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SUPREME COURT OF THE STATE OF FLORIDA

IVANA VIDOVIC MLINAR,
Appellant/Plaintiff,
vs.

UNITED PARCEL SERVICE INC.,
Appellee/Defendant,

RECOVERY MANAGEMENT CORP. d/b/a CARGO LARGO, PAK MAIL OF WELLINGTON, INC., and AARON ANDERSON,
Defendants.

CASE NO: SC14-54
LOWER TRIBUNAL Nos.
FOURTH DCA: 4D12-1332
15th JUD. CIR.: 502008CA036246 (PALM BEACH)

APPENDIX TO INITIAL BRIEF OF APPELLANT
Volume One

ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS AFFIRMING FINAL JUDGMENT OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF FLORIDA IN AND FOR PALM BEACH COUNTY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-serve, and US Mail this 3rd day of JUNE, 2014, to all counsel on the attached list.

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DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT
July Term 2013

IVANA VIDOVIC MLINAR,
Appellant,

v.

UNITED PARCEL SERVICE, INC., PAK MAIL OF WELLINGTON, INC., RECOVERY MANAGEMENT CORP. d/b/a CARGO LARGO and **AARON ANDERSON,**
Appellees.

No. 4D12-1332

[December 4, 2013]

ON MOTION FOR REHEARING, REHEARING EN BANC, AND CERTIFICATION TO THE FLORIDA SUPREME COURT

TAYLOR, J.

Appellant has moved for rehearing, rehearing en banc, and certification of conflict. We deny the motion for rehearing and rehearing en banc, but grant the motion for certification of conflict. We withdraw our prior opinion and substitute the following opinion in its place.

Ivana Vidovic Mlinar appeals a final order dismissing all of her claims against UPS on the ground that the claims were preempted by the Carmack Amendment. We affirm.

Factual Background

Appellant is an artist who created two valuable oil paintings: *Advice* and *The Messenger*. Her husband took the paintings to Pak Mail, a third party retailer, to be shipped via UPS to New York. When the container arrived at its intended destination in New York, it was empty. The duct tape had been sliced and the paintings had been removed. Appellant reported the loss to UPS and Pak Mail. Months later, Pak Mail offered her $100 for the missing contents of the package.

At some point, UPS sold the paintings to Cargo Largo, UPS's lost goods contractor. Cargo Largo later auctioned the paintings. An

individual named Aaron Anderson purchased one of the paintings at the Cargo Largo auction.

About two years after appellant lost possession of the paintings, she received a telephone call from Anderson, who informed her that he had just purchased *Advice* at the Cargo Largo auction sale. Anderson inquired into the value of the painting, and she informed him that it had been appraised to be worth $20,000. He also informed her that *The Messenger* was auctioned in the same lot, but that he did not know the identity of the purchaser.

Anderson placed a listing online offering to sell *Advice* and even offering to introduce the buyer to appellant. He eventually acquired *The Messenger* as well. He then placed advertisements online in which he offered to sell or trade both paintings, and again offered to introduce the buyer to appellant.

Based on the above facts, appellant filed suit against UPS, Pak Mail, Cargo Largo, and Anderson. According to the operative complaint, UPS selectively located the contents of her container "based on their nature, probable worth, and lack of insurance," and then sold the paintings to Cargo Largo for "some as of yet undiscovered consideration." UPS also utilized appellant's contact information on the back of each painting "to catalogue, sell and/or distribute" the paintings to Cargo Largo.

Appellant asserted four claims in her complaint: Conversion (Count I – against UPS, Cargo Largo, and Pak Mail), Profiting by Criminal Activity (Count II – against UPS, Cargo Largo, and Pak Mail), Unauthorized Publication of Name or Likeness (Count III – against UPS, Cargo Largo, and Anderson), and a claim under Florida's Deceptive and Unfair Trade Practices Act (Count IV – against UPS).

The trial court dismissed all of appellant's claims against UPS, ruling that they were preempted by the federal Carmack Amendment. This appeal followed.

Standard of Review

The standard of review of a trial court's order of dismissal is de novo. *Gomez v. Fradin*, 41 So. 3d 1068, 1070 (Fla. 4th DCA 2010).

Law on Carmack Preemption

The Carmack Amendment to the Interstate Commerce Act was

enacted in 1906 to establish a uniform national policy for interstate carriers' liability for property loss. *N.Y., N.H. & Hartford R.R. Co. v. Nothnagle*, 346 U.S. 128, 131 (1953). Under the Carmack Amendment, a carrier is generally liable for the actual loss or injury to the property. 49 U.S.C. § 14706(a)(1). However, a carrier may limit its liability to "a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. § 14706(c)(1).

Consistent with the goal of uniformity, the Carmack Amendment preempts state or common law remedies available to a shipper against a carrier for loss or damage to interstate shipments. *N. Am. Van Lines, Inc. v. Pinkerton Sec. Sys., Inc.*, 89 F.3d 452, 456 (7th Cir. 1996). The Carmack Amendment's preemptive scope supersedes all the regulations and policies of a particular state upon the same subject. *Adams Express Co. v. Croninger*, 226 U.S. 491, 505 (1913). Carmack Amendment preemption embraces "all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation . . . ." *Ga., Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 196 (1916). A cause of action not within the ambit of the preemptive scope of the Carmack Amendment is the rare exception. *Brightstar Int'l Corp. v. Minuteman Int'l*, 2011 WL 4686432 (N.D. Ill. Oct. 4, 2011).

As a general rule, the Carmack Amendment broadly preempts common law fraud, conversion, and unfair trade practices claims. *See, e.g.*, *Hall v. N. Am. Van Lines, Inc.*, 476 F.3d 683, 689 (9th Cir. 2007) (stating that the Carmack Amendment preemption "applies equally to fraud and conversion claims arising from a carrier's misrepresentations as to the conditions of delivery or failure to carry out delivery"); *Moffit v. Bekins Van Lines Co.*, 6 F.3d 305, 306-07 (5th Cir. 1993) (holding that the Carmack Amendment preempted various state law claims, including fraud, negligent and intentional infliction of emotional distress, slander, and a claim under the Texas Deceptive Trade Practices Act, when a moving company failed to deliver household goods to a new home in time for Christmas); *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 289 (7th Cir. 1997) (holding that fraud "claims relating to the making of the contract for carriage are so closely related to the performance of the contract, and the measure of damages for such claims so likely to be the loss or damage to the goods, that they are also preempted by the Carmack Amendment"); *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 506 (1st Cir. 1997) (holding that Carmack Amendment preempted a shipper's claim for violation of the Massachusetts Consumer Protection Act); *United Van Lines v. Shooster*, 860 F. Supp. 826, 828-29 (S.D. Fla. 1992)

(finding that the Carmack Amendment preempted a claim based on an alleged fraudulent estimate made to induce a contract); *see also Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F. Supp. 2d 494, 498 (D.S.C. 2005) (collecting cases).

Situations may exist, however, in which the Carmack Amendment does not preempt all state and common law claims. *Smith v. United Parcel Serv.*, 296 F.3d 1244, 1248 (11th Cir. 2002). Claims that are "based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption." *Id.* at 1249. For example, "no doubt exists that if a UPS driver intentionally assaulted and injured" a plaintiff, the Carmack Amendment would not preempt the cause of action. *Id.*

Other courts have applied a different test, ruling that preemption does not apply if "the shipper alleges injuries separate and apart from those resulting directly from the loss of shipped property." *See Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 382 (5th Cir. 1998). Under this test, a claim alleging a harm independent from the loss or damage to the goods is not preempted by Carmack. *See Braid Sales & Mktg., Inc. v. R & L Carriers, Inc.*, 838 So. 2d 590, 593 (Fla. 5th DCA 2003) ("Here, Braid's claim of an alleged oral contract between the parties for payment of repairs, entered into after the shipment was completed, constitutes a separate harm which is independent from the loss or damage to goods. As such the claim is not preempted."); *Rini*, 104 F.3d at 506 ("[A] claim for intentional infliction of emotional distress alleges a harm to the shipper that is independent from the loss or damage to goods and, as such, would not be preempted."); *Gordon*, 130 F.3d at 289 (holding that claim of intentional infliction of emotional distress was not preempted).

Analysis of Appellant's Claims

We agree with the Eleventh Circuit that the proper test for whether claims escape Carmack preemption is whether the claims are based on conduct separate and distinct from the delivery, loss of, or damage to goods. "In other words, separate and distinct conduct *rather than injury* must exist for a claim to fall outside the preemptive scope of the Carmack Amendment." *Smith*, 296 F.3d at 1249 (emphasis added).

Applying this standard, we conclude that all of appellant's claims against UPS are preempted by the Carmack Amendment. First, we find that appellant's claim against UPS for conversion is preempted because it is predicated upon UPS's failure to deliver appellant's goods. *See Laing v. Cordi*, 2012 WL 4792905 (M.D. Fla. Oct. 9, 2012) ("Plaintiffs' claims for

conversion and civil theft are predicated on Estes' alleged failure to deliver plaintiffs' goods. Although plaintiffs allege that Estes knowingly, intentionally, and maliciously appropriated and converted plaintiffs' personal property, these contentions do not alter the fact that the claims are based on Estes' alleged failure to deliver their personal property.") (record citations omitted). We recognize that some courts allow an exception from preemption "when there has been a true conversion, i.e., where the carrier has appropriated the property for its own use or gain." *Glickfeld v. Howard Van Lines*, 213 F.2d 723, 727 (9th Cir. 1954). However, we decline to craft such an exception. Conversion is an intentional tort under Florida law. *See*, *e.g.*, *Curd v. Mosaic Fertilizer, LLC*, 39 So. 3d 1216, 1223 n.4 (Fla. 2010). We find that any distinction between "true" conversions and other conversions is unworkable in practice. Accordingly, we conclude that appellant's conversion claim is preempted by the Carmack Amendment even though it includes allegations of intentional conduct. To hold otherwise would undermine the Carmack Amendment's goal of creating a uniform national policy on a carrier's liability for property loss.

Second, we conclude that appellant's claim against UPS for the unauthorized use of her name or likeness is preempted by the Carmack Amendment. Courts have held that even claims of slander or damage to reputation are preempted by the Carmack Amendment. *See Moffit*, 6 F.3d at 306-07 (holding that Carmack Amendment preempted all of the plaintiffs' claims, including slander); *Design X Mfg., Inc. v. ABF Freight Sys., Inc.*, 584 F. Supp. 2d 464, 468 (D. Conn. 2008) (holding that Carmack Amendment preempted furniture company's claim against carrier for loss of business and reputation arising out of damaged desk delivered to one of the plaintiff's customers; the "alleged loss to business and reputation flowed directly from the damage to the goods shipped in interstate commerce and the subsequent claims process"). Similarly, in this case we find that UPS's alleged unauthorized use of appellant's likeness in the resale of her paintings flowed directly from UPS's course of conduct in failing to deliver the paintings. This claim is therefore preempted.

Finally, we hold that appellant's claims against UPS in Counts II and IV are also preempted. These counts, which allege fraud and deceptive conduct relating to the formation of the shipping contract, are so closely related to the performance of the contract that they are preempted. *See*, *e.g.*, *Gordon*, 130 F.3d at 289 (holding that fraud "claims relating to the making of the contract for carriage are so closely related to the performance of the contract, and the measure of damages for such claims so likely to be the loss or damage to the goods, that they are also

preempted by the Carmack Amendment"); *Schultz v. Auld*, 848 F. Supp. 1497, 1503 (D. Idaho 1993) ("Decisions more recent than those on which Plaintiff relies have uniformly upheld the preemptive effect of the Carmack Amendment and that the application of a state's deceptive trade practices act is totally incongruous with the purposes of the Carmack Amendment.").[1]

Conclusion

We affirm the trial court's final order of dismissal. To the extent this opinion conflicts with the Fifth District's decision in *Braid Sales*, we certify conflict.

Affirmed; conflict certified.

CIKLIN, J., and ROBINSON, MICHAEL A., Associate Judge, concur.

* * *

Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; Lucy Chernow Brown, Judge; L.T. Case No. 502008CA 036246XXXXMB.

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Evan S. Gutwein and David R. Heffernan of Hamilton, Miller & Birthisel, LLP, Miami, for appellee United Parcel Service, Inc.

Not final until disposition of timely filed motion for rehearing.

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[1] While there are some cases holding that the Carmack Amendment does not preempt unfair trade practice claims, *see Mesta v. Allied Van Lines Int'l, Inc.*, 695 F. Supp. 63 (D. Mass. 1988); *Sokhos v. Mayflower Transit, Inc.*, 691 F. Supp. 1578 (D. Mass. 1988); *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980), these cases are in the minority and two of them have been disapproved. *See Rini*, 104 F.3d 502, 506 n.3 (1st Cir. 1997) ("To the extent [*Sokhos* and *Mesta*] are inconsistent with our holding, they do not represent the law of the circuit.").

FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

IVANA VIDOVIC MLINAR,
Appellant/Plaintiff,

vs.

UNITED PARCEL SERVICE INC.
Appellee/Defendant,

RECOVERY MANAGEMENT CORP. d/b/a CARGO LARGO, PAKMAIL OF WELLINGTON INC., and AARON ANDERSON,
Defendants.

CASE NO.: 4D12-

LT CASE NO.: 50 2008 CA 036246 (PALM BEACH)

INITIAL BRIEF OF APPELLANT

ON APPEAL FROM FINAL JUDGMENT OF
THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

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PRELIMINARY STATEMENT

Plaintiff/Appellant Ivana Vidovic Mlinar is referred to as "Appellant." Appellee/Defendant United Parcel Service Inc. is referred to as "UPS." Defendant Recovery Management Corp. d/b/a Cargo Largo is referred to as "Cargo Largo." Defendant Pak-Mail Of Wellington Inc. is referred to as "Pak Mail." Defendant Aaron Anderson is referred to as "Anderson." Citations to the Record are noted as "R" and followed by the page number.

Appellant appeals the Final Order entered on January 30, 2012 which dismissed all four claims alleged against UPS with prejudice. The Order was based upon two findings: First, all claims alleged against UPS are precluded by the Carmack Amendment. Second, the claim for profiting by criminal activity fails to provide the requisite specificity. Appellant appeals the first finding as contrary to the law and the allegations. Appellant appeals the second finding only in so far as it resulted in an order dismissing the claim with prejudice.

Four claims were pending against UPS: Conversion, Conspiracy, Misappropriation of Identity, and Fraudulent and Deceptive Unfair Trade Practice. All claims excepting the *FDUTPA* claim were alleged against UPS and other defendants. Appellant maintains that none of the claims alleged are subject to Carmack preemption.

STATEMENT OF THE CASE AND OF THE FACTS

Nature of the Case

Appellant is a painter who created two large oil paintings entitled *Advice* and *Messenger*. [R.3] On November 20, 2008, she filed a Complaint alleging that in 2005, these two paintings were stolen by UPS and Cargo Largo through a conspiracy operated by UPS, Cargo Largo and Pak Mail. [R. 10-13.] The complaint alleged that UPS selected the package for theft, removed the contents, and then conveyed the goods to Cargo Largo. [R.6]. Cargo Largo later auctioned the painting to Aaron Anderson; Anderson attempted to sell it over the internet. The Complaint alleged that these transactions exploited and misappropriated her name, a vestige of her likeness. [R. 13-14]. Plaintiff alleged that Advice, the larger of the paintings, had an appraised worth of Twenty Thousand Dollars ($20,000). [R. 5]

Appellant alleged that the events caused her damages including missed opportunity, property loss, injury to professional reputation, and other statutorily proscribed damages such as loss of royalty. [R. 10, 12-14 including ¶¶ 34, 40-41, 48 and all wherefore clauses.] She claimed treble damages and attorney's fees as well. [R. 13.]

UPS answered the Complaint on January 16, 2009. The Fourth Affirmative Defense stated that "some or all of the claims are preempted by federal law, *inter alia,* the Carmack Amendment to the Interstate Commerce Act, 49 USC §14706(a) & (c) *et seq.*" [R. 24.]

On March 26, 2009, Appellant filed an Amended Complaint reflecting technical changes in the names of defendants only. [R. 27-42.] The Amended Complaint continued to state claims for conversion, conspiracy (pursuant to Florida Statutes, chapter 772) and misappropriation of identity (pursuant Florida Statutes, section 540.08). [R. 36-40.] Each of these claims were alleged against defendant UPS as well as defendant Cargo Largo.

On September 30, 2011, upon entry of an Agreed Order, Appellant filed a Second Amended Complaint [R. 197]. The Second Amended Complaint added a claim for Fraudulent and Deceptive Trade Practice (pursuant to Florida Statutes Chapter 501), including additional specific allegations; the new claim was alleged against UPS only. [R. 170-174].

The specific allegations supporting the FDUPTA claim detailed the agreements between the alleged conspirators, UPS and Cargo Largo, including allegations as to how UPS profited from the conversion and conspiracy through a consignment provision in place between the companie. The complaint alleged that the sales revenue paid by Cargo Largo to UPS in any one year exceeded the

total sums UPS ever paid to Cargo Largo to sort through lost package claims. [R. 172-173.]

The new claim asserted that UPS deceptively induces its customers to bring their packages to so-called "third-party retailers" for shipment without disclosing to the customers that UPS will not include them as shippers in the company's published tariffs, will not accept their inquiries regarding missing packages, will not store any of their sender identification on their computers, and will not be able to track a missing package for them. Valuable product that customers attempt to reclaim and track down (like Appellant's paintings) are sent to UPS's contracted overgoods servicer, Cargo Largo, who has the conflicted role of being both a vendor responsible for attempting to pair "lost" items with a concerned UPS customer, and a buyer of "salvaged" goods that profits from the sale of items that remain "lost". [R. 172-173] The system is rigged by UPS so that Cargo Largo will not find valuable products despite customer attempts to reclaim them. [R. 172-173.]

The Allegations

The Second Amended Complaint included the following specific allegations of intentional and conspiratorial misconduct on the part of UPS:

Allegations that Paintings were removed by UPS

Appellant had arranged to exhibit and offer the paintings for sale at a gallery in New York. Her paintings were previously brought to Pak Mail to be shipped by UPS. The paintings were rolled and packaged inside of a fifty-one (51) inch long and four (4) inch diameter PVC pipe. Each end of the pipe was closed with a tightly fitting PVC pipe cap and further secured with silver duct tape. This is a customary method of shipping original paintings. The searled package was seen being loaded onto the UPS truck at Pak Mail. [R. 159; ¶7-9]

Appellant, who did not trust airline baggage delivery, was to receive her paintings in New York, where they were to be exhibited and commemoratively printed in a national, galleried show. [R. 10]

The container was delivered to the proper address; however, the duct tape on the cover of one side of the PVC tube had been sliced and the painting canvases had been removed. The New York UPS deliverymen stated that they delivered the package in exactly the same condition as it had been received when they themselves received it before starting their route. [R. 160; ¶11-12]

Allegations that UPS converted the property

Appellant immediately called UPS to report the missing paintings and initiate an investigation. She explained the totality of the circumstances to UPS.

UPS insisted that it would do nothing about the missing paintings until a report was filed through Pak Mail of Wellington. [R. 160; ¶13]

Appellant provided Pak Mail with the shipping receipt, pictures of both "Advice" and "The Messenger," and a copy of an appraisal reflecting that "Advice," alone, had been appraised at Twenty Thousand Dollars ($20,000). They also advised Pak Mail, and UPS that the paintings were labeled on the back with the identity of the artist and her address. [R. 161; ¶14]

Approximately two years later, Appellant received a shocking telephone call from Anderson stating that he had just acquired "Advice". Anderson purchased "Advice" from Cargo Largo who had received the painting from a UPS auction. [R. 162, ¶ 17]

UPS selectively located the contents based on their nature, probable worth, and lack of insurance. UPS then sent the paintings to Cargo Largo for some as of yet undiscovered consideration exceeding the $100.00 liability coverage provided for all shipments. UPS directly benefited by the conversion. [R. 162, ¶ 19]

Allegations of Misappropriation of Identity

UPS utilized the information on the back of the painting including Appellant's name to catalogue, sell and/or distribute the item to Cargo Largo. [R. 162, ¶ 19]

Significantly, the auctioneer at Cargo Largo was sure to inform the prospective buyers that the paintings were original Ivana Vidovic artwork that had come to Cargo Largo from UPS's lost goods. In fact, Cargo Largo provided Anderson with an acknowledgement of sale, identifying the painting and artist as "the original painting on canvas, 'Advice,' by IvanaVidovic." [R. 163, ¶ 22]

The conspirators knew that Appellant did not consent to the initial distribution of the painting. Appellant did not consent to the use of her name and likeness in connections with the sale or distribution of the painting. The initial and continued use of her name damaged its value. [R. 169-171.]

Anderson placed "Advice" and "The Messenger" for sale in two separate listings on Craigslist. Even more insulting, a third listing on Craigslist offered both "Advice" and "The Messenger" for the exchange of a late model Mercedes. The ad reads in relevant part as follows:

> I have two stunningly beautiful originals by the one and only Floridian listed painter, Ivana Mlinar. 2001 "Advice" and 2005 "The Messenger". Her works are appraised at $30,000 for the two canvases, in hand, and you will have direct contact with the artist herself...introduced by me to the new owner. I will trade both of these paintings for a late model Mercedes Benz in superb condition.

Allegations of Wilful Conspiracy

UPS does not remove the contents from every box it searches; instead, some packages arrive at certain end points with the packaging sliced open and

the goods remaining. Tellingly, these items would not garner more than the $100.00 insured loss limit automatically applicable to all packages. UPS selectively locates certain contents based on their nature, probable worth, and lack of insurance. UPS then sends them to Cargo Largo for some as of yet undiscovered consideration exceeding the company's $100.00 per loss liability coverage. [R. 166, ¶ 29-30]

UPS, Pak Mail and Recovery Management engage in obtaining property by falsely impersonating and/or representing themselves as a shipping enterprise, systematically violating Section 817.02 of Florida Statutes. In fact, they are not a shipping enterprise. The guise of a shipping enterprise has allowed them to falsely seek protections under Carmack and shelve items for the same amount of time it takes a claim under Carmack to expire. The activity forms a pattern of similar acts perpetrated against unrelated persons. [R. 167-167, ¶ 35-37]

Anderson explained to Appellant that he regularly purchased unclaimed or recovered luxury merchandise from transportation giants, like UPS, through Cargo Largo. He further explained that he was considered a "senior buyer" with Cargo Largo; therefore, he is given the first right of purchase in the fine art category. He further noted that many times he contacts the original artists and they state a scenario similar to the Appellant's. Indeed, other artists who had

thought that an item of their work was somehow lost, destroyed or perhaps, stolen by a rogue worker during UPS delivery, finally discovered that it was eventually sold as a UPS lost item. [R. 165, ¶ 25]

Allegations of Damages from the Tortious Conduct

In the wherefore clause of each Count of the Complaint, Appellant sought compensation for the damages proximately caused by these torts including injury to her reputation, lost opportunity, and the loss of the valuable paintings [as illustrated in paragraphs 10-16 of the Complaint], as well as prejudgment interest where applicable. Appellant also sought treble damages and attorneys' fees claimed pursuant to Section 772.104 of Florida Statutes. [R.168-169.] She also sought the full remedies provided by Section 540.08 of Florida Statute. [R. 170-171.]

The Allegations of the FDUPTA CLAIM

UPS enters into agreements with third-party retailers and UPS store retail outlets. The agreements require the outlets to feature UPS as its preferred shipper. UPS advertises its reliability nationally. UPS provides identification and locations of third-party retailers and UPS retail store outlets directly to consumers via its 1-800-PICK-UPS telephone service and web-sites. [R. 171, ¶53.]

UPS allows the third-party retailers and the UPS store outlets to issue a UPS tracking number to the consumer. Most third-party outlet forms allow consumers to fill out shipper return address information. Unbeknownst to the consumer, the same third-party agreements that require the retailer to feature UPS as a preferred carrier prohibit the retailer from listing the consumer's information on the package. [R. 171, ¶53.]

UPS requires third-party retailers and the UPS store to use "WorldShip," a trademarked UPS electronic database that stores shipping label information. The only information it will accept is the retailers name (not the customer's name), the location for delivery, the recipient, the shape of the package, and the class and rate for delivery (for example, UPS ground.) Retailers are prohibited from entering the customer information. [R. 171, ¶53.]

UPS has contracted with an over-goods servicer (Cargo Largo) to codify the contents of undeliverable packages ("packages which become separated from their packaging") based on personal information that may be found therein. Since UPS does not record personal information or identification from third-party customers, over-goods cannot possibly be returned to their packages. Cargo Largo then buys the unresolved over-goods from UPS and/or sells them on a consignment basis. Based upon its refusal to accept customer

information, UPS is virtually guaranteed that it will never pay nearly as much to that servicer as it receives from the servicer. [R. 171, ¶53.]

In any one year, UPS makes more money from Cargo Largo's payment for goods than it has paid to the over-goods servicer for its efforts to find packages for UPS consumers over the last eight (8) years. In fact, the only payment UPS makes to Cargo Largo as a servicer of lost goods is bonuses that are paid based on percentages of found items, so called "voids" of sale. [R. 171, ¶53.]

The Motion to Dismiss and the Memorandum Opposing

On November 8, 2012, UPS filed a Motion to Dismiss the Second Amended Complaint. Despite the fact that the majority of relevant cases cited by UPS included summary judgment jurisprudence, UPS claimed that the Plaintiff cannot avoid the scope of Carmack preclusion through "artful pleading." [R. 211]

In the first footnote of its motion, UPS explained the Carmack Amendment as follows: "the Carmack Act preempts a shipper's common law and state statutory claims for damage or loss of goods moving in interstate commerce through a common carrier." [R. 211]

However, UPS then concludes that the act does not only preempt claims for damage or loss of goods, but that Carmack preempts all claims "stemming from

the loss of goods shipped in interstate commerce." UPS's Motion to Dismiss maintained that "(r)egardless of the wrongs she attributes to UPS, Plaintiff cannot avoid the indisputable fact that all of her claims arise from the loss of her interstate shipment." [R. 222] Thus, the motion concludes that "Plaintiff's legal theories, all of which are grounded in state law, are preempted by federal law and are preempted in this case."

Interestingly, UPS attached its Tariffs and Regulations to the Motion and cites to the time limitation on claims made pursuant to the Tariff, admittedly the same time limitation cited in Appellant's conspiracy claim. [R. 13] The UPS Tariff that is attached to the Motion to Dismiss, however, expressly denies any liability to customers of third party retailers, such as Appellant or the ability of such a customer to seek remedy from UPS at all. [R. 27-28.] In other words, they do not apply here. The Tariffs state "UPS will not be liable to those customers." [R. 28]

Appellant replied that whether artfully stated or not, none of the claims are precluded because the claims do not truly arise out of any loss or damage to her paintings. [R. 255] Appellant's memorandum noted that UPS had already previously answered the first three claims and that the Motion to Dismiss those claims was improper. [R. 254]

Appellant stated two arguments for why the Carmack defense did not apply to her claims:

First, Carmack was meant to unify liabilities among multiple common carriers for damages sustained by shippers—it was not meant to protect those who deny any liability to a set of customers who drop their packages at outlets instead of with carriers. [R. 255, 256-7] Thus, Appellant argued that UPS could not demonstrate the necessary prerequisite to apply the defense. [R.255, 256-7.]

Second, Carmack does not preempt claims arising from intentional misconduct such as conspiracy, conversion, or misappropriation of identity. [R.255, 257-8] Proof of purposeful conversion or other misconduct takes a claim outside of Carmack—therefore, as UPS has heretofore acknowledged by answering the claims, the Carmack defense cannot preclude the present allegations without demonstrating an absence of justiciable issues entitling UPS to summary judgment on the claims of intentional misconduct. [R.255, 257-8]

Appellant then distinguished every case cited by UPS in its conclusory footnote representing that "every United States Court of Appeals (including the Eleventh Circuit) that has considered the issue has concluded that the Act preempts a shipper's common law and state statutory claims for damage or loss of goods moving in interstate commerce through a common carrier." [R.266-271.]

The distinctions demonstrated that none of the dismissals included claims with allegations of intentional and independent misconduct. [R.266-271.] The lone case that considered an intentional tort, conversion, actually declined to dismiss the claim based on the pleading. [R. 263-265] Thus, Appellant argued that UPS had utterly failed to demonstrate its central argument that the claims were within the scope of the Carmack defense "(r)egardless of the wrongs Appellant attributes to UPS." [R.266]

Relying on the precedent cited by UPS which expressly stated that demonstrable conversion claims survive the Carmack defense, Appellant noted some of the record evidence demonstrating the veracity of her conversion claim. [R.292-378]

Notices of Supplemental Authority

In addition to filing a memorandum of law distinguishing the authority cited by UPS in its Motion to Dismiss, Appellant filed a Notice of Filing Supplemental Case Law which included the lone Florida District Court precedent on the scope of Carmack that was cited by the parties, *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003). [R. 398] The case law Appellant relied upon at the hearing was served prior to the hearing and was cited at the hearing of January 20, 2012. It was filed by notice on January 25, 2012. [R. 398]

Order of Dismissal

The Final Order dismissing the claims against UPS with prejudice was based upon the following findings: First, all claims alleged against UPS are precluded by the Carmack Amendment; Second, the claim for profiting by criminal activity fails to provide the requisite specificity. [R. 429-430.]

SUMMARY OF THE ARGUMENT

Carmack was purposed to unify liabilities of multiple interstate carriers when a piece of cargo is negligently lost or damaged under a bill of lading that would often involve the participation of several interstate carriers. Carmack was not intended to allow UPS to deceive thousands of customers into paying for a UPS tracking number when in fact they will never be able to utilize or to rely upon that number or the UPS brand if the package is ever "lost." Carmack does not allow UPS to rifle through packages and to convert select contents for its own corporate gain. It does not give UPS the right to conspire with its wholesaler to reallocate the costs of its lost packages search service while securing a multi-million dollar profit every year. Carmack does not give UPS license to misappropriate soft intellectual property (such as a person's identity) and to exploit that property without the consent of the rights holder.

The trial court's application of the Carmack defense to the plaintiff's allegations would excuse such misconduct despite clear Federal and State precedent holding that the defense would be inapplicable to such allegations. The Trial Court's dismissal of Appellant's claims is based on three clear errors: First, it assumes that the Appellants' paintings were lost when in fact, the underlying allegations of the conspiracy and conversion claims state that UPS

stole the property. Essentially, the Court failed as required to assume the truth of the well-pled allegations of the Complaint. Secondly, the ruling misconstrued the FDUPTA claim, which cannot possibly be read as one arising out the loss of goods because the claim aims to remedy a deceptive practice that affects customers regardless of how their shipment is concluded. In addition, the claim is based on the fact that the tariff excludes Appellant and all shippers of third party outlets; thus UPS cannot meet the applicable prerequisites necessary to rely on Carmack's limitations as a defense. Thirdly, the misappropriation of identity claim is completely divorced from shipping—it relates to the misuse of Appellant's name, not the shipment of her paintings. UPS argues it is not liable for consequential damages since its possession of Appellant's paintings and identity were coincidental to a loss of goods for which it is immune. According to UPS's rationale, if an undiscovered work from an otherwise prolific and well-published artist were found in its bounty of lost goods, so-called "overgoods," it would have complete immunity to exploit the work and the artist. Clearly, an act intended to protect shippers, and limiting the liability of common carriers in the performance of their shipping functions, could not reasonably be construed to protect UPS from liability for torts unrelated to that shipping function. purposed to protect shippers does not excuse these kinds of torts.

The allegations include that several other artists have fallen victim to the UPS/Recovery Management scheme. Should Florida Statutes section 772.104 require any greater specificity than the Second Amended Complaint included, then an opportunity to amend to conform to the evidence already supplied in the record should have been afforded. To the extent that this second finding resulted in the dismissal with prejudice, Appellants ought to have been given a chance to cure the defect and to amend the conspiracy claim.

ARGUMENT

I. CARMACK PREEMPTION ONLY APPLIES TO CLAIMS OF LOSS OR DAMAGE AS THE RESULT OF A CARRIER'S NEGLIGENCE, AND THE DISMISSAL OF THE CLAIMS AGAINST UPS FAILED TO ASSUME THE TRUTH OF THE ALLEGATIONS AGAINST UPS REGARDING CONDUCT OUTSIDE THE SCOPE OF THAT PREEMPTION.

A. Appellate Standard of Review:

This court applies a de novo standard of review regarding the trial court's decision to grant a motion to dismiss. See *MEBA Med. & Benefits Plan v. Lago*, 867 So. 2d 1184, 1186 (Fla. Dist. Ct. App. 4th Dist. 2004) wherein this District Court reviewed an order dismissing a claim upon a finding of federal preclusion: "In assessing the adequacy of the pleading of a claim, the court must accept the facts alleged therein as true and all inferences that reasonably can be drawn from those facts must be drawn in favor of the pleader." *Id.* citing *Taylor v. City of Riviera Beach*, 801 So. 2d 259 (Fla. 4th DCA 2001). See also *Pohl v. Southeast Airlines, Inc.*, 880 So. 2d 766, 766-767 (Fla. 2d DCA 2004) reversing a trial court's dismissal of a whistleblower claim pursuant to a motion to dismiss arguing that the claims were preempted by federal law.

B. Scope of Carmack Defense

The Carmack Amendment, found at 49 USCS § 11706 (a)-(c), applies as a defense to claims made by shippers against common carriers for lost or

damaged goods. It limits the carrier's liability for the resulting loss to a declared value. See *Missouri, K. & T. R. Co. v. Ward*, 244 U.S. 383, 387-388 (U.S. 1917) stating that the purpose of Carmack was to create a unity of liability amongst several lines of carriers in order to "relieve shippers of the difficult, and often impossible, task, of determining on which of the several connecting lines the damage occurred. For the purpose of fixing the liability, the several carriers must be treated, not as independent contracting parties, but as one system." Thus, Carmack prohibits carriers from restricting their liability in any manner other than as contemplated by the statute and requires that limitations must be published with the Interstate Commerce Commission. 49 USCS § 11706.(a) and (c). See *Rohner Gehrig Co. v. Tri-State Motor Transit*, 950 F.2d 1079 (5th Cir. 1992) as cited by *Braid Sales & Mktg. v. R & L Carriers,* 838 So. 2d 590 (Fla. 5th DCA 2003.)

Carmack preemption only applies to claims made pursuant to the liability created by a bill of lading. See *Atlantic C. L. R. Co. v. Riverside Mills*, 219 U.S. 186, 205 (U.S. 1911):

> If it is to be assumed that the ultimate power exerted by Congress is that of compelling cooperation by connecting lines of independent carriers for purposes of interstate transportation, the power is still not beyond the regulating power of Congress, since without merging identity of separate lines or operation it stops with the requirement of oneness of charge, continuity of transportation and primary

> liability of the receiving carrier to the shipper, with the right of reimbursement from the guilty agency in the route.

Florida's Fifth District Court of Appeal has held that Carmack does not apply to separate and independent harms that do not include the initial loss or damage. See *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003). While the Fifth District noted that there has been disagreement about the scope of preemption, its reversal of the breach of contract claim brought by *Braid Sales & Marketing* clearly states agreement with the cases it cites as standing for the proposition that claims for separate and independent harm are not preempted—cases which notably except deceptive trade practice claims from Carmack preemption. See *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, F.N. 3 at 593:

> *Mesta v. Allied Van Lines International, Inc., 695 F. Supp. 63 (D.Mass.1988)*wherein the court held that a claim against the carrier for deceptive acts and practice was based not on loss of property but on the carrier's actions in investigating and responding to the shipper's claim was not preempted. Similarly, in *Sokhos v. Mayflower Transit, Inc.,* 691 F. Supp. 1578 (D.Mass.1988), the court held that the Carmack Amendment did not preempt state law actions based on a carrier's improper handling of the plaintiff's claims for damage to goods. In *American Transfer and Storage Co. v. Brown,* 584 S.W.2d 284 (Tex. Civ.Ct.App.1979), rev. on other grounds, 601 S.W.2d 931, 23 Tex. Sup. Ct. J. 426 (1980), cert. denied, 449 U.S. 1015, 66 L. Ed. 2d 474, 101 S. Ct. 575, the court held that the Carmack Amendment does not preempt a claim under the Texas Deceptive Trade Practices Act for misrepresentations made prior to the contract of carriage.

See also *Gooch v. Oregon Short Line R.R. Co.*, 258 U.S. 22, 42 S. Ct. 192, 66 L. Ed. 443 (1922) explaining that the Carmack Amendment did not preempt an action involving a physical injury to a caretaker accompanying an interstate shipment of cattle; See also *Chicago, Rock Island & Pac. Ry. Co. v. Maucher,* 248 U.S. 359, 39 S. Ct. 108, 63 L. Ed. 294 (1919) holding that the Carmack Amendment did not preempt a claim by a plaintiff who was physically injured.

The Carmack Amendment does not apply to claims based on conduct separate and distinct from the delivery, loss or damage to goods. See *Smith v. UPS*, 296 F.3d 1244, 1249 (11th Cir. Ala. 2002) acknowledging that Carmack does not preempt all claims and citing to *Morris v. Covan Worldwide Moving, Inc.*, 144 F.3d 377, 383 (5th Cir. 1998) acknowledging that the Carmack Amendment would not preempt claims "separate and apart from those resulting directly from the loss of shipped property."

Although it is an unpublished opinion, the following discussion in *Lang v. Frontier Van Lines Moving & Storage, Inc.*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 234 (Pa. County Ct. 2009), is worth noting because it so succinctly, albeit conservatively, paraphrases the jurisprudence on the conversion exception:

> One of the state law claims that may escape preemption is conversion. Conversion, like other state and common law claims, is preempted unless there is "a true conversion, i.e., where the carrier has appropriated the property for its own use or gain." *Glickfeld v.*

Howard Van Lines, Inc., 213 F.2d 723, 727 (9th Cir. 1954). See e.g. *Deiro v. American Airlines, Inc.*, 816 F.2d 1360, 1366 (9th Cir. 1987) ("[o]nly an appropriation of property by the carrier for its own use will vitiate the limits on liability."); Schultz v. Auld, 848 F. Supp. 1497, 1506 (D. Idaho 1993) ("With respect to conversion, [p]laintiff must show a true conversion has taken place in order to avoid Carmack Amendment preemption; the mere nondelivery of good is insufficient.") A "true conversion" has been defined as "a defendant's willful or intentional misconduct occasioning the nondelivery". *Art Masters Assoc., Ltd. v. United Parcel Serv.*, 77 N.Y. 2d 200, 566 N.Y.S.2d 184, 186 567 N.E. 2d 226, 228 (Ct. App. 1990). The burden of establishing that the carrier was responsible for the loss due to some willful or intentional conduct on its part rests upon the party asserting the conversion claim. *Lerakoli, Inc. v. Pan American World Airlines, Inc.*, 783 F.2d 33, 37 (2d Cir. 1986). See *Nippon Fire & Marine Ins. Co. v. Holmes Transp.*, 616 F. Supp. 610 (S.D.N.Y. 1985) ("Absent affirmative proof of [an actual] conversion, the rule of law is that plaintiffs recovery is limited to the agreed release value of [the missing or damaged goods].") Hence, "nothing short of intentional destruction or conduct in the nature of theft of the property will permit a shipper to circumvent the liability limitations" set forth in a bill of lading. *American Cyanamid Co. v. New Perm Motor Express, Inc.*, 979 F.2d 310, 315-16 (3d Cir. 1992).

While each of these cases admittedly indicate that the Appellant would have an affirmative duty to submit prima facie evidence of conversion amounting to "nothing short of intentional destruction or conduct in the nature of theft of the property," the order granting the motion to dismiss erroneously denied the Plaintiff her opportunity to prove allegations that a "true conversion" occurred and that UPS willfully or intentionally occasioned the nondelivery of the paintings.

C. The Claims for Conversion and Conspiracy

The only case cited by UPS that assessed a conversion claim was a case in which UPS was alleged to have converted an airplane part. See *Aircraft Instrument Radio Co. v. United Parcel Service Inc.,* 117 F.Supp. 2d 1032, 1037 (D. Kan. 2000). As stated in UPS's motion, the case included many similar factual allegations to those alleged in the present case. The claim for conversion in that case, however, was not dismissed on the pleadings-although the Court did dismiss claims explicitly based on negligence. The conversion claim, however, survived dismissal and was only defeated on motion for summary judgment because of an inability to produce evidence that supported the conversion allegations. See *Aircraft Instrument Radio Co. v. United Parcel Service Inc.,* 117 F.Supp. 2d 1032, 1037 (D. Kan. 2000) as acknowledged by the Defendant's Motion. [R. 214]

The conspiracy and conversion exception are best exemplified by two 1991 cases wherein UPS was alleged to have converted goods intended for delivery to a New York City address. The cases had opposite outcomes:

In *Art Masters Assoc., Ltd. v. United Parcel Serv.*, 186 567 N.E. 2d 226, 228 (Ct. App. 1990), the New York Court of Appeals reversed the Appellate Division's denial of a summary judgment on the conversion claim. The Appellate Division applied a presumption of fault originating out of New York

precedent, *I.C.C. Metals v Municipal Warehouse Co.*, 50 NY2d 657 (N.Y 1980). Thus, the Appellate division had ruled that *Art Masters* had established a prima facie case of conversion. In that case, UPS alleged that it delivered thousands of dollars' worth of original Erte prints to the plaintiff's gallery at some point after the plaintiff called to describe the contents of the long overdue package. The plaintiff admitted that UPS's delivery man had dropped off the package but had left it unattended at the side of the building. The plaintiff sought the application of the warehouse conversion presumption, equating UPS's failure to deliver the goods to her to conversion.

The New York Court of Appeals reversed the decision, ruling that the presumption of conversion set forth in the case of *I.C.C. Metals v Municipal Warehouse Co.*, 50 NY2d 657 (N.Y 1980) could not apply to carriers as a means to establish fault because Carmack would preempt a claim without affirmative evidence of intentional misconduct.

The case was distinguished the next year by *Fireman's Fund Ins. Co. v. Wagner Fur, Inc.*, 760 F. Supp. 1101, 1106 (S.D.N.Y. 1991) in which UPS was alleged to have converted furs which it demonstrably delivered to the wrong address; an address from which they promptly disappeared:

> UPS cites the recent decision of the New York Court of Appeals in Art Masters Associates, Ltd. v. United Parcel Service, 77 N.Y.2d 200,

> 567 N.E.2d 226, 566 N.Y.S.2d 184 (1990) Masters Associates, Ltd. v. United Parcel Service, 77 N.Y.2d 200, 567 N.E.2d 226, 566 N.Y.S.2d 184 (1990), in which the Court declined to apply the I.C.C. Metals presumption of conversion to claims against common carriers. However, as noted above, there is affirmative evidence in the present case sufficient to support the claim that the bailee mis-delivered the bailed property, eliminating the need for plaintiff to rely on the presumption of conversion.

In an unpublished, opinion the Southern District of New York denied a motion for reconsideration of the denial of summary judgment noting there was an allegation and evidence of "affirmative wrongdoing on the part of UPS." See *Fireman's Fund Ins. Co. v. Wagner Fur, Inc.*, 1992 U.S. Dist. LEXIS 315, 6-7 (S.D.N.Y. Jan. 8, 1992.)

Like these cases, the Appellant alleges that UPS converted paintings which were intended for a New York City address. However, unlike the *Art Masters* plaintiff, Appellant clearly alleges a purposeful conversion and it includes a conspiratorial and systematic violation of Fla. Stat. § 817.02.

Both causes of action, the conversion and the RICO claim, allege an even greater degree of intentional misconduct on the part of UPS than either *Fireman's Fund Ins. Co. v. Wagner Fur, Inc.*, 760 F. Supp. 1101, 1106 (S.D.N.Y. 1991) which survived summary judgment, and *Art Masters Assoc., Ltd. v. United Parcel Serv.*, 567 N.E. 2d 226, 228 (Ct. App. 1990) which was dismissed after a Motion for Summary Judgment successfully

demonstrated an absence of justiciable fact. Yet the Appellant's allegations, which more than satisfy the burden set forth in the purposeful conversion case law cited above by *Lang v. Frontier Van Lines Moving & Storage, Inc.*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 234 (Pa. County Ct. 2009), were dismissed at the pleading stage.

D. The FDUTPA Claim

The Appellant's Fraudulent and Deceptive Trade Practice claim alleges that UPS directs customers to third party outlets in order to originate their shipments without openly disclosing the fact that UPS will deny any liability to such a customer. The deception is enhanced by the fact that the customer pays UPS's rates and is given a UPS tracking number. Meanwhile, UPS's tariffs and contracts with the third party outlet, expressly state that UPS has no obligation to respond to inquiries related to those tracking numbers and no liability to the customer.

The Carmack defense is an affirmative defense. One of the requirements for the application of the defense is that the carrier involved maintain a tariff with the Interstate Commerce Commission. (The tariff is the instrument through which the carrier publishes the limitations on recovery that it will maintain if the shipper's property is lost or stolen.) See *Rohner Gehrig Co. v.*

Tri-State Motor Transit, 950 F.2d 1079 (5th Cir. 1992) as cited by *Braid Sales & Mktg. v. R & L Carriers,* 838 So. 2d 590 (Fla. 5th DCA 2003.)

In *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003), the defendant attempted to demonstrate the applicability of the defense by citing a tariff that did not in fact include its name. Although it relied on testimony of an employee that stated the terms of the posted tariff would have applied to the subject shipment, the District found that the tariff's express terms did not include the defendant in that case. *Id.* at 591. As a result, the Fifth District held that Carmack could not be used to limit the damages in the case. *Id* at 592.

UPS attached its general tariffs in order to establish that it had filed tariffs with the UCC that limit shippers' claims to a declared value process. The terms of the UPS tariff expressly preclude customers of third party retailers from asserting claims directly against UPS. UPS's tariffs do not merely limit its liability to individuals such as Appellant (which Carmack may allow) it attempts to eliminate all liability (which Carmack prohibits) by excluding claims by these customers entirely. Since the tariffs do not apply to Appellant, the company cannot demonstrate the applicability of the Carmack defense to any of her claims. Most notably the defense cannot apply to a FDUPTA claim

based upon an assertion that UPS failed to treat Appellant in the manner Carmack would have required.

Courts have consistently held that deceptive trade practice claims are not preempted by Carmack —holdings noted by Braid Sales & Mktg. v. R & L Carriers, 838 So. 2d 590 (Fla. 5th DCA 2003) at FN 3, at 593. See *Mesta v. Allied Van Lines International, Inc., 695 F. Supp. 63 (D.Mass.1988)* In *American Transfer and Storage Co. v. Brown,* 584 S.W.2d 284 (Tex. Civ.Ct.App.1979), rev. on other grounds, 601 S.W.2d 931, 23 Tex. Sup. Ct. J. 426 (1980), cert. denied, 449 U.S. 1015, 66 L. Ed. 2d 474, 101 S. Ct. 575.

E. <u>Misappropriation of Identity Claim</u>

As a basis for the claim that UPS misappropriated her identity, Appellant alleged that the company not only commercially exploited her name without her consent, but that UPS was responsible for the several subsequent exploits of her name by Cargo Largo and then by Aaron Anderson.

Florida protects a person's name as a vestige of their likeness from being used in commercial exploit without their consent. Fla. Stat § 540.08(1):

> No person shall publish, print, display or otherwise publicly use for purposes of trade or for any commercial or advertising purpose the name, portrait, photograph, or other likeness of any natural person without the express written or oral consent to such use given by such person.

If a person's likeness is indeed misappropriated, the statute affords multiple remedies including that the person may bring an action to enjoin such unauthorized use, and to recover damages for any loss or injury sustained by reason thereof, including an amount which would have been a reasonable royalty, and punitive or exemplary damages. Fla. Stat. 540.08(2).

As indicated by the argument related to the FDUTPA claim above, the Carmack defense does not apply to damages that are alleged to be "a separate harm which is independent from the loss or damage to goods." See again *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590 (Fla. 5th DCA 2003) reversing the dismissal of a claim for breach of an independent contract and citing *Mesta v. Allied Van Lines International, Inc., 695 F. Supp. 63 (D.Mass.1988)* which was recognized but distinguished by *North Am. Van Lines v. Pinkerton Sec. Sys.*, 89 F.3d 452 (7th Cir. Ill. 1996.)

In *North American Van Lines* the Seventh Circuit reversed the Illinois District's denial of the defendant carrier's motion for summary judgment. The Seventh Circuit, based the holding on the finding that "there was no real dispute as to what happened." Since "there (was) no evidence in the record of an independently actionable harm suffered by Brown and Williamson other than the loss of the cigarettes," the claims were precluded. The opinion specifically noted, however, that preclusion is not absolute and, further, that Carmack's

applicability is dependent upon a demonstrable absence of fact that would support an allegation of an independent harm. The Court recognized that carriers may be liable to shippers in tort for incidental harms associated with the loss or damage of cargo. *See, e.g., Mesta v. Allied Van Lines Int'l, Inc., 695 F. Supp. 63, 65 (D. Mass. 1988)* (finding that a carrier may be liable to a shipper under statute prohibiting deceptive trade practices in addition to liability under Carmack Amendment); *Sokhaus v. Mayflower Transit, Inc., 691 F. Supp. 1578, 1581 (D. Mass. 1988)* (same); *Starmakers Publ. Corp. v. Acme Fast Freight, Inc., 615 F. Supp. 787, 791 (S.D.N.Y. 1985)* (stating that a bailor can recover from a bailee in tort if claim for relief does not depend upon existence of a contract). However, these cases involved a separate and independently actionable harm to the shipper as distinct from the loss of, or damage to, the goods. In *Mesta* and *Sokhaus*, the harm was the carrier's failure to provide the shipper with information required by state law. In *Starmakers*, the harm was the carrier's breach of an extra-contractual duty.

The United State Supreme Court recognized that state afforded causes of action which remedy damage to a person (such as a personal injury claim) rather than damage to the person's cargo cannot be preempted by Carmack, even if the action giving rise to the liability of the carrier is one of simple negligence. See *Chicago, R. I. & P. R. Co. v. Marcher,* 248 U.S. 359, 363 (U.S.

1919) holding that a claim for personal injury was not preempted by Carmack.

UPS also argued that the Plaintiffs did not allege that UPS ever misappropriated her name. That argument ignores two clear allegations: First that UPS misappropriated Appellant's name in the conveyance to Cargo Largo and/or through Cargo Largo when it auctioned the painting as an original Ivana Vidovic work and as a UPS good. This is the exact harm F.S. 540.08 is meant to address. The assumption could be made that Ivana Vidovic creates original oil paintings for UPS.

Secondly, Appellant alleges that Aaron Anderson and Cargo Largo continued the misuse of her name on the web. However, the statute provides that if an artist's name is used with her consent in the original sale of the work, it can be used from that point on without incurring liability. Fla. Stat. §540.08(3)(b). UPS, by conveying the work as though it had title to the painting, proximately caused the resulting damage.

II. DISMISSAL OF THE CONSPIRACY CLAIM BASED UPON A FINDING OF DEFICIENCY SHOULD BE ENTERED WITHOUT PREJUDICE TO AFFORD APPELLANT THE OPPORTUNITY TO CURE THE DEFECT

A. Appellate Standard of Review:

As noted above, the standard of review of an order granting a motion to dismiss is de novo. See *Eagletech Communs., Inc. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 859 (Fla. 4th DCA 2012) reversing the dismissal of claims, including a conspiracy claim, with prejudice: A dismissal for failure to state a cause of action is reviewed de novo. *Wells v. Wells*, 24 So. 3d 579, 582 (Fla. 4th DCA 2009). A Motion to Dismiss for Failure to State a Cause of Action admits all well pleaded facts as true, as well as *reasonable* inferences that may arise from those facts." *Id.* (emphasis added) (citation and quotation marks omitted).

B. Discussion

Because of the erroneous preclusion finding, Appellant was not afforded the opportunity to amend the claim and to cure any alleged deficiencies. Since discovery has afforded the names of co-victims, Appellant is prepared to amend the claims if the preclusion finding is reversed on the basis of the absence of that information, and the claims remanded. Because the Appellant can demonstrate that leave to amend would not be futile, dismissal based on the finding of lack of specificity should not have been with prejudice. In E*agletech Communs., Inc. v. Bryn Mawr Inv. Group, Inc.*, 79 So. 3d 855, 866 (Fla. 4th DCA 2012), this District Court affirmed the finding that the RICO count lacked the specifity required under Fla. Stat.§ 772.104; however, it remanded the claim so that the

plaintiff could be afforded the opportunity to amend the claims as required. Although *Eagleton* was on its Fifth Amended Complaint, this District found the dismissal with prejudice was an abuse of discretion because there was no opportunity to cure the defect. Similarly, the Appellant should be afforded an opportunity to amend any defect in the pleading.

CONCLUSION

For the foregoing reasons, the order dismissing the claims against UPS with prejudice should be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by fax and United States Mail this 21ST day of MAY, 2012, to all counsel on the attached list.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(A)(2) of the Florida Rules of Appellate Procedure.

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IN THE FOURTH DISTRICT COURT OF APPEALS FOR THE STATE OF FLORIDA

CASE NO.: 4D12 1332

LT CASE NO.: 50 2008 CA 036246 XXXXMB AH

IVANA VIDOVIC MLINAR,

Appellant,

v.

UNITED PARCEL SERVICE, INC.,

Appellee.

ANSWER BRIEF OF APPELLEE, UNITED PARCEL SERVICE, INC.

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I. INTRODUCTION

Plaintiff/Appellant Ivana Vidovic Mlinar ("Mlinar") brought this action to recover damages she allegedly suffered following the loss and/or theft of a package shipped via Defendant/Appellee United Parcel Service, Inc. ("UPS"). The package was said to contain Mlinar's valuable artwork. While federal law provides the exclusive means of relief, Mlinar chose not to plead under federal law. Rather, Mlinar brought her claims under state law in order to avoid the notice period limitations and liability caps federal law imposes. Mlinar resorted to creative lawyering in an attempt to disguise her lost package claim as a state law claim. But irrespective of how Mlinar characterizes her claim, it remains at its core, a claim stemming from the interstate transportation of packages by a common carrier. Thus, it is governed exclusively by federal law and her state law claims are preempted.

Specifically, Mlinar's claim is preempted by the Carmack Amendment (49 U.S.C. § 14706) which provides a uniform scheme for imposing liability on common carriers such as UPS Preemption by the Carmack Amendment does not depend on how artfully a plaintiff may craft her claims. Preemption applies even where claim arises from events other than loss or damage to her property. The numerous cases cited herein interpreting preemption under the Carmack Amendment demonstrate that

when the parties begin their relationship as parties to a shipping contract, all resulting harms, regardless of how they are pled, must also be brought pursuant to the Carmack Amendment.

In this case, the trial court was correct in dismissing Mlinar's state law claims. All of her claims indisputably arose from UPS's transportation and delivery services. Accordingly, the Carmack Amendment preempts her state law claims and they were rightfully dismissed. The Carmack Amendment is designed to be the sole means of imposing liability against interstate shippers for loss or damage to the property they transport. It is not meant to co-exist with, but to preempt, state means of imposing liability arising out of the shipment of goods. In a long line of decisions, the Supreme Court has broadly defined the preemptive scope of the Carmack Amendment in favor ive and uniform scheme for imposing liability on common PS. And all of Mlinar's state law claims must fall.

n to Dismiss was *not* predicated on the argument that nue of recovery. Rather, in accordance with well settled of authorities presented to the trial court, UPS established Mlinar is governed by the Carmack Amendment, 49

UPS denies that its Motion to Dismiss sought to preclude claims by asserting the Camack preempted all forms of liability that are included under state afforded causes of action, such as misappropriation of identity, deceptive trade, conspiracy an conversion and pretends that any of these liabilities can be addressed by bringing a claim under Carmac. UPS acknowledges, however, that Carmac remedies damages sustained by a carrier's loss of or damage to a shipper's good by limiting losses to the dictates of its published tariff. Since UPS's tariff, however, does not apply to either to the present Plaintiff or to the damages she has claimed in this lawsuit, asserting Carmack preclusion effectively aims to preclude any claim that she or anyone else in her position would ever have.

II. STATEMENT OF THE CASE AND FACTS

Mlinar filed her Second Amended Complaint (the "Complaint") which contained four counts against multiple parties, including UPS. [R. 157, Second Amended Complaint]. Mlinar's various causes of action seek recovery from Defendants based on the shipment of a package via UPS.

The package at issue allegedly had two original paintings created by Mlinar inside. [R. 159, Second Amended Complaint.] Mlinar shipped the package on November 28, 2005 through Pak Mail of Wellington, Inc., a retailer of UPS's services, via UPS ground service from Florida to New York. [R. 159, ¶ 9.] When the package was delivered by UPS to the intended address in New York, it was empty. The duct tape used to seal the container had been sliced and the paintings had been removed. [R. 160, ¶ 11.] Two days after returning home to Florida, Mlinar reported the empty package to UPS and to Pak Mail. [R. 160-161, ¶¶ 13-15.] Mlinar further reported that the paintings were labeled with her name and her address. [R. 161, ¶15.] Eight months after a claim was filed, Pak Mail advised Mlinar that she was entitled to $100 for the missing package. [R. 161, ¶16.] The paintings were later sold by UPS to Recovery Management Corp. d/b/a/ Cargo Largo ("Cargo Largo") who then sold them to an individual by the name of Aaron Anderson. [R. 158, ¶5, R. 162, ¶17, R. 163, ¶ 22.] Aaron

Anderson located Mlinar and told her that he had obtained the paintings from Cargo Largo. [R. 162, ¶ 17, R. 163, ¶ 20.]

Based on these facts, Mlinar alleged the following state law causes of action against UPS; Conversion (Count I), Profiting by Criminal Activity (Count II), Unauthorized Publication of Name or Likeness (Count III), and a count under Florida's Deceptive and Unfair Trade Practices Act (Count IV).

III. SUMMARY OF THE ARGUMENT

At its core, this case is about a lost/stolen package during shipment. Had Mlinar had not utilized UPS's services to ship her package and had UPS not failed to deliver her paintings, she would have not incurred a loss. Mlinar's statement that her claims are based on conduct that is separate and distinct from the "delivery, loss of or damage to goods," *Smith v. United Parcel Service.,* 296 F.3d 1244, 1249 (11th Cir. 2002), is not supported by the facts she alleges or any cases she cites. As explained by the court in *Marshall W. Nelson & Associates., Inc. v. YRC Inc.* (as it granted defendant's motion to dismiss based on the Carmack Amendment) "[a]fter all, the [p]laintiff would not even be in a position to complain . . . if it had not sustained damage to goods that were shipped by the defendant." No. 11-C-0401, 2011 WL 3418302 at *4 (E.D. Wis. Aug. 3, 2011).

A review of the case law interpreting preemption under the Carmack Amendment demonstrates that where the parties' relationship and the ensuing dispute stem from an interstate shipment, all resulting harms are preempted. No matter how far Mlinar attempts to stretch her allegations, she cannot alter the fact that her underlying claims result from UPS's "failure to provide [her] with particular transportation and delivery services." *Smith,* 296 F.3d at 1247.[1]

As set forth below, all four counts of Mlinar's Complaint were properly dismissed by the trial court because they are preempted by the Carmack Amendment.

IV. ARGUMENT

A. Standard of Review

A trial court's order granting a motion to dismiss is reviewed de novo. *Brown v. City of Vero Beach*, 64 So. 3d 172 (Fla. 4th DCA 2011)

[1] The facts here are certainly distinguishable from the example provided by the court in the *Smith* case, providing that an intentional assault and injury inflicted by a driver would not be preempted by the Carmack Amendment.

B. Motions to dismiss state law claims based on preemption by the Carmack Amendment are routinely granted.

In line with the scores of cases granting summary judgment based on preemption by the Carmack Amendment; courts in the Eleventh Circuit and around the country have not hesitated to grant motions to dismiss based on Carmack preemption as well. For example, in *Smith v. United Parcel Service.*, 296 F.3d 1244 (11th Cir. 2002), the Eleventh Circuit affirmed the district court's dismissal at the pleadings stage because the causes of action for fraud, negligence, wantonness, willfulness, outrage and conspiracy all arose from UPS's failure to deliver packages; thus they were preempted by the Carmack Amendment.[2] *See also Marshall W. Nelson & Assocs.*, 2011 WL 3418302 (granting motion to dismiss claims of breach of implied duty of good faith and fair dealing and bad faith denial of insurance claim as

[2] In *Smith*, the plaintiffs complained that UPS improperly refused to make deliveries to their home, and instead required them to pick up the packages at a UPS office, which caused delays and sometimes resulted in packages being returned to the sender. *Id.* at 1245-46. The Smiths asserted a wide range of state-law claims against UPS, including a tort claim for outrage based on UPS's conduct in denying them deliveries with intent to inflict emotional distress. The Eleventh Circuit held that, because the Smiths' claims were all based "on UPS's failure to provide them with particular transportation and delivery services," they "[fell] squarely within the preemption coverage of the Carmack Amendment." *Id.* at 1247. As the *Smith* court explained, Carmack "embraces 'all losses resulting from any failure to discharge a carrier's duty as to any part of the agreed transportation. . . .'" *Id.* at 1249. The court held that even the *Smiths'* outrage claim, which alleged injury to person, rather than property, fell squarely within the scope of Carmack. *Id.* at 1248-49.

preempted by the Carmack Amendment); *Shabani v. Classic Design Servs., Inc.*, 699 F. Supp . 2d 1138 (C.D. Cal. 2010) (granting motion to dismiss conversion and fraud claims based on the Carmack Amendment); *Eventus Mktg., Inc. v. Sunset Transp. Co.*, 722 F. Supp. 2d 1311 (S.D. Fla. 2010) (granting motion to dismiss state law claims for breach of contract, conversion and unjust enrichment based on the Carmack Amendment); *Rykard v. FedEx Ground Package Sys., Inc.*, No. 4:08-CV-74, 2008 WL 4003629 at *2 (M.D. Ga. Aug. 26, 2008) (granting a motion to dismiss where "[p]laintiff's bailment, conversion, respondeat superior, and punitive damage state law claims arose directly from [d]efendant's alleged failure in the transportation and delivery of [p]laintiff's property").

In *Mashburn v. Atlas Van Lines, Inc.*, No. 3:08-CV-389, 2009 WL 3152195 (E.D. Tenn. Sept. 25, 2009), the plaintiff asserted claims under both Tennessee's consumer protection act and the Florida Deceptive Trade Practices Act. Like the instant case, the plaintiff in *Mashburn* attempted to overcome defendant's motion to dismiss by arguing that some courts have found that issues involving conversion and deceptive acts and practices to escape preemption. *Id.* at *1. The court in *Mashburn* nonetheless held that because plaintiff's claims "involve the shipment of goods by an interstate carrier," defendant's motion to dismiss should be granted. *Id.* at *2; *see also*

Hall v. N. Am. Van Lines, Inc., 476 F.3d 683, 689 (9th Cir. 2007) (affirming dismissal of contract, fraud and conversion claims); *Neal v. Allied Van Lines, Inc.*, No. A 06 CA 1008 SS, 2007 WL 831835 (W.D. Tex. Mar. 13, 2007) (granting motion to dismiss claims under the Texas Deceptive Trade Practices Act as preempted by the Carmack Amendment); *Brightstar Int'l Corp. v. Minutemen Int'l,* No. 10 C 230, 2011 WL 4686432 at *3(N.D. Ill. Oct. 4, 2011) (granting defendant's motion to dismiss and explaining that "[a] cause of action not within the ambit of the preemptive scope of the Carmack Amendment is the rare exception. . . .").[3]

The recent case of *BNSF Logistics, LLC v. L & N Express, Inc.*, No. C 11-5810-PJH, 2012 WL 525526 (N.D. Cal. Feb. 16, 2012), bears some similarity to the instant case. Mlinar alleges that UPS does not disclose the restrictions in its tariff and its relationship with third-party retailers when packages are shipped via third-party shipping outlets. [R. 171-172, ¶ 53]. Like Mlinar, the plaintiff in *BNSF Logistics* argued that the Carmack Amendment did not preempt its claims because defendant failed to properly

[3] In *Brightstar Int'l Corp.*, a shipment of combustible floor scrapers was shipped alongside plaintiff's shipment of cell phones. The floor scrapers caught fire and destroyed the cell phones. The court here grappled with who should be responsible for the destroyed shipment as the defendant carrier attempted to *avoid* application of the Carmack Amendment and the consequent liability for the destruction of the cell phones.

communicate about its shipment. The *BNSF Logistics* plaintiff argued these communication issues had "'nothing whatsoever to do with the interstate transportation of any goods. . . .'" 2012 WL 525526 at *5. [4] The court rejected this argument explaining that:

> The duty to inform the shipper of changes in important personnel and to promptly respond to communications regarding shipments is an important part of a carrier's service. Within the context of a carrier's service, this duty is not any less important than the duty to deliver the goods in a timely manner, or the duty to not lose the goods.

Id. at *4. The court granted the defendant's motion to dismiss, ruling that plaintiff's causes of action "fall[] squarely within the preemptive ambit of the Carmack Amendment." *Id.* The same analysis applies here, how UPS sells its shipping products and recovery for lost products is an important aspect of interstate shipping and therefore falls within the ambit of Carmack preemption.

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[4] Before the shipments at issue in *BNSF Logistics*, took place the defendant informed the plaintiff that it would use a certain representative for the shipments. The representative then failed respond to communications by the plaintiff about the shipment and the plaintiff later learned that the defendant neglected to inform plaintiff that it switched agents prior to the shipments. When the shipments were not delivered, the plaintiff alleged state law causes of action for breach of contract and negligence because it was not informed of the change in defendant's representative, preventing any communications with defendant's agent.

C. The District Court was correct in dismissing the conversion claims in Count I of Mlinar's Complaint.

In applying the Carmack Amendment, courts around the country have followed "the dictates of the Supreme Court . . . and the wealth of other courts that have considered the questions presented . . ." in finding that claims for conversion are indeed preempted by the Carmack Amendment. *Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F. Supp. 2d 494, 498 (D.S.C. 2005) (explaining that "almost all courts considering this issue have concluded that the Carmack Amendment has great preemptive force-including preemptive force over common law fraud, *conversion*, and unfair trade practices claims-the court rejects Plaintiffs' arguments to the contrary") (emphasis added); *see also Hellinski v. United Van Lines*, No. C 04-02234, 2004 WL 1844842 at *2 (N.D. Cal. Aug. 18, 2004) ("In the present case, plaintiff offers little resistance to the inescapable conclusion that his claims based on state law [including the California Civil Code], negligence, tortious breach of contract and *conversion*, cannot go forward in light of the preemptive breath of the Carmack Amendment") (emphasis added); *Eventus Mktg.*, 722 F. Supp. 2d 1311 (finding that state law claims for breach of contract, conversion and unjust enrichment were all preempted); *Reeves v. Mayflower Transit, Inc.*, 87 F. Supp. 2d 1251, 1254 (M.D. Ala. 1999) (finding all of a plaintiff's state law claims, including

conversion and civil conspiracy were preempted by the Carmack Amendment); *Kemper Ins. Cos. v. Fed. Express Corp.*, 115 F. Supp. 2d 116 (D. Mass 2000) (rejecting plaintiff's argument that Federal Express' limitation of liability should be set aside because the shipments at issue were stolen by Federal Express' employees), *aff'd*, 252 F.3d 509 (1st Cir. 2001)[5]; *Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 197 (1916) (preemption applies to conversion, or "trover").[6]

1. The law provides no exception based on conversion or conspiracy claims.

Despite Mlinar's arguments to the contrary, there is no exception to Carmack preemption for state law conversion or conspiracy claims. The case that Mlinar contends "best [exemplifies]" this "exception" involves an

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[5] Kemper claimed willful and wanton misconduct on the part of FedEx alleging that FedEx had been aware of, and ignored the repeated theft of valuable shipped goods by employees. Kemper argued that FedEx's knowledge of rampant employee theft and lack of a meaningful effort to prevent future thefts from occurring should serve to nullify the limitation of liability applied through the Carmack Amendment. This was rejected by the court.

[6] Mlinar is simply wrong that the only case cited by UPS that assessed a conversion claim was *Aircraft Instrument Radio Co. v. United Parcel Service., Inc.* 117 F. Supp. 2d 1032 (D. Kan. 2000). UPS's Motion to Dismiss set forth many cases in which conversion claims were ruled to be preempted by the Carmack Amendment. [R. 213-214, Motion to Dismiss Plaintiff's Second Amended Complaint.]

*intra*state shipment and an application of New York law. *See* Initial Brief of Appellant at pg. 24 (citing *Art Masters Assocs., Ltd. v. United Parcel Serv.*, 567 N.E.2d 226 (N.Y. 1990),[7] *Fireman's Fund Ins. Co. v. Wagner Fur, Inc.*, 760 F. Supp. 1101 (S.D.N.Y. 1991)). As explained in *Rafaella Gallery, Inc. v. United Parcel Serv., Inc.*, 818 F. Supp. 53, 55 (S.D.N.Y. 1993), *Fireman's Fund Insurance Co.* "applied New York law governing intrastate carriage, which has no applicability to losses incurred during *inter*state shipment as to which federal law applies." (emphasis added).

Lang v. Frontier Van Lines Moving & Storage, Inc., No. 07-020428, 2009 Pa. Dist. & Cnty. Dec. LEXIS 234 (C.P. Ct. July 6, 2009) does not provide support for Mlinar's arguments either. While, the *Lang* court awarded the plaintiffs the full value of their property (despite the defendant's argument that the Carmack Amendment limited recovery to the amount set forth in the bill of lading) the court based its ruling on the defendant's violation of a court order staying the sale of plaintiff's property after the lawsuit was filed. 2009 Pa. Dist. & Cnty. Dec. LEXIS 234 at *14. Clearly the facts of *Lang* are not analogous here.

[7] Mlinar admits that the court in *Art Masters* reversed the lower court's finding that plaintiff could recover from UPS based on a presumption of conversion. *See* Initial Brief of Appellant at pgs. 24-25. In *Art Masters*, the court construed the Carmack Amendment along with New York's transportation law that governed the case and granted UPS's Motion for Summary Judgment. 567 N.E.2d at 230.

The law is well settled. The effect of the Carmack Amendment "[cannot be] escaped by suing in trover and laying the failure to deliver as a conversion if that had been done." *Am. Ry. Express Co. v. Levee,* 263 U. S. 19, 21 (1923). Taking well-settled law and the policy behind the Carmack Amendment into account, the Third Circuit has explained:

> [W]hen goods are lost or destroyed during transportation, there probably will be many circumstances in which a shipper will be able reasonably to characterize the carrier's conduct as willful, and a rule of law allowing recovery in excess of the released value, if willfulness can be demonstrated, will lead to increased litigation. We think it better that there be certainty in these commercial settings, particularly since the shipper can protect itself by paying for a higher level of protection.

Am. Cyanamid Co. v. New Penn Motor Express, Inc., 979 F.2d 310, 316 (3rd Cir. 1992) (granting motion for summary judgment in favor of defendant carrier where plaintiff alleged that carrier intentionally deviated from the requirements under the parties' agreement in failing to protect its package from freezing). Therefore, claims for conversion and conspiracy, even if characterized as "willful misconduct," still invoke the policy of uniformity underlying the Carmack amendment and are preempted.

D. Count II of Mlinar's Complaint was properly dismissed because the allegations of fraud upon which it was based are preempted by the Carmack Amendment.

In count two of her Complaint, Mlinar alleges that Defendants have engaged in obtaining property by "falsely impersonating and/or representing

themselves as part of a shipping enterprise." [R. 168, ¶ 37, Second Amended Complaint]. In effect, Mlinar argues that UPS induced her into providing her artwork for shipment so that UPS could sell it for profit, not ship it. This claim does not escape the broad preemptive effect of the Carmack Amendment. *Smith*, 296 F.3d at 1244, 1250. The case law here shows that "claims relating to the making of the contract for carriage are so closely related to the performance of the contract" they too are preempted. *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 289 (7th Cir. 1997).

In *Pietro Culotta Grapes Ltd. v. Southern Pacific Transportation Co.*, plaintiffs alleged that defendants wrongfully induced them to enter into the contract by representing that the agreed upon delivery schedules would be met although defendants knew this was unlikely. 917 F. Supp. 713 (E.D. Cal. 1996). The court ruled that claims based on conduct *both before and after* shipment still preempted. *Id.* at717 (collecting cases); *see also Smith*, 296 F.3d at 1247 (dismissing claims that carrier committed fraud by accepting shipments it had no intention of fulfilling or attempting to deliver); *Hall*, 476 F.3d at 689 (holding that that Carmack "applies equally to fraud and conversion claims arising from a carrier's misrepresentations as to the

conditions of delivery or failure to carry our delivery");[8] *Shabani* ,699 F. Supp. 2d at 1141 (granting motion to dismiss where plaintiff contended that allegations that defendant "intentionally and fraudulently misrepresented" that it had procured insurance for the damaged shipments); *United Van Lines, Inc. v. Shooster*, 860 F. Supp. 826 828 (S.D. Fla. 1992) (noting that "the [c]ourt is sympathetic to . . . claim of a 'bait and switch' scheme to induce consumers into entering into contracts" and ruling that "as a matter of law, the [fraud claims alleged] are preempted by the Carmack Amendment . . .").

E. Count III of the Complaint was properly dismissed, as the allegations regarding the unauthorized publication of Mlinar's name or likeness also stem from UPS's failure to provide transportation and delivery services.

Mlinar's attempt to categorize her loss through injury to her name and likeness does not avoid preemption of the Carmack Amendment. In *Smith*, the Eleventh Circuit rejected the plaintiffs' argument that the claim was not preempted because it remedied an injury to the person, rather than to the goods. 296 F.3d at 1249. The court concluded that in order for a claim to escape Carmack preemption, the claim must be based on conduct rather than

[8] In *Hall,* the plaintiff alleged that the carrier defendant fraudulently induced her into transporting her property with "bogus" shipping charges. The Ninth Circuit ruled that her claims were preempted by the Carmack Amendment. *Id.* at 685-86.

injury, that is separate and distinct from the failure to deliver goods. *Id.*[9]

Similarly, in *Design X Manufacturing Co. v. ABF Freight Systems, Inc.*, the court rejected the plaintiff's argument that its claim for damages to its reputation escaped preemption it arose from the claims process and not from the actual shipment of goods. 584 F. Supp. 2d 464 (D. Conn 2008). The court explained "'the claims process is directly related to the loss or damage to the goods that were shipped.' *Indeed . . .people would not be involved in the [claims] process unless either loss or damage had occurred.*'" *Id.* at 467. (emphasis supplied); *see also Moffit v. Bekins Van Lines Co.*, 6 F.3d 305, 307 (5th Cir. 1993) (explaining that the Carmack Amendment preempted the plaintiffs' claims for intentional and negligent infliction of emotional distress and to hold otherwise "could only lead to the

[9] In more detail, the Eleventh Circuit explained that the Smiths allege outrage in that the "actions of [UPS] to deny deliveries to [them] have been intentional and have been designed to inflict emotional distress." *Id.* at 1249. Although the Smiths seek a remedy for an injury to their person, the claim *results* solely from the loss of and mis-delivery of their goods. Therefore, the Smiths' outrage claim is embraced by the preemptive effect of the Carmack Amendment.

morass that existed before the Carmack Amendment").[10]

F. The law clearly supports dismissal of Count IV of the Complaint, brought under Florida's Deceptive and Unfair Trade Practices Acts.

Mlinar's statement that "[c]ourts have consistently held that deceptive trade practices claims are not preempted by Carmack" is misleading and incorrect. All recent federal decisions addressing this specific issue uniformly conclude that the Carmack Amendment does preempt a claim based upon a state's deceptive trade practices statute. *See Mashburn,* 2009 WL 3152195 at *2 (stating that that "[u]pon review, the [c]ourt has found no other controlling or persuasive authority to suggest that plaintiff's claims under the Florida Deceptive and Unfair Trade Practices statutes should not be preempted by the Carmack Amendment"); *Shooster,* 860 F. Supp. at 829 (stating that a "multitude of precedents" "clearly show" that the Carmack

[10] Mlinar essentially alleges that UPS failed to deliver her paintings, sold them to defendant Recovery Management, who then sold them to defendant Anderson who listed them on Craigslist.com; and that UPS should be liable to Mlinar for the advertisement ultimately published by *Anderson*. Mlinar does not allege that UPS published the advertisement; nor does Mlinar identify or attribute any publication of Mlinar's name or likeness to UPS. Consequently, even if these claims were not preempted, which they are, this tenuous chain of facts cannot impose liability on the part of UPS under Fla. Stat. § 540.08 for misappropriation of Mlinar's name or likeness. [R. 217-218, Motion to Dismiss Plaintiff's Second Amended Complaint.]

Amendment applies when state statutory unfair or deceptive trade practices acts are involved).[11]

The cases Mlinar cites to support this proposition have been overruled, called in to doubt or simply do not reflect the current state of the law. *See Mashburn,* 2009 WL 3152195 at *2 (explaining that the decision in *Mesta v. Allied Van Lines Intern., Inc.*, 695 F. Supp. 63 (D. Mass. 1988), was explicitly overruled); *Am. Eye Way, Inc. v. Roadway Package Sys. Inc.*, 875 F. Supp. 820 (S.D. Fla. 1995) (joining with the court in *Shooster*, 860 F. Supp. at 829 and declining to adopt the "extreme minority view" set forth in *Sokhos v. Mayflower Transit, Inc.*, 691 F. Supp. 1578 (D. Mass. 1988)); *Berlanga v. Terrier Transp., Inc.*, 269 F. Supp. 2d 821 (N. D. Tex. 2003)

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[11] *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 506 (1st Cir. 1997) (holding that a shipper's state law claim for violation of the Massachusetts Consumer Protection Act was preempted by the Carmack Amendment); *Design X Mfg.*, 584 F. Supp. 2d at 468 (holding that Connecticut Unfair Trade Practices Act claims against carrier asserting damages to business or reputation were preempted by the Carmack Amendment because the alleged damages "flowed directly from the damage to the goods shipped in interstate commerce and the subsequent claims process"); *White v. Mayflower Transit, L.L.C.*, 543 F.3d 581 (9th Cir. 2008) (holding that the Carmack Amendment bars claims for improper billing and overcharging); *Neal,* 2007 WL 831835 (actions under the Texas Deceptive Trade Practices Act were found to be preempted); *Miracle of Life, LLC,* 368 F. Supp. 2d 494 (actions under the South Carolina Unfair Trade Practices Act were found to be preempted); *Taylor v. Mayflower Transit, Inc.*, 22 F. Supp. 2d 509, 510-11 (W.D.N.C. 1998) actions under the North Carolina Unfair Trade Practices Act were found to be preempted).

(noting that "'this Court must follow federal case law in reaching its decision'" and cannot follow *American Transfer & Storage Co. v. Brown*, 584 S.W.2d 284, 288–90 (Tex. Civ. App. 1979).[12]

G. The Carmack Amendment only requires the UPS Tariff to be made available at any shipper's request.

Both the decision in *Braid Sales & Marketing, Inc. v. R & L Carriers, Inc*, 838 So. 2d 590 (Fla. 5th DCA 2003), and Mlinar's Initial Brief erroneously refer to the requirement that carriers file all tariffs with the Interstate Commerce Commission before any limitation of liability can apply to the recovery of damages in Carmack Amendment claims. The ICC was abolished more than fifteen years ago in 1995 pursuant to the Interstate

[12] To the extent that Mlinar claims that she is entitled to amend her complaint, she may do so only if she has plead a cause of action under the Carmack Amendment. *See Bishop v. Allied Van Airlines*, No. 8:08-cv-2170-T-24, 2008 WL 5111302 at *2 (M.D. Fla. Dec. 4, 2008) (Rather than dismissing plaintiff's case entirely, the court construed the case as bringing a Carmack Amendment claim only. The court explained that "[i]f plaintiff's claims were founded in contract, conversion, or negligence, they would be preempted by the Carmack Amendment. However, within Plaintiff's pleadings one can discover the prima facie case of a Carmack Amendment claim."); *see also Eventus Mktg.*, 722 F. Supp 2d 1311 (ruling that any amended complaint, should be consistent with the court's holding that the Carmack Amendment is plaintiff's exclusive remedy); *Casamassa v. Walton P. Davis Co.*, No. 2:07-cv-317-FtM-34DNF, 2008 WL 879412 (M.D. Fla. Mar. 28, 2008) (granting defendant's motion to dismiss with leave to file an amended claim based on the Carmack Amendment).

Commerce Commission Termination Act of 1995.[13] *See* 40 U.S.C. § 10762 (1994) (repealed 1995), which, *inter alia*, relieved carriers of their obligation to file tariffs with the government. Today, carriers must make their tariffs available to shippers[14] upon a shipper's request. 49 U.S.C. §§ 13710(a)(1), 14706(c)(1)(B); *see also OneBeacon Ins. Co. v. Haas, Indus. Inc.*, 634 F.3d 1092 (9th Cir. 2011) (noting that the ICC Termination Act of 1995 eliminated the need for carriers to file an approved tariff and that the current version of the Carmack Amendment requires a carrier to provide its tariff at the shipper's request). Any argument that UPS's tariff does not apply to Mlinar cannot be supported by valid law.

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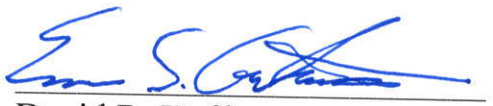
[13] *Braid* is therefore inapplicable to this case as it based its analysis of whether defendant's liability was limited pursuant to the Carmack Amendment on the defendant's right to rely on its tariff. Moreover, each and every case cited in *Braid* regarding the scope of any exception to Carmack preemption has been overruled, called into doubt or does not reflect the current state of the law. *Compare Braid*, 838 So. 2d 590 at fn.3 *with* Section IV(F) *supra*.

[14] The Carmack Amendment, 49 U.S.C. §§ 13102(13) defines an individual shipper as any person who (A) is the shipper, consignor, or consignee of a household goods shipment; (B) is identified as the shipper, consignor, or consignee on the face of the bill of lading; (C) owns the goods being transported; and (D) pays his or her own tariff transportation charges. Mlinar owned the goods being transported and presented them to Pak Mail of Wellington, Inc. ("Pak Mail"), a UPS Authorized Shipping Outlet or Third-Party Retailer of UPS's services.

V. CONCLUSION

In accordance with the well settled authorities presented to the trial court and set forth here; even if UPS was guilty of all of the wrongdoing of which Mlinar accuses, she cannot circumvent the overwhelming preemptive force of the Carmack Amendment. The trial court was correct in dismissing all of Mlinar's claims on this basis and UPS respectfully requests that this court uphold the trial court's ruling.

Respectfully submitted,



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The undersigned counsel hereby certifies that this Answer Brief of Appellee complies with the appropriate requirements in that it has been prepared in Times New Roman 14-point font.

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FOURTH DISTRICT COURT OF APPEAL
FOR THE STATE OF FLORIDA

IVANA VIDOVIC MLINAR,
Appellant/Plaintiff,

vs.

UNITED PARCEL SERVICE INC.
Appellee/Defendant,

RECOVERY MANAGEMENT CORP. d/b/a CARGO LARGO, PAKMAIL OF WELLINGTON INC., and AARON ANDERSON,
Defendants.

CASE NO.: 4D12-1332

LT CASE NO.: 50 2008 CA 036246 (PALM BEACH)

REPLY BRIEF OF APPELLANT

ON APPEAL FROM FINAL JUDGMENT OF THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT IN AND FOR PALM BEACH COUNTY, FLORIDA

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INTRODUCTION

On January 30, 2012, the trial court entered a Final Order dismissing all of the Appellants' claims against UPS with prejudice; the claims against the alleged co-conspirator, Recovery Management remain. The dismissal was based upon the following findings: First, the trial court found that all claims alleged against UPS were precluded by the Carmack Amendment. Second, the trial court found that the claim for profiting by criminal activity failed to provide the requisite specificity. Appellant appealed the order, arguing that both rulings were in error. The Appellee's Answer did not address the dismissal of the conspiracy claim based upon a lack of specificity. It discusses only the issue of Carmack preemption.

UPS's Answer admits that the sum of Appellant's allegations is the following: "UPS induced (Appellant) into providing her artwork for shipment so that UPS could sell it for profit, not ship it." AB 14. While none of the case law cited by UPS actually supports the dismissal of such a claim, UPS misstates the breadth of Carmack preemption and argues that even claims of outright theft and purposeful deception are preempted. Finally, UPS must demonstrate that it has published tariffs which apply to the Appellant in order to limit its liability under Carmack.

The Answer fails to explain how it can meet this prerequisite when the tariffs expressly exclude this Appellant.

A. THE ALLEGED MISCONDUCT WAS SEPARATE AND DISTINCT FROM THE DELIVERY, LOSS OF, OR DAMAGE TO GOODS AND THUS, THE CLAIMS ESCAPE PREEMPTION

UPS's Answer argues that the Appellant's claims, including what UPS acknowledges are allegations of intentional theft and purposed deception, are the result of conduct that is related to shipping; and therefore, UPS maintains that the damages sustained by such misconduct can only be remedied under the dictates of the Carmack Amendment, 49 U.S.C. 14706. (Summary of AB, 4-5.) Such an argument denies the scope of Carmack, which unifies the liability of interstate carriers for damages caused by the loss or damage to a shipper's goods to the remedies provided by the carrier's published tariff. Throughout the Answer, UPS misapplies case law in order to make the alleged misconduct appear to be indistinct from the conduct regularly performed in the delivery, loss or damage to goods.

The Carmack Amendment creates a uniform rule for carrier liability when goods are shipped in interstate commerce and are either damaged or lost in that process; however, "a number of situations" may exist "in which a carrier might remain liable to *a shipper* for certain kinds of separate and independently

actionable harms that are distinct from the loss of, or the damage to the goods." See *Smith v. UPS*, 296 F.3d 1244, 1246 (11th Cir. Ala. 2002), emphasis added.

UPS assumes that all of Appellant's state law claims arise out of a failure to deliver her goods simply because Appellant's relationship to UPS arose out of the fact that UPS shipped her package to New York. Such a syllogism ignores the language of *Smith,* as cited above, which concedes that carriers may be liable to "shippers" for separately actionable harms. *Id.*

The error in UPS's argument becomes blatantly apparent when applied to the facts alleged in this case. The allegations are cited in detail in the Initial Brief and are summarized herein: Appellant's package was delivered to a New York address, as she had arranged with UPS via Pak Mail. The contents of the package, her original oil paintings, were stolen by UPS through a conspiracy with co-defendant Recovery Management. In the process of the theft and sale of the painting, UPS used Appellant's identity in commercial speech without her consent. The conspiracy that enables these acts to occur utilizes a fraudulent and deceptive trade practice wherein UPS customers are lured to third-party vendors to ship their packages. UPS then denies any liability to such customers and refuses to allow the vendor to upload the customer's identity into its World Ship software, virtually

guaranteeing its lost goods servicer a steady stream of untraceable items—"overgoods" that the servicer and simultaneous surplus buyer can then sell through on-line and in-store auctions. For many of these goods, UPS receives a commission. For most of these goods, UPS receives a static compensation. See IB, pp. 2-11 for detailed allegations and record citations.

Clearly these acts include conduct that is distinct from the shipping of goods—a co-conspirator is alleged to be jointly liable for three of the four claims alleged against UPS. That co-conspirator, Recovery Management, is not in the practice of shipping or delivery of packages at all. The only claim that is alleged against UPS alone is the fraudulent and deceptive trade practice claims, which alleges that the deception began years before UPS ever received Appellant's package. The deception is separate from conduct regulated by Carmack because its purpose is to cut off this entire class of customers from *any* remedy under the tariffs that Carmack requires UPS to maintain.

In support of its assumption that any conduct by UPS is excused if it is related to any package UPS had accepted for shipment, UPS cites *Smith v. UPS*, 296 F.3d 1244, 1249 (11th Cir. Ala. 2002), for the proposition that "(t)he Carmack Amendment embraces "all losses resulting from any failure to discharge a carrier's

duty as to any part of the agreed transportation." (AB 4-5.) Importantly, *Smith v. UPS*, 296 F.3d 1244, 1249 (11th Cir. Ala. 2002), expressly agreed with the premise that "a number of situations" may exist "in which a carrier might remain liable to *a shipper* for certain kinds of separate and independently actionable harms that are distinct from the loss of, or the damage to the goods."

How could such situations exist if Carmack precludes any action alleging a breach of the carrier's duty? Because some goods may become "lost" as the result of purposeful acts, acts that have nothing to do with UPS's duty as a carrier. For example, UPS is not liable for negligence if someone comes onto its property and steals a package that is en-route even though it has a duty to maintain a package under security. UPS is liable for theft if it steals the package for its own gain.[1]

In *Smith v. UPS*, 296 F.3d 1244, 1245-46 (11th Cir. Ala. 2002), the claimant alleged that UPS was liable for fraud, negligence, wantonness and outrage for its failure to deliver packages to the Smith residence. The basis of the claim was the failure to carry out the duty to deliver the package. No other misconduct was

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[1] Cases discussing the purposeful conversion exception are discussed in the Appellant's IB, pp.24-27. Particularly, See *Aircraft Instrument Radio Co. v. United Parcel Service Inc.,* 117 F.Supp. 2d 1032, 1037 (D. Kan. 2000) which dismissed a negligence claim against UPS but examined the conversion claim under a summary judgment standard.

alleged except the following: Due to prior threats made by the Smith family members to a certain UPS delivery person, UPS refused to deliver any packages to the Smith household until either another UPS person would be available to make such deliveries or the Smith family would be available to pick them up at will-call. *Id.* This conduct is clearly encompassed within the transportation and delivery of goods.

In dismissing the *Smith* claims, the Eleventh Circuit noted that claims can survive Carmack preemption if the alleged facts detail distinct conduct, such as the conduct alleged in *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 289 (7th Cir. 1997), which held that the shipper's claim for intentional infliction of emotional distress survived Carmack preemption when the alleged misconduct included the carrier's deliberate fraud. The subsequent case cited by UPS, *Marshall W. Nelson & Assocs. v. YRC Inc.*, No. 11C-0401, 2011 U.S. Dist. LEXIS 85718/2011 WL 2418302, (E.D. Wis. Aug. 3, 2011), paraphrases the misconduct alleged in *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 289 (7th Cir. 1997) as follows:

> The plaintiff in *Gordon* was an elderly woman in failing health. Her vision and hearing were impaired, and she could no longer write due to arthritis. The plaintiff contacted a United Van Lines ("United") agency in Florida for the purpose of arranging delivery of some of her belongings to her new apartment in Chicago, and other of her belongings to her daughter's home. She met with a United agent, who

> was aware of her physical impairments, and she instructed him regarding delivery. The agent never obtained the plaintiff's agreement regarding insurance against the loss of her possession, and instead wrote in the bill of lading that the plaintiff released United from liability for loss or damage to the goods exceeding $1,000. United never delivered any of the goods destined for her daughter's home. Instead, the items were inadvertently discarded and incinerated. Rather than acknowledge their error, for a period of several months United represented to the plaintiff and her daughter that the items were in their warehouse and would be safely delivered.

As noted in *Marshall W. Nelson & Assocs. v. YRC Inc.*, No. 11C-0401, 2011 U.S. Dist. LEXIS 85718/2011 WL 2418302, the *Gordon* court allowed the intentional infliction of emotional distress claim but dismissed the claim related to the insurance claim process. The distinction between the kind of claims upheld in *Gordon* and those dismissed by both *Gordon* and *Marshall W. Nelson & Associates* is not apparent from UPS's citation to the case because UPS's citation conveniently omits identification of the cause of action that was dismissed. Compare UPS's AB at p. 4 to *Marshall W. Nelson & Assocs. v. YRC Inc.*, 2011 U.S. Dist. LEXIS 85718, 2011 WL 3418302 at *4 (E.D. Wis. Aug. 3, 2011), emphasis added (word in bold are eclipsed by the ellipses in UPS's citation): After all, the plaintiff would not even be in a position to complain **about a bad faith denial of an insurance claim** if it had not sustained damage to goods that were shipped by the defendant.

The insurance claim process, which is the heart of the claim dismissed in *Marshall V. Nelson,* is a part of the Carmack process-wherein carriers are required to offer additional insurance in relation to an increased rate for a package of an increased declared value. Here, Appellant's causes of action are not related to the conduct that would lead to the loss or damage of her paintings; instead, they are related to a scheme that began well before she trusted her package to UPS and continued long after she received the empty package.

UPS next attempts to bootstrap the holding of *American Cyanamid Co. v. New Penn Motor Express, Inc.*, 979 F.2d 310, 315-316 (3d Cir. Pa. 1992) into its overly broad interpretation of the "broad preemptive effect of Carmack." In *American Cyanamid,* the Third Circuit held that claims for "wilful misconduct' arising in the commercial setting could not defeat Carmack. UPS correctly cites the policy rationale for that holding. However, while it is not clear how the Appellant's shipment of her own original artwork classifies as the "commercial setting" under which this policy rationale would apply, that question does not even need to be addressed here. Like the other cases cited by UPS and discussed above, *American Cyanamid,* expressly distinguishes the misconduct alleged in this case: "intentional destruction or conduct in the nature of theft of the property will permit

a shipper to circumvent the liability limitations in a released value provision. *American Cyanamid Co. v. New Penn Motor Express, Inc.*, 979 F.2d 310, 315-316 (3d Cir. Pa. 1992), emphasis added. Again, this lone sentence is absent from the rest of the paragraph cited by UPS's Answer at page 13.

After ignoring *American Cynamid's* acknowledgement that claims based upon conduct alleged to be 'in the nature of theft" are immune to Carmack defenses, UPS's Answer concedes that the Appellant's allegations are nothing short of theft. On page 14, UPS's Answer admits that "(i)n effect Mlinar argues that UPS induced her into providing her artwork for shipment so that UPS could sell it, not ship it." UPS mistakenly argues, however, that such an outright conspiracy and deception "does not escape the broad preemptive effect of the Carmack Amendment" and again cites to *Smith v. UPS*, 296 F.3d 1244, (11th Cir. Ala. 2002) and *Gordon v. United Van Lines, Inc.*, 130 F.3d 282, 289 (7th Cir. 1997) this time for the premise that "claims relating to the making of a contract for carriage are so closely related to performance of the contract" that they too are preempted. Again, UPS ignores the fact that *Gordon* sustained the claim for intentional infliction of emotional distress and that *Smith* approved such claim because the fraud which occurred at the point of the contract's inception was

distinct from the conduct preempted by Carmack. In addition, UPS fails to recognize that in this case, there is no contract between UPS and the Appellant—that exclusion is the heart of the deceptive scheme and the reason UPS cannot rely on its tariff as discussed more fully below.

Clearly, the claims alleged against UPS, as paraphrased by UPS, include conduct in the nature of theft, deception, misappropriation, and conspiracy to commit such acts and do not arise out of the conduct regulated by Carmack.

B. NONE OF THE ADDITIONAL CASES CITED BY UPS APPLY

UPS also relies on inapposite case law to support its contention that these type of claims are routinely dismissed or that the case law relied upon by the Appellant has been "overruled." The use of the term overruled is completely inaccurate. In addition, some of the cases paraphrased by UPS do not note the distinctions between the facts discussed in those cases and the allegations stated in this case.

For example, on page 7 of its Answer, UPS cites *Houshang Shabani v. Classic Design* Servs., 699 F. Supp. 2d 1138, 1142 (C.D. Cal. 2010) for the premise that dismissal of fraud and conversion claims is proper. The case actually held that "though (p)laintiff's fraud claim appear[s] to arise from events other than the alleged loss or damage to his property, courts have acknowledged that the

preemptive effect of the Carmack Amendment applies equally to claims of fraud **relating to insurance coverage**. *Id.*, emphasis added. In other words, the claim dismissed in that case were not actually based on events other than those relating to insurance coverage.

Also on page 7, UPS cites *Mashburn v. Atlas Van Lines, Inc.*, 2009 U.S. Dist. LEXIS 88798 (E.D. Tenn. Sept. 25, 2009) as holding that Carmack preempts all claims made under Florida's Deceptive and Unfair Trade Practice Act. In fact, that unpublished opinion held that the claim in that case failed only because "the issues and the facts sufficient to support a claim under these issues were not alleged by plaintiff in plaintiff's complaint." It did not hold, as UPS implies, that such claims could never be made. Id.

On page 18, UPS stated that *Mashburn v. Atlas Van Lines, Inc.*, 2009 U.S. Dist. LEXIS 88798 in (E.D. Tenn. Sept. 25, 2009) noted that that one of the cases relied upon by the Appellant, *Mesta v. Allied Van Lines International, Inc., 695 F. Supp. 63 (D.Mass.1988)* was overruled. In describing the case as overruled, *Mashburn* cites to *Rini v. United van Lines, Inc.* 104 F.3d 502, 506 (1st Cir. 1997). *Rini* held that a shipper's deception claim pursuant to Massachusetts's Consumer Protection Act was preempted by Carmack.

First, it should be noted that *Rini* did not completely overrule *Mesta* as it was based upon a distinct set of facts. The distinction between the two Massachusetts's cases is discussed in *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, (Fla. 5th DCA, 2003) as relied upon by the Appellant. (IB 29-31)

Second, the Appellant's citation to *Mesta v. Allied Van Lines International, Inc., 695 F. Supp. 63 (D.Mass.1988)* was afforded by the discussion of that case and others supporting the view that deceptive trade practice claims are not per se preempted by Carmack. See *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, F.N. 3 at 593.

Mesta is not the only case that UPS maintains the Appellant relied upon and is 'overruled,' however it is the only one which needs to be addressed. The other cases UPS originally prefaced as "overruled" were not, in actuality, "overruled." Instead, as UPS later notes on page 17 of its Answer, the cases were simply "disagreed with" by other courts entitled to take a different view. Importantly, each of these cases are discussed in *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, F.N. 3 at 593. *Braid* recognized the conflict and determined that some deceptive trade practice allegations will include allegations of separate and distinct conduct. Whether that allowance is truly the "minority view" is irrelevant. It was

the view adopted by *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, F.N. 3 at 593 and the trial court did not have the authority to dismiss a claim that the Fifth District would have allowed. None of the current cases regarding fraud cited by UPS refer to anything but insurance fraud claims, which are discussed above.

Finally, UPS continues its erroneous description of the misconduct in this case by distinguishing the present allegations from those in *Lang v. Frontier Van Lines Moving & Storage, Inc.*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 234 (Pa. County Ct. 2009), an unpublished opinion cited in the Appellant's initial brief as "worth noting because it so succinctly, albeit conservatively, paraphrases the jurisprudence on the conversion exception."[2] UPS attempts to distinguish *Lang* based upon the fact that some of the misconduct in *Lang* included a violation of a Court order prohibiting the sale of property. As UPS points out, the conduct in *Lang* was demonstrably distinct from the delivery, loss of, or damage to goods: The conduct violated a court order that was not, itself, within the purview of Carmack. *Id.* Likewise, this case alleges that the two co-conspirators jointly violated Section 817.02 of Florida Statutes. In addition, Appellant alleged UPS is liable under Florida Statute Section

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[2] *Lang v. Frontier Van Lines Moving & Storage, Inc.*, 2009 Pa. Dist. & Cnty. Dec. LEXIS 234 (Pa. County Ct. 2009): One of the state law claims that may escape preemption is conversion..."

540.08—which protects a person's right from the unauthorized use of her name in commercial speech. Neither violation is within the purview of Carmack.

In fact when discussing the misappropriation of identity claim, UPS suggests that Appellant never alleged that UPS misappropriated her name. AB 17, FN. 10. In fact, Appellant alleges that UPS used her name in catalogues to or with Cargo Largo, in a "UPS goods" auction and at several other points in the conduct paraphrased by UPS as "purposeful theft." [IB, 2-3.]

C. WHETHER THE TARIFFS WERE PUBLISHED IS IRRELEVANT BECAUSE THE TARIFF EXPRESSLY EXCLUDES THE APPELLANT

Appellant had also cited to *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, (Fla. 5th DCA, 2003) for its discussion of the prerequisite to the Carmack limitation defense, a prerequisite UPS cannot meet in this case. In order to maintain a Carmack defense and limit the Appellant to the recovery of its stated tariffs, UPS must provide the Court with proof that it had published tariffs which would have applied to and remedied the Appellant's claims as contemplated by the dictates of Carmack. *Id* at 592. As discussed in Appellant's initial brief at page 12, the Appellant alleged that UPS attached tariffs which **expressly exclude** the

Appellant and all customers who bring their packages to a third party vendor such as Pak Mail or to the UPS Store.

UPS answers this argument by noting that the requirement that a tariff be filed with the ICC was abolished; subsequently, shippers have been required to publish the tariffs rather than file the tariffs. This is a red herring. The point of *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, (Fla. 5th DCA, 2003) was not whether the carrier correctly published the tariff or filed the tariff, but that the tariff did not include the claimant; thus, the claims were not limited to the caps imposed by the tariffs. UPS's defense fails for the same reasons that the defense failed in *Braid Sales & Mktg. v. R & L Carriers*, 838 So. 2d 590, at 592. Like the proffered tariffs in that case, the tariffs proffered by UPS simply do not include the claimant at issue.

CONCLUSION

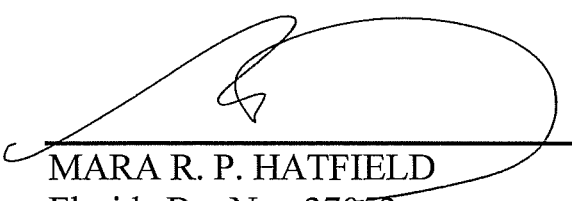
The relief requested in the Initial Brief ought to be afforded: the decision to dismiss the claims should be reversed and the claims against UPS should be remanded.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this Reply Brief of Appellant has been e-filed and hand delivered with the 4th DCA, and a true and correct copy of has been furnished by e-mail and United States Mail this 4th day of SEPTEMBER, 2012, to all counsel on the attached list.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(A)(2) of the Florida Rules of Appellate Procedure.



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