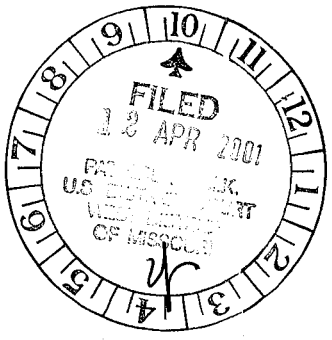
IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION



OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON, AND JERRY VANBOETZELAER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	**Civil Action No. 97-3408-CV-S-1**
Plaintiffs,	**Chief District Judge Dean Whipple**
v.	
NEW PRIME, INC., d/b/a PRIME, INC., AND SUCCESS LEASING, INC.,	
Defendants.	

SUGGESTIONS IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Thomas Sheehan
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-6550
Facsimile: (816) 421-5547

Jerry M. Kirksey
DOUGLAS, LYNCH,
HAUN & KIRKSEY
111 West Broadway
Bolivar, Missouri 65613
Telephone: (417) 326-5261
Facsimile: (417) 326-2845

Paul D. Cullen, Sr.
David A. Cohen
Thomas P. McCann
THE CULLEN LAW FIRM
1101 30TH Street, N.W.
Suite 300
Washington, D.C. 20007
Telephone (202) 944-8600

Attorneys for the Representative Plaintiffs and the Class

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

PAGE

STATUTES

REGULATIONS

INTRODUCTION

Motor carrier transportation is a truly interstate industry and it is critical to the smooth functioning of commerce. Federal regulations, the "Truth-in-Leasing" regulations, establish rules and procedures to be followed by motor carriers who lease equipment and services from independent owner-operators.

This class action lawsuit seeks the enforcement of the Truth-In-Leasing regulations. Specifically, by this class action lawsuit, Plaintiff owner-operator truck drivers petition the Court to invoke its equitable power to enjoin business practices that are unlawful under the federal Truth-In-Leasing regulations and to disgorge from Defendants revenues that have been received through the violation of these federal laws. Plaintiffs have asked the Court for class-wide injunctive and declaratory relief including a declaration that Defendants' business practices violate Truth-In-Leasing obligations, an injunction against future violations of said regulations, and disgorgement of monies unlawfully retained under the Truth-In-Leasing regulations.

This case presents a model for the application of Rule 23. Plaintiffs in this case represent individual owner-operator truck drivers -- the very class of persons that Congress and the DOT intended to protect via the Truth-In-Leasing laws. Separate vindication of the class members' rights would be highly unlikely were otherwise isolated and impecunious owner-operators forced to file lawsuits against comparatively powerful defendants operating in interstate commerce. Given the willingness of the class representatives to lead this action and the proven ability and willingness of counsel to prosecute Plaintiffs' claims, the class action method is ideally suited in this instance to concentrate the litigation of the class members' claims efficiently in one forum.

Defendant New Prime, Inc., ("Prime"), operates as a motor carrier under authority granted

by the U.S. Department of Transportation, ("DOT"), providing transportation services to the shipping public. Defendant Success Leasing, Inc., ("Success"), engages independent truck owner-operators in lease-purchase agreements which purport to lease, with the option to purchase, truck tractor units to the owner-operators. Together, in their shared capacity as affiliates or alter egos or agents of one another, Prime and Success have devised a leasing scheme to deprive the Named Plaintiffs and class members of escrow funds and security deposits to which they rightfully are entitled under federal law.

Plaintiffs Marshall Johnson and Jerry Vanboetzelaer are owner-operators who have leased their equipment and services to Prime. Plaintiff Owner-Operator Independent Drivers Association, Inc., ("OOIDA"), is the nation's largest non-profit trade association which represents the interests of independent owner-operators nationwide. Founded in 1973 to examine and address the challenges and problems faced by independent owner-operators in the trucking industry, OOIDA's membership today exceeds 60,000 owner-operators who collectively operate more than 100,000 trucks in all 50 of the United States and in Canada. *See* Exhibit A, Declaration of James J. Johnston ("Johnston Declaration") at ¶ 2.

Each of the class members in this action is an independent truck owner-operator who has (1) entered into a lease-purchase agreement with either Prime or Success, which purports to lease, with the option to purchase, trucking equipment from Prime or Success to the owner-operator, (2) then leased that equipment in service to motor carrier Prime under the terms of a "Service Contract" between Prime and the owner-operator, and (3) paid money into "reserve" and "security deposit" accounts retained by Prime or its affiliate Success. Each class member's lease-purchase agreement with Prime or Success is substantively identical, as is each class

member's Service Contract with Prime. Based upon information supplied to Plaintiffs by Prime there are over ten thousand putative class members.

In addition to setting forth rental payment and other terms, the lease-purchase agreement specifies certain weekly payments to be made by the owner-operator to Prime and/or Success for the ostensible purpose of covering maintenance-related expenses to the leased equipment. Specifically, the lease-purchase agreement provides for the creation of four separate funds: an "Excess Mileage Rental Account," a "Repair Reserve," a "Tire Replacement Reserve," and a "Performance Bond," which the owner-operator must pay into while using the leased equipment. The "reserve funds" described in the lease-purchase agreements constitute regulated escrow funds within the meaning of the Federal Highway Administration's leasing regulations (commonly referred to as the "Truth-in-Leasing regulations"), because they are monies "deposited by the lessor [owner-operator] *with either a third party [here, Success Leasing] or the lessee [here, Prime]* to guarantee performance, to repay advances, to recover repair expenses, to handle claims, to handle license and state permit costs, and for any other purposes mutually agreed upon." 49 C.F.R. § 376.2(l) (emphasis added).

Under the terms of the lease-purchase agreement, if an owner-operator's lease is terminated before the end of its term, and the owner-operator does not exercise his or her option to purchase the truck equipment, the owner-operator *forfeits* to Defendants all monies accumulated in his or her "reserve funds." Even if the owner-operator completes the lease and exercises the option to purchase, he or she forfeits to Defendants *half* of the "Repair Reserve" and the "Tire Replacement Reserve." These forfeitures presents a patent violation of the federal law requiring that "*in no event shall the escrow fund be returned later than 45 days from the date of [lease] termination.*" 49 C.F.R.

376.12(k)(6) (emphasis added).

In addition, the Service Contract between Prime and each class member fails to comply with the "charge-back" provisions of 49 C.F.R. 376.12(h), which 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 computed." The Service Contract fails to identify *any* of the escrow charges that are deducted from the owner-operator's compensation and similarly fails to recite how the amount of each item is to be computed.

At the same time, the failure of the Service Contract between Prime and members of the putative class to disclose deductions made pursuant to the lease-purchase agreement, violates 49 C.F.R. § 376.12(i) which requires that "[t]he lease shall specify *the terms* of any agreement in which the lessor [the owner-operator] is a party to an equipment purchase or rental contract [the lease-purchase agreement] which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments." (Emphasis added).

In this case, Plaintiffs have asked the Court for class-wide injunctive and declaratory relief. Plaintiffs' Amended Complaint seeks the following class-wide injunctive and declaratory relief: (1) entering judgment declaring the practices of Defendants to be in violation of the Truth-in-Leasing regulations (Amended Complaint, Prayer for Relief at ¶ 57B); (2) permanently enjoining the continuation of such violations (Amended Complaint, Prayer for Relief at ¶ 57B); (3) ordering Defendants to provide an accounting of all transactions relating to class members' escrow funds (Amended Complaint, Prayer for Relief at ¶ 57C); (4) establishing a common fund into which all unlawfully retained escrow funds and statutory interest are deposited (Amended Complaint, Prayer for

Relief at ¶ 57D); (5) enjoining Defendants from transferring, diverting or otherwise concealing class members' escrow funds and records relating to such funds (Amended Complaint, Prayer for Relief at ¶ 57F); and (6) ordering Defendants to disgorge to class members the escrow and other funds (with interest as calculated under applicable law) rightfully belonging to class members. (Amended Complaint, Prayer for Relief at ¶ 57E).

Plaintiffs will illustrate in the sections of this brief that follow a compelling case for class certification. First, through a thorough presentation of the facts, Plaintiffs will demonstrate a common course of conduct on the part of Prime and Success. The facts will demonstrate that it is the policy of Prime and Success to retain escrow funds belonging to its owner-operators and that this policy has been applied in a consistent and uniform manner to every owner-operator under lease to Prime. Plaintiffs will also demonstrate that Prime and Success have a consistent practice of causing the escrow funds of its owner-operators to be withheld beyond the period allowed under federal law. It is this common course of conduct that is at the core of Plaintiffs' case for class certification.

Plaintiffs then apply the facts to each of the requirements for class certification under Rule 23. Applying Rule 23 to this case, it is clear that Defendants' wrongful conduct has affected each member of the class in a consistent, uniform manner. Defendants' course of conduct, acknowledged in its own documents and testimony, was to disregard its responsibilities under the federal regulations and the rights of owner-operators nationwide. The consequences of Defendants' common course of conduct are the same for all owner-operators – they are deprived of escrow funds and interest that they are legally entitled to under the federal regulations. As a result, this case satisfies each of the

requirements of Rule 23 and should be certified as a class action.[1]

STATEMENT OF THE CASE

A. Procedural History

Plaintiffs brought suit against Prime and Success Leasing in August of 1997 alleging violation of several provisions of the federal regulations contained in 49 C.F.R. Part 376, referred to as the "Truth-in-Leasing" regulations. Plaintiffs' class action complaint alleged that provisions in Defendants' lease agreements and equipment lease-purchase agreements violated the Federal Highway Administration leasing regulations and were unconscionable under Missouri law. Upon motion of Defendants, this Court dismissed the suit on jurisdictional grounds on November 17, 1997, holding that the Federal Highway Administration had primary jurisdiction over the dispute.

On appeal, the U.S. Court of Appeals for the Eighth Circuit reversed, holding that the district court erred in concluding that it lacked jurisdiction over the matter. *Owner-Operator Independent Drivers Assoc. v. New Prime, Inc.*, 192 F.3d 778 (8th Cir. 1999), *cert. denied*, 529 U.S. 1066 (2000). In its opinion, the court noted that "the Owner-Operators challenge contract terms governing reserve funds and security deposits as violating 49 C.F.R. §§ 376.12(i) & (k)." 192 F.3d at 780. Notably, the Eighth Circuit held that the Interstate Commerce Commission Termination Act (49 U.S.C. § 14701 et seq.) provided Plaintiffs with a private right of action to seek both injunctive relief and monetary

---

1. Indeed, three federal district courts, including this Court, have certified class actions of owner-operators claiming violations of Truth-in-Leasing regulations. *See Padrta v. Ledar Transport, Inc.*, Civil Action No. 96-0324-CV-W-2 (W.D. Mo. Sept. 6, 1996) (Order certifying class, attached as Exhibit B); *Strickland v. Truckers Express, Inc.*, CV-62-M-RFC, slip. op at p. 16 (D. Mont. June 9, 1999) (decision and order certifying class attached as Exhibit C); *Owner-Operators Independent Drivers Assoc. v. Gilbert Express, Inc.*, Civil Action No. 00-5163 (D. N.J. Feb. 14, 2001) (Order certifying class attached as Exhibit D).

damages for violations of the Truth-in-Leasing regulations.

The Eighth Circuit expressly rejected Prime's argument that the injunctive relief sought by Plaintiffs was beyond the scope of the ICC Termination Act. The court held that the ICC Termination Act "creates a private right of action for injunctive relief for violations of regulations" and that the specific leasing regulations upon which Plaintiffs rely, 49 C.F.R. §§ 376.12(i) & (k), are within the scope of this Court's injunctive powers. 192 F.3d at 784. Similarly, the court held that the ICC Termination Act "authorizes private parties to sue for damages for carrier conduct 'in violation of [regulations promulgated under] this part.'" *Id.* at 785. As a result, the Eighth Circuit directed that "the district court should now proceed to exercise its jurisdiction over the Owner-Operators' claims against Prime." *Id.*

Plaintiffs have filed a Motion for Leave to File an Amended Complaint. Seeking to streamline the adjudication of this dispute, Plaintiffs have limited their Amended Complaint to violations of federal law. Specifically, Plaintiffs' Amended Complaint alleges that Prime and Success violated the provisions of the Truth-in-Leasing regulations codified at 49 C.F.R. §§ 376.12(h) (i) & (k) by failing to return, and pay interest upon, escrow and security deposit funds deposited by Plaintiffs with Defendants. Plaintiffs also seek injunctive relief under 49 U.S.C. § 14704(a)(1), which the Eighth Circuit held allows Plaintiffs to pursue a civil action for injunctive relief for violations of the Truth-in-Leasing regulations. *See New Prime*, 192 F.3d at 783-84.

B. The Federal Regulatory Framework Holds Prime And Success To A Single, Uniform Standard Of Conduct

The parties to this suit represent two distinct segments of the regulated interstate motor transportation industry: federally authorized motor carriers, and independent truck owner-operators.

Under federal law, most forms of interstate for-hire motor transportation require the transporting entity to obtain operating authority from the DOT. The term "carrier," as it arises under the federal regulations, thus refers to parties who possess the requisite federal operating authority to transport goods in interstate commerce on behalf of the shipping public. *See* 49 C.F.R. § 376.2(a).

Owner-operators are independent truckers - small business men and women who own or control truck tractors, and sometimes truck trailers, in the transport of property over the nation's highways. While they may obtain their own federal operating authority, owner-operators more often act as independent contractors, leasing or otherwise providing their equipment and services to DOT-authorized motor carriers. The federal government has estimated that owner-operators account for approximately 40 percent of all inter-city truck traffic in the United States. *See* House Committee on Small Business, *Report on Regulatory Problems of the Independent Owner-Operator in the Nation's Trucking Industry*, H.R. Rep. No. 1812, 95th Cong., 2d Sess., at 5 (Dec. 15, 1978) (the "1978 House Report"). Nationwide, independent owner-operators number in the hundreds of thousands. *Id.*

Federal law requires that the terms of the lease relationship between independent owner-operators and regulated motor carriers be set forth in a comprehensive written agreement directly regulated by the DOT. *See* 49 U.S.C. § 14102; 49 C.F.R. Part 376 *et seq.* Since the independent owner-operator relies heavily on the authorized motor carrier for most of the operator's business, the leasing arrangement under which the operator provides his or her services to the carrier is critical to the operator's economic survival. On average, in exchange for extending its operating authority to the owner-operator, the motor carrier claims between 15 and 25 percent of the gross revenues from the transportation services performed by the owner-operator for customer shippers. In

addition to paying the motor carrier a substantial percentage of his or her compensation, the owner-operator often bears most (if not all) of the costs and risks associated with carrying freight, including the costs relating to truck maintenance and repairs, fuel, various taxes, license and base plate fees, and certain forms of insurance. 1978 House Report, at 5-6.

In order to ensure the availability of funds to cover such maintenance and other truck-related expenses, the federal Truth-in-Leasing regulations prescribe methods by which a carrier or its affiliated equipment rental company may collect and administer "escrow funds" from an operator's compensation. The leasing regulations are very strict as to how such funds are to be maintained by the carrier during the lease term and returned, with interest, to the owner-operator upon lease termination. *See generally* 49 C.F.R. § 376.12(k).

The Truth-in-Leasing regulations specifically require that "the authorized carrier may perform authorized transportation in equipment it does not own only under the . . . conditions" set forth in the regulations. 49 C.F.R. § 376.11. Accordingly, if a carrier's lease agreement with an owner-operator fails to conform with the DOT regulations, the carrier is in violation of federal law and may not transport goods in interstate commerce. *See OOIDA v. Ledar,* No. 0258-CV-W-2-ECF (W.D. Mo. Nov. 3, 2000) (Ex. E).

An "escrow fund" is defined by regulations as "[m]oney deposited by the lessor [owner-operators] with either a third party or the lessee [here, Prime or its affiliate Success] to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, and for any other purposes mutually agreed upon the lessor and the lessee." 49 C.F.R § 376.2(l). The regulations provide a strict time-frame for the return of escrow funds upon termination of the lease, stating that "in no event shall the escrow fund be

returned later than 45 days form the date of termination." 49 C.F.R. § 376.12(k)(6).

The Truth-in-Leasing regulations also require that the carrier's lease disclose all "charge-back" items, meaning any charge deducted from the owner-operator's 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 computed." Similarly, the Truth-in-Leasing regulations mandate that the carrier's lease agreement specifically disclose any amounts to be deducted from compensation for purposes of lease-purchase payments. 49 C.F.R. § 376.12(i) requires that "[t]he lease shall specify the terms of any agreement in which the lessor [the owner-operator] is a party to an equipment purchase or rental contract [the lease-purchase agreement] which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments."

Plaintiffs' case is grounded solely upon the federal Truth-in-Leasing regulations. As described above, these regulations provide a uniform standard of conduct for Defendants in this case.

C. Plaintiffs Have Been Deprived Of Escrow And Security Deposit Funds Deposited With Defendants

1. *Plaintiff Jerry Vanboetzlaer*

a. *The Provisions of the Lease Agreements between Vanboetzelaer and Prime*

Plaintiff Jerry Vanboetzelaer entered into two agreements with Prime, the first on October 5, 1992 and the second on February 20, 1993. These agreements purported that Prime lease to Vanboetzelaer, with the option to purchase, trucking equipment under the terms of a lease-

purchase agreement, and at the same time, purported that Vanboetzelaer lease-back that equipment to Defendant Prime under a Service Contract. The first agreement pertained to the lease-purchase and lease-back of tractor unit 2381. (PRI 001459)[2]. The second agreement pertained to the lease-purchase and lease-back of tractor unit 2731. (PRI 001491).

Each agreement contained four subparts, each of which was signed the same day and presented by Prime as one package. The October 5, 1992 agreement contained: (1) "Lease Agreement" (PRI 001460 - 1469); (2) "Service Contract" (PRI 001470 - 1479); (3) "Personnel Service Contract" (PRI 00 1480 - 1485); and (4) "MCT Lease Agreement" (PRI 001489 - 1490). Similarly, the February 20, 1993 agreement contained four subparts, each of which was signed the same day and presented by Prime as one package: (1) "Lease Agreement" (PRI 001492 - 1501); "Service Contract" (PRI 001502 - 1513); "Personnel Service Contract" (PRI 001514 - 1519); and "MCT Lease Agreement" (PRI 001520 - 1521).

Vanboetzelaer terminated the October 5, 1992 agreement on February 20, 1993. (PRI 001459). On that date he entered into an agreement to lease-purchase and lease-back unit 2731. (PRI 001491). Vanboetzelaer fulfilled all of his obligations under the February 20, 1993 lease, exercising his right to purchase unit 2731, on February 16, 1996, as indicated by Prime's notation on the cover page noting that the agreement was canceled and that Vanboetzelaer "bought truck & took elsewhere." (PRI 001491).

The terms of the lease-purchase and Service Contract agreements entered into between

---

2. Citations beginning with "PRI" refer to the bates numbers assigned by Prime to documents it has produced in discovery in this case. *See* Declaration of David A. Cohen, attached as Exhibit F identifying and authenticating documents produced by Prime in this matter.

Vanboetzelaer and Prime on October 2, 1992 and February 20, 1993 were identical in all material respects. *(Compare* PRI 001460 -1469 to PRI 1492 - 1501). The only distinction between the agreements was that under the terms of the earlier lease-purchase agreement Vanboetzelaer was to make 66 weekly payments of $550.00, while under the later agreement Vanboetzelaer agreed to make 104 weekly payments of $580.00.

Each lease-purchase agreement contained several terms that require the payment of escrow accounts by Vanboetzelaer to Prime. The first purported to be a "Excess Mileage Rental Account." In both lease-purchase agreements the Excess Mileage Rental Account term provided as follows:

> During the term of this lease, or any extension thereof, Lessor, out of the Operating Proceeds, shall retain an amount equal to Five Cents ($.05) per mile times the number of paid miles in excess of Two Thousand Nine Hundred (2,900) paid miles per week.
>
> * * *
>
> In the event (i) this Lease shall be terminated prior to the expiration of its initial term, (ii) the option to extend is not exercised by Lessee, or (iii) this lease is terminated during the extension period and before its expiration, the entire excess mileage retention shall become the sole property of the Lessor.
>
> In the event Lessee shall purchase the Equipment as herein provided, or sell it to a third party, Lessor shall pay to Lessee an amount equal to the entire excess mileage retention.

(PRI 001495 at ¶ 19; PRI 1463 at ¶ 19). This lease provision required Vanboetzelaer to pay five cents for every mile over 2900 per week into an "excess mileage" account. Under this lease provision, Prime purported to retain the entire fund if Vanboetzelaer terminated his lease early.

The second escrow account provided for under the lease-purchase agreement was termed a "Repair Reserve." In both lease-purchase agreements the Repair Reserve term provided as follows:

> During the term of this lease, or any extension thereof, Lessor, out of the Operating Proceeds, shall retain as a repair reserve an amount equal to Three and One-Half Cents ($.035) per pay mile that the Equipment travels. Funds retained as a repair reserve shall be used by Lessor to pay for all non-accident repair work in excess of Five Hundred Dollars ($500.00) to any of the drive line components of the Equipment. Drive line components shall be deemed to be the engine, transmission, differential, and engine cooling system.
>
> In the event (i) this Lease shall be terminated prior to the expiration of its initial term, (ii) the option to extend is not exercised by Lessee, or (iii) this lease is terminated during the extension period and before its expiration, the amount retained as a repair reserve shall become the sole property of the Lessor.
>
> In the event Lessee shall purchase the Equipment or sell it to a third party, the unused funds retained as a repair reserve shall be divided equally between Lessor and Lessee.

(PRI 001495 at ¶ 20; PRI 1463 at ¶ 20). Under this lease provision, Prime purported to retain the entire fund if Vanboetzelaer terminated his lease early. Even if Vanboetzelaer purchased the tractor, as he ultimately did, the provision allowed Prime to confiscate one-half of the fund.

A third provision of the lease-purchase agreement pertained to a "Tire Replacement Reserve." In both lease-purchase agreements signed by Vanboetzelaer, the Tire Replacement Reserve term provided as follows:

> During the term of this lease, or any extension thereof, Lessor, out of the Operating Proceeds, shall retain as a tire replacement reserve an amount equal to One and One-Half Cents ($.015) per mile that the Equipment travels. Funds retained as a tire replacement reserve shall be used by Lessor to purchase tires for the Equipment.
>
> In the event (i) this Lease shall be terminated prior to the expiration of its initial term, (ii) the option to extend is not exercised by Lessee, or (iii) this lease is terminated during the extension period and before its expiration, the amount retained as a tire replacement reserve shall become the sole property of the Lessor.
>
> In the event Lessee shall purchase the Equipment or sell it to a third party, the unused funds retained as a tire replacement reserve shall be divided equally between Lessor and Lessee.

(PRI 001496 at ¶ 21; PRI 1464 at ¶ 21). Under this lease provision, Prime purported to retain the entire fund if Vanboetzelaer terminated his lease early. Even if Vanboetzelaer purchased the tractor, as he ultimately did, the provision allowed Prime to confiscate one-half of the fund.

Prime's intention to confiscate these three escrow funds was evidenced in a provision of the "Termination" clause of the lease-purchase agreements. That provision stated that

> Further, in the event (i) this Lease shall be terminated prior to the expiration of its initial term, (ii) the option to extend is not exercised by Lessee, or (iii) this lease is terminated during the extension period and before its expiration, the excess mileage rental account, repair reserve and tire maintenance reserve shall become the sole property of Lessor as provided in Paragraphs 19, 20 and 21 hereof.

(PRI 001497 at ¶ 25; PRI 001465 at ¶ 25).

At the same time, the Service Contracts between Vanboetzelaer and Prime required Vanboetzelaer to deposit "with Carrier [Prime] the sum of One Thousand Dollars ($1,000.00) as security for the full performance by Contractor [Vanboetzelaer] of all of his obligations under this Service Contract." The Service Contract failed to identify *any* of the escrow charges that were deducted from Vanboetzelear's compensation and similarly failed to recite how the amount of each item was to be computed. Moreover, the Service Contracts failed to disclose, as required by the Truth-in-Leasing regulations, the fact that under the lease-purchase agreements, reserve fund payments were to be deducted from Vanboetzelaer's compensation.

b. *Escrow and Security Deposit Funds Retained by Prime*

Settlement statements supplied by Prime to Vanboetzelaer on a weekly basis stated the amounts of escrow funds withheld by Prime. Beginning with the first settlement statement dated October 13, 1992, the documents refer to "Reserve Cash" and list the amounts for "Current

reserve and $12,127.04 into the repair reserve. (OOI 01682; PRI 000504). As this lease was terminated early, Prime/Success confiscated all of these funds, totaling $17,945.01 for unit 3515, plus interest. Defendants also retained Johnson's Security Deposit in the amount of $1,000.00. (PRI 000504). In addition, Prime failed to pay Johnson interest on the amounts retained by Prime and Success.

D. Defendants Deprived The Putative Class Members Of Escrow And Security Deposit Funds Through Lease Provisions Similar To Those In Which Defendants Deprived Plaintiffs Of Escrow And Security Deposit Funds.

In response to a Request for Production of Documents, Prime produced to Plaintiffs exemplars of lease-purchase and Service Contracts in effect from 1992 to the present. Prime also produced for deposition Darrel Hopkins, who is both Controller and an officer of Prime as well as "Director of Leasing" for Success. March 6, 2001 Deposition of Darrel Hopkins ("Hopkins Dep."), p.12:9-15:3 (Ex. G). Hopkins testified that while Defendants do not maintain an archive of the leases employed by the company over time, Prime produced to Plaintiffs "various contracts over time from the actual files of the owner-operator drivers." Hopkins Dep., p. 31:12-16. Hopkins admitted that "each lease document produced essentially represents the type of lease form that was used by the company during a discrete period of time." Hopkins Dep., p. 32:14-20.

An analysis of the lease-purchase and Service Contracts produced by Prime, which were identified and authenticated by Hopkins, indicates that leases entered into between Defendants and the putative class mirror those of Plaintiffs Vanboetzelaer and Johnson.

Indeed, the lease-purchase and Service Contracts forms that were employed from September 1992 through June 1995 contain the same escrow provisions as those in the lease-

purchase agreements entered into by Plaintiff Vanboetzelaer. Specifically, the form lease-purchase agreement and Service Contract used by Prime from September 1992 through June 1995 (Hopkins Dep.; Ex. 5; PRI 002910 - 2920; PRI 002921-2930) contained the following provisions:

1) As in the Vanboetzelaer-Prime lease-purchase agreement, the form lease-purchase agreement provided for the owner-operator to pay into a "Excess Mileage Reserve," in the amount of five cents ($0.05) per mile for each mile over 2900 per week. (PRI 002914-2916).

2) The form lease-purchase agreement provided for the owner-operator to pay into a "Repair Reserve" an amount equal to three and one-half cents ($0.035) per mile driven. (PRI 002914-2916).

3) The form lease-purchase agreement provided for the owner-operator to pay into a "Tire Replacement Reserve" an amount equal to one and one-half cents ($0.015) per mile driven. (PRI 002914-2916).

4) The disposition of these reserve accounts was identical under the form lease agreement as under the Vanboetzelar-Prime agreements. Under the form lease agreement, if the lease was terminated early Prime retained the entire balance of the "Excess Mileage Reserve," the Repair Reserve," and the "Tire Replacement Reserve." (PRI 002914-2916).

5) If the lease term was completed the entire balance of the Excess Mileage Reserve was returned to the owner-operator. (PRI 002914). At the same time, if the lease was completed, Prime retained one-half of the Repair Reserve and the Tire Replacement Reserve. (PRI 002915).

6) The Service Contract required the owner-operator to deposit $1,000.00 with Prime as a "Security Deposit." The Service Contract failed to identify *any* of the escrow charges that were deducted from the owner-operator's compensation and similarly failed to recite how the amount of each item was to be computed. Moreover, the Service Contract failed to disclose the fact that under the lease-purchase agreement reserve funds payments were to be deducted from the owner-operator's compensation.

Similarly, the lease-purchase agreement used by Success from June 1995 through December 1997 were virtually identical to the lease-purchase agreements between Johnson and Success. The Service Contracts used by Prime during this period also mirrored that of the Johnson-Prime Service Contracts. Specifically, the form lease-agreements and Service Contract used by Prime from June 1995 through April 1997 (Hopkins Dep.; Exs. 6 & 7; PRI 002943 - 2951; PRI 002952-2961; PRI 002970-2978; PRI 002979-2986) contained the following provisions:

1) As in the Johnson-Success lease-purchase agreements, the form lease-purchase agreements provided for the owner-operator to pay into a "Excess Mileage Reserve," based upon the number of miles driven per week.

2) The form lease-purchase agreements provided for the owner-operator to pay into a "Repair Reserve" in the amount of three and one-half cents per mile driven. (PRI 002914-2916).

3) The form lease-purchase agreements provided for the owner-operator to pay into a "Tire Replacement Reserve" in the amount of one and one-half cents per mile driven. (PRI 002914-2916).

4) The disposition of these reserve accounts was identical under the form lease agreements as under the Johnson-Success agreements. Under the form lease agreements if the lease was terminated early Success retained the entire balance of the "Excess Mileage Reserve," the Repair Reserve," and the "Tire Replacement Reserve." (PRI 002914-2916).

5) If the lease was completed the entire balance of the Excess Mileage Reserve was returned to the owner-operator. (PRI 002914). At the same time, if the lease was completed, Success retained one-half of the Repair Reserve and the Tire Replacement Reserve. (PRI 002915).

The Service Contracts used by Prime from June 1995 through December 1997 were identical to the Service Contracts between Johnson and Prime. The form Service Contracts required the owner-operator to deposit $1,000.00 with Prime as a "Security Deposit." (PRI 002955; 002981). The Service Contracts also failed to identify *any* of the escrow charges that are deducted from owner-operator's compensation and similarly failed to recite how the amount of each item was to be computed. Moreover, the Service Contract failed to disclose the fact that under the lease-purchase agreements reserve fund payments were to be deducted from the owner-operator's compensation.

Prime has not modified its Service Contract as it concerns the requirement that owner-operators post a security deposit or Performance Bond in the amount of $1,000.00..

Beginning in 1997, however, the year Plaintiffs initiated this suit, Success modified its lease-purchase agreements by removing the "Repair Reserve" escrow requirement from the lease-purchase agreements. Hopkins Dep.; p. 93:10-13. Success also modified its Tire

Replacement Reserve by retaining, if the lease was terminated early, "an amount equal to the cost attributable to the amount of wear on the tires which occurred during the time this lease was in effect." Hopkins Dep.; p. 91:23-5. The lease-purchase agreements continued, however, to contain material violations of the Truth-in-Leasing regulations even after the 1997 changes. Specifically, the Success lease-purchase agreements continued to contain a provision providing that if the owner-operator terminated the lease early, Success still retained the entire amount of the excess mileage escrow fund. Hopkins Dep.; p. 87:24-88:14. At the same time, the lease-purchase agreements failed to contain a provision requiring the payment of interest on either the excess mileage fund or the tire replacement reserve. Hopkins Dep.; p. 100:2-13.

Based on information supplied by Prime during discovery, the total amount of escrow funds unlawfully retained by Prime and Success total $16,437,693, plus interest, for owner-operators who leased equipment to Prime beginning in August of 1995.[6] *See* Exhibit H, Declaration of Timothy P. Brickell ("Brickell Declaration") at ¶ 5. Defendants have unlawfully retained $ 8,346,922.92 in "Repair Reserve" funds of owner-operators; $ 3,648,623.76 in "Excess Milage Rental Account" funds; $ 3,032,566.00 in "Tire Replacement Reserve" funds and $ 1, 409, 580.00 in security deposit funds from August 14, 1995 through January of 2001. Again, these amounts fail to include any interest that was required to be paid on such escrow funds. Brickell Declaration at ¶ 5.

---

6. This amount vastly underestimates the amount of funds unlawfully retained by Defendants as it does not include funds of owner-operators who entered into agreements with Defendants prior to August of 1995 but within the four year statute of limitations period which began in August of 1993.

ARGUMENT

B. This Case Meets All the Requirements for Class Certification Under Federal Rule of Civil Procedure 23(a).

1. Plaintiffs Have Satisfied the Numerosity Requirement of Federal Rule of Civil Procedure 23(a)(1)

In order to maintain a class action, Plaintiffs must show that the class of plaintiffs is so large that joinder of all members would be "impracticable." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1178 (8th Cir. 1982). Commentators have recognized that "where the class is very large - for example numbering in the hundreds - joinder will be impracticable." *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 574 (D. Minn. 1995), *quoting* Newberg & Conte, *Newberg on Class Actions* § 3.05 (3d ed. 1992). Similarly, this Court has held that the numerosity prong is satisfied where "the putative class members are, by definition, low-income persons who could not afford to prosecute their own actions." *Tinsley v. Kemp*, 750 F.Supp. 1001, 1005 (W.D. Mo. 1990). Finally, numerosity is satisfied where the plaintiffs are geographically dispersed.

In this case, there are approximately 10,000 members of the putative class. *See* Brickell Declaration at ¶ 4; Ex. H. On this basis alone, the numerosity requirement is clearly satisfied. *See Tinsley v. Kemp*, 750 F.Supp. at1005 (holding that "[t]he number of persons in the proposed class exceeds 1,220, demonstrating that as a pratical matter individual lawsuits would be burdensome on the parties (and the courts) that they could not be litigated otherwise.)"

In addition, a variety of other factors in addition to class size support certification of this

class under Rule 23(a)(1). First, the class members' individual claims are relatively small,[7] and the class members almost certainly lack the resources individually to litigate their claims against corporate entities such as Prime and Success. As a result, class members are more likely to be forced simply to concede an unjustified loss than to pursue a separate lawsuit. *See Armstead v. Pingree*, 629 F. Supp. 273, 279 (M.D. Fla. 1986) (finding joinder impracticable in light of factors which show that class members are unlikely to have the resources and ability to bring separate actions if the class was denied). Further, the average owner-operator drives approximately 100,000 miles per year, and spends more than 300 nights away from home. *See* Johnston Declaration, at ¶ 4. Thus, regardless of their declared state of residence, owner-operators are an especially widely dispersed group. *Id.* This geographic dispersion further increases the impracticability of joining all potential class members, and would result in tremendous inconvenience in prosecuting individual actions. *See In re Potash Antitrust Litigation*, 159 F.R.D. 682, 689 (D. Minn. 1995).

In sum, given the large size of the class in this case, the prohibitive economics of pursuing individual claims, and the geographic dispersion of the class members, joinder of all class members clearly is impracticable in this litigation.

2. Common Issues of Fact and Law Exist

The second requirement of Federal Rule of Civil Procedure 23(a) is that there be "questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). However,

---

[7] As stated in the Amended Complaint, Plaintiffs estimate that "[p]ursuant to their respective Lease/Purchase Agreements and Part 376 Lease Agreements with Defendants, each class member has deposited with Defendant Prime and/or Defendant Success between approximately $1,000.00 and $20,000.00 per vehicle leased to Defendant Prime." Amended Complaint at ¶ 39.

"[c]ommonality is not required on every question raised in a class action." *Bradford v. Agco Corp.*, 187 F.R.D. 600, 602 (W.D. Mo. 1999), *quoting DeBoer v. Mellon Mortg. Co.*, 64 F.3d 1171, 1174 (8th 1995). Rather, Rule 23(a)(2) "is satisfied when the legal question linking the class members is substantially related to the resolution of the litigation." *Paxton v. Union Nat'l Bank*, 688 F.2d 552, 561 (8th Cir. 1982). As a result, a class action "cannot be defeated on commonality grounds solely because there are some factual variations among the claims of individual members." *Evans v. Evans*, 818 F. Supp. 1215, 1219 (N.D. Ind. 1993), *citing Patterson v. General Motors Corp.*, 631 F.2d 476, 481 (7th Cir. 1980), *cert. denied.*, 451 U.S. 914 (1981).

This case presents a model for the application of Rule 23's commonality standard that would be hard to exceed in any case. As discussed above, the claims of all members of the class arise from the application of a single federal statutory and regulatory scheme to a single motor carrier to every member of the class, and the application of the statute and regulation is uniform. Commonality is also demonstrated by the fact that Defendants' wrongful conduct has affected each member of the class in a consistent, uniform manner.

Class action claims brought under an analogous federal statute, the Truth-in-Lending Act, ("TILA"), have been consistently found to satisfy the commonality requirement. *See e.g. Fielder v. Credit Acceptance Corp.*, 175 F.R.D. 313, 319-20 (W.D. Mo. 1997), *rev'd on other grounds*, 188 F.3d 1031 (8th Cir. 1999) (holding that the commonality requirement was met as "[t]he potential class members with claims against Defendant NAC would all have mostly the exact same claim"); *Williams v. Chartwell Financial Services, Ltd.*, 204 F.3d 748, 760 (7th Cir. 2000) (affirming finding that plaintiff had successfully demonstrated commonality); *Jackson v. Check*

'N Go of Illinois, Inc., 193 F.R.D. 544 (N.D. Ill. 2000) (granting class certification); *Davis v. Cash for Payday, Inc.*, 193 F.R.D. 518 (N.D. Ill. 2000) (granting class certification). These cases, like the case at bar, are based upon common claims that defendants violated plaintiffs' rights under a federal statutory and regulatory framework protecting plaintiffs from overreaching and injurious business practices.

Notably, the Eighth Circuit, in *DeBoer*, rejected the argument that commonality was not satisfied because members of the putative class had entered into differing contracts. In *DeBoer*, similar to the cause of action in this case, plaintiffs alleged that defendant unlawfully "overescrowed" plaintiffs and the class on various mortgage instruments. 64 F.3d at 1174. The court held that "[t]he fact that individuals with different mortgage forms will have RESPA or contract claims of differing strengths does not impact on the commonality of the class as structured, however." *Id.* The court concluded that the commonality prong of Rule 23(a)(2) was satisfied as "[t]he main point of contention centers on Mellon's alleged overescrowing of funds, and all members of the class are interested in a satisfactory common course of conduct in the future servicing of their loans, despite the fact that some members have different mortgage contracts." *Id.*

In the case at bar, each putative class member is an independent truck owner-operator who has obtained trucking equipment from Defendants by entering into a lease-purchase agreement with either Prime or Success, and in turn has used that equipment in service to Prime under Prime's standard Service Agreement. Each equipment lease-purchase agreement is substantively identical with regard to the escrow funds at issue, as is each Service Contract. *See supra* at pp. 19-23. Each of the putative class members occupies the same status under

Defendants' agreements, and each potential class member has been treated identically under the agreements, *i.e.*, they have been deprived of escrow and security deposit funds belonging to them. *Id.*

Accordingly, the questions of statutory law common to *all* of the class members' claims are (1) whether the "reserve funds" collected and retained by Defendants qualify as "escrow funds" under the federal leasing regulations (49 C.F.R. § 376.2(l)), and (2) whether Success' equipment lease-purchase agreement therefore is subject to the escrow collection and handling provisions under which Prime is directly regulated (49 C.F.R. § 376.12(k)).[8] By extension, the questions of *fact* common to all of the class members' claims are (1) whether Defendants have specified the terms of the "reserve" (escrow) fund withholding provisions of the Prime and Success equipment lease-purchase agreements in the Prime lease agreement (as required by 49 C.F.R. §§ 376.12(h) and(i)), and (2) whether Defendants actually have failed to return, with interest, escrow and security deposit funds rightfully belonging to the class members following the termination of the class members' respective leases (as required by 49 C.F.R. § 376.12(k)). Hence, the Plaintiffs and class members have *both* legal *and* factual questions squarely in common.

Thus, the claims of all class members are based directly on common issues of fact and common issues of law. Therefore, the present class meets the commonality requirements of Rule 23(a)(2).

---

[8] Both of these questions, incidentally, have been answered in the affirmative. *See Owner-Operator Independent Drivers Ass'n. v. New Prime, Inc.*, 192 F.3d 778, 784 (8th Cir. 1999), *cert. denied* 120 S.Ct. 1671 (2000); *Owner-Operator Independent Drivers Ass'n. v. Arctic Express, Inc.*, 87 F.Supp.2d 820 (S.D. Ohio 2000).

3. *The Claims of the Representative Plaintiffs are Typical of the Claims of the Class*

"Typicality under Rule 23(a)(3) means that there are 'other members of the class who have the same or similar grievances as the plaintiff.'" *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1540 (8th Cir. 1996), *quoting Donaldson v. Pillsbury Co.*, 554 F.2d 825, 830 (8th Cir.), *cert. denied*, 434 U.S. 856 (1977). "The burden of demonstrating typicality is fairly easily met so long as other class members have claims similar to the named plaintiff." *Deboer*, 64 F.3d at 1174. Notably, "factual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claims, and gives rise to the same legal or remedial theory." *Alpern*, 84 F.3d at 1540; *see also,* Newberg, *supra*, § 3.15 ("Typicality refers to the nature of the claim or defense of the class representative and not to the specific facts from which it arose or to the relief sought. Factual differences will not render a claim atypical if the claim arises from the same event or practice or course of conduct that gives rise to the claims of the class members, and if it is based on the same legal theory").

The facts set forth above supporting "commonality" equally support a finding of "typicality" here - the claims of the Named Plaintiffs all arise from the common course of conduct of Prime and Success with respect to the class as a whole and are based on the same legal theories. Here, the typicality requirement is satisfied by the fact that the claims of the Named Plaintiffs and the members of the class dovetail precisely on both legal and factual grounds. As discussed above, the central material inquiry in this case, common to all class members, concerns the lawfulness of Defendants' practice of failing to return owner-operators'

escrow funds and security deposits as required after lease termination. In other words, the claims of both the named class representatives and the putative class members arise from the same course of conduct and are based upon the same legal theories.

Defendants may argue that the counterclaims asserted against one of the Named Plaintiffs defeat typicality. It is well-settled, however, that the existence of counterclaims against a Named Plaintiff is insufficient to defeat class certification. This Court recently held, in the context of a class action asserting violations of the federal Truth-in-Lending Act, (TILA), that "a counterclaim premised on a debt to underlying TILA claim was permissive." *Fiedler v. Credit Acceptance Corp.*, 175 F.R.D. 313, 321 (W.D. Mo. 1997), *citing Peterson v. United Accounts, Inc.*, 638 F.2d 1134, 1136 (8th Cir. 1981). The *Fielder* court also held that Federal Rule of Civil Procedure 13, which requires the filing of counterclaims arising out of the same transaction or occurrence that is the subject matter of the opposing party's claim, "is inapplicable in a class context." 175 F.R.D. at 321, *quoting Buford v. H & R Block*, 168 F.R.D. 340, 363 (S.D. Ga. 1996), *aff'd*, 117 F.3d 1433 (11th Cir. 1997). As a result, this Court held that "the counterclaims alleged by Defendants to prevent class certification are not compulsory . . . [and] the Court finds no other barriers to the grant of class certification." 175 F.RD. At 321. *See also Haynes v. Logan Furniture Mart, Inc.*, 503 F.2d 1161, 1164-65 n.4 (7th Cir. 1974), (holding in a TILA case that "litigation respecting individual counterclaims if successful, would only reduce damage awards . . . the possibility of subsequent individual suits for actual damages . . . does not substantially detract from the predominance of class issues"); *Davis v. Cash For Payday, Inc.*, 193 F.R.D. at 521-22 ("[t]o begin with, we disagree with the defendants' contention that the class cannot be certified because of potential counterclaims. Potential counterclaims do not defeat

class certification.").

The claims of the Named Plaintiffs are typical of the claims of the entire class. Therefore, the class meets the requirements of Federal Rule of Civil Procedure 23(a)(3).

4. The Representative Plaintiffs are Adequate Class Representatives

The final requirement of Federal Rule of Civil Procedure 23(a) is that "the representative parties will fairly and adequately protect the interests of the class." This requirement "is designed to 'uncover conflicts of interest between named parties and the class they seek to represent.'" *Bradford v. Agco Corp.*, 187 F.R.D. 600, 603 (W.D. Mo. 1999), *quoting Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231, 2236 (1997). "Not only must the named plaintiff adequately represent the class, but plaintiff's counsel must be able to adequately represent the class." *Id.*

Plaintiffs already have established above that the Named Plaintiffs clearly share common interests with *all* of the proposed class members. Likewise, international trade association OOIDA shares more than sufficient common interests with the class members to qualify as a class representative under Rule 23(a)(4).[9]

First, OOIDA's paramount mission, and the very purpose of its founding over 25 years ago, is to work aggressively to stop abusive practices - especially those of motor carriers - 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

---

9. In *Owner-Operators Independent Drivers Assoc. v. Gilbert Express, Inc.*, Civil Action No. 00-5163 (D. N.J. Feb. 14, 2001), the court, in its Class Certification Order, found that the named plaintiffs, which included OOIDA, were "adequate representatives of the class." (Order certifying class attached as Exhibit D, p.2).

the federal legislation at issue herein, which grants owner-operators a private right of action by which to enforce the federal motor carrier "Truth-in-Leasing" regulations. In fact, it is fair to say that there exists a nearly perfect alignment of OOIDA's interests and the interests of the named and proposed class members. *See generally* Johnston and Cullen Declarations.

Second, the overlap between OOIDA's membership and the ranks of the unnamed class members further recommends OOIDA as a class representative in this action. *See* Johnston Declaration, at ¶ 8 (declaring that 382 members of the putative class are OOIDA members). Third, by bringing and diligently prosecuting this case to date, the named class representatives, particularly OOIDA, have more than demonstrated their ability and willingness to pursue the interests of the class through qualified counsel. Equally important, OOIDA and the named class representatives possess the resources necessary to the vigorous prosecution of the class's claims. *See* Johnston Declaration, at ¶ 6.

Finally, as discussed in the Cullen Declaration, Plaintiffs are represented in this action by The Cullen Law Firm, PLLC general counsel to OOIDA, who have extensive experience in representing owner-operator clients in trucking industry-related class actions. Declaration of Paul D. Cullen, Sr., Exhibit I. In addition, Plaintiffs also are represented in this action by Missouri-based trial counsel Shook, Hardy & Bacon, and Douglas, Lynch, Haun & Kirksey, who have litigated numerous actions in Missouri's federal District Courts. *See* Cullen Declaration at ¶ 6.

Given the 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 more than adequately represent all of the members of the class in this action under Rule

23(a)(4).

B. This Case Satisfies The Requirements Of Rule 23(b).

Class certification requires satisfaction of each of the four parts of Federal Rule of Civil Procedure 23(a) and **at least one** of three parts of Rule 23(b). In this case, Plaintiffs seek class certification under subsection (2) of Rule 23(b), or in the alternative, under subsection (3) of Rule 23(b).

1. Certification of this Case is Warranted Under Rule 23(b)(2)

Federal Rule of Civil Procedure 23(b)(2) provides for class certification if the prerequisites of subdivision (a) are satisfied and "the party opposing class certification has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole."

In this case, Plaintiffs have asked the Court for class-wide injunctive and declaratory relief sufficient to invoke the provisions of Rule 23(b)(2). Plaintiffs' Amended Complaint seeks the following class-wide injunctive and declaratory relief: (1) entering judgment declaring the practices of Defendants to be in violation of the Truth-in-Leasing regulations (Amended Complaint, Prayer for Relief at ¶ 57B); (2) enjoining Defendants from transferring, diverting or otherwise concealing class members' escrow funds and records relating to such funds (Amended Complaint, Prayer for Relief at ¶ 57F); (3) permanently enjoining the continuation of such violations (Amended Complaint, Prayer for Relief at ¶ 57B); (4) ordering Defendants to provide an accounting of all transactions relating to class members' escrow funds (Amended Complaint, Prayer for Relief at ¶ 57C); (5) ordering Defendants to disgorge to class members the escrow and other funds (with interest as calculated under applicable law) rightfully belonging to class

members. (Amended Complaint, Prayer for Relief at ¶ 57E); and (6) establishing a common fund into which all unlawfully retained escrow funds and statutory interest are deposited (Amended Complaint, Prayer for Relief at ¶ 57D).

In *DeBoer*, the Eighth Circuit affirmed the certification of a Rule 23(b)(2) class where the suit sought to enjoin defendant from maintaining escrow accounts in violation of federal law and also sought "to force [defendant] to adjust its escrow accounts to ensure compliance with that standard." 64 F.3d at 1173. The circuit court reasoned that "[i]f the Rule 23(a) prerequisites have been met and injunctive or declaratory relief has been requested, the action usually should be allowed to proceed under subdivision (b)(2)." *Id.* at 1175, *quoting* 7A Charles A. Wright et al., Federal Practice and Procedure § 1775, at 470 (1986).

Similarly, this Court has certified class actions under Rule 23(b)(2) where the underlying suit sought to enjoin defendant from further violation of federal law. *See Bradford v. Agco Corp.*, 187 F.R.D. 600, 605 (W.D. Mo. 1999) (certifying 23(b)(2) class where "[p]laintiffs have sought injunctive relief by requiring the defendant to perform their contractual obligations" under the Employee Retirement Income Security Act); *Fiedler*, 175 F.R.D. 313, 320 (certifying TILA class action under 23(b)(2) where "Court finds that the Rule 23(a) prerequisites have been met and injunctive and declaratory relief were both requested.").

Notably, requests for monetary relief "are not enough to cause a Court to refuse to certify a class action under rule 23(b)(2)." *Bradford*, 187 F.R.D. at 605; *DeBoer*, 64 F.3d at 1175 ("[t]he fact that damages were sought incidentally to the prayer for injunctive relief does not affect this result"); *Fielder*, 175 F.R.D. at 320 ("[t]he fact that the Plaintiffs also seek damages does not alter the ruling that certification is proper under Rule 23(b)(2)"). Indeed, "[m]onetary

damages are almost always requested when injunctive relief is sought. Refusing to certify a Rule 23(b)(2) class action based on a request for monetary relief defeats the possibility of ever maintaining an injunctive class action." *Bradford*, 187 F.R.D. at 600.

In this case, as described above, Plaintiffs seek broad and comprehensive injunctive and declaratory relief as against Prime and Success. As a result, certification is warranted under Rule 23(b)(2).

2. *In the Alternative, Certification is Warranted Under 23(b)(3) as Common Issues of Fact and Law Predominate Over Individual Issues*

In the alternative, Plaintiffs seek certification under Rule 23(b)(3). In order 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."

As discussed above in the commonality analysis addressing Rule 23(a)(2), the common questions of law and fact regarding Defendants' unlawful retention of the class members' escrow funds are sufficient to satisfy the first, "predominating question" prong of 23(b)(3). The second prong of Rule 23(b)(3), regarding superiority of the class action method, requires consideration of:

(A) The interest of members of the class in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the difficulties likely to be encountered in the management of a class action.

With regard to Rule 23(b)(3)(A), the potential damages to be recovered by each class member in the present case are not substantial enough to distinguish the interests of any single class member from the others. As already noted herein, Plaintiffs estimate that each class member has deposited with Defendants only between approximately $1,000 and $20,000 in escrow funds (Amended Complaint at ¶ 39). Moreover, given the limited resources of individual class members, their geographic dispersion, separate efforts at vindication of the class members' rights, even if individuals were inclined to consider separate actions - would be highly unlikely, if not impossible. *See generally* Johnston Declaration.

Moreover, the relatively small amounts of money involved per owner-operator, make a class action superior to other forms of adjudication. One court in a Truth-in-Lending Act class action reasoned, "[t]his is precisely the kind of case that class actions were designed for, with small or statutory damages brought about by impecunious plaintiffs who allege similar mistreatment by a comparatively powerful defendant . . ." *Jackson v. Check 'n Go of Illinois, Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000). The *Jackson* court concluded that without class certification the defendant "otherwise might get away with piecemeal highway robbery by committing many small violations that were not worth the time and effort of individual plaintiffs to redress or were beyond their ability or resources to remedy." Id.

Indeed, it likely is for these economically-oriented reasons that Plaintiffs are aware of no individual or sub-class with a strong interest in separate litigation of the matters addressed in the Amended Complaint. For that matter - with regard to sub-section (B) of Rule 23(b)(3), Plaintiffs are unaware of any litigation in any court concerning the controversy at issue in this action. In fact, class representative OOIDA has been contacted since the filing of this suit by numerous owner-operators who enthusiastically support the prosecution of this action as a class action. *See* Johnston Declaration, at ¶ 7.

As to sub-section (C) of Rule 23(b)(3), given the proven ability and willingness of the class representatives to lead this action - and the proven ability and willingness of counsel to prosecute Plaintiffs' claims - the class action method is ideally suited in this instance to concentrate the litigation of the class members' claims efficiently in one forum. *See generally* Johnston and Cullen Declarations. The Western District Court seems particularly well-suited to this task given its proximity to Defendants' headquarters in Springfield, Missouri.

Moreover, no substantial difficulties are likely to be encountered in the management of this class under Rule 23(b)(3)(D). Much, if not all, of the liability portion of this case may be addressed by dispositive motions. Once liability is established the calculation of damages for each class members will be relatively straightforward, as such damages can be calculated easily from Prime's computer records tracking the amount of funds retained by Defendants for each class member. *See generally* Brickell Declaration.

Finally, if this class is not certified, each individual owner-operator would have to bring a separate action to litigate issues regarding his or her rights to judicial relief. Such a process would involve numerous separate lawsuits. A single class action, supervised by a single judge,

will permit a fair and consistent, as well as an efficient adjudication of the issues. *See Bradford*, 187 F.R.D. 600, 605 (holding that a class should be certified "when the alternative is numerous trials by Western District of Missouri federal judges"); *Jackson v. Check 'n Go of Illinois, Inc.*, 193 F.R.D. 544, 547 (N.D. Ill. 2000) ("I appreciate the defendants' concern about my caseload, but I would much rather handle this case as a class action than try hundreds of individual claims.").

Thus, since each of the elements required under Rule 23(b)(3) is present in this case, a class action is superior to other available methods for the fair and efficient adjudication of the common questions of law and fact that predominate among the class members in this action.

CONCLUSION

For the reasons stated above, the named Plaintiffs respectfully request that this Court certify the class as that class is defined in Plaintiffs' Motion for Class Certification.

Respectfully submitted,

Owner-Operator Independent Drivers Association, Inc., Howard Jenkins, Marshall Johnson, Susan Johnson, and Jerry Vanboetzelaer,

Plaintiffs

By: _____

PAUL D. CULLEN, SR.
DAVID A. COHEN
THOMAS P. McCANN

THE CULLEN LAW FIRM, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007
Telephone: (202) 944-8600
Facsimile: (202) 944-8611

By: _____

THOMAS SHEEHAN, ESQ., Bar # 36462

SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-6550
Facsimile: (816) 421-5547

JERRY M. KIRKSEY, ESQ.
DOUGLAS, LYNCH,
HAUN & KIRKSEY
111 West Broadway
P.O. Box 117
Bolivar, Missouri 65613
Telephone: (417) 326-5261
Facsimile: (417) 326-2845

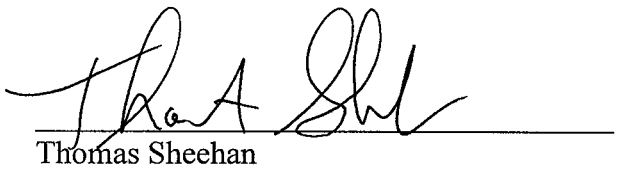
Dated: April 3, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by First-Class U.S. Mail, postage prepaid, this 3rd day of April, 2001 to:

James C. Sullivan, Esq.
Shughart Thomson & Kilroy, P.C.
1700 Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105

Arthur Curtis, Esq.
Greene & Curtis, LLP
1340 E. Woodhurst
Springfield, Missouri 65804



Thomas Sheehan
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-6550
Facsimile: (816) 421-5547

Counsel for Plaintiffs
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON, AND JERRY VANBOETZELAER

Operator Reserves." (OOI 00307 - 308).[3] The settlement sheet contains line items for the following: (1) "Cash Res. For Excess Mileage;" (2) "Cash Res. For Tire;" and (3) "Cash Res. For Repair." There are also line items for "Interest Earned On Reserves."

A review of the settlement sheets supplied by Prime to Vanboetzelaer demonstrate that Vanboetzelaer paid Prime the following escrow amounts for tractor number 2381: (1) Excess Miles Escrow - $865.78; (2) Tire Reserve Escrow - $1240.25; and (3) Repair Escrow - $2,893.99. (OOI 00459). Vanboetzelaer terminated his agreement pertaining to tractor 22381 early, and as a result Prime retained all of the escrow funds, totaling $5,000.02 plus $ 3.70 in interest. (OOI 00466) (noting "Assets Transferred" - $ 5000.02).

Vanboetzelaer then leased tractor number 2731 and paid funds into each of the reserve accounts. Vanboetzelaer paid $7,282.08 into the excess miles reserve fund, $2, 886.17 into the tire reserve and $20,183.69 into the repair reserve. (PRI 001877). Vanboetzelaer completed the lease for unit 2731 and thus Prime returned, pursuant to the lease-purchase agreement, the entire excess mileage reserve to Vanboetzelaer. However, Prime retained one-half of the tire reserve ($1,443.08), and one-half of the repair reserve ($10,091.84). (PRI 001877). Prime also retained Vanboetzelaer's Security Deposit in the amount of $1,000.00. In addition, Prime failed to pay Vanboetzelaer interest on the amounts retained by Prime.

2. *Plaintiff Marshall Johnson*

a. *The Provisions of the Lease Agreements between Johnson and Prime/Success*

---

3. Citations beginning with "OOI" refer to the bates numbers assigned by Plaintiffs to documents they have produced in discovery in this case. *See* Declaration of David A. Cohen, attached as Exhibit F identifying and authenticating documents produced by Plaintiffs in this matter.

Plaintiff Marshall Johnson entered into two agreements with Prime and Success Leasing, the first on July 12, 1994 and the second on October 18, 1994. These agreements purported that Success lease to Johnson, with the option to purchase, trucking equipment under the terms of a lease-purchase agreement, and at the same time, purport that Johnson lease-back that equipment to Prime under a Service Contract. The first agreement pertained to the lease-purchase and lease-back of tractor unit 3116. (PRI 000052). The second agreement pertained to the lease-purchase and lease-back of tractor unit 3515. (PRI 000083).

As with Vanboetzelaer, each agreement contained four subparts, each of which was signed the same day and presented by Prime as one package. The July 12, 1994 agreement contained: (1) "Lease Agreement" (PRI 000053 - 0061); (2) "Service Contract" (PRI 000062 - 0071); (3) "Personnel Service Contract" (PRI 000072 - 0077); and (4) "MCT Lease Agreement" (PRI 000079 - 0080). Similarly, the October 18, 1994 agreement contained four subparts, each of which was signed the same day and presented by Prime as one package: (1) "Lease Agreement" (PRI 000084 - 0092); "Service Contract" (PRI 000093 - 0103); "Personnel Service Contract" (PRI 000104 - 0109); and "MCT Lease Agreement" (PRI 000118 - 0119).

Johnson terminated the July 12, 1994 agreement on October 18, 1994. (PRI 000052). On that date he entered into an agreement to lease-purchase and lease-back unit 3515. (PRI 000083). On August 22, 1996, Johnson received a letter from Prime and Success canceling the lease agreements effective August 20, 1996.[4] (PRI 000114).

---

4. The letter is on "Prime Inc." letterhead, but was signed by Fred Ege for Success Leasing, Inc. In addition, the letter stated that the "Service Agreement between yourself and Success Leasing has been canceled . . ." The Service Contract, however, was entered into between Prime and Johnson. (PRI 000093). Success Leasing was not a party to the

The terms of the lease-purchase and Service Contract agreements entered into between Johnson and Prime/Success on July 12, 1994 and October 18, 1994 were identical in all material respects. *(Compare* PRI 000053 -0061 to PRI 00084 - 0092). The only distinction between the agreements was that under the terms of the earlier lease-purchase agreement Johnson was to make 57 weekly payments of $580.00, while under the later agreement Johnson agreed to make 104 weekly payments of $580.00.

Notably, terms relating to escrow reserves in each of the lease-purchase agreements between Success and Johnson were **identical** to the terms contained in the lease-purchase agreements between Prime and Vanboetzelaer. As in the Vanboetzelaer-Prime agreements, the Johnson-Success lease-purchase agreements provided for an "Excess Mileage Reserve," a "Repair Reserve," and a "Tire Replacement Reserve." The disposition of these reserve accounts was identical under the Johnson-Success agreements as under the Vanboetzelar-Prime agreements. Under the Johnson-Success agreements if the lease was terminated early Success retained the entire balance of each of these reserve funds. (PRI 00055-0058; PRI 00086-0088). If the lease was completed the entire balance of the Excess Mileage Reserve would be returned to Johnson. (PRI 00056; 00087). At the same time, if the lease was completed, Success retained one-half of the Repair Reserve and the Tire Replacement Reserve. (Id.).

The Service Contracts between Johnson and Prime required Johnson to deposit "with Carrier [Prime] the sum of One Thousand Dollars ($1,000.00) as security for the full performance by Contractor of all of his obligations under this Service Contract." The Service Contract failed to identify *any* of the escrow charges that were deducted from Johnson's

---

Service Contract.

compensation and similarly failed to recite how the amount of each item was to be computed. Moreover, the Service Contracts failed to disclose, as required by the Truth-in-Leasing regulations, the fact that under the lease-purchase agreements reserve payments were to be deducted from Johnson's compensation.

b. *Escrow and Security Deposit Funds Retained by Prime and Success*

Settlement statements supplied by Prime to Johnson on a weekly basis stated the amounts of escrow funds withheld by Success. Subsequent to the initial settlement statement dated July 14, 1994, the documents refer to "Reserve Cash" and list the amounts for "Current Operator Reserves." The settlement sheet contains line items for the following: (1) "Cash Res. For Excess Mileage;" (2) "Cash Res. For Tire;" and (3) "Cash Res. For Repair." There are also line items for "Interest Earned On Reserves." (*See e.g.* OOI 02148 - 2149).

A review of the final settlement sheet supplied by Prime to Johnson demonstrate that Johnson paid Success the following escrow amounts for tractor number 3116: (1) Excess Miles Escrow - $629.70; (2) Tire Reserve Escrow - $406.14; and (3) Repair Escrow - $2,147.05. (OOI 02106).[5] Johnson terminated his agreement pertaining to tractor 22381 early, and as a result Prime/Success retained all of the escrow funds, totaling $3,182.89 plus $ 34.31 in interest. (PRI 000183).

Johnson then leased tractor number 3515 and paid funds into each of the reserve accounts. Johnson paid $3,782.40 into the excess miles reserve fund, $1,035.57 into the tire

---

5. Notably, the final settlement sheet fails to disclose the amount of interest calculated on each reserve fund. The settlement sheet for the previous week, however, indicates that $ 34.31 in interest was earned on these reserves. (OOI 02148).