

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA  
THIRD DISTRICT

**CASE NO. 3D2023-2134**

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**TOTAL QUALITY LOGISTICS, LLC,**

Defendant-Appellant,

v.

**TRADE LINK CAPITAL, INC. and TASTE TRACKERS, INC.,**

Plaintiffs-Appellees.

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On Appeal from Nonfinal Order  
(Case No. 2019-037303-CA-01)

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**APPELLANT'S REPLY BRIEF**

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**TABLE OF CONTENTS**

	<b><u>Page</u></b>
TABLE OF AUTHORITIES.....	ii
A. Introduction .....	1
B. The Lower Court Erred by Failing to Comply with the Appellate Order and by Allowing Shippers to Proceed on the Second Amended Complaint.....	2
C. The Shippers’ Additional Arguments are Equally Unavailing....	11
D. Conclusion.....	15
CERTIFICATE OF SERVICE .....	17
CERTIFICATE OF COMPLIANCE .....	17

## **TABLE OF AUTHORITIES**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Ades v. Bank of Montreal</i> , 542 So. 2d 1013 (Fla. 3d DCA 1989) .....	12
<i>Am. Online, Inc. v. Booker</i> , 781 So. 2d 423 (Fla. 3d DCA 2001) .....	13
<i>Bank of New York Mellon v. Mestre</i> , 159 So. 3d 953 (Fla. 5th DCA 2015) .....	5
<i>Baratz v. Land Rover N. Dade, LLC</i> , 205 So. 3d 604 (Fla. 4th DCA 2016) .....	10
<i>Bombardier Cap. Inc. v. Progressive Mktg. Grp., Inc.</i> , 801 So. 2d 131 (Fla. 4th DCA 2001) .....	14
<i>Carnival Corporation v. Sargeant</i> , 690 So. 2d 660 (Fla. 3d DCA 1997) .....	4, 5
<i>Crastvell Trading Ltd. v. Marengere</i> , 90 So. 3d 349 (Fla. 4th DCA 2012) .....	6, 8
<i>De Las Cuevas v. Nat'l Enters. Inc.</i> , 927 So. 2d 41 (Fla. 3d DCA 2006) .....	12
<i>Dep't of Rev. v. Nu-Life Health &amp; Fitness Ctr.</i> , 623 So. 2d 747 (Fla. 1st DCA 1992) .....	7
<i>Dot (SR) v. Telesur</i> , 136 So. 3d 1239 (Fla. 2d DCA 2014) .....	6, 8
<i>Fed. Ins. Co. v. Team Air Express, Inc.</i> , No. 1:19-CV-05325-CAP, 2020 WL 10086550 (N.D. Ga. Aug. 27, 2020) .....	13

<i>GEICO Gen. Ins. Co. v. A &amp; C Med. Ctr., Inc.</i> , 357 So. 3d 233 (Fla. 3d DCA 2023) .....	10
<i>Grice v. Bd. of Cnty. Com’rs of Madison Cnty.</i> , 400 So. 2d 801 (Fla. 1st DCA 1981) .....	4
<i>Ground Improvement Techniques, Inc. v. Merchants Bonding Co.</i> , 707 So. 2d 1138 (Fla. 5th DCA 1998) .....	6, 8
<i>Haughey v. Royal Caribbean Cruises, Ltd.</i> , 55 So. 3d 697 (Fla. 3d DCA 2011) .....	3, 4, 7
<i>Hemingway v. Bresney</i> , 733 So. 2d 1135 (Fla. 4th DCA 1999) .....	6, 8
<i>Hendel v. Internet Escrow Services, Inc.</i> , 317 So. 3d 1175 (Fla. 3d DCA 2021) .....	3, 4
<i>Jain v. Buchanan Ingersoll &amp; Rooney PC</i> , 322 So. 3d 1201 (Fla. 3d DCA 2021) .....	9
<i>K.W. Brown &amp; Co. v. McCutchen</i> , 819 So. 2d 977 (Fla. 4th DCA 2002) .....	5
<i>Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.</i> , 561 U.S. 89 (2010) .....	14
<i>Manrique v. Fabbri</i> , 493 So. 2d 437 (Fla. 1986) .....	13
<i>Merrill Lynch, Pierce, Fenner &amp; Smith, Inc. v. Nat’l Bank of Melbourne &amp; Tr. Co.</i> , 238 So. 2d 665 (Fla. 4th DCA 1970) .....	9
<i>Nelson v. Jason Miller Investments, Inc.</i> , 319 So. 3d 1291 (Fla. 2d DCA 2021) .....	15
<i>Noble v. Martin Mem’l Hosp. Ass’n</i> , 710 So. 2d 567 (Fla. 4th DCA 1997) .....	9

<i>Orbe v. Orbe</i> , 651 So. 2d 1295 (Fla. 5th DCA 1995) .....	6, 8
<i>Palm AFC Holdings, Inc. v. Minto Cmtys., Inc.</i> , 766 So. 2d 436 (Fla. 4th DCA 2000) .....	5
<i>Peters v. Liberty Bell Moving Group</i> , No. 1:19-CV-182-WKW, 2020 WL 1069731 (M.D. Ala. Mar. 5, 2020) .....	13
<i>S &amp; S Directional Boring and Cable Contractors, Inc. v. Am. Nat. Bank of Minnesota</i> , 961 So. 2d 1046 (Fla. 2d DCA 2007) .....	6
<i>Sans Souci v. Div. of Florida Land Sales &amp; Condos., Dep’t of Bus. Regulation</i> , 421 So. 2d 623 (Fla. 1st DCA 1982) .....	12
<i>Scotlynn USA Div., Inc. v. Singh</i> , No. 215CV381FTM29MRM, 2016 WL 8679295 (M.D. Fla. Sept. 9, 2016) .....	14
<i>Smith v. St. Vil</i> , 714 So. 2d 603 (Fla. 4th DCA 1998) .....	4
<i>Sompo Japan Nipponkoa Ins., Inc. v. CSX Transp., Inc.</i> , 3:19-CV-1154-J-34PDB, 2020 WL 7074558 (M.D. Fla. Dec. 3, 2020) .....	13
<i>State ex rel. McGreevy v. Dowling</i> , 223 So. 2d 89 (Fla. 3d DCA 1969) .....	4
<i>Toscano Condo. Ass’n v. DDA Eng’rs</i> , 274 So. 3d 487 (Fla. 3d DCA 2019) .....	9
<i>Total Quality Logistics, LLC v. Trade Link Capital, Inc.</i> , 358 So. 3d 458 (Fla. 3d DCA 2023) .....	14

*Williamson v. Prime Sports Mktg., LLC*,  
314 So. 3d 480 (Fla. 3d DCA 2020) .....6, 8

**Rules**

Fla. R. App. P. 9.045 .....17  
Fla. R. App. P. 9.210(a)(2)(B) .....17

## **A. Introduction**

More than four years into the case and after an Appellate Order granting dismissal based on improper venue, the Shippers' Answer Brief does little more than recycle the same arguments from the answer brief they filed in the Prior Appeal, which this Court already reviewed and rejected then. To the extent there are any "new" arguments, they are aimed at trying to escape the effects of the Appellate Order and attempting to justify the Lower Court's failure to comply with it. Shippers have not and cannot point to any support for their positions that (a) the Appellate Order allowed further amended pleadings and (b) the Lower Court didn't commit obvious legal error in abusing its discretion and acting in excess of its jurisdiction by allowing such amendment and denying the Motion to Dismiss.

Shippers were plainly barred from trying to pursue another amended complaint, particularly one filed years into the case; raising allegations which had never before been asserted, were unsupported, and contradicted all prior allegations and evidence in the case; and which was flagrantly for the sole purpose of trying to work around the Appellate Order and defeat a future motion to dismiss. On top of

that, despite structuring its whole case and focusing its Answer Brief on the application of the Carmack Amendment, Appellant has again failed to carry its heavy burden to avoid enforcement of the Forum Selection Clauses.

Once more, this Court should find that the Order should be reversed, that the Motion to Dismiss should be granted, and that the proceedings below should be dismissed in total after an award to TQL for TQL's reasonable attorneys' fees for the case (including this appeal), leaving no question or room for debate that the Lower Court may not allow further pleadings, amendments, or any additional argument on whether it could serve as a proper venue for the Shippers' claims.

**B. The Lower Court Erred by Failing to Comply with the Appellate Order and by Allowing Shippers to Proceed on the Second Amended Complaint.**

The Shippers contend that the Appellate Order did not have the effect of precluding further amended pleadings and that the Lower Court was therefore acting within its discretion in allowing the Shippers to file an amended complaint. (A.B. 9-12.) The Shippers attempt to do so by arguing that the Appellate Order did not explicitly dismiss the entire case and only dismissed the amended complaint,

such that the door was open for the Shippers to assert wholly new and never-before asserted allegations four years into a case for the purpose of trying to escape the outcome of the Appellate Order and avoid a future motion to dismiss on improper venue. These arguments lack any legal merit and should be properly rejected.

Appellees argue that since the Appellate Order did not direct the dismissal of the “action” and did not direct dismissal with prejudice, it did not bar the Lower Court from allowing new amended pleadings. To make these arguments, Appellees point to multiple decisions, but none of them stand for the propositions which Appellees claim they do or ultimately support Appellees’ position. Appellees point to the decisions in *Haughey v. Royal Caribbean Cruises, Ltd.*, 55 So. 3d 697 (Fla. 3d DCA 2011), contending that it requires that that an appellate order direct the dismissal of an action rather than a complaint, and *Hendel v. Internet Escrow Services, Inc.*, 317 So. 3d 1175 (Fla. 3d DCA 2021), claiming that it demonstrates that dismissal with prejudice language is necessary to prevent new amended filings below. (A.B. 13-14.) Neither case supports the Shippers’ interpretations of them. *Haughey* stands for the proposition that a trial court cannot deviate from the terms of an appellate court’s mandate, a highly relevant

finding for these proceedings, but it in no way suggests that the word “action” is a magic word that must be included to prevent further proceedings. *Haughey*, 55 So. 3d at 698-699. *Hendel* likewise in no way finds that dismissal with prejudice language is proper much less necessary in the context of a motion to dismiss for improper venue, merely noting in dicta via footnote that the “with prejudice” language in the lower court’s ruling didn’t affect the filing of a new action in a different state. *Hendel*, 317 So. 3d at 1179, n.4.

In fact, appellate courts in Florida have repeatedly recognized that orders granting dismissal for improper venue are not on the merits and so should not be with prejudice, and yet they are still final orders. *Smith v. St. Vil*, 714 So. 2d 603, 604-605 (Fla. 4th DCA 1998); *Grice v. Bd. of Cnty. Com’rs of Madison Cnty.*, 400 So. 2d 801 (Fla. 1st DCA 1981). Moreover, once it is found that venue is improper in the subject forum, the trial court can do nothing other than dismiss or transfer the proceedings. *State ex rel. McGreevy v. Dowling*, 223 So. 2d 89, 94 (Fla. 3d DCA 1969). Additionally, it is axiomatic that an order which dismisses a complaint without prejudice and without granting leave to amend is a final order. For example, this Court previously ruled in the matter of *Carnival Corporation v. Sargeant*,

690 So. 2d 660, 661 (Fla. 3d DCA 1997), granting a writ of prohibition on just this topic. There, an order was entered dismissing a complaint without prejudice and “[n]oticeably, the order did not grant leave to amend.” *Id.* This Court therefore recognized that the order was a final appealable order and so, “In order to avoid the consequences of the dismissal, the Respondents were obligated to timely seek rehearing, appeal or file a new lawsuit. They did none of these. As a result, the trial court did not have jurisdiction at the time it entered the order granting leave to amend the complaint.” *Id.* at 661-662. Numerous courts have found likewise.<sup>1</sup>

Accordingly, the Appellate Order itself was a final order, depriving the Lower Court of jurisdiction to even consider granting leave to amend or do anything other than dismiss the case and grant TQL its reasonable attorneys’ fees. Rather than filing an amended

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<sup>1</sup> See, e.g., *Palm AFC Holdings, Inc. v. Minto Cmty., Inc.*, 766 So. 2d 436, 438 (Fla. 4th DCA 2000) (“We agree with *Gries* and *Carnival*. Accordingly, just as in *Carnival* and *Gries*, the trial court had no jurisdiction when it entered the order granting leave to amend the complaint.”); *K.W. Brown & Co. v. McCutchen*, 819 So. 2d 977, 979 (Fla. 4th DCA 2002) (“This is a final appealable order, as it dismisses the complaint without leave to amend.”); *Bank of New York Mellon v. Mestre*, 159 So. 3d 953, 954, n.1 (Fla. 5th DCA 2015) (“An order dismissing an action without prejudice and without granting leave to amend is a final order.”).

complaint with the Lower Court, the Shippers' sole option to continue with the case was to seek rehearing of the Appellate Order and/or an appeal to the Florida Supreme Court. The Shippers pursued the former, asking this Court to instead remand with instructions for the Lower Court to make more detailed findings and conduct further evidentiary hearings, a proposition which the Court specifically rejected and instead issued the Mandate. [App. 0249-0349.] As a result, any further litigation on this topic was closed, with the Lower Court barred from taking further action in this matter, which it ignored, resulting in the instant appeal.

The Shippers cite a host of cases as allegedly standing for the proposition that appellate court orders granting dismissals without prejudice allow leave to amend.<sup>2</sup> (A.B. 12-17.) However, these cases merely stand for the proposition that if the Appellate Order had

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<sup>2</sup> *Dot (SR) v. Telesur*, 136 So. 3d 1239, 1240-1241 (Fla. 2d DCA 2014); *Hemingway v. Bresney*, 733 So. 2d 1135, 1136 (Fla. 4th DCA 1999); *Williamson v. Prime Sports Mktg., LLC*, 314 So. 3d 480, 486-487 (Fla. 3d DCA 2020); *Crastvell Trading Ltd. v. Marengere*, 90 So. 3d 349, 354-355 (Fla. 4th DCA 2012); *S & S Directional Boring And Cable Contractors, Inc. v. Am. Nat. Bank Of Minnesota*, 961 So. 2d 1046 (Fla. 2d DCA 2007); *Orbe v. Orbe*, 651 So. 2d 1295, 1298 (Fla. 5th DCA 1995); *Ground Improvement Techniques, Inc. v. Merchants Bonding Co.*, 707 So. 2d 1138, 1139 (Fla. 5th DCA 1998).

granted leave to amend, such would have been allowed, with each decision explicitly finding that under its circumstances, amendment was justified and should occur on remand. *Id.*; see also *Haughey*, 55 So. 3d at 699 (noting that the lower court properly did not allow an amended complaint because in the prior mandate reversing a denial of a motion to dismiss, “there were no directions to the trial court to allow *Haughey* leave to amend.”); *Dep’t of Rev. v. Nu-Life Health & Fitness Ctr.*, 623 So. 2d 747, 751 (Fla. 1st DCA 1992), as clarified on denial of reh’g (Aug. 30, 1993) (reversing and remanding with the specific finding that leave to amend should be allowed as to jurisdictional deficiencies). The Appellate Order is pointedly devoid of such language or findings, instead recognizing that the Shippers had failed to satisfy their evidentiary burden and that their pleadings should therefore be dismissed, with nothing even suggesting that leave to amend was being authorized below. This Court at least theoretically could have done so, but the absence of that authorization is controlling on the Lower Court, barring it from doing as it did in allowing the Shippers to proceed on the Second Amended Complaint and denying the Motion to Dismiss. Even absent that unassailable fact, the Shippers’ cases are plainly distinguishable,

relying on background and dicta rather than legal rulings (*see, e.g., Ground Improvement Techniques, Inc.*, 707 So. 2d at 1139), circumstances where a new action had been filed or new claims asserted outside the scope of forum selection clauses and against new parties (*see, e.g., Crastvell Trading Ltd.*, 90 So. 3d at 354-355), and overwhelmingly where the arguments and prior proceedings were about pleading deficiencies rather than the full evidentiary hearings and prior appellate rulings which have occurred herein (*see all, including for example, Dot (SR)*, 136 So. 3d at 1240-1241; *Hemingway*, 733 So. 2d at 1136; *Williamson*, 314 So. 3d at 486-487; *Orbe*, 651 So. 2d at 1298).

Even if the above case law did not exist, the Shippers' actions and the Lower Court's allowance of them would be no more appropriate. The Shippers are plainly trying to get around the Appellate Order by adding allegations in an attempt to fix the evidentiary/burden of proof failures noted, and thereby head off a new motion to dismiss, by asserting—four years into the case and after two prior complaints, two prior motions to dismiss, and significant discovery on the venue issue between the filing of the first complaints—wholly new and unsupported facts which run counter

to all prior pleadings and any evidence in the case, particularly with respect to the alleged location of the loss. Such efforts are prohibited and should not have been allowed. *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nat'l Bank of Melbourne & Tr. Co.*, 238 So. 2d 665, 667 (Fla. 4th DCA 1970); *Noble v. Martin Mem'l Hosp. Ass'n*, 710 So. 2d 567, 568–69 (Fla. 4th DCA 1997) (holding trial court properly exercised its discretion in denying motion for leave to amend when “four years and four complaints passed with no request for injunctive relief,” recognizing that a “party should not be permitted to amend its pleadings for the sole purpose of defeating a motion for summary judgment”); *Jain v. Buchanan Ingersoll & Rooney PC*, 322 So. 3d 1201, 1206 (Fla. 3d DCA 2021) (denying motion for leave to amend when sought after trial court orally granted summary judgment, holding, “A party who opposes summary judgment will not be permitted to alter the position of his or her previous pleadings, admissions, affidavits, depositions or testimony in order to defeat a summary judgment.”); *Toscano Condo. Ass'n v. DDA Eng'rs*, 274 So. 3d 487, 491 (Fla. 3d DCA 2019) (finding no abuse of discretion in denying leave to amend when leave granted three times prior and new claim was not asserted “until more than two years after the filing of

the complaint and more than six months after the trial court conducted its case management conference”); *see also Baratz v. Land Rover N. Dade, LLC*, 205 So. 3d 604 (Fla. 4th DCA 2016) (affirming per curiam in favor of moving party on similar improper venue dispute, rejecting requests to allow leave to amend to fix the venue issue). Even under the broad amendment standards, wholly inapplicable herein though they are, amendment should not be allowed where the amendment process has been abused and/or where it would prejudice the other party, standards which are plainly governing under these circumstances in demonstrating the Lower Court’s abuse of discretion. *See GEICO Gen. Ins. Co. v. A & C Med. Ctr., Inc.*, 357 So. 3d 233, 234-235 (Fla. 3d DCA 2023).

Accordingly, the Lower Court should not have even allowed the Second Amended Complaint to be filed, much less denied the Motion to Dismiss with respect to it, as the Shippers had already been given multiple opportunities to argue and present evidence on the improper venue issue and the enforceability of the Forum Selection Clauses, and the Appellate Court found that they failed to meet their burden of disputing them, requiring the dismissal of the proceedings. The Lower Court should have followed the Appellate Order, and it was

reversible error for it to do otherwise and allow the Shippers yet another bite of the apple.

**C. The Shippers' Additional Arguments are Equally Unavailing.**

The Shippers' remaining arguments are largely identical to those presented in their prior answer brief, just couched in the limited additional facts and allegations asserted in the Second Amended Complaint. In the process, the Shippers do not dispute that the Forum Selection Clauses are valid and enforceable and instead try to sidestep their plain and exceptionally clear and encompassing language<sup>3</sup> by arguing that the Parties' relationship was governed by new agreements and that the Carmack Amendment would trump over them. (A.B. 19-34.) Even if these arguments were relevant to and governing upon whether the Second Amended Complaint should have been dismissed, which they are not as shown above, they would still have no merit and provide no basis to affirm the Order below.

The Shippers argue that the Forum Selection Clauses are not

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<sup>3</sup> "The state courts located in Clermont County, Ohio . . . shall be the exclusive venue with respect to any claim, counterclaim or dispute arising in connection with any transactions, loads or other business between [TQL and the Shipper]." (App. 18, 21.)

governing because the Parties' course of dealings and additional agreements and communications had the effect of modifying or novating the Shipper Agreements. (A.B. 33-34.) However, the Shippers point to nothing suggesting that the Shipper Agreements had been set aside, much less any contrary language or agreement with respect to the Forum Selection Clauses. Moreover, novations require mutual agreement between the parties to cancel or discharge the existing obligation by substitution of it with a new one which takes the place of the prior agreement, with the controlling intent of the parties determined by the documents. *Ades v. Bank of Montreal*, 542 So. 2d 1013, 1014 (Fla. 3d DCA 1989); *De Las Cuevas v. Nat'l Enters. Inc.*, 927 So. 2d 41, 43-44 (Fla. 3d DCA 2006) (noting nothing on the new agreement to suggest that it was intended to substitute the prior agreement). Such consent must be express, and actions alone are not sufficient. *Sans Souci v. Div. of Florida Land Sales & Condos., Dep't of Bus. Regulation*, 421 So. 2d 623, 631 (Fla. 1st DCA 1982). The Shippers have not, nor can they, point to such events or evidence in the record before this Court. Moreover, the Shipper Agreements and their Forum Selection Clauses plainly apply to the purportedly "new" arrangements between the parties, including

specifically insurance, broadly applying to “any transactions” and “other business,” not just TQL’s business at the time the Shipper Agreements were executed. (App. 15-21.)

As for Carmack, the Shippers continue to misleadingly suggest that the statutory venue provisions within would preclude enforcement of the Forum Selection Clauses not only as to breach of motor carrier duties claimed under Carmack but also as to the Shippers’ other state law claims, offering no support for that plainly false proposition where such claims must be found either to be preempted or subject to the Forum Selection Clauses.<sup>4</sup> It is Florida’s well-settled public policy to **enforce** forum selection clauses and to ensure the legitimate expectations of contracting parties. *Manrique v. Fabbri*, 493 So. 2d 437, 440 (Fla. 1986); *Am. Online, Inc. v. Booker*, 781 So. 2d 423, 425 (Fla. 3d DCA 2001). Moreover, parties are free to contract around Carmack in these circumstances, and otherwise valid and enforceable forum selection clauses will govern where

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<sup>4</sup> See, for example, *Sompo Japan Nipponkoa Ins., Inc. v. CSX Transp., Inc.*, 3:19-CV-1154-J-34PDB, 2020 WL 7074558, at \*13 (M.D. Fla. Dec. 3, 2020); *Peters v. Liberty Bell Moving Group*, No. 1:19-CV-182-WKW, 2020 WL 1069731, at \*2 (M.D. Ala. Mar. 5, 2020); *Fed. Ins. Co. v. Team Air Express, Inc.*, No. 1:19-CV-05325-CAP, 2020 WL 10086550, at \*6 (N.D. Ga. Aug. 27, 2020).

Carmack does not apply. *See Scotlynn USA Div., Inc. v. Singh*, No. 215CV381FTM29MRM, 2016 WL 8679295, at \*2 (M.D. Fla. Sept. 9, 2016); *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 109-110 (2010).

Furthermore, to avoid the application of the Forum Selection Clauses under Florida law, the burden falls on the Shippers to demonstrate that the agreed-upon forum of Clermont County, Ohio is unreasonable and unjust. *See Bombardier Cap. Inc. v. Progressive Mktg. Grp., Inc.*, 801 So. 2d 131, 134 (Fla. 4th DCA 2001). As this Court previously noted:

Once Total Quality Logistics submitted the affidavit and the written agreements containing the presumptively valid and enforceable forum selection clause agreed to by the parties, the burden shifted to Plaintiffs to show that the forum selection clause was “unjust or unreasonable”—in essence, that Clermont, Ohio amounts to “no forum at all.” Further, and as to the claim filed pursuant to the Carmack Amendment, Plaintiffs would have had to provide evidence to establish (or at least create a disputed issue of fact whether) the Carmack Amendment (49 U.S.C. § 14706) is applicable to the cargo shipment at issue and renders the contractual forum selection clause unenforceable.

*Total Quality Logistics, LLC v. Trade Link Capital, Inc.*, 358 So. 3d 458, 462 (Fla. 3d DCA 2023), reh'g denied (Apr. 12, 2023). Then, as now, the Lower Court did not hold an evidentiary hearing or take evidence

on these points, including as to Shippers' unsupported Carmack-focused allegation of a Miami point of loss, nor did it provide any reasons for its ruling on the record, merely adopting the Order verbatim thereafter. *See Nelson v. Jason Miller Investments, Inc.*, 319 So. 3d 1291 (Fla. 2d DCA 2021) (noting the requirements of evidentiary hearings in these circumstances and on these issues). The Shippers have therefore once again failed to meet their burden of overcoming the presumptively valid, enforceable, and mandatory Forum Selection Clauses, requiring once again that the Order be reversed as the Lower Court abused its discretion in denying the Motion to Dismiss.

#### **D. Conclusion**

For the above reasons and in the Initial Brief, this Court should reverse the Lower Court's Order, dismiss this matter for improper venue, and specifically direct the Lower Court to allow no further amended pleadings or arguments with respect to the venue issue. The only proceedings to take place in the Lower Court before dismissal for improper venue shall be an award of TQL's reasonable attorneys' fees for the case.

Respectfully submitted on June 5, 2024.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 5, 2024, a true and correct copy of the foregoing document has been filed with the Clerk of the Court via the Florida E-Portal, which will send electronic notification to:

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**CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing Appellant’s Reply Brief complies with the applicable font and word count limit requirements set forth in Rules 9.045 and 9.210(a)(2)(B), Fla. R. App. P., with respect to Reply Briefs.

/s/ Eve A. Cann