

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT**

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ALLIANCE LOGISTICS, INC. n/k/a	)	
ALLIANCE 3PL CORP.,	)	Appeal from the United
	)	States District Court for the
Plaintiff-Appellee,	)	Northern District of Illinois,
	)	Eastern Division
v.	)	
	)	No. 07 C 4944
NEW PRIME, INC. d/b/a	)	
PRIME INC.,	)	Hon. Elaine E. Bucklo
	)	
Defendant-Appellant.	)	

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**OPENING BRIEF OF DEFENDANT-APPELLANT NEW PRIME, INC.**

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**CIRCUIT RULE 26.1 DISCLOSURE STATEMENT**

Appellate Court No: 09-3489

Short Caption: Alliance Logistics, Inc. v. New Prime, Inc.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] **PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED..**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P. 26.1 by completing the item #3):  
New Prime, Inc., d/b/a Prime, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:  
Mayer Brown LLP  
Cassiday Schade LLP  
Novoselsky Law Offices

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

New Prime, Inc. has no parent corporation.

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

Attorney's Signature: /s/ Jeffrey W. Sarles Date: October 13, 2009

Attorney's Printed Name: Jeffrey W. Sarles

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Cir. Rule 3(d). Yes X No   .

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Attorney's Signature: /s/ Katherine E. Agonis Date: October 13, 2009

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N/A

Attorney's Signature: /s/ Kristin W. Silverman Date: November 12, 2009

Attorney's Printed Name: Kristin W. Silverman

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## **JURISDICTIONAL STATEMENT**

The district court had jurisdiction pursuant to 28 U.S.C. § 1332. Plaintiff-appellee Alliance Logistics, Inc. (“Alliance”) is an Illinois corporation with its principal place of business in Bolingbrook, Illinois. Defendant-appellant New Prime, Inc. (“Prime”) is a Missouri corporation with its principal place of business in Springfield, Missouri. Alliance’s complaint claimed damages of more than \$2 million, well above the \$75,000 jurisdictional amount.

On August 14, 2009, a jury returned a verdict in favor of Alliance on its breach of contract claim and awarded Alliance damages of \$2,161,229.26. A1. The district court entered final judgment the same day. A1-A2. On August 28, 2009, Prime moved for judgment as a matter of law under Fed. R. Civ. P. 50(b) and alternatively for a new trial under Rule 59(a). On October 5, 2009, the district court denied Prime’s motions. A3.

On October 8, 2009, Prime timely filed a Notice of Appeal. R.164. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

## **ISSUES PRESENTED FOR REVIEW**

1. Whether Prime was entitled to judgment as a matter of law where the meaning of disputed terms in the “back solicitation” clause of the parties’ contract is unambiguous and the clear weight of the evidence establishes that Prime did not solicit Alliance’s customer.

2. Whether Prime is entitled to a new trial because the district court plainly erred by failing to instruct the jury on the meaning of disputed contract terms or, insofar as the court deemed those terms ambiguous, on the jury’s duty to weigh the evidence to construe such terms.

3. Whether Prime is entitled to a new trial because the district court improperly allowed Alliance’s expert to explain the meaning of the back solicitation clause to the jury while improperly excluding testimony on that same subject from Prime’s expert.

## **STATEMENT OF THE CASE**

Alliance sued Prime on August 31, 2007. R.1. As relevant here, Alliance alleged that Prime, a trucking carrier, violated the back solicitation clause of its contract with Alliance, a company that matches shippers with carriers. According to Alliance, Prime violated that clause by soliciting the business of Loders Crokiaan USA (“Loders”), a shipper under contract with Alliance for the provision of bulk transport services. Alliance also claimed that Prime tortiously interfered with Alliance’s prospective business relations with Loders and with an existing contract with an Alliance employee. On March 9, 2009, the district court granted summary judgment to Prime on the interference with contract claim and denied summary judgment with respect to the other claims. A14.

The remaining claims were tried to a jury beginning on August 5, 2009. Prior to trial, the court granted Alliance’s motion in limine to exclude the testimony of Prime’s expert, Lana Batts, and denied Prime’s motion in limine to exclude the testimony of Alliance’s expert, Robert Walters. A11-A12. The court also denied Prime’s motions for judgment as a matter of law, raised at the close of Alliance’s case and again at the close of evidence. A5-A6, A9-A10. The jury returned a verdict in favor of Alliance on the breach-of-contract claim and in favor of Prime on the tortious-interference claim, awarding Alliance damages of \$2,161,229.26. A1. Prime then renewed its motion for judgment as a matter of law and filed an alternative motion for a new trial. The district court denied both motions on October 5, 2009. A3. This appeal followed.

## STATEMENT OF FACTS

### A. The Parties

Prime is a family-owned nationwide trucking carrier founded in 1985 by Robert Low and based in Springfield, Missouri. Tr.III:3-4. Prime initially hauled primarily packaged and refrigerated goods, but it created a bulk tanker division in 2000. *Id.* at 7. In 2005, Prime began a rapid expansion of its bulk tanker business by assigning key personnel and devoting substantial resources to it. *Id.* at 9-10; Tr.II:185-86, 188; Tr.III:76-77.

Alliance is a third party logistics provider (“3PL”), sometimes referred to as a “freight forwarder” or “broker.” Alliance was founded in 1997 by Dan Rimkus and is based in Bolingbrook, Illinois. Tr.I:123-25, 128-29. Alliance does not own any trucks or other equipment; instead it contracts with shippers to move their goods through carriers such as Prime. *Id.* at 125, 131-32; Tr.II:22-23.

### B. Contracts And Relationships

In 1998, Prime began hauling loads for Loders, a leading manufacturer of fats and oils used in the food industry. Tr.III:165. Between 1998 and 2000, Prime carried 124 loads of dry and refrigerated goods from Loders’ Channahon, Illinois, facility, mostly to a Pillsbury plant. *Id.* at 164-80, 183-85; IV:67. In addition, between 2000 and March 2003, Prime carried 13 bulk tanker loads to or from Loders, for which Prime directly invoiced Loders. Tr.III:165-66; IV:52-53, 67-68, 91-92; V:14; VI:89. See R.181 [DX1, 2, 4, 9, 10, 11]. These shipments involved a short-term transactional contract between Loders and Prime known as a “rules page.” R.181 [DX9E]; Tr.II:161-63; Tr.IV:68-69.

On April 19, 2000, Prime and Alliance entered into a Carrier-Shipper Transportation Agreement (“Agreement”), under which Prime would provide motor carrier transport for shippers upon Alliance’s request. A15. The Agreement was drafted by Alliance (Tr.II:25; R.181 ¶ 1[DX3]), states that it is governed by Illinois law (A17 ¶ 12), and contains an integration clause (*id.* ¶ 14) providing: “This document constitutes the entire agreement of the parties as to the subject matter hereof, supersedes any prior or contemporaneous oral or written agreements or understandings and may be amended only by a signed writing.” The Agreement, in which Prime is designated the “Carrier” and Alliance the “Shipper,” also contains a “back solicitation clause,” stating:

Carrier shall not solicit traffic from any shipper, consignee or customer of Shipper where Carrier first knew of the availability of such traffic as a result of Shipper’s efforts or the traffic of Shipper, consignee or customer of the Shipper was first tendered to Carrier by Shipper.

*Id.* ¶ 11.

Alliance initially used Prime infrequently because of the small size and limited capacity of Prime’s bulk tanker division. Tr.I:166-67; Tr.II:91. But Alliance made increasing use of Prime after Prime’s bulk tanker division expanded in 2005. Tr.I:67; Tr.II:98-99, 194-95.

In March 2003, Loders and Alliance executed a contract under which Alliance would arrange for carriers to transport Loders’ products from its Channahon, Illinois plant. Tr.I:136-37; R.181 [DX7]. The Alliance-Loders contract provided for termination without cause on 120 days’ notice. Tr.I:138; R.181 [DX 7 at ¶ 8].

Loders’ supply chain manager, Marcel Henneman, and his successor, Karl Mueller, were primarily responsible for overseeing the Alliance contract. Tr.I:143, 148-52. When Henneman took over as Loders’ supply chain director in 2004, he informed

Dan Rimkus of Alliance that Loders' shipping needs would soon explode due to its development of a new product that was in high demand. *Id.* at 143. Loders was concerned that Alliance, a relatively small operation, would not be able to handle the increased capacity. *Id.* at 144; Tr.II:33-34. Therefore Alliance considered it "perfect" timing that Prime was revamping its bulk tanker division in time for Alliance to meet the demand. Tr.I:170. Rimkus told Prime that the "huge growth" that Loders was expecting in 2005 would provide Prime with an opportunity to increase its loads with Alliance if Prime was willing to invest in new equipment. *Id.* at 170-71.

Loders' shipments began to increase in 2004 and became a "major push" in 2005, stabilizing in mid to late 2006. *Id.* at 145. During this time, Alliance increasingly relied on Prime to service Loders. *Id.* at 172-174; Tr.III:205.

### **C. 2005 Meetings**

In October 2005, Alliance arranged meetings between Loders and three of Alliance's "core base" carriers, including Prime. Tr.I:175-76. Loders' Henneman had requested the meetings because he wanted to "combat" a driver shortage" in light of Loders' "huge growth" and to express directly to the carriers his concerns about service and truck availability. *Id.* at 176, 179. Henneman also wanted to have a carrier build a tank wash (which cleans the interior of a tanker trailer before it is loaded with product, Tr.III:116-17) onsite at Loders' facility—a proposal that Alliance did not support. Tr.II:36-37. Representatives from Prime met with Loders at Loders' facility on October 11, 2005. Tr.I:178-79. At this meeting—with Alliance's Dan Rimkus present—Prime expressed interest in building the tank wash for Loders and increasing the loads it hauled for Loders. Tr.II:207-08.

Loders had already begun to evaluate its transportation options and review its contract with Alliance. Tr.V:81; Tr.IV:98-99. With the final year of that contract approaching, Loders began “to review whether we wanted to continue the contract,” and Henneman thought it prudent to assess other options “for comparative purposes.” Tr.IV:98. Loders was concerned that “after early 2005 Alliance’s service level dropped,” particularly with respect to “on-time delivery,” and had not improved. Tr.V:80-81. As part of its evaluation process, Loders considered bringing logistics management in-house and obtaining carriers itself. *Id.* at 99, 101. Loders decided to solicit information from “several carriers,” including Prime. *Id.* at 108-09.

On November 15, 2005, Henneman and his then-superior, Chee Kuan Wong, attended a meeting at Prime’s corporate office in Springfield. Tr.II:240; Tr.IV:101. Henneman told Alliance’s Rimkus about the meeting, and Rimkus decided to attend as well. *Id.*; Tr.I:181-82. In Henneman’s view, the “primary goal” of this meeting was to discuss the tank wash proposal, and a secondary purpose was “to basically meet and greet and discuss ongoing business.” Tr.IV:101-02. According to Wong (and unbeknownst to Alliance or Prime), Loders also wanted to determine if it should have Prime “bid to be the new 3PL for the Loders facility to replace Alliance.” Tr.V:82. Rimkus was upset that Prime had invited Loders to visit Prime directly instead of going through him, and he wanted to “work on replacing them as a carrier,” but Henneman advised against doing so. Tr.I:182.

The November 15 meeting began with a tour of Prime’s facility, and the various representatives then met in a conference room. Tr.I:184-86. During much of that meeting, Rimkus met separately with a credit manager and Prime’s chief financial officer. *Id.* at 186-89. Prime and Loders discussed the tank wash and the possibility of

having Prime dedicate more of its trucks to Loders. Tr.IV:103. Henneman told Prime that “Loders was considering putting its transportation business contract out to bid or would be possibly making a change at the conclusion of the contract between Loders and Alliance.” *Id.*; Tr.III:187. According to Henneman, Prime did not discuss Prime’s replacing Alliance as Loders’ logistics provider. Tr.IV:110. Rather, Loders made an “informal request” for information from Prime about whether it could manage Loders’ transportation needs and at what cost. *Id.* at 104. Henneman said that he “solicited Prime on behalf of Loders rather than Prime’s representatives soliciting [him].” *Id.*

When Rimkus returned to the Loders meeting from his conversation with Prime’s CFO, he was asked not to enter the room yet, because the Loders officers were discussing a “credit limit issue” that Loders believed was affecting the number of trucks that Prime was making available for Loders loads. Tr.IV:110; *id.* at 105-07. Loders did not tell Alliance that it was surveying the marketplace for other transportation options until several months later, in January or February of 2006, and even then did not specifically tell Alliance that it had informally asked Prime to bid on Loders’ transportation contract. *Id.* at 108-09.

#### **D. Prime’s Response To Loders’ Solicitation**

After the November 15 meeting, Rimkus refused to take any telephone calls from Prime. He suspected that Loders intended to work directly with Prime and wanted to end Alliance’s relationship with Prime altogether. Tr.I:191; Tr.IV:111. However, Loders again requested that Alliance continue to use Prime, because, in Henneman’s view, “it was not a good suggestion to stop working with Prime.” Tr.I:191-92; Tr.IV:111. Although Alliance could not meet Loders’ heavy demand without using Prime as a carrier

(Tr.II:103), Rimkus told his employees to “lean down the amount of loads” given to Prime. Tr.I:192.

Loders continued to communicate with Prime “to investigate the market opportunities on logistics” and to seek “[i]nformal information on rates.” Tr.IV:111-12. In Henneman’s view, “[i]t’s always good to compare when you go into a new contract phase to make sure you get the best deals on quality, performance, and price.” *Id.* at 98. Henneman believed that Loders had been “a totally different business” when it initially hired Alliance and before its expansion, noting that Loders had concerns about Alliance’s “ability to gain the market share needed for our business.” *Id.* at 114. Thus, according to Henneman, “we were looking for market information and seeing whether a deal with Alliance was something that we wanted to renew or end.” *Id.* at 112.

Loders therefore asked Prime, as well as other carriers, for more detailed information about “price and service, specifically for bulk deliveries.” Tr.IV:111-13. Prime, which was “interested in the business of Loders” (Tr.II:241-42), provided the requested information. Tr.III:122-23. Loders also asked to meet with Prime to discuss a “long term relationship.” *Id.* at 82-83; Tr.III at 208. Prime responded enthusiastically to Loders’ inquiries, believing that Loders would be a beneficial long-term partner. *Id.* at 39, 45, 91-92, 208-09; Tr.II:219. Prime had carried loads for Loders before and always preferred to work directly with a shipper instead of using a 3PL middleman. Tr.III:33-37; Tr.II:201-02.

Karl Mueller replaced Henneman as Loders’ supply chain director in June 2006. According to his customer service manager, Milena Green, Alliance was continuing to fail “Loders’ expectations regarding on-time pickup and on-time delivery,” and Loders’ customers were complaining. Tr.V:155-56. Mueller therefore continued to explore other

transportation options for Loders, including conducting “a bidding process” and holding meetings with Prime. *Id.* at 101-03, 112-13, 129-32.

Loders researched various vendors through their websites and contacted some for quotes. Tr.V:129, 157-60. Loders asked eight to ten firms to submit information and requested more detailed assessments from a few of them. *Id.* at 159. Green sent an email to Prime in April 2007 inquiring about rates to transport Loders’ goods, to which Prime responded positively. R.181 [DX8]; Tr.V:34, 50, 160. Low, Prime’s CEO, understood that “Loders was looking for a proposal on how Prime would handle all of its transportation needs,” and Prime “responded to their solicitation” and was “bidding along with other carriers and brokers.” Tr.III:30, 39. Prime, like the other carriers, said that it “wanted to do business with Loders” and sought to show that it “was capable of handling Loders’ business” directly. *Id.* at 45, 90. Prime and Loders held meetings in early 2007 at which, according to Low, Loders “asked us if we could do that” and Prime “responded that, yes, we’d like to do that.” *Id.* at 45. The other carriers receiving bids from Loders made similar presentations and, according to Mueller, also “were eager to have [Loders’] business.” Tr.V:103.

In June 2007, Loders’ Mueller decided not to renew Alliance’s contract because Alliance “was not performing the way we wanted them to perform” and Loders was not “satisfied with [Alliance’s] service.” Tr.V:89-90, 116-17. Green agreed with that decision due to Alliance’s “poor performance at the service levels and the risk of losing customers.” *Id.* at 157. Loders notified Alliance of its termination in June. R.181 [DX6]. But Loders honored its contract with Alliance through the October 2007 termination date, thereafter using Prime to handle its bulk loads and another carrier, C.H. Robinson, to handle its other loads. Tr.V:118. According to Mueller, Prime “had nothing to do with”

his decision to terminate Alliance, which was “independent of Prime and C.H. Robinson.” *Id.* at 104, 149-50.

### **E. District Court Proceedings**

On August 31, 2007, Alliance filed suit against Prime, alleging that Prime breached the Agreement’s back solicitation clause by accepting business directly from Loders. R.1 at 9-10. Prime denied that it breached that clause, contending that it did not solicit Loders, which in fact solicited Prime, and that in any event it did not first learn of the availability of Loders’ traffic through Alliance’s efforts.

The district court denied Prime’s motion for summary judgment on Alliance’s breach of contract claim by minute order dated March 9, 2009, which states in full: “There are questions of fact as to whether defendant’s actions amounted to solicitation of Loder’s business in violation of the back solicitation clause of the contract between plaintiff and defendant.” A14.

#### **1. Disputes over “solicit” and “traffic”**

At trial, the parties’ disputes focused on the meaning of two terms in the Agreement’s back solicitation clause. The fact witnesses were all current or former employees of Alliance, Prime, and Loders, namely:

Alliance: Dan Rimkus, owner and CEO; and Cheryl Hanek, carrier relations manager and Rimkus’ sister.

Prime: Robert Low, owner and CEO; Kirk Erickson, first bulk tanker division director; Jimmy Wilkins, bulk tanker division director beginning 2005; Lance Cain, bulk tanker division sales representative; Darryl Hopkins, bulk tanker division traffic manager; Paul McAnaw, sales and marketing representative; Brent Olson, onsite scheduler (employed by Loders until July 2004 and by Alliance from July 2004 to September 2007); Clarence Wutke, vice-president of sales; Steven Crawford, general counsel; and Richard Hoedl, director of finance.

Loders: Alex Decker, signatory on contract with Alliance; Marcel Henneman, supply chain division director beginning in 2004 (now supply chain manager at Cargill); Chee Kuan Wong, Henneman's superior at Loders (now stationed in the Netherlands); Karl Mueller, supply chain division director beginning June 2006; and Milena Green, Loder's customer service team lead (now works for Kraft).

Alliance contended that the "shall not solicit" term barred Prime from responding favorably to Loders' solicitation and required Prime to notify Alliance upon receiving a solicitation from Loders. Tr.II:56-60; Tr.V:62; Tr.VI:70-71. According to Alliance's Rimkus, the "solicitation" proscribed by the back solicitation clause comprised "[a]ny conversation regarding pricing, charges, rates \*\*\* without the knowledge of Alliance." Tr.II:7071 (emphasis added). In Prime's view, by contrast, the "shall not solicit" term did not bar it from responding to solicitations from shippers. Tr.III:30, 39-40. There was little or no dispute as to the timing or nature of the communications between Loders and Prime. Instead, the parties' witnesses disputed how to characterize those communications, *i.e.*, whether they constituted an improper "solicitation," based on their respective constructions of the Agreement's "shall not solicit" term.

The parties also disputed what constituted the "traffic" that, to breach the back solicitation clause, Prime had to "first kn[o]w of" as a result of Alliance's efforts or had to have been "first tendered" to Prime by Alliance. See A17 ¶ 11. The parties mutually agreed that there was no negotiation over that term before the Agreement was executed. Tr.IV:13. Alliance contended that "traffic" means "the same thing" as "logistics" and must be bulk tanker traffic and quantitatively substantial. Tr.II:49, 81-82; Tr.VI:45, 48. Prime contended, in contrast, that the Agreement places no such limits on the meaning of "traffic," the plain meaning of which is the carriage of loads from one place to another. Tr.III:218. There was no dispute over the underlying facts that Prime had

carried 124 loads of packaged goods and 13 bulk tanker loads for Loders *before* Alliance had arranged for Prime to carry any loads for Loders. Tr. II:149; Tr.III:165; Tr.IV:50-52, 67-68, 93-94; Tr.V:14. The parties instead disputed whether to characterize Prime’s prior loads for Loders as “traffic.”

Neutral third-party witnesses from Loders testified about the process that led to its decision not to renew the Alliance contract and to seek to have Prime provide bulk transport directly. See pp. 7-10, *supra*. Marcel Henneman testified that in 2005-06 there was no “active solicitation of Loders’ business” from Prime. Tr.IV:113. He said that Loders was “actively looking at what market opportunities we would have going forward” (*id.*) and that he “solicited Prime on behalf of Loders rather than Prime’s representative soliciting [him].” *Id.* at 104. Karl Mueller testified that Loders initiated a bidding process to replace Alliance and that Prime and other bidders were merely “responding to [Loders’] bid solicitation.” Tr.V:101-102. As he put it, Prime solicited only if being “interested in our business” qualified as solicitation. Tr.V:112. He could not comprehend how, after “[w]e approached several 3PLs and asked them to bid into our business,” their “responses” could be deemed solicitation. *Id.* at 110. Finally, Milena Green testified that Loders “initiate[d] the process of replacing Alliance,” that it “sought out other logistics providers,” and that it “solicit[ed] bids from more than one bulk carrier.” Tr.V:158-59.

## **2. Expert rulings and testimony**

Both Alliance and Prime engaged expert witnesses who prepared reports about the use and significance of back solicitation clauses. R.76 Ex. A; R.82 Ex. A.

On July 13, 2009, the court granted Alliance’s motion in limine to exclude the testimony of Prime’s expert, Lana Batts, stating in a minute order:

Ms. Batts opines that defendant did not violate the back solicitation clause. This is what the jury will decide based on the evidence and my instructions on the applicable law. Ms. Batts' opinion simply recites what she says are the facts. She does not refer to industry knowledge, custom or practice or otherwise provide any expert knowledge that would assist the jury in interpreting either the clause or the facts. She also opines that defendant did not solicit Loders' business, was simply 'exercising good fiscal control when it questioned Alliance's pay policies' and did not undermine plaintiff's services \*\*\*. Again she offers no expert knowledge that would assist the jury in its deliberations, simply summarizing defendant's arguments as to what it says are the facts. Fed. R. Evid. 702 permits testimony by experts 'if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.' None of Ms. Batts' proposed testimony meets this threshold requirement.

A11.

On August 3, 2009, the court denied Prime's motion to reconsider the exclusion of Batts' expert testimony, stating in another minute order:

I am unable to find anything in either the report or the deposition that touches on her expertise, whether by education or experience, to testify to the custom in the industry regarding any aspect of back solicitation clauses. While her resume is impressive, neither it nor her deposition in which she discusses her responsibilities in her various positions, indicates that she has any basis for knowing what industry practice would be with respect to back solicitation clauses.

A13.

The court did authorize an offer of proof at the close of evidence. Batts then testified, consistent with her report, that she has served as President of the Truckload Carriers Association; President of the Professional Truck Driver Institute and the Truckload Academy; President and CEO of the American Financial Services Association; Transportation Economist of the American Trucking Association; and Executive Vice-President and Chief Development Officer of Transport Network, an e-commerce business that helps optimize loads within the trucking industry. Tr.V:180-82. Batts also has worked with the Transportation Intermediaries Association, a trade association for

“brokers” like Alliance. *Id.* at 180-81. She currently runs consulting firms for the trucking industry. *Id.* at 179. Batts has authored articles on the trucking industry, been quoted in trucking industry trade publications, and given speeches to trucking industry groups. *Id.* at 183. She testified that she was familiar with back solicitation clauses and their purpose, explaining that “back solicitation clauses are always a part of the discussions that come up” in her work with both her carrier and broker clients. *Id.* at 184. On cross-examination, she testified that she had represented a broker in negotiations with a carrier that broke down when the broker accused the carrier of trying to back-solicit the carrier’s customers. *Id.* at 189-90.

Nevertheless, the court again refused to allow Batts to testify. During the offer of proof, the court stopped Batts from stating her opinion on the purpose of back solicitation clauses, saying that the only purpose of the offer of proof was to determine whether she was qualified to testify. Tr.V:184-87. The court concluded: “I’m sure there are many things that she could testify about, but \*\*\* my ruling is the same. If I’m wrong, I’m wrong if it ever gets to that.” *Id.* at 193.

In contrast, the court denied in large part Prime’s motion in limine to exclude the testimony of Robert Walters, Alliance’s expert. The court ruled that Walters, who owns a 3PL brokerage business (R.76 Ex. A at 11; Tr.IV:22-23), “may testify to the purpose of a back solicitation clause, how they are used in the industry, and the custom in the industry to carve out customers from back solicitation clauses.” A12.

At trial, Walters testified that that the purpose of back solicitation clauses is to protect the broker from carrier communications to the shipper no matter whether they are “deliberately or innocently done”; the largest carriers expressly list existing customers in the clause to make clear that the no-solicitation obligation does not apply

to those customers; and the “normal practice,” when an existing customer of both the broker and carrier tenders a load to the carrier, is for the carrier to notify the broker that this was “a preexisting account.” Tr.IV:36-38.

As a result, the jury heard the opinion of Walters, Alliance’s expert, but did not hear the opinion of Batts, Prime’s expert.

### **3. Alliance’s closing argument**

In closing argument, Alliance’s counsel recognized that the meaning of “shall not solicit” in the Agreement’s back solicitation clause is clear: “You don’t solicit the customer whose traffic you first became aware of as a result of our efforts.” Tr.VI:66-67. But he then broadened the plain meaning of “solicit” to encompass responding to someone else’s overture: “[T]he contract doesn’t say you can solicit our customers if they make an overture to you [or] if they ask you for a bid.” *Id.* at 70-71.

Alliance’s counsel also recognized that the meaning of “traffic” is clear: “Traffic is the transportation of goods from one point to another, and everyone in the transportation business is involved in traffic.” Tr.VI:68. But he then backtracked from that recognition, telling the jury that traffic “is the bulk tanker business.” *Id.* He also told the jury that “traffic” means “substantial bulk tanker business” and that the 13 bulk tanker loads carried by Prime for Loders prior to the Prime-Alliance contract were “de minimis” and “so small” that no one could “argue that this was knowledge of traffic from Loders.” *Id.* at 45, 48.

Alliance’s counsel also told the jury that the carrier has an “out” from the no-solicitation mandate only if the carrier notifies the broker that it was already doing business with the customer. Unable to point to any contract language supporting that interpretation, he instead argued that Alliance’s expert “Mr. Walters testified to it.” *Id.*

at 71. He summarized Walters' expert testimony as follows: "If you want to exclude a customer from back solicitation clause [*sic*], you tell the 3PL about the existence of that customer. You either do it at the time the contract is formed or when you get a load with a customer that you think is excluded from a back solicitation clause." Tr.VI:47-48. He further emphasized to the jury in his rebuttal closing that Walters' testimony was the **only** expert testimony on the meaning of the back solicitation clause: "You heard an expert witness in this case whose testimony is **unrebutted** that if you want to take on business from somebody you consider a significant customer, or not a significant customer, a customer, that doesn't violate the back solicitation clause, you declare it when you get the load." *Id.* at 106 (emphasis added). He thereby told the jury that the Agreement contained unstated obligations based on the only expert testimony that the court allowed the jury to hear.

#### **4. Jury instructions**

In discussing proposed jury instructions with the parties' counsel, the district judge indicated that she viewed the meaning of "solicit" to be unambiguous and the meaning of "traffic" to be ambiguous. As for "traffic," she found it "not unambiguous" and said the jury "ha[d] to decide" whether it means "all traffic no matter what [or] how little" or the "particular bulk tanker business" that Prime got through Alliance, as well as whether Prime's 13 bulk tanker trips were "sufficient." Tr.IV:14, 131-32. "I don't know what that contract meant. That's what the jury is going to have to decide." *Id.* at 132. She also indicated that the role of the jury was to decide whether Prime solicited Loders and whether Prime "first knew of" Loders' traffic as a result of Alliance's efforts or tender. See Tr.V:202 ("Did they solicit, and what is meant by 'traffic'? I think that's what it's going to turn on.").

However, the court did not so instruct the jury. Instead, its only instruction on the breach of contract issue stated in full:

The parties do not dispute that they entered into a valid and enforceable contract. Generally, if a party fails to perform its obligation according to the terms of the contract, the party has breached the contract. **You must decide whether New Prime failed to do what it was required to do under the contract.** Alliance claims New Prime breached a contract between them. The relevant provision of the contract is as follows: “Carrier [New Prime] shall not solicit traffic from any shipper, consignee or customer of Shipper [Alliance] where Carrier [New Prime] first knew of the availability of such traffic as a result of Shipper’s [Alliance’s] efforts or the traffic of Shipper [Alliance], consignee or customer of the Shipper [Alliance] was first tendered to Carrier [New Prime] by Shipper [Alliance].” As to Count I, Alliance has the burden of proving New Prime breached the contract in the following way: “by soliciting the traffic from Lodgers where Prime first knew the availability of such traffic as a result of Alliance’s efforts of the traffic of Lodgers was first tendered to Prime by Alliance.” New Prime denies that it breached the contract.<sup>1</sup>

A37; Tr.VI:117-18. Only the very general highlighted sentence told the jury what it was supposed to do, and it said nothing about the meaning of “solicit” or “traffic” or the jury’s duty to weigh the evidence to resolve any ambiguities about the meaning of those terms and then to determine whether Prime solicited Lodgers as barred by the back solicitation clause.

## 5. Verdict and judgment

Prime moved for judgment as a matter of law at the end of plaintiff’s case. Tr.V:55. The district judge denied that motion, in part because she believed that it was up to the jury to come up with “a reasonable interpretation” of the back solicitation clause, in particular with respect to whether the referenced “traffic” had to be “huge” or

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<sup>1</sup> The court’s oral jury instruction deviated a bit from the written version. Whereas the written instruction says Alliance has the burden of proving Prime breached the contract “by soliciting the *traffic* from Lodgers” (emphasis added), the court’s oral instruction said “by soliciting the *transaction* from Lodgers” (emphasis added). Compare Tr.VI:118 with A37.

not. A5-A6. Prime also moved for judgment as a matter of law at the close of evidence. Tr.VI:37. During argument on that motion, the court stated that “I think it’s close” and suggested that the only way Alliance could win was by proving that Loders witnesses Mueller and Green “were both completely lying.” A9-A10. However, the court concluded: “I’m not going to decide this. It’s going to go to the jury, and we’ll see.” A10.

The jury found in favor of Alliance on the breach of contract claim, awarding it damages of \$2,161,229.26, and the district court entered judgment on that award. A1-A2; Tr.VIII:5-7.

After trial, Prime renewed its motion for a judgment as a matter of law, arguing that the disputed contract terms were clear and unambiguous and that the clear weight of the evidence showed that Loders solicited Prime, not vice versa, and that in any event Prime knew of Loders’ traffic independently of Alliance. R.137 at 2-5. Alternatively, Prime requested a new trial, arguing *inter alia* that the court’s rulings on the parties’ experts effectively allowed Alliance’s expert to unilaterally instruct the jury on the meaning of the Agreement, an error compounded by the court’s own failure to instruct the jury on the meaning of the disputed contract terms or on the jury’s duty to resolve the parties’ disputes over the meaning and application of those terms. *Id.* at 8-13. The court denied Prime’s post-trial motions by minute order, stating: “I have considered the issues raised by defendant’s motion and find them to be without merit.” R.159.

## **SUMMARY OF THE ARGUMENT**

### **I.**

Alliance’s breach of contract claim never should have been submitted to the jury. The meaning of the two disputed contract terms—“solicit” and “traffic”—is clear and unambiguous, as the district court should have ruled as a matter of law. The undisputed

evidence established that Loders approached Prime about carrying its loads and that Prime simply responded to Loders' overtures. Such a response is not a solicitation under the plain meaning of that term. The undisputed evidence further established that Prime knew of Loders' traffic independently of Alliance, indeed that Prime had hauled dozens of loads for Loders, including 13 bulk tanker loads, well before Loders ever hired Alliance. The district court should have applied the plain meaning of the back solicitation clause to these undisputed facts and entered judgment as a matter of law in favor of Prime.

## II.

Alternatively, Prime is entitled to a new trial on Alliance's breach of contract claim.

First, the district court's jury instruction on breach of contract was woefully inadequate to apprise the jury of its task. If the court found the disputed terms unambiguous, it should have instructed the jury as to their meaning. Or if the court found them ambiguous, it should have instructed the jury as to its duty to weigh the evidence and determine their meaning. Instead, the instruction simply parroted the contractual language and told the jury to "decide whether New Prime failed to do what it was required to do under the contract." That instruction did not provide the jury with the guidance required under Illinois law and this Court's precedents and deprived Prime of a fair trial. It therefore was plainly erroneous, entitling Prime to a new trial.

Second, apart from the improper jury instruction, the district court erroneously delegated to Alliance's expert the task of explaining to the jury the meaning of the back solicitation clause. The court, not an expert, must explain the law to the jury. Yet, Alliance's expert was permitted to tell the jury that the back solicitation clause means

something other than what it says. The prejudicial impact of this improper testimony was compounded by the court’s refusal to allow countervailing testimony from Prime’s expert. As a result, the jury, which heard nothing from the court on the meaning of the Agreement, heard expert testimony on that subject from one side only—a fact emphasized by Alliance’s attorney at closing argument to sway the jury. This one-sided, unfair, and prejudicial process further entitles Prime to a new trial.

## **ARGUMENT**

**Standard of Review.** The denial of a motion for judgment as a matter of law under FED.R.CIV.P. 50(b) is reviewed *de novo*. *Tate v. Exec. Mgmt. Servs., Inc.*, 546 F.3d 528, 531 (7th Cir. 2008). The denial of a motion for a new trial under FED.R.CIV.P. 59(a) is reviewed for abuse of discretion. *Deicher v. City of Evansville*, 545 F.3d 537, 541 (7th Cir. 2008).

### **I. PRIME IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON ALLIANCE’S BREACH OF CONTRACT CLAIMS.**

Alliance’s breach of contract claim hinges on whether Prime “solicited” business from Loders, and if so, whether that business was “traffic” made available to Prime by Alliance’s “efforts” or “first tendered” to Prime by Alliance. Neither of the disputed terms—“solicit” or “traffic”—is ambiguous. Accordingly, the district court should have “declare[d] the meaning of those provisions” rather than submitted that issue to the jury. *Ryan v. Chromalloy Am. Corp.*, 877 F.2d 598, 602 (7th Cir. 1989). The evidence, in particular the unrefuted testimony of Loders’ disinterested witnesses, established that Prime did not “solicit” Loders’ traffic. Moreover, even if Prime had solicited Loders’ traffic, the un rebutted evidence established that Prime had carried traffic, including bulk transport, for Loders long before Loders became a customer of Allilance.

Accordingly, Prime was entitled to judgment as a matter of law on Alliance's breach of contract claim.

**A. The Disputed Terms Of The Back Solicitation Clause Are Clear And Unambiguous.**

Under Illinois law, "contracts are interpreted according to the 'four corners' rule": a contract "must be presumed to speak the intention of the parties," and contract terms are given their "plain meaning unless otherwise defined." *Camico Mut. Ins. Co. v. Citizens Bank*, 474 F.3d 989, 992-93 (7th Cir. 2007); accord *Supreme Laundry Serv., L.L.C. v. Hartford Cas. Ins. Co.*, 521 F.3d 743, 747 (7th Cir. 2008). A contract is "clear on its face" if "an ordinary reader of English" would find it so. *AM Int'l, Inc. v. Graphic Mgmt. Assocs.*, 44 F.3d 572, 574, 577 (7th Cir. 1995) (plaintiff "presented no objective evidence that the contract means something different from what it seems to mean").

Contracts are not "rendered ambiguous simply because the parties do not agree on the meaning of its terms." *Bourke v. Dun & Bradstreet Corp.*, 159 F.3d 1032, 1036 (7th Cir. 1998). A contract term is ambiguous only if "it can reasonably be interpreted in more than one way due to the indefiniteness of the language or due to it having a double or multiple meaning." *William Blair & Co., LLC v. FI Liquidation Corp.*, 830 N.E.2d 760, 769 (Ill. App. Ct. 2005). "If a judge can make sense of a written contract without hearing testimony, his duty is to construe the contract without letting the parties introduce any evidence other than the contract itself." *LaSalle Nat'l Bank v. General Mills Restaurant Group*, 854 F.2d 1050, 1052 (7th Cir. 1988). Although intermediate appellate courts in Illinois have admitted extrinsic evidence to help determine whether otherwise clear contract language conceals a latent ambiguity, the Illinois Supreme Court has rejected such an approach where, as here, the contract contains an integration

clause. *Air Safety, Inc. v. Teachers Realty Corp.*, 706 N.E.2d 882, 885 (Ill. 1999); see A17 ¶ 14. More generally, “a court cannot alter, change or modify the existing terms of a contract or add new terms or conditions to which the parties do not appear to have assented.” *Gallagher v. Lenart*, 854 N.E.2d 800, 807 (Ill. App. Ct. 2006).

Applying these principles, the disputed contract term “solicit” is clear and unambiguous. “Solicit” means “approach with a request or plea.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2169 (Merriam-Webster 2002); see *Supreme Laundry Serv., L.L.C.*, 521 F.3d at 747 (Illinois courts look to the “dictionary definition” of contract terms). Applying that plain meaning to the back solicitation clause, Prime was barred from approaching Loders to request that it carry certain traffic for Loders. Alliance’s attempt to broaden the meaning of “solicit” to comprise “**any** conversation regarding pricing, charges, rates \*\*\* without the knowledge of Alliance” (Tr.II:71, emphasis added) has no support in the Agreement, the dictionary, or common usage. In fact, it would conflict with the term’s plain meaning by deeming an approach by Alliance’s **customer**, in this case Loders, to be a solicitation by Prime.<sup>2</sup>

Equally insupportable is Alliance’s contention that “no solicitation” includes an affirmative obligation on the part of Prime to notify Alliance if a customer of Alliance requested price information and to list in the Agreement all shippers with which Prime previously had done business. Tr.II: 58-60, 70-71. Nothing in the Agreement, or in the dictionary or common usage, associates such a notice obligation with the bar on

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<sup>2</sup> Even Alliance’s expert unequivocally testified that back solicitation clauses protect against “direct communication \*\*\* **from the carrier to the shipper** that will seek to exclude the broker from his commissions and his revenue.” Tr.IV:36 (emphasis added). He thereby recognized that communications initiated by the shipper are not proscribed.

solicitation. Indeed, Alliance’s CEO Dan Rimkus admitted that the Agreement does not require Prime to identify customers with which it previously had done business. *Id.* at 57-58. And Alliance’s view is rendered even less plausible by Rimkus’ contention that the notice obligation applied with respect to Loders but “not anyone else.” *Id.* at 60.

The other disputed contract term, “traffic,” is also clear and unambiguous. On the witness stand, Alliance’s Rimkus defined it according to its “commonly understood meaning” as “things being transported to and from along a route.” Tr.II:49. The dictionary confirms that “traffic” is “the vehicles or pedestrians moving along a route” or “the passengers or cargo carried by a transportation system.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* p. 23, at 2423. Applying that plain meaning, Prime was barred from soliciting Loders to carry Loders’ cargo on Prime’s trucks (if Prime first learned of Loders’ traffic through Alliance). Alliance’s attempt to limit the meaning of “traffic” to “logistics work” involving a large (but unspecified) number of loads carried in bulk tankers pursuant to a long-term contract (*e.g.*, Tr. II:49, 81-82; Tr.VI:45-6, 48, 68) has no support in the Agreement, the dictionary, or common usage.

In short, there is nothing mysterious about the meaning of “solicit” or “traffic” in the Agreement’s back solicitation clause. Alliance’s attempts to broaden the meaning of “solicit” and narrow the meaning of “traffic” are simply arguments of an interested party. But pure argument cannot “create an ambiguity in the contract language where no ambiguity exists.” *Bechtold v. Physicians Health Plan*, 19 F.3d 322, 326 (7th Cir. 1994). The court should have construed the clear and unambiguous language of the back solicitation clause as a matter of law. See *Dowd & Dowd, Ltd. v. Gleason*, 693 N.E.2d 358, 370 (Ill. 1998); *Rickher v. Home Depot, Inc.*, 535 F.3d 661, 664 (7th Cir. 2008) (applying Illinois law) (“The interpretation of an unambiguous contract is a question of

law for the court”); *Bechtold*, 19 F.3d at 325 (same). Juries simply have no role to play in resolving disputes over unambiguous contract terms. *U.S. Fire Ins. Co. v. Pressed Steel Tank Co.*, 852 F.2d 313, 316-17 (7th Cir. 1988) (“If the contract was unambiguous, the jury should not have been given the task of interpreting it”).<sup>3</sup>

**B. The Pertinent Facts Are Undisputed.**

Not only are the disputed contract terms unambiguous, but the facts relevant to the alleged breach are undisputed. First, unrebutted evidence established that Loders initially approached Prime about carrying loads for Loders directly and that Prime simply responded positively to Loders’ solicitation. See pp. 7-10, *supra*. Second, unrebutted evidence established that Prime carried more than 130 loads for Loders, including 13 bulk tanker loads, before Loders became Alliance’s customer, refuting Alliance’s contention that Prime learned of Loders’ traffic through Alliance. See pp. 4, 12-13, *supra*.

None of Alliance’s witnesses claimed to have observed any solicitation of Loders by Prime. The only witnesses with first-hand knowledge were from Prime and Loders. The Loders witnesses uniformly testified that the initiative came from Loders. Henneman recalled that “it would have been [him] that solicited Prime on behalf of Loders rather than Prime’s representatives soliciting [him].” Tr.IV:104. He explained that Loders was “actively looking at what market opportunities we would have going forward.” *Id.* at 113. He did not “consider Prime’s conduct toward Loders in 2005 and 2006 an active solicitation of Loders’ business.” *Id.* Wong testified that at the November 2005 meeting, Loders wanted “to determine if \*\*\* Loders wanted Prime to bid to be the

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<sup>3</sup> Moreover, Alliance drafted the disputed language. Tr.II:25. To the extent there can be any doubt over the meaning of the terms here, “any ambiguity in the terms of a contract must be resolved against the drafter of the disputed provision.” *Dowd & Dowd, Ltd.*, 693 N.E.2d at 368.

new 3PL for the Loders facility to replace Alliance.” Tr.V:82. Mueller testified that Loders held a bidding process to replace Alliance and that Prime and other bidders were “responding to [Loders’] solicitation.” *Id.* at 101-102. He did not view Prime’s response as soliciting unless “soliciting” means that Prime was “interested in our business.” *Id.* at 112. Green added that Loders “initiate[d] the process of replacing Alliance,” that it “sought out other logistics providers,” and that it “solicit[ed] bids from more than one bulk carrier.” *Id.* at 158-59.

The testimony of Prime’s witnesses confirmed that of the Loders witnesses. For example, Prime’s CEO testified that Prime “had been asked by Loders to bid on their business” and that Prime “responded to their solicitation” and “bid on the business.” Tr.III:30, 124. He explained that Prime believed it could and should “go after” business tendered by Loders. *Id.* at 39, 84, 208-09. Prime’s response was admittedly enthusiastic, as it believed that Loders would be a beneficial long-term partner. *Id.* at 39, 45, 91-92, 208-09; Tr.II:219.

Even if the testimony of Prime’s witnesses were discounted as self-serving, the Loders witnesses were disinterested. See *Salus v. GTE Directories Serv. Corp.*, 104 F.3d 131, 136 (7th Cir. 1997) (testimony of disinterested witnesses entitled to more weight). Indeed, key Loders witnesses Henneman and Green are now employed elsewhere and thus have no stake in the Loders-Prime relationship. They testified without qualification that Loders solicited Prime for information and ultimately to replace Alliance.

With respect to Prime’s knowledge of the Loders traffic, the unrebutted evidence showed that Prime hauled loads for Loders as far back as 1998—long before Loders had a contract with Alliance. Between 1998 and 2003, Prime hauled 124 loads to or from Loders, and at least 13 of those loads were carried by Prime’s bulk tankers. Tr.III:164-

80, 183-85; Tr.II:161-62; Tr.IV:50-52, 67-68, 91-92; Tr.V:13-14; R.181 [DX1, 2, 4, 9-11]. Loders confirmed that its records show that before 2003, “Prime did in fact do certain work related to transportation at the request of Loders.” Tr.IV:93. And a former Loders employee testified that as of May 2001, Prime was on a list of carriers whom “Loders would work with to haul their traffic.” *Id.* at 50.

Unable to refute this evidence, Alliance attempted to amend the contract through argument and assertion. Alliance argued that the preexisting loads were not “traffic” because they were “de minimis” or did not originate at Loders or were not carried with particular equipment. Yet, when pressed, Alliance’s CEO had to admit that no such limitations appear in the Agreement. Tr.II:57. Thus, Alliance offered no factual rebuttal, testimonial or documentary, to refute the abundant evidence that Prime knew of Loders’ traffic independently, not through Alliance.

This unrefuted evidence was sufficient to prove as a matter of law that Prime did not breach the Agreement’s back solicitation clause. Furthermore, Loders’ Mueller unequivocally testified that his decision not to renew Alliance’s contract “had nothing to do with” any conduct by Prime and that Prime did not cause Alliance’s termination. Tr.V:104. Instead, he made that decision because Alliance “was not performing the way we wanted them to perform.” *Id.* at 90. And Alliance offered no evidence that it would have retained the Loders business but for Prime’s alleged solicitation.

In sum, the district court should have construed the disputed but unambiguous contract terms according to their plain meaning, applied them to the unrebutted facts, and concluded that Prime did not breach the Agreement as a matter of law.

## **II. PRIME IS ENTITLED TO A NEW TRIAL BECAUSE THE JURY INSTRUCTIONS ON COUNT I WERE PLAINLY ERRONEOUS.**

Alternatively, Prime is entitled to a new trial because the jury instruction on Alliance's breach of contract claim was fundamentally defective. The district court failed to instruct the jury on the meaning of the disputed contract terms or, if the court deemed them ambiguous, on the jury's duty to resolve the extrinsic evidence as to their meaning. Prime recognizes that, because it did not object to that instruction at trial, it is subject to review only for plain error. FED.R.CIV.P. 51(d)(2); *Higbee v. Sentry Ins. Co.*, 440 F.3d 408, 409 (7th Cir. 2006) (change to Federal Rules allowing review for plain error abrogated this Court's cases predating December 2003). Reversals for plain error "have become more numerous in recent years." 9C Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2558 (3d ed. 2008). This case meets the plain error standard because there was an obvious error that affected Prime's substantial rights by preventing a fair trial on the breach of contract count. See *Ammons-Lewis v. Metro. Water Reclamation Dist.*, 488 F.3d 739, 751 (7th Cir. 2007).

### **A. The Breach Of Contract Instruction Was Plainly Erroneous.**

The first questions under the plain-error analysis are whether there was an error and if so, whether it was "plain" in the sense of being obvious in retrospect. *Ammons-Lewis*, 488 F.3d at 751. A jury instruction is erroneous if it "failed to convey the correct message to the jury reasonably well" and "prejudiced the complaining party." *Dawson v. New York Life Ins. Co.*, 135 F.3d 1158, 1165 (7th Cir. 1998).

The district court gave the jury no guidance as to how to determine whether Prime breached the contract. As this Court has explained, the primary purpose of jury instructions is "to clarify issues for the jury and to educate the jury about what factors

are probative on those issues.” *Humphrey v. Staszak*, 148 F.3d 719, 724 (7th Cir. 1998). The instruction on Count I failed that purpose. Other than parroting the language of the back solicitation clause, Instruction 19 simply told the jury to “decide whether New Prime failed to do what it was required to do under the contract.” A37; Tr.VI:117-18. The court did not provide any guidance as to how that determination should be made. The court’s approach was insufficient under Illinois law, which makes it reversible error to simply place before the jury “the relevant language without explanation” and give “no instruction at all” on how to apply it. *Nat’l Tea Co. v. Commerce & Indus. Ins. Co.*, 456 N.E.2d 206, 210 (Ill. App. Ct. 1983).

The Illinois Pattern Instructions (“IPI”) set forth what the court should have done. IPI 700.01, which applies to breach of contract claims where the contract terms are undisputed, provides (after describing the terms of the contract):

[Plaintiff] has the burden of proving [defendant] breached the contract in the following way: [state here the plaintiff’s contract claims].

IPI 700.10, which applies to breach of contract claims where contract formation is undisputed and, according to the Committee Note, “must be given in conjunction with 700.01,” includes the following:

[ ] claims and has the burden of proving that under the contract [ ] was required to not do the following: [state what the plaintiff claims to be the defendant’s breach].

[ ] claims it did not breach the contract because the parties agreed [ ] did not have to keep its promise unless [insert condition]

Here, other than filling in the parties’ names, the court omitted what would be inserted in the IPI brackets.

Illinois case law confirms that jury instructions on Illinois causes of action must be more than bare-bones. They must, “in a concise and comprehensive manner, inform the jury of the issues presented, the principles of law to be applied, and the necessary facts to be proved to support its verdict.” *Grover v. Commonwealth Plaza Condo. Ass’n*, 394 N.E.2d 1273, 1279 (Ill. App. Ct. 1979) (reversing breach of contract verdict). Instruction 19 is woefully deficient in that regard.

On the one hand, if the court deemed the disputed contract terms to be unambiguous, it should have instructed the jury as to their meaning as a matter of law. See *Bechtold*, 19 F.3d at 325; *Joseph Schlitz Brewing Co. v. Milwaukee Brewery Workers’ Pension Plan*, 3 F.3d 994, 999 (7th Cir. 1993), *aff’d*, 513 U.S. 414 (1995). It should not have left the jury to decide the meaning of unambiguous terms simply because the parties disputed their meaning. “[T]he interpretation of contractual documents is an appropriate question for the jury only when the contractual language is ambiguous.” *Ooley v. Schwitzer Div., Household Mfg. Inc.*, 961 F.2d 1293, 1298 (7th Cir. 1992). Thus, the court should have instructed the jury on the plain meanings of “solicit” and “traffic” and told it to apply those meanings to their factual findings to determine whether Prime breached the Agreement.

On the other hand, if the district court deemed the disputed terms ambiguous, it should have provided the jury with a framework or roadmap for resolving the ambiguities and deciding the meaning of the terms. See *Nat’l Tea Co.*, 456 N.E.2d at 210 (jury “should not be asked” to interpret ambiguous contract “without guidance from the court in the form of an instruction stating what conclusion must be reached if the jury finds certain facts to exist”). The court should have told the jury to weigh the evidence submitted on the meaning of those terms and, based on its findings, determine whether

Prime had solicited Loders based on knowledge of Loders' traffic obtained through Alliance.

“[I]t is the court’s duty to instruct the jury that it should return one verdict if the facts are found one way and a different verdict if the facts are found otherwise.” *Panther Pumps & Equip. Co. v. Hydrocraft, Inc.*, 468 F.2d 225, 228 (7th Cir. 1972) (Stevens, J.). At the very least, instead of simply reprising the unconstrued contract language, the district court should have set forth the nature of the dispute over the meaning of that language. For example, the court could have told the jury that, according to Prime, “solicit” means a customer’s request for business, not a carrier’s response to such a request, and that the only traffic subject to the bar on solicitation is truck cargo made available by Alliance. Likewise, the court could have told the jury that, according to Alliance, “solicit” includes responses to customer requests without notifying Alliance and that “traffic” must be carried in bulk tankers and be quantitatively substantial. Instead, the court left the jury alone in the wilderness without a map. See *Dawson*, 135 F.3d at 1167 (ordering new trial where jury instructions left jury without “a meaningful definition” of key legal standard so that “the jury flew blind during its deliberations and judged all of the statements at issue without the necessary legal guidance”).

Reversal is warranted where jury instructions had a “tendency to confuse or mislead the members of the jury or insufficiently inform them with respect to the applicable principles of law.” 9C Charles Alan Wright & Arther R. Miller, *FEDERAL PRACTICE & PROCEDURE* § 2558 (3d ed. 2008). That is precisely what occurred here. By failing to instruct the jury on the meaning of the back solicitation clause or how to determine that meaning, the court committed reversible error, warranting a new trial. See *Lalvani v. Cook County*, 396 F.3d 911, 913-14 (7th Cir. 2005) (ordering new trial

due to faulty instructions); *Aliotta v. Nat'l R.R. Passenger Corp.*, 315 F.3d 756, 770 (7th Cir. 2003) (same); *Heller Int'l Corp. v. Sharp*, 974 F.2d 850, 856 (7th Cir. 1992) (same); *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 229 (7th Cir. 1983) (same).

Moreover, the court's error was "plain," requiring a new trial under that standard as well. See *Choy v. Bouchelle*, 436 F.2d 319, 325 (3d Cir. 1970) (reversing for plain error where breach-of-contract instructions merely set forth the law "in abstract fashion" without relating it to the factual context); *MacEdward v. N. Elec. Co.*, 595 F.2d 105, 109 (2d Cir. 1979) (failure to properly instruct jury was fundamental error requiring a new trial "even though no specific objection was made").

**B. The Erroneous Instruction Affected Prime's Substantial Rights And Requires Reversal In The Interests Of Justice.**

The district court's erroneous breach of contract instruction affected Prime's substantial rights, satisfying the third prong of the plain-error analysis. See *Production Specialties Group v. Minsor Sys., Inc.*, 513 F.3d 695, 700 (7th Cir. 2008). Allowing that error to stand would call into question the fairness, integrity, and reputation of the judicial system, warranting a new trial. See *id.*

Alliance's case rested largely on its effort to broaden the meaning of "solicit" and narrow the meaning of "traffic." Prime's defense, in turn, rested largely on adhering to the plain contract language. Thus, Prime had a substantial right to have the jury properly instructed on this dispute and the jury's role in resolving it.

If properly instructed, the jury probably would have determined that Prime did not "solicit" business from Loders or that, if it did, the business was not "traffic" known to Prime only because of Alliance's efforts. As explained above, the evidence overwhelmingly supported this view (assuming this issue should have been submitted to

the jury at all). The substantial possibility of a prejudicial impact is sufficient. See *Tyus v. Urban Search Mgmt.*, 102 F.3d 256, 265 (7th Cir. 1996) (vacating jury verdict where erroneous instructions “could have misled the jury”); *Dawson*, 135 F.3d at 1165 (mere “possibility” that improper instruction affected jury verdict sufficient to prejudice adversely affected party). Because there is a substantial chance that Prime would have prevailed at trial but for the inadequate instruction, the challenged error affected its substantial rights. Allowing this error to stand would undermine clear precedent that judges, not juries, determine the meaning of contracts as a matter of law. More importantly, letting the error go uncorrected would call into question the integrity of the judicial system with respect to the guarantee of a fundamentally fair trial.

### **III. THE DISTRICT COURT IMPROPERLY PERMITTED ALLIANCE’S EXPERT TO UNILATERALLY INTERPRET THE AGREEMENT.**

Apart from its erroneous jury instruction, the district court committed reversible error by its rulings on expert testimony. The court improperly allowed Alliance’s expert, Robert Walters, to testify as to the meaning of the back solicitation clause. Moreover, Walters provided the only opinion testimony on that issue because the court excluded countervailing testimony from Prime’s expert, Lana Batts. Alliance’s counsel seized on that disparate treatment to tell the jury that Walters’ testimony was unrebutted. Although it is doubtful that either expert should have been permitted to testify on the meaning of the disputed contract terms, if it was permissible for one to do so, then the other should have been permitted to do so as well. With no instruction from the court on the meaning of the disputed terms, the upshot was that Alliance’s expert alone instructed the jury on that issue. Prime was fundamentally prejudiced by this one-sided process and is therefore entitled to a new trial.

**A. Alliance’s Expert Improperly Instructed The Jury On The Meaning Of The Agreement.**

The district court purportedly admitted Alliance’s expert for the limited purpose of testifying to industry custom and practice with respect to back solicitation clauses. Tr.IV:18-20. But the court allowed him to tell the jury that the back solicitation clause means something other than what it says.

With respect to the meaning of “solicit,” Walters testified that it encompasses “direct communication deliberately or *innocently* done from the carrier to the shipper that will seek to exclude the broker from his commissions and his revenue.” Tr.IV:36. He thereby told the jury that the proscribed solicitation could include *unintentional* conduct, such as, for example, Prime’s neglecting to report Loders’ overtures. The plain meaning of “solicit” bars such a construction, which would greatly broaden the type of conduct barred by the contract. But in any event, it was improper to permit Walters to provide his own construction of this disputed contract term.

Walters also told the jury that back solicitation clauses impliedly include a “carve out” obligation for the carrier. He testified that large carriers use “carve outs” to exempt their existing customers from a back solicitation clause (Tr.IV:36-37), effectively telling the jury that the lack of any such carve-out in the Agreement abrogates the Agreement’s limiting of the solicitation bar to customers whose traffic was first made available by Alliance. Walters’ testimony thereby sought to override the plain contract language, which allowed Prime to solicit any other “traffic” not first made available by Alliance.

Similarly, Walters’ testimony that it is “normal practice” for a carrier to notify the 3PL if it had a “preexisting account” with a customer (Tr.IV:37-38) effectively told the jury that obtaining traffic independently from such a customer without providing such

notice is a proscribed solicitation. Again, he thereby sought to inject a new term into the Agreement, which contains no such notification requirement.

Walters' testimony on the meaning of the back solicitation clause was improper. Under Illinois law, "contract interpretation is a question of law for which expert testimony would not be appropriate." *William Blair & Co.*, 830 N.E.2d at 773. Where, as here, there is no reason to deem the common terms "solicit" and "traffic" to be terms of art or trade, "expert opinion testimony to interpret contract language is inadmissible." *Delta Mining Corp. v. Big Rivers Elec. Corp.*, 18 F.3d 1398, 1402 (7th Cir. 1994). The rationale is plain—preventing an expert from "convey[ing] legal rather than 'expert' opinions." *RLJCS Enter., Inc. v. Prof'l Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 494, 498 (7th Cir. 2007). "Argument about the meaning of \*\*\* contracts \*\*\* belongs in briefs, not in 'expert reports.'" *Id.* Because "the interpretation of contracts is for the judge" and "[c]ontracts mean what they say when read in light of legal principles," it follows that "what strangers to the parties' bargain would do is neither here nor there." *Westfield Ins. Co. v. Sheehan Constr. Co.*, 564 F.3d 817, 819 n.1 (7th Cir. 2009); accord *Loeb v. Hammond*, 407 F.2d 779, 781 (7th Cir. 1969); *Marx & Co. v. Diners' Club, Inc.*, 550 F.2d 505, 509-10 (2d Cir. 1977). Walters was just such a stranger to the parties' bargain whose testimony should have been deemed "neither here nor there."

**B. Alliance's Improper Expert Testimony Was Highly Prejudicial In Light Of The Exclusion Of Prime's Proposed Expert Testimony.**

Walters' expert testimony was particularly prejudicial to Prime in light of the district court's refusal to allow Prime's expert, Lana Batts, to offer countervailing testimony. Indeed, Alliance's counsel multiplied the impact of Walters' improper

testimony by emphasizing to the jury in closing argument that Walters' testimony was un rebutted. Since the court did not instruct the jury on the meaning of the disputed contract terms, the jury's hearing only a single expert from one side was highly prejudicial and prevented Prime from receiving a fair trial.

Batts was certainly as qualified to opine on the background and significance of back solicitation clauses as Walters. See *United States v. York*, 572 F.3d 415, 422 (7th Cir. 2009). She has served as the top official of leading trucking associations and had direct experience with back solicitation clauses. See pp. 14-15, *supra*. It is difficult to fathom how the district court could conclude, after noting Batts' "excellent qualifications," that Batts did not meet the *Daubert* threshold. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). As long as an expert's testimony "rests upon 'good grounds, based on what is known,' it should be tested by the adversary process—competing expert testimony and active cross-examination—rather than excluded." *United States v. Mitchell*, 365 F.3d 215, 244 (3d Cir. 1998), quoting *Daubert*, 509 U.S. at 590.

Even if Batts' specific experience with back solicitation clauses was limited, her broad familiarity with the industry and the context in which such clauses are employed should have been sufficient. "Rule 702 is not so wooden" as to require that an expert have "intimate level of familiarity with every component of a transaction" and "first-hand dealings with the precise type of event that is at issue." *Microfinacial, Inc. v. Premier Holidays Int'l, Inc.*, 385 F.3d 72, 80 (1st Cir. 2004). Any gaps in Batts' specific experience involved the "weight" of her testimony, "not its admissibility." *Huss v. Gayden*, 571 F.3d 442, 452 (5th Cir. 2009). Batts would have testified that because of the premium that carriers place on the privacy of their customer lists, it would be highly

unusual for them to carve out customers by name from a back solicitation clause, as Walters said they do. Tr.V:185-86. Intimate, firsthand familiarity with back solicitation clauses is not necessary for testimony of this nature. The district court should have left the issue of the extent of Batts' experience with back solicitation clauses to Alliance's cross-examination and allowed the jury to compare her experience and credibility with those of Walters. See *Deputy v. Lehman Bros.*, 345 F.3d 494, 506 (7th Cir. 2003) (reversing exclusion of expert witness for reasons that primarily "concerned issues of credibility and persuasiveness").

The district court's expert testimony rulings were particularly prejudicial to Prime because they resulted in Walters being conferred with a "special aura of reliability." *United States v. Upton*, 512 F.3d 394, 401 (7th Cir. 2008). "[T]oo much emphasis" may be accorded "a single expert's opinion" absent "an opposing or independent expert to explain and counter the conclusions." *United States v. Nacchio*, 573 F.3d 1062, 1079 n.14 (10th Cir. 2009). That risk came to fruition in the closing argument of Alliance's counsel. As described above, he stressed to the jury that Walters' testimony was "unrebutted," in other words that Walters was **the** expert. Tr:VI:106. But he also built on Walters' testimony to give it apparently universal significance. Whereas Walters said that only "some" carriers (the largest ones) carve out their customers from a back solicitation clause, Alliance's counsel paraphrased Walters' testimony as follows: "If you want to exclude a customer from a back solicitation clause, you tell the 3PL about the existence of that customer. You either do it at the time the contract is formed or when you get a load with a customer that you think is excluded from a back solicitation clause." *Id.* at 48. The court's improper expert rulings enabled this improper argument. The jury was effectively instructed on the law by Alliance's expert (aided by Alliance's

counsel), not by the court. This fundamentally erroneous process warrants a new trial on Alliance's breach of contract claim.

### **CONCLUSION**

This Court should reverse the judgment against Prime on Count I and remand with instructions to enter judgment for Prime. Alternatively, a new trial should be ordered on Count I.

Dated: November 30, 2009

Respectfully submitted,

---

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Defendant-Appellant New Prime, Inc. certifies that the foregoing brief:

(i) complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i) because it contains 11,000 words including footnotes and excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type styles requirements of Fed. R. App. P. 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 SP1 MSO in 12-point Georgia.

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**COMBINED RULE 30(a) AND RULE 30(b) APPENDIX**

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**CIRCUIT RULE 30(d) STATEMENT**

Pursuant to Circuit Rule 30(d), the materials required by parts (a) and (b) of Circuit Rule 30 are included in this appendix.

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**United States District Court**  
**Northern District of Illinois**  
**Eastern Division**

Alliance Logistics

**JUDGMENT IN A CIVIL CASE**

v.

Case Number: 07 C 4944

New Prime, Inc.

- Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.
- Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that Pursuant to Jury Verdict, Alliance is awarded damages in the amount of \$2,161,229.26 as measured under the contract. As to Count II, judgment is entered in favor of defendant and against plaintiff.

Michael W. Dobbins, Clerk of Court

Date: 8/14/2009

\_\_\_\_\_  
/s/ Mathew P. John, Deputy Clerk

**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.3  
Eastern Division**

Alliance Logistics, Inc.

Plaintiff,

v.

Case No.: 1:07-cv-04944  
Honorable Elaine E. Bucklo

New Prime, Inc.

Defendant.

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**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Friday, August 14, 2009:

MINUTE entry before the Honorable Elaine E. Bucklo:Jury deliberation held on 8/14/09 and concluded. Jury trial completed on 8/14/2009.Pursuant to Jury Verdict, Alliance is awarded damages in the amount of \$2,161,229.26 as measured under the contract. As to Count II, judgment is entered in favor of defendant and against plaintiff. Civil case terminated. Mailed notice(mpj, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.3  
Eastern Division**

Alliance Logistics, Inc.

Plaintiff,

v.

Case No.: 1:07-cv-04944  
Honorable Elaine E. Bucklo

New Prime, Inc.

Defendant.

---

**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Monday, October 5, 2009:

MINUTE entry before the Honorable Elaine E. Bucklo: Defendant New Prim, Inc's motion (135) for judgment as a matter of law or a new trial is denied. I have considered the issues raised by defendant's motion and find them to be without merit. Defendant's motion to stay [138] is denied as moot. Plaintiff's motion to lift stay [145] is also denied as moot. Mailed notice(mpj, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ALLIANCE LOGISTICS, INC., )  
Plaintiff, ) No. 2007 C 4944  
v. ) Chicago, Illinois  
NEW PRIME, INC., )  
Defendant. ) August 11, 2009  
9:30 a.m.

VOLUME V

TRANSCRIPT OF PROCEEDINGS - TRIAL  
BEFORE THE HONORABLE ELAINE E. BUCKLO  
and a jury

APPEARANCES:

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PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PREPARED BY COMPUTER

MICHAEL P. SNYDER  
Official Reporter  
United States District Court  
219 South Dearborn Street, Room 1432  
Chicago, Illinois 60604  
Telephone (312) 435-5563

1 there is no solicitation here.

2           But more important -- and, you know, who better to  
3 know what solicitation was than the person -- one of the people  
4 on the end of the negotiation, Mr. Henneman, said we solicited  
5 them, they didn't solicit us. He said when we came to the  
6 November 5th meeting there had never been a discussion about  
7 Prime doing business directly with Loders until that meeting  
8 and until Henneman brought it up.

9           Now, I'd like to address, though, the other part of  
10 our argument which is the existence of knowledge of traffic. I  
11 think there's an abundant record -- evidence in this record  
12 that Prime knew of the traffic; that Prime knew of the bulk  
13 business with however they want to describe it, Prime knew  
14 before 2003 when Loders became a customer of Alliance.

15           THE COURT: I think the evidence on that is  
16 conflicting.

17           MR. BURKHARDT: Well, if that's the case, they had  
18 every right to solicit it under the contract. That's very  
19 clear. We would argue that it is abundantly clear that we did  
20 know of the business of the traffic, however they want to word  
21 it, before 2003.

22           THE COURT: I'll tell you what. On that one there's  
23 two ways that a jury could look at it and decide in favor of  
24 plaintiff. They could decide they really -- that a reasonable  
25 interpretation of that clause is the business that was going

1 on, which means this huge bulk business, not a random load here  
2 or there before then. They could also, maybe they could decide  
3 otherwise, but they could I think decide that.

4           The other thing they could decide is that if they  
5 didn't really know of it if the owner of the company, after the  
6 suit was filed, is having to go and say was there any -- was  
7 there any business? I mean, what does -- I'm not as sure. And  
8 I think the evidence on that appears to be somewhat conflicting  
9 as to exactly who did. But there's two ways where I think on  
10 that one, I think the -- at this point I suspect the plaintiff  
11 may have a difficult job in convincing the jury, but I think it  
12 would go to the jury.

13           So on that one, I don't -- but I am concerned about  
14 what the whole context is. I guess I'd better look at all of  
15 Mr. Henneman's testimony. So I'm going to reserve ruling on  
16 your motions, and, therefore, you're going to go ahead with  
17 evidence.

18           Now, unfortunately you do still have a few here.

19           Well, leading is a form question.

20           MR. McERLEAN: That's why we withdrew our objection.

21           THE COURT: Well, there's still some here.

22           MR. McERLEAN: Well, I don't dispute that in response  
23 to a leading question about who solicited who, Mr. Henneman  
24 said that. But what I'm saying --

25           THE COURT: No, I'm now back at --

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IN THE UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF ILLINOIS  
EASTERN DIVISION

ALLIANCE LOGISTICS, INC., )  
Plaintiff, ) No. 2007 C 4944  
v. ) Chicago, Illinois  
NEW PRIME, INC., )  
Defendant. ) August 12, 2009  
9:30 a.m.

VOLUME VI

TRANSCRIPT OF PROCEEDINGS - TRIAL  
BEFORE THE HONORABLE ELAINE E. BUCKLO  
and a jury

APPEARANCES:

For the Plaintiff: MR. WILLIAM M. McERLEAN  
MR. JAMES E. MICHEL  
BARNES & THORNBURG, LLP  
One North Wacker Drive, Suite 4400  
Chicago, Illinois 60606  
(312) 357-1313  
For the Defendant: MR. JAMES A. FOSTER  
MR. KYLE R. BURKHARDT  
CASSIDAY SCHADE, LLP  
20 North Wacker Drive, Suite 1040  
Chicago, Illinois 60606-2903  
(312) 641-3100

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY  
TRANSCRIPT PREPARED BY COMPUTER

MICHAEL P. SNYDER  
Official Reporter  
United States District Court  
219 South Dearborn Street, Room 1432  
Chicago, Illinois 60604  
Telephone (312) 435-5563

Hoedl - cross by McErlean

1 THE COURT: Okay. Any more?

2 MR. BURKHARDT: No questions, Your Honor.

3 THE COURT: All right. You're excused. Thank you.

4 (Witness excused.)

5 MR. BURKHARDT: Subject to admission of evidence, we  
6 would rest, Your Honor.

7 THE COURT: I'm not sure what that means. Okay.

8 We'd better take a sidebar.

9 (Discussion at sidebar.)

10 THE COURT: What issues would you be putting on  
11 Mr. Rimkus?

12 MR. McERLEAN: We are not going to call him as a  
13 rebuttal.

14 THE COURT: Well, in that case I guess we are ready  
15 for closing arguments.

16 MR. BURKHARDT: We have motions for directed verdict  
17 at the close of the evidence, Your Honor.

18 THE COURT: I think there's issues of credibility, so  
19 I'm going to let it go to the jury.

20 MR. BURKHARDT: May I make an argument, Your Honor?  
21 I'd just like to state my argument since we didn't get a chance  
22 to put it on paper.

23 THE COURT: Well, I assume it's the same as before.

24 MR. BURKHARDT: Well, the argument, the case law is  
25 the same. The testimony is rock solid, Your Honor.

MICHAEL P. SNYDER, Official Reporter

1 Mr. Mueller got up there around said the only reason they  
2 terminated Alliance was because of Alliance's service issue.

3 THE COURT: I know what it is. I actually thought  
4 about this.

5 MR. BURKHARDT: Okay.

6 THE COURT: And I think it's close.

7 Actually I thought about the way, what you had  
8 argued.

9 What is your response, I mean, how do you win this?  
10 You really have to say that Mueller and the woman who had been  
11 there and who is no longer there were both completely lying.  
12 Now, maybe you can -- I mean, there's reasons maybe where they,  
13 maybe they would.

14 MR. McERLEAN: Right.

15 THE COURT: But really don't you have to conclude  
16 that -- doesn't the jury, for you to possibly win, don't they  
17 have to conclude that both of them are simply lying?

18 MR. McERLEAN: No, it has -- number one, it would  
19 have nothing to do with the breach of contract claim. Whether  
20 they changed for service or any other reason, that's not a  
21 reason for solicitation. There's not a catchall or a carve-out  
22 in the back solicitation clause.

23 As to -- it's pretty clear that starting in November  
24 of 2005 Prime poisoned the relationship with Loders. It  
25 disparaged us and otherwise made our lives miserable and took

1 steps to make us look unstable.

2 THE COURT: All right. The jury is going to hear it.  
3 Okay.

4 MR. BURKHARDT: Just one thing?

5 THE COURT: I really thought about yours because, I  
6 mean, it's hard for me to --

7 MR. BURKHARDT: He testified that none of that, the  
8 last thing Mr. Mueller said --

9 THE COURT: He did.

10 MR. BURKHARDT: -- none of that had anything to do  
11 with why he terminated.

12 Also, that testimony is uncontroverted. Credibility  
13 is not an issue, the jury hasn't heard anything else, it's not  
14 an issue. That's the only evidence in this record --

15 THE COURT: I think they've heard it.

16 MR. BURKHARDT: -- as to why they terminated.

17 THE COURT: I'm not going to decide this. It's going  
18 to go to the jury, and we'll see.

19 MR. BURKHARDT: Thank you.

20 THE COURT: Okay.

21 (End of discussion at sidebar.)

22 THE COURT: All right. In just a minute the  
23 attorneys are going to have an opportunity to address you in  
24 their closing arguments. While they are getting ready, he's  
25 going to turn this thing on for me.

**United States District Court, Northern District of Illinois**

<b>Name of Assigned Judge or Magistrate Judge</b>	Elaine E. Bucklo	<b>Sitting Judge if Other than Assigned Judge</b>	
<b>CASE NUMBER</b>	07 C 4944	<b>DATE</b>	7/13/2009
<b>CASE TITLE</b>	Alliance Logistics vs. New Prime		

**DOCKET ENTRY TEXT**

Various motions in limine are granted in part and denied in part as set forth in the minute order.

■ [ For further details see text below.]

Notices mailed by Judicial staff.

**STATEMENT**

Each party has filed various motions in limine. Rulings are as follows:

1. Plaintiff's motion in limine to exclude testimony of defendant's expert, Lana Batts, is granted. In its opposition to plaintiff's motion, defendant describes what it says Ms. Batts' testimony would be. However, an expert is limited to the opinions actually stated in her report, and it is her report that I must examine in determining whether any opinion she would state is admissible. First, Ms. Batts opines that defendant did not violate the back solicitation clause. This is what the jury will decide based on the evidence and my instructions on the applicable law. Ms. Batts' opinion simply recites what she says are the facts. She does not refer to industry knowledge, custom or practice or otherwise provide any expert knowledge that would assist the jury in interpreting either the clause or the facts. She also opines that defendant did not solicit Loders' business, was simply "exercising good fiscal control when it questioned Alliance's pay policies" and did not undermine plaintiff's services nor hire Olson" as a precondition to getting the business or in order to gain confidential or proprietary information" (the latter of which I have ruled on). Again she offers no expert knowledge that would assist the jury in its deliberations, simply summarizing defendant's arguments as to what it says are the facts. Fed. R. Evid. 702 permits testimony by experts "if scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." None of Ms. Batts' proposed testimony meets this threshold requirement.
2. Plaintiff's motion in limine to bar certain deposition testimony of Marcel Henneman on the ground that a question was leading is denied. The objection was waived.
3. Plaintiff's motion in limine to bar evidence of a state court action between the parties, motion to bar witnesses not previously disclosed, and to bar documents not previously disclosed or produced are unopposed and granted.
4. Defendant's motion in limine to bar plaintiff's expert, Robert Walters, from testifying is denied.. Certain

## STATEMENT

of his opinions are appropriate expert testimony. He may testify to the purpose of a back solicitation clause, how they are used in the industry, and the custom in the industry to carve out customers from back solicitation clauses. The remainder of his testimony is subject to the same objections raised with respect to defendant's expert.

5. Defendant's motion in limine to bar witnesses from testifying about another person's bias is unopposed, and granted.

6. Defendant's motion in limine to bar witnesses generally from testifying that Prime's conduct was unethical or in bad faith is denied, except that plaintiff's expert may not so testify. I do not know the context in which any witness other than the expert might give such testimony so I may uphold an objection at trial. With respect to the expert, whether defendant's conduct was in bad faith or unethical would be for the jury to decide in the context of punitive damages but it does not require expert testimony.

7. Defendant's motion for judgment on the pleadings with respect to plaintiff's claim for punitive damages is denied at this time. Defendant may renew its motion at the close of plaintiff's evidence and I will make a determination of whether there is sufficient evidence of bad faith to allow the jury to award punitive damages if it rules in plaintiff's favor.

8. Defendant's motion in limine barring the testimony of evidence that Brent Olson participated in the negotiation process in any way, etc. is granted. I already determined that there was no evidence that Olson was in any way involved, or considered, in defendant's negotiations. It is possible that Olson's employment may be relevant to whether Prime had knowledge of the business before he began working for defendant. At this time, I cannot make that determination.

9. Defendant's motion in limine to bar evidence of damages on plaintiff's interference with contract claim is denied. While plaintiff argues that the fact that defendant does not have the information it wants is its fault because it did not file a motion to compel, which seems to put the burden where it does not belong, defendant did, at least, have some obligation to enter into a discussion about plaintiff's objection to answering the question. Furthermore, and probably more important, plaintiff appears to have provided substantial information about its claimed damages, and indeed, the parties have stipulated to at least some of that information. If defendant still wants the information it requested in the unanswered interrogatory, plaintiff shall provide it within ten days.

10. Rulings with respect to exhibits are as noted on the record at the pretrial conference. If no ruling was made, it is reserved for trial.

**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.2  
Eastern Division**

Alliance Logistics, Inc.

Plaintiff,

v.

Case No.: 1:07-cv-04944  
Honorable Elaine E. Bucklo

New Prime, Inc.

Defendant.

---

**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Monday, August 3, 2009:

MINUTE entry before the Honorable Elaine E. Bucklo: Defendant's motion (100) to reconsider my decision not to allow defendant's expert to testify that it is not industry practice to list customers that would be carved out of a back solicitation clause is entered and continued. I have reviewed defendant's expert report, as well as her deposition (as attached to the original motion to strike since plaintiff attached only excerpts to its response to the motion to reconsider and defendant attached no parts of the deposition). I am unable to find anything in either the report or the deposition that touches on her expertise, whether by education or experience, to testify to the custom in the industry regarding any aspect of back solicitation clauses. While her resume is impressive, neither it nor her deposition in which she discusses her responsibilities in her various positions, indicates that she has any basis for knowing what industry practice would be with respect to back solicitation clauses. Nevertheless, if defendant chooses, it may present its expert in an offer of proof at the close of evidence on one of the trial dates and if I determine that she has a sufficient basis for her testimony that was simply not brought out in plaintiff's deposition of the expert, I will allow it. Mailed notice(mpj, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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**UNITED STATES DISTRICT COURT  
FOR THE Northern District of Illinois – CM/ECF LIVE, Ver 3.2.2  
Eastern Division**

Alliance Logistics, Inc.

Plaintiff,

v.

Case No.: 1:07-cv-04944  
Honorable Elaine E. Bucklo

New Prime, Inc.

Defendant.

---

**NOTIFICATION OF DOCKET ENTRY**

This docket entry was made by the Clerk on Monday, March 9, 2009:

MINUTE entry before the Honorable Elaine E. Bucklo: Defendant's motion (59) for summary judgment on counts 1 and 2 of plaintiff's complaint is denied. There are questions of fact as to whether defendant's actions amounted to solicitation of Loder's business in violation of the back solicitation clause of the contract between plaintiff and defendant and whether defendant interfered with plaintiff's prospective economic advantage. Summary judgment is granted as to count 3. There is no evidence to support plaintiff's claim that defendant interfered with a confidentiality agreement between Brent Olson and plaintiff. I had previously set this case for trial on March 23, 2009 but it is unrealistic to expect the parties to be prepared to go to trial on that date. A final pretrial order shall be filed by April 30, 2009. Responses to any motions in limine must be filed two weeks later. A final pretrial conference will be held on May 20, 2009 at 4:00 p.m. A new trial date will be set at that conference. Mailed notice(mpj, )

**ATTENTION:** This notice is being sent pursuant to Rule 77(d) of the Federal Rules of Civil Procedure or Rule 49(c) of the Federal Rules of Criminal Procedure. It was generated by CM/ECF, the automated docketing system used to maintain the civil and criminal dockets of this District. If a minute order or other document is enclosed, please refer to it for additional information.

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**CIRCUIT RULE 31(e) CERTIFICATION**

Pursuant to Circuit Rule 31(e), the undersigned attorney certifies that a copy of the foregoing Brief in native PDF format and all of the appendix items that are available in non-scanned PDF format were filed electronically with the Court.

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## **CERTIFICATE OF SERVICE**

The undersigned hereby certifies that two hard copies of the foregoing Brief and Appendix were served by hand delivery, and a digital version was served by e-mail, on the following:

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