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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Virginia Van Dusen; John Doe 1; and Joseph Sheer, individually and on behalf of all other similarly situated persons,

Plaintiffs,

v.

Swift Transportation Co., Inc.; Interstate Equipment Leasing, Inc.; Chad Killibrew; and Jerry Moyes,

Defendants.

Case No. CV 10-899-PHX-JWS

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

I. INTRODUCTION

Plaintiffs' Motion for a Preliminary Injunction is an attempt to divert this Court's attention away from the threshold issue in the case—whether this matter should be arbitrated as called for by the express provisions of the parties' contract. Instead, Plaintiffs seek to have the Court immediately rule on the merits of Plaintiffs' claims. The Court should decline to do so.

Plaintiffs' request for preliminary injunctive relief fails on multiple levels. At the jurisdictional level, Plaintiffs do not have standing to seek preliminary relief on behalf of themselves or other independent contractors. Plaintiffs no longer are independent contractors of Swift Transportation Co. ("Swift") and their separate lease agreements with Interstate Equipment Leasing ("IEL") terminated. Therefore, Plaintiffs no longer are subject to any of the practices they seek to enjoin. Additionally, Plaintiffs have not sought to certify a class action regarding the claims at issue in their motion for a preliminary injunction, therefore, Plaintiffs do not represent any individuals other than themselves and cannot obtain relief on behalf of other independent contractors.

Furthermore, an arbitrator, not the Court, must decide the merits of this case and determine what relief, if any, is appropriate. As set forth in Defendants' motion to compel arbitration which was filed on May 21, 2010, the parties expressly agreed to submit all of their disputes to arbitration under the American Arbitration Association's Commercial Rules, which vest an arbitrator with the exclusive authority to issue various forms of relief, including injunctive relief. Recent Supreme Court caselaw dictates that issues of arbitrability, including determining whether an agreement is unconscionable, are to be determined by the arbitrator, not the Court.

Finally, Plaintiffs' request for injunctive relief also fails on its merits. Plaintiffs cannot meet their high burden of showing: (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in their favor; and (4) that an injunction is in the public interest. The

evidence refutes Plaintiffs' claims that Swift's independent contractor agreement ("IC Agreement") and IEL's lease agreement ("Lease") are unconscionable. Although Plaintiffs give the impression that these two contracts form a single agreement, the evidence shows that the IC Agreement and Lease are two separate contracts, entered into by two separate companies, for two separate purposes—one to haul freight for a carrier and the other to lease a truck. Plaintiffs entered into each of these two agreements freely and without coercion and Plaintiffs did not suffer unconscionable penalties when either agreement terminated.

Plaintiffs cannot show that they are likely to suffer any harm, let alone irreparable harm, in the absence of injunctive relief. Plaintiffs no longer are independent contractors of Swift and no longer lease trucks with IEL. They are not subject to any of the practices that they seek to enjoin—including IEL collecting debts on defaulted Leases, Swift furnishing Department of Transportation (DOT) mandated driver information to other carriers (via outside vendors), and Swift making modifications to the IC Agreement and/or IEL making modifications to the Lease—and there is no evidence that they will be in the future. The balance of the equities does not tip in favor of Plaintiffs. Plaintiffs will suffer no harm in the absence of preliminary injunctive relief, but an injunction would significantly restrict Swift and IEL's abilities to conduct their businesses No public interest will be served by issuing an injunction.

Although Plaintiffs claim that they want to preserve the status quo, they really are asking the Court to alter the status quo by preemptively declaring the Swift IC Agreement and IEL Lease unconscionable and restricting Swift and IEL's abilities to conduct their businesses. Defendants respectfully request that the Court deny Plaintiffs' tactical motion, or in the alternative, delay a decision on Plaintiffs' motion until the Court has ruled on Defendant's Motion to Compel Arbitration.

II. FACTUAL BACKGROUND

A. Swift's Operations

Swift arranges freight delivery services for customers throughout the United States, Canada and Mexico. Swift has 36 major terminals in 26 states. Swift contracts with a fleet

of independent contractors to deliver freight to thousands of different customers throughout the country. Because no two customers have the same delivery requirements, independent contractors who contract with Swift have the opportunity to do all types of work, including short-haul, long-haul, stop-to-stop and "dedicated" delivery work (*i.e.*, where one contractor agrees to work hauling one customer's freight). Declaration of Ellen Bronchetti ("Bronchetti Decl."), Exh. U (Rohwer Decl. at ¶¶ 3, 4) During the three year period encompassed by Plaintiffs' FLSA cause of action, Swift individually contracted with approximately 4,965 individuals who also hold leases with IEL. *Id*., Exh. U (Rohwer Decl. at ¶ 5).

B. IEL's Operations

IEL is a truck leasing company that leases and sells trucks to commercial truck drivers who operate the equipment in connection with trucking contracts with other companies, including Swift. Declaration of Elizabeth Parrish ("Parrish Decl.") ¶ 3. IEL does not itself employ any individuals to haul loads or to perform any other driving duties or tasks. In order to lawfully operate a truck leased from IEL, a driver must be contracted to drive for an entity or individual with operating authority issued by one or more states or the DOT, or obtain his own operating authority. Each IEL lease requires that the lessee contract to drive with an entity approved by IEL, one of whom is Swift. *Id*. at ¶ 4.

C. Independent Contractors Voluntarily Choose Their Own Equipment

Drivers wanting to become independent contractors with Swift must furnish their own trucks. Many drivers own their own trucks, others choose to lease trucks from any company of their choosing. *See, e.g.*, Bronchetti Decl. Exhs. G, H, I (Zukauskas Decl. at ¶¶ 11-12; Olson Decl. at ¶¶ 4, 10; Mendoza Decl. at ¶ 13). Many drivers make the decision to lease a truck from IEL because they find that it makes the most business sense. *Id*., Exhs. B, C, K, F, N, O, P (Bagwell Dec. at ¶ 11 (good equipment at competitive rates); Gandy Dec. at ¶ 5 (researched options, and thought the quality of IEL's trucks were better than those offered by competitors); Armagost Dec. at ¶ 6 (spoke to other owner operators about the terms of their leases, and decided that he was offered a good deal by IEL); Harbour Dec. at ¶¶ 11-13

(leases from the place where he gets the best deal); Brewer Dec. at ¶ 15; Gosuwin Dec. at ¶ 24; Hooper Dec. at ¶ 9).

D. Swift Independent Contractor Agreement

1. Swift Independent Contractors Enter Into Independent Contractor Agreements Freely and Without Coercion

Separate and apart from the driver's truck leasing decision, when a driver decides to become an independent contractor performing delivery services for Swift, parties enter into individual independent contractor agreements ("IC Agreement(s)"). Swift presents the IC Agreement to the driver and provides the driver with the opportunity to review the IC Agreement and ask questions. If a driver would like to take the IC Agreement off premises to review it with a spouse, attorney, or other trusted advisor, he or she is free to do so. Bronchetti Decl., Exhs. V, F, G, H, A, L (Sims Dec. at ¶ 5; Harbour Dec. at ¶ 19 (reviewed the independent contractor agreement before signing it and knew he could show it to an attorney); Zukauskas Dec. at ¶ 7 (carefully reviewed owner/operator agreements and found them straight-forward, and knew she could consult with an attorney); Olson Dec. at ¶¶ 16-17 (could take the contract home, and was told repeatedly by Swift's owner operator division to take the agreement to an attorney so she/he could review it with declarant); Howell Dec. at ¶ 7 (reviewed agreement, which he found to be very clear and straightforward, carefully and spoke extensively to someone at Swift before signing; acknowledged that he was free to take it off premises); Madison Dec. at ¶ 14). Drivers also are told not to sign anything they did not understand. *Id.*, Exhs. Q, J (Servitto Dec. at ¶¶ 6-7 (reviewed carefully each page of the independent contractor agreements; told to not sign anything she did not understand); Kapsoiyo Dec. at ¶¶ 7-8 (told to not sign anything he did not understand)).

2. The Terms of Swift's Independent Contractor Agreement Are Not Unconscionable and Are Designed To Comply With Federal Regulatory Requirements.

IC Agreements entered into before 2008 were for a term of one year and had to be renewed each year. Pltf. Exh. G-1, ¶ 17. Starting in 2008, IC Agreements were for one year and renewed automatically each year unless terminated or superseded by a subsequent

agreement. Declaration of Gary Dowell ("Dowell Decl."), ¶ 4; Pltf. Exh. F-1, ¶ 16. IC Each individual IC Agreement specifies the conditions upon which either party may terminate the IC Agreement. Dowell Decl. ¶ 6; *see also* Pltf. Exhs. F-1 ¶ 16 (A); G-1, ¶ 17(A). In some circumstances, Swift terminates contracts in accordance with the terms of the agreements (and in the interest of public safety), because, for example, a driver fails or refuses a DOT drug and alcohol test, or has DOT safety violations.. Dowell Decl. ¶ 6.

The IC Agreement provides that Swift may make changes in compensation, rebate, or reimbursement during the term of the Agreement. Pltf. Exh. F-1 ¶2(C). Any decrease in compensation, rebate, or reimbursement requires 30 days written notice from Swift. *Id.* Since 2005, Swift only has proposed two modifications to the IC Agreement that resulted in a decrease in compensation, rebate, or reimbursement—only one of which affected Plaintiffs. Dowell Decl. ¶ 7. In June 2009, Swift proposed a new IC Agreement for some independent contractors that reduced the fuel rebate by 2 cents per loaded mile. This change was financially necessary because the economic downturn put pricing pressure on Swift, which also faced difficulty collecting the fuel surcharge from its customers.[1] *Id.* at ¶ 8. In addition to these two modifications, Swift has proposed 4-5 mid-term modifications to the IC Agreement in the last 10 years. Each of these modifications was favorable to the drivers, increasing the base rate earned by the independent contractors. *Id*. at ¶ 9.

DOT regulations require that a driver have operating authority to haul freight. A driver either can obtain his or her own operating authority, or operate under the operating authority of a carrier such as Swift. *Id*. at ¶ 5. As a result, Swift's IC Agreement specifies that independent contractors working with Swift are operating their trucks under Swift's

[1] In January 2009, Swift also proposed a new IC Agreement for some independent contractors dedicated to one customer account, based on changes in the contract between that customer and Swift. None of the Plaintiffs were subject to this change. The new IC Agreement reduced a fuel rebate and eliminated a fee for the first stop of each load, but increased the base rate of compensation by over 11 cents per mile. The change was financially necessary because Swift was not collecting enough in a fuel surcharge to the customer to recover the cost of paying the fuel rebate to the drivers. Independent contractors had 30 days to review and consider the new IC Agreement. Dowell Decl. ¶ 7.

operating authority. Pltf. Exh. F-1 ¶ 5(A). Pursuant to DOT regulations, while a truck is operating under Swift's operating authority, the driver cannot haul goods for another carrier using that truck. *Id*.

3. Swift Reports Driver Information to Outside Vendors In Accordance With DOT Regulations

DOT regulations require carriers, including Swift, to provide information to other carriers regarding a driver's history, accident history, and drug/alcohol testing results. Declaration of Cheryl Mortenson ("Mortensen Decl.") ¶ 3; *see also* 49 CFR 391.23 (2010) (specifying driver information to be collected by motor carriers). To meet this requirement, Swift provides certain driver data to two vendors—DriverFACTS and Hire Right. Mortenson Decl. ¶ 3; Declaration of Angelica Flores ("Flores Decl."), ¶ 3.

DriverFACTS compiles driver data and provides verifications for drivers who have left Swift. Mortensen Decl. ¶¶ 3-4. A carrier can order a report from DriverFACTS containing all or part of the following pieces of information: driver name, hire date, separation date, separation status, rehire status, number of accidents, position, drug/alcohol results, and accident/history report. *Id*. at ¶ 4. With respect to separation status, Swift uses one of three codes: voluntary, involuntary, or V11 (Voluntary Transfer to or from Owner Operator Division). Contrary to the assertions in Plaintiffs' motion, Swift does not furnish DriverFACTS any reasons regarding the driver's separation and does not provide any information regarding whether a driver was sent to collections by IEL because the driver breached his lease agreement with IEL. *Id*. at ¶¶ 5-6. Drivers have the right to rebut a DriverFACTS report if they believe information to be incorrect. *Id*. at ¶ 11.

Hire Right compiles driver data from carriers who subscribe to its service and provides companies with driver histories, background checks, and drug/alcohol testing results. Flores Decl. ¶ 3. Hire Right refers to this driver information as a "DAC report." When a driver ceases his relationship with Swift, Swift completes a standard form provided by Hire Right that requests information regarding a driver's name, dates of service, reason for leaving, eligibility for rehire, driver's experience and equipment operated, loads hauled,

work record, accident record, and drug testing record. *Id*. at ¶¶ 3, 4, 6. In the section for "Reason for Leaving," Swift typically checks one of two boxes: "Resigned/Quit (or Driver Terminated Lease)" or "Discharged (or Company Terminated Lease)." Swift does not provide any information regarding whether an independent contractor was sent to collections by IEL because the driver breached his lease agreement with IEL. *Id*. at ¶ 9. Drivers who have a concern regarding information on their DAC report can dispute their record by submitting a rebuttal to Hire Right. *Id*. at ¶ 10.

E. IEL Lease Agreement

1. Drivers Who Lease Equipment from IEL Enter Into A Separate Lease Agreement

Swift independent contractors who choose to lease their equipment from IEL enter into a lease agreement with IEL ("Lease"). The Lease is an entirely separate document from the Swift IC Agreement. Bronchetti Decl., Exh. L (Madison Decl. at ¶ 14). When meeting with IEL representatives about leasing options, drivers are told to review the Lease and ask any questions. Drivers can take the Lease home and are free to consult with an attorney or any advisor of their choosing. *Id*., Exhs. E, O (Lieber Dec. at ¶ 10 (lease and independent contractor agreements presented separately, and driver free to take them away from the initial meeting for further consideration or attorney review); Gosuwin Dec. at ¶¶ 7, 25 (reviewed IEL lease at home for 1-2 days before signing)).

2. The IEL Lease is Not Unconscionable and Is Designed To Comply With Federal Regulatory Requirements

In order to lawfully operate a truck leased from IEL, a driver must be contracted to drive for an entity or individual with operating authority issued by the DOT, or obtain their own operating authority. Thus, the IEL Lease requires the lessee to contract to drive with an entity approved by IEL, such as Swift. Parrish Decl. ¶ 4.

3. A Driver May Default on His or Her IEL Lease Upon the Driver's Resignation or Discharge from Swift

IEL deems a lessee in default on his or her Lease when IEL becomes aware the lessee has breached a material term of the Lease, including failure to make required lease payments

or to be contracted with the authorized trucking company identified in the Lease. *Id*. at ¶ 6. When a driver lessee is placed in default under these circumstances, IEL immediately sends a letter to the driver lessee notifying the lessee of the default and asking the lessee to contact IEL with any question regarding resolution of the lease obligation. *Id*. at ¶ 7.

IEL offers a lessee in default several options for resolving the Lease obligation. A lessee may secure financing from another source and buy out the lease, in which case the truck would not be repossessed. A lessee may find another qualified individual to assume the Lease, in which case all of the original lessee's Lease obligations would be transferred to the substitute lessee. A lessee terminating his or her IC Agreement with Swift also may have the option to contract with a different trucking company authorized by IEL to fulfill the Lease obligation. Lessees have taken advantage of each of these alternatives. *Id*. at ¶ 8.

4. IEL Never Has Engaged in Any Collection Activities On Its Own and Ceased Its Former Practice of Turning Over Defaulted Leases to a Collection Agency

Prior to August 2009, if a defaulted lessee did not contact IEL or make arrangements to resolve the Lease obligation within 14 days of default, pursuant to the terms of the Lease, IEL repossessed the truck in order to re-lease it. IEL turned over the remaining balance on the lease to a collections agency. IEL contracted with several collection agencies over time, including AR Systems, which it used from March 2008 until August 2009. Since August 2009, after repossessing and re-leasing the truck, it has been IEL's policy not to take any steps to collect remaining lease amounts from defaulting lessees (unless they subsequently seek another lease from IEL), and IEL has not referred any accounts to collection agencies. *Id*. at ¶ 9. At no time since 2005 has IEL engaged in collection activities on its own behalf, and it does not call or contact lessees in an attempt to collect amounts due. *Id*. at ¶ 21.

Since 2005, IEL has not reported lease defaults to credit reporting agencies, although collection agencies, including AR Systems, may have done so. Moreover, contrary to Plaintiffs' assertions, IEL cannot cancel, place restrictions on, or otherwise impact any driver's commercial drivers' license ("CDL"). *Id*. at ¶¶ 22, 24.

F. Individual Plaintiffs

1. Virginia Van Dusen

In March 2009, Virginia Van Dusen ("Van Dusen") signed an IC Agreement to become an independent contractor driver for Swift. Dowell Decl. ¶ 11. As an independent contractor driver, Van Dusen drove with her husband, Philip Hoffmann, who also contracted with Swift. By letter on February 12, 2010, Van Dusen informed Swift that she could not continue contracting with Swift and was "turning the truck keys in." *Id*. at ¶ 11. Swift did not submit a DAC form through Hire Right when Van Dusen terminated her independent contractor relationship. Flores Decl. ¶ 12. Swift submitted information to DriverFACTS indicating Van Dusen terminated voluntarily. Mortensen Decl. ¶ 8.

IEL records reflect that Virginia Van Dusen and her husband signed a truck lease on March 3, 2009. On January 21, 2010, Van Dusen and her husband executed a lease amendment removing him from the lease and leaving Van Dusen fully responsible for the lease obligations. Van Dusen defaulted on her lease on February 15, 2010, after she surrendered her truck. IEL did not refer Van Dusen's account to a collection agency, and has not otherwise pursued collections against Van Dusen. Parrish Decl. ¶ 12.

2. Joseph Sheer

On or about August 7, 2006, Joseph Sheer ("Sheer") entered into an IC Agreement to become an independent contractor driver with Swift. On or about April 7, 2009, Swift notified Sheer that it was terminating its IC Agreement with him. Dowell Decl. ¶ 12. Swift terminated Sheer's IC Agreement due to the number of citations/safety violations Sheer had received. *Id*. Swift did not submit a DAC form when Swift terminated Sheer's independent contractor relationship. Flores Decl. ¶ 14 Swift submitted information to DriverFACTS indicating Sheer terminated involuntarily. Mortensen Decl. ¶ 9.

IEL records reflect that Sheer signed a truck lease on August 7, 2006. Sheer defaulted on that Lease on April 7, 2009, when Swift terminated his IC Agreement. IEL repossessed Sheer's truck and referred his account to a collection agency. In accordance with its current policy, IEL has not pursued collection efforts against Sheer. Parrish Decl. ¶ 11.

3. Jose Motolinia (John Doe 1)

On or about January 28, 2009, Jose Motolinia ("Motolinia") entered into an IC Agreement to become an independent contractor for Swift. Motolinia voluntarily terminated his IC Agreement on January 4, 2010. Dowell Decl. ¶ 13. Swift did not submit a DAC form when Motolinia terminated his independent contractor relationship. Flores Decl. ¶ 13 Swift submitted information to DriverFACTS indicating Motolinia terminated voluntarily. Mortensen Decl. ¶ 9.

IEL records reflect that Motolinia signed a Lease on January 28, 2009. Motolinia's contract with Swift was terminated on January 4, 2010, when he owed only $2,580 under his IEL Lease. IEL has made no efforts to collect that remaining balance. Parrish Decl. ¶ 13.

III. LEGAL ANALYSIS

A. Plaintiffs Do Not Have Standing to Seek a Preliminary Injunction on Behalf of Themselves or Other Swift Independent Contractors

Plaintiffs do not have standing to seek injunctive relief on behalf of themselves or on behalf of other independent contractor drivers. Even if Plaintiffs can demonstrate that Defendants' IC Agreement and Lease are unconscionable, which they cannot, Plaintiffs have not suffered any injury and are not at risk of suffering any future injury that can be remedied by the Court issuing a preliminary injunction. Furthermore, this action has not been certified as a class action. As such, Plaintiffs do not have standing to seek relief on behalf of other independent contractor drivers.

1. Plaintiffs Do Not Have Standing to Seek Injunctive Relief for Their Individual Claims

To have standing under the U.S. Constitution, which would justify the relief Plaintiffs seek through this Motion, a plaintiff must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged action; and redressable by a favorable ruling. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). A plaintiff must demonstrate standing for each form of relief sought. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). The critical question is whether plaintiffs have "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of

federal-court jurisdiction." *Home v. Flores*, 557 U.S. __, 129 S.Ct. 2579, 2592 (2009), quoting *Summers v. Earth Island Inst.*, 555 U.S. ___, 129 S.Ct. 1142, 1149 (2009). Standing is a threshold issue that must be considered before reaching the merits of a motion for an injunction. *Lujan*, 504 U.S. at 560.

Plaintiffs seek an injunction challenging three asserted practices of Swift and/or IEL. Plaintiffs ask the Court to enjoin Swift and IEL from:

> 1) seeking to collect debts allegedly owed by Plaintiffs who have been or may be classified by Defendants as 'in default' of their lease/ICOA contract; 2) furnishing adverse credit and/or employment reports concerning Plaintiffs who have been or may be classified by Defendants as 'in default' of their lease/ICOA contract; and 3) requiring Plaintiffs to agree to changes in their lease/ICOA contracts on threat of placing them in default if they decline to agree to the change.

Pltf. Mtn. at 2-3.

None of the Plaintiffs have demonstrated any prospect for actual injury from the practices they seek to have enjoined. With regard to collection of amounts due under their IEL Leases at default, none of the Plaintiffs have demonstrated any risk that such efforts will be made against them in the absence of an injunction. Since August 2009, after repossessing trucks for re-lease, IEL has not pursued debt collection against *any* defaulting driver, including Plaintiffs. Parrish Decl. ¶¶ 9, 12-14. Two of the Plaintiffs, Van Dusen and Motolinia, defaulted in 2010, *after* IEL's change in policy and have had no debt collection efforts of any kind taken against them as a result of that default. *Id.* ¶¶ 13-14. They never have been subject to the practice they challenge and face no injury if the injunction is denied. Although IEL initially referred Sheer's account to a collection agency upon his default in April 2009, IEL withdrew his account from collections when IEL changed its policy in August 2009. IEL has taken no further action and has no plans to do so. There is no threat of present and actual injury that would be redressed by the preliminary relief sought.[2]

[2] "In a lawsuit brought to force compliance, it is the plaintiff's burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant's allegedly wrongful behavior will likely occur or continue, and that the "threatened injury [is] certainly impending."' *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 190 (2000), *citing Whitmore v.*

Similarly, Plaintiffs' requests to enjoin "adverse credit and/or employment reports," and "requiring Plaintiffs to agree to changes in their lease/ICOA contracts" will not redress any present injury to Plaintiffs. Swift only provides employment data to DriverFACTS and/or Hire Right (DAC) at the time an IC Agreement terminates, pursuant to 49 C.F.R. 391.23. Because Plaintiffs presently do not have independent contractor relationships with Swift, there is no potential for any such reporting that could injure Plaintiffs. Similarly, because Plaintiffs presently do not have independent contractor relationships with Swift, and no longer have lease agreements with IEL, there is no potential for contract modifications that could injure Plaintiffs.

It is well-established that former employees do not have standing to obtain injunctive relief against employment practices to which they are no longer subject, because a plaintiff in that situation cannot "demonstrate that he is realistically threatened by a repetition of the violation." *Heffelfinger v. Electronic Data Systems Corp.* 2008 U.S. Dist. LEXIS 5296 at *67 (C.D. Cal. 2008); *see also Delodder v. Aerotek, Inc.*, 2009 U.S. Dist LEXIS 109256 at *10 (C.D. Cal. 2009). Although Plaintiffs here were independent contractors rather than employees, their motion suffers from the same failing: they cannot seek an injunction against Swift and IEL based only on injuries from *past* contractual relationships. *See Armstrong v. Davis,* 275 F.3d 849, 860-61 (9th Cir. 2001); *Krzyzanowsky v. Orkin Exterminating Co.*, 2009 U.S. Dist. LEXIS 14332 at *41 (N.D. Cal. 2009) ("because [plaintiff] has no contract with [defendant], nor has produced any evidence he intends to obtain one in the future, he cannot show that he is realistically threatened by a repetition of [defendant]'s conduct").

2. Plaintiffs Do Not Have Standing to Seek Injunctive Relief on Behalf of Other Drivers

Likewise, Plaintiffs do not have standing to seek injunctive relief on behalf of other

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Arkansas, 495 U.S. 149, 158 (1990). This is a higher burden than a defendant claiming that voluntary cessation of a practice renders a cause of action moot. *Id.* at 191 (compliance with permitting requirements as a part of a settlement of another lawsuit did not render claim moot).

drivers because the Court has not certified a class action in this case.[3] As a general principle, a plaintiff does not have standing to assert claims on behalf of other individuals. *See McMichael v. County of Napa*, 709 F.2d 1268, 1270 (9th Cir. 1983), *citing Warth v. Selden*, 422 U.S. 490, 517-18 (1975) (". . . the plaintiff must assert his own rights and 'cannot rest his claim to relief on the legal rights or interests of third parties.'") "The class-action device was designed as an 'exception to the usual rules that litigation is conducted by and on behalf of the individual named parties only.'" *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982), *citing Califano v. Yamasaki*, 442 U.S. 682, 700-10 (1979). Unless Plaintiffs comply with certification requirements, the Court lacks jurisdiction to adjudicate Plaintiffs' representative claims. *See Califano*, 442 U.S. at 701 ("Where the district court has jurisdiction over the claims of each individual member of the class, Rule 23 provides a procedure by which the court may exercise that jurisdiction over the various individual claims in a single proceeding.") "Without a properly certified class, a court cannot grant relief on a classwide basis." *Zepeda v. United States Immigration and Naturalization Svs.*, 753 F.2d 719, 728 (9th Cir. 1983).

In *Zepeda v. United States Immigration and Naturalization Svs.*, the Court held that a preliminary injunction issued by the district court must be limited to apply only to the individual plaintiffs unless the court certifies a class action. In reaching this conclusion, the Court stated:

> A federal court may issue an injunction if it has personal jurisdiction over the parties and subject matter jurisdiction over

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[3] On May 10, 2010, Plaintiff filed a motion for conditional certification under the FLSA. The Court has not ruled on this motion. Although Plaintiffs' Complaint seeks to certify a Federal Rule of Civil Procedure Rule 23 class action on its Second through Seventh causes of action, Plaintiff has not filed a Rule 23 motion for class certification.

Even were a class certified, however, the individual Plaintiffs cannot themselves show a prospective injury giving them standing to seek an injunction, and, therefore, could not seek that relief on behalf of a class. *See Anderson*, 275 F.3d at 860 ("In order to assert claims on behalf of a class, a named plaintiff must have personally sustained or be in immediate danger of sustaining some direct injury as a result of the challenged . . . conduct." (internal quotation marks omitted)).

> the claim; it may not attempt to determine the rights of persons not before the court. Under Federal Rule of Civil Procedure 65(d), an injunction binds only "the parties to the action, their officers, agents, servants, employees, and attorneys, and . . . those persons in active concert or participation with them who receive actual notice of the order. . . ." The district court must, therefore, tailor the injunction to affect only those persons over which it has power.

Id. at 727. (internal citations omitted); *see also Paige v. California*, 102 F.3d 1035, 1039 (9th Cir. 1996) (*citing Zepeda* and holding "[b]ecause the injunction issued here provides class-wide relief, we could not uphold it without also upholding the certification of the class."); *National Center for Immigrants Rights, Inc. v. INS*, 743 F.2d 1365, 1371 (9th Cir. 1984) ("the INS asserts that in the absence of class certification, the preliminary injunction may properly cover only the named plaintiffs. We agree."); *see also Davis v. Romney*, 490 F.2d 1360, 1366 (3d Cir 1974) ("Relief cannot be granted to a class before an order has been entered determining that class treatment is proper.").

Here, Plaintiffs have not filed a motion under Rule 23 to certify a class action on their claims that Swift's Agreement and/or IEL's Lease are unconscionable, and no class action has been certified.[4] Accordingly, Plaintiffs cannot seek preliminary injunctive relief on behalf of any independent contractor drivers other than themselves.

3. Information From Declarants Other Than Plaintiffs Must Be Disregarded

To the extent Plaintiffs rely on declarations from individuals other than Plaintiffs to support their claim for injunctive relief, such evidence must be disregarded. In *Hodgers-*

[4] To date, 108 individuals have filed a consent to sue under the FLSA's opt-in procedures. *See* 29 U.S.C. §216(b). However, these individuals are not plaintiffs or "party plaintiffs" for all purposes. The FLSA's opt-in procedures apply only to Plaintiff's first cause of action under the FLSA, which is not at issue in Plaintiff's motion for a preliminary injunction. As Plaintiffs acknowledge in their Complaint, Plaintiffs must certify a class action under Rule 23 for their other causes of action, including their Second, Third, Fifth, and Seventh causes of action which seek a determination that the Agreement and Lease are unconscionable—the claims at issue in this motion for injunctive relief. To date, Plaintiffs have not filed a Rule 23 motion for class certification. Moreover, Defendants may challenge the propriety of combining FLSA collective action claims with claims that may only be certified under Rule 23 due to the fact that such hybrid actions are not manageable and are inconsistent with the purposes of the class action device.

Durgin v. de la Vina, 199 F.3d 1037 (9th Cir 1999), the court found: "[a]ny injury unnamed members of this proposed class may have suffered is simply irrelevant to the question whether the named plaintiffs are entitled to the injunctive relief they seek." *Id.* at 1045 (holding that standing to seek equitable relief was not shown where plaintiffs alleged a single violation and then argued that other members of the class were likely to sustain future injury).[5]

B. The Court Should Not Exercise Jurisdiction to Rule on the Merits Prior to Deciding Whether This Matter Should Be Compelled to Arbitration.

As discussed more fully in Defendants' Motion to Compel Arbitration and Expedited Motion to Stay Consideration of Plaintiffs' Motion for A Preliminary Injunction, the Court should decline to issue injunctive relief before determining the threshold issue of whether to compel this matter to arbitration.[6]

According to the U.S. Supreme Court in *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. ___ , 2010 U.S. LEXIS 4981 (June 21, 2010), challenges to an entire arbitration agreement based on unconscionability should be heard by an arbitrator if that is what the parties agreed to. Here, the parties had such an express understanding, as reflected in the clear and unequivocal language of the IC Agreement. The IC Agreement states as follows:

> **All disputes and claims arising under, arising out of or relating to this Agreement, including an allegation of breach thereof, and any disputes arising out of or relating to the relationship created by the Agreement, including any claims or disputes arising under or relating to any state or federal laws, statutes or regulations, and any disputes as to the rights and obligations of the parties, including the arbitrability of disputes between the parties, shall be fully resolved by arbitration in accordance with Arizona's Arbitration Act and/or the Federal Arbitration Act.** Any arbitration between the parties will be governed by the Commercial Arbitration Rules of the American Arbitration Association (the "Rules").

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[5] If the Court determines that it should examine evidence from Plaintiffs' other declarants, Defendant has included this evidence in the accompanying declarations of Gary Dowell, Elizabeth Parrish, Angelica Flores, and Cheryl Mortensen.

[6] On May 21, 2010, Defendants moved to compel arbitration of Plaintiffs' claims against all Defendants in lieu of answering. To date, the Court has not ruled on Defendants' motion.

Pltf's Exh. F-1, ¶ 25 (emphasis in original).

As stated therein, the parties specifically agreed to submit matters of arbitrability, which includes determinations of unconscionability, to the arbitrator. Because the parties reached consensus, their agreement should be respected. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995) ("The question 'who has the primary power to decide arbitrability' turns upon what the parties agreed about that matter.").[7]

Significantly, by designating that disputes are governed by the AAA Commercial Rules the parties agreed to give the arbitrator the authority to issue preliminary injunctive relief. Rule 34 of the AAA Commercial Rules states in relevant part:

> (a) The arbitrator may take whatever interim measures he or she deems necessary, ***including injunctive relief*** and measures for the protection or conservation of property and disposition of perishable goods.

Bronchetti Decl. ¶ 21, Exh. T (emphasis added).[8] The parties clearly and unambiguously agreed to submit their disputes to arbitration and specifically agreed in the arbitration provision of the Agreement that the AAA Commercial Rules, which permit the arbitrator to issue injunctive relief, shall govern. The Court should abide by the agreement of the parties.

Plaintiffs are attempting to execute an end-around on Defendants' motion to compel arbitration which, if successful, would deprive this Court of jurisdiction. By filing their request for a preliminary injunction while the Court's ruling on Defendants' motion to compel arbitration is pending, Plaintiffs are improperly asking the Court to decide the merits

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[7] Likewise, Rule 7 of the Commercial Arbitration Rules of the American Arbitration Association ("AAA Commercial Rules"), gives the arbitrator authority "to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." Bronchetti Decl. ¶ 21, Exh. T.

[8] Defendants acknowledge that there is some precedent for a court's authority to grant preliminary relief pending arbitration. *See PMS Distributing Co., Inc. v. Polymembrane Systems, Inc.*, 863 F.2d 639 (9th Cir. 1988) (court granted defendant's writ of possession after ordering the parties to arbitration, but acknowledging that the result would be different if the relief were sought *prior* to the dispute being sent to arbitration). Plaintiffs have not cited, and Defendants are not aware of, any Ninth Circuit law that would support the Court's authority and discretion to grant a preliminary injunction where, as here, the arbitrator would have the authority to grant such relief.

of their claims prior to deciding whether this case is properly before it. This tactic should be rejected.

C. Plaintiffs Are Not Entitled To A Preliminary Injunction

1. Legal Standard for a Preliminary Injunction

Even if the Court was to consider the merits of Plaintiffs' Motion, Plaintiffs have failed to present the evidence to warrant the relief sought.[9] Injunctive relief is an extraordinary remedy. *Shelton v. Nat'l Collegiate Athletic Ass'n*, 539 F.2d 1197 (9th Cir. 1976). The Supreme Court recently clarified that the standard for granting injunctive relief requires that Plaintiffs establish four criteria:

> A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.

Winter v. Natural Res. Def. Counsel, Inc., __ U.S. __, 129 S.Ct. 365, 374 (2008). In rejecting a more lenient standard used in the Ninth Circuit (and cited by Plaintiffs), the Supreme Court emphasized that "an injunction cannot issue merely because it is possible that there will be an irreparable injury to the plaintiff; it must be likely that there will be." *American Trucking Ass'ns, Inc. v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009), *citing Winter*, 129 S.Ct. at 375. Cases suggesting a lesser standard are, therefore, neither controlling nor viable. *Id*.

2. Plaintiffs Cannot Show They Are Likely to Succeed on the Merits of Their Claims

a. The Unconscionability Standard

The unconscionability doctrine reflects a policy "of the prevention of oppression and

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[9] In the event the Court grants preliminary injunctive relief, Defendants ask that the Court set a substantial bond as security under Fed. R. Civ. P. 65. Because Defendants' damages may be limited to the amount of such bond in the event such an injunction is determined to be improper, Defendants ask the Court to exercise its discretion to protect Defendants' interests. *See Nintendo of Amer., Inc. v. Lewis Galoob Toys, Inc*, 16 F.3d 1032, 1036-37 (9th Cir. 2994) (purpose of bond is to discourage frivolous and improper motions for injunctive relief); *Mead Johnson & Co. v. Abbott Lab.*, 201 F.3d 883, 888 (7th Cir. 2000).

unfair surprise." *Seekings v. Jimmy GMC of Tucson, Inc.*, 638 P.2d 210, 216 (Ariz. 1981). It is not intended to disturb the "allocation of risks because of superior bargaining power." *Id.* Generally, an agreement is unconscionable only " . . . if it is such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other." *Broemmer v. Otto*, 821 P.2d 204, 208 (Ariz. App. 1991), *rev'd* in part on other grounds, *Broemmer v. Abortion Services of Phoenix*, 840 P.2d 1014 (Ariz. 1992). The court must examine all the facts surrounding the contract *at the time it was entered into.* A.R.S. § 47-2302 (emphasis added); *Cooper v. QC Fin. Servs.*, 503 F. Supp. 2d 1266, 1279 (D. Ariz. 2006). "Although a commercial purchaser is not doomed to failure in pressing an unconscionability claim . . . findings of unconscionability in a commercial setting are rare." *SRP v. Westinghouse Electric Corp.*, 694 P.2d 198, 204 (Ariz. 1984), *partially abrogated on another issue by Flagstaff Aff. Housing v. Design Alliance*, 223 P.3d 664, 666 (Ariz. 2010).

b. Procedural Unconscionability

Procedural unconscionability considers "unfair surprise, fine print clauses, mistakes or ignorance of important fact or other things that mean bargaining did not proceed as it should." *Maxwell v. Fidelity Fin. Srvcs.*, 907 P.2d 51, 57-58 (Ariz. 1995). The various factors reviewed to determine procedural unconscionability include:

> "...[t]he real and voluntary meeting of the minds of the contracting party: age, education, intelligence, business acumen and experience, relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms were possible," and "whether there were alternative sources of supply for the goods in question."

Id. at 58. "The conclusion that the contract was one of adhesion is not, of itself determinative of its enforceability." *Jones v. GMC*, 640 F. Supp. 2d 1124, 1130 (D. Ariz. 2009).

The Swift IC Agreement and IEL Lease are free from "unfair surprise, fine print clauses, mistakes...ignorance of important fact or other things that mean bargaining did not proceed as it should." *Id.* As recognized by the drivers themselves, neither Swift nor IEL

exercised their alleged superior bargaining power in an overreaching or improper manner. Parrish Decl., ¶ 9; Bronchetti Decl. Exhs. F, M, C, G, J (Harbour Decl. ¶ 2; Jones Decl. ¶ 16; Gandy Decl. ¶ 9; Zukauskas Decl. ¶ 25; Kapsoiyo Decl. ¶ 11). They were free to drive for one of Swift's many competitors if they did not want to become independent contractors. Bronchetti Decl. Exh. A (Howell Decl. ¶ 15).

Both Swift and IEL instructed drivers not to sign what they did not understand, and freely answered any potential questions raised. Bronchetti Decl. Exhs. P, Q, S (Hooper Decl. ¶ 6; Servitto Decl. ¶ 6; Esparza Decl. ¶ 8). Drivers had extensive time to carefully review both agreements and the freedom to consult with an attorney. Bronchetti Decl. Exhs. A, B, C, D, E, F, G; (Howell Decl. ¶ 7; Bagwell Decl. ¶ 10; Gandy Decl. ¶ 16; Miez Decl. ¶ 5; Lieber Decl. ¶ 6; Harbour Decl. ¶ 19; Zukauskas Decl. ¶ 7). Drivers chose to review the agreements for periods ranging from four hours to two days. Bronchetti Decl. Exhs. O, P; (Gosuwin Decl. ¶ 25; Hooper Decl. ¶ 6.) None of the Plaintiffs were told that they could not take the agreements from the premises or seek legal advice. Pltf's Exh. F; Van Dusen Decl. ¶¶ 2,11; Pltf's Exh. G; Sheer Decl. ¶¶ 3, 10. Swift and IEL allowed the prospective independent contractor/lessees to make modifications to the contract. Bronchetti Decl. Exhs. H, P (Olsen Decl. ¶ 24, Hooper Decl. ¶ 6). Swift and IEL also allowed the drivers to negotiate clauses and rates. *Id.*

Many of the drivers are well-informed, independent business owners who employ up to eleven individuals. Bronchetti Decl. Exhs. F, C, J (Harbour Decl. ¶ 2; Gandy Decl. ¶ 9; Kapsoiyo Decl. ¶ 10). Others have extensive experience in the trucking industry and with Swift. Parrish Decl. ¶ 5. These businesspeople are accustomed to common industry practices. Pltf's Exhs. F, G (Van Dusen Decl. ¶ 1; Sheer Decl. ¶ 4), Bronchetti Decl., Exh. G (Zukauskas Decl. ¶ 25). They were free to lease a truck from one of IEL's competitors, or purchase a truck. Parrish Decl. ¶ 13. None of the contract clauses in question were hidden or in fine print. All were in plain English. *See* Pltf's Exhs. F-1, G-1, G-2.

c. Substantive Unconscionability

Substantive unconscionability emphasizes "the actual terms of the contract and examines the relative fairness of the obligations assumed." *Jones,* 640 F. Supp. 2d at 1131. An agreement is likely to be substantively unconscionable where there exists terms that are: "so one-sided as to oppress or unfairly surprise an innocent party, an overall imbalance in the obligations and rights imposed by the bargain, and significant cost-price disparity." *Id.* at 1131-32. The contract clauses in question are not substantively unconscionable.

Plaintiffs argue that paragraph 13 of the Lease imposes an unconscionable penalty by allowing IEL to take possession of the truck, terminate the lease, and declare the amount of the unpaid lease payments due and payable.[10] Pltf's Exh. G-2, ¶ 13. These provisions are not unconscionable. First, IEL does not repossess a truck in all cases of default. A driver in default can assign the Lease to another lessee (with the consent of IEL) or secure financing from another source and buy out the Lease. Parrish Decl. ¶ 8. Second, when IEL does repossess a truck in default pursuant to the terms of the Lease, the truck can be sold or re-leased, and the proceeds are then applied to the lessee's obligations. The lessee is responsible only for costs incurred by IEL in preparing the truck for re-lease, and any lease payments missed prior to the re-lease or sale of the truck. *Id*. at ¶ 10. IEL does not seek double recovery, but recovery to mitigate its damages after default. Furthermore, IEL has not referred any driver to collections after repossessing a truck since August 2009. *Id*. at ¶ 9. In the past, if the matter was referred to collections by IEL, the lessee could typically settle for 10 percent or less of the balance owing at the time of the default. *Id*. at ¶ 10.

The cases cited by Plaintiffs in support of their unconscionability argument were decided under New York or Connecticut law, not Arizona law and are not on point.[11] In *McKesson Automated Healthcare, Inc. v. Brooklyn Hospital Center,* McKesson received a stipulated default judgment for $1.5 million in damages against a hospital that breached its

[10] Defendants note that Plaintiffs do not seek to enjoin IEL from terminating a Lease and/or taking possession of a truck upon Lease termination. Pltf. Mtn. at 23.

[11] The Lease and IC Agreement state that Arizona law applies. Pltf's Exh. F-1, ¶ 33; Pltf's Exh. G-1, ¶¶ 23, 24.

equipment lease. 779 N.Y.S. 2d 765, 770 (N.Y. Sup. Ct. 2004). Without advising the court of its judgment, McKesson sought an order of *replevin* and seized the equipment. The court held that having secured a judgment for monetary damages, McKesson was precluded by principles of *res judicata* from obtaining an order of *replevin* seizing the equipment. *Id.* at 768-69. The court stated that under New York law, McKesson could simultaneously pursue both repossession and a money judgment, but could only obtain one category of relief by way of judgment. *Id.* at 770. Here, IEL is not seeking double recovery or indeed any recovery. IEL repossess and re-leases trucks of lessees in default who do not pay off the Lease or arrange for another lessee to assume the Lease. IEL has not referred any driver in default to collections after repossessing a truck since August 2009. Parrish Decl. ¶ 9.

In *Fairfield Lease Corporation v. Marcel Pratt*, 278 A. 2d 154, 156 (Conn. Cir. Ct. 1971), the lease for a coffee machine provided that in the event of a default, the lessee was liable for legal and other expenses incurred in connection with the enforcement of the lessor's remedy, including attorneys' fees, equal to 20% of the total unpaid balance. The lease contained a waiver of defenses on the part of the lessee as against the lessor's assignee. The court found that the combination of various provisions made the lease unconscionable. *Id*. at 155-56.

Unlike in *Fairfield*, the IEL Lease provides that in the event of a default, the remaining balance becomes due, *less any sums received by IEL, once the truck is repossessed and released or sold.* Pltf's Exh. G-2, ¶ 13. The lessee also is responsible for costs incurred by IEL in preparing to re-lease the truck. Parrish Decl. ¶¶ 5-10. This is a reasonable approximation of the damage caused by the breach, and therefore the damage provision is not an unlawful penalty. Plaintiffs present no evidence that IEL forced them, or any other lessee, to pay off the entirety of their Lease after a default. *See, e.g.*, Pltf's Exhs. F, G. In almost all cases, IEL is able to re-lease the truck, reducing the lessee's obligations. Parrish Decl. ¶ 10. The lessee only is responsible for the "loss of the bargain," including repair costs and down-time associated with re-leasing the truck, as well as any missed

payments prior to the re-lease. *Id*. ¶ 10.

John Deere Leasing Company v. Blueblaugh, 636 F. Supp. 1569, 1575 (D. Kan. 1986), involved a lease where the default provisions were written on the back of the lease in "such fine light print as to be nearly illegible." "The court was . . . required to use a magnifying glass to read the reverse side of the lease." *Id.* at 1571. The lease required the lessee to pay ***more*** than the balance of the payments due under the lease in the event of a default, as the lessee ***also*** was required to pay the option purchase price (the amount the lessee would have to pay to purchase the tractor at the end of the lease), which was almost as much as the remaining lease payments plus interest. In declaring the agreement substantively unconscionable, the court found that the addition of the option price to the lessee's liability on default was "quite outside the norm." *Id.* at 1571. Here, in contrast, the Lease is written in normal type and the remedy provisions are not hidden. The acceleration provisions only provide for the balance of the lease due, less proceeds from the sale or re-lease of the truck, plus costs to re-lease the truck. Pltf. Exh. G-2, ¶ 13.

In *Larson-Headstrom & Associates, Inc. v. Jeffries*, 701 P.2d 587, 592 (Ariz. Ct. App. 1985), the liquidated damage provision ***was enforced by the court***. An owner entered into an exclusive listing arrangement with a real estate broker. The broker obtained offers of several million dollars for the property, but the landowner chose to sell the property to a church for $10. The brokerage agreement provided that the owner owed a brokerage fee of 6% of the gross sales price, or other consideration paid. The court held that the provision ***was*** enforceable. *Larson* does not aid Plaintiffs.[12]

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[12] The other cases cited by Plaintiffs were decided under New York or Connecticut law and are distinguishable, as none involved the lessor applying the proceeds from the re-lease of the equipment to extinguish the debt, or they involved defective sales of the equipment once seized and resold, accompanied by a liquidated damages provision. *Hertz Commercial Leasing Corp. v. Dynatron*, 427 A.2d 872 (Conn. 1980) (Lessor waited 15 months before selling the equipment in a private sale without complying with the New York State notice laws); *Fairfield Lease Corp. v. Marsi Dress. Corp.*, 303 N.Y.S. 2d 179 (N.Y. Civ. Ct. 1969) (court did not address resale of the equipment and application of the proceeds to the debt); *In re Merwin & Willoughby Co.*, 206 F. 116 (N.D. N.Y. 1913) (same). Acceleration clauses are valid, and a lessor has a duty to mitigate by re-leasing the property after repossession.

d. The Lease Is Not Unconscionable Because It Allows Either Party To Terminate The Independent Contractor Agreement On Ten Days' Written Notice

Plaintiffs also argue that the Lease is unconscionable because it requires that the driver enter into an independent contractor agreement with Swift, which Swift or the driver can terminate without cause on ten (10) days notice. Pltff's Exh. H, ¶ 16A.

While Swift reserves the right to terminate independent contractors on ten days' notice (also a right of the driver), it does not exercise this right "for no reason at all" as Plaintiffs suggest, and there is no credible evidence of this occurring. In the infrequent instance when Swift elects to terminate an IC Agreement, the reason it does so is based frequently on concern for public safety due to a contractor failing a mandatory DOT drug test, being involved in numerous accidents, or receiving numerous traffic citations. *See* Dowell Decl. ¶ 6.

Only one Plaintiff, Joseph Sheer, had his Agreement terminated by Swift. Swift terminated Sheer's IC Agreement for multiple citations and safety violations. Sheer had seven accidents on his record. *Id*. ¶ 12. No one can contend that terminating a driver contract for multiple citations and/or safety violations is illegal, irrational or inconsistent with a proper independent contractor relationship.

With respect to the Lease termination, under Federal law, a driver must be contracted to drive for an entity or individual with operating authority issued by the DOT. Therefore, when a motor carrier terminates an independent contactor, the driver cannot continue to drive unless he has his own operating authority or contracts his truck with a new entity possessing appropriate operating authority. Parrish Decl. ¶¶ 9-10. Driving for a carrier with a valid operating authority is a material term of the Lease, the breach of which results in default. *Id*.

Given that both parties may terminate the contracts at-will, with notice, they are not unconscionable. *See Pennington's, Inc. v. Brown-Forman Corp.*, 785 F. Supp. 1412, 1416 (D. Mont. 1991), *aff'd* 2 F.3d 1157 (9th Cir. 1993) (Agreement containing a "terminable

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Fairfield Lease Corp. v. 717 Pharmacy, Inc., 109 Misc. 2d 1072 (N.Y. Civ. Ct. 1981) *aff'd* 117 Misc. 2d 304 (N.Y. App. Term. 1983).

at-will" provision with a 30-day notice requirement was not unconscionable, where there was no evidence that the provision was the result of surprise or oppression. "[T]he termination provision cannot be said to be substantively unconscionable since it provided both parties to the agreement the same right to terminate without cause on thirty days' notice."); *Premier Wine & Spirits v. E. & J. Gallo Winery*, 644 F. Supp. 1431 (E.D. Cal. 1986), *aff'd* 846 F.2d 537 (9th Cir. 1988) (A termination-at-will provision with 30 days notice was not unconscionable); *Smith v. Price's Creameries*, 650 P.2d 825, 828-29 (N.M. 1982) (A termination-at-will provision was not unconscionable because it was not ambiguous, there was no evidence of fraud, and the parties were competent and free to choose the provisions of their contract).

e. The IC Agreement Is Not Unconscionable Because It Allows For Mid-Term Modifications

While the IC Agreement provides for modifications upon 30 days' notice by Swift with respect to changes in compensation, rebate, or reimbursement, the vast majority of changes have been made to the benefit of the drivers. Dowell Decl. ¶¶ 7-9; Pltf. Exh. F-1, ¶ 2(C). Proposed modifications occasionally are necessary due to changes in economic conditions, such as an increase in fuel prices. Dowell Decl. ¶¶ 7-8. Contractors who do not like the proposed modifications are free to terminate their IC Agreements at-will on 10 days' notice, or they can choose not to renew their contracts at the end of the year. Pltf's Exh. F-1, ¶ 16.

Contract clauses permitting unilateral modifications are not unconscionable. In *Ohai v. Verizon Communs., Inc.*, 2005 U.S. Dist. LEXIS 25703 at *17 (D.N.J. Oct 24, 2005), the court found a cellular service agreement ("CSA") was not substantively unconscionable even though it allowed Verizon to unilaterally modify or terminate the agreement. The Court stated:

> To the extent the CSA purports to allow Verizon Wireless to change the terms of the agreement, it must do so by giving written notice before the billing period in which the changes go into effect. Upon receipt of such written notice, the plaintiff may

> accept those changes and continue using the service under the revised agreement or reject them and cancel the CSA.
>
> . . .
>
> In short, the face of the CSA does not evidence the lack of mutuality among the parties and, for this further reason, the CSA is not substantively unconscionable.

See also Enderlin v. XM Satellite Radio Holdings, Inc., 2008 U.S. Dist. LEXIS 27668 at *47 (E.D. Ark. Mar 25, 2008) (In enforcing an arbitration agreement in commercial setting, the court rejected an argument that the agreement was illusory since the customer had the option to discontinue service and thereby reject any unilateral modifications); *Iberia Credit Bureau Inc. v. Cingular Wireless LLC*, 379 F.3d 159, 173 (5th Cir. 2004) (court held that change-in-terms provisions in agreements did not render the contracts' obligations illusory, stating "[t]he notice of the change in terms can be understood as an invitation to enter into a relationship governed by the new terms. The customer then accepts the new terms by continuing to use the service.")

The two cases cited by Plaintiffs related to arbitration agreements, *Net Global Marketing, Inc. v. Dialtone, Inc.*, and *Batory v. Sears Roebuck & Co.*, are not on point. In *Net Global Marketing*, the court refused to enforce an arbitration agreement that was hidden in a "prolix" 17-page legal document. The arbitration provisions were not "clearly disclosed" and were not in the same form as the rest of the contract. *Net Global Marketing, Inc.*, 2007 U.S. App. LEXIS 674 at *5 (9th Cir. 2007). In *Batory*, the court found numerous problems with the arbitration language in the contract, including the fact that it was one-sided (only the employee was required to arbitrate, not the employer), and precluded the employee from terminating the agreement on ten days' notice. *Batory*, 456 F. Supp. 2d 1137, 1140 (D. Ariz. 2006). The court also found the contract was one of adhesion. *Id*. In contrast, paragraph 16(C) of the IC Agreement is not hidden or ambiguous and the termination provisions are mutual, not one-sided. These cases are distinguishable.[13]

[13] Likewise, the cases Plaintiffs cite dealing with collective bargaining agreements are inapposite as the National Labor Relations Act prohibits unilateral changes in collective bargaining agreements. *Katz v. NLRB*, 369 U.S. 736 (1962).

Most IEL lessees do not default on their leases and many, in fact, purchase their vehicles from IEL because they view doing so as a wise business decision that leads to profit. *See* Parrish Decl. ¶ 8; Bronchetti Decl. Exhs. A, B, D (Howell Decl. ¶ 6; Bagwell Decl. ¶¶ 4-5; Mize Decl. ¶¶ 8, 11, 15). That Plaintiffs claim to have had negative experiences as independent contractors does not mean that the IC Agreements or Leases are unconscionable.

f. In The Unlikely Event The Court Were To Find The Provisions In Question To Be Unconscionable, They Could Be Severed.

In the unlikely event the Court determines that any of the clauses of the IC Agreement or Lease are unconscionable, the Court may (1) refuse to enforce the contract; (2) enforce the remainder of the contract without the unconscionable clause; or (3) limit the application of the unconscionable clause as to avoid any unconscionable result. Ariz. Rev. Stat. § 47-2302(A). Both the IC Agreement and Lease contain severance clauses. Pltf's Exh. G-2 ¶ 20, Pltf's Exh. G-1 ¶ 25.) The evidence shows that Plaintiffs are unlikely to succeed on the merits of their claim that the IC Agreement and Lease are unconscionable. Until the presentation of evidence to the arbitrator on the unconscionability causes of action of the Complaint, it is premature to issue injunctive relief.[14]

[14] Defendants assert the following evidentiary objections to the Declarations of Plaintiffs: (1) Exhibit F—Van Dusen Declaration, ¶ 24. A recruiter called her and told her that Swift filed a negative DAC Report about her and that "no trucking company is ever going to hire her because of that report." Objection: Hearsay (FRE 802) Best evidence (FRE 1002); (2) Exhibit G—Sheer Declaration ¶¶ 23-27 (describing calls from Bill Jones of a collection agency). Objection: Hearsay (FRE 802); (3) Exhibit H—Sykes Declaration ¶ 21. Swift may try to report his turning in his lease to the DAC Report which could make him unable to get other trucking jobs. Objection: No foundation (FRE 602), speculative; (4) Exhibit Q—Palmer Declaration ¶ 19. Collection agency called and threatened to take her CDL and sue for breach of contract. Objection: Hearsay (FRE 802); (5) Exhibit R—Grogin Declaration ¶ 10. Dispatcher said she had received an email saying to terminate him. Objection: Best evidence (FRE 1002); ¶ 19. Received harassing telephone calls from people who identified themselves as IEL representatives and threatened to have his license suspended. Objection: Hearsay (FRE 802), No foundation (FRE 602); ¶ 21. IEL Representative (name unknown) threatened he would be reported to DOT and would lose his license. Objection: Hearsay (FRE 802) No foundation (FRE 602) (No evidence individual was an agent of IEL); ¶ 22. IEL said $33,000 payment would be put on his credit report.

3. Plaintiffs Cannot Establish That They Will Suffer Irreparable Harm As a Result of Defendant's Conduct

In order to obtain a preliminary injunction, Plaintiffs must demonstrate that they face *likely* irreparable harm if the injunction is not granted. *Winters*, 126 S.Ct. at 374.

> To seek injunctive relief, a plaintiff must show that he is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; it must be fairly traceable to the challenged action of the defendant; and it must be likely that a favorable judicial decision will prevent or redress the injury.

Summers v. Earth Island Institute, __ U.S. __, 129 S.Ct. 1142, 1149 (2009).

In order to be "irreparable," a plaintiff must show that the injury could not adequately be remedied by an award of damages after final determination of the merits. Thus, economic injury generally does not justify issuance of a preliminary injunction. *See Rent-A-Center v. Canyon Television & Appliance Rental, Inc.*, 944 F.2d 597, 603 (9th Cir. 1991). As discussed above with regard to Plaintiffs' lack of standing, the three Plaintiffs in this matter face no potential for injury – let alone a *likelihood of irreparable* injury – in the absence of a preliminary injunction. That alone is sufficient basis for denying this motion. *See* Part III.A.1, *supra*.

As a matter of corporate policy, after repossessing and re-leasing the truck, IEL no longer pursues collection of outstanding lease amounts in the event of default. As a result, none of the individual Plaintiffs – or, for that matter, any member of the putative class – face risk of actual and imminent injury from any such efforts. Plaintiffs argue irreparable emotional distress from collection efforts, but there are neither facts nor law to support these assertions. Neither Van Dusen nor Motolinia ever were referred to collections, and Sheer has not faced any collection efforts due to a change in company policy prior to the filing of this litigation. Moreover, the cases cited by Plaintiffs in support of this argument relate to circumstances wholly inapplicable here, including, for example, denials of credit, violation of federal credit statutes, and the tort of intentional infliction of emotional distress, none of

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Objection: Hearsay (FRE 802) No foundation (FRE 602) (No evidence person represented IEL); (6) Carpenter Declaration ¶¶ 33-34. Spoke with collection agency who said he couldn't keep his truck/continue to make payments. Objection: Hearsay (FRE 802).

which are alleged in this case or are at issue in this motion. *See, e.g.*, *Waddell v. Equifax Information Services, LLC*, 2006 WL 2640577, at *4 (D. Ariz.) (relating to *monetary damages* for consumers who were *denied* credit); *Teng v. Metropolitan Retail Recovery Inc.*, 851 F. Supp. 61, 68-69 (E.D.N.Y. 1994) (referring to violation of the FDCPA); *Long v. Beneficial Finance Co. of New York, Inc.*, 39 A.D.2d 11, 12-14 (N.Y. 4th Dep't 1972) (relating to the tort of intentional infliction of emotional distress); *see also* Pltf's Mot. at 23-24. The analytical chain constructed by Plaintiffs is nothing more than pure speculation and conjecture.

Plaintiff's allegation that Defendant provided "adverse" information on employment reports, such as DAC reports, is unsupported by the evidence in the record. Neither Swift nor IEL has reported any information regarding lease defaults to outside reporting agencies. The only information provided by Swift relates to the termination of a driver's contract with Swift. This information legally is required by DOT regulations, and states *only* whether the contract ended voluntarily or involuntarily. Plaintiffs have not identified how reporting this basic, legally required, factual information is "negative" or "adverse" to their future employment.

The third aspect of the injunction sought, regarding contract modifications, similarly is flawed. Plaintiffs no longer are in contractual relationships with Swift, and therefore cannot show any prospective, actual, injury if changes to contractual agreements are not enjoined. In addition, the only contract modifications Swift has proposed relate to purely economic issues, such as increases in base pay rates and changes to fuel surcharges. There is no evidence that any other, non-economic, changes have, or would occur. Therefore, the contract modifications complained of relate to purely economic injury– injuries that are not properly addressed by injunctive relief. *See Canyon Television*, 944 F.2d at 603 (economic injury does not constitute irreparable harm because it can be remedied by an award of damages).

Plaintiffs' own behavior undermines their claim of urgent, ongoing, actual injury. They have delayed more than six months in filing this motion, despite multiple threats to do so. Such delay is properly considered by the Court in evaluating a claim of irreparable injury. *See, e.g., Jordache Enters. Inc. v. Levi Strauss & Co.*, 841 F. Supp. 506, 521 (S.D.N.Y. 1993). If Plaintiffs have not found sufficient reason to seek preliminary relief in a timely manner, it is disingenuous for them to now claim imminent irreparable injury.

4. The Balance of Equities Does Not Tip In Favor of Plaintiffs

To justify a preliminary injunction, Plaintiffs also must establish that "the balance of equities tips in [their] favor." *Winter*, 129 S.Ct. at 374. Plaintiffs no longer are contracted with Swift, and no longer lease with IEL. As discussed above, they will suffer no harm if preliminary relief is not granted. Balanced against that absence of harm is the substantial hardship that the broad and vaguely phrased injunction would inflict on Defendants' business. As phrased, the injunction essentially could void all lease agreements between IEL and Swift-affiliated drivers, because it would preclude any efforts by IEL to recover its equipment and costs if drivers simply stopped paying their leases, refused to return leased equipment, or damaged the equipment through improper maintenance or crashes. Similarly, Swift would be unable to provide driver information mandated by federal regulations regarding its contracted drivers, effectively prohibiting it from conducting business under its federal operating authority.

Plaintiffs can show no risk of imminent or actual harm from Defendants' present practices, yet the breadth of injunction sought would, even over a short term, effectively prevent Swift and IEL from conducting and managing their entire business. There can be no question that the relief sought would be inequitable.

5. An Injunction is Not In the Public Interest

A Court also should consider whether there is any public interest at stake in the injunction sought. *See Winter*, 129 S.Ct. 365 ("In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the

extraordinary remedy of injunction.") Where, as here, the injunction relates entirely to the conduct of private parties towards each other, no public interest is implicated, and the need for an injunction is less. *See Yakus v. United States*, 321 U.S. 414, 441 (1944) (courts may go much further in granting and denying equitable relief in furtherance of public interest then when only private interest is involved).

There is no public interest implicated by the corporate practices and contracting terms between Swift, IEL, and individual drivers. All of the relief sought relates only to Defendants' conduct toward individual Plaintiffs in the context of contractual relationships. Indeed, to the extent any public policies are at issue, they support *denial* of the requested relief, as issuance of the injection in the requested form would thwart Swift's compliance with DOT reporting regulations and severely hamper the operations of one of the country's largest long-haul trucking carriers. Issuance of the requested preliminary injunction would not serve the public interest.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court deny Plaintiffs' Motion For Preliminary Injunction.

DATED this 12th day of July, 2010.

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I hereby certify that I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants, and mailed a copy of same to the following, if non-registrants, this 12th day of July, 2010:

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