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LAWRENCE M. MARON, J.S.C.

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SUPERIOR COURT OF NEW JERSEY
LAW DIVISION: HUDSON COUNTY

DOCKET NO. HUD-L-6191-11

GONZALO CHIRINO, FELIX D. JAY, ANDREW ANKLE, GARY JOSEPHS, RENE CAMPBELL, ASTON HEMLEY and MARYAN VASYUTA, on behalf of themselves all others similarly situated,

Plaintiffs,

v.

PROUD 2 HAUL, INC., IVANA KOPROWSKI, and "Anonymous Managers 1-5" (names being fictitious),

Defendants.

Civil Action

**ORDER ENJOINING DEFENDANTS TO ENTER INTO LEASES WITH CLASS MEMBERS THAT CONFORM TO TIL REGULATIONS**

This matter, having been opened to the Court by motion of plaintiffs seeking leave to apply on short notice for injunctive relief to require defendants to enter into written leases with all Class members that they engage which conform to the Truth-In-Leasing ("TIL") Regulations, 49 C.F.R. Part 376, and the Court having found in its Order and Decision of February 14, 2014, that "Defendants do not have leases with Plaintiffs that comply with the TIL Regulations," and Defendant Ivana Koprowski having certified to the Court on December 13, 2013, that she would not allow Defendant Proud 2 Haul, Inc. ("P2H") to engage in interstate trucking operations without such conforming leases, and it appearing as of this date that defendants do not yet have such conforming leases, and the Court having considered the various papers submitted by the parties, the previously filed papers on plaintiffs' motion for partial summary judgment, the arguments of counsel, and all other relevant matters of record, and good cause appearing,

**IT IS** this 28 Day of April, 2014, **ORDERED and ADJUDGED** that

1. Plaintiffs' motion for leave to move on short notice be and hereby is granted.

2. Plaintiffs' application for entry of an injunction be and hereby is granted.

3. Defendants shall enter into a written lease that conforms to the TIL regulations with each member of the Class that they ~~have engaged or~~ will engage hereafter. Defendants shall file and serve an exemplar of such a lease within ten (10) days of this date. Defendants shall file and serve a certification that all owner-operators have signed the exemplar lease within twenty (20) days of this date.

L. Maron

LAWRENCE M. MARON, J.S.C.

# FINDINGS OF FACT AND CONCLUSIONS OF LAW

Chirino v. Proud 2 Haul Inc

Docket: L-6191-11

Motion Returnable: 4/11/14

Relief Requested: Injunctive Relief

## FACTS

- In connection with their Motion for Summary Judgment returnable December 6, 2013, Plaintiffs asserted that there was a need for injunctive relief to require Proud 2 Haul to come into conformity with the Truth in Leasing Regulations.
    - Plaintiffs argued "it is pellucidly clear that defendant [P2H] will persist in disregarding the TIL Regulations, even with the entry of additional monetary judgments."
        - The Court denied the request for injunctive relief at that time because Proud 2 Haul's owner, Ms. Ivana Koprowski, certified that "As of January 1, 2014, Proud 2 Haul, Inc. will not engage, utilize, or assign any drivers to perform any interstate deliveries unless such driver has signed a Lease agreement. . .that conforms to and does not violate any provision of the TIL Regulations . . . ."
- On February 14, 2014, Defendants moved for reconsideration of this Court's Order Granting Summary Judgment in connection with the December 6, 2013 motion.
    - Plaintiffs noted, in opposition to the motion, that Defendants had still failed to enter into leases that conform to the TIL Regulations.
    - This Court stated in its Findings of Fact and Conclusions of Law: "Defendant, Ms. Koprowski, submitted a Certification in December, 2013 stating that she would not allow P2H to engage in interstate trucking without such conforming leases. Based on that representation, the Court did not issue an injunction requiring P2H to enter new leases with Plaintiffs. Should P2H not immediately reform its practices to satisfy the representations of Ms. Koprowski's Certification, the issue of injunctive relief may be revisited by the Court, upon further application from Plaintiffs."
- On March 26, 2014, Plaintiffs' counsel contacted two members of the class to determine whether Defendants had, in fact, provided new leases.
    - The class members indicated that they had not received new leases to sign.
- On March 28, 2014, Plaintiffs' counsel filed this motion, asking that it be heard on April 4, 2014.

- April 4, 2014 was not a motion return date. The motion was made returnable, on short notice, for April 11, 2014.

- On April 2, 2014, Defendants submitted opposition indicating that they were in the process of signing new leases and had forwarded to Plaintiffs' counsel all leases thusfar executed.
- On April 4, 2014, Plaintiffs' counsel submitted a letter stating that he had cross-referenced the list of signatories with the March 21, 2014 payroll records for Proud 2 Haul. Counsel found 33 owner-operators who had performed work for Defendants who had not signed new leases.
- In a reply brief submitted on April 4, 2014, Plaintiffs' counsel identified several provisions of the lease which he believed did not conform to the requirements of the Truth in Leasing Regulations.

MOVANT'S ARGUMENT

- An injunction is required to require Defendants to enter into conforming leases with Plaintiffs.

OPPOSITION ARGUMENT

- The motion is moot due to Defendants signing new leases with class members.

REPLY ARGUMENT

- The leases Defendants argue comply with the TIL Regulations are deficient and an injunction should still issue.

SUR REPLY

- Defendants filed a sur-reply on April 10, 2014 containing the Certification of Fritz R. Kahn, Esq.
- Mr. Kahn is currently a solo practitioner. Formerly, he was General Counsel for the Interstate Commerce Commission and a partner in a Washington D.C. law firm.
- Mr. Kahn opines that the leases are in "substantial compliance" with the TIL Regulations.
- Mr. Kahn avers that Section 7 of the new leases is in conformity with the TIL regulations pursuant to Owner Operator Independent Drivers Association, Inc. v. Mayflower Transit LLC, 615 F.3d 790 (7th Cir. 2010).
- Mr. Kahn indicates that this Court may not have jurisdiction and that the Complaint should have been brought in the Federal Motor Carrier Safety Administration pursuant to 49 C.F.R. 386.
- No injunction should issue because the issues with the new leases were not raised until Plaintiff's April 4, 2014 reply letter.

## ANALYSIS

Plaintiffs seek injunctive relief, requiring Defendants to enter into conforming leases with members of the class who continue to work with Defendants. The first question the Court must address is whether the leases that Proud 2 Haul contends are sufficient do, in fact, make Plaintiff's motion moot by bringing Proud 2 Haul into complete compliance with the TIL Regulations.

### I. THE SUFFICIENCY OF THE PROPOSED LEASES

Here, Plaintiff contends the leases provided by Proud 2 Haul are insufficient in several respects. The Court will address the sections in the order they were addressed by Plaintiff's counsel for the sake of clarity.

#### A. Section 7

49 C.F.R. 376.12(j)(1) requires: "The lease shall clearly specify the legal obligation of the authorized carrier to maintain insurance coverage for the protection of the public pursuant to FMCSA regulations under 49 U.S.C. 13906. The lease shall further specify who is responsible for providing any other insurance coverage for the operation of the leased equipment, such as Bobtail Insurance. If the authorized carrier will make a charge back to the lessor for any of this insurance, the lease shall specify the amount which will be charged-back to the lessor."

Section 7 of the exemplar lease provided to the Court states: "The LESSEE [P2H] has a legal obligation and the responsibility to maintain liability and cargo insurance coverage for the protection of the public as required by Federal Highway Administration regulations under 49 U.S.C. 10927, as amended by Public Law 104-88. All insurance cost for the operation of LESSOR's equipment while in the service of LESSEE shall be paid by LESSOR. If the cost of the insurance is initially paid by LESSEE, such costs will be charged-back in full to LESSOR."

Plaintiff contends that the literal reading of 49 C.F.R. 376.12(j)(1), which is generally followed by federal courts, necessitates the conclusion that Section 7 does not comply with the regulation. See Owner-Operator Indep. Drivers Ass'n v. Landstar Sys., 541 F.3d 1278, 1284 n.7. (11th Cir. 2008).

Plaintiffs argue that the second sentence of (j)(1) states that the lease must "specify who is responsible for providing any other insurance coverage for the leased equipment." (emphasis added). Plaintiffs contend that "any other" refers to the first sentence's requirement of the authorized carrier, here P2H, carrying the federally mandated insurance "for the protection of the public." Plaintiffs contend that it is clear that P2H is responsible for the insurance addressed by sentence 1 and either party may be responsible for the insurance coverage addressed by sentence 2. Therefore, Plaintiffs argument concludes that the third sentence, which refers to a chargeback for "any of this insurance" must only apply to the insurance in sentence 2.

Plaintiffs' reading has been rejected by federal courts. In Owner Operator Independent Drivers Association, Inc. v. Mayflower Transit LLC, 615 F.3d 790 (7th Cir. 2010), Judge Easterbrook wrote that the third sentence of (j)(1) refers to "any" of "this" insurance and, therefore, applies to the insurance in both the first and second sentences.

The Court is persuaded by Judge Easterbrook's reading of the regulation. As Judge Easterbrook noted, the regulation could easily have been written to encompass only sentence two but, instead, covers "any" of the insurance mentioned in (j)(1).

Therefore, the Court finds that this provision of Section 7 does not render the leases non-compliant with the TIL Regulations.

Plaintiff also argues that 49 C.F.R. 376.12 (j)(2) requires the lease to contain language specifying that the authorized carrier will provide the lessor with a copy of each policy of insurance purchased by the lessor through the authorized carrier. However, that language is only required "If the lessor purchases any insurance coverage. . .through the authorized carrier." 49 C.F.R. 376.12(j)(2) (emphasis added).

Here, although the lease may contemplate the potential purchase of such insurance, it is not clear that the owner-operators will purchase, or are required to purchase, any insurance through P2H. Therefore, until such a situation arises, the lease need not contain such language and no violation has occurred.

B. Section 8

49 C.F.R. 476.12(e) states, in relevant part: "The lease shall clearly specify the responsibility of each party with respect to the cost of fuel, fuel taxes, empty mileage, permits of all types, tolls, ferries, detention and accessorial services, base plates and licenses, and any unused portions of such items."

Plaintiffs contend that Section 8 of the lease does not contain specifications as to empty mileage, permits of all types, base plates and licenses or any unused portions of such items.

The Court has reviewed the entirety of the exemplar lease and has not found any statement regarding which party is responsible for empty mileage, permits, base plates and licenses or any unused portions of such items. Therefore, as strict compliance with the TIL Regulations is mandated, the Court finds that Section 8 of the lease does not conform to the TIL Regulations.

C. Section 10

49 C.F.R. 376.12(e) provides, in relevant part: "The lease shall clearly specify who is responsible for loading and unloading the property onto and from the motor vehicle, and the compensation, if any, to be paid for this service."

Section 10 of the lease states "The DRIVER is responsible for loading and unloading freight to and from the trailer, unless proper notations are made on the bill of lading that the driver is responsible."

Plaintiffs argue that Section 10 is deficient because the "DRIVER" is not a party to the lease. Additionally, the compensation for loading and unloading is not specified.

First, the Court notes that "DRIVER" is not defined in the lease, unlike all the other terms presented in all capital letters. Additionally, Section 10 does not make sense because it states that the "DRIVER is responsible," unless the appropriate notations are made, in which case the "driver" is responsible." It would therefore appear that the driver is always responsible. Section 10 is, at best, poorly drafted and, at worst, deceptive.

Nevertheless, the failure to specify the compensation, if any, to be provided for loading and unloading services necessitates the conclusion that Section 10 of the lease does not comply with the TIL Regulations.

D. Section 5

49 C.F.R. 376.12(g) states,[1] in relevant part: "When a lessor's revenue is based on a percentage of the gross revenue for a shipment, the lease must specify that the authorized carrier will give the lessor, before or at the time of settlement, a copy of the rated freight bill or a computer-generated document containing the same information, or, in the case of contract carriers, any other form of documentation actually used for a shipment containing the same information that would appear on a rated freight bill."

Plaintiffs contend that Section 5 of the exemplar lease does not specify that the authorized carrier will give the lessor the documentation required by the regulation.

The Court has examined Section 5 and the lease in its entirety. Nowhere in the lease is there a specification that P2H will give the lessor the documents required by the regulation. This omission necessitates the conclusion that the lease does not comply with the TIL Regulations.

E. Section 9

49 C.F.R. 376.12(j)(3) states: "The lease shall clearly specify the conditions under which deductions for cargo or property damage may be made from the lessor's settlements. The lease shall further specify that the authorized carrier must provide the lessor with a written explanation and itemization of any deductions for cargo or property damage made from any compensation of money owed to the lessor. The written explanation and itemization must be delivered to the lessor before any deductions are made."

Plaintiffs contend that while Section 9 of the lease properly states that that a written explanation will be provided, it does not require the written explanation to be furnished prior to a deduction.

[1] Plaintiffs' counsel mistakenly cited 49 C.F.R. § 476.12(f) as the applicable regulation.

The Court finds that the regulation does not require the lease to state that the written explanation will be furnished prior to a deduction being made. The final sentence of (j)(3) is a matter of practice, rather than a provision to be included in the lease. That conclusion is evidenced by the fact that all the sentences mandating a term to be included in the lease are clearly prefaced by the phrase "the lease shall." The sentence mandating that the written explanation be furnished is not prefaced by "the lease shall" and, therefore, the lease need not contain such language to be in conformity with the TIL Regulations. Section 9 appropriately states the conditions for a deduction and that a written explanation will be furnished, which is the only requirement imposed by (j)(3).

Therefore, as to Section 9, the Court concludes that the exemplar lease complies with the TIL Regulations.

F. Section 1/Appendix A

Plaintiffs argue that the lease is insufficient because it does not specify what equipment is leased. Specifically, Plaintiffs assert that the use of the definite article "the" throughout the TIL Regulations evidences an intent to have a single piece of equipment.

The lease, in Section 1,[2] states that "The LESSEE hereby leases the equipment and services of LESSOR, owned and described in Appendix 'A'."

Plaintiffs indicate that there are no Appendices to the written exemplar leases and that it is improper to have a lease that covers more than one piece of equipment.

The Court finds that the use of an Appendix, as P2H has done in this case, is a matter of drafting convenience to avoid the necessity of having another blank space in the form lease that needs to be filled out every time a lease is signed. Plaintiffs have not cited any provision of the TIL Regulations that proscribes the use of such an Appendix as a matter of convenience. Moreover, there is no evidence that Defendants are attempting to lease multiple sets of equipment through the use of an Appendix, and, therefore, the Court need not address the intent of using the definite article "the" at this time.

[2] The lease contains two sections labeled (1). The first describes the term "LESSEE." The second is the first section of the agreement between the parties. The Court's reference to "Section 1" is a reference to the latter.

Provided that the Appendix "A" actually exists with every lease and is attached thereto, the Court finds that there is no violation of the TIL Regulations.

II. INJUNCTIVE RELIEF

Because the Court finds that the leases are not in conformity with the TIL Regulations, the issue of injunctive relief is not moot and must be addressed.

Defendants argue that no injunction should issue because they have attempted to sign new leases in good faith, the leases are "substantially compliant" with the TIL Regulations, and the issues with the present leases were not raised by Plaintiffs until the filing of reply papers in connection with this motion.

Injunctive relief is appropriate where the party seeking the injunction has demonstrated: "1) a reasonable probability of success on the merits, 2) that a balancing of the equities and hardships favors injunctive relief, 3) that the movant has no adequate remedy at law and that the irreparable injury to be suffered in the absence of injunctive relief is substantial and imminent and 4) that the public interest will not be harmed." See Brown v. City of Paterson, 424 N.J. Super. 176, 183 (App. Div. 2012) (numerals added); See also Crowe v. De Goia, 90 N.J. 126 (1982).

This Court deferred the issuance of an injunction in December 2013 based on Ms. Koprowski's Certification that Proud 2 Haul "will not engage, utilize, or assign any drivers to perform any interstate deliveries unless such driver has signed a Lease agreement. . .that conforms to and does not violate any provision of the TIL Regulations . . . ."

Despite that Certification, Defendants did not reform their conduct. In connection with Defendants' motion for reconsideration on February 14, 2014, the Court stated "Should P2H not immediately reform its practices to satisfy the representations of Ms. Koprowski's Certification, the issue of injunctive relief may be revisited by the Court, upon further application from Plaintiffs."

As noted supra, the Court finds that P2H has not immediately reformed its practices to satisfy the representations of Ms. Koprowski's Certification and now revisits the issue of whether an injunction should issue at the request of Plaintiffs.

Defendants have had since December of 2013 to prepare leases that comply with the TIL Regulations. The facts do not show that a "good faith" effort to comply with the TIL Regulations has been made. Moreover, the fact that the deficiencies in a lease issued by a Federally Regulated Motor Carrier were not raised until the reply brief was filed cannot reasonably relieve Defendants of the obligation to enter into leases that comply with federal regulations.

Federal Courts have held that injunctions in cases such as this are appropriate. In Port Drivers Fed'n 18, Inc. v. All Saints Expres, Inc., 757 F. Supp. 2d. 440 (D. N.J. 2010), the District Court for the District of New Jersey determined that injunctive relief was appropriate where a Motor Carrier failed to enter into conforming leases, despite issuing addenda to the leases that did not cause the leases to conform to the requirements of the Truth in Leasing regulations. Id. at 461.

Addressing the first two factors for granting injunctive relief, the Court held:

> The burden of future litigation "might, in and of itself, constitute irreparable harm" because a party should not have to continue to re-litigate issues that have already been decided. See Penn. Transp. Auth. v. Penn. Public Util. Comm'n, 210 F. Supp. 2d 689, 726 (E.D. Pa. 2002). Additionally, a permanent injunction is appropriate where "a full evidentiary hearing disclosed a history of repetitive, flagrant violations, suggesting a real danger of recurrent evasions." U.S. v. Spectro Foods Corp., 544 F.2d 1175, 1182 (3d Cir. 1976).
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> [Id. at 461.]

Here, the Court is persuaded by the District Court's reasoning. The availability of future litigation to collect fines is not sufficient to remedy the harm suffered by Defendants not entering into leases with those Plaintiffs with whom it continues to do business. Moreover, Defendants represented to this Court in December that they would not engage in interstate trucking without having leases that conform to the TIL Regulations. That representation was, apparently, not accurate. Four months have passed and Defendants continue to operate without conforming leases. Therefore, the Court finds that irreparable harm exists as Defendants continue to engage the services of Plaintiffs but have not entered into TIL Regulation compliant leases.

Turning to factor three, the All Saints court stated:

> The balance of hardships weighs in favor of plaintiffs. All Saints is already required by law to comply with the Regulations; if an injunction is granted, it should suffer no hardship in bringing its leases into conformity with the law. By contrast, if an injunction is denied, plaintiffs may well suffer hardship as a result of leases that violate the Regulations, as they will be denied basic employment information such as the duration of their work and the amount of their compensation.

Again, the Court finds this reasoning to be persuasive. Proud 2 Haul is already required, as a matter of law, to conform its behavior with the TIL Regulations. If an injunction is not issued, Defendants will be denied the basic information they are required to possess under the law, diminishing both their rights and their bargaining power. See id. at 461 (citing Owner-Operator Indep. Drivers Ass'n v. Swift Transp. Co., 367 F. 3d 1108, 1110 (9th Cir. 2004)).

Last, the Court finds that there is no harm to the public interest from the granting of an injunction requiring a federally regulated motor carrier from coming into compliance with the federal regulations that govern its operation for the protection of the owner-operators with whom it does business. In fact, as noted in All Saints, requiring conformity with the TIL Regulations and giving the owners of the equipment the appropriate bargaining power, such an injunction advances the public interest. Id. at 461.

Therefore, the Court finds that it is proper to issue an injunction at this time. Defendants have persisted in their conduct and continue to violate the TIL Regulations with respect to the class members.

The only issue left to address is the scope of the injunction.

Plaintiff seeks the following injunction: "Defendants shall enter into a written lease that conforms to the TIL regulations with each member of the Class that they have engaged or will engage hereafter. Defendants shall file and serve an exemplar of such a lease within ten (10) days of this date. Defendants shall file and serve a certification that all owner-operators have signed the exemplar lease within twenty (20) days of this date."

The phrase "that they have engaged or will engage hereafter" is, on its face, too broad. "Have engaged" indicates that Defendants would have to go back and enter into leases with each

individual member of the class they ever did business with as an owner-operator. That result is not necessary and the Court cannot require Defendants to continue doing business with the class members. It is the prospective conduct of Proud 2 Haul that the Plaintiffs, and the Court, are concerned.

With respect to specific lease provisions that are in dispute, the Court finds that Sections 7, 9, 1 and Appendix A are in compliance with the TIL Regulations. However, Sections 5,8 and 10 do not conform to the TIL Regulations and shall be brought into compliance immediately. An exemplar lease shall be served within 10 days of the date of this Order. Defendants shall certify that all owner-operators engaged by them have signed compliant leases within 20 days of the date of this Order.

In an effort to eliminate the need for the parties to litigate each provision as the leases are redrafted, the Court requested that the parties file supplemental briefs regarding the issue of whether there was an independent agency or entity that could review the leases and determine the validity of lease clauses under the TIL Regulations. The parties were asked to file their supplemental briefs by Tuesday, April 22, 2014.

Defendants' counsel contacted the Federal Motor Carrier Safety Administration "Field Office" for New Jersey and was informed that the office will not entertain a review of the entirety of the lease, but will reply as to whether a specific provision complies with the TIL Regulations.

Plaintiffs' counsel provided a lengthy brief demonstrating that federal agencies are not the appropriate forum for such disputes and that the doctrine of primary jurisdiction is generally not applicable to the TIL Regulations. Plaintiff contends that the FMCSA has published decisions stating that it will not adjudicate disputes regarding the TIL Regulations and Plaintiff's counsel confirmed with Mr. Madalen, an employee of the office of the FMCSA's Office of Chief Counsel, that the FMCSA will not review leases for compliance with the TIL Regulations.

By asking the parties to investigate and brief this issue, the Court was not attempting to defer to a federal agency or seeking to have a federal agency resolve the dispute. Instead, the Court was interested in determining whether there was a federal agency or other entity with specific knowledge about such leases that could serve as a neutral arbiter and opine on the

sufficiency of certain provisions of the leases based on its familiarity with the area of law. This might have served to reduce or eliminate future motion practice or litigation on this issue.

It appears that the New Jersey Field Office of the FMCSA is willing to address certain provisions of the leases, albeit informally, and opine on whether they comply. This review is not binding. It is merely a forum for the parties to address their disputes without the need for Court intervention in the event that they cannot determine the validity of a specific lease provision on their own. The Field Office may well have examples of acceptable lease provisions that can be of guidance to both parties in determining if the new leases comply with the TIL Regulations.

III. PRIMARY JURISDICTION

Mr. Kahn's Certification states that this Court should invoke the doctrine of primary jurisdiction, which allows for agencies to pass on certain administrative issues. Mr. Kahn argues that "this Court should stay further proceedings and under the primary jurisdiction doctrine of United States v. Western Pac. R. Co., 352 U.S. 59, 63 (1956), oblige [Plaintiffs] to commence a civil penalty proceeding by contacting the Field Administrator of the FMCSA." Cert. at ¶ 10. Mr. Kahn asserts that "[t]he Court would not lose jurisdiction but gain the benefit of the knowledge and experience of the FMCSA charged with the responsibility of enforcing the Truth in Leasing Regulations." Id.

Mr. Kahn's argument begins with 49 C.F.R. 386.12. The relevant provision, 49 C.F.R. 386.12(a) states, in relevant part:

> Any person may file a written complaint with the Assistant Administrator alleging that a substantial violation of any regulation issued under the Motor Carrier Safety Act of 1984 is occurring or has occurred within the preceding 60 days. A substantial violation is one which could reasonably lead to, or has resulted in, serious personal injury or death.

The provision cited does not support the result requested. The regulation provides only for complaints that assert violations "which could reasonably lead to, or has resulted in, serious personal injury or death." That is not the issue in the case before this Court.

Here, Plaintiffs allege that they are being deprived of their rights because Defendants have entered into leases that do not comply with the TIL Regulations. This deprives them of such

benefits as increased bargaining power and the right to know how their compensation is calculated. There is no allegation that Defendants have created a violation that "could reasonably lead to, or has resulted in, serious personal injury or death." Therefore, Plaintiffs could not file a complaint pursuant to 49 C.F.R. 386.12.

Federal courts regularly consider suits for damages, and injunctions, under the TIL Regulations. See e.g., All Saints, supra. 49 U.S.C. 14704 (a) provides "A person may bring a civil action for injunctive relief for violations of sections 14102, 14103, and 14915(c) [49 USCS §§ 14103, 14301,14915(c)]." This case is brought for a violation of 49 U.S.C. 14102, which permits the Secretary of Transportation to promulgate rules requiring leases between the motor carrier and the owner of the equipment.

As to the doctrine of primary jurisdiction, the Court makes no findings. The Defendants have not briefed the issue and it is only raised by way of citation to a Western Pac. R. Co., supra, and a Third Circuit case.

Notably, the Third Circuit case, College Faculty v. Hufstedler, stated the following:

> As the Supreme Court explained in Rosado v. Wyman, 397 U.S. 397, 406, 25 L. Ed. 2d 442, 90 S. Ct. 1207 (1970), "neither the principle of 'exhaustion of administrative remedies' nor the doctrine of 'primary jurisdiction ' has any application" to a situation where the agency lacks procedures for complainants to "trigger and participate in" the administrative process.
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> [703 F.2d. 732; 737 (3d. Cir. 1983).]

The Court notes that in supplemental briefing, Plaintiff's counsel identified the relevant precedent in the area of the TIL Regulations and indicated that the doctrine of primary jurisdiction is inappropriately invoked in cases involving the TIL Regulations. See Owner Operator Independent Drivers Association v. New Prime, Inc., 192 F. 3D 778 (8th Cir. 1999) (rejecting primary jurisdiction and reinstating the judicial action), cert. den., 529 U.S. 1066 (2000). Moreover, a petition filed by the same parties was denied with a broad statement that where a petition "fails to raise any issues not adequately addressed by existing legal precedent which require the special expertise of [the] agency" the petition will be denied. 63 FR 31827 (June 10, 1998). Therefore, it may be that the FMCSA would decline to adjudicate any dispute between the parties, making primary jurisdiction unavailable.

Because the provision cited (49 C.F.R. 386.12) which would, according to Mr. Kahn, grant Plaintiffs relief in the administrative forum does not appear to be applicable to this case, the Court declines to invoke the doctrine of primary jurisdiction, on that basis, at this time. The Court makes no findings as to the applicability of the doctrine. The parties may brief the issue and file the appropriate motions if they so choose.

## CONCLUSION

For the foregoing reasons, the Court finds that Defendants exemplar leases do not conform to the TIL Regulations. Because of the continued non-compliance with the TIL Regulations and the instructions of this Court, the Court finds that the issuance of an injunction that enjoins Proud 2 Haul from violating the TIL Regulations is appropriate.

Therefore, Defendants shall enter into a written lease that conforms to the TIL Regulations with each member of the class that they will engage hereafter. Defendants shall file and serve an exemplar of such a lease within 10 days of the date of this Order. Defendants shall file and serve a certification that all owner-operators have signed the exemplar lease within 20 days of the date of this Order.