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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

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

Plaintiffs,

vs.

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

Defendants.

Civ. 02-1059 PHX PGR

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

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I. INTRODUCTION

Plaintiffs, owner-operator truck drivers ("Owner-Operators), have filed a Class Action Complaint ("Complaint") in this action seeking relief for defendants' violations of the federal Truth-in-Leasing Regulations found at 49 C.F.R. § 376. By this motion for class certification pursuant to Fed. R. Civ. P. 23, plaintiffs respectfully ask this Court to follow the well established body of cases decided by numerous federal courts throughout the country holding that such cases are ideally suited for class certification.

- *OOIDA v. Mayflower Transit, Inc.*, 204 F.R.D. 138, 145 (S.D. Ind. 2001) ("[T]here are common issues of law *and* fact……the relevant provisions of the leases at issue……are all but identical and all of them are governed by the same federal regulations.") (emphasis in original).
- *OOIDA v. Ledar Transport*, Civil Action No. 00-0258-CV-W-2-ECF (W.D. Mo. March 31, 2002) (Ex. A, Slip. Op. at 8) ("[T]he Court finds that there is a common legal question, which is the application of the Federal Truth-in-Leasing regulations to the defendant's leases.").
- *Sheinhartz v. Saturn Transportation System, Inc.*, 2002 WL 575636 *7 (D. Minn. March 26, 2002) ("Because the named Plaintiff''s claims and the proposed class' claims arise from the same conduct by Defendants alleged to have violated 49 C.F.R. [§§376]……the Court finds that Plaintiffs have satisfied the typicality requirement of Rule 23(a)(3).").
- *OOIDA v. Arctic Express, Inc.*, Case No. C2:97-CV-00750 (Sept. 6, 2001) (Ex. B, Slip. Op. at 12) (""The common question of law……is whether the Agreements violated 49 C.F.R. §376.12(k).").
- *Padrta v. Ledar Transport, Inc.*, Civil Action No. 96-0324-CV-W-2 (W.D. Mo. Sept. 6, 1996) (Ex. C, Slip. Op. at 5) ("The Court is persuaded that plaintiffs have demonstrated not only that there are other members of the proposed class who have the same or similar grievances as plaintiffs, but also that the proposed class members' statutory claims, under 49 C.F.R. §1057.12(k), present a multitude of common questions of law and fact.").
- *OOIDA v. Heartland Express Inc. of Iowa*, No. 3-01-CV-80179 (S.D. Iowa, Jan. 3, 2003) (Ex. D, Slip. Op. at 4) ("The court finds that there is a common legal question, which is the application of the truth in leasing regulation to defendant''s leases.").
- *OOIDA v. Gilbert Exp. Inc.*, C. A. No. 00-5163 (D. N.J. Feb. 14, 2001) (Ex. E at 2) ("There are questions of law and fact that are common to the class and which predominate over questions affecting any individual class member.").

Class certification in this case will provide an indispensable forum for absent class members – thousands of Owner-Operators geographically dispersed throughout

the nation – whose only realistic opportunity to vindicate important federal rights lies in class-wide adjudication. Further, this case easily satisfies the commonality and typicality standards of Fed. R. Civ. P. 23. The lease agreements at issue are typical in all material respects, particularly in regard to their uniform *omission* of disclosures regarding compensation, escrows, and charge-backs to Owner-Operators. While it is axiomatic that "for purposes of evaluating a motion for class certification, the allegations contained in Plaintiffs' complaint are assumed to be true," *Brink v. First Credit Res.*, 185 F.R.D. 567, 569 (D. Ariz.1999)(Silver, J.), discovery obtained from Swift has confirmed that it overcharges Owner-Operators, on a systematic class-wide basis, for items such as fuel and insurance in outright violation of the Regulations. Similarly, this case presents a common question of law – whether defendants' failure to disclose information regarding compensation, escrows, and charge-backs violates the Regulations. Finally, as a result of the defendants' motion to compel arbitration of plaintiffs' claims against M.S. Carriers, Inc., as well as the dismissal of the claims and counterclaims involving M.S. Carriers Warehousing & Distribution, Inc., the defendants' previous objections to class certification have now been largely eliminated. Accordingly, plaintiffs respectfully urge this Honorable Court to follow the long-line of cases granting class certification by granting certification here.

II. BACKGROUND

A. Plaintiffs

Plaintiffs Marc Mayfield, Frank Belcher, David Hayes, Jerry L. Webb, and Valarie Helton ("Named Plaintiffs") leased trucking equipment to defendant Swift Transportation Co., Inc. ("Swift") under the Swift Contractor Agreement that is subject to the Truth-in-Leasing Regulations ("Swift Lease"). Representative copies of the Named Plaintiffs' Swift Leases are attached as Exhibit F. The Swift Lease is a standard form contract. The Named Plaintiffs were compensated by Swift for

trucking services they provided pursuant to the Swift Lease, paid money into escrow accounts held by Swift, were charged-back for goods and services initially paid for by Swift, including insurance and fuel. *See* Ex.G, Settlement Statements for Named Plaintiffs Mayfield, Hayes, Belcher,and Helton. Plaintiffs Marc Mayfield and Frank Belcher also leased trucking equipment from Interstate Equipment Leasing Co. ("Interstate") under the Interstate Equipment Leasing Agreement. ("Interstate Lease"). Copies of their leases are attached as Exhibit H. Lease payments for the Interstate equipment were deducted from plaintiffs' compensation by Swift, and escrow funds required by the Interstate Lease were deducted directly from their compensation by Swift. *Id.* ¶ 2. The Interstate Lease is also a standard form contract. Plaintiff Owner-Operator Independent Drivers Association ("OOIDA") is the national trade association representing the interests of Owner-Operators. *See* Exhibit I, Declaration of James J. Johnston, President, OOIDA. OOIDA has approximately 115,000 members who collectively operate more than 130,000 trucks in all 50 of the United States and in Canada. Ex. I-J. OOIDA has been designated as a class representative in a number of class action suits that are substantially similar to this case.

B. Defendants

Swift is a federally regulated motor carrier that provides trucking services in interstate commerce under authority issued by the U.S. Department of Transportation. *See* Ex. K, Hoggard Aff. at ¶ 1. Swift employs a fleet including its own trucks as well as trucks it leases from Owner-Operators. *Id.* at ¶ 4. Interstate is an equipment leasing company whose lease is subject to the Truth-In-Leasing Regulations by virtue of its interrelationship with Swift. *See* July 28, 2004 Order at 4-7 (doc. # 265).

C. Procedural Background

Plaintiffs commenced this action on September 6, 2002 (doc. # 1). By Order

dated September 26, 2003, the Court granted defendants' motion to compel arbitration with respect to plaintiffs' claims against M.S. Carriers, Inc. (doc. # 172). By Order dated July 28, 2004, the Court granted plaintiffs' motion to dismiss claims and counterclaims with respect to defendant M.S. Carriers Warehousing & Distribution, Inc. (doc. # 265). The Court further ruled that plaintiffs' claims are governed by the four-year statute of limitations set forth in 28 U.S.C. § 1658(a). *Id.* The Court also denied Interstate's Fed. R. Civ. P. 12(b)(6) motion to dismiss. *Id.* Interstate filed its Answer on August 12, 2004 (doc. # 270). On August 17, 2004, all parties stipulated to submit renewed class certification memoranda (doc. # 271).

III. CLASS DEFINITION

This Court has ruled that a class is properly defined where the class definitions are "sufficiently definite and ascertainable such that class members can be accurately identified." *Winkler v. DTE, Inc.*, 205 F.R.D. 235, 239 (D. Ariz. 2001)(Bolton, J.).

Here, the class and its members are clearly ascertainable, definite, and identifiable:

> All persons or entities who, after June 6, 1998, were a party to a lease agreement with Swift Transportation Co., Inc. ("Swift") and/or Interstate Equipment Leasing, Inc. ("Interstate") that was subject to federal regulations contained in 49 C.F.R. Part 376; and who received compensation under such lease; who deposited money into one or more escrow funds held for the benefit of Swift and/or Interstate; who had compensation reduced by Swift and/or Interstate on account of charge-back items; who purchased or were charged for any insurance through Swift and/or Interstate; or who were charged for any cargo damage by Swift and/or Interstate.[1]

IV. ARGUMENT.

a. Class Certification is Appropriate Under Fed. R. Civ. P. 23 (a)

[1]Plaintiffs seek certification only as to those Counts of the Complaint asserting violations of the Truth-in-Leasing Regulations (Counts I, II, and III) and do not seek certification with respect to Counts IV and V of the Complaint asserting tortious interference and joint and several liability. Further, because M.S. Carriers and M.S. Warehousing have been dismissed from the case, plaintiffs do not seek to include them in the class definition.

"For purposes of evaluating a motion for class certification, the allegations contained in Plaintiff's complaint are assumed to be true." *Brink,* 185 F.R.D. 567, 569.[2] "The trial court has broad discretion to certify a class action but must conduct a 'rigorous analysis' of whether the Rule 23 requirements have been met." *Winkler,* 205 F.R.D. 235, 239. "However, in a motion for class certification, the plaintiff need not prove and the court will not consider whether the plaintiff will prevail on the merits." *Id.* Fed. R. Civ. P. 23(a) establishes the threshold requirements for proper certification of a class action: (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation, each of which is satisfied in this case.

(1) Numerosity

"To establish numerosity, the Plaintiffs must show that 'the class is so numerous that joinder of all members is impracticable.'" *Winkler,* 205 F.R.D. at 239 (quoting Fed. R. Civ. P. 23(a)(1). In *Mayflower,* the court held that class certification of a class of "at least 1,000 similarly-situated owner-operators who are geographically dispersed throughout the nation" was appropriate as "[j]oinder would be little short of impossible." *Id.,* 204 F.R.D. 138, 145. Swift has represented that "as of May 2003, Swift had approximately 3,400 owner-operator drivers. Since June 1998, Swift has had as many as 5,500 owner-operator contractors." Ex. K, Hoggard Aff. at ¶ 6. Thus, numerosity is readily established given the large size of the class in this case and the geographic dispersion of the class members - joinder of all members of the class would "be little short of impossible." *Mayflower,* 204 F.R.D. at 145.

(2) Commonality

Fed. R. Civ. P. 23(a)(2) requires a finding that "there are questions of law and fact common to the class." *Id.* "All questions of fact and law need not be

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[2] *Accord Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir.1975) ("The court is bound to take the substantive allegations of the complaint as true, thus ...making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations.").

common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient, as is a common core of salient facts coupled with disparate legal remedies within the class." *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "The standard for commonality is minimal because 'all that is required is a common issue of law or fact.'" *Winkler*, 205 F.R.D. at 240 (*quoting Blackie*, 524 F.2d at 904). Commonality of law and fact is established here as follows:

- The claims of the members of the class all arise from the uniform application of a single regulatory regime – the Truth-in-Leasing Regulations.[3]
- The Swift Leases - identical in all material respects - have failed, on a systematic class-wide basis, to specify compensation or provide a recitation for calculating charge backs. First Amended Complaint, ¶ 40.[4]
- The Interstate Leases - identical in all material respects - have failed, on a systematic class-wide basis, to specify information regarding the handling of escrow accounts, including the failure to pay interest on escrows. First Amended Complaint, ¶ ¶ 24, 44-50.

In *Mayflower*, as here, the plaintiffs alleged that the carrier violated the Truth-in-Leasing Regulations by overcharging Owner-Operators for insurance and failing to return escrow funds. In finding commonality under Rule 23, the court reasoned:

> Here, there are common issues of law *and* fact. First, the relevant provisions of the leases ... are all but identical and all of them are governed by the same federal regulations. *** The common issues of law are all rooted in common issues of fact, including: all class members have entered into lease agreements with Mayflower or its agents" and that "all class members . . . have had moneys deducted from their compensation and maintained in escrow accounts for the purpose of repaying advances against various expenses and all have had moneys deducted from their compensation and maintained in fuel-tax accounts *** The plaintiffs . . . allege that Mayflower engaged in a pattern of conduct--overcharging for insurance--with respect to all of them. Mayflower's alleged misconduct affects all owner-operators in each of the two cases in the same manner, if not to the same degree.

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[3]*See, e.g., Arctic Express, Inc.*, (Ex. B, Slip. Op. at 12)("The common question of law ... is whether the Agreements violated 49 C.F.R. § 376.12(k).").

[4]*See, e.g., Padrta,* (Ex. C, Slip. Op. at 5)("Plaintiffs allege that all of the lease agreements are essentially identical. Importantly, plaintiff alleges that Ledar has breached each of these lease agreement[s] in essentially the same fashion.").

Id. 204 F.R.D. 138 at 146.[5] In sum, commonality in this case is simply irrefutable.

Further, although the determination of whether to certify a class action is to be made on the basis of the allegations in the complaint, and not on a prejudgment of evidence in the case, *Brink,* 185 F.R.D. 567, 569, discovery obtained in the case to date confirms that it is the *common practice* of Swift to overcharge Owner-Operators for insurance and fuel. Plaintiffs allege that Swift has violated the Regulations by charging Owner-Operators more than it actually pays for fuel. *See* First Amended Complaint ¶ 40 a. viii. The Swift Leases uniformly fail to disclose that Swift profits from such fuel charge-backs.[6] In this regard, Swift's Fed.R.Civ.P. 30(b)(6) witness, Roger Henley, testified that Swift sets prices for fuel at Swift-owned fuel terminals by buying it in bulk and selling it for a profit.[7] Swift then tops off that price with an "administrative fee" that it does not disclose to Owner-Operators:

> Q: Who calculates the administrative fee?
>
> A: It's calculated by Steve Valdez with my approval.
>
> Q: And how is the amount of the fee communicated to the owner-operators?

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[5]*See also Sheinhartz,* 2002 WL 575636, *6 ("The Court finds that Plaintiffs have alleged a pattern of misconduct predicated on violations of federal regulations . . . that potentially affected a large number of owner-operators working for Defendants.").

[6]A regulated lease agreement must "clearly specify all items that may be initially paid for by the authorized carrier, but ultimately deducted from the lessor's compensation at time of payment or settlement, together with a recitation as to how the amount of each item is to be computed." 49 C.F.R. § 376.12(h). Owner-operators must "be afforded copies of those documents which are necessary to determine the validity of the charge." *Id.* Charge-backs that exceed the actual amount advanced by the motor carrier are unlawful: "The carrier should not be in a position to manipulate these expenses [charge-backs] in such a way that it makes a profit in its handling of these matters." Lease and Interchange of Vehicles, 46 Fed. Reg. 44013 (Sept. 2, 1981). In its notice of proposed rule-making the the ICC observed that "[i]t appears that, in certain instances, carriers are defeating the intent of the present regulations by profiting from charge-back items at the expense of owner-operators." The ICC concluded that, "[t]o the extent that charge-backs to owner-operators reduce the carrier's legitimate expenses, resulting in losses to the owner-operators and a profit to the carrier, they are not legitimate charge-backs or deductions."*Id.* (emphasis added).

[7]Henley testified that the price Swift charges for the fuel at its terminals is established - not by calculating the cost of the fuel to Swift – but upon a margin against the final retail prices of fuel vendors in the vicinity of Swift's terminals. Ex. L, Henley Tr., at 21:9-17.

A: I don't know if the fee itself is communicated. The cost of fuel is communicated.

***

Q: Do you communicate the price that you paid for fuel or that Swift paid for fuel to the owner-operator?

A: No.

Q: And you don't communicate the administrative cost to the owner-operator?

A: No, we don't show a positive or negative number when we send it out.

***

A. There will be a four-cent administrative fee, up to four cents.

Ex. L, Henley Tr. at 19:11-20:6; 22:1-2.[8] Plaintiffs have also obtained discovery proving that Swift profits from discounts it receives from non-Swift fuel vendors through Swift-issued "Comdata" fuel purchase cards. Swift has negotiated special discounts with such vendors - which it keeps - but charges Owner-Operators the full marked-up non-discounted price:

Q. Am I correct in saying that it is the policy of Swift to charge back against an owner-operator's compensation the cost represented by the gallons purchased at a truck stop times the pump price charged by the truck stop at the point of sale?

A: That is correct.

Q: And that sum is different from the price that Swift pays the truck

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[8] Astonishingly, Swift affirmatively has represented to Owner-Operators that it charges them *no mark up* on the price it pays for fuel:

> There has never been a better time to be an Independent Contractor leased on with Swift Transportation Co., Inc. ... Swift encourages the Owner Operator to use the bulk fuel facilities at our Swift Terminals whenever possible... *The purchase price Swift pays for fuel is equal to what our Owner Operator pays — there is no mark-up on fuel price at our pumps.*

See Ex. M (emphasis added). Henley *guessed* that this statement may have been correct at the particular time it was made because of a temporary suspension of administrative fees, but candidly acknowledged: "That is not accurate today." Ex. L, Henley Tr. at 34:3-25; 35:1-2. Plaintiffs are unaware of any subsequent retraction of the referenced representation. Be that as it may, and more to the point, the Swift lease is *silent* regarding Swift's mark-ups on fuel.

stop for that fuel?

A: *It may be different.*

Q: Under what circumstances would it be different?

A: *When the negotiated discount is an actual number and we get the discount back off of our statement.*

Id. at 144:6-19. Swift realizes enormous profits of upwards to 19 cents per gallon when it charges back the fuel to Owner-Operators. *Id.* at 122:18-123:8. ("Q: Swift would have made 19 cents a gallon on his purchase, approximately? A: Well, we would have been rebated, or our costs would have been 19 cents a gallon less, yes."). These admissions amply show that Swift has overcharged for fuel on a class- wide basis.

In addition to the foregoing fuel overcharges, Plaintiffs have obtained discovery proving that Swift systematically charges Owner-Operators more than it actually incurs for insurance premiums. *See* First Amended Complaint ¶¶ 40, 45. As with fuel, Swift's lease does not disclose that Swift may incur a lower cost than it charges for premiums, nor does it inform Owner-Operators how such mark-ups are computed. Again, such unauthorized and undocumented charge-backs violate 49 C.F.R. §376.12(h). In this regard, Swift's former vice-president of claims and risk management, Lisa Ayotte, testified that Swift routinely marks-up premiums for insurance charged back to Owner-Operators. Referencing the "2003 Insurance Renewal Calendar" she prepared at Swift, Ms. Ayotte testified that for one type of insurance - "Passenger Rider Program" insurance - Swift Paid a $20 premium, but charged Owner-Operators $10 more - $30.

Q. Okay. In the Rate column for this particular coverage, it has - it appears to be $20 per driver per month?

A. Right.

Q. And then it says, charged to driver, $30 per driver per month.

A. Correct.

Q. What does that mean? What is the difference between the $20 per driver per month and the $30 per driver per month?

A. The difference is the amount that Swift was billed versus the amount they billed.

Q. So for this coverage, Swift - do I understand from this column that Swift was paid $20 per driver per month, but charged the drivers $30 per month for that coverage? Is that - is that what this means?

A. That they were charged by the insurance company $20 and they were paid $30.

Ex. N, Ayotte Tr. at 75:7-25, and Dep. Ex. 92. Ms. Ayotte testified that Swift similarly incurred a $25 premium for "bobtail/nontrucking liability" insurance, but charged Owner-Operators $10 more - $35.

Q. All right. We've come down to page 7, item 3, owner-operator, bobtail/nontrucking. Describe once again what this coverage is for as you understand it.

A. It is for the owner-operator for liability to third parties when they re not covered under the corporate auto liability policy.

Q. Under Rates in the column - second column from the end, you seem to have two rates, 25/Mth and 35/Mth/S. What - why are there two rates there?

A. One rate is what the insurance company charges to Swift, and the other rate is what Swift charges to the owner-operator.

Q. And which is the rate that is charged to Swift?

A. The $25.

Q. And so do I understand from this item that Swift pays $25 per month for bobtail/ nontrucking liability insurance for owner-operators, and they charge the owner-operator $35 per month?
A. That's correct.

Id. at 83:4-23. Again, Swift does not disclose these markups to Owner-Operators.

Q. So no communications were made to the driver that you're aware of in your department as to what the actual premium was?

A. That's correct.

Id. At 77. Swift's Interrogatory Answers further confirm these overcharges:

Swift Pays	**Swift Charges Owner-Operators**
$124-128 per month occupational accident insurance	$147.68 per month *($11-15 overcharge)*

$25 per month non-trucking liability insurance	$32.32 per month *($7 overcharge)*
$1041.25 per month physical damage insurance	$1625.00 per month[9] *($400 overcharge)*

The foregoing admissions conclusively establish that Swift has charged Owner-Operators for insurance on a class-wide basis. *See Mayflower, supra*: "The plaintiffs . . . allege that Mayflower engaged in a pattern of conduct--overcharging for insurance--with respect to all of them. Mayflower's alleged misconduct affects all owner-operators in each of the two cases in the same manner, if not to the same degree." *Id.* 204 F.R.D. 138 at 146.[10] The evidence of Interstate's class-wide violations of the Regulations is likewise confirmed by the terms of its Leases with plaintiffs Belcher and Mayfield regarding the disposition of escrow funds. See First Amended Complaint ¶¶ 45, 49. The Truth-in-Leasing Regulations require that a lease must include the following provisions with respect to escrow funds: (1) the escrow amount; (2) the specific items to which the funds can be applied; (3) accounting requirements; (4) interest requirements. 49 C.F.R. § 376.12(k). The Interstate Lease violates the Regulations on a class-wide basis in at least three important respects by: (1) failing to specify procedures for disposition of escrows; (2) authorizing the forfeiture of escrows in the event of default - without requiring any itemization of the specific

[9] *See* "Protective Order Exhibit 1": Answers of Defendants Swift Transportation Co., Inc. (NV/Swift Transportation Co., Inc. (AZ) to Plaintiffs' First Set of Interrogatories, Answer 1. Occupational accident calculations are based on the period (01/01/00-06/01/03); non-trucking liability calculations are based on the period (04/J 1 /01-04/01 /05); and physical damage calculations are based on the period: (01/01/99-01/01/00). The Swift physical damage premium of $1041.25 is calculated based upon a rate of $1.55 per $100 of value ($1007.50), plus a 3.35% surplus lines tax ($33.75), applied to a truck hypothetically valued at $65,000. The $1625.00 charge to Owner-Operators is calculated based on Swift's charge of 2.5% of the truck value, as applied to a truck hypothetically valued at $65,000.

[10] Plaintiffs have offered the foregoing evidence pertaining to insurance and fuel only as illustrations of the commonality of all other violations set forth in Plaintiffs' complaint.

charges against the escrow; and (3) expressly disallowing interest on escrows. As examples, the Belcher agreement contains a "Security Deposit" clause which authorizes forfeiture merely in the event of "default," i.e., without specifying the items to which the funds can be applied. Ex. H, ¶ 22. In addition, the agreement expressly states that "Lessee shall not be entitled to any interest on the security deposit." *Id.* Similarly, the Mayfield Lease requires a deposit of $10,000, denominated as a "Capital Cost Reduction Payment, without specifying the items to which the escrow may be applied, without requiring an accounting, and without making any provision for the payment of interest." Ex. H, p.10. 10. These provisions from Interstate's form leases show Interstate's class-wide violations of the Regulations.[11]

(3) Typicality

"Typicality is established when 'the claims or defenses of the representative are typical of the claims or defenses of the class.'" *Winkler*, 205 F.R.D. at 241. "In assessing typicality, 'the court considers the nature of the claim or defense of the class representative, and not . . .the specific facts from which it arose or the relief sought." *Winkler* at 241. "Specifically, a claim is typical if it is based on the same event or course of conduct giving rise to the claims of other class members and based on the same legal theory. *Id.* "Typicality does not mean that the claims of the class representatives must be identical or substantially identical to those of the absent class members."[12] Typicality is also readily established in this case. Members of the class with Swift Leases allege that they were charged-back for items initially purchased by Swift, such as fuel and insurance, without any provision in the Swift Lease explaining how such charge-backs were to be calculated, and without any reference whatsoever to Swift's practice of profiteering and/or tacking on

[11] *OOIDA v. Arctic Express, Inc.*, 159 F. Supp. 2d 1067, 1078 (S.D. Ohio 2001)("When the Defendants provided for everything to be covered by the maintenance fund, they, in reality, specified nothing.").

[12] *Stanton v. Boeing Co.*, 313 F.3d 447, 466 (9th Cir. 2003). Instead, "[u]nder the rule's permissive standards, representative claims are 'typical' if they are reasonably coextensive with those of absent class members; they need not be substantially identical." *Id.*

"administrative fees" to such charge-backs. These are violations that occurred *on a typical and systematic class-wide basis*. Likewise, the class members with Interstate Leases allege that Interstate typically omitted information in their Leases regarding the disposition of escrow funds; omitted information regarding accounting requirements; included provisions allowing Interstate to keep escrow funds without providing an itemization of how the funds were to be applied; and disallowed interest on such funds. Again, these are violations that occurred *on a typical and systematic class-wide basis*.

(4) Adequacy of Representation

Fed. R. Civ. P. 23(a)(4) requires that "the representative parties will fairly and adequately protect the interests of the class." *Id.* "Adequacy of representation is satisfied if the named representatives appear 'able to prosecute the action vigorously through qualified counsel' and if the representatives have no 'antagonistic or conflicting interests with the unnamed members of the class.'" *Winkler*, 205 F.R.D. at 242 (citation omitted). As demonstrated above, Plaintiffs clearly share common interests with all of the proposed class members. Nor can there be any doubt as to the "vigor" or "ability" of the representatives or their counsel considering their continuing efforts to bring this case to trial after over two years of fierce litigation by Swift and Interstate. Similarly, OOIDA has associational standing to represent the class in this case.[13] OOIDA's paramount mission, and the very purpose of its founding over 25 years ago, is to work aggressively to stop abusive practices directed at independent Owner-Operators. Toward this end, OOIDA has been involved in numerous class actions on behalf of Owner-Operators, and has been instrumental in advocating the federal legislation at issue herein, which grants

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[13]"The doctrine of associational standing permits an organization to 'sue to redress its members' injuries, even without a showing of injury to the association itself.'" *Oregon Advocacy Center v. Mink*, 322 F. 3d 1101, 1109 (9th Cir. 2003). Associational standing exists where: a) association members would otherwise have standing to sue in their own right; b) the interests sought to be protected are germane to the organization's purpose; and c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Id.* (*citing Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333, 343 (1977). OOIDA plainly meets these requirements in this case.

1 Owner-Operators a private right of action by which to enforce the"Truth-in-
2 Leasing" regulations. *See generally* Johnston and Cullen Declarations. (Exhibits I,
3 O). In finding that OOIDA had associational standing to represent the class, the
4 court in *Arctic Express* found that "this suit is an embodiment of the purpose behind
5 the formation of OOIDA. . . . [as] reflected in Mr. Johnston's testimony that OOIDA
6 was 'formed to give professional truckers a voice in the matters that affect them,
7 both on the state and federal level and in the regulatory agencies and in the
8 legislatures, both state and federal." (Ex. B at 13-14). *Accord Mayflower Transit,*
9 204 F.3d 138, 147; *Ledar,* (Ex. A at 13). Finally, as discussed in the Cullen
10 Declaration, Plaintiffs are represented in this action by The Cullen Law Firm, PLLC,
11 general counsel to OOIDA, who have extensive experience in representing owner-
12 operator clients in trucking industry-related class actions. Declaration of Paul D.
13 Cullen, Sr., Exhibit O at ¶¶ 5-6. Notably, the Cullen Law Firm has been appointed
14 class counsel in *Mayflower*, in *Ledar*, in *Arctic*, in *Heartland* and in *Gilbert. Id.* In
15 addition, Plaintiffs also are represented in this action by Phoenix-based trial counsel
16 Brian J. Campbell of the firm Bonn & Wilkins, Chartered. Mr. Campbell is a well-
17 respected attorney who has litigated numerous class actions in Arizona's federal
18 district courts. *Id* at ¶ 6 Given the common interests of the class representatives and
19 the proposed class members, and the experience of counsel, the representative
20 parties will adequately represent the members of the class.

21 **B. Class Certification is Appropriate Under Fed. R. Civ. P. 23 (b)(3)**

22 In order for a class to be certified under Rule 23(b)(3), the moving party must
23 demonstrate that "the questions of law or fact common to the members of the class
24 predominate over any questions affecting only individual members, and that a class
25 action is superior to other methods for the fair and efficient adjudication of the
26 controversy." *Id.* "The predominance inquiry examines 'whether proposed classes
27 are sufficiently cohesive to warrant adjudication by representation.'" *Winkler*, 205
28 F.R.D. 235, 243. (*Citing Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997).
"'When common questions present a significant aspect of the case and they can be

resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than an individual basis.'" *Hanlon. v. Chrysler Corp.*, 150 F. 3d 1011, 1022 (9th Cir. 1998). In this case, common questions clearly predominate over individualized questions. The common questions of law and fact regarding the Swift and Interstate leases allow no genuine dispute over whether they have violated the Truth-in-Leasing Regulations on a systematic class-wide basis. On this record, any attempt by the defendants to muster factual variations among putative class members would be unavailing, particularly when faced with the irrefutable fact that their respective leases made *none* of the disclosures at issue in this case, e.g., profiteering on fuel and insurance charge-backs, and improper disposition of escrow funds. In *Mayflower*, the court found that "[a]ll of the issues . . . 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...." 204 F.R.D. at 148. The court reasoned that "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. It follows that class issues predominate." *Id.* Similarly, in *Sheinhartz*, the court concluded: "The dispositive and predominate legal and factual issues in this case are whether ...Plaintiffs' leases appropriately stated that Defendants were charging more for certain insurance than the premiums paid by Defendants." 2002 WL 575636 at *8.[14]

Swift's previous objections to class certification have now been substantially

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[14]To the extent the defendants may cite *OOIDA v. New Prime*, Inc., 339 F. 3d 1001 (8th Cir. 2003), *cert. denied*, 124 S. Ct. 1878 (2004) for the proposition that individual damages inquiries pertaining to alleged defensive "offsets" pose an obstacle to class certification, that decision is off-point as a matter of law and fact. First, in the Ninth Circuit, it is firmly established that "[t]he amount of damages is invariably an individual question and does not defeat class action treatment." *Blackie*, 524 F. 2d 891 at 905. Second, neither Swift nor Interstate have any legitimate "offsets." *See, e.g., Arctic Express,*(Ex. P, Slip Op. at 4)("Here, the items of set-off claimed by the Defendants would not be capable of liquidation without substantial evidence being presented at trial. This the Court will not allow.").

1 abbreviated by virtue of a number of rulings by the Court including: (1) the referral of
2 plaintiffs' claims against M.S. Carriers, Inc. to arbitration (doc. # 172); the dismissal of
3 claims and counterclaims with respect to M.S. Warehousing & Distribution, Inc. (doc. #
4 265); and the ruling that the plaintiffs' claims are governed by a four-year statute of
5 limitations. *Id.* The foregoing rulings have not only streamlined and simplified the
6 case, but they have eliminated Swift's prior claims that class certification would have
7 been unworkable because of the numerous lease violation issues that implicated M.S.
8 Carriers, Inc., and M.S. Warehousing & Distribution, Inc.; because M.S. Warehousing
9 had asserted counterclaims against a number of Named Plaintiffs; and because the
10 statute of limitations issue was then undecided. Now, of course, those objections have
11 been eliminated. Finally, all of the remaining requirements for class certification under
12 Rule 23 (b)(3) are satisfied as follows:

13 (A) Interests of Class Members in Individually Controlling Separate Actions

14 A class action in this case is superior to individual actions. Fed. R. Civ. P. 23
15 (b)(3)(A). Given the limited resources of individual class members and their
16 geographic dispersion, separate litigation of their claims would be highly
17 impracticable and unlikely. *See generally* Johnston Declaration (Ex. I). Moreover,
18 the relatively small amounts of money involved per Owner-Operator, make a class
19 action superior to other forms of adjudication. *See, e.g., Mayflower* ("[a] lawsuit by
20 each individual class member is impracticable since the amount of money at issue is
21 less, in many cases, than the amount it would cost for each to prosecute a case." 204
22 F.R.D. at 149; *Accord Heartland* (Ex. F at 6-7)("The court agrees that it is doubtful
23 that the majority of these owner-operators would have the time or inclination to seek
24 the relief to which they are allegedly entitled.").

25 (B) The Extent of Any Other Litigation Concerning the Controversy-

26 Plaintiffs are aware of no other litigation concerning the Truth-in-Leasing
27 violations alleged in the Complaint. Fed. R. Civ. P. 23 (b)(3)(B).

28 (C) The Desirability of Concentrating the Case in this Forum- Given the

proven ability and willingness of the class representatives and their counsel to prosecute plaintiffs' claims, the class action method is ideally suited for the purpose of concentrating the case in this central federal forum. Fed. R. Civ. P. 23 (b)(3)(C). *See* Johnston and Cullen Declarations (Ex. I, O). If the class is not certified, each individual Owner-Operator would have to bring a separate action in numerous separate lawsuits throughout the nation. Such a process would be plainly inefficient and undesirable. *Mayflower*, 204 F.R.D at 149 ("absent a class action, the individuals would likely be without a remedy and Mayflower would likely retain the benefits of its alleged wrongdoing."); *Accord Heartland,* (Ex. F at 8)("Multiple suits might ...create inconsistent judgments. Thus, concentrating the issues in this forum is desirable.").

(D) The Difficulties in the Management of a Class Action - No substantial difficulties are likely to be encountered in the management of this class under Rule 23(b)(3)(D). *See, e.g., Heartland* (Ex. F. at 8)("Plaintiffs' counsel appear to be capable of managing the class ... 600 individual lawsuits would not be superior to this single class action.").

V. CONCLUSION

For the reasons stated above, the named Plaintiffs respectfully request that this Court certify the class as that class is defined in Plaintiffs' Motion for Class Certification.

RESPECTFULLY SUBMITTED this 24th day of September, 2004.

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