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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

MUSHROOM EXPRESS, INC.,

vs.

PENSKE TRUCK LEASING CO., LP,

Defendant.

CASE NO. 13cv2622 JM(NLS)

ORDER GRANTING IN PART AND  
DENYING IN PART DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT OR, ALTERNATIVELY,  
PARTIAL MOTION FOR SUMMARY  
JUDGMENT

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AND RELATED COUNTERCLAIM

Defendant and Counter-Claimant Penske Truck Leasing Co., LP (“Penske”) moves for summary judgment or, alternatively, partial summary judgment. Plaintiff and Counter-Defendant Mushroom Express, Inc. (“Mushroom”) opposes the motion. Pursuant to L.R. 7.1(d)(1), the matters presented are appropriate for decision without oral argument. For the reasons set forth below, the court grants in part and denies in part Penske’s motion for summary judgment.

**BACKGROUND**

On September 6, 2013, in the Superior Court for the County of San Diego, Plaintiff commenced this action by alleging a claim for breach of contract and a claim for intentional interference with prospective business interests. (Ct. Dkt. 1). Following removal of the action to this court on October 30, 2013, based upon diversity

1 jurisdiction, the parties jointly moved to dismiss with prejudice the intentional  
2 interference with prospective business interests claim. (Ct. Dkt. 5). On February 26,  
3 2014, Penske answered the Complaint and filed a Counterclaim alleging three causes  
4 of action for breach of contract, account stated and common counts. Penske seeks to  
5 recover unpaid lease payments in the amount of \$15,150.20.

6 Mushroom’s claims arise from the following alleged events. Mushroom,  
7 incorporated in California with its principal place of business in California, is engaged  
8 in the business of growing and distributing mushrooms to customer accounts  
9 throughout the nation. (Compl. ¶2). Penske, a Delaware corporation with its principal  
10 place of business in Pennsylvania, is in the business of leasing vehicles, among other  
11 things. In December 2009, the parties entered into a written contract, the Vehicle  
12 Lease Service Agreement (“Agreement”), pursuant to which Penske agreed to lease  
13 freightliner trucks to Mushroom in exchange for lease payments. The Agreement also  
14 provided that Penske would “provide all preventive maintenance and repairs to keep  
15 the leased vehicle in good repair and operating condition.” (Compl. ¶7). In the event  
16 a leased vehicle became disabled, Penske “agreed to provide a substitute vehicle in  
17 good repair and operating condition at the location where the originally leased vehicle  
18 became disabled.” Id.

19 In January 2010, one of Mushroom’s drivers was operating a leased vehicle in  
20 western Oklahoma when the truck broke down and became disabled. (Compl. ¶9).  
21 Mushroom notified Penske and a substitute vehicle was delivered to the site of the  
22 break down. The substitute truck provided had just been returned to Penske with a  
23 mechanical problem. Upon delivery of the substitute vehicle, the Penske “drivers  
24 advised Plaintiff’s driver of the problems with the substitute vehicle.” The substitute  
25 vehicle would not start and had to be towed away. (Compl. ¶10-12). A second  
26 substitute vehicle was requested. However, by the time it arrived, Mushroom could not  
27 make a timely delivery to its largest customer and “the perishable produce had declined  
28 in quality during the delay.” (Compl. ¶15). Based upon the failure to timely provide

1 a working substitute vehicle, Mushroom asserts that Penske breached the Agreement  
2 by (1) not properly maintaining the originally leased vehicle and (2) failing to provide  
3 a substitute vehicle in good operating condition. Mushroom asserts that the 15 hour  
4 delay “resulted in a significant downgrade in the quality of mushrooms after losing at  
5 least 15% of its shelf life” as a result of the “delay in providing the substitute vehicle.”  
6 (Oppo. at p.10:26-28).

7 The Counterclaim filed by Penske alleges that Mushroom stopped paying the  
8 lease invoices starting in August 2012. As of October 2013, there allegedly remained  
9 an unpaid balance under the Agreement in the amount of \$15,150.20. (Counterclaim  
10 ¶12).

## 11 DISCUSSION

### 12 Legal Standards

13 A motion for summary judgment shall be granted where “there is no genuine  
14 issue as to any material fact and . . . the moving party is entitled to judgment as a matter  
15 of law.” FED. R. CIV. P. 56(c); Prison Legal News v. Lehman, 397 F.3d 692, 698 (9th  
16 Cir. 2005). The moving party bears the initial burden of informing the court of the  
17 basis for its motion and identifying those portions of the file which it believes  
18 demonstrate the absence of a genuine issue of material fact. Celotex Corp. v. Catrett,  
19 477 U.S. 317, 323 (1986). There is “no express or implied requirement in Rule 56 that  
20 the moving party support its motion with affidavits or other similar materials negating  
21 the opponent’s claim.” Id. (emphasis in original). The opposing party cannot rest on  
22 the mere allegations or denials of a pleading, but must “go beyond the pleadings and  
23 by [the party’s] own affidavits, or by the ‘depositions, answers to interrogatories, and  
24 admissions on file, designate ‘specific facts showing that there is a genuine issue for  
25 trial.’” Id. at 324 (citation omitted). The opposing party also may not rely solely on  
26 conclusory allegations unsupported by factual data. Taylor v. List, 880 F.2d 1040,  
27 1045 (9th Cir. 1989).

28 The court must examine the evidence in the light most favorable to the non-

1 moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Any doubt  
2 as to the existence of any issue of material fact requires denial of the motion. Anderson  
3 v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). On a motion for summary judgment,  
4 when ““the moving party bears the burden of proof at trial, it must come forward with  
5 evidence which would entitle it to a directed verdict if the evidence were  
6 uncontroverted at trial.”” Houghton v. South, 965 F.2d 1532, 1536 (9th Cir. 1992)  
7 (emphasis in original) (quoting International Shortstop, Inc. v. Rally's, Inc., 939 F.2d  
8 1257, 1264-65 (5th Cir. 1991), cert. denied, 502 U.S. 1059 (1992)).

### 9 **The Motion for Summary Judgment**

#### 10 The Choice-of-Law Issue

11 Before addressing the merits of the summary judgment motion, the parties  
12 dispute whether the contractual choice-of-law provision, choosing Pennsylvania state  
13 law, applies to the parties’ contractual relationship. Mushroom argues that California  
14 law should apply to the parties’ relationship but then applies Pennsylvania law to the  
15 parties’ contractual relationship.

16 Federal courts look to the law of the forum state in resolving choice of law  
17 issues. See Ticknor v. Choice Hotels Intern., Inc., 265 F.3d 931, 937 (9th Cir. 2001);  
18 Sparling v. Hoffman Constr. Co., Inc., 864 F.2d 635, 641 (9th Cir. 1988). “In  
19 determining the enforceability of . . . contractual choice-of-law provisions, California  
20 courts shall apply the principles set forth in the Restatement (Second of Conflict of  
21 Laws) section 187 which reflects a strong policy favoring enforcement of such  
22 provisions.” Nedlloyd Lines B.V. v. Superior Court, 3 Cal.4th 459, 464 (1992).

23 Section 187 provides, in pertinent part, that:

24 The law of the state chosen by the parties to govern their contractual  
25 rights and duties will be applied . . . unless . . .

26 (b) application of the law of the chosen state would be contrary to a  
27 fundamental policy of a state which has a materially greater interest than  
28 the chosen state in the determination of the particular issue and which,  
under the role of section 188, would be the state of the applicable law in  
the absence of an effective choice of law by the parties.

Restatement (2d) of Conflict of Laws §187(2) (1988). In determining the

1 enforceability of a contractual choice-of-law provision the court must first determine  
2 (1) whether the chosen state has a substantial relationship to the parties or transaction  
3 or (2) whether there is any other reasonable basis for the parties' choice of law. If  
4 either test is met then the court must next determine whether the chosen state's law is  
5 contrary to a fundamental policy of California. If there is no conflict, the court must  
6 enforce the parties' choice of law. If there is a fundamental conflict with California  
7 law, the court must then determine whether California has a materially greater interest  
8 than the chosen state in the determination of the particular issue. If California has a  
9 materially greater interest, then the choice-of-law provision will not be enforced. See  
10 Nedlloyd, 3 Cal.4th at 464-466.

11 Here, there is a reasonable basis for the parties' choice of law because Penske  
12 maintains its principal place of business in Pennsylvania. (Counterclaim ¶1).  
13 Furthermore, Mushroom fails to identify any fundamental conflict between California  
14 and Pennsylvania law.<sup>1</sup> Accordingly, Pennsylvania law applies to the parties' conduct.

15 The Alleged Failure to Maintain the Vehicle in Good Operating Condition

16 To prevail on a breach of contract claim under Pennsylvania law, a plaintiff must  
17 show three elements: (1) the existence of a contract, including its essential terms, (2)  
18 a breach of a duty imposed by the contract, and (3) damages. McShea v. City of  
19 Philadelphia, 995 A.2d 334, 340 (2010).

20 The Agreement provides that Penske is obligated to provide "all preventive  
21 maintenance, replacement parts, and repairs to keep the Vehicles in good repair and  
22 operating condition." (Defendant's Notice of Lodgement "DNOL," Exh. 1 ¶2).  
23 Mushroom argues that Penske breached this provision by failing to properly repair the  
24 vehicle's clutch within a reasonable period of time. In support of this argument, the  
25 evidence submitted by Plaintiff consists of some statements on Penske's website and  
26 five Repair Orders on the vehicle. The first Repair Order from a facility located in  
27 Bakersfield, California, dated July 19, 2011, indicates that Plaintiff complained that the

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28 <sup>1</sup> The court notes that both parties rely on Pennsylvania state law authorities.

1 vehicle was “hard to shift gears.” The Repair Order indicates the cause as “worn out  
2 clutch” and that the issue was corrected by adjusting the clutch “to obtain proper  
3 clearance and travel.” (Plaintiff’s Notice of Lodgment “PNOL” Exh.1). The second  
4 Repair Order from a facility located in San Marcos, California, dated September 23,  
5 2011, indicates that Plaintiff requested a clutch inspection. The Repair Order indicates  
6 that the clutch was inspected, found to be within specification, and no repairs were  
7 made. The third Repair Order from a facility located in Stockton, California, dated  
8 October 3, 2011, listed “inspect clutch operation” as a complaint. As cause, the Repair  
9 Order noted “clutch linkage bushing worn/safe to drive back to base.” The Repair  
10 Order indicates that the clutch and brake components were inspected and found to be  
11 within specification. The fourth Repair Order from a facility located in San Marcos,  
12 California, dated October 24, 2011, listed “clutch linkage bushings are wor (sic)” as  
13 a complaint. As cause, the Repair Order indicates “unit needs alignment” and the  
14 corrective measure noted “align/alignment front axle.” The final Repair Order, dated  
15 January 3, 2012, after the time of the malfunction, indicates “lost the clutch won’t go  
16 into gear” as a complaint. As cause, the Repair Order indicates “clutch failed” and the  
17 corrective measure notes “sub and recovery 7170-10.”

18 In addition to these Repair Orders, Mushroom cites several statements contained  
19 on Penske’s website. The marketing-related statements include such statements as  
20 “Our rigorous service, powerful systems and quality assurance controls your costs and  
21 protects the value of the vehicle through its lifetime” and “We invest in the tools and  
22 training programs necessary to maintain an exceptional fleet.” The court notes that  
23 these marketing-related statements, seen in context, do not impose obligations on  
24 Penske outside the four corners of the Agreement.

25 The court concludes that the evidentiary record submitted by Mushroom is  
26 adequate to give rise to an inference that Penske failed to maintain the vehicle in good  
27 working condition. Specifically, the documentation submitted by Mushroom is  
28 suggestive of an on-going problem with the clutch assembly of the vehicle which,

1 although addressed a number of times, was never properly repaired before the  
2 breakdown on January 3, 2012. In light of the repair chronology, Mushroom meets its  
3 burden by designating “specific facts showing that there is a genuine issue for trial.”  
4 Celotex, 477 U.S. at 324.

5 In sum, the court denies summary judgment in favor of Penske on whether  
6 Penske breached the Agreement by failing to properly maintain the vehicle.

#### 7 The Alleged Failure to Provide a Substitute Vehicle within a Reasonable Time

8 The Agreement at issue provides that Penske would provide a “Substitute  
9 [vehicle] in as nearly as practicable the same size and type as the inoperable vehicle.”  
10 (DNOL Exh. ¶4a). The parties are in agreement that, under Pennsylvania law, Penske  
11 was required to deliver the replacement vehicle within a reasonable time depending on  
12 the circumstances and nature of the business. See Commonwealth v. Pendleton, 389  
13 A.2d 532, 534-35 (1978). The undisputed time line submitted by the parties shows  
14 that, on January 3, 2012, at 12:40 a.m., Penske was first notified of the breakdown of  
15 the vehicle in western Oklahoma; at 3:18 a.m Penske arranged for a replacement truck  
16 to be towed to the site of the breakdown some 235 miles from Tulsa, Oklahoma; at 9:32  
17 a.m. the first replacement vehicle arrived on the site; at 10:11 a.m. the parties learned  
18 that the replacement vehicle was inoperable; at 10:36 a.m. Penske located a second  
19 replacement truck; and, at 3:03 p.m. the second replacement truck arrived at the site of  
20 breakdown. (DNOL Exh. E).

21 Whether the delay in providing a replacement vehicle was reasonable presents  
22 a genuine issue of material fact not appropriately resolved on a motion for summary  
23 judgment. The parties simply fail to make a sufficient showing that any particular  
24 delay was reasonable, or unreasonable, under the circumstances. A determination of  
25 reasonableness is within the providence of the jury, and not this court. Accordingly, the  
26 court denies the motion for summary adjudication on this claim.

#### 27 The Limitation of Damages Provision

28 Penske seeks partial summary judgment on the damage limitations provisions.

1 Section 16 provides:

2 **NON-LIABILITY FOR CONTENTS.** Penske shall not be liable for  
3 loss of, or damage to any cargo or other property left, stored, loaded or  
transported in, upon, or by any Vehicle at any time or place.

4 Section 18 provides:

5 **DISCLAIMER.** PENSKE MAKES NO WARRANTY OF ANY KIND,  
6 EXPRESS OR IMPLIED, AS TO THE MERCHANTABILITY,  
7 FITNESS FOR ANY PARTICULAR PURPOSE OR ABSENCE OF  
ANY MANUFACTURING DEFECT OF ANY VEHICLE COVERED  
BY THIS [AGREEMENT].

8 (DNOL, Exh. A at §§16, 18).

9 “Under Pennsylvania law, contractual provisions limiting warranties,  
10 establishing repair or replacement as the exclusive remedy for breach of warranty and  
11 excluding liability for special, indirect and consequential damages in a commercial  
12 setting are generally valid and enforceable.” New York State Elec. & Gas Corp. v.  
13 Westinghouse Elec. Corp., 564 A.2d 919, 924 (1989) (citing 13 Pa.Cons.Stat.Ann. §§  
14 2316, 2718 & 2719 (1982); National Cash Register Co. v. Modern Transfer Co., 224  
15 Pa.Super. 138, 302 A.2d 486 (1973)). Unconscionable damage limitation provisions  
16 are not enforceable. See Borden, Inc. v. Advent Ink Co., 701 A.2d 255, 264 (1997).  
17 A contractual provision is unconscionable if: 1) one of the parties had no meaningful  
18 choice with respect to the provision, and 2) the provision unreasonably favors the other  
19 party.” Id. (citing Witmer v. Exxon Corporation, 495 Pa. 540, 434 A.2d 1222 (1981)).  
20 The burden of establishing unconscionability lies with the party seeking to invalidate  
21 a contract. Salley v. Option One Mort Corp., 592 Pa. 323, 347 (2007).

22 Here, the evidentiary record demonstrates that both parties are experienced and  
23 sophisticated business people. Mushroom is a family owned business that conducts  
24 sales throughout the country. As noted by Mushroom, Penske is a much larger  
25 business with \$5.2 billion in revenue. While Mushroom asserts that the contract was  
26 offered on a “take it or leave it” basis, this evidence fails to establish that Mushroom  
27 had no meaningful choice with respect to the provision. Moreover, a limitation of  
28 damages provision appears to be a reasonable business practice under Pennsylvania



1 law. Section 2-719(3) of the Pennsylvania Code, identical to Cal. Commercial Code  
2 2719(3), provides:


3 ‘Consequential damages may be limited or excluded unless the limitation  
4 or exclusion is unconscionable. Limitation of consequential damages for  
5 injury to the person in the case of consumer goods is prima facie  
unconscionable but limitation of damages where the loss is commercial  
is not.’

6 Here, as in K & C, Inc. v. Westinghouse Elec. Corp., 437 Pa. 303, 308 (1970), the loss  
7 is commercial, not involving personal injury. As Comment 3 to Section 2-719(3)  
8 points out, the exclusion is ‘merely an allocation of unknown or undeterminable risks.’  
9 The limitation of damages provision serves to allocate unknown risks. Such a  
10 provision is commercially reasonable, especially in a case such as this where the delay  
11 in obtaining a working substitute vehicle was only a matter of hours, not days or weeks.  
12 See Eimco Corp. v. Lombardi, 193 Pa.Super. 1 (1969). “The fact that consequential  
13 damages nevertheless resulted was clearly a possibility that the parties foresaw and  
14 bargained for at the inception of their relationship.” New York State Electric & Gas  
15 Corp. v. Westinghouse Elec. Corp., 387 Pa. Super 537, 560 (1989). Under these  
16 circumstances, Mushroom fails to make a sufficient showing that there is a genuine  
17 issue of material fact regarding the unconscionability of the damage limitation  
18 provision (the Non-Liability for Contents provision, DNOL, Exh. A at §16).

19 In sum, the court denies partial summary judgment for Penske on whether  
20 Penske breached the duty to maintain the vehicle in good operating condition, denies  
21 partial summary judgment for Penske on whether Penske provided a replacement  
22 vehicle within a reasonable period of time, and grants partial summary judgment in  
23 favor of Penske on the damage limitation provision (the Non-Liability for Contents  
24 provision).

25 **IT IS SO ORDERED.**

26 DATED: January 7, 2015

27   
28 Hon. Jeffrey T. Miller  
United States District Judge

cc: All parties