IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOHN DOE 1 and JOSEPH SHEER, individually and behalf of all other similarly situated persons, **Plaintiffs,** **v.** **SWIFT TRANSPORTATION CO., INC. and INTERSTATE EQUIPMENT LEASING, INC.,** **Defendants.**	**1:09-cv-10376 (RMB)(JCF)**

PLAINTIFFS' MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

Respectfully Submitted,

By

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ATTORNEYS FOR PLAINTIFFS

Plaintiffs move this Court for a preliminary injunction enjoining Defendants during the pendency of this action from 1) engaging in collections efforts to recover the unpaid lease balance of plaintiffs deemed "in default" of their contracts with Defendants; and 2) furnishing adverse credit and employment reports concerning plaintiffs who are in default status, until after the litigation has determined whether the Lease/ICOAs at issue are lawful or unlawful.[1] Plaintiffs requested of defense counsel that defendants temporarily forswear such actions until this litigation can determine the legality of the Lease/ICOA. Ex. B., Getman letter to Boudreau. However, defense counsel refused even to negotiate the request. Ex. C, Boudreau E-mail.

STATEMENT OF THE CASE AND MOTION

This lawsuit is brought as a nationwide class and collective action on behalf of truckers who lease trucks from Interstate Equipment Leasing Co., Inc. ("IEL") and drive for IEL's affiliated company Swift Transportation Co. ("Swift"). The lease from IEL requires drivers to sign an "Independent Contractor Operating Agreement" (ICOA) with Swift as a condition of entering into the lease. In fact, the two documents are presented to drivers as a single package of approximately 60 pages and Defendants require drivers to sign both forms at the same time, or neither is valid, *See e.g.* Ex. H-2, Sykes ¶2(e) & p.12 Authorization and Assignment; Ex. G-2, Sheer ¶2(e). Thus, the lease and the operating agreement operate as a single contract (hereafter referred to as the " contract") created by defendants jointly for a common business purpose – trucking freight for Swift. SWIFT is the largest truckload carrier in the United States, with approximate revenues of 3.4 billion dollars in 2008. Ex. E, Swift Website, Our History, http://www.swifttrans.com/c-clamp.aspx?id=174.

[1] At this time, Plaintiffs do not seek to enjoin Defendants from placing drivers into default for no reason nor do they seek to preclude Defendants from repossessing the leased vehicles from drivers placed in default. They only seek to enjoin collection of the unpaid balance of the lease and adverse credit reporting.

IEL is a closely related company to Swift, headquartered in the same building, owned and run by the same person -- Jerry Moyes -- with interrelated officers and interrelated operating management. Ex.A, Corporate Information. Defendant IEL leases trucks only to drivers who agree to drive only for Swift Transportation. Ex. H-2, Sykes ¶¶2(e) & 12(g); Ex. G-2, Sheer ¶12(g). Once the contract is signed, Swift refuses to permit drivers to drive for other companies. Ex. F, VanDusen Decl. ¶14 & 16; Ex. G, Sheer Decl. ¶12; Ex. H, Sykes Decl. ¶19; Ex. I, Hoffman Decl. ¶9&15. The trucks that defendants lease to plaintiffs are registered to Swift, (*see* Ex. O, registration), operated under Swift's DOT operating authority, Ex ICOAs, F-1, G-1, H-1, I-1, ¶5(a), and are emblazoned with Swift's name and address. Ex. J, Photo of Truck.

Plaintiffs' claims in this case are threefold: First, Plaintiffs contend that the Defendants have violated the FLSA and other state employment laws by misclassifying drivers as "independent contractors" when they are, in fact, "employees" of the Defendants and that the Lease/ICOA contract which characterizes the drivers as independent contractors is invalid. Second Amd. Compl. ¶¶ 4, 14, 70, 77, 85, 108-90, 134, 140, 152.

Second, Plaintiffs also assert declaratory judgment, unjust enrichment and related contract claims alleging that the contract is unconscionable and unenforceable. Under the contract, defendants are permitted to terminate plaintiffs' services to Swift for any reason or no reason, and then treat that termination as a "default" of the lease by the trucker. Ex. ICOAs F-1 & H-1, ¶16; Ex. G-1 & I-1, ¶17; & Ex. Leases G-2 & H-2, ¶12(g). Moreover, once the trucker is put in default by Swift, the Lease/ICOA contract permits Defendants to both take back the leased truck *and* demand all remaining lease payments to the end of the lease. as well as to exact additional charges. If plaintiffs stop working for Swift, seek to drive for another carrier, or for any or no reason, Swift may put them in default and become liable to defendants for the "default." Plaintiffs claim that

these contract provisions are unconscionable and voidable under state contract law.

Third, Plaintiffs' claim that defendants' contracts constitute a scheme of "forced labor" in violation of 18 U.S.C. §1589 and 1595. Defendants threaten Plaintiffs that they will use the legal system to enforce the crushing five or six figure debt that Defendants' Lease/ICOA contract imposes on Plaintiffs if they do not work exclusively for Swift and follow Swift's rules and instructions precisely.

Plaintiffs now move for a preliminary injunction to preserve the status quo during this litigation. Specifically, plaintiffs seek to restrain defendants from 1) engaging in collections efforts to recover the unpaid lease balance when a plaintiff is deemed "in default" on the lease, and 2) from furnishing adverse credit and employment reports concerning plaintiffs who it puts into default status, until after the litigation has determined whether the are lawful or unlawful.[2]

FACTS RELEVANT TO THE MOTION

All named Plaintiffs gave detailed declarations showing that Defendants used high pressure tactics and coercion to get them to sign their contracts. *See generally*, Ex. D, Sheer, Van Dusen, Doe 1 Decls. Attached to Pl. Venue Letter Brief. Those declarations show that there is a significant disparity in bargaining power between Swift Transportation, with its legal team, and the truckers (generally with high school level education). *Id.* The truckers all testified that they were not permitted time to review the sixty pages of legal agreements, and none were permitted to review the forms with an attorney, though they all sought to do so. None were allowed to take the contract out of the bustling terminal, and all were required to sign the agreements then and there, or not at all. And in each case, there were substantial financial costs imposed if plaintiffs refused to sign.

Once they signed and began working for Swift, Swift exercised total control over their

[2] At this time, Plaintiffs do not seek to enjoin Defendants from placing drivers into default for no reason nor do they seek to preclude Defendants from repossessing the leased vehicles from drivers placed in default. They only seek to enjoin collection of the unpaid balance of the lease and adverse credit reporting.

work, telling them where to go to pick up loads, when to deliver the load by, and what route to take to get there. If they failed to follow Swift's suggested route, they were subjected to financial penalties. Ex. L, Qualcomm Messages re Route. Plaintiffs were only permitted to drive loads for Swift; they could not take their trucks to other carriers who would pay more money. Exs. F, Van Dusen ¶14& 16, G, Sheer ¶10, 12, H, Sykes ¶19, & I, Hoffman ¶9, 15. Swift set work rules by imposing an over 200 page manual with which drivers were required to comply. *See* Ex. M, Swift Manual, and listing of instructions culled from the manual, Ex. M-1; Ex. ICOAs, F-1, H-1 ¶16; G-1, I-1 ¶17. Swift monitored the drivers every move through a GPS enabled QualComm unit that measured the driver's mileage, speed, adherence to route, stopping and starting. Ex. M, Swift Manual, Sec. 7. The QualComm device also enabled Swift to send instructions to drivers in real time and to dispatch them to the next job. *Id.* If a driver turned down jobs that were offered, Swift would refuse to route them to additional jobs. Ex. K, Qualcomm Message re Load. Swift set a "speed governor" on each truck that set maximum speed and engine revolutions per minute. Ex. M, Swift Manual, Sec. 7.

Swift could fire the drivers at will. Ex. G-1, ¶17. In fact, Swift fired plaintiff Joseph Sheer even though he violated no law and no work rule. Ex. G, Sheer Decl., ¶14-21. Once Swift terminated his ICOA, he was deemed to be in "default" of his lease. *Id. a*t ¶21-32. Defendants demanded repossession of the truck and began billing him for all remaining lease payments due on the truck (approximately $32,000). *Id.*

Plaintiffs Sykes, Van Dusen and Hoffman made so little money that they could not afford to continue to work for Swift, make the required lease payments, pay for gas, tolls, insurance, taxes, maintenance, equipment, bonding, and bear all the other charges Swift required them to bear, and still support themselves and their families. Ex. F, H, & I, Decls.. Plaintiff Hoffman

made $2500 in 7 months of work. His personal vehicle was repossessed and he and his wife became homeless, both forced to live in the truck. He had to cut back on his heart medication even though he had four prior heart attacks. Ex. I, Hoffman Decl.. 13-29. Plaintiff Sykes was operating at a loss, despite eleven weeks of working for Swift, which led to his not having enough money to pay for fuel oil for the family's home – forcing them (including three children) to live for a week without heat. Ex. H, Sykes Decl., ¶ 23-24. Plaintiff Van Dusen could not keep up with home mortgage payments or even keep enough money in her account to pay for training courses. Ex. F, Van Dusen Decl., ¶ 13, 18. Each of these plaintiffs made so little money that they had to turn in their truck.

Swift sent plaintiff Sheer and Hoffman's remaining lease obligations to collections, resulting in a daily barrage of bill collector phone calls. Sheer and his very ill wife were called "deadbeats" by the collections agency in scores of harassing phone calls they received each day. Ex. G, Sheer Decl. ¶25-29. Swift has furnished negative employment reports on plaintiffs' DAC reports. Ex. F, Van Dusen Decl. ¶23-24. DAC reports are the standard employment screening tool in the trucking industry and negative reports can keep plaintiffs from ever driving again. Ex. H, Sykes Decl. ¶27. *See* Ex. N, HireRight.com. Defendants have filed a negative DAC report against Plaintiff Van Dusen, who as a result was turned down for a trucking job with a better trucking company. When she was turned down, Van Dusen was told that as a result of the negative DAC report filed by defendants, she would never find work in the trucking industry again. Ex. F, Van Dusen Decl. ¶23-24.

ARGUMENT

A plaintiff seeking a preliminary injunction must satisfy all four parts of the standard set out by the Supreme Court in *Winter v. Natural Resources Defense Council, Inc.*, ___ U.S. ____,

129 S.Ct. 365 (2008). Plaintiffs must establish that they are likely to succeed on the merits, 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. *Id.*

I. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

Likelihood of success is judged by whether the moving party makes "a showing that the probability of prevailing is better than fifty percent." *Eng v. Smith,* 849 F.2d 80, 82 (2d Cir.1988); *See Lopez v. Delta Funding Corp*., 1998 WL 1537755, 5 (E.D.N.Y.) (E.D.N.Y.,1998). Where plaintiffs "assert[ ] multiple claims upon which the [requested] relief may be granted, the plaintiff[s] need only establish a likelihood of success on the merits of one of the claims." *Eve of Milady v. Impression Bridal, Inc.,* 957 F.Supp. 484, 487 (S.D.N.Y.1997).

Plaintiffs contend that the Lease/ICOA contract is unconscionable both because it allows Swift to place drivers in default for no reason and because it imposes unconscionable penalties upon drivers once they are placed in default. Plaintiffs also contend that the Lease/ICOA contract is unenforceable because it unlawfully classifies employees as "independent contractors."

A. The Unconcionability Standard

New York has long recognized that the common law doctrine of unconscionability as a grounds for refusing to enforce harsh and unreasonable contract terms. *Leasing Service Corp. v. Justice*, 673 F.2d 70, 71 (2nd Cir., 1982); *Winter Bros. Recycling Corp. v. Barry Imports East Corp.* 2009 WL 1067409, 5 (N.Y.Dist.Ct.,2009). The New York UCC Section 2-302(1) also gives courts the power to refuse to enforce a contract which was unconscionable at the time it was made.

To establish that a contract is unconscionable, a Plaintiff generally must show "that the contract was procedurally and substantively unconscionable when made -- i.e., some showing of an absence of meaningful choice on the part of one of the parties together with contract terms

which are unreasonably favorable to the other party." *McNally Wellman Co., a Div. of Boliden Allis, Inc. v. New York State Elec. & Gas Corp.,* 63 F.3d 1188, 1197-98 (2nd Cir.1995) *quoting Gillman v. Chase Manhattan Bank, N.A.,* 73 N.Y.2d 1, 10, (1988). However, New York courts recognize that substantive unconscionability, by itself, is enough to render the terms of an agreement unenforceable.

Gill v. World Inspection Network, 2006 WL 2166821 at *5 (E.D. N.Y. 2006); *Brower v. Gateway 2000, Inc.* 246 A.D.2d 246, 254, 676 N.Y.S.2d 569 (1st Dept. 2000).

For a contract to be found procedurally unconscionable, a court must find a "lack of meaningful choice" arising from the contract formation process, in light of the circumstances of the transaction and the sophistication and bargaining power of the parties. *Gillman*, 73 N.Y.2d at 10-11. The procedural element of unconscionability requires an examination of the contract formation process and the alleged lack of meaningful choice. The focus is on such matters as "the size and commercial setting of the transaction, whether deceptive or high-pressured tactics were employed, the use of fine print in the contract, the experience and education of the party claiming unconscionability, and whether there was disparity in bargaining power." *Auto Style Leasing Ltd. v. Evans* 1995 WL 144812, 6 (S.D.N.Y.,1995) citing *Gillman*, 73 N.Y.2d 1, 10-11. See also *Morris v. Snappy Car Rental, Inc*., 84 N.Y.2d 21 (1994); *Master Lease Corp. v. Manhattan Limousine, Ltd.,* 177 A.D.2d 85, 89, 580 N.Y.S.2d 952 (2d Dep't 1992) ("high pressure commercial tactics, inequality of bargaining power, deceptive practices and language in the contract, and an imbalance in the understanding and acumen of the parties.").

A contract is substantively unconscionable where its terms are unreasonably favorable to the party against whom unconscionability is claimed. *Brennan v. Bally Total Fitness,* 198 F.Supp.2d 377, 382 (S.D.N.Y.2002). The court must examine "the substance of the bargain to

determine whether the terms were unreasonably favorable" to one party in light of "their commercial context, their purpose, and their effect." *Gillman,* 73 N.Y.2d at 12.

B. **The Swift and IEL Contract Is Procedurally Unconscionable**

As the affidavits of Plaintiffs make clear there was a significant disparity in bargaining power between Swift Transportation, with its legal team, and the high school educated truckers. Moreover Swift used high pressure tactics when offering the Lease/ICOA agreement to drivers: drivers were presented with the lease agreement and ICOA documents on a take-it-or-leave it basis; both documents had to be signed as a package and no modifications in either document was permitted. See Ex. D, Declarations of Van Dusen, Sheer, Doe 1 attached to plaintiffs' opposition to defendants' motion for change of venue. The truckers were not permitted sufficient time to review the contracts and none were allowed to take the agreement out of the office in order to review them at home. Nor were drivers allowed to take them to an attorney to review, although they all specifically asked for permission to do so. *Id.* In short, they were presented with the agreements and expected to sign them then and there, or not at all.

These circumstances are more than sufficient to establish procedural unconscionability. S*ee Brennan v. Bally Total Fitness,* 198 F.Supp.2d 377, 383 -84 (S.D.N.Y. 2002)(arbitration agreement vacated because of procedural unconscionability in forming the agreement, "(1) the considerable disparity in bargaining power ...(2) ... failure to give the employees adequate time to review the contract; (3) ... failure to inform the employees that they could review the document with an attorney; (4) ...conceded threat that those who refused to sign would not be promoted; and (5) ... failure to address the impact that the [clause] would have on any pending complaints...); *Williams v. Aries Financial LLC,* 2009 WL 3851675 at *11 (E.D. N.Y. 2009); *State of NY v. Wolowitz,* 468

N.Y.S.2d 131 (2nd Dept. 1983); *Industralease Automated & Scientific Equipment Corp. v. RME Enterprises, Inc.,* 396 N.Y.S. 2d 427, 490 (2d Dept. 1977).

C. **The Swift and IEL Contract Is Substantively Unconscionable**

The lease/ICOA contract is substantively unconscionable for two distinct reasons: First, it imposes unconscionable penalties on drivers who seek to terminate the lease. Second, it gives Swift the ability to place drivers in default for any reason, or no reason whatsoever. As set forth below, either one of these aspects of the contract are sufficient to render it unenforceable as a matter of law.

1. The Contract Imposes Unconscionable Penalties

Paragraph 13 of the lease portion of the contract specifically states that in the event of a default, the Lessor may terminate the lease (¶13(a)), require the driver to return the truck (or seize it and charge the driver for the cost of repossession, (¶13(c), (d), and (f)), and declare the entire amount of the rent for the full term of the lease immediately due and payable as "liquidated damages." (¶13(b)). In other words, Swift claims the right to both retain the truck and demand full payment of all remaining lease payments --even those not yet due.[3]

Courts have consistently found contracts, like this one, that allow the lessor to demand both forfeiture of the equipment *and* full payment of the purchase price of the equipment to be unconscionable double-recovery. *See, e.g., McKesson Automated Healthcare, Inc. v. Brooklyn Hospital Center,* 779 N.Y.S.2d 765, 770 (Kings Co. 2004) (in case involving lease of complex computerized hospital equipment court held that allowing lessor to accelerate all payments due under the lease and seize the equipment "would impose an unconscionable forfeiture and penalty

[3] Also, the CABS Training Manual received after signing states: "You are responsible for the full length – all payments -- of the lease, regardless of whether you quit, turn in the truck early, or leave early. Walking away from the lease will be considered a default of the lease and you will subject to any collections, including any cost for repair of the truck as needed." Ex. P, p.22.

. . . and contravene public policy."); *Fairfield Lease Corp. v. Umberto,* 1970 WL 12608 (NY City 1970) (finding lease of coffee machine that allowed lessor the right to repossess the equipment and demand payment of all unaccrued and unearned lease payments to be unconscionable under UCC §2-302); *Fairfield Lease Corp v. Marsi Dress Corp.,* 303 N.Y.S.2d 179 (NY City 1969)(same). *See also In re Merwin & Willoughby Co.,* 2 Cir., 206 F. 116, 122-125 (N.D. N.Y. 1913) (claim for unearned lease payments disallowed in bankruptcy because lessor seized equipment and lease provision giving lessor right to payment of remainder of lease payments after seizure was unconscionable). *Hertz Commercial Leasing Corp. v. Dynatron, Inc.* 37 Conn.Supp. 7, 427 A.2d 872 (Conn.Super., 1980)(clause in equipment lease that even a minor breach by lessee would allow leasing company at its option, to recover damages far in excess of fair value of breach was unconscionable under New York Uniform Commercial Code and, as such, was unenforceable. N.Y. Uniform Commercial Code, § 2-302(1)). *See also Fairfield Lease Corporation v. Umberto*, 7 UCC Reporting Service 1181 (N.Y. Civil Court, 1970); *Fairfield Lease Corporation v. Pratt,* 6 Conn.Cir. 537, 540-41, 278 A.2d 154 (1971).

2. The Contract Is Unconscionable Because It Allows Swift To Place Drivers in Default For Any or No Reason

Paragraph 16 of the ICOA portion of the contract states that "[t]his Agreement may be terminated by either party with or without cause upon ten (10) days prior written notice to the other party." Ex. H-1, Sykes. While this provision may, by itself, appear to be mutual, it must be read in conjunction with the lease portion of the contract. That document provides that a driver must enter into an ICOA with Swift Transportation Co., Inc., Ex. H-2, ¶2(e), and that a driver "shall be in default under this Lease" in the event that the "Lessee's ICOA with Carrier is terminated by Carrier or Lessee")." ¶12(g). In other words, Swift can terminate all its duties under the Lease/ICOA for any reason or no reason whatsoever, but the driver remains liable on

the lease for all of the unpaid lease payments (as well as losing the truck). Nothing in the contract places any limit upon this power to place drivers in default. Swift can put drivers in default within ten days of their signing a lease agreement, seize the equipment and still demand full payment of the entire lease. Or it can wait until the driver has only one more payment to make before he or she may buy her truck outright, place the driver in default and seize the truck. Such complete lack of mutuality renders the contract void and unenforceable.

Adding further insult, the Lease/ICOA permits Swift to terminate the plaintiffs' services, seize the truck, and actually name these actions a "default" by the driver. Attributing the "default" to the driver, when it is really Swift who has ceased to comply with the bargain, gives Swift contractual cover for reporting the "default" to collection agencies and placing negative references on the DAC employment screening or driver credit reports.

D. The Lease/ICOA Agreement Violates Federal and State Employment Law.

The Lease/ICOA misclassifies the plaintiffs as "independent contractors" when by federal and state law, they must be treated as "employees."[4] The FLSA defines "employee" as "any individual employed by an employer," and to "employ" as including "to suffer or permit to work." 29 U.S.C. §§ 203(e)(1), 203(g). The definition is necessarily a broad one in accordance with the remedial purpose of the Act. *See United States v. Rosenwasser*, 323 U.S. 360, 363, (1945); *Real v. Driscoll Strawberry Associates, Inc*., 603 F.2d 748, 754 (9th Cir.1979); *Brock v. Superior Care, Inc.* 840 F.2d 1054, 1058 (2d Cir. 1988)(" The ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity

[4] Defendants benefit greatly by misclassifying Plaintiffs as independent contractors. Defendants charge Plaintiffs tens of thousands of dollars per year for the lease of Defendants' trucks, and they also require Plaintiffs to pay for other equipment such as the QualComm, and plaintiffs must pay for all gas, insurance, bonding, repairs and maintenance, tolls, and a variety of other items. Exs. F-1, G-1, H-1, I-1, ¶¶5, 6, 8, 10, 11, and Schedule B. Defendants even exact a financial profit for accounting transactions by charging Plaintiffs an accounting fee to issue Plaintiffs' paychecks – the earnings statements. Ex. H-3, p.7. Accounting service fee $15.00; " ICOA ¶4.

to render service or are in business for themselves.")

> A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. The use of the words 'each' and 'any' to modify 'employee,' which in turn is defined to include 'any' employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.

U.S. v. Rosenwasser 323 U.S. 360, 362-363, 65 S.Ct. 295, 296 - 297 (U.S. 1945); *Herman v. RSR Sec. Services Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999)("Above and beyond the plain language, moreover, the remedial nature of the statute further warrants an expansive interpretation of its provisions so that they will have "the widest possible impact in the national economy.").

This Court set forth the standard for evaluating whether an employee is misclassified as an independent contractor in *Gustafson v. Bell Atlantic Corp.* 171 F.Supp.2d 311, 324 -325 (S.D.N.Y. 2001):

> In determining whether someone is an employee for FLSA purposes, a court employs the "economic reality" test which considers: (1) the degree of the employer's control over the worker; (2) the worker's opportunity for profit or loss and his investment in the business; (3) the degree of skill and independent initiative required to perform the work; (4) the permanence or duration of the working relationship; and (5) the extent to which the work is an integral part of the employer's business. *See Brock*, 840 F.2d at 1058-59 (*citing United States v. Silk*, 331 U.S. 704, 716, 67 S.Ct. 1463, 91 L.Ed. 1757 (1947)); *McGuiggan v. CPC Int'l, Inc.*, 84 F.Supp.2d 470, 479 (S.D.N.Y.2000). The test is intended to be broad "so that the [provisions will] have the widest possible impact in the national economy." *Carter v. Dutchess Cmty. Coll.*, 735 F.2d 8, 12 (2d Cir.1984).
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> No one factor in this common law test is dispositive and "the test is based on the totality of the circumstances." *Brock*, 840 F.2d at 1059. Furthermore, "[t]he ultimate concern is whether, as a matter of economic reality, the workers depend upon someone else's business for the opportunity to render service or are in the business for themselves." *Id.*

Gustafson, 171 F.Supp.2d at 324 -325. Of these factors, the degree of the employer's control is considered the "ultimate," or "crucial" determinant. *Brock v. Superior Care, Inc.* 840 F.2d 1054, 1058 (2d Cir. 1988), however, each and every factor suggest employment status here.

Many courts have found truck drivers to be misclassified as contractors by their trucking companies. For example, in *Estrada v. FedEx Ground Package System, Inc.,* 154 Cal.App.4th 1, 64 Cal.Rptr.3d 327 (Cal.App. 2 Dist. 2007), the Court found that Fed Ex truck drivers were employees even under the narrower common law standard:

> FedEx's control over every exquisite detail of the drivers' performance, including the color of their socks and the style of their hair, supports the trial court's conclusion that the drivers are employees, not independent contractors. The drivers must wear uniforms and use specific scanners and forms, all obtained from FedEx and marked with FedEx's logo. The larger items-trucks and scanners-are obtained from FedEx approved providers, usually financed through FedEx, and repaid through deductions from the drivers' weekly checks. Many standard employee benefits are provided, and the drivers work full time, with regular schedules and regular routes. The terminal managers are the drivers' immediate supervisors and can unilaterally reconfigure the drivers' routes without regard to the drivers' resulting loss of income. The customers are FedEx's customers, not the drivers' customers. FedEx has discretion to reject a driver's helper, temporary replacement, or proposed assignee.
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> Drivers-who need no experience to get the job in the first place and whose only required skill is the ability to drive-must be at the terminal at regular times for sorting and packing as well as mandatory meetings, and they may not leave until the process is completed. The drivers are not engaged in a separate profession or business, and they are paid weekly, not by the job. They must work exclusively for FedEx. Although they have a nominal opportunity to profit, that opportunity may be lost at the discretion of the terminal managers by "flexing" and withheld approvals, and for very slight violations of the rules. Most drivers have worked for FedEx for a long time (an average of eight years), and drivers employed by FedEx's competitors (UPS, DHL, and FedEx's sister corporation, FedEx Express) are classified as employees.

Id., notes omitted. In the present case, Swift does not require a uniform, but does place its logo on the drivers' trucks, requires a variety of equipment (to be leased from it), dispatches plaintiffs to all jobs, handles all negotiations with the shippers, configures routes, and has discretion to approve replacement drivers. Most importantly, plaintiffs here work only for Swift, as the *Estrada* plaintiffs worked only for Fed Ex.

Another similar trucking case in New York is *In re Wright,* 58 A.D.3d 988, 871 N.Y.S.2d

459 (3 Dept. 2009), where the Court found the Company employed drivers who were required to display the company logo on their truck, were provided with loading assistance, were required to complete paperwork for the company and paid the contract rate for each load, and the company handled customer complaints. The Court noted that the employee's ability to sub-contract with others to do the deliveries did not make the employees into contractors since the company "retained the authority to object to the replacement driver based on safety or competency concerns. Similarly, if claimant failed to show or provide a replacement driver, Central would attempt to reassign claimant's deliveries or have one of its "employee drivers" haul claimant's load."

In *Steinert v. Arkansas Workers' Compensation Com'n,* --- S.W.3d ----, 2009 Ark. App. 719, 2009 WL 3643446 (Ark.App. 2009), the Court affirmed a finding of employee status, where

> driving a truck was an integral part of the business of Hurricane Express/Naedok and that the drivers hauled loads exclusively for these motor carriers. The Commission cited evidence that the trucks the drivers used-owned by KSI-had the Hurricane Express logo on them. The Commission noted the rental agreement between KSI and the truck drivers that provided that the drivers were required to operate the truck under KSI's direction and under the operating authority of Hurricane Express. The agreement further provided that no person other than the driver may use the truck without the express written consent of KSI, that the driver may not assign the agreement or sublease the truck, and that the driver of the truck must be approved by KSI. The driver had the duty to have the truck regularly serviced by a "qualified mechanic approved by [KSI]." The Commission further noted that a rental agreement provided that the driver did not have any property interest in the truck, but had the option to purchase the truck upon performance of all obligations under a rental agreement.FN3
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> The Commission also found that while there was testimony that the drivers could choose their own routes and refuse loads at will, the reality was that drivers chose the most direct route for economic reasons and had to accept loads in order to pay for the truck. Finally, the Commission pointed out that the truck drivers were required to report to Hurricane-Express and Naedok (to comply with DOT regulations) and that the failure to do so resulted in termination of the operating agreement with HurricaneExpress/Naedok and termination of a rental agreement with KSI.

See also, Chinn v. Mark Transp., Inc., 2010 WL 374958 (N.J.Super.A.D.)[5]

This case is indistinguishable from *Estrada, Wright,* and *Steinert.* As in those cases, Defendants jointly control Plaintiffs' work and, by law, employ the Plaintiffs to transport goods by truck for SWIFT's customers. Defendants control when, where, and how Plaintiffs deliver freight. They also control the equipment that Plaintiffs use, including, its operation, maintenance, and condition. Defendants control virtually every aspect of Plaintiffs' performance of SWIFT's work and the equipment that Plaintiffs use for that work. Swift negotiates terms with the shippers, not plaintiffs, and Swift chooses which plaintiff it dispatches to which load. Swift places its logo on the side of plaintiffs' leased truck, Ex. J, Photo of Truck, and requires that drivers drive only for Swift.

Most importantly, the ICOA specifically states that, **"While operating the Equipment under COMPANY'S authority, COMPANY shall have exclusive possession, control and use of the equipment during the term of this Agreement."** Exs. F-1, G-1, H-1, I-1, ICOA ¶5A. That statement is as concise and conclusive a statement of defendants' control as could be written.

Defendants' total control over plaintiffs' work is also ensured by the ICOA contract provision which allows Swift to terminate the driver from its workforce any time it wishes, and then treat that termination as a "default" by trucker. Ex. F-1 & H-1, ¶17, G-1 & I-1, ¶16. By virtue of this provision, Swift is able to force drivers to agree to contract modifications and

[5] Defendants' scheme ensures them a virtually indentured workforce for a period of years. But the scheme has other benefits as well: By treating its truck drivers as independent contractors instead of employees, defendants are also able to avoid worker's compensation and unemployment payments, shift the employer share of social security taxes to its employees, and avoid other benefits otherwise owed to employees. Defendants are also able to evade liability under wage protection statutes such as the FLSA and state wage and hour statutes, avoid unions, engage in otherwise unlawful practices and yet evade liability under Title VII, FMLA, ADEA, ADA, ERISA, and other employment statutes, and shift the cost of their fleet inventory and other business expenses to their employees. Since defendants can also enforce loyalty to Swift through the debt for periods in excess of typical employment, Defendants obtain a vast competitive advantage over competitor trucking companies that treat employees as employees in compliance with the law. As the largest truckload carrier in the United States, Defendants' pay practices drive down trucker wages and undercut fair labor practices across the country.

amendments that benefit Swift. *Id.*

The plaintiffs cannot use their leased truck as they see fit, such as to drive for other carriers offering better paying or more convenient loads. Under the contract, a trucker cannot use the truck to haul for another carrier, without Defendants' explicit written consent. Exs. F-1 & I-1, ¶5(A); Exs. G-1, H-1, ¶5(B). However, Swift never gives drivers permission to drive for other companies. Ex. F, VanDusen Decl. *¶*14 & 16; Ex. G, Sheer Decl. ¶10,12; Ex. H, Sykes Decl. ¶19; Ex. I, Hoffman Decl. ¶9&15. Swift specifically tells all drivers that they may NOT drive for other companies. *Id*

Defendants dispatch the plaintiffs to their jobs, setting the load time, the delivery time, and also setting the route. While the drivers are nominally permitted to select their own route, if they deviate from Swift's preferred route, they suffer financial penalties. *Exs., G, Sheer ¶10, H, Sykes ¶21, I, Hoffman ¶9;* Ex. L, Qualcomm Messages re Route. Nor are plaintiffs able to refuse loads that Swift sets for them. If a driver turns down loads, they will be reprimanded and not assigned further loads for a period (thus exacting a financial penalty). *See e.g. Exs. F Van Dusen ¶7, G, Sheer ¶10, H, Sykes ¶21, I, Hoffman ¶9*; Ex. K, Qualcomm Message re Load. Thus, plaintiffs are not able to control their profit or loss, Swift does. Defendants assign loads to each driver and even takes "overage" charges if a driver drives more than 11,000 miles a month. Ex. G-2, Sheer ¶21; Ex. H-2, Sykes ¶2(c). Thus, drivers do not make money through their skill or initiative, they make money by having Swift dispatch them to light loads that have high mileage and thus low fuel requirements.

Defendants also control how the plaintiffs do their work by setting comprehensive work rules for the plaintiffs. First the Agreement itself sets a variety of rules. Next Swift imposes an

over 200 page manual of work rules that the independent contractors must follow.[6] Defendants also convey detailed instructions to truckers by mobile phone and the use of the QualComm mobile communications device. S*ee e.g.* Ex. M Swift Manual, Sec. 7.

Defendants also control how plaintiffs perform their work by use of a "speed governor" that is affixed to the truck. The governor controls the engine's maximum revolutions per minute and the maximum speed it may travel. Swift has mandatory settings that drivers are not permitted to change. In fact, any time a driver takes their truck to a Swift authorized service station, the governor settings are checked, and if a driver has arranged to change the settings, they are changed back to Swift's mandated settings. Swift's governor settings govern revolutions per minute the engine and also restrict the amount of miles a driver may cover in a set amount of time, precluding a driver from making his own decisions about fuel efficiency, pay per hour, and risk. *Exs. G, Sheer ¶10, H, Sykes ¶21, I, Hoffman ¶9*

Defendants also routinely monitor plaintiffs' whereabouts and send instructions to plaintiffs through the use a QualComm device. The QualComm device is a mobile communications tool used in the trucking industry. Defendants current contract requires plaintiffs to lease a QualComm device from them. The QualComm has a GPS and reports the truck location to the Swift dispatcher. Thus, the QualComm enables Swift to know when drivers are driving, and when they are resting. It enables Swift to monitor miles driven, average miles per hour, and collect various statistics about a driver in real time. It also measures compliance with the route set by Swift for the load. Ex. M Swift Manual, Sec. 7.

The QualComm also enables defendants to give drivers instructions in real time. For example, the QualComm instructs drivers about their next load, delivery time, route changes. Ex.

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[6] A violation of the work rules is a specific basis for claiming that the contract is terminated and therefore the driver is in default. Ex ICOAs, F-1 & H-1 ¶17(A); G-1 & I-1 ¶16.

M Swift Manual, Sec. 7. Since the QualComm uses "macros" that enable a driver to respond while en route, Swift demands that drivers "agree" to contract changes by signifying assent by macro over the QualComm. Ex. M Swift Manual, Sec. 7; Exs. F-1 & H-1, ¶2(c); G-1 & I-1, ¶2(D). If the driver refuses to agree to Swift's contract amendment, they will be put in default by Swift, grounded and have the truck repossessed. Ex. F, Van Dusen Decl. ¶9.

There are numerous other features of Swift's operations that demonstrate that plaintiffs cannot be considered "independent contractors." For example, plaintiffs regularly train defendants' new employees. In fact, many drivers have found that the only way they can make any money driving for Swift is if they take a new trainee driver and supervise the trainee.[7]

The permanence of the relationship between the parties is also a factor showing employment status. *Gustafson v. Bell Atlantic Corp.* 171 F.Supp.2d at 324 -325. Each of the plaintiffs was treated as an employee driver working full-time for Swift prior to accepting a lease. Decls. Exs. F, G, H, & I ¶2. After signing their Lease/ICOA contracts, the Plaintiffs continued driving full-time for Swift, just as they did as employees. It is true that Swift can terminate plaintiffs Lease/ICOA contract at will – but that is no different from any "at-will" employee. Exs. F-1 & H-1, ¶17; Exs. G-1 & I-1, ¶16. "The extent to which the work is an integral part of the employer's business" is a factor also supporting employment status here. These drivers do Swift's work – they haul freight for the common carrier. This is the very service that Swift provides to the business shippers it hauls for. Indeed, Swift contractors haul the same

[7] Under this arrangement, the trainee drives miles and the plaintiff gets a per mile fee for all miles driven by the trainee. Obviously, the lessee bears various risks associated with having a new driver drive his or her truck. New drivers have more frequent accidents, and since a tractor trailer clutch is not easy to master, they bear the greater wear and tear (or actual maintenance charges) for a trainee's learning period. By the terms of the Lease, IEL claims all truck depreciation for tax purposes. Thus, although plaintiffs bear the operating expenses of the vehicle and they pay for its use, they are not permitted to claim the depreciating value of the asset on their taxes.

Defendants also set the "Stipulated Loss Value" in their Lease in an amount that guarantees them profits in the event that the truck is lost in an accident, thereby claiming a portion of any plaintiffs' insurance compensation. *See e.g. Ex. H-2, p.10/60.* Since the "Stipulated Loss Value" exceeds the truck value at signing and at buyback by approximately $10,000, defendants secure additional profits out of plaintiffs' loss recovery in an accident.

loads that Swift employee drivers do. Each of the plaintiffs was treated as an employee driver at one point before accepting a lease. Ex. F, ¶1, Ex. G, H, I, ¶2. Each of the five factors supports finding that plaintiffs are employed by defendants. *Gustafson,* 171 F.Supp.2d at 324 -325.

II. PLAINTIFFS ARE SUFFERING IRREPARABLE INJURY

The DAC report is the trucking industry's pre-employment screening tool. Like a credit report, the DAC follows a trucker wherever they go, reporting negative employer experiences wherever a trucker has worked; it also follows a trucker to virtually all prospective jobs – contract or employee -- in trucking industry. Exs. I, ¶27, N, DAC Background. The DAC report is created by HireRight (operated by US Information Services, Inc.). HireRight states: "DAC Employment History File contains historical employment records from more than 2,500 motor carriers, and acts as a 'file cabinet' for participating members who are required to submit records to gain access to the database. Currently containing over 5.7 million records, with thousands added every month, the DAC Employment History File is the only employment history database of its kind in the transportation industry." Ex. N. Swift furnishes information for and uses the DAC report. Ex. F, ¶24. Once Swift has put a driver in default, it furnishes information to DAC. Plaintiff Van Dusen, received a negative DAC report from Swift after she was put in default. And Van Dusen was turned down from a trucking job with Heartland Express due to the negative DAC report. *Id.* Thus, if Swift or IEL files a negative report concerning a driver's default, the driver will likely be prevented from gaining further employment in the trucking industry. A clean DAC report is critical to a driver's ability to work anywhere in their profession.[8] *Id.*

Swift also refers the remaining lease payments it considers due to a collections agency, A.R. Systems, Inc. ("AR Systems"). Shortly after placing the driver in default, AR Systems begins

[8] Indeed, it is fear of negative DAC reports, crushing debt and credit damage, which keeps plaintiffs laboring at sub-minimum wages for defendants for periods of years. *See Forced Labor Claim, 2nd Am. Cplt.*

dunning the driver for the balance of lease payments that Swift considers to be due it. After defendants put plaintiff Sheer in default for some reason that was never fully explained, AR Systems began dunning him for approximately $32,000, calling him and his sick wife on the phone scores of times per day, calling them "deadbeats" and demanding payment. Exs. G, ¶23-32 & G-3. After he made $2,500 in 7 months of work, Plaintiff Hoffman turned in his truck, was put in default and was dunned for $63,000 by IEL and AR Systems. He was called multiple times per day and received demands from bill collectors for more than a year. Exs. I, ¶19-20 & I-3. Plaintiffs Van Dusen and Sykes have been told the same thing will happen to them, though the amounts Swift considers them to owe has never been determined. Ex. H, Sykes ¶27; Ex. F, Van Dusen ¶23 & F-2.

Plaintiffs are suffering two kinds of irreparable injuries: First, they are subjected to the emotional harm from the collections measures. Second, they are subjected to financial harm from the negative credit reporting that will be incalculable and which does not admit to easy proof because the degree of loss cannot be known. These harms will be examined in turn.

Courts and Congress have noted that irreparable harm can ensue from collections measures generally. *Benedict College v. National Credit Systems, Inc.,* 2009 WL 3839473 (D.S.C.2009)(collections agency enjoined from collecting debts for college, in part based on concern for irreparable injury to student creditworthiness); *F.C.C. v. Pacifica Foundation,* 438 U.S. 726, 749 (1978); New York Courts have issued preliminary injunctions involving collections measures to enforce unconscionable contracts. *See State by Lefkowitz v. ITM, Inc.* 52 Misc.2d 39, 275 N.Y.S.2d 303 (Sup.Ct. NY Cty. 1966).

Numerous cases have noted that unlawful debt collections inevitably entail infliction of emotional distress. *See Teng v. Metropolitan Retail Recovery Inc.* 851 F.Supp. 61, 68 -69 (E.D.N.Y. 1994)("we believe that violations of the FDCPA, by their very nature, (e.g., abusive,

deceptive or unfair debt collection practices), are those kinds of actions which may be expected to cause emotional distress”). *See also Long v. Beneficial Finance Co. of New York, Inc.,* 39 A.D.2d 11, 12-14, 330 N.Y.S.2d 664 (4th Dep't 1972)(tort of intentional infliction of emotional distress was actionable in debtor-creditor relationship). In *Crossley v. Lieberman*, 90 B.R. 682 (E.D.Pa.1988), aff'd, 868 F.2d 566 (3d Cir.1989), the Court wrote: “we believe that violations of the FDCPA, by their very nature, (e.g., abusive, deceptive or unfair debt collection practices), are those kinds of actions which may be expected to cause emotional distress…”. And mental distress can itself constitute irreparable injury. *Pantel v. Workmen's Circle/Arbetter Ring Branch 281,* 289 A.D.2d 917, 735 N.Y.S.2d 228 (N.Y.A.D. 3 Dept. 2001)(“Plaintiffs' allegation of mental and emotional distress from the perceived desecration of their family graves demonstrates irreparable injury”); *Pollis v. New School for Social Research,* 829 F .Supp 584, 598 (S.D.N.Y.1993) (affirming that non-economic claims such as emotional harm can demonstrate irreparable harm); *see also, United Steel Workers of America v. Textron, Inc.,* 836 F.2d 6, 8 & 9 (1st Cir.1987) (finding that the loss of insurance benefits to retired workers would likely result in emotional distress, concern about financial disaster and possibly deprivation of life's necessities and, therefore, constituted irreparable harm).

Moreover, the Congressional findings and declaration of purpose in 15 U.S.C. §16929(a) notes that abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.” *Bates v. C & S Adjusters, Inc.* 980 F.2d 865, 868 (2d Cir. 1992).

Here, the collections measures are particularly vexing to plaintiffs given that the debt is demonstrably unlawful. Collections of taxes likely to be found unlawful have also been enjoined for causing irreparable injury. *See State of S.C. ex rel. Patrick v. Block* 558 F.Supp. 1004 (D.S.C.

1983)(preliminary injunctive relief granted given financial positions of farmers concerned with agriculture Secretary's deduction of 50 cents per 100 weight from proceeds of sales of all milk marketed commercially in the United States constituted irreparable injury); *Cf. Berne Corp. v. Government of Virgin Islands,* 120 F.Supp.2d 528 (D.Virgin Islands 2000)(irreparable injury need not be shown to enjoin unlawful collections by taxing authority).

Similarly, negative reporting to a DAC employment screening report constitutes irreparable injury since it is likely to result in blackballing of the plaintiff from a career in the trucking industry. Loss of potential employment is itself irreparable injury and it is not capable of legal remedy since it is impossible to ferret out and calculate. Blacklisting from an industry has been held to constitute irreparable injury. In *Jordan v. Metropolitan Life Ins. Co.* 280 F.Supp.2d 104, 108 -109 (S.D.N.Y.,2003), the Court found irreparable injury would ensue from filing a negative U-5 Report on an insurance agent.

> Jordan contends that the Form U-5 will cause him irreparable harm by damaging his business reputation, employment opportunities with comparable insurance companies, and client base. See Pl. Mem. at 12-13. **There is no doubt that the negative Form U-5 will substantially damage Jordan's reputation in the insurance industry.**FN6 As a result, Jordan, who is now deemed an unethical agent, will have difficulties attracting prospective employers and clients and maintaining his client base.
>
> > FN6. A negative Form U-5 "can effectively 'blackball' a [dealer] from the industry." Acciardo v. Millennium Sec. Corp., 83 F.Supp.2d 413, 419 (S.D.N.Y.2000); see also Dawson v. New York Life Ins. Co., 135 F.3d 1158, 1164 (7th Cir.1998) ("Any embellishment or exaggeration [in a Form U-5] can only damage the agent's professional reputation and make the job hunt more difficult.").
>
> There is no adequate remedy at law for Jordan's damages if MetLife mistakenly filed a false Form U-5.

Id, Jordan v. Metropolitan Life Ins. Co. 280 F.Supp.2d 104, 108 -109 (but denying injunction for lack of likelihood of success on the merits); *And see Towers Fin. Corp. v. Dun & Bradstreet,*

Inc., 803 F.Supp. 820, 822-23 (S.D.N.Y.1992) (finding irreparable harm where "[plaintiff's] reputation among customers and potential customers will be severely damaged ... [and the injury] is both imminent and 'incapable of being fully remedied by monetary damages' "); *Crown Zellerbach Corp. v. Wirtz*, 281 F.Supp. 337 (D.D.C., 1968)(Paper manufacturer and union entitled to preliminary injunction against Secretary of Labor enjoining him from directly or indirectly debarring manufacturer from further business with the government).

Similarly, in *Pultz v. Economakis* 2005 WL 1845635, 7 (N.Y.Sup. 2005), the Court found irreparable injury to tenants would likely ensue from landlord reporting rent strike participants to credit agencies. Furnishing negative credit information can constitute irreparable injury under New York law. "Irreparable harm would ensue if the cooperative were not restrained from cancelling plaintiffs' shares or issuing negative information with respect to the rent strike participants to credit reporting agencies." *DeCastro v. Bhokari,* 201 A.D.2d 382, 383 (NY App. Div. 1st Dept.1994).

Defendants' adverse collections and credit reporting measures irreparably harm plaintiffs. Plaintiffs will never be able to calculate or prove the various harms that will ensue to each trucker from these measures during the pendency of the case. *Selchow & Righter Co. v. McGraw-Hill Book Co*., 580 F.2d 25, 28 (2d Cir. 1978); *Estee Lauder Companies Inc. v. Batra,* 430 F.Supp.2d 158, 174 (S.D.N.Y. 2006); *People by Abrams v. Anderson* 137 A.D.2d 259, 271, 529 N.Y.S.2d 917, 924 (App.Div. 4 Dept. 1988). Monetary relief is not practical; nor could it ever furnish plaintiffs full relief from the harms caused.

III. THE BALANCE OF HARDSHIPS FAVORS ISSUANCE OF AN INJUNCTION

In deciding whether to grant a preliminary injunction, a court must consider the effect on each party of the granting or withholding of the requested relief, and the balance must tip in favor of the moving party. *Winter*, ___ U.S. ___, 129 S.Ct. at 374, 376. If it errs in its preliminary

injunction ruling, the court commits a mistake the gravity of which is measured by the irreparable harm, if any, this decision causes to the opposing party. “Therefore, the entire preliminary injunction inquiry ... is intended to ensure that the district court ‘choose[s] the course of action that will minimize the costs of being mistaken.’ Thus, . . . the real issue in this regard is the degree of harm that will be suffered by the plaintiff or the defendant if the injunction is *improperly* granted or denied.” *Scotts Co. v. United Industries Corp.*, 315 F.3d 264, 284 (4th Cir. 2002) (original emph.).

As demonstrated above, Plaintiffs will suffer grave and irreparable injury if a preliminary injunction is not issued, including loss of credit and the likely inability to find work in their chosen profession as a result of negative credit reports from Defendants. Even if Plaintiffs ultimately succeed in demonstrating that the debts giving rise to these devastating collection practices are illegal and void, no judgment will be able to undue the harm caused by the collection practices and negative credit reporting that occurs between now and final judgment. On the other hand, Defendants will suffer little harm from a preliminary injunction, even if they ultimately succeed on the merits. The injunction requested by Plaintiffs only delays their collection efforts while the legality of the underlying debt is litigated. If the Court ultimately concludes that the Lease/ICOA contract is not unconscionable or otherwise contrary to law, there will be ample time at that point for Defendants to pursue the collection practices allowed under the Lease/ICOA agreement (with no reason to think plaintiffs will now be better able to pay any amounts due). In short, the balance of hardships to Plaintiffs from wrongfully refusing the injunction compared to the hardship to Defendants from a wrongfully granted injunction clearly tips in Plaintiffs favor and justifies entry of the injunction.

IV. THE PUBLIC INTEREST FAVORS ISSUANCE OF AN INJUNCTION

Here, the public interest favors allowing truckers to secure other employment or credit

needed to live or drive, while litigation over the lawfulness of defendants' Lease/ICOA is concluded. The cases cited above demonstrate a strong public interest in prohibiting debt collections measures on unlawful debts. *See, e.g., McKesson Automated Healthcare, Inc.,* 779 N.Y.S.2d at 770 (noting that allowing a lessor to accelerate all payments due under a lease *and* seize the equipment "would impose an unconscionable forfeiture and penalty . . . and contravene public policy."). Similarly, there is a strong public interest in the enforcement of remedial federal and state wage and hour law. *Mullins v. City of New York,* 634 F.Supp.2d 373 (S.D.N.Y. 2009)(public interest in FLSA compliance supports P.I. prohibiting City from prosecuting FLSA claimants). Moreover it is not in the public interest to allow unconscionable contract provisions to be enforced. Suspending Defendants' collection efforts until the legality of the challenged provisions can be determined would serve the public interest.

CONCLUSION

Plaintiffs' Motion for a Preliminary Injunction should be granted.

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Respectfully Submitted,

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