

## OWI SPECIALIZED, INC. BROKER – SHIPPER AGREEMENT

This Broker – Shipper Transportation Agreement (“Agreement”) is made and entered into as of the date of the last signature below (the “Effective Date”), by \_\_\_\_\_, (“Customer”), a \_\_\_\_\_ business with offices at \_\_\_\_\_ and OWI Specialized, Inc., and its subsidiaries, related companies, agents, or representatives (collectively, “Broker”) with offices at P.O. Box 6674, San Pedro, CA 90734.

### RECITALS

WHEREAS, Broker has operating authority as a broker from the Federal Motor Carrier Safety Administration (“FMCSA”), docket number MC685132, and as a licensed broker, arranges for motor transportation. A copy of Broker’s operating authority is attached as Appendix “A” and incorporated herein by reference; and

WHEREAS, Shipper, to satisfy some of its transportation needs, desires to utilize the services of Broker to arrange for transportation of Shipper’s cargo.

NOW THEREFORE, Broker and Shipper agree as follows:

**1.0 TERM.** Subject to section 11.0, the term of this Agreement shall be one (1) year, commencing on the Effective Date, as defined in section 23.0, and shall automatically renew for successive one-year periods; *provided*, however, that either Party may terminate this Agreement on thirty (30) days’ written notice to the other Party, with or without cause, or as otherwise provided in this Agreement.

**2.0 SERVICE.** Broker agrees to arrange for transportation of Shipper’s cargo under the terms and conditions of this Agreement and in compliance in all material respects with all federal, state, and local laws and regulations relating to the brokerage of the cargo covered by this Agreement. Broker’s responsibility under this Agreement shall be limited to arranging for, but not actually transporting, Shipper’s cargo. The parties may, upon written agreement, include additional service terms that they would attach in a further appendix to this Agreement. Notwithstanding paragraph 4.8 below, Shipper acknowledges its obligations to review and comply with California Air Resources Board (“CARB”) Heavy-Duty Vehicle Greenhouse Gas Emission Reduction Regulations and Airborne Toxic Control Measures (collectively hereafter “ATCM”) for Transportation Refrigeration Units (“TRU”).

**3.0 VOLUME.**

3.1 Shipper agrees to tender a minimum of three (3) shipments per year to Broker and Broker agrees to arrange for the transportation of those shipments, as well as any other shipments that Shipper may tender. This Agreement is not exclusive: Shipper may tender cargo to other brokers, or directly to motor carriers, and Broker may arrange motor transportation for other shippers.

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

**4.0 CARGO CARRIAGE.** Shipper understands and agrees that Broker has entered into or will enter into a bilateral written contract of carriage with each motor carrier that Broker uses in the performance of this Agreement. Those contracts comply or shall comply with all applicable federal and state laws and regulations and will typically include the following provisions:

4.1 Each motor carrier is in compliance and shall remain in compliance during the term of this Agreement with all applicable federal, state, and local laws relating to the provision of its services including, without limitation:

- 4.1.1 transportation of hazardous materials, including the licensing and training of drivers, as defined in 49 C.F.R. sections 172.800, 173, and 397 *et seq.* to the extent that any shipments hereunder constitute hazardous materials;
- 4.1.2 security regulations;
- 4.1.3 owner/operator lease regulations;
- 4.1.4 loading and securement of freight regulations;
- 4.1.5 implementation and maintenance of driver safety regulations including, without limitation, hiring, controlled substances, and hours of service regulations;
- 4.1.6 sanitation, temperature, and contamination requirements for transporting food, perishable, and other products, qualification and licensing and training of drivers;
- 4.1.7 implementation and maintenance of equipment safety regulations;

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4.1.8 maintenance and control of the means and method of transportation including, without limitation, performance of its drivers.

4.2 Each motor carrier shall agree to defend, indemnify, and hold Broker and Shipper harmless from all damages, claims, or losses arising out of its performance of motor transportation under this Agreement, including, without limitation, cargo loss and damage, theft, delay, damage to property, and personal injury or death.

4.3 Each motor carrier shall agree that its liability for cargo loss, damage, or delay shall be no less than that of a motor carrier under 49 U.S.C. section 14706 (the "Carmack Amendment"). Exclusions in a motor carrier's insurance policy shall not exonerate the motor carrier from Carmack Amendment motor carrier liability.

4.4 Each motor carrier shall agree to maintain at all times during the term of the contract, insurance coverage with limits of not less than the following:

- 4.4.1 General Liability \$1,000,000;
- 4.4.2 Auto Liability \$1,000,000;
- 4.4.3 Cargo Legal Liability \$100,000; and
- 4.4.4 Workers' Compensation As required by law.

Broker shall use its best efforts at the outset of each carrier contract to confirm that each motor carrier it utilizes in the performance of this Agreement has insurance coverage as set forth above.

4.5 Each motor carrier shall agree that the provisions contained in 49 C.F.R. section 370.1 *et seq.* shall govern the processing of claims for loss, damage, injury, or delay to cargo and the processing of salvage.

4.6 Each motor carrier shall agree that at no time during the term of its contract with Broker shall it have an "unsatisfactory" safety rating as determined by the FMCSA. If the motor carrier receives an "unsatisfactory" or "out of service" safety rating, it shall immediately notify Broker. Broker shall not knowingly arrange transportation of Shipper's cargo by any motor carrier with an "unsatisfactory" or "out of service" safety rating in the performance of this Agreement. Shipper agrees that Broker shall rely on the FMCSA's rating of the carrier and that Broker does not have an independent duty to investigate or determine a carrier's safety or fitness.

4.7 Each motor carrier shall agree that the terms and conditions of its contract with Broker shall apply on all shipments it handles for Broker and shall prevail over any inconsistent terms in any of the motor carrier's tariffs, rules, classification schedules, service guides, or similar documents.

4.8 Each motor carrier shall represent and warrant that it has reviewed the CARB ATCM for TRUs on the Internet at [www.arb.ca.gov/diesel/tru/tru.htm](http://www.arb.ca.gov/diesel/tru/tru.htm) and [www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm](http://www.arb.ca.gov/msprog/onrdiesel/onrdiesel.htm) and that all refrigerated equipment necessary or required for the performance of motor carrier's obligations ("Equipment"), including but not limited to, 53 foot trailers, including both dry-van and refrigerated Equipment, operated within California are in full compliance with CARB's ATCM for TRUs and that prior to transporting any goods under the motor carrier shall inspect its Equipment for compliance with CARB ATCM TRU regulations, cleanliness, odors, dirt, or debris before loading.

**5.0 RECEIPTS AND BILLS OF LADING.** Upon request by Shipper, Broker agrees to provide Shipper with proof of acceptance and delivery of such loads in the form of a signed bill of lading or proof of delivery, as Shipper may specify. Shipper understands and agrees that its insertion of Broker's name on any bill of lading shall be for Shipper's convenience only and shall not change Broker's status as anything other than a broker that arranges motor transportation. Shipper understands and agrees that Broker is not a motor carrier and that Broker has not held itself out as being a motor carrier. The terms and conditions of any freight documentation that either Broker or an underlying motor carrier may use shall not supplement, alter, or modify the terms of this Agreement.

**6.0 PAYMENTS.** Shipper agrees to pay Broker's invoice within 15 days of invoice date without deduction or setoff. Broker shall apply payment to the amount due for the specified invoice, regardless of the existence of earlier unpaid invoices. Shipper's payment of the freight charges to Broker shall relieve Shipper, consignee, or any other responsible party of any liability to the underlying motor carrier for non-payment of its freight charges. Broker hereby covenants and agrees to indemnify Shipper, consignee, or any other responsible party against such liability.

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### 7.0 CLAIMS.

7.1 In the event that Shipper has a claim for cargo loss, shortage, or damage arising out of the motor transportation of cargo that Broker arranged under this Agreement, Shipper must file a notice of claim with Broker within one hundred eighty (180) days from the date of any loss, shortage, or damage, which for purposes of this Agreement, shall be the delivery date or, in the event of non-delivery, the scheduled delivery date. Broker agrees to forward any claims that Shipper makes onto the responsible motor carrier. Shipper must file any civil action against Broker in a court of law within one (1) year from the date the motor carrier or Broker provides written notice to Shipper that the motor carrier has disallowed any part of the claim in the notice. Motor carriers that Broker has selected shall agree in writing with Broker to be liable for cargo loss or damage as set forth in section 4.3 above.

Shipper understands and agrees that the motor carriers' cargo legal liability insurance for any one shipment shall not exceed \$100,000 unless Shipper notifies Broker, prior to pick-up of a given cargo, that its value exceeds \$100,000. Shipper's aforementioned prior notification shall be of sufficiently reasonable time in order to allow Broker or the underlying motor carrier to procure additional insurance coverage.

7.2 **BROKER'S LIMITATION OF LIABILITY AND OPPORTUNITY TO AVOID LIMITATION.** Shipper understands and agrees that Broker is not a motor carrier. Accordingly, Shipper expressly understands and agrees that Broker shall not be liable for loss, damage, or delay in the transportation of Shipper's cargo unless it was Broker's negligent acts or omissions in the performance of this Agreement that proximately caused any of the foregoing. In any event, Broker has established and offered alternative rates of booking freight for transportation and Shipper acknowledges that it has made an election between those alternative booking rates, between (1) Broker's regular/lower booking rates for cargo with limited value, and (2) ad valorem booking rates for cargo not so limited, which rates are dependent on the value declared by Shipper, which broker uses as the basis on which to arrange transportation by the underlying motor carriers. Unless Shipper declares the nature and value of the cargo prior to its transportation, states the same on the Broker's booking confirmation and pays the corresponding ad valorem rate, Shipper knowingly and willingly elects to ship under the Broker's regular/lower booking rates, the consequence of which shall be that the Broker's liability to Shipper shall be limited to the greater of \$.50 per pound or \$50.

7.3 Broker shall assist Shipper in the filing of claims with the underlying motor carrier. If Broker, at its sole option, pays a claim to Shipper, Shipper shall automatically assign its rights and interest in the claim to Broker in order to allow Broker to subrogate its loss. In no event shall Broker or the underlying motor carrier be liable to Shipper or anyone else for special, incidental, or consequential damages that arise out of or are in any way related to the loss, damage, or delay to a shipment, unless Shipper has informed Broker in writing, prior to tendering a shipment or series of shipments to Broker, of the potential nature, type, and approximate value of such damages, and Broker specifically agrees in writing to accept responsibility for such damages.

7.4 The parties shall notify each other within sixty (60) days of any claims other than cargo loss or damage claims, and shall file any such claims with the other party within one hundred eighty (180) days from the date of such claims. The claiming party must commence any civil action in a court of law within two (2) years from the date on which the claiming party provides written notice to the other party.

**8.0 INSURANCE.** Broker agrees to procure and maintain, at its expense, and at all times during the term of this Agreement, the following insurance coverages with the corresponding limits:

8.1	General Liability	\$1,000,000;
8.2	Contingent Auto Liability	\$1,000,000;
8.3	Errors and Omissions	\$1,000,000; and
8.4	Contingent Cargo Legal Liability	\$100,000.

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

**9.0 HAZARDOUS MATERIALS.** Shipper and Broker shall comply with all applicable laws and regulations relating to the transportation of hazardous materials as defined in 49 C.F.R. sections 172.800, 173, and 397 *et seq.* to the extent that any shipments constitute hazardous materials. Shipper is obligated to inform Broker immediately if any such shipments constitute hazardous materials. Shipper shall defend, indemnify, and hold Broker harmless from any penalties or liability of any kind, including, without limitation, reasonable attorneys' fees, arising out of Shipper's failure to comply with applicable hazardous materials laws and regulations.

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**10.0 HOMELAND SECURITY.** As may be applicable, Broker and Shipper shall comply with state and federal Homeland Security related laws and regulations.

**11.0 DEFAULT.** The parties will discuss any perceived deficiency in performance and will promptly endeavor to resolve all disputes in good faith. But if a party materially fails to perform its duties under this Agreement, then party claiming default may terminate this Agreement on 10 (ten) days' written notice to the other Party. Shipper shall be responsible to pay Broker for any services performed prior to the termination of this Agreement and for shipments not yet completed or not yet invoiced to Shipper.

**12.0 INDEMNIFICATION.** Subject to the insurance policy limits in section 8.0, Broker and Shipper shall defend, indemnify, and hold each other harmless against any claims, actions, or damages, including, without limitation, cargo loss, damage, or delay, and payment of rates or accessorial charges to motor carriers, arising out of their respective performances under this Agreement; *provided*, however, the indemnitee shall not offer settlement in any such claim without the agreement of the indemnitor, which agreement the indemnitor shall not unreasonably withhold. If the indemnitee offers or agrees to a settlement for such a claim without the written agreement of the indemnitor, then it shall be relieved of its indemnification obligation. Neither party shall be liable to the other party for any claims, actions, or damages due to the negligence of the other party. Although section 8.0 only imposes insurance requirements upon Broker, for purpose of this section 12.0, those amounts also shall limit the scope of Shipper's indemnification obligations. The obligation to defend shall include all costs of defense including, without limitation, reasonable attorneys' fees, as they accrue.

**13.0 ASSIGNMENT/MODIFICATIONS OF AGREEMENT.** Neither party may assign or transfer this Agreement, in whole or in part, without the prior written consent of the other party. No amendment or modification of the terms of this Agreement shall be binding unless in writing and signed by the parties.

**14.0 SEVERABILITY/SURVIVABILITY.** If any provision of this Agreement shall for any reason be held to be invalid or unenforceable, then the remainder of this Agreement shall be unaffected thereby, and remain in full force and effect.

**15.0 INDEPENDENT CONTRACTOR.** The parties agree that Broker is not an agent for Shipper or any underlying motor carrier. The parties agree that Broker is and at all times shall remain an independent contractor. The parties agree that Shipper does not exercise or retain any control or supervision over Broker, its operations, employees, or the motor carriers with which Broker arranges the transportation of Shipper's cargoes.

**16.0 NON-WAIVER.** Failure of either party to insist upon performance of any of the terms, conditions, or provisions of this Agreement, or to exercise any right or privilege herein, or the waiver of any breach of any of the terms, conditions, or provisions of this Agreement, shall not be construed as thereafter waiving any such terms, conditions, provisions, rights, or privileges, but the same shall continue and remain in full force and effect as if no forbearance or waiver had occurred.

**17.0 NOTICES.** The parties shall give any notices to each other required by this Agreement by U.S. mail, postage prepaid, to the following addresses:

Broker  
P.O. Box 6674  
San Pedro, CA 90734  
Attention: Daniel Benoit  
e-mail: daniel@owispecialized.com

Shipper  
Attn: \_\_\_\_\_  
[ADDRESS]  
[CITY, STATE, ZIP]  
E-Mail:

Alternatively, the parties may provide notice by e-mail. The parties agree that they may send such written notices by facsimile transmission or e-mail provided that the transmitting party can evidence its successful transmission of the notice with printed confirmation of the same.

**18.0 FORCE MAJEURE.** "Force Majeure Event" means any event beyond a party's control, including, without limitation, acts of war, acts of public enemies, terrorist attacks, governmental orders relating to the foregoing, insurrections, riots, sabotage, earthquakes, floods, acts of God, embargoes, authority of laws, labor disputes, strikes, lockouts, job actions, boycotts, fires, explosions, or failure in electrical power, heat, light, air conditioning, or communications equipment. To the extent that either party's performance, except payment obligations, is precluded or delayed by a Force Majeure Event, such performance shall be excused for the time necessitated by such Force Majeure Event.

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**19.0 CHOICE OF LAW AND MANDATORY VENUE.** The parties agree that all claims or disputes arising out of or in any way connected to this Agreement or the parties' relationship shall be determined under the federal law of the United States of America, or where such law is inapplicable, under the laws of the State of California, without regard to its conflicts-of-law rules. The parties agree that all claims or disputes hereunder or questions arising out of or in any way relating to this Agreement or the parties' relationship shall be determined only in the federal or state courts located in Los Angeles, California, to the exclusion of all other courts, and the parties further agree to submit to the personal jurisdiction of the aforementioned courts and thereby waive any jurisdictional, venue, or inconvenient forum objections to such courts.

**20.0 CONFIDENTIALITY.** Broker shall not utilize Shipper's name or identity in any advertising or promotional communications without Shipper's prior written consent and the parties shall not publish, use, or disclose the contents or existence of this Agreement except as necessary to conduct their operations under this Agreement. Broker shall require underlying motor carriers that transport Shipper's cargoes to comply with this confidentiality clause.

**21.0 ENTIRE AGREEMENT.** This Agreement is the parties' final expression and entire agreement arising out of or in any way relating to Broker's arranging of the transportation of Shipper's cargo. This Agreement sets forth the parties' entire understanding and it supersedes any and all contemporaneous and prior oral and written understandings and agreements that arise out of or are in any way related to the subject matter of the Agreement. This Agreement shall be binding upon and inure to the benefit of the executors, administrators, personal representatives, heirs, successors, and assigns of each party.

**22.0 COUNTERPARTS.** The parties may sign this Agreement in counterparts, and each signed counterpart shall become part of the final Agreement and shall have the same force and effect. A copy of any signature on a signature page, including, without limitation, a facsimile or scanned electronic copy, shall be as valid and binding as an original signature.

**23.0 EFFECTIVE DATE.** This Agreement shall become effective when all parties have signed the same. The date this Agreement is signed by the last party to sign it—as indicated by the date associated with that party's signature—shall be deemed the date of this Agreement. Each party is signing this Agreement on the date stated below that party's signature in its signature block.

**SHIPPER**

\_\_\_\_\_  
AUTHORIZED SIGNATURE

\_\_\_\_\_  
PRINTED NAME

\_\_\_\_\_  
TITLE

\_\_\_\_\_  
DATE

**BROKER - OWI SPECIALIZED, INC.**

\_\_\_\_\_  
AUTHORIZED SIGNATURE

\_\_\_\_\_  
PRINTED NAME

\_\_\_\_\_  
TITLE

\_\_\_\_\_  
DATE