

05-1981-CD  
Preston America vs Brink  
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Preston America vs Brink Transportation et  
2005-1981-CD

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

FILED

11/13/2005  
DEC 21 2005 pd.

05-1981-CD

William A. Shaw  
Prothonotary/Clerk of Courts

PRESTON AMERICA, INC.,

Plaintiff,  
vs.

No. 2005-653-CD

BRINK TRANSPORTATION, INC.,

Defendant,  
vs.

LLOYD'S OF LONDON and BESSO, LTD.,

Additional Defendants

NO.  
FILED IN MERCER  
COUNTY  
ELIZABETH F. FAIR  
PROTHONOTARY  
2005 DEC - 9 P 1:21

ORDER OF COURT

AND NOW, this 9th day of December, 2005, upon consideration of Plaintiff Preston America, Inc.'s Motion to Dismiss Complaint, and upon consideration of Defendant, Brink Transportation, Inc.'s Motion for Change of Venue, and upon the representation of Lewis and Ristvey, P.C. that no party objects to the granting of said Motions, IT IS HEREBY ORDERED AND DECREED, as follows:

1. The Hearing scheduled for Wednesday, December 28, 2005, to hear said Motions is hereby cancelled.
2. The Complaint of Preston America, Inc., filed at the above term and number is dismissed without prejudice;
3. The claims of Brink Transportation, Inc. against Lloyd's of London, and Besso, Ltd., as well as any claims of Lloyd's of London and Besso, Ltd. against Brink Transportation, Inc., shall remain in effect at the above term and number.
4. The surviving claims shall be transferred forthwith to the Court of Common Pleas of Clearfield County, Pennsylvania.

12/21/05

cc: atty Yeatts  
atty Koerber  
atty Testa  
atty Breen

BY THE COURT:

Christopher J. M. J.

(C)

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.  
Plaintiff

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

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NO. FILED IN MERCER  
COUNTY

2005 DEC - 6 A 10 23

ELIZABETH F. FAIR  
PROTHONOTARY

**ORDER**

AND NOW, this 5<sup>th</sup> day of December, 2005, upon consideration of Defendant's Motion for Continuance of a hearing on the Motion to Dismiss Complaint of Plaintiff and the hearing on the Motion for Change of Venue scheduled in the above-captioned matter, it is the Order of this Court that the Continuance is granted and the hearings on both motions have been rescheduled for the 28<sup>th</sup> day of December, 2005, at 10:30 A.M. in Courtroom No. 1, Mercer County Courthouse, Mercer, PA.

By the Court:

  
\_\_\_\_\_, Judge

12/6/05  
cc: atty Yeatts  
atty Testa  
atty Breen  
atty Koerber

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY PENNSYLVANIA  
CIVIL ACTION – LAW

Preston America, Inc.  
Plaintiff,

v.

Brink Transportation  
Defendant,

v.

Lloyd's of London and  
Besso Limited  
Additional Defendants.

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Docket No. 2005-653-CD

JK  
2005 DEC -9 A 8:50  
NO. FILED IN MERCER COUNTY  
ELIZABETH F. FAIR  
PROTHONOTARY

Type of Pleading:

ANSWER TO  
DEFENDANT'S, BRINK  
TRANSPORTATION'S, NEW MATTER

Filed on behalf of:

Those Certain Underwriters at Lloyd's,  
London who subscribe to certificate no.  
NO324100S

Counsel of record for this party:

Brian F. Breen  
PA I.D. 81416

WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
(215) 627-6900

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY PENNSYLVANIA  
CIVIL ACTION – LAW

|                        |   |                        |
|------------------------|---|------------------------|
| Preston America, Inc.  | ) |                        |
| Plaintiff,             | ) |                        |
|                        | ) |                        |
| v.                     | ) |                        |
|                        | ) |                        |
| Brink Transportation   | ) | Docket No. 2005-653-CD |
| Defendant,             | ) |                        |
|                        | ) |                        |
| v.                     | ) |                        |
|                        | ) |                        |
| Lloyd's of London and  | ) |                        |
| Besso Limited          | ) |                        |
| Additional Defendants. | ) |                        |

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**ANSWER OF ADDITIONAL DEFENDANT,  
THOSE CERTAIN UNDERWRITERS AT LLOYD'S, LONDON  
WHO SUBSCRIBE TO CERTIFICATE NO. NO324100S,  
TO THE NEW MATTER OF THE DEFENDANT, BRINK TRANSPORTATION**

Those Certain Underwriters at Lloyd's, London who subscribe to certificate no. NO324100S ("Underwriters"), improperly identified in defendant's, Brink Transportation, Inc.'s, Complaint against Additional Defendants as Lloyd's of London answer the allegations raised in defendant's new matter as follows:

55. Denied. The allegations of paragraph 55 are conclusions of law that require no response. In the event and to the extent a response is deemed required, said allegations are denied.

56. Denied. The allegations of paragraph 56 are conclusions of law that require no response. In the event and to the extent a response is deemed required, said allegations are denied.

57. Denied. The allegations of paragraph 57 are conclusions of law that require no response. In the event and to the extent a response is deemed required, said allegations are denied.

WHEREFORE, additional defendants request that the relief requested in the additional defendant's counterclaim be granted.

Respectfully submitted,

WILSON, ELSEK, MOSKOWITZ, EDELMAN &  
DICKER LLP

BY: Brian F. Breen

Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

VERIFICATION

Brian F. Breen, Esquire, states that he is the attorney for Additional Defendant, Those Certain Underwriters at Lloyd's, London who subscribe to certificate no. NO324100S; that he has the authority to make this verification on their behalf; that he is acquainted with the facts set forth in the foregoing Additional Defendant's Answer; that the same are true and correct to the best of his knowledge, information and belief; and that this statement is made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities.



Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

**CERTIFICATE OF SERVICE**

Brian F. Breen, attorney for Those Certain Underwriters at Lloyd's of London Who  
Subscribe to Policy No. 3245100S, certifies that on December 7, 2005 he sent a copy of the  
foregoing Additional Defendant's Answer to defendant's new matter via United States mail, first  
class, postage prepaid, to:

Robert G. Yeatts, Esquire  
Lewis and Ristvey, P.C.  
689 N. Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Dwight L. Koerber, Jr.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830



---

Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

Type of Pleading:  
Motion for Continuance

Filed on Behalf of:  
Defendant:  
Brink Transportation

Counsel of Record for  
This Party:

Dwight L. Koerber, Jr.  
Pa. I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

NO  
FILED IN MERCER  
COUNTY  
2005 DEC - 6 A 10:23  
ELIZABETH F. FAIR  
PROTHONOTARY

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

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**MOTION FOR CONTINUANCE**

COMES NOW Dwight L. Koerber, Jr., Esquire, counsel for Defendant Brink Transportation and files the within Motion for Continuance in the above-captioned matter.

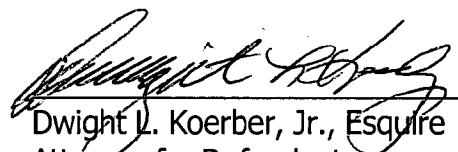
1. A hearing on Motion of Plaintiff to Dismiss Complaint and a hearing on the Motion of Defendant Brink Transportation for Change of Venue are currently scheduled on December 14, 2005 at 9:30 a.m. in Courtroom No. 1 at the Mercer County Courthouse. On that date the undersigned counsel is required to attend a previously scheduled hearing before the Court of Common Pleas of Clearfield County.

2. In addition to the conflict in schedule created by the hearing in Clearfield County on December 14, 2005, the undersigned counsel has medical procedures that currently require intravenous treatment each day at 1:00 p.m. and it is uncertain

whether treatment will be completed by that date, as they are currently scheduled through December 11, 2005.

3. The undersigned counsel for Defendant Brink Transportation respectfully requests that the December 14, 2005 hearing be continued until some date after December 21, 2005.

Respectfully submitted,



\_\_\_\_\_  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

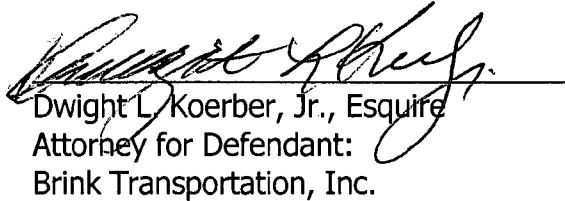
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**CERTIFICATE OF SERVICE**

This is to certify that on the 1<sup>st</sup> day of December 2005 the undersigned  
served a true and correct copy of the Motion for Continuance and Scheduling Order in the  
above-captioned matter upon counsel for Plaintiff and counsel for Additional Defendants.  
Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Brian F. Breen, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.  
Plaintiff

-vs-

Brink Transportation  
Defendant

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

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Docket No. 2005-653-CD

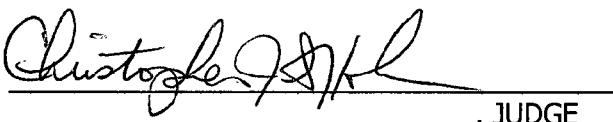
ELIZABETH F. FAIR  
PROTHONOTARY

NO.  
FILED IN MERCER  
COUNTY  
2005 NOV 22 P 2:21  
JR

**ORDER**

NOW, this 22<sup>nd</sup> day of November, 2005, upon consideration of the Motion for Change of Venue filed by Defendant Brink Transportation, Inc., it is the Order and Decree of this Court that a hearing shall be held on this Motion on the 14<sup>th</sup> day of December, 2005, at 9:30 a.m. ~~10:00~~ in Courtroom Number 1, Mercer County Courthouse, Mercer, PA.

BY THE COURT:

  
\_\_\_\_\_  
, JUDGE

Counsel for Plaintiff,  
Preston America, Inc.:  
Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Counsel for Defendant,  
Brink Transportation, Inc.:  
Dwight L. Koerber, Jr., Esquire  
LAW OFFICES OF DWIGHT L. KOERBER, JR.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830

Counsel for Additional Defendants,  
Lloyd's of London and Besso Limited  
Brian F. Breen, Esquire  
WILSON, ELSEY, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

11-22-05  
cc: atty Yeatts  
atty Koerber  
atty Testa  
atty Breen  
ct admin

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff,

vs.

No. 2005-653-CD

BRINK TRANSPORTATION, INC.,

Defendant,

vs.

LLOYD'S OF LONDON and BESSO, LTD.,

Additional Defendants

NO. FILED IN MERCER  
COUNTY

JK  
2005 NOV 22 P 1:14

ELIZABETH F. FAIR  
PROTHONOTARY

SCHEDULING ORDER

AND NOW, this 21<sup>st</sup> day of November, 2005, upon consideration of the within Motion, IT IS HEREBY ORDERED AND DECREED that a hearing shall be heard thereon said hearing is scheduled for the 14<sup>th</sup> day of DECEMBER, 2005, at 9:30 o'clock A.m. in Courtroom number 1, Mercer County Courthouse, Mercer, Pennsylvania.

BY THE COURT:

  
Christopher J. Johnson

11-22-05

CC: Atty Yeatts  
Atty Koerber  
Atty Testa  
Atty Breen  
Ct. Admin

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

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NO.  
FILED IN MERCER  
COUNTY

JR  
2005 NOV 21 P 1:02

ELIZABETH F. FAIR  
PROTHONOTARY

Type of Pleading:  
MOTION FOR CHANGE OF VENUE

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

(8)

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

**MOTION FOR CHANGE OF VENUE**

COMES NOW Defendant Brink Transportation, Inc., by and through its attorney Dwight L. Koerber, Jr., Esquire, and files the within Motion requesting a change of venue, so as to transfer this proceeding to the Court of Common Pleas of Clearfield County.

1. Movant is Brink Transportation, Defendant in this proceeding.
2. Respondents are Plaintiff Preston America, Inc., and Additional Defendants Besso Limited and Lloyd's of London, which is also referred to in their pleading as Those Certain Underwriters at Lloyd's of London who subscribe to certificate no. NO324100S.
3. Substantially contemporaneously with the filing of this Motion, Plaintiff has or will file a Motion to Dismiss the Complaint which it has filed, because of a settlement that it has entered into with one of the Additional Defendants, Lloyd's of London. In

principle, Movant does not object to the dismissal of the Complaint that has been filed, because it does not wish to unnecessarily inconvenience or prolong the level of litigation that Plaintiff is required to participate in. However, Movant would point out that Plaintiff is the primary tie with Mercer County in this proceeding, thereby removing the primary or perhaps only nexus that created venue in Mercer County for this proceeding.

4. Permitting Preston America, Inc. to dismiss its Complaint would result in it no longer being a party participant per se in this case. That being the case, there is no sound judicial reason for the subject litigation to continue in Mercer County.

5. The issue that remains before This Honorable Court is the breach of contract Complaint and bad faith insurance claim which Brink Transportation has filed against Besso Limited and Lloyd's of London. Lloyd's of London has also filed a Counterclaim, alleging an entitlement to reimbursement of \$4,000.00, but that issue, like the breach of contract case and the bad faith insurance claim, revolves around the insurance policy which the Additional Defendants have issued to Defendant.

6. Pa. R.C.P. 2179(b) specifically addresses the issue of venue involving an action upon a policy of insurance against an insurance company, and provides that an action in such case may be brought in the county where the claimant on that policy resides, which in this case would be the county where Brink Transportation is located – Clearfield County, Pennsylvania.

7. In addition to requesting a change of venue under the provisions of Pa. R.C.P. 2179, Movant also requests a change of venue based upon the forum non

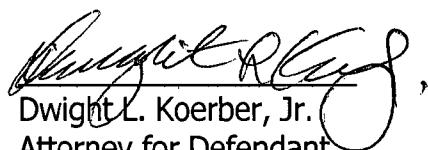
conveniens doctrine. It is the position of Movant that Clearfield County is the most convenient forum for litigation to occur in this case for the following reasons:

- (a) Brink Transportation has its headquarters and office personnel located at R.R. 1, Box 316-H, Houtzdale, Clearfield County, Pennsylvania.
- (b) Counsel for Brink Transportation is located in Clearfield County, Pennsylvania.
- (c) The policy on which the action which is the principle subject of litigation in this case was issued to Brink Transportation in Clearfield County.
- (d) Counsel for Additional Defendants are located in Philadelphia which is closer to Clearfield County than it is to Mercer County.

8. As long as Preston America, Inc. was a party participant in this case, it would be appropriate to give deference to its selection as Mercer County for the forum that would hear this litigation. Now that Preston America, Inc. is about to be dismissed as a party participant in this case, that consideration is no longer applicable in this proceeding.

WHEREFORE, Movant Brink Transportation, Inc. respectfully requests that its Motion for Change of Venue, so as to transfer this case to the Court of Common Pleas of Clearfield County, be granted.

Respectfully Submitted,

  
Dwight L. Koerber, Jr.  
Attorney for Defendant,  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 16<sup>th</sup> day of November, 2005 the undersigned served a true and correct copy of the MOTION FOR CHANGE OF VENUE in the above captioned matter upon counsel for Plaintiff. Such document was served and United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Brian F. Breen, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant  
Brink Transportation, Inc.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff,

vs.

No. 2005-653-CD

BRINK TRANSPORTATION, INC.,

Defendant,

vs.

LLOYD'S OF LONDON and BESSO, LTD.,

Additional Defendants

NO.  
FILED IN MERCER  
COUNTY

2005 NOV 21 A 10:20

ELIZABETH F. FAIR  
PROTHONOTARY

**PLAINTIFF'S MOTION TO DISMISS  
COMPLAINT**

Filed on behalf of Plaintiff,  
Preston America, Inc.,

Counsel of Record for the Plaintiff:  
Robert G. Yeatts, Esquire  
Pa. I.D. #34289

LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
PO Box 1024  
Hermitage, PA 16148

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff,

vs.

No. 2005-653-CD

BRINK TRANSPORTATION, INC.,

Defendant,

vs.

LLOYD'S OF LONDON and BESSO, LTD.,

Additional Defendants

**MOTION TO DISMISS COMPLAINT**

AND NOW, comes the Plaintiff, Preston America, Inc., by and through its attorneys, Lewis and Ristvey, who respectfully submits the following Motion:

(1) Plaintiff filed a Complaint at the above term and number against Brink Transportation, Inc., on or about March 2, 2005.

(2) After disposition of Preliminary Objections, Brink Transportation, Inc., filed an Answer to the Plaintiff's Complaint, and filed a Third Party Complaint, joining Lloyd's of London (Lloyd's) and Besso, Ltd. (Besso).

(3) Lloyd's filed an Answer, New Matter and Counterclaim to Brink Transportation, Inc.'s Third Party Complaint, and Besso filed an Answer and New Matter to Brink Transportation, Inc.'s Third Party Complaint. Brink Transportation, Inc. filed a Reply to New Matter and Answer to Counterclaim to Lloyd's and a Reply to New Matter of Besso.

(4) Preston America, Inc. has resolved its differences with both parties, in part by accepting payment of \$4,000.00 and executing a Settlement Agreement which is attached hereto, labeled as Exhibit 1, and incorporated herein by reference.

(5) Plaintiff desires to dismiss its Complaint filed at the above term and number, without prejudice, per the terms of the aforementioned Settlement Agreement, Release and Assignment of Rights.

(6) Plaintiff's Counsel has advised Counsel for the other parties of Plaintiff's intention to file this Motion and no party has any objection to the granting of this Motion, although Brink Transportation, Inc. has indicated its intention to file a Motion for change of venue, requesting that this proceeding be transferred to the Court of Common Pleas of Clearfield County, Pennsylvania.

Respectfully submitted,

LEWIS AND RISTVEY

By:   
\_\_\_\_\_  
Robert G. Yeatts,  
Attorney for Plaintiff

**SETTLEMENT AGREEMENT, RELEASE  
AND ASSIGNMENT OF RIGHTS**

KNOW ALL MEN BY THESE PRESENTS:

That PRESTON AMERICA, INC. (hereinafter "Releasor"), for and in consideration of the sum of Four Thousand Dollars (\$4,000.00), in hand paid and for other good and valuable consideration, the receipt of which is hereby acknowledged, and intending to be legally bound hereby, does hereby release and forever discharge **THOSE CERTAIN UNDERWRITERS AT LLOYD'S, LONDON WHO SUBSCRIBE TO CERTIFICATE NO. NO324100S** ("UNDERWRITERS"), BESSO LIMITED and BRINK TRANSPORTATION (hereinafter "Releasees") and any other person, partnership, firm, corporation, or other entity charged and chargeable with responsibility or liability and their assigns, successors, heirs, executors, administrators, attorneys, and insurers, of any and all manner of liability, actions, causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, agreements, judgments, claims and demands whatsoever in law or in equity, including any claim for contribution or indemnity, with respect to any claim that was asserted or could have been asserted with regard to the recovery, storage and other charges, expenses or fees arising out of an accident that occurred on March 5, 2004, whether now in existence or which may hereafter arise, including but not limited to the claims asserted or which could have been asserted in the civil action pending in the Court of Common Pleas of Mercer County, Pennsylvania, docket number 2005-653-CD, which against said Releasees or any other person, partnership, firm, corporation, or other entity charged and chargeable with responsibility or liability and their assigns, successors, heirs, executors, administrators and insurers ever had, now have or which their heirs, executors, administrators, successors, assigns and insurers or any of them, hereinafter can, shall or may have, for or by

reason of any cause, matter or thing whatsoever from the beginning of time to the date of these presents. This Settlement Agreement and Release does not release Brink Transportation from the liability assigned by the Releasor to Underwriters as more fully set forth below;

AND FURTHER, in consideration of the mutual covenants contained herein and intending to be legally bound hereby, the parties agree as follows:

1. The total and complete sum of Four Thousand Dollars (\$4,000.00) shall be paid to Preston America, Inc. and their attorney, Robert G. Yeats, Esquire.
2. It is understood and agreed the parties hereto have entered into this Settlement Agreement to resolve disputed claims and neither entering into this Settlement Agreement nor anything contained herein shall be taken or construed to be an admission on the part of any party of the validity of any claim. It is further understood that this document shall be neither offered nor admitted into evidence or otherwise used in any other litigation or proceeding whatsoever except to establish a claim of breach of the agreements contained herein or in support of the assignment of rights contained herein.
3. This Settlement Agreement shall benefit and be binding upon each of the parties hereto and their legal representatives, heirs, predecessors, executors, successors, administrators or assigns.
4. Releasor hereby assigns any and all rights they may have with regard to the claims, up to the amount of consideration received for this Release or \$4,000, asserted against Brink Transportation in the civil action pending in the Court of Common Pleas of Mercer County, Pennsylvania, docket number 2005-653-CD, to those Certain Underwriters at Lloyd's, London who subscribe to Certificate NO324100S and agrees to cooperate with the Underwriters.

in the pending litigation against Brink to recover any payments made pursuant to this Settlement Agreement and Release.

5. Releasor shall dismiss without prejudice the complaint filed in the Court of Common Pleas of Mercer County, Pennsylvania, docket number 2005-653-CD.

6. This Settlement Agreement contains the entire agreement of the parties hereto and the terms of the agreement are contractual.

7. The persons whose names appear below as signatories for the respective parties hereto represent, by affixing their signatures hereto, that they have full, actual and unconditional authority to bind the respective parties hereto immediately.

8. The persons whose names appear below as signatories acknowledge that they have carefully read this document and sign the same of their own free will.

IN WITNESS WHEREOF, the parties have executed this Settlement Agreement on the date and year first written below.

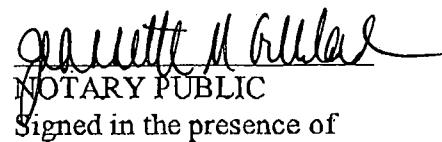
Signed in the presence of

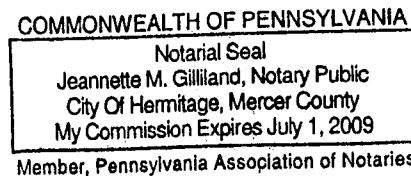
  
\_\_\_\_\_  
Preston America, Inc.

Troy R. Preston

Print or Type Name

Sworn to and subscribed  
before me this 7<sup>th</sup> day  
of November , 2005

  
\_\_\_\_\_  
NOTARY PUBLIC  
Signed in the presence of



Member, Pennsylvania Association of Notaries

---

Date

Those Certain Underwriters at Lloyd's, London  
who subscribe to Certificate NO324100S

---

Print or Type Name

Sworn to and subscribed  
before me this \_\_\_\_\_ day  
of \_\_\_\_\_, 2005

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NOTARY PUBLIC

---

Besso Limited

---

Date

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Print or Type Name

Sworn to and subscribed  
before me this \_\_\_\_\_ day  
of \_\_\_\_\_, 2005

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NOTARY PUBLIC

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff,

vs.

No. 2005-653-CD

BRINK TRANSPORTATION, INC.,

Defendant,

vs.

LLOYD'S OF LONDON and BESSO, LTD.,

Additional Defendants

**ORDER OF COURT**

AND NOW, this \_\_\_\_\_ day of \_\_\_\_\_, 2005, upon consideration of Plaintiff Preston America, Inc.'s Motion to Dismiss Complaint, IT IS HEREBY ORDERED AND DECREED, as follows:

1. The Complaint of Preston America, Inc., filed at the above term and number is dismissed without prejudice;
2. The claims of Brink Transportation, Inc. against Lloyd's of London, and Besso, Ltd., as well as any claims of Lloyd's of London and Besso, Ltd. against Brink Transportation, Inc., shall remain in effect at the above term and number.

BY THE COURT:

\_\_\_\_\_  
J.

LEWIS AND RISTVEY, P.C.

ATTORNEYS AT LAW

689 NORTH HERMITAGE ROAD

P.O. BOX 1024

HERMITAGE, PENNSYLVANIA 16148-1024

DAVID K. LEWIS, JR.  
(1931-1986)

MICHAEL RISTVEY, JR.

ROBERT G. YEATTS

KENNETH K. McCANN

DAVID A. RISTVEY

DOUGLAS M. WATSON

CAROLYN E. HARTLE

WILLIAM C. KUHN  
OF COUNSEL

(724) 981-8700  
FACSIMILE NO. (724) 981-8705

November 21, 2005

**Peter A. Morin, Court Administrator**

**Motions Court**

Mercer County Courthouse

Mercer, PA 16137

RE: Preston America, Inc. vs. Brink Transportation, Inc. vs. Lloyd's of London and Besso, Ltd.  
Docket No.: 2005-653-CD

Dear Mr. Morin:

Enclosed please find Plaintiff, Preston America Inc.'s Motion to Dismiss Complaint, together with a Scheduling Order and a proposed Court Order.

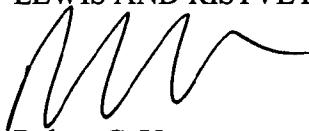
All other parties through their counsel of record have been notified of Plaintiff's intention to file this Motion, which we ask be placed on the next available Motions Court calendar.

It is my understanding that no other party has any objection to the filing or granting of this Motion, however, it is my understanding that Attorney Dwight Koerber, counsel for Brink Transportation, Inc., intends to file a Motion for Change of Venue concerning the remaining portion of the case and that he would like to have this Motion heard at the same time as the Plaintiff's Motion to Dismiss.

If anything further is needed from this office, please advise.

Sincerely yours,

LEWIS AND RISTVEY, P.C.



Robert G. Yeatts

RGY/jg

Encl.

Cc: Dwight L. Koerber, Jr., Esq. (w/encl.)

Brian F. Breen, Esq. (w/encl.)

~~Elizabeth Fair, Mercer County Prothonotary (w/encl.)~~

Preston America, Inc. (w/encl.)

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

ELIZABETH F. FAIR  
PROTHONOTARY

NO. 2  
FILED IN MERCER  
COUNTY

2005 NOV 21 P 1:24

Type of Pleading:  
PRAECIPE FURNISHING  
VERIFICATION PAGES

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

**PRAECLYPE FURNISHING VERIFICATION PAGES**

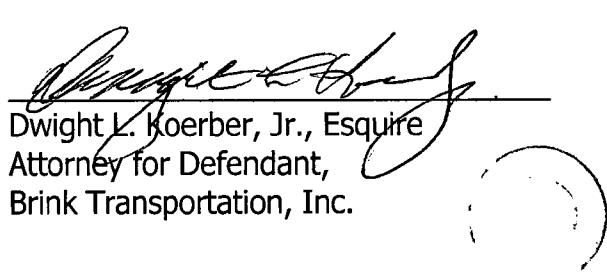
TO: ELIZABETY F. FAIR, PROTHONOTARY  
COURT OF COMMON PLEAS OF MERCER COUNTY  
N. Diamond St.  
Mercer, PA 16137

Attached hereto are two separate verification pages, that were inadvertently omitted from the following two pleadings:

1. Reply of Defendant Brink Transportation to New Matter of Additional Defendant Lloyd's of London and Answer and New Matter of Defendant Brink Transportation to Counterclaim of Additional Defendant Lloyd's of London;
2. Reply of Defendant Brink Transportation to New Matter of Additional Defendant Besso Limited.

I would ask that the record reflect that each of the verifications is hereby deemed to have been attached to the above-referenced pleadings.

Respectfully submitted,

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant,  
Brink Transportation, Inc.

## **VERIFICATION**

I certify that the statements made in the foregoing document are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

  
Samuel D. Brink  
Samuel D. Brink, President  
BRINK TRANSPORTATION, INC.

DATE: November 10, 2005

## **VERIFICATION**

I certify that the statements made in the foregoing document are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.



Samuel D. Brink, President  
BRINK TRANSPORTATION, INC.

DATE: November 10, 2005

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

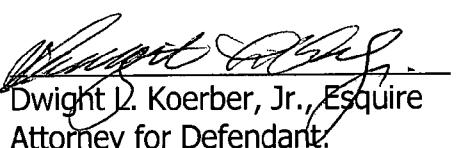
|                       |   |                        |
|-----------------------|---|------------------------|
| Preston America, Inc. | * |                        |
| Plaintiff             | * |                        |
| -vs-                  | * | Docket No. 2005-653-CD |
| Brink Transportation  | * |                        |
| Defendant             | * |                        |
| -vs-                  | * |                        |
| Lloyd's of London and | * |                        |
| Besso Limited         | * |                        |
| Additional Defendants | * |                        |

**CERTIFICATE OF SERVICE**

This is to certify that on the 18<sup>th</sup> day of November 2005 the undersigned served a true and correct copy of the PRAEICE FURNISHING VERIFICATION PAGES in the above-captioned matter upon counsel for Plaintiff. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Brian F. Breen, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight J. Koerber, Jr., Esquire  
Attorney for Defendant  
Brink Transportation, Inc.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

Type of Pleading:  
REPLY OF DEFENDANT BRINK  
TRANSPORTATION TO NEW MATTER OF  
ADDITIONAL DEFENDANT BESSO  
LIMITED

Filed on behalf of:  
Brink Transportation, Inc.

NO FILED IN MERCER  
COUNTY  
2005 NOV 17 A 9:31  
*[Signature]*  
ELIZABETH F. FAIR  
PROTHONOTARY

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

|                       |   |                        |
|-----------------------|---|------------------------|
| Preston America, Inc. | * |                        |
| Plaintiff             | * |                        |
|                       | * |                        |
| -vs-                  |   | Docket No. 2005-653-CD |
|                       | * |                        |
| Brink Transportation  | * |                        |
| Defendant             | * |                        |
|                       | * |                        |
| -vs-                  | * |                        |
|                       | * |                        |
| Lloyd's of London and | * |                        |
| Besso Limited         | * |                        |
| Additional Defendants | * |                        |

**REPLY OF DEFENDANT BRINK TRANSPORTATION TO NEW MATTER OF  
ADDITIONAL DEFENDANT BESSO LIMITED**

COMES NOW, Defendant Brink Transportation, Inc. by and though its attorney, Dwight L. Koerber, Jr., Esquire, and files the within Reply to the New Matter of Besso Limited, Additional Defendant.

42. Denied. To the contrary, service was effectuated in accordance with the terms of the policy. Moreover, Defendant has waived the right to assert the issue of service, as it has filed an Answer and New Matter, and has thereby fully participated as a party in this case.

43. Denied, legal conclusion. No answer required.

44. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant would point out that no facts have been presented to

raise this affirmative defense, thereby demonstrating that the effort to raise such a defense is defective and done in a fashion contrary to the Pennsylvania Rules of Civil Procedure.

45. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant would point out that no facts have been presented to raise this affirmative defense, thereby demonstrating that the effort to raise such a defense is defective and done in a fashion contrary to the Pennsylvania Rules of Civil Procedure. Moreover, in order to be binding an accord and satisfaction needs to be in writing and in the present case, no such written document has been presented.

46. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant Brink Transportation would point out that from the time that the said tractor and said trailer were deemed to be totaled, that Additional Defendants were responsible for all storage expense that emanated from them being held and not disposed of in an prompt and expeditious fashion. Moreover, in accepting title to the said trailers and in arranging for their sale, Additional Defendants ratified and approved their prior actions/inactions insofar as being owner of the subject equipment and therefore are responsible for the proper disposal and interim storage of such.

47. Denied. See policy attached as Exhibit E to Complaint against Additional Defendants where the name of Besso Limited is set forth. Moreover, at page identified as page 4 of 5 in that policy a person identified as director of Besso Limited specifically

signed the appropriate portion of the policy, thereby confirming their identity as a party in this matter.

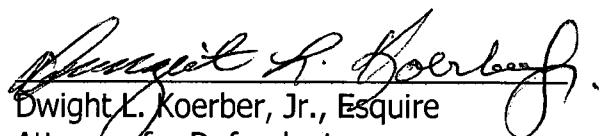
48. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant would point out that no facts have been presented to raise this affirmative defense, thereby demonstrating that the effort to raise such a defense is defective and done in a fashion contrary to the Pennsylvania Rules of Civil Procedure. Furthermore, it is the position of Defendant Brink Transportation that Additional Defendant is not entitled to assert an equitable defenses of any nature because it has failed to comply with numerous equitable principles directly applicable to it, such as the duty to do equity if one seeks equity, the requirement to have clean hands, and other pertinent equitable maxims.

49. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant would point out that no facts have been presented to raise this affirmative defense, thereby demonstrating that the effort to raise such a defense is defective and done in a fashion contrary to the Pennsylvania Rules of Civil Procedure. Furthermore, it is the position of Defendant Brink Transportation that Additional Defendant is not entitled to assert an equitable defenses of any nature because it has failed to comply with numerous equitable principles directly applicable to it, such as the duty to do equity if one seeks equity, the requirement to have clean hands, and other pertinent equitable maxims.

50. Denied, legal conclusion. No answer required.

WHEREFORE, Defendant Brink Transportation, Inc. requests This Honorable Court to deny the New Matter presented on behalf of Besso Limited and to grant the relief requested in the Complaint filed by Defendant Brink Transportation.

Respectfully submitted,



Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant,  
Brink Transportation, Inc.

PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

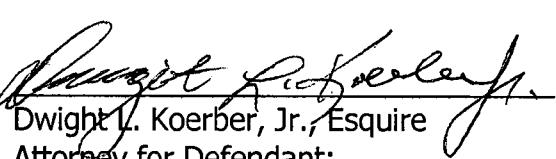
\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 15<sup>th</sup> day of November 2005 the undersigned served a true and correct copy of the REPLY OF DEFENDANT BRINK TRANSPORTATION TO NEW MATTER OF ADDITIONAL DEFENDANT BESSO LIMITED filed in the above-captioned matter upon counsel for Plaintiff and upon counsel for Additional Defendants. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Brian F. Breen, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

Type of Pleading:

REPLY OF DEFENDANT BRINK  
TRANSPORTATION TO NEW MATTER  
OF ADDITIONAL DEFENDANT LLOYD'S  
OF LONDON AND ANSWER AND NEW  
MATTER OF DEFENDANT BRINK  
TRANSPORTATION TO COUNTERCLAIM  
OF ADDITIONAL DEFENDANT LLOYD'S  
OF LONDON

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

NO. FILED IN MERCER  
COUNTY  
2005 NOV 17 A 9:31  
ELIZABETH F. FAIR  
PROTHONOTARY

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

**NOTICE**

YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE ENCLOSED ANSWER AND NEW MATTER WITHIN TWENTY (20) DAYS FROM SERVICE HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.



**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

**REPLY OF DEFENDANT BRINK TRANSPORTATION TO NEW MATTER OF  
ADDITIONAL DEFENDANT LLOYD'S OF LONDON AND ANSWER AND NEW  
MATTER OF DEFENDANT BRINK TRANSPORTAION TO COUNTERCLAIM OF  
ADDITIONAL DEFENDANT LLOYD'S OF LONDON**

COMES NOW, Defendant Brink Transportation, Inc. by and though its attorney, Dwight L. Koerber, Jr., Esquire, and files the within Reply to the New Matter and the Answer and New Matter to Counterclaim of Lloyd's of London, Additional Defendant.

**REPLY TO NEW MATTER**

42. Denied, as Defendant has served Additional Defendant Lloyd's of London in accordance with the procedures set forth in the policy. Moreover, this assertion goes to jurisdiction and Additional Defendant has waived it by participating in the merits of this case.

43. Denied, legal conclusion. No answer required.



44. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant would point out that no facts have been presented to raise this affirmative defense, thereby demonstrating that the effort to raise such a defense is defective and done in a fashion contrary to the Pennsylvania Rules of Civil Procedure.

45. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant would point out that no facts have been presented to raise this affirmative defense, thereby demonstrating that the effort to raise such a defense is defective and done in a fashion contrary to the Pennsylvania Rules of Civil Procedure. Moreover, in order to be binding an accord and satisfaction needs to be in writing and in the present case, no such written document has been presented.

46. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant Brink Transportation would point out that from the time that the said tractor and said trailer were deemed to be totaled, that Additional Defendants were responsible for all storage expense that emanated from them being held and not disposed of in an prompt and expeditious fashion. Moreover, in accepting title to the said trailers and in arranging for their sale, Additional Defendants ratified and approved their prior actions/inactions insofar as being owner of the subject equipment and therefore are responsible for the proper disposal and interim storage of such.

47. Denied, legal conclusion. Defendant would point to the affirmative evidence that it filed in its Complaint, itemizing the areas where Additional Defendant failed to fulfill its contractual obligations. Moreover, Defendant would point out that in addition to the Breach of Contract Complaint, Additional Defendant has also filed a bad faith insurance claim.

48. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant would point out that no facts have been presented to raise this affirmative defense, thereby demonstrating that the effort to raise such a defense is defective and done in a fashion contrary to the Pennsylvania Rules of Civil Procedure. Furthermore, it is the position of Defendant Brink Transportation that Additional Defendant is not entitled to assert an equitable defenses of any nature because it has failed to comply with numerous equitable principles directly applicable to it, such as the duty to do equity if one seeks equity, the requirement to have clean hands, and other pertinent equitable maxims.

49. Denied, legal conclusion. No answer required. To the extent that an answer is required, Defendant would point out that no facts have been presented to raise this affirmative defense, thereby demonstrating that the effort to raise such a defense is defective and done in a fashion contrary to the Pennsylvania Rules of Civil Procedure. Furthermore, it is the position of Defendant Brink Transportation that Additional Defendant is not entitled to assert an equitable defenses of any nature because it has failed to comply with numerous equitable principles directly applicable to

it, such as the duty to do equity if one seeks equity, the requirement to have clean hands, and other pertinent equitable maxims.

50. Denied. See answer to paragraph 47, above.

WHEREFORE, Defendant Brink Transportation, Inc. requests This Honorable Court to deny the New Matter presented on behalf of Lloyd's of London and to grant the relief requested in the Complaint filed by Defendant Brink Transportation.

#### **ANSWER TO COUNTERCLAIM**

51. Denied. Upon reasonable investigation, Defendant is without knowledge of the terms and conditions of the Counterclaim, although it has learned of the proposed transaction through verbal information. Strict proof of any settlement is required. It is denied that the reason for the settlement was to limit the liability of Brink, as any settlement, if in fact it was made, was made as part of Additional Defendant's obligations under the insurance policy in question. It is denied, as a matter of law, that Additional Defendant has the right to file suit against its insured for obligations covered under the insurance policy. See New Matter.

52. Denied. See answer set forth in paragraph 51 and in New Matter.

53. Denied, no answer required. To the extent that an answer is required, Defendant hereby incorporates its answers to the Plaintiff's allegations which have already been filed of record.

54. Denied. Legal conclusion. No answer required. Also, see answer to paragraph 51 and New Matter, set forth below.

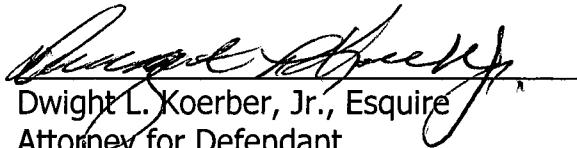
## NEW MATTER

In further support of its position herein, Defendant Brink Transportation, Inc. asserts the following New Matter.

55. Additional Defendant's claims are barred by the Doctrine of Estoppel.
56. In view of the relationship of Defendant and Additional Defendant as being that of insured and insurer, Additional Defendant is barred, as a matter of law, from bringing suit against its insured to seek reimbursement for claims that are covered by the insurance contract between the parties.
57. The Counterclaim herein, as filed by Additional Defendants against Defendant, fails to state a claim upon which relief may be granted.

WHEREFORE, Defendant Brink Transportation prays that the Counterclaim of Additional Defendant Lloyd's of London and/or Those Certain Underwriters at Lloyd's of London who subscribe to certificate no. NO324100S be denied.

Respectfully submitted,



Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant,  
Brink Transportation, Inc.

PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

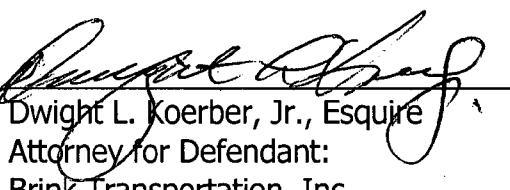
\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 15<sup>th</sup> day of November 2005 the undersigned served a true and correct copy of the REPLY OF DEFENDANT BRINK TRANSPORTATION TO NEW MATTER OF ADDITIONAL DEFENDANT LLOYD'S OF LONDON AND ANSWER AND NEW MATTER OF DEFENDANT BRINK TRANSPORTATION TO COUNTERCLAIM OF ADDITIONAL DEFENDANT LLOYD'S OF LONDON filed in the above-captioned matter upon counsel for Plaintiff and upon counsel for Additional Defendants. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Brian F. Breen, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc. )  
Plaintiff, )  
 )  
v. )  
 )  
Brink Transportation ) Docket No. 2005-653-CD  
Defendant, )  
 )  
v. )  
 )  
Lloyd's of London and )  
Besso Limited )  
Additional Defendants. )

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NO FILED IN MERCER COUNTY  
2005 OCT 26 A 10:00  
ELIZABETH F. FAIR  
PROTHONOTARY  
*[Signature]*

Type of Pleading:

ANSWER, NEW MATTER AND  
COUNTERCLAIM OF  
ADDITIONAL DEFENDANT TO THE  
COMPLAINT OF DEFENDANT, BRINK  
TRANSPORTATION

Filed on behalf of:

Those Certain Underwriters at Lloyd's,  
London who subscribe to certificate no.  
NO324100S

Counsel of record for this party:

Brian F. Breen  
PA I.D. 81416

WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
(215) 627-6900

**NOTICE TO PLEAD**

TO: Defendant, Brink Transportation,  
You are hereby notified to file a written response to the  
enclosed Counterclaim within 20 days from service  
hereof or a judgment may be entered against you.



\_\_\_\_\_  
Attorney for Additional Defendant, Those Certain  
Underwriters at Lloyd's, London who subscribe to  
certificate no. NO324100S

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY PENNSYLVANIA  
CIVIL ACTION – LAW**

|                        |   |                        |
|------------------------|---|------------------------|
| Preston America, Inc.  | ) |                        |
| Plaintiff,             | ) |                        |
|                        | ) |                        |
| v.                     | ) |                        |
|                        | ) |                        |
| Brink Transportation   | ) | Docket No. 2005-653-CD |
| Defendant,             | ) |                        |
|                        | ) |                        |
| v.                     | ) |                        |
|                        | ) |                        |
| Lloyd's of London and  | ) |                        |
| Besso Limited          | ) |                        |
| Additional Defendants. | ) |                        |

---

**ANSWER, NEW MATTER AND COUNTERCLAIM OF ADDITIONAL DEFENDANT,  
THOSE CERTAIN UNDERWRITERS AT LLOYD'S, LONDON  
WHO SUBSCRIBE TO CERTIFICATE NO. NO324100S,  
TO THE COMPLAINT OF THE DEFENDANT, BRINK TRANSPORTATION**

Those Certain Underwriters at Lloyd's, London who subscribe to certificate no. NO324100S ("Underwriters"), improperly identified in defendant's, Brink Transportation, Inc.'s, Complaint against Additional Defendants as Lloyd's of London answers as follows:

1. Admitted.
2. Admitted.

**COUNT I**

3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted that defendant filed the answer and new matter as alleged.

Underwriters deny that they are responsible to defendant for contribution or indemnification.

7. Underwriters admit that on March 5, 2004 an Automobile Physical Damage Insurance policy issued to the defendant was in effect. The remainder of this paragraph sets forth conclusions of law that do not require a response and as such are specifically denied.

8. Denied as stated. Exhibit D is a copy of the policy furnished to defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley. Exhibit E is a covernote issued by Besso Limited to evidence the coverages provided in policy number NO324100S which is Exhibit D. Underwriters deny that the policy provides coverage for the claims asserted by Preston America, Inc. against Brink Transportation in the within civil action.

9. Denied as stated. Exhibit D is a copy of the policy furnished to defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley. Exhibit E is a covernote issued by Besso Limited to evidence the coverages provided in policy number NO324100S which is Exhibit D.

10. Admitted.

11. Admitted.

12. Denied. The Automobile Physical Damage Insurance policy limits the amount Underwriters are responsible to pay with regard to a claim. Specifically, the policy provides, in pertinent part, that:

## INSURING AGREEMENTS

1. In consideration of the premium paid hereon and the particulars and statements contained in the written Proposal, a copy of which is attached hereto, which particulars and statements are warranted by the Assured to be true and are agreed to be incorporated herein, the Underwriters hereby agree to indemnify the Assured against direct and accidental loss of or damage to the Automobiles specified in the Schedule herein . . .

2. This insurance covers only such and so many of the Perils named in the Schedule as are indicated by a specific premium set thereunder. The limit of the Underwriters' Liability in respect of each of such Perils is the amount insured stated in the Schedule or the actual cash value of the vehicle concerned at the time of loss, whichever is the less.

Underwriters have already paid the amount due under the policy. Brink was paid \$9,600 in connection with the trailer, VIN No. 6060, which, at the time of loss had an actual cash value of \$14,600. Brink was also paid \$13,736 in connection with the tractor, VIN No. 083203, which, at the time of loss had an actual cash value of \$23,335. Additionally, at the insured's direction, \$4,599, the salvage value of the tractor, was paid directly to plaintiff. Finally, Underwriters, on behalf of Brink, paid Preston America \$10,000 for towing and storage expenses incurred through June 27, 2005. Therefore, Underwriters paid a total of \$37,935 in connection with this loss. That figure is equal to the combined actual cash value of the vehicles at the time of loss and therefore Underwriters limit of liability under the policy.

13. Underwriters admit that they have refused to pay storage and towing charges in excess of their limit of liability under the applicable insurance policy.

14. Denied. Underwriters incorporate here their answer to paragraph 12 in its entirety. Further, Underwriters state that they satisfied their obligations under the applicable policy of insurance by paying their limit of liability.

15. Denied. Underwriters incorporate here their answer to paragraph 12 in its entirety. Further, Underwriters state that they satisfied their obligations under the applicable policy of insurance by paying their limit of liability. Additionally, the remainder of this paragraph contains legal conclusions to which no answer is required. However, to the extent an answer is required, Underwriters deny the remainder of this paragraph.

## **COUNT II**

16. Admitted.

17. Denied as stated. Exhibit D is a copy of the policy furnished to defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley. Exhibit E is a covernote issued by Besso Limited to evidence the coverages provided in policy number NO324100S which is Exhibit D.

18. Admitted.

19. Admitted.

20. Admitted.

21. Admitted.

22. Denied as stated. Endorsement LSW544 is a part of the policy and the wording speaks for itself.

23. Admitted.

24. Admitted.

25. Denied. The allegations of paragraph 25 are conclusions of law that require no response. In the event and to the extent a response is deemed required, said allegations are denied. It is specifically denied that Underwriters ever became the equitable and/or legal owner of the salvage. Moreover, Underwriters deny that the language of the policy cited by Brink Transportation works to create any such transfer of ownership.

26. Denied. Underwriters state that they were abiding by the language of the policy of insurance whereby the insured is prohibited from abandoning the vehicles to the Underwriters.

27. Denied. Underwriters deny that they were, at any time, the owner of the subject vehicles. Additionally, Underwriters deny that they have any obligation to pay storage expenses in excess of their limit of liability under the applicable policy of insurance, which in this case was the actual cash value of the vehicles at the time of loss and Underwriters have made payments equal to the actual cash value of the vehicles.

28. Denied. Underwriters paid the limits of liability under the policy and are not liable for any additional sums.

29. Denied.

(a) Denied. Underwriters paid Brink Transportation \$9,600 in connection with the loss of the trailer. This amount reflects the actual cash value of the trailer, \$14,600, less the \$5,000 deductible applicable to this vehicle.

(b) Denied. Underwriters paid Brink Transportation \$13,736 in connection with the loss of the tractor. Additionally, pursuant to the direction of Brink Transportation, the salvage value of the tractor, \$4,599, was paid directly to Preston America. Therefore, \$18,335 was paid to, or on behalf of, Brink Transportation. This amount reflects the actual cash value of the tractor, \$23,335, less the \$5,000 deductible applicable to this vehicle.

(c) Denied. Underwriters incorporate herein their answer to paragraph 12.

Moreover, Underwriters deny that they have any obligation to pay sums in excess of their limit of liability under the policy of insurance.

30. Denied. Underwriters deny that they are responsible for any sums in excess of the limits of liability under the policy. Additionally, Underwriters deny that the salvage value of the vehicles has not been paid to, or on behalf of, the insured.

31. This paragraph contains conclusions of law which do not require a response. To the extent a response is required, Underwriters deny the allegations contained in this paragraph. Underwriters deny that Brink Transportation is owed any money under the applicable policy of insurance. Underwriters have paid their limit of liability under the policy and no further amounts are owed.

32. This paragraph contains conclusions of law which do not require a response. To the extent a response is required, Underwriters deny the allegations contained in this paragraph. Underwriters deny that Brink Transportation is owed any money under the applicable policy of insurance. Underwriters have paid their limit of liability under the policy and no further amounts are owed.

### **COUNT III**

33. Underwriters repeat and reassert their answers to paragraphs 1-32 as if set forth here in their entirety.

34. Underwriters admit that they issued policy number NO324100S002, which was in effect on March 5, 2004. Underwriters repeat and reassert their responses to the individual paragraphs contained in Counts I and II as if set forth here in their entirety.

35. Denied as stated. Exhibit D is a copy of the policy furnished to defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley. Exhibit E is a covernote issued by Besso Limited to evidence the coverages provided in policy number NO324100S which is Exhibit D.

36. Denied. Underwriters have acted in good faith in connection with this claim. The storage fees asserted by Preston America against Brink are the result of Brink's actions, not Underwriters. Underwriters have paid the full amount of their limit of liability with regard to this matter.

37. Denied. Underwriters deny that they informed the plaintiff that it would have to accept the appraised value for both vehicles on a "take it or leave it" basis before Underwriters would pay the salvage and fully adjust the settlement for one of the vehicles.

(a) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they failed to adjust this claim in a prompt and timely fashion or that they failed to move forward with due diligence and assert that any delay was caused by the actions of Brink.

(b) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that any of their actions constitute bad faith.

(c) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they improperly interpreted the subject insurance policy. Moreover, Underwriters refer to paragraph 8 under the section entitled "Conditions" which provides that "[i]t shall be optional with Underwriters to take all or any part of the property at the agreed or appraised value, but there can be no abandonment thereof to the

Underwriters.” Additionally, Underwriters did not withhold from Brink Transportation the salvage value of the vehicles. Brink was paid the full value of the trailer less only the deductible. In regard to the tractor, Brink was also paid the full value less the deductible, the only difference being that an amount equal to the salvage value of the tractor was paid to Preston America pursuant to Brink’s direction.

(d) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that the policy of insurance creates any duty on the part of Underwriters to be responsible for the salvage if the insured elects not to exercise its right of first refusal to bid on the salvage.

(e) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, the allegations in this paragraph are denied. Underwriters did advise the insured of additional pertinent sections of the policy of insurance.

(f) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they intentionally “low balled” the estimate for one of the vehicles.

(g) Denied

(h) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim and that it followed the language of the policy of insurance that controlled this claim.

(i) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in

the administration of this claim and that it followed the language of the policy of insurance that controlled this claim.

(j) This paragraph contains a conclusion of law to which no answer is required.

To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim and that it followed the language of the policy of insurance that controlled this claim.

(k) This paragraph contains a conclusion of law to which no answer is required.

To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim.

(l) This paragraph contains a conclusion of law to which no answer is required.

To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim and that it followed the language of the policy of insurance that controlled this claim. Additionally, the policy of insurance in no way requires Underwriters to take title to the subject vehicles.

(m) Underwriters admit that they created the proofs of loss attached to Brink Transportations complaint. Underwriters deny that the creation of these proofs of loss was done in bad faith. Additionally, Underwriters refer to the language in the policy prohibiting the abandonment of the vehicles to Underwriters.

(n) This paragraph contains a conclusion of law to which no answer is required.

To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim and that it followed the language of the policy of insurance that controlled this claim.

(o) After reasonable investigation, Underwriters are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in this paragraph and therefore this paragraph is denied.

(p) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim and that it followed the language of the policy of insurance that controlled this claim. Additionally, Underwriters deny that they purposefully secured an appraiser prone to producing appraisals below fair market value.

(q) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they structured their affairs in a manner designed to complicate or encumber the settlement process for this claim or claims in general. Additionally, Underwriters state that they adhered to the language of the policy of insurance in their administration of this claim.

(r) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim. Additionally, Underwriters deny that they orchestrated any policy of delay.

38. This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that Brink is owed any money. Underwriters have paid Brink, and Preston America, at Brink's direction the limit of their liability. Underwriters paid Brink Transportation \$13,736 in connection with the loss of the tractor. Additionally, pursuant to the direction of Brink Transportation, the salvage value of the tractor, \$4,599, was paid directly to Preston America. Therefore, \$18,335 was paid to, or on behalf of,

Brink Transportation for the tractor. This amount reflects the actual cash value of the tractor, \$23,335, less the \$5,000 deductible applicable to this vehicle. Additionally, Underwriters paid Brink Transportation \$9,600 in connection with the loss of the trailer. This amount reflects the actual cash value of the trailer, \$14,600, less the \$5,000 deductible applicable to this vehicle. Finally, Underwriters have paid \$10,000 to Preston America on behalf of Brink. Therefore, Underwriters have made total payments of \$37,935 which is equivalent to the actual cash value of the tractor and trailer at the time of loss and Underwriters limit of liability under the policy.

39. This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they have caused any economic harm to Brink Transportation.

40. This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim.

41. This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Underwriters deny that they acted in bad faith at any point in the administration of this claim.

#### **NEW MATTER**

42. Plaintiff failed to properly serve the complaint against additional defendants in this matter.

43. The complaint against additional defendants fails to state a claim upon which relief can be granted.

44. The claims asserted in the complaint are barred by the applicable statute of

limitations.

45. An accord and satisfaction bar defendant's claims against additional defendants.

46. The alleged storage expenses and any resulting damages were caused by the actions of the defendant, Brink Transportation, and not the additional defendant.

47. The additional defendant satisfied all their obligations under the policy of insurance.

48. Defendant's claims are barred by estoppel.

49. Defendant's claims are barred by laches.

50. The additional defendant paid defendant all amounts owed under the policy.

### **COUNTERCLAIM**

51. Underwriters and Plaintiff have agreed to settle the claims asserted by the plaintiff against Brink in the amount of \$4,000. This payment is over and above the amount Underwriters are required to pay under Brink's policy and was made to limit the liability of Brink and to prevent the unnecessary accumulation of additional storage fees.

52. Plaintiff has agreed to assign the claims it has asserted against Brink in its complaint, in an amount up to the \$4,000 paid for the release, to Underwriters.

53. Underwriters incorporate by reference the allegations contained in plaintiff's amended complaint.

54. Underwriters seek payment from Brink of the \$4,000 paid on Brink's behalf to Preston that is above the amount due under Brink's policy.

WHEREFORE, additional defendants request judgment against the defendant in the amount of \$4,000, together with interest and costs.

Respectfully submitted,

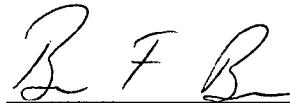
WILSON, ELSER, MOSKOWITZ, EDELMAN &  
DICKER LLP

BY: 

Wendy Testa, Esquire  
Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

VERIFICATION

Brian F. Breen, Esquire, states that he is the attorney for Additional Defendant, Those Certain Underwriters at Lloyd's, London who subscribe to certificate no. NO324100S; that he has the authority to make this verification on their behalf; that he is acquainted with the facts set forth in the foregoing Additional Defendant's Answer with New Matter and Counterclaim; that the same are true and correct to the best of his knowledge, information and belief; and that this statement is made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities.



---

Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

CERTIFICATE OF SERVICE

Brian F. Breen, attorney for Those Certain Underwriters at Lloyd's of London Who Subscribe to Policy No. 3245100S, certifies that on October 25, 2005 he sent a copy of the foregoing Additional Defendant's Answer with New Matter and Counterclaim via United States mail, first class, postage prepaid, to:

Robert G. Yeatts, Esquire  
Lewis and Ristvey, P.C.  
689 N. Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Dwight L. Koerber, Jr.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830

B F B

Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc. )  
Plaintiff, )  
 )  
v. )  
 )  
Brink Transportation ) Docket No. 2005-653-CD  
Defendant, )  
 )  
v. )  
 )  
Lloyd's of London and )  
Besso Limited )  
Additional Defendants. )

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NO FILED IN MERCER  
COUNTY  
JULY 26 2005 A 10:00  
ELIZABETH FAIR  
PROTHONOTARY  
*[Signature]*

Type of Pleading:

ANSWER AND NEW MATTER OF  
ADDITIONAL DEFENDANT TO THE  
COMPLAINT OF DEFENDANT, BRINK  
TRANSPORTATION

Filed on behalf of:

Besso Limited

Counsel of record for this party:

Brian F. Breen  
PA I.D. 81416

WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
(215) 627-6900

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY PENNSYLVANIA  
CIVIL ACTION – LAW

|                        |   |                        |
|------------------------|---|------------------------|
| Preston America, Inc.  | ) |                        |
| Plaintiff,             | ) |                        |
|                        | ) |                        |
| v.                     | ) |                        |
|                        | ) |                        |
| Brink Transportation   | ) | Docket No. 2005-653-CD |
| Defendant,             | ) |                        |
|                        | ) |                        |
| v.                     | ) |                        |
|                        | ) |                        |
| Lloyd's of London and  | ) |                        |
| Besso Limited          | ) |                        |
| Additional Defendants. | ) |                        |

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**ANSWER AND NEW MATTER OF ADDITIONAL DEFENDANT,  
BESSO LIMITED, TO THE COMPLAINT OF THE DEFENDANT,  
BRINK TRANSPORTATION**

Besso Limited answers the Complaint of Brink Transportation against Additional Defendants as follows:

1. Admitted.
2. Admitted.

**COUNT I**

3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted that defendant filed the answer and new matter as alleged. Besso Limited

denies that it is responsible to defendant for contribution or indemnification.

7. Besso Limited admits that on March 5, 2004 an Automobile Physical Damage Insurance policy issued to the defendant was in effect. The remainder of this paragraph sets forth conclusions of law that do not require a response and as such are specifically denied. Further, Besso Limited denies that it is responsible to Brink Transportation pursuant to the policy of insurance as Besso Limited is not the insurer and is not a party to that contract.

8. Denied as stated. Exhibit D is a copy of the policy furnished to defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley. Exhibit E is a covernote issued by Besso Limited to evidence the coverages provided in policy number NO324100S which is Exhibit D. Besso Limited denies that it is responsible to Brink Transportation pursuant to the policy of insurance as Besso Limited is not the insurer and is not a party to that contract.

9. Denied as stated. Exhibit D is a copy of the policy furnished to defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley. Exhibit E is a covernote issued by Besso Limited to evidence the coverages provided in policy number NO324100S which is Exhibit D. Besso Limited admits that the covernote, Exhibit E attached to Brink Transportation's complaint, was provided by counsel for Additional Defendant Underwriters.

10. Besso Limited admits that the accident giving rise to Brink Transportation's complaint occurred on March 5, 2004. Besso Limited denies that it is the insurer for the involved vehicles.

11. Admitted.

12. Denied. Besso Limited is not the insurer and is not a party to the contract of insurance.

13. Besso Limited admits that it has refused to pay storage and towing charges under the applicable insurance policy. Besso Limited denies that it is responsible for storage and towing charges because it is not the insurer and is not a party to the insurance contract.

14. Denied. Besso Limited denies that it has any contractual obligation to Brink Transportation as Besso Limited is not the insurer and is not a party to the contract of insurance.

15. Denied. Besso Limited denies that it has any contractual obligation to Brink Transportation as Besso Limited is not the insurer and is not a party to the contract of insurance.

## COUNT II

16. Denied. Besso Limited denies that it held the position of insurer as Besso Limited is not a party to the applicable policy of insurance.

17. Denied as stated. Exhibit D is a copy of the applicable insurance policy. Besso Limited denies that it is the insurer or a party to that contract. Exhibit E is a covernote issued by Besso Limited that identifies the coverages procured by defendant.

18. Admitted.

19. Admitted. Besso Limited admits that Underwriters determined that the vehicles were covered vehicles. Besso Limited denies that it is the insurer or a party to the contract of insurance.

20. Admitted. Besso Limited admits that Underwriters determined that the cost of repairing the vehicles exceeded their fair market value. Besso Limited denies that it is the insurer or a party to the contract of insurance.

21. Admitted. Besso Limited admits that Underwriters determined the salvage value of the vehicles. Besso Limited denies that it is the insurer or a party to the contract of insurance.

22. Denied as stated. Endorsement LSW544 is a part of the policy and the wording speaks for itself.

23. Admitted.

24. Admitted.

25. Denied. The allegations of paragraph 25 are conclusions of law that require no response. In the event and to the extent a response is deemed required, said allegations are denied. It is specifically denied that Besso Limited ever became the equitable and/or legal owner of the salvage. Moreover, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

26. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

27. Denied. Besso Limited denies that it was, at any time, the owner of the subject vehicles. Additionally, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

28. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

29. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

(a) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

(b) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

(c) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

30. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

31. Denied. This paragraph contains conclusions of law which do not require a response. To the extent a response is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

32. Denied. This paragraph contains conclusions of law which do not require a response. To the extent a response is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

### **COUNT III**

33. Underwriters repeat and reassert their answers to paragraphs 1-32 as if set forth here in their entirety.

34. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance.

35. Denied as stated. Exhibit D is a copy of the policy furnished to defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley. Exhibit E is a covernote issued by Besso Limited to evidence the coverages provided in policy number NO324100S which is Exhibit D.

36. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

37. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(a) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(b) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(c) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(d) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(e) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(f) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(g) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(h) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(i) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(j) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(k) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(l) This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(m) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(n) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(o) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(p) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(q) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

(r) Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

38. This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

39. This paragraph contains a conclusion of law to which no answer is required. To the extent an answer is required, Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

40. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

41. Denied. Besso Limited denies that it is the insurer or a party to the referenced contract of insurance and therefore is not subject to 42 Pa. C.S. § 8371.

#### NEW MATTER

42. Plaintiff failed to properly serve the complaint against additional defendants in this matter.

43. The complaint against additional defendants fails to state a claim upon which relief can be granted.

44. The claims asserted in the complaint are barred by the applicable statute of limitations.

45. An accord and satisfaction bar defendant's claims against additional defendants.

46. The alleged storage expenses and any resulting damages were caused by the actions of the defendant, Brink Transportation, and not the additional defendant.

47. The additional defendant Besso Limited is not a party to the referenced contract of insurance and therefore is not liable for breach of any of the terms of the contract.

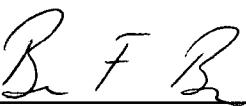
48. Defendant's claims are barred by estoppel.

49. Defendant's claims are barred by laches.

50. Defendant's claims are barred due to the lack of privity.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP

BY: 

Wendy Testa, Esquire  
Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

**VERIFICATION**

Brian F. Breen, Esquire, states that he is the attorney for Additional Defendant, Besso Limited; that he has the authority to make this verification on its behalf; that he is acquainted with the facts set forth in the foregoing Additional Defendant's Answer with New Matter; that the same are true and correct to the best of his knowledge, information and belief; and that this statement is made subject to the penalties of 18 Pa.C.S.A. §4904 relating to unsworn falsification to authorities.

*Brian F. Breen*

Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

**CERTIFICATE OF SERVICE**

Brian F. Breen, attorney for Besso Limited, certifies that on October 25, 2005 he sent a copy of the foregoing Additional Defendant's Answer with New Matter via United States mail, first class, postage prepaid, to:

Robert G. Yeatts, Esquire  
Lewis and Ristvey, P.C.  
689 N. Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Dwight L. Koerber, Jr.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830



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Brian F. Breen, Esquire  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106  
215-627-6900  
Attorney for Additional Defendant

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

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NO  
FILED IN MERCER  
COUNTY  
2005 AUG 23 A 10:1b  
ELIZABETH FAIR  
PROTHONOTARY

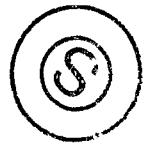
Type of Pleading:  
ANSWER AND NEW MATTER OF  
DEFENDANT TO AMENDED COMPLAINT

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611



**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.

\*

Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation

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Defendant

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-VS-

\*

Lloyd's of London and

\*

Besso Limited

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Additional Defendants

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**NOTICE**

YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE ENCLOSED ANSWER AND NEW MATTER WITHIN TWENTY (20) DAYS FROM SERVICE HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

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-vs-

Docket No. 2005-653-CD

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Brink Transportation  
Defendant

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-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

**ANSWER AND NEW MATTER OF DEFENDANT TO AMENDED COMPLAINT**

COMES NOW, Brink Transportation, Inc. (Defendant), by and though its attorney, Dwight L. Koerber, Jr., Esquire, and files the within Answer and New Matter to the Amended Complaint filed herein.

1. Admitted in part and denied in part. The name and address of Plaintiff are admitted but the scope and nature of its business activities are denied and strict proof of same is required, as upon reasonable investigation Defendant is unable to confirm the full scope of Plaintiff's business activities.

2. Admitted.

3. Admitted in part and denied in part. It is admitted that an accident occurred on Interstate 80 on March 5, 2004, as alleged. Upon reasonable investigation,

Defendant does not know whether Plaintiff was dispatched by Mercer County 911 and requires strict proof of same. Defendant agrees that Plaintiff assisted in the transloading of cargo but denies that it stored same.

4. Denied, as the document attached only contains the application that Plaintiff apparently filed with the Pennsylvania State Police and does not contain an itemization of all work as alleged. Strict proof of same is required at trial.

5. It is denied that it was incumbent upon Defendant to specifically deny the charges, as Plaintiff elected to deal primarily with the claims adjuster for Defendant's insurance company, the Additional Defendants herein. Accordingly, the circumstances underlying the processing of the claims herein did not lend themselves to cause Defendant to object to the charges per se. Moreover, Defendant would point out that the hourly rate and the number of hours that the hourly rate set forth for the charges itemized are exorbitant and unreasonable and cannot be presumed to be expressly or impliedly agreed to by Defendant.

6. Admitted, with the understanding that Defendant had no duty to pay the amount required.

**COUNT I  
BREACH OF CONTRACT**

7. No answer required.

8. Denied. Upon reasonable investigation, Defendant is unable to ascertain the truthfulness of the allegations made and accordingly requires strict proof of same at

trial. Moreover, Defendant specifically denies that the filing of documents with the Commonwealth of Pennsylvania means that this filing in any way establishes that the rates charged and the method of calculation is fair and reasonable.

9. Defendant denies that there was a meeting of the minds, either implied or expressed, and disputes that there was an oral agreement as alleged.

10. Admitted in part and denied in part. It is admitted that for certain aspects of its services, Plaintiff is entitled to reasonable compensation, but it is denied that the charge assessed to Defendant for recovery is in fact a reasonable charge. In terms of the storage expense, Plaintiff dealt directly with Defendant's insurer, Additional Defendants herein, and is therefore required to look to it alone for recovery of charges, if any, that it may be entitled.

11. Denied, legal conclusion. Moreover, Defendant would point out that Plaintiff has not produced a copy of any agreement that it has with the Commonwealth of Pennsylvania nor has it set forth the terms of the oral agreement that it allegedly had with Defendant.

12. Denied, legal conclusion. Moreover, the amount of charges assessed is not set forth with any particularity and cannot be distinguished, and these special damages cannot therefore be addressed. To the extent that financing charges are claimed, Defendant would point out that the sum certain for the amount of collection on the recovery work has never been established. Any interest, if proven, per se, should not be prejudgment interest, therefore, should not be awarded.

13. Admitted that no payment was made, but it is denied that the demand of Plaintiff is accurate, reasonable or proper in any manner.

**WHEREFORE**, Defendant Brink Transportation, Inc. prays that judgment be entered in its favor and against Plaintiff and that Count I be denied.

**COUNT II**  
**UNJUST ENRICHMENT**  
**(Alternate Count)**

14. No answer required.

15. Denied, legal conclusion. See answer to paragraph 8, above.

16. It is denied that a benefit was conferred upon Defendant for storage services, because its tractor-trailer combination was totaled and did not warrant storage beyond a minimal period of time. All claims for storage should be directed solely to Defendant's insurer, Additional Defendants named herein, as Plaintiff looked to it and negotiated with it on storage.

17. Denied. Upon reasonable investigation, Defendant is unable to determine the truth and correctness of the allegations made and requires strict proof of same at trial.

18. Denied, legal conclusion. Furthermore, with respect to the contention raised by Plaintiff, Defendant would point out that the hourly charges assessed for recovery are unfair and unreasonable, and not proportionate to the expenses which Plaintiff incurred in rendering them. Accordingly, Plaintiff had no reasonable expectation that such charges would be paid.

**WHEREFORE**, Defendant Brink Transportation, Inc. prays that judgment be entered in its favor and that Count II of the Complaint be dismissed.

**COUNT III  
ACCOUNT STATED  
(Alternative Count)**

19 – 26. No answer required in view of the ruling by this Honorable Court in its August 2, 2005 Order which sustained Defendant's demurrer to Count III.

**NEW MATTER  
UNDER Pa. R.C.P. 2252**

27. Defendant hereby asserts as New Matter a claim against Additional Defendants Lloyd's of London and Besso Limited.

28. These named Additional Defendants, Lloyd's of London and Besso Limited, appear to be actually one legal entity, known as "Certain Underwriters of Lloyd's of London". This cannot be determined by the insurance policy in question, policy number NO324100S002.

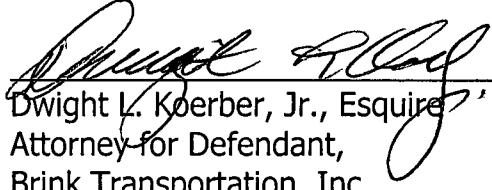
29. Additional Defendants, as the insurer of Defendant, entered into direct dealings with Plaintiff, covering the matter of paying for storage and towing expense. Plaintiff's entitlement to recover for the matter set forth herein, should be directed to Additional Defendants.

30. To the extent, however, that Plaintiff recovers against Defendant for any towing or storage under the matters arising out of the facts and allegations set forth in

the Complaint filed herein, Additional Defendants are liable to Defendant and responsible to pay all such charges, including attorney's fees and costs.

WHEREFORE, Defendant Brink Transportation, Inc. denies that it is liable to the Plaintiff in any sum or sums whatsoever, or in the alternative, demands contributions and indemnity from Additional Defendants Besso Limited and Lloyd's of London.

Respectfully submitted,



Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant,  
Brink Transportation, Inc.

VERIFICATION

I verify the statements made in the foregoing documents are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsifications to authorities.

8-18-05  
Date

Samuel D. Brink  
Samuel D. Brink

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

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-VS-

Docket No. 2005-653-CD

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Brink Transportation  
Defendant

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-VS-

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Lloyd's of London and  
Besso Limited  
Additional Defendants

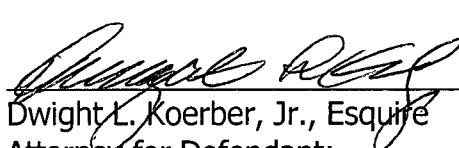
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**CERTIFICATE OF SERVICE**

This is to certify that on the 22<sup>nd</sup> day of August 2005 the undersigned served a true and correct copy of the ANSWER AND NEW MATTER OF DEFENDANT TO AMENDED COMPLAINT filed in the above-captioned matter upon counsel for Plaintiff and upon counsel for Additional Defendants. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Wendy D. Testa, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

\* \* \* \*

NO  
FILED IN MERCER  
COUNTY

2005 AUG 23 AM 10:16

ELIZABETH F. FAIR  
PROTHONOTARY

Type of Pleading:  
COMPLAINT AGAINST  
ADDITIONAL DEFENDANTS

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
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**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

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-vs-

Docket No. 2005-653-CD

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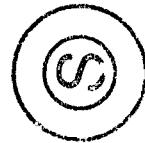
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**NOTICE**

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you within twenty (20) days. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any relief claimed in the complaint by the plaintiff.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

MERCER COUNTY LAWYERS' REFERRAL SERVICE  
c/o Mercer County Bar Association  
P.O. Box 1302  
Hermitage, PA 16148



**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

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-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

**COMPLAINT AGAINST ADDITIONAL DEFENDANTS  
LLOYD'S OF LONDON AND BESSO LIMITED**

COMES NOW, Brink Transportation, Inc., by and though its attorney, Dwight L. Koerber, Jr., Esquire, and files the within Complaint Against Additional Defendants Lloyd's of London and Besso Limited.

1. On April 27, 2005, Plaintiff Preston America, Inc. filed an Amended Complaint against Defendant Brink Transportation, Inc.
2. Attached hereto as Exhibit A is a true and correct copy of the Amended Complaint filed.

**COUNT I**

3. On May 16, 2005, Defendant filed a Writ of Summon to Join under Pa. R.C.P. 2252(c), to join Besso Limited and Lloyd's of London as Additional Defendants in

this proceeding.

4. On August 2, 2005, the Court of Common Pleas of Mercer County entered an Order sustaining in part and denying in part the Preliminary Objections which Defendant filed to the Amended Complaint. Attached hereto as Exhibit B is a true and correct copy of that Order.

5. On or about August 23, 2005, Defendant filed an Answer and New Matter in response to the Amended Complaint filed by Plaintiff. Attached hereto as Exhibit C is a true and correct copy of the said Answer and New Matter.

6. In further support of its Answer defending the Complaint filed against it herein, Defendant alleged in New Matter under Pa. R.C.P. 2252, that it is not responsible for the damages claimed by Plaintiff, but if it is responsible for any portion of the damages that Plaintiff is seeking herein, that Additional Defendants are responsible over to Defendant for contributions and indemnity.

7. Defendant seeks to have Additional Defendants held responsible for any damages for towing and storage expenses which Plaintiff is seeking, based upon the fact that the transaction and occurrence and the accident giving rise to such claims by Plaintiff occurred on March 5, 2004, at a time that Defendant was insured under a comprehensive and collision insurance policy with Additional Defendants.

8. Attached hereto as Exhibit D and Exhibit E respectively, are two separate copies of what appears to be the identical insurance policy, such policy being in effect

for 12 months and commencing April 20, 2003, thereby covering the accident/claims of March 5, 2004.

9. Exhibit D is a true and correct copy of the insurance policy furnished to Defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley. Exhibit E is a true and correct copy of the insurance policy furnished by counsel for Additional Defendants, in response to a request that he furnish such policy.

10. The accident giving rise to the lawsuit filed by Plaintiff against Defendant occurred on March 5, 2004 wherein two vehicles insured by Additional Defendants were totally damaged.

11. The two vehicles that were totally damaged as a result of the March 5, 2004 accident were a 1991 J & J Trailer, VIN No. 6060 and a 1996 International Truck Tractor, VIN No. 083203.

12. Under the terms of the insurance policy in effect, policy number NO324100S002, Additional Defendants are responsible for paying the cost of towing and storage expenses that are more fully itemized and identified in the Amended Complaint filed by Plaintiff against Defendant, which is attached hereto as Exhibit A.

13. Additional Defendants have failed and refused to pay the charges arising out of the March 5, 2004 accident pertaining to storage and towing of the insured vehicles of Defendant.

14. Additional Defendants have a contractual duty to pay the towing and storage charges for which Plaintiff seeks to recover in this proceeding, for the reasons

more fully identified in paragraphs 16 to 32 of the within Complaint against Additional Defendants. In failing and refusing to make the payments for towing and storage which they are contractually obligated to pay under policy number NO324100S002, Additional Defendants have failed to fulfill their contractual duties, thereby making them now liable over to Defendant if in fact Plaintiff should prevail in its lawsuit against Defendant.

15. In view of Additional Defendants contractual obligation to cover the storage and towing expenses that Plaintiff is now seeking to collect against Defendants, Additional Defendants have a duty to indemnify Defendant for any judgment that is entered against it in favor of Plaintiff, including all costs and interest that may be assessed against Defendant.

WHEREFORE, Defendant Brink Transportation, Inc. prays that in the event that an award of any monetary damages is entered against it and in favor of Plaintiff, based upon unpaid towing and storage charges arising out of the March 5, 2004 accident, that Additional Defendants be required to contribute that full sum of money to Defendant and/or the Plaintiff, Preston America, Inc. and that Additional Defendants be required to indemnify and hold Defendant Brink Transportation, Inc. harmless for all such claims, including interest and costs.

**COUNT II**  
**BREACH OF CONTRACT**

16. At the time of the March 5, 2004 accident, as described in the Amended Complaint filed by Plaintiff, giving rise to the present litigation, Defendant and

Additional Defendants held the relationship of insured and insurer covering a comprehensive and collision insurance policy.

17. Attached hereto as Exhibit D and Exhibit E are copies of the aforesaid insurance policy.

18. Defendant filed a claim against Additional Defendants for damage incurred by the tractor-trailer combination that was involved in the March 5, 2004 accident, these vehicles being a 1991 J & J Trailer, VIN No. 6060 and a 1996 International Truck Tractor, VIN No. 083203.

19. Additional Defendants have acknowledged that the 1991 J & J Trailer, VIN No. 6060 and the 1996 International Truck Tractor, VIN No. 083203 were covered vehicles.

20. In the process of adjusting the claims for the 1991 J & J Trailer, VIN No. 6060 and the 1996 International Truck Tractor, VIN No. 083203, Additional Defendants acknowledged that the two said vehicles were totally damaged, meaning that the cost of repairing the vehicles exceeded the fair market value of the vehicles at the time of the accident.

21. Additional Defendants determined, in conjunction with their customary adjusting process, that the salvage value of the 1991 J & J Trailer, VIN No. 6060 was \$1,556.00 and that the salvage value of the 1996 International Truck Tractor, VIN No. 083203 was \$4,599.00.

22. In accordance with a special endorsement under policy number NO324100S002, Endorsement No. LSW544, Defendant as the insured was given the right of first refusal to bid for the salvage.

23. Upon learning of the salvage value assessed for the said vehicles, Defendant gave notice to Additional Defendants that it did not wish to purchase (receive a credit against proceeds from the policy) the salvage for the 1991 J & J Trailer, VIN No. 6060 and the 1996 International Truck Tractor, VIN No. 083203, and thereby informed Additional Defendants that it did not wish to exercise its right of first refusal for the salvage.

24. Defendant believes that the date when it gave notice that it did not wish to exercise its right of first refusal so as to obtain the salvage was in August of 2004. In addition to that date, Plaintiff announced on numerous occasions that it did not wish to exercise its right of first refusal and to receive the salvage, doing so through its own representative dealing with the claims adjusters of Additional Defendants, and also through its legal counsel, by having him give verbal and written notice to Additional Defendants that Defendant did not choose to exercise its right of first refusal.

25. From the time that the 1991 J & J Trailer, VIN No. 6060 and the 1996 International Truck Tractor, VIN No. 083203 were adjusted as being a total damage and after Defendant gave notice that it did not wish to receive the salvage and thereby declined to exercise its right of first refusal, the Additional Defendants became in essence the equitable and/or legal owner of the salvage, in accordance with the

provisions of the insurance policy and in particular endorsement number LSW544, as set forth at page 11 of the insurance policy attached hereto as Exhibit D which reads as follows:

#### SALVAGE

It is a Condition of this Insurance that in the event of loss or damage covered hereunder, the Underwriters may, at their option, pay the amount stated under the Limit of Liability in the Schedule or the actual cash value (whichever is the lesser amount), less any applicable deductible, and such payment shall entitle the Underwriters to all salvage resulting after such loss or damage.

It is agreed that the Assured shall have first refusal of the bid for salvage.

26. Notwithstanding the language listed above, Additional Defendants refused to process any claim for payment for the 1991 J & J Trailer, VIN No. 6060 and the 1996 International Truck Tractor, VIN No. 083203 unless Defendant agreed to accept the salvage and be responsible for it, even though Defendant chose not to exercise its right of first refusal to receive the salvage.

27. Because Additional Defendants were entitled to, and in essence were the owner of, the salvage in question, they had the duty to pay all storage expenses associated with this salvage.

28. Additional Defendants acknowledged their responsibility to pay for salvage through the period of August 2004, but they refused to pay any additional storage and refused to accept processing of Defendant's claim for its full loss because Defendant refused to accept the salvage after the two said vehicles had been deemed to be totaled.

29. The specific areas in which Additional Defendants breached the terms of their insurance policy with Defendant, policy number NO324100S002, are as follows:

(a) Refusing to pay Defendant the value for the salvage of the 1991 J & J Trailer, VIN No. 6060, as this amount was deducted from the settlement check otherwise furnished to Defendant, such nonpayment amounting to \$1,556.00.

(b) Refusing to pay Defendant the value for the salvage of the 1996 International Truck Tractor, VIN No. 083203, as this amount was deducted from the settlement check otherwise furnished to Defendant, such nonpayment amounting to \$4,599.00.

(c) Refusing to pay towing and storage expenses claimed by Preston America, Inc., as covered by the Complaint filed by Preston America, Inc. and identified as Exhibit A to this Complaint.

30. Defendant has made numerous requests that Additional Defendants be responsible for towing and storage, and for the \$6,155.00 amount of salvage that were wrongfully withheld from it in the settlement covering the loss of its 1991 J & J Trailer, VIN No. 6060 and its 1996 International Truck Tractor, VIN No. 083203.

31. Defendant is entitled to legal interest on the unpaid money owned to it under its insurance policy covering the improperly withheld salvage value for its 1991 J & J Trailer, VIN No. 6060 and 1996 International Truck Tractor, VIN No. 083203, with such interest being prejudgment interest that should be entered effective April 5, 2004, which is 30 days after the date of the accident.

32. Plaintiff is entitled to be reimbursed for all damages that it incurs as a result of the failure of Additional Defendants to pay the towing and storage charges that are owed to Preston America, Inc. for the 1991 J & J Trailer, VIN No. 6060 and the

1996 International Truck Tractor, VIN No. 083203. This amount of money is currently alleged by Preston America, Inc. to be in excess of \$25,000.00 and is subject to further increases as long as this debt remains unresolved.

WHEREFORE, Defendant prays that judgment be entered in its favor and against Additional Defendants for an amount in excess of \$25,000.00, plus prejudgment interest and costs.

**COUNT III**  
**BAD FAITH INSURANCE CLAIM**

33. Paragraphs 1 – 32 of this Complaint against Additional Defendants are incorporated by reference as though set forth in full.

34. As pertinent to the accident that occurred on March 5, 2004, involving Defendant's 1991 J & J Trailer, VIN No. 6060 and 1996 International Truck Tractor, VIN No. 083203, as more fully described in Counts I and II of this Complaint, the Additional Defendants were the insurer of Defendant under policy number NO324100S002.

35. The insurance policy covering the relationship between Defendant and Additional Defendants is attached hereto as Exhibits D and E.

36. Additional Defendants have acted with bad faith within the meaning of 42 Pa. C.S.A. §8371, in the manner in which they have adjusted, administered, interpreted and handled the claims of Plaintiff arising out of the March 5, 2004 accident involving its 1991 J & J Trailer, VIN No. 6060 and 1996 International Truck Tractor, VIN No. 083203.

37. The manner in which Additional Defendants acted in bad faith is as follows:

(a) Additional Defendants failed to adjust the claim in a prompt and timely fashion, as they delayed in beginning the adjusting process, and did not move forward with diligence and due regard for the financial harm that Defendant was incurring with the loss of its totaled vehicles.

(b) Additional Defendants placed no emphasis upon making a prompt adjustment of the March 5, 2004 claim notwithstanding Section 146.6 of the Unfair Claims Settlement Practices Act, 31 P.S. §146.6 requires them to complete their investigation within 30 days. Additional Defendants did not come close to meeting the 30-day timetable.

(c) Additional Defendants improperly interpreted the subject insurance policy in a self-serving, one-sided fashion, contrary to fair and reasonable insurance interpretation procedures, when they concluded that this policy permitted them to compel Defendant as the insured to accept the salvage for the 1991 J & J Trailer, VIN No. 6060 and the 1996 International Truck Tractor, VIN No. 083203, even though its insured gave clear notice that it did not wish to receive the salvage.

(d) In addressing the contractual language involving the salvage issue, Additional Defendants totally ignored the fact that there was a special endorsement that was issued that gave its insured the right to bid on the salvage, i.e. receive the salvage, which clearly creates a correlative duty on the part of the insured to be responsible for the salvage if its insured does not elect to receive the salvage.

(e) In giving numerous written explanations of its position in refusing to accept the salvage, Additional Defendants referred only to that section of their insurance policy, pertaining to abandonment, and did not inform their insured of the specific endorsement that addresses salvage – Clause LSW544 – notwithstanding the fact that section 146.4(a) of the Unfair Claims Settlement Practices Act, 31 P.S. §146.4(a) specifically requires the insurer to disclose all pertinent provisions of the policy relating to a claim.

(f) In adjusting the claim covering two separate vehicles, Additional Defendants intentionally "low-balled" one of the two vehicles – the 1991 J & J Trailer, VIN No. 6060 – doing so with the intention of pressuring its insured to accept a valuation which it knew was substantially below the fair market value/actual cash value of that vehicle.

(g) Additional Defendants never informed its insured that it could accept the valuation for one of the two vehicles in question, but instead informed

it that it would have to accept the appraised value for both vehicles on a take it or leave it basis, before it would pay the salvage and fully adjust the settlement for one of the vehicles.

(h) Throughout the administration of the claim, Additional Defendants took the position that it was entirely in their discretion to decide whether or not it would accept salvage, thereby forcing its insured to accept the salvage, and at no time did Additional Defendants take into account fair and reasonable insurance practices or fair treatment toward its insured.

(i) In administering the March 5, 2004 claim and interpreting its insurance policy so as to refuse to accept responsibility for the salvage, Additional Defendants were motivated by ill-will and a bad faith desire to impose the responsibility for paying storage after August 2004 upon Defendants, knowing full well that if they accepted ownership of the salvage, which was reasonably their responsibility under the policy, that they would be incurring additional costs which they sought to avoid so as to financially benefit themselves and at the same time produce a corresponding harm to their insured.

(j) Additional Defendants acted in bad faith in interpreting section 8 of their insurance policy, which begins with the phrase: ABANDONMENT – RETURN OF STOLEN PROPERTY, as it is clear that the import of the policy language on that point is to deal with stolen vehicles and the issue of whether or not a stolen vehicle can be abandoned to the insured after it is recovered, and not whether the salvage of a totaled vehicle can be turned over to the insured, as the salvage of a totaled vehicle is covered by a specific endorsement for the insurance policy – LSW544.

(k) Throughout the course of processing this claim, Additional Defendants did not give written notice to Defendant, its insured, at the time that the appraisal was performed, as to the date, if any, after which the insurer would not be responsible for storage charges, with this specifically being required by subsection (a) of the applicable standards imposed upon an appraiser under 31 Pa. Code §62.3.

(l) At various stages in the handling of this claim, Defendant attempted to present the Certificates of Title covering the 1991 J & J Trailer, VIN No. 6060 and the 1996 International Truck Tractor, VIN No. 083203 to its insurer, Additional Defendants, so as to facilitate the process of mitigating damages and having the salvage sold, but Additional Defendants consistently refused to accept the Certificates of Title and refused to properly dispose of the salvage because they recognized that in doing so it would harm the legal position

they had taken concerning abandonment of vehicles, even though they knew that the terms of the insurance policy did not justify taking such a position in good faith.

(m) In preparing Proofs of Loss, Additional Defendants were willing to prepare such documents only with a specific provision requiring Defendant, its insured, to accept a Proof of Loss with salvage specified to the insured, even though Additional Defendants knew that its insured did not want the salvage and was not in favor of any type of adjusting process that required it to take it. Attached hereto as Exhibit F are copies of the Proof of Loss forms that Additional Defendants insisted that Defendant sign even though Defendant stated that it did not want the salvage.

(n) In addition to being contrary to the terms of the insurance policy covering the March 5, 2004 claim, Additional Defendants engaged in a course of action in refusing to accept responsibility for the salvage of the 1991 J & J Trailer, VIN No. 6060 and the 1996 International Truck Tractor, VIN No. 083203 after they were totaled, in a fashion contrary to the established and generally followed practices in the insurance industry. Additional Defendants took this position for the purpose of seeking to administer the policy in a self-serving manner beneficial to Additional Defendants and harmful to their insured, Defendant herein.

(o) Upon request by its insured to furnish a copy of the insurance policy in question – policy number NO324100S002 – Additional Defendants failed to furnish the policy within 10 working days, with this being a violation of section 146.5 of the Unfair Claims Settlement Practices Act, 31 P.S. §146.5.

(p) Additional Defendants intentionally secured an appraiser that was prone to produce damage appraisals below fair market value, recognizing that before its insured could challenge the correctness of such appraisal, it would be necessary for the insured to pay the expense of retaining an attorney and pay the expense of securing a competent and experienced appraiser, all of which was done to benefit the Additional Defendants financially and to attempt to intimidate the Defendant from exercising its rights under the insurance policy.

(q) Defendant believes and therefore alleges that Additional Defendants intentionally structured their affairs so as to limit the authority of their claims adjusters, agents, attorneys and representatives, in a fashion so as to complicate and encumber the settlement process for this claim and for claims in general, with this policy then applying in a fashion so as to produce a harmful impact upon Defendant, Additional Defendants' insured, by causing him to spend

undue management time, additional legal fees and expenses, and expert witness fees, all for the purpose of establishing contractual rights that should have routinely been given to Defendant if the subject insurance policy had been fairly and reasonably interpreted and applied.

(r) Defendant believes and therefore alleges that Additional Defendants intentionally orchestrated a policy of delay and dilatory actions in administering claims in general, including this specific claim, as doing so would produce on a long-term, large scale basis, additional financial benefit to Additional Defendants, the insurer, at the unfair and prejudicial expense of its insured.

38. As a result of the bad faith actions of Additional Defendants, as outlined in paragraph 37, subparagraphs a – r above, Defendant has incurred economic harm in the amount of \$1,556.00 which was unpaid for the salvage value of Defendant's 1991 J & J Trailer, VIN No. 6060 and \$4,599.00 which was the unpaid salvage value of the 1996 International Truck Tractor, VIN No. 083203. In addition, Plaintiff has incurred or does stand to incur unliquidated damages that could be in excess of \$25,000.00, covering unpaid towing and storage fees, all of which have been incurred as a result of the bad faith actions of Additional Defendants.

39. Defendant is entitled to interest from March 5, 2004 covering the economic harm which Additional Defendants have caused it.

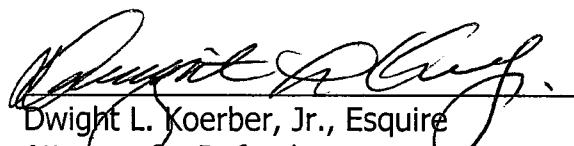
40. Defendant seeks an award of punitive damages against Additional Defendants, its insurer. Defendant is entitled to recover punitive damages, as a matter of law under 42 Pa. C.S.A. 8371, as Additional Defendants have engaged in bad faith conduct in dealing with its insured under policy number NO324100S002. In addition, the actions of Additional Defendants are reprehensible, outrageous, and in reckless

indifference to the interests of its insured, Defendant herein, thereby further establishing that punitive damages should be awarded.

41. Defendant seeks attorney's fees and court costs against Additional Defendants, pursuant to the statutory provisions of 42 Pa. C.S.A. 8371.

WHEREFORE, Defendant prays that judgment be entered in its favor in an amount in excess of \$25,000.00, plus punitive damages, attorney's fees, costs and interest.

Respectfully submitted,



Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant,  
Brink Transportation, Inc.

VERIFICATION

I verify the statements made in the foregoing documents are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsifications to authorities.

---

Date

8-18-05

---

Samuel D. Brink

**EXHIBIT A**

Attached hereto as Exhibit A is a true and correct copy of the Amended Complaint filed.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff,

vs.

No. 2005-653-CD

BRINK TRANSPORTATION,

Defendant

**NOTICE TO CLAIM AND DEFEND RIGHTS**

TO: Brink Transportation, Defendant:

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you.

You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Mercer County Lawyer's Referral Service  
P.O. Box 1302  
Hermitage, Pennsylvania 16148  
(724) 342-3111

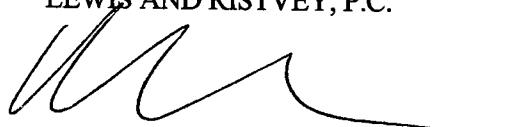
[ ] Original Pleading

Certified Copy

We hereby certify that the within is a true and correct copy of the original Complaint filed in this case.

LEWIS AND RISTVEY, P.C.

By:

  
Robert G. Yeatts,  
Attorney for Plaintiff

SERVE ALL PAPERS ON  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
Hermitage, Pennsylvania 16148  
(724) 981-8700

NO FILED IN MERCER COUNTY  
2005 APR 21 P 3:36  
ELIZABETH F. FAIR  
PROTHONOTARY

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

No.

FILED  
MERCER  
COUNTY

2005 APR 27 A 10:25

PRESTON AMERICA, INC.,

Plaintiff

vs.

BRINK TRANSPORTATION,

Defendant

No. 2005-653-CD

ELIZABETH F. FAIR  
PROTHONOTARY

**AMENDED COMPLAINT**

AND NOW, comes the Plaintiff, Preston America, Inc., by and through its attorneys, Lewis and Ristvey, who respectfully sets forth the following Complaint:

(1) The Plaintiff, Preston America, Inc., is a Pennsylvania corporation having an address of 3479 ½ Sharon Road, West Middlesex, Mercer County, Pennsylvania 16159, and is in the business of accident recovery for the recovery of vehicles, equipment and cargo and the storage of vehicles, equipment and cargo.

(2) Defendant, Brink Transportation, is a corporation having a business address of Box 317, RR#1, Houtzdale, Pennsylvania 16651.

(3) On or about March 5, 2004, Defendant's tractor trailer was involved in an accident on Interstate 80 in Mercer County, Pennsylvania. Preston America, Inc., was dispatched by Mercer County 911 center to recover the wrecked vehicle and assist with the transloading of cargo. Preston assisted in the transloading of cargo and stored the same.

(4) Plaintiff's charges for all work related to the recovery of the tractor and trailer, transloading and storage of cargo, and finance charges are attached hereto and incorporated herein by reference are marked as Exhibit A and are attached and incorporated herein by reference.

- (5) Defendant has never objected to the amounts set forth on Plaintiff invoices.
- (6) Despite repeated requests for payment, Defendant has not paid the same.

**COUNT I**  
**BREACH OF CONTRACT**

(7) The allegations contained in Paragraphs one through six above are incorporated herein by reference as fully set forth.

(8) Plaintiff recovered Defendant's tractor and trailer and assisted with transloading its cargo per the Plaintiff's agreement with the Commonwealth of Pennsylvania to provide wrecker/recovery services for that portion of Interstate 80 upon which the Defendant's vehicle was found. Plaintiff's arrangement with the Commonwealth of Pennsylvania is through an application to provide emergency towing services with the Pennsylvania State Police, which is kept on file with the Pennsylvania State Police (A copy of said application is attached hereto as Exhibit A, and incorporated herein by reference.)

(9) Within a day or two of the accident, Plaintiff and Defendant entered into an oral agreement for Plaintiff to recover and store Defendant's cargo and equipment from the accident.

(10) The parties did not discuss the specific amounts but payment was implied by the conduct of the parties that Plaintiff would be reasonably compensated for its services, and Defendant was aware that the work Defendant requested Plaintiff to perform was the type of services and work Plaintiff customarily performs as part of its business and that Plaintiff charges for those services.

(11) Plaintiff fully complied with his agreement with the Commonwealth of Pennsylvania and with its oral agreements with the Defendant for the recovery of Defendant's



vehicle, recoverage of Defendant's cargo and storage of Defendant's vehicle and cargo.

(12) Plaintiff's unpaid charges for this service together with finance charges is \$34,046.16.

(13) Despite demand for payment of these services, Defendant's bill remains unpaid.

WHEREFORE, Plaintiff, Preston America, Inc., requests judgment against the Defendant in the amount of \$34,046.16, together with interest at the legal rate and record costs.

**COUNT II**  
**UNJUST ENRICHMENT**  
**(Alternate Count)**

(14) The allegations contained in Paragraphs one through six are herein incorporated by reference as fully set forth.

(15) Through its agreement with the Commonwealth of Pennsylvania (See Exhibit A) Plaintiff was dispatched to the accident site and recovered the Defendant's tractor and trailer, transloaded and hauled Defendant's cargo, and stored Defendant's tractor and trailer and cargo.

(16) Plaintiff's actions in recovering the Defendant's tractor and trailer and transloading and storing its tractor and trailer and cargo conferred a benefit to the Defendant. Plaintiff's unpaid charges for recovery, transloading of cargo, and storing of tractor and trailer and cargo which is set forth in Exhibit A is \$34,046.16.

(17) Defendant requested Plaintiff perform services for the Defendant in the recovery of Defendant's tractor and trailer, transloading and storing its tractor and trailer and cargo, which services Plaintiff customarily performs and charges for as part of its business.

(18) Defendant received the services of the Plaintiff under circumstances which in

equity and good conscience it should not be permitted to retain without compensating Plaintiff for the same.

WHEREFORE, Plaintiff, Preston America, Inc., requests judgment against the Defendant in the amount of \$34,046.16, together with interest at the legal rate and record costs.

**COUNT III**  
**ACCOUNT STATED**  
**(Alternative Count)**

(19) The allegations contained in paragraphs one through six above are incorporated herein by reference as fully set forth.

(20) The Plaintiff sent invoices to the Defendant as set forth above. Defendant examined and accepted said statements of account without objection.

(21) Defendant failed to pay the account.

(22) Plaintiff performed its obligations owing the Defendant and provided valuable services to Defendant incurring costs on Defendant's behalf, the fair and reasonable value of which is \$34,046.16.

(23) Despite Defendant's obligation to pay Plaintiff for the services performed and costs incurred on Defendant's behalf, and despite the Plaintiff's demands on Defendant for such payment, Defendant has wrongly failed and refused to pay Plaintiff the sums due it.

(24) Defendant has had an opportunity to scrutinize the accounts.

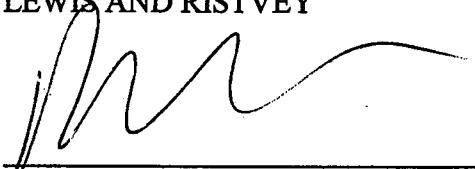
(25) Defendant has agreed to or acquiesced in the correctness of the accounts.

(26) Defendant has never questioned or objected either specifically or generally to the numerous accounts rendered.

WHEREFORE, Plaintiff demands Judgment in the amount of \$34,046.16, together with record costs and interest at the legal rate.

Respectfully submitted,

LEWIS AND RISTVEY

By: 

Robert G. Yeatts,  
Attorney for Plaintiff

VERIFICATION

I verify that the statements made in the foregoing Complaint are true and correct. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. 4904, relating to unsworn falsification to authorities.

Dated: 04/26/05

  
\_\_\_\_\_  
Troy Preston, President  
Preston America, Inc.



**PENNSYLVANIA STATE POLICE**  
**APPLICATION TO PROVIDE EMERGENCY TOWING SERVICES**

|  |                          |   |   |  |
|--|--------------------------|---|---|--|
| 1. EMERGENCY TOWING SERVICE NAME   |                          | CORPORATION <input checked="" type="checkbox"/> | PARTNERSHIP <input type="checkbox"/>            | PROPRIETORSHIP <input type="checkbox"/>        |
| Preston America, Inc.  |                          |   |   |  |
| RECOVERY SERVICE <input checked="" type="checkbox"/>   |                          | LIGHT DUTY <input checked="" type="checkbox"/>  | MEDIUM DUTY <input checked="" type="checkbox"/> | HEAVY DUTY <input checked="" type="checkbox"/> |
| 2. ADDRESS   |                          | CITY STATE ZIP                                  |   |  |
| 3479 sharon Rd. West Middlesex, Pa   |                          | 16159   |   |  |
| 3. SALES TAX LICENSE NUMBER  |                          | 4. EMPLOYER IDENTIFICATION NUMBER               |   |  |
| 80846206   |                          | 5. PROPRIETOR'S SSN                             |   |  |
|  |                          | 23-2942815 173-48-5538                          |   |  |
| <b>EQUIPMENT INFORMATION</b>   |                          |   |   |  |
| 6. YEAR  | 7. MAKE                  | 8. TITLE NUMBER                                 | 9. VIN  |  |
| 88   | Peterbilt                | 44125996702                                     | 1XP5D29X5JH252271                               |  |
| 95   | Freightliner             | 54676579  | 1FUPD2YB75H718476                               |  |
| 95   | Peterbilt                | 49350356302                                     | 1XPNHF7X1SN387327                               |  |
| 2001   | Ford                     | in process at Harrisburg                        | 3FDNX65H31MA02631                               |  |
|  |                          |   |   |  |
| 10. AUTO LIABILITY INSURANCE COMPANY   |                          | 11. POLICY NUMBER                               |   |  |
| Universal underwriters   |                          | 212278A   |   |  |
| 12. GARAGE KEEPER'S INSURANCE COMPANY  |                          | 13. POLICY NUMBER                               |   |  |
| Universal underwriters   |                          | 212278A   |   |  |
| * USE BLANK PAPER TO PROVIDE ADDITIONAL INFORMATION IN THE SAME MANNER   |                          |   |   |  |
| I CERTIFY, IN ACCORDANCE WITH SECTION 4604 OF THE CRIMES CODE (RELATING TO UNSWORN FALSIFICATION TO AUTHORITIES), THAT ALL INFORMATION CONTAINED IN THIS APPLICATION AND ITS ATTACHMENTS IS TRUE AND CORRECT, AND THE ABOVE-LISTED BUSINESS MEETS THE PSP DEFINITION FOR EACH CLASS OF TOWING REQUESTED. |                          |   |   |  |
| 14. SIGNATURE  | 15. NAME (TYPE OR PRINT) |   |   | 16. DATE                                       |
|  |                          |   |   |  |

## FEE SCHEDULE

Light Duty per truck required to complete the task

|  |          |            |          |       |
|--|----------|------------|----------|-------|
| Standby Time                                   | \$ 65.00 | /Hr and/or | \$ 1.70  | /mile |
| Plus Recovery Specialist                       | \$ 45.00 | /Hr        |          |       |
| Extra Personnel                                | \$ 85.00 | /Hr and/or | \$ 1.00  | /mile |
| Hook-up Charge                                 | \$ 45.00 | /Hr        |          |       |
| Rollback Rate<br>(if different from tow truck) | \$ 75.00 | Prep time  | \$ 65.00 | /hour |
| Dolly Charge                                   | \$ N/A   | /Hr        | \$ 1.70  | /mile |
| Overtime, Holiday, or<br>Weekend Charges       | \$ N/A   | /Hr and/or | \$       | /mile |

Medium Duty per truck required to complete the task

|  |          |            |          |       |
|--|----------|------------|----------|-------|
| Standby Time                                   | \$ 90.00 | /Hr and/or | \$ .90   | /mile |
| Plus Operator                                  | \$ 90.00 | /Hr        |          |       |
| Extra Personnel                                | \$ 45.00 | /Hr and/or | \$ 1.00  | /mile |
| Hook-up Charge                                 | \$ 45.00 | /Hr        |          |       |
| Rollback Rate<br>(if different from tow truck) | \$ 90.00 | Prep time  | \$ 90.00 | /hour |
| Dolly Charge                                   | \$ N/A   | /Hr        | \$ .90   | /mile |
| Overtime, Holiday, or<br>Weekend Charges       | \$ N/A   | /Hr and/or | \$       | /mile |

**Heavy Duty** per truck required to complete the task

|  |              |            |           |       |
|--|--------------|------------|-----------|-------|
|  | \$ 276.00    | /Hr and/or | \$        | /mile |
| Standby Time                                   | \$ 90.00     | /Hr        |           |       |
| Plus Operator                                  | \$ 65.00     | /Hr and/or | \$        | /mile |
| Extra Personnel                                | \$ 65.00     | /Hr        |           |       |
| Hook-up Charge                                 | \$ min 1 hr. | Prep time  | \$ 276.00 | /hour |
| Rollback Rate<br>(if different from tow truck) | \$ N/A       | /Hr        | \$        | /mile |
| Dolly Charge                                   | \$ N/A       |            |           |       |
| Overtime, Holiday, or<br>Weekend Charges       | \$ N/A       | /Hr and/or | \$        | /mile |

Extra Specialty Equipment Lane closer equipment and man power @ \$250.00 per hr.

Minimum Charges 4 and 8 hours min. Applies to certain incidents

Debris Cleanup Labor Level 1 Risk @ \$35.00 II @ \$45.00 III @ \$55.00 per hour

Supplies Bags, matting, etc. at fair market value

Disposal Applicable Land fill Rates w/ no markup just  
Transport FEE

**RECOVERY CHARGES**

On Scene Supervisor/ Coordinator \$ 85.00 /Hr

**Light Duty**

\$ 65.00 /Hr

Plus Operator

\$ /Hr

Show Up

\$ 25.00 /Hr

N/A \$ /mile \$ 25.00 minimum

Standby Time

\$ 45.00 /Hr

\$ 45.00 minimum

Extra Personnel

\$ 65.00 /Hr

Overtime, Holiday, or  
Weekend Charges

\$ NONE /Hr and/or \$ /mile

|                                       |          |            |        |                               |
|---------------------------------------|----------|------------|--------|-------------------------------|
| <u>Medium Duty</u>                    | \$ 90.00 | /Hr        |        |                               |
| Plus Operator                         | \$ 65.00 | /Hr        |        |                               |
| Show Up                               | \$ 90.00 | /Hr        | \$ NA  | /mile \$ 90.00 minimum        |
| Standby Time                          | \$ 90.00 | /Hr        |        | \$ 90.00 minimum              |
| Extra Personnel                       | \$       | /Hr        |        |                               |
| Overtime, Holiday, or Weekend Charges | \$ NA    | /Hr and/or | \$ NA  | /mile                         |
| <u>Heavy Duty Tractor</u>             | \$ 90.00 | /Hr and/or | \$ N/A | /mile \$ 90.00 minimum        |
| <u>Tractor w/Landoll</u>              | \$ —     | /Hr and/or | —      | \$ — /mile \$ — minimum       |
| <u>Transfer Trailer</u>               | \$ 90.00 | /Hr and/or | NA     | \$ N/A /mile \$ 90.00 minimum |
| <u>Air Cushion System</u>             | \$ NA    | /Hr        |        | \$ minimum                    |
| <u>Operator</u>                       | \$ NA    | /Hr        |        |                               |

Crane/Specialty Equipment - How billed? at 4 or 8 hour increments

Sublet Equipment - How billed? as subcontractor's

Hazardous spill clean up?  yes  no

Do you charge for disposal?  yes  no

Do you charge for expendables?  yes  no

|                        |           |      |               |
|------------------------|-----------|------|---------------|
| <u>Inside Storage</u>  | \$ 50.00  | /Day | Light Duty    |
|                        | \$ 50.00  | /Day | Truck/Tractor |
|                        | \$ 100.00 | /Day | Trailer       |
|                        | \$ 100.00 | /Day | Cargo         |
| <u>Outside Storage</u> | \$ 14.00  | /Day | Light Duty    |
|                        | \$ 25.00  | /Day | Truck/Tractor |
|                        | \$ 35.00  | /Day | Trailer       |
|                        | \$        | /Day | Cargo         |

#### Storage Site Environmental Charge

\$ 250.00 /day \$ 250.00 Flat Fee

Storage Lot Release Fee After Hours?  yes  no \$ 25.00

**EXHIBIT B**

Attached hereto as Exhibit B is a true and correct copy of the August 2, 2005 Order of the Court of Common Pleas of Mercer County.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL DIVISION – LAW

PRESTON AMERICA, INC.,  
Plaintiff,

vs.

No. 2005 – 653

BRINK TRANSPORTATION,  
Defendant,

vs.

LLOYD'S OF LONDON and  
BESSO LIMITED,  
Additional Defendants.

2005 AUG - 3 A 10:48

LIZABETH FAIR  
PROTHONOTARY

NO  
FILED IN MERCER  
COUNTY

MEMORANDUM OPINION & ORDER

This matter is before the Court on Defendant's Preliminary Objections to Plaintiff's Amended Complaint, which are in the nature of demurrers. Defendant seeks to have Counts I, II, and III of the Amended Complaint dismissed, and to limit the amount of damages recoverable by Plaintiff.

This action arises from a commercial transaction between Preston America, Inc. (hereinafter "Plaintiff") and Brink Transportation (hereinafter "Defendant") involving Defendant's destroyed tractor trailer. On or about March 5, 2004, Defendant's tractor trailer was involved in an accident on Interstate 80 in Mercer County, Pennsylvania. The tractor trailer was destroyed. Plaintiff was dispatched to recover and store the tractor trailer as well as recover, move, and store the tractor trailer's cargo.

Plaintiff alleges that within a day or two of the accident, Plaintiff and Defendant agreed that Plaintiff would store Defendant's tractor trailer and cargo at Plaintiff's place of business. Specific price terms and interest rates were apparently not discussed during this meeting, though Defendant was allegedly aware that the services Plaintiff was performing were the type of services and work that Plaintiff customarily performed in its day to day business operations. See Am. Compl. ¶ 10. Plaintiff also believed that the conduct of the parties implied that Plaintiff would be compensated for its services. See *id.*

Plaintiff stored the tractor trailer and its cargo for approximately twelve months. During this period of time, Plaintiff sent invoices to Defendant for its storage services, which included interest on the unpaid balance. Defendant never objected to the amounts set forth in the invoices. Plaintiff has made repeated requests for payment, but to no avail.

Plaintiff filed an initial Complaint on March 2, 2005, to which the Defendant filed Preliminary Objections on April 8, 2005. In response to the Preliminary Objections, Plaintiff filed an Amended Complaint on April 27, 2005. The Amended Complaint, which this Memorandum addresses, alleges the following causes of action:

1. Breach of Contract
2. Unjust Enrichment
3. Account Stated

Defendant has brought preliminary objections in the nature of a demurrer to all of the above counts. In addition, Defendant has objected to the exact nature of recovery that Plaintiff is due; specifically Defendant objects to the interest rate that Plaintiff has charged Defendant.

### **STANDARD OF REVIEW**

The guiding standard is well-established. "The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Ham v. Sulek*, 620 A.2d 5, 9 (Pa. Super. 1993). The trial court must review the complaint to determine "whether the complaint adequately states a claim for relief under any theory of law." *Id.* To evaluate a demurrer under this standard, the court must accept as true all material averments of the complaint and may sustain the demurrer only if the law will not permit a recovery. See *Mellon Bank, N.A. v. Fabinyi*, 650 A.2d 895, 899 (Pa. Super. 1994). "Where any doubt exists as to whether a demurrer should be sustained, it must be resolved in favor of overruling the demurrer." *Mistick, Inc. v. Northwestern Nat'l Cas. Co.*, 806 A.2d 39, 42 (Pa. Super. 2002).

### **DISCUSSION OF LAW**

#### **I. Measure of Damages**

In its Preliminary Objections to Plaintiff's Amended Complaint, Defendant objects to Plaintiff's measure of damages. Specifically, Defendant objects to the method at which Plaintiff arrived at its total of damages. However, this is an evidentiary question, not an issue to be resolved by a demurrer. Furthermore, the

Amended Complaint merely avers a total without any breakdown. Defendant can engage in discovery to obtain a breakdown of damages.

Defendant also objects to the imposition of interest charges on the sums that it allegedly owes to Plaintiff.<sup>1</sup> Under Pennsylvania law, “[i]f the breach consists of a failure to pay a definite sum in money ... with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due ....” RESTATEMENT (SECOND) OF CONTRACTS § 354 (1981); *Daset Mining Corp. v. Indus. Fuels Corp.*, 473 A.2d 584, 595 (Pa. Super. 1984). In other words, “[i]n contract cases, prejudgment interest is awardable as of right.” *Daset Mining Corp.*, 473 A.2d at 595. To determine the rate of interest, the Pennsylvania Supreme Court has held:

[A] debtor who defaults in the payment of the principal of an obligation when due and payable becomes liable for interest from the date of such default at the legal rate of 6% per annum until payment is made, irrespective of the rate proscribed in the obligation itself for the period prior to maturity .... [I]n the absence of an agreement to the contrary, a liquidated claim carries interest at the legal rate from the time the debt becomes due.

*Miller v. City of Reading*, 87 A.2d 223, 225 (Pa. 1953); see also 41 PA. STAT. ANN. § 201 (1999) (setting “the legal rate of interest” at six percent per annum); *Daset Mining Corp.*, 473 A.2d at 594-95 (“in claims that arise out of a contractual right, interest has been allowed at the legal rate from the date that payment was

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<sup>1</sup> Defendant did not properly raise this question in its Preliminary Objections, but merely mentions it in its brief in support thereof. However, the Court will briefly deal with the question of interest rates and charges for the sake of expedience in this case.

wrongfully withheld, where the damages are liquidated and certain, and the interest is readily ascertainable through computation.").

As a preliminary matter, the court notes that Plaintiff has not attached copies of the exact invoices it sent to Defendant every month. However, at the demurrer stage, the court must view these monthly charges as being due and payable by Defendant every month. Therefore, Defendant would have owed a definable sum to Plaintiff every month, and defaulted on the aggregate bill through nonpayment every month, according to Plaintiff's Amended Complaint. Irrespective of the interest rate mentioned in the invoice itself, Defendant would owe to Plaintiff the legal rate of interest every month, which case law and statute define as six percent per annum. The interest rate on the invoices due, therefore, would amount to six percent per annum for each invoice, calculated from the date that the invoice became due.<sup>2</sup>

Accordingly, Defendant's demurrer regarding the calculation of damages will be denied. However, Plaintiff will only be permitted to recover interest at the legal rate, not the rate on its invoice.

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<sup>2</sup> The court notes also that while Plaintiff has not attached the actual invoices to its Amended Complaint, in its prayer for relief, it asks the court for "interest at the legal rate." Statutory law states that "[r]eference in any law or document...to 'the legal rate of interest'...without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum." 41 PA. STAT. ANN. § 202.

## **II. Breach of Contract and Unjust Enrichment**

Defendant also argues that insufficient facts were averred within the Amended Complaint to support causes of action for Breach of Contract and for Unjust Enrichment. The court disagrees.

### **A. Breach of Contract**

In Pennsylvania "[a] cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *Corestates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999) (citation omitted). "While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." *Id.*

In order to form any type of contract, there must be an offer, acceptance, consideration and mutual meeting of the minds. *Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa. Super. 1995). While it is true that an informal or oral contract may be enforced even though the parties have not formalized their agreement in writing, the parties must still agree on the essential terms and have a meeting of the minds. See *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999); *GMH Assocs., Inc. v. Prudential Realty Group*, 752 A.2d 889, 900 (Pa. Super. 2000).

Plaintiff has pled facts sufficient to survive a demurrer by averring elements of offer, acceptance, and consideration. These elements can be found in paragraphs 3, 8, 9, 10, and 11 of Plaintiff's Amended Complaint.

### **B. Unjust Enrichment**

To support a claim for unjust enrichment, a plaintiff must plead facts that, if proven, demonstrate that a defendant wrongfully secured or passively received benefits from the plaintiff that it would be unconscionable for defendant to retain without payment over to the plaintiff. See *Martin v. Little, Brown and Co.*, 450 A.2d 984, 988 (Pa. Super. 1981); *Ameripro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. 2001). The most significant element of a claim for unjust enrichment is the *unjust* portion; the doctrine does not apply simply because a defendant may have benefited from the actions of the plaintiff. *Id.*

Plaintiff has pled facts sufficient to survive a demurrer by averring facts which demonstrate that Defendant wrongfully secured benefits from Plaintiff (such as the removal of the tractor trailer and the transloading of cargo from the interstate as well as the storage of said tractor trailer and cargo at Plaintiff's place of business), and Defendant's retention of these benefits without payment to Plaintiff would be unconscionable. These elements can be found in paragraphs 2, 8, 10, 11, 16, 17, and 18 of Plaintiff's Amended Complaint. Defendant's demurrer as to these two counts will likewise be denied.

### **III. Account Stated**

Finally, Defendant contends that Plaintiff has not pled facts sufficient to support a cause of action for Account Stated. The court agrees and will accordingly grant the demurrer to Count III of the Amended Complaint.

Under Pennsylvania law, an account stated is defined as an "account in writing examined and accepted by both parties." *Leinbach v. Wolle*, 61 A. 248, 248 (Pa. 1905) (citations omitted); see also *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 35 A.2d 346, 349 (Pa. 1944) (stating that "the gist of [an account stated] consists in an agreement to, or acquiescence in, the correctness of the account, so that in proving the account stated, it is not necessary to show the nature of the original transaction, or indebtedness, or to set forth the items entering into the account.") (citations omitted)). A cause of action for an account stated requires that an "account must be rendered, and the other party must accept, agree to or acquiesce under such circumstances as to import a promise of payment on the one side and acceptance on the other." *C-E Glass v. Ryan*, 70 Pa. D. & C.2d 251, 253-54 (Beaver C.P. 1975) (quoting 1 P.L.E., Accounts, § 4).

While a party must accept the account stated, "this acceptance need not be express, but may be implied from the circumstances." *Leinbach*, 61 A. at 248. For instance, the Superior Court has stated that "[r]etention without objection by one party for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent ...." *Donahue v. City of Philadelphia*, 41 A.2d 879, 881 (Pa. Super. 1945) (citing RESTATEMENT OF CONTRACTS § 422 (1948)).<sup>3</sup> But, mere silence does not always indicate acceptance, because:

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<sup>3</sup> The *Donahue* Court relied on the First Restatement of Contracts. While the Second Restatement of Contracts has been published for a number of years, no Pennsylvania appellate court has ever adopted the Second Restatement's revision of § 422 of the First Restatement. However, the Court notes that § 422(2) of the First Restatement and § 282(1) of the Second Restatement, in this context, are identical but for small grammatical changes. Compare RESTatement OF CONTRACTS § 422(2) (1932) with RESTatement (SECOND) OF CONTRACTS § 282(1) (1982).

[w]here assent is inferred from the mere lapse of time, the cases indicate that there has also been shown a course of dealing, where the rendering of accounts is an accepted method of adjustment over a period of time and involving an extended series of transactions between the two parties to the suit.

*C-E Glass*, 70 Pa D. & C.2d at 254 (citation omitted).<sup>4</sup>

Recent appellate decisions on accounts stated are sparse. However, a fairly recent set of facts in *C-E Glass* is instructive on this matter of law. In *C-E Glass*, plaintiff and defendant engaged in four business transactions over a period of several months. *Id.* at 253. Plaintiff sent an invoice to defendant every month over the course of their business relationship, and defendant did not respond to any of these invoices. *Id.* The court held that this relationship was "insufficient to establish an account stated." *Id.* The court opined that in these limited transactions, the facts had not demonstrated the required "course of dealing" needed to establish a cause of action for account stated. See *id.* at 254.

Turning to the facts of our case, Plaintiff alleges that it salvaged Defendant's cargo and tractor trailer on March 5, 2004, and proceeded to hold the cargo and tractor trailer for 12 months, sending an invoice for the storage costs to Defendant every month, to which Defendant did not respond. However, Plaintiff alleges no other business transaction or course of dealing outside of the March 5, 2004 salvage and subsequent storage of Defendant's cargo and tractor trailer.

---

<sup>4</sup> For an example of prior appellate cases where a course of dealing was deemed instructive in acquiescence by silence in an account stated cause of action, see *Leinbach*, 61 A. at 248 (holding that the previous course of dealings among partners was instrumental in using a partner's silence to mean he accepted the account stated).

Hence, no prior "course of dealings" can be deemed to exist at the demurrer stage absent specific facts in Plaintiff's Amended Complaint.

Here, the court finds that Plaintiff did render an account to Defendant, but Defendant did not expressly accept the account as stated by Plaintiff, nor does Plaintiff aver the required course of dealings with Defendant that would allow for acquiescence by silence. The parties merely met with one another once, where they did not even go so far as to cover the price terms of their transaction. One transaction or meeting with another party can certainly not be called a course of dealings, which is required for an acceptance by silence in a cause of action for account stated. See *id.* at 253-54. The limited interaction between the parties likewise demonstrates that the rendering of accounts was not an accepted method of account adjustment over a period of time, and therefore, cannot be used as a justification for an account stated cause of action based upon the record as it now stands. See *id.*

**HENCE THIS ORDER:**

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL DIVISION – LAW

PRESTON AMERICA, INC.,  
Plaintiff,

vs.

No. 2005 – 653

BRINK TRANSPORTATION,  
Defendant,

vs.

LLOYD'S OF LONDON and  
BESSO LIMITED,  
Additional Defendants.

ORDER

AND NOW, this 2<sup>nd</sup> day of August, 2005, Defendant Brink Transportation's Preliminary Objections in the Nature of a Demurrer to the Amended Complaint are SUSTAINED IN PART and DENIED IN PART. Defendant's demurrer as to Counts I and II is DENIED. The legal interest rate for any alleged sums owed to Plaintiff, however, shall be at the legal rate of interest as set in accordance with the principles set forth in the Memorandum Opinion. Defendant's other objections to Plaintiff's calculation of damages are DENIED at this stage of the proceedings. It is further ordered that Defendant's demurrer to Count III is SUSTAINED.

BY THE COURT:

  
Christopher J. St. John, Judge

NO FILED IN MERCER COUNTY  
2005 AUG - 3 A 10:49  
ELIZABETH FAIR  
PROTHONOTARY

**EXHIBIT C**

Attached hereto as Exhibit C is a true and correct copy of the Answer and New Matter filed by Defendant on or about August 23, 2005.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

Type of Pleading:  
ANSWER AND NEW MATTER OF  
DEFENDANT TO AMENDED COMPLAINT

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

**NOTICE**

YOU ARE HEREBY NOTIFIED TO FILE A WRITTEN RESPONSE TO THE ENCLOSED ANSWER AND NEW MATTER WITHIN TWENTY (20) DAYS FROM SERVICE HEREOF OR A JUDGMENT MAY BE ENTERED AGAINST YOU.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

**ANSWER AND NEW MATTER OF DEFENDANT TO AMENDED COMPLAINT**

COMES NOW, Brink Transportation, Inc. (Defendant), by and though its attorney, Dwight L. Koerber, Jr., Esquire, and files the within Answer and New Matter to the Amended Complaint filed herein.

1. Admitted in part and denied in part. The name and address of Plaintiff are admitted but the scope and nature of its business activities are denied and strict proof of same is required, as upon reasonable investigation Defendant is unable to confirm the full scope of Plaintiff's business activities.

2. Admitted.

3. Admitted in part and denied in part. It is admitted that an accident occurred on Interstate 80 on March 5, 2004, as alleged. Upon reasonable investigation,

Defendant does not know whether Plaintiff was dispatched by Mercer County 911 and requires strict proof of same. Defendant agrees that Plaintiff assisted in the transloading of cargo but denies that it stored same.

4. Denied, as the document attached only contains the application that Plaintiff apparently filed with the Pennsylvania State Police and does not contain an itemization of all work as alleged. Strict proof of same is required at trial.

5. It is denied that it was incumbent upon Defendant to specifically deny the charges, as Plaintiff elected to deal primarily with the claims adjuster for Defendant's insurance company, the Additional Defendants herein. Accordingly, the circumstances underlying the processing of the claims herein did not lend themselves to cause Defendant to object to the charges per se. Moreover, Defendant would point out that the hourly rate and the number of hours that the hourly rate set forth for the charges itemized are exorbitant and unreasonable and cannot be presumed to be expressly or impliedly agreed to by Defendant.

6. Admitted, with the understanding that Defendant had no duty to pay the amount required.

**COUNT I  
BREACH OF CONTRACT**

7. No answer required.

8. Denied. Upon reasonable investigation, Defendant is unable to ascertain the truthfulness of the allegations made and accordingly requires strict proof of same at

trial. Moreover, Defendant specifically denies that the filing of documents with the Commonwealth of Pennsylvania means that this filing in any way establishes that the rates charged and the method of calculation is fair and reasonable.

9. Defendant denies that there was a meeting of the minds, either implied or expressed, and disputes that there was an oral agreement as alleged.

10. Admitted in part and denied in part. It is admitted that for certain aspects of its services, Plaintiff is entitled to reasonable compensation, but it is denied that the charge assessed to Defendant for recovery is in fact a reasonable charge. In terms of the storage expense, Plaintiff dealt directly with Defendant's insurer, Additional Defendants herein, and is therefore required to look to it alone for recovery of charges, if any, that it may be entitled.

11. Denied, legal conclusion. Moreover, Defendant would point out that Plaintiff has not produced a copy of any agreement that it has with the Commonwealth of Pennsylvania nor has it set forth the terms of the oral agreement that it allegedly had with Defendant.

12. Denied, legal conclusion. Moreover, the amount of charges assessed is not set forth with any particularity and cannot be distinguished, and these special damages cannot therefore be addressed. To the extent that financing charges are claimed, Defendant would point out that the sum certain for the amount of collection on the recovery work has never been established. Any interest, if proven, per se, should not be prejudgment interest, therefore, should not be awarded.

13. Admitted that no payment was made, but it is denied that the demand of Plaintiff is accurate, reasonable or proper in any manner.

**WHEREFORE**, Defendant Brink Transportation, Inc. prays that judgment be entered in its favor and against Plaintiff and that Count I be denied.

**COUNT II**  
**UNJUST ENRICHMENT**  
**(Alternate Count)**

14. No answer required.

15. Denied, legal conclusion. See answer to paragraph 8, above.

16. It is denied that a benefit was conferred upon Defendant for storage services, because its tractor-trailer combination was totaled and did not warrant storage beyond a minimal period of time. All claims for storage should be directed solely to Defendant's insurer, Additional Defendants named herein, as Plaintiff looked to it and negotiated with it on storage.

17. Denied. Upon reasonable investigation, Defendant is unable to determine the truth and correctness of the allegations made and requires strict proof of same at trial.

18. Denied, legal conclusion. Furthermore, with respect to the contention raised by Plaintiff, Defendant would point out that the hourly charges assessed for recovery are unfair and unreasonable, and not proportionate to the expenses which Plaintiff incurred in rendering them. Accordingly, Plaintiff had no reasonable expectation that such charges would be paid.

**WHEREFORE**, Defendant Brink Transportation, Inc. prays that judgment be entered in its favor and that Count II of the Complaint be dismissed.

**COUNT III  
ACCOUNT STATED  
(Alternative Count)**

19 – 26. No answer required in view of the ruling by this Honorable Court in its August 2, 2005 Order which sustained Defendant's demurrer to Count III.

**NEW MATTER  
UNDER Pa. R.C.P. 2252**

27. Defendant hereby asserts as New Matter a claim against Additional Defendants Lloyd's of London and Besso Limited.

28. These named Additional Defendants, Lloyd's of London and Besso Limited, appear to be actually one legal entity, known as "Certain Underwriters of Lloyd's of London". This cannot be determined by the insurance policy in question, policy number NO324100S002.

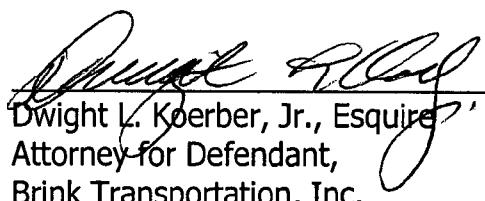
29. Additional Defendants, as the insurer of Defendant, entered into direct dealings with Plaintiff, covering the matter of paying for storage and towing expense. Plaintiff's entitlement to recover for the matter set forth herein, should be directed to Additional Defendants.

30. To the extent, however, that Plaintiff recovers against Defendant for any towing or storage under the matters arising out of the facts and allegations set forth in

the Complaint filed herein, Additional Defendants are liable to Defendant and responsible to pay all such charges, including attorney's fees and costs.

WHEREFORE, Defendant Brink Transportation, Inc. denies that it is liable to the Plaintiff in any sum or sums whatsoever, or in the alternative, demands contributions and indemnity from Additional Defendants Besso Limited and Lloyd's of London.

Respectfully submitted,



Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant,  
Brink Transportation, Inc.

**VERIFICATION**

I verify the statements made in the foregoing documents are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsifications to authorities.

8-18-05  
Date

Samuel D. Brink  
Samuel D. Brink

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

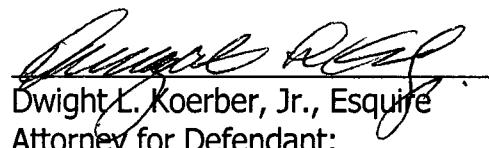
|                       |   |                        |
|-----------------------|---|------------------------|
| Preston America, Inc. | * |                        |
| Plaintiff             | * |                        |
|                       | * |                        |
| -vs-                  |   | Docket No. 2005-653-CD |
|                       | * |                        |
| Brink Transportation  | * |                        |
| Defendant             | * |                        |
|                       | * |                        |
| -vs-                  | * |                        |
|                       | * |                        |
| Lloyd's of London and | * |                        |
| Besso Limited         | * |                        |
| Additional Defendants | * |                        |

**CERTIFICATE OF SERVICE**

This is to certify that on the 22<sup>nd</sup> day of August 2005 the undersigned served a true and correct copy of the ANSWER AND NEW MATTER OF DEFENDANT TO AMENDED COMPLAINT filed in the above-captioned matter upon counsel for Plaintiff and upon counsel for Additional Defendants. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Wendy D. Testa, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**EXHIBIT D**

Attached hereto as Exhibit D is a true and correct copy of the insurance policy furnished to Defendant by the insurance brokerage firm of Atlantic/Smith, Cropper & Deeley.

# LLOYD'S

**THE ASSURED IS REQUESTED TO READ THIS POLICY. IF IT IS INCORRECT, PLEASE RETURN IT  
IMMEDIATELY TO YOUR BROKER OR AGENT FOR ALTERATION.**

**IN ALL COMMUNICATIONS THE POLICY NUMBER APPEARING OVERLEAF SHOULD BE QUOTED**

THE SCHEDULE

Policy no. 595/NO324100S

**The Name and Address of the Assured:**

Brink Transportation Inc.

RR 1 Box 316H  
Houtzdale  
Pennsylvania 16651

**Period of Insurance:**

**From:** 20th April 2003

**To:** 20th April 2004

both days at 12.01a.m. standard time at the address of the Assured as stated above

**Service of Suit Nominees:**

Mendes and Mount  
750 Seventh Avenue  
New York  
New York 10019-6829

**Notification of Claims to:**

Atlantic/Smith, Cropper & Deeley LLC  
7171 Brent Pine Road  
P.O. Box 770  
Willards  
Maryland 21874

**The person or persons other than the Assured to whom loss shall be payable, as interest may appear:**

See Attached

**PART A. The Automobile(s) and amounts of the deductibles.**

| Item no. | Trade name | Model year | Type | Serial no. or motor no. | Limit of Liability per Automobile. US\$ |
|----------|------------|------------|------|-------------------------|---|
|----------|------------|------------|------|-------------------------|---|

See Attached

Type of cargo carried: Coal, Limestone and Blacktop

Radius of use: Unlimited within the territorial limits

Purpose of use (private Automobile only): Not Applicable

Amount to be deducted from each and every loss, applicable to each Automobile separately: US\$5,000 in respect of Sections C and F

**PART B. Perils, Limits of Liability and Premiums**

Limit in respect of any combination of Automobile, truck, tractor, trailer or semi-trailer: US\$110,000

Limit any one event, catastrophe or terminal loss: US\$1,000,000

**PERILS**

|   |              |
|---|--------------|
| Section A - Fire                                | Not Included |
| Section B - Theft                               | Not Included |
| Section C - Collision                           | Included     |
| Section D - Windstorm                           | Not Included |
| Section E - Combined Additional Coverage        | Not Included |
| Section F - Comprehensive (excluding Collision) | Included     |

Premium: US\$3,429.00

Dated in London: 4th July 2003

002806721

U.S.A.

**LLOYD'S AUTOMOBILE PHYSICAL DAMAGE INSURANCE****INSURING AGREEMENTS**

1. In consideration of the premium paid hereon and the particulars and statements contained in the written Proposal, a copy of which is attached hereto, which particulars and statements are warranted by the Assured to be true and are agreed to be incorporated herein, the Underwriters hereby agree to indemnify the Assured against direct and accidental loss of or damage to the Automobiles specified in the Schedule herein, during the Period of Insurance specified in the Schedule, while such Automobiles are within the United States of America (excluding Hawaii, the Philippine Islands, the Virgin Islands and Puerto Rico) and the Dominion of Canada.
2. This Insurance covers only such and so many of the Perils named in the Schedule as are indicated by a specific premium set thereunder. The Limit of the Underwriters' Liability in respect of each of such Perils is the amount insured stated in the Schedule or the actual cash value of the vehicle concerned at the time of loss, whichever is the less.

**PROVIDED ALWAYS THAT** Underwriters' Liability shall not exceed:

- (a) the limits stated in Part B of the Schedule in respect of any combination of Automobile, truck, tractor, trailer or semi-trailer, or
- (b) the limit stated in Part B of the Schedule in respect of any one event, catastrophe or terminal loss.

**DEFINITIONS**

1. **DEFINITION OF AUTOMOBILE.** The word "Automobile" wherever used herein shall mean each motor vehicle or trailer or semi-trailer described in this Insurance, including its equipment and other equipment permanently attached thereto. The terms of this Insurance and the Limit of Liability, including any deductible provisions, shall apply to each Automobile separately.
2. **DEFINITION OF PERILS.**

**SECTION A. FIRE, LIGHTNING AND TRANSPORTATION.**

This Section covers

- (i) loss or damage resulting from fire arising from any accidental cause, and lightning.
- (ii) damage by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the Automobile is located, and
- (iii) loss or damage resulting from the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the Automobile is being transported on land or on water, including general average and salvage charges for which the Assured is legally liable.

**SECTION B. THEFT, ROBBERY AND PILFERAGE.****SECTION C. COLLISION OR UPSET.**

This Section covers loss of or damage to an Automobile caused by accidental collision of the Automobile with another object, or by upset, provided always that the deductible specified in the Schedule shall be deducted from the amount of each and every loss or damage to each Automobile.

**SECTION D. WINDSTORM, EARTHQUAKE, EXPLOSION, HAIL OR WATER.**

This Section covers loss or damage caused by windstorm, hail, earthquake, explosion, external discharge or leakage of water, except loss or damage resulting from rain, snow or sleet, whether or not wind-driven.

**SECTION E. COMBINED ADDITIONAL COVERAGE.**

This Section covers loss or damage caused by windstorm, hail, earthquake, explosion, riot or civil commotion or the forced landing or falling of any aircraft or its parts or equipment, flood or rising water, external discharge or leakage of water, except loss or damage resulting from rain, snow or sleet, whether or not wind-driven.

**SECTION F. COMPREHENSIVE COVERAGE EXCEPT BY COLLISION OR UPSET.**

This Section covers loss of or damage to the Automobile except loss or damage caused by collision of the Automobile with another object or by upset of the Automobile or by collision of the Automobile with an Automobile to which it is attached. Breakage of glass and loss or damage caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

**EXCLUSIONS**

This Insurance does not cover

1. loss of or damage to any radio transmitting or receiving set and tape recorders unless permanently attached to an Insured Automobile, radio tubes in any event, robes, wearing apparel, personal effects, or other property of the Assured or of others carried in or upon the Automobile;
2. loss of or damage to tyres unless damaged by fire or stolen or unless lost or damaged in an accidental collision or upset which also caused other damage to the Insured Automobile;
3. loss or damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or requisition or destruction or damage by or under the order of any government or public or local authority, or, except under Sections E and F, riot or civil commotion;
4. loss or damage arising from nuclear reaction, nuclear radiation or radioactive contamination;
5. loss of or damage to any Automobile
  - (i) while used for any purposes other than those specified in the Schedule,
  - (ii) while operated, maintained or used by any person in violation of State Law as to age or by any person under the age of eighteen years in any event,
  - (iii) while operated, maintained or used in any race or speed contest.

- (iv) while rented or used for livery purposes or to carry passengers for a consideration, express or implied, unless specifically agreed herein,
- (v) while subject to any bailment lease, conditional sale, mortgage or other encumbrance, not specifically declared and described in this Insurance,
- (vi) while the Automobile is used in connection with any illicit trade or transportation,
- (vii) which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other losses covered by this Insurance;

6. under Sections B and F

- (a) loss or damage caused by any person or persons in the Assured's household or in the Assured's service or employment, whether the loss or damage occurs during the hours of such service or employment or not,
- (b) loss suffered by the Assured as the result of voluntarily parting with title or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretence,
- (c) the theft, robbery or pilferage of tools or repair equipment except in conjunction with the theft of an entire Automobile,
- (d) the wrongful conversion, embezzlement or secretion by a mortgagee, vendee, lessee or other person in lawful possession of the insured property under a mortgage, conditional sale, lease or other contract or agreement, whether written or verbal.

## CONDITIONS

1. **LIMITATION OF USE.** It is understood and agreed that the regular and frequent use of the vehicles covered hereunder is and will be confined during the Period of this Insurance to the territory within the radius of miles stated in the Schedule of the place of principal garaging of such vehicles; that is, regular or frequent trips will NOT be made during the Period of this Insurance to any location beyond such radius of the place of principal garaging of such vehicle.
2. **AUTOMATIC INSURANCE FOR NEWLY ACQUIRED AUTOMOBILES.** If the Assured who is the owner of the Insured Automobiles acquires ownership of another Automobile, such coverage as is afforded by this Insurance shall apply also to such other Automobiles from the date of delivery thereof, subject to the following additional conditions:-
  - (a) If the Underwriters insure all Automobiles owned by the Assured at the date of such delivery, this Insurance applies to such other Automobile if it is used for pleasure purposes or in the business of the Assured but only to the extent applicable to all such previously owned Automobiles.
  - (b) If the Underwriters do not insure all Automobiles owned by the Assured at the date of such delivery, this Insurance applies to such other Automobile if it replaces an Automobile described in this Insurance but only to the extent applicable to the replaced Automobile.
  - (c) The coverage afforded hereunder upon the replaced Automobile
    - (i) automatically terminates at the date of such delivery,
    - (ii) does not apply to any loss or damage against which the Assured has other valid and collectible insurance,
    - (iii) does not apply unless the Assured notifies the Underwriters within ten (10) days following the date of delivery of the new Automobile and pays any additional premium required.

3. **NOTICE TO UNDERWRITERS.** Upon the occurrence of any accident claimed to be covered under this Insurance, the Assured or someone on his behalf shall give, as soon as reasonably possible, written notice thereof to the Underwriters and in the event of theft, larceny, robbery or pilferage or vandalism to the police, but shall not, except at his own cost, offer or pay any reward for recovery of the vehicle. Such notice shall contain particulars sufficient to identify the Insured Automobile(s).
4. **INSPECTION OF LOSS OR DAMAGE.** In the event of any loss or damage covered hereunder, the Assured shall give the Underwriters a reasonable time and opportunity to examine the Insured Automobile before any repairs are begun or any physical evidence of damage removed.
5. **PROOF OF LOSS.** Within sixty (60) days after loss or damage, unless such time is extended in writing by the Underwriters, the Assured shall forward to the Underwriters a statement, signed and sworn to by the Assured, stating the place, time and cause of the loss or damage, the interest of the Assured and of all others in the property, the sound value thereof and the amount of loss or damage thereto, all encumbrances thereon and all other insurance, whether valid and collectable or not, covering said property. The Assured, as often as required, shall submit to examination under oath by any person designated by the Underwriters and subscribe the same. As often as required, the Assured shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof if the originals are lost, at such reasonable place as may be designated by the Underwriters, and shall permit extracts and copies thereof to be made.
6. **PAYMENT OF LOSS.** The loss shall in no event become payable, until sixty (60) days after the verified proof of loss herein required shall have been received by the Underwriters and, if appraisal is demanded, then not until sixty (60) days after an award has been made by the appraisers.

Loss, if any, shall be payable as interest may appear to the Assured and to the person or persons specified in the Schedule for the purpose.

7. **PARTIAL LOSS.** In the event of partial loss or damage under this Insurance, the Underwriters shall be liable only for the actual cost of (and shall have the option of) repairing, rebuilding or, if necessary, replacing the parts damaged or destroyed.

In the event of loss or damage to the Automobiles described herein, whether such loss or damage is covered by this Insurance or not the liability of the Underwriters shall be reduced by the amount of loss or damage until repairs have been completed.

8. **ABANDONMENT - RETURN OF STOLEN PROPERTY.** It shall be optional with the Underwriters to take all or any part of the property at the agreed or appraised value, but there can be no abandonment thereof to the Underwriters. If theft is covered hereunder and stolen property is recovered prior to any payment hereunder for such property, the Assured shall take back the recovered property if so required by the Underwriters, who will only be liable, subject to the terms, limits and conditions of this Insurance, for any damage done to such property by the thief or thieves.
9. **PROTECTION OF SALVAGE.** In the event of any loss or damage, whether covered hereunder or not, the Assured shall protect the property from other or further loss or damage, and any such other or further loss or damage due directly or indirectly to the Assured's failure to protect shall not be recoverable hereunder. Any such act of the Assured or the Underwriters in recovering, saving and preserving the property described herein, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and where the loss or damage suffered constitutes a claim hereunder, then all reasonable expenses thus incurred shall also constitute a claim hereunder, provided, however, that the Underwriters shall not be responsible for the payment of any reward offered for the recovery of the insured property unless authorized by the Underwriters.
10. **OTHER INSURANCE.** If the Assured carries a policy of another insurer against a loss covered hereby, the Assured shall not be entitled to recover from the Underwriters a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid and collectible insurance, and if any person, firm or corporation other than the Assured has valid and collectible insurance against any loss covered hereby then no such person, firm or corporation shall be considered as an Assured hereunder.

11. APPRAISAL. In the Assured and Underwriters shall fail to agree to the amount of loss or damage each shall on the written demand of either, select a competent and disinterested appraiser. Before entering upon the reference, the appraisers shall first select a competent and disinterested umpire, and failing for fifteen (15) days to agree upon such umpire, then on the request of the Assured or the Underwriters such umpire shall be selected by a judge of a court of record in the County and State in which the appraisal is pending. The appraisers shall then appraise the loss or damage, stating separately the sound value and loss or damage; and failing to agree, shall submit their differences only to the umpire. The award in writing of any two, when filed with the Underwriters, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of the appraisal and of the umpire shall be paid by the parties equally.

12. ASSIGNMENT OF INTEREST. If an Automobile, to which this Insurance applies, is sold, transferred or assigned, the insurance provided herein shall not extend to such purchaser, transferee or assignee. In the event of death of the Assured during the Period of Insurance this Insurance shall continue in force for the benefit of the legal representative of the Assured for sixty (60) days from Noon on the date of such death, but in no event shall the Period of this Insurance thereby be extended.

13. SUBROGATION. If the Underwriters become liable for any payment under this Insurance in respect of a loss, the Underwriters shall be subrogated, to the extent of such payment, to all the rights and remedies of the Assured against any party in respect of such loss and shall be entitled at their own expense to sue in the name of the Assured. The Assured shall give to the Underwriters all such assistance in his power as the Underwriters may require to secure their rights and remedies and, at Underwriters' request, shall execute all documents necessary to enable Underwriters effectively to bring suit in the name of the Assured, including the execution and delivery of the customary form of loan receipt.

14. CANCELLATION. This Insurance may be cancelled by the Assured at any time by written notice or by surrender of this Contract of Insurance. This Insurance may also be cancelled by or on behalf of the Underwriters by delivering to the Assured or by mailing to the Assured, by registered, certified or other first class mail, at the Assured's address as shown in the Schedule, written notice stating when, not less than five days thereafter, the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this Insurance shall terminate at the date and hour specified in such notice.

If this Insurance shall be cancelled by the Assured, the Underwriters shall retain the short rate proportion set out herein of the premium hereon.

If this Insurance shall be cancelled by or on behalf of the Underwriters, the Underwriters shall retain the pro rata proportion of the premium hereon.

Payment or tender of any unearned premium by the Underwriters shall not be a condition precedent to the effectiveness of Cancellation but such payment shall be made as soon as practicable.

If the period of limitation relating to the giving of notice is prohibited or made void by any law controlling the construction thereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

15. SERVICE OF SUIT. It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.

It is further agreed that service of process in such suit may be made upon the person or persons specified for the purpose in the Schedule, and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which make provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Assured or any beneficiary hereunder arising out of this Contract of Insurance, and hereby designates the above named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

16. MISREPRESENTATION AND FRAUD. If the Assured has concealed or misrepresented any material fact or circumstance concerning this Insurance, or if the Assured shall make any claim knowing the same to be false or fraudulent, as regards to amount or otherwise, this Insurance shall become void and all claim hereunder shall be forfeited.

**0 SHORT RATE CANCELLATION TABLE**

A. For insurances written for one year:-

| Days<br>Insurance<br>in Force | Per cent.<br>of One<br>Year | Days<br>Insurance<br>in Force | Per cent.<br>of One<br>Year |
|-------------------------------|-----------------------------|-------------------------------|-----------------------------|
|                               | Premium                     |                               | Premium                     |
| 1 .....                       | 5                           | 154 - 156                     | 53                          |
| 2 .....                       | 6                           | 157 - 160                     | 54                          |
| 3 - 4 .....                   | 7                           | 161 - 164                     | 55                          |
| 5 - 6 .....                   | 8                           | 165 - 167                     | 56                          |
| 7 - 8 .....                   | 9                           | 168 - 171                     | 57                          |
| 9 - 10 .....                  | 10                          | 172 - 175                     | 58                          |
| 11 - 12 .....                 | 11                          | 176 - 178                     | 59                          |
| 13 - 14 .....                 | 12                          | 179 - 182                     | (6 months) 60               |
| 15 - 16 .....                 | 13                          | 183 - 187                     | 61                          |
| 17 - 18 .....                 | 14                          | 188 - 191                     | 62                          |
| 19 - 20 .....                 | 15                          | 192 - 196                     | 63                          |
| 21 - 22 .....                 | 16                          | 197 - 200                     | 64                          |
| 23 - 25 .....                 | 17                          | 201 - 205                     | 65                          |
| 26 - 29 .....                 | 18                          | 206 - 209                     | 66                          |
| 30 - 32 (1 month) .....       | 19                          | 210 - 214                     | (7 months) 67               |
| 33 - 36 .....                 | 20                          | 215 - 218                     | 68                          |
| 37 - 40 .....                 | 21                          | 219 - 223                     | 69                          |
| 41 - 43 .....                 | 22                          | 224 - 228                     | 70                          |
| 44 - 47 .....                 | 23                          | 229 - 232                     | 71                          |
| 48 - 51 .....                 | 24                          | 233 - 237                     | 72                          |
| 52 - 54 .....                 | 25                          | 238 - 241                     | 73                          |
| 55 - 58 .....                 | 26                          | 242 - 246                     | (8 months) 74               |
| 59 - 62 (2 months) .....      | 27                          | 247 - 250                     | 75                          |
| 63 - 65 .....                 | 28                          | 251 - 255                     | 76                          |
| 66 - 69 .....                 | 29                          | 256 - 260                     | 77                          |
| 70 - 73 .....                 | 30                          | 261 - 264                     | 78                          |
| 74 - 76 .....                 | 31                          | 265 - 269                     | 79                          |
| 77 - 80 .....                 | 32                          | 270 - 273                     | (9 months) 80               |
| 81 - 83 .....                 | 33                          | 274 - 278                     | 81                          |
| 84 - 87 .....                 | 34                          | 279 - 282                     | 82                          |
| 88 - 91 (3 months) .....      | 35                          | 283 - 287                     | 83                          |
| 92 - 94 .....                 | 36                          | 288 - 291                     | 84                          |
| 95 - 98 .....                 | 37                          | 292 - 296                     | 85                          |
| 99 - 102 .....                | 38                          | 297 - 301                     | 86                          |
| 103 - 105 .....               | 39                          | 302 - 305                     | (10 months) 87              |
| 106 - 109 .....               | 40                          | 306 - 310                     | 88                          |
| 110 - 113 .....               | 41                          | 311 - 314                     | 89                          |
| 114 - 116 .....               | 42                          | 315 - 319                     | 90                          |
| 117 - 120 .....               | 43                          | 320 - 323                     | 91                          |
| 121 - 124 (4 months) .....    | 44                          | 324 - 328                     | 92                          |
| 125 - 127 .....               | 45                          | 329 - 332                     | 93                          |
| 128 - 131 .....               | 46                          | 333 - 337                     | (11 months) 94              |
| 132 - 135 .....               | 47                          | 338 - 342                     | 95                          |
| 136 - 138 .....               | 48                          | 343 - 346                     | 96                          |
| 139 - 142 .....               | 49                          | 347 - 351                     | 97                          |
| 143 - 146 .....               | 50                          | 352 - 355                     | 98                          |
| 147 - 149 .....               | 51                          | 356 - 360                     | 99                          |
| 150 - 153 (5 months) .....    | 52                          | 361 - 365                     | (12 months) 100             |

## B. For Insurances written for more or less than one year:-

1. If insurance has been in force for 12 months or less, apply the standard short rate table for annual insurances to the full annual premium determined as for an insurance written for a term of one year.
2. If insurance has been in force for more than 12 months:
  - a. Determine full annual premium as for an insurance written for a term of one year.
  - b. Deduct such premium from the full insurance premium, and on the remainder calculate the pro rata Earned Premium on the basis of the ratio of the length of time beyond one year the insurance has been in force to the length of time beyond one year for which the insurance was originally written.
  - c. Add premium produced in accordance with items (a) and (b) to obtain Earned Premium during full period insurance has been in force.

NMA1630

**○ ADDITIONAL WORDINGS & CLOSSES****CANCELLATION CONDITION AMENDMENT**

In Condition 14. Cancellation, the words "not less than five days" are amended to read "not less than thirty days".

**SCHEDULE OF AUTOMOBILES**

It is hereby understood and agreed that the Schedule of Automobiles and Limit any one event, catastrophe or terminal loss are as held on file in the offices of Besso Limited.

**SALVAGE**

It is a Condition of this Insurance that in the event of loss or damage covered hereunder, the Underwriters may, at their option, pay the amount stated under the Limit of Liability in the Schedule or the actual cash value (whichever is the lesser amount), less any applicable deductible, and such payment shall entitle the Underwriters to all salvage resulting after such loss or damage.

It is agreed that the Assured shall have first refusal of the bid for salvage.

01/93  
LSW544

**TOTAL OR CONSTRUCTIVE TOTAL LOSS**

It is hereby understood and agreed that in the event of a Total or Constructive Total Loss of any item of property insured during the Period of Insurance specified in the Schedule and the loss is paid by Underwriters then the total premium for that property shall be considered to be fully earned.

This Endorsement shall not apply where State Law or any Premium Finance Agreement would be violated or infringed.

Constructive Total Loss shall be defined as "loss where the cost of recovery and repair would exceed the Limit of Liability shown in the Schedule or the actual cash value (whichever is the lesser amount)".

01/93  
LSW546

**ACTUAL CASH VALUE**

It is a Condition of this Insurance that the Limit of Liability per Automobile shown in the Schedule represents the full actual cash value of the Automobile(s) covered hereon. If not, in the event of loss or damage, the Assured shall only be entitled to recover hereunder such proportion of the said loss or damage as the Limit of Liability bear to the full actual cash value.

01/93  
LSW545

**ELECTRONIC DATE RECOGNITION EXCLUSION (EDRE)**

This Policy does not cover any loss, damage, cost, claim or expense, whether preventative, remedial or otherwise, directly or indirectly arising out of or relating to:

- (a) the calculation, comparison, differentiation, sequencing or processing of data involving the date change to the year 2000, or any other date change, including leap year calculations, by any computer system, hardware, programme or software and/or any microchip, integrated circuit or similar device in computer equipment or non-computer equipment, whether the property of the Insured or not; or
- (b) any change, alteration, or modification involving the date change to the year 2000, or any other date change, including leap year calculations, to any such computer system, hardware, programme or software and/or any microchip, integrated circuit or similar device in computer equipment or non-computer equipment, whether the property of the Insured or not.

This clause applies regardless of any other cause or event that contributes concurrently or in any sequence to the loss, damage, cost, claim or expense.

17/12/97  
NMA2802

**TERRORISM EXCLUSION ENDORSEMENT**

Notwithstanding any provision to the contrary within this insurance or any endorsement thereto it is agreed that this insurance excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any act of terrorism regardless of any other cause or event contributing concurrently or in any other sequence to the loss.

For the purpose of this endorsement an act of terrorism means an act, including but not limited to the use of force or violence and/or the threat thereof, of any person or group(s) of persons, whether acting alone or on behalf of or in connection with any organisation(s) or government(s), committed for political, religious, ideological or similar purposes including the intention to influence any government and/or to put the public, or any section of the public, in fear.

This endorsement also excludes loss, damage, cost or expense of whatsoever nature directly or indirectly caused by, resulting from or in connection with any action taken in controlling, preventing, suppressing or in any way relating to any act of terrorism.

If the Underwriters allege that by reason of this exclusion, any loss, damage, cost or expense is not covered by this insurance the burden of proving the contrary shall be upon the Assured.

remain in full force and effect.

08/10/01  
NMA2920

**ENDORSEMENTS**

Attaching to and forming part of this Policy.

**Endorsement No: 1**

It is hereby understood and agreed that, with effect from 20th April 2003:

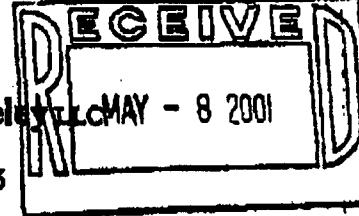
1. The Premium shown herein is a Deposit Premium adjustable monthly at 0.322% on declared values.
2. The Limit Any One Automobile applicable to this Policy shall be US\$85,000.
3. Underwriters hereon agree the automatic inclusion of Loss Payees as their interest may appear.

**ALL OTHER TERMS AND CONDITIONS REMAIN UNALTERED**

FROM Atlantic/Smith, Cropper &amp; Ley

(FRI) MAY 20 2005 11:08/ST. 11:08/NO. 8386010249 P 18

814 378 5712



Atlantic/Smith Cropper & Deeter LLC  
P.O. Box 770, Willards, MD. 21874  
(410) 835-2000 Fax (410)835-3356

### TRUCK PHYSICAL DAMAGE PROPOSAL

Federal ID# or SS# 85-1789149

1. Name of Applicant Brink Transportation, Inc. Telephone 814-378-5147
2. Address P.R. 1 Box 8144 City Hanover County PA Zip 16645
3. Date of Coverage is to be effective: 4/20/01 4. Radius of Operation \_\_\_\_\_
5. Principal Routes: From \_\_\_\_\_ To \_\_\_\_\_  
(City/State) \_\_\_\_\_ (City/State) \_\_\_\_\_
6. Type of Cargo carried: Coal - limestone - block 7. No. Year in Business: \_\_\_\_\_
8. Do you own vehicles other than those listed? Yes \_\_\_\_\_ If yes, Specify: Physical damage coverage not desired
9. Has any vehicle been altered, modified, or reconstructed with Glider Kit? No  
If yes, give details: \_\_\_\_\_
10. Do you operate any driver incentive program? \_\_\_\_\_ Give Details: \_\_\_\_\_
11. Name of Previous Carrier: Lloyd's of London 12. Prior Policy # 100/9
13. Has applicant had previous Fire, Theft Collision coverage cancelled? No  
If so, state date, name of Insurance Co. and reasons for cancellation: \_\_\_\_\_
14. Premiums and losses sustained by applicant last three years:

#### LOSSES

| Year    | Premium                    | Fire | Theft | Collision | Company |
|---------|----------------------------|------|-------|-----------|---------|
| 2000-01 | Refer to Loss Runs on file |      |       |           |         |
|         |                            |      |       |           |         |
|         |                            |      |       |           |         |

COMPLETE REVERSE SIDE

| Vol | Year | Makr            | Model         | VIN                | Value |
|-----|------|-----------------|---------------|--------------------|-------|
| 1   | 1990 | FORD            | TRI AXLE      | 1FDZAB0X8LVA28377  | 25000 |
| 2   | 1993 | FORD            | TRI AXLE      | 1FDZAB0X7PVA82426  | 25000 |
| 3   | 1993 | FORD            | TRI AXLE      | 1FDZAB0X8PVA82425  | 25000 |
| 4   | 1994 | FORD            | TRI AXLE      | 1FDZAB0WXRVA41759  | 40000 |
| 5   | 1994 | FORD            | TRI AXLE      | 1FDZAB0W8RVA43800  | 40000 |
| 6   | 1994 | FORD            | TRI AXLE      | 1FDZAB0X7RVA28814  | 40000 |
| 7   | 1994 | FORD            | TRI AXLE      | 1FDZABCW5RVA40898  | 40000 |
| 9   | 1995 | FORD            | TRI AXLE      | 1FDZAB0WX8VA43291  | 45000 |
| 10  | 1995 | FORD            | TRI AXLE      | 1FDZAB0V88VA43280  | 45000 |
| 11  | 1995 | FORD            | TRI AXLE      | 1FDZAB0W88VA43540  | 45000 |
| 13  | 1995 | FORD            | TRI AXLE      | 1FDZAB0X88VA88219  | 45000 |
| 15  | 1995 | FORD            | TRI AXLE      | 1FDZAB0W08VA08828  | 45000 |
| 17  | 1995 | FORD            | TRI AXLE      | 1FDZAB0XX8VA71584  | 45000 |
| 18  | 1994 | FORD            | TRI AXLE      | 1FDZAB0W7RVA45059  | 40000 |
| 19  | 1994 | FORD            | TRI AXLE      | 1FDZAB0XXRVA11298  | 40000 |
| 20  | 1994 | FORD            | TRI AXLE      | 1FDZAB0W08VA43582  | 40000 |
| 21  | 1989 | BAXTER          | TRAILER       | 180D24029KP1880084 | 15000 |
| 22  | 1990 | J & J           | TRAILER       | 1808T0240LM008053  | 20000 |
| 23  | 1990 | J & J           | TRAILER       | 1808T0240LM008062  | 25000 |
| 24  | 1991 | J & J           | TRAILER       | 1808T0240MM008080  | 15000 |
| 25  | 1988 | BAXTER          | TRAILER       | 180024021JP188001  | 15000 |
| 26  | 1990 | FORD            | TRACTOR       | 1FTYAB0X8LVA08015  | 15000 |
| 27  | 1994 | FORD            | TRACTOR       | 1FTYAB0X1RVA28896  | 30000 |
| 28  | 1998 | FREIGHTLINER    | TRACTOR       | 2FUPDXYB7WA958532  | 50000 |
| 29  | 1998 | FREIGHTLINER    | TRACTOR       | 2FUPDXYB0WA958533  | 50000 |
| 30  | 1993 | KENWORTH        | WRECKER       | 1XKADR8X8PJ812865  | 20000 |
| 31  | 1998 | FORD            | TRIAKLE       | 1FDZAB0W1TVA20882  | 40000 |
| 32  | 1997 | FREIGHTLINER    | TRI AXLE DUMP | 2FVNPFXYB1VA770114 | 50000 |
| 34  | 1998 | INTERNATIONAL   | TRACTOR       | 2H8FMAMR7T0083208  | 30000 |
| 35  | 1998 | STERLING        | DUMP TRUCK    | 1FZXFXYB3XAF18318  | 65000 |
| 36  | 1998 | LOUISVILLE      | TRIAKLE       | 1FDZV88WVA18885    | 70000 |
| 37  | 1998 | LOUISVILLE      | TRIAKLE       | 1FDZV96W5WVA18887  | 70000 |
| 38  | 2000 | J & J DUMP TRLR |               | 1802A4023YM098092  | 20000 |

Total Values 1275000

## Brink Driver List

| [Name]               | Date of Birth | Drivers License Number | State |
|----------------------|---------------|------------------------|-------|
| Samuel D. Brink      | 1/6/1953      | 15956678 PA            |       |
| Kenneth Wayne Brink  | 1/28/1987     | 17630162 PA            |       |
| Ricky A. Viard       | 8/19/1982     | 19771919 PA            |       |
| Douglas Craig Hummel | 2/26/1986     | 25184427 PA            |       |
| Larry D. Spald       | 9/1/1981      | 19531872 PA            |       |
| Mark Albert Br       | 12/17/1981    | 20253723 PA            |       |
| Clair Welder         | 9/26/1971     | 23848789 PA            |       |
| Kevin Blaize         | 4/25/1971     | 22388666 PA            |       |
| Larry Brink          | 1/6/1963      | 80027663 PA            |       |
| Jack Gardner         | 12/21/1937    | 9887048 PA             |       |
| Kenneth Stiles       | 3/5/1975      | 23748965 PA            |       |
| Tom Tozer            | 8/21/1974     | 24102420 PA            |       |
| Carl Baer            | 4/10/1987     | 17778006 PA            |       |
| Jeff Foust           | 11/26/1982    | 20038629 PA            |       |
| William Brink        | 12/3/1980     | 25482994 PA            |       |
| Thomas Tozer         | 8/21/1974     | 24102420 PA            |       |
| Ronald Fyock         | 8/22/1982     | 16765600 PA            |       |
| Richard Smeal        | 5/8/1944      | 124120 PA              |       |
| Robert Peterson      | 7/3/1988      | 1815 PA                |       |
| Bert Memmilen        | 3/8/1971      | 23848789 PA            |       |
| Roy Venecoyos        | 8/4/1986      | 22388666 PA            |       |
| Alan Gaul            | 8/3/1984      | 25184427 PA            |       |
| Michael Hamm         | 8/9/1970      | 19531872 PA            |       |
| John Perada          | 4/16/1974     | 20253723 PA            |       |
| Keith Clark          | 8/28/1971     | 23848789 PA            |       |
| Raymond Cloud        | 8/16/1940     | 17778006 PA            |       |
| Paul Dipko           | 2/28/1971     | 20038629 PA            |       |
| Robert Lutz          | 4/28/1977     | 17778006 PA            |       |
| Francis Hamm         | 8/2/1948      | 19531872 PA            |       |
| Keith Petrosky       | 8/9/1963      | 25184427 PA            |       |
| Richard Bennett      | 8/18/1956     | 19531872 PA            |       |
| Steve Haneel         | 8/6/1968      | 20253723 PA            |       |
| Christopher Hubler   | 8/28/1972     | 23848789 PA            |       |



The Table of Syndicates referred to on the face of this Policy follows:

| Syndicate Number          | Percentage      | Underwriters' References |
|---------------------------|-----------------|--------------------------|
| 2003                      | 26.3159         | NB2000034979             |
| 2488                      | 19.7368         | NAAP43JA0353             |
| 570                       | 19.7368         | 03PL44359KX              |
| 958                       | 13.1579         | XMCAXTCN3672             |
| 1206                      | 6.5789          | 03J04603ANNO             |
| 2001                      | 6.5789          | FCX0387203WA             |
| 1096                      | 3.2895          | 04863Z03AA               |
| 780                       | 3.2895          | D2665648U031             |
| 1084                      | 1.3158          | 320RF308009X             |
| <b>Total Lloyd's Line</b> | <b>100.0000</b> |                          |

The list of Underwriting Members of Lloyd's is for the 2003 year of account

LPSO Signing Number and Date or Reference: 61045 23/05/2003

## Schedule of Vehicles

| Year | Trade Name                           | Type | Serial Number | Stated Amt. | Ded. | Rate | Prem. |
|------|--------------------------------------|------|---------------|-------------|------|------|-------|
| 1.   | <u>See Attached Vehicle Schedule</u> |      |               |             |      |      |       |
| 2.   |                                      |      |               |             |      |      |       |
| 3.   |                                      |      |               |             |      |      |       |
| 4.   |                                      |      |               |             |      |      |       |
| 5.   |                                      |      |               |             |      |      |       |
| 6.   |                                      |      |               |             |      |      |       |

The Stated Amount (Actual Cash Value A.C.V.) stated above constitutes the limit of liability of that vehicle under the policy in respects of any one vehicle limit. The A.C.V. does not include any equipment (i.e. CB's, telephones, Tarps, chains or binders) unless described herewith.

If any of the vehicles scheduled on the policy have a dumping exposure, a special deductible is applicable to each. And every vehicle which occurs while loading and/or unloading in the course of any dumping operation. The Special deductible is two times your scheduled deductible.

| List Full Name of All<br>Drivers of Insd Veh(s) | Birthdate<br>(Mo/Dy/Yr) | Operator's<br>License Number | State | Yrs Comm'l<br>Experience | Viol's<br>3 Yrs. | Accs.<br>3 Yrs. |
|---|-------------------------|------------------------------|-------|--------------------------|------------------|-----------------|
| <u>See Attached Drivers List</u>                |                         |                              |       |                          |                  |                 |
|   |                         |                              |       |                          |                  |                 |
|   |                         |                              |       |                          |                  |                 |
|   |                         |                              |       |                          |                  |                 |

Give details of any accidents listed above:

**IMPORTANT NOTICE:** It should be understood that coverage is only provided while covered vehicles are being driven by person named above and accepted by Underwriters. Any change in drivers must be reported immediately.

## LIENHOLDERS

| Unit Number(s)                   | Name and Full Address | Loan Balance |
|----------------------------------|-----------------------|--------------|
|                                  |                       |              |
|                                  |                       |              |
| <u>See Attached Vehicle List</u> |                       |              |
|                                  |                       |              |

This Proposal will be incorporated into and made a part of any insurance issued.

I/We hereby agree that the information on this proposal is a just, full and true statement of all facts and circumstances with regard to the risk to be insured and that the actual cash values stated above are the true actual cash values.

Date: 5-4-01 Signature of Assured: Sam D. B. S.

**EXHIBIT E**

Attached hereto as Exhibit E is a true and correct copy of the insurance policy furnished by counsel for Additional Defendants.



## BESSO LIMITED

Atlantic/Smith, Cropper & Seeley LLC  
7171 Bent Pine Road  
P.O. Box 770  
Willards  
Maryland 21874  
U.S.A.

Policy Number: NO324100S  
Please quote this Number in all  
Correspondence.

Date: 30th May 2003

### Cover Note

In accordance with your instructions we have effected insurance for your account as follows:

**Type:** Comprehensive and Collision Insurance

**Form:** J (a) Form plus NMA 1650  
Proposal Form dated 4th May 2001 - as expiring

**Assured:** Brink Transportation Inc.

**Address:** RR 1 Box 316H  
Houtzdale  
Pennsylvania 16651  
U.S.A.

**Period:** Twelve months at 20th April 2003, 12.01 a.m. Local Standard Time

**Interest:** Schedule of Vehicles totalling USD1,065,000 Actual Cash Value  
(as held on file in the offices of Besso Limited)

**Sum Insured:** USD 85,000 any one Vehicle  
USD 110,000 any one Combined Unit  
USD1,000,000 any one Loss

**Situation:** As per Form.

Rx Date/Time  
FROM: Atlantic

MAR-10-2004 (WED) 09:13  
Smith, Cropper & Deeley

4108353356  
(WED MAR 10 2004)

P.007

ST. 9:39/NO. 6366010760 P 7



Cover Note: NO324100S

**Conditions:** Deductible: USD 5,000 each and every loss, each and every vehicle.

Service of Suit Clause (USA) - NMA1998.

30 Days Cancellation Clause.

Radius of Use: Unlimited

Salvage Clause - LSW 544

Total or Constructive Total Loss Clause - LSW 546

Actual Cash Value Clause - LSW 545

Terrorism Exclusion Endorsement - NMA 2920

Electronic Date Recognition Exclusion (EDRE) - NMA 2802

Automatic Inclusion of Loss Payees

**Deposit**

**Premium:**

USD 3,429 adjustable monthly at 0.322% on declared values.

**Payment of**

**Premium:**

Please be advised that premium in respect of this insurance is due and payable to Besso Limited on 30th June 2003.

**Security:**

Lloyd's Underwriters as per schedule attached

100,0000%

**US**

**Classification:**

Surplus Lines

Agent:- Atlantic/Smith, Cropper & Deeley LLC, 7171 Bent Pine Road,  
P.O. Box 770, Willards, Maryland 21874, U.S.A.

**Information:**

Agents facsimile dated 19th March 2003 seen by Underwriters

Type of Cargo Carried: Coal, Limestone and Blacktop

**Renewing:**

NO315100R.

Rx Date/Time  
FROM Atlantic

MAR-10-2004 (WED) 09:13

With. Cropper

4108353356

(WED MAR 10 2004 9:39 AM ST. 9:39/NO. 6366010760 P. 8

P. 008

Cover Note: NO324100S

**Loss Record:**

|       |   |  |
|-------|---|--|
| 02/03 | : | \$ TBA (adjuster estimate \$22,822, insured estimate \$32,957) |
| 01/02 | : | \$ 13,447  |
| 00/01 | : | \$ 30,412  |
| 99/00 | : | \$ 137,705   |
| 98/99 | : | \$ 28,151  |
| 97/98 | : | \$ 12,783  |
| 96/97 | : | \$ 26,793  |
| 95/96 | : | \$ 20,800  |

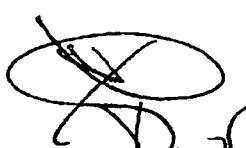
Cover Note: NO324100S

**Reminder:**

It is understood that you have provided complete and accurate information to insurers and that you have complied with your legal duty to disclose, before inception of the insurance contract, all material matters relating to the risk (i.e. all information which would influence the judgement of a prudent insurer in determining whether to underwrite the risk and if so upon what terms and at what premium). If all such information has not been disclosed, insurers have the right to avoid the contract from its commencement which may lead to claims not being met.

If you believe that you may not have complied with this duty, you should contact us immediately.

The Assured must comply with any warranty, subjectivity and/or condition contained within this insurance (whether express or implied). Failure to do so may discharge Underwriters from all liability.

  
\_\_\_\_\_  
Director  
Besso Limited

  
\_\_\_\_\_  
Director  
Besso Limited

Rx Date/Time MAR-10-2004 (WED) 09:13  
FROM Atlantic with Cropper Seeley

410835335  
(WED MAR 10 2004)

P.005  
7/ST. 9:39/NO. 6366010760 P 5

BRINK VEHICLE LIST

| Veh # | Year | Make          | Model    | VIN               | Value  |
|-------|------|---------------|----------|-------------------|--------|
| 1     | 1990 | FORD          | TRI AXLE | 1FDZA90X8LVA28377 | 25000  |
| 4     | 1994 | FORD          | TRI AXLE | 1FDZA90WXRVA41759 | 35000  |
| 5     | 1994 | FORD          | TRI AXLE | 1FDZA90W6RVA43900 | 35000  |
| 6     | 1994 | FORD          | TRI AXLE | 1FDZA90X7RVA28914 | 35000  |
| 7     | 1994 | FORD          | TRI AXLE | 1FDZA9CW5RVA40888 | 35000  |
| 10    | 1995 | FORD          | TRI AXLE | 1FDZA90W8SVA43290 | 40000  |
| 13    | 1995 | FORD          | TRI AXLE | 1FDZA90X5SVA68219 | 40000  |
| 15    | 1995 | FORD          | TRI AXLE | 1FDZA90W0SVA06928 | 40000  |
| 18    | 1994 | FORD          | TRI AXLE | 1FDZA90W7RVA45058 | 35000  |
| 19    | 1994 | FORD          | TRI AXLE | 1FDZA90XXRVA11296 | 35000  |
| 20    | 1994 | FORD          | TRI AXLE | 1FDZA90W0SVA63582 | 35000  |
| 22    | 1990 | J & J         | TRAILER  | 1S9ST0240LM006053 | 20000  |
| 23    | 1990 | J & J         | TRAILER  | 1S9ST0240LM006052 | 20000  |
| 24    | 1991 | J & J         | TRAILER  | 1S9ST0240MM006060 | 20000  |
| 28    | 1998 | FREIGHTLINER  | TRACTOR  | 2FUPDXYB7WA955532 | 50000  |
| 29    | 1998 | FREIGHTLINER  | TRACTOR  | 2FUPDXYB9WA955533 | 50000  |
| 30    | 1993 | KENWORTH      | WRECKER  | 1XKADR9X8PJ612855 | 20000  |
| 31    | 1996 | FORD          | TRIAxLE  | 1FDZA90W1TVA20662 | 45000  |
| 37    | 1998 | LOUISVILLE    | TRIAxLE  | 1FDZV96W5WVA18557 | 65000  |
| 38    | 2000 | J & J DUMP    | TRLR     | 1S92A4023YM006532 | 50000  |
| 39    | 2001 | Sterling      | Tractor  | 2FWJA3AVX1AF60145 | 60000  |
| 40    | 1995 | Ford          | Tri Axle | 1FDZA90XXSVA71584 | 40000  |
| 42    | 1999 | Freightliner  | Tractor  | 1FVNFXYB6XLA17050 | 65000  |
| 43    | 1995 | Ford          | Tri axle | 1FDZA90X9SVA69714 | 40000  |
| 44    | 2003 | Sterling      | Tri axle | 2FZHAZCV83AL99683 | 90000  |
| 45    | 2003 | Sterling      | Tri axle | 2FZHAZCV13AL99685 | 90000  |
| 46    | 1999 | Sterling      | Tri axle | 2FZXFXYB6XAF16315 | 65000  |
| 47    | 1993 | Ford          | Tri axle | 1FDZA90X7FVA32426 | 30000  |
| 48    | 1997 | Freightliner  | Tri axle | 2FVNFXYB1VA770114 | 10000  |
| 49    | 1993 | Ford          | Tri axle | 1FDZA90X5PVA32425 | 25000  |
| 50    | 1994 | Ford          | Tri axle | 1FDZA90W8RVA41758 | 30000  |
| 52    | 1995 | Ford          | Tri axle | 1FDZA90W5SVA43540 | 35000  |
| 53    | 1995 | Ford          | Tri axle | 1FDZA90WXSVA43291 | 35000  |
| 54    | 1997 | Ford          | Tri axle | 1FDZA90W2VVA00584 | 40000  |
| 56    | 2003 | Sterling      | Tractor  | 2FZHAZVCL3AL99682 | 110000 |
| 57    | 1999 | Sterling      | Tri axle | 1FZXFXYB3XAF16319 | 55000  |
| 58    | 1996 | International | Tractor  | 2HSFMAMR7TC083203 | 30000  |

U.S.

## LLOYD'S AUTOMOBILE PHYSICAL DAMAGE INSURANCE

### INSURING AGREEMENTS

1. In consideration of the premium paid hereon and the particulars and statements contained in the written Proposal, a copy of which is attached hereto, which particulars and statements are warranted by the Assured to be true and are agreed to be incorporated herein, the Underwriters hereby agree to indemnify the Assured against direct and accidental loss of or damage to the Automobiles specified in the Schedule herein, during the Period of Insurance specified in the Schedule, while such Automobiles are within the United States of America (excluding Hawaii, the Philippine Islands, the Virgin Islands and Puerto Rico) and the Dominion of Canada.
2. This Insurance covers only such and so many of the Perils named in the Schedule as are indicated by a specific premium set thereunder. The Limit of the Underwriters' Liability in respect of each of such Perils is the amount insured stated in the Schedule or the actual cash value of the vehicle concerned at the time of loss, whichever is the less.

PROVIDE ALWAYS THAT Underwriters' Liability shall not exceed:

- a) the limits stated in Part B of the Schedule in respect of any combination of Automobile, truck, tractor, trailer or semi-trailer, or
- b) the limit stated in Part B of the Schedule in respect of any one event, catastrophe or terminal loss.

### DEFINITIONS

1. **DEFINITION OF AUTOMOBILE.** The word "Automobile" wherever used shall mean each motor vehicle or trailer or semi-trailer described in this Insurance, including its equipment and other equipment permanently attached thereto. The terms of this Insurance and the Limits of Liability, including any deductible provisions, shall apply to each Automobile separately.
2. **DEFINITION OF PERILS.**

### SECTION A. FIRE, LIGHTNING AND TRANSPORTATION.

This Section covers

- (i) loss or damage resulting from fire arising from any accidental cause, and lightning,
- (ii) damage by smoke or smudge due to a sudden, unusual and faulty operation of any fixed heating equipment serving the premises in which the Automobile is located, and
- (iii) loss or damage resulting from the stranding, sinking, burning, collision or derailment of any conveyance in or upon which the Automobile is being transported on land or on water, including general average and salvage charges for which the Assured is legally liable.

### SECTION B. THEFT, ROBBERY AND PILFERAGE.

### SECTION C. COLLISION OR UPSET.

This Section covers loss of or damage to an Automobile caused by accidental collision of the Automobile with another object, or by upset, provided always that the deductible specified in the Schedule shall be deductible from the amount of each and every loss or damage to each Automobile.

## SECTION D. WINDSTORM, EARTHQUAKE, EXPLOSION, HAIL OR WATER.

This Section covers loss or damage caused by windstorm, hail, earthquake, explosion, external discharge or leakage of water, except loss or damage resulting from rain, snow or sleet, whether or not wind-driven.

## SECTION E. COMBINED ADDITIONAL COVERAGE.

This Section covers loss or damage caused by windstorm, hail, earthquake, explosion, riot or civil commotion or the forced landing or falling of any aircraft or its parts or equipment, flood or rising waters, external discharge or leakage of water, except loss or damage resulting from rain, snow or sleet, whether or not wind-driven.

## SECTION F. COMPREHENSIVE COVERAGE EXCEPT BY COLLISION OR UPSET.

This Section covers loss of or damage to the Automobile except loss or damage caused by collision of the Automobile with another object or by upset of the Automobile or by collision of the Automobile with an automobile to which it is attached. Breakage of glass and loss or damage caused by missiles, falling objects, fire, theft, explosion, earthquake, windstorm, hail, water, flood, vandalism, riot or civil commotion shall not be deemed loss caused by collision or upset.

## EXCLUSIONS

This insurance does not cover

1. loss of or damage to any radio transmitting or receiving set and tape recorders unless permanently attached to an Insured Automobile, radio tubes in any event, robes, wearing apparel, personal effects, or other property of the Assured or of others carried in or upon the Automobile;
2. loss of or damage to tires unless damaged by fire or stolen or unless lost or damaged in an accidental collision or upset which also caused other damage to the Insured Automobile;
3. Loss or damage directly or indirectly occasioned by, happening through or in consequence of war, invasion, acts of foreign enemies, hostilities (whether war be declared or not), civil war, rebellion, revolution, insurrection, military or usurped power or confiscation or requisition or destruction or damage by or under the order of any government or public or local authority, or, except under Section E and F, riot or civil commotion;
4. Loss or damage arising from nuclear reaction, nuclear radiation or radioactive contamination;
5. Loss of or damage to any Automobile
  - (i) while used for any purpose other than those specified in the Schedule,
  - (ii) while operated, maintained or used by any person in violation of State Law as to age or by any person under the age of eighteen years in any event,
  - (iii) while operated, maintained or used in any race or speed contest,
  - (iv) while rented or used for livery purposes or to carry passengers for a consideration, express or implied, unless specifically agreed herein,
  - (v) while subject to any bailment lease, conditional sale, mortgage or other encumbrance, not specifically declared and described in this Insurance,
  - (vi) while the Automobile is used in connection with any illicit trade or transportation,
  - (vii) which is due and confined to wear and tear, freezing, mechanical or electrical breakdown or failure, unless such damage is the result of other losses covered by this Insurance;
6. under Section B and F
  - (a) loss or damage caused by any person or persons in the Assured's household or in the Assured's service or employment, whether the loss or damage occurs during the hours of such service or employment or not,
  - (b) loss suffered by the Assured as the result of voluntarily parting with title or possession, whether or not induced so to do by any fraudulent scheme, trick, device or false pretence,
  - (c) the theft, robbery or pilferage of tools or repair equipment except in conjunction with the theft of an entire Automobile,

(d) the wrongful conversion, embezzlement or secretion by a mortgagee, vendee, lessee or other person in lawful possession of the insured property under a mortgage, condition sale, lease or other contract or agreement, whether written or verbal.

## CONDITIONS

1. **LIMITATION OF USE.** It is understood and agreed that the regular and frequent use of the vehicles covered hereunder is and will be confined during the Period of this Insurance to the territory within the radius of miles stated in the Schedule of the Place of principal garaging of such vehicles; that is, regular or frequent trips will NOT be made during the Period of this Insurance to any location beyond such radius of the place of principal garaging of such vehicle.
2. **AUTOMATIC INSURANCE FOR NEWLY ACQUIRED AUTOMOBILES.** If the Assured who is the owner of the Insured Automobiles acquires ownership of another Automobile, such coverage as is afforded by this Insurance shall apply also to such other Automobiles from the date of delivery thereof, subject to the following additional conditions:-
  - (a) If the Underwriters insure all Automobiles owned by the Assured at the date of such delivery, this Insurance applies to such other Automobile if it is used for pleasure purposes or in the business of the Assured but only to the extent applicable to all such previously owned Automobiles.
  - (b) If the Underwriters do not insure all Automobiles owned by the Assured at the date of such delivery, this Insurance applies to such other Automobile if it replaces an Automobile described in this Insurance but only to the extent applicable to the replaced Automobile.
  - (c) The coverage afforded hereunder upon the replaced Automobile
    - (i) automatically terminates at the date of such delivery,
    - (ii) does not apply to any loss or damage against which the Assured has other valid and collectible insurance,
    - (iii) does not apply unless the Assured notifies the Underwriters within ten (10) days following the date of delivery of the new Automobile and pays any additional premium required.
3. **NOTICE TO UNDERWRITERS.** Upon the occurrence of any accident claimed to be covered under this Insurance, the Assured or someone on his behalf shall give, as soon as reasonably possible, written notice thereof to the Underwriters and in the event of theft, larceny, robbery or pilferage or vandalism to the police, but shall not, except at his own cost, offer or pay any reward for recovery of the vehicle. Such notice shall contain particulars sufficient to identify the Insured Automobile(s).
4. **INSPECTION OF LOSS OR DAMAGE.** In the event of any loss or damage covered hereunder, the Assured shall give the Underwriters a reasonable time and opportunity to examine the Insured Automobile before any repairs are begun or any physical evidence of damage removed.
5. **PROOF OF LOSS.** Within sixty (60) days after loss or damage, unless such time is extended in writing by the Underwriters, the Assured shall forward to the Underwriters a statement, signed and sworn to by the Assured, stating the place, time and cause of the loss or damage, the interest of the Assured and of all others in the property, the sound value thereof and the amount of loss or damage thereto, all encumbrances thereon and all other insurance, whether valid and collectable or not, covering said property. The Assured, as often as required, shall submit to examination under oath by any person designated by the Underwriters and subscribe the same. As often as required, the Assured shall produce for examination all books of accounts, bills, invoices, and other vouchers, or certified copies thereof if the originals are lost, at such reasonable place as may be designated by the Underwriters, and shall permit extracts and copies thereof to be made.
6. **PAYMENT OF LOSS.** The loss shall in no event become payable, until sixty (60) days after the verified proof herein required shall have been received by the Underwriters and, if appraisal is demanded, then not until sixty (60) days after an award has been made by the appraisers.

Loss, if any, shall be payable as interest may appear to the Assured and to the person or persons specified in the Schedule for the purpose.

7. **PARTIAL LOSS.** In the event of partial loss or damage under this Insurance, the Underwriters shall be liable only for the actual cost of (and shall have the option of) repairing, rebuilding or, if necessary, replacing the parts damaged or destroyed.

In the event of loss of or damage to the Automobiles described herein, whether such loss or damage is covered by this Insurance or not the liability of the Underwriters shall be reduced by the amount of loss or damage until repairs have been completed.

8. **ABANDONMENT – RETURN OF STOLEN PROPERTY.** It shall be optional with the Underwriters to take all or any part of the property at the agreed or appraised value, but there can be no abandonment thereof to the Underwriters. If theft is covered hereunder and stolen property is recovered prior to any payment hereunder for such property, the Assured shall take back the recovered property if so required by the Underwriters, who will only be liable, subject to the terms, limits and conditions of this Insurance, for any damage done to such property by the thief or thieves.

9. **PROTECTION OF SALVAGE.** In the event of any loss or damage, whether, covered hereunder or not, the Assured shall protect the property from other or further loss or damage, and any such other or further loss or damage due directly or indirectly to the Assured's failure to protect shall not be recoverable hereunder. Any such act of the Assured or the Underwriters in recovering, saving and preserving the property described herein, shall be considered as done for the benefit of all concerned and without prejudice to the rights of either party, and where the loss or damage suffered constitutes a claim hereunder, then all reasonable expenses thus incurred shall also constitute a claim hereunder, provided, however, that the Underwriters shall not be responsible for the payment of any reward offered for the recovery of the insured property unless authorized by the Underwriters.

10. **OTHER INSURANCE.** If the Assured carries a policy of another insurer against a loss covered hereby, the Assured shall not be entitled to recover from the Underwriters a larger proportion of the entire loss than the amount hereby insured bears to the total amount of valid and collectible insurance, and if any person, firm or corporation other than the Assured has valid and collectible insurance against any loss covered hereby then no such person, firm or corporation shall be considered as an Assured hereunder.

11. **APPRAISAL.** In case the Assured and Underwriters shall fail to agree as to the amount of loss or damage each shall on the written demand of either, select a competent and disinterested appraiser. Before entering upon the reference, the appraisers shall first select a competent and disinterested umpire, and \*\*\*\*\* for fifteen (15) days to agree upon such umpire, then on the request of the Assured or the Underwriters such umpire shall be selected by a judge of a court of record in the County and State in which the appraisal is pending. The appraisers shall then appraise the loss or damage, stating separately the sound value and loss or damage; and failing to agree, shall submit their differences only to the umpire. The award in writing of any two, when filed with the Underwriters, shall determine the amount of sound value and loss or damage. Each appraiser shall be paid by the party selecting him and the expenses of the appraisal and of the umpire shall be paid by the parties equally.

12. **ASSIGNMENT OF INTEREST.** If an Automobile, to which this Insurance applies, is sold, transferred or assigned, the insurance provided herein shall not extend to such purchaser, transferee or assignee. In the event of death of the Assured during the Period of Insurance this insurance shall continue in force for the benefit of the legal representative of the Assured for sixty (960) days from Noon on the date of such death, but in no event shall the Period of this Insurance thereby be extended.

13. **SUBROGATION.** If the Underwriters become liable for any payment under this Insurance in respect of a loss, the Underwriters shall be subrogated, to the extent of such payment, to all the rights and remedies of the Assured against any party in respect of such loss and shall be entitled at their own expense to sue in the name of the Assured. The Assured shall give to the Underwriters all such assistance in his power as the Underwriters may require to secure their rights and remedies and, at Underwriters' request, shall execute all documents necessary to enable Underwriters effectively to

bring suit in the name of the Assured, including the execution and delivery of the customary form of loan receipt.

14. CANCELLATION. This Insurance may be cancelled by the Assured at any time by written notice or by surrender of this Contract of Insurance. This Insurance may also be cancelled by or on behalf of the Underwriters by delivering to the Assured or by mailing to the Assured, by registered, certified or other first class mail, at the Assured's address as shown in the Schedule, written notice stating when, not less than five days thereafter, the cancellation shall be effective. The mailing of such notice as aforesaid shall be sufficient proof of notice and this Insurance shall terminate at the date and hour specified in such notice.

If this Insurance shall be cancelled by the Assured, the Underwriters shall retain the short rate proportion set out herein of the premium hereon.

If this Insurance shall be cancelled by or on behalf of the underwriters, the Underwriters shall retain the pro rata proportion of the premium hereon.

Payment or tender of any unearned premium by the Underwriters shall not be a condition precedent to the effectiveness of Cancellation but such payment shall be made as soon as practicable.

If the period of limitation relating to the giving of notice is prohibited or made void by any law controlling the construction thereof, such period shall be deemed to be amended so as to be equal to the minimum period of limitation permitted by such law.

15. SERVICE OF SUIT. It is agreed that in the event of the failure of the Underwriters hereon to pay any amount claimed to be due hereunder, the Underwriters hereon, at the request of the Assured, will submit to the jurisdiction of a Court of competent jurisdiction within the United States. Nothing in this Clause constitutes or should be understood to constitute a waiver of Underwriters' rights to commence an action in any Court of competent jurisdiction in the United States, to remove an action to a United States District Court, or to seek a transfer of a case to another Court as permitted by the laws of the United States or of any State in the United States.

It is further agreed that service of process in such suit may be made upon the person or persons specified for the purpose in the Schedule, and that in any suit instituted against any one of them upon this contract, Underwriters will abide by the final decision of such Court or of any Appellate Court in the event of an appeal.

The above-named are authorized and directed to accept service of process on behalf of Underwriters in any such suit and/or upon the request of the Assured to give a written undertaking to the Assured that they will enter a general appearance upon Underwriters' behalf in the event such a suit shall be instituted.

Further, pursuant to any statute of any state, territory or district of the United States which make provision therefor, Underwriters hereon hereby designate the Superintendent, Commissioner or Director of Insurance or other officer specified for that purpose in the statute, or his successor or successors in office, as their true and lawful attorney upon whom may be served any lawful process in any action, suit or proceeding instituted by or on behalf of the Assured or any beneficiary hereunder arising out of this Contract of Insurance, and hereby designate the above named as the person to whom the said officer is authorized to mail such process or a true copy thereof.

16. MISREPRESENTATION AND FRAUD. If the Assured has concealed or misrepresented any material fact or circumstance concerning this Insurance, or if the Assured shall make any claim knowing the same to be false or fraudulent, as regards to amount or otherwise, this Insurance shall become void and all claim hereunder shall be forfeited.

Cover Note: NO324100S

**Schedule of Lloyd's Underwriters**

|          |     |      |
|----------|-----|------|
| 26.3159% | SJC | 2003 |
| 19.7368% | AGM | 2488 |
| 19.7638% | ATR | 0570 |
| 13.1579% | GSC | 0958 |
| 6.5789%  | GER | 1206 |
| 6.5789%  | AML | 2001 |
| 3.2895%  | RAS | 1096 |
| 3.2895%  | ADV | 0780 |
| 1.3158%  | HAY | 1084 |

**100.0000%**

**EXHIBIT F**

Attached hereto as Exhibit F are copies of the Proof of Loss forms that Additional Defendants insisted that Defendant sign even though Defendant stated that it did not want the salvage.

PROOF OF LOSS AND DIRECTION TO PAY - UNDISPUTED VALUE

INTERESTED LLOYD'S UNDERWRITERS

(hereinafter referred to as "Underwriters")

THE UNDERSIGNED HEREBY EXPRESSLY AGREES THAT THE UNDISPUTED VALUE OF LOSS OR DAMAGE, OCCURRING ON OR ABOUT THE 5<sup>th</sup> day of MARCH, 2004, AS SET FORTH PREVIOUSLY IN THE UNDERSIGNED'S STATEMENT OF LOSS, TO PROPERTY COVERED BY POLICY NUMBER NO324100S002 is US\$ 23,335.00 IN RESPECT OF THE UNDISPUTED ACTUAL CASH VALUE OF A 1996 INTERNATIONAL TRACTOR, VIN 083203

The said loss or damage did not originate by any act, design, or procurement on the part of the Undersigned nor on the part of anyone having interest in the property insured, or in the said policy of insurance; nor in any consequence of any fraud or evil practice done or suffered by the Undersigned and that no property saved has in any manner been concealed.

It is expressly understood and agreed that the furnishing of the "Proof of Loss" blank to the insured, or assistance in making up this statement by an adjuster or any person otherwise an agent of Underwriters is an act of courtesy and is not a waiver of any rights of said Underwriters.

In consideration of payment, if made, of the amount set forth below by Underwriters, the Undersigned hereby agrees to release and discharge Underwriters from any and all liability under its policy for the undisputed value of said loss and/or damage. The undersigned further agrees upon said payment to hold Underwriters, its successors or assigns, free and harmless from further claims for the loss described. The Undersigned hereby directs the above-described Underwriters to pay to:

\$ \_\_\_\_\_

|                               |                              |                |
|-------------------------------|------------------------------|----------------|
| RR 1 BOX 316 H                | UNDISPUTED ACTUAL CASH VALUE | \$ 23,335.00   |
| HOUTZDALE, PENNSYLVANIA 16651 | LESS: POLICY DEDUCTIBLE      | \$ ( 5,000.00) |
| AND CSB BANK                  | LESS: SALVAGE RETAINED       | \$ ( 4,599.00) |
|                               |                              | \$ _____       |

**TOTAL PAYMENT** (entire loss or damage, less deductible, if applicable) \$ 13,736.00  
and agrees that such payment shall fully discharge Underwriters from any and all claims arising out of the above described loss in respect of the undisputed value of the claim. Any additional value agreed and accepted by Underwriters will be settled through a Supplemental Proof of Loss. SETTLEMENT OF THE UNDISPUTED VALUE OF THE CLAIM IN NO WAY PREJUDICES YOUR RIGHTS TO PURSUE ANY ADDITIONAL DISPUTED VALUE THAT YOU BELIEVE IS DUE UNDER THE TERMS AND CONDITIONS OF THE APPLICABLE POLICY OF INSURANCE.

The Undersigned hereby assigns, transfers, and sets over to Underwriters any and all claims or causes of action of whatsoever kind and nature which the Undersigned now has, or may hereafter have, to recover against any person or persons as the result of said occurrence and loss as described above, to the extent of the payment above made; the Undersigned agrees that Underwriters may enforce the same in such manner as shall be necessary or appropriate for the use and benefit of Underwriters, either in its own name or in the name of the Undersigned, that the Undersigned will furnish such papers, information or evidence as shall be within the Undersigned's possession or control for the purpose of enforcing such claim, demand or cause of action; and further that Underwriters on the Undersigned's behalf may execute all receipt's and releases; and endorse all checks and drafts received in payment of said loss or damage.

The undersigned covenants that no release or settlement of any such claim, demand or cause of action has been made.

The Undersigned affirms that the statements herein made are true. Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information, or conceals for the purpose of misleading, information containing any fact material thereto, commits a fraudulent insurance act which is a crime and subjects such person to criminal and civil penalties.

Witness \_\_\_\_\_

Insured

Witness \_\_\_\_\_ hand at \_\_\_\_\_

this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_

State of \_\_\_\_\_

County of \_\_\_\_\_ 20 \_\_\_\_\_

Personally appeared \_\_\_\_\_ signer of the foregoing statement who made solemn oath to the truth of same, and that no material fact is withheld of which said Company should be advised. Subscribed and sworn before me, the day and date written above.

My Commission expires \_\_\_\_\_, 20 \_\_\_\_\_

(Notary Public)

PROOF OF LOSS AND DIRECTION TO PAY UNDISPUTED VALUE

INTERESTED LLOYD's UNDERWRITER

(hereinafter referred to as "Underwriters")

THE UNDERSIGNED HEREBY EXPRESSLY AGREES THAT THE UNDISPUTED VALUE OF LOSS OR DAMAGE, OCCURRING ON OR ABOUT THE 5<sup>th</sup> day of MARCH, 2004, AS SET FORTH PREVIOUSLY IN THE UNDERSIGNED'S STATEMENT OF LOSS, TO PROPERTY COVERED BY POLICY NUMBER NO324100S002 is US\$ 8,825.00 IN RESPECT OF THE UNDISPUTED ACTUAL CASH VALUE OF A 1991 J & J TRAILER, VIN 6060

The said loss or damage did not originate by any act, design, or procurement on the part of the Undersigned nor on the part of anyone having interest in the property insured, or in the said policy of insurance; nor in any consequence of any fraud or evil practice done or suffered by the Undersigned and that no property saved has in any manner been concealed.

It is expressly understood and agreed that the furnishing of the "Proof of Loss" blank to the insured, or assistance in making up this statement by an adjuster or any person otherwise an agent of Underwriters is an act of courtesy and is not a waiver of any rights of said Underwriters.

In consideration of payment, if made, of the amount set forth below by Underwriters, the Undersigned hereby agrees to release and discharge Underwriters from any and all liability under its policy for the undisputed value of said loss and/or damage. The Undersigned further agrees upon said payment to hold Underwriters, its successors or assigns, free and harmless from further claims for the loss described. The Undersigned hereby directs the above-described Underwriters to pay to:

\$

|                                      |                                     |                       |
|--------------------------------------|-------------------------------------|-----------------------|
| <u>RR 1 BOX 316 H</u>                | <u>UNDISPUTED ACTUAL CASH VALUE</u> | <u>\$ 8,825.00</u>    |
| <u>HOUTZDALE, PENNSYLVANIA 16651</u> | <u>LESS: POLICY DEDUCTIBLE</u>      | <u>\$ ( 5,000.00)</u> |
|                                      | <u>LESS: SALVAGE RETAINED</u>       | <u>\$ ( 1,556.00)</u> |
|                                      |                                     | <u>\$</u>             |

**TOTAL PAYMENT** (entire loss or damage, less deductible, if applicable) \$ 2,269.00  
and agrees that such payment shall fully discharge Underwriters from any and all claims arising out of the above described loss in respect of the undisputed value of the claim. Any additional value agreed and accepted by Underwriters will be settled through a Supplemental Proof of Loss. **SETTLEMENT DISPUTED VALUE THAT YOU BELIEVE IS DUE UNDER THE TERMS AND CONDITIONS OF THE APPLICABLE POLICY OF INSURANCE.**

The Undersigned hereby assigns, transfers, and sets over to Underwriters any and all claims or causes of action of whatsoever kind and nature which the Undersigned now has, or may hereafter have, to recover against any person or persons as the result of said occurrence and loss as described above, to the extent of the payment above made; the Undersigned agrees that Underwriters may enforce the same in such manner as shall be necessary or appropriate for the use and benefit of Underwriters, either in its own name or in the name of the Undersigned, that the Undersigned will furnish such papers, information or evidence as shall be within the Undersigned's possession or control for the purpose of enforcing such claim, demand or cause of action; and further that Underwriters on the Undersigned's behalf may execute all receipt's and releases; and endorse all checks and drafts received in payment of said loss or damage.

The undersigned covenants that no release or settlement of any such claim, demand or cause of action has been made.

The Undersigned affirms that the statements herein made are true. Any person who knowingly and with intent to defraud any insurance company or other person files an application for insurance or statement of claim containing any materially false information, or conceals for the purpose of misleading, information containing any fact material thereto, commits a fraudulent insurance act which is a crime and subjects such person to criminal and civil penalties.

Witness \_\_\_\_\_

Insured

Witness \_\_\_\_\_ hand at \_\_\_\_\_

this \_\_\_\_\_ day of \_\_\_\_\_ 20 \_\_\_\_\_

State of \_\_\_\_\_

County of \_\_\_\_\_

20 \_\_\_\_\_

Personally appeared \_\_\_\_\_ signer of the foregoing statement who made solemn oath to the truth of same, and that no material fact is withheld of which said Company should be advised. Subscribed and sworn before me, the day and date written above.

My Commission expires \_\_\_\_\_, 20 \_\_\_\_\_

(Notary Public)

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

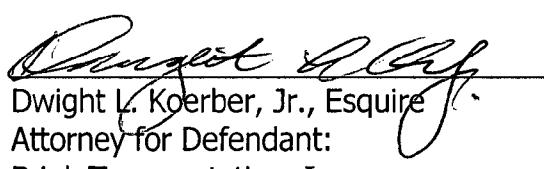
\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 22<sup>nd</sup> day of August 2005 the undersigned  
served a true and correct copy of the COMPLAINT AGAINST ADDITIONAL DEFENDANTS  
filed in the above-captioned matter upon counsel for Plaintiff and upon counsel for  
Additional Defendants. Such document was served via United States First Class Mail upon  
the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Wendy D. Testa, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL DIVISION

\*  
PRESTON AMERICA, INC.,  
Plaintiff

-vs-

BRINK TRANSPORTATION, INC.,  
Defendant

-vs-

LLOYD'S OF LONDON AND  
BESSO, LTD.,  
Additional Defendants

\* Docket No. 2005-653-CD

\*

\*

\*

\*

JK  
Type of pleading:  
AFFIDAVIT OF SERVICE

FILED IN MERCER  
COUNTY

2005 AUG -1 A q 14

ELIZABETH F. FAIR  
PROTHONOTARY

Filed on behalf of:  
DEFENDANT, Brink  
Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.,  
Esquire  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611



COURT, MERCER COUNTY, STATE OF PENNSYLVANIA

PRESTON AMERICA, INC.

Plaintiff/Petitioner

Vs

BRINK TRANSPORTATION  
LLOYD'S OF LONDON  
LB550 LTD.

Defendant/Respondent

STATE OF NEW YORK }

COUNTY OF NEW YORK } SS:

**AFFIDAVIT OF SERVICE**

Sheriff's Case No. M05-2046

Index No. \_\_\_\_\_

DANIEL KING, being duly sworn, affirms that he/she is a Deputy Sheriff of the City of New York, being over the age of eighteen years, is not a party to this action or proceeding, and served the annexed, WIT OF SUMMONS TO JOIN in the above titled action or proceeding on the 14TH day of JULY, 2005, at approximately 3:25 a.m.(p.m), at MENDES & MOUNT, 750 7TH AVE, in the borough of NEW YORK, County of NEW YORK, service was made upon LLOYD'S OF LONDON, the defendant/respondent, in the following manner:

**PERSONAL SERVICE**  By delivering to and leaving with the above named defendant/respondent personally a true copy thereof, said person being known as the person mentioned and described herein.

**ALTERNATE PERSON**  By delivering to and leaving a true copy thereof with, \_\_\_\_\_, a person of suitable age and discretion, who is \_\_\_\_\_ to the defendant/respondent. Said address is the dwelling place/place of business of the party served.

**AFFIXED TO PREMISES**  By affixing a true copy thereof to the door of the above mentioned address, said address being the  dwelling place  place of business of the defendant/respondent.

**MAILED**  On \_\_\_\_\_ I mailed the \_\_\_\_\_ by first class mail to the defendant/respondent at his/her last known residence/actual place of business in an envelope bearing the legend "PERSONAL AND CONFIDENTIAL" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the defendant/respondent.

**CORPORATION**  By delivering to and leaving with, ANTHONY SPAIN, a true copy thereof. Said person stated he/she is the PORTER, MENDES & MOUNT an agent authorized to accept service of legal process.

**STATUTORY FEE**  At the time of service, a statutory fee of \$ \_\_\_\_\_ was also left with the person mentioned and described herein.

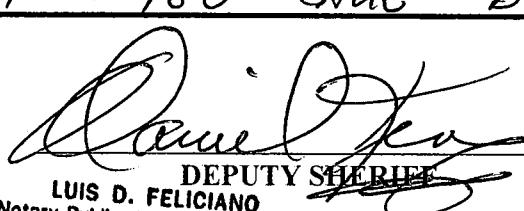
**OTHER:**  \_\_\_\_\_

**DESCRIPTION**  The person served is a  Male  Female and approximately: Age: 40 Height: 5'11" Weight: 180 Skin CAUC Hair: BRN

**NOTARY**

Sworn to (affirmed) before me this  
15 day of July, 2005

D. Feliciano

  
DEPUTY SHERIFF  
LUIS D. FELICIANO  
Notary Public, State of New York  
No. 02FE6037555  
Qualified in Bronx County  
Commission Expires Feb 22, 2006

8/29/98

Writ of Summons to Join

Commonwealth of Pennsylvania  
County of Mercer

No.: 2005-00653

PRESTON AMERICA INC

\*\* VERSUS \*\*

BRINK TRANSPORTATION

TO: *6/3/05 AS.* LLOYD'S OF LONDON AND BESSO LIMITED (Add'l Def.)  
LLOYD'S OF LONDON AND BESSO LIMITED

DEF ATTY:

KOERBER DWIGHT L JR  
110 NORTH SECOND STREET  
PO BOX 1320  
CLEARFIELD, PA 16830

You are notified that the following Defendant(s),

BRINK TRANSPORTATION

has joined you as an additional defendant in this action, which  
you are required to defend.

Date: May 16, 2005

*Elizabeth F. Laird, Esq.*  
Prothonotary (Clerk)

By

Deputy

*May 16 2005*

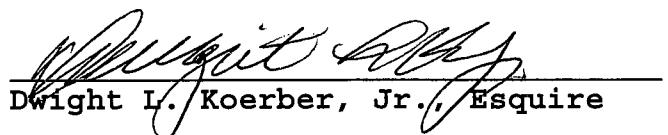
Attested to be a true and  
correct copy of the original.

*Elizabeth F. Laird, Esq.*  
Prothonotary

CERTIFICATE OF SERVICE

I certify that on this 29<sup>th</sup> day of July, 2005, a copy of the foregoing Affidavit of Service has been served by United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
Lewis and Ristvey, P.C.  
689 North Hermitage Road  
P. O. Box 1024  
Hermitage, PA 16148-1024

  
Dwight L. Koerber, Jr., Esquire

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL DIVISION

\*  
PRESTON AMERICA, INC.,  
Plaintiff

-vs-

BRINK TRANSPORTATION, INC.,  
Defendant

-vs-

LLOYD'S OF LONDON AND  
BESSO, LTD.,  
Additional Defendants

\* Docket No. 2005-653-CD

\*

\*

\*

\*

\*

Type of pleading:  
AFFIDAVIT OF SERVICE

100  
FILED IN MERCER  
COUNTY

2005 AUG - 1 A q: 14

ELIZABETH F. FAIR  
PROTHONOTARY

Filed on behalf of:  
DEFENDANT, Brink  
Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.,  
Esquire  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

COURT, MERCER COUNTY, STATE OF PENNSYLVANIA

PRESTON AMERICA, INC.

Plaintiff/Petitioner

Vs

BRINK TRANSPORTATION  
LLOYD'S OF LONDON  
+ BESSO LTD.

Defendant/Respondent

STATE OF NEW YORK }

COUNTY OF NEW YORK } SS:

DANIEL KING, being duly sworn, affirms that he/she is a Deputy Sheriff of the City of New York, being over the age of eighteen years, is not a party to this action or proceeding, and served the annexed, WRIT OF SUMMONS TO JOIN in the above titled action or proceeding on the 14TH day of JULY, 2005, at approximately 3:25 a.m./p.m. at MENDES & MOUNT, 750 7TH Ave, in the borough of NEW YORK, County of NEW YORK, service was made upon BESSO LTD., the defendant/respondent, in the following manner:

**PERSONAL SERVICE**  By delivering to and leaving with the above named defendant/respondent personally a true copy thereof, said person being known as the person mentioned and described herein.

**ALTERNATE PERSON**  By delivering to and leaving a true copy thereof with, \_\_\_\_\_, a person of suitable age and discretion, who is \_\_\_\_\_ to the defendant/respondent. Said address is the dwelling place/place of business of the party served.

**AFFIXED TO PREMISES**  By affixing a true copy thereof to the door of the above mentioned address, said address being the [ ] dwelling place [ ] place of business of the defendant/respondent.

**MAILED**  On \_\_\_\_\_ I mailed the \_\_\_\_\_ by first class mail to the defendant/respondent at his/her last known residence/actual place of business in an envelope bearing the legend "PERSONAL AND CONFIDENTIAL" and not indicating on the outside thereof, by return address or otherwise, that the communication is from an attorney or concerns an action against the defendant/respondent.

**CORPORATION**  By delivering to and leaving with, ANTHONY SPAIN, a true copy thereof. Said person stated he/she is the PARTNER, MENDES & MOUNT an agent authorized to accept service of legal process.

**STATUTORY FEE**  At the time of service, a statutory fee of \$ \_\_\_\_\_ was also left with the person mentioned and described herein.

**OTHER:**  \_\_\_\_\_

**DESCRIPTION**  The person served is a  Male  Female and approximately: Age: 40 Height: 5'11" Weight: 180 Skin: CAUC Hair: BRN

NOTARY

Sworn to (affirmed) before me this

15 day of July, 2005

D. Feliciano

Reine D. Feliciano  
DEPUTY SHERIFF

LUIS D. FELICIANO  
Notary Public, State of New York  
No. 02FE6037555  
Qualified in Bronx County  
Commission Expires Feb 22, 2006

8/29/98

Writ of Summons to Join

Commonwealth of Pennsylvania  
County of Mercer

No.: 2005-00653

PRESTON AMERICA INC

\*\* VERSUS \*\*

TO: *6/3/05 AS.*  
BRINK TRANSPORTATION  
LLOYD'S OF LONDON AND BESSO LIMITED (Add'l Def.)  
LLOYD'S OF LONDON AND BESSO LIMITED

DEF ATTY:  
KOERBER DWIGHT L JR  
110 NORTH SECOND STREET  
PO BOX 1320  
CLEARFIELD, PA 16830

You are notified that the following Defendant(s),

BRINK TRANSPORTATION

has joined you as an additional defendant in this action, which  
you are required to defend.

Date: May 16, 2005

*Elizabeth F. Laufer*  
Prothonotary (Clerk)

By \_\_\_\_\_ Deputy

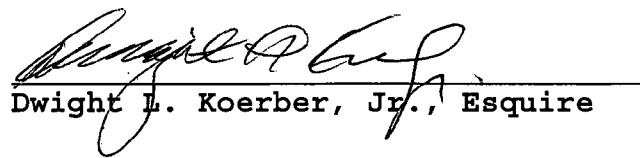
*May 16 2005*  
Attested to be a true and  
correct copy of the original.

*Elizabeth F. Laufer*  
Prothonotary

CERTIFICATE OF SERVICE

I certify that on this 29<sup>th</sup> day of July, 2005, a copy of the foregoing Affidavit of Service has been served by United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
Lewis and Ristvey, P.C.  
689 North Hermitage Road  
P. O. Box 1024  
Hermitage, PA 16148-1024

  
Dwight L. Koerber, Jr., Esquire

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP <sup>NO.</sup> *✓* FILED IN MERCER

Kevin T. Kavanagh, Esquire

Attorney I.D. No. 45442

The Curtis Center, Suite 1130 East

Independence Square West

Philadelphia, Pennsylvania 19106

Telephone: (215) 627-6900

Facsimile: (215) 627- 2665

2005 JUL 27 A 8:57

LIZABETH F. FAIR  
PROTHONOTARY *EL*

PRESTON AMERICA, INC.

MERCER COUNTY  
COURT OF COMMON PLEAS

Plaintiffs, :

v. :

DOCKET NO.: 2005-00653

BESSO LTD. :

and :

THOSE CERTAIN UNDERWRITER'S AT :

LLOYD'S OF LONDON WHO SUBSCRIBE  
TO POLICY NO. NO. 3245100S :

Defendants :

**ENTRY OF APPEARANCE**

TO THE PROTHONOTARY:

Kindly enter my appearance on behalf of Besso Ltd. and Those Certain Underwriters at

Lloyd's of London Who Subscribe to Policy No. 3245100S, in the above captioned matter.

Respectfully submitted,

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

By: *Wendy D. Testa*

Wendy D. Testa, Esquire  
Attorney for Defendants

Date: 7/25/05



WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

153436.1 THE CURTIS CENTER • SUITE 1130 EAST • INDEPENDENCE SQUARE WEST • PHILADELPHIA, PA 19106  
PHONE: (215) 627-6900 • FAX: (215) 627-2665

**CERTIFICATE OF SERVICE**

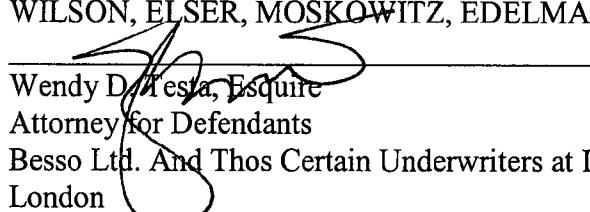
Wendy D. Testa, attorney for Besso Ltd. and Those Certain Underwriters at Lloyd's of London Who Subscribe to Policy No. 3245100S, certifies that on July 25, 2005 she sent a copy of the foregoing Entry of Appearance via United States mail, first class, postage prepaid, to:

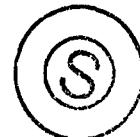
Robert G. Yeatts, Esquire  
Lewis and Ristvey, P.C.  
689 N. Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Dwight L. Koerber, Jr.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830

By:

WILSON, ELSER, MOSKOWITZ, EDELMAN & DICKER LLP

  
Wendy D. Testa, Esquire  
Attorney for Defendants  
Besso Ltd. And Thos Certain Underwriters at Lloyd's of London



IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL DIVISION – LAW

PRESTON AMERICA, INC.,  
Plaintiff,

vs.

No. 2005 – 653 *ASAP*

BRINK TRANSPORTATION,  
Defendant,

vs.

2005 AUG - 3 A 10:48  
ELIZABETH F. FAIR  
PROTHONOTARY

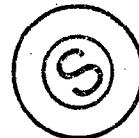
LLOYD'S OF LONDON and  
BESSO LIMITED,  
Additional Defendants.

10. FILED IN MERCER  
COUNTY

MEMORANDUM OPINION & ORDER

This matter is before the Court on Defendant's Preliminary Objections to Plaintiff's Amended Complaint, which are in the nature of demurrers. Defendant seeks to have Counts I, II, and III of the Amended Complaint dismissed, and to limit the amount of damages recoverable by Plaintiff.

This action arises from a commercial transaction between Preston America, Inc. (hereinafter "Plaintiff") and Brink Transportation (hereinafter "Defendant") involving Defendant's destroyed tractor trailer. On or about March 5, 2004, Defendant's tractor trailer was involved in an accident on Interstate 80 in Mercer County, Pennsylvania. The tractor trailer was destroyed. Plaintiff was dispatched to recover and store the tractor trailer as well as recover, move, and store the tractor trailer's cargo.



Plaintiff alleges that within a day or two of the accident, Plaintiff and Defendant agreed that Plaintiff would store Defendant's tractor trailer and cargo at Plaintiff's place of business. Specific price terms and interest rates were apparently not discussed during this meeting, though Defendant was allegedly aware that the services Plaintiff was performing were the type of services and work that Plaintiff customarily performed in its day to day business operations. See Am. Compl. ¶ 10. Plaintiff also believed that the conduct of the parties implied that Plaintiff would be compensated for its services. See *id.*

Plaintiff stored the tractor trailer and its cargo for approximately twelve months. During this period of time, Plaintiff sent invoices to Defendant for its storage services, which included interest on the unpaid balance. Defendant never objected to the amounts set forth in the invoices. Plaintiff has made repeated requests for payment, but to no avail.

Plaintiff filed an initial Complaint on March 2, 2005, to which the Defendant filed Preliminary Objections on April 8, 2005. In response to the Preliminary Objections, Plaintiff filed an Amended Complaint on April 27, 2005. The Amended Complaint, which this Memorandum addresses, alleges the following causes of action:

1. Breach of Contract
2. Unjust Enrichment
3. Account Stated



Defendant has brought preliminary objections in the nature of a demurrer to all of the above counts. In addition, Defendant has objected to the exact nature of recovery that Plaintiff is due; specifically Defendant objects to the interest rate that Plaintiff has charged Defendant.

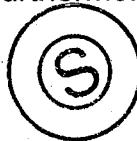
### **STANDARD OF REVIEW**

The guiding standard is well-established. "The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible." *Ham v. Sulek*, 620 A.2d 5, 9 (Pa. Super. 1993). The trial court must review the complaint to determine "whether the complaint adequately states a claim for relief under any theory of law." *Id.* To evaluate a demurrer under this standard, the court must accept as true all material averments of the complaint and may sustain the demurrer only if the law will not permit a recovery. See *Mellon Bank, N.A. v. Fabinyi*, 650 A.2d 895, 899 (Pa. Super. 1994). "Where any doubt exists as to whether a demurrer should be sustained, it must be resolved in favor of overruling the demurrer." *Mistick, Inc. v. Northwestern Nat'l Cas. Co.*, 806 A.2d 39, 42 (Pa. Super. 2002).

### **DISCUSSION OF LAW**

#### **I. Measure of Damages**

In its Preliminary Objections to Plaintiff's Amended Complaint, Defendant objects to Plaintiff's measure of damages. Specifically, Defendant objects to the method at which Plaintiff arrived at its total of damages. However, this is an evidentiary question, not an issue to be resolved by a demurrer. Furthermore, the



Amended Complaint merely avers a total without any breakdown. Defendant can engage in discovery to obtain a breakdown of damages.

Defendant also objects to the imposition of interest charges on the sums that it allegedly owes to Plaintiff.<sup>1</sup> Under Pennsylvania law, “[i]f the breach consists of a failure to pay a definite sum in money ... with fixed or ascertainable monetary value, interest is recoverable from the time for performance on the amount due ....” RESTATEMENT (SECOND) OF CONTRACTS § 354 (1981); *Daset Mining Corp. v. Indus. Fuels Corp.*, 473 A.2d 584, 595 (Pa. Super. 1984). In other words, “[i]n contract cases, prejudgment interest is awardable as of right.” *Daset Mining Corp.*, 473 A.2d at 595. To determine the rate of interest, the Pennsylvania Supreme Court has held:

[A] debtor who defaults in the payment of the principal of an obligation when due and payable becomes liable for interest from the date of such default at the legal rate of 6% per annum until payment is made, irrespective of the rate proscribed in the obligation itself for the period prior to maturity .... [I]n the absence of an agreement to the contrary, a liquidated claim carries interest at the legal rate from the time the debt becomes due.

*Miller v. City of Reading*, 87 A.2d 223, 225 (Pa. 1953); see also 41 PA. STAT. ANN. § 201 (1999) (setting “the legal rate of interest” at six percent per annum); *Daset Mining Corp.*, 473 A.2d at 594-95 (“in claims that arise out of a contractual right, interest has been allowed at the legal rate from the date that payment was

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<sup>1</sup> Defendant did not properly raise this question in its Preliminary Objections, but merely mentions it in its brief in support thereof. However, the Court will briefly deal with the question of interest rates and charges for the sake of expedience in this case.

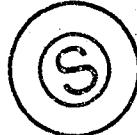
wrongfully withheld, where the damages are liquidated and certain, and the interest is readily ascertainable through computation.").

As a preliminary matter, the court notes that Plaintiff has not attached copies of the exact invoices it sent to Defendant every month. However, at the demurrer stage, the court must view these monthly charges as being due and payable by Defendant every month. Therefore, Defendant would have owed a definable sum to Plaintiff every month, and defaulted on the aggregate bill through nonpayment every month, according to Plaintiff's Amended Complaint. Irrespective of the interest rate mentioned in the invoice itself, Defendant would owe to Plaintiff the legal rate of interest every month, which case law and statute define as six percent per annum. The interest rate on the invoices due, therefore, would amount to six percent per annum for each invoice, calculated from the date that the invoice became due.<sup>2</sup>

Accordingly, Defendant's demurrer regarding the calculation of damages will be denied. However, Plaintiff will only be permitted to recover interest at the legal rate, not the rate on its invoice.

---

<sup>2</sup> The court notes also that while Plaintiff has not attached the actual invoices to its Amended Complaint, in its prayer for relief, it asks the court for "interest at the legal rate." Statutory law states that "[r]eference in any law or document...to 'the legal rate of interest'...without specification of the applicable rate shall be construed to refer to the rate of interest of six per cent per annum." 41 PA. STAT. ANN. § 202.



## **II. Breach of Contract and Unjust Enrichment**

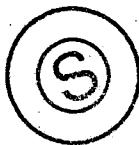
Defendant also argues that insufficient facts were averred within the Amended Complaint to support causes of action for Breach of Contract and for Unjust Enrichment. The court disagrees.

### **A. Breach of Contract**

In Pennsylvania "[a] cause of action for breach of contract must be established by pleading (1) the existence of a contract, including its essential terms, (2) a breach of a duty imposed by the contract and (3) resultant damages." *Corestates Bank, N.A. v. Cutillo*, 723 A.2d 1053, 1058 (Pa. Super. 1999) (citation omitted). "While not every term of a contract must be stated in complete detail, every element must be specifically pleaded." *Id.*

In order to form any type of contract, there must be an offer, acceptance, consideration and mutual meeting of the minds. *Jenkins v. County of Schuylkill*, 658 A.2d 380, 383 (Pa. Super. 1995). While it is true that an informal or oral contract may be enforced even though the parties have not formalized their agreement in writing, the parties must still agree on the essential terms and have a meeting of the minds. See *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999); *GMH Assocs., Inc. v. Prudential Realty Group*, 752 A.2d 889, 900 (Pa. Super. 2000).

Plaintiff has pled facts sufficient to survive a demurrer by averring elements of offer, acceptance, and consideration. These elements can be found in paragraphs 3, 8, 9, 10, and 11 of Plaintiff's Amended Complaint.



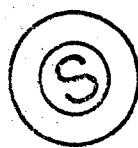
### **B. Unjust Enrichment**

To support a claim for unjust enrichment, a plaintiff must plead facts that, if proven, demonstrate that a defendant wrongfully secured or passively received benefits from the plaintiff that it would be unconscionable for defendant to retain without payment over to the plaintiff. See *Martin v. Little, Brown and Co.*, 450 A.2d 984, 988 (Pa. Super. 1981); *Ameripro Search, Inc. v. Fleming Steel Co.*, 787 A.2d 988, 991 (Pa. Super. 2001). The most significant element of a claim for unjust enrichment is the *unjust* portion; the doctrine does not apply simply because a defendant may have benefited from the actions of the plaintiff. *Id.*

Plaintiff has pled facts sufficient to survive a demurrer by averring facts which demonstrate that Defendant wrongfully secured benefits from Plaintiff (such as the removal of the tractor trailer and the transloading of cargo from the interstate as well as the storage of said tractor trailer and cargo at Plaintiff's place of business), and Defendant's retention of these benefits without payment to Plaintiff would be unconscionable. These elements can be found in paragraphs 2, 8, 10, 11, 16, 17, and 18 of Plaintiff's Amended Complaint. Defendant's demurrer as to these two counts will likewise be denied.

### **III. Account Stated**

Finally, Defendant contends that Plaintiff has not pled facts sufficient to support a cause of action for Account Stated. The court agrees and will accordingly grant the demurrer to Count III of the Amended Complaint.

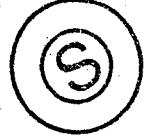


Under Pennsylvania law, an account stated is defined as an "account in writing examined and accepted by both parties." *Leinbach v. Wolle*, 61 A. 248, 248 (Pa. 1905) (citations omitted); see also *David v. Veitscher Magnesitwerke Actien Gesellschaft*, 35 A.2d 346, 349 (Pa. 1944) (stating that "the gist of [an account stated] consists in an agreement to, or acquiescence in, the correctness of the account, so that in proving the account stated, it is not necessary to show the nature of the original transaction, or indebtedness, or to set forth the items entering into the account.") (citations omitted)). A cause of action for an account stated requires that an "account must be rendered, and the other party must accept, agree to or acquiesce under such circumstances as to import a promise of payment on the one side and acceptance on the other." *C-E Glass v. Ryan*, 70 Pa. D. & C.2d 251, 253-54 (Beaver C.P. 1975) (quoting 1 P.L.E., Accounts, § 4).

While a party must accept the account stated, "this acceptance need not be express, but may be implied from the circumstances." *Leinbach*, 61 A. at 248. For instance, the Superior Court has stated that "[r]etention without objection by one party for an unreasonably long time of a statement of account rendered by the other party is a manifestation of assent ...." *Donahue v. City of Philadelphia*, 41 A.2d 879, 881 (Pa. Super. 1945) (citing *RESTATEMENT OF CONTRACTS* § 422 (1948)).<sup>3</sup> But, mere silence does not always indicate acceptance, because:

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<sup>3</sup> The *Donahue* Court relied on the First Restatement of Contracts. While the Second Restatement of Contracts has been published for a number of years, no Pennsylvania appellate court has ever adopted the Second Restatement's revision of § 422 of the First Restatement. However, the Court notes that § 422(2) of the First Restatement and § 282(1) of the Second Restatement, in this context, are identical but for small grammatical changes. Compare *RESTATEMENT OF CONTRACTS* § 422(2) (1932) with *RESTATEMENT (SECOND) OF CONTRACTS* § 282(1) (1982).



[w]here assent is inferred from the mere lapse of time, the cases indicate that there has also been shown a course of dealing, where the rendering of accounts is an accepted method of adjustment over a period of time and involving an extended series of transactions between the two parties to the suit.

*C-E Glass*, 70 Pa D. & C.2d at 254 (citation omitted).<sup>4</sup>

Recent appellate decisions on accounts stated are sparse. However, a fairly recent set of facts in *C-E Glass* is instructive on this matter of law. In *C-E Glass*, plaintiff and defendant engaged in four business transactions over a period of several months. *Id.* at 253. Plaintiff sent an invoice to defendant every month over the course of their business relationship, and defendant did not respond to any of these invoices. *Id.* The court held that this relationship was "insufficient to establish an account stated." *Id.* The court opined that in these limited transactions, the facts had not demonstrated the required "course of dealing" needed to establish a cause of action for account stated. See *id.* at 254.

Turning to the facts of our case, Plaintiff alleges that it salvaged Defendant's cargo and tractor trailer on March 5, 2004, and proceeded to hold the cargo and tractor trailer for 12 months, sending an invoice for the storage costs to Defendant every month, to which Defendant did not respond. However, Plaintiff alleges no other business transaction or course of dealing outside of the March 5, 2004 salvage and subsequent storage of Defendant's cargo and tractor trailer.

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<sup>4</sup> For an example of prior appellate cases where a course of dealing was deemed instructive in acquiescence by silence in an account stated cause of action, see *Leinbach*, 61 A. at 248 (holding that the previous course of dealings among partners was instrumental in using a partner's silence to mean he accepted the account stated).

Hence, no prior "course of dealings" can be deemed to exist at the demurrer stage absent specific facts in Plaintiff's Amended Complaint.

Here, the court finds that Plaintiff did render an account to Defendant, but Defendant did not expressly accept the account as stated by Plaintiff, nor does Plaintiff aver the required course of dealings with Defendant that would allow for acquiescence by silence. The parties merely met with one another once, where they did not even go so far as to cover the price terms of their transaction. One transaction or meeting with another party can certainly not be called a course of dealings, which is required for an acceptance by silence in a cause of action for account stated. See *id.* at 253-54. The limited interaction between the parties likewise demonstrates that the rendering of accounts was not an accepted method of account adjustment over a period of time, and therefore, cannot be used as a justification for an account stated cause of action based upon the record as it now stands. See *id.*

**HENCE THIS ORDER:**



IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL DIVISION – LAW

PRESTON AMERICA, INC.,  
Plaintiff,

vs.

No. 2005 – 653

BRINK TRANSPORTATION,  
Defendant,

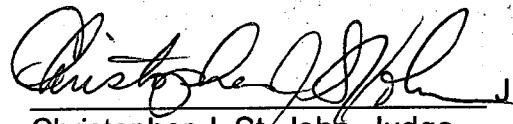
vs.

LLOYD'S OF LONDON and  
BESSO LIMITED,  
Additional Defendants.

ORDER

AND NOW, this 2<sup>nd</sup> day of August, 2005, Defendant Brink Transportation's Preliminary Objections in the Nature of a Demurrer to the Amended Complaint are SUSTAINED IN PART and DENIED IN PART. Defendant's demurrer as to Counts I and II is DENIED. The legal interest rate for any alleged sums owed to Plaintiff, however, shall be at the legal rate of interest as set in accordance with the principles set forth in the Memorandum Opinion. Defendant's other objections to Plaintiff's calculation of damages are DENIED at this stage of the proceedings. It is further ordered that Defendant's demurrer to Count III is SUSTAINED.

BY THE COURT:

  
Christopher J. St. John, Judge

8/3/05  
cc: Atty Yeates  
Atty Koerler  
Atty Sista



IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff

vs.

BRINK TRANSPORTATION,

Defendant

No. 2005-653-CD

**PLAINTIFF'S BRIEF IN OPPOSITION TO  
DEFENDANT BRINK TRANSPORTATION'S  
PRELIMINARY OBJECTIONS**

Filed on behalf of Plaintiff,  
Preston America, Inc.,

Counsel of Record for the Plaintiff:  
Robert G. Yeatts, Esquire  
Pa. I.D. #34289

LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
PO Box 1024  
Hermitage, PA 16148

*[Handwritten Signature]*  
**RECEIVED**

JUN - 2 2005

**PROTHONOTARY**

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

## PRESTON AMERICA, INC.,

Plaintiff,

VS.

No. 2005-653-CD

## BRINK TRANSPORTATION,

**Defendant**

**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT BRINK  
TRANSPORTATION'S PRELIMINARY OBJECTIONS**

This Brief is filed on behalf of the Plaintiff, Preston America, Inc., in opposition to the preliminary objections to Amended Complaint filed by Defendant, Brink Transportation.

## I. PROCEDURAL HISTORY OF THE CASE

On March 2, 2005, Plaintiff, Preston America, Inc., filed a Complaint against the Defendant, Brink Transportation, alleging Breach of Contract, and in the alternative claims for Unjust Enrichment and Account Stated.

All counts refer to an incident which took place on or about March 5, 2004, when Defendant's tractor-trailer was involved in an accident on Interstate 80 in Mercer County, Pennsylvania. On that date, Preston America was dispatched by the Mercer County 911 Center to recover the wrecked vehicle and assist with transloading the cargo.

Preston assisted in the transloading of cargo and stored the same. Plaintiff's charges for all work related to the recovery of the tractor-trailer, transloading and storage of cargo, and finance charges were set forth in its Complaint.

## II. ARGUMENT

### A. DEMURRER FOR BREACH OF CONTRACT

The Defendant has filed Preliminary Objections challenging the legal sufficiency of the claim or cause of action of Plaintiff's Amended Complaint pursuant to Pa. R.C.P. 1028.(a)(4), commonly referred to as a demurrer. In ruling on a demurrer, the Court should observe the following standards:

In ruling o[n] a Preliminary Objection in the nature of a Demurrer, this Court must accept as true all well-pleaded material allegations in the [Amended Complaint] as well as all inferences reasonably deduced therefrom. This Court need not accept as true conclusions of law, unwarranted inferences from facts, argumentative allegations or expressions of opinions. In order to sustain a Preliminary Objection [in the nature or a Demurrer], this Court must know with certainty that the law will [not] permit recovery and should resolve any doubt by refusing to sustain them.

First Nat. Bank of Pennsylvania v. First Western Bank, F.S.B., 28 Mercer County L.J. 394, 397 (1998) (Dobson, J.) (citations omitted); see, also, Doyle v. Springfield Twp. Bd. of Commrs., 145 A.2d 695 (Pa. 1958) (averments in plaintiff's amended complaint were required to be taken as true).

The only issue to be resolved in considering a demurrer is whether the facts are sufficient to entitle the pleader to relief. Intermit. Union of Operating Engineers v. Linesville Constr. Co., 322 A.2d 353, 356 (Pa. 1974). The pleading on its face must demonstrate that the claim "cannot be sustained, and the law will not permit recovery. If there is any doubt, this should be resolved in favor of overruling the demurrer." Gekas v. Shapp, 364 A.2d 691, 693 (Pa. 1976).

Furthermore, a demurrer tests the legal sufficiency of a cause of action; it is not used to test the limits of a party's liability. See Dept. of Environmental Resources v. Hartford Accident & Indem. Co., 396 A.2d 885, 889 (Pa. Commw. 1979). As relayed above, the question presented by a demurrer is whether, on the facts averred, the law says with certainty that no recovery is

possible. Werner v. Plater-Zyberk, 799 A.2d 776, 783 (Pa. Super.) (citation omitted), appeal denied, 806 A.2d 862 (Pa. 2002). To be clear and free from doubt, "It must appear with certainty that the law would not permit recovery by the plaintiff upon the facts averred. Any doubt should be resolved by refusal to sustain the objections." Id., (citations omitted).

Where a party files a preliminary objection in the nature of a demurrer pursuant to Pa. R.C.P. 1028(a)(4), the Court's review is confined to the content of the Complaint, or in this case, the contents of the Amended Complaint. See In re Adoption of S.P.T., 783 A.2d 779, 782 (Pa. Super. 2001) (citing Mellon Bank, N.A. v. Fabinyi, 650 A.2d 895, 899 (Pa. Super. 1994)). A preliminary objection in the nature of a demurrer requires the Court to resolve whether or not the Plaintiff has pled valid causes of action based solely on the pleadings; no testimony or other evidence outside of the pleadings may be considered to dispose the legal issues presented by a demurrer. Mellon Bank, 650 A.2d at 899 (citing Internat. Union of Operating Engineers, Local No. 66 v. Linesville Construc. Co., 322 A.2d 353 (Pa. 1974)). Thus, the Court cannot decide a demurrer based on anything other than the pleadings, for example, it cannot base a demurrer on affidavits, e.g., Bell Fuel Corp. v. Cattolico, 544 A.2d 450, 454 (Pa. Super. 1988), appeal denied, 554 A.2d 505 (Pa. 1989), the Court may not rely on deposition testimony, Orner v. Mallick, 527 A.2d 521, 524, n.3 (Pa. 1987), rely on testimony or other evidence, e.g., Mistik, Inc. v. Northwestern Nat. Cas. Co., 806 A.2d 39, 42, (Pa. Super. 2002), nor may the Court even take judicial notice of facts outside the record. See 220 Partnership v. Philadelphia Elec. Co., 650 A.2d 1094, 1096-97 (Pa. Super. 1998). It is improper for a court to grant a demurrer based on

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<sup>1</sup> Defendant's recitation of the procedural background in its Brief contains various statements which are not in evidence, or are otherwise irrelevant, and the same should be disregarded in the determination on the Defendant's preliminary objections.

facts supplied by a demurrer or on implied facts that are not part of the record.<sup>1</sup> See Barbet v. Edelstein, 499 A.2d 1106, 1107-1108 (Pa. Super. 1985) (citing and relying upon Nat. Recovery Sys. v. Frebrero, 430 A.2d 686 (Pa. Super. 1981)). The Court would commit reversible error if it were to consider facts or allegations beyond the face of the Amended Complaint in ruling on any demurrer or allegations in support of any demurrer raised by the Defendants. E.g., Mellon Bank, 650 A.2d at 899; Elling v. Kallas, 482 A.2d 1065, 1067 (Pa. Super. 1984).

It is axiomatic that a cause of action for breach of contract is established by the pleading of (1) the existence of a contract to which the Plaintiff and Defendant were parties; (2) the essential terms of the contract; (3) a breach of a duty imposed by the contract; and (4) that damages resulted from the breach. See, e.g. General State Auth. V. Coleman Cable & Wire Co., 365 A.2d 1347, 1349 (Pa. Commw. 1976); Corestates Bank, N.A. v. Cutillo, 723 A.2d 1053, 1058 (Pa. Super. 1999). Moreover, while not every term of a contract must be stated in complete detail, every element of the cause of action must be pled. See, Smith v. Snaith, 422 A.2d 1379, 1382 (Pa. Super. 1980).

In the present matter, Plaintiff has quoted the essential terms of the agreement. While the specifics of the contract may not have been pled, the essential elements have been, and for purposes of the demurrer, Count I is legally sufficient.

Much of the Defendant's argument concerns the Plaintiff's various claims for damages. On Preliminary Objections in the nature of a demurrer, the Court will not pass upon the propriety of damages nor will it decide questions relating to the proper measure of damages. See Hudok v. Donegal Mut. Ins. Company, 264 A.2d 668, 671 & n.2 (Pa. 1970). Furthermore, if the Court concludes the Plaintiff had made out a *prima facie* case for its claims, a demurrer cannot be

granted where the claimed damages are more than may ultimately be recovered. See Hudok, 264 A.2d at 671 & n.2.

Defendant argues that the Plaintiff seeks to recover for unjust enrichment at the same time it seeks to recover for breach of contract. Although Defendant in its brief notes that Plaintiff pled these counts in the alternative, the Defendant continues to argue that the Plaintiff cannot allege that there was a contract and unjust enrichment at the same time. The Defendant confuses pleading with recovery. The rules specifically allow pleading in the alternative and Plaintiff submits that there can be pleading in the alternative even though the Plaintiff may not be able to recover under both theories. See, Pa. R.C.P. 1020; See, also, Crawford's Auto Center, Inc., v Commonwealth of Pennsylvania, 655 A.2d 1064 (Pa. Commonwealth, 1995). The cases cited by the Defendant do not bar pleading breach of contract and unjust enrichment where the claims are pled in the alternative.

### **CONCLUSION**

The Plaintiff has properly pled a claim for breach of contract, and alternatively, a claim for unjust enrichment and account stated. The propriety of damages cannot be decided on preliminary objections in the nature of a demurrer.

The Plaintiff respectfully requests the Defendant's Preliminary Objections be dismissed.

Respectfully submitted,

LEWIS AND RISTVEY, P.C.

By:

  
Robert G. Yeatts, Esquire  
Attorneys for the Plaintiff,  
Preston America, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

*[Signature]*  
**RECEIVED**

MAY 19 2005

**PROTHONOTARY**

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**BRIEF OF DEFENDANT IN SUPPORT OF PRELIMINARY  
OBJECTIONS TO AMENDED COMPLAINT**

---

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

**BRIEF OF DEFENDANT IN SUPPORT OF PRELIMINARY OBJECTIONS  
TO AMENDED COMPLAINT**

This Brief is filed on behalf of Defendant, Brink Transportation, Inc. in support of the Preliminary Objections to Amended Complaint filed contemporaneously in this case.

**I.  
PROCEDURAL BACKGROUND**

This matter arises out of an incident that occurred on March 5, 2004, when a tractor-trailer combination operated by Defendant veered off Interstate 80 and then turned over, thereby resulting in the tractor and trailer both being totaled. Fortunately, there were no personal injuries involved.

Plaintiff is seeking to recover for the cost of towing Defendant's tractor-trailer to its facilities and then assessing a storage charge and financing charge for the next 12 months. This involves circumstances where both the tractor and the trailer were totaled, with there being nothing to be gained from any type of storage or protection of the vehicles, but nevertheless Plaintiff assessed a storage charge and then a financing charge<sup>1</sup> when the storage charge was not paid.

By way of explanation, if this case moves forward, Defendant would point out that after the accident occurred Defendant reached an impasse with its insurance company as to whether Defendant would be forced to accept the salvage value of the tractor and of the trailer, even though they were acknowledged as being "totaled". That impasse resulted in the units being left at Plaintiff's lot, while this impasse was being addressed. While a charge has been assessed for "storage", the tractor and trailer were not stored in the conventional sense, but instead, were retained and held for leverage. It is clear that the "storage" was done primarily to benefit the Plaintiff, as the vehicles were "totaled" and of a value well below the storage that was assessed. Furthermore, it is notable that Plaintiff did not itemize the time or expense involved in its recovery work or set forth a basis for its charges, but simply detained the vehicles and assessed a unilateral charge for its initial services and a unilateral charge for "storage" services.

It is recognized that the reasonableness of the storage charges, the duty to

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<sup>1</sup> It cannot be determined how the financing charge was calculated as it is simply listed as a financing charge at an unspecified interest rate. There is not even an allegation that Defendant agreed to such a charge. Part I of the Preliminary Objections seeks to strike any reference to financing charges.

mitigate damages, and the issue of whether or not interest is chargeable could be construed as a type of affirmative defense. In the circumstances here, however, they go to the very heart of whether or not there was a contract and what the terms of the contract were. That is why Defendant has filed Preliminary Objections.

## II.

### **ARGUMENT CONCERNING DEMURRER FOR BREACH OF CONTRACT**

As pointed out in the Preliminary Objections that have been filed herein, there is no factual statement as to what the basis of the charges was that Plaintiff has set forth in its bill. Likewise, there is no basis for establishing that the Defendant agreed to those charges. Without an allegation as to the basis upon which the charges listed in Appendix A were set forth, the fundamental issue of the terms of the contract has not been addressed by the Plaintiff in its Complaint, thereby warranting the sustaining of the demurrer which Defendant has filed. See, e.g., J.W.S. Delavau, Inc. vs. Eastern America Transport and Warehousing, 2002 Pa. Super 336, 810 A. 2d 672, 681, where the mechanics of establishing the terms of contract formation are reviewed.

Pa. R.C.P. 1019(a) requires that the material facts that a cause of action rests upon must be set forth. Without the material facts of the contract being set forth, as opposed to a bald statement at paragraph 9 that the parties entered into an oral agreement, it is respectfully submitted that it is not possible for Plaintiff to establish that there was a contract, let alone a breach. See Delavau, supra.

The necessity of setting forth the terms of the contract cannot be

overemphasized when one points to the fact that Plaintiff has added in financing charges. Under what legal theory are financing charges assessed? One has no idea, because that issue has simply not been addressed by the Plaintiff. How was the towing charge determined; the recovery charge determined; the storage charge determined? Was the claim to be paid by the insurer or the insured? Was interest to be assessed at prime, at 10%, 12%, 14%, 16% or 18%? All of these questions are unanswered because no allegation has been set forth nor has any documentation been presented to show the value of the services or Defendant's acceptance of contract terms.

Also raised in the form of a demurrer is the fact that the Plaintiff seeks to recover for unjust enrichment at the same time under a theory of quantum meruit. It is recognized that Count II is pled as an alternate count, but it cannot be denied that the measure of damages that the Plaintiff is seeking to recover under Count II is that which is set forth in Appendix A, which is the alleged breach of contract damages. Defendant would submit that as a matter of law a plaintiff cannot allege that there was a contract and sue on that contract, as the law under the doctrine of quantum meruit and unjust enrichment would entitle recovery only where the amount of compensation has not been agreed upon by the parties. See, e.g. Schlechter v. Foltz, 179 Pa. Super 119, 115 A. 2d 910 (1955); and Coldwell Banker Phyllis Real Estate vs. Romano, 422 Pa. Super 319, 619 A. 2d 376,382 (Pa. Super 1993).

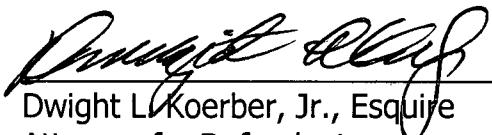
Count III also is subject to a demurrer, inasmuch as the measure of damages there likewise are set forth based upon a breach of contract theory. Without

establishing what the terms of the contract are, and without establishing that an account would be established that the Defendant would make payment on it, there is no basis for seeking to recover under an account stated basis. In short, there cannot be an account stated without a contract showing the terms to which the stated account applies. Cf., Delavau, supra, at 681.

**III.**  
**PRAYER FOR RELIEF**

Defendant prays that its Preliminary Objections be sustained, and that the Complaint herein be dismissed.

Respectfully submitted,

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

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-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

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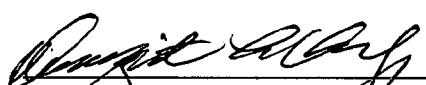
Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 16<sup>th</sup> day of May 2005 the undersigned served a true and correct copy of the BRIEF OF DEFENDANT IN SUPPORT OF PRELIMINARY OBJECTIONS TO AMENDED COMPLAINT filed in the above-captioned matter upon counsel for Plaintiff. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

  
\_\_\_\_\_  
Dwight L. Koerber, Jr., Esquire

Attorney for Defendant  
Brink Transportation, Inc.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

ELIZABETH F. FAIR  
PROTHONOTARY

NO. *✓*  
FILED IN MERCER  
COUNTY

2005 MAY 19 A 8:45

Type of Pleading:  
PRAECIPE TO SCHEDULE FOR  
ARGUMENT

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

**PRAECIPE TO SCHEDULE FOR ARGUMENT**

TO: ELIZABETY F. FAIR, PROTHONOTARY  
COURT OF COMMON PLEAS OF MERCER COUNTY  
N. Diamond St.  
Mercer, PA 16137

1. The nature of this case concerns an alleged contract between the parties for which Defendant has filed Preliminary Objections to the Amended Complaint filed by Plaintiff.

2. Counsel representing the parties is as follows:

Counsel for Plaintiff,  
Preston America, Inc.:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

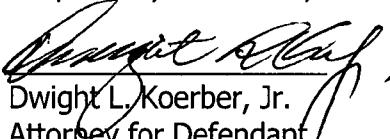
Counsel for Defendant,  
Brink Transportation, Inc.:

Dwight L. Koerber, Jr., Esquire  
LAW OFFICES OF DWIGHT L. KOERBER, JR.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830

3. As of the filing of this Praecipe, there have been no rulings entered in this case.

Please place Argument on the Preliminary Objections of Defendant Directed to Amended Complaint in the above-referenced case on the Argument List for the appropriate session of Argument Court.

Respectfully Submitted,

  
Dwight L. Koerber, Jr.  
Attorney for Defendant  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

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Brink Transportation  
Defendant

\*

-vs-

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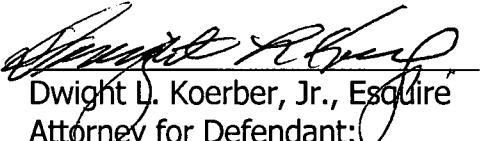
Lloyd's of London and  
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Additional Defendants

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Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

ELIZABETH F. FAIR  
PROTHONOTARY

2005 MAY 19 A 8:45

NO. 2  
FILED IN MERCER  
COUNTY

Type of Pleading:  
PRELIMINARY OBJECTIONS  
OF DEFENDANT DIRECTED TO  
AMENDED COMPLAINT

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.

\*

Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation

\*

Defendant

-vs-

\*

Lloyd's of London and

\*

Besso Limited

\*

Additional Defendants

\*

**ORDER**

NOW, this \_\_\_\_\_ day of May 2005, upon the filing of the Preliminary Objections

Of Defendant Directed to Amended Complaint, it is the Order and Decree of this Court

that Oral Argument thereon shall be held on the \_\_\_\_\_ day of \_\_\_\_\_, 2005 at

\_\_\_\_\_ a.m./p.m. at \_\_\_\_\_.

BY THE COURT:

\_\_\_\_\_, JUDGE

**COUNSEL OF RECORD:**

Counsel for Plaintiff,

Preston America, Inc.:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Counsel for Defendant,

Brink Transportation, Inc.:

Dwight L. Koerber, Jr., Esquire  
LAW OFFICES OF DWIGHT L. KOERBER, JR.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

**PRELIMINARY OBJECTIONS OF DEFENDANT  
DIRECTED TO AMENDED COMPLAINT**

COMES NOW Defendant, Brink Transportation, Inc., by and through its attorney, Dwight L. Koerber, Jr., Esquire, and files the within Preliminary Objections to the Amended Complaint filed herein and respectfully shows as follows:

**I.**

**LEGAL INSUFFICIENCY OF A PLEADING (DEMURRER)**

1. Pa. R.C.P. 1028(a)(4) provides that Preliminary Objections may be filed for the legal insufficiency of a pleading, in the form of a demurrer.
2. Defendant hereby demurrs to Count I of the pleading because of the failure of Plaintiff to set forth facts that legally support its claim for relief.

3. In paragraph 10 of the Amended Complaint, Plaintiff attempts to set forth terms to the alleged oral Agreement by stating that payment was implied, without setting forth any basis for determining how the charges were assessed. Plaintiff has not established what these services would be. Indeed, while Plaintiff attaches a list of charges, it has not presented any itemization to show how those charges were applied and to establish how the alleged claim that it is making was calculated.

4. In Counts I, II and III, Plaintiff is seeking to recover for financing charges without establishing any legal or factual basis for making a request for such relief, thereby further establishing the insufficiency of the Complaint for all three counts.

5. Based upon the deficiency set forth hereinabove, it is Defendant's position that the Complaint filed herein is legally insufficient and for that reason its demurrer should be sustained.

WHEREFORE, Defendant prays that its Preliminary Objections be sustained, that any reference to financing charges be stricken, and that Counts I, II and III of the Complaint be dismissed for failure to set forth a cause of action.

**II.**  
**DEMURRER AS TO CLAIM FOR UNJUST ENRICHMENT**

6. Pa. R.C.P. 1028 permits Preliminary Objections to be filed in the form of a demurrer when there is a legal insufficiency in a pleading.

7. Count II of the pleading herein is legally insufficient, inasmuch as the Plaintiff is seeking to recover under a theory of unjust enrichment and at the same time

seeking to recover under a theory of breach of contract. It is Defendant's position that it is mutually exclusive to proceed under these two different theories of recovery.

8. Defendant would acknowledge that Count II has been identified as being filed in the alternative, but the measure of damages that have been listed are in the nature of breach of contract damages, and clearly do not create a basis for establishing an independent basis for recovering under an unjust enrichment/quantum meruit theory, as Appendix A is used as the measure of damages for both breach of contract and quantum meruit, thereby showing that the Plaintiff's true theory of recovery is breach of contract, thereby depriving it of the right to proceed concurrently under an unjust enrichment claim.

9. Plaintiff has also failed to meet the elements for unjust enrichment as it has not listed or even alleged the time, labor or supplies that it has expended, so as to justify the bill that has been charged to Defendant.

WHEREFORE, Defendant prays that its demurrer be granted and that Count II of the Complaint be dismissed.

### **III. DEMURRER AS TO ACCOUNT STATED**

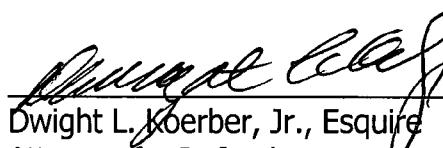
10. Pa. R.C.P. 1028 permits demurrer to be filed when the Plaintiff has failed to set forth an entitlement to recover on the facts that have been alleged.

11. In the circumstances here, Plaintiff is seeking to recovery under an account stated that arises only if there is a contractual relationship between the parties.

12. There is no separate basis for an account stated recovery here, as Plaintiff has failed to establish the terms of the underlying contract to which the alleged account stated applies.

WHEREFORE, Defendant prays that its demurrer be granted and that Count III of the Complaint be dismissed.

Respectfully submitted,

  
\_\_\_\_\_  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 16<sup>th</sup> day of May 2005 the undersigned served a true and correct copy of the PRELIMINARY OBJECTIONS OF DEFENDANT DIRECTED TO AMENDED COMPLAINT filed in the above-captioned matter upon counsel for Plaintiff. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

  
\_\_\_\_\_  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

-vs-

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

\*

NO.  
FILED IN MERCER  
COUNTY

2005 MAY 19 A 8:45

ELIZABETH F. FAIR  
PROTHONOTARY

Type of Pleading:  
PRAECIPE TO WITHDRAW  
PRELIMINARY OBJECTIONS  
TO ORIGINAL COMPLAINT

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611



**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

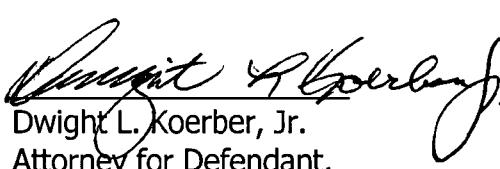
\*

**PRAECIPE TO WITHDRAW PRELIMINARY OBJECTIONS  
TO ORIGINAL COMPLAINT**

TO: ELIZABETH F. FAIR, PROTHONOTARY  
COURT OF COMMON PLEAS OF MERCER COUNTY  
N. Diamond St.  
Mercer, PA 16137

Please mark the docket to show that the Preliminary Objections Defendant filed on or about April 5, 2005 to the original Complaint have been withdrawn in view of the Amended Complaint filed by Plaintiff. This Praecipe to Withdraw is being filed Contemporaneous with Revised Preliminary Objections which are directed to the Amended Complaint.

Respectfully Submitted,

  
Dwight L. Koerber, Jr.  
Attorney for Defendant,  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation  
Defendant

\*

-vs-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

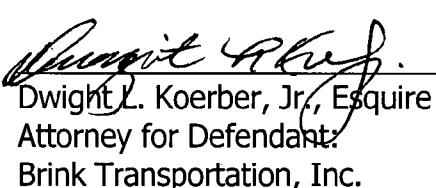
\*

\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 16<sup>th</sup> day of May 2005 the undersigned served a true and correct copy of the PRAECIPE TO WITHDRAW PRELIMINARY OBJECTIONS TO ORIGINAL COMPLAINT in the above captioned matter upon counsel for Plaintiff. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant  
Brink Transportation, Inc.

Writ of Summons to Join

Commonwealth of Pennsylvania  
County of Mercer

No.: 2005-00653

PRESTON AMERICA INC

\*\* VERSUS \*\*

BRINK TRANSPORTATION  
LLOYD'S OF LONDON AND BESSO LIMITED (Add'l Def.)  
TO: LLOYD'S OF LONDON AND BESSO LIMITED

DEF ATTY:  
KOERBER DWIGHT L JR  
110 NORTH SECOND STREET  
PO BOX 1320  
CLEARFIELD, PA 16830

You are notified that the following Defendant(s),

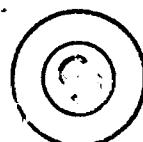
BRINK TRANSPORTATION

has joined you as an additional defendant in this action, which  
you are required to defend.

Date: May 16, 2005

*Elizabeth F. Fairless*  
Prothonotary (Clerk)

By \_\_\_\_\_  
Deputy



IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.

Plaintiff

\*

-vs-

Docket No. 2005-653-CD

Brink Transportation

Defendant

\*

\*

Lloyd's of London and

Besso Limited

Additional Defendants

\*

\*

\*

✓ *ASW*  
NO FILED IN MERCER  
COUNTY  
2005 MAY 16 A 9:53  
ELIZABETH F. FAIR  
PROTHONOTARY

Type of Pleading:  
PRAECIPE TO JOIN  
ADDITIONAL DEFENDANT

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

writ issued (4) attested writs to act as

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.

\*

Plaintiff

\*

-vs-

Docket No. 2005-653-CD

\*

Brink Transportation

\*

Defendant

-vs-

\*

Lloyd's of London and

\*

Besso Limited

\*

Additional Defendants

\*

**PRAECIPE TO JOIN ADDITIONAL DEFENDANT**

TO: Lloyd's of London  
BESSO LIMITED  
c/o Atlantic/Smith, Cropper & Deeley LLC  
7171 Bent Pine Road  
P.O. Box 770  
Willards, MD 21874

You are notified that Brink Transportation, Inc. has joined you as an additional defendant in this action, which you are required to defend.

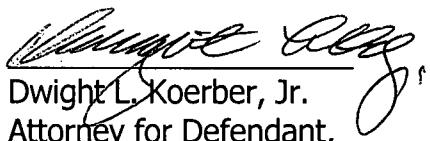
DATE: \_\_\_\_\_

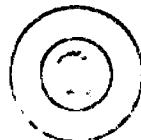
Seal of Court:

\_\_\_\_\_  
(Elizabeth F. Fair, Prothonotary)

BY: \_\_\_\_\_

Respectfully Submitted,

  
Dwight L. Koerber, Jr.  
Attorney for Defendant,  
Brink Transportation, Inc.



**LAW OFFICES  
OF  
DWIGHT L. KOERBER, JR.**

*Dwight L. Koerber, Jr.*  
Telephone (814) 765-9611

*Attorney at Law  
110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830*

*Facsimile (814) 765-9503  
Email: dkoerber@atlanticbb.net*

May 13, 2005

Elizabeth F. Fair, Prothonotary  
COURT OF COMMON PLEAS OF MERCER COUNTY  
N. Diamond St.  
Mercer, PA 16137

Via Federal Express Overnight  
8436 2635 4547

**Re: Preston America, Inc. v.  
Brink Transportation, Inc.  
Docket No. 2005-653-CD**

Dear Ms. Fair:

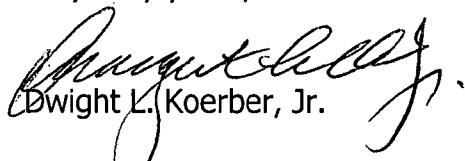
I represent Brink Transportation, Inc., Defendant in the above-referenced case. Enclosed herewith is a Praeclipe to Join Additional Defendant which I am filing on behalf of my client Brink Transportation, Inc. According to a phone conversation we had with your office, I understand that your office will be preparing the Writ and that there is no cost for that service. I would ask that you prepare the Writ as soon as reasonably possible as we are under a deadline to have the additional defendant joined no later than Tuesday, May 17, 2005.

I would request that you return 4 certified copies of the Writ to my office as we will be serving opposing counsel, Robert G. Yeatts, and we will also arrange for appropriate service upon additional defendant. Enclosed herewith is a stamped, self-addressed envelope for your convenience in returning the certified copies.

If there are any questions concerning the document I have enclosed or if any other information is needed, please call my office at the phone number in this letterhead.

Thank you for your assistance in this matter.

Very truly yours,

  
Dwight L. Koerber, Jr.

DLK/sah

Enclosures: Praeclipe to Join Additional Defendant  
cc: Brink Transportation, Inc.  
Robert G. Yeatts, Esquire



IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff,

vs.

BRINK TRANSPORTATION,

Defendant

No. 2005-653-CD

NO FILED IN MERCER COUNTY  
LIZABETH F. FAIR  
PROTHONOTARY  
2005 APR 21 P 3:35  
J

**NOTICE TO CLAIM AND DEFEND RIGHTS**

TO: Brink Transportation, Defendant:

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you.

You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Mercer County Lawyer's Referral Service  
P.O. Box 1302  
Hermitage, Pennsylvania 16148  
(724) 342-3111

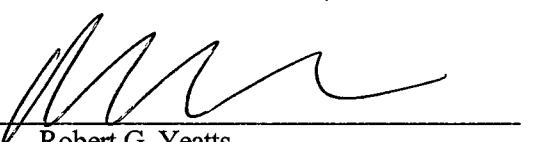
Original Pleading

Certified Copy

We hereby certify that the within is a true and correct copy of the original Complaint filed in this case.

LEWIS AND RISTVEY, P.C.

By:

  
Robert G. Yeatts,  
Attorney for Plaintiff

SERVE ALL PAPERS ON  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
Hermitage, Pennsylvania 16148  
(724) 981-8700



IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

FILED IN MERCER  
COUNTY  
Up

PRESTON AMERICA, INC.,

vs.

BRINK TRANSPORTATION,

Plaintiff

Defendant

No. 2005-653-CD

ELIZABETH F. FAIR  
PROTHONOTARY

2005 APR 27 A 10:25

**AMENDED COMPLAINT**

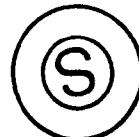
AND NOW, comes the Plaintiff, Preston America, Inc., by and through its attorneys, Lewis and Ristvey, who respectfully sets forth the following Complaint:

(1) The Plaintiff, Preston America, Inc., is a Pennsylvania corporation having an address of 3479 ½ Sharon Road, West Middlesex, Mercer County, Pennsylvania 16159, and is in the business of accident recovery for the recovery of vehicles, equipment and cargo and the storage of vehicles, equipment and cargo.

(2) Defendant, Brink Transportation, is a corporation having a business address of Box 317, RR#1, Houtzdale, Pennsylvania 16651.

(3) On or about March 5, 2004, Defendant's tractor trailer was involved in an accident on Interstate 80 in Mercer County, Pennsylvania. Preston America, Inc., was dispatched by Mercer County 911 center to recover the wrecked vehicle and assist with the transloading of cargo. Preston assisted in the transloading of cargo and stored the same.

(4) Plaintiff's charges for all work related to the recovery of the tractor and trailer, transloading and storage of cargo, and finance charges are attached hereto and incorporated herein by reference are marked as Exhibit A and are attached and incorporated herein by reference.



- (5) Defendant has never objected to the amounts set forth on Plaintiff invoices.
- (6) Despite repeated requests for payment, Defendant has not paid the same.

**COUNT I**  
**BREACH OF CONTRACT**

(7) The allegations contained in Paragraphs one through six above are incorporated herein by reference as fully set forth.

(8) Plaintiff recovered Defendant's tractor and trailer and assisted with transloading its cargo per the Plaintiff's agreement with the Commonwealth of Pennsylvania to provide wrecker/recovery services for that portion of Interstate 80 upon which the Defendant's vehicle was found. Plaintiff's arrangement with the Commonwealth of Pennsylvania is through an application to provide emergency towing services with the Pennsylvania State Police, which is kept on file with the Pennsylvania State Police (A copy of said application is attached hereto as Exhibit A, and incorporated herein by reference.)

(9) Within a day or two of the accident, Plaintiff and Defendant entered into an oral agreement for Plaintiff to recover and store Defendant's cargo and equipment from the accident.

(10) The parties did not discuss the specific amounts but payment was implied by the conduct of the parties that Plaintiff would be reasonably compensated for its services, and Defendant was aware that the work Defendant requested Plaintiff to perform was the type of services and work Plaintiff customarily performs as part of its business and that Plaintiff charges for those services.

(11) Plaintiff fully complied with his agreement with the Commonwealth of Pennsylvania and with its oral agreements with the Defendant for the recovery of Defendant's

vehicle, recoverage of Defendant's cargo and storage of Defendant's vehicle and cargo.

(12) Plaintiff's unpaid charges for this service together with finance charges is \$34,046.16.

(13) Despite demand for payment of these services, Defendant's bill remains unpaid.

WHEREFORE, Plaintiff, Preston America, Inc., requests judgment against the Defendant in the amount of \$34,046.16, together with interest at the legal rate and record costs.

**COUNT II**  
**UNJUST ENRICHMENT**  
**(Alternate Count)**

(14) The allegations contained in Paragraphs one through six are herein incorporated by reference as fully set forth.

(15) Through its agreement with the Commonwealth of Pennsylvania (See Exhibit A) Plaintiff was dispatched to the accident site and recovered the Defendant's tractor and trailer, transloaded and hauled Defendant's cargo, and stored Defendant's tractor and trailer and cargo.

(16) Plaintiff's actions in recovering the Defendant's tractor and trailer and transloading and storing its tractor and trailer and cargo conferred a benefit to the Defendant. Plaintiff's unpaid charges for recovery, transloading of cargo, and storing of tractor and trailer and cargo which is set forth in Exhibit A is \$34,046.16.

(17) Defendant requested Plaintiff perform services for the Defendant in the recovery of Defendant's tractor and trailer, transloading and storing its tractor and trailer and cargo, which services Plaintiff customarily performs and charges for as part of its business.

(18) Defendant received the services of the Plaintiff under circumstances which in

equity and good conscience it should not be permitted to retain without compensating Plaintiff for the same.

WHEREFORE, Plaintiff, Preston America, Inc., requests judgment against the Defendant in the amount of \$34,046.16, together with interest at the legal rate and record costs.

**COUNT III**  
**ACCOUNT STATED**  
**(Alternative Count)**

(19) The allegations contained in paragraphs one through six above are incorporated herein by reference as fully set forth.

(20) The Plaintiff sent invoices to the Defendant as set forth above. Defendant examined and accepted said statements of account without objection.

(21) Defendant failed to pay the account.

(22) Plaintiff performed its obligations owing the Defendant and provided valuable services to Defendant incurring costs on Defendant's behalf, the fair and reasonable value of which is \$34,046.16.

(23) Despite Defendant's obligation to pay Plaintiff for the services performed and costs incurred on Defendant's behalf, and despite the Plaintiff's demands on Defendant for such payment, Defendant has wrongly failed and refused to pay Plaintiff the sums due it.

(24) Defendant has had an opportunity to scrutinize the accounts.

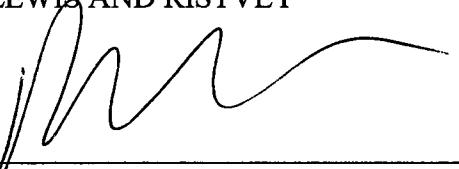
(25) Defendant has agreed to or acquiesced in the correctness of the accounts.

(26) Defendant has never questioned or objected either specifically or generally to the numerous accounts rendered.

WHEREFORE, Plaintiff demands Judgment in the amount of \$34,046.16, together with record costs and interest at the legal rate.

Respectfully submitted,

LEWIS AND RISTVEY

By: 

Robert G. Yeatts,  
Attorney for Plaintiff

**VERIFICATION**

I verify that the statements made in the foregoing Complaint are true and correct. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. 4904, relating to unsworn falsification to authorities.

Dated: 04/26/05

  
\_\_\_\_\_  
Troy Preston, President  
Preston America, Inc.



**PENNSYLVANIA STATE POLICE**  
**APPLICATION TO PROVIDE EMERGENCY TOWING SERVICES**

|  |              |   |                                      |   |                                      |   |
|--|--------------|---|--------------------------------------|---|--------------------------------------|---|
| 1. EMERGENCY TOWING SERVICE NAME   |              |   |                                      | CORPORATION <input checked="" type="checkbox"/> | PARTNERSHIP <input type="checkbox"/> | PROPRIETORSHIP <input type="checkbox"/> |
| Preston America, Inc.  |              |   |                                      |   |                                      |   |
| RECOVERY SERVICE <input checked="" type="checkbox"/>   |              | LIGHT DUTY <input checked="" type="checkbox"/>    | MEDIUM DUTY <input type="checkbox"/> | HEAVY DUTY <input checked="" type="checkbox"/>  |                                      |   |
| 2. ADDRESS   |              |   |                                      | CITY  | STATE                                | ZIP                                     |
| 3479 sharon Rd. West Middlesex, Pa   |              |   |                                      |   |                                      | 16159                                   |
| 3. SALES TAX LICENSE NUMBER  |              | 4. EMPLOYER IDENTIFICATION NUMBER                 |                                      | 5. PROPRIETOR'S SSN                             |                                      |   |
| 80846206   |              | 23-2942815  |                                      | 173-48-5538                                     |                                      |   |
| <b>EQUIPMENT INFORMATION</b>   |              |   |                                      |   |                                      |   |
| 6. YEAR  | 7. MAKE      | 8. TITLE NUMBER                                   | 9. VIN                               |   |                                      |   |
| 88   | Peterbilt    | 44125996702                                       | 1XP5D29X5JH252271                    |   |                                      |   |
| 95   | Freightliner | 54676579  | 1FUPDZYB75H718476                    |   |                                      |   |
| 95   | Peterbilt    | 49350356302<br><i>in process at</i><br>Harrisburg | 1XPNF7X1SN387327                     |   |                                      |   |
| 2001   | Ford         |   | 3FDNX65H31MA02631                    |   |                                      |   |
|  |              |   |                                      |   |                                      |   |
| 10. AUTO LIABILITY INSURANCE COMPANY   |              |   |                                      | 11. POLICY NUMBER                               |                                      |   |
| Universal underwriters   |              |   |                                      | 212278A   |                                      |   |
| 12. GARAGE KEEPER'S INSURANCE COMPANY  |              |   |                                      | 13. POLICY NUMBER                               |                                      |   |
| Universal underwriters   |              |   |                                      | 212278A   |                                      |   |
| * USE BLANK PAPER TO PROVIDE ADDITIONAL INFORMATION IN THE SAME MANNER   |              |   |                                      |   |                                      |   |
| I CERTIFY, IN ACCORDANCE WITH SECTION 4804 OF THE CRIMES CODE (RELATING TO UNSWORN FALSIFICATION TO AUTHORITIES), THAT ALL INFORMATION CONTAINED IN THIS APPLICATION AND ITS ATTACHMENTS IS TRUE AND CORRECT, AND THE ABOVE-LISTED BUSINESS MEETS THE PSP DEFINITION FOR EACH CLASS OF TOWING REQUESTED. |              |   |                                      |   |                                      |   |
| 14. SIGNATURE  |              | 15. NAME (TYPE OR PRINT)                          |                                      |   | 16. DATE                             |   |
|  |              |   |                                      |   |                                      |   |

## FEE SCHEDULE

Light Duty per truck required to complete the task

|  |          |            |          |       |
|--|----------|------------|----------|-------|
|  | \$ 65.00 | /Hr and/or | \$ 1.70  | /mile |
| Standby Time                                   | \$ 45.00 | /Hr        |          |       |
| Plus Recovery Specialist                       | \$ 85.00 | /Hr and/or | \$ 1.00  | /mile |
| Extra Personnel                                | \$ 45.00 | /Hr        |          |       |
| Hook-up Charge                                 | \$       | Prep time  | \$ 65.00 | /hour |
| Rollback Rate<br>(if different from tow truck) | \$ 75.00 | /Hr        | \$ 1.70  | /mile |
| Dolly Charge                                   | \$ N/A   |            |          |       |
| Overtime, Holiday, or<br>Weekend Charges       | \$ N/A   | /Hr and/or | \$       | /mile |

Medium Duty per truck required to complete the task

|  |          |            |          |       |
|--|----------|------------|----------|-------|
|  | \$ 90.00 | /Hr and/or | \$ .90   | /mile |
| Standby Time                                   | \$ 90.00 | /Hr        |          |       |
| Plus Operator                                  | \$ 45.00 | /Hr and/or | \$ 1.00  | /mile |
| Extra Personnel                                | \$ 45.00 | /Hr        |          |       |
| Hook-up Charge                                 | \$ 90.00 | Prep time  | \$ 90.00 | /hour |
| Rollback Rate<br>(if different from tow truck) | \$ 90.00 | /Hr        | \$ .90   | /mile |
| Dolly Charge                                   | \$ N/A   |            |          |       |
| Overtime, Holiday, or<br>Weekend Charges       | \$ N/A   | /Hr and/or | \$       | /mile |

Heavy Duty per truck required to complete the task

|  |             |            |           |       |
|--|-------------|------------|-----------|-------|
|  | \$ 276.00   | /Hr and/or | \$        | /mile |
| Standby Time                                   | \$ 90.00    | /Hr        |           |       |
| Plus Operator                                  | \$ 65.00    | /Hr and/or | \$        | /mile |
| Extra Personnel                                | \$ 65.00    | /Hr        |           |       |
| Hook-up Charge                                 | \$ min 1 hr | Prep time  | \$ 276.00 | /hour |
| Rollback Rate<br>(if different from tow truck) | \$ N/A      | /Hr        | \$        | /mile |
| Dolly Charge                                   | \$ N/A      |            |           |       |
| Overtime, Holiday, or<br>Weekend Charges       | \$ N/A      | /Hr and/or | \$        | /mile |

Extra Specialty Equipment Lane closer equipment and man power @ \$250.00 per hr.

Minimum Charges 4 and 8 hours min. Applies to certain incidents

Debris Cleanup Labor Level 1 Risk @ \$35.00 II @ \$45.00 III @ \$55.00 per hour

Supplies Bags, matting, etc. at fair market value

Disposal Applicable Land fill Rates w/ no markup just Transport FEE

### RECOVERY CHARGES

On Scene Supervisor/ \$ 85.00 /Hr  
Coordinator

Light Duty \$ 65.00 /Hr

Plus Operator \$ /Hr

Show Up \$ 25.00 /Hr NA \$ /mile \$ 25.00 minimum

Standby Time \$ 45.00 /Hr \$ 45.00 minimum

Extra Personnel \$ 65.00 /Hr

Overtime, Holiday, or  
Weekend Charges \$ NONE /Hr and/or \$ /mile

|                                       |          |            |        |                               |
|---------------------------------------|----------|------------|--------|-------------------------------|
| <u>Medium Duty</u>                    | \$ 90.00 | /Hr        |        |                               |
| Plus Operator                         | \$ 65.00 | /Hr        |        |                               |
| Show Up                               | \$ 90.00 | /Hr        | \$ NA  | /mile \$ 90.00 minimum        |
| Standby Time                          | \$ 90.00 | /Hr        |        | \$ 90.00 minimum              |
| Extra Personnel                       | \$       | /Hr        |        |                               |
| Overtime, Holiday, or Weekend Charges | \$ NA    | /Hr and/or | \$ NA  | /mile                         |
| <u>Heavy Duty Tractor</u>             | \$ 90.00 | /Hr and/or | \$ N/A | /mile \$ 90.00 minimum        |
| <u>Tractor w/Landoll</u>              | \$ —     | /Hr and/or | —      | \$ — /mile \$ — minimum       |
| <u>Transfer Trailer</u>               | \$ 90.00 | /Hr and/or | NA     | \$ N/A /mile \$ 90.00 minimum |
| <u>Air Cushion System</u>             | \$ NA    | /Hr        |        | \$ minimum                    |
| <u>Operator</u>                       | \$ NA    | /Hr        |        |                               |

**Crane/Specialty Equipment** - How billed? at 4 or 8 hour increments

**Sublet Equipment** - How billed? as subcontractor's

Hazardous spill clean up?  yes  no

Do you charge for disposal?  yes  no

Do you charge for expendables?  yes  no

|                        |           |      |               |
|------------------------|-----------|------|---------------|
| <u>Inside Storage</u>  | \$ 50.00  | /Day | Light Duty    |
|                        | \$ 50.00  | /Day | Truck/Tractor |
|                        | \$ 100.00 | /Day | Trailer       |
|                        | \$ 100.00 | /Day | Cargo         |
| <u>Outside Storage</u> | \$ 14.00  | /Day | Light Duty    |
|                        | \$ 25.00  | /Day | Truck/Tractor |
|                        | \$ 35.00  | /Day | Trailer       |
|                        | \$        | /Day | Cargo         |

Storage Site Environmental Charge

\$ 250.00 /day \$ 250.00 Flat Fee

Storage Lot Release Fee After Hours?  yes  no \$ 25.00

## SHERIFF'S RETURN - OUT OF COUNTY

CASE NO: 2005-00653 P  
 COMMONWEALTH OF PENNSYLVANIA:  
 COUNTY OF Mercer

PRESTON AMERICA INC

VS

BRINK TRANSPORTATION

William H. Romine, Jr. , Sheriff , who being duly sworn according to law, that he made a diligent search and inquiry for the within name DEFENDANT , to wit: BRINK TRANSPORTATION but was unable to locate Them in his bailiwick. He therefore deputized the sheriff of CLEARFIELD County, Pennsylvania, to serve the within COMPLAINT .

On April 14th, 2005, this office was in receipt of the attached return from CLEARFIELD County, Pennsylvania.

## Sheriff's Cost:

|                  |          |
|------------------|----------|
| Docketing        | .00      |
| Out of County    | .00      |
| Surcharge        | .00      |
| Mercer Co. Costs | \$ 37.00 |
|                  | .00      |

## So answers:

*William H. Romine Jr.*  
 William H Romine Jr, Sheriff

00/00/0000

*Clearfield Co. Costs \$ 32.95*

Sworn and subscribed to before me

this \_\_\_\_\_ day of

A.D.

Notary

NO  
FILED IN MERCER  
COUNTY

LIZABETH F. FAIR  
PROTHONOTARY

2005 APR 19 P 1:45



IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA

DOCKET # 100309  
NO: 2005-653  
SERVICE # 1 OF 1  
COMPLAINT

PLAINTIFF: PRESTON AMERICA, INC.  
vs.  
DEFENDANT: BRINK TRANSPORTATION

**SHERIFF RETURN**

NOW, March 18, 2005 AT 10:44 AM SERVED THE WITHIN COMPLAINT ON BRINK TRANSPORTATION DEFENDANT AT BOX 317, RR#1, HOUTZDALE, CLEARFIELD COUNTY, PENNSYLVANIA, BY HANDING TO CAROL BRINK, PERSON IN CHARGE A TRUE AND ATTESTED COPY OF THE ORIGINAL COMPLAINT AND MADE KNOWN THE CONTENTS THEREOF.

SERVED BY: DAVIS / MORGILLO

| PURPOSE         | VENDOR | CHECK # | AMOUNT |
|-----------------|--------|---------|--------|
| SHERIFF HAWKINS | LEWIS  | 28986   | 32.95  |

100  
FILED IN MERCER  
COUNTY

2005 APR 19 P 1:45  
ELIZABETH F. FAIR  
PROTHONOTARY

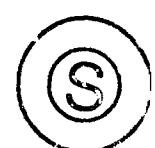
Sworn to Before Me This

8<sup>th</sup> Day of April 2005  
Chester A. Hawkins

WILLIAM A. SHAW  
Prothonotary  
My Commission Expires:  
1st Monday in Jan. 2006  
Clearfield Co., Clearfield, PA

So Answers,

*Chester A. Hawkins  
by Marlyn Hawkins*  
Chester A. Hawkins  
Sheriff



**SHERIFF'S DEPARTMENT****MERCER COUNTY**

205 SOUTH ERIE STREET, ROOM 102, MERCER PA 16137

(724) 662-3800 PHONE

(724) 662-1603 FAX

|  |   |  |  |
|--|---|--|--|
| <b>SHERIFF SERVICE INSTRUCTIONS</b>  |   | LOG #:                                 | <b>MERCER COUNTY ADVANCE:</b>                    |
|  |   | 20678                                  | Check:<br>Cash:<br>Money Order: 75 <sup>00</sup> |
| 1. PLAINTIFF/S<br>PRESTON AMERICA, INC.  |   | 2. COURT NUMBER<br>2005-653            |  |
| 3. DEFENDANT/S/<br>BRINK TRANSPORTATION  |   | 4. TYPE OR WRIT/COMPLAINT<br>Complaint |  |
| <b>SERVE<br/>AT</b>  | 5. NAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC. TO SERVE:<br>Brink Transportation   |  |  |
|  | 6. ADDRESS (Street or Road, Apartment No., City, Boro, Twp., State & Zip Code):<br>Box 317, RR#1, Houtzdale, Pennsylvania 16651 |  |  |
| 7. INDICATE UNUSUAL SERVICE: DEPUTIZE: REGISTERED MAIL: OTHER:   |   |  |  |
| <b>ATTORNEY OR ORIGINATOR USE ONLY</b>   |   |  |  |
| 8. SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING THE SERVICE:<br>A.) Hearing Date, if Applicable: _____   |   |  |  |
| <p>Now, <u>3/14/05</u>, I, SHERIFF<br/> <u>OF MERCER COUNTY, PA</u>, do hereby<br/>         deputize the Sheriff of<br/> <u>CLEARFIELD</u> County to execute<br/>         this Writ and make return thereof<br/>         according to law. This deputation<br/>         being made at the request and risk<br/>         of the plaintiff.</p> <p><u>William H. Rossine Jr.</u> Sheriff</p> <p><u>\$100 00</u> Advance Enclosed</p> |   |  |  |
| RECEIVED<br>SHERIFF OF<br>MERCER COUNTY  |   |  |  |
| 9. SIGNATURE OR ATTORNEY or other ORIGINATOR   |   | 10. TELEPHONE NUMBER                   | 11. DATE<br>2/25/05                              |
| 12. ADDRESS OF ATTORNEY or other ORIGINATOR (This area must be completed)  |   |  |  |
| 689 NORTH HERMITAGE ROAD, HERMITAGE, PA 16148  |   |  |  |

Now, I, SHEREE  
DE MERCER COUNTY, PA, do hereby  
depnitise the Sheriff of  
County to execute  
Title Will and WSRP return Iperated  
according to law. This deposition  
being made at the undersigned time  
of the business.

Sheriff \_\_\_\_\_  
Address Enclosed \_\_\_\_\_ 2

33561

CNB<sup>®</sup>

COUNTY NATIONAL BANK

MAIN OFFICE, CLEARFIELD, PA.

60-62733-3

1 N SECOND ST. SUITE 116

CLEARFIELD, PA 16830

814-765-2841 EXT 5986

CHESTER A. HAWKINS, SHERIFF

COUNTY OF CLEARFIELD

Sixty seven and five hundredths dollars

\$67.05

\*VOID AFTER 90 DAYS.\*

*Mark H. Hawn*

LEWIS & RISTVEY, ESQ.

1103356110031306278111260881411

WARNING - THIS DOCUMENT HAS A SECURITY COLOR BACKGROUND ON FACE AND ORIGINAL DOCUMENT SECURITY SCREEN ON BACK

CHESTER A. HAWKINS, SHERIFF COUNTY OF CLEARFIELD

33561

Date 04/07/2005

Pay To LEWIS & RISTVEY, ESQ.

PRESTON AMERICA, INC.

BRINK TRANSPORTATION

Case # 2005-653 Docket # 100309 Attorney Refund

\$67.05

Clearfield County  
Office of the Sheriff

1 North Second Street, Suite 116 Clearfield, PA 16830

Chester A. Hawkins  
Sheriff

Fax

**REFUND STATEMENT**

MERCER COUNTY SHERIFF  
205 SOUTH ERIE ST.  
MERCER, PA. 16137

April 07, 2005

Sheriff # 100309

Docket # 2005-653

Plaintiff  
PRESTON AMERICA, INC.

Defendant  
BRINK TRANSPORTATION

|                                 |                  |
|---------------------------------|------------------|
| Docket & Return                 | 9.00             |
| Service Fees                    | 9.00             |
| Mileage                         | 14.58            |
| Added Fees                      |                  |
| State Fee                       |                  |
| Mailing Costs                   | 0.37             |
| Deputation                      |                  |
| NF/NS                           |                  |
| <b>Total Fees</b>               | <b>\$32.95</b>   |
| Total Deposit on Case           | 100.00           |
| <br><b>Refund on Case Costs</b> | <br><b>67.05</b> |

ATTACHED CHECK REPRESENTS THE ABOVE REFUND AMOUNT.

RECEIPT FOR DISTRIBUTION OF ADVANCE PAYMENTS HELD IN ESCROW

=====

Mercer County  
205 S Erie St, Room 102  
Mercer PA 16137

Receipt Date 04/18/2005  
Receipt Time 10:57:35  
Receipt No. 145923

PRESTON AMERICA INC (VS) BRINK TRANSPORTATION

Case Number 2005-00653 P

Service Info

Remarks Escrow Transfer Out

Advance Payment Balance 75.00 LEWIS & RISTVEY  
Total Amount Distributed 75.00

Balance Remaining .00

----- Distribution -----

| Transaction Description  | Amount | Payee                        |
|--------------------------|--------|------------------------------|
| DOCKET FEES              | 9.00   | MERCER COUNTY TREASURER      |
| SERVICE                  | 9.00   | MERCER COUNTY TREASURER      |
| DEPUTIZE OUT OF CT       | 9.00   | MERCER COUNTY TREASURER      |
| SURCHARGE - CVL CR       | 10.00  | BUREAU OF RECEIPTS & CNTR MD |
| REFUND TO ATTY/PLT       | 38.00  | LEWIS & RISTVEY              |
| Total Amount Distributed | 75.00  |                              |

RECEIPT FOR PAYMENT

Mercer County  
205 S Erie St, Room 102  
Mercer PA 16137

Receipt Date 03/14/2005  
Receipt Time 09:56:44  
Receipt No. 145355

PRESTON AMERICA INC (VS) BRINK TRANSPORTATION

Case Number 2005-00653 P  
Service Info  
Remarks

|                  |   |       |
|------------------|---|-------|
| Total Check...   | + | 75.00 |
| Total Cash....   | + | .00   |
| Cash Out.....    | - | .00   |
| Receipt total. = |   | 75.00 |

Check No. 28928

----- Distribution Of Payment -----

| Transaction Description | Payment Amount |                 |
|-------------------------|----------------|-----------------|
| ADVANCE PAYMENT         | 75.00          | LEWIS & RISTVEY |
|                         | 75.00          |                 |

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.  
Plaintiff

-vs-

Brink Transportation  
Defendant

\*

\*

\*

\*

\*

Docket No. 2005-653-CD

2005 APR -8 A q: 39  
LIZABETH F. FAIR  
PROTHONOTARY

NO FILED IN MERCER COUNTY

Type of Pleading:  
PRAECIPE TO SCHEDULE FOR  
ARGUMENT

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611



**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

\*

-vs-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

\*

**PRAECIPE TO SCHEDULE FOR ARGUMENT**

TO: ELIZABETY F. FAIR, PROTHONOTARY  
COURT OF COMMON PLEAS OF MERCER COUNTY  
N. Diamond St.  
Mercer, PA 16137

1. The nature of this case concerns an alleged contract between the parties for which Defendant has filed Preliminary Objections to the Complaint filed by Plaintiff.

2. Counsel representing the parties is as follows:

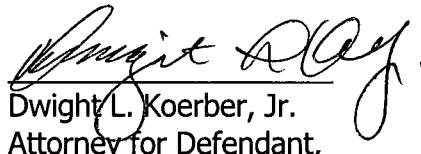
Counsel for Plaintiff,  
Preston America, Inc.:  
Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Counsel for Defendant,  
Brink Transportation, Inc.:  
Dwight L. Koerber, Jr., Esquire  
LAW OFFICES OF DWIGHT L. KOERBER, JR.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830

3. As of the filing of this Praecipe, there have been no rulings entered in this case.

Please place Argument on the Preliminary Objections filed by Defendant in the above-referenced case on the Argument List for the appropriate session of Argument Court.

Respectfully Submitted,

  
Dwight L. Koerber, Jr.  
Attorney for Defendant,  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

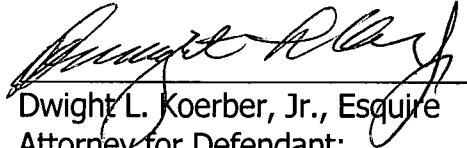
\*

\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 5<sup>th</sup> day of April, 2005 the undersigned served a true and correct copy of the PRAECIPE TO SCHEDULE FOR ARGUMENT in the above captioned matter upon counsel for Plaintiff. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.



**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

\*

**ORDER**

NOW, this \_\_\_\_\_ day of April, 2005, upon the filing of the Preliminary Objections by Defendant, it is the Order and Decree of this Court that Oral Argument thereon shall be held on the \_\_\_\_\_ day of \_\_\_\_\_, 2005 at \_\_\_\_\_ a.m./p.m. at \_\_\_\_\_.

BY THE COURT:

---

, JUDGE

COUNSEL OF RECORD:

Counsel for Plaintiff,  
Preston America, Inc.:  
Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

Counsel for Defendant,  
Brink Transportation, Inc.:  
Dwight L. Koerber, Jr., Esquire  
LAW OFFICES OF DWIGHT L. KOERBER, JR.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

Preston America, Inc.  
Plaintiff

\*

-vs-

\*

Brink Transportation  
Defendant

\*

\*

Docket No. 2005-653-CD

2005 APR -8 A q: 39  
ELIZABETH FEE FAIR  
PROTHONOTARY

32  
NO FILED IN MERCER  
COUNTY

Type of Pleading:  
PRELIMINARY OBJECTIONS  
OF DEFENDANT

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

\*

-vs-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

\*

**ORDER**

And now this \_\_\_\_\_ day of \_\_\_\_\_, 2005 upon consideration of the  
Preliminary Objections filed by Defendant, it is the Order and Decree of this Court that  
the Preliminary Objections are sustained and the Complaint is hereby dismissed.

By the Court:

---

**COUNSEL OF RECORD:**

**Counsel for Plaintiff,**

Preston America, Inc.:  
Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

**Counsel for Defendant,**

Brink Transportation, Inc.:  
Dwight L. Koerber, Jr., Esquire  
LAW OFFICES OF DWIGHT L. KOERBER, JR.  
110 North Second Street  
P.O. Box 1320  
Clearfield, PA 16830

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.

\*

Plaintiff

\*

-VS-

\*

Docket No. 2005-653-CD

Brink Transportation

\*

Defendant

\*

**PRELIMINARY OBJECTIONS OF DEFENDANT**

COMES NOW Defendant, Brink Transportation, Inc., by and through its attorney, Dwight L. Koerber, Jr., Esquire, and files the within Preliminary Objections to the Complaint filed herein and respectfully shows as follows:

**I.**

**LEGAL INSUFFICIENCY OF A PLEADING (DEMURRER)**

1. Pa. R.C.P. 1028(a)(4) provides that Preliminary Objections may be filed for the legal insufficiency of a pleading, in the form of a demurrer.
2. Defendant hereby demurrs to Count I of the pleading because of the failure of Plaintiff to set forth facts that legally support its claim for relief.
3. In paragraph 9 of the Complaint, Plaintiff has alleged that the Plaintiff and Defendant entered into an oral contract for Plaintiff to recover and store Defendant's cargo and equipment. This allegation is totally devoid of any of the material terms that are needed in order to establish a right to recover on a contract, such as the following:

- (a) The specific names of the parties which had allegedly entered into the contract are not set forth.
- (b) The time and date of the alleged oral contract are not set forth.
- (c) The terms for assessing the charge for recovery are not set forth.
- (d) The terms for assessing storage of cargo are not set forth.
- (e) The terms for assessing storage for equipment are not set forth.
- (f) No explanation or terms at all are set forth with respect to an alleged finance charge, but a finance charge has been assessed.

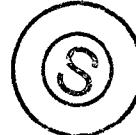
4. In Counts I, II and III, Plaintiff is seeking to recover for financing charges without establishing any legal or factual basis for making a request for such relief, thereby further establishing the insufficiency of the Complaint for all three counts.

5. Based upon the deficiency set forth hereinabove, it is Defendant's position that the Complaint filed herein is legally insufficient and for that reason its demurrer should be sustained.

WHEREFORE, Defendant prays that its Preliminary Objections be sustained and that Counts I, II and III of the Complaint be dismissed for failure to set forth a cause of action.

**II.**  
**FAILURE TO PLEAD IN CONFORMITY WITH LAW**

6. Pa. R.C.P. 1028(a)(2) provides that Preliminary Objections may be filed for the failure to plead in conformity with law.



7. Plaintiff has failed to comply with the requirements of the Pennsylvania Rules of Civil Procedure, in particular the requirements of Rule 1019(h)(i) which require that when a claim is based upon an agreement, that a copy of the agreement must be identified as being a written agreement or oral agreement.

8. Pa. R.C.P. 1019(i) requires that a copy of the agreement, if it is in writing, must be attached.

9. In paragraphs 10 and 13 of its Complaint, Plaintiff has made reference to a contract that it has with the Commonwealth of Pennsylvania and alleges that it has complied with the terms of that contract. Plaintiff, however, has failed to attach a copy of that contract. In failing to attach a copy of the contract, Plaintiff has failed to establish an entitlement to recover under Counts I, II and III, inasmuch as all three of them are premised upon that alleged contract and the statement that Plaintiff has complied with it.

WHEREFORE, Defendant prays that its Preliminary Objections be sustained and that Counts I, II and III of the Complaint be dismissed.

**III.**  
**DEMURRER AS TO CLAIM FOR UNJUST ENRICHMENT**

10. Pa. R.C.P. 1028 permits Preliminary Objections to be filed in the form of a demurrer when there is a legal insufficiency in a pleading.

11. Count II of the pleading herein is legally insufficient, inasmuch as the Plaintiff is seeking to recover under a theory of unjust enrichment and at the same time

seeking to recover under a theory of breach of contract. It is Defendant's position that it is mutually exclusive to proceed under these two different theories of recovery.

12. Defendant would acknowledge that Count II has been identified as being filed in the alternative, but the measure of damages that have been listed are in the nature of breach of contract damages, and clearly do not create a basis for establishing an independent basis for recovering under an unjust enrichment/quantum meruit theory, as Appendix A is used as the measure of damages for both breach of contract and quantum meruit, thereby showing that the Plaintiff's true theory of recovery is breach of contract, thereby depriving it of the right to proceed concurrently under an unjust enrichment claim.

13. Plaintiff has also failed to meet the elements for unjust enrichment as it has not listed or even alleged the time, labor or supplies that it has expended, so as to justify the bill that has been charged to Defendant.

WHEREFORE, Defendant prays that its demurrer be granted and that Count II of the Complaint be dismissed.

#### **IV. DEMURRER AS TO ACCOUNT STATED**

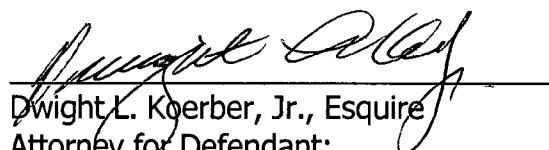
14. Pa. R.C.P. 1028 permits demurrer to be filed when the Plaintiff has failed to set forth an entitlement to recover in the facts that have been alleged.

15. In the circumstances here, Plaintiff is seeking to recovery under an account stated that arises only if there is a contractual relationship between the parties.

16. There is no separate basis for an account stated recovery here, as Plaintiff has failed to establish the terms of the underlying contract to which the alleged account stated applies.

WHEREFORE, Defendant prays that its demurrer be granted and that Count III of the Complaint be dismissed.

Respectfully submitted,

  
\_\_\_\_\_  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

\*

-vs-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

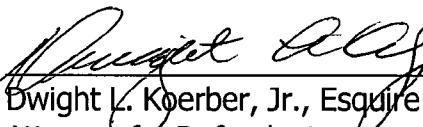
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**CERTIFICATE OF SERVICE**

This is to certify that on the 5<sup>th</sup> day of April, 2005 the undersigned served a true and correct copy of the PRELIMINARY OBJECTIONS filed in the above-captioned matter upon counsel for Plaintiff. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

  
\_\_\_\_\_  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

\*

Type of Pleading:  
PRAECIPE TO ENTER APPEARANCE

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

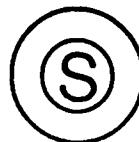
Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

NO. FILED IN MERCER  
COUNTY  
2005 MAR 24 A 8:52

ELIZABETH F. FAIR  
PROTHONOTARY

*TLK*



**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

\*

-vs-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

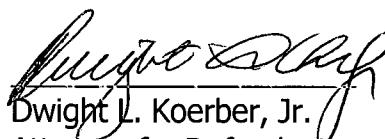
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\*

**PRAECIPE TO ENTER APPEARANCE**

Please enter my appearance on behalf of Defendant, Brink Transportation in the  
above-referenced matter.

Respectfully Submitted,

  
Dwight L. Koerber, Jr.  
Attorney for Defendant,  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

\*

-VS-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

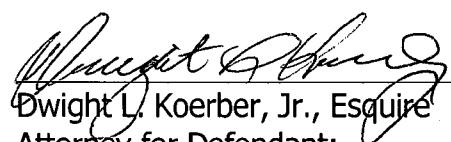
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\*

**CERTIFICATE OF SERVICE**

This is to certify that on the 21<sup>st</sup> day of March, 2005 the undersigned served a true and correct copy of the PRAECIPE TO ENTER APPEARANCE in the above captioned matter upon counsel for Plaintiff. Such document was served and United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff,

vs.

BRINK TRANSPORTATION,

Defendant

No.

COMPLAINT

Judge:

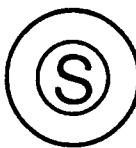
Filed on Behalf of the Plaintiff:  
Preston America, Inc.

Counsel of Record for the Plaintiff:  
Robert G. Yeatts, Esquire  
Pa. I.D. # 34289

LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
PO Box 1024  
Hermitage, PA 16148  
Telephone: 724-981-8700

2005-653  
2005 MAR -2 P 1:48  
ELIZABETH F. FAIR  
PROTHONOTARY  
NO FILED IN MERCER  
SUEK

# 1800 *Arg*  
cc Sheriff w/c/c & consti



IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.

Plaintiff,  
vs.  
BRINK TRANSPORTATION,  
Defendant,

No. 2005- 653

**NOTICE TO CLAIM AND DEFEND RIGHTS**

TO: Brink Transportation, Defendant:

You have been sued in court. If you wish to defend against the claims set forth in the following pages, you must take action within twenty (20) days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you.

You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any other claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER OR CANNOT AFFORD ONE, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT WHERE YOU CAN GET LEGAL HELP.

Mercer County Lawyer's Referral Service  
P.O. Box 1302  
Hermitage, Pennsylvania 16148  
(724) 342-3111

Original Pleading

Certified Copy

We hereby certify that the within is a true and correct copy of the original Complaint filed in this case.

LEWIS AND RISTVEY

By:

  
Robert G. Yeatts  
Attorney for Plaintiff

---

SERVE ALL PAPERS ON  
LEWIS AND RISTVEY  
689 North Hermitage Road  
Hermitage, Pennsylvania 16148  
(724) 981-8700

IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW

PRESTON AMERICA, INC.,

Plaintiff,

vs.

BRINK TRANSPORTATION,

Defendant

2005- 653

**COMPLAINT**

AND NOW, comes the Plaintiff, Preston America, Inc., by and through its attorneys, Lewis and Ristvey, who respectfully sets forth the following Complaint:

(1) The Plaintiff, Preston America, Inc., is a Pennsylvania corporation having an address of 3479 ½ Sharon Road, West Middlesex, Mercer County, Pennsylvania 16159, and is in the business of accident recovery for the recovery of vehicles, equipment and cargo and the storage of vehicles, equipment and cargo.

(2) Defendant, Brink Transportation, is a corporation having a business address of Box 317, RR#1, Houtzdale, Pennsylvania 16651.

(3) On or about March 5, 2004, Defendant's tractor trailer was involved in an accident on Interstate 80 in Mercer County, Pennsylvania. Preston America, Inc., was dispatched by Mercer County 911 center to recover the wrecked vehicle and assist with the transloading of cargo. Preston assisted in the transloading of cargo and stored the same.

(4) Plaintiff's charges for all work related to the recovery of the tractor and trailer, transloading and storage of cargo, and finance charges are attached hereto and incorporated herein by reference are marked as Exhibit A and are attached and incorporated herein by reference.

(5) Defendant has never objected to the amounts set forth on Plaintiff invoices.

(6) Despite repeated requests for payment, Defendant has not paid the same.

**COUNT I**  
**BREACH OF CONTRACT**

(7) The allegations contained in Paragraphs one through six above are incorporated herein by references fully set forth.

(8) Plaintiff recovered Defendant's tractor and trailer and assisted with transloading its cargo per the Plaintiff's contract with the Commonwealth of Pennsylvania to provide wrecker/recovery services for that portion of Interstate 80 upon which the Defendant's vehicle was found.

(9) Plaintiff and Defendant entered into an oral agreement for Plaintiff to recover and store Defendant's cargo and equipment from accident.

(10) Plaintiff fully complied with his contract with the Commonwealth of Pennsylvania and with its oral agreements with the Defendant for the recovery of Defendant's vehicle, recoverage of Defendant's cargo and storage of Defendant's vehicle and cargo.

(11) Plaintiff's unpaid charges for this service together with finance charges is \$34,046.16. Despite demand for payment of these services, Defendant's bill remains unpaid.

WHEREFORE, Plaintiff, Preston America, Inc., requests judgment against the Defendant in the amount of \$34,046.16, together with interest at the legal rate and record costs.

**COUNT II**  
**UNJUST ENRICHMENT**  
**(Alternate Count)**

(12) The allegations contained in Paragraphs one through six are herein incorporated by references fully set forth.

(13) Through its contract with the Commonwealth of Pennsylvania Plaintiff was

dispatched to the accident site and recovered the Defendant's tractor and trailer, transloaded and hauled Defendant's cargo, and stored Defendant's tractor and trailer and cargo.

(14) Plaintiff's actions in recovering the Defendant's tractor and trailer and transloading and storing its tractor and trailer and cargo conferred a benefit to the Defendant. Plaintiff's unpaid charges for recovery, transloading of cargo, and storing of tractor and trailer and cargo which is set forth in Exhibit A is \$34,046.16.

(15) Defendant received the services of the Plaintiff under circumstances which in equity and good conscience it should not be permitted to retain without compensating Plaintiff for the same.

WHEREFORE, Plaintiff, Preston America, Inc., requests judgment against the Defendant in the amount of \$34,046.16, together with interest at the legal rate and record costs.

**COUNT III**  
**ACCOUNT STATED**  
**(Alternative Count)**

(16) The allegations contained in paragraphs one through six above are incorporated herein by references fully set forth.

(17) The Plaintiff sent invoices to the Defendant as set forth above. Defendant examined and accepted said statements of account without objection.

(18) Defendant failed to pay the account.

(19) Plaintiff performed its obligations owing the Defendant and provided valuable services to Defendant incurring costs on Defendant's behalf, the fair and reasonable value of which is \$34,046.16.

(20) Despite Defendant's obligation to pay Plaintiff for the services performed and costs incurred on Defendant's behalf, and despite the Plaintiff's demands on Defendant for such payment, Defendant has wrongly failed and refused to pay Plaintiff the sums due it.

(21) Defendant has had an opportunity to scrutinize the accounts.

(22) Defendant has agreed to or acquiesced in the correctness of the accounts.

(23) Defendant has never questioned or objected either specifically or generally to the numerous accounts rendered.

WHEREFORE, Plaintiff demands Judgment in the amount of \$34,046.16, together with record costs and interest at the legal rate.

Respectfully submitted,

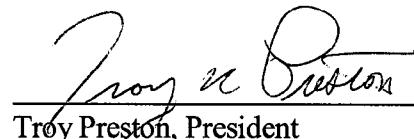
LEWIS AND RISTVEY

By:   
Robert G. Yeatts,  
Attorney for Plaintiff

**VERIFICATION**

I verify that the statements made in the foregoing Complaint are true and correct. I understand that false statements made herein are subject to the penalties of 18 Pa. C.S. 4904, relating to unsworn falsification to authorities.

Dated: 3-24-05

  
\_\_\_\_\_  
Troy Preston, President  
Preston America, Inc.

# Statement

Preston America, Inc.

3479 1/2 Sharon Road  
West Middlesex, PA 16159  
1-800-PRESTON/(724) 528-9921  
FAX# (724) 528-3443

DATE

2/8/2005

TO:

BRINK TRANSPORTATION  
BOX 317 RR #1  
HOUTZDALE, PA 16651  
1-814-378-5147 SAMOR BILL  
1-814-592-6521 BIL DUNSMORE

| AMOUNT DUE  | AMOUNT ENC. |
|-------------|-------------|
| \$34,046.16 |             |

| DATE       | TRANSACTION                  | AMOUNT   | BALANCE   |
|------------|------------------------------|----------|-----------|
| 02/29/2004 | Balance forward              |          | 0.00      |
| 03/05/2004 | INV #35587 - TRK#336         | 3,812.50 | 3,812.50  |
| 03/10/2004 | INV #36021 - TRAILER         | 6,130.00 | 9,942.50  |
| 03/10/2004 | INV #36022 - CARGO           | 4,195.00 | 14,137.50 |
| 08/02/2004 | INV #37025 - TRK STORAGE     | 2,200.00 | 16,337.50 |
| 08/02/2004 | INV #37026 - TRL STORAGE     | 3,080.00 | 19,417.50 |
| 09/14/2004 | INV #37465 - TRL STORAGE     | 1,225.00 | 20,642.50 |
| 09/14/2004 | INV #37466 - TRK STORAGE     | 875.00   | 21,517.50 |
| 09/14/2004 | INV #FC 407 - Finance Charge | 1,440.59 | 22,958.09 |
| 12/07/2004 | INV #38201 - STORAGE         | 2,125.00 | 25,083.09 |
| 12/07/2004 | INV #38202 - TRL STORAGE     | 2,975.00 | 28,058.09 |
| 12/07/2004 | INV #FC 422 - Finance Charge | 899.86   | 28,957.95 |
| 02/02/2005 | INV #38713 - TRK STORAGE     | 1,860.00 | 30,817.95 |
| 02/02/2005 | INV #38714 - TRL STORAGE     | 2,480.00 | 33,297.95 |
| 02/02/2005 | INV #FC 435 - Finance Charge | 748.21   | 34,046.16 |

| CURRENT | 1-30 DAYS PAST DUE | 31-60 DAYS PAST DUE | 61-90 DAYS PAST DUE | OVER 90 DAYS PAST DUE | AMOUNT DUE  |
|---------|--------------------|---------------------|---------------------|-----------------------|-------------|
| 0.00    | 5,088.21           | 0.00                | 5,999.86            | 22,958.09             | \$34,046.16 |

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

\*

*[Signature]*  
**RECEIVED**

APR 08 2005

**PROTHONOTARY**

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**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS  
FILED BY DEFENDANT**

---

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

\*

-vs-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

\*

\*

**BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS FILED BY DEFENDANT**

This Brief is filed on behalf of Defendant, Brink Transportation, Inc. in support of the Preliminary Objections filed contemporaneously in this case.

**I.  
PROCEDURAL BACKGROUND**

This matter arises out of an incident that occurred on March 5, 2004, when a tractor-trailer combination operated by Defendant veered off Interstate 80 and then turned over, thereby resulting in the tractor and trailer both being totaled. Fortunately, there were no personal injuries involved.

Plaintiff is seeking to recover for the cost of towing Defendant's tractor-trailer to its facilities and then assessing a storage charge and financing charge for the next 12 months. This involves circumstances where both the tractor and the trailer were

totaled, with there being nothing to be gained from any type of storage or protection of the vehicles, but nevertheless Plaintiff assessed a storage charge and then a financing charge<sup>1</sup> when the storage charge was not paid.

By way of explanation, if this case moves forward, Defendant would point out that after the accident occurred it reached an impasse with its insurance company as to whether Defendant would be forced to accept the salvage value of the tractor and of the trailer, even though they were acknowledged as being "totaled". That impasse resulted in the units being left at Plaintiff's lot outside, while this impasse was being addressed. While a charge has been assessed for "storage", the tractor and trailer were not stored in the conventional sense, but instead, just left on vacant ground out in the open. It is also notable that Plaintiff did not itemize the time or expense involved in its recovery work or set forth a basis for its charges, but simply detained the vehicles and assessed a unilateral charge for its initial services and a unilateral charge for "storage" services.

It is recognized that the reasonableness of the storage charges, the duty to mitigate damages, and the issue of whether or not interest is chargeable could be construed as a type of affirmative defense. In the circumstances here, however, they go to the very heart of whether or not there was a contract and what the terms of the contract were. That is why Defendant has filed Preliminary Objections.

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<sup>1</sup> It cannot be determined how the financing charge was calculated as it is simply listed in Exhibit A to the Complaint as a financing charge at an unspecified interest rate.

**II.**  
**ARGUMENT CONCERNING DEMURRER FOR BREACH OF CONTRACT**

As pointed out in the Preliminary Objections that have been filed herein, there is no factual statement as to what the basis of the charges was that Plaintiff has set forth in its bill. Likewise, there is no basis for establishing that the Defendant agreed to those charges. Without an allegation as to the basis upon which the charges listed in Appendix A were set forth, the fundamental issue of the terms of the contract has not been addressed by the Plaintiff in its Complaint, thereby warranting the sustaining of the demurrer which Defendant has filed. See, e.g., J.W.S. Delavau, Inc. vs. Eastern America Transport and Warehousing, 2002 Pa. Super 336, 810 A. 2d 672, 681, where the mechanics of establishing the terms of contract formation are reviewed.

Pa. R.C.P. 1019(a) requires that the material facts that a cause of action rests upon must be set forth. Without the material facts of the contract being set forth, as opposed to a bald statement at paragraph 9 that the parties entered into an oral agreement, it is respectfully submitted that it is not possible for Plaintiff to establish that there was a contract, let alone a breach. See Delavau, supra.

The necessity of setting forth the terms of the contract cannot be overemphasized when one points to the fact that Plaintiff has added in financing charges. Under what legal theory are financing charges assessed? One has no idea, because that issue has simply not been addressed by the Plaintiff. How was the towing charge determined; the recovery charge determined; the storage charge determined? Was the claim to be paid by the insurer or the insured? Was interest to be assessed at

prime, at 10%, 12%, 14%, 16% or 18%? All of these questions are unanswered because no allegation has been set forth nor has any documentation been presented to show the value of the services or Defendant's acceptance of contract terms.

Also raised in the form of a demurrer is the fact that the Plaintiff seeks to recover for unjust enrichment at the same time under a theory of quantum meruit. It is recognized that Count II is pled as an alternate count, but it cannot be denied that the measure of damages that the Plaintiff is seeking to recover under Count II is that which is set forth in Appendix A, which is the alleged breach of contract damages. Defendant would submit that as a matter of law a plaintiff cannot allege that there was a contract and sue on that contract, as the law under the doctrine of quantum meruit and unjust enrichment would entitle recovery only where the amount of compensation has not been agreed upon by the parties. See, e.g. Schlechter v. Foltz, 179 Pa. Super 119, 115 A. 2d 910 (1955); and Coldwell Banker Phyllis Real Estate vs. Romano, 422 Pa. Super 319, 619 A. 2d 376,382 (Pa. Super 1993).

Count III also is subject to a demurrer, inasmuch as the measure of damages there likewise are set forth based upon a breach of contract theory. Without establishing what the terms of the contract are, and without establishing that an account would be established that the Defendant would make payment on it, there is no basis for seeking to recover under an account stated basis. In short, there cannot be an account stated without a contract showing the terms to which the stated account applies. Cf., Delavau, supra, at 681.

**III.**  
**FAILURE TO ATTACH CONTRACT**

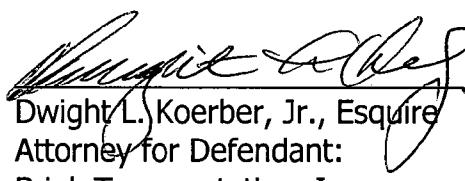
Plaintiff has alleged that it was brought in to perform services under a contract that it had with the Commonwealth of Pennsylvania (See paragraphs 8 and 10 of the Complaint. Also, in paragraph 13 Plaintiff has alleged that it was dispatched pursuant to that contract). Thus, the breach of contract and the unjust enrichment claims are both based upon an alleged contract with the Commonwealth of Pennsylvania. Indeed, in paragraph 10 of its breach of contract case, Plaintiff states that it has complied with the terms of its contract with the Commonwealth of Pennsylvania.

Quite clearly, the existence of the Plaintiff's claims herein are based upon the existence of that contract with the Commonwealth of Pennsylvania. By merely alleging that there is a contract and not attaching a copy of that document, Plaintiff has failed to comply with the requirements of Pa. R.C.P. 1019(i). Accordingly, in failing to comply with the Rules of Court covering this action, Plaintiff has created a basis for having the Preliminary Objections filed herein sustained. See Pa. R.C.P. 1028(a)(4).

**IV.**  
**PRAYER FOR RELIEF**

Defendant prays that its Preliminary Objections be sustained, and that the Complaint herein be dismissed.

Respectfully submitted,

  
\_\_\_\_\_  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

**IN THE COURT OF COMMON PLEAS OF MERCER COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-vs-

\*

Docket No. 2005-653-CD

Brink Transportation  
Defendant

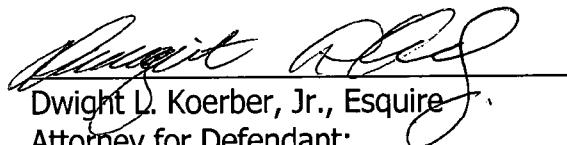
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**CERTIFICATE OF SERVICE**

This is to certify that on the 5<sup>th</sup> day of April, 2005 the undersigned served a true and correct copy of the BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS FILED BY DEFENDANT filed in the above-captioned matter upon counsel for Plaintiff. Such document was served via United States First Class Mail upon the following:

Robert G. Yeatts, Esquire  
LEWIS AND RISTVEY, P.C.  
689 North Hermitage Road  
P.O. Box 1024  
Hermitage, PA 16148

  
\_\_\_\_\_  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant:  
Brink Transportation, Inc.

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

PRESTON AMERICA, INC.,  
Plaintiff

\*

-VS-

\*

Docket No. 2005-1981-CD

BRINK TRANSPORTATION,  
Defendant

\*

\*

-VS-

\*

LLOYD'S OF LONDON AND  
BESSO LIMITED,  
Additional Defendants

\*

Type of pleading:  
CERTIFICATE OF SERVICE

Filed on behalf of:  
DEFENDANT, Brink  
Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr., Esquire  
PA I.D. No. 16332

110 North Second Street  
Clearfield, PA 16830  
(814) 765-9611

FILED  
07/03/2005  
JUL 03 2005  
NOCC  
WMA  
William A. Shaw  
Prothonotary/Clerk of Courts

IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL DIVISION

PRESTON AMERICA, INC.,  
Plaintiff

\*

-VS-

\*

Docket No. 2005-1981-CD

BRINK TRANSPORATION,  
Defendant

\*

\*

-VS-

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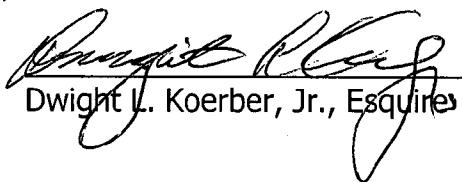
LLOYD'S OF LONDON AND  
BESSO LIMITED,  
Additional Defendants

\*

**CERTIFICATE OF SERVICE**

I certify that on the 28<sup>th</sup> day of June, 2007, the original Answer of Defendant Brink Transportation, Inc. to First Set of Interrogatories of Additional Defendant, and the original Answer of Defendant Brink Transportation, Inc. to First Request for Production of Documents of Additional Defendant were served by United States First Class Mail upon the following:

Kevin T. Kavanagh, Esquire  
Brian F. Breen, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER, LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

  
Dwight L. Koerber, Jr., Esquire

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 05-1981-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

Type of Pleading:  
JOINT PRAECIPE TO DISMISS

Filed on behalf of:  
Brink Transportation, Inc.

Counsel of record for  
this party:

Dwight L. Koerber, Jr.  
PA I.D. No. 16332

110 North Second Street  
P. O. Box 1320  
Clearfield, PA 16830  
(814) 765-9611

**FILED** 3cc & 3 Cert.  
013-231701 of Disc. to Atty  
DEC 26 2007 Koerber  
*LM*

William A. Shaw  
Prothonotary/Clerk of Courts

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.  
Plaintiff

\*

-VS-

Docket No. 05-1981-CD

\*

Brink Transportation  
Defendant

\*

-VS-

\*

Lloyd's of London and  
Besso Limited  
Additional Defendants

\*

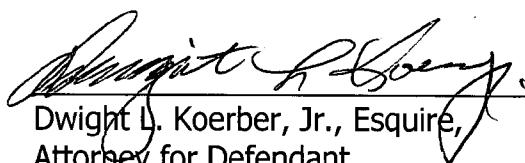
\*

**JOINT PRAECIPE TO DISMISS**

1. The original Plaintiff in this matter, Preston America, Inc., has been dismissed as a party by Order of December 9, 2005 of the Court of Common Pleas of Mercer County, such Order being entered prior to the time that this case was transferred to Clearfield County.

2. The remaining parties, Defendant Brink Transportation and Additional Defendants Lloyd's of London and Besso Limited, hereby request that the docket in this proceeding be marked to show that the case has been settled and dismissed with prejudice.

Respectfully submitted,

  
Dwight L. Koerber, Jr., Esquire,  
Attorney for Defendant,  
Brink Transportation

  
\_\_\_\_\_  
Brian F. Breen, Esquire  
Attorney for Additional Defendants  
Lloyd's of London and Besso Limited

DATED: 12/18/07

DATED: 12/14/07

**IN THE COURT OF COMMON PLEAS OF CLEARFIELD COUNTY, PENNSYLVANIA  
CIVIL ACTION - LAW**

Preston America, Inc.

\*

Plaintiff

\*

-vs-

Docket No. 05-1981-CD

\*

Brink Transportation

\*

Defendant

\*

-vs-

\*

Lloyd's of London and

\*

Besso Limited

\*

Additional Defendants

\*

**CERTIFICATE OF SERVICE**

*D.L.*  
This is to certify that on the 24<sup>th</sup> day of December 2007 the undersigned served a true and correct copy of the JOINT PRAECIPE TO DISMISS filed in the above-captioned matter upon counsel for Additional Defendants. Such document was served via United States First Class Mail upon the following:

Brian F. Breen, Esquire  
WILSON, ELSER, MOSKOWITZ,  
EDELMAN & DICKER LLP  
The Curtis Center, Suite 1130 East  
Independence Square West  
Philadelphia, PA 19106

*Dwight L. Koerber*  
Dwight L. Koerber, Jr., Esquire  
Attorney for Defendant  
Brink Transportation, Inc.

*COPY*

**IN THE COURT OF COMMON PLEAS OF  
CLEARFIELD COUNTY, PENNSYLVANIA**

**CIVIL DIVISION**

**Preston America, Inc.**

**Vs.**

**No. 2005-01981-CD**

**Brink Transportation, Inc.  
Lloyd's of London  
Besso, Ltd.**

**CERTIFICATE OF DISCONTINUATION**

Commonwealth of PA  
County of Clearfield

I, William A. Shaw, Prothonotary of the Court of Common Pleas in and for the County and Commonwealth aforesaid do hereby certify that the above case was on December 26, 2007, marked:

Settled and Dismissed with Prejudice

Record costs in the sum of \$70.00 have been paid in full by Dwight L. Koerber, Jr., Esq.

IN WITNESS WHEREOF, I have hereunto affixed my hand and seal of this Court at Clearfield, Clearfield County, Pennsylvania this 26th day of December A.D. 2007.



---

William A. Shaw, Prothonotary