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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

**Owner-Operator Independent Drivers
Association, Inc. et al.,**

Plaintiffs,

vs.

**Swift Transportation Co., Inc. (AZ), et
al.,**

Defendants.

Civ. 02-1059 PHX PGR

**PLAINTIFFS' COUNTER-
STATEMENT OF DISPUTED
FACTS IN OPPOSITION TO
DEFENDANT'S MOTION FOR
PARTIAL SUMMARY
JUDGMENT ON COUNTS I AND
II OF THE FIRST AMENDED
COMPLAINT**

Plaintiffs respond to Defendant's Statements of Fact as follows:

1. Swift is a regulated motor carrier headquartered in Phoenix, Arizona, that provides transportation of property in interstate commerce under authority issued by the United States Department of Transportation ("DOT"). Swift operates its trucking business in the 48 contiguous states and has 35 terminals around the country. (Affidavit of Randall H. Eslick ("Eslick Aff."), ¶ 1, Ex. A.)

Plaintiffs' Response to Statement 1.

Undisputed.

1 2. Swift has differing relationships with its truck drivers. Some of
2 Swift's truck drivers are actually employees of Swift, while some of Swift's
3 drivers are independent contractors, known in the industry as owner-operators. An
4 owner-operator is an independent business person who owns or controls a tractor
5 unit and then leases that unit and his driving services to the trucking company to
6 transport freight. An owner-operator is an independent contractor who is paid a
certain amount of revenue based on the trucking services provided to the motor
carrier. In most instances, this is a certain amount per mile. As an independent
business entity, and unlike Swift's employee drivers, an owner-operator is
responsible for his own operational expenses, like fuel, truck payments, insurance,
maintenance, repairs, cargo and accident claims, taxes and so on. (Eslick Aff., ¶ 5.)

7 **Plaintiffs' Response to Statement 2.**

8 Plaintiffs do not have information regarding Swift's employees. Subject to
9 its duties to comply with of the Truth-in-Leasing regulations, Plaintiffs do not
10 dispute this statement.

11
12 3. Plaintiffs Mark Mayfield, Frank Belcher, David Hayes, Jerry Webb,
13 Valarie Helton and Wayne Bibicoff are all former owner-operator truck drivers for
Swift. (Eslick Aff., ¶ 6.)

14 **Plaintiffs' Response to Statement 3.**

15 Undisputed.

16
17 4. Swift has a mandatory orientation program for its owner-operators.
18 The length of the orientation program and the topics covered have varied over
19 time. The orientation was designed to teach the owner-operators how to be
20 successful owner-operators and to educate them about the details of Swift's owner-
21 operator program, including information concerning compensation and charge-
back items. During orientation, Swift goes through the Contractor Agreement that
will be entered into between Swift and its owner-operators. Swift also discusses
and provides various written information to its owner-operators, including the
information that is contained in Exhibits 1 and 2 attached to the Eslick Affidavit.
(Eslick Aff., ¶ 7.)

22 **Plaintiffs' Response to Statement 4.**

23 Plaintiffs do not have information regarding whether the Swift orientation
24 program is mandatory. Relevant to Plaintiffs' claims for violation of the federal
25 Truth-in-Leasing regulations as alleged in Counts I and II of the amended
26 Complaint, however, Plaintiffs dispute this Statement. Swift did not provide
27
28

1 information and documentation regarding chargeback items deducted from owner-
 2 operator compensation sufficient to allow owner-operators to determine the
 3 validity of the chargebacks. Swift Defendants' Answers to Plaintiffs,
 4 Interrogatories, dated October 25, 2006, Exhibit P,¹ Answer to Interrogatory Nos.
 5 12, 12(a), 13, 13 14; Swift Defendants' Responses to Plaintiffs Request for the
 6 Production of Documents dated October 26, 2006, Response to RFP Nos. 9, 11,
 7 16, Exhibit Q. Further, Swift has stated that it will continue to refuse provide the
 8 information and documentation required to determine the validity of the
 9 chargebacks. Eslick Affidavit ¶ 32.

10
 11 5. As part of its owner-operator program, Swift has offered owner-
 12 operators various programs, products and services so that owner-operators can
 13 purchase from or through Swift in order to reduce the cost of running their
 14 businesses. Swift's Contractor Agreement has, at least since January 1, 1998, made
 15 clear that owner-operators are not required to purchase any programs, products and
 16 services from or through Swift. Owner-operators that choose to buy programs,
 products and services from or through Swift pay for these items by deductions
 from their weekly settlements. Owner-operators for Swift have never been
 required to purchase programs, products or services from Swift. Owner-operators
 can purchase these programs, products and services from whomever they choose.
 (Eslick Aff., ¶ 8.)

17 **Plaintiffs' Response to Statement 5.**

18 Plaintiffs do not dispute that paragraph 4 of the Contractor Agreements at
 19 issue in this lawsuit states "[t]he CONTRACTOR is not required to purchase or
 20 rent any products, equipment or services from the COMPANY." However,
 21 Plaintiffs do dispute that this provision conclusively establishes that the
 22 chargeback items were not forced purchases. Plaintiffs do not dispute that charges
 23 for certain programs, products and services were deducted from owner-operator
 24 compensation, as reflected on the summary settlement statements submitted in
 25 support of Plaintiffs' Statement of Material Facts (Doc. 338) Finally, Swift does

26 ¹ Exhibit designations refer to those filed in support of Motion for Summary Judgement
 27 and Statement of Material Facts (Docs. 337, 338 and 339).

1 not specify which items it is referring to in this Statement of Fact, and accordingly,
2 the statement is insufficient to establish the truth of the matter for which it is
3 submitted.

4 6. Among other things, Swift offers its owner-operators the opportunity
5 to purchase various types of insurance they must have in order to run their
6 businesses. These insurance products include: (1) physical damage (or collision)
7 insurance with a \$1,000 deductible that protects the owner-operator's investment
8 in his tractor equipment in the event it is wrecked or damaged; (2) non-trucking
9 use (or bobtail) liability insurance with \$1 million in coverage that protects the
owner operator from liability he might incur if he creates liability to third parties
when he is not carrying a shipment for Swift; and (3) occupation accident
insurance, which is similar to workers' compensation insurance in that it protects
the owner-operator in the event he is hurt while working. (Eslick Aff., ¶ 9.)

10 **Plaintiffs' Response to Statement 6.**

11 It is undisputed that Swift requires its owner-operators to maintain certain
12 insurance coverages and that it provides such coverages in its chargeback
13 programs..

14 7. Dating back to at least June 1, 1998, Swift has provided its owner-
15 operators detailed information about the insurance products they may purchase
16 from or through Swift, including details of the various coverages offered and the
cost to the owner-operators. (Eslick Aff., ¶ 10.)

17 **Plaintiffs' Response to Statement 7.**

18 Plaintiffs' dispute this Statement of Fact. In violation of 49 C.F.R.
19 §376.12(h) Swift fails to disclose either in the Contractor Agreement or otherwise,
20 its mark-ups over its own costs of the premiums, and administrative fees, charged
21 to owner-operators for various insurance coverages. Additionally, Swift claims
22 confidentiality for the very information and documentation which §376.12(h)
23 commands it to provide to owner-operators to allow them to determine the validity
24 of the chargebacks for insurance deducted from owner-operator compensation.
25 Swift Defendants' Answers to Plaintiffs, Interrogatories, dated October 25, 2006,
26 Exhibit P, Answer to Interrogatory Nos. 12, 12(a), 13, 13 14; Swift Defendants'

1 Responses to Plaintiffs Request for the Production of Documents dated October
2 26, 2006, Response to RFP Nos. 9, 11, 16, Exhibit **Q**. Further, Swift has stated
3 that it will continue to refuse provide the information and documentation required
4 to determine the validity of the chargebacks. Eslick Affidavit ¶ 32.

5
6 8. Since at least June 1, 1998, Swift has provided Doc. No. STC00010
7 of Exhibit 1 to the Eslick Affidavit, or one similar to it, to owner-operators during
8 the orientation program or prior to execution of the Contractor Agreement.
9 Document No. STC00010 identifies the specific charge to the owner-operator for
non-trucking use/bobtail liability insurance (\$8.08 per week) and occupational
accident insurance (\$36.92 per week). (Eslick Aff., ¶ 11.)

10 **Plaintiffs' Response to Statement 8.**

11 Plaintiffs do not dispute that they were informed of the final charge
12 deducted from their compensation. However, in violation of 49 C.F.R. §376.12(h)
13 Swift fails to disclose either in the Contractor Agreement or otherwise, its mark-
14 ups over its own costs of the premiums, and administrative fees, charged to owner-
15 operators for various insurance coverages. Additionally, Swift claims
16 confidentiality for the very information and documentation which §376.12(h)
17 commands it to provide to owner-operators to allow them to determine the validity
18 of the chargebacks for insurance deducted from owner-operator compensation.
19 Swift Defendants' Answers to Plaintiffs, Interrogatories, dated October 25, 2006,
20 Exhibit **P**, Answer to Interrogatory Nos. 12, 12 (a), 13, 14; Swift Defendants'
21 Responses to Plaintiffs Request for the Production of Documents dated October
22 26, 2006, Response to RFP Nos. 9, 11, 16, Exhibit **Q**. Further, Swift has stated
23 that it will continue to refuse provide the information and documentation required
24 to determine the validity of the chargebacks. Eslick Affidavit ¶32.

25
26 9. Swift has also provided owner-operators with documentation to
27 explain how the physical damage/collision insurance is calculated. Because the
tractor equipment driven by different owner-operators may vary in value, the cost

1 of the insurance to different owner-operators also varies. Since at least June 1,
 2 1998, Swift has provided Document No. STC00062 of Exhibit 1 to the Eslick
 3 Affidavit, or one similar to it, to its owner-operators during the orientation
 4 program or prior to execution of the Contractor Agreement. Doc. No. STC00062
 5 specifically states that physical damage insurance will be calculated at a rate of
 “2.5% of tractor value per week.” It then goes on to provide the following
 example: “For an \$86,075.00 truck value, physical damage insurance is \$41.38 per
 week.” (Eslick Aff., ¶ 12.)

Plaintiffs’ Response to Statement 9.

6 Plaintiffs do not dispute that they were informed of the final charge
 7 deducted from their compensation. However, in violation of 49 C.F.R. §376.12(h)
 8 Swift fails to disclose either in the Contractor Agreement or otherwise, its mark-
 9 ups over its own costs of the premiums, and administrative fees, charged to owner-
 10 operators for various insurance coverages. Additionally, Swift claims
 11 confidentiality for the very information and documentation which §376.12(h)
 12 commands it to provide to owner-operators to allow them to determine the validity
 13 of the chargebacks for insurance deducted from owner-operator compensation.
 14 Swift Defendants’ Answers to Plaintiffs, Interrogatories, dated October 25, 2006,
 15 Exhibit **P**, Answer to Interrogatory Nos. 12, 12 (a), 13, 14; Swift Defendants’
 16 Responses to Plaintiffs Request for the Production of Documents dated October
 17 26, 2006, Response to RFP Nos. 9, 11, 16, Exhibit **Q**. Further, Swift has stated that
 18 it will continue to refuse provide the information and documentation required to
 19 determine the validity of the chargebacks. Eslick Affidavit ¶32 .

21 10. In addition to certain insurance programs, Swift also offers its
 22 owner-operators a means to purchase mobile-satellite communications equipment
 23 or Qualcomm equipment at a price that is cheaper than the owner-operator could
 24 obtain it on his own. Like insurance, owner-operators are not required to purchase
 this equipment from or through Swift, but rather they are only required to have
 equipment that is compatible with Swift’s equipment. (Eslick Aff., ¶ 13.)

Plaintiffs’ Response to Statement 10.

26 Plaintiffs do not dispute that they were informed of the final charge for
 27
 28

1 Qualcomm deducted from their compensation. However, in violation of 49 C.F.R.
2 §376.12(h) Swift fails to disclose either in the Contractor Agreement or otherwise,
3 its mark-ups over its own costs for Qualcomm, and administrative fees, charged to
4 owner-operators for Qualcomm. Additionally, Swift claims confidentiality for the
5 very information and documentation which §376.12(h) commands it to provide to
6 owner-operators to allow them to determine the validity of the chargebacks for
7 Qualcomm. Response of Defendants Swift Transportation Co., Inc. (NV/Swift
8 Transportation Co., Inc. (AZ) to plaintiffs Fifth Set of Requests for Production of
9 Documents, dated May 28, 2004, Response to RFP No. 2, Exhibit V. Swift
10 Defendants' Answers to Plaintiffs, Interrogatories, dated October 25, 2006, Exhibit
11 **P**, Answer to Interrogatory Nos. 12, 12(a), 13, 14; Swift Defendants' Responses to
12 Plaintiffs Request for the Production of Documents dated October 26, 2006,
13 Response to RFP No 16, Exhibit **Q**. Further, Swift has stated that it will continue
14 to refuse provide the information and documentation required to determine the
15 validity of the chargebacks. Eslick Affidavit ¶ 32.

16
17 11. Since at least June 1, 1998, Swift has provided owner-operators
18 with detailed information identifying the charge to the owner-operator for
19 purchasing Qualcomm equipment through Swift, along with an explanation as to
20 how the price was arrived at. Since at least June 1, 1998, Swift has provided Doc.
21 No. STC00010 of Exhibit 1 to the Eslick Affidavit, or one similar to it, to owner-
22 operators during the orientation program or prior to execution of the Contractor
23 Agreement. Document No. STC00010 identifies the specific charge to the owner-
24 operator for Qualcomm equipment (\$26.42 per week). In addition, Swift has
25 provided Doc. No. STC00032, or one similar to it, to owner-operators during
26 orientation that describes how the cost to the owner-operator for the Qualcomm
27 equipment is calculated. (Eslick Aff., ¶ 14.)

Plaintiffs' Response to Statement 11.

28 Plaintiffs do not dispute that they were informed of the final charge for
Qualcomm deducted from their compensation. However, in violation of 49 C.F.R.
§376.12(h) Swift fails to disclose either in the Contractor Agreement or otherwise,

1 its mark-ups over its own costs for Qualcomm, and administrative fees, charged to
 2 owner-operators for Qualcomm. Additionally, Swift claims confidentiality for the
 3 very information and documentation which §376.12(h) commands it to provide to
 4 owner-operators to allow them to determine the validity of the chargebacks for
 5 Qualcomm. Response of Defendants Swift Transportation Co., Inc. (NV/Swift
 6 Transportation Co., Inc. (AZ) to plaintiffs Fifth Set of Requests for Production of
 7 Documents, dated May 28, 2004, Response to RFP No. 2, Exhibit V. Swift
 8 Defendants' Answers to Plaintiffs, Interrogatories, dated October 25, 2006, Exhibit
 9 **P**, Answer to Interrogatory Nos. 12, 12(a), 13, 14; Swift Defendants' Responses to
 10 Plaintiffs Request for the Production of Documents dated October 26, 2006,
 11 Response to RFP No 16, Exhibit **Q**. Further, Swift has stated that it will continue
 12 to refuse provide the information and documentation required to determine the
 13 validity of the chargebacks. Eslick Affidavit ¶32 .

14
 15 12. Swift has also offered accounting services to its owner-operators as
 16 part of its owner-operator program. The accounting services are actually provided
 17 by an entity named American Truck Tax, LLC. Since Swift has offered these
 18 accounting services, it has provided Document Nos. STC00066-67 of Exhibit 1 to
 19 the Eslick Affidavit, or ones similar to them, to owner-operators during orientation
 20 or prior to execution of the Contractor Agreement. These documents explain that
 ATT's price is \$15.00 per week and further explain what the owner-operator
 receives if the owner-operator elects to purchase this service. The charge-back
 amount that appears on the owner-operator's settlement is a complete pass through
 of this amount to the service provider. Swift retains none of this amount. (Eslick
 Aff., ¶ 15.)

21 **Plaintiffs' Response to Statement 12.**

22 Whether or not the \$15 charge is a straight pass-through from a third party
 23 vendor is an issue going to damages. The chargeback provisions of the Leasing
 24 regulations require that Swift provide documentation to owner-operators to support
 25 the validity of the charge which Swift did not do. Plaintiffs therefore dispute this
 26 Statement.

1 13. Because Swift recognizes that owner-operators are small business
2 people, it offers its owner-operators the option to take cash advances from Swift by
3 use of a Comdata cash card. Of course, owner-operators are not required to take
4 cash advances from Swift. Ever since Swift has offered cash advances, it has
5 provided documentation to its owner-operators to explain that a \$3.00 service fee
6 will be added to each cash advance using a Comdata card. For instance, Swift
7 provides all owner-operators a Driver Manual that contains Doc. No. STC00248 of
8 Exhibit 2 to the Eslick Affidavit, or one similar to it, that specifically states that a
9 \$3.00 service charge will be added to cash advances using a Comdata card, and
10 provides examples of how the fee is added to the cash advance. (Eslick Aff., ¶ 16.)

11 **Plaintiffs' Response to Statement 13.**

12 Plaintiffs do not dispute that they were informed of the final charge for the
13 Comdata transaction fee. However, in violation of 49 C.F.R. §376.12(h) Swift
14 fails to disclose either in the Contractor Agreement or otherwise, its mark-ups over
15 its own costs for the fee, and any additional administrative fees, charged to
16 owner-operators for use of the Comdata card. Additionally, Swift claims
17 confidentiality for the very information and documentation which §376.12(h)
18 commands it to provide to owner-operators to allow them to determine the validity
19 of the chargebacks for Qualcomm. Swift Defendants' Answers to Plaintiffs,
20 Interrogatories, dated October 25, 2006, Exhibit P, Answer to Interrogatory Nos.
21 12, 12(a), 13, 14; Swift Defendants' Responses to Plaintiffs Request for the
22 Production of Documents dated October 26, 2006, Response to RFP No 16,
23 Exhibit Q. Further, Swift has stated that it will continue to refuse provide the
24 information and documentation required to determine the validity of the
25 chargebacks. Eslick Affidavit ¶32.

26 14. In approximately June 2001, Swift Holding Company acquired the
27 stock of M.S. Carriers, Inc. ("MSC"). In January 2002, the operations of Swift and
28 MSC were combined and the owner-operator drivers of MSC became owner-
operator drivers for Swift. (Eslick Aff., ¶ 17.)

29 **Plaintiffs' Response to Statement 14.**

30 Not all MSC drivers became owner-operators under contract to Swift.

1 15. Prior to combining the operations of Swift and MSC, the MSC
 2 owner-operators were provided an orientation like the orientation that Swift
 3 provided to its new owner-operators as discussed above. In addition, Swift
 4 provided the MSC owner-operators who were becoming owner-operators of Swift
 a copy of the information contained within Exhibits 1 and 2 to the Eslick Affidavit.
 (Eslick Aff., ¶

Plaintiffs' Response to Statement 15.

5 Plaintiffs dispute this Statement of Fact and incorporate their response to
 6 Statement 4.

8 16. Plaintiff Marc Mayfield began working for Swift as an owner-
 9 operator in or about March 1998. When he joined Swift as an owner-operator, he
 10 signed a Contractor Agreement with Swift dated March 1, 1998, and he
 11 contemporaneously signed a Qualcomm Agreement that included the price of the
 12 Qualcomm system (\$26.42 per month) and a description of how the price was
 13 calculated. (Eslick Aff., ¶ 19; Exs. 3 and 4 to Eslick Aff.) Plaintiff Mayfield
 signed various additional Contractor Agreements with Swift each year throughout
 his tenure with Swift. (Exs. 5 through 7 to Eslick Aff.) Plaintiff Mayfield
 terminated his relationship with Swift in approximately April 2001. (Eslick Aff., ¶
 19.)

Plaintiffs' Response to Statement 16.

14 For the reasons stated in response to Statements of Fact Nos. 10 and 11,
 15 Plaintiffs dispute that they received any information or documentation which
 16 discloses how the Qualcomm chargeback was calculated. Plaintiffs do not dispute
 17 the remainder of this Statement of Fact.

19 17. During the period that plaintiff Mayfield was an owner-operator
 20 for Swift, he purchased some of the services and/or products discussed above.
 21 Plaintiff Mayfield knew that he could purchase products or services like insurance
 22 from sources other than Swift. (Deposition of Mark Mayfield, p. 70, Ex. B.)
 23 Examples of plaintiff Mayfield's settlements are attached to the Eslick Affidavit as
 24 Exhibit 8. For instance, as demonstrated by these settlements, plaintiff Mayfield
 25 purchased (1) non-trucking/bobtail liability insurance at \$8.08 per week, (2)
 26 occupational accident insurance at \$36.92 per week, (3) physical damage/collision
 27 insurance calculated at 2.5% per \$1000 of truck value, which in his case varied
 from \$31.72 to \$41.61 per week, depending on the value of his truck at a given
 time, and (4) Qualcomm equipment and service at \$26.42 per week. (Eslick Aff., ¶
 17.) The charges for all of these products or services were exactly what was
 disclosed to plaintiff Mayfield in the documentation given to him during his
 orientation. (Eslick Aff., ¶ 17.) The charge for the Qualcomm was also exactly

1 what he agreed to pay in his Qualcomm agreement when he first signed a
2 Contractor Agreement with Swift. (*Id.*; Ex. 4 attached to Eslick Aff.)

3 **Plaintiffs' Response to Statement 17.**

4 Plaintiffs do not dispute that they were informed of the amount of the
5 chargeback for various items deducted from their compensation. For the reasons
6 stated in response to Statements of Fact Nos. 4, 7, 8, 9, 10, 11 and 13, Plaintiffs
7 dispute that they received any information or documentation which discloses how
8 these chargebacks were calculated.

9
10 18. Plaintiff Frank Belcher began driving for Swift as an owner-operator on
11 or about September 11, 2001, at which time he signed a Contractor Agreement
12 with Swift. (Eslick Aff., ¶ 21; Ex. 9 to Eslick Aff.) At the same time that he signed
13 this Contractor Agreement, plaintiff Belcher also signed a Qualcomm Agreement
14 that included the price of the Qualcomm system (\$26.42 per month) and a
15 description as to how the price was calculated. (*See* Ex. 10 to Eslick Aff.) Plaintiff
16 Belcher signed three additional Contractor Agreements with Swift for later years.
17 (*See* Exs. 11 through 13 to Eslick Aff.) Swift cannot presently locate Belcher's
18 Contractor Agreement for 2004, but Belcher would have signed a Contractor
19 Agreement in the same form as Exhibit 13 before driving for Swift in 2004.
20 Belcher stopped driving for Swift in or about March 2004. (Eslick Aff., ¶ 21.)

21 **Plaintiffs' Response to Statement 18.**

22 For the reasons stated in response to Statements of Fact Nos. 10 and 11 ,
23 Plaintiffs dispute that they received any information or documentation which
24 discloses how the Qualcomm chargeback was calculated. Plaintiffs do not dispute
25 the remainder of this Statement of Fact.

26
27 19. The Contractor Agreements that plaintiff Belcher signed for 2003
28 and 2004 varied slightly from the Contractor Agreements from prior years in that
the 2003 and 2004 Contractor Agreements contained a schedule that identified the
products or services that plaintiff Belcher could purchase from or through Swift
and the amount that plaintiff would be charged for those products or services.
(Exs. 12 and 13 to Eslick Aff., Schedule B.) This schedule also provided plaintiff a
statement as to whether the product was being offered at Swift's actual cost or cost
plus a mark-up. (*Id.*)

1 **Plaintiffs' Response to Statement 19.**

2 Plaintiffs do not dispute that the Revised Form Lease Agreements vary
3 from the Old Form Lease Agreements in that the Revised Form Agreements
4 contain a statement that certain chargeback items might include "administrative
5 costs associated with offering or maintaining the item." Plaintiffs submit that none
6 of the various Form Lease Agreements comply with the Leasing Regulations.
7 Interpretation of this provision is a legal issue addressed in Plaintiffs'
8 Memorandum in Opposition to Swift's Motion for Summary Judgment.

9
10 20. During the period that plaintiff Belcher was an owner-operator for
11 Swift, he purchased some of the services and/or products discussed above. Plaintiff
12 Belcher knew that he could purchase products or services like insurance from
13 sources other than Swift. (Deposition of Frank Belcher, p. 77-79, Ex. C.)
14 Examples of plaintiff Belcher's weekly settlements are attached to the Eslick
15 Affidavit as Exhibit 14. For instance, as demonstrated by these settlements,
16 plaintiff Belcher purchased (1) non-trucking/bobtail liability insurance at \$8.08 per
17 week, (2) occupational accident insurance at \$36.92 per week, except in 2004
18 where the Contractor Agreement between Swift and Belcher stated a price of
19 \$47.76, (3) physical damage/collision insurance calculated at 2.5% per \$1000 of
20 truck value, which in his case equaled \$41.36 per week, (4) Qualcomm equipment
21 and service at \$26.42 per week, and (5) accounting services at \$15.00 per week.
22 The charges for all of these products or services were exactly what was disclosed
23 to plaintiff Belcher in the documentation given to him during his orientation.
24 (Eslick Aff., ¶ 23.)

25 **Plaintiffs' Response to Statement 20.**

26 Plaintiffs do not dispute that they were informed of the amount of the
27 chargeback for various items deducted from their compensation. For the reasons
28 stated in response to Statements of Fact Nos. 4, 7, 8, 9, 10, 11, and 13, Plaintiffs
dispute that they received any information or documentation which discloses how
these chargebacks were calculated.

21. Plaintiff Jerry Webb worked as an owner-operator for M.S. Carriers
until it was acquired by Swift. Webb signed an East Coast Contractor Agreement
with Swift on December 31, 2001. (Eslick Aff., ¶ 24; Ex. 15 to Eslick Aff.) On or
about March 26, 2002, after driving for Swift for less than three (3) months, Webb

1 terminated his Contractor Agreement before it expired. (Eslick Aff., ¶ 24.)

2 **Plaintiffs' Response to Statement 21.**

3 Undisputed.

4
5 22. During the period that plaintiff Webb was an owner-operator for
6 Swift, he purchased some of the services and/or products discussed above.
7 Examples of plaintiff Webb's weekly settlements are attached to the Eslick
8 Affidavit as Exhibit 16. For instance, as demonstrated by these settlements,
9 plaintiff Webb purchased (1) non-trucking/bobtail liability insurance at \$8.08 per
10 week, (2) occupational accident insurance at \$36.92 per week, (3) physical
11 damage/collision insurance calculated at 2.5% per \$1000 of truck value, which in
12 his case equaled \$48.36 per week, and (4) Qualcomm equipment and service at
13 \$26.42 per week. The charges for all of these products or services were exactly
14 what was disclosed to plaintiff Webb in the documentation given to him as part of
15 his orientation. (Eslick Aff., ¶ 25.)

16 **Plaintiffs' Response to Statement 22.**

17
18 Plaintiffs do not dispute that they were informed of the amount of the
19 chargeback for various items deducted from their compensation. For the reasons
20 stated in response to Statements of Fact Nos. 4, 7, 8, 9, 10, 11, and 13, Plaintiffs
21 dispute that they received any information or documentation which discloses how
22 these chargebacks were calculated.

23
24 23. Plaintiff David Hayes also worked as an owner-operator for M.S.
25 Carriers until it was acquired by Swift. After Swift acquired M.S. Carriers, Hayes
26 signed a Contractor Agreement with Swift on December 17, 2001. (Eslick Aff., ¶
27 26; Ex. 17 to Eslick Aff.) Plaintiff Hayes signed three additional Contractor
28 Agreements with Swift for later years. *See* Exs. 18 through 20 to Eslick Aff.)
Hayes stopped driving for Swift during 2005. (Eslick Aff., ¶ 26.)

Plaintiffs' Response to Statement 23.

Undisputed.

24
25 24. The Contractor Agreements that plaintiff Hayes signed for 2003,
26 2004 and 2005 varied slightly from the Contractor Agreements from prior years in
27 that these Contractor Agreements contained a schedule that identified the products
28 or services that plaintiff Hayes could purchase from or through Swift and the
amount that plaintiff would be charged for those products or services. (Exs. 18, 19

1 and 20 to Eslick Aff., Schedule B.) This schedule also provided plaintiff a
2 statement as to whether the product was being offered at Swift's actual cost or cost
plus a mark-up. (*Id.*)

3 **Plaintiffs' Response to Statement 24.**

4 Plaintiffs do not dispute that the Revised Form Lease Agreements vary
5 from the Old Form Lease Agreements in that the Revised Form Agreements
6 contain a statement that certain chargeback items might include "administrative
7 costs associated with offering or maintaining the item." Plaintiffs dispute that the
8 various Form Lease Agreements comply with the Leasing Regulations.
9 Interpretation of this provision is a legal issue addressed in Plaintiffs'
10 Memorandum in Opposition to Swift's Motion for Summary Judgment.
11

12 25. During the period that plaintiff Hayes was an owner-operator for
13 Swift, he purchased some of the services and/or products discussed above. Plaintiff
14 Hayes knew that he could purchase products or services like insurance from
15 sources other than Swift. (Deposition of David Hayes, pp. 29-31, Ex. D.)
16 Examples of plaintiff Hayes' weekly settlements are attached to this affidavit as
17 Exhibit 21. For instance, as demonstrated by these settlements, plaintiff Hayes
18 purchased (1) non-trucking/bobtail liability insurance at \$8.08 per week, (2)
19 occupational accident insurance at \$36.92 per week, except in 2004 and 2005
where the Contractor Agreement between Swift and Hayes stated the price of
\$47.76, (3) physical damage/collision insurance calculated at 2.5% per \$1000 of
truck value, which in his case equaled \$36.04 per week, (4) Qualcomm equipment
and service at \$26.42 per week, and (5) accounting services at \$15.00 per week.
The charges for all of these products or services were exactly what was disclosed
to plaintiff Hayes in the documentation given to him as part of his orientation.
(Eslick Aff., ¶ 28.)

20 **Plaintiffs' Response to Statement 25.**

21 Plaintiffs do not dispute that they were informed of the amount of the
22 chargeback for various items deducted from their compensation. For the reasons
23 stated in response to Statements of Fact Nos. 4, 7, 8, 9, 10, 11, and 13, Plaintiffs
24 dispute that they received any information or documentation which discloses how
25 these chargebacks were calculated.
26
27
28

1 26. Plaintiff Valarie Helton also was formerly an owner-operator for
2 M.S. Carriers until it was acquired by Swift. After Swift acquired M.S. Carriers,
3 plaintiff Helton signed a Contractor Agreement with Swift on December 27, 2001,
4 which she prematurely terminated just a few months later. (Eslick Aff., ¶ 29; Ex.
5 22 to Eslick Aff.)

6 **Plaintiffs' Response to Statement 26.**

7 Swift's characterization of Plaintiff Helton's termination of her Contractor
8 Agreement with Swift as premature is a legal issue which is not addressed by the
9 parties on these cross motions for summary judgment. Plaintiffs do not dispute the
10 remaining factual material contained in this Statement of Fact.

11 27. During the period that plaintiff Helton was an owner-operator for
12 Swift, she purchased some of the services and/or products discussed above.
13 Examples of plaintiff Helton's weekly settlements are attached to this affidavit as
14 Exhibit 23. For instance, as demonstrated by these settlements, plaintiff Helton
15 purchased (1) non-trucking/bobtail liability insurance at \$8.08 per week, (2)
16 occupational accident insurance at \$36.04 per week, (3) physical damage/collision
17 insurance calculated at 2.5% per \$1000 of truck value, which in her case equaled
18 \$35.00 per week, and (4) Qualcomm equipment and service at \$26.42 per week.
19 The charges for all of these products or services are exactly what was disclosed to
20 plaintiff Helton in the documentation given to her as part of her orientation. (Eslick
21 Aff., ¶ 29.)

22 **Plaintiffs' Response to Statement 27.**

23 Plaintiffs do not dispute that they were informed of the amount of the
24 chargeback for various items deducted from their compensation. For the reasons
25 stated in response to Statements of Fact Nos. 4, 7, 8, 9, 10, 11, and 13, Plaintiffs
26 dispute that they received any information or documentation which discloses how
27 these chargebacks were calculated.

28 28. Plaintiff OOIDA sells programs, products and services to its
member. For instance, like Swift, OOIDA sells (1) physical damage (or collision)
insurance; (2) nontrucking use (or bobtail) liability insurance; and (3) occupation
accident insurance. (OOIDA's Answers to Defendants' First Interrogatories, Ex.
E.)

Plaintiffs' Response to Statement 28.

1 Plaintiffs do not dispute that an affiliate of OOIDA, OOSI, offers these
2 insurance coverages, but disputes that the coverages are “like Swift” coverages.
3 Although the type of the coverages may be denominated the same, the details of
4 the various coverages differ substantially. The insurance coverages cannot be
5 compared simply by category.

6
7 29. When similar insurance products containing the same coverages
8 and/or deductibles are compared between Swift and OOIDA, the rates charged by
9 Swift for physical damage, non-trucking use (or bobtail) insurance, and
10 occupational accident insurance are less than the price charged by OOIDA for all
11 products for the entire relevant time of this case. (*Compare* Ex. E to Eslick Aff., ¶¶
11, 12, 20, 23, 25, 28, and 30.) It is noteworthy that the amounts disclosed by
OOIDA in its interrogatories do not include applicable taxes while the amounts
shown by Swift include all charges to the owner-operators. (Ex. E, p. 3, n.2.)

12 **Plaintiffs’ Response to Statement 29.**

13 Plaintiffs do not dispute that an affiliate of OOIDA, OOSI, offers these
14 insurance coverages, but disputes that the coverages and the pricing can be directly
15 compared to Swift coverages. Although the type of the coverages may be
16 denominated the same, the details of the various coverages differ substantially.
17 The insurance coverages, including pricing, cannot be compared simply by
18 category.

19
20 30. In addition to insurance products, Swift also offers fuel at its
21 terminals for its owner-operator drivers to purchase. The price per gallon for such
22 fuel changes regularly just as at a retail fuel outlet. Owner-operators can find out
23 the price of fuel at Swift’s terminal through use of their Qualcomm. (Eslick Aff., ¶
24 31.) Swift makes available an easy-to-use macro for owner-operators to contact
Swift via satellite to obtain fuel prices at Swift’s terminals. (*See* Ex. 2 to Eslick
Aff., Doc. STC 00238.) In addition, owner-operators can call an 800 number to
obtain fuel prices at Swift terminals. The price per gallon is also posted at Swift’s
terminals and/or at the pump. (Eslick Aff., ¶ 31; Deposition of Roger Henley
 (“Henley Depo.”) at 20, Ex. F.)

25 **Plaintiffs’ Response to Statement 30.**

26 Swift marks up its fuel prices over the amounts that it pays for fuel to third
27
28

1 party vendor and adds an administrative fee to the per gallon price for fuel. Swift
2 also receives rebates and discounts from fuel vendors. Swift does not disclose to
3 owner-operators the mark-ups, administrative fees, rebates or discounts. Henley
4 Depo. Exerpts attached as Exhibit N to Plaintiffs' Statement of Undisputed Facts.
5 Testimony of Randall H. Eslick, Hearing on Plaintiffs' Motion for Preliminary
6 Injunction, October 28, 2002, at 148-150, Exhibit 4).

7
8 31. The price that Swift charges for fuel at its terminals is based upon the
9 market price of fuel available within a 20 to 30 mile radius of the terminal that
10 offers fuel. If the market price for fuel in the vicinity of the Swift terminal is
11 greater than Swift's acquisition cost for the fuel, Swift may add up to \$.04 per
12 gallon to the price of its fuel, but even when fuel is marked up, Swift will always
13 price its fuel at least \$.01 per gallon less than the local retail stores. In addition, if
14 Swift's acquisition cost actually exceeds to local retail outlets, Swift will reduce
15 the price of its fuel to \$.01 per gallon less than the local retail stores, thereby
16 selling fuel at a loss. (Henley Depo., pp. 17-24.)

17 **Plaintiffs' Response to Statement 31.**

18 Swift marks up its fuel prices over the amounts that it pays for fuel to third
19 party vendor and adds an administrative fee to the per gallon price for fuel. Swift
20 also receives rebates and discounts from fuel vendors. Swift does not disclose to
21 owner-operators the mark-ups, administrative fees, rebates or discounts. Henley
22 Depo. Exerpts attached as Exhibit N to Plaintiffs' Statement of Undisputed Facts.
23 Testimony of Randall H. Eslick, Hearing on Plaintiffs' Motion for Preliminary
24 Injunction, October 28, 2002, at 148-150, Exhibit 4).

25 32. The cost to Swift to dispense fuel at its terminals is \$.05 per gallon.
26 (Henley Depo. at 24).

27 **Plaintiffs' Response to Statement 32.**

28 Swift has not produced evidence supporting this assertion allowing,
Plaintiffs to dispute or deny it.

This Statement poses a question of law involving available remedies for violation of the federal Truth-in-Leasing Regulations. Plaintiffs will address these legal issues at an appropriate time in a memorandum of law submitted to the Court.

By: /s/ Daniel Cohen

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CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2006, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing and by First-Class Mail to the following:

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