IN THE SUPREME COURT OF THE STATE OF NEVADA

DYNAMIC TRANSIT COMPANY; AND KNIGHTS COMPANY/AUTO TRANSPORTERS, A MISSOURI BUSINESS ENTITY,

Appellants/Cross-Respondents,

vs.

TRANS PACIFIC VENTURS, INC. AND TREVOR SMALL,

Respondents/Cross-Appellants.

CASE NO. 58041

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MOTION OF THE TRUCKING INDUSTRY DEFENSE ASSOCIATION FOR LEAVE TO JOIN THE EXTENSION GRANTED APPELLANTS / CROSS RESPONDENTS TO FILE THEIR PETITION FOR REHEARING

AND

FOR LEAVE OF AMICUS CURIAE TO FILE A BRIEF IN SUPPORT OF PETITION FOR REHEARING

COMES NOW the Trucking Industry Defense Association ("TIDA"), pursuant to N.R.A.P 29(c), and respectfully moves this Court for leave to file an amicus curiae brief in support of Appellants / Cross-Respondents Petition for Rehearing regarding the issues raised in the opinion of *Dynamic Transit Co. v. Trans Pacific Ventures, Inc.,* 128 Nev. Adv. Op. 69 (2012). The opinion demonstrates that the Court has failed to understand the balance between the rights and interests of shippers and motor carriers as crafted by the U.S. Congress in its adoption of the Carmack Amendment. The opinion also fails to appreciate the scope of the preemptive effect of Carmack on state law and remedies involving disputes arising from damage or loss of goods in interstate commerce. Finally, the Court has failed to understand how, by adopting a "true conversion" exception to the Carmack preemption doctrine, the opinion will upset or destroy

the plan for uniformity and consistency in handling disputes of loss or damage afforded to motor carriers by Congress. TIDA is conditionally filing its proposed amicus curiae brief simultaneously with this motion.

In support of this motion for leave to file an amicus curiae brief, TIDA shows the Court as follows:

1. TIDA is an international organization comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and defense counsel. The motor carrier members of TIDA include common carriers, private carriers, and private fleets that haul cargo throughout the United States and internationally. The insurance company members provide transportation cargo insurance for the trucking industry. TIDA provides training and assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, cargo damage / loss, insurance and workers' compensation claims.

2. TIDA is interested in the case because TIDA's members, both those involved in the operation of motor carriers and those involved in the insurance aspects of the trucking industry, have a substantial interest in having this Court properly balance the rights and interests of the shippers and motor carriers and their insurers according to the plan set forth by the U.S. Congress under the Carmack Amendment.

3. An amicus brief is desirable to better inform the Court of the purpose and scope of the Carmack Amendment. In TIDA's view, the Court ruled correctly that the carrier committed conversion. However, the Court misapplied the effect of the conversion by ruling that the Carmack Amendment does not apply. Instead, Congress expressly applied the Carmack Amendment to all motor carriers who transport goods in interstate commerce. The so-called "conversion exception" on which the Court relies in support of its opinion is not intended to

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relate to whether the Carmack Amendment and its preemptive effects apply to an interstate shipment but to whether a motor carrier may limit its liability as allowed under 49 U.S.C. §14706(c)(1). Case law addressing "conversion" holds that where a carrier seeks to limit its liability under that subsection, it may not do so if it converted the goods to its own use, but Carmack applies nonetheless.

4. If given leave, TIDA would briefly address the points of law it believes the Court has overlooked or misapprehended. If allowed, TIDA would briefly point out how the Court overlooked the balance of rights and protections Congress granted under the Carmack Amendment to both shippers and motor carriers operating in interstate commerce. TIDA would explain the type of strict liability granted by Carmack and the importance of state law preemption in providing motor carriers the uniformity and consistency needed to be able to conduct commerce between the various states.

7. TIDA is very concerned that by discarding the application of the Carmack Amendment and creating an exception to the doctrine of preemption of state law claims, the opinion will undermine the consistent and uniform system for adjudication of cargo loss and damage disputes between shippers and motor carriers which Congress established under Carmack. Furthermore, TIDA is concerned that such an exception will open a floodgate of loss or damage claims in state courts under state law which up to now have been uniformly, expeditiously and economically resolved under Carmack. Finally, TIDA recognizes that delays and increased dispute resolution costs will ultimately be passed on to the shippers and consumers of products that are being moved in interstate commerce.

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8. This motion and the attached conditional brief are being filed within the time allowed for the filing of the brief of defendant-appellant, the supported party.

TIDA respectfully moves that this Court grant it leave to file as an amicus curiae in support of the Petition for Rehearing.

DATED 22 January 2013

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Exhibit A

IN THE SUPREME COURT OF THE STATE OF NEVADA

DYNAMIC TRANSIT COMPANY; AND KNIGHTS COMPANY/AUTO TRANSPORTERS, A MISSOURI BUSINESS ENTITY, Appellants/Cross-Respondents, vs. TRANS PACIFIC VENTURS, INC. AND TREVOR SMALL, Respondents/Cross-Appellants.	CASE NO. 58041

AMICUS CURIAE TRUCKING INDUSTRY DEFENSE ASSOCIATION'S BRIEF IN SUPPORT OF APPELLANTS/CROSS-RESPONDENTS' PETITION FOR REHEARING

and

REQUEST THAT THE AMICUS BE ALLOWED TO JOIN THE EXTENSION OF TIME GRANTED TO APPELLANTS/CROSS-RESPONDENTS TO FILE THEIR PETITION FOR REHEARING

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STATEMENT OF THE IDENTITY, INTERSTS AND AUTHORITY OF THE AMICUS CURIAE OF TIDA

The Trucking Industry Defense Association (TIDA) is an international organization comprised of motor carriers, transportation logistics companies, insurers of motor carriers, third party claims administrators, and defense counsel. The motor carrier members of TIDA include common carriers, private carriers, and private fleets that haul cargo throughout the United States and internationally. The insurance company members provide transportation cargo insurance for the trucking industry. TIDA provides training and assistance to the trucking industry on various issues regarding risk management, personal injury, property damage, cargo damage / loss, insurance and workers' compensation claims.

TIDA is interested in the case because TIDA's members, both those involved in the operation of motor carriers and those involved in the insurance aspects of the trucking industry, have a substantial interest in having this Court properly balance the rights and interests of the shippers and motor carriers and their insurers according to the plan set forth by the U.S. Congress under the Carmack Amendment.

TIDA's authority to file the brief will be upon leave of the court.

ARGUMENT

The Court should grant Appellant's Petition for Rehearing. TIDA does not believe that the Court has overlooked or misapprehended any material facts. Nor does TIDA condone the actions of the motor carrier in converting the shipper's vehicle. However, TIDA argues that the Court has overlooked or misapprehended material question of law and has failed to consider controlling authority regarding the application and preemptive effect of the Carmack Amendment, 49 U.S.C. §14706.

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I. THE COURT MISAPPREHENDED OR OVERLOOKED THE PURPOSE AND SCOPE OF THE CARMACK AMENDMENT

In their Opening Brief at pps. 25 - 33, Appellants/Cross-Respondents argued that the District Court erred when it failed to recognize the effects of the Carmack Amendment. In their Opening and Reply Briefs, Appellants/Cross-Respondents argued in favor of the doctrine of preemption of state law claims under Carmack. However, TIDA believes the Court's decision – concerned as it properly was over the fact of the motor carrier's "conversion" of the shipment – evidences that it either misunderstood or overlooked the scope of Congress's plan under Carmack and why Carmack's preemption of state law claims is key to the success of that plan.

A. BY THE CARMACK AMENDMENT, CONGRESS GAVE SHIPPERS A MEANS WHEREBY THEY COULD RECOVER FROM MOTOR CARRIERS FOR THE LOSS OR DAMAGE TO GOODS IN TRANSIT WITHOUT HAVING TO PROVE NEGLIGENCE.

Goods being transported in interstate commerce do not always go from point of origin to point of delivery in the hands of the same carrier. The Carmack Amendment protects shippers, allowing them to recover for the loss of or damage to shipped goods without having to prove the negligence of any one carrier who may have transported the goods. 49 U.S.C. §14706(a)(1); Reider v. Thompson, 339 U.S. 113, 119 (1950). Congress granted shippers this unique and generous advantage under Carmack. *See* Wesley Chused, *The Evolution of Motor Carrier Liability Under the Carmack Amendment Into the 21st Century*, 36 Transp. L. J. 177, 179 (2009); LEXSEE 36 TRANSP L J 177.

B. IN EXCHANGE FOR THE STRICT LIABILITY GIVEN SHIPPERS, CONGRESS GAVE MOTOR CARRIERS UNIFORMITY

The Court overlooked or failed to appreciate that Congress gave motor carriers uniformity and preemption in exchange for the benefit it gave shippers, namely strict liability-type recovery against the motor carrier.

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1. Without Full State Law Preemption, The Balance That Congress Struck Between The Shippers And The Motor Carriers Fails Because The Motor Carriers Are Deprived of Uniformity And Consistency Among The States In Dealing With Interstate Claims

The court in Nichols v. Mayflower Transit, LLC, 368 F.Supp.2d 1104 (D. Nev. 2003) explained the purpose behind the Carmack Amendment. It said that "Congress enacted the Carmack Amendment . . . to establish uniformity and consistency among states in the application and resolution of interstate shipping loss and damage cases." Id. at 1106.

To enforce the Congressional vision of nationwide uniform law over interstate cargo, courts have found that Carmack must preempt state law claims arising from loss of or damage to goods in interstate commerce. In Missouri, K. & T.R. Co. of Tex. v. Harris, 234 U.S. 412, 420 (1914), the U.S. Supreme Court said that under Carmack "the special regulations and policies of particular States upon the subject of the carrier's liability for loss or damage to interstate shipments, and the contracts of carriers with respect thereto, have been superseded." See also Charleston & Western Carolina Railway Co. v. Varnville Furniture Co., 237 U.S. 597, 603 (1915).

The scope of the preemptive effect of Carmack is seen in Moffit v. Bekins Van Lines, 6 F.3d 305, 306 (5th Cir. 1993). In Moffit, the Plaintiffs' Complaint included a litany of state law claims including: 1) the tort of outrage; 2) intentional and negligent infliction of emotional distress; 3) breach of contract; 4) breach of implied warranty; 5) breach of express warranty; 6) violation of the a state's deceptive trade practices or consumer protection statutes; 7) slander; 8) misrepresentation; 9) fraud; 10) negligence and gross negligence; and 11) violation of the common carrier's statutory duties as a common carrier under state law. The Fifth Circuit upheld the trial court's decision dismissing all of the Plaintiff's state law claims. The Moffit court quoted the language from Adams Express Co. v. Croninger, 226 U.S. 491 (1913) where it held:

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> To hold that the liability therein declared may be increased or diminished by local regulation or local views of public policy will either make the provision less than supreme, or indicate that Congress has not shown a purpose to take possession of the subject. The first would be unthinkable, and the latter would be to revert to the uncertainties and diversities of rulings which led to the amendment.

6 F.3d at 486 (quoting Adams Express Co., 226 U.S. at 505-06)

2. In Addition To State Law Preemption, Congress Restricted The Shipper's Recovery To Actual Damages And Gave Motor Carriers The Opportunity To Limit Their Liability

Under Carmack, a shipper may recover no more than the actual loss or injury caused to the property. 49 U.S.C. §14706(a)(1). After imposing a strict liability system on interstate motor carriers, Congress, in turn, created a mechanism whereby motor carriers could limit the extent of their liability for loss of or damage to goods in transit under certain circumstances. 49 U.S.C. §14706(c)(1). The Nichols court explained this Carmack principle as well at 368 F.Supp.2d at 1106 where it quoted the statute and said that the damages were limited to the actual loss. In addition, if conditions are met, Carmack allows the shipper and the motor carrier to negotiate for a reduced shipment rate if the shipper will agree to limit its recovery for any loss or damage.

For example, the Court in American Cyanamid Co. v. New Penn Motor Exp., Inc., 979 F.2d 310 (3rd Cir. 1992) enforced a $2,084.00 limitation on liability for the loss of a $53,000.00 shipment of vaccines where the limit was set in the bill of lading. In fact, the American Cyanamid court explained that it is this negotiated limitation on liability that motor carrier loses if it intentionally destroys or steals the good. Id. at 315-16. Carmack preemption remained intact.

II. THE COURT MISAPPREHENDED THE OPINIONS ON WHICH IT RELIED TO REACH THE CONCLUSION THAT THERE IS AN EXCEPTION TO STATE LAW PREEMPTION IN CASES OF "TRUE CONVERSION"

In its opinion, the Court ruled that state law claims for "true conversion" are not preempted by the Carmack Amendment. The opinions that the Court relied on

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in reaching that conclusion either do not stand for the proposition cited or are inapposite on the facts.

A. THE GLICKFELD OPINION DOES NOT STAND FOR THE PROPOSITION THAT THERE IS A CONVERSION EXEMPTION FROM CARMACK'S PREEMPTION DOCTRINE

In its opinion at page 6, the Court cites Glickfeld v. Howard Van Line, 213 F.2d 723, 727 (9th Cir. 1954) in support of its assertion that there is a "true conversion" exception to the rule of state law preemption. Because the Court misapprehends Carmack, it misreads Glickfeld. By reading the context surrounding the language quoted from the Glickfeld opinion, one can see that the "limitation" to which Glickfeld referred was the negotiated limitation of damage that is still authorized under today's version of Carmack at 49 U.S.C. §14706(c)(1). See Section I.B.2 above.

In no instance does the Glickfeld court hold that Carmack preemption is inapplicable. In fact, Glickfeld enforced the limitation on damages authorized under the Carmack Amendment. This concept of "Released Valuation" is well explained in the case of Deiro v. American Airlines, Inc., 816 F.2d 1360 (1987). The Deiro court cites Glickfeld to explain that it is the negotiated limits on liability that are lifted in cases of "true conversion," but not the application of Carmack preemption. See also American Cyanamid, 979 F.2d at 315-16. Stated differently, Glickfeld stands for the principle that where there is a "conversion" of the shipment by the motor carrier, it loses the benefit of a properly negotiated and documented limitation on liability that it would otherwise enjoy under 49 U.S.C. §14706(c)(1). Glickfeld does not for stand for the principle that Carmack preemption is lost where there is a conversion.

B. THE TRAN DECISION ALSO TALKS ABOUT AVOIDING THE "LIMITATIONS ON LIABILITY" AND NOT ABOUT AVOIDING PREEMPTION

The court also relies on Tran Enterprises, LLC. v. DHL Exp. (USA), Inc., 627 F.3d 1004, 1009 (5th Cir. 1954). Like Glickfeld, the Tran court talks about

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lifting "limitations on liability." Read in the context of the case, those "limitations" are the ones negotiated under 49 U.S.C. §14706(c)(1) and not an avoidance of preemption altogether. Furthermore, any reference to a "true conversion" exception to state law preemption is dicta because there were no facts to support such a finding.

C. THE MAYFLOWER CASE IS INAPPOSITE BECAUSE THAT CASE INVOVLES THE CONVERSION OF PROPERTY THAT WAS NOT SUBJECT TO CARMACK PREEMPTION BECAUSE IT WAS NOT EVEN INTENDED TO BE SHIPPED

Finally, in its opinion at page 6, the Court also cites to Mayflower Transit, Inc. v. Weil, Gotshal & Manges, L.L.P., No. Civ.A. 3:00-CV-549-P, 2000 WL 34479959 (N.D. Tex. Oct. 18, 2000) in support of the proposition that there is an exception to the rule of Carmack preemption in conversion cases. The Mayflower case is inapposite in that the property stolen (a diamond ring) was not shipped and the record demonstrated that the ring was not even intended to be shipped.

This is not that case. In this case there was an intent to ship the vehicle.

D. THE CONTROLLING CASE IS HALL V. NORTH AMERICAN VAN LINES, INC., 476 F.3d 683 (9th Cir. 2007).

TIDA argues that Hall v. North American Van Lines, Inc., 476 F.3d 683 (9th Cir. 2007) is the controlling case. In Hall, the Ninth Circuit dismissed the shipper's state law conversion claims.

III. THE COURT MISSAPPREHENDS OR OVERLOOKS THE EFFECT THAT ITS DECISION WILL HAVE ON SHIPPERS, MOTOR CARRIERS AND THE COURTS

It would be ill advised to create an exception to the doctrine of state law preemption under the Carmack Amendment based upon cases that have been misread. It is one thing to deny a motor carrier a claimed limitation on liability due to "conversion." It is quite another to deny the application of the federal statute governing interstate motor carriage altogether, which the underlying decision would do.

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First, TIDA anticipates if preemption of state law under Carmack is set aside for conversion claims it will open a floodgate of litigation, much of which will happen in the state courts.

Second, if this opinion stands, the balance of rights, duties and liabilities between shippers and motor carriers prescribed by Carmack Amendment will be destroyed and supplanted by disparate state law remedies. Interstate motor carriers and shippers will no longer have a uniform and consistent system under which they can operate.

Finally, the impact of disparity, uncertainty and the resulting litigation will eventually drive up the costs of interstate transportation of goods nationwide, negatively impacting shippers and consumers alike.

CONCLUSION

The Carmack Amendment is the law of the land. Under the Carmack Amendment, Congress balanced the interests of shippers and motor carriers. Shippers enjoy the benefit of almost strict liability for damage or loss to the goods that they are shipping. In exchange, Congress gave motor carriers the uniformity and consistency that they need to be able to effectively do business in the 50 states. In order to provide that uniformity and consistency, the court has ruled that all state law claims must be preempted. This court should grant rehearing and overturn its opinion.

DATED 22 January 2013

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 40 OR 40A

1. I hereby certify that this brief in support of petition for rehearing / reconsideration or answer complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

[X] It has been prepared in a proportionally spaced typeface using MS Word 2010 in 14pt. Times New Roman Font; or

[ ] It has been prepared in a monospaced typeface using [state name and version of word-processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 40 or 40A because it is either:

[X] Proportionately spaced, has a typeface of 14 points or more, and contains 2,131 words; or

[ ] Monospaced, has 10.5 or fewer characters per inch, and contains _____ words or _____ lines of text; or

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Dated this _____ day of January 2013.

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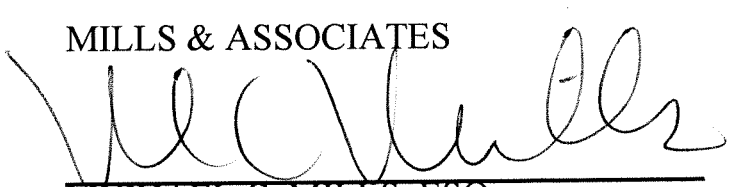

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this Amicus Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this _____ day of January 2013.

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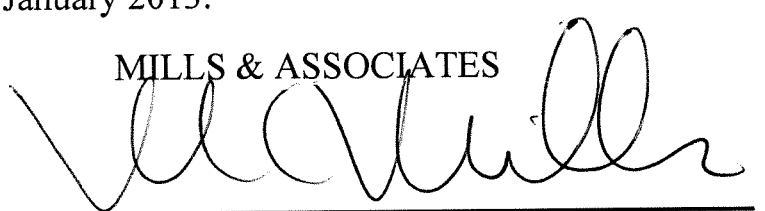

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