COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

SCENTS CORPORATION D/B/A PERFUMES OF THE WORLD	:	
	:	**CASE NO. 2019 CVH 01394**
Plaintiff	:	**Judge McBride**
vs.	:	
TOTAL QUALITY LOGISTICS, LLC	:	**DECISION/ENTRY**
Defendant	:	

Lewis Brisbois Bisgaard & Smith, LLP, John R. Christie and Y. Timothy Chai, counsel for the plaintiff, Scents Corporation d/b/a Perfumes of the World, 1375 East 9th Street, Suite 2250, Cleveland, Ohio 44114 and Katherine Compton (appearing *pro hac vice*), co-counsel for Scents Corporation d/b/a Perfumes of the World, 2100 Ross Avenue, Suite 2000, Dallas, Texas 75201.

Dickinson Wright PLLC, Matthew J. Wiles and David A. Lockshaw, Jr., counsel for the defendant Total Quality Logistics, LLC, 150 East Gay Street, Suite 2400, Columbus, Ohio 43215.

This cause is before the court for consideration of the motion filed by the defendant, Total Quality Logistics, LLC (hereinafter referred to as "TQL") to dismiss the first amended complaint filed by the plaintiff Scents Corporation d/b/a Perfumes of the World (hereinafter referred to as "POTW").

The defendant filed its motion to dismiss and supporting argument on April 20, 2020. The plaintiff filed its response and memorandum in opposition to motion on May 5, 2020. On May 11, 2020 the defendant filed a reply brief in support of the motion to dismiss

the amended complaint. Oral argument on the motion was heard on May 22, 2020.[1] The court then took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the written and oral arguments of counsel, and the applicable law, the court now renders this written decision.

PLAINTIFFS' ALLEGATIONS IN ITS FIRST AMENDED COMPLAINT

The following is a brief summary of the facts alleged in the plaintiff's first amended complaint. These facts are assumed to be true for purposes of this motion.

POTW, headquartered in Texas, is one of the largest distributors of premium brand fragrances in the United States and internationally. TQL is a licensed freight broker, arranging for the transportation of freight by for-hire carriers in interstate or foreign commerce.

POTW contracted with TQL's North Carolina office to broker the shipment of flats of perfume from Florida to Texas. The Customer Application prepared by TQL and executed by POTW's Texas billing manager includes a set of 12 general terms and conditions prefaced by the statement: "These General Terms and Conditions ('General Terms') apply to all transportation services provided by Total Quality Logistics, LLC ("TQL") or its subsidiaries, including TQL Global, LLC." They include the following language with respect to insurance on cargo:

[1] At the hearing on May 22, 2020, the court also heard conflicts of law arguments on the plaintiff's motion to apply Texas law. That motion and the factual allegations supporting it will be discussed in a separate Decision/Entry of this court.

> "TQL's Contract Carriers are required to maintain cargo insurance in the amount of $100,000 per load. Customer will not tender loads valued in excess of $100,000 without first giving TQL sufficient written notice to arrange for increased insurance limits. Failure to provide such written notice prior to tender will result in Customer's loads being insured to a maximum of $100,000."[2]

The Customer Application did not set forth the detail for any specific brokerage service job requested by POTW to be provided by TQL. The specifics of the brokerage job for the shipment of flats of perfume from Florida to Texas were arranged via text messages and email communications between a POTW employee in Texas and a TQL employee in North Carolina.

POTW alleges that the Customer Application does not contain the complete, contractual agreement of the parties, but that it also includes the text messages and email communications regarding the high value cargo, additional insurance required, and initial pick-up instructions as modified by an additional request for a third pick-up of cargo requiring more insurance due to high value cargo.

Exhibit B appended to the first amended complaint includes text messages between the Texas POTW employee and the North Carolina TQL employee. Exhibit C is an email from the TQL employee to the POTW employee. Exhibit D contains the three bills of lading representing the three cargo pick-ups by the carrier. Some of these electronic communications pertain to the value of the Florida to Texas shipment. POTW was aware that TQL's standard provision of insurance coverage was $100,000.00. However, this shipment was valued much higher. For that reason, POTW requested additional insurance to cover this higher value shipment. The text message

[2]Pl's Am. Compl., Ex. A, pg. 4 of 4, Gen. Term & Cond. 8.

communications include an initial advice from POTW to TQL as to the high value cargo of the requested shipment from Florida to Texas. TQL replied that it could handle this for $1,500.00 including two pick-ups plus the high value insurance. The next day, POTW advised TQL it wanted to add another pallet pick-up to the high value shipment. TQL responded with a text message quote of $1,700.00 to include the additional pallet.

After the cargo was picked up by the carrier selected by TQL, the entire shipment of perfume was stolen in the State of Florida. It never reached its intended destination in the State of Texas. It is alleged in the complaint that the carrier did not carry insurance nor was additional insurance placed on the shipment by TQL.

This claim was originally filed in the federal district court in Texas. That court, relying on the choice of forum language in the Customer Application, dismissed the action, noting that the courts in Clermont County, Ohio were the contractually agreed-to forum for legal disputes of this nature.

STANDARD OF REVIEW

The defendant's motion to dismiss is made pursuant to Civ.R. 12(B)(6), which provides that a party may move to dismiss an action on the basis of failure to state a claim upon which relief can be granted.

"A motion to dismiss for failure to state a claim upon which relief can be granted tests the sufficiency of the complaint."[3] "Thus, the movant may not rely on allegations or

[3] *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio St.3d 494, 2010-Ohio-2057, 929 N.E.2d 434, ¶ 11, citing, *Assn. for the Defense of the Washington Local School Dist. v. Kiger*, 42 Ohio St.3d 116, 117, 537 N.E.2d 1292 (1989).

evidence outside the complaint; such matters must be excluded * * *."[4] "'The factual allegations of the complaint and items properly incorporated therein must be accepted as true. Furthermore, the plaintiff must be afforded all reasonable inferences possibly derived therefrom.'"[5] "It must appear beyond doubt that the plaintiff can prove no set of facts entitling him to relief."[6]

LEGAL ANALYSIS

TQL's motion argues three reasons for dismissal: (1) The plaintiff's exclusive remedy is a strict liability claim against the motor carrier pursuant to the Carmack Amendment; (2) The plaintiff's breach of contract claim is preempted by the ICCTA; and (3) The breach of contract claim fails as a matter of law. The motion further argues that if it is successful in this motion to dismiss, any further amended complaint asserting claims against TQL would be futile under these particular circumstances. Finally, in what this court deems a motion for partial dismissal, the defendant requests that the punitive damages claim in the amended complaint be stricken. The court will discuss each of these arguments in the order presented in the defendant's motion to dismiss.

The Carmack Amendment

[4] Id. citing Civ.R. 12(B).
[5] Id. at ¶ 12 quoting *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988).
[6] Id. citing *Vail v. Plain Dealer Publishing Co.*, 72 Ohio St.3d 279, 280, 649 N.E.2d 182 (1995).

"'The Carmack Amendment was enacted in 1906 as an amendment to the Interstate Commerce Act of 1887 and addresses the liability of common carriers for goods lost or damaged during a shipment[.]'"[7] "The goal of the law 'was to facilitate shippers' recoveries against carriers for damage to transported cargo.'"[8]

"The Carmack Amendment requires carriers to issue a receipt or bill of lading for cargo and establishes carrier liability: '[A]ny ... carrier that delivers the property and is providing transportation or service subject to [the Carmack Amendment is] liable to the person entitled to recover under the receipt or bill of lading. The liability imposed under this paragraph is for the actual loss or injury to the property caused by [a carrier.]'"[9]

The Carmack Amendment defines a "carrier" as "a motor carrier, a water carrier, and a freight forwarder."[10] An "individual shipper" is defined as:

> "* * * any person who –
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> (A) is the shipper, consignor, or consignee of a household goods shipment;
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> (B) is identified as the shipper, consignor, or consignee on the face of the bill of lading;
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> (C) owns the goods being transported; and
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> (D) pays his or her own tariff transportation charges."[11]

The Carmack Amendment defines a "broker" as "a person, other than a motor carrier or an employee or agent of a motor carrier, that as a principal or agent sells, offers

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[7] *Excel, Inc. v. Southern Refrigerated Transport, Inc.* (July 27, 2012), S.D. Ohio No. 2:10-CV-994, 2012 WL 3064106, *4, quoting, *Shao v. Link Cargo (Taiwan) Limited*, 986 F.2d 700, 704 (4th Cir.1993).
[8] Id., quoting, *Intransit, Inc. v. Excel North American Road Transport, Inc.*, 426 F.Supp.2d 1136, 1140 (D.Or.2006).
[9] Id., quoting, 49 U.S.C. § 14706(a)(1).
[10] 49 U.S.C. § 13102(3).
[11] 49 U.S.C. § 13102(13).

for sale, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by motor carrier for compensation."[12]

"'In general, a federal law may preempt a state law in any of the following three scenarios. First, a federal statute may expressly preempt the state law. Second, a federal law may impliedly preempt a state law. Third, preemption results from an actual conflict between a federal and a state law.'"[13]

"'Implied preemption occurs 'if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it ....' *Gibson v. Am. Bankers Ins. Co.*, 289 F.3d 943, 949 (6th Cir.2002) (quoting *Pub. Intervenor v. Mortier*, 501 U.S. 597, 605, 111 S.Ct. 2476, 115 L.Ed.2d 532 (1991)). The Carmack Amendment broadly regulates the liability of a carrier under a bill of lading. *See Adams Express Co. v. E.H. Croninger*, 226 U.S. 491, 505–06, 33 S.Ct. 148, 57 L.Ed. 314 (1913). Within a certain field, this regulation is sufficiently pervasive to imply preemption of state regulation and state causes of action. *See REI Transp., Inc. v. C.H. Robinson Worldwide, Inc.*, 519 F.3d 693, 697 (7th Cir.2008) (citing *Adams Express*, 226 U.S. at 505) ('The Carmack Amendment generally preempts separate state-law causes of action that a shipper might pursue against a carrier for lost or damaged goods.')."[14]

The issue in the case at bar is **not** whether the Carmack Amendment preempts state law claims brought by shippers against carriers. Rather, the issue is whether the Carmack Amendment preempts state law claims brought by shippers against brokers.

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[12] 49 U.S.C. § 13102(2).
[13] *Exel, Inc.*, supra, at *4, quoting, *Garcia v. Wyeth–Ayerst Labs.*, 385 F.3d 961, 965 (6th Cir.2004).
[14] Id.

The plaintiff cites the 2014 case of *ASARCO LLC v. England Logistics Inc.*, 71 F.Supp.3d 990 (Dist. Ct. Arizona, December 23, 2014) holding that "because the Carmack Amendment does not apply to brokers, it is questionable that such a law could pre-empt claims against brokers. * * * Consequently the [defendant's] argument that the breach of contract claim is pre-empted is denied * * * .[15] The plaintiff also argues that federal courts presented with this issue have followed "the overwhelming majority of courts that have held that the [Carmack] Amendment does not preempt claims against brokers."[16]

There still remains some split of authority in the federal system and no clear guidance from either the United States Supreme Court or the Sixth Circuit Court of Appeals on the issue of broker liability *vis a vis* the Carmack Amendment. Given the state of the law at this time, this court's opinion is much the same as stated by the United States District Court for the Northern District of Illinois, Eastern Division:

> "The Carmack Amendment is silent on the issue of broker liability. This does not mean that the Carmack Amendment grants entities which arrange for the transportation of goods absolute immunity for breach of contract or tort actions arising out of the interstate shipment of goods. Various courts have implicitly recognized that brokers may still be liable on various causes of action outside of the Carmack Amendment."[17]

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[15] *ASARCO LLC v. England Logistics Inc.*, 71 F.Supp.3d at 1009.
[16] *Atlas Aerospace LLC v. Advanced Transp., Inc.*, 2013 WL 1767943 *3 (D. Kansas, April 24, 2013).
[17] *Custom Cartage, Inc. v. Motorola, Inc.*, 1999 WL 89563, *3 (N.D. Ill., E.D., February 16, 1999).

In the *Red Chamber* case cited by both the plaintiff and the defendant, the Twelfth District Court of Appeals noted that the Carmack Amendment " * * * does not specifically govern brokers in the scheme of interstate cargo loss and damage liability."[18]

TQL faced this issue last year in the United States District Court for the Southern District of Ohio, Western Division. That court noted that "[t]he 'overwhelming majority' of courts in other Circuits have reached the same conclusion * * * holding that the [Carmack] Amendment does not preempt claims against brokers."[19]

Therefore, while there remain splits among the jurisdictions, the federal court which encompasses this county has specifically found that the Carmack Amendment does not preempt a state lawsuit for breach of contract by a shipper against a broker. Dismissal will not be granted on this ground.

ICCTA

The Interstate Commerce Commission Termination Act (ICCTA), codified at 49 U.S.C. § 10101 et seq., went into effect on January 1, 1996. In addition to terminating the Interstate Commerce Commission as an agency, the stated purposes of the act included providing a judicial forum for the adjudication of claims arising under the motor carrier leasing regulations including "authorizing owner-operators to bring private causes

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[18] *Total Quality Logistics, LLC v. Red Chamber Co.*, 12th Dist. Clermont, 2017-Ohio-4369, ¶ 11, 92 N.E.3d 62.
[19] *Heliene, Inc. v. Total Quality Logistics, LLC*, 2019 WL 4737753 *2, S.D. Ohio, W.D., September 27, 2019.

of action against carriers for certain violations of the Motor Carrier Act and its implementing regulations."[20]

The defendant notes that the preemption provision of the Federal Aviation Administration Authorization Act (FAAAA), found at 49 U.S.C. § 14501(c)(1), was re-codified as part of the ICCTA as of the January 1, 1996 effective date. In support of its motion to dismiss, the defendant cites the portion of this federal statute providing that "a State * * * may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier * * * or any motor private carrier, broker, or freight forwarder with respect to the transportation of property."[21]

While researching this issue the court came across a case with surprisingly similar facts to the case at bar.[22] The case involved a shipment of perfume in transit from Florida to Texas. The shipper employed a transportation broker to arrange the shipment and to ensure insurance coverage on the cargo. The shipment was stolen, along with the tractor-trailer, from a truck stop in Pasco County, Florida. When the shipper made a claim for the stolen shipment from the insurance carrier, the claim was denied because the perfume shipment was not scheduled specifically in the cargo insurance policy. The court found that the broker was not an insurance carrier but rather an intermediary. The broker's acts were a "substantial factor" in the loss sustained by the shipper because the broker acted on behalf of the shipper in selecting the carrier. The court further found that the transportation broker bore the responsibility of ensuring that the carrier had insurance

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[20] *Owner-Operator Independent Drivers Ass'n, Inc. v. Arctic Express, Inc.*, 270 F.Supp.2d 990, 993 (S.D. Ohio, E.D., July 11, 2003).
[21] Def's Mot., p. 7, citing 49 U.S.C. §14501(c)(1).
[22] *Huntington Operating Corp. v. Sybonney Exp., Inc.*, 2009 WL 2423860 (S.D. Texas, Houston Div., August 3, 2009).

to cover the shipper's cargo and that the broker could not escape liability by claiming it relied on the carrier's alleged misrepresentations regarding coverage. The court permitted state court claims to move forward, denying the broker's motion for summary judgment. While this case underscores the fact that many courts have held that the Carmack Amendment does not apply to claims brought against brokers,[23] it has also been cited with approval for the view that state breach of contract claims against a transportation broker are not preempted by 49 U.S.C. § 14501.[24]

The federal district court in the previously cited case of *Heliene, Inc. v. Total Quality Logistics, LLC,* held that while 49 U.S.C. § 14501(c)(1) preempts tort claims, it does not preempt breach of contract claims against brokers:

> " * * * [S]ection 14501(c)(1) does not preempt Plaintiff's breach of contract claim. Plaintiff alleges that Defendant committed breach of contract, because Defendant agreed to get the trucks across the U.S. border by February 6, 2018 – then failed to arrange for the same. * * *Plaintiff's allegations concern self-(note state-) imposed obligations. * * * Indeed, they arise from an email dated February 2, 2018 (the alleged contract). As Plaintiff's allegations concerning self-(note state-) imposed obligations, Plaintiff's breach of contract claim is not preempted."[25]

The defendant's reliance on the Clermont County and Twelfth District Court of Appeals case of *Total Quality Logistics, LLC v. Red Chamber Co.*[26] is misplaced. That case involved negligence claims as well as a breach of contract claim. This court agrees that negligence claims are expressly preempted by the ICCTA. However, in terms of the breach of contract claim in *Red Chamber,* the appellate court found that "the trial court

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[23] Id. fn. 1.
[24] *Chatelaine, Inc. v. Twin Modal, Inc.,* 737 F.Supp.2d 638 (N.D. Tex, Dallas Div., August 20, 2010.
[25] 2019 WL 4737753 *4.
[26] See fn.

properly found [the claimant] failed to meet its burden to demonstrate the existence of a genuine issue of material fact with respect to * * * the breach of contract claim."[27] In other words, the appellate court affirmed the ruling of Judge Ferenc of this court on the Motion to Dismiss, based on there not being a genuine issue of material fact presented as to the breach of contract claim. This decision did not hold that breach of contract claims are preempted by the ICCTA.

For these reasons the motion to dismiss will not be granted on ICCTA preemption grounds.

Breach of Contract Claim

The defendant posits that the breach of contract claim fails as a matter of law stating that "the parties entered into no contract which required TQL to investigate or ensure the insurance coverage of the motor carrier with which TQL separately contracted to transport POTW's cargo."[28]

The defendant's first argument is that the Texas court determined that the Customer Application was an enforceable and valid contract and binding, and that the Texas court did not acknowledge the text messages and email communications as a part of the contract. For this reason, the defendant says that the Texas ruling should operate as *res judicata* and be given full faith and credit by the Clermont County court.

In support of this, the defendant cites *Bradley v. Holivay* (8th Dist. Cuyahoga), 183 Ohio App.3d 596, 2009-Ohio-3895, 918 N.E.2d 596. The *Bradley* case was a foreign

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[27] 2017-Ohio-4369, ¶ 26.
[28] Def's Mot., p. 9.

judgment collection matter. The judgment creditor obtained a judgment from a California state court and certified the judgment in the Court of Common Pleas of Cuyahoga County, Ohio. Clearly, the judgment creditor had been successful on the merits claim to the satisfaction of the California court. In the case at bar, the merits of the case were never heard nor decided by the Texas court. The only holding by the Texas court that is binding on this court is the determination that the forum selection clause of the Customer Application is binding on both parties and required dismissal by the Texas court without prejudice to refiling in the selected forum, Clermont County, Ohio. Obviously, this court has given full faith and credit to that judgment of the Texas court.

Next, the defendant argues that the Customer Application does not contain the insurance-related obligations that POTW claims TQL breached. It is not disputed that the Customer Application was a document prepared by the defendant TQL. Included in the insurance provision of the General Terms and Conditions is the language: "Customer will not tender loads valued in excess of $100,000 without first giving TQL sufficient written notice to arrange for increased insurance limits." The defendant has correctly stated that the Ohio Supreme Court " * * * notes that common words appearing in a written instrument are to be given their plain and ordinary meaning unless manifest absurdity results or unless some other meaning is clearly intended from the face or overall contents of the instrument."[29]

One reasonable interpretation of this language is that, upon the shipper giving the broker notice of a high-limit cargo, the broker will arrange for increased insurance limits. That would place an obligation on the broker -- an obligation that the plaintiff claims the

[29] *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 245, 374 N.E.2d 146 (1978).

defendant has breached. To this court, that is a material fact which could arguably, if determined in the plaintiff's favor, entitle the plaintiff to relief.

The court could continue this analysis by citing authority to the fact that any ambiguity in the contract document must be construed strictly against the author, or the fact that the Customer Application does not contain an "entire contract" clause.[30] The court could also continue to address the defendant's argument to dismiss the amended complaint by noting that other courts have found email and text messages to comprise a part of the shipping contract as did the *Heliene* case.[31] However, this is unnecessary, because, from the face of the amended complaint, itself, the plaintiff has alleged facts that can go forward and, if proved, would entitle it to recover.

Additional Amended Complaint

The defendant's argument in this section of its motion is cautionary. It points out that if defendant is successful in this motion to dismiss, a second amended complaint would be futile. As the court has already discussed, its reason for disagreement with the defendant's three legal arguments for dismissal, the court need not address the concerns regarding an additional amended complaint.

Request for Punitive Damages

[30] See fn. 2.
[31] See fn. 15.

Finally, the defendant has requested partial dismissal on the section of the plaintiff's complaint requesting that it be awarded punitive damages. The defendant cites the court to the case of *Digital & Analog Design Corp. v. North Supply Co.* (1989) 44 Ohio St.3d 36, 45-46, 540 N.E.2d 1358. That case sets forth two general categories of conduct upon which punitive damages may be awarded, the second being "a conscious disregard for the rights and safety of other persons that has a great probability of causing substantial harm."[32] Whether the plaintiff will be able to prove to the satisfaction of a jury that TQL disregarded the rights of POTW that had a great probability of causing substantial harm is an open question. At the conclusion of the discovery phase, TQL may find that it has factual support for summary judgment on this issue. However, at this point, it is premature for the court to dismiss this section of the plaintiff's complaint.

CONCLUSION

For the foregoing reasons, the court finds the defendant's motion to dismiss the amended complaint is not well taken and is hereby denied.

IT IS SO ORDERED.

DATED: 8-30-20

Judge Jerry R. McBride

[32] *Digital*, 44 Ohio St.3d at 44.

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Decision/Entry were sent on this 15th day of September 2020 by e-mail to John Christie, Attorney for the Plaintiff, at John.Christie@lewisbrisbois.com, to Jordan D. Rauch, at JRauch@dickinsonwright.com, and Matthew J. Wiles, at mwiles@dickinson-wright.com, Attorneys for the Defendant.

Judicial Assistant to Judge McBride