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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and WILLIAM PIPER, JAMES MURPHY, and DON SULLIVAN, SR. individually, and on behalf of all others similarly situated, **Plaintiffs,** **vs.** **C. R. ENGLAND, INC.** **Defendant.**	**PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** CASE NO. 2:02 CV 950 TS Judge Ted D. Stewart Magistrate Judge Nuffer

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Pursuant to the Court's Order of January 18, 2007, Plaintiffs submit the following Proposed Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR LIABILITY UNDER THE ICOA

A. Background

1. The Parties and Related Entities

1. Defendant C.R. England, Inc. ("CRE") operates as a federally regulated motor carrier providing transportation of property in interstate commerce under authority granted by the Department of Transportation. (Stipulated Facts; Pretrial Order, Ex. 1).

2. CRE was founded in 1920. It is located in Salt Lake City. (Tr. 10/25; 1068:6-11)(Daniel England). CRE is a long-haul trucking company. Its average length of haul is around 1500 miles. (Tr. 10/25; 1068:15-25)(Daniel England).

3. Opportunity Leasing is not a party to this action. Opportunity Leasing is an entity related to CRE, and is owned by members of the England family. Opportunity Leasing purchases trucks and then leases them to independent contractor drivers. The independent contractor drivers then, in turn, lease on with CRE. (Tr. 10/25; 1072:16-24)(Dan England).

4. Plaintiff Owner-Operator Independent Drivers Association ("OOIDA") is a non-profit trade association which represents the interests of independent owner-operators nationwide. OOIDA and has approximately 150,000 members located in all 50 states and Canada. (Stipulated Facts, Pretrial Order, Exhibit 1). Each of the individual Plaintiffs are current members of OOIDA.

(Murphy, Tr. 10/16; 96:9-17);(Piper, Tr. 10/16; 96:9-17).

5. Plaintiffs James Murphy, William "Al" Piper and Donald Sullivan, Sr., entered into Independent Contractor Operating Agreements ("ICOA") with CRE subject to the Truth-in-Leasing regulations.[1]

6. Murphy was an "owner-operator" in that he obtained his tractor truck from a third party not affiliated with CRE. Piper and Sullivan were "lease operators" in that they leased their trucks from Opportunity Leasing, a company affiliated with CRE.

2. The ICOA

7. ICOA was a preprinted form lease contract that was given to Plaintiffs and others similarly situated. (Tr. 10/16; 54:9-12)(Murphy).

8. Plaintiffs were not able to negotiate any terms of the ICOA (Tr. 10/16; 54:13-15) (Murphy); (Tr. 10/17; 212:18-20)(Piper).

9. The ICOA remained materially the same from 1997 to 2002. (Tr. 10/24; 944:7-10)(MacInnes).

B. Standard for Adjudicating Liability Under the Truth-in-Leasing Regulations

10. CRE argues that the Court should adopt a "substantial compliance" standard in determining whether CRE's ICOA violated the Truth-in-Leasing Regulations (or "Leasing Regulations"). The Court is unpersuaded by CRE's argument and notes that CRE has failed to cite any binding authority to

[1] Murphy signed the ICOA July 11, 2001 (Tr. 10/16; 42:9-20) (Ex. 67); Piper signed the ICOA on April 29, 1999 (Ex. 8); Sullivan signed two ICOAs, one on April 25, 1998 (Ex. 80) and the other on February 25, 1999 (Ex. 92).

support its theory.

11. The Court concludes that the language of 49 C.F.R. § 376.12 is clear that a carrier shall comply with its requirements. The Truth-in-Leasing regulations mandate that: (1) "the written lease required under § 376.11 (a) *shall* contain the following provisions" and (2) "[t]he required lease provisions *shall* be adhered to and performed by the authorized carrier." 49 CFR § 376.12. When Congress uses the word "shall," it denotes mandatory requirements in a statute and an obligation "impervious to judicial discretion."[2] Thus, the Court will strictly construe the Leasing Regulations.

C. Findings of Fact and Conclusions of Law on Plaintiffs' Claims for Undisclosed, Undocumented and/or Excessive Charge-Backs Against Compensation

1. Charge-Backs for Tires

A. Findings of Fact

12. Regarding the purchase of tires, the ICOA stated the following: "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." (Piper ICOA, Ex. 8, Addendum 2, ¶ IV); (Murphy ICOA, Ex. 67, Addendum 2, ¶ IV); (Sullivan First ICOA, Ex. 80, Addendum 2, ¶ IV); (Sullivan Second ICOA, Addendum 2, ¶ IV)

13. Under the terms of this provision in the ICOA, CRE represented that Plaintiffs could purchase tires through CRE at "the fleet discount price" charged to CRE, plus a five percent administrative fee.

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[2] *Lexicon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *Tenet Healthsystems Hospitals, Inc. v. Shalala*, 43 F. Supp. 2d at 1342.

14. In reality, CRE's practice was to markup tires sold to independent contractor drivers by 30 percent above "the fleet discount price" paid by CRE. (Tr. 10/20; 644:6-9) (Todd England).

15. The 30 percent markup on tires was not disclosed in settlement statements provided to independent contractor drivers. (Tr. 10/20; 645:12-14) (Todd England); (Tr. 10/24; 912:21-25)(Yeck).

16. Piper purchased tires through CRE. (Tr. 10/17; 223:3-17) (Piper) (Ex. 350).

17. Murphy purchased three tires through CRE. (Tr. 10/16; 83:8-9) (Murphy).

18. Murphy requested documentation regarding tire charges. (Tr. 10/16; 60:1-9)(Murphy). He requested "paperwork, but nobody would provide it or could." (Tr. 10/16; 60:13-14)(Murphy).

19. Documentation for tire charge-backs was contained in "Repair Order Detail" reports. These reports were given to drivers when they requested documentation. (Tr. 10/20; 652:1-5) (Todd England). The Repair Order Detail Report is essentially an invoice showing the parts and labor that was performed on the vehicle. (Tr. 10/20; 652:6-8) (Todd England).

20. A Repair Order Detail Report (Ex. 38) for Piper indicated Piper was charged for eight new tires. (Tr. 10/20; 652:9-653:1) (Todd England). The charge for parts (tires) was $ 2,329.60. (Ex. 38). The 30 percent markup is included in that price. The markup is not broken out so that the driver can see it and know he has been charged a markup. (Tr. 10/20; 653:6-12)(Todd England).

21. The Court finds not only that the ICOA failed to disclose that Plaintiffs would be charged a 30 percent markup for tires purchased through CRE, but also that the ICOA materially misrepresented how charge-backs for tires were to be computed.

22. Documentation supposedly validating the tire purchases charge-backs did not disclose markup over its cost.

B. Conclusions of Law

23. 49 C.F.R. Section 376.12(h) states that "[t]he lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed."

24. Subsection (h) also requires that the "lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge."

25. The Court concludes that the ICOA violated section 376.12(h) by failing to contain an accurate recitation as to how the charge-back amount for tires were to be computed.

26. The Court concludes that CRE, by misrepresenting in the ICOA that Plaintiffs could purchase tires at the "fleet discount price," when in reality CRE was marking up tires by 30 percent over its cost, violated section 376.12(h).

27. The Court concludes that CRE violated § 376.12(h) by failing to provide documentation to Plaintiffs necessary for them to determine the validity of charge-backs to compensation. The "documentation" provided by CRE consisted solely of Repair Order Detail reports, which failed to disclose the fact that CRE had marked up the tires by 30 percent over its cost.

28. The Court concludes that whether Plaintiffs could have purchased tires from a third party for less than they were charged by CRE is not relevant to the determination of liability for violating the

Leasing Regulations.

2. Charge-Backs for Parts

A. Findings of Fact

29. The England Service Centers ("ESC") are the repair facilities that repair and maintain independent contractor trucks. (Tr. 10/20; 630:10-16) (Todd England).

30. There are England Service Centers in Salt Lake City; Mira Loma, California; Laredo, Texas; Burlington, New Jersey; and Denver, Colorado. (Tr. 10/20; 660:14-18)(Todd England).

31. CRE has been marking up by 30 percent over its cost the parts sold to independent contractor drivers at its ESC since late 1997 or early 1998, when the ESC was first started. (Tr. 10/20; 633:17-24) (Todd England).

32. The 30 percent markup on parts was applied consistently during the ICOA period by CRE. (Tr. 10/20; 633:25-634:2) (Todd England).

33. CRE marked up all parts by 30 percent, regardless of its cost. (Tr. 10/24; 893:21-22)(Yeck).

34. The only exception to the 30 percent markup was on parts used in the refurbishment of the truck upon lease termination or completion. The markup on parts used in refurbishment was ten percent. (Tr. 10/20; 666:25-667:1) (Todd England).

35. The ICOA 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 . . ." (ICOA at ¶ 7).

36. Addendum 2 to the ICOA 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 . . ." (Addendum 2 at ¶ IV).

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

38. The ICOA failed to disclose that CRE marked up parts used to repair and maintain Plaintiffs' trucks at ESC.

39. Each of the individual Plaintiffs had repairs made, and maintenance performed, at the ESC in Salt Lake City. (See Exs.166-293, 296-297, Repair Order Detail reports for repairs and maintenance performed at ESC).

40. If a driver requested an estimate for a repair, CRE would generally give the driver an estimate orally. (Tr. 10/20; 651:18-21) (Todd England).

41. Estimates given to the driver would quote the estimate for parts as a lump sum, but would not break out or otherwise provide notice of the 30 percent markup. (Tr. 10/20; 651:22-25) (Todd England)

42. Murphy requested documentation regarding charges for installation of a seat in his truck. (Tr. 10/16; 60:1-9)(Murphy). Murphy requested "paperwork, but nobody would provide it or could." (Tr. 10/16; 60:13-14)(Murphy).

43. Sullivan asked for documentation relating to a charge for a $652.96 repair that appeared on his final settlement. (Ex.499)(Tr. 10/18; 339:15-21).

44. In response to Sullivan's request, CRE failed to provide any documentation for the charge. (Tr.

10/18; 339:22-340:2)(Sullivan).

45. Documentation for repair-related charge backs are contained in "Repair Order Detail" reports. These reports were given to drivers when they requested documentation. (Tr. 10/20; 652:1-5) (Todd England).

46. The Repair Order Detail report is essentially an invoice showing the parts and labor that was performed on the vehicle. (Tr. 10/20; 652:6-8) (Todd England).

47. The Repair Order Detail reports for Plaintiffs' repairs do not disclose the existence of the 30 percent markup on parts. (See Exs. 166-293).

48. The 30 percent markups on tire and parts is not disclosed in settlement statements provided to independent contractor drivers. (Tr. 10/20; 645:12-14) (Todd England); (Tr. 10/24; 912:21-25)(Yeck).

B. Conclusions of Law

49. The Court concludes that CRE violated § 376.12(h) by failing to clearly specify that Plaintiffs would be charged back against their compensation for parts used in conjunction with repairs and/or maintenance performed at CRE's ESC.

50. The Court concludes that CRE violated § 376.12(h) by failing to contain a recitation as to how the amount of charge-backs for parts purchased by Plaintiffs at the ESC were to be computed. Specifically, the Court concludes that CRE violated subsection (h) by failing to disclose in the ICOA that Plaintiffs would be charged a 30 percent markup on parts when they had repairs made or maintenance preformed at the ESC.

51. The Court concludes that whether Plaintiffs could have purchased parts from a third party for less than they were charged by CRE is not relevant to the determination of liability for violating the Leasing Regulations.

52. The Court concludes that CRE violated § 376.12(h) by failing to provide documentation to Plaintiffs necessary for them to determine the validity of repair and maintenance related charge-backs to compensation. The "documentation" provided by CRE consisted solely of Repair Order Detail reports, which failed to disclose the fact that CRE had marked up parts by 30 percent over its cost.

3. Charge-Backs for Fuel

A. Findings of Fact

53. CRE negotiates fuel price discounts with truck stops. (Tr. 10/18; 430:9-25)(McGuire).

54. CRE provided a CRE-issued Comdata card to Plaintiffs and other independent contractor drivers. When an independent contractor driver uses the CRE-issued Comdata card to purchase fuel, CRE charges the driver amounts for fuel that exceed the price CRE paid for the fuel. (Tr. 10/18; 391:5-9)(McGuire).

55. CRE determines the current retail price the owner-operator driver could have bought the fuel for had it been purchased outside the CRE plan. (Tr. 10/18; 391:11-16)(McGuire).

56. CRE marks up the price of fuel it sells to its owner-operator drivers by 60 percent of the difference between CRE's cost and the retail price. (Tr. 10/18; 391:17-392:6)(McGuire).

57. CRE is a fuel vendor vis a vis drivers because it buys fuel from truck stops and sells it to drivers at a marked up price. (Tr. 10/18; 392:15-21)(McGuire).

58. When the fuel program was first initiated, CRE did not markup the fuel it sold to owner-operators. (Tr. 10/18; 401:6-11)(McGuire).

59. CRE changed its policy of giving owner-operators 100 percent of the discount to 40 percent of the discount because CRE wanted to create a revenue stream. (Tr. 10/18; 402:19-23)(McGuire).

60. Each of the individual Plaintiffs used CRE's fuel card and purchased fuel from CRE. During the period he was leased to CRE, Piper was charged markups on fuel that exceeded CRE's costs by $2,811. (Ex. 630, p.21).

61. During the period he was leased to CRE, Sullivan was charged markups on fuel that exceeded CRE's costs by $790. (Ex. 631, p.4).

62. During the period he was leased to CRE, Murphy was charged markups on fuel that exceeded CRE's costs by $934. (Ex. 632, p.7).

63. Plaintiffs were not informed, in any way, by CRE of the difference between CRE's cost for fuel and the price CRE charged-back to Plaintiffs for fuel. (Tr. 10/18; 424:10-20)(McGuire).

64. The ICOA stated that "[i]f 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." (ICOA at ¶ 4).

65. The ICOA also stated that "[w]e will attempt to negotiate fuel discounts with fuel vendors and YOU will be advised of the availability of **the** discounts periodically." (ICOA, Addendum 2, ¶ V). (Emphasis added).

66. The ICOA failed to disclose that CRE marked up the price of fuel it sold to Plaintiffs by 60

percent of the difference between CRE's cost and the retail price.

67. The ICOA failed to contain a recitation stating how amounts charged-back against Plaintiffs' compensation for fuel were to be computed.

B. Conclusions of Law

68. The Court concludes that the ICOA violated § 376.12(h) by failing to contain a recitation of how the amount of charge-backs for fuel purchased by Plaintiffs by using CRE's fuel card were to be computed.

69. The Court concludes that CRE violated subsection (h) by failing to disclose in the ICOA that CRE marked up the price of fuel it sold to its independent contractor drivers by 60 percent of the difference between CRE's cost and the retail price.

70. The Court concludes that CRE violated § 376.12(h) by failing to provide documentation to Plaintiffs necessary for them to determine the validity of fuel related charge-backs to compensation.

71. The Court concludes that whether Plaintiffs could have purchased fuel from a third party for less than they were charged by CRE is not relevant to the determination of liability for violating the Leasing Regulations.

4. Charge-Backs for Repair-Related "Administrative" Charges

A. Findings of Fact

72. The ICOA 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

> 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.
>
> ICOA, Addendum 2, ¶ IV.

73. CRE's practices were consistent with Addendum 2, ¶ IV of the ICOA until September 1999. At that time, CRE eliminated the five percent administrative fee described in the ICOA. (Tr. 10/24; 1024:25-1025:4)(MacInnes).

74. In September 1999, CRE implemented a new policy, in which CRE charged back against Plaintiffs' and Class members' compensation, charges for "admin chg o/o" and "admin chg shop." Each of these "admin" charges was $ 4.00. (See Ex. 510; Murphy settlement statement for the week of 8/17/2001); (Tr. 10/16; 85:7-86:1)(Murphy).

75. The "admin chg o/o" and "admin chg shop" charges were not disclosed in the ICOA. (Tr. 10/16; 85:19-86:8)(Murphy).

76. CRE did not obtain any written agreement from its independent contractor drivers to the charges for "admin chg o/o" and "admin chg shop." (Tr. 10/24; 1025:5-8)(MacInnes).

77. Murphy asked CRE what these "admin" charges were for. CRE never gave Murphy a response advising him what specifically these charges were for. (Tr. 10/16; 85:13-24)(Murphy).

78. Piper was charged for "admin chg o/o" and "admin chg shop" on a settlement statement dated April 20, 2001. (Ex. 448) (Tr. 10/17; 222:12-22)(Piper).

79. Piper had "no idea" what those charges represented. (Tr. 10/17; 222:25-223:1)(Piper).

80. Piper never received any communication from CRE stating that CRE was changing the way it handled administrative charges for repairs done on the road. (Tr. 10/17; 263:12-264:6)(Piper). Piper does not recall seeing a purported Qualcomm message from CRE stating that CRE was changing the way it handled administrative charges for repairs done on the road. (See Ex. D-8) (Tr. 10/17; 279:10-25)(Piper).

81. Piper was never presented with an addendum to the ICOA to sign, disclosing the changes in how CRE handled administrative charges for repairs done on the road. (Tr. 10/17; 279:23-280:2)(Piper).

82. Piper did not sign any document that allowed CRE to deduct a ten dollar "administrative fee" for a Comchek. (Tr. 10/17; 280:3-5)(Piper).

83. Of the ten dollar Comcheck charge, Piper had no idea how much of that ten dollars was actually a cost to a third party as opposed to CRE's supposed administrative costs. (Tr. 10/17; 280:6-9)(Piper).

B. Conclusions of Law

84. The ICOA failed to disclose that CRE would be charging back amounts for "admin chg o/o" and "admin chg shop."

85. The Court concludes that the ICOA failed to contain a recitation as to how the amounts of the repair-related administrative fees were to be computed.

86. The Court concludes that CRE violated subsection (h) by failing to disclose in its ICOA the amount of repair-related administrative fees, the means by which they were computed, and whether

these "administrative" fees reflected actual administrative costs paid by CRE to a third party or were intended to cover CRE's alleged administrative costs.

87. The Court concludes that CRE violated § 376.12(h) by failing to provide documentation to Plaintiffs necessary for them to determine the validity of charge-backs to compensation for repair related administrative fees.

88. 49 C.F.R. § 376.11(a) provides that "[t]here shall be a written lease granting the use of the equipment and meeting the requirements contained in § 376.12."

89. 49 C.F.R. § 376.2(i) defines an "addendum" as "[a] supplement to an existing lease which is not effective until signed by the lessor and lessee."

90. The Court concludes that the Qualcomm message (Ex. D-8) sent by CRE to independent contractor drivers informing them that CRE intended to change its charge-back terms for repair-related administrative fees failed to comply with the requirements of the Leasing Regulations that all charge-back items be disclosed in the lease agreement or in an addendum.

91. The Court concludes that the Qualcomm message is not a valid addendum to the ICOA under section 376.2(i) as it was not signed by Plaintiffs and Class members.

5. Charge-Backs for Fuel-Related Transaction Fees

A. Findings of Fact

92. When Plaintiffs and Class members purchased fuel with CRE's fuel card, Plaintiffs and Class members were charged "transaction fees" in varying amounts. (See e.g. Ex. 510) (Murphy Settlements for August 2001).

93. For example Murphy's settlement for the week of Aug. 31, 2001, contains charge-backs for "transaction fees." (Tr. 10/16; 79:12-15)(Murphy).

94. The transaction fees charged-back to Murphy totaled eight dollars. The settlement statement does not indicate what transactions generated what transactions fees, and in what amounts. (Tr. 10/16; 79:20-80:19)(Murphy)

95. Murphy asked CRE for explanation of the "transaction fees" many times. (Tr. 10/16; 79:20-80:1). In response, Murphy was never given a definite answer as to what these charges were for. (Tr. 10/16; 79:20-80:6).

96. Murphy asked CRE for a breakdown of the transaction fees, and was told by CRE that "these are just normal transaction fees. And I said, 'okay normal for what.' And I really wouldn't get a specific answer." (Tr. 10/16; 188:11-19)

97. On or about January 28, 2000, CRE changed the form of its settlement statements. (Compare Exs. 350, 351 to Ex. 386) (Piper settlements).

98. Under the previous settlement form, the amount of the transaction fee was stated after the transaction. Under the new form, the settlement form aggregates the amount of transaction fees. (Tr. 10/17; 226:22-228:25)(Piper). There is no way to tell on the new settlement statement what the transaction fee was for each specific transaction. (Tr. 10/17;226:22-228:25)(Piper).

99. CRE did not inform Piper that it was changing the format of the settlement statements and deleting information it previously provided. (Tr. 10/17;228:8-11)(Piper).

100. The ICOA did not disclose that Plaintiffs and Class members would be charged-back for

fuel-related transaction fees.

101. The ICOA did not contain a recitation as to how the amounts of such transaction fees were to be computed.

B. Conclusions of Law

102. The Court concludes that the ICOA failed to disclose that CRE would be charging back amounts for fuel-related transaction fees.

103. The Court concludes that the ICOA failed to contain a recitation as to how the amount of the fuel-related transaction fees was to be computed.

104. The Court concludes that CRE violated subsection (h) by failing to disclose in its ICOA the existence of fuel-related transaction fees, and the means by which they were computed, and whether these transaction fees reflected actual costs paid by CRE to a third party.

105. The Court also concludes that CRE violated § 376.12(h) by failing to provide documentation to Plaintiffs necessary for them to determine the validity of charge-backs to compensation for fuel-related transaction fees.

6. Termination-Related Administrative Fees

A. Findings of Fact

106. During the ICOA period, CRE's policy was to charge independent contractor drivers who terminated their ICOA's prematurely a $ 500 "termination administration fee," as well as a ten dollar charge for a termination letter. (Tr. 10/18; 626:20-526:4)(Pakter); (Tr. 10/25; 1148:11-14)(Hoffman).

107. Sullivan was charged $ 1,000 in termination administrative fees by CRE. (Ex. 612))(Tr.

10/17; 304:15-18).

108. Sullivan was charged $ 20 for two termination letters by CRE (Ex. 612) (Tr. 10/17; 304:22-24).

109. The "termination administration fee" was not disclosed in the ICOA. (See Exs. 80 and 92).

110. The "termination letter" charge was not disclosed in the ICOA. (See Exs. 80 and 92).

B. Conclusions of Law

111. The Court concludes that CRE violated section 376.12(h) because the ICOA failed to disclose that CRE would be charging back amounts for termination-related administrative fees.

112. The Court concludes that CRE violated section 376.12(h) because the ICOA failed to contain a recitation as to how the amount of the termination administrative fees were to be computed.

113. The Court concludes that CRE violated section 376.12(h) because the ICOA failed to disclose that CRE would be charging back amounts for termination letters.

114. The Court concludes that CRE violated section 376.12(h) because the ICOA failed to contain a recitation as to how the amount for the termination letter charges were to be computed.

D. Findings of Fact and Conclusions of Law on Plaintiffs' Escrow Fund Claims

1. The Maintenance Escrow

A. Findings of Fact

115. The ICOA contained the following provision:

> Security Deposit and Maintenance Escrow: YOU will pay five hundred dollars ($ 500.00) per tractor immediately upon executing this Agreement and authorize a minimum 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 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 replacements 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 reached $ 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. WE, in our discretion, may relieve YOU of compliance with this provision except for the initial five hundred dollar ($ 500.00) deposit.
>
> ICOA, Addendum 2, ¶ III.

116. Addendum 3 to the ICOA stated that "YOU hereby authorize US to deduct" the following items from compensation: (1) License/Permits/FHUT; (2) insurance premiums for bobtail, physical damage, workers compensation, cargo insurance; (3) the insurance administrative fee; (4) the tractor lease payment; (5) the settlement administrative fee; (6) satellite user charge; and (7) passenger insurance.

117. There are no other provisions of the ICOA that specify the specific items to which the maintenance escrow could be applied, or the conditions Plaintiffs must satisfy in order to have the

escrow returned.

118. Each of the individual Plaintiffs paid five cents per mile into the Maintenance Escrow Fund during the period they were leased to CRE. (See Settlement Statements; Exs. 350-466, 479-527).

119. After each of the individual Plaintiffs terminated, CRE sent to Plaintiffs a final settlement statement. (Piper; Exs. 21 or 463); (Sullivan; Exs. 95 and 499); (Murphy; Ex. 75).

120. CRE intended these final settlement statements to constitute a "final accounting." (Tr. 10/24; 916:8-18)(MacInnes). There is no evidence that CRE provided Plaintiffs or Class members a separate document purporting to be a "final accounting."

121. Piper had $310 in his maintenance reserve at the time of his final settlement (Exs. 21, 463). Piper could not tell from his "final accounting" what specific deductions were made from his maintenance reserve. (Tr. 10/17; 235:17-19)(Piper).

122. Based on his review of CRE's "final accounting" for Piper, (Ex. 21) Plaintiffs' expert and forensic accountant, Michael Pakter opined that from an accounting point of view, Piper had $8,409 in revenue, plus $5,000 in escrow reimbursements, for an approximate total of $14,000. (Tr. 10/19; 536:1-20)(Pakter).

123. Pakter reviewed Piper's final settlement statement or "final accounting" and found it difficult to allocate specific charges against specific escrow funds. (Tr. 10/19; 533:19-24). Pakter opined that CRE had not made specific charges against specific escrow funds. (Tr. 10/19; 533:25-534:3). Against the approximately $14,000 in revenue and escrow reimbursements, CRE deducted a variety of expenses and fees totaling $9,800. Pakter opined that it is "not clear at all" which of those deductions

were made from which of Piper's escrow funds and which were deducted from his revenues. Pakter concluded, from an accounting standpoint, that CRE commingled Piper's escrow funds. (Tr. 10/19; 536:18-537:7)(Pakter).

124. Pakter concluded that CRE's commingling of escrow funds was inappropriate from an accounting standpoint because "the assumption is that all of these monies are as equally available as all the other monies to satisfy the charges. His revenue from driving is as equally available to satisfy these charges as the return of his escrow money." (Tr. 10/19; 537:13-25)(Pakter)

125. Murphy had $ 516.60 in his maintenance escrow when he terminated with CRE. (Murphy; Ex. 75).

126. Sullivan had $ 2,040.95 in his maintenance escrow when he terminated his first ICOA with CRE, and had $ 1,058.55 in his maintenance escrow when he terminated his second ICOA with CRE. (Exs. 95 and 499).

127. Murphy and Sullivan could not tell from their "final accountings," what specific items were deducted from which of their maintenance escrow funds. (Murphy, Tr. 10/16; 95:15-18); (Sullivan, Tr. 10/17; 292:9-11).

128. James MacInnes, CRE's Director of the Independent Contractor Division, admitted that CRE, in its final accountings, did not set out and account for escrow funds separately. Instead CRE commingled the escrows with other funds. (Tr. 10/24; 924:21-24)(MacInnes).

129. MacInnes was the person responsible for administering the maintenance reserve for the independent contractors. (Tr. 10/24; 994:13-16)(MacInnes).

130. It was MacInnes' understanding that CRE could use maintenance escrow funds to satisfy any debt to CRE. (Tr. 10/24; 994:17-24)(MacInnes). These debts included monies allegedly owed by Plaintiffs and Class members to Opportunity Leasing. (Tr. 10/24; 1027:24-1028:2)(MacInnes).

131. After reviewing each of the individual Plaintiffs' "final accountings," the Court agrees with Plaintiffs and their expert that it is impossible to determine what specific charges were deducted from each of the Plaintiffs' several escrow funds. Specifically, the Court finds that it cannot determine what specific charges were deducted from Plaintiffs' maintenance escrows.

132. The Court finds that CRE used Plaintiffs' and Class members' maintenance escrow as an "all-purpose" fund, in that CRE's policy and practice was to off-set against the monies in the maintenance escrow (and the other escrow funds) all claimed indebtedness owed to CRE and to Opportunity Leasing.

133. Piper terminated his ICOA on July 21, 2001. (Tr. 10/17; 223:7-14)(Piper).

134. Piper received a "final accounting" (Ex. 463) from CRE approximately 55 days after he terminated his ICOA. (Tr. 10/17; 233:19-234:3)(Piper).

135. Sullivan terminated the second ICOA on May 7, 1999. (Exs. 93 and 94).

136. Sullivan received his "final accounting" more than seven months later, on December 13, 1999. (Ex. 95) (Tr. 10/17; 297:8-15).

B. Conclusions of Law

137. The Court concludes that the maintenance escrow meets the definition of an escrow fund as it is "money deposited by the lessor with either a third party or the lessee . . . to cover repair expenses."

49 C.F.R 376.2(l).

138. Pursuant to section 376.12(k)(2), the lease must specify "the specific items to which the escrow funds can be applied."

139. In this case, the Court concludes that the ICOA failed to specify the items to which the escrow fund can be applied. The ICOA provides that "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."

140. The Court concludes that by allowing the escrow fund to "cover any indebtedness" Plaintiffs allegedly owed CRE, the ICOA failed to specify the items to which the escrow fund can be applied. In *OOIDA v. Arctic Express*, 159 F. Supp. 2d 1067, 1070 (S.D. Ohio 2001), the lease agreement required owner-operators to pay into a maintenance reserve "for the sole purpose of satisfying maintenance obligations" of the owner-operator. Another provision of the lease agreement purported to allow Arctic to "make deductions form any monies due and owing Lessor from whatever sources for purposes of satisfying any and all obligations of Lessee arising under this Agreement." *Id.* at 1076. The *Arctic* court found that this provision "permits the withholding of Member's escrow funds for almost any conceivable obligation that could be incurred by the Member during the term of lease." *Id.* at 1077. "When Defendants provided for everything to be covered by the maintenance fund, they, in reality, specified nothing." *Id.* at 1078. Thus, the court held that Arctic's agreement violated section 376.12(k)(2) for failing to disclose the "specific items to which the escrow fund can be applied." *Id.* at 1077. The Court concludes that the reasoning of *Arctic* is persuasive.

141. Pursuant to section 376.12(k)(6), the lease must specify "[t]he conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor o[f] all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination."

142. The Court concludes that the ICOA failed to specify the conditions Plaintiffs and Class members must satisfy in order to have the maintenance escrow fund returned. The ICOA stated that "upon the termination of the Agreement, WE shall pay YOU the balance in the Escrow fund less any appropriate, [sic] offsets within 45 days." The ICOA does not specifically define or specify what these "appropriate offsets" are. Given that these "offsets" include "any indebtedness" allegedly owed by Plaintiffs and Class members to CRE, the ICOA violated section 376.12(k)(6) by failing to specify the conditions Plaintiffs and Class members must satisfy in order to have the escrow fund returned.

143. The Court concludes that CRE violated subsection (k)(6) by deducting amounts from Plaintiffs' and Class members' maintenance escrow funds for alleged obligations that were not previously specified in the ICOA.

144. The Court concludes that CRE violated section 376.12(k)(6) by failing to provide a final accounting to Plaintiffs and Class members detailing "all such final deductions made to the escrow fund." The Court concludes that by requiring a final accounting of all final deductions "made to the escrow fund," section 376.12(k)(6) required CRE to provide a separate final accounting for each

escrow fund, identifying all deductions made to each escrow fund.

145. The Court concludes that CRE, by failing to render a final accounting for each escrow fund, and by commingling escrow funds with revenue, failed to provide a "final accounting" to Plaintiffs and Class members for the maintenance escrow as required by section 376.12(k)(6).

146. The Court further concludes that CRE violated section 376.12(k)(6) by failing to provide a final accounting to Piper and to Sullivan within the 45-day period under the regulations.

147. The Court concludes that CRE violated subsection (k)(6) by failing to return maintenance escrow funds to Plaintiffs and Class members within 45 days after lease termination.

2. The Security Deposit or Performance Bond

A. Findings of Fact

148. The ICOA, in Addendum 2, ¶ III, is titled "Security Deposit and Maintenance Escrow." However, the language that follows, (which is quoted in the prior section of these Findings of Fact), appears to relate solely to the maintenance escrow. For example, the paragraph speaks of "tire replacements" and "major repairs." There is no language in this paragraph which is specifically applicable to the "security deposit" referenced in the title of the paragraph.

149. Addendum 3 to the ICOA identifies a charge-back for "Performance Bond $250 down $50 x 5 weeks."

150. There are no terms in the ICOA that identify the specific items to which the security deposit or performance bond may be applied.

151. There are no terms in the ICOA that specify the conditions Plaintiffs and Class members were

required to fulfill in order to have the security deposit or performance bond returned.

152. Murphy had $ 500 in his performance bond at the time of his final settlement. (Ex. 75). Murphy could not tell from the final accounting (Ex. 75) provided by CRE what specific items were deducted from the performance bond. (Tr. 10/16; 95:19-21) (Murphy).

153. Piper had $ 500 in his performance bond at the time of his final settlement (Ex. 463). Piper could not tell from his "final accounting" (Ex. 463) what specific deductions were made from his performance bond. (Tr. 10/17; 234:22-24).

154. Sullivan had a total of $750 in his performance bond at the time of his final settlements under both ICOAs. (Exs. 95 and 499). Sullivan could not tell what specific items were deducted from his performance bond. (Tr. 10/17; 292:12-14) (Ex. 499).

155. Sullivan believed that the performance bond was for costs associated with abandonment of a load or abandonment of the truck. (Tr. 10/18; 340:13-17)(Sullivan).

156. CRE admitted that the performance bond was an escrow fund. (Tr. 10/24; 924:4-8)(MacInnes).

157. According to MacInnes, CRE would use monies in the performance bond to "recover the truck if they abandoned the truck, or any expenses that we incurred in refurbishing the truck." (Tr. 10/24; 997:9-16)(MacInnes).

B. Conclusions of Law

158. The Court concludes that the security deposit/performance bond meets the definition of an escrow fund as it is "money deposited by the lessor with either a third party or the lessee to guarantee

performance . . ." 49 C.F.R 376.2(l).

159. The Court concludes that the ICOA complies with section 376.12(k)(1) by specifying the amount of the security deposit/performance bond to be paid by Plaintiffs and Class members.

160. The Court concludes that CRE violated section 376.12(k)(2) because the ICOA failed to specify any specific items to which the security deposit/performance bond could be applied.

161. The Court also concludes that CRE violated section 376.12(k)(6) because the ICOA failed to specify the conditions Plaintiffs and Class members were required to satisfy in order to have their security deposit/performance bond returned.

162. The Court concludes that CRE violated subsection (k)(6) by deducting amounts from Plaintiffs' and Class members' security deposit/performance bond funds for alleged obligations that were not previously specified in the ICOA.

163. The Court concludes that CRE violated section 376.12(k)(6) by failing to provide a final accounting to Plaintiffs and Class members detailing "all such final deductions" made to the security deposit/performance bond escrow fund. CRE, by failing to tender a final accounting for each escrow fund, and by commingling escrow funds with revenue, failed to provide a "final accounting" to Plaintiffs and Class members for the security deposit/performance bond escrow as required by section 376.12(k)(6).

164. The Court concludes that CRE violated subsection (k)(6) by failing to return security deposit/performance bond escrow funds to Plaintiffs and Class members within 45 days after lease termination.

3. Fuel/Road Tax Escrow

A. Findings of Fact

165. The ICOA contained the following provision:

> 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. (ICOA, Addendum 2, ¶ IX).

166. The ICOA provided for the deduction of $0.015 per mile for "fuel/road tax." (ICOA, Addendum 3).

167. CRE deducted $0.015 per mile for fuel/road tax from Plaintiffs' compensation. (See Settlement Statements; Exs. 350-466, 479-527).

168. CRE admitted that it considered these funds to constitute a fuel/road tax escrow fund. According to MacInnes, CRE would "deduct a penny and a half and put it into an escrow fund account" to pay the driver's fuel and road taxes. (Tr. 10/24; 1000:14-1001:4)(MacInnes).

169. There are no terms in the ICOA that specify the specific items to which the fuel/road tax escrow funds may be applied.

170. There are no terms in the ICOA that specify the conditions Plaintiffs and Class members were required to satisfy in order to have the fuel/road tax escrow funds returned.

171. Murphy had $249.76 in his fuel/road tax escrow fund according to his "final accounting."

Murphy's "fuel tax/actual final" was $115.68, according to the same "final accounting." (Ex. 75)

172. It is impossible to determine from Murphy's "final accounting" what specific deductions were made to his fuel/road tax escrow fund after lease termination.

173. Sullivan had $ 267.91 in his "fuel tax reserve" according to his "final accounting" relating to his second ICOA. Sullivan's "fuel tax actual final" was $ 34.37, according to the same "final accounting." (Ex. 95).

174. CRE failed to return Sullivan's fuel tax escrow funds within 45 days after lease termination. Instead, it appears that CRE used Sullivan's remaining fuel/road tax escrow funds to offset debts allegedly owed by Sullivan to Opportunity Leasing. (Ex. 95)

B. Conclusions of Law

175. The Court concludes that the fuel/road tax reserve fund meets the definition of an escrow fund as it is "money deposited by the lessor with either a third party or the lessee . . . to handle license and State permit costs and any other purposes mutually agreed upon by the lessor and lessee." 49 C.F.R 376.2(l). *See OOIDA v. Mayflower Transit, Inc.*, 227 F.Supp.2d 1014, 1019 (S.D. Ind. 2002) ("[w]e conclude that Mayflower retained the fuel tax credits in an escrow fund, which entails that those credits were refundable to the owner-operators within forty-five days after termination of the leases.").

176. The Court concludes that CRE violated section 376.12(k)(2) because the ICOA failed to specify the specific items to which the fuel/road tax escrow could be applied.

177. The Court concludes that CRE violated section 376.12(k)(6) because the ICOA failed to specify the conditions Plaintiffs and Class members were required to satisfy in order to have their

fuel/road tax escrow funds returned.

178. The Court concludes that CRE violated subsection (k)(6) by deducting amounts from Plaintiffs' and Class members' fuel/road tax escrow funds for alleged obligations that were not previously specified in the ICOA.

179. The Court concludes that CRE violated subsection (k)(6) by failing to return fuel/road tax escrow funds to Plaintiffs and Class members within 45 days after lease termination.

E. Findings of Fact and Conclusions of Law on Plaintiffs' Forced Purchase or Rent of Products, Equipment or Services Claim

1. Satellite Usage Fees

A. Findings of Fact

180. Qualcomm is a satellite communications device that CRE uses to communicate with its drivers, both company and owner-operator. (Tr. 10/18; 372:14-16) (McGuire).

181. The ICOA contained the following provision:

> Satellite Communications 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. (ICOA, Addendum 2, ¶ VI).

182. Addendum 3 to the ICOA identifies "Satellite Usage Charge" in the amount of fifteen dollars per week as a charge-back against compensation.

183. Murphy was told during orientation that CRE's Qualcomm unit "had to be installed in the truck." (Tr. 10/16; 46:21-24)(Murphy). Murphy was required to initial the line next to the satellite

usage charge if he wanted to enter into the ICOA with CRE. (Tr. 10/16; 73:19-25).

184. Similarly, Piper was told during orientation that he was required to use the Qualcomm unit already installed in the truck. (Tr. 10/17; 218:25-219:4).

185. Each of the individual Plaintiffs was charged a $ 15 per week fee for satellite communications services. (See Settlement Statements, Exs. 350-466, 479-527).

186. CRE admits that under the ICOA, independent contractor drivers were required to pay the fifteen dollar Qualcomm fee if they wanted to drive for CRE. (Tr. 10/18; 379:8-17) (McGuire).

187. Based on the plain language of the ICOA, and the testimony of the parties, the Court finds that Plaintiffs and Class members were required to purchase satellite communications services from CRE as a condition of entering into the ICOA.

B. Conclusions of Law

188. 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."

189. 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." *Lease and Interchange of Vehicles*, Decision, June 13, 1978; 129 M.C.C. 700, 729. 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." *Id.* (emphasis

added).

190. The Court concludes that the plain language of the regulations prohibited CRE from requiring Plaintiffs and Class members to purchase or rent any products or services from CRE.

191. The Court concludes that CRE violated section 376.12(i) by forcing Plaintiffs and Class members to purchase satellite communications services from CRE as a condition of entering into the ICOA.

2. Settlement Administrative Services

A. Findings of Fact

192. CRE charged lease operators, such as Piper and Sullivan, a "Settlement Admin. Fee" during the ICOA period. CRE did not charge owner-operators, such as Murphy, a settlement administration fee until 2004. (Tr. 10/24; 963:1-964:12)(MacInnes).

193. Addendum 3 to the ICOA provided that lease operators would have $ 3.46 per week deducted from their compensation for the Settlement Admin. Fee.

194. Piper and Sullivan were charged for "settlement administrative" services in the amount of $ 3.46 per week by CRE. (Exs. 350-466, 479-509).

195. Piper had no understanding of what the settlement fee was for. (Tr. 10/17; 267:9-20)(Piper).

196. According to MacInnes, the settlement admin fee is intended to cover the costs associated with the drivers "dropping their trip pak in a trip box and being picked up and overnighted to a facility in Ohio where their trips are processed." (Tr. 10/24; 963:6-10)(MacInnes).

197. Lease operators could not avoid the weekly settlement administrative fee. (Tr. 10/24;

961:22-962:2)(MacInnes).

198. Lease operators had no ability to obtain settlement administrative services from a third party because the information contained in the settlement statements are derived from CRE's internal data. (Tr. 10/24; 962:6-15)(MacInnes).

B. Conclusions of Law

199. The Court concludes that the plain language of the regulations prohibited CRE from requiring Plaintiffs Piper and Sullivan and other lease-operator Class members to purchase settlement administrative services from CRE.

200. The Court concludes that CRE violated section 376.12(i) by forcing Plaintiffs and Class members to purchase settlement administrative services from CRE as a condition of entering into the ICOA.

3. Insurance Administrative Services

A. Findings of Fact

201. During the ICOA period, every lease operator obtained his or her insurance through CRE. (Tr. 10/20; 611:24-642:4)(Rowberry); (Tr. 10/24; 960:11-12)(MacInnes).

202. Lease operators could not take the truck off the lot without insurance. (Tr. 10/24; 961:12-15)(MacInnes).

203. Each of the individual Plaintiffs was charged $ 2.31 per week for insurance-related administrative services. (See Settlement Statements).

204. Piper was told in orientation that he did not need to obtain insurance independently of CRE,

because insurance was to be provided by the company. (Tr. 10/17; 254:9-16)(Piper).

205. Sullivan was told by Penny Blaser, a CRE employee, that the insurance was provided by CRE with the truck and that it was a "package deal." (Tr. 10/17; 327:10-11)(Sullivan).

206. Murphy was required to initial the line next to the insurance administrative fee if he wanted to enter into the ICOA with CRE. (Tr. 10/16; 73:19-22). Murphy testified that he could not have refused to obtain insurance administrative services from CRE and still have been able to enter into a contract with CRE. (Tr. 10/17; 192:25-193:3)(Murphy).

207. The Court finds that Plaintiffs were required to purchase insurance products from CRE.

208. The Court finds that Plaintiffs were forced to purchase insurance-related administrative services as a condition of entering into the ICOA.

B. Conclusions of Law

209. The Court concludes that the plain language of the regulations prohibited CRE from requiring Plaintiffs and Class members to purchase insurance related administrative services from CRE.

210. The Court concludes that CRE violated section 376.12(i) by forcing Plaintiffs and Class members to purchase insurance-related administrative services from CRE as a condition of entering into the ICOA.

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR LIABILITY UNDER THE RICOA

A. Background

211. The ICOA had remained materially the same from 1997 to 2002. (Tr. 10/24;

944:7-10)(MacInnes).

212. The process of revising the ICOA began in Sept. 2001. (Tr. 10/24; 1012:8-10)(MacInnes). The RICOA was implemented in August 2002. (See Ex. 51).

213. Plaintiff Murphy entered into the RICOA on August 8, 2002. (Ex. 71).

214. There are 180 current members of OOIDA who signed the RICOA. (Tr. 10/24; 1040:9-20)(Proffer of Holly Koncilla).

B. Findings of Fact and Conclusions of Law on Plaintiffs' Charge-Back Against Compensation Claims

1. Findings of Fact

215. Ex. V-7 is the current version of the RICOA used by CRE. (Tr. 10/24; 1022:5-10)(MacInnes).

216. Attachment 3 is titled "Charge-Back and Deduction Items." (Ex. V-7; page 3-1). At the last page of Attachment 3, the RICOA states,

> If any [charge-back] item in any of the above columns will be changing, YOU will be so notified by Qualcomm transmission, fax, or other written notice. In any event, YOU shall not be subject to any such change until ten (10) calendar days after such notice or such later time as set forth in the notice. **YOUR failure, by the end of ten (10) calendar days after such notice, to notify US of any objection to the change shall constitute YOUR express consent and authorization to US to implement the change and modify accordingly the deductions from YOUR settlement compensation, beginning immediately after the ten (10) day period.** Such modified amounts shall replace and supercede those shown in the table in Section 1 above. If YOU fail to notify US of YOUR objection within the ten (10) calendar day period - or if YOU notify US of YOUR objection within the ten calendar day period, and YOU and WE are then unable to resolve the matter to YOUR and OUR mutual satisfaction, YOU and WE shall each have the right to terminate this Agreement immediately thereafter. (Although YOU shall remain subject to the change until the effective date and time of YOUR termination).

(Ex. V-7; page 3-6) (Emphasis in original).

217. According to MacInnes, CRE is retaining to itself the ability to unilaterally change the cost, or method of computation, of any charge back item. (Tr. 10/24; 957:3-7)(MacInnes).

218. MacInnes testified that "if we chose to do so," CRE could unilaterally change the markup on parts from 30 percent to 80 percent, without obtaining the signed consent from the driver. He also testified that that the driver's silence is deemed to be an express consent to the change. (Tr. 10/24; 957:8-21)(MacInnes).

219. Attachment 4 to the RICOA, titled "Insurance" has the same language purporting to allow CRE to unilaterally change the amounts CRE charges drivers for insurance, or the Insurance Administrative Fee, without obtaining the driver's written consent. The driver's silence is deemed to be an express consent to the change. (Ex. V-7; page 4-4).

220. CRE does not believe that the Leasing Regulations require CRE to obtain a signed consent to changes in the amount or the method of computation of any charge-back. (Tr. 10/24; 958:19-22)(MacInnes)

221. CRE has, pursuant to the language in Attachment 3, unilaterally changed the amount it charges drivers for insurance premiums, for labor rates and for the amount charged back for using an "express code." (Tr. 10/24; 1023:13-24)(MacInnes).

222. Ex. E-8 is Attachment 8 to the RICOA. This authorization form allows CRE to deduct monies from Class members' compensation for bookkeeping and tax services provided by Opportunity Financial Services ("OFS"). (Tr. 10/24; 1049:4-24)(Brinkman).

223. Section V of Ex. E-8 states allows Opp Financial Services to unilaterally change the terms or the fees for the services provided by OFS. If the driver fails to respond within 10 days, that silence is deemed to be the express consent of the driver to change the terms of those fees. OFS recently changed the fees it charges drivers pursuant to the language in Ex. E-8. (Tr. 10/24; 1056:8-1057:4)(Brinkman).

2. Conclusions of Law

224. 49 C.F.R. § 376.11(a) provides that "[t]here shall be a written lease granting the use of the equipment and meeting the requirements contained in § 376.12."

225. Section 376.12(h) states that "[t]he lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed."

226. 49 C.F.R. § 376.2(i) defines an "addendum" as "[a] supplement to an existing lease which is not effective until signed by the lessor and lessee."

227. The Court concludes that Attachment 3 to the RICOA violates section 376.12(h) because the language of this provision purports to allow CRE to unilaterally change the cost and/or method of computation, of any charge back item.

228. The Court concludes that, pursuant to 49 C.F.R. § 376.2(i), CRE is required to supplement any terms to the RICOA through an addendum. According to section 376.2(i), the addendum is effective only upon the signature of independent contractor drivers.

229. The Court concludes that Attachment 3 to the RICOA violates sections 376.2(i) and 376.12(h)

by asserting that CRE may deem the silence of drivers to be an express consent to the change in the charge-back.

230. The Court concludes that Attachment 3 to the RICOA violates sections 376.2(i) and 376.12(h) because it would allow CRE to charge-back against drivers' compensation amounts that are not disclosed, or not accurately disclosed, in the RICOA.

231. Even more problematic is the fact that under Attachment 3, CRE could unilaterally change the method of computation for a charge-back. MacInnes testified that "if we chose to do so," CRE could unilaterally change the markup on parts from 30 percent to 80 percent, without obtaining the signed consent from the driver. The Court concludes that Attachment 3 violates section 376.12(h) as it would allow CRE to conceal from its drivers the amount, or increases to, mark-ups, "administrative fees," and "transaction fees."

232. Similarly, the Court concludes that Attachments 4 and 8 to the RICOA violate these same subsections as Attachment 3, for the reasons described above.

C. Findings of Fact and Conclusions of Law on Plaintiffs' Escrow Claims

1. The "General Reserve" Escrow

A. Findings of Fact

233. When the RICOA was implemented, CRE changed the name of the maintenance reserve to the "General Reserve." (Tr. 10/24; 993:19-22)(MacInnes).

234. The "final accounting" Murphy received from CRE indicated that Murphy had $ 517 in his General Reserve. (Ex. 75).

235. Attachment 2 to the RICOA required Murphy and Class members to pay $ 0.05 (five cents) per mile into the General Reserve. (Ex. 71; Attachment 2-4).

236. The specific items to which the General Reserve may be applied is stated as follows:

> (A) YOU are authorized to withdraw funds from the General Reserve to purchase replacement tires and pay for major repairs to the Equipment. 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; and
> (B) At the time of final settlement following termination of this Agreement or upon termination of any Equipment lease appended to Attachment 5 of this Agreement, **WE are authorized to apply any and all funds in the General Reserve to all Escrow Final Deduction Items** to the extent that the amounts owed by YOU for such Items exceed YOUR earned and payable expenses.
> (Ex. 71, Attachment 2-5)(emphasis added).

237. "Escrow Final Deductions Items" are defined as

> **[A]ll advances, expenses, taxes, fees, fines, penalties, damages, losses, or other amounts paid, owed, or incurred by US, or that YOU owe to a third party under an appended purchase or rental contract, that are YOUR responsibility under this Agreement** – specifically, the charge-back and deduction items set forth in Attachment 3 **and any other attachments or addendums to the Agreement, whether these items refer only to deductions from YOUR settlement or compensation or also to deductions from YOUR escrow funds** . . . to the extent that the amounts owed by YOU for such items exceed YOUR earned and payable compensation.
> (Ex. 71, Attachment 2-4, 2-5)(emphasis added).

238. The RICOA stated, that in order for Murphy and Class members to have their General Reserve returned to them following termination,

> You must first comply with all of the specific obligations set forth in Section 14 of this Agreement and make payments to US for all Escrow Final Deduction Items. At the time of the return of any remaining balance in the Escrow funds, WE may deduct monies for all Escrow Final Deduction Items. **These deductions shall be limited to**

> **amounts for such Items that WE actually spend, incur, or owe to a third party (or that YOU owe to a third party under a purchase or renal contract appended to this Agreement)** either (1) before termination of this Agreement or (2) if related to any of YOUR obligations under Section 14 of this Agreement, then upon termination or within forty-five (45) days thereafter. WE shall provide a final accounting to YOU of all such final deductions made from the Escrow Funds within forty-five (45) days from the date of the termination of the Agreement."
> (Ex. 71; Attachment 2-6).

239. Section 14 of the RICOA provides, in part, that upon Murphy's and Class members' termination of the RICOA,

> YOU shall . . .return all of OUR property, including trailers, permit book and other paperwork, load securement equipment, Qualcomm communications equipment, and freight, to OUR headquarters yard in Salt Lake City, Utah, or any closer location WE designate; and pay US all amounts YOU owe US at that time under this Agreement. If YOU fail to return OUR property or freight to US or remove and return all OUR identification from the Equipment upon termination of this Agreement, **YOU shall pay US all expenses (including reasonable attorneys' fees) WE incur in seeking the return of such items**, and WE may pursue all other remedies allowed by law or authorized the Agreement against YOU. Such remedies include withholding YOUR last settlement payment until YOU return and, except in the case of identification painted directly on the Equipment, return all OUR identification devices or deliver to US a letter certifying that such devices have been removed, and **making deductions from any remaining balances in YOUR Escrow Funds for the replacement value of OUR unreturned property** and for other amounts YOU owe US, as provided by Section III(e) of Attachment 2.
> (Ex. 71, Section 14).

240. Attachment 3 to the RICOA provides a list of "charge-back and deduction items." Included in this Attachment are the following descriptions of certain charge-back items:

(1) "Base plate fees, Single-State Registration System fees, Idaho hazardous materials transportation fee, New York highway use tax sticker fee, International Fuel Tax Agreement decal fee, Oregon weight certificate permit fee, **and other such fees,** but not including

overdimensional permit fees." (Attachment 3-1, emphasis added).

(2) "Damages and/or court or arbitration costs, attorneys' fees **and other legal expenses** associated with seeking an injunction or other relief to restrain disclosure of identity of OUR customers or other Confidential Matters . . ." (Attachment 3-2, emphasis added).

(3) "Fines, penalties, and **related court costs**, attorneys' fees, and **other legal expenses**."(Attachment 3-2, emphasis added).

(4) "Losses, damages, fines, penalties, court costs, attorneys' fees, **and other expenses** (together "damages") WE incur in connection with YOUR obligations under this Agreement . . . (Attachment 3-4, emphasis added).

(5) "**Operating expenses not otherwise listed** in this table for which YOU are responsible under this Agreement . . .

(Attachment 3-4, emphasis added).

241. These provisions of the RICOA have not materially changed, as evidenced by the fact that the current version of the RICOA contains virtually the same language. (*See* Ex. V7; Attachment 2).

242. The Court finds that the purpose of the General Reserve is that of a maintenance reserve. The sole purpose for which Murphy and Class members could use funds in the General Reserve was "to purchase replacement tires and pay for major repairs to the Equipment."

243. The Court finds that the RICOA purports to allow CRE to deduct from Murphy's and Class members' General Reserve any conceivable obligation of Murphy or the Class member to CRE and/or Opportunity Leasing. The RICOA also purports to allow CRE to deduct from Murphy and Class

members' General Reserve CRE's obligations to any third party under the terms of the RICOA. (See portions of RICOA in boldface type.)

244. The Court finds that the RICOA failed to specify the specific the items to which the General Reserve could be applied by allowing deductions from the escrow for "other amounts paid, owed or incurred by us," "and other such fees," "related court costs, attorneys' fees, and other legal expenses," and "operating expenses not otherwise listed." (See portions of RICOA in boldface type.)

245. Murphy had $ 516.60 in his General Reserve when he terminated with CRE. (Murphy; Ex. 75).

246. Murphy could not tell from his "final accounting," what specific items were deducted from his General Reserve funds. (Tr. 10/16; 95:15-18)(Murphy).

247. James MacInnes admitted that CRE, in its final accountings, did not set out and account for escrow funds separately. Instead they commingled the escrows with other funds. (Tr. 10/24; 924:21-24)(MacInnes).

248. After reviewing Murphy's "final accountings," (Ex. 75), the Court finds that it is impossible to determine what specific charges were deducted from Murphy's General Reserve escrow fund.

249. The Court finds that CRE used Murphy's and Class members' General Reserve escrow as an "all-purpose" fund, in that CRE's policy and practice was to off-set against the monies in the maintenance escrow (and the other escrow funds) all claimed indebtedness owed to CRE and to Opportunity Leasing.

B. Conclusions of Law

250. The Court concludes that the General Reserve escrow meets the definition of an escrow fund as it is "money deposited by the lessor with either a third party or the lessee . . . to cover repair expenses." 49 C.F.R § 376.2(l).

251. Pursuant to section 376.12(k)(2), the lease must specify "the specific the items to which the escrow funds can be applied." Here, the Court concludes that the RICOA failed to specify the items to which the escrow fund can be applied. The RICOA purports to allow CRE to deduct from Murphy's and Class members' General Reserve any conceivable obligation of Murphy or the Class member to CRE, Opportunity Leasing, or a third party. The RICOA also purports to allow CRE to deduct from Murphy and Class members' General Reserve CRE's obligations to any third party under the terms of the RICOA.

252. The Court concludes that by allowing the escrow fund to be used to satisfy any conceivable obligation of Murphy and Class members, the RICOA failed to specify the items to which the escrow fund can be applied. In *OOIDA v. Arctic Express*, 159 F. Supp. 2d 1067, 1070 (S.D. Ohio 2001), the lease agreement required owner-operators to pay into a maintenance reserve "for the sole purpose of satisfying maintenance obligations" of the owner-operator. Another provision of the lease agreement purported to allow Arctic to "make deductions form any monies due and owing Lessor from whatever sources for purposes of satisfying any and all obligations of Lessee arising under this Agreement." *Id.* at 1076. The *Arctic* court found that this provision "permits the withholding of Member's escrow funds for almost any conceivable obligation that could be incurred by the Member during the term of lease.

Id. at 1077. "When Defendants provided for everything to be covered by the maintenance fund, they, in reality, specified nothing." *Id.* at 1078. Thus, the court held that Arctic's agreement violated section 376.12(k)(2) for failing to disclose the "specific items to which the escrow fund can be applied." *Id.* at 1077. The Court concludes that the reasoning of the *Arctic* court is persuasive.

253. The *Arctic* court also found that Arctic violated section 376.12(k)(2) by transforming the maintenance reserve into an "all-purpose fund." The court found that the lease agreement, by allowing Arctic to use the maintenance reserve to satisfy all obligations of the owner-operator transformed the fund from a maintenance fund to "a general fund to satisfy any obligations incurred by the Members, which is in violation of the letter . . . and the spirit of the Regulations." *Id.* at 1078. The court reasoned that Arctic violated subsection (k)(2) because the agreement's "'specific items' are thus not 'specific,' since in practice they include any and all conceivable costs . . . When the Defendants provided for everything to be covered by the maintenance fund, they, in reality, specified nothing." *Id.* The court held that Arctic has not disclosed "specific" items as it has disclosed "all" items. *Id.* Here, the Court concludes that CRE has not disclosed "specific" items which the General Reserve can be applied to as CRE has disclosed "all" items.

254. Pursuant to section 376.12(k)(6), the lease must specify "[t]he conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor o[f] all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be

returned later than 45 days from the date of termination."

255. The Court concludes that the RICOA failed to specify the conditions Plaintiffs and Class members must satisfy in order to have the General Reserve returned. As the Court has previously concluded, the RICOA purports to allow CRE to deduct from the General Reserve all amounts for any and all obligations allegedly owed by Class members not only to CRE, but to Opportunity Leasing and other third parties. By including every possible obligation allegedly owed by Class members to CRE, Opportunity Leasing and other third parties, the RICOA violated section 376.12(k)(6) by failing to specify the conditions Class members must satisfy in order to have the escrow fund returned.

256. The Court concludes that CRE also violated subsection (k)(6) by deducting amounts from Murphy's and Class members' General Reserve escrow funds for alleged obligations that were not previously specified in the RICOA

257. The Court concludes that CRE violated subsection (k)(6) by failing to return Murphy's and Class members General Reserve escrow funds within 45 days after lease termination.

258. The Court also concludes that CRE violated section 376.12(k)(6) by failing to provide a final accounting to Murphy and Class members detailing "all such final deductions made to the escrow fund." The Court holds that by requiring a final accounting of all final deductions "made to the escrow fund," section 376.12(k)(6) required CRE to provide a separate final accounting for each escrow fund, identifying all deductions made to each escrow fund.

259. The Court concludes that CRE, by failing to render a final accounting for each escrow fund, and by commingling escrow funds with revenue, failed to provide a "final accounting" to Murphy and

Class members for the General Reserve escrow as required by section 376.12(k)(6).

2. The "Performance Bond" Escrow

A. Findings of Fact

260. Attachment 2 to the RICOA required Murphy and Class members to pay five hundred dollars ($ 500) into a "Performance Bond," to be deducted at fifty dollars ($ 50) per week for the first ten (10) weeks of service. (Ex. 71; Attachment 2-4).

261. The specific items to which the Performance Bond may be applied is stated as follows:

> At the time of final settlement following termination of this Agreement or upon termination of any Equipment lease appended to Attachment 5 of this Agreement, the Performance Bond may be applied to **[A]ll advances, expenses, taxes, fees, fines, penalties, damages, losses, or other amounts paid, owed, or incurred by US, or that YOU owe to a third party under an appended purchase or rental contract, that are YOUR responsibility under this Agreement** – specifically, the charge-back and deduction items set forth in Attachment 3 **and any other attachments or addendums to the Agreement, whether these items refer only to deductions from YOUR settlement or compensation or also to deductions from YOUR escrow funds** . . . to the extent that the amounts owed by YOU for such items exceed YOUR earned and payable compensation.
> (Ex. 71, Attachment 2-4, 2-5)(emphasis added).

262. The RICOA stated, that in order for Murphy and Class members to have their Performance Bond returned to them following termination,

> You must first comply with all of the specific obligations set forth in Section 14 of this Agreement and make payments to US for all Escrow Final Deduction Items. At the time of the return of any remaining balance in the Escrow funds, WE may deduct monies for all Escrow Final Deduction Items. **These deductions shall be limited to amounts for such Items that WE actually spend, incur, or owe to a third party (or that YOU owe to a third party under a purchase or renal contract appended to this Agreement)** either (1) before termination of this Agreement or (2) if related to any of YOUR obligations under Section 14 of this Agreement, then upon termination or

> within forty-five (45) days thereafter. WE shall provide a final accounting to YOU of all such final deductions made from the Escrow Funds within forty-five (45) days from the date of the termination of the Agreement."
> (Ex. 71; Attachment 2-6)(emphasis added).

263. Section 14 of the RICOA and Attachment 3 of the RICOA are described in the Court's earlier Findings of Fact for the General Reserve.

264. These provisions of the RICOA have not materially changed, as evidenced by the fact that the current version of the RICOA contains virtually the same language. (*See* Ex. V7; Attachment 2).

265. The Court finds that the RICOA purports to allow CRE to deduct from Murphy's and Class members' Performance Bond any conceivable obligation of Murphy or the Class member to CRE, Opportunity Leasing or other third parties. The RICOA also purports to allow CRE to deduct from Murphy and Class members' Performance Bond CRE's obligations to any third party under the terms of the RICOA.

266. The Court finds that the RICOA failed to specify the specific the items to which the Performance Bond could be applied by allowing deductions from the escrow for "other amounts paid, owed or incurred by us," "and other such fees," "related court costs, attorneys' fees, and other legal expenses," and "operating expenses not otherwise listed."

267. Murphy had $ 500 in his Performance Bond when he terminated with CRE. (Murphy; Ex. 75).

268. Murphy could not tell from his "final accounting," what specific items were deducted from his Performance Bond funds. (Tr. 10/16; 95:15-18)(Murphy).

269. James MacInnes admitted that CRE, in its final accountings, did not set out and account for

escrow funds separately. Instead they commingled the escrows with other funds. (Tr. 10/24; 924:21-24)(MacInnes).

270. After reviewing Murphy's "final accounting," (Ex. 75), the Court finds that it is impossible to determine what specific charges were deducted from Murphy's Performance Bond escrow fund.

271. The Court finds that CRE used Murphy's and Class members' Performance Bond escrow as an "all-purpose" fund, in that CRE's policy and practice was to off-set against the monies in the Performance Bond (and the other escrow funds) all claimed indebtedness owed to CRE and to Opportunity Leasing.

B. Conclusions of Law

272. The Court concludes that the Performance Bond meets the definition of an escrow fund as it is "money deposited by the lessor with either a third party or the lessee to guarantee performance . . ." 49 C.F.R § 376.2(l).

273. Pursuant to section 376.12(k)(2), the lease must specify "the specific the items to which the escrow funds can be applied." Here, the Court concludes that the RICOA failed to specify the items to which the escrow fund can be applied. The RICOA purports to allow CRE to deduct from Murphy's and Class members' Performance Bond any conceivable obligation of Murphy or the Class member to CRE, Opportunity Leasing, or to a third party. The RICOA also purports to allow CRE to deduct from Murphy and Class members' Performance Bond CRE's obligations to any third party under the terms of the RICOA.

274. The Court concludes that by allowing the escrow fund to be used to satisfy any conceivable

obligation of Murphy and Class members, the RICOA failed to specify the items to which the escrow fund can be applied. *See OOIDA v. Arctic Express*, 159 F. Supp. 2d 1067, 1070 (S.D. Ohio 2001)(described above).

275. As with the General Reserve, the Court concludes that CRE has not disclosed "specific" items which the Performance Bond can be applied to as CRE has disclosed "all" items.

276. The Court concludes that the RICOA failed to specify the conditions Plaintiffs and Class members must satisfy in order to have the Performance Bond returned. As the Court has previously concluded, the RICOA purports to allow CRE to deduct from the Performance Bond all amounts for any and all obligations allegedly owed by Class members not only to CRE, but to Opportunity Leasing and other third parties. By including every possible obligation allegedly owed by Class members to CRE, Opportunity Leasing and other third parties, the RICOA violated section 376.12(k)(6) by failing to specify the conditions Class members must satisfy in order to have the escrow fund returned.

277. The Court concludes that CRE also violated subsection (k)(6) by deducting amounts from Murphy's and Class members' Performance Bond escrow funds for alleged obligations that were not previously specified in the RICOA

278. The Court also concludes that CRE violated section 376.12(k)(6) by failing to provide a final accounting to Murphy and Class members detailing "all such final deductions made to the escrow fund." The Court holds that by requiring a final accounting of all final deductions "made to the escrow fund," section 376.12(k)(6) required CRE to provide a separate final accounting for each escrow fund, identifying all deductions made to each escrow fund.

279. CRE, by failing to render a final accounting for each escrow fund, and by commingling escrow funds with revenue, failed to provide a "final accounting" to Murphy and Class members for the Performance Bond escrow as required by section 376.12(k)(6).

3. The "Fuel Tax Reserve" Escrow

A. Findings of Fact

280. Attachment 2 to the RICOA required Murphy and Class members to pay one and one-half cents ($ 0.015) per mile into a "Fuel Tax Reserve." (Ex. 71; Attachment 2-4).

281. The specific items to which the Fuel Tax Reserve may be applied is stated as follows:

> All net debits over credits for all fuel taxes YOU owe to all taxing jurisdictions combined for operation of the Equipment on OUR behalf in excess of amounts already paid at the pump. In addition, at the time of final settlement following termination of this Agreement or upon termination of any Equipment lease appended Attachment 5 of this Agreement, WE are authorized to apply any and all funds in the Fuel Tax Reserve to all Escrow Final Deduction Items to the extent that the amounts owed by YOU for such Items exceed YOUR earned and payable compensation.
> (Ex. 71; Attachment 2-5).

282. Escrow Final Deduction Items are defined as

> **[A]ll advances, expenses, taxes, fees, fines, penalties, damages, losses, or other amounts paid, owed, or incurred by US, or that YOU owe to a third party under an appended purchase or rental contract, that are YOUR responsibility under this Agreement** – specifically, the charge-back and deduction items set forth in Attachment 3 **and any other attachments or addendums to the Agreement, whether these items refer only to deductions from YOUR settlement or compensation or also to deductions from YOUR escrow funds** . . . to the extent that the amounts owed by YOU for such items exceed YOUR earned and payable compensation.
> (Ex. 71, Attachment 2-4, 2-5)(emphasis added).

283. The RICOA stated, that in order for Murphy and Class members to have their Fuel Tax

> Reserve returned to them following termination,
>
> You must first comply with all of the specific obligations set forth in Section 14 of this Agreement and make payments to US for all Escrow Final Deduction Items. At the time of the return of any remaining balance in the Escrow funds, WE may deduct monies for all Escrow Final Deduction Items. **These deductions shall be limited to amounts for such Items that WE actually spend, incur, or owe to a third party (or that YOU owe to a third party under a purchase or renal contract appended to this Agreement)** either (1) before termination of this Agreement or (2) if related to any of YOUR obligations under Section 14 of this Agreement, then upon termination or within forty-five (45) days thereafter. WE shall provide a final accounting to YOU of all such final deductions made from the Escrow Funds within forty-five (45) days from the date of the termination of the Agreement."
> (Ex. 71; Attachment 2-6).

284. Section 14 of the RICOA and Attachment 3 of the RICOA are described in the Court's earlier Findings of Fact for the General Reserve. These provisions of the RICOA have not materially changed, as evidenced by the fact that the current version of the RICOA contains virtually the same language. (*See* Ex. V7; Attachment 2).

285. The Court finds that the purpose of the Fuel Tax Reserve is to pay Murphy's and Class member's fuel tax obligations. The sole purpose for which Murphy and Class members could use funds in the Fuel Tax Reserve was to satisfy their fuel tax obligations to various jurisdictions.

286. The Court finds that the RICOA purports to allow CRE to deduct from Murphy's and Class members' Fuel Tax Reserve any conceivable obligation of Murphy or the Class member to CRE, Opportunity Leasing or other third parties. The RICOA also purports to allow CRE to deduct from Murphy and Class members' Fuel Tax Reserve CRE's obligations to any third party under the terms of the RICOA.

287. The Court finds that the RICOA failed to specify the specific the items to which the Fuel Tax Reserve could be applied by allowing deductions from the escrow for "other amounts paid, owed or incurred by us," "and other such fees," "related court costs, attorneys' fees, and other legal expenses," and "operating expenses not otherwise listed."

288. Murphy had $249.76 in his fuel/road tax escrow fund according to his "final accounting." Murphy's "fuel tax/actual final" was $115.68, according to the same "final accounting." (Ex. 75)

289. It is impossible to determine from Murphy's "final accounting" what specific deductions were made to his fuel/road tax escrow fund after lease termination.

290. Murphy could not tell from his "final accounting," what specific items were deducted from his Fuel Tax Reserve funds. (Tr. 10/16; 95:15-18)(Murphy).

291. James MacInnes admitted that CRE, in its final accountings, did not set out and account for escrow funds separately. Instead they commingled the escrows with other funds. (Tr. 10/24; 924:21-24)(MacInnes).

292. After reviewing Murphy's "final accounting," (Ex. 75), the Court finds that it is impossible to determine what specific charges were deducted from Murphy's Fuel Tax Reserve escrow fund.

293. The Court finds that CRE used Murphy's and Class members' Fuel Tax Reserve escrow as an "all-purpose" fund, in that CRE's policy and practice was to off-set against the monies in the Fuel Tax Reserve (and the other escrow funds) all claimed indebtedness owed to CRE and to Opportunity Leasing.

B. Conclusions of Law

294. The Fuel Tax Reserve escrow meets the definition of an escrow fund as it is "money deposited by the lessor with either a third party or the lessee . . . for any . . . purposes mutually agreed to by the lessor and lessee." 49 C.F.R § 376.2(l).

295. Pursuant to section 376.12(k)(2), the lease must specify "the specific the items to which the escrow funds can be applied." Here, the Court concludes that the RICOA failed to specify the items to which the escrow fund can be applied. The RICOA purports to allow CRE to deduct from Murphy's and Class members' Fuel Tax Reserve any conceivable obligation of Murphy or the Class member to CRE, Opportunity Leasing, or to a third party. The RICOA also purports to allow CRE to deduct from Murphy and Class members' Fuel Tax Reserve CRE's obligations to any third party under the terms of the RICOA.

296. The Court concludes that by allowing the escrow fund to be used to satisfy any conceivable obligation of Murphy and Class members, the RICOA failed to specify the items to which the escrow fund can be applied. *See OOIDA v. Arctic Express*, 159 F. Supp. 2d 1067, 1070 (S.D. Ohio 2001)(described above).

297. As with the General Reserve and the Performance Bond, the Court concludes that CRE has not disclosed "specific" items which the Fuel Tax Reserve can be applied to as CRE has disclosed "all" items.

298. The Court concludes that the RICOA failed to specify the conditions Plaintiffs and Class members must satisfy in order to have the Fuel Tax Reserve returned. As the Court has previously

concluded, the RICOA purports to allow CRE to deduct from the Fuel Tax Reserve all amounts for any and all obligations allegedly owed by Class members not only to CRE, but to Opportunity Leasing and other third parties. By including every possible obligation allegedly owed by Class members to CRE, Opportunity Leasing and other third parties, the RICOA violated section 376.12(k)(6) by failing to specify the conditions Class members must satisfy in order to have the escrow fund returned.

299. The Court concludes that CRE also violated subsection (k)(6) by deducting amounts from Murphy's and Class members' Fuel Tax Reserve escrow funds for alleged obligations that were not previously specified in the RICOA

300. The Court also concludes that CRE violated section 376.12(k)(6) by failing to provide a final accounting to Murphy and Class members detailing "all such final deductions made to the escrow fund." The Court holds that by requiring a final accounting of all final deductions "made to the escrow fund," section 376.12(k)(6) required CRE to provide a separate final accounting for each escrow fund, identifying all deductions made to each escrow fund.

301. The Court concludes that CRE, by failing to render a final accounting for each escrow fund, and by commingling escrow funds with revenue, failed to provide a "final accounting" to Murphy and Class members for the Fuel Tax Reserve escrow as required by section 376.12(k)(6).

D. Findings of Fact and Conclusions of Law on Plaintiffs' Forced Purchase of Settlement Administrative Services Claim

1. Findings of Fact

302. Attachment 3 to the RICOA provides that a "settlement administrative fee" in the amount of $

3.46 per week is to be deducted from Class members' compensation.

303. The Court finds that because specific provisions of the RICOA are not subject to negotiation, Class members were required to purchase settlement administrative services from CRE as a condition of entering into the RICOA.

2. Conclusions of Law

304. The Court concludes that the plain language of the regulations prohibited CRE from requiring Class members to purchase settlement administrative services from CRE.

305. The Court concludes that CRE violated section 376.12(i) by forcing Plaintiffs and Class members to purchase settlement administrative services from CRE as a condition of entering into the RICOA.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' CLAIMS FOR INJUNCTIVE RELIEF

A. Injunctive Relief Pertaining to RICOA-Related Violations

1. Injunctive Relief Relating to Charge-Backs Against Compensation

A. Findings of Fact

306. The Court has held that Attachment 3 to the RICOA, which purports to allow CRE to unilaterally change the terms of charge-backs against Class members' compensation violates sections 376.2(i) and 376.12(h) of the Truth-in-Leasing regulations. The Court has found that Attachment 3 to the RICOA violates sections 376.2(i) and 376.12(h) as it would allow CRE to charge-back against drivers' compensation amounts that are not disclosed, or not accurately disclosed in the RICOA, and

because it would allow CRE to conceal from its drivers the amount, or increases to, mark-ups, "administrative fees," and "transaction fees." Similarly, the Court found that Attachment 4 (insurance coverage and charges) and Attachment 8 (Opportunity Financial Services) to the RICOA violate these same subsections as does Attachment 3, for the reasons set forth above.

307. There are 180 current members of OOIDA who signed the RICOA. (Tr. 10/24; 1040:9-20)(Proffer of Holly Koncillia).

308. According to MacInnes, CRE is retaining to itself the ability to unilaterally change the cost, or method of computation, of any charge back item. (Tr. 10/24; 957:3-7)(MacInnes). MacInnes testified that "if we chose to do so," CRE could unilaterally change the markup on parts from 30 percent to 80 percent, without obtaining the signed consent from the driver. He also said that that the driver's silence is deemed to be an express consent to the change. (Tr. 10/24; 957:8-21)(MacInnes).

309. MacInnes testified that the Leasing Regulations do not require CRE to obtain a signed consent to changes in the amount or the method of computation of any charge-back. (Tr. 10/24; 958:19-22)(MacInnes).

310. CRE has, pursuant to the language in Attachment 3, unilaterally changed the amount it charges drivers for insurance premiums, for labor rates and for the amount charged back for using an "express code." (Tr. 10/24; 1023:13-24)(MacInnes).

311. Given that CRE has, in fact, changed charge-back terms pursuant to Attachment 3, and that CRE believes that it need not obtain a written consent from the driver, the Court finds that CRE has violated the Leasing Regulations and will likely continue to do so without the Court's intervention.

B. Conclusions of Law

312. 49 U.S.C. § 14704(a)(1) gives the Court the authority to issue injunctive relief as a remedy for violations of the Leasing Regulations.

313. As a threshold matter, the Court finds, based upon the fact that there are 180 current OOIDA members who signed the RICOA, and the fact that OOIDA is an association that represents the interests of independent contractor drivers, that OOIDA has associational standing to seek injunctive relief regarding the RICOA. *See Roe # 2 v. Ogden*, 253 F.3d 1225, 1230 (10th Cir. 2001).

314. "To grant a permanent injunction, a district court must find that four requirements have been satisfied: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003).

315. The Court concludes that Plaintiffs have satisfied the first prong as they have demonstrated that portions of the RICOA violate the Leasing Regulations.

316. "When the evidence shows that the defendants are engaged in, or about to be engaged in, the act or practices prohibited by a statute which provides for injunctive relief to prevent such violations, irreparable harm to the plaintiffs need not be shown." *Mical Comminications., Inc. v. Sprint Telemedia, Inc.*, 1 F.3d 1031, 1035 (10th Cir. 1993).

317. The Court concludes that the evidence demonstrates that CRE is engaged in, or about to be engaged in, practices prohibited by the Leasing Regulations. Thus, the Court concludes that Plaintiffs

need not prove irreparable harm.

318. Alternatively, if irreparable harm is prerequisite for the issuance of an injunction in this case, this requirement can be met by showing that "the court would be unable to grant an effective monetary remedy after a full trial because such damages would be inadequate or difficult to ascertain." *Dominion Video Satellite, Inc. v. EchoStar Satellite Corp.*, 269 F.3d 1149, 1156 (10th Cir. 2001). More recently, the Tenth Circuit held that the "irreparable harm requirement is met if a plaintiff demonstrates a significant risk that he or she will experience harm that cannot be compensated after the fact by monetary damages." *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1258 (10th Cir. 2003).[3]

319. In this case, the Court concludes that Class members currently leased to CRE by way of the RICOA will be irreparably harmed unless a permanent injunction enjoining the RICOA is issued. The Court concludes that Class members would be unable to obtain monetary damages for CRE's unilateral amendment of the RICOA because damages would be inadequate or difficult to ascertain. The Court reaches this conclusion by virtue of the fact that Class members would be required to file separate and multiple claims for damages each time CRE changed or modified its charge-back terms. *See Northeast Women's Center v. McMonagle*, 665 F.Supp. 1147, 1153 (E.D. Pa. 1987).

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[3] Quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 484-85 (3d Cir. 2000); *See also Salt Lake Tribune Publishing Co., LLC v. At&T Corp.*, 320 F.3d 1081, 1105 (10th Cir. 2003)("Irreparable harm, as the name suggests, is harm that cannot be undone, such as by an award of compensatory damages or otherwise."); *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 805 F.2d 351, 355 (10th Cir. 1986)("Injury is generally not irreparable if compensatory relief would be adequate.").

320. The Court concludes that the threatened injury outweighs the harm that the injunction may cause the opposing party. The Court finds that the threatened injury, CRE's unilateral changing of charge-back terms without the written consent of Class members, is a significant and tangible injury. If as MacInnes admitted, CRE could increase the amount CRE marks up tires, parts and fuel without obtaining the driver's written consent, CRE would effectively bypass the foundations of the Leasing Regulations, stability and transparency, as is evident from the requirement that all disclosures regarding charge-backs be included in the written lease signed by both parties. On the other hand, the Court perceives little, if any harm, to CRE by enjoining CRE from acting upon the unlawful language contained in Attachments 3, 4 and 8.

321. The Court also concludes that such an injunction, if issued, will not adversely affect the public interest. According to the I.C.C., one of the purposes of the Leasing Regulations was "to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry." *Lease and Interchange of Vehicles*, 131 M.C.C. 141, 142 (1979). The Court finds that the public's interest in promoting the stability and economic welfare of the independent trucker segment of the industry is best served by requiring motor carriers such as CRE to comply with the Leasing Regulations.

322. Therefore, the Court concludes that a permanent injunction shall issue against CRE. CRE is hereby enjoined (1) from entering into any lease agreement with any independent contract driver that contains the language found unlawful by the Court; (2) from charging-back against Class members' compensation amounts for charge-back items that differ from the amounts disclosed in Attachment 3 of the RICOA signed by the individual Class member. The Court further concludes that CRE shall (1)

provide the Court with a revised RICOA deleting the terms found unlawful by the Court; and (2) provide the Court with a time frame in which current independent contractor drivers will sign a revised, and compliant RICOA.

2. Injunctive Relief Relating to Escrow Violations

A. Findings of Fact

323. The Court has concluded that CRE violated section 376.12(k)(2) as its RICOA failed to specify the items to which the General Reserve, Performance Bond, and Fuel Tax Reserve escrow funds can be applied.

324. The Court also concluded that CRE violated section 376.12(k)(6) because the RICOA failed to specify the conditions Class members must fulfill in order to have their General Reserve, Performance Bond and Fuel Tax Reserve escrow funds returned. CRE also violated subsection (k)(6) by deducting amounts from Plaintiffs' and Class members' escrow funds for alleged obligations that were not previously specified in the RICOA.

325. In addition, the Court concluded that CRE violated section 376.12(k)(6) by failing to provide a final accounting to Plaintiffs and Class members detailing "all such final deductions made to the escrow fund." The Court held that by requiring a final accounting of all final deductions "made to the escrow fund," section 376.12(k)(6) required CRE to provide a separate final accounting for each escrow fund, identifying all deductions appropriately made to each separate escrow fund. CRE, by failing to tender a final accounting for each escrow fund, and by commingling escrow funds with revenue, failed to provide a "final accounting" to Plaintiffs and Class members for the maintenance escrow as required by section

376.12(k)(6).

326. The Court finds that CRE continues to violate section 376.12(k) as it continues to use and employ the RICOA and its escrow terms.

B. Conclusions of Law

327. "To grant a permanent injunction, a district court must find that four requirements have been satisfied: (1) actual success on the merits; (2) irreparable harm unless the injunction is issued; (3) the threatened injury outweighs the harm that the injunction may cause the opposing party; and (4) the injunction, if issued, will not adversely affect the public interest." *Fisher v. Okla. Health Care Auth.*, 335 F.3d 1175, 1180 (10th Cir. 2003).

328. Plaintiffs have satisfied the first prong as they have demonstrated that the escrow portions of the RICOA violate the Leasing Regulations.

329. The Court concludes that the evidence demonstrates that CRE is engaged in, or about to be engaged in, practices prohibited by the Leasing Regulations. Thus, the Court concludes that Plaintiffs need not prove irreparable harm.

330. In the alternative, the Court concludes that Class members leased to CRE under the RICOA will be irreparably harmed unless a permanent injunction enjoining the RICOA is issued. The Court bases its ruling on the fact that Class members would be unable to obtain monetary damages for CRE's violation of the escrow provisions because damages would be inadequate or difficult to ascertain. Without a true and correct final accounting for each escrow fund, Class members cannot determine what specific items were deducted from their individual escrow funds. As a result, Class members

could not obtain damages without CRE providing an accurate accounting of their escrow funds.

331. The Court concludes that the threatened injury outweighs the harm that the injunction may cause the opposing party. The Court finds that the threatened injury, CRE's unlawful retention of Class members' escrow funds, is a significant and tangible injury. On the other hand, the Court perceives little, if any harm, to CRE by requiring CRE to comply with the escrow provisions of the regulations.

332. The Court also concludes that such an injunction, if issued, will not adversely affect the public interest. The Court finds that the public's interest in promoting the stability and economic welfare of the independent trucker segment of the industry is best served by requiring motor carriers such as CRE to comply with the Leasing Regulations.

333. Therefore, the Court concludes that a permanent injunction shall issue against CRE. CRE is hereby enjoined (1) from entering into any lease agreement with any independent contract driver that contains escrow language found unlawful by the Court; (2) withholding Class members' escrow funds for periods longer than 45 days after lease termination; and (3) tendering "final accountings" that commingle individual escrow funds and operating funds.

The Court further concludes that CRE shall (1) provide the Court with a revised RICOA containing escrow language that comports with the requirements of section 376.12(k) within 60 days of the entry of these Findings of Fact and Conclusions of Law; (2) provide the Court with a time frame in which current independent contractor drivers will sign a revised, and compliant RICOA; (3) tender "final accountings" to independent contractor drivers within 45 days after lease termination for each specific escrow fund; and (4) tender "final accountings" for each escrow fund specifically stating the amounts

deducted from each escrow fund after lease termination.

B. Injunctive Relief Relating To ICOA-Related Violations

1. Findings of Fact

334. The Court has found that CRE's ICOA violated sections 376.12(h) (charge-backs against compensation), 376.12(i) (forced purchases) and 376.12(k) (escrow) of the Leasing Regulations. Plaintiffs seek a permanent injunction enjoining Defendant from using the ICOA, or engaging in unlawful conduct consistent with the ICOA such as failing to accurately disclose charge-back items and/or the method of computation of such charge-backs.

335. Plaintiffs filed this suit on June 4, 2002, in the United States District Court for the Eastern District of California. (Docket; E.D. Calif. Case No. 1:02-cv-05664-AWI-SMS; Doc. # 1). Two weeks later, on June 18, Plaintiffs moved for a preliminary injunction, asking the Court to enjoin CRE from continuing to operate under the ICOA. (California Docket; Doc. # 3).

336. On August 19, 2002, the California court issued an order transferring this case to the District of Utah and declining to rule on Plaintiffs' motion for a preliminary injunction. (California Docket; Doc. # 65).

337. When Plaintiffs filed their motion for a preliminary injunction in June of 2002, CRE was still using the ICOA. (Tr. 10/24; 944:7-10)(MacInnes). CRE implemented the RICOA beginning in August 2002. (Ex. 51).

338. At trial, CRE's former CEO, Daniel England testified that he initiated the process to revise the ICOA. He initiated the revision of the ICOA because in some of the meetings of trucking industry

associations, "it became evident that there were some concerns about the way some these lease agreements or IC agreements had been drafted. There had been some challenges to these agreements and there were some criticisms about them, so I was concerned." (Tr. 10/25; 1071:6-1072:1)(Dan England).

339. Daniel England retained a lawyer in Washington, D.C., with the intent of making sure that CRE was in complete compliance with the leasing regulations. (Tr. 10/25; 1072:3-15)(Dan England).

340. According to MacInnes, the process of revising the ICOA began in Sept. 2001. (Tr. 10/24; 1012:8-10)(MacInnes). MacInnes also claimed the RICOA was not in response to this lawsuit. Instead, it had been in progress for "a long time." (Tr. 10/24; 948:6-13)(MacInnes).

341. Contradicting testimony of MacInnes, Todd England testified that the principal reason CRE decided to revise the ICOA was the suit that OOIDA brought against CRE. (Tr. 10/20; 676:2-7) (Todd England).

342. According to Todd England, an officer and shareholder of CRE, CRE was concerned that the company had violated the Truth-in-Leasing regulations before the lawsuit was filed. (Tr. 10/20; 691:1-9) (Todd England).

343. The Court credits the testimony of Todd England and finds that the primary reason CRE implemented the RICOA in August of 2002 was because of this suit. This finding is corroborated by the chronology of the suit, and the fact that Plaintiffs had a motion for a preliminary injunction regarding the legality of the ICOA pending before the California court at the time the RICOA was implemented.

344. According to MacInnes, CRE implemented the RICOA because CRE "wanted to be

absolutely clear that we were complying" with the regulations. (Tr. 10/24; 946:2-7)(MacInnes). At the same time, neither MacInnes, nor any officer or employee of CRE, admitted at trial that the ICOA violated the Leasing Regulations in any way.

345. CRE's position throughout this litigation is that the ICOA did not violate in any way the Leasing Regulations. CRE continues to maintain that the ICOA is compliant with the Leasing Regulations. (See Defendant's Motion for Partial Summary Judgment; Doc. # 194).

346. MacInnes testified that the Leasing Regulations do not require CRE to obtain a signed consent to changes in the amount or the method of computation of any charge-back. (Tr. 10/24; 958:19-22)(MacInnes). CRE has, pursuant to the language in RICOA Attachment 3, unilaterally changed the amount it charges drivers for insurance premiums, for labor rates and for the amount charged back for using an "express code." (Tr. 10/24; 1023:13-24)(MacInnes).

347. The Court finds that CRE continues to engage in, and defend, unlawful conduct consistent with the ICOA, such as failing to fully disclose charge-back amounts and/or the method of computation in its lease agreements with owner-operators.

2. Conclusions of Law

348. The Court, having found that the ICOA violated the Leasing Regulations, is now faced with the question of whether an injunction shall be issued precluding Defendant from using the ICOA, or engaging in unlawful conduct consistent with the ICOA such as failing to accurately disclose charge-back items and/or the method of computation of such charge-backs.

349. Defendant's principal argument in opposition to the issuance of an injunction is that CRE's

adoption of the RICOA and its stated abandonment of the ICOA moots the need for any injunctive relief.

350. "In seeking to have a case dismissed as moot . . . the defendant's burden is a heavy one." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc.*, 484 U.S. 49, 66 (1987). "The defendant must demonstrate that it is absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Id.*

351. The fact that a defendant continues to defend its conduct in litigation may also form the basis for the court's refusal to deem a claim moot. *See Dow Chem. Co. v. U.S. EPA*, 605 F.2d 673, 679 (3d Cir. 1979). The argument that "voluntary cessation does not constitute mootness is particularly true in the face of [defendants'] continued insistence that their discontinued activities were legal." *U.S. v. Gregg*, 32 F.Supp.2d 151, 158 (D. N.J. 1998).

352. CRE's actions to date in this litigation, including its continued and vigorous defense of its ICOA, demonstrate that CRE does not believe that its ICOA was unlawful or that its conduct under the ICOA violated the Leasing Regulations.

353. The Court concludes that CRE has failed to sustain its burden that it is absolutely clear that its wrongful conduct under the ICOA could not reasonably be expected to recur. Therefore, in the absence of injunctive relief, there is a substantial likelihood that CRE will continue to engage in unlawful conduct.

354. Therefore, the Court concludes that a permanent injunction shall issue against CRE. CRE is enjoined from relying upon, for any reason, any language in the ICOA found by this Court to violate the

Leasing Regulations. CRE is enjoined from engaging in any unlawful conduct consistent with the ICOA.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW ON PLAINTIFFS' CLAIMS FOR EQUITABLE RELIEF

A. The Court's Ability to Render Equitable Relief to Remedy Violations of the Truth-in-Leasing Regulations

355. Plaintiffs seek equitable remedies in the form of restitution and disgorgement as remedies for CRE's violations of the Truth-in-Leasing Regulations. Defendant has argued that the Court has no capacity to render such equitable relief.

356. In its ruling on September 12, 2006, the Court held:

> Congress has expressly provided a private right of action to owner-operators to enforce leasing regulations. By so doing, the ICC Termination Act invoked the Court's equity jurisdiction. This is consistent with the holding of the Tenth Circuit in *United States v. RX Depot*, 438 F.3d 1052, Tenth Circuit[,] 2006. Further, 49 U.S. Code, Section 14704(a)(1) specifically states, in part, that, quoting, a person my bring a civil action for injunctive relief for violations of, end of quote, the Motor Carrier Act, which encompasses the Truth-in-Leasing provisions at issue here.
>
> The Court believes in its reviewing the total regulatory scheme and the history of the evolution of the ICC regulation to private claims by injured parties, that the Court inherits the ability to seek the full range of equitable relief that was originally in the hands of the ICC. This Court, consistent with its equitable powers, will therefore retain the discretion to determine the proper and equitable nature of the relief, if any, it may award in this case. (Court's Ruling at 9).

357. Having reviewed the briefs of the parties submitted after the conclusion of the trial, the Court

finds no reason to amend, or retreat from, its previous ruling.[4]

358. The Court concludes that "[r]estitution and disgorgement are part of the courts' traditional equitable authority."[5]

359. In determining the equitable remedies available to the Court in this case, the Court notes that prior to the enactment of the I.C.C. Termination Act, the I.C.C. sought and obtained from the district courts a broad range of equitable remedies.[6]

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[4] Defendant argues that the Court should adopt the recent ruling of the court in *OOIDA v. Landstar Inway, Inc.*, Case No. 3:02-cv-1005-J-25MCR (M.D. Fla. January 12, 2007), in which the court found, in an action seeking to enforce the Leasing Regulations, that it did not have equitable jurisdiction to provide relief in the form of restitution or disgorgement. Notably, the *Landstar* court failed to address the fact that Congress, in the Interstate Commerce Commission Termination Act ("ICCTA") "sunsetted" the I.C.C. and transferred the authority to enforce the Truth-in-Leasing regulations to private parties. Similarly, the *Landstar* court did not acknowledge that prior to the enactment of the ICCTA, the I.C.C. sought and obtained a broad range of equitable remedies in enforcing the leasing regulations. Thus, the *Landstar* ruling offers no persuasive authority for this Court to revisit its prior ruling.

[5] *See United States v. Univ. Management Services, Inc.*, 191 F.3d 750, 760 (6th Cir. 1999) citing *Heinicke v. Parr*, 168 F.2d 194, 197 (6th Cir. 1948) ("[N]othing is more clearly a part of the subject matter of an injunction suit in the recovery of that which has been illegally acquired and which has necessitated injunctive relief."); *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 469 (11th Cir. 1996) ("Among the equitable powers of a court is the power to grant restitution and disgorgement.")

[6] *See I.C.C. v. Brannon Systems, Inc.*, 686 F.2d 295, 296 (5th Cir. 1982) (finding that "the I.C.C. has inherent power to seek injunctive relief to enforce the regulatory process . . ."); *I.C.C. v. B & T Trans. Co.*, 613 F.2d 1182 (1st Cir. 1980)(remanding to district court with instructions to entertain I.C.C.'s request for restitution); *I.C.C. v. J.B. Montgomery, Inc.*, 483 F.Supp. 279, 280 (D.Colo. 1980)(holding that I.C.C. may pursue "restitutionary relief" on behalf of shippers for defendant's duplicative billing and overcharges); *I.C.C. v. Interstate Contract Carrier*, 598 F.Supp. 661 (D. Utah 1984)(finding that defendant violated the escrow provisions of the leasing regulations and ordering an accounting and restitution); *I.C.C. v. Lifschultz Freight Corp.*, 151 B.R. 150, 153-54 (N.D. Ill. 1993)(enjoining defendant, ordering it "to perform an audit and to provide an accounting within 30 days of this order," and ordering defendant to "make restitution."); *I.C.C. v. Bug-Eye*

360. Paramount in these adjudications was the discretion of the district court to render the equitable remedy appropriate under the circumstances. In *I.C.C. v. B & T Trans. Co.*, 613 F.2d 1182, 1183 (1st Cir. 1980), defendant violated the Motor Carrier Act by charging customers for consolidation services with no tariff in effect reflecting the rate or charges for those services. The I.C.C. sought, on behalf of defendant's customers, "restitution of [defendant's] overcharges." *Id.* The court of appeals concluded that "[i]t is for the district court on remand to determine whether and how it should exercise its equitable power, i.e., to decide what relief, if any, is necessary 'to provide complete relief in light of the statutory purposes.'" *Id.*

361. Thus, this Court concludes that it should exercise its equitable power to provide complete relief in light of the statutory and regulatory purposes.

362. In this case, the Motor Carrier Act, upon which the Leasing Regulations were promulgated, has been held to be "a highly remedial statute." *I.C.C. v. W.H Dudgeon*, 213 F.Supp.710, 714 (S.D. Cal. 1961). "The Act being a remedial statute, it should be liberally interpreted to effect its evident purpose." *Id.*

363. The I.C.C. promulgated the Leasing Regulations with the following objectives:

> (1) to simplify existing and new regulations and to write them in understandable English; (2) to promote truth-in-leasing-a full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties; (3) to eliminate or reduce opportunities for skimming and other illegal or

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Trans., Ltd., 1987 WL 7259 (N.D. Ill. Feb. 23, 1987)(finding that defendant violated the escrow provisions of the leasing regulations, the court ordered that defendant submit an accounting and that defendant make restitution).

> inequitable practices; and (4) to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry. We believe that the final leasing rules issued in this decision will attain these objectives.
> *Lease and Interchange of Vehicles*, 131 M.C.C. 141, 142 (1979).

364. Courts interpreting the Leasing Regulations have also noted the purposes of the Leasing Regulations, including the purpose of eliminating or reducing opportunities for skimming and other illegal or inequitable practices.[7]

365. The Court concludes that the disclosure requirements of the Leasing Regulations are a critical requirement in the I.C.C.'s and Congress' regulatory scheme, and that a violator is legislatively presumed to improperly benefit because of a breach of the duty imposed by Congress to disclose markups, administrative fees and transaction fees imposed on products charged-back to owner-operators. *See S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215 (D.C. Cir. 1989). In *First City*, the court rejected defendant's argument that violation of a disclosure requirement did not merit disgorgement, finding that while "some may doubt the usefulness" of the reporting and disclosure requirements, "it is hardly up to the judiciary to second-guess the wisdom of Congress' approach to

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[7] *See, e.g., OOIDA v. Swift Transp. Co.*, 367 F. 3d 1108, 1110 (9th Cir. 2004)("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"); *OOIDA v. New Prime, Inc.*, 398 F. 3d 1067, 1070 (8th Cir. 2005)(noting "'the Commission's deep concern for the problems faced by the owner-operator in making a decent living in his chosen profession,'" and observing that "in its notice of proposed final rules, the ICC said that some of its rulemaking objectives were to 'eliminate or reduce opportunities for skimming and other illegal or inequitable practices; and to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry'"); *Tayssoun Transp., Inc. v. Universal Am-Can, Ltd.*, No. Civ. A. H-04-1074, 2005 WL 1185811, at *16-17 (S.D. Texas 2005)("The ICC explained that the purpose of the regulations is to 'eliminate or reduce opportunities for skimming and other illegal or inequitable practices [by motor carriers].'")

regulating takeovers." 890 F.2d at 1230. Instead, the court held that the disclosure and reporting provision "is a critical requirement in the congressional scheme, and a violator, it is legislatively assumed, improperly benefits by purchasing stocks at an artificially low price because of a breach of the duty to Congress imposed to disclose his investment position." *Id.* at 1230.

366. Thus, the Court concludes that the Motor Carrier Act is a remedial act. The Court further concludes that the Leasing Regulations, having been promulgated by the I.C.C. pursuant to the Motor Carrier Act, are also remedial, and that the purposes of the Leasing Regulations include promoting truth-in-leasing, a full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties; as well as to eliminate or reduce opportunities for skimming and other illegal or inequitable practices; and to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry.

367. It is with these statutory and regulatory purposes in mind that the Court analyzes Plaintiffs' specific requests for equitable relief.

B. Standards for Fashioning Equitable Relief

1. Disgorgement

368. The starting point in deciding whether disgorgement is an appropriate remedy for violations of the Leasing Regulations is determining whether disgorgement furthers the purposes of Leasing Regulations.

369. Traditionally, disgorgement has been found to further the purposes of federal statutes by halting current violations of the statute, and also by deterring future violations. *RX Depot*, 438 F.3d at 1061.

"Disgorgement, which deprives wrongdoers of their ill-gotten gains, deters violations of the law by making illegal activity unprofitable." *Id.*[8]

370. This same rationale, depriving wrongdoers of unjust enrichment and furthering deterrence, has been used by the courts to require disgorgement of profits where the defendant consciously violated federal trade practices and securities laws, even in the absence of a discernable harm to consumers or shareholders.[9]

371. "Conscious wrongdoing" by the defendant is also a requirement for disgorgement under the *Restatement (Third) of Restitution and Unjust Enrichment*. According to the Restatement, "[w]here the defendant has acted in conscious disregard of the plaintiff's rights, the whole of any resulting gain is treated as unjust enrichment, even though defendant's gain may exceed both (i) the measurable injury to the plaintiff, and (ii) the reasonable value of a license authorizing the defendant's conduct." *Restatement (Third) of Restitution and Unjust Enrichment*, § 3, Comment B. "Liability to disgorge profits is ordinarily limited to instances of conscious wrongdoing: the specific disincentives created by the disgorgement remedy have no application to cases of inadvertent or involuntary wrong." *Id.* at Comment C.

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[8] *See also Porter v. Warner Holding Co.*, 328 U.S. at 400 ("Future compliance may be more definitely assured if one is compelled to restore one's illegal gains. . .").

[9] *See F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 67-68 (2d Cir. 2006) (holding that upon a finding of defendants' violation of the Unfair Trade Practices Act, disgorgement of profits need not be related to "consumer's loss" and ruling instead that "[l]abeling the remedy 'consumer redress' or 'disgorgement,' each a resitutionary remedy, does not alter the basic principle that restitution is measured by the defendant's gain.").

372. The Tenth Circuit has held that "[t]he district court has broad discretion not only determining whether or not to order disgorgement but also in calculating the amount to be disgorged." *S.E.C. v. Maxxon , Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006), quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1474-75 (2d Cir. 1996).

373. Any award of disgorgement must be causally related to the amount by which defendant was unjustly enriched. The amount to be disgorged "need only be a reasonable approximation of profits causally connected to the violation." *First Jersey Sec.*, 101 F.3d at 1475 (citations omitted). An order to disgorge is not punitive, but instead is a remedial measure "to restore only 'ill-gotten gains' earned by the defendant . . ." *United States v. Telluride Co.*, 146 F.3d 1241, 1247 (10th Cir. 1998).

2. Restitution

374. "Restitution" means restoration. "Restitution is a return or restoration of what the defendant has gained in a transaction. . . . [R]estitution claims are bound by a major unifying thread. Their purpose is to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction." Dan B. Dobbs, "*Law of Remedies*" 365-66 (West 2d ed. 1993).

375. The general rule is that restitution is not proper where one party has performed on a contract later voided for public policy reasons. *Restatement (Second) of Contracts § 197*. Under this rule, the court "will simply leave both parties as it finds them, even though this may result in one of them retaining a benefit that he has received as a result of the transaction." *Id.* § 197, comment. a.

376. This rule is subject to various exceptions. Restatement (Second) of Contracts § 197 (authorizing restitution in all cases where "denial of restitution would cause disproportionate forfeiture"); *id.* § 198(b) (authorizing restitution where the party seeking restitution "was not equally in the wrong with the promisor"); *id.* § 199(b) (authorizing restitution where the claimant "did not engage in serious misconduct" and "allowance of the claim would put an end to a continuing situation that is contrary to public policy").

377. In *Wessel v. City of Albuquerque*, 463 F.3d 1138, 1147 (10th Cir. 2006), the Tenth Circuit held that "[a] more recent formulation of the exceptions identified in the Restatement (Second) of Contracts is found in the Restatement (Third) of Restitution, currently under consideration by the American Law Institute. It points to restitution as appropriate in circumstances where one party is unjustly enriched at the expense of the other, even 'under an agreement that is illegal or otherwise unenforceable for reasons of public policy.'" *Wessel*, 463 F.3d at 1147.

378. The Tenth Circuit also stated that another circumstance where restitution might be appropriate is where it will deter future misconduct. The court cited a variety of factors to assess the need for restitution, including (1) the nature of the illegality; (2) the extent of the party's culpability; and (3) the strength of the deterrent effect of the decision. *Id.*

C. Background Facts Relevant for Consideration of Equitable Remedies

379. The Court having found that CRE violated the Leasing Regulations, and having determined that it possesses the authority to order equitable relief, makes the following findings of fact relevant to consideration of such equitable relief.

380. Almost every officer or employee of CRE who testified at trial asserted that CRE's independent contractor program was a "success" not only for CRE, but also for the drivers. James MacInnes, the Director of CRE's Independent Contractor Division, testified that the program has been a "success" for the independent contractor drivers. (Tr. 10/24; 925:2-9)(MacInnes).

381. The Court finds that CRE stated, in both its promotional materials, and in the statements of its employees, that its program would make drivers a "success" and that CRE and the Plaintiffs were "partners" in the trucking business together. (Ex. 99); (Tr. 10/17; 226:1-10)(Piper). For example, a promotional pamphlet CRE sent to Murphy states that CRE "formats a business plan for success," and that "[t]his program is tailored for the commercial driver who intends to make the most of their career by taking another step to fleet ownership!!! Yes, this could be you." (Ex. 99; PLTF 02485). The pamphlet also has a picture of the England family, and the caption reads: "Because all of these Senior Offices have earned their CDL's, they understand what it takes to be on the road. We don't just say we care about our drivers - we prove it every day! We've been a family owned and family operated business for over 80 years and our drivers are our most important asset." (Ex. 99; PLTF 02482).

382. The Court finds that CRE's independent contractor program was not a "success" for Plaintiffs and for most members of the Class. Each of the named Plaintiffs terminated his business relationship with CRE on the ground that CRE and/or its independent contractor program failed to comport with the promises of "success" and "partnership" made by CRE. For example, Murphy terminated his lease with CRE because CRE forced him to drive beyond the number of hours allowed by law. (Tr. 10/16; 89:5-91:25) (Ex. 72).

383. Piper terminated his ICOA because the representations in CRE's promotional materials promising him a net income of $ 57,000 per year proved false. (Ex. 576; Tr. 10/17; 232:4-11)(Piper). Instead, Piper's net income for the year 2000 was only $ 34,106. (Ex. 433; Tr. 10/17;230:11-21). Piper decided to terminate his lease agreement on July 21, 2001, because "I realized that I was never going to be able to make the monies that C.R. England represented to me. I realized that after many lies and confusion and all of the problems that I had trying to fulfill my lease agreement, that it was useless. I was making money for England and there was nowhere near the partnership they told me I was going to have." (Tr. 10/17; 223:7-14)(Piper).

384. Plaintiff Sullivan also relied on CRE's promotional materials in deciding to become an independent contractor driver. (Tr. 10/17; 287:2-8). Sullivan terminated his ICOA because he was not earning the amount of money he needed to make his truck payment. (Tr. 10/17; 294:22-295:4). After terminating his ICOA, CRE claimed that Sullivan owed the company more than $ 8,700. (See Findings of Fact, infra at ¶¶ 608-617).

385. Sullivan's experience was not unique. The majority of independent contractor drivers who leave CRE without completing their lease terminate because they feel that they are not making enough money to meet their financial obligations. (Tr. 10/24; 937:19-938:1)(MacInnes). Some drivers terminated because there was no realistic way for them to purchase the tractor truck. (Tr. 10/24; 943:4-18)(MacInnes).

386. The Court finds that the independent contractor program was not successful to Class members based on the fact that the vast majority of the approximately 7,000 drivers who have worked as

independent contractor drivers for CRE terminate their relationship with CRE allegedly owing CRE money. (Tr. 10/24; 1030:10-14)(MacInnes); (Exs. 557, 558, 559).

387. The Court finds that CRE has been assigning debts to collection agencies since 1999. (Tr. 10/24; 928:15-18)(MacInnes). CRE has retained three different collection agencies to collect debt from former independent contractor drivers. (Tr. 10/24; 926:5-8)(MacInnes). These collection companies are Accelerated Collection Management, (Ex. 557), Partners Financial Services (Ex. 558), and North American Recovery (Ex. 559). (Tr. 10/24; 926:9-928:7)(MacInnes).

388. According to Accelerated Collection Management's "Client Status Report" dated Sept. 20, 2004, there were 2,225 "accounts" contained in the Report. Each account represents a former independent contractor driver. (Ex. 562, p. CRE 003639)(Tr. 10/24; 928:22-930:16)(MacInnes). The total amount of debt sought to be collected by Accelerated Collection was, as of Sept. 2004, over ten million dollars ($10,564,288). (Ex. 562, p. CRE 003639). The total amount of debt sought to be collected by Partners Financial Services was, as of Sept. 2004, $ 3,654,562. (Ex. 561, p. CRE 003566).

389. The Court also finds that the CRE independent contractor program was not a success for Class members based on the fact that the turnover rate for "lease operators" at CRE is approximately 150 percent per year. (Tr. 10/24; 925:14-16)(MacInnes). The turnover rate for owner-operators with CRE is between 40 and 60 percent. (Tr. 10/24; 925:17-19(MacInnes).

CRE claimed at trial, but produced no evidence, that these turnover figures are "comparable" to those of other trucking companies. The Court finds these turnover rates indicative of the fact that lease

operators, those who come to CRE not owning their own trucks, are at a much higher risk of failing than owner-operators who come to CRE owning their own equipment.

390. The Court finds that during both the ICOA and RICOA periods, CRE used an internal publication, the "Lease Success Guidebook," as an instructional document during the orientation of prospective independent contractor drivers. (Ex. 530) (Tr. 10/16; 65:19-23)(Murphy). When the ICOA was discussed during orientation, the Lease Success Guidebook was in front of the drivers. The ICOA was not. (Tr. 10/20; 715:17-23)(Welch).

391. The Court finds that for purposes of liability, representations made, or not made, in the Lease Success Guidebook are not relevant. The Court finds, however, that the Lease Success Guidebook is relevant to the Court in determining the extent to which equitable relief is required in this case.

392. The Court finds that during the entire ICOA period, the Lease Success Guidebook did not disclose that CRE was marking up tires, parts and fuel purchased by drivers. (Tr. 10/20; 712:1-4)(Welch); (See Ex. 530, Edition One; Ex. 531, Edition Three; and Ex. 532, Edition Four).

393. The Court finds that editions of the Lease Success Guidebook revised after the RICOA was implemented continue the practice of not disclosing the existence of any markups by CRE for tires, parts and fuel purchased by independent contractor drivers from CRE. (See Ex. 534, Lease Success Guidebook, Edition Seven, April 2005; Ex. 535, Lease Success Guidebook, Edition Eight, October 2005). Welch helped draft the Lease Success Guidebook. (Tr. 10/20; 703:6-8)(Welch). Welch does not know why markups by CRE on parts, tires and fuel still are not disclosed in the Guidebook. (Tr. 10/20; 714:25-715:4).

394. The Court finds that CRE's disclosure of markups is limited solely to the RICOA, and that CRE has no intention of disclosing the markups in the Lease Success Guidebook. According to MacInnes, the Lease Success Guidebook does not disclose markups on tires, parts and fuel because CRE "had no obligation to disclose" the markups in the Guidebook. (Tr. 10/24; 954:14-18)(MacInnes). Perhaps so, but the failure to make such disclosures in the Guidebook may be considered by the Court to determine the degree of culpability and appropriateness of restitution and disgorgement.

D. Equitable Relief for CRE's Unlawful Charge-Backs Under the ICOA

1. Charge-Backs for Tires

A. Findings of Fact

395. The Court finds that CRE's officers and employees informed Plaintiffs and Class members that they could purchase tires from CRE at the company's "fleet discount price." For example, Sullivan was told at orientation that he could purchase tires from CRE at their fleet discount price. Sullivan believed these representations to be true. (Tr. 10/18; 364:17-22)(Sullivan).

396. If Sullivan had known that CRE was marking up tires by 30 percent, he would have price checked the tire with a local tire shop in Bakersfield. (Tr. 10/18; 345:3-346:1).

397. Todd England, who was in charge of maintenance, told Murphy during orientation that CRE "had a national account." (Tr. 10/16; 46:2-7)(Murphy). Murphy purchased three tires through CRE. (Tr. 10/16; 83:8-9). Murphy believed that when he purchased tires through CRE that he was receiving the tires at CRE's "fleet discount price." (Tr. 10/16; 83:10-13).

398. Murphy did not look for tires from other sources because he believed he was buying tires at CRE's "fleet discount price." (Tr. 10/16; 83:22-84:14). If Murphy had known CRE was marking up tires by 30 percent, his behavior would have changed. He would have bought tires someplace else. (Tr. 10/16; 84:15-20). If the markup on the tires had been disclosed, Murphy would have conducted price comparison and checking. (Tr. 10/16; 161:19-24).

399. Piper believed that when he bought tires from CRE he was being charged the "fleet discount price." (Tr. 10/17; 278:17-20). Piper did not know that, in reality, CRE was marking up the tires by 30 percent over its cost. (Tr. 10/17; 279:3-5).

400. If Piper had known that CRE was marking up tires by 30 percent, he would not have brought tires from CRE. According to Piper, he had become "so frustrated with England, with their lies and so forth about how they are going to make this a wonderful partnership and save me so much money and help me be successful trucking, and it not occurring, that I wouldn't have bought anything from them." (Tr. 10/17; 271:12-24)(Piper).

401. Darrin Rowberry, CRE's employee who ran owner-operator orientations during the ICOA period, reviewed paragraph IV of the ICOA with prospective drivers during orientation. (Tr. 10/20; 619:7-9)(Rowberry). Rowberry told drivers that they could purchase tires from CRE at the company's "fleet discount price." (Tr. 10/20; 619:10-13)(Rowberry).

402. The Court finds that some of CRE's officers and employees knew that CRE was marking up tires by 30 percent. Todd England knew that CRE was marking up tires by 30 percent and that the ICOA did not disclose the tire markups. (Tr. 10/20; 634:3-16) (Todd England). Carl Yeck, the

people that reported to him and other mangers within CRE's maintenance department also knew of the 30 percent markup on tires. (Tr. 10/20;645:15-18)(Todd England).

403. The Court finds that Todd England and Carl Yeck failed to inform the persons within the Independent Contractor Division that CRE was marking up parts used to service and repair independent contractor trucks by 30 percent. Rowberry was not told by CRE that the company was marking up tires by 30 percent. (Tr. 10/20; 620:11-17)(Rowberry). In fact, Rowberry did not know what the markup was on tires sold by CRE. Tr. 10/20; 620:11-17)(Rowberry).

404. Lee Cohen, the Director of the Independent Contractor Division, was not aware, during the period he was with CRE from 1996 through 1999, that CRE was marking up tires by 30 percent. (Tr. 10/23; 836:20-837:9)(Cohen).

405. In summary, the Court finds: (1) Todd England and Carl Yeck knew that CRE was marking up tires by 30 percent; (2) Todd England knew that the ICOA failed to disclose the mark-up; (3) both Todd England and Carl Yeck represented to Plaintiffs that they could purchase tires without a markup; and (4) neither Todd England nor Carl Yeck told the CRE employees responsible for communicating with the company's independent contractor drivers of the existence of the 30 percent markup on tires.

406. Based on these facts, the Court finds that CRE, through its officers and employees, intentionally concealed the fact of the 30 percent markup on tires from its independent contractor drivers throughout the ICOA period.

407. The Court also finds that Plaintiffs and Class members reasonably relied on the false statements contained in the ICOA, and those made orally during orientation.

408. The Court finds that as a result of CRE's misrepresentations of fact, Plaintiffs and Class members were harmed in that they did not purchase tires at CRE's "fleet discount price." Instead, they were charged a higher price than what they bargained for.

409. According to Plaintiffs' expert, Michael Pakter, Class members, during the ICOA period, were charged back against their compensation markups for tires in the aggregate amount of $ 986,307. (Ex. 619A); (Tr. 10/19; 545:10-23) (Pakter). Pakter arrived at this calculation from documents produced by CRE for its ESC cost center for tires, detailing CRE's costs for tires, multiplied by 30 percent. (Tr. 10/19; 545:16-23). Notwithstanding Hoffman's protestations to the contrary, the Court finds that profit is the difference between revenues and costs. (Tr. 10/23; 726:23-24)(Pakter).

410. In this case, the Court finds that CRE covertly profited in the amount of not less than $ 986,307 on tire sales to Plaintiffs and Class members during the ICOA period.

411. Hoffman also opined that after the markups on tires were disclosed in the RICOA, such disclosures had no affect on independent contractor purchasing patterns for tires. (Tr. 10/25; 1174:14-1175:4)(Hoffman). The Court finds that while the RICOA discloses the markup on tires, it cannot credit Hoffman's conclusion that, as a factual matter, the ICOA's failure to disclose the markups had no affect on the buying patterns of the Class.

412. Plaintiffs testified that in many instances, they had no cash or means to purchase products such as tires, parts or fuel, and had no choice but to purchase the product through CRE. (Tr. 143:18-

25)(Murphy); (Tr. 10/17; 209:23-201:3)(Piper). Under these circumstances, the Court finds it difficult to conclude that the tire program was "voluntary" in the usual sense of the term.

413. The Court also finds that the CRE tire program was not "voluntary" in the usual sense of the word, because when Plaintiffs' and Class members' tires failed on the road, Plaintiffs and Class members purchased tires through CRE's road service. CRE's road service directed Plaintiffs and Class members to tire shops that did business with CRE. (Tr. 10/18; 344:1-7)(Sullivan); (Tr. 10/24; 999:21-1000:3)(MacInnes).

414. The Court finds these economic incentives to purchase tires through CRE, particularly when drivers are on the road, negates the relevance of buying patterns among Class members prior to, and after disclosure of the markups in the RICOA.

B. Conclusions of Law

415. The first issue before the Court is whether disgorgement is an appropriate remedy for violations of the Leasing Regulations. In this instance, the Court found that CRE, through its officers and employees, intentionally concealed the fact of the 30 percent markup on tires sold to its independent contractor drivers throughout the ICOA period.

416. The Court concludes that disgorgement furthers the purposes of the Motor Carrier Act and the Leasing Regulations by both halting current violations and also by deterring future violations of the regulations. *See RX Depot*, 438 F.3d at 1061. The Court finds that depriving wrongdoers such as CRE their ill-gotten gains will deter violation of the Leasing Regulations by making illegal activity unprofitable.

417. The Court, having found that CRE intentionally concealed and misrepresented the existence of tire markups during the ICOA period, concludes that the intentional misrepresentation and concealment of markups on tires is both an unlawful and inequitable practice.

418. The Court concludes that the disgorgement of profits related to such unlawful and inequitable conduct furthers the purposes of the Leasing Regulations to eliminate or reduce opportunities for skimming and other illegal or inequitable practices.

419. The Court concludes that, with regard to CRE's ICOA and conduct pertaining to charge-backs for tires, disgorgement will deter CRE, and other motor carriers, from misrepresenting markups in their lease agreements with independent contractor drivers.

420. The Court further concludes, based upon the fact that CRE's officers and employees, with knowledge of the Truth-in-Leasing Regulations' duty to disclose, intentionally concealed the company's mark-ups on tires from Plaintiffs and Class members, that CRE acted in conscious disregard of Plaintiffs' and Class members' rights under the Leasing Regulations. *See Restatement (Third) of Restitution and Unjust Enrichment*, § 3. Such conscious disregard for Plaintiffs' and Class members' rights satisfies the culpability requirement supporting an award of disgorgement.

421. The Court also concludes that CRE's profits in the amount of $986,307, represents CRE's actual profits related to the "tainted transaction," the sale of tires to Plaintiffs and Class members. The Court holds that this amount is a "reasonable approximation of profits causally connected to the violation." *See First Jersey Sec.*, 101 F.3d at 1475 (citations omitted).

422. The Court concludes that the disclosure requirements of the Leasing Regulations, which require disclosure of markups on tires, are a critical requirement in the I.C.C.'s and Congress' regulatory scheme, and that a violator, such as CRE, is legislatively presumed to improperly benefit because of a breach of the duty imposed by Congress to disclose markups on tires. *See S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). Thus, the Court rejects CRE's argument that there is no causal connection between its concealment of its markup on tires and CRE's resulting profit.

423. The Court rejects CRE's argument that it should not order disgorgement on the ground that Plaintiffs have not proven that they suffered damages. Depriving wrongdoers of their ill-gotten gain and furthering deterrence, has been used by the courts to require disgorgement of profits where the defendant consciously violated federal trade practices and securities laws, even in the absence of a discernable harm to consumers or shareholders. *See F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 67-68 (2d Cir. 2006).

424. The Court concludes that CRE shall disgorge its ill-gotten gain, $ 986,307, to Plaintiffs and Class members.

425. The Court requests that the parties confer and that Plaintiffs submit a proposed matrix for disgorgement to Plaintiffs and individual Class members no later than sixty (60) days after entry of these Findings of Fact and Conclusions of Law.

2. Charge-Backs for Parts

A. Findings of Fact

426. The Court has found that CRE violated section 376.12(h) of the Truth-in-Leasing Regulations by failing to disclose in its ICOA that Plaintiffs and Class members would be charged a 30 percent markup on parts used to repair and maintain Plaintiffs' and Class members' trucks at CRE's England Service Centers ("ESC").

427. The Court finds that CRE's officers and employees informed Plaintiffs and Class members that they could purchase parts from CRE at the company's cost. CR England's "maintenance supervisor" told Murphy that he could save money on parts and labor by having his truck repaired at CRE's maintenance facility. (Tr. 10/16; 44:16-45:3)(Murphy). The maintenance supervisor told Murphy that he could buy parts at a "reduced price" from CRE (Tr. 10/16; 45:6-13) (Murphy). The promotional pamphlet CRE sent to Murphy stated that "[b]ecause C.R. England is the largest refrigerated motor carrier in the nation, we command and achieve the greatest discounts on fuel, parts, tires, etc., and pass along a fabulous savings directly to our valued leasers." (Ex. 99; PLTF 02485).

428. Piper was told during orientation that he should have his truck repaired at CRE's maintenance facility because "we would get the best deal in C.R. England's maintenance shop." (Tr. 10/17; 208:7-14)(Piper). Both Darrin Rowberry and Carl Yeck promoted getting repair work done at ESC to Piper. (Tr. 10/17; 208:23-25) (Piper). Neither Rowberry nor Yeck told Piper that CRE would be marking up parts by 30 percent. (Tr. 10/17; 209:1-4)(Piper).

429. Sullivan was told in orientation that he could buy parts at CRE's cost. (Tr. 10/18; 346:25-347:9)(Sullivan). Sullivan was not told at orientation that CRE would be marking up parts by 30 percent. (Tr. 10/18; 360:11-13)(Sullivan).

430. If Sullivan had known that CRE was marking up parts by 30 percent, it would have made a difference in his decision where to have his truck serviced. (Tr. 10/18; 346:25-347:9)(Sullivan).

431. The Court finds that certain CRE officers and employees knew that CRE was marking up parts used to service and repair independent contractor trucks by 30 percent. Todd England knew that CRE was marking up parts because Todd England was involved in the decision to markup parts. (Tr. 10/20; 668:2-8)(Todd England). Carl Yeck also knew that CRE was marking up parts by 30 percent over its cost. (Tr. 10/24; 893:18-22)(Yeck).

432. The Court finds that Todd England and Carl Yeck failed to inform the persons within the Independent Contractor Division that CRE was marking up parts used to service and repair independent contractor trucks by 30 percent. Darrin Rowberry was never told by anyone in CRE's management that the company was marking up parts by 30 percent. (Tr. 10/20; 616:7-11)(Rowberry). If a driver asked Rowberry what the amount of markup was on parts, Rowberry would not have been able to tell them. (Tr. 10/20; 616:12-14)(Rowberry). Rowberry "assumed that there was some kind of a margin in there, but to me it was irrelevant." (Tr. 10/20; 615:23-616:4)(Rowberry). Rowberry admitted that while he did not know "for sure" whether, and to what extent, CRE marked up parts, he "emphasized" to drivers that ESC "would probably be the best place to get their parts and service." (Tr. 10/20; 617:15-22)(Rowberry).

433. Similarly, Lee Cohen was not aware, during the period he was with CRE from 1996 through 1999, that CRE was marking up parts by 30 percent. (Tr. 10/23; 837:14-17)(Cohen). Todd England

never informed Lee Cohen that CRE was marking up parts by 30 percent. (Tr. 10/23; 838:19-21)(Cohen).

434. James MacInnes gave conflicting testimony regarding when he became aware of markups. He first testified that he became aware of the markups on tires and parts in June or July 2002. (Tr. 10/24; 946:18-947:5)(MacInnes). He then testified that he became aware of the markup in April 2002. (Tr. 10/24; 950:12-19)(MacInnes).

435. In summary, the Court finds: (1) Todd England and Carl Yeck knew that CRE was marking up parts by 30 percent; (2) CRE's officers and employees represented to Plaintiffs that they could purchase parts at CRE's costs; and (3) neither Todd England nor Carl Yeck told the CRE employees responsible for communicating with the company's independent contractor drivers the existence of the 30 percent markup on parts.

436. Based on these facts, the Court finds that CRE, through its officers and employees, intentionally concealed the existence of the 30 percent markup on parts from its independent contractor drivers throughout the ICOA period.

437. The Court finds that CRE has presented no documentation to support its argument that its markups of 30 percent on parts sold to Plaintiffs and Class members was lower than the markup at other repair facilities.

438. Plaintiffs' expert, opined that CRE's markup of parts by 30 percent was excessive, based on the fact that CRE charged back to owner-operators amounts that exceeded the cost to CRE for acquisition of the parts. (Tr. 10/19; 524:25-525:9)(Pakter).

439. Piper was charged $ 1,607 in markups for parts during the period of time he was leased to CRE. (Ex. 623).

440. Sullivan was charged $ 125 in markups for parts during the period of time he was leased to CRE. (Ex. 624).

441. Murphy was charged $ 839 in markups for parts during the period of time he was leased to CRE. (Ex. 625).

442. Class members, during the ICOA period, were charged back against their compensation markups for parts in the aggregate amount of $ 967,756 (Ex. 620A); (Tr. 10/19; 549:20-550:19) (Pakter).

443. Pakter arrived at this calculation from documents produced by CRE for its ESC cost center for repair parts used on all independent contractor tractors at the ESC, detailing CRE's costs for parts multiplied by 30%. (Tr. 10/19; 549:20-550:21)(Pakter).

444. According to Pakter, CRE made profits in the amount of $ 967,756 during the ICOA period from the sale of parts to Class members. This amount represents the amount CRE charged Class members for parts in excess of CRE's cost. (Tr. 10/19; 564:17-565:4).

445. The Court finds that CRE profited in the amount of not less than $ 967,756 on the sales of parts to Plaintiffs and Class members during the ICOA period.

446. Hoffman opined that after the markups on parts were disclosed in the RICOA, such disclosures had no affect on independent contractor purchasing patterns for tires. (Tr. 10/25;

1174:14-1175:4)(Hoffman). The Court does not adopt the opinion of Hoffman for the reasons stated regarding his similar testimony regarding CRE's sale of tires.

B. Conclusions of Law

447. The Court, having found that CRE intentionally concealed the existence of the parts markups from Plaintiffs and Class members during the ICOA period, concludes that the intentional concealment of markups on parts is both an unlawful and an inequitable practice.

448. The Court concludes that disgorgement of profits related to such unlawful and inequitable conduct furthers the purposes of the Leasing Regulations to eliminate or reduce opportunities for skimming and other illegal or inequitable practices.

449. Consistent with its findings and conclusions relating to tires, the Court concludes that, with regard to CRE's ICOA and conduct pertaining to charge-backs for parts, disgorgement will deter CRE, and other motor carriers, from failing to disclose markups in their lease agreements with independent contractor drivers.

450. The Court further concludes, based upon the fact that CRE's officers and employees with knowledge of the Truth-in-Leasing Regulations' duty to disclose, intentionally concealed the company's mark-ups on parts from Plaintiffs and Class members, that CRE acted in conscious disregard of Plaintiffs' and Class members' rights under the Leasing Regulations. Such conscious disregard for Plaintiffs' and Class members' rights satisfies the culpability requirement supporting an award of disgorgement.

451. The Court also concludes that CRE's profits in the amount of $ 967,756 represents CRE's actual profits related to the "tainted transaction," the sale of parts to Plaintiffs and Class members. The Court holds that this amount is a "reasonable approximation of profits causally connected to the violation." *See First Jersey Sec.*, 101 F.3d at 1475 (citations omitted).

452. The Court rejects CRE's argument that there is no causal connection between its failure to accurately disclose its markup on parts and CRE's resulting profit. The Court credits Plaintiffs' testimony that they would have considered purchasing parts elsewhere if they had known that CRE was marking up parts by 30 percent.

453. The Court concludes that the disclosure requirements of the Leasing Regulations, which require disclosure of markups on parts, are a critical requirement in the I.C.C.'s and Congress' regulatory scheme, and that a violator, such as CRE, is legislatively presumed to improperly benefit because of a breach of the duty imposed by Congress to disclose markups on parts. *See S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). Thus, the Court rejects CRE's argument that there is no causal connection between its concealment of its markup on parts and CRE's resulting profit.

454. The Court concludes that CRE shall disgorge its ill-gotten gain, $ 967,756 to Plaintiffs and Class members.

455. The Court requests that Plaintiffs submit a proposed matrix for disgorgement to Plaintiffs and individual Class members no later than sixty (60) days after entry of these Findings of Fact and Conclusions of Law.

3. Charge-Backs for Fuel

A. Findings of Fact

456. The Court finds that CRE represented in a non-ICOA document that CRE would pass the entire fuel discount, as opposed to only 40 percent, to its independent contractor drivers. A document titled, "Review of Independent Contractor Program" (March 30, 2001 Update), was provided by CRE to Murphy during orientation. (Tr. 10/16; 52:9-24)(Murphy). This documented stated that "We will pass on fuel discounts from appropriate truck stops that give C.R. England the discounts." (Ex. 66; p.4). A similar document was given to Piper during his orientation. (Ex. 5; "Review of Independent Contractor Program," August 5, 1998 Update.) (Tr. 10/17; 216:22-217:3) (Ex. 5).

457. Both Murphy and Piper believed that any discounts associated with their fuel purchases would be passed through to the drivers. Murphy believed that any discount that CRE obtained would be forwarded to him. (Tr. 10/16; 48:12-14)(Murphy). Piper believed CRE's representations on fuel. "I figured that everything that they were telling me came to me in honesty and good faith. And I operate in good faith, I expect them to operate in good faith. And a discount is a discount. If they say they are going to give the discount to me, that means to me all of it. It doesn't mean part of it." (Tr. 10/17; 218:10-15)(Piper).

458. CRE has defended its practices, in part, on the ground that Plaintiffs' and Class members' purchase of fuel through CRE was entirely voluntary. (See Tr. 10/25; 1133:5-10)(Hoffman).

459. The Plaintiffs claim, however, that they were required to purchase fuel with CRE's fuel card if they wanted to avoid negative financial tax consequences. Piper testified that was told during

orientation that if he used his own card or cash, there would be financial consequences. (Tr. 10/17; 209:14-210:7).

460. The Court finds that Plaintiffs and Class members were required to purchase fuel through the CRE-issued fuel card if they wanted to avoid negative financial tax consequences. During orientation, Rowberry told prospective drivers that if the drivers did not use CRE's Comdata card, "that they would be on their own as far as calculating their mileage based taxes." (Tr. 10/20; 602:15-603:1) (Rowberry). If independent contractor drivers did not use their CRE issued Comdata card when they purchased fuel, the company would not be able to calculate the driver's fuel tax obligations correctly. (Tr. 10/20; 623:1-5)(Rowberry). If CRE could not calculate independent contractor drivers' fuel tax obligations correctly, it would have negative financial consequences to the individual driver. (Tr. 10/20; 623:6-9)(Rowberry). In reality the driver had to use the CRE issued fuel card if they wanted their fuel tax obligations to be calculated correctly and to minimize their tax obligations. (Tr. 10/20; 623:10-13)(Rowberry).

461. The same representations were made in the Lease Success Guidebook. According to page 37 of the Guidebook (Ex. 530), a driver can pay cash for fuel, "however, there are consequences. If we can't calculate your fuel tax refund and your quarterly fuel tax calculation accurately, it will be wrong and increase your tax liability." McGuire wrote all of the Lease Success Guidebook section regarding fuel. (Tr. 10/18; 419:6-8)(McGuire).

462. Murphy read the Lease Success Guidebook section on fuel and he believed those statements to be true. (Tr. 10/16; 69:8-13).

463. Similarly, the "Review of Independent Contractor Program," August 5, 1998 Update, states: "O/O's must use our fuel card if they want us to file their road/fuel tax. If they don't we do not have accurate information to file for them. Secondly, they will lose the discounts from the truck stops." (Ex. 5, page 3, second paragraph).

464. CRE also asserts that there is no causation between the ICOA's failure to disclose markup on fuel because utilization rates of the fuel card and the Fuel Optimization Program did not change after disclosure of the fuel markups in the RICOA. (See Tr. 10/18; 443:2-444:25)(McGuire).

465. Plaintiffs again respond that Plaintiffs and Class members were required to use CRE's "Fuel Optimization Program," which instructed them where to purchase fuel. According to Jeff McGuire, the head of CRE's fuel department, Qualcomm sends the driver a message telling him where he should buy fuel along his route. The optimization program looks at the driver's origin and his destination, how much fuel he had at the time of his empty call, the state taxes along this route, and then all the truck stops along that route line's pricing. (Tr. 10/18; 381:1-8) (McGuire).

466. The Lease Success Guidebook used during the ICOA period stated that goal for "compliance" with the Fuel Optimization Program was 75 percent, "however, 100 percent is better for your profitability." (Ex. 530, p. 35). A more recent version of the Lease Success Guidebook, Volume One, Edition 8, states that it is "critical" that compliance with the Fuel Optimization Program be between 95 and 100 percent. (Ex. 535, p. 27).

467. CRE tracks compliance with the Fuel Optimization Program of both employee and independent contractor drivers. (Tr. 10/18; 387:17-21) (McGuire). According to CRE, independent contractor

drivers who do not use the Fuel Optimization Program are contacted by CRE and "encouraged" to use the program. (Tr. 10/18; 388:10-16) (McGuire).

468. The Court finds, however, that CRE used more than "encouragement" to force drivers to use CRE's Fuel Optimization Program. When Murphy did not purchase fuel with Fuel Optimization Program, he was disciplined by CRE. (Tr. 10/16; 71:1-25)(Murphy). Murphy received letters from fuel department stating that CRE wanted to discuss lack of Fuel Optimization Program purchases at Murphy's earliest opportunity. (Tr. 10/16; 71:8-20)(Murphy). Murphy had discussions with CRE's safety department where he was asked why he did not purchase fuel where the Fuel Optimization Program told him to buy fuel. (Tr. 10/16; 71:8-25). During those conversations, Murphy was told "not to do it again." (Tr. 10/16; 71:1-72:2).

469. Based on the foregoing facts, the Court finds that use of CRE's fuel card and its Fuel Optimization Program were not purely voluntary programs. Instead, CRE used its financial leverage, threats of increased tax liability, as well as coercive statements to insure maximum participation in both programs. As a result, the Court finds that Plaintiffs' and Class members' purchase of fuel with CRE's fuel card at CRE's designated locations (the Fuel Optimization Program) was essentially mandatory.

470. The Court also finds that the mandatory nature of CRE's Fuel Optimization Program negates the relevance of utilization rates among Class members prior to, and after disclosure of the fuel markups in the RICOA. Simply put, one would not reasonably expect the utilization rate of a mandatory program to change by disclosing the markups related to that program.

471. The Court also finds that CRE's management did not inform its employees, such as Rowberry, who interacted on a daily basis with the company's independent contractor drivers, of the existence of the fuel markup. Rowberry did not know that CRE was retaining 60 percent of the discounts associated with the driver's purchase of fuel. (Tr. 10/20; 622:15-20) (Rowberry). As a result, Rowberry did not tell prospective independent contractor drivers during orientation that CRE was retaining 60 percent of the discount generated by the driver's purchases of fuel. (Tr. 10/20; 622:15-20) (Rowberry).

472. Michael Welch did not tell prospective drivers during orientation that CRE was marking up fuel. (Tr. 10/20; 712:18-23).

473. In addition, the most recent version of the Lease Success Guidebook does not mention the fact that CRE is marking up fuel sold to drivers. McGuire testified that while he wrote the entire section on fuel he does not know why this fact is not being disclosed in the Guidebook. (Tr. 10/19; 466:14-24)(McGuire).

474. According to McGuire, it was in CRE's interest for the drivers to know that CRE was marking up fuel. (Tr. 10/18; 409:16-18)(McGuire). However, the Fuel Optimization Program data provided from CRE to the driver does not include the difference between the retail price and CRE's cost. (Tr. 10/18; 424:10-20)(McGuire).

475. MacInnes testified that he became aware that CRE was marking up fuel sold to independent contractor drivers in December of 1998. (Tr. 10/24; 1035:11-23)(MacInnes). MacInnes became aware of the fuel markups at that time because CRE was "undergoing a proposed revision to the

ICOA." (Tr. 10/24; 1035:11-23)(MacInnes). CRE did not revise the ICOA to disclose markups on fuel. (Tr. 10/24; 1035:11-23)(MacInnes).

476. Based on the foregoing facts, the Court finds that CRE intentionally concealed the existence of the fuel markups from Plaintiffs and Class members during the ICOA period.

477. Murphy did not know that CRE was marking up fuel purchased through CRE. (Tr. 10/16; 84:21-24). If Murphy had known that CRE was marking up fuel his behavior would have changed considerably. He would have confronted CRE about the markup and would have wanted to know why CRE was charging him more than what they were paying. (Tr. 10/16; 84:25-85:6).

478. If Murphy had known he was only getting 40% of the negotiated discount between CRE and the truck stop, he would have terminated his contract earlier than when he did (Tr. 10/16; 158:6-15).

479. Piper testified that the price of fuel was not the primary factor in deciding where to purchase fuel. (Tr. 10/17; 269:11-25). Piper said that time was the principal factor, because "time is money. Time means the more miles you can run. So I would coordinate my fuel stops with my meal stops or my rest beaks or my end of the night run." (Tr. 10/17; 269:11-25).

480. No one told Sullivan at orientation that CRE would be marking up fuel over the cost that CRE paid. (Tr. 10/18; 360:14-16)(Sullivan).

481. Sullivan testified that there are factors other than price that determined where he purchased fuel. These factors included drivers' services, cleanliness of showers and whether they have an actual sit-down restaurant. (Tr. 10/18; 342:18-23)(Sullivan). If the price difference is only a few pennies a

gallon, then "it's better to go to the next truck stop with better service." (Tr. 10/18; 342:21-23)(Sullivan).

482. Pakter opined that CRE's markup on fuel was excessive because it exceeded the amount CRE paid to third party fuel vendors. (Tr. 10/19; 532:15-19)

483. Class members were charged back against their compensation for fuel markups an aggregate of $ 2,234,506 during the ICOA period (6/6/98 - 8/7/02). (Ex. 627A); (Tr. 10/19; 551:4-553:2) (Pakter).

484. Pakter calculated the total amount of fuel markups charged back against Class members' compensation by analyzing CRE's Operating Statements for CRE's Independent Contractor Division. (Ex. 627A). CRE made profits in the amount of $ 2,234,506 during the ICOA period from the sale of fuel to Class members. This represents the amount CRE charged Class members for fuel in excess of CRE's cost. (Tr. 10/19; 564:17-565:4)(Pakter).

485. The Court finds that CRE profited in the amount of not less than $ 2,234,506 on sales of fuel to Plaintiffs and Class members during the ICOA period.

B. Conclusions of Law

486. The Court, having found that CRE intentionally concealed the existence of the fuel markups from Plaintiffs and Class members during the ICOA period, concludes that the intentional concealment of markups on fuel is both an unlawful and an inequitable practice.

487. The Court concludes that disgorgement of profits related to such unlawful and inequitable conduct furthers the purposes of the Leasing Regulations to eliminate or reduce opportunities for skimming and other illegal or inequitable practices.

488. Consistent with its findings and conclusions relating to tires and parts, the Court concludes that, with regard to CRE's ICOA and conduct pertaining to charge-backs for fuel, disgorgement will deter CRE, and other motor carriers, from failing to disclose markups in their lease agreements with independent contractor drivers.

489. The Court further concludes, based upon the fact that CRE's officers and employees with knowledge of the Truth-in-Leasing Regulations' duty to disclose, intentionally concealed the company's mark-ups on fuel from Plaintiffs and Class members, and that CRE acted in conscious disregard of Plaintiffs' and Class members' rights under the Leasing Regulations. Such conscious disregard for Plaintiffs' and Class members' rights satisfies the culpability requirement supporting an award of disgorgement.

490. The Court also concludes that CRE's profits in the amount of $ 2,234,506 represents CRE's actual profits related to the "tainted transaction," the sale of fuel to Plaintiffs and Class members. The Court concludes that this amount is a "reasonable approximation of profits causally connected to the violation." *See First Jersey Sec.*, 101 F.3d at 1475 (citations omitted).

491. The Court rejects CRE's argument that there is no causal connection between its failure to accurately disclose its markup on fuel and CRE's resulting profit. The Court has found that the CRE fuel card and the Fuel Optimization Program are both mandatory programs. The Court would not

expect that utilization rates by Class members of the CRE fuel programs would change after disclosures of the markups in the RICOA because Class members were required to use these programs during both the ICOA and RICOA periods.

492. Furthermore, the Court credits Plaintiffs' testimony that they would have considered purchasing fuel from other sources if they had known that CRE was marking up fuel by 30 percent. The Court also credits the testimony of the Plaintiffs that there are considerations other than price, such as restaurant and shower facilities and the timing of the fueling, that determine where Plaintiffs and Class members choose to purchase fuel.

493. The Court concludes that the disclosure requirements of the Leasing Regulations, which require disclosure of markups on fuel, are a critical requirement in the I.C.C.'s and Congress' regulatory scheme, and that a violator, such as CRE, is legislatively presumed to improperly benefit because of a breach of the duty imposed by Congress to disclose markups on fuel. *See S.E.C. v. First City Fin. Corp., Ltd.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989). Thus, the Court rejects CRE's argument that there is no causal connection between its concealment of its markup on fuel and CRE's resulting profit.

494. Thus, the Court concludes that CRE shall disgorge its ill-gotten gain, $ 2,234,506 to Plaintiffs and Class members.

495. The Court orders that the parties confer and that Plaintiffs submit a proposed matrix for disgorgement to Plaintiffs and individual Class members no later than sixty (60) days after entry of these Findings of Fact and Conclusions of Law.

4. Charge-Backs for Repair-Related "Administrative" Charges

A. Findings of Fact

496. The Court found that CRE violated subsection (h) by failing to disclose in its ICOA the amount of repair-related administrative fees, the means by which they were computed, and whether these "administrative" fees reflected actual administrative costs paid by CRE to a third party or if these fees were intended to cover CRE alleged administrative costs.

497. The Court has also found that in September 1999, CRE eliminated the five percent administrative fee described in the ICOA. (Tr. 10/24; 1024:25-1025:4)(MacInnes). CRE implemented a new policy, in which CRE charged back against Plaintiffs' compensation, charges for "admin chg o/o" and "admin chg shop." Each of these "admin" charges was $4.00. (See Ex. 510; Murphy settlement statement for the week of 8/17/2001); (Tr. 10/16; 85:7-86:1)(Murphy).

498. If the repair charge was less than $ 200, the new flat $ 10 fee was an increase over the previous 5 percent charge. (Tr. 10/24; 1025:9-17)(MacInnes). As a result, the Court finds that Plaintiffs and Class members were harmed to the extent that their repair-related administrative charges were in excess of what such fees would have been under the language of the ICOA.

499. If Piper had known that he was being charged ten dollars every time he used a Comchek, he might have used less Comcheks. (Tr. 10/17; 280:9-10).

500. Piper was charged $140 for "Admin Chg O/O" and $ 140 for "Admin Chg Shop" during the period of time he was leased to CRE. (Ex. 612).

501. Murphy was charged $24 for "Admin Chg O/O" and $ 24 for "Admin Chg Shop" during the period of time he was leased to CRE. (Ex. 612).

502. Plaintiffs' expert opined that the four dollar "Admin Chg O/O" and "Admin Chg Shop" were excessive because the fees exceeded the CRE's disbursements to third party vendors. (Tr. 10/19; 531:4-22)(Pakter).

503. According to Pakter, Plaintiffs and Class members were charged a total of $194,405 for repair-related administrative fees during the ICOA period. (See Ex. 636B).

504. Defendant's expert opined that Plaintiffs and Class members were charged $ 191,710 for repair-related administrative fees during the ICOA period. (See Ex. I-6).

505. Hoffman subtracted from this amount costs and expenses allocated from "Cost Center 391 Wages" which is CRE's owner-operator cost center. (Ex. I-6). According to Hoffman, CRE incurred costs of $122,104 in wages related to these administrative functions during the ICOA period. (Ex. I-6). Hoffman concluded that, even taking into account the alleged costs for wages, CRE's revenues for repair-related administrative fees exceeded CRE's costs by $69,606 during the ICOA period. (Ex. I-6).

506. Plaintiffs contest CRE's ability to charge-back Plaintiffs and Class members for CRE's internal costs of administering its repair program. Plaintiffs' expert testified that a "profit center" is a center where a manger has responsibility for both profits and costs. (Tr. 10/23; 727:5-7)(Pakter). He also testified that a "cost center" is a center where the manager has responsibility for costs only. (Tr. 10/23; 727:8-10)(Pakter).

507. According to Pakter, the owner-operator program is the program whereby CRE has decided to use owner-operators to increase its business capacity to deliver freight without expending capital on equipment. (Tr. 10/23; 728:21-24)(Pakter). Pakter opined that CRE's owner-operator program is a profit center because the manager, in this case CRE, is accountable for revenues and costs. (Tr. 10/23; 728:2-6)(Pakter). Pakter bases his conclusion on the fact that CRE's financial statements treat the owner-operator division as a profit center. (Tr. 10/23; 728:7-25)(Pakter).

508. Pakter testified that the term "costs of doing business" are the costs that a company incurs or is obligated to incur in pursuit of its major or central operations. (Tr. 10/23; 729:1-3)(Pakter). Pakter concluded that it is inappropriate for CRE to allocate clerical costs associated with its owner-operator division where the duties of the employees are in furtherance of CRE's business activities, and in discharge of its duties, as opposed to the business activities of CRE's independent contractor drivers. (Tr. 10/23; 732:25-733:21)(Pakter).

509. The Court finds that CRE's internal administrative costs in this instance were CRE's cost of doing business and that CRE may not shift such costs to Plaintiffs and Class members.

510. The Court also finds that CRE's charge-backs for repair-related administrative fees were excessive as CRE's revenues for repair-related administrative fees exceeded CRE's costs, whether those costs are limited to third party vendors or include CRE's internal costs.

511. The Court finds that Plaintiffs and Class members were injured by CRE's charge-back of repair-related administrative fees as CRE's revenues for repair-related administrative fees exceeded CRE's costs, whether those costs are limited to third party vendors or include CRE's internal costs.

B. Conclusions of Law

512. Plaintiffs seek restitution of the full amount charged back to Plaintiffs and Class members for repair-related administrative fees during the ICOA period.

513. First, the Court concludes that restitution is an appropriate equitable remedy to enforce the Leasing Regulations. The Court has previously cited several pre-I.C.C. Termination Act cases wherein the district court ordered restitution as a remedy for violations of the regulations.

514. While the Court recognizes the general rule that restitution is not proper where one party has performed on a contract later voided for public policy reasons, the Court holds that this case falls within the exceptions to that rule.

515. The Court holds, pursuant to the Restatement (Second) of Contracts, that denial of restitution in this instance would cause disproportionate forfeiture by Plaintiffs and Class members. The Court also holds that authorizing restitution is justified in this instance as the parties seeking restitution (Plaintiffs and Class members) were not equally in the wrong with the promisor (CRE).

516. In determining whether restitution is warranted in this instance, the Court will consider the factors identified by the Tenth Circuit in *Wessel v. City of Albuquerque*, 463 F.3d 1138, 1147 (10th Cir. 2006). These factors include: (1) the nature of the illegality; (2) the extent of the party's culpability; and (3) the strength of the deterrent effect of the decision. *Id.*

517. The Court concludes that the nature of the illegality supports an award of restitution. As the Court has stated previously, the purposes of the Leasing Regulations are to promote transparency in leasing, meaning a full disclosure between the carrier and the owner-operator of the elements,

obligations, and benefits of leasing contracts signed by both parties as well as to eliminate or reduce opportunities for skimming and other illegal or inequitable practices. The Court concludes that ordering restitution of monies unlawfully deducted from Plaintiffs' and Class members' compensation for excessive repair-related administrative fees furthers the purposes of the Leasing Regulations.

518. The Court concludes that CRE acted consciously in both imposing the repair-related administrative fees and in failing to adequately disclose those fees in the ICOA.

519. The Court concludes that the deterrent effect of an award of restitution for the unlawful charge-back of undisclosed and excessive repair-related administrative fees would be substantial. Indeed, the Court concludes that the award of restitution would deter CRE and other motor carriers from engaging in such illegal conduct in the future.

520. Finally, to the extent that harm is relevant to the Court's award of restitution, the Court concludes that Plaintiffs and Class members were harmed by CRE's illegal conduct in that Plaintiffs and Class members were charged-back amounts for repair-related administrative fees that exceeded CRE's costs.

521. The Court awards Plaintiffs and Class members $ 191,710 in restitution for CRE's unlawful charge-back of undisclosed and excessive repair-related administrative fees. The Court requests that Plaintiffs submit a proposed matrix for restitution to Plaintiffs and individual Class members no later than sixty (60) days after entry of these Findings of Fact and Conclusions of Law.

5. Charge-Backs for Termination-Related "Administrative" Charges

A. Findings of Fact

522. The Court found that the ICOA violated section 376.12(h) because it failed to disclose that CRE would be charging back amounts for termination-related administrative fees. The Court also held that the ICOA failed to contain a recitation as to how the amount of the termination administrative fees would be computed.

523. The Court also held that the ICOA violated subsection (h) as it failed to disclose that CRE would be charging back amounts for termination letters. The Court held that the ICOA failed to contain a recitation as to how the amount for the termination letter charges would be computed.

524. Plaintiffs' expert opined that CRE's termination related administrative fees were excessive because the fees exceeded the costs that CRE disbursed to a third party vendor. CRE had no third party costs associated with the termination fees. (Tr. 10/19; 525:20-526:4)(Pakter).

525. CRE charged Plaintiffs and Class members during the ICOA period $1,147,006 for termination administrative fees. (Ex. 636B).

526. CRE charged Plaintiffs and Class members during the ICOA period $ 25,061.25 for termination letter fees. (Ex. 636B).

527. CRE asserts that while it may have charged Plaintiffs and Class members termination-related administrative fees, almost all of these fees were uncollected. CRE's expert, Hoffman, opined that CRE charged Plaintiffs and Class members $25,021 for termination letter fees and $ 1,173,547 in termination administrative fees during the ICOA period. (Ex. F6).

528. Hoffman calculated, based on his analysis of a database of final settlement statements, that because most independent contractors left CRE allegedly owing the company money, that CRE actually collected only $176,029 from Class members during the ICOA period. (Ex. F6).

529. Whether CRE actually collected the majority of termination administrative fees is besides the point. The Court finds that Plaintiffs and Class members were harmed because CRE included the uncollected termination administrative fees in assignments of alleged debt to debt collection agencies. The reporting of an unpaid debt affects the debtor's borrowing capacity. CRE has been assigning debts to collection agencies since 1999.

530. The Court has previously found that Sullivan was charged termination administrative fees by CRE. Sullivan's "final accounting" included $510 in termination administrative fees. (Ex. 95) (Tr. 10/17; 297:8-15)(Sullivan). CRE claimed that Sullivan owed CRE more than $ 8,700. The termination administrative fees were included in this alleged debt. (Ex. 95).

531. CRE referred Sullivan's $8,700 debt to a collection agency, Accelerated Collections. (Tr. 10/17; 307:3-10) (Ex. 583, 584). The collection agency called Sullivan's home repeatedly. (Tr. 10/17; 308:5-6). The collection agency called Sullivan at his place of employment. (Tr. 10/17; 308:7-9).

532. CRE reported that Sullivan owed the company $8,700 to credit reporting bureaus. (Tr. 10/17; 312:12-18). The credit report caused Sullivan to be denied a mortgage on a new home. (Tr. 10/17; 312:19-24). The negative credit report by CRE affected Sullivan's ability to obtain financing for a truck. He was forced to pay a higher interest rate of 14 percent. (Tr. 10/18; 367:24-368:18).

533. The Court finds that CRE's internal administrative termination costs were in furtherance of CRE's business activities as opposed to Plaintiffs and Class members. Thus, the Court finds that CRE's internal termination-related costs represent CRE's cost of doing business.

534. The Court also finds that CRE's charge-backs for termination-related administrative fees were excessive as CRE's revenues from termination-related administrative fees exceeded CRE's external costs.

535. The Court finds that Plaintiffs and Class members were injured by CRE's charge-back of termination-related administrative fees. The Court bases this finding on the fact that some Class members, those who were not in debt to CRE when they terminated, actually had these charges deducted from their compensation or their escrow funds. The Court also bases this finding on the fact that CRE included these termination administrative charges in referrals to debt collection agencies, and that Plaintiffs and Class members were subject to debt collection calls and that Plaintiffs and Class members' credit reports were negatively affected as a result of such alleged debt.

B. Conclusions of Law

536. Plaintiffs seek restitution of the full amount charged back to Plaintiffs and Class members for termination-related administrative fees during the ICOA period.

537. First, the Court concludes that restitution is an appropriate equitable remedy to enforce the Leasing Regulations. The Court has previously cited several pre-I.C.C. Termination Act cases wherein the district court ordered restitution as a remedy for violations of the regulations. The remedies then available to the I.C.C. are now available to the Plaintiffs.

538. The Court concludes that the nature of the illegality supports an award of restitution. As the Court has stated previously, the purposes of the Leasing Regulations are to promote truth-in-leasing, meaning a full disclosure by the carrier to the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties as well as to eliminate or reduce opportunities for skimming and other illegal or inequitable practices. The Court holds that ordering restitution of monies unlawfully deducted from Plaintiffs' and Class members' compensation for excessive termination-related administrative fees furthers the purposes of the Leasing Regulations.

539. The Court concludes that CRE acted consciously in both imposing the termination-related administrative fees and in failing to adequately disclose those fees in the ICOA.

540. The Court holds that the deterrent effect of an award of restitution for the unlawful charge-back of undisclosed and excessive termination-related administrative fees would be substantial. Indeed, the Court concludes that the award of restitution would deter CRE and other motor carriers from engaging in such illegal conduct in the future.

541. Finally, to the extent that harm is relevant to the Court's award of restitution, the Court holds that Plaintiffs and Class members were harmed by CRE's illegal conduct in that Class members either paid these excessive charges from their compensation and/or escrow funds, or Plaintiffs and Class members had these unlawful charges referred to debt collection agencies, subjecting them to debt collection calls and negatively affecting their credit.

542. The Court awards Plaintiffs and Class members $1,173,547 in restitution for CRE's unlawful charge-back of undisclosed and excessive termination-related administrative fees. The Court requests

that the parties confer and the Plaintiffs submit a proposed matrix for restitution to Plaintiffs and individual Class members no later than sixty (60) days after entry of these Findings of Fact and Conclusions of Law.

E. Equitable Relief for CRE's Escrow Violations Under the ICOA and RICOA

1. The Maintenance and "General Reserve" Escrow

A. Findings of Fact

543. Sullivan had $1,058.55 in his maintenance reserve escrow at the time his "final accounting" was tendered to him. (Ex. 95). According to the "final accounting," the only maintenance-related expense was a charge of $175.61 for "shop work." (Ex. 95).

544. Murphy had $ 516.60 in his maintenance escrow or General Reserve at the time his "final accounting" was tendered. (Ex. 75). According to the "final accounting," there were no expenses related to maintenance or repairs.

545. The Court finds that CRE's failure to comply with the escrow regulations was not unique to Plaintiffs. Instead, the Court finds that CRE engaged in a uniform practice of commingling Class members' escrow funds, and using the balances in Class members' maintenance and General Reserve escrow funds to offset any monies allegedly owed by Class members to either CRE or Opportunity Leasing. (Tr. 10/24; 924:21-24)(MacInnes); (Tr. 10/24; 994:17-24)(MacInnes).

546. Plaintiffs' expert opined that over $3.8 million in Class members' maintenance escrow fund has been retained by CRE throughout the ICOA period. (Ex. 634).

547. Plaintiffs' expert opined that over $ 2.8 million in Class members' General Reserve escrow funds during the RICOA period. (Ex. 635).

548. The ICOA that Plaintiffs and Class members signed contained a provision requiring Plaintiffs and Class members to arbitrate any dispute under the ICOA. (Exs. 8, 67, 80, 92).

549. The RICOA that Murphy and Class members signed contained a provision requiring Murphy and Class members to arbitrate any dispute under the RICOA. (Ex. 71).

550. The Court previously found that the arbitration provision in CRE's lease agreements was unconscionable. The Court found that while the lease agreements required Plaintiffs to arbitrate any dispute, the agreements "allow C.R. England to act unfettered by any requirement to arbitrate. Among other things, it is able to exercise control over disputed funds, bring any legal actions it deems necessary regarding its claimed property, and to sell or refer all of its claims against the drivers rather than submit a single one to arbitration." *OOIDA v. C.R. England, Inc.*, 325 F.Supp.2d 1252, 1263 (D. Utah 2004).

551. The Court found that "C.R. England refers or sells all of its claims against its former drivers to collection agencies." The Court also found that "C.R. England has not submitted a single one of its 2,591 claims under the [lease agreements] to arbitration." *Id.* at 1261-62.

552. The RICOA continued to require Class members to arbitrate all disputes under the RICOA until the Court issued its ruling on July 13, 2004, striking down the arbitration clause. (Tr. 10/25; 1022:11-18)(MacInnes).

553. The Court finds that CRE's failure to submit a single claim to arbitration at any time during the ICOA and RICOA periods demonstrates CRE's bad faith and its intent to deprive Plaintiffs and Class members the ability to timely dispute amounts allegedly owed to CRE.

554. The Court finds that Class members cannot reasonably determine, years after they returned their trucks to CRE, the validity of any of CRE's alleged set-offs. The Class period extends back to June 1998. After the passage of several years, Class members cannot be expected to have retained relevant documents and cannot be expected to remember factual details such that Class members could reasonably condone or dispute any set-off by CRE for alleged maintenance expenses to Class members' trucks. Thus, the Court finds that Class members would be prejudiced if required to dispute set-offs by CRE for alleged maintenance expenses.

B. Conclusions of Law

555. The Court concludes that it has the authority to order restitution in this case. Prior to the I.C.C. Termination Act, the I.C.C. sought and obtained orders for restitution from the district courts as a result of defendants' violations of the Leasing Regulations.[10]

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[10]See *I.C.C. v. Interstate Contract Carrier*, 598 F.Supp. 661 (D. Utah 1984)(finding that defendant violated the escrow provisions of the leasing regulations and ordering an accounting and restitution); *I.C.C. v. Lifschultz Freight Corp.*, 151 B.R. 150, 153-54 (N.D. Ill. 1993)(enjoining defendant, ordering it "to perform an audit and to provide an accounting within 30 days of this order," and ordering defendant to "make restitution."); *I.C.C. v. Bug-Eye Trans., Ltd.*, 1987 WL 7259 (N.D. Ill. Feb. 23, 1987)(finding that defendant violated the escrow provisions of the leasing regulations, the court ordered that defendant submit an accounting and that defendant make restitution).

556. In *OOIDA v. Arctic Express, Inc.*, 288 F.Supp.2d 895, 906 (S.D. Ohio 2003), the court expressed the measure of injury as follows: "Had the Defendants here complied with the provisions of 49 C.F.R. § 376.12(k), then the Plaintiff owner-operators, within 45 days of the termination of their respective leases, would have recovered the net balance of their maintenance escrow funds." The court concluded that "[t]he measure of damages here is thus the unrecovered amounts remaining in the maintenance escrows at the time of termination of each class member." *Id.*

557. Here, the Court concludes that Plaintiffs and Class members were injured to the extent that CRE did not return maintenance and General Reserve escrow funds to Class members within 45 days after lease termination.

558. The Court finds the analysis of *Arctic* persuasive and concludes that Plaintiffs and individual Class members are entitled to the return of the net balance in their maintenance and General Reserve escrow funds at the time of lease termination.

559. The Court concludes that CRE's failure to arbitrate a single claim against Plaintiffs and Class members demonstrates CRE's bad faith. Instead of arbitrating its claims against Plaintiffs and Class members, CRE referred its claims to collection agencies, thus depriving Plaintiffs and Class members the ability to timely dispute any alleged set-offs against Plaintiffs' and individual Class members' escrow funds.

560. The Court concludes that CRE may not set-off against Plaintiffs' and individual Class members' maintenance and/or General Reserve escrow funds amounts allegedly owing to CRE or Opportunity Leasing. The Court has found that Class members cannot reasonably determine, years after they

returned their trucks to CRE, the validity of any of CRE's alleged set-offs. After the passage of several years, Class members cannot be expected to have retained relevant documents and cannot be expected to remember factual details such that Class members could reasonably condone or dispute any set-off by CRE for alleged maintenance expenses to Class members' trucks.

561. The Court concludes that it is simply too late to allow CRE to set-off against Plaintiffs' and Class members' escrow funds. "Laches has been defined to be 'negligence in the assertion of a right,' 'unreasonable delay in enforcing a known right,''such delay as will warrant the presumption that the party has waived his right.'" *Payson Building & Loan Soc. v. Taylor*, 48 P.2d 894, 901 (Utah 1935). Allowing such claims to be asserted now would be unfair and prejudicial to drivers who were entitled to final accountings years ago. The Court concludes that laches preclude CRE from raising any claim of set-off against Plaintiffs' and Class members' escrow funds.

562. Thus, the Court concludes that the parties shall confer and that Plaintiffs, within sixty (60) days of the entry of these Findings of Fact and Conclusions of Law, shall submit a restitution matrix identifying the amount remaining in each individual Class members' maintenance and/or General Escrow fund at the time of lease termination. The Court further concludes that CRE shall return as restitution those amounts to those Plaintiffs and Class members.

2. The Performance Bond/Security Deposit Escrow

A. Findings of Fact

563. Each of the named Plaintiffs had monies deducted from their compensation and placed into a security deposit/performance bond. None of the Plaintiffs received a final accounting detailing what

specific items were deducted from their security deposits/performance bonds. Murphy had $500 in his performance bond at the time of his final settlement. (Ex. 75). Piper had $500 in his performance bond at the time of his final settlement. (Ex. 463). Sullivan had a total of $750 in his performance bonds at the time of his final settlements under both ICOAs. (Exs. 95 and 499).

564. Based upon the "final accountings" tendered by CRE to Plaintiffs, the Court cannot determine what specific items were deducted from Plaintiffs' security deposits/performance bonds at the time of lease termination.

565. Plaintiffs' expert opined that CRE retained approximately $1.14 million in Class members' performance bonds during the ICOA period. (Ex. 634).

566. Plaintiffs' expert opined that CRE retained approximately $ 1.40 million in Class members' Performance Bonds during the RICOA period.

567. The ICOA that Plaintiffs and Class members signed contained a provision requiring Plaintiffs and Class members to arbitrate any dispute under the ICOA. (Exs. 8, 67, 80, 92).

568. The RICOA that Murphy and Class members signed contained a provision requiring Murphy and Class members to arbitrate any dispute under the RICOA. (Ex. 71).

569. The Court previously found that the arbitration provision in CRE's lease agreements was unconscionable. The Court found that while the lease agreements required Plaintiffs to arbitrate any dispute, the agreements "allow C.R. England to act unfettered by any requirement to arbitrate. Among other things, it is able to exercise control over disputed funds, bring any legal actions it deems necessary regarding its claimed property, and to sell or refer all of its claims against the drivers rather than submit

a single one to arbitration." *OOIDA v. C.R. England, Inc.*, 325 F.Supp.2d 1252, 1263 (D. Utah 2004).

570. The Court found that "C.R. England refers or sells all of its claims against its former drivers to collection agencies." The Court also found that "C.R. England has not submitted a single one of its 2,591 claims under the [lease agreements] to arbitration." *Id.* at 1261-62.

571. The RICOA continued to require Class members to arbitrate all disputes under the RICOA until the Court issued its ruling on July 13, 2004, striking down the arbitration clause. (Tr. 10/25; 1022:11-18)(MacInnes).

572. The Court finds that CRE's failure to submit a single claim to arbitration at any time during the ICOA and RICOA periods demonstrates CRE's bad faith and its intent to deprive Plaintiffs and Class members the ability to timely dispute amounts allegedly owed to CRE.

573. The Court finds that Class members cannot reasonably determine, years after they returned their trucks to CRE, the validity of any of CRE's alleged set-offs. The Class period extends back to June 1998. Thus, the Court finds that Class members would be prejudiced if required to dispute set-offs by CRE.

574. Defendant's expert opined that Class members' performance bonds were subject to various deductions and offsets. (Ex. P6). These deductions and offsets included various "transaction" and "administrative" fees, Qualcomm charges, truck lease payments and "other charges." (Ex. P6).

575. The Court finds that none of the purported deductions or set-offs to Class members' performance bonds identified by Defendant's expert ,("transaction" and "administrative" fees,

Qualcomm charges, truck lease payments and "other charges"), were specifically identified in the ICOA as items which may deducted from Plaintiffs' and Class members' performance bonds.

B. Conclusions of Law

576. The Court incorporates its previous conclusions that it has the power to order restitution, or the return, of Plaintiffs' and Class members' escrow funds unlawfully retained by CRE.

577. The Court concludes that because the ICOA and the RICOA failed to identify any specific items to which the security deposit/performance bond could be applied, and the ICOA and the RICOA failed to specify the conditions Plaintiffs and Class members were required to satisfy in order to have their security deposit/performance bond returned, CRE may not deduct any item from Plaintiffs' and Class members' security deposit/performance bond escrow funds.

578. The Court concludes that Plaintiffs' and Class members' security deposit/performance bond escrow funds are not subject to any deduction or setoff by CRE after Plaintiffs' and Class members' termination of their lease agreements.

579. The Court concludes that CRE violated the Leasing Regulations by failing to return the balance of Plaintiffs' and Class members' security deposit/performance bond escrow funds at the time of lease termination.

580. The Court concludes that CRE's failure to arbitrate a single claim against Plaintiffs and Class members demonstrates CRE's bad faith. Instead of arbitrating its claims against Plaintiffs and Class members, CRE referred its claims to collection agencies, thus depriving Plaintiffs and Class members

the ability to timely dispute any alleged set-offs against Plaintiffs' and individual Class members' escrow funds.

581. The Court concludes that CRE may not set-off against Plaintiffs' and individual Class members' security deposit/performance bond escrow funds amounts allegedly owing to CRE or Opportunity Leasing. The Court has found that Class members cannot reasonably determine, years after they returned their trucks to CRE, the validity of any of CRE's alleged set-offs. After the passage of several years, Class members cannot be expected to have retained relevant documents and cannot be expected to remember factual details such that Class members could reasonably condone or dispute any set-off by CRE.

582. The Court concludes that it is simply too late to allow CRE to set-off against Plaintiffs' and Class members' escrow funds. "Laches has been defined to be 'negligence in the assertion of a right,' 'unreasonable delay in enforcing a known right,''such delay as will warrant the presumption that the party has waived his right.'" *Payson Building & Loan Soc. v. Taylor*, 48 P.2d 894, 901 (Utah 1935). Allowing such claims to be asserted now would be unfair and prejudicial to drivers who were entitled to final accountings years ago. The Court concludes that laches preclude CRE from raising any claim of set-off against Plaintiffs and Class members' escrow funds.

583. Thus, the Court concludes that the parties shall confer and that Plaintiffs, within sixty (60) days of the entry of these Findings of Fact and Conclusions of Law, shall submit a restitution matrix identifying the amount remaining in each individual Class members' security deposit/performance bond

at the time of lease termination. The Court further concludes that CRE shall return as restitution those amounts to those Plaintiffs and Class members.

3. Fuel/Road Tax Escrow and Fuel Tax Reserve

A. Findings of Fact

584. Each of the named Plaintiffs had monies deducted from their compensation and placed into a fuel/road tax escrow funds. None of the Plaintiffs received a final accounting detailing what specific items were deducted from their fuel/road tax escrow fund.

585. Murphy had $ 249.76 in his fuel/road tax escrow fund according to his "final accounting." Murphy's "fuel tax/actual final" was $ 115.68, according to the same "final accounting." (Ex. 75).

586. Sullivan had $ 267.91 in his "fuel tax reserve" according to his "final accounting" relating to his second ICOA. Sullivan's "fuel tax actual final" was $ 34.37, according to the same "final accounting." (Ex. 95).

587. Based upon the "final accountings" tendered by CRE to Plaintiffs, the Court cannot determine what specific items were deducted from Plaintiffs' fuel/road tax escrow funds at the time of lease termination.

588. The ICOA that Plaintiffs and Class members signed contained a provision requiring Plaintiffs and Class members to arbitrate any dispute under the ICOA. (Exs. 8, 67, 80, 92).

589. The RICOA that Murphy and Class members signed contained a provision requiring Murphy and Class members to arbitrate any dispute under the RICOA. (Ex. 71).

590. The Court previously found that the arbitration provision in CRE's lease agreements was unconscionable. The Court found that while the lease agreements required Plaintiffs to arbitrate any dispute, the agreements "allow C.R. England to act unfettered by any requirement to arbitrate. Among other things, it is able to exercise control over disputed funds, bring any legal actions it deems necessary regarding its claimed property, and to sell or refer all of its claims against the drivers rather than submit a single one to arbitration." *OOIDA v. C.R. England, Inc.*, 325 F.Supp.2d 1252, 1263 (D. Utah 2004).

591. The Court found that "C.R. England refers or sells all of its claims against its former drivers to collection agencies." The Court also found that "C.R. England has not submitted a single one of its 2,591 claims under the [lease agreements] to arbitration." *Id.* at 1261-62.

592. The RICOA continued to require Class members to arbitrate all disputes under the RICOA until the Court issued its ruling on July 13, 2004, striking down the arbitration clause. (Tr. 10/25; 1022:11-18)(MacInnes).

593. The Court finds that CRE's failure to submit a single claim to arbitration at any time during the ICOA and RICOA periods demonstrates CRE's bad faith and its intent to deprive Plaintiffs and Class members the ability to timely dispute amounts allegedly owed to CRE.

594. The Court finds that Class members cannot reasonably determine, years after they returned their trucks to CRE, the validity of any of CRE's alleged set-offs. The Class period extends back to June 1998. Thus, the Court finds that Class members would be prejudiced if required to dispute set-offs by CRE.

595. Plaintiffs' expert opined that CRE retained approximately $ 757,000 in Class members' fuel/road tax escrow funds during the ICOA period. (Ex. 634).

596. Plaintiffs' expert opined that CRE retained approximately $ 1.31 million in Class members' fuel/road tax escrow funds during the RICOA period. (Ex. 635).

B. Conclusions of Law

597. The Court incorporates its previous conclusions that it has the power to order restitution, or the return, of Plaintiffs' and Class members' escrow funds unlawfully retained by CRE.

598. The Court concludes that because the ICOA and RICOA failed to identify any specific items to which the fuel/road tax escrow funds could be applied, and the ICOA and RICOA failed to specify the conditions Plaintiffs and Class members were required to satisfy in order to have their fuel/road tax escrow funds returned, CRE may deduct only amounts for fuel/road tax obligations actually incurred by Plaintiffs and Class members.

599. The Court concludes that CRE's failure to arbitrate a single claim against Plaintiffs and Class members demonstrates CRE's bad faith. Instead of arbitrating its claims against Plaintiffs and Class members, CRE referred its claims to collection agencies, thus depriving Plaintiffs and Class members the ability to timely dispute any alleged set-offs against Plaintiffs' and individual Class members' escrow funds.

600. The Court concludes that CRE may not set-off against Plaintiffs' and individual Class members' fuel/road tax escrow funds amounts allegedly owing to CRE or Opportunity Leasing. The Court has found that Class members cannot reasonably determine, years after they returned their trucks to CRE,

the validity of any of CRE's alleged set-offs. After the passage of several years, Class members cannot be expected to have retained relevant documents and cannot be expected to remember factual details such that Class members could reasonably condone or dispute any set-off by CRE.

601. The Court concludes that it is simply too late to allow CRE to set-off against Plaintiffs' and Class members' escrow funds. "Laches has been defined to be 'negligence in the assertion of a right,' 'unreasonable delay in enforcing a known right,''such delay as will warrant the presumption that the party has waived his right.'" *Payson Building & Loan Soc. v. Taylor*, 48 P.2d 894, 901 (Utah 1935). Allowing such claims to be asserted now would be unfair and prejudicial to drivers who were entitled to final accountings years ago. The Court concludes that laches preclude CRE from raising any claim of set-off against Plaintiffs and Class members' escrow funds.

602. The Court concludes that CRE violated the Leasing Regulations by failing to return the balance of Plaintiffs' and Class members' fuel/road tax escrow funds at the time of lease termination.

603. Thus, the Court concludes that the parties shall confer and that Plaintiffs, within sixty (60) days of the entry of these Findings of Fact and Conclusions of Law, shall submit a restitution matrix identifying the amount remaining in individual Class members' fuel/road tax escrow fund at the time of lease termination. The Court further concludes that CRE shall return as restitution those amounts to those Plaintiffs and Class members.

4. Misadministration of Escrow Funds

A. Findings of Fact

604. The Court previously found that Plaintiffs Piper and Sullivan received their "final accountings" from CRE approximately 55 days and seven months respectively after Plaintiffs' after the termination of their ICOAs.

605. The Court concluded that CRE violated section 376.12(k)(6) by failing to provide a final accounting to Piper and to Sullivan within the 45-day period set forth in the regulations.

606. At trial, Plaintiffs introduced evidence demonstrating that not only was Sullivan's "final accounting" tendered seven months late but also that the "final accounting" was grossly incorrect.

607. Between the time Sullivan terminated his ICOA on May 7, 1999, and when he received the "final accounting," from CRE on December 13, 1999, Sullivan called CRE three or four times asking them why he had not received the accounting. (Tr. 10/17; 297:25-298:4)(Sullivan).

608. According to the December 1999 "final accounting," Sullivan owed CRE more than $8,700. (Ex. 95) (Tr. 10/17; 299:1-10)(Sullivan). Sullivan was "extremely shocked and scared" when he received the letter stating that he owed CRE $ 8,700. (Tr. 10/17; 299:11-19)(Sullivan).

609. Sullivan was charged more than $9,500 for remaining lease payments to Opportunity Leasing. (Ex. 95) (Tr. 10/17; 304:3-14).

610. Sullivan called CRE's owner operator department and told them that the final accounting was wrong. Sullivan spoke with Penny and he requested that she double check the accounting. (Tr. 10/17; 305:5-306:8)(Sullivan). In response, Penny told Sullivan that the accounting was correct and accurate.

(Tr. 10/17; 306:9-11)(Sullivan). When Sullivan called CRE the next time, he was told that the final accounting was correct and "I should be a man and pay it." (Tr. 10/17; 306:13-25)(Sullivan).

611. CRE referred Sullivan's alleged $8,700 debt to a collection agency, Accelerated Collections. (Tr. 10/17; 307:3-10) (Ex. 583, 584). The collection agency called Sullivan's home repeatedly. (Tr. 10/17; 308:5-6). The collection agency called Sullivan at his place of employment. (Tr. 10/17; 308:7-9).

612. Sullivan hired an attorney in Bakersfield, California to dispute the debt. (See Ex. 587).

613. In April of 2000, Sullivan traveled to Salt Lake City to confront CRE regarding the incorrect accounting. (Tr. 10/17; 309:10-23)(Sullivan). Sullivan asked to speak to Jim MacInnes. MacInnes told Sullivan to speak with Tricia O'Neal. (Tr. 10/17; 310:1-13).

614. Tricia Clark O'Neal has been an employee of CRE since 1998. She was an administrative assistant in the independent contractor division. Currently, she is supervisor of that division. (Tr. 10/25; 1098:1-12)(O'Neal).

615. O'Neal knew "right of the top of her head" that the amount of remaining lease payments charged to Sullivan was wrong. (Tr. 10/17; 310:17-24)(Sullivan). O'Neal told Sullivan that she specifically remembered that Sullivan's truck was released in three days. (Tr. 10/17; 310:24-311:8)(Sullivan).

616. O'Neal adjusted the amount Sullivan allegedly owed CRE from $8,700 to $1,359.24. (Tr. 10/17; 311:15-312:11)(Sullivan).

617. The Court finds that Sullivan was injured by CRE's grossly inaccurate and late final accounting. CRE reported that Sullivan owed the company $8,700 to credit reporting bureaus. (Tr. 10/17; 312:12-18)(Sullivan). The credit report caused Sullivan to be denied a mortgage on a new home. (Tr. 10/17; 312:19-24)(Sullivan). Sullivan's credit report, as of November 4, 2005, still shows Sullivan owing CRE $8,700. (Ex. 641, p.27 of 36) (Tr. 10/17; 314:9-315:25)(Sullivan). The negative credit report by CRE affected Sullivan's ability to obtain financing for a truck. He was forced to pay a higher interest rate of 14 percent. (Tr. 10/18; 367:24-368:18)(Sullivan).

618. MacInnes testified that Sullivan's final accounting "just fell through the cracks." (Tr. 10/24; 923:7-21)(MacInnes).

619. Plaintiffs submit that CRE's failure to provide timely and accurate final accountings is a class-wide issue as opposed to an issue limited to Sullivan.

620. The Court finds that the grossly late and inaccurate final accounting tendered to Sullivan was not an isolated circumstance. During 1999, the period in which Sullivan's final accounting was prepared, O'Neal's department, was shorthanded. "We had more work than we could handle." (Tr. 10/25; 1111:12-1112:2)(O'Neal).

621. During 1999, the preparation of final settlement statements was very time consuming. The work was all performed manually. (Tr. 10/25; 1112:2-12)(O'Neal)

622. During 1999, there was office turnover in O'Neal's department. She had to bring in temporary workers to prepare final settlements. There were at least five different people in 1999 preparing final settlement statements. (Tr. 10/25; 14-1113:7).

623. O'Neal admitted that these circumstances contributed to the fact that Sullivan's final accounting was tendered far beyond the 45-day period. (Tr. 10/25; 1113:11-18).

624. O'Neal admitted that during 1999, final accountings were "occasionally" made beyond the 45-day period. (Tr. 10/25; 1110:8-1111:4)(O'Neal).

625. According to O'Neal, the gross inaccuracy of Sullivan's final accounting was due to the fact that an incorrect date was entered manually. (Tr. 10/25; 1113:19-1114:11)(O'Neal).

626. CRE has performed no analysis to determine how many final settlements were tendered beyond the 45-day period. (Tr. 10/25; 1115:5-9)(O'Neal). CRE has conducted no analysis as to how many of the 7,000 drivers received their final accountings late (Tr. 10/25; 1101:22-25)(O'Neal).

627. CRE has not performed any analysis to determine whether final settlements prepared during the ICOA time frame were accurate. (Tr. 10/25; 1115:10-13).

628. After CRE learned that Sullivan's final settlement statement was grossly inaccurate, CRE took no action to determine whether or not any other drivers' final settlement statements were inaccurate. (Tr. 10/25; 1115:18-24)(O'Neal).

629. The Court finds that during the ICOA period, the CRE administrative unit responsible for preparing final settlement statements to independent contractors was in disarray. The Court finds that the department was understaffed and that, as a result temporary workers were brought in to prepare final settlements. The Court also finds that CRE personnel entered data for final settlement statements manually. The Court finds that these factual circumstances led to CRE preparing a grossly inaccurate and late final accounting for Sullivan.

630. The Court finds that these factual circumstances existed during the ICOA period and were likely to have caused CRE to prepare inaccurate and late final accountings for other Class members.

631. The Court also finds that CRE failed to engage in any analysis of whether its final accountings prepared during the ICOA period were inaccurate and/or late. As a result, the Court finds that there is a high probability that other Class members were provided inaccurate and/or late final accountings.

632. The Court finds that CRE's failure to provide accurate and timely final accountings is a class issue.

B. Conclusions of Law

633. The Court incorporates its previous conclusions that it has the power to order restitution, or the return, of Plaintiffs' and Class members' escrow funds unlawfully retained by CRE.

634. The Court concludes that CRE violated 49 C.F.R. § 376.12(k) on a class-wide basis by failing to provide Plaintiffs and Class members with accurate and timely final accountings.

635. The Court has found that Class members cannot reasonably determine, years after they terminated their agreements with CRE, the validity of any of CRE's alleged set-offs. After the passage of several years, Class members cannot be expected to have retained relevant documents and cannot be expected to remember factual details such that Class members could reasonably condone or dispute any set-off by CRE.

636. The Court concludes that laches preclude CRE from raising any claim of set-off against Plaintiffs and Class members' escrow funds.

637. The Court concludes that the parties shall confer and that Plaintiffs, within sixty (60) days of the entry of these Findings of Fact and Conclusions of Law, shall submit a restitution matrix identifying the amount remaining in its individual Class members' escrow funds. The Court further concludes that CRE shall return as restitution those amounts to those Plaintiffs and Class members.

F. Equitable Relief for CRE's Forced Purchase Violations Under the ICOA and RICOA

1. Forced Purchase/Rental of Satellite Communications Services Under the ICOA

A. Findings of Fact

638. The Court concluded that CRE violated section 376.12(i) by forcing Plaintiffs to purchase satellite communications services ("Qualcomm") from CRE as a condition of entering into the ICOA.

639. CRE's employee drivers do not pay for Qualcomm. (Tr. 10/18; 379:2-3) (McGuire).

640. Independent contractor drivers pay fifteen dollars per week for Qualcomm services. (Tr. 10/18; 379:4-7) (McGuire).

641. The Qualcomm fees paid by the independent contractor drivers cover the entire cost of the communication system. They do not cover any of the hardware costs. (Tr. 10/18; 379:21-25) (McGuire).

642. The Court finds that the Qualcomm system is at the heart of CRE's business model. (Tr. 10/18; 374:2-4) (McGuire). The Court also finds that the information transmitted through the Qualcomm system provides considerable benefits to CRE. CRE allows some customers, who are

shippers, the ability to tap into CRE's Qualcomm system so that the customer can determine the exact location of the truck hauling its goods. (Tr. 10/18; 374:9-3) (McGuire).

643. Once per hour, the Qualcomm unit in the truck sends CRE a "ping" which is a message from the Qualcomm unit to CRE providing data regarding the location and speed of the truck. (Tr. 10/18; 375:12-16) (McGuire).

644. Qualcomm helps CRE calculate its fuel taxes. CRE tracks its trucks' mileages per state by the footprint Qualcomm uses. (Tr. 10/18; 375:10-16) (McGuire).

645. CRE is a refrigerator hauler. CRE uses Qualcomm in tracking the company's trailers. Qualcomm provides information regarding the trailer's refrigeration unit. If there is a problem with the refrigeration unit, CRE can send the driver a Qualcomm message to adjust the temperature. (Tr. 10/18; 375:17-25) (McGuire).

646. Qualcomm allows CRE to detect possible theft of fuel. (Tr. 10/18; 377:13-25) (McGuire). The electronic control module contained within the Qualcomm allows CRE to track its miles per gallon and idle percentage on its trucks. (Tr. 10/18; 376:1-7) (McGuire).

647. Plaintiffs' expert opined that CRE's Qualcomm fees were "excessive." (Tr. 10/19; 516:1-6). Pakter defined excessive, in this context, as a charge that exceeds a reasonable or certain limit. (Tr. 10/19; 516:7-10)

648. In order to determine whether the Qualcomm fee was excessive, Pakter compared the cost charged to drivers to the cost incurred by CRE and the benefits of those costs, and who those costs were incurred for the benefit of. (Tr. 10/19; 516:11-15).

649. Based on his review of the documents, Pakter concluded that Qualcomm is critical and integral for CRE's operations, financial record keeping, compliance and client service. (Tr. 10/19; 517:6-11).

650. Pakter also concluded that Qualcomm is far less critical to the businesses of the individual owner-operator because the owner-operators would have other means of communicating with the company. (Tr. 10/19; 514-17:20-518:5).

651. Plaintiffs testified that Qualcomm messages did not contain a sufficient number of lines to include critical compensation information, such as amounts deducted for certain charge-backs. (Tr. 10/17; 226:11-21)(Piper); (Tr. 10/17; 185:9-186:10)(Murphy).

652. Pakter concluded that the messaging cost of the Qualcomm is CRE's cost of doing business. It is CRE's communication costs and it is incurred in order for CRE to properly manage and control its business. (Tr. 10/19; 522:22-523:3).

653. CRE's expert disagreed with Pakter's conclusion. According to Hoffman, there is no way "with any reasonable certainty" to allocate the benefits of the Qualcomm system between CRE and its independent contractor drivers.

654. Hoffman did, however, perform a cost allocation analysis for CRE's Qualcomm system. According to Hoffman, CRE paid a total of $2,170,747 to Qualcomm for messaging costs associated with CRE's independent contractors during the ICOA period. (Ex. A6). Hoffman also opined that CRE incurred hardware costs, principally depreciation of the Qualcomm unit, in the amount of $709,276 during the ICOA period. (Ex. A6). Hoffman also allocated a total of $45,317 in McGuire's salary to CRE's Qualcomm costs. (Ex. A6).

655. According to Pakter, CRE charged Class members a total of $2,038,401 for Qualcomm usage fees during the ICOA period. (Ex. 636B); (Tr. 10/19; 542:18-24)(Pakter). Hoffman, on the other hand, concluded that Class members paid $1,989,355 in Qualcomm usage fees during the ICOA period. (Ex. A6). The Court finds that Class members were charged a total of approximately $2,000,000 for Qualcomm usage fees during the ICOA period.

656. The Court also finds, based on Hoffman's analysis, that Class members paid 68 percent of the entire cost of CRE's Qualcomm system, including all messaging costs, hardware costs and salaries. (Ex. A6); (Tr. 10/25; 1193:16-24)(Hoffman).

657. The Court finds that while Class members did obtain some benefit from CRE's Qualcomm system, Class members did not receive 68 percent of the benefits of the system. Instead, the Court finds, based upon the entire trial record, that Class members received no more than ten percent of the total benefits of CRE's Qualcomm system. The Court bases this finding on the following facts: (1) CRE, as opposed to Class members selected this system and CRE's ICOA required Class members to purchase or rent the system; (2) the Qualcomm system was at the heart of CRE's business model; (3) CRE was dependent upon the Qualcomm system for most of its key corporate functions; (4) Class members could have communicated with CRE by other means such as by telephone; and (5) limitations in the Qualcomm system limited its value to Class members.

658. Piper was charged $1,744.43 by CRE for satellite usage fees during the period he was leased to CRE. (Ex. 612).

659. Murphy was charged $857.20 by CRE for satellite usage fees during the period he was leased to CRE. (Ex. 612).

660. Sullivan was charged $462.87 by CRE for satellite usage fees during the period he was leased to CRE. (Ex. 612).

B. Conclusions of Law

661. Plaintiffs seek restitution of the full amount charged back to Plaintiffs and Class members for Qualcomm usage fees during the ICOA period.

662. First, the Court concludes that restitution is an appropriate equitable remedy to enforce violations of the forced purchase provisions the Leasing Regulations. The Court has previously cited several pre-I.C.C. Termination Act cases wherein the district court ordered restitution as a remedy for violations of the regulations.

663. In determining whether restitution is warranted in this instance, the Court will consider the factors identified by the Tenth Circuit in *Wessel v. City of Albuquerque*, 463 F.3d 1138, 1147 (10th Cir. 2006). These factors include: (1) the nature of the illegality; (2) the extent of the party's culpability; and (3) the strength of the deterrent effect of the decision. *Id.*

664. The Court concludes that the nature of the illegality supports an award of restitution. As the Court has stated previously, the purposes of the Leasing Regulations are to promote truth-in-leasing, meaning a full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties as well as to eliminate or reduce opportunities for skimming and other illegal or inequitable practices. The Court holds that ordering restitution of monies

unlawfully deducted from Plaintiffs' and Class members' compensation for the forced purchase of satellite communications services furthers the purposes of the Leasing Regulations.

665. The Court concludes that CRE acted consciously in forcing Plaintiffs and Class members to purchase satellite communications services from CRE.

666. The Court concludes that CRE's illegal conduct in this instance (the forced purchase of satellite communications services) was not central to the performance of the ICOA.

667. The Court holds that the deterrent effect of an award of restitution for the forced purchase of satellite communications services would be substantial. Indeed, the Court concludes that the award of restitution would deter CRE and other motor carriers from engaging in such illegal conduct in the future.

668. Finally, to the extent that harm is relevant to the Court's award of restitution, the Court holds that Plaintiffs and Class members were harmed by CRE's illegal conduct in that Class members paid more than two-thirds of the total cost of CRE's satellite communications system, but received less than ten percent of the benefit of the satellite communications system.

669. The Court awards Plaintiffs and Class members $2,000,000 in restitution for CRE's unlawful forced-purchase of satellite communications services. The Court requests that Plaintiffs submit a proposed matrix for restitution to Plaintiffs and individual Class members no later than sixty (60) days after entry of these Findings of Fact and Conclusions of Law.

2. Forced Purchase of Settlement Administrative Services Under the ICOA and RICOA

A. Findings of Fact

670. CRE prepared settlement statements for both owner-operators and for lease operators. (Tr. 10/23; 828:15-17)(Cohen).

671. CRE did not charge owner-operators like Murphy for "settlement administrative fees" during the entire ICOA period. In fact, CRE did not charge owner-operators a settlement administration fee until 2004. (Tr. 10/24; 963:1-964:12)(MacInnes).

672. Essentially, owner-operators were getting the same benefits as the lease-operators, but were not being charged for it. (Tr. 10/24; 964:6-9)(MacInnes).

673. The purported purpose of the "settlement administrative fee" has varied over time.

674. According to Lee Cohen, the reason owner-operators were not charged for "settlement administrative" services is because "owner-operators, the pure owner-operators that owned their own equipment, had their own business relationships, all we did is give them their settlement and they took it to their own CPAs. The lease drivers we brought in, they sat down with people in the company and went through every one of their settlements and there was a cost related to that." (Tr. 10/23; 830:2-8).

675. According to Cohen, the settlement administration fee was not intended to recoup administrative costs relating to the preparation of the settlement statements, "it was for the time and energy and the additional people put in for lease operators to put them in a business mode and going

over every one of their settlements when they came into Salt Lake City." (Tr. 10/23; 830:9-16)(Cohen).

676. Paige Zhang, a financial analyst for CRE, testified that she was asked by Keith Wallace, CRE's CFO, to analyze the Settlement Administrative Fee in July 2002 (one month after suit was filed in this case). (Zhang Dep. Designation, March 18, 2005; 29:5-30:7).

677. According to Zhang, the settlement administrative fee was intended to "reimburse" CRE's Independent Contractor Division for the "services" provided by the Independent Contractor Department. (Zhang Dep. Designation, March 18, 2005; 30:9-16).

678. Zhang prepared a financial analysis of the Settlement Administrative Fee purporting to calculate the "costs" justifying the fee. Zhang allocated the salaries of the entire independent contractor division, (eight to ten employees, including Jim MacInnes). (Zhang Deposition Designation, March 18, 2005; 54:25-55:22).

679. Zhang admitted that the employees of the independent contractor division are not "directly involved with settlement. Actually, the settlement was done by our payroll department." (Zhang Deposition Designation, March 18, 2005; 56:15-16).

680. Zhang testified that she did not include any payroll department employees in her calculations, stating that "I probably treated payroll as part of the overhead." She also stated that because payroll department employees perform tasks for employee drivers, as well as for independent contractor drivers, she did not include them in her analysis. (Zhang Deposition Designation, March 18, 2005; 56:17-57:17).

681. According to MacInnes, the settlement admin fee is intended to cover the costs associated with the drivers "dropping their trip pak in a trip box and being picked up and overnighted to a facility in Ohio where their trips are processed." (Tr. 10/24; 963:6-10)(MacInnes).

682. Defendant's expert, Richard Hoffman, completely disregarded Zhang's analysis, and instead allocated most of the costs of the payroll division in an attempt to justify the administrative fee. (Tr. 10/25; 1154:6-1156:6)(Hoffman); (Ex. G-6).

683. The settlement administrative fee was a "token" charge made by CRE to owner-operators. (Tr. 10/23; 838:22-839:9)(Cohen).

684. There was no study performed by CRE at the time the settlement admin fee was initiated to determine the actual cost to CRE for settlement administration. (Tr. 10/23; 839:10-15)(Cohen).

685. Plaintiffs' expert testified opined that CRE's settlement administrative fee was excessive because the fee exceeded CRE's costs that CRE disbursed to third party vendors. (Tr. 10/19; 526:16-22)(Pakter).

686. Pakter opined that CRE's settlement administrative fee was also excessive because the services associated with the preparation of the settlement statements are CRE's cost of doing business. (Tr. 10/19; 526:16-527:9)(Pakter). The basis of Pakter's opinion is that CRE decided for its own business purposes to have an owner-operator division and an owner-operator program. Settlement preparation costs are CRE's costs of its decision to have this program. (Tr. 10/19; 527:10-16)(Pakter).

687. The Court finds that CRE collected $ 348,636 in settlement administrative fees during the ICOA period. (*See* Ex. 636B).

688. The Court finds that CRE collected $ 510,278 in settlement administrative fees during the RICOA period. (*See* Ex. 636B).

689. According to CRE's expert, CRE incurred "costs" in the amount of $ 496,998 during the ICOA period and in amount of $ 722,577 during the RICOA period, for independent contractor division salaries, payroll department salaries and costs to TMI, the company that actually scans and processes the "trip packs" containing independent contractor settlement data. (Ex. G6).

690. According to Hoffman's analysis, CRE's costs associated with settlement administration have increased over time. (Ex. G6).

691. The settlement administrative fee has remained unchanged at $ 3.46 per week, since its inception in 1998.

692. The Court finds that the settlement administration fee, to the extent its purpose was to recoup costs associated with preparing independent contractor settlement statements, was not a bona fide or legitimate fee. The Court bases this finding on the following facts: (1) the settlement administrative fee was not charged to owner-operators such as Murphy during the entire ICOA period and throughout most of the RICOA period; (2) CRE performed the exact same settlement-related services for owner-operators as it performed for lease-operators; (3) CRE failed to conduct any study to determine the cost of preparing settlement statements for lease operators only; and (4) the settlement administration fee does not bear any relation to the actual administrative costs incurred by CRE in administering independent contractor settlement statements.

B. Conclusions of Law

693. Plaintiffs seek restitution of the full amount charged back to Plaintiffs and Class members for settlement administrative services during the ICOA and RICOA periods.

694. First, the Court concludes that restitution is an appropriate equitable remedy to enforce violations of the forced purchase provisions the Leasing Regulations. The Court has previously cited several pre-I.C.C. Termination Act cases wherein the district court ordered restitution as a remedy for violations of the regulations.

695. The Court concludes that the nature of the illegality supports an award of restitution. As the Court has stated previously, the purposes of the Leasing Regulations are to promote truth-in-leasing, meaning a full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties as well as to eliminate or reduce opportunities for skimming and other illegal or inequitable practices. The Court holds that ordering restitution of monies unlawfully deducted from Plaintiffs' and Class members' compensation for the forced purchase of settlement administrative services furthers the purposes of the Leasing Regulations.

696. The Court concludes that CRE acted consciously in forcing Plaintiffs and Class members to purchase settlement administrative services from CRE.

697. The Court concludes that the deterrent effect of an award of restitution for the forced purchase of settlement administrative services would be substantial. Indeed, the Court concludes that the award of restitution would deter CRE and other motor carriers from engaging in such illegal conduct in the future.

698. Finally, to the extent that harm is relevant to the Court's award of restitution, the Court holds that Plaintiffs and Class members were harmed by CRE's illegal conduct in that Class members paid more $ 850,000 in fees for "administrative services" that the Court has found to be illegitimate and substantially exceeded the amounts paid by CRE to third parties for such services.

699. The Court awards Plaintiffs and Class members $ 858,914 in restitution for CRE's unlawful forced-purchase of settlement administrative services. The Court requests that Plaintiffs submit a proposed matrix for restitution to Plaintiffs and individual Class members no later than sixty (60) days after entry of these Findings of Fact and Conclusions of Law.

3. Forced Purchase of Insurance Administrative Services During the ICOA Period

A. Findings of Fact

700. Lee Cohen testified that the insurance administration fee was a "token fee." (Tr. 10/23; 822:16-24)(Cohen).

701. CRE did not perform a formal study at the time the insurance admin fee was initiated to determine what CRE's actual administrative costs were. Instead, according to Lee Cohen, "It was a lot on the blackboard. To my knowledge, there was nothing really written." (Tr. 10/23; 839:10-25)(Cohen). Pakter opined that CRE's insurance administrative fee was excessive because the fee exceeded CRE's costs that CRE disbursed to third party vendors. (Tr. 10/19; 530:10-18).

702. Murphy was charged a total of $ 132.00 for insurance administrative fees during the period he was leased to CRE. (Ex. 612).

703. Piper was charged a total of $ 271.92 for insurance administrative fees during the period he was leased to CRE. (Ex. 612).

704. Sullivan was charged a total of $ 110.23 for insurance administrative fees during the period he was leased to CRE. (Ex. 612).

705. Class members were charged a total of $ 312,060 for insurance administrative fees during the ICOA (6/6/98 – 8/7/02) period. (Ex. 636B).

706. CRE's expert opined that during the ICOA period CRE's internal "costs" for the administration of Class members' insurance was $ 264,791. (Ex. H6).

707. Hoffman concluded that, even taking into account CRE's "internal costs," CRE's collection of insurance administrative fees exceeded CRE's "internal costs" by $ 47,269 during the ICOA period. (Ex. H-6).

708. The Court finds that CRE's charge-backs for insurance-related administrative fees were excessive as CRE's revenues for insurance-related administrative fees exceeded CRE's costs, whether those costs are limited to third party vendors or include CRE's internal costs.

709. The Court finds that Plaintiffs and Class members were injured by CRE's charge-back of insurance-related administrative fees as CRE's revenues for insurance-related administrative fees exceeded CRE's costs, whether those costs are limited to third party vendors or include CRE's internal costs.

B. Conclusions of Law

710. Plaintiffs seek restitution of the full amount charged back to Plaintiffs and Class members for insurance administrative services during the ICOA period.

711. First, the Court concludes that restitution is an appropriate equitable remedy to enforce violations of the forced purchase provisions the Leasing Regulations. The Court has previously cited several pre-I.C.C. Termination Act cases wherein the district court ordered restitution as a remedy for violations of the regulations.

712. The Court concludes that the nature of the illegality supports an award of restitution. As the Court has stated previously, the purposes of the Leasing Regulations are to promote truth-in-leasing, meaning a full disclosure between the carrier and the owner-operator of the elements, obligations, and benefits of leasing contracts signed by both parties as well as to eliminate or reduce opportunities for skimming and other illegal or inequitable practices. The Court holds that ordering restitution of monies unlawfully deducted from Plaintiffs' and Class members' compensation for the forced purchase of insurance administrative services furthers the purposes of the Leasing Regulations.

713. The Court concludes that CRE acted consciously in forcing Plaintiffs and Class members to purchase insurance administrative services from CRE.

714. The Court concludes that the deterrent effect of an award of restitution for the forced purchase of insurance administrative services would be substantial. Indeed, the Court concludes that the award of restitution would deter CRE and other motor carriers from engaging in such illegal conduct in the future.

715. Finally, to the extent that harm is relevant to the Court's award of restitution, the Court holds that Plaintiffs and Class members were harmed by CRE's illegal conduct in that Class members paid over $ 300,000 in fees for "administrative services" that the Court has found to be excessive in that CRE's revenues for insurance-related administrative fees exceeded CRE's costs, whether those costs are limited to third party vendors or include CRE's internal costs.

716. The Court awards Plaintiffs and Class members $ 312,060 in restitution for CRE's unlawful forced-purchase of insurance administrative services. The Court requests that Plaintiffs submit a proposed matrix for restitution to Plaintiffs and individual Class members no later than sixty (60) days after entry of these Findings of Fact and Conclusions of Law.

DATED this 1st day of March, 2007.

/s/Brent O. Hatch
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Brent O. Hatch

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CERTIFICATE OF SERVICE

I certify that on this 1st day of March, 2007, I caused a copy of the above Plaintiffs' Proposed Findings of Fact and Conclusions of Law to be served on counsel of record listed below by the Court's CM/ECF system.

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