Paul D. Cullen, Sr., DC Bar No. 100230
Daniel E. Cohen, DC Bar No. 414985
Joyce E. Mayers DC Bar No. 268227
THE CULLEN LAW FIRM, PLLC
1101 30th Street, NW, Suite 300
Washington, D.C. 20007
Telephone - (202) 944-8600
Fax - (202) 944-8611
E-mail - dec@cullenlaw.com

Randall D. Wilkins, State Bar No. 009350
Brian J. Campbell, State Bar No. 013177
BONN & WILKINS, CHARTERED
805 North Second Street
Phoenix, Arizona 85004
(602) 254-5557

Attorneys for Plaintiffs

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' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT ON COUNTS I AND II OF THE FIRST AMENDED COMPLAINT**

Randall D. Wilkins
Brian J. Campbell
BONN & WILKINS, CHARTERED
805 North Second Street
Phoenix, Arizona 85004
(602) 254-5557

Paul D. Cullen, Sr.
Daniel E. Cohen
Joyce E. Mayers
THE CULLEN LAW FIRM, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007
(202) 944-8600

Attorneys for Plaintiffs

I. INTRODUCTION

As this Court observed in its March 25, 2003 preliminary injunction Order, Swift's compliance with the Federal Truth-in-Leasing Regulations in this case has been "negligible at best:"

> [T] he Court wishes to note that the plaintiffs have in fact established, even under the "substantial compliance" standard, that they have at least a fair chance of proving that the defendants have violated certain requirements of the Truth-in-Leasing regulations in that the *defendants' compliance with certain of those requirements is negligible at best.*

(Doc. #98, Mar. 25, 2003 Order at 8 n. 6)(emphasis added). As Plaintiffs have demonstrated in their own motion for partial summary judgment, Swift has done virtually nothing in the intervening four years to bring its conduct into compliance with the Regulations. Swift's leases have at all times failed to specify how charge-backs are to be calculated. Further, Swift has at all times failed to provide owner-operators copies of those documents which are necessary to determine the validity of the charges. Now, as conclusively demonstrated in its summary judgment motion, Swift has taken the adamant position that it is not required to do anything more than essentially tell its owner-operators the amount of the charge-backs it is extracting from their paychecks. As we demonstrate below, this is a manifestly untenable view of the Regulations, the regulatory history leading to their promulgation, and the relevant caselaw. Accordingly, Plaintiffs submit that Swift's motion should be denied, and summary judgment should be issued in favor of Plaintiffs.

II ARGUMENT

A. Swift's Contention that The Regulations Only Require Disclosure of the Charge-back Amount is Misplaced as a Matter of Law

Swift's assertion that 49 U.S.C. § 376.12 (h) is "ambiguous" and that the regulatory history establishes that a carrier must only disclose either (1) the actual amount of the charge-back, or (2) when the actual amount is not available at the inception of the relationship, then at least a recitation of how the amount would be calculated, is based on a wholly incomplete and incorrect analysis of the plain language of both the Regulation, as well as the history leading to its promulgation. (Swift Mem. at 6-7). We start with the language of the

Regulation itself:

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

49 U.S.C. § 376.12 (h). This language is not ambiguous, and it most certainly does not support Swift's reading that the carrier is only required to disclose the "amount" of the charge-back, or that it need only provide a statement as to how it is to be computed in instances where the amount is unavailable upon execution of the lease. To the contrary, the plain language of the Regulation unconditionally requires - *in all instances* - that: (1) the lease must provide "a recitation as to how the amount of each item is to be computed;" and, (2) "[t]he lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge."

The courts have consistently held this language to require disclosure and documentation showing how the charge-back is calculated, including the carriers' mark-ups. In *Tayssoun Transp., Inc. v. Universal Am-Cam, Ltd.*, 2005 WL 1185811 *16 (S.D. Tex. 2005) the court entered summary judgment against a carrier for violation of § 376.12(h) for failing to disclose how a $5.00 insurance fee was being used to defray the carrier's actual cost for insurance, concluding: "If UACL in fact used the money generated from Tayssoun's trip fee payments to pay the cost of the Cargo Policy, then UACL was required by §376.12(h) to recite in the Agreement with specificity how the deduction would be computed, and to provide Tayssoun with copies of the documents necessary to determine the charge's validity. UACL did neither." In support of its conclusion in this regard, the court cited other decisions likewise holding that a carrier's failure to disclose and document charge-backs violates §376.12(h):

> This requirement is designed to allow owner-operators, like Tayssoun, to determine whether a per trip fee being charged is fair. Under these assumptions, UACL's failure to do so is a violation of § 376.12(h). See Owner-Operator Independent Drivers Ass'n, Inc. v. Ledar Transport, 2000 WL

> 33711271, at *7 (W.D.Mo.) (carrier's list of items was insufficient to satisfy 376.12(h) because agreement did not recite how each deductible item would be computed); Owner-Operator Indep. Drivers Ass'n, Inc. v. Rocor Int'l, Inc., No. CIV-98-846-L, slip op. at 6 (W.D.Okla. July 19, 2000) (carrier's weekly $35 charge-back of owner-operator compensation for insurance premiums violated §376.12(h) because carrier failed to provide documents necessary to determine validity of the charge).

Id. at *16. In *Rocor,* which was cited by the court in *Tayssoun*, the carrier charged its owner-operators $35 per week for workers compensation coverage without disclosing or documenting how the amount was calculated. The court concluded that the carrier's failure to disclose or document the charge-back violated § 376.12(h):

> ROCOR's argument that it need not disclose the method of computing the $35.00 charge because is it a "flat fee" does not alter the fact that it did not disclose the amount charged and has not provided "copies of those documents which are necessary to determine the validity of the charge."

2000 WL 35512897 at * 3. *Accord Sheinhartz. v. Saturn Transp., Inc*., 2002 WL 575636 (D. Minn., March 22, 2002)("The fact that these Plaintiffs may have been satisfied with the price of the insurance does not obviate the need for Defendants to comply with federal and state law requiring them to disclose the amount of any fees charged in excess of the premiums.").

Similarly, in *OOIDA v. Ledar Transport, Inc*., the court found that the carrier had violated § 376.12(h) by failing to disclose and document how each item was computed:

> Ledar's Lease Agreement violated § 376.12(h) by failing to clearly specify all items that may be initially paid for by carrier," but ultimately deducted from owner operator compensation together with a recitation of how each item is to be computed. Ledar violated § 376.12(h) by failing to provide documentation to owner-operators necessary for them to determine the validity of charge-backs to compensation ... Ledar's failure to comply with the regulation injured Plaintiffs.[1]

Id. at 13. The court also expressly found that the carrier improperly concealed its mark-ups on charge-backs:

> Ledar charged-back for Comdata-related transaction fees in excess of what Ledar advanced on behalf of Plaintiffs and Class members. Ledar hid its actual costs by "whiting out" the actual costs in documentation provided to drivers.

[1] No. 00-0258-CV-W-FG, Slip Op. Dec. 30, 2004 (W.D. Mo.)(Copy attached, Ex. 1).

Id. at 12.[2] Finally, the court observed that the regulatory history indicated that such mark-ups were unlawful:

> The regulatory history of Section 376.12 (h) indicates that charge-backs that exceed the actual amount advanced by the motor carrier are unlawful. The Interstate Commerce Commission concluded that, "[t]o the extent that charge-backs to owner-operators reduce the carrier's legitimate expenses, resulting in losses to the owner-operators and a profit to the carrier, they are not legitimate charge-backs or reductions." Lease and Interchange of Vehicles, 46 Fed. Reg. 44013 (Sept. 2, 1981).

Id. at 13, n. 36. While the holdings in *Rocor, Tayssoun, Sheinhartz,* and *Ledar* would seem to be incontestable, Swift nonetheless suggests that the regulatory history demonstrates that those courts got it wrong. But Swift fails to offer an entirely accurate discussion of the regulatory history leading to the current text of 376.12 (h), which proves that those courts got it precisely right. Swift's analysis is predicated on a 1979 ICC comment - pertaining only to insurance charge-backs - providing the carrier would not be required to "disclose to the owner-operator the total cost of insurance that the carrier pays," and allowing the lease "to specify the amount that the owner-operator will be charged for insurance provided through the carrier." Swift Mem. at 17. *Quoting* Lease and Interchange of Vehicles, 131 M.C.C. 141, 151, 1979 WL 11158 *8 (1978). However, Swift fails to note that in 1982, the ICC promulgated the current rendition of Section 376.12 (h), which the Commission concluded would henceforth encompass insurance charge-backs, and would require the same disclosures and documentation required for all other charge-backs. As a starting point in that regard, the Commission made the following comments regarding the requirement that carriers fully disclose and document all charge-backs:

> [W]e conclude that, rather than require carriers to state with specificity the amount of charge-backs, we should, instead, require that the lease contain the

---

[2] Also, as particularly pertinent to Swift's assertion that such violations are "trivial and hypertechnical," (Swift Mem. at 14), the Ledar court aptly concluded: "Ledar's failure to both disclose charge-backs to compensation and to provide documentation had a material negative impact on the ability of Plaintiffs to receive proper compensation and was not merely a technical violation of the leasing regulations." *Id.* at 12.

> charge-back items, together with a recitation as to how the amount of each item is computed. To ensure that the owner-operator has access to these computation methods, we will require that owner-operators be afforded copies of those documents which are necessary to determine the validity of the charge. With such information, the owner-operators will be able to ascertain whether these charges have been computed correctly.

Lease and Interchange of Vehicles, 132 M.C.C. 916, 922 -23, 1982 WL 28480 *6 (November 12, 1982). The foregoing discussion, without more, obviously undermines Swift's contention that it need only disclose the amount of the charge-backs. But perhaps more significantly, the Commission also expressly required carriers to provide identical disclosures and documentation for insurance charge-backs - *for the specific purpose of deterring "excessive mark-ups":*

> Insurance. Finally, parties see no necessity for a requirement that carriers summarize the insurance coverage provided to the owner-operator. We agree, especially in view of our alteration of the proposed changes to §§ 1057.1(i), so as to require that owner-operators have access to all documents supporting any charge-back. This will include insurance charge-backs, and should deter any excessive "mark up" of insurance, as discussed in our notice of proposed rulemaking.

Id.[3] In sum, the regulatory history soundly defeats Swift's argument that a carrier need only disclose the amount of the charge-back. To be sure, the regulatory history confirms that the lease must disclose how the charge-backs are to be computed and that the owner-operators are to be provided back-up documentation - *without exception* - for the express purpose of deterring excessive mark-ups. For these reasons, Swift's motion for summary judgment should be denied and summary judgment should be entered in favor of the Plaintiffs.

B. Swift's Substantial Compliance Defense Must be Rejected as a Matter of Law

In light of the foregoing analysis, Swift's substantial compliance defense is academic at best. Swift admittedly fails to disclose how its charge-backs are computed, and admittedly fails to produce documents to its owner-operators validating its charge-backs. Accordingly, even if substantial compliance were the appropriate test - and Plaintiffs submit that it is not -

[3] Former Section 1057.1(i), of course, is now Section 376.12(h).

Swift has failed to show *any* compliance.

As a preliminary matter, substantial compliance in the statutory setting is disfavored. As the Ninth Circuit observed in *Sawyer v. County of Sonoma*, 719 F.2d 1001, 1008 (9th Cir. 1983):

> The doctrine of substantial compliance is an equitable doctrine designed to avoid hardship in cases where the party does all that can reasonably be expected of him. However, in the context of statutory prerequisites, the doctrine can be applied only where invocation thereof would not defeat the policies of the underlying statutory provisions.

Id. Further, "the doctrine of substantial compliance can have no application in the context of a clear statutory prerequisite that is known to the party seeking to apply the doctrine." *Id.* *Accord Family Leadership Foundation v. United States,* 2006 WL 3218661 (D. Ariz., Nov. 3, 2006). In this case in particular, Swift is unconditionally obligated to know about, and to comply with, its mandatory obligations under the Truth-in-Leasing Regulations as a prerequisite to operating under its federal DOT authority. The Truth-in-Leasing regulations mandate that: (1) "the written lease required under § 376.11 (a) *shall* contain the following provisions" and (2) "[t]he required lease provisions *shall* be adhered to and performed by the authorized carrier." 49 CFR § 376.12. When Congress uses the word "shall," it denotes mandatory requirements in a statute and an obligation "impervious to judicial discretion." *Lexicon v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998).[4] Further, as the Ninth Circuit previously observed in *OOIDA v. Swift Transp. Co.*, 367 F. 3d 1108, 1110 (9th Cir. 2004): "A primary goal of this regulatory scheme is to prevent large carriers from taking

---

[4] Swift's reliance on cases decided under the federal Truth-in-Lending Act ("TILA") in an attempt to minimize its damages exposure under the ICC Termination Act further undercuts its substantial compliance defense because those cases also hold that "TILA is a strict liability statute with respect to imposition of statutory damages: 'once a court finds a violation, *no matter how technical*, it has no discretion with respect to the imposition of liability.'" *Fabricant v. Sears Roebuck*, 202 F.R.D. 310, 318 (S.D. Fla. 2001)(emphasis in original). While Plaintiffs dispute the substantive relevance of Swift's damages defenses under TILA, it is nonetheless significant to examine Swift's reliance on such cases in their entirety to demonstrate that Swift should not be permitted to have it both ways.

advantage of individual owner-operators due to their weak bargaining position." In light of these principles, the inevitable consequence of allowing carriers to evade their mandatory responsibilities through *ad hoc* "substantial" compliance loopholes would only serve to "defeat the policies of the underlying statutory provisions." *Sawyer* at 1008.

Even if the Court were inclined to adopt a substantial compliance standard in this case, it must necessarily be confined to the question of whether the *four corners* of Swift's leases substantially comply with the regulations. For that reason alone, Swift's reliance on *Dart Transit* is unavailing.[5] In *Dart*, the I.C.C. emphasized that its ruling was based solely on disclosures in the contract documents:

> *The agreement* is consistent with . . . [the] regulations *** The *addendum*, thus, conveys the essence of owner-operator's equipment lease arrangements *** the terms of the Maintenance Reserve Fund arrangement *are disclosed adequately within Dart's owner-operator agreement* to satisfy the requirements of '1057.12(I). (emphasis added).

The I.C.C. thus concluded: "that the full-disclosure requirements of the Commission's leasing regulations *are satisfied by Dart's 'Independent Contractor Agreement*' . . . ." *Id.* In this case however, Swift cannot credibly argue that the four corners of its leases comply with the Regulations, even a bit. Indeed, as this Court observed in its March 25, 2003 preliminary injunction Order, Swift's compliance has been "negligible at best." Doc. #98, Mar. 25, 2003 Order at 8 n. 6)(emphasis added). Swift's summary judgment brief fails to demonstrate *any* compliance with the most basic requirements under 49 C.F.R. § 376.12 (h) mandating: (1) that its leases "shall clearly specify" items that may be initially paid for" by the carrier but charged back to Plaintiffs, "together with a recitation as to how the amount of each item is to be computed;" and, (2) that it provide Plaintiffs "copies of those documents which are necessary to determine the validity of the charge."

---

[5] *Dart Transit Co. Petition for a Declaratory Order*, 9 I.C.C. 2d 701, 708, 1993 WL 220182 *5 (1993). Swift's reliance on *Curtis, Inc. - Investigation*, No. MC-C-10806, 1984 WL 906683 (I.C.C., Jan. 12, 1984) is also unavailing. There, the I.C.C. discontinued a proceeding after finding that the carrier's violations were "minimal and outdated." *Id.* at 5. Here, in contrast, Swift's violations are *material* and *ongoing*.

Rather, Swift supports its motion with the Affidavit of Randall H. Eslick, who fails to offer any meaningful evidence that Swift has ever taken any steps to inform owner-operators how the charge-backs in question, e.g., fuel, are computed. This is not altogether surprising in light of Mr. Eslick's own testimony at the October 2002 Preliminary Injunction hearing specifically regarding fuel charge-backs:

Q. How is the driver supposed to know what Swift actually paid for the fuel if you, the head of the owner-operator division, don't know? How do you expect him to know what Swift actually paid for that fuel?

A. If a question was brought to me, I would get the answer for him.

***

Q. And can you point to Plaintiffs' Exhibit 1, and show me a clause in Mr. Hayes's contract with Swift, that describes how that transaction is calculated –

A. I can't.

Q. – or laid out?

A. I can't do that.

***

Q. Now, if Swift negotiated special discounts with those truck stops, that would – would be of interest to the owner-operator, would it not?

A. It sure would.

Q. Because the owner-operator is entitled to know how much money Swift advanced for the fuel or for anything else Swift purchased for them?

A. Yes, sir.

Q. And there's nothing in the agreement here with respect to fuel purchases that allows the owner-operator to figure that out?

A. No.

(Ex. 2, October 28, 2002 Tr. at 148-150). Moreover, now Mr. Eslick states in his Affidavit that Swift will not do *anything* to change the disclosures in its leases, absent an order from the Court.

> Swift has no intention to change the terminology of this Contractor Agreement absent an order from this Court to do so or to meet future interpretations of or changes in the law.

Eslick Affidavit at ¶ 10. In light of Mr. Eslick's prior testimony, and his current Affidavit, Swift's substantial compliance theory must be rejected out of hand.

1. Swift's Substantial Compliance Defense Fails to Legitimize its Old Form Lease Agreements

It is undisputable that Swift's Old Form Lease agreements completely failed to disclose or document any of the charge-backs at issue.[6] It is therefore not altogether surprising that Swift is so strident in its attempt to obscure its regulatory violations with a substantial compliance defense. Even so, Swift's substantial compliance theory falls of its own weight. Swift's reliance on *Renteria v. K&R Transp., Inc.*, No. 98-CV-290, 2001 WL 34780102 (C.D. Cal., June 22, 2001), is completely unavailing on this record. As a preliminary matter, the Ninth Circuit vacated the district court's rulings in *Rivas v. Rail Delivery Servs., Inc.*, 423 F. 3d 1079 (9th Cir. 2005). Further, in *Renteria*, the district court considered parol evidence ostensibly showing that "the defendants took all practical steps both to apprise the plaintiffs of the required information and to make available to the plaintiffs the details of the method defendants used in making their calculations." *Id.* Here, Swift should be precluded from introducing parol evidence because its Form Lease Agreements contain a uniform integration clause specifying:

> Entire Agreement. This Agreement, and any other document specifically referred to or contemplated by this Agreement constitutes the entire Agreement and understanding between the parties. This Agreement shall not be modified or amended in any respect except by written instrument, signed by the parties hereto.[7]

Even if the Court were inclined to allow such parol evidence, Swift still fails to square this case with the finding in *Renteria* that "the defendants took all practical steps both to apprise the plaintiffs of the required information and to make available to the plaintiffs the details of the method defendants used in making their calculations." *Id.* In fact, Swift

---

[6] Pl. Statement of Material Facts as to Which there is No Genuine Dispute ("Pl. S.M.F." ¶ C; Exhibits C-D , Belcher Leases; Exhibits F-J, Mayfield Leases; Exhibit K, Hayes Lease; Exhibit L, Helton Lease.

[7] *See* Pl. Mem. Ex. I, Mayfield Lease at ¶ 16; Ex. K, Hayes Lease at ¶ 16; Ex. L. Helton Lease at ¶ 16)(*see also* Swift Mem. Ex.. 9, Belcher Sept. 11, 2001 Lease at ¶ 16; Ex. 11, Belcher January 1, 2002 Lease at ¶ 16. The parol evidence rule prohibits the introduction of evidence offered by Swift purporting to show disclosures concerning the charge-backs at issue in the context of orientations, manuals, and the like. *See In re: Viscount Air Services, Inc.*, 232 B.R. 416, 446 (D. Ariz. 1998)("law prevents changing written contracts by hint, suggestion or oral testimony....").

proffers no evidence that it ever took *any* steps to disclose "the details of the method...used in making [Swift's] calculations." Indeed, Swift's substantial compliance defense with respect to insurance charge-backs is decimated by the testimony of Swift's former vice-president of claims and risk management confirming that information regarding Swift's mark-ups to insurance premiums was *never disclosed* to Owner-Operators: "Q: So no communications were made to the driver that you're aware of in your department as to what the actual premium was? A. That's correct." *See* Pl. Mem., Ex. M, Ayotte Tr. at 75:7-25.

Finally, even to this day, Swift has stubbornly refused to disclose the information at issue on the grounds that it is "confidential." Specifically, in its discovery responses, Swift has asserted the following objection:

> Swift objects due to the ***highly confidential nature of this information.*** Subject to this objection, the answer to this interrogatory is contained in a large volume of documents, which Swift will produce under Fed. R. Civ. P. 33(d), ***subject to an appropriate protective order***, from which these items can be identified.[8]

In sum, Swift's failure to produce such information *in discovery* serves only to cement the conclusion that it never apprised owner-operators of the details of such mark-ups *in the first instance*, thus rendering its reliance on *Renteria*, and its substantial compliance defense, specious.

2. Swift's Substantial Compliance Defense Fails to Legitimize its Revised Form Lease Agreements

While Swift's Revised Form Lease agreements disclose the amounts of some of the items to be charged-back, they still do not disclose how the charges are to be calculated, and Swift still refuses to provide documentation allowing its owner-operators to determine the charge's validity as follows:

- **Insurance**

While Swift's Revised Form Lease Agreement sets forth charges for Occupational

---

[8] Pl. Mem., Ex. V, Defendants' Answers to Plaintiffs, Interrogatories, dated October 25, 2006, Answer to interrogatory No. 12; ; ,Pl. Mem. Ex. W, Swift Defendants' Responses to Plaintiffs Request for the Production of Documents dated October 26, 2006, Response to RFP No. 16.

Accident Insurance, Non-Trucking Liability Insurance, and Physical Damage Insurance - "O/O Collision Insurance," it does nothing more than add a footnote - *literally a footnote* - purporting to validate charges for these insurance coverages as follows:

> *The charge to CONTRACTOR for this item includes the cost of the item, plus any direct or indirect administrative costs associated with securing, offering and maintaining the item.[9]

This, of course, is patently inadequate. Finally, Swift fails to demonstrate that it has provided Plaintiffs "copies of those documents which are necessary to determine the validity of the charge." To the contrary, it has refused to disclose such information even in the context of discovery due to what it claims to be "the highly confidential nature of this information." (Pl. Mem. Ex. W).

- **Fuel**

Similar to its vague "disclosures" regarding insurance charge-backs, Swift's Revised Lease contains the following opaque notation with respect to the addition of "administrative expenses," on top of fuel charge-backs:

> 15. Purchase of Fuel. CONTRACTOR may purchase fuel from COMPANY at COMPANY'S facilities. ... The posted pump price may include the cost of the fuel, taxes, other governmental fees and charges, delivery freight costs and administrative expenses.[10]

Once again, this is a patently inadequate disclosure under 49 C.F.R. § 376.12 (h) which mandates that the lease provide a "recitation as to how the amount of each item is to be computed." It is further undisputed that Swift has not provided Plaintiffs "copies of those documents which are necessary to determine the validity of the charge." Again, it

---

[9] Pl. Mem., Ex. E, Belcher Lease at STC 12148)(*see also* Hayes Leases attached hereto as Ex. 1 at STC 14367; Ex. 2 at STC 14383; Ex. 3 at STC 14413). Plaintiffs inadvertently failed to attach the Revised Form Leases of Plaintiff David B. Hayes to their motion for summary judgment. They were however attached to Swift's motion as Exhibits 18, 19, 20. They are also attached to this Opposition as Exhibits 3, 4, and 5.

[10] Pl. Mem., Ex. E, Belcher Lease at STC 121444; Ex. 1, Hayes Lease at STC 14362; Ex. 2, Hayes Lease, STC 14378; Ex.. 3, Hayes Lease, STC 14409.

has refused to disclose such information even in the context of discovery due to what it claims to be "the highly confidential nature of this information." (*See* Pl. Mem. Ex. W).

- **Qualcomm**

The Revised Form leases do not make any disclosures regarding any administrative fees added on to Qualcomm charge-backs. The only disclosure made regarding Qualcomm charges is that the weekly charge would be $26.42. (Pl. Mem., Ex. E at 12148, Belcher Lease at STC 121444). Again, this fails to comply with the Regulations. Notably, Swift's *newest* form lease dated January 1, 2007, attached to its motion as Exhibit 25, now contains an asterisk (*) next to the weekly Qualcomm charge-back figure of $26.42 which, like insurance, vaguely states that the charge-back includes "any direct or indirect administrative costs..." While this disclosure is also insufficient, it serves to confirm that the Revised Lease completely hid such charges.

- **Accounting Services**

The make-up of "accounting services" charge-backs was also undisclosed in the Revised Leases. Rather, all that was disclosed was a "weekly" charge of $15.00. (Pl. Mem., Ex. E at 12148, Belcher Lease at STC 12148). While Swift denies adding on administrative charges for accounting services - which only goes to damages - it nonetheless failed to provide "copies of those documents which are necessary to determine the validity of the charge." Indeed, Swift's defense that it does not mark-up these charges only serves to underscore the importance of showing its owner-operators where it is, or is not, adding on such charges, and by how much.

- **Comdata Cash Advance Service Fees**

Swift's Revised Form Lease recites that it may deduct any amounts for cash advances "plus three dollars ($3.00) to cover costs and administrative expenses." (Pl. Mem., Ex. E at 12148, Belcher Lease at STC 12144). Once again however, the make-up of the charge-back is not disclosed, and Swift has failed to provide "copies of those

documents which are necessary to determine the validity of the charge."

In sum, none of Swift's leases comply with the Regulations, and its substantial compliance defense should be rejected both as a matter of law and fact.

C. Plaintiffs Are Not Required to Prove Damages as a Prerequisite to Establishing Swift's Liability

Swift's assertion that Plaintiffs must prove they sustained damages as a predicate for establishing liability is legally and logically untenable. First, the extent and amount of damages is necessarily a fact intensive inquiry, precluding summary judgment in any event. Indeed, it is for that reason that Fed. R.Civ. P. 56 (c) expressly provides:

> A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Id. Second, as Swift acknowledges in its own papers, Plaintiffs' claims for injunctive relief must still be adjudicated. Thus, the amount of damages Plaintiffs ultimately prove is simply irrelevant to the issue of whether the Court is empowered to render a liability determination for the purpose of determining appropriate injunctive relief. Indeed, Swift's theory has previously been rejected by at least one other district court in a similar Truth-in-Leasing case. In *OOIDA v. Allied Van Lines*, 231 F.R.D. 280, 284 n. 10 (N.D. Ill. 2005) the court held:

> [Defendants] actually go further, suggesting that the individualized issues as to damages are actually a component of liability rather than remedy because aq showing of sustained damages as a predicate of liability. That just won't fly. When the statute says a carrier is "liable for damages sustained by a person...," it identifies the amount of any recovery rather than liability. Liability is a function of whether or not a "violation of this part" has occurred .... If so, the carrier is liable for the consequences of that violation (for example, the injunctive relief already discussed) even in the absence of a proof of individual damages.

Finally, Swift's detrimental reliance theory has no validity - and certainly no precedent - in the context of actions arising under the statute at issue in this case, 49 U.S.C. § 14704(a)(2), which authorizes a private right of action "for damages" sustained as a result of Swift's violations of the federal motor carrier safety regulations, 49 C.F.R. §§ 376.11;

376.12. The authority for Swift's novel detrimental reliance theory is the Eleventh Circuit's holding in *Turner v. Beneficial Corporation*, 242 F.3d 1023 (11th Cir. 2001), a case arising under the federal Truth-in-Lending Act ("TILA"), which is inapposite as a matter of both law and logic. As a starting point, TILA sets forth a comprehensive remedial scheme authorizing statutory damages, *e.g.*, in the case of an individual action, damages "twice the amount of any finance charge in connection with the transaction," as well as actual damages. *Id.*, 242 F.3d at 1026 n. 5. Importantly, the courts have reasoned that - given the multiple remedies available under the TILA- "[w]ithout a causation requirement, actual damages would overlay statutory damages for no apparent reason." *Perrone v GMAC*, 232 F.3d 433, 436 (5th Cir. 2000). To resolve this perceived anomaly under TILA, the *Turner* court points to legislative history supporting the need for different standards for statutory and actual damage, including a more stringent requirement where actual damages are sought:

> Section 130(a) of TILA allows a consumer to recover both actual and statutory damages in connection with TILA violations. Congress provided for statutory damages because actual damages in most cases would be nonexistent or extremely difficult to prove. To recover actual damages, consumers must show that they suffered a loss because they relied on an inaccurate or incomplete disclosure.[11]

The court further noted that, "[t]he legislative history emphasizes that TILA provides for statutory remedies on proof of a simple TILA violation, and requires the more difficult showing of detrimental reliance to prevail on a claim for actual damages." *Id.*, 242 F.3d at 1028. Here, by contrast, the private right of action created under 49 U.S.C. § 14704(a)(2) has no provision for statutory damages and makes no reference to "actual" damages. Accordingly, the rationale for a more onerous requirement of detrimental reliance in the case of "actual" damages under the Lending Act is not present here.

D. Swift is Not Entitled to Judgment on Plaintiffs' Escrow Claims

Paragraph 6 of the Swift lease requires owner-operators to post a bond to

---

[11] *Id.* (citing H.R. Rep. No. 193,104, 104th Con., 1st Sess. (1995)).

guarantee performance under the agreement:

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

In *OOIDA v. Arctic Express,* 159 F. Supp. 2d 1067 (S.D. Ohio 2001), the Court found a similar provision authorizing use of the maintenance escrow for a broad range of obligations to be in violation of the Regulations. Section 376.12(k)(2) requires the lease to state "the specific items to which the escrow fund can be applied." The Arctic Court explained that transforming the escrow fund into a general fund available to satisfy any obligation of the operator, violated both the letter and the spirit of the regulation. *Id.* at 1077. Arctic violated the letter of the law when it did not identify the "specific items" to which the escrow fund can be applied. *Id.* at 1078. The Court reasoned that "the Agreements' 'specific items' are thus not 'specific' since in practice they include any and all conceivable costs ... To satisfy 'any and all obligations of the Lessee under the Agreement.' When Defendants provided for everything to be covered by the maintenance fund, they, in reality, specified nothing." *Id.* A similar result must obtain here as well.

E. Swift is Not Entitled to Judgment on Plaintiffs' Forced Purchase Claims

The fact that Swift's leases merely recite the language of Section 376.12(i) stating that owner-operators are not required to purchase the items at issue is not conclusive. Indeed, other courts have rejected similar arguments, thus precluding Swift's motion for summary judgment. *See Tayssoun*, 2005 WL 1185811 at *19.

F. Swift is Not Entitled to Summary Judgment on Plaintiffs' Claims for Injunctive Relief

Swift's contention that the remedies for its violations of the Truth-in-Leasing Regulations should be adjudicated at the summary judgment stage is, at best, premature. Nonetheless, the record at this stage conclusively demonstrates that injunctive relief is not only appropriate, but absolutely necessary to compel Swift to comply with the mandatory disclosure requirements under the Regulations. While Swift would have the Court conclude

that it has rectified the violations of the past through the issuance of a new lease, an examination of the new lease confirms, yet again, that Swift has no intention of making the disclosures required by the Regulations. For example, in the Schedule of charge-backs accompanying the lease, Swift adds an asterisk (*) to a number of the charge-back items, qualified by the following:

> *The charge to CONTRACTOR for this item includes the cost of the item, plus any direct or administrative costs associated with securing, offering and maintaining the item, plus an additional amount to provide a return to COMPANY in exchange for undertaking the risk of securing, offering and maintaining such products, equipment and services.

Swift Mem., Ex. 25.[12] Further, as previously noted, Mr. Eslick, the regional Director of Swift's Owner-Operator Division, states in his Affidavit that "Swift has no intention to change the terminology of this Contractor Agreement absent an order from this Court to do so or to meet future interpretations of or changes in the law." Eslick Affidavit at ¶ 10.

In sum, if this is Swift's idea of compliance with the Regulations, or its testimonial that there is "no reasonable expectation" that the challenged conduct will be re-instated, then Plaintiffs submit that an injunction is the *only* way that Swift will *ever* be brought into compliance with the Regulations.

---

[12] Mr. Eslick states that Swift was to require all owner-operators to execute the agreement by 2007. *Id.* Plaintiffs Belcher, Hayes, Helton, and Mayfield do not currently have leases with Swift. However, OOIDA still retains its associational standing because it has a number of members who are currently under lease to Swift. *See* Declaration of James Johnston, Ex. 6). "The doctrine of associational standing permits an organization to ''sue to redress its members'' injuries, even without a showing of injury to the association itself.'' *Oregon Advocacy Center v. Mink*, 322 F. 3d 1101, 1109 (9th Cir. 2003). Associational standing exists where: a) association members would otherwise have standing to sue in their own right; b) the interests sought to be protected are germane to the organization's purpose; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* (*citing Hunt v. Washington State Apple Adver. Comm''n,* 432 U.S. 333, 343 (1977). As demonstrated in the Declaration of OOIDA's President, James Johnston (Ex. 6), OOIDA plainly satisfies these prerequisites in this case.
Also, insofar as the Court has ruled that it denied Plaintiffs' motion for class certification, *without prejudice*, Plaintiffs submit that the putative class also retains its provisional standing to seek injunctive relief pending further class certification proceedings. *County of Riverside v. MacLaughlin*, 500 U.S. 44, 51-52 (1991).

III. CONCLUSION

For all of the foregoing reasons, Defendant's Motion for Partial Summary Judgment should be denied and Plaintiffs' Motion for Partial Summary Judgment on Liability should be granted.

Respectfully submitted,

By: /s/ Daniel Cohen
Paul D. Cullen, Sr.
Daniel E. Cohen
Joyce E. Mayers
THE CULLEN LAW FIRM, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007
(202) 944-8600

Randall D. Wilkens
Brian J. Campbell
Bonn & Wilkins, Chartered
805 North Second Street
Phoenix, Arizona 85004
(602) 254-5557

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on February 23, 2007, I directed the foregoing to be sent by First-Class Mail to Messrs. Bibicoff and Webb, and to be electronically filed with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

James C. Sullivan, Esq.
SHUGHART THOMSON & KILROY, PC
Twelve Wyandotte Plaza
120 West 12th Street, Suite 1700
Kansas City, Missouri 64105

Paul M. Briggs, Esq.
SHUGHART THOMSON & KILROY, PC
One Columbus Plaza
3636 N. Central Avenue, Suite 1200
Phoenix, Arizona 85012

Michael R. Ross, Esq.
MEYER, HENDRICKS & BIVENS, PA
Phoenix Corporate Center
3003 North Central Avenue, Suite 1200
Phoenix, AZ 85012

Wayne Bibicoff
202 Clark Street
Clearfield, PA 16830
(First Class Mail Only)

Gerald Webb
1225 White Fern Road,
Beech Bluff, TN 38313-7705
(First Class Mail Only)

By: /s/ Daniel Cohen