UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and G.L. BREWER; GERALD E. EIDAM, JR.; JAMES E. MICHAEL; ROBERT PENMAN and JAMES E. SCHMIDT and on behalf of all others similarly situated,	
Plaintiffs,	**Case No. 3:02-CV-1005-J-25-MCR**
v.	
LANDSTAR SYSTEM, INC.; LANDSTAR EXPRESS AMERICA, INC.; LANDSTAR GEMINI, INC.; LANDSTAR INWAY, INC.; LANDSTAR LIGON, INC.; LANDSTAR LOGISTICS, INC.; and LANDSTAR RANGER, INC.,	
Defendants.	

PLAINTIFFS' MOTION AND MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

1. Pursuant to Fed.R.Civ.P. 23(a) and 23(b) (3), Plaintiffs Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), Gerald E. Eidam, Jr., James E. Michael, Robert Penman and G.L. Brewer, by counsel, on behalf of themselves and all others similarly situated ("Owner Operators"), respectfully move this Court to enter a determination and an Order that this action can be maintained as a class action.

2. Plaintiffs seek to certify the following class of Plaintiffs -- at least 7,000 people:

> All owner-operators in the United States who, after November 1, 1998, and through the pendency of this proceeding, had or have leases with Landstar Inway, Inc., Landstar Gemini, Inc., or Landstar Ligon, Inc., or their authorized agents or business

affiliates ("Lessors"), that are subject to federal regulations contained in Part 376, Code of Federal Regulations.

3. Plaintiffs respectfully request that this Court enter an Order certifying the class as defined above, certifying the Named Plaintiffs as adequate representatives of the Class, and appointing counsel for the Named Plaintiffs, Paul D. Cullen, Sr., Joseph A. Black, and Daniel E. Cohen of The Cullen Law Firm, PLLC, and Michael R. Freed of the firm Brennan, Manna & Diamond, as Class Counsel. In support the Plaintiffs offer the following.

I. INTRODUCTION

Owner-Operators seek relief for Defendants' violation of the federal Truth-in-Leasing regulations found at 49 C.F.R. Part 376 ("Truth-in-Leasing regulations"). By this motion, Plaintiffs ask this Court to follow the well-established body of law decided by numerous federal courts throughout the country holding that such cases are ideally suited for class certification:

- *OOIDA v. Mayflower Transit, Inc.*, 204 F.R.D. 138, 145 (S.D. Ind. 2001) ("[T]here are common issues of law *and* fact…the relevant provisions of the leases at issue…are all but identical and all of them are governed by the same federal regulations.") (emphasis in original).

- *OOIDA v. Ledar Transport*, Civil Action No. 00-0258-CV-W-2-ECF (W.D. Mo. March 31, 2002) (Ex. C, Slip. Op. at 8, 16) ("[T]he Court finds that there is a common legal question, which is the application of the Federal Truth-in-Leasing regulations to the defendant's leases.").

- *Sheinhartz v. Saturn Transportation System, Inc.*, 2002 WL 575636 *7 (D. Minn. March 26, 2002) ("Because the named Plaintiff's claims and the proposed class' claims arise from the same conduct by Defendants alleged to have violated 49 C.F.R. [§376]…the Court finds that Plaintiffs have satisfied the typicality requirement of Rule 23(a)(3).").

- *OOIDA v. Arctic Express, Inc.*, Case No. C2:97-CV-00750 (Sept. 6, 2001) (Ex. D, Slip. Op. at 12, 5) ("The common question of law…is whether the Agreements violated 49 C.F.R. §376.12(k) *** The named Plaintiff's claims and the proposed class's claims are all focused on the same legal issue: whether the Lease Agreement…violated §376.21(k) of the Motor Carriers Act.").

- *Padrta v. Ledar Transport, Inc.*, Civil Action No. 96-0324-CV-W-2 (W.D. Mo. Sept. 6, 1996) (Ex. E, Slip. Op. at 5) ("The Court is persuaded that plaintiffs have demonstrated not only that there are other members of the proposed class who have the same or similar grievances as plaintiffs, but also that the proposed class members' statutory claims, under 49 C.F.R. §1057.12(k), present a multitude of common questions of law and fact.").

- *OOIDA v. Heartland Express Inc. of Iowa*, No. 3-01-CV-80179 (S.D. Iowa, Jan. 3, 2003) (Ex. F, Slip. Op. at 4) ("The court finds that there is a common legal question, which is the application of the truth in leasing regulation to defendant's leases.").

- *OOIDA v. Gilbert Express, Inc.*, Civil Action No. 00-5163 (D. N.J. Feb. 14, 2001) (Ex. G at 2) ("There are questions of law and fact that are common to the class and which predominate over questions affecting any individual class member.").

Class certification in this case will provide an indispensable forum for absent class members – thousands of Owner-Operators geographically dispersed throughout the nation – whose only realistic opportunity to vindicate important federal rights lies in class-wide adjudication. Further, this case easily satisfies the commonality and typicality standards of Fed. R. Civ. P. 23. Specifically, each class member's lease agreement with Landstar is typical in all material respects. Further, the facts alleged in the Complaint demonstrate that it is the common policy of Landstar to overcharge Owner-Operators for fuel and related transaction fees, to skim money related to military shipments, and to overcharge for base plates and permits. And, while it is well settled that a class certification ruling is not a decision on the merits, recent incriminatory admissions by Landstar reinforce the propriety of class certification here. Moreover, this case presents a common question of law – whether the failure of Landstar's lease agreements to fully disclose Landstar's practice of overcharging and skimming proceeds from Owner-Operators violated the Truth-in-Leasing regulations. Finally, adjudication of this case as a class action is clearly the superior method of resolving the Plaintiffs' claims. As one court has observed: "absent a class action, the individuals would likely be without a remedy and [the carrier] would likely retain the benefits of its alleged wrongdoing." *Mayflower,* 204 F.R.D. 138, 149. Plaintiffs

urge this Court to adopt the rationale expressed in this long-line of cases by granting class certification here.

II. BACKGROUND

The Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), James E. Michael, Robert Penman, Gerald E. Eidam, Jr., and G.L. Brewer bring this action on behalf of themselves and all others similarly situated against the Landstar Defendants ("Landstar") for violations of Truth-in-Leasing Regulations. Under the Truth-in-Leasing Regulations, Landstar may provide transportation in equipment leased from Owner-Operators only if the equipment is covered by a written lease meeting the requirements set forth in the Regulations. 49 C.F.R. §376.12. (A representative copy of the Landstar lease at issue is attached as Exhibit A). The Complaint alleges Landstar's violations of the Regulations as follows:

(1) Landstar systematically charges Owner-Operators more than it actually pays for fuel and fuel transactions. Landstar's lease agreements do not disclose this practice in violation of 49 C.F.R. §376.12(h). *See* Complaint, Count II.

(2) Landstar systematically skims proceeds due to Owner-Operators before calculating their compensation by first reducing the gross revenue by two percent for all military shipments. Landstar's lease agreements do not disclose this practice in violation of 49 C.F.R. §376.12(d) and (h). *See* Complaint, Count III.

(3) Landstar systematically charges Owner-Operators more than it actually pays for base plates and permits. Landstar's lease agreements do not disclose this practice in violation of 49 C.F.R. §376.12(h). *See* Complaint, Count IV.

Although a class certification ruling is not a decision on the merits, a number of incriminating admissions recently made by Landstar are nonetheless extremely relevant for the purpose of illustrating the commonality and typicality of Plaintiffs' claims. In a June 28, 2004 memorandum to Landstar Owner-Operators, Landstar stated that it was superseding the lease at issue in this case with a new lease (Exhibit B) which, it asserted was prompted by the allegations

in this lawsuit: "claim[ing] that your existing agreement does not comply with OOIDA's view of federal rules and laws mainly addressing disclosures of information." *Id.* Landstar then stated:

> Through the enclosed new Independent Contractor Operating Agreement, Landstar desires to make the required disclosures in an updated and uniform manner to all Landstar BCO's. The new agreement is intended to assure each of you receives uniform and up to date disclosures.

Id. Landstar's smooth wording notwithstanding, the "required disclosures" are indeed totally "*new*", i.e., they were *never previously disclosed* in the lease at issue in this case.

Previously Undisclosed Retention of Profits – The new lease discloses that Landstar receives discounts on goods and services charged to Owner-Operators, but reserves the right to keep such profits.

> [T]he parties agree that [Landstar], from time to time, may obtain volume discounts or rebates from third party vendors as a result of the purchase of goods or services by [Owner-Operators]. [Landstar] will endeavor to pass along such discounts to [Owner-Operators]; provided, however, the parties agree that ***any discount may be retained in whole or in part by [Landstar] in its discretion***.

See Exhibit B at ¶13 (emphasis added). In contrast, the Landstar lease at issue discloses *nothing* about such profits, thus further establishing the commonality and typicality of Landstar's violations of the regulations. *See also* Complaint Count II, ¶¶37-40.

Previously Undisclosed Transaction Surcharges – Landstar's new lease states that Comdata charges "comprise both a transaction fee to the financial services provider Comdata ***and an administrative fee and/or profit to CARRIER for its time and expense***." (Exhibit B, App. C at 30, ¶ 10) (emphasis added). Again, the lease at issue says *nothing* about such fees or profits, further highlighting the commonality and typicality of Landstar's violations of the regulations. *See also* Complaint, Count II, ¶41.

Previously Undisclosed Skimming of Revenues – Landstar's new lease discloses Landstar's adjustments of revenues as shown on freight bills:

> ***reduced by*** … ***(g) a payment processing fee*** comprised of the actual cost incurred by [Landstar] for those shipments in which [Landstar's] customer or third party payor make deduction for [Landstar's] freight charges related to electronically-transmitted billing and payment ("EB&P") account use ….

Ex. B, App. A at 15 (emphasis added). In contrast, the lease at issue discloses *nothing* about a reduction for such "payment processing fees," confirming the Plaintiffs' class action allegation that Landstar has systematically skimmed monies by deducting two percent of the revenue shown on the rated freight bill for all DOD shipments before calculating the Owner-Operator's share of the revenue. *See also* Complaint Count III, ¶¶ 46-53.

Previously Undisclosed Surcharges for Base-Plates – Landstar's new lease discloses that Landstar adds on administrative fees for obtaining base plates as follows:

> The charge [for base plates] comprises both [Landstar's] payments to the relevant IRP jurisdictions ***and an administrative fee to [Landstar***] for its costs in applying for and obtaining the plate.

Ex. B at 29. Again, the lease at issue is *silent* on this point, further illuminating the commonality of Landstar's practice of charging back excessive sums for base-plates. Count IV, ¶¶55-62.

Previous Failure to Provide Access to Chargeback Data – The new Landstar lease expressly specifies that Landstar will provide Owner-Operators with the terms of volume discounts received:

> [Landstar] will provide to [Owner-Operator] the names of the sources of any such volume discounts or rebates and the terms of such volume discounts or rebates upon the written request of [Owner-Operator].

Exhibit B at 9, ¶13. Once again, the lease at issue is *silent* on this point. In sum, Landstar's recent reformation of its leases by including disclosures which *never before existed* in the lease at issue not only admits its violations of the Truth-in-Leasing regulations, but reinforces the Plaintiffs' assertion that those violations satisfy all prerequisites for class certification under Fed. R. Civ. P. Rule 23.

III. CLASS DEFINITION

The class at issue is, as required, identifiable and clearly defined so as to be "ascertainable without a prolonged and individualized analytical struggle."[1]

> All owner-operators in the United States, who after November 1, 1998, and through the pendency of this proceeding, had or have leases with Landstar Inway, Inc., Landstar Ranger, Inc., or Landstar Ligon, Inc., or their authorized agents or business affiliates ("Lessors"), that are subject to federal regulations contained in Part 376, Code of Federal Regulations.[2]

IV. CLASS CERTIFICATIONS STANDARDS

a. Federal Rule of Civil Procedure 23(a)

This Court has ruled that "a class certification ruling is not a decision on the merits, and that 'in determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.'" *Miles,* 202 F.R.D. at 301. (citation omitted). "[I]n ruling upon a motion for class certification, the substantive allegations in plaintiff's complaint are accepted as true …Likewise, a predetermination of the merits of the defense of the suit is also inappropriate." *In re Commercial Tissue Products,* 183 F.R.D. 589, 591 (N.D. Fla. 1998). Fed. R. Civ. P. 23(a) sets forth the preliminary requirements for class certification, "commonly referred to as: (1) numerosity; (2) commonality; (3) typicality; and (4) adequacy of representation." *Swanson v. Mid Am, Inc.,* 186 F.R.D. 665, 667 (M.D. Fla. 1999) (Adams, J.). "If

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[1] *Miles v. America Online, Inc.,* 202 F.R.D. 297, 305 (M.D.Fla. 2001)(Moody J.).

[2] Landstar cannot seriously contest the propriety of this definition. Landstar may claim that Inway, Ranger, and Ligon should be treated independently, however, such a claim would have dubious merit in view of their identical conduct as well as their *joint* June 28, 2004 letter to Owner-Operators stating that they were revising their leases in identical respects. (Exhibit B). It also is telling that Ligon, Ranger, and Inway are identified on the letterhead as *unified* members of the Landstar Carrier Group, thus further establishing their commonality. Be that as it may, at most, Landstar could only argue that each Defendant should be separated into a subclass.

the plaintiffs establish these four factors, they must then satisfy at least one of the alternative requirements of Rule 23(b)." *Miles*, 202 F.R.D. at 303. Plaintiffs satisfy each of these criteria:

(1) Numerosity – Rule 23(a)(1) provides that a class action may be maintained only if "the class is so numerous that joinder of all class members is impracticable." *Id.*

> There is no yardstick that measures the minimum class members necessary to satisfy the requirements of numerosity. . . . Numerosity depends on the circumstances of each case. Factors to be considered by the court include the proposed class, size, ease of identifying members' names and addresses, ease with which they could be served, and their geographic location. . . . It is not necessary that a precise number of class members be known; plaintiffs may make reasonable and supported estimates as to the size of the proposed class.

Miles, 202 F.R.D. at 302 (citations omitted). As one court observed, certification of a class of "at least 1,000 similarly-situated owner-operators who are geographically dispersed throughout the nation" was appropriate as "[j]oinder would be little short of impossible."[3] In this case, Landstar's SEC 10-K report indicates that there are over 7000 Owner-Operators under lease to Landstar; i.e. members of the putative class. (Ex. H at 7). Thus, numerosity is readily satisfied

(2) Commonality – Fed. R. Civ. P. 23(a)(2) requires a finding that "there are questions of law and fact common to the class." *Id.* "Class relief is appropriate when the 'issues involved are common to the class as a whole' and when they 'turn on questions of law applicable in the same manner to each member of the class.'" *Miles*, 202 F.R.D. at 302 (citation omitted). "This commonality provision does not require complete identity of legal claims…Nor will class certification be denied because of some factual variances among class members' claims." *Armstead v. Pingree*, 629 F. Supp. 273, 280 (M.D. Fla. 1986)(Melton, J.). "Not all factual or legal questions raised in the litigation need be common so long as at least one issue is common to

[3] *Mayflower, supra,* 204 F.R.D. 138, 145; *Accord Sheinhartz,* 2002 WL 575636, *4 (holding that class of 500 owner-operators was sufficient to satisfy the numerosity prong of Rule 23).

all class members." *Fuller v. Becker & Poliakoff*, 197 F.R.D. 697, 700 (M.D. Fla. 2000)(Kovachevich J.). "'A sufficient nexus is established if the claim or defenses of the class and the class representatives arise from the same event or pattern or practice and are based on the same legal theory.'" *Id.* This standard is met here:

- The claims of the members of the class all arise from the uniform application of a single regulatory regime – the Truth-in-Leasing Regulations. *See, e.g., Arctic Express, Inc.*, (Ex. D at 12, 15) ("The common question of law…is whether the Agreements violated 49 C.F.R. §376.12(k) *** The named Plaintiff's claims and the proposed class's claims are all focused on the same legal issue: whether the Lease Agreement…violated §376.12(k) of the Motor Carriers Act.").[4]

- The clauses in each class member's lease agreement with Landstar are identical in material respects. Complaint ¶ 30. *See, e.g., Mayflower Transit, Inc.*, 204 F.R.D. at 145 ("[T]here are common issues of law *and* fact…the relevant provisions of the leases at issue…are all but identical and all of them are governed by the same federal regulations.") (emphasis in original).

- The facts alleged in the Complaint demonstrate the uniform policy of Landstar: (i) to overcharge owner-operators for fuel and related transaction fees; (ii) to skim proceeds related to military shipments; and, (iii) to unlawfully overcharge for base plates and permits. *See, e.g., Ledar* (Ex. E at 5) ("Importantly, plaintiff alleges that Ledar has breached each of these lease agreements[s] in essentially the same fashion.").

In *Mayflower*, the court certified a class where the plaintiffs alleged that the carrier overcharged Owner-Operators for insurance, concluding:

> The common issues of law are all rooted in common issues of fact, including all class members have entered into lease agreements with Mayflower or its agents…The plaintiffs…alleged that Mayflower engaged in a pattern of conduct--overcharging for insurance-- with respect to all of them. Mayflower's alleged misconduct affects all owner-operators in each of the two cases in the same manner, if not the same degree.

[4] The Court should reject any claim by Landstar that this case is governed by state law. Federal regulatory regimes such as the Leasing regulations are enforced in accordance with federal law. "It is axiomatic that federal law governs questions involving the interpretation of a federal statute." *Kamen v. Kemper Fin. Services*, 111 S. Ct. 1711, 1717 (1991); *Turner v. Miller Transporters,* 852 So.2d 478, 485 (La. App. 2003)("The provision of the lease agreements that Mississippi law would govern the interpretation of the contract cannot supersede the federally enacted cause of action for damages … for … breach of the specific federal terms that regulate motor carriers.").

Id., 204 F.R.D. 138 at 146; *Accord Sheinhartz,* 2002 WL 575636, *6. ("the Court finds that Plaintiffs have alleged a pattern of misconduct predicated on violations of federal regulations…that potentially affected a large number of owner-operators working for Defendants."). Here, as in each of the foregoing cases in which certification was granted, Plaintiffs raise common claims that Landstar has uniformly overcharged them for fuel, overcharged them for base-plates, and skimmed funds related to DOD shipments.

(3) Typicality – Rule 23 (a)(3) requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." *Id.* This Court has held that "[t]ypicality is satisfied where the plaintiff's claims 'arise from the same event or pattern or practice and are based on the same legal theory' as the claims of the class." *Swanson v. Mid Am, Inc.,* 186 F.R.D. 665 at 668 (citation omitted). The Eleventh Circuit has observed that "[i]n many ways, the commonality and typicality requirements of Rule 23(a) overlap. Both requirements focus on whether a sufficient nexus exists between the legal claims of the named class representatives and those of individual class members to warrant class certification." *Prado-Steiman v. Bush,* 221 F. 3d 1266, 1278 (11th Cir. 2000).[5] "Plaintiffs may satisfy the typicality requirement upon a showing that there is a 'strong similarity in legal theories,' despite substantial factual variations. . . . typicality may be demonstrated where Plaintiffs' claims 'arise from the same event or pattern or practice and are based on the same legal theory' as the claims of the class.'" *Miles*, 202 F.R.D. 297 at 302 (citations omitted). Here, again, there is undeniable

[5] The Court in *Prado-Steiman* further noted: "Previously, we have explained that these requirements may be satisfied even if some factual differences exist between the claims of the name representatives and the claims of the class at large. …'[T]he typicality requirement may be satisfied even if there are factual distinctions between the claims of the named plaintiffs and those of other class members.'" *Id.* at 1279 n. 14 (citations omitted).

"typicality" between the claims of the Plaintiffs and those of the class members whom they seek to represent, namely, Landstar's violations of the Truth-in-Leasing regulations.[6]

(4) Adequacy of Representation – Rule 23 (a)(4) requires that "the representative parties will fairly and adequately protect the interest of the class." *Id.* "The adequate representation requirement involves questions of whether plaintiffs' counsel are qualified, experienced, and generally able to conduct the proposed litigation, and of whether plaintiffs have interests antagonistic to the rest of the class."[7] "The same concerns that justify a finding of typicality also justify a finding of adequate representation."[8] As demonstrated above, Plaintiffs clearly share common interests with all of the proposed class members.[9] Likewise, OOIDA shares more than sufficient common interests with the class members to qualify as a class representative under Rule 23(a)(4). Associational standing exists where: a) association members would otherwise have standing to sue in their own right; b) the interests sought to be protected are germane to the organization's purpose; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.[10] In finding that OOIDA had associational standing to represent the class in *Arctic,* Judge Marbley concluded that "this suit is an

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[6] *See, e.g., Sheinhartz,* 2002 WL 575636 *7 ("Because the named Plaintiffs' claims and the proposed class' claims arise from the same conduct by Defendants alleged to have violated 49 C.F.R. [376]…the Court finds that Plaintiffs have satisfied the typicality requirement of Rule 23(a)(3).").

[7] *Griffin v. Carlin*, 755 F. 2d 1516, 1532-33 (11th Cir. 1985).

[8] *In re Commercial Tissue Products*, 183 F.R.D. 589, 594.

[9] By diligently prosecuting this case to date, Plaintiffs and OOIDA have demonstrated their capability to pursue the interests of the class through qualified counsel. OOIDA and the named Plaintiffs have expended tremendous resources responding to Landstar's litigation tactics, including, e.g., successfully opposing Landstar's demand for arbitration in this Court and on appeal. Indeed, Landstar itself has confirmed the effectiveness of Plaintiffs' efforts by *admitting* that the recent reformation of its leases *was prompted by OOIDA and this litigation*! (Ex.B).

[10] *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). *See also Nat'l Coalition for Students with Disabilities v. Bush,* 170 F. Supp. 2d 1205, 1210 (N.D. Fla.2001) ("primary reason people join an organization is 'to create an effective vehicle for vindicating interest that they share with others,' thus providing 'some guarantee that the association will promote their interests.'")(citation omitted).

embodiment of the purpose behind the formation of OOIDA." (Ex. D at 13).[11] Finally, as discussed in the Cullen Declaration, Plaintiffs are represented in this action by The Cullen Law Firm, PLLC, general counsel to OOIDA, which has extensive experience in representing owner-operator clients in trucking industry-related class actions. Declaration of Paul D. Cullen, Sr., Exhibit J at ¶¶5-6. Notably, the Cullen Law Firm has been appointed class counsel in *Mayflower*, in *Ledar,* in *Arctic*, in *Heartland* and in *Gilbert*. In addition, Plaintiffs are represented in this action by Jacksonville-based trial counsel Michael R. Freed of the firm Brennan, Manna & Diamond. Mr. Freed is a well-respected attorney who has litigated numerous actions in the Middle District of Florida. *See* Cullen Declaration at ¶ 7. In light of the foregoing common interests and goals of the class representatives named herein and the proposed class members, and the broad experience of class counsel, the representative parties will adequately represent all of the members of the class in this action under Rule (a)(4).

b. Federal Rule of Civil Procedure 23 (b)(3)

For a class to be certified under Rule 23(b)(3), the moving party must demonstrate that "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other methods for the fair and efficient adjudication of the controversy." *Id.* "'[I]n general, predominance is met when there exists generalized evidence which proves or disproves an element on a simultaneous, class-wide basis, since such proof obviates the need to examine each class members' individual position.'" *Allapattah Services, Inc. v. Exxon Corp.,* 333 F. 3d 1248, 1260 (11th Cir. 2003). As

[11] OOIDA's paramount mission, and the very purpose of its founding over 25 years ago, is to work aggressively to stop abusive practices directed at independent Owner-Operators. Toward this end, OOIDA has been involved in numerous class actions on behalf of Owner-Operators, and has been instrumental in advocating the federal legislation at issue herein, which grants Owner-Operators a private right of action by which to enforce the "Truth-in-Leasing" regulations. *See generally* Johnston and Cullen Declarations. (Exhibits I-J).

demonstrated above, the common questions of law and fact regarding Landstar's leases allow no genuine dispute over whether Landstar has violated the Truth-in-Leasing Regulations on a systematic class-wide basis. Any attempt by Landstar to muster factual variations about putative class members would be unavailing, particularly when faced with its own damaging admissions that its lease made *none* of the required disclosures at issue in this case. *See* discussion *supra*, at 3-5. In *Mayflower*, the court found that "[a]ll of the issues…arise from a common nucleus of operative facts: Mayflower's alleged course of conduct in failing to return moneys which, plaintiffs allege, it had a legal obligations to repay to the owner-operators…'" *Id.*, 204 F.R.D. at 148. The court reasoned that "the individual differences to which Mayflower points – variations in lease provisions and variations in how Mayflower or its agents treated particular contractors under certain circumstances – are insufficient to outweigh the common issues. It follows that class issues predominate." *Id.* Similarly, in *Sheinhartz*, the court concluded: "The dispositive and predominate legal and factual issues in this case are whether…Plaintiffs' leases complied with federal regulations by clearly stating the amount to be paid to the owner-operators by Defendants." *Id.,* 2002 WL 575636 at *8. So it is here - simply put, this case presents a model of "predominance" that would be difficult to exceed in any case.

Finally, this case satisfies the remaining considerations for certification of a class under Rule 23(b)(3) concerning whether "a class action is superior to other available methods for the fair and efficient adjudication of the controversy" as follows:

(A) Class Members' Interests in Individually Controlling Separate Actions

A class action in this case is superior to individual actions. Fed. R. Civ. P. (b)(3)(A). Given the limited resources of individual class members and their geographic dispersion, separate litigation of their claims would be highly impracticable and unlikely. *See generally*

Johnston Declaration (Ex. J). Moreover, the relatively small amounts of money involved per owner-operator, make a class action superior to other forms of adjudication.[12]

(B) The Extent of Any Litigation Concerning the Controversy Already Commenced

Plaintiffs are aware of no other litigation concerning the controversy presented in Plaintiffs' Complaint. Fed. R. Civ. P. 23(b)(3)(B).

(C) The Desirability of Concentrating the Case in this Forum

Given the proven ability and willingness of the class representatives and their counsel to prosecute Plaintiffs' claims, the class action method is ideally suited for the purpose of concentrating the case in this central federal forum. Fed. R. Civ. P. 23(b)(3)(C). *See* Johnston and Cullen Declarations (Ex. I-J). If the class is not certified, each individual Owner-Operator would have to bring a separate action in numerous separate lawsuits throughout the nation. Such a process would be plainly inefficient and undesirable.[13]

(D) The Difficulties Likely to Be Encountered in the Management of Class Action

No substantial difficulties are likely to be encountered in the management of this class under Rule 23(b)(3)(D). As noted by the *Heartland* court "Plaintiffs' counsel appear to be capable of managing the class . . . 600 individual lawsuits [at least 7,000 in this action] would not be superior to this single class action." Ex. F at 8.[14]

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[12] *See, e.g., Mayflower* 204 F.R.D. at 149 ("[a] lawsuit by each individual plaintiff is impracticable since the amount of money at issue is less, in many cases, than the amount it would cost for each to prosecute a case."); *Accord Heartland* (Ex. F at 7) ("The court agrees that it is doubtful that the majority of these owner-operators would have the time or inclination to seek the relief to which they are allegedly entitled.").

[13] *Mayflower*, 204 F.R.D. at 149 ("It follows that, absent a class action, the individuals would likely be without a remedy and Mayflower would likely retain the benefits of its alleged wrongdoing."); *Accord Heartland,* (Ex. F at 8) ("Multiple suits might very well create inconsistent judgments. Thus, concentrating the issues in this forum is desirable.").

[14] In accordance with Local Rule 4.04(b), plaintiffs propose to provide and/or defray the cost of providing the notice required by Rule 23(c)(2), Fed. R. Civ. P., by mailing such notice to class members whose names and addresses will be provided to plaintiffs by defendants in an electronic database that will help facilitate and defray the cost of the

V. Landstar Has No Legitimate Objections To Class Certification

Landstar recently revealed its defenses to class certification in its Motion for Partial Summary Judgment, contending that its defenses require a "contractor-by-contractor" analysis in order to certify a class. (Dkt. 107 at 5). There, Landstar argued that, before the Court rules on class certification, it should decide whether Plaintiffs must prove that Landstar did not "substantially comply" with the Truth-in-Leasing Regulations, and whether Plaintiffs must also prove that they sustained "actual" damages as a result of "detrimental reliance." *Id.* As Plaintiffs have demonstrated in their Memorandum in Opposition to Landstar's motion (Dkt. 110, incorporated by reference herein), none of Landstar's theories have substantive merit within the framework of the Truth-in-Leasing Regulations and none pose an obstacle to class certification.

As an initial matter, the Court should decline Landstar's invitation to turn this class certification proceeding into a trial on the merits of its defenses regarding whether, and to what extent, it violated the Truth-in-Leasing Regulations.[15] Nevertheless, Plaintiffs have not only demonstrated that the substantial compliance standard is inappropriate in this case, but also that Landstar's recent reformation of its leases by disclosing information that never before existed in the lease at issue destroys any claim that its lease complied with the Truth-in-Leasing Regulations *even a bit*. *See generally* discussion Dkt. 110 at 4-9.

Moreover, to the extent that the doctrine of substantial compliance is applicable at all, it necessarily is limited to the question of whether *the four corners of the Landstar lease itself*

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notification procedure. Plaintiffs will initially incur the cost of notification by mail subject to reimbursement upon appropriate Order of the Court at the conclusion of the case. Defendants will incur the cost of preparation of the electronic database.

[15] "A class certification ruling is *not a decision on the merits*...the question is not whether the...plaintiffs have stated a cause of action or will prevail on the merits, but...whether the requirements of Rule 23 are met.'" *Miles*, 202 F.R.D. 297, 301 (emphasis added). "Likewise, a predetermination of the merits *of the defense* of the suit is inappropriate." *In re Commercial Tissue Products,* 183 F.R.D. 589, 591 (emphasis added).

substantially complies with the regulations. This conclusion is confirmed by *Dart Transit Co.--Petition for Declaratory Order*, where the I.C.C. confined its ruling regarding the defendant's compliance to *the four corners of the leasing documents*.[16] Neither *Dart*, nor the doctrine of substantial compliance, will permit the introduction of rank parol evidence, particularly on this record. In this regard, Landstar is absolutely prohibited from introducing evidence extraneous to the four corners of its lease because: (1) Landstar's own lease contains an integration clause, and (2) the parol evidence rule absolutely prohibits the introduction of such evidence.[17] Finally, and perhaps most importantly, Landstar's recent incriminating admissions conclusively prove that the lease at issue in this case does not comply with the regulations *at all*. Accordingly, the Court should reject Landstar's disingenuous efforts to frustrate class certification by a so-called "contractor-by-contractor" analysis regarding its palpably unlawful conduct. For similar reasons, the Court should reject Landstar's argument that each member of the class must prove "actual damage" based upon "detrimental reliance" as a condition to class certification. As plaintiffs have demonstrated in their opposition to Landstar's summary judgment motion, Landstar's

[16] 9 I.C.C. 2d 701, 708-711, 1993 WL 220182 (1993). The I.C.C. held that ***"the agreement*** is consistent with … [the] regulations *** The ***addendum,*** thus, conveys the essence of owner-operator's equipment lease arrangements *** the terms of the Maintenance Reserve Fund arrangement ***are disclosed adequately within Dart's owner-operator agreement*** to satisfy the requirements of §1057.12(i)," and thus concluded, "that the full-disclosure requirements of the Commission's leasing regulations ***are satisfied by Dart's 'Independent Contractor Agreement'***…." *Id.* (emphases added).

[17] *See* Exhibit A, ¶ 26; *Int'l Erectors, Inc. v. Wilhoit Steel Erectors & Rental Service*, 400 F. 2d 465, 468 (5th Cir. 1968) ("[p]arol evidence rule forbids any addition to or contradiction of the terms of a written instrument…"); *See also Sheinhartz,* 2002 WL575636, at *8 ("[i]t does not matter what linehaul amount each owner-operator was quoted nor does it matter what each owner-operator was told orally about the cost of insurance…The dispositive and predominate legal and factual issues in this case are whether…Plaintiffs' leases complied with the federal regulations by clearly stating the amount to be paid to the owner-operators…"). Landstar's reliance on the court's unpublished decision in *Strickland v. Trucker's Express, Inc.,* No. CV-95-62-M-LBE, (D. Mont. Feb. 3, 2003) (Exhibit D to Landstar Sum. J. Mem.) is unavailing. Putting aside the court's admission of parol evidence in *Strickland* (the admission of which is prohibited in this case, *see Int'l Erectors, supra*), the incontrovertible evidence of Landstar's defalcation of Owner-Operator's earnings in this case renders any claim of substantial compliance spurious. Lastly, while Landstar has cited a decision from *Ledar* regarding substantial compliance, *see* Dkt. 107 at 18, it conveniently sidesteps the fact that Judge Gaitan has ***granted class certification*** in that case! *See Ledar* (Ex. C).

actual damage and detrimental reliance theories are unprecedented and unsustainable as a matter of law. *See generally* discussion, Dkt. 110 at 11-18. Landstar's reliance on cases decided under regulatory regimes ***other than*** the Truth-in-Leasing regulations is undermined by the vast body of cases decided ***within*** the framework of the Truth-in-Leasing regulations. *Id.*[18] Moreover, contrary to Landstar's rhetorical broadsides, *OOIDA v. New Prime, Inc.* lends no legal support whatsoever to its novel theories - *New Prime* never once mentions the word "actual" damages, nor does it suggest that "detrimental reliance" is a prerequisite to recovery.[19] In addition, to the extent the court in *New Prime* upheld denial of class certification on the grounds that the case presented individualized questions of fact as to damages, it is *inconsistent* with the law of the Eleventh Circuit, and, for that matter, many other circuits throughout the country. The Eleventh Circuit has ruled that "numerous courts have recognized that the presence of individualized damages issues does not prevent a finding that the common issues in the case predominate."[20]

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[18] Though not cited in Landstar's summary judgment motion, to the extent Landstar may cite the RICO case of *Sikes v. Teleline*, 281 F. 3d 1350 (11th Cir. 2002), it, too, is inapposite for the same reasons set forth in plaintiffs' opposition (Dkt. 110). Additionally, unlike the Truth-in-Leasing regulations, detrimental reliance is a necessary element of a RICO cause of action.

[19] 339 F. 3d 1001 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1878 (2004) (cited in Landstar Sum. J. Mem., Dkt. 107 at 7). *New Prime* is also inapposite as a matter of fact in this case. Landstar asserts no class-wide offsets as an affirmative defense, or as a defense to class certification. Rather, it pleads offset to one of the named plaintiffs, as to whom it has asserted a counterclaim. (Dkt. 100, 12th Affirmative Defense). Such a free-standing counterclaim is insufficient to defeat certification. *See Alapattah,* 333 F. 3d at 1259 ("several courts have determined that the appropriate time for a class action defendant to raise affirmative defenses and to assert set-off claims is during the damages phase of the action." Further, Landstar has no cognizable offsets in this case. A defensive set-off must (1) be asserted solely to defeat or diminish the adverse party's recovery; (2) arise from a transaction extrinsic to the original claim; (3) be based on a contract or judgment; and (4) be liquidated or capable of liquidation without the aid of evidence presented at trial. *See, e.g., Arctic Express,* (Ex. K. at 4)(citing cases) ("Here, the items of set-off claimed by Defendants would not be capable of liquidation without substantial evidence being presented at trial. This the Court will not allow.").

[20] *Allapattah Services* 333 F. 3d at 1261. *Citing In re Visa Check/MasterMoney Antitrust Litig.,* 280 F. 3d 124, 139 (2d Cir. 2001) ("Common issues may predominate when liability can be determined on a class-wide basis, even when there are some individualized damage issues."); *Accord Blackie v. Barrack*, 524 F. 2d 891, 905 (9th Cir. 1975)("The amount of damages is invariably an individual question and does not defeat class action treatment."); *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F. 3d 290, 298 (5th Cir. 2001) ("Although calculating damages will require some individualized determinations, it appears that virtually every issue prior to damages is a common issue"); *Sterling v. Velsicol Chemical Corp.*, 855 F. 2d 1188 (6th Cir. 1988)("No matter how individualized the

Further, Landstar has effectively conceded that a "contractor-by-contractor" analysis would not be required if the relief to be awarded in this case were in the form of *restitution.*[21] In this regard, because the Plaintiffs have specifically pleaded for restitution - and because this Court has the *inherent* equitable power to award restitution – Landstar's theories fall of their own weight.[22] Finally, even under the federal Lending Act, 15 U.S.C. 1601 *et seq.*, the regulatory foundation upon which Landstar has anchored its "contractor-by-contractor" theme, it has been ruled that where the named plaintiff was not eligible for actual damages, "such preclusion ***does not render her claim atypical***" for purposes of certifying the class. *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 314 (S.D. Fla. 2001) (emphasis added).

In the final analysis, Landstar's novel defenses have but one transparent objective – to obfuscate the relatively simple class certification issues presented in this case by any conceivable means. Tellingly, in a recent promotional client newsletter, Landstar's attorneys, Scopelitis, Garvin, Light & Hanson wrote:

> [C]arriers are fighting lawsuits challenging allegedly undisclosed "off-the-top" reductions in percentage of revenue compensation in Florida. ... All of those carriers will hopefully

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issues of damages may be, these issues may be reserved for individual treatment with the question of liability tried as a class action."); *Aamco Auto. Transmission, Inc. v. Taylor,* 67 F.R.D. 440, 450 (E.D. Pa. 1975) ("[I]n the event of a finding of liability, damages might have to be established on an individual basis. This fact alone ... does not preclude class action treatment."). *See also OOIDA v. Arctic Express, Inc.*, 288 F. 2d 895 (S.D. Ohio 2003)(refusing to decertify class based upon *New Prime*) (*See also Arctic,* Ex. D). To the extent *Hammett v. Am. Bankers Ins. Co.*, 203 F.R.D. 690, 697 (S.D. Fla. 2001) retains any vitality after *Alapattah* it necessarily is delimited to facts not present here. ("Plaintiff's breach of contract claim seeks compensatory damages for suffering economic loss, aggravation, anxiety, dismay and loss of their ability to obtain credit, a remedy requiring complex individualized determinations.").

[21] Dkt. 107 at 10 n.5 (*citing Albillo v. Intermodal Container Services.* 114 Cal. App. 4th 190, 8 Cal. Rptr. 3d 350, 354 (2003) (court awarded restitution under state statute for predicate violation of federal Truth-in-Leasing regulations).

[22] *See generally* Dkt. 110 at 14 -16, discussing *I.C.C. v. B&T Trans. Co.,* 613 F. 3d 1182 (1st Cir. 1980); *Porter v. Warner Holding Co.*, 328 U.S. 395, 397-98 (1946); *Mitchell v. Robert DeMario Jewelry, Inc.*, 361 U.S. 288, 291-92 (1960); *I.C.C. v. Brannon Systems, Inc.*, 686 F. 2d 295, 296 (5th Cir. 1982); *I.C.C. v. J.B. Montgomery Int'l Comm., Ltd.*, 483 F. Supp. 279 (D. Colo. 1980). *See also Guyana Tel.&Tel. Co., Inc., v. Melbourne Int'l Comm., Ltd.,* 329 F. 3d 1241, 1249 (11th Cir. 2003) (restitution a "remedy that is often available to victims of a wrong").

> win their cases *by pointing to supportive additional disclosures or courses of dealing.* For those not yet sued, the best deterrent is extra precision and detail in drafting both compensation and chargeback provisions in leases.

(Exhibit L, *The Transportation Brief*, Spring 2004 at 2). This Court should summarily reject Landstar's ruse of "pointing to supportive additional disclosures or courses of dealing," in order to divert the Court's attention from its admitted violations of the Truth-in-Leasing regulations.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs motion for class certification should be granted.

Respectfully submitted,

BRENNAN, MANNA & DIAMOND, P.L.

By _____
Michael R. Freed

Florida Bar No. 069205
76 South Laura Street, Suite 1700
Jacksonville, Florida 32202
(904) 366-1504
(904) 366-1505 (facsimile)

-AND-

Paul D. Cullen, Sr., Esq.
Joseph A. Black, Esq.
Daniel E. Cohen, Esq.
THE CULLEN LAW FIRM, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007-3770
(202) 944-8600 (Telephone)
(202) 944-8611 (Telecopier)

Attorneys for Plaintiffs

Certificate of Service

I HEREBY CERTIFY that a copy of Plaintiffs' Motion and Memorandum of Law in Support of Plaintiffs' Motion for Class Certification has been served by Telecopier (without exhibits) and by First Class Mail (with exhibits) to: Lawrence J. Hamilton II, Esq., Holland & Knight, LLP, 50 North Laura Street, Suite 3900, Jacksonville, Florida 32202 (without enclosures); Daniel R. Barney, Esq., Scopelitis, Garvin, Light & Hanson, P.C., 1850 M Street, N.W., Suite 280, Washington, DC 20036-5804, (without enclosures); and by Federal Express to Gregory M. Feary, Esq., Robert L. Browning, Esq., and Timothy W. Wiseman, Esq., Scopelitis, Garvin, Light & Hanson, P.C., 10 West Market Street, Suite 1500, Indianapolis, Indiana 462204-2968, this 14th day of September, 2004.

Attorney