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FIVE ESSENTIAL SHIPPING AND TRANSPORTATION DOCUMENTS IN TRUCKING CASES¹

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I. Introduction

In handling trucking cases, it is important to understand the documents and transactions underlying why the truck in question is on the road. Such knowledge may indicate where liability lies. It is crucial to know the legal distinctions between the three different parties to a contract for the transportation of goods—the shipper, the receiver, and the motor carrier—because each party has a different role, and the way the parties categorize themselves in formal and informal language is not necessarily an accurate description of their legal roles.²

The following includes a description of and the strategy points related to five essential shipping and transportation documents. Attached to this article is an Abbreviated Table of Legal Terminology,³ an example bill of lading,⁴ a model example of a shipper-motor carrier contract,⁵ a model version of a shipper-broker contract,⁶ two versions of broker-motor carrier contracts,⁷

¹ This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Annual Conference*, San Diego, CA, July 2019.

² *United States v. California*, 297 U.S. 175, 181 (1936) (“Whether a transportation agency is a common carrier depends not upon its corporate character or declared purposes, but upon what it does.”). *See also* *Schramm v. Foster*, 341 F. Supp. 536, 548-51 (D. Maryland 2004) (discussing the differing legal roles of brokers and motor carriers and how holding oneself out as one or the other does not necessarily predict one’s actual legal role).

³ *See* Attachment I.

⁴ *See* Attachment II.

⁵ *See* Attachment III.

⁶ *See* Attachment IV.

⁷ *See* Attachment V and VI.

and an example trailer interchange and indemnity agreement.⁸

II. The Five Essential Documents

1. Bill of lading

A bill of lading is a document required of “[a]ll common carriers, except express companies, engaged in the transportation of property other than livestock and wild animals, by rail or by water subject to the Interstate Commerce Act”⁹ that specifies to whom products are shipped, from whom they are shipped, who the carrier is, the date the products are shipped, various descriptors of the shipped products, and to whom charges are advanced.¹⁰ Marketrans provides an example bill of lading that is easily accessible online.¹¹

It is especially important to pay attention to whom the charges are advanced, because the payor is ultimately responsible for the shipped goods. If the bill of lading indicates that the cost is “prepaid” the shipper pays and is responsible for the goods.¹² If the bill of lading indicates that the cost is “collect,” the receiver of the goods pays and is responsible for the goods.¹³ If the bill of lading indicates that the cost is by a “third party,” then neither the shipper nor the receiver of the goods pays for or is responsible for the shipped goods, and instead a broker, motor carrier, or other third party is responsible.¹⁴

In many cases, the carrier listed on the bill of lading is not necessarily the carrier making the final delivery of the goods. This is due to the current economic landscape of the transportation industry, where roughly 57 percent of the truckload revenue generated is by trucking firms with more than 100 trucks operated in their fleets.¹⁵ Of the 770,000

⁸ See Attachment VII.

⁹ 49 C.F.R. § 1035.1(a) (2014).

¹⁰ See *id.* at § 1035; see also Attachment I: Abbreviated Table of Legal Terminology.

¹¹ *Bill of Lading*, MARKETTRANS.COM, available at http://marketrans.com/wordpress/wp-content/uploads/2015/04/Bill_of_Lading_Form.pdf (last visited May 30, 2019). This document is attached as Attachment II.

¹² *FOB Definition: Shipping Terms of Sale*, DSI-TMS.COM, available at http://www.dsi-tms.com/hs-fs/hub/1%20987/file-18496826-pdf/docs/fob_definition.pdf (last visited May 30, 2019).

¹³ *Id.*

¹⁴ *Id.*

¹⁵ FREIGHT MGMT. AND OPERATIONS DIV., DEP’T OF TRANSP., EVALUATION OF U.S. COMMERCIAL MOTOR CARRIER INDUSTRY CHALLENGES AND OPPORTUNITIES (Mar. 31, 2003) available at https://ops.fhwa.dot.gov/Freight/publications/eval_mc_industry/index.htm.

trucks operating in the truckload division, about 570,000 trucks are operating under the authority of the largest trucking companies; about 300,000 of these trucks are independent owner-operators hauling for the biggest companies.¹⁶ These owner-operators typically carry only the minimum amount of insurance required by the federal government. In a catastrophic injury case with only \$750,000 to \$1,000,000 of coverage available, lawyers are frequently tasked with finding the hidden pocket of insurance money. In cases like this, the bill of lading becomes a critical piece of evidence in determining who the motor-carrier was, who hired the motor carrier, and whether there are other contractual arrangements which may lead to another liable party.

2. Shipper-motor carrier contract

A shipper-motor carrier contract is a contract between the individual shipper and the motor carrier for the transportation of goods from the shipper to the receiver through a motor carrier. Typically, there is no broker involvement in a shipper-motor carrier contract. Due to the costs involved with enlisting brokers, shippers often prefer shipper-motor carrier contracts to contracts involving brokers.¹⁷ Shippers tend to enlist larger carriers because such carriers have greater sales resources, which they can utilize to advertise to and be more readily found by shippers.¹⁸ A model shipper-motor carrier contract example is the National Industrial Transportation League's "Motor Carrier/Shipper Agreement."¹⁹

Although, these types of contracts can be lucrative to the motor carrier, they often legally bind it to performing the transportation of the goods. Due to the driver shortage and the expensive nature of new equipment, many of these motor carriers are forced to hire independent contractors to be the end-hauler. The carrier often attempts to hide behind the independent contractor defense to avoid liability after their independent contractors cause a catastrophic wreck. However, the terms of the shipper-carrier agreements typically undermine any attempt at avoiding liability in these situations.

If a shipper cannot find an acceptable carrier, or if the shipper feels that finding a carrier is not worth the search due to having undesirable cargo or for other reasons, the next step

¹⁶ *Id.*

¹⁷ James C. Hardman, *Third-Party Contract Issues Concerning Motor Carriers, Brokers, and Shippers*, U. DEN. TRANS. L.J. 307, 317 (Jan. 14, 2008), available at http://www.law.du.edu/pdfdocuments/v34no3_hardman2.pdf.

¹⁸ *Id.*

¹⁹ *General Instructions for Completing of Model Truckload Motor Carrier/Shipper Agreement with Commentaries*, TRUCKING.ORG, available at <https://www.trucking.org/ATA%20Docs/What%20We%20Do/Law%20and%20Litigation/General%20Documents/Instructions%20for%20Use%20-%20Shipper.pdf>. This document is attached as Attachment III.

is often to seek out a broker.²⁰ When an acceptable broker is found, at least two contracts must follow: 1) the shipper-broker contract, and 2) the broker-motor carrier contract.²¹

3. Shipper-broker contract

A shipper-broker contract is a contract between the shipper and the broker for the transportation of goods from the shipper to the receiver through some motor carrier that the broker finds and contracts with separately. A model shipper-broker contract example is the Transportation Intermediaries Association's "Broker/Shipper Transportation Agreement."²²

Typically, a shipper can insulate itself from liability by utilizing this method of contractual arrangement, because the shipper is shifting the responsibility for selecting a competent motor-carrier to the broker.

4. Broker-motor carrier contract

A broker-motor carrier contract is a contract between the broker and the motor carrier for the transportation of goods. It is often small or individual carriers that enter into such contracts with brokers.²³ These contracts tend to be detailed, yet form-fillable, allowing for contracts that are essentially the same from one moving job to the next.²⁴ Model broker-motor carrier contracts include the Transportation Intermediaries Association's Broker-Carrier Agreement²⁵ and the American Trucking Associations' Model Motor Carrier/Broker Agreement.²⁶

Generally, brokers are not liable for the acts of the independent contractor trucking firms they hire to transport the goods with the exception of two scenarios: 1) where the broker

²⁰ Hardman at 317.

²¹ *Id.*

²² *Documents*, RFXINC.COM, available at <https://www.rfxinc.com/resources/documents/>. This document is attached as Attachment IV.

²³ Hardman at 317.

²⁴ *Id.*

²⁵ *Broker-Carrier Agreement*, PREFERREDGLOBALLOGISTICS.COM, available at http://preferredgloballogistics.com/index.php?doc_id=26. This document is attached as Attachment V.

²⁶ *See Carrier Broker Agreements*, TRUCKING.ORG, available at http://www.trucking.org/Carrier_Broker_Agreements.aspx# (last visited May 30, 2019) (showcasing downloadable links to short and long versions of the agreement on the right side of the webpage). The short version of this document is attached as Attachment VI.

hires an incompetent independent contractor²⁷ and 2) the broker has asserted enough control under the terms of the broker-carrier agreement to constitute an agency claim.

5. Trailer interchange agreements and anti-indemnity statutes

A trailer interchange agreement is an agreement entered into by two motor carriers for the use of one motor carrier's trailer. It generally holds that the receiving motor carrier will pay for any damage that happens to the owning motor carrier's trailer or the items therein while the lending motor carrier maintains possession of the trailer, but that the receiving motor carrier will not pay for damage caused by the owning motor carrier's negligent acts or omissions. A model trailer-interchange contract example is the National Private Truck Council's Trailer Interchange and Indemnity Agreement.²⁸ The indemnity language contained in these contracts is often very critical, because the indemnity language is designed to exclude trailer liability coverage for the lessee under the lessor's insurance policy. One way to combat this issue is to examine the indemnity language and see if it violates many states' anti-indemnity statutes.

An anti-indemnity statute is a state statute holding that a party²⁹ contracting with a motor carrier cannot hold the motor carrier responsible for negligent acts or omissions conducted by the party, or, according to some state statutes, any party.³⁰ Forty-two states contain some form of an indemnity statute; the eight states that do not have indemnity statutes are: Delaware, Mississippi, New York, New Jersey, New Hampshire, Ohio, Rhode Island, and New York.³¹ The existence of state anti-indemnity statutes holding that any party contracting with a motor carrier cannot cause the motor carrier to indemnify them from liability explains why trailer-interchange agreements like the National Private Truck Council's agreement (Attachment VII) have exceptions to liability clauses, stating that the receiving motor carrier will not be held liable for the owning motor carrier's negligent acts or omissions. Although many of the newer trailer-interchange agreements sync with the anti-indemnity statutes, it is very important for

²⁷ See RESTATEMENT (SECOND) OF TORTS §411 (1965).

²⁸ *Trailer Interchange and Indemnity Agreement*, NPTC.ORG, available at <http://www.nptc.org/get-certified/ctp-resources/ctp-insider/817-trailer-interchange-and-indemnification-current-spring-2013/file> (last visited May 30, 2019). This document is attached as Attachment VII.

²⁹ Of states that have anti-indemnity statutes, most hold that such statutes apply to any party contracting with a motor carrier, while a minority of states only recognize the statute's applicability to shippers contracting with motor carriers. JASON ORLEANS ET AL., *Handling Anti-Indemnity Issues in Transportation Contracts*, in TRANSPORTATION CONTRACTS: FROM START TO FINISH 131 (2015).

³⁰ For a detailed grouping of states that, in 2015, applied anti-indemnity statutes in dealings with motor carriers 1) to any third party, 2) just to the "promisee," 3) to unspecified third parties, 4) to the "shipper," and 5) to any of the above, but with unique statutory language, see *id.*

³¹ *Id.* at 131.

counsel to be aware of the language.

III. Conclusion

As the trucking industry becomes more and more consolidated, it is important for plaintiff's counsel to understand the transaction nature of the motor-carrier's business in order to properly litigate the plaintiff's claims. The contracts that govern these transactions typically speak to the true nature of each defendant's role in the transportation, and ultimately are the deciding factor in whether any liability attaches to the defendant.

Appendix A: Abbreviated Table of Legal Terminology

Bill of Lading- A document required of “[a]ll common carriers, except express companies, engaged in the transportation of property other than livestock and wild animals, by rail or by water subject to the Interstate Commerce Act”³² that specifies to whom products are shipped, from whom they are shipped, the date they were shipped, various descriptors of the shipped products, and to whom charges are advanced.³³

Broker- “[A] person who, for compensation, arranges, or offers to arrange, the transportation of property by an authorized motor carrier.”³⁴

Individual Shipper- “[A]ny person who—(A) is the shipper, consignor, or consignee of a household goods shipment; (B) is identified as the shipper, consignor, or consignee on the face of the bill of lading; (C) owns the goods being transported; and (D) pays his or her own tariff transportation charges.”³⁵

Motor Carrier- “[A] person providing motor vehicle transportation for compensation.”³⁶

³² 49 C.F.R. § 1035.1(a).

³³ *See id.* at § 1035, appendix A.

³⁴ 49 C.F.R. § 371.2(a). The statute clarifies: “Motor carriers, or persons who are employees or bona fide agents of carriers, are not brokers within the meaning of this section when they arrange or offer to arrange the transportation of shipments which they are authorized to transport and which they have accepted and legally bound themselves to transport.” *Id.*

³⁵ 49 U.S.C. § 13102(13).

³⁶ 49 U.S.C. § 13102(16).

Appendix B: Bill of Lading

SHIP FROM

Name: _____
 Address: _____
 City/State/Zip: _____
 SID#: _____

FOB:

Bill of Lading Number: _____
BAR CODE SPACE

SHIP TO

Name: _____ Location #: _____
 Address: _____
 City/State/Zip: _____
 CID#: _____

FOB:

CARRIER NAME: _____
 Trailer number: _____
 Seal number(s): _____
SCAC: _____
Pro number: _____

THIRD PARTY FREIGHT CHARGES BILL TO:

Name: _____
 Address: _____
 City/State/Zip: _____

BAR CODE SPACE

SPECIAL INSTRUCTIONS:

Freight Charge Terms: (freight charges are prepaid unless marked otherwise)
 Prepaid _____ Collect _____ 3rd Party _____

(check box) Master Bill of Lading: with attached underlying Bills of Lading

CUSTOMER ORDER INFORMATION					
CUSTOMER ORDER NUMBER	# PKGS	WEIGHT	PALLET/SLIP Y or N	ADDITIONAL SHIPPER INFO	

GRAND TOTAL

CARRIER INFORMATION								
HANDLING UNIT		PACKAGE		WEIGHT	H.M. (X)	COMMODITY DESCRIPTION <small>Commodities requiring special or additional care or attention in handling or stowing must be so marked and packaged as to ensure safe transportation with ordinary care. <i>See Section 2(e) of NMFC Item 360</i></small>	LTL ONLY	
QTY	TYPE	QTY	TYPE				NMFC #	CLASS

	RECEIVING
	STAMP SPACE
GRAND TOTAL	

Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property as follows:

"The agreed or declared value of the property is specifically stated by the shipper to be not exceeding _____ per _____."

COD Amount: \$ _____

Fee Terms: Collect: Prepaid:
 Customer check acceptable:

NOTE Liability Limitation for loss or damage in this shipment may be applicable. See 49 U.S.C. - 14706(c)(1)(A) and (B).

RECEIVED, subject to individually determined rates or contracts that have been agreed upon in writing between the carrier and shipper, if applicable, otherwise to the rates, classifications and rules that have been established by the carrier and are available to the shipper, on request, and to all applicable state and federal regulations.

The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

Shipper Signature

SHIPPER SIGNATURE / DATE

This is to certify that the above named materials are properly classified, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the DOT.

Trailer Loaded:	Freight Counted:
<input type="checkbox"/> By Shipper	<input type="checkbox"/> By Shipper
<input type="checkbox"/> By Driver	<input type="checkbox"/> By Driver/pallets said to contain
	<input type="checkbox"/> By Driver/Pieces

CARRIER SIGNATURE / PICKUP DATE

Carrier acknowledges receipt of packages and required placards. Carrier certifies emergency response information was made available and/or carrier has the DOT emergency response guidebook or equivalent documentation in the vehicle.
 Property described above is received in good order, except as noted.

SUPPLEMENT TO THE BILL OF LADING

Page _____

Bill of Lading Number: _____

CUSTOMER ORDER INFORMATION

CUSTOMER ORDER NUMBER	# PKGS	WEIGHT	PALLET/SLIP Y or N		ADDITIONAL SHIPPER INFO
PAGE SUBTOTAL					

CARRIER INFORMATION

HANDLING UNIT		PACKAGE		WEIGHT	H.M. (X)	COMMODITY DESCRIPTION <small>Commodities requiring special or additional care or attention in handling or stowing must be so marked and packaged as to ensure safe transportation with ordinary care. See Section 2(e) of NMFC Item 360</small>	LTL ONLY	
QTY	TYPE	QTY	TYPE				NMFC #	CLASS
PAGE SUBTOTAL								

Attachment III

Appendix C: Model Truckload Motor Carrier-Shipper Agreement with Commentaries



Model Truckload Motor Carrier/Shipper Agreement with Commentaries

MOTOR CARRIER/SHIPPER AGREEMENT

THIS MOTOR CARRIER/SHIPPER AGREEMENT (this "Agreement"), is made and entered into as of the ____ day of _____, 20__, by and between _____, a(n) _____ corporation, ("Shipper"), and _____ a(n) _____ corporation ("Carrier"). Shipper and Carrier are sometimes individually referred to herein as a "Party" and together as the "Parties."

WHEREAS, Shipper desires to hire Carrier to perform motor carrier transportation service for Shipper in accordance with the terms and subject to the conditions of this Agreement; and

WHEREAS, Carrier desires to perform motor carrier transportation service for Shipper in accordance with the terms and subject to the conditions of this Agreement;

NOW, THEREFORE, for and in consideration of the foregoing premises and the mutual agreements and provisions hereinafter set forth, the Parties hereby mutually agree as follows:

1. Term. This Agreement shall remain in full force and effect for a ____ year period beginning on the date first written above and continuing thereafter on a year-to-year basis. Either Party may terminate this Agreement at any time, with or without cause, upon thirty (30) days' written notice to the other party, unless otherwise specified in this Agreement.

COMMENTARY

The 30-day termination provision is subject to exception if otherwise agreed to by the parties. Some carriers and shippers may make major monetary investments and operation changes, including stationing personnel on the other's premises to meet specific requirements. In such instances, the 30-day period may not be fair and equitable in protecting the interests of the parties and should be modified. For longer term contracts, it may be beneficial to add a section dealing with termination of this Agreement if unexpected or unusual circumstances arise that change the expectations of the parties. This clause provides for an "evergreen" contract (i.e. one that continues indefinitely unless the parties take action to terminate it). An alternative form would be to establish an expiration date that ends the agreement unless the parties take action to extend its term. The evergreen option is commonly used, but in some instances, such as very long-term or complex contracts, a fixed expiration date may be useful.

2. Scope of Agreement. Carrier is a motor carrier under 49 U.S.C. 13102(12), is duly registered with the Department of Transportation pursuant to 49 U.S.C. 13902 and 13905 with a Motor Carrier Safety Rating of "_____", and will provide lawful and responsible transportation service to Shipper under contract. Shipper will tender Carrier freight for transportation. The scope of the service contemplated by the Parties is set forth in Appendix A. Carrier shall be an independent contractor of Shipper. As between the Parties, Carrier shall have the sole and exclusive responsibility for the costs and over the manner in which its employees and/or independent contractors perform the transportation service, including the equipment provided.

COMMENTARY

This clause establishes the authority the carrier has to provide service, its safety rating, and its willingness to provide lawful and responsible service under contract. It also establishes that a shipper will utilize the carrier's service without interfering with the relationship between the carrier and its employees or independent contractors.

Under Part B of Subtitle IV Interstate Transportation, 49 U.S.C. § 13101, et seq., entities formerly categorized as common and contract carriers no longer exist and all carriers are simply identified as *motor carriers*, which may provide service under contract. It is no longer necessary for a motor carrier to have a permit as a contract carrier.

It is not necessary for shippers to identify a specific number of loads or lading to be tendered to carriers to meet the "*series of shipments*" as this requirement under previous law was abolished.

However, since the parties may have to make specific financial outlays or predicate operational changes based on the scope of the service contemplated, including, but not limited to, acquisition of additional or new types of equipment, or engagement of additional operations personnel, it would behoove the parties to set forth the scope of the operations in realistic terms in Appendix A. This may include establishing meaningful obligations regarding volume of traffic, equipment requirements, and other matters, and possible penalties for non-performance.

3. Rates, Charges, and Payment Terms.

- (a) Shipper shall pay Carrier, within _____ days of the shipment date shown on the invoice, the amounts calculated in accordance with the schedule of rates and charges attached hereto as Appendix B, including any written supplements thereto, and as otherwise set forth in this Agreement. No offsets may be taken against invoiced charges. Carrier shall apply Shipper's payment to the amount due for the specified invoice, regardless whether there are earlier unpaid invoices. Carrier may assess a service charge of ____% per month (or the highest lawful rate, if less) for any delayed payments.
- (b) On billings to third parties, Shipper, as the contracting party with Carrier, will be responsible for all freight and related charges for transportation under this Agreement. As an accommodation to Shipper, Carrier shall bill a third party upon notice on the freight documentation the Parties utilize, but Shipper agrees to guarantee payment and stand as primary debtor. Carrier shall: (i) advise Shipper if third party payment is not made within thirty (30) days of billing; (ii) assign to Shipper any rights Carrier may have to collect freight charges from the third party; and (iii) cooperate with Shipper in any collection proceeding instituted by Shipper, with the understanding that Carrier will be reimbursed reasonable expenses of so doing. Shipper will pay the third party freight bill within thirty (30) days of the assignment provided above.

- (c) If Shipper does not pay the invoiced amounts, Carrier must commence civil action or final and binding arbitration proceedings to recover such invoiced amounts within eighteen (18) months of delivery or tender of delivery of the shipments involved. If Carrier alleges undercharges, or Shipper alleges overcharges, duplicate payment, or overcollection, notice of such claims or unidentified payments must be given within 180 days of receipt of the invoice and a civil action or arbitration proceeding must be filed within eighteen (18) months of delivery or tender of delivery of the shipments involved. The processing, investigation, and disposition of overcharge, unidentified payment, duplicate payment, or overcollection claims shall be governed by present federal regulations codified at 49 C.F.R. Part 378.

COMMENTARY

Payment within a reasonable period of time, without a unilateral offset, is necessary to ensure that a carrier achieves a level of cash flow sufficient to meet its contractual obligations. In determining the payment period, shipper and carrier should consider, among other things, the working capital needs of carrier and the marketplace in which shipper competes. A requirement for payment of freight charges within a specific period is without effect if there is no penalty for non-compliance. Carriers and shippers also may want to consider an incentive discount for early payment of charges.

The time limits for bringing a civil action or final and binding arbitration proceeding concerning overcharges, undercharges, etc. are consistent with current statutory provisions and would ensure uniformity between all contractual parties.

The reference to and use of the procedures embraced in 49 C.F.R. Part 378 for handling overcharges, etc. allows the parties to utilize a known and generally accepted process.

4. Freight Documentation. The Uniform Freight Documentation form set forth as Appendix D may be utilized by the Parties. The terms and conditions of this Agreement shall prevail over those appearing on that form or any other form(s) used by the Parties for the delivery of freight. Any form(s) used by the Parties shall only be used for the purpose of documenting the pick-up and delivery of freight. Either Party, at its option, may supply any document required by or referenced in this Agreement in either paper or electronic form (including, but not limited to, an electronically imaged, faxed, photocopied, or online posted version), and any such version shall be sufficient for all purposes under this Agreement. Unless specifically agreed to by the Parties, any joint movement involving another transportation entity to or from a point outside the U.S. shall not be considered as moving on a "through" bill of lading. Carrier agrees not to subcontract, broker, interline, or to use "substituted services" by rail or motor carrier without the specific approval of Shipper. If for any reason this is done without permission, Carrier shall be liable to Shipper for any cargo loss, damage, or injury to the same extent as if Carrier performed the service.

COMMENTARY

The variety of bills of lading currently being used in the industry has increased and, because of different provisions, makes it difficult, if not impossible, for parties to understand what obligations are being undertaken on any given shipment. Further, there frequently are conflicts between bills of lading and contract terms. Since the intent of the contract is to spell out the terms and conditions of the parties' endeavor in a single document, the freight document should essentially serve as a receipt.

The increase in intermodal and international movements raises issues regarding the applicability of the Carmack Amendment and foreign laws and judicial processes. The "through" bill of lading provision is intended to limit the contract's applicability to the domestic portion of an international movement by the carrier to avoid such issues. Carrier and shipper can specifically provide for "through" movements if they so desire.

Carrier and shipper contract for the services set forth in the agreement. If substituted services through third parties are used without approval of shipper, carrier is made liable to shipper for cargo loss, damage, or injury to the same extent as if carrier performed the service. However, if substitute services are part of the overall transportation solution and agreed to in advance, carrier and shipper can specifically provide that each carrier in the transportation chain shall bear its portion of the risk as set forth in such agreed upon solution.

5. Insurance. Carrier shall maintain during the term of this Agreement (a) workers' compensation insurance on all employees, as required by applicable state law, (b) automobile and property damage liability insurance with limits of liability of not less than \$_____ per occurrence, (c) cargo insurance to cover damage to or loss of cargo in the amount of \$_____ per occurrence, and (d) general liability insurance with limits of liability of not less than \$_____ per occurrence. The required insurance shall cover the entire geographic scope in which the Carrier will operate under this Agreement and, as applicable, be "Broad Form." Upon request, Carrier will furnish Shipper with a certificate of insurance from a reputable insurance company evidencing such insurance. Carrier will request that its insurance company provide 30 days' advance notice to Shipper prior to cancellation of such insurance. Neither Party waives any right to subrogation it or its insurers may have arising out of service provided pursuant to this Agreement. Notwithstanding the foregoing, if Carrier meets all applicable federal requirements, Carrier may self-insure. Upon request, Carrier shall furnish Shipper with proof of self-insurance.

COMMENTARY

The minimum insurance amounts required pursuant to 49 U.S.C. 13906 must be met.

The provision requiring carriers to request that notice of cancellation be sent to shippers 30 days prior to the cancellation of the required insurance will protect shippers.

Waivers of subrogation are precluded to prevent either party from avoiding the consequences of their own negligence or acts. In addition, a waiver of subrogation could possibly cause a loss of any insurance coverage.

If a carrier does not maintain "Broad Form" coverage, the parties should negotiate different terms.

6. Refused Shipment-Warehouseman Liability. If the consignee refuses the lading tendered by Carrier or if Carrier is unable to deliver the lading because of fault or mistake of Shipper or the consignee, or if Shipper advises and instructs Carrier to stop movement of the lading and to hold it in transit, Carrier's liability thereafter immediately shall be that of a warehouseman. The procedures which Carrier agrees to and will take as a warehouseman involve the use of ordinary care to keep the lading in a safe or suitable place or to store the lading properly. Carrier shall (a) attempt to give Shipper notice as soon as possible if the foregoing occurs, (b) place the lading in public storage, if available, unless Carrier receives contrary disposition instructions from Shipper within twenty-four (24) hours, and (c) if disposition instructions are not given by Shipper within ten (10) days of Carrier's initial notification to Shipper, Carrier may offer the lading for public sale. In the case of perishable lading, Carrier may dispose of the lading at a time and in a manner Carrier deems appropriate. Shipper will be responsible for storage costs and reasonable costs Carrier incurs in acting as a warehouseman. To the extent any sale or disposal revenues exceed the storage costs and the costs Carrier incurs as a warehouseman, Carrier shall remit the balance to Shipper. If Shipper gives Carrier timely disposition instructions, Carrier shall use any commercially reasonable steps to abide with such instructions. Shipper will pay Carrier's costs and any additional transportation costs Carrier incurs in doing so.

COMMENTARY

The procedures for handling freight as a warehouseman are normally covered by the bill of lading or state statutes in the absence of a private agreement. Since freight movements normally involve multiple states, procedures have been set forth to eliminate such variances and clearly allow the parties to know what will occur and the liabilities involved.

7. Cargo Liability.
- (a) Carrier shall be liable to Shipper for loss or damage to lading occurring while it is in Carrier's possession, except to the extent such loss or damage is caused by an act of God or a public enemy, a public authority, an act of Shipper, or the inherent vice or nature of the lading. Carrier's possession of lading under this Agreement shall begin when Carrier has executed the freight documentation form for such lading and shall terminate upon the lading being tendered for delivery to Shipper's consignee.

[NOTE: The Parties should select either Option A or Option B. Option A provides for the statutory Carmack standard to apply. Under this option, Carrier generally is liable for the actual loss or injury to the cargo. Option B limits Carrier's monetary liability for cargo damage to the amount of cargo insurance maintained by Carrier under this Agreement.]

[Option A]

- (b) Carrier's liability for cargo loss and damage will be as described in the provisions of 49 U.S.C. 14706. The Parties may agree to released value rates, in Appendix B to this Agreement, that limit Carrier's liability to a specified amount.

[Option B]

- (b) Carrier's monetary liability will be limited to the amount of cargo insurance provided in Section 5 above. If Shipper asserts that the value of lading on a particular shipment shall exceed this amount, Carrier shall be advised twenty-four (24) hours before the time of tendering a load. Carrier may refuse the load or secure additional cargo insurance in the amount of liability Shipper claims, the cost of which shall be invoiced to Shipper as part of freight charges. Shipper also shall note any separately agreed value on the freight documentation form referenced in Section 4 above. If the freight Shipper tenders consistently exceeds the amount of cargo insurance provided in Section 5 above, the Parties shall agree in writing to an alternate cargo insurance amount, which will be reflected in freight charges otherwise assessed.
- (c) Claims for loss or damage to lading must be filed in writing by Shipper within nine (9) months from date of delivery, or scheduled date of delivery for lost lading, or in the absence of a scheduled delivery date, the filing period shall begin after a reasonable time has elapsed for delivery, and a civil suit or arbitration proceeding shall be commenced by Shipper within two (2) years from the date Carrier gives Shipper written notice Carrier is disallowing the claim or any part of it. Claims will be filed and resolved in accordance with federal regulations codified at 49 C.F.R. Part 370.
- (d) The measure of damages for loss of or physical damage to the cargo shall be the invoice value of the lading, or in the absence of an invoice, wholesale destination value. Carrier also shall be liable for the reasonable costs of the Shipper to mitigate its damages.
- (e) In no event shall Carrier be liable to Shipper or anyone else for special, incidental, or consequential damages that relate to loss, damage or delay to a shipment, unless Shipper has informed Carrier in written or electronic form, prior to or when tendering a shipment or series of shipments to Carrier, of the potential nature and type of such damages, and Carrier specifically agrees in written or electronic form to accept responsibility for such damages. In no event shall Carrier be liable to

Shipper or anyone else for punitive or exemplary damages that relate to loss, damage or delay to a shipment.

COMMENTARY

Carrier and shipper may select either Option A or Option B to address the liability of carrier to shipper for cargo loss, damage, and delay claims. Under Option A, the parties also should refer to Appendix B, Section 1, and its Commentary for protection of carrier from liability for "high value" commodities that exceed the parties' expectations at the time they entered into the Agreement.

Option A incorporates the standard under existing Federal law (49 USC 14706), also known as the Carmack Amendment. Federal law provides that, in the absence of an agreement to the contrary, a carrier assumes full liability, without limit, for the actual loss or injury to property the carrier handles, subject to several well-established exceptions. Federal law also permits a carrier to limit its liability to a reasonable value established by written agreement with the shipper. If the carrier and shipper desire to limit the carrier's liability, they should declare that the rates in Appendix B are released value rates that limit the carrier's liability to \$_____. Carrier is responsible for damages that exceed its insurance coverage, unless carrier and shipper otherwise have agreed to released liability rates that limit carrier's liability to a lesser amount.

Option B limits carrier's monetary liability for cargo damage to the amount of cargo insurance maintained by carrier under this Agreement, unless a greater value is noted and accepted, in which case shipper would be assessed additional cargo insurance costs.

Limitation periods are consistent with acceptable and common periods within current industry practices.

Claim handling is to be made under the procedures codified in 49 C.F.R. Part 370, which procedures generally are acceptable to shippers and carriers.

The measure of damages may be negotiated, as necessary, to address factors specific to the shipper and carrier. Incidental, special and consequential damages ordinarily are recoverable by a shipper only if the carrier knows, or has reason to know, of the likelihood of such damages. This provision modifies that standard by providing that incidental, special and consequential damages are not recoverable by shipper unless carrier specifically agrees in writing to accept responsibility for such damages. The most common form of such damages are lost profits, overtime, and downtime. This provision adopts a formal process for shipper to notify carrier of the potential for these damages to occur, and for carrier to accept responsibility for such damages. The parties may need to modify these procedures to better address circumstances peculiar to their business procedures. Punitive and exemplary damages are rarely, if ever, recoverable under Federal law and are precluded by this provision.

8. Sealed Shipment. If Shipper loads and seals the lading in or on the trailer and Carrier does not have the opportunity to count the lading being loaded and the seal is intact upon delivery, Carrier shall be absolved from any liability for shortages or any damage to the lading except when proximately caused by independent action of Carrier. Such absolution of liability will also occur if (i) the seal is broken at the direction and under the supervision of an agent of a body politic, or (ii) trailers are preloaded and the adequacy of loading or count of such trailer is not practical by a representative of Carrier. Carrier agrees that if a seal is broken and an inspection made by an agent of a body politic, its operator or other representative will take all reasonable steps to secure the count, safety, and integrity of the lading. These steps will include requesting that the body politic reseal the trailer and/or make appropriate notation on the freight documentation form. Carrier may break the seal on a trailer if, upon Carrier's determination or that of its operator or other representative, it becomes reasonably necessary to do so to inspect, reposition, or protect the lading or Carrier's equipment or to comply with federal, state, municipal, or provincial laws, rules, and regulations. Shipper's consignee may not refuse delivery of a shipment solely because the seal on a trailer is broken.

COMMENTARY

"Shipper load and count" shipments are increasingly prevalent in carrier operations, and it is essential that the parties agree on the handling of such shipments.

The first provision essentially sets forth the black letter law governing such shipments.

With current concerns over homeland security, it is anticipated that there will be more inspections of loads in transit by security personnel. Such inspections should not default the protection of SL&C shipments afforded to carriers. Carriers and shippers are encouraged to have federal, state, and local authorities adopt resealing programs to protect the status of loads. In the absence thereof, shipper and carrier should agree on the mechanics of documenting a security inspection.

Specific mention is made that the break of seal in and of itself does not constitute a right of refusal by a consignee. This reflects the current status of the law which is often overlooked by consignees.

9. Salvage. Shipper will have the right reasonably to determine to repair, repackage, salvage, or scrap damaged lading. If Shipper elects to salvage lading, Shipper shall notify Carrier to return the lading to Shipper or allow Carrier to dispose of the lading. If salvage is sought, at least two independent bids shall be obtained, and the highest bid accepted. Any monies received in salvage, whether accomplished by Carrier or Shipper, will be credited, if applicable, against any amount Carrier may otherwise be responsible for in terms of the damages. Shipper may condition salvage upon the removal of all identifying marks or labels or the lading being permanently marked as "*damaged*" or with a similar notation. If Carrier is retained by Shipper to return the damaged lading for repair, salvage, or scrapping, Shipper agrees to pay Carrier freight charges otherwise

provided in this Agreement, or at a negotiated rate to be reduced to writing, without prejudice to recovery of such freight charges as damages. Damaged lading will not be scrapped unless repair and/or salvage is not feasible. If Carrier salvages the lading, Carrier may bill a reasonable charge for doing so against salvage receipts.

COMMENTARY

This clause attempts to define the respective rights and procedures in a fair, clear, and brief manner.

10. Indemnification.

- (a) Carrier shall defend, indemnify, and hold Shipper and its employees and agents harmless from and against all claims, liabilities, losses, damages, fines, penalties, payments, costs, and expenses (including, without limitation, reasonable legal fees) caused by and resulting from (i) the negligence or intentional misconduct of Carrier or its employees or agents, or (ii) Carrier's or its employees' or agents' violation of applicable laws or regulations.
- (b) Shipper shall defend, indemnify, and hold Carrier and its employees and agents harmless from and against all claims, liabilities, losses, damages, fines, penalties, payments, costs, and expenses (including, without limitation, reasonable legal fees) caused by and resulting from (i) the negligence or intentional misconduct of Shipper, its employees, or agents, or (ii) Shipper's or its employees' or agents' violation of applicable laws or regulations.
- (c) In the event such claims, liabilities, losses, damages, fines, penalties, payments, costs, and expenses (including, without limitation, reasonable legal fees) are caused by the joint and concurrent negligence of the Parties, or the Parties and a third party, the indemnity obligations for such claims, liabilities, losses, damages, fines, penalties, payments, costs, and expenses (including, without limitation, reasonable legal fees) shall be borne by each Party in proportion to its degree of fault.
- (d) In no event shall either Party be liable to the other under this Section 10 to the extent damages are incidental, consequential, special, punitive, or exemplary. Any indemnified party under this Section 10 shall promptly tender the defense of any claim to the indemnifying Party. Carrier's liability for cargo damage shall be governed by Section 7 above.

[NOTE: Each carrier needs to check with its insurer or its insurance policy to determine whether it is covered for contractual indemnification.]

COMMENTARY

Indemnification should be given on a mutual basis. "Negligence" is noted as a causation factor in lieu of "sole" or "gross" negligence as many accidents or incidents in the transportation industry may involve, in part, a combination of shipper, carrier, and third party negligence. Further, "gross" negligence is difficult to define and inappropriately excuses some negligence. Many states will not allow indemnification against one's own negligence and a party should not be required to do so.

In the case of joint and concurrent negligence, the parties will share damages in proportion to their respective degree of fault.

Incidental, consequential, special, punitive, and exemplary damages are excluded in this Section as such damages could possibly be substantial and beyond the contemplation or understanding of the parties in establishing freight charges and undertaking service requirements. To the extent the parties are willing to accept such liability, the circumstances of doing so should be by separate, specific agreement.

Since the indemnifying party has the duty to defend, the party seeking indemnification is obligated to tender defense of any claim on a timely basis to the indemnifying party so that an adequate defense may be prepared.

11. Hazardous Materials. Shipper shall identify any loads that contain Hazardous Materials, as defined in the Hazardous Materials Transportation Act, 49 U.S.C. §5101 *et seq.*, as amended, and the regulations of the U.S. Department of Transportation made thereunder, at least 24 hours in advance of tendering to Carrier. Not less than 12 hours prior to the scheduled pick-up time, Carrier shall either: (i) decline such load, or (ii) accept such load on terms and conditions identified by Carrier in such acceptance, which terms may include market rates and the pass through of any associated costs to Shipper. If Carrier accepts such load, Carrier represents and warrants that it is fully qualified and authorized to transport Hazardous Materials in the United States. Carrier and Shipper certify that they are familiar with U.S. laws and regulations applicable to transportation of Hazardous Materials and that they will comply with all such laws and regulations. Carrier further certifies that its employees, including drivers, have been trained and instructed in the proper method of transporting Hazardous Materials. Upon Carrier request, Shipper will provide a copy of the Material Safety Data Sheet for the Hazardous Materials.

COMMENTARY

If the service carrier will provided includes the regular transportation of hazardous materials, the parties may want to consider substituting the following clause in Section 11.

Hazardous Materials. Carrier acknowledges that the services to be performed under this Agreement include the transportation of Hazardous Materials, as defined in the Hazardous Materials Transportation Act, 49 U.S.C. §5101 *et seq.*, as amended, and the regulations of the U.S. Department of Transportation made thereunder. Carrier represents and warrants that it is fully qualified and authorized to transport Hazardous Materials in the United States. Carrier and Shipper certify that they are familiar with U.S. laws and regulations applicable to

transportation of Hazardous Materials and that they will comply with all such laws and regulations. Carrier further certifies that its employees, including drivers, have been trained and instructed in the proper method of transporting Hazardous Materials. Upon Carrier request, Shipper will provide a copy of the Material Safety Data Sheet for the Hazardous Materials.

12. Legal Restraint or Force Majeure. In the event performance by one Party is affected by any cause beyond the reasonable control of such Party, including without limitation, fire, labor strife, riot, war, weather conditions, acts of the public enemy, acts of God, acts of terrorism, local or national disruptions to transportation networks or operations, material equipment repairs, fuel shortages, governmental regulations, or governmental request or requisition for national defense, and provided that the applicable cause is not attributable to the acts or omissions of such Party, and such Party is taking reasonable measures to remove or mitigate the effects of the applicable cause, then the running of all periods of time mentioned herein and the performance of all obligations required herein shall be suspended during the continuance of such interruption, and such Party shall promptly notify the other Party of such interruption. Such period of suspension shall not in any way invalidate this Agreement, but on resumption of operations, any affected performance by such Party shall be resumed. Carrier shall be permitted an extension period equal to the period of suspension to complete shipments adversely affected by the suspension. No liability shall be incurred by either Party for damages resulting from such suspensions.

COMMENTARY

This clause is commonly accepted in current shipper-carrier contracts and is important to include because of homeland security measures now being taken in response to terrorism threats.

13. Business and Employment Opportunity. Shipper agrees to notify Carrier twenty-four (24) hours before tendering any load that would subject Carrier to regulation under any non-discrimination laws, rules, orders, and regulations of governmental authorities, including, but not limited to, Title VII of the Civil Rights Act of 1964, as amended, Executive Order 11246, and the rules and regulations promulgated thereunder, the Rehabilitation Act of 1973, and the Vietnam Era Veterans Readjustment Act of 1974. If Carrier accepts such a load, the Parties agree to comply with any applicable non-discrimination laws, rules, orders, and regulations.

COMMENTARY

This clause, apart from any social justice considerations, will satisfy certain contracting requirements imposed on carriers and shippers hauling government freight or otherwise doing business with the government.

14. Notices. Any notice required or permitted to be given under this Agreement, unless otherwise indicated, shall be deemed sufficiently given if it is delivered by hand or sent by prepaid mail, registered or certified, return receipt requested, by a nationally recognized overnight courier, or facsimile transmission (with confirming copy sent first

class mail) if sent to the address or fax number and to the attention of the individual noted in the signatory provision hereof.

15. Captions. The captions set forth in this Agreement are for convenience only and shall not be considered a part of this Agreement nor affect in any way the meaning of the terms and provisions hereof.
16. Successors and Assigns; Other Parties. This Agreement shall be binding upon and inure to the benefit of the Parties hereto and their respective successors and assigns. This Agreement may not be assigned by either Party without the written consent of the other Party, except to any wholly-owned subsidiary of such Party and, except in the case of Carrier, an assignment in connection with the sale of substantially all of the assets of Carrier or merger by Carrier with or into another entity.

COMMENTARY

Two exceptions to written consent are set forth to reflect more common occurrences in the marketplace.

17. Entire Agreement. This Agreement and the attached Appendices constitutes the entire agreement between the Parties hereto and supersedes all prior agreements, representations, warranties, statements, promises, information, arrangements, and understandings, whether oral, written, expressed, or implied, with respect to the subject matter hereof.
18. Amendments. No amendment or modification of the terms of this Agreement shall be binding unless in writing and signed by the Parties.
19. Severability. Any term or provision of this Agreement that is held to be invalid or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity or unenforceability without rendering invalid or unenforceable the remaining terms and provisions of this Agreement or affecting the validity or enforceability of any of the terms or provisions of this Agreement in any other jurisdiction.
20. Waiver. No waiver of any right, power, or privilege hereunder shall be binding upon any Party unless in writing and signed by or on behalf of the Party against which the waiver is asserted.
21. Counterparts. This Agreement may be executed in one or more counterparts, any or all of which shall constitute one and the same instrument.
22. Governing Law. The Parties desire that the provisions of this Agreement will have precedence over any federal or state provisions governing or dealing with the specific provisions of this Agreement. The Parties agree that pursuant to 49 U.S.C. § 14101(b)(1) they expressly waive any and all rights and remedies under the Interstate Commerce

Commission Termination Act and Interstate Commerce Act as amended, and regulations promulgated thereunder, including Part B of Subtitle IV Interstate Transportation, 49 U.S.C. § 13101, et seq. (the "Acts") that are inconsistent with the provisions of this Agreement. No Party shall challenge any provision of this Agreement on the ground that any such provision or provisions violates the waived rights and remedies under the Acts. To the extent no conflicts exist with this Agreement or federal law, the law of the State indicated in the Shipper's address in the signatory provision hereof shall apply.

COMMENTARY

To make the Agreement as inclusive of the parties' positions as possible, the provision gives the terms of the contract precedence over any federal or state provisions and a specific waiver is set forth in accordance with 49 U.S.C. § 14101(b)(1). In some instances the law of the State of the shipper's domicile may be unfavorable. Thus, it could be advisable for a specific State to be identified.

23. Dispute Resolution. The Parties agree that this Agreement is being entered into in good faith and that if a dispute arises in its application or interpretation that:
- (a) They shall attempt to resolve said dispute between themselves or upon mutual agreement by the intervention of an experienced mediator and upon the terms and cost allocation agreed upon.
 - (b) If a dispute is not resolved voluntarily, good faith considerations shall be given to submitting the dispute to final and binding arbitration under the Commercial Rules of the American Arbitration Association before a single arbitrator at a point mutually agreed upon or if no point is agreed upon at the offices of the Association which is approximately equal distance from the headquarters of the Parties. The award of the arbitrator may be enforced in any court of competent jurisdiction.
 - (c) If arbitration is not agreed to, or if the dispute involves a remedy not otherwise available in arbitration such as, but not limited to, injunctions, criminal penalties, or certain equitable relief, civil action may be pursued subject to the following: (i) jury trials are waived by the Parties; (ii) service by certified mail to the persons specified as being entitled to notice under this Agreement and to the address shown shall constitute valid and binding service of process; and (iii) jurisdictional issues as to state or federal jurisdiction and forum non-conveniens are not waived.
 - (d) Any disputes which arise on movements to, from, or within Mexico and/or Canada which cannot be resolved between Carrier and Shipper shall be resolved by final and binding arbitration as provided in Section 23(b) above.

COMMENTARY

This clause attempts to provide for the most effective, least costly, and undistruptive manner possible to resolve disputes.

If the parties cannot settle a dispute between themselves, voluntary mediation is invited, recognizing that mediation can only be successful if the parties approach it voluntarily.

Final and binding arbitration also is offered as a voluntary alternative dispute resolution technique, except in the case of disputes involving international movements, where it is made mandatory. Arbitration of any disputes which arise on movements to, from, or within Mexico and/or Canada will eliminate the need to deal with the multiple laws, rules, and regulations related to judicial and administrative proceedings in the two foreign countries, including enforcement proceedings.

If arbitration is not agreed to or, in some instances, if a specific remedy is sought and not available under arbitration, civil action may be pursued. Jury trials are waived, a simplified service of process procedure is provided, and jurisdictional issues are not waived.

24. Confidentiality. The Parties shall keep in confidence and not disclose to any third party (a) the terms of this Agreement, and (b) any confidential or proprietary information either learns about the other Party, such as, but not limited to, the rates, value, origin, destination, or consignee of any shipment made hereunder. The Parties may disclose such terms and information to the extent required by law, to obtain financing, to substitute service providers to the extent necessary to provide such substitute service, or to auditors retained for the purpose of assessing the accuracy of freight bills.
25. No Use of Name. Neither Party may use the other's name, trademarks, or trade names, or those of its subsidiaries or affiliates, in any manner, especially advertising, without the other's expressed written consent, which may be withheld in such Party's sole discretion.
26. Compliance with Laws and Regulations. The Parties shall at all times comply with all applicable federal, state, municipal, and provincial laws, rules, and regulations including, but not limited to, the federal and state safety regulations. To the extent this Agreement or any services provided hereunder shall conflict with such laws, rules, and regulations, this Agreement and the services provided hereunder shall be modified to comply with such laws, rules, and regulations, and the Parties shall not be deemed in breach of this Agreement or suffer any liability or penalty for compliance with such laws, rules, and regulations. In the event Carrier, through no fault of its own, is delayed or removed from service by or because of an inspection by any body politic, Carrier shall not be deemed in breach of this Agreement, nor shall it suffer any liability or penalty under the terms of this Agreement.
27. Commentaries. Under no circumstances shall any of the commentaries to this Agreement be considered a part hereof.

Remainder of Page Intentionally Left Blank

IN WITNESS WHEREOF, the Parties hereto have caused this Agreement to be executed by a duly authorized officer effective as of the date first above written.

CARRIER

SHIPPER

Name: _____

Name: _____

By: _____

By: _____

Title: _____

Title: _____

Dated: _____

Dated: _____

INFORMATION FOR NOTICES

Address: _____

Address: _____

Fax: _____

Fax: _____

Attention: _____

Attention: _____

COMMENTARY

The signatories must have the authority to make the promises contain in this Agreement. This authority may come from the office or position held by the signatory or a specific grant of authority given to the signatory by the company's board of directors.

SCOPE OF SERVICE

COMMENTARY

The service terms contained in a motor carrier/shipper agreement will vary substantially depending on the types of services being provided and the particular circumstances of the carrier-shipper relationship. Service terms should include as much detail as possible so that each party understands its rights and obligations. The following are some of the issues that should be considered when drafting service terms:

- description of commodities to be handled
- types and specifications of equipment to be used in performing the transportation services;
- minimum and/or maximum number of loads to be tendered;
- loading and unloading services to be performed, if any;
- geographic scope of service;
- responsibility for engaging border brokers if deliveries will not be made to points in Mexico and/or Canada;
- special requirements and restrictions if hazardous waste and/or materials will be transported;
- safety requirements;
- technology requirements for transmitting information and documents electronically;
- procedures for reporting delayed shipments;
- on time delivery standards;
- billing procedures and payment methods;
- procedures for performance reviews;
- procedures for tender of freight;
- specific pick-up and delivery requirements;
- procedures for authorizing a return or reconsignment;
- delivery confirmation requirements;
- on site offices;
- security;
- trailer spotting; and
- tracking and tracing requirements.

The accessorial and miscellaneous charges in Appendix B may need to be modified depending on the specific service terms agreed upon.

FREIGHT CHARGES
ACCESSORIAL and MISCELLANEOUS CHARGES

1. Basic Freight Charges. The Parties agree that Carrier shall be paid for its transportation services in accordance with the attached price list, which can only be changed by the written agreement of the Parties. The attached price list applies only to the commodities identified in this Agreement and assumes that Shipper will tender and Carrier will transport only those commodities. If no commodities are specifically identified in this Agreement or if Shipper tenders commodities other than those identified in this Agreement, Shipper shall notify Carrier at least twenty-four (24) hours before the time of tendering a load that has a value exceeding \$ _____, and Carrier shall have the right to refuse any such load.

COMMENTARY

A shipper and carrier may, or may not, specifically identify the commodities to which the Agreement applies. Typically, however, a carrier quotes rates to a shipper based on an understanding that specific commodities are being transported and the general value of those commodities. This provision protects a carrier in the event a shipper tenders a different commodity with a much higher value than the parties understood when they entered into the Agreement, by requiring the shipper to notify the carrier in advance of any "high value" shipments. The parties should insert a dollar amount that reasonably estimates the full actual value of the highest value commodity that shipper expects to tender under this Agreement. Protection against "high value" shipments is not necessary if the parties use "released value" rates, which are described in the Commentary to Section 7(b), or select Option B in Section 7, which limits carrier's monetary liability for cargo damage to the amount of cargo insurance maintained by carrier.

2. Mileage Computation. If any payment is specifically based on a mileage basis, mileage will be determined by the practical mileage route determined by the following software _____. New versions of this software will not automatically be adopted under this Agreement, and must be specifically agreed to by the Parties in writing.

If governmental restrictions prescribe specific routes to be used or avoided because of the size and/or weight of the shipment, the nature of the lading being transported, or there exist unusual road conditions, Shipper will pay the additional mileage required to complete delivery. If freight charges are not described on a mileage basis, the following mileage charge may be assessed by Carrier for excess mileage: \$ _____ per mile.

COMMENTARY

Payment on the basis of practical mileage routes is provided because these routes allow for more expedited movement of freight to meet the increasing demands of shippers for scheduled pickups and deliveries, just-in-time movements, and the safe use of more responsive equipment. From a public relationship standpoint, carrier and shipper also should desire to direct traffic over routes more practical and safe for truck traffic.

3. Fuel Surcharge. Freight charges will be subject to a fuel surcharge which will be billed as a separate charge on freight bills. The charge will be adjusted up or down each Monday by the cost per mile adjustment listed on the matrix attached as Appendix C.

COMMENTARY

In ordinary situations, carriers are expected to recover their costs through their transportation rates. The fluctuating price of fuel, however, can add significant costs to carriers. A fuel surcharge is the most common option to address volatile fuel prices during periods of high fluctuation in fuel prices. If the shipper agrees to assume this risk, it also may be appropriate for the shipper to request a fuel rebate if fuel prices fall below a specified level. In lieu of fuel surcharges and rebates, the parties may elect to rely upon the 30-day contract termination provision of the Agreement. Appendix C contains examples of fuel surcharge and rebate programs.

4. Applicability to Commercial Zone.

- (a) If rates are based on zip codes as a territorial description, they shall include the geographical area encompassed by the zip code destinations of the United States Postal Service.
- (b) If rates are specified to a particularly stated origin and/or destination, they shall not include or apply the commercial zone of the points.

If rates are intended to include commercial zones, the Parties initial and agree that the commercial zone will be determined as set forth in 49 C.F.R. Part 372. Carrier ____ Shipper ____

5. Payments. All payments, whether involving a domestic or international shipment shall be made in U.S. currency and at U.S. rate of exchange.
6. Congestion Security and Insurance Surcharge. Recognizing that certain geographical areas of operations involve extreme congestion or delays for homeland security hindering efficient and economical operations, Shipper agrees to pay the following congestion charges which will be listed as a separate line item on freight bills Carrier submits.
- (a) \$ _____ for each shipment originating from or destined to (i) New York City, New York; Long Island, New York, and (ii) the commercial zone of each, including all areas within the zip codes ranging from 10001 through 11999.
- (b) \$ _____ for each shipment originating from or destined to Los Angeles, California and its commercial zones and zip codes ranging from _____ to _____.
- (c) All export, import, or coastwise shipments which Carrier picks up and/or delivers direct from or to an ocean going vessel or barges shall be subject to a charge of \$ _____ and shown as a separate charge on the freight bill.
- (d) All shipments which move through an entry point to Canada and/or Mexico shall be subject to a charge of \$ _____ and shown as a separate charge on the freight bill.

- (e) If the insurance cost of Carrier's auto liability insurance and/or cargo liability insurance increases by more than _____% at any time during the term of this Agreement, Shipper agrees that Carrier may bill Shipper the following as a separate surcharge on the following basis: _____
- _____
- _____

COMMENTARY

Ground traffic congestion in some regions may render uniform national pricing inappropriate. This can be addressed by negotiating separate rates for congested areas, or by assessing a congestion surcharge. Section 6(a)-(d) is an example of how to implement a congestion surcharge.

Insurance costs ordinarily will be factored into the negotiated transportation rate. Occasionally, however, insurance premiums may spike unexpectedly and it is desirable to protect carrier against this loss. In this circumstance, it may be desirable to assess an insurance surcharge. An insurance surcharge typically should not be necessary in contracts with a term of one year or less. Even then, the parties may choose to rely upon the 30-day termination provision to protect carrier. Section 6(e) is an example of how to implement an insurance surcharge.

7. Detention of Trailer With Tractor. Upon Carrier's offering of a trailer with tractor for loading or unloading, Shipper or Shipper's consignee, as the case may be, shall be allowed, without charge, _____ hours to complete such loading or unloading and release the equipment for dispatch. If Shipper or Shipper's consignee fails to complete the loading or unloading and release the equipment for dispatch within the _____ hour period, Shipper shall pay Carrier a detention charge of \$_____ per hour for each hour or fraction thereof in excess of the _____-hour period, up to a maximum of \$_____ per twenty-four hour period following the expiration of the _____-hour period. Shipper shall use the trailer with tractor for the sole purpose of loading and/or unloading the lading within the scope of this Agreement.

COMMENTARY

Responsible carriers and shippers have recognized that (i) efficient and economical motor carriage is predicated on freight moving over the highways, and (ii) operators are demanding that excessive delays at the docks be resolved. Reasonable detention charges are necessary to encourage efficient loading and unloading practices. The detention period should be determined based on the specific circumstances of the shipper-carrier relationship.

8. Detention of Trailer Without Tractor. Upon Carrier's offering of a trailer without a tractor for loading or unloading, Shipper or Shipper's consignee, as the case may be, shall be allowed _____ hours to complete such loading or unloading. If Shipper fails to tender the trailer to Carrier, either loaded and ready for dispatch on behalf of Shipper or unloaded and ready for dispatch by Carrier as it desires within the _____ hour period, Shipper agrees to pay Carrier a detention charge of \$_____ per hour for each hour or fraction thereof in excess of the _____ hour period, up to a maximum of \$_____ per twenty-four hour period following the expiration of the _____ hour period. Shipper shall use the trailer without a tractor for the sole purpose of loading and/or unloading the lading within the scope of this Agreement.

COMMENTARY

The trailers of carriers must be used in the transportation of freight and not as storage vehicles if transportation pricing and costs are to be reasonable. This provision will encourage the correct use of trailer equipment.

9. Tractor Ordered and Not Used. If Shipper requests that a tractor with operator be made available and cancels its request, Shipper shall pay Carrier a charge of \$___ per mile for each mile the tractor and driver traveled to be available for Shipper before Carrier was notified, if at all, plus \$___ per hour until the tractor is re-dispatched, up to an aggregate maximum of \$___. If a tractor and operator are not used within ___ hours of the time they are made available to Shipper, Carrier shall have the right to re-assign its tractor and operator and collect the charges set forth above. In no event shall Shipper use such tractor and operator for a period greater than _____, without the written authorization of Carrier.
10. Determination of Detention Period. For purposes of determining the number of hours and/or days that a tractor, trailer, or operator is detained by Shipper or Shipper's consignee for loading or unloading, Carrier may use, in its reasonable discretion, any reliable method of determining the date and time that a tractor, trailer, or operator is offered for loading or unloading including, without limitation, a signed bill of lading or delivery receipt, Qualcomm report, satellite communication, or on-board tracking device. Holidays and weekends shall be counted in determining the length of any detention period.

COMMENTARY

If they desire, the parties may agree on a single method of determining the detention time period. They also may exclude holidays and/or weekends in determining the length of any detention period.

11. Reconsignment. If Shipper reconsigns or otherwise changes the destination of a shipment prior to delivery, the applicable rate shall be the rate that would be applied had Carrier been originally directed to deliver the shipment to the new destination via the location where the shipment was located at the time it was reconsigned, plus a reconsignment charge equal to the greater of \$ _____ or \$ _____ per additional mile required by virtue of the reconsignment. If a shipment is reconsigned or otherwise assigned a new destination at the time of delivery, the applicable rate shall be the rate that would apply to a new shipment from the point of delivery to the new destination, and Carrier shall bill for the reconsigned shipment as though it were two separate deliveries.
12. In-Transit Stop-Off / Drop Charges. A single shipment may be stopped at the direction of Shipper for partial loading or partial unloading; provided, however, that in the event of any in-transit stop at the direction of Shipper or Shipper's consignee, Shipper shall pay Carrier, in addition to other freight charges due (a) \$ _____ per mile required to be deviated from the most practical route otherwise to be traversed from origin to destination and (b) \$ _____ per hour or fraction thereof which is taken per partial loading or unloading, with a total minimum charge of \$ ____.
13. Tracking and Tracing. Carrier, to the best of its capabilities, shall make available in-transit load position and related load delivery status and tracing information. For information provided by Carrier in response to Shipper's inquiry by telephone, e-mail, or other method requiring personal

contact and response, Shipper shall pay an amount equal to \$ _____ per usage, after _____ uses per load.

COMMENTARY

While the responsible carrier will be tracking loads to help meet shipper requirements, forwarding such information upon individual request involves a cost to the carrier that may not be substantial on an occasional, individual inquiry basis, but can be substantial in the aggregate. Costs for multiple inquiries generally are not contemplated in the pricing of service. Thus, a reasonable charge for excessive use of the service, which is by choice, appears appropriate. The parties may agree that the provisions of this Section shall not apply if a load is delayed beyond an agreed upon time.

14. C.O.D. Shipments. Carrier shall accept shipments with C.O.D. charges to collect if Shipper advises Carrier of the need for such service at the time of offering a load and checks the applicable box on the freight document the Parties have agreed to use. Carrier shall only accept money orders or certified checks from consignees unless Shipper otherwise indicates acceptance of an uncertified check. Carrier shall remit to Shipper the collection within fifteen (15) days of delivery. Shipper will pay Carrier a \$ _____ collection charge for each collection shipment.

COMMENTARY

"Cash" has been eliminated as acceptable payment due to concern for the safety of the operator who might be on the road with substantial sums of money.

15. Loading and Unloading. If the services Carrier agrees to perform under this Agreement include loading and unloading, Carrier only shall be responsible for loading and unloading to the extent such services can be physically performed without mechanical assistance.

If Shipper or Shipper's consignee requires the use of a lumper (third-party loader or unloader), Shipper will be responsible for the payment of such lumping or guarantee the payment of any actual charges Carrier may incur and pay Carrier an administrative fee of \$ ____.

If any loading and/or unloading is done by an operator of Carrier beyond the tailgate, including sorting or stacking or similar service, Carrier will be paid \$ _____ per hour or fraction thereof for such service, with a minimum charge of \$ ____.

COMMENTARY

Operators of carrier equipment are generally not trained or physically qualified to perform loading and unloading services, and such services curtail the number of hours they can lawfully and safely drive. Shipper personnel and/or lumpers should be primarily responsible for these functions. To the extent operators are involved in loading and unloading or the carrier is involved in utilizing a lumper at a shipper's or consignee's direction, there should be some reasonable payment or reimbursement to the carrier.

16. Billing Weight. If freight charges are to be assessed in whole or part on billing weights, such weights shall be based on scale weight except that uniform or standard weights may be billed at average weight subject to verification by Carrier. Weight shall include protective materials used by Shipper in preparing the lading for shipment.

17. Exclusive Use of Vehicle. If the freight Shipper tenders does not fill the capacity of the trailer Carrier furnishes and additional freight of another shipper may be hauled without jeopardizing the integrity of the freight Shipper tendered, Carrier may utilize such additional freight unless Shipper indicates that exclusive use of the vehicle is desired. Carrier may assess a \$ _____ charge if Shipper requests exclusive use of the trailer.
18. Permits. Carrier shall secure any permits for any over-dimensional or overweight load and Shipper agrees that Carrier may bill Shipper the actual cost of any permits or those costs for the use of any required escort vehicles. If the over-dimensional or overweight movement requires the payment of tolls over normal truckload tolls, Shipper shall absorb the difference in charges.
19. Redelivery Charges. If a delivery cannot be accomplished through no fault of Carrier, Carrier shall notify Shipper and request redelivery instruction from Shipper, and if redelivery is made, the following charges may be assessed to Shipper:
- | | | |
|-----|--------------------------|----------|
| (a) | Same day redelivery | \$ _____ |
| (b) | Overnight detention | \$ _____ |
| (c) | Operator per diem charge | \$ _____ |
| (d) | Redelivery charge | \$ _____ |

If delivery cannot be accomplished within ___ hours, Carrier shall assume the role of a warehouseman as to such lading.

20. Trailer Pools. If Shipper desires to have trailers stationed at a facility for convenience in loading and unloading, the Parties will negotiate in good faith on the number of vehicles to be assigned and Shipper agrees that if a trailer is not used in transportation for Shipper, without fault of Carrier, for a period in excess of _____ days, Shipper will pay Carrier \$ _____ per day until usage occurs.
21. Forwarding and Documentation Services. On any international or coastal intermodal service, Shipper shall be responsible for any costs involved in forwarding and documentation services.
22. Split Pickups on Shipper Premises. If Carrier is required to make pickups at two or more sites on a premises, an additional charge of \$ _____ per pickup, exclusive of the initial pickup will be assessed to Shipper.
23. Proof of Delivery. If a copy of a signed bill of lading, or other document, is required as a prerequisite to payment of freight charges, Carrier will provide same subject to a charge of \$ _____ per occurrence.

COMMENTARY

Because a signed bill of lading or other document is not normally a prerequisite to payment of freight charges, carriers providing this service to meet a particular shipper's requirement should be paid a nominal sum to cover the cost of the service.

24. Movements Under Certain or Special Bonds or Special Permits. If Shipper tenders a shipment moving under a Custom Bond, Carrier shall charge Shipper \$ _____. If a body politic requires a bond or special permit, Carrier will assess the cost of such bond or permit to Shipper.

25. Tarping. If Shipper requests or requires tarping of a load, Carrier will charge Shipper as follows:

- | | | |
|-----|-----------------------|----------|
| (a) | 480 – 965 sq. ft. | \$ _____ |
| (b) | 966 – 1440 sq. ft. | \$ _____ |
| (c) | 1441 and over sq. ft. | \$ _____ |

FUEL SURCHARGE PROGRAM

The fuel surcharge shall be determined by reference to (i) the U.S. Department of Energy ("DOE") diesel fuel price (i) national average, or (ii) regional PAD average from which the shipment originates if the price per gallon of diesel fuel in such regional PAD is more than \$0.05 higher than the national average. Shipper will pay a fuel surcharge of \$____ per mile for each \$____ per gallon increase above a base of \$____ per gallon.

Therefore, the following schedule will apply:

<u>DOE Price</u>	<u>Surcharge</u>	<u>DOE Price</u>	<u>Surcharge</u>
Up to ____	None	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile
_____ to _____	_____ /mile	_____ to _____	_____ /mile

The same formula will be used should the index reach or exceed \$____. Adjustments will be made each Monday based upon the weekly DOE price .

COMMENTARY

In ordinary situations, carriers are expected to recover their costs through their transportation rates. The fluctuating price of fuel, however, can add significant costs to carriers. A fuel surcharge is the most common option to address volatile fuel prices during periods of high fluctuation in fuel prices. If the shipper agrees to assume this risk, it also may be appropriate for the shipper to request a fuel rebate if fuel prices fall below a specified level. In lieu of fuel surcharges and rebates, the parties may elect to rely upon the 30-day contract termination provision of this Agreement. The following fuel rebate program could be utilized in connection with the fuel surcharge program above.

Carrier will pay a fuel rebate of \$ ____ per mile for each \$ ____ per gallon decrease below a base of \$ ____ per gallon. Therefore, the following schedule will apply:

<u>DOE Price</u>	<u>Surcharge</u>	<u>DOE Price</u>	<u>Rebate</u>
Down to ____	None	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile
____ to ____	____ /mile	____ to ____	____ /mile

The same formula will be used should the index reach or exceed \$ ____ and reach or fall below \$ ____ . Adjustments will be made each Monday based upon the weekly DOE price .

APPENDIX D

**[Parties may attach the following Uniform Freight Documentation as Appendix D
or substitute their preferred freight documentation]**

(To be Printed on White Paper)

UNIFORM FREIGHT DOCUMENTATION

ORIGINAL – NOT NEGOTIABLE

Carrier's Pro No. _____
Shipper's Bill of Lading No. _____
Consignee's Reference/PO No. _____
Carrier's Code (SCAC) _____

Name of Carrier _____

RECEIVED, subject to individually determined rates and contract terms that have been agreed upon in writing between the carrier and shipper:

From: _____ Date: _____
Street: _____ City: _____ County: _____ State: _____ Zip: _____

The property described below, in apparent good order, except as noted (contents and condition of contents of packages unknown) marked, consigned, and destined as shown below, which said carrier agrees to carry to destination.

Consigned to _____
On Collect on Delivery Shipments, the letters "COD" must appear before consignee's name

Destination Street _____
City _____ County _____ State _____ Zip _____
Delivering Carrier _____ Trailer No. _____
Additional Shipment Information _____

Collect on Delivery \$ _____	C.O.D. charges Shipper <input type="checkbox"/>
Street _____ City _____ State _____	To be paid by Consignee <input type="checkbox"/>

Hdg. Units No. Type	Packages No. Type	HM	Kind of Package, Destination of Articles, Special Marks and Exceptions (Subject to correction)	Weight (Subj to Correction)	Class or Rate Ref. (For Info. Only)	Cube (Options)

⊕ Mark "X" to designate Hazardous Materials as defined in DOT Regulations.

NOTE (1) Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property as follows:

"The agreed or declared value of the property is specifically stated by the shipper to be not exceeding _____ per _____."

NOTE (2) Liability Limitation for loss or damage on this shipment may be applicable. See 49 U.S.C. § 14706(c)(1)(A) and (B).

NOTE (3) Commodities requiring special or additional care or attention in handling or stowing must be so marked and packaged as to ensure safe transportation with ordinary care.

**Freight charges are
PREPAID
Unless marked collect.
CHECK BOX
IF COLLECT**

Notify if problem enroute or at delivery _____ (for information purposes only).
Name Fax No.

Tele No.

Send freight bill to _____
Company Name City Street State Zip

Shipper _____ Carrier _____
Per _____ Per _____ Date _____

HAZARDOUS MATERIAL CERTIFICATION

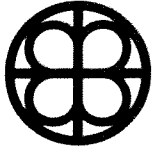
Shipper Certification	Carrier Certification
This is to certify that the above named materials are properly classified, packaged, marked and labeled, and are in proper condition for transportation according to the applicable regulations of the DOT. Per: _____ Date: _____	Carrier acknowledges receipt of packages and required placards. Carrier certifies emergency response information was made available and/or carrier has the DOT emergency response guidebook or equivalent document in the vehicle. Per _____ Date _____ Package Nos. _____

COMMENTARY

Because the contract and/or appendices cover the terms and conditions normally covered in a bill of lading, the freight documentation essentially becomes a "receipt". Parties may desire to continue to use established bill of lading forms, but should be aware that such forms will not affect their contractual relationship.

Attachment IV

Appendix D: Broker-Shipper Transportation Agreement



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BROKER/SHIPPER TRANSPORTATION AGREEMENT

THIS AGREEMENT, "Agreement", made and intended to be effective this (the) _____ day of _____, 20____ by and between _____ having offices at _____ ("BROKER") and _____ having offices at _____ ("SHIPPER"), collectively, the "PARTIES".

RECITALS

A. **WHEREAS** BROKER is licensed as a Property Broker by the Federal Motor Carrier Safety Administration (FMCSA) in Docket Number MC-_____, or by appropriate State agencies, and as a licensed broker, arranges for freight transportation. A copy of BROKER's authority is attached as Appendix A and a copy of BROKER's Surety Bond or trust fund agreement is attached as Appendix B; and

B. **WHEREAS** SHIPPER, to satisfy some of its transportation needs, desires to utilize the services of BROKER to arrange for transportation of SHIPPER's freight.

NOW THEREFORE, intending to be legally bound, BROKER and SHIPPER agree as follows:

AGREEMENT

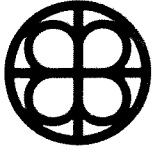
1. **TERM.** Subject to paragraph 12, the term of this Agreement shall be one (1) year, commencing on the date first mentioned above, and shall automatically renew for successive one year periods; provided, however, that either Party may terminate this Agreement on 30 days written notice to the other Party, with or without cause, or as otherwise provided in this Agreement.

2. **SERVICE.** BROKER agrees to arrange for transportation of SHIPPER's freight pursuant to the terms and conditions of this Agreement and in compliance in all material respects with all federal, state and local laws and regulations relating to the brokerage of the freight covered by this Agreement. BROKER's responsibility under this Agreement shall be limited to arranging for, but not actually performing, transportation of SHIPPER's freight. The PARTIES may, upon written mutual agreement, include additional service terms to be attached as Appendix C.

3. **VOLUME.**

A. SHIPPER agrees to tender a minimum of three (3) shipments per year to BROKER, and BROKER agrees to arrange for the transportation of said shipments, as well as any other shipments offered by SHIPPER. Shipper is not restricted from tendering freight to other brokers, or directly to motor carriers. BROKER is not restricted from arranging transportation for other parties.

B. SHIPPER shall be responsible to BROKER for timely and accurate delivery instructions and description of the cargo, including any special handling or security requirements, for any shipment.



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4. **FREIGHT CARRIAGE.** BROKER warrants that it has entered into, or will enter into a bilateral written contract of carriage with each carrier it utilizes in the performance of this Agreement. BROKER further warrants that those contracts comply with all applicable federal and state laws and regulations and shall include the following provisions:

- A. Carrier is in, and shall maintain compliance during the term of this Agreement, with all applicable federal, state and local laws relating to the provision of its services including, but not limited to:
 - 1. transportation of Hazardous Materials, (including the licensing and training of drivers), as defined in 49 C.F.R. § 172.800, § 173, and §397 et seq. to the extent that any shipments hereunder constitute Hazardous Materials;
 - 2. security regulations;
 - 3. owner/operator lease regulations;
 - 4. loading and securement of freight regulations;
 - 5. implementation and maintenance of driver safety regulations including, but not limited to, hiring, controlled substances, and hours of service regulations;
 - 6. sanitation, temperature, and contamination requirements for transporting food, perishable, and other products, qualification and licensing and training of drivers;
 - 7. implementation and maintenance of equipment safety regulations;
 - 8. maintenance and control of the means and method of transportation including, but not limited to, performance of its drivers.
- B. Carrier shall agree to defend, indemnify and hold BROKER and SHIPPER harmless from all damages, claims or losses arising out of its performance of the Contract, including cargo loss and damage, theft, delay, damage to property, and personal injury or death, to the fullest extent permissible under applicable federal and state law.
- C. Carrier shall agree that its liability for cargo loss or damage shall be no less than that of a Common Carrier as provided for in 49 USC 14706 (the Carmack Amendment). Exclusions in Carrier's insurance coverage shall not exonerate Carrier from this liability.
- D. Carrier shall agree to maintain at all times during the term of the contract, insurance coverage with limits not less than the following:

General Liability	\$
Auto Liability -	\$
Cargo Liability -	\$
Worker's Compensation – as required by law.	

BROKER shall verify that each carrier it utilizes in the performance of this Agreement has insurance coverage as defined above.

- E. Carrier shall agree that the provisions contained in 49 CFR 370.1 et seq. shall govern the processing of claims for loss, damage, injury or delay to property and the processing of salvage.



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F. The Parties agree that BROKER is the sole party responsible for payment of Carrier's charges. Failure of BROKER to collect payment from its customer shall not exonerate BROKER of its obligation to pay CARRIER. BROKER agrees to pay Carrier's undisputed invoice within ___ days of receipt of the bill of lading or proof of delivery, provided Carrier is not in default under the terms of this Agreement. If BROKER has not paid Carrier's undisputed invoice as agreed, and CARRIER has complied with the terms of this Agreement, Carrier may seek payment from the Shipper or other party responsible for payment after giving BROKER _____ (business days) advance written notice. Carrier shall not seek payment from Shipper or any other Party responsible for payment if SHIPPER or such other Party can prove payment to BROKER.

Carrier shall agree that, at no time during the term of its contract with BROKER shall it have an "Unsatisfactory" safety rating as determined by the Federal Motor Carrier Safety Administration (FMCSA). If Carrier receives an "Unsatisfactory" safety rating, it shall immediately notify BROKER. BROKER shall not knowingly utilize any carrier with an "Unsatisfactory" safety rating in the performance of this Agreement.

Carrier shall agree that the terms and conditions of its contract with BROKER shall apply on all shipments it handles for BROKER. Any terms in a tariff that are referenced in the carrier contract which are inconsistent with the contract shall be subordinate to the terms of the contract.

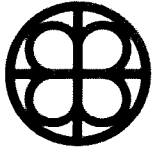
Carrier shall expressly waive all rights and remedies under Title 49 U.S.C., Subtitle IV, Part B to the extent they conflict with the contract.

BROKER further warrants it will require proof of insurance and operating authority from each Carrier and, should BROKER utilize the services of any Carrier or other broker on SHIPPER's behalf, which Carrier and/or broker does not have proof of insurance and/or operating authority, BROKER agrees to indemnify and hold harmless SHIPPER from all legitimate claims not paid by Carrier, including but not limited to cargo loss and damage claims.

For shipments outside of the United States the terms in Foreign Shipments Appendix D of this Agreement shall apply.

5. **RECEIPTS AND BILLS OF LADING.** If requested by SHIPPER, BROKER agrees to provide SHIPPER with proof of acceptance and delivery of such loads in the form of a signed Bill of Lading or Proof of Delivery, as specified by SHIPPER. SHIPPER's insertion of BROKER's name on the bill of lading shall be for SHIPPER convenience only and shall not change BROKER's status as a property broker. The terms and conditions of any freight documentation used by BROKER or carrier selected by BROKER may not supplement, alter, or modify the terms of this Agreement.

6. **PAYMENTS.** BROKER shall invoice SHIPPER for its services in accordance with the rates, charges and provisions set forth in Appendix D, attached, and any written supplements or revisions that are mutually agreed to between the PARTIES. If rates are negotiated between the PARTIES and not otherwise confirmed in writing, such rates shall be considered "written," and shall be binding, upon BROKER's invoice to SHIPPER and SHIPPER's payment to BROKER. SHIPPER agrees to pay BROKER's invoice within ___ days of invoice date without deduction or setoff. BROKER shall apply payment to the amount due for the specified invoice, regardless whether there are earlier unpaid invoices.



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Payment of the freight charges to BROKER shall relieve SHIPPER, Consignee or other responsible party of any liability to the carrier for non-payment of its freight charges; and BROKER hereby covenants and agrees to indemnify SHIPPER, Consignee or other responsible party against such liability.

7. CLAIMS.

A. **Freight Claims:** SHIPPER must file claims for cargo loss or damage with BROKER within one hundred eighty (180) days from the date of such loss, shortage or damage, which for purposes of the Agreement shall be the delivery date or, in the event of non-delivery, the scheduled delivery date. SHIPPER must file any civil action against BROKER in a Court of Law within two (2) years from the date the carrier or BROKER provides written notice to SHIPPER that the carrier has disallowed any part of the claim in the notice. Carriers utilized by BROKER shall agree in writing with BROKER to be liable for cargo loss or damage as outlined in paragraph 4.c above. The carriers' cargo liability for any one shipment shall not exceed \$ _____, unless BROKER is notified by SHIPPER of the increased value prior to shipment pickup and with reasonable advance notice to allow BROKER and/or the carrier to procure additional insurance coverage. It is understood and agreed that the BROKER is not a Carrier and that the BROKER shall not be held liable for loss, damage or delay in the transportation of SHIPPER's property unless caused by BROKER's negligent acts or omissions in the performance of this Agreement. BROKER shall assist SHIPPER in the filing and/or processing of claims with the Carrier. If payment of claim is made by BROKER to SHIPPER, SHIPPER automatically assigns its rights and interest in the claim to BROKER. In no event shall BROKER or BROKER's Carrier be liable to SHIPPER for special, incidental, or consequential damages that relate to loss, damage or delay to a shipment, unless SHIPPER has informed BROKER in written or electronic form, prior to or when tendering a shipment or series of shipments to BROKER, of the potential nature, type and approximate amount of such damages, and BROKER specifically agrees in written or electronic form to accept responsibility for such damages.

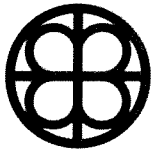
B. **All Other Claims:** The PARTIES shall notify each other of all known material details within sixty (60) days of receiving notice of any claims other than cargo loss or damage claims, and shall update each other promptly thereafter as more information becomes available. Civil action, or arbitration, if any, shall be commenced within two (2) years from the date either Party provides written notice to the other Party of such a claim.

8. **INSURANCE.** BROKER agrees to procure and maintain at its own expense, at all times during the term of this Agreement, the following insurance coverage amounts:

- A. Comprehensive general liability insurance covering bodily injury and property damage \$ _____
- B. Contingent Cargo Insurance \$ _____
- C. Errors and Omissions Insurance \$ _____

BROKER shall submit to SHIPPER a certificate of insurance as evidence of such coverage and which names SHIPPER as "Certificate Holder".

9. **SURETY BOND.** BROKER is a TIA Performance Certified member and shall maintain a surety bond or trust fund agreement as required by the Federal Motor Carrier Safety Administration in the amount of \$10,000, plus \$240,000 for a total surety of \$250,000 and furnish SHIPPER with proof upon request.



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10. **HAZARDOUS MATERIALS.** SHIPPER and BROKER shall comply with all applicable laws and regulations relating to the transportation of hazardous materials as defined in 49 CFR § 172.800, § 173, and § 397 et seq. to the extent that any shipments constitute hazardous materials. SHIPPER is obligated to inform BROKER immediately if any such shipments constitute hazardous materials. SHIPPER shall defend, indemnify and hold BROKER harmless from any penalties or liability of any kind, including reasonable attorney fees, arising out of SHIPPER's failure to comply with applicable hazardous materials laws and regulations.
11. **HOMELAND SECURITY.** As applicable to each, respectively, BROKER and SHIPPER shall comply with state and federal Homeland Security related laws and regulations.
12. **DEFAULT.** Both parties will discuss any perceived deficiency in performance and will promptly endeavor to resolve all disputes in good faith. However, if either Party materially fails to perform its duties under this Agreement, the party claiming default may terminate this Agreement on 10 (ten) days written notice to the other Party. SHIPPER shall be responsible to pay BROKER for any services performed prior to the termination of this Agreement and for shipments not yet completed and/or not yet invoiced to SHIPPER.
13. **INDEMNIFICATION.** Subject to the insurance limits in Section 8, BROKER and SHIPPER shall defend, indemnify and hold each other harmless against any claims, actions or damages, including, but not limited to, cargo loss, damage, or delay, and payment of rates and/or accessorial charges to Carriers, arising out of their respective performances under this Agreement, provided, however, the indemnified party shall not offer settlement in any such claim without the agreement of the indemnifying party which agreement shall not be unreasonably withheld. If the indemnified party offers or agrees to a settlement for such a claim without the written agreement of the indemnifying party, the indemnifying party shall be relieved of its indemnification obligation. Neither party shall be liable to the other party for any claims, actions or damages due to the negligence of the other party. Although Section 8 only imposes insurance requirements upon BROKER, for purpose of this Section 13, those amounts also shall limit the scope of SHIPPER's indemnification obligations. The obligation to defend shall include all costs of defense as they accrue.
14. **ASSIGNMENT/MODIFICATIONS OF AGREEMENT.** Neither party may assign or transfer this Agreement, in whole or in part, without the prior written consent of the other party. No amendment or modification of the terms of this Agreement shall be binding unless in writing and signed by the PARTIES.
15. **SEVERABILITY/SURVIVABILITY.** In the event that the operation of any portion of this Agreement results in a violation of any law, or any provision is determined by a court of competent jurisdiction to be invalid or unenforceable, the Parties agree that such portion or provision shall be severable and that the remaining provisions of the Agreement shall continue in full force and effect. The representations and obligations of the PARTIES shall survive the termination of this Agreement for any reason.
16. **INDEPENDENT CONTRACTOR.** It is understood between BROKER and SHIPPER that BROKER is not an agent for the Carrier or SHIPPER and shall remain at all times an independent contractor. SHIPPER does not exercise or retain any control or supervision over BROKER, its operations, employees, or carriers.
17. **NONWAIVER.** Failure of either party to insist upon performance of any of the terms, conditions or provisions of this Agreement, or to exercise any right or privilege herein, or the waiver of any breach of any of the terms, conditions or provisions of this Agreement, shall not be construed as thereafter waiving any such terms, conditions, provisions, rights or privileges, but the same shall continue and remain in full force and effect as if no forbearance or waiver had occurred.



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18. **NOTICES.** Unless the PARTIES notify each other in writing of a change of address, any and all notices required or permitted to be given under this Agreement shall be in writing (or fax with machine imprint on paper acknowledging successful transmission) and shall be addressed as follows:

<p>(BROKER)</p> <p>At _____</p> <p>Address: _____</p> <p>Phone: _____</p> <p>Fax: _____</p>	<p>(SHIPPER)</p> <p>At _____</p> <p>Address: _____</p> <p>Phone: _____</p> <p>Fax: _____</p>
--	---

19. **FORCE MAJEURE.** Neither Party shall be liable to the other for failure to perform any of its obligations under this Agreement during any time in which such performance is prevented by fire, flood, or other natural disaster, war, embargo, riot, civil disobedience, or the intervention of any government authority, or any other cause outside of the reasonable control of the SHIPPER or BROKER, provided that the Party so prevented uses its best efforts to perform under this Agreement and provided further, that such Party provide reasonable notice to the other Party of such inability to perform.

20. **CHOICE OF LAW AND VENUE.** All questions concerning the construction, interpretation, validity and enforceability of this Agreement, whether in a court of law or in arbitration, shall be governed by and construed and enforced in accordance with the laws of the State of _____, without giving effect to any choice or conflict of law provision or rule that would cause the laws of any other jurisdiction to apply.

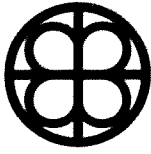
21. **DISPUTE RESOLUTION:** (Choose one option below. Both parties must initial the selected option)

A. **ARBITRATION:** ___ SHIPPER, ___ BROKER

In the event of a dispute arising out of this Agreement, the Party's sole recourse shall be to arbitration within two years from the date of the alleged loss. Proceedings shall be conducted under the rules of the Transportation Arbitration and Mediation PLLC (TAM), the American Arbitration Association (AAA) or Transportation ADR Council, Inc. (ADR) at the discretion of the party filing the complaint. Upon agreement of the PARTIES, arbitration proceedings may be conducted outside of the administrative control of the TAM, AAA or ADR. The decision of the arbitrators shall be binding and final and the award of the arbitrator may be entered in a court of competent jurisdiction. The prevailing party shall be entitled to recovery of costs, expenses and reasonable attorney fees as well those incurred in any action for injunctive relief, or in the event further legal action is taken to enforce the award of arbitrators. The arbitration provisions of this paragraph shall not apply to enforcement of the award of arbitration.

B. **COMBINATION ARBITRATION/LITIGATION:** ___ SHIPPER, ___ BROKER

"Subject to the time limitations set forth in par 7 above, for disputes where the amount in controversy exceeds \$ _____ the Parties shall have the right, but not the obligation, to select litigation in order to resolve any disputes arising hereunder. In the event of litigation the prevailing Party shall be entitled to recover costs, expenses and



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NATIONAL
INDUSTRIAL
TRANSPORTATION
LEAGUE



reasonable attorney fees, including but not limited to any incurred on appeals.”

C. LITIGATION: _____ SHIPPER, _____ BROKER

In the event of a dispute arising out of this Agreement, the Party’s sole recourse shall be litigation, which shall be filed in accordance with paragraph 20 above within two years from the date of the alleged loss. The prevailing party shall be entitled to recovery of costs, expenses and reasonable attorney fees as well those incurred in any action for injunctive relief.

22. **CONFIDENTIALITY.** BROKER shall not utilize SHIPPER’s name or identity in any advertising or promotional communications without written confirmation of SHIPPER’s consent and the PARTIES shall not publish, use or disclose the contents or existence of this Agreement except as necessary to conduct their operations pursuant to this Agreement. BROKER will require its carriers and/or other brokers to comply with this confidentiality clause.

23. **ENTIRE AGREEMENT:** This Agreement, including all Appendices and Addenda, constitutes the entire agreement intended by and between the PARTIES and supersedes all prior agreements, representations, warranties, statements, promises, information, arrangements, and understandings, whether oral, written, expressed or implied, with respect to the subject matter hereof. Any modifications to this model contract, as published and copyrighted by TIA and NITL, shall be highlighted or italicized and initialed by both PARTIES to be valid. The PARTIES further intend that this Agreement constitutes the complete and exclusive statement of its terms and that no extrinsic evidence may be introduced to reform this Agreement in any judicial or arbitration proceeding involving this Agreement.

IN WITNESS WHEREOF, the PARTIES hereto have caused this Agreement to be executed in their respective names by their fully-authorized representatives as of the dates first above written.

BROKER

SHIPPER

Signed

Signed

Printed Name

Printed Name

Title

Title

Appendix E and F: Broker-Carrier Agreement

BROKER - CARRIER AGREEMENT

This Agreement is entered into this ___ day of _____, 20___, by and between _____ ("BROKER"), a Registered Property Broker, Lic. No. MC-_____, and _____, a Registered Motor Carrier, Permit/Certificate No. DOT-_____ ("CARRIER"); collectively, the "Parties". ("Registered" means operated under authority issued by the Federal Motor Carrier Safety Administration (or its predecessors) within the U.S. Department of Transportation.)

1. CARRIER REPRESENTS AND WARRANTS THAT IT:

- A. Is a Registered Motor Carrier of Property authorized to provide transportation of property under contracts with shippers and receivers and/or brokers of general commodities;
- B. Shall transport the property, under its own operating authority and subject to the terms of this Agreement;
- C. Makes the representations herein for the purpose of inducing BROKER to enter into this Agreement;
- D. Agrees that a Shipper's insertion of BROKER's name as the carrier on a bill of lading shall be for the Shipper's convenience only and shall not change BROKER's status as a property broker nor CARRIER's status as a motor carrier.
- E. Will not re-broker, assign or interline the shipments hereunder, without prior written consent of BROKER. If CARRIER breaches this provision, BROKER shall have the right of paying the monies it owes CARRIER directly to the delivering carrier, in lieu of payment to CARRIER. Upon BROKER's payment to delivering carrier, CARRIER shall not be released from any liability to BROKER under this Agreement. In addition to the indemnity obligation in Par 1.H CARRIER will be liable for consequential damages for violation of this Paragraph.
- F. Is in, and shall maintain compliance during the term of this Agreement, with all applicable federal, state and local laws relating to the provision of its services including, but not limited to: transportation of Hazardous Materials, (including the licensing and training of drivers), as defined in 49 C.F.R. §172.800, §173, and §397 et seq. to the extent that any shipments hereunder constitute Hazardous Materials; security regulations; owner/operator lease regulations; loading and securement of freight regulations; implementation and maintenance of driver safety regulations including, but not limited to, hiring, controlled substances, and hours of service regulations; sanitation, temperature, and contamination requirements for transporting food, perishable, and other products, qualification and licensing and training of drivers; implementation and maintenance of equipment safety regulations; maintenance and control of the means and method of transportation including, but not limited to, performance of its drivers.
- G. CARRIER will notify BROKER immediately if its federal Operating Authority is revoked, suspended or rendered inactive for any reason; and/or if it is sold, or if there is a change in control of ownership, and/or any insurance required hereunder is threatened to be or is terminated, cancelled, suspended, or revoked for any reason.
- H.
 - i. Subject to the express monetary insurance limits in Par 3.D as to CARRIER, and BROKER'S monetary insurance limits for public liability, \$_____, and property damage, \$_____, or such other amounts as mutually agreed by the Parties in writing, CARRIER shall defend, indemnify and hold BROKER and its shipper customer harmless from any claims, actions or damages, arising out of its performance under this Agreement, including cargo loss and damage, theft, delay, damage to property, and personal injury or death, and BROKER shall defend,

- indemnify, and hold CARRIER harmless from any claims, actions, or damages, including cargo loss and damage, theft, delay, damage to property, personal injury or death, arising out of its performance hereunder. Neither Party shall be liable to the other for any claims, actions or damages due to the negligence of the other Party, or the shipper. The obligation to defend shall include all costs of defense as they accrue.
- ii. Except for CARRIER's liability under Par 1.E, unless otherwise agreed in writing, and regardless of whether the Parties insurance as referred to in sub par i) above, is valid or provides coverage, the Parties indemnity obligations shall not exceed the monetary insurance limits referred to in sub par i).
 - I. Does not have an "Unsatisfactory" safety rating issued by the Federal Motor Carrier Safety Administration (FMCSA), U.S. Department of Transportation, and will notify BROKER in writing immediately if its safety rating is changed to "Unsatisfactory" or "Conditional".
 - J. Authorizes BROKER to invoice CARRIER's freight charges to shipper, consignee, or third parties responsible for payment.
 - K. Has investigated, monitors, and agrees to conduct business hereunder based on the credit-worthiness of BROKER and is granting BROKER credit terms accordingly.

2. BROKER RESPONSIBILITIES:

- A. SHIPMENTS, BILLING & RATES: BROKER agrees to solicit and obtain freight transportation business for CARRIER to the mutual benefit of CARRIER and BROKER, and shall offer CARRIER at least three (3) loads/shipments annually. BROKER shall inform CARRIER of (a) place of origin and destination of all shipments; and (b) if applicable, any special shipping instructions or special equipment requirements, of which BROKER has been timely notified.
- B. BROKER agrees to conduct all billing services to shippers. CARRIER shall invoice BROKER for its (CARRIER's) charges, as mutually agreed in writing, by fax, or by electronic means, contained in BROKER's Load Confirmation Sheet(s) incorporated herein by reference (Exhibit A, et seq.). Additional rates for truckload or LTL shipments, or modifications or amendments of the above rates, or additional rates, may be established to meet changing market conditions, shipper requirements, BROKER requirements, and/or specific shipping schedules as mutually agreed upon, and shall be confirmed in writing (or by fax) by both Parties. Any such additional, modified, or amended rates, changes in rates shall automatically be incorporated herein by reference as part of Exhibit A, Amendment 1, et seq.
- C. RATES: Additionally, any rates, which may be verbally agreed upon, shall be deemed confirmed in writing where CARRIER has billed the agreed rate and BROKER has paid it. All written confirmations of rates, including confirmations by billing and payment, shall be incorporated herein by reference as part of Exhibit A, Amendment 1, et seq. Rates or charges, including but not limited to stop-offs, detention, loading or unloading, fuel surcharges, or other accessorial charges, released rates or values, or tariff rules or circulars, shall only be valid when specifically agreed to in a signed writing by the Parties.
- D. PAYMENT:
 - i. The Parties agree that BROKER is the sole party responsible for payment of CARRIER's charges. Failure of BROKER to collect payment from its customer shall not exonerate BROKER of its obligation to pay CARRIER. BROKER agrees to pay CARRIER's invoice within ____ days of receipt of the bill of lading or proof of delivery, provided CARRIER is not in default under the terms of this Agreement. If BROKER has not paid CARRIER's invoice as agreed, and CARRIER has complied with the terms of this Agreement, CARRIER may seek payment from the Shipper or other party responsible for payment after giving BROKER ____ (business days) advance written notice.

- CARRIER shall not seek payment from Shipper if Shipper can prove payment to BROKER.
- ii. Payment and other disputes are subject to the terms of Par 4.D, which provides in part that prevailing parties are entitled to recovery of costs, expenses and reasonable attorney fees.
- E. **BOND:** BROKER shall maintain a surety bond /trust fund as agreed to in the amount of \$_____ and on file with the Federal Motor Carrier Safety Administration (FMCSA) in the form and amount not less than that required by that agency's regulations.
- F. BROKER will notify CARRIER immediately if its federal Operating Authority is revoked, suspended or rendered inactive for any reason; and/or if it is sold, or if there is a change in control of ownership, and/or any insurance required hereunder is threatened to be or is terminated, cancelled, suspended, or revoked for any reason.

3. CARRIER RESPONSIBILITIES:

- A. **EQUIPMENT:** Subject to its representations and warranties in Paragraph 1 above, CARRIER agrees to provide the necessary equipment and qualified personnel for completion of the transportation services required for BROKER and/or its customers. CARRIER will not supply equipment that has been used to transport hazardous wastes, solid or liquid, regardless of whether they meet the definition in 40 C.F.R. §261.1 et. seq. CARRIER agrees that all shipments will be transported and delivered with reasonable dispatch, or as otherwise agreed in writing.
- B. **BILLS OF LADING:** CARRIER shall issue a bill of lading in compliance with 49 U.S.C. §80101 et seq., 49 C.F.R. §373.101 (and any amendments thereto), for the property it receives for transportation under this Agreement. Unless otherwise agreed in writing, CARRIER shall become fully responsible/liable for the freight when it takes/receives possession thereof, and the trailer(s) is loaded, regardless of whether a bill of lading has been issued, and/or signed, and/or delivered to CARRIER, and which responsibility/liability shall continue until delivery of the shipment to the consignee and the consignee signs the bill of lading or delivery receipt. Any terms of the bill of lading (including but not limited to payment terms) inconsistent with the terms of this Agreement shall be controlled by the terms of this Agreement. Failure to issue a bill of lading, or sign a bill of lading acknowledging receipt of the cargo, by CARRIER, shall not affect the liability of CARRIER.
- C. **LOSS & DAMAGE CLAIMS:**
- i. CARRIER shall comply with 49 C.F.R. §370.1 et seq. and any amendments and/or any other applicable regulations adopted by the Federal Motor Carrier Safety Administration, U.S. Department of Transportation, or any applicable state regulatory agency, for processing all loss and damage claims and salvage and
 - ii. CARRIER's liability for any cargo damage, loss, or theft from any cause shall be determined under the Carmack Amendment, 49 U.S.C. §14706; and
 - iii. Special Damages: CARRIER's indemnification liability (Par 1.H) for freight loss and damage claims under this sub par C (ii) shall include legal fees which shall constitute special damages, the risk of which is expressly assumed by CARRIER, and which shall not be limited by any liability of CARRIER under sub par (ii) above.
 - iv. Except as provided in Par 1.E above, neither Party shall be liable to the other for consequential damages without prior written notification of the risk of loss and its approximate financial amount, and agreement to assume such responsibility in writing.
 - v. Notwithstanding the terms of 49 CFR 370.9, CARRIER shall pay, decline or make settlement offer in writing on all cargo loss or damage claims within _____ days of receipt of the claim. Failure of CARRIER to pay, decline or offer settlement within this _____ day period shall be deemed

admission by CARRIER of full liability for the amount claimed and a material breach of this Agreement.

- vi. CARRIER's liability for cargo damage, loss, or theft from any cause for any one shipment, under sub par b) above, shall not exceed \$_____ unless CARRIER is notified by BROKER or Shipper of the increased value _____ days prior to shipment pick up.
- D. INSURANCE: CARRIER shall furnish BROKER with Certificate(s) of Insurance, or insurance policies providing thirty (30) days advance written notice of cancellation or termination, and unless otherwise agreed, subject to the following minimum limits: Public liability \$_____; motor vehicle (including hired and non-owned vehicles), property damage, and personal injury liability \$_____ (\$_____ if transporting hazardous materials including environmental damages due to release or discharge of hazardous substances); cargo damage/loss, \$_____; workers' compensation with limits required by law. Except for the higher coverage limits which may be specified above, the insurance policies shall comply with minimum requirements of the Federal Motor Carrier Safety Administration and any other applicable regulatory state agency. Nothing in this Agreement shall be construed to avoid CARRIERS liability due to any exclusion or deductible in any insurance policy.
- E. ASSIGNMENT OF RIGHTS: CARRIER automatically assigns to BROKER all its rights to collect freight charges from Shipper or any responsible third party on receipt of payment from BROKER.

4. MISCELLANEOUS:

- A. INDEPENDENT CONTRACTOR: It is understood and agreed that the relationship between BROKER and CARRIER is that of independent contractor and that no employer/employee relationship exists, or is intended. BROKER has no control of any kind over CARRIER, including but not limited to routing of freight, and nothing contained herein shall be construed to be inconsistent with this provision.
- B. NON-EXCLUSIVE AGREEMENT: CARRIER and BROKER acknowledge and agree that this contract does not bind the respective Parties to exclusive services to each other. Either party may enter into similar agreements with other carriers, brokers, or freight forwarders.
- C. WAIVER OF PROVISIONS:
 - i. Failure of either Party to enforce a breach or waiver of any provision or term of this Agreement shall not be deemed to constitute a waiver of any subsequent failure or breach, and shall not affect or limit the right of either Party to thereafter enforce such a term or provision.
 - ii. This Agreement is for specified services pursuant to 49 U.S.C. §14101(b). To the extent that terms and conditions herein are inconsistent with Part (b), Subtitle IV, of Title 49 U.S.C. (ICC Termination Act of 1995), the Parties expressly waive any or all rights and remedies they may have under the Act.
- D. DISPUTES: In the event of a dispute arising out of this Agreement, including but not limited to Federal or State statutory claims, the Party's sole recourse (except as provided below) shall be to arbitration. Proceedings shall be conducted under the rules of the (select one): Transportation Arbitration and Mediation PLLC (TAM), American Arbitration Association (AAA), Transportation ADR Council, Inc. (ADR), DRC (Fruit and Vegetable Dispute Resolution Corp) for fresh produce related claims, upon mutual agreement of the Parties, or if no agreement, then at BROKER's sole discretion. Arbitration proceedings shall be started within eighteen (18) months from the date of delivery or scheduled date of delivery of the freight, whichever is later. Upon agreement of the Parties, arbitration proceedings may be conducted outside of the administrative control of the TAM, AAA, ADR, or DRC. The decision of the arbitrators shall be binding and final and the award of the arbitrator may be entered as judgment in any court of competent jurisdiction. The prevailing party shall be entitled to recovery of costs, expenses and

reasonable attorney fees as well as those incurred in any action for injunctive relief, or in the event further legal action is taken to enforce the award of arbitrators. Arbitration proceedings shall be conducted at the office of the AAA, ADR, DRC or TAM nearest _____ or such other place as mutually agreed upon in writing or directed by the acting arbitration association. Provided, however, either Party may apply to a court of competent jurisdiction for injunctive relief. Venue for any such action shall be in (state) _____. Unless preempted or controlled by federal transportation law and regulations, the laws of the State of _____ shall be controlling. The arbitration provisions of this paragraph shall not apply to enforcement of the award of arbitration.

E. NO BACK SOLICITATION:

- i. Unless otherwise agreed in writing, CARRIER shall not knowingly solicit freight shipments for a period of _____ month(s) following termination of this agreement for any reason, from any shipper, consignor, consignee, or other customer of BROKER, when such shipments of shipper customers were first tendered to CARRIER by BROKER.

(OPTIONAL)

- ii. In the event of breach of this provision, BROKER shall be entitled, for a period of _____ months following delivery of the last shipment transported by CARRIER under this Agreement, to a commission of _____ percent (____%) of the gross transportation revenue (as evidenced by freight bills) received by CARRIER for the transportation of said freight as liquidated damages. Additionally, BROKER may seek injunctive relief and in the event it is successful, CARRIER shall be liable for all costs and expenses incurred by BROKER, including, but not limited to, reasonable attorney's fees.

F. CONFIDENTIALITY:

- i. In addition to Confidential Information protected by law, statutory or otherwise, the Parties agree that all of their financial information and that of their customers, including but not limited to freight and brokerage rates, amounts received for brokerage services, amounts of freight charges collected, freight volume requirements, as well as personal customer information, customer shipping or other logistics requirements shared or learned between the Parties and their customers, shall be treated as Confidential, and shall not be disclosed or used for any reason without prior written consent.
- ii. In the event of violation of this Confidentiality paragraph, the Parties and agree that the remedy at law, including monetary damages, may be inadequate and that the Parties shall be entitled, in addition to any other remedy they may have, to an injunction restraining the violating Party from further violation of this Agreement in which case the prevailing Party shall be liable for all costs and expenses incurred, including but not limited to reasonable attorney's fees.

G. The limitations of liability for cargo loss and damage as well as other liabilities, arising out of the transportation of shipments, which originate outside the United States of America, may be subject to the laws of the country of origination.

H. MODIFICATION OF AGREEMENT: This Agreement and Exhibit A et.seq. attached may not be amended, except by mutual written agreement, or the procedures set forth above (Pars 2.B and 2.C).

I. NOTICES:

- i. All notices provided or required by this Agreement, shall be made in writing and delivered, return receipt requested, to the addresses shown herein with postage prepaid; or by confirmed (electronically acknowledged on paper) fax.
- ii. THE PARTIES shall promptly notify each other of any claim that is asserted against either of them by anyone arising out of the Parties performance of this Agreement.

- iii. Notices sent as required hereunder, to the addresses shown in this Agreement shall be deemed sent to the correct address, unless the Parties are notified in writing of any changes in address.
- J. **CONTRACT TERM:** The term of this Agreement shall be one year from the date hereof and thereafter it shall automatically be renewed for successive one (1) year periods, unless terminated, upon thirty (30) day's prior written notice, with or without cause, by either Party at any time, including the initial term. In the event of termination of this Agreement for any reason, the Parties shall be obligated to complete performance of any work in progress in accordance with the terms of this Agreement.
- K. **SEVERANCE: SURVIVAL:** In the event any of the terms of this Agreement are determined to be invalid or unenforceable, no other terms shall be affected and the unaffected terms shall remain valid and enforceable as written. The representations, rights and obligations of the parties hereunder shall survive termination of this Agreement for any reason.
- L. **COUNTERPARTS:** This Agreement may be executed in any number of counterparts each of which shall be deemed to be a duplicate original hereof.
- M. **FAX CONSENT:** The Parties to this Agreement are authorized to fax to each other at the numbers shown herein, (or otherwise modified in writing from time to time) shipment availabilities, equipment and rate promotions, or any advertisements of new services.
- N. **ENTIRE AGREEMENT:** Except for Exhibit A and its amendments, and unless otherwise agreed in writing, this Agreement contains the entire understanding of the Parties and supersedes all verbal or written prior agreements, arrangements, and understandings of the Parties relating to the subject matter stated herein. The Parties further intend that this Agreement constitutes the complete and exclusive statement of its terms, and that no extrinsic evidence may be introduced to reform this Agreement in any judicial or arbitration proceeding involving this Agreement.

IN WITNESS WHEREOF, we have signed this Agreement the date and year first shown above.

(BROKER)
 Company Name: _____

 Authorized Signature:

 Printed Name:

 Title:

 Company Address: _____

City _____ State: _____ Zip: _____
 Country: _____

 Phone:

 Fax:

 E-Mail:

(CARRIER)
 Company Name: _____

 Authorized Signature:

 Printed Name:

 Title:

 Company Address: _____

City _____ State: _____ Zip: _____
 Country: _____

 Phone:

 Fax:

 E-mail:

Attachment VI

SHORT-FORM MODEL
MOTOR CARRIER/BROKER AGREEMENT

THIS MOTOR CARRIER/BROKER AGREEMENT ("Agreement") is effective as of _____, 20__ (the "Effective Date"). The parties to this Agreement (the "Parties") are _____, a _____ organized under the laws of _____ ("Carrier"), and _____, a _____ organized under the laws of _____ ("Broker"). The purpose of this Agreement is to specify the terms and conditions under which Broker will engage Carrier to perform motor contract carriage and related services for Shippers (the "Services"), and under which Carrier will render those Services.

TERMS AND CONDITIONS

The Parties hereby agree to adopt and incorporate by reference the Terms and Conditions of the Model Motor Carrier/Broker Agreement ("Model Agreement") developed by the American Trucking Associations, Inc. and the exhibits and attachments thereto which are published and available to the public on the Associations' web site, the internet address of which is: www.truckline.com. To the extent there is any conflict between the terms of this Agreement and those of the Model Agreement, the terms of this Agreement shall be controlling.

1. Contract Carriage. All Services by Carrier as a motor carrier of property in United States interstate or foreign commerce shall be rendered as contract carriage within the meaning of 49 U.S.C. §§ 13102(4)(B) and 14101(b). In connection with contract carriage Services, Broker and Carrier hereby expressly waive all provisions of Chapters 137 and 147 and any other provisions of Subtitle IV, Part B of Title 49, United States Code, to the extent that such provisions are in conflict with express provisions of this Agreement. The Parties do not, however, waive the provisions of that subtitle relating to registration, insurance, or safety fitness.

{Comment: if limiting the scope of the services to which this Agreement shall apply, the Parties should include the following paragraph:

The geographic and commodity scope of the Services shall be as follows:

[INSERT DESCRIPTION OF GEOGRAPHIC AND COMMODITY SCOPE OF SERVICES]}

2. Relationship of Parties. The relationship of Carrier to Broker is that of an independent contractor. Under no circumstances shall employees or agents of Carrier be deemed employees or agents of Broker or Shipper, nor shall Broker or Shipper be liable for any wages, fees, payroll taxes, assessments or other expenses relating to employees or agents of Carrier.

3. Subcontracting. Carrier shall not subcontract any Services to third parties without giving prior notice to Broker and obtaining Broker's consent. Any such subcontracting, with or without notice and consent, shall not affect Carrier's responsibilities or liabilities to Broker under this Agreement. As between Broker and Carrier, all costs of rendering the Services (including compensation of subcontractors as well as payment of all taxes or other governmental assessments imposed on Carrier) shall be borne solely and exclusively by Carrier. The prohibition against subcontracting does not apply to a person leased to the Carrier pursuant to the provisions of 49 C.F.R. Part 376.

4. Due Diligence. By arranging for transportation of shipments by Carrier pursuant to this Agreement, Broker represents and warrants that it has conducted due diligence with regard to the creditworthiness of Shippers tendering such shipments, and that it vouches for same.

5. Non-Exclusivity of Services. Neither Party intends to give the other Party any exclusive rights or privileges under this Agreement. Except as otherwise stated in this Agreement, either party may contract with or otherwise provide service to any other motor carrier, broker, other intermediary or shipper.

6. Rates and Charges.

Option 1. Carrier shall be entitled to the rates and charges set forth in Attachment 1 as its sole and exclusive compensation for rendering the Services (including any Services subcontracted to third parties or performed in a capacity other than as a motor carrier, with or without the notices and consents required under paragraph 3. No shipment tendered under this Agreement to Carrier

shall be subject to rates or charges set forth in any tariff or rate schedule maintained by Carrier, unless those rates and charges are specifically set forth in Attachment 1. Rates and charges set forth in Attachment 1 on the effective date of this Agreement shall not be changed except by the mutual written agreement of the Parties.

Option 2. The following rates and charges shall apply to all shipments tendered to carrier under this Agreement:

[INSERT TABLE OF RATES AND CHARGES]

7. Invoicing and Payment. Carrier shall invoice Broker for all Services and fees. Broker shall invoice Shippers for Carrier's freight charges and Broker's commissions or other fees, and to take necessary measures to collect such invoices. Broker shall remit freight charges owed to Carrier within [insert credit period] days of the date of Carrier's invoice regardless of any late payment or non-payment to Broker by Shippers.

8. Insurance; Broker bond

8.1 Broker shall at all times maintain a surety bond/trust in an amount no less than . The form and terms of the bond shall be consistent with the provisions of FMCSA Form BMC 34 as that form was in effect on January 1, 2005.

8.2 Carrier shall maintain cargo liability insurance in the amount of \$ per occurrence.

9. Cargo Liability. The rules and procedures governing Carrier's liability for loss or damage to goods in Carrier's possession or control as a motor carrier in connection with the Services and the filing and disposition of claims are set forth in Exhibit 6 of the Model Agreement and are hereby incorporated herein, except that

Option 1: the Carrier's liability for loss or damage to goods shall be governed by 49 U.S.C. § 14706.

Option 2: the Carrier's liability for loss or damage to goods shall be limited to [insert amount] per pound

10 Governing Law. Except to the extent that such laws are preempted by reason of 49 U.S.C. § 14501(c) or other federal law, this Agreement shall be interpreted in accordance with the laws of the State of , disregarding any choice-of-law principle under which that State would look to the laws of another jurisdiction.

11. Notices. Pursuant to the provisions of the Model Agreement notices shall be sent to the Parties at the addresses first stated above to the attention of the respective signatory of this Agreement.

12. Back-Solicitation

Except upon a material breach of this Agreement by Broker, Carrier shall refrain from directly soliciting freight business during the term of this Agreement, or for months thereafter, from any entity which (i) was not solicited by Carrier prior to the Effective Date and (ii) actually tenders at least shipments to Carrier during the term of this Agreement.

WHEREFORE, the Parties have executed this instrument as their legally binding agreement as of the Effective Date first written above.

_____ (Broker)

_____ (Carrier)

By its Designated Contact:

By its Designated Contact:

Signature: _____
Printed Name: _____
Title: _____
Address: _____

Signature: _____
Printed Name: _____
Title: _____
Address: _____

Telephone: _____
Facsimile: _____

Telephone: _____
Facsimile: _____

Attachment VII

Appendix G: Trailer Interchange and Indemnity Agreement

TRAILER INTERCHANGE AND INDEMNITY AGREEMENT

This Trailer Interchange and Indemnity Agreement is entered into between Private Fleet Company, Located at Address, and _____, Inc. located at _____ and shall govern the terms and conditions of the use of trailer equipment belonging to one party by another.

WHEREAS, each party to this Agreement in the ordinary course of its business owns, operates and maintains tractor-trailer equipment suitable for transportation of cargo in intra- and interstate commerce; and

WHEREAS, the parties are engaged in transportation agreements which provide for the through movement of freight including pickup and delivery and spotting of trailer equipment under circumstances which require or permit one party to use the trailer of another to facilitate service; and

WHEREAS, the parties desire to permit such interchange and use of trailer by the other subject to the terms and conditions of this uniform Agreement;

NOW, THEREFORE, the Parties agree as follows:

As otherwise agreed in writing from time to time, one party may make permissive use of trailer equipment owned by the other with or without compensation under the following conditions.

1. The party owning the equipment warrants that equipment is regularly maintained and is free from any known defects by it.
2. Upon acceptance of any trailer, the receiving party shall prepare an equipment receipt/inspection report noting all damage, absence of damage and conditions of safety related items including, but not limited to, tires, brakes, air systems, sliding tandem hook pin. Such reports shall be prepared upon the acceptance of the trailer. Should the inspection reveal any safety related defects, the receiving party will notify the owner before use. Use of any trailer without notification or the preparation of an inspection report shall be deemed as acceptance without recourse. No warranty, express or implied, is made by the owner of the quality, design, or manufacture of the equipment. The owning party agrees to extend to the receiving party all warranties, if any, offered by the manufacturers of the equipment. The receiving party shall be responsible for all loss or damage to trailer while the trailer is in its possession and control, except to the extent such loss is caused by the act or omission of owner or its employees.
3. Receipt by any party of equipment belonging to the other without written notice shall constitute the receiving party's acknowledgment that the shipment is in good working order and free of reasonable defect.

4. While equipment is in its care, custody and control, any party receiving the equipment of another under this Agreement warrants as follows:

- (a) It will indemnify and hold the owner of the trailer equipment harmless from all risk of loss, claims, damage or cause of action arising out of its use including, but not limited to, any legal fee, the cost of defense or a judgment resulting from any claim of negligent entrustment or vicarious liability arising out of the receiving party's use, including the loading and unloading of the trailer while in the receiving party's possession.
- (b) The receiving party shall use the trailer only for the use contemplated by the authorizing agreement between the parties and shall return same at the completion of use to the location agreed to by the parties, free from defect, ordinary wear and tear excepted.
- (c) The receiving party shall bear all costs associated with any physical damage resulting from its use, and assume liability for any loss and/or damage to equipment (including shipments contained therein) while said equipment is stored on its premises or is being used by it or its designee to load, unload, transport cargo, or reposition equipment, unless such loss or damage is caused by the negligent acts or omissions of the owner.
- (d) The receiving party warrants that its auto liability coverage is properly endorsed to extend coverage to the owner of trailer equipment under a lease interchange endorsement.

5. Insurance. As financial surety for the indemnities and undertakings in 1 through 4 above, each warrants that it and/or its designee shall maintain the following insurance coverage which it warrants will inure to the owner of the trailer equipment's benefit:

(a) Commercial General Liability Coverage in the amount of not less than \$1,000,000.

(b) Auto Liability Coverage in the amount of not less than \$1,000,000 per occurrence.

(c) Motor Truck Cargo Insurance in the amount of not less than the market value of shipment but not to exceed \$250,000 per truck load. .

(d) Worker's Compensation Insurance in the amount required by applicable state law.

(e) Physical Damage Insurance in an amount equal to or exceeding the value of the interchanged equipment or evidence of an appropriate trailer interchange endorsement.

Each will be named a certificate holder as well as an additional insured on (a), *supra* and as a loss payee on (c) and (e) *supra*, on the other parties' policies.

6. Miscellaneous. This Agreement will become effective on the date written below and will continue from month-to-month thereafter, subject to termination by either party on 10 days prior written notice to the other. This Agreement shall not be modified except by written instrument signed by authorized representatives for affected parties. This Agreement shall be governed by and interpreted under the laws of the State of Tennessee. In the absence of written trailer interchange executed at time of the transfer of possession or other contemporaneous written notification, the receiving party of equipment accepts the equipment free from observable defect or damage.

Private Fleet Company, contact # - _____

“Other Party” Contact information: _____

Dated this _____ day of _____, 20____.

Private Fleet Company

Company: _____

By:

By:

Title:

Title:

WINNING YOUR CASE THROUGH DEPOSITIONS¹

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Generally speaking, the deposition process and issues related to depositions are well-controlled by the Federal Rules of Civil Procedure. *See, e.g.*, FED. R. CIV. P. 30 and 32. In fact, there is even a rule governing the stipulations about discovery procedures. To the point, Rule 29 provides:

Unless the Court orders otherwise, the parties may stipulate that: (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified—in which event I may be used in the same way as any other deposition

The Court may order the parties to perform under the rules as written, eviscerating any stipulations. *In re Westinghouse Electric Corp. Uranium Contracts Litigation*, 570 F.2d 899, 902 (10th Cir. 1978).

In considering the use of depositions at the late stages of the case, one should consider the following:

I. Use of Depositions at Mediation

You can use the deposition at mediation in any way you deem fit, so long as you do not violate stipulated rules related to the mediation or the mediator's procedures. Video clips for the use of the depositions at mediations are best when they are concise and make a strong point. As a general rule, no clip should exceed 90 seconds. As a preferred practice, clips of 30 seconds or less work best. Generally speaking, there are no rules for use of mediations at depositions.

¹ This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Annual Conference*, Denver, CO, July 2018.

II. Use of Depositions at Arbitration

The use of video depositions is an important component of a successful arbitration. Even in cases where liability is ultimately admitted, depositions may be used to show force and mechanism of injury.

Notify the arbitrator and opposing counsel that you will use deposition clips at the arbitration in accordance with the Federal Rules of Civil Procedure. The deposition of an adverse party may be used for any purpose, as substantive evidence or for impeachment. *Creative Consumer Concepts, Inc. v. Kreisler*, 563 F.3d 1070, 1080 (10th Cir. 2009) (there is no need to show that a witness is unavailable when introducing the testimony of a party opponent). This principle applies to a party's organizations' officers, directors, and managing agents, and to representatives designated under Rule 30(b)(6). *Shanklin v. Norfolk Southern Railroad Co.*, 369 F.3d 978 (6th Cir. 2004).

Deposition transcripts may be used by any party, regardless of who noticed the deposition. *Sovoie v. Lafourche Boat Rentals, Inc.*, 627 F.2d 722 (5th Cir. 1980). Rule 32 does not draw any distinctions between depositions taken for discovery purposes and those taken for use at trial. *Manley v. AmBase Corp.*, 337 F.3d 237, 247 (2nd Cir. 2003).

Depositions are very useful at arbitration and can help you frame the case effectively. The key in this practice is to properly identify, by page and line designation, the portions of the deposition that you intend to introduce at the arbitration. That gives the defense counsel an opportunity to identify and introduce counter-designated portions.

III. Use of Depositions at Trial

An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or Rule 31(a)(4). (Rule 31(a)(4) relates to a deposition by written questions). Much like the use of the deposition at arbitration, if a party offers into evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce any other parts. FED. R. CIV. P. 32(a)(6).

Rule 32 of the Federal Rules of Civil Procedure provides in pertinent part:

Rule 32. Using Depositions in Court Proceedings

(a) Using Depositions

(1) In General. At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

(A) the party was present or represented at the taking of the deposition or had reasonable notice of it;

(B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and

(C) the use is allowed by Rule 32(a)(2) through (8).

(2) *Impeachment and Other Uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.

(3) *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).

(6) *Using Part of a Deposition.* If a party offers in evidence only part of a deposition, an adverse party may require the offeror to introduce other parts that in fairness should be considered with the part introduced, and any party may itself introduce other parts.

(7) *Substituting a Party.* Substituting a party under Rule 25 does not affect the right to use a deposition previously taken.

(8) *Deposition Taken in an Earlier Action.* A deposition lawfully taken and, if required, filed in any federal- or state-court action may be used in a later action involving the same subject matter between the same parties, or their representatives or successors in interest, to the same extent as if taken in the later action. A deposition previously taken may also be used as allowed by the Federal Rules of Evidence.

(b) *Objections to Admissibility.* Subject to Rules 28(b) and 32(d)(3), an objection may be made at hearing or trial to the admission of any deposition testimony that would be inadmissible if the witness were present and testifying.

(c) *Form of Presentation.* Unless the court orders otherwise, a party must provide a transcript of any deposition testimony the party offers, but may provide the court with the testimony in nontranscript form as well. On any party's request, deposition testimony offered in a jury trial for any purpose other than impeachment must be presented in nontranscript form, if available, unless the court for good cause orders otherwise...

Generally speaking, a party must provide a transcript of any deposition testimony the party offers but may provide the court the testimony in a non-transcript form as well.

Objections to the admissibility of a deposition under Rule 32 must be made at the time the testimony is offered at trial or the objections are waived. Similarly, objections to the procedures at a deposition must be asserted as soon as practicable or those objections are also waived. This includes any notice to any defects in the deposition notice, the disqualification of the officer recording the deposition, or objections to the oath, objections to enter of transcription, and even objections to testimony.

IV. Conclusion

Video depositions, when used properly, provide an opportunity to tap into the power of seeing and hearing. The power of video is undeniable. Long gone are the days when someone from our offices would help read in doctors' depositions at trial.

Increasingly, our jurors are absorbing intense, quick bursts of information. In the current environment, less really is more. Risks are still present—a long video of a medical witness will quickly anesthetize the most attentive jury.

The average YouTube video uploaded is 2:46; an Instagram video is 15 seconds. A Vine video lasts six seconds and a GIF tells a bite-sized story in just a few seconds. Like it or not, our jurors are used to bursts of information in compact formats. We need to capitalize.

DATA MINING: DECODING THE TRUCK CRASH¹

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With modern telematics and event recording systems, there is a plethora of data available in most truck crashes. As trucking lawyers, it is important that we get all this information and understand how to use it. This data not only shows what really happened in a truck crash but can also show that the information was available to the trucking company as to how the driver was performing in the real world.

I. Cell Phones and Call Detail Records

One of the most common sources of data in truck crashes is the cell phone. While many of us have been getting cell phone records for years to determine whether a driver was talking on the phone at the time of the crash, if we can actually get the phone, we can get far more information. A good forensic examiner can determine not only whether someone was talking on the phone, but also whether someone was using an app or in the process of typing an e-mail or text message at the time of the crash. Cell phones also often contain e-mails and text messages between the trucking company and the dispatcher. These communications can be relevant as to whether or not the company was pushing the driver to exceed the hours-of-service regulations.

The phone itself and many apps often record location data. Sometimes, a qualified cell phone forensic expert can determine the latitude and longitude position of the phone at various points in time. This information can be used to determine the driver's true whereabouts, which can then be used to audit his logs. Also, when a driver is using apps or making calls while in the sleeper berth, he may not allow himself adequate time to rest. Even if a driver is technically in compliance with the hours-of-service regulations, that driver is still not supposed to drive while fatigued.

Even without the phone, cell phone call detail records contain valuable data. These records can be subpoenaed directly from the cellular carriers. They not only include the times and dates of each call and text, but also include information on how much data was being downloaded during

¹ This paper was first presented at AAJ's (formerly the Association of Trial Lawyers of America (ATLA®)) *Annual Convention*, San Diego, CA July, 2019.

certain periods of time. Forensic experts can use this information to determine whether a driver was using an app or watching a movie at the time of a crash. Also, the cellular carriers can provide the latitude and longitude of each cell tower to which the phone was connected during each call. This tower location information can be used to audit a driver's logs.

II. Electronic Control Modules

Some heavy vehicle engine manufacturers use electronic control modules, also known as ECMs, which record and store certain vehicle and engine parameters. The data stored can include the engine revolutions per minute (RPM), vehicle speed, and brake applications. The purpose of this data is for engine diagnostics and fleet management. This data can be extracted both after crash and during routine maintenance.

The ECM data will often show what a driver's average speeds and top speeds were. It will also create reports on sudden decelerations. This is an available source of information to show a trucking company that a driver has been hard braking, which is an instance of following too close or not paying attention, and that a driver has been driving too fast.

Many of the ECMs showing hard braking will also capture data from crashes. If the crash data is captured, it will show speeds, when the vehicle braked, and decelerations. This data is very useful in conducting an accident reconstruction.

The ECM data will also show the maximum cruise control speed and the speed at which a vehicle is governed. In cases involving speeding or hours-of-service violations, this information can be very valuable, as it shows the trucking company had the ability to monitor a driver's speed.

Cummins, Caterpillar, Detroit Diesel, Mercedes-Benz, Mack International, Navistar, Volvo, and PACCAR all have engine control module data available. Many of these modules store sudden deceleration incident data similar to that recorded by a passenger car's crash data recorder.

1. Cummins

Later-model Cummins engines have the capability of recording three sudden deceleration incidents. These include vehicle speed, engine speed, brake status, and other parameters for up to 60 seconds prior to, and 15 seconds after, a deceleration threshold is reached.

2. Caterpillar

Caterpillar has been making engine control modules with the capability of recording quick stops since the mid-1990s. A Caterpillar quick-stop records vehicle speed for up to 44 seconds prior to, and 15 seconds after, a sudden deceleration event. However, since January 1, 2007, the quick-stop recording feature comes turned off. The user has to change the electronic control module parameters with Caterpillar software in order to turn it on. Therefore, it is the motor carrier's choice as to whether to record this data.

3. Detroit Diesel and Mercedes

Detroit Diesel and Mercedes engines record the last two hard braking events. The hard braking event records include vehicle speed, engine speed, brake status, and other parameters for up to 60 seconds prior to, and 15 seconds after, the deceleration threshold is reached. The Detroit Diesel and Mercedes engines also record the last stop record. This records the vehicle speed, engine speed, brake status, and other parameters for up to 60 seconds prior to, and 15 seconds after, the last time the engine came to a stop. The Detroit Diesel and Mercedes engine control modules also record engine usage, which can be used to confirm or refute a driver's logbooks.

4. Mack

The Mack engine control modules can record up to two incident report events. These records include vehicle speed, engine speed, brake status, and other parameters for up to 16 seconds prior to, and 16 seconds after, the deceleration event is reached.

5. Volvo

Older Volvo models do not record hard braking events or last stop data. However, newer models record hard brake events.

6. Navistar

New Navistar Maxxforce truck engine electronic control modules have the capability of recording hard braking events.

7. PACCAR

Newer PACCAR engine electronic control modules have the capability of recording hard braking events.

III. Telematics

Telematics are a two-way wireless link between a vehicle and a computer network. The vehicle sends data through the wireless interface to a network computer. Typically, the information sent includes GPS location data, giving information as to where a vehicle is in various points in time. The information can also include vehicle speeds.

Some telematics work in conjunction with onboard cameras and engine control modules to automatically send information to motor carriers when certain acceleration or deceleration thresholds are met. For example, in some systems if there is a hard brake, or a sudden steering input, the system will send not only speed and braking data to the motor carrier, but some systems will even show a video of the seconds leading up to and following an event. This can be

very useful in showing that motor carrier knew that a driver was engaging in unsafe behavior prior to a crash.

Some of the more advanced telematics systems are designed to assist motor carriers in managing their assets. Some of these systems, such as the Vericom system, allow live, real-time GPS tracking of vehicles as well as reports. The motor carrier can see how many times a driver has been speeding, how much time the driver has spent exceeding the speed limit, how many sudden stops or sudden lane changes the driver has made, and other information. A responsible motor carrier will use this information to ensure that its drivers are operating in a safe manner.

There are other systems that allow drivers and motor carriers to communicate with each other while the driver is on the road. The most well-known is Qualcomm. Other systems include CADEC, PeopleNet, XATA, Aethr-geologic, and Discrete Wireless. These products often include electronic login devices, GPS measurement, messaging and dispatch, critical incident reporting, measuring fuel consumption and driver performance, and even doing fuel tax records. It is important to find out which devices are installed in a particular truck, if there are user manuals, and to determine what is available. Getting this information can be the difference between a simple accident and improving corporate knowledge.

IV. Electronic Logging Devices

The Federal Motor Carrier Safety Administration requires motor carriers to equip its vehicles with electronic logging devices. The electronic logging device is supposed to automatically switch to driving if the vehicle is exceeding a certain threshold, which should not exceed five miles an hour. Drivers should not be able, in theory, to edit out driving time. However, never assume that trucking companies and their drivers are not going to find ways to cheat the system. Any electronic data can be edited or manipulated. There will be likely companies selling systems that have back doorways to cheat built in. Also, when a vehicle is not moving, the electronic logging device has no way to determine whether the driver is in the sleeper, off-duty, or really doing something that should be recorded as on duty not driving. Therefore, drivers will still try to get away with violations of the 14- and 80-hour rules, even with electronic logging devices. We need to remain vigilant and find the ways that truck drivers and motor carriers are going to cheat with these new safety devices in place.

Another way that drivers can cheat is by inventing a fake co-driver. They can then log driving time and on-duty time through the fake co-driver.

V. E-ZPass

Trucking companies often install an E-ZPass in their vehicles to allow the trucks to go through toll booths without stopping. The pass will store information, including the transponder number, the vehicle class number, the entry interchange, the entry date and time, the exit interchange, the exit date and time, and the amount of the fare. This information can be used to help audit a driver's logs.

VI. Getting the Data

Plaintiff's counsel must act swiftly to obtain this data. Cell phone data is constantly being overwritten. ECM hard stop data is overwritten when the vehicle makes another hard stop. Drive cams and telematics do not retain data forever. It is imperative to put motor carriers and drivers on notice immediately with a demand to preserve evidence. Consider obtaining a temporary restraining order to preserve data if it is not promptly produced prior to litigation.

The data we need to prove the truth is out there. Act fast. Get it. Learn to use it. You owe it to your clients to obtain all available evidence.

Don't Chase Two Rabbits: The Importance of Themes¹

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The Importance of Choosing the Right Theme

- Do not shovel evidence at a jury or fact-finder—
give them the context and theme first
- Entrenchment may happen much earlier than we
realize

The Importance of Choosing the Right Theme (cont.)

- Look past “what” happened to “why” it happened—based on the trucking company’s policies and culture—and then connect the two
- Focus has to be on the defendant’s bad conduct and not on the plaintiff

The Importance of Choosing the Right Theme (cont.)

- “This is a case about a trucking company that . . . ”
- Focus has to be on the defendant’s bad conduct—and not on the plaintiff
- Focus groups have confirmed—it is better to hear themes of defendant’s conduct than to show a video or photos of the collision first

The Importance of Choosing the Right Theme (cont.)

- Particularly true in dissecting how a collision occurred
- Do not get lost in the weeds—do not get to times, distances, and so forth, until it is clear how it relates to your theme

Finding a Theme

- Ask a focus group: why do you think this happened?
 - What happened?
 - Truck driver made a right turn without carefully checking mirror and ran over a bicyclist riding next to the truck—surveillance video
 - Why did it happen?
 - Distracted driving—“I bet he was texting”
 - Sloppy driving like it was the end of a shift—“Was the driver driving beyond the maximum allowable safe hours?”
 - The driver did not have their mind on the job—“maybe he was having a fight with his girlfriend”

Outline for Opening, Mediation, or Pleadings

- Theme of defendant's bad conduct
- Timeline of defendant's bad conduct (start months or years before the crash)—what should have been done versus what was done—set up the contrast or choice—rules
- Set up the scene just before the crash
- *Now*—plaintiff comes on the scene
- Details of collision
- Injuries and damages
- Life before versus life after
- All easily preventable

Too Much Info: How Much Information Is Too Much?

- This is true for trial, mediations, pleadings, and generally when talking about your case—start practicing it!
- Avoid the temptation to talk about your clients first
- Also avoid the temptation to talk about the collision first (and never call it the “accident”) until after you have mentioned the themes

Themes of Safety Culture Are Everywhere Now

- Construction sites
- Restaurants
- Roadways
- Laboratories
- Schools
- Health care facilities
- Hotels

Themes of Safety Culture Are Everywhere Now (cont.)

- Theme of “failed safety culture” can be very powerful with expert testimony

What Is Their Approach?

- Traditional approach
 - Traffic deaths are inevitable
 - Perfect human behavior
 - Prevent collisions
 - Individual responsibility
 - Saving lives is expensive
- Vision zero
 - Traffic deaths are preventable
 - Integrate human failing in approach
 - Prevent fatal and severe crashes
 - Systems approach
 - Saving lives is not expensive

Vision Zero

- 36 cities in the U.S. have adopted Vision Zero, including a statement that traffic fatalities in cities should be eliminated because they are preventable

Themes: Look for the Trucking Company's Negligence

- Negligent hiring
- Negligent routing or trip planning
- Negligent training
- Negligent supervision
- Negligent retention
- Failure to prevent distracted driving
- Driving while intoxicated or using drugs
- Spoliation of evidence—missing, lost, destroyed, or altered
- Driving beyond safe maximum hours
- Speed was more important than safety

Check for This Theme

- *Trucking company failed to provide adequate safety equipment*
- Was there some technology or safety equipment that could have prevented this collision?
 - Disable or block texting while driving
 - Inward facing cameras to monitor drivers' behavior
 - Pedestrian detection sensors
 - Automatic emergency braking
 - Side underride guards

How Does This Collision Relate to the Theme Such as Inadequate Training?

- Show the kinds of training materials that are out there—tie everything back into a theme, particularly against the trucking company, not just the driver

Theme: Driving While Drowsy

- Show the federal regulations but also show the training materials that were available
- How much was their safety budget?
- Would they have been able to afford these training materials? Was it practical and feasible for them to provide this training to their employees if they had wanted to? If they say no, it opens up their budget and comparing it to unnecessary expenses in other areas then they could have been spending it on safety

Theme: Inadequate Blind-Spot Mirrors

- This is a case about a trucking company that failed to give its drivers proper safety equipment, including additional mirrors, even though it knew the truck would be driven in urban areas with many pedestrians and bicyclists right next to it

When Was the Drug and Alcohol Testing Done on a Fatality?

- Remember that incarceration is not an excuse for failure to test for drugs and alcohol—the Federal Motor Carrier Safety Regulations' (FMCSRs) place the responsibility on the employer to get this done

When Was the Drug and Alcohol Testing Done on a Fatality? (cont.)

- Post-collision—Drug and alcohol tests may be required after crashes according to the following chart ([49 C.F.R. § 382.303](#)); the employer is required to do alcohol and drug testing “as soon as practicable”

When Was the Drug and Alcohol Testing Done on a Fatality? (cont.)

	Citation Issued to the Commercial Motor Vehicle (CMV Driver)	Test Must Be Performed by Employer
Human Fatality	Yes	Yes
Human Fatality	No	Yes
Bodily Injury With Immediate Medical Treatment Away From the Scene	Yes	Yes
Bodily Injury With Immediate Medical Treatment Away From the Scene	No	No
Disabling Damage to Any Motor Vehicle Requiring Tow Away	Yes	Yes
Disabling Damage to Any Motor Vehicle Requiring Tow Away	No	No

When Should Attempts to Test Stop?

- 49 C.F.R. § 382.303(d)
 - (1) Alcohol tests. If a test required by this section is not administered within two hours following the accident, the employer shall prepare and maintain on file a record stating the reasons the test was not promptly administered. If a test required by this section is not administered within eight hours following the accident, the employer shall cease attempts to administer an alcohol test . . .
 - (2) Controlled substance tests. If a test required by this section is not administered within 32 hours following the accident, the employer shall cease attempts to administer a controlled substances test, and prepare and maintain on file a record stating the reasons the test was not promptly administered . . .

If Tests Were Not Done Within Time Frame

- This can become an important theme
- This is particularly true when there is a negligent hiring or retention claim, and you will be able to get prior drug and alcohol issues into evidence
- Remember that evidence that is lost or destroyed by the defendant can be one of your best themes
- The way you will get all of this evidence: depositions and document requests
- Final step: Test your themes and prioritize them in focus groups

LEARNING TO LOVE FEDERAL COURT: FRCP 26(F) INITIAL DISCOVERY AND SCHEDULING ORDERS CHECKLIST

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Often the trucking cases I am associated on have been removed to federal court. Areas where lawyers get into trouble in federal court are the initial 26(f) discovery planning conference and scheduling orders which influence the entire case. I hope the below thoughts and checklist will help you avoid some of the pain I have experienced over the years with poorly thought out discovery plans and scheduling orders (it is even more painful when you see it coming and the Court orders it anyway).

Plan on having your Rule 26(f) conference and report in WELL BEFORE the Rule 16 meeting with the Court and assume it is the Plaintiff's obligation to arrange the conference and file the report.

Rule 26(f) Conference:

FRCP 26(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. ... at least 21 days before a scheduling conference is to be held or a scheduling order is due under [Rule 16\(b\)](#).

(2) Conference Content; Parties' Responsibilities.

- make or arrange for the disclosures required by Rule 26(a)(1);
- discuss any issues about preserving discoverable information; and ---
- develop a proposed discovery plan.
- submitting to the court within 14 days after the conference a written report outlining the plan.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under [Rule 26\(a\)](#), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order [under Federal Rule of Evidence 502](#);

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed;

1. Ahead of time review with care:
 - Local Rules – This will often shorten the time frame of the 26(f) conference and impose a duty on a party (often Plaintiff) to conduct the meet and confer and report.
 - Judge’s preferences (Judges will often have preferences on how they like their cases to be scheduled.) Often the courts will have a template.
 - the timing of written discovery,
 - fact and expert discovery deadlines (How many experts? Type? What witnesses will need to be deposed before the expert’s deposition?), and
 - document production.
2. Establish a procedure for requesting deadline extensions or scheduling modifications. Be aware that jurisdictions may require “good cause” for an extension and mere agreement between the parties, or busy workload, isn’t good cause. See: *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 607-08 (9th Cir. 1992)(“good cause” standard primarily considers a parties diligence)
3. When your Complaint is filed you should already have your initial disclosures prepared.
4. Require documents to be Bates stamped so you know what has, and has not, been produced and for easy reference though depositions and trial.

5. Where is ESI coming from?
 - Third party Vendors (Log checking, routing, and other services in the trucking industry are often handled by third parties and the initial [erroneous] objection is always that they are not under the defendants control)
 - Cell Phones
 - Emails
 - Facebook/Social media
 - Qualcomm or truck mounted devices
 - Computers, Servers, etc...
 - Black box/EDR
 - Other?
6. What format do you want ESI? Photo's should always be .jpg for example, not .pdf. ALWAYS reserve the right to request documents in the original format. Is there a standing general order on ESI in your court? (See for example the Middle District of Tennessee's excellent Administrative Order on ESI, 174-1 found at:
<https://www.tnmd.uscourts.gov/sites/tnmd/files/AO%20174-1%20entered%209-12-18.pdf>)
7. What documents come in color (driver logs, QUALCOMM, dispatch records, etc...)? Black and white?
8. Do you get metadata? (With electronic driver logs you should also get the audit trail that shows when the entry was made, who made changes, etc...to ensure they weren't created after the fact)
9. Identify the custodians of the documents and the "tech guy" for computer search and backup.
10. Identify that document retention policies are in place (FMCSR 379, Appendix A gives you a nice checklist of documents that need to be maintained in trucking cases).
11. Consider how your requests are limited and proportional. The same request for a 1 truck company may be completely inappropriate for a 5,000 truck company.
12. Do you need a clawback agreement? If so what are the terms? See: FRE 502

13. Determine if another meet and confer is needed or if matters need to be decided by the court.
14. When are the exchanges due?
15. How are costs for production handled and are any unreasonable costs anticipated?
16. Consider how you are getting the material into evidence. Are the documents business records? Admissible? Remember what is good for the Goose is good for the Gander.
17. WRITE IT OUT with blanks for names and dates.
18. Discuss privilege and privilege logs. Can you agree on a format? (See an excellent discussion of requirements in *Beard v. Middle Tennessee Home Health Serv.*, 144 F.R.D. 340 (E.D. Tenn. 1992))
19. Prepare a Motion to Compel for defendants' failing to meet their Rule 26(f) obligations
20. Consider if any claims or defenses should be limited:

Rule 11 Certification: As a result of further investigation as required by Fed. R. Civ. P. 11, after filing the initial pleadings in this case, the parties agree that the following claims and defenses raised in the pleadings do not apply to the facts of this case, and hereby agree the court may dismiss or strike these claims and defenses at this time (an order adopting this agreement will be entered).

Thoughts on Scheduling Orders:

1. See the presentation, also
 - Sequencing of Discovery: Plaintiffs and defendants can disclose their experts at the same time. There is no requirement under any rule of civil procedure – state or federal – that requires the plaintiff to go first. If the defendant has proper experts, they do not need to see what the plaintiff experts state in order to render an opinion.

Rule 26(d)(3) also makes clear that there is no limitation on the sequence of discovery and that a party cannot delay responding to discovery simply because the other party has not yet responded to its discovery. Fed. R. Civ. P. 26(d)(3)(B); see also *id.* Advisory Committee Notes, 1970 Amendments. Moreover, it is not an “objection” at all, and certainly not a valid one, that a party may not have a response or responsive documents, yet, or that the party

may have to supplement its response later, because Rule 26(e) imposes that very obligation to supplement responses. See *id.* at 26(e). *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 186 (N.D. Iowa 2017). The general rule under Federal Rule of Civil Procedure 26(d) is that discovery may proceed in any sequence, and there is no formal sequence dictating that a particular party must go first or last. See *Volkswagen AG v. Dorling Kindersley Pub., Inc.*, 2006 WL 2357543, at *1 (E.D. Mich. Aug. 15, 2006) (“Federal Rules of Civil Procedure do not permit one party to make unilateral decisions regarding the timing and sequence of depositions during the discovery phase of civil litigation.”). *Beijing Fito Med. Co., Ltd. v. Wright Med. Tech., Inc.*, 2016 WL 10518448, at *7 (W.D. Tenn. July 1, 2016) “It is of no consequence that contention interrogatories may be the more appropriate route to obtain the information as nothing precludes a deposition either in lieu of or in conjunction with such interrogatories. See *United States v. Taylor*, 166 F.R.D. 356, 362–63 (M.D.N.C.1996).” *Sec. Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 34 (D. Conn. 2003). “[T]he various methods of discovery as provided for in the Rules are clearly intended to be cumulative, as opposed to alternative or mutually exclusive.” *Richlin v. Sigma Design W., Ltd.*, 88 F.R.D. 634, 637 (E.D.Ca.1980). *Dykes v. BNSF Ry. Co.*, C17-1549-JCC, 2018 WL 1456931, at *3 (W.D. Wash. Mar. 23, 2018) (“What Plaintiffs are really asking the Court to do is prioritize their request for written discovery over Defendant’s request for depositions. The Federal Rules, however, specifically prohibit this kind of tit-for-tat discovery. Fed. R. Civ. P. 26(d)(2)(B) (“discovery by one party does not require any other party to delay its discovery.”); see also, *Segal v. Amazon.com, Inc.*, No. C11-0227-RSL, slip op. at 1 (W.D. Wash. Mar. 7, 2011) (denying plaintiff’s request to postpone his deposition until after it had conducted a deposition of defendant); *Houserman v. Comtech Telecommunications Corp.*, 2:19-CV-00336-RAJ, 2019 WL 6052407, at *2 (W.D. Wash. Nov. 15, 2019) (As an initial matter, a party may not withhold discovery pending receipt of its own requested discovery. Fed. R. Civ. P. 26(d)(2)(B) (“discovery by one party does not require any other party to delay its discovery.”))

- Before deadlines for motions for summary judgment, motions in limine, etc., all experts should have been deposed at least 30 days prior to the deadline. I say 30

days because it typically takes at least two weeks for a court reporter to type up a deposition transcript and another two weeks to get it read, digested, and briefed into any meaningful motions. Add more time (generally 30 days) if the deposition is material to an expert's report.

- All fact witnesses depositions, including 30(b)(6) witnesses, need to be completed at least 30 days prior to our expert disclosures for the same reasons as above. We need to get the depositions transcribed and over to our experts to review at least 30 days before their reports are due.
- My normal process is to take a Records Custodian deposition 60 days prior to the Safety Director and Driver in a trucking case. The 60 days allows time for the court reporter to type up the transcript, for us to request missing documents, and then to file a motion to compel or move the deposition so we have all the documents we need when we take the Driver and Safety Director depositions.
- I find that rulings on motions in limine will typically determine whether defendants settle a case or proceed to trial. Therefore, I like to have motions in limine submitted 60 days prior to trial so the court can rule on them in a timely basis and openings/closings can be created with evidence that will actually be allowed. There is nothing worse than planning an open or close to find out that the judge has stricken the evidence you were trying to reference. Motions in limine are NOT final orders, the judge can change their minds and expect a defense request to do so, be nimble!
- In trucking, where cases typically get better over time, I typically like mediation scheduled after all expert reports are in but before clients incur the expense of expert depositions. In cases I really want to go to trial, I want mediation to occur 30 to 90 days before trial. I find the closer we are to a trial date the more willing my clients are to refuse inadequate offers, and the more willing defendants are to fairly assess the value of our cases.
- Often Defendants will file Daubert Motions and Motions for Summary Judgment on the same day. Consider having the parties file Daubert Motions 30-45 days after the deposition. In that case if your expert has been stricken, but the time to add experts/discovery has not run, you can add an expert or make other case decisions.
- Admissions: are often not covered and some courts treat them as written discovery, other courts do not. It is better practice to have a separate deadline shortly before trial (90 days or so).
- Written discovery: One of the biggest changes is whether written discovery must be served by the written discovery cut off date or answered by the discovery cut-off date. You also have issue with the mailbox rule on adding 3 days after service.

Make the date clear for proper scheduling in your office when written discovery may last be SERVED.

2. Typically, a scheduling order will address the following:

SCHEDULING ORDER

Come the parties, by and through counsel, and enter into the following Scheduling Order by agreement:

All allegations of comparative fault shall be made with specificity by _____ .

The party having the burden of proof on an issue will disclose the identity of its experts, together with any required reports, not later than _____ as provided by FRCP 26(a)(2).

The party not having the burden of proof on an issue will disclose identity of its experts, together with any required reports, not later than _____ as provided by FRCP 26(a)(2)

The parties shall attend mediation no later than _____.

The plaintiff shall depose the defendant's experts not later than _____.

The defendant shall depose the plaintiff's experts not later than _____.

All depositions in this action shall be taken and used in accordance with the FRCP 32, unless otherwise specified in this Order, or by consent of the parties.

Objections to a proposed expert's qualifications, competency to offer an expert opinion, or objections under Daubert, shall be filed no later than _____.

The parties shall serve written discovery by _____.

The parties shall complete all discovery by _____.

All depositions for evidence shall be taken by _____.

The parties shall file any final requests for admission no later than 90 days before trial.

All motions in limine shall be filed 60 days before trial.

All parties shall submit their final dispositive motions to include motions for summary judgment no later than _____.

The parties shall exchange final witness and exhibit lists no later than 30 days before trial. Exhibits are not to be pre-numbered or pre-marked before the commencement of

trial. Parties wishing to use transcripts shall also specifically designate those portions they wish to use and the parties shall confer within 5 days of the transcript designations.

Objections to all disclosed exhibits and transcript designations shall be filed no later than 15 days before the final pretrial conference. Exhibits to which there are no objections or upon which the court has ruled admissible may be used at all stages of trial.

Requested jury instructions shall be filed 10 days before trial, citing with each request one (1) supporting authority. Pattern Jury Instructions shall be cited by number and title.

All parties shall submit their trial briefs to the Court no later than ____.

All parties shall submit their motions in limine to the Court no later than _____.

All parties shall submit their respective jury charges to the Court no later than ____.

The Court will schedule a final pretrial conference approximately two (2) weeks before the trial date, and will notify the parties with the exact date.

This matter shall be heard on _____, and is expected to last ____ days. Counsel shall be present at ____ o'clock to handle any preliminary matters and the trial shall commence at _____ o'clock. This Scheduling Order shall not be modified except by leave of Court and only for good cause. Failure to abide by this Order may result in the sanctions set forth in Tenn. R. Civ. P. 16.

UNDERSTANDING THE TRANSPORTATION CYCLE AND DISCOVERY NEEDED IN THE COMMERCIAL MOTOR VEHICLE CRASH CASE

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I. Finding the Correct Defendants

1. The Paper Trail
 - Where does it start?

II. What to Request in a Broker Case

1. Service Agreements
2. Dispatch Instructions
3. Bills of Lading
4. Inspection Reports
5. Rate Confirmation
6. Transportation Management Software
7. Communications
8. Load Report
9. Cargo Loss Documents
10. Contracts
 - a. Broker Carrier Agreement
 - b. Carrier Information Survey
 - c. Load Confirmation Agreement

- d. Carrier Load Confirmation
- e. Carrier Dispatch Confirmation
- f. Rate Confirmation
- g. Confirmation Agreement
- h. Hauling Agreement with Broker
 - (1) Customer's Equipment
 - (2) Loading Dock Policies

III. Liability for the Load

- 1. CDL Manual—Spot Possible Liability Issues

IV. Basic Requests

- 1. Driver's Receipt of Federal Motor Carrier Safety Regulations (FMCSRs)
- 2. Medical Card
- 3. Medical Examination Report (MER)
- 4. Driver Logs
- 5. Trip Summary
- 6. Messaging and Communications
 - Cell download
- 7. Driver Qualification (DQ) File

POTENTIAL DEFENDANTS

ENTITY/PERSON	NAME/SERVICE ADDRESS	DOCUMENT
Operator		
Owner		
Motor Carrier		
Driver Leasing Company		
Chassis Pool		
Third Party Logistics		
Transportation Intermeds		
Brokerage Company		
Co-broker		

PRODUCTION REQUESTS IN A BROKER CASE

Preceding General Instructions include any document that is in your possession which can be printed in color, please print in color. If charges for printing color documents exceed \$100.00, please contact plaintiffs' counsel with exact charge before printing.

Documents include digital documents.

1. All documents describing lawsuit/litigation as a result of the negligent selection of an independent contractor for the five years prior to the crash.
2. All records regarding _____ over which _____ has possession, custody or control, including personnel files, payroll records and all contractual agreements.
3. All contracts between _____ and _____, regarding this load and the DOT authority under which it was accepted.
4. All contracts between _____, _____ and _____ regarding this load and the DOT authority under which it was accepted.
5. All contracts with any entity involved with this load, including shippers, brokers, motor carriers, freight forwarders and other entities to specifically include Transportation Service Agreements.
6. All contracts with any entity involved with this load and the load itself, in your possession.
7. The contract under which you were employed by the shipper for this load.
8. All documents relating to this load, the status of the load, the entities or persons involved with the load between you and the shipper, to specifically include any contracts under which you were operating.
9. All documents, emails or other materials, including digital, that show you informed the shipper that the load was brokered by someone other than yourself.
10. All documents showing the DOT authority under which each party accepted the load.
11. All documents showing any detention charges, late fees or penalties for the seven days before the crash and the day of the crash for _____, _____ or the load.

12. The bills of lading involving any load from _____ to _____ for the year prior to the day of the crash and the day of the crash.
13. All tariff and rate sheets applicable to the load.
14. All waybills or house bills for the load.
15. All documents for the trip the TT was making and the load it was carrying at the time of the crash, including bills of lading, manifests, shipping orders, way bills, consignee or delivery receipts, dispatch tickets, routing instructions, weight receipts, scale receipts, toll receipts, fuel maintenance, inspections, repair, cleaning and expense receipts, credit card receipts, phone bills, daily log sheets, vehicle and condition reports and all expense sheets.
16. All emails or documents, including digital, referencing the crash, the load, or DOT authority under which any person or entity was involved in the load.
17. All documents referencing the load check calls, delays or contacts with _____, its agents, employees and/or owners, to specifically include _____.
18. All documents, emails or other materials that indicate the load was or was not allowed to be brokered by another party.
19. All documents regarding the dispatch of this load, the TT and/or driver for the seven days prior to the crash up to the day of the crash.
20. All documents relating to the freight shipment being transported by _____ and/or _____ at the time of the crash, including the following:
 - a. all personnel involved in loading and supervision of loading;
 - b. the identity and location of the intended recipient;
 - c. the contents of shipment;
 - d. the weight of shipment;
 - e. manner of departure from the shipper;
 - f. dispatching of all stages of the shipment;
 - g. date, time and address of departure from the shipper;
 - h. date, time and address of arrival at the ultimate destination(s); and
 - i. all documentation of the shipment.
21. All computer records, data and reports (inputs/outputs), including event analysis of the crash and the tracking records of the location, time, speed, RPMs and switch analysis of the above described tractor and trailer for the date of the wreck.

22. All documents showing the system or procedures _____ used or employed up to and including the day of the crash to train, educate and test its employees, or other operating under your permits, concerning safe qualifications of motor carriers.
23. All documents used to make any preventable decisions at the time of the crash and currently.
24. All documents used to train supervisors and managers at _____ on the issues of motor carrier disqualification once employed by you.
25. All documents showing the processes and procedures used to approve and qualify _____ before hiring, together with the actual documents, if different.
26. All flyers, newsletters, posters, emails, messages or other materials describing the facts of this crash, or a similar crash, advising _____ employees, or motor carriers such as _____, of the steps to take to prevent similar crashes from happening in the future.
27. All user manuals and administrative manuals for all software programs used to send or received any information with the motor carrier, the shipper, the load, the driver, the truck or the trailer.
28. All documents showing the relationship between _____ and any defendant or witness.
29. All documents identifying the specific load of cargo being transported at the time of the crash, together with where it had been picked up and where it was scheduled to be delivered.
30. All documents including Electronically Stored Information (ESI), regarding the dispatching of the driver the week before, the day of and the day after, the crash.
31. All documents including electronic, radio, telephone or other transmissions with show any communications between _____ and the driver or operator of the TT, from the time the load of cargo being hauled was picked up until the time of the crash.
32. All documents that show what, when and how the crash occurred, and _____'s knowledge about the acts and/or events of the crash by any officers, agents and employees of _____ including any statements made by any party or witness.
33. All documents showing what, when, how and why the driver communicated with anyone as to why the crash happened.

34. All documents showing the speed of the TT at the time of the crash.
35. All documents that substantiate the driver's hours of service for the month prior to the crash, the day of the crash.
36. All documents showing the time, date or location of the TT and driver entering or leaving any yard or facility.
37. All recorded information from an electronic control module (ECM), or equivalent device, which shows readings, data or outputs that were extracted from, acquired or created by the tractor or trailer for the seven days prior to the crash and the day of the crash, and the name, address and employer or each person who has had possession, custody or control of all such data and the module itself with the dates and times of such control and the reasons why.
38. All company crash, accident, incident or similar reports concerning the wreck.
39. All documents that shows anyone at or on behalf of _____ found the crash preventable or non-preventable, together with all documents reviewed in order to make such determination.
40. All reports made to _____ concerning this crash, excluding anything protected by attorney client work product.
41. All reports, notes, correspondence, records or other such things made by or within the control or possession of _____ or any detective, investigator or other like entity having anything whatsoever to do with any aspect of the subject of this lawsuit.
42. All photographs, videotapes or other visual reproductions obtained by any investigator, detective, agent, insurer, witness, having anything to do with any aspect of this crash, the injuries, damages or any aspect of this action. This request includes images of any surveillance of any type of the plaintiffs.
43. All photographs, videotapes or other visual reproductions showing or depicting any aspect of the crash or plaintiffs.
44. All electronic, radio, telephone, mobile/cellular phone or other recorded trip transmissions to and from the TT and driver for the trip during which the crash happened, including those made on the day of the crash.
45. All computer, electronic or email messages created in the first 48 hours immediately after the crash by and between _____ and any agents or third parties relating to the facts, circumstances, or actual investigation of the crash, as well as any messages which relate to this crash, whether generated or received.

46. The identification of any individuals by whom you were contacted regarding the crash or who spoke to the driver on the day of the crash.
47. The identification of all employees or agents of _____ who were in charge of or involved in an investigation or inquiry into the wreck, or with any knowledge about the investigation done into the crash.
48. All documents identifying the dispatcher or other employees of _____ in contact with the carrier or driver for the load involved in the wreck and any notes or documents made by them.
49. All recorded conversations or transcripts of conversations or statements by any entity whatsoever regarding any aspect of this action.
50. The identity of each person who has/had possession, custody or control of the driver's Daily Log(s) for the operation of the TT for the six months immediately prior to the crash, the day of the crash and the thirty days after the crash.
51. The names and last known business addresses and telephone numbers of any person, consultant, advisor or company to conduct a safety audit of _____ in the 36 months preceding the date of this crash.
52. The names and last known business addresses and telephone numbers of any person, consultant, advisor or company to conduct a safety audit of the driver for one year prior to the crash, the day of the crash and for the 30 days after the crash.
53. All documents showing the background, training, education and knowledge required of the individuals charged with the training, operation and safety, including the FMCS Regulations, regarding brokers and motor carriers.
54. All documents describing proper loading procedures for drivers at _____.
55. All documents regarding background searches on any defendant.
56. All documents showing employment references provided by _____ to _____ and any contact with the references verifying or confirming the safety, background or history of _____,
57. All documents showing any information sent or received to/by a defendant, shipper, motor carrier, receiver or anyone involved with this crash, other than your lawyers.
58. All documents showing the monitoring of _____ safety record, including DOT, FMCSA and SMS.
59. All documents that found _____ deficient in any BASIC prior to this crash.

60. The BASIC measurements for _____ for the three years prior to the crash.
61. A copy of the carrier profile maintained by MCMIS for _____ for the three years prior to the crash.
62. All documents regarding any safety issue for _____, including the initiation, investigation and final conclusions of any warning letters, targeted roadside inspections, offsite investigation, onsite investigation, cooperative safety plan, notice of violation, notice of claim/settlement agreement and documents that stated _____ is unfit.
63. All documents produced by any defendant to you in order to be approved for work.
64. All documents that describe proper procedures for drivers securing a load.
65. All documents showing the safety practices and principles for hiring motor carriers prior to this crash.
66. All documents showing any use of third party providers to verify suitability of motor carriers to haul for you.
67. All documents _____ used to determine what constitutes a preventable crash and the crash at issue.
68. All documents that show the proper process to approve a trucking company to work for you, such as checklists, policies, procedures, training manuals or written safety plan.
69. All documents that show the proper process to allow a trucking company to continue to work for you after initial approval, such as checklists, policies, procedures, training manuals or written safety plan.
70. All documents showing the number of loads carried each year for you by _____ for the three years prior to the crash.
71. All documents showing when _____ first was approved to work for you and when terminated by you.
72. All proposed safety rules, policies or procedures involving safety that were considered and rejected by _____ prior to the crash.
73. All policies and procedures that jointly impact _____ and _____.
74. All policies and procedures that require _____ to be separate from _____.

75. All documents showing the systems and procedures _____ used or employed up to the day of the crash, to monitor drivers' compliance with federal motor carrier driving time regulations and those requiring the timely and accurate recording of Daily Log sheets.
76. The forms used to conduct safety audits of motor carriers that work for you.
77. All documents related to any internal or external safety audits conducted by or on behalf of _____ in the 36 months preceding the crash.
78. All safety audits in you or your agent's possession of _____ and driver prior to the crash and any subsequent period that includes the crash.
79. Minutes of all _____ safety meetings for the 36 months prior to the crash.
80. All documents showing all safety and disciplinary rules, regulations, policies, procedures, guides, goals, suggestions or manuals provided to motor carriers working for you.
81. All safety and disciplinary regarding _____, its agents and employees, including the driver, over which _____ has possession, custody or control.
82. All documents showing the disciplinary process for trucking companies such as _____ and drivers such as _____.
83. All documents showing reasons for and manner of discipline, suspension or termination of a motor carrier such as _____ or its drivers.
84. All indemnification agreements covering this load and any aspect of damages.
85. All documents relied upon in denying or controverting the statements set forth in Plaintiffs' Complaint or any Amended Complaint.
86. All documents relied upon in denying or controverting that plaintiffs are entitled to the relief sought in their Prayer for Relief.
87. All documents you contend supports your affirmative defenses.
88. All documents you contend supports your position on any counter-claim.

STAYING ON THE RIGHT SIDE OF THE ROAD: ETHICAL CONSIDERATIONS FOR THE BIG TRUCK CASE

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I. Outline of Subjects

1. Conflicts of interest

An attorney who chooses to represent two plaintiffs in the same trucking accident may be presented with a situation where policy limits will not adequately compensate both plaintiffs for their injuries. Plaintiffs' attorneys should be aware of the conflict of interest presented when representing multiple plaintiffs in a single suit with a limited pool of funds.

2. Using and opposing expert witnesses

Attorneys will often need to retain experts in properly litigating a trucking accident. Ethical conflicts may arise for plaintiffs' attorneys when clients want to make decisions regarding experts. Additional conflicts arise when a formerly retained expert is now the opposing side's testifying expert

3. Heavier caseload & higher stakes

Trucking litigation is extensive and labor intensive. The trucking industry is heavily regulated with various federal requirements. Plaintiffs' attorneys should determine whether they have the manpower to adequately collect and evaluate all the issues presented.

4. Contacting former employees

Plaintiffs' attorneys may want to contact former employees of the defendant trucking company. Plaintiffs' attorneys should be cautious of privileged information the employee learned prior to their leaving.

5. Pre-suit discovery

Some states provide mechanisms for pre-suit discovery. Others do not. Is it unethical for plaintiffs' attorneys in states that do not provide this mechanism to try and create their own ways of obtaining information prior to filing suit.

6. Limited resources

Proper work up and investigation of a trucking accident can be expensive and time consuming. Plaintiffs' attorneys should consider if they have the proper resources to undertake the task. This is especially true when attorneys are not paid until the end of litigation.

7. Settlement considerations

Plaintiffs arguably have more to lose than insurance companies. Do plaintiffs' attorneys have an ethical obligation to encourage clients to settle at lower offers instead of facing the risk of leaving a catastrophically injured plaintiff holding the bag after trial?

8. Co-counsel agreements

Large accidents can result in co-counsel arrangements. Co-counsel agreements can prove challenging when determining who makes ultimate decisions, communicates with clients and opposing counsel, and the splitting of fees – all while still working in the client's best interest.

9. 2016 Ethics Presentation review

In an effort to not repeat materials from similar presentations, I've bullet pointed a few talking points on some important issues that we've experienced lately that were covered in a prior presentation at AAJ.

II. Ethical Considerations for the Big Truck Case

1. Conflicts of interest

- Model rule 1.7: conflict of interest between clients.
 - a. Model rule 1.7(a)(1): except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client. 1
 - b. Hypo: can you represent two passengers who are critically injured when there is only \$1 million in coverage? No. Should you, ethically, if they sign off?

- How do you balance coverage limits when there are two (or more) catastrophically injured plaintiffs.

c. Any time there may be a limited pool of funds from which multiple clients seek to recover, an inherent conflict is present.

(1) In fact, the Texas ethics committee conceded it would be a violation of the Texas disciplinary rules of professional conduct (1.06) to represent two or more clients in a single accident caused by a third person, when it becomes clear that the third person has a limited amount of funds to pay a possible judgment or settlement (e.g. Insurance policy limits substantially less than likely verdict range). The unwary personal injury lawyer's over-indulgence in signing up multiple clients may ultimately cost her clients an opportunity to maximize their recoveries, which can, in turn, cost the lawyer in terms of a professional liability claim.²

(2) In addition to the potential conflict that a limited recovery option may present, multiple clients may actually have conflicting, or adverse, claims. A lawyer engaging multiple clients should notify the clients, in writing, of any potential conflicts of interest and the clients' immutable right to independent counsel on these and other issues that may arise³

- "it is frequently the case that a defendant will not wish to settle a case piecemeal and will condition settlement on attainment of a global resolution between the parties. If some, but not all, of the co-plaintiffs wish to settle the matter, a conflict will develop between the co-plaintiffs."⁴

(3) In Alabama ethics opinion 82-591 (Mar. 17, 1982), the committee determined that a lawyer may not represent all plaintiffs in an automobile accident case where the assets are not sufficient for the full satisfaction of all potential claims and a recovery by one claimant would reduce the assets available for the satisfaction of the other claims.⁵

(4) An alternative for a lawyer representing two individuals hurt or injured as a result of the same accident is for that lawyer to limit her scope of representation initially to include maximizing a recovery into one lump sum, but have the clients agree between themselves the potential split.⁶

(5) There are a number of ways that an injured person may collect compensation in excess of insurance policy limits.⁷

- Bringing suit against more than one defendant

- In trucking cases, negligent entrustment and negligent supervision claims can be brought against the trucking company for entrusting an unfit truck driver with violations on his record.⁸
 - Recovering under an umbrella insurance policy – UIM
 - Collecting from defendant personally – assets (least likely option)
2. Using and opposing expert witnesses
- a. Model rule 1.7: conflict of interest with experts and previous clients
- (1) Model rule 1.7(a)(2): except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a conflict of interest. A concurrent conflict of interest exists if: (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.⁹
- (2) In most trucking litigation, it will be necessary to retain various experts. I.e. Trucking expert, accident reconstructionist, safety expert, economist, etc.
- (3) “personal interest conflict” → arises when there is a “significant risk” that a lawyer’s representation of one client will be “materially limited” by the lawyer’s responsibilities to another client, a former client, a third person, or by the personal interests of the lawyer.
- This would happen if an expert which you used in a previous case (case a) is now the opposing side’s expert in a current case (case b). What are your loyalties to your current client and to your previous client who relied on an expert in case A? You may know expert A’s background, credentials, views, and prior statements which can be used against them and undermine their credibility in case A.
 - To avoid conflict, attorneys should do research and investigation into the backgrounds of experts to determine whether they are appropriate for their case (identify conflict of interests). Discussed in 2016 AAJ presentation ethical considerations for trucking cases.
- (4) Disagreements with a client about strategy
- A client may disagree with your strategy over whether or not to use an expert witness to address a particular issue, the use of a

particular expert, or the anticipated testimony that an expert may provide. Disagreement may exist on whether you have an ethical obligation to take remedial measures to correct an expert's testimony. Hopefully, clients will trust the judgment of their trial counsel, but we know that is not always the case. Sophisticated clients will likely want at least some input into decisions involving expert witnesses. Some clients may want to influence expert witnesses, or in some instances, they may even want to control decisions involving expert witnesses due to their importance to a case.¹⁰

- See also, model rule 3.3(a)(3); requiring a lawyer to take “remedial measures” upon learning that material false evidence was presented to a tribunal.
- Model rule 1.2 provides that “a lawyer shall abide by a client's decisions concerning the objectives of representation.”
- When a disagreement with a client occurs over the means to accomplish the agreed upon objective of the representation, a lawyer should consider documenting his or her recommendation to the client. This will prevent any future disagreement over the lawyer's recommended strategy in the event that the client's decision fails to produce the desired result.¹¹

b. Presentation of expert testimony

(1) Model rule 3.3 prohibits a lawyer from offering testimony known to be false.

(2) Discerning when the threshold between speculation or concern and actual knowledge of falsity is crossed can be particularly difficult with expert testimony because frequently experts will disagree over the reliability or validity of a test, a methodology, or a particular type or piece of information or evidence. When an expert's testimony contradicts a conclusion, opinion, or testimony rendered on the same issue involving a substantially similar fact pattern in another matter, a lawyer should assess the truthfulness of the expert's opinions or testimony.¹²

(3) In *Fuentes v. Miller*, 2015 wl 3936321 (n.d. Ind. June 26, 2015), the court noted that a trucking practices expert could offer testimony on the best-practices of the trucking industry as well as what it takes to safely operate a semi-truck. Such testimony met the reliability requirement as it

was based on her extensive experience, training, and knowledge of how to safely operate commercial vehicles such as the semi-trucks in this case.¹³

- However, the trucking practice expert and an accident reconstructionist could not testify as to concepts that are within the experience of the average juror, such as who had the “right-of-way” during merging as the rules about merging apply to all vehicles.

(4) The same court found that expert testimony on the topic of attentiveness would only be permitted insofar as there is specific insight into attentiveness that would go beyond the knowledge of an average juror, e.g., an attentive driver's reaction time is typically less than x amount of time. Since testimony about following distances and what counts as too close is different for heavy commercial vehicles than it is for cars, expert testimony about safe following distances for semi-trucks would be useful to the jury and is thus permitted.¹⁴

3. Heavier caseload & higher stakes

a. To handle a trucking case the correct way is very labor intensive – especially if you’re bringing a broker claim. If you have too many cases and cannot dedicate a sufficient amount of time to the trucking case, it will not be handled correctly.

b. There are more than 1,000 federal regulatory requirements for trucking companies. These laws hold the key to everything about your trucking accident case, from the amount of money that will be available to critical evidence needed to win. A lawyer who is not experienced in litigating serious trucking accident cases simply cannot handle one like he handles other types of personal injury cases.¹⁵

c. Trucks are more regulated than other types of motor vehicles because they are more dangerous. Trucks are obviously bigger and heavier and cause more serious injuries and fatalities than other auto accidents. Truck companies usually carry more insurance and, in general, the quality of defense lawyers hired by their insurance companies is better. These defense lawyers are more likely to spend more money defending these trucking accident cases, and the defense tactics may be very aggressive.¹⁶

d. Overworked lawyers are not effective lawyers. This issue should be of great concern for the personal injury lawyer who has an excessive caseload. Unless adequate staff and associate attorneys are hired to assist, attorneys with hundreds of active cases are, unfortunately, the usual suspects for missed deadlines and poor preparation that leads to decreased return for client and lawyer alike, and an increased likelihood of a malpractice suit as a result. In order to maximize effectiveness and recovery, and minimize the likelihood of mistakes and potential

liability, personal injury lawyers should take regular stock of their caseload in order to ensure an appropriate balance of capacity and quality of work is maintained. Clearly, it would be better for any lawyer to achieve a great result by representing one client accurately and thoroughly than to achieve little or no success by representing two or more clients inadequately and exposing herself to liability for malpractice. *This advice applies most poignantly to lawyers representing victims of catastrophic events, 17 i.e., victims of trucking accidents.*

4. Contacting former employees of the trucking company

a. Can you ethically contact a former safety director who hired the wrongdoing driver and then left the company prior to the collision? Former drivers? Former dispatchers?

(1) A lawyer representing a party may directly contact former employees of another party not known to be represented in the matter, including former supervisory employees provided, however, that the lawyer may not seek disclosure of any privileged communications between the former employee and the organization's counsel that occurred while the individual was employed by the company and may not state or imply that she or he is disinterested in the matter.¹⁸

- Although model rule 4.3 does not prohibit ex parte communications with former employees, a former employee who had left the company or was fired prior to the accident may have participated in privileged communications with the defendant employer's attorneys.¹⁹

(2) No provision of the Michigan Rules of Professional Conduct creates either an obligation that the lawyer notify the opposing party's lawyer of the contact or a right for the opposing party's lawyer to be present at the lawyer's interview of the former employee.²⁰

b. An attorney might be interested in contacting a former employee, especially if they have knowledge about improper policies or procedures, because it is the most direct source of information about the causation element.

- Testimony from these employees can provide context for and explain documentary evidence related to the adverse action, which an attorney may be able to use to counter or undermine the defendant employer's explanation.

c. Former employees with representation

- Model rule 4.2 requires that even if a former employee is exempt from a no contact rule, if they have personal representation, an attorney is obligated to receive consent of counsel before speaking with them.²¹
- Prior to interviewing any former employees, it is best practice to ask if they have an attorney.

5. Pre suit discovery

a. Some states have mechanisms which allow for pre-suit discovery and others do not, is it ethical to try and invent other ways to get discovery/information.

- Ex: file suit against insurance company. Do not serve complaint on defendant insurance company. Serve with subpoena to get information. Dismiss suit against defendant insurance company (before answer) but keep information and use it in later lawsuit against driver.

b. Plaintiffs are disadvantaged by information asymmetry in the beginning of a claim. At major collision sites, Defendant’s insurers have their rapid response teams on site, collecting information, in some situations “guiding” law enforcement, etc. Plaintiff counsel might not be retained for days, weeks or months afterwards. Pre-suit discovery allows plaintiffs to gather more information prior to the actual filing of a lawsuit. Some states have recognized the plaintiff’s disadvantage and introduced pre-suit discovery mechanisms.

State	Pre suit discovery power?	Power/ rule of civil procedure
California ²²	Yes. Petitions to perpetuate testimony or preserve evidence.	Code civ. Proc. §2305.020: petitions can be used to obtain pre-litigation oral and written depositions, inspections of documents and things, and places, and physical and mental examinations. Code civ. Proc §2035.060: discovery obtained can be used in any subsequent action involving the same subject matter that is brought in a ca court against any party, or expected adverse party, named in the petition.

New York ²³	Yes. Plaintiff can initiate a lawsuit without an identified defendant. Cpl ^r 3102(c).	Cpl ^r 3102(c): before an action is commenced, disclosure to aid in bringing an action, to preserve information or to aid in arbitration, may be obtained, but only by court order. The court may appoint a referee to take testimony.
Texas ²⁴	Yes. Depositions before suit are permitted.	Texas rule of civil procedure 202.1: a person may petition the court for an order authorizing the taking of a deposition on oral examination or written questions either: To perpetuate or obtain the persons use in an anticipated lawsuit; or To investigate a potential claim or suit.
Illinois ²⁵	Yes.	Illinois supreme court rule 224(a)(i): a person or entity who wishes to engage in discovery for the sole purpose of ascertaining the identity of one who may be responsible for damages may file and independent action for such discovery.” Comment to Rule 224(a)(i) states, “the rule facilitates the identification of potential defendants through discovery depositions or through any of the other discovery tools set forth in rules 201 through 214.” Rules 201-214 include: written interrogatories, production of documents, inspections of objects and tangible things. Arguably this includes any discovery tool that you could use in a “regular” case.

<p>Florida26</p>	<p>Very limited pre-suit discovery. Pre-suit discovery only allows insurer to obtain specific medical information from healthcare provider to verify legitimacy of insured's claim. No other civil discovery tools allowed during pre-litigation.</p>	<p>In the event of a dispute regarding an insurer's right to discovery of facts under this section, the insurer may petition a court of competent jurisdiction to enter an order permitting such discovery. The order may be made only on motion for good cause shown and upon notice to all persons having an interest, and must specify the time, place, manner, conditions, and scope of the discovery. In order to protect against annoyance, embarrassment, or oppression, as justice requires, the court may enter an order refusing discovery or specifying conditions of discovery and may order payments of costs and expenses of the proceeding, including reasonable fees for the appearance of attorneys at the proceedings, as justice requires.</p> <p>In <i>State Farm Mut. Auto. Ins. Co. V. Shands Jacksonville med. Ctr., Inc.</i>, 210 so. 3d 1224, 1225 (Fla. 2017), the Florida supreme court resolved a conflict regarding the above-mentioned provision, finding as matter of statutory construction that the "discovery of facts" referred to in the statute was intended by the Florida legislature to be a limited pre-litigation procedure for a pip insurer to obtain specified information about the treatment provided to its insured and the charges for that treatment, through the</p>
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		<p>production of documents, and concluding that the trial court erred in ordering the hospital to make a designated corporate representative available for deposition. Pip statute allowing an insurer to verify the legitimacy of a claim by seeking discovery of medical facts regarding an insured before it pays pip benefits, provides limited pre-litigation discovery into specified information about the treatment and charges for treatment provided to an injured party, and the discovery tools found in the rules of civil procedure are not triggered until litigation over the reasonableness of those charges has ensued.</p>
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6. Limited resources

a. Trucking cases require manpower and increased financial resources²⁷

(1) “Plaintiff’s attorneys work on a contingency fee basis and operating under this banner means not getting paid until the case is concluded. It also means not getting paid until the case is concluded. It also means spending lots of money to build a case before receiving a dime in compensation, which can be incredibly expensive, and potentially cause cash flow issues. Expenses like travel, depositions, expert witnesses, and processing documents can add up quickly and cause financial damage to the law firm”

(2) “A ny type of litigation pursued by a plaintiff’s attorney can quickly become expensive this is especially true of trucking litigation because of the many parties and separate factors involved, including insurance companies, attorneys, business finances, the severity of the damage, and personal liability.”

b. Evidentiary concerns

(1) Trucking cases include significant amounts of information/evidence. Much more than your typical auto v auto rear end at stop light accident. Do you have the ability to collect and organize this information?

- Increased amount of work than a regular auto collision.
- Specialized information specific this to this industry
- Additional concerns: preservation of truck, plaintiff's vehicle, documents, inclusion of defendants that may not be apparent at first assessment.²⁸
 - Dot regulations require trucking companies to retain certain documents for 6 months. If regulations only require trucking companies to retain documents for 6 months, these companies may be inclined to getting rid of certain documents immediately after the 6 months are up.
 - A trucking accident lawyer can prevent such documents from being destroyed by submitting a legal order to preserve the documents.²⁹
 - Trucking accident lawyers must file the lawsuit as soon as possible to avoid costing the injured client millions of dollars.³⁰

(2) In collecting evidence, investigations should be conducted as soon as possible. Is it unethical to do this before you've been officially hired on a case? Do you have the ability to conduct investigations in the early stages?

- Conducting investigation as quickly as possible can be indispensable for plaintiffs' attorneys. Regardless of when you enter the case, you are likely behind the defense. At the immediate outset of a major trucking accident, the truck has probably undergone multiple investigations by the trucking company, the insurance company, the police, and potentially other entities involved (lessor, broker, etc.)³¹

7. Settlement considerations

- a. Large insurance companies have less to lose than a catastrophically injured plaintiff

(1) In advocating for your clients best interests, do you as the attorney have an ethical obligation to take a smaller settlement offer to ensure your client gets some compensation for their injuries instead of rolling the dice at trial and receiving less, or even worse, nothing?

(2) “theoretically, if the value of an injury claim is \$100,000, but plaintiff only has a 50/50 change of winning, a \$50,000 settlement may be appropriate. However, plaintiffs must always realize that cases against large defendants or in cases in which the defendant is insured, that the plaintiff has a lot more to lose than the defendant. In the example above, if the insurance company turns down a \$50,000 demand and the plaintiff wins \$100,000, payment of an additional \$50,000 will mean very, very little to a large insurance company or corporation. On the other hand, if the plaintiff turns down the insurance company’s \$50,000 offer and wins nothing at trial, it could create a devastating blow in which the plaintiff is unable to pay for his or her bills.³²

- Not only could this be a devastating blow to plaintiff, but also to the trial attorney.

b. Expense of litigation

- There are some trucking cases which, if worked up properly, could result in the expenses actually being higher or almost the entire amount of an eventual settlement or verdict. Is it ethical for a plaintiff’s attorney to work up costs to potentially leave a client with little or no award at the end?

8. Co-counsel agreements

a. Large trucking cases, especially those that involve out of state parties, can potentially involve lawyers from multiple states.

(1) When serving as co-counsel with a different attorney or law firm, decisions will need to be made re: client communication, splitting of fees, litigation tactics, and communication with opposing counsel.

- In a co-counsel arrangement, the 2002 amendments to model rule 1.5 require that a client must agree in writing to the participation of each lawyer, including the fee share each will receive.
- Model rule 1.5 is silent on the signing of the agreement.

(2) “the other issue that can arise is, generally, how the case is going to be handled... thus, if the attorneys cannot agree on how a certain aspect of the case will be handled, such as incurring costs of certain depositions,

then the attorneys will need to resolve the issue while keeping the best interests of the client in mind.”³³

- Co-counsel arrangements can create a controversy within the case.

(2) Malpractice considerations. Depending on the retainer agreement between the attorneys, they could share liability for malpractice or wrongdoing. Otherwise, if the retainer agreement specifies that one attorney is taking a very limited role, they may be excused from liability on malpractice.³⁴

- b. Model rule 1.5(e) allows for the division of fees between lawyers who are not in the same firm.

III. 2016 Presentation by Rena Leizerman, “Ethical Issues Arising in Trucking Litigation”

Rena Leizerman’s presentation in 2016 was great (as is her usual work). I encourage you to order her presentation and materials from Playback. Here are some highlights direct from her materials.

1. Social media (see p. 1-6)
 - a. Competency of technology
 - Model rule 1.1: lawyers must be competent to represent their clients.
 - A lawyer must be competent in using google, social networking sites, other internet sources.
 - b. Overreaching in social media
 - Attorney sanction \$522,000 by VA court for telling client to “clean up” his Facebook page which contained incriminating photos. *Lester v. Allied concrete co*, 2011 WL 112663430 (VA. Cir. Ct. Oct. 21, 2011).
 - Information that is posted publicly on Facebook is not considered privileged. “defendant does not have a generalized right to rummage at will through information that plaintiff has limited from public view.” *Tompkins v. Detroit metro. Airport*, 278 FRD. 387, 388 (e.d. Mich. 2012).
 - Plaintiff ordered to produce Facebook photos on her account that she was tagged in. She did not post the photos. *Davenport v. State farm ins. Co.*, 2012 WL 555759 (m.d. Fla. Feb. 21, 2012)

c. Discovery and investigation

- It is ethical for a client to provide his or her attorney with the client's login and password to let the attorney research using social media as long as the attorney is passively browsing and not directly communicating with other members. Shane Witnov, *Investigating Facebook: the ethics of using social networking websites in legal investigations*, 28 Santa Clara computer & high tech l.j. 31, 64-65 (2011).
- Attorneys can access and review public portions of a party's social-networking pages without facing ethical repercussions. In *State ex. Rel. State Farm Fire & Cas. Co. v. Madden*, the Supreme Court of West Virginia held that viewing the represented party's "activities that occur in full view of the general public is not an ethical violation." John G. Browning, *The Lawyer's Guide to Social Networking* (Thomson Reuters 2010).
- If information on Facebook is "private" you must friend them to gain access to their posts:
 - (1) New York City approach: allows attorneys to use truthful "friending" a nonclient to gain access to a nonclient's private social media. New York City Bar Formal Ethics Opinion 2010-2. This view is limited so as not to ethically endorse the use of deception to gain access to a nonclient's social media. *Id.* The opinion implies that an attorney who omits their intent is not deceptive. *Id.*
 - (2) Philadelphia approach: attorney is not allowed to ask a third party, who the witness would not recognize, to friend the witness on Facebook to retrieve information and report back to the attorney. The Philadelphia Bar held that this conduct was deceptive, and therefore, unethical. Philadelphia Bar Opinion 2009-02 (March 2009)

d. Witness and juror issues:

- Model rule 4.2: communication with represented person involved in matter prohibited
- Model rule 4.3: when communicating with unrepresented party a lawyer shall not state or imply that the lawyer is disinterested.
- Model rule 8.4: it is professional misconduct for a lawyer to...engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

- e. Confidentiality:
 - Attorneys cannot reveal confidential information about clients through social media.
- 2. Using opposing expert witnesses in trucking litigation (see p. 7-12)
 - a. Personal conflict of interest
 - Coi between clients because of previously used expert (discussed above)
 - (1) A dilemma that arises when an expert you are using in case a is a testifying expert against you in another case.
 - (2) Coi with the “switching expert.” This is different than using a forensic engineer/accident reconstructionist whose evaluations typically do not involve confidential or proprietary information from a client and are unlikely to create a potential conflict of interest.
 - b. Mere speculation or misrepresentation
 - Lawyers should not partake in “dishonesty, fraud, deceit, or misrepresentation, or conduct that is prejudicial to the administration of justice.”
 - c. Evidence issues
 - Model rule 3.4: fairness to opposing party & counsel
 - A lawyer shall not:
 - (1) Unlawfully obstruct another party’s access to evidence or unlawfully alter, destroy, or conceal a document having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.
 - (2) Falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law.
 - (3) Knowingly disobey an obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists
 - (4) In trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible

evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused.

(5) Request a person other than client to refrain from voluntarily giving relevant information to another party unless: 1) the person is a relative or an employee or other agent of a client; and 2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

- Model rule 3.4 prohibits a lawyer from directly or indirectly unlawfully obstructing a party's access to evidence, as well as the alteration, destruction, or concealment of any documents having potential evidentiary value.
- Model rule 3.4 also deal with the proper preservation of paper or electronic information when litigation has started or is reasonably anticipated by specifying that a lawyer "shall not" counsel or assist a person to alter or destroy documents or disobey an obligation under the rules of a tribunal.

d. Use of inadmissible evidence

- Model rule 3.4 prohibits using or referring to evidence that a lawyer reasonably believes is not relevant or that will not be supported by admissible evidence. While an expert may be able to rely on inadmissible evidence to explain their opinion, an attorney cannot make an argument based on that inadmissible information.

e. Contingent fees to an expert

- Concern that a contingency fee will compromise an expert's objectivity.
 - Whether this is allowed depends on jurisdiction.

f. Cross examination

- It is permissible to cross examine the number or percentage of times that an expert has been retained by plaintiffs or defendants and the amount of income earned as an expert witness.
 - Potential violation of model rule 3.4 to accuse an expert of unethical conduct when the suggestions is not supported by admissible evidence.

- g. Ex parte contact with defense experts
 - Ethical violation to have ex parte contact with an expert witness retained by the opposing parties.
- 3. Other common ethical traps (see p. 14-15)
 - a. Is it your client?
 - Determining whether they have established a client/attorney relationship.
 - b. Does your website violate rules?
 - Advertising rules on websites.
 - c. Did you remember to communicate with your client?
 - Duty to communicate is essential to every aspect of the fiduciary duty a lawyer owes to a client.
 - When representing multiple clients, failure to communicate with one client could result in professional discipline.

¹https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_7_conflict_of_interest_current_clients/.

² <https://www.ns-law.net/7-Deadly-Sins-CLE.pdf>, at p. 7.

³ <https://www.ns-law.net/7-Deadly-Sins-CLE.pdf>, at p.7.

⁴ See Part C. Ethical Issues Posed by Settlement with Multiple Plaintiffs.

<https://www.kmblegal.com/publications/legal-ethics-issues-in-the-representation-of-multiple-parties-issues-affecting>

⁵ *Id.*

⁶ <https://www.ns-law.net/7-Deadly-Sins-CLE.pdf>, at p.8.

⁷ <https://www.alllaw.com/articles/nolo/personal-injury/compensation-beyond-insurance-policy-limits.html>

⁸ <https://www.michiganautolaw.com/wp-content/uploads/2014/09/Michigan-Court-of-Appeals-opinion-Shekoski-00591704.pdf>

⁹ *Id.*

¹⁰ 57 No. 12 DRI For Def. 74

¹¹ *Id.*

¹² *Id.*

¹³ *Fuentes*, 2015 WL 3936321 at *5. (Attached as Exhibit 1)

¹⁴ *Id.*

¹⁵ <https://www.michiganautolaw.com/truck-accident-lawyer/trucking-accident-cases/>

¹⁶ <https://www.michiganautolaw.com/truck-accident-lawyer/trucking-accident-cases/>

¹⁷ <https://www.ns-law.net/7-Deadly-Sins-CLE.pdf>, at p. 6.

¹⁸ MRPC 4.2, 4.3; [R-2](#); [RI-44](#); [RI-120](#); ABA Formal Op 91-359.

¹⁹ *Id.*

²⁰ *Id.* https://www.michbar.org/opinions/ethics/numbered_opinions?OpinionID=1234&Type=4.

²¹

<https://www.kmblegal.com/sites/default/files/Ex%20Parte%20Contact%20with%20Current%20and%20Former%20Employees%20of%20Defendant%20Employer..pdf>. (**Attached as Exhibit 2**).

²² <https://www.schwartzsemerdjian.com/trial-bar-news/pre-litigation-discovery-petitions-to-perpetuate-testimony-and-preserve-evidence>

²³ *Pre-Action Discover: The Underutilized Legal Remedy*, N.Y. L. J. (April 2, 2018). (**Attached as Exhibit 3**).

²⁴ <https://www.krcl.com/articles/litigation-update/rule-202-pre-suit-depositions-texas/>

²⁵ https://www.iltla.com/wp-content/uploads/2014/05/Dixon-Grant_Summer-2014-FINAL.pdf

²⁶ Fla. Stat. Ann. § 627.736 (West); *State Farm Mut. Auto. Ins. Co. v. Shands Jacksonville Med. Ctr., Inc.*, 210 So. 3d 1224, 1225 (Fla. 2017)

²⁷ <https://legalfunding.com/news/why-plaintiffs-attorneys-who-take-on-trucking-lawsuits-need-legal-finance/>

²⁸ This article gives a long list of information Plaintiffs' attorneys will want to collect in litigating a trucking case. <https://www.mrblaw.com/Articles/Trucking-Litigation-The-Plaintiffs-Perspective.shtml>.

²⁹ <https://www.michiganautolaw.com/truck-accident-lawyer/trucking-accident-cases/>

³⁰ <https://www.michiganautolaw.com/truck-accident-lawyer/trucking-accident-cases/>

³¹ <https://www.beasleyallen.com/webfiles/Plaintiff's%20Perspective%20in%20Trucking%20Litigation.pdf>, at p. 8-9.

³² <https://www.wmlawyers.com/firm-highlights/publications/what-every-plaintiff-needs-to-know-about-truck-accidents-injuries-and-litigation/>

³³ <https://pricebenowitz.com/co-counsel/ethical-issues/>

³⁴ *Id.*