

<p>Colorado Court of Appeals 101 West Colfax Avenue, Suite 800 Denver, CO 80202</p>	
<p>Industrial Claim Appeals Office DD254052009</p>	
<p>Appellant:</p> <p>SZL, Inc.</p> <p>v.</p> <p>Appellees:</p> <p>Michael J. Smith and Industrial Claim Appeals Office</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p>
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<p style="text-align: center;">BRIEF OF AMICI CURIAE COLORADO MOTOR CARRIERS' ASSOCIATION AND AMERICAN TRUCKING ASSOCIATIONS, INC. IN SUPPORT OF APPELLANT, SZL, INC.</p>	

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

Signature of Attorney

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**BRIEF OF AMICI CURIAE COLORADO MOTOR CARRIERS’
ASSOCIATION AND AMERICAN TRUCKING ASSOCIATIONS, INC.
IN SUPPORT OF APPELLANT, SZL, INC.**

Amici Curiae, the Colorado Motor Carriers’ Association (“CMCA”) and American Trucking Associations, Inc. (“ATA”), by counsel and pursuant to C.A.R. 29, respectfully submit the following arguments in support of Appellant, SZL, Inc. (“SZL”), in its appeal from the Final Order of the Industrial Claims Appeals Office (“ICAO”) in the proceedings below.

I.

IDENTITY AND INTEREST OF AMICI

CMCA is a nonprofit corporation established in 1939 to promote and represent the trucking industry in Colorado. The goals of CMCA are to encourage friendly relations between members; to foster and advance safety upon the public roads and highways; to affiliate with or establish reciprocal relations with any other associations, commercial or industrial, and ATA; to disseminate information and statistics valuable to the members of all of the several national conferences of the trucking industry; and to promote cordial relations with the public and national, state and municipal authorities in matters of common interest to the industry.

ATA is the national trade association of the trucking industry whose mission is to protect and promote the common interests of trucking. Made up of motor

carriers, state trucking associations (including CMCA), and national trucking conferences, ATA's membership includes approximately 2,000 of the nation's largest trucking companies and many industry suppliers of equipment and services. Directly and through its affiliated organizations, ATA represents more than 37,000 companies of every size, type, and class of motor carrier.

Most of the motor carrier members of the *amici* trucking associations utilize to some degree trucks leased from individuals, sole proprietors, or legal entities – commonly referred to as “owner-operators.” Those owner-operators have an ownership interest in the leased trucks and contractually supply drivers for their operation. Indeed, many motor carriers operate business models that predominantly feature vehicles leased from owner-operators.

In virtually all cases, the motor carrier and owner-operator mutually agree that the owner-operator will be classified as an independent contractor in order to secure the many benefits that accrue to both parties on account of this relationship. From the motor carrier's perspective, the independent contractor relationship saves equipment and capital costs, provides a mature, experienced workforce, and promotes significant operational flexibility. From the owner-operator's perspective, the relationship offers financial, lifestyle, and entrepreneurial advantages not available to employee drivers.

The entrepreneurial advantages offered by the owner-operator business model are at the heart of this case. In the Final Order under review, the ICAO held that an owner-operator leased to SZL, Claimant Michael J. Smith (“Smith”), was not engaged in an “independently established business” within the meaning of Col. Rev. Stat. § 8-70-115(1)(b) and therefore was SZL’s employee for purposes of Colorado’s unemployment insurance program. In support of this conclusion, the ICAO relied on the fact that that Smith, whose vehicle was acquired in the first instance by leasing it from SZL in an arrangement referred to as a “leaseback” program, did not perform driving services for other motor carriers while he was under lease with SZL.

The ICAO ruling betrays an unfamiliarity with the general practices and regulations of the motor carrier industry in which the *amici* trucking associations’ members operate. The *amici* trucking associations are especially well suited to provide the Court an overview of the independent nature of an owner-operator’s business and to cite to the Court well-established precedent that the highly regulated nature of the trucking industry does not negate that independence. ATA will also explain the common use in the trucking industry of leaseback arrangements in the establishment of owner-operators’ businesses and why such arrangements do not diminish the independent nature of those businesses.

Amici will also provide insight into the regulatory structure to which motor carriers and owner-operators are subject under controlling federal law and explain how Colorado law expressly recognizes that motor carrier satisfaction of leasing regulatory requirements is not an appropriate factor in deciding whether owner-operators are conducting an independent business. *See* Colo. Rev. Stat. § 40-11.5-102. The ICAO decision incorrectly dismissed Colorado’s statutory recognition that satisfaction of leasing requirements does not affect the independent nature of owner-operator businesses as being not “determinative” of Smith’s entitlement to unemployment benefits. That statutory recognition, however, should be considered controlling in this matter.

First, it merely reflects and codifies well-settled legal precedent in this area. Second, the basis for the ICAO decision, that Smith was not independent because he could not work for multiple parties concurrently, is a limitation directly traceable to the leasing regulations. As discussed herein, the leasing regulations prevent any owner-operator from leasing a vehicle to more than one motor carrier at a time and that fact should not have been relied upon by the ICAO as being indicative of a lack of independence, let alone controlling.

II.

ARGUMENT

Pursuant to Colo. Rev. Stat. § 8-70-115(1)(b), Smith’s application for unemployment benefits was governed by a two-part test under which his services were deemed “employment” unless he was shown to be (1) “free from control and direction in the performance of [his] service, both under his contract for the performance of service and in fact” and (2) “customarily engaged in an independent trade, profession, or business related to the service performed.” Significantly, Colo. Rev. Stat. § 8-70-115(1)(b) goes on to provide that

the degree of control exercised by the person for whom the service is performed over the performance of the service or over the individual performing the service, if exercised pursuant to the requirements of any state or federal statute or regulation, shall *not* be considered.

(Emphasis supplied). In this respect, the ICAO seemingly recognized the legal irrelevance of regulatorily-imposed obligations in its conclusion that the hearing officer’s order did not support a “control” finding under the first part of the statutory “employment” test given that several of the factors cited by the hearing officer were mandated by federal regulation. For this reason, *Amici* need not undertake a separate analysis of the facts of this case against the control standard of the employment test. What *Amici* will address, however, is the ICAO’s failure

to acknowledge that trucking industry regulation *also* has a significant impact upon the second, “independent business” prong of the two-part employment test and that, in particular, the dedication of Smith’s leased vehicle to SZL’s use should not dictate an employment finding.

As shown below, the ICAO’s ruling conflicts with the Colorado legislature’s express determination that regulation of the owner-operator’s truck has no legal impact upon his independent contractor status. *Amici* also submit that the regulatory mandates associated with leasing arrangements in the trucking industry, along with owner-operators’ independence and entrepreneurialism, plainly distinguish this case from Colorado decisions upon which the Final Order relies and call for a different legal standard for assessment of the “independent business” question under Colo. Rev. Stat. § 8-70-115(1)(b). Finally, the leaseback arrangement between Smith and SZL should not change Smith’s status as an independent contractor and should instead be recognized as a common industry practice in the trucking industry that is utilized by owner-operators nationwide to establish and further their independent business activities. These points, because they raise questions of statutory interpretation and the application of governing legal principles, present questions of law for this Court to decide without deference to the ICAO’s ruling or the weight of the evidence presented below. *See Gonzales*

v. Industrial Comm’n, 740 P.2d 999, 1001 (Colo. 1987); *Prince-Walker v. Industrial Claim Appeals Office*, 870 P.2d 588, 591 (Colo. Ct. App. 1993), *aff’d sub nom*, 883 P.2d 3 (Colo. 1994).

A.

The Final Order Conflicts With The Colorado Legislature’s Determination That Regulation Of The Owner-Operator’s Truck Has No Legal Impact Upon His Independent Contractor Status

In the proceedings below, SZL directed the ICAO’s attention to Colo. Rev. Stat. § 40-11.5-101, which expressly recognizes that motor carriers may use independent contractors in the provision of trucking services, and to Colo. Rev. Stat. § 40-11.5-102 (“Section 40-11.5-102), which contains two important – and controlling – provisions bearing upon the ICAO’s decision in this case.

First, Section 40-11.5-102(1)(b) provides that lease agreements between motor carriers and owner-operators may require the carrier to “enforce compliance with . . . federal, state, and municipal statutes, ordinances, and regulations by the independent contractor,” which requirements “shall *not* affect the status of the independent contractor as an independent contractor for purposes of this article.” (Emphasis supplied). Second, Section 40-11.5-102(1)(i) directly authorizes the use of lease terms requiring “that the independent contractor *only* work for the certificated carrier or contract carrier as a driver during the time the independent

contractor is operating the motor vehicle pursuant to the lease.” In addition, under subsection (4) of the same statute, leases that include that work limitation, which require compliance with federal leasing regulations such as the “exclusive use” requirement, and which include other designated criteria “shall be presumed *prima facie* evidence of an independent contractor relationship between the parties to the lease” – a presumption that may only be overcome by “clear and convincing evidence of an employment relationship between the parties . . . considering only factors not in the lease.” (Emphasis supplied).

The Final Order’s determination that Smith was an employee of SZL merely because he was restricted from concurrently performing similar services for others is directly contrary to this recognition by the Colorado legislature that neither compliance with general regulatory requirements, an exclusive working relationship with the leasing carrier, nor the motor carrier’s exclusive use of an owner-operator’s truck adversely affects the independent contractor relationship between the parties.

There is good reason for the Colorado legislature’s enactment of Section 40-11.5-102’s terms based upon the long history of federal regulatory control over trucking in general and motor carrier leases with owner-operators in particular. The use of commercial motor vehicles by motor carriers and their drivers has long

been subject to extensive regulation by both the Federal Motor Carrier Safety Administration (“FMCSA”) and its statutory predecessor, the Interstate Commerce Commission, under the Federal Motor Carrier Safety Regulations set forth at 49 C.F.R. §§ 390.1 through 399.211 pursuant to 49 U.S.C. § 31136. In addition, and as is more pertinent to this case, 49 U.S.C. § 14102(a) provides for FMCSA regulation of a motor carrier’s use of motor vehicle equipment it does not own, and, as a result, the Federal Leasing Regulations at 49 C.F.R. §§ 376.1 *et seq.* dictate the specific terms and conditions required when motor carriers lease trucks from owner-operators.

Most significantly, 49 C.F.R. § 376.12(c)(1) requires the motor carrier to “assume complete responsibility” for the operation of the leased equipment and further obligates the motor carrier to maintain “*exclusive possession, control, and use of the equipment for the duration of the lease.*” (Emphasis supplied). By the same token, the FMCSA expressly commands in the same regulation that “[n]othing” in the “exclusive use” requirement “is intended to affect whether the lessor or driver provided by the lessor is an independent contractor or an employee of the authorized carrier lessee.” 49 C.F.R. § 376.12(c)(4). To the contrary, recognizing the distinction between regulation of the leased *truck*, as opposed to regulation of the *driver* and his relationship with the motor carrier, the FMCSA

pointedly observes that “[a]n independent contractor relationship may exist when a carrier lessee complies with 49 U.S.C. 14102 and attendant administrative requirements.” *Id.*

Accordingly, Section 40-11.5-102(4), in its express recognition that lease terms that require exclusive dedication of the owner-operator’s vehicle to a single motor carrier are not only consistent with independent contractor status but, when employed in association with other permissible lease terms are “*prima facie* evidence of an independent contractor relationship between the parties,” is an acknowledgment of the “exclusive use” requirement of federal law – a requirement that both the FMCSA and courts across the country have determined to be of no effect when assessing the independent contractor relationship between motor carriers and owner-operators. Case law authority on this point is too extensive to cite exhaustively,¹ but, most importantly for this Court’s purposes, the ICAO’s

¹ See e.g., *North American Van Lines, Inc. v. NLRB*, 869 F.2d 596, 599 (D.C. Cir. 1989) (“employer efforts to ensure the worker’s compliance with government regulations, even when those efforts restrict the manner and means of performance, do not weigh in favor of employee status”); *Ruiz v. Affinity Logistics Corp.*, ___ F.Supp.2d ___, 2010 WL 1038226 *4 (S.D. Cal. 2010) (federal leasing regulations, including “exclusive possession, control, and use of the equipment” requirement do not affect whether owner-operator is an independent contractor or an employee); *Pouliot v. Paul Arpin Van Lines, Inc.*, 292 F.Supp.2d 374, 383 (D. Conn. 2003) (lease regulations have no impact on the type of relationship that exists between the parties to the lease); *Upshaw v. Hale Intermodal Transport Co.*, 480 S.E.2d 277, 278 (Ga. Ct. App. 1997) (federal leasing requirement that motor carrier have “full direction and control of owner-operator leased vehicles” does not affect independent contractor relationship); *Hernandez v. Triple Ell*
Continued

reliance on Smith's dedication of his truck to SZL's exclusive use as indicative of an employment relationship is not only in conflict with that authority but also at odds with the Colorado legislature's express determination otherwise.

In this respect, although the legislative history of Section 40-11.5-102 is not readily available, both this Court and the ICAO previously have recognized the purpose of the statute's enactment in 1990 was to ensure that owner-operators working for motor carriers under qualifying lease agreements would be presumed to be independent contractors for both unemployment compensation and workers' compensation benefit purposes. *See Frank C. Klein & Co., Inc. v. Colorado Compensation Insurance Authority*, 859 P.2d 323, 326 (Colo. Ct. App. 1993) (citing *Hearings Before the Senate Committee on Transportation*, 58th General Assembly (January 21, 1992)); *In re Claim of Laurel Butts v. D. Grego Trucking Co.*, 2003 WL 1883255 *2 (Colo. Ind. Cl. App. Off. March 17, 2003) (same).

Transport, Inc., 175 P.3d 199, 205 (Idaho 2007) ("adherence to federal law" was no evidence of motor carrier's control over owner-operator); *Universal Am-Can, Ltd. v. Workers' Compensation Appeal Board*, 762 A.2d 328, 336 (Pa. 2000) ("obligations imposed by law upon a motor carrier . . . when leasing equipment from an owner-operator are not probative" of the independent contractor determination); *Wilkinson v. Palmetto State Transportation Co.*, 676 S.E.2d 700, 705 (S.C. 2009), *cert. denied*, ___ U.S. ___, 130 S.Ct. 741 (2009) (federal regulation "is not intended to affect" the independent contractor determination under state law). *See also Lease & Interchange of Vehicles – Declaratory Order*, 1994 Fed. Carrier Cases ¶ 38,121, 1994 WL 70557 *6 (I.C.C. March 8, 1994) ("regulations should have no bearing" on the subject of state tort, contract, and agency law and must not "create carrier liability where none would otherwise exist").

Consequently, far from being not “determinative” as the Final Order concludes, the Colorado legislature’s express determination in Section 40-11.5-102 that neither compliance with governmental regulation nor a motor carrier’s exclusive use of an owner-operated vehicle adversely affects the parties’ independent contractor relationship should have been considered controlling. On this basis alone, the Final Order should be reversed.

B.

**The Regulatory Atmosphere Of The Trucking Industry, Along
With The Owner-Operator’s Independence And Entrepreneurialism,
Distinguish This Case From Other Colorado Case Law**

1. The *Carpet Exchange/Locke* Standard Should Not Have Been Applied

In assessing whether Smith was “customarily engaged in an independent trade, occupation, profession, or business related to the service performed” within the meaning of Colo. Rev. Stat. § 80-70-115(1)(b), the Final Order relies upon interpretations of that statutory term expressed in cases such as *Carpet Exchange of Denver, Inc. v. Industrial Claim Appeals Office*, 859 P.2d 278 (Colo. Ct. App. 1993), and *Locke v. Longacre*, 772 P.2d 685 (Colo. Ct. App. 1989), which, under the facts presented therein, required that the worker “actually and customarily provide similar services to others at the same time he or she works for the putative employer.” *Carpet Exchange*, 859 P.2d at 282.

As this Court has more recently recognized, however, the *Carpet Exchange/Locke* rule does not apply rigidly to all circumstances in the unbending fashion suggested by ICAO's decision. Plainly, that standard should not have applied here where trucking regulation requires the motor carrier's exclusive use of the owner-operator's truck and the owner-operator may not legally because of regulatory limitations actually provide similar services to others at the same time.

In *Long View Systems Corp. v. Industrial Claim Appeals Office*, 197 P.3d 295 (Colo. Ct. App. 2008), this Court ruled that lack of contemporaneous work for others is *not* dispositive of whether a worker maintains an independent trade or business in all cases and circumstances. *Id.* at 300. The *Long View* facts (which involved a short-term contract for consulting services) instead called for consideration of a non-exclusive list of other relevant factors including whether the worker was engaged in a trade or profession that would survive termination of the relationship with the putative employer; whether the worker, by reason of his skill, engaged in his own economic enterprise such that he bore the risk of his own unemployment; whether he could suffer a financial loss in connection with performance of the service; and whether he maintained business listings, used his own equipment, determined the price of his services, employed others to perform the services, and carried his own liability or workers' compensation insurance. *Id.*

Long View, therefore, stands for the direct proposition that lack of contemporaneous work for others is not always controlling on the “independent business” prong of the two-part employment test under Colo. Rev. Stat. § 80-70-115(1)(b) and that the ICAO should remain flexible to assessing a wide variety of factors when the *Carpet Exchange/Locke* rule is not appropriate to the particular case at hand.

And so it is here. The *Carpet Exchange/Locke* rule simply does not work in the regulatory atmosphere of the trucking industry in which, by federal law, the motor carrier must maintain “exclusive possession, use and control” over the owner-operator’s equipment – a factor that has been recognized as non-controlling on the independent contractor determination under Section 40-11.5-102.

2. A Multi-Factor Independent-Business Legal Test Should Be Used In Trucking Cases

A different legal standard for assessing the independence of an owner-operator’s business should be used. A wide variety of factors (many of which were identified in *Long View*) should be considered, all of which demonstrate – consistent with the evidence presented in Smith’s case – the owner-operators’ independence and entrepreneurialism in conducting his independent business. Such factors include the owner-operator’s responsibility for all of his own business and operating expenses; the accepted practice that he bear the entrepreneurial risk

of profit or loss in his business; the investment he makes in the equipment, including its maintenance and associated operating expenses and taxes; the knowledge and skills he develops to obtain the commercial driver's license required of a professional truck driver and to maintain regulatory compliance; and the freedom he enjoys to work when he wishes, to decline unprofitable loads, to choose his own routes of travel, to hire drivers or other helpers to assist in conducting his business, and to independently carry out the specific details of his work – all toward the goal of building his own independent business.²

3. Broad Recognition of the Independent Nature of Owner-Operator Businesses Supports a Finding of Independence in this Matter

As confirmed by the testimony of CMCA's representative in the proceedings below, independent owner-operators have long been an important component of virtually every segment of the trucking industry. They are used in most, if not all, sectors of the industry, including long-haul trucking, household goods moving, and

² *Speedy Messenger & Delivery Service v. Industrial Claim Appeals Office*, 129 P.3d 1094 (Colo. Ct. App. 2005), decided three years before the *Long View* decision rejected rigid application of the *Carpet Exchange/Locke* rule in all cases, did not have occasion to consider such factors in finding courier drivers to be employees of the messenger service for which they worked. Nor is there any indication in *Speedy Messenger* that the couriers operated vehicles leased to the messenger service pursuant to the Federal Leasing Regulations or were even operating in interstate commerce so as to be subject to the Regulators' requirements. Thus, no consideration was given to either the "exclusive use" requirement of 49 C.F.R. 376.12(c)(1) or Section 40-11.5-102's acknowledgment that dedication of a vehicle to a single motor carrier does not adversely affect the independent contractor determination.

intermodal operations.³ The trucking industry thus offers an opportunity for individuals to begin their own business, allowing owner-operators to live out their own version of the American dream. It allows them to run their own businesses, control their own finances, work the hours and days they choose, select the equipment they operate, and ultimately control their working environment.⁴

It is not surprising, therefore, that the majority of states recognize the independent nature of the owner-operator business model in trucking. At least 28 states, by statute, expressly acknowledge the owner-operator's status as an independent contractor for purposes of unemployment compensation, workers' compensation insurance, or both.⁵ Ten additional states have acknowledged

³ Estimates of the number of owner-operators vary. The Owner-Operator Independent Drivers' Association ("OOIDA") – the international trade association representing independent owner-operators and professional drivers – boasts nearly 160,000 members in the U.S. in Canada. See *OOIDA.com – Who We Are*, http://www.oida.com/who_we_are/index.shtml. According to an article in *Fleet Owner Magazine*, a vehicle inventory and use survey issued by the U.S. Census Bureau and Department of Commerce estimated that there were 390,000 owner-operators as of 2002. In the same article, an OOIDA spokesman estimated that there may be as many as 500,000 owner-operators in the U.S. Terrance Nguyen, *Gauging the Owner-Operator Population*, *Fleet Owner Magazine* (December 13, 2004).

⁴ Studies show high levels of job satisfaction among independent contractor owner-operators. See Upper Great Plains Transportation Institute, *Creating a Competitive Advantage Through Partnership With Owner-Operators* 12 (1992) (95% of owner-operators surveyed rated "independent lifestyle" as the most important aspect of their job).

⁵ Fifteen states have enacted statutes or regulations expressly exempting owner-operators from the application of unemployment insurance laws. Florida (Fla. Stat. § 443.1216(13)(w)); Georgia (Ga. Code § 34-8-35(n)(17)); Illinois (820 Ill. Comp. Stat. § 405/212.1); Indiana (Ind. Code § 22-4-8-3.5); Kansas (Kan. Stat. § 44-703(4)(Y)); Maryland (Md. Lab. & Empl. 8-206(f)); Minnesota (Minn. Stat. § 268.035(25b)); Missouri (Mo. Rev. Stat. § 288.035); Nebraska (Neb. Continued

through court decisions that owner-operators are independent contractors, not employees of the motor carriers to which they are leased.⁶ Although most courts deem owner-operators to be independent contractors based upon the right to control test only, which is far and away the prevailing test across the country, three courts have also found the owner-operator to be engaged in an independently-established business. *See State Compensation Insurance Fund*, 38 Cal. Rptr.2d at 105 (citing the contractors’ “true entrepreneurial opportunity”); *Hilldrup Transfer*

Rev. Stat. § 48-604(6)(q)); New Jersey (N.J. Stat. § 43:21-19(i)(7)(X)); Oklahoma (Okla. Stat. tit. 40, § 1-208.1); Oregon (Or. Rev. Stat. § 657.047); Texas (Tex. Lab. Code § 201.073); Virginia (Va. Code § 60.2-212.1); Wyoming (Wyo. Stat. § 27-3-108(x)). Twenty-three state statutes, including Colorado’s, exempt owner-operators from application of workers’ compensation laws. Alabama (Ala. Code § 25-5-1(4)); Colorado (Colo. Rev. Stat. § 8-40-301(5)); Florida (Fla. Stat. § 440.02(15)(D)(4)); Georgia (Ga. Code § 34-9-1(2)); Indiana (Ind. Code § 22-3-6-1(b)(8)); Iowa (Iowa Code §§ 85.61(11)(c)(3)); Kansas (Kan. Stat. § 44-503c); Louisiana (La. Rev. Stat. § 23:1021(10)); Maryland (Md. Lab. & Empl. § 9-218); Minnesota (Minn. Stat. § 176.043); Mississippi (Miss. Code § 71-3-5); Missouri (Mo. Rev. Stat. § 287.020(1)); North Carolina (N.C. Gen. Stat. § 97-19.1); North Dakota (N.D. Cent. Code § 65-01-03(2)); Oklahoma (Okla. Stat. tit. 85 § 3(9)); Oregon (Or. Rev. Stat. § 656.027(15)); South Carolina (S.C. Code § 42-1-360(9)); South Dakota (S.D. Cod. Laws § 62-1-10); Tennessee (Tenn. Code § 50-6-106(1)(A)); Texas (Tex. Lab. Code § 406.122(C)); Utah (Utah Code § 34A-2-104(5)(e)); Washington (Wash. Rev. Code § 51.08.180); Wyoming (Wyo. Stat. § 27-14-102(a)(vii)(O)). Only a select few of the cited statutes expressly remove from their independent contractor definitions owner-operators who acquire trucks through leaseback arrangements, a topic more fully discussed in Section C below. *See* 820 Ill. Comp. Stat. § 405/212.1; La. Rev. Stat. § 23:1021(10); N.J. Stat. § 43:21-19(i)(7)(X); Okla. Stat. tit. 85 § 3(9); S.C. Code § 42-1-360(9).

⁶ *State Compensation Insurance Fund v. Brown*, 38 Cal. Rptr.2d 98 (Cal. Ct. App. 1995); *Hanson v. Transportation General, Inc.*, 716 A.2d 857, 863 (Conn. 1998); *Hammond v. Department of Employment*, 480 P.2d 912 (Idaho 1971); *Broughton v. Quality Carriers, Inc.*, 2006 WL 2382747 (Ky. Ct. App. 2006); *Ferullo’s Case*, 121 N.E.2d 858 (Mass. 1954); *Commercial Motor Freight, Inc. v. Ebright*, 54 N.E.2d 297 (Ohio 1944); *Universal Am-Cam, supra* (Pa.); *Beany v. Paul Arpin Van Lines Co.*, 200 A.2d 592 (R.I. 1964); *Wilkinson, supra* (S.C.); *Jarrett v. Labor & Industrial Review Comm’n*, 607 N.W.2d 326 (Wis. Ct. App. 2000).

& Storage of New Smyrna Beach, Inc. v. Dep't of Labor & Employment Security, 447 So.2d 414, 417-418 (Fla. Ct. App. 1984) (observing that the owner-operator's success "depends on his own skill and acumen," not that of the motor carrier); *Hammond*, 480 P.2d at 914-15 (citing contractors' authority to hire subordinates and their ownership of and responsibility for all expenses related to equipment). A common theme running through all of the case law is the entrepreneurial activity in which the owner-operator is engaged – *not* whether the operation of any particular truck is used in exclusive service to a single motor carrier.

4. Reliance on a Single Entity For Compensation Is Not a Concern for Independent Contractors in the Trucking Industry

The *Carpet Exchange/Locke* rule requiring contemporaneous work for multiple hiring entities has been stated as being designed to ensure that a worker, whose income is almost "wholly dependent upon continued employment by a single employer, is protected from the vagaries of involuntary unemployment." *Long View*, 197 P.3d at 299. Owner-operators in the trucking industry are, however, not so dependent. Federal regulation of the owner-operator's *truck*, requiring that it be subject to the exclusive use, possession and control of the motor carrier, does not render the owner-operator or his business dependent upon the motor carrier for income. Many owner-operators acquire multiple trucks and lease them to different motor carriers with other drivers they hire, and even single-truck

operating individuals are afforded a wealth of opportunity to use the single truck for another motor carrier wholly within *intra* state operations or to terminate the lease and switch to other motor carrier leasing arrangements. The market for owner-operators and their services has traditionally been very much a sellers' market, with tens of thousands of motor carriers competing to gain relationships with good owner-operator business men and women.

In this respect, as of June, 2008, the FMCSA listed over 600,000 U.S. interstate motor carriers, over 214,000 of which were for-hire carriers, and some analysts predict as many as 400,000 new drivers will be needed by the end of 2011.⁷ Owner-operators are particularly attractive to trucking companies because they are often mature drivers who are highly skilled and motivated, enable trucking companies to save on equipment and capital costs, and provide flexibility to meet fluctuations in demand for trucking services. Trucking companies also believe owner-operators to be more productive, dedicated, and safety conscious than employee drivers.⁸ Under such circumstances, owner-operators like Smith (who admittedly worked for another motor carrier as an owner-operator prior to leasing

⁷ See American Trucking Associations, *American Trucking Trends 2008-09* at 2 (relevant excerpts attached); CNNMoney.com, *Wanted: 400,000 Truck Drivers*, http://money.cnn.com/2010/06/09/news/economy/truck_driver_shortage/index.htm.

⁸ See generally David H. Maister, *Management of Owner-Operator Fleets*, 25-30 (1980).

on with SZL) do not fit the mold of a worker who requires the protection of the *Carpet Exchange/Locke* rule applicable in other cases.

As recognized in *Long View, supra*, the *Carpet Exchange/Locke* rule does not apply in all cases, and it should not apply here.

C.

The Leaseback Arrangement Between Smith And SZL Does Not Change Smith's Status As An Independent Contractor

The leaseback or lease/purchase arrangement between Smith and SZL is quite common in the trucking industry and should not be viewed as undermining the independent nature of his business. Owner-operators acquire the vehicles that they lease to trucking companies in a variety of ways, outright purchase, installment purchases, leases, lease purchases from truck manufacturers or truck leasing companies or, as is becoming more prevalent, lease purchase arrangements with motor carriers or an entity affiliated with the motor carrier to whom they lease the truck for operation. Because the cost of these vehicles is substantial, the owner-operator entrepreneur must find the best deal available, and motor carriers, because of many factors, are often able to provide that best deal.

But the acquisition of a vehicle is only one element of an owner-operator establishing a successful business. Many other factors come into play in deciding whether that owner-operator will survive and flourish or unfortunately, like many

small businesses, fail. The entrepreneurial ability of an owner-operator to run a successful trucking business (manage expenses, choose loads, maintain equipment, meet regulatory requirements, etc.) is what makes him an independent businessman, not simply an ownership interest in a truck. Indeed, given the demand for owner-operators, vehicle availability is not a significant impediment to establishing an owner-operator business.

1. Lease/Purchase Arrangements Are an Efficient Way For Owner-Operators to Acquire Equipment

As one commentator has observed, although a number of leasing sources are available to independent contractors, financing through programs sponsored by motor carriers is now a standard industry practice among owner-operators as a means by which to acquire equipment for their business activities. James C. Hardman, *Crimping Entrepreneurship: The Attack on Motor Carrier Sponsored Equipment Acquisition Programs*, 35 *Transportation L. J.* 157, 162-63 (Summer 2008). Owner-operators benefit from such arrangements because they can take advantage of the motor carrier's purchasing power and thereby secure more favorable rates and credit terms, because motor carriers are more likely to emphasize work ethic over current financial ability in assessing an owner-operator's creditworthiness, because the availability of such programs assures the owner-operator of greater continuity of work availability, and because the motor

carrier's interest in assuring a successful transaction also means it is a willing resource to the owner-operator for any needed assistance in obtaining reputable equipment maintenance or necessary licenses, insurance, and other helpful information. *See generally id.* at 168-71.

2. Federal Regulations and Case Law Recognize the Validity of Lease/Purchase Arrangements in a Trucking Independent Contractor Relationship

Leaseback arrangements between motor carriers and owner-operators are consistent with Federal Leasing Regulation requirements and have been found by courts not to impact owner-operator worker classification. The Federal Leasing Regulations themselves do not distinguish between independent contractors who purchase trucks and those who lease them,⁹ and a number of courts have applied common-sense in ruling that leaseback arrangements do not adversely affect the independent contractor determination. *North American Van Lines, supra* (drivers who obtained competitive financing from motor carrier found to be independent contractors); *Ruiz v. Affinity Logistics*, 2010 WL 1038226 (deeming driver who

⁹ 49 C.F.R. § 376.2(d) defines an "owner" as a person "(1) to whom title to equipment has been issued, or (2) who, without title, has the right to exclusive use of equipment, or (3) who has lawful possession of equipment registered and licensed in any State in the name of that person." *See also Owner-Operator Independent Drivers' Ass'n v. Ledar Transport*, 2004 WL 5376211 (W.D. Mo. 2004) (drivers who leased equipment from motor carrier through leaseback/purchase agreements were "owners" of the equipment for purposes of the Federal Leasing Regulations).

leased equipment through oral leaseback agreement to be independent contractor); *Bonnetts v. Arctic Express, Inc.*, 7 F.Supp.2d 977 (S.D. Ohio 1998) (upholding independent contractor status of owner-operator who leased his equipment from an affiliate of the motor carrier); *Hilldrup Transfer & Storage, supra* (owner-operator was an independent contractor notwithstanding lease of vehicle from the motor carrier); *Washington State Dept. of Labor & Industry v. Mitchell Bros. Truck Line, Inc.*, 54 P.3d 711 (Wa. Ct. App. 2002) (driver operating under leaseback arrangement with motor carrier was an “owner” of the truck for purposes of state workers’ compensation law recognizing owner-operators as independent contractors). The IRS also acknowledges in its agent training manual that the leasing of equipment to a worker is not an indicia of employment even if the owner of the equipment receives the benefit of the workers’ services.¹⁰

3. Potential Loss of Equipment When an Owner-Operator Leaves a Particular Carrier Does Not Extinguish the Independence of that Owner-Operator’s Business

As discussed herein, there is more to an owner-operator’s business than his or her ownership interest in a particular piece of equipment. Rather, it is all of the managerial and operational activities that an owner-operator must undertake that

¹⁰ See *Independent Contractor or Employee? Training Materials*, Training 3320-102(10-96) at 1-1, www.irs.gov/pub/irs-utl/emporind.pdf.

defines the independence of his business. A skilled and experienced owner-operator can quickly continue his or her trucking business after severing his or her relationship with a particular carrier, even if severing that relationship meant the loss of a tractor. As Mr. Smith has done during his career as an owner-operator, new equipment is readily available when an independent contractor partners with a new motor carrier.

Moreover, like SZL in this case, motor carriers often have a legitimate interest in restricting the use of motor carrier-financed equipment to services performed on their behalf because the financing motor carrier often attempts to match the number of trucks available for leaseback with the amount of freight reasonably anticipated to be available for transportation so to assure both the owner-operator and the motor carrier of a reliable source of business revenue. Hardman, 35 Transportation L. J. at 170, n.55. In any event, it is not the ownership of a truck, but rather the owner-operator's "significant entrepreneurial opportunity for gain or loss" – "the degree to which [one] takes economic risk and has the corresponding opportunity to profit from working smarter, not just harder" – that best captures the distinction between an independent contractor owner-operator and an employee. *See FedEx Home Delivery v. National Labor Relations Bd.*, 563 F.3d 492, 503 (D.C. 2009) (internal citations omitted).

In sum, while an interest in the equipment may be a factor bearing upon the independent contractor determination, it should not be rigidly applied so as to require that the interest survive the end of the operating relationship between a motor carrier and an owner-operator. As indicated above, the acquisition of a truck is but one part of the owner-operator independent contractor business model, which also depends in large part upon the owner-operator's entrepreneurial spirit and opportunity, his business acumen, his investment in the knowledge and skills necessary to acquire a commercial driver's license and to maintain his regulatory compliance, his expertise in evaluating what loads and routes are profitable for his activities, his autonomous decision-making on the means and methods of his work, his freedom to choose when and when not to work, and his drive and ambition to operate his own independent business.

Trucks are commodities readily available from other motor carriers in other leaseback arrangements, from leasing transactions with leasing companies small and large (including nationally-recognized companies like Penske and Ryder), and by way of purchase from manufacturers and commercial financing companies. But the owner-operator's independence and entrepreneurialism are uniquely his alone and survive regardless of when or how he acquires or disposes of his equipment. The leaseback arrangement between Smith and SZL, therefore, did not change

Smith's status as an independent contractor, and the Final Order's premise that it did – which is in any event directly contrary to Section 40-11.5-102(1)(i) – should be reversed.

III.

CONCLUSION

For all the foregoing reasons, *Amicus Curiae* respectfully join SZL in requesting the Court for a decision reversing the Final Order in its entirety.

Respectfully submitted,

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Certificate of Service

I hereby certify that a copy of the foregoing has been served upon the following parties of record by depositing a copy of same in the U.S. Mail, first class postage prepaid, this 13th day of July, 2010.

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