UNITED STATES DISTRICT COURT
DISTRICT OF KANSAS

KIRK ROBERTS, FARAJI ARTURO COUNCIL, TERRENCE COLVIN-WILLIAMS, REGINALD BRADLEY, DAVID COLEMAN, and CARL McROBERTS JR., on behalf of themselves and all others similarly situated, Plaintiffs, v. TRANSAM TRUCKING, INC., OLATHE NOBLE EQUIPMENT LEASING, INC., and JACOBSON HOLDINGS, INC., Defendants.	)	Civil Action No. 2:21-cv-02073-JWB-GEB

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF FACTS, STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS, AND OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

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PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF FACTS[1]

Response to Defs.' ¶ 1: Admitted that TransAm and ONE are wholly-owned subsidiaries of JHI; denied that they are "separate entities." The two companies share a holding company, officers, employees, etc. Pls.' Stmt. Add'l Facts ¶¶ 66-71.

Response to Defs.' ¶ 4: Admitted that TransAm and ONE have some of their own employees; denied that all of their employees are "separate and apart from JHI," which is responsible for payroll services and employee benefits for TransAm employees and has "the authority to hire, suspend, discharge and fix and modify the duties, salary or other compensation of employees" of TransAm. Pls.' Stmt. Add'l Facts ¶¶ 66-71.

Response to Defs.' ¶¶ 5-6: Denied that TransAm's driver recruiters are TransAm employees and that Jacobson does not employ driver recruiters. Jacobson employs the Director of Recruiting, pays incentives based on the number of drivers that driver recruiters recruit, is responsible for payroll services and employee benefits for TransAm employees, and has "the authority to hire, suspend, discharge and fix and modify the duties, salary or other compensation of employees" of TransAm. Pls.' Stmt. Add'l Facts ¶¶ 66-71.

Response to Defs.' ¶ 9: Admitted that TransAm's orientation program consists of at least two, to as many as seven, days of orientation, lasting approximately 7.5 hours per day. Denied that what drivers record on the Garmin devices is their actual time spent in orientation. Pls.' Stmt. Add'l Facts ¶ 76; Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 22, 24.

Response to Defs.' ¶ 11: Admitted that orientation is ***primarily*** conducted by TransAm employees. Denied that orientation is exclusively conducted by TransAm employees. The following employees, who are also employed by ONE and/or JHI, have had roles in orientation:

[1] To the extent that Plaintiffs admit any of the facts herein, they are doing so for purposes of summary judgment and do not waive the right to contest these facts at trial.

Dean Cochran, Carrie Reeves, Christina Pope. Pls.' Ex. 41, Cochran Dep. 7:13-8:9, 22:19-24:8; Pls.' Ex. 42, Murray Dep. 10:7-12; Pls.' Ex. 43, Sybesma Dep. 79:17-80:1, 81:2-83:23. Additionally, the three Defendants are affiliated; TransAm is wholly owned by Jacobson; and Jacobson has extensive payroll and human resources responsibilities for TransAm employees. *See* Response to Defs.' ¶ 16; Pls.' Stmt. Add'l Facts ¶¶ 68-70.

Response to Defs.' ¶ 12: Admitted that information regarding TransAm's Owner Operator program is presented to new drivers at orientation by Jesse Miller. The "program" is characterized in some places as the "Independent Contractor Program." *See* Pls.' Ex. 13, ONE Referral Incentives. In certain contexts, "Owner Operators" refers exclusively to drivers who bring their own vehicles and do not lease from ONE. Pls.' Ex. 41, Cochran Dep. 37:16-38:11.

Response to Defs.' ¶ 13: Admitted that Jesse Miller is a TransAm employee. Denied that Miller is not a JHI employee. *See* Response to Defs.' ¶ 4; Pls.' Stmt. Add'l Facts ¶¶ 66-71.

Response to Defs.' ¶ 16: Denied that Christina Pope is not an employee of JHI. *See* Response to Defs.' ¶ 4; Pls.' Ex. 43, Sybesma Dep. 79:17-80:1 ("[Pope] works for [JHI].").

Response to Defs.' ¶¶ 17-18, 20: Admitted that TransAm ***initially*** pays the travel expenses for new drivers coming to orientation and pays for and provides lunch to new drivers during orientation and that drivers do not ***initially*** pay TransAm to attend orientation. Denied to the extent that TransAm enforces its policy of reducing drivers' pay to recoup orientation expenses, including motel and travel expenses, from drivers who resign prior to working 90 days for TransAm. Defs.' Ex. J, Company Driver Handbook, 2-7.

Response to Defs.' ¶ 21: Denied that each of the plaintiffs were paid the applicable minimum wage for time spent in orientation. Pls.' Stmt. Add'l Facts ¶¶ 72- 78; Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 24-25; Pls.' S.J. Opp., Sect. II.

Response to Defs.' ¶ 24: Admitted that TransAm pays drivers ***(post-orientation)*** for time logged as "on duty" in their ELDs for DOT purposes. Admitted that TransAm instructs drivers they "must be On Duty when performing work for the company." Denied as to any legal conclusion about the compensability of time not logged as "on duty." Pls.' S.J. Opp., Sect. II.

Response to Defs.' ¶ 25: Admitted that TransAm's Handbook contains the quoted language. Denied that drivers are actually relieved of all duties and responsibilities for the care and custody of the vehicle, its accessories and cargo when they remain in or near the truck. Pls.' Stmt. Add'l Facts ¶¶ 82-83. Denied as to any legal conclusion about the compensability of time logged as "sleeper" or "off duty" under the FLSA. Pls.' S.J. Opp., Sect. III.

Response to Defs.' ¶ 27: Admitted that TransAm's drivers are never on duty for 24 hours per day. Denied that TransAm's drivers are not "on call" ***under the FLSA*** when off duty for DOT purposes. Pls.' Stmt. Add'l Facts ¶¶ 82-83; Pls.' S.J. Opp., Sects. II, III.

Response to Defs.' ¶ 28: Denied. The time drivers spend in the sleeper berth is not their own and they have obligations to TransAm while in the truck. Pls.' Stmt. Add'l Facts ¶¶ 82-83.

Response to Defs.' ¶ 29: Denied. TransAm's company drivers are not free to choose where they sleep, and leave their tractor and trailer while they do so, because they must follow a strict timetable and route for purposes of on-time delivery and fuel optimization and must obtain permission from their driver manager for any out out of of route miles. *See* Defs' Ex. J, Company Driver Handbook, 1-26 (drivers are accountable for "follow[ing] the route provided by TransAm's GPS and adher[ing] to the fueling location(s) and gallon requirements of the fuel optimization system"); 1-38 (reasons for termination include "[n]on-compliance with the fuel optimization program"); 2-7 (drivers "must receive authorization from their Driver Manager for miles driven that are out of the normal route of operation for dispatched loads or hometime").

Response to Defs.' ¶ 31: Admitted that Defendants' expert identified three company drivers who each had one week below minimum wage in the amounts cited. Denied that each of the company driver plaintiffs were paid the applicable minimum wage for all time worked outside of orientation. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 26-27; Pls.' S.J. Opp. Sects. III, IV.

Response to Defs.' ¶ 32: Admitted that TransAm performs a "true up" based on drivers' ***hours reported as "on duty" for DOT purposes with the intent*** to ensure minimum wage is paid to each company driver for such hours. Denied that drivers' reported hours are the only hours compensable under the FLSA. *See* Pls.' Stmt. Add'l Facts ¶ 76; Pls.' S.J. Opp., Sects. II-IV.

Response to Defs.' ¶ 33: Denied that the ICA is only "a lease whereby TransAm leases semi-tractors and driving services from contractors by entering into an ICA with each contractor for each tractor leased to TransAm." The ICAs also contain other provisions, including (*inter alia*) provisions whereby drivers purchase certain services from TransAm, TransAm takes deductions from drivers' compensation, drivers agree to use their trucks to perform freight deliveries for TransAm, and TransAm has exclusive possession, control, and use of the trucks and is considered the owner of the trucks. Pls.' Stmt. Add'l Fact ¶¶ 85-100.

Response to Defs.' ¶ 34: Admitted that the Agreement states that it is between the driver and TransAm; however, answering further, the Agreement also provides that the monies will be remitted to ONE and incorporates obligations in the ELA. Pls.' Stmt. Add'l Facts ¶ 89. Additionally, Jacobson, TransAm, and ONE are affiliated entities, and Jacobson is responsible for financial, billing, and collection services for TransAm, etc. Pls.' Stmt. Add'l Facts ¶¶ 66-71.

Response to Defs.' ¶ 38: Admitted that the ICA states that contractors are paid by weekly settlements; denied that TransAm's contractors are always paid by weekly settlements; sometimes, they receive no pay. *See, e.g.*, Pls.' Ex. 38, Settlement Statements, pp. 45-71.

Response to Defs.' ¶ 39: Admitted that the ICA states that drivers authorize certain deductions from their settlements; denied that drivers are able to choose/authorize all deductions. For example, drivers are required to obtain physical damage insurance through Defendants. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶ 49. Additionally, the ICA permits TransAm to make certain deductions regardless of drivers' authorization. ICA, Defs.' Ex. B, ¶¶ 1(i), 9, 14, 15.

Response to Defs.' ¶ 42: Admitted that the ICA identifies these items to which the escrow can be applied. Denied that the specific items to which the escrow can be applied are set forth with sufficient clarity. Pls.' S.J. Opp., Sect. V.B.1. Answering further, the ICA contains additional provisions about the use/retention of escrow funds. Pls.' Stmt. Add'l Facts ¶¶ 90-96.

Response to Defs.' ¶ 45: Admitted that the ICA contains provisions relating to the timing and conditions upon which the escrow funds may be returned to the driver at the end of the contractual relationship. Denied that this information is set forth with sufficient clarity. Pls.' S.J. Opp., Sect. V.B.1.

Response to Defs.' ¶ 49: Denied that drivers are not required to purchase required insurance through TransAm. Drivers are required to purchase physical damage insurance through TransAm. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶ 49.

Response to Defs.' ¶ 52: Denied that the cost of obtaining any insurance option through TransAm is clearly set out in the ICA. The ICA's Insurance Addendum does not provide an amount for the cost of obtaining physical damage insurance; it states only "Physical Damage @ Stated Value." Pls.' S.J. Fact Stmt. (ECF No. 162) ¶ 47. Additionally, the amounts on the Insurance Addendum often do not match the deducted amounts. Pls.' Stmt. Add'l Facts ¶ 119.

Response to Defs.' ¶ 53: Admitted that the Addendum states this; denied that it is accurate. Drivers are required to purchase physical damage insurance through TransAm. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶ 49.

Response to Defs.' ¶ 57: Denied that insurance costs change and that only insurance costs are deducted from drivers' compensation. The amounts charged for insurance may change, but that does not mean that the actual "costs" change. For example, Defendants' mark-up for physical damage insurance is not tied to any actual costs to Defendants, and the weekly amount charged to drivers stays the same each week, even though the amount charged to Defendants goes down. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 52-55, 58. Additionally, deductions often are not accurately reflected on settlement statements. Pls.' Stmt. Add'l Facts ¶ 119.

Response to Defs.' ¶ 66: Denied that the ICA states that any discounts/rebates for fuel obtained by TransAm accrue solely to TransAm's benefit; the ICA incorporates a document entitled "TransAm Owner-Operator Program," which states that "100% of all fuel discounts are passed on to owner-operators." Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 31-32.

Response to Defs.' ¶ 67: Admitted that Droescher's affidavit states that TransAm does not receive any rebates or kickbacks for the fuel discount it has negotiated with certain providers and all discounts are passed on to contractors; denied that this statement is entirely accurate. *See* Pls.' S.J. Opp. at V.B.3.b.

Response to Defs.' ¶ 68: Denied that the ICA and Exhibit E clearly indicate a negative fuel surcharge (*i.e.*, a deduction from earnings). The ICA and all other documents state that a fuel surcharge will be "paid." Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 34-37. Starting in early 2020, Exhibit E to the ICA contained numbers in parentheses but did not state that there would be a negative fuel surcharge and continued to state only that a fuel surcharge would be "paid." *Id.*, ¶¶

38-39. Moreover, Defendants did not modify any other documents and also continued to use the old Exhibit E after that time. *Id*., ¶¶ 40-43.

Response to Defs.' ¶ 69: Admitted that the ELA states that it is between the driver and ONE; however, answering further, the Agreement also provides that the equipment is leased to TransAm. Pls.' Stmt. Add'l Facts ¶ 102. Additionally, Jacobson, TransAm, and ONE are affiliated entities, and Jacobson is responsible for financial, billing, and collection services for TransAm, etc. *Id.* ¶¶ 66-71.

Response to Defs.' ¶ 71: Admitted that the ELA states this; denied that the ELA provides that the only amounts to which the performance escrow fund can be applied are "any and all amounts owed or payable by Lessee pursuant to this Agreement." The ELA also states that drivers may only receive back monies in the performance escrow fund if they satisfy all of their obligations under the ELA and that escrow funds may be used upon termination to "offset against any amounts due Lessee." Pls.' Stmt. Add'l Facts ¶¶ 103-09. Also denied that the ELA sufficiently specifies the items to which the performance escrow fund can be applied. *Id*., Pls.' S.J. Opp., Sect. V.B.1.

Response to Defs.' ¶ 74: Admitted that the ELA states this. Denied that this states the conditions for return of performance escrow funds with sufficient clarity. Pls.' S.J. Opp., Sect. V.B.1.

Response to Defs.' ¶ 75: Admitted that the ELA says this. Denied that the provision clearly states what the reserve may be used for. Pls.' Stmt. Add'l Facts ¶¶ 103-09; Pls.' S.J. Opp., Sect. V.B.1.

Response to Defs.' ¶ 77: Admitted that the ELA says that; denied that this amount "represents Lessor's cost for maintaining such insurance coverage plus an administrative fee"

and denied that the "specified amount" in the ELA was what was always charged to drivers. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 50-58.

Response to Defs.' ¶ 78: Denied. The Addendum does not include a dollar amount but states only that physical damage insurance will be deducted "@ Stated Value." Additionally, though the Addendum states that the insurance deductions are voluntary, drivers must purchase physical damage insurance through Defendants. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 47-49.

Response to Defs.' ¶ 79: Denied. There is no dollar amount listed in the ICA, and the dollar amount listed in the ELA is not always the amount actually deducted. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 47, 50-51, 57-58.

PLAINTIFFS' STATEMENT OF ADDITIONAL UNCONTROVERTED FACTS[2]

I. DEFENDANTS' AFFILIATION

66. Defendant Jacobson Holdings, Inc. ("Jacobson" or "JHI") is a corporation that wholly owns several companies, including Defendants TransAm Trucking, Inc. ("TransAm") and Olathe Noble Equipment Leasing, Inc. ("ONE"). 3d Am. Compl. (ECF No. 109) ¶¶ 28, 38, 40; Jacobson Ans. to 3d Am. Compl. (ECF No. 113) ¶¶ 28, 38, 40.

67. Defendants are all headquartered at the same facility in Olathe, Kansas, and share common officers, a common executive team, and common directors, nearly all of whom are employed by JHI. 3d Am. Compl. (ECF No. 109). ¶¶ 42-44; Jacobson Ans. (ECF No. 113), ¶¶ 42-44; TransAm Ans. (ECF No. 114), ¶¶ 42-44; ONE Leasing Ans. (ECF No. 115), ¶¶ 42-44; Pls.' Ex. 44, Annual Reports.

68. JHI employs "executives who . . . provide some professional services to TransAm and/or ONE Leasing." Jacobson Ans. to 3d Am. Compl. (ECF No. 113) ¶ 45.

[2] For ease of reference, Plaintiffs have continued the numbering from their statement of undisputed facts in support of summary judgment, which ended with ¶ 65. *See* Pls.' S.J. Fact Stmt. (ECF No. 162) at 12.

69. JHI has entered into Management and Administrative Services Agreements with both TransAm and ONE, pursuant to which JHI has agreed to provide the following oversight and management services to TransAm and ONE: management and oversight responsibilities; human resources, payroll, employee benefits, and personnel services; project development services, secretarial and clerical services; financial, accounting, billing and collection services; IT support; management of insurance; etc. Pls.' Ex. 45, Mgmt. Serv. Agreements.

70. Pursuant to the Management Services Agreements, JHI is responsible for payroll services and employee benefits for TransAm and ONE employees and also has "the authority to hire, suspend, discharge and fix and modify the duties, salary or other compensation of employees" of TransAm and ONE. Pls.' Ex. 45, Mgmt. Serv. Agreements, ¶ 1(b)).

71. JHI employs management employees whose responsibility is to oversee driver recruiters and recruitment of TransAm drivers, including Marketing Coordinator, Vice President of Human Resources, and Director of Recruiting, and those managerial employees are given incentives for recruiting individuals to drive for TransAm. Pls.' Ex. 46, JHI Incentive Programs.

II. ORIENTATION PAY

72. The Garmin devices used during orientation are stored in orientation classrooms. Pls.' Ex. 47, McFarland Dep. 60:7-9; Pls.' Ex. 48, Pope Dep. 19:20-20:20.

73. The orientation classroom in Tampa is located in the main terminal ("T1") whereas the lot where drivers practice maneuvers (referred to as "T2") is located approximately 29 miles away from T1. Pls.' Ex. 49, Tucker Dep. 61:10-63:17.

74. The Orientation Manager for Tampa testified during his deposition that he takes experienced drivers directly from the hotel to "T2" on the third day of orientation. Pls.' Ex. 49, Tucker Dep. 111:17-114:19, 188:2-6.

75. These are the orientation "hours worked" records for the named plaintiffs:

Plaintiff	HOS ID	Day 1	Day 2	Day 3	Day 4	Day 5	Day 6	Day 7
Roberts	ROBK05	7:30	6:42	5:32	5:34	7:51	6:41	0:00
Curtis (2018)	CURJOH	7:30						
Curtis (2019)	CURJOH	7:30	2:54	0:00	0:00			
Colvin-Williams	COLTE	8:00	6:31	6:20				
Coleman	COLD16	8:00	6:13	5:44	3:47			
McRoberts	MCRCA	7:30	6:12	7:48	5:06			

See Pls.' Ex. 26, On-duty Logs.

76. Defendants' expert, Robert Crandall, conceded at his deposition that the "hours worked" data he used to determine whether drivers were paid at least minimum wage was only "on-duty driving and on-duty non-driving time" logged for purposes of compliance with DOT regulations limiting drivers' hours of service. Pls.' Ex. 50, Crandall Dep. at 18:6-18:9.

77. Crandall's orientation minimum wage analysis includes TransAm's records of "hours worked" and compensation paid to drivers, including Carl McRoberts, Terrence Colvin-Williams, Manuel Cuevas, Daryl Salmon, and Timothy Jarman, ***after*** they converted to lease driver status. *See* Defs.' Ex. I, Crandall Report ¶ 14, n. 11; Pls.' Ex. 51, Crandall Output, Orientation Periods (Driver Type = Both); Pls.' S.J. Fact Stmt. (ECF No. 162) ¶ 24.

78. Crandall's orientation minimum wage analysis includes subsequent payments made by TransAm to "cure" Florida minimum wage violations identified by Plaintiffs' counsel, including to David Coleman. *See* Defs.' Ex. I, Crandall Report ¶ 14, n. 9; *compare id.*, Table 1 (Coleman Total Driver Pay for 11/8/19 = $366.88) *with* Pls.' Ex. 52, Add'l Payroll Recaps (Coleman Taxable Earnings for 11/8/19 = $310.90); Pls' Ex. 28; Pls' Ex. 29.

III. COMPANY DRIVER WAGES

79. Crandall analyzed the payroll records of five plaintiffs who worked for TransAm exclusively as company drivers (and never as lease drivers): David Coleman, Dennis Hubbard, Frederick Neal, John Curtis, and Robert Texeira. Those plaintiffs worked a total of 27

workweeks collectively. Including the company driver workweeks for the other plaintiffs (Cecil Brown, Darin Rucker, and Kirk Roberts), who went on to drive as lease drivers, Crandall analyzed a total of 30 workweeks. *See* Pls.' Ex. 51, Crandall Output, Regular Work Periods.

80. Once assigned their trucks, each of the company driver plaintiffs logged hours for DOT purposes as "sleeper." *See, e.g.*, Pls.' Ex. 53, DOT Logs (Hubbard).

81. The sleeper berths of TransAm's trucks do not have bathrooms. *See* Pls.' Ex. 61.

82. The job duties of company drivers include requirements to "[p]romptly report all accidents involving driver or Company equipment"; "[m]aintain constant care of refrigeration unit to ascertain it is operating efficiently and that the temperature is consistent with the bill of lading. Report any mechanical failure of the refrigeration unit promptly." Defs.' Ex. J, Company Driver Handbook, 1-25, 1-26.

83. All TransAm drivers must respond to alerts automatically generated by TransAm's system(s) while in the sleeper berth. *See, e.g.*, Pls.' Ex. 54, Message ("I HAD TO BREAK MY SLEEPER B[E]RTH CAUSE THE REEFER HAD A LOW FUEL ALARM").

84. Weeks in which Defendants' determined that driver pay was not sufficient to compensate drivers at the minimum wage are identifiable in Defendants' payroll records because they contain an entry for "Min Wage Adjust." *See, eg.*, Pls.' Ex. 52, Payroll Recaps.

IV. INDEPENDENT CONTRACTOR AND EQUIPMENT LEASE AGREEMENTS

A. Independent Contractor Agreements

85. Pursuant to the ICA, drivers agree to use the trucks they lease from ONE to perform freight deliveries for TransAm. ICA, Defs.' Ex. B, at 1.

86. The ICA identifies numerous deductions that TransAm will make from drivers' compensation. *Id*. at 9, ¶ 15.

87. The ICA identifies several "services" that drivers may purchase from TransAm, including truck maintenance services, insurance coverage, fuel optimization, etc. *Id*. at 2, ¶ 1(d), Insurance Addendum, PrePass Authorization Addendum,Fuel Optimizer Authorization Addendum.

88. Pursuant to the ICA, TransAm has "exclusive possession, control and use of the Equipment and shall assume complete responsibility for the operation of the Equipment for the duration of the lease created by this Agreement," and TransAm "may be considered the owner of the Equipment. . ." *Id*. at 2, ¶ 1(h).

89. Exhibit D states that the driver authorizes TransAm to make deductions for lease payments and expenses and remit those amounts to ONE. *Id*., Ex. D.

1. TransAm Performance Escrow Fund

90. The ICA establishes a "performance escrow fund," pursuant to which TransAm may make deductions from drivers' compensation for "any and all amounts owed or payable to Carrier" pursuant to numerous provisions of the ICA. *Id*. at 5, ¶ 4.

91. One of the items for which TransAm may make deductions from the performance escrow fund is the Maintenance Savings Account. *Id*.

92. The ICA states that "Carrier shall not apply the performance escrow fund to any items not specified in this Agreement." *Id*.

93. The ICA also states that "Contractor must satisfy all of Contractor's obligations specified under this Agreement in order to have the performance escrow fund returned following termination of this Agreement." *Id*.

94. The ICA states that "Contractor has the right to demand to have an accounting for transactions involving the performance escrow fund at any time." *Id*.

95. In early 2020, TransAm added an amendment to the ICA that provides that "after satisfaction of all of Contractor's obligations specified under the Agreement, the balance of the performance escrow fund, if any, shall be applied by Carrier to any and all amounts owed or payable by Contractor to the Leasing Company pursuant to the Equipment Lease Agreement." Pls.' Ex. 55, Roberts Amendment to Independent Contractor Agreement, Apr. 16, 2020.

96. The amounts deducted from drivers' compensation for the performance escrow fund are held by TransAm and recorded on drivers' compensation statements. Pls.' Ex. 38, Settlement Statements, pp. 45-71.

2. TransAm Maintenance Savings Account

97. The ICA provides for an optional Maintenance Savings Account "to cover costs and expenses relating to maintenance and repair of the equipment." ICA, Defs.' Ex. B at 2, ¶ 1(e).

98. The ICA states only that the amount to be deducted is "either a fixed dollar amount per week or a specific amount of cents per mile, not to exceed an aggregate amount of $15,000.00." *Id*.

99. The ICA states: "Interest will not accrue on any Maintenance Savings Account funds." *Id*.

100. The ICA does not state that drivers have a right to demand to have an accounting for transactions involving the Maintenance Savings Account. *Id*.

B. Equipment Lease Agreement

101. Pursuant to the ELA, drivers are required to make weekly lease payments, as well as other payments for the performance escrow fund, the maintenance/tire replacement reserve, insurance, etc. ELA, Defs.' Ex. S at 2, ¶¶ 7-8, Ex. B.

102. The ELA states that the motor carrier to whom the truck is leased is TransAm. ELA, Defs.' Ex. S, Ex. A.

1. ONE Leasing Performance Escrow Fund

103. The ELA establishes a performance escrow fund and states that "[t]he specific items to which the performance escrow fund can be applied by Lessor are any and all amounts owed or payable by Lessee pursuant to this Agreement." *Id*. at 2, ¶ 8.

104. The ELA also states that "Lessor shall not apply the performance escrow fund to any items not specified in this Agreement." *Id*.

105. However, the ELA also provides that "Lessee must satisfy all of Lessee's obligations specified under this Agreement in order to have the performance escrow fund returned following termination of this Agreement." *Id*. at 3, ¶ 8.

106. Additionally, in another section, the ELA states that escrow funds may used upon termination to "offset against any amounts due Lessee." *Id*. at 7, ¶ 26.

107. The ELA provides that "Lessee may receive an accounting of transactions involving the performance escrow fund at any time upon request." *Id*. at 3, ¶ 8.

108. The ICA incorporates an obligation to pay the ONE performance escrow fund, stating that deductions from drivers' earnings will include deductions relating to "Contractor's obligations for purchase or rental payments, related expenses or charges and/or *escrow fund obligations to a third party lender or lessor* pursuant to an equipment purchase or rental contract concerning the Equipment." ICA, Defs.' Ex. B, at 9, ¶ 15(j) (emphasis added).

109. The amounts deducted from drivers' compensation for the ONE performance escrow fund are held by TransAm and recorded on drivers' compensation statements. Pls.' Ex. 38, Settlement Statements, pp. 45-71.

2. ONE Leasing Maintenance/Tire Replacement Reserve

110. The ELA requires drivers to "pay into a maintenance/tire replacement reserve maintained by Lessor." ELA, Defs.' Ex. S at 2, ¶ 7.

111. "The reserve shall be used to purchase tires for the Equipment and to maintain and repair the Equipment (i.e., routine maintenance/repairs as necessitated by ordinary wear and tear) while this Agreement is in effect." *Id*.

112. The ELA also states that: "Upon termination or expiration of this Agreement (unless Lessee purchases the Equipment pursuant to paragraph 11 below), Lessor shall retain out of the reserve an amount necessary to perform preventative maintenance services and to make any required repairs to the Equipment, and an amount equal to the cost attributable to the amount of wear on the tires which occurred during the time this Agreement was in effect." *Id*.

113. In a subsequent paragraph, the ELA also provides that the Reserve may be used upon termination to "offset against any amounts due Lessee." *Id*. at 7, ¶ 26.

114. The amounts deducted from drivers' compensation for the ONE maintenance/tire replacement reserve are held by TransAm and recorded on drivers' compensation statements as "ONE MAINT ESCROW MILES." Pls.' Ex. 38, Settlement Statements, pp. 45-71.

115. The ELA provides that drivers "may receive an accounting of transactions involving the reserve at any time upon request." ELA, Defs.' Ex. S at 2, ¶ 7.

C. Plaintiffs' Request for Accounting

116. On behalf of the named plaintiffs and eight opt-in plaintiffs, Plaintiffs' counsel requested that Defendants provide an accounting of all transactions involving the TransAm performance escrow fund and the ONE maintenance/tire replacement reserve, but Defendants refused to provide this information. 3d Am. Compl. (ECF No. 109), ¶¶ 186-87; Jacobson Ans.

(ECF No. No. 113), ¶¶ 186-87; TransAm Ans. (ECF No. 114), ¶¶ 186-87; ONE Ans. (ECF No. 115), ¶¶ 186-87; Pls.' Ex. 56, Pls.' Jan. 21, 2022 Ltr.; Pls.' Ex. 57, Defs.' Feb. 4. 2022 Ltr.

D. Insurance Disclosures

117. The ICA provides that, if drivers obtain required insurance through TransAm: "Carrier will provide Contractor with a certificate of insurance for each such policy as required by 49 CFR § 376.12. Carrier will also provide Contractor with a copy of each such policy upon request of Contractor." ICA, Defs.' Ex. B at 7, ¶ 9(c).

118. On behalf of the named plaintiffs and eight opt-in plaintiffs, Plaintiffs' counsel requested that Defendants provide a copy of each insurance policy and a certificate of insurance. 3d Am. Compl. (ECF No. No. 109), ¶¶ 199-200; Defs. Ans. (ECF No. 113-115), ¶¶ 199-200; Pls.' Ex. 56, Pls.' Jan. 21, 2022 Ltr.; Pls.' Ex. 57, Defs.' Feb. 4. 2022 Ltr..

119. Defendants frequently deducted amounts from drivers' compensation that differed from the amounts listed in the drivers' ICAs, specifically as to the named and opt-in plaintiffs:

Name	bobtail/deadhead insurance		occupational accident insurance		buy down insurance	
	ICA	Actually Deducted	ICA	Actually Deducted	ICA	Actually Deducted
Baker	$9.92	$10.15	$26.54	$23.08	$40.15	$40.84
Brown	$9.92	$10.38	$26.54	$23.08	$40.15	$41.76
Colvin-Williams	$9.92	$10.15 to $10.38	$26.54	$23.08	$40.15	$40.84 to $41.76
Cuevas	$10.38	$10.38	$18.46	$80.00	$41.76	n/a
McRoberts, 2/17/2020	$9.92	$10.15	$26.54	$23.08	$40.15	$40.84
Salmon	$9.92	$10.38	$26.54	$23.08	$40.15	n/a

Pls.' Ex. 38, Settlement Statements; Pls.' Ex. 58, Compendium of Insurance Addenda.

V. REGINALD BRADLEY

120. ONE sent Reginald Bradley a letter on February 22, 2017, informing him that ONE's final accounting calculations resulted in a balance owed of more than $8,000. The

referenced final accounting includes an accounting of Bradley's various escrow accounts and the results of TransAm's manual settlement process. The manual settlement process included a "final hold" placed on Bradley's settlements on February 3, 2017, in the amount of $4,109.45. Bradley's settlements in 2017, dating back to January 6, 2017 all had negative balances, which were carried forward to TransAm's final accounting and contributed to Bradley's balance owed to ONE. *See* Pls.' Ex. 59, ONE Feb. 22, 2017 Ltr. to Bradley; Pls.' Ex. 60, Bradley Final Accounting; Pls.' Ex. 38, Bradley Settlements, pp. 128-133.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

I. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' KCPA CLAIMS.

A. Plaintiffs' KCPA claims concern a "consumer transaction."

Defendants' proffered test for what constitutes a consumer transaction does not track the plain language of the statutory definition. Defendants assert that "to qualify as a 'consumer transaction' under the KCPA there must be . . . a sale of property or services (or solicitation of such) by the supplier." Defs.' S.J. Mem. (ECF No. 159) at 16. Not so. There may be a "sale," ***or*** there may be a "lease" or an "assignment" or "other disposition," ***or*** there may be a "solicitation" for one of those "dispositions." K.S. § 50-624(c). K.S. § 50-624 "broadly defines the terms 'consumer,' 'supplier,' and 'consumer transaction,'" *Williamson v. Amrani*, 283 Kan. 227, 231 (2007), *quoting* K.S. 50-624, and Defendants' restrictive interpretation runs afoul of the KCPA's mandate that it "shall be construed liberally" to promote consumer protection. K.S. § 50-623.

The appropriate inquiry for the Court is whether there has been (1) a sale, lease, assignment or other disposition (or solicitation of same) (2) for value (3) of property or services (4) to a consumer. All of those elements are satisfied here based on undisputed facts. First, the transaction involves the formation and execution of the lease driver relationship, which includes

advertising for and recruitment of drivers, attendance at mandatory orientation, entering into a truck lease with ONE, entering into a contract with TransAm to use that truck to haul freight for TransAm's customers, and the lease driver relationship.[3] *See* Pls.' S.J. Mem. (ECF No. 162) at 18-32. This falls squarely within the broad definition of "consumer transaction," because it involves a "lease" for the truck, "assignment" of trucking jobs, as well as another "disposition," namely the agreement to become a lease driver hauling freight for TransAm. *See, e.g., Watkins v. Roach Cadillac, Inc.*, 7 Kan. App. 2d 8, 10 (1981) (consumer transaction subject to KCPA involved automobile lease); *Griffin v. Sec. Pac. Auto. Fin. Servs. Corp.*, 33 F. Supp. 2d 926, 930 (D. Kan. 1998) (KCPA claim involved installment contract for vehicle lease-to-buy transaction).

Second, contrary to Defendants' argument, *see* Defs.' S.J. Mem (ECF No. 159) at 16, the drivers have given "value" for this lease driver relationship, namely the agreement to have significant amounts of money deducted from their earnings each week for lease payments, insurance deductions, escrow funds, and other services. Pls.' Stmt. Add'l Facts ¶¶ 85-115. It is preposterous for Defendants to claim that drivers agreeing to pay hundreds to thousands of dollars out of their weekly earnings does not constitute value. *See Alexander*, 1997 WL 756605, at *5 ("The buyer's payment is the value exchanged for the service.").

Third, the transaction involves property (the truck) and services (the provision of trucking assignments and other services provided by TransAm in connection with the lease driver relationship). *See* Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 28-29. Notably, Defendants admit in their brief that TransAm offers numerous "services" for which drivers can "pay," (i.e., give "value"), specifically, insurance coverage, "PrePass" for automated toll payment, "TransAm's

[3] Defendants' argument that there has been no consumer transaction rests on its inaccurate and narrow interpretation of the transaction at issue, specifically that the transaction is only "TransAm's recruitment of Plaintiffs to drive for TransAm." Defs.' S.J. Mem. (ECF No. 159) at 16.

fuel optimization program," etc. Defs.' S.J. Mem. (ECF No. 159) at 25-27. This admission by Defendants negates their argument that there has been no provision of services for value.

The cases cited by Defendants do not support their argument because they both involve situations in which there was no relationship and had been no communications or interactions between the parties. *See Ellibee v. Aramark Corr. Svcs., Inc.*, 37 Kan. App. 2d 430, 433 (2007) (no communications or contractual relationship between plaintiff (a prisoner at a state correctional facility) and food service contractor; "[w]hat was provided to Ellibee was simply a by-product of Aramark's contract with the DOC"); *Berry v. Nat'l Med. Svcs., Inc.*, 41 Kan. App. 2d 612 (2009) (no contract, transaction, or direct dealings between parties). In contrast, Defendants here made numerous "representation[s] directly" to the drivers (and also entered into contracts with them), *Ellibee*, 37 Kan. App. 2d at 433, and it is those direct representations (and omissions) that Plaintiffs challenge under the KCPA. *See, e.g.,* Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 28-65.

B. The KCPA applies to the parties' relationship.

With minimal exposition or support, Defendants argue that Plaintiffs cannot pursue their KCPA claim because they have also asserted employment-based claims. This argument fails for three reasons. First, there is no basis whatsoever for interpreting the KCPA as prohibiting claims arising out of employment relationships. The definition of "consumer" in the statute is broad and does not exclude employees, either explicitly or implicitly. *See* K.S. § 50-624(b).

There is not a single case that even hints that the KCPA does not apply to employment relationships. And at least one court has reached the exact opposite conclusion. In *Dante v. Schwartz*, the plaintiffs worked as employees for the defendants and asserted that they had paid the defendants for insurance coverage but the defendants took the money instead of obtaining the

insurance for their employees. 2022 WL 1104996 (D.N.J. Apr. 13, 2022). The court rejected the defendants' argument that the KCPA does not "appl[y] to an employment relationship," concluding: "Given the plain language of the statute, the Court finds that Plaintiffs [employees of defendants] are 'consumers,' given that they are individuals who sought property and services.'" *Id*. at *9 (citing K.S. § 50-624(b)).[4]

Second, the KCPA claims here arise out of the initiation of the relationship between the parties and Defendants' misrepresentations and omissions at that time, not the work ultimately performed by the lease drivers. In other words, under the KCPA, Plaintiffs challenge Defendants' statements in connection with advertising, recruiting, and signing drivers up to be lease drivers. The claims, therefore, predate the actual employment relationship challenged in Plaintiffs' wage claims.

Third, at a minimum, even if the Court were ultimately to hold that the drivers are employees and that that precluded application of the KCPA, Plaintiffs are certainly entitled to pursue both legal theories in the alternative. *See* Fed. R. Civ. P. 8(d) (allowing parties to plead alternative claims and to "state as many separate claims . . . as it has, regardless of consistency"); *Rezac v. Livestock Comm'n Co. v. Pinnacle Bank*, 255 F. Supp. 3d 1150, 1175 (D. Kan. 2017) (plaintiff may allege different counts as "alternative (or even inconsistent) legal theories").

C. Jacobson is a "supplier" under the KCPA.

Defendants make a half-hearted argument that Jacobson is not liable under the KCPA because TransAm employees recruited the drivers and conducted orientation and TransAm was

[4] The cases cited by Defendants are all distinguishable because they involved other states' laws with different legal standards. *See Cooperman v. R.G. Barry Corp.*, 775 F. Supp. 1211 (D. Minn. 1991) (challenged practice did not relate to a sale of merchandise, as required under the statute at issue); *Donovan v. Digital Equip. Corp.*, 883 F. Supp. 775, 786 (D.N.H. 1994) (citing *Manning v. Zuckerman*, 388 Mass. 8, 14 (1983), in which employment contract did "not constitute 'trade' or 'commerce' as those terms are defined under" Massachusetts consumer statute); *Pharmaresearch Corp. v. Mash*, 158 N.C. App. 744, 2003 WL 21498852, at *2 (Ct. App. Jul. 1, 2003) (different statute and fact pattern); *Miller v. Fairfield Communities, Inc*., 299 S.C. 23, 29 (1989) (same).

party to the ICA. Defendants' argument fails on the facts and the law. Jacobson owns and manages both TransAm and ONE; the companies share officers, directors, and executives; and Jacobson is responsible for providing oversight, management, personnel, and administrative services for TransAm and ONE. Pls.' Stmt. Add'l Facts ¶¶ 66-71.

On these facts, Jacobson unquestionably qualifies as a "supplier" under the KCPA. The statutory definition's breadth is unambiguous, *see* K.S. 50-624(l), and the inclusion of the catchall provision "other person" and the proviso that the entity need not "deal[] directly with the consumer" confirms that the definition covers Jacobson. *See Alexander v. Certified Master Builders Corp.*, 268 Kan. 812, 826 (2000) ("A party may be a supplier whether or not it deals directly with the consumer.").

Under the KCPA's broad definition of "supplier," Kansas courts have properly held that there need not be a direct contractual relationship between the parties. *Lynd v. Brickie*, 1990 WL 203158, at *2 (D. Kan. Nov. 21, 1990) (broad definition of "supplier" "expressly negates any privity [of contract] requirement because it extends the reach of the Act to third parties to the consumer transaction and to time periods both before and after contract formation"); *Cooper v. Zimmer Holdings, Inc.*, 320 F. Supp. 2d 1154, 1163 (D. Kan. 2004) ("supplier" includes entities that merely facilitate transactions."). In *Alexander*, the Kansas Supreme Court held that the defendant was a supplier, even though it was "merely a trade agency" that "promote[d] the home building industry" through brochures and advertisements but was not directly involved in any relationships formed between consumers and its members. 268 Kan. 812, 825-26 (2000). If a trade agency that encourages members of the public to contract with its members to build houses is a supplier, then certainly Jacobson, the management company that owns, manages, and shares

officers and executives with the entities that lease trucks to drivers and advertise and recruit drivers to haul freight, is a supplier as well.[5]

II. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT ON THEIR MINIMUM WAGE CLAIMS DURING ORIENTATION.

Defendants' argument that they are entitled to summary judgment on Plaintiffs' orientation claims rests on two faulty premises: (1) their assertion that drivers "record their actual time spent in orientation via a Garmin device for each day of orientation,"; and (2) their expert's analysis that purportedly found no minimum wage violations. Defs.' S.J. Mem. (ECF No. 159) at 19. Plaintiffs dispute both premises. In fact, when wages owed are properly calculated using 7.5 hours per day, *see* Defs.' S.J. Fact Stmt. (ECF No. 159) ¶ 9, minimum wage violations are rampant, and summary judgment should be entered for Plaintiffs, as requested in their motion for summary judgment. Pls' S.J. Fact Stmt. and Mem. (ECF No. 162) ¶¶ 24-25, pp. 13-16.

Plaintiffs dispute that the total time spent in orientation each day is recorded on drivers' Garmin devices. Drivers' times logged vary from day to day and often differ markedly from the admitted "approximately 7.5 hours per day" for orientation. Defs.' ¶ 9; Pls.' Stmt. Add'l Facts ¶ 75. This makes sense. The purpose the Garmin devices is to log time for DOT purposes, not to record all compensable time under the FLSA. *See* Pls.' S.J. Mem. at 14-15, citing WHD Opinion Letter SCA-118; DOL Field Operations Handbook, § 14g03. As such, these time logs would not capture all time worked for FLSA purposes, which is why there is often a discrepancy between the logged hours and the 7.5 hours. The reasons that not all compensable time is logged as on

[5] *CIT Group/Sales Financing, Inc. v. E-Z Pay Used Cars, Inc*., 29 Kan. App. 2d 676 (2001), cited by Defendants, is inapposite. That case does not state that an entity that "did not contract directly or otherwise transact with Plaintiffs," Defs. Mem. at 18, cannot be a supplier. It states that an individual may not be a *consumer* if he or she does not "directly contract with suppliers for goods or services," *id*. at 685, *not* that every *supplier* must directly contract with every consumer. A supplier need not "deal[] directly," K.S. 50-624(l), *i.e.*, it need not "contract directly." Defs. S.J. Mem. (ECF No. 159) at 18.

duty may include: logging out for short breaks between orientation presentations or waiting between sessions; logging off duty while being transported to the truck yard for maneuver training (approximately 29 miles away from the main terminal); lack of access to Garmin devices while on the yard; waiting in the yard to get onto a truck; logging only driving time, etc.[6] Pls.' Stmt. Add'l Facts ¶¶ 72-74.

Second, the analysis by Defendants' expert, Robert Crandall, of orientation minimum wage claims is similarly flawed; it relies on the Garmin hours logged for DOT purposes, not the 7.5 hours per day for orientation. Pls.' Stmt. Add'l Facts ¶ 76. Crandall's analysis suffers from additional flaws as well. First, he inappropriately included compensation paid to drivers after they converted to lease driver status, when they were no longer classified by TransAm as employees, and which was not paid as W-2 wages. *See* Pls.' Stmt. Add'l Facts ¶ 77. Second, he included after-the-fact payments made by Defendants to cure Florida minimum wage violations in his FLSA analysis. This is inappropriate under long-standing FLSA precedent holding that employers cannot "credit" delayed payments toward their minimum wage obligations for liability purposes. *See* Pls.' S.J. Mem. (ECF No. 162) at 16 n.3.

Because Defendants' assumptions about hours worked and compensation paid during orientation are not supported by the record evidence, their request for summary judgment as to Counts I and II should be denied, and summary judgment instead should be entered for Plaintiffs as argued in their motion for summary judgment. *Id.* at 13-15.

[6] Just as a lawyer's billing records may capture all time attributable to a particular case but would not capture all time when the attorney is working, a driver's record of DOT "on duty" time would not capture all time spent in the 7.5-hour per day orientation program.

III. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT AS TO THE COMPENSABILITY OF SLEEPER BERTH TIME.

Defendants' argument that their drivers' many hours logged as "sleeper" for DOT purposes is not compensable working time under the FLSA because drivers are not "performing work" and the time is "their own, with no obligations to TransAm," Defs.' ¶¶ 24, 28, is wrong both as a matter of law and factually. *See* Reponses to Defs.' ¶¶ 24, 28.

First, time may be compensable for FLSA purposes even if it is properly logged as off-duty or sleep time for DOT purposes. *See* Pls.' S.J. Mem. (ECF No. 162) at 14-15. In fact, DOL has stated that a blanket policy of "treating all such sleeper berth time as off duty, and therefore noncompensable" is contrary to Supreme Court precedent. WHD Opinion Letter SCA-118 (June 22, 1979), attached to Pls.' S.J. Mem. as Att. A (ECF No. 162-1). DOL considers the time spent by truck drivers in the sleeper berths of their trucks to be "on duty" as a matter of law. *Id*. ("a long-haul driver in a truck cab is considered to be on duty under IB 785 regardless of whether he is driving, sitting beside the driver, or in the sleeper berth."); *Browne v. P.A.M. Transp., Inc.*, No. 5:16-CV-5366, 2018 WL 5118449, at *3 (W.D. Ark. Oct. 19, 2018) (holding that "a truck driver is not 'working' when he is sleeping," but "a truck driver's time spent sleeping should nevertheless 'count as hours worked'").

Because sleeper berth time is "on duty" time, it is presumed to be compensable under the FLSA. DOL has developed clear regulations relating to compensability of sleep time. "An employee who is required to be on duty for less than 24 hours is working even though he is permitted to sleep or engage in other personal activities when not busy." 29 C.F.R. § 785.21. For shifts of 24 hours or more only, "not more than 8 hours" of sleep time may be excluded from hours worked, but only subject to certain conditions. 29 C.F.R. § 785.22. There are only two possible situations in which a truck driver's sleeper berth time is properly excluded from

compensable time, therefore: (1) for shifts of fewer than 24 hours, if the driver is "permitted to sleep in adequate facilities furnished by the employer," 29 C.F.R. § 785.41; or (2) for shifts of 24 hours or more, if the requirements of 29 C.F.R. § 785.22 are met.

Neither situation applies here. Defendants admit that their drivers are ***not*** on duty for 24 hours or more. *See* Defs.' ¶ 27.[7] A truck's sleeper berth does not constitute "adequate facilities" under 29 C.F.R. § 785.41. **"**Adequate sleeping facilities" are "comfortable sleeping accommodations reasonably comparable to those found in the average home." *Bowers v. Remington Rand*, 64 F. Supp. 620, 626 (S.D. Ill.), *aff'd*, 159 F.2d 114 (7th Cir. 1946); DOL Field Operations Handbook ("FOH") § 31b12(c) (Aug. 10, 2016) ("In general, an employer must ensure that the employee has access to basic sleeping amenities, such as a bed and linens, reasonable standards of comfort, and basic bathroom and kitchen facilities."). The sleeper berth of a truck, which among other limiting features does not contain a bathroom, Pls.' Stmt. Add'l Facts ¶ 81, is not an "adequate sleeping facility."[8] A straightforward application of 29 C.F.R. § 785.21, therefore, requires a determination that all sleeper berth time logged by company drivers (who, Defendants concede, are on duty for under 24 hours) must be compensated as hours worked.

Even if Defendants' drivers were on duty for 24 hours or more, their sleeper berth time cannot be excluded from compensable time because there is no agreement, whether express or

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[7] This case is distinguishable from the three cited by Defendants, see Defs.' S.J. Mem. (ECF No. 159) at 20-21. Two of those cases concerned shifts of 24 hours or more. *Nance* is distinguishable on the facts. The *Nance* plaintiffs were trainees paired with experienced drivers for two weeks, whereas TransAm's company drivers drive solo and have an entirely different set of job duties. Legally, *Nance* is flawed because it ignored DOL's specific guidance about the conditions that must be met for sleeper berths to be deemed adequate facilities.

[8] The DOL has carved out an exception for truck sleeper berths, but "this rule applies to sleeping berth time of truck drivers or helpers *only* when they are on continuous tours of duty during trips away from home for a period of 24 hours or more." If the tour of duty is less than 24 hours, the sleeper berth of the truck is *not* deemed an adequate sleeping facility and "all time on duty on the truck is time worked (except, of course, for bona fide meal periods) even though some of that time is spent in the sleeping berth." FOH § 31b09(a).

implied, between Defendants and company drivers "to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked." 29 C.F.R. § 785.22. Without an agreement to exclude up to 8 hours of sleeping time from hours worked, all such time is compensable. *Id.*; *see also Gen. Elec. Co. v. Porter*, 208 F.2d 805, 815 (9th Cir. 1953) ("The absence of an express or implied agreement in this case as to sleeping time . . . distinguishes this case from [those where sleeping time was allowed to be uncompensated]").

TransAm gains an enormous benefit from having company drivers sleep in the berths of their trucks, including but not limited to the fact that company drivers are required to report all accidents and mechanical failures of trailers' refrigeration units. Pls' Stmt. Add'l Facts ¶¶ 82-83. When TransAm's drivers remain in the sleeper berth, they are able to "care for the custody of the vehicle, its accessories, and any cargo," *see* Response to Defs.' ¶ 25, simply by virtue of being present, for conditions including but not limited to attempted theft, unanticipated mechanical failures, and accidents caused by other trucks while parked. Additionally, remaining in the sleeper berth during unpredictable waiting periods, such as loading and unloading, allows drivers to respond immediately once the vehicle is ready to be moved, thereby keeping TransAm's customers satisfied and allowing the driver to timely proceed to the next destination.[9] These facts further confirm that sleeper berth time is compensable work time.

Because Defendants admittedly do not include sleeper berth periods in their minimum wage "true up" calculations, Defs.' ¶ 32, they have violated the FLSA with respect to every workweek of every company driver in which Defendants applied the "true up," as a matter of

[9] Even if Defendants disclaim any directive that drivers perform these functions while in the sleeper berth, TransAm is the beneficiary of drivers' time in the sleeper berth and therefore TransAm has "suffered or permitted" the drivers' work. 29 U.S.C. § 203(g); 29 C.F.R. § 785.11 ("Work not requested but suffered or permitted is work time."); *Aguilar v. Mgmt. & Training Corp.*, 948 F.3d 1270, 1286–87 (10th Cir. 2020) ("if the employer is aware of the work and therefore 'suffer[s] or permit[s]' the work, it must pay the employee").

law (because those are weeks in which the compensation paid did not suffice to pay the drivers minimum wage for on-duty driving and on-duty not driving hours).[10] The Court should deny Defendants' motion for summary judgment and instead enter summary judgment for the Plaintiffs as to this issue.[11]

IV. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON COMPANY DRIVERS' MINIMUM WAGE CLAIMS, AND SUMMARY JUDGMENT SHOULD ENTER FOR PLAINTIFFS AS TO WORKWEEKS WHEN A TRUCK RENTAL FEE WAS DEDUCTED FROM THEIR WAGES.

The sleeper berth issue precludes summary judgment for Defendants as to company drivers' minimum wage claims. Even if the sleeper berth question is put aside, however, Defendants are not entitled to summary judgment on Plaintiffs' minimum wage claims because Defendants' own expert found at least three weeks when the named and opt-in plaintiffs were paid less than the minimum wage. Contrary to Defendants' argument, these confirmed FLSA violations are not *de minimis*, because the three violations were out of a total of 27 to 30 workweeks. Pls.' Stmt. Add'l Facts ¶¶ 79. Regardless, there is no *de minimis* exception to the FLSA. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 234 (2014) ("A *de minimis doctrine* does not fit comfortably within [the FLSA]. . ."). Nor do Defendants cite any authority for the proposition that this Court may ignore these three violations.

Moreover, Plaintiffs have identified a systematic reason for two of the three minimum wage violations identified by Defendants expert: the improper deduction of a truck rental fee from drivers' wages. As argued by Plaintiffs in their motion for summary judgment, summary

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[10] These weeks are readily identifiable in Defendants' payroll records by line items for "Min Wage Adjust." Pls' Stmt. Add'l Facts ¶ 84. Defendants also violated the FLSA in other workweeks, when the wage rate as determined during the Defendants' minimum wage "true up" process just exceeded the minimum wage. Because more discovery and analysis is required to identify those weeks, Plaintiffs do not request entry of summary judgment for Plaintiffs (as to damages) as to those weeks.

[11] Federal Rule of Civil Procedure 56(f)(1) allows the Court to grant summary judgment for a nonmovant.

judgment should enter for Plaintiffs as to any period when a truck rental fee was deducted from Plaintiffs' wages. Pls.' S.J. Mem. (ECF No. 162) at 16-17.

V. DEFENDANTS ARE NOT ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' TIL CLAIMS.

A. Jacobson and ONE Leasing are proper defendants under the TIL regulations.

It is well settled that entities that are affiliated with motor carriers may be subject to the TIL regulations. In *Dart Transit Co.*, 9 I.C.C. 701 (1993), the Interstate Commerce Commission (ICC), the agency originally in charge of regulating motor carriers,[12] held that the affiliation of a motor carrier and another entity that "leased motor-vehicle equipment to independent drivers" and was "under common ownership and had common officers" "was sufficient to trigger the disclosure requirements of the regulations" and that "the affiliation between the two companies was sufficient to impute the agreement of one company to the other." *Owner-Operator Independent Drivers Association, Inc. ("OOIDA") v. Arctic Express, Inc.*, 87 F. Supp. 2d 820, 827-28 (S.D. Oh. 2000) (applying *Dart* and holding that it was entitled to *Chevron* deference). As the *Arctic Express* court explained, the *Dart* holding is "reasonable as it serves to bring entities 'affiliated' with registered motor carriers under the umbrella of the Act." *Id*. at 828. "If this loophole is not closed, a registered carrier could create a non-registered business entity and thereby avoid the regulations promulgated under the Motor Carriers Act." *Id*. at 828-29. As another court has similarly recognized, it is appropriate to allow the TIL regulations "to extend to affiliates of carriers . . . to prevent carriers from exploiting a loophole. . . Otherwise, carriers would have had a simple method to avoid the Truth-in-Leasing regulations, by setting up an

[12] "Prior to the ICC Termination Act [enacted in 1995], the ICC comprehensively regulated motor carriers." *Owner-Operator Independent Driver Ass'n, Inc. v. New Prime, Inc.*, 192 F.3d 778, 781 (8th Cir. 1999).

affiliated business that was not a carrier." *OOIDA v. United Van Lines, LLC*, 2006 WL 1877081, at *5 (E.D. Mo. July 6, 2006).[13]

Other courts have reached similar conclusions. In *OOIDA v. Ledar Transportation*, the court held that the leasing company and individuals who owned the leasing company and motor carrier were liable under the TIL regulations. 2004 WL 5249148, at *12-*13 (W.D. Mo. Dec. 30, 2004). The court explained: "one may not place title to a truck in an entity benefitting from the leasing of trucks to a carrier to both benefit from the leasing and avoid the obligations of a lessee under the Truth-in-Leasing regulations; with the benefits go the obligations." *Id*. at *12; *see also Goodwin v. Am. Marine Express, Inc.*, 2021 WL 848948, at *38 (N.D. Ohio Mar. 5, 2021) (denying summary judgment to non-motor carrier, where companies shared officers/shareholders and collaborated on business; "[e]vidence of this type of shared ownership and control is sufficient to create a question of fact as to whether AMX and GLC were affiliated companies").

The undisputed facts establish affiliation among Defendants similar to *Dart* and *Arctic Express*. *See* Pls.' Stmt. Add'l Facts ¶¶ 66-71. At a minimum, this evidence suffices for the Court to deny summary judgment to Defendants on this issue. The TIL claims in this case properly apply to all three defendants and to both the ICA and the ELA.[14]

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[13] Defendants have muddled this policy analysis, arguing that subjecting affiliated entities to the TIL regulations "would mean, in turn, that any entity affiliated with a motor carrier could operate as a motor carrier despite not having applied for and taken the steps necessary to get its own motor carrier authority." Defs.' Mem. (ECF No. 159) at 23 n.3. Defendants have it backward. The concern is that entities such as Jacobson and ONE are effectively operating as motor carriers but doing so free from the strictures of the TIL regulations (*inter alia*). The way to protect against this is not to allow these entities to continue to operate as quasi-motor carriers unchecked but to prevent the "collusion" identified in *Dart* by requiring affiliated entities to comply with the TIL regulations just as motor carriers must do. *Artic Express*, 87 F. Supp. 2d at 828-29.

[14] In granting Plaintiffs' motion to amend the complaint to add TIL claims against all three Defendants relating to the provisions of both the ICA and the ELA, the Court explained: "If the Court views the factual allegations in the light most favorable to the Plaintiffs, the Defendants could be so affiliated to impute the ELAs from one company to another, or, in the alternative, the owner/operator agreement of Defendant TransAm Trucking, Inc. incorporates the terms of the ELAs, which could suggest exposure to the TIL regulations." Mem. and Ord. on Pls.' Mot. for 3d Am. Compl. (ECF No. 108), at 10-11.

B. The lease agreements do not comply with the TIL regulations.

Under the TIL regulations, lease agreements must be clear about drivers' compensation and deductions from their earnings, deductions may be taken from earnings only as permitted in the regulations, and drivers must actually be compensated and deductions must actually be taken only as the lease agreement provides. *See* 49 C.F.R. § 376.12. In other words, it is not just a matter of whether the lease agreement contains certain language, but also whether or not the lease agreement's provisions are actually followed. *Id*. ("The required lease provisions shall be adhered to and performed by the authorized carrier."). Contrary to Defendants' arguments, they are not entitled to summary judgment on Plaintiffs' TIL claims (and, as set forth in Plaintiffs' Summary Judgment Memorandum at Section IV (ECF No. No. 162), Plaintiffs are entitled to summary judgment as to several of these claims).

1. Defendants' escrow accounts do not comply with the TIL regulations.

"49 C.F.R. § 376.12(k), through its comprehensive delineation of responsibilities, imposes strict fiduciary obligations on motor carriers, such that it places the motor carriers in a position of trust vis-a-vis owner-operators with regard to the handling of escrow funds." *In re Arctic Exp. Inc.*, 636 F.3d 781, 794 (6th Cir. 2011). Defendants' escrow funds have violated the TIL regulations in myriad ways.

a. ICA's performance escrow fund

First, the ICA does not clearly explain what the ICA's performance escrow fund is to be used for, in violation of the requirement that the lease "specify . . . the specific items to which the escrow fund can be applied." 49 C.F.R. § 376.12(k)(2). The ICA includes a litany of items for which the funds may be used, then claims that the "Carrier shall not apply the performance escrow fund to any items not specified in this Agreement" but then contradictorily states that the funds may only be returned to drivers if they satisfy all of their contractual obligations. Pls.'

Stmt. Add'l Facts ¶¶ 90-96. Moreover, Defendants added an amendment in 2020 providing that performance escrow funds could also be used for future outstanding lease payments owed to ONE. *Id*., ¶ 95. These provisions essentially ensure that drivers will never receive money back from the escrow fund.

TransAm's use of drivers' escrow funds for anything and everything, including future equipment lease payments to ONE, and the ICA's provision that no monies are to be returned to drivers unless they "satisfy all of Contractor's obligations specified under this Agreement" violate both the letter and spirit of the TIL regulations. First, the TIL regulations require that the contract "***clearly*** set forth … the ***specific*** items to which escrow funds could be applied." *OOIDA v. C.R. England, Inc.*, 508 F. Supp. 2d 972, 981-82 (D. Utah 2007) (emphasis added); *see also* 49 C.F.R. § 376.12(k)(2) ("lease shall specify . . . [t]he specific items to which the escrow fund can be applied"). A lease provision that "essentially permits the fund to be used for any and all expenses incurred (or yet to be incurred) by the Member" violates 49 C.F.R. § 376.12(k)(2); these provisions were "not 'specific,' since in practice they include any and all conceivable costs. . ." *Arctic Express*, 159 F. Supp. 2d at 1077-78. As the court held in *Arctic Express*, a lease in which a maintenance fund could be used for anything violated the TIL regulations, because "[w]hen the Defendants provided for everything to be covered by the maintenance fund, they, in reality, specified nothing." *Id*. at 1078. For precisely the same reason, TransAm's catchall provision regarding "all of Contractor's obligations" violates 49 C.F.R. § 376.12(k)(2).

Second, escrow/maintenance funds may not be turned into general funds used to satisfy any obligations the company wishes to impose. As the court held in *OOIDA v. Arctic Express, Inc.*, because of a contract provision providing that escrow funds were not refundable unless the

driver either completed the lease or exercised a purchase option, "[t]he fund no longer is a maintenance fund … but is a general fund to satisfy any obligations incurred by the Members, which is in violation of the letter … and spirit of the Regulations." 159 F. Supp. 2d at 1077.

Third, a company cannot "transform[] a "maintenance fund into 'non-refundable' monies [for early lease termination]." *Arctic Express*, 159 F. Supp. 2d at 1076. Such "an early termination penalty thinly disguised by the Defendants" violates the TIL regulations. *Id*. Defendants "cannot hold the funds to satisfy maintenance obligations that the Plaintiffs did not incur, or lease payments due in the future that were speculative at the time of the owner-operators' premature termination." *Id*. at 1080. TransAm's performance escrow fund does precisely what the court held to be unlawful in Ar*ctic Express*: it transforms the fund into non-refundable monies if the lease is terminated early and it requires the funds be used for speculative future lease payments.

Finally, TransAm's use of the escrow funds for speculative future equipment lease payments is an unlawful windfall for Defendants. As the court explained in *Arctic Express*: "[I]f a truck were re-leased following an owner-operator's early termination, . . . there is no provision in either the Lease Agreement or the Lease/Purchase Option that insures the return the excess funds due to the owner-operator. This would create an escrow fund windfall for the Defendants, the very thing the Regulations were enacted to prevent." 159 F. Supp. 2d at 1079. So too here. If/when Defendants re-lease the same truck to another driver, they will in essence be collecting double lease payments as to any future payments made out of drivers' escrow funds on termination. This is patently an inappropriate windfall for Defendants and violates the TIL regulations for that reason.

b. ELA's performance escrow fund

This fund is subject to the TIL regulations for three reasons. First, as explained in Section V.A, *supra*, TransAm and ONE are affiliated entities such that ONE must adhere to the TIL regulations in its dealings with lease drivers. Second, by its language, the definition of escrow fund includes funds held by entities other than the motor carrier, specifically stating that it extends to money deposited "with either ***a third party*** or the lessee." 49 C.F.R. § 376.2(l) (emphasis added). Third, this fund is subject to the TIL regulations because it is incorporated into the ICA by reference and because TransAm's deductions from drivers' earnings include deductions for these amounts. Pls.' Stmt. Add'l Facts ¶¶ 89, 96, 109.

The ELA's performance escrow fund purports to state the specific items for which it may be used, claims that "Lessor shall not apply the performance escrow fund to any items not specified in this Agreement," but then states the drivers only get monies back if they satisfy all contractual obligations and later provides that escrow funds may used upon termination to "offset against any amounts due Lessee." Pls.' Stmt. Add'l Facts ¶¶ 103-09. Like the ICA's performance escrow fund, this fund similarly violates the TIL regulations because of lack of clarity/specificity, improper use of the funds, operation as an early termination penalty, and a windfall to Defendants. *See Arctic Express*, 159 F. Supp. 2d at 1076-80.

c. ICA's Maintenance Savings Account

The ICA's Maintenance Savings Account ("MSA") is an escrow fund under the TIL regulations; it is "[m]oney deposited by the lessor with either a third party or the lessee . . . to cover repair expenses, . . . and[/or] for any other purposes mutually agreed upon by the lessor

and lessee." 49 C.F.R. § 376.2(l).[15] The MSA violates the TIL regulations in several ways. First, it provides no specificity on what amounts are to be deducted for the MSA, in violation of 49 C.F.R. § 376.12(k). Pls.' Stmt. Add'l Facts ¶¶ 97-100. Second, Defendants admit that these funds do not accrue interest, in violation of 49 C.F.R. § 376.12(k)(5). Pls.' Stmt. Add'l Facts ¶ 99. Third, the lease does not provide for "[t]he right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time," as required by 49 C.F.R. § 376.12(k)(4). Pls.' Stmt. Add'l Facts ¶ 100.

d. ELA's Maintenance/Tire Replacement Reserve

This reserve falls under the definition of "escrow fund," 49 C.F.R. § 376.2(l), and is covered by the TIL regulations for the same reasons set forth in Section V.B.2.b, *supra*, as to the ELA's performance escrow fund. Though this reserve is purportedly to be used for necessary maintenance and tire replacement, the ELA also provides that amounts may be withheld for "preventative maintenance services and to make any required repairs to the Equipment" upon termination of the Agreement, ELA, ¶ 7, and that the Reserve may be used upon termination to "offset against any amounts due Lessee." Pls.' Stmt. Add'l Facts ¶¶ 110-15. The reserve violates the TIL regulations because the ELA does not clearly explain how the funds will be used, the provisions about preventative maintenance and an offset of other funds owed operate as an early termination penalty, the offset provision provides for use of the funds for items other than maintenance and/or tire replacement, and the fund results in a windfall for Defendants. *See Arctic Express*, 159 F. Supp. 2d at 1076-80.

[15] To the extent that Defendants argue that it is not an escrow fund because it is voluntary, that argument is without merit. The plain language of the TIL regulations do not exclude voluntary funds, and there is no reason (policy or otherwise) to graft that additional requirement onto the regulations.

e. Failure to provide accounting upon request

49 C.F.R. § 376.12(k)(4) states that the lease shall specify that driver has the right "to demand to have an accounting for transactions involving the escrow fund ***at any time***," and Defendants must "adhere[] to and perform[]" such provisions. 49 C.F.R. § 376.12 (emphasis added). Plaintiffs explicitly requested such an accounting as to the TransAm performance escrow fund and the ONE maintenance/tire replacement reserve, but Defendants refused to provide it, in violation of the regulations. Pls.' Stmt. Add'l Facts ¶ 116.

Numerous courts have held that the failure to provide an accounting for escrow funds violates 49 C.F.R. § 376.12. *See, e.g., Bryant v. All Ways Auto Transp., LLC*, No. 1:22-CV-00906, 2022 WL 17338295, at *4 (N.D. Ill. Nov. 30, 2022) (plaintiff's "allegations of non-provision of periodic accounting. . . are sufficient to allege that AWA violated § 376.12(k) or at a minimum, the general requirement that 'required lease provisions shall be adhered to and performed by the authorized carrier'"); *OOIDA v. C.R. England, Inc.*, 508 F. Supp. 2d 972, 982 (D. Utah 2007) ("Defendant violated this provision by failing to provide an accounting to Plaintiffs. . ."); *OOIDA v. Ledar Transp.*, No. 00-0258-CV-WFJG, 2004 WL 5249148, at *4 (W.D. Mo. Dec. 30, 2004) ("Plaintiffs were harmed because . . . they were not provided accountings or final accountings. . .").

2. Defendants have not complied with the TIL regulations with respect to insurance.

Defendants claim that "the amounts for physical damage insurance were disclosed to the Plaintiffs in writing [in the ELA] and accurately reflected on their settlement statements." Defs.' Mem. at 30. This statement is inaccurate for several reasons. First, the amounts in the ELAs did not always match the amounts actually deducted. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 57-58. Second, the ICA fails to specify the amounts to be deducted, stating only that the "cost" and

"Stated Value" of physical damage insurance would be deducted. *Id*. ¶¶ 46-47. This does not comply with the TIL regulations' requirement that the lease "specify the amount which will be charged-back to the lessor" for insurance. 49 CFR § 376.12(j)(1). Third, contrary to Defendants' argument, the reference to "an administrative fee" in the ELA is woefully inadequate to describe what is actually going on. Defendants do not charge an administrative fee. They deduct and pocket an undescribed, unsupported, and ever-increasing amount from drivers' earnings for physical damage insurance. Pls.' S.J. Fact Stmt. ¶¶ 50-56. Accordingly, as set forth more fully in Plaintiffs' memorandum in support of summary judgment, Pls.' S.J. Mem. (ECF No. 162) at 9-11, 36-40, Plaintiffs are entitled to summary judgment on Defendants' liability under the TIL regulations with respect to physical damage insurance deductions.

Defendants have violated the TIL regulations with respect to insurance in two other ways as well. First, as to bobtail/deadhead insurance, occupational accident insurance, and buy down insurance, Defendants' motion for summary judgment should be denied because the amounts deducted from drivers' compensation for this insurance often did not match the amounts disclosed in the ICAs. Pls.' Stmt. Add'l Facts ¶ 119. Because the amounts charged are different than the amounts disclosed, Defendants have not complied with the provision in the TIL regulations stating that "the lease shall specify the amount which will be charged-back to the lessor" for insurance, 49 CFR § 376.12(j)(1), nor have they complied with the requirement that motor carriers adhere to and perform the required lease provisions. 49 CFR § 376.12.

Second, in response to Plaintiffs' specific request, Defendants have refused to provide the insurance policy and certificate of insurance for insurance policies, in violation of 49 C.F.R. § 376.12(j)(2). *See* Pls.' Stmt. Add'l Facts ¶¶ 117-18.

3. Defendants have not complied with the TIL regulations with respect to other chargebacks and deductions.

As set forth in Plaintiffs' summary judgment motion, Defendants have violated the TIL regulations with respect to the fuel surcharge and fuel discounts.

a. Fuel Surcharge

As to the fuel surcharge, Defendants' only argument for summary judgment is that, in Exhibit E to the ICA, "the fuel surcharge is clearly set forth in writing and reflects that when fuel prices drop to certain amounts, the fuel surcharge will be in the negative." Defs.' Mem. (ECF No. 159) at 29. To the contrary, Defendants' deductions with respect to the fuel surcharge do not comply with the TIL regulations; they are not "clearly stated" and/or "clearly specif[ied]." 49 C.F.R. § 376.12(d), (h). In every place in which the fuel surcharge is referenced, it is described as something that is "paid" to the drivers. Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 34-37. On their face, and contrary to Defendants' argument, these documents (and the myriad others touting that the fuel surcharge is "paid" to drivers) do not "clearly set forth in writing and reflect[] that when fuel prices drop to certain amounts, the fuel surcharge will be negative." Defs.' S.J. Mem. (ECF No. 159) at 29. It is not reasonable to assume that drivers would understand that "paid" means "deducted" where there is only an unexplained number in parentheses in the "FSC Per Mile" column for fuel prices of $2.463 or lower. Pls.' S.J. Fact Stmt. ¶ 38. Not only that – Exhibit E was not even amended to reflect the potential negative fuel surcharge until well after the deductions were imposed. *Id.*, ¶¶ 38-43.

b. Fuel Discounts

Defendants' disclosures with respect to fuel discounts also violate the TIL regulations, which require clarity about all amounts deducted and how the amounts are calculated. *See Brinker v. Namcheck*, 577 F. Supp. 2d 1052, 1061 (W.D. Wis. 2008) ("Sections 376.12(h) and (j)

do not allow defendant to require its owner-operators to play a game of connect-the-dots to figure out their charges."). As to fuel specifically, motor carriers are not permitted to profit from drivers' fuel purchases without clear and explicit disclosure. *See OOIDA v. C.R. England, Inc.*, 508 F. Supp. 2d 972, 977–78 (D. Utah 2007) ("While Defendant's making a profit is not prohibited, the ICOA failed to disclose the mark-up and charge-back for fuel, and failed to contain a recitation of how the amounts were to be computed.").

As explained in Plaintiffs' summary judgment motion, Defendants' ICAs include conflicting and unclear disclosures about fuel discounts, stating in some places that drivers get 100% of all fuel discounts and elsewhere that they get only "at-pump" discounts (and other discounts inure to Defendants). Pls.' S.J. Fact Stmt. (ECF No. 162) ¶¶ 32-33 Defendants assert without factual support (other than an affidavit submitted by the CFO for Jacobson) that, "[i]n practice, TransAm does not receive any rebates or kickbacks for the fuel discounts it has negotiated with certain providers and all discounts are passed on to contractors." Defs.' S.J. Fact Stmt. (ECF No. 159) ¶ 67. However, this statement leaves several questions unanswered, and Plaintiffs have not been able to take discovery on these issues. Schwab Aff. ¶¶ 3-5. These questions go to damages, not liability, Plaintiffs are entitled to discovery on these issues, and the Court should, at a minimum, deny summary judgment to Defendants as to deductions relating to fuel discounts and allow Plaintiffs to take this discovery. *See* Fed. R. Civ. P. 56(d)(2) ("[i]f a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may . . . allow time to . . . take discovery").

VI. BRADLEYS' TIL AND KWPA CLAIMS ARE NOT TIME BARRED.[16]

Defendants argue that Reginald Bradley's claims are time barred because the time period when he provided services to Defendants – December 15, 2016 to January 16, 2017 – is outside the class periods for which Plaintiffs are requesting class certification. Whether Bradley is an adequate class representative, however, is an entirely distinct question from whether his claims are time barred. As Defendants acknowledge, Bradley initiated his claims in this case on February 10, 2021. Defs.' S.J. Mem. (ECF No. 159) at 31. At that point, the applicable statute of limitations for his claims stopped running. If the original complaint fairly discloses the general fact situation out of which the new claims arise, a defendant is not deprived of the protection of the statute of limitations. *Lemons v. Bd. of Cnty. Comm'rs of Cnty. of Brown*, No. 00-2292-KHV, 2001 WL 1717856, at *5 (D. Kan. Aug. 8, 2001)

Under the TIL regulations, the statute of limitations is four years. 28 U.S.C. § 1658(a); *Owner-Operator Indep. Drivers Ass'n, v. United Van Lines, LLC*, 556 F.3d 690, 696 (8th Cir. 2009); *Brinker v. Namcheck*, 577 F. Supp. 2d 1052, 1060 (W.D. Wis. 2008). Therefore, any cause of action under the TIL regulations that accrued on or after February 10, 2017, is timely. Bradley has viable TIL claims that accrued no earlier than February 22, 2017, which is the date on a letter from Defendants informing Bradley that ONE's final accounting calculations resulted in a balance owed of more than $8,000. *See* Pls.' Stmt. Add'l Facts ¶ 120. The referenced final accounting incorporates negative settlement balances dating back to January 6, 2017, which were carried forward to the final accounting. *Id.* Bradley's TIL claims include insurance deductions and escrow funds, *see* Pls.' S.J. Opp., Sect. V, which were routinely deducted from Bradley's 2017 settlements. Bradleys' TIL claims, therefore, are not time barred.

[16] Plaintiffs do not contest that Bradley's KCPA claims are time barred.

Although Plaintiffs seek class certification for the KWPA class under a three-year statute of limitations, the KWPA has a longer statute of limitation for claims based on written contracts, namely 5 years. *See* K.S. 60-511(1); *Sibley v. Sprint Nextel Corp.*, No. CV 08-2063-KHV, 2017 WL 2471304, at *2 (D. Kan. June 8, 2017); *Knight v. Mill-Tel, Inc.*, No. 11-1143-EFM, 2013 WL 3895341, at *4 (D. Kan. July 29, 2013) ("Under Kansas law, a five-year statute of limitations applies to claims concerning written contracts, while a three-year limitations period applies to claims regarding oral contracts."). Because Bradley's KWPA claims are based on what Plaintiffs allege are unlawful aspects of Defendants' ICA – a written contract – the five-year statute of limitation applies to his claims. Even his earliest claims, which date back to December 14, 2016, are not time barred under the five-year statute of limitations.

CONCLUSION

For the foregoing reasons and the reasons set forth in Plaintiffs' summary judgment memorandum, Plaintiffs respectfully request that the Court deny Defendants' motion (and, where appropriate, grant summary judgment to Plaintiffs).

Respectfully submitted,

KIRK ROBERTS, FARAJI ARTURO COUNCIL, TERRENCE COLVIN-WILLIAMS, REGINALD BRADLEY, DAVID COLEMAN, and CARL McROBERTS JR., on behalf of themselves and all others similarly situated,

By their attorneys,

/s/ Daniel W. Craig

Brendan J. Donelon, KS #17420
Daniel W. Craig, KS #78146
DONELON, P.C.
4600 Madison, Ste. 810
Kansas City, Missouri 64112
816-221-7100
Fax: 816-709-1044
brendan@donelonpc.com
dan@donelonpc.com

Hillary Schwab, BBO #666029*
Brant Casavant, BBO #672614*
Rachel Smit, BBO #688294*
FAIR WORK, P.C.
192 South Street, Suite 450
Boston, MA 02111
(617) 607-3260
www.fairworklaw.com
Email: hillary@fairworklaw.com,
brant@fairworklaw.com,
rachel@fairworklaw.com

**Admitted pro hac vice*

Dated: January 27, 2023

CERTIFICATE OF SERVICE

I hereby certify that, on January 27, 2023, a true and correct copy of this pleading was served on all parties of record by ECF filing.

/s/ Daniel W. Craig
Daniel W. Craig