UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

THOMAS MERVYN, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	
v.	)	**No.: 1:13-cv-03587**
ATLAS VAN LINES, INC. and ACE WORLD WIDE MOVING & STORAGE CO., INC., individually and on behalf of all others similarly situated,	)	**Judge Ronald A. Guzmán**
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF
PLAINTIFF'S MOTION FOR CLASS CERTIFICATION

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Regulations

Other Authorities

TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiff, Thomas Mervyn, pursuant to Rule 23(a)(1)-(4) and (b)(3) of the Federal Rules of Civil Procedure and this Court's Minute Entries dated December 18, 2013 (Doc. 71) and January 14, 2014 (Doc. 77), seeks certification of the following Plaintiff Class:

> All equipment owner-operators in the United States who, during the period from May 14, 2009, through the present, had or have lease agreements that identify Atlas Van Lines, Inc. as the carrier, and which are subject to federal regulations contained in Part 376 of the Code of Federal Regulations.

Amended Class Action Complaint for Declaratory Relief and Damages, ¶ 8(a) (Doc. 55 – filed Oct. 22, 2013) (hereinafter "Amended Complaint,,). Plaintiff also seeks certification of the following Defendant Class:

> All moving companies in the United States that, during the period May 14, 2009, to the present, were or are owners-agents of Atlas Van Lines, Inc., had or have lease agreements that identify Atlas Van Lines, Inc. as the carrier, and which are subject to federal regulations contained in Part 376 of the Code of Federal Regulations.

Amended Complaint, ¶ 8(b).

Plaintiff has satisfied the requirements of Rule 23(a)(1)-(4), as well as Rule 23(b)(3), and the Plaintiff Class should be certified. The legal claims asserted by Plaintiff in the Amended Complaint—namely, alleged violations of the Federal Motor Carrier Safety Administration Truth-in-Leasing statute, 49 U.S.C. § 14101 *et seq.* (the "Motor Vehicle Act,,), corresponding federal regulations, 49 C.F.R. § 376.1 *et seq.* (the "Truth-in-Leasing Regulations,,), and breach of contract—were found suitable for nationwide class certification in *Owner-Operator Indep. Drivers Ass'n v. Allied Van Lines, Inc.,* 231 F.R.D. 280 (N.D. Ill. 2005) (Shadur, J.), and numerous other published cases granting class certification in cases involving the Motor Vehicle Act, the Truth-in-Leasing Regulations, and/or breach of contract claims, including:

- *James Foster & Stone Logistics, Inc. v. CEVA Freight, LLC,* 272 F.R.D. 171 (W.D.N.C. 2011) (granting class certification as to Motor Vehicle Act and breach of contract claims), *subsequent decision,* 2012 U.S. Dist. LEXIS 108770 (W.D.N.C. Aug. 3, 2012) (reaffirming class certification as to Motor Vehicle Act claims).

- *Owner-Operator Indep. Drivers Ass'n v. C.R. England, Inc.,* 2005 U.S. Dist. LEXIS 35099 (D. Utah Aug. 29, 2005) (granting class certification as to Motor Vehicle Act claims), *subsequent decision,* 508 F. Supp. 2d 972 (D. Utah 2007) (ordering class-wide accounting).

- *Owner-Operator Indep. Drivers Ass'n v. Arctic Express,* 2001 U.S. Dist. LEXIS 24963 (S.D. Ohio Sept. 4, 2001) (granting class certification as to Motor Vehicle Act claims), *subsequent decision,* 288 F. Supp. 2d 895 (S.D. Ohio 2003) (denying defendant's motion to decertify class).

- *Steinhartz v. Saturn Transp. Sys.*, 2002 U.S. Dist. LEXIS 6198 (D. Minn. Mar. 26, 2002) (granting class certification as to Motor Vehicle Act and breach of contract claims).

- *Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc.,* 204 F.R.D. 138 (S.D. Ind. 2001) (granting class certification as to Motor Vehicle Act claims).

In addition to the above-referenced published cases, Plaintiff's motion for certification of the Plaintiff Class is supported by numerous unpublished district court decisions that are attached as Exhibits 1-5.[1]

In addition, Plaintiff has satisfied the requirements of Rule 23(a)(1)-(4), as well as Rule 23(b)(3), and the Defendant Class should be certified under Judge Lindberg's decision in *Sebo v. Rubinstein,* 188 F.R.D. 310, 318-320 (N.D. Ill. 1999) (certifying a defendant class urologists in

[1] *See, e.g., Owner-Operator Indep. Drivers Ass'n v. Bridge Terminal Transport, Inc.,* Case No. 04-2846 (DMC), Class Certification Order (D.N.J. Feb. 9, 2006) (Ex. 1); *Owner-Operator Indep. Drivers Ass'n v. Heartland Express, Inc. of Iowa,* Case No. 3-01-CV-80179, Order Granting Class Certification (S.D. Iowa Jan. 23, 2003) (Ex. 2); *Owner-Operator Indep. Drivers Ass'n v. Ledar Transport,* Case No. 00-0258-CV-W-2-ECF, Order (W.D. Mo. Mar. 31, 2002) (Ex. 3); *Owner-Operator Indep. Drivers Ass'n v. Gilbert Express, Inc.*, Civil Action No. 00-5163 (AJL), Class Certification Order (D.N.J. Feb. 14, 2001) (Ex. 4); *Padrta v. Ledar Transport, Inc.*, Case No. 96-0324-CV-W-2, Order (W.D. Mo. Sept. 6, 1996) (Ex. 5).

an antitrust class action alleging a price-fixing conspiracy among urologists in the Chicagoland area), and other decisions issued by judges in this District and elsewhere.[2]

II. STATEMENT OF THE CASE

In this proposed nationwide class action, Plaintiff asserts claims against Defendants, Atlas Van Lines, Inc. ("Atlas,,) and Ace World Wide Moving & Storage Co. ("Ace,,), for (1) violations of the Truth-in-Leasing Regulations (specifically, 49 C.F.R. § 376.12(d)), *see* Amended Complaint, ¶¶ 24-29, 35-43 (First and Third Claims for Relief); and (2) breach of contract, *see id.*, ¶¶ 30-34, 44-49 (Second and Fourth Claims for Relief). Plaintiff alleges that Defendants and the members of the Defendant Class formulated, implemented, and/or engaged in and practiced a common course of conduct against Plaintiff and the members of the Plaintiff Class by knowingly and unlawfully reducing and intentionally miscalculating their compensation. *Id.*, ¶ 2. *See Mervyn v. Atlas Van Lines, Inc.*, 2013 U.S. Dist. LEXIS 173744, *3 (N.D. Ill. Dec. 11, 2013) (Cox, M.J.) ("At issue in this case is whether Atlas and/or Ace are in breach of contract and/or violation of 49 C.F.R. § 376.12(d) based on their practice of compensating owner-operators from May 2009 to the present.,,). *See also Mervyn v. Atlas Van Lines, Inc.*, 2013 U.S. Dist. LEXIS 146840, *2 (N.D. Ill. Oct. 2, 2013) (Guzmán, J.) ("Plaintiff

[2] *See, e.g., Sherman v. Twp. High Sch. Dist. 214,* 540 F. Supp. 2d 985 (N.D. Ill. 2008) (Gettleman, J.) (certifying defendant class of school districts); *Weinman v. Fid. Capital Appreciation Fund,* 2008 U.S. Dist. LEXIS 21381 (N.D. Ill. Mar. 18, 2008) (Zagel, J.) (certifying defendant class of recipients of fraudulent stock distribution); *Zessar v. Helander,* 2006 U.S. Dist. LEXIS 12875 (N.D. Ill. Mar. 7, 2006) (defendant class of election officials) (Coar, J.); *Abt v. Mazda Am. Credit,* 1999 U.S. Dist. LEXIS 6169, *11-12 (N.D. Ill. Apr. 14, 1999) (Gettleman, J.) (consumer protection class action; certifying a defendant class consisting of 25 Mazda dealers in Illinois that allegedly used a misleading form agreement); *Endo v. Albertine,* 147 F.R.D. 164 (N.D. Ill. 1993) (certifying defendant class of 106 underwriters of stock offering); *Williams v. State Bd. of Elections,* 696 F. Supp. 1574, 1576-1579 (N.D. Ill. 1988) (Grady, J.) (disputed judicial elections; certifying four classes of defendant judges and one class of defendant judicial candidates); *Hammond v. Hendrickson,* 1986 U.S. Dist. LEXIS 22198, *22-35 (N.D. Ill. 1986) (Marshall, J.) (securities fraud; certifying defendant class of underwriters to distributed corporation's common stock); *Thillens, Inc. v. Community Currency Exch. Ass'n,* 97 F.R.D. 668, 673-683 (N.D. Ill. 1983) (Hart, J.) (antitrust conspiracy; certifying defendant class of currency exchanges).

alleges that Atlas and Ace knowingly and unlawfully miscalculated and reduced payments to truck owner-operators.„).

On behalf of himself and members of the Plaintiff Class, Plaintiff seeks to recover compensatory damages, as provided by 49 U.S.C. § 14704(a)(2) ("A carrier or broker providing transportation or service … is liable for damages sustained by a person as a result of an act or omission of that carrier or broker….„). *See Mervyn v. Nelson Westerberg, Inc.,* 2012 U.S. Dist. LEXIS 177804, *7-8 (N.D. Ill. Dec. 17, 2012) (Feinerman, J.) ("[T]he complaint alleges that the Westerberg Defendants and Atlas underpaid Mervyn and failed to provide him with documentation that would have confirmed the underpayments. That is sufficient to plead damages under § 14704(a).„) (citation omitted).

Paragraphs 8-16 of the Amended Complaint set forth Plaintiff's Class Action Allegations, including the necessary elements to satisfy Rule 23(a)(1)-(4) and (b)(3). On November 6, 2013, Defendants filed their Answer and Affirmative Defenses (Doc. 57), denying Plaintiffs' Class Action Allegations while, at the same time, asserting several class-wide affirmative defenses, including statute of limitations, laches, waiver and estoppel, and set-off. *See* Doc. 57 at 17-18 (Defendants' Affirmative Defenses).

In this case, Plaintiff and his counsel followed the practice, consistent with Seventh Circuit caselaw, *see, e.g., Damasco v. Clearwire Corp.,* 662 F.3d 891 (7th Cir. 2011), of moving at the outset of the litigation to certify the proposed Plaintiff Class. *See* Plaintiff's Motion for Class Certification and Stay of Briefing (Doc. 2 – filed May 14, 2013). As recently stated, such an "up-front certification motion … *cannot be ruled upon until discovery in a number of areas has been completed*….„ *Falls v. Silver Cross Hosp. & Med. Ctrs.,* 2013 U.S. Dist. LEXIS 74872, *1 (N.D. Ill. May 24, 2013) (emphasis added). As set forth herein, and as stated to this

Court during the hearings held on December 18, 2013, and January 14, 2014, Plaintiff believes that limited discovery will uncover facts and provide additional analysis that may be necessary for the parties to formulate a complete record before the instant motion is adjudicated.

III. STATEMENT OF FACTS

The following factual allegations may be found in Plaintiff's Amended Complaint and/or have been revealed in the fact discovery permitted to be taken thus far in this case:

A. The Parties

Plaintiff and the other members of the Plaintiff Class are independent owner-operators of moving trucks who lease their trucks to van lines and their agents, such as Defendants. Doc. 55, ¶ 8(a).

Atlas is the second largest van line in the country. Doc. 57, ¶ 4(a). According to information posted on Atlas's Internet website when this case was filed, "the Atlas Van Lines agent family is a cooperative, or "co-op,„ of 400+ independently owned moving and storage businesses across the U.S.„ *Id*.

Ace is one of Atlas's owner/agents. Deposition Transcript of Patricia Dalman, attached as Exhibit 6, 10:21; 132:23-133:1. Ace is owned by John W. Steiner ("Steiner„). *Id*., 132:23-133:1. Steiner and ten other agents purchased Atlas in 1988. Atlas Amplifier, Vol. 56, Winter 2008, attached as Exhibit 7, p. 9.

While an owner-operator's day-to-day interactions are typically with the owner-agent of Atlas, such as Ace, it is Atlas who ultimately calculates how an owner-operator will be compensated. Dalman Dep. Tr., (Ex. 6), 109:1-3; Deposition Transcript of Elfi Jackowski, attached as Exhibit 8, 101:4-104:2; Deposition Transcript of Mary Beth Johnson dated October

29, 2013, attached as Exhibit 9, 12:2-13:5; Affidavit of Mary Beth Johnson, filed in *Mervyn v. Nelson Westerberg, Inc.*, Case No. 11-cv-06594, Dkt. 136-6, attached as Exhibit 10, ¶¶ 8-9.

B. Form Lease Agreements And Compensation Schedules

Defendants (and, upon information and belief, members of the Defendant Class) entered into owner-operator agreements, also known as lease agreements, with Plaintiff and the other members of the Plaintiff Class during the Class Period, which is May 14, 2009 through the present. Defendants (and, upon information and belief, members of the Defendant Class) used form lease agreements in their dealings with the members of the Plaintiff Class. *See* Deposition Transcript of Marian Sauvey, attached as Exhibit 11, 16:10-19:4, 102:19-103:17; Deposition of Todd Suter, , attached as Exhibit 12, 11:10-12:5.

The form lease agreements include schedules pertaining to owner-operator compensation. *See, e.g.*, Schedule B-1 of the lease agreement governing interstate shipments hauled by Plaintiff during the Class Period, attached as Exhibit 13; Schedule B-1 of a lease agreement governing shipments hauled by Plaintiff prior to the Class Period, attached as Exhibit 14; Schedule B of another lease agreement listing Atlas as the carrier and involving another owner/agent of Atlas and Plaintiff, attached as Exhibit 15.

Plaintiffs believe that discovery will reveal that the lease agreements used with all members of the Plaintiff Class do not differ in any substantive way because they provide that:

- owner-operators are to be compensated based upon a percentage of linehaul and accessorial service revenue (*see, e.g.,* Ex. 13, Schedule B-1 ("Linehaul 58%„… "Accessorials 90%„); Ex. 14, Schedule B-1 (same); Ex. 15, Schedule B ("52% of Linehaul revenue„));

- the linehaul and accessorial service *charges* would be determined by applying a discount off of the tariff-based service rates for a given shipment;[3] and

[3] For instance, Schedule B-1 of Plaintiff's lease, which is believe to be substantively similar to the leases signed by other members of the Plaintiff Class, provides that:

- owner-operators would receive 100% of the applicable Fuel Surcharge relating to a shipment (*see, e.g.*, Ex. 13, Schedule B-1 ("Fuel Surcharge 100%,,); Ex. 14, Schedule B-1 (same); Ex. 15, Schedule B ("100% of the Fuel Surcharge,,)).

It is also anticipated that all lease agreements used with all members of the Plaintiff Class (1) fail to "clearly state,, that owner-operators would be paid only a fraction of the actual Fuel Surcharge on a shipment, even though the leases provide that they would be paid 100% of the Fuel Surcharge and (2) fail to "clearly state,, that owner-operator compensation would be reduced by the application of undisclosed "freebies,, and Defendants' unilateral reclassification of revenue received to "account,, for those "freebies.,,[4]

C. Undisclosed Fuel Discount

Discovery has confirmed that Defendants only paid owner-operators the amount that they decided to charge their customers for fuel. Dalman Dep Tr. (Ex. 6), 109:16-110:16; Johnson

---

> Linehaul and accessorial service ***charges*** shall be determined by applying the applicable effective or predetermined effective bottom line discount (determined under Atlas' rules) to the transportation and accessorial charges for each shipment.

Ex. 13, Schedule B-1 (emphasis added); Ex. 14, Schedule B-1 (same), Ex. 15, Schedule B (same, except that instead of saying "determined under Atlas' rules,, this paragraph in this schedule says "determined under Carriers' rules,, which means the same thing).

[4] The Truth-in-Leasing Regulations were promulgated to protect owner-operators by ensuring, among other protections, that they are provided with a clear explanation of how they will be paid. *Owner-Operator Indep. Drivers Ass'n Inc. v. Bulkmatic Transp. Co.*, 503 F. Supp. 2d 961, 971-72 (N.D. Ill. 2007) (noting that the Truth-in-Leasing Regulations arose out of a "deep concern for the problems faces by the owner-operator in making a decent living in his chosen profession). The regulations are in place "to eliminate or reduce opportunities for skimming and other illegal or inequitable practices; and to promote the stability and economic welfare of the independent truck segment of the motor carrier industry.,, *Id*. Accordingly, Section 376.12(d) of the regulations mandate that "[t]he amount to be paid by the authorized carrier for equipment and driver's services shall be ***clearly stated*** on the face of the lease or in an addendum which is attached to the lease.,, 49 C.F.R. § 376(d) (emphasis added). This disclosure requirement does not permit carriers to benefit from ambiguous payment provisions contained in their leases with owner-operators. *Bulkmatic*, 503 F. Supp. 2d at 971-972 (refusing to interpret an ambiguous lease provision in the manner advocated by the carrier because the carrier "would be permitted to violate the [Truth-in-Leasing Regulations] by drafting [l]eases with ambiguous compensation provisions yet have those same ambiguous terms interpreted in its favor,,).

Dep Tr. 10/29/13 (Ex. 9), 167:8-168:22. This amount was a mere fraction of the actual Fuel Surcharge applicable to the shipment. Johnson Dep. Tr. 10/29/13 (Ex. 9), 167:8-18.

Calculating the damages resulting from Defendants' failure to remit 100% of the applicable Fuel Surcharge will be relatively straightforward. For each shipment hauled during the Class Period, both the applicable Fuel Surcharge amount and the amount actually paid to the owner-operator per shipment are maintained on Atlas's database system, which can be queried to produce user-specified reports, including but not limited to, Atlas "Financial Result,, sheets, as well as owner-operator specific reports for all shipments hauled by that driver. Dalman Dep. Tr. (Ex. 6), 166:18-167-9.[5] Filed contemporaneously with this Motion, and in further support of this Motion, is the Expert Report of Benjamin S. Wilner, Ph.D. Dr. Wilner's analysis and conclusions are incorporated into this Motion. The report is based upon data concerning the Ace shipments hauled by Plaintiff during the Class Period. Dr. Wilner's expert report confirms that damages, i.e., the resulting reductions in payment, through the underpayment of Fuel Surcharge amounts, can be established by a common methodology on a class-wide basis. Wilner Report, pp. 11-12.

[5] Pursuant to Fed. R. Civ. P. 34, Plaintiff requested access to Defendants' computer system to verify and assess the capabilities of their database(s). Defendants objected to the inspection requests. During the meet and confer relating to the inspection requests, counsel for Plaintiff and Defendants both acknowledged (at the time) that discovery was currently limited in scope to Plaintiff's individual claims. Defendants' agreed not to argue that Plaintiff had waived his right to compel said inspections to the extent discovery is expanded to include class discovery.

D. Improper Reduction of Revenue Through Reclassification

Discovery also has confirmed that Defendants reduced owner-operator compensation by internally reclassifying revenue received. Johnson Affidavit, (Ex. 10), ¶ 9; Johnson Dep. Tr. 10/29/13 (Ex. 9), 50:1-63:6. The negative impact Defendants' undisclosed accounting tactics had on the members of the Plaintiff Class is best explained by way of example.

Assume that Defendants' customer was billed $3,000 for a shipment. Assume that the $3,000 is made up of a linehaul charge equal to $1,000, and two accessorial service charges of $1,000 each. Assume further that only one owner-operator hauled the shipment from origin to destination.

Charge Type	Amount Charged To Customer
Linehaul	$1,000
Accessorial Service 1	$1,000
Accessorial Service 2	$1,000
Total	**$3,000**

Under the governing compensation schedule, such as Schedule B-1 (Ex. 13), and with respect to compensation related to linehaul only, the owner-operator who hauled this shipment should have received no less than $580, or 58% of the $1,000 linehaul revenue resulting from the $1,000 linehaul charge.

But because of Defendants' undisclosed reclassification of revenue received, the owner-operator was not paid $580 in linehaul. Instead, Defendants (and, it is believed, the members of the Defendant Class) reclassified revenue received to account for "freebies,, and other discounts and that the reclassification of revenue reduced the amounts used to calculate owner-operator compensation.[6]

[6] Discovery taken thus far shows that Atlas, as opposed to the owner-agents, perform this reclassification of revenue received. Dalman Dep. Tr. (Ex. 6), 109:1-3. There is no indication that any of Atlas's owner-agents perform this task.

Discovery has revealed that one such "freebie,, relates to what is known as Full Valuation Protection ("FVP,,) insurance.[7] Whenever Defendants agreed to provide FVP insurance to their customers free of charge, Defendants would nonetheless place a value on that insurance and book the $3,000 revenue received based upon the assessed value of this "freebie.,, Defendants' lease agreements do not disclose that owner-operator compensation would be affected by this reclassification of revenue received or by "freebies,, or additional undisclosed discounts, which operated just like undisclosed fees in reducing owner-operator compensation. *See, e.g.*, Exs. 13 - 15.

In the example above, now assume that Defendants valued the FVP "freebie,, given to Defendants' customer at $600. Even though Defendants did not charge the customer $600, they pretend as if they did. Having now created this fictitious $600 charge, Defendants then reduce each of the three actual $1,000 charges by $200, in order to arrive back at the amount paid by their customer, which again is $3,000.

Pay Type	**Amount Used To Calculate Owner-Operator Compensation**
Linehaul	$800
Accessorial Service 1	$800
Accessorial Service 2	$800
FVP "Freebie,,	$600
Total	**$3,000**

Defendants then calculate owner-operator compensation based upon linehaul as, using Schedule B-1 as an example, 58% of $800, as opposed to 58% of $1,000, shorting the owner-operator, on just linehaul alone, no less than $116, which equals the difference between (58% *

---

[7] Full Value Protection is a valuation option under which Defendants assumed liability to the customer for either the full cost of repairs or the replacement value of articles lost, missing or destroyed without deduction for depreciation.

$1,000) and (52% * $800). Then, to add insult to injury, the full amount of the value of the "freebie,„ in this example—$600, is distributed and booked as payment to Atlas.[8]

After taking the depositions of certain Defendant employees, it is now understood that these "freebies„ are referenced (albeit not clearly) on Atlas' Financial Result sheets, which contain data stored on Atlas's database. *See* Deposition Transcript of Mary Beth Johnson (10/31/13), attached as Exhibit 16, 73:7-75:16. Atlas produced a Financial Result sheet for each shipment hauled by Plaintiff, demonstrating an ability to generate such reports for each shipment during the Class Period.

The Atlas Financial Result sheets contain three charts.[9] The first chart is titled "Invoice Distribution.„ *See, e.g.*, Ex. 17 (ATLAS000341-000342). Defendants have explained that the Invoice Distribution chart identifies the linehaul charges and accessorial charges pertaining to the shipment. Johnson Dep. Tr. 10/29/13 (Ex. 9), 35:6-36:21. In the example above, this chart would include the $1,000 linehaul charge, and the two accessorial service charges. This chart also identifies the total of all charges, or $3,000.[10]

The second chart is titled "Payable Distribution.„ *See, e.g.*, Ex. 17 (ATLAS000342-000344). Unlike the Invoice Distribution chart, this chart "accounts„ for the assessed value of any "freebies„ Defendants provided to their customers. In the example above, this chart would

---

[8] Atlas declares that "[i]t is undeniable that revenue that is not received cannot be paid out.„ *Mervyn v. Nelson Westerberg, Inc.*, Case No. 11-cv-06594, Dkt. 136-6 (Ex. 10), ¶ 8. But that is exactly what happens with the "freebies.„ Defendants undisclosed booking tactics means that Atlas receives 100% of the assessed value of the "freebie.„

[9] Exhibit 17, is the Financial Result sheet Atlas produced in this case relating to one of the seven shipments hauled by Plaintiff during the Class Period. Atlas produced Financial Result sheets for each shipment hauled by Plaintiff.

[10] On the Financial Result sheet marked as Ex. 17, the total of all charges for the shipment was $3,027.08.

include the reclassified linehaul amounts and accessorial service amounts of $800, as well as a $600 line item for the "freebie.„[11]

The third chart, titled "Participant Distribution,„ identifies the participant who receives the amount of the assessed value of the "freebie„ or "freebies.„[12]

Calculating the damages resulting from Defendants' reclassification of revenue received can also be accomplished through Defendants' data. Both the actual linehaul *charge* and actual accessorial service *charges* that should have been used to calculate owner-operator compensation, as well as the understated linehaul amounts and accessorial service amounts used by Defendants to calculate owner-operator compensation, are maintained on Atlas's database. Reports containing this data, such as Atlas's Financial Result sheets, can be generated for each and every shipment during the Class Period from this database.

Again, filed contemporaneously with this Motion, and in further support of this Motion, is the Expert Report of Benjamin S. Wilner, Ph.D. Dr. Wilner's analysis and conclusions are incorporated into this Motion. The report is based upon data concerning the Ace shipments hauled by Plaintiff during the Class Period. Dr. Wilner's expert report confirms that the damages resulting from undisclosed discounts, for instance through the reductions in payment through the underpayment by way of the manipulation of the "freebies,„ can be established by a common methodology on a class-wide basis. Wilner Report, pp. 9-11.

---

[11] On the Financial Result sheet marked as Ex. 17, there are two "freebies„ that appear in the Payable Distribution chart, but not in the Invoice Distribution chart. Ex. 17, ATLAS 000343. The first is a $[redacted] PBLD adjustment. *Id.* The second is a $[redacted] adjustment for a FVP freebie. *Id.* Note that $3,027.08 is also the total for the Payable Distribution chart. But because a $[redacted] PBLD adjustment and a $[redacted] FVP freebie have been added as additional line items, the amounts for all other line items (*i.e.*, those identified as charges in Invoice Distribution chart) are reduced in order to arrive back at the received revenue figure of $3,027.08

[12] On the Financial Result sheet marked as Ex. 17, the Participant Distribution chart (Atlas 000344-345) shows that Atlas took the full amount of both the $[redacted] PBLD adjustment and the $[redacted] FVP freebie, and that the amounts distributed to all other participants were reduced as result.

IV. ARGUMENT

A. The Plaintiff Class Satisfies The Requirements Of Rule 23(a)

1. Introduction

As the Seventh Circuit and this Court have recognized, "a district court has broad discretion to determine whether certification of a class is appropriate.„ *Kohen v. Pac. Inv. Mgmt. Co.,* 244 F.R.D. 469, 476 (N.D. Ill. 2007) (Guzmán, J.) (quoting *Retired Chi. Police Ass'n v. City of Chi.,* 7 F.3d 584, 596 (7th Cir. 1993), aff'd, 571 F.3d 672 (7th Cir. 2009)).[13] To certify a class, this Court must find that Plaintiff has satisfied the four requirements of Rule 23(a), which are:

(a) *numerosity* (a "class [so large] that joinder of all members is impracticable„);

(b) *commonality* ("questions of law or fact common to the class„);

(c) *typicality* (named parties' claims or defenses "are typical … of the class„); and

(d) *adequacy of representation* (representatives "will fairly and adequately protect the interests of the class„).

Lau v. Arrow Fin. Svcs., LLC, 245 F.R.D, 620, 623 (N.D. Ill. 2007) (Guzmán, J.) (citation omitted). Plaintiff must also satisfy one of Rule 23(b)'s requirements; in this case, that questions of law or fact common to the class predominate over individual questions and a class action is superior method of adjudicating the controversy. *Id.*; *see* FED. R. CIV. P. 23(b)(3).[14]

---

[13] *See also Sherman,* 540 F. Supp. 2d at 991 ("Rule 23 of the Federal Rules of Civil Procedure governs the certification of class actions in federal court, and district courts enjoy broad discretion to determine whether the requirements of the Rule are met.„) (citations omitted).

[14] Before deciding whether to allow a case to proceed as a class action, this Court "should make whatever factual and legal inquiries are necessary„ under Rule 23. *Szabo v. Bridgeport Machines, Inc.,* 249 F.3d 672, 675-676 (7th Cir. 2001); *accord Parko v. Shell Oil Co*., 2014 U.S. App. LEXIS 1018, * 6 (7th Cir. Jan. 17, 2014). However, as this Court (and other judges within this District) have recognized, the "preliminary inquiry into the merits„ discussed in *Szabo* is a limited one that has as its focus not the substantive strength or weakness of Plaintiff's claims against Defendants but, rather, "whether the path that will need to be taken to decide the merits renders the case suitable for class treatment.„ *Lau,* 245 F.R.D. at 623 (citation omitted). It is in this limited sense that this Court assesses the "merits„ of Plaintiff's allegations in considering the instant motion. *Id.* .

Class certification concerns whether the requirements of Rule 23 have been satisfied, *not* whether the party seeking class certification has stated a cause of action or will prevail on the merits. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2550 (2011). Satisfaction of these requirements, "categorically entitles a plaintiff to pursue his claim as a class action.„ *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 398-99 (2009). "District courts have broad discretion in determining wither the plaintiff has satisfied this burden.„ *Rieter v. Sonotone Corp.*, 442 U.S. 330, 345 (1979); *Messner v. Northshore Univ. Healthsystem*, 669 F.3d 802, 811 (7th Cir. 2012)).

As a threshold matter, this Court typically examines the class definition(s) set forth in the plaintiff's complaint and/or class certification motion. *See Lau*, 245 F.R.D. at 623-624; *Kohen*, 244 F.R.D. at 475-476. A class definition must satisfy two prerequisites: First, the class must be sufficiently defined so that the class is identifiable *and* the named representative must fall within the proposed class. *Lau*, 245 F.R.D. at 623. However, Plaintiff need not identify each member of the Plaintiff Class to secure class certification. *Id.* at 624. "An identifiable class exists if its members can be ascertained by objective criteria.„ *Id.* (citation omitted). *Accord Harris v. comScore, Inc.*, 292 F.R.D. 579, 587 (N.D. Ill. 2013) (Holderman, C.J.).

In this case, Paragraph 8(a) of the Amended Complaint defines the Plaintiff Class as "[a]ll equipment owner-operators in the United States who, during the period from May 14, 2009, through the present, had or have lease agreements that identify [Atlas] as the carrier, and which are subject to federal regulations contained in Part 376 of the Code of Federal Regulations.„ This Class definition clearly satisfies the requirements elucidated by this Court in *Lau*, 245 F.R.D. at 623-624, and *Kohen*, 244 F.R.D. at 475. The Class definition "does not

suffer from a fatal flaw,„ and, in this Court's words, "[a]t this stage of the litigation, it would be premature to deny [P]laintiff[] [and members of the Plaintiff Class] the opportunity to unify in their task to prove that [D]efendants engaged in a common course of conduct that negatively affected all members of the [Plaintiff Class].„ *Id.* We note that the definition of the Plaintiff Class is virtually identical to that approved by Judge Shadur in *Allied Van Lines,* 231 F.R.D. at 281.[15] It is also virtually identical to class definitions approved by other district courts in granting class certification in Motor Vehicle Act cases brought by or on behalf of owner-operators. *See, e.g., James Foster,* 272 F.R.D. at 174, 176; *C.R. England,* 2005 U.S. Dist. LEXIS 35099, *1; *Arctic Express,* 2001 U.S. Dist. LEXIS 24963, *14-16; *Steinhartz,* 2002 U.S. Dist. LEXIS 6198, **7, 25.[16]

2. Numerosity

To satisfy the "numerosity„ requirement of Rule 23(a)(1), the exact number of class members need not be pleaded or proved. This Court may rely on common sense assumptions and reasonable inferences in determining whether the numerosity requirement has been met. *See Lau,* 245 F.R.D. at 624; *Kohen,* 244 F.R.D. at 476. In making a numerosity determination, this Court should also consider factors of judicial economy, geographical dispersion, and the ability of individual members to bring suit. *See Lau,* 245 F.R.D. at 624-625.

---

[15] In *Allied Van Lines,* plaintiffs sought certification of class defined as "owner-operators of motor vehicle equipment who, after May 5, 2000, were parties to federally-regulated leases with [defendant] TFC, Inc.„ *Owner-Operator Indep. Drivers Ass'n v. Allied Van Lines, Inc.,* Case No. 04 C 3207, Memorandum in Support of Plaintiffs' Motion for Class Certification, at 4 (filed Jan. 3, 2005). This is the class definition approved by Judge Shadur in his class certification ruling. 231 F.R.D. at 281, 285-286.

[16] It is well settled that whenever necessary, this Court has the authority to modify a class definition as the litigation progresses. *See In re Motorola Sec. Litig.,* 644 F.3d 511, 518 (7th Cir. 2011); *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 619 (7th Cir. 2007); *Boundas v. Abercrombie & Fitch Stores, Inc.,* 280 F.R.D. 408, 411 (N.D. Ill. 2012) (Feinerman, J.).

Plaintiff alleges that there are thousands of members in the Plaintiff Class, "the exact number and their identities being known by Atlas and Ace and the members of the Defendant Class.„ Amended Complaint, ¶ 9. These allegations are more than sufficient under this Court's class certification ruling in *Kohen*, 244 F.R.D. at 476: "Plaintiffs allege that there are over one thousand class members around the United States whose identities can be ascertained through [Chicago Board of Trade] records … [T]he Court is satisfied that the number [of] members in the proposed class is large enough to render joinder impracticable.„ Further, evidence supporting the fact that there are thousands of members in the Plaintiff Class exists. Atlas describes itself as being owned and directed by its agents, which number in the hundreds. Just one of those agents—Newesco, Inc., has contracted with approximately 90 to 100 independent owner-operators on an annual basis during the Class Period. Deposition of Charles Schaper, Exhibit 18, 21:13-17.

To the extent that Defendants contest the sufficiency of Plaintiff's allegations of numerosity, the material facts can be secured from discovery into Defendants' books and records; as Judge Shadur stated in *Allied Van Lines*:

> From documents produced by [defendant] TFC, [plaintiff] has identified 32 owner-operators who are currently under TFC leases and 82 additional owner-operators who were subject to leases with TFC at one time or another during the four-year time frame of the proposed class definition. Moreover, those owner-operators are geographically dispersed (and in fact are almost constantly on the move) which increases the impracticality of individualized joinder. Taken together, those assertions plainly meet the numerosity requirement, and Allied-TFC have not objected on that score.

231 F.R.D. at 281-282 (citation omitted).[17] The same result has been obtained in other Motor Vehicle Act cases in which classes of owner-operators have been certified.[18]

---

[17] As set forth herein, and as discussed with this Court during the hearings conducted on December 18, 2013 and January 14, 2014, Plaintiff seeks leave to conduct focused discovery necessary to satisfy the numerosity requirement. "Although discovery may in some cases be unnecessary to resolve class issues,

Plaintiff submits that the "numerosity„ requirement of Rule 23(a)(1) has been met in this case, and to the extent this Court determines that a showing has not been made, requests leave to take class discovery to make the showing.

3. Commonality

To satisfy the commonality requirement, there must be questions of law or fact common to the class. As this Court has stated, "[a] common nucleus of operative fact is usually enough to satisfy the commonality requirement„, and "[t]he fact that there is some factual variation among the class … will not defeat a class action.„ *Kohen,* 244 F.R.D. at 476 (quoting *Rosario v. Livaditis,* 963 F.2d 1013, 1017-1018 (7th Cir. 1992)). The commonality requirement "has been referred to as a low hurdle that is easily surmounted.„ *Id.* (citations omitted). "Commonality is satisfied as long as one question of law or fact is common to the class.„ *Id.* (citations omitted).

In this case, Plaintiff has identified a variety of common questions that can be resolved on a class-wide basis. *See* Amended Complaint, ¶ 11(a)-(g).[19] These allegations are more than

---

in other cases a court may abuse its discretion by not allowing for appropriate discovery before deciding whether to certify a class.„ *Damasco,* 662 F.3d at 896 (citations omitted). *See generally* 3 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 7:16, at 77 (5th ed. 2013) ("Discovery concerning the certification requirements is … permitted, indeed often required.„) (footnote omitted) (*citing, inter alia,* the Seventh Circuit's decisions in *Damasco* and *Retired Chi. Police Ass'n,* 7 F.3d at 598 ("some discovery may be necessary to determine whether a class should be certified„) (citation omitted)).

[18] *See, e.g., C.R. England,* 2005 U.S. Dist. LEXIS 35099, *5 (numerosity requirement satisfied; based on data provided by defendants, plaintiffs estimated that the number of individual owner-operators who were members of the class was "over one thousand„); *Steinhartz,* 2002 U.S. Dist. LEXIS 6198, *15 (same; noting plaintiffs' assertions that "the average owner-operator drives approximately 100,000 miles per year and spends more than 300 nights away from home„ and observing that "[t]hese peculiar circumstances certainly mitigate against the practicability of individual lawsuits or joinder„); *Mayflower Transit,* 204 F.R.D. at 145 ("Initial document production indicates that the classes will consist of at least 1,000 similarly-situated owner-operators who are geographically dispersed throughout the nation. Joinder would be little short of impossible.„).

[19] Plaintiff alleges that the common questions of law or fact in this class action include, but are not limited to:

(a) Whether the agreements violate the Truth-in-Leasing regulations;

sufficient to satisfy Rule 23(a)(2), as this Court recognized in *Kohen,* 244 F.R.D. at 476-477. *See also Kernats v. Comcast Corp.*, 2010 U.S. Dist. LEXIS 112071, *16 (N.D. Ill. Oct. 20, 2010) ("Plaintiffs' allegations of standardized conduct on the part of Comcast are enough to meet the relatively low hurdle of proving commonality.„) (citations omitted). Plaintiff alleges that "[t]he payment provisions contained in the lease agreements entered into between members of the Plaintiff Class and members of the Defendant Class and listing Atlas as the carrier are, upon information and belief, substantively identical.„ Amended Complaint, ¶ 11. It is well established in this Circuit and District that "claims arising from interpretations of a form contract appear to present the classic case for treatment as a class action.„ *Keele v. Wexler,* 149 F.3d 589, 594 (7th Cir. 1998). *Accord Harris,* 292 F.R.D. at 585; *Boundas,* 280 F.R.D. at 413.

In *Allied Van Lines,* Judge Shadur found that the commonality requirement had been satisfied, 231 F.R.D. at 282, 284-286, observing that "the cases have not been overly restrictive in setting out the requirements for commonality, with the existence of a common nucleus of operative fact usually being enough to qualify.„ *Id.* at 282 (citing *Rosario,* 963 F.2d at 1018). Judge Shadur stated that "[i]n this case a common threshold factual issue – whether TFC's

---

> (b) Whether Atlas and/or Ace and the members of the Defendant Class engaged in a common course of conduct to systematically reduce compensation owed and paid to Plaintiff and the members of the Plaintiff Class;
> (c) Whether Atlas and/or Ace and the members of the Defendant Class engaged or continue to engage in a combination and conspiracy among themselves to improperly reduce and miscalculate the true compensation owed to Plaintiff and the members of the Plaintiff Class;
> (d) Whether the conduct and actions committed or engaged in by Atlas and/or Ace and the members of the Defendant Class violated the Motor Carrier Act;
> (e) Whether the conduct of Atlas and/or Ace and the members of the Defendant Class … caused injury to Plaintiff and the members of the Plaintiff Class;
> (f) Whether Ace and the members of the Defendant Class share a similar defense or defenses; and
> (g) The appropriate measure of damages sustained by Plaintiff and the members of the Plaintiff Class.

Amended Complaint, ¶ 11(a)-(g).

standard lease provisions violate the applicable regulations – will determine the ability of any class member to recover.„ *Id.* at 285. In other Motor Vehicle Act class actions brought by or on behalf of owner-operators, the district courts have reached the same conclusion, finding the commonality requirement to have been satisfied. As Judge Whitney stated in *James Foster*:

> The claims Plaintiffs seek to advance on behalf of the class all arise under the same statute, 49 U.S.C. § 14704(a)(1) (injunctive relief) and § 14704(a)(2) (damages), and the same regulatory scheme involving uniform provisions contained within their respective operating agreements. More specifically, the named Plaintiffs' claims arise from the same course of conduct (CEVA's alleged inclusion of conflicting provisions and failure to include other provisions in its standard operating agreement), and are based on the same legal theory (that through this conduct, CEVA failed to comply with [the Motor Vehicle Act] and the Leasing Regulations, and is therefore liable). As a result, the questions of law and fact stemming from these claims appear to be common to the class.
>
> Similarly, the breach of contract claim involves a standard operating agreement that CEVA entered into with potential class members. The named Plaintiffs advance the legal theory that if CEVA has breached provisions of the operating agreement by failing to comply with the federal regulations, it has breached those provisions in an identical manner for all class members. The parties further agree that the breach of contract claim should be governed by Texas law pursuant to the choice-of-law provision in all of the operating agreements that Plaintiffs and the potential class members signed. This existence of a common operating agreement signed by all members of the class, and of a common set of laws under which the claims of the class will be decided, is sufficient to satisfy Rule 23(a)(2)'s commonality requirement.

272 F.R.D. at 174.[20]

---

[20] *See, e.g., C.R. England,* 2005 U.S. Dist. LEXIS 35099, *6-8 (commonality requirement satisfied where "all causes of action arise from such [standardized] leases and from England's allegedly systematic actions„); *Arctic Express,* 2001 U.S. Dist. LEXIS 24963, *18-20 (commonality requirement satisfied where a question common to the class was whether the lease agreements violated the applicable federal regulations); *Steinhartz,* 2002 U.S. Dist. LEXIS 6198, *15-17 (commonality satisfied where "Plaintiffs have alleged a pattern of misconduct predicated on violations of federal regulations … that potentially affected a large number of owner-operators working for Defendants„); *Mayflower Transit,* 204 F.R.D. at 145-146 (same; enumerating common issues of law and fact affecting owner-operators who were members of the proposed class).

Plaintiff submits that the "commonality„ requirement of Rule 23(a)(2) has been met in this case, and to the extent this Court determines that a showing has not been made, requests leave to take class discovery to make the showing.

4. Typicality

As this Court recognizes, the typicality requirement is met if the named plaintiff's claim "arises from the same event or practice or course of conduct that gives rise to the claims of the other class members and his or her claims are based on the same legal theory.„ *Lau,* 245 F.R.D. at 625 (quoting *De La Fuente v. Stokley-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983)). Rule 23(a)(3) may be satisfied "even if there are factual distinctions between the claims of the named plaintiff[] and those of other class members.„ *Id.* So long as the claims of the other class members have "the same essential characteristics„ as those of the named plaintiff, typicality is established. *Id.* (citation omitted). As this Court recognized in *Kohen,* 244 F.R.D. at 477, even if there are factual distinctions between the representative party and other class members, the typicality requirement can be satisfied. "Thus, similarity of legal theory may control even in the fact of difference of fact.„ *Id.* (quoting *De La Fuente,* 713 F.2d at 232). *See also Harris,* 292 F.R.D. at 586; *Boundas,* 280 F.R.D. at 412-413.

In this case, there is no question that Plaintiff's legal theory is typical of those of the members of the Plaintiff Class—their claims arise out of Defendants' alleged violations of the Truth-in-Leasing Regulations. In particular, the claims arise out of Defendants' undisclosed (and thus unlawful) reclassification of revenue received based upon undisclosed "freebies„ and discounts to Fuel Surcharge, which reduced the amounts received by owner-operators.

Under this Court's decisions in *Lau,* 245 F.R.D. at 625-626, and *Kohen,* 244 F.R.D. at 476-477, this is more than sufficient to satisfy Rule 23(a)(3). In *Allied Van Lines,* Judge Shadur

reached the same conclusion, finding that the typicality requirement had been met in a class action brought on behalf of owner-operators:

> Here it is unquestionable that all of the asserted claims arise from the same course of conduct (TFC's inclusion of certain provisions in its standard lease) and are based on the same legal theory that those provisions violate applicable federal regulations. That clears the low hurdle of Rule 23(a)(3), which requires neither complete coextensivity nor even substantial identity of claims.

231 F.R.D. at 282. *Accord Kernats,* 2010 U.S. Dist. LEXIS 112071, *17. The same conclusion has been reached by other district courts in certifying classes of owner-operators in cases alleging violations of the Truth in Leasing Regulations and/or breach of contract.[21]

We note that in previous cases brought by owner-operators, the district courts have uniformly held that the typicality and commonality requirements have been met, despite the need to calculate individualized damages. *See, e.g., James Foster,* 272 F.R.D. at 175; *Allied Van Lines,* 231 F.R.D. at 284 (noting that "[s]everal district courts in [the Seventh Circuit] have certified class actions in factually analogous situations, despite the need to determine damages individually,,) (citing *Mayflower Transit,* 204 F.R.D. 138). Of course, the existence of individualized damages does not spell doom for class certification; indeed, that is especially true where the individualized claims are small. *See Butler v. Sears, Roebuck & Co.,* 727 F.3d 796, 801 (7th Cir. 2013); *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir. 2004); *Harris,*

---

[21] *See, e.g., James Foster,* 272 F.R.D. at 174-175 (typicality requirement satisfied because the named plaintiffs and the potential class members shared "the same factual allegations as to [defendant's] alleged unlawful conduct,, "the same legal claims that CEVA's conduct violates applicable federal regulations and contract law,, and "the same interest in proving CEVA's liability,,; because "Plaintiffs … signed substantially the same operating agreement as all other CEVA contractors during the class period, … Plaintiffs' allegations of Leasing Regulations violations and breach of contract in the Amended Complaint are typical of those of other potential class members,,); *C.R. England,* 2005 U.S. Dist. LEXIS 35099, *9 (same; "All of the claims in this suit arise from either the allegedly improper drafting of these lease agreements or the allegedly improper and systematic manner with which C.R. England treats its owner-operators.,,); *Arctic Express,* 2001 U.S. Dist. LEXIS 24963, *25 (same); *Steinhartz,* 2002 U.S. Dist. LEXIS 6198, *17-19 (same); *Mayflower Transit,* 204 F.R.D. at 146-147 (same).

292 F.R.D. at 589 (stating that "it is far more efficient to resolve all of the common issues in a single proceeding, and then to hold individual hearings on damages if necessary, than it would be to litigate all of the common issues repeatedly in individual trials,,) (citation omitted).

Plaintiff submits that the "typicality,, requirement of Rule 23(a)(3) has been met in this case, and to the extent this Court determines that a showing has not been made, requests leave to take class discovery to make the showing.

5. Adequacy of Representation

Rule 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class.,, Adequacy of representation includes both adequacy of Plaintiff's counsel, as well as adequacy of representation in protecting the different, separate, and distinct interests of the class members. *See Kohen,* 244 F.R.D. at 478. These requirements may be met by showing that (a) Plaintiff does not have conflicting or antagonistic interests compared with the Plaintiff Class as a whole; (b) Plaintiff is sufficiently interested in the case's outcome to ensure vigorous advocacy; and (c) Class Counsel is experienced, competent, qualified, and able to conduct the litigation vigorously. *See Harris,* 292 F.R.D. at 587; *Boundas,* 280 F.R.D. at 412.[22]

In this case, based upon the course of proceedings since it was initiated in May 2013, this Court should find that both Plaintiff and Class Counsel will vigorously prosecute this case and protect the interests of the members of the Plaintiff Class. *See Harris,* 292 F.R.D. at 587; *Kohen,* 244 F.R.D. at 479.

[22] To demonstrate their qualifications to serve as Class Counsel, the professional resumes of the undersigned counsel are attached as Exhibits 19-22.

Plaintiff submits that the "adequacy of representation„ requirement of Rule 23(a)(4) has been met in this case, and to the extent this Court determines that a showing has not been made, requests leave to take class discovery to make the showing.

B. The Plaintiff Class Satisfies The Requirements Of Rule 23(b)(3)

1. Introduction

In addition to the requirements of Rule 23(a), one of the three subsections of Rule 23(b) must be satisfied before the Plaintiff Class may be certified. Here, Plaintiff seeks certification under Rule 23(b)(3), *see* Amended Complaint, ¶¶ 13-16, which requires this Court to find that common questions of law or fact "predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.„ *Kohen,* 244 F.R.D. at 479 (quoting FED. R. CIV. P. 23(b)(3)).

2. Predominance

As this Court has recognized, predominance is satisfied "when there exists generalized evidence that proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class member's individual position.„ *Lau,* 245 F.R.D. at 626 (citation omitted). Thus, in the words of this Court, it "should consider whether the class seeks remedy to a common legal grievance.„ *Kohen,* 244 F.R.D. at 479 (citation omitted).

In *Allied Van Lines,* 231 F.R.D. 280, Judge Shadur found that Rule 23(b)(3)'s predominance requirement had been satisfied, stating that "[i]n this case a common threshold factual issue – whether TFC's standard lease provisions violate the applicable regulations – will determine the ability of any class members to recover.„ *Id.* at 285. The court rejected the argument advanced by Allied and its agent (TFC) that the owner-operators' claims for monetary relief were too individualized to be amenable to adjudication on a class-wide basis. *Id.* at 284.

Once again, Judge Shadur recognized that other district courts within the Seventh Circuit had "certified class actions in factually analogous situations, despite the need to determine damages individually.„ *Id.* (citing *Mayflower Transit,* 204 F.R.D. 138). Other district courts have found Rule 23(b)(3) to be satisfied where there were similar claims alleging violations of the Truth in Leasing Regulations. After noting these decisions, *see James Foster,* 272 F.R.D. at 176, Judge Whitney offered the following analysis that is equally applicable in this case:

> As to the predominance requirement, Plaintiffs have demonstrated that every member of the class signed substantially the same CEVA operating agreement. As a result, common issues predominate as to whether certain provisions of CEVA's operating agreement, as set forth in each of the named Plaintiffs' Amended Complaint, violate the [Motor Vehicle Act] and Leasing Regulations. The resolution of these issues common to the class will resolve the question of whether injunctive and declaratory relief is warranted and whether any recovery is available to the class members. The same is true for the breach of contract action, … as Plaintiffs maintain that if CEVA has breached certain provisions of the operating agreement by failing to comply with the federal regulations, it has breached those provisions in an identical manner for all class members.

Id. The same result has been reached in other cases brought by owners-operators.[23]

Evidence exists that Defendants relied upon a standard form operating agreement that did not "clearly state„ that Defendants would be reducing owner-operator compensation based upon undisclosed "freebies„ or through undisclosed discounts applied to the applicable Fuel Surcharge. While this Court has not yet permitted Plaintiff to take class certification-related discovery, it is anticipated that such discovery will confirm that all owner-operator agreements used during the Class Period and by all members of the Class contained this flaw, and are substantively similar in manners relevant to this case.

---

[23] *See, e.g., C.R. England,* 2005 U.S. Dist. LEXIS 35099, *20 (predominance requirement satisfied where plaintiffs' case was grounded on federal Truth-in-Leasing regulations and each claim was based on defendant's lease agreements and defendant's allegedly uniform course of conduct directed toward owner-operators); *Arctic Express,* 2001 U.S. Dist. LEXIS 24963, *27-36 (same); *Steinhartz,* 2002 U.S. Dist. LEXIS 6198, *23 (same; "the common issues related to Defendants' alleged violations of federal regulations … predominate„); *Mayflower Transit,* 204 F.R.D. at 148 (same; "we find that the paramount issues involve the interpretation and application of federal truth-in-leasing regulations„).

3. Superiority

Rule 23(b)(3) requires "that a class action [be] superior to other available methods for the fair and efficient adjudication of the controversy.„ *Kohen,* 244 F.R.D. at 480 (quoting FED. R. CIV. P. 23(b)(3)). In *Kohen,* this Court found that that the "superiority„ requirement had been satisfied where the size of the potential class was "estimated at over one thousand„ and the case involved "a large number of investors who are geographically dispersed and seek to resolve a common legal grievance based on defendants' same course of conduct affecting the same fungible contract.„ *Id.* at 481.

Judge Shadur found that the "superiority„ requirement had been satisfied in *Allied Van Lines,* 231 F.R.D. 280, because "the individual amounts recoverable [by the owner-operators] are indeed relatively small, suggesting that many class members would not choose to pursue their claims individually.„ *Id.* at 285. Moreover, "the typical putative class member here spends a majority of time away from home, constantly driving to far-flung destinations„ which also "supports the superiority of the class action device for maintaining this action.„ *Id.* The same reasoning was employed by Judge Barker in *Mayflower Transit*:

> A lawsuit by each individual plaintiff is impracticable since the amount of money at issue is less, in many cases, than the amount it would cost for each to prosecute a case. We note in addition that the individual owner-operators suffer an additional disadvantage that most individual litigants do not: because they travel an average of 100,000 miles per year, they are absent on the average 300 nights per year. Accordingly, even if they were inclined to prosecute their cases, it is unlikely that they could marshal the time to do so. It follows that, absent a class action, the individuals would likely be without a remedy and Mayflower would likely retain the benefits of its alleged wrongdoing.

204 F.R.D. at 149. The same result has been reached by district courts in other cases brought by or on behalf of owner-operators.[24] Further, as explained in Dr. Wilner's expert report, there

[24] *See, e.g., James Foster,* 272 F.R.D. at 177 (superiority requirement satisfied; "It further appears that the class action method is ideally suited to concentrate the litigation of the class members' claims

exists a common methodology to show damages on a class-wide basis as a result of Defendants' conduct. In his report, Dr. Wilner concludes as follows:

> Based upon my review of the records provided, within a reasonable degree of statistical certainty, it is my opinion that damages are capable of measurement on a classwide basis. The data in Defendants' computer records can be identified that were used by Defendants to lower Plaintiffs' compensation. Through the use of the Defendants' computer records, employing a common methodology, there is a viable method of ascertaining the adjustments employed by Defendants to reduce compensation.
>
> As to the Defendants' failure to remit 100% of the applicable fuel surcharge for each shipment hauled during the class period, the applicable fuel surcharge amount and the amount paid can be recovered from the Defendants' database system. This information can be sorted to produce amounts of underpayment for each shipment.
>
> Similarly, improper reduction for the reclassification of revenue due to "freebies„ and other adjustments can be recovered from the Defendants' database system and used to calculate the impact on reducing revenue to the plaintiffs.

Wilner Report, at p. 13

Accordingly, Plaintiff submits that the "predominance„ and "superiority„ requirements of Rule 23(b)(3) have been met in this case, and to the extent this Court determines that a showing has not been made, requests leave to take class certification-related discovery to make the showing, including leave to file a supplemental expert report analyzing additional data concerning the shipments of other members of the Plaintiff Class to explain further that there is a common methodology to show damages on a class-wide basis as a result of Defendants' common conduct. This Court should certify the Plaintiff Class, appoint Plaintiff as the representative of the Plaintiff Class, and designate Class Counsel.

---

efficiently in one forum based on the numerous potential class members, who have substantially the same operating agreement with CEVA.„); *C.R. England,* 2005 U.S. Dist. LEXIS 35099, *21 (same; "regarding manageability, this case involves only one federal statute, applicable to each claim … this Court could save tremendous amounts of judicial resources by certifying the class because the only question of law or fact that must be individually adjudicated is the question of damages„) (footnote omitted); *Arctic Express,* 2001 U.S. Dist. LEXIS 24963, *35 (same); *Steinhartz,* 2002 U.S. Dist. LEXIS 6198, *24 (same).

C. The Defendant Class Satisfies The Requirements Of Rule 23(a)

1. Introduction

Plaintiff also seeks certification of a Defendant Class which, as set forth above, is defined to include "[a]ll moving companies in the United States,, that during the Class Period (May 4, 2009, to the present), "were or are owners-agents of,, Defendant Atlas, "had or have lease agreements that identify [Atlas] as the carrier, and which are subject to federal regulations contained in Part 376 of the Code of Federal Regulations.,, Amended Complaint, ¶ 8(b). Defendant Ace is alleged to be an adequate representative of the Defendant Class, *see id.*, ¶ 4, and "[b]ased upon information posted on the Internet websites maintained by Atlas, Plaintiff believes there are hundreds of members of the Defendant Class …, the exact number and their identities being known by Atlas and/or Ace.,, *Id.*, ¶ 9.

On its Internet website – www.atlasvanlines.com – Defendant Atlas asserts that "the Atlas Van Lines agent family consists of over 300 independently owed moving and storage businesses across the U.S.,,, claiming that "[a]s members of a cooperative network, Atlas agents also share resources.,, Prior to the commencement of this litigation, the same website proclaimed that "the Atlas Van Lines agent family is a cooperative, or 'co-op,' of 400+ independently owned moving and storage businesses across the U.S. … As members of a cooperative network, Atlas agents also share resources….,, As Judge Bork once found, Atlas "and its agents make up an enterprise or firm integrated by contracts, one which is indistinguishable in economic analysis from a complex partnership.,, *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 212 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

During the Class Period (from May 9, 2009, to the present), Plaintiff alleges and discovery demonstrates that Defendants Atlas and Ace, and likely all members of the Defendant

Class, acting in contravention of the lease agreements, used and employed understated amounts purporting to, but not representing, the actual line haul and accessorial charges applicable to shipments to calculate the compensation paid to owner-operators. Amended Complaint, ¶ 19. Evidence also suggests that Atlas, as opposed to its owner-agents, bore direct responsibility for arriving at the understated amounts. *See supra*, n. 6. Under these circumstances, it is appropriate for this Court to certify a Defendant Class, assuming that Plaintiff can satisfy the requirements of Rule 23. *See Abt,* 1999 U.S. Dist. LEXIS 6169, *11-12 (certifying defendant class of 25 Mazda car dealerships where plaintiffs' claims arose out of defendants' custom and practice of using an allegedly misleading form agreement); 2 William B. Rubenstein, NEWBERG ON CLASS ACTIONS § 5:4, at 413 (5th ed. 2012) (same).[25]

2. Numerosity

As set forth above, under Rule 23(a)(1), Plaintiff must demonstrate that the Defendant Class is so numerous that joinder of all members is impracticable. In *Abt,* where defendant Mazda had identified 25 car dealers in Illinois that used a lease agreement similar to the lease in question during the relevant time period, Judge Gettleman found that "[t]his number is sufficient to establish numerosity, particularly for a defendant class.„ 1999 U.S. Dist. LEXIS 6169, at *12 (citation omitted). *See* 2 NEWBERG ON CLASS ACTIONS, § 5:6 at 415-416 (discussing *Abt*); *see also Zessar,* 2006 U.S. Dist. LEXIS 12875, *12-14 (certifying defendant class consisting of 110 election officials; "Joinder may be feasible, but that does not make it practicable.„); *Sebo,* 188 F.R.D. at 318 (certifying defendant class of urologists; "The court finds that joinder of the 101 class members as defendants is sufficiently impracticable to meet the numerosity requirement.„);

[25] *See generally* Francis X. Shen, *The Overlooked Utility of the Defendant Class Action,* 88 DENV. U. L. REV. 73 (2010); Nelson Rodriguez Netto, *The Optimal Law Enforcement with Defendant Class Actions,* 33 U. DAYTON L. REV. 59 (2007).

Thillens, 97 F.R.D. at 676-677 (numerosity requirement satisfied where proposed defendant class had hundreds of members).

Here, as noted, the website maintained by Defendant Atlas proclaims that it has more than 300 agents that are located throughout the United States. Bearing in mind the "impracticality„ factors recognized by Judge Coar in *Zessar* – "the potential class size, the ease of identifying members and determining their addresses, ease of service on members, the geographic dispersion of class members, and the ability of individual class members to bring or defend their own claims„„ 2006 U.S. Dist. LEXIS 12875, *13 (citations omitted)—Plaintiff submits that the members of the Defendant Class are "sufficiently numerous to render joinder impracticable.„ *Id.* at *14. *See also* 2 NEWBERG ON CLASS ACTIONS, § 5:8 at 421 (stating that in the case of a proposed nationwide defendant class, "where defendant classes are so dispersed, the impracticability test is easily met„) (footnote and citations omitted).

3. Commonality

As set forth above (*see* pages 17-20, *supra*), Rule 23(a)(2) requires a question of law or fact "common to the class.„ Courts analyze Rule 23(a)(2) in the same manner for a defendant class as for a plaintiff class. *See Sebo*, 188 F.R.D. at 318. "A single common legal issue satisfies the requirement of commonality even if individual claims and defenses also exist.„ *Id.* (citation omitted). In this case, Plaintiffs have identified numerous factual and legal issues that are common to Defendant Ace and the members of the Defendant Class. *See* Amended Complaint, ¶ 11(a)-(g) (quoted in note 19, *supra*). Any one of these questions will satisfy the commonality requirement. *Thillens*, 97 F.R.D. at 677 (certifying defendant class; finding commonality satisfied by reference to common questions alleged in plaintiff's complaint). Commonality is found where, as here, the claims asserted by Plaintiff and the members of the

Plaintiff Class involve the interpretation of a form contractual agreement, and it is alleged that Defendant Ace and the members of the Defendant Class have engaged in "standardized conduct„ toward the owner-operators. *Reich v. ABC/York-Estes Corp.,* 1997 U.S. Dist. LEXIS 8311, *20 (N.D. Ill. June 6, 1997). *See also* 2 NEWBERG ON CLASS ACTIONS, § 5:9 at 424-425.

4. Typicality

The same result obtains as to the "typicality„ requirement set forth in Rule 23(a)(3). Certification of the Defendant Class requires that the defenses of the proposed class representative (Defendant Ace) be typical of the defenses of the class members.„ *Thillens,* 97 F.R.D. at 678. In their Answer to the Amended Complaint, neither Defendant Atlas nor Defendant Ace has "asserted [any] unique defense that would vitiate the typicality requirement.„ *Sebo,* 188 F.R.D. at 319. *See also Abt,* 1999 U.S. Dist. LEXIS 6169, *12 (certifying defendant class of Mazda automobile dealers; "Typicality is also present because plaintiff's claims arise out of the proposed defendants' use of an allegedly misleading form agreement.„); 2 NEWBERG ON CLASS ACTIONS, § 5:10 at 429 ("as with commonality, the typicality requirement is easily satisfied in defendant class actions … when the dispute arises from a written document„) (footnote omitted) (citing *Abt*).

5. Adequacy of Representation

As alleged in Paragraph 12 of the Amended Complaint, Defendant Ace has every incentive to defend this class action vigorously and will provide adequate representation for the members of the Defendant Class. It has retained competent counsel to enable them to do so. Members of the Defendant Class who are dissatisfied with the representation provided by Defendant Ace have the chance to opt of the class. Under these circumstances, the adequacy of representation requirement has been satisfied. *See Sherman,* 540 F. Supp. 2d at 992-993 (noting

interest of school district in avoiding liability for enforcing unconstitutional statute and finding it to be an adequate representative); *Sebo,* 188 F.R.D. at 319; *Thillens,* 97 F.R.D. at 679-680.

D. The Defendant Class Satisfies The Requirements of Rule 23(b)(3)

Where (as here) Plaintiff and the members of the Plaintiff Class seek to recover money damages from the members of the Defendant Class, the Rule 23(b)(3) "predominance„ analysis is essentially similar in defendant class actions as it is in plaintiff class actions. 2 NEWBERG ON CLASS ACTIONS, § 5:24 at 472. In this case, the common issues include (a) whether Atlas and/or Ace and the members of the Defendant Class engaged in a common course of conduct to systematically reduce compensation owed to Plaintiff and the members of the Plaintiff Class, (b) whether Atlas and/or Ace and the members of the Defendant Class engaged in a combination and conspiracy among themselves to improperly reduce and miscalculate the true compensation owed to Plaintiff and the members of the Plaintiff Class, and (c) whether the conduct and actions committed or engaged in by Atlas and/or Ace and the members of the Defendant Class violated the Motor Carrier Act. Amended Complaint, ¶ 11. As Judge Lindberg found in *Sebo,* these are the "overriding„ issues and these issues "predominate[] over any individualized inquiries.„ 188 F.R.D. at 319. *See also Abt,* 1999 U.S. Dist. LEXIS 6169, *12 ("Each defendant is charged with the same allegation that the lease form contract contained contradictory disclosure that violate the [Consumer Leasing Act]. This common issue predominates over any individual defense. Accordingly, the court certifies the defendant class.„); *Thillens,* 97 F.R.D. at 682 ("the primary common issue is to prove the existence of a conspiracy … in violation of the antitrust laws … that issue will predominate the litigation„).

Rule 23(b)(3) also requires a finding that as class action is superior to other available methods of adjudication. In this case, from the Plaintiff's perspective, there are two options

available should a Defendant Class not be certified: (1) name all 300+ Atlas agents as Defendants, or (2) forego claims against them altogether. Faced with these alternatives, Judge Lindberg ruled in favor of certifying a defendant class in *Sebo*, an antitrust action, certifying a defendant class of urologists and basing the predominance finding on the common issue of the existence of a conspiracy:

> The court finds that it is possible that plaintiff would forego claims against the defendant class should a class not be certified. If she indeed undertook separate lawsuits, however, this district would have approximately 100 similar actions to contend with. The court does not view either alternative as superior to a class action. A defendant class would also prevent an individual defendant from providing the entire cost of defense.

188 F.R.D. at 319 (citing *Thillens,* 97 F.R.D. at 682). *See also Endo,* 147 F.R.D. at 163 (certifying a defendant class of underwriters, stressing their common interests and their relative lack of an incentive to opt out of the class).

Given the facts of this case and the above-referenced precedents, Plaintiff respectfully submits that this Court should certify a Defendant Class and appoint Defendant Ace as the class representative.

V. CONCLUSION

For the reasons set forth herein, Plaintiff's motion should be granted and this Court should certify the Plaintiff Class and the Defendant Class.

DATED: February 18, 2014

Plaintiff,

By: /s/ Andrew Szot
Marvin A. Miller
Andrew Szot
MILLER LAW LLC
115 South LaSalle Street, Suite 2910
Chicago, IL 60603
Telephone: (312) 332-3400

Norman L. Hafron
ROSENFELD, HAFRON, SHAPIRO & FARMER
221 North LaSalle Street, Suite 1763
Chicago, IL 60601
Telephone: (312) 372-6058

Edward D. McNamara, Jr.
McNAMARA & EVANS
P.O. Box 5039
931 South Fourth Street
Springfield, IL 62705-5039
Telephone: (217) 528-8476

Kevin P. Roddy
WILENTZ, GOLDMAN & SPITZER, P.A.
90 Woodbridge Center Drive, Suite 900
Woodbridge, NJ 07095
Telephone: (732) 636-8000

Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I, Andrew Szot, one of the attorneys for plaintiff, hereby certifies that on February 25, 2014, service of the foregoing document was accomplished pursuant to ECF as to Filing Users and I shall comply with LR 5.5 as to any party who is not a Filing User or represented by a Filing User. Further, I also certify that a unredacted copy of the foregoing document, and the exhibits referenced therein, was sent to Defendants' counsel, David Levitt, on February 18, 2014 *via* email.

/s/ Andrew Szot
Andrew Szot