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**SUPREME COURT OF THE STATE OF FLORIDA**

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**IVANA VIDOVIC MLINAR,**  
**Appellant/Plaintiff,**  
**vs.**

**CASE NO: SC14-54**  
**LOWER TRIBUNAL Nos.**  
**FOURTH DCA: 4D12-1332**  
**15<sup>th</sup> JUD. CIR.: 502008CA036246**  
**(PALM BEACH)**

**UNITED PARCEL SERVICE INC.,**  
**Appellee/Defendant,**

**RECOVERY MANAGEMENT**  
**CORP. d/b/a CARGO LARGO,**  
**PAK MAIL OF WELLINGTON,**  
**INC., and AARON ANDERSON,**  
**Defendants.**

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**APPENDIX TO INITIAL BRIEF OF APPELLANT**  
**Volume Two**

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**ON APPEAL FROM THE FOURTH DISTRICT COURT OF APPEALS**  
**AFFIRMING FINAL JUDGMENT OF**  
**THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT**  
**OF FLORIDA IN AND FOR PALM BEACH COUNTY**

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## **TABLE OF CONTENTS**

### **VOLUME ONE:**

- TAB O: Opinion of Fourth District Court of Appeal
- TAB A: Initial Brief of Appellant filed in Fourth District Court of Appeal
- TAB B: Answer Brief of Appellee filed in Fourth District Court of Appeal
- TAB C: Reply Brief of Appellant filed in Fourth District Court of Appeal

### **VOLUME TWO:**

- TAB R: Record of Sixteenth Judicial Circuit on Appeal, pages 1-156

### **VOLUME THREE:**

- TAB R: Record of Sixteenth Judicial Circuit on Appeal, pages 157-253

### **VOLUME FOUR:**

- TAB R: Record of Sixteenth Judicial Circuit on Appeal, pages 254-End

## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via E-serve, and US Mail this 3<sup>rd</sup> day of JUNE, 2014, to all counsel on the attached list.

/s/ Mara Ritchie Poncy Hatfield  
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IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT, IN AND  
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.:

IVANA VIDOVIC MLINAR,

Plaintiff(s)

502003 CA 036246 XXXXAD

vs.

UNITED PARCEL SERVICE CO., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT SERVICES  
LLC d/b/a CARGO LARGO and AARON  
ANDERSON,

Defendant(s).

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SHARON R. BOCK  
CLERK & COMPTROLLER  
CIRCUIT CIVIL DIVISION

COMPLAINT

Plaintiff IVANA VIDOVIC MLINAR, a Florida Resident, files this Complaint against Defendants, UNITED PARCEL SERVICE CO., PAK MAIL OF WELLINGTON, INC., RECOVERY MANAGEMENT SERVICES LLC., and AARON ANDERSON, and alleges:

JURISDICTIONAL ALLEGATIONS

1. This is an action for damages that are in an amount in excess of \$15,000.00.
2. Plaintiff IVANA VIDOVIC MLINAR, (also known professionally as Ivana Vidovic; hereinafter, "VIDOVIC") is a resident of Palm Beach County Florida. VIDOVIC'S husband is Frane Mlinar (hereinafter, "Frane") (hereinafter, VIDOVIC and Frane are collectively referenced as "the Mlinars").
3. PAK MAIL OF WELLINGTON, INC. (hereinafter, "PAK MAIL") is a Florida Corporation with a principal address of 13833 Wellington Trace, Suite E4, Wellington, Palm

# MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000002

MLINAR v. UPS, et al.  
Complaint

Beach County, Florida, 33414. PAK MAIL'S Registered Agent for Service of Process is Linda A. Ramos, who may be served at PAK MAIL'S address.

4. UNITED PARCEL SERVICE CO. (hereinafter, "UPS") is registered with the Florida Department of State as a foreign corporation, with a principal address of 55 Glenparkway, NE Atlanta, Georgia, 30328. The Florida Registered Agent for UPS is Corporation Service Company, 1201 Hays Street, Tallahassee, Florida, 32301-2525. This Court has personal jurisdiction over UPS as it has committed the following acts: registered as a foreign corporation doing business in Florida, conducted regular business in Florida through vendors, franchisees, and wholly owned retail outlets, and maintained a regional headquarters in Miami, Florida,

5. RECOVERY MANAGEMENT SERVICES LLC, d/b/a/ CARGO LARGO (hereinafter, "CARGO LARGO") is a Limited Liability Company domiciled in Missouri; it is referred to by UPS as "overgoods." The Registered Agent for CARGO LARGO is Jennifer Al Bedford, 12502 Manchester Ave., Grandview, Missouri, 64030. CARGO LARGO receives overstock and unclaimed goods from various locations including Florida. CARGO LARGO owns and operates surplus and salvage stores including the Internet based auction house known as "Cargo Largo," which advertises and sells, overstock and lost goods to various locations including Florida.

6. Aaron Anderson (hereinafter, "ANDERSON") is an individual living in Kansas City, Missouri who has solicited Florida artists and art buyers in Florida, including VIDOVIC, for the buying and selling of art in Florida.

MLINAR v. UPS, et al.  
Complaint

**ALLEGED FACTS OF THE CASE**

**CONTRACT for BAILMENT**  
**UPS to ship Package to New York**

7. On the evening of November 28, 2005, Frane, acting at VIDOVIC'S direction and for her benefit, contracted with PAK MAIL to ship two (2) paintings via UPS to New York. The paintings, entitled "Advice" and "The Messenger" were created and owned by VIDOVIC.

8. Frane rolled and packaged the painting canvases inside of a fifty-one (51) inch long and four (4) inch diameter PVC pipe. Each end of the pipe was closed with a tightly fitting PVC pipe cap and further secured with silver duct tape. This is a customary method of shipping original paintings.

9. The paintings were to be shipped to New York to Mario Novak's (hereinafter, "Novak") residence at 129 Bermuda Street, Atlantic Beach, New York, 11509. The assigned UPS tracking number provided by PAK MAIL was 1Z0XW5271244846234. Since the UPS truck was at PAK MAIL while Frane was there to ship the paintings, he observed the package being loaded on the UPS truck.

**PACKAGE ARRIVES EMPTY**  
**Paintings Removed Before Arrival and UPS refuses to act**

10. VIDOVIC had arranged to exhibit and offer the paintings for sale at the Mario Novak Gallery, owned by Novak. The Mlinars flew to New York for the exhibit and arrived on the same day that the paintings were scheduled to arrive. They planned to stay at Novak's

# MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000004

MLINAR v. UPS, et al.  
Complaint

residence. Novak met the Mlinars at the airport while his fiancé, Rachel Koenig (hereinafter, "Koenig"), remained at Novak's residence to accept the paintings.

11. While Novak and the Mlinars were driving from the airport to Novak's house, Novak received a telephone call from Koenig reporting that the container had been delivered; however, the duct tape on the cover of one side of the PVC tube had been sliced and the painting canvases had been removed.

12. Novak and the Mlinars arrived at Novak's house a short time after receiving Koenig's telephone call. They were able to locate the UPS truck as it continued to make deliveries in the neighborhood. When they questioned the two UPS deliverymen about the opened package and missing paintings, both advised that the package had already been opened when they received it. The UPS deliverymen stated that they delivered the package in exactly the same condition it had been when they themselves received it before starting their route.

13. Frantic, the Mlinars immediately called UPS to report the missing paintings and initiate an investigation. They explained the totality of the circumstances to UPS: (1) Frane witnessed the package being placed into UPS custody from PAK MAIL; (2) the empty package arrived at the intended destination; (3) Koenig received the empty package directly from a UPS delivery man when it was delivered to the intended destination; and (4) the UPS deliverymen acknowledged to the Mlinars and Novak that the package was sliced open and the paintings had been removed prior to their receipt of the package.

14. UPS insisted that it would do nothing about the missing paintings until a report was filed through PAK MAIL of Wellington.

# MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000005

MLINAR v. UPS, et al.  
Complaint

15. When the Mlinars arrived home two days later, they reported the missing paintings to Roly Ramos (hereinafter, "Ramos"), the proprietor of PAK MAIL of Wellington. VIDOVIC provided Ramos with the PAK MAIL shipping receipt, pictures of both "Advice" and "The Messenger," and a copy of an appraisal reflecting that "Advice," alone, had been appraised at \$20,000. They also advised PAK MAIL and UPS that the paintings were labeled on the back with the identity of the artist and her address.

16. Ramos advised that he filed the claim with the UPS Investigations Department. Although VIDOVIC checked in with Ramos frequently, UPS never responded to the claim. Approximately eight (8) months later, Ramos advised VIDOVIC that she was entitled to \$100 for the missing package. As a result of the botched delivery, Ramos issued the Mlinars \$100.00 in credit for free future shipping. VIDOVIC was deeply distraught over the loss of the paintings and the missed opportunities and exposure. Since the identity of the owner of the goods would have been readily identifiable had the paintings remained within UPS control, VIDOVIC assumed that the paintings had to have been stolen and immediately removed from UPS control. They never imagined that the company, after having been placed on notice of the loss, would have kept and sold off the contents of a package while the packaging was delivered to its destination.

## CONVERSION

### Rifling through Packages and Sending Contents to Overgoods

17. Approximately two years later, VIDOVIC received a shocking telephone call from ANDERSON stating that he had just acquired "Advice". While somewhat relieved to know the location of "Advice", VIDOVIC was appalled once she became aware of the

# MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000006

MLINAR v. UPS, et al.  
Complaint

circumstances under which ANDERSON obtained it: ANDERSON purchased "Advice" from CARGO LARGO who had received the painting from UPS.

18. VIDOVIC was instantly angered as she realized the scam to which she had fallen victim: If the paintings were ever "lost," their packaging would never have arrived at its proper destination. If the paintings were stolen by a rogue UPS employee or even by a trespasser, they should not have ended up at UPS' lost goods contractor's warehouse and listed for auction. Rather than transfer the goods as they were obliged to do, UPS, without consent, allowed the package to be infiltrated, its contents removed and delivered to its servicer for lost goods.

19. Upon information and belief, UPS selectively located the contents based on their nature, probable worth, and lack of insurance. UPS then sent the paintings to CARGO LARGO for some as of yet undiscovered consideration exceeding the \$100.00 liability coverage provided for all shipments. Upon information and belief, UPS utilized the information on the back of the painting including VIDOVIC'S name to catalogue, sell and/or distribute the item to CARGO LARGO. In any event certain things are clear: UPS allowed the package to be infiltrated and the paintings removed; UPS allowed an empty package to arrive at the proper destination; UPS never performed a diligent search of its lost goods although it utilized the very same information and effort a search would have required to redistribute the package to CARGO LARGO; UPS allowed the bare goods from within the package to be sent to overgoods for sale; UPS directly benefited by the infiltration.

20. VIDOVIC asked ANDERSON, the purchaser of her painting from CARGO LARGO, how he was able to locate her. He replied that he "Google" searched her name as it

MLINAR v. UPS, et al.  
Complaint

appeared on the label printed on the back of the painting and supplied on the CARGO LARGO invoice. He was readily able to find her contact information on the Internet. VIDOVIC was enraged to learn that ANDERSON had handily contacted her using only the painting label information - information that was at all times available to UPS even after the paintings were stripped of their packaging and transferred from UPS to CARGO LARGO as a "lost good."

21. VIDOVIC inquired whether "The Messenger" was also at the CARGO LARGO auction. ANDERSON replied that "The Messenger" was auctioned in the same lot, however, he did not know the identity of the purchaser.

**MISAPPROPRIATION of GOODS AND IDENTITY**  
**Exploitation of the Artist**

22. Significantly, the auctioneer at CARGO LARGO was sure to inform the prospective buyers that the paintings were original Ivana Vidovic artwork that had come to CARGO LARGO from UPS'S lost goods. In fact, CARGO LARGO provided ANDERSON with an acknowledgement of sale, identifying the painting and artist as "the original painting on canvas, 'Advice,' by Ivana Vidovic."

23. The auction for "Advice" started at \$1,400, but ANDERSON was able to purchase the painting for \$1,000. During the telephone conversation, ANDERSON lauded VIDOVIC'S talent. He then asked the value of "Advice." He boldly explained the he intended to place the painting for sale on his eBay web site. VIDOVIC explained that "Advice" had been appraised at \$20,000. ANDERSON was overjoyed to learn the appraisal value and advised that he would use it as the starting eBay bid. ANDERSON even asked VIDOVIC whether she might be interested in purchasing the painting from him; she declined his offer. Alternatively,

# MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000008

MLINAR v. UPS, et al.  
Complaint

ANDERSON asked if VIDOVIC might introduce him to art dealers in the Palm Beach Community where potential buyers might be more familiar with VIDOVIC'S work; she declined this request as well.

24. ANDERSON continued to ask VIDOVIC questions regarding her history as an artist and the history of the painting. Soon thereafter, when ANDERSON did, in fact, list "Advice" for sale on eBay, he included the details of his conversation with VIDOVIC and even offered to personally introduce the potential buyer to VIDOVIC. He, like UPS and CARGO LARGO, knowingly used the identity of the artist in a commercial message to obtain a sale.

25. Over the next couple of weeks, ANDERSON continued to contact VIDOVIC to inquire whether she might reconsider his offer to buy the painting or introduce him to local art dealers in Palm Beach. Interested in maintaining communication, VIDOVIC demurred. ANDERSON also questioned the value of "The Messenger". VIDOVIC advised that the value was approximately \$10,000. Soon thereafter, ANDERSON acquired "The Messenger".

26. VIDOVIC has recently learned that ANDERSON has placed "Advice" and "The Messenger" for sale in two separate listings on craigslist. Even more insulting, a third listing on craigslist offers both "Advice" and "The Messenger" for the exchange of a late model Mercedes. ANDERSON'S ad reads as follows:

**I have two stunningly beautiful originals by the one and only Floridian listed painter, Ivana Mlinar. 2001 "Advice" and 2005 "The Messenger". Her works are appraised at \$30,000 for the two canvases, in hand, and you will have direct contact with the artist herself...introduced by me to the new owner. I will trade both of these paintings for a late model Mercedes Benz in superb condition. No high miles, no restoration project, I'm talking about a really nice Mercedes. If you love Ivana's work, you will have to own these two originals. Interested? This is a serious deal for a serious collector looking**

MLINAR v. UPS, et al.  
Complaint

to upgrade their collection. If the Mercedes just sits in the garage, why not explore the possibility. Have another high-end automobile or classic that's not a Mercedes? I'll listen. Call . . . .

**WILLFUL and MALICIOUS CONDUCT**  
**Victims of a Larger Scheme**

27. ANDERSON explained to VDOVIC that he regularly purchased unclaimed or recovered luxury merchandise from transportation giants, like UPS, through CARGO LARGO. He further explained that he was considered a "senior buyer" with CARGO LARGO; therefore, he is given the first right of purchase in the fine art category. He further noted that many times he contacts the original artists and they state a scenario similar to the VDOVIC'S. Indeed, other artists who had thought that an item of their work was somehow lost, destroyed or perhaps, stolen by a rogue worker during UPS delivery, finally discover that it was eventually sold as an UPS lost item.

28. In fact, UPS employees report on certain internet blogs that they routinely catalogue contents according to eBay and CARGO LARGO categories as they are removed from bins of lost, misplaced, or stolen goods. The goods are described, packaged, and shipped to these purveyors for as of yet undisclosed consideration.

29. Upon information and belief, UPS does not remove the contents from every box it searches; instead, some packages arrive at certain end points with the packaging sliced open and the goods remaining. Tellingly, these items would not garner more than the \$100.00 insured loss limit automatically applicable to all packages.

30. Upon information and belief, UPS selectively locates certain contents based on their nature, probable worth, and lack of insurance. UPS then sends them to CARGO LARGO

MLINAR v. UPS, et al.  
Complaint

for some as of yet undiscovered consideration exceeding the company's \$100.00 per loss liability coverage.

CLAIMS

COUNT 1

Conversion

(UPS, Recovery Management)

31. Facts alleged in paragraphs 1-30 are incorporated as if fully set out herein.

32. UPS, CARGO LARGO, and PAK MAIL as noted above, have engaged in a fleecing operation whereby certain articles whose value is deemed to be above that of the insured liability (including VIDOVIC'S paintings) are removed from the packaging and subsequently sold at auction as goods that were undeliverable or otherwise lost in transit. In reality, the shipping and management of these goods (including VIDOVIC'S paintings) is not the purpose of their acts or the intentions upon the receipt of certain property.

33. UPS, PAK MAIL and CARGO LARGO intended to convert VIDOVIC'S property once it was received at PAK MAIL and at all times afterwards.

34. Such conversion directly and proximately caused damages to VIDOVIC including the loss of the property and the lost opportunities alleged in paragraphs 10-16, as well as any prejudgment interest awardable from the date of loss.

WHEREFORE, the Plaintiff, VIDOVIC, demands judgment against the Defendants UPS CARGO LARGO, and PAK MAIL for compensatory damages, pre-judgment and post-judgment interest, costs, and such other and further relief as the Court may deem appropriate under the circumstances. Plaintiff, VIDOVIC, further demands a trial by jury.

MLINAR v. UPS, et al.  
Complaint

COUNT II

Profiting by Criminal Activity  
(UPS, CARGO LARGO, PAK MAIL)

35. Facts alleged in paragraphs 1-30 are incorporated as if fully set out herein.

36. Defendants UPS, CARGO LARGO, and PAK MAIL have systematically taken artwork as a shipper of goods. They have relied upon certain legal protections that are afforded by Federal Law to limit liabilities for these works at the insured amount. It is not coincidence that VIDOVIC, through ANDERSON, discovered the paintings just after the two year limitation to bring a negligence action afforded under the Federal Carmack Amendment expired. (The Carmack Amendment provides a uniform cause of action for the clients of interstate shipping companies whose property was lost or destroyed through the negligence of the shipper. Carmack is a non-exclusive Federal statute which would preempt causes of action based on the negligence of the carrier; it limits damages to the replacement or bartered for insurance value but provides strict liability for loss or damage.)

37. In this scheme, the Defendants UPS, CARGO LARGO, and PAK MAIL have engaged in obtaining property by falsely impersonating and/or representing themselves as part of a shipping enterprise rather than a fencing organization and have thus systematically violated F.S. §817.02.

38. The course of conduct described above includes "criminal acts" as defined by F.S. §772.102 (2), which lists False Pretenses/Fraud including F.S. §817.02: "Obtaining property by false personation" as a criminal act satisfying the statutory predicate for Florida RICO recovery.

MLINAR v. UPS, et al.  
Complaint

The activity is a pattern of similar acts as it did not stem out of one single contractor transaction against one or more related persons.<sup>1</sup>

39. The UPS, CARGO LARGO, and PAK MAIL Defendants' engagement in this pattern of activity has caused them to be liable to VIDOVIC for three-fold the damages of any resulting injuries to the Plaintiff. These Defendants are also liable for the attorney fees and appellate costs of any claims made for relief of these injuries.<sup>2</sup>

40. Such systematic criminal activity directly and proximately caused damages to VIDOVIC including the loss of the property and the lost opportunities alleged in paragraphs 10-16, as well as any prejudgment interest awardable from the date of loss.

41. In addition, the activity included a public auction of VIDOVIC'S work, including the use of her name without consent. That activity further resulted in the continued misuse of her identity on the World Wide Web through venues such as craigslist, eBay and CARGO LARGO'S website. This has caused injury to the reputation of VIDOVIC who sells works exclusively through reputable art galleries. The unauthorized marketing of works of art attributed to VIDOVIC exposes VIDOVIC to claims that she is in violation of exclusivity

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<sup>1</sup> F.S. 772.104 (4): "Pattern of criminal activity" means engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that the last of such incidents occurred within 5 years after a prior incident of criminal activity. For the purposes of this chapter, the term "pattern of criminal activity" shall not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons.

<sup>2</sup> F.S. § 772.104. Civil cause of action: (1) Any person who proves by clear and convincing evidence that he or she has been injured by reason of any violation of the provisions of s. 772.103 shall have a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of \$200, and reasonable attorney's fees and court costs in the trial and appellate courts.

MLINAR v. UPS, et al.  
Complaint

contracts she has with these venerable galleries. In addition, the manner of marketing has directly and proximately caused injury to the goodwill associated with the VIDOVIC'S name.

WHEREFORE, the Plaintiff, VIDOVIC, demands judgment against the Defendants UPS, CARGO LARGO, and PAK MAIL for compensatory, pre-judgment and post-judgment interest, treble damages and attorney fees allowed by statute as described above, and costs. Plaintiff, VIDOVIC, further demands a jury trial.

**COUNT III**  
**UNAUTHORIZED PUBLICATION OF NAME OR LIKENESS:**  
**F.S. § 540.08**  
**UPS, Recovery Management, ANDERSON**

42. Facts alleged in Paragraphs 1-30 and 41 are incorporated as if fully set out herein.

43. Defendants UPS, CARGO LARGO, and ANDERSON each, individually, and in conspiracy used VIDOVIC'S name and likeness (her artistic signature) in connection with the resale, advertisement and other distribution of artistic productions (the paintings) where VIDOVIC had not consented to the use of her name and likeness in connection with the initial sale or distribution thereof. UPS and CARGO LARGO ultimately published that name in an auction sale and sold the goods wrongfully appropriated.

44. UPS, CARGO LARGO, and ANDERSON knew that VIDOVIC had not consented to the initial distribution as the painting itself was wrongfully converted.

45. Because the contents slip of the bill of lading detailed that the contents of the package included artwork, UPS and CARGO LARGO targeted VIDOVIC'S package with the specific intent of reselling her art product and commercially utilizing her name. Further, because the packages was sent without additional insurance, UPS and CARGO LARGO determined that

MLINAR v. UPS, et al.  
Complaint

the artist would likely be unable or disinclined to pursue any remedy for the injuries sustained.

46. ANDERSON procured the painting with the intent to misappropriate the artist's name although he knew or reasonably should have known that the painting had been misappropriated from the artist. Furthermore, after he ascertained the theft to be certain, he continued to utilize her name in order to sell her paintings.

47. UPS, CARGO LARGO, and ANDERSON therefore violated the protections afforded by Fla. Stat. §540.08.

48. Such misappropriation directly and proximately caused VIDOVIC damages appropriately remedied by §540.08 including the loss of a reasonable royalty, compensatory damages (such as the loss of currency associated with her name as described in paragraph 41), and the punitive or exemplary damages provided by the statute.

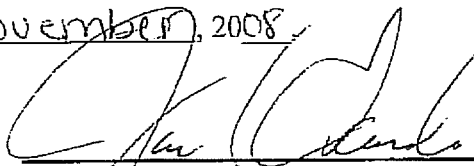
WHEREFORE, Plaintiff, VIDOVIC, demands judgment against the Defendants UPS, CARGO LARGO, and ANDERSON for compensatory damages, pre-judgment and post-judgment interest, costs, and such other and further relief as the Court may deem appropriate under the circumstances. Plaintiff, VIDOVIC, further demands a trial by jury.

FURTHER, Plaintiff, VIDOVIC, reserves the right to amend all counts to include a claim for punitive and damages as warranted by the evidence.

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000015

MLINAR v. UPS, et al.  
Complaint

DATED this 20<sup>th</sup> day of November, 2008.



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IN THE COUNTY COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY,  
FLORIDA

CIVIL DIVISION

**IVANA VIDOVIĆ MLINAR,**

**Plaintiff**

**V.**

**UNITED PARCEL SERVICE CO., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT  
SERVICES LLC d/b/a CARGO LARGO  
and AARON ANDERSON,**

**Defendants,**

**CASE NO:**

502008CA0036246XXXXMB

**ANSWER AND AFFIRMATIVE  
DEFENSES OF UNITED  
PARCEL SERVICE, INC.**

Defendant United Parcel Service, Inc. (“UPS”), incorrectly identified in Plaintiff’s Complaint as “United Parcel Service Co.,” respectfully submits the following Answer and Affirmative Defenses to the Complaint:

**ANSWER**

1.

UPS denies that it is liable to the Plaintiff for any of the damages alleged in Paragraph one of the Complaint.

2.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph two of the Complaint.

3.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph three of the Complaint.

4.

UPS admits that it is a corporation registered and existing under the laws of the State of Delaware and authorized to conduct business in the State of Florida and may be served with process in Florida.

5.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph five of the Complaint.

6.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph six of the Complaint.

7.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph seven of the Complaint, which therefore stand denied.

8.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph eight of the Complaint, which therefore stand denied.

9.

UPS admits that a package bearing tracking number 1Z0XW5271244846234 was shipped via UPS. UPS is without sufficient information to admit or deny the remainder

of the allegations contained in Paragraph nine of the Complaint, which therefore stand denied.

10.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph ten of the Complaint, which therefore stand denied.

11.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph eleven of the Complaint, which therefore stand denied.

12.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph twelve of the Complaint, which therefore stand denied.

13.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph thirteen of the Complaint, which therefore stand denied.

14.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph fourteen of the Complaint, which therefore stand denied.

15.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph fifteen of the Complaint, which therefore stand denied.

16.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph sixteen of the Complaint, which therefore stand denied.

17.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph seventeen of the Complaint, which therefore stand denied.

18.

UPS denies all allegations of theft or wrongdoing on the part of UPS contained in Paragraph eighteen of the Complaint. UPS is without sufficient information to admit or deny any allegations with respect to Vodovic's feelings or realizations.

19.

UPS denies all allegations of contained in Paragraph nineteen of the Complaint.

20.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph twenty of the Complaint, which therefore stand denied.

21.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph twenty-one of the Complaint, which therefore stand denied.

22.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph twenty-two the Complaint, which therefore stand denied.

23.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph twenty-three of the Complaint, which therefore stand denied.

24.

UPS denies the allegation contained within Paragraph 24 of the Complaint that it knowingly used the identity of the artist in a commercial message to obtain a sale. UPS is without sufficient information to admit or deny the remainder of the allegations contained in Paragraph twenty-four the Complaint, which therefore stand denied.

25.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph twenty-five of the Complaint, which therefore stand denied.

26.

UPS is without sufficient information to admit or deny the allegations contained in Paragraph twenty-six of the Complaint, which therefore stand denied.

27.

UPS denies all allegations of wrongdoing on the part of UPS contained in Paragraph twenty-seven of the Complaint. UPS is without sufficient information to admit or deny the remainder of the allegations contained in Paragraph twenty-seven of the Complaint, which therefore stand denied.

28.

UPS denies all allegations of wrongdoing on the part of UPS contained in Paragraph twenty-eight of the Complaint. UPS is without sufficient information to admit or deny the remainder of the allegations contained in Paragraph twenty-eight of the Complaint, which therefore stand denied.

29.

UPS denies the allegations contained in Paragraph twenty-nine of the Complaint.

30.

UPS denies the allegations contained in Paragraph thirty of the Complaint.

31.

UPS incorporates its responses to Paragraphs one through thirty as if fully set forth herein.

32.

UPS denies the allegations contained in Paragraph thirty-two of the Complaint.

33.

UPS denies the allegations contained in Paragraph thirty-three of the Complaint.

34.

UPS denies the allegations contained in Paragraph thirty-four of the Complaint and denies that UPS is liable for any of the damages demanded in the Complaint including those set forth in the Wherefore clause following Paragraph thirty-four of the Complaint.

35.

UPS incorporates its responses to Paragraphs one through thirty-four as if fully set forth herein.

36.

UPS denies the allegations contained in Paragraph thirty-six of the Complaint.

37.

UPS denies the allegations contained in Paragraph thirty-seven of the Complaint.

38.

UPS denies the allegations contained in Paragraph thirty-eight of the Complaint.

39.

UPS denies the allegations contained in Paragraph thirty-nine of the Complaint.

40.

UPS denies the allegations contained in Paragraph forty of the Complaint.

41.

UPS denies the allegations contained in Paragraph forty-one of the Complaint. UPS further denies that UPS is liable for any of the damages demanded in the Complaint including those set forth in the Wherefore clause following Paragraph forty-one of the Complaint.

42.

UPS incorporates its responses to Paragraphs one through forty-one as if fully set forth herein.

43.

UPS denies the allegations contained in Paragraph forty-three of the Complaint.

44.

UPS denies the allegations contained in Paragraph forty-four of the Complaint.

45.

UPS denies the allegations contained in Paragraph forty-five of the Complaint.

46.

UPS denies the allegations contained in Paragraph forty-six of the Complaint to the extent that these allegations attribute any liability to UPS.

47.

UPS denies the allegations contained in Paragraph forty-seven of the Complaint.

48.

UPS denies the allegations contained in Paragraph forty-eight of the Complaint. UPS further denies that UPS is liable for any of the damages demanded in the Complaint including those set forth in the Wherefore clause following Paragraph forty-eight of the Complaint.

49.

UPS denies each and every allegation of the Complaint not specifically admitted, explained or modified herein, and denies that Plaintiff is entitled to any of the relief requested in the Complaint.

#### **AFFIRMATIVE DEFENSES**

Without admitting or acknowledging that UPS bears the burden of proof as to any of them, UPS asserts the following affirmative defenses:

##### **FIRST DEFENSE**

Plaintiff has failed to state a claim against UPS upon which relief can be granted.

##### **SECOND DEFENSE**

Plaintiff's claims are barred by the applicable statute of limitations.

**THIRD DEFENSE**

Pursuant to governing law, regulations, and the contract documents containing the terms and conditions of the transportation of property (including the applicable shipping documents, and the UPS Tariff), all claims for loss or damage to shipments via UPS must be filed, in writing, with UPS within nine months after delivery or after a reasonable time for delivery has elapsed. Claims not made in writing within nine months after delivery are deemed waived. Plaintiff has waived any potential claims by failing to comply with the nine-month limitation.

**FOURTH DEFENSE**

Some or all of Plaintiff's causes of action are preempted by federal law, *inter alia*, the Carmack Amendment to the Interstate Commerce Act, 49 U.S.C. § 14706(a) & (c) *et seq.*, the federal common law, and/or the Federal Aviation Administration Authorization Act of 1994, 49 U.S.C. §§ 14501(c)(1) & 41713(b)(4)(A).

**FIFTH DEFENSE**

Pursuant to governing law, regulations, and the contract documents containing the terms and conditions of the transportation of property (including the applicable shipping documents, and the UPS Tariff) Plaintiff's recovery, if any, is limited to a maximum of the released or declared value of the subject shipment, or to \$100 in the absence of a released or declared value, and UPS is not liable for any consequential damages related to the shipment.

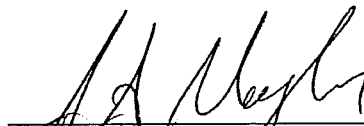
**SIXTH DEFENSE**

The damages allegedly suffered by Plaintiff were not caused by any act or omission of UPS.

SEVENTH DEFENSE

UPS reserves the right to assert other defenses as discovery progresses.

By:

  
Jason A. Mayberry  
Florida Bar No. 0060379

ALSTON & BIRD LLP  
1201 West Peachtree Street  
Atlanta, Georgia 30309-3424  
(404) 881-7000  
Attorneys for Defendant  
United Parcel Service, Inc.  
*Attorneys for Defendant*  
*United Parcel Service, Inc.*

IN THE COUNTY COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY,  
FLORIDA

CIVIL DIVISION

IVANA VIDOVIC MLINAR,

Plaintiff

v.

UNITED PARCEL SERVICE CO., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT  
SERVICES LLC d/b/a CARGO LARGO  
and AARON ANDERSON,

Defendants.

CASE NO:

502008CA0036246XXXXMB

ANSWER AND AFFIRMATIVE  
DEFENSES OF UNITED  
PARCEL SERVICE, INC.

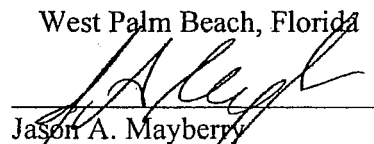
**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **DEFENDANT UNITED PARCEL SERVICE INC.'S ANSWER** has been served upon the following person by placing a copy of the same in the United States mail, postage prepaid and properly addressed, this 16<sup>th</sup> day of January, 2009:

Jack Scarola  
Searcy Denney Scarola Barnhart & Shipley  
2139 Palm Beach Lakes Boulevard  
West Palm Beach, Florida 33409

Shannon Mahoney  
Law Offices of Shannon M. Mahoney, P.A.  
315 11 th Street  
West Palm Beach, Florida 33401

By:

  
Jason A. Mayberry  
Florida Bar No. 0060379

ALSTON & BIRD LLP  
1201 West Peachtree Street  
Atlanta, Georgia 30309-3424  
(404) 881-7000  
Attorneys for Defendant  
United Parcel Service, Inc.  
*Attorneys for Defendant  
United Parcel Service, Inc.*

IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT, IN AND  
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502008CA036246

IVANA VIDOVIC MLINAR,

Plaintiff(s)

vs.

UNITED PARCEL SERVICE INC., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT CORP. d/b/a  
CARGO LARGO, and AARON ANDERSON,

Defendant(s).

---

**AMENDED COMPLAINT**

Plaintiff IVANA VIDOVIC MLINAR, a Florida Resident, files this Complaint against Defendants, UNITED PARCEL SERVICE INC., PAK MAIL OF WELLINGTON, INC., RECOVERY MANAGEMENT CORP., and AARON ANDERSON, and alleges:

**JURISDICTIONAL ALLEGATIONS**

1. This is an action for damages that are in an amount in excess of \$15,000.00.
2. Plaintiff IVANA VIDOVIC MLINAR, (also known professionally as Ivana Vidovic; hereinafter, "VIDOVIC") is a resident of Palm Beach County Florida. VIDOVIC'S husband is Frane Mlinar (hereinafter, "Frane") (hereinafter, VIDOVIC and Frane are collectively referenced as "the Mlinars").
3. PAK MAIL OF WELLINGTON, INC. (hereinafter, "PAK MAIL") is a Florida Corporation with a principal address of 13833 Wellington Trace, Suite E4, Wellington, Palm

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

Beach County, Florida, 33414. PAK MAIL'S Registered Agent for Service of Process is Linda A. Ramos, who may be served at PAK MAIL'S address.

4. UNITED PARCEL SERVICE INC. (hereinafter, "UPS") is registered with the Florida Department of State as a foreign corporation, with a principal address of 55 Glenparkway, NE Atlanta, Georgia, 30328. The Florida Registered Agent for UPS is Corporation Service Company, 1201 Hays Street, Tallahassee, Florida, 32301-2525. This Court has personal jurisdiction over UPS as it has committed the following acts: registered as a foreign corporation doing business in Florida, conducted regular business in Florida through vendors, franchisees, and wholly owned retail outlets, and maintained a regional headquarters in Miami, Florida,

5. RECOVERY MANAGEMENT CORP., d/b/a/ CARGO LARGO (hereinafter, "CARGO LARGO") is a Limited Liability Company domiciled in Missouri; it is referred to by UPS as "overgoods." The Registered Agent for CARGO LARGO is Jennifer Al Bedford, 12502 Manchester Ave., Grandview, Missouri, 64030. CARGO LARGO receives overstock and unclaimed goods from various locations including Florida. CARGO LARGO owns and operates surplus and salvage stores including the Internet based auction house known as "Cargo Largo," which advertises and sells, overstock and lost goods to various locations including Florida.

6. Aaron Anderson (hereinafter, "ANDERSON") is an individual living in Kansas City, Missouri who has solicited Florida artists and art buyers in Florida, including VIDOVIC, for the buying and selling of art in Florida.

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

**ALLEGED FACTS OF THE CASE**

**CONTRACT for BAILMENT**  
**UPS to ship Package to New York**

7. On the evening of November 28, 2005, Frane, acting at VIDOVIC'S direction and for her benefit, contracted with PAK MAIL to ship two (2) paintings via UPS to New York. The paintings, entitled "Advice" and "The Messenger" were created and owned by VIDOVIC.

8. Frane rolled and packaged the painting canvases inside of a fifty-one (51) inch long and four (4) inch diameter PVC pipe. Each end of the pipe was closed with a tightly fitting PVC pipe cap and further secured with silver duct tape. This is a customary method of shipping original paintings.

9. The paintings were to be shipped to New York to Mario Novak's (hereinafter, "Novak") residence at 129 Bermuda Street, Atlantic Beach, New York, 11509. The assigned UPS tracking number provided by PAK MAIL was 1Z0XW5271244846234. Since the UPS truck was at PAK MAIL while Frane was there to ship the paintings, he observed the package being loaded on the UPS truck.

**PACKAGE ARRIVES EMPTY**  
**Paintings Removed Before Arrival and UPS refuses to act**

10. VIDOVIC had arranged to exhibit and offer the paintings for sale at the Mario Novak Gallery, owned by Novak. The Mlinars flew to New York for the exhibit and arrived on the same day that the paintings were scheduled to arrive. They planned to stay at Novak's

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

residence. Novak met the Mlinars at the airport while his fiancée, Rachel Koenig (hereinafter, "Koenig"), remained at Novak's residence to accept the paintings.

11. While Novak and the Mlinars were driving from the airport to Novak's house, Novak received a telephone call from Koenig reporting that the container had been delivered; however, the duct tape on the cover of one side of the PVC tube had been sliced and the painting canvases had been removed.

12. Novak and the Mlinars arrived at Novak's house a short time after receiving Koenig's telephone call. They were able to locate the UPS truck as it continued to make deliveries in the neighborhood. When they questioned the two UPS deliverymen about the opened package and missing paintings, both advised that the package had already been opened when they received it. The UPS deliverymen stated that they delivered the package in exactly the same condition it had been when they themselves received it before starting their route.

13. Frantic, the Mlinars immediately called UPS to report the missing paintings and initiate an investigation. They explained the totality of the circumstances to UPS: (1) Frane witnessed the package being placed into UPS custody from PAK MAIL; (2) the empty package arrived at the intended destination; (3) Koenig received the empty package directly from a UPS delivery man when it was delivered to the intended destination; and (4) the UPS deliverymen acknowledged to the Mlinars and Novak that the package was sliced open and the paintings had been removed prior to their receipt of the package.

14. UPS insisted that it would do nothing about the missing paintings until a report was filed through PAK MAIL of Wellington.

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

15. When the Mlinars arrived home two days later, they reported the missing paintings to Roly Ramos (hereinafter, "Ramos"), the proprietor of PAK MAIL of Wellington. VIDOVIC provided Ramos with the PAK MAIL shipping receipt, pictures of both "Advice" and "The Messenger," and a copy of an appraisal reflecting that "Advice," alone, had been appraised at \$20,000. They also advised PAK MAIL and UPS that the paintings were labeled on the back with the identity of the artist and her address.

16. Ramos advised that he filed the claim with the UPS Investigations Department. Although VIDOVIC checked in with Ramos frequently, UPS never responded to the claim. Approximately eight (8) months later, Ramos advised VIDOVIC that she was entitled to \$100 for the missing package. As a result of the botched delivery, Ramos issued the Mlinars \$100.00 in credit for free future shipping. VIDOVIC was deeply distraught over the loss of the paintings and the missed opportunities and exposure. Since the identity of the owner of the goods would have been readily identifiable had the paintings remained within UPS control, VIDOVIC assumed that the paintings had to have been stolen and immediately removed from UPS control. They never imagined that the company, after having been placed on notice of the loss, would have kept and sold off the contents of a package while the packaging was delivered to its destination.

### CONVERSION

#### Rifling through Packages and Sending Contents to Overgoods

17. Approximately two years later, VIDOVIC received a shocking telephone call from ANDERSON stating that he had just acquired "Advice". While somewhat relieved to know the location of "Advice", VIDOVIC was appalled once she became aware of the

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

circumstances under which ANDERSON obtained it: ANDERSON purchased "Advice" from CARGO LARGO who had received the painting from UPS.

18. VIDOVIC was instantly angered as she realized the scam to which she had fallen victim: If the paintings were ever "lost," their packaging would never have arrived at its proper destination. If the paintings were stolen by a rogue UPS employee or even by a trespasser, they should not have ended up at UPS' lost goods contractor's warehouse and listed for auction. Rather than transfer the goods as they were obliged to do, UPS, without consent, allowed the package to be infiltrated, its contents removed and delivered to its servicer for lost goods.

19. Upon information and belief, UPS selectively located the contents based on their nature, probable worth, and lack of insurance. UPS then sent the paintings to CARGO LARGO for some as of yet undiscovered consideration exceeding the \$100.00 liability coverage provided for all shipments. Upon information and belief, UPS utilized the information on the back of the painting including VIDOVIC'S name to catalogue, sell and/or distribute the item to CARGO LARGO. In any event certain things are clear: UPS allowed the package to be infiltrated and the paintings removed; UPS allowed an empty package to arrive at the proper destination; UPS never performed a diligent search of its lost goods although it utilized the very same information and effort a search would have required to redistribute the package to CARGO LARGO; UPS allowed the bare goods from within the package to be sent to overgoods for sale; UPS directly benefited by the infiltration.

20. VIDOVIC asked ANDERSON, the purchaser of her painting from CARGO LARGO, how he was able to locate her. He replied that he "Google" searched her name as it

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

appeared on the label printed on the back of the painting and supplied on the CARGO LARGO invoice. He was readily able to find her contact information on the Internet. VIDOVIC was enraged to learn that ANDERSON had handily contacted her using only the painting label information - information that was at all times available to UPS even after the paintings were stripped of their packaging and transferred from UPS to CARGO LARGO as a "lost good."

21. VIDOVIC inquired whether "The Messenger" was also at the CARGO LARGO auction. ANDERSON replied that "The Messenger" was auctioned in the same lot; however, he did not know the identity of the purchaser.

**MISAPPROPRIATION of GOODS AND IDENTITY**  
**Exploitation of the Artist**

22. Significantly, the auctioneer at CARGO LARGO was sure to inform the prospective buyers that the paintings were original Ivana Vidovic artwork that had come to CARGO LARGO from UPS'S lost goods. In fact, CARGO LARGO provided ANDERSON with an acknowledgement of sale, identifying the painting and artist as "the original painting on canvas, 'Advice,' by Ivana Vidovic."

23. The auction for "Advice" started at \$1,400, but ANDERSON was able to purchase the painting for \$1,000. During the telephone conversation, ANDERSON lauded VIDOVIC'S talent. He then asked the value of "Advice." He boldly explained the he intended to place the painting for sale on his eBay web site. VIDOVIC explained that "Advice" had been appraised at \$20,000. ANDERSON was overjoyed to learn the appraisal value and advised that he would use it as the starting eBay bid. ANDERSON even asked VIDOVIC whether she might be interested in purchasing the painting from him; she declined his offer. Alternatively,

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

ANDERSON asked if VIDOVIC might introduce him to art dealers in the Palm Beach Community where potential buyers might be more familiar with VIDOVIC'S work; she declined this request as well.

24. ANDERSON continued to ask VIDOVIC questions regarding her history as an artist and the history of the painting. Soon thereafter, when ANDERSON did, in fact, list "Advice" for sale on eBay, he included the details of his conversation with VIDOVIC and even offered to personally introduce the potential buyer to VIDOVIC. He, like UPS and CARGO LARGO, knowingly used the identity of the artist in a commercial message to obtain a sale.

25. Over the next couple of weeks, ANDERSON continued to contact VIDOVIC to inquire whether she might reconsider his offer to buy the painting or introduce him to local art dealers in Palm Beach. Interested in maintaining communication, VIDOVIC demurred. ANDERSON also questioned the value of "The Messenger". VIDOVIC advised that the value was approximately \$10,000. Soon thereafter, ANDERSON acquired "The Messenger".

26. VIDOVIC has recently learned that ANDERSON has placed "Advice" and "The Messenger" for sale in two separate listings on craigslist. Even more insulting, a third listing on craigslist offers both "Advice" and "The Messenger" for the exchange of a late model Mercedes. ANDERSON'S ad reads as follows:

**I have two stunningly beautiful originals by the one and only Floridian listed painter, Ivana Mlinar. 2001 "Advice" and 2005 "The Messenger". Her works are appraised at \$30,000 for the two canvases, in hand, and you will have direct contact with the artist herself...introduced by me to the new owner. I will trade both of these paintings for a late model Mercedes Benz in superb condition. No high miles, no restoration project, I'm talking about a really nice Mercedes. If you love Ivana's work, you will have to own these two originals. Interested? This is a serious deal for a serious collector looking**

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

**to upgrade their collection. If the Mercedes just sits in the garage, why not explore the possibility. Have another high-end automobile or classic that's not a Mercedes? I'll listen. Call . . . .**

**WILLFUL and MALICIOUS CONDUCT**  
**Victims of a Larger Scheme**

27. ANDERSON explained to VIDOVIC that he regularly purchased unclaimed or recovered luxury merchandise from transportation giants, like UPS, through CARGO LARGO. He further explained that he was considered a "senior buyer" with CARGO LARGO; therefore, he is given the first right of purchase in the fine art category. He further noted that many times he contacts the original artists and they state a scenario similar to the VIDOVIC'S. Indeed, other artists who had thought that an item of their work was somehow lost, destroyed or perhaps, stolen by a rogue worker during UPS delivery, finally discovered that it was eventually sold as an UPS lost item.

28. In fact, UPS employees report on certain internet blogs that they routinely catalogue contents according to eBay and CARGO LARGO categories as they are removed from bins of lost, misplaced, or stolen goods. The goods are described, packaged, and shipped to these purveyors for as of yet undisclosed consideration.

29. Upon information and belief, UPS does not remove the contents from every box it searches; instead, some packages arrive at certain end points with the packaging sliced open and the goods remaining. Tellingly, these items would not garner more than the \$100.00 insured loss limit automatically applicable to all packages.

30. Upon information and belief, UPS selectively locates certain contents based on their nature, probable worth, and lack of insurance. UPS then sends them to CARGO LARGO

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

for some as of yet undiscovered consideration exceeding the company's \$100.00 per loss liability coverage.

**CLAIMS**

**COUNT I**

**Conversion**

**(UPS, Recovery Management)**

31. Facts alleged in paragraphs 1-30 are incorporated as if fully set out herein.

32. UPS, CARGO LARGO, and PAK MAIL as noted above, have engaged in a fleecing operation whereby certain articles whose value is deemed to be above that of the insured liability (including VIDOVIC'S paintings) are removed from the packaging and subsequently sold at auction as goods that were undeliverable or otherwise lost in transit. In reality, the shipping and management of these goods (including VIDOVIC'S paintings) is not the purpose of their acts or the intentions upon the receipt of certain property.

33. UPS, PAK MAIL and CARGO LARGO intended to convert VIDOVIC'S property once it was received at PAK MAIL and at all times afterwards.

34. Such conversion directly and proximately caused damages to VIDOVIC including the loss of the property and the lost opportunities alleged in paragraphs 10-16, as well as any prejudgment interest awardable from the date of loss.

WHEREFORE, the Plaintiff, VIDOVIC, demands judgment against the Defendants UPS CARGO LARGO, and PAK MAIL for compensatory damages, pre-judgment and post-judgment interest, costs, and such other and further relief as the Court may deem appropriate under the circumstances. Plaintiff, VIDOVIC, further demands a trial by jury.

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

**COUNT II**

**Profiting by Criminal Activity**  
**(UPS, CARGO LARGO, PAK MAIL)**

35. Facts alleged in paragraphs 1-30 are incorporated as if fully set out herein.

36. Defendants UPS, CARGO LARGO, and PAK MAIL have systematically taken artwork as a shipper of goods. They have relied upon certain legal protections that are afforded by Federal Law to limit liabilities for these works at the insured amount. It is not coincidence that VIDOVIC, through ANDERSON, discovered the paintings just after the two year limitation to bring a negligence action afforded under the Federal Carmack Amendment expired. (The Carmack Amendment provides a uniform cause of action for the clients of interstate shipping companies whose property was lost or destroyed through the negligence of the shipper. Carmack is a non-exclusive Federal statute which would preempt causes of action based on the negligence of the carrier; it limits damages to the replacement or bartered for insurance value but provides strict liability for loss or damage.)

37. In this scheme, the Defendants UPS, CARGO LARGO, and PAK MAIL have engaged in obtaining property by falsely impersonating and/or representing themselves as part of a shipping enterprise rather than a fencing organization and have thus systematically violated F.S. §817.02.

38. The course of conduct described above includes "criminal acts" as defined by F.S. §772.102 (2), which lists False Pretenses/Fraud including F.S. §817.02: "Obtaining property by false personation" as a criminal act satisfying the statutory predicate for Florida RICO recovery.

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

The activity is a pattern of similar acts as it did not stem out of one single contractor transaction against one or more related persons.<sup>1</sup>

39. The UPS, CARGO LARGO, and PAK MAIL Defendants' engagement in this pattern of activity has caused them to be liable to VIDOVIC for three-fold the damages of any resulting injuries to the Plaintiff. These Defendants are also liable for the attorney fees and appellate costs of any claims made for relief of these injuries.<sup>2</sup>

40. Such systematic criminal activity directly and proximately caused damages to VIDOVIC including the loss of the property and the lost opportunities alleged in paragraphs 10-16, as well as any prejudgment interest awardable from the date of loss.

41. In addition, the activity included a public auction of VIDOVIC'S work, including the use of her name without consent. That activity further resulted in the continued misuse of her identity on the World Wide Web through venues such as craigslist, eBay and CARGO LARGO'S website. This has caused injury to the reputation of VIDOVIC who sells works exclusively through reputable art galleries. The unauthorized marketing of works of art

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<sup>1</sup> F.S. 772.104 (4): "Pattern of criminal activity" means engaging in at least two incidents of criminal activity that have the same or similar intents, results, accomplices, victims, or methods of commission or that otherwise are interrelated by distinguishing characteristics and are not isolated incidents; provided that the last of such incidents occurred within 5 years after a prior incident of criminal activity. For the purposes of this chapter, the term "pattern of criminal activity" shall not include two or more incidents of fraudulent conduct arising out of a single contract or transaction against one or more related persons.

<sup>2</sup> F.S. § 772.104. Civil cause of action: (1) Any person who proves by clear and convincing evidence that he or she has been injured by reason of any violation of the provisions of s. 772.103 shall have a cause of action for threefold the actual damages sustained and, in any such action, is entitled to minimum damages in the amount of \$200, and reasonable attorney's fees and court costs in the trial and appellate courts.

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

attributed to VIDOVIC exposes VIDOVIC to claims that she is in violation of exclusivity contracts she has with these venerable galleries. In addition, the manner of marketing has directly and proximately caused injury to the goodwill associated with the VIDOVIC'S name.

WHEREFORE, the Plaintiff, VIDOVIC, demands judgment against the Defendants UPS, CARGO LARGO, and PAK MAIL for compensatory, pre-judgment and post-judgment interest, treble damages and attorney fees allowed by statute as described above, and costs. Plaintiff, VIDOVIC, further demands a jury trial.

**COUNT III**  
**UNAUTHORIZED PUBLICATION OF NAME OR LIKENESS:**  
**F.S. § 540.08**  
**UPS, Recovery Management, ANDERSON**

42. Facts alleged in Paragraphs 1-30 and 41 are incorporated as if fully set out herein.

43. Defendants UPS, CARGO LARGO, and ANDERSON each, individually, and in conspiracy used VIDOVIC'S name and likeness (her artistic signature) in connection with the resale, advertisement and other distribution of artistic productions (the paintings) where VIDOVIC had not consented to the use of her name and likeness in connection with the initial sale or distribution thereof. UPS and CARGO LARGO ultimately published that name in an auction sale and sold the goods wrongfully appropriated.

44. UPS, CARGO LARGO, and ANDERSON knew that VIDOVIC had not consented to the initial distribution as the painting itself was wrongfully converted.

45. Because the contents slip of the bill of lading detailed that the contents of the package included artwork, UPS and CARGO LARGO targeted VIDOVIC'S package with the specific intent of reselling her art product and commercially utilizing her name. Further, because

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

the packages were sent without additional insurance, UPS and CARGO LARGO determined that the artist would likely be unable or disinclined to pursue any remedy for the injuries sustained.

46. ANDERSON procured the painting with the intent to misappropriate the artist's name although he knew or reasonably should have known that the painting had been misappropriated from the artist. Furthermore, after he ascertained the theft to be certain, he continued to utilize her name in order to sell her paintings.

47. UPS, CARGO LARGO, and ANDERSON therefore violated the protections afforded by Fla. Stat. §540.08.

48. Such misappropriation directly and proximately caused VIDOVIC damages appropriately remedied by §540.08 including the loss of a reasonable royalty, compensatory damages (such as the loss of currency associated with her name as described in paragraph 41), and the punitive or exemplary damages provided by the statute.

WHEREFORE, Plaintiff, VIDOVIC, demands judgment against the Defendants UPS, CARGO LARGO, and ANDERSON for compensatory damages, pre-judgment and post-judgment interest, costs, and such other and further relief as the Court may deem appropriate under the circumstances. Plaintiff, VIDOVIC, further demands a trial by jury.

FURTHER, Plaintiff, VIDOVIC, reserves the right to amend all counts to include a claim for punitive and damages as warranted by the evidence.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all counsel on the attached list, this 26<sup>th</sup> day of March, 2009.

MLINAR v. UPS, et al.

Amended Complaint - Amended by Interlineations

JACK SCAROLA

Florida Bar No.: 169440

Searcy Denney Scarola Barnhart & Shipley, P.A.

2139 Palm Beach Lakes Boulevard

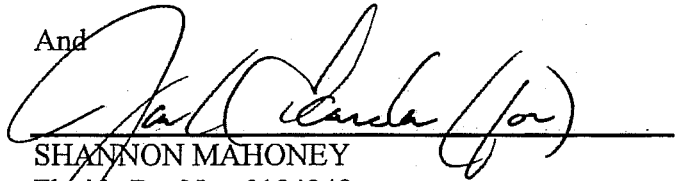
West Palm Beach, Florida 33409

Phone: (561) 686-6300

Fax: (561) 684-5816

Attorneys for Plaintiff

And

A handwritten signature in black ink, appearing to read "Shannon Mahoney (for)", is written over a horizontal line.

SHANNON MAHONEY

Florida Bar No.: 0194948

Law Offices of Shannon M. Mahoney, P.A.

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Phone: (561) 659-4414

Fax: (561) 659-6991

Attorney for Plaintiff

MLINAR v. UPS, et al.  
Amended Complaint - Amended by Interlineations

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IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT, IN AND  
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 502008CA036246

IVANA VIDOVIC MLINAR,

Plaintiff,

vs.

UNITED PARCEL SERVICE, INC, PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT CORP., d/b/a  
CARGO LARGO and AARON ANDERSON,

Defendant,

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**MOTION TO AMEND COMPLAINT BY INTERLINEATION**

Plaintiff Ivana Vidovic Mlinar requests this court to accept for filing the attached Amended Complaint, amended in name only. All Defendants named above have been served. In its Answer, Defendant United Parcel Service Inc. (UPS) noted a technical flaw in the name listed on the Complaint. The listed name was United Parcel Service LLC. Upon service, Recovery Management Corp. d/b/a Cargo Largo, (Recovery Management) notified Plaintiff's counsel that while it recognized itself as the proper defendant according to the DBA designation and description contained in the identification of the parties, it too was named erroneously. It was listed as Recovery Management Services.

The attached Amended Complaint exclusively amends the Caption and identity of those two defendants. Recovery Management has stipulated to service by regular mail of such Amended Complaint and to answer within 20 days of such service.

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000044

IVANA VIDOVIC MLINAR vs. UNITED PARCEL SERVICE CO., PAK MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT SERVICES LLC d/b/a CARGO LARGO and AARON ANDERSON

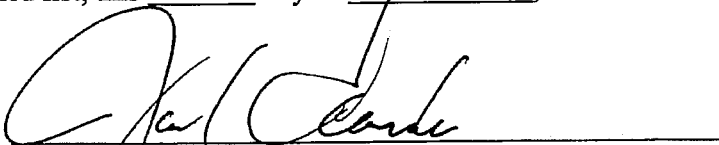
Case No.:

Motion to Amend Complaint by Interlineation

Page 2 of 3

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by

U.S. Mail to all counsel on the attached list, this 26<sup>th</sup> day of March, 2009.



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IVANA VIDOVIC MLINAR vs. UNITED PARCEL SERVICE CO., PAK MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT SERVICES LLC d/b/a CARGO LARGO and AARON ANDERSON

Case No.:

Motion to Amend Complaint by Interlineation

Page 3 of 3

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IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR  
PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

IVANA VIDOVIC MLINAR,

Plaintiff

v.

UNITED PARCEL SERVICE  
INC., PAK MAIL OF  
WELLINGTON, INC.,  
RECOVERY MANAGEMENT  
CORP. d/b/a CARGO LARGO and  
AARON ANDERSON,

Defendants.

CASE NO:

502008CA0036246XXXXMB

DEFENDANT UNITED PARCEL SERVICE, INC.'S  
MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiff's claims against United Parcel Service, Inc. ("UPS") in this case are without merit and unsupported by law. In addition, no genuine issues of material fact exist, allowing this Court to grant summary judgment in favor of UPS.

Plaintiff's claims arise out of an interstate shipment by UPS from Florida to New York on November 28, 2005. The package at issue contained artwork created by Plaintiff. Plaintiff's Complaint alleges a myriad of claims grounded

in Florida law and essentially argues that UPS acted unlawfully in diverting Plaintiff's lost paintings to its overgoods carrier, Recovery Management Corp. ("Recovery Management"), for profit. Although Plaintiff artfully attempts to sidestep the undisputed facts and well settled law, it is unmistakably clear that Plaintiff shipped a package via UPS, she did not declare a value for this package, the package was lost and Plaintiff is entitled to recover no more than \$100 from UPS based on its limitation of liability.

## **II. STATEMENT OF UNDISPUTED FACTS**

1. UPS is a common carrier which transports and delivers more than fifteen million packages every day. UPS contracts with customers or shippers to transport and deliver packages.
2. UPS operates pursuant to a Tariff. The UPS Tariff provides the terms and conditions of all shipments via UPS. The UPS Tariff dated August 15, 2005, in effect at the time of the shipment at issue in this case, is attached to the Affidavit of Brian Konesko ("Konesko Affidavit") as Exhibit A.

3. Pak Mail of Wellington, Inc. ("Pak Mail") is a UPS Authorized Shipping Outlet or Third-Party Retailer of UPS's services. It is an independently owned and operated business and is not an agent of UPS.
4. On or about November 28, 2005, Plaintiff's husband, Frane Mlinar contracted with Pak Mail in order to ship the package that is the subject of this litigation via UPS service. See Amended Complaint ¶ 7.
5. At the time of her shipment, Plaintiff was provided with UPS tracking number 1Z0XW5271244846234. *Id.* at ¶ 2. Attached to the Konesko Affidavit as Exhibit B is a copy of a Receipt issued to Plaintiff for the shipment of the package bearing tracking number 1Z0XW5271244846234, which was provided to UPS by Plaintiff during the course of this litigation.
6. As shown on the receipt and confirmed at her deposition, Plaintiff did not request or pay to declare a value for the shipment of the package.
7. The package contained two paintings which were shipped in a sealed container from Florida to Mario Novak in Atlantic Beach, New York. *Id.* at ¶¶ 8-9.

8. When the package was delivered by UPS to the intended address in New York, it was empty. The duct tape used to seal the container had been sliced and the paintings had been removed. *Id.* at ¶ 11.
9. Two days after returning home to Florida, Plaintiff reported this to UPS and Pak Mail. Plaintiff further reported that the paintings were labeled with the identity of the artist and her address. *Id.* at ¶ 13-15.
10. Eight months after a claim was filed, Pak Mail advised Plaintiff that she was entitled to \$100 for the missing package. *Id.* at ¶ 16.
11. As set forth in Plaintiff's Complaint, the paintings were later sold by Recovery Management to an individual, Aaron Anderson. *Id.* at ¶ 17.
12. Aaron Anderson located Plaintiff and told her that he had obtained the paintings from Cargo Largo. *Id.* at ¶ ¶17, 20.
13. The paintings have been returned by Mr. Anderson to Plaintiff.

### III. LEGAL ARGUMENT AND CITATION OF AUTHORITIES

#### A. APPLICABLE STANDARD

Summary judgment is proper if there is no genuine issue of material fact and if the moving party is entitled to a judgment as a matter of law. Fla. R. Civ. P. 1.510(c); *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126 (Fla. 2000); *Markowitz v. Helen Homes of Kendall Corp.*, 826 So. 2d 256, 259 (Fla. 2002); *Fisel v. Wynns*, 667 So. 2d 761, 764 (Fla. 1996). Once the movant offers competent evidence to support its motion, the opposing party must come

forward with counterevidence to reveal a genuine issue of disputed material fact. It is not enough for the opposing party to merely assert that an issue exists. *See also Fla. Bar v. Mogil*, 763 So. 2d 303, 307 (Fla. 2000); *Fisel*, 667 So. 2d at 764. “[W]here the determination of the issues of a lawsuit depends upon the construction of a written instrument and the legal effect to be drawn therefrom, the question at issue is essentially one of law only and determinable by entry of summary judgment.” *See Aberdeen at Ormond Beach, L.P.*, 760 So. 2d at 131.

**B. FEDERAL LAW GOVERNS THIS CASE AND  
PREEMPTS ANY CAUSE OF ACTION UNDER STATE  
LAW.**

**(1) In accordance with the broad preemptive effect of federal law, all claims related to UPS’s failure to deliver a package are preempted.**

Regardless of whether Plaintiff characterizes the claims at issue in this case as negligence, fraud or as arising under Florida’s state statutes, the interstate transportation of packages by a common carrier, such as UPS, is governed exclusively by federal law. *Smith v. United Parcel Serv.*, 296 F.3d 1244 (11th Cir. 2002) (causes of action alleging fraud, negligence, wantonness, or willfulness, outrage and conspiracy were all preempted by the Carmack Amendment);<sup>1</sup> *Humphrey v. United Parcel Serv. Co.*, No. 05-20283-CIV, 2005 WL

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<sup>1</sup> Every United States Court of Appeals (including the Eleventh Circuit in *Smith*) that has considered the issue has concluded that the Act preempts a shipper's common law and state

5643872, at \*3 (S.D. Fla. May 23, 2005) (quoting *Smith*, 296 F.3d at 1248-49 and explaining that “[O]nly claims based on conduct separate and distinct from the delivery, loss of, or damage to goods escape preemption”) *aff’d*, 200 F. App’x 950 (11th Cir. 2006); *Eventus Mktg., Inc. v. Sunset Transp. Co.*, 722 F. Supp 2d 1311 (S.D. Fla. 2010) (finding that state law claims for breach of contract, conversion and unjust enrichment were all preempted); *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 368 (1986) (providing that when a federal statute expressly supersedes state law or provides a federal regulatory scheme that leaves no room for state regulation, federal law pre-empt[s] state common law remedies); *see also Molloy v. Allied Van Lines, Inc.*, 267 F. Supp. 2d 1246, 1251 (M.D. Fla. 2003); *A.I.G. Uru. Compania de Seguros, S.A. v. AAA Cooper Transp.*, 334 F.3d 997, 1003 (11th Cir. 2003); *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Circle Redmont, Inc. v. Mercer Transp. Co.*, 795 So. 2d 239, 241 (Fla. 5th DCA 2001); *Am. Eye Way, Inc v. Roadway Package Sys., Inc.*, 875 F. Supp. 820 (S.D. Fla. 1995).

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statutory claims for damage or loss of goods moving in interstate commerce through a common carrier. *Intech, Inc. v. Consol. Freightways, Inc.*, 836 F.2d 672, 677 (1st Cir. 1987); *N. Am. Phillips Corp. v. Emery Air Freight Corp.*, 579 F.2d 229, 234 (2d Cir. 1978); *Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700, 706 (4th Cir. 1993); *Air Prods. and Chems., Inc. v. Ill. Cent. Gulf R.R. Co.*, 721 F.2d 483, 487 (5th Cir. 1983); *W. D. Lawson & Co. v. Penn Cent. Co.*, 456 F.2d 419, 421 (6th Cir. 1972); *Hughes v. United Van Lines, Inc.*, 829 F.2d 1407, 1415 (7th Cir. 1987); *cert. denied*, 485 U.S. 913 (1988); *Hopper Furs, Inc. v. Emery Air Freight Corp.*, 749 F.2d 1261, 1264 (8th Cir. 1984); *Hughes Aircraft Co. v. N. Am. Van Lines, Inc.* 970 F.2d 609, 613 (9th Cir. 1992); *Underwriters at Lloyds’ v. N. Am. Van Lines, Inc* 890 F.2d 1112, 1121 (10th Cir. 1989).

(2) Federal Preemption extends to Plaintiff's claims for conspiracy and any alleged violation of Florida's statutes.

The Supreme Court has consistently held that the Carmack Amendment preempts all state statutory and common law claims against a motor carrier for goods that are lost or damaged in interstate commerce. *See Bally v. Freight & Shipping, Inc., et. al.*, No. 1:10-CV-00512, 2010 WL 5393969 (S.D. Ohio Dec. 21, 2010) (citing *Adams Express Co. v. Croninger*, 226 U.S. 491 (1913); *W. D. Lawson & Co. v. Penn Cent. Co.*, 456 F.2d 419 (6th Cir.1972)). Courts have ruled that federal preemption includes claims related to conspiracy. *Reeves v. Mayflower Transit, Inc.*, 87 F. Supp. 2d 1251, 1254 (M.D.Ala.1999) (finding all of a plaintiff's state law claims, including civil conspiracy were preempted by the Carmack Amendment); *Miracle of Life, LLC v. N. Am. Van Lines, Inc.*, 368 F. Supp. 2d 494 (D.S.C. 2005) (same). Courts have also ruled that the breadth of preemption includes state statutory claims,<sup>2</sup> *see State ex rel. Davis v. Atl. Coast Line R.R. Co.*, 103 Fla. 1204, 140 So. 824 (1932) (after order by Interstate

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<sup>2</sup> *See Moffit v. Bekins Van Lines Co.*, 6 F.3d 305, 306-07 (5th Cir. 1993); *Miracle of Life*, 368 F. Supp. 2d 494; *Rini v. United Van Lines, Inc.*, 104 F.3d 502, 506 (1st Cir. 1997) (holding that a shipper's state law claim for violation of the Massachusetts Consumer Protection Act was preempted by the Carmack Amendment); *Miller v. Reebe Storage & Moving Co.*, No. 93-C-3986, 1993 WL 414689 (N.D. Ill., Oct. 14, 1993) (holding that the Carmack Amendment preempted claims arising under the Illinois Consumer Fraud and Deceptive Practice Act; the Illinois Unlawful Practices Act; and the Illinois Untrue, Misleading or Deceptive Advertising Act); *Malowe v. Mayflower Transit, Inc.* 819 F. Supp. 724 (E.D. Tenn. 1993) (holding that statutory claims under the Tennessee Consumer Protection Act and bad faith penalty provisions were found to be preempted); *Neal v. Allied Van Lines, Inc.*, No. A 06 CA 1008 SS, 2007 WL 831835 (W.D.Tex. Mar. 13, 2007) (actions under the Texas Deceptive Trade Practices Act were found to be preempted).

Commerce Commission, state authority exerted on same subject should yield on its own initiative in recognition of dominant federal authority), and that claims for punitive damages<sup>3</sup> or attorney's fees<sup>4</sup> are preempted by the Carmack Amendment. Likewise, Plaintiff's legal theories, all of which are grounded in Florida law, are preempted by federal law and are not viable in this case.

**(3) Any alleged damages incurred by Plaintiff arise from UPS's failure to deliver her package.**

While the Eleventh Circuit Court of Appeals has recognized that a shipper's claim against a carrier may be excluded from the reach of the Carmack Amendment if it is "separate and distinct" from the delivery, loss of, or damage to goods, *see Smith*, 296 F.3d at 1248-49, Plaintiff's purported injury in the action at hand arises precisely from the delivery, loss of, or damage to the goods she entrusted to UPS for shipping. In a case that is very similar to

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<sup>3</sup> *Morris v. Covan World Wide Moving, Inc.*, 144 F.3d 377, 383 (5th Cir. 1998); *Cleveland v. Beltman N. Am. Co.*, 30 F.3d 373, 379 (2d Cir.1994) (finding that an award of punitive damages could well "thwart one of the primary purposes of the Carmack Amendment").

<sup>4</sup> Because the Carmack Amendment is Plaintiff's exclusive remedy and preempts all state law claims, any claim for attorney's fees is also preempted. *See e.g., Accura Sys., Inc. v. Watkins Motor Lines, Inc.*, 98 F.3d 874, 877 (5th Cir. 1996) (holding that attorney's fees authorized by state law are not available under the Carmack Amendment); *Polygram Group Distribution, Inc. v. Transus, Inc.*, 990 F. Supp. 1454 (N.D. Ga. 1997); *Fine Foliage of Fla., Inc. v. Bowman Transp., Inc.*, 698 F. Supp. 1566, 1576 (M.D.Fla. 1988) (explaining that each party in a lawsuit ordinarily shall bear its own attorney's fees unless there is express statutory authorization to the contrary); *aff'd*, 901 F.2d 1034 (11th Cir. 1990); *Strickland Transp. Co. v. Am. Distrib. Co.*, 198 F.2d 546, 547 (5th Cir. 1952) (holding that attorney's fees authorized by state law are not available in Carmack Amendment actions).

the case here, *Aircraft Instrument & Radio, Co. v. United Parcel Service, Inc.*, 117 F. Supp. 2d 1032 (D. Kan. 2000), a federal district court ruled that UPS's apparent negligence in losing and improperly disposing of plaintiff's package did not nullify the \$100 limitation of liability, even though UPS sold plaintiff's \$60,000 aircraft instrument as unclaimed property for \$23.53 after the shipper had reported it as missing.

In *Aircraft Instrument & Radio, Co.*, UPS had been notified by both the shipper of the package and the Federal Bureau of Investigation about a potential theft of the package at issue and asked UPS to search for the aircraft instrument that was contained in it. The aircraft instrument however, remained at UPS's overgoods department until it was sold to its overgoods carrier months later. Much like in the instant case, the plaintiff in *Aircraft Instrument & Radio, Co.*, argued that preemption did not apply because UPS converted the property by selling it to a third party for profit.

The federal district court disagreed. The court explained that despite plaintiff's allegations, nothing suggests that this was anything other than a case of "the right hand at UPS not knowing what the left hand was doing." *Id.* at 1037. In accordance with public policy and well settled law, the court enforced the limitation of liability noting that, although the plaintiff may find it unfair, "Neither is it conformable to plain principles of justice that a shipper may understate the value of his property for the purpose of reducing the [shipping]

rate, and then recover a larger value in case of loss.” *Id.* (quoting *Hart v. Pa. R.R. Co.*, 112 U.S. 331, 340 (1884)).

For purposes of this Motion, UPS concedes that (1) it did not deliver the Plaintiff's paintings, (2) UPS had notice that the paintings, having contained Plaintiff's name and address, could have belonged to Plaintiff, and (3) despite this UPS transferred the paintings to Recovery Management. Still, neither the Complaint, nor any of the evidence produced by Plaintiff provides a basis to conclude that the claims Plaintiff has asserted against UPS, nor any alleged damages she has incurred are “separate and distinct” from UPS's failure to transport and deliver her items pursuant to the interstate shipping contract. *See also Kemper Ins. Cos. v. Fed. Express Corp.*, 115 F. Supp. 2d 116 (D. Mass 2000) (rejecting plaintiff's argument that Federal Express' limitation of liability should be set aside because the shipments at issue were stolen by Federal Express' employees) *aff'd* 252 F.3d 509 (1st Cir. 2001).

**(4) Plaintiff has No Good Faith Basis to Assert that UPS's Limitation of Liability Should Not Apply Because it Engaged in a Pattern of Willful or Criminal Conduct.**

In Plaintiff's unseemly attempt to shoehorn the straight-forward facts of this case into a scheme of willful or criminal activity, Plaintiff makes baseless

and sweeping accusations that are unsupported by any evidence.<sup>5</sup> In fact, Plaintiff has not and cannot produce any substantiation that UPS engaged in willful and criminal acts.

UPS concedes that Plaintiff's paintings were not delivered and that UPS was given notice that Plaintiff was the rightful owner of these paintings. UPS has produced testimony and documents showing that UPS received no more than approximately sixty dollars (\$60.00) for the transfer of the paintings from UPS to Recovery Management.<sup>6</sup> There is not a shred of evidence in the record supporting the Plaintiff's legal theory here. Nor do the facts show that UPS, with profits of more than \$45 billion per year, willfully diverted Plaintiff's painting to its Overgoods Carrier for profit.<sup>7</sup>

An examination of the few cases touching on the subject of willful misconduct show that "[e]ven if there could be some level of willful and intentional conduct by a carrier that would be so egregious as to rise to the

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<sup>5</sup> As a reading of Plaintiff's Complaint shows, Plaintiff's sweeping allegations include accusations that UPS engaged in a pattern of criminal activity in order to systematically take artwork such as that belonging to the Plaintiff and that UPS has obtained property by falsely impersonating themselves as a shipping enterprise.

<sup>6</sup> See Konesko Affidavit ¶ 19 explaining that pursuant to UPS's agreement with Recovery Management, UPS would have received approximately twenty to twenty-nine dollars (\$20-29) per painting for the transfer of the paintings to Recovery Management.

<sup>7</sup> UPS has produced information and testimony showing that UPS received annual payments from Recovery Management from 2005 through 2008. See Konesko Affidavit ¶ 18. This amount pales in comparison to both UPS's overall revenue and its revenue attributed to its small package operations. Should the Court desire to learn the actual amount, this confidential information will be made available for *in camera* review.

level of conversion for its own use. . . ,” *Kemper Ins. Cos.*, 115 F. Supp. 2d at 126., the Plaintiff can not make such a showing here. *See also Am. Cyanamid Co. v. New Penn Motor Exp.*, 979 F.2d 310, 315-316 (3d Cir. 1992) (the court upheld a declared value limitation, opining that “nothing short of intentional destruction or conduct in the nature of theft of the property will permit a shipper to circumvent the liability limitations in a released value provision”). The *American Cyanamid* court rejected an argument that the carrier’s willfulness rendered the provision unenforceable. The court explained:

[W]hen goods are lost or destroyed during transportation, there probably will be many circumstances in which a shipper will be able reasonably to characterize the carrier’s conduct as willful, and a rule of law allowing recovery in excess of the released value, if willfulness can be demonstrated, will lead to increased litigation. We think it better that there be certainty in these commercial settings, particularly since the shipper can protect itself by paying for a higher level of protection.

*Id.* at 316. Try as she might, Plaintiff cannot ignore or elude the terms of the Tariff, including the limitation of liability, she agreed to when shipping her paintings through UPS for a reasonably low rate.

### **C. THE TERMS OF THE UPS TARIFF LIMIT PLAINTIFF’S LIABILITY TO \$100.**

As explained in the Plaintiff’s Complaint, Plaintiff entered into a contract with Pak Mail for the shipment of her package via UPS service. Plaintiff can provide no reason why the contractual limitation of liability does not bar the

recovery she seeks from UPS. It is well established that “the contract between the shipper [Plaintiff] and the carrier [Defendant] consists of the bill of lading and the [applicable] tariff.” *United Parcel Serv. v. S.C. Tees, Inc.*, 508 S.E.2d 34, 36 (S.C. Ct. App. 1998); see *Bryant v. United Parcel Serv. of Am.*, No. 1-05-cv-1352-RBH, 2006 WL 2521613, at \*2 (D.S.C. Aug. 30, 2006) (explaining that it is “well established by the courts. . . throughout this country” that the contract between the shipper and the carrier consists of the bill of lading and the applicable tariff); see also *S. Pac. Transp. Co. v. Commercial Metals Co.*, 456 U.S. 336 (1982); *Se. Express Co. v. Pastime Amusement Co.*, 299 U.S. 28, 29 (1936) (finding liability governed by the provisions of the applicable tariff); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 930 (5th Cir. 1997) (same); *McCall-Thomas Eng’g Co. v. Fed. Express Corp.*, 81 F.3d 28, 30 (4th Cir. 1996) (same); *Aero Trucking, Inc. v. Regal Tube Co.*, 594 F.2d 619, 621 (7th Cir. 1979) (“It has long been held that properly published tariffs are incorporated into any agreement between the shipper and carrier.”); *N. Am. Phillips Corp. v. Emery Air Freight Corp.* 579 F.2d 229, 233 (2d Cir. 1978) (tariffs “govern not only the nature and extent of [the carrier’s] liability, but also the nature and extent of the shipper’s right of recovery”); *American Ry. Express Co. v. Fegenbush*, 107 Fla. 145, 144 So. 320 (1932) (Liability for damage to interstate shipments under through bills of lading depends on acts of Congress, contract and common law as enforced by federal courts).

As explained in the UPS Tariff:

Each domestic package or international shipment is automatically protected by UPS against loss or damage up to a value of \$100 (US). Unless a greater value is recorded in the declared value field of the UPS source document or the UPS shipping system used, the shipper agrees that the released value of each domestic package or international shipment is no greater than \$100 (U.S.), which is a reasonable value under the circumstances surrounding the transportation, and that UPS shall not be liable for more than \$100 for each domestic package or international shipment....

UPS Tariff, page 16. As supported in the case law cited above, this provision controls both UPS's liability and Plaintiff's recovery and UPS is therefore liable to Plaintiff for no more than \$100.

#### **D. PLAINTIFF'S COMPLAINT IS TIME BARRED.**

The contractual limitation of time for bringing actions with respect to an interstate shipment is valid and enforceable according to federal law, which supersedes state statutes. *Atlantic Coast Line R.R. Co. v. Chase & Co.*, 109 Fla. 50, 146 So. 658 (1933). As explained above, Plaintiff alleges in her Complaint that two days after arriving home from New York she advised Pak Mail and UPS that her paintings were not delivered and provided documents to support her claim for the missing paintings. *See* Complaint, ¶ 15. Approximately eight months after the claim was filed with UPS, Pak Mail advised that Plaintiff was entitled to \$100 for the missing package. *Id.* ¶ 16. Based on the allegations in the Complaint and the testimony of Plaintiff, this would have been in or

around August 2006. This action was instituted by way of filing a Complaint on November 20, 2008, *more than* two years later.

The UPS Tariff provides that any lawsuits must be preceded by the filing of a claim with UPS and that lawsuits must be instituted within two years of the denial of any claim. Specifically, the UPS Tariff states:

As a condition precedent to recovery, all claims for loss or damage to shipments via UPS must be filed, in writing, with UPS nine months after delivery or after a reasonable time for delivery has elapsed. Claims not made in writing within nine months after delivery are deemed waived.

UPS Tariff, pgs. 14-15, Items 510 and 520. The Tariff further states:

Lawsuits with respect to loss or damage to packages shall be instituted within two years after denial of any portion of a claim. Where claims are not filed or suits are not instituted thereon, such claims shall be deemed waived and will not be paid.

UPS Tariff, pg. 15, Item 520. Under the terms of the Tariff identified above, Plaintiff was required to file a lawsuit within two years from the denial of her claim. For this reason alone, UPS bears no liability for the shipment of the package at issue. Under governing federal law, a common carrier such as UPS may limit the time in which a lawsuit may be brought with respect to its shipments. *See Arctic Express, Inc. v. Del Monte Fresh Produce NA, Inc.*, 366 B.R. 786 (S.D. Ohio 2007) (explaining that pursuant to federal law, common carriers may restrict the time limit

in which lawsuits relating to packages may be instituted); *Kuehn v. United Van Lines, LLC*, 367 F. Supp. 2d 1047 (S.D. Miss. 2005) (explaining that the Carmack Amendment permits a carrier to limit the time in which suit may be brought to two years and a day after the shipper receives written notice that the carrier has denied part or all of the shipper's claim).

**E. ENFORCING UPS'S LIMITATIONS OF LIABILITY IS A MATTER OF FUNDAMENTAL FAIRNESS**

Courts have explicitly recognized that rate structures that set rates and limit liability benefit shippers by allowing them access to low rates that would not otherwise be available if carriers faced unlimited liability for every shipment. *Adams Express Co. v. Croninger*, 226 U.S. 491, 509-11 (1913); *Hill Constr. Corp. v. Am. Airlines, Inc.*, 996 F.2d 1315, 1317 (1st Cir. 1993) (explaining that liability limitations permit a carrier “to avoid unforeseeably high liability for especially valuable cargo; they permit shippers of ordinary items to pay somewhat lower freight bills; and they permit shippers of valuable items to choose between paying an insurance premium to the carrier and obtaining, perhaps less expensive, insurance on their own”). UPS must limit its liability for the millions of packages it ships in order to provide its shippers access to the reasonable, affordable shipping rates it offers. As held by the Supreme Court, enforcing a carrier’s limitation of liability is a matter of fundamental fairness. “Having accepted the benefit of the lower rate dependent upon the

specified valuation, [the shipper] is estopped from asserting a higher value. To allow him to do so would be to violate the plainest principles of fair dealing.”

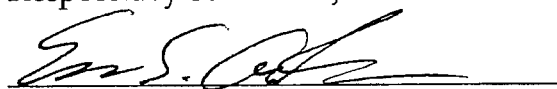
*Am. Ry. Express Co. v. Lindenburg*, 260 U.S. 584, 592 (1923); *see also* *George N.*

*Pierce Co. v. Wells Fargo & Co.* 236 U.S. 278, 286 (1915) (to permit full value recovery where shipper intentionally took advantage of low shipping rate would provide shipper an undue advantage).

### III. CONCLUSION

Plaintiff's claims in this lawsuit arise out of the loss of goods shipped in interstate commerce by UPS, a common carrier. As the overwhelming weight of the authorities in this area of the law hold, Plaintiff's state law causes of action are preempted by federal law and Plaintiff is entitled to one hundred dollars (\$100) based on UPS's limitation of liability. Since there are no genuine issues of material facts present in this case and because UPS is entitled to judgment as a matter of law, UPS requests that this Court enter summary judgment in its favor.

Respectfully Submitted,



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*Admitted Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished upon the attached Service List by mail delivery on this 16<sup>th</sup> day of May, 2011.



Evan S. Gutwein, Esq.

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IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR  
PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

IVANA VIDOVIC MLINAR,

Plaintiff

v.

UNITED PARCEL SERVICE  
INC., PAK MAIL OF  
WELLINGTON, INC.,  
RECOVERY MANAGEMENT  
CORP. d/b/a CARGO LARGO and  
AARON ANDERSON,

Defendants.

CASE NO:

502008CA0036246XXXXMB

AFFIDAVIT OF BRIAN KONESKO

1. My name is Brian Konesko. I am over eighteen (18) years of age and am competent to testify regarding the matters herein.
2. The facts set forth herein are true and correct and based upon my personal knowledge. This affidavit is being given for use in the above-styled action.
3. I am currently employed by United Parcel Service, Inc. ("UPS"), as a member of UPS's Corporate Security Staff. I oversee and manage UPS's overgoods operation. I have been employed by UPS for approximately thirty-two years. As a result, I have knowledge of UPS's policies, business practices,

Exhibit "A"

UPS's claims records and shipping contracts, including the terms and conditions contained in the UPS Tariff.

4. UPS is a common carrier which transports and delivers more than fifteen million packages every day. UPS contracts with customers or shippers to transport and deliver packages.

5. UPS operates pursuant to a Tariff. The UPS Tariff provides the terms and conditions of all shipments via UPS. The UPS Tariff dated August 15, 2005, in effect at the time of the shipment at issue in this case, is attached hereto as Exhibit A.

6. The UPS Tariff provides that:

Each domestic package or international shipment is automatically protected by UPS against loss or damage up to a value of \$100 (US). Unless a greater value is recorded in the declared value field of the UPS source document or the UPS shipping system used, the shipper agrees that the released value of each domestic package or international shipment is no greater than \$100 (U.S.), which is a reasonable value under the circumstances surrounding the transportation, and that UPS shall not be liable for more than \$100 for each domestic package or international shipment....

UPS Tariff, page 16.

7. I understand that on or about November 28, 2005, Plaintiff and/or her husband shipped the package at issue in this litigation through Pak Mail of Wellington, Inc. ("Pak Mail") via UPS service and that the package contained two paintings. See Amended Complaint ¶ 7.

8. Based on my knowledge of this lawsuit I am aware that Plaintiff was provided with UPS tracking number 1Z0XW5271244846234. *Id.* at ¶ 2.

Attached hereto as Exhibit B is a copy of a Receipt issued to Plaintiff for the shipment of the package bearing tracking number 1Z0XW5271244846234.

This receipt was provided to UPS by Plaintiff during the course of this litigation.

9. As shown on the receipt, Plaintiff did not request or pay to declare a value for the shipment of the package.

10. While UPS strives to deliver every package on time and in good condition, unfortunately some packages are lost or damaged.

11. UPS does not dispute that the contents of Plaintiff's package were not delivered.

12. Although UPS has no knowledge or information with respect to whether the paintings showed Ms. Mlinar's name, UPS does not dispute Plaintiff's contention that the paintings showed Ms. Mlinar's name on the front and back as she alleges.

13. I understand that Plaintiff further alleges that her paintings were transferred by UPS to Recovery Management Corp. ("Recovery Management") who is also a Defendant in this case.

14. UPS contracts with Recovery Management for support in managing UPS's overgoods<sup>1</sup> operation so UPS does not dispute Plaintiff's allegation that the paintings were transferred by UPS to Recovery Management.

15. Recovery Management assists and contracts with UPS not only for the transfer of overgoods from UPS to Recovery Management, but for the services Recovery Management provides to UPS in processing and storing the overgoods in their warehouse.<sup>2</sup>

16. UPS's agreement with Recovery Management provides for a payment from Recovery Management to UPS based on the number of billable units received by Recovery Management from UPS.

17. In the time period of 2005 through 2008, Recovery Management paid UPS approximately twenty to twenty-nine dollars (\$20-29) per billable unit.

18. The following total annual payments were made by Recovery Management to UPS from 2005 through 2008.

---

<sup>1</sup> Generally, overgoods are any articles within the UPS system for which the shipper and the consignee are unknown.

<sup>2</sup> Recovery Management also assists UPS in returning any overgoods to their owners if owners are identified.

| Year: | Payment:   |
|-------|------------|
| 2005  | [REDACTED] |
| 2006  | [REDACTED] |
| 2007  | [REDACTED] |
| 2008  | [REDACTED] |

19. Pursuant to UPS's agreement with Recovery Management, UPS would have received approximately twenty to twenty-nine dollars (\$20-29) per painting (or billable unit) for the transfer of the paintings from UPS to Recovery Management.

20. I declare under penalty of perjury that the foregoing is true and correct, and if called as a witness at trial, I can competently testify thereto.

Brian Koniesko  
BRIAN KONIESKO

Sworn to and subscribed before me

this 13 day of May, 2011

Notary Public  
Tomp Jacobs

United Parcel Service, Inc. (a New York corporation) MC-116200

United Parcel Service, Inc. (an Ohio corporation) MC-115495

United Parcel Service Canada Ltd. MC-186275

**GENERAL TARIFF CONTAINING THE  
CLASSIFICATIONS, RULES AND PRACTICES  
FOR THE  
TRANSPORTATION OF PROPERTY**

In Individual Shipments of Packages or Articles Not Exceeding 150 Pounds per piece nor exceeding 108 inches in Length, or 165 inches in Length and Girth combined, except as provided in Item 1030 of Tariff, via all Motor and Substituted Service Between Points and Places in the United States. Certain other classifications, rules and practices may apply as provided in the shipper's contract.

For Reference to Governing Publications see Item 400 of Tariff

EFFECTIVE: August 15, 2005

Issued By:

OFFICE OF GENERAL COUNSEL  
UNITED PARCEL SERVICE, INC.  
55 Glenlake Parkway NE  
Atlanta, Georgia 30328

Permanent Address:  
United Parcel Service, Inc.  
(a New York corporation)  
55 Glenlake Parkway, NE  
Atlanta, Georgia 30328

Permanent Address:  
United Parcel Service Canada Ltd.  
6285 Northam Drive, Suite 400  
Mississauga, Ontario  
Canada L4V 1X5

Permanent Address:  
United Parcel Service, Inc.  
(an Ohio corporation)  
55 Glenlake Parkway, NE  
Atlanta, Georgia 30328

"A"

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

**TABLE OF CONTENTS**

| SUBJECT                                                                                  | ITEM | PAGE |
|------------------------------------------------------------------------------------------|------|------|
| List of Participating Carriers                                                           |      | 3    |
| Governing Publications                                                                   | 400  | 3    |
| Supplemental Corrections or Successive Issues                                            | 420  | 4    |
| Firearms and Ammunition                                                                  | 425  | 4    |
| Measurement of Combined Length and Girth                                                 | 435  | 5    |
| Packaging                                                                                | 437  | 5    |
| Refusal of Service                                                                       | 440  | 5    |
| Right of Inspection                                                                      | 442  | 5    |
| Definition of "Package"                                                                  | 445  | 5    |
| UPS Automated Shipping System and Source Document                                        | 446  | 5    |
| Package Level Detail (PLD) and Smart Label                                               | 447  | 6    |
| Definition of "Delivery"                                                                 | 448  | 6    |
| Payment of Charges                                                                       | 450  | 6    |
| Use of UPS-Provided Materials and Services                                               | 452  | 7    |
| Use of UPS Electronic Information Systems                                                | 455  | 7    |
| Items Not Accepted for Transportation                                                    | 458  | 7    |
| Definition of Articles of Unusual Value Which Are Not Accepted by UPS for Transportation | 460  | 8    |
| Human Remains, and Biological Materials                                                  | 461  | 8    |
| Alcoholic Beverages                                                                      | 462  | 9    |
| Live Animals                                                                             | 463  | 9    |
| Tobacco Products                                                                         | 464  | 9    |
| Correction of Addresses                                                                  | 465  | 10   |
| Refused Packages Returned                                                                | 470  | 10   |
| Drop Shipment                                                                            | 472  | 10   |
| Delivery Change Requests                                                                 | 474  | 10   |
| Deliveries Attempted Three Times Without Extra Charge                                    | 475  | 11   |
| Ship Notification                                                                        | 476  | 11   |
| Shipper Release                                                                          | 477  | 11   |
| Package Tracking/Tracing and Refund Request Charge                                       | 478  | 11   |
| C.O.D. Packages                                                                          | 480  | 11   |
| Remittance of C.O.D.s                                                                    | 485  | 13   |
| UPS Return Services                                                                      | 496  | 13   |
| Interruption of Service                                                                  | 500  | 13   |
| Claims and Legal Actions                                                                 | 505  | 14   |
| Filing of Claims for Loss or Damage To Property                                          | 510  | 14   |
| Acknowledgment of Claims for Loss or Damage To Property                                  | 515  | 14   |
| Time Limit for Filing Claims for Loss or Damage To Property                              | 520  | 15   |
| Investigation of Claims for Loss or Damage To Property                                   | 525  | 15   |
| Disposition of Claims for Loss or Damage To Property                                     | 530  | 15   |
| Limitations of Liability                                                                 | 535  | 16   |
| Method of Determining Transportation Rates                                               | 540  | 17   |
| Options for Payment of Charges                                                           | 560  | 18   |

# MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000072

## RULES AND OTHER PROVISIONS WHICH GOVERN THE TRANSPORTATION OF PROPERTY

| SUBJECT                                                      | ITEM | PAGE |
|--------------------------------------------------------------|------|------|
| Weekly Service Charge for Daily Pickup Service               | 575  | 21   |
| Hazardous Materials Service                                  | 580  | 21   |
| Hazardous Waste and Mercury-Containing Waste                 | 590  | 22   |
| Portable Electronic Devices                                  | 592  | 22   |
| Delivery Confirmation Service                                | 600  | 22   |
| Proof of Delivery (P.O.D.)                                   | 601  | 22   |
| Additional Handling Charges                                  | 605  | 22   |
| Fuel Surcharge                                               | 606  | 23   |
| Delivery Service for Shippers Receiving Daily Pickup Service | 1000 | 23   |
| On-Call Pickup Service                                       | 1005 | 23   |
| UPS Ground Service Guarantee                                 | 1010 | 24   |
| UPS 3 Day Select Service                                     | 1020 | 24   |
| Rates for Oversize, Overweight and Large Packages            | 1030 | 25   |
| Expedited Service                                            | 1060 | 25   |
| UPS Customer Center                                          | 1080 | 27   |
| The UPS Store™/Third Party Retailers                         | 1090 | 27   |
| Hundredweight Service                                        | 2000 | 28   |

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

| ITEM         | LIST OF PARTICIPATING CARRIERS                                                                                                     |                    |
|--------------|------------------------------------------------------------------------------------------------------------------------------------|--------------------|
| CARRIER CODE | MOTOR CARRIERS                                                                                                                     | CERTIFICATE NUMBER |
| UPSN         | United Parcel Service Inc. (a New York corporation)                                                                                | MC-116200          |
| UPSS         | United Parcel Service Inc. (an Ohio corporation)                                                                                   | MC-115495          |
| UPSC         | United Parcel Service Canada Ltd.                                                                                                  | MC-186275          |
|              | Each of the participating carriers individually, or any combination of them collectively, are sometimes referred to herein as UPS. |                    |

400

GOVERNING PUBLICATIONS

This Tariff, containing the Rates, Classifications, Rules and Practices, incorporates herein the following described tariffs, and their supplements or loose-leaf page amendments or successive issues thereof, except to the extent the terms therein are inconsistent with the terms of this Tariff, in which case the terms of this Tariff govern.

| TITLE OF KIND OF TARIFF | ISSUING AGENT OR CARRIER    | TARIFF |
|-------------------------|-----------------------------|--------|
|                         |                             |        |
| Local Zone Charts       | UNITED PARCEL SERVICE, INC. |        |

The effective UPS Rates for shippers located in the 48 contiguous United States are defined as the Daily, On-Demand, or Retail Rates established by UPS for the service selected by the shipper that apply to the shipper and the package, and are in effect at the time of shipping, plus any additional charges or rates for nonstandard service, additional or nonstandard usage, and any other additional charges referenced within this Tariff or the *UPS Rate and Service Guide*, or those applicable additional rates set out in any customized contracts.

The effective UPS Rates for shippers located in Alaska are the UPS Rates published in the *UPS Rate and Service Guide* for customers located in Alaska, for the service selected by the shipper, which apply to the shipper and the package and are in effect at the time of shipping, plus any additional charges or rates for nonstandard service, additional or nonstandard usage, and any other additional charges referenced within this Tariff or the *UPS Rate and Service Guide*, or those applicable additional rates set out in any customized contracts.

The effective UPS Rates for shippers located in Hawaii are the UPS Rates published in the *UPS Rate and Service Guide* for customers located in Hawaii, for the service selected by the shipper, which apply to the shipper and the package and are in effect at the time of shipping, plus any additional charges or rates for nonstandard service, additional or nonstandard usage, and any other additional charges referenced within this Tariff or the *UPS Rate and Service Guide*, or those applicable additional rates set out in any customized contracts.

To determine the amount of any charge for UPS service, consult the effective UPS Rates. The effective UPS Rates are available at UPS.com and upon request at the local UPS office.

UPS reserves the right in its sole discretion to use any mode of transportation whatsoever to provide the service selected by the shipper. Regardless of the mode of transportation used, the effective UPS Rates

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

for the service selected by the shipper shall apply. If, however, a shipper selects a UPS service to a destination for which only a higher level of service is available, UPS will substitute the next higher level of available service and will charge the corresponding rate for the substituted service.

The effective UPS Rates and Service Guides in effect at the time of shipment, and the description of UPS Services at UPS.com, as well as any modifications, amendments, supplements, or successive publications thereof, are hereby incorporated by reference as part of the terms and conditions of this Tariff.

The UPS Tariff, the effective UPS Rates and Service Guides and the description of UPS Services at UPS.com, which are incorporated in the Tariff, and the UPS source document for each shipment, together comprise the complete and exclusive agreement of the parties, except as modified by any existing or future written agreement between the parties, and may not be contradicted or modified by any oral agreement.

The Tariff is published periodically by United Parcel Service. The most current version of the Tariff may be found at UPS.com and is available at all local UPS offices. UPS reserves the right to unilaterally modify or amend any portion of the UPS Tariff or *UPS Rate and Service Guide* at any time without prior notice. The current version of this Tariff and any modifications or amendments supersedes all previous UPS Tariffs. Any failure to enforce or apply any term or provision of the Tariff, or any other term or provision of the parties' agreement, shall not constitute a waiver of that term or provision by UPS, and shall not diminish UPS's right to enforce such term or provision in the future. If one or more provisions of this Tariff shall be held to be invalid, illegal or unenforceable, the validity, legality and enforceability of the remaining provisions shall not be affected or impaired thereby.

UPS may engage subcontractors to perform transportation and incidental services and contracts on its own behalf and on behalf of its servants, agents, and subcontractors, each of whom shall have the benefit of the terms and conditions set forth in this Tariff and the *UPS Rate and Service Guide*. No such party has authority to waive or vary any of these terms and conditions.

420

SUPPLEMENTAL CORRECTIONS OR SUCCESSIVE ISSUES

Where reference is made in this Tariff to a tariff, item, note, rule, or table, such reference will include any supplemental or successive issues of such tariff, item, note, rule, or table.

425

FIREARMS AND AMMUNITION

Firearms will be transported between licensed importers, licensed manufacturers, licensed dealers and licensed collectors, as defined in the United States Gun Control Act of 1968 (Public Law 90-618, enacted October 22, 1968), as amended by the Firearms Owners' Protection Act (P.L. 99-308, approved May 19, 1986, and a subsequent amendment thereto, P.L. 99-360, approved July 8, 1986) ("the Acts"), law enforcement agencies of the United States or of any department or agency thereof, and law enforcement agencies of any State or any department, agency or political subdivision thereof, and between persons not otherwise prohibited from shipping firearms by federal, state or local law and when such shipment complies with all applicable federal, state and local laws. The shipper must affix a UPS label requesting an adult signature upon delivery to each package containing a firearm. Adult means a person 21 years of age or older. UPS, in its sole discretion, may require the shipper to select a UPS Next Day Air Service for any shipment containing a firearm. Handguns, as defined by the Acts, will only be accepted for transportation via UPS Next Day Air Services, but will not be accepted for transportation via UPS Drop Boxes, Internet Shipping, or in response to a request for On-Call Pickup Service. Firearms, including handguns, will not be accepted when presented for shipment at locations of The UPS Store™ or any Third Party Retailer (as described in Item 1090). Small arms ammunition, as defined in 49 C.F.R. § 173.59, will be transported only when packaged and labeled in compliance with 49 C.F.R. § 172.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

435

MEASUREMENT OF COMBINED LENGTH AND GIRTH

To determine the length of a regularly shaped package or article, measure the longest side. To determine the girth, measure the distance around the package or article at its thickest part, at a right angle to the length. The total of the two measurements is the combined length and girth.

To determine the length, width, height, or combined length and girth of an irregularly shaped package or article subject to dimensional weight billing, assume the package or article to be enclosed in a six-sided carton having rectangular sides of no thickness joined together at right angles.

To determine the combined length and girth of articles of regular shape but with open or hollow portions, such as tires, hoops, coils, or frames, measure by use of outer dimensions only, as if the open or hollow portions were solid.

437

PACKAGING

It is the responsibility of the shipper to ensure that proper packaging is used and that contents of packages are adequately and securely packed, wrapped, and cushioned for transportation. The use of UPS-provided packaging is not a guarantee that an item is sufficiently packaged for transportation. UPS does not provide special handling for packages with "Fragile," package orientation (e.g., "UP" arrows or "This End Up" markings), or any other similar such markings.

440

REFUSAL OF SERVICE

UPS reserves the right to refuse to provide service, among other reasons, for any package which by reason of the dangerous or other character of its contents may, in the sole judgment of UPS, soil, taint, or otherwise damage other packages or UPS's equipment, or which is improperly or insecurely packed or wrapped. Packages must be so packed or wrapped as to meet UPS's published standards related thereto set forth in this Tariff or elsewhere, and as to pass the tests set forth in the International Safe Transit Association, Procedure 3A, Procedure for Testing Packaged Products, published by the International Safe Transit Association. In addition, any tested product must be free from damage and the packaging must afford reasonable protection as determined by UPS, in its sole judgment.

In addition, UPS reserves the right to refuse to provide service for any package, or to or from any location, or to provide alternative service arrangements, when, among other reasons, UPS, in its sole judgment, deems that it is unsafe or economically or operationally impracticable to provide service.

442

RIGHT OF INSPECTION

UPS reserves the right in its sole discretion to open and inspect any package tendered to it, but is not required to do so.

445

DEFINITION OF "PACKAGE"

The term "package," as used herein, means any container and its contents, and includes Letters and Express Envelopes, as well as any article that may be handled without packaging if the handling thereof can be accomplished in a reasonably safe and practicable manner.

446

UPS AUTOMATED SHIPPING SYSTEM AND SOURCE DOCUMENT

The term "UPS automated shipping system" as used herein, means a UPS Online® shipping system or a UPS Online Compatible shipping system that meets UPS Online requirements at the time of shipment. The term "source document" as used herein, means a document provided by UPS for the purpose of shipping a

.....  
 RULES AND OTHER PROVISIONS WHICH GOVERN THE  
 TRANSPORTATION OF PROPERTY  
 .....

package via UPS. "UPS automated shipping system" and "source document", individually or collectively, are sometimes referred to herein by the term "UPS shipping system".

447

PACKAGE LEVEL DETAIL ("PLD") AND SMART LABEL

Timely upload of Package Level Detail ("PLD") is defined as the electronic transmission of all applicable PLD information to UPS at the time that packages are tendered to UPS. PLD as used herein, includes, but is not limited to consignee's full name; complete delivery address and package weight.

A smart label as defined herein and described in the *UPS Guide to Labeling* includes, but is not limited to, MaxiCode, postal code bar code, current UPS Routing Code, appropriate UPS service level icon and a UPS 1Z tracking number bar code.

448

DEFINITION OF "DELIVERY"

Delivery for all purposes shall be deemed to include, but not be limited to: delivery to the consignee or the consignee's actual or apparent agent or representative, delivery to the address or location specified in the UPS shipping system, delivery to any person present at the address or location specified in the UPS shipping system, delivery to a reasonable alternate address or location, delivery in accordance with trade custom or usage, delivery pursuant to UPS's driver release procedures, delivery pursuant to UPS's shipper release procedures, or delivery otherwise permitted under this Tariff. UPS does not limit delivery of a package to the person specified as the consignee on the source document or in the UPS shipping system. Unless the shipper requests Delivery Confirmation service requiring a signature, UPS reserves the right, in its sole discretion, to make a delivery without obtaining a signature.

450

PAYMENT OF CHARGES

For purposes of this Item, the term "Charges" means all applicable transportation and other charges, including but not limited to, all applicable accessorial charges, surcharges, additional handling charges, and late payment fees.

Notwithstanding any billing plan that is in effect or payment or billing option selected at the time of shipment, the shipper is ultimately liable for and agrees to pay all Charges, including in the event of insolvency, bankruptcy, or non-payment or refusal to pay by the consignee or third party.

UPS reserves the right to bill for Charges based upon the characteristics of, and services requested for, the packages actually tendered to UPS. UPS also reserves the right to audit invoices to verify service selection, package or shipment weight, and applicability of any Charges, and to make appropriate adjustments. All Charges must be paid in the lawful money of the United States of America. If Charges are paid by credit card, the shipper expressly authorizes UPS to assess any Charges and to obtain payment of the Charges by use of the credit card. If, for any reason, any such credit card transaction is rejected or declined, the shipper will pay to UPS a declined transaction fee of ten dollars (U.S.) (\$10.00) per incident, in addition to any late payment fees assessed by UPS and any collection costs which may be incurred by UPS in the final collection of Charges owed by the shipper. In no event shall the declined transaction fee exceed the maximum amount allowed by applicable law. The shipper authorizes UPS to charge the declined transaction fee to the shipper's credit card account or to collect the fee directly from the shipper, at UPS's sole option.

UPS reserves the right, in its sole discretion, to request advance payment of Charges for any package sent to any international destination.

If a shipper submits package information to UPS (through an automated shipping system, source document, or UPS Internet Shipping) and does not subsequently tender such package to UPS, it is the shipper's sole responsibility to request an adjustment, as set forth below. Shippers who fail to do so will be liable for all applicable Charges.

.....  
RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY  
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Shippers requesting an invoice adjustment (e.g., adjustment of Charges based on an incorrect rate, billable weight, account number, failure to tender a package, or type of service, etc.) or a refund due to a duplicate payment must notify UPS of the request within 180 days of receiving the contested invoice, or any billing dispute is waived. A partial payment against an invoice is not considered a request for an invoice adjustment.

452

USE OF UPS-PROVIDED MATERIALS AND SERVICES

UPS-provided materials, including but not limited to, packaging materials and supplies, envelopes, labels, label printers, shipping documents, publications and products are provided solely for the use of UPS shippers to obtain UPS services on their behalf and to interact with UPS. Any other use of such UPS-provided materials is strictly prohibited.

Under no circumstances may a shipper sell any UPS-provided materials, products, or services to any third party without prior written authorization from UPS.

455

USE OF UPS ELECTRONIC INFORMATION SYSTEMS

"UPS Systems" means for all purposes herein those UPS electronic information systems to which shippers are granted access by UPS and which are accessed by means of hardware, software, or Internet interfaces.

A shipper may use the UPS Systems solely for UPS-related business conducted by or on behalf of the shipper. Any other use of the UPS Systems is strictly prohibited. A shipper may use or disclose information provided via the UPS Systems only in connection with packages shipped by or to the shipper or on the shipper's behalf.

A shipper may not use the UPS Systems in any way that adversely affects the performance or function of the UPS Systems or interferes with access by other parties to the UPS Systems. A shipper shall not gain access, or attempt to gain access, by any means to any UPS computer system or database, other than the UPS Systems to which the shipper is expressly granted access by UPS.

A shipper shall preserve and reproduce all content of the information provided by the UPS Systems and maintain all data formats, structure, sequence and organization of the information delivered by the UPS Systems, without amendment, deletion or modification of any type. UPS reserves the right to terminate, update, alter or supplement any or all of the UPS Systems and services and information available from the UPS Systems at any time. UPS reserves the right to assess charges for the use of any UPS System, by providing notice of such charges to the shipper. By permitting limited usage of the UPS Systems, UPS does not convey any property interest in or to the UPS Systems or any other UPS property or services.

UPS reserves the right to terminate a shipper's access to and use of the UPS Systems for any reason, including if UPS in its sole judgment believes that (1) the system is being used for an illegal purpose or a purpose not authorized by UPS, or (2) UPS or a third party's rights are being jeopardized, or (3) UPS or any third party is potentially exposed to liability or damage of any type, or (4) the shipper is violating this Tariff or any other applicable agreement between UPS and the shipper.

458

ITEMS NOT ACCEPTED FOR TRANSPORTATION

UPS does not accept for transportation, and shippers are prohibited from shipping:

- (1) Articles of unusual value (as defined in Item 460);
- (2) Hazardous waste;
- (3) Human remains, fetal remains, human body parts, or components thereof;
- (4) Common fireworks;

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

- (5) Packages with an actual weight of more than 150 pounds; or packages that, when measured to determine the billable weight, exceed 108 inches in length, or exceed a total of 165 inches in length and girth combined, or in the case of import shipments, exceed 130 inches in length and girth combined;
- (6) Packages with a value of more than \$5,000 shipped as a result of a request for service made through the Internet by a shipper who has a UPS Internet shipping account only;
- (7) Packages with a value of more than \$1,000 returned via Print Return Label, Print and Mail Return Label, Electronic Return Label or 1 UPS Pickup Attempt Return Services;
- (8) Packages with a value of more than \$500 shipped via a UPS Drop Box;
- (9) Prepaid Letters with a value of more than \$100;
- (10) Packages with a value of more than \$999 when Shipper Release is selected;
- (11) Packages with a C.O.D. amount in excess of \$500 shipped via a UPS Drop Box;
- (12) Packages shipped internationally containing jewelry (not including costume jewelry) having a value of more than \$500;
- (13) Packages presented for shipment at Authorized Shipping Outlets, locations of The UPS Store™ or any Third Party Retailer containing any hazardous materials requiring shipping papers, firearms, or ammunition;
- (14) Packages tendered via UPS Return Services containing hazardous materials or requiring a UPS label requesting an adult signature upon delivery; and
- (15) Any other items prohibited by this Tariff, the UPS Rate and Service Guide, or UPS.com.

460

DEFINITION OF ARTICLES OF UNUSUAL VALUE WHICH ARE NOT ACCEPTED BY UPS FOR  
TRANSPORTATION

Shippers are prohibited from shipping articles of unusual value via UPS. Articles of unusual value shall be deemed to include, but are not limited to:

- (1) Coins, currency, postage stamps, negotiable instruments (except checks), money orders, unset precious stones, and industrial diamonds.
- (2) Any article that contains more than fifty percent by weight of gold or platinum or any combination thereof in raw form, including, but not limited to, bullion, bars, or scraps of these metals.
- (3) Any package having an actual value of more than \$50,000.

UPS will not be liable for any loss of, or damage to, articles of unusual value. UPS reserves the right, but is not required, to return to the shipper any package containing an article of unusual value. Such return will be made solely at the shipper's risk and expense.

461

HUMAN REMAINS AND BIOLOGICAL MATERIALS

No service shall be rendered in the transportation of human remains, fetal remains, human body parts, or components thereof.

Packages containing Diagnostic Specimens as described in 49 C.F.R. § 173.199, which are prepared in accordance with all aspects of 49 C.F.R. § 173.199, will be accepted for transportation.

Transportation of other biological materials is limited, must be prearranged, and will only be provided under the following conditions: the shipper has received prior written authorization from UPS for the specific package tendered; and the shipper requests service in accordance with the conditions set forth in the written authorization from UPS for the package tendered. Any package containing biological materials shall be considered a perishable commodity and will be accepted for transportation solely at the shipper's risk for any damage or loss arising from the perishable nature of the item.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

462

ALCOHOLIC BEVERAGES

The only alcoholic beverages that UPS accepts for transportation are wine and beer. Packages containing wine and beer are accepted for transportation only from shippers who are licensed and authorized under applicable laws to ship alcohol and only on a contractual basis. To receive service for packages containing wine or beer, the shipper must sign a contract and agree to the provisions set forth in the applicable approved UPS agreement for the transportation of wine or beer. The shipper must affix a UPS label, requesting Delivery Confirmation Adult Signature Required service, to each package containing wine or beer. Adult means a person 21 years of age or older. It is the responsibility of the shipper to ensure that a package tendered to UPS does not violate any federal, state, provincial, or local laws or regulations applicable to the package.

UPS reserves the right to dispose of any alcoholic beverages tendered for shipment which shippers are prohibited from shipping, which UPS is not authorized to accept, which UPS states that it will not accept, or which UPS has a right to refuse. The shipper agrees to indemnify, defend, and hold harmless UPS, its parent corporation, and affiliated companies, their officers, directors, employees, agents, and their successors and assigns, from all claims, demands, expenses, liabilities, causes of action, enforcement procedures, and suits of any kind or nature brought by a governmental agency or any other person or entity arising from or relating to the transportation of a package containing alcoholic beverages, or from the shipper's noncompliance with UPS requirements for the shipment of alcoholic beverages or governmental laws or regulations applicable to the transportation of alcoholic beverages. Under no circumstances shall UPS be liable for special, incidental, or consequential damages arising from the transportation of a shipment of alcoholic beverages. UPS reserves the right to discontinue service to any shipper for, among other reasons, tendering a package containing alcoholic beverages that does not comply with all applicable laws or the UPS Terms and Conditions of Service relating to the shipment.

463

LIVE ANIMALS

UPS provides service on a limited basis for packages containing some types of live animals. (The term "animal" as used herein refers to anything living, except plants). UPS will only accept packages containing live animals for shipment within the United States and as set forth in the UPS Terms and Conditions of Service, available at UPS.com. Any package containing a live animal shall be considered a perishable commodity and will be accepted for transportation solely at the shipper's risk for any damage or loss arising from the perishable nature of the item. UPS shall not be liable for any special, incidental, or consequential damages.

464

TOBACCO PRODUCTS

Packages containing tobacco products shipped to a consumer will only be accepted for transportation as a contractual service. To receive service for packages containing tobacco products shipped to a consumer, the shipper must sign a contract and agree to the provisions set forth in the applicable approved UPS agreement for the transportation of tobacco products. For all other service for packages containing tobacco products, the shipper and consignee must be licensed and authorized to ship and receive such items, respectively, pursuant to any applicable federal, state, provincial, or local law or regulation. It is the responsibility of the shipper to ensure that a shipment tendered to UPS does not violate any federal, state, provincial, or local laws or regulations applicable to the shipment.

UPS reserves the right to dispose of any tobacco products tendered for shipment which shippers are prohibited from shipping, which UPS is not authorized to accept, which UPS states that it will not accept, or which UPS has a right to refuse. The shipper agrees to indemnify, defend, and hold harmless UPS, its parent corporation, and affiliated companies, their officers, directors, employees, agents, and their successors and assigns, from all claims, demands, expenses, liabilities, causes of action, enforcement procedures, and suits of any kind or nature brought by a governmental agency or any other person or entity arising from or relating to the transportation of a package containing tobacco products, or from the shipper's

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

noncompliance with UPS requirements for the shipment of tobacco products or governmental laws or regulations applicable to the transportation of tobacco products. Under no circumstances shall UPS be liable for special, incidental, or consequential damages arising from the transportation of tobacco products. UPS reserves the right to discontinue service to any shipper for, among other reasons, tendering a package containing tobacco products that does not comply with all applicable laws or the UPS Terms and Conditions of Service relating to the shipment.

465

CORRECTION OF ADDRESSES

If UPS is unable to deliver any package as addressed by the shipper, or if the package has an incorrect or incomplete address (examples include, but are not limited to, P.O. Boxes, missing suite or apartment numbers, old addresses, and missing/incorrect ZIP Codes), UPS will make reasonable efforts, to be determined in its sole discretion, to secure the correct or complete address. An address validated by UPS may be incorrect or incomplete for purposes of completing delivery and may be corrected by UPS.

If the correct or complete address is secured, UPS, at its sole discretion, will attempt delivery, and the shipper will be provided with the correct or complete address in order to update its internal records. An additional charge will be assessed for an address correction.

470

REFUSED PACKAGES RETURNED

Domestic packages refused by consignees, or which for any other reason cannot be delivered, will be promptly returned to the shipper without additional charge. A package returned to the shipper after delivery is subject to applicable Charges.

If a package is refused by the consignee or for any other reason cannot be delivered, and return of the package is refused by the shipper, or the package cannot otherwise be returned to the shipper, UPS will retain the package for a reasonable period of time, to be determined in its sole discretion (not to exceed thirty days), and UPS reserves the right to dispose of the package thereafter.

472

DROP SHIPMENT

Drop Shipment, as defined herein, means any shipment pursuant to a written agreement between UPS and a specific shipper that permits the shipper to tender quantities of individual packages directly to UPS at a UPS pre-approved designated location. A unique Drop Shipper account number will be assigned, which the shipper agrees to use solely for the origin and destination locations as specified in the UPS Drop Ship Letter of Understanding.

UPS reserves the right to refuse any Drop Shipment request, in its sole discretion, including but not limited to, any Drop Shipment that is operationally or economically impracticable to transport. A request for Drop Shipment service is not reasonable unless the shipper makes a prior arrangement with UPS, agreed to in advance by UPS, as to timing, location and volume of the Drop Shipment.

When a shipper, through prior arrangements with UPS, tenders packages at UPS's receiving stations with a return address requiring a movement greater than a Zone 2 movement from the point of tender, any undelivered packages will be returned automatically and will be charged at the rate applicable between the point of tender and the return address. The effective UPS Rates for the applicable shipment will apply.

474

DELIVERY CHANGE REQUESTS

UPS may honor a request that UPS reroute a package to an address or consignee other than the address or consignee identified on a source document, or in the UPS automated shipping system for the package after tender of the package to UPS. UPS will honor such a request where practicable.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

475

DELIVERIES ATTEMPTED THREE TIMES WITHOUT EXTRA CHARGE

If UPS is unable to deliver a package, a notice will be left at the consignee's address stating that delivery has been attempted. Thereafter a second and, if necessary, a third attempt to deliver the package will be made without additional charge.

476

SHIP NOTIFICATION

Upon request, UPS will provide notification by fax or e-mail, as directed by the shipper, of a shipment requested by the shipper. The UPS Ship Notification service will be provided by UPS subject to the effective UPS Terms and Conditions of Service. Ship notification is available in UPS Online® Worldship® and UPS Online® Compatible vendor shipping systems approved to use this service. Only e-mail Ship Notification is provided through UPS CampusShip™ or UPS Internet Shipping. An additional charge will be assessed for each successfully faxed Ship Notification.

477

SHIPPER RELEASE

A shipper may request that UPS release a package on the first delivery attempt. Shipper Release will be provided by UPS subject to the effective UPS Terms and Conditions of Service. When Shipper Release is selected, the shipper acknowledges and agrees that UPS will make only one delivery attempt, that a signature will not be obtained upon delivery, and that a UPS delivery record showing a completed Shipper Release delivery shall be conclusive proof that delivery was completed. Shipper Release is provided solely at the shipper's risk of loss or damage arising from the release of the package by UPS, and UPS will not be liable to shippers or third parties for any damages arising from the release of the package. Shipper Release service is not available for packages having a value of more than \$999.00 (U.S.).

478

PACKAGE TRACKING/TRACING AND REFUND REQUEST CHARGE

UPS may, in its sole discretion, assess a shipper an additional charge for each Package Tracking/Tracing Request initiated by or at the request of the shipper.

This charge will not be assessed for the first 50 package tracking requests per calendar week, or for a quantity of package tracking requests equal to or less than twenty percent (20%) of the shipper's package volume for that week, whichever is greater.

This charge will not be assessed for a quantity of package tracing requests equal to or less than two percent (2%) of the shipper's package volume for that week.

UPS also reserves the right to assess the shipper a charge in the effective UPS Rates for guaranteed service refund requests when the subject package was delivered in accordance with the applicable UPS Service Guarantee in the effective UPS Terms and Conditions of Service.

480

C.O.D. PACKAGES

C.O.D. means, for all purposes, Collect On Delivery.

Preparation and Listing of C.O.D. Packages: C.O.D.s are accepted for amounts up to \$50,000 per package. Shippers not using a UPS automated shipping system must prepare and attach to each C.O.D. package a UPS C.O.D. tag showing the amount to be collected and enter such amount in the space provided for that purpose. Shippers using a UPS automated shipping system will generate, and apply to each C.O.D. package, a system-generated address label with a C.O.D. bar code and the amount to be collected for each individual package. Each C.O.D. package in a Hundredweight shipment must carry a C.O.D. tag or system-generated label for the goods contained in that package. An additional charge will be assessed for each C.O.D. package tendered to UPS. The entry of a C.O.D. amount is not a declaration of value for purposes of

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

purchasing declared value protection against loss or damage. Payment of the C.O.D. charge does not constitute payment of the declared value charge.

Responsibility for C.O.D.s: Upon delivery of each C.O.D. package, UPS will attempt to collect the amount shown on the C.O.D. tag or the system-generated label attached to the package and transmit to the shipper the amount so collected subject to the provisions of Item 485, or, if collection cannot be made, will return the package to the shipper. The shipper must notify UPS within 45 days from date of shipment if the shipper has not received payment of the C.O.D. amount, or any claim relating thereto shall be deemed waived. Suits shall be instituted within two years after denial of any portion of the claim.

If collection cannot be made within three delivery attempts, or the consignee refuses delivery, UPS will return the package to the shipper.

Consignee's Checks in Payment of C.O.D.s: Unless instructions to collect cashier's check or money order only are shown on the C.O.D. tag (in conformity with the instructions on the tag) or system-generated label, UPS will accept a check or other negotiable instrument issued by or on behalf of the consignee. When instructions to collect cashier's check or money order only are clearly indicated on the C.O.D. tag or system-generated label UPS reserves the right to accept a cashier's check, money order, official bank check or other similar instrument issued by or on behalf of the consignee. All checks or other negotiable instruments (including cashier's checks, official bank checks, money orders, and other similar instruments) tendered in payment of C.O.D.s will be accepted by UPS based solely upon the shipper assuming all risk relating thereto including, but not limited to, risk of nonpayment, insufficient funds, and forgery, and UPS shall not be liable upon any such instrument. All checks or other negotiable instruments (including cashier's checks, official bank checks, money orders, and other similar instruments) will be transmitted to the shipper together with UPS's own check if consignee check(s) collected are for less than the C.O.D. amount.

Currency in Payment of C.O.D.s: UPS will not accept currency in any amount for payment of C.O.D. shipments.

Payment of \$10,000 or more: Payment for any C.O.D. package of \$10,000 or more must be received in a single check or other negotiable instrument such as a cashier's check, money order, official bank check, or other similar instrument.

In the event that UPS accepts a personal or company check when a shipper has properly instructed UPS to collect a cashier's check or money order only, UPS reserves the right, in its sole discretion, to deposit into a UPS account the personal or company check collected and to provide the shipper with a check issued by UPS.

In the event that a shipper timely notifies UPS that it has not received payment of the C.O.D. amount, if UPS's records show that it collected a C.O.D. payment and the remittance has not been cashed, UPS may, in its sole discretion, provide the shipper with a digital image of the check or money order along with a C.O.D. Remittance Verification in order to assist the shipper in locating the missing C.O.D. payment. If the shipper is still unable to locate the C.O.D. payment, UPS may, in its sole discretion, provide the shipper with an indemnified C.O.D. check or money order, which is a digital image of the original payment collected by UPS at the time of delivery and can be deposited in a bank, provided that the original check or money order has not previously been deposited or negotiated. If the indemnified check or money order is invalid for any reason, including but not limited to insufficient funds or forgery, UPS shall not be liable upon the instrument.

C.O.D. packages with an amount to be collected in excess of \$500 will not be accepted for transportation via a UPS Drop Box.

C.O.D. service is not provided for international shipments.

As with all packages, UPS shall not be liable for any special, incidental, or consequential damages in connection with C.O.D. packages.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

485

REMITTANCE OF C.O.D.s

Subject to the remaining provisions of this Item, UPS shall remit C.O.D. collections to the shipper after the date of collection.

For purposes of this Item, the term "Charges" shall have the same definition as set forth in Item 450. The shipper irrevocably authorizes UPS to apply, in its sole discretion and without prior notice to the shipper, any C.O.D. collections to any past due Charges owed by the shipper. To this end, if there are any past due Charges owed by the shipper, the shipper hereby (a) irrevocably assigns and transfers to UPS all of the shipper's right, title and interest in and to each check or other negotiable instrument for payment of a C.O.D. that is received by UPS or its employee or agent, and (b) constitutes and appoints UPS as the shipper's attorney-in-fact and authorizes UPS, in the shipper's name, place and stead, to endorse any such check or other negotiable instrument with the shipper's name, to deposit the same into any UPS account, and to apply the proceeds of the same against any past due Charges owed by the shipper. The shipper acknowledges and agrees that such appointment of UPS as the shipper's attorney-in-fact is coupled with an interest and is irrevocable. UPS may exercise any of its rights under this Item either directly or through any employee or agent.

The shipper relinquishes, waives and agrees not to assert any claim against UPS or any of its employees or agents, any consignee, any collecting or paying bank, or any other person or entity that may directly or indirectly arise as a result of UPS's exercise of any of its rights under this Item. Without diminishing any of UPS's rights under the preceding sentence, the shipper agrees that UPS and such other persons or entities shall not be liable to the shipper or any other person or entity for any special, incidental, or consequential damages in any claim made with respect to UPS's exercise of any such rights.

The shipper agrees that, following UPS's application of any C.O.D. collections to any past due Charges owed by the shipper in accordance with this Item, the shipper will continue to be fully liable for the payment of all remaining Charges owed by the shipper (including, without limitation, (i) any Charges that are not covered by the application of the C.O.D. collections, and (ii) any Charges relating to a previously applied C.O.D. collection that is reversed by reason of the uncollectibility of the C.O.D. check or other negotiable instrument or otherwise).

Nothing in this Item shall constitute an election of remedies by UPS or any other person or entity or a waiver of any of the rights of UPS or any other person or entity under the remaining provisions of this Tariff or at law or in equity.

496

UPS RETURN SERVICES

UPS offers a variety of services for the return of UPS compatible packages, as provided in the applicable UPS Service Guides and effective UPS Terms and Conditions of Service. These services include: Print Return Label, Print and Mail Return Label, Electronic Return Label, 1 UPS Pickup Attempt, 3 UPS Pickup Attempts, and Call Tag. The value limit for each package returned via UPS Print Return Label, UPS Print and Mail Return Label, Electronic Return Label, or 1 UPS Pickup Attempt Return Services is \$1,000. The value limit for each package returned via 3 UPS Pickup Attempts or Call Tag Return Services is \$50,000.

Packages containing certain items are prohibited from being shipped, and are not accepted by UPS, when tendered for transportation via UPS Return Services, including but not limited to: Hazardous Materials and packages requiring a UPS label requesting an adult signature upon delivery.

C.O.D. (Collect On Delivery) service and Collect or Third-Party billing are not provided for UPS Return Services.

500

INTERRUPTION OF SERVICE

UPS shall not be liable for any interruption of service due to causes beyond UPS's control including, but not limited to, the following: the unavailability or refusal of a person to accept delivery of the shipment; acts of

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

God; acts of public authorities acting with actual or apparent authority; acts or omissions of customs or similar authorities; insufficient information provided by a customer; the application of security regulations imposed by the government, or otherwise applicable to the shipment; a government agency hold; riots; strikes or other labor disputes; civil unrest; disruptions of any kind in air or ground transportation networks; and natural disasters.

505

CLAIMS AND LEGAL ACTIONS

Claims against UPS must be filed within strict time limits, including as set forth in Item 450, regarding invoice adjustments or billing disputes; Item 520, regarding claims for loss or damage to property; and pursuant to the UPS Service Guarantee.

All claims against UPS arising from or related to the provision of services by UPS, including, but not limited to, demands for damages, refunds, credits, and any legal or equitable relief whatsoever, shall be extinguished unless the shipper or claimant (1) timely and completely complies with all applicable notice and claims periods set forth in this Tariff and in the *UPS Rate and Service Guide*, including as to claims for loss or damage to property, claims under UPS's Service Guarantee, or claims for invoice adjustments; and (2) pleads on the face of any complaint filed against UPS satisfaction and compliance with those notice and claims periods as a contractual condition precedent to recovery.

Claimants may not deduct the amounts of pending claims from any charges owed to UPS, and the shipper waives any and all rights, including any statutory or common law rights, to set off the amount of any claim against charges owed to UPS.

510

FILING OF CLAIMS FOR LOSS OR DAMAGE TO PROPERTY

All claims for loss of or damage to property transported or accepted for transportation must: (1) be in writing and must include reference to the source document or pickup record number and date of shipment or copies of other documents sufficient to identify the shipment involved, and the declared value; (2) assert the liability of UPS for alleged loss or damage; (3) make claim for payment of a specified or determinable amount of money; and (4) be accompanied by a copy of the original invoice or, if no invoice was issued, other proof, certified in writing, as to the purchase price paid by the consignee (where the property involved has been sold to the consignee), actual cost or replacement cost of the property, or extent of the damage to the property.

No claims will be voluntarily paid unless filed in writing by or on behalf of the shipper in accordance with these provisions.

515

ACKNOWLEDGMENT OF CLAIMS FOR LOSS OR DAMAGE TO PROPERTY

After receiving a proper written claim in the manner and form and with the supporting documents described in Items 510 and 525, UPS or its designee will acknowledge the receipt of such claim in writing to the claimant within 30 days after the date of receipt, unless such claim has already been paid or denied in writing. UPS will at the time each claim is received create a separate file and assign thereto a successive claim file number and note that number on all documents filed in support of the claim and all records and correspondence with respect to the claim including the written acknowledgment of receipt and, if in its possession, the source document and delivery receipts, if any, covering the shipment involved. At the time such claim is received, UPS will cause the date of receipt to be recorded on the face of the claim document, and the date of receipt will also appear on the written acknowledgment of receipt sent to the claimant.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

520

TIME LIMIT FOR FILING CLAIMS FOR LOSS OR DAMAGE TO PROPERTY

As a condition precedent to recovery, all claims for loss or damage to property must be filed in writing with UPS within the following time limits: for domestic shipments, claims must be filed within nine months after delivery of the package or, in case of failure to make delivery, then within nine months after a reasonable time for delivery has elapsed. For international shipments, claims must be filed within sixty days after delivery of the package or in the case of non-delivery, within sixty days after a reasonable time for delivery has elapsed. Suits shall be instituted within two years after denial of any portion of the claim. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, such claims shall be deemed waived and will not be paid.

A request for proof of delivery does not constitute the filing of a claim.

525

INVESTIGATION OF CLAIMS FOR LOSS OR DAMAGE TO PROPERTY

- (1) Prompt Investigation. Each claim for loss or damage to a package or shipment filed in the manner prescribed herein will be promptly and thoroughly investigated, if investigation has not already been made prior to receipt of the claim.
- (2) Supporting Documents. A necessary part of an investigation requires that each claim be supported by the following: evidence of payment of the shipping and any declared value charges; and either the original invoice, a photographic copy of the original invoice or an exact copy thereof, or an extract made therefrom, certified by the claimant to be true and correct with respect to the property and cost thereof involved in the claim, or certification of prices or costs, with trade or other discounts, allowance, or deductions of any nature whatsoever and the terms thereof, or depreciation reflected thereon; provided, however, that where the property involved in a claim has not been invoiced to the consignee shown on the bill of lading or receipt or where an invoice does not show price or cost, or where the property involved has not been sold, or where the property has been transferred at bookkeeping values only, UPS will, before paying a claim thereon, require the claimant to establish the value in the quantity shipped, transported, or involved and to certify the correctness thereof in writing. UPS reserves the right to request the original shipping record or source document.
- (3) Original Packaging Materials. In the event that a claim is made for damage to a package, the original packaging materials must be made available to UPS or its designee for inspection.
- (4) Verification of Loss. When an asserted claim for loss of an entire package or an entire shipment cannot be otherwise authenticated upon investigation, UPS will obtain from the consignee of the shipment involved a certified statement in writing that the property for which the claim is filed has not been received from UPS or from any other source.

530

DISPOSITION OF CLAIMS FOR LOSS OR DAMAGE TO PROPERTY

UPS or its designee, after receiving a written claim for property transported, will pay, decline, or make a firm compromise settlement offer in writing to the claimant within 120 days after UPS receives the claim; provided, however, that if the claim cannot be processed and disposed of within 120 days after receipt, UPS or its designee will at that time and at the expiration of each succeeding 60-day period while the claim remains pending, advise the claimant in writing of the status of the claim and the reason for the delay in making final disposition thereof and shall retain a copy of such notice to the claimant in its claim file.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

535

LIMITATIONS OF LIABILITY

Each UPS domestic package or international shipment is automatically protected by UPS against loss or damage up to a value of \$100 (U.S.). Unless a greater value is recorded in the declared value field of the UPS source document or the UPS shipping system used, the shipper agrees that the released value of each domestic package or international shipment is no greater than \$100 (U.S.), which is a reasonable value under the circumstances surrounding the transportation, and that UPS shall not be liable for more than \$100 for each domestic package or international shipment. If additional protection is desired, the shipper may declare a value in excess of \$100 by showing a value in excess of \$100 in the declared value field of the UPS source document or the UPS shipping system used. An additional charge as set forth in the UPS Rates in effect at the time of shipping will be assessed.

Whenever property is damaged or lost by UPS in the course of transportation, and a valid claim has been filed in accordance with Items 510, 520, and 525, UPS will pay, at its option, the lowest of the following, not to exceed \$100: (1) for the damaged or lost goods; (2) for the purchase price paid by the consignee (where the property involved has been sold to the consignee); (3) for the actual cost or replacement cost of the property; or (4) for the cost of repairing the damaged property.

Where a value has been declared and the applicable charges paid, UPS's maximum liability shall not exceed the lesser of: (1) the declared value on the UPS source document or shipping system used; (2) the lesser of the purchase price paid by the consignee (where the property involved has been sold to the consignee), the actual cost, or the replacement cost of the property; (3) the cost of repairing the damaged property; (4) \$50,000 per package, except for (i) packages shipped via a UPS Drop Box, in which case UPS's maximum liability shall be \$500 per package, (ii) packages shipped as the result of a request for service made through the Internet by a shipper who has a UPS Internet shipping account only, in which case UPS's maximum liability shall be \$5000 per package, (iii) packages returned via UPS Print Return Label, UPS Print and Mail Return Label, Electronic Return Label, or 1 UPS Pickup Attempt Return Services, in which case UPS's maximum liability shall be \$1,000 per package, and (iv) packages for which Shipper Release is selected, in which case UPS's maximum liability shall be \$999 per package, or (5) \$500 for international jewelry (not including costume jewelry) shipments.

In the event of loss of or damage to any article or articles which are part of a pair or set, UPS will be liable only for an amount consisting of the reasonable and fair proportion of the total value of the pair or set, giving consideration to the importance of said article or articles, but in no event shall such loss or damage be construed to mean total loss of the pair or set.

In the event of loss of or damage to any part of property (including any part of a machine) consisting, when complete for sale or use, of several parts, UPS will be liable only for the value of the part lost or damaged, not to exceed the declared value of the part lost or damaged.

When UPS pays the actual cost, the purchase price, or the replacement cost of the property, title to the property shall thereupon pass to UPS; otherwise, the damaged property shall be returned to the shipper. UPS will not be liable or responsible for the loss of or damage to any package, the contents of which shippers are prohibited from shipping, which UPS is not authorized to accept, which UPS states that it will not accept, or which UPS has a right to refuse. UPS will not voluntarily pay a claim for loss or damage to property unless all applicable transportation and other charges have been paid. UPS shall not be liable for and reserves the right in its sole discretion to deny claims pertaining to a package for which there are no UPS records reflecting that the package was tendered to UPS by the shipper.

UPS will not be liable or responsible for the loss of or damage to (1) articles of unusual value (as defined in Item 460), (2) any package resulting from insects, moths, vermin, inherent vice (including, but not limited to, improper, inadequate, or unsafe packaging or wrapping that fails to meet UPS's published standards related thereto set forth in this Tariff or elsewhere), deterioration, dampness of atmosphere, extreme of temperature, ordinary wear and tear, or that which occurred or arose prior to or after the course of transportation by UPS, (3) perishable commodities or commodities requiring protection from heat or cold, to the extent the loss or damage results from exposure to heat or cold or the perishable nature of the items, (4) human remains, fetal remains, human body parts, or components thereof, (5)

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

packages lost or damaged due to war risks, (6) packages lost or damaged due to nuclear damage; (7) packages with a value in excess of \$5000 when the package is shipped as a result of a request for service made through the Internet by a shipper who has a UPS Internet shipping account only, (8) packages having a value of more than \$500 if shipped via a UPS Drop Box, (9) Prepaid Letters having a value of more than \$100, (10) packages shipped internationally containing jewelry (not including costume jewelry) with a value in excess of \$500, (11) packages having a value of more than \$1,000 returned via UPS Print Return Label, UPS Print and Mail Return Label, Electronic Return Label, or 1 UPS Pickup Attempt Return Services, or (12) packages having a value of more than \$999 when Shipper Release is selected.

UPS's liability for a package containing a check or checks is limited to the cost of stopping payment on and reissuing the check(s), not to exceed \$100 per package. In no event shall UPS be liable for the face value of the check(s). UPS's liability for a package containing a phone card, gift certificate, or gift card is limited to the cost (which shall not include any amount of the value attached to the card or certificate) of replacing the physical card(s) or certificate(s), not to exceed \$100 per package. In no event shall UPS be liable for the face value of any phone card, gift certificate, or gift card.

Declaring a value in the declared value field of the UPS source document or UPS shipping system used does not provide protection for, and shippers may not declare a value for protection for, any damages related to providing, or the failure to provide, C.O.D. service, including but not limited to: failure to collect the C.O.D. amount; failure to collect the specified form of payment; collection of an instrument in the wrong amount; failure or delay in delivering the collected instrument to the shipper; or collection of forged, insufficient funds, or otherwise invalid instruments.

UPS does not provide a protective service for the transportation of perishable commodities or commodities requiring protection from heat or cold. Such commodities will be accepted for transportation solely at the shipper's risk for any loss or damage arising from the perishable nature of the item. Shippers shall not file claims for, and UPS shall not be liable to shippers or any third parties for, any damage arising from the transportation of perishable commodities or commodities requiring protection from heat or cold, regardless of whether the package is delivered pursuant to an applicable UPS Service Guarantee or is delayed in transit. UPS reserves the right to dispose of any package in the UPS system containing a perishable commodity that, in UPS's sole discretion, is deemed to be unsafe or unsanitary.

In the event that UPS fails to attempt delivery in accordance with the terms of the UPS Service Guarantee, set forth in full in the Terms and Conditions of Service in the *UPS Rate and Service Guide* and at UPS.com, UPS, at its option, will either credit or refund the transportation charges for each such package to the payer only, upon request, provided that the conditions set forth in the UPS Service Guarantee are met. This is the sole remedy available under the UPS Service Guarantee.

Any declared value in excess of the maximums allowed in the applicable UPS Tariff or Service Guide is null and void. Acceptance for carriage of any package bearing a declared value in excess of the allowed maximums specified in the applicable UPS Tariff or Service Guide, or any package containing articles that shippers are prohibited from shipping or that UPS does not or is not authorized to accept for transportation, does not constitute a waiver of any provision of the Tariff or Service Guide limiting UPS's liability or responsibility for any such package.

Under no circumstances shall UPS be liable for any special, incidental, or consequential damages, including but not limited to, damages arising from loss, misdelivery of, or damage to property, delayed delivery, or failure to attempt delivery in accordance with the UPS Service Guarantee. Under no circumstances shall UPS be liable for any damages whatsoever for delayed delivery, except as specifically provided for shipments made under the UPS Service Guarantee.

UPS shall not be liable for any damages arising from UPS's inability, failure, or refusal to comply with a request to stop, return or reroute shipment of a package after tender to UPS.

540

METHOD OF DETERMINING TRANSPORTATION RATES

To determine rates pursuant to this Tariff:

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

- (1) Refer to the UPS Zone Chart applicable to the package in effect at the time of shipping to determine the appropriate zone for use in determining the rate.
- (2) Refer to the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping and declared value charges applicable to the package in effect at the time of shipping, which are available at UPS.com and upon request at the local UPS office.
- (3) Refer to the effective UPS Rates applicable to the shipper and package and in effect at the time of shipping, for other charges, surcharges or rates charged by reason of nonstandard service and/or additional or nonstandard usage.
- (4) Refer to any applicable customized contract.

Released value of package:

The effective UPS Rates and any declared value charges are applicable only when the value of the property inserted in the declared value field of the UPS shipping system used by the shipper, or agreed upon in writing, as the released value thereof is as follows:

- a. For a value not exceeding \$100 per package:

Apply the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping, which are available at UPS.com and at local UPS offices upon request;

- b. For a declared value exceeding \$100 per package:

Apply the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping, plus the declared value charge, the amount of which is available at local UPS offices upon request and at UPS.com.

560

OPTIONS FOR PAYMENT OF CHARGES

For purposes of this Item, the term "Charges" shall have the same definition as set forth in Item 450.

In its sole discretion, UPS may provide alternative payment terms to certain of its shippers. UPS, in its sole discretion, shall decide which, if any, of the alternative payment plans described below will be made available to the shipper. A shipper that is not enrolled in any of the payment plans described below shall pay all Charges in advance of shipment as required by UPS.

If, for any reason, a negotiable instrument submitted to UPS as payment for Charges is returned to UPS unpaid, or an electronic request for payment is dishonored, UPS may charge the shipper a dishonored payment fee of twenty dollars (U.S. \$20.00) or such greater amount as may be allowed by applicable law, per incident. In addition to any late payment fees assessed by UPS and any collection costs which may be incurred by UPS in the final collection of Charges owed by the shipper. In no event shall the dishonored payment fee exceed the maximum amount allowed by applicable law.

As an accommodation to the shipper, and in UPS's sole discretion, UPS may render invoices or copies of invoices to a third party at the request of the shipper. The shipper remains responsible for the timely payment in full of all Charges owed by the shipper. By requesting UPS to render invoices or copies of invoices to a third party, the shipper is deemed to authorize the third party to act on behalf of the shipper, and UPS may rely thereon in all respects.

UPS also may in its sole discretion elect to render an invoice that includes Charges owed in addition to payments owed for services provided by UPS affiliates.

Where UPS elects to make an alternative payment plan available to the shipper, UPS may render an invoice to the shipper on a weekly (i.e., seven-days) or a monthly (i.e., four or five calendar weeks) basis. A weekly invoice will include the Charges incurred in the previous week. Notwithstanding that UPS has elected to render an invoice to the shipper on a weekly basis, an invoice may be issued only when the shipper has incurred aggregate Charges in excess of ten dollars (\$10.00), or when five (5) calendar weeks have elapsed from the date of issuance of the last invoice, whichever event occurs first. A monthly invoice

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

will include the Charges incurred for the four or five week period for which the invoice is issued. A weekly service charge will be added to each invoice if the shipper has requested UPS's automatic daily pickup call service. Except as otherwise expressly provided below, UPS's payment terms require payment of all Charges within seven (7) days after receipt of the UPS invoice. In its sole discretion, UPS may offer one or more of the following alternative payment plans for the payment of Charges:

(1). Electronic Funds Transfer Plan (Debit EFT)

By written agreement with UPS, the shipper will provide UPS with the shipper's bank account number and bank account routing number to enable UPS to electronically request payment, for all Charges incurred by the shipper, directly from the shipper's bank, on a weekly or monthly basis. The shipper's bank will remit the amount requested to UPS and deduct that amount from the shipper's bank account. Payments to UPS will be shown on the shipper's bank statements. The shipper is responsible for payment of any fees imposed by the shipper's bank. Additionally, the shipper will receive a weekly or monthly invoice, as applicable, except as described above, from UPS listing the services provided for the applicable billing period. If, for any reason, an electronic request for payment is dishonored, the shipper is responsible for making a timely payment directly to UPS. Past due balances will be subject to any collection costs which may be incurred by UPS in the final collection of Charges owed by the shipper. No late payment fee shall be assessed with respect to the Electronic Funds Transfer Plan.

(2). Monthly Prepayment Plan

By written agreement with UPS, the shipper will make a prepayment with UPS in an amount equal to four weeks' anticipated Charges as estimated by UPS. Upon notice to the shipper, the required prepayment amount may be changed by UPS at any time to reflect a revised estimate of four weeks' Charges. All prepayment amounts will remain on account with UPS. No interest will be paid or accrued on the prepayment amounts.

The Charges incurred for the applicable month will be totaled and billed to the shipper on a monthly basis. Payment is due within seven (7) days after receipt of the UPS invoice. Past due balances will be subject to a late payment fee as described below in addition to any collection costs which may be incurred by UPS in the final collection of Charges owed by the shipper.

(3). Weekly Prepayment Plan

By written agreement with UPS, the shipper will make a prepayment with UPS in an amount equal to four weeks' anticipated Charges as estimated by UPS. Upon notice to the shipper, the required prepayment amount may be changed by UPS at any time to reflect a revised estimate of four weeks' Charges. All prepayment amounts will remain on account with UPS. No interest will be paid or accrued on the prepayment amounts.

Shipper will receive invoices on a weekly basis, except as described above. Each invoice will list the previous period's Charges incurred. Payment for all accumulated Charges will be due within seven (7) days following the shipper's receipt of every fourth invoice; however, if prior to receiving the fourth invoice the shipper's accumulated Charges should equal or exceed the prepayment amounts on account with UPS, then the accumulated Charges will be due within seven (7) days following the shipper's receipt of the invoice requiring such payment. Past due balances will be subject to a late payment fee as described below in addition to any collection costs which may be incurred by UPS in the final collection of Charges owed by the shipper.

(4). Special Payment Plan

By written agreement with UPS, the shipper may elect to prepay an amount equal to the anticipated Charges for a period of between ten to twenty-six weeks, as estimated by UPS. The Charges actually incurred by the shipper will be deducted by UPS on a weekly basis from the prepayment amounts on account with UPS. Weekly invoices marked as paid will be forwarded to the shipper reflecting the balance of the prepayment amount on account with UPS. When the prepayment amount on account with UPS reaches the minimum balance specified in the written agreement, the shipper is required to make another prepayment for an additional period pursuant to the same agreement, or, if the shipper

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

does not do so, the shipper must make another payment arrangement with UPS. All prepayment amounts will remain on account with UPS. No interest will be paid or accrued on the prepayment amounts. If the Charges incurred by the shipper exceed the remaining balance of the prepayment amounts on account with UPS, the excess Charges will be due within seven (7) days following the shipper's receipt of the invoice requiring such payment. Past due balances will be subject to a late payment fee as described below in addition to any collection costs which may be incurred by UPS in the final collection of Charges owed by the shipper.

(5). Credit Extension Plan

By written agreement with UPS, the shipper may elect to pay an annual credit extension fee and thereafter receive invoices for Charges incurred by the shipper on a monthly basis with no prepayment requirement. The invoices will be payable within seven (7) days following receipt by the shipper. The credit extension fee is based upon the shipper's total annual Charges, as estimated by UPS, and is subject to change annually by UPS in its sole discretion. In order to be eligible for the Credit Extension Plan, the shipper must use UPS's transportation services and the Credit Extension Plan solely for business, commercial, or agricultural purposes. A shipper is not eligible for the Credit Extension Plan if the shipper uses UPS's transportation services and the Credit Extension Plan for any personal, family, or household purposes. By using the Credit Extension Plan (if made available to the shipper), the shipper represents, warrants, certifies, and agrees that it will use UPS's transportation services and the Credit Extension Plan solely for business, commercial or agricultural purposes and not for any personal, family, or household purposes. Past due balances will be subject to a late payment fee as described below in addition to any collection costs which may be incurred by UPS in the final collection of Charges owed by the shipper.

(6). Weekly Payment Plan

Each week the shipper will receive an invoice for the previous week's Charges except as described above. The invoice is due within seven (7) days of receipt. No prepayment is required under this plan.

Past due balances will be subject to a late payment fee as described below in addition to any collection costs which may be incurred by UPS in the final collection of Charges owed by the shipper.

Shipper acknowledges and agrees that there may be a delay of two or more days between the date that payments are received by UPS and the date that the payments are posted and credited to the shipper's account with UPS. If a UPS remittance advice is attached to the shipper's payment, the payment will be credited accordingly. If no remittance advice is attached to the shipper's payment, the payment will be credited to the oldest outstanding invoice.

For the Monthly Prepayment Plan, the Weekly Prepayment Plan, the Special Payment Plan, the Credit Extension Plan, and the Weekly Payment Plan, a late payment fee will be assessed if the shipper's payment is not received by UPS within fourteen (14) days of the invoice due date. Except as otherwise stated below, the late payment fee will equal five percent (5%) of the total past due balance of the shipper's invoice (including, without limitation, any previously assessed but unpaid late payment fees) that is fourteen (14) days past due or the maximum amount permitted by applicable law, whichever is less.

In determining the late payment fee for the Monthly Prepayment Plan and the Weekly Prepayment Plan, UPS will apply the prepayment amounts on account with UPS to reduce the calculated base amount on which the late payment fee is assessed; provided, that UPS will so apply the prepayment amounts to the oldest outstanding invoice first, and to each subsequent invoice thereafter, until the prepayment amounts have been fully so applied. If an invoice 14 days past due is fully so covered by the prepayment amount, no late payment fee will apply. If an invoice 14 days past due is partially so covered by the prepayment amount, the late payment fee will apply to the portion not so covered by the prepayment amount.

For the Special Payment Plan, a late payment fee will not be assessed if there has been a positive balance in the shipper's prepayment account with UPS at any time during the 27-day period immediately preceding the transmittal of the current invoice to the shipper. The late payment fee for the Special Payment Plan will

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

be assessed on the "charges this period" of the shipper's invoice (including, without limitation, any previously assessed but unpaid late payment fees) that is fourteen (14) days past due.

A late payment fee will be assessed only once on each invoice that is fourteen (14) days past due. Each late payment fee will be due and payable within seven (7) days following the shipper's receipt of the invoice that first reflects the assessment of the late payment fee. The late payment fee is in addition to any collection costs that may be incurred by UPS in the final collection of Charges owed by the shipper. Neither the assessment nor the payment of a late payment fee will (a) affect the shipper's responsibility to pay all Charges owed, or (b) in any manner preclude UPS from exercising any of its rights or remedies hereunder or under applicable law.

575

WEEKLY SERVICE CHARGE FOR DAILY PICKUP SERVICE

When Daily Pickup Service is requested, an additional weekly service charge will be assessed and shall apply in addition to the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping. UPS will call upon each UPS daily pickup service shipping account once each business day to pick up packages for delivery to all points served without a special pickup request. UPS may not call upon a UPS daily pickup service shipping account on any day in which the account indicates that there are no packages available for pickup.

The weekly service charge is based on a daily pickup account's weekly billing total, as reflected in the UPS billing system. The weekly billing total may not necessarily reflect all packages tendered during a calendar week.

580

HAZARDOUS MATERIALS SERVICE

Hazardous Materials, defined as those materials regulated under Title 49 of the Code of Federal Regulations (49 C.F.R.), excluding ORM-D ground shipments, are accepted for transportation only via Daily Pickup Service, and only as a contract service under the provisions set forth in the UPS standard form Agreement for Transportation of Hazardous Materials (Agreement). To receive Hazardous Materials Service, a shipper must either sign an Agreement or incorporate the provisions of the Agreement into the shipper's existing customized contract for shipping service with UPS.

UPS transports Hazardous Materials only within and among the 50 United States and Puerto Rico.

An additional charge will be assessed for each Hazardous Materials package shipped under the Agreement. The effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping will apply.

It is the shipper's responsibility to determine if a package contains a Hazardous Material and to properly classify, label, mark, and package it in accordance with governmental regulations, 49 C.F.R. and the terms set forth in the Agreement.

UPS reserves the right to charge and the shipper agrees to pay, for all costs resulting from improperly packed Hazardous Materials, or the cost of disposal if the shipper refuses to accept a returned item. The shipper agrees to indemnify, defend, and hold harmless UPS, its parent corporation, and affiliated companies, their officers, directors, employees, agents, and their successors and assigns, from all claims, demands, expenses, liabilities, causes of action, enforcement procedures, and suits of any kind or nature brought by a governmental agency or any other person or entity arising from or relating to the transportation of a Hazardous Materials package, from the shipper's breach of the Agreement, or from the shipper's non-compliance with governmental laws or regulations applicable to the transportation of Hazardous Materials. Under no circumstances shall UPS be liable for special, incidental, or consequential damages arising from the transportation of a Hazardous Materials shipment.

UPS reserves the right to discontinue service to any shipper for, among other reasons, tendering an undeclared Hazardous Materials package (including ORM-D shipments that are tendered without the proper shipping documentation) to UPS. If a shipper tenders an undeclared Hazardous Materials

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

package to UPS, UPS shall not be liable for the package in the event of loss, damage, delay, or misdelivery, nor shall UPS be liable for any special, incidental, or consequential damages.

Additional terms and conditions regarding the shipment of Hazardous Materials are set forth in the *UPS Guide for Shipping Ground and Air Hazardous Materials*, which is available at UPS.com.

590

HAZARDOUS WASTE AND MERCURY-CONTAINING WASTE

No service shall be rendered in the transportation of hazardous waste. Hazardous waste is a solid waste that meets any of the criteria of hazardous waste as described in Section 261.3 of Title 40 of the Code of Federal Regulations.

UPS's acceptance for transportation of any mercury-containing waste material or used mercury-containing device (including, but not limited to, medical devices, spent or broken fluorescent lamps, thermostats or thermometers) is limited, must be prearranged, and will only be provided pursuant to prior written authorization from UPS upon satisfaction of certain requirements, including appropriate packaging and financial assurances.

592

PORTABLE ELECTRONIC DEVICES

UPS transports packages containing radio frequency devices (RFID), ultra-wideband devices (UWB) and other portable electronic devices (PED) only when such devices are in an inactivated state or otherwise in compliance with applicable law, including 14 C.F.R. 91.21, 14 C.F.R. 121.306, or 47 C.F.R. 15.521(a).

600

DELIVERY CONFIRMATION SERVICE

At the time a shipper tenders a domestic package to UPS, the shipper may request Delivery Confirmation Service by indicating Delivery Confirmation on a UPS source document (excluding Air Shipping Documents) or in a UPS automated shipping system. Each Delivery Confirmation response will include the date of delivery and either the name of the recipient or the disposition of the package; however, in the event of a return, the response will indicate the reason for the return and the date processed. An additional charge will be assessed for each such response. All responses will be consolidated and provided to the shipper in printed or electronic format.

For an additional charge, a shipper may request UPS to obtain the recipient's signature and to include it on the Delivery Confirmation response.

A shipper may request UPS to obtain the signature of an adult 21 years of age or older and to include it in the Delivery Confirmation response. An additional charge will be assessed for each such response. UPS, in its sole discretion, will determine if delivery can be completed when such a request is made, and may request photo identification indicating the recipient's age before completing delivery. The shipper must use a UPS automated shipping system to initiate a request for this service.

A shipper may elect to direct the response to an address other than the return address specified on the shipping label. In such a case, the response will be mailed individually and an additional charge will be assessed.

601

PROOF OF DELIVERY (P.O.D.)

Upon request, UPS will provide proof of delivery via facsimile or mail transmission. The request must include a facsimile number, including area code, for an operating facsimile machine, or an address deliverable by the United States Postal Service for mail. UPS reserves the right to assess the shipper an additional charge for each successfully transmitted or mailed P.O.D.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

605

ADDITIONAL HANDLING CHARGES

An additional handling charge in the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping will be assessed for the transportation of the following: any article that is encased in an outside shipping container made of metal or wood; any cylindrical item, such as a barrel drum, pail, or tire, that is not fully encased in a corrugated cardboard shipping container; any package with the longest side exceeding 60 inches or its second-longest side exceeding 30 inches; and any package qualifying as a Large Air Package. An additional handling charge will not be assessed to packages qualifying for a Large Package Surcharge. UPS reserves the right to assess the Additional Handling Charge for any package that, in UPS's sole discretion, requires special handling.

606

FUEL SURCHARGE

UPS reserves the right to institute a fuel surcharge on some or all shipments without prior notice. This surcharge is subject to adjustment monthly. This surcharge may apply to any domestic or international transportation or other charges, including but not limited to, any accessorial charge or surcharge. This surcharge will be applied to such services and for such periods as UPS, in its sole discretion, may determine necessary. The current fuel surcharge is described at UPS.com.

1000

DELIVERY SERVICE FOR SHIPPERS RECEIVING DAILY PICKUP SERVICE

Shippers who elect Daily Pickup Service, pursuant to the terms of Item 575, may ship general commodities except articles of unusual value (as defined in Item 460), Classes A and B explosives, household goods as defined in 49 U.S.C. § 13102(10), commodities in bulk, commodities requiring special equipment, those commodities injurious or contaminating to other lading and items identified in Item 458. The rate for delivery of packages between points and places in the United States to a commercial location (a place of business or employment, not including a business operated out of a home that does not have an entrance open to the public) or to a residential location (a location that is a home, including a business operating out of a home that does not have an entrance open to the public) shall be the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping.

If the delivery location could be construed as either residential or commercial, then the rates for residential delivery service will be applied.

For rates applicable to Daily Pickup Service, see Item 575.

Note 1 - UPS will profile the shipper's traffic at a single location and/or at multiple locations as

necessary and, based on that profile, will assign the shipper's traffic to a customer group for the receipt of applicable package information, problem resolution, solution support, and communication services.

Note 2 - In the event a shipper selects the "Bill Consignee" or "Bill Third Party" option and omits the account number or supplies an invalid account number, then in addition to being liable for the transportation and other charges, the shipper shall be assessed an additional charge. An account number is invalid if it is the wrong account number for the bill-to party, or if it is the account number for a consignee or third party who fails to pay the shipping charges.

1005

ON-CALL PICKUP SERVICE

When On-Call Pickup Service is requested by the shipper, UPS will arrange (where reasonably practicable) a package pickup at the shipper's location. The effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping will apply. An additional charge for On-Call Pickup Service will also be assessed.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

On-Call Pickup Service is available for packages containing general commodities, except articles of unusual value (as defined in Item 460), Classes A and B explosives, household goods as defined in 49 U.S.C. § 13102(10), commodities in bulk, commodities requiring special equipment, hazardous materials requiring shipping papers in accordance with 49 C.F.R. § 172.200, those commodities injurious or contaminating to other lading and items identified in Item 458.

1010

UPS GROUND SERVICE GUARANTEE

UPS guarantees on-schedule delivery of UPS Ground Service and UPS Hundredweight Service Ground packages, where such services are available, to all 50 states and Puerto Rico. The guarantee is provided according to the terms of the applicable UPS Service Guarantee in the effective UPS Terms and Conditions of Service.

Note 1 - If the delivery location could be construed as either residential (a location that is a home, including a business operating out of a home that does not have an entrance open to the public) or commercial (a place of business or employment, not including a business operated out of a home that does not have an entrance open to the public), then the rates for residential delivery service will be applied.

Note 2 - The guarantee does not apply to shipments that are delayed due to causes beyond UPS's control including, but not limited to, the following: the unavailability or refusal of a person to accept delivery of the shipment; acts of God; acts of public authorities acting with actual or apparent authority; acts or omissions of customs or similar authorities; insufficient information provided by a customer; the application of security regulations imposed by the government, or otherwise applicable to the shipment; a government agency hold; riots; strikes or other labor disputes; civil unrest; disruptions of any kind in air or ground transportation networks; and natural disasters.

Note 3 - The guarantee does not apply to shipments that are picked up or scheduled to be delivered between December 12th and December 24th.

Note 4 - The sole remedy provided under the UPS Ground Service Guarantee is the credit or refund of transportation charges, which will only be remitted to the payer. Under no circumstances shall UPS be liable for any special, incidental, or consequential damages for failure to attempt delivery in accordance with the UPS Ground Service Guarantee.

1020

UPS 3 DAY SELECT SERVICE

UPS 3 Day Select Service is available for the shipment of general commodities, except articles of unusual value (as defined in Item 460), Classes A and B explosives, household goods as defined in 49 U.S.C. § 13102(10), commodities in bulk, commodities requiring special equipment, those commodities injurious or contaminating to other lading, and items identified in Item 458, between points and places in the 48 contiguous United States. UPS 3 Day Select Service is available to the shipper by attaching a special label, approved by UPS, at the time the package is tendered to UPS, in accordance with the effective UPS Terms and Conditions of Service. UPS guarantees delivery of UPS 3 Day Select packages subject to the terms of the applicable UPS Service Guarantee in the effective UPS Terms and Conditions of Service.

The rate for delivery of UPS 3 Day Select Service packages to a residential location (a location that is a home, including a business operating out of a home that does not have an entrance open to the public) or to a commercial location (a place of business or employment, not including a business operated out of a home that does not have an entrance open to the public) shall be the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping.

Note 1 - A service charge for pickup service may apply. For rates applicable to pickup service, see Items 575 and 1005.

Note 2 - Transportation charges will be based on the dimensional weight of the package when the dimensional weight exceeds the actual weight.

Dimensional weight is determined as follows:

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

Step 1 - Calculate cubic size: Multiply the package length by the width by the height (round each number to the nearest whole inch) (LxWxH). The result is the cubic size of the package.

Step 2 - Determine dimensional weight: Divide the cubic size of the package by 194 to determine the dimensional weight (in pounds). Increase fractions of a pound to the next full pound.

$$\frac{L \times W \times H}{194} = \text{Dimensional Weight}$$

Note 3 - Hazardous materials are accepted for transportation via UPS 3 Day Select Service only in passenger aircraft quantities prepared according to the requirements set forth in Title 49 of the Code of Federal Regulations and the UPS *Guide for Shipping Ground and Air Hazardous Materials*, and only for customers who have completed a UPS standard form Agreement for Transportation of Hazardous Materials or have the provisions of that Agreement incorporated into their existing customized contract for shipping service with UPS. Hazardous materials and all "Other Regulated Materials" (ORM) are prohibited from being shipped via UPS 3 Day Select Hundredweight Service.

Note 4 - UPS Hundredweight Service is available for 3 Day Select Service provided the total shipment actual weight is 200 pounds or more. All other terms and conditions of UPS Hundredweight Service contained in the applicable UPS Service Guides and the effective UPS Rates will apply.

1030

RATES FOR OVERSIZE, OVERWEIGHT AND LARGE PACKAGES

OverSize 1: If a package exceeds 84 inches in length and girth combined and is less than or equal to 108 inches in length and girth combined and has an actual weight of less than 30 pounds, the package will be considered "OverSize 1" (OS1). Each OS1 package will be treated as a 30-pound package when calculating the billable weight.

OverSize 2: If a package exceeds 108 inches in length and girth combined, and is less than or equal to 130 inches in length and girth combined, and has an actual weight of less than 70 pounds, the package will be considered "OverSize 2" (OS2). Each OS2 package will be treated as a 70-pound package when calculating the billable weight.

OverSize 3: If a UPS Ground package exceeds 130 inches in length and girth combined and has an actual weight of less than 90 pounds, the package will be considered "OverSize 3" (OS3). Each UPS Ground OS3 package will be treated as a 90-pound package when calculating the billable weight and will be subject to a Large Package Surcharge.

A Large Package Surcharge (LPS) will be applied to each UPS Ground package sent between locations in the United States, including Hundredweight, when the size of the package exceeds 130 inches in length and girth combined and/or the package is identified as OS3. Each Large Package in a UPS Ground multi-piece shipment may receive an LPS. An LPS will not apply to UPS Standard To Canada packages or Authorized Return Services Ground packages.

A package shipped using a UPS Air Service or UPS 3 Day Select is considered a Large Air Package when its length, combined with twice the width plus twice the height, exceeds 130 inches, and is equal to or less than 165 inches. For each Large Air Package, the rate is based on the greater of the dimensional weight or the actual weight. Large Air Packages are subject to a minimum billable rate of \$90. The minimum billable rate will not apply to UPS Hundredweight Service shipments.

Packages with an actual weight of more than 150 pounds, or packages that, when measured to determine the billable weight, exceed 108 inches in length, or exceed a total of 165 inches in length and girth combined, or in the case of import shipments, exceed 130 inches in length and girth combined, are not accepted for transportation. If found in the UPS system, they are subject to one or more of the following additional charges: Over Maximum Weight (\$50), Over Maximum Length (\$50), or Over Maximum Size (\$50).

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

1060

EXPEDITED SERVICE

Expedited Service may be selected by a shipper for general commodities, except articles of unusual value (as defined in Item 460), Classes A & B explosives, household goods as defined in 49 U.S.C. § 13102(10), commodities in bulk, commodities requiring special equipment, those commodities injurious or contaminating to other lading and items identified in Item 458. This service is available between points and places in the United States. Expedited Service may be selected by tendering a package to UPS and attaching a special label, approved by UPS, requesting expedited UPS Next Day or 2nd Day delivery service.

When such service is requested, the rates for delivery of UPS Next Day or UPS 2nd Day Letters, Express Envelopes or packages, with a value not exceeding \$100 per package, shall be the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping.

Note 1 - Alternatively, the shipper may attach a special label, approved by UPS, to the package requesting UPS Next Day Saver delivery service. The UPS Next Day Saver delivery service will be provided by UPS subject to the terms and conditions published in the applicable UPS Service Guides. The effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping will apply.

Note 2 - The shipper may attach a special label, approved by UPS, to the package requesting UPS Next Day Early A.M. delivery service. The UPS Next Day Early A.M. delivery service will be provided by UPS, subject to the terms and conditions published in the applicable UPS Service Guides, and subject to the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping. The shipper may request optional verbal confirmation of delivery service by indicating Verbal Confirmation of Delivery on the UPS Next Day Early A.M. source document or in the UPS automated shipping system. When this service is selected, UPS will call the shipper to confirm delivery on the day of delivery. The Verbal Confirmation of Delivery will be provided for an additional charge.

Note 3 - The shipper may also attach a special label, approved by UPS, to the package requesting UPS 2nd Day A.M. delivery service. The UPS 2nd Day A.M. delivery service will be provided by UPS, subject to the terms and conditions published in the applicable UPS Service Guides. The effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping will apply.

Note 4 - For Next Day services, there is no weight limit for Express Envelopes containing correspondence, urgent documents, and electronic media. When a Next Day service is selected, Express Envelopes containing items other than those listed above are subject to the corresponding rates for the applicable weight. The shipper agrees to comply with the requirements of the Private Express Statutes when using UPS 2nd Day A.M. and UPS 2nd Day services. For UPS Second Day services, Express Envelopes weighing one (1) pound or more are subject to the corresponding rates for the applicable weight.

Note 5 - A service charge for pickup service may apply. For rates applicable to pickup service, see Items 575 and 1005.

Note 6 - An additional charge will be assessed on each UPS Next Day or UPS 2nd Day package picked up on Saturday for subsequent delivery.

An additional charge will be assessed on regular Saturday Pickup accounts when a pickup stop is made and no packages are picked up.

Note 7 - Transportation charges will be based on the dimensional weight of the package when the dimensional weight exceeds the actual weight.

Dimensional weight is determined as follows:

Step 1 - Calculate cubic size: Multiply the package length by the width by the height (round each number to the nearest whole inch) (LxWxH). The result is the cubic size of the package.

Step 2 - Determine dimensional weight: Divide the cubic size of the package by 194 to determine the dimensional weight (in pounds). Increase fractions of a pound to the next full pound.

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

LxWxH     =     Dimensional Weight  
194

Note 8 - In the event a shipper selects the "Bill Consignee" or "Bill Third Party" option for a UPS Next Day or 2nd Day package and omits the account number or supplies an invalid account number, then in addition to being liable for the transportation and other charges, the shipper shall be assessed an additional charge. An account number is invalid if it is the wrong account number for the bill-to party, or if it is the account number for a consignee or third party who fails to pay the shipping charges.

Note 9 - Hazardous materials are accepted for transportation via expedited delivery service only in passenger aircraft quantities prepared according to the requirements set forth in Title 49 of the Code of Federal Regulations and the *UPS Guide for Shipping Ground and Air Hazardous Materials*, and only for customers who have completed a UPS standard form Agreement for Transportation of Hazardous Materials or have the provisions of that Agreement incorporated into their existing customized contract for shipping service with UPS.

Note 10 - UPS Hundredweight Service is available for Expedited Service provided the total shipment weight is 100 pounds or more. All other terms and conditions of the UPS Hundredweight Service contained in the applicable UPS Service Guides and the effective UPS Rates will apply.

1080

UPS CUSTOMER CENTER

A UPS Customer Center is a UPS facility where shippers may tender packages for transportation by UPS. Customer Centers will accept packages containing general commodities, except articles of unusual value (as defined in Item 460), Classes A and B explosives, household goods as defined in 49 U.S.C. § 13102(10), commodities in bulk, commodities requiring special equipment, hazardous materials requiring shipping papers in accordance with 49 C.F.R. § 172.200, those commodities injurious or contaminating to other lading and items identified in Item 458.

The rates for packages sent from a UPS Customer Center to a residential location (a location that is a home, including a business operating out of a home that does not have an entrance open to the public) or to a commercial location (a place of business or employment, not including a business operated out of a home that does not have an entrance open to the public) shall be the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping.

If the delivery location could be construed as either residential or commercial, then the rates for residential delivery service will be applied.

Before releasing any package at a UPS Customer Center to a consignee or other recipient, UPS reserves the right to require sufficient verification, as determined by UPS in its sole discretion, of the recipient's name, address, authorization to receive the package, or any other information UPS deems necessary to release the package in its sole discretion.

1090

THE UPS STORE™/THIRD PARTY RETAILERS

The UPS Store™ locations are independently owned and operated by licensed franchisees of Mail Boxes Etc., Inc., an indirect subsidiary of United Parcel Service of America, and are not agents of UPS. UPS assumes no liability other than to The UPS Store location, as the shipper of the package, for lost, damaged, or delayed packages sent via that The UPS Store location. Any such liability to The UPS Store location is subject to the limitations set forth in the applicable UPS Tariff or *UPS Rate and Service Guide*. All inquiries regarding packages shipped via any The UPS Store location must be directed to the shipping The UPS Store location. UPS will deal solely with The UPS Store location in all matters concerning packages shipped via The UPS Store location, including but not limited to: tracking/tracing requests; claims and guarantees; C.O.D. preparation and remittance; return of undeliverable packages and letters; proper packaging and labeling; and billing. Even if UPS responds directly to customers of a The UPS Store location regarding tracking requests, UPS will not be liable to those customers. The UPS Store locations are solely responsible

RULES AND OTHER PROVISIONS WHICH GOVERN THE  
TRANSPORTATION OF PROPERTY

for the issuance of any refunds and claims to those who shipped packages via The UPS Store location. The UPS Store locations agree not to ship any articles that UPS does not accept for transportation. The UPS Store locations shall indemnify and hold harmless UPS in any action against UPS arising from the loss, damage, or delay of a package shipped via that The UPS Store location.

UPS Authorized Shipping Outlets or Commercial Counters (collectively referred to within this Item as "Third-Party Retailers") are independently owned and operated businesses and are not agents of UPS. UPS assumes no liability other than to the Third-Party Retailer, as the shipper of the package, for lost, damaged, or delayed packages sent via the Third-Party Retailer. Any such liability to the Third-Party Retailer is subject to the limitations set forth in the applicable UPS Tariff or *UPS Rate and Service Guide*. All inquiries regarding packages shipped via Third-Party Retailers must be directed to the Third-Party Retailer. UPS will deal solely with the Third-Party Retailer in all matters concerning packages shipped via a Third-Party Retailer, including but not limited to: tracking/tracing requests; claims and guarantees; C.O.D. preparation and remittance; return of undeliverable packages and letters; proper packaging and labeling; and billing. Even if UPS responds directly to Third-Party Retailer customers regarding tracking requests, UPS will not be liable to those customers. Third-Party Retailers are solely responsible for the issuance of any refunds and claims to those who shipped packages via the Third-Party Retailer. The Third-Party Retailer agrees not to ship any articles that UPS does not accept for transportation. Third-Party Retailers shall indemnify and hold harmless UPS in any action against UPS arising from the loss, damage, or delay of a package shipped via the Third-Party Retailer.

2000

HUNDREDWEIGHT SERVICE

UPS Hundredweight Service is available only for customers receiving Daily Pickup Service. Hundredweight Service may be selected for shipment of general multiple-piece commodities that total 200 pounds actual weight or more for commercial or residential Ground or 3 Day Select delivery service, or for expedited shipments totaling 100 pounds or more sent to a single address on the same day. Excluded shipments include: articles of unusual value (as defined in Item 460), Classes A & B explosives, household goods as defined in 49 U.S.C. § 13102(10), commodities requiring special equipment, hazardous materials requiring shipping papers in accordance with 49 C.F.R. § 172.200, those commodities injurious or contaminating to other lading and items identified in Item 458.

The rate for delivery of Hundredweight shipments subject to the terms and conditions in the applicable UPS Service Guides, with a value not exceeding \$100 per package, shall be the effective UPS Rates applicable to the shipper and the package and in effect at the time of shipping.

Note 1 - RATE DETERMINATIONS - For Ground and 3 Day Select Hundredweight shipments, a minimum charge equal to the greater of either a charge based on 15 pounds per package or a shipment minimum charge in effect at the time of shipping will be assessed. For expedited Hundredweight shipments, a minimum charge based on an average weight of 10 pounds per package will be assessed.

Note 2 - MAXIMUM WEIGHT PER PACKAGE is 150 pounds. The maximum weight for an "Other Regulated Materials" (ORM) package is 66 pounds unless further restricted in the *UPS Guide for Shipping Ground and Air Hazardous Materials*, which is available at UPS.com.

Note 3- For expedited shipments, if the dimensional weight of a package exceeds the actual weight, the dimensional weight of that package will be used in the calculation of the shipment billed weight. See Item 1060 for explanation of dimensional weight.

Note 4 - UPS Express Envelopes and Letters are excluded from Hundredweight Service.

Note 5 - UPS Return Services are not provided for UPS Hundredweight Service.

Note 6 -All ORM packages are prohibited in UPS 3 Day Select Hundredweight and expedited Hundredweight Service.

The End

~~57~~  
1Z0XWS27 124484 6234

5'x 4" x 4"

11/28/05

Marie Novak  
129 Bermuda St  
Atlantic Beach, NY 11509

Wellington Marketplace  
561-795-2373

Store: 1 Clerk: LA Register: 1  
11/28/2005 5:40:17  
Transaction#: 69601

\*\*\*\*\*  
RECEIPT RECEIPT  
\*\*\*\*\*  
Reprinted on 12-13-2007 11:43:57

1. OPS 3 Day Rs Ref: 40394  
2. TRK: 120XWS271244846234  
3. No Value Declared  
4. Scale Wgt: 7.95  
5. Zip: 11509 Zn: 1306 Wgt: 7.95  
Lx 29.18

|              |       |
|--------------|-------|
| Subtotal:    | 29.18 |
| Balance Due: | 29.18 |
| CCPd:        | 29.18 |
| Change:      | 0.00  |

Thank you for  
shipping with  
Pak Mail

"B"

IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT, IN AND  
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50 2008 CA 036246XXXXMB  
AH

IVANA VIDOVIC MLINAR,

Plaintiff,

vs.

UNITED PARCEL SERVICE INC., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT CORP. d/b/a  
CARGO LARGO and AARON ANDERSON,

Defendants.

---

**MOTION FOR CONTINUANCE TO SEPTEMBER/OCTOBER TRIAL DOCKET**

Plaintiff Ivana Vidovik Mlinar, by and through her undersigned counsel, hereby files this  
Motion for Continuance to the September/October Docket and states as follows

1. This case is currently set for the Court's July/August trial docket with a pretrial stipulation due next week.
2. The Plaintiff alleges that Defendant United Parcel Service Inc. (UPS) and Defendant Recovery Management Corporation (RCM) were engaged in a conspiracy which resulted in the conversion and re-sale of her artwork as well as the unlicensed use of her name in the sale of the artwork.
3. The Plaintiff has complied with all discovery requests served by the Defendants; however, Plaintiff is awaiting several responses, answers and accommodations on several key discovery requests she has made thus far.

# MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000101

Ivana Mlinar v. UPS, et al  
Case No.: 50 2008 CA 036246XXXXMB AH

4. From RCM, Plaintiff awaits dates to be able to inspect the UPS Function at RCM's warehouse location in Missouri, the site where Plaintiff's paintings were auctioned to the public.
5. Plaintiff also awaits dates for the depositions of two key RCM witnesses including the owner of the corporation, Louis D. Pak (signatory to the agreements between UPS and RCM) and Elizabeth Simons, the individual who valued the paintings by using Lavon Art Gallery, a direct-customer of UPS.
6. On February 18, RCM issued Non-Party Subpoenas on the gallery owners who have sold the Plaintiff's work in the past. Plaintiff filed a Request for Copies. There has been no response.
7. Defendant RCM's counsel new attorney (at the same retained firm) has asked Plaintiff's counsel for a week to review the file before providing the outstanding discovery. That week lapsed today and no communications have been made.
8. From UPS, the Plaintiff awaits amended discovery answers to several key requests. In fact, Plaintiff has informed UPS about ten specific areas of discovery that have been insufficiently responded to as of this date. These ten issues are present in several responses and answers. (Correspondence attached as Exhibit A.)
9. Plaintiff believes that entering into a pretrial stipulation at this time is futile and that the case should be continued for the next four months only.
10. Plaintiff has attempted to confer with the Defendants regarding a continuance; neither has responded.

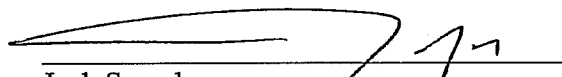
Ivana Mlinar v. UPS, et al  
Case No.: 50 2008 CA 036246XXXXMB AH

WHEREFORE, Plaintiff requests the Court grant the Plaintiffs' Motion for Continuance and enter an Order setting Trial upon its September/October Docket with pretrial deadlines set in accordance thereto.

MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000103

Ivana Mlinar v. UPS, et al  
Case No.: 50 2008 CA 036246XXXXMB AH

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by  
U.S. Mail to all Counsel on the attached list, this 27<sup>th</sup> day of mar, 2011.



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Ivana Mlinar v. UPS, et al  
Case No.: 50 2008 CA 036246XXXXMB AH

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May 25, 2011

**Via Facsimile: (305) 379-3690  
and U.S. Mail**

ATTORNEYS AT LAW:

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BRIAN P. SULLIVAN<sup>2,6</sup>

KAREN E. TERRY

\*C. CALVIN WARRINER III

SHAREHOLDERS

\*BOARD CERTIFIED

ALSO ADMITTED

<sup>1</sup> KENTUCKY

<sup>2</sup> MAINE

<sup>3</sup> MARYLAND

<sup>4</sup> MASSACHUSETTS

<sup>5</sup> MISSISSIPPI

<sup>6</sup> NEW HAMPSHIRE

<sup>7</sup> NEW JERSEY

<sup>8</sup> VIRGINIA

<sup>9</sup> WASHINGTON DC

PARALEGALS:

VIVIAN AYAN-TEJEDA

ALYSSA A. DIEDWARD

RANDY M. DUFRESNE

DAVID W. GILMORE

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DEBORAH M. KNAPP

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STEVE M. SMITH

BONNIE S. STARK

WALTER A. STEIN

Evan R. Gutwein, Esquire  
Hamilton, Miller & Birthisel, LLP  
150 SE 2nd Avenue, Suite 1200  
Miami, FL 33131

Re: Ivana Mlinar v. UPS, et al  
Our File No.: 281470

Dear Mr. Gutwein

In an attempt to lessen the motion practice occurring in this case, I am advising of several production deficiencies that should be corrected. Plaintiffs will move to compel production for each of the deficiencies discussed below if not rectified. Our contentions are highlighted and annotated in the pleadings as well. **Please let me know if you expect that compliance with the Court's order will take longer than ten days.**

FIRST, nearly all of the discovery responses fail to comply with Rule 1.350. Pursuant to the Court's Order entered on May 18, 2011 (granting Plaintiffs' Motion to Compel UPS to Comply with Rule 1.350), all of UPS's discovery responses should be amended to include specific objections and to remove any objections notwithstanding production. Boilerplate objections based on irrelevance, such as "unlikely to lead to admissible evidence," are without merit; the scope of discovery is wider than the test for admissibility.

SECOND, certain Responses served on May 16, 2011 state that documents will be produced but do not identify which documents are being produced in response to which request. The responses should identify the documents.

THIRD, the Answer to the Interrogatories needs to be fully notarized.



May 25, 2011  
Page 2

FOURTH, we disagree with UPS's partial objection that the time periods requested in each of the requests to produce are too broad and/or unlimited. In fact, each interrogatory and/or request is limited to the time of the agreement referred to therein until the present day. For example, a request for all the yearly amendments referred to in a 2003 agreement includes the years 2004-2011. The same is true for all payments made pursuant to an agreement entered into in the year 2003. Further, the time of the agreement until today is the relevant time period. We assert that UPS's and RCM's motivation to act in the intentionally conspiratorial manner alleged in this case is based upon the monies that had been and/or could be generated pursuant to certain agreements. All of the payments received pursuant to an agreement, and any amendments thereto, are relevant as well.

FIFTH: Interrogatory One and Eight asks for both the work history and current status of certain UPS employees.. The work history requests have been ignored entirely.

SIXTH: Interrogatory Two asks for the amounts paid and/or received by UPS's "overgoods" locations. The answer to that question should not be an amalgam but specifically state what each location receives.

SEVENTH: UPS's Answer to Affirmative Defense Interrogatories state that Margorie Fischback was conducting an on-going investigation. She admitted in deposition that her investigation was limited to searching two electronic systems. She further stated that any hard-copy documentation regarding the paintings would be located either at the claim center at Newport News, VA and/or with Michelle Faimon at UPS's facility at RCM. Please provide dates for a deposition duces-tecum of these managers.

EIGHTH: Plaintiff's Interrogatory number Nine asks whether UPS has ever hired employees from RCM. UPS's response is that "UPS Corporate Overgoods is not aware of hiring any person who was employed by RCM to work for UPS." This is an evasive answer.

NINTH: UPS' Answers to Affirmative Defense Interrogatories identifies Ms. Fischbach as the person conducting an on-going investigation into Plaintiffs' claims. As it turns out, Ms. Fischbach's 2008 investigation was a brief examination of electronic systems that do not store information for more than 18 months. Further, Ms. Fischbach stated that until the 2008 complaint was filed, the subject matter was not within her jurisdiction and she has made no inquiry into the file at the claims center in Newport News, VA. The proper people to depose regarding any file remaining on the paintings and the rout of the paintings to RCM would be Michelle



May 25, 2011  
Page 3

Faimon (UPS's on-site manager at RCM) and <sup>Steve Hayes</sup> A (Ms. Fischbach's counterpart at Newport News Va.). Please provide dates to depose those individuals.

TENTH: The response regarding Special Accounts is confusing at best. First UPS objects based on relevance. Second, UPS states that it does not have any policies or procedures regarding Special Accounts. Third, it explains some of the procedures for those merchants who request accounts. There simply must be some documentation of who has an account, how the merchant gets an account, how the merchant even knows to request an account. Please revise and produce accordingly.

Sincerely,



JACK SCAROLA

JS/:mrh

CC via

e-mail only: Angela Adams, Esquire  
Robert J. Mayer, Esquire





**REQUESTS**

**REQUESTS REGARDING IVANA VIDOVIC MLINAR:**

**REQUEST NO. 1:**

All documents identifying, describing or edifying the manifest (journey up to and including delivery) for the package shipped by Ivana Mlinar Vidovic as described in the Complaint and of which the outer package was finally shipped to New York to Mario Novak's residence at 129 Bermuda Street, Atlantic Beach, New York, 11509. The assigned UPS tracking number provided by PAK MAIL was 1Z0XW5271244846234.

**RESPONSE:**

UPS has no documents responsive to this Request. UPS further responds that information and documents that would allow UPS to respond to this Request is not available at this time. UPS states that it delivers over fifteen (15) million packages per day and does not, in the ordinary course of business, retain the details of shipping transactions as called for by Request No. 1.

**REQUEST NO. 2:**

All security protocols, policies or procedures pertaining to the individual shipping centers, drop off points or process facilities wherein the Mlinar package (1Z0XW5271244846234 as described above) was stored and/or processed before the arrival of the empty package in New York.

**RESPONSE:**

UPS has no documents responsive to this Request. UPS further responds that information and documents that would allow UPS to respond to this Request is not available at this time. UPS states that it delivers over fifteen (15) million packages per day and does not, in the ordinary course of business, retain the details of shipping transactions as called for by Request No. 2.

**REQUEST NO. 3:**

All documents regarding the lost package claim and/or complaints made by any party about the package shipped by Ivanna Mlinar Vidovic (1Z0XW5271244846234 as described above).

**RESPONSE:**

UPS has no documents responsive to this Request. UPS further responds that information and documents that would allow UPS to respond to this Request is not available at this time. UPS states that it delivers over fifteen (15) million packages per day and does not, in the ordinary course of business, retain the details of shipping transactions as called for by Request No. 3.

**REQUEST NO. 4:**

All documents describing the transaction between Recovery Management and UPS wherein possession of Ivanna Mlinar Vidov's paintings was transferred from UPS to Recovery Management. The paintings were the original contents of the Mlinar package (1Z0XW5271244846234 as described above) that did not arrive within the package wrapping that was delivered to the Novak New York residence as described above.

**RESPONSE:**

UPS has no documents responsive to Request No. 4.

**REQUESTS REGARDING UPS GENERALLY:**

**REQUEST NO. 5:**

All policies, practices, procedures and guidelines regarding the handling of lost package claims.

**RESPONSE:**

UPS has produced relevant documents responsive to Request No. 5.

**REQUEST NO. 6:**

All policies, practices, procedures and guidelines regarding the disposition of unclaimed, unidentified, and undeliverable merchandise.

**RESPONSE:**

UPS will produce documents responsive to Request No. 6 in accordance with the Confidentiality Stipulation executed by the parties in this case.

**REQUEST NO. 7:**

All policies, practices, procedures and guidelines regarding the labeling of packages including but not limited to any shorthand or coding used to describe the contents and/or whether the package is insured.

**RESPONSE:**

UPS objects to Request No. 7 because it is vague, ambiguous and because it appears irrelevant and not calculated to lead to discoverable evidence. Notwithstanding the foregoing objection, UPS responds that it has no documents responsive to Request No. 7. UPS further responds that it does not label packages to describe the contents or whether packages have a declared value.

**REQUEST NO. 8:**

All policies and procedures regarding maintenance of package integrity and/or consumer privacy.

**RESPONSE:**

UPS objects to Request No. 8 because it is vague, ambiguous and because it appears irrelevant and not calculated to lead to discoverable evidence.

**REQUEST NO. 9:**

All pictorial or graphic description of the structure of UPS executive and managerial departments.

Objections based on irrelevance and unlikely to lead to admissible evidence are without merit; the scope of discovery is wider than the test for admissibility.

**RESPONSE:**

UPS objects to Request No. 9 because it is unduly burdensome, irrelevant and not calculated to lead to discoverable evidence. UPS further responds that the information called for by Request No. 9 is publicly available.

Objections based on irrelevance and “unlikely to lead to admissible evidence” are without merit; the scope of discovery is wider than the test for admissibility.

**REQUEST NO. 10:**

All pictorial or graphic descriptions of the relationships between and among UPS its subsidiaries, its parent(s) and other entities related by common or shared ownership interests.

**RESPONSE:**

UPS objects to Request No. 10 because it is overly broad, unduly burdensome, irrelevant and not calculated to lead to discoverable evidence. UPS further responds that the information called for by Request No. 10 is publicly available.

**REQUESTS REGARDING RECOVERY MANAGEMENT CORP., d/b/a/ CARGO LARGO (hereinafter, "RECOVERY MANAGEMENT"):**

**REQUEST NO. 11:**

All agreements between RECOVERY MANAGEMENT and UPS or its subsidiaries.

**RESPONSE:**

UPS objects to Request No. 11 because it is overly broad, unduly burdensome, irrelevant and not calculated to lead to discoverable evidence inasmuch as it calls for agreements with any of UPS's subsidiaries. UPS further responds that it will produce the relevant Overgoods Management Agreements in response to Request No. 11 pursuant to the Confidentiality Stipulation executed by the parties.

Produce all agreements or state the scope of the ones excludes and included so we might file a motion to compel if we disagree. We believe all are relevant for purposes of discovery.

**REQUEST NO. 12:**

All correspondence between RECOVERY MANAGEMENT and UPS or its subsidiaries.

**RESPONSE:**

UPS objects to Request No. 12 because it is overly broad, unduly burdensome, irrelevant and not calculated to lead to discoverable evidence.

Objections based on irrelevance and “unlikely to lead to admissible evidence” are without merit; the scope of discovery is wider than the test for admissibility.

**REQUEST NO. 13:**

All policies, guidelines, training manuals and the like regarding the cataloguing of goods sent to RECOVERY MANAGEMENT.

**RESPONSE:**

UPS responds that it will produce the relevant Overgoods Management Agreements between UPS and Recovery Management in response to Request No. 13 pursuant to the Confidentiality Stipulation executed by the parties.

Produce all agreements or state the scope of the ones excluded and included so we might file a motion to compel if we disagree. We believe all are relevant for purposes of discovery. Objections based on irrelevance and “unlikely to lead to admissible evidence” are without merit; the scope of discovery is wider than the test for admissibility.

**REQUEST NO. 14:**

All documents identifying, describing, or edifying all goods, valuables or monies transferred from UPS to RECOVERY MANAGEMENT.

**RESPONSE:**

UPS objects to Request No. 14 because it is overly broad, unduly burdensome, irrelevant and not calculated to lead to discoverable evidence.

**REQUEST NO. 15:**

All documents identifying, describing, or edifying all goods, valuables or monies transferred to UPS from RECOVERY MANAGEMENT.

**RESPONSE:**

UPS objects to Request No. 15 because it is overly broad, unduly burdensome, irrelevant and not calculated to lead to discoverable evidence.

**REQUESTS REGARDING PAK MAIL OF WELLINGTON, INC. (hereinafter, "PAK MAIL"):**

**REQUEST NO. 16:**

All generic agreements between Pak Mail centers or franchises and UPS or its subsidiaries.

**RESPONSE:**

UPS objects to Request No. 16 because it is overly broad, unduly burdensome, irrelevant and not calculated to lead to discoverable evidence.

Objections based on irrelevance and "unlikely to lead to admissible evidence" are without merit; the scope of discovery is wider than the test for admissibility.

**REQUEST NO. 17:**

All specific agreements between PAK MAIL or Wellington and UPS or its subsidiaries.

**RESPONSE:**

UPS will produce documents responsive to Request No. 17 if any exist.

**REQUEST NO. 18:**

All correspondence between PAK MAIL and UPS regarding the packages shipped by Ivanna Vidovic Mlinar.

**RESPONSE:**

UPS has no documents responsive to Request No. 18.

**REQUEST NO. 19:**

All correspondence between PAK MAIL and UPS regarding the lost packages.

**RESPONSE:**

UPS objects to Request No. 19 because it is overly broad, unduly burdensome, irrelevant

and not calculated to lead to discoverable evidence. UPS further responds that it has no correspondence between Pak Mail and UPS regarding the packages at issue in this case.

By: Jason Mayberry w/ express permission (AA)  
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*Attorneys for Defendant*  
*United Parcel Service, Inc.*

IN THE COUNTY COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT  
IN AND FOR PALM BEACH COUNTY,  
FLORIDA

CIVIL DIVISION

IVANA VIDOVIC MLINAR,

Plaintiff

v.

UNITED PARCEL SERVICE CO., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT  
SERVICES LLC d/b/a CARGO LARGO  
and AARON ANDERSON,

Defendants.

CASE NO:

502008CA0036246XXXXMB

DEFENDANT UNITED PARCEL  
SERVICE INC.'S ANSWERS AND  
OBJECTIONS TO PLAINTIFF'S  
INTERROGATORIES

CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the within and foregoing  
**DEFENDANT UNITED PARCEL SERVICE INC.'S AMENDED RESPONSES AND  
OBJECTIONS TO PLAINTIFF'S CORRECTED REQUEST TO PRODUCE TO  
DEFENDANT** upon the following by depositing a copy of same in the United States Mail with  
adequate first-class postage affixed thereto and addressed as follows:

This 4<sup>th</sup> day of February 2010.

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Searcy Denney Scarola Barnhart & Shipley  
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West Palm Beach, Florida 33409

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PakMail of Wellington, Inc.  
c/o Registered Agent: Linda A. Ramos  
13833 Wellington Trace  
Suite E4  
Wellington, Florida 33414

By: Jason Mayberry *if expressed permission* (AA)  
ALSTON & BIRD LLP  
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Attorneys for Defendant  
United Parcel Service, Inc.  
*Attorneys for Defendant*  
*United Parcel Service, Inc.*

IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR  
PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

IVANA VIDOVIC MLINAR,

Plaintiff

v.

UNITED PARCEL SERVICE  
INC., PAK MAIL OF  
WELLINGTON, INC.,  
RECOVERY MANAGEMENT  
CORP. d/b/a CARGO LARGO and  
AARON ANDERSON,

Defendants.

PLAINTIFF'S ANNOTATED AND HIGHLIGHTED PRINTOUT FOR  
CORRESPONDENCE WITH UPS COUNSEL AS GOOD FAITH  
EFFORT TO RESOLVE AREAS OF DISPUTE.

**UNITED PARCEL SERVICE INC.'S AMENDED RESPONSES AND  
OBJECTIONS TO PLAINTIFFS REQUESTS FOR PRODUCTION:  
NO. 14, NO. 15, 2ND REQUEST NO. 1 AND 2ND REQUEST NO 2.**

United Parcel Service, Inc. ("UPS" or Defendant) submits its Amended Responses and Objections to Plaintiffs Requests for Production No. 14, No. 15, 2nd Request No. 1 and 2nd Request no 2. Please note that this has been marked "Confidential" in accordance with the parties' Confidentiality Stipulation.

**REQUEST NO. 14:** All documents identifying, describing, or edifying all goods, valuables or monies transferred from UPS to RECOVERY MANAGEMENT.

**REQUEST NO. 15:**

All documents identifying, describing, or edifying all goods, valuables or monies transferred to UPS from RECOVERY MANAGEMENT.

CONFIDENTIAL  
EXHIBIT A

RESPONSE TO REQUESTS NOS. 14 and 15:

UPS objects to these Requests because they seek documents that are neither relevant to the subject matter involved in this action, nor reasonably calculated to lead to the discovery of admissible evidence.

Objections based on irrelevance and “unlikely to lead to admissible evidence” are without merit; the scope of discovery is wider than the test for admissibility.

In further response UPS submits t

personnel in districts throughout the country ship overgoods to Recovery

Management. From 2005 through 2008, a liquidation transfer record was filled out by

the districts and sent with the overgoods. The information on the forms was then

electronically entered into a computer system referred to as STAIRS. The STAIRS

system was replaced in 2006 and the electronic information contained in it in 2006

no longer available. UPS does not have copies of the liquidation transfer records that

were filled out from 2005 until 2006. A sample of the liquidation transfer record

utilized until 2006 was produced by UPS bearing bates no. UPS 001502.

The time of the agreements, 2003, until today is the relevant time period

In 2006, UPS began utilizing a new system in which the districts would generate a shipping label through an electronic system called ARES. Instead of using

liquidation transfer forms, the districts processing overgoods would type in a brief

description of the item in the ARES database, an application available both to the

districts, UPS’s corporate overgoods department and Recovery Management. UPS

does not have copies of the electronic records stored in ARES from 2005 to 2008.

The electronic records are only retained for eighteen months. A sample of the

shipping label utilized after 2006 was produced by UPS bearing bates no. UPS 001503.

UPS therefore does not have any documents identifying, describing, or edifying any goods or valuables that were transferred between UPS and Recovery Management for the time period between 2005 and 2008. UPS does have spreadsheets showing the monies that were paid by Recovery Management to UPS and credited to UPS by Recovery Management for the time period between 2005 and 2008. Notwithstanding and without waiving UPS's objection as to the relevance of these requests, UPS has produced the spreadsheets bearing bates nos. UPS 001504-1511, showing those amounts

The time of the agreement until today is the relevant time period

2ND REQUEST NO. 1:

All documents regarding a shipping account held by UPS for Rose Lavon Art Gallery, formerly of Monroe

UPS' discovery responses should be amended to include **specific** objections and to remove any objections notwithstanding production. Objections based on irrelevance and "unlikely to lead to admissible evidence" are without merit; the scope of discovery is wider than the test for admissibility.

RESPONSE TO 2ND REQUEST NO. 2:

UPS objects to this Request because it seeks documents

relevant to the subject matter involved in this action nor reasonably calculated to lead to the discovery of admissible evidence. Notwithstanding and without waiving this objection, UPS has produced the documents bearing bates nos. UPS 001515-001526.

2nd REQUEST NO. 2:

All documents regarding policies and procedures for special account holders.

UPS objects to this Request because it seeks documents that are neither relevant to the subject matter involved in this action nor reasonably calculated to lead to the discovery of admissible evidence.

Objections based on irrelevance and “unlikely to lead to admissible evidence” are without merit; the scope of discovery is wider than the test for admissibility.

In further response, UPS submits that UPS does not have an actual procedure or process with respect to how a customer becomes a “special account.” Generally, a UPS customer who is a manufacturer of certain trademarked products may become a special account, which means that the customer has requested that it does not want its identifiable trademarked products sold to a third party by UPS (i.e. transferred from UPS to Recovery Management) regardless of whether the special account holder is the owner of the product. Typically, the customer requesting that it be treated as a special account negotiates an agreement with UPS through its strategic account manager and the UPS overgoods department. Each special account will have different terms and conditions depending on the agreement that is ultimately reached between the parties. The Plaintiff in this case is not a manufacturer of trademarked products and cannot provide any reason why this information is relevant to her case or will lead to discoverable evidence.

There must be some paper work on the requests, process, and implements for such a program as well as return of product and lists of holders.

Respectfully Submitted,

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Florida Bar No.0893005

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*Admitted Pro Hac Vice*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished upon the attached Service List by mail delivery on this 16<sup>th</sup> day of May, 2011.

  
Evan Gutwein

SERVICE LIST

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Searcy Denney Scarola Barnhart &  
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IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR  
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CIVIL DIVISION

IVANA VIDOVIC MLINAR,

Plaintiff

v.

UNITED PARCEL SERVICE  
INC., PAK MAIL OF  
WELLINGTON, INC.,  
RECOVERY MANAGEMENT  
CORP. d/b/a CARGO LARGO and  
AARON ANDERSON,

Defendants.

PLAINTIFF'S ANNOTATED AND HIGHLIGHTED PRINTOUT  
FOR CORRESPONDENCE WITH UPS COUNSEL AS  
GOOD FAITH EFFORT TO RESOLVE AREAS OF  
DISPUTE.

**UNITED PARCEL SERVICE INC.'S RESPONSES AND OBJECTIONS TO  
PLAINTIFF'S THIRD REQUEST TO PRODUCE**

United Parcel Service, Inc. ("UPS" or Defendant) submits its Responses and Objections to Third Request to Produce to United Parcel Service Inc. Regarding Items Missing from Materials Previously Produced, in accordance with the Florida Rule of Civil Procedure 1.350. Please note that this has been marked "Confidential" in accordance with the parties' Confidentiality Stipulation.

**REQUESTS**

**REQUEST NO. 1:**

Any and all versions and/or updates of Exhibits A and B which are referenced but not attached to the OVERGOODS MANAGEMENT OPERATING PROCEDURES (UPS 000190- 000195) and are described by such manual as follows

Bullet 1, UPS000190 "Buyer shall process Goods (which are consolidated and delivered by Seller from those 'Districts' which are described and set forth on Exhibit A attached hereto and incorporated herein by this reference.

Bullet 36, UPS000194 "Seller shall pay and/or reimburse Buyer for those services and supplies set forth on Exhibit "A" attached hereto and incorporated herein by reference.

Bullet 37, UPS000194-000195, "Buyer shall receive from Seller certain incentive-based compensation (as set forth on Exhibit "B" attached hereto and incorporated herein by this reference) for performance which includes the following: No Find Percentage Reduction; External Void Percentage Increase; Internal Void Percentage Increase; and Hotlist Match Percentage Increase.

**RESPONSE:**

The time of the agreement (2003) until today is the relevant time period.

UPS objects to this Request to the extent that it is not limited to any particular time period. Subject to the confidentiality agreement entered in this case, UPS will produce documents responsive to this Request, if any exist.

Documents not. identified

**REQUEST NO. 2:**

Extensions, rewrites, and/or modifications to the AGREEMENT FOR OVERGOODS MANAGEMENT AND FOR THE PURCHASE AND SALE OF SALVAGED GOODS AND CONSIGNMENT SALES, UPS000196-UP S 000209.

**RESPONSE:**

The time of the agreement (2003) until today is the relevant time period.

UPS objects to this Request to the extent that it is not limited to any particular time period. Subject to the confidentiality agreement entered in this case, UPS will produce documents responsive to this Request, if any exist.

Documents not identified.

**REQUEST NO. 3:**

Annual Purchase Price Reviews from 2004 to 2010 and all documents used to draft such reviews as discussed in Bullet 3 of the Agreement, UPS000197 and any and all modifications resulting in Exhibit A, UPS000205 "Calculation of Unit of Shipment."

**RESPONSE:**

While there have been changes to the amount received per billable unit by UPS this was not memorialized in a formal purchase price review, contract or addendum thereto. The amounts remained at all times between 2005 and 2008 between twenty and twenty-nine dollars (\$20-29) per billable unit.

The time of the agreement (2003) until today is the relevant time period.

**REQUEST NO. 4:**

All rewrites, modifications, updates to Exhibit B-C attached to the agreement UPS000206-UPS000209 as called for by the terms of the agreement.

**RESPONSE:**

The time of the agreement (2003) until today is the relevant time period.

UPS objects to this Request to the extent that it is not limited to any particular time period. Subject to the confidentiality agreement entered in this case, UPS will produce documents responsive to this Request, if any exist.

Documents not identified

**REQUEST NO. 5:**

All audits generated under the provision of Exhibit C, Consignment of Merchandise, UPS000207-000209, particularly under provision 6(g), UP S000208.

**RESPONSE:**

UPS has no documents responsive to this Request.

**REQUEST NO. 6:**

All copies of insurance policies submitted by Recovery Management for the coverage of UPS property as provided for under provisions of Exhibit C, Consignment of Merchandise, UPS000207-000209, particularly under provision 8, UPS000209.

**RESPONSE:**

The time of the agreement (2003) until today is the relevant time period.

UPS objects to this Request to the extent that it is not limited to any particular time period. Subject to the confidentiality agreement entered in this case, UPS will produce documents responsive to this Request, if any exist.

Documents not identified.

**REQUEST NO. 7:**

All letter agreement generated under provisions of the AGREEMENT FOR OVERGOODS MANAGEMENT AND FOR THE PURCHASE AND SALE OF SALVAGED GOODS AND CONSIGNMENT SALES.

**RESPONSE:**

UPS has no documents responsive to this Request.

Respectfully Submitted,



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*Admitted Pro Hac Vice*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished upon the attached Service List by mail delivery on this 16<sup>th</sup> day of May, 2011.

  
Evan Gutwein

**SERVICE LIST**

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IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT IN AND FOR  
PALM BEACH COUNTY, FLORIDA

CIVIL DIVISION

IVANA VIDOVIC MLINAR,

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UNITED PARCEL SERVICE  
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CORP. d/b/a CARGO LARGO and  
AARON ANDERSON,

Defendants.

PLAINTIFF'S ANNOTATED AND HIGHLIGHTED  
PRINTOUT FOR CORRESPONDENCE WITH UPS  
COUNSEL AS GOOD FAITH EFFORT TO RESOLVE  
AREAS OF DISPUTE.

**DEFENDANT UNITED PARCEL SERVICE INC.'S ANSWERS AND  
OBJECTIONS TO PLAINTIFF'S INTERROGATORIES TO  
DEFENDANT UPS, INC. REGARDING THE PROCEDURES  
DESCRIBED IN UPS PRODUCED MANUALS**

COMES NOW, United Parcel Service, Inc. ("UPS" or Defendant) and submits its answers and objections to Plaintiff's Interrogatories to Defendant UPS, Inc. Regarding the Procedures Described in UPS Produced Manuals in accordance with Florida Rule of Civil Procedure 1.340. Please note that this has been marked "Confidential" in accordance with the parties' Confidentiality Stipulation.

CONFIDENTIAL  
EXHIBIT A

Respectfully Submitted,



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\_\_\_\_\_  
Evan Gutwein

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Corporation*

**ANSWERS TO INTERROGATORIES**

**Interrogatory No. 1**

Please provide the identity of the individuals specifically referred to in the agreements between Recovery Management Corp. d.b.a. Cargo Largo (hereinafter RMC) and UPS produced by UPS at bates numbers UPS000190 thru UPS000209 and state the nature and status of any such individual's past or present employment at UPS including but not limited to

- A. all signatories to the agreements as found on UPS000195, and
- B. any UPS "on-site representative" or "Corporate Overgoods Manager" as envisioned and/or described on UPS000194.

**Response to Interrogatory No. 1A:**

Tony Palmazzano. Mr. Palmazzano is no longer employed by UPS.

**Response to Interrogatory No. 1B:**

Michelle Faimon. Ms. Faimon is currently employed by UPS as a Corporate Overgoods Site Manager in Independence, Missouri.

**Interrogatory No. 2:**

List each UPS and/or third party districts, subdivisions, or warehouse facility receiving and storing and/or salvaging lost or damaged goods for UPS since 2003 until the present day; and, for each such entity or subdivision selling salvaged goods, state the total payments, by year, received by UPS

- A. as result of the subdivision's or entity's sale of a good pursuant to the consignment sale provision for damaged items to which UPS has obtained Title under the Provision of Tariff 53-5 -and which -hold - value of greater than \$ 5,000 .00 (see UPS 000017 as defined within item 30 on UPS000194 and explained in further detail at pages UPS207-209.)

- B. as a result of the consignment sale provision for unknown overgoods holding a value of over \$ 5,000.00 as defined within item 30 on UPS000194 and explained in further detail at pages UPS207-209.
- C. as a result of the sale of "release units of shipment" or salvageable totes as described in item 3, UPS000197 and Exhibit A, UPS000205.

**Answer to Interrogatory No. 2:**

Independence Corporate Overgoods  
1600 N. State Route 291, Unit 800  
Independence, MO 64058

Salt Lake City Corporate Overgoods  
430 N. Neil Armstrong Rd.  
Salt Lake City, UT 84116

Warehouse 86, W86, aka Bargainland  
481 Airport Industrial Dr.  
Suite 110  
Southaven, MS 38671

**Answer to Interrogatory No. 2A:**

UPS objects to Interrogatory No. 2A to the extent that requests information for a time period that is not applicable here. From the period of 2005 through 2008, no payments were received by UPS.

The time of the agreement until today is the relevant time period. We assert that UPS' and RCM' motivation to act in the intentionally conspiratorial manner alleged in this case is based upon the monies that had been and/or could be generated pursuant to certain agreements. All of the payments received pursuant to an agreement, and any amendments thereto, are relevant as well.

**Answer to Interrogatory No. 2B:**

UPS objects to Interrogatory No. 2A to the extent that requests information for a time period that is not applicable here. From the period of 2005 through 2008, no payments were received by UPS.

The time of the agreement until today is the relevant time period. We assert that UPS' and RCM' motivation to act in the intentionally conspiratorial manner alleged in this case is based upon the monies that had been and/or could be generated pursuant to certain agreements. All of the payments received pursuant to an agreement, and any amendments thereto, are relevant as well.

**Answer to Interrogatory No. 2C:**

UPS objects to Interrogatory No. 2A to the extent that requests information for a time period that is not applicable here. From the period of 2005 through 2008 the following payments were received by UPS:

| Year: | Payment:    |
|-------|-------------|
| 2005  | \$5,803,450 |
| 2006  | \$5,194,152 |
| 2007  | \$4,457,505 |
| 2008  | \$4,721,128 |

The time of the agreement until today is the relevant time period. We assert that UPS' and RCM' motivation to act in the intentionally conspiratorial manner alleged in this case is based upon the monies that had been and/or could be generated pursuant to certain agreements. All of the payments received pursuant to an agreement, and any amendments thereto, are relevant as well.

**Interrogatory No. 3:**

Describe by date and amount each payment made to RMC for the incentives program described in item 37 on UPS000194.

**Answer to Interrogatory No. 3:**

UPS objects to Interrogatory No. 3 to the extent that requests information for a time period that is not applicable here. From the period of 2005 through 2008 the following payments were made to RMC for the incentives program.

| Year: | Payment:  |
|-------|-----------|
| 2005  | \$183,829 |
| 2006  | \$255,485 |
| 2007  | \$496,407 |
| 2008  | \$457,491 |

The time of the agreement until today is the relevant time period. We assert that UPS' and RCM' motivation to act in the intentionally conspiratorial manner alleged in this case is based upon the monies that had been and/or could be generated pursuant to certain agreements. All of the payments received pursuant to an agreement, and any amendments thereto, are relevant as well.

**Interrogatory No. 4:**

For the dates 2003 until today, state the yearly amounts UPS has paid in claims for

A. Damaged goods

B. Lost goods

**Answer to Interrogatory No. 4A:**

UPS objects to Interrogatory No. 4A because it calls for information that is irrelevant and is not calculated to lead to discoverable evidence.

**Answer to Interrogatory No. 4B:**

Objections based on irrelevance and “unlikely to lead to admissible evidence” are without merit; the scope of discovery is wider than the test for admissibility.

UPS objects to Interrogatory No. 4B because it calls for information that is irrelevant and is not calculated to lead to discoverable evidence.

**Interrogatory No. 5:**

List the compensations between UPS and UPS customers who have or have had "Special Accounts" (described in the manual as "shippers with special agreements on the handling of their shipments") and state whether

- A. Special Account Holders must be shipping customers of UPS
- B. Special Account Holders pay a yearly or flat fee for the maintenance and/or ownership of the account.
- C. Special Account Holders are regularly shipped unknown overgoods which they created, manufactured or branded.

**Answer to Interrogatory 5, 5B and 5C:**

UPS objects to Interrogatory No. 5 because it calls for irrelevant and is not calculated to lead to discoverable evidence.

Objections based on irrelevance and “unlikely to lead to admissible evidence” are without merit; the scope of discovery is wider than the test for admissibility.

this objection, UPS submits that a UPS customer who is a manufacturer of certain trademarked products may become a special account, which means that the customer has requested that it does not want its identifiable trademarked products sold to a third party by UPS regardless of whether the special account holder is the owner of the product. Typically, the customer requesting that it be treated as a special account

holder negotiates an agreement with UPS through its strategic account manager and the UPS overgoods department. Each special account will have different terms and conditions depending on the agreement that is ultimately reached between the parties, there is not a standard fee that applies. The Plaintiff in this case is not a manufacturer of trademarked products and cannot provide any reason why this information is relevant to her case or will lead to discoverable evidence.

**Interrogatory No. 6:**

For all versions of the two different manuals produced, the "UPS Undeliverable Package Handling Procedure" and the "Corporate Overgoods Procedure Manual," identify

Not answered.

- A. the individual(s) who authored the manual,
- B. which entity the individual(s) worked for at the time,
- C. the individual(s)'s work history within the company including start date and promotions.
- D. whether the individual(s) remain(s) employed at that entity,
- E. whether the individual(s) worked for any other defendant in this action and, if so, the identity of the defendant and the dates of employment, work history and promotions.

**Answer to Interrogatory No. 6A:**

| <i>Manual</i>                            | <i>Authors</i>                                               |
|------------------------------------------|--------------------------------------------------------------|
| Undeliverable Package Handling Procedure | Joe Rizzo, Industrial Engineering Operations Support Manager |
|                                          | Wally Maughn, Industrial Engineer                            |
|                                          | Todd Westberg, Industrial Engineer/Technology Support.       |
|                                          | Dave Berg, Industrial Engineer.                              |
|                                          | Rachel Lopez, Information Services                           |

|                                      |                                                                                                                                                                                                  |
|--------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Corporate Overgoods Procedure Manual | Michelle Faimon, Corporate Overgoods Site Manager<br><br>Julie Rose, Overgoods Office Manager<br><br>Kathy Ujifusa-Clark, Corporate Overgoods Site Manager<br><br>Robert Pellicer, Fraud Manager |
|--------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

**Answer to Interrogatory No. 6B:**

All of the individuals identified in response to Interrogatory No. 6A were employed by UPS or a division thereof.

**Answer to Interrogatory No. 6C:**

UPS objects to Interrogatory No. 6C because it is irrelevant and is not calculated to lead to relevant evidence. UPS further objects to Interrogatory No. 6C because it is unduly burdensome.

**Answer to Interrogatory No. 6D:**

| <i>Individual</i> | <i>Employment status</i> |
|-------------------|--------------------------|
| Joe Rizzo         | Currently employed       |
| Wally Maughn      | No longer employed       |
| Todd Westberg     | Currently employed       |

|                     |                     |
|---------------------|---------------------|
| Dave Berg           | No longer employed. |
| Rachel Lopez        | No longer employed  |
| Kathy Ujifusa-Clark | No longer employed. |
| Michelle Faimon     | Currently employed. |
| Julie Rose          | Currently employed. |
| Robert Pellicer     | Currently employed  |

**Answer to Interrogatory No. 6E:**

None of the individual identified in response to Interrogatories 6A were ever employed by any of the other defendants in this action.

**Interrogatory No. 7:**

Regarding the lost claims files discussed in Tariff 515, UPS 000015 and their maintenance in 2005, state:

- A. The length of time files are typically maintained.
- B. Whether lost claims for third party-retailers have files opened, maintained and searched in the same manner as those from UPS direct shippers.

**Answer to Interrogatory No. 7A:**

Claim files are typically maintained for thirty (30) months. Some general data regarding claims may be maintained in back up files stored in UPS storage centers.

**Answer to Interrogatory No. 7B:**

Claim files are maintained in the same way and for the same time period regardless of whether the claim is submitted by a third-party retailer or a UPS direct shipper.

**Interrogatory No. 8:**

Regarding the institution of the ARES data entry, search locator program state:

- A. The date it became utilized by RMC services and by UPS personnel;
- B. The precursor program;
- C. The dates the precursor program was in use.

**Answer to Interrogatory No. 8A:**

Approximately July and/or August 2006.

**Answer to Interrogatory No. 8B:**

STAIRS

**Answer to Interrogatory No. 8C:**

Approximately 1993 until 2006.

**Interrogatory No. 9:**

State whether UPS has hired employees from RMC to work for UPS directly and if so who those individuals are and the history and present status of their employment at UPS including dates of promotions, demotions and/or disciplinary issues.

**Answer to Interrogatory No. 9:**

The UPS Corporate Overgoods Department is not aware of hiring any person who was employed by Recovery Management to work for UPS.

Incomplete Answer.

**Interrogatory No. 10:**

State what percentage of the over 17 million packages shipped daily by UPS are shipped through the following types of shippers of record:

- A. Third-party retailers
- B. UPS retail outlets (the UPS store)
- C. Direct customers
- D. Internet shippers

NOT Answered.

**Answer to Interrogatory No. 10A:**

UPS objects to Interrogatory No. 10A because it calls for information that is irrelevant and will not lead to discoverable evidence.

**Answer to Interrogatory No. 10B:**

UPS objects to Interrogatory No. 10B because it calls for information that is irrelevant and will not lead to discoverable evidence.

Objections based on irrelevance and “unlikely to lead to admissible evidence” are without merit; the scope of discovery is wider than the test for admissibility

**Answer to Interrogatory No. 10C:**

UPS objects to Interrogatory No. 10C because it calls for information that is irrelevant and will not lead to discoverable evidence.

Brian Konesko

BRIAN KONESKO

United Parcel Service, Inc.

STATE OF \_\_\_\_\_ )  
COUNTY OF \_\_\_\_\_ )

The foregoing instrument was acknowledged before me this 12 day of  
May, 2011, by Brian Konesko, who is  
personally known to me or who has produced as identification and who did/did not  
take an oath.

(SEAL)

(Notary signature)

Tonya Jacobs

(Notary name - print)

NOTARY PUBLIC, State of Kentucky

Tonya Jacobs

(Serial number, if any)

IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT, IN AND  
FOR PALM BEACH COUNTY, FLORIDA

CASE NO.: 50 2008 CA 036246XXXXMB  
AH

IVANA VIDOVIC MLINAR,

Plaintiff,

vs.

UNITED PARCEL SERVICE INC., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT CORP. d/b/a  
CARGO LARGO and AARON ANDERSON,

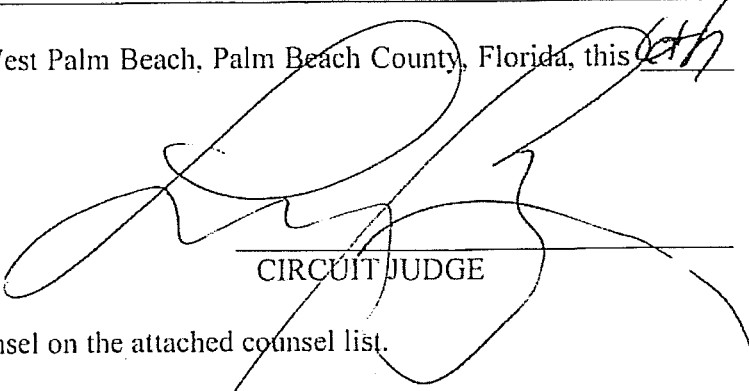
Defendant.

ORDER ON PLAINTIFF'S MOTION FOR CONTINUANCE

THIS CAUSE having come to be considered upon the Plaintiff's Motion For  
Continuance, and the Court having reviewed the file and being fully advised in the premises, it is  
hereby,

ORDERED and ADJUDGED: The motion is Granted.  
The case is stricken from  
the July 2011 docket and rescheduled  
on the January, 2012, eight (8) week  
docket.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 6th  
day of JUNE, 2011.

  
CIRCUIT JUDGE

Copies have been furnished to all counsel on the attached counsel list.

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CARGO LARGO and AARON ANDERSON,

Defendants.

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**PLAINTIFF'S MOTION TO COMPEL**  
**RECOVERY MANAGEMENT TO PRODUCE WITNESSES FOR DEPOSITION**

The Plaintiff, Ivana Mlinar, by and through the undersigned attorneys, moves this Honorable Court to enter an order compelling Defendant, RECOVERY MANAGEMENT CORP. d/b/a CARGO LARGO [hereinafter RCM] to produce the following persons for deposition, and further, to sanction RCM by awarding Plaintiff fees and costs associated with this motion, and in support thereof states as follows:

1. Louis D. Pak  
Owner and Founder of RCM and signatory of agreements with UPS
2. Elizabeth Simons  
RCM Employee who valued Plaintiff's paintings and later sold them.

Despite this Court's rulings on similar objections made by UPS, RCM makes the following objections to the Plaintiff's request to depose Ms. Simons:

“We will not produce Elizabeth Simons for her deposition voluntarily, as Plaintiff recognizes that Ms. Simons merely set prices for over goods during the relevant time period. As the value placed on the two paintings by my client are not in contention pursuant to the allegations of the Complaint, her deposition is not reasonably calculated to lead to the discovery of admissible evidence.”

Plaintiff does not recognize that “Ms. Simons merely set prices for over goods.” Furthermore, Plaintiff does not agree “that the price set on the paintings are not in contention.” The very subject matter of this suit is how oil paintings that typically sold for over \$10,000.00 were sold for under \$2,000.00 by a warehouse wholesaler. As this Court has noted, Fla. R. Civ. P. 1.280 affords a wide scope of discovery. RCM’s objection that the deposition is “not reasonably calculated to lead to the discovery of admissible evidence” has no merit--particularly since the Defendant has failed to state what inadmissible evidence the Plaintiff seeks.<sup>1</sup> RCM does not even state that the witness is irrelevant, only that her testimony may include facts that are uncontroverted.

Recovery Management makes the following objections to the request to depose Mr. Pak:

“As the owner of the corporation and its Chief Executive Officer, Mr. Pak is a senior officer of the corporation who had no role in the sale or processing of Plaintiff’s paintings and did not participate in the investigation of her claims. Mr. Pak is a manager of the business and not an employee with personal knowledge of the factual disputes involved in the lawsuit. As such, Mr. Pak’s deposition is not reasonably calculated to lead to the discovery of admissible evidence under Florida Rules of Civil Procedure 1.280, and we will not agree that he be deposed. Please see *General Star*

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<sup>1</sup> 1.280 B. *Scope of Discovery* 1).... *It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.*

*Indemnity Company v. Atlantic Hospitality of Florida, LLC*, 57 So.3d 238 (Fla. 3<sup>rd</sup> DCA 2011).”

The case law cited in RCM’s correspondence supports Plaintiff’s right to depose the owner/CEO and outright denies the argument made by RCM. *General Star Indemnity Company v. Atlantic Hospitality of Florida, LLC*, 57 So.3d 238 (Fla. 3<sup>rd</sup> DCA 2011), states that “Florida’s discovery rules do not contain a requirement that a party must show that a high level officer has unique or superior knowledge before the officer can be deposed.”

In *General Star Indemnity Company v. Atlantic Hospitality of Florida, LLC*, 57 So.3d 238 (Fla. 3<sup>rd</sup> DCA 2011), the Third District quashed orders compelling the depositions of two senior officers in the insurance company that denied an insured’s claim. The Defendant’s rationale misapplies *General Star*’s holding even though it was expressly limited to insurance bad faith actions. The holding was based on the decision in *Granada Ins. Co. v. Ricks*, 12 So.3d 276, 277 n. 1 (Fla. 3d DCA 2009) in which Third District stated that its “decision is based upon the universally applied rule that *discovery which concerns only potential issues of bad faith or other purported improprieties in defending the claim* are wholly impermissible unless and until it is determined that the policy indeed provides coverage.” The purpose of the rule is to keep insurance company senior executives, whose names are electronically stamped on every policy, from being deposed in each and every bad faith investigation.

This is NOT a bad faith case. Instead, it is a case alleging a conspiracy of theft against a closely held company. Defendant’s application of this rule outside of bad faith litigation assumes a blanket privilege for senior officers in the corporate culture. *General Star* refused to state that this sort of protection, the so called Apex Rule, applies in all cases against insurance

companies, let alone in all cases against corporations of any sort. In explaining its refusal to endorse the “Apex Doctrine,” the Third DCA cites Fourth District precedent affirming that there is no requirement that a party must show that a high level officer has unique knowledge before the officer can be deposed:

*General Star* has urged us to apply the “apex doctrine” and to expressly require Atlantic Hospitality to depose lower-level employees involved in the insurance dispute before noticing any deposition of senior managers at the “apex” of the company. This concept has been applied in cases involving the deposition of senior state governmental officers (*Dep't of Agric. & Consumer Servs. v. Broward County*, 810 So.2d 1056, 1058 (Fla. 1st DCA 2002)) and by federal courts in this district ( *Little League Baseball, Inc. v. Kaplan*, 2009 WL 426277 (S.D. Fla. 2009)), but this Court has not expressly adopted the “apex doctrine.” Because we need not render such a broad holding in this case, we note but do not adopt the doctrine. The Fourth District also declined to adopt it, observing that:

[N]o reported Florida appellate court opinion has expressly adopted the doctrine; a district court of appeal cannot adopt a doctrine which arguably conflicts with the discovery rules. Because discovery rules are rules of practice and procedure, only the Florida Supreme Court has this authority. Art. V, § 2(a), Fla. Const. Florida's discovery rules do not contain a requirement that a party must show that a high level officer has unique or superior knowledge before the officer can be deposed.

See *General Star Indemnity Company v. Atlantic Hospitality of Florida, LLC*, 57 So.3d 238, 239 (Fla. 3<sup>rd</sup> DCA 2011).

However, even if there were a requirement to show unique knowledge, Plaintiff has afforded that very reason to the Defendant, and indeed, to this Court. Plaintiff has repeatedly reminded Recovery Management that this case is not only about the theft and resale of the Plaintiff's paintings and the misappropriation of her likeness in that commercial endeavor, it is also about the conspiracy at the heart of Plaintiff's RICO claims. Discovery into the agreements

between RCM and UPS are completely relevant; the agreements themselves have been provided by both parties. Mr. Pak is the signatory to those agreements. He was also the sole shareholder and has information regarding the company's present and past ownership structure.

On the one hand, RCM claims Mr. Pak should not be deposed because he has no knowledge of facts regarding the hands on treatment and sale of the paintings. On the other, RCM opposes the deposition of Ms. Simons who, as revealed by details divulged in RCM's production, both valued and sold the paintings. During the hearing on Plaintiff's Motion to Continue, the Defendant (for the first time) stated its opposition to the Plaintiff's stated need for a continuance. The Plaintiff cited RCM's failure to comply with many discovery requests including the requests for these dates. At that time, the Plaintiff stated the reasons she sought these very depositions and the Court granted the Motion for Continuance. The Court noted that the parties needed to work together to get the case to trial, particularly since it sounded as though there would be depositions to take place in Missouri.

Unbelievably, despite the discussion of these issues with the Court, the Defendant still refuses to schedule these depositions and has referred Plaintiff back to the letter the Defendant sent prior to the hearing on the Motion to Continue. Plaintiffs should not bear the expenses of readdressing these issues. *Fla. R. Civ P. 1.380 (a)(4)* provides

"when a motion to compel is granted after opportunity for hearing, the court *shall* require the party or deponent whose conduct necessitated the motion or the party or counsel advising the conduct to pay to the moving party the reasonable expenses incurred in obtaining the order that may include attorneys' fees unless... the opposition to the motion was justified, or that other circumstances make an award of expenses unjust."

There is no opposition justified when the matter has already been addressed. "A boilerplate objection such as "overbroad, burdensome, and not reasonably calculated to lead to

the discovery of admissible evidence," baldly asserted, is "patently without merit." Such "stonewalling tactics" constitute discovery abuse. *First Healthcare Corp. v. Hamilton*, 740 So.2d 1189, 1194 (Fla. 4<sup>th</sup> DCA 1999); *see also First City Devs. Of Fla., Inc. v. Hallmark of Holly Condo. Ass'n*, 545 So.2d 502, 503 (Fla. 4<sup>th</sup> DCA 1985) noting that conclusory objections such as "burdensome" and "not reasonably calculated" are "words of the art [that] have little meaning without substantive support." Indeed, *First Healthcare* affirmed imposition of discovery sanctions even when the delaying party concedes the issue and agrees to production only after the party seeking depositions is forced to litigate the issue.

WHEREFORE, Plaintiff respectfully requests this Court to enter an order compelling Defendant RCM to provide dates wherein Louis D. Pak and Elizabeth Simons can be deposed within the next three weeks of the date of this Order, and further, to award Plaintiff costs and fees associated with the filing of this motion as sanction for the Defendant's continued delay tactics.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all Counsel on the attached list, this \_\_\_\_\_ day of July, 2011.

---

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CIVIL DIVISION

### Defendants.

502008CA0036246XXXMB

This cause having come before the Court on Defendant, United Parcel Service Co.'s *Unopposed* Motion to Cancel Special Set Hearing on Its Motion for Summary Judgment, the Court having considered the Motion, and being otherwise fully advised in the premises, it is hereupon:

ORDERED AND ADJUDGED that the Motion is hereby GRANTED. The hearing set for August 12, 2011 at 2:00 P.M. is CANCELLED.

DONE AND ORDERED in Palm Beach County, Florida this \_\_\_\_\_ day of \_\_\_\_\_

, 2011.

**SIGNED & DATED**

AUG 02 2011

JUDGE LUCY CHERNOW BROWN

Hon. Lucy Chernow Brown  
Circuit Court Judge

cc: All Counsel of Record

IN THE CIRCUIT COURT OF THE  
FIFTEENTH JUDICIAL CIRCUIT, IN AND  
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IVANA VIDOVIC MLINAR,

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VS.

UNITED PARCEL SERVICE INC., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT CORP. d/b/a  
CARGO LARGO and AARON ANDERSON,

Defendants.

**ORDER ON PLAINTIFF'S MOTION TO COMPEL  
RECOVERY MANAGEMENT TO PRODUCE WITNESSES FOR DEPOSITION**

THIS CAUSE having come to be considered upon the Plaintiff's Motion to Compel Recovery Management to Produce Witnesses for Deposition, and the Court having reviewed the file and being fully advised in the premises, it is hereby,

ORDERED and ADJUDGED: Plaintiff has the right to depose

Louis<sup>D</sup> Pak. The deposition shall take place in Missouri. The

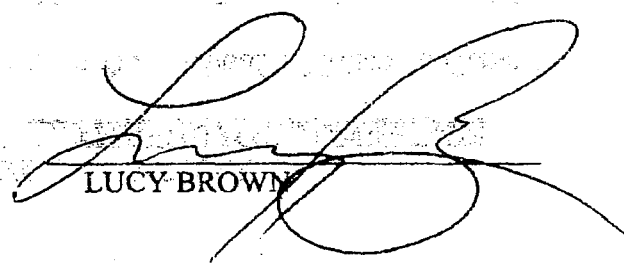
Court will not limit the scope of the deposition other than the

application of the <sup>Fla.</sup> Rules of Civil Procedure. Recovery Management agrees to produce

The Court reserves ruling on Plaintiff's Motion for Fees and Costs.

DONE AND ORDERED at West Palm Beach, Palm Beach County, Florida, this 8<sup>th</sup> Elizabeth

day of August 2011.

  
LUCY BROWN

**MLINAR RECORD ON APPEAL AS INDICATED BY INDEX 000154**

**Ivana Mlinar v. UPS, et al**  
**Case No.: 50 2008 CA 036246XXXXMB AH**

Copies have been furnished to:

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CASE NO.: 50 2008 CA 036246XXXXMB  
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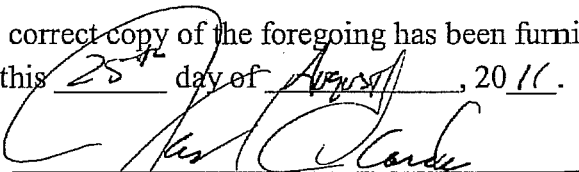
UNITED PARCEL SERVICE INC., PAK  
MAIL OF WELLINGTON, INC.,  
RECOVERY MANAGEMENT CORP. d/b/a  
CARGO LARGO and AARON ANDERSON,  
Defendants.

**MOTION TO AMEND COMPLAINT**

Plaintiff, IVANA VIDOVIC MLINAR, by and through her undersigned attorneys seek leave to amend the complaint and as grounds therefore state as follows:

1. Discovery has revealed facts supporting a new claim against defendant UPS.
2. The additional claim is made pursuant to Florida's Deceptive and Unfair Trade Practices Act, F.S. Chapter 501 Part II.
3. The trial of this case is set on the Court's 8 week jury trial docket of January, 2011. The Defendant will not be prejudiced by the granting of this Amendment.
4. The proposed Second Amended Complaint is attached as Exhibit A.

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to all Counsel on the attached list, this 25<sup>th</sup> day of August, 20 11.



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Ivana Mlinar v. UPS, et al  
Case No.: 50 2008 CA 036246XXXXMB AH  
Motion to Amend Complaint

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