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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., et al., Plaintiffs, v. C.R. ENGLAND, INC., Defendant.	**PLAINTIFFS' TRIAL BRIEF** Case No. 2:02-CV-950 TS Judge Ted Stewart Magistrate Judge David O. Nuffer

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PLAINTIFFS' TRIAL BRIEF

I. INTRODUCTION

The trial of a class action is similar to a traditional civil trial. The principal distinction is that claims of the certified class are adjudicated through the claims of representative plaintiffs. As with a traditional civil trial, the Court must first decide if the Defendant is liable. Plaintiffs seek enforcement of what are commonly called the Truth-in-Leasing regulations ("Leasing Regulations") found at 49 C.F.R. Part 376. Plaintiffs' claims are grounded upon the following three sections of the Leasing Regulations. These provisions are as follows:

(1) Charge-Backs Against Compensation: 49 C.F.R. 376.12(h) requires that the "[l]ease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed." The regulation also requires the motor carrier to afford copies of documents necessary for the owner-operator to verify the validity of the charge-back.

(2) Administration of Escrow Funds: The escrow provisions of the federal Truth-in-Leasing regulations, 49 C.F.R. §376.12(k), require in relevant part that the lease specify and that the carrier perform:

> (1) The amount of any escrow fund …
>
> (2) The specific items to which the escrow fund can be applied …
>
> (3) The carrier shall provide an accounting…
>
> (5) The carrier shall pay interest on the escrow fund …
>
> (6) [At termination] the carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease …. In no event shall the escrow

> fund be returned later than 45 days from the date of termination.

(3) Forced Purchase of Goods and Services: Section 376.12(i) states that "[t]he lease shall specify that the lessor is not required to purchase or rent any products, equipment or services form the authorized carrier as a condition of entering into the lease arrangement."

In this case, the threshold question is whether Defendant violated the Truth-in-Leasing Regulations. If so, the Court will determine what any remedies, if any, are required. The remedies sought in this case consist of declaratory and injunctive relief and the equitable remedies of restitution, disgorgement and an accounting.

Plaintiffs submit this trial brief to assist the Court in identifying and analyzing the principal legal issues that will arise at trial.

II. LIABILITY OF C.R. ENGLAND UNDER THE ORIGINAL ICOA

A. Standard for Determining Liability

A threshold issue for the Court is whether Defendant is liable to Plaintiffs (and the certified Class) for violations of the federal Truth-in-Leasing regulations.

As a federally regulated motor carrier, the Independent Contractor Operating Agreement ("ICOA") and the Revised Independent Contractor Operating Agreement ("RICOA") that C.R. England entered into with Plaintiffs for the use of their trucks must conform to Leasing Regulations at 49 C.F.R. Part 376. *See* 49 C.F.R. § 376.11(a).

This Court rejected Defendant's argument that it need only "substantially comply" with the Leasing Regulations. Defendant's position is that defects in the written lease agreement can be ignored if the motor carrier communicated substantially similar information required by the regulations outside of the four corners of the lease. This Court rejected the Defendant's "substantial compliance" theory: "[t]he Court finds further that the appropriate standard to this case is one of strict compliance with the language of the regulation. To the extent a lease

agreement in question fails to comply with or is contrary to the applicable regulation, the regulation prevails."[1]

Plaintiffs will prove at trial that the Defendant's Lease agreements violated the Leasing Regulations. Plaintiffs will also prove that Defendant's conduct in implementing the lease provisions also violated the Leasing Regulations.

B. Defendant's ICOA Violated the Charge-Back Regulation

Evidence presented at trial will show that each of the Plaintiffs entered into the ICOA with Defendant and that the terms of the ICOA were non-negotiable and uniform. Plaintiffs will prove that the ICOA form agreement was used by C.R. England from at least August 1998 until August 2002.

As described above, 49 C.F.R. 376.12(h) requires that C.R. England's ICOA must "clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed." The regulation also requires the motor carrier to afford copies of documents necessary for the owner-operator to verify the validity of the charge-back. In interpreting this regulation, the Court held that subsection (h) required Defendant's ICOA to disclose the existence of any mark-up as part of the "recitation" requirement.[2]

In this case, Plaintiffs will prove that Defendant's ICOA failed to clearly specify that the following items were initially paid for by C.R. England, but ultimately deducted from Plaintiffs' compensation at the time of payment or settlement: "trans fees;" "misc trans fee;" "OFS bookkeeping service;" "truck repair costs, "Admin Chg O/O;" "Admin Chg Shop;" "Termination Admin Fee;" and "Termination Admin Letter." None of these items were disclosed in the ICOA.

[1] Motion Hearing, Court's Ruling; September 12, 2006 at 5-6.
[2] Motion Hearing, Court's Ruling; September 12, 2006 at 5.

The failure to disclose these charge-back items in the Lease Agreement is readily apparent when compared to the items contained on the Plaintiffs' Settlement Statements.[3]

Plaintiffs will also prove at trial that even where charge-backs were disclosed in the ICOA, the ICOA failed to contain a recitation as to how the amount of each item was to be computed. For example, the ICOA failed to contain such recitations for charge-backs for fuel and repairs. In the case of fuel, the ICOA states: "If you have secured an advance of any kind from us, such as for fuel, owe us money, or request to us to withhold money for any reason on Addendum 3, We shall make deductions from any monies otherwise due YOU."[4] The only other reference to fuel is contained in ICOA Addendum 2: "We will attempt to negotiate fuel discounts with fuel vendors and YOU will be advised of availability and amount of the discount periodically."[5]

In reality, Defendant utterly failed in fulfilling this promise. Defendant only passed through 40 percent of the discounts it negotiated with fuel vendors to Plaintiffs and Class members. Defendant, without any disclosure to the Plaintiffs, retained sixty percent of all discounts generated from Plaintiffs' fuel purchases. The ICOA's failure to contain a recitation as to how the amount charged-back for fuel was computed (i.e. retail fuel price less 40 percent of the discounts). As a result, the ICOA violated section 376.12(h) by failing to contain a recitation as to how the amount of fuel was computed.

The same is true for charge-backs for repairs. Here, C.R. England marked-up all parts used in the repair and maintenance of Plaintiffs' tractor at the England Service Center ("ESC") by thirty percent.[6] The ICOA's disclosure of repair related charge-backs is limited to a single clause which is completely silent regarding mark-ups on parts:

---

[3] Compare Pls. Trial Exhibit 8 and Exhibits 419, 420, 423 and 425, attached to this Brief.
[4] ICOA; Pls. Trial Exhibit 8, ¶ 4.
[5] ICOA; Exhibit 8, Addendum 2at ¶ V.
[6] *See e.g.* Letter from Todd England and Carl Yeck acknowledging the company's practice of marking-up tires by 30%; Pls. Trial Exhibit 40, attached to this Brief.

> 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 the YOU authorize the amount of the transaction to be deducted from contract settlements per Addendum 3 to this Agreement.[7]

The ICOA violated the charge-back regulation by failing to contain a recitation as to how charges for truck repairs made at the ESC were computed and by filing to disclose the 30 percent mark-up on parts.

In addition, the ICOA failed to contain an accurate statement as to how charge-backs for tires were to be computed. According to the ICOA, "YOU may purchase tires at the fleet discount price plus a 5% administrative fee if YOU authorize on Addendum 3 to have payment to be deducted."[8] This statement is false. C.R. England added a 30 percent mark-up to tire purchases made by Plaintiffs through C.R. England. Thus, the ICOA failed to contain an accurate recitation as to how charge-backs for tires were to be computed.

Finally, the ICOA violated the documentation clause of section 376.12(h). Paragraph 2 of the ICOA states that, "All settlements shall be final and cannot be questioned or disputed by either of us unless notice is given the other party within 60 days of the settlement." Paragraph 4 provides that, "Upon reasonable request, We shall provide documents validating such deductions unless related to a settlement considered final under Paragraph 2."

Paragraphs 2 and 4 of the ICOA attempt to limit C.R. England's responsibility to provide documentation for Plaintiffs' charge-backs to only those charge-backs less than 60 days old. This restriction is not in compliance with the legal requirements. In addition, Plaintiffs will testify at trial that this temporal restriction is unreasonable because Plaintiffs were on the road

[7] ICOA; Exhibit 8, Addendum 2at ¶ IV.
[8] ICOA; Exhibit 8, Addendum 2at ¶ IV.

for weeks at a time and had no ability to review settlements statements or request documents until they returned home. Indeed, the 60-day provision eviscerated the right of Plaintiffs and Class members to be afforded copies of documents necessary for the owner-operator to verify the validity of the charge-backs. Thus, the effect of the ICOA is to unlawfully limit Defendant's obligation to provide documentation necessary to verify the validity of the charge-back.

C. Defendant's ICOA Violated the Escrow Provisions of the Leasing Regulations.

1. *The ICOA Created Three Separate Escrow Funds*

The ICOA as applied by C.R. England created three separate escrow funds. The first fund is the "Maintenance Escrow." Its purpose is pay for replacement tires and for major repairs to the tractor. The Maintenance Escrow fund is created in Addendum 2, paragraph II, of the ICOA, which provides, "You will pay five hundred dollars ($ 500.00) per tractor immediately upon executing this Agreement and authorize a minimum deduction of 5 cents per dispatched mile from contract settlements which WE shall hold in this escrow . . ."

The second escrow fund is the "Performance Bond." The purpose of a Performance Bond is to guarantee performance under the contract. The Performance Bond fund is created by Addendum 3 to the ICOA, which provides for the deduction of $ 50.00 per week for five weeks for the Performance Bond.

The third escrow fund is the "Fuel/Road Tax" fund. The purpose of this fund is to pay for state fuel and road taxes. The Fuel/Road Tax fund is created by Paragraph IX of Addendum 2 of the ICOA by allowing the deduction of amounts described in Addendum 3 for the payment of "mileage based taxes (such as fuel taxes)." Addendum 3 then allows Defendant to deduct 1.5 cents per mile for "Fuel/Road Tax."

The creation of these three escrow funds is also substantiated by the settlement statements received by Plaintiffs from Defendant. These settlement statements routinely listed deductions from compensation for "Fuel Tax Reserve," "Lease Maintenance Reserve" and "Performance Bond."[9]

2. *The ICOA Failed To Comply With the Escrow Requirements of 376.12(k)*

The ICOA failed to comply with the most basic requirements of section 376.12(k) regarding the escrowed funds. The regulations require that the lease specify:

> (1) The amount of any escrow fund …
>
> (2) The specific items to which the escrow fund can be applied
>
> (3) The carrier shall provide an accounting…
>
> (5) The carrier shall pay interest on the escrow fund …, and
>
> (6) [At termination] the carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease …. In no event shall the escrow fund be returned later than 45 days from the date of termination.

(a) <u>The Maintenance Escrow</u>

According to section 376.12(k)(2) the motor carrier lease agreement "shall specify . . . the specific items to which the escrow fund can be applied." Section 376.12(k)(6) further states that the lease must specify "the conditions the lessor must fulfill in order to have the escrow fund returned," and that "[a]t 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*

[9] *See* Settlement Statements; Pls. Trial Exhibits 419, 420, 423, and 445.

in the lease, and shall provide a final accounting to the lessor of all such final deductions made to the escrow fund." The lease must also specify that "in no event shall the escrow fund be returned later than 45 days after lease termination."

The ICOA fails to satisfy the requirements of subsections (2) and (6) which require the motor carrier lease to specify the specific items to which the escrow fund can be applied, the conditions upon which the escrow will be returned and the items which may be deducted from the escrow at lease termination. The ICOA states 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. YOU may withdraw funds from this Escrow fund only to purchase replacement tires and pay for major repairs to the vehicle under contract. WE, in our discretion, will decide what constitutes a major repair and may request that withdrawals for such purposes including tire replacements be documented by appropriate receipts. . . Upon the termination of the Agreement WE shall pay YOU the balance in the Escrow fund less any appropriate offsets within 45 days.[10]

By stating that the maintenance escrow may be applied by C.R. England to "cover any indebtedness" Plaintiffs owe Defendant, and by making final distributions to the escrow conditioned upon the deduction of "any appropriate offsets," the ICOA fails to meet the specificity requirements of subsections (2) and (6).

In *OOIDA v. Arctic Express, Inc.,* 159 F.Supp.2d 1067, 1077 (S.D. Ohio 2001), the court found a similar provision authorizing use of the maintenance escrow for a broad range of obligations to be in violation of the regulations. The *Arctic* Court explained that transforming the maintenance fund into a general fund available to satisfy any obligation of the operator,

[10] ICOA; Exhibit 8, Addendum 2at ¶ III, (emphasis added).

violated both the letter and the spirit of the regulation. *Id.* The motor carrier violated the letter of the law when it did not identify the "specific items" to which the escrow fund can be applied. The court rejected Arctic's argument that it had disclosed the "conditions for the return of the escrow funds," explaining that this argument rendered the requirements of §376.12(k)(6) meaningless. *Id.* "When Defendants provided for everything to be covered by the maintenance fund, they, in reality, specified nothing." *Id.* at 1078. Thus, the *Arctic* court held that a motor carrier may not convert a specific escrow fund (fuel tax, maintenance, etc.) into an all-purpose fund to cover other types of obligations (whether disclosed or not) at the time of lease termination.

Applying the reasoning of *Arctic* to this case, it is clear that the ICOA failed to comply with the requirements of section 376.12(k).

(b) The Fuel/Road Tax Escrow Fund

In the case of the Fuel/Road Tax escrow fund, the only requirement satisfied by the ICOA is (1), the amount of the escrow fund (1.5 cents per mile). The ICOA failed to contain any language stating what items may be deducted from the escrow fund, either during the course of the ICOA or upon termination of the ICOA. The ICOA failed to state that Plaintiffs had the right to request an accounting or that Defendant would pay interest on the escrow funds. Finally, the ICOA failed to state that these escrow funds shall be returned no later than 45 days after lease termination. Thus, the ICOA violated section 376.12(k) by failing to contain required terms and conditions relating to the Fuel/Road Tax escrow fund.

(c) Performance Bond

As with the Fuel Tax Escrow, the terms of the ICOA relating to the Performance Bond fail failed to identify the specific items to which the escrow fund may be applied. It also failed to specify the items that may be deducted at the time of lease termination. As a result, the ICOA's Performance Bond terms failed to comply with the escrow provisions of the Leasing Regulations.

D. Defendant's ICOA Violated the Forced Purchase Prohibition of the Regulations.

Section 376.12(i) states that "[t]he lease shall specify that the lessor is not required to purchase or rent any products, equipment or services from the authorized carrier as a condition of entering into the lease arrangement." In this case, the ICOA stated, "YOU are not required to purchase or rent any products, equipment or services from us a condition to executing this Agreement except as reflected on Addendum 2."[11] Addendum 2 required Plaintiffs to purchase or rent satellite communications services from Defendant as a requirement of entering into the ICOA.

Paragraph VI of Addendum 2 states:

> Satellite Communication Equipment: We will provide and install satellite communications equipment 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.

[11] ICOA; Exhibit 8, at ¶ 1.

The plain language of the ICOA indicates that Plaintiffs were required to pay a $ 15.00 per week "usage charge" to Defendant for satellite communications services as a condition of entering into the ICOA.

At the same time, Addendum 3 to the ICOA required Plaintiffs to purchase "insurance administrative services" and "settlement administrative services" from Defendant. Defendant charged Plaintiffs $ 2.31 per week for "insurance administrative services." This fee is a forced purchase because it is imposed on all drivers who purchase at least one insurance product from Defendant. At trial, Plaintiffs will testify that they were forced to purchase insurance from Defendant, and James MacInnes, the Director of Defendant's Independent Contractor Division, will corroborate Plaintiffs.

Plaintiffs were also charged $ 3.46 per week for settlement administrative services. Plaintiffs will testify at trial that they were required to purchase these "administrative services" from Defendant as a condition of entering the ICOA. MacInnes again will confirm that all drivers entering into the ICOA could not avoid being charged the settlement administrative fee.

III. DEFENDANT'S REVISED ICOA CONTINUES TO VIOLATE THE CHARGE-BACK AND ESCROW REGULATIONS.

Plaintiff James Murphy signed the Revised ICOA ("RICOA") in August 2002.[12] The RICOA continues to violate the charge-back and escrow regulations.

[12] RICOA; Pls. Trial Exhibit 71, attached to Brief.

A. Continued Violation of the Charge-Back Regulation

Attachment 3 to the RICOA is titled "Charge-Back and Deduction Items." Paragraph I contains a detailed list and description of each charge-back item. Paragraph II of Attachment 3 states that:

> If an 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 one hundred twenty (120) hours after such notice or such later time as is set forth in the notice. **YOUR failure, by the end of 120 hours 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 120-hour period.** If YOU fail to notify US of YOUR objection within the 120-hour period – or if YOU notify US of YOUR objection within the 120 hour 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.[13]

Under this provision, C.R. England may unilaterally change the amount or the method of computation of any charge-back without the agreement of the owner-operator. For example, C.R. England, after the conclusion of this lawsuit, could mark-up parts and tires by 50 percent rather than the present 30 percent. Or, C.R. England may decide that it will keep 100 percent of the discounts and rebates generated from owner-operator fuel purchases, as opposed to the 60 percent it presently retains.

Plaintiffs take issue with the clause of Paragraph II which states that if the owner-operator fails to notify C.R. England within 120 hours (five days) of his objection to the change, this silence "shall constitute YOUR express consent and authorization to US to implement the

[13] Emphasis in original.

change." If allowed to stand, this provision would give C.R. England the ability to materially change the terms of the RICOA based solely on the silence of the owner-operator.

This provision violates the terms of the Leasing Regulations. 49 C.F.R. § 376.11 states that "the authorized carrier may perform authorized transportation in equipment it does not own only under the following conditions: (a) Lease. There shall be a written lease granting the use of the equipment and meeting the requirements contained in § 376.12." Section 376.12(a) provides that "[t]he lease shall be made between the authorized carrier and the owner of the equipment. The lease shall be signed by these parties or their authorized representatives." Moreover, the Regulations define a lease "Addendum" as "[a] supplement to an existing lease which is not effective until signed by the lessor and lessee." 49 C.F.R. § 376.2(i).

In this case, any change in the terms of the RICOA would require an Addendum, which according to section 376.2(i), is not effective until *signed* by the owner-operator. The RICOA, by allowing C.R. England to unilaterally change the terms of its charge-back lease provisions without a signed addendum by the owner-operator, violates the plain language of the Leasing Regulations. The regulation is reasonable and serves an important purpose. Drivers on the road and away from home cannot in fairness be able to make an informed decision within 120 hours (5 days).

B. The RICOA Continues to Violate the Escrow Regulations

The RICOA specifically provides for three separate escrow funds: a Performance Bond, a "General Reserve," and a "Fuel Tax Reserve."[14] The RICOA has a section titled "Specific Items to Which Escrow Funds May Be Applied." This section provides:

[14] RICOA, Exhibit 71 at Attachment 2, page 2-4.

The specific items to which the Escrow Funds may be applied are:

(1) **Performance Bond.** 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 all advances, expenses, taxes, fees, finds, 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 settlements or compensation or also to deductions from YOUR Escrow Funds (all hereafter referred to as "Escrow Final Deduction Items") – to the extent that the amounts owed by YOU for such Items exceed YOUR earned and payable compensation;

(2) **General Reserve.**

(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 compensation;

(C) **(4) Fuel Tax Reserve**. All net debits over credits for 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 of any Equipment lease appended to 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.[15]

The above terms fail to comply with the requirements of subsection 376.12(k)(2) and (6). According to the RICOA, Defendant may deduct from the performance bond "all advances, expenses, taxes, fees, finds, 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." The categories listed in this language are general descriptions and not specific as required by the regulations. Further, the inclusion of "other amounts paid, owed or incurred" by C.R. England or by a third party are not specified in the RICOA. As discussed above previously herein in the context of the ICOA, by specifying everything, the RICOA, as a legal matter, has specified nothing. The RICOA uses the same language regarding deductions from the General Reserve and the Fuel Tax Reserve. The RICOA fails to specify the specific items upon which the General Reserve and Fuel Tax Reserves may be applied, or the specific items which may be deducted from the escrow after lease termination. Moreover, the RICOA allows C.R. England to convert drivers' escrow funds into all-purpose funds used to satisfy all alleged obligations of the driver. Thus, Defendant's RICOA continues to violate the escrow provisions of the Leasing Regulations.

IV. C.R. England's Conduct Violated the Leasing Regulations

C.R. England is also liable to Plaintiffs because, in addition to the defective provisions in its ICOA and RICOA, its conduct violated the Truth-in-Leasing regulations. Plaintiffs will prove at trial that C.R. England's conduct violated the Truth-in-Leasing regulations in the following respects:

[15] RICOA, Exhibit 71 at Attachment 2, page 2-4, 2-5.

A. Charge-Back Violations

Section 376.12(h) requires that for each charge-back to compensation, the owner-operator "shall be afforded copies of documents which are necessary to determine the validity of the charge." Plaintiffs will present evidence that C.R. England failed to provide Plaintiffs the documentation necessary to determine the validity of the charge-backs.

B. Escrow Violations

Section 376.12(k)(6) required C.R. England to provide return all escrow funds within 45 days after lease termination. The regulation states that at time of escrow return, the motor carrier "shall provide a final accounting to the lessor of all such final deductions made to the escrow fund."

Plaintiffs will present evidence that C.R. England failed to return escrow funds to Plaintiffs within 45 days after lease termination, and failed to provide final accountings of the escrow funds within the 45-day period. Plaintiff Sullivan terminated his ICOA on May 7, 1999.[16] Under the regulations, Defendant was required to provide a final accounting no later than June 21, 1999. Defendant provided Sullivan with a "final accounting" on December 13, 1999, claiming that Sullivan owed C.R. England and/or Opportunity Leasing $ 8,700.28.[17] This "final accounting" was, in fact grossly wrong. C.R. England sent Sullivan a revised "final accounting" in April 2000 reducing the amount Sullivan allegedly owed Defendant from $ 8,700 to $ 1,359.24, which is still incorrect.[18]

Furthermore, the "final accountings" tendered by C.R. England fail to comply with plain language of subsection 276.12(k)(6), which states that the motor carrier "shall provide a final accounting to the lessor of all such final deductions made to the escrow fund." In this case, C.R. England's "final accounting" lumps all credits (including compensation and escrow funds) and

[16] See Letter from C.R. England to Donald Sullivan confirming termination date; Pls. Trial Exhibit 94.
[17] See Letter from Opportunity Leasing to Donald Sullivan, Dec. 13, 1999; Pls. Trial Exhibit 95.
[18] See Pls. Trial Exhibits 96 and 97.

then subtracts all alleged costs and expenses from the total credit amount.[19] The accounting fails to state what specific deductions were made from which escrow funds. As a result, C.R. England violated section 376.12(k) by failing to return escrow funds within 45 days of lease termination, by failing to provide a final accounting identifying specific deductions to each escrow fund, and by failing to provide any accounting within 45 days after lease termination.

V. THE COURT SHOULD GRANT DECLARATORY AND INJUNCTIVE RELIEF

In this case, Plaintiffs seek a declaratory judgment that Defendant's ICOA and RICOA violate the Leasing Regulations. Plaintiffs also seek the entry of a permanent injunction (1) enjoining Defendant from entering into the ICOA and RICOA in their present form at any time with any Class member or owner-operator; (2) ordering Defendant to revise its RICOA to comply with the Leasing Regulations; and (3) ordering that Defendant's conduct comply with the Leasing Regulations.

A. Standard for Injunctive Relief

Ordinarily, a party seeking preliminary injunction must satisfy a four factor test in order to be awarded such relief. The requesting party must demonstrate (1) that it has a substantial likelihood of prevailing on the merits; (2) that it will suffer irreparable harm unless the preliminary injunction is issued; (3) that the threatened injury outweighs the harm the preliminary injunction might cause the opposing party; and (4) that the preliminary injunction if issued will not adversely affect the public interest." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1246 (10th Cir. 2001). The standard for a permanent injunction is essentially the same as the standard for a preliminary injunction, except that the plaintiff must actually succeed on the merits." *Tyler v. Kansas Lottery*, 14 F.Supp.2d 1220, 1223 (D. Kan. 1998).

[19] See Sullivan "Final Accounting;" Pls. Trial Exhibit 95.

The Tenth Circuit has held, however, that "[w]hen 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." *Star Fuel Marts, LLC v. Sam's East, Inc.*, 362 F.3d 639, 651 (10th Cir. 2004). The Tenth Circuit reasoned that "it is not the role of the courts to balance the equities between the parties where Congress has already balanced the equities and has determined that,, as a matter of public policy, an injunction should issue where the defendant is engaged in any activity which the statute prohibits." *Id.*, quoting *Burlington N. R.R. Co. v. Blair*, 957 F.2d 599, 601 (8th Cir. 1992).

B. The Court Should Enter a Declaratory Judgment That the RICOA Violates the Leasing Regulations and Enjoin Defendant from Using the Agreement Until It is Compliant With the Leasing Regulations

Applying the standard for the issuance of injunctive relief to this case, Plaintiffs satisfy the requirements. First, Plaintiffs have already proven that the RICOA's escrow and charge-back provisions violate the Leasing Regulations.

Second, even if Plaintiffs' must prove irreparable harm, (which does not appear to be a requirement under the Tenth Circuit's ruling in *Star Fuel Marts*), Plaintiffs can meet this requirement. This burden 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). In this case, Class members who are parties to the RICOA will be unable to obtain an effective monetary remedy for violations of the escrow and charge-back regulations. Indeed, it would be extremely difficult for class members who have entered into the RICOA to obtain damages based upon the language in the RICOA allowing C.R. England to change the terms of its charge-backs without a signed addendum by Class members. Also, Class members

would face a difficult challenge in proving damages based upon the RICOA's unlawful escrow provisions. As a result, Plaintiffs have proved irreparable harm.

Third, the continued violation of the Leasing Regulations outweighs any harm to C.R. England by being enjoined to comply with the Leasing Regulations. As described above, the RICOA's failure to comply with the escrow and charge-back provisions of the Leasing Regulations leaves Class members vulnerable to continued abuse by Defendant. If the Court allows the charge-back provisions in the RICOA to stand, allowing Defendant to unilaterally increase mark-ups and profits without a signed addendum as required by the Leasing Regulations, Class members are likely to experience significant harm in the nature of increased skimming by C.R. England. These unlawful practices can only be stopped through the issuance of a permanent injunction.

Fourth, the issuance of a permanent injunction will serve the public interest. The Leasing Regulations are designed to promote the stability of the owner-operator segment of the trucking industry. To the extent a major motor carrier such as C.R. England is forced to comply with the Leasing Regulations, this compliance will promote the public interest. Thus, the Court should issue a permanent injunction ordering Defendant to enter into a compliant lease agreement with its owner-operators.

C. The Court Should Enter a Declaratory Judgment That the ICOA Violated the Leasing Regulations and Enjoin Defendant from Using the Agreement in the Future

Having found that the ICOA violated the Leasing Regulations, the Court should enter a Declaratory Judgment to that effect. In addition, the Court should enjoin Defendant from using the ICOA or any of its offending terms in the future.

In determining whether it should issue injunctive relief regarding the ICOA, the Court should reject the argument that such relief is mooted by the fact that Defendant has adopted a

new lease agreement after Defendant was sued in this case. According to the Supreme Court, "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1953). The Tenth Circuit, in the same vein, has stated that "[t]he court must exercise supervisory poser over the matter until it can say with assurance that the unconstitutional practices have been discontinued and that there is no reasonable expectation that unconstitutional practices will recur." *Battle v. Anderson*, 708 F.2d 1523, 1538 (10th Cir. 1983). The burden is on the defendant to demonstrate that there is no reasonable expectation that the wrong will be repeated," and "[t]he burden is a heavy one." *W.T. Grant*, 345 U.S. at 633.

Defendant cannot meet this heavy burden. In determining whether a claim is moot, the Court should consider the potential for the challenged conduct to be repeated. In this case, the question is whether, in the absence of an injunction, C.R. England would return to its old ways of failing to disclose mark-ups and retained discounts and rebates in its lease agreement? C.R. England has amply demonstrated the likelihood of recidivism through the fact that it continues to hide these mark-ups and retained discounts and rebates from its owner-operators in its non-lease disclosures.

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) (holding that case was not moot because defendant had not "altered its substantive stance" regarding the legality of its challenged conduct."). 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." *United States v. Gregg*, 32

F.Supp.2d 151, 158 (D. N.J. 1998). C.R. England's actions to date in this litigation, including its vigorous defense of the ICOA in its motion for partial summary judgment, demonstrate that C.R. England does not believe that ICOA was unlawful or that its conduct has violated the Leasing Regulations. Therefore, in the absence of injunctive relief, C.R. England is likely to continue to engage in unlawful conduct.

VI. HAVING FOUND THAT DEFENDANT VIOLATED THE LEASING REGULATIONS, THE COURT SHOULD ORDER THE DISGOREMENT OF DEFENDANT'S ILL-GOTTEN GAINS

A. The Court Has the Ability to Render Equitable Relief

Plaintiffs seek the award of equitable relief in the form of restitution, disgorgement and an accounting. Prior to the enactment of the I.C.C. Termination Act, the federal courts held that the I.C.C. had plenary power to seek restitution, even where the statute did not specifically authorize such. In *I.C.C. v. B & T Trans. Co.*, 613 F.3d 1182 (1st Cir. 1980), the court was faced with the question of whether the ICC had the "power to seek restitution in view of the lack of any express, or even implicit, authorization of such power in the language of the Motor Carrier Act." *Id.* at 1183. Based upon the strong pronouncements of the Supreme Court, the First Circuit held that "the traditional power of an equity court to grant complete relief may be said to have provided the I.C.C. with residual, untapped authority to seek equitable restitution once it has properly invoked the equity jurisdiction of the district courts." *Id.* at 1186.

In another case, *I.C.C. v. J.B. Montgomery, Inc.*, 483 F.Supp. 279 (D. Colo. 1980) the ICC sued motor carriers seeking injunctive and restitutionary relief to recover transportation charges in excess of the tariff. Relying on the holding of *B & T Trans. Co.*, the court held that

"the ICC will be permitted to pursue restitutionary relief in this case." *J.B. Montgomery, Inc.,* 483 F.Supp. at 280.

Finally, in a case directly on point, *I.C.C. v. Brannon Systems, Inc.*, 686 F.2d 295 (5th Cir. 1982), the court was faced with the issue of whether the ICC had the authority to enforce the compensation provisions of the predecessor to Part 376 - 49 C.F.R. § 1057.12(g). The Fifth Circuit, relying upon Supreme Court precedent and *B & T Trans. Co.*, held that "the ICC must have the ability to enforce that provision by whatever means prove necessary . . ." *Id.* at 296.

In this case, the Court reasoned that, "in 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."[20] Thus, the Court held that it would retain "the discretion to determine the proper and equitable nature of the relief, if any, it may award in this case."[21]

B. The Standard for Awarding Restitution and Disgorgement

The Tenth Circuit recently held, in *United States v. RX Depot, Inc.*, 438 F.3d 1052 (10th Cir. 2006), that the district court had the equitable power to order disgorgement of ill-gotten gains where the defendant was unjustly enriched through the violation of a federal statute. The Tenth Circuit noted that disgorgement "is only permitted after a party is found by a Court to be in violation of the Act and only at the court's discretion." *Id.* at 1061. The court also found that "[d]isgorgement, which deprives wrongdoers of their ill-gotten gains, deters violations of the law by making illegal activity unprofitable." *Id., quoting SEC v. Fischbach Corp.*, 133 F.3d 170, 175 (2d Cir. 1997).

[20] Motion Hearing, Court's Ruling; September 12, 2006 at 9.
[21] *Id.*

The Restatement (Third) of Restitution and Unjust Enrichment currently under consideration by the American Law Institute states that "[a] person who interferes with the legally protected rights of another, acting without justification and in conscious disregard of the other's rights, is liable to the other for any profit realized by such interference." *Restatement (Third) Restitution* §3 (T.D. No. 3, 2004). The comment to the Restatement section explains that "[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 the defendant's gain may exceed both the (i) the measurable injury to the plaintiff, and (ii) the reasonable value of a license authorizing the defendant's conduct." *Id.*, Comment b. "Conscious wrongdoing" is defined as intentional conduct, as opposed "cases of inadvertent or involuntary wrong."

C. The Prerequisites for Disgorgement are Satisfied in this Case

The first requirement for disgorgement, the determination that the defendant violated federal law, is satisfied by the finding that C.R. England violated the Truth-in-Leasing Regulations.

The second requirement is the finding that C.R. England acted "in conscious disregard of the [Plaintiffs'] rights." In this case, the evidence will demonstrate that C.R. England's failure to disclose charge-back items and a recitation of how each charge-back item was to be computed under the ICOA was conscious. Indeed, C.R. England's officers and employees *knew* that the company was marking-up tires and parts by 30 percent and that the ICOA failed to disclose this information. At the same time, C.R. England's officers and employees *knew* that the company was retaining 60 percent of all fuel-related discounts and rebates and that this fact was not disclosed in the ICOA. In other words, C.R. England's failure to disclose information regarding

mark-ups and retained discounts and rebates was not inadvertent or involuntary. C.R. England is a conscious wrongdoer.

Finally, pursuant to *RX Depot*, the Court must consider whether disgorgement of defendant's ill-gotten gains would serve to deter violations of the Leasing Regulations by making illegal activity unprofitable. Plaintiffs submit that without the Court's exercise of equitable remedies such as disgorgement, C.R. England and other motor carriers will be allowed to violate the Leasing Regulations without fear of any meaningful consequences. By ordering disgorgement of defendant's ill-gotten gains, the Court will deter violations of the Leasing Regulations by Defendant, and other motor carriers, in the future.

D. Calculating the Proper Amount of Disgorgement

A district court has broad discretion not only in determining whether to order disgorgement but also in calculating the amount to be disgorged. *S.E.C. v. Svoboda*, 409 F.Supp.2d 331, 344 (S.D.N.Y. 2006). "The disgorgement amount need be only 'a reasonable approximation of profits causally connected to the violation' and any risk of uncertainty in calculating the amount 'should fall on the wrongdoer whose illegal conduct created that uncertainty.'" *Id.*, quoting *S.E.C. v. Patel,* 61 F.3d 137, 139 (2d Cir. 1995).

E. Plaintiffs Have Made the Requisite Showing of C.R. England's Profits

In this case, both the documentary evidence and Plaintiffs' expert, Michael Pakter, ("Pakter"), will show that Defendant earned substantial profits from the sale of tires, parts and fuel to Plaintiffs and Class members under the ICOA. Specifically, Pakter will testify (consistent with his Report and his Rebuttal Report) that C.R. England charged-back to the Class for tire purchases $ 972,745 more than its costs during the ICOA period. Pakter will also testify that

C.R. England charged-back to the Class for parts $ 918,958 more than its costs during the ICOA period. He will testify that these amounts constituted C.R. England's profits. Turning to fuel, the evidence will show that C.R. England earned a profit of approximately $ 2.2 million from the retention of Class-generated discounts during the ICOA period.

Plaintiffs will also prove that Defendant charged-back class members approximately $ 2.03 million for satellite communications charges under the ICOA. Similarly, Plaintiffs will prove that C.R. England charged-back against Class members' compensation $ 349,000 for settlement administrative fees and $ $ 312,000 for insurance administrative fees during the ICOA period. Defendant imposed termination administrative fees in the amount of $ 1.16 million and $ 194,000 for repair related administrative fees during the ICOA period. These fees, which were either not disclosed (termination and repair fees) or were forced purchases of services (satellite communications, insurance and settlement administration) should also be disgorged.

VII. HAVING FOUND THAT C.R. ENGLAND VIOLATED THE ESCROW PROVISIONS OF THE LEASING REGULATIONS, THE COURT SHOULD ORDER AN ACCOUNTING OF CLASS MEMBERS' ESCROW FUNDS

Under Utah law, an accounting is an equitable remedy. *See Precision Vascular Sys., Inc. v. Saros, L.C.*, 199 F.Supp.2d 1181 (D. Utah 2002). The resolution of equitable issues rests in the sound discretion of the trial court. *See Hildebrand v. Olinger*, 689 P.2d 695 (Colo. App. 1984). Although an accounting is an extraordinary remedy, it may be ordered if the plaintiff is unable to determine how much money is due him or her from another. *Andrikopoulos v. Broadmoor Mgmt. Co*., 670 P.2d 435 (Colo. App. 1983).

In this case, as described above, Defendant's failed to comply with the most basic requirements of the escrow regulations. C.R. England's ICOA and RICOA failed to specify the items that may be deducted from escrow funds and tendering a proper final accounting. At the same time, C.R. England failed to provide proper final accountings indicating the specific deductions made from Plaintiffs and Class members' escrow funds.

Because of Defendant's systemic failures to comply with the Leasing Regulations, Plaintiffs are unable to quantify the amount of escrow funds unlawfully retained by Defendant. As a result, Plaintiffs seek the equitable remedy of an accounting for all escrow funds administered by C.R. England. Only by examining each individual Class members' escrow fund, including documentation regarding any and all deductions from the escrow fund, may Plaintiffs quantify the amount C.R. England unlawfully retained.

Thus, Plaintiffs request that the Court order an equitable accounting for all Class member escrow funds in this case in order to determine the amounts of escrow funds improperly retained by Defendant. As part of the accounting process, the Court should delineate the categories of deductions that are permissible for each specific escrow fund.

WITNESS LIST

Per the Trial Order in this case, dated September 7, 2006, Plaintiffs list the witnesses to be called at trial with a short statement as to the substance of each witness' testimony.

1. William "Al" Piper – Mr. Piper is a named Plaintiff and a former lease-operator leased to Defendant. Mr. Piper will testify concerning the circumstances under which he entered into a lease agreement with Defendant. He will also testify to the nature of

the services and products offered by Defendant, including repairs, tires, fuel and "administrative services," and whether the purchase of such goods and services was "optional." He will testify concerning deductions made to his compensation by C.R. England for various undisclosed, undocumented or inadequately disclosed items. He will testify as to the "final accounting" tendered by C.R. England regarding his escrow funds and to the disposition of those funds.

2. James Murphy – Mr. Murphy is also a named Plaintiff and a former owner-operator leased to C.R. England. Mr. Murphy is a party to both the ICOA and RICOA and will testify to the circumstances under which he entered into both agreements. He will also testify to the availability of obtaining insurance from a source other than through Defendant. He will also testify to the nature of the services and products offered by Defendant, including repairs, tires, fuel and "administrative services," and whether the purchase of such goods and services were "optional." He will testify concerning deductions made to his compensation by Defendant for various undisclosed, undocumented or inadequately disclosed items. He will testify as to the "final accounting" tendered by Defendant regarding his escrow funds and to the disposition of those funds.

3. Donald Sullivan, Sr. – Mr. Sullivan is a named Plaintiff who was a lease-operator leased to Defendant on two separate occasions. Mr. Sullivan will testify regarding undisclosed or inadequately deductions from his compensation by Defendant. He will also testify to the timing and accuracy of Defendant's purported "final accountings" of his escrow funds.

4. Carl Yeck – Mr. Yeck is a current employee of C.R. England, and is in charge of the England Service Center (ESC). Mr. Yeck is expected to testify regarding the repair of owner-operator trucks by the ESC and the policies and practices of ESC with regard to mark-ups on parts and tires at that facility.

5. Todd England – Mr. England is an officer of C.R. England. He has direct responsibility regarding the company's maintenance division and the ESC. He is expected to testify that he and other members of the maintenance division knew that the company was marking up tires by 30 percent at the same time the lease agreement said drivers could by tires at the company's "fleet discount price."

6. Michael Pakter – Plaintiffs' expert witness. Mr. Pakter will testify consistent with his expert report in this case.

7. Thomas Shutt – Mr. Shutt is a former owner-operator leased to C.R. England. He will testify concerning his ability to obtain insurance from other sources, and whether purchases of fuel, repair services, tires and "administrative services" were optional. He will testify regarding deduction from his compensation for undisclosed, undocumented and inadequately disclosed charge-backs. He will testify regarding the disposition of his escrow funds.

8. Holly Koncilia – Ms. Koncilia is an employee of the Owner-Operator Independent Drivers Association, Inc. ("OOIDA"). She will testify as to the number of Class members who entered into the RICOA who are also current members of OOIDA.

9. Michael Welch – Mr. Welch is a current employee of Defendant. He is expected to testify as to the company's policies and procedures regarding dissemination and

signing of the lease agreement. He is also expected to testify regarding statements made in the in-house C.R. England publication, the "Lease Success Guidebook."

10. Keith Wallace – Mr. Wallace is the current CFO of Defendant. He is expected to testify to the company's financial disclosures.

11. Steve Orme – Mr. Orme is the current Controller of Defendant. He is expected to testify to the company's financial disclosures.

12. James C. MacInnes – Mr. MacInnes is the Director of Defendant's Independent Contractor Division. He is expected to testify regarding Defendant's practices concerning charge-backs to Plaintiffs' compensation for fuel, repairs, tires, satellite communications, and administrative services. He is expected to testify to Defendant's practices regarding the administration of escrow funds, including a "final accounting." He is expected to testify to the company's practices regarding the forced purchase of satellite communications services and administrative services under the ICOA.

13. Jeffrey McGuire – Mr. McGuire is the head of Defendant's fuel department. He is expected to testify to Defendant's practice of retaining 60 percent of any discounts generated by Plaintiffs' purchase of fuel through Defendant's "fuel optimizer." He will testify to the practices of Defendant regarding the installation of its satellite communications equipment in Plaintiffs' trucks and the benefits of such communications equipment which inures to Defendant and its customers.

14. Paige Zhang – Paige Zhang is a former employee of Defendant. She is expected to testify as to the financial analysis conducted by Defendant regarding its charges for satellite communications, and insurance and settlement administrative services.

DATED this 10th day of October, 2006.

/s/ Brent O. Hatch
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CERTIFICATE OF SERVICE

I certify that on this 10th day of October, 2006, I caused a copy of the above Trial Brief of Plaintiffs to be served on counsel of record listed below by the Court's CM/ECF system or otherwise by U.S. Mail, first class, post prepaid.

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