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IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO.: SC14-54
Lower Case Nos.: 4D12-1332; 502008 CA036246 XXXXMB AH

IVANA VIDOVIC MLINAR,

Petitioner,

v.

UNITED PARCEL SERVICE, INC. ET AL.,

Respondent.

ANSWER BRIEF OF RESPONDENT, UNITED PARCEL SERVICE, INC.

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I. STATEMENT OF THE CASE AND FACTS

In November 2008, Plaintiff Ivana Vidovic Mlinar ("Mlinar") filed suit in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida against United Parcel Service Inc. ("UPS"), Pak Mail of Wellington, Inc., Aaron Anderson and Recovery Management Corp. d/b/a Cargo Largo. [R. 0001, November 20, 2008 Complaint]. In August 2011, Mlinar filed a Second Amended Complaint (the "Complaint") containing claims against UPS for conversion, criminal activity, violation of the Florida Deceptive and Unfair Trade Practices Act ("FDUPTA") and unauthorized publication of name or likeness in violation of Florida Statute §540.08. [R. 157, Complaint]. All of Mlinar's claim stem from a shipment of a package via UPS ground service.

On November 28, 2005, Mlinar entered into a contract with Pak Mail, a third party retailer of UPS's services, for the shipment of a package from Florida to New York. [R. 159, ¶ ¶ 7, 9] The package at issue contained two original paintings created by Mlinar (the "Package"). [R. 159, ¶¶ 7-9, Complaint.] According to Mlinar's Complaint, when the package was delivered by UPS to the intended address in New York, it was empty. Mlinar alleges that the duct tape allegedly used to seal the container had

been sliced and the paintings had been removed. [R. 160, ¶ 11.] 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.]

Consistent with the contract that Mlinar entered into with Pak Mail, UPS informed Mlinar that she should file a claim with Pak Mail for the missing paintings. [R. 161, ¶14.] Mlinar then filed a claim with Pak Mail and eight months after Mlinar's claim was filed, Pak Mail advised Mlinar that she was entitled to $100 for the missing paintings. [R. 161, ¶16.] As set forth in Mlinar's Complaint, approximately two years later, she became aware that the paintings were purchased by Defendant Aaron Anderson from Recovery Management Corp. d/b/a/ Cargo Largo ("Cargo Largo"). [R. 158, ¶5, R. 162, ¶17, R. 163, ¶¶ 20, 22, 25-26] Mlinar subsequently filed this lawsuit.

On November 3, 2011, UPS timely moved to dismiss Mlinar's Second Amended Complaint and the trial court granted UPS's motion, dismissing with prejudice all of Mlinar's claims against UPS. Mlinar appealed and the Fourth District Court of Appeals affirmed the trial court's dismissal finding that Mlinar's claims all arose from UPS's failure to deliver the Package and holding, therefore, that the Carmack Amendment preempted all of her

claims. After reconsideration, the appellate court certified a conflict to the extent that its decision conflicted with *Braid Sales & Marketing, Inc. v. R & L Carriers, Inc*., 838 So. 2d 590 (Fla. 5th DCA 2003). *See Mlinar v. United Parcel Service, Inc., et al.*, 129 So. 3d 406 (Fla. 4th DCA 2013).

II. SUMMARY OF THE ARGUMENT

The trial court and the Fourth District Court of Appeals correctly ruled that the Carmack Amendment preempts all of Mlinar's state law claims against UPS, and that they must, therefore, be dismissed. Mlinar attempts to circumvent the comprehensive and well-settled preemptive scope of the Carmack Amendment by arguing that her claims are exempt from federal preemption under various creative theories.

Mlinar first asserts that the validity of the UPS Tariff and enforcement of limitation of liability precludes preemption under the Carmack Amendment. This position, however, ignores the established principle that the issue of whether to enforce a limitation of liability in a carrier's tariff has no bearing on the preemptive effect of the Carmack Amendment.

Mlinar then argues – relying extensively on the decision by the Fifth District Court of Appeals in *Braid Sales & Marketing, Inc., v. R & L Carriers, Inc.*, 838 So. 2d 590 (Fla. 5th DCA 2003) – that preemption under the Carmack Amendment should be based on whether its claims arose from

separate *harm*, as opposed to separate *conduct*. Mlinar's reliance on the *Braid* decision, however, is misplaced and erroneous for two reasons: (1) the *Braid* court neglects to consider relevant federal appellate precedent that expressly rejects *Braid*'s holding that separate and distinct harm removes a case outside the preemptive scope of the Carmack Amendment; and (2) even under *Braid*'s "separate harm" standard, Mlinar's claims are still preempted under the Carmack Amendment, as all of Mlinar's state law claims and any harm caused to her by UPS directly flowed from UPS's loss of the contents of the Package.

Finally, Mlinar asserts that the alleged intentional conduct of UPS's actions allows her to bypass federal preemption pursuant to the "true conversion" exception doctrine. This argument must also fail as federal case law makes clear that the true conversion exception does not negate the preemptive effect of the Carmack Amendment; the exception is only relevant to the determination as to whether to permit the carrier to limit its liability.

All of Mlinar's causes of actions fall squarely into categories of claims preempted by the Carmack Amendment. Mlinar also fails to establish any legal grounds under which her state law claims fall outside the Carmack's preemptive scope. Accordingly, the dismissal of all of Mlinar's

claims against UPS by both the circuit court and district court of appeal should be affirmed.

III. ARGUMENT

A. Standard of Review

A trial court's ruling on a motion to dismiss based on a question of law is subject to de novo review. *Execu-Tech Bus. Sys., Inc. v. New Oji Paper Co.*, 752 So. 2d 582, 584 (Fla. 2000). When considering the merits of a motion to dismiss, a court's review is limited to the four corners of the complaint. *Gladstone v. Smith*, 729 So. 2d 1002, 1003 (Fla. 4th DCA 1999). To the extent that Mlinar references any evidence outside the four corners of her Second Amended Complaint, such evidence is irrelevant and may have no bearing on the Court's consideration of this Appeal. *See Pizzi v. Cent. Bank & Trust Co.*, 250 So. 2d 895 (Fla. 1971) (explaining that the court must confine itself strictly to the allegations within the four corners of the complaint in ruling on a motion to dismiss and that the discovery sought prior to testing the complaint is immaterial to its sufficiency).[1]

[1] In her Initial Brief, her Memorandum in Opposition to UPS's Motion to Dismiss and the Brief she filed in the Fourth District Court of Appeals, Mlinar improperly cites to evidence outside the pleadings at issue. Her Plaintiff's Second Amended Complaint and UPS's Motion to Dismiss are the only relevant pleadings. While Mlinar may argue that discovery she received from UPS formed the factual basis for her Amended Complaint [Initial Brief, 9], to the extent that it is not referenced in her Second

As a general rule, it is not appropriate for a party to raise an issue for the first time on appeal. *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) (a claim not raised in the trial court will not be considered on appeal); *Dober v. Worrell*, 401 So. 2d 1322 (Fla. 1981) (appellate court will not consider issues not presented to the trial judge on appeal from final judgment on the merits)). "In order to be preserved for further review by a higher court, an issue must be presented to the lower court and the specific legal argument or ground to be argued on appeal or review must be part of that presentation if it is to be considered preserved." *Sunset Harbour Condo*, 914 So. 2d at 928 (quoting *Tillman v. State*, 471 So. 2d 32, 35 (Fla. 1985)).

B. UPS Has Properly Asserted Preemption Under the Carmack Amendment.

As set forth fully in UPS's November 3, 2011 Motion to Dismiss, even if the Court accepts as true all of the allegations of Mlinar's Complaint, the claims that she asserts are preempted by the Carmack Amendment. [R. 208, UPS's Motion to Dismiss.] In her Initial Brief, Mlinar takes a new spin on her argument that the Court should not apply the Carmack Amendment to this case. She argues that preemption is an affirmative defense and that UPS

Amended Complaint it is irrelevant and may not be considered in the Court's determination of this Appeal.

did not properly raise that defense for two reasons: (1) UPS did not meet its burden of proving that it properly maintained its tariffs; and (2) UPS did not prove that the limitation of liability found in its tariff applies to Mlinar. [Initial Brief, 11, 13]. These arguments are without merit and confuse the issue at hand.

UPS properly asserted the defense of federal preemption in its motion to dismiss. As this Court has ruled "[a] defendant may, at its option, raise any affirmative defense, including the defense of federal preemption, in a motion to dismiss." *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 568 (Fla. 2005) (rejecting the appellate court's finding that the defense of preemption asserted as an affirmative defense could only be resolved through a motion for summary judgment, and explaining that the court must determine the issue as a matter of law based only on the well-pleaded allegations in the complaint). Moreover, a plethora of courts have determined that claims similar to Mlinar's were preempted at the motion to dismiss stage. *See supra,* pg. 32-33, fn. 16.

Assertion of the preemptive effect of the Carmack Amendment does not require UPS to prove that, or how, provisions of the Amendment concerning the potential for limitation of liability apply to Mlinar. Mlinar confuses the issue before this Court by conflating the concepts of

preemption and enforcement of the limitation of liability contained in a carrier's tariff by both citing to *UPS Supply Chain Solutions, Inc., v. Megatrux Transp., Inc*., 24 Fla. L. Weekly Fed. C 1333 (11th Cir. May 8, 2014), and misconstruing the application of the "true conversion" exception.

In UPS's Motion to Dismiss, UPS asserted that Mlinar's claims should be dismissed because they were preempted by operation of law; *not* because UPS's liability was limited pursuant to its Tariff, [R. 208, UPS's Motion to Dismiss.]. It was on that basis that the trial court granted UPS's motion and the Fourth District affirmed. [R. 431, Final Order of Dismissal with Prejudice]; *Mlinar*, 129 So. 3d 406. Despite Mlinar's arguments in her most recent brief, no cases hold that the preemptive effect of the Carmack Amendment is impacted in any way by a court's determination of whether to enforce the limitation of liability contained in a carrier's tariff.

C. The Fourth District Court of Appeals Properly Applied the Preemption Test Set Forth in Braid to Find that Mlinar's Common Law and Statutory Claims Should Be Dismissed.

In its decision upholding the trial court's dismissal, the Fourth District Court of Appeals analyzed the preemptive scope of the Carmack Amendment under the test of whether the claims are based on *conduct* separate and distinct from the delivery, loss of, or damage to the goods. *Mlinar v. United Parcel Serv., Inc*., 129 So. 3d 406 (Fla. 4th DCA 2013)

(emphasis added)). The application of this test for preemption is consistent with informative and well-reasoned opinions of the Eleventh Circuit Court of Appeals. Although the Fourth District Court of Appeals affirmed the trial court's dismissal of all claims against UPS, the appellate court certified a conflict to the extent that its decision conflicted with *Braid Sales & Marketing,* 838 So. 2d 590.

The *Braid* court neglected to cite or consider the *many* well-settled federal cases construing preemption under the Carmack Amendment. Nor did the *Braid* decision acknowledge that, at the time it was decided, *every* United States Court of Appeals that had considered the issue, including the Eleventh Circuit in *Smith*, concluded that the Carmack Amendment preempts all common law and state statutory claims for damage or loss of goods moving in interstate commerce through a common carrier.[2]

The *Braid* case involved a shipment of machinery that was damaged in transit. After delivery was complete, defendant R & L verbally agreed to

[2] *See Intech, Inc. v. Consol. Freightways, Inc*., 836 F.2d 672, 677 (1st Cir. 1987); *N. Am. Phillips Corp. v. Emery Air Freight Corp*., 579 F.2d 229, 234 (2d Cir. 1978); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 706 (4th Cir. 1993); *Air Prods. & Chems., Inc. v. Ill. Cent. Gulf R.R. Co*., 721 F.2d 483, 487 (5th Cir. 1983); *W. D. Lawson & Co. v. Penn Cent. Co*., 456 F.2d 419, 421 (6th Cir. 1972); *Hughes v. United Van Lines, Inc*., 829 F.2d 1407, 1415 (7th Cir. 1987); *Hopper Furs, Inc. v. Emery Air Freight Corp*., 749 F.2d 1261, 1264 (8th Cir. 1984); *Hughes Aircraft Co. v. N. Am. Van Lines, Inc.* 970 F.2d 609, 613 (9th Cir. 1992); *Underwriters at Lloyds' of London v. N. Am. Van Lines,* 890 F.2d 1112, 1121 (10th Cir. 1989).

repair the damaged machinery. When R & L failed to repair it, Braid filed its lawsuit against R & L for breach of the oral contract. Although the trial court in *Braid* found that the shipper's claims were preempted by the Carmack Amendment, the Fifth District Court of Appeals reversed. The Fifth District Court of Appeals evaluated preemption based upon whether R & L's breach of the oral contract for the repairs was a "separate *harm* which is independent from the loss or damage to goods." *Id*. at 593 (emphasis added).[3] The Fifth District Court of Appeals found that the harm arising from the breach of the oral contract for repair was a separate harm and ruled that Braid's claims were not preempted by the Carmack Amendment.

[3] The *Braid* case also based its holding on its finding that the tariff at issue in *Braid* was not applicable to R & L and erroneously cited the requirement that carriers file their 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 Commerce Commission Termination Act of 1995 and today carriers must make their tariffs available at 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); *Werner Enters., Inc. v. Westwind Maritime Int'l, Inc.*, 554 F.3d 1319, 1327, fn. 6 (11th Cir.2009) (same); *UPS Supply Chain Solutions, Inc., v. Megatrux Transp., Inc*., 24 Fla. L. Weekly Fed. C1333 (11th Cir. 2014) (same).Thus, any argument that UPS did not properly publish its Tariff is without merit.

There is no doubt that the *Braid* decision, which relies on federal law, contradicts the leading Eleventh Circuit precedent on the issue, which is consistent with the overwhelming consensus of federal courts that have decided the issue. First, *Braid* failed to consider *Smith v. United Parcel Service.*, 296 F.3d 1244, 1249 (11th Cir. 2002), which was decided approximately seven months earlier and also involved dismissal of a Florida state law claim in light of the Carmack Amendment. In *Smith*, the Eleventh Circuit expressly rejected the holding subsequently fashioned in *Braid* that separate and distinct *harm* removes a case from Carmack preemption.[4] The *Smith* court ruled that for a claim to escape preemption, it must involve *conduct* that is separate and distinct from the "delivery, loss of, or damage to goods." *Id.* The Eleventh Circuit explained that, because the Smiths' claims were all based "on UPS's failure to provide the plaintiffs with particular transportation and delivery services, they "[fell] squarely within the preemption coverage of the Carmack Amendment." *Id.* As the *Smith* court explained, the Carmack Amendment "embraces 'all losses resulting from

[4]In S*mith*, the plaintiffs complained that UPS 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. *Id.* at 1247.

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.[5]

The *Braid* decision relied upon a line of cases that did not, and does not, reflect the current state of applicable federal law. In footnote three of the *Braid* decision, the Fifth District Court of Appeals stated that "[t]he federal cases which have discussed the scope of preemption of the Carmack Amendment are not in agreement as to what claims are preempted by the Carmack Amendment. . . ." *Braid Sales & Mktg*., 838 So. 2d at 593 n.3. The court then cited three cases in support of Braid's argument that its claims were not preempted: *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) and *American Transfer & Storage Co. v. Brown*, 584 S.W.2d 284, 288–90 (Tex. Civ. App. 1979), *rev'd*, 601 S.W. 2d 931 (Tex. 1980). At the time of the *Braid* decision however, these three cases had been overruled, called in to doubt or simply did not reflect the current state of the

[5] In acknowledging that under this standard a wide variety of claims would in fact be preempted, the Eleventh Circuit did concede that situations may exist in which all claims would not be preempted. As an example the Eleventh Circuit provided that an intentional assault and injury inflicted by a driver would *not* be preempted by the Carmack Amendment. *Id*. at 1247.

law.[6] *See also Mlinar,* 129 So. 3d 406 at fn. 1 (explaining that the cases cited by Mlinar "are in the minority and two of them have been disapproved").

In this case, Mlinar's claims of purposeful, deceptive, illegitimate and criminal activity all stem from the fact that UPS never delivered her paintings. Mlinar essentially alleges that: UPS failed to deliver her paintings; UPS sold them to Recovery Management as part of its overgoods process; Recovery Management sold them to an individual by the name of Aaron Anderson, who then listed them on Craigslist.com; and that UPS should therefore be liable to Mlinar under the various state law theories that she has presented. But, as the alleged facts show, UPS's participation in this chain of facts relates only to the shipment and unfortunate loss of Mlinar's goods. Any state law claims that Mlinar may have against UPS and any harm caused to her by UPS, are directly related to UPS's loss of the contents of the Package. Mlinar's claims are not based on conduct separate and

[6] *See Mashburn v. Atlas Van Lines, Inc.*, 3:08CV-389, 2009 WL 3152195, at *2 (E.D. Tenn. Sept. 25, 2009) (explaining that the decision in *Mesta*, 695 F. Supp. 63 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 *United Van Lines, Inc. v. Shooster*, 860 F. Supp. 826, 829 (S.D. Fla. 1992) and declining to adopt the "extreme minority view" set forth in *Sokhos*, 691 F. Supp. 1578); *Berlanga v. Terrier Transp., Inc.*, 269 F. Supp. 2d 821 (N. D. Tex. 2003) (noting that "'this Court must follow federal case law in reaching its decision'" and cannot follow *American Transfer & Storage Co.*, 584 S.W.2d 284).

distinct from the loss of the painting. Nor are any of the damages for which she seeks to hold UPS responsible attributable to any "harm," other than that stemming from the loss of her goods. Therefore, under either the properly applied test for preemption set forth by the Eleventh Circuit or the "separate harm" test applied in *Braid*, her state law claims are preempted by the Carmack Amendment.[7]

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[7] Further, as UPS explained in its Motion to Dismiss, many courts have found a wide variety of claims against carriers preempted when the action complained of took place before or after delivery or where it related to the carrier's claims process. *See Rini v. United Van Lines, Inc*., 104 F.3d 502, 506 (1st Cir. 1997) (ruling that preempted state law claims include all "liability stemming from the claims process, and liability related to the payment of claims."); *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); *Pietro Culotta Grapes, Ltd. v. S. Pac. Transp. Co.*, 917 F. Supp. 713, 717 (E.D. Ca. 1996) (finding that the Carmack Amendment preempted plaintiff's claims that defendants wrongfully induced them to enter into the shipping contract by representing that the agreed upon delivery schedules would be met although defendants knew this was unlikely); *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); *Shooster*, 860 F. Supp. at 828 (noting that while "the [c]ourt is sympathetic to…claim of a 'bait and switch' scheme to induce consumers into entering contracts" the fraud claims alleged are preempted by the Carmack Amendment); *Design X Mfg., Inc. v. ABF Freight Sys., Inc.*, 584 F. Supp. 2d 464, 465, 468 (D. Conn. 2008) (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); *Marshall W. Nelson & Assocs., Inc. v. YRC Inc.*, No. 11-C-0401, 2001 WL 3418302 (E.D. Wis. Aug. 3, 2011) (denying plaintiff's claim for bad faith denial of insurance claim under Wisconsin law).

D. Shipment of the Package Through an Intermediary Does Not Destroy the Preemptive Scope of the Carmack Amendment or Negate the Application of the Limitation of Liability Found in the Tariff.

In opposition to UPS's Motion to Dismiss and in her appeal, Mlinar argues that the UPS Tariff and the Carmack Amendment should not apply to her because Pak Mail was the shipper of record for the relevant package and she was among "a set of customers who drop their packages at outlets instead of with carriers." [R. 255, ¶ ¶ 3, 5, Memorandum in Opposition to Motion to Dismiss].[8] Mlinar acknowledges that the UPS Tariff states that only the shipper of record here, Pak Mail, has the right to file a claim against

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[8] As set forth in Mlinar's Second Amended Complaint, on or about November 28, 2005, Mlinar entered into a contract with Pak Mail, a third party retailer of UPS's services, for the shipment of the Package from Florida to New York. [R. 159, ¶ 7.] As a third party retailer of UPS's services, Pak Mail acted as an intermediary and contracted on Mlinar's behalf to ship the Package via UPS service. [R. 171-712, ¶ ¶ 7, 53(a).] Pak Mail agreed that the terms and conditions of UPS's services are provided by the UPS Tariff, which is and was at the time the Package was shipped, available at www.ups.com. [R. 228-229, 252-253, § 1090 ("stating that UPS's liability is subject to the limitations set forth in the applicable UPS Tariff")]. These terms and conditions included a limitation of liability in the event of loss or damage to the package, which is capped at $100, unless a higher value is declared. At the time of shipment, neither Mlinar nor Pak Mail requested or informed UPS that the Package should be shipped with a declared value (referred to by Mlinar as "insurance"). [R. 161, ¶¶ 16, 19, 29, 32.] Had either party requested UPS's declared value service at the time of shipment, they could have increased UPS's liability for the loss of the package from $100 in accordance with the UPS Tariff and its terms. [R. 241 § 535, UPS Tariff].

UPS but argues that because Pak Mail must file a claim on her behalf, the UPS Tariff does not or should not apply to her. [R. 161, ¶ 14-16, Initial Brief, 17-18] She states that "if the tariff does not include the claim at issue, there can be no Carmack preemption. [Initial Brief, 15].

This argument represents an additional attempt by Mlinar to circumvent well settled federal law and to receive a windfall in contravention of the terms of the shipping contract for her package. Her logic is that because the UPS Tariff provides that only the shipper of record must file a claim with UPS, the UPS Tariff is not applicable to her and therefore the Carmack Amendment (and consequently its limitation of liability), does not apply to her claims. None of the legal authorities that Mlinar cites supports this argument.[9] These arguments were also never raised at the trial court or district court of appeal levels and are presented for the first time here in Mlinar's Initial Brief. Thus, aside from lacking

[9] Additionally, it an appropriate exercise of UPS's freedom to structure its contracts of carriage and develop an efficient system of third party retailers in this way and it promotes efficiency resulting in lower shipping rates for the public. *See Norfolk Southern Railway. Co. v. Kirby*, 543 U.S. 14, 33 (2004) (explaining that "if liability limitations negotiated with cargo owners were reliable while limitations negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates. A rule prompting downstream carriers to distinguish between cargo owners and intermediary shippers might interfere with statutory and decisional law promoting nondiscrimination in common carriage").

substantive merit, the arguments were not properly preserved on appeal. *See Sunset Harbour Condo. Ass'n*, 914 So. 2d 925; *Dober*, 401 So.2d 1322.

Preemption by the Carmack Amendment arises by operation of law, not pursuant to an agreement between the parties or by applying a carrier's tariff. 49 U.S.C. § 14706(a)(1). Still, the Carmack Amendment permits a carrier such as UPS to limit its liability through a tariff. 49 U.S.C. § 14706(c)(1)(A). Such a provision allows a shipper to contract with a carrier to determine the amount of loss payable in the event of loss of or damage to a shipment, regardless of whether a carrier is found to have breached a term of the shipping contract. *See, e.g., Am. Cyanamid Co. v. New Penn Motor Express, Inc*., 979 F.2d 310, 316 (3d Cir. 1992). In applying the Carmack Amendment, courts throughout the country have consistently enforced the terms of carriers' tariffs and the liability limitations that they contain.[10]

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[10] *See, e.g., Am. Ry. Express Co. v. Lindenburg*, 260 U.S. 584, 592 (1923) (explaining that"[h]aving accepted the benefit of the lower rate dependent upon the specified valuation, [the shipper] is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing"); *George N. Pierce Co. v. Wells Fargo & Co.,* 236 U.S. 278, 286 (1915) (affirming limitation of liability where shipper "intentionally [took] the risk of less responsibility from the carrier, for a lower rate"); *Tran Enters., LLC v. DHL Exp. (USA), Inc*., 627 F.3d 1004, 1011 (5th Cir. 2010) (holding that the district court was correct in finding that the one hundred dollar per shipment limitation of liability found in the carrier's shipping contract was valid under the Carmack Amendment); *King Jewelry, Inc. v. Fed. Express Corp*., 316 F.3d 961 (9th Cir. 2003) (barring plaintiff's recovery for damage to its $37,000 candelabra in excess of

Similarly, federal precedent explicitly holds that limitations of liability found in carriers' tariffs apply not only to the parties to the shipping contract, who specifically agreed to the terms of the tariff, but also to third parties who seek to recover from the transporting carrier for the loss of or for damage to their property. *See Werner Enters., Inc. v. Westwind Maritime Int'l, Inc.*, 554 F.3d 1319, 1325 (11th Cir. 2009) (holding that where a third party enters into shipping contract with a carrier on behalf of goods' owner, the owner's recovery against the carrier is limited by the liability limitation to which third party and carrier agreed); *Rykard v. FedEx Ground Package Sys., Inc.*, No. 4:08-CV-74 (CDL), 2010 WL 554698, at *2 (M.D. Ga. Feb. 9, 2010) (rejecting plaintiff's argument that he was not bound to FedEx's liability limitation because he never entered into a shipping contract with

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Federal Express's five-hundred dollar liability limitation for the shipment of items of extraordinary value); *Nippon Fire & Marine Ins. Co. v. Skyway Freight Sys., Inc.*, 235 F.3d 53, 59-62 (2d Cir. 2000) (enforcing carrier's provision in tariff limiting liability to declared value and precluding all other damages); *Sam L. Majors Jewelers v. ABX, Inc*., 117 F.3d 922, 930-31 (5th Cir. 1997) (enforcing exclusion of liability for the shipment of jewelry); *Hill Constr. Corp. v. Am. Airlines, Inc.*, 996 F.2d 1315, 1317 (1st Cir. 1993) (enforcing the limitations of liability found in the carrier's contract of carriage); *Deiro v. Am. Airlines, Inc.*, 816 F.2d 1360 (9th Cir. 1987) (affirming airline's liability limitation where plaintiff never declared a higher value for shipped goods); *Kemper Ins. Cos. v. Fed. Express Corp.*, 115 F. Supp. 2d 116, 121 (D. Mass. 2000) (enforcing carrier's limitations provision limiting liability for lost or damaged jewelry to maximum amount of $500 pursuant to federal common law, which relies upon the Carmack Amendment), *aff'd*, 252 F.3d 509 (1st Cir. 2001).

FedEx and merely tendered the package to an intermediary who then arranged for shipment by FedEx); *Flying Phx. Corp. v. Creative Packaging Mach., Inc.*, 681 F.3d 1198, 1200-01 (10th Cir. 2012) (same).

Essentially, if an intermediary such as Pak Mail enters into a contract with a carrier on behalf of its customer (typically the owner of the property being transported), the carrier's tariff governs the shipment of the property and the carrier's liability as to *both* the intermediary and its customer. As explained in *Werner Enterprises*, 554 F.3d at 1323-24:

> When an intermediary contracts with a carrier to transport goods, the cargo owner's recovery against the carrier is limited by the liability limitation to which the intermediary and carrier agreed.

In *Werner*, the Eleventh Circuit reasoned that because contracts for carriage often involve extended chains of parties and agreements, both equity and efficiency are served by allowing carriers to rely on limitations of liability negotiated by intermediaries. *See Id.* The court explained that this rule "eliminate[s] the need for carriers to commit time and effort investigating long chains of parties and agreements, thereby potentially causing higher shipping rates." *Id*. at 1324. The *Werner* decision adopted the United States Supreme Court's reasoning in *Norfolk Southern Railway. Co.,* 543 U.S. 14, 33, which also held that a valid written agreement between a carrier and a shipper's intermediary is binding on the shipper. Both of these cases hold

that carriers are entitled to assume that the party entrusted with goods may negotiate a limitation of liability on the property owner's behalf. *Werner*, 554 F.3d at 1325. Notably, the property owner "retains the option to sue the intermediary who failed to protect itself by negotiating a liability limitation." *Id.* Thus, here, Mlinar may take issue with Pak Mail not following her instructions concerning shipment of her packages, but to the extent there are issues related to the actual loss, damage or delay of the property shipped itself, she must stand in the shoes of her agent, Pak Mail, that made the actual contract of carriage with UPS for shipment.

Mlinar contends that *Megatrux Transportation*, 24 Fla. L. Weekly Fed. C 1333, supports her argument that the UPS Tariff should not apply to her and that the case requires UPS to prove that Mlinar agreed to a limitation of liability with UPS. [Initial Brief, 17.] Mlinar's Initial Brief, however, does not correctly explain the facts of *Megatrux* or apply the Eleventh Circuit's reasoning in *Megatrux* to the case at hand. The *Megatrux* case does not address the preemptive scope of the Carmack Amendment to the plaintiff's claims of breach of contract and negligence. Instead, the case addressed the application of a contractual limitation of liability in the context of analysis of one element of a contract for carriage in a series of events

involving multiple parties and agreements.[11] If anything, it thus stands for the importance of looking to the terms agreed to by the parties and their agents in a chain of agreements. That analysis, if applied here, leads to the inescapable conclusion that, as a matter of law, Mlinar's agent (Pak Mail) entered into a shipping contract that was not subject to state law claims about loss, damage or delay of the shipment.

Specifically, in the *Megatrux* case, Seagate Technology LLC ("Seagate"), the owner of the property to be transported, contracted with UPS for certain services; including, *inter alia*, warehousing, brokerage services and transportation. *Id*. at *2. Seagate and UPS agreed that UPS's liability would be limited for these services. UPS, as an intermediary then contracted with Megatrux for the transportation of the property. *Id*. Megatrux's agreement with UPS did *not* contain a limitation of liability and instead stated that Megatrux would have full liability for actual loss. *Id*. After the property was stolen, UPS settled with Seagate and filed suit against

[11] *Megatrux* is similar to *Werner* in that it involves intermediaries who arranged for a shipment of goods. *See Megatrux*, 24 Fla. L. Weekly Fed. C1333 , *5 ("This case is the mirror image of *Werner*"). *Megatrux*, however, differs from *Werner* in that the *Werner* plaintiff sought to enforce a tariff that contained a limitation of liability, and in *Megatrux*, the tariff provided that the carrier was responsible for full liability and actual loss – no limitation of liability was provided. *See id.* at *4-5.

Megatrux to recover for the loss of the property pursuant to UPS's and Megatrux's contract. *Id*. at *3. The Eleventh Circuit enforced UPS's and Megatrux's agreement, finding that Megatrux was liable to UPS for the full amount of the loss of the cargo. *Id* at *4. The court explained that the limitation of liability in Seagate's contract with UPS was irrelevant. *Id*. (explaining that "[t]he existence of liability limitations in the upstream contract between Seagate and UPS – a contract that Megatrux had no knowledge of or participation in-is irrelevant"). Rather, as the transporting carrier, Megatrux never limited its liability and was therefore fully liable for the loss of the shipment. *Id*. Notably, the Eleventh Circuit in *Megatrux* pointed out that the *Werner* decision held that the limitation agreed to by the intermediary and the transporting carrier controlled regardless of whether the property owner had any knowledge of the limitation or an opportunity to negotiate the limitation. *Id.* at *4; *Werner*, 554 F.3d at 1328.

Accordingly, *Megatrux* does not support Mlinar's argument that her claims are not preempted by the Carmack Amendment. Instead, the *Megatrux* case holds that where a shipper, such as Mlinar contracts with an intermediary, here Pak Mail, for shipment of goods via a common carrier such as UPS, the intermediary's agreement to the shipper's tariff and liability limitation is binding on the shipper regardless of whether the

shipper agreed to the limitation or even knew of the limitation. *See Megatrux*, *4*; Werner*, 554 F.3d at 1328.

E. Regardless Of Whether Mlinar Pleads Her Claims As Conversion, "True Conversion" Or Any Intentional Tort, They Remain Preempted By The Carmack Amendment.

1. The "True Conversion" Exception Argued by Mlinar Does Not Negate the Scope of Carmack Preemption.

Mlinar's Initial Brief argues that case law has carved out a "true conversion exception" to federal preemption, and that it applies here because, UPS "willfully and intentionally took her paintings and did so for corporate gain."[12] Mlinar's arguments are overreaching and do not accurately convey what the "true conversion" exception really means. Although it is accurate that some federal courts have recognized that a true conversion, if properly alleged, may alter a carrier's liability, the exception does not, standing alone, negate the preemptive effect of the Carmack Amendment.

In *Lang v. Frontier Van Lines Moving & Storage, Inc*., No. 07-020428, 2009 Pa. Dist. & Cnty. Dec. LEXIS 234 (Ct. Com. Pl. July 6,

[12] Mlinar alleges that UPS has engaged in intentional and systematic misconduct that is not preempted by federal law and that UPS has "engaged in obtaining property by falsely impersonating and/or representing themselves as part of a shipping enterprise." [R. 168, ¶ 37, Complaint.] Mlinar has further alleged that UPS engaged in policies intended to result in the payment of UPS rates under false pretenses. [R. 171, ¶ 53].

2009), cited by Mlinar in support of her argument, the conduct at issue involved the defendant carrier'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.[13] The *Lang* court found this conduct to be distinct from the shipment of goods and thus not preempted under the Carmack Amendment. *Lang*, however, is not analogous to the facts at hand. While, admittedly the *Lang* court was correct in finding that the carrier's violation, after shipment and *after a lawsuit was filed*, should not preempted, Mlinar takes the *Lang* case a step further.

Mlinar's Initial Brief appears to argue that if this Court determines that her Amended Complaint properly pleads that UPS committed a true conversion, then *all* of her state law claims against UPS may go forward and will not be preempted by the Carmack Amendment, *regardless* of whether UPS's actions involved conduct that is separate and distinct from the delivery, loss of or damage to goods. [Initial Brief, 20] This is incorrect. Not one case in federal or state court has held that the true conversion

[13] In *Lang* the parties contracted for the transportation of household goods and personal property which were placed in a storage facility. *Id.* at *3-4. A dispute arose as to the amount of money owed to the carrier for the various services rendered. *Id.* The carrier issued a sale notice in order to auction the plaintiff's goods. *Id.* Plaintiff filed a lawsuit along with a petition to stay the sale of the plaintiff's goods and the court issued an order to stay the sale. *Id.* The carrier proceeded with the auction anyway. *Id.*

exception allows a shipper to assert a state law claim of conversion without also finding that the conduct complained of is separate and distinct from the delivery, loss of or damage to goods. *See Certain Underwriters at Interest at Lloyd's of London v. United Parcel Serv. of Am., Inc.*, No. Civ. 13-1087, 2013 WL 5803777 at *6 (E.D. Pa. Oct. 28, 2013) (granting UPS's Motion to Dismiss and holding that "Plaintiffs' reliance on the true conversion exception fails, because it applies only to determine whether a court should enforce certain liability limitations, but has *no legal bearing on the preemptive effect* of the Carmack Amendment") (emphasis added); *Glickfeld v. Howard Van Lines, Inc.*, 213 F.2d 723, 727 (9th Cir. 1954) (stating that the true conversion exception is relevant only to a determination as to whether "to permit the carrier to limit its liability and thus to profit from its own misconduct").[14]

[14] Tellingly, Mlinar's Initial brief does not cite the federal cases that initially carved out the true conversion exception. *See, e.g., Glickfeld*, 213 F.2d 723, 727 (9th Cir. 1954); *Kemper Ins. Cos. v. Fed. Express Corp.*, 252 F.3d 509, 515-16 (1st Cir. 2001) (upholding trial court's granting of carrier's motion to dismiss despite plaintiff's allegations of a true conversion); *Tran Enters., LLC v. DHL Express (USA), Inc.* 627 F.3d 1004, 1009 (5th Cir. 2010) (upholding summary judgment in favor of carrier and explaining that "in some circumstances, where a carrier has intentionally converted for its own purposes the property of the shipper, traditional true conversion claims should be allowed to proceed and limitations on liability should be considered inapplicable").

While UPS does not concede that Mlinar has, or can plead a claim for true conversion, the true conversion exception does not completely eviscerate the preemptive effect of the Carmack Amendment. Rather, the federal cases that have construed the true conversion exception have ruled only that where there is a true conversion, the carrier may not avail itself of the contractual limitation of liability. These cases do not hold, however, that the preemptive effect of the Carmack Amendment is impacted in any way. The exception does not provide, as Mlinar proposes, that the true conversion exception introduces the question of whether to uphold the preemptive force and exclusive applicability of the Carmack Amendment itself.

2. The Fourth District Court of Appeals Was Correct In Holding That Mlinar's Conversion Claim Is Preempted Even Though It Includes Allegations of Intentional Conduct.

The Fourth District Court of Appeals found that despite Mlinar's allegations that UPS "selectively located the contents of her container based on their nature, probable worth and lack of insurance" her claims of intentional conduct were all preempted by the Carmack Amendment. *See Mlinar,* 129 So. 3d 406; [R. 162, ¶ 19, Complaint]. The Fourth District Court of Appeals' reasoning, that, "[t]o hold otherwise would undermine the Carmack Amendment's goal of creating a uniform national policy on a carrier's liability for property loss" is consistent with well-settled law and the

policy behind the Carmack Amendment. *Id*. As 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.

American Cyanamid Co., 979 F.2d 310 at 316 (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). The Fourth District Court of Appeals was correct in holding that any distinction between conversion and true conversion is unworkable and its ruling is consistent with the many other courts that have ruled accordingly. *See Mlinar*, 129 So. 3d 406 (explaining that an exception to the Carmack Amendment for true conversion is unworkable and inconsistent with national policy).[15]

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[15] *See also 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"); *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

F. Under the Preemptive Scope of the Carmack Amendment, Mlinar Has Failed To Plead An Actionable Cause Of Action Against UPS.

The overwhelming majority of Courts which have addressed the same state law claims brought by Mlinar have dismissed these claims due to Carmack Amendment preemption. All of Mlinar's state law claims against UPS for conversion, criminal activity, violation of the FDUPTA and unauthorized publication of name or likeness in violation of Fla. Stat. §540.08 are preempted by the Carmack Amendment.[16] The Fourth District Court of Appeals affirmed the trial court's dismissal of Mlinar's state law claims because the claims all arose from the conduct of UPS's failure to deliver her package and were therefore preempted by the Carmack

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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"); *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); *Ga. Fla. & Ala. Ry. Co. v. Blish Milling Co.*, 241 U.S. 190, 197 (1916) (preemption applies to conversion, or "trover").

[16] In addition, as explained in UPS's Motion to Dismiss, Mlinar's claims for criminal activity and misappropriation of identity are not valid under Florida's *state* law. [R. 214-218].

Amendment. *Mlinar,* 129 So. 3d 406. Mlinar attempted to escape Carmack Amendment preemption by alleging that her state law causes of action were separate and distinct from the loss or damage to a package during shipment. But because the wrongs sued upon all stemmed from UPS's loss of Mlinar's package, her various state law claims were preempted. The Fourth District Court of Appeals opinion, relying upon well-settled federal case law, held that:

- Mlinar's claim against UPS for conversion was preempted because it was predicated on UPS's failure to deliver Petitioner's goods.
- UPS's alleged unauthorized use of Mlinar's likeness in the resale of her paintings flowed directly from UPS's course of conduct in failing to deliver the paintings.
- Mlinar's claims against UPS alleging 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.

Id. at 410-12.

Courts in the Eleventh Circuit and around the country have similarly upheld the dismissal of such claim based on the preemptive scope of the Carmack Amendment. *See 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. . . .").[17]

All of the state law claims alleged here fall squarely into the categories of claims preempted by the Carmack Amendment, consistent with its purpose of replacing disparate state laws with a federal statutory scheme providing uniformity of liability and remedy. The uniformity offered by the preemptive scope of the Carmack Amendment inures to the benefit of shippers in the form of reasonable shipping rates. *See, e.g., Express Co. v.*

[17] *See also Smith*, 296 F.3d 1244 (granting motion to dismiss causes of action alleging fraud, negligence, wantonness, willfulness, outrage and conspiracy); *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); *Shabani v. Classic Design Servs., Inc.*, 699 F. Supp. 2d 1138 (C.D. Cal. 2010) (granting motion to dismiss conversion and fraud claims); *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"); *Mashburn*, 2009 WL 3152195 (dismissing claims for conversion and deceptive acts); *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).

Pastime Amusement Co., 299 U.S. 28, 29 (1936) (noting that the broad purpose of the federal act is to compel the establishment of reasonable rates and to provide for their uniform application); *Norfolk Southern Railway. Co.*, 543 U.S. 14, 19 (2004) (noting that if liability limitations negotiated with cargo owners were reliable while limitations negotiated with intermediaries were not, carriers would likely want to charge the latter higher rates). The ruling sought by Mlinar would weaken and, eventually, destroy these clearly established protections of the Carmack Amendment that have been in effect for more than a century. It "would undermine the Carmack Amendment's goal of creating a uniform national policy on a carrier's liability for property loss" and result in higher shipping rates to customers. *Mlinar,* 139 So. 3d 406. Here, Mlinar has failed to establish any legal basis under which her state law claims against UPS are excluded from the preemptive scope of the Carmack Amendment. Accordingly, the trial court's dismissal of her claims against UPS and the Fourth Circuit's affirmation of that dismissal should be upheld.

IV. CONCLUSION

Respondent, UPS respectfully requests that this Court affirm the Fourth District Court of Appeals affirmance of trial courts' dismissal order.

DATED this 30th day of June, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was furnished via e-mail on this **30th** day of **June, 2014** upon:

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CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby files this certificate of compliance and hereby certifies that Respondent's Answer Brief is submitted in Times New Roman 14-point font.

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