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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and THOMAS SHUTT, WILLIAM PIPER, DON SULLIVAN, SR., JAMES MURPHY, and WALTER WILLIAMS individually, and on behalf of all others similarly situated, Plaintiffs, vs. C.R. ENGLAND, INC. Defendant.	**MEMORANDUM IN SUPPORT OF MOTION FOR FOR CLASS CERTIFICATION** CASE NO. 2:02 cv 950 TS Judge Ted Stewart Magistrate Judge David O. Nuffer

Plaintiffs, owner-operator truck drivers, seek relief for Defendant C.R. England's violations of the federal Truth-in-Leasing regulations found at 49 C.F.R. Part 376. Plaintiffs ask

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this Court, pursuant to Fed. R. Civ. P. 23 ("Rule 23"), to certify the requested class and to appoint class counsel. At least seven other federal courts have certified classes in similar cases seeking relief for violations of the Truth-in-Leasing Regulations.

The proposed class consists of approximately 7,000 owner-operators geographically dispersed throughout the nation whose only realistic opportunity to vindicate important federal rights lies in class-wide adjudication. Moreover, this action under the Truth-in-Leasing Regulations presents a model of the commonality and typicality standards set forth in Rule 23. The claims of each of member of the class arise from the application of a *single* federal statutory and regulatory regime that applies to every single member of the class.

The facts demonstrate that C.R. England's policies and practices were applied uniformly and consistently to Plaintiffs and potential class members on the following specific issues: (1) the administration and disposition of owner-operator escrow funds; (2) undisclosed, undocumented, and excessive charge backs against Plaintiffs' compensation for fuel, repairs, maintenance, and other items; (3) the forced purchase of goods and services from C.R. England, including "administrative" services and insurance products; and (4) failure to disclose the terms of equipment lease agreements in Defendant's lease agreements. It is this common course of conduct that is at the core of Plaintiffs' case for class certification.

I. FACTS

The Claims

1. Plaintiffs, in their Amended Complaint, raise six specific counts: (1) that C.R. England has violated 49 C.F.R. § 376.12(k) by improperly deducting monies from, and failing to return, escrow funds (Count II); (2) that C.R. England violated 49 C.F.R. § 376.12(h) by making

undisclosed, undocumented and excessive charge backs against Plaintiffs' compensation for fuel, repairs, maintenance and other items (Count III); (3) that C.R. England has violated 49 C.F.R. § 376.12(i) by forcing Plaintiffs and members of the class to buy goods and services from C.R. England, including "administrative" services and insurance products (Count IV); (4) that C.R. England has violated 49 C.F.R. § 376.12(i) by failing to specify the terms of the lease-purchase agreement Plaintiffs entered into with Opportunity Leasing (Count V); (5) that C.R. England violated 49 C.F.R. § 376.12 (j) by failing to provide insurance information to Plaintiffs (Count VI); and (6) that C.R. England's lease agreements fail to comply with the requirements of 49 C.F.R. § 376.12 and thus C.R. England has engaged in the unauthorized transportation of property in interstate commerce (Count I).

The Parties

2. Plaintiffs in this case represent individual owner-operator truck drivers -- the very class of persons that Congress and the U.S. Department of Transportation, ("DOT"), intended to protect via the Truth-In-Leasing laws. Plaintiffs Thomas Shutt, William Piper, Don Sullivan, Sr., James Murphy, and Walter Williams are owner-operators who have leased their equipment and services to C.R. England.

3. Plaintiff Owner-Operator Independent Drivers Association, Inc., ("OOIDA"), is the nation's largest non-profit trade association which represents the interests of independent owner-operators nationwide. Founded in 1973 to examine and address the challenges and problems faced by independent owner-operators in the trucking industry, OOIDA's membership today exceeds 120,000 owner-operators who collectively operate more than 180,000 trucks in all 50 of the

United States and in Canada. *See* Declaration of James J. Johnston ("Johnston Declaration") at ¶ 2, attached hereto as Exhibit "A".

4. Defendant C.R. England, Inc., ("C.R. England"), operates as a motor carrier under authority granted by the DOT, providing transportation services to the shipping public. *See* Defendant's Answer at ¶ 1, Doc. # 75.

The Lease Agreements

5. Each of the individual named Plaintiffs in this action entered into an "Independent Contractor Operating Agreement" ("ICOA") with C. R. England during the period April 1999 to July 2001. The ICOAs of Plaintiffs Sullivan and Williams are attached as Exhibits B and C to this Memorandum. The ICOA entered into by the named Plaintiffs is a form agreement that was used by Defendant from January 1997 through July 2002 with all owner operators. *See* Deposition of James MacInnes, the relevant pages are attached as Exhibit D; ("MacInnes Dep."); Tr. 38:1 - 42:12. During this period of time, there were no relevant, significant revisions of the ICOA. *Id.*, Tr. 40:20 - 42:12. C.R. England has admitted that the terms of the ICOA are not subject to negotiation by owner operators. *Id.*, Tr. 46:18 - 47:8. Thus, each class member's ICOA with C.R. England is substantively identical.

6. In July 2002, C.R. England adopted a new ICOA ("Revised ICOA") and required all owner-operators to sign the Revised ICOA. *Id.*, Tr. 46:18 - 48:21. In fact, those owner-operators who refused to sign the new agreement had their existing ICOA terminated by Defendant. *Id.*, Tr. 48:14 - 21. Plaintiff Murphy entered into the Revised ICOA with C.R. England. Murphy Revised ICOA attached as Exhibit E.

7. According to C.R. England, there are 6,958 persons who have entered into Independent Contractor Operating Agreements with C.R. England from June 1998 through December 2004. *See* Defendant's Answers to Plaintiffs' Third Set of Interrogatories at 11 -15, attached as Exhibit F. Of these nearly 7,000 drivers, 3,337 entered the original ICOA and 3,621 drivers entered the Revised ICOA. *Id.*

C.R. England's Escrow Lease Provisions and Practices

8. C.R. England's lease agreements required the named Plaintiffs to establish, and pay into, three escrow funds; a maintenance fund at the rate of $0.05 per mile, a security deposit in the amount of $ 500.00, and a fuel tax reserve. Defendant's ICOA provided that *all* indebtedness may be deducted from a driver's escrow notwithstanding its obligation to specify with particularity the items for which the escrow can be used as required by 49 C.F.R. § 376.12 (k).

9. At the time their ICOA was terminated, each of the named Plaintiffs had substantial balances in their escrow accounts. For example, Mr. Shutt had approximately $2,500.00 in his maintenance escrow, while Messrs. Sullivan and Williams had roughly $1,000.00 and $1,400.00 in their respective accounts. *See* Declarations of Thomas Shutt (Ex. G); Walt Williams (Ex. H); and Don Sullivan (Ex. I). Mr. Sullivan also had approximately $ 270.00 in his "fuel tax reserve" escrow account. MacInnes Dep. (Exhibit D), Tr. 149:12 - 150:8; MacInnes Dep. at Ex. 28, attached as Exhibit J. C.R. England failed to provide a final accounting and failed to return these escrow funds within 45 days after lease termination. *See* Exs. G, H, and I.

10. C.R. England claimed that each representative Plaintiff owed C.R. England thousands of dollars in truck repair costs. Based on these alleged debts, C.R. England confiscated

all of Plaintiffs' escrow funds, and transferred the remaining alleged debt to a collection agency for collection. *Id.*

11. Defendant's escrow practices were practiced uniformly on members of the putative class. James MacInnes, Defendant's Director of its Independent Contractor Division, testified that it was "standard practice" for Defendant to send the same types of settlement statements and final accountings to all owner-operators after lease termination. MacInnes Dep. (Exhibit D); Tr. 143:13 - 144:2. Similarly, Mr. MacInnes testified that C.R. England used the combined escrow balances to offset charges claimed by Defendant. *Id.*, Tr. 149:9 - 150:8. At the same time, evidence presented by C.R. England to this Court indicated that C.R. England claims that more than 2,600 owner-operators left Defendant owing Defendant money and have referred these claims to various collection agencies. See C.R. England Response to Interrogatory Nos. 3 & 4, attached as Exhibit K.

Charge-Back Lease Provisions and Practices

12. 49 C.F.R. 376.12(h) requires that the "[l]ease 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 regulation also requires the motor carrier to provide documents necessary for the owner-operator to verify the validity of the charge-back. The ICOA entered into by the named Plaintiffs does not recite an unqualified obligation to provide drivers with documentation to substantiate charge-backs as required by 49 C.F.R. § 376.12(h). In addition, the ICOA provides that Defendant may deduct from the driver's compensation *any* amount the driver owes it, notwithstanding its obligation to specify all chargebacks in advance as required by 49 C.F.R. § 376.12 (h).

13. C.R. England routinely deducted from Plaintiffs compensation charges for fuel and fuel related-transaction fees. MacInnes Dep. (Exhibit D), Tr. 69:25 - 71:13; See also, Ex. 28 (Exhibit J) (Settlement Statement of Donald Sullivan stating deductions for fuel-related transaction fees). The ICOA, however, does not specify any charge-backs against owner-operator compensation for fuel-related transaction fees. These transaction fees were collected from all other, similarly situated putative class members. MacInnes Dep. (Exhibit D), Tr. 69:25 - 70:20.

14. C.R. England also deducted from Plaintiffs' compensation amounts allegedly for repairs of the tractor or "other charges." See Williams Declaration at ¶ 6 (Exhibit H); Murphy Declaration at ¶¶ 6 – 8 (Exhibit L); Shutt Declaration at ¶¶ 6 – 8 (Exhibit G). Defendant failed to provide the documentation necessary for Plaintiffs to verify the validity of these charge-backs. *Id.*

Forced Purchase of Products and Services

15. 40 C.F.R. 376.12(i) states that "[t]he lease shall specify that the lessor is not required to purchase or rent any products, equipment or services form the authorized carrier as a condition of entering into the lease arrangement." C. R. England's ICOA required Plaintiffs to authorize the deduction of a "settlement administrative fee" of $ 3.46 per week and an "insurance administrative fee" at the rate of $ 2.31 per week. Williams ICOA (Exhibit C); See Murphy Declaration at ¶ 4 (Exhibit L); Williams Declaration at ¶ 3 (Exhibit H); Sullivan Declaration at ¶ 3 (Exhibit I). The ICOA also required Plaintiffs to purchase satellite communications equipment from C.R. England. *Id.*

16. C.R. England has admitted that every owner-operator is required to purchase settlement administration services and insurance administration services from C.R. England. MacInnes Dep. at 97:23 - 108:3 (Exhibit D). Similarly, all owner-operators were required to

purchase satellite communications equipment from Defendant. *Id.* at 53:13 - 54:4. According to C.R. England's own analysis, Defendant collected approximately $70,000 in insurance administration fees, $ 131,000 in settlement administration fees and $ 554,000 in satellite purchase fees from its owner-operators for the year 2001. *Id.*; MacInnes Dep. at Ex. 19, attached hereto as Exhibit U.

17. The representative Plaintiffs were required to purchase insurance products from C.R. England, including non-trucking use liability, occupational accident, physical damage, cargo and passenger liability insurance. Plaintiffs were not given the opportunity to procure their own insurance. Sullivan Declaration at ¶ 2 (Exhibit I); Williams Declaration at ¶ 2 (Exhibit H); Murphy Declaration at ¶ 3 (Exhibit L).

18. C.R. England forced putative class members to purchase the same insurance products through Defendant. Defendant admits that from 1998 through the present *all* of its owner-operators purchase non-trucking use liability, occupational accident, cargo and passenger insurance through C.R. England. MacInnes Dep., Tr. 134:18 - 136:23 (Exhibit D). In the case of physical damage insurance, "there are less than a dozen independent contractors" that have purchased this insurance from other sources. *Id.* at 135:3 - 10.

Charges for Remaining Lease Payments

19. 49 C.F.R. § 376.12(i) requires the lease to specify the terms of any agreement in which an owner-operator purchases or rents equipment which gives the carrier the right to make deductions from compensation for the purchase or rental payments.

20. C.R. England uses a related corporation, Opportunity Leasing, to lease truck tractor units to independent truck owner-operators. Opportunity Leasing and C.R. England are under

common ownership and have common officers and directors. See MacInnes Dep. at Ex.2, attached as Ex. M. Opportunity Leasing entered into equipment lease agreements with representative Plaintiffs Piper, Shutt, Sullivan, and Williams and other members of the putative class. *See* MacInnes Dep., Tr. 117:14 - 120:15 (Exhibit D) (the equipment lease between Piper and Opportunity Leasing was a form agreement).

21. C.R. England's ICOA does not state that it may deduct from owner-operator escrow funds, lease payments allegedly due Opportunity Leasing for remaining lease payments where the equipment lease was terminated early.

22. In Mr. Sullivan's case, the last settlement statement provided by C.R. England stated that Mr. Sullivan owed Defendant nearly $ 10,000.00 for "truck lease payments." This was a common practice of Defendant. When an owner-operator terminated his lease agreement early, C.R. England charged the driver for truck lease payments for the number of weeks left on the equipment lease before Opportunity Leasing could release the vehicle. MacInnes Dep., Tr. 143:13 - 147:20 (Exhibit D); Exhibit J.

II. ARGUMENT

A. Numerous Courts Have Granted Class Certification in Similar Cases

A number of courts have held that cases involving violations of the Truth-in-Leasing Regulations are particularly well suited for class certification:

•*Owner-Operators Independent Drivers Assoc. v. Mayflower Transit, Inc.*, 204 F.R.D. 138, 146, 149 (S.D. Ind. 2001) ("[T]he common question of law is whether Mayflower's conduct with respect to those lease provisions violates *federal* regulations. *** We find that the plaintiffs have satisfied all of the pertinent standards for class certification.").

•*Owner-Operator Independent Drivers Association v. Heartland Express Inc. of Iowa* , No. 3-01-CV-80179 at p.4 (S.D Iowa, Jan. 23, 2003), attached hereto as Exhibit N ("The court finds that there is a common legal question, which is the application of the truth in leasing regulation in the defendant's leases.")

•*Owner-Operators Independent Drivers Assoc. v. Ledar Transport,* Civil Action No. 00-0258-CV-W-2-ECF at p. 8, 16 (W.D. Mo. March 31, 2002), attached hereto as Exhibit O ("[T]he Court finds that there is a common legal question, which is the application of the Federal Truth-in-Leasing regulations to the defendant's leases. *** [T]he court finds that plaintiffs have satisfied all of the prerequisites for class certification.....").

•*Sheinhartz v. Saturn Transport System, Inc.*, 2002 WL 575636 *7 (D. Minn. March 26, 2002), attached hereto as Exhibit P ("Because the named Plaintiff's claims and the proposed class' claims arise from the same conduct by Defendants alleged to have violated 49 C.F.R. [376] ... the Court finds that Plaintiffs have satisfied the typicality requirement of Rule 23(a)(3). *** The Court finds that Plaintiffs have satisfied all of the prerequisites to class certification.").

•*Owner-Operators Independent Drivers Assoc. v. Arctic Express, Inc.*, Case No. C2:97-CV-00750 at p. 12, 15, 21 (Sept. 6, 2001), attached hereto as Exhibit Q ("The common question of law ... is whether the Agreements violated 49 C.F.R. § 376.21(k). *** The named Plaintiffs' claims and the proposed class's claims are all focused on the same legal issue: whether the Lease Agreement ... violated § 376.21(k) of the Motor Carriers Act. *** The Court therefore concludes that the Plaintiffs have satisfied both Rule 23(a) and Rule 23(b)(3).").

•*Padrta v. Ledar Transport, Inc.*, Civil Action No. 96-0324-CV-W-2 (W.D. Mo. Sept. 6, 1996), attached hereto as Exhibit R (certifying case as class action).

•*Owner-Operators Independent Drivers Assoc. v. Gilbert Express, Inc.*, Civil Action No. 00-5163 (D. N.J. Feb. 14, 2001), attached hereto as Exhibit S (court found certification appropriate under Fed. R.Civ. P. 23 (a) ands 23 (b) (1)).

•*Compare Owner-Operators Independent Drivers Assoc. v. New Prime, Inc.*, 339 F. 3d 1001, 1011 (8th Cir. 2003)(court found each of requirements of Rule 23(a) satisfied but concluded, on grounds not applicable here, that questions affecting individual members damages would predominate over questions of law and fact common to the members).

B. Class Definition

Although not specifically mentioned in Rule 23, a prerequisite of a class action is the existence of an identifiable class.[1] A class is sufficiently defined if it is "administratively feasible for the court to determine whether a particular individual is a member."[2] In this case, Plaintiffs seek certification of a class action consisting of all independent truck owner-operators who have entered into an "Independent Contractor Operator Agreement" with C.R. England that leases equipment and services to C.R. England on or after June 4, 1998. Plaintiffs' class definition is based upon a four-year statute of limitations in this action

C. This Case Meets the Requirements for Class Certification Under Rule 23(a)

1. *Plaintiffs Have Satisfied the Numerosity Requirement of Rule 23(a)(1).* In order to maintain a class action, Plaintiffs must show that the class is so large that joinder of all members would be "impracticable."[3] Commentators have recognized that "where the class is very large - for example numbering in the hundreds - joinder will be impracticable."[4] In addition, in *Owner-Operators Independent Drivers Assoc. v. Mayflower Transit, Inc,.*[5] the court held that class certification of a class of "at least 1,000 similarly-situated owner-operators who are geographically dispersed throughout the nation" was appropriate as "[j]oinder would be little short of

[1] *See Daigle v. Shell Oil Co.*, 133 F.R.D. 600, 602 (D. Colo. 1990).
[2] *Davoll v. Webb*, 160 F.R.D. 142, 143 (D. Colo. 1995), aff'd 194 F.3d 1116 (10th Cir. 1999).
[3] *Horn v. Associated Wholesale Grocers, Inc.*, 555 F.2d 270, 275-76 (10th Cir. 1977).
[4] Newberg & Conte, *Newberg on Class Actions* § 3.05 (3d ed. 1992).
[5] 204 F.R.D. 138, 145 (S.D. Ind. 2001)

impossible." Here, C.R. England admits that there are approximately 7,000 owner-operators who have entered into ICOAs with C.R. England.[6] The numerosity requirement is clearly satisfied.

2. *Common Issues of Fact and Law Exist*. The second requirement of Rule 23(a) is that there are "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). However, "[t]his does not mean that every issue must be common to the class."[7] "Factual differences in the claims of class members should not result in a denial of class certification where common questions of law exist."[8]

This case presents a model for the application of the Rule 23 commonality standard. Plaintiffs' case is grounded solely upon the federal Truth-in-Leasing regulations. These regulations provide a uniform standard of conduct for Defendant in this case. Thus, the claims of all members of the class arise from the application of a single federal statutory and regulatory scheme as applied to the contracts of a single motor carrier that are uniform as to every member of the class. Further, the application of the statute and regulations is uniform in this case.

In *OOIDA v. Mayflower*, as in this case, owner-operators brought suit under the federal Truth-in-Leasing regulations alleging that Mayflower violated the regulations by failing to return escrow funds and by overcharging owner-operators for insurance. In determining whether plaintiffs satisfied the commonality requirement of Rule 23, the court reasoned that "[t]hese common issues of law are all rooted in common issues of fact, including: all class members have entered into lease agreements with Mayflower or its agents," "all class members . . . have had

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[6] Defendant's Answers to Interrogatories attached as Exhibit F.

[7] *Joseph v. General Motors Corp.*, 109 F.R.D. 635, 639 (D. Colo. 1986).

[8] *Milonas v. Williams*, 691 F.2d 931, 938 (10th Cir. 1982), cert. denied, 460 U.S. 1069 (1983), citing *Penn v. San Juan Hospital, Inc.*, 528 F.2d 1181, 1189 (10th Cir. 1975).

moneys deducted from their compensation and maintained in escrow accounts for the purpose of repaying advances against various expenses, and all have had moneys deducted from their compensation and maintained in fuel-tax accounts."[9] In this case, as in *Mayflower*, Plaintiffs raise common claims that Defendant violated Plaintiffs' rights under a federal statutory and regulatory framework protecting Plaintiffs from overreaching and injurious business practices.

Commonality is also demonstrated by the fact that the ICOA entered into by the representative Plaintiffs are identical to the Agreements entered into by each members of the putative class. Moreover, C.R. England engaged in a common course of conduct as to each owner operator and its escrow, charge-back, forced purchase, and insurance practices. Defendant's alleged wrongful conduct has affected each member of the class in a consistent, uniform manner. Thus, the claims of all class members are based directly on common issues of fact and common issues of law, and the present class meets the commonality requirements of Rule 23(a) (2).

3. *The Claims of the Representative Plaintiffs are Typical of the Claims of the Class*.

Typicality under Rule 23(a)(3) "only requires a comparison of the claims or defenses of the representative with the claims or defenses of the class."[10] "Further, differing fact situations of class members do not defeat typicality so long as the claims of the class representative and class members are based on the same legal or remedial theory."[11] The facts set forth above supporting "commonality" equally support a finding of "typicality" here - the claims of the representative Plaintiffs all arise from the common course of conduct of C.R. England with respect to the class as

[9] *Mayflower*, 204 F.R.D. at 146.

[10] *Taylor v. Safeway Stores, Inc.*, 524 F.2d 263, 270 (10th Cir. 1975).

[11] *Adamson v. Bowen*, 855 F.2d 668, 676 (10th Cir. 1988); *see also,* Newberg, *supra*, § 3.15 ("Typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory.").

a whole and are based on the same legal theories. Here, the typicality requirement is satisfied by the fact that the claims of the representative Plaintiffs and the members of the class dovetail precisely on both legal and factual grounds. As discussed above, the central material inquiry in this case, common to all class members, concerns the lawfulness of Defendant's leases and practices regarding the disposition of escrow funds, charge-backs against owner-operator compensation for fuel and repairs, and the forced purchase of administrative services and insurance products. The claims of representative Plaintiffs are typical of the claims of the entire class; therefore, the class meets the requirements of Federal Rule of Civil Procedure 23(a) (3).

4. *The Representative Plaintiffs are Adequate Class Representatives*. The final requirement of Federal Rule of Civil Procedure 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." "Plaintiffs seeking class certification must demonstrate that (a) counsel for named plaintiffs are competent to conduct the litigation as a class action, and (b) the interests of the party and the proposed class do not conflict."[12]

Plaintiffs already have established above that the representative Plaintiffs clearly share common interests with all of the proposed class members. Likewise, as the international trade association for the owner operators, OOIDA shares more than sufficient common interests with the class members to qualify as a class representative under Rule 23(a)(4). First, OOIDA's paramount mission, and the very purpose of its founding over 30 years ago, is to work aggressively to stop abusive practices - especially those of motor carriers -directed at independent owner-operators. Toward this end, OOIDA has been involved in numerous class actions on behalf of owner-operators, and has been instrumental in advocating the federal legislation at issue herein,

[12] *M.A.C. v. Bett*, 284 F.Supp.2d 1298, 1303 (D. Utah 2003).

which grants owner-operators a private right of action by which to enforce the federal motor carrier "Truth-in-Leasing" regulations. *See generally* Johnston Declaration (Exhibit A). Finally, Plaintiffs are represented by experienced class action counsel as well as by experienced local counsel with relevant experience. Declaration of Paul D. Cullen, Sr., attached as Exhibit T.

Given the common interests and goals of the class representatives named herein and the proposed class members, and the broad experience of class counsel, the representative parties will more than adequately represent all of the members of the class in this action under Rule 23(a)(4).

B. This Case Satisfies The Requirements Of Rule 23(b).

Class certification requires satisfaction of each of the four parts of Rule 23(a) and **at least one** of three parts of Rule 23(b). In this case, Plaintiffs seek class certification under subsection (3) of Rule 23(b), or in the alternative, under subsection (2) of Rule 23(b).

1. *Certification is Warranted Under Rule 23(b)(3) as Common Issues of Fact and Law Predominate Over Individual Issues*. In order for a class to be certified under Rule 23(b)(3) the moving party must demonstrate that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy." In determining whether common issues predominate, many courts look to whether a "common nucleus of operative facts exists."[13] As discussed above in the commonality analysis addressing Rule 23(a)(2), the common questions of law and fact regarding Defendant's lease agreements, and Defendant's uniform course of conduct involving escrows, charge-backs against compensation,

[13] *See Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir.), cert. denied, 394 U.S. 928 (1968); *Hanlon. v. Chrysler Corp.*, 150 F. 3d 1011, 1022 (9th Cir. 1998); *McEwen v. Digitran Systems, Inc.*, 160 F.R.D. 631, 638 (D. Utah 1994); *In re Intelcom Group, Inc. Securities Litig.*, 169 F.R.D. 142, 148 (D. Colo. 1996).

forced purchases and insurance products are sufficient to satisfy the first, "predominating question" prong of 23(b)(3).[14]

The fact that damages will vary among class members cannot defeat certification under Rule 23(b)(3) where, as in this case, there are common issues of liability. The Tenth Circuit has held, in an antitrust action, that "where the question of basic liability can be established readily by common issues, then it is apparent that the case is appropriate for class action."[15] The court recognized that while there will be individualized issues on the question of damages, "[t]he fact hat there may have to be individual examinations on the issue of damages has never been held, however, a bar to class actions."[16]

The second prong of Rule 23(b)(3), regarding superiority of the class action method, requires consideration of: (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the difficulties likely to be encountered in the management of a class action.

With regard to Rule 23(b)(3)(A), the potential damages to be recovered by each class member in the present case are not substantial enough to distinguish the interests of any single class member from the others. Given the limited resources of individual class members, their geographic

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[14] In *Mayflower*, the court found that "[a]ll of the issues . . . arise from a common nucleus of operative facts: Mayflower's alleged course of conduct in failing to return moneys which, plaintiffs allege, it had a legal obligation to repay to the owner-operators." The court reasoned that "the individual differences to which Mayflower points - variations in lease provisions and variations in how Mayflower or its agents treated particular contractors under certain circumstances - are insufficient to outweigh the common issues. It follows that class issues predominate." 204 F.R.D. at 148.

[15] *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 796 (1970).

[16] *Id.* at 798.

dispersion, separate efforts at vindication of the class members' rights, even if individuals were inclined to consider separate actions - would be highly unlikely, if not impossible. *See generally* Johnston Declaration (Exhibit A).

Indeed, it is likely for these economically-oriented reasons that Plaintiffs are aware of no individual or sub-class with a strong interest in separate litigation of the matters addressed in the Amended Complaint. For that matter - with regard to subsection (B), Plaintiffs are unaware of any litigation in any court concerning the controversy at issue in this action. As to subsection (C), given the proven ability and willingness of the class representatives to lead this action - and the proven ability and willingness of counsel to prosecute Plaintiffs' claims - the class action method is ideally suited in this instance to concentrate the litigation of the class members' claims efficiently in one forum. *See generally* Johnston and Cullen Declarations (Exhibits A & T).

Moreover, no substantial difficulties are likely to be encountered in the management of this class under subsection(D). Much, if not all, of the liability portion of this case may be addressed by dispositive motions. Once liability is established, the calculation of restitution or damages for each class member will be relatively straightforward, as such damages can be calculated easily from C.R. England's records for each class member.

Thus, certification under Rule 23(b)(3) is appropriate in this case.

2. *Certification Is Also Authorized Under Fed. R. Civ. P. 23(b)(2).* Rule 23(b)(2) provides that an action may be maintained as a class action where "the party opposing class certification has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." In

this case, Plaintiffs have asked the Court for class-wide injunctive and declaratory relief sufficient to invoke the provisions of Rule 23(b)(2).

Plaintiffs' Amended Complaint seeks the following class-wide injunctive and declaratory relief: (1) entering a declaratory judgment that the leases that Defendant entered into with Plaintiffs and all members of the class violate 49 C.F.R. § 376.12 (h), (i), (j) and (k) of the Truth-in-Leasing regulations; (2) entering an injunction enjoining and restraining the Defendant from performing authorized transportation in equipment it does not own until it enters into written lease agreements that conform with the requirements of the Truth-in-Leasing regulations; (3) entering an Order requiring Defendant to provide an accounting of all transactions involving deductions to income, and requiring Defendant to recite how each charge against income was calculated; (4) enjoining Defendant from violating Part 376 regulations in the future; (5)enjoining Defendant from any acts of retaliation, harassment or intimidation against the representative Plaintiffs or class members; and (6) requiring Defendant to pay restitution for all unlawful charge-backs and other sums unlawfully deducted from compensation.

C.R. England has plainly acted "on grounds generally applicable to the class," thus warranting judgment granting all of the foregoing declaratory and injunctive relief sought on behalf of the Class. The fact that Plaintiffs seek not only equitable relief, but money damages as well, does not alter this conclusion. "As long as the plaintiffs' primary claim is for injunctive relief, certification under Rule 23(b)(2) is proper."[17] Monetary relief may be obtained in a Rule 23(b)(2) class action so long as the predominant relief sought is injunctive or declaratory. *Id.*

[17] *See Colo. Cross-Disability Coalition v. Taco Bell Corp.*, 184 F.R.D. 354, 361 (D. Colo. 1999)("Nor does the fact that the class also seeks monetary damages change this result.)."

Here, the predominant demands in Plaintiffs' Amended Complaint seek class-wide injunctive and declaratory relief. Moreover, Plaintiffs' damages, and those of the putative class, all flow directly from C.R. England's violations of the Truth-in-Leasing Regulations.[18]

In view of the foregoing, certification should be granted under Rule 23(b)(2).

Respectfully submitted this 15th day of February, 2005,

By: 

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[18] *See, e.g., Owner-Operator Independent Drivers Association v. Heartland Express Inc. of Iowa* (Ex. N, Slip. Op. at 6)("[P]laintiffs seek fourteen different items of relief, with approximately the first nine ranging from declaratory relief of legal violations, injunctions, and an accounting. Plaintiffs also seek restitution or disgorgement of sums allegedly unlawfully withheld, the creation of an escrow account, and an award of attorneys' fees. These equitable requests do not appear pretextual to monetary relief.").

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum in Support of Motion for Class Certification was served as indicated this 15th day of February, 2005 on the following counsel of record:

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