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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

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 PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON LIABILITY CASE NO. 2:02 cv 950 TS Judge Ted D. Stewart Magistrate Judge Nuffer

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I. INTRODUCTION

Defendant C.R. England has systemically violated the most basic precepts of the Truth-in-Leasing Regulations – that owner-operator lease agreement must disclose all charge-backs to compensation and that motor carriers should not manipulate charge-backs in order to profit from them. In addition, C.R. England also violated the Leasing Regulations by forcing Plaintiffs and class members to rent satellite communications services and purchase insurance and settlement "administrative" services from the carrier. Lastly, the motor carrier has violated the escrow provisions of the Leasing Regulations by transforming maintenance and fuel-tax escrow funds into general all-purpose funds used to satisfy all alleged debts owed to the carrier by the owner-operator.

In presenting their case for partial summary judgment, Plaintiffs note that Defendant has employed two different form lease agreements. The first, used from 1998 until shortly after suit was filed in this matter in June 2002, referred to here as the Original Lease Agreement, failed to disclose the company's practices of marking-up parts and tires by thirty percent, as well as the imposition of various "administrative" fees. Notably, C.R. England charged-back its owner-operators for thirty percent mark-ups on tires when the Original Lease Agreement stated that owner-operators could purchase tires at the company's "fleet discount price."

In addition to marking-up tires, the company also marked-up parts used in repairs and maintenance by thirty percent. C.R. England also charged-back drivers for a plethora of undisclosed "administrative fees" for "shop overhead," "transaction fees," and for the motor carrier's basic responsibilities.

Not satisfied by the millions of dollars in profits C.R. England generated by mark-ups and fees, the company has made advancing costs of fuel to its owner-operators a large and growing

profit center. Under this scheme, owner-operators are charged-back well in excess of the company's actual cost of fuel, leaving a substantial profit for C.R. England.

The Truth-in-Leasing Regulations, 49 C.F.R., Part 376, unequivocally mandate both that C.R. England's leases "*shall contain*," the provisions required under § 376.12, and that such provisions "*shall be adhered to and performed by*" C.R. England. Section 376.12 (h) of the Regulations, governing, chargeback items, mandates that C.R. England's lease "*shall clearly specify*" items that may be initially paid for by C.R. England, but charged back to Plaintiffs, "*together with a recitation as to how the amount of each item is to be computed.*" C.R. England is also required to provide Plaintiffs "copies of those documents which are necessary to determine the validity of the charge." *Id.* There is no genuine issue of fact that C.R. England's Original Lease Agreement fails to "*clearly specify*" that charge-backs for parts, tires and fuel included mark-ups and "administrative fees," and fails to recite how the amounts of these chargebacks are computed.

In the Summer of 2002, C.R. England forced its owner-operators to enter into a revised lease agreement, referred to here as the "New Lease Agreement." In the New Lease Agreement, C.R. England discloses that it marks-up parts and tires by thirty percent and similarly discloses the various "administrative" fees imposed on its owner-operators. It also discloses its practices in which it charges back more than what it advances on behalf of owner-operators for fuel.

The disclosures of charge-backs in excess of C.R. England's costs for parts, tires and fuel do not make these charge-backs lawful. Indeed, the regulatory history of the charge-back regulations clearly recognizes that motor carriers cannot manipulate charge-backs to make a profit at the expense of owner-operators.

In addition to its statutory authority to award damages for violation of the Truth-in-Leasing Regulations, Plaintiffs invoke this Court's general equity jurisdiction, and request that the Court order C.R. England to disgorge its ill-gotten gains. Disgorgement, which deprives wrongdoers of their ill-gotten gains, deters violations of the law by making illegal activity unprofitable. In this case, requiring C.R. England to disgorge its ill-gotten gains would deter other motor carriers from engaging in the same conduct and, at the same time, would assure C.R. England's future compliance with the regulations.

II. STATEMENT OF MATERIAL FACTS

The undisputed material facts to support the Plaintiffs' Motion for Partial Summary Judgement are:

General Facts

1. On or about February 25, 1999, Plaintiff Donald Sullivan, Sr., entered into an Independent Contractor Operating Agreement (the "Original Lease Agreement") with C.R. England. A true and correct copy of this agreement is attached as Exhibit 1.

2. On or about February 25, 1999, Plaintiff Donald Sullivan, Sr., entered into a Vehicle Lease Agreement with Opportunity Leasing, Inc. A true and correct copy of this agreement is attached as Exhibit 2.

3. On or about April 29, 1999, Plaintiff William "Al" Piper, entered into an Original Lease Agreement with C.R. England. A true and correct copy of this agreement is attached as Exhibit 3.

4. On or about April 29, 1999, Plaintiff William "Al" Piper, entered into a Vehicle Lease Agreement with Opportunity Leasing, Inc. A true and correct copy of this agreement is attached as Exhibit 4.

5. On or about January 17, 2001, Plaintiff Walter Williams entered into an Original Lease Agreement with C.R. England. A true and correct copy of this agreement is attached as Exhibit 5.

6. On or about January 17, 2001, Plaintiff Walter Williams entered into a Vehicle Lease Agreement with Opportunity Leasing, Inc. A true and correct copy of this agreement is attached as Exhibit 6.

7. On or about May 11, 2001, Plaintiff Thomas Shutt entered into an Original Lease Agreement with C.R. England. A true and correct copy of this agreement is attached as Exhibit 7.

8. On or about May 11, 2001, Plaintiff Thomas Shutt entered into a Vehicle Lease Agreement with Opportunity Leasing, Inc. A true and correct copy of this agreement is attached as Exhibit 8.

9. On or about July 11, 2001, Plaintiff James Murphy entered into an Original Lease Agreement with C.R. England. A true and correct copy of this agreement is attached as Exhibit 9.

10. On or about August 8, 2002, Plaintiff James Murphy entered into a Revised Independent Contractor Operating Agreement (the "New Lease Agreement") with C.R. England. A true and correct copy of this agreement is attached as Exhibit 10.

11. The Original Lease Agreements entered into by the named Plaintiffs and C.R. England were identical in all material respects.

12. The Vehicle Lease Agreements entered into by the named Plaintiffs and C.R. England were identical in all material respects.

13. Plaintiffs Sullivan, Piper, Williams and Shutt are examples of "Lease-Operators" in that they leased their tractor from Opportunity Leasing, and then "leased-back" the same tractor, and their personal services, to C.R. England.

14. Plaintiff Murphy is an example of an "Owner-Operator" in that he obtained his tractor from a third-party not affiliated with C.R.England.

15. C.R. England is a closely held Utah corporation.

16. C.R. England is a regulated motor carrier that provides transportation of property in interstate commerce under the authority of the U.S. Department of Transportation. C.R. England leases equipment and services from independent contractors, otherwise known as owner-operators.

17. Opportunity Leasing, Inc. is a Utah corporation that leases tractor truck units to lease-operators. Opportunity Leasing is located at the same address as C.R. England and has common directors, officers and ownership.

General Facts Related to Charge-Backs

18. The Original Lease Agreements entered into by the Plaintiffs do not recite an unqualified obligation to provide drivers with documentation to substantiate charge-backs.

19. The Original Lease Agreement provides that Defendant may deduct from the driver's compensation *any* amount the C.R. England claims the driver owes it. (Orig. Lease at ¶ 4)

20. The Original Lease Agreement states that C.R. England will make documents available validating deductions from compensation only if such request is made within 60 days of the charge. (Orig. Lease at ¶ 4).

Facts Related To C.R. England's Charge-Back For Tires In Excess Of Amount Advanced By C.R. England

21. The Original Lease Agreements entered into by Plaintiffs stated, "YOU may purchase tires at the fleet discount price WE pay plus a 5% administrative fee if YOU authorize on Addendum 3 to have payment to be deducted." (Orig. Lease, Addendum ¶ 4).

22. C.R. England negotiated "fleet pricing" with two or three tire vendors, Michelin, Bridgestone, and Yokahama (Deposition of Todd England, 21-22; attached as Exhibit 11).

23. In reality, C.R. England marked-up all tires purchased by its lease- and owner-operators by thirty percent. These include markups on "Tires on Road," "New Tires" and "New Tires – Caps." (Ex. 65; Yeck Deposition, attached as Exhibit 12).

24 All C.R. England employees in the maintenance division were aware that C.R. England was marking-up tires by thirty percent. (Todd England Deposition at 24).

25. Todd England, Executive Vice President of Maintenance, stated that "in the history of the whole program, we've always applied a thirty percent markup, and never intended to do anything else." (Todd England Deposition at 23).

26. The Original Lease Agreement failed to disclose that C.R. England charged-back against lease- and owner-operator compensation amounts for mark-ups on tires.

27. The Original Lease Agreement failed to contain a recitation as to how charge-backs for tires are computed.

28. C.R. England failed to provide Plaintiffs copies of documents necessary for them to determine the validity of the thirty percent mark-up for tires. (Murphy Deposition at 50; Pakter Report 31-33; attached as Exhibit 15).

29. Plaintiff Thomas Shutt was charged-back $45.00 for mark-up on tires purchased through C.R. England in 2001. (See Pakter Report, Exhibit 7, Schedule 1; attached as Exhibit 19).

30. C.R. England charged-back against owner-operator compensation slightly less than one million dollars for mark-ups to tires purchased by class members from June 6, 1998 through August 7, 2002. (See Pakter Rebuttal Report, Exhibit 1, attached as Exhibit 20.)

31. The New Lease Agreement discloses that charge-backs for tires include a thirty percent markup. (Pakter at 35; attached as Exhibit 15).

32. C.R. England charged-back against owner-operator compensation more than one million dollars for mark-ups to tires purchased by class members from August 8, 2002 through October 28, 2005. (See Pakter Rebuttal Report, Exhibit 1).

Facts Related To C.R. England's Charge-Back For Repairs

33. Employees of C.R. England told Plaintiffs that C.R. England preferred to have repairs and maintenance on the tractors performed at the England Service Center ("ESC"). (See Piper Deposition at 81-82, attached as Exhibit 21; Williams Deposition at 52, attached as Exhibit 22; Shutt Deposition at 50-51, attached as Exhibit 23).

34. ESC performed repairs and maintenance on lease-operator and owner-operator trucks only. ESC did not perform repairs on trucks driven by C.R. England's employee drivers. (Yeck Deposition at 9-10).

35. The Original Lease Agreements entered into by the named Plaintiffs and C.R. England stated that Plaintiffs were responsible for "paying all operating expenses, including all expenses for fuel, oil and repairs . . ." (Orig. Lease at ¶ 7).

36. The Addendum to the Original Lease Agreement stated that "YOU [Plaintiff] may have maintenance work done at recommended independent vendors and take advantage of the reduced pricing they offer to business persons under contract with WE [C.R. England] . . ." (Addendum at ¶ IV).

37. The Original Lease Agreement failed to disclose any information pertaining to charge-backs against Plaintiffs' compensation for repairs and maintenance performed at the ESC.

38. ESC purchased parts for owner-operator and lease-operator tractors in bulk. (Yeck Deposition at 38).

39. When ESC performs maintenance or repairs on an owner-operator or lease-operator tractor there is a thirty percent markup on parts. (Yeck Deposition at 38).

40. The markup of parts at ESC has always been thirty percent. (Yeck Deposition at 39).

41. C.R. England charged-back Plaintiffs three types of "administrative fees" which were imposed when Plaintiffs had repairs made by C.R. England. (Pakter Report at 42-43; Pakter Ex. 4, Schedules 1 -5, attached as Exhibit 18).

42. The Original Lease Agreement failed to disclose that C.R. England marked-up parts used at the ESC by thirty percent.

43. The Original Lease Agreement failed to contain a recitation as to how charge-backs for repairs are computed.

44. C.R. England failed to provide Plaintiffs copies of documents necessary for them to determine the validity of the thirty percent mark-up for parts. (Pakter Report at 34-35).

45. Plaintiff Donald Sullivan was charged-back $125.27 for mark-up on parts purchased in conjunction with repairs made at the ESC between 1998 and 2001. (See Pakter Report, Exhibit 7, Schedule 3, attached as Exhibit 19).

46. Plaintiff Donald Sullivan was charged-back $49.22 for "Administration Charge" in conjunction with repairs made at the ESC between 1998 and 2001. (See Pakter Report, Exhibit 4, Schedule 3, attached as Exhibit 18).

47. Plaintiff William Piper was charged-back $1,608.85 for mark-up on parts purchased in conjunction with repairs made at the ESC between 1999 and 2001. (See Pakter Report, Exhibit 7, Schedule 2).

48. Plaintiff William Piper was charged-back $51.63 of "Administration Charge," $140.00 for "Admin Chg O/O" and $140.00 for "Admin Chg Shop" in conjunction with repairs made at the ESC between 1999 and 2001. (See Pakter Report, Exhibit 4, Schedule 2).

49. Plaintiff Thomas Shutt was charged-back $169.52 for mark-up on parts purchased in conjunction with repairs made at the ESC in 2001. (See Pakter Report, Exhibit 7, Schedule 1).

50. Plaintiff Thomas Shutt was charged-back $8.00 for "Admin Chg O/O" and $8.00 for "Admin Chg Shop" in conjunction with repairs made at the ESC in 2001. (See Pakter Report, Exhibit 4, Schedule 1).

51. Plaintiff James Murphy was charged-back $839.09 for mark-up on parts purchased in conjunction with repairs made at the ESC between 2001 and 2002. (See Pakter Report, Exhibit 7, Schedule 4).

52. Plaintiff James Murphy was charged-back $24.00 for "Admin Chg O/O" and $24.00 for "Admin Chg Shop" in conjunction with repairs made at the ESC between 2001 and 2002. (See Pakter Report, Exhibit 4, Schedule 4).

53. Plaintiff Walter Williams was charged-back $451.23 for mark-up on parts purchased in conjunction with repairs made at the ESC in 2001. (See Pakter Report, Exhibit 7, Schedule 5).

54. Plaintiff Walter Williams was charged-back $16.00 for "Admin Chg O/O" and $16.00 for "Admin Chg Shop" in conjunction with repairs made at the ESC in 2001. (See Pakter Report, Exhibit 4, Schedule 5).

55. C.R. England charged-back against owner-operator compensation slightly less than one million dollars for mark-ups to parts purchased in conjunction with repairs made at the ESC from June 6, 1998 through August 7, 2002. (See Pakter Rebuttal Report, Exhibit 1; attached as Exhibit 20).

56. The New Lease Agreement states, "Maintenance and repairs YOU choose to have performed at OUR maintenance facility" are charged-back at the "amount WE paid suppliers for parts plus a 30 percent markup to US for shop overhead." (See Exhibit 10, Sechedule 3).

57. C.R. England charged-back against lease- and owner-operator compensation more than one million dollars for mark-ups to parts purchased in conjunction with repairs made at the ESC from August 8, 2002 through October 28, 2005. (See Pakter Rebuttal Report, Exhibit 1.)

Facts Related to C.R. England's Termination-Related Charge-Backs

58. Plaintiff Thomas Shutt was charged-back for a $500 "Termination Administration Fee" and for a $10 "Termination Letter." (See Pakter Report, Exhibit 4, Schedule 1; attached as Exhibit 18).

59. Plaintiff Donald Sullivan was charged-back a total of $1,000 for "Termination Administration Fees" and $20 for "Termination Letters." (See Pakter Report, Exhibit 4, Schedule 3; attached as Exhibit 18).

60. Plaintiff Walter Williams was charged-back for a $500 "Termination Administration Fee" and for a $10 "Termination Letter." (See Pakter Report, Exhibit 4, Schedule 5; attached as Exhibit 18).

61. The Original Lease Agreement entered into by the Plaintiffs failed to disclose that C.R. England would charge-back against their compensation $500 for a "termination administration fee."

62. The Original Lease Agreement entered into by the Plaintiffs failed to disclose that C.R. England would charge-back against their compensation $10 for a "termination letter."

63. The Original Lease Agreement failed to contain a recitation as to how charge-backs for termination-related fees are computed.

64. C.R. England failed to provide Plaintiffs copies of documents necessary for them to determine the validity of these termination-related charge-backs.

65. After the New Lease Agreement was implemented, C.R. England ceased charging lease- and owner-operators for the "Termination Administration fee." (See Pakter Report at Exhibit 3, Schedule 2.)

Facts Related To C.R. England's Charge-Backs For Fuel

66. C.R. England provides its lease- and owner-operators with a Comdata fuel card, under which C.R. England facilitates the acquisition of fuel by drivers from truck stops and then charges-back to drivers sums substantially in excess of what it pays the truck stop for such fuel. (Jeff McGuire Dep., 18-19; attached as Exhibit 25).

67. C.R. England advances the cost for the fuel acquired by the Plaintiffs and other lease- and owner-operators by making payments either to Comdata, Inc. or directly to the truck stop chain that dispensed the fuel to owner-operators. Defendant then charges back an amount for such fuel against the compensation due Plaintiffs and other owner operators who use the C.R. England Comdata card. (McGuire Deposition at 17).

68. The sums charged back by C.R. England to the Plaintiffs for such fuel are substantially greater than the amounts actually paid by the Defendant to Comdata or to individual truck stops for

such fuel, providing Defendant with a substantial undisclosed profit on the transaction. (Pakter Report at 11-12, 44-46).

69. C.R. England consciously decided to charge-back for fuel in excess of its costs because the company was looking for ways to "increase the profitability of the owner-operator division." (McGuire Deposition at 24).

70. CR England dispenses fuel at its terminal in Salt Lake City. The fuel is sold to lease- and owner-operator trucks and is also dispensed to company trucks. C.R. England charges back to owner-operators sums in excess of what it actually paid for fuel dispensed at its terminal. (McGuire Deposition at 60).

71. C.R. England also charged back against Plaintiffs' compensation amounts for fuel-related transaction fees. (Pakter Report, Exhibit 4, Schedules 1-5).

72. The Original Lease Agreement entered into by Plaintiffs fails to state that C.R. England retains any of the discounts or rebates generated by virtue of the lease- or owner-operator's use of the Comdata card. The Original Lease Agreement fails to contain a recitation as to how such charge-backs are computed.

73. C.R. England failed to provide Plaintiffs with documents necessary for them to determine the validity of the charge-backs for fuel.

74. C.R. England charged back against Plaintiff Thomas Shutt's compensation $353.50 for fuel that exceeded C.R. England's cost for such fuel. (Pakter Report at 12; attached as Exhibit 14).

75. C.R. England charged back against Plaintiff William Piper's compensation $2,810.72 for fuel that exceeded C.R. England's cost for such fuel. (Pakter Report at 12).

76. C.R. England charged back against Plaintiff Donald Sullivan's compensation

$790.43 for fuel that exceeded C.R. England's cost for such fuel. (Pakter Report at 12).

77. C.R. England charged back against Plaintiff James Murphy's compensation $934.13 for fuel that exceeded C.R. England's cost for such fuel. (Pakter Report at 12).

78. C.R. England charged back against Plaintiff Walter Williams compensation $249.92 for fuel that exceeded C.R. England's cost for such fuel. (Pakter Report at 12).

79. C.R. England profited in the amount of approximately two million dollars for the period June 6, 1998 through August 7, 2002 as a result of its fuel charge-back practices. (Pakter Rebuttal Report; Exhibit 1).

80. C.R. England profited in the amount of approximately two million dollars for the period August 8, 2002 through October 28, 2005 as a result of its fuel charge-back practices. (Pakter Rebuttal Report, Exhibit 1).

Facts Related To The Forced Purchase of Satellite Communications and Administrative Services

81. The Original Lease Agreement entered into by Plaintiffs stated, "WE will provide and install satellite communications on contracted equipment at no cost and YOU agree to such installation and to authorize a fifteen ($15.00) per week usage charge to be deducted from contract settlements per Addendum 3 . . ."

82. Lease- and owner-operators were required to lease satellite communications services from C.R. England. They were not permitted to purchase, lease or install their own satellite communications services. (James MacInnes Deposition at 53-54; attached as Exhibit 26).

83. Each of the named Plaintiffs were required to lease satellite communications services from C.R. England. (See Original Lease Agreements Exhibits 1,3,5,7, and 9).

84. The Original Lease Agreement entered into by Plaintiffs contained an "Addendum 3," which listed additional deductions to Plaintiffs' compensation. Included on Addendum 3 are charge-backs for an "Insurance Admin. Fee" and for a "Settlement Admin. Fee."

85. Each of the named Plaintiffs was charged back $3.46 per week for the "Settlement Admin. Fee." (See Pakter Report, Exhibit 4; attached as Exhibit 18).

86. The "Settlement Admin. Fee" was imposed by Opportunity Leasing. "It's an administrative fee that is used to cover our expenses to process trip packs and process settlements and prepare settlement for the independent contractors who would quit." (MacInnes Deposition at 100:8-15).

87. According to C.R. England "The fee is part of our cost of doing business to provide net income and a recording of what their revenue and reimbursements and expenses were back to the independent contractor to give them an accounting on how they did that particular week." (MacInnes Deposition at 108:12-18).

88. All lease- and owner-operators were required to pay the "Settlement Admin. Fee." "I can't conceive of any scenario where they could have avoided the settlement admin fee and still have been paid weekly . . ." (MacInnes Deposition at 108:5-11).

89. Each of the Plaintiffs was charged-back $2.31 per week for "Insurance Admin. Fee." (See Pakter Report, Exhibit 4).

90. If the lease- or owner-operator "was paying for his own insurance he wouldn't be charged that fee. If he's purchasing any insurance through us that we facilitate for him, he would be charged that fee." (MacInnes Deposition at 98:11-15).

91. The Insurance Admin Fee is the same if one insurance policy or five are purchased through CR England. (MacInnes Deposition at 98:22-109:2).

Facts Related To Plaintiffs' Escrow Claims

93. Each Vehicle Lease Agreement requires an escrow account entitled "Opportunity Maintenance Account." The Account is funded by the collection of 5 cents per mile from operator compensation. The Account is capped at $5,000 for owner-operators and $10,000 for lease-operators. (Vehicle Lease Agreement ¶ 11 and Schedules A and C, attached as Exhibits 2,4,6, and 8; Pakter Report at 46).

94. The Vehicle Lease Agreement specified that the Opportunity Maintenance Account is to be used for tire replacement and major repairs to the vehicle. Major repairs are defined as those costing more than $500. The Vehicle Lease Agreement expressly prohibits use of funds in the Opportunity Maintenance Account for routine and preventive maintenance for the equipment. The specifications for the use of the Opportunity Maintenance Account are consistently highlighted throughout the Vehicle Lease Agreement and Addenda by the use of bold capital letters. (Schedule C and Policy on Maintenance Reserve Account; MacInnes Deposition at 89:7-21).

95. The Original Lease Agreement provided for the establishment of the "Maintenance Escrow" and authorizes the deduction of 5 cents per mile from compensation. (Orig. Lease Agreement ¶III and Addendum 3).

96. Upon termination, the Vehicle Lease Agreement provides for the use of funds in the Maintenance Account for a broad range of operator obligations, including a $500 termination fee, not otherwise specified as the purpose for the establishment and funding of this escrow account. In operation, the general maintenance fund is netted against any final expenses that the operator has incurred. (Vehicle Lease Agreement ¶15 and Schedule A; MacInnes Deposition at 91:1-11; Pakter Report at 46).

97. The Vehicle Lease Agreement provides for the deduction of 1 ½ cents per mile from compensation for a fuel and road tax reserve. The Original Lease Agreement authorized the deduction of these amounts from compensation. (Vehicle Lease March 30, 2001 Addenda; Orig. Lease ¶ IX and Addenda 3).

98. The Vehicle Lease Agreement provides for a Performance Bond in the amount of $500 to be collected from operator compensation by deducting $50 per settlement. The Original Lease Agreement authorized the deduction of these amounts from compensation. The Performance Bond is intended to ensure performance under the Original Lease Agreement. (Vehicle Lease March 30, 2001 Addenda; Orig. Lease ¶III and Addenda 3).

99. The Original Lease Agreement provides for a Security Deposit or Performance Bond in the amount of $500 to be collected prior to signing the Original Lease Agreement. The Security Deposit is intended to ensure the operator's satisfactory completion of the lease. (Orig. Lease, Addendum 2, ¶ III).

100. The Vehicle Lease Agreement provides for a Lease Termination Fee in the amount of $500 and a Termination Letter Fee in the amount of $10 which is collected from the operator's escrow funds at the termination of the Agreement. A minimum termination fee of $500 is deducted regardless of the actual cost, if any, to C.R. England. (Vehicle Lease ¶ 15 and Schedule A; Pakter Rpt. at 8).

101. The Original Lease Agreement provided for the deduction of $0.015 per mile for "fuel/road tax." These amounts were deducted weekly from Plaintiffs' compensation. C.R. England held these funds to satisfy fuel tax obligations of Plaintiffs to state taxing authorities. (Orig. Lease, Addendum 3).

102. When Thomas A. Shutt terminated his Lease, C. R. England failed to provide him a full, proper and timely accounting and refund of his escrow funds, itemized as follows:

a. Fuel Tax Reserve $614.86

b. Maintenance Reserve $2,589

c. Performance Reserve Bond $500;

and improperly deducted a Termination Fees of $510 from these escrows (Pakter Report at 8, 13).

103. When William A. Piper terminated his Lease, C.R. England failed to provide him a full, proper and timely accounting and refund of his escrow funds, itemized as follows:

a. Fuel Tax Reserve $128.20

b. Maintenance Reserve $310.24

c. Maintenance Reserve Interest $1.22

d. Performance Reserve Bond $500;

e. Performance Reserve Bond Interest $2.30

(Pakter Report at 13).

104. When Donald L. Sullivan, Sr. terminated his Lease, C.R. England failed to provide him a full, proper and timely accounting and refund of his escrow funds, itemized as follows:

a. Fuel Tax Reserve $267.91

b. Maintenance Reserve $1,058.55

c. Performance Reserve Bond $250.01;

and improperly deducted a Termination Fees of $1020 from these escrows (Pakter Report at 8, 13).

105. When James V. Murphy terminated his Lease, C.R. England failed to provide him a full, proper and timely accounting and refund of his escrow funds, itemized as follows:

a. Fuel Tax Reserve $249.76

b. General Reserve (Maintenance Reserve) $516.60

c. Performance Reserve Bond $500;

(Pakter Report. at 14).

106. When Walter J. Williams terminated his Vehicle Lease, C.R. England failed to provide him a full, proper and timely accounting and refund of his escrow funds, itemized as follows:

a. Fuel Tax Reserve $150.27

b. Maintenance Reserve $1486.25

c. Maintenance Reserve Interest $3.67

d. Performance Reserve Bond $500;

e. Performance Reserve Bond Interest $1.45

and improperly deducted a Termination Fees of $510 from these escrows (Pakter Report at 8,14).

III. ARGUMENT

A. SUMMARY JUDGMENT STANDARDS

Summary judgment must be entered under Fed. R. Civ. P. 56(c) when it appears "that there is no genuine issue as to any material fact and that the moving Party is entitled to judgment as a matter of law." Where the movant produces evidence sufficient to present a *prima facie* case, the burden of going forward shifts to the opponent to demonstrate that a jury could reasonably rule in its favor.[1] The non-moving party "must set forth specific facts showing that there is a genuine issue for trial."[2] A party must come forth with significantly probative evidence to support its claims, and cannot prevent judgment by resting "on mere allegations or denials of its pleadings."[3] An issue of fact is "genuine" if a "reasonable jury could return a verdict for the non-moving party."[4] Fed. R. Civ. P. 56(d) provides that the court may "ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted."

B. STANDARDS OF LIABILITY UNDER THE FEDERAL TRUTH-IN-LEASING REGULATIONS

As a starting proposition, a federal court, when presented with a contract allegedly violative of a federal statute, must first decide, as a question of law, whether the contract in fact violates federal law.[5] "The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as

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[1] *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).
[2] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986); *Clifton v. Craig*, 925 F.2d 182, 183 (10th Cir. 1991).
[3] *Universal Money Centers, Inc. v. Am. Tel. & Telegraph Co.*, 22 F.3d 1527, 1539 (10th Cir. 1994).
[4] *Id.*
[5] *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 83 (1982)("a federal court has a duty to determine whether a contract violates federal law before enforcing it.")

manifested in . . . federal statutes. . . . Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power."[6] In addition, for purposes of summary judgment, it is elementary that "[c]onstruction of a contract is ordinarily for the court regardless of however ambiguous, uncertain, or difficult its terms may be . . . ."[7]

In this case, the standards governing C.R. England's liability under the federal Regulations are straightforward, unequivocal and absolute. The Regulations mandate that C.R. England's leases "*clearly state*" and "*clearly specify*" information regarding chargebacks and escrow fund deductions "*on the face of the lease.*" 49 C.F.R. § 376.12(h) & (k). The Regulations further mandate that C.R. England's leases "*shall contain*" such disclosures, and that these required lease provisions "*shall be adhered to and performed by the authorized carrier.*" 49 C.F.R. §§ 376.11(a); 376.12. At the same time, the regulations require that the lease *shall* specify that the lessor is not required to purchase or rent any products, services or equipment from the carrier.

It is axiomatic that when Congress uses the word "shall," it denotes mandatory requirements in a statute and an obligation "impervious to judicial discretion."[8] "[I]n the absence of a showing of a contrary intent on the part of the legislature, the word 'shall' is considered mandatory, and inconsistent with the idea of discretion. Thus, the word 'shall' does not create an option, and the courts must give effect to the legislative prescription without carving out exceptions."[9]

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[6] *Id.*
[7] *Marine Charter & Storage, Ltd. v. All Underwriters at Lloyds of London*, 628 F. Supp. 740, 743 (S.D. Fla. 1986).
[8] *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).
[9] 82 C.J.S. *Statutes* § 368 (2005) *See also Ala. v. Bozeman*, 533 U.S. 146, 153 (2001) ("As used in statutes, word "shall" is ordinarily the language of command.").

C. C.R. ENGLAND'S ORIGINAL LEASE FAILED TO COMPLY WITH REGULATORY REQUIREMENTST

1. The Original Lease Failed to Comply with the Charge-Back Regulations

The Court need only examine the C.R. England form leases ("Original Lease Agreements") that gave rise to the filing of this action in June 2002 (Exhibits 1,3,5,7,9) to see that that they fail to disclose the chargeback practices that are the subject of Plaintiffs' complaint. 49 C.F.R.§ 376.12(h) provides: "Chargeback items – The *lease shall clearly specify* all items that may be initially paid for by the authorized carrier . . . *together with a recitation as to how the amount of each item is to be computed.* (emphasis added).

In Truth-in-Leasing cases in particular, the courts have held that the Regulations are violated where the face of the lease does not disclose – with specificity – how charge-backs are calculated. Most recently, in *Tayssoun Transp., Inc. v. Universal Am-Cam, Ltd.*,[10] the court held that the carrier's failure to disclose how a $5.00 fee was being used to defray the carrier's actual cost for insurance violated § 376.12(h), concluding: "If UACL in fact used the money generated from Tayssoun's trip fee payments to pay the cost of the Cargo Policy, then UACL was required by § 376.12(h) *to recite in the Agreement with specificity* how the deduction would be computed, and to provide Tayssoun with copies of the documents necessary to determine the charge's validity. UACL did neither."[11] In support of its conclusion in this regard, the court cited other decisions likewise holding that the failure to disclose chargebacks, or the methodology of their calculation, violates §376.12(h):

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[10] 2005 WL 1185811 *16 (S.D. Tex. 2005)(Ex. 27).
[11] *Id.* at *17 (emphasis added).

> This requirement is designed to allow owner-operators, like Tayssoun, to determine whether a per trip fee being charged is fair. Under these assumptions, UACL's failure to do so is a violation of § 376.12(h). *See Owner-Operator Independent Drivers Ass'n, Inc. v. Ledar Transport,* 2000 WL 33711271, at *7 (W.D.Mo.) (carrier's list of items was insufficient to satisfy 376.12(h) because agreement did not recite how each deductible item would be computed); *Owner-Operator Indep. Drivers Ass'n, Inc. v. Rocor Int'l, Inc.,* No. CIV-98-846-L, slip op. at 6 (W.D.Okla. July 19, 2000) (carrier's weekly $35 charge-back of owner-operator compensation for insurance premiums violated § 376.12(h) because carrier failed to provide documents necessary to determine validity of the charge).[12]

Given these authorities- and the mandatory language of the Regulations themselves - it was C.R. England's unconditional obligation "to recite in the Agreement with specificity how the deduction would be computed."[14]

a. Charge-Backs for Tires

The first and most egregious charge-back against compensation is for tires. The Original Lease Agreement stated that C.R. England would charge Plaintiffs for tires at C.R. England's "fleet discount price." In reality, C.R. England charged Plaintiffs the discount price plus a thirty percent mark-up. The Original Lease Agreement disclosed *no information* concerning C.R. England's practice of adding a thirty percent mark-up for tires purchased by Plaintiffs through C.R. England.

This was no innocent oversight. According to Todd England, Executive Vice-President of Maintenance, the mark-up of thirty percent on tires was known to everyone at C.R. England, (except the lease- and owner-operators). He testified that "everyone understood there was a mark-

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[12] *Id.* at *16. *See also Sheinhartz v. Saturn Transp. System, Inc.*, 2002 WL 575636, at *8 (D. Minn. 2002)(Ex. 28)("The dispositive and predominate legal and factual issues in this case are whether . . . *Plaintiffs' leases complied* with the federal regulations *by clearly stating the amount to be paid* to the owner-operators by Defendants. . . .and *[whether] Plaintiffs' leases appropriately stated that Defendants were charging more for certain insurance than the premiums paid by Defendants.*")(emphasis added).

[14] *Tayssoun*, at *17.

up on parts, including tires." When asked who "everyone" included, he answered "Everyone within Maintenance. Everyone within the IC [Independent Contractor] department."[15]

Thus, the Original Lease Agreement violated § 376.12(h) by (1) failing to disclose that charge-backs for tires included a thirty percent mark-up; and (2) failing to contain a recitation as to how the actual amount of tire-related charge-backs were to be computed.

b. Charge-backs for Repairs

Plaintiffs were informed by employees of C.R. England that C.R. England preferred to have repairs and maintenance on the tractors performed at the England Service Center ("ESC") in Salt Lake City. ESC performed repairs and maintenance on lease-operator and owner-operator trucks only. ESC did not perform repairs on trucks driven by C.R. England's employee drivers.

The Original Lease Agreement entered into by the named Plaintiffs and C.R. England stated that Plaintiffs were responsible for "paying all operating expenses, including all expenses for fuel, oil and repairs . . ." The Addendum to the Original Lease Agreement stated that "YOU may have maintenance work done at recommended independent vendors and take advantage of the reduced pricing they offer to business persons under contract with WE [C.R. England] . . ."

The representations made in the Original Lease Agreement were at best incomplete, and at worst downright false. As with tires, C.R. England marked-up parts by thirty percent that were used by ESC to repair and maintain Plaintiffs' trucks. Nowhere in the Original Lease Agreement is it disclosed that charge-backs for parts would include a mark-up of thirty percent.

In addition to marking-up parts by thirty percent, C.R. England also charged-back against Plaintiffs' compensation various "administration fees" related to repairs. C.R. England charged-

[15] Dep. Todd England, 21-22 (Ex. 11).

back Plaintiffs for "Admin. Charges," "Admin Chg O/O" and "Admin Chg Shop" during the course of their lease with C.R. England. Again, there is no disclosure of any of these charges in the Original Lease Agreement. Similarly, there is no recitation in the agreements as to how the amount of "administration" charges and fees are computed.

Thus, the Original Lease Agreement violated § 376.12(h) by (1) failing to disclose that charge-backs for repairs included a thirty percent mark-up on parts; (2) failing to disclose that C.R. England would charge-back for various administration charges related to repairs and (3) failing to contain a recitation as to how charge-backs for repairs were to be computed.

c. Charge-backs for Fuel

C.R. England provides its lease and owner-operators with a Comdata fuel card, under which C.R. England first advances cost of fuel on behalf of the driver and then charges-back the cost to the driver. C.R. England advances the cost for the fuel acquired by the Plaintiffs and other owner-operators by making payments either to Comdata, Inc. or directly to the truck stop chain that dispensed the fuel to owner-operators. Defendant then charges back an amount for such fuel against the compensation due Plaintiffs and other owner operators who use the C.R. England Comdata card.

Through negotiations with truck stops, C.R. England obtains discounts or rebates from the price shown on the pump at the time fuel is dispensed to an owner-operator. The sums charged back by C.R. England to the Plaintiffs for such fuel after the deduction of the discount or rebate are substantially greater than the amounts actually paid by the Defendant to Comdata or to individual truck stops for such fuel providing Defendant with a substantial undisclosed profit on the transaction.

In addition, the Original Lease Agreement failed to disclose that C.R. England would charge-back against Plaintiffs' compensation amounts for fuel-related transaction fees. Plaintiffs were charged-back, with each use of the Comdata card, transaction fees ranging from thirty cents to one dollar.

The Original Lease Agreements entered into by Plaintiffs were completely silent regarding C.R. England's fuel-related charge-back practices. The Original Lease Agreements violated § 376.12(h) by (1) failing to disclose that C.R. England charged-back against Plaintiffs' compensation amounts for fuel in excess of the actual costs of such fuel to C.R. England; (2) failing to disclose that C.R. England would charge-back fuel related transaction fees; and (3) failing to contain a recitation as to how the actual amount of fuel-related charge-backs were to be computed.

d. Termination-Related Charge-backs

Plaintiffs Thomas Shutt, Donald Sullivan, and Walter Williams were each charged-back for a $500 "Termination Administration Fee" and for a $10 "Termination Letter." In essence, Plaintiffs were charged for their pink slips by C.R. England.

The Original Lease Agreements entered into by the Plaintiffs failed to disclose that C.R. England would charge-back against their compensation $500 for a "termination administration fee." The lease agreements entered into by the Plaintiffs failed to disclose that C.R. England would charge-back against their compensation $10 for a "termination letter." The lease agreements failed to contain a recitation as to how charge-backs for termination-related fees are computed.

The Original Lease Agreements violated § 376.12(h) by (1) failing to disclose that C.R. England charged-back against Plaintiffs' compensation amounts for "termination administration

fees" and for "termination letters"; and (2) failing to contain a recitation as to how the amount of termination-related charge-backs were to be computed.

2. The Original Lease Agreements Failed to Comply With the "Forced Purchase" Regulations

Section 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."

In this case, C.R. England required lease- and owner-operators to lease satellite communications services from C.R. England. Plaintiffs and Class members were not permitted to purchase, lease, or install their own satellite communications services.

Each of the named Plaintiffs was charged back $3.46 per week for the "Settlement Admin. Fee." According to James MacInnes, Director of C.R. England's Independent Contractor Division, all lease and owner-operators were required to pay the "Settlement Admin. Fee." "I can't conceive of any scenario where they could have avoided the settlement admin fee and still have been paid weekly."[16]

Each of the Plaintiffs was also charged-back $2.31 per week for "Insurance Admin. Fee" Again, Plaintiffs were required to purchase these "administrative services" from Defendant. According to C.R. England, if the lease or owner-operator "was paying for his own insurance he wouldn't be charged that fee. If he's purchasing any insurance through us that we facilitate for him, he would be charged that fee." The Insurance Admin Fee is the same if one insurance policy or five are purchased through CR England.

[16] Dep. James MacInnes (Ex. 26).

In promulgating the prohibition against forced purchases, the I.C.C. stated that "[t]he proposed rule is designed to insure that the lessor will not be obligated to purchase or rent products or services from the authorized carrier as a condition to entering into a lease agreement."[17] Notably, the I.C.C. intended the prohibition to be applied broadly, declaring that "[t]his section is intended to be *all inclusive* and affects other items as well, e.g. washing of equipment, repair services, insurance and so on."[18]

The plain language of the regulations prohibits C.R. England from requiring Plaintiffs to purchase or rent any products or services from C.R. England. In this case, C.R. England forced Plaintiffs to rent satellite communications services from C.R. England, and at the same time, forced Plaintiffs to purchase "administrative services" from Defendant. The Court should find that C.R. England violated § 376.12(i).

3. C.R. England Improperly Administered Plaintiffs' Escrow Funds

a. The Various Reserve Accounts Are Escrows Under the Leasing Regulations

C.R. England requires three separate reserve funds: (1) the Maintenance Reserve Account (later called the "General Reserve"); (2) the Performance Bond or Security Deposit; and (3) the Fuel Tax Reserve. Each reserve fund is an escrow fund within the meaning of the Truth-in-Leasing regulations. The leasing regulations, codified in 49 C.F.R. § 3762(l), define an escrow fund as

> Money deposited by the lessor [Plaintiffs] with either a third party or the lessee [CRE] to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purpose mutually agreed upon by the lessor and lessee.

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[17] *Lease and Interchange of Vehicles*, Decision, June 13, 1978; 129 M.C.C. 700, 729, (Ex. 32)
[18] *Id.* (emphasis added).
[20] Original Lease Agreement, ¶ III.

operator's escrow funds, including the Maintenance Reserve.[31] While the Performance Bond and Security Deposit were collected to guarantee performance, the Maintenance Reserve was not available to offset general debt of the operator.

In even stronger terms than the language included in the Arctic lease, C.R. England 's Vehicle Lease restricts the use of maintenance funds. The Vehicle Lease emphatically provides that the Maintenance Reserve was "to be used to purchase tire replacements and to pay for **MAJOR** repairs to the vehicle."[32] In an addendum to the Vehicle Lease, the limitations on the availability of the Maintenance Reserve is further explained: "MAINTENANCE ACCOUNT IS USED FOR MAJOR REPAIRS, TIRES, OR BREAKDOWNS (ONLY!)"[33] The addendum continues on to state that the Maintenance Reserve cannot be used for routine or preventative maintenance service; and "no personal loans or deductions for personal finances."[34] In the face of these highlighted, bold, capitalized and enlarged restrictions, at termination of the Vehicle Lease, C.R. England took any funds remaining in any of the various escrows to satisfy any amount it claimed an operator might owe to C.R. England.

The Vehicle Lease purports to authorize C.R. England to net amounts claimed by C.R. England against the operator at termination against the Maintenance Reserve. Paragraph 15 of the Vehicle Lease is entitled "Liquidated Damages," and lists potential obligations which might be owed to C.R. England at termination of the Lease. The concluding sentence of this paragraph states, again in all capital letters, "YOU AUTHORIZE US TO USE ANY MONIES IN THE

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[31] (MacInnes Depo. at 91:1-11; Pakter Rpt. at 46).
[32] Vehicle Lease Agreement ¶11(emphasis in original)
[33] Vehicle lease Agreement March 30, 2001 Addendum.(Emphasis and font size in original)
[34] *Id.*

CLAUSE 11 RESERVE ACCOUNT [Maintenance Reserve] TO SATISFY ALL OR PART OF THE DAMAGES." This provision is in itself a separate violation of the escrow provisions of the leasing regulations.

The *Arctic* court found a similar provision authorizing use of the maintenance escrow for a broad range of obligations to be in violation of the regulations. Section 376.12(k)(2) requires the lease to state "the specific items to which the escrow fund can be applied." The *Arctic* court explained that transforming the maintenance fund into a general fund available to satisfy any obligation of the operator, violated both the letter and the spirit of the regulation.[35] Arctic violated the letter of the law when it did not identify the "specific items" to which the escrow fund can be applied. The court rejected Arctic's argument that it had disclosed the "conditions for the return of the escrow funds," explaining that this argument rendered the requirements of §376.12(k)(6) meaningless.[36] "When Defendants provided for everything to be covered by the maintenance fund, they, in reality, specified nothing."[37]

Finally, C.R. England violated the leasing regulations in its failure to return remaining escrow funds to Plaintiffs within the mandated time period. Section 376.12(k)(6) states that "in no event" shall escrow funds be returned later than 45 days from termination. The *Arctic* court found that the carrier could not hold funds beyond the 45 days regardless of what the contingent

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[35] 159 F. Supp. 2d at 1077; *See, also, OOIDA v. Ledar, supra.,* Slip Op. at 4 ("By failing to specify the items that may be deducted from the security deposit, Ledar has transformed the security deposit into 'a general fund to satisfy any obligation incurred by [owner-operators], which is a violation of the letter of 49 C.F.R. §376.12(k)(2)(providing that the lease must identify specifications to which the escrow fund can be applied), and spirit of the regulations.'" *Citing OOIDA v. Arctic Express,* 159 F.Supp. 2d 1067, 1077 (S.D. Ohio 2001).

[36] *OOIDA v. Arctic,* 159 F. Supp. 2d at 1077.

[37] *Id.* at 1078.

obligations of the operator might be beyond that time period.[38] The court in *OOIDA v. Mayflower Transit* held that even though fuel tax returns might be audited for three years increasing the operator's tax liability, fuel tax escrows were required to be returned to the operator within 45 days of termination.[39] Here, C.R. England failed to return any of the Plaintiffs' fuel tax escrow funds.

The ability of a motor carrier to create escrow funds out of a driver's pay is an extraordinary privilege which has been narrowly circumscribed by the regulations. Escrow funds may be used to pay only previously defined items of indebtedness, a motor carrier may proceed against a driver for more generalized forms of debt but it may not use escrow funds for such collections. Here, C.R. England did not return unused escrows remaining in varying amounts for each of the five Class Representatives in the three different escrow funds required by C.R. England .[40] Regardless of any amounts C.R. England might claim against any one of the Class Representatives, C.R. England had an absolute obligation to return the escrows within the 45 days mandated by §376.12(k)(6). C.R. England failed to return the escrows as required, and has thus violated the leasing regulations.

D. C.R. ENGLAND'S CHARGE-BACKS HAVE BEEN, AND CONTINUE TO BE, IN EXCESS OF ITS COSTS

1. Excessive Charge-Backs Under The Original Lease

There can be no dispute that C.R. England's charge-backs for tires, repairs and fuel were excessive, in that the amounts charged Plaintiffs and Class members for such items exceeded the actual costs to C.R. England.

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[38] *Id.* at 1080.
[39] 277 F. Supp. 2d at 1019.
[40] Pakter Report at 13-14.

C.R. England's own financial documents demonstrate that the company reaped a substantial financial benefit by selling tires and parts to Plaintiffs and Class members with an undisclosed thirty percent mark-up. Plaintiffs' expert, Michael Pakter, after examining C.R. England's financial documents, found that between June 6, 1998 and August 7, 2002, C.R. England charged-back Plaintiffs and Class slightly less than one million dollars for tires in excess of the costs of such tires to C.R. England.[41] At the same time, C.R. England charged-back Plaintiffs and Class members somewhat less than one million dollars for parts in excess of the cost of such parts to C.R. England during the same time period.[42]

In addition to the thirty percent mark-ups on tires and parts, C.R. England also pocketed additional monies in the form of "administrative charges" related to repairs. According to Mr. Pakter, these repair-related "administrative charges" totaled approximately $200,000 for the period June 6, 1998 through August 7, 2002.[43]

Even more excessive are C.R. England's charge-backs for fuel. Here, the company's practice of charging back well in excess of its actual costs for lease and owner-operator fuel purchases has generated large and increasing profits for C.R. England. Indeed, C.R. England's fuel charge-back practices were the result of the company's attempt to "increase the profitability of the owner-operator division." During the period June 1998 through August 7, 2002, C.R. England charged-back Plaintiffs and Class members well over two million dollars for fuel that exceeded the cost to C.R. England.[44]

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[41] Pakter Rebuttal Report at Exhibit 1.
[42] Pakter Rebuttal Report at Exhibit 1.
[43] Pakter Rebuttal Report at Exhibit 1.
[44] Pakter Rebuttal Report at Exhibit 1.

Finally, Plaintiffs and Class members were charged-back for termination-related "administrative fees." These fees were calculated by Mr. Pakter to total over one million dollars for the period June 1998 through August 7, 2002.[45]

2. Although Disclosed Under The New Lease Agreement, C.R. England Continues to Profit From Its Charge-Back Practices

Beginning in the Summer of 2002, C.R. England implemented a new lease agreement. In its New Lease Agreement, which was entered into by Plaintiff James Murphy, C.R. England disclosed its charge-back practices including its practice of marking-up tires and parts by thirty percent as well as its practice of retaining discounts and rebates generated from lease and owner-operator fuel purchases.

The company, however, continues to engage in the same charge-back practices, with the same result – it charges-back for tires, repairs and fuel far in excess of its costs. For example, for the period August 8, 2002 through October 28, 2005, C.R. England charged-back Class members more than one million dollars for tires in excess of the costs of such tires.[46] At the same time, C.R. England charged-back Class members more than one million dollars for parts in excess of the cost of such parts to C.R. England during the same time period.[47] During the same period, C.R. England charged-back more than one hundred thousand dollars for "administrative" fees related to repairs.[48]

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[45] Pakter Rebuttal Report, at Exhibit 1.
[46] Pakter Rebuttal Report, Exhibit 1.
[47] Pakter Rebuttal Report, Exhibit 1.
[48] Pakter Rebuttal Report, Exhibit 1.

Finally, for the period August 8, 2002 through October 2005, C.R. England charged-back Class members more than two million dollars for fuel in excess of the cost of such fuel to C.R. England.[49]

E. C.R. ENGLAND MUST RETURN EXCESSIVE CHARGE-BACKS AND PROFITS

1. The Statute and Regulations Authorize the Award of Damages For Violation of the Charge-Back Regulation.

49 U.S.C. § 14704(a)(2) provides that "[a] carrier . . . is liable for damages sustained by a person as a result of an act or omission of that carrier or broker in violation of this part." In *OOIDA v. Ledar Transport, Inc.*, the court found that defendant violated the charge-back provision of the leasing regulations by failing to disclose charge-backs to compensation for "transaction fees," insurance fees, and repair costs in its lease agreement with owner-operators.[50] The court stated that "the amount of damages suffered by Plaintiffs and Class members will be determined in the damages phase of this case." Judge Gaitan then specifically found that the regulatory history underlying § 376.12(h) prohibits motor carriers from making profits on charge-backs to owner-operators:

> The regulatory history of Section 376.12(h) indicates that charge-backs that exceed the actual amount advanced by the motor carrier are unlawful. The Interstate Commerce Commission concluded that, "*[t]o the extent that charge-backs to owner-operators reduce the carrier's legitimate expenses, resulting in losses to the owner-operators and a profit to the carrier, they are not legitimate charge-backs or deductions.*" Lease and Interchange of Vehicles, 46 Fed. Reg. 44013 (Sept. 2, 1981).[51]

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[49] Pakter Rebuttal Report, Exhibit 1.

[50] *OOIDA v. Ledar Transport, Inc.*, 00-0258-CV-W-FJG (W.D. Mo., Dec. 30, 2004), *slip. op.* at 11-13, attached as Exhibit 29.

[51] (Dec. 30, 2004 Slip. Op. 13 n. 36).

The regulatory history confirms that C.R. England's practices smack of the very abuses the Regulations were intended to stamp out. As the Ninth Circuit observed in *OOIDA v. Swift Transp. Co.*: "A primary goal of this regulatory scheme is to prevent large carriers from taking advantage of individual owner-operators due to their weak bargaining position."[52]

As originally implemented in 1978, §376.12(h) read as follows:

> Charge-back items. The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at time of payment or settlement.

Subsequently however, the ICC learned that motor carriers were circumventing the underlying objectives of this regulation by manipulating charge-backs in order to make a profit from owner-operators. In a 1981 rulemaking proceeding, the Commission emphasized, in no uncertain terms, that the chargeback rule was intended to eliminate such profiteering abuses:

> It appears that, in certain instances, *carriers are defeating the intent of the present regulations by profiting from charge-back items* at the expense of owner-operators…We believe that all legitimate charge-backs and deductions should be clearly specified and identified in the lease and agreed upon between the parties.[53]

In turn, the Commission amended the chargeback rule to include the language as it currently appears in 49 C.F.R.§376.12(h).[54]

Furthermore, the Commission could not have expressed its objective any more clearly – to prohibit the abuses of "*carriers [who] are defeating the intent of the present regulations by profiting from charge-back items at the expense of owner-operators.*"[55] The Regulation also

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[52] 367 F. 3d 1108, 1110 (9th Cir. 2004).
[53] Lease and Interchange of Vehicles, 46 Fed. Reg. 44013, ** 44014-15, 1981 WL 107853 (I.C.C. 1981) (emphasis added) (Ex. 30).
[54] Lease and Interchange of Vehicles, 132 M.C.C. 916, 926 1982 WL 28480 *9 (Ex. 31).
[55] *Id.*

definitively reflects the Commission's concerns that a charge-back includes *nothing* more than the "*legitimate*" charge for items "*initially paid for by the authorized carrier.*"[56] Finally, the Regulation firmly embodies the Commission's mandate that to the extent that such charges exceed the amount "initially paid for by the authorized carrier," "*they are not legitimate charge-backs or deductions.*"[57]

2. The Court Has The Power To Require C.R. England To Disgorge Profits From Its Unlawful Conduct

In addition to its authority to award damages for charge-back violations discussed previously, the Court clearly has the authority to render equitable relief in the form of restitution and disgorgement.[58] Thus, even if the Court were to conclude that the Regulations did not bar profiting on charge-backs under all circumstances, restitution and disgorgement would be available where, as here, C.R. England has violated federal law. The Court clearly has the authority to render such equitable relief.

In *United States v. RX Depot, Inc.*[59] the Tenth Circuit recently held that when "a statute invokes general equity jurisdiction, courts are permitted to utilize any equitable remedy to further the purposes of the statute absent a clear legislative command or necessary and inescapable inference restricting the remedies available." In *RX Depot*, the issue before the court was whether the district court had the power to order disgorgement of profits where defendant violated the Food,

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[56] *Id.*
[57] *Id.*
[58] See Prayers for Relief at ¶ 10 (asking that the Court "Order Defendant to disgorge into a common fund . . . all of the sums by which Defendant has been unjustly enriched . . ."; Prayers for Relief at ¶ 12 (asking that the Court "Enter an order establishing a restitution grid by which the sums by which Defendant has been unjustly enriched are to be distributed to the Class Members.").
[59] 438 F.3d 1052, 1055 (10th Cir. 2006).

Drug and Cosmetic Act (FDCA), 21 U.S.C. §301 et seq. The statute gives the district courts jurisdiction to "restrain violations of [the FDCA]." 21 U.S.C. §332(a).

The starting point for the Tenth Circuit's analysis was the dual Supreme Court cases of *Porter v. Warner Hoding Co.*[60] and *Mitchell v. Robert De Mario Jewelry, Inc.*[61] In *Porter*, the Supreme Court analyzed whether the Office of Price Administration could seek restitution of rents charged in excess of rent control regulations issued under the Emergency Price Control Act, (EPCA), even though there was no language in the Act expressly conferring such authority. The Supreme Court reasoned that: "[T]he Administrator invoked the jurisdiction of the District Court to enjoin acts and practices made illegal by the Act and to enforce compliance with the Act. *Such a jurisdiction is an equitable one. Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction.*"[62] In *Mitchell*, the Court held that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature.'"[63]

Armed with these precedents, the Tenth Circuit reasoned that disgorgement is available under the FDCA unless (1) there is a clear legislative command or necessary and inescapable

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[60] 328 U.S. 395 (1946).
[61] 361 U.S. 288 (1960).
[62] 328 U.S. at 397 (emphasis added).
[63] 361 U.S. at 291-92.

reference prohibiting disgorgement or (2) disgorgement is inconsistent with the purposes of the FDCA.[64]

Applying the holding of *RX Depot* to the instant case, the first question is whether Congress, in promulgating the ICC Termination Act, ("ICCTA"), invoked the court's "equity jurisdiction." 49 U.S.C. § 14704(a)(1) states, in part, that "[a] person may bring a civil action for injunctive relief for violations of sections 14102 and 14103." Section 14102 encompasses the Motor Carrier Act, under which the Truth-in-Leasing regulations are promulgated.

Courts have often found that when Congress provides for the issuance of a permanent injunction, it invokes the equity jurisdiction of the district court. The Fifth Circuit has held that by allowing plaintiffs to seek injunctive relief, the statute "carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it."[65] Similarly, the Eleventh Circuit, found that "Congress, when it gave the district court authority to grant a permanent injunction . . . also gave the district court the authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary or inescapable inference."[66] Congress invoked this Court's equitable jurisdiction by providing for the issuance of injunctive relief under § 14704(a)(1).

The next issue is whether there is "a clear legislative command or necessary and inescapable reference prohibiting disgorgement" in this case. In *RX Depot*, the court rejected the argument that "because the FDCA explicitly authorizes certain remedies, we should be reluctant to infer additional

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[64] 438 F.3d at 1058.
[65] *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982).
[66] *AT&T Broadband v. Tech Communications, Inc.*, 381 F.3d 1309, 1316 (11th Cir. 2004).

remedies."[67] Relying upon *Porter*, the court determined that "the express provision of certain remedies in the EPCA did not create a necessary and inescapable inference limiting courts' authority to order unenumerated equitable remedies."[68] In this case, the statute authorizes injunctive relief but contains no language prohibiting other equitable remedies. To the contrary, 49 U.S.C. § 13103 specifically provides that the remedies provided in this part (Title 49, Part B) are in addition to remedies existing under common law. Thus, not only is there is no clear legislative command or necessary and inescapable reference prohibiting disgorgement, there is clear legislative language inviting a broader view of the remedies available under Title 49.

The final question is whether disgorgement is inconsistent with the purposes of the ICC Termination Act and the leasing regulations. In answering this question it is important to note that prior to the enactment of the ICCTA, the I.C.C. regulated motor carriers, promulgated regulations, including the Truth-in-Leasing regulations, and enforced those regulations in court. Notably, in addition to seeking injunctive relief for violations of the Motor Carrier Act, the I.C.C. also had the ability to sue for equitable relief including restitution. In *I.C.C. v. B & T Trans. Co.*,[69] the I.C.C. sued a motor carrier in federal court, alleging that the carrier overcharged its customers and seeking restitution of the overcharges. The First Circuit noted that while the Motor Carrier Act only expressly provided for the I.C.C. to seek "prospective injunctions to restrain future conduct," the court rejected the argument that Commission lack the ability to seek other equitable relief. The court concluded that "the traditional power of an equity court to grant complete relief may be said to

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[67] 438 F.3d at 1059.
[68] *Id.*
[69] 613 F.2d 1182 (1st Cir. 1980).

have provided the I.C.C. with residual, untapped authority to seek equitable restitution once it has invoked the equity jurisdiction of the district courts."[70]

When Congress terminated the I.C.C., it created a private right of action allowing aggrieved parties to sue directly in state or federal court to enforce provisions of the Motor Carrier Act. According to the Report of the House Transportation and Infrastructure Committee, Congress did not believe that "DOT should allocate scarce resources to resolving these essentially private disputes, and specifically directs that DOT should not continue the dispute resolution functions in these areas. The bill provides that private parties may bring actions in court to enforce the provisions of the Motor Carrier Act."[71] Consistent with this explanation, the Committee described section 14704 of the House Bill as "provid[ing] for private enforcement of the provisions of the Motor Carrier Act in Court."[72] Given that Congress under the ICCTA transferred enforcement of the Motor Carrier Act, including the leasing regulations, from the I.C.C. to private parties, disgorgement is certainly not inconsistent with the purposes of the ICC Termination Act.

As for the leasing regulations themselves, disgorgement furthers the purposes of the regulations. As the Tenth Circuit noted in *RX Depot*, "[d]isgorgement, which deprives wrongdoers of their ill-gotten gains, deters violations of the law by making illegal activity unprofitable."[73] In this case, requiring C.R. England to disgorge its ill-gotten gains would deter other motor carriers

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[70] *Id.* at 1186.
[71] H.R. Rep. No. 104-311, at 87-88 (1995), *reprinted in OOIDA v. New Prime, Inc.*, 192 F.3d 778, 781 (8th Cir. 1999).
[72] *Id.*
[73] 438 F.3d at 1061, *citing SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997); *see also SEC v. First City Financial* Corp., 890 F.2d 1215, 1230 (D.C. Cir. 1989). (approving the remedy of disgorgement "to deprive a wrong doer of his unjust enrichment and to deter others from violating the law.").

from engaging in the same conduct and, at the same time, would assure C.R. England's future compliance with the regulations.

Thus, under the analysis set forth by the Tenth Circuit in *RX Depot*, this Court has the authority to order the disgorgement of C.R. England's ill-gotten gains.

IV. CONCLUSION

There can be no "genuine" factual dispute that the leases fail to "*clearly state*" and "*clearly specify*" the information regarding chargebacks at issue in this case "*on the face of the lease,*" as required by the Regulations. Thus, C.R. England is liable for unlawful charge-backs under the Original Lease Agreement because the amounts of such charge-backs and the methodology of their computation, were inadequately disclosed or not disclosed at all. The Original Lease Agreement also violated the Leasing Regulations as it required Plaintiffs and class members to rent satellite communications equipment and to purchase insurance and settlement "administrative" services.

There is also no genuine factual dispute that C.R. England's conduct, beginning under the Original Lease Agreement and continuing under the present New Lease Agreement, violated the charge-backs, forced-purchase and escrow portions of the Leasing Regulations. C.R. England has manipulated its charge-back practices in such a way as to profit handsomely from repairs made at its service center, from selling tires and through the sale of fuel. In each case C.R. England charges-back against compensation well in excess of the actual costs to C.R. England.

C.R. England's escrow practices are also unlawful. The carrier has transformed escrow funds specifically created for maintenance expenses and for fuel tax obligations into all-purpose funds used to satisfy all alleged debts of Plaintiffs and class members asserted by either C.R. England or its sister company, Opportunity Leasing.

Accordingly, partial summary judgment should be entered in favor of Plaintiffs on the following issues of C.R. England's liability pursuant to Fed. R. Civ. P. 56 (c): (1) undisclosed, undocumented and excessive charge-backs for repairs, including the charge-back of thirty percent mark-up for parts and various "administrative fees;" (2) undisclosed, undocumented and excessive charge-backs for tires, including the charge-back of thirty percent mark-up for tires; (3) undisclosed, undocumented and excessive charge-backs for fuel, including charging back for fuel well in excess of C.R. England's costs for fuel and for "administrative fees" related to the purchase of fuel; (4) the forced rental of satellite communications services; (5) the forced purchase of insurance and settlement "administrative" fees; and (6) the misadministration of escrow funds.

DATED this 24th day of March, 2005.

Respectfully submitted,

By: _____

Brent O. Hatch
HATCH, JAMES & DODGE, P.C.

Paul D. Cullen, Sr
David A. Cohen
Joyce E. Mayers
THE CULLEN LAW FIRM, PLLC

Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Memorandum in Support of Plaintiffs' Motion for Partial Summary Judgment on Liability were served, by First-Class U.S. Mail, postage prepaid, this 24th day of March, 2005 on:

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RAY QUINNEY & NEBEKER
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4701 W. 2110 S
P.O. BOX 27728
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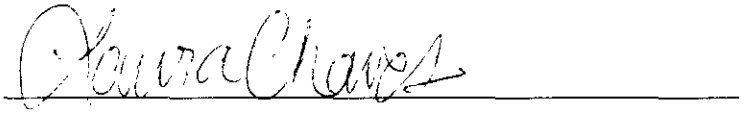

EXHIBIT 1

INDEPENDENT CONTRACTOR OPERATING AGREEMENT

C.R. England, Inc. ("WE:), and DAVID LEE SULLIVAN SR
(NAME)
_____ (the "CONTRACTOR" or "YOU") STATE:

WE are a for-hire Motor Carrier, and wish to utilize independent contractors to assist in our motor carrier business; and
YOU are in lawful possession of Equipment, which is suitable for use in our business as more fully described hereafter on Addendum 1 or sheet 2 of this Agreement.
YOU are willing to perform personally or through others certain functions related to the operation of the equipment in our business.
THEREFORE, WE both agree as follows:

1. YOU will lease to us and operate the Equipment together with drivers and all other necessary labor to transport, load and unload on our behalf freight WE make available. YOU specifically agree that WE have no express or implied obligation to make any minimum use of the equipment or to use the equipment at any particular time or location. YOU are not required to purchase or rent any products, equipment, or services from us as a condition to executing this Agreement except as reflected on Addendum 2.

2. WE agree to pay YOU as indicated on Addendum 2 within 15 days after YOU give us any logs required by the Federal Department of Transportation and those documents to be included within trip envelopes which are necessary for us to be paid by the customer. All settlements shall be final and cannot be questioned or disputed by either of us unless notice is given the other party within 60 days of the settlement.

3. Payments WE may make beyond those on Addendum 2 shall be determined on a case-by-case basis and shall only apply to the settlement involved.

4. If YOU have secured an advance of any kind from us, such as for fuel, owe us any money, or request us to withhold money for any reason on Addendum 3, WE shall make deductions from any monies otherwise due YOU. Upon reasonable request, WE shall provide documents validating such deductions unless related to a settlement considered final under Paragraph 2.

5. YOU agree to make a visual inspection prior to assuming control of the trailer or semitrailer WE furnished and immediately report any existing damage or defect, and also to report any damage that occurs while the vehicle is under your control. Such equipment shall only be used in service covered by this Agreement or YOU will be assessed costs as described on Addendum 2.

6. Our relationship is subject to Government regulation. YOU shall have the responsibility of satisfying certain regulatory requirements, by:

A. Equipping and maintaining the Equipment per governmental regulation including identifying it with appropriate placards;
B. Conducting lawful operations;
C. Utilizing drivers who have been verified by both of us as meeting regulatory and company qualifications; and
D. Giving us only that possession, control, and use of the Equipment WE need to meet applicable regulations which WE shall accept and WE further agree to assume complete responsibility for the operation of the Equipment as contemplated by the Leasing Regulations or any state regulatory agency for the duration of this Lease.

7. YOU shall determine how to provide us with contractual service and be responsible for:

A. Selecting and supervising all workers YOU engage.
B. Selecting, securing and maintaining your Equipment.
C. Selecting all routes; and
D. Paying all operating expenses, including all expenses of fuel, oil and repairs to the Equipment, fuel and road taxes, use taxes, fines for parking, moving or weight violations, licenses, or any other levies or assessments. WE shall reimburse YOU for fines YOU pay for size, weight, and permit violations not caused by your acts and omissions and scale tickets when required by the shipper.

8. WE both recognize our relationship as that of CARRIER and INDEPENDENT CONTRACTOR and not as an EMPLOYER-EMPLOYEE relationship. No person YOU may engage shall be considered as our employee. Also, neither of us is the agent of the other and has no right to bind the other unless specifically authorized. Recognizing the above, YOU agree:

A. To advise all third parties of the nature of our relationship;
B. Fulfill all obligations related to federal, state and local income, withholding and employment taxes; and
C. Maintain proper Workers' Compensation coverage covering all persons YOU engage and use in performance of this Agreement
D. Give us, reasonable evidence of the above.

9. **Reasonable customer satisfaction is of the utmost and critical importance and the responsibility of each of us. All provisions of this Agreement must be interpreted and applied with this in mind and YOU agree to meet customer requirements.**

10. YOU shall notify us by telephone or otherwise immediately of any accident which occurs and shall cooperate in the investigation of said accident and in any subsequent legal action. WE shall maintain at our expense, as required by statute and/or regulation, insurance coverage for the protection of the public, but as between us, WE shall have the benefit of any insurance YOU maintain.

11. WE shall not be liable (a) for any damage which occurs to your equipment; or (b) for liabilities arising from the operation of your equipment while not in our service. YOU agree to carry through any insurers WE approve, (a) non-trucking liability insurance providing a minimum $1,000,000.00 per occurrence combined single limit Bodily Injury and Property Damage liability coverage, (b) Cargo insurance with liability limits of not less than $100,000, unless YOU participate in the cargo claim program per addendum 2, and (c) workers compensation or occupational accident insurance if YOU are a sole proprietor or partner signatory. WE shall be named as an additional insured on all applicable policies and will be furnished a Certificate of Insurance indicating the foregoing coverage.

12. You agree to be liable to us for damages arising from (a) the loss, damage, or delay of cargo resulting and/or arising from your negligent operations or your agents or employees; (b) your failing to pick up or complete delivery of a load YOU accepted for transportation; (c) your terminating this Agreement and failing to return promptly the last assigned trailer to Salt Lake City, UT., or a point WE designate; (d) the result of your gross negligent acts or omission or willful misconduct or other culpable acts or those of your agents and/or employees; and (e) your failure to remove from your equipment all identification reference to us and surrendering to us all materials and documents WE furnished within 7 days. Any monetary damages due us under this Paragraph may be deducted from any monies otherwise due YOU. We shall furnish you with a written explanation and itemization of any deduction. Except

when damages arise from gross negligence or omission or willful misconduct, YOU will be liable for a maximum of $1,500 damages per occurrence for each type of claim. Each occurrence may include four types of claims; 1) personal injury; 2) property damage; 3) cargo damage; 4) damage YOU incur to OUR equipment. Should any of these occur in combination, per occurrence, your maximum liability will be limited to $4,500 per occurrence.

13. This mutual Agreement shall commence on the date indicated below and will continue from year-to-year thereafter unless cancelled by either of us. It may be cancelled at any time in writing or orally for material defaults or breaches. YOU may not assign this Agreement unless WE consent.

14. Upon cancellation, WE may withhold payment of your last settlement under Paragraph 2 until YOU prove that all our identification devices have been removed from your vehicle and property WE had made available is returned. In the absence of the physically viewing the vehicle, WE will accept the return of any removable device and/or a letter certifying the removal. WE shall have 45 days from cancellation of the agreement to make all appropriate deductions or refunds not related to a settlement covered by Paragraph 2.

15. This Agreement and any properly adopted Addendum's plus informational data regarding the independent contractor program shall constitute the entire agreement and understanding between us and it shall be interpreted under the laws of the State of Utah. If there are any changes, they must be in writing and signed by both parties unless otherwise mutually assented to by both parties to the extent allowed by law. To the extent any disputes arise under this Agreement or its interpretation, WE both agree to submit such disputes to final and binding arbitration under the rules of the American Arbitration Association before an arbitrator WE and YOU agree at a point agreed upon or Salt Lake City, UT. Nothing in this provision shall preclude WE from taking whatever legal action WE deem necessary to regain possession of any cargo of our customers or our trailer if YOU default under this Agreement.

16. WE are both bound by this Agreement and the lease of equipment shall be effective from the date and time written below and until cancellation by either of us according to the terms of Paragraph 13. WE have executed this Agreement at Salt Lake City, Utah on February, 25 1999 at 1430 a.m./p.m.

Contractor

as ☐ Sole Proprietor ☐ Partner ☐ Corporate Officer

Social Security or Fed. ID # 547-43-2868

2507 Park Way

Address

Bakersfield, CA 93304

City, State

C.R. ENGLAND, INC.
4701 W 2100 South 84120
P.O. Box 27728
Salt Lake City, UT 84127-0728

By: 2/26

ADDENDUM 1

INDEPENDENT CONTRACTOR OPERATING AGREEMENT
(I.C.O.A)

DESCRIPTION OF EQUIPMENT

MAKE: Freightliner
MODEL: Classic
YEAR: 1999
IDENTIFICATION #: 1FUPCDXB1XPB36099
ENGLAND #: 90381

MAKE:
MODEL:
YEAR:
IDENTIFICATION #:
ENGLAND #:

MAKE:
MODEL:
YEAR:
IDENTIFICATION #:
ENGLAND #:

MAKE:
MODEL:
YEAR:
IDENTIFICATION #:
ENGLAND #:

MAKE:
MODEL:
YEAR:
IDENTIFICATION #:
ENGLAND #:

August 4, 1998 revision

Addendum 2

CONTRACT PAYMENT SCHEDULE AND MISCELLANEOUS FINANCIAL ITEMS

I. Payments to YOU: We agree to pay YOU as follows:

(a). Eighty-one cents (81¢) per dispatched mile per the current edition of the Household Goods Carrier Bureau Mileage Guide except no compensation will be made for empty dispatched miles to the next loading point if (1) YOU were late in delivering the previous shipment which WE, in good faith, determined was without good cause or (2) YOU decline one load tendered to YOU prior to the load accepted.

(b). Toll costs will be reimbursed as follows: 50% of road tolls and 100% of bridge or tunnel tolls will be paid if dispatch involves a pick up and/or delivery in the New England States, NJ, points in Pennsylvania east of an imaginary north-south line through Harrisburg, PA and in New York on and east of Interstate Highway 81.

(c). Twenty-five ($25.00) for each pickup and/or delivery which WE can bill the consignor or consignee (other than the initial pickup and delivery) in excess of two, except if YOU are specifically paid for loading and unloading the trailer.

(d). One dollar and fifty cents ($1.50) per 1,000 pound of lading for loading and/or unloading lading not on pallets by YOU or any person YOU engage to load. If a lumper service historically exists at the loading or unloading point WE only pay the established lumper fee. You may or may not choose to engage a lumper. If WE engage a lumping service and YOU are required to pay the lumping fee YOU will be reimbursed. If any case, whether payment or reimbursement is made for loading/unloading YOU will be assessed a $10 deduction at any loading/unloading point if YOU do not perform the following: (1) send in timely completed and proper macros, (2) verify the piece count and weight, (3) pre-cool the trailer as required, or (4) complete a dock receipt. If YOU fail to pick up the load and record the pulped temperature on the bill of lading at any point of loading/unloading YOU will forfeit the entire payment or reimbursement for the load/off-load or stop payments.

(e). Reimbursement for reefer fuel upon submittal of a proper receipt at the time of the trip settlement.

(f). Quarterly incentive payments if YOU do not have a preventable accident and attend a safety meeting during the quarter and as a solo operator perform over 32,000 dispatched revenue generating miles or if in team operations perform over 48,000 dispatched miles during the quarter. Quarters will start on the first day of April, July, October, and January. The incentive payment to respective recipients will be 05¢ per dispatched revenue generating mile (DH not included) over 32,000 (solo) or 48,000 (team) up to a maximum of $150 per quarter for solo operators and no mileage cap per quarter for team operators.

(g). 5¢ per dispatched revenue generating mile (DH not included) for each mile a solo operator drives in excess of 120,000 dispatched revenue generating miles during the period April 1 to March 31 of each year to accrue towards the payments of license, permit, and otherwise due from YOU. If YOU operate on a team basis 5¢ per dispatched revenue generating mile (DH not included) will accrue on the same basis and for the same purpose if YOU operate in excess of 200,000 dispatched revenue generating miles. In no instance will the accrual to be paid exceed the actual costs to license for permits and in each case – solo and team – is capped at $1,000. If WE or YOU terminate this Agreement before payment is made for a license, permits, payment under this provision will not occur and will be forfeited.

II. Reimbursement Requirements: To the extent YOU are to be reimbursed for any expenditures YOU make on our behalf or to receive payments as above for tolls or loading and unloading YOU must submit appropriate receipts or other evidence of payment timely with the documents otherwise required to receive a contract payment for the particular trip involved or such additional payments will be forfeited.

III. Security Deposit and Maintenance Escrow: YOU will pay five hundred dollars ($500.00) per tractor immediately upon executing this Agreement and authorize a minimum deduction of 5 cents per dispatched mile from contract settlements which WE shall hold in this escrow with interest being paid quarterly based on the interest rate on the 1st day of each quarter determined by the current average yield or equivalent upon issue yield on 91 day, 13 week treasury bills as established in the preceding weekly auction by the U.S. Department of Treasury. Interest payments will calculate on the balance YOU have in the Escrow account less the average of any advances WE made to YOU during the interest period. WE, at our discretion, may make withdrawals from the Escrow account at any time to cover any deficiencies in money to meet deductions YOU authorize on Addendum 3 to this Agreement or to cover any indebtedness YOU owe to WE. YOU may withdraw funds from this Escrow fund only to purchase replacement tires and pay for

major repairs to the vehicle under contract. WE, in our discretion, will determine what constitutes a major repair and may request that withdrawals for such purposes including tire replacement be documented by appropriate receipts. WE shall make an accounting to YOU on a monthly basis showing activity within the escrow account, but YOU shall have the right to request in writing to have an accounting at any time. When the escrow account reaches $5,000.00, the automatic deduction of 5 cents per mile will cease. It will, however, be deducted again should authorized deducting take the account below $5,000.00. Upon the termination of the Agreement WE shall pay YOU the balance in the Escrow fund less any appropriate, offsets within 45 days. If YOU are participating in another escrow fund or program related to tire replacement and major repairs, WE, in our discretion, may relieve YOU of compliance with this provision except for the initial five hundred dollar ($500.00) deposit.

IV. Maintenance and Tires: YOU may purchase tires at the fleet discount price WE pay plus a 5% administrative fee if YOU authorize on Addendum 3 to have payment to be deducted. YOU may have maintenance work done at recommended independent vendors and take advantage of the reduced pricing they offer to business persons under contract with WE and, if WE approve, to allow payment to be made by our purchase order with the agreement and understanding that YOU will pay us a 5% administrative fee per transaction and that YOU authorize the amount of the transaction to be deducted from contract settlements per Addendum 3 to this Agreement.

V. Fuel Surcharge and Discount: If WE are able to collect a fuel surcharge from a customer it will be paid to YOU at the first settlement after receipt. We will attempt to negotiate fuel discounts with fuel vendors and YOU will be advised of the availability and amount of the discounts periodically.

VI. Satellite Communication Equipment: We will provide and install satellite communications on contracted equipment at no cost and YOU agree to such installation and to authorize a fifteen dollar ($15.00) per week usage charge to be deducted from contract settlements per Addendum 3 and to insure the equipment against loss or damage at the agreed upon value of $5,000.00. Upon termination of this Agreement YOU will return the equipment to WE, its owner, in substantially the same condition less normal wear and tear or WE may charge YOU the cost of replacement or repair and refurbishment. If the Agreement is terminated within one year of installation YOU agree to pay a minimum of $200.00 or the actual cost of installation and removal.

VII. Miscellaneous Charges: If YOU cause any of the following to occur YOU agree WE may deduct the amounts shown from the next settlement due YOU or from any escrows or other funds:

(a). Dropping a trailer which interior needs to be cleaned or a damaged trailer unless YOU advise us..... $25.00

(b). Dropping a loaded trailer by your choice at a point other than point of final destination necessitating delivery by another contractor or cartage company.....$35 or actual cost which ever is greater.

(c). Using a trailer WE furnish for any service outside this Agreement.....$.20 per mile and $50 per day or portion of day.

VIII. Cargo Claims Program: If YOU elect to participate in this program YOU shall authorize $25.00 per month per tractor to be deducted on Addendum 3. Participants shall only be liable for the first $1,500.00 of each occurrence resulting from accidental fire, collision or upset not involving reckless, intentional or deliberate acts of YOU and/or driver engaged by YOU. If reckless, intentional or deliberate acts are involved or YOU or any driver engaged by YOU spoils a load or partial load because of negligence or intentional failure to follow procedures in maintaining the operations of a refrigeration unit or proper temperature levels, YOU will be liable for the full amount of the damages.

IX. Mileage Based Taxes: YOU agree to submit after each trip original receipts and other evidence of direct payment of mileage based taxes (such as fuel taxes) and allow a deduction from your settlement in the amount specified on Addendum 3. If WE incur any liability for such taxes from YOU failing to file reports with the Governmental Body involved, WE shall have the right to deduct the amount from any settlement or any other monies due YOU or to bill YOU if said funds are not available. If YOU request WE file the reports and remit the taxes, WE shall do so under our name and be entitled to all credits and refunds. YOU agree to allow the amount of the taxes to be considered an advance to YOU and subject to offset per paragraph 4 of the Agreement.

"WE": C.R. England, Inc.

By: _____

Dated: 2-26-99

"YOU":

_____

Dated: 2/22/99

LEASE OPERATOR SETTLEMENT DEDUCTIONS REQUEST- Addendum 3

YOU hereby authorize US to deduct and assign the following amounts of money to the accounts: indicated per settlements:

Accounts:	Amount		Initial
License/Permits/FHUT	T.B.D		
Insurance[1]			
Bobtail Liability	$16.08	week	
Physical Damage	$38.46	week	
Health			
Single	T.B.D.		
Family	T.B.D.		
Single Package	T.B.D.		
Family Package	T.B.D.		
Occupational Disability	$27.23	week	
Business Interruption	N/A		
Workers Compensation		week	
Cargo Insurance	$2.31	week	
Insurance Admin. Fee	$2.31	week	
Opportunity Leasing, Inc.[2]			
Lease Maintenance Account	$0.05	p.p.m.	
Tractor Lease Payment	612.00	week	
Tractor Mileage Payment	$0.035	p.p.m.	
Settlement Admin. Fee	$3.46	week	
CRE Cargo Claims Program	$3.46	week	
Satellite User Charge	$15.00	week	
Fuel/Road Tax	$0.015	p.p.m.	
Performance Bond $250 down $50 x 5 weeks	$50.00	week	
Passenger Insurance	$1.45	week	

Fuel .162
OIL .007
TIRES .021

Any monies otherwise due YOU shall be applied in the order indicated above. In the event that sufficient funds are not available to make all deductions as scheduled, it is understood that YOU are under no obligation to make any remittances on our behalf and that defaults and/or penalties in obligations may occur.

To the extent that monies due YOU become available at a later date, WE are authorized to withhold sufficient funds at the time to cover unsatisfied scheduled deduction requests.

Dated: 2/25/99

Contractor- "YOU"

Dated: 2-26-99

C.R. England Inc.

[1]Notice-Coverage on insurance will not be effective nor shall deductions be made until a separate application is completed by contractor and approved by the insurance carrier to whom payments will be made.

[2]Payments authorized to this entity are consistent under the contract which it and I have executed.

EXHIBIT 2

VEHICLE LEASE AGREEMENT

Opportunity Leasing, Inc. [WE] and the undersigned [YOU] agree as follows:

1. **Vehicle Term and Charges.** WE will lease to you the vehicle described on Schedule A [the vehicle] for the period of time indicated and YOU agree to pay the amount indicated and scheduled on schedule A including 1-1/2% or currently permitted lawful interest on any amount due in excess of thirty days. If the carrier to whom YOU contract will allow deductions from contract settlements for purposes of meeting vehicle payments and other amounts due under this Agreement, YOU agree to authorize the carrier to make such deductions. YOU are responsible for loss or damage to the vehicle during the term of this Agreement and WE shall be entitled to rental charges regardless of such loss or damage and also any period during the time of this Agreement that the vehicle is being repaired or otherwise 'not in' service.

2. **Your Responsibilities.**

(a) **Maintenance and repairs.** YOU agree to pay for the repair and maintenance needed to keep the vehicle operating properly and safely including: (i) Taking all steps necessary to maintain any manufacturer's warranty; (ii) Changing the oil and oil filter per the vehicle manufacturer's specifications; (iii) Having an oil sample analysis at our discretion or per manufacturer's specifications and arranging to have the analysis results sent directly to us; (iv) Tire repairs and replacement; and, (v) vehicle washes. If WE feel in good faith that required maintenance and repairs are not being done, WE may have such maintenance and repair work done at a shop WE select and to charge such costs to YOU.

WE shall provide assistance, if requested, in securing repair work and replacement parts, including tires.

(b) **Licenses, Permits, and Taxes.** YOU will be responsible to acquire and pay for any licenses necessary to operate the vehicle and any taxes, including the Federal Highway Use Tax, tolls, or other charges assessed against the vehicle arising from your use. YOU will also pay fuel costs, fuel taxes, and any other costs of operations.

3. **Changes, Alterations, Improvements.** YOU may not add, change, or remove any items, which are or will be affixed to the vehicle including **any equipment speed controls unless WE give YOU written permission**. If YOU return the vehicle, any item YOU affixed may be removed only if removal will not damage the vehicle.

4. **Inspection.** WE or our authorized agent have the right to inspect the vehicle at any reasonable time or place and YOU agree to return the vehicle to Salt Lake City, UT or another point WE indicate every 90 or more days as WE specify for our inspection.

5. **Warranty.** WE are not the manufacturer or dealer of the vehicle, and merely attempt to acquire vehicles from reliable sources that meet certain standards WE have established, but **THE CONDITION AND OPERATION OF THE VEHICLE YOU LEASE IS NOT WARRANTED OR GUARANTEED BY US FOR ANY PURPOSE, PARTICULAR OR OTHERWISE, AND IS LEASED ON AN "AS IS" BASIS AND YOU ACCEPT THE ENTIRE RISK AS TO THE QUALITY AND PERFORMANCE OF THE VEHICLE INCLUDING MERCHANTABILITY.** If a standard warranty of the vehicle's manufacturer is applicable to the vehicle, WE will advise YOU and to the extent WE may do so, WE shall assign the warranty to YOU or otherwise give YOU the benefit WE receive. YOU acknowledge that YOU have been given the opportunity to inspect the vehicle prior to signing this Agreement.

6. **Insurance.** YOU will provide the insurance indicated on schedule A personally from an insurance company WE approve or through a registered carrier or WE may do so upon your request and at your cost. In all instances, **WE SHALL BE SHOWN AS AN ADDITIONAL INSURED AND, IN THE CASE OF PHYSICAL DAMAGE INSURANCE, AS THE LOSS PAYEE AND SHALL BE GIVEN THIRTY DAYS NOTICE BY YOU AND THE INSURER BEFORE ANY CANCELLATIONS.**

7. **Drivers and Pets.** YOU agree that the vehicle is being acquired for use in your business and that except as otherwise provided YOU will be the driver assigned to the vehicle. If YOU are ill, disabled, or otherwise unable to drive the vehicle WE shall entertain a request to allow YOU to substitute a competent, licensed driver who will be under your control and direction and who will not abuse the vehicle and will operate it with reasonable care, diligence and caution and subject to all provisions of this Agreement. **WE SHALL HAVE THE ABSOLUTE DISCRETION AS TO WHETHER TO GRANT YOUR REQUEST AND, IF GRANTED, TO ATTACH CONDITIONS WE REASONABLY FEEL APPROPRIATE TO PROTECT OUR INTEREST IN THE VEHICLE.** YOU will not allow any pets or animals to enter any part of the vehicle unless we authorize it.

8. **Law.** YOU will operate the vehicle in the United State and/or Canada and in compliance with all laws and **regulations to include speed and traffic,** and be responsible for the payment of any fines or other action taken arising out of any violations and to pay the cost of modifications required by law or regulation during the term of the Agreement. This Agreement will be governed and construed under the laws of the State of Utah.

9. **Cooperation.** WE and YOU agree to keep each other informed of any major problems, attachments, liens, or encumbrances which arise in the operation of the vehicle or while it is leased, reporting information relating to any accident or lawsuit which occurs and in cooperating between each other and insurers in the investigation, prosecution, or defense of any accidents, claims, or suits arising from the operation of the vehicle.

10. **Sublease.** YOU will not use this vehicle except under an Independent Contractor Operating Agreement [ICOA] with the for-hire motor carrier reflected on Schedule A.

If YOU wish to utilize the vehicle under sublease to another motor carrier and this Agreement has been in existence for an 18 month period WE will allow YOU to do so under the following conditions:

(a) YOU are current in your lease payment and do not owe WE or the carrier reflected on Schedule A any monies or YOU satisfy any debt.

(b) YOU give us a security deposit of five thousand dollars ($5,000.00) which will be returnable within forty-five days of the successful completion of the term of this Agreement. However, such monies may be used to satisfy any liquidated damages under Clause 15 of this Agreement.

(c) WE in the exercise of good faith agree to the carrier, to which YOU desire to sublease the vehicle, and that carrier agrees to and YOU authorize the carrier to remit the amount of the lease payments and monies required under Clause 11 of this Agreement directly to WE from any contract payments due YOU during the term of this Agreement.

(d) YOU give thirty (30) days written notice of the intention to exercise this provision so WE may make the investigation necessitated by your action and to take the steps necessary to effect the change. YOU agree to pay the administrative charge set forth on Schedule A as reimbursement to WE.

11. **Reserve for Tires and Repair.** YOU agree to enter into an Agency Agreement specified as Schedule C with WE to create a reserve fund to be used to purchase tire replacements and to pay for MAJOR repairs to the vehicle.

12. **Indemnity.** WE will be reimbursed and held harmless by YOU for any loss or damage WE incur by reason of the death or injury to any person, damage to any property, fines, or penalties caused or resulting in whole or in part by your inspection, maintenance and use of the vehicle. Reimbursement will include reasonable attorney fees incurred by WE. This Clause shall survive the termination of this Agreement as will all other obligations YOU have undertaken.

13. **Title. YOU ARE NOT BUYING THE VEHICLE DURING THE TERM OF THE AGREEMENT AND WILL NOT HAVE ANY SECURITY OR OWNERSHIP INTEREST IN THE VEHICLE.** This Agreement constitutes a lease and WE are merely allowing YOU to use the vehicle.

14. **Default.** If YOU fail to perform any of the conditions or meet the terms of this Agreement, WE Shall have the right to cancel the Agreement and YOU shall return the vehicle or WE may secure possession by any lawful and peaceful means to acquire possession. EXAMPLES of action which WE will consider in exercising our right is the status of lease payments; YOU threatening to sell or take unlawful possession of the vehicle or causing intentional damage to the vehicle; knowing and intentional violation of the law; or any action which WE feel threatens our interest in the vehicle or this Agreement. The fact that WE may not exercise our right for a particular default does not mean WE will not do so for a repeat default or other defaults.

15. **Liquidated Damages.** YOU agree to pay us upon termination of the lease by default or otherwise: (a) Any lease payment due as of the date of notice of default or termination. In the case of default, lease payments shall be paid by YOU until WE can lease the vehicle or sell it for a price WE deem appropriate; (b) Any expense WE incur in returning the vehicle to the condition it was when leased, ordinary wear and tear excepted and failure to meet the minimum guidelines on Schedule B, in replacing any equipment or accessories which are missing from the vehicle, and incurred in selling or leasing the vehicle to a third party; (c) Any expenses WE incur in returning the vehicle to the office WE have at Salt Lake City, UT or a closer alternate point if WE so elect; (d) Any expenses, including attorney fees, WE incur in securing possession of the vehicle if YOU do not voluntarily return the vehicle; and (e) the administrative fee reflected on Schedule A. **YOU AUTHORIZE US TO USE ANY MONIES IN THE CLAUSE 11 RESERVE ACCOUNT TO SATISFY ALL OR PART OF THE DAMAGES.**

16. **Personal Property.** WE assume no liability for loss or damage to personal property YOU or a driver carry in the vehicle. If YOU or your driver have any personal property in the vehicle at the time WE secure possession of the vehicle under this Agreement, WE shall not be liable for any damage to, loss of or disposition of such property. WE shall attempt to secure the property and give YOU notice. If YOU do not claim possession or advance us costs to send YOU the items within 30 days of our securing possession of the vehicle, YOU agree that WE may dispose of such property as WE deem appropriate.

17. **Completion Incentive.** If YOU successfully complete the lease term and have satisfied all lease payments debt due and owing under this Agreement and to the carrier or carriers to whom YOU sublet the vehicle, WE shall pay YOU within 45 days after the lease term a bonus in the amount of two cents ($.02) for each PAID mile YOU operated the vehicle in the service of the motor carrier per Clause 10 and for which YOU were paid under the I.O.C.A. In addition, at the successful completion of the lease, you have the option to purchase the vehicle at the then stated fair market value.

18. **Subordination and Default.** The vehicle and the rights and obligations WE and YOU have under this Agreement may be subject to and subordinated to another Lease Agreement or Security Agreement to which WE are a party and, if so, the Agreement will be noted on Schedule A. If WE default under the Agreement, the third party shall have the right to possession of the vehicle or to our interest in this Agreement. In the unlikely event that this would ever occur, WE would, at your option, place YOU in a substitute vehicle of equal use and value or allow YOU to cancel the lease without further obligation.

19. **Assignment.** YOU may not sell or assign this Agreement without our written consent nor sublet the vehicle except to the motor carrier indicated on Schedule A except as provided under Clause 10 WE may sell or assign this Agreement and the party shall have all rights and remedies which WE now possess.

20. **Dispute Resolution.** If WE and YOU have any dispute arising out of or relating to this Agreement, it shall be determined and settled by final and binding arbitration under the rules of the American Arbitration Association before an arbitrator WE and YOU agree upon. The arbitration shall be held in Salt Lake City, UT unless WE and YOU agree to an alternate location. WE and YOU shall be responsible for our own expenses in arbitrating, including attorney fees, unless attorney's fees are otherwise provided for in this Agreement. Nothing in this provision shall preclude WE from taking whatever legal action WE deem necessary to regain possession, upon default by YOU, of the vehicle.

21. **Notice.** All required notices shall be mailed to the other party by registered mail to the address below and is effective as of the date of mailing. Notice of an address change will be given in writing.

22. **General.** The headings used in this Agreement have no substantive effect and are used for convenience.

"WE" Opportunity Leasing, Inc.

By: _____
Name/Title

Date: 2-26-99

Address: 4701 West 2100 South
Salt Lake City, Utah 84120

"YOU"

By: EDWARD LEE SULLIVAN SR
Name/Title

Date: 2/22/99

Address: 207 PARK WAY
BAKERSFIELD, CA 93304

SCHEDULE A

Truck No: 90381

Lease Term: Start: 2/25/99 Months: 36 mos lease ends 2/23/2002

Description of Vehicle: 1999 Freightliner Classic 1FUPCDZB1XPB 36099

Rental: 612.00 per week (charged in advance) plus $.035 per mile paid under your I.C.O.A.

NOTE: Excess mileage charges of $.05 per odometer mile will be pro rated for miles over 110,000 p/year or 13,888 average per month. The mileage reading will be calculated approximately quarterly in conjunction with the quarterly safety bonus and reconciled annually. Excess mileage charges, if applicable, will become immediately due and YOU will authorize US to deduct it from the next contract payment due YOU.

Carrier (s) Per Clause 10: C.R. England, Inc.

Clause 11 Reserve: **$0.05** cents per mile paid under your I.C.O.A.

Administrative Fee Per Clause 15: ACTUAL COSTS WITH A MINIMUM OF $500.00

Secured Party/Master Lease: _____

Administrative Fee Per Clause 10 Sub (d): MINIMUM OF $500.00

Insurance:

Public Liability: Minimum 1 Million Dollars
Non-Trucking Liability: Equal to Public Liability
Physical Damage: Equal to Truck Blue Book ® Value of Tractor.

WE: Opportunity Leasing, Inc. by: _____
Initialed

Dated: 2-26-99

YOU: _____
Initialed

Dated: 2/25/99

MINIMUM GUIDELINES - CLAUSE 15 SCHEDULE B

1. TIRES: They shall have a minimum of 50% tread on all tires, shall have sound recappable casings, shall be matched tread design (all grip tread or regular tread), shall be the same size. Wear beyond 50% will be charged on a pro-rated basis. Tires must be either: Michelin, Goodyear or Bridges brands.

2. BODY: Shall have no dented or punctured panels (including fuel tanks).

3. INTERIORS: Shall be clean, shall have no tears, odors, burns, damage to seats, seat backs, dashes, headliners, door panels or carpeting, original radio and other original equipment to be in place. Gauges and all other operative parts and accessories shall be in working order.

4. ENGINES: Shall be mechanically sound with no cracked heads or blocks. Transmission and differentials shall have no seal leakage (including wheel seals - steer and drive axles), shall be operable as originally provided to customer, shall have no excessive gear noise.

5. DRIVE TRAIN COMPONENTS: Shall perform to 80% of rated horsepower and pass dyno pressure test and not have any oil leaks.

6. GLASS: Windshield shall not be pitted, chipped or cracked that would fail DOT inspection. Windows and mirrors shall not be broken or cracked and all windows operating mechanisms will be operable.

7. ELECTRICAL: Batteries, starters, alternators, etc. shall be operable. Lights and wiring will be operable with no broken sealed beams, lenses, etc. Heaters and air conditioning systems shall be operable.

8. FACTORY EQUIPMENT & IN SERVICE EQUIPMENT: Factory installed equipment and any equipment installed in unit prior to lease shall be intact and operable. Includes fifth wheel, mudflaps, airfoils, safety equipment, chain boxes, etc.

9. CHROME & BRIGHT METAL TRIM: Bumpers, grab handles, wheel hub caps, grills, etc. originally on unit at time of lease shall be free from damage and scrapes.

10. BRAKES: Shoes shall have a minimum of 50% wear. Wear beyond that point will be charged on a prorated basis.

"WE": Opportunity Leasing, Inc. by: _____ "YOU": _____
Initialed _____ Initialed

Dated: 2-26-99 Dated: 2/22/99

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CRE 000784

Agency Agreement Schedule C

Opportunity Leasing, Inc.[WE] and the undersigned independent contractor [YOU] agree as follows:

1. WE will maintain an escrow account entitled "Opportunity Maintenance Account" [Account] to which YOU and other contractors will have the opportunity to contribute funds for the purpose of building a reserve for the payment of major maintenance expenses. **This account will cap at $10,000 and will rebuild to this level after any authorized deductions which may take it below the cap level.**

2. YOU will contribute the amount designated in any Collateral Agreement between WE and YOU and direct the motor carrier to whom you are contracted as an independent contractor to make direct remittal of the funds to the Account. You may contribute such additional amounts as YOU deem appropriate but may not change the increased rate of contribution more than once during any six (6) month period.

3. WE shall act as your limited agent in managing the Account and making disbursements from it which disbursements will only be made (i) upon the presentation of valid vendor name and invoice number from any facility YOU utilize for maintenance work and to the extent of such bill; or (ii) upon the termination or cancellation of the Independent Contractor Operating Agreement YOU have with the motor carrier; or (iii) if YOU satisfy the provision of any Collateral Agreement between WE and YOU; or (iv) in the case of hardship occasioned by disability or other causes WE agree constitutes a hardship. If YOU have agreed to any further restriction in Collateral Agreements of which WE are aware, WE shall abide by such restriction unless/or until YOU establish to our satisfaction that the collateral document is of no force or effect.

4. The Account will consist of funds from all independent contractors who participate in the Maintenance Reserve Plan, but in no instance shall any participant be allowed any disbursement of funds in excess of his or her prorata share of the Account.

5. WE will pay monthly interest on the average balance of your prorata share of the Account, at a rate which shall be at least equal to the lower of the average yield or equivalent coupon issue yield on 91 day, 13-week treasury bills established at the weekly auction by the Department of the Treasury on the date the interest period begins. YOU will be responsible for the payment of any federal or state taxes due on the interest credited to YOU and WE will issue an appropriate tax form reflecting interest payments.

6. WE shall provide YOU a monthly statement which will reflect: (a) the monthly balance of your Account; (b) the payments made to your Account; (c) interest rate and amount of interest paid to your Account; and (d) disbursements from your Account.

7. To the extent the Account generates interest and/or earnings in excess of that which WE pay YOU and other participants, WE may retain said funds to pay the cost of maintaining and administering the Account and as an agent's fee.

8. We shall not incur any liability for any mistakes or errors in judgment made in good faith and in the exercise of due care in connection with this Agency Agreement.

9. Upon termination of this Agreement for any cause WE shall have the right to hold your prorata funds in the Account for a period of not to exceed 45 days or until such time as YOU give possession of the vehicle YOU are leasing if such is not done within the 45 day period and to apply said funds against any debt YOU may owe to WE and/or the motor carrier to which YOU are contracted if such carrier gives us reasonable evidence of such debt. YOU will be given an accounting of such application.

10. If any dispute arises over the interpretation and/or application of this Agency Agreement, it shall be resolved under the laws of the State of Utah and it shall be submitted to final and binding arbitration under the rules of the American Arbitration Association before an arbitrator we agree upon, at a point agreed upon or Salt Lake City, UT.

11. This Agency Agreement shall become effective when WE execute and date it and shall continue indefinitely until terminated or canceled as otherwise provided.

"WE" Opportunity Leasing, Inc.
By: _____
Dated: 2-26-99

"YOU" _____
By: DONALD LEE SULLIVAN SR.
Dated: 2/22/99

CRE 000786

10/26/98

TO: Independent Contractor

SUB: Summary of your pay opportunities under the C.R. England Independent Contractor lease signed by you and dated: 2/25/99.

The attached information sheet, dated August 5, 1998, summarizes the details of the Independent Contractor lease programs and provides you with a summary of the program, what potential revenues and incentives you may earn and the rules governing each opportunity.

This is informational only and does not preempt or supersede the lease documents you have signed.

I acknowledge receipt of this summary and have read and understand what is included.

INDEPENDENT CONTRACTOR:

Print Name: DOWARD LEE SULLIVAN SR Date: 2/22/99

Sign: [signature]

Unit Number: 90381

Witness: Dawn Hansen

CRE 000787