UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 0:18-cv-60673-WPD

DISTRIBUIDORA NEW YORK S DE R.L.,
ELSA INES RAMIREZ CASTILO and
INVERSIONES CASTELL S.DE R.L.,

Plaintiffs,

vs.

GREAT WHITE FLEET LINER
SERVICES, LTD.,

Defendant.
_____/

ORDER GRANTING RULE 52(C) MOTION; FINDINGS OF FACT AND CONCLUSIONS OF LAW

This Cause is before the Court on Defendant's Rule 52 Motion for Judgement, made at the conclusion of the Plaintiff's case in chief. The Court presided over a two-day non-jury trial on December 5-6, 2019 and heard arguments on December 9, 2017. The Court received exhibits in evidence and determined credibility of witnesses. Defendant, Great White Fleet Services (GWF), is entitled to judgement in this case.

I. FINDINGS OF FACT

1. In November 2017, Plaintiffs contracted with their local customs broker, Pamela Bertrand of BTD Cargo ("Bertrand"), to make arrangements for the transportation of bales of used clothing from the Port of Freeport (Texas) to Puerto Cortes (Honduras) and for ultimate ground delivery to them at their places of business in San Pedro Sula, Honduras. San Pedro Sula has been a very dangerous place to live over the last decade.

2. Bertrand engaged Latin Freight International ("LFI"), a Miami-based shipper and freight forwarder, and LFI then booked ocean carriage with GWF.

3. On November 25, 2017, GWF sent Plaintiffs, though Bertrand, standard "arrival notice" documents informing the Plaintiffs that their cargo would arrive on November 27, and further informing them that they had the opportunity to arrange for additional security for the ground transportation of their cargo, and if they failed to do so, they would assume the risk if anything untoward would happen.

4. Bertrand, who had done business with GWF many times, was aware of the terms of the arrival notice, including those offering additional security and cautioning about her clients' assumption of risk.

5. On November 26, 2017, a national election was held in Honduras, and it became mired in controversy, which over the coming days and beyond sparked national protests.

6. The goods arrived by ship at Puerto Cortes, Honduras on November 27, 2017.

A. *Looting of the Cargo*

7. Despite the post-election protests, until December 1, the port was open, and was running generally without interruption.

8. Three days after its arrival, on November 30, Plaintiffs' cargo had been preliminarily processed and, at various times during the afternoon (2:57, 4:33, 4:41, and 4:54), was dispatched by truck from the port, to its destinations: customs warehouses near San Pedro Sula.

9. At the time the cargo was dispatched on the afternoon of November 30, 2017, the protesting in and around San Pedro Sula had been relatively peaceful. However, there were road blockages. Some stores had closed. Many employees were unable to get to work in San Pedro

Sula. Nevertheless, there had been little, if any, looting. There had been no outbreak of any vandalistic conduct.

10. The customs warehouse destinations, like the port, were open for business.

11. When it dispatched the cargo, GWF may have been aware that, a short distance outside the port near the Seaboard Yard, there were protesters affecting traffic flow and that the progress of the trucks would suffer delay. There is no showing that GWF anticipated anything more than delay.

12. Such delays are not uncommon; Honduras often has demonstrations, sometimes political, sometimes labor-related, in which protesters gather in the road, seeking to block or interfere with traffic flow.

13. The information GWF had was that there was law enforcement on the scene near the Seaboard Yard and that, in time, the protesters would be cleared from the road.

14. There is no showing that GWF perceived that there was any potential danger to the cargo, the container, the trucks, or the truck drivers, when it dispatched Plaintiffs' cargo.

15. The independent trucking companies and truck drivers also did not perceive that there was any potential danger to them, their trucks, or the cargo, by dispatching from the port.

16. GWF had little financial motive to risk the cargo – not to mention the containers, the trucks, and the truck drivers – because even if they were not waived, the port charges that would have been imposed for not dispatching the cargo were probably minimal.

17. None of the Plaintiffs, nor their agent, Bertrand, instructed GWF to refrain from dispatching the cargo from the port due to the street conditions or otherwise. Bertrand did testify that had she been notified of the plans that she would have advised GWF not to dispatch on November 30th because of the circumstances since the election.

18. No other customer or agent instructed GWF to refrain from dispatching cargo from the port due to the street conditions or otherwise.

19. None of the Plaintiffs, nor their agent, Bertrand, ordered extra security for their cargo as offered in the arrival notice they had received. In any event, it appears that extra security would not have prevented the looting.

20. Indeed, while at the port GWF was going on about its business in the ordinary course, down in San Pedro Sula, Plaintiffs' own businesses were open, too. Elsa Ramirez' retail store was open, and customers were shopping. Distribuidora New York's place of business was open. Inversiones Castell had some local locations open, some closed.

21. Shortly outside the port – by the Seaboard Yard on CA-13 – all of the trucks carrying the cargo dispatched from the port by GWF, and numerous other carriers, were delayed by a roadblock of protesters.

22. Hours passed until the road was finally cleared and, at about 9:00 p.m., the trucks were able to proceed south along CA-13.

23. There is no evidence that any truck, of any trucking company, carrying the cargo container of any carrier, at this point or any other point, turned around and returned to the port or otherwise diverted off of CA-13 (the sole artery from the port to San Pedro Sula). This includes Seaboard Marine, whose own yard was right there, adjacent to the initial roadblock.

24. Over an hour later, the first record evidence appears that some vandalistic activity had occurred in the San Pedro Sula area: a toll (government property) in San Pedro Sula was burned. That evidence is a tweet by a journalist, Carlos Dada, time-stamped 10:17 p.m.

25. At that time and throughout the night and early morning, there had still been little or no reports of vandalism to private property or looting of any kind anywhere in the area.

26. Meanwhile, the trucks traveled south on CA-13, slowly due to the backed-up traffic, and at several points along the way, again encountered protesters in the road impeding traffic and causing additional delays.

27. At about 5:00 a.m., the trucks ultimately arrived at a roadblock near the town of Choloma. They were now generally unable to go forward, backward, or in any direction. They were stuck.

28. At the Choloma roadblock, later in the morning, looting of the cargo broke out.

29. Along with other cargo containers, the four containers carrying the Plaintiffs' cargo, were looted.

30. Numerous other carriers who had dispatched cargo the prior day and followed the same path as the GWF containers, had their cargo containers looted during the same incident, including: Maersk, Seaboard Marine, Sealand, Hapag-Lloyd, King Ocean, Crowley, and Dole. Some of those carriers got their insurance company to cover the losses. However, insuring used clothing is difficult in Honduras. Bertrand testified that her clients did not insure shipments because they had never had a loss.

31. With the sudden escalation of street conditions resulting in vandalism and looting, on December 1, 2017, for the first time since the election, the port closed, the customs warehouses closed, and the Honduran authorities instituted a nighttime curfew.

32. Two of the truck drivers carrying the Plaintiffs' cargo, Tylson Zuniga and Ramon Nolasco, life-long Honduras residents, also did not anticipate that the circumstances would devolve to looting, because the escalation was unprecedented and had not even occurred during the protesting after the 2009 coup d'etat. They certainly would not have risked their safety if they had anticipated the situation they ultimately faced.

B. The Contract

33. The contractual relationship between the Plaintiffs' and GWF is set forth in the original Bills of Lading. Of particular importance are the terms and conditions printed on the back of the Bills of Lading.

34. The Bills of Lading contain a "Clause Paramount" (¶4) that contractually extends the Carriage of Goods at Sea Act (COGSA) from the sea voyage to the ground transportation portion of the delivery in its entirety "except as amended by this Bill of Lading…"

35. The Bills of Lading exculpates GWF from liability for loss that occurs, as this did, during the ground transportation portion of the delivery, when GWF did not have actual physical custody of the cargo. (¶13)

36. The Bills of Lading also sharply limit GWF's potential liability for loss that occurs, as this did, during the ground transportation portion of the delivery to $500 per container. (¶19(c)). The Plaintiffs' cargo was packed in four containers – two for Elsa Ramirez, and one each for Distribuidora New York and Inversiones Castell.

C. "Reasonable Opportunity Doctrine"

37. Bertrand was the authorized agent for the Plaintiffs in the subject transactions.

38. Bertrand is highly experienced in the industry; clearly a sophisticated party.

39. Bertrand, who had done business with GWF over a hundred times, was aware of the terms and conditions of the Bills of Lading, including the exculpation and limitation provisions related to the ground delivery.

40. Moreover, when the subject bookings were made, the limitation provisions at issue here were published in GWF's public tariff.

41. Also, the bookings were made by LFI, which maintained a "Service Contract" in which the terms and conditions of GWF's Bill of Lading – including the exculpation and limitation provisions for ground delivery – are incorporated by reference.

42. It is standard in the freight shipping industry to withhold issuance of an original Bill of Lading until after the voyage is completed. Indeed, the shipper, LFI, explicitly instructed GWF in its initial booking (through a "Master Bill of Lading" forms) to hold the originals.

43. The Master Bill of Lading forms furnished additional notice of the limitation clause, stating, "[r]ead clause 19 hereof concerning extra freight and carrier's limitations of liability."

44. The electronic (non-original) Bills of Lading issued to Plaintiffs prior to the voyage furnished explicit notice of the exculpation and limitation provisions, on each page stating, "SEE CLAUSE 19 ON THE REVERSE SIDE OF THIS BILL OF LADING" (all caps in original) and on the second page stated, "MERCHANTS ATTENTION IS ALSO DRAWN TO THE TERMS AND CONDITIONS OF THIS BILL OF LADING IN RESPECT TO LIABILITIES AND LIMITATIONS ARISING DURING INTERMODAL CARRIAGE".

45. The Master Bill of Lading forms contain a box on the front page (lower left) by which the importer may declare a value, and the box specifically directs attention to the "clause 19", the limitation provision.

46. The electronic Bills of Lading issued by GWF before the voyage contain a box on the front page (lower left) by which the importer may declare a value, and the box specifically directs attention to the applicable "clause 19".

47. Based on the paragraphs above, Plaintiffs had actual and constructive notice of the exculpation and limitation provisions of the contract.

48. The original Bills of Lading include a box for the declaration of value.

49. Plaintiffs never considered declaring a value, never inquired about the *ad valorem* rate, and never considered or inquired about insuring their freight.

50. GWF's so-called *ad valorem* rate is published in its public tariff as 3 ¾ % of the declared value of the cargo.

51. LFI was an insurance vendor, selling importers such as the Plaintiffs freight insurance at economical rates.

52. Bertrand asked the Plaintiffs about insuring cargo and they declined. It was not their policy to insure their cargo.

53. Bertrand was aware that LFI offered insurance and never inquired.

54. Plaintiffs had fair and adequate opportunity to protect itself from the contractual exculpation and limitation provisions.

II. CONCLUSIONS OF LAW

A. Applicability of COGSA

55. The Carriage of Goods as Sea Act ("COGSA") governs "all contracts for carriage of goods by sea to or from ports of the United States in foreign trade," *Fireman's Fund Ins. Co. v. Tropical Shipping & Const. Co.*, 254 F.3d 987, 995–96 (11th Cir. 2001). However, COGSA only governs from the time the goods are loaded on the ship to the time they are discharged from the ship. *See Fireman's Fund*, 254 F.3d at 995 (citing *Hartford Fire Ins. Co.* v. *Orient Overseas Containers Lines (UK) Ltd.*, 230 F.3d 549, 557 (2d Cir.2000)).

56. A Bill of Lading, however, may extend the reach of COGSA, as it did here, to the inland portion of the delivery, through what is commonly known as a "Clause Paramount." *See Fireman's*, 254 F.3d at 995. Since the extension of COGSA to the inland transportation is a

matter of contract, COGSA's extension applies to the extent it is not contradicted or superseded by other terms of the Bill of Lading. *See Hartford*, 230 F.3d at 557. *See also Fireman's Fund*, 254 F.3d at 995–96 (citing *Hartford*, 230 F.3d at 557).

B. Liability Exculpations under COGSA and the Bills of Lading

57. COGSA exculpates GWF from liability for loss or damage arising or resulting from a number of enumerated uncontrollable causes of loss including riots and civil commotions¸ *see* 46 U.S.C. App. 1304(2)(k)[1], and ¶13 of the Bills of Lading exculpates GWF from liability for loss that occurs during the inland transportation portion of the delivery when the cargo is not in the possession of GWF.

58. The doctrine of deviation, which nullifies a bill of lading when a carrier deviates from the contract of carriage, *see Unimac Co., Inc. v. C.F. Ocean Service, Inc.*, 43F.3d 1434, 1437 (11th Cir. 1995), does not apply to the present case because actions did not deviate from the terms of contract of carriage or the obligations thereunder. *See, e.g. P.W.S. Int'l, Inc. v. Caribbean Freight Sys., Inc.*, No. 06-22624-CIV, 2007 WL 9705870, at *3 (S.D. Fla. Dec. 17, 2007).

C. *Applicability of COGSA's Liability Limitation Provision*

59. In the alternative, if GWF is not exculpated from liability, ¶19(c) of the Bills of Lading limit GWF's liability to $500 per container, or here, to a total of $500 to Distribuidora New York, $500 to Inversiones Castell, and $1000 to Elsa Ramirez. The Bills of Lading contain two definitions of "package" for the purposes of COGSA's $500 limitation of liability. The front of the Bills of Lading list the number of "COGSA packages," which serve as the definition of "package" for the purposes of COGSA. *See Hayes-leger Associates, Inc. v. M/V/ Oriental Knight*, 765 F.2d 1076 (11th Cir. 1985) (adopting the rules that: "(1) when a bill of lading

[1] COGSA has been re-codified and now appears as a note to 46 U.S.C. 30701.

discloses the number of COGSA packages in a container, the liability limitation of section 4(5) applies to those packages; but (2) when a bill of lading lists the number of containers as the number of packages, and fails to disclose the number of COGSA packages within each container, the liability limitation of section 4(5) applies to the containers themselves.") In addition, ¶ 19(c) of the Bills of Lading specifies that for the inland transport the shipping container serves as the "package" for the purposes of COGSA's $500 limitation of liability. "An interpretation giving reasonable meaning to all provisions of a contract is preferred to one which leaves a part useless or inexplicable." *See In re FFS Data, Inc.*, 776 F.3d 1299 (11th Cir. 2015). Therefore, the interpretation of the contract that makes sense of both of these provisions is preferable, so while the number of packages listed on the front of the Bills of Lading defined the COGSA packages for the purposes of the ocean voyage, ¶ 19(c) defined the package for the purposes of the inland transport.

60. Under the fair opportunity doctrine, in order to invoke COGSA's $500 limitation of liability to limit the liability of a carrier to less than the value of the cargo, a carrier must demonstrate (1) that the shipper has been given adequate notice of the subject limitation; and (2) that the shipper has been given fair opportunity to protect itself from the limitation by declaring a value of the goods and paying a reasonable *ad valorem* charge. *See Fireman's Fund*, 254 F.3d at 996.

61. The "adequate notice" provision may, of course, be satisfied by the actual notice of Plaintiffs' agent, Bertrand, to which she conceded. It may also be satisfied by the mere dint of familiarity – that the Plaintiffs or their agent "regularly conducted business and regularly use[d] the bill at issue such that [importer] would be deemed to have knowledge of those standard terms from a prior transaction." *Federal Ins. Co. v. Great White Fleet Ltd.*, No. 07 Civ. 2415, 2008 WL

2980029, *14 (S.D.N.Y. Aug. 1, 2008). *See also, Anvil Knitwear, Inc. v. Crowley American Transport, Inc.*, 2001 WL 856607, *2 (S.D.N.Y. July 27, 2001) (The terms of a Bill of Lading are "especially applicable where … the parties had utilized an identical bill of lading on 'hundreds' of previous occasions.").

62. Constructive notice also suffices – satisfied here by the fact that the exculpation and limitation provisions were found in GWF's public tariff filed with the Federal Maritime Commission. *Federal Insurance*, 2008 WL 2980029, at *14.

63. Moreover, it is no impediment to the enforceability of the contractual provisions that the original Bills of Lading were not issued until after the voyage was complete. See *Anvil Knitwear*, 2001 WL 856607, at *3 (noting that "[i]t is not unusual to issue a bill of lading after a carrier has taken possession of cargo and courts have regularly held that this does not prevent parties from being bound by its terms."); *Ironfarmers Parts & Equipment v. Compagnie Generale Maritime et Financiere*, No. CV493-321, 1994 WL 730895 (S.D.Ga.1994) (noting that "[i]t is well settled that, as long as a bill of lading would have been issued in the ordinary course of business, the bill of lading serves as a contract governing the relationship of a shipper and carrier even if it was not actually issued."); *Garnay, Inc. v. M/V Lindo Maersk*, 816 F. Supp. 888, 894 (S.D.N.Y. 1993); *Mack Trucks, Inc. v. Farrell Lines, Inc.*, 1990 A.M.C. 2669, 1990 WL 3926 (S.D.N.Y. 1990); *Berkshire Knitting Mills v. Moore–McCormack Lines, Inc.*, 265 F.Supp. 846 (S.D.N.Y. 1965); *Luckenbach S.S. Co., Inc. v. American Mills Co.*, 24 F.2d 704 (5th Cir. 1928).

64. Additionally, in order to sustain its contractual liability exculpation and limitations, under the federal common law, the carrier must show that the importers were afforded the opportunity to insure the goods – to protect themselves from the contractual

limitations – traditionally, by declaring a value and paying the carrier an "*ad valorem* charge that is reasonable." *Federal Insurance*, 2008 WL 2980029, at *15 (citing *General Electric Co. v. MV Nedlloyd*, 817 F.2d 1022, 1028 (2nd Cir. 1987)).

65. Plaintiffs' opportunity to declare value is abundantly clear. The Master Bill of Lading form with which the shipper, LFI, made the bookings and directed the contents of the bills of lading, contains a box on the front page (lower left) by which the importer may declare a value, and the box specifically directs attention to the applicable "clause 19" which subjects the importer to the limitation, "unless the value of such goods has been declared and inserted in the appropriate space on the other side of this Bill of Lading and any required extra freight charge has been paid therefor." The electronic Bills of Lading issued by GWF before the voyage do the same. The original Bills of Lading issued in Honduras also include a box for the declaration of value.

66. Plaintiffs are charged with knowledge of GWF's "required extra freight charge" – its so-called *ad valorem* rate. GWF publishes it in its public tariff, Rule 12, entitled "Ad Valorem Rates", which states that "[w]here value is declared on any piece or package in excess of the bill of lading limit of value of $500.00 the as (sic) valorem rate … shall be three and three quarter (3 ¾%) of the total declared value in addition to the base freight."[2] Rates are among the things that are required to be published in the tariff; indeed, it is the essential purpose of the tariff. See 46 C.F.R. §520.1(b)(1). It is well-settled that the carrier's publication of its *ad valorem* rate in a public tariff satisfies this leg of the analysis. *Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415, 424 (5th Cir. 1981). Accordingly, Plaintiffs are on constructive notice of GWF's *ad valorem* rates. *Federal Insurance*, 2008 WL 2980029, at *14.

[2] *Dec. of Descartes*, Tariff Rule 12 (App. 1521-1522).

67. The "reasonableness" of GWF's *ad valorem* rate is not a viable issue. Plaintiffs never considered or inquired about insuring their freight in any way, and accordingly, estoppel bars them from now raising the rate's reasonableness. *See Ins. Co. of N. Am. v. M/V Ocean Lynx*, 901 F.2d 934, 940 (11th Cir. 1990) (citing *General Electric Company v. MV Nedlloyd,* 817 F.2d at 1028-29); *see also Aetna Insurance Co. v. M/V Lash Italia*, 858 F.2d 190, 194 (4th Cir. 1988).

D. Possible Vitiation of Contractual Exculpatory and Limitation Provisions

68. Under both federal common law and New York law[3] a liability limitation is valid and enforceable against claims of negligence and is only vitiated by *gross* negligence. *See Carnival Corporation v. BAE Systems*, Case # 13-0314-CG-C, 2015 WL 12778847 (S.D. Ala. March 26, 2015) (discussing federal common law in admiralty, and concluding, "that a marine contract should not be enforced to the extent is attempts to limit liability between the contracting parties for gross negligence." *Id*., at *7. See also, *Royal Ins. Co. v. Southwest Marine*, 194 F.3d 1009, 1016 (9th Cir. 1999) (citing public policy, court holds "a party to a maritime contract should not be permitted to shield itself contractually from liability for gross negligence."); *Todd Shipyard Corp. v. Turbine Service, Inc.*, 674 F.2d 401, 411 (5th Cir. 1982). New York law is in full accord. *Salis v. American Export Lines*, 566 F. Supp. 2d 216, 225 (S.D.N.Y. 2008) (reversed on other grounds); *Amro Verzekeringen BV v. Geologistics Americas, Inc.*, 253 F. Supp. 2d 757, 765 (S.D.N.Y. 2003), *aff'd*, 485 F.3d 85 (2d Cir. 2007) ("New York law does not restrict the ability of non-carrier freight forwarders to limit their liability through contract. In the commercial context generally, the Court of Appeals has held that '[i]t is the public policy of this

[3] Paragraph 23 of the Bills of Lading states, "[a]ll rights, duties and/or obligations not specifically otherwise described or incorporated herein shall be determined according to the laws of the United States, or, where there is no governing federal law, according to the laws of the State of New York." Accordingly, absent a federal statute regulating the subject limitation, federal common law or New York law controls. No party requested a transfer of venue to New York.

State, however, that a party may not insulate itself from damages caused by grossly negligent conduct'"(citations omitted)); *Bausch & Lomb, Inc. v. Mimetogen Pharms., Inc.*, Case # 14-CV-6640-FPG, 2016 WL 2622013, at *17 (W.D.N.Y. May 5, 2016) ("New York public policy renders a limitation of liability clause unenforceable when it would bar damages caused by 'willful or grossly negligent acts.'"(citation omitted)).

69. Gross negligence is defined, specifically in the admiralty context, as conduct that "involves some extreme departure from reasonable care *coupled with a conscious awareness of the risk of harm*." *Lobegeiger v. Celebrity Cruises, Inc.*, No. 11-21620-CIV, 2011 WL 3703329, *16 (S.D. Fla. Aug. 23, 2011) (emphasis added). The Eleventh Circuit has stated, "[t]o hold a party liable for gross negligence, [one] must find that *the defendant had knowledge of the existence of circumstances* which constitutes a 'clear and present danger' and yet still undertakes 'a conscious, voluntary act or omission ... which is likely to result in injury.'" *Central State Transit & Leasing Corp. v. Jones Boat Yard, Inc.*, 206 F.3d 1373, 1377 (11th Cir. 2000) (*quoting Sullivan v. Streeter*, 485 So.2d 893, 895 (Fla. 4th DCA 1986)) (emphasis added). Here, the clear absence of foreknowledge by GWF precludes a finding of gross negligence.

70. It is unclear if the exculpation provisions are governed by federal statute. While COGSA typically "governs a carrier's duty from the time of loading to the time of discharge; the Harter Act governs a carrier's duty from the time of discharge [from the ship] to the time of delivery." *Crowley American Transport, Inc. v. Richard Sewing Mach. Co.*, 172 F.3d 781, 785 n. 6 (11th Cir. 1999). The Harter Act would prohibit the exculpation provision from being enforced against negligence. *See* 46 U.S.C. § 30704. However, regardless of whether the contract's exculpation of liability can be vitiated by negligence or only gross negligence, here the Court finds GWF was not negligent nor grossly negligent.

71. In a COGSA case, once a Defendant demonstrates that it exercised due diligence to prevent damages to a shipper's goods or that the loss was caused by the one of the uncontrollable causes specified by COGSA, the ultimate burden of proof to establish negligence (gross or ordinary) to avoid the exculpation and limitation provisions falls squarely on the Plaintiffs. *Banana Servs, Inc. v. M/V Fleetwave,* 911 F.2d 519, 521 (11th Cir. 1990). Plaintiffs have failed to satisfy that burden. GWF was not negligent in dispatching the trucks on November 30th. They were not negligent in failing to get the trucks to turn around before the looting.

III. CONCLUSION

Accordingly, it is hereby **ORDERED AND ADJUDGED** as that Defendant's Rule 52 (C) motion is **GRANTED**. Pursuant to Federal Rule of Civil Procedure 58 a separate order will be entered.

DONE AND ORDERED at Fort Lauderdale, Broward County, Florida this 13th day of December, 2019.

WILLIAM P. DIMITROULEAS
United States District Judge

Copies furnished to:

Counsel of record