

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NATIONAL BANKERS TRUST)	
CORPORATION,)	
)	
Plaintiff,)	
)	No. 12-CV-02208-tmp
vs.)	
)	
TOTAL QUALITY LOGISTICS, LLC,)	
)	
Defendant.)	

ORDER GRANTING DEFENDANT’S MOTION FOR PARTIAL SUMMARY JUDGMENT
AND DENYING PLAINTIFF’S CROSS MOTION FOR PARTIAL SUMMARY JUDGMENT

Before the court are plaintiff National Bankers Trust Corporation’s (“National”) and defendant Total Quality Logistics, LLC’s (“Total”) motions for partial summary judgment. (ECF Nos. 53 & 54.) Each party has filed a response in opposition to the opposing party’s motion. Additionally, Total has filed a reply to National’s response. For the reasons below, Total’s Motion for Partial Summary Judgment is GRANTED, and National’s Cross Motion for Summary Judgment is DENIED.

I. BACKGROUND

In connection with their cross motions for partial summary judgment, the parties have stipulated to the following undisputed material facts:

Total is a licensed property/freight broker that arranges for the transportation of full truck load shipments of goods for its

customers. Total enters into Broker-Carrier Agreements with each and every motor carrier that hauls loads tendered to it by Total. Pursuant to these Broker-Carrier Agreements, the carriers transport the shipments of goods brokered by Total on behalf of its customers. A typical Broker-Carrier Packet that Total sends to prospective carriers includes the following: (1) a cover page; (2) Total Quality Logistics Carrier form; (3) Payment Terms form; (4) Comchek Authorization form; (5) Direct Deposit Agreement, Change, and/or Cancellation form; (6) a Form W-9; (7) a Broker-Carrier Agreement; and (8) Total's U.S. Department of Transportation Federal Motor Carrier Safety Administration license.¹

The Broker-Carrier Agreement, in relevant part, contains the following terms:

4. **COMPENSATION.** CARRIER agrees to transport freight for BROKER, under the terms of its carrier authority, at a rate mutually agreed upon in writing, by fax, or by electronic means, contained in BROKER's Load Confirmation Sheet(s). . . . CARRIER shall submit invoices, bills of lading and signed loading or delivery receipts for all transportation services furnished under this Agreement to BROKER.

. . . .

8. **CARGO AND LIABILITY CLAIMS.** CARRIER shall issue a bill of lading in compliance with 49 U.S.C. § 80101 et seq., 49 C.F.R. § 373.101 (and any amendments thereto), for the property it receives for transportation under this Agreement. Unless otherwise agreed in writing, CARRIER shall become fully responsible/liable for the freight when it takes/receives possession thereof, and the trailer(s) is loaded, regardless of whether a bill of

¹Sample copies of these forms are attached to National's motion.

lading has been issued, and/or signed, and/or delivered to CARRIER, and which responsibility/liability shall continue until delivery of the shipment to the consignee and the consignee signs the bill of lading or delivery receipt. Any terms of the bill of lading (including but not limited to payment terms) inconsistent with the terms of this Agreement shall be controlled by the terms of this Agreement.

. . . .

All liability standards, time limitations and burdens of proof regardless of whether the CARRIER has common or contract authority shall be governed by the common law applicable to common carriers and by 49 U.S.C. § 14706 (the Carmack Amendment), subject to a maximum liability of \$250,000.00 per truckload. **BROKER reserves the right to offset any claim(s) with pending invoices.** [Emphasis added by the parties.]

Notwithstanding the terms of 49 C.F.R. 370.9, CARRIER shall pay, decline or make settlement offer in writing on all cargo loss or damage claims within 30 days of receipt of the claim. Failure of CARRIER to pay, decline or offer settlement within this 30 day period shall be deemed admission by CARRIER of full liability for the amount claimed and a material breach of this Agreement.

. . . .

15. **GOVERNING LAW.** Unless preempted or controlled by Federal Transportation Laws and Regulations this Agreement shall be governed and construed in accordance with the laws of the State of Ohio. CARRIER and BROKER further agree that the exclusive venue for any lawsuit necessary to resolve a dispute shall be in state or federal court in Cincinnati, Clermont County, Ohio. CARRIER agrees to pay all reasonable expenses, attorney fees and costs (including court costs) that BROKER incurs in any such litigation.

. . . .

18. **ASSIGNMENT AND DELEGATION.** This Agreement shall inure to the benefit of and be binding upon the successors and assigns of both Parties, provided, however, that no assignment of rights and no delegation of duties under this Agreement shall be effective without

the prior written consent of the other Party.

19. **FACTORING.** CARRIER shall provide BROKER written notice of any assignment, factoring, or other transfer of its right to receive payments arising under this Contract at least thirty (30) days prior to such assignment, factoring, or other transfer taking legal effect as to BROKER's payment obligation hereunder (BROKER shall not be obligated to honor any factoring, assignment or any other transfer of CARRIER's right to receive any payments hereunder unless such notice is timely received).

GENERAL CARRIER REQUIREMENTS

. . . .

4. CARRIER is responsible for any damage to product or damage to the products container, and shortages of freight.

. . . .

7. Failure to deliver with fully loaded trailer or incomplete order will [result] in a reduced pro-rated fee.

During the transportation by the carrier of the brokered shipment and before a shipment is delivered, a carrier may request cash advances from Total to cover the cost of fuel, towing, repairs, or unloading. Pursuant to the terms of the Broker-Carrier Agreement and the carrier's Comchek Authorization, Total will respond to a carrier's request for cash advances by issuing a "Comchek" in the amount requested by the carrier, and as provided for in the Comchek Authorization form, Total will assess a \$25.00 fee against the carrier for each cash advance.² If there is an

²Sample copies of a Comchek Authorization Form and a "Load Financial" showing the amount of the advance, the purpose of the advance, and the Comchek advance fee are attached to National's

unloading charge for a shipment, the carrier may request a Comchek advance for the unloading when a carrier arrives at the designated shipping destination. Comchek advances may also be used for accessorial charges and other appropriate transportation charges. If Total receives a carrier's request for a Comchek advance for an unloading charge, Total will advance the amount of the unloading charge to the carrier and assess a Comchek advance fee, when applicable.

Once the shipment is delivered by the carrier and accepted by the recipient, the carrier receives a signed bill of lading from the recipient of the shipment. Pursuant to paragraph 4 of the Broker-Carrier Agreement, the carrier then sends to Total the signed bill of lading, the carrier's invoice for all transportation services furnished under the Broker-Carrier Agreement, and any signed loading or delivery receipts. Payment by Total to the carrier for any particular shipment is not due unless and until the carrier provides Total with a bill of lading indicating there are no outstanding issues with the shipment.

National is a factoring company that purchases the accounts receivable of various trucking companies at a discount. If a carrier assigns its accounts receivable to National, the carrier and National enter into National's A/R Max Equity Line of Credit

motion.

Agreement ("Assignment Agreement").³ The Assignment Agreement provides, in relevant part:

1) FINANCING OF RECEIVABLES

a) During the terms of this Agreement, all receivables owned by the Client shall serve as security for any and all Advance made by National to Client pursuant to this Agreement.

b) National may in its sole discretion, lend to Client an amount equal to the Advance Rate times (x) the face amount of the receivable (the "Advance").

c) Client shall not present any invoices directly to the Customer (the "Customer" shall mean any individual or entity that enters into a business transaction with Client wherein Customer uses Client's products or services). Client shall submit invoices to National no less than weekly. **Client shall present no invoice to National until the goods have been completely delivered or services rendered and Client has performed all of its obligations to Customer in connection with the transaction. . . . Client shall receive no payments of any kind from any Customer for any purpose. All payments by Customers must be made directly to National. If Client receives payment from a Customer, Client shall immediately forward payment to National.** National shall be responsible for all billing, presentment and collection of invoices directly to Customer. [Emphasis added by the parties.]

. . . .

3) CUSTOMER DISPUTES

All disputes relating to the products and/or services rendered by Client to Customer shall be settled between Client and Customer.

. . . .

16) SECURITY INTERESTS

³A sample copy of an Assignment Agreement is attached to National's motion.

As collateral securing the obligations under this Agreement, Client and Guarantors grant to National a continuing first priority security interest in and to the Collateral.

a) Collateral ("Collateral") shall mean and refer to all present and future accounts[.]

b) Account ("Account") shall mean and refer to all of Clients accounts, contract rights, instruments, documents, chattel paper, notes, drafts, and other forms of obligations owing to Client however created.

With regard to shipments delivered by a carrier and received by the designated recipient after the date the carrier enters into an Assignment Agreement with National, after the carrier receives a signed bill of lading from the recipient of the shipment, the carrier sends the Rate Confirmation Sheet for that shipment and the signed bill of lading to National pursuant to the terms of the Assignment Agreement.⁴ Total's Rate Confirmation Sheets are pre-shipment confirmations of the rate agreed upon between Total and the carrier. In the event issues arise with the shipment before delivery, Total issues a new Rate Confirmation Agreement to the carrier to take into account issues that may have arisen during transit of which Total is aware. The carrier then signs and returns the new Rate Confirmation Sheet.

After National receives a Rate Confirmation Sheet and signed bill of lading for a particular shipment from the carrier, National

⁴Sample copies of a Rate Confirmation Sheet and bill of lading are attached to National's motion.

funds the carrier for that shipment. National then generates an invoice for that shipment, based on the information about the shipment the carrier provides to National, and sends the invoice to the broker (in this case, Total). If it has not already done so, National will also send a Notice of Assignment to the broker with the invoice. Each invoice is also separately stamped with a Notice of Assignment.⁵

Total made payments on certain National invoices subject to deductions taken for the amount of the cash advances it made to the carriers under the terms of the Broker-Carrier Agreement. Such cash advances were made after receipt of National's Notices of Assignment and before delivery of the pending freight load. Total also made payments on certain National invoices subject to deductions taken for the amount of the Comchek fees arising out of cash advances made to the carriers. Such Comchek fees accrued after receipt of National's Notices of Assignment, and before delivery of the pending freight load. In addition, Total made payments on certain National invoices subject to deductions taken for the amount of the claims against prior loads that arose after receipt of the Notice of Assignment.⁶

⁵Sample copies of a Notice of Assignment and invoice are attached to National's motion.

⁶The parties agree that any claim on a load asserted by Total, whether asserted against the invoice arising from the load giving rise to the claim or whether asserted against a subsequent invoice on a claim arising from a prior load, is valid if and only if Total

In addition to stipulating to these undisputed material facts, the parties have jointly presented in their motions two agreed upon questions of law:

(1) Under Uniform Commercial Code ("U.C.C.") § 9-404 and § 9-406, and pursuant to the terms of the Broker-Carrier Agreement between Total and the carrier, are cash advances and cash advance fee assessments, made by Total to a carrier on a given shipment prior to delivery of that shipment, subject to National's Notice of Assignment of the carrier's accounts receivable if notice was received by Total prior to the advance or fee assessment?

(2) Under U.C.C. § 9-404 and pursuant to the terms of the Broker-Carrier Agreement between Total and the carrier, is a deduction made by Total against a shipment delivered by the carrier subject to National's Notice of Assignment of the carrier's accounts receivable, if Total made the deduction because of a valid claim on a prior shipment by the carrier after Total received notice of the assignment?

The parties believe that these two agreed upon questions of law properly present the issues for the court to resolve on their partial motions for summary judgment, and that resolution of these questions will be dispositive of the case on the issue of liability.

II. ANALYSIS

A. Summary Judgment Standard

Federal Rule of Civil Procedure 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled

or the shipper complied with the requirements of the Carmack Amendment that a written notice of claim be served on the carrier within nine months of the date of delivery.

to judgment as a matter of law." Fed. R. Civ. P. 56(a); see also Geiger v. Tower Auto., 579 F.3d 614, 620 (6th Cir. 2009). In reviewing a motion for summary judgment, the court must view the evidence in the light most favorable to the nonmoving party. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (citation omitted). "The moving party bears the initial burden of production." Palmer v. Cacioppo, 429 F. App'x 491, 495 (6th Cir. 2011) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Once the moving party has met its burden, "the burden shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 200 (6th Cir. 2010) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). "[I]f the nonmoving party fails to make a sufficient showing on an essential element of the case with respect to which the nonmovant has the burden, the moving party is entitled to summary judgment as a matter of law." Thompson v. Ashe, 250 F.3d 399, 405 (6th Cir. 2001). "The central issue is whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Palmer, 429 F. App'x at 495 (quoting Anderson, 477 U.S. at 251-52) (internal quotation marks omitted).

B. Cash Advances and Fees

National does not dispute that Total is authorized, pursuant

to the terms of the Broker-Carrier Agreements and Comchek Authorizations, to pay cash advances to the carriers to cover costs of fuel, towing, repairs, unloading, accessorial charges, and other appropriate transportation charges. National also does not dispute that Total is authorized to assess a \$25.00 fee against the carrier for each cash advance. National argues, however, that as a U.C.C. Article 9 secured creditor of the assignor-carriers, it holds a perfected security interest over all such accounts receivable - past, present, and future.⁷ National contends that Total, upon receipt of notices of assignment from National, became an account debtor under the U.C.C. and was therefore required to discharge its obligation by making payments directly to National, not to the assignor-carriers. However, despite receiving timely notice of the assignment, Total continued to forward cash advances directly to the carriers on invoices assigned to National, and assessed Comchek fees arising out of those cash advances, allegedly in violation of U.C.C. § 9-406(a).⁸

⁷The parties agree that with respect to the assignor-carriers at issue in this litigation, those carriers assigned their entire accounts receivable they had with Total - past, present, and future - to National.

⁸In their motions, Total cites to Ohio's version of the U.C.C., while National cites to Tennessee's version of the U.C.C. but notes that the applicable version is immaterial because the relevant provisions of the U.C.C. at issue are identical for both Ohio and Tennessee. A federal court sitting in diversity applies the choice-of-law rules of the state in which the court sits. Klaxon v. Stentor Elec. Mfg. Co., 313 U.S. 487, 497 (1941); Montgomery v. Wyeth, 580 F.3d 455, 459 (6th Cir. 2009). For purposes of

U.C.C. § 9-406(a) states, in relevant part, that "an account debtor . . . may discharge its obligation by paying the assignor until, but not after, the account debtor receives a notification . . . that the amount due or to become due has been assigned and that payment is to be made to the assignee. After receipt of the notification, the account debtor may discharge its obligation by paying the assignee and may not discharge the obligation by paying the assignor." The court concludes, as a matter of law, that the cash advances and Comchek fees do not constitute payments made by Total to "discharge its obligation" to the carriers. Instead, it is clear that the cash advances were paid for the purpose of ensuring that the carriers could complete their shipments to the

resolving the instant motions, the court need not decide which version of the U.C.C. applies, because Ohio and Tennessee have enacted identical versions of the U.C.C. provisions at issue. Compare Tenn. Code Ann. § 47-9-102(a)(2) with Ohio Code Ann. § 1309.102(A)(2)(a); compare Tenn. Code Ann. § 47-9-404 with Ohio Code Ann. § 1309.404; compare Tenn. Code Ann. § 47-9-406 with Ohio Code Ann. § 1309.406. See also In re Commercial Money Ctr., Inc., Equip. Lease Litigation, No. 1:02CV16000, 2008 WL 4279888, at *3 n.10 (N.D. Ohio Sept. 15, 2008) ("Although AMICO argues in its motion that California law should apply to the Court's consideration of this issue, all parties apparently agree that choice of law does not affect the outcome with respect to the standing issue, since the Sureties' argument is based upon the common law of assignments and the Uniform Commercial Code. The relevant provisions of the Ohio version of UCC § 9-617 (O.R.C. § 1309.617) are substantially similar."). Moreover, the court is not aware of any material distinction in the case law interpreting Ohio or Tennessee law on contracts or the U.C.C., at least as the law pertains to the issues raised in the instant motions.

shipper-customers.⁹ While National's Assignment Agreements with the carriers expressly prohibited *the carriers* from receiving any "payments of any kind from any Customer for any purpose," Total was not a party to those Assignment Agreements and had no obligation to ensure that the carriers complied with their Assignment Agreements with National. Thus, to the extent the carriers may have improperly received payments from Total in violation of the Assignment Agreements, National's remedy would be to seek recovery of those payments from the carriers, not from Total.

Moreover, Restatement (Second) of Contracts § 317(2)(a) states that a "contractual right can be assigned unless the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially

⁹National does not argue that any of the carriers were paid the cash advances for purposes other than for fuel, towing, repairs, unloading, accessorial charges, and other appropriate transportation charges. National does suggest that because the amount of the cash advance on a particular shipment was capped at a percentage of the final payment that the carrier was to receive on that shipment, the cash advance was actually a payment on the obligation. The parties' stipulation of undisputed material facts does not address this point. The court notes, however, that the Comchek Authorization apparently imposes a 40% cap only on certain cash advances - Comcheks issued directly to dispatchers and drivers, and Comcheks issued by Total's after hours personnel. In any event, even if all cash advances were capped based on a percentage of the payment on delivery, that would not change the ultimate conclusion that the purpose of the cash advance was to ensure completed delivery, not to discharge Total's obligation.

reduce its value to him[.]” See also Ohio Env'tl. Dev. Ltd. P'ship v. Envirotech Sys. Corp., 478 F. Supp. 2d 963, 979 (N.D. Ohio 2007) (quoting the Supreme Court of Ohio for the proposition that “an assignment must not materially change the duty of the obligor, materially increase the insurer’s burden or risk under the contract, materially impair the insurer’s chance of securing a return on performance, or materially reduce the contract’s value.”); Clark v. BP Oil Co., 930 F. Supp. 1196, 1205 (E.D. Tenn. 1996) (citing Tennessee case authority and § 317(2) of the Restatement (Second) of Contracts). Under National’s interpretation of the assignment, Total’s contractual right under its Broker-Carrier Agreements to make cash advances to ensure that the carriers completed delivery would materially change. The assignment would also materially increase the risk to Total and materially impair its chance of obtaining return performance from the carriers. Without these cash advances, the carriers may be unable to provide safe and timely delivery of the shipments, thereby causing Total to fail to meet its contractual obligations to its customers.

Finally, Total had the right to recoup the cash advances and Comchek fees from the assigned accounts. See National City Bank, Northwest v. Columbian Mutual Life Insurance Co., 282 F.3d 407, 409-10 (6th Cir. 2002). National does not dispute that if the court finds that the post-assignment cash advances and fees do not

run afoul of U.C.C. § 9-406(a), then Total is entitled to recoup those advances and fees.

For these reasons, Total's motion for partial summary judgment relating to the cash advances and fees is granted, and National's cross motion is denied.

C. Setoffs For Claims on Prior Shipments

U.C.C. § 9-404 states in relevant part:

(a) Unless an account debtor has made an enforceable agreement not to assert defenses or claims, and subject to subsections (b) through (e), the rights of an assignee are subject to:

(1) all terms of the agreement between the account debtor and assignor and any defense or claim in recoupment arising from the transaction that gave rise to the contract; and

(2) any other defense or claim of the account debtor against the assignor which accrues before the account debtor receives a notification of the assignment authenticated by the assignor or the assignee.

(b) [T]he claim of an account debtor against an assignor may be asserted against an assignee under subsection (a) only to reduce the amount the account debtor owes.

With respect to deductions for valid claims on prior shipments by the same carrier, National argues that Total "cannot properly setoff assigned receivables with earlier claims that did not arise from the transaction giving rise to the instant debt obligation." National contends that § 404(a)(1) requires that any claims on a shipment made after Total received notice of the assignment must be asserted on the invoice for that particular shipment because

Total's right to setoff is limited to "any defense or claim in recoupment *arising from the transaction that gave rise to the contract.*" (emphasis added.) Total argues that because its right to setoff is expressly authorized in the Broker-Carrier Agreement, claims can be deducted from any pending invoice as long as timely notice is provided.

The court finds, as a matter of law, that Total is authorized under the Broker-Carrier Agreement and § 9-404 to deduct from pending invoices valid claims on prior shipments, even after Total received notice of the assignment. National's argument ignores the first part of § 9-404(a)(1), which subjects the assignee's rights to "all terms of the agreement between the account debtor and assignor[.]" Reading the provision in its entirety, the U.C.C. subjects National to all terms of the agreement between Total and the carrier *as well as* any defense or claim in recoupment arising from the transaction that gave rise to the contract. Thus, as the assignee, National is subject to the terms of the Broker-Carrier Agreement, which specifically allows Total to setoff claims on pending invoices. See Oxford Commercial Funding, LLC v. Carqill, Inc., No. 00 C 4996, 2002 WL 31455989, at *3 (N.D. Ill. Oct. 31, 2002) (allowing account debtor to assert a defense against assignee that was based on the original contract between the account debtor and assignor because "account debtor may defend against his own obligation to pay based on any defensive posture available to him

were the assignor seeking payment"). National has no greater rights under the assigned contracts than the carriers had prior to assignment. See Ward v. Sun Valley Foods Co., Inc., 212 F. App'x 386, 391 (6th Cir. 2006) ("Indeed, it is a fundamental rule of the law of contract that the assignee stands in the shoes of the assignor, possessing the same rights and remaining subject to the same defenses as the assignor."); Dana Corp. v. Fireman's Trust Fund Ins. Co., No. 3:83CV1153, 1997 WL 135591, at *3 (N.D. Ohio Feb. 19, 1997) ("As it is often expressed, the assignee stands in the shoes of the assignor, and that by the assignment the assignee could acquire no greater rights than its assignor This is a universally acknowledged doctrine of long-standing and enduring vitality.") (citations omitted). And, as discussed above, the assignment cannot "materially increase the burden or risk imposed on [the obligor] by his contract" or "materially reduce its value to him[.]" Restatement (Second) of Contracts § 317(2)(a). Prohibiting Total from exercising its contractual right to setoff, and instead requiring Total to pay National the full amounts on the invoices and then seek affirmative recovery on claims against each carrier, would materially increase the burden on Total and reduce the contract's value to Total. See Quality Infusion Care, Inc. v. Health Care Serv. Corp., 628 F.3d 725, 729 (5th Cir. 2010) (stating that "an assignee may be subject to a setoff if the assignor could be subject to the same setoff under the assigned contract" because

the assignee stands in the same position that the assignor stood and takes "no greater and no less" than the rights of the assignor). Because Total, prior to assignment, had the contractual right to setoff pending invoices with prior claims on the carriers' accounts, Total retained that right to setoff when National received assignment of those same accounts - past, present, and future - from those same carriers.

Contrary to National's argument, allowing a setoff from a claim on a prior load against a subsequent invoice would not violate the prohibition against affirmative recovery under § 9-404(b), even if the amount of the claim exceeded the value of the contract. Section 9-404(b) allows an account debtor to assert claims against an assignee only to reduce the amount the account debtor owes. By deducting valid claims from subsequent invoices, this is exactly what Total is doing - reducing the amount it owes to National on the entire account by the value of the claim.

Therefore, because National is bound by the term of the Broker-Carrier Agreement that allows Total to offset pending invoices with claims on prior shipments, Total's motion for summary judgment on this issue is granted and National's cross-motion is denied.

III. CONCLUSION

For the above reasons, Total's Motion for Partial Summary Judgment is GRANTED, and National's Cross-Motion for Partial

Summary Judgment is DENIED.

IT IS SO ORDERED.

s/ Tu M. Pham

TU M. PHAM

United States Magistrate Judge

September 30, 2013

Date