Case No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Owner-Operator Independent Drivers Association, Inc., and Marshall Johnson, and Jerry Vanboetzelaer, Individually and on Behalf of All Others Similarly Situated,

Petitioners-Plaintiffs,

v.

New Prime, Inc., d/b/a Prime, Inc., and Success Leasing, Inc.,

Respondents-Defendants.

PETITION FOR REVIEW OF CLASS CERTIFICATION ORDER PURSUANT TO FED.R.CIV.P. 23(F)

Thomas A. Sheehan, Esq.
Shook, Hardy & Bacon, L.L.P.
One Kansas City Place
1200 Main Street
Kansas City, MO 64105

Paul D. Cullen, Esq.
David A. Cohen, Esq.
The Cullen Law Firm, PLLC
1101 30th Street, NW, Suite 300
Washington, DC 20007

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SUMMARY OF REASONS FOR GRANTING THIS PETITION

Petitioners respectfully request that this Court exercise its discretion under Fed.R.Civ.P. 23(f) to review and reverse an Order denying class certification entered on February 25, 2002, by the United States District Court for the Western District of Missouri, Southern Division, in *Owner-Operator Indep. Drivers Ass'n et al. v. New Prime, Inc. et al*, Case No. 97-3408-CV-S-1. (Addendum "A"). Immediate review is necessary to prevent the Order from extinguishing the instant cause of action, sowing confusion where it conflicts with the class certification analysis of other district court actions involving similarly situated parties, and eviscerating a private right of action first recognized by this Court at an earlier stage of this litigation. *Owner-Operator Indep. Drivers Ass'n v. New Prime, Inc.*, 192 F.3d 778 (8th Cir.1999), *cert. denied*, 529 U.S. 1066 (2000).

The fulcrum upon which the District Court's opinion rests is that set-offs against the class, not alleged with specificity, untested legally, and factually unproven, may alone defeat class certification. This ruling is demonstrably incorrect, runs counter to established precedent in this circuit and elsewhere, and is diametrically opposed to the stated policy of both Rule 23 and the Truth-in-Leasing regulations. The District Court's ruling, if it is allowed to stand, will eviscerate the policy objectives of the Truth-in-Leasing regulations. If motor carriers may defeat class certification of Truth-in-Leasing actions by merely alleging set-offs, then no class actions can be certified, and owner-operators will lose the only effective mechanism to vindicate their rights under the Truth-in-Leasing regulations.

This Court held in *New Prime* that Congress gave independent truck owner-operators a private right of action to enforce the regulations governing the economic relationship between

them and motor carriers. These regulations are codified at 49 C.F.R. Part 376 and are commonly referred to as the "Truth-in-Leasing" regulations. In this case, Plaintiffs allege that Defendants violated the portion of the regulations involving the handling and return of owner-operators' escrow funds. Because individual monetary claims under the Truth-in-Leasing regulations are small, here they average $1600, these claims will not be vindicated and important federal rights will be lost in the absence of class certification.

Defendants' alleged set-offs have not been specified, much less tested in law or in fact. They are subject to laches, estoppel and fail as a matter of law because they violate the terms of the Truth-in-Leasing regulations themselves, which require that owner-operator escrow funds be returned *no later* than 45 days after lease termination. In relying solely on these alleged set-offs to defeat certification, the District Court broke two cardinal rules of class certification jurisprudence. First, it ruled that absent class members are parties for purposes of Defendants' alleged set-offs. Second, it ruled that the alleged set-offs were meritorious before the validity of those set-offs were subjected to test at trial.

In addition, the trial court's ruling that individual issues of damages predominated over common issues of liability is demonstrably incorrect and runs counter to the established precedent of this and other circuits. The District Court found that Plaintiffs satisfied all the requirements of Rule 23(a); numerosity, commonality, typicality and adequacy of representation. Indeed, the court found that liability issues are common to all members of the class; namely, that Plaintiffs have alleged a common course of conduct by Defendants that have violated the Truth-in-Leasing regulations for every member of the class. The trial court's ruling that individualized issues of damages defeat class certification is indefensible under accepted class action

jurisprudence. Issues of damages almost always contain individualized issues, yet they cannot defeat class certification where the central issues of liability are common to the class. To hold otherwise would render Rule 23 lifeless as damages will almost always require individualized proof.

STATEMENT OF THE CASE

1. Statement of Facts.

This lawsuit seeks the enforcement of the federal Truth-in-Leasing regulations codified at 49 C.F.R. Part 376. In their Amended Complaint, Plaintiffs petitioned the court for a declaration that Defendants' business practices violate the Truth-in-Leasing regulations, an injunction barring future unlawful business practices, and an order requiring Defendants to disgorge revenues received through the violation of these regulations. *See* 49 U.S.C. §§ 13301, 13501, 14102, and 14704; 49 C.F.R. §§ 376.12 (h), (i) and (k).

Defendant New Prime, Inc., ("Prime"), operates as a motor carrier under authority granted by the U.S. Department of Transportation, ("DOT"), providing transportation services to the shipping public. Defendant Success Leasing, Inc., ("Success"), engages independent truck owner-operators in lease-purchase agreements which purport to lease, with the option to purchase, truck tractor units to the owner-operators. Plaintiffs Marshall Johnson and Jerry Vanboetzelaer are owner-operators who have leased such equipment from Success and then leased this truck and their services to Prime. Plaintiff Owner-Operator Independent Drivers Association, Inc., ("OOIDA"), is the nation's largest non-profit trade association which represents the interests of independent owner-operators nationwide.

Each of the putative class members in this action is an independent truck owner-operator who has (1) entered into a lease-purchase agreement with either Prime or Success, which purports to lease, with the option to purchase, trucking equipment from Prime or Success to the owner-operator, (2) then leased that equipment and their services to motor carrier Prime under the terms of a "Service Contract" between Prime and the owner-operator, and (3) paid money into "reserve" and "security deposit" accounts retained by Prime or its affiliate Success. Each class member's lease-purchase agreement with Prime or Success is substantively identical, as is each class member's Service Contract with Prime. Based upon information supplied to Plaintiffs by Prime there are over ten thousand putative class members.

The lease-purchase agreement provides for the creation of four separate funds: an "Excess Mileage Rental Account," a "Repair Reserve," a "Tire Replacement Reserve," and a "Performance Bond," which the owner-operator must pay into while using the leased equipment. Under the terms of the lease-purchase agreement, if an owner-operator's lease is terminated before the end of its term, and the owner-operator does not exercise his or her option to purchase the truck equipment, the owner-operator *forfeits* to Defendants all monies accumulated in his or her "reserve funds." Even if the owner-operator completes the lease and exercises the option to purchase, he or she forfeits to Defendants *half* of the "Repair Reserve" and the "Tire Replacement Reserve." These forfeitures present a patent violation of the federal law requiring that "*in no event shall the escrow fund be returned later than 45 days from the date of [lease] termination*." 49 C.F.R. 376.12(k)(6) (emphasis added).

Plaintiffs' original complaint was dismissed by the District Court in 1997, on the ground that Plaintiffs' claims should be adjudicated by the Federal Highway Administration, under the

doctrine of "primary jurisdiction." This Court reversed in *New Prime*, holding that "49 U.S.C. § 14704(a) authorizes private actions for damages and injunctive relief to remedy at least some violations of the Motor Carrier Act and its implementing regulations." 192 F.3d at 785.

On remand, Defendants answered Plaintiffs' Amended Complaint and filed a counterclaim against Plaintiff Marshall Johnson for breach of contract. Defendants also asserted the affirmative defense of set-off against Johnson. Although the Defendants make reference to potential set-offs against class members, no specific set-offs are alleged and the record is wholly silent as to a factual basis of any particular set off.

2. The District Court's Denial of Class Certification.

The trial court found that Plaintiffs satisfied all of the prongs of Rule 23(a): numerosity, commonality, typicality and adequacy of representation. The District Court then determined that certification was inappropriate under 23(b)(2) for two reasons. First, the court incorrectly characterized Plaintiffs' requests for declaratory and injunctive relief as remedies that "serve the ultimate goal of recovering money" and that Rule 23(b)(2) was inapplicable. Second, the court held that "it is clear that an injunction obtained by an individual class member would benefit the entire class, thus making class certification under Rule 23(b)(2) inappropriate. Dist. Ct. Op. at 16.

The District Court then addressed certification under Rule 23(b)(3), which requires common issues to predominate over individual issues. The only issue the court addressed in analyzing predominance was whether individualized issues of damages predominated. The court, without reference to any legal authority, held that "Defendants are not liable for failing to return funds if those funds are offset by amounts owed to Defendants or if the owner-operator did

not terminate his or her lease with a positive balance in his or her escrow account." *Id*. at 18. The District Court continued that if the court certified the class, "the Court would be required to make individualized determinations of whether a class member suffered damages due to the lease terms about which Plaintiffs complain" and that "determining whether an individual class member had suffered damage would require examination of individualized proof and predominates over common issues." *Id.* at 18-19.

QUESTION PRESENTED

The sole question presented is whether the District Court erred in denying Plaintiffs' motion for class certification on the ground that individual issues of damages predominated over common issues of liability.

RELIEF SOUGHT

Petitioners request this Court to grant it permission to appeal from the District Court's Order denying class certification, and to reverse such order as erroneous.

REASONS FOR GRANTING THE PETITION

Federal Rule of Civil Procedure 23 (f) states:

> Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

The Advisory Committee Note emphasizes that "[t]he court of appeals is given unfettered discretion whether to permit the [interlocutory] appeal, akin to the discretion exercised by the Supreme Court in acting on a petition for certiorari." Comm. Note, Fed. R. Civ. P. 23(f). The Note states that "[p]ermission is most likely to be granted when the certification decision turns on a novel or unsettled question of law, or when, as a practical matter, the decision of certification is likely dispositive of the litigation." *Id.* The Committee also states 23(f) review may be appropriate where "[a]n order denying certification may confront the plaintiff with a situation in which the only sure path to appellate review is by proceeding to final judgment on the merits of an individual claim that, standing alone, is far smaller than the costs of litigation." *Id.*

This circuit has no published opinions that would aid litigants regarding the criteria for review of Rule 23(f) petitions. Several other circuits, however, have rendered opinions discussing their application of the rule. The first was *Blair v. Equifax Check Services, Inc.*, 181 F.3d 832, 834-35 (7th Cir. 1999), in which the Seventh Circuit identified three categories of cases appropriate for review under Rule 23(f). The first two categories comprise the so-called "death knell" cases and their counterparts - namely cases in which the class certification order effectively terminates the litigation either because the denial of certification makes the pursuit of individual claims prohibitively expensive or because the grant of certification forces the defendant to settle. *Id.* at 834-35. The Seventh Circuit noted, however, that in addition, "the appellant must demonstrate that the district court's ruling on class certification is questionable." *Id.* at 835. The third category described by the Seventh Circuit are those in which the interlocutory appeal of the class certification order "may facilitate the development of the law." *Id.*

The opinion of the First Circuit in *Waste Management Holdings, Inc. v. Mowbray*, 208 F.3d 288 (1st Cir. 2000), agrees with the sentiments expressed by *Blair*. It also expresses the view that a petition for review under Rule 23 (f) "be restricted to those instances in which an appeal will permit the resolution of an unsettled legal issue that is important to the particular litigation as well as important in itself and likely to escape effective review if left hanging until the end of the case." *Id.* at 294.

The Eleventh Circuit, in *Prado-Steiman v. Bush*, 221 F.3d 1266, 1272-74 (11th Cir. 2000), further expounded on Rule 23(f) standards by stating that "[i]nterlocutory review may be appropriate when it promises to spare the parties and the district court the expense and burden of

litigating the matter to final judgment only to have it inevitably reversed by this Court on an appeal after final judgment. Such a situation may exist, for example, when the district court expressly applies the incorrect Rule 23 standard or overlooks directly controlling precedent." *Id*. at 1275. Indeed, "[t]he more the alleged error arises out of a mistake of law (as opposed to an improper application of the law to the facts), the more the case may be susceptible to interlocutory review, simply because such an error is more readily reviewable by [a Court of Apeals] and does not require [it] to base [its] determination on an evolving factual record that may already have become incomplete." *Id.* at n.9. Conversely, "[t]he stronger the showing of an abuse of discretion, the more this factor weighs in favor of interlocutory review." *Id*. The Eleventh Circuit also stated that "a court should consider whether the appeal will permit the resolution of an unsettled legal issue that . . . might be one as to which an appellate ruling sooner rather than later will substantially assist the bench and bar, as may be the case when an issue is arising simultaneously in related actions involving the same or similarly- situated parties or is one that seems likely to arise repeatedly in the future. The fact that the lawsuit . . . has a strong public interest component, may also lend the issue particular importance and urgency." *Id.* at 1274-76.

1. Granting the Petition Will Resolve an Unsettled Legal Issue That Has a Strong Public Policy Component.

Plaintiffs' 23(f) petition should be granted because immediate review will permit the resolution of an unsettled legal issue that is important generally as well as to the particular litigation. *Mowbray*, *supra*. Moreover, this issue arises simultaneously in related actions involving similarly situated parties and involves an important question of public policy. *Prado-*

Steiman, supra. The unsettled legal question that must be resolved is whether, under Rule 23(b)(3), issues of damages affecting only individual owner-operators are sufficient to defeat class-wide consideration of systematic Truth-in-Leasing violations. There is significant and direct disagreement on this issue between the District Court in this case and two other district courts litigating similar causes of action involving similarly situated parties.

Taking up the Truth-in-Leasing private right of action where this Court left off in 1999, the United States District Court for the Southern District of Ohio has certified a class of owner-operator drivers who seek redress for systematic violations of 49 C.F.R. § 376.12 (i) and (k) by Arctic Express, Inc. The court certified a class of owner operators in part on the ground that "individual class members do not have the resources to control, let alone bring, separate actions against the Defendants." *Owner-Operator Indep. Drivers Ass'n, Inc. v. Arctic Express, Inc.*, No. 97-CV-00750, Slip op. at 20 (S.D. Ohio Sept. 6, 2001) (Addendum "B"). In *Arctic*, Rule 23(b)(3) was "the primary issue to be reached . . . in deciding the Plaintiffs' Motion for Class Certification . . ." Slip op. at 18. Declining to extend counterclaims to unnamed class members, the court resolved the Rule 23(b)(3) issue by finding that "the common issue of whether § 376.12 (k) was violated by the Defendants predominates over the four Counterclaims brought against the three named Plaintiffs, as well as over any issue of damages . . ." *Id*. at 20.

Also relying on this Court's annunciation of the Truth-in-Leasing private right of action,[1] the United States District Court for the Southern District of Indiana has certified two class

[1] The *Mayflower* court relied on the reasoning and holding of this Court in *New Prime* in its denial of Mayflower's motion to dismiss on the ground that owner-operators had no private right of action. *See Owner-Operator Indep. Drivers Association v. Mayflower Transit, Inc.*, 161 F.Supp.2d 948, 952 (S.D. Ind. 2001).

actions in two law suits filed to redress violations of 49 C.F.R. § 376.12 (f), (h), (j), and (k). *Owner-Operator Indep. Drivers Ass'n v. Mayflower Transit, Inc.*, 204 F.R.D. 138 (S.D. Ind. 2001). The *Mayflower* court found the class action to be the best mechanism for giving meaning to the private right of action because it determined that maintaining an individual lawsuit to vindicate rights under the Truth-in-Leasing regulations would be a near impossibility for most drivers. The court found explicitly that a "lawsuit by each individual plaintiff is impracticable since the amount of money at issue is less, in many cases, than the amount it would cost for each to prosecute a case." *Id*. at 149. Noting the mobility of owner-operators, the court found that "even if they were inclined to prosecute their cases, it is unlikely that they could marshal the time to do so. It follows that, absent a class action, the individuals would likely be without a remedy and Mayflower would likely retain the benefits of its alleged wrongdoing." *Id*. With regard to the Rule 23(b)(3) prong, the court stated unequivocally, "common issues of law and fact predominate over individual issues. All of the issues in both cases arise from a common nucleus of operative facts: Mayflower's alleged course of conduct in failing to return moneys which, plaintiffs allege, it had a legal obligation to repay to the owner-operators . . . By contrast, the individual differences to which Mayflower points--variations in lease provisions and variations in how Mayflower or its agents treated particular contractors under certain circumstances--are insufficient to outweigh the common issues." *Id*. at 148.

Rather than harmonize the approach to realizing the benefits of the private right of action, the District Court in this case confused it. The District Court agreed with the *Arctic* and the *Mayflower* courts when it found that "the common question linking members of the class is whether the Service Contract and the Leasing Agreements, contracts into which *all* class

members entered, violate the Truth-in-Leasing regulations." Dist. Ct. Op. at 10-11 (emphasis added). The court also found that "any variations between the claims of Johnson and potential class members is not sufficient to prevent Plaintiffs from satisfying the typicality prerequisite . . ." *Id*. at 11. Yet, in the end, the District Court abandoned a class proceeding because of its discomfort with potential set-offs that might diminish the final recovery of some putative class members. The District Court admitted that its Order on class certification directly conflicted with the result in *Mayflower* on relatively indistinguishable facts. Dist. Ct. Op. at 19.

The continued enforcement of the Truth-in-Leasing regulations is an important public priority in ensuring the vitality of this country's transportation system.[2] What results from these inconsistent outcomes involving similarly situated parties in different jurisdictions, however, is

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[2] At the sunset of the ICC, Congress, the ICC and DOT found the need for sustained protection compelling. "If the federal government were to discontinue regulation of owner-operator leasing arrangements, owner-operators would be left on their own to protect themselves against possible abuses by carriers . . . As independent contractors, owner-operators are unable to organize and obtain the benefits of collective bargaining. Some federal regulatory oversight of owner-operator leasing would ensure that an important segment of the transportation community can conduct its operations safely and without being subjected to abusive practices that cannot be prevented by market forces. Interstate Commerce Commission, *Study of Interstate Commerce Commission Regulatory Responsibilities Pursuant to Section 210(a) of the Trucking Industry Regulatory Reform Act of 1994* (October 25, 1994) (the "1994 ICC Report"), 1994 MCC LEXIS 104, at 170-171.

public policy confusion -- confusion about how the Truth-in-Leasing rights should be realized. This confusion should be eliminated immediately by this Court.

2. Denial of Class Certification Will be the "Death Knell" of this Litigation for Plaintiffs.

As the Seventh Circuit noted in *Blair v. Equifax,* exercise of interlocutory review of a denial of class certification order is merited where the denial tolls the "death knell" of the litigation for plaintiffs because the denial of certification makes the pursuit of individual claims prohibitively expensive. *See supra* 181 F.3d at 833-36. Recently, the Third Circuit granted a Rule 23(f) petition from a denial of class certification in a securities case on the ground that the denial of certification effectively terminated the litigation because the value of each plaintiffs claim is outweighed by the costs of stand-alone litigation. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (2001). The Third Circuit reasoned that "some of the securities claims pressed by the putative class members may be too small to survive as individual claims." *Id.* at 165.

As in *Newton*, the District Court's denial of class certification in this case effectively terminates the litigation because the value of the claims of the putative class are too small to survive as individual claims. The trial court found that the class was comprised of more than 10,000 individual owner-operators. Dist. Ct. Op. at 10. The court also stated that Plaintiffs' class claims were roughly $16,000,000. *Id.* at 15. The average claim then is $1600, an amount that would easily be exceeded by the costs of litigation. At the same time, a claim for $1600 is far too small for an attorney to represent class members on a contingent fee basis.

In addition, the unique characteristics of the class make individual actions of class members against Defendants highly unlikely. Individual owner-operators travel an average of

100,000 miles per year and are absent from home on average 300 nights per year. *See* Affidavit of James Johnston, attached to Plaintiffs' Motion for Class Certification. As a result, the trial court's denial of class certification sounds the "death knell" of the Plaintiffs' litigation, and will result in the vast majority of the class left without a remedy.

3. The Court Should Correct Six Errors of Law by the District Court.

1. It is an Error of Law to Predetermine the Merits of Defendants' Set-offs.

The District Court committed an error of law by predetermining that Defendants' potential set-off claims against the putative class are meritorious. It is well established that the trial court may not delve into the merits of plaintiffs' substantive claims in ruling on a motion for class certification. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974). Likewise, a predetermination of the merits of the defense to the suit is also inappropriate. *See In re Catfish Litigation*, 826 F.Supp. 1019, 1033 (N.D. Miss. 1993); *Philadelphia Elec. Co. v. Anaconda Am. Brass, Co.*, 43 F.R.D. 452, 458 (E.D. Pa. 1968).

Without the benefit of a hearing or argument, the District Court held that "the determination whether an owner-operator has a right to escrow funds . . . would necessarily entitle the Defendants to present individualized proof of offsets, advances and maintenance expenses charged to the owner-operators' accounts to determine whether any escrow funds remained to which the owner-operator may be entitled." Dist. Ct. Op. at 18. The court has expressly ruled on the merits of Defendants' alleged set-offs, finding both that such potential set-offs can be raised against absent class members, and that such set-offs have legal merit and can be proven.

Whether Defendants may assert set-offs in this action will be vigorously contested both

factually and legally. Such set-offs are state law claims that are, by definition, extrinsic to Plaintiffs' claims. The factual bases for these alleged set-offs have yet to be articulated and may be challenged on a class-wide basis. The alleged set-offs are also subject to the legal defenses of laches and estoppel. The ability of Defendants to raise set-offs is directly at odds with the Truth-in-Leasing regulations themselves, which provide that "*in no event shall the escrow fund be returned later than 45 days from the date of [lease] termination*." 49 C.F.R. 376.12(k)(6) (emphasis added).[3] The ability of a motor carrier to hold funds belonging to drivers is an extraordinary privilege that is strictly limited in time by the regulations. In order for the regulation to have any meaning, owner-operator escrow funds must be returned within the 45-day period, without regard to unresolved claims that may potentially be raised by the motor carrier. Thus, Defendants' set-offs cannot defeat the 45-day rule even if they had meritorious state claims.

The trial court's ruling was an error of law because it prejudges the merits of the case and is therefore an abuse of discretion. *See Crawford v. Hoffman-La Roche Ltd.,* 267 F.3d 760, 763 (8th Cir. 2001) ("A district court by definition abuses its discretion when it makes an error of law.").

2. <u>It Is an Error of Law to Hold That Absent Class Members Are Opposing Parties under Rule 13 for Purposes of Defendants' Set-offs.</u>

The trial court's ruling that absent class members are opposing parties under Rule 13 for

[3] In promulgating the Truth-in-Leasing regulations, the I.C.C. rejected the carriers' argument that they should be allowed additional time to retain escrow funds to settle potential claims, and decided to "affirm our prior decision and discussion and emphasize our belief that strict time limits for the return of escrow funds are necessary." *Lese and Interchange of Vehicles,* 131 M.C.C. 141, 154 (Jan. 9, 1979).

purposes of Defendants' potential set-offs was an error of law that directly led to the court's denial of class certification.

The basis for the conclusion that absent class members are not opposing parties for purposes of Rule 13 is rooted in due process concerns expressed in well-settled policy underlying Rule 23. Class actions permit plaintiffs with limited resources and small claims their only realistic access to the courts. *Phillips Petroleum v. Shutts*, 472 U.S. 797, 808-809 (1985). The class action was an invention in equity allowing plaintiffs to pool claims involving common questions which would be uneconomical to litigate individually. *Id.* Unlike a defendant in a normal civil suit, an unnamed class action plaintiff is not required to fend for himself; an absent class action plaintiff is not required to do anything. *Id.* at 810. In accordance with this "continuing solicitude for his rights, absent class members are not subject to other burdens imposed upon defendants. . . . They are almost never subject to counterclaims or cross claims, or liability for fees or costs." *Id.*

These concerns have led many courts to find Rule 13 inapplicable to absent class members. The Eleventh Circuit affirmed a district court decision which held that since "Rule 13 expressly is applicable only to opposing parties. A court may properly conclude that absent class members are not opposing or litigating adversaries, for purposes of Rule 13. . . . and therefore, Rule 13 is inapplicable in a class context." *Buford v. H & R Block*, 168 F.R.D. 340, 363 (S.D. Ga. 1996), *aff'd, Jones v. H & R Block*, 117 F.3d 1433 (11th Cir. 1997)(citation omitted). Relying on *Buford*, the court in *Fielder v. Credit Acceptance Corp.*, 175 F.R.D. 313, 321 (W.D. Mo. 1997), *vacated on other grounds*, 188 F.3d 1031 (8th Cir. 1997) held that "Rule 13 of the Federal Rules of Civil Procedure is not applicable in class actions." *See also Johns v. Rozet*, 141

F.R.D. 211, 219 n. 7 (D.D.C. 1992).

In its discussion of predominance, the trial court held, correctly, that Defendants' alleged counterclaims could not defeat class certification because absent class members are not considered "opposing parties" for purposes of Fed. R. Civ. P. 13. Specifically, the court held that "Rule 13 has no application in the class action context because unnamed class members are not considered 'opposing parties' under that rule and thus, potential compulsory counterclaims can not serve as a barrier to class certification." Dist. Ct. Op. at 17, *citing Peterson v. United Accounts, Inc.*, 638 F.2d 1134, 1136 (8th Cir. 1981).

Then, without any analysis or legal authority, the trial court determined that *potential set-offs* against absent class members could be, and in this case are, a barrier to class certification. The effect of the court's analysis is that absent class members are opposing parties under Rule 13 for purposes of set-off, but are not opposing parties for purposes of compulsory counterclaims. There is no basis in law for the court's distinction between counterclaims and set-offs under Rule 13. If absent class members are not opposing parties for purposes of counterclaims, then they cannot be opposing parties for purposes of set-off.

Both Rule 13(a), regarding compulsory counterclaims, and Rule 13(b), permissive counterclaims, contemplate claims against "opposing parties." Rule 13(c) makes it clear that a "counterclaim may or may not diminish or defeat the recovery sought by the *opposing party*." (Emphasis added). While counterclaims and set-off were distinct creatures under common law, the federal courts have consistently held that common law defenses such as set-off and recoupment are included within the scope of Rule 13. *See Shump v. Balka*, 574 F.2d 1341,1346 (10th Cir. 1978) ("Counterclaim under Rule 13 , F.R.C.P., includes both setoff and recoupment,

and is broader than either in that it includes other claims and may be used as a basis for affirmative relief"); *Pipeliners Local Union No. 798 v. Ellerd*, 503 F.2d 1193, 1198 (10th Cir. 1974) (same quotation).

Defendants' claims for set-off are Missouri state law claims. Under Missouri law, set-offs are considered within the broad category of counterclaims. *See Tindall v. Holder*, 892 S.W.2d 314, 326 (Mo.App. S.D. 1994) ("The former remedy of set-off and common law recoupment have lost considerable identity in modern practice and now are included within the remedy of a counterclaim"); *Edmonds v. Stratton*, 457 S.W.2d 228, 232 (Mo. App. 1970) ("The former remedy of set-off (a term loosely and confusingly used) and a defendant's common law right to recoupment have lost considerable identity in modern practice and now are included within the remedy of a counterclaim."). Thus, the District Court's ruling on this point is in error.

3. It is an Error of Law to Find That Individual Issues of Damages Predominated over Common Class Liability.

The trial court's finding that individualized issues of damages caused individual issues to predominate over common issues, must be analyzed under Rule 23(b)(3)'s predominance test. "The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods. v. Windsor*, 521 U.S. 591, 623 (1997). In order to meet the predominance requirement of Rule 23(b)(3), a plaintiff must establish that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, . . . predominate over those issues that are subject only to individualized proof." *Rutstein v. Avis Rent-A-Car Sys., Inc.*, 211 F.3d 1228, 1233 (11th Cir. 2000), *cert. denied Zeirei Agudath Israel Bookstore v. Avis Rent-A-Car System, Inc.*, 532 U.S.

919 (2001). Notably, "[c]ommon questions need only to predominate; they need not be dispositive of the litigation." *Lockwood Motors, Inc. v. General Motors Corp.*, 162 F.R.D. 569, 580 (D. Minn. 1995).

It is critical to note that the district court found that Plaintiffs satisfied the commonality requirement of Rule 23(a)(2). The trial court found that the "relevant lease provisions" executed by class members "are substantially similar in all material respects." Dist. Ct. Op. at 10. The court also found that "Plaintiffs have alleged a common course of conduct on the part of Defendants that has purportedly violated the Truth-in-Leasing regulations." *Id.* As a result, the court concluded that "the common question linking members of the class is whether the Service Contract and the Leasing Agreement, contracts into which all class members entered, violate the Truth-in-Leasing regulations." *Id.* In essence, then, the trial court held that the central liability issue, whether the agreements entered into by all members of the class violate the Truth-in-Leasing regulations, is a common issue that can be decided on a representative basis.

In its discussion of predominance of common issues under 23(b)(3), the trial court failed to mention its earlier findings of commonality regarding liability issues. Instead, the trial court focused only on individualized issues of damages, and found that such issues predominated over *all* common issues. Implicit in the court's ruling, is the finding that individualized issues of damages predominate over the central and common issues of class liability; namely, whether the agreements entered into by all members of the class violate the Truth-in-Leasing regulations.

The trial court's decision regarding predominance is contrary to the well-established rule in this circuit that individualized issues of damages cannot defeat class certification when class liability issues predominate. In *Alpern v. Utilicorp United, Inc.*, 84 F.3d 1525, 1540-41 (8th Cir.

1996), this Court held that the same District Court that refused to certify a class in this case, also abused its discretion in failing to certifying a class of investors in a § 10-b securities action. In the context of typicality, this Court held that "[f]actual variations in the individual claims will not normally preclude class certification if the claim arises from the same event or course of conduct as the class claim, and gives rise to the same legal or remedial theory." *Id.* at 1540. The Court also rejected the argument that individual damage calculations justified denial of certification, holding that "[t]he fact that damage calculations might differ slightly . . . is a minor matter in comparison with these fundamental similarities." *Id.*

The District Court's ruling is also directly contrary to the predominance analysis of the other circuit courts. *See Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298, *rehearing en banc denied*, 252 F.3d 437 (5th Cir. 2001) (affirming district court's determination that common issues predominated because "[a]lthough calculating damages will require some individualized determinations, it appears that virtually every issue prior to damages is a common issue"); *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977), *cert. denied* 434 U.S. 1086 (1978) ("it has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate"); *Gold Strike Stamp Co. v. Christensen*, 436 F.2d 791, 798 (10th Cir. 1979) ("where the question of basic liability can be readily established by common issues . . . [t]he fact that there may have to be individual examinations on the issue damages has never been held, however, a bar to class actions"); *Blackie v. Barrack*, 524 F.2d 891, 905 (9th Cir. 1975), *cert. denied* 429 U.S. 816 (1976) ("The amount of damages is invariably an individual question and does not defeat class action treatment.").

Decisions of many district courts reaffirm the principal that the predominance requirement under Rule 23(b)(3) is satisfied where common liability issues predominate, even though individual issues of damages may exist. For example, in *Lockwood v. General Motors Corp.*, 162 F.R.D. 569, 580 (D. Minn. 1995), plaintiff claimed that defendant violated the Federal Automobile Dealers Day in Court Act by requiring plaintiff to pay a 1% "marketing initiative" charge to defendant on all vehicle sales. Defendant opposed class certification, in part, on the ground that individual issues of fact predominated. The court held that "when one or more of the central issues in the action are common to the class and can be said to predominate, the action will be considered proper under Rule 23(b)(3) even though other important matters will have to be tried separately." The court expressly rejected defendant's argument that individual issues of damages precluded class certification, holding that "[d]ifferences which may arise in calculating the amount of individual damages plaintiffs have sustained will not prevent certification under Rule 23(b)." *Id.* at 581-82. *See also Selby v. Principal Mut. Life Ins. Co.*, 197 F.R.D. 48, 58 (S.D.N.Y. 2000) (holding that the central liability "question predominates over the particular issues associated with each plaintiff's claim, namely: the specifics of the insured's policy, the illnesses his claims concerned, [and] the potential amounts of benefits each insured is due . . ."); *Shaw v. Toshiba America Information Systems, Inc.*, 91 F.Supp.2d 942, 956 (E.D. Tex. 2000) ("the possibility that some class members may have larger damages than others is no significant obstacle to certification"); *In re Catfish Antitrust Litigation*, 826 F.Supp. 1019, 1043 (N.D. Miss. 1993) ("the court also recognizes the obvious. That is, damage amounts are individualized and will vary among plaintiffs. Nonetheless, individual questions of damages are often encountered in antitrust actions, and they are rarely a barrier to certification"); *Town of New*

Castle v. Yonkers Contracting Co., Inc., 131 F.R.D. 38, 42 (S.D.N.Y. 1990) ("the fact that each class member's damages will be different and, thus, will require individualized treatment does not prevent one from concluding that common questions predominate"); *Bryan v. Amrep Corp.*, 429 F.Supp. 313, 316 (S.D.N.Y. 1977) ("Even in cases involving fungible items, the amount of damage is invariably an individual question and does not by itself bar a class action").

By failing to follow the well-established law on predominance under Rule 23(b)(3), the District Court abused its discretion.

4. It is an Error of Law to Hold That Fact of Damages Are an Obstacle to Class Certification.

The trial court's misapplication of the "fact of damage" doctrine constitutes an error of law, and an abuse of discretion. To understand the District Court's error, it is important to recognize the distinction between "fact of damage" and "actual damages." "Fact of damage" pertains to the existence of injury, as a predicate to liability, while "actual damages" involve the quantum of injury, and relate to the appropriate measure of individual relief. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 435, 454-56 (3d Cir. 1977). Clearly, the District Court confused the "fact of damage"and the issue of "actual damages," inverting the analysis and reaching an untenable result.

The District Court cited as sole authority for its denial of class certification under Rule 23(b)(3), *Martinto v. McDonald's Systems, Inc.*, 86 F.R.D. 145 (N.D. Ill. 1980). In *Martino*, the court decertified a Sherman Antitrust Act class action on the ground that plaintiffs could not "prove classwide their fact of damage." *Id.* at 146. The court's analysis was premised on the foundation that "fact of damage proof . . . is an essential element to the establishment of antitrust

liability." *Id.* The court listed a litany of factors that made the classwide proof of damage impossible, and concluded that "scrutiny of individual franchises and alternative locations" made "class wide proof of damage impossible." *Id.* at 150.

Martino is inapplicable to the case at bar because the "fact of injury" in this case is common to the class. *See Walton v. Franklin Collection Agency, Inc.*, 190 F.R.D. 404, 412 (N.D. Miss. 2000) (holding that in a Fair Debt Collection Practices Act class action, "the *fact* of injury is common to the class . . . as each class member allegedly sustained damages by being required to pay attorneys fees to the Defendant . . . and which were retained by the Defendant as compensation.") (emphasis in original). Here, as set out in the Amended Complaint, each class member sustained damages by entering into standard lease agreements with Defendants that forced oppressive and illegal terms onto them in violation of the Truth-in-Leasing regulations.

On the other hand, Defendants' alleged set-offs, to the extent they have any viability at all, affect the amount of "actual damages" suffered by each individual class member, and are no bar to class certification. *See Walton*, 190 F.R.D. at 412 ("while the *amount* of damages suffered may have to be proven on an individual basis . . . [s]mall differences in the amount of damages suffered by each class member will not preclude certification when the 'fact of injury' is common to all.").

Finally, it must be noted that the conclusion of the District Court that "injury in fact" cannot be proved on a classwide basis has been roundly rejected by the courts, as it would defeat the purpose of Rule 23 by allowing differences in class members' damages to serve as a foil in defeating virtually all motions for class certification. *See Visa Check/Mastermoney Antitrust Litigation*, 2001 WL 1252717, *9 (2d Cir. Oct. 17, 2001) ("If defendants' argument (that the

requirement of individual damages is in itself sufficient to preclude class treatment) were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims"); *In re Catfish Litigation*, 826 F.Supp. 1019, 1044 (N.D. Miss. 1993) ("If defendants' argument were uncritically accepted, there would be little if any place for the class action device in the adjudication of antitrust claims.").

5. It is an Error of Law to Deny Rule 23(b)(2) Certification on the Ground of Necessity.

In its Order, the District Court stated that "an injunction obtained by an individual class member would benefit the entire class, thus making class certification under Rule 23(b)(2) inappropriate." Dist. Ct. Op. at 16 citing 7B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, FEDERAL PRACTICE & PROCEDURE, § 1785.2 (2001). The cases relied upon in § 1785.2 involve actions seeking to enjoin the application of public laws.[4] The basis for the Truth-in-Leasing action, however, is a standard lease agreement between a private parties. While an individual action may be sufficient to nullify an unlawful or unconstitutional public law, an individual action will *not* suffice to affect changes in the relationship between Defendant and the thousands of owner-operators whose relationship with Defendants are governed by individual lease agreements.

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[4] *See also Johnson v. City of Opelousas*, 658 F.2d 1065, 1069 n.5 (5th Cir. 1981); *Bond v. Dentzer*, 325 F.Supp. 1343, 1352 (N.D.N.Y.1971) (stating, "[i]t makes me wonder why the complexities of Federal Rule of Procedure 23 are entered into when the declaration of unconstitutionality for one would, or at least should, in effect proclaim unconstitutionality for all"); *See also Ihrke v. Northern States Power Co.*, 459 F.2d 566, 572 (8th Cir. 1972), *vacated on other grounds*, 409 U.S. 815 (1972) (reasoning that "(t)he determination of the constitutional question can be made by the Court and the rules and regulations determined to be constitutional or unconstitutional regardless of whether this action is treated as an individual action or as a class action. No useful purpose would be served by permitting this case to proceed as a class action.").

Under Article III, § 2 of the United States Constitution, "the exercise of judicial power depends upon the existence of a case or controversy." *In re Paulson*, 276 F.3d 389 (8th Cir. 2001) (citing *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974) (internal citation omitted). As this Circuit stated in *Gopher Oil Co. v. Bunker*, 84 F.3d 1047 (8th Cir. 1996), "to satisfy the actual controversy requirement . . . there must exist a substantial controversy between the parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Id*. at 1050. In other words, "a live dispute must exist between the parties at the time of the court's hearing." *Id.* When the District Court denied class certification, it eliminated absent owner-operators from the case. In the absence of class certification, the only lease agreements at issue are those between the named Plaintiffs and Defendants. The District Court will be powerless to affect Defendants' lease agreements between Defendants and other owner-operators because those owner-operators will no longer be before the District Court. Accordingly, the District Court's finding that an injunction entered in an individual action would benefit the entire class is wrong as a matter of law and must be reversed.

6. <u>It is an Error of Law to Characterize Requested Relief as Merely an Attempt To Recover Money.</u>

Before addressing whether certification was proper under Rule 23(b)(2), the District Court stated that it "need not remain blind to the 'realities of litigation'. . . . The establishment fund into which retained escrow funds will be deposited, an injunction preventing the transfer of funds, and the ultimate disgorgement of the funds, all serve the ultimate goal of recovering money." Dist. Ct. Op. at 15. The Court thus declined to apply Rule 23(b)(2) holding that "the predominate relief sought in this case is money and thus, if any class is to be certified, it must be certified according to Rule 23(b)(3)." *Id*. at 16.

The District Court's disposition of Rule 23(b)(2) certification is contrary to its own conclusions of law. In denying Defendants' Motion for Judgment on the Pleadings, the District Court held that "Plaintiff (sic) has asserted a valid cause of action for injunctive relief." December 17, 2001 Order Denying Defendants' Motion for Judgment on the Pleadings at 15 (Addendum "C"). This was because "the specific provisions Plaintiffs seek to enforce . . . were within the [ICC's] general jurisdiction pursuant to [49 U.S.C.] § 13301 and were specifically authorized by [49 U.S.C.] § 14102. This is not remarkable," commented the court, "considering § 13301 was interpreted . . . to give the Secretary [of the Department of Transportation] wide-ranging authority to regulate the industry."

It is an error of law to reduce Plaintiffs' request for injunctive relief to merely "recovering money." The Truth-in-Leasing regulations describe a variety of on-going, affirmative obligations of regulated motor carriers to its owner-operators. For example, the escrowed monies "are subject to a statutory trust created by the federal Truth-in-Leasing regulations for the benefit of Owner-Operators." *Owner-Operator Indep. Drivers Ass'n v. Huntington Nat'l Bank*, Adv. No. 01-1044, Slip op. at 5 (Bankr. S.D. Ohio Jan. 9, 2002) (Addendum "D"). The motor carriers

have fiduciary duties to the owner-operators and accounting obligations that exist irrespective of whether the motor carrier owes money to the owner-operator. The requested injunctive relief asks the District Court to compel Defendants to meet those obligations in this case irrespective of whether any particular owner-operator has a positive or a negative account balance with Defendants. Where the purpose of Plaintiffs' request for injunctive relief is for the enforcement of the Truth-in-Leasing regulations, it is an error of law for the District Court to reduce Plaintiffs' requested injunctive relief as an attempt to recover money where owner-operators are entitled to the benefit of the Truth-in-Leasing regulations irrespective of whether money is owed to them. This error of law was compounded when the District Court used this characterization as rationale for failing to apply Rule 23(b)(2).

CONCLUSION

This Court should grant the instant petition allowing Plaintiffs permission to appeal from the District Court's Order denying class certification, and should reverse the Order as erroneous.

Respectfully submitted,

Owner-Operator Independent Drivers Association, Inc., Marshall Johnson, and Jerry Vanboetzelaer,

Plaintiffs/Petitioners

By: _____
Thomas Sheehan, Esq., Bar # 36462
SHOOK, HARDY & BACON

One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-6550

By: _____

Paul D. Cullen, Sr.
David A. Cohen
THE CULLEN LAW FIRM, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007
Telephone: (202) 944-8600

Dated: March 11, 2002

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were served by hand delivery, on Monday, March 11, 2002 upon:

James C. Sullivan, Esq.
Shughart Thomson & Kilroy, P.C.
1700 Twelve Wyandotte Plaza
120 West 12th Street
Kansas City, Missouri 64105

and by U.S. Mail, first-class, postage prepaid upon:

Arthur Curtis, Esq.
Greene & Curtis, LLP
1340 E. Woodhurst
Springfield, Missouri 65804

_____

David A. Cohen
THE CULLEN LAW FIRM, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007
Telephone: (202) 944-8600
Facsimile: (202) 944-8611

Counsel for Petitioners-Plaintiffs