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6 IN THE UNITED STATES DISTRICT COURT  
7 FOR THE DISTRICT OF ARIZONA  
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10 Owner-Operator Independent Drivers  
Association, Inc., et al.,

11 Plaintiffs,

12 vs.

13 Swift Transportation Co., Inc. (AZ), et al.,  
14 Defendants.  
15

No. CV-02-1059-PHX-PGR

OPINION and ORDER

16 This action involves alleged violations of the federal Truth-in-Leasing  
17 regulations, 49 C.F.R. Part 376, which impose requirements and restrictions on  
18 lease agreements between federally regulated motor carriers and owner-  
19 operators. The plaintiffs' First Amended Class Action Complaint for Declaratory  
20 and Injunctive Relief [and] Damages (doc. #174), filed on September 26, 2003,  
21 seeks declaratory and injunctive relief, as well as damages, pursuant to the  
22 private right of action afforded by the Interstate Commerce Commission  
23 Termination Act of 1995, 49 U.S.C. § 14704(a). The plaintiffs named in the  
24 amended complaint are the Owner-Operator Independent Drivers Association,  
25 Inc. ("OOIDA"), and twelve individual owner-operators: Marc Mayfield, Frank  
26 Belcher, David Hayes, Gerald Webb, David Rush, Valerie Helton, John Nunn, Sr.,

Wayne Bibicoff, Roy Sparks, Olin Sparks, Paul Hawkins, and Frank Carter.<sup>1</sup> The named defendants are Swift Transportation Co., Inc. (AZ) ("Swift"), Swift Transportation Co., Inc. (NV), Interstate Equipment Leasing Co., Inc., M.S. Carriers, Inc., and M.S. Carriers Warehouse & Distribution, Inc.<sup>2</sup>

Among the motions pending before the Court are the Motion for Partial Summary Judgment of Defendant Swift Transportation Co., Inc. (AZ) on Counts I & II of the First Amended Complaint and Plaintiffs' Motion for Partial Summary Judgment on Liability, simultaneously filed on December 29, 2006. Having considered the parties' memoranda in light of the evidence of record, the Court finds that the cross-motions should be granted in part and denied in part pursuant to Fed.R.Civ.P. 56.<sup>3</sup>

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<sup>1</sup>  
The Court denied the plaintiffs' motion for class certification on March 30, 2006.

<sup>2</sup>  
The Court stayed the plaintiffs' claims against M.S. Carriers, Inc. and referred those claims to arbitration pursuant to the Federal Arbitration Act on September 26, 2003, dismissed the plaintiffs' claims against M.S. Carriers Warehouse and Distribution, Inc. and dismissed its counterclaims on July 28, 2004, and dismissed, pursuant to stipulation, the plaintiffs' claims against Interstate Equipment Leasing Co., Inc. on February 12, 2007.

<sup>3</sup>  
The Court notes that it construes the plaintiffs' summary judgment motion as also being brought in the name of Gerald Webb. Although the named moving plaintiffs are limited to Belcher, Hayes, Helton, and Mayfield, the record establishes that Webb was also a Swift owner-operator for some three months in 2002. While the plaintiffs' counsel moved to withdraw as counsel for Webb on February 23, 2007, on the ground that they had lost contact with him, those counsel were still counsel of record for Webb pursuant to LRCiv 83.3(a) at the time the plaintiffs' summary judgment motion was filed on December 29, 2006 and the plaintiffs' motion should have included Webb.

The Court also notes that it does not construe Swift's motion as being directed at plaintiff Wayne Bibicoff, who is currently representing himself in this

1 A. Standard for Regulatory Compliance for Liability Purposes

2 The parties initially, and extensively, raise the issue as to what level of  
 3 regulatory compliance is required to avoid liability under the Truth-in-Leasing  
 4 regulations, with the plaintiffs arguing that the owner-operators' leases must  
 5 literally comply with the provisions of the regulations, and the defendants arguing  
 6 that they must only substantially comply with the regulations. While there are a  
 7 few unpublished district court decisions supporting both sides' positions, the  
 8 Court concludes that it need not resolve the issue for purposes of the pending  
 9 motions as the evidence of record establishes that Swift's leases in effect prior to  
 10 2003 violated the Truth-in-Leasing regulations to some degree even under the  
 11 lesser substantial compliance standard, and that Swift's leases in effect starting in  
 12 2003 sufficiently complied with the Truth-in-Leasing regulations even under the  
 13 literal compliance standard.

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 16 action. Although Swift's motion lists Bibicoff as a former Swift driver, that was  
 17 apparently done in error, notwithstanding the plaintiffs' failure to dispute it, as  
 18 there is nothing in the summary judgment record establishing that Bibicoff ever  
 19 signed a lease with Swift.

20 The Court further notes that it has considered the parties' exhibits in  
 21 resolving the summary judgment motions, notwithstanding the parties' improper  
 22 failure to authenticate the exhibits, as neither side has objected to any of the  
 23 exhibits. See Orr v. Bank of America, NT & SA, 285 F.3d 764 (9<sup>th</sup> Cir. 2002). The  
 24 Court has not, however, searched the record for evidence not properly and/or  
 25 specifically identified in the parties' statements of facts as required by LRCiv 56.1.  
 26 See Clarr v. Burlington Northern R. Co., 29 F.3d 499, 504 (9<sup>th</sup> Cir. 1994) ("It is not  
 the district court's job to sift through the record to find admissible evidence in  
 support of a non-moving party's case."); accord, Keenan v. Allan, 91 F.3d 1275,  
 1279 (9<sup>th</sup> Cir. 1996).

The Court additionally notes that it has intentionally not discussed  
 every argument raised by the parties and that those arguments not discussed  
 were considered by the Court to be unnecessary to the resolution of the pending  
 motions.

1 B. Liability

2 49 CFR § 376.12, the section of the Truth-in-Leasing regulations that sets  
 3 forth what must be contained in the owner-operators' leases, contains twelve  
 4 subsections. The plaintiffs' amended complaint alleges in Counts I<sup>4</sup> and II<sup>5</sup> that  
 5 the Swift leases violate eight of those subsections. Notwithstanding the totality of  
 6 the allegations of Counts I and II, the plaintiffs' summary judgment motion is  
 7 limited solely to the issue of Swift's liability pursuant to § 376.12(h), the charge-  
 8 back provision, as it relates to Swift's deductions from their compensation for  
 9 physical damage insurance, non-trucking use liability insurance, occupational  
 10 accident insurance, Qualcomm service, accounting services, Comdata cash  
 11 advance service fees, and fuel purchased at Swift terminals or with fuel cards.<sup>6</sup>

12  
 13 <sup>4</sup>

14 Count I, in its current posture, alleges that Swift is engaging in the  
 15 unlawful provision of transportation services in equipment that it does not own  
 16 because the leases governing its use of the equipment fail to conform to the  
 17 Truth-in-Leasing regulations, by either failing to contain provisions required by 49  
 18 C.F.R. § 376.12, or by containing provisions that conflict with § 376.12. The  
 19 count seeks economic damages allegedly suffered by the plaintiffs as a result of  
 20 Swift's violation of federal law, and injunctive relief barring Swift from providing  
 21 transportation in leased equipment until it executes leases conforming to the  
 22 Truth-in-Leasing regulations.

19 <sup>5</sup>

20 Count II, in its current posture, alleges that Swift does not adhere to or  
 21 perform the obligations established by the Truth-in-Leasing regulations set forth  
 22 in 49 C.F.R. Part 376. The count seeks damages for Swift's alleged violation of  
 23 the Truth-in-Leasing regulations, and seeks to enjoin Swift from engaging in  
 24 business practices that violate the Truth-in-Leasing regulations.

23 <sup>6</sup>

24 It is not clear to the Court whether the limited nature of the plaintiffs'  
 25 motion means that the plaintiffs have abandoned their other allegations of liability  
 26 in Counts I and II not related to charge-backs, or whether they simply believe that  
 the unmentioned grounds are not suitable for resolution by summary judgment.

1 While the main focus of Swift's motion is also directed at § 376.12(h), it also  
 2 seeks summary judgment as to all aspects of Counts I and II, including liability  
 3 and damages and injunctive relief.<sup>7</sup>

4 (1) Violation of § 376.12(h)

5 The charge-back regulation, § 376.12(h), provides that

6 [t]he lease shall clearly specify all items that may be initially paid for  
 7 by the authorized carrier, but ultimately deducted from the lessor's  
 8 compensation at the time of payment or settlement, together with a  
 9 recitation as to how the amount of each item is to be computed. The  
 10 lessor shall be afforded copies of those documents which are  
 11 necessary to determine the validity of the charge.

12 The parties separate the Swift leases into "old form" leases, *i.e.* those  
 13 before 2003, and "revised" leases, *i.e.* those entered into on or after January 1,  
 14 2003.<sup>8</sup> For purposes of the individual plaintiffs' liability claims, the relevant  
 15 revised leases only go through 2005, as that is when the last individual plaintiff  
 16 stopped driving for Swift.

17 (a) Old Form Leases

18 While Swift concedes that its old form leases did not literally comply with

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20 It also is not clear to the Court whether Swift's reference to seeking  
 21 judgment against the "plaintiffs" in Counts I and II is meant to include just the  
 22 individual plaintiffs who ever signed leases with Swift, or whether it also includes  
 23 OOIDA (assuming that OOIDA is meant to be a plaintiff in Counts I and II, which  
 24 is not clear from the amended complaint).

25 Another problem with Swift's motion is that it seeks judgment as to the  
 26 entirety of Count I, it does not specifically discuss all of the grounds for liability  
 raised in Count I, *e.g.* the alleged violations of § 376.12(d), (e), (g), (j) and various  
 subparts of (k).

<sup>8</sup>

It is the position of both parties that, for purposes of the summary  
 judgment motions, the old form leases are materially uniform to each other and  
 the revised leases are materially uniform to each other.

1 § 376.12(h) in some material respects, it disputes the plaintiffs' contention that  
2 the old form leases did not even substantially comply with the charge-back  
3 regulation. Swift's general contention is that it has substantially complied with the  
4 regulation because the plaintiffs were always provided an identification of all  
5 charge-back items and either the amount of the charge-back or a calculation of  
6 the charge-back before they executed the leases. Swift has supported its  
7 summary judgment motion with an affidavit from Randall H. Eslick, who since  
8 1995 has been in charge of overseeing Swifts' owner-operators, including their  
9 training. The gist of Eslick's affidavit is that Swift has made the charge-back  
10 disclosures required by the Truth-in-Leasing regulations to owner-operators since  
11 at least June 1, 1998 during the orientation program or by other means prior to  
12 the execution of the lease agreements.

13 The Court concludes that the evidence of record establishes that Swift's old  
14 form leases, under any standard of liability, violated the charge-back regulation at  
15 least to the extent that those leases did not disclose the fact that certain of the  
16 charge-backs included a "mark-up", *i.e.*, a sum added by Swift as compensation  
17 for its administrative costs in supplying the products or services to the owner-  
18 operators and/or to provide it with a profit on those products and services.

19 (i) Existence of Mark-ups

20 The plaintiffs contend that Swift violated the Truth-in-Leasing regulations in  
21 part because it charged-back more for certain services and products than it paid  
22 to third-party vendors; they argue, for example, that Swift "illegally profited" on  
23 fuel charge-backs and on insurance premium charge-backs. The Court  
24 disagrees. While there is some scant case law supporting the plaintiffs' position,  
25 *see e.g., Owner-Operator Independent Drivers Ass'n v. Ledar Transport*, 2004  
26 WL 5249148, at \*6 n.36 (W.D.Mo. Dec. 30, 2004) (Court, referring to an ICC

1 report issued the year before the current version of the Truth-in-Leasing  
2 regulations was adopted, briefly stated in a footnote that the regulatory history of  
3 §376.12(h) indicates that charge-backs that exceed the actual amount advanced  
4 by the motor carrier are unlawful), the majority of the few courts that have  
5 specifically dealt with the issue have much more persuasively concluded that it is  
6 not unlawful for a charge-back to consist of more than the actual amount  
7 advanced by the carrier. See *e.g.*, Owner-Operator Independent Drivers Ass'n v.  
8 Landstar System, Inc., 2006 WL 4069044, at \*6-7 (M.D.Fla. Oct. 6, 2006) (Noting  
9 that the Truth-in-Leasing regulations are silent regarding the ability of a motor  
10 carrier to include administrative fees or profits on charge-backs, the court  
11 concluded that it is not unlawful for carriers to charge more for products and  
12 services that they pay third-party vendors because the legislative history of the  
13 regulations makes clear that the ICC considered a total ban on profits and  
14 rejected it before adopting the current version of the regulations); Owner-  
15 Operator Independent Drivers Ass'n v. C.R. England, Inc., 2007 WL 1795768, at  
16 \*7 (D.Utah June 20, 2007) (Court concluded that "charge-backs that include  
17 profits and fees are not *per se* unlawful under § 376.12(h); the [Truth-in-Leasing]  
18 Regulations do not preclude Defendant from making a profit.") The Court  
19 concludes that Swift did not violate § 376.12(h) by including a mark-up on some  
20 of the charge-backs.

21 (ii) Recitation of the Manner of the Calculation

22 The plaintiffs also contend that Swift has violated that portion of the charge-  
23 back regulation that requires that there be "a recitation as to how the amount of  
24 each item is to be computed." Swift argues that what it perceives as an ambiguity  
25 in the regulation concerning what "recitation" means can only be resolved by  
26 concluding that the required disclosure is achieved by either a statement of the



1 amount of the charge-back or if that amount is not available at the time of the  
2 execution of the lease, by a statement as to how the charge-back is to be  
3 computed. Swift's general position is that while it did not always include this  
4 information in its pre-2003 leases, the plaintiffs were informed of the amount of  
5 the charge-backs or their calculation during their orientation before they executed  
6 their leases.<sup>9</sup> Examples of this dispute include the charge-backs for fuel and  
7 insurance premiums - while it is undisputed that Swift informed its owner-  
8 operators that they would be charged for fuel they purchased at Swift's terminals  
9 at the posted fuel price and informed them of the amount of the premiums for  
10 insurance purchased through Swift, it is also undisputed that Swift never  
11 disclosed to the owner-operators how those costs were calculated, *i.e.* never  
12 disclosed the existence of various mark-ups over the prices Swift paid for the fuel  
13 and insurance.

14 To the extent that the plaintiffs are arguing that this "recitation" provision  
15 requires that the actual amount of any mark-up be disclosed to owner-operators,  
16 the Court is not persuaded and concludes otherwise. See *e.g.*, OOIDA v.

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19 The plaintiffs do not dispute the following costs were in fact disclosed by  
20 Swift with regard to the pre-2003 leases for purchasing services and products  
21 from Swift:

22 Insurance - that physical damage insurance was 2.5% per \$1,000 of  
23 tractor value per week, that non-trucking use liability insurance was  
24 \$8.08 per week, and that occupational accident insurance was  
25 \$36.92 per week.

26 Qualcomm service - was \$26.42 per week.

Accounting services - was \$15.00 per week.

Comdata cash advances - was a \$3.00 fee for each cash advance.

Fuel - would be charged posted price.



1 Landstar System, Inc., 2006 WL 4069044, at \*8 (M.D.Fla. Oct. 6, 2006) (“The  
2 legislative history makes clear that the [charge-back] regulation does not require  
3 the lease to state on the face of the lease the amount of ... the mark-ups[.]”)  
4 (Footnote omitted).

5       However, while the actual amount of the mark-up need not be disclosed,  
6 the Court rejects Swift’s argument that the fact that a charge-back includes a  
7 mark-up need not be disclosed. The Court concludes that it is a violation of the  
8 charge-back regulation for a carrier to fail to disclose the existence of a mark-up  
9 included in a charge-back. See e.g., OOIDA v. C.R. England, Inc., 2007 WL  
10 1795768, at \*4 (D.Utah June 20, 2007) (Court found that the carrier violated  
11 § 376.12(h) in part by failing to disclose certain mark-ups.); OOIDA v. Landstar  
12 System, Inc., 2006 WL 4069044, at \*7-8 (M.D.Fla. Oct. 6, 2006) (Court rejected  
13 carrier’s argument that § 376.12(h) doesn’t require charge-back mark-ups to be  
14 disclosed.)

15                   (iii) Documentation of Charge-backs

16       The plaintiffs further contend that Swift has violated that portion of the  
17 charge-back regulation that provides that the owner-operator “shall be afforded  
18 copies of those documents which are necessary to determine the validity of the  
19 charge.” Nothing in the Truth-in-Leasing regulations explains what “afforded”  
20 means, and the parties have done very little to bring any enlightenment to this  
21 issue. It is apparently the plaintiffs’ position that all of Swift’s leases at issue  
22 failed to comply with this requirement because they did not disclose the right of  
23 the owner-operators to receive documentation supporting the amount of the  
24 charge-backs. Swift, while otherwise essentially ignoring the documentation  
25 issue, contends only that “afford” means to “make available” and that the plaintiffs  
26 have not submitted any evidence that they were refused documents by Swift to

1 determine the validity of the charge-backs; Swift does not argue that any of its  
2 leases informed the owner-operators that they could see the underlying  
3 documentation.

4 The plaintiffs, in an argument not responded to by Swift, assert that it is  
5 clear that Swift never provided the required documentation necessary for them to  
6 determine the validity of the charge-backs because Swift "claims confidentiality  
7 for the very information and documentation which § 376.12(h) commands it to  
8 provide to owner-operators to allow them to determine the validity of the  
9 chargebacks" - the basis for this argument is that Swift has refused to disclose  
10 documentation during discovery, without a protective order, regarding its costs  
11 related to fuel charges, insurance charges, and transaction fees on the ground  
12 that such information constitutes confidential, proprietary business information,  
13 and has refused to produce at all documentation related to its Qualcomm costs  
14 on the ground that it constitutes confidential, proprietary business information and  
15 is protected by a confidentiality agreement with Qualcomm.

16 Since the Court has concluded that the actual amount of any mark-up need  
17 not be disclosed, the Court further concludes that Swift is not required by the  
18 charge-back regulation to provide its owner-operators with confidential and  
19 proprietary business information underlying its mark-ups. See Owner-Operator  
20 Independent Drivers Ass'n v. Landstar Inway, Inc., 2007 WL 958284, at \*7  
21 (M.D.Fla. March 29, 2007) (Court concluded that the carrier's charge-back for  
22 Qualcomm's services was not a charge-back for § 376.12(h)'s purposes for which  
23 the owner-operators had to be afforded copies of Qualcomm's confidential pricing  
24 information to determine the validity of the charge-back.)

25 The purpose of the documentation provision is to allow owner-operators to  
26 ascertain whether they are being properly charged for the products and services

1 advanced to them by the carrier. While it does not appear that Swift's old form  
2 leases actually informed the owner-operators that they could view documentation  
3 from which the validity of the charge-backs could be determined, the plaintiffs do  
4 not dispute that Swift provided them with weekly settlement sheets detailing the  
5 charge-backs, and they have not cited the Court to any evidence establishing that  
6 those settlement sheets did not provide sufficient information to allow them to  
7 determine whether or not the charge-back rates previously disclosed to them  
8 were being used to determine their charge-backs. See *id.* (Court concluded that  
9 the carrier's settlement statements to the owner-operators constituted sufficient  
10 documentation under the literal compliance standard to determine the validity of  
11 charge-back items.) While Swift would have violated § 376.12(h) if it refused to  
12 provide an owner-operator with non-confidential documentation of the charge-  
13 backs upon request, see e.g., OOIDA v. C.R. England, 2007 WL 1795768, at \*3  
14 (D.Utah June 20, 2007), the plaintiffs have not controverted Swift's argument that  
15 none of them ever asked for any additional underlying documentation of the  
16 charge-backs.

17 The Court thus concludes that the moving plaintiffs are entitled to a  
18 declaration that Swift violated § 376.12(h) to the extent that Swift never disclosed  
19 to them prior to 2003 the fact that the amount of certain of the deductions from  
20 their compensation for products and services purchased from or through Swift  
21 included an amount over and above the price that Swift paid to third-party  
22 vendors for those products and services.

23 (b) Revised Leases

24 Swift revised its owner-operator leases starting in January 1, 2003,  
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1 apparently as a result of this litigation.<sup>10</sup> Swift's basic position is that the revised  
 2 leases at issue complied with the Truth-in-Leasing regulations even under the  
 3 literal compliance standard because the charge-backs and their amounts not  
 4 itemized in the body of the revised lease were itemized in a Schedule B attached  
 5 to each lease, and that the information provided in the revised lease form  
 6 specified whether the charge-back was the actual charge to Swift or included a  
 7 mark-up.<sup>11</sup> The actual amounts of the mark-ups, whether profit, administrative

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9 The evidence of record establishes that only plaintiffs Belcher and  
 10 Hayes entered into leases with Swift that used the revised form of the lease.  
 11 Belcher stopped driving for Swift in 2004 and Hayes stopped driving for Swift in  
 2005.

12 <sup>11</sup>

13 For example, Belcher's January 1, 2003 lease states in ¶ 4 that the  
 14 deduction for the owner-operator's purchase or rent of company furnished  
 15 products, equipment or services "may include amount's to cover COMPANY's  
 16 administrative costs or offering and maintaining such products, equipment or  
 17 services[,]" it states in ¶ 14 regarding Comdata card cash advances that the  
 18 charge-back will include "three dollars (\$3.00) to cover costs and administrative  
 19 expenses[,]" and it states in ¶ 15 regarding fuel purchases that the "posted pump  
 20 price may include the cost of the fuel, taxes, other government fees and charges,  
 21 delivery/freight costs and administrative expenses."

22 Schedule B to Belcher's January 1, 2003 lease supplements the lease  
 23 provisions by stating:

<u>Account</u>	<u>Amount</u>	<u>Schedule</u>
Performance Bond	\$100	Weekly (maximum \$1,500.00)
Single Rate Registration	\$25.00	Weekly (maximum \$250.00)
Qualcomm	\$26.42	Weekly
O/O Nontrucking Liability	\$8.08	Weekly
Insurance*		
O/O Collision [sic]	An equal amount	Weekly
Insurance*	of \$25 to \$1000 of	

fees, etc., were not disclosed in the revised leases.

While the plaintiffs concede that the revised leases disclosed the charge-back items and the amount of the individual charge-backs, they contend that the revised leases still violated the Truth-in-Leasing regulations because they did not disclose how the charges were calculated and they failed to disclose that the owner-operators were entitled to receive documentation supporting the validity of the charges.

(i) Recitation of the Manner of the Calculation

Although the plaintiffs repeatedly, and entirely conclusorily, assert that the disclosures in the revised leases regarding the mark-ups were “patently inadequate” to comply with the charge-back regulation, the Court disagrees and concludes that Swift’s revised leases sufficiently disclosed how the charge-backs were calculated because it is specified within the lease itself whether the basis of the computation was the actual cost to Swift, or on its cost plus a mark-up in the

	stated value of the vehicle divided by 52	
Qualcomm Insurance	\$1.96	Weekly
Occupation Accident Insurance*	\$36.92	Weekly
Accounting Services	\$15.00	Weekly
Medical Insurance	\$52.03 (single)	Weekly
	\$145.65 (family)	Weekly
Workers' Compensation for Contractor Employees	\$40.38	Weekly

\* The charge for this item includes the cost of the item, plus administrative costs associated with offering and maintaining the item.

form of an administrative fee, etc.<sup>12</sup> See OOIDA v. Ledar Transport, 2000 WL 33711271, at \*7 (W.D.Mo. Nov. 3, 2000) (Court noted that the recitation of how the amount of the charge-back is to be computed includes “whether Defendant will deduct simply the actual cost of the charge, or the cost plus administrative fees, etc.”) See *also*, OOIDA v. Landstar Inway, Inc., 2007 WL 958284, at \*7 (M.D.Fla. March 29, 2007) (Court, using a literal compliance standard, concluded that a lease properly recited how a charge-back was computed because the lease specified that when an exact amount of a charge-back would not be known until liability is incurred, the owner-operators would be charged a “variable” cost - the Court noted, for example, that the lease disclosure specifying that the amount of a tire purchase would be “variable, plus \$6 per tire” complied with the computation disclosure requirement of § 376.12(h).)

#### (ii) Documentation of Charge-backs

While the plaintiffs contend that the revised leases still violated the charge-back regulation’s requirement that they be afforded the documents necessary to determine the validity of the charge-backs, the Court disagrees to the extent that the revised leases stated that the deductions from the owner-operators’ compensation for advances and charges would be itemized on their settlement statements and the plaintiffs have failed to cite to any evidence in their

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<sup>12</sup>

According the plaintiffs, Swift amended its latest lease form, effective in January 2007, to disclose for the first time that the Qualcomm weekly charge included an administrative fee mark-up. They argue that this recent disclosure, accomplished by adding the Qualcomm charge to the footnote in Schedule B denoting a mark-up, while still insufficient, serves to confirm that the pre-2007 revised leases “completely hid such charges.” The plaintiffs’ statements of fact, however, do not cite to any evidence that Swift included any administrative fee mark-up for the Qualcomm charges assessed against Belcher and Hayes during the period covered by their revised leases.

1 statements of fact showing that Swift's weekly settlement statements were  
2 insufficient to comply with the documentation requirement. See OOIDA v.  
3 Landstar Inway, Inc., 2007 WL 958284, at \* 7 (M.D.Fla. 2007) (Court concluded  
4 that appropriate documentation for charge-backs that the lease disclosed were  
5 calculated based on a "variable" cost were satisfied by a settlement statement  
6 issued to the owner-operators that reflected the total charge, and that for charge-  
7 backs that were disclosed as being calculated with a fixed rate with a mark-up,  
8 "the only documents necessary to determine the validity of those charges are  
9 documents showing that the owner-operators were in fact charged the amounts  
10 that are stated in the lease", and that settlement statements to the owner-  
11 operators reflecting the amount that was charged-back were sufficient  
12 documentation.)

13 The Court thus concludes that Swift is entitled to summary judgment on all  
14 claims against it in the amended complaint that its post-January 1, 2003 leases  
15 with plaintiffs Belcher and Hayes violated § 376.12(h).

16 (2) Violation of § 376.12(i)

17 Count II of the amended complaint alleges in part that Swift has "required  
18 owner-operators to purchase insurance and other products as a condition to  
19 entering into lease agreements in violation of 49 C.F.R. § 376.12(i)."<sup>13</sup> Swift

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20 <sup>13</sup>

21 § 376.12(i) states:

22 The lease shall specify that the lessor is not required to purchase or  
23 rent any products, equipment, or services from the authorized carrier  
24 as a condition of entering into the lease arrangement. The lease  
25 shall specify the terms of any agreement in which the lessor is a  
26 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.



1 specifically argues in its summary judgment motion that it is entitled to judgment  
2 on all claims against it alleging forced purchases because the plaintiffs have not  
3 offered any evidence that any owner-operator was forced to purchase any goods  
4 or services, including insurance, from or through it, and because the plaintiffs do  
5 not dispute that all of its leases have at all relevant times unequivocally stated  
6 that the owner-operators were not required to purchase or rent equipment or  
7 services from it.

8 The Court concurs, as the plaintiffs have not in fact cited to any evidence of  
9 record establishing any violation by Swift of § 376.12(i). The plaintiffs' only  
10 response to Swift's argument regarding alleged forced purchases is a totally  
11 conclusory contention that the fact that the Swift leases recited the language of  
12 § 376.12(i) is not conclusive of the issue. The plaintiffs' sole elaboration of their  
13 contention is a mere citation to Tayssoun Transportation, Inc. v. Universal Am-  
14 Can, Ltd., 2005 WL 1185811 (S.D.Tex. April 20, 2005), wherein the court  
15 concluded that a carrier's lease violated § 376.12(i) notwithstanding that it  
16 expressly stated that the owner-operator was not required to purchase items from  
17 the carrier because another portion of the lease expressly required the owner-  
18 operator to purchase cargo insurance from the carrier. 2005 WL 1185811, at \*19.  
19 The Tayssoun case is factually inapposite because the plaintiffs have not cited to  
20 any evidence of record showing that anything similar occurred to them.

21 The Court thus concludes that Swift is entitled to summary judgment on all  
22 claims against it in the amended complaint that it violated § 376.12(i).

23 (3) Violation of § 376.12(k)

24 Counts I and II of the amended complaint allege in part that Swift violated  
25 various subparts of 49 C.F.R. § 376.12(k), which deals with escrow funds. Swift  
26 argues that it is entitled to summary judgment on all of the plaintiffs' claims that it

1 violated § 376.12(k)(2) by making improper deductions from their escrow  
2 accounts, and all of their claims that it violated § 376.12(k)(6) by failing to return  
3 unused escrow accounts within 45 days of lease termination.<sup>14</sup> Swift's contention  
4 is that the plaintiffs' discovery responses have not provided any substance to the  
5 conclusory escrow-related allegations in the amended complaint, nor have they  
6 provided any support for those allegations by, e.g., identifying a single improper  
7 deduction.<sup>15</sup> Swift also contends that the plaintiffs have not set forth any  
8 damages they have sustained as a result of any violation of the escrow  
9 regulation.

10 The plaintiffs' only argument as to why Swift is not entitled to summary  
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13 Although Swift generally states that it is entitled to summary judgment  
14 on all of the plaintiffs' escrow-related claims, its motion only specifically refers to  
15 the plaintiffs' claims concerning violations of § 376.12(k)(2) and (6). Not  
16 mentioned by Swift, or by the plaintiffs in their response, is that Count I of the  
17 amended complaint also alleges that Swift violated other parts of the escrow  
18 regulation, including § 376.12(k)(3) and (4), as well as other portions of (k)(6)  
19 than those referred to in Swift's motion.

20 Section 376.12(k)(2) provides that a lease requiring escrow funds must  
21 specify "[t]he specific items to which the escrow fund can be applied."  
22

23 15

24 Count III of the amended complaint alleges that the Swift defendants  
25 breached their fiduciary duties owed to their owner-operators as a result of the  
26 required escrow accounts by failing to observe the escrow requirements of the  
Truth-in-Leasing regulations, by dissipating the escrow accounts, by failing to pay  
interest on the accounts, and by failing to return the escrow accounts. The Swift  
defendants filed a separate summary judgment motion that in part sought the  
dismissal of Count III; in that motion they argued in part that the plaintiffs had not  
produced any evidence that the defendants had mishandled a single escrow  
account. Rather than filing a response going to the merits of that motion,  
plaintiffs Mayfield, Belcher, Hayes, and Helton entered into a stipulation with the  
Swift defendants that dismissed Count III with prejudice.

1 judgment on their escrow-related allegations, which argument is directed only to  
2 the issue of liability and not damages, is that the performance bond requirement  
3 of some unidentified Swift lease was so broad that it violated § 376.12(k)(2).<sup>16</sup>  
4 The plaintiffs do not, however, make any effort to controvert Swift's argument  
5 regarding alleged violations of § 376.12(k)(6), or to establish that any improper  
6 deductions were in fact made from their escrow funds.

7 The Court agrees with the plaintiffs that the performance bond requirement  
8 in Swift's old form leases violated the escrow disclosure regulation because the  
9 provision did not specify the specific items to which the performance bond could  
10 be applied. See Owner-Operator Independent Drivers Ass'n v. Arctic Express,  
11 Inc., 159 F.Supp.2d 1067, 1077-78 (S.D.Ohio 2001) (Court concluded that a  
12 purported maintenance fund that permitted the withholding of the owner-  
13 operator's escrow funds for almost any conceivable obligation that could be  
14 incurred by the owner-operator during the term of the lease was in fact a general  
15 fund that violated both the letter and the spirit of § 376.12(k) because when the  
16 defendants "provided for everything to be covered by the maintenance fund, they,

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20 The portion of the Swift lease provision quoted by the plaintiffs, which it  
21 identifies only as being in ¶ 6 of the lease, states:

22 All or any portion of the bond may be applied by COMPANY to  
23 satisfy any indebtedness incurred by the CONTRACTOR in  
24 connection with the performance of this agreement. ...

25 Swift states, without contravention by the plaintiffs, that the quoted lease  
26 provision applied only to its pre-2003 leases. Swift amended the performance  
bond provision in its revised leases to identify the specific items which could be  
deducted from the performance bond and the plaintiffs do not argue that the  
revised version violates § 376.12(k)(2)

1 in reality, specified nothing.”)<sup>17</sup> *Accord*, OOIDA v. Ledar Transport, 2004 WL  
 2 5429148, at \*2 (W.D.Mo. Dec. 30, 2004) (Court, citing to Arctic Express,  
 3 concluded that a security deposit lease provision violated § 376.12(k)(2) because  
 4 its failure to specify the items that could be deducted from it turned it into an  
 5 impermissible general fund that could be used to satisfy any obligation incurred  
 6 by the owner-operator.)

7 The Court thus concludes that the plaintiffs are entitled to a declaration that  
 8 Swift violated § 376.12(k)(2) to the extent that the performance bond provision of  
 9 Swift’s old form leases failed to properly specify the items that could be deducted  
 10 from the bond, and that Swift is entitled to summary judgment on all other claims  
 11 against it in the amended complaint that it violated § 376.12(k)(2) by making  
 12 improper deductions from the plaintiffs’ escrow accounts and all claims against it  
 13 that it violated § 376.12(k)(6) by failing to timely return unused escrow accounts  
 14 to the plaintiffs.

### 15 C. Damages

16 The relief sought by the plaintiffs in their amended complaint for Swift’s  
 17 alleged violations of the Truth-in-Leasing regulations includes damages pursuant  
 18 to 49 U.S.C. § 14704(a)(2), which provides in relevant part that an authorized  
 19 motor carrier “is liable in damages sustained by a person as a result of an act or  
 20 omission of that carrier ... in violation of this part.” See Owner-Operator  
 21 Independent Drivers Ass’n v. New Prime, Inc., 339 F.3d 1001, 1012 (8<sup>th</sup> Cir.

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22 <sup>17</sup>

23 Although Swift argues in its reply that the pre-2003 performance bond  
 24 provision was not as broad as the plaintiffs suggest because the lease specifically  
 25 limited deductions only to those items that actually arose “in connection with the  
 26 performance of this agreement[.]” that argument does nothing to controvert the  
 fact that the performance bond provision failed to identify the specific items that  
 could be deducted from the bond.

2003), *cert. denied*, 541 U.S. 973 (2004) (Court noted that § 14804(a)(2) provides a right to recover only to persons who have sustained damages as a result of a carrier violation.); see also, OOIDA v. Landstar Inway, 2007 WL 958284, at \*5 (M.D.Fla. March 29, 2007) (Court concluded that in order to establish damages, the plaintiffs were required to present evidence that they sustained damages “as a result” of the defendants’ failure to disclose pursuant to § 376.12(h).) Courts have required actual damages, concluding that a mere violation of the Truth-in-Leasing regulations is an insufficient basis on which to recover monetary damages. See e.g., Robertson v. North American Van Lines, Inc., 2004 WL 5026265, at \*4 (N.D.Cal. April 19, 2004) (Court concluded that “[a] carrier’s violation of federal regulations does not, in and of itself, entitle a plaintiff to recovery, as the plaintiff must still prove damages.”) The plaintiffs bear the burden of proving damages under § 14704(a)(2). OOIDA v. Landstar Inway, Inc., 2007 WL 958284, at \* 5 (M.D.Fla. March 29, 2007).

As part of its motion, Swift specifically argues that it is entitled to summary judgment on all of the plaintiffs’ claims for damages because the plaintiffs have no evidence that they sustained damages as a result of any alleged violation by Swift of the Truth-in-Leasing regulations. The plaintiffs, however, in an inexplicable refusal to recognize that Swift has properly placed the existence of damages at issue at the summary judgment stage, heedlessly assert that the pending motions only concern the issue of liability and that they will put on evidence of their damages at trial.<sup>18</sup> There has not in fact been any bifurcation of

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<sup>18</sup>

The plaintiffs, for example, in response to Swift’s statement of fact no. 33 regarding the items for which the plaintiffs are seeking damages, merely state that these are legal issues and that they “will address these legal issues at an appropriate time in a memorandum of law submitted to the Court.” In addition, in

1 the issues of liability and damages in this action and the plaintiffs, as the party  
 2 with the burden of proving that they have suffered monetary damages resulting  
 3 from any violation by Swift of the Truth-in-Leasing regulations, can only survive  
 4 summary judgment as to the issue of damages by producing significant probative  
 5 evidence of their damages.<sup>19</sup> The Court concurs with Swift that the plaintiffs have  
 6 clearly not done so.<sup>20</sup>

7 \_\_\_\_\_  
 8 response to Swift's notice of supplemental authority, wherein Swift submitted a  
 9 copy of OOIDA v. Landstar Inway, Inc., 2007 WL 958284 (M.D.Fla. March 29,  
 10 2007), expressly because of that court's damages-related rulings, the plaintiffs  
 11 state that the Landstar case is in effect inapposite because they "have not yet put  
 12 forth their damages evidence at this time. Plaintiffs *will* put forth that evidence at  
 13 trial in this case - once this Court rules on the parties' summary judgment motions  
 14 regarding liability." (Emphasis in original).

15 <sup>19</sup>

16 None of the plaintiffs' statements of fact directly relate to the issue of  
 17 the plaintiffs' damages.

18 <sup>20</sup>

19 The gist of the plaintiffs' main response to Swift's damages argument is  
 20 their contention that they are not required to prove damages as a prerequisite to  
 21 establishing Swift's liability under the Truth-in-Leasing regulations. While that's  
 22 legally correct, as Swift effectively concedes, see e.g., Owner-Operator  
 23 Independent Drivers Ass'n v. Allied Van Lines, Inc., 231 F.R.D. 280, 284 n.10  
 24 (N.D.Ill. 2005) (Court rejected argument that a showing of sustained damages is  
 25 a predicate for liability in a Truth-in-Leasing regulations case); OOIDA v. C.R.  
 26 England, Inc., 2007 WL 1795768, at \*7 (D.Utah June 20, 2007) ("Actual damages  
 are not a predicate for, or an element of *liability* under 49 U.S.C. § 14704(a)(2).")  
 (emphasis in original), it is not responsive to the actual damages issue raised by  
 Swift. While there is some loose language in the damages portion of Swift's  
 motion, *i.e.*, its statement that the plaintiffs "cannot establish liability on their  
 claims without demonstrating actual economic harm[.]" it's clear that the gist of  
 Swift's contention regarding damages is that it should be granted summary  
 judgment on all claims for monetary loss because the plaintiffs have none. See  
OOIDA v. Landstar Inway, Inc., 2007 WL 958284, at \*6 (M.D.Fla. March 29,  
 2007) (Court entered judgment in favor of the defendants on the issue of  
 damages because the plaintiffs had failed as a matter of law to establish

1 Swift argues that it is entitled to summary judgment on all of the plaintiffs'  
 2 claims for monetary loss in Counts I and II in part because the legal theory  
 3 underlying the plaintiffs' claimed damages is fatally flawed as a matter of law  
 4 inasmuch as the damages they are seeking to recover consist only of Swift's  
 5 mark-ups on charge-back items.<sup>21</sup> The Court concurs since the majority of the  
 6 courts that have specifically dealt with the issue of damages related to  
 7 undisclosed mark-ups for charge-backs have concluded that an owner-operator  
 8 has not suffered damages for purposes of § 14704(a)(2) merely because a motor  
 9 carrier charged-back more than it actually paid a third-party vendor for a product  
 10 or service advanced to the owner-operator. See e.g., OOIDA v. C.R. England,  
 11 Inc., 2007 WL 1795768, at \*7 (D.Utah June 20, 2007) ("Simply proving that  
 12 Defendant charged more to Plaintiffs for a product or service that it paid to a third-  
 13 party vendor is insufficient, without more, to establish that Plaintiffs have  
 14 sustained damages as a result of a disclosure violation under § 376.12(h).");  
 15 OOIDA v. Landstar Inway, Inc., 2007 WL 958284, at \*5 (M.D.Fla. March 29,  
 16 2007) ("The Court finds that proof of the difference between Defendants' third-  
 17 \_\_\_\_\_  
 18 damages as a result of the defendants' violation of § 376.12(h)).

19 <sup>21</sup>

20 Swift's description of the plaintiffs' damages theory, which is unrefuted  
 21 by the plaintiffs as they fail to even discuss it in their response to Swift's motion,  
 22 is supported by the record in that the plaintiffs state in their amended complaint  
 23 that part of the relief they seek is a return of all monies deducted from their  
 24 compensation in violation of the Truth-in-Leasing regulations, they state in their  
 25 summary judgment motion that they are seeking judgment in part for undisclosed  
 26 mark-ups, and the summary judgment record contains a letter from the plaintiffs' counsel to Swift's counsel dated November 17, 2006 wherein the plaintiffs seek disgorgement and/or damages consisting of the mark-ups, administrative fees, and discounts not disclosed to them in their leases, i.e. "undisclosed, undocumented and excessive charges for fuel, QualCom usage, various insurance coverages, accounting fees, and Comdata transaction fees".



1 party costs and the prices they charged Plaintiffs does not, standing alone,  
2 establish that Plaintiffs sustained damages as a result of the violation [of  
3 § 376.12(h)'s disclosures requirements.]”)

4 While the plaintiffs have established as a matter of law that Swift's old form  
5 leases violated § 376.12(h) by failing to disclose the existence of mark-ups and  
6 violated § 376.12(k)(2) by failing to disclose the specific items that could be  
7 deducted from the performance bond, the plaintiffs have not established that they  
8 suffered any actual damages therefrom under any theory of damages. Swift has  
9 established through the affidavit of Randall Eslick, its owner-operator manager,  
10 that the actual charge-backs to the plaintiffs driving for Swift did not exceed the  
11 amounts disclosed to them either in their leases, orientation materials, driver's  
12 manuals, etc. , and the plaintiffs do not make any attempt to argue otherwise.<sup>22</sup>

13 The Court thus concludes that Swift is entitled to summary judgment on all  
14 claims for damages against it in Counts I and II of the amended complaint.

#### 15 D. Injunctive Relief

16 Swift also argues in its motion that it is entitled to summary judgment on  
17 the plaintiffs' request in the amended complaint that Swift be enjoined pursuant to  
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19 <sup>22</sup>

20 Swift, asserting that its charge-back prices were below market value,  
21 also argues that the plaintiffs have not, and cannot, establish that they sustained  
22 any actual economic harm from any violation of the charge-back disclosure rules  
23 because they cannot show that the total charge-back price they paid to Swift for  
24 any goods or services was more than they would or could have paid to anyone  
25 else to obtain the same goods or services. While Swift has established through  
26 Randall Eslick's testimony that the owner-operators fueling at Swift's terminals  
were always charged one cent per gallon less than the prevailing market rate, a  
fact which the plaintiffs have not controverted, the Court cannot conclude from  
the evidence of record that Swift has otherwise established that every product or  
service it offered to the plaintiffs was in fact priced below market value.

1 49 U.S.C. § 14704(a)(1) “from performing authorized transportation in equipment  
2 it does not own until it enters into written lease agreements that meet the  
3 requirements of the Truth-in-Leasing regulations found at 49 C.F.R. § 376.12.”<sup>23</sup>  
4 Swift contends that injunctive relief is not appropriate because its current 2007  
5 lease form fully complies with the Truth-in-Leasing regulations and there is no  
6 reasonable expectation that it will reinstate an unconforming lease form. The  
7 plaintiffs argue that injunctive relief is the only way to make Swift comply with the  
8 Truth-in-Leasing regulations because the current lease still does not comply with  
9 the charge-back disclosure rule regarding mark-ups and because Randall Eslick  
10 states in his affidavit that “Swift has no intention to change the terminology of this  
11 [2007] Contractor Agreement absent an order from this Court to do so or to meet  
12 future interpretations of or changes to the leasing regulations.”

13 The Court agrees with Swift that no basis for injunctive relief remains in this  
14 action. First, with regard to the individual plaintiffs, no injunctive relief is possible  
15 since none of them have driven for Swift for several years now (with the last one,  
16 Hayes, having stopped in 2005) and they have not presented any evidence that  
17 there is any reasonable expectation that any of them will ever again enter into an  
18 owner-operator lease agreement with Swift. Second, to the extent that OOIDA  
19 has any surviving claims against Swift and/or retains its associational standing to  
20 challenge the compliance of Swift’s current owner-operator lease with the Truth-  
21 in-Leasing regulations, no showing has been made that Swift’s current lease

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24 <sup>23</sup>

25 The Court denied the plaintiffs’ motion for a preliminary injunction on  
26 March 25, 2003, and that denial was subsequently upheld by the Ninth Circuit in Owner-Operator Independent Drivers Ass’n v. Swift Transportation Co., 376 F.3d 1108 (9<sup>th</sup> Cir. 2004).

1 does not sufficiently comply with the regulations.<sup>24</sup>

2 Therefore,

3 IT IS ORDERED that Plaintiffs' Motion for Partial Summary Judgment on  
4 Liability (doc. #337) is granted in part and denied in part. It is granted solely to  
5 the extent that the Court declares as follows:

6 (1) That defendant Swift Transportation Co., Inc. (AZ) violated 49 C.F.R.  
7 § 376.12(h) by failing to disclose to plaintiffs Marc Mayfield, Frank Belcher, David  
8 Hayes, Valerie Helton, and Gerald Webb prior to January 1, 2003 that certain of  
9 its deductions from their compensation for services and products it advanced to  
10 them were in excess of its costs;

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12 The Court rejects the plaintiffs' contention that Swift's 2007 lease form  
13 fails to comply with § 376.12(h). The Court notes that ¶ 4 of the current lease  
14 form, which relates to company furnished products, equipment or services, is  
15 compliant with the Court's conclusions herein regarding what the charge-back  
16 regulation requires in that the lease states:

16 The CONTRACTOR is not required to purchase or rent any  
17 products, equipment or services from the COMPANY. In the event  
18 that CONTRACTOR elects to purchase or rent products, equipment  
19 or services from the COMPANY, CONTRACTOR agrees that the  
20 COMPANY may deduct amounts due for such products, equipment  
21 or services from the compensation due the CONTRACTOR.  
22 CONTRACTOR and COMPANY agree such amounts will include the  
23 cost of such products, equipment or services to COMPANY and may  
24 include amounts to cover COMPANY'S direct and indirect  
25 administrative costs of securing, offering and maintaining such  
26 products, equipment or services, plus an additional amount to  
provide a return to COMPANY in exchange for undertaking the risk  
of securing, offering and maintaining such products, equipment or  
services. Upon request by CONTRACTOR, COMPANY will afford  
copies of documents that are necessary to determine the validity of  
items charged to CONTRACTOR. COMPANY may retain all or any  
portion of any vendor or supplier rebates or discounts on any items  
purchased through COMPANY. (Emphasis in original).

1 (2) That defendant Swift Transportation Co., Inc. (AZ) violated 49 C.F.R.  
2 § 376.12(k)(2) by failing to disclose in the performance bond requirement in its  
3 contractor agreements with plaintiffs Marc Mayfield, Frank Belcher, David Hayes,  
4 Valerie Helton, and Gerald Webb prior to January 1, 2003, the specific items to  
5 which deductions from the bond could be applied.

6 IT IS FURTHER ORDERED that the Motion for Partial Summary Judgment  
7 of Defendant Swift Transportation Co., Inc. (AZ) on Counts I & II of the First  
8 Amended Complaint (doc. #333) is granted in part and denied in part. It is  
9 granted to the extent that the following claims in Count I and/or Count II of the  
10 First Amended Complaint against defendant Swift Transportation Co., Inc. (AZ)  
11 are dismissed with prejudice:

12 (1) That defendant Swift Transportation Co., Inc. (AZ) violated 49 C.F.R.  
13 § 376.12(h) with regard to the contractor agreements entered into with plaintiffs  
14 Frank Belcher and David Hayes on or after January 1, 2003;

15 (2) That defendant Swift Transportation Co., Inc. (AZ), violated 49 C.F.R.  
16 § 376.12(i) with regard to its dealings with plaintiffs Marc Mayfield, Frank Belcher,  
17 David Hayes, Valerie Helton, and Gerald Webb;

18 (3) That defendant Swift Transportation Co., Inc. (AZ) violated 49 C.F.R.  
19 § 376.12(k)(2) by making improper deductions from the escrow accounts of  
20 plaintiffs Marc Mayfield, Frank Belcher, David Hayes, Valerie Helton, and Gerald  
21 Webb, and violated 49 C.F.R. § 376.12(k)(6) by failing to timely return unused  
22 escrow accounts to those plaintiffs upon the termination of their contractor  
23 agreements;

24 (4) That plaintiffs Marc Mayfield, Frank Belcher, David Hayes, Valerie  
25 Helton, and Gerald Webb are entitled monetary damages for any violations of the  
26 Truth-in-Leasing regulations by defendant Swift Transportation Co., Inc. (AZ);

1 (5) That any named plaintiff is entitled to injunctive relief stemming from  
2 any violation of the Truth-in-Leasing regulations by defendant Swift  
3 Transportation Co., Inc. (AZ).

4 IT IS FURTHER ORDERED that the Swift Defendants' Motion for  
5 Summary Judgment on Counts III and IV (doc. #335) is granted to the extent that  
6 any and all claims set forth in Counts III and IV of the First Amended Complaint  
7 against defendant Swift Transportation Co., Inc. (AZ) and all claims in the First  
8 Amended Complaint against defendant Swift Transportation Co., Inc. (NV)  
9 not otherwise terminated with prejudice by the Stipulation of Dismissal of Counts  
10 II and IV of the First Amended Complaint (doc. #363) are dismissed with  
11 prejudice.<sup>25</sup>

12 IT IS FURTHER ORDERED that the Plaintiffs' Motion for Clarification of  
13 July 26, 2006 Order (docs. #325 and #326) is granted solely to the extent that the  
14 Court's order (doc. #319), entered on July 27, 2006, is vacated.

15 IT IS FURTHER ORDERED that Plaintiffs' Motion to Withdraw as Attorney  
16 of Record for Plaintiff Gerald Webb Pursuant to LRCiv 83.3 (doc. #351) is granted  
17 pursuant to LRCiv 83.3 and LRCiv 7.2(i) and that Paul D. Cullen, Sr., Joyce E.  
18 Mayers , and Daniel E. Cohen of the Cullen Law Firm, PLLC and Randall D.  
19 Wilkins and Brian Campbell of Bonn & Wilkins, Chartered are withdrawn as  
20

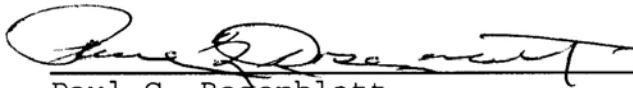
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22 <sup>25</sup>

23 The stipulation to dismiss Counts III and IV was entered into only  
24 between the Swift defendants and plaintiffs Mayfield, Belcher, Hayes, and Helton.  
25 To the extent that it is not clear from the stipulation that the stipulation was meant  
26 to completely resolve the Swift defendants' summary judgment motion on Counts  
III and IV, the Court is granting that motion in its entirety on its merits for the  
reasons stated therein and pursuant to LRCiv 7.2(i) because no plaintiff filed a  
response to the motion that complies with LRCiv 56.1.

1 counsel for plaintiff Gerald Webb.<sup>26</sup>

2 IT IS FURTHER ORDERED that the parties, after the consultation of their  
3 counsel, shall file a joint report no later than **November 2, 2007** that sets forth the  
4 parties' positions as to what, if any, claims of the First Amended Complaint  
5 remain to be resolved in this action, as well as a proposed schedule for resolving  
6 any such claims.

7 DATED this 27<sup>th</sup> day of September, 2007.

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11 Paul G. Rosenblatt  
United States District Judge  
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26 The Clerk of the Court shall send a copy of this Opinion and Order to  
Gerald Webb at his last known address of record as noted in doc. #351.