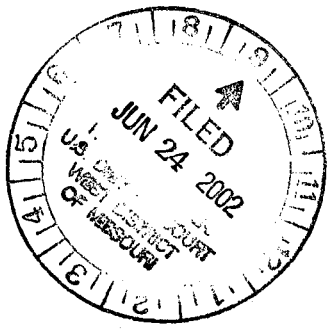
IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION



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

SUGGESTIONS OF OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION IN OPPOSITION TO MOTION OF DEFENDANTS NEW PRIME AND SUCCESS LEASING FOR SUMMARY JUDGMENT

I. STATEMENT OF MATERIAL FACTS TO WHICH A GENUINE ISSUE EXISTS

1. New Prime, Inc. ("Prime") regularly enters into lease agreements with its owner-operators. In response to Plaintiffs' Request for Production of Documents, Prime produced agreements it claimed Prime used for a discrete period of time. (Deposition of Darrell Hopkins, March 6, 2001, 28:21 - 32:20, attached as Exhibit "A").

2. Darrell Hopkins, Success Leasing's Director of Leasing, testified that from 1992 to 2000 Prime has used ten different lease forms with its owner-operators. Hopkins Dep., 33:3, 36:1, 62:11, 78:18, 85:22, 97:3, 104:23, 107:1, 115:8, 117:13.

3. The first type lease form Prime claims it used with its owner-operators is an agreement dated May 21, 1992 between Transportation Investments and James Long. Hopkins

Dep. 33:13 - 35:25, Exhibit "4". The agreement required the owner-operator to pay into four "reserve" accounts. These "reserve" accounts included a "Repair Reserve," a "Tire Reserve," an "Excess Mileage Rental Account," and a "Security Deposit." (Hopkins Dep., Exhibit 4, ¶¶ 19, 20, 21).

4. The first "reserve" account referenced under the lease agreement pertained to a "Repair Reserve." 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.

Hopkins Dep., Exhibit 4 at ¶ 20).

5. The lease agreement also referred to an "Excess Mileage Rental Account." 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.

(Hopkins Dep., Exhibit "4" at ¶ 19).

6. A third provision of the lease-purchase agreement pertained to a "Tire Replacement Reserve." 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.

(Hopkins Dep., Exhibit 4 at ¶ 21).

7. Beginning in approximately September of 1992, Prime claims that it used an lease agreement and a Service Contract form containing the same terms as in the agreements between Gary D. Brush and Prime, dated September 10, 1992. (Hopkins Dep. 41:3 - 44: 10, Exhibit "5").

8. The provisions of the lease agreement between Brush and Prime contain identical terms regarding the "Repair Reserve," the "Tire Reserve," the "Excess Mileage Rental Account," and the "Security Deposit," as did the agreement between Long and Transportation Investments. (Hopkins Dep. 43:4 - 59:13, Exhibit "5").

9. The lease agreements entered between named Plaintiff Jerry Vanboetzelear and Prime contained the same language regarding the "Repair Reserve," the "Tire Reserve," the

"Excess Mileage Rental Account," and the "Security Deposit," as did the agreements between Long and Transportation Investments (Hopkins Ex. 4) and the agreement between Brush and Prime (Hopkins Exhibit 5). See Vanboetzelaer Dep., Exs. 1, 2, attached as Exhibit "B" to these Suggestions.

10. On July 12, 1994 and on October 18, 1994, Plaintiff Marshall Johnson entered into lease agreements with Success Leasing. Deposition of Marshall Johnson, Exhibits 1 and 2, attached as Exhibit "B" to these Suggestions.

11. The lease agreement between Johnson and Success Leasing required owner-Johnson to pay into three "reserve" accounts. The "reserve" accounts included a "Repair Reserve," a "Tire Reserve," and a "Excess Mileage Rental Account."

12. The first "reserve" account referenced under the lease agreements pertained to a "Repair Reserve." 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.

Johnson Dep., Exhibit 1 at ¶ 20; Exhibit 2 at ¶ 20).

13. The lease agreements also referred to a "Excess Mileage Rental Account." 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.

(Johnson Dep., Exhibit 1 at ¶ 19, Exhibit 2 at ¶ 19).

14. A third provision of the lease-purchase agreements pertained to a "Tire Replacement Reserve." 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.

(Johnson Dep., Exhibit 1 at ¶ 21, Exhibit 2 at ¶ 21).

15. Success Leasing claims that beginning in approximately April of 1997, it began using a lease agreement form containing the same terms as in the agreement between Valinda

Wannetta Fletcher and Success Leasing, dated April 17, 1997. (Hopkins Dep. 86:1 - 97:20, Exhibit "8"). Plaintiffs dispute the facts alleged in paragraph 7 of Prime's Statement of Uncontroverted Facts. Plaintiffs specifically dispute the alleged fact that "[i]n about April 1997 the Lease Agreement used by Success Leasing changed substantially." Plaintiffs specifically dispute the alleged fact that the "Excess Mileage Charge" is "an additional expense to the lessee for excess mileage over certain threshold amounts."

16. The lease form used by Success Leasing, identified by Hopkins as Exhibit "8," contained a provision titled "Excess Mileage Charge." The Excess Mileage Charge term provided as follows:

> During the term this lease is in effect, You shall pay to Us an Excess Mileage Charge on the basis of the accumulated average weekly miles the Tractor travels in excess of the mileage shown on Schedule A. The Excess Mileage Charge shall be adjusted and paid to Us weekly based upon the average miles per week traveled from the date of this Lease to the most current week. In the event You purchase the equipment or complete the full term of the Lease, We shall pay to You a sum equal to the total Excess Mileage Charge, subject to Our right of set off as set forth in Clause 21.

Hopkins Dep., Exhibit "8;" PRI 2997, ¶ 2).

17. The lease form used by Success Leasing, identified by Hopkins as Exhibit "8," contained a provision titled "Tire Replacement Reserve." This provision states:

> During the term this Lease is in effect, We will, out of the Operating Proceeds, establish and maintain as a Tire Replacement Reserve an amount equal to 1-1/2 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 while this Lease is in effect.
> If this lease is terminated prior to completion, we shall be entitled to keep an amount equal to the cost attributable to the amount of wear on the tires which occurred during the time the lease was in effect. The balance of the Tire Replacement Reserve shall be paid to you.
> In the event You purchase the Tractor or complete the full term of this lease, the unused funds accumulated as a Tire Replacement Reserve shall be paid to You, subject, however, to Our right of set off as set forth in Clause 21.

Hopkins Dep., Exhibit "8;" PRI 2997, ¶ 3.

18. The lease form used by Success Leasing, identified by Hopkins as Exhibit "8," contained a provision titled "Set Off." This provision states:

> (i) Termination of Lease: If this Lease is terminated prior to the expiration of its term, You grant Us the right to require any motor carrier that You are leased with to offset against (i) Your Operating Proceeds, and (ii) the returnable portion of any deposit placed with such company, an amount sufficient to cure any deficiency in the lease payments, Tire Replacement Reserve, Excess Mileage or amounts otherwise due Us under the terms of this lease.
> (ii) Completion of Lease: At the time You complete the full term of this Lease, We may set off against amount due You under Clause 2, Tire Replacement Reserve (Clause 3), and the Lease completion Incentive (Clause 16), any unpaid amounts otherwise due Us under the terms of this Lease, including but not limited to necessary repairs (see Schedule B).

Hopkins Dep., Exhibit "8;" PRI 3000, ¶ 21.

19. Darrell Hopkins states that Defendants currently use lease agreements identified as Exhibits 1-E and 1-F. Defendants continue to use lease agreements that continue provisions requiring an "Excess Mileage Charge." Defendants' Exhibit 1-F. This provision states:

> One of the lease charges referred to in Paragraph 2 ["Lease Charges"] is the Excess Mileage Charge. The excess Mileage Charge is based on the accumulated average weekly miles the Tractor travels in excess of the milage 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.

Defendants' Exhibit 1-F, ¶ 4.

20. Currently, Defendants claim to use lease agreements that continue to contain provisions requiring a "Tire Replacement Reserve." Defendants Exhibit 1-F. This provision states:

> 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 account of the amounts paid by You to the Tire Replacement Reserve at any time. 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 that 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, a (sic) established on The Weekly Auction by the Department of Treasury on the outstanding balance of all such advances. Interest shall be charged weekly.

21. Currently, Defendants claim to use lease agreements that continue to contain provisions requiring "set-off." Defendants Exhibit 1-F. This provision, contained in paragraph 21, states:

> (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 [Advances], 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.

21. Plaintiffs dispute the alleged facts in Prime's Statement of Uncontroverted Facts contained in paragraph 8.

I. ARGUMENT

Defendants' principal argument in support of their motion for summary judgment is that "OOIDA's claim for declaratory and injunctive relief lacks actual controversy and is moot." Defendant's Mem. at 1. Defendants submit that the question of whether Defendants' leases violate federal law is "irrelevant," as "OOIDA's request for declaratory and injunctive relief is now moot because Success Leasing is not a party to any existing contract that authorizes the retention of reserve account funds after the lease has been terminated." *Id.*

Defendants' argument is wrong both on the facts and on the law. Defendants tellingly ignore the critical question of whether, in fact, their lease agreements with the Named Plaintiffs violated the federal Truth-in-Leasing regulations. When analyzed against the requirements imposed by the Truth-in-Leasing regulations, however, it is readily apparent that these agreements violated the regulations.

Defendants themselves continue to insist, in their Amended Answer, that their agreements with Plaintiffs did not violate federal law. As a result, declaratory and injunctive relief are necessary to ensure that Defendants do not engage in the same conduct, and use the same agreements, with other owner-operators.

OOIDA's claim for declaratory and injunctive relief is not moot. Indeed, despite Defendants' conclusory denials, Defendants continue to use lease agreements that violate the federal Truth-in-Leasing regulations. OOIDA is entitled injunctive and declaratory relief against Defendants: (1) declaring that the lease agreements between Defendants and Plaintiffs Johnson and Vanboetzelaer are unlawful; (2) enjoining Defendants from using such leases in the future; (3) declaring that the leases used by Defendants after 1997, including Defendants' current leases, violate the Truth-in-Leasing regulations; (4) enjoining Defendants from using such leases to

move goods in interstate commerce in equipment they do not own; and (5) enjoining Defendants from engaging in conduct that violates the Truth-in-Leasing regulations.

The Court should deny Defendants' motion and allow OOIDA's claims for injunctive and declaratory relief to be adjudicated at trial.

A. Declaratory and Injunctive Relief are Warranted on Defendants' Agreements with Named Plaintiffs.

Defendants' principal argument, that injunctive and declaratory relief is not warranted where Defendants no longer operate under the challenged lease terms, was expressly rejected by the court in *I.C.C. v. Atlas Van Lines, Inc.*, 825 F.Supp. 771 (N.D. Tex. 1993). In *Atlas*, the I.C.C. commenced a civil action against the motor carrier on the grounds that Atlas failed to comply with the federal Truth-in-Leasing regulations governing owner-operator compensation and escrow funds. *Id.* The I.C.C. found that Atlas failed to return owner-operator escrow funds within 45 days after lease termination. *Id.* at 773. Subsequently, Atlas moved for summary judgment on plaintiff's claim for injunctive relief against Atlas. *Id.*

Atlas argued in support of its motion for summary judgment on injunctive relief that "the issue of preventing the continuing violations . . . is moot . . . [and] there is no need for Atlas to bear the burden and the onus of an injunction." *Id.* at 775. Atlas also argued that "Plaintiff has produced no evidence that any of its agents are *currently* violating the ICC regulations." *Id.* (emphasis in original).

The court found that Atlas' argument that it is not *currently* violating federal law "rings hollow," and that "it is well-settled that, in a suit for injunctive relief, the voluntary cessation of allegedly illegal conduct does not moot the controversy arising from the challenged activity. This because the defendant is free to return to his old ways." *Id.* Recognizing that, without the

issuance of an injunction, Atlas would be free to resume its unlawful conduct, the court held that "[t]he Court will not Atlas to return to its old ways. **Atlas has come to the dinner table of equity with unclean hands, and cannot now complain when made to wash up with the soap and water of an injunction**." *Id.* (emphasis added).

The *Atlas* court's reasoning is consistent with the Supreme Court's holding that even when a defendant changes his contumacious conduct, it is not always a logical conclusion that injunctive relief is no longer necessary. *See United States v. W.T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897 (1953). The Eighth Circuit has held that "voluntary compliance by a party does not normally render an action moot." *U.S. Dept. of Agriculture v. Fed. Labor Rel. Auth.*, 876 F.2d 50, 52 (8th Cir.1989). "The Supreme Court has held that a defendant has a 'heavy burden' of showing that the wrong will not be repeated." *Id.*, *quoting W.T. Grant Co.,* 345 U.S. at 633.

In this case, Defendants vigorously dispute in their Answer to the Amended Complaint that the lease agreements with Johnson and Vanboetzelaer violate the Truth-in-Leasing regulations, or any federal law. See Doc. #85. In a case such as this, where Defendants have not admitted the illegality of their conduct, that "heavy burden" referred to by the Supreme Court has not been met. At the same time, the record demonstrates that Defendants have used no less than ten forms of lease agreements between 1992 and the present. Material Facts at ¶ 2. Without declaratory and injunctive relief, there would be no bar to Defendants resuming the use of its former lease forms.

As Plaintiffs will show in the sections of this memorandum that follow, Defendants' lease agreements with its owner-operators have failed, and continue to fail, to comply with the

requirements of the Truth-in-Leasing regulations. Final injunctive relief is necessary to assure Defendants' compliance with the federal leasing regulations.

B. Defendants' Lease Agreements With Plaintiffs Johnson and Vanboetzelaer Violate the Truth-in-Leasing Regulations.

Defendants boldly suggest that it is "irrelevant" whether their contracts with the Named Plaintiffs violated federal law. Tellingly, Defendants do not substantively defend the terms of the agreements which allow Defendants to confiscate Plaintiffs' escrow funds, nor do they defend the practice itself. The reason why Defendants do not defend their leases or their actions is clear: the lease terms and Defendants' conduct violated the Truth-in-Leasing regulations.

In this case, Prime is a federally regulated motor carrier that provides transportation of property in interstate commerce, receiving authorization to perform such transportation from the U.S. Department of Transportation ("DOT"). In conducting such authorized transportation, Prime leases trucking equipment from independent truckers (known as "owner-operators"), including Plaintiffs. 49 U.S.C. § 14102 authorizes the DOT to require motor carriers to enter into written lease agreements with the owners of vehicles that the carriers use for transporting property in interstate commerce. Under regulations promulgated to implement the DOT's authority under 49 U.S.C. § 14102, "authorized motor carriers" like Prime may perform authorized transportation in equipment that they do not own *only* if the equipment is covered by a written lease meeting the requirements set forth in 49 Code of Federal Regulations, Part 376, Section 376.12. *See* 49 C.F.R. § 376.11(a). Section 376.12 requires that authorized motor carriers include specifically prescribed terms in their owner-operator leases, and that the carriers adhere to those terms.

Prime, and its alter ego Success Leasing, entered into lease agreements with Vanboetzelaer and Johnson. These leases failed to comport with the requirements of the Regulations in two separate respects: (a) the Leases set forth terms which conflict with the Regulations; and (b) the Leases fail to set forth certain terms required by the Regulations.

1. Required Terms Missing from Prime's Lease Agreements with Vanboetzelaer and Johnson

Prime's Service Contracts with Vanboetzelaer and Johnson ***failed to include*** language informing Plaintiffs of their rights and Prime's obligations under the lease, as required by the Truth-in-Leasing regulations. First, Prime's Service Contract with Vanboetelaer and Johnson do not make reference to, much less specify the terms of the rental or escrow provisions of the lease-purchase agreements under which Prime and Success Leasing made deductions directly from Vanboetzelaer's and Johnson's compensation. This violates 49 C.F.R. § 376.12(h), which provides that "[t]he lease shall clearly specify all items . . . 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 has been computed."

The Service Contract also violates § 376.12(i) of the Truth-in-Leasing regulations because it fails to provide any information regarding Vanboetzelaer's and Johnson's lease-purchase agreement and that Prime has the right to make deductions from their compensation for lease payments. 49 C.F.R. § 376.12(i) states that

> The lease shall specify the terms of any agreement in which the lessor is 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.

Nowhere in the Service Contract between Plaintiffs and Prime does the lease specify the terms of the lease-purchase agreement or that Prime has the right to deduct lease-purchase payments from

Plaintiffs' compensation. See Exhibits B and C. Similarly, the Service Contract fails to state that Prime has the right to deduct escrow contributions from Plaintiffs' compensation.

2. Required Terms Missing from Lease-Purchase Agreements with Plaintiffs

At the same time, the Lease Purchase agreements Vanboetzelaer and Johnson entered with Prime and Success Leasing, (Vanboetzelaer Dep., Exs 1, 2; Johnson Dep., Exs. 1, 2), failed to contain terms required by the regulations. The Lease Purchase agreements required Plaintiffs to pay into three "reserve" accounts, ostensibly for the benefit of Plaintiffs. These "reserve" accounts included a "Repair Reserve," a "Tire Reserve," and an "Excess Mileage Rental Account." (Vanboetzelaer Dep., Exs 1, 2, ¶¶ 19, 20, 21; Johnson Dep, Exs. 1, 2, ¶¶ 19, 20, 21).

These three reserves clearly qualify as escrow accounts under § 376.2(l). As a result, Defendants are subject to the requirements of § 376.12(k)(1) - (k)(6), which require specific language to be included in any lease in which escrow funds are required. Here, the lease terms fail to specify the specific items to which the fund can be applied, as required under § 376.12(k)(2). The lease fails to state that while the escrow funds are under the control of Prime or Success Leasing that they shall provide an accounting to Plaintiffs of any transactions involving the funds and that Plaintiffs have the right to demand an accounting of the funds at any time, all of which are required by § 376.12(k)(3) and (k)(4). Most importantly, the lease agreements fail to state, in contravention of § 376.12(k)(6), that a final accounting to Plaintiffs shall be provided and **that in no event shall the escrow fund be returned later than 45 days from the date of lease termination**.

3. Lease Agreement Terms Conflicting with Regulations

The lease agreements between Defendants and Vanboetzelaer and Johnson contain terms that ***conflict*** with language required by the Truth-in-Leasing regulations informing Plaintiffs of

their rights and Defendants' obligations under the lease. The most egregious term of the Lease Purchase Agreements between Plaintiffs and Defendants that conflicts with the Truth-in-Leasing provisions is the lease's early lease termination penalty, purporting to allow Prime and Success Leasing to confiscate all of Plaintiffs' escrow funds if they terminated their lease prematurely. Under each of the lease provisions regarding the "Repair Reserve," the "Tire Replacement Reserve," and the "Excess Mileage Rental Account," Plaintiffs forfeited the entire amount in each of these reserves if the lease agreement was terminated early. Material Facts §§ 4,5,6,12,13,14.

This forfeiture provision violates 49 C.F.R. § 376.12(k)(6), which requires that within 45 days of termination of an owner-operator's lease the motor carrier must either provide a final accounting of its deductions from the owner-operator's escrow fund and return the balance, or return the entire escrow fund. Motor carriers, including Prime, have no authority to eliminate this protective regulation through contract negotiation. The Truth-in-Leasing regulations were promulgated because owner-operators lack the economic leverage and bargaining power to protect themselves in such transactions with carriers. Former ICC Chairman O'Neal acknowledged this inequity when testifying before Congress:

> My concern is that **because they like to eat, owner-operators will continue to find it necessary to enter into contracts with carriers they would like to avoid.** Or they may find after entering an agreement that **promises are not kept and conditions are not met.** What can the owner-operator do about that situation? What about the right to contract? The difficulty is that one owner-operator by himself will have **very little chance of bargaining any changes in any contract. His option will be to take it or leave it.**

43 Fed. Reg. 29812 (1978) (emphasis added).

Additionally, the two federal agencies responsible for the motor carrier industry have acknowledged that motor carrier leasing abuses represent a glaring exception to the principle that

the market can be trusted to regulate itself efficiently and fairly. Analyzing the industry's owner-operator leasing problem, the DOT explained:

> Given the **uneven bargaining power of owner-operators**, the small dollar amount of their claims, and the unique nature of their operations, DOT recommends that the . . . **leasing rules** be retained.

U.S. Dept. of Transportation, *Report on the Functions of the Interstate Commerce Commission* 86 (July 1995) (emphasis added). The DOT also concluded, "Because of their **small size and weak bargaining position**, owner-operators sometimes **lack the ability to negotiate and the resources to enforce equitable terms of their contractual agreements with carriers.**" *Id.* at 83 (emphasis added). The ICC came to the same conclusion in the 1994 ICC Report. *See* 1994 ICC Report at *170-*171 (owner-operators are "**unable to . . . obtain the benefits of collective bargaining,**" making federal regulation integral to their conducting "operations safely and without being **subjected to abusive practices that cannot be prevented by market forces**") (emphasis added)).

In *Owner-Operator Indep. Drivers. Ass'n v. Arctic Express, Inc.*, 159 F.Supp.2d 1067 (S.D. Ohio 2001), the court faced the identical issue. In *Arctic*, as in the instant case, the motor carrier's lease agreement with its owner-operators required owner-operators to pay into a "maintenance fund." Under the agreement, "[t]he fund balance was not refundable if the lease was terminated mid-term without the Member exercising his purchase option." *Id.* at 1070. The *Arctic* court found that the forfeiture provision of the lease agreement violated § 376.12(k)(6), which requires the return of escrow funds within 45 days of lease termination. *Id.* at 1075. The court concluded that "[t]he Defendants' transformation of the maintenance fund into 'non-refundable' monies is unrelated to the cost of maintenance of the Plaintiffs' vehicles, and therefore is in violation of § 376.12(k)." The court also found that "the non-refundable nature of

maintenance fund is no more than an early termination penalty thinly disguised by the Defendants . . ." *Id.* The lease provisions in the instant case are almost identical to those held to be unlawful in *Arctic*. The forfeiture provisions therefore violate the escrow provisions of the Truth-in-Leasing regulations.

As stated above, the lease agreements between Plaintiffs and Defendants fail to comply with the Truth-in-Leasing regulations in several material respects. Because 49 C.F.R. § 376.11(a) states that Prime may perform authorized transportation in equipment that it does not own *only* if the equipment is covered by a written lease meeting the requirements set forth in § 376.12, Prime is in violation of § 376.11(a) and is subject to an injunction enjoining it from entering into lease agreements with unlawful terms, as a well an injunction enjoining it from moving goods in interstate commerce.

C. Defendants' Post-1997 Lease Agreements Continue to Violate the Federal Truth-in-Leasing Regulations

Defendants argue, without any factual or legal support, that the lease agreements they allegedly began using in 1997 do not violate federal law. Defendants maintain that "the excess mileage rental account was eliminated and in its place an excess mileage charge is now assessed so that even OOIDA cannot claim that the owner-operators have some expectation of an account for their benefit accruing funds that might one day be returned to them." Defs. Mem. at 7.

The Excess Mileage Charge term provided as follows:

> During the term this lease is in effect, You shall pay to Us an Excess Mileage Charge on the basis of the accumulated average weekly miles the Tractor travels in excess of the mileage shown on Schedule A. The Excess Mileage Charge shall be adjusted and paid to Us weekly based upon the average miles per week traveled from the date of this Lease to the most current week. In the event You purchase the equipment or complete the full term of the Lease, We shall pay to You a sum equal to the total Excess Mileage Charge, subject to Our right of set off as set forth in Clause 21.

Material Facts ¶ 16; Hopkins Dep., Exhibit "8;" PRI 2997, ¶ 2.

The Excess Mileage Charge is an escrow fund as defined by the regulations. 49 C.F.R. § 376.2(l) defines an "escrow fund" as "**[m]oney deposited by the lessor with either a third party or the lessee** to guarantee performance, to repay advances, to cover repair expenses, to handle claims, to handle license and State permit costs, **and for any other purpose mutually agreed upon for the lessor and lessee.**" (Emphasis added). In this case, the owner-operator is required to deposit monies with Defendants for the purpose of maintaining funds for expenses incurred when the tractor exceeds mileage limitations set by Defendants. Owner-operators clearly have an expectation to receive these funds back, as the agreement provides for the repayment of the fund to owner-operators. Therefore, the "Excess Mileage Charge" is an escrow fund under the definition in § 376.2(l).

Given that the Excess Mileage Charge is, in reality, an escrow fund subject to the Truth-in-Leasing regulations, the lease agreement fails to comply with the most basic requirements of § 376.12(k)(2) - (6). For example, the lease provision fails to specify the specific items to which the fund can be applied; that while the fund is under the control of Defendants that they shall provide an accounting to the owner-operator of any transactions involving the fund; that the owner-operator has the right to demand an accounting of the fund at any time; that interest will be paid on or at least a quarterly basis; and that a final accounting to the owner-operator shall be provided and that in no event shall the escrow fund be returned later than 45 days from the date of lease termination. In addition, the lease term violates the regulations by permitting the return of the Excess Mileage Charge only if the driver exercises his right to purchase the vehicle and not within 45 days of lease termination as required.

At the same time, Defendants modified the "Tire Replacement Reserve" provision of the contract. Defendants assert that the "tire reserve was changed so that all unused funds are returned to the owner-operator, and thus are not even allegedly 'unlawfully retained.'" Defs. Mem. at 7. Defendants' argument has no merit, as the Tire Reserve still fails to comply with the Truth-in-Leasing regulations.

The Tire Reserve provision, (Material Facts ¶ 17, Hopkins Dep., Exhibit "8;" PRI 2997, ¶ 3), violates the charge-back regulation of § 376.12(h) by failing to specify all items that will initially paid for by carrier but will ultimately be deducted from the Tire Reserve Fund (and, ultimately, owner's compensation) at time of settlement. The lease provision violates § 376.12(h) by failing to specify how the amount of such charge-backs will be computed, and providing no means for calculating the potential obligation under the Tire Reserve Fund that will be owed to carrier.

The Tire Reserve term violates 49 C.F.R. § 376.12 (k)(2) by failing to specify the specific items to which the fund can be applied; specifically, the lease fails to state the methodology to be used in determining charges to the fund based on tire wear. The lease term violates § 376.12 (k)(3) by failing to specify that a separate accounting provided to the owner-operator of any transactions involving the escrow fund shall be done on a monthly basis. The lease term violates § 376.12(k)(5) by failing to state that while the escrow is under the control of Defendants that they shall pay interest on the escrow fund on a quarterly basis. Finally, the lease term also violates the regulations by allowing Defendants to use the escrow fund as a set-off under Paragraph 21.

Both the Excess Mileage escrow and the Tire Replacement Reserve are subject to the unlawful "set-off" provisions contained in paragraph 21 of the lease. This provision states:

> (i) Termination of Lease: If this Lease is terminated prior to the expiration of its term, You grant Us the right to require any motor carrier that You are leased with to offset against (i) Your Operating Proceeds, and (ii) the returnable portion of any deposit placed with such company, an amount sufficient to cure any deficiency in the lease payments, Tire Replacement Reserve, Excess Mileage or amounts otherwise due Us under the terms of this lease.
> (ii) Completion of Lease: At the time You complete the full term of this Lease, We may set off against amount due You under Clause 2, Tire Replacement Reserve (Clause 3), and the Lease completion Incentive (Clause 16), any unpaid amounts otherwise due Us under the terms of this Lease, including but not limited to necessary repairs (see Schedule B).

Material Facts ¶ 18. Hopkins Dep., Exhibit "8;" PRI 3000, ¶ 21.

The "set-off" provision of paragraph 21 violates the charge-back regulation of § 376.12(h), by failing to adequately specify all items that will be initially paid for by Defendants but will ultimately be deducted from the owner's compensation at the time of settlement. Paragraph 21 violates the regulations by allowing Success to off set amounts from the Excess Mileage and the Tire Reserve funds for items that are not specifically listed in Paragraphs 4 and 5 and are not directly related to the purpose for which those escrow accounts were created. Paragraph 21 also violates the regulations by allowing Defendants to retain portions, if not all, of these escrows to cover unspecified expenses, rather than return these escrows in total within 45 days of lease termination as required.

D. Defendants' Current Lease Agreements Continue to Violate the Truth-in-Leasing Regulations.

Defendants argue, again without any legal or factual support, that their current lease agreements do not violate federal law. Notably, Defendants do not state when their "current" lease form began to be used, or how many drivers are operating under them. Regardless, the provisions contained in their current lease agreements (Defendants' Exhibit 1-F) continue to violate the Truth-in-Leasing regulations.

Currently, Defendants use lease a lease-purchase agreement that continues to contain provisions requiring an "Excess Mileage Charge." Material Facts at ¶ 19. Defendants' Exhibit 1-F, ¶ 4. This provision violates 49 C.F.R. § 376.12 (k)(2) - (k)(6). The Excess Mileage Charge is an escrow fund as defined by the regulations. Paragraph 4 and Schedule A fail to specify the specific items to which the fund can be applied in violation of § 376.12(k)(2). The provision violates § 376.12(k)(3) by failing to state that while the fund is under the control of Defendants that they shall provide an accounting to the owner-operator of any transactions involving the fund. The term violates § 376.12(k)(4) by failing to state that the owner-operator has the right to demand an accounting of the fund at any time. The lease term violates § 376.12(k)(5) by its failure to state that interest will be paid on a quarterly basis. Finally, the term violates § 376.12(k)(6) by failing to state that a final accounting to the owner-operator shall be provided and that in no event shall the escrow fund be returned later than 45 days from the date of lease termination. Paragraph 4 also violates § 376.12(k)(6) by permitting the return of the Excess Mileage Charge only if the driver exercises his right to purchase the vehicle and not within 45 days of lease termination as required.

Defendants also continue to use lease agreements that contain provisions requiring a "Tire Replacement Reserve." Material Facts, ¶ 20. Defendants' Exhibit 1-F, PRI 3917 - 18, ¶ 5. Defendants' Tire Reserve lease term violates § 376.12(h) of the regulations by failing to specify all items that will initially paid for by the carrier but will ultimately be deducted from the Tire Reserve Fund (and, ultimately, owner-operator's compensation) at time of settlement. The Tire Reserve term also violates § 376.12(h) by failing to specify how the amount of such charge-backs will be computed, and provides no means for calculating the potential obligation under the Tire Reserve Fund that will be owed to carrier.

The Tire Reserve terms also continue to violate the escrow provisions of the regulations. The lease term continues to violate § 376.12(k)(2) by failing to specify the specific items to which the escrow fund can be applied. Notably, the lease provision places the obligation upon the owner-operator to request all information necessary to calculate the costs attributable to the owner operator or the escrow fund, a violation of § 376.12(k)(2).

The current Tire Reserve terms continue to violate § 376.12(k)(3) of the regulations by failing to specify that any separate accounting provided to the owner-operator of any transaction involving the escrow fund shall be done on a monthly basis. The lease term violates § 376.12(k)(6) of the regulations by allowing Defendants to use the escrow fund as a set-off under Paragraph 21.

Finally, Defendants continue to violate the Truth-in-Leasing regulation through the use lease agreements that contain provisions "set-off" of owner-operator escrow funds. Material Facts, ¶ 21. Defendants' Exhibit 1-F, PRI 3921 - 22, ¶ 21. As with Defendants' lease agreement used since 1997, the "set-off" provision of paragraph 21 violates the charge-back regulation of § 376.12(h), by failing to adequately specify all items that will be initially paid for by Defendants but will ultimately be deducted from the owner's compensation at the time of settlement. Paragraph 21 violates the regulations by allowing Defendants to off set amounts from the Excess Mileage and the Tire Reserve funds for items that are not specifically listed in Paragraphs 4 and 5 and are not directly related to the purpose for which those escrow accounts were created. Paragraph 21 also violates § 376.12(k)(6) of the regulations by allowing Defendants to retain portions, if not all, of these escrows to cover unspecified expenses, rather than return these escrows in total within 45 days of lease termination as required.

III. CONCLUSION

Defendants base their entire motion for summary judgment on the misplaced assertion that OOIDA's claims for declaratory and injunctive relief are moot because the leases Defendants have used since 1997 are in complete compliance with federal law. Defendants completely ignore whether their leases prior to 1997 violate federal law. At the same time, Defendants would have this Court believe, based solely on their bald allegations and superficial analysis, that the lease agreements they routinely enter into with owner-operators since 1997 are completely in compliance with federal law.

Plaintiffs have demonstrated that Defendants' lease agreements with the Named Plaintiffs violated the Truth-in-Leasing regulations, that Defendants' lease agreements entered into after 1997 violated the Truth-in-Leasing regulations, and that Defendants' current agreements continue to violate the Truth-in-Leasing regulations. Plaintiffs have described with factual and legal precision the specific provisions of Truth-in-Leasing regulations that have been, and continue to be, violated as a result of Defendants' conduct and lease agreements. In the face of Defendants' pervasive and continuing violation of the federal regulations, Defendants' argument that declaratory and injunctive relief would serve no purpose, or are moot, rings hollow.

To borrow from the words of the court in *I.C.C. v. Atlas,* Prime and Success Leasing have come to the dinner table of equity with unclean hands, and cannot now complain when made to wash up with the soap and water of an injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by First-Class U.S. Mail, postage prepaid, this Friday, June 21, 2002 to:

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