific underpayments and unlawful charges he was subjected to and harmed by. Because these are instances of "actual damages," which Defendant argued Plaintiff could not demonstrate, Defendant is not entitled to summary judgment on Plaintiff's TILA claim.

2. Plaintiff can show actual damages for his TILA violations stemming from PTL's Failure to disclose and failure to pay accessorial charges violated 49 C.F.R. § 376.12(d) and 49 C.F.R. § 376.12(g).

Most clearly, PTL's contracts promised that drivers like Plaintiff could receive the accessorial charges and other miscellaneous payments which PTL charged its customers. The contracts also promised that these accessorial payments would be disclosed to drivers so that the drivers could confirm they were being paid correctly. Pursuant to 49 C.F.R. § 376.12(d), drivers' compensation must clearly stated on the face of the lease or in an addendum, and the amount or calculation of compensation must be delivered to the driver **prior** to the commencement of any trip for the carrier. 49 C.F.R. § 376.12(g) provides that at or before each settlement, a driver paid a percentage of gross revenue (as Plaintiff was) be provided either a copy of the rated freight bill or another form of documentation actually used in shipment that contains the same information as the rated freight bill. Defendant violated both provisions and caused Carter to sustain "actual damages" of $1590. *See* RDSOF at #7, #11.

Under the Service Agreements, PTL was required to pay Plaintiff certain accessorial fees associated with Plaintiff's work:

> "**Accessorial and Other Charges/Credits.** The amount payable to Contractor related to accessorial services will be paid as follows:
>
> > (a) Other Charges: All other charges for items such as multiple stop-offs; loading and unloading; lumper loading and unloading; detention/layover; reconsignment; redelivery; or authorized deadhead; etc. **shall be paid to Contractor by PTL** in the amounts which shall be communicated to Contractor, upon request."

See PRDSOF at #7, #11; *See* Carter Dep., Ex. 3, ECF Doc. No. 177-2, App. A, § 1.03(a); Owen Decl., No. ECF Doc. No. 177-7, at ¶ 7-8 (emphasis added). Despite this promise that the Lease Operators would receive these payments, PTL withheld them. *See* PRDSOF at #7, #11; *see* Carter

Settlement, Ex. J, at 1; Carter BOL, Ex. K at PTL1049; Carter Messages, Ex. I at PTL695; Ex. J, at 3; Ex. K at PTL1047; Ex. I at PTL700-701.

By way of example, on January 6, 2015, Defendant paid $350 to Carter for Load No. 3349513, as 70% of the $500 linehaul revenue received for that load. Ex. J at PTL115. On the Invoice for this Order, delivered to the customer by Defendant on December 9, 2015, however, it shows that Defendant billed two Detention payments for this Order, one for $275 for a detention of 324 minutes, and a second for $50 for a detention of 52 minutes. *See* Ex. K at PTL1116. Finally, a review of Plaintiff's Qualcomm messages confirms that Plaintiff was indeed detained consistent with the Invoice. *See* Ex. I at PTL832. Indeed, a careful review of that message shows Plaintiff reporting that he is being detained because the customer was not ready to load/unload despite Plaintiff arriving on time. *Id.*

Notably, this issue is not a singular clerical error, but rather, Defendant's systematic policy. Carter worked for PTL for eight weeks and had five incidents in which PTL withheld this type of pay from him. *See* RDSOF at #7. Hays worked for PTL for about three months, and also had five such incidents. *See* RDSOF at #11; *see, e.g.,* Hays Settlements, Ex. L, at 4; Hays BOL, Ex. M at PTL1152; Hays Messages, Ex. G at PTL577 (Order No. 3414690, 04/20/2016); Ex. L, at 4; Ex. M at PTL1155; Ex. G at PTL579 (Order No. 3415256, 04/27/2016).

Clearly, Defendant's statement in the Service Agreements that the amounts of these payments would only be communicated to the drivers "upon request" violates the substantive notice requirements of 49 C.F.R. § 376.12(d) and 376.12(g) which provides that notice of the amount a driver is to receive will be provided to the driver prior to the commencement of the relevant trip, and provides that the documents necessary to confirm that the proper rate is being paid will be provided at or before settlement. And Carter—and other Lease Operators—were

actually and specifically harmed by this violation, insofar as they did not receive these payments and did not know that they did not receive these payments. These violations demonstrate that Defendant is not entitled to summary judgment for Plaintiff's TILA claim, because Carter can show he suffered actual damages.

3. Plaintiff can show other damages related to Defendant's other violations of TILA.

While Defendant's unlawful withholding of accessorial pay and its failure to disclose the existence of such payments so that drivers could challenge PTL and seek these payments may be the most brazen example of PTL's TILA violations, they are not the only TILA violations, nor are they the only violations to which Plaintiffs can already—even before discovery has ended—demonstrate the existence and at least approximate amount of actual damages. These other violations include the failure to disclose the escrow deduction properly, the failure to pay interest on the amounts in the escrow account, the practice of having Lease Operators sign the Service Agreement before they had leased a truck, and the failure to properly disclose all chargebacks assessed against Lease Operators.

i. Failure to disclose the amount of the escrow deduction violated TILA and permits Carter to recover the escrow payments Defendant unlawfully retained.

Defendant's escrow deductions from Carter's pay were unlawful because the amount of theses deductions was not disclosed in the contract. Carter is accordingly entitled to reimbursement of these deductions as damages. 49 C.F.R. § 376.2(l) defines an escrow fund as "money deposited by the lessor with either a third party or the lessee to guaranty performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purpose mutually agreed upon by the lessor and lessee." 49 C.F.R. § 376.12(k)(1) requires that the lease specify the amount of the escrow fund. 49 C.F.R. § 376.12(k) "through its comprehensive

delineation of responsibilities, imposes strict fiduciary obligations on motor carriers, such that it places the motor carriers in a position of trust vis-à-vis owner operators with regard to the handling of escrow funds." *In re Arctic Exp. Inc.*, 636 F.3d at 794. This position of trust means that Defendants are liable to return unlawfully withheld escrow amounts in total. *Id.* at 795.

Here, Defendant failed to specify the actual amount which would be withheld from Carter's settlement statement each pay period to fund the escrow account—it left this amount blank. *See* Carter Dep., Ex. 3, ECF Doc. No. 177-2, at 106. The funding of the escrow account meant that Carter would start each pay period with a negative balance in order that PTL could build up a security deposit to use to recoup its unlawful early termination fee—and Carter was not provided what the amount of this negative starting point would be prior to signing the lease, thereby putting him at a disadvantage and violating TILA. At the end of Carter's employment, PTL was holding $1753.03 in the Maintenance Reserve Account. Ex. J at 8. Carter did not receive any of this money back. *Id.* Because this money was unlawfully withheld, and not returned, Carter is entitled to be reimbursed this amount as damages as well. *See In re Arctic Exp. Inc.*, 636 F.3d at 795.

ii. Failure to pay interest on the Escrow Account.

Defendant also failed to pay any interest on the amounts in the escrow account. *See, e.g.*, Ex. J at 1-8. 49 C.F.R. § 376.12(k)(5) requires that carriers like PTL pay interest on drivers' escrow funds quarterly and maintains standards for how that interest will be calculated. PTL did not pay the Drivers *any* interest on their escrow accounts, resulting in immediate and continuing economic damages. *See OOIDA v. Ledar Transport*, 2008 WL 857758, at *6 (W.D. Mo. March 31, 2008) (awarding the plaintiffs as damages the amounts remaining in their escrow accounts at the time of termination and interest on their escrow accounts). Plaintiff is likewise entitled to the payment of this interest, and this amount is also included as part of Plaintiff Carter's actual TILA damages.

iii. Defendant violated 49 C.F.R. § 376.12(a) by having Plaintiff sign the ICSA before he had leased his vehicle, causing Plaintiff economic harm, and rendering the ICSA unlawful under TILA.

49 C.F.R. § 376.12(a) requires that Service Agreement like the ones between Plaintiff and PTL be between the "owner of equipment" and the carrier who seeks to use that equipment. At the time that Plaintiff signed his Service Agreement, he had not yet chosen the trucks that he agreed to lease to PTL. Specifically, Plaintiff signed his Service Agreement with PTL on October 15, 2015, Def. Ex. A, ECF Doc. No. 177-2 at 102, but did not sign his lease agreement with Element until October 20, 2015. *Id.* at 109,119.

Accordingly, at the time Plaintiff entered into the Service Agreement with Defendant—an ICSA which would subject him a substantial early termination fee if he terminated after signing—he had no idea as what truck he would be able to lease or how much it would cost. Plaintiff received sub-minimum and sub-market wages because of the lack of disclosures, and Plaintiff is entitled to continue taking discovery before he presents his final damages model for this claim. Accordingly, the Court should deny Defendant's motion with respect to the violation of 49 C.F.R. § 376.12(a).

iv. There is clear evidence that Defendant violated Section 376.12(h) by failing to adequately disclose certain chargebacks.

Defendant violated 49 C.F.R. § 376.12(h) of the leasing regulations by failing to disclose a number of charges that were taken from Plaintiff's pay without notice. Over the course of the Drivers' employment, Defendant deducted hundreds of dollars from the Drivers' pay for bus tickets, down payments, and escrow fees that were not authorized in their Service Agreements.

49 C.F.R. § 376.12(h) states that:

> "The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed.

> The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge."

There remains dispute as to whether Defendant properly specified the charges that were to befall Plaintiff such that Defendant's motion for summary judgment on that issue must be denied. *Britts v. Stevens Van Lines, Inc.*, 2017 WL 385738, at *5 (N.D. Ohio Jan. 27, 2017) (denying summary judgment to defendants on the plaintiff's claims under sections 376.12(d) and (h).

Courts have also held that where the carrier utilizes a "catch-all" phrase in the agreement to describe a collection of charges that may be attributable to the driver, such phrases do not conform to TILA as they do not properly specify the charges or deductions attributable to the driver. *OOIDA v. Landstar*, 622 F.3d 1307, 1317 (11th Cir. Oct. 4, 2010) (citing *OOIDA v. Bulkmatic Tr. Co.*, 503 F. Supp. 2d 961, 969 (N.D. Ill. 2007) (finding that a lease was ambiguous under 49 C.F.R. § 376.12(d) because it failed to define the meaning of "gross revenue" or "specifically state which items, if any, may be excluded from gross revenue before calculating owner-operator compensation"); *Arctic Express, Inc.*, 159 F.Supp.2d at 1078 (finding a violation of 49 C.F.R. § 376.12(k) where the language in the agreement was not specific enough as it in practice included any conceivable costs).

Throughout their employment with PTL, the Lease Operators routinely had charges deducted from their pay that were not accounted for in their Leases. Plaintiff discusses above Defendant's failure to adequately disclose the amount of escrow deductions. Similarly, Carter was charged $2 fees on each advance he took while with the company; the existence of these advance fees was not disclosed prior to their occurrence. *Id*. Plaintiff is entitled to recovery of these undisclosed charges as well.

4. Plaintiff is entitled to argue that but for Defendant's TILA violations, most specifically in falsely stating that Plaintiff was an independent contractor who could control his own level of work, Plaintiff would not have entered into an agreement with Defendant and would have sought alternative employment.

The Court previously held in denying Defendant's motion to dismiss that Plaintiffs could establish a viable claim under TILA by showing that the "lack of transparency in their contractual relationship" was the cause of Plaintiff's wages dropping below the minimum wage and eventually inducing Plaintiffs' to fall into debt to PTL. Memorandum and Opinion, June 19, 2018, ECF Doc. No. 80 at 16-17.

The Service Agreement states that Carter was to be an independent contractor with the potential and expectation of profit. *See* ECF Doc. No. 177-2 at 90. Plaintiff has alleged—and advanced evidence—that he was not. By being economically dependent on Defendant, Plaintiff could not work to the maximum extent of his abilities and use his initiative to make the income he expected. Plaintiff detailed during his deposition the difference in what he had been promised and what he received. *See* RDSOF at # 8; Carter Deposition, Ex. D at 83:22-1 (Carter expected to be able to make an income that could support his family); *Id.* at 91:4-1; *Id.* at 209:25-210:03; 92:13-24 (Carter was being assigned low-paying loads and was not able to get any of the types of loads he was requesting, or which Defendant had advertised). Indeed, had Carter **been** an employee of PTL, he would have made a minimum of $0.38 cents a mile. *See* Employee Driver Compensation, Ex. N.

On Carter's first settlement statement, he drove 592 miles and received $127.24 in pay. *See* Ex. J at 1. If he had been paid like an employee for PTL, he would have made $224.96. On his second settlement statement, he drove 1288 miles, and made $0. *See id.* at 2. Under the employee compensation schedule, he would have made $489.44. On this third settlement statement, he drove 2604 miles and received $818.25 plus a $200 advance. *Id.* at 3. Paid as an employee, he would

have made $989.52. His fourth settlement, he drove 2527 miles, and received $822.64. *Id.* at 4. Paid as an employee, he would have made $960.26. His fifth settlement, he drove 1681 miles, and received $112.71. *Id.* at 5. Had he been designated an employee, he would have made $638.78. His sixth settlement, he drove 1839 miles, and received $645.70. *Id.* at 6. Had he been an employee, he would have received $698.82. His seventh settlement, he drove 2315 miles, and received $748.79. *Id.* at 7. As an employee, he would have received $879.70. And his final settlement, he drove 1932 miles, and, again, received nothing. Had PTL paid him like the employee that he actually was, he would have received $734.16. Finally, to add insult to injury, post-termination, Defendant confiscated $1754.03 of Carter's escrow and assessed a $7312.54 debt against Carter. *See* Debt Collection Letter, Ex. O.

All told, Carter still would have made more than $2140 more had he been paid like one of PTL's lowest-paid non-trainee employee drivers. Include the debt, and Carter ended up nearly $9500 behind what he would have made as PTL's lowest-paid non-trainee employee driver. As Defendant points out, Carter wanted to be a lease operator instead of an employee, and be chose to pursue a position in which he was designated as an independent contractor because he thought it would allow him to make more money. *See* Def. Br., ECF Doc. No. 177-1 at 9. Defendant makes pre-contractual representations about the Lease Purchase Program telling drivers that the average length of haul was 725 miles. *See* Defendant's Advertisements, Ex. P, at 4. Carter did 30 trips and drove 14,778 miles—an average of just 492.6 miles per trip—despite wanting longer and better-paying trips. *See* Ex. J at 7-8; Ex. D at 209:25-210:03.

TILA requires technical compliance, but its keystone principle is contained in its name: Truth. The Service Agreement said Carter was an independent contractor who could control his own ability to make a profit or loss. This was not true. Had Carter simply been paid like the

employee he actually was, he would have been entitled to at least the minimum wage, and, more likely, he would have understood what his wages were in advance and then found a job that paid him the market rate for his skills and experience. Accordingly, Carter can recover under TILA for the damages he suffered due to his misclassification and the misrepresentations and misclassification of the working relationship contained in the Service Agreement.

5. Defendant is not entitled to summary judgment as to Plaintiff Carter's TILA claims because Plaintiff has established actual harm and actual damages caused by Defendant's violations of the law.

Accordingly, Plaintiff Carter is perfectly capable of pointing to distinct and actionable harm caused by Defendant's TILA violations—including specific dollar amounts which Carter seeks reimbursement for. Additionally, Plaintiff was harmed by being subjected to severe penalties as part of an illegal contract which he would not have entered had the true terms and conditions of the working arrangement been disclosed and the requirements of TILA been followed. And finally, Defendant has not explicitly forgiven or waived the debt it sought to collect from Carter. Accordingly, Plaintiff also seeks rescission, reimbursement, and cancellation of those penalty provisions which were imposed pursuant to this illegal contract, including the trailer relocation fee, the early termination fee, the service failure charges, and the concomitant debt that PTL claims against him. *See* ECF Doc. No. 177-2 at 96-97; Ex. J at 8; Ex. N. These too are actual damages to which Plaintiff is entitled a legal remedy. Accordingly, for all these reasons, the Court should deny Defendant's motion for summary judgment as to Plaintiff Carter's TILA claims.

B. PLAINTIFF'S FORCED LABOR CLAIMS ARE SUPPORTED BY EVIDENCE IN THE RECORD AND WARRANT DENYING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

The Court should also deny Defendant's motion for summary judgment regarding Plaintiff's FFLS claims. Plaintiff have produced sufficient evidence to raise issues of material facts

for the jury as to whether Defendant's punitive and exploitative lease-purchase program coerced Plaintiff into working for subminimum and sub-market wages to avoid the imposition of a substantial financial penalty which he expected would have caused him significant financial harm.[2]

The FFLS (also known as the Trafficking and Violence Protection Act ("TVPA")) prohibits any person from obtaining "labor or services of a person by one or by any combination of the following means –

> (1) By means of force, threats of force, physician restraint, or threats of physical restraint to that person or another person;
>
> (2) By means of serious harm or threats of serious harm to that person or another person;
>
> (3) By means of the abuse or threatened abuse of law or legal process; or
>
> (4) By means of any scheme, plan, or pattern intended to cause the person to believe that, if that person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint.

18 U.S.C.A. § 1589(a).

"The fundamental purpose of § 1589 is to reach cases of servitude achieved through **nonviolent coercion**—namely serious harm, the threat of serious harm, or the abuse or threatened abuse of legal process." *Paguirigan v. Prompt Nursing Employment Agency LLC*, 286 F. Supp. 3d 430, 439 (E.D.N.Y. 2017) (emphasis added). The statute criminalizes a wide variety of conduct which could result in coerced labor based on a Congressional acknowledgement that modern-day forced labor scenarios are "increasingly subtle." H.R.Rep. No. 106–939, at 101, 2000 U.S.C.C.A.N. 1380, 1392–93 (2000) (Conf. Rep.), 2000 WL 1479163, at *91. To accomplish the goal of combating involuntary servitude, the statute broadly defines harm as:

> ***any harm***, whether physical or nonphysical, ***including*** psychological, ***financial***, or reputational harm, that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the

[2] To the extent the Court holds otherwise, discovery is not complete. Plaintiff reserves the right to move to stay this motion pending the completion of discovery pursuant to Fed. R. Civ. P. 56(d).

> same circumstances to perform or to continue performing labor or services in order to avoid incurring that harm.

18 U.S.C. § 1589(c)(2) (emphasis added).

Stated otherwise, "someone is guilty of forced labor if he intends to cause a person in his employ to believe that if she does not continue to work, she will suffer the type of serious harm—physical or nonphysical, including psychological, financial, reputation harm—that would compel someone in her circumstances to continue working to avoid that harm." *United States v. Dann*, 652 F.3d 1160, 1169–70 (9th Cir. 2011), (*citing United States v. Calimlim*, 538 F.3d 706, 712, 714 (7th Cir.2008)) (finding threat to stop paying victim's poor family members constitutes serious harm).

Along with all other circuits, the Sixth Circuit Court has explicitly recognized that the statute is to be construed broadly in accordance with its language to combat involuntary servitude. *See United States v. Callahan*, 801 F.3d 606, 618 (6th Cir. 2015) (noting "Congress enacted § 1589 in response to [*United States v. Kozminski*] to expand the forms of coercion that could result in forced labor"). Thus, economic harms fall squarely within those harms that the FFLS is designed to combat. *See e.g., Dann*, 652 F.3d at 1169-70; *Paguirigan*, 286 F. Supp. 3d at 439..

The Court should deny a motion for summary judgment as to a forced labor claim under the FFLS if, in the light most favorable to the plaintiff, "[the plaintiff] creates a factual question regarding whether an objectively reasonable person with the same background as [the plaintiff] and under her circumstances would have felt forced to continue performing labor." *Friend v. Aegis Commc'ns Grp., LLC*, 2014 WL 4421579, at *6 (W.D. Mo. Sept. 9, 2014) (denying the defendant's motion for summary judgment on the plaintiff's forced labor claim, even while acknowledging that the plaintiff's claims "stretched the bounds of the intention of the statute"). Here, Plaintiff has met that burden.

Defendant's instant motion ignores the evidence in the record and instead mischaracterizes the testimony of the Plaintiff to frame the relationship between the Carter and PTL as one in which Carter was merely unhappy with his employment situation but was not coerced to stay with Defendant through the threat of serious financial harm. Defendant takes Carter's testimony that he was hoping that the job would turn around and start to pay him a living wage to frame Carter's decision to stay as uncoerced. Defendant's Brief, ECF Doc. No. 177-1 at 12. This argument takes a single line of Plaintiff's deposition out of context, and ignores Plaintiff's consistent and repeated testimony that he felt trapped and locked in by the consequences Defendant had promised would result if Plaintiff let before he completed nine months working for PTL. PSOF at ¶ 130.

Plaintiff's complete testimony—even more so when examined in light of the very low pay Plaintiff was receiving which made the $5000 early termination penalty even more concerning—are sufficient for a jury to find that (a) Defendant's threats of serious financial harm—the early termination fee which would accrue if Plaintiff did not work a nine month term with Defendant—were sufficient to compel a driver in Plaintiff's position, subjected to the terms and conditions of Defendant's work-contract, to continue working for subminimum and submarket wages due to that threat, and (b) that Carter himself felt this coercion and it kept him working for Defendant for extremely low wages; and (c) such a result was Defendant's intention in instituting the penalty. Accordingly, these facts are sufficient to defeat Defendant's motion for summary judgment as Carter's Forced Labor claim.

1. The Financial Consequences of leaving PTL, including PTL's Early Termination Fee, constitute a threat of serious harm under the FFLS.

To establish a claim of violations of the FFLS, a plaintiff must first show a threat of a "sufficiently serious" harm. *Dann*, 652 F.3d at 1170. The determination of whether the harm is sufficiently serious requires an analysis of the harm threatened, as well as an analysis of whether

such harm compelled the individual to continue providing labor to the defendant. It should be noted that the harm need not be implemented. Rather, the issue for the Court is whether the harm an individual "believed" would be implemented is sufficiently serious. *Lagayan v. Odeh*, 199 F. Supp. 3d 21, 29 (D.D.C. 2016).

Since the amendments to the FFLS, courts across jurisdictions have been clear that threats of financial harm, fall squarely within the scope of the types of harm the FFLS protects against. In line with same, this Court has specifically acknowledged the $5,000 could constitute a serious harm in accordance with the statute. *See* Memorandum and Order dated May 2, 2018, Docket No. 80 (denying Defendant PTL's Motion to Dismiss Plaintiff's Forced Labor Case) (holding that the $5,000 early termination fee "falls neatly in the spectrum of financial harm" which is prohibited by the FFLS).

Such a finding was in line with the well-established case law. *See e.g. Paguirigan* 286 F. Supp 3d at 438 ("the threat of financial harm constitutes serious harm within the meaning of the TVPA"); *Dann*, 652 F.3d at 1170 (threat of $8,000 debt); *Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 2012 WL 5378742, at *3 (C.D. Cal. Aug. 27, 2012); *Javier v. Beck, No.* 13-CV-2926, 2014 WL 3058456, at *1 (S.D.N.Y. July 3, 2014) (threatened enforcement of $15,000 confession of judgment); *Nunag–Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 790 F.Supp.2d 1134, 1146 (C.D. Cal. 2011) (threat of a $5,000 debt).

More significant to the Court's analysis than the amount of the fee itself is the unique circumstances of the plaintiff. *See United States ex rel. Hawkins v. ManTech Int'l Corp*., No. CV 15-2105 (ABJ), 2020 WL 435490, at *18 (D.D.C. Jan. 28, 2020) (courts must "consider the particular vulnerabilities of a person in the victim's position" when analyzing whether such a

victim could be compelled to provide labor to avoid a specific harm); *Javier*, 2014 WL 3058456, at *6 (noting that Courts must look to the "context of the threat").

Here, while Plaintiff had high expectations of the job, once he was on the road, he learned that he was not being offered sufficient loads and sufficient quality loads to make enough money for his family. *See* RDSOF at #8. Carter testified that when he first learned about the early termination fee, he believed PTL "would offer me the revenue to be able to pay for the truck, take care of my household and actually build up some for maintenance." Carter Deposition, Ex. D at 83:22-1. Prior to contracting with PTL, PTL's recruiter told Carter he would be making about $1500 per week. *Id.* at 43:8-13; 90:17-21. However, shortly after beginning his work with Defendant, Carter contacted his recruiter to advise him that the revenue he was receiving was not commensurate with the typical amounts that the recruiter had advised Carter would make. *Id.* at p. 45:20-21. PTL was consistently assigning/offering Carter low-paying loads. *Id.* at 91:4-1. He accepted these loads not because he believed they were acceptable but because PTL was not providing any alternatives, and the only other option was not to make any money at all. *Id.* at 209:25-210:03. Nevertheless, Carter always requested longer loads, higher paying loads, and loads in area where he believed he would be more likely to get a follow-up load and not sit and wait for work. *Id*; see at 92:13-24. Carter spoke with other drivers and learned they were also struggling to earn enough revenue to stay afloat. *Id.* at 80:3-23. The lack of quality work being offered further caused Carter to incur debts and miss bill payments. *Id.* at 93:15-18; 24-25. Carter testified that his concern about adding the early termination fee on top of these other debts and lack of pay kept him "locked into PTL" so that he "couldn't leave." *Id*. at 194:14-18; 199:20-200:2; *Id*. at 203:23-25; *Id.* at 258: 15-20.

Carter worked for PTL from on or around October 15, 2015 to on or around December 17, 2015. ECF Doc. No. 177-2 at 90; Ex. I. During this time, for 30 trips and 14,778 miles, he grossed approximately $3,275.33 in compensation. Ex. F at 7-8. Accordingly, the early termination fee represented 150% of his total income. To put it another way, by quitting when he did, Carter was risking that instead of making severely sub-optimal and below-market wages, he would have spent the last quarter of 2015 driving the length of America five times over not merely for nothing, but to put himself in debt to PTL.

Of course, the Early Termination Fee is not the only financial harm that "locked" Carter and other drivers into PTL. If Carter did not or could not get the Trailer back to PTL within 48 hours of quitting, he would be assessed an additional $2500 on top of the Early Termination Fee. ECF Doc. No. 177-2 at 97. If he quit working for PTL, he would lose the truck he had leased and forfeit all the lease payments he had already made, and expose himself to a massive debt from Quality and Element. *Id.* at 113-114. The Court should look at the holistic and interlocking nature of these various threats in determining that Carter has sufficiently established his FFLS claim. But even if it were the case that the only threat at issue was the $5000 early termination fee, this Court's prior rulings and the case law shows that this threat was sufficient to sustain a FFLS claim.

2. Defendant's Scheme Compelled Carter to Provide Labor to Avoid Harm.

As noted above, Plaintiff testified that he felt "locked in" to work for Defendant and "there was no way around it" because of the substantial termination fee and the low income he was receiving which meant that he could afford to pay the termination fee. Ex. D. at 194:14-18. Specifically, during his deposition, Carter testified to the following: "If you leave earlier than the months they told you would have to pay." *Id*. at 86:24-25. He testified further:

> If you leave early, before the time they say you can leave to go to another company . . . that's what you - you have to pay that 5,000, and I mean, even though we wasn't

> making money, we couldn't afford to leave and go to another company because we didn't have $5,000.

Id. at 87:6-12.

> I was pretty much locked into PTL. It was no way around it. They wouldn't give me the revenue, and I couldn't leave. I didn't have the money to buy out of there, so I was looked [sic] in.

Id. at 194:14-18.

> Everything ties together, saying I can't - I got to work for PTL, or I got to pay a penalty for leaving . . . I can't leave and go to any outside company and work and still make my payments. If I leave, I got to leave the truck.

Id. at 199:20-200:2.

> I couldn't just come up with $5,000. I didn't have any money. And I was struggling to make it as it was. For me to --- it was no possibility of coming up with $5,000, even if I had met the time frame to go somewhere else.

Id. at 258: 15-20.

> They [Quality] told me I couldn't work for nobody but PTL or it was all these fines and stuff.

Id. at 203:23-25.

In opposition to this repeated testimony that Carter felt coerced by the termination fee, Defendant makes three points. First, Defendant argues that Carter voluntarily agreed to contract with PTL despite knowing about the early termination fee. Second, Defendant argues that Carter could not have been coerced to work because the Service Agreement allowed him to reject loads and the only consequence of same was not working for a period of time. Third, Defendant argues that Carter left voluntarily after two months. None of these points prove that Carter was not coerced to work by PTL and by the threats of serious harm PTL and its partners levied should Carter quit.

As to Defendant's first point, regarding Carter's voluntary entry into the contract, most deals with the Devil involve the victim voluntarily putting pen to paper. A coercive and forced situation is not defined by whether the victim entered the situation voluntarily, but by whether,

once entered, the victim could voluntarily extricate himself. Here, Carter agreed to the early termination fee when he believed he would be making an average of $1500 per week. *See* Ex. D at 83:22-1; 43:8-13; 90:17-21. Once he was faced with the reality of how much money he could actually make, he wanted to leave, but felt locked in by the lack of revenue and the threat of the Early Termination Fee. *Id*. at 194:14-18. In *Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd*., 790 F. Supp. 2d 1134, 1146 (C.D. Cal. 2011), the defendant recruited teachers to work in its program, and only advised the plaintiffs of fees related to walking away from the program after they paid the initial recruitment fee. The court explicitly held that evidence that the plaintiff had wanted to work for defendant did not prove the absence of coercion. *Id.* (finding that the plaintiffs "had to work for [the defendants] so that they would be able to repay the massive debt they incurred due to [the defendants'] fraud").

As to PTL's second point, PTL conflates the freedom to reject a particular load with the freedom to quit PTL and get a better job. PTL allowed the first, and actively prevented the second. Carter testified that he wanted different, better, work than the work PTL was offering him, that he asked for this different, better, work, but that PTL would not give it to him. Ex. D at 209:25-210:03; *see id.* at 92:13-24. And Carter testified that he accepted the work he did not want because the alternative was no work at all. *Id.* at 209:25-210:03. But the only reason the alternative to accepting PTL's bad loads was no work at all was because Carter could not leave PTL and work for another trucking company without incurring serious financial harm. Accordingly, the ability to reject loads while tied into the Quality Vehicle Lease and subject to the Early Termination Fee is not sufficient freedom to undo the coercive nature of the Lease Operator contract.

As to PTL's final point, PTL points out that Carter testified that the Early Termination Fee did not force him to stay at PTL, and that he remained with PTL because he had hopes that he

would start earning the money that had been advertised. As to the first point, Carter, like many others who find themselves in coercive situations, ultimately escaped from that situation. Carter, an experienced truck driver used to make a living wage, nevertheless worked for PTL for two months before that escape. And his testimony that he waited to leave until he was sure that he was never going to make the money that had been promised does not prove that his labor before then was not also secured through coercion. Carter testified above that the interlocking nature of the early termination fee, the low-paying loads, and the truck lease kept him locked into a coercive work situation he was unhappy about. *See supra.*

Reconciling the two strands of Carter's testimony is his statement of hope that if he began to make more money, he could make enough money to leave PTL, pay the Early Termination Fee, and still have made some money for his time. *See* Ex. D at 83:22-1. But this merely confuses a path to freedom with freedom itself. The obvious path to freedom from the early termination fee was working for PTL for the substandard wages for nine months. The second path involved making enough money to pay off the termination fee. That Carter was more interested in the second path than the first did not mean that Carter did not feel coerced to stay in the work relationship by the Fee. And on a motion for summary judgment, Carter's testimony that he did feel so coerced is more than enough to warrant denying the motion and submitting the issue to the factfinder.

Defendant's citation to *Muchira v. Al-Rawaf* and *Headley v. Church of Scientology* are distinguishable. In *Muchira*, the only harm alleged was "psychological harm in the form of depression, acute stress, and panic attacks." *Muchira v. Al-Rawaf*, 850 F.3d 605, 620 (4th Cir. 2017), as amended (Mar. 3, 2017). In *Muchira*, while the domestic worker had given her employer her passport and did not know the alarm code to leave the house, she failed to produce evidence that these restrictions had been imposed by the family or that the family would have refused to let

her leave if she asked. In other words, in *Muchira,* there was no actual threat which was designed to compel continued labor. Here, it is undisputed that Defendant imposed an early termination fee whose purpose and result was to impose a serious enough harm on drivers for leaving prior to the completion of nine months with the company to dissuade them from doing so.

Similarly, in *Headley*, the only threat that the plaintiffs alleged compelled their labor was the threat that the church would cease its association with the plaintiffs if they ceased working for its ministry. *Headley v. Church of Scientology Int'l*, 687 F.3d 1173, 1180 (9th Cir. 2012). But ending a particular association due to a falling out cannot constitute a coercive threat to compel continued work. Many organizations are disappointed when employees leave, and choose not to associate with them in the future. Few organizations require employees to give back substantial amounts of compensation if they leave, and fewer still do so to workers who are making close to or less than the minimum wage.

3. Plaintiff could not freely find another trucking job because of Defendant's coercive policies and practices.

Defendant also argues that Plaintiff cannot establish a claim of forced labor because of his "demonstrated ability to easily find new trucking jobs." Def. Br., Docket No. 177-1, at 14. This claim misunderstands Plaintiff's assertion. Plaintiff does not claim he remained employed with PTL because he was lacking the opportunity for alternative employment—indeed, if he did, that argument would doom his FFLS. Instead, it is the strange reality that Plaintiff worked for sub-market and sub-minimum wages even though he was able to find another trucking job that leads to the natural inference that there must have been something making him stay in a bad situation. That something was PTL's coercive policies and practices, coupled with the coercive policies and practices of Quality and Element.

Second, PTL's argument that $5000 is an insufficiently large amount to deter truck drivers from leaving PTL appears to confuse truck drivers with investment bankers. In 2019, the median pay for truck drivers was $45,260 per year. *See, e.g.*, Heavy and Tractor-Trailer Drivers, Occupational Outlook Handbook, Bureau of Labor Statistics, https://www.bls.gov/ooh/transportation-and-material-moving/heavy-and-tractor-trailer-truck-drivers.htm. A 2017 CareerBuilder poll showed that half of Americans who make less than $50,000 a year live paycheck to paycheck, and 73% of that cohort are in debt, *see* http://press.careerbuilder.com/2017-08-24-Living-Paycheck-to-Paycheck-is-a-Way-of-Life-for-Majority-of-U-S-Workers-According-to-New-CareerBuilder-Survey. At PTL, Carter was making approximately $1500 a month—for an annualized salary of $18,000. *See* Ex. J at 1-8. Carter testified that the low wages were forcing him into credit card debt. Ex. D at 93:15-18, 24-25.

Plaintiff agrees that Carter could and did find another trucking job that paid far better than PTL. But none of Carter's jobs which he worked or could reasonably expect to work allowed him to work for two months without pay, or to incur an extra $5000 in unnecessary debt. And certainly, it is not the province for counselors and judges to determine whether $5000 is sufficiently large or sufficiently small to allow or preclude a FFLS claim as a matter of law. Accordingly, while Plaintiff appreciates the visual chart of Carter's employment history, that chart has no relevance to PTL's coercion of Carter to keep working for substandard wages.

4. There is sufficient evidence in the record for the jury to infer that Defendant intended the Early Termination Fee to compel continued labor.

Defendant also argues that Plaintiff cannot show as a matter of law that it intended to compel Carter's continued labor. In the instant matter, it is evident that Defendant threatens to enforce these fees against its drivers if they leave before nine months, and then does so. *See* Collection Letter. Given the coercive size of the fee, this is sufficient to meet the FFLS's scienter

standard. *See Paguirigan*, 286 F. Supp. 3d at 439 (holding that a defendant's threats to sue a plaintiff for a $25,000 early termination fee in a contract constitute intentional conduct under the FFLS to induce labor for fear of serious harm).

Defendant's intention to use the termination fee to coerce continued labor until the end of the lockout period is further supported by the disparity between the fee sought and the income earned during his employment. In *Javier v. Beck*, the district court held that a contract termination fee represented six months of an employee's gross wages was sufficient to show intent to coerce labor. No. 13CV2926, 2014 WL 3058456, at *6 (S.D.N.Y. July 3, 2014). Like the plaintiff in *Beck*, Plaintiff here also identifies a fee that was equivalent to months of labor. At minimum, this raises a dispute of fact that allows a jury to determine that Defendant intended to compel Plaintiff's labor.

Moreover, discovery is not completed, and Defendant's proffered evidence in the form of self-serving affidavits based on documents which Defendant has not provided to Plaintiff cannot be used to show that Defendant possessed an intent other than coercion in enacting and using the Early Termination Fee against Lease Operators and Plaintiff.

5. The Early Termination Fee Constitutes an Unlawful Penalty Evidencing Defendant's Intent to Compel Labor

Moreover, if the early termination fee constitutes an illegal penalty as a matter of contract law, this would help establish that Defendant acted with an improper intention. The Sixth Circuit has noted that contract penalties are unlawful is because they are "designed to coerce performance by punishing default." *Vanderbilt Univ. v. DiNardo*, 174 F.3d 751, 755 (6th Cir. 1999). Thus, implicit in any ruling that the early termination fee would constitute an illegal penalty is the recognition of its penal coercive nature.

Defendant of course characterizes this penalty as "liquidated damages." Yet, Defendant's own Recruiting Director indicates that the cost to Defendant in recruiting independent contractor

drivers is approximately $1,000-$1,200 dollars per contractor. *See* Declaration of Marlin Bates, Docket No. 177-5. As courts have recognized, a termination fee in a contract is legitimate only when same is based in the cost expenditures of Defendant to recruit and/or onboard the employee. *See Panwar v. Access Therapies, Inc.*, No. 1:12-CV-00619-TWP, 2015 WL 1396599, at *4 (S.D. Ind. Mar. 25, 2015). In the instant matter, the contract termination fee significantly exceeds the consequential damages to Defendant arising from any one driver's decision to stop working for PTL, especially given that Defendant can employ Lease Operators for substandard wages. The Sixth Circuit has held that charges which significantly exceed the actual expenditures shall, if there is "any doubt as to the character of the contract provision will be resolved in favor of finding it a penalty." *Vanderbilt Univ.*, 174 F.3d at 755. There is a substantial likelihood that Plaintiff will succeed in showing that the Early Termination Fee is an unlawful penalty, and this would then be strong, if not dispositive, evidence of Defendant's improper intent to coerce.

6. Plaintiff has presented sufficient evidence to preclude summary judgment of his FFLS claim.

Accordingly, for the reasons set forth above, Plaintiff has presented sufficient evidence to allow a jury to find that Defendant violated the FFLS with respect to him and with respect to individuals similarly situated working in the same coercive working arrangement, which combined the threat of serious financial harm in the form of the early termination fee and the default provision in the vehicle lease with the low wages paid to the Lease Purchase Drivers by virtue of Defendant's failure to offer and provided Plaintiffs with well-paying loads or the ability to find their own loads. Accordingly, the Court should deny Defendant's motion for summary judgment against Plaintiff as to his Forced Labor Claims as well.

VI. CONCLUSION

For the reasons set forth above, the Court should deny Defendant's motion for summary judgment.

Respectfully Submitted,

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