

44 C.A.D. (Rev. 12/11)

# CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)

### I. (a) PLAINTIFFS

GS Transport, Inc.

### DEFENDANTS

Apple, Inc.  
Red Arrow Consulting, Inc.  
RLI Insurance Company  
County of Residence of First Listed Defendant Santa Clara  
*(IN U.S. PLAINTIFF CASES ONLY)*

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

Attorneys (If Known)

(b) County of Residence of First Listed Plaintiff Alameda  
*(EXCEPT IN U.S. PLAINTIFF CASES)*

(c) Attorneys (Firm Name, Address, and Telephone Number)  
James Attridge  
270 Divisadero Street, #3 San Francisco, CA 94117  
415-552-3088

### II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 3 Federal Question *(U.S. Government Not a Party)*
- 2 U.S. Government Defendant
- 4 Diversity *(Indicate Citizenship of Parties in Item III)*

### III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- |   |                            |                            |   |                            |                            |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
|   | PTF                        | DEF                        |   | PTF                        | DEF                        |
| Citizen of This State                   | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State     | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State                | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation  | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

### IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	<b>PERSONAL INJURY</b> <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury <input type="checkbox"/> 362 Personal Injury - Med. Malpractice	<b>PERSONAL INJURY</b> <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 367 Health Care/Pharmaceutical Personal Injury Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability <b>PERSONAL PROPERTY</b> <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 690 Other <b>LABOR</b> <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 751 Family and Medical Leave Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act <b>IMMIGRATION</b> <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee (Prisoner Petition) <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 <b>PROPERTY RIGHTS</b> <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark <b>SOCIAL SECURITY</b> <input type="checkbox"/> 861 HIA (1395ff) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) <b>FEDERAL TAX SUITS</b> <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 375 False Claims Act <input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input checked="" type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 896 Arbitration <input type="checkbox"/> 899 Administrative Procedure Act/Review or Appeal of Agency Decision <input type="checkbox"/> 950 Constitutionality of State Statutes

### V. ORIGIN

- (Place an "X" in One Box Only)
- 1 Original Proceeding
  - 2 Removed from State Court
  - 3 Remanded from Appellate Court
  - 4 Reinstated or Reopened
  - 5 Transferred from another district (specify)
  - 6 Multidistrict Litigation

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):  
49 USC 14706

### VI. CAUSE OF ACTION

Brief description of cause:  
Interstate cargo loss

### VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23  
DEMAND \$ 25,000.00

CHECK YES only if demanded in complaint:  
JURY DEMAND:  Yes  No

### VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE

DOCKET NUMBER

### IX. DIVISIONAL ASSIGNMENT (Civil L.R. 3-2)

(Place an "X" in One Box Only)

- SAN FRANCISCO/OAKLAND
- SAN JOSE
- EUREKA

DATE 07/02/2012

SIGNATURE OF ATTORNEY OF RECORD

99

JAMES ATTRIDGE [SBN NO. 124003]  
Business Trial Lawyer  
270 Divisadero Street, #3  
San Francisco, CA 94117  
Telephone: (415) 552-3088  
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E-filing

FILED

JUL 02 2012

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Attorney for Plaintiff  
GS TRANSPORTATION, INC.,  
a California corporation

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Case No. CV 12 3470

GS TRANSPORT, INC.,

Plaintiff,

COMPLAINT FOR:

vs.

(1) RECOVERY OF INTERSTATE FREIGHT CHARGES;

APPLE, INC., a California corporation; RED ARROW CONSULTING, INC., a Washington corporation; RLI INSURANCE COMPANY, an Illinois corporation,

(2) DECLARATORY RELIEF

Defendants.

I. PARTIES

1. Plaintiff GS Transport, Inc. ("GST" or "plaintiff") is a California corporation in good standing with its principle place of business in Castro Valley, California. It operates pursuant to an interstate motor carrier authority no. MC 6641422, issued by the United States Department of Transportation.

2. Apple, Inc. is a California corporation with its principle place of business in Cupertino, California. It is a manufacturer of computers. Through wholly owned subsidiaries it operates a production facility in Fremont, California and a distribution center in Mount Juliet, Tennessee.

3. Red Arrow Consulting, Inc. does business as Red Arrow Logistics ("Red Arrow") and is a Washington corporation with its principle place of business in Issaquah, Washington. It operates pursuant to brokers license no. MC-541163-B issued by the United States Department of

1 Transportation.

2 4. RLI Insurance Company ("RLI") is an Illinois corporation in good standing with its  
3 principle place of business in Peoria, Illinois.

## 4 II. JURISDICTION AND VENUE

5 5. Jurisdiction is predicated upon 28 USC 1331 and 28 USC 1337 in that the  
6 controversy arises under the laws of the United States governing interstate commerce including but  
7 not limited to federal common law, Code of Federal Regulations section 373, and the Carmack  
8 Amendment 49 USC 14706 which exclusively governs actions involving loss to property transported  
9 in interstate commerce and because the amount in controversy exceeds \$10,000. To the extent the  
10 first cause of action is deemed not to be governed by said statutes and regulations, jurisdiction is  
11 predicated upon 28 USC 1367(a) in that both causes of action arise from the same nucleus of  
12 operative fact.

13 6. Venue is proper within this judicial district because the shipments referenced herein  
14 originated here.

## 15 COMMON ALLEGATIONS

16 7. Between January 3, 2011 and February 17, 2011, Red Arrow arranged for GST to  
17 transport eight loads of Apple computers from Apple's facility in California to various Apple  
18 distribution centers located outside California but within the United States.

19 8. All shipments arrived intact at destination with no exceptions taken.

20 9. The value of the services provided by GST as quoted by Red Arrow was \$37,700.

21 10. Red Arrow has tendered the sum of \$12,700 only in payment of these invoices,  
22 claiming entitlement to an offset in the amount of \$25,000, arising from the alleged theft referenced  
23 in paragraph 18, *infra*.

24 11. Red Arrow as broker, and Apple, Inc. as consignor and consignee are jointly and  
25 severally liable for the freight charges owing.

26 12. GST is informed and believes that Red Arrow has entered into a contractual  
27 agreement with Apple, Inc. and/or its subsidiaries to provide transportation brokerage services as  
28 that term is defined in 49 USC 13102(2).

1 13. The terms and conditions of the Red Arrow/Apple contract referenced in paragraph  
2 12 have never been made known to GST.

3 14. Red Arrow Logistics entered into a Logistics Transportation Brokerage Contract with  
4 GST on May 29, 2007. A true and correct copy of that agreement is attached hereto as Exhibit 1.

5 15. The Red Arrow/GST contract, Exhibit 1, contains no express waiver of the terms of  
6 the Interstate Commerce Act as mandated in 49 USC 14101(b).

7 16. GST is informed and believes that RLI issued a policy of insurance to Red Arrow  
8 Logistics.

9 17. On January 14, 2011 Red Arrow Logistics arranged for GST to transport a load of  
10 computer equipment from Apple, Inc.'s facility in Fremont, California to Apple, Inc.'s distribution  
11 center in Mount Juliet, Tennessee. A true and correct copy of the bill of lading prepared by Apple,  
12 Inc. and issued by GST in connection with that shipment is attached hereto as Exhibit 2.

13 18. The shipment was not delivered, but instead was stolen on the early morning of  
14 January 17, 2011 from GST's trailer in the parking lot across the street from the destination.

15 19. Pursuant to the terms of Exhibit 2, GST's liability to Apple, Inc. is limited to the sum  
16 of \$2.00 per pound which in this instance is precisely \$11,752.

17 20. Notwithstanding the terms and conditions of its own bill of lading form, Apple, Inc.  
18 filed a claim against Red Arrow pursuant to 49 CFR 1005.2 seeking recovery for the full value of its  
19 product, alleged to be \$182,445.03.

20 21. Red Arrow then tendered a claim for this loss to its insurer, RLI. RLI initially  
21 declined the tender in full based upon the erroneous conclusion of its investigator that GST's truck  
22 was unattended at the time of the theft. RLI reconsidered and paid the sum of \$157,4450.03, which  
23 constituted the entire value of Apple's claim minus Red Arrow's \$25,000 deductible.

24 22. Red Arrow, in turn, paid an additional \$25,000 to Apple in full and final payment of  
25 Apple's claim, and withheld that sum from the freight charges owed to GST as payment for the  
26 services outlined in paragraphs 7, 8 and 9, *supra*.

27 ///

28 ///

1 **First Claim for Relief**

2 **(Recovery of Interstate Freight Charges)**

3 **AGAINST APPLE, INC. AND RED ARROW CONSULTING, INC.**

4 23. Plaintiff GST hereby incorporates by reference as if fully set forth herein the  
5 allegations of paragraphs 1 through 22.

6 24. Accounting for all legally permissible offsets there is now due and owing from Red  
7 Arrow and Apple jointly and severally to GST freight charges in the amount of \$25,000.

8 WHEREFORE, plaintiff prays judgment as fully set forth herein.

9 **Second Claim for Relief**

10 **(Declaratory Relief Against All Defendants)**

11 25. Plaintiff GST hereby incorporates by reference as if fully set forth herein the  
12 allegations of paragraphs 1 through 24.

13 26. An actual controversy has arisen and now exists between the parties relating to the  
14 enforceability of Exhibit 1, particularly but not limited to the jurisdiction, venue, choice of law, and  
15 indemnity provisions of paragraphs V(i), XI and XIV(b)(c). GST contends these provisions are  
16 violative of the Carmack amendment 49 USC 14706 and that Exhibit 1 contains no express waiver  
17 of the Carmack amendment as required by 49 USC 14101(b).

18 27. The indemnity provision contained in Exhibit 1 is contended by Red Arrow to be  
19 enforceable and is the sole legal basis upon which it contends to be entitled to withhold the freight  
20 charges referenced in paragraph 9, *supra*.

21 28. The indemnity provision contained in Exhibit 1 is contended by RLI to be  
22 enforceable by it in subrogation and it has threatened suit to recover \$157,440.03. A true and correct  
23 copy of correspondence from RLI demanding payment to forestall litigation is attached hereto as  
24 Exhibit 3.

25 29. A declaratory judgment is necessary to resolve the purely legal issue of the  
26 enforceability of Exhibit 2.

27 WHEREFORE, plaintiff GST prays judgment as follows

28 As to the first claim:

- 1           1. For judgment in the amount of \$25,000 against defendants Red Arrow and Apple,  
 2 jointly and severally;  
 3           2. For prejudgment and post judgment interest.  
 4           As to the second claim:  
 5           3. That the court declare the respective rights and duties of the parties pursuant to  
 6 Exhibit 1.  
 7           4. That plaintiff be awarded its costs, expenses and attorneys' fees incurred herein; and  
 8           5. For such further relief as the court deems warranted.  
 9

10                                 Respectfully submitted

11     Dated: June 30, 2012

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

  
 JAMES ATTRIDGE  
 Attorneys for Plaintiff  
 GS TRANSPORTATION, INC.

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**EXHIBIT 1**



## Red Arrow Logistics Transportation Brokerage Contract

### I. Identification of Parties

This transportation brokerage agreement is made on 29 May, 2009 by and between GS TRANSPORT, INC. referred to as "CARRIER" and Red Arrow Logistics referred to as "BROKER".

Whereas, BROKER is licensed as a property broker by the Federal Motor Carrier Safety Administration ("FMSCA") (MC541163)), and as a licensed broker arranges for motor carrier freight transportation under its contracts with consignors and consignees ("Customer") and controls the transportation of commodities to be tendered to CARRIER; and

Whereas, CARRIER is registered with FMSCA as a motor contract carrier in interstate, intrastate, and/or foreign commerce and is in all respects qualified to transport freight as required by BROKER; and

Now therefore, in consideration of the representation made herein, the parties agree to the Terms and Conditions as Follows:

### II. Term and Location of Copies of this Agreement

The term of this agreement ("Agreement") shall be one year, subject to earlier termination by either party giving thirty (30) days written notice to the other. Absent such notice, it shall automatically renew for successive one-year periods. BROKER has placed on file a signed copy of the Agreement at the offices of Red Arrow Logistics, 700 NW Gilman Blvd. #200, Issaquah, WA 98027. It will be available for inspection and verification by the signatories, by their designated agents, by their designated legal representatives and/or any other parties with a legitimate claim of interest in the terms of this Agreement.

### III. Specific Obligations of the Broker

BROKER will pay CARRIER the agreed amount within thirty (30) days of BROKER'S receipt of CARRIER'S freight bill, bill of lading, clean (i.e. no exceptions) delivery receipt, and any other documents necessary to enable BROKER to ascertain transportation has been properly provided.

RED ARROW LOGISTICS 700 NW Gilman Blvd #200 · Issaquah WA 98027

Phone: 425-747-7914 · Fax: 425-747-7569

[www.redarrowlogistics.com](http://www.redarrowlogistics.com)





A Quick Payment Option: CARRIER may at its discretion receive a quick payment option. Terms of Quick Payment Option are as follows: CARRIER may request Quick Payment Option on Quick Payment Form after a clean, original and legible Proof of Delivery and Carrier Freight Bill is received by BROKER. Once complete Paperwork is received,

CARRIER shall receive payment within 5 days of request. **BROKER shall deduct 3% of total freight bill for this option.**

#### IV. Commitment of the Broker to Tender and the Carrier to transport a Series of Shipments

BROKER shall offer to CARRIER for shipment a minimum of one (1) shipment per year for each year this Agreement is in effect, and the CARRIER agrees to transport said shipment, subject to the availability of suitable equipment owned by or leased by CARRIER.

#### V. Specific Obligations of Carrier

- A. CARRIER warrants (1) it is legally qualified to perform the contemplated transportation, (2) it does not have a "conditional" or "unsatisfactory" FMSCA safety rating, (3) it will comply with all applicable laws regarding the contemplated transportation, and (4) it shall immediately notify BROKER in writing of any adverse change in its safety rating or any suspension or revocation of its operating authorities.
- B. CARRIER shall transport all BROKER'S shipments without delay. CARRIER shall immediately notify BROKER of any likelihood of delay.
- C. The CARRIER shall issue a uniform standard Bill of Lading in accord with 49 U.S.C. Section 81 and 49 C.F.R. part 1035 for property it receives to transport under this Contract and shall be liable to the person entitled to recover the bill of lading. The liability imposed by this paragraph is for the actual loss or injury to the property.



- D. CARRIER shall obtain from the consignee a complete, signed delivery receipt for each shipment, and it shall notify BROKER immediately of any exception on any document. CARRIER shall send BROKER delivery receipts and bills of lading within twenty-four (24) hours of delivery, as BROKER directs.
- E. If BROKER requests CARRIER to transport any shipment required to be placarded under DOT rules as hazardous material, the additional provisions in Appendix A, including additional insurance requirements, shall apply for each such shipment.
- F. CARRIER shall be wholly responsible for performing the contemplated transportation and for all costs and expenses of such transportation, including as examples, costs and expenses of all CARRIER'S transportation equipment, its maintenance, and those persons who operate it. As to BROKER; CARRIER is an independent contractor, and as such is wholly responsible in every way for such persons as CARRIER hires or employs.
- G. During this agreements term, CARRIER shall procure and maintain, as its sole expense:
- (1) Commercial Automobile Liability Insurance in the amount of no less than \$1 million (\$US) for each occurrence, covering all vehicles, however owned, used by CARRIER to transport BROKER'S shipments, including coverage for all liabilities for personal injury (including death) and property damage arising out of CARRIER'S transportation under this agreement. CARRIER shall cause its Insurance Carrier to forward, first by facsimile, then by U. S. postal service to BROKER a standard Certificate of Insurance, (showing Red Arrow Logistics as certificate holder), which certificate shall require the insurance carrier to give BROKER written notice no less than thirty (30) days prior to the cancellation or modification of such insurance.
  - (2) All Risk Broad Form Motor Truck Cargo Liability Insurance in the amount of no less than \$100,000 (\$US). CARRIER shall cause its Insurance Carrier to forward, first by facsimile, then by U. S. postal service to BROKER a standard Certificate of Insurance, (showing Red Arrow Logistics as certificate holder), which certificate shall require the insurance carrier to give BROKER written notice no less than thirty

RED ARROW LOGISTICS 700 NW Gilman Blvd #200 - Issaquah WA 98027

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(30) days prior to the cancellation or modification of such cargo insurance. The cargo insurance shall be in the form required by 49 C.F.R. 1043.2(c) (motor common carriers' cargo liability) and shall have no exclusions or restrictions that would not be accepted by the insurance filed in accord with the said part.

(3) CARRIER Cargo Insurance shall cover specific types of cargo hauled over and above general freight in all industries including, but not limited to: Ice cream, fresh produce, apparel, electronics and hazardous materials.

H. CARRIER'S liability shall begin at the time cargo is loaded upon CARRIER'S equipment at point of origin, and continue until said cargo is delivered to the final destination, or to any agreed intermediate stop off point.

I. CARRIER shall defend, indemnify, and hold BROKER harmless from and against all loss, liability, damage, claim, fine, cost or expense, including reasonable attorney's fees arising out of or in any way related to, CARRIER'S performance of the contemplated transportation or CARRIER'S breach of terms of this agreement.

J. CARRIER shall not withhold any freight due to any dispute with BROKER regarding freight charges or any other dispute. CARRIER waives and releases all liens which it might otherwise have to any of BROKER'S or Customer's freight in its possession.

K. CARRIER shall transport all freight tendered by BROKER only on equipment operated under CARRIER'S authority.

CARRIER shall not in any way subcontract, broker, or arrange for the freight to be transported by a third party.

**VI. Rates and Charges**

A. After a rate is agreed to by both parties, BROKER shall fax to CARRIER a Rate Confirmation Sheet, which document will identify: Date of Tender, Origin, Destination, Commodity, Estimated Weight, Dates and Times of



Loading and Delivery and the Agreed rate. These rate confirmation sheets will be accepted addenda to this agreement.

- B. Carrier authorizes BROKER to invoice shipper, receiver, consignor and consignee for freight charges as agent for and on behalf of CARRIER. Payment of the freight charges to BROKER shall relieve shipper, consignor or consignee of any liability to the CARRIER for nonpayment of charges.

#### **VII. Bills of Lading**

The bill of lading shall note that the shipment was transported by CARRIER, acting as a CARRIER, and that the shipment was arranged by BROKER, acting as BROKER. The name of the underlying shipper shall be inserted in the blank area for the SHIPPER, and the name of the consignee shall be inserted in the blank area for the CONSIGNEE. Originals shall be sent to the BROKER at the time of invoicing.

**All Proofs of Delivery ("POD's") and unloading receipts must be faxed to BROKER before carrier is released from load. In the event a fax machine is not available at the place of delivery, Driver or CARRIER shall fax within a twenty-four (24) hour time period from time of signature of Receiver.**

#### **VIII. Compliance with 49 U.S.C. 10102**

Both parties recognize that the motor carrier service is based on the CARRIER, either (1) assigning motor vehicles for a continuing period of time for the exclusive use of a shipper, or (2) providing a service designed to meet the distinct needs of a shipper. This agreement does not contemplate the assignment of motor vehicles under contract agreements, but the contract arrangement has been designed to meet the distinct needs of the BROKER.

#### **IX. Transit Time**

The BROKER and the CARRIER may make arrangements on each shipment as to required transit time. Such arrangements shall be in writing. Such agreements may make the transit time obligation less or more than



"reasonable dispatch." All such agreements shall follow FMSCA Rules and Regulations. CARRIER covenants that upon acceptance of a shipment, that Driver can legally perform the shipment within the required transit time.

**X. No Back-Solicitation by Carrier**

CARRIER shall not solicit any logistical services/traffic from any shipper, consignor, consignee or customer of BROKER where (1) the availability of such traffic first became known to CARRIER as a result of BROKER'S efforts, or (2) where the traffic of the shipper, consignor, consignee or customer of the BROKER was first tendered to the CARRIER by the BROKER. If CARRIER breaches this agreement and "back solicits" the BROKER'S customers and/or obtains any logistical business/traffic from such a customer, BROKER will be entitled to, and CARRIER will pay BROKER, for a period of six (6) months after the involved business/traffic first begins, a commission of 10% of the gross transportation revenue received by CARRIER or its agents or subcontractors on the movement of the traffic as liquidated damages.

**XI. Indemnification**

CARRIER shall defend, indemnify and hold harmless BROKER and the Shipper, and their respective employees, officers, directors and agents (individually "Indemnitee" and collectively "Indemnitees"), from and against all losses, damages, fines, penalties, expenses, costs (including attorney's fees), claims, demands, actions and judgments for bodily injury (including injury resulting in death), for damage to property and for clean up or remediation of any leak, spill or contamination, where the liability is caused by the acts or omissions of Carrier, its independent contractor(s) or carrier(s) or their respective employees or agents, and arises out of or in connections with CARRIER'S discharge of, or failure to discharge, its duties and responsibilities specified in this Agreement. This indemnity shall not apply to an indemnitee to the extent any liability is caused or contributed to by the negligent acts or omissions of such indemnitee.



#### **XII. Independent Contractor Status**

The relationship of CARRIER to BROKER shall, at all times, be that of an independent contractor, except that BROKER shall be the agent to the CARRIER in regard to collections and payment of charges to CARRIER. CARRIER shall have no lien on any shipments in any cases.

Should BROKER obtain a contract for CARRIER, a separate appendix stating the terms and conditions thereof will become an equal part of this contract and will be signed by all parties in agreement hereto.

#### **XIII. Forced Exemptions**

Neither party hereto will be liable for the failure to tender or timely transport of freight under this Agreement if such failure, delay or other omission is caused by strikes, acts of God, war, accidents, civil disorder, or through compliance with legally constituted order of civil or military authorities.

#### **XIV. Provisions as to the Settlement of Cargo Claims and other Disputes**

- A. Cargo claims shall be investigated and settled in accordance with the regulations codified at 49 C.F.R. 1005.
- B. This Agreement is governed by the substantive and procedural laws of Washington State and CARRIER and BROKER agree to submit to the exclusive jurisdiction of, and venue in, the courts of King County, Washington State in any dispute arising out of or relating to this Agreement.
- C. This Agreement shall be considered to have been executed by both parties within the State of Washington and, to the extent that the laws of Washington are not inconsistent with title 49 of the United States Code and Part 49 of the Code of Federal Regulations, shall be governed and construed in accordance with the laws of the State of Washington without regard to any conflicts or choice of law rules. When construing this agreement or a term hereof, there shall be no presumption or construction against the party causing this Agreement to be drafted.
- D. Notices shall be sent by overnight courier, to each party at the address shown below, or to such other addresses as shall have been designated in writing.



## **XV. Security Procedures**

The following security guidelines and procedures apply to all work/load assignments. All driver and non-driving personnel will be expected to be knowledgeable of, and adhere, to these guidelines and procedures when performing any load-related.

### **1. Point of Origin**

- 1.1. Upon arrival at the load's point of origin, all drivers shall check in with the responsible shipping personnel to notify them of arrival and to provide proof of identity. While at the shipper, drivers shall follow the loading instruction and obey all customer plant safety and security rules.
- 1.2. At the designated loading location (assigned dock door), the driver shall secure the vehicle. No vehicle will be left unattended until the driver is confident the vehicle is secured from moving.

### **2. Shipper Load & Count**

- 2.1. In the event a driver is scheduled to pick up a pre-loaded trailer, under no circumstances should the driver be allowed or permitted to break a seal on a load moving under a shipper's load and count provision. This guideline applies to outbound loads as well as loads being picked up and returned to a terminal for spotting/staging.
- 2.2. In the event of a live load, drivers are expected to supervise the entire loading process. Drivers are responsible to make sure no unauthorized or unscheduled cargo is loaded on the trailer.
- 2.3. When loading is completed, drivers are responsible for making sure the cargo is secure and to check the bill of lading or the delivery manifest to ensure it is accurate. Once driver are satisfied that the cargo matches the shipping papers, they shall:
  - 2.3.1. Close the trailer doors and witness the shipper sealing of the trailer and record that number on the shipping papers
  - 2.3.2. Have the shipping papers signed by the responsible shipping personnel before leaving.



2.3.3. If a discrepancy is found between the cargo and bill of lading, drivers shall contact their supervisor immediately for instructions.

2.3.4. Before leaving any shipper, drivers shall make a thorough visual observation of their immediate surrounding and report any unusual or suspicious activity to the shipping supervisor.

**3. In-Transit Security Guidelines & Procedures**

3.3. Dispatch shall make every effort to arrange delivery schedules that minimize in-transit down time. In most cases, this means that dispatch will schedule loads for delivery as early as possible based on drivers' available hours and receivers' hour of operation.

3.4. While in transit, drivers are prohibited from discussing information related to their load, route, or delivery schedule with any person(s) other than authorized company officials. Drivers failing to abide by this policy are subject to disciplinary action up to and including termination of employment/contract.

3.5. Drivers are to report any suspicious activity (including load related inquiries from strangers) to their supervisors.

3.6. Drivers are expected to take all reasonable and responsible precautions to prevent damage to company vehicle and theft of cargo while in transit. For personal protection and safety, and the security of the cargo, drivers are expected to park in safe, well lit, designated truck parking locations only (such as reputable truck stops or high-traffic, major rest areas). When possible, loaded trailer should be parked against a wall, fence, or other stationary object to enhance cargo security.

3.7. Drivers shall lock their vehicles at all times while in transit – especially during all time spent in urban areas.

3.8. When possible, dispatch shall contact receivers for the purpose of arranging secure overnight or after hours parking for drivers who can safely and legally arrive at their destinations.

3.9. Drivers are prohibited from taking their equipment (loaded or empty) to or through home, or parking in any unsecured area.

3.10. Drivers are expected to maintain regular communications with the company while in transit. Any incident of drivers failing to communicate as required shall be assumed to be suspicious and highly irregular.





Drivers are expected to fully understand this procedure and make every effort to maintain regular contact with dispatch.

#### 4. Hijack or Cargo Theft Driver Guidelines

- 4.3. In the event of an attempted vehicle hijacking or cargo theft situation while the vehicle is in motion, the BROKER has adopted a NO STOP policy. Drivers, who believe a hijacking is or may be in progress, are instructed to keep the vehicle moving as safely and responsibly as possible until the attempt has ceased and/or the authorities have been notified.
- 4.4. In any hijack situation, drivers should use their own good judgment (whether to stop or keep moving) based on the degree to which they feel their personal safety is at risk. Nothing our drivers do is worth getting hurt over.
- 4.5. Drivers who do fall victim to vehicle hijacking or cargo thieves are instructed to notify local police as soon as possible.
- 4.6. Once the proper authorities have been notified, drivers are required to contact the appropriate company official and follow subsequent instructions.

#### 5. Arriving at Stop Off/Destination

- 5.1. Upon arrival at the destination or stop off, drivers shall check in with the responsible receiving person(s) to notify them of arrival, show proof of identity, and receive unloading instructions. Drivers shall follow receiver and consignee's unloading instructions, and obey all customer plant safety and security rules.
- 5.2. Once permission to unload has been given, the driver shall proceed to the unloading location (assigned receiving dock door or lot, etc.) and secure the vehicle. No vehicle shall be left unattended until the driver is satisfied that the vehicle is secure from moving.
- 5.3. The driver, along with responsible receiving employee, shall inspect the cargo
- 5.4. Drivers shall supervise the unloading process. In the even of cargo damage, overage, shortage, or any other discrepancy, drivers shall contact their supervisor immediately for instructions and to report the cargo claim incident.



5.5. After the unloading process has been completed, the driver shall get the appropriate paperwork signed by the responsible receiving employee, and contact dispatch for the next assignment or instructions.

This Agreement is the entire agreement between the parties, superseding all earlier agreements. It cannot be altered or amended except in a writing signed by authorized officers of both parties. It may not be assigned or transferred in whole or in part. If the operation of any part of this Agreement results in a violation of any law, such part shall be severed and the agreement's remaining provisions shall continue in full force and effect.

In Witness Whereof, the parties hereto have caused this agreement to be executed in their respective names by their duly authorized representatives as of the date first above written.

Dated: May 2009

"Broker"  
Red Arrow Consulting, Inc.

"Carrier"  
Company: GS TRANSPORT, INC.

By: *Liz Lasater*  
Signature of Authorized Agent or Attorney-in-fact

By: *Stephanie Mai*  
Signature of Authorized Agent or Attorney-in-fact

Printed: Liz Lasater

Printed: STEPHANIE MAI

President

Address: 700 NW Gilman Blvd. #200  
Issaquah, WA 98027  
Phone: 425-747-7914  
Fax: 425-747-7569  
FMSCA MC#: MC-541163-B

Address: 22036 BETLEN WAY  
CASTRO VALLEY, CA 94546  
Phone: 510-690-9623  
Fax: 510-886-8184  
FMSCA MC#: 661422

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**EXHIBIT 2**

# Apple Computer, Inc.

Straight Bill of Lading - Short Form

HB00944646  
 HB00944721  
 HB00944722  
 HB00944727  
 HB00944728  
 HB00944744  
 HB00944746

SHIPMENT/SORT CODE HB00944631		SALES ORDER NO.	
BILL OF LADING NO. 119500			
CUSTOMER P.O. NO.		DATE 01/14/2011	
TAL. NO. 119500	PRO. NO.	119500	
PREPAID / COLLECT PREPAID	DIV. NO.	DEPT. NO.	

TO

Apple Inc. C/O OHL  
 578 Aldi Boulevard  
 Mt. Juliet TN 37122

FROM

Apple Computers  
 44350 Nobel Drive  
 Fremont, CA 94536

**DEPOSITION EXHIBIT**  
5  
*Cherry*

COLLECT ON DELIVERY	Date: 1/17/11 Pallets In: 44 plds. Dropped/Subject to Count & Inspection By: <i>Martel Neely</i> Exceptions: <i>No Seal and only 44 plds.</i>	Total Rec: Pallets Out: C.O.D. CHARGES PAID BY FREIGHT CHARGES
AMOUNT		

NO. OF CARTONS	KIND OF PACKAGING, DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	WEIGHT (SUBJECT TO CORRECTION)	VOL. OR RATE	CHECK COLUMN
528	Freight Of All Kinds, Electronic Equipment  Prepaid - Bill to Third Party Billing ACC#92035977 Apple Computer C/O Aims 311 Moore, LN Collierville, TN 38017	15810	92.5	

Received at the point of origin on the date specified, from the consignor mentioned herein, the property herein described in apparent good order, except as noted (contents and conditions of contents of packages unknown) marked, consigned and destined as indicated below, which the carrier agrees to carry and to deliver to the consignee at the said destination, if on its own authorized route or otherwise to cause to be carried by another carrier on the route to said destination, subject to the rates and classification in effect on the date of shipment.

It is mutually agreed, as to each carrier of all or any of the goods over all or any portion of the route to destination, and as to each party of any time interested in all or any of the goods, that every service to be performed here under shall be subject to all conditions not prohibited by law, whether printed or written, including conditions on back hereof, which are hereby agreed by the consignor and accepted for himself and his assigns.

**NOTICE OF CLAIM**

(a) No carrier is liable for loss, damage or delay to any goods carried under the Bill of Lading unless notice thereof setting out particulars of the origin, destination and date of shipment of the goods and the estimated amount claimed in respect of such loss, damage or delay if given in writing to the originating carrier or the delivering carrier within sixty (60) days after the delivery of the goods, or, in case of failure to make delivery within nine (9) months from the date of shipment.

(b) The final statement of the claim must be filed within nine (9) months from the date of shipment, together with a copy of the paid freight bill.

SPECIAL INSTRUCTIONS PO #: 0479435308 PO #: 0479440567 PO #: 0479445743  Service: TTL	<i>Dancer Phone # 310 676-8501</i> <i>MAR KEVIN</i> <i>NO SEAL</i>
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No seal at OHL

MAXIMUM LIABILITY OF \$4.41 PER KILOGRAM (\$2.00 PER POUND) COMPUTED ON THE TOTAL WEIGHT OF THE SHIPMENT, UNLESS DECLARED VALUATION STATES OTHERWISE. (CONDITIONS ON BACK)

DECLARED VALUE / INSURED VALUE

*Seal 001347*  
*528 BX on 70 PCTS*

PERMANENT POST OFFICE ADDRESS OF SHIPPER 2811 Laguna Blvd ELK GROVE, CA 95755	AUTH. SIGNATURE (SHIPPER) <i>[Signature]</i>	AUTH. SIGNATURE (CARRIER) <i>[Signature]</i>	PIECES BX 528	TIME	DATE 1/17/11
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CARRIER

1. APPLICATION

The following provisions shall apply to all non-hazardous goods, by air, by land, by carrier licensed under the Motor Vehicle Transport Act (Canada Act 1970) or by common carrier, with the exception of the transport of:
(a) used household goods,
(b) live stock,
(c) live game or traps,
(d) the personal baggage of passengers,
(e) such other specific commodities as may be specified by provincial law.

II BILL OF LADING

- 1. A bill of Lading shall be prepared as provided herein for each shipment.
2. On each article covered by the Bill of Lading, there shall be plainly marked thereon by the consignor the name of the consignor and the destination thereof. This requirement shall not apply in cases where the shipment is from one consignee to another consignee or is consigned to the kind of person.
3. The Bill of Lading shall be signed in full three originals, by the consignor and by a carrier or an independent third party, and shall contain the following:
4. At the option of the carrier a receipt may be prepared by the carrier and the weight shown on the same shall be the same as that of the goods as shown on the original Bill of Lading, unless no circumstances of all the weight reported on original Bill of Lading.

III CONDITIONS OF CARRIAGE

- 1. Liability of Carrier
The carrier of the goods herein described is liable for any loss of or damage to goods as described by this bill of lading except as hereinafter provided.
2. Liability of Carrier
When a shipment is accepted for carriage by more than one carrier, the carrier issuing the bill of Lading (hereinafter called the originating carrier), and the carrier who assumes responsibility for delivery to the consignee (hereinafter called the delivering carrier) in addition to any other liability hereunder, are liable for any loss of or damage to the goods while they are in the custody of any other carrier to whom the goods are or have been delivered and from which liability the other carrier is not relieved.
3. Recovery from Connecting Carrier
The originating carrier or the delivering carrier, as the case may be, is entitled to recovery from any other carrier to whom the goods are or have been delivered the amount of the loss or damage that the originating carrier or delivering carrier, as the case may be, may be required to pay hereunder resulting from loss of or damage to the goods while they were in the custody of such other carrier. When shipments are insured between carriers, settlement of concealed damage claims shall be made on the basis of receipts received.
4. Remedy by Consignor or Consignee
Nothing in articles 2 or 3 deprives a consignor or consignee of any rights he may have against any carrier.
5. Exceptions from Liability
The carrier shall not be liable for loss, damage or delay to any of the goods described in the Bill of Lading caused by fire, Act of God, the Queen's, or public enemies, riots, strikes, a defect in or defect of the goods, the act or default of the consignor, owner or consignee, or any of his quantities or differences in weights or counts, or other conditions caused by or to the goods.
6. Delay
No carrier is bound to transport the goods by any particular vehicle or by any particular method or otherwise that will give the earliest delivery by agreement specifically contained in the Bill of Lading, and such delay shall not constitute a breach of the Bill of Lading.
7. Routing by Carrier
In case of physical necessity where the carrier forwards the goods by conveyance that is not a licensed for hire vehicle, the liability of the carrier is the same as though the entire carriage were by licensed for hire vehicle.
8. Stoppage in Transit
When goods are stopped and held in transit at the request of the party entitled to the goods, the carrier shall be liable for the loss of or damage to the goods, if any, which shall be computed on the basis of:
(a) the value of the goods at the place and time of shipment including the freight and other charges, if any, or
(b) where a value lower than that referred to in paragraph (a) has been stipulated in writing by the consignor or has been agreed upon, such lower value shall be the measure of liability.
9. Maximum Liability
The amount of any loss or damage computed under paragraph (a) or (b) of Article 8 shall not exceed \$1.41 per kilogram (\$1.00 per pound) computed on the Total Weight of the shipment unless a higher value is declared on the face of the Bill of Lading.
10. Consignor's Risk
Where it is agreed that the goods are carried at the risk of the consignor of the goods, such agreement covers only such loss as is necessarily incidental to transportation and the agreement shall not relieve the carrier from liability for any loss or damage or delay which may result from any negligent act or omission of the carrier, his agents or employees, and the burden of proving absence from negligence shall be on the carrier.
11. Notice of Claim
(a) No carrier is liable for loss, damage or delay to any goods except under the bill of Lading and the carrier shall not be liable for any loss, damage or delay to any goods, if the originating carrier or the delivering carrier within sixty (60) days after the delivery of the goods or, in the case of failure to make delivery within one (1) month from the date of shipment.
(b) The final statement of the claim must be filed within one (1) month from the date of shipment together with a copy of the paid freight bill.
12. Articles of Extraordinary Value
No carrier is bound to carry any documents, goods or any article of extraordinary value unless by a special agreement in writing. If such goods are carried without a special agreement and the nature of the goods is not disclosed hereon, the carrier shall not be liable for any loss or damage in excess of the maximum liability stipulated in article 9 above.
13. Freight Charges
(a) If remanded by the carrier the freight and all other freight charges applicable to the goods shall be paid before delivery and the carrier shall not be liable for any loss, damage or delay to any goods, if the goods shipped are not those described in the Bill of Lading for freight charges, including charges for the goods actually shipped, and with any additional charges lawfully payable thereon.
(b) Should a consignor fail to indicate that a shipment is to move prepaid, or fail to indicate how the shipment is to move, it will automatically move on a collect basis.
14. Dangerous Goods
Every person who, as principal or agent, shipping explosives or dangerous goods without previous full disclosure to the carrier as required by law shall indemnify the carrier against all loss, damage or delay caused thereby and such goods may be warehoused at the consignor's risk and expense.
15. Undelivered Goods
(a) Where, through no fault of the carrier, the goods cannot be delivered, the carrier, at its immediate option, may deliver to the consignee, if so consigned that delivery has not been made, and shall request disposal instructions.
(b) Pending receipt of such disposal instructions, the goods may be stored in the warehouse of the carrier, subject to a term made charge for storage or, if provided that the carrier has notified the consignee of his intention, the goods may be disposed of and stored in a public place, at the expense of the consignor, without liability on the part of the carrier or warehouseman, provided that the carrier has notified the consignee of his intention to dispose of the goods.
16. Return of Goods
Where notice has been given by the carrier pursuant to paragraph (a) article 15, and if disposal instructions have not been received within the time specified, from the date of such notice, the carrier may return to the consignor, or at the consignor's option, to the warehouse, if provided, the goods, if such disposal instructions have not been given.
17. Alterations
Subject to article 15, any notation on the carrier's liability on the bill of Lading, and any alteration or addition to the bill of Lading, shall be signed or initialed by the consignor or his agent and the originating carrier or his agent and unless so initialed, such shall be without effect.
18. Weights
It shall be the responsibility of the consignor to check correct weights, and the carrier shall not be liable for any loss or damage to any goods if the shipment does not agree with the weight shown on the Bill of Lading, the weight shown thereon shall be the weight of the goods.
19. C.O.D. Shipments
(a) A carrier shall not deliver a C.O.D. shipment unless payment is received in full.
(b) The charge for collecting and remitting the amount of C.O.D. bills for C.O.D. shipments shall be collected immediately upon delivery of the goods, unless the consignor has otherwise so indicated and instructed on the bill of Lading.
(c) A carrier shall remit all C.O.D. monies to the consignor or person designated by him within the time specified in the bill of Lading.
(d) A carrier shall keep all C.O.D. monies separate from the other moneys, and the carrier shall not be liable for any loss or damage to any goods if the shipment does not agree with the weight shown on the Bill of Lading, the weight shown thereon shall be the weight of the goods.
(e) A carrier shall include as a separate item in his schedule of rates the charge for collecting and remitting the amount of C.O.D. bills for C.O.D. shipments.

IV OTHER SPECIFICATIONS

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**EXHIBIT 3**

**SUBROGATEWAY USA, INC.****Michael L. Stoll  
Director**

January 24, 2012

VIA EMAIL: jana.sartore@thehartford.com ; VIA FACSIMILE # 860-757-5720 &amp; VIA CERTIFIED MAIL

Ms. Jana Sartore  
Senior Claim Adjustor  
Hartford Insurance Companies  
4245 Meridian Parkway  
Aurora, Illinois 60504

- Re: - Your Claim # CP986 4545  
- Your Insured: GS Transport, Inc.  
- Policy # 52MSNK6348  
- Policy Period 11/30/2010 to 11/30/2011  
- Shipment Date: 1/14/2011  
- Occurrence Date: 1/17/2011  
- Survey Report Dated 4/20/2011 (copy attached)  
- BOL# 11950 (copy attached); 528 Packages; 70 Pallets;  
- Shipper: Apple Computers  
- Consignee: Apple, Inc., c/o OHL  
- Apple Formal Claim dated 2/09/2012, in the amount of \$182,445.03  
reflecting the value of their freight loss (copy attached)  
- Cargo: 528 Packages on 70 Pallets; 26 Pallets & Seal 001347 Missing at Delivery  
- Formal Claim Notice Dated June 25, 2011, in the amount of \$157,445.03  
- RLI Payment in the Amount of \$157,445.03  
- Claim Demand \$157,445.03

Dear Ms. Sartore:

A load of Apple Computers, as described above, carried by your Insured, GS Transport, Inc., and insured under your cargo policy # 52MSNK6348, was picked up by your Insured at Fremont, CA on 1/14/2011, under Seal # 001347 and subsequently found to be missing 26 Pallets valued at \$182,445.03 by Apple's receiver in Mt. Juliet, TN on 1/17/2011. Under federal law 49 U.S.C. § 14706 (Carmack) your insured is strictly liable for the loss or damage to freight in this instance, regardless of where in the line of chain of carriage the damage occurred, and as the insurer for this vehicle, you are therefore obligated to pay (§14706, sub d (a)(1) & (2); PNH Corp. v. Hullquist Corp. (1st Cir. 1988) 843 F.2d 586, 588 (PNH)). The 2<sup>nd</sup> circuit court ruled that "The statute [Carmack] absolutely preempts all state common law claims against such carriers and freight forwarders." (Chubb Group of Ins. Companies v. H.A. Transp. Sys. (C.D. Cal. 2002) 243 F. Supp. 2d 1064, 1068 (Chubb); see also Power Standards Lab. Inc. v. Federal Express Corp. (2005) 127 Cal. App. 4th 1039, 1048).

As subrogation agent for RLI Insurance Company in this instance we request that you arrange for payment of this claim in the amount of \$157,445.03, under check payable to "RLI Insurance Company" and send it to my attention for further handling, within the next 7 days, or by February 1, 2012, in order to resolve the matter for all parties without further activity.

If for any reason you are unable to meet this payment date please contact me immediately at 972-923-1971.

Sincerely,

  
Enclosures.

## SUBROGATEWAY USA, INC.

Michael L. Stoll  
Director

1010 West Marvin Avenue, Waxahachie, Texas 75165 ♦ 972-923-1971 ♦ michaelstoll@att.net

**VIA EMAIL to jattredge@attridge-law.com & Regular Mail**

February 17, 2012

Mr. James Attridge  
Transportation Lawyer  
270 Divisadero Street, Suite 3  
San Francisco, CA 94117

Re: - BOL# 119500; 528 Packages; 70 Pallets; 26 Pallets & Seal 001347 Missing at Delivery  
- Shipment Date: 1/14/2011  
- Occurrence Date: 1/17/2011  
- Shipper: Apple, Inc./Apple Computers  
- Consignee: Apple, Inc., c/o OHL  
- Carrier: GS Transport, Inc.  
- RLI Payment in the Amount of \$157,445.03  
- Claim Demand of \$157,445.03  
- Yours of 2/13/2012

Dear Mr. Attridge:

Thank you for your interesting letter of 2/13/2012.

Please be advised that we are engaged to pursue subrogation, under pertinent law, for claim damages paid by RLI Insurance Company ("RLI") in the amount of \$157,455.03 consistent with the provisions of an all-risk type insurance policy issued to Red Arrow, in the state of Washington. (*Anne Horner v. Farmers Insurance Company of Washington Court of Appeals Division I (2010)*). "The insurers right of subrogation may arise by contract or independently of [the] contract provision, 'equity'" (*General Ins. Co. v. Stoddard Wendle Ford Motors*, 67 Wn.2d 973, 976, 410 P.2d 904 (1966)); (*Mahler v. Saucis*, 135 Wn.2d 398, 412, 415, 957 P.2d 632 (1998)) "right to reimbursement may arise by operation of law, called "legal" or "equitable" subrogation, or by contract, called "conventional" subrogation"; (*Roberts v. Safeco Ins. Co.*, 87 Wn. App. 604, 607-608, 941 P.2d 668 (1997)). "Safeco's subrogation rights arise in equity *and* by contract. ... Thus, under both the insurance contract *and* equity, Safeco holds a subrogation interest in any recovery... from the tortfeasor [emphasis added]"; (*Affiliated FM Ins. Co. v. LTK Consulting Servs., Inc.*, 556 F.3d 920, 922 (9th Cir. 2009)). "By undertaking professional ... services, LTK bore a tort law duty of reasonable care encompassing safety risks of physical damage to SMS's property interests ... Hence, SMS's subrogee, Affiliated FM Insurance Company (AFM), may bring a claim of negligence against LTK for LTK's tortious injury of those interests"; (*Morris V. Crete Carrier Corp.*, 105 F.3d 279 (6th Cir. 1997)); (*Mutual of Enumclaw Ins. Co. v. U.S.F. Ins. Co.* (Wash. S. Ct., September 4, 2008)).

To the extent GS Transport Freight Charges are being withheld, as you suggest, in an amount corresponding to that incurred by Red Arrow under their Insurance deductible for cargo loss, this has been found lawful and such amount, if any, is subject to offset in subrogation under applicable law governing such matters. (*Thiringer v. American Motors Ins. Co.*, 91 Wn.2d 215, 220, 588 P.2d 191 (1978)), "equitable subrogation prevents insured's double recovery from his insurer and the tortfeasor"; (*Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 618, 160 P.3d 31 (2007)). "It is well established in Washington that insureds are not entitled to double recovery, and thus after an insured is 'fully compensated for his loss,' an insurer may seek an offset, subrogation, or reimbursement...".

As a separate item of interest, you indicate that "GS Transport's insurer has conducted an extensive investigation and unearthed evidence pointing to the conclusion that this loss was due to a theft in which Employees of Apple were complicit...". The claim adjustor for your client's cargo policy, Hartford, has denied any knowledge of such an investigation. We are therefore most curious and request your clarification as to the source of this information, the Apple employees implicated, the police authorities involved to substantiate the criminal wrongdoing you have cited and who it is that Apple employees were allegedly complicit with. Such an allegation, even if proven true, does not impede the claims asserted herein.



**SUBROGATEWAY USA, INC.**

**Michael L. Stoll  
Director**

1010 West Marvin Avenue, Waxahachie, Texas 75165 ♦ 972-923-1971 ♦ michaelstoll@att.net

Page - 2 -  
Mr. James Altridge

Red Arrow was insured and operating as a Broker authorized by the U.S. D.O.T. in accordance with 49 U.S.C §13102. Definitions (2), and 49 C.F.R. §371.2, and thereby treated distinctively different from a Motor Carrier or Shipper as respects roles and obligations under applicable law.

Under the terms of its insurance policy, Red Arrow has received payment of \$157,455.03 from RLI and assigned to RLI its rights to pursue recovery of cargo loss from GS Transport as required under contract and arising directly from the demonstrable & flagrant breach of contractual duties by GS Transport as respects their transit of cargo tendered to its custody and control, as explained herein. (Edwards Bros., Inc. v. Overdrive Logistics, Inc., 581 S.E. 2d 570 (Ga, 2003)). "Because the Carmack Amendment was enacted to protect the rights of shippers suing under a receipt or bill of lading, not brokers, it does not preempt [the broker's] breach of contract claim in this case." (Intransit, Inc. v. Excel North American Road Transport, Inc., 426 F. Supp. 2d 1136 (D. Ore. 2006)). (Plaintiff broker's claims against defendant motor carrier for direct contractual indemnity are not found preempted by the Carmack Amendment). .) "Intransit entered into a brokerage agreement with Exel to provide transportation services and Exel agreed to indemnify Intransit for all losses or damage arising from Exel's transportation services... Intransit's complaint clearly states that it is a truck broker and that Exel is a carrier... Exel, a carrier, filed a third-party complaint against Wal-Mart, a shipper. The Carmack Amendment does not apply to either of these actions." (Transcort National Logistics LLC v. Chaler Corp., 2008, (D. S.D. 2008)) (Plaintiff broker's claims against defendant motor carrier are held governed by obligations imposed under the brokerage agreement rather than Carmack).

Under the terms of the Red Arrow Logistics Transportation Brokerage Contract ("AGREEMENT") between Red Arrow and GS Transport, GS Transport was obligated to perform safe carriage without delay under Section V.(B), to assume full responsibility for carriage under Section V.(F), to provide "All Risk" Motor Truck Cargo Insurance under Section V.(G)(2), to indemnify and hold Red Arrow harmless as to any loss, damage or related expense under Section V.(I), to indemnify and hold Red Arrow harmless as to any loss, damage, related costs and expense arising from its acts or omissions or failure to discharge any duties required by this Agreement under Section XI, to supervise and verify the accuracy and count of each load under Section XV(2), and to take all responsible precautions to protect the cargo from theft in transit, as respects locking and parking the cargo in a secured versus unsecured area under Section XV(3). Reflective of knowledge obtained through investigation and other communications, it is clear GS Transport is in breach of all the cited provisions of its Agreement with Red Arrow, and this breach is the proximate and direct cause of loss as cited.

In view of the facts recited here we renew our demand of payment in full for the recovery of loss by RLI in the amount of \$157,455.03. Let me know of your client's plans for payment.

Sincerely,



## SUBROGATEWAY USA, INC.

Michael L. Stoll  
Director

1010 West Marvin Avenue, Waxahachie, Texas 75165 • 972-923-1971 • michaelstoll@att.net

VIA EMAIL to [jattridge@atridge.com](mailto:jattridge@atridge.com) & Regular Mail

March 13, 2012

Mr. James Attridge  
Transportation Lawyer  
270 Divisadero Street, Suite 3  
San Francisco, CA 94117

Re: - BOL# 119500; 528 Packages; 70 Pallets; 26 Pallets & Seal 001347 Missing at Delivery  
- Shipment Date: 1/14/2011  
- Occurrence Date: 1/17/2011  
- Shipper: Apple, Inc./Apple Computers  
- Consignee: Apple, Inc., c/o OHL  
- Carrier: GS Transport, Inc.  
- RLI Payment in the Amount of \$157,445.03  
- Claim Demand of \$157,445.03  
- Yours of 2/13/2012  
- Yours of 2/27/2012

Dear Mr. Attridge:

With reference to your letter of 2/27/2012, just received, I would point out the following:

- As respects your comments on my earlier correspondence with GS Transport, you will note this correspondence stated the fact GS Transport has liability as a motor carrier under Carmack and also incurs liability obligations under the terms of its Broker Carrier Agreement with Red Arrow.
- Your assertion that our subrogation claim stands "in the shoes" of our subrogor, such as Red Arrow, and your reference to the *Transcor* ruling that the Broker Carrier Agreement is exempt from Carmack, "because it is not the subrogation of the shipper's claim..." is on point with our position. It is precisely under this exemption from Carmack that we are pursuing claim against your client, for damages arising as a direct result of your client's breach of contract as itemized in my letter of 2/17/2012, including failure, by your client's own admission, to observe security precautions, to verify accuracy and count, to purchase proper insurance, to assume responsibility for payment of loss or damage, and other breaches. This fact pattern follows the ruling of the court in *Edwards Bros., Inc. (Edwards Bros., Inc. v. Overdrive Logistics, Inc., 581 S.E. 2d 570 (Ga., 2003))*. "Overdrive [freight broker], brought an action against Edwards Bros and Robinson, jointly and severally, seeking damages against Edwards Bros. for breach of contract, or in the alternative, pursuant to the Carmack Amendment..." "The sole issue in this appeal is the grant of summary judgment to Overdrive on its breach of contract claim against Edwards Bros., the trucking company." "Overdrive, rather than the shipper, Robinson, is seeking to recover damages from the carrier, Edwards Bros., pursuant to the brokerage contract between Overdrive and Edwards Bros." "Overdrive is not seeking damages under the bill of lading, the provisions of which are fixed as the contract under the Carmack Amendment. Because the Carmack Amendment was enacted [196] to protect the rights of shippers suing under a receipt or bill of lading, not brokers, it does not preempt Overdrive's breach of contract claim in this case. n6 Accordingly, the dispute between Overdrive and Edwards Bros. is governed by their brokerage contract [emphasis added]." "The terms of the brokerage contract are not in dispute. Edwards Bros. agreed to transport shipments tendered by Overdrive in vehicles designed to meet the distinct

## SUBROGATEWAY USA, INC.

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needs of Overdrive's shippers. The contract also provided that "[Edwards Bros.] will be liable to [Overdrive] and/or shipper for any loss or damage." "Consequently, Overdrive incurred a loss because the shipment of chicken was damaged during transport and rejected by the consignee. Thus, we agree with the trial court that no issues of fact remain as to Edwards Bros' breach of the brokerage contract. 2. Edwards Bros. argues that the trial court's grant of summary judgment on liability on Overdrive's breach of contract claim permits a double recovery. This argument, which presumes that the jury will award Overdrive the damages it seeks from both Edwards Bros. and Robinson, is premature. Several issues, including damages, [18] remain for the jury's determination in this case. n7 Accordingly, this enumeration provides no basis for reversal." This ruling is not inconsistent with the finding in Transcorr where the Agreement between Broker and Carrier also obligated the Carrier to "defend, indemnify, and hold [the plaintiff-broker] harmless from and against all loss, liability, damage, claim, fine, cost or expense ... arising out of or in any way related to the performance or breach of this Agreement by [the defendant-carrier...]", and where the plaintiff Broker was not "suing on behalf of or taking over the claim of its shipper-customer." Transcorr National Logistics, LLC, v. Chaler Corp., No. 1:08-cv-0037, 2008 U.S. Dist. LEXIS 104472, 2008 WL 5272895, \*4(S.D. Ind. Dec. 19, 2008. The court in InTransit also ruled in favor of Broker's right to bring claim "for direct contractual indemnity and not from an assignment of rights by the shipper...", and where "the court finds that Congressional intent was not to preempt InTransit's claims as a broker against Exel as a carrier via the Carmack amendment." In this matter it was the court's finding that "Excel also agreed to hold Intransit harmless from any cost, expenses, and incidental liabilities related to the transportation of each shipment. (id. at 10). Excel agreed to defend Intransit against any claims and hold Intransit harmless from any and all loss or damage to each shipment transported and from any negligence on Excel's part. (id.)." Hence, it is clear these cases find Carmack does not preempt our position, nor does it require reliance on assignment of the Shippers rights under the BOL or under a Shipper Agreement with Red Arrow, as your letter suggests. Hence, Hartford's assertion that we are limited by the BOL limitation is not tenable, nor is your implication that we are limited to a claim under Carmack and must act solely in subrogation of Shipper's rights rather than that of our Insured, Red Arrow, in this instance.

- Your client's breach of contract also entails liability for related legal fees arising from this breach.

Your letter refers to issues with Chubb v. H.A. Transport, although this cite is not included in my communication to you dated 2/17/2012, nor does it appear to be cited in my correspondence to GS Transport. Your cite of American Cyanamid Company, Appellant, v. New Penn Motor Express, Inc., Appellee, 979 2d 310 (32d Cir.1992) concerns a matter of BOL terms governing a shipper and motor carrier relationship and therefore not on point to the instant discussion for the reasons explained herein and in my earlier letter of 2/17/2012. Your reference to Urban Electric Co., Inc. v. Cable Index 735 F. Supp. 29 (D. Mass 1990) is not on point insofar as it does not concern a contract breach between Freight Broker and Carrier and even in the limited context of that case, the court in Urban Electric Co., refers to Carmack exemptions that may exist, such as in Sokhos v. Mayflower Transit, Inc., 691 F.Supp. 1578 (D.Mass. 1988).

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Mr. James Attridge

We have yet to receive further word from you, as previously requested, as to your allegations under letter dated 2/13/2012 of criminal misconduct by employees of Apple that you assert was determined by a Hartford Insurance Company investigation, although the Hartford claim adjustor denies such a finding.

In view of the clear facts of this case, adverse to your client, I suggest you save your client and other parties further time and expense, discuss an arrangement with your client for settlement of damages and get back to me with a resolution within the next few days.

Sincerely,

