

1 [prior firm redacted]

2 Mary F. Mock (State Bar No. 249279)

3 Attorneys for Defendant, Cross-Complainant, and Cross-Defendant  
4 PACIFIC NATIONAL SECURITY SERVICES, INC.

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**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

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**FOR THE COUNTY OF LOS ANGELES, SOUTH DISTRICT**

8

9 THE CONTINENTAL INSURANCE  
10 COMPANY, a Pennsylvania corporation; and  
24K STYLE LLC, a New York limited liability  
company,

11 Plaintiffs,

12 vs.

13 IMPAC LOGISTICS SERVICES, INC., a  
California corporation; IDS IMPAC LTD., a  
14 Delaware Corporation; ALBA WHEELS UP  
INTERNATIONAL, INC., a New York  
15 corporation; MITSUI O.S.K. BULK SHIPPING  
(USA), INC., a Delaware corporation; T.K.  
16 TRANSPORT SERVICES, INC., a California  
corporation; PACIFIC SECURITY SERVICES,  
17 INC., a California corporation; and DOES 1  
through 150, inclusive,

18 Defendants.

19

CASE NO. NC042638

[Assigned to Hon. Roy L. Paul, Dept. 88C]

**DEFENDANT PACIFIC NATIONAL  
SECURITY SERVICE, INC.'S MOTION  
FOR SUMMARY ADJUDICATION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES; DECLARATIONS OF  
JOE RAMIREZ AND LAURA K. KIM IN  
SUPPORT THEREOF**

**[FILED CONCURRENTLY WITH SEPARATE  
STATEMENT OF UNDISPUTED FACTS AND  
SUPPORTING EVIDENCE; DECLARATION OF JOE  
RAMIREZ IN SUPPORT THEREOF; DECLARATION  
OF LAURA K. KIM IN SUPPORT THEREOF; AND  
PROPOSED ORDER]**

DATE: JUNE 30, 2009

TIME: 8:30 A.M.

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1 PACIFIC NATIONAL SECURITY  
2 SERVICES, INC., a California Corporation,

DEPT.: 88C

3 Cross-Complainant,

TRIAL DATE: JULY 20, 2009

4 vs.

5 IMPAC LOGISTICS SERVICES, INC., a  
6 California corporation; IDS IMPAC LTD., a  
7 Delaware Corporation; ALBA WHEELS UP  
8 INTERNATIONAL, INC., a New York  
9 corporation; MITSUI O.S.K. BULK SHIPPING  
10 (USA), INC., a Delaware corporation; T.K.  
11 TRANSPORT SERVICES, INC., a California  
12 corporation; and ROES 1 through 150,  
13 inclusive,

14 Cross-Defendants.

15 **TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

16 **PLEASE TAKE NOTICE** that on June 30, 2009, at 8:30 a.m., or as soon  
17 thereafter as the matter may be heard, in Dept. "88C" of the above-entitled Court, located at 638 S.  
18 Beacon Street, San Pedro, California, Defendant Pacific National Security Services, Inc.  
19 ("Defendant" or "Pacific"), will and hereby does move for an order adjudicating that the following  
20 issues be decided against Plaintiffs, that no further proof thereof shall be required at the trial of  
21 this action, and that any final judgment in this action shall, in addition to the matters determined at  
22 trial, be based upon the issues so established:

23 **ISSUE NO. 1**

24 For the purposes of this motion only, assuming that Plaintiffs were the intended  
25 third-party beneficiaries of the Contract between Impac and Pacific, their damages are limited by a  
26 valid liquidated damages clause in the Contract.

27 **ISSUE NO. 2**

28 Plaintiffs cannot maintain their fifth cause of action against Pacific because even if  
Pacific was negligent in its provision of security services, Plaintiffs' damages are limited to the  
amount stated in the liquidated damages clause of the contract.

**ISSUE NO. 3**

Plaintiffs cannot maintain their eighth cause of action against Pacific because

1 California *Uniform Commercial Code* § 7204, which regulates warehousemen, does not apply to  
2 Pacific.

3                   This Motion is based on this Notice, the accompanying Memorandum of Points  
4 and Authorities, the concurrently filed Separate Statement of Undisputed Material Facts, the  
5 Declarations of Laura K. Kim and Joe Ramirez in support thereof and Exhibits thereto, upon the  
6 complete records and files of this action, and upon any such other and further oral or documentary  
7 evidence as may be presented at the hearing of this motion.

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10 DATED: April 16, 2009

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By: \_\_\_\_\_

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Mary F. Mock

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Attorneys for Defendant and Cross-Complainant  
PACIFIC NATIONAL SECURITY SERVICES,  
INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION AND SUMMARY OF ARGUMENT**

3 Plaintiffs have sued a freight forwarding service, a shipper, delivery company,  
4 warehouse operator, and a security company for the alleged loss of its cargo from a warehouse in  
5 Carson, California. The fourth, fifth, and eighth causes of action for breach of contract for third-  
6 party beneficiary, negligent provision of security, and loss of goods pursuant to California  
7 *Uniform Commercial Code* § 7204, respectively, are alleged against Defendant Pacific National  
8 Security Services, Inc. (“Pacific”).

9 For the purposes of this motion only, assuming that Plaintiffs were the intended  
10 third-party beneficiaries of the Contract between Impac and Pacific, their damages are limited by a  
11 valid liquidated damages clause in the Contract. Pacific is entitled to summary adjudication on the  
12 fifth cause of action for negligent provision for security services because even assuming that  
13 Pacific was negligent, Plaintiffs damages are limited by a contractual liquidated damages clause.  
14 Pacific is entitled to summary adjudication on the eighth cause of action because Pacific is not  
15 subject to the purview of California *Uniform Commercial Code* § 7204.

16 **II. STATEMENT OF FACTS**

17 Plaintiff 24K Style LLC hired several companies to transport a shipment of its  
18 clothing (“Cargo”) from China to Los Angeles, California for shipment to nationwide retailers.  
19 (Undisputed Fact (“UF”) 1). Alba Wheels Up International, Inc. provided freight forwarding  
20 services in connection with the transport of the Cargo. (UF 2.) Mitsui O.S.K. Bulk Shipping  
21 (USA), Inc. took physical possession of the Cargo and transported it by ocean-going vessel from  
22 China to the Port of Los Angeles on or about July 9, 2007. (UF 3.) On July 13, 2007, T.K.  
23 Transport Services, Inc. (“TK”) allegedly delivered the Cargo from the Port of Los Angeles to a  
24 warehouse operated by IDS Impac Ltd (formerly IMPAC Logistics, Inc.) (“IMPAC”). (UF 4, 5.)  
25 Records show that the container holding the Cargo bore identification #MOFU6717745  
26 (“Container”) and was delivered to IMPAC’s warehouse (“Warehouse”) at 3:56 p.m. on July 13,  
27 2007. (UF 6.) However, the Container is not listed or logged in any records as having left the  
28 Warehouse. (UF 7.) Plaintiffs allege that at some point prior to July 17, 2007, the Cargo and its

1 Container was stolen and never recovered. (UF 8.)

2 Pacific and IMPAC entered into a Service Contract (“Contract”) whereby, for a  
3 monthly service fee, Pacific agreed to provide security services at the Warehouse. (UF 9.)  
4 Pursuant to the Contract, Pacific security personnel were present and on duty at the Warehouse  
5 between July 13, 2007 and July 17, 2007. (UF 10.) At no time was Pacific paid to store any of  
6 the goods in the Warehouse. (UF 16.) Moreover, Pacific is not in the business of storing or  
7 warehousing goods for profit. (UF 16.) The Contract also contains a liquidated damages  
8 provision that limits Pacific’s liability for any loss or damage to one month’s service fee. (UF 11.)  
9 Pacific performed security services under the Contract and billed IMPAC and IMPAC paid for  
10 services covered by the Contract at the rates stated in the Contract. (UF 12.)

11 According to Joel Levitt, Director of Operations for IMPAC, IMPAC is not privy  
12 to the value of the goods received from customers and its employees typically have no idea what is  
13 inside the containers at the Warehouse. (UF 12, 13.) This is also true of Pacific employees, who  
14 would not know from looking at a container who dropped it off. (UF 13.) Pacific has no  
15 knowledge of the facts surrounding the loss of the Cargo. (UF 14.)

16 On July 11, 2008, Plaintiffs 24K Style LLC and its insurer, The Continental  
17 Insurance Company, filed suit against IMPAC, Pacific National Security, and the above  
18 aforementioned companies for damages related to the alleged loss of the Cargo.

19 **III. SUMMARY ADJUDICATION IS REQUIRED WHERE A CAUSE OF ACTION**  
20 **HAS NO MERIT**

21 A defendant’s motion for summary adjudication is proper if it disposes of a cause  
22 of action, an affirmative defense, a claim for punitive damages, or an issue of duty. *Code of Civil*  
23 *Procedure* § 437c(f)(1). To prevail on a summary adjudication motion against a cause of action,  
24 the moving defendant need only negate one essential element of that cause of action. *Code of*  
25 *Civil Procedure* § 437c(o)(1); *Bacon vs. Southern California Edison Co.* (1997) 53 Cal.App.4th  
26 854, 858. Thus, a defendant’s moving papers need not disprove every element of the action.  
27 *Code of Civil Procedure* § 437c(p)(2); *Union Bank vs. Superior Court* (1995) 31 Cal.App.4th 573,  
28 585-86.

1                   Once the defendant has met the burden of establishing that one or more of the  
2 elements of the cause of action has no merit, the burden shifts to the plaintiff to show that a triable  
3 issue of one or more material facts exists as to that cause of action. *Code of Civil Procedure* §  
4 437c(p)(2).

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6 **IV.     ASSUMING ARGUENDO, THAT PLAINTIFFS WERE THE INTENDED**  
7 **BENEFICIARIES OF THE PACIFIC/IMPAC CONTRACT, THEIR DAMAGES**  
8 **ARE LIMITED BY THE CONTRACT’S LIQUIDATED DAMAGES CLAUSE**

9       **A.     The Liquidated Damages Clause In The Contract Is Valid And Enforceable**

10                   “The parties in a contract may agree in advance to liquidate their damages – to  
11 provide ahead of time that a certain sum of money is conclusively presumed to represent the  
12 amount of damage that will be caused by a specified breach of the contract.” *Utility Consumers’*  
13 *Action Network, Inc. v. AT&T Broadband of Southern Cal., Inc.* (2006) 135 Cal.App.4th 1023,  
14 1029. Liquidated damages serve an important function by removing uncertainty from determining  
15 damages from a breach of contract and reducing litigation. *Utility Consumers’ Action Network,*  
16 *Inc. v. AT&T Broadband of Southern Cal., Inc., supra*, 135 Cal.App.4th at 1038.

17                   Pacific and IMPAC agreed in advance to liquidate their damages in the following  
18 provision at ¶ 2:

19                   **“It is understood and agreed the Pacific National Security, Inc.**  
20 **is not an insurer.** Payments provided herein are based solely on the  
21 value of service(s) as set forth herein and are unrelated to the value  
22 of property Client [IMPAC] or property of others, located on  
23 premises of Client; that Pacific National Security, Inc. makes no  
24 guaranty or warranty, including any implied warranty of  
25 merchantability or fitness that the services will avert or prevent  
26 occurrences therefrom which the service is designed to detect or  
27 avert. **Client acknowledges that it is impractical and extremely**  
28 **difficult to fix the actual damages, if any, which may**

1                   **proximately result from Pacific National Security, Inc.’s**  
2                   **negligence, or a failure by Pacific National Security, Inc. to**  
3                   **perform any of the obligations herein** because of among other  
4 things:

5                   A.       The uncertain amount of value of property belonging to  
6 Client or the property of others kept on the premises which may be  
7 lost, stolen, destroyed, damaged or otherwise affected by  
8 occurrences which the service is designed to detect or avert;

9                   B.       The uncertainty of the response time of any police or fire  
10 department, should the police or fire department is dispatched as a  
11 result of a call from the security officer;

12                  C.       The inability to ascertain what portion, if any, of any loss  
13 would be proximately caused by Pacific National Security, Inc.’s  
14 failure to perform. Client understands and agrees that if Pacific  
15 National Security, Inc. should be found liable for loss or damage due  
16 to Pacific National Security, Inc’s negligence, or a failure of Pacific  
17 National Security, Inc to perform any of the obligation herein,

18                   **Pacific National Security, Inc’s liability shall be limited to one**  
19                   **month’s service fee for routine services, as liquidated damages**  
20                   **and not as a penalty, and this liability shall be exclusive, and**  
21                   **that the provisions of this section shall apply if loss or damage,**  
22                   **irrespective of cause or origin, results directly or indirectly to**  
23                   **persons or property, from performance or nonperformance of**  
24                   **the obligations imposed by this agreement, or from negligence,**  
25                   **active or otherwise, of Pacific National Security, Inc., its agents,**  
26                   **assigns or employees.”** (Emphasis added) (*See* Declaration of Joe  
27 Ramirez, Exh. “A”).

28                   A long line of California cases confirm that liquidated damages provisions are valid

1 even in form contracts and even where the provision itself is not actually negotiated between the  
2 parties. *Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern Cal., Inc.*,  
3 *supra*, 135 Cal.App.4th at 1038; *Better Food Mkts. v. Amer. Dist. Teleg. Co.* (1953) 40 Cal. 2d  
4 179 (*superseded on other grounds*); *Lowe v. Mass. Mut. Life Ins. Co.* (1976) 54 Cal.App.3d 718.  
5 Furthermore, California courts have consistently upheld liquidated damages provisions in cases  
6 involving security alarm companies with facts very similar to the one here.

7           In *Utility Consumers' Action Network, Inc. v. AT&T Broadband of Southern Cal.,*  
8 *Inc., supra*, 135 Cal.App.4th 1023 (“*UCAN*”), a consumer organization appealed from the  
9 summary judgment entered in favor of defendant cable Internet service providers in an action to  
10 determine the legality of a late fee liquidated damages provision contained in defendants’ service  
11 contracts. *Id.* at 1025. Although *UCAN* involved consumer services contracts under *Civil Code* §  
12 1671(d), the Court thoroughly analyzed the history and current law on liquidated damages clauses.

13           The *UCAN* court analyzed the two-part test for determining whether a liquidated  
14 damages provision was valid. *Id.* at 1029. Under the first part, fixing the amount of actual  
15 damages had to be impracticable or extremely difficult. *Id.* The second part requires that the  
16 amount of liquidated damages represents “a reasonable endeavor by the parties to estimate fair  
17 compensation for the loss sustained.” *Id.*

18           As for the requirement that fixing the amount of actual damages had to be  
19 impracticable or extremely difficult, California courts have uniformly found this to be true in the  
20 context of alarm company contracts. *See, e.g., H.S. Perlin Company, Inc. v. Morse Signal Devices*  
21 *of San Diego* (1989) 209 Cal.App.3d 1289; *Better Food Mkts. v. Amer. Dist. Teleg. Co.* (1953) 40  
22 Cal. 2d 179, *superseded on other grounds*; *Feary v. Aaron Burglar Alarm, Inc.* (1973) 32  
23 Cal.App.3d 553. Here, it is also impracticable or extremely difficult to fix the amount of actual  
24 damages in advance because Pacific was not informed of the nature of the contents or the value of  
25 any of the contents in the Warehouse. (UF 12,13.)

26           As for the requirement that the amount of liquidated damages represents “a  
27 reasonable endeavor by the parties to estimate fair compensation for the loss sustained,” California  
28 law is that negotiation by both contracting parties is not required by the reasonable endeavor test.



1 *UCAN, supra*, 135 Cal.App.4th at 1035; *Better Food Mkts. v. Amer. Dist. Teleg. Co., supra*, 40  
2 Cal. 2d at 187 (Even though the liquidated damages clause was found in a form contract, and even  
3 though the defendant did not investigate plaintiff’s business or the value of its inventory, the  
4 parties agreed to the liquidated damages provision, “and there is no evidence that they were not  
5 fully aware of circumstances making it desirable that liquidated damages be provided for.”) Here,  
6 the fact that the liquidated damages clause was contained in a form contract does not detract from  
7 its validity and enforceability since Pacific and IMPAC were sophisticated business entities who  
8 entered into the Contract at arms’-length.

9 **B. Public Policy Favors Enforcement Of The Liquidated Damages Clause**

10 The policy rationale for upholding liquidated damages provisions in contracts  
11 involving security alarm companies was stated best in *H.S. Perlin Company, Inc. v. Morse Signal*  
12 *Devices of San Diego, supra*, 209 Cal.App.3d 1289. The consequences of an alarm or security  
13 company’s failure are so innumerable that it would, as a matter of law, be impracticable or  
14 extremely difficult to fix the actual damages up front. *H.S. Perlin Company, Inc. v. Morse Signal*  
15 *Devices of San Diego, supra*, 209 Cal.App.3d at 1296. “If they could not contract away this risk,  
16 they would have to insure; and since it is likely that the user would also insure, this would  
17 probably result in overinsurance. Such a [liquidated damages] clause should be enforced in a  
18 high-risk, low-compensation service when enforcement is what the parties expected.” *Id.* at 1297  
19 (*citing* Sweet, Liquidated Damages in California (1972) 60 Cal.L.Rev. 84, 115; 11 Cal. Law  
20 Revision Com. Rep. (1973) 1262.)

21 Here, as in *H.S. Perlin, Better Foods* and its progeny, the compensation provided to  
22 the security company, at \$12.75 to \$19.13 per hour (UF 13), was nominal in relation to the  
23 company’s potential liability. If security companies like Pacific could not rely on the enforcement  
24 of liquidated damages clauses in their contracts, they would essentially be forced to act as insurers.  
25 Such a result would be inequitable in light of the small compensation they receive for their  
26 services in relation to the unknown and potentially limitless value of goods which may be stolen.  
27 Furthermore, it is undisputed that neither IMPAC nor Pacific and its employees were informed of  
28 the contents of particular deliveries or containers on the Warehouse premises. (UF 12,13.) Thus,

1 the policy rationale in cases such as *H.S. Perlin* and *Better Foods* applies equally here and public  
2 policy weighs in favor of enforcing the liquidated damages provision in the Contract.

3 C. **Assuming That Plaintiffs Are Third-Party Beneficiaries Under The Contract,**  
4 **Their Recovery Is Limited To Liquidated Damages Because Third-Party**  
5 **Beneficiaries Cannot Enjoy Rights Under A Contract Greater Than That Of**  
6 **The Actual Contracting Parties**

7 It is well settled that a third-party beneficiary cannot assert greater rights under the  
8 contract than those of the actual contracting party. *Syufy Enterprises v. City of Oakland* (2002)  
9 104 Cal.App.4th 869, 888. Because the contract provides the foundation for the third-party  
10 beneficiary's rights, Plaintiffs "must take that contract as [they] find it," rather than having the  
11 right to select the parts [they] find advantageous and reject those [they] find not to [their] liking.  
12 *Marina Tenants Assn. v. Deauville Marina Development Co.* (1986) 181 Cal.App.3d 122, 132.

13 Under the Contract's liquidated damages provision, Pacific's liability to IMPAC is  
14 limited to the amount of one month's fee for routine services. As purported third-party  
15 beneficiaries, Plaintiffs may not recover an amount greater than what is due to IMPAC – the actual  
16 contracting party. Therefore, assuming for the purposes of this Motion only that Plaintiffs are  
17 third-party beneficiaries under the Contract, Plaintiffs may recover only what would be due to the  
18 actual contracting parties, which amount is plainly fixed in writing by the Contract.

19 V. **ASSUMING THAT PACIFIC WAS NEGLIGENT IN PROVIDING SECURITY**  
20 **SERVICES, PLAINTIFFS' DAMAGES ARE LIQUIDATED BY THE CONTRACT**

21 Plaintiffs allege in the fifth cause of action for "Negligent Provision of Security  
22 Services" that "the Cargo would not have been stolen had PACIFIC competently performed its  
23 duties as the provider of security services with respect to the Warehouse and the Cargo stored  
24 therein." Complaint, ¶ 54, Exh. "C" to Kim Decl. Plaintiffs also allege that "[b]y contracting with  
25 IMPAC/IDS to provide security services with respect to the Warehouse and its contents, PACIFIC  
26 voluntarily undertook to enable IMPAC/IDS to discharge their duty to said clients." Nowhere do  
27 Plaintiffs allege that Pacific owed any duties not arising from its Contract with IMPAC. For that  
28 reason, Plaintiffs cannot circumvent the Contract's liquidated damages clause simply by bringing

1 a tort cause of action. Several California courts have so held.

2                   In *Feary v. Aaron Burglar Alarm, Inc.*, *supra*, 32 Cal.App.3d 553,  
3 plaintiff/appellant owned and operated a retail jewelry store. Defendant/respondent operated a  
4 business installing and maintaining burglar alarm systems in various types of businesses. *Id.* at  
5 555. In 1963, the parties signed a form contract, which provided:

6                   “the Contractor [alarm company] is not an insurer . . . . [F]rom the  
7 nature of the services to be rendered, it is impracticable and  
8 extremely difficult to fix the actual damages, if any, which may  
9 proximately result from a failure on the part of the Contractor to  
10 perform any of its obligations hereunder . . . . [T]he Contractor’s  
11 liability hereunder shall be limited to a fixed sum of fifty dollars, as  
12 liquidated damages, and not as a penalty, and this liability shall be  
13 exclusive.”

14 *Id.* Subsequently, plaintiff’s business was burglarized and \$100,000 of jewelry was stolen. *Id.*  
15 Plaintiff sued the alarm company for negligence and breach of warranties.

16                   The trial court found that the alarm company 1) was negligent in the installation  
17 and maintenance of the alarm system; 2) breached an express and implied warranty; and 3) that  
18 plaintiff jewelry store was damaged in the amount of \$100,000 as a proximate result of the alarm  
19 company’s negligence and breach of warranty. *Id.* However, the court also concluded that the  
20 liquidated damages provision was valid and determined that plaintiff’s damages were limited to  
21 \$50. *Id.* at 556. On appeal, the Court stated:

22                   “In seeking actual damages, appellant is attempting to enforce a tort  
23 measure of damages based on the trial court’s stipulated finding that  
24 respondents were negligent in the installation and maintenance of  
25 the burglar alarm system. There is no allegation of property damage  
26 or the breach of any duty other than that contemplated by the  
27 contract. We hold that appellant is limited to the damages provided  
28 for in the agreement. The court in *Better Food, supra*, at page 188,

1 stated: “. . . Although an action in tort may sometimes be brought  
2 for the negligent breach of a contractual duty . . . , still the nature of  
3 the duty owed and the consequences of its breach must be  
4 determined by reference to the contract which created that duty . . .  
5 The plaintiff cites no authority and none has been discovered to the  
6 effect that where the breach of a duty created only by contract is a  
7 negligent one the application of a valid clause for liquidated  
8 damages may be avoided by bringing an action in tort.” *Id.* at 558.

9 The Court of Appeal ruled similarly in *H.S. Perlin Company, Inc. v. Morse Signal*  
10 *Devices of San Diego* (1989) 209 Cal.App.3d 1289. There, the owner of a coin and stamp store  
11 and its consignors appealed from a judgment awarding them \$250 in liquidated damages caused  
12 by the negligence of an alarm company (Morse). *Id.* at 1291. The form contract between the store  
13 owner and alarm company stated:

14 “Morse does not represent or warrant that the alarm system may not  
15 be compromised or circumvented; that the system will prevent any  
16 loss by burglary, hold-up, fire or otherwise; or that the system will  
17 in all cases provide the protection for which it is installed or  
18 intended. Subscriber acknowledges that Morse is not an insurer . . . .”

19 *Id.* The contract in *H.S. Perlin* also contained a liquidated damages clause similar to the one in  
20 this case:

21 “Charges are based solely upon the value of the services provided  
22 for, and are unrelated to the value of the Subscriber’s property or the  
23 property of others located in Subscriber’s premises. The amounts  
24 payable by the Subscriber are not sufficient to warrant Morse  
25 assuming any risk of consequential or other damages to the  
26 Subscriber due to Morse’s negligence or failure to perform . . . .  
27 From the nature of the services to be performed, it is impractical and  
28 extremely difficult to fix the actual damages, if any, which may

1 proximately result from the failure on the part of Morse to perform  
2 any of its obligations hereunder . . . . If Morse should be found liable  
3 for loss or damage due to a failure on the part of Morse or its  
4 system, in any respect, its liability shall be limited to the refund to  
5 Subscriber of an amount equal to the aggregate of six (6) monthly  
6 payments, or to the sum of Two Hundred Fifty (\$250.00) Dollars,  
7 whichever sum shall be less, as liquidated damages and not as a  
8 penalty, and this liability shall be exclusive. The provisions of this  
9 paragraph shall apply in the event loss or damage, irrespective of  
10 cause or origin, results directly or indirectly to person or property  
11 from the performance or non-performance of the obligations set  
12 forth by the terms of the contract, or from negligence, active or  
13 otherwise, of Morse, its agents or employees.” *Id.* at 1292.

14 While the contract was in force, burglars stole approximately \$200,000 of goods  
15 from the store. *Id.* Before entering the store, the burglars cut a telephone line which ran from the  
16 alarm system in the store to Morse’s central station. An interruption in services signal was  
17 received by Morse, but nobody at Morse investigated the reason for the interruption. *Id.* at 1292-  
18 93. At trial, the court ruled Morse’s *negligence* caused the plaintiffs’ losses, but limited  
19 recoverable damages to \$250 under the contract. *Id.* The Court of Appeal affirmed, holding that  
20 the liquidated damages clause was enforceable under *Civil Code* § 1671, under either the pre-1978  
21 version, as amended thereafter. *Id.* at 1291, 1297-1298.

22 As in *Better Foods, Feary*, and *H.S. Perlin*, Plaintiffs in this case do not and cannot  
23 allege that Pacific breached a duty other than that arising out of the Contract. Were it not for the  
24 Contract between Pacific and IMPAC, Pacific would owe no duty to IMPAC to patrol the  
25 Warehouse, whether or not the Warehouse was empty or contained any of Plaintiffs’ goods. Thus,  
26 Plaintiffs cannot raise a triable issue of fact that Pacific would have owed any duty to them absent  
27 the Contract. Since Pacific’s alleged duty to Plaintiffs arises only and absolutely out of the  
28 Contract, Plaintiffs’ recovery for Pacific’s negligence, if any, is limited by the Contract’s

1 liquidated damages clause.

2 **VI. DEFENDANT IS ENTITLED TO SUMMARY ADJUDICATION ON THE EIGHTH**  
3 **CAUSE OF ACTION BECAUSE CALIFORNIA *COMMERCIAL CODE* § 7204**  
4 **DOES NOT APPLY TO DEFENDANT**

5 California *Uniform Commercial Code* § 7204 states:

6 (a) A warehouse is liable for damages for loss of or injury to the  
7 goods caused by its failure to exercise care with regard to the goods  
8 that a reasonably careful person would exercise under similar  
9 circumstances. Unless otherwise agreed, the warehouse is not liable  
10 for damages that could not have been avoided by the exercise of that  
11 care.

12 A warehouseman is defined as "a person engaged in the business of storing goods  
13 for hire." California *Uniform Commercial Code* § 7102(1)(h). There are no California cases in  
14 which a security firm or security services personnel was determined to be a warehouse or  
15 warehouseman for purposes of California *Uniform Commercial Code* § 7204. Furthermore, the  
16 Ninth Circuit made clear that California *Uniform Commercial Code* § 7204 applies only to those  
17 who are "storing ... goods for profit." *Insurance Co. of N. Am. v. NNR Aircargo Serv. (USA), Inc.*  
18 (9th Cir. 2000) 201 F.3d 1111, 1115.

19 In *Insurance Co. of N. Am. v. NNR Aircargo Serv. (USA), Inc.* (9th Cir. 2000) 201  
20 F.3d 1111, a plaintiff insurance company sued NNR, a company whose services included "freight  
21 forwarding, customs brokering, transporting from the Port of Long Beach to NNR's warehouse...,  
22 and palletizing." *Insurance Co. of N. Am. v. NNR Aircargo Serv. (USA), Inc., supra*, 201 F.3d  
23 1111, 1112. NNR contracted with sporting goods manufacturer, Dunlop, to transport 2,703  
24 cartons of golf balls from Japan to Long Beach, California. *Id.* After completing the ocean  
25 transport, NNR transported the golf balls to its warehouse where NNR held the cargo for a few  
26 days before it was to be shipped to its final destination in South Carolina. *Id.* However, the golf  
27 balls were stolen from NNR's warehouse before they could be picked up for final delivery.  
28 Dunlop's insurer sued NNR in subrogation for the non-recovered golf balls and for duty and ocean

1 freight charges. *Id.* at 1113. The district court granted NNR’s partial motion for summary  
2 judgment and limited its liability to \$50 under the contract terms.

3           On appeal, the insurer argued that California *Uniform Commercial Code* § 7204  
4 applied to NNR because it warehoused the golf balls. *Id.* at 1115. The Court disagreed, stating  
5 that, “[o]ther than pointing out that NNR was holding the container of golf balls while preparing it  
6 to be picked up for delivery to South Carolina, [the insurer] fails to raise any facts of material  
7 relevance that NNR was storing the goods for profit.” *Id.*

8           Similarly here, Plaintiffs cannot show any evidence that Pacific stored any goods  
9 for profit, as Pacific provided only security services. Thus, Plaintiffs cannot raise a triable issue of  
10 fact that Pacific is subject to the purview of California *Uniform Commercial Code* § 7204, and  
11 summary adjudication should be granted on the eighth cause of action in favor of Pacific.

12 **VII. CONCLUSION**

13           For all the foregoing reasons, Defendant Pacific National Security Services, Inc.  
14 respectfully requests that the Court grant summary adjudication on the fourth, fifth, and eighth  
15 causes of action of the First Amended Complaint in favor of Pacific National Security Services,  
16 Inc.

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18 DATED: April 16, 2009

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20 By: \_\_\_\_\_  
21 Mary F. Mock  
22 Attorneys for Defendant, Cross-Complainant, and  
23 Cross-Defendant  
24 PACIFIC NATIONAL SECURITY SERVICES,  
25 INC.  
26  
27  
28