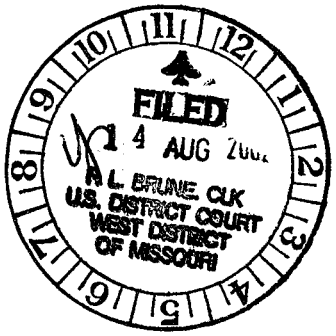
IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

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



ORDER

Pending before the Court is Defendants' Motion for Summary Judgment Against Plaintiff Owner-Operator Independent Drivers Association, Inc. ("OOIDA"). OOIDA has filed suggestions in opposition and Defendants have replied thereto. Defendants argue that they are entitled to summary judgment because OOIDA's claims on Defendants' past leases are moot and that Defendants' current leases conform to the Truth-in-Leasing regulations. For the following reasons, the Court hereby GRANTS Defendants' motion. Furthermore, because there are no longer any pending claims over which this Court has original jurisdiction, the Court hereby DISMISSES Defendants' counterclaims against plaintiff Johnson pursuant to 28 U.S.C. § 1367(c)(3).

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Background[1]

OOIDA is business association of owner-operators who own and operate motor carrier equipment. Defendant Prime is a regulated motor freight carrier. Defendant Success Leasing leases tractor units, with the option to purchase, to independent owner-operators. According to OOIDA, defendant Success Leasing is owned and controlled by defendant Prime. The lease agreement utilized by Defendants with owner-operators must conform to the federal Truth-in-Leasing regulations codified at 49 C.F.R. § 376.

The complaint in this action was filed on August 14, 1997 pursuant to 49 U.S.C. § 14704(a)(1) & (2), the private enforcement mechanism created by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"). It alleges that charge-back provisions and escrow account terms in leases executed by Defendants with the individual plaintiffs violated various sections of 49 C.F.R. § 376.12. OOIDA participated in the lawsuit "only in connection with Plaintiffs' prayers for declaratory and injunctive relief."

The complaint alleges that Defendants' leases violated 49 C.F.R. § 376.12(h) which requires the following:

> (h) Charge-back items. The lease shall clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

49 C.F.R. § 376.12(h). According to OOIDA's complaint, the contract under which defendant Prime contracted for services with owner-operators did not specify that escrow payments required under a separate Lease Purchase Agreement with either defendant Prime or defendant

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[1]The facts and inferences therefrom are viewed in the light most favorable to the nonmoving party. See Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-90 (1986).

Success would be deducted from the weekly settlement paid by Prime.

OOIDA also complains that the leases violated 49 C.F.R. § 376.12(i) which requires the following:

> (i) Products, equipment, or services from authorized carrier. The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.

49 C.F.R. § 376.12. According to the complaint, the contract under which defendant Prime contracted for services with owner-operators did not reference, let alone specify, terms of lease payments and escrow withholding provisions of the separate Lease Purchase Agreement with either defendant Prime or defendant Success under which Defendants could deduct from the owner-operators' compensation.

Finally, the complaint alleges that Defendants violated 49 C.F.R. § 376.12(k) which requires the following:

> (k) Escrow funds. If escrow funds are required, the lease shall specify:
>
> (1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.
>
> (2) The specific items to which the escrow fund can be applied.
>
> (3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:
>
> > (i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or
> > (ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

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

49 C.F.R. 376.12(h),(i) & (k). The complaint references numerous violations of 49 C.F.R. § 376.12(k) relating to escrow account provisions in Defendants' leases. According to the complaint, various terms in the lease provisions regarding escrow accounts violated the Truth-in-leasing regulations or terms required by the regulations were missing. According to the complaint, Defendants' practice of directly deducting funds from compensation due under the Service Contract to fund certain escrow accounts known as an "excess mileage rental account," a "repair reserve," a "tire replacement reserve," and a "security deposit," were illegal.

Defendants continue to lease equipment to owner-operators and then lease the services of the owner-operators. The terms of those leases, however, have changed. In fact, many of the escrow accounts about which Plaintiffs complained have either been removed from the leases or have changed significantly. Defendants have been granted summary judgment on the individual plaintiffs' claims in this lawsuit. Defendants now seek summary judgment on OOIDA's claims for declaratory and injunctive relief.

Discussion

Summary judgment is appropriate if the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986). The facts and inferences therefrom are viewed in the light most favorable to the nonmoving party. See Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-90 (1986). The moving party must carry the burden of establishing both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. See id.

Summary judgment is appropriate if the movant demonstrates that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 327, 106 S. Ct. 2548, 2254-55, 91 L. Ed. 2d 265 (1986). The facts and inferences therefrom are viewed in the light most favorable to the nonmoving party. See Fed. R. Civ. P. 56(c); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-90, 106 S. Ct. 1348, 1355-58, 89 L. Ed. 2d 538 (1986). The moving party must carry the burden of establishing both the absence of a genuine issue of material fact and that such party is entitled to judgment as a matter of law. See id.

Once the moving party has met this burden, the nonmoving party may not rest on the allegations in the pleadings, but by affidavit or other evidence must set forth specific facts showing that a genuine issue of material fact exists. See Fed. R. Civ. P. 56(e); Lower Brule Sioux Tribe v. State of S.D., 104 F.3d 1017, 1021 (8th Cir. 1997). To determine whether the disputed facts are material, courts analyze the evidence in the context of the legal issues involved. See id. Thus, the mere existence of factual disputes between the parties is insufficient to avoid summary judgment. See id. Rather, the "disputes must be outcome determinative under prevailing law."

Id. (citations omitted).

In order to establish that a factual dispute is genuine and sufficient to warrant trial, the party opposing summary judgment "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita, 475 U.S. at 586. Demanding more than a metaphysical doubt respects the proper role of the summary judgment procedure: "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action." Celotex, 477 U.S. at 327, 106 S. Ct. at 2555.

OOIDA's Claims for Injunctive and Declaratory Relief

Defendants argue that they are entitled to summary judgment on the claims of OOIDA because Defendants have not used the leases referenced in the complaint for a period of years and thus, OOIDA's claims are moot. Furthermore, to the extent OOIDA claims that Defendants' current leases are inconsistent with 49 C.F.R. 376.12, Defendants argue that their current leases are consistent with all Truth-in-Leasing regulations as a matter of law.

On August 2, 2002 the Court granted summary judgment to Defendants on the individual claims brought by plaintiffs Marshall Johnson and Jerry Vanboetzalaer. In so doing, the Court held that the ICCTA cannot serve as the basis for an action challenging violations of the Truth-in-Leasing regulations predating the acts's enactment. See Order of August 2, 2002; see also Hughes Aircraft Co. v. United States, 520 U.S. 939, 948-49 (1997). Thus, the Court granted summary judgment to Defendants because their claims complained of Defendants' inclusion of certain terms and failure to include other terms in leases that were executed prior to January 1, 1996.

The Court's holding regarding the individual plaintiffs' leases applies with equal force to OOIDA's claims on those leases. The only leases at issue in the complaint are leases executed prior to the effective date of the ICCTA. An organization only has standing to assert the claims of its members so long as "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." See Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). Thus, in order for OOIDA to maintain its claim for declaratory judgment and injunctive relief on the leases referenced in the First Amended Class Complaint, there must be OOIDA members that would have a right of action on those leases under 49 U.S.C. § 14704(a). There has been no showing by OOIDA in this case that any of its members entered into leases with Defendant after January 1, 1996 that contain the terms referenced in the complaint.

Regardless, any claims based on the terms contained in leases held by plaintiffs Johnson and Vanboetzalaer are moot. The mootness doctrine is rooted in the Article III prohibition against issuing advisory opinions. See id. at 127. Generally, a claim is moot if events taking place subsequent to the filing of the lawsuit resolve the dispute. See Erwin Chemerinsky, Federal Jurisdiction 126 (3d ed. 1999). Defendants ceased using leases containing the terms referenced in the complaint before this case was even filed.

Plaintiffs counter, however, that the voluntary cessation of the conduct about which a plaintiff complains does not moot a controversy. See City News and Novelty, Inc. v. City of Waukesha, 531 U.S. 278, 284 n.1 (2001). The policy supporting the voluntary cessation exception to the mootness doctrine is that a party should not be able to evade judicial review by temporarily altering questionable behavior. See id. The Court notes, however, that Defendants

in fact stopped using the leases at issue before the filing of this lawsuit which was roughly five years ago. This fact weighs heavily in evaluating Defendants' claim that the lease terms were changed for reasons unrelated to this lawsuit. The Court can find no reason to discount this claim and thus, any claim of OOIDA premised on the terms contained in plaintiff Johnson or Vanboetzelaer's leases is moot.

OOIDA argues that even if it cannot seek relief on Defendants' past leases it should be permitted to challenge the legality of the terms contained in Defendants' current leases. According to Plaintiff OOIDA, Defendants' current lease still violates the Truth-in-Leasing regulations. The interpretation of an unambiguous contract provision is a question of law suitable for summary judgment. See McCormack v. Citibank, N.A., 100 F.3d 532, 538 (8th Cir. 1996). Whether OOIDA should be permitted to challenge Defendants current practices is a question the Court need not address because, for the following reasons, the Court holds that as a matter of law the lease agreement currently used by Defendants conforms to the Truth-in-Leasing regulations.

OOIDA's first challenge to Defendants current lease agreement is that a provision establishing an "Excess Mileage Charge" violates the Truth-in-Leasing regulations. Specifically, OOIDA contends that the Excess Mileage Charge violates 49 C.F.R. § 376.12(k)(2)-(6) governing escrow accounts. An escrow account is money "deposited" with the carrier "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 by the lessor and lessee." 49 C.F.R. § 276.2(l). Defendants maintain that the Excess Mileage charge is not an "escrow account" subject to 49 C.F.R. § 376.12(k)(2)-(6).

The Excess Mileage Charge provision reads as follows:

One of the lease charges referred to in Paragraph 2 is the Excess Mileage Charge.

> The Excess Mileage Charge is based on the accumulated average weekly miles the Tractor travels in excess of the mileage shown in Schedule A. The Excess Mileage Charge shall be adjusted and paid by You weekly based upon the average miles the Tractor travels. If You exercise Your option to purchase, Success shall pay to You an amount equal to the entire Excess Mileage charge paid by You.

The Court agrees with Defendants that the Excess Mileage Charge does not create an account into which money is deposited for the purposes enumerated in 49 C.F.R. § 276.2(l). The money is a payment to Defendants to cover the decrease in value of the Tractor caused by the increased mileage. Thus, it is money to which the owner-operator under the lease has no claim. Therefore, the money paid by the owner-operator pursuant to the Excess Mileage Charge is not an escrow fund under the Truth-in-Leasing regulations and therefore, it is not subject to the dictates of 49 C.F.R. § 376.12(k)(2)-(6).

Another provision in Defendants' current lease with which OOIDA takes issue is the provision establishing a Tire Replacement Reserve. That provision reads as follows:

> During the term of this Lease, You agree to place in a Tire Replacement Reserve an amount equal to 1.5 cents per mile that the Tractor travels. You shall authorize the Tire Replacement Reserve amount to be deducted from Your weekly Settlement by any carrier You lease the Tractor to and remitted to Success, and You and Success will require that carrier to provide You with an accounting of the deductions or Success will do so as it receives the payments. You may demand an accounting of the amounts paid by You to the Tire Replacement Reserve at any time.
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> The Tire Replacement Reserve shall be used to purchase tires for the Tractor while this Lease is in effect. During that time, Success shall pay to You interest equal to the average yield on Ninety-One-Day Thirteen Week Treasury Bills as established in the weekly auction by the Department of Treasury. Interest shall be paid to You quarterly. Upon termination of this Lease, Success shall retain out of the Tire Replacement Reserve 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. The calculation of such costs shall be based on the wear of each tire measured in one thirty-seconds of an inch of useable tire remaining at the time of termination. Because the types of tires and their costs vary the resulting calculations may also vary and it is not possible to include an exact calculation of cost in this Lease. However, Success will make available to You upon request, all information necessary to calculate the cost to You attributable to the wear on your tires at any given time. The balance of the Tire

> Replacement Reserve, less amounts set off as provided in paragraph 21, shall be paid to you. In the event You exercise Your option to purchase, all amounts accumulated in the Tire Replacement Reserve, less amounts set off as provided in paragraph 21, shall be paid to You. All amounts to be returned to You from the Tire Replacement Reserve, after authorized deductions, shall be returned within forty-five (45) days following termination of this Lease Agreement.
>
> If You do not have enough money in the Tire Replacement Reserve to purchase replacement tires, Success may elect to advance You the money to do so. The amount of that advance shall be reflected as a negative balance in the Tire Replacement Reserve on Your Weekly Settlement. You shall pay Success interest equal to the average yield on Ninety-One-Day, Thirteen-Week Treasury Bills, as established on the Weekly Auction by the Department of Treasury on the outstanding balance of all such advances. Interest shall be charged weekly.

OOIDA alleges that the Tire Replacement Reserve violates 49 C.F.R. § 376.12(h) which states that the lease shall specify the following:

> all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item is to be computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

49 C.F.R. § 376.12(h). OOIDA contends that the Tire Replacement reserve violates 49 C.F.R. § 376.12(h) by failing to specify items initially paid for by the carrier but "ultimately deducted from the Tire Reserve Fund (and, ultimately, [an] owner-operator's compensation) at time of settlement." OOIDA also argues that the lease fails to specify how the amount of this charge-back will be computed.

Essentially, § 376.12(h) requires the authorized carrier to set forth items that will be paid for by the carrier then deducted from the owner-operator's compensation (charge-backs) and to provide supporting documentation. The Court finds that any items referenced in the Tire Replacement reserve that can be appropriately characterized as charge-backs are adequately specified. Furthermore, the lease repeatedly references the owner-operator's right to an

accounting and states that the owner-operator is entitled to "all information necessary to calculate the cost to You attributable to the wear on your tires at any given time." Therefore, the Court finds that to the extent any item in the Tire Replacement Reserve can be properly characterized as a charge-back, defendants have specified that the owner-operator is entitled to the documentation supporting the cost thereof. Thus, the Court finds that the Tire Replacement reserve does not violate 49 C.F.R. § 376.12(h).

OOIDA contends that the Tire Replacement Reserve violates 49 C.F.R. § 376.12(k)(2) by failing to specify the specific items to which the escrow fund can be applied and making documentation of the deduction amounts available "upon request." Section 376.12(k)(2) requires that the lease specify "[t]he specific items to which the escrow fund can be applied." The Court finds that, in fact, the Tire Replacement Reserve specifies the item, i.e. tires, to which the fund will be applied with great specificity and that making the documentation of the deduction available upon request does not violate § 376.12. Thus, the Court rejects OOIDA's argument on this point.

OOIDA contends that the Tire Replacement Reserve violates 49 C.F.R. § 376.12(k)(3). That section requires the lease to specify as follows:

> (3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:
>
> > (i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or
> > (ii) By providing a separate accounting to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

49 C.F.R. § 376.12(k)(3). OOIDA contends that the Tire Replacement Reserve violates §

376.12(k)(3) by not specifying that a separate accounting will be provided to the owner-operator on a monthly basis. The Court finds OOIDA's position to be without merit. Providing a monthly accounting is only one option of providing an accounting under 49 C.F.R. § 376.12(k)(3). While the Tire Replacement Reserve does not specify a monthly accounting, it does contemplate weekly accounting of the amount contributed to the Tire Replacement Reserve at the time of each owner-operator's weekly settlement along with an additional accounting upon request of the owner-operator at any time. The Court finds that the Tire Replacement Reserve does not violate 376.12(k)(3).

Finally, OOIDA argues that a set-off provision included in Defendants' lease violates 49 C.F.R. § 376.12(h) & (k). The provision in question reads as follows:

> (a) Termination of Lease. If this Lease is terminated prior to the expiration of its term, You grant Success the right to require any carrier that You are leased with, and You shall so authorize that carrier, to off set against any amounts due You by the carrier an amount sufficient to cure any deficiencies in Lease charges, Tire Replacement Reserve, excess Mileage Charges, or any other amounts due Success, by virtue of advances made on Your behalf for items referred to in paragraph 22, and to pay those amounts directly to Success.
>
> (b) Completion of Lease. At the time You complete the full term of this Lease, You grant to Success the right to set off against any amounts due You from the Tire Replacement reserve and any incentives earned by You for completion of this Lease, any amounts due Success by virtue of advances made on Your behalf for items referred to in paragraph 22 under the terms of this Lease. Also, in the event the Tire Replacement Reserve has a negative balance, Success may set off from any incentives earned by You for completion of this Lease amounts sufficient to zero balance the Tire Replacement Reserve. You further authorize Success to offset against any amounts due You under the terms of this Lease, any amounts due the carrier to whom You are leased, and to remit such amounts to that carrier upon its request.

Paragraph 22 that is referenced in the above provision is titled "Advances" and it reads as follows:

> Paragraphs 10, 12, 14, 15, 17 and 19(d) contain financial obligations for which You are responsible. The amount of those obligations shall be the actual cost of each. All such amounts as You are required to pay for obligations arising out of the paragraphs

> set forth above may be advanced by Success or Success may cause the carrier to whom You are leased to make such advance. You shall authorize any such advances to be deducted by any carrier You are leased to from any Settlement You have with that carrier and remitted to the entity who advanced them. If any of the advances are not repaid in that manner, they shall be repaid in accordance with paragraph 21 hereof.

OOIDA argues that the above-quoted provisions violate § 376.12(h) by failing to adequately specify all items initially paid for by the carrier but deducted from the owner-operator's compensation. OOIDA further argues that the above set-off provision violates § 376.12(k)(6) by allowing Defendants to retain portions of escrow funds in excess of 45 days. The Court disagrees.

The set-off provisions allow Defendants to set-off against money owed to owner-operators by either Defendants or another motor carrier amounts due under the lease. The items for which a set-off may occur are adequately described in the lease. Thus, the set-off provisions does not violate § 376.12(h). Furthermore, the set-off provisions do not violate § 376.12(k)(6) which specifies that remaining escrow funds must be returned within 45 days because the escrow funds at issue, i.e. the Tire Replacement Reserve, under that provision of the lease are required to be returned to the owner-operator within 45 days. The fact that Defendants have included in the lease their right to off-set specific enumerated items against those escrow funds before they are returned does not violate § 376.12(k)(6).

In conclusion, OOIDA cannot maintain claims based on the leases of plaintiff Johnson and Vanboetzelaer because those claims would be an impermissible retroactive application of the ICCTA and furthermore, the claims on those leases are moot because defendant ceased using those leases long ago. To the extent OOIDA seeks injunctive and declaratory relief on the leases currently used by Defendants, the Court holds that OOIDA's claims fail as a matter of law and

therefore, the Court will grant Defendants' motion for summary judgment.

Defendant's Counterclaims Against Plaintiff Marshall Johnson

The federal courts are obligated to raise the issue of subject-matter jurisdiction sua sponte. See Andrus v. Charlestone Stone Products Co., 436 U.S. 604, 608 n. 6 (1978). Defendant asserts counterclaims against the previously dismissed plaintiff Johnson arising under state law. This Court had supplemental jurisdiction over those claims by operation of 28 U.S.C. § 1367(a) because those claims formed part of the same case or controversy as plaintiff Johnson's claims against Defendants.

Pursuant to 28 U.S.C. 1367(c)(3), the Court has the discretion to dismiss a state law claim over which it originally had supplemental jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The Court has granted summary judgment to Defendants on all federal claims by the various plaintiffs in this action.

The Court finds that although this case has been pending for quite some time and the parties have invested a large amount of time and resources in it, it is unlikely that a significant amount of that time and those resources are attributable to the counterclaims asserted by Defendants. If Defendants decide to pursue an action against plaintiff Johnson in state court, any discovery obtained in the pending suit would be applicable thus lessening the need for discovery in that forum. Finally, the counterclaims are not significant in amount and the Court finds that the federal court is not the appropriate forum for the dispute. Therefore, the Court, in its discretion pursuant to 28 U.S.C. § 1367(c)(3) will dismiss Defendants' counterclaims against plaintiff Johnson for lack of subject matter jurisdiction.

Therefore, Defendants' Motion for Summary Judgment Against Plaintiff Owner-Operator Independent Drivers Association, Inc. is hereby GRANTED. Furthermore, the Court hereby DISMISSES Defendants' counterclaims against plaintiff Marshall Johnson pursuant to 28 U.S.C. § 1367(c)(3). Finally, all other pending motions are hereby DISMISSED AS MOOT.

IT IS SO ORDERED.

Dean Whipple
United States District Judge

Date 8-14-02