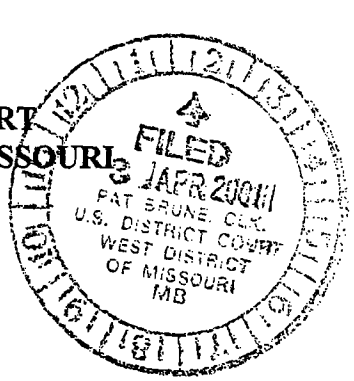
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION



OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., MARSHALL JOHNSON, and JERRY VANBOETZELAER, Individually and on behalf of ALL OTHERS SIMILARLY SITUATED,	
Plaintiffs,	**Civil Action No. 97-3408-CV-RGC**
v.	**Chief District Judge Dean Whipple**
NEW PRIME, INC., d/b/a PRIME, INC. SUCCESS LEASING, INC.	
Defendants.	

FIRST AMENDED CLASS ACTION COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF; DEMAND FOR JURY TRIAL

The Owner-Operator Independent Drivers Association, Inc., and Marshall Johnson and Jerry Vanboetzelaer, individually and on behalf of all others similarly situated (collectively, "Plaintiffs" or "class members"), sue New Prime, Inc., d/b/a Prime, Inc. ("Prime"), and Success Leasing, Inc. ("Success Leasing"), and allege as follows:

NATURE OF THE ACTION

1. This is a class action against Defendants pursuant to which Plaintiffs named herein, as class representatives on behalf of themselves and all others similarly situated, all of whom are independent truck owner-operators, challenge the lawfulness of Defendants' Service Contracts

and/or Lease-Purchase Agreements as applied to the class members. Plaintiffs maintain that Defendants' Service Contracts and Lease-Purchase Agreements contain terms that violate federal commercial transportation laws and regulations as set forth under the United States Code and the Code of Federal Regulations. More specifically, Plaintiffs assert that Defendants' Service Contracts and/or Lease Purchase Agreements, *inter alia*, fail to provide notice to Plaintiffs of the items that will be deducted from settlement or payment; fail to provide a recitation of how deductions from Plaintiffs settlements and payments were calculated; fail to provide adequate notice of the terms of the agreements that give Prime the right to make deductions from Plaintiffs' compensation for Success Leasing's benefit; and fail to account for and return escrow and other funds to which only the class members are entitled.

2. Accordingly, Plaintiffs seek declaratory and injunctive relief; an immediate accounting of escrow and other funds deposited with Defendants by the various class members during their respective periods of association with Defendants; the disgorgement of such escrow and other funds to the class members with interest as calculated under applicable law; attorneys' fees and costs incurred by Plaintiffs in this action; and such other relief as may be deemed proper and just by the Court. Plaintiffs also request an order enjoining and restraining Defendants from transferring, diverting, or otherwise concealing the class members' funds at issue and from destroying records relating in any way to the escrow funds or other amounts owed by Defendants to the class members.

JURISDICTION AND VENUE

3. This action arises under 49 U.S.C. §§ 14102 and 14704 (a)(1) and (2), and 49 C.F.R. Part 376 for violation of the statutes and regulations governing the terms and conditions

pursuant to which truck owner-operators lease equipment to authorized motor carriers for the transport of property.

4. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (Federal Question), because the claims asserted herein arise under the laws of the United States.

5. Venue is proper in this Court pursuant to 28 U.S.C. § 1391(b), because Defendants' principal place(s) of business and principal operating office(s) are located in this judicial district and in this division of that judicial district.

PARTIES

6. Plaintiff Owner-Operator Independent Drivers Association, Inc. ("OOIDA"), is a business association of persons and entities, commonly known as "owner-operators," who own and operate motor carrier equipment. OOIDA is a not-for-profit corporation incorporated in Missouri, with its headquarters at 311 R.D. Mize Road, P.O. Box L, Grain Valley, Missouri 64029. OOIDA was founded in 1973 and now has over 60,000 members in all fifty (50) States of the United States and in Canada. A number of OOIDA's members are owner-operators who operate motor vehicles in and through the State of Missouri and are, or are likely to be, employed by or otherwise associated with Prime and/or Success Leasing under the terms set forth in Defendants' Service Contracts and Lease-Purchase Agreements. OOIDA seeks to have Defendants' leasing and business practices declared unlawful and in violation of federal motor carrier leasing regulations (49 C.F.R. § 376), and to have the continuation of said practices permanently enjoined, and thus participates as a Plaintiff herein only in connection with Plaintiffs' prayers for declaratory and injunctive relief.

7. Plaintiff Marshall Johnson ("Plaintiff Johnson") is a resident of the State of Georgia.

Plaintiff Johnson is an independent truck owner-operator who has provided motor vehicle equipment to Defendant Prime under the terms of the Service Contract entered into between Plaintiff Johnson and Defendant Prime. In addition, Plaintiff Johnson was party to a Lease-Purchase Agreement with Success Leasing under which Plaintiff Johnson leased from Success Leasing, with the option to purchase, the motor vehicle equipment that was the subject of the Service Contract between Plaintiff Johnson and Defendant Prime. The terms of the Service Contract entered into between Plaintiff Johnson and Defendant Prime are the same or substantially the same as the terms of the Service Contracts entered into between Defendant Prime and each of the class members herein. Defendant Prime has persisted in unjustifiably depriving Plaintiff Johnson of escrow and other funds deposited with Defendant Prime by Plaintiff Johnson during the term of the Service Contract. Plaintiff Johnson seeks declaratory and injunctive relief, and other equitable relief, including restitution and disgorgement, on behalf of himself and all other similarly situated independent truck owner-operators.

8. Plaintiff Jerry Vanboetzelaer ("Plaintiff Vanboetzelaer") is a resident of the State of New York. Plaintiff Vanboetzelaer is an independent truck owner-operator who has provided motor vehicle equipment to Defendant Prime under the terms of the Service Contract entered into between Plaintiff Vanboetzelaer and Defendant Prime. In addition, Plaintiff Vanboetzelaer was party to a Lease-Purchase Agreement with Prime under which Plaintiff Vanboetzelaer leased from Prime, with the option to purchase, the motor vehicle equipment that was the subject of the Service Contract between Plaintiff Vanboetzelaer and Defendant Prime. The terms of the Service Contract entered into between Plaintiff Vanboetzelaer and Defendant Prime are the same or substantially the same as the terms of the Service Contracts entered into between Defendant Prime and each of the

class members herein. Defendant Prime has persisted in unjustifiably depriving Plaintiff Vanboetzelaer of escrow and other funds deposited with Defendant Prime by Plaintiff Vanboetzelaer during the term of the Service Contract. Plaintiff Vaboetzelaer seeks declaratory and injunctive relief, and other equitable relief, including restitution and disgorgement, on behalf of himself and all other similarly situated independent truck owner-operators.

9. Plaintiff owner-operators are "owners" within the meaning of 49 C.F.R. § 376.2(d).

10. Plaintiff owner-operators are "lessors" within the meaning of 49 C.F.R. § 376.2(f).

11. The equipment provided for use by Plaintiff owner-operators to Defendant Prime constitute "equipment" within the meaning of 49 C.F.R. § 376.2(b).

12. Defendant Prime is a corporation incorporated under the laws of the State of Nebraska, authorized to do business in Missouri, and having its principal place of business at 2740 North Mayfair, Springfield, Missouri 65803. Defendant is a regulated motor carrier, primarily engaged in the enterprise of providing transportation services to the shipping public under authority granted by the United States Department of Transportation (the "DOT"). In addition, Defendant Prime, *inter alia*, engages in the business of leasing truck tractor units, with the option to purchase, to independent truck owner-operators.

13. Defendant Prime is an "authorized carrier" within the meaning of 49 C.F.R. § 376.2(a).

14. Defendant Prime is a "lessee" within the meaning of 49 C.F.R. § 376.2(g).

15. Defendant Success Leasing is a corporation incorporated under the laws of the State of Nebraska, authorized to do business in Missouri, and having its principal place of business at

2740 North Mayfair, Springfield, Missouri 65803. Defendant Success Leasing, *inter alia*, engages in the business of leasing truck tractor units, with the option to purchase, to independent truck owner-operators.

16. Plaintiffs maintain that Defendant Success Leasing is owned and controlled by Defendant Prime, or Defendants Prime and Success Leasing are under common ownership and control and said Defendants act as a single entity and do not engage in arm's-length transactions between one and the other. Thus, Plaintiffs maintain that the Lease-Purchase Agreements entered into between Success Leasing and the various class members herein effectively were entered into between those various class members and Defendant Prime or an alter ego or an agent of Prime, and that Defendant Prime consequently is liable under each of Plaintiffs' claims arising from the unlawfulness of the Lease-Purchase Agreements entered into between Defendant Success Leasing and the various class members herein. Plaintiffs also allege that Success Leasing has been used by Prime as an artifice to accomplish what Prime, as an authorized motor carrier, cannot.

CLASS

17. **Class Description**: The individual owner-operators who are Plaintiffs and class members bring this action on behalf of themselves and all other similarly situated independent truck owner-operators. Each class member has, *inter alia*, entered into a Service Contract with Defendant Prime and a Lease-Purchase Agreement with either Defendant Prime or Defendant Success Leasing. Under the respective terms of these Service Contracts and Lease-Purchase Agreements, each class member has leased trucking equipment from either Prime or Success Leasing, and, in turn, leased their trucking equipment and services to Prime. In connection with these leasing transactions, each class member has been required to provide Prime and/or Success

Leasing with various escrow and other funds, ostensibly to cover various trucking-related expenses arising in the course of the class members' work. Under federal law, the contractual terms under which such escrow funds are collected by a motor carrier must be specified in a regulated lease agreement, and must be returned to the truck owner-operator upon termination of the leasing relationship. However, Prime and/or Success Leasing have not specified in a regulated lease agreement the contractual terms under which Prime and/or Success Leasing have collected escrow funds, and have not returned the escrow funds rightfully belonging to the class members following the terminations of the leasing relationships at issue. Consequently, each of the class members is, *inter alia*, entitled to a return of the escrow and other funds held by Defendants Prime and/or Success Leasing.

18. Thus, for the purpose of class certification under Fed.R.Civ.P. 23, each of the 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 in service 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.

19. **Impracticability of Joinder**: On information and belief, there are several thousands of independent truck owner-operators who have entered into Service Contracts and Lease-Purchase Agreements with Defendants Prime and/or Success Leasing during the past several (exceeding one) years. Each of these owner-operators is entitled to a refund of escrow and other funds held by Defendants Prime and/or Success Leasing, each has been prejudiced as a result of

entry into a Service Contract and a Lease-Purchase Agreement with Defendants Prime and/or Success Leasing, and each qualifies as a class member. Individual joinder of all potential class members is impracticable.

20. **Commonality**: Pursuant to identical, or substantially identical, Service Contracts and Lease-Purchase Agreements, Defendants Prime and Success Leasing have acted and failed to act with regard to Plaintiffs' escrow and other funds in a way that affects all class members similarly and, accordingly, any questions of fact are common to the class as a whole. Defendants' actions and failures to act with regard to Plaintiffs' escrow and other funds also have caused substantially the same harm to each of the class members and, accordingly, any questions regarding Defendants' liability to individual Plaintiff class members are common to the class as a whole. Further, Defendants have acted and failed to act with regard to Plaintiffs' escrow and other funds in a manner generally applicable to the class, therefore making injunctive relief appropriate with respect to the class as a whole.

21. **Typicality**: Plaintiffs' claims are typical of the claims of the class members as a whole, and Plaintiffs are capable of fairly and adequately protecting the interests of the class.

22. **Class Action Superior**: Defendants' actions in failing to provide either an accounting or a return of the class members' escrow and other funds, and questions relating to Defendants' actions, predominate over any questions affecting only individual members of the class. Accordingly, a class action is superior to other available methods for the fair and efficient adjudication of this controversy.

23. **Other Factors:**

In addition:

A. the prosecution of separate actions by individual members of the class would substantially impair or impede the individual members' abilities to protect their interests, in part because individual class members do not have the ability to promptly bring and prosecute these claims;

B. there is no litigation already commenced by class members concerning this controversy that will protect the interests of the class members as a whole;

C. the class action will be efficient because it will concentrate the litigation of numerous substantially identical claims in one forum; and

D. a class action is fair and efficient because no substantial difficulties are likely to be encountered in the management of the class action.

FACTUAL ASSERTIONS COMMON TO ALL COUNTS

24. Owner-operators are small business men and women who own or control truck tractors, and sometimes truck trailers, used to transport property over the nation' s highways. They comprise one of the primary sectors of the interstate motor carrier industry. It has been estimated that owner-operators account for approximately forty percent (40%) of all inter-city truck traffic in the United States. Nationwide, the number of owner-operators totals in the hundreds of thousands.

25. Owner-operators engage in the transportation of commodities exempt from DOT regulations, or, acting as independent contractors, they lease or otherwise provide their equipment and services to motor carriers who possess the requisite legal operating authority under DOT regulations to enter into contracts with shippers for the transport of property. The relationship between independent truck owner-operators and regulated carriers is set forth in an agreement between the parties which is regulated by the DOT under, *inter alia*, 49 U.S.C. § 14102, § 14704,

and 49 C.F.R. Part 376.

26. The class members herein are all independent truck owner-operators who, like each of the named individual Plaintiffs, have entered into two separate and distinct contracts—the first solely with Defendant Prime, and the second with Defendant Prime **or** with Defendant Success Leasing, a wholly-owned affiliate or alter ego or agent of Defendant Prime (*see infra*).

The Part 376 Service Contract (between Each Class Member and Prime)

27. The first contract, entitled the "Service Contract" and referred to herein as the "Part 376 Service Contract" (*see infra*), is a standard agreement pursuant to which each class member has leased a truck tractor unit and the services of a qualified driver to Defendant Prime for use by Defendant Prime as a carrier in the transport of property over the nation's highways. The Service Contract is directly regulated under 49 C.F.R. Part 376. A model of the Part 376 Service Contract entered into by and between Defendant Prime and each of the Plaintiff owner-operators, which is typical of each class member's Part 376 Service Contract with Defendant Prime, is attached hereto as Exhibit "A."

28. The Part 376 Service Contract constitutes a "lease" within the meaning of 49 C.F.R. § 376.2(e) because it is a "contract or arrangement in which the owner [each class member] grants the use of equipment, with or without driver, for a specified period to an authorized carrier [Defendant Prime] for use in the regulated transportation of property, in exchange for compensation."

29. Pursuant to the Part 376 Service Contract, Plaintiff owner-operators, on behalf of and at the direction of Defendant Prime, transport and deliver property from pick-up points to points of delivery. Owner-operators generally are compensated for their services on a per-load

basis, and are entitled to a percentage share of the revenues paid to Defendant Prime by shippers. The owner-operator receives his or her sole payment in the form of "settlement checks" issued to the owner-operator by Defendant Prime, usually on a weekly basis.

30. Pursuant to the Part 376 Service Contract, Defendant Prime has required each class member to, *inter alia*, furnish Defendant Prime with "Security Deposit" funds in the sum of $1,000.00 "as security for the full performance by [class member owner-operators] of all . . . obligations under the Service Contract." Under the Security Deposit provision, Defendant Prime may "set off against this deposit any reserve claims which [Prime] has reason to believe should be rightfully charged to the [Plaintiff owner-operators]." The Part 376 Service Contract requires class member owner-operators to deposit security deposit funds directly with Defendant Prime, and such funds are maintained in Defendant Prime's sole possession and control.

31. The Service Contract provides, in pertinent part, that:

> The security deposit provided for herein shall be forfeited should contractor not comply with the provisions of [the] paragraph . . . of this service contract [requiring the return of licenses, placards, and other authorizations within seven days of termination].

The Lease-Purchase Agreement (between Each Class Member and *either* Prime *or* Success Leasing)

32. The second contract, entitled the "Lease Agreement" and referred to herein as the "Lease-Purchase Agreement," is a commercial lease-purchase agreement pursuant to which each class member has leased from Prime or Success Leasing, with the option to purchase, one or more truck tractor units of the type employed by motor carriers in the transport of property over the nation's highways.

33. The Lease-Purchase Agreement is an "equipment purchase or rental contract"

(under 49 C.F.R. § 376.12(i)), under which an individual entity (*i.e.*, Defendant Prime or Defendant Success Leasing) grants the use of equipment to Plaintiff owner-operators, who are not authorized carriers.

34. Pursuant to the Lease-Purchase Agreement, Defendant Prime or Defendant Success Leasing leases to an individual truck owner-operator a truck tractor for use by the owner-operator in providing services as an independent contractor to "a trucking company approved by [Prime or Success Leasing]" under a separate Part 376 agreement (*i.e.*, the Service Contract). In each instance, the trucking company approved by Prime or Success Leasing is Defendant Prime itself.

35. Each Lease-Purchase Agreement between Defendant Prime or Defendant Success Leasing and an individual class member specifies the weekly truck rental payments to be made to the Defendant by the class member. Defendant Prime or Defendant Success Leasing deducts these rental payments directly from each class member's compensation under the Part 376 Service Contract on a weekly basis, as reflected in weekly "Operator Settlement" statements provided to class members by Defendant Prime and/or Defendant Success Leasing.

36. Pursuant to the Lease-Purchase Agreement, Defendant Prime or Defendant Success Leasing has required each class member to, *inter alia*, furnish Defendant with "Excess Mileage Rental Account" funds, "Repair Reserve" funds, and "Tire Replacement Reserve" funds for the ostensible purpose of covering maintenance of and repairs to leased vehicles. These funds are deducted by Defendant Prime and/or Defendant Success Leasing directly from respective Plaintiffs' compensation and are maintained in Defendant Prime's and/or Defendant Success Leasing's possession and control.

37. The Lease-Purchase Agreement provides as to the terms of the "Excess Mileage

Rental Account," "Repair Reserve," and "Tire Replacement Reserve," in pertinent part, that:

> [I]n the event (i) this Lease shall be terminated prior to expiration of its initial term, (ii) the option to extend is not exercised by Lessee [*i.e.*, the owner-operator], or (iii) this Lease is terminated during the extension period and before its expiration, the excess mileage rental account, repair reserve and tire maintenance reserve shall become the sole property of Lessor [*i.e.*, Defendant Prime or Defendant Success Leasing] as provided in [other applicable paragraphs] hereof.

The Lease-Purchase Agreement further provides that:

> In the event Lessee shall purchase the equipment or sell it to a third party, or shall complete the full term of this Lease, the unused funds retained as a repair reserve shall be divided equally between the Lessor and Lessee.

The Lease-Purchase Agreement further provides that:

> In the event Lessee shall purchase the equipment or sell it to a third party, or shall complete the full term of this Lease, the unused funds retained as a tire replacement reserve shall be divided equally between the Lessor and Lessee.

Funds at Issue under the Part 376 Service Contract and the Lease-Purchase Agreement

38. Pursuant to 49 C.F.R. § 376.2(l), the "Excess Mileage Rental Account," "Repair Reserve," "Tire Replacement Reserve," and "Security Deposit" constitute regulated escrow funds because they are monies "deposited . . . to guarantee performance, to repay advances, to recover repair expenses, to handle claims, to handle license and state permit costs, and for any other purposes mutually agreed upon."

39. Pursuant to their respective Lease-Purchase Agreements and Part 376 Service Contracts, each class member has deposited with Defendant Prime and/or Defendant Success Leasing between approximately $1,000.00 and $20,000.00 per vehicle leased to Defendant Prime.

Applicable Federal Motor Carrier Law

40. DOT regulations expressly provide for the disclosure in lease contracts of all items that are deducted from the lessor's compensation at the time of the payment or settlement and a recitation of how the amount of each item was calculated. Specifically, 49 C.F.R. § 376.12 (h) provides:

> *Charge-back items*. The lease shall clearly specify all items . . . ultimately deducted from the lessor's compensation at the time of payment or settlement, together with a recitation as to how the amount of each item has been computed. The lessor shall be afforded copies of those documents which are necessary to determine the validity of the charge.

41. DOT regulations expressly provide for the disclosure in lease contracts of certain terms set forth in equipment purchase or rental contracts such as the ones entered into between the class member owner-operators and Defendant Prime or Defendant Success Leasing. Specifically, 49 C.F.R. § 376.12 (i) provides:

> *Products, equipment, or services from authorized carrier* -- The lease shall specify that the lessor is not required to purchase or rent any products, equipment, or services from the authorized carrier as a condition of entering into the lease arrangement. **The lease shall specify the terms of any agreement in which the lessor is a party to an equipment purchase or rental contract which gives the authorized carrier the right to make deductions from the lessor's compensation for purchase or rental payments.**

(emphasis added).

42. DOT regulations specifically provide for the manner in which regulated motor carriers, such as Defendant Prime, are required to maintain escrow funds, including providing for an immediate accounting and the return of escrow funds to the lessor owner-operator following lease agreement termination. Specifically, 49 C.F.R. § 376.12 (k) provides as follows:

> *Escrow funds* -- If escrow funds are required, the lease shall specify:

(1) The amount of any escrow fund or performance bond required to be paid by the lessor to the authorized carrier or to a third party.

(2) The specific items to which the escrow fund can be applied.

(3) That while the escrow fund is under the control of the authorized carrier, the authorized carrier shall provide an accounting to the lessor of any transactions involving such fund. The carrier shall perform this accounting in one of the following ways:

(i) By clearly indicating in individual settlement sheets the amount and description of any deduction or addition made to the escrow fund; or

(ii) By providing a separate account to the lessor of any transactions involving the escrow fund. This separate accounting shall be done on a monthly basis.

(4) The right of the lessor to demand to have an accounting for transactions involving the escrow fund at any time.

(5) That while the escrow fund is under the control of the carrier, the carrier shall pay interest on the escrow fund on at least a quarterly basis. For purposes of calculating the balance of the escrow fund on which interest must be paid, the carrier may deduct a sum equal to the average advance made to the individual lessor during the period of time for which interest is paid. The interest rate shall be established on the date the interest period begins and shall be at least equal to the average yield or equivalent coupon issue yield on 91-day, 13-week Treasury bills as established in the weekly auction by the Department of Treasury.

(6) The conditions the lessor must fulfill in order to have the escrow fund returned. At the time of the return of the escrow fund, the authorized carrier may deduct monies for those obligations incurred by the lessor which have been previously specified in the lease, and shall provide a final accounting to the lessor of all such final deductions made to the escrow fund. The lease shall further specify that in no event shall the escrow fund be returned later than 45 days from the date of termination.

43. Violations of DOT regulations are privately actionable. 49 U.S.C. §14704(a)(1) and (2).

44. Parties asserting a private right of action under 49 U.S.C. § 14704 (a)(1) and (2) may seek and are entitled to reasonable attorneys' fees and costs incurred in the prosecution of such an action under 49 U.S.C. § 14704 (e).

45. Defendants are liable for violations of federal commercial transportation laws and regulations as described herein, and Defendants' acts and omissions have caused Plaintiffs to bring this action.

46. All conditions precedent to the maintenance of this action have been performed, discharged, or otherwise satisfied.

COUNT I
(Violation of 49 C.F.R. § 376.12 (h)
Failure to Identify and Provide Accounting of Charge-Back Items)

47. Plaintiffs reallege and incorporate herein the allegations set forth in paragraphs 1 through 46 hereof.

48. Defendant Prime's Part 376 Service Contracts do not adequately identify the items that the Lessee will deduct from the Lessor's compensation at the time of payment or settlement. Moreover, Defendants have failed to provide a recitation as to how the amounts deducted are calculated. Specifically, the Defendants' leases do not adequately indicate, *iter alia*, that escrow payments pursuant to the Lease-Purchase Agreement with Prime and/or Success Leasing will ultimately be deducted from the settlements paid by Prime. Defendants' failures to provide notice of or provide an accounting of such items deducted from payment or settlement are unlawful and

constitute material and continuing violations of 49 C.F.R. § 376.12(h).

49. As a direct and proximate result of Defendants' actions and omissions, individual Plaintiffs and all class members have been injured and are entitled to relief from said injury.

COUNT II
(Violation of 49 C.F.R. § 376.12(i)
Unauthorized Deductions from Compensation)

50. Plaintiffs reallege and incorporate herein the allegations set forth in paragraphs 1 through 49 hereof.

51. Defendant Prime's Part 376 Service Contracts do not make reference to, let alone specify, the terms of the rental payment or escrow withholding provisions of the Lease-Purchase Agreements under which Defendant Prime and/or Defendant Success Leasing, as the case may be, makes deductions directly from each owner-operator's compensation. Consequently, Defendant Prime's and/or Defendant Success Leasing's actions in deducting regular purchase or rental payments due under the respective Lease-Purchase Agreements from compensation due the class members under their respective Part 376 Service Contracts with Prime are unlawful and constitute material and continuing violations of 49 C.F.R. § 376.12(i).

52. As a direct and proximate result of Defendants' actions and omissions, individual Plaintiffs and all class members have been injured and are entitled to relief from said injury.

COUNT III
(Violation of 49 C.F.R. § 376.12(k) Unauthorized Deduction of Escrow Funds)

53. Plaintiffs reallege and incorporate herein the allegations set forth in paragraphs 1 through 52 hereof.

54. Defendants' actions in making direct escrow fund deductions (in the form of "Excess Mileage Rental Account," "Repair Reserve," "Tire Replacement Reserve," and "Security Deposit" funds) from compensation due to owner-operators under Prime's Part 376 Service Contracts, and Defendant Prime's and/or Defendant Success Leasing's subsequent retention and failures to return such escrow funds pursuant to Prime's and/or Success Leasing's respective Lease-Purchase Agreement with owner-operators, are unlawful and constitute material and continuing violations of 49 C.F.R. § 376.12(k) because, *inter alia*:

A. There are no provisions in Prime's Part 376 Service Contracts authorizing such deductions or permitting the retention of all or any portion of such escrow funds following termination or cancellation of said Part 376 Service Contracts, and said Part 376 Service Contracts do not specify or even make reference to the terms of the Lease-Purchase Agreements which give Defendants Prime and/or Defendant Success Leasing the right to make deductions from an owner-operator's compensation for escrow fund deductions. *See* 49 C.F.R. § 376.12(k), *supra*.

B. There are no provisions in Prime's Part 376 Service Contracts which specify the amount of any escrow fund or performance bond required to be paid by the owner-operator to Prime or to a third party.

C. There are no provisions in Prime's Part 376 Service Contracts which identify the specific items to which the escrow fund can be applied.

D. There are no provisions in Prime's Part 376 Service Contracts which specify (i) that while the escrow fund is under Prime's control, Prime shall provide an accounting to the lessor of any transactions involving such fund, and (ii) the means by which Prime shall perform such an accounting.

E. There are no provisions in Prime's Part 376 Service Contracts which specify the right of the lessor owner-operator to demand to have an accounting for transactions involving the escrow fund at any time.

F. There are no provisions in Prime's Part 376 Service Contracts which specify that while the escrow fund is under Prime's control, Prime shall pay interest on the escrow fund on at least a quarterly basis under the calculation methods and at the rate prescribed under 49 C.F.R. § 376.12(k)(5).

G. There are no provisions in Prime's Part 376 Service Contracts which specify (i) the conditions the owner-operator must fulfill in order to have the escrow fund returned, (ii) that Prime, at the time of the return of the escrow fund, may deduct monies for those obligations incurred by the owner-operator which have been previously specified in the lease, and shall provide a final accounting to the owner-operator of all such final deductions made to the escrow fund, and (iii) that in no event shall the escrow fund be returned to the owner-operator later than 45 days from the date of lease termination.

H. The escrow provisions contained in the respective Lease-Purchase Agreements between owner-operators and Defendant Prime or Defendant Success Leasing authorize the unlawful retention of escrow amounts in excess of those needed to offset obligations incurred by Defendant Prime or Defendant Success Leasing on behalf of the respective owner-operators.

I. The escrow provisions contained in the respective Lease/Purchase Agreements between owner-operators and Defendant Prime or Defendant Success Leasing unlawfully provide for the return of **only half** of the owner-operator's escrow funds under certain narrow conditions (*i.e.*, if the owner-operator completes the full term of the lease, or if the owner-operator purchases the equipment or sells the equipment to a third party).

J. The escrow provisions contained in the respective Lease/Purchase Agreements between owner-operators and Defendant Prime or Defendant Success Leasing unlawfully mandate the owner-operator's **complete forfeiture** of his or her escrow funds if the lease is terminated (presumably by either the owner-operator or Prime) prior to expiration of its initial term, if the owner-operator does not exercise his or her option to extend the lease, or if the lease is terminated (presumably by either the owner-operator or Prime) during an extension period and before the lease's expiration.

K. Defendants Prime and Success Leasing have failed, and continue to fail, to return to the owner-operators the escrow funds (with quarterly interest as calculated under applicable law) to which the owner-operators rightfully are entitled following their respective terminations of their agreements with Prime and/or Success Leasing.

55. In sum, the scheme under which Prime and/or Success Leasing has obtained and maintained possession of escrow and other funds rightfully belonging to class member owner-operators is unlawful because (A) the provisions under which Prime and/or Success Leasing collect and retain such funds are not set forth in Prime's Part 376 Service Contracts **and** (B) the provisions themselves are facially violative of applicable federal regulations.

56. As a direct and proximate result of Defendants' actions and omissions, individual

Plaintiffs and all class members have been injured and are entitled to relief from said injury.

PRAYERS FOR RELIEF

57. **WHEREFORE**, Plaintiffs individually and on behalf of all others similarly situated, respectfully request this Court to:

A. certify the class as described herein;

B. enter judgment (i) declaring the practices of Defendants as described herein to be unlawful and in violation of federal motor carrier leasing regulations (49 C.F.R. Part 376) and (ii) permanently enjoining the continuation of said practices; and

C. require Defendants immediately to provide an accounting of all transactions and other activity relating to the class members' escrow and other funds;

D. establish a common fund into which all unlawfully retained escrow funds and statutory interest thereon are deposited;

E. require Defendants immediately to disgorge to the class members the escrow and other funds (with quarterly interest as calculated under applicable law) rightfully belonging to the class members;

F. enjoin Defendants from transferring, diverting, or otherwise concealing the class members' escrow and other funds and from destroying records which demonstrate Defendants' liability or relate in any way to the class members' escrow and other funds;

G. award reasonable attorneys' fees to the class members pursuant to 49 U.S.C. § 14704(e); and

H. award reasonable attorneys' fees out of the common fund;

I. award such other and further relief as the Court deems proper and just.

DEMAND FOR JURY TRIAL

Pursuant to Rules 38 and 39 of the Federal Rules of Civil Procedure, and to Rule 14.A. of the Rules of the United States District Court for the Western District of Missouri, Plaintiffs individually and on behalf of all others similarly situated, demand a trial by jury of all issues triable of right by a jury.

Respectfully submitted,

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

Plaintiffs

By: David A. Cohen /TNS

PAUL D. CULLEN, SR.
DAVID A. COHEN
THOMAS P. McCANN
THE CULLEN LAW FIRM, PLLC
1101 30th Street, N.W., Suite 300
Washington, D.C. 20007
Telephone: (202) 944-8600
Facsimile: (202) 944-8611

By: _____

THOMAS SHEEHAN, ESQ., Bar # 36462
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-6550
Facsimile: (816) 421-5547

JERRY M. KIRKSEY, ESQ.
DOUGLAS, LYNCH,
HAUN & KIRKSEY
111 West Broadway
P.O. Box 117
Bolivar, Missouri 65613
Telephone: (417) 326-5261
Facsimile: (417) 326-2845

Dated: April 3, 2001

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing were sent by First-Class U.S. Mail, postage prepaid, this 3rd day of April, 2001 to:

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

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

Thomas Sheehan
SHOOK, HARDY & BACON
One Kansas City Place
1200 Main Street
Kansas City, Missouri 64105
Telephone: (816) 474-6550
Facsimile: (816) 421-5547

Counsel for Plaintiffs
OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC.,
HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON,
AND JERRY VANBOETZELAER

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
SOUTHERN DIVISION

OWNER-OPERATOR INDEPENDENT DRIVERS ASSOCIATION, INC., and HOWARD JENKINS, MARSHALL JOHNSON, SUSAN JOHNSON, and JERRY VANBOETZELAER, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,	
Plaintiffs,	**Civil Action No. 97-3408CV-RGC**
v.	**Chief District Judge Dean Whipple**
NEW PRIME, INC., d/b/a PRIME, INC., and SUCCESS LEASING, INC.,	
Defendants.	

ORDER

WHEREAS Plaintiffs have filed a Motion to File Amended Class Action Complaint; and

WHEREAS the Court has examined Plaintiffs' First Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages; Demand for Jury Trial and finds no prejudice is caused to Defendants or to absent class members by the filing of an amended complaint, the Court on this _____ day of _____ in the year _____hereby

ORDERS that Plaintiffs be granted leave to file Plaintiffs' First Amended Class Action Complaint for Declaratory and Injunctive Relief and Damages.

_____
Dean Whipple
United States District Court Judge