UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
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TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA as subrogee of SUMMIT TRANSPORTATION AND FULFILLMENT, INC.; individually and as assignee of ANN TAYLOR, INC. and AMERICAN HOME ASSURANCE CO.,

04 CV 5830 (JAP) (JJH)

Plaintiffs,

v.

A.D. TRANSPORT EXPRESS, INC.,

Defendant.
--- X

**BRIEF OF DEFENDANT A.D. TRANSPORT EXPRESS, INC.
IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT**

LAW OFFICES OF JOHN C. LANE
Attorneys for Defendant
A.D. Transport Express, Inc.
191 Godwin Avenue
Wyckoff, New Jersey 07481
201-848-6000

On the Brief:

John C. Lane (JL 2569)

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STATEMENT

Plaintiff Travelers Property Casualty Company of America sues as subrogee of Summit Transportation and Fulfillment, Inc., and as assignee of Ann Taylor, Inc. and American Home Assurance Co., to recover for the loss of a shipment of garments tendered to defendant A.D. Transport Express, Inc., for carriage from New Jersey to Louisville, Kentucky. The complaint alleges Carmack Amendment and state common law causes of action.

Defendant A.D. Transport Express, Inc. moves for summary judgment –

A. To dismiss the state common law causes of action because they are preempted by the Carmack Amendment to the Interstate Commerce Act;

B. To dismiss the complaint in its entirety because plaintiff cannot prove an essential element of its claim, that the goods were in good order when tendered to A.D. Transport; and

C. To limit A.D. Transport's liability in any event to $10,000 because of the released value provisions of its tariff and its bills of lading.

STATEMENT OF FACTS

This case involves the loss of a truckload shipment of garments in May 2004, which A.D. Transport was carrying for plaintiff Summit Transportation, from Summit's warehouse in Secaucus, New Jersey, en route to Louisville, Kentucky. It is in fact an ordinary freight-loss case that involves a carrier's ability to enforce a limitation of liability printed in its tariff and bills of lading, a limitation which in this case was actually known by the shipper. The facts are set forth in the accompanying Affidavit of Gary Percy, president of A.D. Transport, the Certification of John C. Lane, and the exhibits to both. Those include the depositions of Summit's president, Dean Brody, and its controller, Martin Linkletter, and the various shipping documents which are germane to the course of dealing followed by the parties.

A.D. Transport limited its liability in its tariff and bills of lading

A.D. Transport is a motor carrier which maintains a tariff in accordance with federal law, and makes that tariff available to a shipper upon request, also in accordance with federal law. [Percy Aff. ¶¶ 24, 33; Percy Ex. 2]. Section 320 of the tariff, entitled Released Value, provides as follows:

> Released Value
>
> The released value for all shipments is the greater of $50.00 or $.50 per pound, said value will not exceed a maximum amount of $10,000.00, unless a higher released or declared value is specified by the shipper on the bill of lading, air bill, or shipping order. Values exceeding $10,000.00 must be approved and communicated in writing prior to the shipment to be valid.

It is undisputed that Summit never requested a copy of the tariff. [Brody dep., pp. 93-94].

A.D. Transport's bill of lading [Percy Aff. ¶¶ 7, 8; Percy Ex. 1; Lane Ex. H as authenticated in Linkletter deposition] repeats that limitation and explains how to calculate a higher freight rate for a higher level of liability. That Declared Value provision is prominently displayed on the front

side of the bill of lading, on the right side and near the top. The provision contains the following unmistakable language:

> VALUE AGREED TO BE $50 PER SHIPMENT OR .50 CENTS PER POUND PER PIECE UNLESS EXCESS VALUE DECLARED. EXCESS VALUE CHARGE WILL BE COMPUTED AT .40 CENTS PER $100 OF THE EXCESS.
>
> DECLARED VALUE EXCEEDING $10,000.00 MUST BE APPROVED AND COMMUNICATED IN WRITING PRIOR TO THE SHIPMENT TO BE VALID.

That box contains a space for the shipper to include a declared valuation. [See Percy Aff. Ex. 1; Lane Ex. H]. It is also undisputed that at no time did Summit ever declare a valuation, on an A.D. Transport bill of lading or on the bill of lading drafted and filled out by Summit. Nor did Summit ever contact A.D. Transport to seek prior approval for a value exceeding $10,000.

Those documents, along with the shipper's bill of lading prepared by Summit and described herein, constitute the agreement of long-standing between A.D. Transport and Summit. The course of dealing between the carrier and this sophisticated shipper as described below confirms that agreement. Summit knew of the limitations of liability, which kept the freight rate low. For 670 prior shipments it accepted those terms and paid the freight invoices, each time receiving an A.D. Transport freight bill [Lane Ex. G, as authenticated by Mr. Linkletter at his deposition] and an A.D. Transport bill of lading identical to those described above. Each time, Summit paid the freight bill. These facts are not in dispute. On the one occasion that resulted in a loss, Summit, or at least its subrogated insurer, claims that the limitation is not a part of their contract. A.D. Transport will prove that it is.

Summit Transportation is a sophisticated shipper

Summit Transportation & Fulfillment, Inc. ("Summit"), is as its name suggests, a sophisticated trucking, transportation, warehousing and distribution company with headquarters and

a modern warehouse facility in Secaucus, New Jersey. Summit operates its own fleet of trucks, and a 100,000 square-foot warehouse and consolidation operation, on behalf of major importers and retailers, one of which is Ann Taylor, Inc. Others include David's Bridal, Dress Barn, Daffy's, and Modell's. These facts come from the deposition of Dean Brody, president, and Martin Linkletter, controller, respectively, of Summit Transportation and Fulfillment, Inc.

For a dozen or more years, Summit has served Ann Taylor in a seamless transportation and logistics operation, as described by Messrs. Brody and Linkletter. Ann Taylor has its garments manufactured overseas. They are transported to New York by air or sea. Summit uses its own trucks to go to the New York area airports and seaports to pick up the goods and take them to the Summit warehouse. The goods generally are in cartons, and remain in those cartons, never opened by Summit. The cartons of goods are consolidated by Summit and transported to Ann Taylor's facility in Louisville, Kentucky, pursuant to Ann Taylor's direction.

Summit has a comprehensive contract with Ann Taylor [Lane Ex. E], covering the obligations of pick-up of imported goods, storage and consolidation of the goods at the Summit warehouse, and transportation to the Louisville destination. That agreement requires Summit to bear any freight loss or damage in full and to maintain insurance, including cargo liability insurance.

For some period of time Summit performed the transportation to Louisville with its own trucks, and then with another trucker [Brody dep. p. 57]. Then, at the suggestion of Ann Taylor, Summit approached A.D. Transport Express to handle the interstate transportation between Summit's warehouse in Secaucus, New Jersey, to Ann Taylor's facilities in Louisville, Kentucky. [Brody dep, pp. 91-93]. Whatever deal Summit might strike with A.D. Transport, the cost would have to allow Summit to make a profit on the Ann Taylor business, since that transportation was included in Summit's contract with Ann Taylor. [Brody Dep., 86:7-87:21].

Summit engaged A.D. Transport to transport the Ann Taylor shipments at a freight rate that was favorable to Summit and subject to A.D. Transport's limitation of liability

Sometime in 2001, Dean Brody, president of Summit Transportation & Fulfillment, Inc. (hereinafter "Summit") reached out to Gary Percy, president of A.D. Transport Express, to engage A.D. Transport in a long-term contractual relationship. Brody wanted A.D. Transport to carry truckloads of garments from Summit's warehouse in Secaucus, New Jersey, to Summit's customer, Ann Taylor, in Louisville, Kentucky. The two men met face-to-face, in A.D. Transport's office in Canton, Michigan. Mr. Percy offered Mr. Brody a fair, low freight rate, subject to the limitations of liability in its tariff and bill of lading. He asked if Summit would need a higher coverage, for which A.D. would have to charge a higher freight rate. Mr. Brody declined any higher coverage, because as he told Mr. Percy, Summit had plenty of insurance. That turned out to be quite true: Summit has a very significant policy of business insurance with Travelers, the subrogated plaintiff in this action.

Mr. Brody accepted the freight rate offered by Mr. Percy, of $750 per shipment. The parties proceeded with their business arrangement. The course of dealing described below was followed from the very first shipment, and continued for a total of 670 shipments before the theft of the load (indeed, the theft of the A.D. Transport truck) on May 5, 2004. At any time, Mr. Brody could have requested a copy of the A.D. tariff but did not bother.[1]

After the loss of May 2004, Summit asked A.D. Transport for a freight rate that would include insurance coverage in excess of $10,000. In July 2004, A.D. Transport offered a freight rate of $850 per shipment, which would include $300,000 of insurance coverage. Summit rejected that $100 increase as too high. [Percy Aff. ¶¶ 19, 20, 21, and 22]. That rejection demonstrates A.D.

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[1] Federal law no longer requires the filing of a trucker's tariff with a federal agency such as the former Interstate Commerce Commission, but now requires that the tariff be kept by each trucker and made available to a shipper upon request. 49 U.S.C. § 13710; § 14706.

Transport's point in this case: Summit did not want to incur any additional cost for the transportation of Ann Taylor goods from New Jersey to Louisville, Kentucky under its contract with Ann Taylor.

The Course of dealing confirmed Summit's acceptance of A.D. Transport's limitation of liability

After every shipment to Ann Taylor, A.D. Transport sent to Summit a freight bill accompanied by an A.D. Transport bill of lading, using the form identified by Mr. Percy in his Affidavit and by Mr. Linkletter in his deposition. [Percy Aff. Ex. 1; Lane Ex. H]. The 670 freight bills and bills of lading before May 4, 2004, were all received and handled by Martin Linkletter, controller of Summit Transportation. He reviewed every freight bill and bill of lading, and approved every payment. He admits that he saw and read the Declared Value box on the front of the A.D.Transport bills of lading. [Linkletter dep., pp. 85-91].

Each A.D. Transport bill of lading [Percy Ex. 1; Lane Ex. H] had a prominently displayed and clearly worded released value, as set forth above, which instructs the shipper how to increase the limit of liability in exchange for a higher freight rate. Summit's controller acknowledges that he read that limitation. No one at Summit, including the controller, ever requested a higher released value. Per the bill of lading, the increased rate would be based on the value declared by Summit. No one at Summit ever requested a copy of the A.D. Transport tariff, which also contains the released value limitation and the $10,000.00 maximum.

The limitation of liability should be enforced

This case does not involve an unsophisticated shipper lost in the fine print of tariffs and bills of lading. It involves a sophisticated shipper that is itself a motor carrier and doubtless maintains its own tariffs, an agreement for transportation that included a typical limitation of liability, and a course of dealing which detailed and confirmed that agreement.

First, the case involves a limitation of the carrier's liability easily located in its tariff and in bills of lading that were clearly worded, easy to find, and which were actually read by the shipper. Summit can simply not deny knowledge of the released value limitation.

The case involves a sophisticated shipper, Summit Transportation, deeply concentrated in the transportation business of this country. Summit, formerly known as Siegel & Cohen Express, Inc., has a trucking operation with federal motor carrier authority, whose business includes interstate transportation of goods, pick-ups at airports and seaports – and the requisite industry and government permissions – and motor carrier transportation within the greater New York region. It includes a warehouse and consolidation operation in its 100,000 square-foot warehouse, in which it provides those services to various major manufacturing and retailing customers under agreements similar to its contract with Ann Taylor.

It involves invoices and air waybills from Ann Taylor's suppliers overseas into New York. It involves local pick-up by Summit and temporary holding at Summit's New Jersey warehouse. It involves Summit's consolidation of the same cartons that were received from the airports, all unopened, and then counted and positioned at the truck loading docks of the Summit warehouse.

It involves Summit's long-term contract with Ann Taylor, Inc. That contract provides seamless handling of the Ann Taylor goods from the airports in New York to the Ann Taylor facility in Kentucky. The fees paid to Summit are based on volume, and they cover everything in that process – including the transportation of the goods, by truck, from Summit's New Jersey warehouse to Ann Taylor's facility in Kentucky. It involves the bill of lading that Summit issued to Ann Taylor and which Summit says is the bill of lading between Summit and A.D. Transport. That of course makes it a *shipper's* bill of lading.

Most important, this case involves a course of dealing between Summit and A.D. Transport. It involves an agreement by A.D. Transport to undertake regular transport for Summit of those Ann Taylor goods from New Jersey to Kentucky, at a low freight rate and with a limitation of liability. And, it involves *670 shipments* since 2001, *before* the shipment leading to this lawsuit. Those shipments define that course of dealing.

Over the course of three years and 670 shipments, Summit loaded A.D. Transport trucks with Ann Taylor goods, received A.D. Transport's freight bills and bills of lading containing the limitation of liability identical to A.D.'s tariff, and signed checks to pay those freight bills. Summit knew full well that it had engaged with A.D. Transport in a transportation contract that included a distinct limitation of liability. The course of conduct proves it. Summit cannot now be heard to say that it is a novice shipper that did not understand that limitation.

The A.D. Transport Express limitation of liability should be enforced.

LEGAL ARGUMENT

SUMMARY

The Carmack Amendment to the Interstate Commerce Act in its present form is found at 49 U.S.C. § 14706. Under the Amendment, a motor carrier is liable for the full value of the loss or damage to goods carried in interstate commerce. 49 U.S.C. § 14706(a)(1). An exception to this general rule, found at 49 U.S.C. § 14706 (c)(1)(A), allows a carrier to limit its liability "to a value established by...written agreement between the carrier and shipper..." *See, Siren v. Estes Express Lines*, 249 F.3d 1268, 1270 (11th Cir. 2001). The statute merely requires that the carrier and shipper agree in writing to a reasonable value. *Id*. at 1271.

The various requirements imposed by courts upon a carrier who drafts a contract seeking to limit its liability "were intended to protect shippers from carriers who would take advantage of their own superior knowledge and leverage when dealing with unwary shippers." *Id.* at 1272.

But a sophisticated, knowledgeable shipper who prepares its own bill of lading, or who uses industry-specific terms, is not an "unwary shipper" needing special protection from the court: "This Court does not deem it proper or necessary to protect shippers from themselves." *Id.* In this case, Summit cannot complain about the consequences of leaving blank a Valuation block in its own bill of lading form; nor do we have a "devious carrier hoping to slip a quick one over on an unsuspecting shipper." *Id*. at 1272. Here, we have neither a devious carrier nor an unsuspecting shipper.

Over the course of three years, A.D. Transport consistently issued bills of lading with its freight bills, admittedly after each shipment, containing a limitation of liability and a simple instruction to calculate a higher freight rate for a higher limit of liability. This was done with every one of the 670 shipments preceding the shipment picked up on May 4, 2004. On every shipment, Summit made out its own bill of lading, left the Valuation box blank, read the A.D. bill of lading

with its limitation of liability, and wrote a check in payment of A.D.'s freight bill. Summit knew exactly what it was doing. It was getting transportation service at the very cheapest rate, and it was Summit which tried to "slip a quick one over on" the carrier, A.D. Transport.

The Supreme Court expressed the point, perhaps best, more than a hundred years ago, in a pre-Carmack Amendment case, when it upheld a limitation of liability in a carrier's bill of lading, in *Hart v. Penn R. Co.*, 112 U.S. 331 (1884): "The presumption is conclusive that if the liability had been assumed on a valuation as great as that now alleged, a higher rate of freight would have been charged. The freight rate is indissolubly bound up with the valuation." *Id.* at 337.

A quarter century later, the Supreme Court reaffirmed those common law principles even in light of the passage of the Carmack Amendment, in *Adams Express Co. v. E.H. Croninger*, 226 U.S. 491, 509, 510 (1913). The *Adams* Court dealt with a contract drafted by a carrier. In upholding the carrier's limitation, the Court quoted approvingly from its earlier *Hart* decision:

> It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practised on the shipper, should be upheld. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in the case of loss.

Adams Express, 226 U.S. at 511 (quoting *Hart*, 112 U.S. at 341).

For 670 shipments Summit had the benefit of the reduced rate, saving many tens of thousands of dollars over that span as against the freight rate that would have been charged if Summit had declared the value of its shipments. Summit was happy with that arrangement for 670 claim-free shipments but wants "to repudiate it in case of a loss." As the Supreme Court would say, such a result would be unjust and unreasonable, and repugnant to public policy.

The Third Circuit has agreed that the sophistication of the shipper is material in determining

whether a limitation of liability will be enforced, in *Carmana Designs v. North American Van Lines, Inc.*, 943 F.2d 316 (3rd Circuit 1991). Carmana Designs was a small company owned and operated by Carmen Vona and his wife, in Philadelphia, Pennsylvania. They manufactured and sold custom furniture, with just two employees to help them. In July 1989 Carmana Designs landed a contract to provide custom display exhibits for two Macy's stores in northern California.

Carmana had virtually no experiences as a shipper. The Vonas arranged for shipment by North American Van Lines (NAVL), through a freight forwarder, American Priority Express. On the NAVL bill of lading, Vona selected a liability limitation of $1.25 per pound. He reasoned that this was more than enough for the shipment, as NAVL had listed the shipment's weight in the appropriate bill of lading block, as 24,000 pounds. In actuality, totally unknown to Carmana Designs, North American inserted that figure as a designation that Carmana had reserved the entire truck: the net weight of the furniture, only later determined, was just 9,725 pounds.

The furniture was destroyed in a one-truck accident. The district court limited liability of NAVL to $12,156.25 ($1.25 per pound x 9,725 pounds). The Third Circuit reversed. The court held that Carmana Designs reasonably believed that it was fully covered. *Id*. at 317, 322.

Carmana Designs was a very small, occasional, shipper. Had it been more experienced, the Court of Appeals says the result might have been different:

> If Carmana Designs were a *sophisticated shipper* or had extensive dealings with North American prior to this accident, we would be more receptive to North American's argument. A shipper's sophistication, abundant experience, or extensive prior dealings with a carrier may constitute additional evidence of a limitation agreement between the parties. [Emphasis added].

Id. at 321. The Court of Appeals emphasized that Carmana Designs had shipped with North American only once before, and had not received any additional information "regarding limits of coverage or the necessity of separately purchasing insurance for the shipment." *Id*. The Court also

made the point in its factual rendition that Macy's had "severely limited its future business with Carmana Designs because of Carmana's failure to timely deliver the exhibits." *Id.* at 317-318. The Court would not allow the unsophisticated shipper to suffer that loss.

In cases in which a sophisticated shipper has a fair opportunity to increase the limitation of liability, the courts have enforced a carrier's limitation of liability. *See*, especially, *American Cyanamid Co. v. New Penn Motor Freight Express, Inc.*, 979 F.2d 310 (3d Cir. 1992) (rejecting a claim for full value of goods shipped when a released value is contained in the shipper's own bill of lading).

Summit Transportation is not in the position of the neophyte Carmana Designs. Rather, it is a sophisticated shipper such as we find in American Cyanamid Company and others, discussed below, who understood the contracts they entered into and the limitations of liability that they accepted.

Finally, this Court should consider the course of dealing that took place for three years and 670 shipments before May 4, 2004. The courts have engaged in course of dealing analyses in transportation cases involving the Carmack Amendment, the Carriage of Goods By Sea Act, state common law, and other regimes, where as here, the course of dealing lays bear the true agreement between shipper and carrier. *Ins. Co. of North America v. NNR Air Cargo Service (USA), Inc.*, 201 F.3d 1111 (9th Cir. 2000); *Calvin Klein Ltd. v. Trylon Trucking Corp.*, 892 F.2d 191 (2d Cir. 1989; *Atlantic Mut. Ins. Co. v. Yasutomi Warehousing and Distribution, Inc.*, 326 F.Supp.2d 1123, 1126-27 (C.D. Cal. 2004) ("As long as there is a 'course of dealing', courts have only required that the bill of lading clearly state the [monetary] limitation and the method for avoiding it.").

Based upon all of the facts, and the applicable law, defendant A.D. Transport Express, Inc., urges the following conclusions as a matter of law:

1. The Carmack Amendment to the Interstate Commerce Act provides the exclusive remedy for the loss of the Ann Taylor shipment. All state law causes of action must be dismissed.

2. The complaint must be dismissed because Summit cannot establish the good order of the goods when tendered to A.D. Transport, which is an essential element of the claim.

3. The sophistication of this shipper, and the course of dealing between Summit and A.D. Transport over three years and 670 prior shipments, must be considered in determining whether the A.D. Transport limitation of liability should be enforced.

4. A.D. Transport has met the requirements of the Carmack Amendment in order to limit its liability to Summit (and, thus, to Travelers) in the claim before this Court.

5. The claim for the loss of the shipment is limited under federal law to $10,000 as provided in its tariff and bills of lading, and the agreement of the parties.

POINT I

STANDARD OF REVIEW

Defendant brings this motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. To prevail on a motion for summary judgment, the moving party must establish that "there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c).

When considering a motion for summary judgment, all evidence submitted must be viewed in the light most favorable to the non-moving party. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-32, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). The burden of showing that no genuine issue of material fact exists rests initially with the moving party. *Goodman v. Mead Johnson & Co.*, 534 F.2d 566, 573 (3d Cir.1976). Once the moving party submits a properly supported motion, the burden shifts to the non-moving party to demonstrate the existence of a genuine dispute. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

To make that showing, the non-moving party must come forward with specific facts showing that there is a triable issue. Fed.R.Civ.P. 56(e). Further, there must be evidence on which the jury could reasonably find for the plaintiff. *Anderson*, 477 U.S. at 252, 106 S.Ct. 2505. Further, if "the evidence [submitted by the non-movant] is merely colorable, or is not significantly probative, summary judgment may be granted." *Id.* at 249-50, 106 S.Ct. 2505. A factual dispute is genuine "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Thus, "[s]ummary judgment may present the district court with an opportunity to dispose of meritless cases and avoid wasteful trials." *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir.1996).

POINT II

PLAINTIFF'S STATE LAW CLAIMS ARE PREEMPTED BY THE CARMACK AMENDMENT

The Carmack Amendment, 49 U.S.C. § 14706, governs an interstate carrier's liability for cargo loss and states in pertinent part:

> (1) Motor carriers and freight forwarders. A carrier providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 [49 USCS §§ 13501 et seq. or § 13531] shall issue a receipt or bill of lading for property it receives for transportation under this part [49 USCS §§ 13101 et seq.]. That carrier and any other carrier that delivers the property and is providing transportation or service subject to jurisdiction under subchapter I or III of chapter 135 or chapter 105 [49 USCS §§ 13501 et seq. or § 13531 or §§ 10501 et seq.] are liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by (A) the receiving carrier, (B) the delivering carrier, or (C) another carrier over whose line or route the property is transported in the United States or from a place in the United States to a place in an adjacent foreign country when transported under a through bill of lading and, except in the case of a freight forwarder, applies to property reconsigned or diverted under a tariff under section 13702 [49 USCS § 13702]. Failure to issue a receipt or bill of lading does not affect the liability of a carrier. A delivering carrier is deemed to be the carrier performing the line-haul transportation nearest the destination but does not include a carrier providing only a switching service at the destination.

Courts, including this court, have held that State law claims, including claims for breach of contract, negligence, breach of bailment and conversion, are all preempted by the Carmack Amendment. The Court in *Usinor Steel Corp v Norfolk S. Corp*, 308 F. Supp. 2d 510, 517-18 (D.N.J., 2004), held:

> It is generally accepted that the principal purpose of the Amendment was to achieve uniformity, and thus that Congress enacted the amendment to "take possession of the subject of interstate carriers liability. . .and supersede all state regulation with reference to liability for lost or damaged property." *Orlick*, 144 F.Supp.2d at 345; see also *Rini v. United Van Lines*, 104 F.3d 502, 504 (1st Cir. 1997). Since Congress intended to occupy the legislative field, the Carmack Amendment preempts "state and common law remedies where goods are damaged or lost in interstate commerce." *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 288 (7th Cir. 1997). Accordingly, plaintiff's claims for breach of contract, negligence, breach of bailment and

conversion are preempted and the Court will consider plaintiff's plea for relief as one for "actual losses" as provided under the Carmack Amendment, 49 U.S.C. 11706(a).

As plaintiff's state law claims for negligence and breach of contract are preempted, they must be dismissed, and plaintiff's sole claim is a plea for relief under the provisions of the Carmack Amendment.

POINT III

THE CARMACK REGIME: THE SHIPPER'S BURDEN OF PROOF; AND THE CARRIER'S DEFENSES AND LIMITATIONS

A. Summit has failed to prove the good order of the goods at the time of tender to A.D. Transport.

To establish a case of liability against a carrier, the shipper must prove the following three elements: "(1) delivery of the goods to the initial carrier in good condition, (2) damage of the goods before delivery to their final destination, and (the amount of damages." *Conair Corp. v. Old Dominion Freight Line, Inc.*, 22 F.3d 529, 531 (3d Cir. 1994) (other citations omitted). *Beta Spawn Inc. v. FFE Transportation Services, Inc.*, 250 F.3d 218, 223 (3d Cir. 2001). When the shipper fails to establish by a preponderance of the evidence that the goods were delivered to the carrier in good order, or that they were damaged before arrival at final destination, the shipper cannot recover. *Id.*; *Bluebird Food Prods. Co. v. Baltimore & Ohio R.R. Co.*, 474 F.2d 102 (3d Cir. 1973), *appeal after remand*, 492 F.2d 1329 (3d Cir. 1974); *Penske Logistics v. KLLM, Inc.*, 285 F.Supp.2d 468 (D.N.J. 2003).

Unlike the shipper in *Beta Spawn* (which presented substantial circumstantial evidence of condition prior to tender), Summit has provided no proof of the condition of the goods tendered to A.D. Transport. Summit loaded the 1,946 cartons onto the "dropped" trailer, closed, and sealed the trailer, and allowed the A.D. Transport driver to drive it away. The A.D. Transport driver had nothing to do with the loading of the trailer. The cartons had never been opened since they left their place of manufacture overseas. Summit had never inspected the garments inside the cartons. On this minimal evidence, Summit cannot rely upon a bill of lading, either A.D. Transport's or its own, to establish the condition at tender. Exclusive reliance upon the bill of lading is "insufficient to prove the condition of goods which had been in a sealed container. *See Blue Bird II*, 492 F.2d at

1331." *Beta Spawn*, *supra*, 250 F.3d at 223. *See, also, D.P. Apparel Corp. v. Roadway Express, Inc.*, 736 F.2d 1, 4 (1st Cir. 1984) ("In fact, where the contents of the shipment are not visible or open for inspection, additional direct and affirmative proof is necessary to show that the cloth was in good condition when delivered to Roadway.").

Summit has provided no evidence, circumstantial as in *Beta Spawn*, or direct as in *D.P. Apparel*, as to the condition of the goods at the time that they were loaded into the A.D. Transport truck by Summit personnel and their sealing of the trailer. As proof of that element is crucial to Summit's recovery, the complaint must be dismissed.

B. A.D. Transport has established its right to limit its liability to its released value of $10,000 as contained in its tariff and its bill of lading.

A.D. Transport is well aware of the recent decision of the Third Circuit in *Emerson Electric Supply Co. v. Estes Express Corp.*, 451 F.3d 179 (3d Cir. 2006), holding that under the most recent changes to the Carmack Amendment brought about by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), the requirement remains that a carrier seeking to enforce a released value or other limitation of liability must offer two or more levels of liability to the shipper. The particular holding is that the Estes tariff and bill of lading did not meet that requirement, because the tariff limited the Estes liability to ten cents per pound regardless of whether the shipper declared a higher value or left the declared value box blank in the bill of lading: "Because the tariff did not provide an option to declare a higher value with a corresponding level of liability, Estes failed to meet the two or more levels of liability requirement." *Id.* at 188. The *Emerson* court presented a history of the right of the Carmack Amendment and its changes over time, noting that under ICCTA a carrier no longer is required to file a tariff but must provide its tariff on request of a shipper (49 U.S.C. § 10730(a)(1)), which A.D. Transport was always prepared to do. The current

legislation maintains the right to limit liability through a written declaration of the shipper or by a written agreement between the shipper and carrier. The Third Circuit, in *Emerson*, notes that ICCTA "does not contain clear language altering the courts' additional requirement that a carrier offer two or more rates with two or more levels of liability. *Id.* at 187.

The Third Circuit thus places upon the carrier wishing to enforce its limitation the burden of establishing that it offers the shipper "two or more rates with corresponding levels of liability," and that there is a written agreement or written designation by the shipper accepting that limitation. *Id.*

Nothing in the *Emerson Electric* opinion suggests that the written agreement, or the "fair opportunity" to choose between levels of liability, may not be established through circumstantial or extrinsic evidence, such as a three year course of dealing between two commercial enterprises and including a shipper that is at least as sophisticated as the carrier. What follows is the compelling evidence of that course of dealing, and the legal basis that requires its careful consideration.

That course of dealing will supply the requirements of the Carmack Amendment, as presently interpreted by the Third Circuit in *Emerson Electric v. Estes Express Lines, supra*, and will support a judgment limiting A.D. Transport's liability to $10,000. This is particularly appropriate in a case, as here, in which the shipper drafts the bill of lading. *Siren v. Estes Express Lines*, 249 F.3d 1268 (11th Cir.2001); *Am. Cyanamid v. New Penn Motor Express, Inc.*, 979 F.2d 310 (3d Cir. 1992); *Mech. Tech. Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085 (2d Cir. 1985).

POINT IV

THE CARRIER'S LIMITATION OF LIABILITY IS ROOTED IN PUBLIC POLICY

The right of a carrier to limit its liability is firmly entrenched in public policy and is recognized by Congress and the courts. The First Circuit provides a straightforward and comprehensible explanation of the importance and advantages of liability limitations, for carrier and shipper alike, in *Hill Construction Corp. v. American Airlines, Inc.*, 996 F.2d 1315, 1317 (1st Cir. 1993):

> In a commercial context, liability limitations have certain advantages. They permit a carrier to avoid unforeseen high liability for especially valuable cargo; they permit shippers of ordinary items to pay somewhat lower freight bills; and they permit shippers of valuable items to choose between paying an insurance premium to the carrier and obtaining, perhaps less expensive, insurance on their own. * * * [T]he requirements of reasonably communicative notice and an opportunity to buy increased coverage for a premium payment lessen the risk of unfairness.

That is precisely what happened in the case at bar. Summit chose the lower freight rate and the lower limitation of liability, "obtaining, perhaps less expensive, insurance on their own." The A.D. Transport bill of lading contains clear and unequivocal language limiting its liability but giving Summit the opportunity to declare a higher value, pay a higher freight rate, and obtain a higher limitation of liability, which Summit declined to do. The higher rate described in the bill of lading is tied to the value declared by the shipper. The limitation is on the *front* of the bill of lading, at the top, in full-size print. The same bill of lading had been given to Summit 670 times before, from 2001 to May 2004, on the same transportation business, *i.e.*, hauling Ann Taylor's garments from Secaucus, New Jersey, to Louisville, Kentucky, at the low rate of $750 per trip. Summit got exactly what it wanted: a low freight rate and the choice to purchase its own insurance, perhaps less expensively. "And, as we have said, balancing advantages and disadvantages, both Congress and

the courts have approved the use of such clauses." *Hill Construction Corp.*, *supra*, 996 F.2d at 1317.

Summit was quite pleased with the agreement it forged with A.D. Transport, at a low freight rate. For 670 shipments, all loss-free, Summit received the A.D. bill of lading, fully understood the limitation of liability, and relied upon its own insurance for any loss. In so doing, Summit issued its own bill of lading but did not declare a value or request additional coverage from A.D. Transport. To limit Summit's recovery here does not spring surprise, nor unfairness, upon this sophisticated shipper. As the Supreme Court said eighty-six years ago in *Union Pacific R. Co. v. Burke*, 255 U.S. 317, 322 (1921), "[T]he contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations." (quoting from the *Hart Case*, 112 U.S. 343). And quoting from the *Piper Case* (246 U.S. 444), the Court explained that although a limitation of liability does not permit the carrier to defeat recovery for losses resulting from its own negligence, it "serves to fix the amount of recovery upon an agreed valuation made in consideration of the lower rate stipulated to be paid for the service." *Id.*

The policy basis for limitation of liability is thus a "sharp distinction between such [forbidden] exculpatory clauses and provisions which merely limited liability to the agreed value of the property shipped, where the amount of the rate depended upon the value of the shipment. *See Hart v. Penn. R.R.*, 112 U.S. 331 (1884)." *United States Gold Corp. v. Federal Express Corp.*, 719 F. Supp. 1217, 1224 (S.D.N.Y. 1989). The district court in *United States Gold* further explained the policy reasons favoring limitations of liability:

> The agreed upon value merely constituted an estoppel against the unfairness of asserting a larger amount as the "true" value, when a smaller value had been used to calculate the rate. The legal validity of an agreed value contract enabled the carrier's rate to be reasonably proportioned to the risk to which it was exposed.

See, First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc., 731 F.2d 1113, 1115-16 (3d Cir. 1984).

719 F.Supp. at 1224. That rationale has continued to underlie common law principles throughout "various periods of regulatory legislation," including the Carmack Amendment. *Id.*

The policy basis is even more firmly grounded when the shipper, like Summit is commercially sophisticated:

> There is no doubt that Pan Am [the shipper] was on notice of Pinto's [the motor carrier] limited liability and choice of rates by virtue of the letters of July 24, 1980, October 8, 1980, the bill of lading, and the tariffs. It is equally clear that Pan Am, itself a sophisticated business enterprise well familiar with released values and limitations of liability, proceeded not to declare a higher value.

Ruston Gas Turbines, Inc. v. Pan American World Airways v. Pinto Trucking Service, 757 F.2d 29, 31-32 (2d Cir. 1985).

The contract between Summit and A.D. Transport, based upon a course of dealing over 670 shipments utilizing the same grouping of documents containing the limitation, is a contract "negotiated between people of at least equal economic stature and commercial awareness or acuity. In this posture, the contract should be enforced." *Id.* At 32-33. The limitation is grounded solidly in public policy. It is in fact "an established rule of the [federal] common law" declared by the Supreme Court in "many cases" permitting a carrier to limit its liability by a "fair, open, just and reasonable agreement." *Adams Express Co. v. E.H. Croninger*, 226 U.S. 491, 509-510 (1913).

Our own Circuit Court, in *National Small Shipments Traffic Conference, Inc. v. United States*, 887 F.2d 443, 447 (3d Cir. 1989), explained that "released value" or "inadvertence clauses" have been upheld by the courts (citing the Second Circuit's decision in *Ruston Gas Turbines, Inc.*, *supra*) . In affirming a determination of the Interstate Commerce Commission, the Court of Appeals concluded that "where a tariff contained an inadvertence clause, the parties had in reality entered into a written agreement." *Id.* at 447. In the case of A.D. Transport, the bill of lading itself

contained the inadvertence clause, prominently on the front of the document. Summit did not have to search the tariff.

We now look at Summit as the sophisticated shipper and the course of dealing between Summit and A.D. Transport Express.

POINT V

AS A COMMERCIALLY SOPHISTICATED SHIPPER, SUMMIT CANNOT ASSERT LACK OF KNOWLEDGE OF A.D. TRANSPORT'S LIMITATION OF LIABILITY

When a shipper is a commercially sophisticated business enterprise and the shipping documents afford the shipper a reasonable opportunity to choose between two available coverages, that is normally enough to give the shipper a "fair opportunity" to opt for more coverage in exchange for a higher rate. *Hollingsworth & Vose Co. v. A-P-A Transportation Corp.*, 158 F.3d 617 (1st Cir. 1998); *Hill Constr. Corp. v. American Airlines, Inc.*, 996 F.2d 1315 (1st Cir. 1993); *American Cyanamid v. New Penn Motor Express*, 979 F.2d 310, 314 (3d. Cir. 1992) ("Cyanamid does not claim to be an unsophisticated shipper at the mercy of an experienced carrier."); *Carmana Designs v. N.A. Van Lines, Inc.*, *supra*, 943 F.2d 316 (3d Cir. 1991); *Nippon Fire & Marine Ins. Co.*, 45 F.Supp.2d 288, 291(S.D.N.Y. 1999) ("Courts have considered such factors as . . . the economic stature and commercial sophistication of the parties, [and] . . . the availability of 'spot' insurance to cover a shipper's exposure."). *See, also, Siren v. Estes Express Lines*, 249 F.3d 1268, 1271 (11th Cir. 2001) ("This Court does not deem it proper or necessary to protect shippers from themselves.").

Summit Transportation is a company that has for many years been involved in the trucking, transportation, warehousing and logistics businesses. It operates a 100,000 square-foot warehouse, one-third of which is devoted to consolidation services for several customers, including Ann Taylor, David's Bridal, Dress Barn, Daffy's, and Modell's. Each of those customers has its own consolidation requirements for Summit. The remainder of the warehouse is used for Summit's warehousing operations.

Summit manages the Ann Taylor freight that is brought into the country by air or ship, trucks it to the Summit warehouse in Secaucus, and consolidates it into shipments for delivery to Ann

Taylor in Louisville. For a time, Summit made the deliveries with its own trucks, using its own federal motor carrier authority. It then engaged HMH Motor Service for that purpose. [Brody dep., pp. 57-58]. Ultimately, Ann Taylor recommended that A.D. Transport Express, Inc., be engaged to replace HMH Motor Service, in 2001. [Brody dep., p. 91]. A.D. Transport continues to provide that service to this day, although it is now paid directly by Ann Taylor [Percy Aff. ¶ 23].

A sophisticated shipper cannot claim that it did not understand the limitation of liability in the carrier's tariff or bill of lading (or in the shipper's own bill of lading). Nor can it claim that it did not have a fair opportunity to declare a higher value of the freight and pay a higher freight rate in return for higher coverage. In *Hollingsworth & Vose*, *supra*,158 F.3d 617 (1st Cir. 1998), the plaintiff engaged A-P-A Transportation to truck a calendar roll (a large cylinder used to produce fabric) from its plant in Floyd, Virginia, to KRH Rolls in Orange, Massachusetts. Hollingsworth filled out its own bill of lading, not objecting when A-P-A arranged for Wilson Trucking to substitute in the first portion of the trip. The calendar roll was delivered in a damaged condition. The carrier's tariff set forth its released rate limitation, and the bill of lading contained a section for the shipper to declare a higher value. The Hollingsworth shipping clerk left that section blank. *Id.* at 619-20. The First Circuit held that since the shipper is charged with knowledge of the tariff (*American Ry. Express Co. v. Daniel*, 269 U.S. 40 (1925)), "it follows that Hollingsworth, in leaving the declaration space blank in the bill of lading, agreed – by virtue of the tariff's "unless" clause – to the 10 cents-per-pound maximum valuation." *Id.* at 619. The limitation was enforced:

> It is enough that the tariff made both coverages available, the bill of lading afforded the shipper a reasonable opportunity to choose between them . . . , and the shipper was a substantial commercial enterprise capable of understanding the agreements it signed. In our view, that is normally enough to give this shipper a "fair opportunity" to opt for more coverage in exchange for a higher rate.

Id. at 621.

Similarly, the shipper in *Hill Construction*, *supra*, 996 F.2d 1315 (1st Cir. 1993), had been in business in Puerto Rico for eighteen years:

> Its employees had previously shipped helicopter parts from Puerto Rico to the mainland. In this context, a reasonably prominent writing, not in particularly small print, set forth with reasonable clarity on the front of a printed airbill, would seem sufficient to communicate the liability limitation, or at least to impose upon the commercial customer a further obligation to read (rather than to impose upon the carrier a further obligation to point to) what is written.

Id. at 1318.

Recent cases, including those in the Third Circuit, have recognized that a sophisticated shipper is not "at the mercy of an experienced carrier" when dealing with a transportation contract containing a limitation of liability or a released valuation. *Siren v. Estes Express Lines*, 249 F.3d 1268 (11th Cir. 2001); *American Cyanimd Co. v. New Penn Motor Express*, 979 F.2d 310 (3d Cir. 1992); *Carmana Designs v. North American Van Lines*, *supra*, 943 F.2d at 321 (3d Cir. 1991) ("A shipper's sophistication, abundant experience, or extensive prior dealings with a carrier may constitute additional evidence of a limitation agreement between the parties.").

In *Siren*, *supra*, the bill of lading was drafted by the shipper, as Summit claims occurred in the case at bar. Siren's bill of lading, like Summit's, contained very little information but the essentials, and instructed that the shipment should travel under "Class 85". As a sophisticated shipper, Siren knew that the designation of Class 85 would mean in the industry that the carrier's limitation would be $11.87 per pound. This fact was set forth in the carrier's tariff, which Siren, like Summit, never requested. The Court of Appeals vacated the district court's finding in favor of Siren. The Court pointed out that as a sophisticated shipper, Siren "could have chosen a different Class for this shipment and, in return, received a different rate along with a different limitation of Estes' liability." 249 F.3d at 1268. The Court of Appeals concluded as a matter of law that this sophisticated shipper was bound by the limitation even if its bill of lading did not incorporate the

Estes tariff. *Id*. at 1270.

Summit was privy to all of the documents (the A.D. Transport freight bill and bill of lading containing the limitation, and the Summit bill of lading with the Valuation block always left blank) that had formed the agreement with A.D. Transport – 670 times before. Summit had purchased its own insurance and so did not need higher coverage from A.D. Transport. Summit may be deemed to know that by taking no steps to request a higher released value as set forth prominently on the A.D. Transport bill of lading (670 times before), it was accepting the carrier's limitation. In fact, Mr. Brody's denial that he was told of the limitation of liability by Mr. Percy is simply not material. Summit's officers had actual knowledge of the limitation.

Any claim to the contrary would come "with ill grace" as stated by the Third Circuit in *American Cyanamid*, *supra*, 979 F.2d at 314. Under the circumstances, "it seems fair to hold [the shipper] to the terms it established. *See Carmana*, 943 F.2d at 321-22; *Mechanical Technology, Inc. v. Ryder Truck Lines, Inc.*, 776 F.2d 1085, 1088-89 (2d Cir. 1985)." *Id.*

Summit Transportation & Fulfillment, Inc. and its affiliates and principals have been in the trucking, transportation, warehousing, and consolidation business for many years, and operate a 100,000 square-foot warehouse, run several trucking operations of their own, and engage the services of outside truckers on a regular basis, for Ann Taylor, Inc. and other customers. Summit cannot claim that it was in a disadvantaged situation and unaware of the contract that it negotiated. *Carmana Designs*, *supra*.

The Third Circuit had just this situation in mind when it ruled in favor of an airline and against a sophisticated shipper, in *First Pennsylvania Bank, N.A. v. Eastern Airlines, Inc.*, 731 F.2d

1113, 1122:

> As sophisticated men of affairs, appellant's officers knew that there was a substantial risk arising from the discrepancy when the shipments had an actual value of millions of dollars and the carrier disclaimed in writing any liability in excess of $500. They made a business judgment when they decided not to explore the possibility of obtaining greater protection from the airline at a higher rate, or even taking out a policy themselves with an insurance company to cover their exposure. Having made their bed they must lie in it. We are not at liberty to "second guess" their cost-benefit analysis.

Summit had purchased its own insurance, and it made a conscious decision not to seek greater protection from A.D. Transport. This court is not at liberty to "second guess" Summit's cost-benefit analysis.

The agreement that Summit forged with A.D. Transport must be viewed from the standpoint of two commercially sophisticated parties. It consists not only of the documents that were consistently used, but also Summit's purchase of its own insurance, and the course of dealing engaged in on 670 shipments from 2001 to 2004, averaging five shipments per week over that long period of time.

We now turn to that course of dealing.

POINT VI

THE COURSE OF DEALING BETWEEN SUMMIT AND A.D. TRANSPORT CONFIRMED SUMMIT'S ACCEPTANCE OF THE LIMITATION OF LIABILITY

Courts have used evidence of a course of dealing, and other extrinsic evidence, to define and confirm limitation terms in transportation agreements in Carmack and non-Carmack Amendment cases, across the spectrum of transportation modes. Carmack Amendment cases include *Atlantic Mut. Ins. Co. v. Yasutomi Warehousing and Dist., Inc.*, 326 F.Supp.2d 1123 (C.D. Cal. 2004) (course of dealing in 101 shipments over three years considered in Carmack Amendment case); *Penske Logistics, Inc. V. KLLM, Inc.*, 285 F.Supp.2d 468 (D.N.J. 2003) (extrinsic evidence of purchase of insurance by shipper considered in Carmack Amendment case); and *U.S. JVC Corp. v. New England Motor Freight Inc.*, 1990 WL 115621 (S.D.N.Y. 1990) (not otherwise reported) (Carmack case denying cross-motions for summary judgment because of material factual dispute as to whether shipper's knowledge of the carrier's limitation could be deduced from prior course of dealing).

Prominent course of dealing cases in other transportation modes, or non-Carmack trucking cases, include *Insurance Company of North America v. NNR Aircargo Service (USA), Inc.*, 201 F.3d 1111 (9th Cir. 2000) (applying federal common law in freight forwarder claim); *Royal Ins. Co. v. Sea-Land Service, Inc.*, 50 F.3d 723 (9th Cir. 1995) (applying Carriage of Goods By Sea Act in claim against ocean carrier); *Capitol Converting Equip., Inc. v. LEP Transport, Inc.*, 965 F.2d 391 (7th Cir. 1992) (application of Illinois UCC to mysterious loss of cargo transported on a through air waybill from Genoa to Chicago, via Norfolk); *Calvin Klein Ltd. v. Trylon Trucking Corp.*, 892 F.2d 191 (2d Cir. 1989) (truck stolen during exempt transport within the New York Commercial Zone, applying

New York UCC); *Royal Ins. Co. (U.K.) v. Fountain Technologies, Inc.*, 984 F.Supp. 724 (S.D.N.Y. 1997) (federal common law applied to local trucking leg from Brooklyn to Newark Airport for air transport to London); *Independent Machinery, Inc. v. Kuehne & Nagel, Inc.*, 867 F.Supp. 752 (N.D. Ill. 1994) (non-Carmack freight forwarder claim applying Illinois UCC and considering "a sheer volume of prior transactions between the parties").

There is no reason that A.D. Transport cannot demonstrate its adherence to the "*Hughes*" requirements, as described in *Emerson Electric*, through the presentation of evidence of the course of dealing between Summit and A.D. Transport over three years and 670 shipments.

Regardless of the transportation mode or legal regime, the policy reason for considering course of dealing evidence is the same: to determine whether the shipper knew of the carrier's limitation and had a fair opportunity to request a higher limitation or purchase its own insurance. In the case at bar, the documents involved in every shipment constitute the written agreement; they provide Summit with the opportunity to choose between two or more levels of liability as required by *Emerson Electric Supply Co. v. Estes Express Lines Corp.*, 451 F.3d 179 (3d Cir. 2006).

The course of dealing that followed the initial meeting between Mr. Brody and Mr. Percy gave Summit the actual knowledge of the terms of the A.D. Transport limitation regime. It also defined the full terms of their agreement. That course of dealing will demonstrate that A.D. Transport is entitled to limit its liability in accordance with its tariff and bills of lading.

Following the first shipment, and every one of over 600 shipments thereafter, A.D. Transport sent Summit a freight bill and an accompanying bill of lading (specifically referenced in the freight bill). Each bill of lading contained a clearly visible limitation of liability box in the upper right hand corner, boldly displaying this language:

> VALUE AGREED TO BE $50 PER SHIPMENT OR .50 CENTS PER POUND PER PIECE UNLESS EXCESS VALUE DECLARED EXCESS VALUE CHARGE WILL BE COMPUTED AT .40 CENTS PER $100 OF THE EXCESS.
> DECLARED VALUE TO EXCEEDING $10,000.00 MUST BE APPROVED AND COMMUNICATED IN WRITING PRIOR TO THE SHIPMENT TO BE VALID.

That box contains a space for the shipper to include a declared valuation. [See Percy Aff. Ex. 1]. At no time did Summit ever declare a valuation, on an A.D. Transport bill of lading or on the bill of lading drafted and filled out by Summit. Nor did Summit ever contact A.D. Transport to seek prior approval for a value exceeding $10,000.

And on 670 shipments Summit received and paid the freight bill that accompanied that bill of lading, without exception or any objection. As a sophisticated shipper, a company in the transportation business, they understood its meaning. The limitation was of no concern, because Summit had its own *insurance*. In all those occasions, Summit never requested a higher limitation, or declared any value whatever, to A.D. Transport. Nor did Summit request a copy of the A.D. Transport tariff, which was readily available to Summit upon request, a requirement of the modern Carmack Amendment, 49 U.S.C. § 14706.

After each of the shipments, Summit's controller received an A.D. Transport invoice accompanied by an A.D. Transport bill of lading, described above. He acknowledges that he read the release value language on the front of the bill of lading. He then approved payment. Summit's president signed a check to A.D. Transport, 670 times.

Summit chose to use its own form of bill of lading [Lane Ex. F]. That Summit form document is filled in by Summit personnel. It is signed by an A.D. Transport driver, signifying only his receipt of a loaded and sealed trailer. This is not an "A.D. Transport bill of lading."

The Summit bill of lading has a location to include the Value of the shipment. Summit never filled it in. Summit at one and the same time rejected the opportunity to purchase a higher limit of liability and also opted for the released value set forth so boldly and understandably in the A.D. Transport bill of lading, of which Summit admits it had actual knowledge.

The contract reached by these sophisticated commercial parties consists of the A.D. Transport tariff and the following:

- Summit's receipt of the A.D. Transport invoice and accompanying bill of lading containing the limitation on 670 prior shipments;
- Summit's payment of every prior invoice;
- Summit's preparation and issuance of its own bill of lading, leaving theValue section blank;
- Summit's failure to request a copy of the A.D. Transport tariff;
- Summit's failure on any shipment to seek or ask for a "higher limit of liability in return for a higher freight rate; and
- Summit's purchase of its own insurance.

This history over three years and 670 shipments was sufficient to constitute a course of dealing that confirmed and defined the parties' contract.

"Invoice terms and conditions may supplements shipping agreements if there has been a sufficient course of dealing." *Ins. Co. of North America v. NNR Aircargo Service (USA), Inc.*, 201 F.3d 1111, 1113 (9th Cir. 2000) (involving the theft of a shipment of golf balls owned by INA's insured, Dunlop Slazenger Corporation). Dunlop had contracted with NNR on 47 prior occasions. On each occasion, NNR sent Dunlop an invoice containing terms and conditions, including its limitation of liability. The Court of Appeals upheld the liability limitation found in the NNR

invoice, finding that 47 separate transactions is sufficient to constitute a *course of dealing*: "Consistent with this reasoning, we find that 47 identical invoices sent by NNR over a period of three years put Dunlop on notice of the terms and conditions contained in them." *Id.* at 1114.

In the case at bar, it was not just an invoice that put Summit on notice of A.D. Transport's terms and conditions; it was A.D.'s bill of lading. It was not just 47 shipments over three years; it was 670 shipments, fourteen times as many, over three years. And, Summit's controller admits that he saw those 670 identical invoices and bills of lading and did nothing about them except to authorize their payment. The president of Summit then signed the checks to A.D. Transport – 670 of them.

In addition, the appearance of the limitation provisions in hundreds of prior invoices, and the absence of any prior discussion to the contrary has been held sufficient to enforce a limitation contained in an invoice even where the shipper claims it is unaware of the term. *Capitol Converting Equip., Inc. v. LEP Transport., Inc.*, 965 F.2d 391, 395 (7th Cir. 1992). As few as five transactions in a single year has been held to constitute a course of dealing, with each transaction including an invoice clearly setting forth a liability limitation. *Independent Machinery, Inc. v. Kuehne & Nagel, Inc.*, 867 F. Supp. 752, 764-65 (N.D. Ill. 1994).

In the case at bar, Summit actually knew of the limitation in the A.D. Transport bill of lading. Summit simply chose to ignore it.

The Second Circuit found a course of dealing to describe the shipper-motor carrier agreement in *Calvin Klein Ltd. v. Trylon Trucking Corp.*, 892 F.2d 191 (2d Cir. 1989). Calvin Klein used the services of Trylon for three years, "involving hundreds of shipments, prior to the lost shipment referred to." *Id*. at 192. After each shipment Trylon would send Calvin Klein an invoice which

contained a $50.00 limitation (per truckload) unless a greater value were declared and higher freight charge were paid. Calvin Klein, like Summit, knew of the limitation and had never contested it in the hundreds of shipments in the previous three years. There was no invoice for the stolen truckload. The district court thus held that Calvin Klein could not have assented to the limitation clause for *that* shipment. The Court of Appeals reversed, holding that the course of dealing provided the evidence that the limitation also applied to the lost shipment. *Id.* at 193-94.

Interestingly, while *Calvin Klein* is decided under New York law because the shipment was within the New York Commercial Zone, the Second Circuit referred to the "similar scheme under the Interstate Commerce Act" (*Id.* at 194) when discussing the limitation and the ability of the shipper to "increase the limitation by written notice of the value of the goods to be delivered and by payment of a commensurately higher fee." *Id.*

In *Atlantic Mut. Ins. Co. v. Yasutomi*, *supra*, relied upon course of dealing evidence on 101 shipments over a span of three years, in which the carrier issued an identical bill of lading (326 F.Supp.2d at 1124-25). The district court held that the course of dealing was sufficient to establish the requisite knowledge and fair opportunity to avoid the monetary limitation. *Id.* at 1126-27. The district court also emphasized the importance of the purchase by the shipper of separate insurance, *Id.* at 1128:

> A party such as Unirex had an opportunity to make an informed choice between shipping with Defendant's limited liability or by purchasing separate insurance, which Unirex did through Atlantic Mutual. The Ninth Circuit ruled that "the function served by notice of limited liability is accomplished if the shipper in fact purchases separate insurance, whether or not such notice is actually given." *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1198 (9th Cir. 1999). Unirex's purchase of insurance through Plaintiff makes it clear that Defendant's limited liability contained in its usual bill of lading is valid and enforceable.

The contract described by the course of dealing is further confirmed by the fact that Summit purchased its own outside, private insurance. *Royal Ins. Co. (U.K.) v. Fountain Technologies, Inc.*, 984 F.Supp.724, 733 (S.D.N.Y. 1997) ("...both parties are sophisticated business enterprises and it is clear that Fountain had the opportunity to obtain outside insurance coverage since it is Highmead's insurer that has brought the suit."). The Ninth Circuit emphasized the point in *Read-Rite Corp. v. Burlington Air Express, Ltd.*, 186 F.3d 1190, 1198 (9th Cir. 1999):

> The decision to insure separately "in and of itself demonstrates . . . a conscious decision not to opt out of the liability limitation." *Vision Air Flight Service v. M/V National Pride,* 155 F.3d 1165, 1169 (9th Cir. 1998; (other citations omitted). The separate purchase of insurance simply cannot be reconciled with a contention that the shipper has been disadvantaged by a lost opportunity to pay the carrier more money in return for greater coverage. As we explained in *Travelers Indemnity* [26 F.3d 895, 900], "[w]hy would [the shipper] increase its costs by insuring the same cargo twice?" (Emphasis added).

This incontestable point is true regardless of the transportation mode or the liability regime involved. Why, indeed, would Summit insure the cargo twice? The purchase of insurance explains why Summit would not have wanted to opt for a higher level of liability, and thus a higher freight rate, from A.D. Transport.

On every shipment, Summit made a commercial decision to reject the *fair opportunity* to declare a higher value in exchange for a limitation in excess of the maximum $10,000 release value in the A.D. Transport tariff and bill of lading. Summit used its own bill of lading form, filled in by Summit, but chose not to include a value on that form. The limitation, therefore, should be enforced. *Schweitzer Aircraft Corp. v. Landstar Ranger, Inc.*, 114 F.Supp.2d 199, 203 (W.D.N.Y. 2000) (The shipper "assumed this risk of loss by rejecting the fair opportunity afforded to it to declare its own

release rate in exchange for a higher shipping rate."). *See*, *also*, *Mechanical Technology, Inc. v. Ryder Truck Lines*, 776 F.2d 1085, 1089 (2d Cir. 1985) ("When a sophisticated shipper, using his own bill of lading form, leaves blank the space provided for declaring the released value of the goods, we will presume that he did so deliberately with full knowledge of the consequences under the applicable tariff.").

Summit chose not to pay a higher rate for a higher level of liability. The "presumption is conclusive," as the Supreme Court said in *Hart v. Penn R. Co.*, 112 U.S. 331 337 (1884), that if the higher level of liability had been assumed, "a higher rate of freight would have been charged."

The presumptions of the Supreme Court and the Second Circuit must be applied here. Summit knew of the limitation, had a fair opportunity to choose a higher level of limitation, and rejected it. "[I]t would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in the case of loss." *Adams Express*, *supra*, 226 U.S. at 511.

The liability of A.D. Transport Express must be limited to $10,000.

CONCLUSION

Plaintiff Travelers Property Casualty Company of America, stands in the shoes of its subrogor, Summit Transportation and Fulfillment, Inc. Summit Transportation is a sophisticated transportation business enterprise. It entered into an agreement with defendant A.D. Transport Express, Inc., for A.D. Transport to move shipments from New Jersey to Kentucky, as many as five times per week. Summit had actual knowledge of the A.D. Transport limitation of liability and the opportunity to opt for a higher limitation and pay a calculable higher freight rate. Over the course of three years and 670 shipments, Summit never exercised that option. Instead, it had its own insurance (with plaintiff) and had no reason to pay twice for the coverage. Summit having had the benefit of the lower freight rate for 670 claim-free shipments, Travelers is in no position to repudiate the deal that Summit struck now that there has been a theft loss.

Plaintiff is unable to establish the good order of the goods at the time that they were loaded by Summit personnel onto the A.D. Transport truck and tendered to the defendant for carriage to Louisville, Kentucky. That inability is fatal to the lawsuit, and it compels the dismissal of the complaint in its entirety.

Plaintiff cannot proceed with the causes of action founded upon state common or statutory law. The shipment in question is governed by the Carmack Amendment, which provides the exclusive remedy for any loss of the Ann Taylor goods. Therefore, plaintiff's state-law claims must be dismissed, as a matter of law.

Whatever may be left of plaintiff's case, governed as it is by the Carmack Amendment, must be limited to $10,000, as called for in the A.D. Transport tariff, its bills of lading actually received and read by Summit Transportation, and by their course of dealing over three years and 670 prior shipments.

For all of the foregoing reasons, the motion of A.D. Transport for partial and complete summary judgment, to dismiss the complaint or to limit defendant's liability to $10,000, should be granted in its entirety.

Dated: February 26, 2007

Respectfully submitted,

/s/ John C. Lane

John C. Lane (JL 2569)