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

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., et al.,	)	
Plaintiffs,	)	**No. 3:02-CV-1005-J-25 HLA/MCR**
v.	)	
LANDSTAR INWAY, INC., et al.,	)	
Defendants.	)	

PLAINTIFFS' TRIAL BRIEF

I. INTRODUCTION

A. The Chargeback Rule is a Critical Part of the Truth-in-Leasing Regulations

The privilege of deducting money from someone's paycheck with no questions asked is enormously powerful. Drivers within this industry who want to challenge undisclosed or undocumented chargebacks by motor carriers often risk retaliation if they complain – termination of the lease, or the prospect of being assigned less desirable and more infrequent loads. Under Landstar's original lease, a driver brave enough or foolish enough to challenge the system was required to travel from his home state, hire a lawyer in Jacksonville, and pay an arbitrator to resolve an issue often worth only a few thousand dollars. We know of no one who made this trip despite the fact that for years Landstar has been making tens of millions of dollars in undisclosed and undocumented chargebacks to over 26,000 owner-operators. Under the New Lease, adopted as a result of this litigation, arbitration is no longer required, but other obstacles remain. This type of class action aside, the ability of owner-operators to protect themselves from abusive practices by motor carriers is very limited.

The ICC recognized this industry-wide problem when it promulgated the Federal Truth-in-Leasing regulations.[1] The circumstances under which motor carriers can take money out of the pockets of owner-operators were carefully limited.[2] But Landstar does not want to be judged by the regulatory regime crafted so carefully by the ICC. Instead, Landstar wants its conduct to be judged by the rules of the marketplace as one would judge the commercial conduct of Michelin Tire or the local truck dealer under state contract claims. What Landstar stubbornly refuses to acknowledge is that motor carriers like it occupy a position of dominance over owner-operators and it is that dominant position that prompted the ICC to craft special rules governing the use of chargebacks within the motor carrier/owner-operator relationship.

The Court has ruled that Landstar cannot use the chargeback mechanism to make undisclosed or undocumented deductions to owner-operator revenues.[3] If Landstar wants to be a pure merchant and make *undisclosed* and *undocumented* revenues, it is required to do what other merchants do – accept VISA© or MasterCard©, require drivers to finance through a bank or credit union, or accept monthly checks in payment, etc. The regulations simply do not permit regulated motor carriers to exercise the enormous leverage that they have over owner-operators by making

[1] *See, e.g., OOIDA v. Swift Transp. Co.*, 367 F. 3d 1108, 1110 (9th Cir. 2004)("A primary goal of this regulatory scheme is to prevent large carriers from taking advantage of individual owner-operators due to their weak bargaining position."); *OOIDA v. New Prime, Inc.*, 398 F. 3d 1067, 1070 (8th Cir. 2005)(noting "'the Commission's deep concern for the problems faced by the owner-operator in making a decent living in his chosen profession.'") (quoting 42 Fed. Reg. 59984 (Nov. 23, 1977)) and ("observing that "in its notice of proposed final rules, the ICC said that some of its rulemaking objectives were to 'eliminate or reduce opportunities for skimming and other illegal or inequitable practices; and to promote the stability and economic welfare of the independent trucker segment of the motor carrier industry'") (quoting 43 Fed. Reg. 29, 812 (July 11, 1978)); *Tayssoun Transp., Inc. v. Universal Am-Can, Ltd.*, No. Civ. A. H-04-1074, 2005 WL 1185811, at *16-17 (S.D. Texas 2005)("The ICC explained that the purpose of the regulations is to 'eliminate or reduce opportunities for skimming and other illegal or inequitable practices [by motor carriers].'") (quoting Lease and Interchage of Vehicles, 131 M.C.C. 141, 142 (1979)).

[2] *See, e.g.* 49 C.F.R. §376.12(introductory paragraph)(h), (i) and (k).

[3] Dkt. 320 at 12, 15.

undisclosed and undocumented deductions from their compensation and forcing them to travel to Jacksonville in order to challenge the transaction under circumstances where the economics of such a trip are simply not worth it. The remedy phase of this proceeding will determine whether the Truth-in-Leasing regulations have teeth and whether the remedial and deterrent purposes of those regulations can be achieved.

B. The Remedy to be Pursued At Trial

This Court has previously found that, while there is nothing in the federal Truth-in-Leasing regulations that prohibit a motor carrier from adding fees and profits to chargeback items (Dkt. 320 at 12), Landstar nevertheless violated the regulations by making undisclosed and undocumented markups to owner-operator chargebacks. (Dkt. 320 at 15). Class counsel has elected to pursue equitable remedies during the remedy phase of this proceeding. Our analysis below shows that Plaintiffs have suffered economic harm because of Landstar's unlawful conduct, and that, while they have a perfectly valid claim for damages under Section 14704(a)(2), equitable remedies have the potential of providing more comprehensive relief for class members. In addition, equitable remedies are a superior means to advance the law's remedial and deterrent purposes.

The evidence at trial will show that Landstar's original leases, as well as its New Lease agreement, contain provisions that limit chargebacks for driver operational expenses to Landstar's payments to third party vendors. Class Members are entitled to the benefit of their bargain with Landstar. The lease agreements at issue here specify that Landstar will charge back the "payment" made to third parties; and the regulations specifically provide that such undertakings "shall be adhered to and performed."[4] Plaintiffs will then present a driver by driver, transaction by transaction analysis of Landstar's chargebacks to the 26,000 plus Class

[4] 49 C.F.R. § 376.12 (introductory paragraph).

Members covered by this litigation. This analysis, based entirely on Landstar' own computerized records, will show that Landstar collected a total of $37,280,661 from owner-operators in excess of its payments to third party vendors. Landstar's position that drivers have not been harmed because the products and services purchased by them could not be purchased cheaper from other vendors is completely untethered from the reality of the situation. First, no vendor can charge his customer more than the agreed-upon price and then defend his conduct on the ground that the goods were not available elsewhere for less. So too, Landstar cannot charge owner-operators more than what was agreed to in its written leases (Landstar's actual payment to third party vendors) no matter at what prices the same products and services may have been available from others. The regulations do not permit a motor carrier to abandon its written undertakings (Section 376.12) any more than contract law would permit such conduct. The availability and price of the same product or service from other vendors in the marketplace has absolutely nothing to do with whether owner-operators can insist on receiving the benefit of the bargain set forth in their written lease agreements – a benefit taken from them by the violation of federal regulations that this Court has already found to have taken place. Second, equity will simply not tolerate allowing a wrongdoer to keep $37,280,661 of unlawfully deducted chargebacks. To do so would make a mockery out of the law and invite further violations by Landstar and others emboldened by any judicial decision allowing this to happen.

This Court has ample authority to require Landstar to disgorge all amounts in excess of its payment to third party suppliers. This remedy is neither punitive nor does it produce a windfall for Class Members. All that the Court is being asked to do is to restore the parties to the condition that they would have been in had Landstar not made undisclosed and undocumented upcharges to owner-operator operational expenses advanced by it.

Landstar must also be required to disgorge profits that it generated using funds belonging to owner-operators unlawfully in its custody. During his deposition, Landstar's Chief Financial Officer testified that Landstar generates an internal rate of return in excess of 20 percent.[5] Using this rate of return, Plaintiffs' expert will testify that Landstar earned profits of $29,056,749 on the $37 million in owner-operator money that it held unlawfully during the period covered by this litigation. Equitable principles require Landstar to disgorge these ill-gotten gains. Nor can Landstar claim that disgorgement of such profits would be unreasonable. Landstar's written lease agreements require owner-operators to pay Landstar interest on sums owed by them at the highest legal rate available in the State of Florida.[6] Landstar currently charges 18 percent interest on sums allegedly owed to it by drivers.[7] Requiring Landstar to disgorge the profits it generated at its own internal rate of return on funds belonging to its owner operators is nothing but equal justice. What's good for the goose is certainly just good for the gander.

By proceeding in equity, seeking disgorgement and equitable restitution, Class Members are entitled to recover their damages ($37,280,661) plus the profits Landstar made by using their money ($29,056,749) for a total recovery of $66,337,410. Failure to allow such a recovery would rob the Truth-in-Leasing regulations of their remedial purpose and would deprive drivers of the specific protections that both Congress and the ICC (now DOT) intended for them. Landstar is no ordinary vendor. It cannot defy the special rules applicable to motor carriers that were designed to protect weaker owner-operators from systematic abuse. Allowing it to do so would

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[5] La Rose Dep. 96:10-18 (May 5, 2006), attached as Exhibit A.

[6] Any monies due Landstar will be paid "together with interest at the maximum legal rate." (Exhibit C and C-1 at ¶ 4(b)).

[7] Promissory note dated 10/17/06 from Madeline Marquez to Landstar, Inc., attached as Exhibit B.

signal thousands of motor carriers throughout the country that they, too, can ignore the regulations with impunity. We are confident that this Court will not let this happen.

II. FACTS TO BE ESTABLISHED AT TRIAL

The Plaintiffs submit the following summary of their case that will be proven at trial.

A. Landstar's Charges in Excess of its Operational Expenses

1. Plaintiffs will show that Landstar's written leases do not authorize the chargeback of sums exceeding Landstar's payments to third party vendors for owner-operator operating expenses.

2. Plaintiffs will show that Landstar's leases prohibit modification except in writing.

3. Plaintiffs will demonstrate that Landstar's leases lead to the legitimate conclusion that chargebacks would not exceed sums paid by Landstar to vendors for products and services.

4. Plaintiffs will prove Landstar's differentials through December 31, 2006 (without interest) between what Landstar paid to third party vendors and what it charged back to owner-operators for operational expenses is $37,280,661.

B. Facts Related to Disgorgement of Landstar's Illegal Gains

1. Plaintiffs will show that Landstar's internal rate of return on money held by it is in excess of 20 percent.

2. Plaintiffs will show that Landstar's written lease agreements authorize it to impose interest charges on sums owed to it by owner-operators in an amount equal to the highest legal rate of interest that may be charged within the State of Florida.

3. Plaintiffs will show that Landstar is currently charging owner-operators 18 percent on sums allegedly owed by owner-operators.

4. Based on the criteria identified above, Plaintiffs will prove that the profits made by Landstar on its undisclosed and undocumented upcharges are as follows:

   a. 20% - Landstar's internal rate of return: $29,056,749

b. 18 % - Landstar rate charged to BCOs: $26,151,074[8]

C. Calculation of Plaintiffs' Claims

Chargebacks	Lost Revenue	18 percent	20 percent
TripPak	3,735,002	2,621,898	2,913,220
Landstar Card Loading Fee	4,008,062	2,957,960	3,286,622
Pre-Pass Transponder	1,342,432	579,495	643,884
IRP Base Plate	12,423,384	8,237,887	9,153,207
Qualcomm Base Airtime	176,472	225,725	250,805
Permit Package	10,115,520	7,009,727	7,788,585
LCAPP Tire Purchases	2,378,622	1,899,332	2,110,369
Contractor Pager Airtime	1,451,899	1,654,763	1,838,625
Estimate for Unreported Early Months	457,200	645,806	717,562
Estimate for Unreported Late Months	754,487	11,535	12,816
Subtotal	**36,843,080**	**25,844,127**	**28,715,696**

Unrefunded Rebates	437,581	306,948	341,053

Total, Chargebacks + Rebates	**37,280,661**	**26,151,074**	**29,056,749**
Total+ Landstar Profit	**37,280,661**	**63,431,735**	**66,337,410**

[8] The current interest authorized by Florida Code § 55.03 for pre-judgment entered during the year 2007 is 11 percent. An award of prejudgment interest at the State of Florida statutory rate of 11 percent would yield $15,793,633 in interest based upon damages of $37,280,661. An award of only prejudgment interest at the prevailing statutory rate would allow Landstar to retain $13,000,000 in profits that it generated at its own internal rate of return using money belonging to Class Members.

D. There is No Basis for Offsetting Landstar's Unlawful Chargeback Differentials by Purported Administrative Costs or Offsets

Plaintiffs have filed a motion in limine demonstrating that Landstar's evidence of "administrative expenses," "offsets," and or "counterclaims" is irrelevant and/or inadmissible (Dkt. 329), as follows:

1. Landstar's administrative costs are irrelevant.

2. Landstar has no records created in the ordinary course of business that would reliably establish its supposed administrative costs.

3. The data Landstar offers is unreliable because it was created for this litigation and it is not based on admissible evidence. Landstar's attempt to label it as an "analysis," is unavailing – an analysis based on inadmissible evidence is also inadmissible.

4. Landstar's data includes costs not related to the chargebacks at issue.

5. Landstar's experts did nothing to verify the accuracy of Landstar's purported administrative costs.

6. Landstar's offsets and counterclaims are inadmissible.

E. There is No Equitable Basis for Allowing Landstar to Retain its Unlawful Chargebacks

Plaintiffs will show that disgorgement of Landstar's unlawful gains will effectuate the salutary and deterrent purposes of the Truth-in-Leasing Regulations. Landstar's assertion that disgorgement would be punitive is unsupported.

F. Landstar's New Lease and Conduct Continue to Violate the Regulations

Landstar's failure to comply with the Regulations continues unabated to this day. First, Landstar continues to mark-up chargebacks in disregard of the provisions in its lease limiting it to reimbursement for actual payments to vendors. Second, even if such mark-ups were permissible, vague statements in the New Lease that chargebacks may include profit only serve to underscore the importance of disclosure, and further demonstrate Landstar's continuing violation of the Regulations by failing to provide documentation demonstrating the validity of such chargebacks.

G. Plaintiffs are Entitled to a Permanent Injunction Order

Landstar has been found liable for violating Section 376.12 (h) of the Truth-in-Leasing Regulations by failing to provide documents necessary to determine the validity of the chargebacks at issue in this case. (Dkt. 320). As far as we are aware, Landstar has still not disclosed such documents to its BCO's. While Landstar's counsel wrote to Plaintiffs' counsel on October 23, 2006, stating that Landstar began "working to develop a plan" to provide its BCO's with the information; to date, it has revealed no such plan to Class Counsel. To the contrary, on November 15, 2006, Landstar took the astonishing position that before sharing any of Landstar's supposedly "confidential" data with the members of the class, Class Counsel would need to obtain confidentiality agreements from each of the 26,000 class members![9] Further, the general demeanor evinced by Landstar since the Court issued its ruling has been one of indifference, maintaining both that its mark-ups are "legal," and that its violations are a mere technicality, causing no "actual damage." Simply put, there has been no genuine showing by Landstar that it takes the Court's ruling seriously, or that it will cease its illegal behavior in the absence of a permanent injunction.[10]

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[9] *See* Exhibit H.

[10] Plaintiffs believe an injunction is appropriate in this case. The requirement of irreparable harm/inadequate remedy of law is met in this case: without an injunction Plaintiffs will be forced to return to court to enforce their rights. Landstar has consistently shown disregard for the Truth-in-Leasing regulations. Repeated acts requiring multiplicity of suits has been held to constitute irreparable harm/inadequate remedy of law. *See Koniag, Inc. v. Koncor Forest Resource,* 39 F. 3d 991, 1000 n. 9 (9th Cir. 1994); *Actuant Corp. v. Huffman*, No. cv-04-998-HU, 2005 WL396610 at *23 (D. Or. 2005) (citing *Dobbs Law of Remedies* §2.5(2), 131 (2d ed. 1993)).

III. LEGAL ARGUMENT[11]

A. Congress Conferred Authority On Federal Courts To Award A Broad Range Of Equitable Remedies For Violations Of The Truth-In-Leasing Regulations

1. Section 14704(a)(1) authorizes full exercise of this Court's inherent equitable authority.

Section 14704(a)(1) expressly provides that "a person may bring a civil action for injunctive relief for violations of 14102 and 14103." In the seminal Supreme Court decision of *Porter v. Warner Holding Co.*, the Court ruled that "[u]nless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction."[12] The Court later expanded upon this principle in *Mitchell v. Robert De Mario Jewelry, Inc*. where it observed that "[w]hen Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in the light of statutory purposes."[13] These principles have been embraced both by the Eleventh Circuit, as well as this Court.[14] Other courts have uniformly applied these precepts in upholding their

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[11] Defendant Landstar has previously filed a Motion in Limine to Preclude Evidence of Landstar's Alleged "Unjust Enrichment," (Dkt. 332) to which Plaintiffs have filed an opposition. (Dkt. 339). Landstar's motion in limine has all of the earmarks of a dispositive motion. Our opposition brief met these arguments head on and necessarily included much of the material that would normally be included in this trial brief. In order to relieve the Court of needless repetition, on the scope of its equitable powers, the Court is referred to Plaintiffs' earlier brief (Dkt. 339 at 7-16).

[12] *Porter v. Warner Holding Co.,* 328 U.S. 395, 398 (1946).

[13] *Mitchell v. Robert DeMario Jewelry,* 361 U.S. 288, 290-92 (1960).

[14] *See FTC v. Peoples Credit First*, No. 8:03-cv-2353-T, 2005 WL 3468588 at *7 (M.D. Fla. Dec. 18, 2005) (citing *FTC v. Gem Merchandising Corp.*, 87 F.3d 466, 468-70 (11th Cir.1996))(finding disgorgement to be appropriate under the Federal Trade Commission Act); *AT&T Broadband v. Tech Communications, Inc.,* 381 F. 3d 1309, 1316 (11th Cir. 2004) ("Congress, when it gave the district court authority to grant a permanent injunction . . . also gave the district court the authority to grant any ancillary relief necessary to accomplish complete justice because it did not limit that traditional equitable power explicitly or by necessary or inescapable inference.") (quoting *FTC v. U.S. Oil & Gas Corp.*, 748 F. 2d 1431 (11th Cir. 1984)).

authority to order restitution or disgorgement under statutes that did not expressly constrain their exercise of such authority.[15] Section 14704(a)(1) sets forth an unqualified cause of action and remedy for injunctive relief. Part B of Title 49, U.S. Code contains no provisions restricting the authority of this Court to award equitable relief to the Class on account of Landstar's transgressions. Plaintiffs have requested injunctive relief here, including "restitution and disgorgement."[16]

2. Section 13103 confirms Congressional intent to authorize a full range of equitable relief.

49 U.S.C. § 13103 states: "[e]xcept as otherwise provided in this part, the remedies provided under this part are in addition to remedies existing under another law or common law." This provision does not establish a new cause of action, but expands the available remedies under causes of action established elsewhere in Part B of Title 49, U.S. Code.

Section 13103 is essentially the same provision previously found in Section 22 of the Interstate Commerce Act of 1887 which provided: "[n]othing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." In *Pennsylvania Railroad Co. v. Puritan Coal*, the Supreme Court explained that "[t]hat proviso was added at the end of the statute, not to nullify

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[15] *See United States v. RX Depot*, 438 F.3d 1052, 1055 (10th Cir. 2006) (when "a statute invokes general equity jurisdiction, courts are permitted to utilize any equitable remedy to further the purposes of the statute absent a clear legislative command or necessary and inescapable inference restricting the remedies available."); *SEC v. First City Fin. Corp.*, 890 F.2d 1215, 1230 (D.C. Cir. 1989) (relying on *Porter* to award disgorgement under the Securities Exchange Act of 1934); *FTC v. Southwest Sunsites, Inc.*, 665 F.2d 711, 718 (5th Cir. 1982) (statute "carries with it the authorization for the district court to exercise the full range of equitable remedies traditionally available to it."); *CFTC v. Co Petro Mktg. Group, Inc.*, 680 F.2d 573, 583-84 (9th Cir.1982) (disgorgement under the Commodity Exchange Act); *I.C.C v. B & T Transp. Co.*, 613 F.2d 1182, 1184-85 (1st Cir. 1980)(applying *Porter* and *Mitchell* to permit restitution under the Motor Carrier Act); *CFTC Comm'n v. Hunt*, 591 F.2d 1211, 1222-23 (7th Cir.1979) (holding that *Porter* authorized disgorgement under the Commodity Exchange Act).

[16] First Am. Comp., at 9, Dkt. 151.

other parts of the act, or to defeat rights or remedies given by preceding sections, but to preserve all existing rights which were not inconsistent with those created by statute" and to create the broadest possible remedies.[17]

The rule that this savings clause preserved common law equitable remedies was recognized more recently by the Supreme Court in *Arrow Transportation v. Southern Railway Company*.[18] In *Arrow*, the Supreme Court was divided on the question of whether Congressional authority to stay proposed railroad rate increases was vested exclusively in the ICC.[19] Whatever differences there may have been within the Court with respect to Congressional intent on the ability to stay railroad rate increases, all nine Justices agreed that federal courts retain the authority to impose broad equitable remedies under the precursor to Section 13103, unless that authority had been previously circumscribed. In this case, there is no basis to assert that Congress intended to circumscribe the ability of a court to impose broad equitable remedies for violations of Part B of Title 49.[20]

B. Landstar Must Disgorge the Full Amount of its Unlawful Upcharges Without Reference to its Alleged Administrative Costs

"Restitution is not damages; restitution is a restoration required to prevent unjust enrichment." Dan B. Dobbs, *The Law of Remedies: Damages, Equity, Restitution* (2d Ed. 1993)

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[17] *Pennsylvania R. Co. v. Puritan Coal Min. Co.*, 237 U.S. 121, 129 (1915).

[18] *Arrow Transportation Company v. Southern Railway Company*, 372 U.S. 658 (1963).

[19] *Id.* at 667, 671, n.22.

[20] *Compare Fulfillment Services, Inc. v. United Parcel Services, Inc.*, No. CV 05-538 TUC DCB, 2006 WL 1061892 (D. Ariz April 19, 2006) (appeal pending). There, the district court seemed to reject the use of Section 13103 as a free standing cause of action. While the District Court may have been correct in its belief that Section 13103 does not create new causes of action, it was incorrect to the extent that it failed to recognize that Section 13103 defined the range of remedies available for causes of action established elsewhere. The case law discussed above shows us that Section 13103 expands the remedies available under existing causes of action where Congress has not directed otherwise. Causes of action alleged in this case arise under 49 U.S.C. § 14704, not Section 13103.

§ 4.1(2). Professor Laycock, a respected authority on restitution, explained that "[d]efendant may commit a civil wrong that benefits him more than it hurts plaintiff, or that benefits defendant in an easily measurable way and hurts plaintiff in a speculative or hard-to-measure way. In such a case, plaintiffs will prefer restitution of defendant's unjust enrichment to compensation for his own damages."[21]

In *Great-West Life & Annuity Insurance Company v. Knudson*,[22] the Supreme Court noted the conditions under which equitable restitution would be appropriate: "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession."[23] "Thus, for restitution to lie in equity, the action generally must seek not to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession."[24] This is exactly what the Plaintiffs herein seek.

Landstar also argues Plaintiffs proposed equitable relief constitutes a penalty because of the administrative costs incurred by Landstar in implementing the BCO program. (Dkt. 332 at 21). Such an argument was rejected in the Sixth Circuit in *United States v. Universal Management Services, Inc*.[25] Specifically, in rejecting the proposition that restitution is a penalty, the Sixth Circuit explained " Appellants, who disobeyed the law, should not have his expenses

[21] Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277, 1289 (1989).

[22] *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 213 (2002).

[23] *Id.*

[24] *Id.* at 214 (2002); *Popowski v. Parrot*, 461 F.3d 1367, 1372 (11th Cir. 2006)(citing *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002))(holding that a plaintiff does not seek to impose personal liability on a defendant when the defendant possesses particular funds belonging to the plaintiff).

[25] *United States v. Universal Management Services, Inc.*, 191 F.3d 750, 764 (6th Cir. 1999).

covered by consumers. To say that restitution is unavailable is to say that consumers must cover the costs of Appellants' production, advertising, and illegal distribution."[26]

These cases establish that Class Members are entitled to the full value of Landstar's unlawful gains even if such gains did not precisely match the Class Members' actual losses. They further support the conclusion that a wrongdoer may not reduce his obligation to disgorge by subtracting the costs he incurred in his unlawful enterprise.

C. Landstar Must Also Disgorge Profits It Generated On Money Unlawfully Extracted from Class Members

The facts presented at trial will show that Landstar extracted undisclosed and undocumented upcharges of $37,280,661 from the compensation of Class Members. Landstar's Chief Financial Officer testified in his deposition that Defendant earns an internal rate return in excess of 20 percent.[27] Plaintiffs' expert will testify that Landstar generated $29,056,749 in profit by unlawfully holding Class Members' money. Section 4(b)(1) of both Landstar's old and new leases states that any monies that an owner operator may owe to Landstar are to be calculated at ". . . the maximum legal rate and any expenses, including reasonable attorneys' fees, incurred by carrier in recovering such amounts."[28] Landstar currently charges owner-operators 18 percent interest on their alleged debts to it.[29] Requiring Landstar to disgorge its profits on the $37,280,661 in owner-operator funds would obviate the need for a separate calculation of pre-judgment interest. There is ample authority supporting the requirement that a

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[26] *Id.*

[27] LaRose Dep. at 96:10-18 (Exhibit A).

[28] *See* Exhibits C and G.

[29] Promissory note dated 10/17/06 from Madeline Marquez to Landstar, Inc., attached as Exhibit B.

wrongdoer disgorge profits resulting from his illegal activities.[30] The purpose of "the remedy of disgorgement is designed both to deprive a wrongdoer of his unjust enrichment and to deter others from violating the [] laws."[31] Disgorgement of profits earned using the money unlawfully obtained is obviously the most complete and adequate remedy because it comports closely to how Landstar treats its owner-operators when the shoe is on the other foot.

D. Class Members are Entitled to the Benefit of their Bargain Under Landstar's Leases Which Limit Chargebacks for Operational Expenses to Landstar's Third Party Vendor Costs

Each of Landstar's written lease agreements authorize it to chargeback only the amounts paid by it to third party vendors and nothing more. The following clause appears in both Landstar's original leases [32] as well as in Landstar's New Lease[33]:

> 7. OPERATIONAL EXPENSES: Except as otherwise provided in this Agreement, INDEPENDENT CONTRACTOR shall furnish, provide and pay all operational expenses including, but not limited to, the items listed in this paragraph. In the event CARRIER is called upon *to pay* any of these operational expenses on behalf of INDEPENENT CONTRACTOR, *such payment* shall be considered a Pre- Trip Settlement to INDEPENDENT CONTRACTOR (and a cost of operation) and CARRIER shall be entitled to seek *reimbursement* from

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[30] *See 1 Palmer, § 2.12, at 158, 164-65* ("In equity it has been traditional to hold a wrongdoer accountable for profits realized through the wrongful act."); *SEC v. Huffman*, 996 F.2d 800, 802, citing *Commodities Futures Trading Comm'n v. American Metals Exchange Corp.*, 991 F.2d 71, 76 (3rd Cir. 1993); *SEC v. Blatt*, 583 F.2d 1325, 1335)5th Cir. 1978); *FTC v. Febre* 128 F.3d 530, citing *Randall v. Loftsgaarden*, 478 U.S. 647, 671-72, (1986); *U.S. v. Universal Management Services, Inc.*, 191 F.3d 750 (6th Cir. 1999); *F.T.C. v. Verity Int'l, Ltd.*, 443 F.3d 48, 67-68 (2d Cir. 2006) (holding that upon a finding of defendants' violation of the Unfair Trade Practices Act, disgorgement of profits need not be related to "consumer's loss" and ruling instead that "[l]abeling the remedy 'consumer redress' or 'disgorgement,' each a resitutionary remedy, does not alter the basic principle that restitution is measured by the defendant's gain."); *Estate of Jones*, 449 N.W.2d at 430, 432 (disgorging profits from a stock sale to a third party 11 years after the fraud); *Restatement of Restitution § 1 cmt. e (1937)* (enrichment may be unjust even when the plaintiff "has not suffered a corresponding loss or, in some cases, any loss").

[31] *SEC v. Friendly Power Co.*, 49 F.Supp.2d 1363, 1372 (S.D. Fla. 1999).

[32] Brewer Lease, (Exhibits C and C-1 ¶ 7); Michael Lease (Exhibit D and D-1 at ¶ 9); Whiskers Heavy Haul Lease (Exhibit E and E-1 at ¶); Penman lease (Exhibit F and F-1 at ¶ 8).

[33] New Lease, (Exhibit G at ¶ 7).

> INDEPENDENT CONTRACTOR or to charge back *the payment* as set forth in paragraph 4(b). (emphasis added).

This language could not be more clear. In the event that Landstar is called upon "to pay" a driver's operational expenses it will be entitled to seek "reimbursement" or to "charge back" such "payment." This provision authorizes Landstar to charge back only third party vendor costs and nothing more, including its purported "administrative costs." Moreover, each of these leases contains an integration clause specifying that the written lease contains the entire agreement and that no amendments may be made except in writing.[34] Landstar has thus made a disclosure that it will charge back only payments made by it to vendors. Having put this undertaking in its written lease, it is required to adhere to and perform under this provision.[35]

Landstar appears to be suffering from a serious case of seller's remorse. It is little wonder why Landstar struggled for so long to persuade this Court to adopt the "substantial compliance" standard. It obviously hoped to extract itself from the bargain it struck with owner-operators in its written leases. But a bargain is a bargain and Landstar should not be allowed to evade the consequences of its own Truth-in-Leasing disclosures.

Appendix C to Landstar's New Lease,[36] adopted as a result of this litigation, does contain a general reference to the possibility that chargebacks may include profit for Landstar. No specifics are provided disclosing how much that profit would be or how it would be calculated. Neither did Landstar provide documentation. Hence, this Court's ruling that chargebacks in the New Lease also violate the regulations. Furthermore, this new provision contradicts the clear

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[34] Brewer lease (Exhibit C and C-1 at ¶ 26); Michael Lease (Exhibit D and D-1 at ¶ 33); Whiskers Heavy Haul Lease (Exhibit E and E-1 at ¶ 26); Penman Lease (Exhibit F and F-1 at ¶ 32); New Lease (Exhibit G and G-1at ¶ 25).

[35] Section 376.12 (introductory paragraph).

[36] Exhibit G at page 27-28.

undertaking in paragraph 7 of the New Lease authorizing the chargeback only of third party costs. Any ambiguity caused by these inconsistent provisions must be construed against Landstar as the drafter of both provisions.[37] Certainly the vague and legally incomplete language in Appendix C cannot trump the specific undertaking in paragraph 7 limiting chargebacks to Landstar's payments to third party vendors.

Landstar's argument that it is free to impose undisclosed and undocumented upcharges on owner-operators so long as the final price charged is below market is utter nonsense. Under the regulations, Landstar is bound by the provisions of its written lease and owner-operators are harmed when it fails to do so. The same result applies under fundamental principles of contract law. When a buyer and a seller agree on a price, the seller is not free to charge more than that price.[38] Class members have been harmed because Landstar charged back more for products and services more than what was provided for in the written lease agreements. There is no serious issue of causation as to the harm inflicted upon Class Members. Returning the differential between what was agreed to in the leases (Landstar's payment to third party vendors) and what was actually charged back to the class members (Landstar's payment to third party vendors plus undisclosed and undocumented markups, which may consist of administrative fees, profits, etc.) cannot under any circumstances, be considered a windfall to the drivers or a punitive remedy imposed upon Landstar.

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[37] *Key v. Allstate Ins. Co.* 90 F.3d 1546, 1549 (11th Cir. 1996); *See First Savings Ass'n v. Comprop Inv. Properties*, 752 F. Supp. 1568, 1571 (M.D. Fla. 1990).

[38] *Allapattah Services, Inc. v. Exxon Corporation*, 61 F.Supp.2d 1308, 1325 (S.D. Fla. 1999) (The basic tenet of contract law instructs that "a contract consists of a binding promise or set of promises, [therefore,] a breach of contract is a failure, without legal excuse, to perform any promise which forms the whole or part of a contract.") citing *Montgomery v. Amoco Oil Co.*, 804 F.2d 1000, 1003 n. 6 (7th Cir. 1986) (quoting *Williston on Contracts*).

The Truth-in-Leasing regulations require that motor carriers like Landstar make certain disclosures in written leases and that those "required lease provisions shall be adhered to and performed by the authorized carrier."[39] This Court has found that Landstar failed to disclose and document its markups over its payments to third party vendors. Those undisclosed and undocumented markups are completely inconsistent with the regulation and with the reasonable expectations of drivers operating under these written lease agreements that chargebacks would be limited to Landstar's payments to third party vendors.

E. Prejudgment Interest

If the Court awards full restitution of Landstar's profits on the money held by it, there would be no need to address the question of pre-judgment interest. If, however, the Court decides to impose prejudgment interest rather than full disgorgement of profits, there is ample authority to support an interest rate of 11 percent. The 11th Circuit in *Industrial Risk Insurers* explained that "[a]wards of prejudgment interest are equitable remedies, to be awarded or not awarded in the district court's sound discretion."[40] In the absence of a controlling statute, as in the present case, federal courts' choice of a rate at which to determine the amount of prejudgment interest to be awarded is a matter for their discretion.[41] Therefore, this court has discretion in determining whether to award pre judgment interest and in selecting the rate of interest to apply. Case law in this circuit and Landstar's own lease provide guidance as to which

[39] 49 C.F.R. §376.12(h) (introductory paragraph).

[40] *Industrial Risk Insurers v. M.A.N. Gutehoffunghshütte, et al.*, 141 F.3d 1434, 1447 (11th. Cir. 1998) (citing *Osterneck v. E.T. Barwick Ind., Inc.*, 825 F.2d 1521, 1536 (11th Cir. 1987)); *Waterside Ocean Navigation Co. v. International Navigation Ltd.*, 737 F.2d 150, 153 (2d Cir. 1984).

[41] *See Industrial Risk Insurers,* 141 F.3d at 1447.

rate the court should apply. Notably, both sources direct the court to Section 55.03 of the Florida Code, which currently sets the interest rate at 11 percent, *per annum*.

Additionally, there is considerable case law in the 11th Circuit supporting the use of Florida's statutory interest rate. In *American International Life Assurance,* the 11th Circuit held that a federal district court did not abuse its discretion in looking to the state statutory interest rate for guidance in determining appropriate prejudgment interest rate on district court's award of accidental death benefits under insurance policy governed by ERISA.[42] The court explained that federal courts are not required to use the federal statute on post-judgment interest rates in determining prejudgment interest and the district court did not abuse its discretion in looking to the state statutory interest rate.[43] Prejudgment interest is an equitable remedy designed to compensate the plaintiff for the loss of the use of money from the date of the injury until the date of judgment. It also serves to deprive the defendant of unjust enrichment resulting from the use of the plaintiffs' money.[44] To some extent the remedy of disgorgement overlaps with the question of whether or how much prejudgment interest to award.

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[42] *Smith v. American International Life Assurance Company of New York*, 50 F.3d 956, 958 (11th Cir. 1995).

[43] *Id.* (citing *E.g. Sweet v. Consolidated Aluminum Corp.*, 913 F.2d 268, 270 (6th Cir.1990)); *Blanton v. Anzalone*, 760 F.2d 989, 993 (9th Cir.1985). However, section 1961(a) only mandates the rate for post-judgment interest; it does not speak to pre-judgment interest rates. There is no similar statute mandating the pre-judgment interest rate. Furthermore, under the law of this circuit, "[t]he award of an amount of prejudgment interest in an ERISA case is a matter 'committed to the sound discretion of the trial court.' " *Nightingale v. Blue Cross/Blue Shield of Alabama*, 41 F.3d 1476, 1484 (11th Cir.1995) (quoting *Moon v. American Home Assurance Co.*, 888 F.2d 86, 89-90 (11th Cir.1989)). Other circuits agree. *Quesinberry v. Life Ins. Co.*, 987 F.2d 1017 (4th Cir.1993); *Hansen v. Continental Ins. Co.*, 940 F.2d 971 (5th Cir.1991).

[44] Prejudgment interest is "awarded not as a penalty or as compensation for loss of property use, but as compensation for the use of funds to which the plaintiff was ultimately judged entitled, but which the defendant had the use of prior to the judgment." *Miller Indus. v. Caterpillar Tractor Co.*, 733 F.2d 813, 823 (11th Cir. 1984); *see also Socony Mobile Oil Co. v. Texas Coastal & Int'l*, 559 F.2d 1008, 1014 (5th Cir. 1977).

III. CONCLUSION

The Court has already determined that Landstar has violated the Truth-in-Leasing regulations by making undisclosed and undocumented chargebacks to owner-operators. The only issue remaining is a determination of the remedy for those violations. Plaintiffs ask this Court to require that Landstar disgorge the full amount of those mark-ups plus its profits as determined by Landstar's internal rate of return.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2006, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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