No.

IN THE

Supreme Court of the United States

HEADSTREAM TECHNOLOGIES, LLC, PETITIONER

v.

FEDEX EXPRESS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

To foster economic competition among airlines, Congress in the Airline Deregulation Act of 1978 prohibits States from enacting or enforcing any law related to "a price, route, or service" of an air carrier. But when an air carrier's employee intentionally commits fraud, even inventing a fake recipient/signor to cover up the air carrier's failed delivery of petitioner's package, is it liable under state law for its fraud using the rationale of the Second, Third, Fourth, Ninth and Tenth Circuits or are such claims preempted by the ADA as decided by the First, Fifth and Sixth Circuits?

1. Should this Court resolve the continuing conflict among the Circuits whether the ADA preempts state-law tort claims which allege intentional, unreasonable and unnecessary behavior by an air carrier in providing its service?

2. Did the Panel mishandle the summary judgment record by refusing to view the reasonable inferences drawn therefrom in the light most favorable to petitioner, the nonmoving party, when assessing its state-law contract claim that the air carrier never presented it with its terms of service until *after* the contract was formed?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

RULE 29.6

Petitioner Headstream Technologies, LLC ("Headstream") is a non-governmental limited liability Delaware company with a principal place of business in Charlotte, Michigan. Its parent company is Faulkner Tech, Inc., a Michigan corporation. Neither Headstream nor its parent company are publicly held entities. No publicly held entity owns, holds, or controls 10% or more of Headstream's stock or membership units.

STATEMENT OF RELATED CASES

None.

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The unpublished Opinion of the United States Court of Appeals for the Sixth Circuit in *Headstream Technologies, LLC v. Federal Express*, C.A. Docket No. 22-1410, decided and filed February 1, 2023, and reported at 2023 WL 1434054 (6th Cir. 2/1/2023), affirming the district court's grant of summary judgment in favor of respondent, is set forth in the Appendix hereto (App. 1-17).

The unpublished Order of the United States District Court for the Western District of Michigan, Southern Division, in *Headstream Technologies, LLC v. Federal Express*, Civil Action No. 1:20-cv-282, decided and filed April 6, 2022, contained in the transcript of a hearing on respondent's summary judgment motion, and unreported by either Westlaw or LEXIS, granting respondent's motion for summary judgment, is set forth in the Appendix hereto (App. 17-50).

The unpublished Order of the United States Court of Appeals for the Sixth Circuit in *Headstream Technologies, LLC v. Federal Express*, C.A. Docket No. 22-1410, decided and filed February 17, 2023, denying petitioner's timely filed petition for Panel rehearing, is set forth in the Appendix hereto (App. 51-52).

JURISDICTION

The unpublished Opinion of the United States Court of Appeals for the Sixth Circuit affirming the

district court's entry of summary judgment in favor of respondent, was entered on February 1, 2023; and its unpublished Order denying petitioner's timely filed petition for Panel rehearing was decided and filed on February 17, 2023 (App. 1-17;51-52).

This petition for writ of certiorari is filed within ninety (90) days of the date the Court of Appeals denied petitioner's timely filed petition for Panel rehearing. 28 U.S.C. § 2101(c). Revised Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Article VI, Clause 2(The Supremacy Clause) :

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

United States Constitution, Amendment V:

No person shall ... be deprived of life, liberty, or property, without due process of law....

49 USC § 41713(b)(1) & (b)(4)(A) (the Airlines Deregulation Act):

Preemption of authority over prices, routes, and service

(b) Preemption.—

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

....

(4) Transportation by air carrier or carrier affiliated with a direct air carrier.—

(A) General rule.—

Except as provided in subparagraph (B), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier or carrier affiliated with a direct air carrier through common controlling ownership when such carrier is transporting property by aircraft or by motor vehicle (whether or not such property has had or will have a prior or subsequent air movement).

49 U.S. Code § 41112(a):

Liability insurance and financial responsibility

(a) Liability Insurance.—

The Secretary of Transportation may issue a certificate to a citizen of the United States to provide air transportation as an air carrier under section 41102 of this title only if the citizen complies with regulations and orders of the Secretary governing the filing of an insurance policy or self-insurance plan approved by the Secretary. The policy or plan must be sufficient to pay, not more than the amount of the insurance, for bodily injury to, or death of, an individual or for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft under the certificate. A certificate does not remain in effect unless the carrier complies with this subsection.

49 U.S. Code § 14501(c)(1):

Federal authority over intrastate transportation

(c) Motor Carriers of Property.—

(1) General rule.—

Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or

> enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

STATEMENT

In early 2018, the Norfolk Public School System of Norfolk, Virginia, issued a Request for Proposals ("RFP") from vendors to provide it with a professional development management system. Bidders were required to submit their proposals to the Norfolk Public Schools in Norfolk by 1:00 PM on March 28, 2018. Petitioner Headstream Technologies, LLC ("petitioner" or "Headstream") prepared its bid on the project. On March 27, 2018, its employee took a USB drive or "flash drive" containing its proposal to Kopy Korner in Mt. Pleasant, Michigan, to have it printed and then delivered to Norfolk, Virginia, before the 1:00 PM deadline on March 28, 2018.

Kopy Korner is an agent of respondent FedEx Express ("respondent" or "FedEx"). Told that Headstream needed the documents printed and sent to Norfolk Public Schools at its address in Norfolk, Virginia via the earliest next-day delivery offered (which was 8:00AM the following day), FedEx's agent agreed that FedEx could provide this delivery.

Headstream's employee left the Norfolk address and the USB drive and returned later that day when the documents were ready for shipment. The printed documents were placed by FedEx's agent into an envelope which it had addressed to "Norfolk Public School RFP" at the tendered address in Norfolk, Virginia; "First Overnight" delivery was designated.

At this point the FedEx agent told the Headstream employee the amount of the bill and the Headstream employee paid by credit card.

After paying the bill, the FedEx employee printed out the receipt for Headstream which detailed *only* the transaction amounts. To this receipt, FedEx's agent then stapled an 8 ½ x 11 sheet of paper on which was copied both the shipping label and – if one looked closely – additional (and new) "terms and conditions." One such "term" was that the customer agrees to all the terms and conditions found in FedEx's "Service Guide."

At no point during the transaction did FedEx's agent present Headstream's employee with FedEx's "terms and conditions," FedEx's "Service Guide," or even a "contract of carriage" to sign or even review. At no point did FedEx's agent alert Headstream to any new contract terms. As became clear in discovery, FedEx's agent at Kopy Korner *alone* was aware of the FedEx Service Guide, and the "terms and conditions," and it was FedEx's agent who filled out the "contract for carriage" for the shipment. In discovery, FedEx declined to provide a copy of the contract of carriage

and the only evidence of the sheet of paper stapled to the receipt is a photograph taken later by the Headstream employee to document his expenses. There the added terms are partially visible.

The delivery of Headstream's proposal by FedEx to the School System was scheduled for on or before 8:00 AM the following morning of March 28, 2018. FedEx's tracking number for Headstream's parcel was 4154 0905 2889.

By 9:00 AM the morning of March 28th, FedEx's website still showed that Headstream's parcel was "out for delivery." Shortly after 10:00 AM, FedEx sent Headstream a delivery confirmation that its parcel had been successfully delivered to the Norfolk Public School System at Room 1008 in the School Administration Building in Norfolk, Virginia, at 10:14 AM and was signed for by one "J. Pruiett" (App. 3). Headstream relied upon FedEx's delivery confirmation in deciding not to pursue any further attempt to deliver its proposal to the School System by another method prior to the 1:00 PM deadline.

After the 1:00 PM deadline passed, the Norfolk Public School System advised Headstream that its proposal had never arrived and that it was excluded from bidding on the School System's project. Surprised, Headstream forwarded FedEx's delivery confirmation to the School System and called FedEx who told them that it the delivery had been delivered specifically to the School System's "Room 1008". When Headstream

sent FedEx's delivery confirmation to the School System to rebut the claim that its proposal never arrived, the School System's Michael Sinnott—who oversaw the RFP process—investigated. Mr. Sinnott personally searched the several floors which the School System occupied—including the mail room and Room 1008—and confirmed that Headstream's proposal had *not* been delivered anywhere within the School System. In fact, the School System's employee in Room 1008 specifically denied having contact with "anybody [at] FedEx to accept a package" (App. 4). Sinnott even went so far as to call the School System's Human Resources Department and search the School System's employee e-mail database. Both confirmed that no "J. Pruiett" was employed anywhere in the School System (App. 3).

Only after the deadline had passed was Headstream's parcel brought to the School System by someone from the juvenile court system located on floors 1 through 3 of the same building. We can only speculate how and when FedEx later dropped the parcel off in that location. On March 29, 2018, the day *after* bids were due, Sinnott emailed Headstream that its proposal in response to the RFP arrived at the School System "at 9:00 AM today," i.e., March 29, 2018, a day late, and therefore it "cannot be considered" (App. 3-4). According to Sinnott's email, "Federal Express delivered it yesterday to an unknown person, J. Pruiett, who is not an employee of Norfolk Public Schools" (App. 4).

FedEx told *two different stories* about what happened to Headstream's proposal. To Headstream, FedEx claimed that its courier delivered the proposal directly to the School System by delivering it to Room 1008 (and *only* to Room 1008) on the tenth floor of the School Administration Building and that one "J. Pruiett" in Room 1008 signed for the parcel on behalf of the School System. However, to the School System FedEx gave an entirely different story: that the FedEx courier misdelivered the parcel "a couple of blocks away" (App. 4). As Michael Sinnott later testified, "the package had not been delivered to the School Administration Building on the day that it was due, notwithstanding what FedEx claimed" (*Id.*).

FedEx misrepresented to Headstream *when* its proposal was delivered, *where* it was delivered and even invented a fake recipient/signor to cover up its failed delivery of petitioner's parcel. However, Headstream's claim did not pursue the misdelivery of the parcel. Headstream's claim concerned the misrepresentations which FedEx published to Headstream following the delivery—misrepresentations which Headstream relied upon at a time when it could still accomplish the delivery by another (albeit expensive) route.

Proceedings Below.

On March 27, 2020, petitioner brought this civil action against both FedEx Express and FedEx Corporation in the federal district court for the

Western District of Michigan, Southern Division, asserting diversity jurisdiction under 28 U.S.C. § 1332(a), and seeking damages under the laws of Michigan for common law fraud, tortious interference with prospective economic advantage and breach of contract (App. 4;20). After discovery and the voluntary dismissal of FedEx Corporation, FedEx moved for summary judgment claiming that petitioner's claims were preempted by the Airlines Deregulation Act, 49 USC § 41713(b)(1) ("ADA"), which prohibits a State from enacting or enforcing any law or regulation relating to "a price, route, or service of an air carrier" like FedEx.

FedEx argued that petitioner's two claims alleging intentional torts were simply claims about how an air carrier performed its service and were therefore preempted by the ADA (App. 24-25). Headstream maintained that while the delivery notifications sent out by FedEx following delivery might be considered "related to" a service, that such notifications were, at best, tenuously related to the air carrier's services.

Regarding Headstream's contract claim, FedEx contended that the additional paper that accompanied the receipt given to Headstream after the transaction was sufficient to impose new "terms and conditions" on the transaction, including the incorporation of the "FedEx Service Guide." In discovery and in summary judgment, FedEx made no showing of any agreement (signed or unsigned) of Headstream's acceptance or even knowledge of its "terms and conditions." Still,

FedEx argued that such terms governed the relationship, including a one-year statute of limitations (App. 25-27) and a $100 Declared Value Limit (App. 27;28). Since petitioner's suit was not brought within one year, FedEx argued that such claims were time barred (App. 25-26).

Headstream averred before the district court that it never saw, read, signed, agreed to, or was alerted to any of FedEx's "terms and conditions" and that it was FedEx's burden to show evidence of such. Headstream argued that— when FedEx handed the receipt to Headstream after they had completed the transaction—FedEx's agent did not alert it to any additional contract terms. Discovery showed that FedEx's agent, and not Headstream, filled out the "contract for carriage" for the parcel (App. 36-38).

As for the intentional tort of fraud (petitioner abandoned its tortious interference claim), Headstream argued that preemption will never apply to give an air carrier *carte blanche* to lie and deceive its customers, as FedEx did here. Headstream contended that it would be illogical and unfair to assume that Congress intended to preempt tort suits where carriers perform a service in an unreasonable and unnecessary manner since such fraudulent conduct could never meaningfully impact an air carrier's economic competitiveness (App. 28;29-30;33;34-35). Here FedEx deliberately lied about where, when and to whom Headstream's proposal was delivered, a lie which Headstream relied upon. As petitioner argued, a jury could find that this fraudulent,

outrageous and unreasonable conduct implicated a tort claim not preempted by the ADA (App. 35).

Ruling in open court, the district court, Neff, J., read the court's opinion from the Bench granting FedEx's summary judgment motion (App. 43-50). She determined that all petitioner's claims stemmed from FedEx's mishandling of its parcel and that these common law claims therefore all relate to FedEx's delivery "service" which warrants preemption under the ADA (App. 44-45;46 citing *Tobin v. Fed. Express Corp.*, 775 F.3d 448, 454 (1st Cir. 2014)). The court did not believe that FedEx's alleged false representations which followed the delivery of the parcel amounted to outrageous conduct for purposes of *Rombom v. United Air Lines, Inc.*, 867 F.Supp. 214 (S.D.N.Y. 1994) (App. 45-46). Though no evidence of any effects were presented, the district court found that permitting petitioner to go forward on its fraud claim would have a direct effect on FedEx's services, changing it "considerably to remain in business" (App. 47). Accordingly, the district court found that "preemption wins this case for FedEx on the strength of the statutory exemption and the Airline Deregulation Act" (App. 46).

Regarding petitioner's contract claim, the district judge ruled that in placing the parcel in the hands of FedEx, "paying the fee and accepting the forms back,... there was an agreement" (App. 46). The court also noted that FedEx's "terms and conditions" appeared on the shipping label (App. 47-48). It bears

noting that the shipping label was in evidence as a joint stipulation and no such language exists there (App. 35-36;38-39). Due the contract's "limitation of liability" provision and the one-year statute of limitations contained in FedEx's Service Guide, the court ruled that petitioner's claims were barred except for its recovery of $100.00 pursuant to the contract of carriage (App. 47-48).

Petitioner filed a timely appeal to the Sixth Circuit Court of Appeals on May 5, 2022 and submitted its brief on August 12, 2022. On February 1, 2023, the court of appeals affirmed the entry of summary judgment in FedEx's favor (App. 1-17).

In reaching its decision, the court of appeals noted the murky line separating conduct which courts have deemed "preempted" versus conduct which courts have deemed to have survived preemption. And while the court noted the existence of the *Rombom* three-part test raised by Headstream, the test was not applied. See, *Rombom*, 867 F.Supp. at 221-224 (App. 5-8).

Headstream noted that claims such as discrimination (See *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493, 494 (6th Cir. 1999)), defamation (See, *Thomas v. United Parcel Service*, 614 N.W.2d 707 (Mich. Ct. App. 2000), and personal injury (See, *Day v. SkyWest Airlines*, 45 F.4th 1181 (10th Cir. 2022)) survive preemption because such tortious conduct is not reasonably necessary to the provision of the

service. *Rombom*, 867 F.Supp. at 222. See also, *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340 (5th Cir. 1995). Headstream argued that the tortious conduct in the instant case (intentional misrepresentation) is also not reasonably necessary to the provision of a service and should survive preemption.

The circuit court disagreed, affirming the district court's finding of preemption with regard to Headstream's tort claims. (App. 8 citing *Tobin v. Fed. Exp. Corp.*, *supra*). To Headstream's use of *Wellons* and *Rombom* in making its argument, the majority noted that FedEx's misrepresentation "is not equivalent to an airline passenger's assault or [an] employee's experience with racial discrimination." (App. 8-9).

The circuit court also rejected Headstream's contract claim, not because it was preempted by the ADA but because the claim was untimely under the one-year limitations period contained in FedEx's Service Guide (App. 10-11). It ruled that Headstream's argument that at no time during the transaction were FedEx's additional terms ever shown to Headstream was foreclosed by precedent establishing that mere acceptance of a receipt where additional terms were present constituted acceptance of those additional terms. (App. 10-12).

In a concurring opinion, Murphy, J., admitted that he failed to understand the dividing line developed by the decisional law about which conduct by an air carrier is sufficiently connected to its service to make

claims arising therefrom subject to preemption and which conduct is not, especially here where the ADA's preemption covers an air carrier's non-air or ground services (App. 12; 14-15). Instead, he decided Headstream's fraud claim on the merits, concluding that there was not enough evidence on this record to show that FedEx knowingly or recklessly made a false statement during its "cursory communication [with Headstream] before the 1:00 PM deadline" (App. 15-16).

On February 15, 2023, Headstream timely filed its Petition for Panel Rehearing Pursuant to F.R.A.P. 40. On February 17, 2023, the Panel denied petitioner's petition (App. 51-52).

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve the Continuing Conflict Among the Circuits About Whether the Airlines Deregulation Act Preempts State-Law Tort Claims Which Allege Intentional, Unreasonable or Unnecessary Behavior by An Air Carrier in Providing Its Service.

Due to confusion among the circuits regarding when preemption should apply under the Air Deregulation Act, the populace is left with differing ruling in different circuits which provide different legal results depending on where a litigant files his or her case.

In *Morales*, the Court determined that (1) state enforcement actions "having a connection with, or reference to" an air carrier's "rates, routes, or service," are preempted. *Morales*, 504 U.S. at 384; (2) preemption may occur even if a state law's effect on rates, routes, or service "is only indirect," *id.* at 386; and (3) preemption occurs at least where state laws have a "significant impact" related to Congress' deregulatory and preemption-related objectives. *Id.* at 390. Because Congress' overarching goal in deregulating the airlines was to achieve maximum reliance on competitive forces in the industry which would stimulate efficiency, innovation and low prices, *Morales* held that the ADA preempts States from enforcing their consumer fraud statutes against deceptive airline-fare advertisements. *Id.* at 391.

Finally, *Morales* held that federal law might *not* preempt state laws that affect airline fares in only a "tenuous, remote, or peripheral...manner," such as state laws forbidding gambling or prostitution. *Id.* at 390 quoting *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100 n.21 (1983). But the Court did not say where, or how, "it would be appropriate to draw the line" for when preemption is found because the state law before it in *Morales* did not present "a borderline question." *Id.* See *Rowe v. New Hampshire Motor Transp. Assn.*, 552 U.S. 364, 371 (2008) .

In *Wolens*, the Court held that the ADA's preemption clause did not stop a state from affording relief to a party who claims and proves that an airline

dishonored a term in a contract the airline itself stipulated, i.e., its frequent flyer program. 513 U.S. at 226-228. As to the line between what the ADA preempts and what it leaves to private ordering, backed by judicial enforcement, the *Wolens* majority adopted a "middle course" between minimal and nearly total preemption as "best calculated to carry out the congressional design." *Id.* at 226-227.

The *Wolens* Court acknowledged the line-drawing problem created in *Morales* for finding preemption under the ADA but advised that "principles seldom can be settled 'on the basis of one or two cases, but require a closer working out..'" 513 U.S. at 227-228 quoting Pound, *Survey of the Conference Problems*, 14 U.Cin.L.Rev. 324, 339 (1940) (Conference on the Status of the Rule of Judicial Precedent). In the absence of "a closer working out" of these principles of preemption by the Court itself, lower federal courts have with difficulty tried to determine when state-law tort claims having enough of a connection to a carrier's "rates, routes, or service" to be preempted under the ADA.

The result is judicial opinions—Judge Murphy's concurrence among them—which recognize the lack of a coherent dividing line these cases mean to establish (App. 14-15). See *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 340; 343-344 (5th Cir. 1995) (*en banc*) (Higginbotham, J., dissenting) (disagreeing with majority's finding of no preemption of state tort claims and describing the preemption question as "a difficult interpretation task"); (Jolly, J., specially concurring)

(where majority and dissent agree on a preemption test but come to different conclusions upon its application, "it promises uncertainty and inconsistent results."); *Gee v. Southwest Airlines*, 110 F.3d 1400, 1409-1410 (9th Cir. 1997) (O'Scannlain, J., specially concurring) (disagrees with majority's "muddled" preemption jurisprudence regarding state-law tort claims and"problematic" distinction between airline "services" and "operations" made by the Fifth Circuit in deciding preemption).

There is also a host of decisions addressing the preemption of state-law tort claims under the ADA which are difficult to reconcile. Compare *Montalvo v. Spirit Airlines*, 508 F.3d 464, 474-475 (9th Cir. 2007) (claim requiring airplane cabin seating design to avoid deep vein thrombosis not preempted) with *Witty v. Delta Airlines, Inc.*, 366 F.3d 380, 383 (5th Cir. 2004) (negligence claim for design of cabin seating causing deep vein thrombosis preempted). See *Chukwu v. Board of Directors British Airways*, 889 F.Supp. 1218, 1223-1224 (D. Mass. 1995), *aff'd*, 101 F.3d 106 (1st Cir. 1996) (tort claims such as slander preempted) with *Fenn v. American Airlines, Inc.*, 839 F.Supp. 1218, 1223-1224 (S.D. Miss. 1993) (slander claim not preempted). See *Lawal v. British Airways, PLC*, 812 F.Supp. 713, 720 (S.D. Tex. 1992) (claims for mistreatment of passenger held preempted) and *Rombom*, *supra*, 867 F.Supp. at 221-224 (state tort claim arising from mistreatment of passenger not preempted).

The issue of the ADA's scope of preemption for state-law tort claims comes within Rule 10(c)'s guidance about the considerations which point toward the Court's granting a petition for certiorari, i.e., when "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." Headstream respectfully requests that the Court grant certiorari, identify error in the Opinion below where it is present, provide further guidance to conflicting circuits regarding when a state-law tort claim against an air carrier is preempted under the ADA, and remand the matter back to the district court for trial.

A. The concurring Judge in this very case expressed confusion over the legal standards.

Judge Murphy's concurring opinion in this matter speaks volumes regarding the confusion among the courts:

> Because the Airline Deregulation Act's preemption provision uses this "related to" phrase, it raises the same concerns. See *DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011). Read literally, it could wipe out nearly all state laws as applied to air carriers. The Court thus ended its *Morales* opinion by suggesting that some laws (such as those regulating

gambling) could have "too tenuous, remote, or peripheral" of a connection to a carrier's rates, routes, or services to fall within the provision (even if the carrier offered in-cabin gambling). 504 U.S. at 390.

Yet how should courts distinguish a "regular" connection (subject to preemption) from a "tenuous" one (saved from preemption)? If a flight attendant negligently runs a drink cart into a passenger, may the passenger assert a negligence claim under a state's tort law? Cf. *Day v. SkyWest Airlines*, 45 F.4th 1181, 1182 (10th Cir. 2022); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995) (en banc). If an air carrier discriminates against a pilot on the basis of race, may the pilot assert a discrimination claim under a state's civil-rights laws? Cf. *Wellons v. Nw. Airlines, Inc.*, 165 F.3d 493, 495-96 (6th Cir. 1999). Courts have held that the Act does not preempt these sorts of claims. See *Day*, 45 F.4th at 1190; *DiFiore*, 646 F.3d at 87 nn.6 &8. How about if an air carrier negligently delivers a package to the wrong address, causing that different homeowner harm? Cf. *Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 449-50 (1st Cir. 2014). Or if the carrier commits fraud in its frequent-flyers program? Cf. *Wolens*, 513 U.S. at 224-25. Courts have found these claims preempted. See *id.* at 228; *Tobin*, 775 F.3d at 453-54.

> *I fail to understand the dividing line that these cases mean to establish.* What in the Act's text or purposes distinguishes an airline customer's negligence claim for a personal injury from the customer's fraud claim for a property injury?

(App. 14) (emphasis supplied).

B. There is a Conflict Among the Circuits Whether the ADA Preempts State-Law Tort Claims Which Allege Intentional, Unreasonable and Unnecessary Behavior by an Air Carrier in Providing its Service.

There is conflict among the Circuits as to whether the ADA preempts state-law tort claims which allege intentional, unreasonable, or unnecessary behavior by an air carrier in providing its service. The confusion arises because – after a court concludes that an air carrier's "service" is involved – there is no clear, agreed-upon test or metric for whether the alleged tortious activity is too tenuously related to the service. The circuit courts have no clear direction regarding when a claim involving "service" ought to be preempted and when it should not. Is the dividing line whether or not the tortious act is a provision of a service in a reasonable manner as the *Rombom* court maintains in the Second Circuit? Is it whether air safety or market efficiency is appreciably hindered by the state law as suggested by *Wellons v. Northwest Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999) in the Sixth Circuit? Is it simply that the complained-of activity was "sufficiently related

to" the service provided as opined by the Fifth Circuit's *Onoh v. Northwest Airlines, Inc.*, 613 F.3d 596 (5th Cir. 2010)?

No real test exists to adjudicate what to do once an air carrier's activity has been identified as a "service." As the concurrence in the Opinion below stated outright: read literally, the ADA's "related to" language can be read to preempt virtually all state law applied to air carriers (App. 13-14). Consequently, the circuit courts have been left to write their own tests which have produced inconsistent results.

Headstream's claims would most certainly earn different treatment in other circuits. There is a conflict among the Circuits whether the ADA preempts state-law tort claims which allege intentional, unreasonable and unnecessary behavior by an air carrier in providing its service. Courts in the Second (*Rombom*), Third (*Elassaad v. Independence Air, Inc.*, 613 F.3d 119, 126 (3rd Cir. 2010)); Fourth (*Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998)); Ninth (*Charas v. Trans World Airlines, Inc.*, 160 F.3d 12591263-1264 (9th Cir. 1998)); and Tenth (*Day v. Skywest Airlines*, 45 F.3d at 1187-1188) Circuits have adopted, more or less, *Rombom's* approach in assessing the behavior or manner in which an air carrier renders its service in order to determine preemption or they have interpreted the term "service" in the ADA in a less expansive way to find no preemption of state tort claims.

On the other hand, courts in the First (*Tobin v. Fed. Express Corp.*, 775 F.3d at 453-454), Fifth (*Hodges v. Delta Airlines, Inc.*, 44 F.3d at 340-345), and Sixth (*Headstream Technologies, LLC v. FedEx, supra*) Circuits have either adopted an overly-broad reading of "service" in the ADA even to include an air carrier's unreasonable or unnecessary behavior when providing service or, because the circuit employs no clear preemption analysis, it is only with great difficulty that any state tort claim survives ADA preemption.

The *Al-Tawani* Court in the Eastern District of Michigan stated plainly that, "[c]ourts in other jurisdictions have reached differing conclusions based upon the factual bases for state law torts and whether they relate to a rate, route or service of an air carrier." See, e.g., *Shqeirat v. U.S. Airways, Inc.*, 515 F.Supp.2d 984, 1006-07 (D.Minn.2007) (surveying the varying interpretations of the § 41713(b)(1)'s use of the term "service" generated by the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits)." *Al-Watan v. Am. Airlines*, 570 F.Supp.2d 925 (E.D. Mich. 2008).

The Tenth Circuit court of appeals in *Day v. Skywest Airlines* noted that there was no direct definition of what activities fall within the scope of "services" but that they have favorably borrowed language from the Fifth Circuit. See, *Day v. SkyWest*, 45 F.4th at 1184.

Headstream urges the Court to grant its petition for a writ of certiorari and intends to urge the Court to adopt a clear preemption analysis with regard to an air carrier's "service." Once a court has determined that claims against an air carrier involve "service," what are the further analyses which should be made?

Amid these contradictory decisions highlighted above, the most clear, balanced approach to analyzing how and when a state-law tort claim is preempted under the ADA appears in *Rombom, supra,* 867 F. Supp. at 219; 221-223. Then District Judge Sotomayor developed a three-step inquiry which focuses on the conduct or behavior of the airline's employee in providing its service to determine preemption. *Id.* Incorporating the language of both *Morales* and *Wolens*, it first asks whether the activity at issue in the claim is an airline service; and second, if so, whether the challenged activity affects the service directly or tenuously, remotely or peripherally. *Id.* If the state claim has only an incidental effect on a service, there is no preemption and the state claim should continue. *Id.* at 222. However, if the activity in question directly implicates a service (as it does in this case), the court proceeds to the third step to ask whether the tortious conduct was reasonably necessary to the provision of the service. *Id.* As the district judge concluded, "it would be illogical to assume that Congress intended to preempt a subsequent tort suit where [the airline employee] performs a service in *an unreasonable and unnecessary* manner." *Id.* (emphasis added).

In developing this test, the *Rombom* Court was mindful that the purpose of Congress is "the ultimate touchstone" in every preemption case, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992); that it "is difficult to believe that [a rational] Congress would, without comment, remove all means of judicial recourse for those injured by illegal conduct," *Silkwood v. Kerr-MeGee Corp.*, 464 U.S. 238, 251 (1984); and that 49 U.S.C. § 1371(q)(1) then required an air carrier to carry liability insurance in an amount prescribed by the Department of Transportation, to cover claims for personal injuries and property losses "resulting from the operation or maintenance of aircraft,"strong evidence that Congress did not intend to preempt state tort claims. See *Wolens*, 513 U.S. at 231 n.7.

Applying *Rombom's* principled three-step inquiry, state-law claims alleging fraud by an air carrier (such as Headstream's claim) are not preempted because even though the claim implicates an air carrier's service, the inquiry recognizes whether the air carrier service was performed in an unreasonable or unnecessary manner. See *Rombom*, 867 F. Supp. at 223-224 (no preemption of state tort claim stemming from arrest of passenger which was allegedly motivated by spite). As the *Rombom* Court makes clear, the manner in which an air carrier performs its service bears crucially on the question of preemption. *Id.* at 221. Accordingly, FedEx's tortious conduct— its blatant fraud—was in no way reasonably necessary to the provision of FedEx's delivery service.

Petitioner respectfully requests that this Court add to it its analyses in *Morales v. Trans World World Airlines, Inc.*, 504 U.S. 374 (1992), *American Airlines v. Wolens*, 513 U.S. 219 (1995), and *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014). This Court might consider that further guidance is necessary in determining which state-law claims against air carriers would be preempted under the ADA after it has been determined that an air carrier's "service" is involved. The current absence of any clear test has left inferior federal courts with too few principles to apply. The result has been confusing and inconsistent rulings on preemption among the Circuits and in the district courts. With few exceptions – the *Rombom* decision being one of them – the approaches for determining when a state-law claim related to an air carrier's service is preempted under the ADA is fragmented and confusing.

In the instant case, the majority's unstructured analysis (which the concurrence recognized) fails to identify a workable dividing line between (1) cases in which an air carrier's conduct was reasonably necessary to the provision of the service so as to make claims arising therefrom subject to preemption and (2) conduct which is not reasonably necessary to the provision of the service.

The ruling fails to acknowledge the core principle which should guide an examination of the scope of ADA's preemption: does the air-carrier's tortious activity at issue further the provision of the

air-carrier's service in a reasonable manner?

State-law tort claims which have a *de minimis* effect on service (or, as in Headstream's case, where no effect was presented) should survive preemption because the blunt instrument of state common law is *not* being used to prescribe broad or economic protocols for an air carrier's package labeling, verification or delivery, all elements of its service. No fundamental changes to the air carrier's core business would occur.

If the Panel's decision is allowed to stand, its unstructured analysis—admitted by Circuit Judge Murphy—will impose on plaintiffs and future litigants an unequal measure of justice as that enjoyed by other parties in other circuits. This includes the onerous and unwarranted burden of having to prove "outrageous" conduct by an air carrier entirely divorced from its service, a burden which is not justified under any view of the law of preemption under the ADA.

Where different circuits produce different results under different standards, forum shopping results. Headstream could have brought its claims before the federal courts located in Michigan or in Virginia. Both had jurisdiction over this matter. Headstream is left to wonder how the outcome would have been different had it filed in the Fourth Circuit which encompasses Virginia's district courts. Litigants should never be tempted to wonder this in the U.S. Federal Courts.

C. The Opinion Below Shields Even Intentional Torts Like Fraud

If an air carrier such as FedEx is permitted to shield itself from even intentional torts under the guise that they are "related to" its service, we've made a mockery of Congress' intent.

FedEx deliberately lied to Headstream about where, when and to whom its proposal was delivered on March 28, 2018, a lie which Headstream relied upon. This is precisely the kind of unreasonable and unnecessary behavior by an air carrier recognized under *Rombom—not* the proof of "outrageous" conduct demanded in the Opinion below. Under *Rombom*, such unreasonable and unnecessary behavior properly results in a litigant's state law claims surviving preemption under the ADA and surviving summary judgment. "[I]t would be illogical to assume that Congress intended to preempt a subsequent tort suit where a flight crew member performs a service in an unreasonable and unnecessary manner." *Rombom*, 867 F. Supp. at 222.

This standard is akin to the unreasonable and unnecessary behavior of the airline employee's actions of false imprisonment and slander in *Fenn v. American Airlines, Inc.*, *supra*, or the conduct which caused personal injury during beverage service in *Day v. Skywest Airlines*, 45 F.3d 1181, 1186 (10th Cir. 2022). In each case, the state-law tort claims—based on the unreasonable and unnecessary behavior of the air

carrier's agent(s)— were found not to be preempted by the ADA.

Contrary to this clear approach, the court of appeals gave only lip service to *Rombom*, never thoroughly applying the rationale of that case. The Sixth Circuit ignored petitioner's summary judgment materials describing FedEx's deceit – materials which would have allowed a reasonable factfinder to conclude that FedEx published a false delivery confirmation to Headstream with an invented signatory all the while telling the recipient that it had misdelivered the package blocks away. The court of appeals demanded that the air carrier's "unreasonable and unnecessary" behavior rise to an intentionally malicious "outrageousness" standard when that requirement was never part of *Rombom's* or any court's essential holding. The circuit court so expansively read the term "service" in the ADA as to encompass even an air carrier's intentional, fraudulent conduct in providing service.

Respectfully, the reasoning in the Opinion below was stitched together in uncertainty. Such *ad hoc* reasoning would be avoided with an authoritative pronouncement by this Court resolving the continuing confusion among the Circuits about the most principled way to decide when a state-law tort claim related to an air carrier's service will be preempted by the terms of 49 USC § 41713(b)(1).

If an air carrier such as FedEx is permitted to shield itself from even intentional torts under the guise that its torts are "related to" service, for what tortious conduct could an air carrier possibly be liable?

II. The Panel Mishandled Summary Judgment By Refusing To Draw Its Reasonable Inferences From the Materials in the Light Most Favorable To Headstream, the Nonmoving Party., When Assessing Its Contract Claim That FedEx's "Terms & Conditions" Never Became Part of The Parties' Shipment Contract.

At the summary judgment stage, two core principles apply: (1) in construing the materials adduced by the parties, the Panel upon its *de novo* review was bound to draw all reasonable inferences from these materials *against* FedEx as the moving party and *in favor* of petitioner as the non-moving party; and (2) it was also required to resolve all credibility questions *in favor* of petitioner, the non-moving party, because the role of the court is only to determine whether there is a genuine issue of material fact for trial. *Beard v. Banks*, 548 U.S. 521, 529-530;534 (2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151 (2000). *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-255 (1986). As *Reeves* holds, the Panel cannot make credibility determinations because this is a jury's function, *not* a judge's role. 530 U.S. at 150-151 citing *Anderson*, 477 U.S. at 255.

Headstream's position before the district court and the Sixth Circuit was that FedEx's "terms and conditions" was never presented to Headstream during the transaction. Headstream produced evidence that the "contract of carriage" had been filled out and executed solely by FedEx (App. 35;37-38), FedEx, in turn, produced no evidence that Headstream has ever seen, let alone agreed to, its "terms and conditions" (App. 38-39).

In *Wolens*, the Court carved out an exception to the ADA's preemptive effect for the "adjudication of routine breach-of-contract claims." 513 U.S. at 232. The Court explained that the ADA's preemption clause "stops States from imposing their own substantive standards with respect to rates, routes, or services, but not from affording relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated." *Id.* at 232-233. Here petitioner sought relief for breach of contract because FedEx failed to perform the shipment contract to which FedEx itself agreed to, i.e., the self-imposed obligation to deliver petitioner's proposal to the School System by 8:00 AM the following morning on March 28, 2018.

The Panel rejected Headstream's contract claim not because it was preempted by the ADA but because it believed FedEx's (the movant's) version of facts that Headstream has agreed to FedEx's "terms and conditions" including FedEx's entire Service Guide. FedEx produced *no* evidence in support of such agreement. Further, FedEx's pleadings before the

district court even admitted FedEx had never presented its contract of carriage to Headstream during the transaction (App. 38-39). However, within the FedEx Service Guide (the terms of which FedEx argued were incorporated into the transaction) was a one-year statute of limitations term. The district court accepted FedEx's contention that Headstream agreed to the FedEx's terms and that its contract claim was "untimely." The circuit court also accepted FedEx's version of events in summary judgment, affirming the district court.

In summary judgment, it is axiomatic that the burden was on FedEx as the movant to prove affirmatively that the additional terms and conditions presented to Headstream after the transaction were accepted by Headstream. Because FedEx produced its terms and conditions after the transaction and did not even notify Headstream that additional terms were being stapled behind FedEx's receipt, the terms are not effective. "[A]n offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *Pang v. Samsung Elecs. Am., Inc.*, 371 F. Supp. 3d 633 (N.D. Cal. 2019) (citation omitted).

FedEx's presentation of new terms failed. FedEx's attempt to add new terms and incorporate by reference its entire Service Guide by stapling them to the receipt and giving them to the customer *after* the

transaction had already concluded makes FedEx's assertion of its terms and conditions *highly* suspect. Under applicable Michigan law which has adopted the Restatement (Second) of Contracts §§ 3;17 (1981), mutual assent is required before any new terms become part of the parties' contract. *Smith v. Allendale Mut. Ins. Co.*, 303 N.W.2d 702, 709 (Mich. 1981) (adopting Restatement).

Given petitioner's showing that its employee never saw, reviewed, agreed to or signed any Service Guide or its "terms and conditions" prior to paying FedEx for the shipment, it was a jury question whether any of the terms contained within FedEx's Service Guide became part of the parties' contract. *Klapp v. United Ins. Group Agency*, 663 N.W.2d 447, 454 (Mich. 2003). By deciding for itself that the Service Guide was, in fact, part of the parties' shipment contract, the court of appeals fundamentally mishandled summary judgment procedure and took this fact question away from a jury which deserved to decide it in the first instance.

In *Tolan v. Cotton*, 572 U.S. 650, 660 (2014) (*per curiam*), the Court reinforced longstanding summary judgment principles by ruling that all "reasonable inferences should be drawn in favor of the nonmoving party," i.e., the plaintiff. *Id.* If believed by a jury, the facts adduced by petitioner presented good reasons *not* to hold it to FedEx's Service Guide in prosecuting its breach of contract claim under Michigan law.

By construing all reasonable inferences from the summary judgment materials *in favor of* the moving party, FedEx, and *against* petitioner as the non-moving party, the court of appeals irremediably tilted the record in FedEx's favor and denied petitioner its day in court on its breach of contract claim. It also resolved credibility questions *against* petitioner, the non-moving party, the *reverse* of the treatment required under summary judgment protocol. None of this appellate factfinding and weighing of evidence by the court of appeals comports with *Reeves*, *Anderson* or *Tolan*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,
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APPENDIX

2023 WL 1434054
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United States Court of Appeals, Sixth Circuit.

HEADSTREAM TECHNOLOGIES, LLC, Plaintiff-Appellant,

v.

FEDEX CORPORATION, Defendant,
FedEx Express, jointly and severally, Defendant-Appellee.

No. 22-1410
FILED February 1, 2023

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN

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Before: STRANCH, MURPHY, and DAVIS, Circuit Judges.

STRANCH, J., delivered the opinion of the court in which DAVIS, J., joined in full. MURPHY, J. (pp. ——– ——), delivered a separate opinion concurring in part and in the judgment.

OPINION

JANE B. STRANCH, Circuit Judge.

This case concerns Plaintiff Headstream Technologies, LLC's common law claims of fraud and tortious interference with prospective economic advantage, and its alternative claim for breach of contract, against Defendant FedEx Express. Headstream brought these claims when its bid in response to a request for proposals, submitted to FedEx for delivery, was not received until after the deadline for consideration had passed. FedEx moved for summary judgment, arguing that Headstream's common law claims were preempted by the Airline Deregulation Act, that its breach of contract claim was untimely, and that FedEx's liability was limited to $100 based on the contract of carriage. The district court granted FedEx's motion; Headstream appealed. For the reasons that follow, we **AFFIRM**.

I. BACKGROUND

In early 2018, the Norfolk Public School System of Norfolk, Virginia, issued a request for proposals (RFP) for a system to track teachers' professional development and credentials. Bidders' proposals were due by 1:00 p.m. on March 28, 2018. Headstream (whose parent company is a Michigan corporation) sought to submit a proposal.

On March 27, 2018, a Headstream employee took a digital copy of the company's proposal to a business called Kopy Korner for printing and overnight delivery. Headstream paid Kopy Korner to print the documents and ship them via FedEx Express, to be delivered to

the Norfolk Public School System by 8:00 a.m. the next day, March 28, 2018. Headstream did not declare a value on the shipment, and asserts that "at no point" was its employee presented with a written contract to review or sign. After Headstream paid for the shipment, however, the employee was handed a receipt to which the shipping label was stapled.

The shipping label noted that its use constituted the shipper's "agreement to the service conditions in the current FedEx Service Guide," and that FedEx's liability for "any loss," including lost profits, was "limited to the greater of $100 or the authorized declared value." In March 2018, the operative FedEx Service Guide confirmed that, "[w]ith respect to U.S. Express package services, unless a higher value is declared and paid for, [FedEx's] liability for each package is limited to $100." The Guide explained that FedEx would "[i]n no event" be liable for "any special, incidental or consequential damages, including ... loss of profits," whether or not FedEx knew such damages might be incurred. The Guide also stated that any right to equitable or legal relief based on any cause of action arising from FedEx's transportation of a package would be "extinguished" unless the shipper filed the action within one year "from the date of delivery of the shipment or from the date on which the shipment should have been delivered."

At approximately 10:14 a.m. on March 28, 2018, the package was marked as signed for in Room 1008 of the Norfolk Public School System building by a "J. Pruiett." No one by that name worked for Norfolk Public Schools at the time.

The next day, Headstream received an email from Michael Sinnott, the Norfolk Public Schools employee in charge of the bid process, informing the

company that its proposal had arrived at 9:00 a.m. on March 29, 2018, and could not be considered because it was not received by the deadline. Sinnott had unsuccessfully checked both the mailroom and Room 1008 for the package the previous day. According to FedEx, in the investigation that followed, Sinnott learned that a Norfolk Public Schools employee had found Headstream's package in the mailroom sometime after 1:30 p.m. on March 28, 2018, and that a person from another office in the building had brought the package to the mailroom at some point that morning. During the investigation, FedEx maintained to Headstream that the package had been delivered to Room 1008 of the Norfolk Public School System building at 10:14 a.m. on March 28, 2018, but told Sinnott that, based on GPS data, the courier was "a couple blocks away" from the building at that time. Per FedEx, the GPS address captures around this time were inaccurate due to the variable quality of the satellite signals used to establish the GPS location.

On March 27, 2020, Headstream sued FedEx, claiming diversity jurisdiction and alleging that (1) FedEx committed common law fraud when it represented that the company's proposal had been timely delivered on March 28, 2018, to "J. Pruiett," (2) FedEx committed tortious interference with Headstream's prospective economic advantage when it "willfully" failed to deliver Headstream's proposal to the Norfolk Public School System, and (3) in the alternative, FedEx breached its contract with Headstream to deliver the proposal by March 28, 2018, causing Headstream to incur consequential damages. At summary judgment, the district court determined that Headstream's common law claims were preempted by the Airline Deregulation Act, that its breach of

contract claim was untimely, and that FedEx's liability was limited to $100 based on the contract of carriage. Headstream timely appealed.

II. ANALYSIS

We review the district court's grant of summary judgment de novo, making all reasonable inferences in favor of the non-moving party.[1] *SunAmerica Hous. Fund 1050 v. Pathway of Pontiac, Inc.*, 33 F.4th 872, 878 (6th Cir. 2022).

A. Headstream's Common Law Claims

The Airline Deregulation Act (ADA, or the Act) was enacted in 1978 to promote "efficiency, innovation, and low prices" in the airline industry. 49 U.S.C. § 40101(a)(12)(A). "To ensure that the States would not undo federal deregulation with regulation of their own, the ADA included a pre-emption provision[.]" *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 378-79 (1992). In its current form, the provision prohibits states from enacting or enforcing "a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier." 49 U.S.C. § 41713(b). The parties do not dispute that FedEx is an air carrier subject to the ADA.

The preemption clause's causation requirement is broadly construed. *See Morales*, 504 U.S. at 383-84; *Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995) (noting that *Morales* defined the predecessor to the ADA preemption clause's "related to" language as "having a connection with, or reference to," air carrier prices, routes, or services). That said, some claims may affect air carrier pricing or service in a manner "too

tenuous, remote, or peripheral" for preemption to apply. *Morales*, 504 U.S. at 390 (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100 n.21 (1983)); *see Day v. SkyWest Airlines*, 45 F.4th 1181, 1185-86 (10th Cir. 2022).

At issue, then, is whether Headstream's common law claims are sufficiently "related to" a service of FedEx to merit ADA preemption. As our concurring colleague articulates, courts have struggled to determine when a claim's connection to carrier services is sufficiently strong to merit preemption, and when it is not. We agree that the dividing line, insofar as it exists, has not been clearly drawn. But we need not establish a definitive taxonomy of ADA preemption to resolve this case.

Headstream compares the events at issue to the racial discrimination, intentional infliction of emotional distress, fraud, and misrepresentation that was alleged in *Wellons v. Nw. Airlines, Inc.*, 165 F.3d 493 (6th Cir. 1999). "Just as discriminatory acts do not further an air carrier's service," neither do the intentional and deliberate misrepresentations FedEx purportedly made regarding the delivery of the proposal. In sum, Headstream argues, its intentional tort claims are too tenuously connected to FedEx's services for preemption to apply.

Headstream also points to *Rombom v. United Airlines, Inc.*, 867 F. Supp. 214 (S.D.N.Y. 1994) (Sotomayor, J.), which held that ADA preemption did not bar a plaintiff's tort claim based on her arrest when she was escorted off an airplane. *Id.* at 224. The court articulated a three-part test to determine whether preemption was warranted: Was the activity at issue an air carrier service? If so, did the plaintiff's claims affect said service directly or "tenuously, remotely, or

peripherally"? And if the claims had more than an "incidental" effect on the service, was the carrier's underlying tortious conduct reasonably necessary to the provision of the service? *Id.* at 221-22. This analysis was guided by the understanding that the ADA preemption provision "cannot be construed in a manner that insulates air carriers from tort liability for injuries caused by outrageous conduct that goes beyond the scope of normal aircraft operations." *Id.* at 222.

The *Rombom* court concluded that the "essence" of the plaintiff's claims arising from her arrest was that "the air carrier abused its authority to provide a given service," and because "the flight crew's decision to have Rombom arrested was allegedly motivated by spite or some unlawful purpose, Rombom's subsequent tort claims arising out of this decision [were] at best tenuously related to an airline service." *Id.* at 224. And, taking the facts as alleged in the complaint, Rombom's arrest was also not necessary to promote safety; it therefore failed the third prong of the preemption inquiry. *Id.*

Headstream claims that the *Rombom* plaintiff's arrest is "similar" to FedEx's "intentional conduct in forging the signature" of the person who received the proposal "at an office which FedEx did not visit, at a time when FedEx demonstrably made no delivery, in order to send a fake confirmation to Headstream." According to Headstream, FedEx's "intentional misrepresentations" had only an "incidental effect" on FedEx's services and constituted the kind of unreasonable or outrageous conduct that should survive a preemption analysis (*i.e.*, satisfy both the second and third prongs of the *Rombom* inquiry).

Like our sister circuit, we find *Rombom* instructive in resolving the matter at hand and apply it

here. *See Smith v. Comair, Inc.*, 134 F.3d 254, 259 (4th Cir. 1998) (citing *Rombom*). At issue under this test is whether FedEx's delivery of the proposal to the Norfolk Public School System building and subsequent verification thereof is within the scope of FedEx's service. As a majority of our sister circuits has held, the term "service" as used in the ADA refers to the "bargained-for or anticipated provision of labor from one party to another." *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 336 (5th Cir. 1995); *see Watson v. Air Methods Corp.*, 870 F.3d 812, 817-18 (8th Cir. 2017); *Air Transp. Ass'n of Am., Inc. v. Cuomo*, 520 F.3d 218, 223 (2d Cir. 2008) (per curiam) (collecting cases).

"Stripped of rhetorical flourishes," Headstream's common law claims are "about FedEx's package handling ... and delivery procedures." *Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 454 (1st Cir. 2014). Any attempt on appeal to draw a line between FedEx's alleged misrepresentation about the proposal's delivery and the delivery itself is belied by the position Headstream took at oral argument before the district court:

> THE COURT: [W]ould you agree that the common law claims all are reliant on the fact that somehow FedEx mishandled this particular package?
> HEADSTREAM COUNSEL: Yes.

R. 71, Mot. for Summ. J. Hr'g Tr., PageID 702. A misrepresentation about a misdelivered package, moreover, is not equivalent to an airline passenger's assault or employee's experience with racial discrimination. *Cf. Wellons*, 165 F.3d at 496; *Hammond v. Nw. Airlines*, No. 09-12331, 2009 WL 4166361, at *4-5

(E.D. Mich. Nov. 25, 2009). And Headstream provides no evidence that FedEx abused its authority in delivering the proposal. Even if the FedEx courier falsely represented that the package was delivered to the right room in the building or entered an incorrect name into the delivery tracker, no evidence suggests that FedEx's conduct was intentional, let alone so intentionally malicious as to be outrageous or outside the scope of FedEx's operations. In short, the activity at issue here was directly related to FedEx's services as an air carrier. "By using state common law as a blunt instrument to prescribe protocols for package ... verification[ ] and delivery, the claims presented here would regulate how FedEx operates its core business." *Tobin*, 775 F.3d at 456. Thus, state common law claims like Headstream's "fall comfortably within the language of the ADA pre-emption provision." *Nw., Inc. v. Ginsberg*, 572 U.S. 273, 281, 285 (2014).

Finally, Headstream argues that preemption of its common law claims would produce "a due process issue." But applying preemption here would create no due process concerns. Headstream does have a remedy for misdelivery of the proposal—in the contract of carriage. Headstream could have declared a value on the package or purchased third-party insurance coverage, both contemplated by the Service Guide. It simply chose not to. There is no serious physical injury here, or otherwise outrageous conduct such that the application of preemption could deprive a plaintiff of any remedy. *Cf. Rombom*, 867 F. Supp. at 221; *Day*, 45 F.4th at 1187-90. Headstream's common law claims are based on mishandling and misdelivery of the package—*i.e.*, FedEx's services—and they are preempted under the ADA.[2]

B. Headstream's Breach of Contract Claim

Headstream's breach of contract claim is based on an agreement the parties "voluntarily undertook" and so is not subject to ADA preemption. *Ginsberg*, 572 U.S. at 285; *see Wolens*, 513 U.S. at 229. FedEx argues, however, that the claim is untimely, and that, in any event, FedEx's liability is limited to $100 by the terms of the contract of carriage.

Before discussing the breach of contract claim's timeliness, we address Headstream's threshold argument that the contract of carriage does not apply. According to Headstream, it never agreed to abide by the terms listed on the package's shipping label (that is, the service conditions contained in the FedEx Service Guide). Rather, Headstream agreed only to pay FedEx in exchange for FedEx shipping its proposal by a certain time; it did not agree to the "additional" shipping label terms. Headstream argues that the terms of whatever contract did exist between the company and FedEx were ambiguous, and whether these "additional" shipping label terms were part of the contract was a question of contract formation and interpretation that should have been presented to a jury.

This argument is foreclosed by century-old precedent. *See Am. Ry. Express Co. v. Lindenburg*, 260 U.S. 584, 591 (1923) ("The respondent, by receiving and acting upon the receipt, although signed only by the petitioner, assented to its terms and the same thereby became the written agreement of the parties."). Headstream's employee received the receipt and attached shipping label, which expressly stated that its use constituted agreement to the service conditions in the FedEx Service Guide. Headstream received the

terms set forth in the shipping label and was on notice of the terms in the Service Guide. That is enough to demonstrate that the contract of carriage, including the terms and conditions incorporated through the Service Guide, governs. *See S. Pac. Transp. Co. v. Com. Metals Co.*, 456 U.S. 336, 342 (1982); *Sam L. Majors Jewelers v. ABX, Inc.*, 117 F.3d 922, 930-31 (5th Cir. 1997). *Cf. Solo v. United Parcel Serv. Co.*, 819 F.3d 788, 792 n.1 (6th Cir. 2016).

The remaining question is whether Headstream's breach of contract claim is timely. Per the Service Guide, Headstream had one year from the date of delivery of the shipment or from the date on which the shipment should have been delivered to file any lawsuit against FedEx for loss or damage to its shipment. Headstream has provided no reason why this time limit should not be enforced. *See Ord. of United Com. Travelers of Am. v. Wolfe*, 331 U.S. 586, 608 (1947) (a contractual provision may "validly limit" the statute of limitations so long as the limitation is "reasonable"); *Myers v. W.-S. Life Ins. Co.*, 849 F.2d 259, 260 (6th Cir. 1988) (Michigan law agrees); *see also Blanco v. Fed. Express Corp.*, 741 F. App'x 587, 590 (10th Cir. 2018) (parties did not dispute that FedEx's one-year limitations period was enforceable). The proposal was to be delivered on March 28, 2018, and Headstream did not file its complaint until March 27, 2020, a year after its contractual statute of limitations had elapsed. Headstream's breach of contract claim was therefore untimely.

Applying the limitations on liability found on the shipping label and in the Service Guide, we also agree that FedEx's liability is limited to $100 because Headstream failed to declare a value on the package. *See Kemper Ins. Cos. v. Fed. Exp. Corp.*, 252 F.3d 509,

512-14 (1st Cir. 2001). And, although Headstream sought consequential damages, under the terms of the Service Guide, FedEx is not liable for any such damages, including lost profits, regardless of whether it knew such damages might be incurred. The district court did not commit error as to these two points.

III. CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court's judgment.

MURPHY, Circuit Judge, concurring in part and concurring in the judgment.

My colleagues offer a thoughtful discussion about why the Airline Deregulation Act's preemption provision bars Headstream Technologies' two tort claims against FedEx Express. In my view, however, the provision's "unhelpful text" leaves its proper reach unclear. *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 656 (1995). I thus find it easier to resolve part of this case by adopting FedEx's alternative argument: that Headstream's tort claims fail on their merits under Michigan law. I otherwise fully concur in my colleagues' separate conclusion that Headstream did not timely file its breach-of-contract claim.

The Airline Deregulation Act provides that a state "may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart." 49 U.S.C. § 41713(b)(1). The Supreme Court has interpreted this language as having a broad reach

because the key phrase "related to" covers any state law that merely "stand[s] in some relation" to or has a "connection with" an airline's prices, routes, or services. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383–84 (1992) (quoting *Black's Law Dictionary* 1158 (5th ed. 1979)). To adopt this broad reading, the Court relied on its cases interpreting a similar provision in the Employee Retirement Income Security Act (ERISA). *See id.* ERISA's preemption provision covers all state laws that "relate to any employee benefit plan." *Id.* at 383 (citation omitted). And the Court had held that this language preempts state laws that have "a connection with, or reference to, such a plan." *Id.* at 384 (citation omitted); *see also Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 223 (1995).

Since *Morales*, the Court's ERISA cases have come to recognize that a literal reading of the elastic phrase "related to" could prohibit courts from applying nearly all state laws to employee welfare plans because, "as many a curbstone philosopher has observed, everything is related to everything else." *Cal. Div. of Lab. Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 335 (1997) (Scalia, J., concurring); *see Gobeille v. Liberty Mut. Ins. Co.*, 577 U.S. 312, 319 (2016); *Travelers*, 514 U.S. at 655. Finding that expansive result unpalatable, the Court has sought to develop "workable standards" tied to ERISA's overarching goals to determine when a state law has the forbidden connection to an employee welfare plan. *Gobeille*, 577 U.S. at 319.

Because the Airline Deregulation Act's preemption provision uses this "related to" phrase, it raises the same concerns. *See DiFiore v. Am. Airlines, Inc.*, 646 F.3d 81, 86 (1st Cir. 2011). Read literally, it could wipe out nearly all state laws as applied to air

carriers. The Court thus ended its *Morales* opinion by suggesting that some laws (such as those regulating gambling) could have "too tenuous, remote, or peripheral" of a connection to a carrier's rates, routes, or services to fall within the provision (even if the carrier offered in-cabin gambling). 504 U.S. at 390.

Yet how should courts distinguish a "regular" connection (subject to preemption) from a "tenuous" one (saved from preemption)? If a flight attendant negligently runs a drink cart into a passenger, may the passenger assert a negligence claim under a state's tort law? *Cf. Day v. SkyWest Airlines*, 45 F.4th 1181, 1182 (10th Cir. 2022); *Hodges v. Delta Airlines, Inc.*, 44 F.3d 334, 335 (5th Cir. 1995) (en banc). If an air carrier discriminates against a pilot on the basis of race, may the pilot assert a discrimination claim under a state's civil-rights laws? *Cf. Wellons v. Nw. Airlines, Inc.*, 165 F.3d 493, 495–96 (6th Cir. 1999). Courts have held that the Act does not preempt these sorts of claims. *See Day*, 45 F.4th at 1190; *DiFiore*, 646 F.3d at 87 nn.6 & 8. How about if an air carrier negligently delivers a package to the wrong address, causing that different homeowner harm? *Cf. Tobin v. Fed. Exp. Corp.*, 775 F.3d 448, 449–50 (1st Cir. 2014). Or if the carrier commits fraud in its frequent-flyers program? *Cf. Wolens*, 513 U.S. at 224–25. Courts have found these claims preempted. *See id.* at 228; *Tobin*, 775 F.3d at 453–54.

I fail to understand the dividing line that these cases mean to establish. What in the Act's text or purposes distinguishes an airline customer's negligence claim for a personal injury from the customer's fraud claim for a property injury? In some respects, moreover, Headstream's claim is further removed from FedEx's air services than a non-preempted claim

alleging a personal-injury tort on an airline. Headstream does not complain about the manner in which FedEx shipped its package *through the air*; it complains that FedEx lied about its driver's alleged failure to *walk the package* to the right room in a building. Does the Airline Deregulation Act's preemption provision cover an air carrier's non-air services? Or might a separate preemption provision for motor carriers apply? *See Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 367 (2008).

Given these difficult interpretive questions, I would resolve Headstream's claims on the merits. Headstream alleges that FedEx committed fraud by falsely claiming that it had delivered the package and that FedEx tortiously interfered with Headstream's prospective economic relationship with the Norfolk Public School System. Aside from its preemption analysis, FedEx argued in the district court that Headstream failed to present enough evidence for a reasonable jury to find all elements of either of these claims under Michigan law. And we may affirm a district court's decision on an alternative ground as long as the record supports that ground. *See Bannister v. Knox Cnty. Bd. of Educ.*, 49 F.4th 1000, 1014 (6th Cir. 2022). The record supports it here.

I start with Headstream's fraud claim. This claim required Headstream to prove, among other things, that a FedEx agent knowingly or recklessly made a false statement with the intent that Headstream would rely on the statement. *See, e.g.*, *Hi-Way Motor Co. v. Int'l Harvester Co.*, 247 N.W.2d 813, 816 (Mich. 1976). As best as I can tell, Headstream alleges (1) that the FedEx tracking website displayed the FedEx driver's misrepresentation that he had delivered the package, (2) that Headstream relied on this false statement, and

(3) that it would have arranged for an alternative delivery if it had known about the lie. But the record contains insufficient evidence to show that FedEx knowingly or recklessly made a false statement. FedEx's tracking website showed that the driver had delivered a package in Norfolk, Virginia, at 10:14 a.m. on March 28, 2018, and that "J. Pruiett" had signed for this package. R.56-1, PageID 509. Yet there is no genuine dispute that the package *was* delivered to the school system's building on March 28. An employee of the school system found it in the mailroom sometime after the 1:00 p.m. deadline for delivery. R.55-3, PageID 416. Even if the driver delivered the package to the wrong room in the building, the website did not identify a specific room of delivery or otherwise provide any details whatsoever about the manner of delivery. So Headstream did not adequately establish a knowingly or recklessly false statement in FedEx's cursory communication before the 1:00 p.m. deadline.

Headstream's tortious-interference claim is even easier. This claim required Headstream to prove that FedEx had knowledge of its potential economic relationship with the Norfolk Public School System. *See Cedroni Assocs., Inc. v. Tomblinson, Harburn Assocs., Architects & Planners Inc.*, 821 N.W.2d 1, 3 (Mich. 2012). Yet, other than FedEx's delivery of a package to the school system, Headstream presented no evidence of this knowledge. Indeed, Headstream did not even respond to FedEx's lack-of-knowledge argument in the district court or on appeal. So it has forfeited (or potentially waived) any contrary contention. *See Bannister*, 49 F.4th at 1011–12. For these reasons, I concur in part and concur in the judgment.

All Citation

Footnotes

1Here we have for review "only the transcript of the summary judgment hearing" to ascertain the district court's reasoning. *Peck v. Bridgeport Machines, Inc.*, 237 F.3d 614, 617 (6th Cir. 2001). Such motions are "inherently fact-intensive," and both appellate review and the parties themselves would be aided by "a written opinion explaining its ruling and the reasoning, factual and legal, in support, especially when the ruling disposes of the case in a final judgment." *Willard v. Huntington Ford, Inc.*, 952 F.3d 795, 806 (6th Cir. 2020) (quoting *Peck*, 237 F.3d at 617).

2We need not address the parties' squabble over the applicability of 14 C.F.R. § 205.5. Air carriers are required to file an insurance policy or self-insurance plan that is "sufficient to pay, not more than the amount of the insurance, ... for loss of, or damage to, property of others, resulting from the operation or maintenance of the aircraft." 49 U.S.C. § 41112. FedEx states that it has done so.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN SOUTHERN DIVISION

HEADSTREAM TECHNOLOGIES, LLC,,

Case No. 1:20-cv-282

Plaintiff,

vs.

FED EX EXPRESS,

Defendant.

MOTION
(Via Zoom Videoconferencing)
HELD BEFORE THE HONORABLE JANET NEFF, U.S. DISTRICT JUDGE

Lansing, Michigan, Wednesday, April 6, 2022

APPEARANCES:

For the Plaintiff: JOHN A. RENDA
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For the Defendant: THOMAS W. MURREY, JR.
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REPORTED BY: GENEVIEVE A HAMLIN, CSR-3218, RMR, CRR
Federal Official Court Reporter
128 Federal Bldg
Lansing MI 48933

April 6, 2022
1:34 p.m.

PROCEEDINGS

THE CLERK: All rise, please. Court is now in session. Please be seated.

THE COURT: Good afternoon, everybody.

MR. RENDA: Good afternoon, Your Honor.

MR. MURREY: Good afternoon, Your Honor.

THE COURT: This is the date and time set for a hearing on a motion for summary judgment in case number 1-20-cvV-282, Headstream Technologies versus Fed Express.

Counsel, would you please put your appearances on the record for me?

MR. MURREY: Yes, Your Honor. This is Tom Murrey for Federal Ex Express.

MR. RENDA: Your Honor, for Plaintiff Headstream Technologies this is John Renda.

MR. BOOCHER: Likewise, Your Honor, local counsel for the plaintiff, Daniel Boocher.

THE COURT: Okay. One more. Oh, that's the court reporter. We haven't done this before.

All right. This case is removed from—it's not removed, I'm sorry. It's here on diversity, and we have current claims against Fed Ex all arising out of state law, and let me just put a little bit of background on the

record so that you don't have to go into a lot of factual detail while you're presenting your arguments.

The plaintiff, Headstream, placed a package for delivery with the defendant, Fed Ex, and it was intended to reach the designated recipient the day after it was placed with Fed Ex. It had to do with a bid proposal which plaintiff was submitting, and somewhere along the line it didn't get to where it was supposed to go in time.

I note that there is a—on the Fed Ex label there is a disclosure which indicates that both the parties agree to the service conditions in the service guide and a limitation of liability of a hundred dollars or the authorized declared value.

As I said, the package was scheduled to arrive at 8:00 on March 28th. I think it was sent from, where, Mt. Pleasant, Michigan, to Norfolk and it didn't get there at that time. Now, Fed Ex Express is an air cargo common carrier operating under a certificate of authority granted by the United States Department of Transportation through the Federal Aviation Commission—Administration, sorry.

According to the facts as I have them, the package was transported by air and ground and it—Fed Ex published a proof of delivery at 10:14 a.m. on March 28th, which was the designated arrival date, but it was—it was delivered to a different office in the same building so the bid proposal which Headstream was hoping to be considered was never considered by the Norfolk Public School Systems because it arrived late, and that's when the plaintiff filed this three count complaint alleging common law fraud, tortious interference with prospective economic advantage, and breach of contract including consequential damages.

Now, who is going to argue for the defendant this afternoon, counsel?

MR. MURREY: I am, Your Honor. Tom Murrey.

THE COURT: Okay. Let's hear it. Keeping in mind you've got a 15-minute window, and, again, I am familiar—pretty familiar with the facts, so tell me what your argument is.

MR. MURREY: Yes, Your Honor. Thank you very much. I'll try to be as concise as I possibly can. Bottom line is this package got to the building on March 28th at some time. It was—it was seen after the bid opening time, one o'clock in the mailroom by Anissa Randolph, an employee of the Norfolk Public Schools.

Anyway, one of two things happened that day. It either got delivered to the wrong room—there's some evidence that someone brought it up from the juvenile court system which was a few levels down in the building. It back got up to the mailroom. Either we mis-delivered it or it got mishandled internally, I don't think that's entirely clear, but I don't think it's necessarily determinative of what happens in this case.

I'd like to address the fraud and tortious interference claims first. Our position is that both those claims are preempted by the Airline Deregulation Act. The ADA provides that no state —

THE REPORTER: I'm sorry, sir. I lost you for a second. The ADA provides that no state...

MR. MURREY: May enact—may not enact or enforce a law, regulation, or other provision having a force or effect of law relating to a price, route, or service from an air carrier. The two important terms there are going to be the term provision and the term service in this case.

The Supreme Court's addressed the Airline Deregulation Act several times, most notably for air

carriers in Moralis, Owens, and Ginsberg. Owens, the Supreme Court basically said you only get a breach of contract action, state law claims are preempted. In some circuits, apparently Ninth Circuit, they were still trying to hold that common law claims weren't necessarily preempted, but that was taken care of by the Supreme Court in 2014 in the Ginsberg case cited in our brief, and it explains that common law claims are, in fact, provisions, so when the Airline Deregulation Act states that any provision has the effect of law relating to service, well, that's what applies here, so these common law claims filed by Headstream are provisions under the ADA.

So, look further in this case, plaintiff has cited several cases—in fact, they've cited a whole lot of cases. They've got a three page quote from the Holmes case, Holmes versus United Airlines. They rely heavily on the Rombom case and the Peterson versus Continental case. Now, what you've got to understand is those are all personal injury claim cases. Holmes versus United Airlines, that's a case where a woman fell off a ladder de-planing. Rombom and Peterson are both about unruly passengers who were removed from an airplane and then subsequently arrested. The courts in those cases have said that, yes, they can maintain state law, common law claims against airlines in those situations. If you look on page eight of the plaintiff's response brief you'll see that he has—I guess the case—they list several cases. They state courts have recognized that personal injury negligence claims against airlines or government of state law, and then he goes through basic —

THE REPORTER: I'm sorry, sir. I lost you again.

THE COURT: You are speaking a little too fast for the court reporter and for the judge.

MR. MURREY: I'll slow down, Your Honor. I'm sorry. I'm watching my clock here, but I think I'm going to be all right.

The bottom line is those cases cited on page eight of the plaintiff's brief were all personal injury cases. One was jumping on a slide when they had to deplane. Another one was falling off a ladder. Really, these cases go back to Hodges versus Delta Airlines, a Fifth Circuit case that kind of started this trend where if you have a personal injury the courts are going to hold that the ADA preemptions do not apply.

So, what do we do here? Well, the best case out there on this is the First Circuit case called Tobin versus Federal Express. Tobin is an interesting case. Someone was shipping illegally marijuana through the Fed Ex system. While the box was going through the system something happened to the label, Fed Ex retyped a new label, and they mistyped the address. Instead of going to the intended recipient, the package went to Mrs. Tobin. She gets the package. She said that her daughter was having a birthday soon, she thought someone was sending her a present. She opened the package, she found marijuana, she was very upset, but it gets worse. The intended recipients called Federal Express, said, hey, where's our package, and we told them, we delivered it to this address. Well, they take the address, go to Ms. Tobin's, and they scare her to death, and she filed a bunch of state common law claims against us, so in Tobin it boiled down to was this a service, was this about a service, and they gave probably as good a definition as you'll find in the case law of about what a service is, and that's a bargained for, anticipated provision of labor from one party to

another, and they have another good quote, package handling, address verification, package delivery plainly concerned a contractual arrangement between Fed Ex and the user of its services.

Now, in this case Ms. Tobin responded, hey, I'm not a party to the contract. You know, I'm just an innocent bystander who gets delivered a package of marijuana and also I'm terrorized by some thugs, you owe me some money, and the Tobin court said, it doesn't matter if you're a party to the contract or not, it said, quote, satisfying the language element does not require plaintiff to be a customer for whom service is undertaken, so even if you're not the customer of the service, if it relates to a service, preemption still applies, so how do you reconcile these cases with—in Tobin with the cases cited by plaintiff? And Tobin explains that very well. There's a dividing line. On one side of the line is how a service is performed, and on the other side is—and these are the cases cited by plaintiff—it's how an airline behaves as an employer or proprietor, so there are cases where airline employees have, for instance, sued for discrimination and the airlines have tried to dismiss the claims under Airline Deregulation Act preemption. The courts have said, no, that's how you're behaving as an employer, all these cases—every single case cited by the plaintiff for how the airline behaved as a proprietor. If you look at it, falling off a ladder, getting injured jumping on the slide. A proprietor is someone who has exclusive control or use of a property. In this case, you know, the airplanes are what we're talking about. How they behaved is proprietary versus the performance of the service. We are definitely on the side of performance of the service, so all the cases cited by the plaintiff are irrelevant. They do not apply to the situation before the Court

today. This is simply a case about how we performed the service, so what that means is the fraud and the tortious interference claims are preempted and must be dismissed by the Court.

That leaves a breach of contract action. Well, let me back up. There is a purpose to all this. The reason for the Airline Deregulation Act was to create a policy of national uniformity so you don't have airlines having to have different types of services—services to 50 different states and maybe even more locations than just 50 states. For instance, if this case was held that fraud and tortious interference can go forward, we would probably—and there's unlimited liability when you tender a package to someone like Kopy Korner who then gives it to us, we would have to change our services. We would have to require, for instance, in Michigan, I guess, that every package that entered the Fed Ex system had to go through a Fed Ex location instead of other authorized ship centers so there—so the purposes of national uniformity is huge.

Now, we're left with a breach of contract. You see the terms and conditions that are referred to in the receipt given to Headstream when they shipped the package. It says, the terms and conditions apply to the shipment. We don't ship any package—and it's quoted in my brief—any package without these terms and conditions in the service guide applying. We don't just take a package and say, hey, it's a free for all, let's hope that, you know—let's hope it gets here but we have unlimited liability, so the contractual statute of limitations clause in the service guide states that you have one year from the date of delivery or the date the package should have been delivered to file suit. That would have put it, let's say, late March 2019. This case was filed, I think, in March 2020, so they missed that

contractual statute of limitations by one year, so that means all claims were extinguished, and, for instance, if for some reason fraud and tortious interference weren't preempted, they'd still be extinguished under the contractual statute of limitations, so the best case on that is the Eighth Circuit case we argued about four years ago, Blanco versus Federal Express. Again, in that case the customer had about 400 grand in gold stolen from their package by a Fed Ex employee. They sued us for conducting a negligent investigation because it took about three months before we figured it out and got—got about 75 percent of the money back, but he said you lost the other part because you were conducting a negligent investigation, and that's, sir, now part of your service. Well, the Court in the Tenth Circuit said, anything arising from the shipment, you have one year to file, and that's the case here. You have one year to file. Any claim arising from a shipment, you have one year, and there's some other cases, they're cited, Samtech, but there are no cases that state to the contrary of Fed Ex's contractual statute of limitations.

That takes me to the declared value —

THE REPORTER: I apologize again, sir. Your volume went down and I lost you.

MR. MURREY: The declared value issue which in this case they did not declare value on the package. It's very clear on the receipt they were given and in the service guide, if you do not declare a value on a shipment, you get $100. We're not limited to—we're not open to unlimited liability.

The best—there's a couple cases I've cited, Wagman is one and Husman, it's on page 16 of our initial brief. There's a great quote from Husman, says basically it's not—Those using delivery services to transmit bids are in the best position to procure

insurance for their time sensitive cargo or to otherwise proceed at their own risk. It's unreasonable to subject a carrier to liability for enormous and unforeseeable consequential damages in return for the $11.75 shipment fee, and I don't think $120 makes that much difference. There's no way the transportation industry carriers can survive if we have unlimited liability for $120, so that's just not the way it works.

The declared value doctrine goes back to the 1800s. That's why we cite the Hart versus Pennsylvania Railroad case where the Supreme Court addressed declared value and said it's unfair to expect—you make a deal for a certain amount of liability, then if there's loss or damage you expect more. That's just not the way it works. There's a contract, and the contract in this case stated if there's a misdelivery, there's misinformation, there's a loss, there's damage, you get $100. So, you know, that's—that's probably the second alternative.

As far as—I have about a minute late. As far as tortious interference goes, I think the plaintiff abandoned that claim as they did not rebut it in their response brief, but, again, our brief is clear. There's a case that came out named Temrowski in Michigan in between the time I filed my initial brief and I filed my reply brief that has some excellent language, and quickly in the last few seconds I have, they—the plaintiff certainly can't establish the elements for fraud. There's—the big one to me is showing intent that Fed Ex intended Headstream to act a certain way when we delivered the package. Anyway, that's all I have, and I'll take any questions from Your Honor.

THE COURT: I just have—I just have one, Mr. Murrey. If preemption applies here, where does that leave the declared value $100 liability?

MR. MURREY: Well, Supreme Court stated that you can—the breach of contract action can be maintained, but if fraud and tortious interference are preempted and—I can't tell necessarily if plaintiff has abandoned breach of contract based on some things they've said, but if it still exists, the hundred dollar—the contract applies—you're limited—according to Wolens, you're limited to the four corners of the contract. The parties are limited to the terms of the contract, and those terms are bound in the service guide and the—and the shipping label that was provided to plaintiff at tender, at Kopy Korner, so it's a hundred dollars. That's what they're left with. Contractually, they ship the package and if anything happened to it, mis-delivered, set on fire, stolen, whatever, their limited liability is—our limited liability is $100.

THE COURT: Okay.

MR. MURREY: That case law, like I said, goes back 200 years.

THE COURT: Yeah. Well, thank you very much. Is it Mr. Renda?

MR. RENDA: Yes, Your Honor.

THE COURT: Okay.

MR. RENDA: Your Honor, this case is entirely about how Fed Ex behaved as a proprietor. Everything here was under defendant's control. Nothing here was an accident. Nothing here was a slip and fall. We're alleging an intentional tort. As for the tortious interference, we had no room in the brief.

The test for summary judgment is whether there are any genuine issues of material fact, whether any liability can be found under any possible reading of the law. And defendant argues, first, that the Airline Deregulation Act cloaks Fed Ex from any and all types

of liability for tort, for fraud, outrageous conduct whether negligent or intentional. They leave no other opening. They advance the notion that everything is precluded, and we've all read the cases. That is just wrong. There is a myriad of federal and state court cases holding the ADA inapplicable in tort, in fraud, and especially where outrageous conduct is concerned. If Fed Ex—

THE COURT: Let me just interrupt you, Mr. Renda. I have, in reading your papers, I have a really difficult time seeing outrageous conduct in this circumstance. I think you have some other problems in this case with preemption and so forth, but outrageous conduct, really?

MR. RENDA: Sure. I think when somebody purports to deliver something to a room, even to a building that they never went into, the evidence in this case shows they did not make the delivery, that they invented a name to go into the—to go into the signature box, and then two months later gave two different stories to two parties, one back to the plaintiff that said, yes, this definitely was a delivery and here's the room and the person who signed for it, but then went and told Norfolk Public Schools, yeah, our delivery driver got it wrong. They actually delivered it two blocks away. That's outrageous conduct. It's an obvious lie. We have—we did not provide the evidence with regard to this. The evidence was provided by Norfolk Public Schools who said they searched for this package, they looked in the room where Fed Ex said it was. It didn't exist. They went to the person they said that it was delivered to. That person didn't exist. They went to HR and searched every building and every office for an employee with that name, part-time and full-time, it never existed.

When we then went and talked to Fed Ex's 30(b)(6) representative, they certified that this was not an ancillary delivery, which they do have that. You can deliver it to a neighbor or a different floor. The driver certified in the computer when he delivered it, this was signed for by the recipient in the room it was supposed to be.

We can show outrageous conduct, Your Honor. That's a bit of it. The fact that it was then brought up by the county court system, and I have no idea where they found it, after the deadline shows that Fed Ex never got near Norfolk Public Schools, so, yes, we're absolutely —

THE COURT: Okay.

MR. RENDA: Yeah. The defendant has also argued about the terms and conditions. Quite frankly, the only time that the defendant—that the plaintiff ever saw the terms and conditions was a list of terms that were given to them with a receipt. Plaintiff—defendant has testified, has shown in their own documentation that their agent—it's not just a copy center that somehow ships to Fed Ex. Their agent that they green light to be their agent filled out the form on behalf of both parties, and now they want plaintiff to be bound by terms that they cannot even establish were ever given to the plaintiff. They can't even establish that they were seen. They didn't even depose the person who did the shipment.

Let's discuss the ADA's application. To begin with, two truths. The ADA is intended to prevent states from regulating rates, routes, and services. The second truth, the ADA does not protect air carriers from all torts and frauds and contractual damages. It just doesn't, and the blanket preemption that's being suggested by Fed Ex, I'm sorry, that just doesn't exist

under the law. The Supreme Court in Moralis versus Transworld talked about the rates, routes, and services of the air carrier and pointed out that if the claim has too tenuous an affect on rates, routes, and services, that it's not preempted at all, and because this is summary judgment, it's incumbent upon Fed Ex to show how holding Fed Ex accountable for fraud will somehow change Fed Ex's business model or cost them an extra nickel. Fed Ex has made no showing of how this case would affect its rates or services in any way. They've put absolutely nothing into evidence.

THE COURT: Mr. Renda, again—Mr. Renda, again, a couple of questions. First of all, have you abandoned your breach of contract or the tortious interference claim?

MR. RENDA: We have not abandoned our breach of contract, and I can only—I understand what the Court will do to our breach of contract claim because we did not brief it, but honestly I had—I had to cut it out. I needed the space.

THE COURT: All right. Another question, a second question, would you agree that the common law claims all are reliant on the fact that somehow Fed Ex mishandled this particular package?

MR. RENDA: Yes.

THE COURT: Okay. All right.

MR. RENDA: Yes.

THE COURT: Okay.

MR. RENDA: And I think that the testimony that comes from the only independent person in this group, which is the Norfolk Public School personnel, have conclusively established that. They've testified that absolutely they did not receive it in any way, shape, or form.

Let me return to the ADA. The Fifth Circuit has talked about that neither the language nor the history of the ADA implies that Congress was trying to displace state tort law claims. The Seventh Circuit echoed that, and they said, to see what's not preemptive we look at what kinds of regulations are preempted, and those involve issues which reach beyond a single local jurisdiction.

This case is a small matter which will not affect Fed Ex in any meaningful way. Fed Ex has produced no evidence that it would, and I think that's their burden, especially under—especially under Moralis. Anything now would be unsupported testifying.

But let's talk about services, because the defendant relies on several courts' languages about whether a law relates to service, but just saying that it relates to service isn't an examination of service. I did quote Rombom, and I didn't quote Rombom because Justice Sotomayor, then District Judge Sotomayor, was talking about a personal injury claim. I quoted Rombom because Judge Sotomayor has the most widely accepted test for service. It's used in the Second Circuit. It's used in the Fifth. It's used in the Seventh, and it's the most salient.

Under Rombom the Court first determines whether the activity at issue is an airline service. If it's not a service, the preemption ceases, ends. Second, if the activity in question implicates a service, then the Court must determine whether the claim affects an airline service directly, tenuously, remotely, peripherally. If it's too incidental, there's no preemption at all. Third, if the activity in question directly implicates a service, and I believe, Your Honor, that this is the most important, the Court then determines whether the underlying tortious conduct was

reasonably necessary to the provision of the service. If the activity represents outrageous conduct, which the plaintiffs here have alleged, the claims should not be preempted.

Fed Ex's argument fails in the second prong; plaintiff's claims affect air carrier service only peripherally. First, the claim was removed from air carrier activities after the first failed delivery when the parcel then went to a Fed Ex ship center and was re-sorted into a different driver, but for argument sake let's assume that the claim is not peripheral. Fed Ex fails the third prong. The underlying tortious conduct, the fraud, that's not reasonably necessary to the provision of the service. Defendant's underlying tortious conduct—well, Fed Ex cannot reasonably claim that materially misrepresenting a delivery and inventing a fake name for signatory is necessary for Fed Ex service.

Let me also get to the—there was—we made a mention in our brief about defendant's insurance. Every air carrier is required under the Code of Federal Regulations to carry insurance covering the losses of a consumer resulting from their services, and that's part and parcel and has been mentioned in many cases with the ADA because this is a remedy. If plaintiff's claims were related to Fed Ex's service, then Fed Ex's insurance policy would cover this claim or at least allow—at least allow the filing of the claim.

Fed Ex in its initial disclosures and pursuant to Rule 34 was required to identify any insurance agreement which could potentially satisfy or reimburse the plaintiff for its losses, potentially. Defendant responded that there were none. That's their initial disclosures A(4). If plaintiff's claims were even related to Fed Ex's airline service, their insurance policy would

at a minimum simply allow a claim to be made. If the Court precludes plaintiff's claims then plaintiff has no route to any remedy for any loss whatsoever under any court or any law. If the ADA precludes—

THE COURT: But you would agree with me, though, wouldn't you, Mr. Renda, that the Supreme Court and various circuit courts around the country have interpreted the preemption clause under the ADA pretty broadly, both in terms of what is a service and what is a provision and so on, don't you agree with that?

MR. RENDA: I would, Your Honor, absolutely, and I would—and I would indicate what the New Hampshire Supreme Court said. Despite the expansion language of the ADA, its preemptive reach is not unlimited. As the Supreme Court in Moralis made clear, some state actions are too tenuous, remote, or peripheral to have a preemptive effect. It then went on to state, preemption may not apply when interpretation of the ADA would give a carrier, and it quotes Moralis, carte blanche to lie and deceive customers, which is what we are saying. Fed Ex's actions—this is where I think Fed Ex has the largest problem in the case. Fed Ex's actions are outrageous. They are unreasonable. They withstand preemption because of this. Rombom noted it saying it would be illogical to assume that Congress intended to preempt a subsequent tort suit where members perform a service in an unreasonable and unnecessary manner. Peterson V Continental Airline added that a plaintiff's state law tort was not preempted because it alleged intentional torts. The Court held that the state law claim did not frustrate the goal of economic deregulation nor significantly affect a defendant's competitive posture.

In this case plaintiff sent—or Fed Ex sent plaintiff a false time when its delivery was made, a false room and a floor to where the delivery was made, and a made-up Norfolk employee who signed for the package. We can establish before a finder of fact outrageous and unreasonable conduct.

Can I also—I'm going to make a comment about your court rules. Obviously this is—this is completely something that—I don't know how you make this decision, Your Honor, but I believe that Fed Ex waived its arguments under the ADA. We've said this in our brief. Under the court rules the defendant was required to present its basis for summary judgment at a pre-motion conference and in its writings for pre-motion conferences. Fed Ex didn't do this. There's no mention of the ADA at all in the defendant's request for a pre-motion conference. That's ECF-32. It was entirely concerning the contract of carriage. The Court then heard from the parties, set parameters, but when the defendant filed the motion, it was 90 percent Airline Deregulation Act.

And let's deal—right now I should probably deal with the contract claims and defenses. It's incumbent upon Fed Ex to establish the contractual terms and conditions. The defendant has raised several of the terms and conditions. They—let's see. Yeah. Defendant's burden to show that the parties agreed to the terms, that the plaintiff accepted the terms, or even that the plaintiff saw the terms. Defendant has done none of that. None of that is in evidence. Defendant is —

THE COURT: So under your analysis, then, there can be no contract, right?

MR. RENDA: Well, of course. Your Honor—

THE COURT: Yes?

MR. RENDA: Yes.

THE COURT: If—if there was no meeting of the minds, as you indicate or suggest, then you can't have a contract, right?

MR. RENDA: Well, no, Your Honor. I'm sorry, if I—if I walked into—I walked into their agent, and it is their agent, not just some copy center, if I walked into their agent, the deal was, here's a package, please ship this—actually, they dropped off a USB drive. Please print this out and ship it to here at the earliest possible whatever. They said, okay. Our guy went and got coffee. When he came back the package was already done and they said, scan your credit card. He did. They handed him a receipt and another piece of paper, which now that I've read it, I provided it to the other side, had terms and conditions. This is after the deal was done. Nobody—

THE COURT: You haven't answered my—you haven't answered my question. If you do not have an offer and an acceptance, this is black letter first year of law school, you can't have a contract, right?

MR. RENDA: Just as I walk into an ice cream store and I buy an ice cream cone, that's a contract. I can walk into a Fed Ex agent and I can give them money to ship something by 8:15. Then that is the contract. If Fed Ex —

THE COURT: Can you also then argue that there is no offer and acceptance, because that is absolutely contrary to the concept of a contract. When you walk into an ice cream store and you give the person at the cash register $1.50 or however much it was, you are making your offer of payment, she is giving you the product that you have bought; ergo, offer and acceptance. You say that isn't here.

MR. RENDA: No, Your Honor.

THE COURT: So you can't—you cannot have it both ways.

MR. RENDA: No, Your Honor. I'm sorry, I disagree. What I'm saying is that the offer is I need to have this shipped to this location at this time and they say, great, here's what it costs. Now, there are terms of adhesion, there are extra terms, there are terms provided after the fact. Fed Ex cannot continue to provide terms, so if I tell Fed Ex what I would like and Fed Ex gives me a price, we have a contract. When Fed Ex then tries to give me terms after I have paid, those terms are not operative because they were never part of the bargain.

The mistake, if there is a mistake, must be a mutual mistake under contract law. There is no mutual mistake. The mistake is entirely Fed Ex's. If Fed Ex would like to give us terms and conditions, phenomenal, but you have to do that before somebody buys it from you. After somebody buys it from you you can't hand them a list of terms and conditions and say, by the way, here's all these terms and conditions. It doesn't work under any color of law, never has.

Doctor Murray made an entire thing out of this with battle of the forms with regard to when the contract was formed and has stated very, very—I'm sorry, when I say Doctor Murray, I did not mean Tom. I meant Doctor Murray who wrote the book on contracts. Doctor Murray has said a contract will be formed wherever the contract can be and as soon as it can be, and in the battle of the forms analysis you can't be delivering forms after the contract is made. Those are not operative. They don't attach. Sometimes they're called terms of adhesion. Sometimes they're just

excluded. But what Fed Ex is trying to do is say, well, yeah, they did come in and pay for this.

Now, by the way—and let me get to a point of evidence. There is no contract of carriage produced in this case, yet Fed Ex has it. Fed Ex told us and provided to the Court during the briefing schedule in ECF-43, attachment two that their records indicate that the contract of carriage was executed by their agent not by plaintiff. So when we asked for all of these—for discovery and we all agreed on pre-complaint—not pre-complaint, on pre-discovery disclosures, we produced 117 pages worth of shipping documents and emails. Fed Ex produced not one scrap of paper including not the contract of carriage because they knew that it wasn't executed by us. We asked several different times during discovery for all—for any documents. They did not provide the contract for carriage because it was signed by them, not us, and they knew it was not operative. There is no way that should be construed against the plaintiff who never signed it. They never put into evidence that we even saw it.

It is their burden to establish those terms and conditions. They haven't done any of that. In fact, quite frankly, once they then informed the Court through ECF-43 that their records indicate their own agent filled out the contract of carriage, there's a lot of records that we're interested in seeing then because apparently those records never made their way to us. We have never received a single thing that we asked for in discovery. The only thing that Fed Ex put into discovery was self-serving things that they came up with and wanted to put in. Nothing that we requested. Not an e-mail. Not a piece of paper. Not a shipping document, and when we asked about the emails, they

responded, finding those things is hard. That's the actual response. I can show it to you, but that's not important.

THE COURT: You're about out of time, Mr. Renda, so please wrap it up.

MR. RENDA: The facts in the case indicate we raise genuine issues of material fact. We support fraud. We support breach of contract. Outrageous conduct is something that we can put in front of a jury and we can demonstrate that. The plaintiff can establish defendant's fraud or breach of contract, and we can establish the defendant made further material representations even after its investigation when they were telling the Norfolk Public Schools that the package was delivered in a different building elsewhere two blocks away but telling us, no, no, no, it was delivered specifically to this room, room 1008.

THE COURT: You have made the point, Mr. Renda. I get it.

MR. RENDA: Your Honor, defendant hasn't met its burden in summary judgment and, quite frankly, because they haven't produced any of the documents underlying their terms and conditions in good faith, I think they should be precluded from even introducing them. I would ask that they not be allowed to dismiss the claim in summary judgment, but, quite frankly, the idea—even your law clerk brought it up when we had our last meeting in front of you, he said, we don't even have a contract of carriage, and you're right, they didn't produce it, and they have known all along that they signed it, but they've been maintaining before this Court and in their pleadings that we agreed to these terms that they know we never signed and we probably never saw.

THE COURT: Again, Mr. Renda, I get it.

MR. RENDA: Then I'm done. I'm done, Your Honor.

THE COURT: Mr. Murrey, you've got seven minutes to rebut.

MR. MURREY: Thank you, Your Honor. I'm not sure where to begin, though. Let me start with what he was just saying. We had a discovery hearing on this. Mr. Renda keeps saying that we didn't provide him any discovery. That's false. We gave him 120 some pages. The reason he's saying he doesn't—we didn't provide a contract of carriage is because he doesn't know what a contract of carriage is. If you look at the case law, it's pretty clear. It can be an airbill. In this case a label and the terms and conditions of the service guide that are incorporated by reference.

If you look at the receipt that they got, and it's—I believe it's exhibit—I can't remember what it is. It's in the brief. I think it's Exhibit H, Fed Ex Exhibit H, you know, it says right there, you agree to the terms and conditions of—the terms and conditions found in the service guide. That's the contract of carriage. Mr. Renda, I don't know if he thinks that there's like a special piece of paper where both parties sit down and negotiate the terms and everybody signs it, that's not what a contract of carriage is. The contract of carriage in this case is going to be these terms on the receipt found at Exhibit H and the service guide incorporated by reference.

I don't know what the point is, either, on the—claiming there's not a contract of carriage in this case. He never answered the question about whether or not they've abandoned the contract of—breach of contract claim so I'm just kind of puzzled about what he's talking about. To say that—he's made some statements that—you want to talk about outrageous. He's saying that we

never went to the building. Well, they produced records that showed that our courier was in the building about—their records show 10:20, so about the time we're showing we made delivery a Fed Ex carrier was there. There's not a Fed Ex carrier there the next day when he claims the package was redelivered, so, you know, the facts in the case are the package was in the building March 28th so I don't know how he can stand before the Court and say we never went to the building and we never made the delivery.

Now, there was—there was some confusion. Unfortunately, when they called our customer service representative they did not know how to read the GPS data. And this was explained by our 30(b)(6) witness. When our courier went into the building there was a satellite that pinged him going into the building. Once he goes into the building, especially gets on the elevator, the satellite ping was gone and it pinged to two to three different places in the next minute, all different places outside, and about two minutes you enter the building you have him being registered again by the satellite, so he was in the building two and a half minutes, something like that, two, three minutes, but in the meantime it pinged out.

Our expert explained that under the old satellite system, and we use wireless now by the way, but under the old satellite system you lost people when they went into high-rise buildings especially if they got on the elevator so, unfortunately, the person at Fed Ex who took the call looked at the GPS data and said, okay, it was delivered a couple blocks away. We know that's wrong. Mr. Renda is saying we're lying about it, but we know that it was in the building on March 28th from the records produced by the Norfolk Public Schools.

Again, when we talk about the ADA application, Mr. Renda is talking again about the cases that have to do with proprietorship. This is a case that has to do with services, and it's interesting he can't find a single case, he does not cite a single case that supports his position that in an air cargo case there should be—ADA preemption should not apply. That's very, very important. Not one single case. And there's a reason for that. I've been doing this for 22 years. There isn't a case. There's not a case out there, and if you think this is outrageous, in the Blanco case, cited in our brief, one of our employees stole—out of a package stole gold but that's—you know, that's outrageous, and you can say that's not part of your service, but if it has to do with the delivery, the carrying of a shipment, it's preempted.

Now, he said there's no remedy. There is a remedy. There's absolutely a remedy. It's called declared value. And if you not—you can only get $50,000 in declared value for a domestic shipment anyway, so what they should have done if they really want to be covered for, you know, a million, two million, whatever they're claiming, they should have gone and got third-party insurance. That's the remedy. The courts talk about that. That's in the Husman case that I cited earlier. That's the remedy. You go get third party insurance if you're really worried that you're going to have losses of this—if this shipment doesn't get there on time so—I'm trying to think what else. Oh, yeah. I've addressed the airbill. You should—you know, as far as the argument that we don't have insurance, we're self insured. I don't know where that goes or what it means or what it would lead to, but it's irrelevant to this case. Again, the remedy was declared value.

Your Honor, I'll be glad to take any questions you have for me, but that's about all I have to say in response.

THE COURT: Thank you, Mr. Murrey. Okay. Well, I put some background on the case early on in this hearing and the parties have filled in some additional facts, although nothing I don't think substantially different from what I put on originally, and as Mr. Renda has admitted here, this case really is all about a mishandled, I guess, package that was put in the hands of the defendant, Fed Ex, and for reasons we don't really clearly understand, it didn't get to where it was supposed to be on time.

Now, we're looking at a summary judgment motion under Rule 56, and the standard, as we know, is that the moving party has to show that there's no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law, and that's ^ Keith versus the County of Oakland, 703 F3d 918 at 923, a Sixth Circuit case from 2013.

And it's important, I think—one of the things we kind of tend to overlook in establishing the motion for summary judgment is what is a genuine dispute, and Mr. Renda sort of referred to this to some extent, but a genuine dispute is one where the evidence would allow a reasonable jury to return a verdict in favor of the non-movant, and the fact is material if it may affect the outcome of the case, and that's Wylie and Sons Landscaping versus Fed Ex, 696 Federal Appendix 713 at 723. It's a Sixth Circuit case from 2017. And it cites Anderson versus Liberty Lobby, 477 U.S. 242 at 248, Supreme Court case from 1986.

Now, the defendant here in pursuing this case I think quite justifiably relies heavily on the Airline Deregulation Act of 1978 which does apply to preempt

and bar certain cases brought against a common carrier. There is no question that under 49 USC 41713(b)(4)(A) that preemption does apply where we're dealing with an air carrier and the carrier is transporting property by aircraft or motor vehicle and so forth.

Now, there's no question that Fed Ex is an air carrier operating under a certificate of authority granted by the Department of Transportation through the Federal Aviation Administration, and it is covered by the ADA, the Airline Deregulation Act.

Now, the defense argues that the broad ADA preemption covers the tort claims and that the plaintiff's suit is connected to a Fed Ex service which is defined as the delivery of packages, and for this the defendant relies on Tobin versus Federal Express at 775 F3d 448 at 454, it's a First Circuit case from 2014, and, frankly, this case is on all fours with the Tobin case where, first of all, it indicates that all of the common law claims depend on Fed Ex's mishandling of a case—of a package and they plainly concern the contractual arrangement between Fed Ex and users of its services, so they are necessarily appurtenances to the contract carried. Here I'm quoting from Tobin. But the Court Tobin goes on to say that we have to ask a number of questions to determine whether the—whether preemption exists in a given case, and the relevant inquiry under Tobin is whether enforcement of the plaintiff's claims would impose some obligation on the airline defendant with respect to conduct that when properly undertaken is a service. Well, it would be hard, I think, to find other than that plaintiff's claims are sufficiently related to services to warrant preemption. The state law claims have connection with

or reference to an airline's prices, routes, or services, and can be preempted under those circumstances.

Now, the plaintiff—again, back to Tobin. Tobin says that there are—in the analysis of the ADA's preemption, we look at two things, the mechanism question and the linkage question and whether the claim is predicated on a law, regulation, or other provision having force and effect of law. The Supreme Court, according to Tobin, and they cite a Supreme Court case from 2014, has made it clear that state common law causes of action are provisions that have the force and effect of law for purposes of ADA preemption, and here I think clearly the two state law claims, the common law claims do fit that definition.

Then the question is whether it is a service under the ADA, and that is defined in Tobin as an action that represents a bargained for or anticipated provision of labor from one party to another leading to a concern with a contractual arrangement between the airline and the user of the service, and, again, the factual circumstances under which this case arrives fit that to a T, as far as I can tell.

One of the cases cited in Tobin is Northwest Inc. versus Ginsberg, 572 U.S. 273 at 284, which concludes, as I said, that other provisions having the force and effect of law includes common law claims, and so in the argument of the plaintiff that the ADA preemption does not apply, he relies on this Rombom case that Mr. Renda has noted a couple of times and argues that preemption doesn't apply because the package was delivered by truck, and also this argument of outrageous and unreasonable conduct and the false representations after the delivery, supposedly after delivery is—as I said initially, I think it's a little

difficult to reach that conclusion under the facts and circumstances of this case.

Now, we have what I think Mr. Murrey has referred to as Exhibit H, which is the—essentially the agreement or the original label for shipping of the package placed there by the plaintiff, and it quite clearly does indicate that—what it covers. Mr. Renda wants us to say that—I guess moving over into the common law—or the contractual issue, I don't think that there can be any question that in placing the package in the hands of Fed Ex, paying the fee and accepting the forms back, that there was an agreement, so preemption wins this case for Fed Ex on the strength of the statutory exemption and the Airline Deregulation Act.

The parties do dispute whether the tort claims are related to the air carrier, Fed Ex's provision of services and survive preemption. I think the citation to Tobin really takes that out of the picture, and I do find that the tort claims are preempted and barred by the ADA based on the language of 49 USC 41713(b)(4)(A) and because the claims of the plaintiff relate to Fed Ex's air carrier service, and I think that's important.

There are a number of cases that go directly to the question of state tort law claims based on placing a package with Fed Ex. I'm going to cite these for you here. Deerskin Trading Post, Inc., versus United Parcel, 972 Fed Supp 665 at 667 out of the Northern District of Georgia in 1997. ACL Computers and Software, Inc., versus Fed Ex, the 2016 Westlaw reference is 946127. And then Tobin, of course, at 775 F3d 448. I just think that the factual predicates necessary for preemption are clearly here. The claims of fraud and tortious interference are definitely targeted at the main business that Fed Ex offers, and I

would cite to you Wagman versus Fed Ex, 47 F3d 1166 out of the Fourth Circuit in 1995.

I do reach the conclusion that permitting the plaintiff to go forward with its tort claims would implicate and have a direct effect on Fed Ex's package transportation and delivery service and that, again, the claims are preempted by the ADA. That's Trujillo versus American Airlines at 938 Fed Supp 392 out of the Northern District of Texas in 1995, affirmed at 98 F3d 1338 in the Fifth Circuit.

You know, there are cases that talk about whether a damages award would result in fundamental changes to Fed Ex services and whether such an award would result in new and enhanced procedures for delivery of packages which would have an effect on Fed Ex's business and would not be tenuous, remote, or peripheral, and to this I cite Eggleston versus United Parcel, 834 Southeast 2d 713 at 718 which cites Tobin.

Now, in one of these cases, and I'm not sure which one it is, it might even be Tobin, I'm not sure, but the point is made as a matter of practical application that if every state's common law were allowed to avoid preemption under the circumstances we have here, then certainly Fed Ex would have to change its services considerably to remain in business, perhaps 50 times over, so I do find that the plaintiff's claims relate to air carrier Fed Ex's services under the ADA and they are dismissed as preempted.

Now, the breach of contract claim, including consequential damages, the defendant in support of his motion looks to the contract of carriage, the bill label which contains limitation of liability and incorporates a one-year limitations period combined with the Fed Ex's service guide, the action—they argue that action is barred because plaintiff did not file suit within the one

year time period required by the contract of carriage. I think that's not—that's not disputed here.

There was—again, Mr. Renda, excuse me, but seems to be arguing out of both sides of his mouth when he says there was never a meeting of the minds but there was a contract, and he says that the plaintiff can't be held to the one year statute of limitations and the liability provision. Assuming that a contract existed, the contract claim is also denied because the limitations period and the limitation on liability and the airbill and service guide are valid; see Wagman versus Fed Ex at 844 Fed Supp 274, 251, District of Maryland from 1994, affirmed at 47 F3d 1166, Fourth Circuit 1995. There was a summary judgment for Fed Ex in that case relating to the failure to timely deliver a package and confirming that the language in the airbill and the carrier service guide explicitly limited liability for failure of delivery, including late delivery, to a hundred dollars, and no other value was declared, and federal law does permit carriers to limit their liability. So the inescapable conclusion, if I can understand it, is that at the very most the plaintiffs can collect $100 in this case and not anything more than that.

I think there has been a full airing of the issue of summary judgment here, that there really is no genuine dispute as to any material fact. The defendant, I think, has put forth in a fairly succinct way why that is true. I think the plaintiff's argument weaves around and is not really particularly persuasive—it is not persuasive at all, actually.

So, where are we left? We are left with a motion for a partial summary judgment being granted. We will enter an order effectuating this bench opinion, and essentially because the order resolves all pending

claims in this matter, a judgment will issue to close the case.

Gentlemen and others, thank you for your attendance today. We are adjourned.

THE CLERK: All rise, please. The court is now adjourned.

(Whereupon, hearing concluded at 2:42 p.m.)

REPORTER'S CERTIFICATE

I, Genevieve A. Hamlin, Official Court Reporter for the United States District Court for the Western District of Michigan, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the proceedings had in the within entitled and numbered cause on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/s/ Genevieve A. Hamlin
Genevieve A. Hamlin.
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Case No. 22-1410

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

HEADSTREAM TECHNOLOGIES, LLC

Plaintiff - Appellant

v.

FEDEX CORPORATION

Defendant

and

FEDEX EXPRESS, jointly and severally

Defendant - Appellee

BEFORE: STRANCH, MURPHY, DAVIS, Circuit Judges;

Upon consideration of the petition for rehearing filed by the appellant,

It is **ORDERED** that the petition for rehearing be, and it hereby is, DENIED.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Issued: February 17, 2023