UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

ERIC R. BRANT,

Plaintiff,

v.

Case No. 1:20-cv-01049-WCG
Judge William C. Griesbach

SCHNEIDER NATIONAL INC., SCHNEIDER NATIONAL CARRIERS INC., SCHNEIDER FINANCE INC., and DOE DEFENDANTS 1-10,

Defendants.
_____/

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS

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Now comes Plaintiff Eric Brant and files this his memorandum of law in opposition to Defendants' motion to dismiss.

I. Standard of Review

To survive a motion to dismiss under Rule 12(b)(6), "a complaint must allege 'sufficient factual matter to state a claim to relief that is plausible on its face.'" *Gogos v. AMS Mech. Sys., Inc.*, 737 F.3d 1170, 1172 (7th Cir. 2013) (per curiam) (alterations omitted) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Applying this standard, the Court should accept all well-pleaded facts in the complaint as true and then ask whether those facts state a plausible claim for relief. *See id.* at 679; *Santana v. Cook Cty. Bd. of Review*, 679 F.3d 614, 620 (7th Cir. 2012). Allegations that state "legal conclusions" or "[t]hreadbare recitals of the elements of a cause of action" are not entitled to the assumption of truth. *Iqbal*, 556 U.S. at 678. As this analysis suggests, the plausibility standard does not allow a court to question or otherwise disregard nonconclusory factual allegations simply because they seem unlikely. *See id.* ("The plausibility standard is not akin to a 'probability requirement'...."). Rather, "a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Alam v. Miller Brewing Co.*, 709 F.3d 662, 666 (7th Cir. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

In light of this standard, Plaintiff has pled sufficient nonconclusory factual allegations to plausibly state his causes of action.

II. Plaintiff Has Stated Claims for Unpaid Wages

Defendants move to dismiss Plaintiff's Fair Labor Standards Act (FLSA) and Wisconsin Minimum Wage claims (Counts 1 and 2) arguing that Plaintiff's contract with Defendants

(hereafter "Schneider"), Doc 20-2, 20-3, 20-4, shows that Plaintiff was an independent contractor, and that the allegations to the contrary in the complaint should be ignored. The principal flaw with Defendants' motion is that the contract, whatever its provisions, does not control whether Plaintiff is an employee entitled to the protections of the FLSA and Wisconsin law. The FLSA defines "employ" as "to suffer or permit to work." 29 U.S.C. § 203(g). "This is the broadest definition . . . ever included in any one Act."[1] *United States v. Rosenwasser*, 323 U.S. 360, 363 n.3 (1945); *see also Sec. of Labor v. Lauritzen*, 835 F.2d 1529, 1534 (7th Cir. 1987). Pursuant to this definition, FLSA "employees are those who as a matter of economic reality are dependent upon the business to which they render services." *Id.* (quoting *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947). Moreover, as Judge Easterbrook has noted, "[t]he FLSA is designed to defeat rather than implement contractual arrangements." *Lauritzen*, 835 F.2d at 1544-45 (Easterbrook, J., concurring). Accordingly, "[c]ontracts, however skillfully devised," should not be permitted to alter who is an employer or employee as defined by the FLSA and other social welfare statutes. *United States v. Silk*, 331 U.S. 704, 715 (1947). "[E]conomic realities, not contractual labels, determine employment status for the remedial purposes of the FLSA." *Real v. Driscoll Strawberry Assocs., Inc.*, 603 F.2d 748, 755 (9th Cir. 1979); *see also Usery v. Pilgrim Equip. Co., Inc.*, 527 F.2d 1308, 1315 (5th Cir. 1976) ("We reject both the

[1] Wisconsin law applies a similar definition to determine employee status for purposes of Wisconsin minimum wage. *Pope v. Espeseth, Inc.*, 228 F. Supp. 3d 884, 891 (W.D. Wis. 2017); *Montana v. JTK Restors., LLC*, No. 14-cv-487, 2015 WL 5444945, at *2 (E.D. Wis. Sept. 14, 2015). *See also Stafford Trucking, Inc. v. Wis. Dep't of Indus., Labor & Hum. Rels.*, 102 Wis. 2d 256, 306 N.W.2d 79, 83 (Wis. Ct. App. 1981) ("It is immaterial whether the right or power to control is in fact exercised as long as the right to exercise such control exists."). Defendants' motion assumes that allegations sufficient to state an FLSA claim are sufficient to state a claim under Wisconsin law. Accordingly, Plaintiff's arguments regarding the FLSA apply with equal force to their Wisconsin wage claim.

declaration in the lease agreement that the operators are 'independent contractors' and the uncontradicted testimony that the operators believed they were, in fact, in business for themselves as controlling of FLSA employee status. Neither contractual recitations nor subjective intent can mandate the outcome in these cases. Broader economic realities are determinative.").[2]

Rather than look to contractual recitations to determine who is an FLSA employee, the Seventh Circuit makes that determination by analyzing the work relationship in light of six broad factors to determine what those factors indicate about a worker's economic dependence upon the alleged employer:

> (1) The nature and degree of the alleged employer's control as to the manner in which work is performed;
>
> (2) The alleged employee's opportunity for profit or loss depending on his managerial skill;
>
> (3) The alleged employee's investment in equipment or materials required for his task, or his employment of workers;
>
> (4) Whether the service rendered requires a special skill;
>
> (5) The degree of permanency and duration of the working relationship;
>
> (6) The extent to which the service rendered is an integral part of the alleged employer's business.

[2] This is not to say that the contract is irrelevant. To the extent its terms accurately reflect the economic reality of the work relationship they may be considered. But conclusory provisions and labels that conflict with the reality of the relationship are not controlling. Also, for purposes of the FLSA employer/employee analysis, "it is not what the [workers] *could* have done that counts, but as a matter of economic reality what they actually *do* that is dispositive." *Brock v. Mr. W. Fireworks*, 814 F.2d 1042, 1047 (5th Cir. 1987). Thus the fact that the contract may recite that Plaintiff has certain rights, they are irrelevant if he did not in fact exercise those rights.

Lauritzen, 835 F.2d at 1535. No one factor is controlling; rather courts must look to the totality of the circumstances of the work activity to determine whether the worker is dependent upon, or independent of, the alleged employer. *Rutherford Food Corp. v. McComb*, 331 U.S. 722 (1947); *Lauritzen*, 835 F.2d at 1534. The allegations of the complaint, the contract to the extent it is relevant, and the attached declarations[3] analyzed in light of these six factors make clear that Plaintiff has more than plausibly pled that he was an FLSA employee entitled to the protections of the FLSA and Wisconsin law.

(1) **Control**: *Lauritzen*, the seminal Seventh Circuit case analyzing employee status for purposes of the FLSA, examined whether harvest workers hired by a pickle farm were employees of the farm. The Court noted that the farm exercised no control over when, how, or how long the harvesters worked. *Lauritzen*, 835 F.2d at 1533 ("[t]he defendants leave the when and how to pick [the pickles] to the [harvest workers]."); *id.* at 1540 (Easterbrook, J., concurring). However, the Court made clear that in assessing the control factor, the focus should not be on control of the specific tasks performed by the harvesters, but on the extent to which the alleged employer controlled "the entire pickle-farming operation." *Id.* at 1536. Because Lauritzen "exercise[d] pervasive control over the operation as a whole," the Court concluded that the control factor favored a finding of employee status. *Id.* Here, Plaintiff's pleading supports a similar conclusion. As Plaintiff avers, Schneider controls the advertising for its freight hauling business, employs the sales force that locates customers, and negotiates the terms and conditions

[3] The Seventh Circuit has made clear that, in opposing a 12(b)(6) motion, a plaintiff "may elaborate on his factual allegations so long as the new elaborations are consistent with the pleadings," including "materials outside the pleadings to illustrate the facts a party expects to be able to prove." *Geinosky v. City of Chicago*, 675 F.3d 743, 745 n1 (7th Cir. 2012). Additional facts may also be set forth in Plaintiff's brief in opposition to the motion to dismiss. *Phillips v. Prudential Ins. Co. of Am.*, 714 F.3d 1017, 1019-20 (7th Cir. 2013).

under which freight will shipped for customers. Compl. ¶67(c). Schneider also controls the infrastructure necessary for assigning loads to Drivers, controls and communicates pick-up and delivery times, and controls the billing of customers and payment of Drivers. Brant Decl. ¶¶ 17, 19-21, 30-33, 37-42, 46; Campbell Decl. ¶¶ 19, 23-25, 34-38, 40-45; Baldwin Decl. ¶¶ 15, 17, 19-21, 29-31, 34, 36-41; Rich Decl. ¶¶ 15, 17, 19-21, 29-32, 35-40. This level of control over the entire freight hauling operation is at least as pervasive as the control exercised over the pickle operation by the employer in *Lauritzen*.

Moreover, Plaintiff's allegations show that Schneider, unlike the employer in *Lauritzen*, also exercises control over the details of the work performed by Plaintiff and other lease operators [hereafter "Drivers"]. The complaint and declarations aver that Schneider requires drivers to comply with Schneider's policies, Compl. ¶ 67(k); Brant Decl. ¶¶ 21-22, 31; Campbell Decl. ¶¶ 23-24, 33; Baldwin Decl. ¶¶ 19-20, 29; Rich Decl. ¶¶ 19-20, 29; provides them with instructions including delivery times, Compl. ¶ 67(n), monitors their speed, location, route, and estimated time of arrival, Compl. ¶ 67(m), OOOA ¶ 5(f), and disciplines Drivers who violate Schneider's policies. Brant Decl. ¶¶ 26, 31; Campbell Decl. ¶¶ 28, 33; Baldwin Decl. ¶¶ 24, 29; Rich Decl. ¶¶ 24, 29. Schneider also controls Drivers' work by prohibiting them from driving for any other carrier absent prior written consent from Schneider. Compl. ¶ 67(a); OOOA ¶ 18. Most importantly, Schneider retains the right to terminate Drivers at-will on 15-days' notice, Compl. ¶ 67(a); OOOA ¶ 21, a right that provides Schneider the power to demand that Drivers conform to its demands. *See Alexander v. FedEx Ground Package Sys., Inc.*, 765 F.3d 981, 988 (9th Cir. 2014) ('The right to terminate at will, without cause, is strong evidence in support of an employment relationship."); *Time Auto Transp. v. NLRB*, 377 F.3d 496, 500 (6th Cir. 2004) (same); *Aetna Freight Lines, Inc. v. NLRB*, 520 F.2d 928, 930 (6th Cir. 1975) (same); *Doty v.*

Elias, 733 F.2d 720, 723 (10th Cir. 1984) (same); *Doe v. Swift Transp. Co., Inc.*, 2017 WL 67521, at *5 (D. Ariz. Jan. 6, 2017) (same).

Schneider has the ability to exercise even more control over Drivers like Plaintiff who lease their vehicle from Schneider. Schneider can place such Drivers in default of their leases simply by exercising its right to terminate the contract at-will. Lease ¶ 19(L); OOOA ¶ 21; Compl. ¶ 68(a). Placing a Driver in default of his lease results in the immediate acceleration of all outstanding lease payments as well as other expenses and fees. Compl. ¶ 68. The company's ability to impose the draconian consequences of lease default on Drivers necessarily gives the company "full control over the terms of the relationship." *Swift Transp.*, 2017 WL 67521, at *8. Indeed it is a far greater control than Schneider can exercise over its employee drivers. Schneider can threaten to terminate employee drivers who fail to conform to its wishes, but it has the power to threaten financial ruin as well as termination with respect to Plaintiff and other lease operators.

Defendants' efforts to show that the control factor weighs in favor of independent status are unpersuasive. They begin by citing conclusory, general language in the contract to the effect that Plaintiff had the right to "determine the manner, means and methods of performance" OOOA ¶ 2(b) and that his "business operations are independent of those of Carrier and are not subject to cancelation or destruction in the event that the Agreement is terminated." OOOA ¶ 2(b)(v). But, as noted above, such contractual recitations about independence are irrelevant. It is the economic reality of the actual work relationship that controls, not self-serving statements inserted in the contract by Schneider in an effort to make Drivers appear to be independent.[4]

[4] Besides, these self-serving characterizations are themselves contradicted by the provision in the contract that states that Schneider shall "have exclusive possession, *control* and use of the Equipment and assume complete responsibility for the operation of the Equipment, for the duration of this Agreement." OOOA ¶ 3(b) (emphasis added). Neither this statement nor the one regarding Plaintiff's control add much to the analysis. What matters is the economic reality

The rest of the "controls" that Defendants would have this Court ascribe to Plaintiff are either illusory or of no significance to the question of Plaintiff's alleged independence. Schneider places special emphasis on the fact that the contract purports to allow Plaintiff to drive for other carriers. But the contract makes clear that that right can be exercised if, and only if, Schneider gives its consent, and even then, a Driver must satisfy all of the other pre-conditions set forth in the contract. OOOA ¶ 18; Compl. ¶ 67(a). The Complaint and the declarations attached to this brief make clear, however, that in reality, Schneider does not give its consent and affirmatively tells drivers that they are not permitted to drive for other carriers. Brant Decl. ¶¶ 38-39, Campbell Decl. ¶¶ 41-42, Baldwin Decl. ¶¶ 37-38, Rich Decl. ¶¶ 36-37. Because these factual allegations must be taken as true, the alleged "right" to drive for other companies must be treated, at least for purposes of the motion to dismiss, as yet another illusory promise designed by Schneider to create the appearance, but not the reality, of independence.[5] Even if Schneider granted its permission, the other pre-conditions that must be met to drive for a different carrier make it impossible for Drivers to exercise the right. Compl. ¶ 67(t). This is certainly a plausible factual allegation. *See Swift*, 2017 WL 67521, at *12-13 (finding conditions imposed on driving

of the working arrangement and whether that arrangement allowed Plaintiff to operate independently or left him dependent upon Schneider for his livelihood.

[5] This fact distinguishes *Derolf v. Risinger Bros. Transfer, Inc.*, 259 F. Supp. 3d 876 (C.D. Ill. 2017), the primary case that Schneider relies upon. In *Derolf*, the court specifically noted that "[t]here is no allegation in the Amended Complaint that Defendants did not give [permission to drive for other companies] or that the Plaintiffs or others ever asked for such permission." *Id.* at 881. Based on that one finding the Court concluded that Risinger did not control the drivers, that the drivers could make a profit because they were free to solicit "new customers," and were not dependent on Risinger because they "can haul freight for such other carriers." *Id.* 881-82, 884. By contrast, Schneider exercises control by preventing Drivers from working for others; that, in turn, precludes them from building a business with "new customers," and renders them entirely dependent on Schneider for their livelihood.

for other carriers—similar to Schneider's—rendered it impractical for drivers to exercise the right).[6]

Defendants cite the Drivers' right to determine their routes, fueling stops, and breaks as an indication of control. But control over these minor aspects of the job are of no significance as they contributed nothing to Driver independence. *See Narayan v. EGL*, 616 F.3d 895, 904 (9th Cir. 2010) ("[T]he ability to determine a driving route is simply a freedom inherent in the nature of the work and not determinative of the employment relationship."); *see also Usery v. Pilgrim Equip. Co. Inc.*, 527 F.2d 1308, 1312-13 (5th Cir. 1976) ("Control [exercised by a worker] is only significant when it shows an individual exerts such a control over a meaningful part of the business that she stands as a separate economic entity."). Besides, given Schneider's insistence that Drivers meet strict pick-up and delivery times and pay for their own fuel, Drivers were compelled to take the most efficient route possible and keep breaks to a minimum. That is no doubt why Schneider felt no need to control these minor aspects of Plaintiff's work. In this respect, this case is similar to *Lauritzen* where the employer did not need to exercise control over the details of the harvesters' picking work because the piece rate pay system imposed by Lauritzen ensured they would pick efficiently. *Lauritzen*, 835 F.2d at 1536.

Defendants also note that Drivers had the right to turn down loads and set their own hours of work. OOOA ¶ 1. Here again, these rights conferred no independence upon Drivers since they could not use the free time to drive for another carrier. The right to turn down loads or take time

[6] The right to drive for other companies is not necessarily inconsistent with employee status in any event. *See Lauritzen*, 835 F.2d at 1533 (harvest workers found to be employees of farm despite the fact that they were sometimes permitted to work for other farms); *Arunin v. Oasis Chicago, Inc.*, No. 14-cv-6870, 2016 WL 851989, at *4 (N.D. Ill. Mar. 4, 2016) (fact that plaintiffs drove for other restaurants does not mean they were not employees of defendant).

off from Schneider simply meant sitting idle and earning less money.[7] Nor was there any need for Schneider to set fixed work hours: As in *Lauritzen*, Schneider's system of paying by the delivered load coupled with Schneider deducting its operating costs from Drivers, including the substantial lease payments, each week ensured Drivers would work the maximum number of hours possible.[8]

Defendants cite provisions in the contract that gave the Drivers the right to hire employees. This provision has no significance for several reasons: First, Schneider makes no effort to explain how this right could, in any way, contribute to a Driver's independence from Schneider. Since Drivers could not work for other companies, a driver who hired an employee would still be entirely dependent on the loads offered by Schneider for his livelihood. Hiring an employee would simply mean sharing his or her per load earnings with another person. The absence of any advantage from hiring an employee is no doubt why Plaintiff and other Drivers never did so. Brant Decl. ¶ 27; Campbell Decl. ¶ 29; Baldwin Decl. ¶ 25; Rich Decl. ¶ 25. Here again, this contract provision appears to be designed to create the appearance of independence

[7] The right not to take loads was also contingent on compliance with a baroque set of rules designed to discourage Drivers from taking time off. OOOA ¶17. A driver who is going to stop working is required to inform Schneider when their "out of service" status will begin, when it will end, and where the Driver anticipates being when he becomes available for work. A Driver who goes out-of-service is required to drop off his trailer at a location designated by Schneider. If the Driver leaves the trailer at the last shipment location, the Driver has to agree to return to the last shipment location (or within 100 miles thereof) when he comes back to work. Either way, if the Driver comes back to work at a location more than 100 miles from where he went out of service, he must pay a fee of $250. OOOA ¶ 17. Yet another example of Schneider's efforts to control Drivers.

[8] The Supreme Court and the Seventh Circuit have noted that many employment relationships allow workers to set their own hours, particularly where, as here, the employer incentivizes steady work by using a piece rate pay system. *Goldberg v. Whitaker House Coop.*, 366 U.S. 28 (1961) (knitters who work from home and set their own hours of work are employees); *Donovan v. Dial Mktg., Inc.*, 757 F.2d 1376, 1384 (3d Cir. 1985) (telephone solicitors who work from home and set own hours of work are employees).

without conferring any meaningful control to Drivers. Courts routinely treat the right to hire employees as meaningless in these circumstances. *See Real*, 603 F.2d at 755 (harvest workers' ability to hire employees insignificant as it did not diminish employer's control); *Brock v. Mr. W. Fireworks*, 814 F.2d 1042, 1049 (5th Cir. 1987) (giving workers the right to hire employees to assist in selling fireworks did not preclude a finding that they were employees); *Mednick v. Albert Enters.*, 508 F.2d 297, 302 (5th Cir. 1975) (right to hire substitute and never appear in person to work is of no consequence where it contributed nothing to the worker's economic substance.); *Swift Transp.*, 2017 WL 67521 at *13 (finding right to hire employees insignificant because drivers remained dependent on assignments from Swift, and "the most Plaintiffs could gain from an additional driver was a cut of the milage earned by that driver."). Second, even if a Driver could hire someone, the contract makes clear that Schneider controls the standards the employee must meet and retains the right to reject a Driver's hiring choice, OOOA ¶ 2(d), thereby depriving Drivers of the unfettered discretion of an independent contractor, rendering the purported right entirely facile. *See Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1102 (9th Cir. 2014) (rejecting significance of worker's right to hire employees because the employer's right to approve workers hiring decisions, even for neutral factors, deprived the worker of "an important right that would normally inure to a self-employed contractor"); *Swift Transp.*, 2017 WL 67521, at *13 (finding employer approval "greatly diminished" the significance of the right to hire). Third, even if Plaintiff could hire an employee, he alleges that he did not do so. Brant Decl. ¶ 27; *see also* Campbell Decl. ¶ 29; Baldwin Decl. ¶ 25; Rich Decl. ¶ 25. Thus the abstract right to hire employees is irrelevant; for purposes of the FLSA employer/employee analysis, "it is not what the [workers] *could* have done that counts, but as a matter of economic reality what they actually *do* that is dispositive." *Brock v. Mr. W. Fireworks*, 814 F.2d 1042, 1047 (5th Cir. 1987).

Finally, Defendants note that Drivers were responsible for "selecting, purchasing, leasing financing, maintaining, operating and insuring" the equipment used in providing transportation services. OOOA ¶ 2(b)(ii). But the reality was that Plaintiff had no ability to do any of these things on his own. He had no credit rating or money to lease a truck; he only obtained one because Schneider provided it. Brant Decl. ¶ 18; *see also* Campbell Decl. ¶¶ 8, 20; Baldwin Decl. ¶ 16; Rich Decl. ¶ 16. Schneider had to approve all maintenance performed on the equipment and required Plaintiff to set aside a portion of each week's earnings to fund a maintenance account to ensure that he could afford to pay for the repairs. Lease ¶ 12; *see also* Brant Decl. ¶¶ 28, 33 Campbell Decl. ¶¶ 30, 35; Baldwin Decl. 26, 31 Rich Decl. ¶¶ 26, 31. Schneider arranged for all of Plaintiff's insurance needs and advanced the cost of the insurance before deducting it from Plaintiff's weekly earnings. OOOA ¶¶ 7(e), 11. Plaintiff alleges that Schneider, in fact, provided Drivers insurance through its own captive insurance company. Compl. ¶ 81. Schneider also handled the reporting and paying of federal heavy vehicle use taxes. OOOA ¶ 10(b). Thus, while Schneider imposed these responsibilities on Plaintiff, he had no independent ability to carry them out; he was entirely dependent on Schneider's assistance at every turn. In short, Plaintiff's so-called "independent business" was entirely a creation of Schneider and could not have existed but for Schneider.[9] *See Swift Transp.*, 2017 WL 67521, at *14 ("Swift's assistance in providing the necessary equipment and credit through cost-advancing and leasing arrangements is evidence that [the plaintiff drivers] did not actually operate autonomously."); *Max Trucking LLC v. Liberty Mut. Ins. Corp.*, 802 F.3d 793, 804 (6th Cir.

[9] To be sure, the contract did not require Plaintiff to lease his truck through Schneider Leasing, Inc. or to purchase insurance through Schneider National, Inc., OOOA ¶ 7, but the economic reality was that Plaintiff had no resources or ability to do anything other than depend on Schneider to help him with these things. It is that reality that determines the employer/employee issue.

2015) (finding lease-to-own drivers to be employees for purposes of workers compensation and noting that the drivers "were financially dependent on Max Trucking for all practical purposes" where Max Trucking provided advances for insurance, fuel and repairs, eventually charging costs back to the drivers); *Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093, 1103-04 (9th Cir. 2014) (where company advanced all of the costs of leasing a truck to drivers and required them to drive exclusively for the company, drivers had no independence).

In sum, none of the contract provisions cited by Defendants to show control by Drivers withstand scrutiny. They are either irrelevant self-serving characterizations of the relationship, illusory rights that, as a matter of economic reality, cannot be exercised, or minor matters that confer no genuine independence upon the Drivers.[10] Viewed in the light most favorable to Plaintiff, as they must be, the complaint and the attached declarations more than plausibly allege that Schneider exercised the kind of control over Plaintiff and other Drivers indicative of an employer/employee relationship.

(2) **Profit or Loss**: Plaintiff's allegations plausibly plead that he had no ability to make a profit through entrepreneurial skill. Defendants' argument to the contrary is based on Plaintiff's alleged ability to drive for other carriers which, according to Schneider, gave him the right to "recruit[] new customers *on his own.*" Doc 20-1 at 21 (emphasis in original). But as demonstrated above, that right was illusory. Without the ability to drive for others, Plaintiff remained entirely dependent on the loads and rates offered by Schneider for his income. Brant

[10] Likewise, Defendants fail to address multiple additional allegations that, contrary to Defendants' assertions, are factual allegations of Defendants' control, not "sweeping legal conclusions." (Defendants' Mem., Doc. 20-1,13). *See, e.g.*, Compl. ¶ 67(d),(e),(g), and (p), wherein Plaintiff alleges Defendants define compensable miles, set compensation rates, furnish the equipment needed to perform the job, and control the appearance of the vehicles including identifying the trucks as Schneider's.

Decl. ¶¶ 38-39; *see also* Campbell Decl. ¶¶ 41-42, Baldwin Decl. ¶¶ 37-38, Rich Decl. ¶¶ 36-37. It may be that experienced Drivers could marginally increase their earnings by careful selection of loads from the load board as well as their routes and fuel stops, but increasing earnings through such efficiencies is not the same thing as making a profit based on entrepreneurial skill. *See Rutherford Food Corp.*, 331 U.S. at 730. It is the same efficiency of an experienced employee. *Id*. For purposes of the motion to dismiss, this factor too weighs in favor of employee status.

(3) **Investment**: Defendants argue that Plaintiff and other drivers made considerable investment in their trucks. But, as a matter of economic reality, that "investment" was entirely a function of Schneider's efforts and credit. Plaintiff had no ability to lease a truck but for Schneider's willingness to advance everything from the down payment to the fuel and insurance costs. Brant Decl. ¶¶ 5, 18; *see also* Campbell Decl. ¶¶ 7-8, 20; Baldwin Decl. ¶¶ 5, 16; Rich Dec. ¶¶ 13, 16. As long as he drove enough loads each week to cover his operating costs, he could continue to operate without making any capital investment whatsoever – just like an employee driver. Such an arrangement does not constitute the kind of investment indicative of independent status. *See Affinity Logistics*, 754 F.3d at 1103-1104 (where company "advanced the drivers' costs of leasing and maintaining their trucks, and deducted the advances from the drivers' paychecks," it was clearly erroneous for the district court to treat the truck as an investment by the worker)*; see also Max Trucking*, 802 F.3d 793, 805 (6th Cir. 2015) (employer's lease-to-buy arrangement with its truck drivers indicated that the "drivers are effectively economically depending on Max trucking for their ability to operate as truckers because they would not have otherwise had the credit to purchase the trucks."); *Donovan v. Sureway Cleaners*, 656 F.2d 1368, 1372 n.9 (9th Cir. 1981) (where alleged employer "leased"

premises to workers and deducted the rent payments from the weekly settlement, such a lease did not constitute an investment on the part of the worker, particularly where the employer offset increases in the rent through increases in workers' pay).

(4) **Skill:** While specialized skills can be indicative of independent status, "[s]kills are not the monopoly of independent contractors." *Lauritzen*, 835 F.2d at 1537. Here, while Schneider claims that driving a truck is a special skill, it is the same skill possessed by Schneider's employee drivers so it is hardly indicative of independent status. *See* Brant Decl. ¶¶ 3, 17, 21, 54; Campbell Decl. ¶¶ 3, 19, 23; Baldwin Decl. ¶¶ 3, 15, 19; Rich Decl. ¶¶ 3, 15. Schneider also claims that Plaintiff must have possessed business acumen and managerial skills because "he decided what shipments to accept for transport, what routes to take, how fast to drive, and when he would work." Doc. 20-1 at 16. For the most part, those are the same skills that Defendants' employee drivers had. To the extent managerial skills were required for the operation of Plaintiff's truck, those skills were provided by Schneider though contracting with customers for loads, setting prices, billing customers as well as arranging for licenses, insurance, and taxes for Plaintiff's truck.

(5) **Permanency of the Relationship**: Driver's contract offered a one-year term, Compl. ¶ 21, which was routinely renewed by Schneider. Brant Decl. ¶ 13; Campbell Decl. ¶ 14. Even without renewal, a one-year term is sufficient to indicate employment rather than independent contractor status, particularly where, as here, Plaintiff was engaged in continuous and exclusive performance of activities for Schneider during the term of the contract as opposed to working on a short term project or projects. *See Cromwell v. Driftwood Elec. Contractors*, 348 F. App'x 57, 61 (5th Cir. 2009) (finding welders who worked on a steady and reliable basis exclusively for defendant for ten months were employees while welders who worked on specific projects lasting

only a matter of weeks were not); *Baker v. Flint Eng'g & Const. Co.*, 137 F.3d 1436, 1442 (10th Cir. 1998) (finding "permanency" factor supported finding of employee status even though the workers only worked for two months); *Jaworski v. Master Hand Contractors, Inc.*, 2013 WL 1283534, at *6 (N.D. Ill. Mar. 27, 2013) (exclusive relationship of ten months to three years indicates employee status). *See also Ingram v. Passmore*, 175 F. Supp. 3d 1328, 1337 (N.D. Ala. 2016) (fact that alleged employer allowed drivers to incur pay advances and debt and pay them off over time through deductions from their earnings suggests that the employer expected a degree of permanency in the working relationship.).

(6) **Integral Part of Schneider's Operations**: Defendants concede, as they must, that Drivers' work was and is an integral part of Schneider's operations. Doc. 20-1 at 24. Schneider's business is hauling freight. It carries out that business through its employee drivers and through lease operators like Plaintiff. Compl. ¶ 3-5. Plaintiff alleges that on average, 28% of Schneider's trucks available per month to transport freight were operated by so-called "owner-operators" like Plaintiff. Compl. ¶ 6. Plaintiff's work was not only integral to Schneider's business, but he performed that work in a manner indistinguishable from the way the employee drivers worked. Where a worker "follows the usual path of an employee," he is an employee. *Rutherford Food Corp.*, 331 U.S. at 729.

Conclusion: Thus, Plaintiff has pled facts that more than plausibly show that all six *Lauritzen* factors indicate that he was an employee entitled him to the protections of the FLSA. Nothing more is required. That Plaintiff's allegations are sufficient to create a plausible FLSA claim is further confirmed by the fact that courts have found drivers operating under similar terms of work to be employees under the common law standard which is narrower than the FLSA standard. *See, e.g., Ruiz v. Affinity Logistics Corp.*, 754 F.3d 1093 (9th Cir. 2014) (drivers

who leased trucks with financial assistance of Affinity, who were restricted to driving for Affinity, and who had no ability to negotiate the rates paid by Affinity were employees under California common law); *Swift Transp.*, 2017 WL 67521 (finding drivers who are able to lease their trucks from Swift by virtue of Swift's credit and advances and who could not, as a practical matter, drive for other companies to be common law employees of Swift); *Aetna Freight Lines, Inc. v. NLRB*, 520 F.2d 928 (6th Cir. 1975) (finding drivers who own their own trucks but who, *inter alia*, are required to drive exclusively for Aetna, who are subject to "carefully prescribed time restrictions on deliveries" are common law employees of Aetna). Indeed, even Schneider recognizes that the terms of work imposed on Drivers could plausibly create an employment relationship. That is evident from the fact that ¶ 24(e) of the contract provides that, "[i]f . . . Owner Operator is determined to be an employee of Carrier by any federal, State, local . . . or other governmental body . . . this Agreement shall be rescinded back to the time of its formation. . . ." and that, in that event, the "Carrier shall . . . immediately owe Owner-Operator, for all work activities during the each week . . . only the then applicable federal minimum hourly wage . . . multiplied by Owner-Operator's total hours actually performing on-duty work for Carrier. . . ." Plainly if Defendants did not recognize that the contract plausibly could be construed to create an employer/employee relationship, there would have been no reason to include this provision.

One other point must be addressed. Schneider repeatedly claims that the allegations of the complaint "contradict" the terms of the contract and should be ignored. But, as is made clear above, the pleading simply alleges that, as a matter of economic reality, many of the contract terms cited by Defendants, such as the right to drive for others or the right to hire employees, were, in actual practice, illusory or of no value. The complaint also clarifies the way the various terms of the Agreement worked together. For instance while the Agreement clearly says that

Plaintiff was free to turn down loads, the provisions allowing Schneider to terminate the agreement at-will as well as the provisions imposing all costs of operation on Plaintiff meant that, as a practical matter, Plaintiff could not freely exercise that right for fear of going into debt and/or losing his job. In other instances, the complaint clarifies seemingly contradictory statements in the contract such as the statement that Plaintiff has the right to "determine the manner, means and methods of performance," OOOA ¶ 2(b), while simultaneously Schneider retains "exclusive possession, *control* and use of the Equipment and assume complete responsibility for the operation of the Equipment, for the duration of this Agreement." OOOA ¶ 3(b) (emphasis added). There is nothing improper or contradictory about allegations in a complaint that show how a contract operated in reality. *See Swift Transp.*, 2017 WL 67521, at *15 (finding "the terms of the Contractor Agreement, bolstered by the evidence presented as to how those terms worked in practice," established the plaintiff drivers were employees under the common law standard). The fact that Plaintiff alleges that the reality of his working conditions did not conform to the illusory statements in the agreements supports Plaintiff, not Schneider.[11] *See Iontchev v. AAA Cab Inc.*, No. 12-00256, 2015 WL 1345275, at *4 (D. Ariz. Mar. 18, 2015), *aff'd sub nom. Iontchev v. AAA Cab Serv., Inc.*, 685 F. App'x 548 (9th Cir. 2017) ("[T]he 'economic reality' controls regardless of whether the drivers [] have contracts purporting to describe their relationship."); *Flynn v. Sanchez Oil & Gas Corp.*, No. 5:19-0867, 2020 WL

[11] Moreover, the Seventh Circuit has made clear that the rule that documents trump allegations must be applied with caution and only when there is an "inherent inconsistency" rather than raising questions of weight to be given to documents or clarifying ambiguities, which is what Plaintiff's allegations do. *Flanery v. Recording Industry Assn of America,* 354 F.3d 632, 638 (7th Cir. 2004); *see also FDIC v. Pantazelos*, 2013 WL 4734010, at *4 (N.D. Ill. Sept. 3, 2013) (refusing to consider alleged contradictions between contract documents and allegations where plaintiff did not plead breach of contract action and only cited contracts as examples of "certain guidelines for defendant's conduct.")

1083825, at *5 (W.D. Tex. Mar. 6, 2020) ("[N]o matter what was promised or documented, what will be dispositive under the FLSA will be how the parties in reality behaved."); *Thomas v. Carrington's Caring Angels, LLC*, No. 8:17-1586, 2018 WL 467470, at *4 (M.D. Fla. Jan. 18, 2018) ("It is not significant how one 'could have' acted under the contract terms. The controlling economic realities are reflected by the way one actually acts."); *VanPortfliet v. Carpet Direct Corp*., No. 16-00616, 2017 WL 1023380, at *3 (D. Colo. Mar. 15, 2017) (the "contracts are **irrelevant** to whether plaintiffs were, in fact, independent contractors for purposes of plaintiffs' FLSA claim"); *Crouch v. Guardian Angel Nursing, Inc.*, 2009 WL 3738095, at *4 (M.D. Tenn. Nov. 4, 2009) (denying motion to dismiss FLSA action relying on contract because "the Sixth Circuit, like every other court that has considered the issue, has explicitly recognized that the existence of a contract, like the Independent Contractor Agreement signed by each of the Plaintiffs in this action and which purports to characterize Plaintiffs as independent contractors, is not dispositive of the question of whether an employment relationship exists").

III. Plaintiff Plausibly Alleges A Minimum Wage Violation

"In order to comply with the requirements of *Towmbly*, *Iqbal*, and Fed. R. Civ. P. 8(a)(2), a plaintiff alleging a minimum wage violation must provide sufficient factual context to raise a plausible inference that there was at least one workweek in which he or she was underpaid." *Hirst v. Skywest, Inc*., 910 F.3d 961, 966 (7th Cir. 2018). It is not necessary to "plead specific dates and times," as long as a plaintiff "provide[s] some factual context that will nudge their claim from conceivable to plausible." *Id.*

Plaintiff more than satisfies this standard by pleading that during the week of May 2, 2019, he drove over 3,000 miles hauling five loads for Schneider and received $0.00 in pay for that week's work. Compl. ¶ 87. Defendants claim that this is insufficient citing *Hughes v.*

Scarlett's G.P., Inc., 2016 WL 4179153, at *2 (N.D. Ill. Aug. 8, 2016). But the problem in *Hughes* was that the plaintiff only averred that she did not receive minimum wage for certain hours of work. *Id.* As the district court correctly pointed out, there is no requirement that a worker receive pay for every hour worked. Rather, the FLSA operates on a workweek basis and a violation only occurs if the average wages for the entire workweek fall below minimum wage. Because the plaintiff "offer[ed] no workweek allegations" there was no basis for finding a minimum wage violation plausible. Here by contrast, Plaintiff did provide workweek allegations: He cited a specific week in which he performed significant work and received no pay. It is true that he did not explicitly allege his "average rate of pay" as Defendants demand, but it is certainly possible to infer that if one is paid nothing for an entire workweek, one's average rate of pay is still nothing. These allegations are more than sufficient to meet the *Hirst* standard.

IV. The Complaint Adequately States a Claim for Relief for Unjust Enrichment.

Under Wisconsin law, a claim for unjust enrichment has the following elements: "(1) a benefit conferred upon the defendant by the plaintiff, (2) appreciation by the defendant of the fact of such benefit, and (3) acceptance and retention by the defendant of such benefit under circumstances such that it would be inequitable to retain the benefit without payment of the value thereof." *Smith v. RecordQuest, LLC*, 380 F. Supp. 3d 838, 845 (E.D. Wis. 2019). Plaintiff adequately pleaded, *inter alia*, that Defendants require Drivers to pay for fuel, insurance, taxes, tolls, ferry fees, road taxes, mileage taxes, licensing fees, and permitting costs, Compl. ¶ 75; that Defendants deduct certain amounts from Drivers' pay for lease payments, security deposit payments, insurance payments, maintenance costs and repair costs, as well as amounts to fund an "escrow account" and "maintenance reserve," Compl. ¶¶ 76-78; and that the balance of the escrow and maintenance funds are not returned to Drivers upon termination, Compl. ¶ 79.

Plaintiff further alleges that these facts render Defendants' agreements unconscionable, and thus void or voidable under common law. Compl. ¶¶ 117-18. Defendants raise three arguments in favor of dismissal of Plaintiff's unjust enrichment claim. Plaintiff addresses each in turn.

First, Defendants argue that the OOOA and/or Lease invalidate Plaintiff's claim. Defendants are mistaken. Under Wisconsin law, "[i]n the absence of an enforceable contract, [ ] a plaintiff may turn to quasi-contractual theories of relief[,]" such as unjust enrichment. *Lindquist Ford, Inc. v. Middleton Motors, Inc.*, 557 F.3d 469, 476 (7th Cir. 2009) ("restat[ing] some first principals" of unjust enrichment under Wisconsin law). *Cf. Columbia River Techs. 1, LLC v. Blackhawk Grp. LLC*, No. 19-cv-385, 2020 WL 5411320, at *4 (W.D. Wis. Sept. 9, 2020) (granting summary judgment to defendant on unjust enrichment claim because "the subject of the claim is addressed by a valid and enforceable contract," and "[n]o party is contending that the contract is invalid or unenforceable") (quoting *Roumann Consulting Inc. v. Symbiont Constr., Inc.*, No. 18-C-1551, 2019 WL 3501527, at *10 (E.D. Wis. Aug. 1, 2019)). Here, Plaintiff contends that the OOOA and Lease are void or voidable for unconscionability, making a claim for unjust enrichment available to him.

The authority Defendants cite—which addresses *Illinois* law, not Wisconsin law—does not change this analysis. Mot. Dismiss 20 (quoting *Enger v. Chicago Carriage Cab Corp.*, 812 F.3d 565, 571 (7th Cir. 2016)). *Enger* involved an undisputed implied-in-fact contract, 812 F.3d at 571. Here, there is no possibility of an implied-in-fact contract because there is an explicit contract in writing, albeit one that Plaintiff contends is void or voidable. Thus, while Wisconsin courts, like the court in *Enger*, apply general contract principals to implied-in-fact contracts and would disallow unjust enrichment where such a contract exists, that law has no relevance here where Plaintiff alleges his written contract was void or voidable. *See Lindquist Ford*, 557 F.3d at

480-81 (unjust enrichment applies in the absence of a valid contract). Thus, Defendants' first argument fails.

Second, Defendants again cite to caselaw analyzing and deciding issues of unjust enrichment under *Illinois* law, not Wisconsin law, for the proposition that Plaintiff's unjust enrichment claims must fail because his unpaid minimum wage claims fail. Mot. Dismiss 20 (citing *Cleary v. Philip Morris Inc.*, 656 F.3d 511, 517 (7th Cir. 2011)). Under Wisconsin law, unjust enrichment is a separate, stand-alone cause of action. *Lindquist Ford*, 557 F.3d at 477-78; *Smith v. RecordQuest, LLC*, 380 F. Supp. 3d 838, 845 (E.D. Wis. 2019) *C.f. Horist v. Sudler & Co.*, 941 F.3d 274, 281 (7th Cir. 2019) ("Unjust enrichment is not a separate cause of action under Illinois law.") (citing *Cleary*, 656 F.3d at 517). Because unjust enrichment is its own cause of action under Wisconsin law, the unjust enrichment claim is not tied to any other claim of Plaintiff. Accordingly, Defendants' second argument fails.

Third, Defendants argue that the unjust enrichment claim has been "preempted" by FLSA, yet fail to do any actual preemption analysis, instead arguing that the unjust enrichment claim duplicates portions of the wage claims. Mot. Dismiss 21 ("Plaintiff's unjust enrichment claim is based on the same factual assertions of his FLSA claims, and the FLSA plainly addresses the situation . . . ."). Of course, Fed. R. Civ. P. 8(e)(2) contemplates and permits a party to plead alternative theories of relief. *Kasten v. Saint-Gobain Performance Plastics Corp.*, No. 07-cv-449, 2007 WL 5414927, at *2 (W.D. Wis. Dec. 7, 2007) (citing *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 379 (7th Cir. 2003)). Here, to the extent the minimum wage claims do not provide relief to Drivers—either because the fees and deductions did not drop Drivers' pay below the minimum wage or are otherwise not recoverable under the FLSA or Wisconsin wage law—Plaintiff seeks to recover the fees and deductions Defendants collected

from Drivers through his unjust enrichment claim. Thus to the extent the unjust enrichment claim and the FLSA claim seek damages for the same injury, "Plaintiffs have done nothing more than plead alternative theories of relief by pleading their state common law claims along with claims under the FLSA and Wisconsin state statutes[,]" and as Fed. R. Civ. P. 8 and the courts make clear, "they are free to plead such alternative theories. *Kasten*, 2007 WL 5414927, at 2.

Accordingly, Plaintiff has properly pleaded unjust enrichment, and the Court should deny Defendants' motion to dismiss.

V. The Complaint Adequately States a Claim for Relief for the TILA Claim.

TILA requires, among other things, that carriers:

- specify in the lease or in an addendum thereto the amount of compensation to be paid to the Driver, 49 C.F.R. § 376.12 (d);
- provide the Driver with a copy of the freight bill when Drivers' pay is based on a percentage of the gross revenue for the shipment, and regardless of the method of Drivers' compensation, allow Drivers to examine the carrier's tariff or other documents from which rates and charges are computed, § 376.12(g);[12]
- clearly specify in the lease all items for which the carrier may initially pay, but will ultimately be deducted from lessor's compensation, "along with a recitation as to how the amount of each item is to be computed," 376.12(h);
- specify in the lease the amount of any escrow fund or performance bond required, specific items to which the escrow fund can be applied, and conditions the lessor must fulfill in order to have the escrow fund returned, § 376.12(k).

TILA requires not only that the lease contain the above provisions, but also, "[t]he required lease provisions shall be adhered to and performed by the authorized carrier." § 376.12. Specifically

[12] Defendants misstate the law on this point. "***Regardless of the method of compensation***, the lease must permit lessor to examine copies of the carrier's tariff or, in the case of contract carriers, other documents from which rates and charges are computed[.]" 49 C.F.R. § 376.12(k) (emphasis added).

with respect to the escrow funds, 49 C.F.R. § 376.12(k), through its comprehensive delineation of responsibilities, imposes strict fiduciary obligations on motor carriers, such that it places the motor carriers in a position of trust vis-à-vis [lease]-operators with regard to the handling of escrow funds," and "when viewed in the historical context in which it was enacted, implicitly creates a statutory trust for the benefit of [lease]-operators." *In re Arctic Exp. Inc.*, 636 F.3d 781, 794 (6th Cir. 2011).

While sufficient pleading of TILA requires allegations of actual damages, courts in this circuit have held it to be sufficient for plaintiffs to allege they were "disadvantaged by a lack of transparency in their contractual relationship with [Defendant], resulting in damages, specifically under-compensation." *Mervyn v. Nelson Westerberg, Inc.*, No. 11-C-6594, 2012 WL 6568338, at *3 (N.D. Ill. Dec. 17, 2012) (quoting *Nelson v. Signor Trucking, Inc.*, 2010 WL 3307288 (D. Neb. Aug. 19, 2010) (holding that the owner-operator stated a viable claim where the complaint alleged that '[d]efendants made improper deductions from her weekly compensation, causing her significant economic harm, and then failed to disclose documents verifying the validity of these deductions")).

Here, Plaintiff alleges that Defendants:

- failed to set forth the compensation that Drivers were to receive for their work by, *inter alia*, failing to specify deductions from the Drivers' compensation for "accessorial amounts due," Compl. ¶ 95;

- failed to clearly set forth the chargebacks to Drivers by, *inter alia*, failing to specify the reasons for accessorial amounts and insurance charged back, Compl. ¶ 96;

- failed to provide Drivers with copies of freight bills or other documents from which Drivers' compensation was calculated, Compl. ¶ 97, Brant Decl. ¶ 32; Campbell Decl. ¶ 34; Baldwin Decl. ¶ 30; Rich Decl. ¶ 30;

- failed to set forth the amount of escrow fund or performance bond required to be paid by Lease Drivers, Compl. ¶ 98; and

- caused Drivers financial injury and lost compensation as a result of these actions, and prevented Drivers from seeking employment elsewhere to improve their wages and conditions of employment, Compl. ¶ 99, 100; Brant Decl. ¶¶ 32, 50-53; Campbell Decl. ¶ 34, 38, 53; Baldwin Decl. ¶ 30, 34; Rich Decl. ¶ 30, 32, 47.

This lack of transparency disadvantaged Drivers in their contractual relationship with Defendants. Brant Decl. ¶ 32, 50-53; Campbell Decl. ¶ 34; Baldwin Decl. ¶ 30; Rich Decl. ¶¶ 30, 32, 47. Moreover, Drivers believe they were undercompensated but because Defendants failed to comply with their obligations under TILA, Drivers could not confirm the underpayment to have Defendants correct the error. Brant Decl. ¶¶ 32; Campbell Decl. ¶¶ 34, 38, 53; Rich Decl. ¶¶ 30, 32, 47; *see also* Baldwin Decl. ¶ 30. Drivers also were surprised by amounts deducted or by amounts charged, which caused financial harm. Brant Decl. ¶¶ 32, 50-53; Campbell Decl. ¶¶ 34, 38, 53; Baldwin Decl. ¶ 34; Rich Decl. ¶¶ 32, 47.

Despite Defendants' arguments to the contrary, the OOOA and Lease do not contradict these allegations. First, TILA not only requires that the Lease contain the specified provisions, but also that the "required lease provisions [ ] be adhered to and performed by the authorized carrier." 49 C.F.R. § 376.12. In other words, even if the Lease contains the provisions required under the law, Defendants' failure to adhere to the provisions also violates TILA. For example, Defendants argue that the Lease specifies that Defendants would provide "a copy of the rated freight bill (or a computer-generated summary)" to Drivers when Drivers' "payment is based on a percentage of revenue," Mot. Dismiss 25-26 & Ex. B, but the language in the agreement does nothing to address Plaintiff's allegations that Defendants failed to *actually* provide the freight bills or to allow Drivers to examine copies of Defendants' tariffs. The same is true of the deductions and chargebacks. Defendants argue that the chart included as an exhibit to the OOOA

satisfies the requirements of § 376.12(h). Mot. Dismiss 25 & Ex. B. The majority of the itemized list of fees and charges do not include a specific amount, but rather a method of computation that requires additional documents to calculate and/or verify the deduction amount, e.g., for "Medical Examination," the amount is "actual cost of medical examination." Mot. Dismiss Ex. B at 64. Such a description requires that Defendants provide additional documentation of the "actual cost of medical examination," and TILA requires that Drivers "be afforded copies of those documents which are necessary to determine the validity of the charge." § 376.12(h). Because Plaintiff alleges Defendants failed to provide such documentation to compute and determine the validity of such charges, Campbell Decl. ¶ 38, the OOOA cannot contradict the allegations, and Defendants' argument fails.

Further, Defendants do not deny that the OOOA fails to set forth the compensation that Drivers were to receive for their work.[13] "The amount to be paid may be expressed as a percentage of gross revenue, a flat rate per mile, a variable rate depending on the direction traveled or the type of commodity transported, or by any other method of compensation mutually agreed upon by the parties to the lease." § 376.12(d). With respect to the "accessorial payments," however, the OOOA falls short of this requirement. The OOOA sets forth: "Carrier may (but is not obligated to), at its discretion, pay [Lease]-Operator for other types of accessorials which are not identified above," and that such payments "may be made by Carrier on an individual Shipment basis, or on a systematic basis, as [sic] Carrier's discretion," may be cancelled by Defendants at any time, "may, for certain shipments, be paid by Carrier if and only if [Lease]-

[13] Instead, Defendants make hay of the fact that Plaintiff misstates the direction of payments of "accessorial amounts" as being deductions from Drivers' pay, when they are actually payments from Defendants to Drivers. Mot. Dismiss 25 (citing Compl. ¶ 95). Regardless of whether the accessorial amounts are paid to or deducted from Drivers, the fact remains that the result is Defendants' failure to specify Drivers' compensation.

Operator meets designated service standards established by the customer for the selected shipment," and even that "Carrier may choose to [pay] [Lease]-Operator less than 100% of the amount that Carrier received from the customer." Mot. Dismiss Ex. B, at 62-63. This language purports to make payments to Drivers for accessorials wholly discretionary on the part of Defendants, and is not expressed in any of the acceptable forms set forth in § 376.12(d) of the regulations.

Finally, neither the OOOA nor the Lease contradict Plaintiff's allegations with regard to the escrow fund or performance bond. The Lease requires a Driver leasing his or her truck through Schneider and wishing to drive for another Carrier to pay a security deposit increased "by such amounts as [Defendants] deem[] necessary to protect its interests hereunder (which in most instances is not expected to exceed an additional $5.000)." Mot. Dismiss Ex. C at ¶ 19(L). The OOOA and the Lease, operating as a single contract, fail to specify the amount of additional security deposit required, which prevented Drivers from seeking employment elsewhere to improve their wages and conditions of employment, and caused additional financial injury to Drivers who sought to work for other Carriers. Compl. ¶ 100.

VI. Conclusion

For all of the foregoing reasons, the Court should deny Defendants' motion to dismiss in its entirety.

Respectfully submitted October 2, 2020.

By: */s/ Michael J.D. Sweeney*

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